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Submitted Via Email

The Honorable Daniel M. Ashe
Director
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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 Mr. Ashe:

Attached for your review are comments by the National Association of Home Builders (NAHB) concerning the ***Draft Policy on Interpretation of the Phrase "Significant Portion of its Range" (SPR) in the Endangered Species Act's Definitions of "Endangered Species" and "Threatened Species"***, released jointly by the U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) (hereafter referred to as the "Services") and published in the Federal Register on December 9, 2011.

In addition to these comments on the draft SPR policy, NAHB also filed comments as a member of the National Endangered Species Act Reform Coalition (NESARC) a broad coalition of industries, private landowners, and local governments representing agricultural interests, farmers, forest product companies, municipalities and counties, rural irrigators, ranchers, electric utilities, and homebuilders. NESARC is focused on achieving improvements to the Endangered Species Act (ESA). As member of NESARC, NAHB fully endorses NESARC's comments on the draft SPR policy and in particular, NESARC's responses to the specific questions posed by the Service in the December 9th Federal Register on the policy implications of the draft SPR policy.¹ Since NAHB participated in the crafting of NESARC's responses, NAHB will not repeat the responses here.

¹ 76 Fed. Reg. 77,004 (Dec. 9, 2011)

The Service states that the draft SPR policy is intended to establish a legally binding policy that the Service will use when making ESA listing determinations, including whether to list, delist, or reclassify a species pursuant to ESA §4. The draft SPR policy, as proposed, is not a formal rulemaking itself, but rather will be official Agency guidance the Services will use in the administration of their ESA listing determinations. If adopted, the Services expect the SPR policy to be afforded a level of deference by courts in reviewing challenges to the particular decision.²

NAHB is a federation of more than 850 state and local home builder associations nationwide. Our organization has over 140,000 members including individuals and firms engaged in land development, single and multifamily construction, multifamily ownership, building material trades, and commercial and industrial projects. Over 80 percent of our members are classified as "small businesses" and meet the federal definition of a "small entity," as defined by the U.S. Small Business Administration. Our members collectively employ over eight million people nationwide. Four out of every five new homes are built by NAHB members and it is anticipated that these members will construct 80 percent of the new housing units projected for 2011. NAHB is submitting these comments on behalf of NAHB state and local associations and NAHB's members who own private property, develop land, construct homes, and supply building materials that will be directly impacted by the Service's ESA listing determinations based upon the final SPR policy.

1. Summary of SPR policy:

The Service's draft SPR policy clearly states that once finalized, the SPR policy would create an independent basis for protecting a "species" across its entire range³ (e.g., species, subspecies, or distinct population segment "DPS"). However, unlike the traditional ESA listing process where the Service makes a determination that threats impacting a species occur across the species' range, the SPR policy allows the Service to determine a species warrants ESA protections range wide based on threats that occur in just a portion of the range if the Service concludes those threats are so "significant" as to warrant protecting the species' range wide.

Therefore, the draft SPR policy marks a significant departure from existing practice by enabling the Service to list species at a range wide level, while recognizing the actual threats occur only in a portion of the species' range. By comparison, under the Service's existing DPS policy, the regulatory restrictions under the ESA are intentionally limited to only those geographic areas defined by the Service as comprising the species' DPS and do not extended range wide, as the under the draft SPR policy.⁴ Therefore, under the draft SPR policy the most crucial factor for landowners is how the Service will determine what threats occurring in just a portion of a species range are so "significant," as to warrant an ESA SPR listing determination.

As discussed further in sections 3(a) and 3(b) of this comment letter, the Service has deliberately and appropriately set a "high bar"⁵ for making a "significance" determination under the draft SPR policy. In short, the "significance," determination is a prerequisite step for the

² 76 Fed. Reg. 76,989 (December 9, 2011)

³ 76 Fed. Reg. 77,002 (December 9, 2011)

⁴ 61 Fed. Reg. 4,725 (February 7, 1996)

⁵ 76 Fed. Reg. 76,995 (Dec. 9, 2011)

Service to justify a SPR listing determination. This means that if the Service fails to find that: (1) a specific portion of a species' range is so "significant" to the overall viability of the species, as a whole; *and* (2) without protecting that specific portion of the species range the entire species as a whole would be at risk of extinction, the SPR listing analysis would end.⁶ Conversely, if the Service determines a "significant" threshold *does* exist during a SPR listing analysis, the Service would perform the five-factor threat analysis under the ESA's statutorily required listing process.⁷

Thus, according to FWS's draft SPR policy, the Service should have to make three independent determinations in sequential order to ensure the SPR listing determination was decided correctly:

- I. The species under consideration must in fact be a "species" eligible for ESA protection as defined by the statute (e.g., species, subspecies, or DPS)⁸;
- II. The Service must make a factual determination based verifiable biological findings as to why specific portions of a species range (SPR) are so "significant" to the overall viability of the species as a whole, that without protecting that specific portion of the species' range under the SPR policy the entire species would be at an immediate risk of extinction; and
- III. As the case with any ESA listing determination, the Service must perform the statutorily required threat analysis and rulemaking process as mandated under ESA §4(a).⁹

The draft SPR policy addresses some, but not all three procedural elements identified above. Specifically, NAHB believes the draft SPR policy correctly sets a high "significance" threshold¹⁰ necessary to trigger a SPR listing determination based on biological factors unique to the species under consideration. The Service also correctly addresses whether or not the loss of a species "historic range" should be a factor considered when establishing the overall "range" of a species during a SPR listing determination.¹¹ However, the draft SPR policy has several elements that need further clarification and/or correction before being finalized. For example, draft SPR policy must clarify that the SPR determination is completely independent of (and happens *after*) the Service first determines whether or not the species under SPR listing consideration is in fact a "species" as defined under the ESA and therefore eligible to be protected under the ESA in the first place.¹² Furthermore, while NAHB agrees with the Service's decision to base the "significant" test on biological factors specific to the species under consideration, the Service must identify and allow the public to analyze the biological findings the Service can rely upon in making the SPR listing determination.

⁶ 76 Fed. Reg. 76,994 (Dec. 9, 2011)

⁷ 42 U.S.C.A. § 1532

⁸ Ibid.

⁹ Ibid.

¹⁰ 76 Fed. Reg. 77,002 (Dec. 9, 2011)

¹¹ Ibid.

¹² 16 U.S.C.A §1533(6)

2. Statutory basis for SPR:

Importantly, as the Service states in the preamble of the draft SPR policy, although the phrase “significant portion of its range” has existed in the statute since the ESA was enacted in 1973, the Service has never attempted to clarify the meaning of SPR in regulation or explain the regulatory consequences under the ESA of finding a species, subspecies, or DPS warranting ESA protection at a SPR level.

In 2007, the Solicitor of the Department of the Interior (DOI) issued a legal opinion memorandum (M-Opinion) clarifying the meaning of the SPR phrase within the context of the ESA's regulatory programs (e.g., listing process, designation of critical habitat, treatment of historic range, etc.).²⁶ In short, the M-Opinion memorandum determined the statutory SPR phrase provided the Service with an independent basis to list a species. However, the limited protections of the ESA applied to only the SPR portion of the species' range. The Service states in the preamble of today's action that it formally withdrew the “M-Opinion” memorandum on May 4, 2011 following two court decisions that questioned aspects of the “M-Opinion” memorandum.²⁷

The phrase “*significant portion of its range*” is found under the statutory definitions for both “endangered species” and “threatened species.” The definition of “endangered species” reads:

*“...means any species which is in danger of extinction throughout all or significant portion of its range....”*²⁸

Similarly the statutory definition for threatened species reads:

*“...means any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.”*²⁹

The statutory SPR phrase read in this context does appear to provide the Service discretion to determine whether a “species” (as defined under the ESA) warrants a listing determination based upon threats found either (A) throughout all of the species range, or (B) across a significant portion of its range. The draft SPR policy claims the SPR phrase must be interpreted as providing the Service with an independent basis for making a listing determination.³⁰ NAHB agrees.

However, the phrase SPR also appears within ESA §4(c)(1). Under this statutory provision, Congress requires the Service to publicly identify all species listed as either “endangered” or “threatened”. ESA §4(c)(1) reads:

²⁶ U.S. Department of the Interior (2007) *The Meaning of “In Danger of Extinction Throughout All of Significant Portion of its Range.”* Office of the Solicitor, U.S. Department of the Interior legal memorandum M-37013. March 16, 2007

²⁷ 76 Fed. Reg. 76,988 (Dec. 9, 2011)

²⁸ 16 U.S.C.A. § 1532(6)

²⁹ 16 U.S.C.A. § 1532(20)

³⁰ 76 Fed. Reg. 77,002 (Dec. 9, 2011)

"... to specify with respect to each such species [i.e., endangered and threatened species] *over what portion of its range it is endangered or threatened, and specify any critical habitat within such range.*"³¹

Read in this context, the SPR phrase allows the Service to determine over what portions of given species' range the Service can decide to extend the ESA's various regulatory protections for a species. In fact, under the Service's prior SPR guidance (now withdrawn) the Service had interpreted the authorities Congress granted under ESA §4(c)(1) in exactly the same manner, as it stated:

"Reading the Act to require protection for a species only where it is endangered, as specified in § 4(c)(1), provides precisely the flexibility that the Nixon Administration sought in 1972 and Congress provided in 1973."³²

Moreover, the record from the Congressional debate during the 1973 passage of the ESA reflects Congress' desire to provide flexibility under the SPR phrase to allow the Service to apply the ESA's regulatory protections to only those portions of a species range that warrant those ESA protections.

"...the Secretary may list an animal as "endangered" through all or a portion of its range. An animal might be "endangered" in most States but overpopulated in some. In a State in which a species is overpopulated, the Secretary would have the discretion to list that animal as merely threatened or to remove it from the endangered species listing entirely while still providing protection in areas where it was not threatened with extinction."³³

Examining the statutory history of the SPR phrase within context of the ESA provisions above demonstrates Congress's clear intent to provide the Service with the necessary flexibility to extend the ESA regulatory protections to those portions of a species range where those protections are needed.

Consistent with this interpretation, NAHB disagrees with the Service's claim requiring any SPR species listing determination to automatically be applied range wide. Such an interpretation effectively reads out of the statute the flexibilities extended by Congress under §4(c)(1) and the interpretation contained in the M-Opinion memorandum. Contrary to prior practice the Service's draft SPR policy has incorrectly interpreted §4(c)(1) as a purely administrative function (e.g., an obligation for the Service to "publish a list" of all endangered species) rather than affording the phrase SPR independent meaning. The Service states:

³¹ 16 U.S.C.A § 1533(C)(1)

³² U.S. Department of the Interior (2007) *The Meaning of "In Danger of Extinction Throughout All of Significant Portion of its Range."* Office of the Solicitor, U.S. Department of the Interior legal memorandum M-37013. March 16, 2007. Page 17

³³ 119 Cong. Rec. 15662, 25669 (July 24, 1973) Statement of Senator Tunney (floor manager supporting passage of S. 1983)

"On balance, we [Service] conclude that treating the "portion of its range" language in §4(c)(1) as informational rather than substantive is the best way to harmonize the various provisions of the Act."³⁴

The Service's statement relies entirely upon the federal district court's ruling in *Defenders of Wildlife v. Salazar*. NAHB believes the Service has incorrectly interpreted the court's holding that focused on the smallest portion of a species eligible to be listed under Act. Instead, under the draft SPR policy the Service viewed the court's holding in *Defenders of Wildlife v. Salazar* as invalidating the statutory discretion granted by Congress under §4(c)(1) to focus the application of ESA's regulatory provisions to specific portions of a protected species range.

NAHB does not believe the draft SPR policy, by applying any SPR listing determination on a range wide basis, gives the SPR phrase independent meaning, as the Service contends it does. To correct this mistake, the Service must ensure the SPR phrase contained under §4(c)(1) has full meaning by allowing the Service, to make a listing determination focused on those portions of a species' range where the specific biological and physical features are found and that warranted a SPR list determination in the first place.

3. *Elements of the SPR Policy Supported by NAHB:*

a. High Threshold for the "Significance Test:"

NAHB agrees with the "significant" test threshold proposed by the Service under the SPR policy. As the Service states, a high-threshold for the significant test is warranted to ensure against expending limited conservation resources disproportionately in relationship to the conservation benefits achieved.³⁵ NAHB agrees with this statement and believes a high-threshold for the significant test under the SPR policy is warranted because under the draft SPR policy, unlike the typical ESA §4 listing process, the Service need not find evidence of threats to a species occurring across a species' range, but rather the Service can find threats occurring in just a portion of that species' range. Meaning under the draft SPR policy a listing determination could be made by the Service despite the fact the species is flourishing elsewhere in the range (e.g., outside of the SPR area).

Moreover, unlike under the existing DPS policy, which requires species populations that qualify as a DPS to be isolated (e.g., genetically isolated and or geographically isolated from the species' larger population) from other members of its own species, members of a SPR protected species can freely migrate between SPR areas and the rest of the species' range including areas where potentially the species population is flourishing. Because a species SPR listing determination may be applied range wide, despite the fact the "threats" upon which a SPR listing determination is made occurs only in a portion of the species overall range, it is imperative for the SPR policy to have a "high threshold" for making a "significant" determination. As the Service correctly states in the draft SPR policy;

"Note that this draft policy's definition establishes a threshold for "significant" that is relatively high. On the one hand, given that the consequences of finding a species to be endangered or threatened in the SPR would be listing the species throughout its entire

³⁴ 76 Fed. Reg. 76,992 (Dec. 9, 2011)

³⁵ 76 Fed. Reg. 76,995 (Dec. 9, 2011)

*range, it is important not to use a threshold for "significant" that is too low (e.g., a portion of the range is "significant" if its loss would result in any increase in the species' extinction risk even a negligible one).*³⁶

NAHB concurs. As further evidence as to why such a high "significant" threshold is warranted, NAHB points to the sequence of analyses the Service would have already conducted for the species' range wide and determined such an ESA listing was "not warranted." However, under the draft SPR policy the Service would nevertheless be able to list the species range wide because of "significant" impacts on the species.

Therefore, to permit the Service to use a lower threshold for the "significant" test under the SPR policy, as some commenters have suggested, would be to render the normal ESA listing analysis meaningless. Using a lower threshold for a "significant" test under the SPR policy would likely result in either the Service, or more likely third-party petitioners, to subdivide a given species' range to such an extent to find an impact from almost any activity that could reasonable be found to present either a "detectable" or "likely" threat to a species over some portion of that species' range.

Furthermore, if the Service were to consider lowering the "significant" threshold under the SPR policy, it would risk rendering meaningless the meaning of the word "significant" within the SPR phrase. The common use meaning of the word "significant" connotes an understanding that a specific action was the result of a significant event. As defined under Webster's dictionary, "significant" is defined as, "*probably caused by something other than mere chance.*"³⁷ This concept of "significant" means more than the mere probability of a particular event occurring e.g., a mere contributory relationship between a particular threat occurring within the SPR area and the overall extinction threat to the species range wide. Again, because the Service has chosen to apply all SPR listing determinations range wide it is essential the Service has a high threshold (i.e., extinction level) for the significant test. Otherwise, landowners and local governments whose property is located either within a given species' SPR or outside the SPR area but within the species' range face significant ESA regulatory burdens as well as wasting limited conservation resources.

b. Biological Basis for Determining "Significant" under SPR Policy:

NAHB concurs with the Service on a conceptual level that any "significant" test under the draft SPR policy must be based on biological factors specific to the species and justified by those particular biological and physical features present within the area designated as the SPR for a given species.³⁸ NAHB, however, believes further clarifications are necessary regarding how the Service will apply other ESA regulatory provisions (e.g., the designation of critical habitat) under the final SPR policy to ensure the Service has appropriately focused on biological factors in making SPR listing determinations.

With regard to designating a specific geographical area as a SPR area, NAHB believes such a SPR listing determination necessitates finding(s) by the Service within the administrative record that specific biological and or physical features present within the SPR area are so biologically

³⁶ 76 Fed. Reg. 76,995 (Dec. 9, 2011)

³⁷ Webster's New Collegiate Dictionary (9th ed.), (1990) New York, NY, Page 1096

³⁸ 76 Fed. Reg. 76,994 (Dec. 9, 2011)

“significant” to the species as a whole (i.e., the species’ representation, redundancy, or resiliency) that failing to protect those specific biological or physical features risks extinction for the species range wide. Importantly, the Service already has an identical statutory obligation under ESA §3(5)(A) when designating critical habitat to identify those specific geographical areas (occupied by the species at the time of listing) on which are found those “*specific physical and biological features that are essential for the conservation of the species.*”³⁹ Therefore, NAHB believes it is reasonable to require the Service, under the final SPR policy, to identify those specific biological and physical features found within the SPR area that warranted the Service’s SPR listing determination. Such a factual determination of identifying those biological functions and physical features is vital for landowners and local government located within the SPR area. Since the Service already defines those geographical areas lacking the specific biological or physical features necessary for the survival of the species as not being part of a proposed critical habitat designation, presumably the same process would apply to SPR area designations. Finally, NAHB agrees with the Service’s statement in the preamble that any biological finding under the SPR policy must be based upon the best available scientific and commercial data as required by the statute.⁴⁰

c. Treatment of “Historical Range.”

Another aspect of the draft SPR policy which NAHB agrees with the Service is the treatment of the loss of “historic range.” The Service states the loss of historic range for a particular species cannot be a factor the Service considers when making a SPR listing determination.⁴¹ Furthermore, rulings by the federal courts have supported the proposition that the loss of a species historic range does not justify a SPR listing determination.

In *Defenders of Wildlife v. Norton*⁴⁴, the Court of Appeals for the Ninth Circuit equated “its range” in the term “significant portion of its range” with historical range, or where a species “once was.” Then, however, the court recognized that the Secretary has a great deal of discretion in delineating a species range because “significant portion of its range” is not defined in the ESA.⁴⁵ The FWS has properly disagreed with the Ninth Circuit’s reading, instead focusing its analysis on a species current range. As the Services have explained, “... in the ESA Congress used present and future tense (i.e. “is in danger,” “present or threatened destruction . . .,” “is believed to occur”⁴⁶), but did not require the FWS to determine where a species may have existed.

Furthermore, as the District Court in New Mexico explained, it is possible that “99% of a species’ historic range may be lost, yet the species will still be thriving in the 1% that is left . . .”⁴⁷ And from a practical point of view, “[i]f raw size of the range were the only determinative factor, virtually every non-domestic species of wildlife in North America would be listed.”⁴⁸

³⁹ 16 U.S.C. §1532(5)(A).

⁴⁰ 16 U.S.C. §1533(b)(1)(A).

⁴¹ 76 Fed. Reg. 76,997 (Dec. 9, 2011)

⁴⁴ 258 F.3d 1136 (9th Cir. 2001).

⁴⁵ *Id.* at 1145.

⁴⁶ 76 Fed. Reg. 76,987, 76,997 (Dec. 9, 2011).

⁴⁷ *Center For Biological Diversity v. Norton*, 411 F.Supp.2d 1271, 1280 (D.N.M. 2005)

⁴⁸ *Id.* at 1281.

Finally, NAHB submits that in this instance it is appropriate for the Services to develop a rule that does not follow the Ninth Circuit's reasoning. In *National Cable & Telecommunications Association v. Brand X Internet Service (Brand X)*⁴⁹, the Supreme Court held that a court's prior judicial construction of a statute trumps and agency's interpretation if the "court decision holds that its construction follows from unambiguous terms of the statute" The Ninth Circuit in *Defenders of Wildlife*, however, did not hold that Congress clearly meant for the term "range" to mean "historic range." In fact, the court explained that the statute is "inherently ambiguous" and that the Secretary had a "wide decree of discretion" because the term "significant portion of its range" is undefined.⁵⁰ Thus, under *Brand X*, it is appropriate for the Services to diverge from the "historical range" reasoning the Ninth Circuit adopted in *Defenders of Wildlife*. Therefore, the decision to exclude consideration of the loss of historic range when determining the range of a species under the SPR policy is completely reasonable position for the Service to take.

d. *Overlap with existing DPS policy:*

The Service recognizes the draft SPR policy potentially overlaps with two existing Service policies; Evolutionary Significant Units (ESU) and Distinct Population Segment (DPS).⁵¹ Since all three policies (e.g., DPS, ESU, and now SPR) allow the Service to protect segments of a species based upon "significant" threats to a species' population below the subspecies level, NAHB agrees the Service should clarify how in any given situation, the final SPR policy would be applied as opposed to the existing ESU and DPS policies.

Furthermore, NAHB recognizes the ESA's statutory definition of "species" expressly allows the Service to protect distinct population segments (DPS) of vertebrate species below subspecies level.⁵² However Congress, in granting the Service the authority to protect vertebrate species below subspecies level, also admonished the Service to use that ESA authority sparingly;

*"...Listing of populations may be necessary when the preponderance of evidence indicates that a species faces a widespread threat, but conclusive data is available with regard to only certain populations. Nonetheless, the Committee is aware of the great potential for abuse of this authority and expects the FWS [Service] to use the ability to list populations sparingly and only when the biological evidence indicates that such action is warranted."*⁵³

The Service first clarified the meaning of DPS in 1991 when the Service extended ESA protections to certain subpopulations of Pacific salmon under the Evolutionary Significant Unit (ESU) policy.⁵⁴ Under the ESU policy, the Service stated a population of salmon must have two attributes:

1. The population must be reproductively isolated from other similar populations units of the same species, and

⁴⁹ 545 U.S. 967, 982 (2005).

⁵⁰ *Defenders*, 258 F.3d at 1141, 1145.

⁵¹ 76 Fed. Reg. 76,998 (Dec. 9, 2011)

⁵² 16 U.S.C. §1532(16)

⁵³ S. Rep. No. 151, 96th Cong., 1st Ses. 7 (1979)

⁵⁴ 57 Fed. Reg. 51,472 (1992)

2. The population must be a significant component in the evolutionary legacy of the species.

As for the meaning of “reproductive isolation,” the Service took the position that a salmon subspecies would need to have at least a detectable genetic variation from other members of its species. The Service had a considerably more difficult time clarifying what the meaning of a “significant component” of the species “evolutionary legacy” meant. Ultimately, the Service decided the phrase meant the DPS for a species had to have a distinctive adaption to its present environment (i.e., habitat).⁵⁵ Despite the Service's efforts to clarify the application of the ESU policy, ultimately the ESU policy created such confusion among the courts and regulated community that the Service agreed to limit the application of the ESU policy to only DPS/ESU of Pacific salmon species.

In an attempt address this uncertainty in 1996, the Services issued a joint DPS policy clarifying the meaning of “Distinct Population Segment” under the ESA. Unlike the Service's prior ESU policy that was limited only to Pacific salmon subpopulations, the joint DPS policy would apply to all other vertebrate species.⁵⁶ Under this policy in order for a subpopulation of vertebrate to be considered a DPS for the purposes of an ESA listing determination, the Service would have to find three factors present:

1. The “discreteness” of the vertebrates species population segment in relation to the remainder of the species to which it belongs,
2. The “significance” of the vertebrate species population segment to the species in which it belongs, and
3. The vertebrate species' population segment would be treated as if it were a “species” when determining whether the vertebrate population segment was “endangered” or “threatened” under the ESA.⁵⁸

Under the policy, “discreteness” could include a physical separation from other members of the species, such as international borders. The “significant” test includes, among other factors, evidence that the loss of that specific vertebrate population would result in a “significant gap” in the range of an overall species. Finally, the DPS policy - unlike the draft SPR policy – allows the Service to protect (i.e., list) just that portion of the species' population found within the geographical area designated by the Service as comprising the species' DPS and not the entire species range wide. The Service justifies the significant difference in the scope of species protections under the current DPS (limited to DPS area) and scope of protections proposed under the draft SPR policy (range wide) by claiming the “significant” threshold is much higher under the draft SPR policy than under the current DPS policy.⁵⁹ NAHB questions whether this will prove true in practice. Despite NAHB's concerns about the potential overlap between the existing DPS policy and the draft SPR policy NAHB supports the Service's position under the

⁵⁵ Ibid.

⁵⁶ 61 Fed. Reg. 4,772 (Feb. 7, 1996)

⁵⁸ Ibid.

⁵⁹ 76 Fed. Reg. 76,998 (Dec. 9, 2011)

draft SPR policy that in situations where a species' population qualifies for both a DPS and SPR determination the Service will list the species as a DPS and not a SPR.⁶⁰

4. Elements of the draft SPR Policy NAHB Opposes:

- a. *"Failure to recognize the independent statutory authority of the phrase SPR found under §4(c)(1)"*

Undoubtedly, the most controversial aspect of the Service's draft SPR policy is the proposal to apply the SPR listing determination status (i.e., "endangered" or "threatened") not just within the area designated as the SPR, but across the entire range of the species.⁶¹ The policy ramifications resulting from such an interpretation are problematic and widespread, particularly as this policy relates to landowners located outside of the SPR area, but still within the overall range of a SPR listed species. Any given species' "range" can extend over tremendously large geographical areas, spanning several states, or stretch even across international borders. When these large geographical areas are overlain by the regulatory prohibitions and limitations imposed by the ESA, the potential impacts of the draft SPR policy become clear.

Unfortunately, the Service's draft SPR policy will impose the same regulatory burdens on private landowners and local governments whose property is located hundreds or even thousands of miles outside the SPR area as the Service would impose upon landowners and local governments found within a SPR area itself. The Service's refusal under the draft SPR policy to articulate how the Service will use existing statutory flexibilities afforded under the ESA to address the very regulatory inequalities created under the draft SPR policy for landowners located outside of the SPR area must be seriously considered in the final SPR policy. There are two examples of statutory discretion granted by Congress to reduce the ESA's regulatory burdens are ESA. First is under §4(c)(1) that allows the Service identify specific portions of a protected species range that are experiencing threats to the species and should be subject to the ESA's regulatory protections, while leaving other portions of the species' range not experiencing threats to be unregulated. Another example of statutory discretion to reduce regulatory burdens is found under ESA §4(b)(2), which enables the Service to exclude any areas from "final" critical habitat designations if the Service determines the benefits (economic or otherwise) of excluding a given area from a final critical habitat designation outweigh the benefits of including that area in a final critical habitat designation.

NAHB recognizes the Service's decision to apply SPR listing determinations range wide is in response to two recent court decisions (*Defenders of Wildlife v. Salazar* and *WildEarth Guardians v. Salazar*). Both of these court rulings questioned the 2007 SPR guidance that allowed the Service to limit the extent of the ESA's regulatory protections over only a portion of a species' range as being inconsistent with the intent of the ESA thus also failed to recognize the ESA's statutory definition of a "species," which states DPS are the smallest listible entity that can be protected.⁶² NAHB agrees the 2007 SPR policy incorrectly interpreted the statutory definition of "species," however, NAHB questions whether the draft SPR policy is inconsistent with the ESA by extending regulatory protections to invertebrates and plants species below the

⁶⁰ 76 Fed. Reg. 77,003 (Dec. 9, 2011)

⁶¹ 76 Fed. Reg. 76,990 (Dec. 9, 2011)

⁶² 76 Fed. Reg. 76,990 (Dec. 9, 2011)

subspecies level. According to the Service, the court's ruling in *Defenders of Wildlife v. Salazar* interpreted the ESA as allowing the Service only to protect vertebrate species below the subspecies level (i.e., DPS level).⁶³

Likewise, this case interpreted the Service's authority under ESA §4(c)(1) as purely administrative (i.e., publish a list of protected species) rather than an independent and substantive provision of the statute. NAHB disagrees. NAHB views ESA §4(c)(1) as being both a substantive and independent provision of the ESA that provides the Service with full discretion to specify what portions of a listed species range the regulatory protections of the ESA shall apply.

As previously discussed, NAHB disagrees with the Services' statement that ESA §4(c)(1) "is in effect a book keeping provision . . ."⁶⁴ As with any statutory provision, the Agency must "give effect to the unambiguously expressed intent of Congress."⁶⁵ It is a "cardinal rule of statutory construction that significance and effect shall, if possible, be accorded to every word."⁶⁶ Under ESA §4(c)(1) provides that the endangered and threaten species lists "shall [with respect to a species] specify . . . over what portion of its range it is endangered or threatened . . ."⁶⁷ This language clearly shows that Congress did not intend for all species to be listed only over their entire range. The word "shall" is a command and generally leaves no discretion for an agency.⁶⁸ The Agencies' interpretation not only ignores the word "shall," but simply fails to give ESA §4(c)(1) any effect at all.

The Services rely on *Wildearth Guardians v. Salazar*⁶⁹ and *Defenders of Wildlife v. Salazar*⁷⁰ to support their determination that once a species has been determined to be threatened or endangered it must be listed in its entire range. NAHB disagrees with the Services' conclusion.

In *Wildearth Guardians*, Judge Martone explained that the ESA can be read to permit:

- I. the "listing of an endangered species in only a portion of its range," or
- II. "a portion of a species to be listed as an endangered or threatened species."⁷¹

The FWS relied on the second reading to find that the montane Gunnison's prairie dog was an endangered species. The court rejected this finding because the FWS had determined that the Gunnison's prairie dog was a species (and there was no subspecies or DPS) and therefore the montane Gunnison's prairie dog was a classification less than a species. The FWS's error with respect to the montane Gunnison's prairie dog was that it attempted to treat it as its own species.

⁶³ Ibid.

⁶⁴ 76 Fed. Reg. 76,991 (Dec. 9, 2011)

⁶⁵ *Chevron USA, Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984).

⁶⁶ *Market Company v. Hoffman*, 101 U.S. 112, 115 (1879).

⁶⁷ 16 U.S.C. § 1533(c)(1).

⁶⁸ *National Assoc. of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 661-62 (2007)

⁶⁹ 2010 WL 3895682 (D. Ariz. 2010).

⁷⁰ 729 F.Supp.2d 1207 (D. Mt. 2010).

⁷¹ 2010 WL 3895682, *2.

With respect to the first way the ESA can be read (above), Judge Martone was mistaken. He stated that ESA §4(c)(1) “simply tracks the definitions of endangered and threatened species.”⁷² This is incorrect, because sections ESA §3(6) and ESA §3(20) define threatened and endangered species in terms of “all or a *significant* portion of” their range, while §4(c)(1) allows the Services to determine “over what *portion* of its range” a species is threatened or endangered. ESA §4(c)(1) does not suggest that the portion of a species range where a species can be protected must equate to the “significant portion of its range.”

In explaining the manner in which the FWS could have properly listed the Gunnison's prairie dog, Judge Martone first provides that if the FWS had determined that the Gunnison's prairie dog was in danger of extinction over a significant portion of its range, then it would qualify as an endangered species. NAHB agrees with this analysis. He then states that the FWS could have listed the Gunnison's prairie dog and “specif[ied] the montane portion of its range.” It is unclear what Judge Martone meant by this statement. He could have meant that the FWS would state that the Gunnison's prairie dog is only endangered in the montane region. NAHB would agree with this reading because it gives meaning to § 4(c)(1). On the other hand, he could have meant that the Gunnison's prairie dog must be considered endangered throughout its entire range but the FWS should explain that it was listed due to the SPR. If so, NAHB would disagree with this reading because it gives no effect to § 4(c)(1).

Additionally the Services rely on *Defenders of Wildlife* to support their contention that a species must be listed throughout its entire range. *Defenders of Wildlife*⁷³ cites to § 4(c)(1) only once and contains flawed analyses. First, the court asserted numerous times that the Service historically interpreted the ESA to prohibit protecting a species in a portion of its range.⁷⁴ While the Service may agree that it cannot consider a “species” to be anything other than a species, subspecies or distinct population segment, it has historically provided ESA protection to species in portions of a species range. In fact, in *Defenders of Wildlife v. Norton*, the Ninth Circuit explained that historically, the FWS did provide protection only in certain portion of a species range.⁷⁵ The Ninth Circuit referred to the grizzly bear, marbled murrelet, bighorn sheep, Stellar sea lions, caracara and piping plovers as examples. Thus, the District of Montana's conclusion that the FWS's argument was “novel” and contradicted its historical practices is simply untrue.

Further, in its only discussion of § 4(c)(1), the court incorrectly concluded that the “portion of its range” language in § 4(c)(1) is included so the Services can “identify a species below its taxonomic level.” This argument suggests that 4(c)(1) requires the Services to always refer to a species (in the scientific sense) or its lowest taxonomic rank (not a subspecies or DPS) when creating the list. The court's reasoning, however, ignores the ESA definition of species and the wording of 4(c)(1). Congress defined “species” to mean species, subspecies or DPS. Thus, when Congress used the word species in 4(c)(1) it is reasonable to insert subspecies or DPS. Thus, the “range” language in 4(c)(1) is not necessary to identify a species below its taxonomic level; that can be done by referring to the subspecies or DPS. Furthermore, § 4(c)(1) provides that the Services shall refer to species “by scientific and common name or names, *if any* . . .”⁷⁶

⁷² Id. at *5.

⁷³ 729 F.Supp.2d 1207 (D. Mt. 2010).

⁷⁴ Id. at 1216, 1218, 1223.

⁷⁵ 258 F.3d 1136, 1144-45; the Ninth Circuit cited Senator Tunney who explained that the ability to provide protection in only a portion of a species range was “perhaps the most important §” of 1973 amendments. *Id.*

⁷⁶ 16 U.S.C. § 1533(c)(1).

"If any" can be attached to either the scientific name or the common name(s). This interpretation recognizes that a subspecies or DPS may not have a scientific name, but that the Services can still refer to them under 4(c)(1).

Finally, in *Defenders*, while the court proclaimed that the ESA is clear that the Services may not consider a "species" to be unit smaller than a DPS⁷⁷, it did not conclude that ESA §4(c)(1) clearly requires protection only over a species entire range. Therefore, pursuant to *Brand X*, the Services can interpret 4(c)(1) in a manner that contradicts the District of Montana's conclusion, if the Services do not allow a species unit to be smaller than a DPS.

NAHB suggests that the best way to harmonize the "significant portion of its range" language found within the statutory definitions of endangered species and threatened species under ESA §3 and the "portion of its range" language found within ESA §4(c)(1) is for the Services to list only valid species units (species, subspecies, DPS), but during the listing process to exclude portions of the range in which the species unit does not require protection.

The Services interpret of the term "portion of its range it is endangered or threatened" under ESA §4(c)(1) to mean a species' entire range.⁷⁸ NAHB suggests that the Services abandon this interpretation and instead adopt one that emulates the ESA's treatment of critical habitat.

Under ESA §4(a)(3)(A)(i) commands the Services to designate critical habitat concurrently with making a determination that a species is endangered or threatened.⁷⁹ Congress defined critical habitat to mean those areas occupied by the species at the time the species is listed on which contain "physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protections."⁸⁰ In addition, Congress defined critical habitat to mean areas not occupied by the species that are "essential for the conservation of the species."⁸¹ Finally, Congress proclaimed that critical habitat "shall not include the entire geographical area which can be occupied" by the species.⁸²

Thus, within the definition of critical habitat, Congress expressly understood that a species can be sufficiently protected even when a species' entire range of a species is not protected. In a similar fashion under the draft SPR policy, the Service does not need to protect a species entire range when making a SPR listing determination.

Rather, when the Service lists a species under the SPR policy, as in the case of when the Service designates critical habitat for a species, the Service should focus on those areas that contain specific physical or biological features identified by the Service and that require "special

⁷⁷ 729 F.Supp.2d 1207, 1217-1222 (explaining why the term species must be given the same meaning throughout the statute).

⁷⁸ 16 U.S.C. § 1533(c)(1).

⁷⁹ 16 U.S.C. § 1533(a)(3)(A)(i).

⁸⁰ 16 U.S.C. § 1532(5)(A).

⁸¹ *Id.*

⁸² *Id.*

management considerations or protections.”⁸³ Similarly, Congress specifically explained that a species entire geographic area is generally not to be designated as critical habitat.⁸⁴

Finally, Congress expressly permitted the Service to exclude any area from critical habitat if he [Service] determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat...” Thus, Congress illustrates under the designation of critical habitat how the Service can exclude specific geographic areas if, after weighing the economic and other impacts, the Services determine that the “exclusion outweighs the benefits”⁸⁵ Again, this illustrates Congress’ understanding that a species’ entire range does not need to be uniformly regulated under the ESA in order to protect the species.

NAHB believes that Congress’ recognition that a species’ entire range need not be protected informs the manner in which the term “portion of its range it is endangered or threatened” under ESA §4(c)(1) should be interpreted.⁸⁶ The Service’s interpretation under the draft SPR policy demonstrates a belief that a species must be preserved across its entire range regardless of the variation of threats across its range, or the biological value of the habitat to be protected under the SPR listing determination. However, NAHB believes Congress’ treatment of critical habitat resists that belief.

NAHB views the statutory flexibilities provided under ESA §4(c)(1) as completely consistent with the Service’s past ESA listing determinations (e.g., American Alligator, Grizzly Bear, Marbled Murrelet, etc.). Under these prior ESA listing determinations, the Service has selectively applied the ESA regulatory protections across specific portions of a listed species range. In these listing determinations, the Service decided to apply ESA regulatory protections in only those areas where such protections were needed, while deciding not to extend those same ESA regulatory protections across other areas of the listed species’ range where those regulatory protections were not necessary.

The Service has published a whitepaper in conjunction with the draft SPR policy in which the Service states the Agency found no statutory basis identified in the rulemaking record to justify the Service’s decision to selectively apply the ESA regulatory protections over some portions of these listed species range and not others.⁸⁷ If this is the case, the Service must explain what statutory basis other than ESA §4(c)(1) could permit the Service to apply the ESA regulatory protections over specific portion of a species’ range and not others portion of the same species range.

As stated before, the Service’s decision to apply the SPR listing determination range wide, marks a significant policy departure from the Service’s prior (2007) SPR guidance that correctly limited the ESA’s regulatory protections to only those SPR portions of the species’ geographic

⁸³ *Id.*

⁸⁴ 16 U.S.C. § 1532 (5)(C)

⁸⁵ 16 U.S.C. § 1533(b)(2).

⁸⁶ 16 U.S.C. § 1533(c)(1).

⁸⁷ U.S. Fish & Wildlife Service (2010) *Whitepaper: Options for Interpreting the phrase “Significant Portion of its Range.”* SPR Working Group. June 2010. Page 13

range.⁸⁸ However, in 2011, the Service decided to withdraw this prior SPR guidance based upon two recent federal district court rulings that questioned specific aspects of the prior SPR guidance.⁸⁹ Today's draft SPR policy is a direct result of the Service's decision to withdraw the prior SPR guidance.

If the Service, in its final policy applies all of the ESA's regulatory restrictions range wide (i.e., ESA's §7 consultation requirements, ESA §4 designation of critical habitat, and ESA §9 take prohibitions) instead limiting the ESA's regulatory restrictions (as the previous Service's SPR policy had) to those specific geographical areas found to contain those specific biological features so essential for the species survival as a whole as to warrant an SPR determination, it is imperative the Service use this new SPR policy sparingly.

While the Service suggests the draft SPR policy will be used sparingly since a SPR determinations to only those situations where the Service determines the geographical area in question is "significant" and its contribution to the viability of the species is so important that without that portion, the species would be in danger of extinction," there is no assurance that such limits will be followed by the Service.⁹⁰

b. No assurance the Service will exclude all private lands from critical habitat designations located outside the SRP area.

Consistent with the President's directives under the *Presidential Memorandum on Proposed Revised Habitat for the Spotted Owl: Minimizing Regulatory Burdens*, the Service must articulate under the final SPR policy how the Service will exclude all private lands located outside the SPR area from critical habitat designations.¹¹⁴ The President's Memorandum was in response to concerns of severe economic dislocations impacting the timber industries, local governments, and private landowners from the expansion of critical habitat designation for the spotted owl. However the President's Memorandum had a broader directive for the Service to fully consider economic impacts resulting from all critical habitat designations and find ways to reduce those costs. As the President states within the Presidential Memorandum;

Consistent with the ESA and Executive Order 13563, [Improving Regulations and Regulatory Review] today's proposed rule emphasizes the importance of flexibility and pragmatism. The proposed rule notes the need to consider "the economic impact" of the proposed rule, outlines a series of potential exclusions from the proposed critical habitat, and asks for public comment on those exclusions and other possible exclusions. Private lands and State lands are among the potential exclusions, based on the recognition that

⁸⁸ U.S. Department of the Interior (2007) *The Meaning of "In Danger of Extinction Throughout All of Significant Portion of its Range."* Office of the Solicitor, U.S. Department of the Interior legal memorandum M-37013. March 16, 2007.

⁸⁹ U.S. Department of the Interior (2011) *Withdrawal of M-37013, The Meaning of "In Danger of Extinction Throughout All or Significant Portion of its Range."* Office of the Solicitor, U.S. Department of the Interior legal memorandum M-37024. May 4, 2011.

⁹⁰ 76 Fed. Reg. 77,002 (Dec. 9, 2011)

¹¹⁴ Presidential Memorandum for the Secretary of the Interior, *Proposed Revised Habitat for the Spotted Owl: Minimizing Regulatory Burdens*, February 28, 2012.

habitat typically is best protected when landowners are working cooperatively to promote forest health, and a recognition – as discussed in the proposed rule – that the benefits of excluding private lands and State lands may be greater than the benefits of including those areas in critical habitat.”¹¹⁵

While the Service or opponents of reforming the critical habitat designation process may misinterpret the President's directives as being limited to the re-designation of spotted owl critical habitat, NAHB reads the President's memorandum as ordering the Service to revise federal regulations governing the designation of critical habitat itself.¹¹⁶ Specifically, the President ordered the Service to immediately conduct a federal rulemaking to require the Service to complete economic analysis before proposes any critical habitat designation. The President's rationale is to ensure the Service designates critical habitat in the least burdensome manner by excluding all private and state lands in a manner consistent with the objectives of the ESA and E.O. 13563.

The exclusion of all private lands located outside the SPR area from critical habitat designations is consistent with the statutory definition of critical habitat itself. Congress defined “critical habitat” as, “*specific geographical areas occupied by the species at the time of listing where the Service has found specific physical and or biological features that the Service has concluded are (a) essential to the conservation of the species and (b) warrant special management protections.*”¹¹⁷ Under the draft SPR policy, the Service would base any SPR listing determinations upon threats occurring and/or biological features found primarily within the SPR area. Furthermore, the Service would only list a species following a SPR determination if the Service found “but for” the protection of the SPR area the species as a whole would be at risk of extinction range wide. Because SPR listing determination and corresponding critical habitat designation is not based upon threats or physical features found on property located outside of the SPR area, the SPR policy should allow the Service to theoretically avoid designating any private lands located outside of the SPR area as critical habitat. This analysis would be based upon a finding by the Service that private lands located outside of the SPR area do not warrant special management protections.

Thank you for the opportunity to provide these comments on the Service's draft SPR policy. NAHB welcomes the opportunity to discuss any of NAHB's concerns with the draft SPR policy. Or to discuss any of NAHB's suggested modifications. If you have any questions regarding specific issues raised in these comments please feel free to contact me or Michael Mittelholzer, Assistant Staff Vice President, at (202) 266-8660 or mmittelholzer@nahb.org.

Sincerely,

¹¹⁵ Presidential Memorandum for the Secretary of the Interior, *Proposed Revised Habitat for the Spotted Owl: Minimizing Regulatory Burdens*, Page 2. February 28, 2012.

¹¹⁶ Ibid. Page 3

¹¹⁷ 16 U.S.C. § 1532(5)(A)

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A handwritten signature in black ink, appearing to read "Susan Asmus". The signature is fluid and cursive, with the first name "Susan" and last name "Asmus" clearly distinguishable.

Susan Asmus

Senior Vice President

Environmental, Labor, Safety, & Health Policy

National Association of Home Builders