

New Policy to Improve Endangered Species Act Implementation **“Significant portion of its Range”** **Questions and Answers**

Q. What action are the U.S. Fish and Wildlife Service and the National Marine Fisheries Service taking?

A. The U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NOAA) are jointly proposing a policy to provide an interpretation of the phrase “significant portion of its range” (SPR) that appears in the Endangered Species Act’s (ESA) definitions of “endangered species” and “threatened species.”

Q. Why is this policy needed?

A. The proposed policy’s interpretation of the “significant portion of its range” language in the Act’s definitions of “endangered species” and “threatened species” will provide a uniform standard for interpretation of the SPR language and its role in determining whether a species meets the definitions of “endangered species” or “threatened species.”

The ESA provides for the identification and protection of “endangered species” and “threatened species” across the nation, defining these two terms as follows:

“The term ‘endangered species’ means any species which is in danger of extinction throughout all or a significant portion of its range...”

The term ‘threatened species’ means any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.”

The ESA itself does not, however, define the phrase “significant portion of its range.” As a result, the meaning of this important phrase has been uncertain, and agency decisions based on varying interpretations of the phrase have been the subject of debate and litigation.

The FWS and NOAA are proposing the proposed policy interpretation as the best alternative to harmonize all relevant provisions of the ESA related to the definition of “threatened species” and “endangered species” and the phrase “significant portion of its range.”

Q. What does the policy propose?

A. The phrase “significant portion of its range” in the ESA’s definitions of “endangered species” and “threatened species” provides an independent basis for listing; thus there are two situations (or factual bases) under which a species would qualify for listing: a species may be endangered or threatened throughout all of its range; or a species may be endangered or threatened in only a significant portion of its range.

The proposed joint policy interpretation has three major components:

- Under the joint policy interpretation, if a species is found to be endangered or threatened in only a significant portion of its range, the entire species would be listed as endangered or

threatened, respectively, and the ESA's protections would apply across the species' entire range.

- The proposed policy defines a portion of the range of a species 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.
- The range of a species is considered to be the general geographical area within which that species can be found at the time the FWS and NOAA make a status determination. This range includes those areas used throughout all or part of the species' life cycle. Lost historical range would not constitute a significant portion of a species' range (in other words, a species cannot be listed solely on the basis of loss of historical range), but the causes and consequences of loss of historical range on the current and future viability of the species must be considered and are an important component of determining whether a species is currently threatened or endangered.

Q. Why are FWS and NOAA taking this action now?

A. Following several years of litigation regarding interpretation of the SPR phrase, on March 16, 2007, the Solicitor of the Department of the Interior issued a formal opinion, “The Meaning of ‘In Danger of Extinction Throughout All or a Significant Portion of Its Range,’” M-37013 (U.S. DOI 2007) (M-Opinion). FWS began applying this interpretation in its listing determinations. Aspects of the FWS interpretation were rejected by two courts and DOI subsequently withdrew the M-Opinion on May 4, 2011.

NOAA did not apply the M-Opinion interpretation, but also never issued separate guidance. Consequently, neither agency currently has a policy providing for the interpretation and application of the SPR phrase in its listing determinations.

Q. How will this policy improve ESA implementation?

A. This policy will improve ESA implementation by providing a consistent and uniform standard for interpretation of the phrase “significant portion of its range” by both the FWS and NOAA in making decisions to list species in need of Federal protection and delist species no longer in need of Federal protection (recovered species). It will inform other Federal agencies and Tribes and other public and private entities of the interpretation and provide more transparency on when a species may qualify for listing or delisting. In addition:

- **The proposed policy will provide for increased and earlier opportunities for proactive conservation** of species that are facing serious threats in portions of their ranges that are of substantial conservation importance, thus lessening the need for emergency actions and increasing the likelihood of recovery and delisting. Listing a species when it is endangered or threatened in a “significant portion of its range,” before it is endangered or threatened throughout all its range will give FWS and NOAA the opportunity to work with partners to protect and conserve the species and the ecosystems upon which it depends before large-scale decline occurs throughout the entire range of the species. This could provide for recovery of declining species in a more timely and effective manner, and on a smaller scale than the more

costly and extensive efforts that might be needed to recover a species that is endangered or threatened throughout all its range.

- **The proposed policy would limit consideration of portions of a species' range to those that are biologically important** to the species' conservation as a whole. In this way, it would ensure that FWS and NOAA focus on species of greatest conservation concern, while minimizing the degree to which restrictions will be imposed or resources expended that do not contribute substantially to species conservation. This approach will help to avoid the inefficient allocation of conservation resources that would occur if FWS and NOAA were to protect species when a portion that is of only minor conservation importance to the species is imperiled.
- **The proposed policy prioritizes science in decision-making.** The policy's definition of "significant" is based on conservation biology principles. It makes the species itself the reference point for determining whether a portion of a range is "significant." In so doing, it prioritizes the use of science and biology for decision-making within species status determinations and, in turn, increases the transparency and consistency of those decisions.

Ultimately, both the FWS and NOAA agree that the benefits to be realized through the proposed policy — consistency, clarity, transparency, opportunities for proactive conservation, and more effective use of time and resources — will improve the agencies' ability to protect and recover the nation's most vulnerable species, while improving implementation of the ESA.

Q. What are the implications of this policy for implementing the ESA?

A. Under nearly all circumstances, FWS and NOAA anticipate that application of the proposed policy will result in the same status determinations as would have been made without the policy. However, in a few cases, application of the policy could result in FWS and NOAA listing and protecting throughout their ranges some species that previously the agencies may not have listed, or (under the judicially rejected rationale of the M-Opinion) would have listed in only portions of their ranges. However, this result would occur only under a limited set of circumstances. Under most circumstances, FWS and NOAA anticipate that the outcomes of its status determinations with or without the policy would be the same.

Threats, population trends, and relative importance to recovery commonly vary across the range for many species, especially as recovery efforts progress. FWS and NOAA routinely account for this variation in their consultation and permitting processes. Where threats vary across the range of a species, FWS and NOAA may use various methods to streamline consultation and permitting processes affecting threatened and endangered species in areas where the species are more secure.

Determining that a species is threatened in a significant portion of its range will result in the threatened status being applied to the entire range of the species. When a species is listed as threatened, section 4(d) of the ESA allows FWS and NOAA to issue special regulations "necessary and advisable to provide for the conservation" of the species. This provision in effect allows FWS and NOAA to tailor regulations to the needs of the species. When a species is listed as threatened because of its status in an SPR, FWS and NOAA will consider the development of a 4(d) rule to provide regulatory flexibility and to ensure that the agencies apply the prohibitions of the ESA where appropriate. If a species is

endangered in a significant portion of its range, endangered status will be applied to the entire range of the species and the full prohibitions of the ESA will be applied throughout its range.

Q. What interpretation will FWS and NOAA apply until a final policy is in place?

A. FWS and NOAA intend to publish a final policy that will provide a uniform standard for interpretation of the SPR language and its role in listing determinations. However, before it can become final, the policy must go through public notice-and-comment procedures consistent with the requirements of the Administrative Procedure Act. This notice begins that process.

In the meantime, FWS and NOAA have an obligation to make numerous determinations in response to petitions to list, reclassify, and delist species, and to meet statutory timeframes. During this interim period, FWS and NOAA will not apply this policy as a binding interpretation of the SPR language. However, during this period, FWS and NOAA will consider the interpretations and principles contained in this proposed policy as nonbinding guidance in making individual listing determinations.

Thus, as nonbinding guidance, FWS and NOAA will apply those interpretations and principles only as the circumstances warrant, and the agencies will independently explain and justify any decision made in this interim period in light of the circumstances of the species under consideration. In preparing a final policy, FWS and NOAA will consider all comments and information received during the comment period on this proposed policy, as well as experience gained during the interim period. Accordingly, FWS and NOAA recognize that any interpretation in the final, binding policy may differ from those in this proposal and those applied during this interim period.

Q: What is the “M-Opinion?”

A. On March 16, 2007, the Solicitor of the Department of the Interior issued a formal opinion, “The Meaning of ‘In Danger of Extinction Throughout All or a Significant Portion of Its Range,’” M-37013 (U.S. DOI 2007), commonly known as an M-opinion. FWS began applying this interpretation in its listing determinations. Aspects of the FWS interpretation were rejected by two courts, and DOI subsequently withdrew the M-Opinion on May 4, 2011. NOAA did not apply the M-Opinion interpretation, but also never issued separate guidance.

Q. How does this policy differ from the M-Opinion interpretation?

A. The proposed interpretation is similar to the M-Opinion in that it interprets the SPR phrase in the definitions of “endangered species” and “threatened species” to provide an independent basis for listing; thus there are two situations (or factual bases) under which a species would qualify for listing: a species may be endangered or threatened throughout all of its range; or a species may be endangered or threatened in only a significant portion of its range. The proposed policy differs substantially from the M-Opinion interpretation by requiring that if a species is found to be threatened or endangered in an SPR, the entire species must be listed and protections of the ESA applied throughout its range. Under the M-Opinion, only individuals of a species found within the SPR were allowed to be protected under the ESA. This policy also proposes a more specific and stringent standard to evaluate whether a portion of a species’ range would be considered “significant” than that which was applied under the M-Opinion interpretation. This higher bar is intended to ensure that the species being evaluated for ESA protection are truly in need of conservation.

Q. How can comments be provided on the proposed policy?

A. Before finalizing the policy, FWS and NOAA are seeking public comments on the proposal for 60 days beginning on the date of the proposed rule's publication in the *Federal Register*. Written comments and information concerning this proposal must be submitted by one of the following methods:

- Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments to Docket No. [FWS-R9-ES-2011-0031]; or
- U.S. mail or hand delivery: Public Comments Processing, Attn: [FWS-R9-ES-2011-0031]; Division of Policy and Directives Management; U.S. Fish and Wildlife Service; 4401 N. Fairfax Drive, MS 2042-PDM; Arlington, VA 22203.

The FWS and NOAA will post all comments on <http://www.regulations.gov>. This generally means any personal information provided through the process will be posted.

For further information, please contact Rick Sayers, U.S. Fish and Wildlife Service, Endangered Species Program, 4401 North Fairfax Drive, Room 420, Arlington, VA 22203; telephone 703-358-2171; facsimile 703-358-1735; or Marta Nammack, National Marine Fisheries Service, Office of Protected Resources, 1315 East-West Highway, Silver Spring, MD 20910; telephone (301-427-8469); fax (301-713-0376).