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Public Comments Processing
Division of Policy and Directives Management
US Fish and Wildlife Service
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Attn: FWS-R9-ES-2011-0031

Dear US Fish and Wildlife Service:

The American Society of Mammalogists (ASM) is a non-profit, professional, scientific, and educational Society consisting of nearly 3,000 members from all 50 United States and 60 other countries worldwide. The ASM was founded in 1919 and is the world's oldest and largest organization devoted to the study of mammals. We strongly support the conservation and responsible use of wild mammals based on current, sound, and accurate scientific knowledge. The Society has a long history of reviewing issues related to mammalian conservation and, where appropriate, adopting positions on issues concerning the conservation and responsible management of mammals and their habitats based upon our scientific expertise.

We submit this comment letter in order to express our serious concerns over the US Fish and Wildlife Service (USFWS) and National Marine Fisheries Service (NMFS) draft proposed policy that would change the interpretation of the phrase "significant portion of its range" in the 1973 Endangered Species Act (ESA; 16 U.S.C. 1531-1544, 87 Stat. 884) to exclude consideration of a species' historic range. The phrase "significant portion of its range" is used in the definitions of "endangered species" ("any species which is in danger of extinction throughout all or a significant portion of its range…") and "threatened species" ("any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.").

The previous administration tried twice to approve a similar restriction in the interpretation of the plain language of the ESA, and the federal courts have repeatedly struck down these attempts. Among the several endangered species mentioned in these court decisions as being adversely affected by such a change in interpretation are the gray wolf (*Canis lupus*; Nat'l Wildlife Fed'n v. Norton, 386 F. Supp. 2d 553 (D. Vt. 2005)) and the Canada lynx (*Lynx canadensis*; Defenders of Wildlife v. Norton, 239 F. Supp. 2d 9 (D.D.C. 2002)).

This proposed policy would replace a 2007 Department of the Interior Solicitor's M-opinion (withdrawn in May 2011), portions of which we agree with, namely the statement that "The Secretary's discretion in defining 'significant' is not unlimited; he may not, for example, define 'significant' to require that a species is endangered

only if the threats faced by a species in a portion of its range are so severe as to threaten the viability of the species as a whole."

The proposed policy substantially limits interpretation of the phrase "significant portion of its range" by considering only where the species currently exists and not its historic range, and by defining "significant" to mean that loss of the species from that portion of range must threaten the survival of the species as a whole. The definitions for these important phrases as currently interpreted (Vucetich et al. 2006) make clear that an imperiled species need not be at risk of global extinction to qualify for ESA protection. The ESA of 1973 allows for the protection of a species when it is in danger of extirpation from "a significant portion of its range" even when that extirpation does not jeopardize the species as a whole. For example, the extirpation of the gray wolf from the Northern Rockies removed the apex predator from the Greater Yellowstone Ecosystem, the largest intact natural ecosystem remaining in the lower 48; if the proposed new interpretation of the language of the ESA had been in place in the 1990s, the USFWS would have felt no obligation to reintroduce the gray wolf as it did in 1995. More recently, the current administration separately evaluated threats to disjunct populations of the endangered Preble's meadow jumping mouse (*Zapus hudsonius preblei*) in northern Colorado and Wyoming, respectively, keeping protections for the Colorado population. Although the federal court restored protection for the Wyoming population in 2011, this case demonstrated a continuation of the long-held practice of considering different threats to an endangered species in different parts of its range, as conservation biologists strongly advise (Greenwald 2009).

Although the phrase "a significant portion of its range" is not clearly defined in the Act, its placement after the words "all or" clearly was intended to mean that the threat of extirpation in a "significant portion of its range" warrants protection of one or more populations of a species even when the species is not threatened with extinction globally. Global status of a species is in fact a larger and altogether distinct question and should not be allowed to be substituted for the protections inherent and intended in the ESA (Vucetich et al. 2006), which include protection of Distinct Population Segments as a way to identify Evolutionarily Significant Units (ESUs; Waples 2006). In fact, Ehrlich (1988) argued that the loss of such important populations of a species (ESUs) was at least as serious a problem for ecosystem health as loss of the entire species. USFWS's proposed new policy would result in species that are in fact endangered in significant portions of their range being denied protection because they are secure in just one portion of their range, even if that portion is a relatively small fraction of their entire range. We are very concerned that this proposed policy would not allow the USFWS to protect a species even if it has undergone severe recent declines across a major portion of its range. An emerging example of this is the little brown myotis (*Myotis lucifugus*), a species of bat with an extensive range across the United States. Unfortunately, due to white-nose syndrome, this species has drastically declined in nearly the entire eastern portion of its range (Frick et al. 2010). However, under the proposed policy, this species would not qualify for ESA protection because white-nose syndrome has not reached the western US yet and as a result these bats are still common in the western US.

In this proposed interpretive change, the historic range of a species would not be given consideration in determining whether or not a species should be protected under the ESA, which ignores Congressional intent regarding the purpose of the ESA (Vucetich et al. 2006). Furthermore, this interpretive change would allow recent declines or extirpations of regional populations of a species to be effectively ignored, and would make it more difficult to designate declining animal and plant species for protection under the ESA. A good example of this difficulty is the plains bison (*Bison bison bison*), one of two subspecies of North American bison. The plains bison has lost > 99% of its historic range, and its current numbers are < 1% of those known to exist in the 1800s. Moreover, of the remaining herds, only 50 herds totaling approximately 20,000 animals are under conservation management, and many of these herds are suffering from hybridization with cattle and increased domestication (Hedrick 2009). Given these facts, the plains bison should qualify for consideration for ESA protection, as intended by the ESA, although USFWS decided—wrongly, we feel—not to list the species as Threatened in 2011. The proposed new policy would likely remove from consideration altogether the historically and scientifically supportable argument for ESA protection of the plains bison.

For almost 40 years, the ESA has served to recover endangered species in their historic ranges so that as many Americans as possible have opportunities to watch and enjoy these species, which provide important "esthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people." Thus, we feel strongly that species should continue to be designated as threatened or endangered if they are in fact threatened

or endangered over a significant portion of their *historic* range. To do otherwise is to limit protection, study, and recovery to species that have become restricted to only small portions of much larger geographic ranges as they retreated in the face of numerous widespread threats to their survival across sometimes vast landscapes.

Of major importance to this discussion is the fact that the goal of the ESA is to return species to the point where they are viable components of their ecosystems, not merely to prevent extinctions of our animal and plant species. Failing to consider historic range allows the USFWS and NMFS to ignore species loss in significant areas and not provide protection, which is contrary to the ecosystem protection mandate of the ESA. As the authors of the ESA wrote, the goal of protecting ecosystems and restoring species to their historic ranges marked a significant shift away from previous federal attempts to protect wildlife, which only focused on the narrower goal of protecting those species facing worldwide extinction. Thus, it is very clear to us that the ESA intended for ecosystems to be protected. We feel that this proposed policy reflects an attempt by the USFWS and NMFS to abdicate this congressionally mandated responsibility. A reading of the 1973 House report on the ESA reveals that Congress felt that the ESA represented "the institutionalization of caution" when it comes to protecting declining and imperiled species. Thus, the threshold for protecting species should be maintained at a lower level consistent with this principle.

In light of the current science of trophic relations in natural ecosystems, we are particularly concerned that protection and restoration of apex predators in only small fractions of their historic ranges will preclude ecosystem restoration in much of the federal public lands that otherwise protect natural habitats (Estes et al. 2011). We are equally concerned that certain non-predatory species that are nonetheless keystone species in their extensive natural habitats, yet have been widely extirpated and reduced—for example black-tailed prairie dogs (*Cynomys ludovicianus*), which support recovering black-footed ferrets (*Mustela nigripes*), North America's rarest mammal—will not in the future be assessed for protection by fully considering the scope of their decline.

Finally, the USFWS has long been criticized for only protecting species on the very brink of extinction, which invariably makes recovery that much more difficult (and expensive). This proposed policy would actually codify that approach, essentially protecting species when they are in the most dire situations. We as a scientific society dedicated and committed to the conservation of all wild mammal species and their habitats cannot understand why the USFWS continually seeks to limit its own ability to stop the species extirpation and extinction processes, which they are mandated to do. We strongly disagree with this approach and call on both the USFWS and NMFS to halt efforts seeking to limit their abilities to carry out their ESA-related mandates.

In summary, we find that this proposed draft policy is inconsistent with, and undermines, the intent of the ESA, the intent of the 93rd Congress, which passed this legislation, and the legislative history of the ESA. We feel the proposed policy represents a step away from an unbiased, scientific approach to the protection of imperiled species within their historic ranges as mandated by the ESA. We believe that a variety of factors should be utilized to determine the significance of a portion of the range of a species, including whether that portion supports unique habitats or adaptations for the species, and whether its loss would result in a significant gap in the species' range. For the various reasons stated above, we strongly recommend that USFWS and NMFS consider the lost historic ranges of species when evaluating species for protection under the ESA. Only by full consideration of multi-level threats—to ESUs or regional populations, as well as global threats to a taxon—can the ESA truly be the effective tool for recovery of our imperiled species and their dependent natural ecosystems that it was intended to be.

An early member of the American Society of Mammalogists, Aldo Leopold, is considered one of the fathers of the American environmental movement. It is good to remember his words on environmental ethics when attempting to reach a decision on such a complex issue. "A thing is right when it tends to preserve the integrity, stability, and beauty of the biotic community. It is wrong when it tends otherwise."

Thank you for your careful consideration of our comments.

Respectfully,

Michael A. Mares, Ph.D., President
American Society of Mammalogists

References:

Ehrlich, P.R. 1988. The loss of diversity: Causes and consequences. Pp. 21-27 *In* Wilson, E.O., ed, Biodiversity. National Academy Press, Washington, DC.

Estes, J.A., J. Terborgh, J. Brashares, et al. 2011. Trophic downgrading of Planet Earth. Science 333:301-306.

Frick, W.F., J.F. Pollock, A.C. Hicks, K.E. Langwig, D.S. Reynolds, G.G. Turner, C.M. Butchkoski, and T.H. Kunz. 2010. An emerging disease causes regional population collapse of a common North American bat species. Science 329:679-682.

Greenwald, D.N. 2009. Effects on species' conservation of reinterpreting the phrase "significant portion of its range" in the U.S. Endangered Species Act. Conservation Biology 23:1374-1377.

Hedrick, P.W. 2009. Conservation genetics and North American bison. J. Heredity 100:411-420.

Vucetich, J. A., M. P. Nelson, and M. K. Phillips. 2006. The normative dimension and legal meaning of endangered and recovery in the U.S. Endangered Species Act. Conservation Biology 20:1383–1390.

Waples, R.S. 2006. Distinct population segments. Pp. 127-149 *In* Scott, J.M., D.D. Goble, and F.W. Davis, eds., The Endangered Species Act at thirty, Vol. 2: Conserving biodiversity in human-dominated landscapes. Island Press, Washington, DC.