



NATIONAL ENDANGERED SPECIES ACT  
REFORM COALITION

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

Dear Sir/Madam,

On December 9, 2011, the U.S. Fish and Wildlife Service (“FWS”) and National Marine Fisheries Service (“NMFS”) (collectively, “Services”) issued a draft policy interpreting “significant portion of its range” in the Endangered Species Act (“ESA”) definitions of “endangered” and “threatened.”<sup>1</sup> Further, the Services identified a series of questions and issues for consideration and comment by the public. Pursuant to the *Federal Register* notice and subsequent notice of extension of the comment period, the National Endangered Species Act Reform Coalition (“NESARC”) respectfully provides its comments and recommendations on the Services’ draft policy on interpretation of the phrase “significant portion of its range.”

NESARC is the country’s oldest broad-based, national coalition dedicated solely to achieving improvements to the ESA and its implementation. As detailed in the membership list<sup>2</sup> attached to these comments, NESARC includes farmers, cities and counties, rural irrigators, electric utilities, forest product companies, homebuilders, agricultural interests, mining companies, and other businesses and individuals throughout the United States. NESARC and its members are committed to promoting effective and balanced legislative and administrative improvements to the ESA that support the protection of fish, wildlife, and plant populations as well as responsible land, water, and resource management.

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<sup>1</sup> 76 Fed. Reg. 76,987 (Dec. 9, 2011).

<sup>2</sup> See Attachment A.

## COMMENTS

NESARC supports the Services’ efforts to address the existing ambiguities and often conflicting interpretations of the appropriate treatment of the “significant portion of its range” inquiry. As discussed in more detail below, there are several key elements that should guide the Services’ review and further refinement of their interpretation of the “significant portion of its range” inquiry. In particular:

- The Services must give independent meaning to the “significant portion of its range” inquiry in all aspects of the ESA administration. Specifically, the Services must ensure that:
  - The “significant portion of its range” inquiry is sequential to, and clearly segregated from, the initial range-wide review. Where a species is found to be threatened or endangered on a range-wide basis, *no* “significant portion of its range” inquiry is necessary.
  - Where a “significant portion of its range” inquiry is determined to be required, it must be preceded by a public notice that details the identified portion of the range to be reviewed and a factual finding detailing that sufficient information exists to confirm that the identified range has physical attributes and biological elements which are so integral to the life cycle of the species so as to have a unique and irreplaceable relationship with the ability of the species to survive, and that meet the definition of “significant” as detailed by the Services.
  - Where the Services determine that a species is threatened or endangered within a “significant portion of its range,” that designation is limited to the identified portion of the species’ range—not range-wide.
- NESARC agrees with and supports the Services’ use of a high threshold, with a basis in biological conditions, for determination of a portion of a range as “significant.”
- NESARC supports the definition of “significant” as proposed by the Services. The “significance” standard must remain focused on a “but for” analysis that confirms the significance of the relationship between the identified portion of a species’ range and the species’ ability to survive.

- NESARC supports the Services’ conclusion that the “significant portion of its range” review is appropriately limited to presently-occupied habitat, excluding historical range. While treatment of historical range occurs in the actual listing determination, the first-level identification of what constitutes a significant portion of a species’ range is an independent and narrower inquiry that focuses on those areas presently occupied by the species.
- Where a species is designated as threatened or endangered within a “significant portion of its range,” a high threshold should apply to the designation of critical habitat of unoccupied areas or areas outside the identified portion of the range for which the listing is made.
- No single metric, percentage, or other quantitative measure should be used to establish a presumption for identifying a significant portion of a species’ range. The determination of what constitutes a significant portion of a species’ range must draw upon those myriad factors specific to the species and the examined range in order to determine whether it meets the threshold for identification and review under the “significant portion of its range” inquiry.
- The Services must maintain and continue to separately implement the Distinct Population Segment (“DPS”) policy. Consistent with the independent meaning principle announced by the Services, when a DPS is identified for consideration, the review should be conducted solely under the DPS policy. No “significant portion of its range” inquiry is required.
- The principles and process for implementing the “significant portion of its range” inquiry must be equally applied to the delisting and reclassification of species under the ESA.

In addition to these core elements, other clarifications and improvements of the “significant portion of its range” inquiry are necessary, including: measures to ensure openness and public transparency to the inquiry; corresponding modifications to the Services’ implementing regulations for management and consideration of petitions; and application of the “status review” process to determinations that a “significant portion” of a species’ range warrants review. Further, the Services must adopt several core elements of the “significant portion of its range” inquiry as regulatory text and incorporate these substantive requirements into the Services’ ESA implementation regulations.

## I. RESPONSE TO SERVICES’ QUESTIONS

As part of its *Federal Register* notice, the Services requested comments and recommendations on a series of questions. In response, NESARC provides the following comments:

### A. *Services Question 1(a): Consequences of a species being endangered or threatened in a significant portion of its range:*

***(a) The draft policy interprets the “significant portion of its range” language to provide an independent basis for listing. Is this an appropriate interpretation? Are the other alternative interpretations we considered more appropriate, and why or why not? Are there other alternative interpretations that we should consider?***

The Services’ determination that the “significant portion of its range” language creates an independent basis for listing is a reasonable interpretation of the ESA. As the Services acknowledge, basic principles of statutory construction warrant interpretations that “follow a ‘natural reading . . . which would give effect to *all* of [the statute’s] provisions.”<sup>3</sup> The definitions of both “endangered” and “threatened” species each contain the phrase “...throughout all *or* a significant portion of its range.”<sup>4</sup> 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.<sup>5</sup> Specifically, the determination that a species is either threatened or endangered

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

<sup>4</sup> See 16 U.S.C. §§ 1532(6), 1532(20) (emphasis added).

<sup>5</sup> The review of a species as threatened or endangered must be a sequential process that begins with determining whether an entity qualifies as a species, subspecies, or DPS. For DPSs, further consideration occurs under the DPS policy. For species and subspecies, the Services first must consider the species’ status range-wide. If it warrants protection as threatened or endangered on a range-wide basis, no further inquiry is necessary. The “significant portion of its range” inquiry should only occur when the Services determines that a species does not otherwise qualify for protection on a range-wide basis, and a factual

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 also must ensure that the “significant portion of its range” inquiry is sequential to, and clearly segregated from, the “range-wide” review. This can be best accomplished by ensuring that the “significant portion of its range” inquiry is triggered only where a review finds that a species does not warrant protection on a range-wide basis. Further, prior to undertaking a “significant portion of its range” inquiry, the Services must make, and publish, a factual finding as to any specific area that qualifies for independent listing review under the “significant portion of its range” concept. This factual finding must document that sufficient biological information exists to confirm that there are physical attributes and biological elements so integral to the life cycle of the species as to have a unique and irreplaceable relationship with the ability of the species to survive, and which meet the definition of “significant” as detailed by the Services. An approach to clarifying the sequential nature of review of the “significant portion of its range” inquiry is further discussed in Sections II.B. and II.C.

***B. Services Question 1(b) and (6): Consequences of a species being endangered or threatened in a significant portion of its range: ...***

***[1(b)] When a species is listed due to being endangered or threatened throughout an SPR, should the protections of the Act apply throughout the range of the species? If so, how should we apply those protections?***

...

***(6) We recognize that under the draft policy, a species can be threatened throughout all of its range while also being endangered in an SPR. For the reasons discussed in this document, in such situations we would list the entire species as endangered throughout all of its range. However, we recognize that this approach may raise concerns that the Services would be applying a higher level of protection where a lesser level of protection may also be appropriate, with the consequences that the Services would have less flexibility to manage the species and that scarce conservation resources would be diverted to species***

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finding has been made that there is a “significant portion” of a species’ range that warrants independent consideration. To ensure independent meaning, the public must be given public notice and an opportunity to comment on the “significant portion its range” determination before further analysis can take place. The public notice can occur as part of the notice that the species is being considered for listing range-wide. If there is insufficient information as to whether a significant portion of the species’ range exists at the time of consideration for range-wide listing, notice must be given to the public about an impending significant portion of range analysis after the Services have found that the species does not warrant listing range-wide. No “significant portion of its range” inquiry can proceed without first providing public notice and opportunity for comment on the identification of a “significant portion” of a species’ range.

*that might arguably better fit a lesser standard if viewed solely across its range.  
The Services are particularly interested in public comment on this issue.*

As reflected in the above-two questions, 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.

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.<sup>6</sup> NESARC does not agree with the draft policy’s interpretation in this regard. The Services’ interpretation of how to apply the phrase “significant portion of its range” must give full effect to the ESA, in this case, to Section 4(c)(1).<sup>7</sup> 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.”<sup>8</sup> The proper interpretation of Section 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 the significant 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.”<sup>9</sup> Moreover, flexibility in administration of the ESA 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 the implementation of listing decisions for the American alligator, grizzly bear, and bald eagle, as well as DPS listings, there is an established history of the Services making listing decisions that are tailored to a species’ particular circumstances.

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<sup>6</sup> 76 Fed. Reg. at 76,996, 77,002.

<sup>7</sup> 16 U.S.C. §1533(c)(1).

<sup>8</sup> *Id.* (emphasis added).

<sup>9</sup> *Defenders of Wildlife*, 258 F.3d at 1144.

The flexibility of the Act was 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.<sup>10</sup>

Further, the Congressional debate emphasizes that this approach of focusing the ESA’s protections in those regions where the species clearly warrants them allows healthy populations of the species to continue to be managed by the States.<sup>11</sup> Thus, limiting the scope of a “significant portion of its range” listing to the identified significant portion of range is not only consistent with the inherent flexibility of the ESA, but also facilitates the ESA’s continued recognition of the States’ role in managing fish and wildlife populations within their borders.

Elimination of the “up-listing” or range-wide protection approach to the “significant portion of its range” listing also is consistent with the Services’ approach to listing of DPSs. Notably, when the Services determine that a DPS warrants designation as threatened or endangered, that designation is not extended to the species on a range-wide basis. That same principle and approach should apply in this context.

The Services must exercise their discretion to list a species as 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 unprotected. Rather, such a listing determination gives independent meaning to the “significant portion of its range” inquiry, while reflecting 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

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<sup>10</sup> 119 Cong. Rec. 15,662, 25,669 (Jul. 24, 1973) (statement of Sen. Tunney, floor manager supporting passage of S.1983).

<sup>11</sup> *Id.*

should remain consistent upon a finding that the species warrants protection in a “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 Section 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.

***C. Services Question: (2) The definition of “significant:”***

***(a) The draft policy includes a definition based on biological/ conservation importance. Are alternative ways to define “significant” more appropriate, and why or why not? Would such approaches be workable in terms of their transparency, harmony with all key portions of the Act, and ability to be implemented consistently?***

NESARC agrees that the definition of “significant” should have a basis in biological conditions. In fact, the Services should further strengthen this definition by more clearly establishing the linkage to biological considerations in the determination as to what constitutes a significant portion of a species’ current range. In Sections II.A through II.C, below, NESARC discusses how the “significant portion of its range” definition can provide for a transparent linkage to biological considerations that is consistent with the independent meaning approach that the Services have adopted and will facilitate consistent application of a “significant portion of its range” inquiry.

***D. Services Question 2. (b) [Part I] We chose a relatively high threshold for “significant” which requires that loss of the portion would cause the overall species to become endangered (“in danger of extinction”). Is this threshold appropriate? Should it be higher or lower? ...***

NESARC supports the Services’ intent to use a “threshold for ‘significant’ that is relatively high.”<sup>12</sup> 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 ESA.<sup>13</sup> NESARC would add that common sense and consistent interpretation of the term “significant” requires a high threshold in order to effectuate its meaning.

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<sup>12</sup> 76 Fed. Reg. at 76,995. While NESARC supports the use of a high threshold, further improvements to the process for determining what constitutes a “significant portion” of a species’ range are necessary. These measures are discussed in further detail in Sections II.B., II.C. and II.F.

<sup>13</sup> *Id.*

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.<sup>14</sup>

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 its 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 range-wide and “significant portion of its range” 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 warrants 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.

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<sup>14</sup> Merriam-Webster’s Collegiate Dictionary (11th ed. 2008), available at <http://www.merriam-webster.com/dictionary/significant>.

***E. Services Question 2(b) [Part 2]: Should the definition reference both “in danger of extinction” and “likely to become endangered,” thus reflecting both the definitions of “endangered species” and “threatened species” as the benchmark for biological significance? Or should it refer only to whether loss of the portion would render the whole “in danger of extinction,” as is currently included in the draft policy?***

NESARC 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 the 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, NESARC 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 the appropriate consideration of the significance of the relationship between the identified portion of the range and the species.<sup>15</sup>

***F. Services Question (3): We recognize that our definition of “significant” in the draft policy has a difficult conceptual underpinning both to analyze and to convey. Would it be appropriate to use another measure, such as percentage of range or population, as a rebuttable presumption as to whether a portion meets the definition of “significant,” or whether a portion does not meet the definition of “significant”? Doing so could potentially streamline analyses and allow us to use our resources more effectively, as well as provide some general guidance to the public on how the standard for “significant” would be applied. Would development of such a measure provide a useful tool? What measure***

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<sup>15</sup> As further discussed in Section II.B, NESARC believes the biological importance of a portion of the range to the species should be further highlighted by ensuring that the Services focus on those physical attributes and biological elements in an identified range that are integral to the life cycle of the species so as to have a unique and irreplaceable relationship to the ability of the species to survive.

***would be appropriate for a rebuttable presumption, and how would it be rebutted?***

NESARC 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.

***G. Services Question (4) Range and historical range: What role should lost historical range play in determining whether a species is endangered or threatened?***

The draft policy currently considers the range of a species as the general geographical area within which that species can be found at the time the Services make a particular status determination.<sup>16</sup> NESARC supports the Services’ conclusion that “significant portion of its range” review should be limited to presently-occupied habitat, excluding historical range.

The starting point of any statutory interpretation is language employed by Congress; courts typically assume that legislative purpose is expressed by the ordinary meaning of the words used.<sup>17</sup> 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.<sup>18</sup> 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.”<sup>19</sup> 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.

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<sup>16</sup> 76 Fed. Reg. at 76,996-97, 77,002-03.

<sup>17</sup> *American Tobacco Co. v. Patterson*, 456 U.S. 63 (1982).

<sup>18</sup> Merriam-Webster’s Collegiate Dictionary (11th ed. 2008), available at <http://www.merriam-webster.com/dictionary/its>.

<sup>19</sup> Merriam-Webster’s Collegiate Dictionary (11th ed. 2008), available at <http://www.merriam-webster.com/dictionary/range>.

The focus on a species’ currently 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 Section 2(5)(A) explicitly addresses the treatment of occupied and unoccupied areas in the designation of critical habitat.<sup>20</sup> 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.”<sup>21</sup> 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.

NESARC anticipates that some parties may point to certain United States Court of Appeals for the Ninth Circuit opinions such as *Defenders of Wildlife v. Norton*<sup>22</sup> and *Tucson Herpetological Society v. Salazar*<sup>23</sup> 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.<sup>24</sup> 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 factor in reviewing whether a species is endangered or threatened.<sup>25</sup> Specifically, Section 4(a)(1) includes a consideration of the “curtailment” of a species’ habitat or range.<sup>26</sup> 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.

Once again, the Services must strive to ensure consistency with the principle of independent meaning and a natural reading of the ESA. As enacted by Congress, the statutory inquiry that is at issue here is not whether a species is endangered or threatened, but rather the precursor inquiry as to what constitutes a significant portion of a species’

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<sup>20</sup> 16 U.S.C. §1532(5)(A).

<sup>21</sup> *Connecticut Nat’l Bank v. Germain*, 203 U.S. 249, 252-253 (1992).

<sup>22</sup> 258 F.3d 1136.

<sup>23</sup> 566 F.3d 870 (9<sup>th</sup> Cir. 2009).

<sup>24</sup> 76 Fed. Reg. at 76,997.

<sup>25</sup> *Id.*

<sup>26</sup> *See* 16 U.S.C. § 1533(a)(1).

range for the purpose of undertaking a listing determination inquiry. Thus, while treatment of historical range occurs in the actual listing determination, the first-level identification of what constitutes a significant portion of a species’ range is a narrower inquiry that only looks to those areas which are presently occupied by the species.

***H. Services Question (5): Reconciling SPR with DPS authority: What is the proper relationship between SPR and DPS?***

NESARC supports the Services’ approach to giving independent meaning to the DPS policy in relation to the “significant portion of its range” inquiry.<sup>27</sup> Specifically, the Services state that 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. NESARC agrees with this approach.

The Services have a long-standing set of policies, listing determinations, and ESA implementation actions involving DPSs. Further, the adequacy and scope of the DPS policy has been the subject of settled judicial precedent.<sup>28</sup> Overall, implementation of the DPS policy has reached a level of certainty in application that warrants its continued utilization. Thus, application of the DPS policy and listing/de-listing determinations involving DPSs, independent of the “significant portion of its range” inquiry, provides a level of flexibility and continuity that is encouraged in the administration of the ESA.

In order to maintain the separation of these policies, the Services need to clarify that the “significant portion of its range” inquiry will not be used in the evaluation of a DPS for listing. Rather, the appropriate review considerations, thresholds, and findings covering the determination of a DPS as either threatened or endangered are established in the Services’ DPS policy. This would further underline and emphasize the independence of these two inquiries.

NESARC supports the Services’ proposed harmonization of the DPS policy with their treatment of the “significant portion of its range” policy. DPSs are the smallest division of a species that can be protected under the ESA.<sup>29</sup> Further, Congress specifically directed that the DPS policy is to be used sparingly and only where biologically warranted.<sup>30</sup> The nature of a DPS and Congress’ expressed intent heightens the importance of distinguishing listings based on DPS or “significant portion of its range” inquiries, and listing on a DPS basis where it is biologically warranted.

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<sup>27</sup> 76 Fed. Reg. at 76,997-98.

<sup>28</sup> See, e.g., *Trout Unlimited v. Lohn*, 559 F.3d 946 (9<sup>th</sup> Cir. 2009).

<sup>29</sup> *Alsea Valley Alliance v. Evans*, 161 F. Supp. 2d 1154, 1162 (D. Ore. 2001) (citing *Southwest Ctr. for Biological Diversity v. Babbit*, 980 F. Supp. 1080, 1085 (D. Ariz. 1997)).

<sup>30</sup> Congress has instructed the Secretary to exercise this authority with regard to DPSs “... sparingly and only when the biological evidence indicates that such action is warranted.” S. Rep. No 96-151, at 7 (1979).

NESARC supports the Services’ proposal to defer to a listing of a DPS in lieu of a “significant portion of its range listing” when there is a valid DPS. 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 mechanisms are not imposed upon areas where they are unnecessary. By deferring to utilization of the DPS listing for valid population segments rather than a “significant portion of its range” inquiry, the Services, again, will fully apply the principle of ensuring independent meaning to all elements of the ESA as well as avoid overregulating and potentially increasing administrative costs.

## **II. CLARIFICATIONS AND IMPROVEMENTS TO THE SERVICES POLICY**

In addition to responding to the specific questions posed by the Services, a number of other elements to the draft policy warrant comments. Specifically, NESARC wishes to highlight those elements of the policy that require further review, clarification, and in some cases, addition. To further this consideration, NESARC is providing comments on issues that we have identified in the draft policy as well as proposed modifications to the text of the policy to address these matters. While these proposed modifications are included in the text comments (below), a consolidated version of all proposed policy modifications also is attached to these comments as Attachment B.

### **A. The Definition of a “Significant Portion of its Range” is Appropriate**

NESARC 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.” NESARC 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 of the range to the species’ health.

It is important to stress that the “significant portion of its 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 its range,” but conclude that the species is healthy within the “significant portion of its 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, prejudice, or other determination as to whether the species in that identified “significant portion of its range” warrants protection under the ESA as either threatened or endangered.

**B. A Factual Finding Must be Provided Identifying the Physical Attributes and Biological Elements of a Specific Portion of Range Which are Necessary for Species Survival Prior to Initiation of a “Significant Portion of its Range” Inquiry**

NESARC believes that identification of a significant portion of a species’ range can only be established by a factual finding that confirms the necessary level of “significance.” Specifically, in determining what constitutes a significant portion of a species’ range, there must be factual evidence supporting a significant relationship between biological elements within a species’ present range and its ability to survive. Additionally, the Services must provide factual evidence regarding any physical attributes of the range that relate to a finding that a portion of the range should be designated as “significant.” These physical features may include elements such as the presence of water bodies, a specific altitude, the level of tree density, or the geology of the area. In all instances, the public must be given notice and the opportunity to comment on the factual evidence supporting the identification of the biological elements and physical attributes underlying a “significance” determination.

To accomplish this further clarification, NESARC recommends the approach articulated in *Center for Biological Diversity v. Norton*,<sup>31</sup> which emphasized biological considerations. Particularly, in that proceeding, a New Mexico district court explained that the interpretation of “significant portion of its range” focuses on biological rather than geographical significance.<sup>32</sup> In reaching this decision, the court noted that:

The parties in this case [i.e., Center for Biological Diversity and FWS] agree that the word “significant” here does not mean *geographically* significant, in the sense of a large area of land or a large percentage of a species’ historical habitat, but rather implies a *biologically* significant portion of the range.<sup>33</sup>

Starting from the premise that the appropriate inquiry is the determination of a portion of range and the physical attributes that are biologically significant to the species, the Services must then look to how best to integrate biological considerations into the

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<sup>31</sup> 411 F.Supp.2d 1271 (D.N.M. 2005).

<sup>32</sup> *Id.* at 1279.

<sup>33</sup> *Id.* See also *Ctr. for Biological Diversity v. Fish and Wildlife Serv.*, 2007 U.S. Dist. LEXIS 16175 (D.Col. Mar. 7, 2007) (Bonneville cutthroat trout) (following the 10<sup>th</sup> Circuit *Ctr. for Biological Diversity v. Norton* (RGCT) opinion in using biological rather than geographical significance).

identification of what constitutes a significant portion of a species’ range. Here there is guidance in the plain meaning of the term significant. Merriam-Webster’s Dictionary defines the common understanding of “significant” as meaning:

...having meaning; suggestive

...having or likely to have influence or effect; important

...probably caused by something other than mere chance; statistical correlation.<sup>34</sup>

This meaning of the term “significant” taken in the context of its usage in the phrase “significant portion of its range” requires a factual finding of an important or integral relationship to the species. Moreover, this concept of significance can be expressed in the level of interrelationship between the biological characteristics found in the identified portion of the species’ occupied range and the ability of the species to survive. Specifically, are the primary biological elements present in an area integral to the life cycle of a species and its ability to survive? The focus on whether the species would be “in danger of extinction” without that portion of its range should be supported by a factual finding. This finding must indicate whether there is a high level of interrelationship between the primary biological factors or elements within that area and the species’ life cycle needs which rise to a level of having an important impact on the species’ ability to survive. Without such a factual finding establishing the presence of a portion of a species’ range that meets the “significance” criterion, there is no basis on which a “significant portion of its range” inquiry can go forward.

The Services must ensure that there is a meaningful inquiry as to the biological importance of a specifically identified portion of the species’ range. This inquiry requires a factual finding of a sufficient level of specificity to meet the high threshold that must be met to prove that a portion of the species’ range is so important as to put the species “in danger of extinction” without that portion.

***Proposed modification:*** To properly define and implement the “significant portion of its range” inquiry, the Services should modify their definition of “significant” to add the text as follows:

In implementing the assessment of a portion of a range’s contribution to the viability of a species, the Services shall identify and explain those physical attributes and biological elements that are present in the species occupied range and are so integral to the life cycle of the species that they make a unique and irreplaceable contribution to the species’ ability to survive.

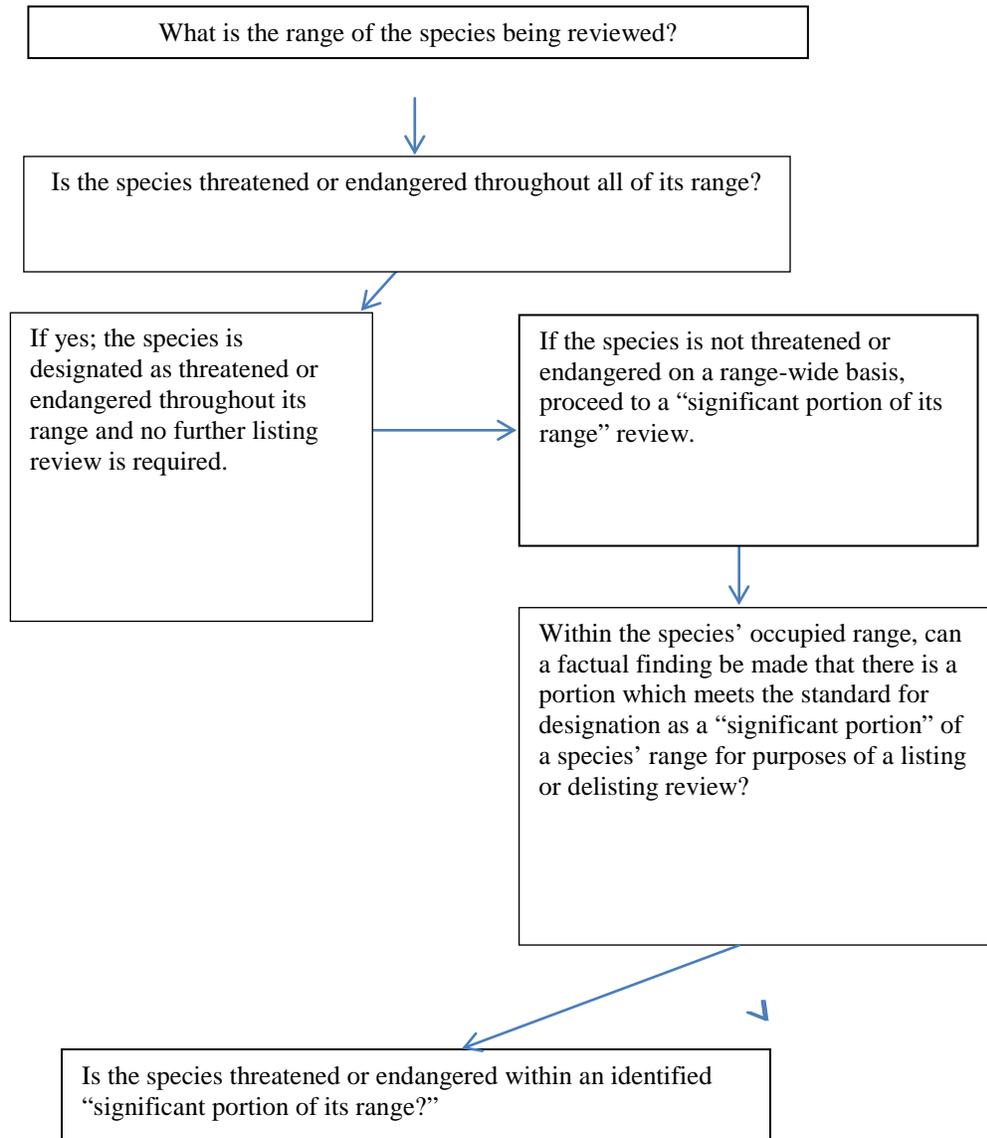
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<sup>34</sup> Merriam-Webster’s Collegiate Dictionary (11th ed. 2008), available at <http://www.merriam-webster.com/dictionary/significant>.

**C. The “Significant Portion of its Range” Review is a Sequential Review  
That is Only Undertaken Where a Range-Wide Listing Determination is  
not Warranted**

In implementing the “significant portion of its range” inquiry, the Services must recognize its sequential nature—especially in relation to the broader range-wide listing review. Specifically, the Services should first look at range-wide threats and conditions and, only if necessary, proceed to a narrower “significant portion of its range” review. The sequential nature of the review, itself, is supported by the fact that the “significant portion of its range” inquiry will not always be necessary. First, a broader range-wide listing determination will render the need for a “significant portion of its range” review moot. Further, there also will be circumstances where the Services conclude that there are no particular portions of a species’ range that warrant separate consideration under the “significant portion of its range” inquiry.

This sequence or decision-tree process for review of species or subspecies<sup>35</sup> is best reflected as follows:



This process will allow for efficient and proper administration of the “significant portion of its range” inquiry. Accordingly, NESARC recommends that the Services amend the

<sup>35</sup> This sequence does not apply to a DPS; the Services’ existing DPS policy should continue to govern the procedures for the identification and listing review of a DPS.

“flow chart” that they have developed for the “significant portion of its range” policy to reflect the decision process reflected above.

**D. Designation of a Species as Endangered or Threatened in a “Significant Portion of its Range” Should Be Specific to that Portion of its Range**

The Services’ proposal to extend designation of a species as threatened or endangered range-wide should be reversed. As noted in Sections I.A and I.B., this proposal fails to give independent meaning to the listing review and determination of range-wide threats versus the narrower “significant portion of its range” inquiry. If, as the Services now pronounce, they are recognizing the “significant portion of its range” inquiry as a separate and independent basis for designating a species as threatened or endangered, then the Services must apply such determination in a manner consistent with the structure of the ESA. Section 4(c)(1) definitively addresses this matter, providing that:

Each list shall refer to the species contained therein by scientific and common name or names, if any, 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.<sup>36</sup>

This formulation clearly requires and accommodates designation of a species as threatened or endangered in a “portion of its range.” Accordingly, the Services must remove from their policy the present statement that a finding of threatened or endangered status within a significant portion of a species’ range requires listing of the entire species on a range-wide basis.

We have reviewed the Services’ explanation of reasons for proposing to list a species range-wide if the species is at risk only in a “significant portion of its range.”<sup>37</sup> We encourage the Services to reconsider, for a number of reasons. First, as just explained, listing a species only within a “significant portion of its range,” when the listing is based on a determination that the species is at risk only in a “significant portion of its range,” and is not at risk range-wide, would be a more accurate reflection of what the Services have determined through the “significant portion of its range” analysis. Such a narrower listing would more fully honor the ESA’s statutory language, in particular Section 4(c), by giving full meaning to the “significant portion of its range” and Section 4(c) “portion of range” provisions of the ESA. This approach also would avoid inappropriately broad listings of species that are at risk only in a significant portion of their range, not range-wide, and would help to focus limited Services and regulated community resources where the need is greatest.

Further, we do not view past court opinions as constraining such a well-founded interpretation of the ESA, if that interpretation is adopted with sufficient substantiation as

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<sup>36</sup> 16 U.S.C. §1533(c)(1) (emphasis added).

<sup>37</sup> 76 Fed. Reg. at 76,991-3.

discussed in our comments. As the Services have noted, they can depart from court precedent (in this case the 2010 district court decisions suggesting constraints on listing at less than a species, subspecies, or DPS level), in particular when the courts have interpreted (as here) ambiguous language that is open to contrary administrative interpretation and to which the Services are entitled to deference.<sup>38</sup> Also, the Services correctly note that the 2001 Ninth Circuit *Defenders (Lizard)* decision<sup>39</sup> suggests that the Services can in fact list a species in a portion of its range.<sup>40</sup> We certainly disagree with the view that Section 4(c) of the ESA, in requiring the Services to identify “over what portion of its range [each listed species] is endangered or threatened” constitutes a mere informational requirement that can be ignored in determining where a species is listed.<sup>41</sup> Section 4(c) needs to be more fully honored in implementing the ESA’s “significant portion of its range” provisions.

***Proposed modification:*** To properly define the applicability and scope of a listing determination based on findings associated with a significant portion of a species’ range, the Services should undertake the following edits to their policy:

*Under “Consequences of a species being endangered or threatened in a significant portion of its range,” modify the second paragraph as follows:*

...

*If a species is found to be endangered or threatened in only a significant portion of its range, ~~entire range is the~~ species shall be designated as endangered or threatened, respectively, only in that portion of its range, and the Act’s protections shall apply solely to such identified portion of the species’ range across the species’ entire range.*

#### **E. A High Threshold Should Apply to the Designation as Critical Habitat of Unoccupied Areas or Areas Outside the Identified Portion of the Range for Which the Listing is Made**

The Services propose to use “the same process” for designation of critical habitat for a species that is listed based on a “significant portion of its range” finding as is presently undertaken for a range-wide listing.<sup>42</sup> In particular, the Services assert that “critical habitat designations may include areas within a significant portion of the species’ range, areas outside the significant portion of range occupied by the species, and areas that are both outside the significant portion of the species’ range and outside the area occupied by the species at the time of listing, as appropriate.”<sup>43</sup> Further, the Services also state that

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<sup>38</sup> *Id.* at 76,989 (first paragraph of the section I.D discussing relevant case law).

<sup>39</sup> *Defenders of Wildlife v. Norton*, 258 F.3d 1136 (9th Cir. 2001).

<sup>40</sup> 76 Fed. Reg. at 76,989 (right column); *id.* at 76,993 (left column).

<sup>41</sup> *Id.* at 76,991 (right column).

<sup>42</sup> *Id.* at 77,003.

<sup>43</sup> *Id.*

“...as a result of threats in a significant portion of its range, the designation of critical habitat may tend to focus on that portion of its range.”<sup>44</sup> This “tendency” to focus on the portion of a species’ range for identification of critical habitat should be further clarified to establish a high threshold for any designation of unoccupied areas or areas outside the identified portion of the species’ range.

As an initial matter, NESARC wishes to confirm that the Services will approach the critical habitat designations associated with a “significant portion of its range” listing using the specific purpose established under the ESA. Namely, critical habitat designations are to be limited to those areas with physical or biological features essential to the conservation of the species *and* in need of special management considerations or protection.<sup>45</sup> Further, the Services will exclude areas from a critical habitat designation where the benefits of exclusion outweigh the benefits of specifying such area as part of the critical habitat (unless its exclusion would result in the extinction of the species concerned).<sup>46</sup> This analysis and construct must be applied to the framework of a “significant portion of its range” listing—particularly with respect to the biological elements that have been identified as having a significant relationship to the species’ ability to survive.

NESARC recognizes that, by definition, the concept of critical habitat may cover both occupied and unoccupied habitat.<sup>47</sup> However, this is not the only relevant consideration in the context of a designation of critical habitat associated with a “significant portion of its range” listing. In particular, Section 4(c)(1) explains that:

Each list shall refer to the species contained therein by scientific and common name or names, if any, 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.<sup>48</sup>

This language is not superfluous. To the contrary, the reference to specification of critical habitat “within such range” was added at the same time as the concept of “significant portion of its range.” As such, the statutory provisions under Section 4(c)(1) evince an intent to focus designation of critical habitat within the species’ range. Accordingly, the presumption should be that if a species is listed on the basis that it is endangered or threatened throughout a “significant portion of its range,” any designation of critical habitat should similarly be limited to that area that has been determined to be a “significant portion of its range.”

In discussing the “significant portion of its range” inquiry, the Services note that “...with respect to portions of the range of the species not facing relevant threats, the Secretary

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<sup>44</sup> *Id.*

<sup>45</sup> 16 U.S.C. §1532(5)(A)(i).

<sup>46</sup> *Id.* §1533(b)(2).

<sup>47</sup> *Id.* §1532(5)(A).

<sup>48</sup> *Id.* § 1533(c)(1) (emphasis added).

may be more likely to find that the benefits of excluding an area from designation outweigh the benefits of specifying the area as critical habitat.”<sup>49</sup> The presumption limiting critical habitat to that area that has been determined to be a “significant portion of its range” is consistent with this premise and supports the ability of the Services to exercise their authority under Section 4(b)(2) to exclude certain portions of range from a critical habitat designation based on the relative benefits of the designation compared to the exclusion. For areas outside the significant portion of the species’ range, especially those areas that are unoccupied by the species, the Services must critically apply the benefits assessment under Section 4(b)(2) to identify instances where exclusion from a critical habitat designation is warranted.

NESARC further encourages the Services to ensure that when critical habitat needs to be designated for a species that has been listed because it is at risk in a “significant portion of its range,” the appropriate focus for the critical habitat designation should first be to examine the primary constituent elements (PCEs) *within such range*—i.e., the areas which have been identified to represent a significant portion of a species’ range. Moreover, review and designation of any unoccupied habitat or areas outside the identified range should be undertaken only in the event that the Services first determine that habitat within the identified range, if designated as critical habitat, will not fully satisfy the purpose of designation of critical habitat.

***Proposed modification:*** *To clarify the Services’ treatment of the process for designation of critical habitat in the case of a “significant portion of its range” listing, the Services should add the following provisions to the policy:*

***Designation of Critical Habitat:*** *The Services will undertake their review and designation of critical habitat in relation to “significant portion of its range” listing in a manner that is consistent with the independent nature of the listing determination and its focus on a specific portion of a species’ range. Consistent with Section 4(c)(1), the Services will first review whether the primary constituent elements for such species and habitat within the identified portion of its range allow for full satisfaction of the purpose of the critical habitat, i.e., identifying habitat that is essential to the conservation of the species and in need of special management. The Services will employ a presumption that the habitat within the identified portion of range is sufficient to meet the purposes of the critical habitat designation, and will only consider the designation of unoccupied habitat or areas outside the identified portion of the range where, without the review and potential designation of such unoccupied habitat or outside-area habitat, the species will be in danger of extinction.*

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<sup>49</sup> 76 Fed. Reg. at 77,003.

**F. The Services Must Adopt Transparency Measures and Revisions to Their Petition Process to Ensure that Adequate Information is Made Available to the Public**

A fundamental premise of the Services’ policy is that the Services intend to undertake, as an independent analysis, the potential listing of a species as threatened or endangered based on threats to such species within a “significant portion of its range.” A prerequisite to any such determination, however, is the need to fully inform the public regarding the identification and analysis of any portion of a species’ range under this “significant portion of its range” inquiry. Failure to provide specific information of the particular portion of range being identified and the factors necessitating its independent review would fundamentally undermine the openness and sufficiency of the public notice and comment period. To facilitate this level of transparency, the Services must take several steps:

- First, the Services must include in their policy and procedures, a specific requirement that any initiation of a status review for a species (including a 12-month review under Section 4(b)(3)(B); the annual candidate notice of review; and any proposed listing of a species as threatened or endangered within a “significant portion of its range”) shall be preceded by a publication in the *Federal Register* that includes notification of any proposal or consideration of an area for separate assessment of a species listing under the “significant portion of its range” inquiry. Such information must, at a minimum, include mapping, identification of factors considered, identification of all studies and information to be considered in relation to this inquiry, and an explanation as to any proposed basis for the identification of an area as a significant portion of a species’ range for the purpose of an independent listing inquiry.
- Second, the Services must contemporaneously propose revisions to their regulations governing the submission and review of listing petitions to require specification and documentation of any proposal to consider a portion of a species’ range as a “significant portion of its range” for the purpose of a separate listing review. Further, the Services should explicitly note that any petition failing to provide such information shall be considered to only be requesting consideration of a species listing on a range-wide basis. Finally, review and action on the listing petition must be limited to the specific question and issues posed within the listing petition.

The ESA and the Services’ own scientific integrity policies dictate the need for the identification of the best scientific and commercial data available for consideration in a listing process. Further, the Services have long stated their intention to ensure a fully

transparent listing review process. That must be carried forward in the implementation of the “significant portion of its range” policy.

NESARC also would like to clarify that the independent nature of the “significant portion of its range” inquiry should be consistently implemented. Such implementation should include recognition of insufficient information warranting further review (similar to the practice for critical habitat designations) and appropriate application of the warranted but precluded finding in a listing determination. It also should include utilization of the status review process to examine the extent or need of any protection under the “significant portion of its range” element. Each of these practices and listing program elements have equal application to a “significant portion of its range” listing review and/or listing determination.

***Proposed modification:*** *To effectuate the necessary level of transparency and allow for an adequate public notice and comment period, NESARC recommends that the Services undertake the following measures:*

- *Insert within the policy and procedures for defining a “significant portion of its range” in a species status review, the following text:*

*Public Notice and Comment: In order to ensure a complete administrative record and fulfill the requirements for public notice and comment on the Services listing determinations, each of the Services shall:*

- (1) Include in the applicable Federal Register Notice announcing a species status review, 12-month review, or any other review of a species for listing, delisting or reclassification, a statement as to whether the Service is reviewing whether a specific area qualifies for review under the “significant portion of its range” inquiry. Such public notice shall provide detailed information on the identified portion of the species’ range, including mapping information regarding the location and boundaries of such range segment, the physical attributes and biological factors to be considered in analyzing whether such portion represents a significant portion of a species’ range, and the identification of all scientific and commercial information within the Service’s administrative record that is to be considered in the review and identification of any significant portion of a species’ range that is to be separately assessed for a listing determination. The Service shall invite public comment on this identified area prior to making any factual finding that the area qualifies for independent listing, delisting, or reclassification review under the “significant portion of its range” inquiry.*

- (2) The Service shall maintain and make available to the public all information submitted regarding the identification of an area for consideration as a “significant portion of its range.”
- (3) Upon completion of the review described in paragraphs (1) and (2), the Service shall publish in the Federal Register a factual finding for any area which the Service has determined qualifies for independent listing review under the “significant portion of its range” inquiry. Such Federal Register notice shall include identification of such area, including mapping, identification of specific physical attributes and biological factors requiring its designation, and citation of all information considered in making this determination. Such public notice also shall request public comment on this determination. The Service shall not proceed to any independent listing review of a significant portion of a species’ range prior to the publication of such public notice and sufficient opportunity for the public to review and comment. At a minimum, the Service shall provide ninety (90) days for review and comment on a determination that a significant portion of a species’ range requires separate assessment for potential listing under the Act.
- (4) A final determination that a specific area qualifies for independent listing review under the “significant portion of its range” inquiry shall be subject to periodic review of the mapping information regarding the location and boundaries of such range segment, the factors to be considered in analyzing whether such portion represents a significant portion of a species’ range, and the identification of all scientific and commercial information within the Service’s administrative record that is to be considered in the review and identification of any significant portion of a species’ range that is to be separately assessed for a listing determination.
- *The Services also must modify the listing petition procedures (50 C.F.R§ 424.14(b)(2)(iii)(2011)) to include the following requirements:*
- § 424.14 Petitions.**
- ...
- (b) *Petitions to list, delist, or reclassify species. ...*

*(2) In making a finding under paragraph (b)(1) of this section, the Secretary shall consider whether such petition—*

*(i) Clearly indicates the administrative measure recommended and gives the scientific and any common name of the species involved;*

*(ii) Contains detailed narrative justification for the recommended measure, describing, based on available information, past and present numbers and distribution of the species involved and any threats faced by the species;*

*(iii) Provides information regarding the status of the species over all or a significant portion of its range, and if the petition requests listing, delisting, or reclassification of a species as endangered or threatened in a “significant portion of its range,” provides sufficient information necessary to identify the proposed range including: (1) definition of the proposed area to be considered a significant portion of a species’ range; (2) mapping of such portion of range; (3) identification of the biological characteristics requiring designation of such area as a significant portion of a species’ range; and (4) evidence that the areas proposed for consideration are currently occupied by the species and are used throughout all or part of the species’ life cycle;*

*(A) however if the petition fails to request listing, delisting, or reclassification of a species as endangered or threatened in a “significant portion of its range,” or fails to provide sufficient information as described in (1) – (4) of this subsection to support identification of the species’ proposed range as a significant portion of its range, the Secretary shall limit its petition determination to the specific actions request and shall not otherwise consider listing, delisting, or reclassification of a species as endangered or threatened in a significant portion of its range;*

*and*

*(iv) Is accompanied by appropriate supporting documentation in the form of bibliographic references, reprints of pertinent publications, copies of reports or letters from authorities, and maps.*

*Further, the Services also should ensure this level of transparency in any notices of review for a species. To accomplish this transparency, the Services should modify 50 C.F.R. § 424.15 to add a new subsection (d) which provides as follows:*

*§ 424.15 Notices of review.*

*...*

(d) Any notices published in the Federal Register regarding the status of a species being reviewed for listing, delisting, or reclassification as endangered or threatened throughout a “significant portion of its range” must include sufficient information regarding the range to be identified, including: (1) definition of the proposed area to be considered a significant portion of a species’ range; (2) mapping of such portion of range; (3) identification of the characteristics requiring designation of such area as a significant portion of a species’ range; and (4) evidence that the areas proposed for consideration are currently occupied by the species and are used throughout all or part of the species’ life cycle.

### **G. The “Significant Portion of Its Range Inquiry” Applies to Delisting a Species Previously Listed as Endangered or Threatened**

In its present policy, the Services fail to fully explain the treatment of delisting matters in the context of the “significant portion of its range” inquiry. While the Services appear to generally acknowledge the application of the “significant portion of its range” inquiry to delisting matters,<sup>50</sup> no guidance is provided as to how such inquiry actually would be undertaken.

The Services must confirm how they intend to apply the “significant portion of its range” inquiry to a determination of whether a species should no longer be listed as threatened or endangered. In the same manner that the Services now must look sequentially at both a range-wide and “significant portion of its range” inquiry in the process of reviewing a potential listing of a species as threatened or endangered, a similar two-step, sequential review should be applied in the delisting process. This review and delisting consideration should occur both in the context of the periodic status reviews of listed species as well as in response to delisting petitions submitted by interested parties.

### **H. Periodic Reviews of the Factual Finding as to a Significant Portion of a Species’ Range Also Must be Undertaken**

In addition to determining whether a species warrants continued listing in a “significant portion of its range,” the Services also must review their preliminary determination that an area warrants consideration as a significant portion of a species’ range. In other words, within the normal status review process (and where required in light of an administrative petition), the Services must re-assess and confirm the continued treatment of a specified area as a significant portion of a species’ range. Moreover, consistent with

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<sup>50</sup> See, e.g., 76 Fed. Reg. at 77,003 (discussion of the “effects” of the policy which includes the statement that: “The only direct effect of the policy would be to accept or reject as “significant” portions of the range of a species under consideration for listing, delisting, or reclassification.”).

the independent meaning principle being adopted by the Services, where the Services identify necessary changes to the boundaries of the area designated as a significant portion of a species’ range, the protections afforded to the species must be adjusted accordingly. Moreover, if the review determines that the factual findings that initially supported the area’s designation as a significant portion of the species’ range are no longer valid, a species listed based on the “significant portion of its range” inquiry should be immediately delisted.

### **I. Artificial Boundaries Should Not Be Used to Delineate a Significant Portion of the Species’ Range**

The Services’ discussion of the “significant portion of its range” policy fails to adequately address the question of artificial boundaries—such as State borders and international boundaries.

As noted previously, the Services must segregate the identification of an area deemed to be a significant portion of a species’ range from the later listing review determination of whether a species is threatened or endangered within a “significant portion of its range.” As an initial matter, NESARC believes that artificial boundaries should not be used to delineate a factual finding of an area representing a significant portion of a species’ range. Instead, the recognition of artificial boundaries such as State and county jurisdictional boundaries and international borders is a critical element of the “existing regulatory mechanisms” review process in the listing determination.

### **J. Application of Policy to Pending Candidate Review**

NESARC also requests that FWS clarify and explain the intended role of the “significant portion of its range” policy in ongoing implementation of the candidate species review settlements with WildEarth Guardians and the Center for Biological Diversity. Under these settlements, FWS is required to review 251 candidate species over the course of approximately five years and either propose the species for listing or find that a listing of such candidate species is not warranted and remove the “candidate” designation for such species. FWS’s initial determination that the species should be classified as “candidate species” clearly occurred prior to establishment of the now proposed interpretation of the “significant portion of its range” inquiry. NESARC assumes and understands the candidate review process under this settlement to consider the status of the species based on present conditions. As such, NESARC presumes that FWS will be updating its administrative record for each species as it is reviewed and independently assessing whether listing of the species is now required. Accordingly, it would make sense that FWS apply all of the same procedures, assumptions, thresholds, and definitions that the Services are now announcing under this present policy.

The ability and nature of any FWS application of the “significant portion of its range” definition and procedures to its candidate review process should not be left unstated. Accordingly, prior to any implementation, the FWS should publicly and with full transparency, explain how it intends to address the “significant portion of its range” inquiry in the candidate review process.

**III. REQUEST FOR ADOPTION OF FORMAL RULEMAKING AND ADDITIONAL OPPORTUNITIES FOR PUBLIC ENGAGEMENT AND COMMENT: CORE ELEMENTS OF THE TREATMENT OF THE “SIGNIFICANT PORTION OF ITS RANGE” INQUIRY AND ITS LEGAL IMPLICATIONS MUST BE INCORPORATED INTO THE SERVICES’ ESA REGULATIONS**

Several elements of the Services’ draft policy clearly warrant application of full notice and comment rulemaking proceedings under the Administrative Procedures Act (“APA”) and incorporation into the Services’ ESA implementing regulations. In particular, those elements that go beyond merely “interpretative” functions to establishing firm legal rights and consequences include:

- The definition of “significant portion of its range;”
- Identification of factors to be used in determining a significant portion of a species’ range;
- The effect of a listing determination (i.e., designation solely within the identified significant portion of a species’ range); and
- Modification of the listing petition review process (as detailed in Section II.F).

As the Services recognize, the phrase “significant portion of its range” has been the subject of a number of different interpretations emanating from both the Services and the courts. Continuation of such a piecemeal and haphazard treatment of the “significant portion of its range” inquiry is unproductive and must be ended to ensure a more consistent approach to implementation of the ESA. However, it is equally important that the Services use the appropriate approach to implementation of the “significant portion of its range” inquiry. Specifically, the Services should not be adopting a “policy” for interpreting this phrase, but rather engaging in a full regulatory rulemaking under the APA.

Federal courts have long recognized that an agency’s attempt to “define” or “interpret” a statutory phrase does not, by that act, qualify it as an interpretive rule.<sup>51</sup>

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<sup>51</sup> *Hemp Indus. Assoc. v. Drug Enforcement Agency*, 333 F.3d 1082, 1087 (9<sup>th</sup> Cir. 2003) (citing *Yesler Terrace Cmty. Council v. Cisneros*, 37 F.3d 442, 449 (9<sup>th</sup> Cir.1994)). See also *Shalala v. Guernsey Mem’l Hosp.*, 514 U.S. 87, 99, 115 S.Ct. 1232, 131 L.Ed.2d 106 (1995); *Am. Mining Cong. v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1109 (D.C.Cir.1993).

In general terms, interpretive rules merely explain, but do not add to, the substantive law that already exists in the form of a statute or legislative rule. ... Legislative rules, on the other hand, create rights, impose obligations, or effect a change in existing law pursuant to authority delegated by Congress.<sup>52</sup>

For example, an interpretation of a statutory term that creates a new or independent basis for enforcement action also is creating new rights and imposing new obligations, thereby making such action a legislative rule under the APA.<sup>53</sup> 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.<sup>54</sup>

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.*<sup>55</sup>

These statements carry with them new legal implications, including:

- The listing and delisting process will now separately consider the status of each species under the “significant portion of its range” inquiry;
- 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; and
- The Services would change the designation of a species from a range-wide designation of “threatened” to an “endangered” status if the species is deemed endangered within a “significant portion of its range.”

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<sup>52</sup> *Hemp Indus.*, 333 F.3d at 1087.

<sup>53</sup> *Id.* at 1089.

<sup>54</sup> *Am. Mining*, 995 F.2d at 1109.

<sup>55</sup> 76 Fed. Reg. 76,987, 77,002 (emphasis added). As already noted, NESARC urges the Services to modify this last sentence, which as modified would still be important to reflect in regulations because it would still have practical consequences that would affect the regulated community.

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 of endangered and threatened species and designation of critical habitat. 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 from these regulations—and certainly contemplates listing determinations that are not in accordance with the present listing regulations.

As an example, the western snowy plover has been listed as a threatened species due to threats throughout its range. The species also has a relatively wide range spanning eleven Western States and Mexico, with population density and health at varying levels throughout its range. Under the Services’ new policy, through either a status review or a citizen petition, the Services could now determine that the species is “endangered” within a “significant portion of its range”—even though it remains only “threatened” range-wide. Such an action violates the express provisions of 50 C.F.R. § 424.10.

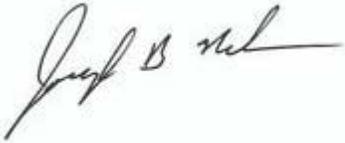
The existing ESA listing regulations detail factors for consideration in making listings and designating critical habitat, basic information requirements for petitions and notices of review, and timelines for actions. The Services now propose to adopt an independent basis for listing determinations and articulate specific criteria for reviewing what constitutes a significant portion of a species’ range. Logically, and consistent with governing precedent, such measures should be included in the ESA listing regulations.

In the event that the Services do not use a formal rulemaking to implement the draft policy, NESARC notes that certain reviews and procedures still must be undertaken. Specifically, in all instances, the Services should undertake the appropriate reviews and assessments under the Regulatory Flexibility Act and the Small Business Regulatory Enforcement Fairness Act. Specifically, contrary to the discussion at Section VI.B of the notice announcing the proposed policy, the proposed policy will clearly have impacts on the regulated community, including small businesses. Further, it is imperative that the Services fully recognize and analyze those impacts.

#### IV. CONCLUSION

NESARC greatly 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 continue to collaborate with the public on such measures. Thank you.

Sincerely,

A handwritten signature in black ink, appearing to read "Joseph B. Nelson", is centered below the text "Sincerely,". The signature is written in a cursive style.

Joseph B. Nelson  
Counsel, National Endangered Species Act Coalition



NATIONAL ENDANGERED SPECIES ACT  
REFORM COALITION

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## Attachment A

### National Endangered Species Act Reform Coalition 2012 Membership Roster

**American Agri-Women**  
Mission, Texas

**American Farm Bureau Federation**  
Washington, D.C.

**American Forest and Paper Association**  
Washington, D.C.

**American Petroleum Institute**  
Washington, D.C.

**American Public Power Association**  
Washington, D.C.

**Association of California Water Agencies**  
Sacramento, California

**Central Electric Cooperative**  
Mitchell, South Dakota

**Central Platte Natural Resources District**  
Grand Island, Nebraska

**Charles Mix Electric Association**  
Lake Andes, South Dakota

**Coalition of Counties for Stable Economic Growth**  
Glenwood, New Mexico

**Codington-Clark Electric  
Cooperative, Inc.**  
Watertown, South Dakota

**Colorado River Energy Distributors Association**  
Tempe, Arizona

**Colorado River Water Conservation District**  
Glenwood Springs, Colorado

**Colorado Rural Electric Association**  
Denver, Colorado

**County of Eddy**  
Carlsbad, New Mexico

**County of Sierra**  
Truth or Consequences, New Mexico

**CropLife America**  
Washington, D.C.

**Dixie Escalante Rural Electric Association**  
Beryl, Utah

**Dugan Production Corporation**  
Farmington, New Mexico

**Edison Electric Institute**  
Washington, D.C.

**Frank Raspo & Sons**  
Vernalis, California.

**Empire Electric Association, Inc.**  
Cortez, Colorado

**Garrison Diversion Conservancy District**  
Carrington, North Dakota

**High Plains Power, Inc.**  
Riverton, Wyoming

**Idaho Mining Association**  
Boise, Idaho

**National Association of Counties**  
Washington, D.C.

**National Association of Home Builders**  
Washington, D.C.

**National Grange**  
Washington, DC

**National Mining Association**  
Washington, D.C.

**National Rural Electric Cooperative Association**  
Washington, D.C.

**National Water Resources Association**  
Arlington, Virginia

**Nebraska Farm Bureau Federation**  
Lincoln, Nebraska

**Northern Electric Cooperative, Inc.**  
Bath, South Dakota

**Northwest Horticultural Council**  
Yakima, Washington

**Public Lands Council**  
Washington, D.C.

**Renville-Sibley Cooperative Power Association**  
*Danube, Minnesota*

**Rushmore Electric Power Cooperative, Inc.**  
*Rapid City, South Dakota*

**San Luis Water District**  
*Los Banos, California*

**Southwestern Power Resources Association**  
*Tulsa, Oklahoma*

**Sulphur Springs Valley Electric Cooperative**  
*Willcox, Arizona*

**Teel Irrigation District**  
*Echo, Oregon*

**Tri-State Generation & Transmission Association, Inc.**  
*Denver, Colorado*

**Washington State Potato Commission**  
*Moses Lake, Washington*

**Washington State Water Resources Association**  
*Yakima, Washington*

**Wells Rural Electric Company**  
*Wells, Nevada*

**West Side Irrigation District**  
*Tracy, California*

**Western Business Roundtable**  
*Lakewood, Colorado*

**Wheat Belt Public Power District**  
*Sidney, Nebraska*

**Whetstone Valley Electric  
Cooperative, Inc.**  
*Milbank, South Dakota*

**Wilder Irrigation District**  
*Caldwell, Idaho*

**Y-W Electric Association, Inc.**  
*Akron, Colorado*



## **Attachment B**

### ***Proposed Modifications of “Significant Portion of its Range” Policy Based on NESARC Comments***

***Consequences of a species being endangered or threatened in a significant portion of its range:*** The phrase “significant portion of its range” in the Endangered Species Act’s (the Act’s) definitions of “endangered species” and “threatened species” 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, ~~entire range is the species shall be designated listed~~ as endangered or threatened, respectively, only in that portion of its range, and the Act’s protections shall apply solely to such identified portion of the species’ range across the species’ entire range.

***Significant:*** 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. In implementing the assessment of a portion of a range’s contribution to the viability of a species, the Services shall identify and explain those physical attributes and biological elements that are present in the species occupied range and are so integral to the life cycle of the species that they make a unique and irreplaceable contribution to the species’ ability to survive.

***Range:*** The range of a species is considered to be the general geographical area within which that species can be found at the time FWS or NMFS makes any particular status determination. This range includes those areas used throughout all or part of the species’ life cycle, even if they are not used regularly (e.g., seasonal habitats). Lost historical range is relevant to the analysis of the status of the species, but it cannot constitute a significant portion of a species’ range.

***Reconciling SPR with DPS authority:*** If the species is not endangered or threatened throughout all of its range, but it is endangered or threatened within a significant portion

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of its range, and the population in that significant portion is a valid DPS, we will list the DPS rather than the entire taxonomic species or subspecies.

**Designation of Critical Habitat:** The Services will undertake their review and designation of critical habitat in relation to “significant portion of its range” listing in a manner that is consistent with the independent nature of the listing determination and its focus on a specific portion of a species’ range. Consistent with Section 4(c)(1), the Services will first review whether the primary constituent elements for such species and habitat within the identified portion of its range allow for full satisfaction of the purpose of the critical habitat, i.e., identifying habitat that is essential to the conservation of the species and in need of special management. The Services will employ a presumption that the habitat within the identified portion of range is sufficient to meet the purposes of the critical habitat designation, and will only consider the designation of unoccupied habitat or areas outside the identified portion of the range where, without the review and potential designation of such unoccupied habitat or outside-area habitat, the species will be in danger of extinction.

**Public Notice and Comment:** In order to ensure a complete administrative record and fulfill the requirements for public notice and comment on the Services listing determinations, the each of the Services shall:

- (1) Include in the applicable Federal Register Notice announcing a species status review, 12-month review, or any other review of a species for listing, delisting or reclassification, a statement as to whether the Service is reviewing whether a specific area qualifies for review under the “significant portion of its range” inquiry. Such public notice shall provide detailed information on the identified portion of the species’ range, including mapping information regarding the location and boundaries of such range segment, the physical attributes and biological factors to be considered in analyzing whether such portion represents a significant portion of a species’ range, and the identification of all scientific and commercial information within the Service’s administrative record that is to be considered in the review and identification of any significant portion of a species’ range that is to be separately assessed for a listing determination. The Service shall invite public comment on this identified area prior to making any factual finding that the area qualifies for independent listing, delisting, or reclassification review under the “significant portion of its range” inquiry.

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- (2) The Service shall maintain and make available to the public all information submitted regarding the identification of an area for consideration as a “significant portion of its range.”
  
- (3) Upon completion of the review described in paragraphs (1) and (2), the Service shall publish in the Federal Register a factual finding for any area which the Service has determined qualifies for independent listing review under the “significant portion of its range” inquiry. Such Federal Register notice shall include identification of such area, including mapping, identification of specific physical attributes and biological factors requiring its designation, and citation of all information considered in making this determination. Such public notice also shall request public comment on this determination. The Service shall not proceed to any independent listing review of a significant portion of a species range prior to the publication of such public notice and sufficient opportunity for the public to review and comment. At a minimum, the Service shall provide ninety (90) days for review and comment on a determination that a significant portion of a species’ range requires separate assessment for potential listing under the Act.
  
- (4) A final determination that a specific area qualifies for independent listing review under the “significant portion of the its range” inquiry shall be subject to periodic review of the mapping information regarding the location and boundaries of such range segment, the factors to be considered in analyzing whether such portion represents a significant portion of a species’ range, and the identification of all scientific and commercial information within the Service’s administrative record that is to be considered in the review and identification of any significant portion of a species’ range that is to be separately assessed for a listing determination.