



March 8, 2012

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

Submitted via Federal eRulemaking Portal: <http://www.regulations.gov>

**Re: NMA Comments on the FWS/NMFS Draft Policy on Interpretation of
“Significant Portion of Range”**

Dear Sir/Madam,

The National Mining Association (NMA) appreciates the opportunity to comment on the Fish and Wildlife Service (FWS) and National Marine Fisheries Service’s (NMFS)(collectively, “the Services”) draft policy interpreting “significant portion of its range” in the Endangered Species Act (“ESA”) definitions of “endangered” and “threatened.” 76 Fed. Reg. 76987 (Dec. 9, 2011). NMA is a national trade association that includes the producers of most of the nation’s coal, metals, industrial and agricultural minerals; the manufacturers of mining and mineral processing machinery, equipment and supplies; and the engineering and consulting firms, financial institutions and other firms serving the mining industry. NMA has many members around the country that are directly impacted by agency policy on the ESA.

NMA takes issue with two significant aspects of the agency’s proposal. First, we believe that these changes must be implemented through rulemaking pursuant to the Administrative Procedure Act (APA). Second, we are strongly opposed to the agencies’ proposal to automatically mandate application of ESA protections across a species’ entire range regardless of whether the best scientific information available demonstrates such actions are warranted. However, NMA supports a number of aspects of the proposal, including: the high threshold for “significant”; the definition of range; the relationship to a distinct population segment; and the definition of a “significant portion of its range.” Our detailed comments are provided on each topic below.

**I. Changes Being Considered by FWS Should be Implemented Through
Notice and Comment Rulemaking**

The Services should not be adopting a “policy” for interpreting this phrase, but rather should be engaging in rulemaking under the Administrative Procedure Act (“APA”). An interpretation of a statutory term that creates a new or independent basis for enforcement action is also creating new rights and imposing new obligations, thereby making such action a legislative rule under the APA. Similarly, where a rule adds to, amends or otherwise changes an existing legislative rule, the modifying action by the agency also must be treated as a legislative rule pursuant to the APA.¹

Here, the Services are not merely formalizing their “interpretation” of the phrase “significant portion of its range.” Rather, they are setting forth a definitive rule that states, in part, that:

The phrase “significant portion of its range” ... provides *an independent basis for listing*; thus there are two situations (or factual bases) under which a species would qualify for listing: a species may be endangered or threatened throughout all of its range; or a species may be endangered or threatened in only a significant portion of its range. *If a species is found to be endangered or threatened in only a significant portion of its range, the entire species is listed as endangered or threatened, respectively, and the Act’s protections apply across the species’ entire range.*²

The following are two examples demonstrate how the agency’s new policy will carry new legal implications:

- The listing and delisting process will now separately consider the status of each species under the “significant portion of its range” inquiry; and
- If a designation of threatened or endangered is required under the “significant portion of its range” analysis, then “take” prohibitions and Section 7 consultation requirements will be imposed.

While the Services have undoubtedly struggled with and attempted to interpret the “significant portion of its range” inquiry on a case-by-case basis, this proposal steps beyond that approach. Specifically, there are clearly new rights and legal obligations arising from the prospective application of the proposed interpretation of the “significant portion of its range” inquiry.

As an additional matter, the proposed policy will have the effect of modifying and adding to the Services’ existing ESA regulations covering the process for designation of endangered and threatened species. Notably, 50 C.F.R. § 424.10 provides that “[t]he Secretary may add a species to the lists or designate critical habitat, delete a species or critical habitat, change the listed status of a species . . . *only in accordance with the procedures of this part.*” (Emphasis added). The Services’ proposal, however, departs

¹ See *American Mining Congress v. MSHA*, 995 F.2d 1106, 1109 (D.C. Cir. 1993).

² 76 Fed. Reg. 76987, 77002 (emphasis added).

from these regulations—and certainly contemplates listing determinations that are not in accordance with the present listing regulations. Accordingly, such changes should be made through notice and comment rulemaking.

II. FWS Should Not Apply Endangered Status Throughout a Species' Entire Range When it is Only Endangered in a Significant Portion of Its Range

The agency's determination that the "significant portion of its range" language creates an independent basis for listing is a reasonable interpretation of the ESA. As FWS acknowledges, basic principles of statutory construction warrant interpretations that "follow a 'natural reading . . . which would give effect to *all* of [the statute's] provisions."³ The definitions of both endangered and threatened species each contain the phrase "...throughout all or a significant portion of its range." Here, the natural reading of this phrase is that the use of "or" distinguishes between two scenarios:

- First, where a species is found to be endangered or threatened throughout all of its range; and
- Second, where a species is found to be endangered or threatened throughout a significant portion of its range.

Importantly, however, the Services must apply the independent meaning/natural reading principle consistently in its administration of the "significant portion of its range" inquiry. In this respect, further improvements to the "significant portion of its range" inquiry are necessary. First, if independent meaning is to be given to the "significant portion of its range" inquiry, then the designation of a species as threatened or endangered—as a result of such analysis—must be limited to that portion of a species' range. Specifically, the determination that a species is either threatened or endangered within a significant portion of its range **is not** a basis to extend such threatened or endangered determination to a range-wide listing. Thus, in order to fully give independent meaning to the determination of threatened or endangered within a significant portion of a species' range, the actual designation must solely apply to that portion of the range, not range-wide as proposed by the Services.

The Services propose a range-wide designation of a species where they determine that a species is threatened or endangered throughout a significant portion of its range. Further, such range-wide designations will have the potential effect of "up-listing" a species from range-wide threatened to range-wide endangered if the "significant portion of its range" review determines a species meets the threshold for an endangered designation. Both the application of a range-wide designation as well as this "up-listing" scenario are inconsistent with the independent meaning concept adopted by the Services and are contrary to the terms and intent of the ESA.

³ *Defenders of Wildlife v. Norton*, 258 F.3d 1136, 1142 (9th Cir. 2001) (original emphasis) quoting *United Food and Commercial Workers Union Local 751 v. Brown Group, Inc.*, 517 U.S. 544, 549 (1996).

The draft policy proposes that when a species is found to be threatened or endangered only within a significant portion of its range, the entire species will be listed as threatened or endangered throughout its entire range.⁴ NMA does not agree with the draft policy's interpretation in this regard. The Services' interpretation of how to apply the phrase "significant portion of range" must give full effect to the ESA, in this case, to § 4(c)(1).⁵ This section provides that when listing species, the secretary will "specify with respect to each such species over what portion of its range it is endangered **or** threatened, and specify any critical habitat within such range."⁶ The proper interpretation of § 4(c)(1) and the significant portion of its range inquiry is that the listing determination based on a significant portion of its range determination is limited to a portion of the species' range.

The ESA does not dictate a one-size fits all approach. In fact, the courts have recognized it "appears that Congress added [the significant portion of its range] language in order to encourage greater cooperation between federal and state agencies and to allow the Secretary more flexibility in her approach to wildlife management."⁷ Moreover, flexibility in administration of the act is embedded in all elements of the ESA, including: (1) recognition that existing regulatory mechanisms, protection measures and other conservation practices implemented by governmental authorities may be sufficient to protect a species without invocation of the ESA; (2) exclusion from critical habitat designations where the secretary finds that benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat and such exclusion will not result in the extinction of the species; and (3) differentiation of "take" prohibitions for threatened species. Further, through implementation of the distinct population segment policy and other listing decisions for the American alligator, grizzly bear and bald eagle, there is an established history of the Services making listing decisions that are tailored to a species' particular circumstances.

The flexibility of the act is explained during the 1973 congressional debate on the ESA where it was discussed that:

...the Secretary may list an animal as "endangered" through all or a portion of its range. An animal might be "endangered" in most States but overpopulated in some. In a State in which a species is overpopulated, the Secretary would have the discretion to list that animal as merely threatened or to remove it from the endangered species listing entirely while still providing protection in areas where it was threatened with extinction. In that portion of its range where it was not threatened with

⁴ 76 Fed. Reg. at 76996 and 77002.

⁵ 16 U.S.C. §1533(c)(1).

⁶ *Id.*

⁷ *Defenders of Wildlife v. Norton*, 258 F.3d 1136, 1144 (9th Cir. 2001).

extinction, the States would have full authority to use their management skills to insure the proper conservation of the species.⁸

As applied to the “significant portion of its range” inquiry, in order to ensure that the full flexibility of the ESA is being employed, the Services must exercise their discretion to list a species threatened or endangered in the portion of its range in which it is at risk, while recognizing the sufficiency and health of its population outside the area identified as a “significant portion of its range.” Importantly, this does not mean that the species is in any way going unprotected. Rather, such a listing determination not only gives “independent meaning” to the significant portion of its range inquiry, but also reflects the prioritization and flexibility of the ESA to protect the species where such measures are necessary.

The Services’ proposal for range-wide protections for significant portion of its range findings also upsets the natural process of the listing inquiry. When determining whether a species is endangered or threatened, the Services should first assess whether the species is at risk range-wide. If the species is endangered or threatened throughout its range, then it should be listed as such and no further inquiry is necessary. If, however, the Services find that the species does not warrant listing range-wide, but does warrant listing in a significant portion of its range, it would be contradictory to then list the species as endangered or threatened range-wide based on the significant portion of its range finding. The preliminary finding that the species does not require range-wide protection should remain consistent upon a finding that the species warrants protection in any significant portion of its range.

In conclusion, the Services’ proposed approach for imposing a range-wide listing on the basis of the “significant portion of its range” listing contradicts the Services’ own “independent meaning” principle, ESA § 4(c)(1) and the overall acknowledged flexibility of the ESA. Designating a species to be listed as endangered or threatened in the portion of its range where such protection is necessary will ensure that the Services’ application of this element is consistent with the statutory text, and that the agencies’ limited resources are focused where they can be most effective in furthering the purposes of the act.

III. FWS Has Appropriately Set a High Threshold for “Significant”

NMA supports the Services’ intent to utilize a “threshold for ‘significant’ that is relatively high.” In explaining this approach, the Services have stated that they are seeking the balance needed to ensure that they are not imposing restrictions or expending conservation resources disproportionately to conservation benefits, while also ensuring that the “significant portion of its range” determination has independent meaning in implementation of the act. NMA would add that common-sense and consistent

⁸ 119 Cong. Rec. 15662, 25669 (Jul. 24, 1973) Statement of Sen. Tunney (floor manager supporting passage of S.1983).

interpretation of the term “significant” requires a high threshold in order to effectuate its meaning.

Usage of the term “significant” as an adjective has multiple meanings. For example, Merriam-Webster’s Dictionary states that “significant” can be defined as:

...having meaning; suggestive

...having or likely to have [influence](#) or effect; important

....probably caused by something other than mere chance; statistical correlation.⁹

In any usage, the term “significant” carries the connotation of a heightened status. As the Services have noted, applying the principle of giving force and independent meaning to the “significant portion of its range” inquiry means that there must be a clear distinction between review of the species on a range-wide basis and the narrower “significant portion of the range” inquiry. Under the “independent meaning” approach taken by the Services, the first element of the listing inquiry is whether, range-wide, the species is threatened or endangered. Thus, in order to give independent and separate purpose to the significant portion of its range inquiry, there must be a threshold that allows for an appropriate distinction between the inquiries. Specifically, there must be a meaningful inquiry as to the biological importance of a specifically identified portion of the species range.

Use of a lower threshold for significance would ultimately dilute and conflate the “significant portion of its range” inquiry. It is not merely any threats to a species within any part of its range that merits protection under the significant portion of its range inquiry. Further, it is not a measure that is defined by mere percentages, acreage or other measures of “size” (although such factors may be relevant to determining whether a portion of a species range is significant). Rather, the determination of what constitutes a significant portion of a species range must draw upon myriad factors (size, species health, characteristics of the range being reviewed, utilization and other biological characteristics critical to the species well-being) to determine whether there is a significant portion of the species’ range that bears a separate review and, if so, a determination of whether a species is threatened or endangered within that significant portion of its range.

Establishing a high threshold/independent meaning approach to the significant portion of its range inquiry also wards against attempts to cherry-pick or gerrymander identification of an area for the purpose of obtaining a listing determination. Rather, it is imperative that the Services establish a clearly defined, high threshold for review of a significant portion of a species range as an independent basis for listing a species.

⁹ Merriam-Webster’s Dictionary, <http://www.merriam-webster.com/definition/significant>.

NMA supports the use of the definition of “significant” as proposed by the Services. Specifically, the standard should remain focused on a “but for” analysis that addresses significance of the relationship of that portion of a species range and its ability to survive (i.e., whether, but for the identified portion of the range, the species would be in danger of extinction).

Further, NMA opposes the introduction of a consideration of whether a species is “likely to become endangered” as part of the “significant portion” identification. Introducing a “likely to become endangered” element confuses the purpose of the identification of a significant portion of a species’ range. The question of whether a species is endangered or is likely to be endangered is a matter for the listing review—not the identification of what constitutes a significant portion of its range.

In implementing the definition, the Services must focus on the biological elements that warrant identification of a significant portion of a species’ range. Specifically, the Services must ensure that their focus remains on identification of portions of a species range that are significant. Thus, the focus of the inquiry should not be on the “likelihood” of whether a species may be threatened or endangered, but rather on the biological significance of a particular portion of the occupied range to that species. The proposed definition of “significant” provides for that appropriate consideration of the significance of the relationship between the identified portion of the range and the species.

NMA opposes the use of “percentage of range” or other quantification metrics to establish a rebuttable presumption. The determination of what constitutes a significant portion of a species’ range is a biological inquiry that must focus on specific factors relevant to the subject species. Further, acreage of habitat or other similar metrics or any use of a rebuttable presumption run counter to the holistic analysis of factors (i.e. representation, redundancy or resiliency/NMFS’ four viability characteristics) that has been proposed by the Services. The review of a species’ status, including identification of any significant portion of its range, should be done on an individual basis and addressed through examination of the specific factors and characteristics particular to that species.

IV. FWS Has Correctly Defined the Range of a Species to Include Presently-Occupied Habitat and to Exclude Historical Range

The draft policy currently considers range of a species as the general geographical area within which that species can be found at the time FWS or NMFS makes a particular status determination.¹⁰ NMA strongly supports the Services’ conclusion that “significant portion of its range” review should be limited to presently-occupied habitat, excluding historical range.

¹⁰ 76 Fed. Reg. at 76,996-97 and 77,002-03.

The starting point of any statutory interpretation is language employed by Congress and courts typically assume that the legislative purpose is expressed by the ordinary meaning of the words used.¹¹ The statutory text supports the conclusion that historical range should not be included in identifying what constitutes a significant portion of a species range. In both the definition of “endangered” and “threatened,” the statute refers to “its range”—which is a present tense, possessive usage.¹² Further, most definitions of “range” similarly refer to current conditions. For example, Merriam-Webster’s Dictionary defines range, when referring to wildlife, as “the region throughout which a kind of organism or ecological community naturally lives or occurs.”¹³ In fact, the contrary usage of “historical range” is necessary to otherwise distinguish the commonly used and understood concept of a species’ range. By customary usage, the term “its range” looks to the present range of the species—and the Services should be consistent with this approach.

The focus on a species’ current, occupied, range also is supported by the fact that, when Congress intended to look at unoccupied areas, it specifically addressed that element. In particular, ESA § 2(5)(A) explicitly addresses the treatment of occupied and unoccupied areas in the designation of critical habitat.¹⁴ The Services must take note of Congress’ purposeful choice of language in defining the scope and applicability of particular provisions. As the Supreme Court has noted, “[i]n interpreting a statute a court should always turn to one cardinal canon before all others. . . . [C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there.”¹⁵ As evidenced by its treatment of the definition of “critical habitat,” Congress contemplated and addressed those instances where both occupied and unoccupied areas are to be examined. The fact that Congress did not explicitly include historical range, but rather used what is clearly a present tense, possessive phrase of “its range” is a meaningful legislative choice that defines the scope of the “significant portion of its range” inquiry.

Some parties may point to certain Ninth Circuit opinions such as *Defenders of Wildlife v. Norton*¹⁶ and *Tucson Herpetological Society v. Salazar*¹⁷ to lend credence to the argument for enshrining the consideration of lost historical range in what constitutes a significant portion of a species range. As the Services properly recognize, however, such positions are a misreading of the ESA and the appropriate treatment of historical range.¹⁸ In their comments supporting the proposed exclusion of historical range from the identification of what constitutes a significant portion of a species’ range, the Services note that the loss of habitat or narrowing of a species’ range is an appropriate

¹¹ *American Tobacco Co. v. Patterson*, 456 U.S. 63 (1982).

¹² Merriam-Webster Dictionary, <http://www.merriam-webster.com/dictionary/its>.

¹³ Merriam-Webster Dictionary, <http://www.merriam-webster.com/dictionary/range>.

¹⁴ 16 U.S.C. §1532(5)(A).

¹⁵ *Connecticut Nat’l Bank v. Germain*, 112 S.Ct 1146, 1149 (1992).

¹⁶ 258 F.3d 1136 (9th Cir. 2001) (“*Defenders (Lizard)*”).

¹⁷ 566 F.3d 870 (9th Cir. 2009).

¹⁸ 76 Fed. Reg. at 76,997.

factor in reviewing whether a species is endangered or threatened.¹⁹ Specifically, § 4(a)(1) includes a consideration of the “curtailment” of a species habitat or range.²⁰ This element properly captures when and how the consideration of historical range is to occur in the listing inquiry. Specifically, as *part of* the listing review that will look at a species’ status within a significant portion of its range, the Services are directed to look at whether a species’ range has been curtailed, modified or otherwise adversely affected in a way that it is in danger of extinction or is likely to become endangered in the foreseeable future. Accordingly, integration of historical range into the *identification* of what constitutes a significant portion of a species range is inappropriate.

V. FWS Policy is Correct with Regard to the Relationship Between a “Significant Portion of its Range” and a Distinct Population Segment

The draft policy attempts to harmonize the current practice of designating distinct population segments (“DPS”) as threatened or endangered with the “significant portion of its range” inquiry.²¹ The Services propose to retain the DPS inquiry as a separate review and where they could make a determination that a species is endangered or threatened within a significant portion of its range and the population in that significant portion also is a valid DPS, the Services will exercise their discretion to list and protect *only* the DPS rather than the entire species. NMA supports the Services’ proposal and urges the Services to give independent meaning to the DPS language in the definition of “species” under the ESA.

NMA supports the Services’ proposed harmonization of the DPS policy with its treatment of the “significant portion of its range” policy. Distinct population segments are the smallest division of a species that can be protected under the act.²² Further, Congress specifically directed that the DPS policy is to be used sparingly and where biologically warranted.²³ NMA supports the Services’ proposal to defer to a listing of a distinct population segment in lieu of a significant portion of its range listing when there is a valid distinct population segment. This approach provides for an appropriate harmonization of the DPS and “significant portion of its range” elements. The Services’ approach ensures that species will be protected where necessary, and that the ESA’s mandates and regulatory mechanism are not imposed upon areas where they are unnecessary. By deferring to utilization of the distinct population segment listing for valid population segments, over a significant portion of its range inquiry, the Services will fully apply the principle of ensuring independent meaning to all elements of the act as well as avoid overregulating and potentially increasing administrative costs.

VI. The Definition of a “Significant Portion of its Range” is Appropriate

¹⁹ *Id.*

²⁰ See 16 U.S.C. § 1533(a)(1).

²¹ 76 Fed. Reg. at 76997-98.

²² *Alsea Valley Alliance v. Evans*, 161 F. Supp. 2d 1154, 1162 ((D. Ore. 2001) (citing *Southwest Center for Biological Diversity v. Babbitt*, 980 F. Supp. 1080, 1085 (D. Ariz. 1997)).

²³ Congress has instructed the Secretary to exercise this authority with regard to DPS’s “... sparingly and only when the biological evidence indicates that such action is warranted.” Senate Report 151, 96th Congress, 1st Session.

NMA supports the proposed definition of “significant portion of its range.” In discussing the proposed policy, the Services frequently note the need to apply biological considerations to the definition of a “significant portion of its range.” NMA agrees. The Services propose 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 would be in danger of extinction.

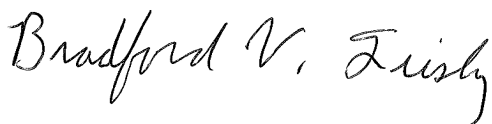
This definition serves to create a “but for” test to determine whether a portion of the species range is significant: namely, consideration as to whether the species would be in danger of extinction but for the contribution of the portion of its range to the species’ ability to survive. This test ensures that the significant portion of its range identification focuses on the biological importance and relationship of an identified portion to the species’ health.

It is important to stress that the significant portion of range inquiry is separate and apart from the issue of whether listing of a species is required. In fact, it is entirely possible that the Services may identify a significant portion of range, but conclude that the species is healthy within the significant portion of a species’ range such that no listing is necessary. To ensure that the Services continue to recognize these distinct requirements, the Services should clarify that the identification of a significant portion of a species’ range does not create a presumption, prejudgment or other determination as to whether the species in that identified “significant portion of its range” warrants protection under the ESA as either a threatened or endangered species.

VII. Conclusion

NMA appreciates the opportunity to provide these comments to the Services and to initiate a further discussion on ways to improve the “significant portion of its range” policy. We hope that the Services will take our comments into account and apply them when the agencies initiate rulemaking procedures to implement these policy changes.

Sincerely,

A handwritten signature in black ink that reads "Bradford V. Frisby". The signature is written in a cursive, flowing style.

Bradford V. Frisby
Associate General Counsel
National Mining Association