Finding of No Significant Impact for Final Policy on Interpretation of the Phrase "Significant Portion of Its Range" in the Endangered Species Act's Definitions of "Endangered Species" and "Threatened Species"

National Marine Fisheries Service

National Environmental Policy Act (NEPA) regulations, 42 U.S.C. § 4321; 40 C.F.R. Parts 1500-1508, require that federal agencies consider the potential for a proposed federal action to have direct, indirect, or cumulative effects on the quality of the human environment. The CEQ regulations implementing NEPA define the "human environment" as including "the natural and physical environment and the relationship of people with that environment." 40 C.F.R. § 1508.14. "Effects" are defined generally as including ecological, aesthetic, historic, cultural, economic, social, or health effects (40 C.F.R. § 1508.8). National Oceanic and Atmospheric Administration Administrative Order (NAO) 216-6 (May 20, 1999) contains criteria for determining the significance of the impacts of a proposed action. In addition, the Council on Environmental Quality (CEQ) regulations at 40 CFR 1508.27 state that the significance of an action should be analyzed both in terms of "context" and "intensity." Each criterion listed below is relevant to making a finding of no significant impact and has been considered individually, as well as in combination with the others. The U.S. Fish and Wildlife Service (FWS) and National Marine Fisheries Service (NMFS) (collectively, the Services) have prepared an environmental assessment (EA) for their Final Policy on Interpretation of the Phrase "Significant Portion of Its Range" in the Endangered Species Act's Definitions of "Endangered Species" and "Threatened Species" (Final Policy). The Final Policy provides an interpretation and application of "significant portion of its range" that reflects a permissible reading of the law and its legislative history and minimizes undesirable policy outcomes, while fulfilling the conservation purposes of the Endangered Species Act. We incorporate the EA here by reference.

The Services developed an Environmental Assessment that analyzed three alternatives. To identify the environmental impacts that are likely to result from implementing the Final Policy, the Services compared the Final Policy (Alternative 2) with the "no-action alternative" of evaluating "significant portion of its range" on a case-by-case basis (Alternative 1) and with applying a different interpretation of when a portion of a species' range is significant (the interpretation outlined in the Draft Policy, also referred to as Alternative 3). Several other alternatives were considered, but rejected as not meeting the purpose and needs underlying the policy.

This policy has been coordinated with all interested and/or affected parties. In publishing the Draft Policy, the Services described some of the options that they had considered, and specifically requested public comment on a number of issues, including: whether the Services should consider alternatives other than interpreting the phrase to provide an independent basis for listing; measuring significance based on biological/conservation importance; including in the significance threshold that, without the members in that portion, the species would be "likely to become in danger of extinction" and not just "in danger of extinction;" and whether a species found to be threatened or endangered in a significant portion of its range should be listed

throughout all of its range or just throughout that significant portion of its range. Once the Draft Policy was published, the Services briefed State agencies and environmental groups on the Draft Policy, and encouraged their feedback on the Draft Policy. The drafting team then reviewed all of the comments that they had received on the Draft Policy, determined whether to change any aspects of the Draft Policy based on the that feedback, and developed responses to all of the comments. All comments received were analyzed and, where appropriate, incorporated into the Final Policy.

The significance of this action is analyzed based on the NAO 216-6 criteria and CEQ's context and intensity criteria. These include:

1. Can the proposed action reasonably be expected to cause substantial damage to the ocean and coastal habitats and/or essential fish habitat (EFH) as defined under the Magnuson-Stevens Act and identified in FMPs?

Issuance of the Final Policy cannot reasonably be expected to cause substantial damage to the ocean and coastal habitats and/or essential fish habitat (EFH) as defined under the Magnuson-Stevens Act and identified in FMPs. FWS and NMFS' issuance of the Final Policy is intended to reduce inconsistencies in applying the phrase and improve effective and efficient implementation of the Act. The only direct effect of the policy will be to classify as "significant" (or not) portions of the range of a species under consideration for listing, delisting, or reclassification. More uniform application of the Act's definitions of "endangered species" and "threatened species" will allow the Services, various other government agencies, private individuals and organizations, and other interested or concerned parties to better judge and concentrate their efforts toward the conservation of biological resources vulnerable to extinction.

Application of the policy may result in the Services listing and protecting, throughout their ranges, species that previously we either would not have listed or would have listed in only portions of their ranges. Listing a species when it is endangered or threatened throughout a "significant portion of its range" before it is endangered or threatened throughout all its range may allow the Services to protect and conserve species and the ecosystems upon which they depend before large-scale decline occurs throughout the entire range of the species.

2. Can the proposed action be expected to have a substantial impact on biodiversity and/or ecosystem function within the affected area (e.g., benthic productivity, predator-prey relationships, etc.)?

The proposed action is not expected to have a substantial impact on biodiversity and/or ecosystem function within the affected area. FWS and NMFS' issuance of the Final Policy is intended to reduce inconsistencies in applying the phrase and improve effective and efficient implementation of the Act. The only direct effect of the policy will be to classify as "significant" (or not) portions of the range of a species under consideration for listing, delisting, or reclassification. More uniform application of the Act's definitions of "endangered species" and "threatened species" will allow the Services, various other government agencies, private individuals and organizations, and other interested or concerned parties to better judge and concentrate their efforts toward the conservation of biological resources vulnerable to extinction.

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3. Can the proposed action reasonably be expected to have a substantial adverse impact on public health or safety?

The proposed action is not expected to result in any impacts related to public health and safety because application of this policy (that is, listing a species or not listing a species as threatened or endangered under the ESA based on its status in a significant portion of its range) will not have any effect on public health or safety.

4. Can the proposed action reasonably be expected to adversely affect endangered or threatened species, their critical habitat, marine mammals, or other non-target species?

Issuance of the Final Policy cannot reasonably be expected to adversely affect endangered or threatened species, their critical habitat, marine mammals, or other non-target species. Listing a species when it is endangered or threatened throughout a "significant portion of its range" before it is endangered or threatened throughout all its range may allow the Services to protect and conserve species and the ecosystems upon which they depend before large-scale decline occurs throughout the entire range of the species. This may allow protection and recovery of declining organisms in a more timely and less costly manner, and on a smaller scale than the more costly and extensive efforts that might be needed to recover a species that has reached a point that it has become endangered or threatened throughout all its range.

5. Are significant social or economic impacts interrelated with natural or physical environmental effects?

There are no significant social or economic impacts interrelated with natural or physical environmental effects. Although we can foresee that decreasing or increasing status determination costs could affect the number of various kinds of ESA actions the Services could complete in any fiscal year, which could then have various socio-economic or environmental impacts, we cannot reasonably foresee which of the various impacts would result from adopting any of the alternatives, or the scale of such impacts. Rather, the Services are taking into consideration that, in general, adopting the Final Policy would likely to some degree decrease the cost of status determinations—both by reducing the cost of individual status determinations and by reducing the likelihood of remands—and thereby allow the Services to complete more status determinations and/or other ESA actions within a given period of time. The Services conclude that completing more status determinations and/or other ESA actions within a given period of time would clearly allow for more efficient implementation of the ESA and further the purposes of the ESA. However, because it would be speculative for the Services to predict which types of status determinations or other ESA actions would be accelerated in the future as a result of the decrease in costs, let alone what the outcomes of those accelerated determinations or actions

would be, the specific environmental impacts that are likely to flow from reducing status determination costs by adopting the Final Policy are not reasonably foreseeable.

6. Are the effects on the quality of the human environment likely to be highly controversial?

Issuance of the Final Policy will not have effects on the human environment that are likely to be highly controversial. There is no substantial disagreement over the proposed action's size, nature, or effect. We did not receive comments from the public indicating that this policy would be highly controversial. The only direct effect of the policy will be to classify as "significant" (or not) portions of the range of a species under consideration for listing, delisting, or reclassification. More uniform application of the Act's definitions of "endangered species" and "threatened species" will allow the Services, various other government agencies, private individuals and organizations, and other interested or concerned parties to better judge and concentrate their efforts toward the conservation of biological resources vulnerable to extinction. Application of the policy may result in the Services listing and protecting, throughout their ranges, species that previously we either would not have listed or would have listed in only portions of their ranges. Listing a species when it is endangered or threatened throughout a "significant portion of its range" before it is endangered or threatened throughout all its range may allow the Services to protect and conserve species and the ecosystems upon which they depend before large-scale decline occurs throughout the entire range of the species.

7. Can the proposed action reasonably be expected to result in substantial impacts to unique areas, such as historic or cultural resources, park land, prime farmlands, wetlands, wild and scenic rivers, essential fish habitat, or ecologically critical areas?

Issuance of the Final Policy cannot reasonably be expected to result in substantial impacts to unique areas, such as historic or cultural resources, park land, prime farmlands, wetlands, wild and scenic rivers, essential fish habitat, or ecologically critical areas. This policy provides an interpretation of a statutory phrase and defines a term in that phrase, and this will potentially result in a few more ESA listing actions. See response to question #6 for more details on what this policy will do.

8. Are the proposed action's effects on the human environment likely to be highly uncertain or involve unique or unknown risks?

Issuance of the Final Policy will not have effects on the human environment that are likely to be highly uncertain or involve unique or unknown risks. See response to question #6 for more details on what this policy will do. The effects of listing a species under the ESA are not likely to be highly uncertain or involve unique or unknown risks. **9. Is the proposed action related to other actions with individually insignificant, but cumulatively significant impacts?**

Issuance of the Final Policy is not related to other actions with individual insignificant, but cumulatively significant impacts. We cannot identify any individually insignificant, but

cumulatively significant impacts related to this policy because this is a policy, not an on-the-ground action. As stated above, this policy will result in potential ESA listing based on the status of a species in only a significant portion of its range. See response to question #6 for more details on what this policy will do.

10. Is the proposed action likely to adversely affect districts, sites, highways, structures, or objects listed in or eligible for listing in the National Register of Historic Places or may cause loss or destruction of significant scientific, cultural, or historical resources?

Issuance of the Final Policy is not likely to adversely affect districts, sites, highways, structures, or objects listed in or eligible for listing in the National Register of Historic Places or may cause loss or destruction of significant scientific, cultural, or historical resources because listing a species as threatened or endangered under the ESA has no effect on these things. See response to question #6 for more details on what this policy will do.

11. Can the proposed action reasonably be expected to result in the introduction or spread of a nonindigenous species?

Issuance of the Final Policy cannot reasonably be expected to result in the introduction or spread of a nonindigenous species because listing a species as threatened or endangered based on its status in a significant portion of its range (a potential result of this policy) has no impact on whether nonindigenous species are introduced. See response to question #6 for more details on what this policy will do.

12. Is the proposed action likely to establish a precedent for future actions with significant effects or represent a decision in principle about a future consideration?

Issuance of the Final Policy is not likely to establish a precedent for future actions with significant effects or represent a decision in principle about a future consideration. Application of the policy may result in the Services listing and protecting, throughout their ranges, species that previously we either would not have listed or would have listed in only portions of their ranges. However, this result will occur only under a limited set of circumstances. Under most circumstances, we anticipate that the outcomes of our status determinations with or without the policy will be the same. We have concluded not only that the environmental effects are likely to be a very small increment over what would occur without adopting a binding policy, but also that we cannot predict at this time where, to what extent, or how any environmental effects would occur. There are so many uncertain intervening circumstances that would occur between adopting the policy, experiencing any changes in outcomes or costs, and tracing how those changes in the future will affect the environment that a reasonable person would not take into account such environmental consequences.

13. Can the proposed action reasonably be expected to threaten a violation of Federal, state, or local law or requirements imposed for the protection of the environment?

Issuance of the Final Policy cannot reasonably be expected to threaten a violation of Federal, state, or local law or requirements imposed for the protection of the environment. NMFS has

made all appropriate determinations under other applicable statutes, and NMFS' action will not violate any laws or requirements. See response to question #7 for more details on what this policy will do.

14. Can the proposed action reasonably be expected to result in cumulative adverse effects that could have a substantial effect on the target species or non-target species?

Issuance of the Final Policy cannot reasonably be expected to result in cumulative adverse effects that could have a substantial effect on the target species or non-target species. FWS and NMFS' issuance of the Final Policy is intended to reduce inconsistencies in applying the phrase and improve effective and efficient implementation of the Act. See response to question #12 for further rationale on why implementation of this policy is expected to have limited effects, with usually the same outcomes, with or without the policy. Implementation of the proposed action, in conjunction with other past, present, and reasonably foreseeable future actions, would not be expected to result in significant cumulative impacts to the environment. As such, the proposed action will not result in cumulative adverse effects that could have a substantial effect on species in the action area.

DETERMINATION

Based on a review and evaluation of the information contained in the Environmental Assessment, it is my determination that the Final Policy interpreting the phrase "significant portion of its range" will not have a significant effect on the quality of the human environment under the meaning of section 102(2)(c) of the National Environmental Policy Act of 1969 (as amended). As shown in the Environmental Assessment, the only effects on the human environment that we can reasonably foresee resulting from the adoption of the Final Policy (Alternative 2) would be minimal and would not be significant. Such effects are limited to indirect effects that would occur if there are differences in the outcomes of future status determinations as a result of applying the interpretation outlined in the Final Policy, or cumulative effects that could occur from potentially reducing the costs of status determinations and thereby accelerating the rate of completing status determinations. However, we anticipate that any differences in status determination outcomes that would result from adopting the Final Policy would be rare and would occur only under a limited set of circumstances. We cannot foresee that any environmental effects resulting from such differences in outcomes would be significant. Moreover, any decrease in costs would likely be marginal, and therefore we do not anticipate that environmental effects from any such cost reductions would be significant.

In view of the information presented in this document and the analysis contained in the supporting EA prepared for issuance of the Final Policy, it is hereby determined that FWS and NMFS' issuance of the Final Policy will not significantly impact the quality of the human environment as described above and in the supporting documents. The proposed policy was

published in the Federal Register, and all public comments were considered and addressed. These public comments presented no new information that affects this determination. In addition, all beneficial and adverse impacts of the proposed action have been addressed to reach the conclusion of no significant impacts. Accordingly, preparation of an environmental impact statement for this action is not necessary.

JUN 03 2014

PERRY GAYARDO

for Donna S. Wieting, Director
Office of Protected Resources

Date