

March 8, 2012

TO: Tina Campbell, Chief
Division of Policy and Directives Management
U.S. Fish and Wildlife Service
4401 North Fairfax Drive, MS 2042
Arlington, VA 22203
Attn: FWS-R9-ES-2011-0031

RE: Comments on a draft policy on interpretation of the phrase “significant portion of its range” in the Endangered Species Act’s definitions of “endangered species” and “threatened species.”

Dear Ms. Campbell:

On behalf of our millions of members and supporters who care deeply about imperiled wildlife that depend on the nation’s forests, deserts, grasslands, oceans and other ecosystems, we write to express our concerns with the draft policy on interpretation of the phrase “significant portion of its range” (“SPOIR”) proposed by U.S. Fish and Wildlife Service (FWS) and National Marine Fisheries Service (NMFS). The Endangered Species Act defines an endangered species as “any species which is in danger of extinction throughout all or a significant portion of its range” and a threatened species as “any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.” The language of these definitions, the legislative history, recent case law, and the draft policy itself all make clear that a species need not be at risk of worldwide extinction to qualify for Endangered Species Act protection. Rather, as noted in the draft policy, a species can qualify as an endangered species in two ways: if it is in danger of extinction “throughout all of its range,” or if it is in danger of extinction “in a significant portion of its range.”¹ In enacting this provision, Congress intended to provide a means to protect species before they are on the brink of extinction, which is of paramount importance to species conservation.

The previous policy developed by the Solicitor of the Department of the Interior ran afoul of the ESA’s statutory language, and we supported its withdrawal.² We have serious concerns, however, about provisions of the draft policy—specifically: (1) the proposed definition of “significant,” which specifies that a portion of range can be considered significant only if loss of the species from that portion would threaten the species as a whole with extinction, and (2) the determination that lost historic range cannot qualify as a significant portion of range.

The draft policy specifies that a “portion of the range of a species is ‘significant’ if its contribution to the viability of the species is so important that without that portion, the species

¹ U.S. Fish and Wildlife Service and National Oceanic and Atmospheric Administration. 2011. Draft Policy on Interpretation of the Phrase “Significant Portion of Its Range” in the Endangered Species Act’s Definitions of “Endangered Species” and “Threatened Species.” December 9, 2012, 76 Fed. Reg. 76,991.

² U.S. Department of the Interior, Office of the Solicitor. 2007. The Meaning of “In Danger of Extinction Throughout All or a Significant Portion of its Range.” Memorandum M-37013, March 16, 2007.

would be in danger of extinction.”³ This definition does not provide a meaningful distinction between when a species is endangered or threatened in a SPOIR and when a species is imperiled throughout all its range, and will severely limit protection for species that are imperiled in significant portions of their ranges. Indeed, this definition of significance has already formed the basis for denying protection to the cactus ferruginous pygmy-owl despite the fact that it is indisputably imperiled in the Sonoran Desert, which FWS itself determined is important to the representation, redundancy and resiliency of the species.⁴

Moreover, we believe this draft policy definition does not truly solve the redundancy problem identified by the Ninth Circuit Court of Appeals in Defenders of Wildlife v. Norton, 258 F.3d 1136 (9th Cir. 2001). In Defenders, the appellate court held that “[i]f ... the effect of extinction throughout ‘a significant portion of its range’ is the threat of extinction everywhere, then the threat of extinction throughout ‘a significant portion of its range’ is equivalent to the threat of extinction throughout *all* its range.” Id. at 1141. Although worded differently, it seems that, in effect, the Services have again collapsed the two paths to species’ protection mandated by Congress. See 76 Fed. Reg. at 77,003 (conceding that, “[u]nder most circumstances, ... the outcomes of [the agencies’] status determinations with or without the draft policy would be the same”).

The draft policy emphasizes “the biological importance of the portion to the conservation of the species as the measure” for determining when a portion can be considered significant, using “the concepts of redundancy, resiliency, and representation.”⁵ We support using these concepts to evaluate the significance of portions of range, but the threshold for determining this importance cannot be set as high as the risk of extinction to the species as a whole. Instead, portions of range that meaningfully contribute to the species in terms of its redundancy, resiliency, and representation should be considered significant. Please consider this alternative approach.

The draft policy further specifies that when considering whether a species is endangered in a SPOIR, the range that will be considered is “the general geographical area within which that species can be found at the time FWS or NMFS makes any particular status determination,” and more directly that lost historical range “cannot constitute a significant portion of a species’ range.”⁶ Under this policy, past losses of species are effectively ignored unless they compromise the viability of the species in its current range, making determinations of the need to protect species arbitrarily dependent on when the agencies consider the status of a species. This approach leads to a temporally shifting baseline, which has long been recognized as problematic by conservation scientists.⁷ We do not contend that lost historic range automatically means a

³ 76 Fed. Reg. at 77,002.

⁴ U.S. Fish and Wildlife Service, Endangered and Threatened Wildlife and Plants; 12-Month Finding on a Petition To List the Cactus Ferruginous Pygmy-Owl as Threatened or Endangered With Critical Habitat, October 5, 2011, 76 Federal Register 61856.

⁵ 76 Fed. Reg. at 76,993.

⁶ 76 Fed. Reg. at 77,002.

⁷ See Dayton, P. K., M. J. Tegner, P. B. Edwards, and K. L. Riser. 1998. Sliding baselines, ghosts, and reduced expectations in kelp forest communities. *Ecological Applications* **8**:309–322; Waples, R. S., P. B. Adams, J. Bohnsack, and B. L. Taylor. 2008. Legal viability, societal values, and SPOIR: response to D’Elia et al. *Conservation Biology* **22**:1075–1077; and Greenwald, D.N. 2009. Effects on Species’ Conservation of

species must be protected under the Endangered Species Act, but rather that, as with current range, the agencies should analyze whether areas of lost range are needed to ensure redundancy, resiliency, and representation of the species.

We are further concerned that the proposed SPOIR policy is inconsistent with the urgent need to ensure that species have sufficient habitat and adaptability to weather changes in their environment ongoing and predicted under climate change, which will undoubtedly have consequences on the range of imperiled species. Therefore, it is essential that a SPOIR not be restrictive, but rather allow for broad protections to the full range of habitats occupied by species, some of which will undoubtedly provide climate refugia and thereby ensure their survival.

As acknowledged in the draft policy, protecting species because they are endangered in significant portions of their ranges “may lead to application of the protections of the Act in areas in which a species is not currently endangered or threatened with extinction.”⁸ To address this issue while at the same time avoiding exposing more species to the risk of extinction, we agree with the Services that they have the discretion “to implement the Act, where possible, to avoid or minimize expending resources on actions that either do not address threats that led to the species warranting listing or do not advance recovery of the species.”⁹

Sincerely,

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Rinterpreting the Phrase “Significant Portion of its Range” in the U.S. Endangered Species Act. *Conservation Biology* 23:1374-1377.

⁸ 76 Fed. Reg. at 76,992.

⁹ Id.

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