Final Endangered Species Act Policy Revises Definition of “Significant Portion of Its Range”

On July 1, 2014, the U.S. Fish and Wildlife Service and the National Marine Fisheries Service jointly published a final policy providing their interpretation of the phrase “significant portion of its range,” which is part of the Endangered Species Act’s definitions of “endangered species” and “threatened species.” The final policy is essentially the same as the draft policy that the Services published on this issue on December 9, 2011, with one important change. This change relates to the definition of the word “significant.”

The Act defines “endangered species” as “any species which is in danger of extinction throughout all or a significant portion of its range.” 16 U.S.C. § 1532(6). The Act defines “threatened species” as “any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.” 16 U.S.C. § 1532(20).

The December 2011 draft policy would have defined “significant” to mean: “A portion of a species’ range is ‘significant’ if its contribution to the viability of the species is so important that, without that portion, the species would be in danger of extinction.” The new final policy changes this definition as follows:

A portion of the range of a species is “significant” if the species is not currently endangered or threatened throughout all of its range, but the portion’s contribution to the viability of the species is so important that, without the members in that portion, the species would be in danger of extinction, or likely to become so in the foreseeable future, throughout all of its range.

According to the Services, the revised definition is intended to eliminate the confusing situation where a species simultaneously could qualify as both threatened throughout all of its range and endangered throughout a “significant” portion of its range. The change ensures that only one legal status is assigned to the species, so that if a species is endangered or threatened throughout all of its range, no portions of its range can qualify as “significant” under the policy.

The revised definition also is intended to provide a lower and simpler threshold for being “significant.” As opposed to the former draft policy, which required the species to face the danger of extinction, the definition of “significant” in the final policy is met if the species faces the danger of extinction, or is likely to face this danger in the foreseeable future.

The Services also made a number of other nonsubstantive language changes to the December 2011 draft policy.

With the adoption of the final policy, the Services conclude:

1. if a species is found to be endangered or threatened throughout a significant portion of its range [SPR], the entire species is listed as endangered or threatened, respectively, and the Act’s protections apply to all individuals of the species wherever found;

2. a portion of the range of a species is “significant” if the species is not currently endangered or threatened throughout all of its range, but the portion’s contribution to the viability of the species is so important that, without the members in that portion, the species would be in danger of extinction, or likely to become so in the foreseeable future, throughout all of its range;

3. the range of a species is considered to be the general geographical area within which that species can be found at the time FWS or NMFS makes any particular status determination; and

4. if a vertebrate species is endangered or threatened throughout an SPR, and the population in that significant portion is a valid [distinct population segment], [the Services] will list the [distinct population segment], rather than the entire taxonomic species or subspecies.

Under the final policy, the Services must first find that the species is neither endangered nor threatened throughout all of its range before conducting an SPR analysis. Despite the adoption of the new policy, the Services predict that listings dependent on an SPR determination will still be infrequent.

The Services intend this final policy to be legally binding. The policy becomes effective on July 31, 2014.

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