



Alaska Oil and Gas Association
121 W. Fireweed Lane, Suite 207
Anchorage, Alaska 99503-2035
Phone: (907) 272-1481
www.aoga.org



American Petroleum Institute
1220 L Street, NW
Washington, DC 20005
Phone: (202)682-8000
www.api.org

March 7, 2012

VIA ELECTRONIC MAIL

United States Fish and Wildlife Service
Division of Policy and Directives Management
4401 North Fairfax Drive – MS 2042
Arlington, VA 22203

Re: Draft Policy on Interpretation of the Phrase “Significant Portion of its Range” in the Endangered Species Act’s Definitions of “Endangered Species” and “Threatened Species,” Docket No. FWS-R9-ES-2011-0031

Dear Sir or Madam:

The American Petroleum Institute (“API”) and Alaska Oil and Gas Association (“AOGA”) appreciate this opportunity to comment on the National Marine Fisheries Service’s (“NMFS”) and the U.S. Fish and Wildlife Service’s (“FWS,” collectively “the Services”) Draft Policy on Interpretation of the Phrase “Significant Portion of its Range” in the Endangered Species Act’s (“ESA”) Definition of “Endangered Species” and “Threatened Species” (“Draft Policy”).¹ 76 Fed. Reg. 76987 (Dec. 9, 2011).

API is a national trade association representing more than 490 member companies involved in all aspects of the oil and natural gas industry. Those members include producers, refiners, suppliers, pipeline operators and marine transporters, as well as service and supply companies that support all segments of the industry. API members are dedicated to meeting environmental requirements, while economically developing and supplying energy resources for consumers. AOGA is a nonprofit trade association whose member companies account for the majority of oil and gas exploration,

¹ We will refer to the “Final Policy” or the “SPR Policy” when discussing the ultimate adoption and application of the Draft Policy in the future. “Draft Policy” refers to the text of the Draft Policy contained in Section III, *id.* at 77002-03, along with the perambulatory and explanatory language comprising the bulk of the Notice.

development, production, refining, transportation, and marketing activities in the State of Alaska. As such, API's and AOGA's members have a significant stake in the Services' activities generally, and in the Draft Policy specifically.

We appreciate the difficult task the Services had interpreting the ESA's terms, particularly in light of the statute's legislative history, conflicting provisions, and judicial interpretation. These customary tools of statutory construction provide no clear path to define and delimit the phrase "throughout all or a significant portion of [a species'] range" within the ESA's definitions of threatened and endangered so as to give each part effect.

The Draft Policy does not resolve all statutory ambiguities. Indeed, as explained in greater depth below, the present attempt to clarify this phrase shares significant, perhaps insurmountable, legal problems with other, prior attempts to resolve the difficulty created by Congress when it melded prior agency-proposed language with its own structure. *See, e.g., id.* at 76989 (explaining the development of the SPR phrase).

In terms of the structure of these comments, API and AOGA provide an Executive Summary of major points, followed by comments on the Draft Policy, including identification of the key legal deficiencies we have identified; aspects of the Draft Policy we strongly support; and key areas in need of clarification and revision, assuming the Draft Policy is adopted substantially in its current form. That is followed by a series of recommendations for further changes and recommendations of a general nature. We provide an appendix with the specific questions raised by the Services, with citations to where they are addressed in the letter or direct answers.

Executive Summary

The Draft Policy represents an imperfect solution to a highly complex question, over which the Services and courts have long struggled. Among the considered alternatives, the Draft Policy evaluates the biological and conservation importance of a portion of range to determine whether it is "significant." It may, with clarification and refinement, come to represent a realistic and acceptable alternative. Among its drawbacks, however, the Draft Policy is highly complex and, in some essential respects, confusing and even contradictory. At worst, it is legally deficient in that the Draft Policy rests on the presumption that the word "range" in the definitions of both "threatened" and "endangered" has a different meaning depending on which clause of the definitions modifies it.

When Congress uses the same word in different parts of a statute, the word is presumed to have the same meaning in each. The Services, in the Draft Policy, construe the same word in a *single sentence* two different ways. The Draft Policy is entirely dependent on a construction of the word "range" that is geographic when referring to "all of" a species' range, but biological when it refers to "a significant portion of its range" ("SPR"). To bring some needed consistency, the Services must explain, at a minimum, how the spatial

area occupied by a species in an area to be designated as an SPR will be identified and defined.

Further, while the Draft Policy's "text," set forth at Section III of the Notice, is concise and captures many of the Draft Policy's key elements, it omits several elements API and AOGA consider essential. As stated above, the most significant barrier to the Draft Policy's clear understanding emanates from the Services' decision to define "portion of its range" biologically, that is, as the members of the species inhabiting a particular portion of the species' overall current range. This definition is not included in the Draft Policy's "text." If the Draft Policy set forth in Section III is to have independent, operative effect, separate and apart from the Draft Policy's broader discussion and explanations, API strongly recommends adding this and other key definitions to that text, with revisions suggested below.

Elements of the Draft Policy which have our support, albeit with additional clarification in some instances, are: (1) the decision to use current, as opposed to historic, range for purposes of delimiting the area which can be considered SPR; (2) the proposed "high threshold" for significance, which is based on the "endangered" standard; concomitantly, API believes using the "threatened" standard is administratively infeasible, inconsistent with the ESA, and poor policy; and (3) the decision to list a distinct population segment ("DPS"), rather than the entire species, if the geographic area comprising the DPS is also an SPR or the SPR is within the discrete geographic boundaries of a DPS. The most important reason the high threshold and these other policies are important is that increased numbers of listings based on the Draft Policy will occur, meaning significant conservation resources will be needed for species that would otherwise not have been listed. A too-low bar will substantially increase listing activity to a point that will prevent the Services from being able to fulfill their conservation missions, and will have severe adverse consequences for existing and potential economic, social, and cultural users of United States lands and waters

Among API's and AOGA's additional important recommendations are: (1) to create a strong presumption that critical habitat will be designated only within the SPR, if conditions within the SPR represent the basis for listing; and (2) to allow under certain conditions for the listing, as threatened, of a species that qualifies as threatened based on its status in all of its range, but is endangered in an SPR. The former policy recognizes that limiting critical habitat to the core impacted areas helps focus conservation resources where most needed and gives effect to the Services' ability to consider economic impacts in making such designations. The latter, we believe, provides the flexibility in the ESA's administration that is required as a matter of law.

The Services should also clarify the criteria they will use to guide their discretion in identifying SPR, and to inform petitioners, the public, and courts, of relevant factors to be applied. We also recommend including a clear statement that any habitat, area, or range that is essential to the species as a whole (*e.g.*, breeding grounds), is *not* a significant portion of a species' range for purposes of the Draft Policy. The reason such areas are

not, as occasionally suggested in the Draft Policy, is because threats to essential range affect the species throughout *all* its range.

The Draft Policy is highly consequential. Its operation will adversely affect a multitude of public and private landowners and users, including API's and AOGA's members, who have the potential to interact with listed species. A transparent and predictable policy that allows for consistent administration is the minimum standard the final SPR Policy must meet.

I. The Draft SPR Policy Rests on a Faulty Premise

The Draft Policy applies a varying meaning to the term “range,” depending on whether it refers to the first or second clause of the definition of “threatened” and “endangered.” A threatened species is defined as “any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.” 16 U.S.C. § 1532(20). An endangered species is one “which is in danger of extinction throughout all or a significant portion of its range.” *Id.* § (6). Nothing in the plain language of either definition suggests that “range” has any connotation other than one that is geographic in nature.

Consistently, when the word “range” is used to refer to the clause “throughout all . . . of its range,” the Draft Policy defines it as “the general geographical area within which that species can be [currently] found.” *See id.* at 77002 (defining range as “current range”). However, when referring to “a significant portion of its range,” the term has a biological meaning. As the Services state, “when discussing SPR and ‘portion of the range’ and similar phrases, we are referring to the species within that portion of the range,” as well as “the contribution of the individuals in that portion to the viability of the species in determining whether a portion is significant.” *Id.* at 76991. As the discussion below at Part II.C.1 demonstrates, many of the Draft Policy’s ambiguities arise from the Services’ decision to employ SPR as a biological construct, rather than as a matter of geographic area.

“When a term is used throughout a statute, the court ‘presume[s] that Congress intended that the term have the same meaning in each of the pertinent sections or subsections of the statute, and [the court] presume[s] that Congress intended that [the agency], in defining the term, would define it consistently.’” *Former Employers Merrill Corp. v. United States*, 483 F. Supp. 2d 1256, 1270 (Ct. Int’l Trade 2007) (quoting *SKF USA Inc. v. United States*, 263 F.3d 1369, 1382 (Fed. Cir. 2001)) (alterations in original); *see also Desert Palace, Inc. v. Costa*, 539 U.S. 90, 101 (2003) (“Absent some congressional indication to the contrary, we decline to give the same term in the same Act a different meaning depending on whether the rights of the plaintiff or the defendant are at issue.”) The Draft Policy violates this canon by applying two distinctly different meanings to the same word in same sentence.

API and AOGA recognize the Services confront a challenge in interpreting this ambiguous statutory language. However, at a minimum, they must better resolve this evident inconsistency in a legally defensible manner.

II. Comments on the Draft Policy

The Services propose to apply a species-wide listing to the taxonomic unit at which the species is identified (*i.e.*, species, sub-species, or DPS), based on its status as threatened or endangered either through all its range or a significant portion of its range. Applying the status of a species in a unit of range determined, according to the criteria set forth in the Draft Policy, to be an SPR to the species as the whole represents a change of policy (at least for FWS) and is the crux of the proposal. The driving force behind the Draft Policy is a series of court decisions requiring the Services to give effect to each portion of the respective definitions of “threatened” and “endangered,” as well as judicial criticism of prior attempts to reconcile the ESA’s “plain terms” (*e.g.*, FWS’ M-Opinion).

As written, the Draft Policy’s ultimate implementation will require making very fine distinctions, particularly in identifying SPR and distinguishing conditions affecting the species in these areas from those impacting the status of the species as a whole. It is in this area where added clarity is most important, although we highlight several other essential issues.

We begin with a brief comment on the Draft Policy’s “text” that is contained in Section III of the Notice, followed by a discussion of elements of the Draft Policy that API and AOGA generally support and those elements and issue that require further clarification. API and AOGA also make recommendations on matters not specifically addressed in the Draft Policy.

A. The “Text” of the Draft Policy Appears Incomplete

Section III of the Draft Policy sets forth “the text of our Draft Policy, which we developed based on the preceding information provided in this document.” 76 Fed. Reg. at 77002-03. This “text” is a highly circumscribed summation of four key elements of the Draft Policy: (1) consequences (a finding that a species is threatened or endangered in its entirety if it is threatened or endangered in an SPR); (2) a definition of “significant”; (3) clarification that “range” means “current range” as opposed to historic range; and (4) an explanation of the relationship between SPR and DPS, noting that if an SPR constitutes a DPS, or is identified in a DPS, only the DPS will be listed. *Id.*

We are uncertain what role the text will play in the ultimate implementation of the final SPR Policy. The Services should explain its import in the final rule. Standing alone, this text does not convey aspects of the Draft Policy that are vital to understanding its elements and operation. To the extent that the abbreviated text is meant to be operational language or will be published as the “Policy” shorn of the explanatory text, API and AOGA recommend it be expanded to include additional definitions and clarifications.

We suggest points that could be incorporated, both here and below, in the context of discussing specific issues.

As one important and illustrative example, the text does not include the definition of “portion of its range” despite its centrality to the Draft Policy. In fact, such a definition seems a logical addition given the counterintuitive way the Draft Policy defines the term, most frequently as a biological concept rather than the geographic concept the plain words evoke. As discussed above, that meaning is “the individuals of the species that occupy that portion,” rather than some geographic area. *Id.* at 76991. We strongly encourage adding this definition, as appropriately revised, to the Draft Policy’s “text” as it provides the necessary context for the definition of “significant” therein.

As a general comment, much confusion is engendered by the fact that “portion of its range” is used in the Draft Policy both in this biological sense of the species inhabiting some part of a species’ overall range and as geographic descriptor, *i.e.*, range as “area” or “territory.” This issue is discussed in more detail below.

B. Specific Elements of the Draft Policy Supported by API

Before turning a broader discussion of concerns with the Draft Policy as presented, API and AOGA focus first on specific elements of the Policy that we broadly support. These are areas on which the Services have asked for specific comment.

1. SPR Analysis Appropriately Focuses on “Current Range”

One of the most important components of the Draft Policy is the clarification that “[t]he 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.”² 76 Fed. Reg. at 77002. This issue addresses the question, raised in court decisions, whether the Services must consider (or at least explain) why the historic range from which a species has been extirpated is not an SPR. *See, e.g., Defenders of Wildlife v. Norton*, 258 F.3d 1136, 1145 (9th Cir. 2001) (*Defenders (Lizard)*) (“[W]here . . . the area in which the lizard is expected to survive is much smaller than its historical range, the Secretary must at least explain her conclusion that the area in which the species can no longer live is not a ‘significant portion of its range.’”). For the reasons explained in the Draft Policy and further here below, this qualification is vital and necessary for the Policy’s proper administration once it is promulgated.

As a legal matter, the Services’ analysis supporting its decision to define “range” of a species as its current (occupied), rather than historic, range is persuasive, consistent with the Act’s plain terms, and entitled to deference. *See Chevron U.S.A., Inc. v. NRDC*, 467

² Specifically, the Notice states: “The Services interpret the term ‘range’ to be the general geographical area within which the species is currently found and to include those areas used throughout all or part of the species’ life cycle, even if not used on a regular basis.” 76 Fed. Reg. at 76996. Current range, as so defined, is “the range occupied by the species at the time the Services make a determination under section 4 of the Act.” *Id.*

U.S. 837, 844 (1984) (“We have long recognized that considerable weight should be accorded to an executive department’s construction of a statutory scheme it is entrusted to administer”). The strength of the Services’ legal analysis and rationale is important in light of the Ninth Circuit’s decision in *Defenders (Lizards)* and other cases suggesting the need to consider historic range.

As the Services note elsewhere in the Notice, a court’s construction of a statute trumps an agency construction otherwise entitled to deference *only if* that court’s decision holds its construction follows from unambiguous terms of a statute, leaving no room for agency discretion. *See, e.g.*, 76 Fed. Reg. at 76989 (citing *Nat’l Cable & Telecomm. Ass’n v. Brand X Internet Serv.*, 545 U.S. 967, 982 (2005)). Otherwise, as has been recognized in a number of cases, the agency’s subsequent interpretation is entitled to deference under *Chevron*.³ Here, ample room for agency discretion exists, and the Services are appropriately exercising it. Importantly, not only did the Ninth Circuit *not* hold its determination was required by statute, but explicitly stated “[t]he Secretary necessarily has a wide degree of discretion in delineating ‘a significant portion of its range’, since the term is not defined in the statute.” *Defenders (Lizards)*, 258 F.3d at 1145.

The Draft Policy provides a cogent and legally supported justification for considering only the current, occupied range for purposes of implementing the SPR Policy. For instance, the ESA’s temporal language (*e.g.*, “is in danger of extinction” in the endangered definition, 16 U.S.C. § 1532(6)), noted by the Services, evince clear congressional intent to focus on a species where it exists at the time of listing, and not the areas from which it has already been extirpated. *See* 76 Fed. Reg. at 76997. The Notice similarly explains how the ESA section 4(a)(1)(A) list of factors relevant to the Secretary’s listing determinations – specifically consideration of “the ‘present’ or ‘threatened’ (i.e., future), rather than the past, ‘destruction, modification, or curtailment’ of a species’ habitat or range” – supports the determination to focus on current, as opposed to historic, range. *Id.* (quoting 16 U.S.C. 1533(a)(1)(A)).

It is also inconsistent to read “significant portion of its range” as including unoccupied historical areas (where dangers of extirpation have since been realized), when Congress directs the Services to identify critical habitat based on a species’ current range. *See* 16 U.S.C. § 1532(5)(A)(i) (defining critical habitat, in part, as “the specific areas within the geographical area *occupied by the species*, at the time it is listed”) (emphasis added). While the critical habitat definition allows the Services to include parts of a species’ historic range in certain instances, *id.* § (ii), this language does not control the definition of range at the anterior listing determination phase.

More specifically, the ESA defines critical habitat to include “specific areas outside the geographical area occupied by the species at the time it is listed . . . upon a determination by the Secretary that such areas are essential for the conservation of the species.” *Id.* By definition, such areas must be “essential” to the species as a whole. In the SPR context,

³ 967 U.S. at 982; *see also* *Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735, 740–741 (1996); *Sash v. Zenk*, 439 F.3d 61, 67 n.6 (2nd Cir. 2006); *Dominion Energy Brayton Point, LLC v. Johnson*, 443 F.3d 12, 16 (1st Cir. 2006).

by contrast, the inquiry is whether a species is threatened or endangered “in a significant portion of its range,” and is naturally focused on those areas currently occupied. If areas outside the current occupied range are “essential” for conservation, then they are most likely to affect the status of the species throughout “all” its range. Consistently, the Services proposed to evaluate lost historic range in this latter context.

For this, and all other reasons stated herein and detailed in the Notice, the Services’ interpretation of “range” as “current range” is lawful, entitled to deference, and good policy. API and AOGA strongly support its retention in the Final Policy.

2. A “High Threshold” for Listing Based on SPR is Appropriate

If the final SPR Policy is not to result in widespread adverse economic impacts, waste of limited conservation resources, and overprotection of species in areas where they are not under threat, the proposed “high threshold” must be rigorously administered and maintained. Based on the standard applying to “endangered” species, the Services propose identifying “a portion [of range as] ‘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.” 76 Fed. Reg. at 76993. As explained below, the endangered standard’s use as the basis for the significance test is appropriate and necessary. As a matter of both law and policy, the Final Policy should maintain and strengthen the “significance” test for identifying SPR set forth in the Draft Policy.

a. The High Threshold’s Importance

As the Services recognize, the proposed SPR Policy will increase the number of species listed and extend the range over which the ESA’s protection apply. Notably, according to the process by which the Services intend to proceed, prior to application of the SPR inquiry, the species will already have been determined *not* to be endangered or, in some instances, threatened throughout its range.⁴ As a result, agency resources and the impacts attendant to listings will be applied in areas where, by definition, the measures are unwarranted and unnecessary. These include, among other things, conservation efforts, ESA section 7 consultation, and the ESA’s proscriptions against takes in areas where a species may be thriving. Additional unnecessary listings will thus result in the expenditure of scarce conservation resources and entail significant economic harm that would not accrue but for the SPR Policy. Accordingly, it is vitally important that the threshold be high.

A low significance standard will have a serious negative impact on the Services’ conservation mission. Not only does the SPR evaluation process set forth in the Notice entail significantly more analysis than the traditional listing inquiry,⁵ but the SPR Policy

⁴ We separately take up the issue of a species that qualifies as threatened throughout all its range, but is endangered in an SPR in Part III.B below.

⁵ To evaluate a species under the Draft Policy, the Services first must assess a species’ status throughout its range, and then conduct significance analysis of some portion of its range, as well as a

itself will most likely engender a host of new listing petitions. The Services' resources are already insufficient to meet litigation-driven obligations in the coming years. In fact, FWS has just entered into an agreement to attempt to clear a backlog of petitions for hundreds of listings and critical habitat designations, as well as its candidate species list, under a court-approved timetable.⁶ In exchange, the environmental plaintiffs agreed to "limit" litigation and cap the number of new petitions, but this agreement does not bind non-parties, nor is the threshold for limitation clearly defined. A low SPR listing standard invites more petitions, increased litigation, and a diversion of staff resources from species in greater need.

A high threshold is also legally defensible, if not required. In this regard, the ESA vests significant discretion in the Secretaries for determining whether a listing is warranted, subject, of course, to the standard that any such decision be based on the "best scientific and commercial data available."⁷ *Id.* § (b)(1)(A). A species listed throughout its range based on the status of a population or segment within a portion of its range deemed significant is, by definition, one that generally does not qualify for listing based on its status throughout its range. Moreover, the determination whether a portion is biologically significant to the species as a whole involves judgment and expertise that will always involve uncertainty. A high standard prevents excessive listings and their attendant burdens based on an abundance of precaution.

Finally, the Services' increasing willingness to expand the rationale used for listing to include vaguely defined genetic variations provides additional context for our concern over the potential consequences of a low standard of significance. For example, a recent 90-day finding on a petition to delist the coastal California gnatcatcher subspecies was rejected, in part, because a review panel (consisting entirely of federal biologists, five of which were from the FWS), opined that the "loss of the coastal California gnatcatcher would represent a significant diminution of the species as a whole (in terms of evolutionary legacy or range of biological characteristics represented within the species)." 76 Fed. Reg. 66255, 66257 (Oct. 26, 2011). The peer review team of federal biologists was unable to provide evidence or to assign adaptive significance of any of the morphological variation deemed characteristic of the subspecies. Instead, FWS' conclusions regarding the "diminution of evolutionary legacy" were based entirely on speculation. FWS contended that "[a]lthough the adaptive significance of the morphological differences has not been investigated, it is possible they represent

"detailed analysis of the threats to the species in that portion to determine if the species is threatened or endangered there." *Id.* at 76994.

⁶ See *In re Endangered Species Act Section 4 Deadline Litigation*, No. 10-CV-00230 (EGS) (D.D.C.) (approving a timetable for FWS to make initial petition findings for over 600 species and issue proposed listing rules or not warranted findings for at least 251 candidate and other species over 6 years).

⁷ Cf. *Southwest Ctr. for Biological Diversity v. Babbitt*, 141 F.3d 1179, 1179 (9th Cir. 1998) (upholding decision not to list Coastal Cactus Wren species where FWS found scientific evidence on the issue "spotty and equivocal" and "sparse and inconclusive"); *American Wildlands v. Kempthorne*, 530 F.3d 991, 999 (D.C. Cir. 2008) (mem. op.) ("If plaintiffs believe the Service's decision not to list westslope cutthroat trout depended on counting fish which, if genetically tested, would have introgression levels greater than 20%, the path for plaintiffs to press their argument is clear; provide sufficient genetic data to substantiate this claim").

important adaptations to the local environment, and that their loss would diminish the species evolutionary legacy.” *Id.* at 66258.

This example suggests a reliance not only on surmise and speculation rather than empirical data, but also an extremely low threshold, in some listing decisions. Such an approach fails to fulfill the ESA requirement that listing decisions be based upon the “best available scientific and commercial data.” 16 U.S.C. § 1533(b)(1)(A). We urge the Services to create safeguards to avoid similar normative decisionmaking processes in the Final Policy. Maintaining a high threshold and stringent data quality standards will both help in this regard.

b. Use of the “Endangered” Standard is Appropriate; the “Threatened” Standard is Not

To avoid these adverse consequences while still giving effect to the definitions of threatened and endangered, stringent adherence to the endangered standard is necessary when evaluating a species under the SPR Policy. Congress was clearly concerned with depletion of “species of fish, wildlife, and plants” to the extent “they are in danger of or threatened with extinction.” 16 U.S.C. § 1531(a)(2). But the ESA is not a general animal or plant protection act. The purpose of listing, and the significant consequences attendant to it, are to prevent this extreme outcome, *i.e.*, extinction. As the court in *Trout Unlimited v. Lohn*, 645 F. Supp. 2d 929 (D. Ore. 2007), noted in rejecting a claim that the “benefit of the doubt” standard applied to listing decisions:

Such a reading would require listing a species as threatened if there is any possibility of it becoming endangered in the foreseeable future. This would result in all or nearly all species being listed as threatened. Instead, Congress vested the NMFS with discretion to make listing decisions based on consideration of the relevant statutory factors using the best scientific information available.

Id. at 947. For the Draft Policy’s significance test to remain tethered to the ESA’s statutory goals and purposes, it must relate the finding with respect to the species within some portion of range deemed significant to the strong likelihood of extinction.

Use of the “threatened” standard, *i.e.*, whether the remainder population may be likely to become endangered in the foreseeable future, would, by contrast, result in vast over-protection of otherwise stable species. Such an outcome is inconsistent with the purposes of the Act. Use of the threatened standard is also administratively infeasible, as a practical matter. As the Department of Interior Solicitor’s opinion on the meaning of “foreseeable future” in the “threatened” definition notes, the threatened inquiry depends on “the extent to which the Secretary can reasonably rely on predictions about the future in making determinations about the future conservation status of the species.” DOI, *The Meaning of “Foreseeable Future” in Section 3(20) of the Endangered Species Act*, at 1 (Jan. 16, 2009). Utilizing a foreseeability test under the hypothetical loss of part of the population within an SPR stretches the agencies’ forecasting abilities to their limit by

adding conjecture to conjecture. Indeed, it is difficult to envision a situation in which a species' prospects are evaluated without a population in a significant portion of its range that would not result in a threatened determination. Such a result would be contrary to the ESA and applicable case law.

Parenthetically, while we support the use of the endangered standard for evaluating the viability of a species in the Draft Policy, the proposed SPR methodology starts from a hypothetical worst-case scenario that may not fully account for the biology of species under evaluation. The Services should ensure that the final SPR Policy fully takes into account factors relevant to species' viability. A more biologically realistic and unbiased option would be to conduct a viability analysis across the entire range of a species, subspecies, or DPS, as appropriate, under a variety of realistic demographic scenarios. This would include the relation of the SPR to the rest of the species' range, and would be based upon examination of the biology of the species, including taking into account such factors as, for example, dispersal ability, potential for recolonization of a locally extirpated population from other populations, a species' generation time, and its intrinsic rate of increase. This approach would be more consistent with the professed high threshold.

c. Conclusion Regarding the "High Threshold"

As suggested below, sufficiently transparent and stringent significance criteria are an essential element of the Draft Policy. A high threshold, based on the endangered standard, allows the Services to appropriately prioritize their workload, review and appropriately dispose of petitions within the statutory timeframes, and meet conservation objectives for those species most in need.

3. The Draft Policy Strikes a Reasonable Balance Between the SPR and DPS Policies

The Draft Policy both explains the difference in the meaning of the word "significant" as used in the DPS and SPR Policies,⁸ and expresses a preference for listing a DPS in the expectedly rare instance where the two policies could be applied to the same area. API and AOGA agree with the Services' analysis and support, for the reasons provided, the proposed preference for listing of a DPS (where otherwise warranted) rather than the full species under the conditions.

As noted in the Draft Policy, the ability to identify and protect a species at the DPS level meets Congress' expressed intent to allow the Services "to give consideration to differences in status [of a species over its range] . . . and apply differing management

⁸ In fact, this is not a case of defining the same word differently in different contexts. For the DPS policy, the interpretation relates to phrase "significant to the taxon as a whole" while the Draft Policy defines "significant" for the purposes of classifying portions of a species' range. As the Notice correctly states, the "significance criterion under the DPS policy is necessarily broad, and could be met under a wider variety of circumstances." 76 Fed. Reg. at 76998.

where appropriate.” 76 Fed. Reg. at 76999 (citing *The Endangered Species Act of 1972: Hearings on S. 3199 and S. 3818 Before the Subcomm. On the Environment of the Senate Comm. On Commerce*, 92d Cong. 109 (1972)). Listing an entire species based on its status within a recognized DPS would remove the flexibility granted the agencies within the definition of species. Moreover, listing identified DPS’s according to their individual status is consistent with ESA’s plain terms and avoids the conundrum that would otherwise arise with respect to a species with multiple DPS, each with a different status. *See id.*; *see also infra* at Part III.I (discussing the issues relating to the Draft Policy, DPSs, and international boundaries).

Parenthetically, as the DPS Policy makes clear, listing a population of vertebrate species as a “distinct population segment” should be done “sparingly,” 61 Fed. Reg. 4722, 4722 (Feb. 7, 1996) (quoting Senate Report 151, 96th Congress, 1st Sess.), although we note that since 1996, DPS listings seem to have become increasingly common. Certainly, judicious use of the DPS Policy where the standards can be met represents an effective means of concentrating protections and conservation resources where most needed. In some respects, the SPR Policy will be a step back from this, representing diffusion of efforts and listing impacts beyond areas of significant need. Based on the Services’ characterization of the SPR Policy’s high threshold, however, listings of species (no matter how defined) based on it should occur rarely. We would urge the Services, however, to guard against a weakening of the significance standard over time if the Draft Policy is adopted in something like its current form.

C. Key Issues In Need of Clarification Prior to Finalization of the Draft Policy

As expressed in the Draft Policy, and in the various listing determinations cited therein (*see* 76 Fed. Reg. at 76994), the Services purport to use “conservation biology” methodologies to determine significance. API and AOGA share the Services’ concern that it may be less transparent and more susceptible to inconsistent administration than others considered (*e.g.*, the Clarification, SPR equals DPS, and alternatives based purely on relative size). This method is imperfect, at best, but so are all the options under consideration. If, however, the SPR Policy employs the significantly high bar proposed in the Notice, it may do less violence to the ESA’s letter and spirit than the other options under consideration. If the Draft Policy is adopted, there are several issues within the policy that are in need of further clarification. These issues are taken up below.

1. The Draft Policy’s Discussion of “Portion of its Range” and Definition of “Significant” are Ambiguous

API and AOGA believe that the phrases “portion of the range” and “significant” need to be clarified so their apparent biological and geographic components can be better understood. The Services should adopt further objective criteria to ensure public understanding and consistent implementation. Clarity on these issues is particularly important inasmuch as these two issues are the very heart of the Draft Policy.

a. The Geographic Aspect of the Phrase “Portion of its Range” Should be Explained

As stated above, the Draft Policy does a poor job explaining the phrase “portion of its range” in its most common sense—an amount of territory that is somewhat less than a species’ current range—and more particularly what criteria will apply in drawing boundaries around SPR. As the FWS’ White Paper on Options for Interpreting the Phrase “Significant Portion of its Range” (and briefly, as well, in the Draft Policy, *see* 76 Fed. Reg. at 77002), states, “there are potentially an infinite number of portions of a species’ range to analyze.” FWS White Paper at 29. If the Services go forward with this proposal, we recommend they develop a set of criteria they will use to identify, define, and map geographic areas for evaluation as potential SPR, which may help to overcome the legal deficiency identified in Part I above. These criteria should supplement, not supplant, the elements of conservation biology described in the Draft Policy so that the definition includes both a biological and geographic aspect, both of which must be present to designate an area as an SPR. We provide some specific suggestions below.

The guidance on how to map an SPR is far less refined than the guidance on how to define an SPR. The Draft Policy does provide a fairly straightforward explanation of how “portion of its range” is defined as a biological matter; that is, “as the individuals of the species that occupy that portion.” *Id.* at 76991. Further, there is a lengthy discussion of how the Services will apply the principles of “conservation biology,” redundancy, resiliency, representation (or of NMFS’ four analogous factors: abundance, spatial distribution, productivity, and species diversity) as a matter of determining the “significance” of these species to the population as a whole. *See* 76 Fed. Reg. at 76994. There is no comparably clear discussion of how, for lack of a better term, the “maps” will be drawn around these species’ components, or any indication of whether, in order to be “significant,” a portion of a species’ range has to be of substantial size relative to current range or even whether it has to be contiguous.⁹ The Final Policy should make clear that an area must qualify as SPR as both a biological and geographic matter.

These are substantial omissions that must be rectified in the final version. It is possible the Services intend to rely solely on the principles of “conservation biology” to identify SPR. However, with no basic criteria relating to the geographic scope of SPR, we are concerned that the SPR Policy will be inconsistently interpreted and implemented. Certainly without more specific guidance, the Services are likely to be overwhelmed with meritless petitions by advocates seeking listings based on idiosyncratic views of what “portion of range” they deem significant.

API and AOGA strongly recommend the Services develop a list of factors that can be used to guide the geographic identification of a portion of range for further evaluation as potentially significant. Such factors will help reconcile the meaning of “range” as applied to both the “all” and “portion of” clauses as a geographic term. The following criteria should be used as a starting point: that an area under threat be of substantial size

⁹ That an SPR be contiguous is suggested directly from the statutory language, “a significant portion,” not “significant portions.”

or represent a relatively large proportion of current range (even if no minimum threshold is quantified); be contiguous; and contain populations with attributes or adaptations relatively unique and important to the species as a whole. This list may not be exhaustive, but these elements appear essential to guide petitioners and inform the public and courts as to what criteria the Services will employ in their SPR determinations.

The determination made in the case of Gunnison's prairie dog, where FWS explained in detail the basis for finding the montane portion of its range significant, provides a good example of how the agency used factors like those suggested above.¹⁰ See 73 Fed. Reg. 6660, 6676 (Dec. 18, 2008). The area identified as SPR was so identified because it contained "[a]pproximately 40 percent of . . . current habitat," "populations in unique, higher elevation habitat, and adaptations relevant to this habitat," and "genetic material substantially unique" to the species. *Id.* This portion was also under much greater current threat than populations in other regions and constituted a contiguous geographic area. In short, the listing discussed the geographic aspects of the SPR, along with the biological considerations, in a way the Draft Policy is lacking.

We recognize that "precise circumstances are likely to vary from case to case" and that it may be difficult to "describe prospectively all the classes of information that might bear on the biological significance of a portion of the range for a species." 76 Fed. Reg. at 76994. However, the Draft Policy currently leaves unbridled discretion that provides no meaningful standards for the Services to apply, the public to understand, or courts to interpret. This must be addressed by the Services in its revisions.

The Final SPR Policy should also specify that any listing/delisting petition clearly define the range, provide mapping, and identify the characteristics defining the significance of the portion. Petitioners should be required to undertake analysis of the species' status throughout its range, present justifications why an area is an SPR (guided by a list of specific criteria), and conduct the extinction analysis called for by the Draft Policy. The Services presumably will thoroughly identify the range for species listed under the SPR Policy in the description of the "portion of its range it is endangered or threatened" in the Federal Register, required by ESA section 4(c)(1), 16 U.S.C. § 1533(c)(1), and also clearly state this in the Final Policy.

b. The Methodology for Identifying the Significance of a "Portion of its Range" Needs Clarification

The Draft Policy is extremely difficult to conceptualize and understand, particularly in the section discussing "portion of its range" and the significance test. This is largely due to the conflation of portion of the range as both a geographic area and the species

¹⁰ We note, however, that FWS used a much lower standard for determining significance in the Gunnison prairie dog listing than is proposed in the Draft Policy. The standard applied there was that the "contribution [of the species in the range] must be at a level such that its loss would result in a decrease in the ability of the species to persist." 73 Fed. Reg. at 6675. On that basis, the range was identified as significant. It appears that under the current Draft Policy, using the extinction standard, it seems unlikely that the montane range would be considered an SPR due to the healthy, thriving population in the Wyoming portion.

inhabiting that area. Often it is difficult to know which sense is being used. API and AOGA recommend using different terms, such as “important geographic area” and the “species” therein, to clarify the discussion.

Without clarification, the Draft Policy’s description of the process by which a portion of range is identified is somewhat tautological. Range will be evaluated for significance if “the range is significant.” More specifically:

The Services will only engage in a detailed analysis of portion of the range of the species if they have substantial information suggesting both that a portion of the range is significant and that the species may be in danger of extinction there or likely to become so due to, for instance, the concentration of threats in an important geographic area. Moreover, if such an analysis is done, the range-wide analysis will provide important context for the SPR analysis. Thus, the “all or” language will also retain independent meaning and play an important role in status determinations.

76 Fed. Reg. at 76992. Nor does the reference to “important geographic area” provide an objective standard that is clear and apparent to the public. We recommend developing a definition for “important geographic area,” as well as clarifying the role of geography (*e.g.*, size relative to current range) in designating SPR by identifying essential factors, such as those listed above in Part II.C.1.a. To the extent that the Draft Policy’s “text” in Section III has any operative meaning, these criteria should be spelled out in the text.

c. The Significance Test Should Focus on the Importance of the Species in an SPR to Population as a Whole, Not the Status of Habitat Within the SPR

API and AOGA are concerned that part of the discussion of the significance test tends to conflate biological significance of a population inhabiting an SPR with the attributes of the habitat comprising the area. The Services appear, in examples shown below, to be mixing the status inquiry (*i.e.*, whether the species within the SPR is threatened or endangered), with the significance determination (*i.e.*, is the “portion” – the species inhabiting the potential SPR – “significant,” that is, biologically essential, to the species as a whole). Further, the discussion may lead some to conclude that areas essential for the species, such as breeding grounds, migratory corridors, or wintering areas, are by definition SPR. While the Services state at a couple of points in the Notice that impacts to such areas affect the species as a whole, and thus are not SPR, this point must be made more clearly. This may be another matter to address in the Draft Policy’s “text.”

The Policy appropriately expresses the intent to establish a high threshold for “significance” when determining whether a portion of a species’ range constitutes an SPR. This threshold is based on analysis that asks “*without that portion* [*i.e.*, the species in the identified range], the representation, redundancy, or resiliency of the species—or the four viability characteristics used more commonly by NMFS—would be so impaired that the species would have an increased vulnerability to threats to the point that the

overall species would be in danger of extinction (*i.e.*, would be ‘endangered’).” *Id.* at 76994. The Services determine the “biological contribution” of the “portion” (the population in the potential SPR) “to the conservation of the species” as whole by assessing the “remainder” of the species to see if it meets the standard definition of “endangered.” *Id.*

The Draft Policy lists four examples of a “significant” population or “portion.” “For example, the population in the remainder of the species’ range without the population in the SPR might not be large enough to be resilient to environmental catastrophes or random variations in environmental conditions” or “the population in the SPR contains important elements of genetic diversity.” *Id.* Ambiguity arises in the third example quoted directly below:

Further, without the population in the SPR, the spatial structure of the entire species could be disrupted, resulting in fragmentation that could preclude individuals from moving from degraded habitat to better habitat. If habitat loss is extensive, especially in core areas, remaining populations become isolated and fragmented, and demographic and population dynamic processes within the species can be disrupted to the extent that the entire species is at risk of extinction.

Id. (citation omitted). This discussion relating to “degraded habitat” and “habitat loss” appears to conflate the status inquiry (either as to all or the population within the SPR) with the announced test for significance. This example raises the question whether the Services intend to evaluate SPR based solely on habitat impacts. This seems inappropriate, because that assessment, as in the example above, appears to be a test of whether habitat critical to the species as a whole is under threat. If so, a species status determination should be based on “all its range.”

It is our understanding that areas such as essential breeding grounds, migratory corridors, and wintering grounds, for example, *are not* SPRs for purposes of listing a species under the Draft Policy. For example, the text explains that “severe threats” to such vital areas affect the entire species, and thus, if serious enough, would warrant a species’ listing “based on its status throughout all its range rather than its status in a significant portion of its range.” *Id.* at 76995. The Draft Policy also states: “The status of the entire species may be affected if threats are acting in an area that is so critical to the species’ overall status that the threats indirectly affect the entire species, such that any finding that a species is imperiled in the area where the threat is acting directly is in fact tantamount to a finding that the species is endangered overall.” *Id.* at 76996.

The example quoted above, coupled with the inherent ambiguity of the phrase “portion of its range,” suggest that more clarity is needed on this essential point. If left unresolved, it is likely the Services will be faced with petitions seeking to invoke the SPR Policy for a listing based on the threats to habitat critical to the species as a whole. API and AOGA recommend the Services add a clear statement in the Final Policy to the effect that “areas of habitat critical to the species as a whole, such as breeding grounds, migratory

corridors, and the like, are not ‘significant’ for the purposes of this Policy, as threats to such areas affect the species through all its range.” The Draft Policy’s “text” may be a ideal location for such language.

III. Other Recommendations and Issues of Importance

A. Limit Critical Habitat Designations for SPR Listings to the SPR

When a species is listed under the SPR Policy, the Draft Policy states the Services “will use the same criteria for designating critical habitat for species regardless of” the basis for listing. 76 Fed. Reg. at 77003. That could include areas “outside the SPR and outside the area occupied by the species at the time of listing.” *Id.* We recommend the Services limit critical habitat designations to areas solely within the SPR itself unless an unusual set of circumstances suggest a reason to do so beyond that area. Specifically, as explained below, no areas outside current range should be thus designated, and any area outside the SPR should be designated only if it both meets the critical habitat criteria and is under serious current threat.

As noted above, critical habitat are “specific areas within the geographic area occupied by the species,” and can include areas “essential for the conservation of the species” outside that range. *Supra* at 7 (quoting 16 U.S.C. § 1532(5)(A)). Unlike listing determinations made under ESA section 4, however, Congress has granted the Services discretion to consider “the economic impact” of designating critical habitat. 16 U.S.C. § 1533(b)(2). “The Secretary may exclude any area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless he determines, based on the best scientific and commercial data available, that the failure to designate such area as critical habitat will result in the extinction of the species concerned.” *Id.* Under the circumstances described below, there is no possibility that a failure to designate critical habitat outside the SPR could result in extinction. Moreover, the net benefits test in most instances will weigh strongly against designations beyond the SPR, and certainly beyond the species’ current range.

API’s and AOGA’s specific recommendation is that when a species is designated threatened or endangered based on its status in an SPR, there be a rebuttable presumption that only the areas in the SPR under threat and upon which the SPR determination was principally based should be designated as critical habitat. Exceptions should be limited to other areas outside the SPR that may be under current threat *and* which are both “essential to conservation of the species” and “require special management considerations or considerations or protection.” A policy of limiting designations in this manner is consistent with the determinations that must be made when listing a species under the Draft Policy, which focus on localized threats. It is thus appropriate to concentrate critical habitat designations to those threatened areas.

The ESA defines critical habitat within a species’ range as “those physical or biological features (I) essential to the conservation of the species *and* (II) which may require special management considerations or protection.” 16 U.S.C. § 1532(5)(A)(i) (emphasis added).

By definition, while other areas outside the SPR may be essential for the species' conservation, it is the areas under threat that "may require special management considerations." These two conditions must both be met. Under the scenario posited above, only areas within the SPR can meet the second.

Moreover, designating areas outside the occupied range must be predicated "upon a determination by the Secretary that such areas are essential for the conservation of the species." *Id.* § (ii). For a species that, but for the SPR Policy, would not qualify for listing, such a determination could not withstand scrutiny. We strongly encourage the Services to alter the Draft Policy to incorporate this recommendation.

Finally, there are compelling policy reasons for limiting the designations. For one, the additional listings that will result from the SPR Policy will burden both the agency and the public. However, while the listing determination is made solely on the basis of the best scientific and commercial data available, the Services have discretion in making critical habitat determinations. Designating areas where the species is not under threat will only add to the burdens of listings that would not be made but for the SPR Policy.

If and when effective, the SPR Policy will result in listings that will cause projects to be delayed, altered, or foregone in their entirety to minimize impacts on threatened and endangered species. When such projects occur in critical habitat, the burdens are even greater. The benefits of including areas beyond the locus of the species' main threats, which are likely to be concentrated in the SPR, are extremely unlikely to exceed the designation's associated costs. A presumption that such areas will not be designated provides some measure of predictability that may offset to some extent the uncertainty that will arise from the application of the SPR Policy.

An approach limiting critical habitat designations can also help the Services preserve conservation resources, the expenditure of which is also a "relevant impact" within the meaning of the ESA. The reason for a presumption limiting critical habitat designations to areas within the SPR is that such a presumption helps to focus resources where they are most needed. While each listing will raise a different set of issues, we strongly believe that our proposal helps meet both the ESA's conservation and economic objectives.

B. When a Species is Threatened Throughout All its Range, but Endangered in an SPR, it Should be Listed as "Threatened"

The Draft Policy would always list an entire species as endangered when, under the Services' current approach, it would be considered threatened throughout its range, and that status results from threats that endanger the species in an SPR. *See* 76 Fed. Reg. at 76996. In other words, the species may be thriving outside the SPR, yet a range-wide "endangered" status determination under the Draft Policy results solely from concentrated adverse conditions in only a portion of the species' range. API and AOGA believe that under these conditions, the law requires that the species be listed as "threatened" based on its status throughout "all its range," and not "endangered" based on

its localized status. By creating a single, inflexible approach that ignores overall species' conditions, the Services have unlawfully resolved this important question.

Under the circumstances described above, the species simultaneously meets the ESA's definitions for threatened and endangered, the former based on the species' status throughout all its range; the latter, based on its status within an SPR. To hold that the localized condition should be inflexibly determinative of the species' overall status in all instances, the Services would not only be ignoring the law's definition of "threatened species," but many other ESA provisions which, collectively, suggest that the range-wide status should be determinative in most such instances. This is particularly true where a species is thriving in parts of its range.

The ESA provides the Services with discretion to tailor protections of the law to areas most in need. For instance, as discussed immediately above, the critical habitat definition directs the Services to identify areas "which may require special management considerations or protection." 16 U.S.C. § 1532(5)(A)(i)(II). For threatened species, ESA section 4(d) rules allow the Services to focus ESA protections on specific threats in the portion of the range leading to the determination.¹¹ *Id.* § 1533(d). Congress would not have provided the Services flexibility to administer their conservation duties by directing them to concentrate on areas in greatest need of protection, while robbing them of similar flexibility at the listing stage.

In fact, the latter-described flexibility Congress provided is quite extensive. Section 4(d) provides: "The Secretary may by regulation prohibit with respect to any threatened species any act prohibited under section 1538(a)(1) of this title, in the case of fish or wildlife" 16 U.S.C. 1533(d). As the Court of Appeals for the District of Columbia Circuit explained, this "second sentence gives the FWS discretion to apply any or all of the § 1538(a)(1) [take and other] prohibitions to threatened species without obligating it to support such actions with findings of necessity."¹² There is no rational reason Congress would have provided such a broad grant of discretion to tailor the law's anti-take provisions in areas where a species was thriving if it intended localized conditions to determine conclusively the overall listing status.

¹¹ As FWS explains, "'4(d) rules' take the place of the normal protections of the ESA and may either increase or decrease the ESA's normal protections. The ESA specifies that 4(d) rules must be 'necessary and advisable to provide for the conservation of such species.'" FWS, *Little Known but Important Features of the ESA*, available at <http://www.fws.gov/pacific/news/grizzly/esafacts.htm>.

¹² *Sweet Home Chapter of Communities for a Greater Oregon v. Babbitt*, 1 F.3d 1, 7-8 (D.C. Cir. 1993), *rev'd on other grounds on reh'g* 17 F.3d 1463 (D.C. Cir. 1994), *rev'd on other grounds* 515 U.S. 687 (1995). (Under FWS regulations, the default is that the ESA § 1539(a)(1) prohibitions apply to threatened species unless exempted by special rule, 50 C.F.R. § 17.31(a), while NMFS does not apply § 1539(a)(1) prohibitions except by special rule. 50 C.F.R. § 222.307.) As the court further notes, section 4(d) contains two distinct authorities: the first to issue regulations deemed "necessary and advisable" to conserve threatened species; the second, providing discretion to determine whether or to what extent to apply the "take" prohibition. A rule issued under the first sentence requires a "necessary and advisable" finding, while a rule issued under the second sentence does not—a factor not mentioned or discussed in the Draft Policy's discussion of 4(d) rules. *See* 76 Fed. Reg. at 77003. The Services should modify this section in the Final Policy to clarify and apply these separate authorities.

This analysis is supported by the ESA's legislative history. As the court in *Defenders (Lizard)* explained at great length, using the example of the American alligator, Congress recognized a species may be endangered in some locations, while thriving in others, and that active culling and management may even be necessary where the species was highly abundant. 258 F.3d at 1144-45. This concern appears to be one reason the ESA requires the Services to make listing decisions only "after taking into account those efforts, if any, being made by any State or foreign nation, or any political subdivision of a State or foreign nation, to protect such species, whether by predator control, protection of habitat and food supply, or other conservation practices, within any area under its jurisdiction; or on the high seas." 16 U.S.C. § 1533(b)(1)(A). A blanket "endangered" listing based on conditions in an SPR is inconsistent with this mandatory inquiry.

Further, the ESA's requirement to make listing determinations "on the basis of the best scientific and commercial data available . . . after conducting a review of the status of the species," *id.*, likewise requires the listing of species based on its range-wide status. This is because when threats are acting on the species within the SPR to the extent that it is endangered in that area, the impact of that threat to the species' entire current range (including that outside the SPR) is more a matter of foreseeability rather than the kind of probability that would exist if the threat were acting on the animals range-wide. Thus, any analysis of an SPR and its relationship to the species as a whole necessarily involves probabilities and judgments. Analysis of a population as a whole is much more likely to be more refined than that based on SPR analysis, and therefore the "best science" within the meaning of the law.

Finally, purely as a matter of policy, this is the right resolution of this issue. Listing species that qualify both as threatened or endangered (within an SPR) as threatened allows the Services to resolve the issue in a manner that avoids over-protecting the species and draining conservation resources. As mentioned, targeted section 4(d) rules can direct resources and protections to where they are needed most and eschew the take prohibition where it is unneeded. Furthermore, listing a species as threatened based on its status throughout its range avoids the second analytical step for which the Draft Policy calls. Given the Services' already high workload and the very likely increased level of petitions and listings the SPR Policy will entail, this is a logical solution that is consistent with the ESA's plain terms.

C. Give SPR-Based Listings Low Priority Under FWS' Endangered and Threatened Species Listing and Recovery Priority Guidelines

The Endangered and Threatened Species Listing and Recovery Priority Guidelines, 48 Fed. Reg. 43098 (Sept. 21, 1983), provide "a ranking system to assist in the identification of species that should receive priority review under" ESA section 4(a)(1). 16 U.S.C. § 1533(h)(3). Under the terms of the guidelines, priorities for listing (or reclassifying a species from threatened to endangered) are assigned first by the magnitude of the threats facing the species, the immediacy of those threats, and, within those categories, the taxonomy. In each instance, the more discrete the taxonomic classification, the lower the

priority. *See* 48 Fed. Reg. at 43103 (Table 1). There are a total of twelve categories, with the highest being monotypic genus, facing great and immediate threats. *Id.*

We recommend that the Services rank listings based on SPR at a lower level of priority than species, subspecies, or DPS listings. By definition, a species listed based on its status in an SPR does not qualify for that status throughout all its range. (The only exception would be that described above, where the choice should generally be made to list a species as “threatened” based on its status throughout all its range.) Thus, both the magnitude and immediacy of threats facing such species are lower. Further, since the classification rests on only a portion of the species in the SPR, the decision would be based on population-level effects. API and AOGA recommend the Services incorporate this lower ranking in the final SPR Policy.

In addition, the Services should make greater use, where appropriate, of their authority to make “warranted but precluded by higher priorities” findings under 16 U.S.C. § 1533(b)(3)(iii), where petitions raising substantial information based on the SPR Policy may otherwise overwhelm agency resources to deal with higher priority matters. *See Biodiversity Legal Found. v. Babbitt*, 146 F.3d 1249, 1255 (10th Cir. 1998) (“Both the language and legislative history of 4(b)(3)(A) reflect Congress’s recognition that the Service must retain the ability to order and prioritize its work, particularly when provided limited resources, in order to adequately fulfill its mission”). Recognizing that governmental resources are limited and are not likely to become more abundant for the foreseeable future, such policies are necessary to ensure the species in the greatest need of conservation are addressed.

D. Incorporate the President’s Guidance on Scientific Integrity Into the Draft Policy

On March 9, 2009, President Obama issued a Memorandum setting forth principles “for ensuring the highest level of integrity in all aspects of the executive branch’s involvement with scientific and technological processes.” 74 Fed. Reg. 10671, 10671 (March 11, 2009). Most pertinent here is the prescription that “[w]hen scientific or technological information is considered in policy decisions, the information should be subject to well-established scientific processes, including peer review where appropriate, and each agency should appropriately and accurately reflect that information in complying with and applying relevant statutory standards.” *Id.* This announced policy aligns with the Services’ duties under the Information Quality Act (“IQA”). 44 U.S.C. §§3504(d)(1), 3516.

In a subsequent Executive Order on Improving Regulation and Regulatory Review, 76 Fed. Reg. 3821 (Jan. 21, 2011) (Executive Order 13563), the President reiterated and applied these standards specifically to the rulemaking process, stating that our regulatory system must “promote predictability and reduce uncertainty . . . and take into account benefits and costs, both quantitative and qualitative.” *Id.* at 3821. Executive Order 13563 further echoed the President’s Memorandum in calling for “objectivity of any scientific and technical information and processes used to support [an] agency’s

regulatory actions.” *Id.* at 3822. Executive policy dictates that the scientific basis on which any listing decision is made be accurate, transparent, objective, and defensible.

We strongly recommend adding a discussion to the Final Policy of how the Services will incorporate the IQA and presidential directives into the process of evaluating species under the SPR Policy. The Draft Policy calls for multi-tiered analysis of species, including analysis of the “remainder” population under hypothetical circumstances. Such analysis appears to be particularly prone to mistake or misinterpretation if the highest standards of scientific integrity, including peer review, are not rigorously followed. Given that listings of abundant and widely distributed species can easily result in regulatory impacts rising to the level of a “major rule” (\$100 million in annual economic impact), the safeguards and standards provided by the IQA and the presidential guidelines are particularly important.

Certainly, we support the routine use of independent peer review for the key analyses employed in a listing under the SPR Policy, as well as in administration of the ESA more generally. API and AOGA also recommend incorporating, even if by reference, the Services’ new scientific integrity and IQA guidelines applying to influential scientific information.

E. Develop and Incorporate Quantifiable and Objective Standards

The Draft Policy does not provide a uniform or quantifiable standard for interpretation of the SPR language, including the term “significance.” Instead, the Services have chosen to rely on qualitative criteria:

We evaluate biological significance based on the principles of conservation biology using the concepts of redundancy, resiliency, and representation (Schaffer and Stein 2000). These concepts also can be expressed in terms of the four viability characteristics used more commonly by NMFS: Abundance, spatial distribution, productivity, and diversity of the species. Resiliency (abundance, spatial distribution, productivity) describes the characteristics of a species that allow it to recover from periodic disturbance.

76 Fed. Reg. at 76994. API and AOGA are concerned that proposed SPR Policy may purposefully avoid quantifiable standards and thresholds, using definitions that fail to provide objective, repeatable method(s) for evaluating listing decisions. In our view, this approach puts species conservation at a disadvantage, results in unnecessary litigation, and places a heavy burden on society. The Services have an opportunity here to define the criteria by which species are listed more precisely, place more limited and quantifiable definitions on disputable terms, and insure that ESA listing decisions are based on scientific evidence.

This concern is shared by scientists and agency staff, including those involved in listing decisions (D’Elia and McCarthy 2010). Those authors clearly articulated the problem:

The imprecision of terms leaves broad latitude for determining which species fit into a particular category. That latitude, although seen by some as providing flexibility to address a wide variety of individual circumstances, can result in subjective rather than repeatable or transparent decisions (USDOJ 2007). Failure to clearly articulate how vulnerability assessment decisions are made undermines their credibility and erodes public confidence in the agencies responsible for developing the assessments (Shelden et al. 2001, USDOJ 2007). Moreover, this lack of clarity can result in litigation (e.g., *Western Watersheds Project v. Jeffrey Foss and Gale Norton*, 2005), diverting resources from the implementation of species recovery actions, ultimately to the detriment of species conservation efforts.¹³

The scientific commentators also provided specific recommendations to address this issue. “To increase transparency and efficiency in imperiled species categorization systems, we recommend that the FWS and NMFS establish quantitative criteria (including both time horizons and risk of extinction) for categorizing species as threatened or endangered (e.g., Gerber and DeMaster 1999, IUCN 2001, DeMaster et al. 2004) through policy or regulation.” *Id.* Their specific recommendations for the development of these criteria are briefly listed below:

1. Establish time horizons based on explicit probabilities of endangerment.
2. Develop guidelines for using population viability analysis in categorization decisions.
3. Consider the desirable characteristics of species categorization systems.
4. Use a team approach and consult experts.

The authors conclude: “A case-by-case approach to explicitly defining analysis time horizons [as is done now] is likely to be plagued by inconsistencies in time horizons selected and the rationales for them. These inconsistencies increase the likelihood of capricious decision making and legal vulnerability (Office of the Solicitor 2009).” *Id.* And, “[e]stablishing an explicit framework for making categorization decisions gives a level of certainty and credibility to a process that is otherwise subject to political and socioeconomic influences.” *Id.*

We urge the Services to act upon their recommendations before issuing a final SPR Policy.

F. A Definition is Needed for “Foreseeable Future”

Issuance of an SPR Policy is an opportunity for the Services to resolve a long-standing inconsistency in application of the ESA, namely to define “foreseeable future” in terms of

¹³ Jesse D'Elia and Scott McCarthy, *Time Horizons and Extinction Risk in Endangered Species Categorization Systems*, BioScience, 60(9):751-758 (2010), available at <http://www.bioone.org/doi/full/10.1525/bio.2010.60.9.12>.

quantifiable units, either years or generations. With an increasing reliance on population viability models, it is imperative that the FWS bring consistency to its determinations and the criteria by which they are arrived at, and thus provide a consistent scientific basis for evaluation. We urge the Services to commit to standards (years or generations) and thresholds (the number of each) to bring consistency to its use of *reasonably foreseeable future*.

A recent report by a panel convened by the Interior Department (Regan, *et al.*, 2009) used years as units because they provide a universal and easily understandable currency for ESA designations, and thresholds of 50 and 100 years for analyses.¹⁴ Other authors, whose work has been cited in recent ESA listing decisions, had used 30 and 100 years. Arguably, 30 years is at the outside edge of reliable estimates, so would encourage the Services to use a definition of *reasonably foreseeable future* no greater than 30 years.

G. The Services Should Guard Against Overly Precautionary Listings Under the Policy

We fully agree that listing decisions should be based on biology; but the scientific and analytical techniques need to be robust. Giving the “benefit of the doubt” at the species listing stage is not appropriate under the caselaw. *See, e.g., Trout Unlimited*, 645 F. Supp. 2d at 946-47. In that case, the court upheld NMFS’ legal determination to “reject[] a ‘precautionary approach’ as the appropriate statutory standard” for determining if a species met the ESA’s definition of “threatened.” *Id.* at 945. Even in the context of designing “reasonable and prudent alternatives” designed to avoid jeopardy of an *already* listed species – a stage at which courts have found the “benefit of the doubt” standard may apply¹⁵ – precaution does not trump the requirement to provide “a reasoned and scientifically justified basis” for decisions made. *Consolidated Salmonid Cases*, 713 F. Supp. 2d 1116, 1165 (E.D. Cal. 2010).

There is a significant risk that this Draft Policy could erode the Services’ long established standards for listing decisions if the announced stringent standards are not maintained. The Services must resist entreaties to weaken these standards by applying an inappropriate precautionary approach for listings based on the SPR Policy, if and when it is adopted.

H. The Policy Needs a Description of the SPR Delisting Process

API and AOGA recommend the Services include a discussion on how the delisting process will be conducted for a species listed solely on the basis of its status in a

¹⁴ Regan, T., B. Taylor, G. Thompson, J. Cochrane, R. Merrick, M. Nammack, S. Rumsey, K. Ralls, and M. Runge, *Developing a structure for quantitative listing criteria for the U.S. Endangered Species Act using performance testing*. Phase 1 Report. NOAA Technical Memorandum NMFS NOAA-TM-NMFS-SWFSC-437, U.S. Department of Commerce, National Oceanic and Atmospheric Administration, National Marine Fisheries Service, Southwest Fisheries Science Center (March 2009).

¹⁵ *See, e.g., id.* at 946-47 (discussing and distinguishing *Conner v. Burford*, 848 F.2d 1441, 1454 (9th Cir. 1988), *cert. denied*, 489 U.S. 1012 (1989), and discussing the differing standards and considerations of the Services’ determinations under ESA sections 4 and 7).

significant portion of its range. Currently, the issue of delisting is only raised at the very end of the Notice in conjunction with the Draft SPR Policy. *See* 76 Fed. Reg. at 77003 (“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.”).

Presumably, subject to the five-year review and any recognized or apparent change in the status of the species outside the SPR (either positive or negative), a delisting petition would focus on changes solely within the SPR itself. Potentially, the same factors that are expected to increase the number of listings relative to the status quo (and petitions for listings based on the final SPR Policy), could have a similar impact on the number of delistings, or petitions for delisting.

We believe that if the Services specify how the delisting process will work in the context of the SPR Policy, the public will have a better understanding of the standards that are likely to be employed in practice. Such clarifications will also help guide the Services in utilizing the significance standard in a consistent manner regardless of the purpose for which the determination (listing, delisting, or, presumably, reclassifying a species) is being made.

I. Application of the Policy When SPR is Outside the United States

We highly recommend including in the final version language that if the foreign population constituting an SPR is threatened or endangered, but the domestic population is thriving, listing of the domestic population not be warranted. Such an approach finds support both in the ESA’s terms and long-standing FWS and NMFS policy.

The Draft Policy is silent on the issue of jurisdictional boundaries, but it is an important concept that should be retained in any listing policy. The concept already exists in the Service’s DPS Policy, which finds the authority to consider species’ differences across international boundaries in ESA section 4(a)(1)(D).¹⁶ The DPS Policy accounts for circumstances where a population straddles an international border and, because of this fact, the foreign portion faces different levels of harm than the domestic portion and, likewise, is subject to different conservation management. *See* 61 Fed. Reg. 4722 (Feb. 7, 1996). Under the DPS Policy, a population is “discrete” if

1. It is markedly separated from other populations of the same taxon as a consequence of physical, physiological, ecological, or behavioral factors. . . . or
2. It is delimited by international governmental boundaries within which differences in control of exploitation, management of habitat, conservation status, or regulatory mechanisms exist that are significant in light of section 4(a)(1)(D) of the Act.

¹⁶ “The Secretary shall by regulation promulgated in accordance with subsection (b) of this section determine whether any species is an endangered species or a threatened species because of any of the following factors: ... the inadequacy of existing regulatory mechanisms.” 16 U.S.C. § 1533(a)(1)(D).

Id. at 4725. When an international border divides two populations and significant differences in conservation status exist between the two populations, it begs the question of whether both the foreign and domestic populations warrant listing and whether domestic conservation measures will have any operational effect.

The Services have undertaken these analyses in the past, and courts have upheld their decisions. *See, e.g., Nat'l Assoc. of Home Builders*, 340 F.3d 835, 842-44 (9th Cir. 2003) (*rev'd on other grounds*) (upholding FWS finding that Arizona pygmy owls were declining in numbers due to housing boom while Mexican pygmy owls thrived); *Endangered Status for the Peninsular Ranges Population Segment of the Desert Bighorn Sheep in So. Calif.*, 63 Fed. Reg. 13,134, 13,136 (Mar. 18, 1998) (finding “significant differences between the United States and Mexico in regard to the species’ conservation status” where the population in Baja California is not likely to be in danger of extirpation within the foreseeable future because there are significantly more animals there than occur in the United States). We support the retention of jurisdictional boundaries as a factor in the listing analysis.

The Services have shied away from jurisdictional analyses in the Draft Policy, likely due to recent court precedent. Legislative history and a close reading of the court’s holdings, however, reveal that consideration of other jurisdictional boundaries (*e.g.*, state boundaries) should likewise be a permissible basis for exercise of the Service’s listing discretion.¹⁷ During congressional hearings on the 1973 bill that amended the original ESA, Senator Tunney explained the changes to the ESA as allowing an agency to protect a species as endangered in one state while removing it from the list in another. 119 Cong. Rec. 25,662, 25,669 (Jul. 24, 1973).

An animal might be “endangered” in most States but overpopulated in some. In a State in which a species is overpopulated, the secretary would have the discretion to list that animal as merely threatened or to remove it from the endangered species listing entirely while still providing protection in areas where it was threatened with extinction. In that portion of its range where it was not threatened with extinction, the States would have full authority to use their management skills to insure the proper conservation of the species.

Id. The Grey Wolf decision would have turned out differently had the Service evaluated in which states wolves needed protection during the listing phase instead of listing the entire species nation-wide and then attempting to delist them state-by-state. *Defenders of*

¹⁷ Importantly, the courts overturned many of FWS’ listing determinations because of inadequate explanations accompanying the Service’s decisions, not because they were impermissible. *Defenders of Wildlife v. Salazar (Grey Wolf case)*, 729 F. Supp. 2d 1207, 1226 n.11 (D. Mont. 2010) (“The Service has not adequately explained this change in course” from not allowing delisting state-by-state to then listing the entire DPS nation-wide but only affording partial protection); *Defenders (Lizard)*, 258 F.3d at 1145 (“Secretary must at least explain her conclusion . . . ”); *Nat'l Assoc. of Home Builders*, 340 F.3d at 847 (“Nowhere in the Listing Rule . . . does the FWS mention the existence of any genetic differences between the pygmy-owls in Arizona and New Mexico We cannot defer to the FWS’ argument on appeal that the Arizona pygmy-owls are genetically distinct.”).

Wildlife v. Salazar, 729 F. Supp. 2d 1207, 1226 n.11 (D. Mont. 2010); *see also Center for Biological Diversity v. Norton*, 411 F. Supp. 2d 1271, 1280 (D.N.M. 2005), *vacated on other grounds by* No. 06–2049 (10th Cir. May 14, 2007). Jurisdictional boundaries are, therefore, very much salient to whether a species, subspecies, or DPS is listed at all and accordingly should be memorialized in the Service’s Policy.

J. The Executive Order 13132 Analysis Must Be Improved and Impact on States Evaluated in the Final Policy

API and AOGA disagree with the Services’ federalism analysis claiming the Draft Policy would not have “substantial direct effects on the States, on the relationship between the Federal Government and the States, or on the distribution of power and responsibilities among the various levels of government.” 76 Fed. Reg. at 77005. Experience with implementation of the ESA has proven otherwise. Listings and reclassifications typically have great economic, social, and political impacts on states and local communities. This is clear from the U.S. Supreme Court’s interpretation of the ESA in *TVA v. Hill*, 427 U.S. 153 (1978), finding that “the value of endangered species is ‘incalculable’” and that a listed species must be protected “whatever the cost.” *Id.* at 187, 184.

There is no allowance in the Draft Policy to take into account positive steps taken by states to conserve species. Instead, under the proposed SPR Policy, states that are proactive and successful in conserving a species could nonetheless be burdened with a listing as a result of less effective, or non-existent, policies in other states. The Draft Policy thus creates a perverse *disincentive* for states to take proactive conservation measures. Instead, states would be better off simply opposing listings rather than working with the federal government cooperatively to advance species conservation as intended by Congress when it enacted the ESA.

The Services have not provided any analysis of what these additional ‘costs’ would be in terms of increased expenditures and regulatory burdens on state and municipal governments, not to mention federal and private entities. These costs can have potentially negative effects on the conservation of previously listed species by draining limited conservation resources and taxing existing conservation programs, redirecting resources to species in much less need. A review of the Final Policy under NEPA would help correct this analytical deficit.

K. Listings for Five Species Based on FWS’ M-Opinion Must Be Reevaluated Under the New Standards if the Draft Policy is Adopted

As noted above, *supra* n.10, the standard of significance employed in some, if not all, the listing determinations made under FWS’ prior interpretation of the SPR authority (*i.e.*, the M-Opinion) was lower than the standard announced in the Draft Policy. Thus, to the extent the five listings made under the M-Opinion have not been vacated or withdrawn, they should be withdrawn. Further, any new listing of these species should be subject to new rulemakings applying the standards of the final SPR Policy, if and when it is adopted.

L. Data Used in SPR Decisions Must Be Public Information

Data and algorithms used in determining if a species, subspecies, or DPS is threatened over a significant portion of its range (and used in the decision to list, or not to list) should be publicly available for independent review and evaluation. It would be most useful if these were posted online prior to a 90-day finding so that adequate time is available for independent replication of results and conclusions.

Conclusion

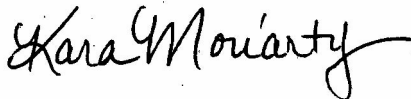
API and AOGA appreciate this opportunity to comment on the Draft Policy. This is a highly consequential matter with broad national implications. We urge the Services to carefully consider these and other comments, and to fully assess the impacts before moving to a final SPR Policy. Most importantly, the Final Policy must be clear and readily understandable to the public. This is no small task. Hopefully, the suggestions and comments provided here will assist in that task.

If you have any questions about these comments, or if we can provide any further information, please do not hesitate to contact us.

Sincerely,



Richard Ranger
Senior Policy Advisor
Director, Upstream and Industry Operations
American Petroleum Institute



Kara Moriarty
Executive Director
Alaska Oil and Gas Association

Attachment A: Answers to Questions Raised

API lists the questions raised in the Notice and answers each specifically, either by designation to the portion of the letter in which the issue is addressed or directly.

(1) 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?

API/AOGA Response: The Services’ interpretation is a reasonable interpretation of the ESA’s definitions of “threatened” and “endangered.”

(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?

API/AOGA Response: It is appropriate to apply the listing status based on a species’ status in an SPR throughout a species range, save for instances in which a species qualifies as threatened throughout all its range, but is endangered in an SPR. *See* Parts II.B.2 and III.B of the Letter. The Services should use all the flexibility the ESA provides, including limiting ESA section 7 anti-take provisions to species within the SPR of threatened species and limiting critical habitat designations to the SPR. *See* Parts III.A and B of the Letter.

(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 portion of the Act, and ability to be implemented consistently?

API/AOGA Response: The definition of “significant” in terms of conservation biology is appropriate. However, transparency and consistency can only be achieved if this approach is coupled with a set of criteria to help define and delimit “portions of the range” subject to significance analysis. *See* Parts I, II.C.1, and III.E of the Letter. We are also concerned that the Draft Policy inappropriately gives dual meanings to the term “range” depending on which clause of the “threatened” and “endangered” definitions it is applied to. *See* Part I.

(b) 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? 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?

API/AOGA Response: The “endangered” standard is appropriate; the “threatened” standard, *i.e.*, “likely to become endangered,” is not. See Part II.B.2.b of the Letter.

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

API/AOGA Response: While geographic concepts, including that an SPR be comprised of a substantially large portion of a species’ range, should be incorporated, it should not be the sole standard. See Part II.C.1.a of the Letter. Other aspects of the “significant” standard need to be clarified. See Parts II.C.1.b and c of the Letter.

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

API/AOGA Response: Historic range should not be considered in applying the SPR Policy. See Part II.B.1 of the Letter.

(5) Reconciling SPR with DPS authority: What is the proper relationship between SPR and DPS?

API/AOGA Response: Addressed in Parts II.B.3 and III.I of the Letter.

(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 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.

API/AOGA Response: Under these circumstances described above, a species should be listed as threatened based on its status throughout all its range. *See* Part III.B of the Letter.

