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Remembering the Spirit of the Endangered Species Act: A Case for Narrowing Agency Discretion to Interpret "Significant Portion" Of a Species' Range

Ashling P. McAnaney

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COMMENT

REMEMBERING THE SPIRIT OF THE
ENDANGERED SPECIES ACT:
A CASE FOR NARROWING AGENCY
DISCRETION TO INTERPRET
“SIGNIFICANT PORTION” OF A
SPECIES’ RANGE

It is difficult to estimate overall rates of extinction. However, biologists generally agree that on the land, at least, and on a worldwide basis, species are vanishing one hundred times faster than before the arrival of humans. The world’s flora and fauna are paying the price of humanity’s population growth.

E.O. Wilson¹

INTRODUCTION

In late September 2005, the House of Representatives approved the Threatened and Endangered Species Recovery Act of 2005, sponsored by Rep. Richard Pombo, chairman of the House Resources Committee and an “outspoken property rights activist.”² It was the first time in more than a decade that the House of Representatives passed legislation

¹ Edward O. Wilson, *Biodiversity: Wildlife in Trouble*, in SCIENTISTS ON BIODIVERSITY 1, 1 (Linda Koebner et al. eds., American Museum of Natural History 1998).

² Zachary Coile, *PROFILE: REP. RICHARD POMBO Lawmaker's agenda just part of his nature, Congressman finds fault with federal environmental rules*, SAN FRANCISCO CHRONICLE, May 3, 2004, at A1, available at <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2004/05/03/MNGAF6ELOT1.DTL&hw=pombo+profile&sn=001&sc=1000>.

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regarding the Endangered Species Act of 1973 ("ESA").³ The bill would eliminate critical habitat designations,⁴ instead requiring the listing agency to prepare recovery plans that identify certain areas considered to be important to a species' recovery.⁵ Representative Pombo's bill highlights the conflict between property owners and the stringent protections that the ESA provides for species listed as endangered or threatened.⁶

If passed, this amendment would be the first revision of the ESA, once described as "the crown jewel of the nation's environmental laws,"⁷ to weaken its provisions.⁸ But the conflict between the ESA's requirements and the interests of property owners has been building due to the human population explosion.⁹ It is disappointing that current members of the House of Representatives either chose to ignore or forgot that the ESA arose out of Congress's prior recognition of "the problem of human-induced species extinction."¹⁰ Congressman John Dingell, former chairman of the Subcommittee on Fisheries and Wildlife Conservation and Environment of the House Committee on Merchant Marine and Fisheries, has stated that "[w]hen Congress passed the [ESA], it set a clear public policy that [Congress] would not be

³ Press Release, House Passes Historic Endangered Species Improvement Bill (Sept. 29, 2005), available at http://www.house.gov/pombo/press/press2005/sept29_05.htm, ENDANGERED SPECIES ACT OF 1973, §§ 16 U.S.C. 1531 – 1540 (2000).

⁴ RAY VAUGHAN, ENDANGERED SPECIES ACT HANDBOOK 28-30 (Government Institutes, Inc. 1994) (explaining that when a species is listed as endangered or threatened, the ESA provides for the concurrent designation of critical habitat for that species. This designation increases protection for the species because federal agencies are not permitted to engage in destructive activities in critical habitat. If critical habitat is not designated, however, activities that actually harm the species may proceed.).

⁵ Zachary Coile, *Rewriting Endangered Species Act House Resources Panel's OK expected as Critics Complain*, SAN FRANCISCO CHRONICLE, Sept. 20, 2005, at A3, available at <http://www.sfgate.com/cgi-bin/article.cgi?file=/c/a/2005/09/20/MNGKTEQK2S1.DTL>.

⁶ Coile, *supra* note 2.

⁷ Elizabeth A. Schulte, *From Downlisting to Delisting: Anticipating Legal Actions if Gray Wolves are Delisted From the Endangered Species Act*, 24 J. Land Resources & Envtl. L. 537, 537 (2004) (citing Shannon Peterson, *Congress and Charismatic Megafauna: A Legislative History of the Endangered Species Act*, 29 Envtl. L. 463, 464 (1999)).

⁸ DANIEL J. ROHLF, THE ENDANGERED SPECIES ACT, A GUIDE TO ITS PROTECTIONS AND IMPLEMENTATION 206 (Andrew C. Dana ed., Stanford Environmental Law Society 1989) ("Although lawmakers have amended the ESA four times in its fifteen-year history, they have steadfastly rejected efforts to significantly weaken its provisions. Most changes, in fact, have strengthened the statute, underscoring a continuing congressional commitment to halt and reverse the trend towards species extinctions.").

⁹ Wilson, *supra* note 1, at 2 ("The conclusion of scientists and conservationists is practically unanimous: The only way to save wild species is to maintain them in their natural habitats. Considering how rapidly such habitats are shrinking, even that straightforward solution will be an overwhelming task.").

¹⁰ TONY A. SULLINS, ENDANGERED SPECIES ACT 2 (2001).

indifferent to the destruction of nature's bounty."¹¹ The ESA's origins, therefore, are in stark contrast to the sabotage currently perpetrated by two of the agencies responsible for listing species in need of the ESA's protections, the Secretary of the Department of the Interior ("Secretary")¹² and the Fish and Wildlife Service ("FWS").¹³

The ESA provides great protection to species listed as endangered or threatened.¹⁴ The strength of the ESA lies in the nondiscretionary, mandatory duty imposed on the Secretary to list qualified species and to then enforce the species' preservation once they are listed.¹⁵ The listing process has, therefore, been called "the keystone of the Endangered Species Act."¹⁶ Though some species occur entirely on federal land,¹⁷ it is presumed that once a species is listed for protection, the ESA will impact the rights of property owners.¹⁸ However, any conflicts created should not derail the listing agencies from fulfilling the vision of the 1973 Congress. "Once a species is listed as threatened or endangered, the FWS 'must do far more than merely avoid the elimination of [the] protected species. It must bring these species back from the brink so that they may be removed from the protected class.'"¹⁹ These protections generate conflict with property owners due to the near-absolute nature of

¹¹ John D. Dingell, *The Endangered Species Act: Legislative Perspectives on a Living Law*, in *BALANCING ON THE BRINK OF EXTINCTION* 25, 25 (Kathryn A. Kohm ed., Island Press 1991).

¹² ENDANGERED SPECIES ACT OF 1973 § 3, 16 U.S.C. § 1532(15) (2000) ("The term 'Secretary' means . . . the Secretary of the Interior or the Secretary of Commerce as program responsibilities are vested pursuant to the provisions of Reorganization Plan Numbered 4 of 1970 . . .").

¹³ 50 C.F.R. § 402.01(b) (2005) ("The U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) share responsibilities for administering the Act."). This comment refers to the Secretary and the FWS as the "listing agencies" because both share the responsibility of listing species under the ESA.

¹⁴ ENDANGERED SPECIES ACT OF 1973 § 3, 16 U.S.C. § 1532(6) (2000) ("The term 'endangered species' means any species which is in danger of extinction throughout all or a significant portion of its range . . ."); 16 U.S.C. § 1532(20) (2000) ("The term 'threatened species' means any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.").

¹⁵ SULLINS, *supra* note 10, at 6.

¹⁶ Kevin Cassidy, Comment, *Endangered Species' Slippery Slope Back to the States: Existing Regulatory Mechanisms and Ongoing Conservation Efforts Under the Endangered Species Act*, 32 *Envtl. L.* 175, 187 (2002).

¹⁷ Sterling Burnett & Byron Allen, *The Endangered Species Act: First Step Toward Fixing a Costly Failure* (1998), <http://www.ncpa.org/ba/ba276.pdf> (citing that nine species subsequently delisted from the ESA existed solely on federal lands).

¹⁸ Robin L. Rivett, *Recent Enforcement Litigation and Endangered Species Act Primer*, SK056 ALI-ABA 249, 251 (2005).

¹⁹ Schulte, *supra* note 7, at 540-41 (quoting *Fund for Animals v. Babbitt*, 903 F. Supp. 96, 104 (D.D.C. 1995)).

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the ESA's restrictions and prohibitions.²⁰ If a species is never listed, however, the restrictions of the ESA never impact property owners and conflict is avoided.²¹

The phrase "significant portion of its range" is the cornerstone of a listing determination, because a species must face, or soon be faced with, extinction throughout "all or a significant portion of its range"²² to be listed. Through a series of cases ("*Defenders* series"),²³ this Comment demonstrates the Department of the Interior shifting its interpretation of the phrase "significant portion of its range" to achieve listing decisions inconsistent with the goal of the ESA. The *Defenders* series consists of four cases that analyzed the various interpretations of the phrase "significant portion of [a species'] range" proffered by the listing agencies. These cases reveal that the Secretary has attempted to avoid listing species,²⁴ as well as to downlist or delist listed species,²⁵ by manipulating the qualifications of a "significant portion" of a species' range. This Comment proposes to narrow the Secretary's discretion in determining a significant portion of a species' range. This may be accomplished by the listing agencies' adoption of an interpretation of the statutory phrase "significant portion of its range" that embodies the congressional intent to bring species back from the brink of extinction so that they may be removed from the list.²⁶ As the United States Supreme Court summarized, the "plain intent of Congress in enacting [the ESA] was to halt and reverse the trend toward species extinction, whatever the cost."²⁷

Procedural safeguards should be adopted to ensure the transparency

²⁰ See ENDANGERED SPECIES ACT OF 1973 § 9, 16 U.S.C. § 1538(a)(1) (2000).

²¹ SULLINS, *supra* note 10, at 10 (quoting H.R. Rep. No. 97-567 (1982), for the proposition that the protective measures to counter species extinction take effect when a species is listed).

²² ENDANGERED SPECIES ACT OF 1973, 16 U.S.C. § 1532(6) (2000) ("The term 'endangered species' means any species which is in danger of extinction throughout all or a significant portion of its range"); 16 U.S.C. 1532(20) (2000) ("The term 'threatened species' means any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.").

²³ *Defenders of Wildlife v. Norton* (Defenders (lizard)), 258 F.3d 1136 (9th Cir. 2001); *Nat'l Wildlife Fed. v. Norton*, 386 F. Supp. 2d 553 (D. Vt. 2005); *Defenders of Wildlife v. Sec'y, U.S. Dep't of the Interior* (Defenders (wolf)), 354 F. Supp. 2d 1156 (D. Or. 2005); *Defenders of Wildlife v. Norton* (Defenders (lynx)), 239 F. Supp. 2d 9 (D.D.C. 2002), *remedy vacated in part*, 89 Fed. App'x 273 (D.C. Cir. 2004).

²⁴ *Defenders (lizard)*, 258 F.3d 1136 (9th Cir. 2001).

²⁵ *Nat'l Wildlife Fed.*, 386 F. Supp. 2d 553 (D. Vt. 2005); *Defenders (wolf)*, 354 F. Supp. 2d 1156 (D. Or. 2005).

²⁶ ROHLF, *supra* note 8, at 28 ("Ultimately, the Endangered Species Act attempts to bring populations of listed species to healthy levels, so that they no longer need special protection.").

²⁷ SULLINS, *supra* note 10, at 2 (quoting *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 180 (1978)).

of the listing agencies' determinations concerning what constitutes a significant portion of a species' range.²⁸ The adoption of procedural safeguards would prevent the Secretary from providing post-hoc interpretations and rationales in her efforts to avoid conflict on non-federal land.²⁹ Consequently, prior to a final listing decision, the Secretary would be held responsible to account to the public for flawed reasoning or improper considerations. This approach would potentially reduce litigation.³⁰ In the prophetic words of Professor Daniel J. Rohlf:

Public vigilance and judicial oversight will likely become even more important to ensure that listed species receive the full protections to which they are entitled. The federal bureaucracy has an increasingly spotty record of administering the ESA. During the Reagan Administration . . . the Secretary of the Interior adopted narrow interpretations of many of the Act's provisions . . . and the Secretary's limited regulatory interpretation[s] attest to the problem that the executive branch may not always translate Congress' concern for vanishing species into forceful actions.³¹

Sadly, these words written in 1989 are an accurate portrayal of the current landscape of ESA litigation. The *Defenders* series demonstrates the frequency of citizen suits attempting to compel the agencies responsible for enforcing the protections of the ESA to carry out their responsibilities.

Part I of this Comment addresses the importance of biodiversity and the need to protect endangered and threatened species.³² A lack of an understanding of, and respect for, the manner in which all species improve our quality of life can make it difficult to support the ESA when it conflicts with the interests of property owners or the federal government. Part II briefly details the history of the 1973 ESA and its predecessor statutes.³³ Part III provides a summary of the relevant portions of the ESA.³⁴ Part IV outlines the substantive guidelines and procedural safeguards to be adopted by the listing agencies when determining a significant portion of a species' range.³⁵ That part describes how the proposed factors would reduce redundant litigation,

²⁸ See *infra* note 238 and accompanying text.

²⁹ See *infra* notes 240-242 and accompanying text.

³⁰ See *infra* notes 243-244, 246 and accompanying text.

³¹ ROHLF, *supra* note 8, at 206.

³² See *infra* notes 37-52 and accompanying text.

³³ See *infra* notes 53-68 and accompanying text.

³⁴ See *infra* notes 69-130 and accompanying text.

³⁵ See *infra* notes 131-246 and accompanying text.

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benefit the listing agencies and affirm the mandate of the ESA to bring protected species to the point of actual recovery and delisting.³⁶

I. IMPORTANCE OF SPECIES PROTECTION AND BIODIVERSITY

Due to the restrictions the ESA potentially places on human activity, it is difficult for many people to support it without a greater appreciation of its goals. It is important to acknowledge that the protection of threatened and endangered species and the ecosystems upon which they depend ultimately ensures a better quality of life for humans.³⁷ Biodiversity has many definitions, including diversity within an ecosystem comprising different species and genetic differences within a population of a species.³⁸ The importance of biodiversity cannot be overstated.³⁹ Recent studies demonstrate that ecosystems with greater numbers of species are more productive and have a greater ability to withstand environmental strains, such as drought.⁴⁰ Humans thus take the benefits of biodiversity, such as clean water, enriched soil, and clean air, for granted.⁴¹

Currently, we live in a paradoxical time because humans are causing a mass extinction of species during the same period that we continue to discover and derive benefits from species.⁴² We recognize our reliance on plants and animals to satisfy needs such as food and shelter; however, many lack a greater appreciation for the role plants and animals play in the health of human populations through medicines and disease prevention.⁴³ Nature provides the raw materials essential to the development of new medicines: the antihypertensive Vasotec, the antibiotic amoxicillin, and the antiulcer medicine Zantac are some

³⁶ See *infra* notes 131-246 and accompanying text.

³⁷ Peter H. Raven, *What Have We Lost, What Are We Losing?*, in *THE BIODIVERSITY CRISIS* 57, 62 (Michael J. Novacek ed., The New Press 2001) ("The biodiversity we are losing is the original source of nearly all sustainable productivity: our food, medicines, fiber, and doubtless a host of potential new products we have not yet discovered.").

³⁸ Paul R. Ehrlich and Simon A. Levin, *Biodiversity: What It Is and Why We Need It*, in *SCIENTISTS ON BIODIVERSITY* 20, 20-21 (Linda Koebner et al. eds., American Museum of Natural History 1998) (explaining that other definitions of biodiversity include species diversity and the number of geographically separate populations of a particular species).

³⁹ Michael J. Novacek, *Preface* to *THE BIODIVERSITY CRISIS* 12, 12 (Michael J. Novacek ed., The New Press 2001) ("Biodiversity is the spectacular variety of life on Earth and the essential interdependence among all living things.").

⁴⁰ Wilson, *supra* note 1, at 2.

⁴¹ *Id.*

⁴² Francesca T. Grifo, *Biodiversity and Human Health*, in *SCIENTISTS ON BIODIVERSITY* 15, 19 (Linda Koebner et al. eds., American Museum of Natural History 1998).

⁴³ *Id.*

examples of drugs derived from natural sources.⁴⁴ Penicillin, an essential medication practically taken for granted currently, was derived from a mold.⁴⁵

Animals also ensure a healthy ecosystem because they prevent the transmission of disease due to their role as predators of disease-carrying vectors.⁴⁶ One example of an unhealthy system that resulted when an ecosystem's top predator species was removed is the increased transmission of Lyme disease.⁴⁷ The deer population has increased substantially in much of the eastern United States because the deer no longer have many predators.⁴⁸ Consequently, the deer have carried the tick (*Ixodes dammini*) that transmits the bacteria that causes Lyme disease to suburban areas, where it has made greater contact with humans and pets.⁴⁹ The loss of species therefore has unexpected and serious ramifications for the health of all the species that make up the ecosystem, including humans.⁵⁰ Significantly, the elimination of species habitat is recognized as the leading cause of species extinction.⁵¹ Therefore, if humans can maintain species in their natural habitats, all ecosystem occupants will benefit.⁵²

II. HISTORY OF THE ENDANGERED SPECIES ACT

This history specifically focuses on the evolution of the ESA to provide protections to species, even species that are not facing extinction worldwide. The Endangered Species Preservation Act of 1966 ("1966 Act") was Congress's response to the problem of species extinction due to human activity.⁵³ The 1966 Act provided protection for species the current Act would consider "endangered," but not those considered "threatened."⁵⁴ It was also limited in scope: only native vertebrate species were covered by the Act and no restrictions were placed on the possession of listed species.⁵⁵

⁴⁴ *Id.* at 17.

⁴⁵ John D. Dingell, *The Endangered Species Act: Legislative Perspectives on a Living Law*, in *BALANCING ON THE BRINK OF EXTINCTION* 25, 26 (Kathryn A. Kohm ed., Island Press 1991).

⁴⁶ Grifo *supra* note 42, at 16.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.* at 15.

⁵¹ Wilson, *supra* note 1.

⁵² Wilson, *supra* note 1, at 2.

⁵³ ROHLF, *supra* note 8, at 20-21.

⁵⁴ Cassidy, *supra* note 16, at 184.

⁵⁵ ROHLF, *supra* note 53, at 21.

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The 1966 Act was amended by the 1969 Endangered Species Conservation Act ("1969 Act").⁵⁶ One change extended protections to invertebrates and subspecies.⁵⁷ Importantly, Congress contemplated the international arena and authorized the Secretary to consult with the foreign nation where a species being considered for listing was found.⁵⁸ This Act also amended the listing provisions of the 1966 Act by mandating four statutory factors for the Secretary to consider when determining whether to list a species: (1) the destruction, drastic modification, or severe curtailment, or the threatened destruction, drastic modification, or severe curtailment, of its habitat, or (2) its overutilization for commercial or sporting purposes, (3) the effect on it of disease or predation, or (4) other natural or man-made factors affecting its continued existence.⁵⁹ Significantly, the Secretary was also directed not to contemplate economic considerations when determining to list a species and to list species based only on the "best scientific and commercial data available."⁶⁰

In the early 1970's, many forces pressured Congress to protect those species whose populations were decreasing but not facing imminent extinction.⁶¹ In 1972 President Nixon set the stage for Congress to enact legislation to provide broader protections for populations not previously covered by the 1969 Act when he declared existing United States law "simply does not provide the kind of management tools needed to act early enough to save a vanishing species."⁶²

In 1973, Congress replaced the Endangered Species Conservation Act with the Endangered Species Act, to provide a means whereby the ecosystems upon which endangered and threatened species depend may be conserved.⁶³ The ESA created the "threatened" category of species deserving protection.⁶⁴ Furthermore, it elaborated the protections granted by its predecessor legislation and became considered the most comprehensive legislation for the preservation of endangered species

⁵⁶ Cassidy, *supra* note 16, at 185.

⁵⁷ *Id.* (citing DAN ROHLF, THE ENDANGERED SPECIES ACT: A GUIDE TO ITS PROTECTIONS AND IMPLEMENTATION 21-22 (1989)).

⁵⁸ *Id.* (citing Pub. L. No. 91-135, 83 Stat. 275 (repealed 1973)).

⁵⁹ *Id.* at 186.

⁶⁰ *Id.* at 185 (citing 83 Stat. at 275).

⁶¹ ROHLF, *supra* note 8, at 22-23 (citing the first Earth Day in 1970, the Marine Mammal Protection Act in 1972, and the 1973 Convention on International Trade in Endangered Species of Wild Fauna and Flora as prompting Congress to reconsider the adequacy of the 1969 Act).

⁶² *Id.* at 23 (quoting *The President's 1972 Environmental Program*, 8 Weekly Comp. Pres. Doc. 218, 223-24 (Feb. 8, 1972)).

⁶³ ENDANGERED SPECIES ACT OF 1973, 16 U.S.C. §1531(b) (2000).

⁶⁴ ROHLF, *supra* note 8, at 23.

ever enacted by any nation.⁶⁵ Significantly, Congress “lowered the endangerment threshold to cover species threatened in a significant portion of their range, rather than only those species facing worldwide extinction.”⁶⁶ This change in the statutory language was intended to allow the listing agencies flexibility in their management of listed species.⁶⁷ Currently, this phrase has also become the focus of litigation surrounding the listing agencies’ decisions.⁶⁸

III. THE ENDANGERED SPECIES ACT OF 1973

This section particularly focuses on section 4 of the ESA,⁶⁹ the listing process, as well as sections 7 and 9,⁷⁰ which generate the most conflict between listed species and property owners or the federal government.

A. SECTION 4: DETERMINATION OF ENDANGERED AND THREATENED SPECIES

Section 4 of the ESA establishes the guidelines for determining the listing status of a species.⁷¹ The Secretary may consider the listing of a species on her own initiative.⁷² Section 4(b) mandates that the Secretary make determinations for listing “solely on the basis of the best scientific and commercial data available.”⁷³ This strict mandate therefore prohibits the listing agency from engaging in any balancing of competing interests when determining whether to list a species.⁷⁴

The Secretary determines if a species merits listing as threatened or endangered according to the presence of any one of the following section 4 factors: (A) the present or threatened destruction, modification, or

⁶⁵ Katherine Hausrath, Comment, *The Designation of “Distinct Population Segments” Under the Endangered Species Act in Light of National Association of Homebuilders v. Norton*, 80 Chi.-Kent L. Rev. 449, 454 (2005) (citing *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 180 (1978)).

⁶⁶ ROHLF, *supra* note 8, at 23.

⁶⁷ *Defenders (lizard)*, 258 F.3d 1136, 1144 (quoting H.R. Rep. No. 93-412, at 2 (1973)).

⁶⁸ See, e.g., *Defenders (lizard)*, 258 F.3d 1136 (9th Cir. 2001); *Defenders (lynx)*, *Nat’l Wildlife Fed.*, 386 F. Supp. 2d 553 (D. Vt. 2005); *Defenders (wolf)*, 354 F. Supp. 2d 1156 (D. Or. 2005); 239 F. Supp. 2d 9 (D.D.C. 2002), *remedy vacated in part*, 89 Fed. App’x 273 (D.C. Cir. 2004).

⁶⁹ ENDANGERED SPECIES ACT OF 1973 § 4, 16 U.S.C. § 1533 (2000).

⁷⁰ ENDANGERED SPECIES ACT OF 1973 §§ 7, 9, 16 U.S.C. §§ 1536, 1538 (2000).

⁷¹ Schulte, *supra* note 7, at 541.

⁷² ENDANGERED SPECIES ACT OF 1973 § 4, 16 U.S.C. § 1533(a)(1) (2000).

⁷³ ENDANGERED SPECIES ACT OF 1973 § 4, 16 U.S.C. § 1533(b)(1)(A) (2000).

⁷⁴ Ivan Lieben, Comment, *Political Influences on USFWS Listing Decisions Under the ESA: Time to Rethink Priorities*, 27 Env’tl. L. 1323, 1330-31 (1997).

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curtailment of the species' habitat or range; (B) overutilization for commercial, recreational, scientific, or educational purposes; (C) disease or predation; (D) the inadequacy of existing regulatory mechanisms; or (E) other natural or manmade factors affecting its continued existence.⁷⁵ Once a species is listed, the Secretary's subsequent determination to reclassify, delist or downlist the species may be made only after considering the same factors.⁷⁶

Section 4 also includes a provision for any "interested person" to petition the Secretary to list a species.⁷⁷ Upon receipt of a valid petition, the Secretary has ninety days to find whether the petition presents substantial scientific or commercial information indicating that the petitioned action might be warranted.⁷⁸ The Secretary then has twelve months from the original receipt of the petition to issue the next finding.⁷⁹ There are only three findings available to the Secretary: (1) that the petitioned action is warranted, (2) that the petitioned action is not warranted, and (3) that the petitioned action is warranted but precluded.⁸⁰ If the action is found warranted, the Secretary must publish in the Federal Register a general notice and a proposed regulation to implement the petitioned action.⁸¹ The Secretary must also include a summary of the data upon which the proposed rule is based, a showing of the relationship of the data to the proposed rule, and a summary of factors affecting the species.⁸² With the publishing of the proposed rule in the Federal Register commences the sixty-day public-comment period.⁸³ Significantly, the opportunity to participate in the rulemaking process must be meaningful and must occur reasonably close in time to the making of the final decision.⁸⁴ Within one year of the proposed rule, the

⁷⁵ ENDANGERED SPECIES ACT OF 1973 § 4, 16 U.S.C. § 1533(a)(1) (2000).

⁷⁶ ENDANGERED SPECIES ACT OF 1973 § 4, 16 U.S.C. § 1533(c)(2)(B) (2000) ("The Secretary shall determine on the basis of this review [at least once every five years] whether any species should: (i) be removed from such a list; (ii) be changed in status from an endangered species to a threatened species; or (iii) be changed in status from a threatened species to an endangered species. Each determination under subparagraph (B) shall be made in accordance with the provisions of subsections (a) and (b) of this section.").

⁷⁷ ENDANGERED SPECIES ACT OF 1973 § 4, 16 U.S.C. § 1533(b)(3)(A) (2000) (citizen petition to be made under 5 U.S.C. § 553(e) (2000)).

⁷⁸ 50 C.F.R. § 424.14(b)(1) (2005).

⁷⁹ ENDANGERED SPECIES ACT OF 1973 § 4, 16 U.S.C. § 1533(b)(3)(B) (2000); 50 C.F.R. § 424.14(b)(3) (2005).

⁸⁰ ENDANGERED SPECIES ACT OF 1973 § 4, 16 U.S.C. § 1533(b)(3)(B)(i)-(iii) (2000).

⁸¹ ENDANGERED SPECIES ACT OF 1973 § 4, 16 U.S.C. § 1533(b)(3)(ii) (2000); 50 C.F.R. § 424.14(b)(3)(ii) (2005).

⁸² 50 C.F.R. § 424.16(b) (2005).

⁸³ 50 C.F.R. § 424.16(c)(2) (2005).

⁸⁴ SULLINS, *supra* note 10, at 22 (citing *Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392,

Secretary must publish a final rule proposing the species as endangered or threatened, or the Secretary must withdraw the proposal.⁸⁵

Under section 4, when a species merits listing as threatened or endangered, the Secretary should concurrently designate critical habitat for the species to the maximum extent prudent and determinable.⁸⁶ The critical-habitat designation is not held exclusively to the “best science” mandate: the Secretary may consider the economic impact of such designation.⁸⁷ Finally, section 4(f) requires the Secretary to develop and implement “recovery plans” for the conservation and survival of endangered and threatened species, unless such a plan will not promote the conservation of the species.⁸⁸ Recovery plans are considered an affirmative obligation to improve the position of listed species.⁸⁹

B. SECTION 7: INTERAGENCY COOPERATION

Section 7 addresses the federal government’s obligation to comply with the ESA in actions it carries out on its own.⁹⁰ Specifically, the Secretaries of Interior and Commerce must ensure that any programs administered by their respective agencies further the goal of the ESA.⁹¹ Federal agencies must therefore adhere to the ESA’s underlying policy, which states, “all Federal departments and agencies shall seek to conserve the endangered species and threatened species and shall utilize their authorities in furtherance [of this conservation].”⁹² The Supreme Court has determined that section 7 imposes an affirmative duty to halt and reverse the trend toward species extinction, regardless of the cost.⁹³ As a result, section 7 has proven to be one of the most significant of the ESA’s provisions, because it directs federal agencies to ensure their

1404 (9th Cir. 1995) for the proposition that the procedural requirements of the Administrative Procedure Act apply to listing decisions).

⁸⁵ ROHLF, *supra* note 8, at 43.

⁸⁶ ENDANGERED SPECIES ACT OF 1973 § 4, 16 U.S.C. § 1533(a)(3)(A) (2000) (“The Secretary . . . to the maximum extent prudent and determinable- (i) shall, concurrently with making a determination . . . that a species is an endangered species or a threatened species, designate any habitat of such species which is then considered to be critical habitat . . .”).

⁸⁷ ENDANGERED SPECIES ACT OF 1973 § 4, 16 U.S.C. § 1533(b)(2) (2000) (“The Secretary shall designate critical habitat . . . on the basis of the best scientific data available and after taking into consideration the economic impact . . . of specifying any particular area as critical habitat.”).

⁸⁸ ENDANGERED SPECIES ACT OF 1973 § 4, 16 U.S.C. § 1533(f)(1) (2000).

⁸⁹ ROHLF, *supra* note 8, at 87 (comparing Sections 7 and 9 as prohibitions on various activities in an effort to merely insure that endangered species’ conditions do not worsen).

⁹⁰ Schulte, *supra* note 7, at 538.

⁹¹ ENDANGERED SPECIES ACT OF 1973 § 7, 16 U.S.C. § 1536(a)(1) (2000).

⁹² ENDANGERED SPECIES ACT OF 1973 § 2, 16 U.S.C. § 1531(c) (2000).

⁹³ *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 184 (1978).

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actions “do not jeopardize the continued existence of listed species or destroy or adversely modify species’ critical habitats.”⁹⁴

C. SECTION 9: PROHIBITED ACTS

In contrast to section 7, section 9 of the ESA applies to all persons within the jurisdiction of the United States.⁹⁵ Section 9 of the ESA enumerates what are unlawful actions when taken against endangered species.⁹⁶ Most importantly, it generally prohibits the “taking” of any endangered species.⁹⁷ This protection forbids the following activities (and attempts to engage in them): harassing, harming, pursuing, hunting, shooting, wounding, killing, trapping, capturing, and collecting.⁹⁸ The FWS’s implementing regulations have further defined the words used in the ESA’s “taking” prohibition to provide a “broad and comprehensive delineation” of actions that would constitute a prohibited take under the ESA.⁹⁹

Importantly, the definitions not only refer to the listed species, but they contemplate a system-wide approach by extending prohibitions to conduct affecting the species’ habitat as well. “Harass” is defined as an intentional or negligent act or omission that creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns, which include breeding, feeding and sheltering.¹⁰⁰ “Harm” includes any action that actually kills or injures wildlife through significant habitat modification or degradation by significantly impairing essential behavioral patterns, including breeding, feeding and sheltering.¹⁰¹ These definitions are significant, as they may prevent future takings if evidence demonstrates that habitat modification or degradation will have an adverse impact on a listed species’ population.¹⁰² Therefore, section 9’s comprehensive focus on protecting endangered species through enjoining future harmful activities leads to the most conflicts with business and property owners.¹⁰³

⁹⁴ ROHLF, *supra* note 8, at 29.

⁹⁵ ENDANGERED SPECIES ACT OF 1973 § 9, 16 U.S.C. § 1538(a)(1) (2000).

⁹⁶ ENDANGERED SPECIES ACT OF 1973 § 9, 16 U.S.C. § 1538(a)(1) (2000).

⁹⁷ ENDANGERED SPECIES ACT OF 1973 § 9, 16 U.S.C. § 1538(a)(1)(B) (2000) (“Generally . . . it is unlawful for any person subject to the jurisdiction of the United States to . . . take any such species within the United States or the territorial sea of the United States.”)

⁹⁸ ENDANGERED SPECIES ACT OF 1973 § 3, 16 U.S.C. § 1532(19) (2000).

⁹⁹ VAUGHAN, *supra* note 4, at 65.

¹⁰⁰ 50 C.F.R. § 17.3 (2005).

¹⁰¹ 50 C.F.R. § 17.3 (2005).

¹⁰² VAUGHAN, *supra* note 4, at 68.

¹⁰³ Rivett, *supra* note 18, at 253-54.

Unlike an endangered species, however, a threatened species may not necessarily receive these extensive protections.¹⁰⁴ Listing a species as threatened grants the Secretary flexibility under section 4(d) of the ESA to determine such regulations as she deems necessary for the conservation of the species.¹⁰⁵ These special regulations may provide important flexibility to address species-human conflicts as the species approaches recovery and becomes more widespread.¹⁰⁶

D. CITIZEN SUITS AND ADMINISTRATIVE PROCEDURE ACT

Section 11(g) of the ESA allows citizens to bring lawsuits in federal court to enforce the ESA.¹⁰⁷ The provision allows private parties to enforce the ESA against any party regulated by the ESA.¹⁰⁸ Citizens may also sue the Secretary for a failure to perform her nondiscretionary section 4 duties.¹⁰⁹ The *Defenders* series illustrates the necessity of citizen suits as a means to provide additional enforcement of the protection of listed species. Some believe ESA decisions are “characterized by the intense involvement of viciously combative interest groups willing to sue each other . . . with . . . gleeful abandon.”¹¹⁰ Others extol the pivotal role the federal courts have played in the enforcement of the ESA.¹¹¹

Citizens may only bring suit under section 11(g) for limited reasons.¹¹² However, some final actions by the Secretary that are not

¹⁰⁴ What Is The Difference Between Endangered and Threatened? (2003), <http://www.fws.gov/midwest/wolf/esa-status/e-vs-t.pdf>.

¹⁰⁵ ENDANGERED SPECIES ACT OF 1973 § 4, 16 U.S.C. § 1533(d) (2000).

¹⁰⁶ What Is The Difference Between Endangered and Threatened? (2003), <http://www.fws.gov/midwest/wolf/esa-status/e-vs-t.pdf>.

¹⁰⁷ ENDANGERED SPECIES ACT OF 1973 § 11, 16 U.S.C. § 1540(g)(1) (2000).

¹⁰⁸ ENDANGERED SPECIES ACT OF 1973 § 11, 16 U.S.C. § 1540(g)(1)(A) (2000).

¹⁰⁹ ENDANGERED SPECIES ACT OF 1973 § 11, 16 U.S.C. § 1540(g)(1)(C) (2000) (“Except as provided in paragraph (2) of this subsection any person may commence a civil suit on his own behalf--(A) to enjoin any person, including the United States and any other governmental instrumentality or agency (to the extent permitted by the eleventh amendment to the Constitution), who is alleged to be in violation of any provision of this chapter or regulation issued under the authority thereof; or (B) to compel the Secretary to apply, pursuant to section 1535(g)(2)(B)(ii) of this title, the prohibitions set forth in or authorized pursuant to section 1533(d) or 1538(a)(1)(B) of this title with respect to the taking of any resident endangered species or threatened species within any State; or (C) against the Secretary where there is alleged a failure of the Secretary to perform any act or duty under section 1533 of this title which is not discretionary with the Secretary.”).

¹¹⁰ Symposium, *The Battle Over Endangered Species Act Methodology*, 34 *Envtl. L.* 555, 560 (2004).

¹¹¹ Eric R. Glitzenstein, *The Vital Importance of Citizen Suits and Judicial Oversight in Ensuring Effective Implementation of the ESA*, SK056 ALI-ABA 241, 243 (2005).

¹¹² SULLINS, *supra* note 10, at 140.

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reviewable under section 11(g) are reviewable under the Administrative Procedure Act (“APA”).¹¹³ Under section 706 of the APA, courts must set aside agency actions that are “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”¹¹⁴ An agency action is arbitrary and capricious if the agency “failed to consider relevant factors or articulate a rational connection between the facts found and the choice made,” or “relied on factors which Congress had not intended it to consider, entirely failed to consider an important aspect of the problem, [or] offered an explanation that runs counter to the evidence before the agency.”¹¹⁵ Section 706 of the APA generally requires the “reviewing court to engage in a substantial inquiry,”¹¹⁶ albeit a narrow one.¹¹⁷ A court may not substitute its judgment for the decision of the agency.¹¹⁸ Therefore, this is generally a deferential standard of review.¹¹⁹ The courts in the *Defenders* series analyzed the claims under the deferential “arbitrary and capricious” standard.¹²⁰

One reason for the deferential review is that the fewer constraints a statute imposes on an agency—in other words, the greater the agency’s discretion—the less opportunity a court has to evaluate the decision.¹²¹ Furthermore, agency decision-making is shaped by the need to avoid being arbitrary and capricious.¹²² Consequently, to satisfy this deferential standard of review when constraints are imposed on the agency’s decision-making, the agency must merely show that it acted appropriately within the constraints.¹²³

The initial case to analyze the phrase “significant portion of [a species’] range” was *Defenders of Wildlife v. Norton* in the Ninth Circuit (“*Defenders (lizard)*”).¹²⁴ The interpretations the Secretary gave to the phrase in *Defenders (lizard)* failed to satisfy even this deferential

¹¹³ *Id.* at 143 (citing *Bennett v. Spear*, 117 S. Ct. 1154 (1997)).

¹¹⁴ Administrative Procedure Act, 5 U.S.C. § 706(2)(A) (2006).

¹¹⁵ *Nat’l Wildlife Fed. v. Norton*, 386 F. Supp. 2d 553, 560-61 (D. Vt. 2005).

¹¹⁶ *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 415 (1971), *overruled on other grounds*, 430 U.S. 99 (1977).

¹¹⁷ *Volpe*, 401 U.S. at 416, *Nat’l Wildlife Fed.*, 386 F. Supp. 2d at 561.

¹¹⁸ *Volpe*, 401 U.S. at 416, *Nat’l Wildlife Fed.*, 386 F. Supp. 2d at 561.

¹¹⁹ Timothy Bechtold, Comment, *Listing the Bull Trout Under the Endangered Species Act: The Passive-Aggressive Strategy of the United States Fish and Wildlife Service to Prevent Protecting Warranted Species*, 20 Pub. Land & Resources L. Rev. 99, 126 (1999).

¹²⁰ *Defenders (lizard)*, 258 F.3d at 1137; *Nat’l Wildlife Fed.*, 386 F. Supp. 2d at 559; *Defenders (wolf)*, 354 F. Supp. 2d at 1158-59; *Defenders (lynx)*, 239 F. Supp. 2d at 11-12.

¹²¹ Symposium, *The Battle Over Endangered Species Act Methodology*, 34 *Envtl. L.* 555, 579 (2004).

¹²² *Id.*

¹²³ *Id.*

¹²⁴ 258 F.3d 1136 (9th Cir. 2001).

standard.¹²⁵ The Ninth Circuit did not propose a definition for the phrase;¹²⁶ in fact, it affirmed the Secretary's "wide discretion" when determining a significant portion of a species' range.¹²⁷ It did, however, impose a methodological constraint for FWS to satisfy in future determinations of the statutory phrase and thus laid the foundation for subsequent judicial analysis of the Secretary's interpretations. Consequently, the listing agencies have attempted to interpret the phrase and make listing determinations in keeping with the methodological constraint imposed by the Ninth Circuit's decision.¹²⁸ Courts continue to find the listing agencies' interpretations arbitrary and capricious, demonstrating the need for adoption of procedural constraints and substantive guidelines to ensure decision-making that is in keeping with the goal of the ESA.¹²⁹ This Comment's recommendations call for the listing agencies to remember the strong conservationist spirit of Congress that imbued the ESA of 1973.¹³⁰

IV. RECOMMENDATIONS FOR INTERPRETATION OF "SIGNIFICANT PORTION OF ITS RANGE"

These recommendations are derived from the courts' analysis in the *Defenders* series, which reveal a pattern of the listing agencies' narrow interpretation of the statutory phrase.¹³¹ Though the Secretary is to use only the best science available in her determinations of which species merit listing under the ESA, history demonstrates that political pressure has influenced listing decisions.¹³² One incident occurred in Alaska, where the FWS circulated a paper that listed the "pros" and "cons" of not listing the Alexander Archipelago wolf.¹³³ The "pro" was that not listing the wolf would be the least controversial option for the agency.¹³⁴ The "con" of not listing the wolf, however, was that the wolf had been found

¹²⁵ *Defenders (lizard)*, 258 F.3d at 1137.

¹²⁶ Linda C. Maranzana, Comment, *Defenders of Wildlife v. Norton: A Closer Look at the "Significant Portion of its Range" Concept*, 29 Ecology L.Q. 263, 273 (2002).

¹²⁷ *Defenders (lizard)*, 258 F.3d at 1145.

¹²⁸ See *infra* note 239.

¹²⁹ *Defenders (lizard)*, 258 F.3d at 1137; *Defenders (lynx)*, 239 F. Supp. 2d at 21; *Defenders (wolf)*, 354 F. Supp. 2d at 1172; *Nat'l Wildlife Fed.*, 386 F. Supp. 2d at 566.

¹³⁰ Dingell, *supra* note 11.

¹³¹ *Defenders (lizard)*, 258 F.3d 1136 (9th Cir. 2001); *Defenders (lynx)*, 239 F. Supp. 2d 9 (D.D.C. 2002), *remedy vacated in part*, 89 Fed. App'x 273 (D.C. Cir. 2004); *Defenders (wolf)*, 354 F. Supp. 2d 1156 (D. Or. 2005); *Nat'l Wildlife Fed.*, 386 F. Supp. 2d 553 (D. Vt. 2005).

¹³² Lieben, *supra* note 74, at 1336 (citing a 1978 General Accounting Office report that showed the FWS delayed listing species when confronted with political conflict.).

¹³³ *Id.* at 1361.

¹³⁴ *Id.*

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to merit listing under the analysis of the five statutorily promulgated factors.¹³⁵ This weighing of benefits and consequences is illegal, because the listing agency is only to consider the five section 4(a)(1) listing factors when making listing determinations.¹³⁶ This incident exposes the FWS engaging in improper analysis and allowing political considerations to be taken into account.¹³⁷

The *Defenders* series, unfortunately, reveals another disturbing trend: the Secretary's attempts to avoid the stringent nondiscretionary duties imposed by the ESA.¹³⁸ The ESA defines threatened and endangered species as those facing extinction in all or a significant portion of their range.¹³⁹ However, the Secretary possesses the discretion to determine what constitutes a significant portion of a species' range.¹⁴⁰ The *Defenders* series reveals how the Secretary has capitalized on this grant of discretion to provide shifting definitions and rationales to justify her decisions regarding the listing of species.¹⁴¹

A. THE SECRETARY MAY NOT CONSIDER LAND OWNERSHIP IN DETERMINING A SIGNIFICANT PORTION OF A SPECIES' RANGE

The increase in the human population is leading to sprawl in all corners of the United States, and this boom is not easily reconciled with ESA protections afforded listed species with habitat on private property.¹⁴² At least 712 listed species occurred on private lands as of 1995.¹⁴³ Furthermore, a 1993 study by the Association for Biodiversity Information and The Nature Conservancy found that half of listed

¹³⁵ *Id.*

¹³⁶ ENDANGERED SPECIES ACT OF 1973 § 4, 16 U.S.C. § 1533(b)(1)(A) (2000); *see supra* note 75 and accompanying text.

¹³⁷ Lieben, *supra* note 74, at 1336.

¹³⁸ *See Defenders of Wildlife v. Norton*, 258 F.3d 1136, 1140 (9th Cir. 2001).

¹³⁹ ENDANGERED SPECIES ACT OF 1973 § 3, 16 U.S.C. § 1532(6) (2000) ("The term 'endangered species' means any species which is in danger of extinction throughout all or a significant portion of its range . . ."); 16 U.S.C. 1532(20) (2000) ("The term 'threatened species' means any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.").

¹⁴⁰ *Defenders (lizard)*, 258 F.3d at 1145.

¹⁴¹ *Defenders (lizard)*, 258 F.3d at 1146 n.11; *Defenders of Wildlife v. Sec'y, U.S. Dep't of the Interior*, 354 F. Supp. 2d at 1164.

¹⁴² Joyce Morrison, Shoot, Shovel and Shut-Up (2004), <http://www.newswithviews.com/Morrison/joyce7.htm> (explaining that some property owners' fear of ESA restrictions leads them to actually destroy listed species found on their property).

¹⁴³ Safe Harbor Agreements for Private Property Owners (1999), http://training.fws.gov/library/Pubs9/safe_harbor_agree.pdf.

species have at least 80% of their habitat on private land.¹⁴⁴ The FWS recognizes the importance of private landowner participation in recovery efforts and has created programs to encourage cooperation by property owners.¹⁴⁵ However, the listing agencies attempt to use this reliance on local conservation efforts to protect species as a means to avoid listing deserving species.¹⁴⁶

Defenders (lizard) concerned the Secretary's decision not to designate the flat-tailed horned lizard ("lizard") for protection as a threatened species.¹⁴⁷ The Secretary decided to withdraw an earlier proposed rule that recommended listing the lizard as a threatened species.¹⁴⁸ The Secretary determined that, however serious the threats to the lizard on *private* land, "[l]arge blocks of habitat with few anticipated impacts exist on *public* lands throughout the range of this species"¹⁴⁹ It appeared the lizard was not in danger of extinction throughout all of its range; thus, whether the lizard merited protection under the ESA depended largely on the meaning of the phrase "extinction throughout . . . a significant portion of its range."¹⁵⁰ Plaintiff *Defenders of Wildlife* argued that if the lizard's *private land* habitat constituted "a significant portion of its range" and the lizard's population on that private land habitat was in jeopardy, the ESA required the Secretary to designate the lizard for protection.¹⁵¹ By not considering the private land habitat a significant portion of the lizard's range, the Secretary did not have to analyze the lizard's population on private land under the five section 4(a)(1) factors.¹⁵² If any of those factors had been present on private land considered to be "a significant portion of" the lizard's range, the

¹⁴⁴ Our Endangered Species Program and How It Works (2003), <http://www.fws.gov/endangered/landowner/landown.pdf>.

¹⁴⁵ Our Endangered Species Program and How It Works (2003), <http://www.fws.gov/endangered/landowner/landown.pdf> ("The Safe Harbor Policy encourages voluntary management for listed species to promote recovery on non-Federal lands by giving assurances to the landowners that no additional future regulatory restrictions will be imposed The Habitat Conservation Plan allows landowners to develop land supporting listed species provided they undertake conservation measures. The No Surprise Policy assures participating landowners that they will incur no additional mitigation requirements beyond those they agreed to in their Habitat Conservation Plans, even if circumstances change.")

¹⁴⁶ Cassidy, *supra* note 16, at 177.

¹⁴⁷ *Defenders (lizard)*, 258 F.3d at 1137.

¹⁴⁸ *Defenders (lizard)*, 258 F.3d at 1140.

¹⁴⁹ *Id.* (quoting 62 Fed. Reg. 37,860) (emphasis added).

¹⁵⁰ *Id.* at 1141 ("Assuming the lizard's population remains viable on public land, it is not in danger of extinction throughout *all* its range.").

¹⁵¹ *Id.*

¹⁵² *Id.*

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Secretary would have had to list the lizard for ESA protection.¹⁵³

The Ninth Circuit found the phrase “significant portion of its range” inherently ambiguous.¹⁵⁴ When there is ambiguity in a statutory provision, a court should defer to the interpretation offered by the agency responsible for implementing the statute, so long as the interpretation is reasonable.¹⁵⁵ In the litigation, the Secretary initially explained that a species faced extinction throughout a “significant portion of its range” only if it was in danger of extinction everywhere.¹⁵⁶ The court found this interpretation rendered the phrase superfluous because the ESA already defined endangered species as those “in danger of extinction throughout all . . . of [their] range.”¹⁵⁷ Such a reading was unacceptable because courts follow a natural reading when interpreting a statute and give effect to all of the statute’s provisions.¹⁵⁸ The Secretary’s interpretation of the phrases as “functional equivalents” was thus invalidated.¹⁵⁹

Alternatively, the Secretary offered the explanation that the “significant portion of its range” phrase enabled her to provide protection to a species before it became endangered.¹⁶⁰ This reasoning conflated the ESA’s provisions for protection of threatened species, which face a future threat of endangerment, and the provision for endangered species, which currently face extinction.¹⁶¹ That reasoning would make the phrase redundant and unnecessary.¹⁶² The plaintiff’s argument that the percentage of lost habitat was so large that it must constitute a “substantial” portion of the lizard’s range was also rejected.¹⁶³ The Ninth Circuit examined the legislative history and subsequent historical practice under the ESA to discern a meaning for the statutory phrase.¹⁶⁴

The Ninth Circuit relied heavily on the legislative history’s chronicling of the ESA as the third in a series of laws aimed at protecting and preserving endangered species.¹⁶⁵ Specifically, the court found that the ESA’s expansion of protection to “species in danger of extinction ‘in

¹⁵³ *Id.*

¹⁵⁴ *Defenders of Wildlife v. Norton*, 258 F.3d 1136, 1141 (9th Cir. 2001).

¹⁵⁵ *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984).

¹⁵⁶ *Defenders (lizard)*, 258 F.3d at 1141.

¹⁵⁷ *Id.* at 1142 (emphasis added).

¹⁵⁸ *Id.* (citing *United Food & Commercial Workers Union Local 751 v. Brown Group, Inc.*, 517 U.S. 544, 549 (1996)).

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Defenders (lizard)*, 258 F.3d at 1142.

¹⁶² *Id.*

¹⁶³ *Id.* at 1143.

¹⁶⁴ *Id.* at 1144.

¹⁶⁵ *Id.*

any portion of its range” represented “a significant shift in the definition in existing law which considers a species to be endangered only when it is threatened with worldwide extinction.”¹⁶⁶ This change was intended to provide the Secretary flexibility in her approach to wildlife management because a species may be listed as threatened in one location and endangered in another area where it is faced with the threat of extinction.¹⁶⁷ The Ninth Circuit concluded that a species can be extinct “throughout . . . a significant portion of its range” if there are major geographical areas in which it is no longer viable, but once was.¹⁶⁸ The Secretary has wide discretion to delineate “a significant portion of its range.”¹⁶⁹ But if the species is expected to survive in an area much smaller than its historical range, the Secretary must explain her conclusion that the lost area is not a “significant portion of [the species’] range.”¹⁷⁰ This has become known as the “*Defenders Test*.”¹⁷¹

Ultimately, the court found that the Secretary did not expressly consider the “extinction throughout . . . a significant portion of its range” issue prior to the lizard Final Rule.¹⁷² The decision to withdraw the proposed rule recommending the lizard for ESA protection was held arbitrary and capricious.¹⁷³ The decision was remanded to the Secretary for consideration in accordance with the outlined legal standards.¹⁷⁴

Defenders (lizard) centered around the Secretary’s decision not to consider the threats the lizard faced on private land because conservation efforts on public lands would ensure the survival of the species.¹⁷⁵ Similarly, in *Defenders of Wildlife v. Norton*,¹⁷⁶ (“*Defenders (lynx)*”) the FWS acknowledged that “the overwhelming majority of the regions it determined not to be significant [were] comprised of non-federal lands.”¹⁷⁷ *Defenders (lynx)* concerned a challenge to a final decision by the FWS declaring the Canada lynx in the contiguous United States to be

¹⁶⁶ *Defenders (lizard)*, 258 F.3d at 1144 (quoting H.R. Rep. No. 93-412, at 2 (1973)).

¹⁶⁷ *Defenders (lizard)*, 258 F.3d at 1144.

¹⁶⁸ *Id.* at 1145.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Nat’l Wildlife Fed. v. Norton*, 386 F. Supp. 2d 553, 566 (D. Vt. 2005); *Defenders of Wildlife v. Sec’y, U.S. Dep’t of the Interior*, 354 F. Supp. 2d 1156, 1165 (D. Or. 2005).

¹⁷² *Defenders (lizard)*, 258 F.3d at 1145.

¹⁷³ *Id.* at 1146.

¹⁷⁴ *Id.* at 1146-47.

¹⁷⁵ *Defenders (lizard)*, 258 F.3d at 1140.

¹⁷⁶ 239 F. Supp. 2d 9 (D.D.C. 2002), *remedy vacated in part*, 89 Fed. App’x 273 (D.C. Cir. 2004).

¹⁷⁷ *Defenders (lynx)*, 239 F. Supp. 2d 9, 20 n.9 (D.D.C. 2002), *vacated in part*, 89 Fed. App’x 273 (D.C. Cir. 2004) (quoting Fed. Reg. 16, 061, 16, 081).

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a threatened rather than an endangered species.¹⁷⁸ The FWS published its lynx Final Rule on March 24, 2000, and declared that collectively, the Northeast, Great Lakes, and Southern Rockies did not constitute a significant portion of the range of the lynx.¹⁷⁹ The plaintiffs argued that FWS acted arbitrarily and capriciously in determining that the three areas did not constitute a significant portion of the lynx's range.¹⁸⁰ Had the FWS considered those three regions collectively a significant portion of the lynx's range, the plaintiffs argued, "then the lynx's highly imperiled status in *those* three areas would necessitate listing [the lynx] as endangered."¹⁸¹ Again, by avoiding review of the lynx in those three areas, the Secretary avoided any possibility of a mandatory listing of the lynx due to section 4(a)(1).

Like the Ninth Circuit in *Defenders (lizard)*, the district court in *Defenders (lynx)* reviewed the agency decision under the APA's deferential standard of review.¹⁸² However, the court relied on a plain-meaning reading of the statutory phrase and defined "significant" as "a noticeably or measurably large amount."¹⁸³ As a result, the court found the agency's determination that three quarters of lynx habitat was not a significant portion in conflict with this definition.¹⁸⁴ The court applied the Ninth Circuit's conclusion that a "species could be extinct throughout a significant portion of its range if there are major geographical areas in which it is no longer viable but once was."¹⁸⁵ Due to FWS's own acknowledgement that the lynx historically occurred in the Northeast and Southern Rockies,¹⁸⁶ the FWS's decision was set aside and remanded back to the agency for reconsideration consistent with the court's ruling.¹⁸⁷ Specifically, the court demanded the FWS explain its conclusion that the area in which the lynx had once lived, but no longer could, was not a significant portion of its range.¹⁸⁸

¹⁷⁸ *Id.* at 11.

¹⁷⁹ *Id.* at 17.

¹⁸⁰ *Defenders (lynx)*, 239 F. Supp. 2d 9, 18 (D.D.C. 2002) (citing Lynx Final Rule, 65 Fed. Reg. 16,052), *vacated in part*, 89 Fed. App'x 273 (D.C. Cir. 2004).

¹⁸¹ *Id.* (quoting the Pls. Mot. For Summ. J. at 30) (emphasis in original).

¹⁸² *Id.* at 17.

¹⁸³ *Defenders of Wildlife v. Norton*, 239 F. Supp. 2d 9, 19 (D.D.C. 2002), *remedy vacated in part*, 89 Fed. App'x 273 (D.C. Cir. 2004).

¹⁸⁴ *Id.* (defining "significant" as "a noticeably or measurably large amount").

¹⁸⁵ *Id.* at 20.

¹⁸⁶ *Id.* at 20 ("FWS itself has acknowledged that lynx historically occurred in at least two of these regions . . . and may now be extirpated from these areas.").

¹⁸⁷ *Defenders of Wildlife v. Norton*, 239 F. Supp. 2d 9, 21 (D.D.C. 2002), *remedy vacated in part*, 89 Fed. App'x 273 (D.C. Cir. 2004).

¹⁸⁸ *Id.*

Upon remand for reconsideration of its interpretation of the significant portion of the Canada lynx's range,¹⁸⁹ the FWS determined again to list the lynx as threatened.¹⁹⁰ The instructions were to reconsider the lynx's status "consistent with the Court's memorandum opinion"; however, the FWS proceeded to substitute a different definition for the meaning of "significant."¹⁹¹ The FWS noted that the court "suggested, but did not decide" that the appropriate definition for "significant" in the context of species habitat was "a noticeably or measurably large amount."¹⁹² The FWS instead determined that a definition of "significant" pertaining to "importance" was more consistent with the intention of the ESA.¹⁹³ The FWS therefore failed to follow the court's directive, while reaffirming its decision to list the lynx as threatened.¹⁹⁴

If habitat on non-federal land constitutes a significant portion of a species' range, the listing agencies may not neglect the species' status on that land.¹⁹⁵ A species' range is not confined by state and territorial boundary lines, and this should be reflected in agency listing decisions.

B. THE SECRETARY MUST DETERMINE A SIGNIFICANT PORTION OF A SPECIES' RANGE CONSISTENT WITH THE CONGRESSIONAL INTENT OF RECOVERING LISTED SPECIES

The courts' analyses in the *Defenders* series share similarities because *Defenders (lizard)* provided the foundational analysis of the phrase "significant portion of [a species'] range" subsequently relied on by the later cases.¹⁹⁶ This should not undermine the importance of the courts' criticisms of the Secretary's or FWS's interpretations of the statutory phrase as contrary to the intent of Congress.¹⁹⁷

¹⁸⁹ *Id.*

¹⁹⁰ Notice of Remanded Determination of Status for the Contiguous United States Distinct Population Segment of the Canada Lynx; Clarification of Findings; Final Rule 68 Fed. Reg. 40,076-77 (July 3, 2003).

¹⁹¹ *Id.* at 40,076.

¹⁹² *Id.* at 40,076.

¹⁹³ *Id.* at 40,076.

¹⁹⁴ *Id.* at 40,076.

¹⁹⁵ *Defenders of Wildlife v. Norton*, 239 F. Supp. 2d 9, 20 n.9 (D.D.C. 2002), *remedy vacated in part*, 89 Fed. App'x 273 (D.C. Cir. 2004).

¹⁹⁶ *Defenders (lynx)*, 239 F. Supp. 2d at 20; *Defenders of Wildlife v. Sec'y, U.S. Dep't of the Interior*, 354 F. Supp. 2d 1156, 1165 (D. Or. 2005); *Nat'l Wildlife Fed. v. Norton*, 386 F. Supp. 2d 553, 566 (D. Vt. 2005).

¹⁹⁷ *Defenders (lizard)*, 258 F.3d 1136, 1142 ("[The Secretary's] understanding of the statutory language . . . runs up against the statute's legislative history."); *Defenders (wolf)*, 354 F. Supp. 2d 1156, 1168 ("Further, the Secretary's interpretation runs counter to Congressional intent."); *Defenders (lynx)*, 239 F. Supp. 2d 9, 19 ("Thus, FWS's exclusive focus on one region where the

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The court in *Defenders (lizard)* invoked the sentiment of naturalist Aldo Leopold to explain the spirit of the ESA: “There seems to be a tacit assumption that if grizzlies survive in Canada and Alaska, that is good enough. It is not good enough for me . . . Relegating grizzlies to Alaska is about like relegating happiness to heaven; one may never get there.”¹⁹⁸ The language of the ESA supports this interpretation because it declares that all agencies must seek to conserve endangered and threatened species.¹⁹⁹ Congress further defined “conserve” as “to use . . . all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this chapter are no longer necessary.”²⁰⁰ The intent of Congress in enacting the ESA, therefore, was to eventually recover a species to a population level at which the species could subsequently be removed from the list.²⁰¹

District courts in both Oregon and Vermont also issued a resounding rejection of the FWS’ goal of simply ensuring the viability of a species.²⁰² On April 1, 2003, the FWS issued the *Final Rule to Reclassify and Remove the Gray Wolf From the List of Endangered and Threatened Wildlife in Portions of the Conterminous United States* (“wolf Final Rule”).²⁰³ The wolf Final Rule analyzed the population of the gray wolf in the contiguous United States and divided the species into three Distinct Population Segments (“DPSs”)²⁰⁴ - Eastern, Western, and Southwestern - and downlisted the gray wolf’s status from endangered to threatened in the Eastern and Western DPSs.²⁰⁵ As a result of downlisting the wolf to threatened status in the Eastern and Western DPSs,²⁰⁶ the FWS could adopt rules under ESA section 4(d) that allowed

[l]ynx is more prevalent . . . is contrary to the expansive protection intended by the ESA.”).

¹⁹⁸ *Defenders of Wildlife v. Norton*, 258 F.3d 1136, 1145 n.10 (9th Cir. 2001).

¹⁹⁹ ENDANGERED SPECIES ACT OF 1973 § 2, 16 U.S.C. § 1531(c)(1) (2000).

²⁰⁰ ENDANGERED SPECIES ACT OF 1973 § 3, 16 U.S.C. § 1532(3) (2000).

²⁰¹ ROHLF, *supra* note 8, at 28.

²⁰² *Defenders (wolf)*, 354 F. Supp. 2d at 1169 (citing *Defenders (lizard)* and *Defenders (lynx)* for the proposition that designating a significant portion of a species’ range to ensure merely the viability of a DPS is contrary to the ESA.), *Nat’l Wildlife Fed.*, 386 F. Supp. 2d at 566.

²⁰³ *Defenders (wolf)*, 354 F. Supp. 2d at 1158.

²⁰⁴ ENDANGERED SPECIES ACT OF 1973 § 3, 16 U.S.C. § 1532(16) (2000) (“The term ‘species’ includes any subspecies of fish and wildlife or plants, and any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature.”).

²⁰⁵ *Defenders (wolf)*, 354 F. Supp. 2d at 1159.

²⁰⁶ Policy Regarding the Recognition of Distinct Vertebrate Population Segments Under the Endangered Species Act, 61 Fed. Reg. 4,722, 4,725 (February 7, 1996). A distinct population segment is determined upon consideration of the (1) discreteness of that population segment compared to the remainder of the species to which it belongs and (2) the significance of that population segment to the species to which it belongs. *Id.*

“takes” of gray wolves under certain circumstances.²⁰⁷ The wolf Final Rule, in fact, allowed for “the full spectrum of depredation control actions, from nonlethal opportunistic harassment to lethal control of depredating wolves.”²⁰⁸ These permitted activities would have been prohibited if the wolf remained listed as endangered.²⁰⁹ Defenders of Wildlife brought an action in the District Court for the District of Oregon, seeking an injunction to remand the wolf Final Rule to the FWS for reconsideration.²¹⁰ The Secretary’s interpretation and application of the statutory phrase “significant portion of its range” were at the root of the controversy.²¹¹

The Secretary argued that she had defined the significant portion of the wolf’s range as “that area that is important or necessary for maintaining a viable, self-sustaining, and evolving representative population or populations in order for the taxon to persist into the foreseeable future.”²¹² Applying this definition, the Secretary concluded that the significant portion of the wolf’s range consisted of the core areas of the Western Great Lakes and the Northern Rockies.²¹³ Consequently, she determined there was “no obligation . . . to assess the five ESA § 4(a)(1) factors” outside the Northern Rockies and the Western Great Lakes.²¹⁴ The same five factors used to determine whether to list a species are used to determine whether threats to the species have been diminished or removed to the point that downlisting or delisting is appropriate.²¹⁵ Due to the Secretary’s exercise of her discretion to define the “significant portion” of the wolf’s range as the wolf’s current range, she did not face the possibility of a mandatory continuation of the wolf’s listing due to the analysis of wolf populations outside the current range under the listing factors.²¹⁶ The wolf Final Rule was vacated as arbitrary and capricious for downlisting major geographic areas without assessing the threats to the wolf by applying the statutorily mandated listing factors.²¹⁷ The District Court for the District of Vermont analyzed the

²⁰⁷ *Defenders (wolf)*, 354 F. Supp. 2d at 1160.

²⁰⁸ Final Rule to Reclassify and Remove the Gray Wolf From the List of Endangered and Threatened Wildlife in Portions of the Conterminous United States, 68 Fed. Reg. 15,868 (April 1, 2003).

²⁰⁹ *Defenders (wolf)*, 354 F. Supp. 2d at 1160 n.3.

²¹⁰ *Id.* at 1158.

²¹¹ *Id.* at 1164.

²¹² *Id.*

²¹³ *Defenders (wolf)*, 354 F. Supp. 2d at 1164.

²¹⁴ *Id.* at 1167.

²¹⁵ *Nat’l Wildlife Fed. v. Norton*, 386 F. Supp. 2d 553, 558 (D. Vt. 2005).

²¹⁶ *Defenders (wolf)*, 354 F. Supp. 2d at 1167.

²¹⁷ *Id.* at 1169.

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same FWS decision in a similar vein as the District Court in Oregon and also vacated the wolf Final Rule as contrary to the ESA.²¹⁸

The legislative history relied on by the *Defenders* series reveals that the inclusion of the phrase “any significant portion of [a species’] range,” not only was a significant shift in the definition of existing law, but was meant to increase flexibility in wildlife management.²¹⁹ The *Defenders (lizard)* court used the history of the American alligator to demonstrate this likely intent.²²⁰ The alligator population was so strong in some portions of its range that it needed to be harvested, but in other portions of its range, the population was severely depleted due to loss of habitat.²²¹ The statutory language afforded the Secretary the ability to list populations of the same species differently according to the level of threat they faced.²²² The intent of this flexible approach was to allow local authorities to take steps “to insure healthy populations.”²²³

The *Defenders* series unfortunately demonstrates the abuse of this grant of discretion and flexibility. Rather than tailor listings to ensure struggling populations receive enhanced protection, the listing agencies appear to be doing the opposite. The agencies rely on the size and strength of one population of a species in their efforts to withdraw and lessen the protections afforded the other populations.²²⁴ This approach is a shift from the sweeping goals of the ESA to provide protection to a species facing extinction throughout any portion of its range and to restore species to the point where listing is no longer necessary. The Secretary must interpret a “significant portion of a species’ range” to be an area that ensures the achievement of those aims.

C. THE SECRETARY MUST ADDRESS THE *DEFENDERS* TEST

The Ninth Circuit held that a species could be extinct throughout a significant portion of its range if there are major geographical areas in which it is no longer viable but once was.²²⁵ Though *Defenders (lizard)* did not identify this holding as a definition for a significant portion of a

²¹⁸ *Nat’l Wildlife Fed.*, 386 F. Supp. 2d at 566.

²¹⁹ *Defenders of Wildlife v. Norton*, 258 F.3d 1136, 1144 (9th Cir. 2001) (quoting H.R. Rep. No. 412, 93rd Cong., 1 Sess. (1973) (internal quotations omitted).

²²⁰ *Defenders (lizard)*, 258 F.3d at 1144 (internal quotations omitted).

²²¹ *Id.*

²²² *Id.*

²²³ *Defenders (lizard)*, 258 F.3d at 1145.

²²⁴ *Defenders (lizard)*, 258 F.3d 1136, 1141; *Defenders (wolf)*, 354 F. Supp. 2d 1156, 1168.

²²⁵ *Defenders (lizard)*, 258 F.3d 1136, 1145.

species' range,²²⁶ subsequent decisions have referred to this holding as the “*Defenders* test.”²²⁷ If it is determined that there are major areas in a species' historic range where the species is no longer viable, that finding must then trigger an explanation from the Secretary of why that unpopulated area is not considered a significant portion of the species' range.²²⁸

This is a good test because when a species no longer populates a portion of its historic range, that species will ultimately decline.²²⁹ Furthermore, the growth of human communities into undeveloped areas is often the cause of such a population contraction due to habitat fragmentation.²³⁰ Habitat fragmentation creates edges that have negative impacts on the biological community of the original habitat.²³¹ Loss of habitat and range results in loss of diversity of species and a reduction in individual species' populations.²³² This loss is dangerous because each individual has its own unique features that contribute to the species' long-term genetic capacity to adapt to changes in the environment.²³³ There is an inherent conflict between the loss of habitat and range for the species and the goal of the ESA to conserve a listed species to the point at which it can be removed from the list. Therefore, we need to protect big core habitats, and the corridors between them, particularly for large carnivores because such “top-down regulation” improves the health of the ecosystem.²³⁴ Large carnivores affect not only the populations of other species, but also how those species interact with their habitat and

²²⁶ Maranzana, *supra* note 126.

²²⁷ *Nat'l Wildlife Fed.* 386 F. Supp. 2d 553, 566; *Defenders (wolf)*, 354 F. Supp. 2d 1156, 1165.

²²⁸ *Defenders (lizard)*, 258 F.3d 1136, 1145 (9th Cir. 2001).

²²⁹ MSN Encarta- Endangered Species, http://encarta.msn.com/encyclopedia_761557586/Endangered_Species.html (last visited Feb. 5, 2006) (explaining that fragmentation of a species' habitat causes them to become highly vulnerable to extinction due to losing contact with other populations of their own kind).

²³⁰ Scott K. Robinson, *Nest Gains, Nest Losses*, in *THE BIODIVERSITY CRISIS* 112, 114 (Michael J. Novacek, ed., The New York Press 2001) (explaining that the predation of song bird nests is greater in forests that are near human developments such as farms, yards, and roads than in mostly forested areas).

²³¹ Kefyn M. Catley, *Global Warming, Loss of Habitat, and Pollution*, in *THE BIODIVERSITY CRISIS* 100, 102 (Michael J. Novacek ed., The New York Press 2001).

²³² EDWARD O. WILSON, *THE DIVERSITY OF LIFE* 276 (Harvard University Press 1992).

²³³ Paul R. Ehrlich and Simon A. Levin, *Biodiversity: What It Is and Why We Need It*, in *SCIENTISTS ON BIODIVERSITY* 20, 22, (Linda Koebner et al. eds., American Museum of Natural History 1998) (explaining that there are strong parallels between an ecosystem comprising many species and the population of an individual species).

²³⁴ Dave Foreman, *The Green-Fire Wolf: Saving Wildlands With a Wild Heart*, in *NATURE'S OPERATING INSTRUCTIONS* 92, 94-95 (Kenny Ausubel ed., Sierra Club Books 2004).

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other species in the habitat.²³⁵ Ecosystems therefore become unbalanced as a result of human encroachment into habitats and efforts to reduce large carnivores such as wolves and mountain lions.²³⁶ The decision to adopt protections to merely maintain the survival of the species as a whole will ultimately result in a loss of endangered and threatened species.²³⁷

D. THE SECRETARY'S ANALYSIS OF A SIGNIFICANT PORTION OF A SPECIES' RANGE SHOULD BE EXPLICITLY REVEALED IN THE SECRETARY'S PROPOSED CATEGORIZATION OF THE SPECIES

A disheartening pattern that emerges from this series of cases is the lack of transparency regarding the Secretary's determination of what constitutes a significant portion of a species' range. In *Defenders (lizard)*, the court found that the Secretary had failed to expressly consider the "extinction throughout a significant portion of its range" issue at all.²³⁸ Subsequent cases indicate that the Secretary and the FWS have been put on notice of the importance of the analysis of this issue.²³⁹ It is therefore appropriate to publish the agency's consideration of what constitutes a significant portion of a species' range. Ultimately, publication in the Federal Register during the period for public comment will help reduce citizen suit litigation and maintain the sweeping goals of the ESA as the priority consideration. The identification of the listing agency's considerations prior to the establishment of a final rule regarding the species in question would reduce litigation because it would provide for the revelation of any analysis that betrays the intent of the ESA. It would also allow the listing agency to consider and respond to the public's comments regarding a species' range.

Should judicial inquiry occur, the publication of the listing agency's determination will provide trustworthy evidence of the guidelines to

²³⁵ *Id.* at 95.

²³⁶ *Id.* at 94-95 (explaining that in suburban San Diego, where suburbs surround remaining patches of coastal sage scrub, the presence of coyotes protects native songbirds from smaller meso-predators such as raccoons, foxes, and housecats).

²³⁷ Ehrlich & Levin, *supra* note 233, at 22 (stating that a loss in genetic diversity of an individual species will decrease the species' capacity to adapt to changes in the environment and ability to survive in the long-term).

²³⁸ *Defenders of Wildlife v. Norton*, 258 F.3d 1136, 1145 (9th Cir. 2001).

²³⁹ Federal Defendant's Reply in Support of Motion for Summary Judgment at 6, *Defenders of Wildlife v. Sec'y, Dept. of the Interior*, 354 F. Supp. 2d 1156 (D. Or. 2005) (Civ. 03-1348) ("FWS not only considered what constitutes a significant portion of the gray wolf's range . . . but it did so with specific regard to *Defenders of Wildlife v. Norton* . . . the leading Ninth Circuit case addressing the term.").

which the listing agency actually adhered. This is not merely a cynical characterization of the government's actions. *Defenders (lizard)* determined that the government engaged in post-hoc considerations and explanations of the phrase.²⁴⁰ In *Defenders (lizard)*, deference for the government's interpretations was withheld due to the court's characterization of the rationales as "newly minted" for that lawsuit.²⁴¹ Furthermore, the court did not even consider the government's proffered interpretations, because the court could not "affirm the decision of an agency on a ground that the agency did not invoke in making its decision."²⁴² Had there been evidence to ensure that the listing agency had established a guiding definition of the statutory phrase at the outset of the listing determination, the agency's interpretation may have received more deferential treatment.

The government's decision-making and analysis received a slightly more favorable response in *Defenders (wolf)*.²⁴³ To defend against the accusation that it never determined which portions of the wolf's range were significant, the FWS claimed to have discussed the phrase in the context of the wolf at a meeting at Marymount University in November of 2000.²⁴⁴ The court determined that the wolf Final Rule did not thoroughly discuss what constituted a significant portion of the wolf's range and was also internally inconsistent.²⁴⁵ However, the court also determined that the FWS considered the issue of the wolf's range prior to the wolf Final Rule by virtue of its "oblique reference" to the "Marymount definition."²⁴⁶

The requirement of publishing the listing agency's determination of a significant portion of a species' range in the Federal Register alongside the proposed rule regarding the listing status of the species would ultimately benefit the listing agency. It would ensure analysis of a species' range and create a record to support the credibility of the listing agency's position. This would in turn strengthen the likelihood the court would defer to the agency's interpretation of the phrase.

²⁴⁰ *Defenders of Wildlife v. Norton*, 258 F.3d 1136, 1146 n.11 (9th Cir. 2001).

²⁴¹ *Defenders (lizard)*, 258 F.3d at 1146.

²⁴² *Defenders (lizard)*, 258 F.3d at 1146 n.12 (quoting *Pinto v. Massanari*, 249 F.3d 840, 847 (9th Cir. 2001)).

²⁴³ *Defenders of Wildlife v. Sec'y, U.S. Dep't of the Interior*, 354 F. Supp. 2d 1156, 1165 (D. Or. 2005).

²⁴⁴ *Defenders (wolf)*, 354 F. Supp. 2d at 1164 (defining "the significant portion of the gray wolf's range as 'that area that is important or necessary for maintaining a viable, self-sustaining and evolving representative population in order for the taxon to persist into the foreseeable future'").

²⁴⁵ *Defenders (wolf)*, 354 F. Supp. 2d at 1165.

²⁴⁶ *Id.* (finding that the wolf Final Rule contained some discussion of the wolf's long-term viability, which suggests that the FWS applied the Marymount definition to the wolf Final Rule).

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V. CONCLUSION

The *Defenders* series of challenges to listing decisions of the Secretary demonstrate that the grant of “wide discretion” to the Secretary in delineating “a significant portion of [a species’] range” is no longer appropriate. The intent of Congress was to protect a species in any portion of its range so that the species may recover and be removed from listing under the ESA. This approach therefore precludes adoption of policies aimed at merely listing species only as necessary to achieve the narrow goal of the survival of the species as a whole. Though a strict quantitative approach has not been endorsed, the adoption of the standards recommended above would reduce future arbitrary and capricious listings, by providing clarity to the Secretary in her listing considerations. The protection for species would thus be strengthened and the need for lawsuits to correct erroneous listing decisions would also be reduced.

ASHLING P. MCANANEY*

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