

**Environmental Assessment 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”**

**May 2014**

## SUMMARY

The U.S. Fish and Wildlife Service (FWS) and National Marine Fisheries Service (NMFS) (collectively, the Services) have prepared this 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.

The Endangered Species Act of 1973, as amended (16 U.S.C. 1531 et seq.) (Act) provides for the classification (i.e., the listing) and protection of “endangered species” and “threatened species.” It is implemented by the Services. Where language in the Act is ambiguous and open to interpretation, the Secretaries of the Interior and Commerce (Secretaries) have the discretion to provide a reasonable interpretation of that language. One such ambiguity is the meaning of the phrase “significant portion of its range” (SPR) found in the Act’s definitions of “endangered species” and “threatened species.”

Despite the fact that the definitions of “endangered species” and “threatened species” have been part of the Act since its enactment in 1973, prior to 2007, neither agency had adopted a regulation or binding policy defining or explaining the application of the phrase “significant portion of its range,” an element common to both definitions. Specifically, the Services have never addressed in their regulations: (1) The consequences of a determination that a “species” is either in danger of extinction, or likely to become so in the foreseeable future, throughout a significant portion of its range, but not throughout all of its range; or (2) what qualifies a portion of a range as “significant.” To address this, the Solicitor of the Department of the Interior (DOI) issued a legal opinion in 2007 addressing several issues regarding the meaning of the SPR phrase (referred to as the “M-Opinion”) (DOI 2007). The M-Opinion applied to FWS status determinations, so while it was in effect NMFS did not have a policy providing a uniform interpretation. The M-Opinion’s conclusion that provided for applying the Act’s protections to a listed species in only a portion of its range was rejected by subsequent court rulings, and the M-Opinion was withdrawn on May 4, 2011 (DOI 2011). Following withdrawal of the M-Opinion, neither agency has had a policy providing a uniform interpretation of the phrase “significant portion of its range.”

On December 9, 2011, the Services published a draft policy regarding the interpretation and application of the SPR phrase (76 FR 76987). The Draft Policy included: (1) An explanation of the consequences of a species being in danger of extinction or likely to become so in the foreseeable future throughout an SPR, but not throughout all of its range; (2) a definition of the term “significant” as it applies to SPR; (3) an interpretation of the term “range” and

explanation of how historical range is considered as it applies to SPR; and (4) a means of reconciling our draft interpretation of SPR with the inclusion of “distinct population segment” (DPS) in the Act’s definition of “species.” The Draft Policy sought public comment on the Draft Policy in an initial 60-day comment period from December 9, 2011, to February 7, 2012 (76 FR 76987); on February 7, 2012, the comment period was extended for an additional 30 days (77 FR 6138). Following review and analysis of the public comments, the Services developed the Final Policy.

This EA examines the probable environmental impacts on the human environment as a result of implementing the Final Policy. 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 the range is significant—that is, the interpretation set out in the Draft Policy (Alternative 3).

## **PURPOSE AND NEED FOR ACTION**

This environmental assessment (EA) complies with the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.) (NEPA), the implementing regulations of the Council on Environmental Quality (40 CFR Parts 1500-1508), DOI's regulations for implementing NEPA (43 CFR Part 46; 516 DM), and NOAA's Environmental Review Procedures for Implementing NEPA (NAO 216-6; NOAA Administrative Order Series 216-6).

The need underlying this policy is to develop a joint interpretation of SPR in order to reduce inconsistencies in applying the phrase and improve effective and efficient implementation of the Act. The other purposes that the policy needs to meet are to be consistent with the plain language and mandates of the Act, and with case law, to provide clarity as to both the meaning and consequences of the SPR phrase so that the Services will be accorded deference when we apply the interpretation in making status determinations, and to further the conservation purposes of the Act.

## SCOPING

In 2009, the FWS Endangered Species Program (now the Ecological Services Program) and the NMFS Office of Protected Resources formed an internal working group – the SPR team – that included representatives from both agencies and their headquarters and regional offices. The team was charged with considering possible interpretations of the phrase “significant portion of its range” and developed and analyzed a range of potential alternatives. The SPR team conducted the internal scoping. That team explored options, and presented them to others in the Services, then incorporated internal feedback before presenting them to the drafting team. The drafting team consisted of representatives from both agencies and their headquarters offices.

In publishing the Draft Policy, the Services described some of the options that we 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 the Services had received on the Draft Policy, determined whether to change any aspects of the Draft Policy based on that feedback, and developed responses to all of the substantive comments.

## DESCRIPTION OF THE ALTERNATIVES

This section describes the three alternatives for which this environmental assessment evaluated the environmental impacts in compliance with NEPA. It then describes other alternatives that the Services considered, as described in the Draft Policy, but for which the Services did not evaluate the environmental impacts, because those alternatives did not meet the purpose of and need for the action.

### Alternative 1 – No Action Alternative

Under the no action alternative, the Services would not adopt a formal, written policy and would apply the phrase “significant portion of its range” on a case-by-case basis, as it has been doing in the absence of an applicable interpretation. Under this alternative, the Services would continue to evaluate the “significant portion of its range” for each species as we work through the listing process, and would also determine on a case-by-case basis how to proceed if a species’ population in an SPR constitutes a DPS of the species.

### Alternative 2 – Preferred Alternative

Under Alternative 2, the Services would adopt a formal, written policy that prescribes the following four elements that factor into interpreting the phrase “significant portion of its range” and applying that interpretation within the statutory framework of the Act:

- (1) Consequences of a species being in danger of extinction or likely to become so in the foreseeable future throughout a significant portion of its range: The phrase “significant portion of its range” in the Act’s definitions of “endangered species” and “threatened species” provides an independent basis for listing. Thus, there are two situations (or factual bases) under which a species would qualify for listing: a species may be endangered or threatened throughout all of its range; or a species may be endangered or threatened in only a significant portion of its range. If a species is found to be endangered or threatened in only a significant portion of its range, the entire species is listed as an endangered or threatened species, respectively, and the Act’s protections apply across the species’ entire range.
- (2) Significant: A portion of the range of a species is “significant” if the species is not currently endangered or threatened throughout its range, but the portion’s contribution to the viability of the species is so important that, without the members in that portion, the species would be in danger of extinction, or likely to become so in the foreseeable future, throughout all of its range.

- (3) Range: The range of a species is considered to be the general geographical area within which that species can be found at the time FWS or NMFS makes any particular status determination. This range includes those areas used throughout all or part of the species' life cycle, even if they are not used regularly (e.g., seasonal habitats). Lost historical range is relevant to the analysis of the status of the species, but it cannot constitute a significant portion of a species' range.
- (4) Reconciling SPR with DPS authority: If the species is endangered or threatened throughout a significant portion of its range, and the population in that significant portion is a valid DPS, we will list the DPS rather than the entire taxonomic species or subspecies.

Alternative 2 will result in protection of the species throughout all of its range should that species be found to be endangered or threatened only in an SPR (unless the population in that SPR is a valid DPS). This is consistent with the plain meaning of the Act (e.g., sections 3(6), 7, and 9). Under Alternative 2, if we determine that a species is endangered (or threatened) throughout all of its range, we will list the species as an endangered (or threatened) species, and no SPR analysis will be conducted. If we find that a species is neither endangered nor threatened throughout its entire range, we will determine whether the species is endangered or threatened in a significant portion of its range. If we determine that the species is endangered or threatened in a significant portion of its range, we will list (or continue to list) the species as an endangered or threatened species and protections will apply to the entire species, whereas if we determine that the species is neither endangered nor threatened in a significant portion of its range, we will not list the species (or delist it if it is currently listed).

### **Alternative 3 – Different Interpretation of When a Portion of the Range is Significant**

Under Alternative 3 (which would finalize the Draft Policy as published; see 76 FR 76987), the Services would adopt a formal, written policy that prescribes nearly the same four elements that are described in Alternative 2. However, Alternative 3 defines the term “significant” differently from how Alternative 2 defines the term. The second element under Alternative 3 would be as follows:

Significant: A portion of the range would be 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.

Therefore, Alternative 3 is similar to Alternative 2, in that both versions apply the protections of the Act to the entire species should that species be found to be endangered or threatened in only a significant portion of its range, use the same definition for the range of the

species, and will list the DPS rather than the entire species or subspecies should the species be endangered or threatened throughout a significant portion of its range, and the population in that significant portion is a valid DPS.

However, the definition of “significant” under Alternative 3 differs from that under Alternative 2 in two respects. First, under Alternative 3 a portion of a species’ range may qualify as “significant” even if the species is threatened or endangered throughout its range, while under Alternative 2 it could not. Thus, under Alternative 3 there would be more situations in which the Services would need to undertake an SPR analysis (although as a practical matter, a different result will be possible only for species that are threatened throughout all of their ranges). Conducting more than cursory SPR analyses<sup>1</sup> for species that are threatened throughout all of their range could potentially lead to a greater likelihood of finding species that have SPRs, but this would not mean that more species would be listed. For species that are threatened throughout all of their ranges, the SPR analyses under Alternative 3 either would have no effect on the listing status of the species or would change the classification of the species from a threatened species to an endangered species. (If the SPR analysis concludes that the portion of the range is not significant (because the species would not be endangered even if it were extirpated from that portion of its range), the species would still be listed as a threatened species, by virtue of its threatened status throughout its range; if the SPR analysis concludes that the portion of the range is significant (because the species would be endangered if it were extirpated from that portion of its range), and the species is threatened throughout that portion of its range, the species would still be listed as a threatened species throughout its range, by virtue of its threatened status both throughout its range and throughout that portion of its range; and if the SPR analysis concludes that the portion of the range is significant, and the species is endangered throughout that portion of its range, the species would still be listed throughout its range, but would be classified as an endangered species (by virtue of its status as endangered throughout that significant portion of its range) rather than a threatened species). In other words, the primary result of conducting more than a cursory SPR analysis for a species that is threatened throughout its range is the possibility of listing the species throughout its range as endangered, instead of threatened, because of its endangered status in a significant portion of its range).

The second difference between Alternatives 2 and 3 is that under Alternative 3 for a portion of a species’ range to qualify as “significant,” the species would need to be endangered (rather than either threatened or endangered) throughout its range without the members in that

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<sup>1</sup> “SPR analysis” or “detailed SPR analysis” refers to the analysis required to determine if a portion of a species’ range meets the definition of “significant” (for example, under Alternative 2, if, without the members in that portion of its range, the species would be threatened or endangered throughout all of its range). Frequently, the status determination for a species describes the range of a species as so limited or the threats to the species as so evenly distributed throughout its range that no portion of the species’ range would meet the definition of “significant” or contain members with a different listing status from rest of the species. Throughout this document, we refer to the brief discussion in these instances explaining why it is not necessary to undertake a detailed SPR analysis as a “cursory SPR analysis.”

portion of its range. This would mean that there would likely be fewer instances in which a portion of a species' range qualifies as "significant."

The two circumstances in which these two differences would result in a different outcome for the SPR analysis would be (1) where a species is currently threatened throughout its range but is endangered throughout a portion of its range and would be endangered throughout all of its range without the members in that portion of its range (under Alternative 3 that portion of the species' range would be "significant" and the species would be listed throughout its range as an endangered species (by virtue of its endangered status throughout that SPR), but under Alternative 2 we would not ask the question of whether the portion of the species' range is significant, because we would stop our analysis after finding that the species is threatened throughout its range); and (2) where a species is not currently endangered or threatened throughout its range, but is threatened or endangered throughout a portion of its range and would be threatened throughout all of its range without the members in that portion of its range (under Alternative 3 that portion of the species' range would not be "significant," and the species would not be listed, but under Alternative 2 that portion of the species' range would be "significant," and the species would be listed throughout its range as threatened or endangered, depending on its status in that portion of its range).

### **Other Alternatives Considered, But Not Evaluated in this Environmental Assessment**

The Services considered several other alternatives, but concluded that these alternatives did not meet the purposes and need underlying the action. Therefore, the Services did not assess the environmental impacts of those alternatives.

With respect to the first element of the policy—the consequences of determining that a species is in danger of extinction or likely to become so in the foreseeable future throughout a portion of its range—the Services considered whether to adopt an interpretation that would apply the protections of the Act only in the SPR. Under this alternative, a species may be found to be endangered or threatened throughout all of its range, or endangered or threatened in only a significant portion of its range. If a species is threatened or endangered in only an SPR, protections would apply only to that SPR. This alternative is most consistent with the 2007 DOI Solicitor's Memorandum Opinion (M-Opinion), which was withdrawn on May 4, 2011. Two courts have found that this aspect of the M-Opinion violated the plain and unambiguous language of the Act (see *Defenders of Wildlife v. Salazar*, 729 F. Supp. 2d 1207 (D. Mont. 2010), *vacated as moot*, 2012 U.S. App. Lexis 26769 (9th Cir. Nov. 7, 2012), and *Wild Earth Guardians v. Salazar*, 2010 U.S. Dist. LEXIS 105253 (D. Ariz. Sept. 30, 2010)), and concluded that reading the SPR language to allow protecting only a portion of the species' range is inconsistent with the Act's definition of "species," which forecloses listing any population that does not qualify as a species, subspecies, or DPS. The Services did not evaluate the

environmental impacts of this alternative because it would not meet the purposes of being consistent with case law and providing the Services the maximum degree of judicial deference regarding our interpretation and application of the SPR language in status determination rules.

With respect to the second element of the policy—the meaning of “significant”—the Services considered adopting the interpretation that the SPR phrase does not provide an independent basis for listing, but rather clarifies the extent to which the Services must show that a species is endangered or threatened throughout its range. This interpretation of the SPR phrase—also referred to as the “clarification interpretation”—would allow the Services to list a species if we determine that it is endangered or threatened in at least a portion of its range that is so significant to the whole that it is currently driving the status of the entire species. Under this alternative, the Services would not need to demonstrate that threats occur throughout the range of the species, or know definitively the status of the species everywhere, provided that we could infer its overall status by evaluating its status within a significant portion. The Services eliminated this alternative, as it has been rejected by the Ninth Circuit (see *Defenders of Wildlife v. Norton*, 258 F.3d 1136 (9th Cir. 2001) (*Defenders – Lizard*)), which held that this interpretation of SPR was inconsistent with the plain meaning of the Act. Therefore, The Services did not evaluate the environmental impacts of such an alternative, because it would not meet the purposes of being consistent with the plain language and mandates of the Act, and with case law, and providing a maximum degree of judicial deference.

With respect to the third element of the policy—the definition of “range”—the Services rejected the possibility of including lost historical range as part of the term “range.” If lost historical range were part of the range of a species, for purposes of the SPS analysis the Services would have to evaluate whether the lost historical range is a significant portion of the species’ range and whether the species is endangered or threatened in that portion of its range. However, it would be inconsistent with the statutory definition of “endangered species” and “threatened species” to attempt to evaluate whether a species is “in danger of extinction,” or likely to become so in the foreseeable future, in a portion of its range where it has already been extirpated. A species’ lost historical range would still be relevant to the Services’ analysis of the status of the species.

With respect to the fourth element of the policy—the interplay between listing a species that is threatened or endangered in an SPR and listing a DPS of a species—the Services considered whether the SPR and DPS language comprise a single authority, in that the SPR phrase and DPS language in the definition of “species” are read together to provide a single authority to list populations (“single-authority interpretation”). This alternative would interpret the SPR phrase to be a descriptive term that places a limitation on the listing of populations of species or subspecies by only allowing listing of populations that make up a significant portion of the entire species’ or subspecies’ range. The Services eliminated this alternative because it would be inconsistent with the statute. The phrase “distinct population segment” appears in the definition of “species” (section 3(16)). The phrase “significant portion of its range” appears in

the definitions of “endangered species” (section 3(6)) and “threatened species” (section 3(20)), not in the definition of “species” (section 3(16)). The single-authority interpretation would essentially be treating the phrase “significant portion of its range” as if it did appear in the definition of “species.” Therefore, this interpretation would be contrary to the plain language of the Act. It would also be contrary to court decisions requiring that the Services undertake a separate analysis of whether the species at issue is threatened or endangered throughout a significant portion of its range (*E.g., Defenders of Wildlife, et al., v. Norton, et al.*, 258 F.3d 1136 (9<sup>th</sup> Cir. 2001)). As a result, the Services did not evaluate the environmental impacts of such an alternative, because it would not meet the purposes of being consistent with the plain language and mandates of the Act, and providing the maximum degree of judicial deference, and therefore would not meet the purposes and need identified above.

Finally, with respect to the policy as a whole, the Services considered interpreting the phrase “significant portion of its range” through guidance that does not require a notice-and-comment rulemaking process. However, the extent to which the Services, in their listing decisions, could rely on a policy that had not been adopted through notice-and-comment rulemaking process would be unclear. Therefore, the Services did not evaluate the environmental impacts of such an alternative, because it would not meet the purposes of providing the maximum degree of judicial deference, providing clarity as to the meaning and effect of the SPR phrase, and improving effective and efficient implementation of the Act. Some alternatives that were suggested during public comment, such as amending the Act, were beyond the authority of the Services, so we likewise did not evaluate the environmental impacts of those alternatives, because they would not meet the purpose of being consistent with the plain language and mandates of the Act, and therefore would not meet the purposes and need identified above.

## **AFFECTED ENVIRONMENT**

This section describes the environment that could be affected by implementation of the alternatives described above. The aspects of the affected environment described in this section focus on relevant major resources and issues to determine if a significant impact may occur.

This policy will directly affect only listing determinations made by the Services. But because listed species may in theory be found anywhere life can exist on the planet, the geographic area that may be indirectly affected by the proposed action includes the entire world. The proposed action would, however, only address the process and outcomes for listing, uplisting, downlisting, and delisting under Section 4 of the Endangered Species Act. The Endangered Species Act of 1973, as amended (16 U.S.C. 1531 et seq.) (Act) provides for the classification (i.e., the listing) and protection of “endangered species” and “threatened species.”

Status determinations under Section 4(a)(1) of the ESA can have several potential outcomes—to list the species as threatened (or downlist it from endangered to threatened) either throughout all of its range or throughout a significant portion of its range; to list the species as endangered (or uplist it from threatened to endangered) either throughout all of its range or throughout a significant portion of its range; to delist the species; or not to list, reclassify, or delist the species. Interpretation and application of the “significant portion of its range” language may affect the outcome of listing determinations, and the degree to which protective provisions of the Act apply. However, these results would occur only under a limited set of circumstances (such as where, without that portion of the range, the rest of the population might not be large enough to be resilient to variations in environmental conditions; might not be able to maintain a high-enough growth rate to persist in the face of threats without that portion; might be so fragmented that important demographic and population-dynamic processes are disrupted; or might not have sufficient genetic diversity to provide evolutionary resilience). Under most circumstances, we would anticipate that the outcomes of our status determinations with or without the Final Policy would be the same. 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 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 is endangered or threatened throughout all its range.

Once a species is determined to be an endangered species or a threatened species, the provisions of the Act are applied similarly, regardless of whether the species was listed because it is endangered or threatened throughout all of its range or throughout only a significant portion of its range. Therefore, if the Services determine that a species is endangered or threatened in a significant portion of its range, under either the Final or Draft Policy we will list the entire species, and apply protections of the Act to all individuals of the species wherever found (50

CFR 17.11(e) and 17.12(e)), triggering statutory and regulatory requirements under other sections of the Act. These statutory and regulatory requirements include prohibitions against harming the species or adversely modifying its critical habitat, and requirements for the development of recovery plans and for federal agencies to ensure that their actions are not likely to jeopardize the continued existence of the species or adversely modify its critical habitat. For example, the Act and its implementing regulations set forth a series of general prohibitions and exceptions that apply to all endangered and threatened<sup>2</sup> wildlife. The prohibitions of section 9(a)(2) of the Act, codified at 50 CFR 17.21 for endangered wildlife, in part, make it illegal for any person subject to the jurisdiction of the United States to take (includes harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect; or to attempt any of these), import, export, ship in interstate commerce in the course of commercial activity, or sell or offer for sale in interstate or foreign commerce any listed species. Under the Lacey Act (18 U.S.C. 42–43; 16 U.S.C. 3371–3378), it is also illegal to possess, sell, deliver, carry, transport, or ship any such wildlife that has been taken illegally. Certain exceptions apply to agents of the Service and State conservation agencies. Therefore, although the policy itself only directly addresses the Services' analyses in determining whether or not to list species, to the limited extent that the policy may change the substantive outcomes of status determinations, there are numerous resources it could indirectly affect, including:

### **Physical Environment**

- **Water Quality and Water Resources**

The current regulatory definition for waters of the United States can be found at 40 CFR 230.3(s) (see [http://www.ecfr.gov/cgi-bin/text-idx?tpl=/ecfrbrowse/Title40/40cfr230\\_main\\_02.tpl](http://www.ecfr.gov/cgi-bin/text-idx?tpl=/ecfrbrowse/Title40/40cfr230_main_02.tpl)) and is incorporated here by reference.

- **Soil Resources**

The Natural Resources Conservation Service (NRCS) maintains the Official Soil Series Descriptions, which is a national collection of more than 20,000 detailed soil series descriptions covering the United States. Those descriptions are incorporated here by reference and be accessed online at [http://www.nrcs.usda.gov/wps/portal/nrcs/detail/soils/home/?cid=nrcs142p2\\_053587](http://www.nrcs.usda.gov/wps/portal/nrcs/detail/soils/home/?cid=nrcs142p2_053587).

- **Wetlands**

Wetlands are defined as "those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal

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<sup>2</sup> Although the protections of section ESA 9(a)(2) apply only to endangered species, Section 4(d) requires the Services to issue regulations that are "necessary and advisable" to provide for the conservation of threatened species as well, and for threatened wildlife this may include adopting the protections of Section 9(a)(2). FWS applies the protections of Section 9(a)(2) to all threatened wildlife, absent a special rule for the specific wildlife species. 50 C.F.R. 17.31(a). NMFS promulgates protective regulations specific to individual threatened species.

circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs and similar areas." (40 CFR 230.3(t)). Wetlands are protected under the Clean Water Act. The U.S. Army Corps of Engineers reviews and issues section 404 permits under the Clean Water Act; these permits relate to the discharge of dredged or fill material into waters of the United States, including wetlands.

### **Biological Environment**

- **Biological Resources** (listed and sensitive species, vegetation, common species, ecosystem services, etc.)

Biological resources are the plant and animal species and their habitats comprising an ecosystem. These include areas the species may use for feeding, breeding, or sheltering. The biological resources of importance to a species, such as habitat types and food resources, are generally identified in both the proposed and final status determination rules or provided in supplementary documentation.

The listing of a species under the ESA may draw public attention to the ecosystem services provided by the ecosystem in which the species occurs. Other listed or sensitive species, such as those on the candidate list or sensitive species identified by other Federal agencies, may be found within the range of the listed species.

### **Socio-Economic Environment**

- **Costs to the Federal Government**

Section 7(a) of the Act requires Federal agencies to evaluate their actions with respect to any species that is proposed or listed as an endangered or threatened species and with respect to its critical habitat, if any is designated. Regulations implementing this interagency cooperation provision of the Act are codified at 50 CFR part 402. Section 7(a)(4) of the Act requires Federal agencies to confer with the Service on any action that is likely to jeopardize the continued existence of a species proposed for listing or result in destruction or adverse modification of proposed critical habitat. If a species is listed subsequently, section 7(a)(2) of the Act requires Federal agencies to ensure that activities they authorize, fund, or carry out are not likely to jeopardize the continued existence of the species or destroy or adversely modify its critical habitat. If a Federal action may affect a listed species or its critical habitat, the responsible Federal agency must enter into consultation with the Service.

Federal agency actions within the species' habitat that may require conference or consultation or both as described in the preceding paragraph include management and any other landscape-altering activities on Federal lands or waters administered by the U.S. Fish and Wildlife Service, the Bureau of Ocean Energy Management, U.S. Forest

Service, National Park Service, Bureau of Land Management, or other federal agencies; issuance of section 404 Clean Water Act permits by the Army Corps of Engineers; and construction and maintenance of roads or highways by the Federal Highway Administration.

Finally, in addition to the costs incurred in consulting with the Services and potentially modifying their actions to avoid jeopardizing the continued existence of listed species or adversely modifying their critical habitat, Federal agencies may incur additional costs in implementing the requirement under section 7(a)(1) to undertake programs for the conservation of threatened and endangered species. Listing domestic species also triggers the requirement under section 4(f) of the ESA to develop and implement recovery plans for listed species.

- Land Use (grazing, agriculture, energy, development, transportation, etc.)

Land use may be defined as the ways in which humans utilize the land and its resources. Land uses include agriculture, energy development, grazing, transportation, housing, logging, or recreation. The listing of a species may affect the types of land use activities occurring within the range of the species if such activity may result in take of a listed species, or may require Section 7 consultation if the land use has a federal nexus.

- Cultural Resources

Cultural resources include archaeological sites, historic buildings and structures, landscapes, and objects with historical significance. Listed species may occur in areas of cultural significance, such as National Parks or National Monuments.

- Tribal lands

Listed species may occur on tribal lands. Tribal lands may mean any land or interests in land owned by a tribe or tribes, title to which is held in trust by the United States, or is subject to a restriction against alienation under the laws of the United States. In accordance with the President's memorandum of April 29, 1994 (Government-to-Government Relations with Native American Tribal Governments; 59 FR 22951), Executive Order 13175 (Consultation and Coordination With Indian Tribal Governments), and the Department of the Interior's manual at 512 DM 2, we acknowledge our responsibility to communicate meaningfully with recognized Federal Tribes on a government-to-government basis. In accordance with Secretarial Order 3206 of June 5, 1997 (American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act), we acknowledge our responsibilities to work directly with tribes in developing programs for healthy ecosystems, to acknowledge that tribal lands are not subject to the same controls as Federal public lands, to remain sensitive to Indian culture, and to make information available to tribes.

## ENVIRONMENTAL CONSEQUENCES

The CEQ regulations implementing NEPA specify that agencies are to examine whether a proposed action will have direct, indirect, or cumulative effects on the quality of the human environment. The regulations define “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. Effects may be beneficial or adverse. More specifically, the CEQ regulations define the three types of effects as follows:

“Direct effects” are defined as those effects “which are caused by the action and occur at the same time and place.” 40 C.F.R. § 1508.8(a).

“Indirect effects” are defined as those effects “which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable.” 40 C.F.R. § 1508.8(b).

“Cumulative impact” is defined as “the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions.” 40 C.F.R. § 1508.7.

The discussion of effects in this section considers all three of the above definitions when using the term “effects” for purposes of NEPA. Note that the CEQ definitions, above, are different from the ESA definitions of these same (or similar) terms, and the CEQ definitions for NEPA are specifically applicable for the analyses in this section of this EA.

This EA examines whether the three alternatives identified by the Services (Alternative 1 – No Action; Alternative 2 – Preferred Alternative; and Alternative 3 – Draft Policy), will have direct, indirect, or cumulative effects on the quality of the human environment, and assesses the significance of any such effects. The purpose of any policy interpreting the phrase “significant portion of its range” would be to inform and clarify future status determinations, and would not affect past status determinations, unless and until the Services again evaluate the status of those species (whether through a five-year review, a future petition finding related to the species, or a future status review initiated by the Services as a result of new information).<sup>3</sup> Therefore, the only direct effect would be to provide clarity and uniformity to the Services, Federal and State

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<sup>3</sup> We note, however, that even in those instances when the Services re-evaluate the status of species that were listed in the past, we do not anticipate that either policy would have the effect of changing the status of those species, except in rare circumstances. As discussed throughout this EA, listing a species because of its status in a portion of its range is infrequent. Moreover, under most circumstances, we would anticipate that the outcomes of our status determinations with or without the Final Policy or the Draft Policy would be the same.

agencies, and the public regarding how the Services will interpret the phrase “significant portion of its range” in determining whether to accept or reject as “significant” portions of the range of species for purposes of future status determinations. Since any effects to the human environment would not occur in the same time and place that the policy becomes effective, only indirect and cumulative effects to the human environment could result from adopting one of the policies.

We have identified three general series of actions and consequences, or pathways, through which indirect and cumulative effects to the human environment could potentially occur as a result of adopting any of the three alternatives analyzed in this environmental assessment. The first pathway would be through providing clarity and uniformity regarding the Services’ interpretation of SPR. The second pathway would be through changing the outcomes of future status determinations—that is, changing whether a species gets listed, uplisted, delisted, or downlisted; what its listing status is; or whether that listing status applies throughout all of the species’ range or throughout a significant portion of it. The third pathway would be through increasing or reducing the costs incurred within the Services’ listing programs; to the extent that any alternative will lead to a decrease in the amount of staff time and budget that goes into making status determinations, the cumulative effect could be to enable the Services to complete more status determinations each fiscal year, which could have primarily beneficial effects on the species and their habitat.

However, for future actions or future effects to be “reasonably foreseeable,” they must be sufficiently likely to occur that a reasonable person would take them into account in reaching a decision. Although we can anticipate potential actions or consequences that could flow from pursuing each of the three alternatives that are evaluated in this EA, we quickly reach a point where we cannot conclude that those potential actions or consequences are sufficiently likely to occur that a reasonable person would take them into account in reaching a decision, because their likelihood would depend on intervening actions or circumstances that the Services cannot ascertain at this time. Any environmental consequences we can identify are beyond that point, because the nature and scope of those consequences would depend upon intervening circumstances, such as, for example, the outcomes of future status determinations, the biology of and threats to the species whose status those determinations resolve, and what actions third parties take as a result of those status determinations. Therefore, we cannot identify environmental consequences that we can conclude would be reasonably foreseeable as a result of pursuing any of these alternatives.

The first pathway through which effects to the human environment could potentially occur as a result of pursuing one of these alternatives would be from providing clarity and uniformity regarding how the Services will interpret and apply the phrase “significant portion of its range.” Although the no-action alternative (Alternative 1) would not result in this additional clarity and uniformity, adopting either the Final Policy (Alternative 2) or the Revised Policy

(Alternative 3) could, and thereby would 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. However, although the Services' decision on the SPR Policy takes into account that providing clarity and uniformity will allow parties to make more informed decisions, it would be speculative to try to predict how parties will ultimately make use of this information in the future. We therefore cannot predict how the future actions of landowners or government agencies that are informed by this increased clarity and uniformity would affect the human environment. Although we are taking into consideration that allowing government agencies and interested parties to make more informed decisions is desirable, we cannot conclude that in selecting among the three alternatives a reasonable person would take into consideration speculative environmental consequences that could result from those future decisions.

The second pathway through which effects to the human environment could potentially occur as a result of pursuing one of these alternatives would be from changing the outcomes in status determinations. Under the ESA, the outcomes from status determinations can vary in three different ways: (1) whether or not the species gets (or stays) listed; (2) if listed, whether the listing status is threatened or endangered; and (3) if listed, whether the species is listed throughout all of its range or only throughout a significant portion of its range. The Services currently conduct numerous status assessments a year. We have listed and will continue to list species regardless of adoption of any of these alternatives. The effect we are assessing in this document is the extent to which there will be an increment of change in outcomes—such that more or fewer species would be listed, the listing status of any of the species that are listed would be different, or there would be a different range throughout which any species would be listed. The Draft Policy and Final Policy establish a relatively high threshold for significance—a higher threshold than requiring only that without that portion the extinction risk of the species be increased, but a lower threshold than requiring that the status of the species in that portion currently drive the status of the species throughout its range. This means that either the Draft Policy or the Final Policy could result in the Services' listing and protecting throughout their ranges species that previously we would not have listed under the clarification interpretation, or in FWS' listing and protecting throughout their ranges species that we would have listed in only portions of their ranges under the M-Opinion. In other words, adopting either the Final Policy or the Draft Policy may result in some additional listings or listings of species over a greater area.

Any additional or more-widespread listings would lead to additional protections not only for those species, but also for their critical habitat—such as water, soil, and wetlands resources. For example, once a species is listed, the Section 9 prohibitions against harming the species would generally apply to endangered species (and to threatened species to the extent that a rule under section 4(d) makes those prohibitions applicable). This would trigger permit requirements, which could require individual landowners to develop habitat conservation plans. In accordance

with Section 7, Federal agencies would be required to avoid jeopardizing the continued existence of the species or adversely modifying its critical habitat, and might also implement conservation programs for the species in accordance with the requirement to “carry[] out programs for the conservation” of listed species. Recovery planning and implementation would occur, and stakeholders might modify their actions, or prioritize their conservation actions differently. Conversely, any fewer listings, listings throughout a smaller portion of range, and in some cases listings of species as threatened instead of endangered could withhold protections for those species and their critical habitat.

Another potential change in outcomes could be reducing legal vulnerability so that status determinations are less likely to be vacated as a result of adverse court decisions. Environmental consequences from vacating listing or uplisting determinations (or vacating them pending remand) would include removing ESA protections for the species and their critical habitats until the deciding Service can complete a new rulemaking. Environmental consequences from vacating delisting or downlisting determinations pending remand would include keeping in place ESA protections for the species and their critical habitats until the deciding Service can complete a new rulemaking. The Services cannot at this time speculate about the outcomes of future litigation, including what kinds of status determinations (listing, uplisting, delisting, or downlisting) would be challenged in the future, whether SPR analyses in those status determinations will withstand judicial scrutiny, or whether courts will vacate status determinations pending remand. Therefore, the Services cannot reasonably foresee which environmental consequences are likely to flow from the theoretical decrease in likelihood of remands, or the scale of those consequences.

Although we can reasonably foresee in general that adopting the Draft Policy or the Final Policy could change the outcomes of future status determinations, we cannot reasonably predict which species would be listed, listed with a different status, or listed throughout all of their ranges as a result of any of those changed outcomes, nor can we identify with any specificity the resources that provide critical habitat to those species. The no-action alternative would allow the Services to apply different interpretations of the phrase “significant portion of its range” in their future status determinations, which could change the outcomes of those determinations. But because any such changes would be a result of intervening future actions, it is even more difficult to predict those changes. Even if we could predict how future status determinations would change under any of the alternatives, we would not be able to predict how land uses or other actions of interested parties would change as a result of listing or not listing the species, designating the species as threatened or endangered, or listing them over a more broad or narrow range. Therefore, beyond recognizing that there may be species that get listed, get listed with a different status, or get listed throughout all of their ranges, as a result of adopting the Draft or Revised Policy, we cannot reasonably foresee the specific nature and scope of environmental consequences that would result from that change. Evaluating the nature and scope of those

environmental consequences would require us to predict, among numerous other factors: (1) the species whose status the Services are likely to assess in the future, (2) the biological needs, range, and threats that are likely to be relevant to those future status determinations, (3) the species for which the Services will likely need to (or decide to) evaluate threats in a portion of the range, (4) the likely outcome of those status determinations with respect to the status of the species throughout all or a portion of its range, (5) whether a species' population within the portion of its range is a valid DPS, and (6) the changes in protections to the species or in actions of stakeholders that will result from that decision about the status of the species and that could affect the environment.

The only one of these five factors that we could evaluate with some confidence would be the first, and even that would be limited. Although workload information such as candidate lists, work plans, and five-year review results could provide an indication of what species will be assessed in the next few years and potentially beyond that point, such information extends only a relatively short time into the future, and frequently changes over time. The Services cannot at this time evaluate the second and third factors at all, because listing decisions are highly fact-specific, and must be based on the best available information about the biological needs of the species and the threats they face at the time the listing decision is made. With respect to the fourth and fifth factors, the Service cannot at this time pre-judge the likely outcome of its future status determinations, including whether a species' population in the portion of its range is a valid DPS. Finally, it would be speculative to attempt to predict for purposes of the sixth factor whether any status determination is likely to result in species protections, the scale of such protections, if any, or the extent to which the status determination is likely to lead to human actions that would have environmental consequences.

What we can reasonably foresee is that the scale of any environmental consequences that would flow from adopting the Draft Policy or Final Policy is likely to be small. Listing a species because of its status in a portion of its range is relatively infrequent. In the four years and two months that the M-Opinion was in effect, FWS made only two final status determinations (along with three other findings, including proposed listing rules and warranted-but-precluded findings) that found a species to be threatened or endangered in a significant portion of its range. In the two years and ten months since the M-Opinion was withdrawn—during which time the Services have in most status determinations determined that the circumstances warranted applying the interpretations and principles contained in the Draft Policy—there has been only one final status determination in which the Services found a species to be threatened or endangered throughout a significant portion of its range. In that instance, we determined that there were two SPRs of the species (in this case, a DPS). However, both SPRs had the same status as the DPS throughout all of its range – threatened. The DPS was therefore listed as threatened not because of its status in those portions of the range, but rather because it was threatened throughout all of its range. This exemplifies the Services' assessment—

articulated in both the Draft and Final Policies—that under most circumstances the outcomes of our status determinations will be the same regardless of whether the Draft Policy, the Final Policy that is the preferred alternative, or no binding policy is in effect. The Services further conclude that any change in outcomes would only occur under a limited set of circumstances.

The third pathway through which effects to the human environment could potentially occur would be through changing the cost of status determinations. There are two ways in which the alternative chosen could change the cost of status determinations—(1) through changing the amount of staff time and budget that goes into individual status determinations and (2) through affecting the likelihood of adverse court decisions and therefore the number of remanded status determinations the Services must complete. Individual status determinations could become less time-consuming and costly if the Services adopt a binding SPR policy, because there would be no need to resolve how best to interpret the meaning and consequences of the phrase, nor would there be a need to explain in each status determination why that interpretation is reasonable. In addition, if a species within a portion of its range is a DPS, there would be no need to complete an SPR analysis because of the way the Draft and Final Policy reconcile the SPR and DPS authorities. Likewise, the likelihood of adverse decisions and accompanying remands would decrease if the Services adopt a binding SPR policy, because the courts afford a higher level of deference when agencies follow a binding policy that has undergone a notice-and-comment-rulemaking process. However, it would be speculative to attempt to predict the specific circumstances of how the Services will apply the binding policy in the future, how often legal challenges to the adequacy of those SPR analyses will occur, how courts will rule in those challenges, or how outcomes will differ under the different alternatives. Even under Alternative 1, in which the Services would not adopt through APA rulemaking a binding policy that would get judicial deference, the Services could in the future take a number of precautions—such as including in its APA notice and comment for every status determination with an SPR component a thorough explanation of what interpretation of the phrase the determining Service applied and why it was reasonable—that could decrease the likelihood of adverse court decisions.<sup>4</sup>

Because funding and staff time for determining the listing status of species are allocated in the context of a broader ESA or listing budget, increasing or decreasing the costs associated with status determinations—whether by changing the costs of individual status determinations or by changing the frequency with which courts remand status determinations back to the Services—could have the cumulative effect of either supplanting (and thereby delaying) or accelerating work on other status determinations or other activities related to implementing the

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<sup>4</sup> For example, in the time since the Draft Policy was published in December 2011, the Services have considered it to be nonbinding guidance, and determined in individual instances that the circumstances warranted applying the interpretations and principles contained in the Draft Policy. Of the 397 status determinations for which the Services conducted either a cursory or detailed SPR analysis, none of those SPR analyses were challenged, and none of the determinations were remanded because of the SPR analysis.

ESA. This could affect the amount of work the Services can complete both in their listing programs and in their ESA programs overall. For example, within the Fish and Wildlife Service, determinations on whether to add species to the list or “uplist” the status of species from threatened to endangered are funded from an account for listing activities that is subject to a spending cap set by Congress each fiscal year. Therefore, an increase in the cost of listing and uplisting status determinations would have the effect of decreasing the number of determinations the Fish and Wildlife Service can complete related to listing and uplisting species each fiscal year. An increase in the number of listing and uplisting status determinations the Services could complete over a given period of time would, if those additional determinations result in listing or uplisting the species, accelerate ESA protections not only for those species whose status determinations are accelerated, but also for the critical habitat—such as water, soil, and wetlands resources—that those species depend on. The nature and scope of these environmental effects depend on the extent to which there are activities that would have been conducted during that time period that will be prohibited or modified in accordance with the requirements of the ESA protections because of the listing or uplisting of the species. Conversely, a decrease in the number of listing or uplisting status determinations the Services could complete in a given period of time would delay ESA protections for the species whose status determinations are delayed, as well as for their critical habitats; and the environmental effects from this delay would depend on the extent to which there are activities that will be conducted during the delay that would have been prohibited or modified if the status determination had been completed and had resulted in listing the species.

Determinations within the Fish and Wildlife Service on whether to remove species from the list or “downlist” the status of species from endangered to threatened are funded from a different account, which also funds other ESA activities, such as recovery planning and implementation, five-year reviews, special rules under Section 4(d), and post-delisting monitoring. Therefore, a change in the costs of delisting and downlisting status determinations could have the overall effect of changing the number of ESA actions, such as delisting determinations, downlisting determinations, recovery plans, actions prescribed in recovery plans, five-year reviews, 4(d) rules, and/or post-delisting monitoring activities the Fish and Wildlife Service could work on and complete in any fiscal year. The total indirect effects that would follow would depend on which kinds of actions get accelerated or delayed. Delaying delisting or downlisting determinations—and some five-year reviews or 4(d) rules (where those actions indicate the need for, or put in place, decreased ESA protections)—would have the effect of leaving unnecessary protections in place for a longer period of time, which could have socio-economic impacts, such as by affecting land use. The nature and scope of land-use impacts this would cause would depend on the extent to which there are land-use activities that will require delay or modification but would have been able to go forward during the delay period unimpeded if the delisting or downlisting determination, five-year review, or 4(d) rule had not been delayed. Accelerating those actions would have the effect of decreasing or removing

protections sooner and minimizing such adverse socio-economic impacts. Delaying recovery planning and implementation or post-delisting monitoring—along with some five-year reviews or 4(d) rules (where those actions indicate a need for, or put in place, greater ESA protections)—would delay the implementation of conservation actions. Delayed conservation actions could negatively affect not only the species, but also the critical habitat—such as water, soil, and wetlands resources—that those species depend on. Accelerating those conservation actions would benefit the species and its critical habitat—including water, soil, vegetation, wetlands, or any other resources on which those species depend.

For the National Marine Fisheries Services, the funding for all ESA actions comes from the same appropriation, and therefore any increase in costs could impede completion of any type of ESA action, while any decrease in costs would make additional resources and staff time available for completing all types of ESA actions. We note that, regardless of which Service is affected or which kinds of status determinations become more or less costly as a result of the SPR alternative the Services pursue, any of these changes would affect only the timing of resource protections or land-use activities, not the outcome of the status determinations. Therefore, it is only the potential resource protections or land uses during the time period during which the status determination or other ESA action is accelerated or delayed that would be affected.

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. To make such an assessment, we would need to be able to predict at this moment, long before many of those status assessments have even begun: (1) how much less or more each status determination out into the future will cost (or at least, an average), including the cost of the SPR analysis; (2) how many future SPR analyses would be unnecessary as a result of the Draft or Final Policy, because the population of the species in the portion of its range is a valid DPS; (3) how much funding is likely to be available in each fiscal year to the Fish and Wildlife Service—both for listing/uplisting and for delisting/downlisting—and to the National Marine Fisheries Service for its ESA activities; and therefore (4) at what point that increase or decrease in costs is likely to amount to an increase or decrease in the number of species for which the Services are able to complete status determinations or other ESA actions, such as recovery plans, actions outlined in recovery plans, five-year reviews, special rules under Section 4(d), or post-delisting monitoring; (5) what kinds of status determinations or actions the Services would accelerate or delay as a result of the increased or decreased costs; (6) what the outcomes of any accelerated or delayed status determinations would be; (7) the extent to which accelerating or delaying those status determinations or ESA actions would change regulatory or

landowner actions during the delay or acceleration period; and (8) the extent to which any such changed actions would result in environmental effects.

Clearly, the Services cannot reasonably predict the sequential products of all of these variables. Rather, the Services are taking into consideration that, in general, adopting a binding SPR 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 the outcomes of those accelerated determinations or actions, the specific environmental impacts that are likely to flow from reducing status determination costs by adopting a binding SPR policy are not reasonably foreseeable.

As with the second potential pathway for environmental consequences, what we can reasonably foresee is that the scale of any environmental consequences that would flow from any cost savings from adopting the Draft Policy or Final Policy is likely to be small. Only a small subset of status determinations require more than a cursory SPR analysis at all, because where a species has a very narrow range or faces threats that are distributed uniformly across its range, there is unlikely to be a portion of its range where its status differs from its rangewide status. For example, we conducted a rough search of status determinations (12-month findings; proposed listing, delisting, and reclassification rules; final status determination rules; and withdrawals of proposed listing, delisting, and reclassification rules) in the time since the Draft Policy was published. Of the approximately 466 findings that were completed during that time, only approximately 22 findings (fewer than 5) required more than a cursory SPR analysis.<sup>5</sup> Similarly, only 25 (or approximately 8%) of the 319 status determinations in the two years and three months immediately preceding publication of the Draft Policy (September 9, 2009, to December 9, 2011) (including nineteen months during the M-Opinion for FWS and eight months when no SPR policy was in place for either Service) required more than a cursory SPR analysis. Five of those were for species whose populations in that portion of the range constituted a valid DPS,

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<sup>5</sup> Our review of previous status determinations was not comprehensive, because there have been so many determinations that it was not feasible to go back to evaluate every determination in detail. With respect to SPR analyses, we defined a “cursory” SPR analysis as an analysis with one or two statements concluding that the threats are evenly distributed throughout the range of the species or that there is not likely to be a portion of the range where the status of the species differs from its status throughout its range. In the future under the Revised Policy, it could also include statements that there could not be an SPR, because the species is threatened or endangered throughout all of its range.

and therefore none of those SPR analyses would have been necessary under the fourth component of the Draft or Final Policy.

	<b>27 Months Before Draft Policy</b>		<b>27 Months Since Draft Policy Published</b>	
	<b>Number</b>	<b>% of Total</b>	<b>Number</b>	<b>% of Total</b>
<b>Total Status determinations</b>	319	---	466	---
<b>With No SPR Analysis</b> (usually <sup>6</sup> because endangered throughout range)	99	31	69	15
<b>With Cursory SPR Analysis</b> (usually because limited range or threats evenly distributed)	195	61	375	80
<b>With More than a Cursory SPR Analysis</b>	24	8	22	5

Moreover, an SPR analysis is just one component that goes into the status review and five-factor analysis that the ESA requires the Services to make in determining whether a species is threatened or endangered, so it is typically a small portion of the total cost of any status determination. In any status determination where more than a cursory SPR analysis is called for, the deciding Service will need to undertake an SPR analysis and explain the basis for that analysis regardless of whether a binding SPR policy is in place. The need to include a more-detailed explanation and more-thorough support where no binding policy is in place would therefore likely require only an incremental increase in costs. An increase or decrease in remands could mean a more consequential increase or decrease in costs. However, the incidence

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<sup>6</sup> Previous status determinations did not always address SPR at all because of the dearth of guidance on what the phrase means or how to analyze it. Therefore, we do not anticipate that the number of determinations in this category is indicative of what would occur in the future, with a binding SPR policy in place for the Services to apply uniformly—not just in analyzing whether a portion of a species’ range is significant, but also in determining whether or not to undertake more than a cursory SPR analysis.

of remands due to SPR analyses—either with or without a binding policy—has historically been small in scale, averaging less than or equal to one a year.<sup>7</sup>

As explained in more detail below, none of the three alternatives evaluated in this assessment is expected to result in significant effects to the human environment within the meaning of NEPA and the CEQ regulations. This is because, although we describe potential actions and consequences that could flow from each of the alternatives, the nature and scope of environmental consequences that are likely to result from any of the alternatives will depend on so many uncertain intervening circumstances that they are not reasonably foreseeable.

### **Alternative 1: No Action Alternative**

Under the “No Action Alternative,” the Services would continue to make status determinations without any binding policy regarding the meaning of the term “significant portion of its range” in the definitions of “threatened species” and “endangered species” or the consequences of identifying a significant portion of a species’ range where the status of the species differs from its status throughout all of its range. In addition, the Services would determine on a case-by-case basis how to proceed if a species’ population in an SPR constitutes a DPS of the species.

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<sup>7</sup> The M-Opinion differed in scope, substance, and process from the policy at issue, and is thus only somewhat analogous to the policy the Services are currently considering. Nevertheless, to gauge a general scale of how having a binding policy in place might affect the costs related to remands, we reviewed FWS’s judicially-reviewable status determinations (final status determinations, warranted-but-precluded or not-warranted 12-month findings, and negative 90-day findings), and compared the rate of remands in two time periods of comparable length (approximately 4 years and 2 months)—while the M-Opinion was in place (from 2/23/07 to 5/4/11) and before the M-Opinion was issued (from 1/4/03 to 2/23/07). We also reviewed FWS’s judicially reviewable status determinations in the time since the Draft Policy was published; however, because those determinations were relatively recent, the full picture of merits challenges and remands may not yet be known. With no policy in place, of the approximately 57 judicially reviewable determinations FWS identified, the courts remanded 3 because of inadequacy in the SPR evaluation (a rate of approximately 5%). With the M-Opinion in place, of the approximately 122 judicially reviewable determinations FWS identified, the courts remanded 4 because of inadequacy in the SPR evaluation (a rate of approximately 3%). We emphasize, however, that these are just historical numbers. To predict actual outcomes of future challenges would be pure conjecture, because such outcomes depend on the circumstances of the cases, including the interpretation of SPR, and the extent to which individual rulemakings provide robust support for how the agency applied that interpretation of SPR.

	<b>Total Reviewable Status determinations</b>	<b>Reviewable Status determinations Remanded Due to SPR Inadequacy</b>	<b>Percentage of Determinations Remanded</b>
<b>Before M-Opinion</b>	57	3	5.3%
<b>During M-Opinion</b>	122	4	3.3%

Clarity and Uniformity: Adopting no binding SPR policy would result in continued uncertainty about the outcomes of SPR analyses and whether species will be listed because of their status in portions of their ranges. This uncertainty could affect the actions that the Services, various other government agencies, private individuals and organizations, and other interested or concerned parties take in the future. Although one consequence from the lack of clarity would be that it would limit the ability of such interested or concerned parties to judge and concentrate their efforts towards the conservation of biological resources vulnerable to extinction, we cannot reasonably foresee what actions such parties will or will not take in the future as a result of uncertainty. Moreover, the uncertainty may be reduced in the future as the Services apply interpretations in proposed and final status determinations, provide the public with explanations and support for why the interpretations adopted were reasonable given the circumstances for the species, and obtain additional court decisions setting out additional parameters on how the Services may interpret and apply the phrase.

Outcomes: If the Services maintain the status quo and do not adopt a binding SPR policy, we cannot predict with confidence what interpretation of SPR the Services would apply in future status determinations. With no binding policy, the Services could apply a wide range of interpretations of the basis for, and consequences of, determining that a portion of a species' range is "significant." In the time since the Draft Policy was published, the Services have in most instances determined that the circumstances warranted applying the interpretations and principles contained in the Draft Policy, and could choose to continue doing so. However, the Services have also in the past applied various different interpretations of the phrase, including the interpretation in the 2007 M-Opinion (for FWS) and the clarification interpretation. These previous interpretations of the phrase illustrate how the phrase might be applied in the future, but they cannot be considered exhaustive.<sup>8</sup> The Services would be free to develop and apply other interpretations for individual status determinations. Even case law—which offers some parameters for future interpretations, shaped by the interpretations that the courts have found to be arbitrary or to be reasonable—is not determinative of what interpretation or interpretations the Services will apply in the future in the absence of a binding policy; there could still be instances in which either Service determines (and thoroughly explains) that the specific facts pertaining to a species and its threats make it appropriate to adopt an SPR interpretation for those circumstances that a court previously held to be unreasonable under different circumstances.

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<sup>8</sup> We note that, because the "no action" alternative is so undefined, it is difficult to compare the outcomes of status determinations under the other alternatives with the outcomes if the Services do not take action on an SPR policy. Therefore, to illustrate how status determinations would change if the Services pursue Alternative 2 or Alternative 3, we compare and contrast as appropriate the likely outcomes under those alternatives with what the likely outcomes would be under some of these other interpretations that the Services have applied in the past, such as the clarification interpretation or the M-Opinion.

Therefore, it is particularly clear that we cannot reasonably foresee how a decision not to adopt a binding policy would affect the outcomes of future status determinations, or the environmental consequences that are likely to flow from those outcomes.

Costs: Continuing to complete status determinations without a binding SPR policy would likely continue to require an elevated level of status determination costs—both in terms of elevated costs of completing individual status determinations and elevated risk of adverse court decisions and remands. With respect to the elevated costs of completing individual status determinations, the cumulative impact is likely to be relatively small. As discussed earlier, only a small subset of status determinations require more than a cursory SPR analysis at all, and even where one is required, the SPR analysis is just one component that goes into the status review and five-factor analysis that the ESA requires the Services to make in determining whether a species is threatened or endangered. Therefore, the need to include a more-detailed explanation and more-thorough support likely require only an incremental increase in costs.

Continuing to complete status determinations without a binding SPR policy would also mean that the courts would be less likely to defer to the Services regarding their interpretation of the phrase “significant portion of its range.” However, the actual frequency of remands in the future would depend on what interpretation of the phrase the Services adopt and how robust their support for that interpretation is in individual status determinations. If, for example, in each instance in the future the Services continue to determine that the circumstances warrant applying the interpretations and principles contained in the Draft Policy (or another similarly robust interpretation of the phrase), and include in their status determinations thorough support for the reasonableness of the interpretation being applied, those future SPR analyses could withstand merits challenges, even without a binding policy. It would be speculative to attempt to predict the specific circumstances of how the Services will interpret the phrase in the future, how robust their support of their interpretations will be in individual status determinations, how often legal challenges to the adequacy of those SPR analyses will occur, or how courts will rule in those challenges. Although we are taking into consideration that declining to adopt a binding SPR policy would not help the Services reduce litigation and obtain more consistently favorable results when litigation does occur, the pathway from the increase in legal risk to an escalation of costs and from the escalation of costs to any environmental consequences from those increased costs contains so many uncertain intervening circumstances that a reasonable person would not take specific potential environmental consequences into account in making the decision.

As described earlier, the higher cost of status determinations—from both the elevated cost of individual status determinations and the increased likelihood of remands—constrains the number of status determinations and other ESA actions that the Services can complete in a given period of time, and therefore ultimately has the effect of delaying a small subset of status determinations, and other ESA actions, such as recovery plans and actions, five-year reviews,

special rules under Section 4(d), and post-delisting monitoring actions. The Services are taking into consideration that continuing to experience elevated status-determination costs makes the Services less efficient in administering the ESA and furthering the purposes of the ESA. However, different kinds of status determinations are funded from different accounts, depending on whether it is the Fish and Wildlife Service or the National Marine Fisheries Service that completes the determination. We cannot reasonably foresee the types and numbers of status determinations or other ESA actions that the Services would need to delay as a result of not adopting a binding SPR policy, or the nature and scale of any environmental consequences that would flow from delaying status determinations or other ESA actions in the future. It would be speculative to attempt to predict all of the variables that would come into play.

What we can reasonably foresee is that the scale of any environmental consequences that would flow from the elevated costs from not adopting a binding SPR policy is likely to be small. As shown previously, only a small subset of status determinations require more than a cursory SPR analysis at all, and even in those instances where SPR analyses are required, the SPR analysis is just one component of the status review and five-factor analysis that the ESA requires the Services to make in determining whether a species is threatened or endangered. The relevant cost information would not be the overall cost of completing the SPR analysis, but rather the incremental increase in the cost of completing the SPR analysis. An increase or decrease in remands could mean a more consequential increase or decrease in costs. However, the incidence of remands due to SPR analyses—either with or without a binding policy—has historically been small in scale, averaging less than or equal to one a year. Moreover, how courts are likely to rule with respect to future status determinations would be particularly speculative to attempt to predict.

## **Alternative 2: The Preferred Alternative – The Final Policy**

Under the Final Policy, the Services would not undertake more than a cursory SPR analysis unless we have already concluded that the species is not currently endangered or threatened throughout all of its range, and there is substantial information indicating both that a portion of the species' range may be significant and that the species may be threatened or endangered throughout that portion of its range. In undertaking the SPR analysis for a species that is not endangered or threatened throughout its range, the Services would conclude that a portion of a species' range is significant if the portion's contribution to the viability of the species is so important that, without the members in that portion, the species would be in danger of extinction, or likely to become so in the foreseeable future. If the Services determine that a species is threatened or endangered in a significant portion of its range, the entire species would be listed accordingly. This would constitute a somewhat lower threshold for significance than the threshold established in the Draft Policy, in that a portion of a species' range would be

significant even if, without the members in that portion of its range, the species would be threatened throughout all of its range, but not endangered.

Clarity and Uniformity: Adopting the Final Policy would enhance certainty about the outcomes of SPR analyses and whether species will be listed because of their status in portions of their ranges. The Services, various other government agencies, private individuals and organizations, and other interested or concerned parties would have notice of the binding definition of “significant” that the Services will apply in future status determinations, and would know that if the Services do find that a portion of a species’ range is significant and that the species is threatened or endangered throughout that portion of its range, the species will be listed throughout its range with the same status that it has throughout that significant portion of its range. Adopting the Final Policy would also eliminate the potential for confusion regarding the status of the species if either Service were to conclude that a species is in danger of extinction throughout a portion of its range, but merely is likely to become in danger of extinction in the foreseeable future throughout all of its range. In that situation under the Draft Policy, if the portion were otherwise significant, the species would meet the definition of “endangered species” by virtue of its status in a significant portion of its range, but it would also meet the definition of “threatened species” by virtue of its status throughout all of its range. Although the Draft Policy resolves this ambiguity by specifying that, in such a situation, the species would be listed as endangered throughout all of its range, it nevertheless would be incongruous to have an endangered species that also meets the definition of a threatened species. Because the Final Policy limits the definition of “significant” to situations where a species is not threatened or endangered throughout all of its range, this incongruous and confusing outcome could not occur.

However, as previously discussed, the extent to which this increased clarity and uniformity would lead to environmental consequences is not reasonably foreseeable. Although one consequence from the increased clarity would be that it would better enable the Services, various other government agencies, private individuals and organizations, and other interested or concerned parties to judge and concentrate their efforts towards the conservation of biological resources vulnerable to extinction, we cannot reasonably foresee what actions, if any, such parties will or will not take in the future as a result of having greater certainty or eliminating an incongruous result, or what environmental impacts would result from those actions. In addition, the Final Policy does not remove all uncertainty, because—unlike, for example, the simplicity of applying a size or quantitative threshold—applying the Final Policy requires undertaking a complex analysis involving a hypothetical situation in which the members of the species would be absent from the portion of its range that is being evaluated.

Outcomes: We predict that the outcomes of our status determinations would generally be the same whether or not we adopt the Final Policy, for several reasons: (1) in the time since the Draft Policy was published, the Services have determined in most instances that the

circumstances warranted applying the interpretations and principles contained in the Draft Policy; thus, even without adopting the Draft Policy as binding, the Services could continue to determine to apply it in each instance in the future; (2) the Final Policy is very similar to the Draft Policy—it prescribes a biological basis for determining whether a portion of a species’ range is “significant,” and strikes a balance in (i) establishing a relatively high threshold for significance and (ii) requiring that, if a species is threatened or endangered in a significant portion of its range, the species be listed as threatened or endangered throughout its range, rather than just in that significant portion of its range; and (3) although there are two differences between the Draft and Final Policy that could lead to differences in outcomes, this would be uncommon.

The first way in which the Final Policy differs from the Draft Policy is that under the Final Policy no portions of a species’ range would meet the definition of “significant” if the species is threatened throughout all of its range. Therefore, if a species is likely to become in danger of extinction in the foreseeable future throughout all of its range, it would always be listed as a threatened species. In contrast, under the Draft Policy, a species that is not currently in danger of extinction throughout all of its range, but is likely to become so in the foreseeable future, could nevertheless be listed as an endangered species, if the deciding Service identifies a portion of the species’ range that was significant and determined that the species was currently in danger of extinction in that portion of the range. In this circumstance, under the Final Policy the species would receive a lower listing status (threatened rather than endangered), and possibly a lower level of protection (depending on what protections the deciding Service applies under section 4(d) of the Act). However, this would be a very rare occurrence. As discussed previously, listing a species because of its status in a portion of its range is relatively infrequent. It would be even more unusual for a species to be in danger of extinction throughout a significant portion of its range that would be considered significant under the Draft Policy, but only likely to become so throughout all of its range.

We conducted a cursory review of status determinations that have been completed in the two years and three months since the Draft Policy was published in December, 2011—during most of that time, the Services determined that the circumstances warranted applying the interpretations and principles contained in the Draft Policy. There were 231 final status determinations (final listing or delisting or reclassification rules, withdrawals of proposed listing or delisting or reclassification rules or not-warranted findings) where the species was threatened throughout all of its range, and in none of those determinations the species was also endangered in a significant portion of its range. In addition, even in those few situations where under the Final Policy the Services would list a species as threatened throughout all of its range, although it would have been listed as endangered under the Draft Policy, this would not alter the fact that the species would be listed. The only difference in outcomes between the Final Policy and the Draft Policy in such an instance would be that the listing status of the species would be threatened

under the Final Policy instead of endangered, as it would have been under the Draft Policy. Moreover, once a species is listed as threatened, under ESA Section 4(d) the Services would still have the discretion to put in place in that portion of its range (or throughout all of its range) any protections that we deem “necessary and advisable” to provide for the species’ conservation, which could include prohibiting any acts that Section 9 prohibits with respect to endangered species.

Because the Services can tailor the protections for a threatened species by promulgating a rule under section 4(d) of the Act, listing the species as threatened by virtue of its threatened status throughout its range may not result in any meaningful difference in protections from listing the species as endangered by virtue of its endangered status throughout a significant portion of its range. However, another possibility would be that those tailored protections could instead provide less protection for such species. A lower level of ESA protections could minimize adverse land use impacts and other socio-economic impacts, and could decrease protection for those species and their critical habitats—such as water, soil, and wetlands resources. In light of the Services’ broad range of discretion in promulgating protective regulations under section 4(d), we cannot reasonably foresee what effects to the human environment, if any, would result from any rare instances in the future when the Services would list as threatened under the Final Policy species that would have been listed as endangered under the Draft Policy.

The second way in which outcomes under the Final Policy could differ from outcomes under the Draft Policy would be that the threshold for “significance” is not as high under the Final Policy. Unlike under the Draft Policy, where to meet the definition of “significant” the loss of the members in a portion of a species’ range must result in the species’ being in danger of extinction throughout all of its range, under the Final Policy a portion would meet the definition of “significant” even if the species would only be likely to become endangered throughout all of its range without that portion. This could result in instances in which a species is listed as threatened or endangered under the Final Policy because of its status in a portion of its range, where it would not have been listed under the Draft Policy. This will increase the likelihood that species with important populations that are facing a high magnitude of threats will be protected under the Act. Nonetheless, the threshold in the Final Policy is still a relatively high one, which would result in the Services’ finding that a portion of a species’ range is significant in only a limited set of circumstances. We have concluded that the instances in which this somewhat lower threshold will result in listing a species that would not have been listed under the Draft Policy will be rare. In the two years and three months since publication of the Draft Policy—during which time the Services have in most status determinations determined that the circumstances warranted applying the interpretations and principles contained in the Draft Policy—there have been no final status determinations (final listing or delisting or reclassification rules, withdrawals of proposed listing or delisting or reclassification rules, or not-

warranted findings) in which a portion of a species range was not significant because without the members in that portion, the species would be only threatened and not endangered. We thus conclude that listings dependent on an SPR determination will still be unusual.

Implementing the Final Policy means that:

*□ There could be fewer listings than with some other interpretations: Some species that might be listed under other interpretations with a lower threshold for significance might not be listed under the Final Policy. For example, if a portion of a species’ range merely contributes incrementally to the viability of the species, the Services would not find the portion to be “significant” under the Final Policy; therefore, if the species is not threatened or endangered throughout its range, but is threatened or endangered in that portion of its range, the Services would not list it. However, if the portion is so significant that the hypothetical loss of members in that portion would cause the species to warrant listing—either as endangered or threatened—throughout its range, the Services would list the species according to its status in that portion.*

<b>Situation: Species Is Not T or E Throughout Its Range, But Is T or E Throughout a Portion of Its Range</b>		
	<b>Would It Be Listed If Significance Threshold Is:</b>	
<b>Description of Portion</b>	<b>Incremental Contribution</b>	<b>Final Policy</b>
Portion contributes incrementally to the viability of the species	Yes	No
Without that portion, species would be T	Yes	Yes
Without that portion, species would be E	Yes	Yes

- *There could be additional listings: Some species that might not be listed under other interpretations, including the Draft Policy and the clarification interpretation, might be listed under the Final Policy. For example, where the threatened or endangered status of a species in a portion of its range does not cause the species to be threatened or endangered throughout all of its range, but extirpation of the species from that portion of its range would cause the species to be threatened throughout its range, that portion of the species’ range would not be considered “significant” either under the clarification interpretation or under the Draft Policy, and therefore the species would not be listed. Such a species would, however, be considered “significant” under the Final Policy, and would be listed in accordance with its status in that portion of its range. When extirpation of such species from a portion of*

*its range would cause the species to be endangered throughout all of its range, that portion of the species' range would be considered "significant," and therefore could form the basis of listing, under both the Final Policy and the Draft Policy, but not under the clarification interpretation.*

<b>Situation: Species Is T or E Throughout a Portion of Its Range, But Its Status in That Portion Does Not Cause It to Be T or E Throughout Its Range</b>			
<b>Would It Be Listed If Threshold for Significance Is:</b>			
<b>Description of Portion</b>	<b>Final Policy</b>	<b>Draft Policy</b>	<b>Clarification Interpretation</b>
Without members in that portion, species would be T	Yes	No	No
Without members in that portion, species would be E	Yes	Yes	No

- Some species could be given a lower listing status: Some species that might be listed as endangered under other interpretations, including the Draft Policy, might be listed as threatened under the Final Policy. For example, if a species is likely to become in danger of extinction in the foreseeable future throughout all of its range, it would nevertheless be listed under the Draft Policy as endangered throughout all of its range if it was currently in danger of extinction throughout a significant portion of its range that was significant under the Draft Policy (even though the species also meets the definition of "threatened species"). However, this confusing situation could not occur under the Final Policy, because no portion of the species' range would meet the definition of "significant" if the species was threatened throughout all of its range. Therefore, such a species would be listed as threatened under the Final Policy.*

<b>Situation: Species Is T Throughout All of Its Range, But Would Be E Throughout All of Its Range Without Members in a Portion of Its Range</b>		
<b>Status of Species in That Portion of Its Range</b>	<b>How the Species Will Be Listed Throughout Its Range Under:</b>	
	<b>Final Policy</b>	<b>Draft Policy</b>
Threatened	Threatened	Threatened
Endangered	Threatened	Endangered

- *Listings for some species could apply more broadly: For a species that is listed because of its status in a significant portion of its range, the Final Policy would be more protective than some interpretations, because such species would be listed and protected throughout all of its range, while under other possible interpretations, such as the M-Opinion interpretation for the Fish and Wildlife Service, the species would be protected in only that significant portion of its range. However, for any species for which the population in that portion of its range constitutes a DPS, the Services would list the DPS so that the species would still be protected in only the significant portion of its range.*

We can reasonably foresee that adopting the Final Policy could change whether in the future some species get listed under the ESA and benefit from ESA protections, whether some species are listed as threatened or endangered, and whether some species are listed in only a portion of their ranges or throughout their ranges. However, as discussed previously, we cannot reasonably foresee the specific nature and scope of environmental consequences that would result from such changes. There is too much unknown information regarding future status determinations. What we can reasonably foresee is that the instances in which any of these changes will occur will be rare, and therefore the scale of any environmental consequences that will indirectly flow from adopting the Final Policy is likely to be small. As discussed previously, listing a species because of its status in a portion of its range is relatively infrequent, and even where it does occur, the outcomes of our status determinations will usually be the same regardless of whether the Draft Policy, the Final Policy that is the preferred alternative, or no binding policy is in effect.

Costs: We anticipate that adopting the Final Policy would reduce the cost of completing status determinations—both by decreasing the amount of staff time and budget that would go into explaining and supporting how the deciding Service interpreted and applied the phrase “significant portion of its range,” and by increasing the deference the courts would be likely to afford the Services when the Services implement a binding policy and thereby ultimately

decreasing the number of remanded status determinations the Services must complete. In addition, the Final Policy would reduce costs further by eliminating the need for the Services to undertake an SPR analyses when we have already determined that a species warrants listing as threatened throughout all of its range.

However, as discussed previously, we cannot reasonably foresee how many additional status determinations and other ESA actions the Services would be able to complete in a given fiscal year, let alone the nature and scale of any environmental consequences that would flow from this increased efficiency. The cumulative environmental effects that will flow from the decrease in status determination costs will depend on the total cost savings, amount of funding available for different kinds of action, the kinds of actions that eventually get accelerated as a result of the cost savings, and the outcomes of those actions. Clearly, the Services cannot reasonably predict all of these variables.

What is reasonably foreseeable is that any decrease in the status determination costs would likely be marginal. As shown previously, only a small subset of status determinations require more than a cursory SPR analysis at all, and even in those instances where detailed SPR analyses are required, the SPR analysis is just one component of the status review and five-factor analysis that the ESA requires the Services to make in determining whether a species is threatened or endangered. The relevant cost information would not be the overall cost of completing the SPR analysis, but rather the incremental decrease in the cost of completing the SPR analysis. It is therefore likely that relying on a binding SPR policy instead of explaining the SPR interpretation applied in each instance would only marginally decrease the cost of each status determination. Although a decrease in remands could mean a more consequential decrease in costs, as shown earlier the incidence of remands due to SPR analyses—either with or without a binding policy—has historically been small in scale, averaging less than or equal to one a year. Moreover, it would be particularly speculative for the Services to attempt to predict how courts are likely to rule with respect to future status determinations.

Because the Final Policy would also eliminate the need to conduct more than a cursory SPR analysis for any species the Services determine to be threatened throughout all of its range, we further evaluated whether any of the status determinations that included more than a cursory SPR analysis since publication of the Draft Policy would not have required such an analysis if the Final Policy had been in place. During that time there have been 22 determinations that included more than a cursory SPR analysis, and one of them included a determination that the species was threatened throughout all of its range. Therefore, there would have been only a small amount of additional cost savings under the Final Policy. We have consequently concluded that, even if adopting the Final Policy would provide more cost savings than the Draft Policy would, it appears that the cost savings under the Final Policy would still be fairly modest, and we cannot foresee at what point, if at all, the savings would be enough to increase the

number of status determinations or other ESA actions the Services could complete in a given fiscal year.

In selecting a preferred alternative, the Services are taking into consideration that the Final Policy meets some of our primary objectives in adopting an SPR policy—it is likely to reduce costs and litigation, obtain more consistently favorable results when litigation does occur, and increase efficiency in making status determinations. Meeting these objectives allows for more-efficient implementation of the ESA overall, and would also further the purposes of the ESA, which we anticipate will be beneficial for the environment overall. However, we cannot take into consideration the extent to which cost savings—whether from lower status determination costs or decreased likelihood of remands or both—will overall have specific indirect environmental consequences. The pathway to the cost savings and any environmental consequences that would result from those savings contains so many uncertain intervening circumstances that, in adopting an interpretation of “significant portion of its range,” a reasonable person would not take into account the specific environmental consequences of marginally reducing costs.

### **Alternative 3: The Draft Policy**

Under the Draft Policy, the Services would not undertake more than a cursory SPR analysis unless we have already concluded that a species is not currently endangered throughout all of its range, and that there is substantial information indicating both that a portion of the species’ range may be significant and that the species may be threatened or endangered throughout that portion of its range. In undertaking the SPR analysis, we would conclude that a portion of a species’ range is significant if the portion’s contribution to the viability of the species is so important that, without that portion, the species would be in danger of extinction. This would constitute a somewhat higher threshold for significance than the threshold established in the Final Policy, in that a portion of a species’ range would not be significant if, without the members in that portion of its range, the species would be threatened throughout all of its range, but not endangered. If the Services determine that a species is threatened throughout a significant portion of its range, the species would be listed as a threatened species throughout all of its range; if the Services determine that a species is endangered throughout a significant portion of its range, the species would be listed as an endangered species throughout all of its range (even if the species was currently also threatened throughout all of its range).

Clarity and Uniformity: Adopting the Draft SPR Policy would enhance certainty about the outcomes of SPR analyses and whether species will be listed because of their status in portions of their ranges. The Services, various other government agencies, private individuals and organizations, and other interested or concerned parties would have notice of the binding definition of “significant” that the Services will apply in future status determinations.

However, as previously discussed, the extent to which this increased clarity and uniformity would lead to environmental consequences is not reasonably foreseeable. Although one consequence of increasing clarity would be that it would better enable the Services, various other government agencies, private individuals and organizations, and other interested or concerned parties to judge and concentrate their efforts towards the conservation of biological resources vulnerable to extinction, we cannot reasonably foresee what actions, if any, such parties would or would not take in the future as a result of having greater certainty, or what environmental impacts would result from those actions. In addition, the Draft Policy does not remove all uncertainty, because—unlike, for example, the simplicity of applying a size or quantitative threshold—applying the Draft Policy requires undertaking a complex analysis involving a hypothetical situation in which the members of the species would be absent from the portion of its range that is being evaluated.

Outcomes: We predict that the outcomes of our status determinations would generally be the same whether or not we adopt the Draft Policy, because in the time since the Draft Policy was published the Services have usually determined that the circumstances warranted applying the interpretations and principles contained in the Draft Policy, and we could continue to do so. However, adopting the Draft Policy as binding would ensure that the Services would continue to apply the Draft Policy, and would eliminate the possibility of applying other interpretations in the future without a notice-and-comment rulemaking process.

The Draft Policy prescribes a biological basis for determining whether a portion of a species' range is "significant." It strikes a balance in establishing a relatively high significance threshold, which is somewhat higher than the significance threshold that would apply under the Final Policy, but, in contrast to the Final Policy, a portion of a species' range could be significant even if the species is already likely to become in danger of extinction throughout its range in the foreseeable future. Like the Final Policy, it also requires that, if a species is threatened or endangered in a significant portion of its range, the species be listed as threatened or endangered throughout its range, rather than just in that significant portion of its range.

As described earlier, there are only two circumstances in which the Draft Policy would result in different outcomes from the Final Policy: (1) where a species is currently endangered in a portion of its range, and that portion of its range is so significant to the viability of the species that, without the members in that portion, the species would be in danger of extinction throughout all of its range, but currently the species is only likely to become in danger of extinction in the foreseeable future throughout all of its range; in that situation, the species would be listed as an endangered species under the Draft Policy, but must be listed as a threatened species under the Final Policy; and (2) where a species is not threatened or endangered throughout its range, but it is threatened or endangered throughout a portion of its range that is so

significant to its viability that, without the members in that portion of its range, the species would be threatened throughout its range; in that situation, the species would not be listed under the Draft Policy, but it would be listed under the Final Policy according to its status in that portion of its range.

Under the Draft Policy:

- There could be fewer listings than with other interpretations: Some species that might be listed under other interpretations with a lower threshold for significance might not be listed under the Draft Policy. For example, where a species is not threatened or endangered throughout its range, but is threatened or endangered in a portion of its range, if that portion of the species’ range is so significant that the hypothetical loss of members in that portion would cause the species to be threatened throughout its range, but not so significant that such a hypothetical loss would cause the species to be endangered throughout its range, that portion of the species’ range would not be significant under the Draft Policy, and the Services would not list the species. However, under the Final Policy that portion of the range would be significant, and the Services would list the species according to its status in that portion of its range. Another example would be if a species is threatened or endangered throughout a portion of its range that merely contributes incrementally to the viability of the species—in that situation under the Draft Policy the Services would not find the portion to be “significant,” but if the portion is so significant that the hypothetical loss of members in that portion would cause the species to be in danger of extinction throughout all of its range, the Services would list the species according to its status in that portion of its range.*

<b>Situation: Species Is Not T or E Throughout Its Range, But Is T or E Throughout a Portion of Its Range</b>			
	<b>Would It Be Listed If Threshold for Significance Is:</b>		
<b>Description of Portion</b>	<b>Incremental Contribution</b>	<b>Final Policy</b>	<b>Draft Policy</b>
Portion contributes incrementally to the viability of the species	Yes	No	No
Without members in that portion, species would be T	Yes	Yes	No
Without members in that	Yes	Yes	Yes

portion, species would be E			
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- *There could be additional listings: In situations in which a threatened or endangered status of the species in a portion of its range would not cause the species to be endangered throughout all of its range, but the loss of all members of the species in that portion of its range would, that portion of the range would be significant under the Draft Policy (as well as the Final Policy), and the species would be listed, although under some other interpretations, such as the clarification interpretation, it would not.*

<b>Situation: Species Is T or E Throughout a Portion of Its Range, But Its Status in That Portion Does Not Cause It to Be T or E Throughout Its Range</b>		
	<b>Would It Be Listed If Threshold Is:</b>	
<b>Description of Portion</b>	<b>Draft Policy</b>	<b>Clarification Interpretation</b>
Without members in that portion, species would be T	No	No
Without members in that portion, species would be E	Yes	No

- *Some species could be designated a higher listing status: Some species that might be listed as threatened under other interpretations, including the Final Policy, might be listed as endangered under the Draft Policy. For example, if a species is likely to become in danger of extinction throughout all of its range in the foreseeable future, it would meet the definition of “threatened species” throughout all of its range, but it would also meet the definition of “endangered species” if it was currently in danger of extinction throughout a significant portion of its range. Under the Draft Policy, the Services would list such species as endangered even though they also meet the definition of “threatened species.” However, this incongruous result could not occur under the Final Policy, because no portion of the species’ range would meet the definition of “significant” if the species is threatened throughout all of its range, so the species would be listed as threatened throughout all of its range.*

<b>Situation: Species Is T Throughout All of Its Range, But Would Be E Throughout All of Its Range Without Members in a Certain Portion of Its Range</b>		
<b>Status of Species in That Portion of Its Range</b>	<b>Listing Status of Species Under:</b>	
	<b>Final Policy</b>	<b>Draft Policy</b>
Threatened	Threatened	Threatened
Endangered	Threatened	Endangered

- *Listings for some species could apply more broadly: For a species that is listed because of its status in a significant portion of its range, the Draft Policy would be more protective than some interpretations, because the species would be listed and protected throughout all of its range, while under other interpretations, for example under the M-Opinion for the Fish and Wildlife Service, it would be protected in only that significant portion of its range. However, if the species' population in that portion of its range constitutes a DPS, the Services would list the DPS so that the species would still be protected in only that significant portion of its range.*

We can reasonably foresee that adopting the Draft Policy could change whether some species in the future get listed under the ESA and benefit from ESA protections, whether some species are listed as threatened or endangered, and whether some species are listed in only a portion of their ranges or throughout their ranges. However, as discussed previously, we cannot reasonably foresee the specific nature and scope of environmental consequences that would result from such changes. There is too much unknown information regarding future status determinations. What we can reasonably foresee is that the instances in which any of these changed outcomes will occur will be rare, and therefore the scale of any environmental consequences that will indirectly flow from adopting the Draft Policy is likely to be small. As discussed previously, listing a species because of its status in a portion of its range is relatively infrequent, and even where it does occur, the outcomes of our status determinations will usually be the same regardless of whether or not the Draft Policy is in effect.

Costs: As discussed previously, it is reasonably foreseeable that, if the Services adopt the Draft Policy, status determination costs would be less than if the Services pursue the no-action alternative of not adopting a binding policy. The Services would not need to include more than a cursory explanation and justification for its interpretation of the phrase “significant portion of its range” in each status determination. In addition, there would be a reduced risk of being compelled to complete remanded determinations. Reducing costs could enable the Services to

complete additional status determinations or other ESA actions, depending on whether the cost savings come from determinations with respect to listing and uplisting species, or from determinations with respect to delisting and downlisting species.

However, as discussed previously, we cannot reasonably foresee how many additional status determinations and other ESA actions the Services would be able to complete over a given period of time, let alone the nature and scale of any environmental consequences that would flow from this increased or decreased efficiency. The cumulative beneficial environmental effects that will flow from the decrease in status determination costs will depend on the total cost savings, amount of funding available for different kinds of actions, the kinds of actions that eventually get accelerated as a result of the cost savings, and the outcomes of those actions, because different kinds of status determinations are funded from different accounts. Clearly, the Services cannot reasonably predict all of these variables.

What is reasonably foreseeable is that any decrease in the status determination costs would likely be marginal. As shown previously, only a small subset of status determinations require more than a cursory SPR analysis at all, and even in those instances where SPR analyses are required, the SPR analysis is just one component of the status review and five-factor analysis that the ESA requires the Services to make in determining whether a species is threatened or endangered. The relevant cost information would not be the overall cost of completing the SPR analysis, but rather the incremental decrease in the cost of completing the SPR analysis. It is therefore likely that relying on a binding SPR policy instead of explaining the SPR interpretation applied in each instance would only marginally decrease the cost of each status determination. Although a decrease in remands could mean a more consequential decrease in costs, as shown earlier the incidence of remands due to SPR analyses—either with or without a binding policy—has historically been small in scale, averaging less than or equal to one a year. Moreover, it would be particularly speculative for the Services to attempt to predict how courts are likely to rule with respect to future status determinations.

We have consequently concluded that, even if adopting the Draft Policy would reduce the number of status determinations for which the Services need to complete more than a cursory SPR analysis and/or decrease the level of staffing and funding required for individual status determinations that do include SPR analyses, it appears that the savings would be fairly modest, and we cannot foresee at what point, if at all, the savings would be enough to increase the number of status determinations or other ESA actions the Services could complete in a given fiscal year.

In selecting an alternative, the Services are taking into consideration that the Draft Policy meets some of our primary objectives in adopting an SPR policy—it is likely to reduce costs and litigation, obtain more consistently favorable results when litigation does occur, and increase

efficiency in making status determinations. Meeting these objectives allows for more-efficient implementation of the ESA, and would also further the purposes of the ESA, which we anticipate will be beneficial for the environment overall. However, we cannot take into consideration the extent to which cost savings—whether from lower status determination costs or decreased likelihood of remands or both—will cumulatively have specific indirect environmental consequences. The pathway to the cost savings and any environmental consequences that would result from those savings contains so many uncertain intervening circumstances that, in adopting an interpretation of “significant portion of its range,” a reasonable person would not take into account the specific environmental consequences of reducing costs.

## **COMPARISON OF ALTERNATIVES**

This section summarizes the impacts of implementing each alternative and the results of our decision-making process:

### *First Pathway: Impacts from Clarity and Uniformity*

- Unlike the no-action alternative, Alternative 2 and Alternative 3 would both improve the ability of the Services, various other government agencies, private individuals and organizations, and other interested or concerned parties to judge and concentrate their efforts on the conservation of biological resources vulnerable to extinction. We anticipate that this would likely have a small direct impact that is primarily beneficial to the human environment. However, we cannot reasonably predict what actions other parties will take in the future as a result of the increased clarity.
- In addition to the general increased clarity that the Services would achieve by adopting a binding policy, Alternative 2 would also eliminate the confusion that could arise if a species meets the definitions of both “threatened species” and “endangered species,” and would therefore provide somewhat greater clarity and uniformity than Alternative 3.

### *Second Pathway: Impacts from Changed Outcomes*

- Both Alternative 2 and Alternative 3 would provide a lower threshold than some interpretations that could be adopted in the future if the Services were to pursue Alternative 1 and adopt no binding policy. In addition, both Alternative 2 and Alternative 3 would ensure that, when the Services conclude that a species is threatened or endangered throughout a significant portion of its range, that species would be listed throughout all of its range. However, since publication of the Draft Policy, the Services have determined in most instances that the circumstances

warranted applying the interpretations and principles contained in the Draft Policy, and could continue to do so, in which case Alternative 1 would be comparable to Alternative 3.

- Alternative 2 would provide a somewhat lower threshold than Alternative 3 for determining if a portion of a species' range is significant. This could result in listing species that would not have been listed under Alternative 3. However, this would be uncommon. In those rare instances where it occurs, the additional listings would lead to additional ESA protections for those species and their critical habitat.
- Alternative 2 could also result in listing species as threatened that would have been listed as endangered under Alternative 3. However, this would be uncommon, and may not result in environmental effects, because the Services have the authority to tailor protections for threatened species under Section 4(d) of the ESA. However, another possibility would be that those tailored protections could instead provide less protection for the species, which could in turn minimize land use and other adverse socio-economic impacts and decrease beneficial protections for species and their critical habitat.

#### Third Pathway: Impacts from Decreased Costs

- Adopting a binding policy on SPR—either Alternative 2 or Alternative 3—will be beneficial and will promote more effective implementation of the Act than taking no action. A formal policy will likely improve efficiency in administering the Act by (1) increasing transparency in our decision-making, providing a consistent definition for the Services to follow, and avoiding arbitrary distinctions; and (2) reducing the cost of status determinations and the frequency of remanded status determinations the Services need to complete. This will allow the Services to focus on species that are truly in need of conservation, applying the best available science to our status determinations, and/or to accelerate some actions under the ESA to further the purposes of the statute.

In addition to the general reduction in costs that the Services would achieve by implementing a binding policy, Alternative 2—adopting the Final Policy—would eliminate the need to undertake an SPR analysis if the species is threatened throughout all of its range. This would be beneficial and could provide a simpler analysis for determining when a portion of a range is significant, and reduce the cost of status determinations even more than Alternative 3 would.

In selecting an alternative, the Services considered the extent to which the alternatives meet some of our primary objectives in adopting an SPR policy—reducing costs and litigation, obtaining more consistently favorable results when litigation does occur, and increasing efficiency in making status determinations. Meeting these objectives is beneficial because it allows for more-efficient implementation of the ESA overall, and would also further the purposes of the ESA. However, we cannot reasonably foresee the nature or scale of beneficial and adverse environmental consequences that would result either from those limited situations in the future when status determination outcomes would differ, or from the cumulative savings in costs. 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 SPR 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 would affect the environment that a reasonable person would not take into account such environmental consequences.

## CONCLUSION

This EA analyzes the probable environmental impacts of three alternatives for the Services' interpretation of the phrase "Significant Portion of Its Range" in the Endangered Species Act's definitions of "endangered species" and "threatened species." As described above, we have concluded that applying any of the alternatives considered in this EA would have minimal environmental impacts. The Final Policy could lead to impacts from the following sources:

- The preferred alternative—the Final Policy—could change the outcomes of status determinations in rare instances in the future. To the extent that the Final Policy results in listing a species, or listing a species throughout its range, that otherwise might not have been listed, or might have been listed throughout only a portion of its range, the impacts would primarily be beneficial. To the extent that the Final Policy results in not listing, or listing as threatened, a species that would otherwise have been listed, or listed as endangered, the impacts could be viewed as primarily adverse;
- In addition, the Final Policy could result in a savings in costs related to conducting listing determinations. These savings could cumulatively have a beneficial impact on the human environment, to the extent that they free up a sufficient level resources to allow the Services to accelerate one or more status determinations.

However, we cannot reasonably foresee the nature or scale of environmental consequences that would result either from those limited situations in the future when status determination outcomes would differ, or from the cumulative savings in costs. 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 SPR policy, but also that we cannot predict at this time where, to what extent, or how any environmental effects would occur.

We have also considered these impacts on a nationwide scale, and concluded that the cumulative effects of the Final Policy would be minimal.

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