IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CENTER FOR BIOLOGICAL DIVERSITY, *et al.*, Plaintiffs, v. JIM KURTH[1], *et al.*, Defendants, and AMERICAN FOREST & PAPER ASSOCIATION, *et al.*, Defendant-Intervenors.	Case No: 1:15-cv-00477-EGS
DEFENDERS OF WILDLIFE, Plaintiff, v. JIM KURTH, *et al.*, Defendants, and AMERICAN FOREST & PAPER ASSOCIATION, *et al.*, Defendant-Intervenors.	Case No. 1:16-cv-00910-EGS (Consolidated Cases) Honorable E.G. Sullivan

FEDERAL DEFENDANTS' OPPOSITION AND PARTIAL MOTION FOR SUMMARY JUDGMENT ON THE LISTING CLAIMS

[1] Jim Kurth and Ryan Zinke, Acting Director of the United States Fish and Wildlife Service and the Secretary of the United States Department of the Interior, respectively, are automatically substituted for their predecessors in office pursuant to Federal Rule of Civil Procedure 25(d).

Pursuant to Rule 56 of the Federal Rules of Civil Procedure, Local Civil Rule 7(h), and the Court's February 22, 2017 Minute Order, Federal Defendants the United States Fish and Wildlife Service; Jim Kurth, in his official capacity as Acting Director of the United States Fish and Wildlife Service; and Ryan Zinke, in his official capacity as Secretary of the United States Department of the Interior, hereby move for summary judgment on Claims I through III in Center for Biological Diversity, *et al.*'s first Amended Complaint, ECF No. 27; and Claims I and II in Defenders of Wildlife's Complaint, ECF No. 1.

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APA	Administrative Procedure Act
COSEWIC	Committee on the Status of Endangered Wildlife in Canada
ESA	Endangered Species Act
ESU	Evolutionary Significant Unit
ESA	Endangered Species Act
FWS	United States Fish and Wildlife Service
LAR	Listing Administrative Record
MSJ	Motion for Summary Judgment
NMFS	National Marine Fisheries Service
Pd	*Pseudogymnoascus destructans*
SuppAr	Supplemental Administrative Record
WNS	White nose syndrome

STATEMENT OF POINTS AND AUTHORITIES

I. INTRODUCTION

In April 2015, the United States Fish and Wildlife Service ("FWS") determined, following a lengthy notice and comment rulemaking, that the northern long-eared bat (*Myotis septentrionalis*) is a threatened species within the meaning of the Endangered Species Act ("ESA"), 16 U.S.C. § 1532(20). See Threatened Species Status for the Northern Long-Eared Bat with 4(d) Rule, 80 Fed. Reg. 17,974 (Apr. 2, 2015) ("listing determination"). The administrative record demonstrates that, before reaching this conclusion, FWS conducted an extraordinarily comprehensive and meticulous analysis of the best scientific and commercial information available regarding the current status of the northern long-eared bat and the potential threats facing the species within the foreseeable future, precisely as the ESA requires. The proposed rule was made available for public review and comment and also underwent extensive peer review by four impartial experts familiar with the northern long-eared bat and its habitat, biological needs, and threats.[2]

Although FWS's listing determination spans nearly 60 pages and includes discussion of dozens of studies, reports, and observations, the rationale underlying FWS's decision to list the northern long-eared bat as threatened is fairly straight-forward. The main threat to the northern long-eared bat is a cold-loving fungus, *Pseudogymnoascus destructans* ("Pd"), which likely originated in Europe and was first detected in North America in 2006. Id. at 17,998; 18,000. Pd causes a deadly fungal disease in hibernating bats called white-nose syndrome ("WNS"). Following its introduction into North America, Pd and WNS have caused population declines in

[2] FWS actually sought peer review from seven experts. Id. at 18,006. But only four of the experts responded. Id.

many bat species, including the northern long-eared bat. At the time of the listing determination, WNS had spread to 25 states and 5 Canadian provinces within the northern long-eared bat's range, which had caused northern long-eared bats to decline markedly in those areas. However, Pd and WNS had not yet spread to 7 states, 5 other Canadian provinces, and 2 Canadian territories that are home to the northern long-eared bat. As a result, northern long-eared bat populations within those areas had not yet suffered declines and remained stable. After analyzing the rate at which Pd and WNS spread, FWS calculated that WNS would spread throughout the remainder of northern long-eared bat range between 2023 and 2028 with corresponding population declines. FWS concluded that the species was properly classified as a threatened species under the ESA because, while the species is likely to be in danger of extinction in the foreseeable future upon the spread of WNS, the species was not currently in danger of extinction because: (1) WNS would not likely affect the entire range for 8 to 13 years; (2) 40% of the species' total geographic range (the area not infected with WNS) had not yet suffered declines and appeared stable; (3) small numbers of the species still exist in some areas affected by WNS, even years after WNS had been confirmed in those areas; and (4) the population in the midwest part of its range could potentially still be in the millions.

Despite the overwhelming evidentiary support for FWS's determination and the exhaustively thorough and objective analysis of the available information presented in the listing determination, Plaintiffs present a variety of arguments that FWS erred by listing the northern long-eared bat as a threatened species rather than an endangered species. At their core, these arguments represent nothing more than the Plaintiffs' policy disagreement with the FWS's reasoned weighing of the available evidence. The Plaintiffs do not point to any evidence superior to that considered by the FWS. Rather, they review the very same evidence FWS considered and

ask this Court to substitute their weighing of the evidence for that of FWS's. While Plaintiffs clearly would have preferred a different outcome, it is FWS, as the expert agency responsible for making listing decisions under the ESA, that Congress has charged with weighing the available evidence and making reasonable predictions based on that evidence to determine if a species is an endangered species or a threatened species. A reviewing court is not empowered to substitute a plaintiff's preferred conclusion for that reached by FWS. Because Plaintiffs have fallen far short of showing that FWS's determination lacks a rational basis, this Court should uphold the listing determination and grant summary judgment to Federal Defendants on the appropriate claims.

Plaintiffs also assert a challenge to the National Marine Fisheries Service ("NFMS")'s and FWS's (collectively, the "Services") joint policy interpreting the undefined phrase "significant portion of its range" in the definitions of "endangered species" and "threatened species" in the ESA. See Final Policy on the Interpretation of the Phrase "Significant Portion of Its Range" in the Endangered Species Act's Definitions of "Endangered Species" and "Threatened Species", 79 Fed. Reg. 37,578 (July 1, 2014) ("Final SPR Policy"); 16 U.S.C. § 1532(6), (20). Plaintiffs have failed to meet their burden of establishing that "no set of circumstances exists" under which the Final SPR Policy is valid and their burden of establishing that the Final SPR Policy is not a reasonable interpretation of the phrase "significant portion of its range" under the two-step framework established by the United States Supreme Court in Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984). Therefore, this Court should also uphold the Services' Final SPR Policy and grant summary judgment to Federal Defendants on those claims.

II. STATUTORY BACKGROUND

The ESA, 16 U.S.C. § 1531 *et seq.*, was enacted in 1973 "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved,

[and] to provide a program for the conservation of such endangered species and threatened species . . .” 16 U.S.C. § 1531(b). The ESA directs the Secretary[3] to determine which species should be listed as threatened or endangered. 16 U.S.C. § 1533(a)(1). An endangered species is one that is “in danger of extinction throughout all or a significant portion of its range,” while a threatened species is “likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.” Id. § 1532(20), (6).

A species may be listed as an endangered species or threatened species under the ESA in one of two ways, either on the initiative of the Secretary or as a result of a petition submitted by an “interested person.” Id. § 1533(b)(3)(A). The ESA directs the Secretary to determine whether a species should be listed as an endangered species or threatened species because of any one of five listing factors: (A) the present or threatened destruction, modification, or curtailment of its 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. Id. 1533(a)(1). The determination whether to list a species must be made:

> [S]olely on the basis of the best scientific and commercial data available to him after conducting a review of the status of the species and after taking into account those efforts, if any, being made by any State or foreign nation, or any political subdivision of a State or foreign nation, to protect such species, whether by predator control, protection of habitat and food supply, or other conservation practices, within any area under its jurisdiction, or on the high seas.

Id. § 1533(b)(1)(A).

[3] The ESA divides the responsibility for listing species between the United States Secretary of the Interior, who is generally responsible for terrestrial species and inland fishes, and the United States Secretary of Commerce, who is generally responsible for marine and anadromous species. See id. at §§ 1532(15); 1533(a)(2). The Secretary of the Interior and the Secretary of Commerce have delegated their ESA responsibilities to FWS and NMFS, respectively. See 50 C.F.R. § 402.01(b). FWS has jurisdiction over the northern long-eared bat. See id.; 50 C.F.R. § 17.11.

If the Secretary determines that listing a species is warranted, he must publish a notice in the Federal Register that includes the complete text of a proposed rule to implement the action. Id. § 1533(b)(3)(B)(ii). The Secretary must act on a proposed rule within one year of the date of its publication. Id. § 1533(b)(6)(A). At that point, the Secretary may promulgate a final rule, withdraw the proposed rule if he finds that there is not sufficient evidence to justify it, or extend the one-year period for consideration by not more than six months if he finds that there is "substantial disagreement regarding the sufficiency or accuracy of the available data relevant to the determination . . . ." Id. § 1533(b)(6)(B)(i).

Once a species is listed as endangered or threatened, it is afforded certain legal protections. For example, the ESA prohibits any illegal or unauthorized "taking" of endangered fish or wildlife species. Id. § 1538(a)(1).[4] In addition, a federal agency must consult with FWS whenever any action authorized, funded, or carried out by the agency "may affect" a threatened or endangered species, to ensure that the action "is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification" of designated critical habitat. Id. § 1536(a)(2); 50 C.F.R. § 402.14(a).

III. STATEMENT OF FACTS

Northern long-eared bats are a medium-sized bat species distinguished from other similar species by their relatively long ears. See 80 Fed. Reg. at 17,975. The species' range extends across much of the eastern and north-central United States, and all Canadian provinces west to the southern Yukon Territory and eastern British Columbia. Id. This range includes 37 states, the

[4] Although the take prohibition of ESA Section 9, 16 U.S.C. § 1538, applies only to endangered species, FWS's regulations extend the protections given to endangered species to threatened species. The only exception to this regulation is where FWS issues a special rule under 16 U.S.C. § 1533(d) (called a "4(d) rule") that contains all applicable prohibitions. See 50 C.F.R. § 17.31.

District of Columbia, all 10 Canadian provinces, and 2 Canadian territories. See id. Northern long-eared bat habitat changes depending on the season. Id. at 17,989-93. In the summer, northern long-eared bats generally reside in trees where they roost. Id. at 17,986. In the winter, northern long-eared bats hibernate in caves, mines, or other appropriate hibernacula. Id. at 17,986-87. The species preys on a wide variety of insects. Id. at 17,988.

Pd, a cold-loving fungus, likely originated in Europe and was first detected in North America in 2006. Id. at 17,998; 18,000. Pd causes a deadly fungal disease in hibernating bats, including northern long-eared bats, called WNS. Id. At the time of the listing determination, WNS had been confirmed (meaning one or more bats in the state have been analyzed and confirmed with the disease) in 25 states and 5 Canadian provinces in the northern long-eared bat's range. Id. at 17,994. Pd had also been documented on bats in Iowa, Minnesota, and Mississippi, although no mortality or other signs of WNS had been documented. Id.

On January 21, 2010, Plaintiff Center for Biological Diversity submitted a petition to FWS requesting that the northern long-eared bat be listed as an endangered species or threatened species under the ESA. See 12-Month Finding on a Petition to List the Eastern Small-Footed Bat and the Northern Long-Eared Bat as Endangered or Threatened Species; Listing the Northern Long-eared Bat as an Endangered Species, 78 Fed. Reg. 61,046, 61,047 (Oct. 2, 2013). FWS subsequently published a finding in the Federal Register stating that the petition presented substantial information indicating that the request action may be warranted. See id.; 90-Day Finding on a Petition to List the Northern Long-eared Bat as Threatened or Endangered, 76 Fed. Reg. 38,095 (June 29, 2011). On October 2, 2013, FWS published a proposed rule to list the northern long-eared bat as an endangered species. 78 Fed. Reg. at 61,047. After a lengthy notice and comment period (which FWS extended multiple times to receive additional comments) and a public hearing

on this issue, FWS published the final listing determination on April 2, 2015. See 80 Fed. Reg. at 17,974-75. FWS concluded that the northern long eared-bat was threatened under the ESA because, while the species is likely to be in danger of extinction in the foreseeable future upon the spread of WNS, the species was not currently in danger of extinction. Id. at 18,021.

IV. STANDARD OF REVIEW

FWS's decision to list the northern long-eared bat as a threatened species is reviewed under the Administrative Procedure Act ("APA"), 5 U.S.C. § 706, which provides a right to judicial review of certain final agency action. The APA provides that a court may set aside final agency action if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). Review under the "arbitrary and capricious" standard is "highly deferential" and "presumes the agency's action to be valid." Envtl. Def. Fund, Inc. v. Costle, 657 F.2d 275, 283 (D.C. Cir. 1981) (citing, inter alia, Citizens to Pres. Overton Park, Inc. v. Volpe, 401 U.S. 402, 419 (1971)); see also Am. Wildlands v. Kempthorne, 478 F. Supp. 2d 92, 96 (D.D.C. 2007) ("Under the APA's standard of review, there is a presumption of validity of agency action"), aff'd 530 F.3d 991 (D.C. Cir. 2008). A reviewing court is forbidden from "substituting its judgment for that of the agency." Costle, 657 F.2d at 283 (citing, inter alia, Overton Park, 401 U.S. at 416). Rather, the APA standard "mandates judicial affirmance if a rational basis for the agency's decision is presented . . . even though [a court] might otherwise disagree." Id. (citations omitted). An agency's treatment of the evidence need not be a "paragon of clarity," but rather what is required is that the reviewing court be able to discern a "rational basis" for the agency's treatment of the evidence. Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc., 419 U.S. 281, 289-90 (1974).

Reviewing courts are to be at their "most deferential" when the agency is "making

predictions, within its area of special expertise, at the frontiers of science." Baltimore Gas Co. v. NRDC, 462 U.S. 87, 93, 96, 103, 105-106 (1983); see also Marsh v. Or. Nat. Res. Council, 490 U.S. 360, 375-77 (1989) (where analysis "requires a high level of technical expertise," court must defer to informed discretion of agency). As the D.C. Circuit noted in Ethyl Corp. v. EPA, 541 F.2d 1, 36 (D.C. Cir. 1976) (en banc), the court "must look at the decision not as the chemist, biologist or statistician that we are qualified neither by training nor experience to be, but as a reviewing court exercising our narrowly defined duty of holding agencies to certain minimal standards of rationality." This Court has explained that:

> [w]ith regard to FWS decisions in particular, "[g]iven the expertise of the [Service] in the area of wildlife conservation and management and the deferential standard of review, the Court begins with a strong presumption in favor of upholding decisions of the [Service]." . . . . In addition, "[w]hen specialists express conflicting views, an agency must have discretion to rely on the reasonable opinions of its own qualified experts even if, as an original matter, a court might find contrary views more persuasive."

Am. Wildlands, 478 F. Supp. 2d at 96 (internal citations omitted). The D.C. Circuit is "particularly deferential when reviewing agency actions involving policy decisions based on uncertain technical information." State of New York v. Reilly, 969 F.2d 1147, 1150-51 (D.C. Cir. 1992); see also Am. Wildlands v. Kempthorne, 530 F.3d 991, 1000 (D.C. Cir. 2008) ("'[I]n an area characterized by scientific and technological uncertainty[,] this court must proceed with particular caution, avoiding all temptation to direct the agency in a choice between rational alternatives'"), quoting Int'l Fabricare Inst. v. EPA, 972 F.2d 384, 389 (D.C. Cir. 1992).

A reviewing court may reverse under the "arbitrary and capricious" standard only "if the agency has relied on factors which Congress has not intended it to consider, [has] entirely failed to consider an important aspect of the problem, [or has] offered an explanation for [that] decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed

to a difference in view or the product of agency expertise." Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983). In the APA context, "summary judgment is an appropriate mechanism for deciding the legal question of whether the agency could reasonably have found the facts as it did." Occidental Eng'g Co. v. INS, 753 F.2d 766, 770 (9th Cir. 1985). A reviewing court should determine agency compliance with the law solely on the record on which the decision was made. Overton Park, 401 U.S. 402; Camp v. Pitts, 411 U.S. 138, 142 (1973).

V. ARGUMENT

A. FWS Rationally Considered Each of the ESA's Listing Factors and the Current Status of the Northern Long-Eared Bat

As explained above, in deciding whether a species meets the statutory definitions of an endangered species or threatened species, FWS is required to consider five factors, any one of which could independently, or in combination with other factors, support listing. See 16 U.S.C. § 1533(a)(1). In this case, FWS conducted a thorough and in-depth analysis of all five factors and the northern long-eared bat's current status, and came to the reasoned conclusion that this species qualified for listing under the ESA as a threatened species based on the threats facing the bat now and within the foreseeable future. See 80 Fed. Reg. at 17,989-18,006.

1. Factor A: The Present or Threatened Destruction, Modification, or Curtailment of Habitat or Range

The first factor, Factor A, is "the present or threatened destruction, modification, or curtailment of [a species'] habitat or range." Id. at 1533(a)(1)(A). Because northern long-eared bats have two habitats—a summer-specific habitat and a winter-specific habitat—FWS thoroughly analyzed the threats to each habitat. 80 Fed. Reg. at 17,989-93. FWS determined that the greatest impacts to the northern long-eared bats' winter habitat stem from hibernacula modification and human disturbance while the bats hibernate. In the summer, "northern long-eared bats require

forest for roosting, raising young, foraging, and commuting between roosting and foraging habitat." 80 Fed. Reg. 17,990. FWS identified forest conversion and forest management as the two common causes of northern long-eared bat summer habitat loss or modification. Id. Forest conversion is the loss of forest due to urban development, energy production (wind energy development, surface coal mining, and natural gas extraction), transmission, the planting of crops, and other types of development. Id. at 17,990-91. Although forest management includes many practices, FWS focused on the effects of timber harvesting because, unlike most other forest management practices, timber harvesting can have an impact on northern long-eared bats. See id. at 17,993. Timber harvesting includes anything from selected harvest of individual trees to clearcutting which could affect northern long-eared bat roost sites, foraging, and travel behaviors. Id. Ultimately, FWS reached the rational and reasoned conclusion that, while threats to summer and winter northern long-eared bat habitat "alone were unlikely to have significant, population-level effects, there is now likely a cumulative effect on the species in portions of range that have been impacted by WNS" because northern long-eared bats with WNS are less resilient to stressors and populations are smaller. Id.

2. Factor B: Overutilization for Commercial, Recreational, Scientific, or Educational Purposes

The second listing factor requires FWS to analyze whether a species is endangered or threatened based on "overutilization for commercial, recreational, scientific, or educational purposes." 16 U.S.C. § 1533(a)(1)(B). The listing determination demonstrates that FWS analyzed this factor although "[t]here are very few records of the northern long-eared bat being collected specifically for commercial, recreational, scientific, or educational purposes." 80 Fed. Reg. at 17,993. Because there are very few known instances of northern long-eared bats being collected for these purposes, FWS did "not consider such collection activities to pose a threat to the species."

Id. This conclusion is rational and is supported by at least two peer reviewers and Bat Conservation International, an international non-governmental organization dedicated to protecting bats. SuppAR 111141 ("I agree with the [12-month finding] that there is no evidence that collection activities [] pose a threat to this species"); SuppAR 110901 ("I agree with the analysis. There is just no evidence for this with either species [northern long-eared bats or little brown bats]"); SuppAR 003318 ("[Bat Conservation International] is unaware of any threats from overutilization for scientific purposes or commercial trade").

3. Factor C: Disease or Predation

The third listing factor requires FWS to determine if a species is endangered or threatened due to disease or predation. 16 U.S.C. § 1533(a)(1)(C). In response to this requirement, FWS undertook a meticulous and lengthy analysis of WNS, its effect on northern long-eared bats, and its spread in North America. See 80 Fed. Reg. at 17,993-98. Based on its analysis, FWS ultimately concluded that WNS is the "predominant threat to the species" and the proximate cause of the species' rapid decline. Id. at 18,000. "If WNS had not emerged or was not affecting northern long-eared bat populations to the level that it has, we presume the species would not be declining to the degree observed." Id.

4. Factor D: The Inadequacy of Existing Regulatory Mechanisms

The fourth listing factor, Factor D, requires FWS to determine if a species is endangered or threatened due to the "inadequacy of existing regulatory mechanisms." 16 U.S.C. § 1533(a)(1)(D). Under Factor D, FWS evaluates existing regulatory mechanisms to determine whether they effectively reduce or remove threats to the species at issue. 80 Fed. Reg. at 18,000. As required by the ESA, FWS takes into account "relevant Federal, State, and tribal laws, regulations, and other such mechanisms that may reduce any of the threats we describe in threat

analyses under the other four factors." Id.; see 16 U.S.C. § 15333(b)(1)(A). In this case, FWS methodically, and in detail, considered all existing regulatory mechanisms directed at managing threats to northern long-eared bats both internationally and domestically. 80 Fed. Reg. at 18,000-01. After this extensive analysis FWS concluded that, "despite regulatory mechanisms that are currently in place, the species is still at risk." Id. at 18,000. Ultimately, although there are some laws, regulations, and policies that do protect the northern long-eared bat or its habitat in some way, "[n]o existing regulatory mechanisms have been shown to sufficiently protect the species against WNS, the primary threat to the northern long-eared bat," as evidenced by WNS's continued spread and its effect on the species. See id. Therefore, the existing regulatory mechanisms do not effectively reduce or remove threats to the northern long-eared bat to a point where the species does not warrant listing. See id. at 18,000-01. FWS's determination under Factor D that the existing regulatory mechanisms do not adequately address WNS is rational.

5. Factor E: Other Natural or Manmade Factors Affecting Its Continued Existence

In addition to the factors discussed above, FWS is required to address "other natural or manmade factors affecting [the species'] continued existence." 16 U.S.C. § 1533(a)(1)(E). The listing determination demonstrates that FWS carefully considered the effects that wind energy development, climate change, contaminants, and prescribed burning have on northern long-eared bats, as well as any conservation efforts that could reduce the effects of these potential threats on the bats. 80 Fed. Reg. at 18,001-06. Following this analysis, FWS rationally determined, using the best scientific and commercial data available, that "[t]here is currently no evidence that these natural or manmade factors would have significant population-level effects on the northern long-eared bat when considered alone." Id. at 18,005-006.

6. FWS Considered the Cumulative Effects of Threats Under the Listing

Factors in its Listing Determination

In making its decision to list the northern long-eared bat as threatened, FWS considered the cumulative effects of the threats to the species. See id. at 18,006. In a section of the listing determination entitled "Cumulative Effects from Factors A Through E," FWS explicitly stated that:

> WNS (Factor C) is the primary factor affecting the northern long-eared bat and has led to dramatic and rapid population-level effects on the species. WNS is the most significant threat to the northern long-eared bat, and the species would likely not be imperiled were it not for this disease. However, although the effects on the northern long-eared bat from Factors, A, [D], and E, individually or in combination, do not have significant effects on the species, when combined with the significant population reductions due to white-nose syndrome (Factor C), they may have a cumulative effect on this species at a local population scale.

Id. Moreover, throughout its analysis of the individual listing factors, FWS discussed the cumulative effect that the particular factor being analyzed might have in combination with WNS. "Many activities continue to pose a threat to the summer and winter habitats of northern long-eared bats [Factor A]. While, these activities alone were unlikely to have significant, population-level effects, there is now likely a cumulative effect on the species in portions of [its] range that have been impacted by WNS." Id. at 17,993. "No existing regulatory mechanisms have been shown to sufficiently protect the species against WNS, the primary threat to the northern long-eared bat [Factor D]. Therefore, despite regulatory mechanisms that are currently in place for the northern long-eared bat, the species is still at risk, primarily due to WNS, as discussed under Factor C." Id. at 18,001. "There is currently no evidence that these natural or manmade factors [Factor E] would have significant population-level effects on the northern long-eared bat when considered alone. However, these factors may have a cumulative effect on this species when considered in concert with WNS." Id. at 18,005-06. Ultimately, FWS concluded that "WNS is currently the predominant threat to the species, and if WNS had not emerged or was not affecting the northern

long-eared bat populations to the level that it has, we presume the species' would not be experiencing the dramatic declines it has." Id. at 17,989.

As demonstrated above, FWS did discuss and analyze how and whether the five listing factors individually and in combination could affect the northern long-eared bat. See id. at 17,989-18,006. Because FWS undertook this analysis and FWS's analysis of the five listing factors was completely reasonable, FWS's decision to list the northern long-eared bat was not arbitrary or capricious.

7. Current Status of the Northern Long-Eared Bat

In addition to the five listing factors, FWS considered the current status of the northern long-eared bat throughout its range in making its listing determination. See 16 U.S.C. § 1533(b)(1)(A). Because the northern long-eared bat's range is extremely extensive, stretching across much of the eastern and north-central United States and all Canadian provinces west to the southern Yukon Territory and eastern British Columbia, FWS divided the bat's range into five ranges for organizational purposes: the eastern range in the United States, the midwest range in the United States, the southern range in the United States, the western range in the United States, and the Canadian range. 80 Fed. Reg. at 17,976-84. For each of these ranges, FWS identified the species' historical status, the current status of the bat by state (in the United States), and for those areas where WNS has been detected, the impact the disease has had on the bat's distribution and relative abundance in the state as of April 2015. Id.

At the time of the listing determination, WNS had been confirmed (meaning one or more bats in the state have been analyzed and confirmed with the disease) in 25 states and 5 Canadian provinces in the northern long-eared bat's range. Id. at 17,994 (including Table 1). Additionally, although WNS had not been confirmed in Rhode Island or the District of Columbia, their small

size and proximity to states affected by WNS led FWS to reasonably conclude that bat populations there are also affected. Id. The fungus causing WNS, Pd, had also been documented on bats in Iowa, Minnesota, and Mississippi, although no mortality or other signs of WNS had been documented. Id. This means that, at the time of listing, there were at least 7 states, 5 Canadian provinces, and 2 Canadian territories where there were no confirmed instances of either Pd or WNS. See id.; id. at 17,976; SuppAR 239547 at 15.

FWS also analyzed the "substantial" impact of WNS on North American bat populations, including northern long-eared bats. 80 Fed. Reg. at 17,994-95. In areas affected by Pd and WNS, northern long-eared bats have experienced major population declines, although some small populations of bats have still been documented in WNS-affected areas. Id. However, in areas that had not yet been affected by WNS or Pd, the species had "not yet suffered declines and appear[ed] stable." Id.

B. FWS Rationally Applied the ESA's Definitions of "Endangered Species" and "Threatened Species" and Articulated a Rational Connection Between the Available Scientific Information and its Listing Determination

The ESA defines a "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) (emphasis added). Conversely, an "endangered species" is "any species which is *in danger of extinction* throughout all or a significant portion of its range." 16 U.S.C. § 1532(6) (emphasis added). FWS has historically and consistently interpreted the phrase "in danger of extinction" to mean a species that is currently on the brink of extinction in the wild. See LR 23069 ("Polar Bear Memo"); In re Polar Bear Endangered Species Act Listing & § 4(d) Rule Litig., 748 F. Supp. 2d 19, 30 (D.D.C. 2010). Taking these definitions and interpretations together, it is clear that the difference between a threatened species and an endangered species is

largely temporal—a threatened species is one that is likely to be on the brink of extinction in the wild within the foreseeable future, while an endangered species is currently on the brink of extinction. See 16 U.S.C. § 1532(6), (20); LR 23069.

It is readily apparent from the listing determination that FWS took this temporal distinction into account when it decided to list the northern long-eared bat as threatened rather than endangered. See 80 Fed. Reg. at 18,020-22. Based on its analysis of the five listing factors, FWS found that, while there are several factors that affect the northern long-eared bat, no threat is as severe and immediate to the species as WNS. Id. "WNS has impacted the species throughout much of its range, and can be expected to eventually (from 2 to 4 years based upon models of WNS spread dynamics, but more probably within 8 to 13 years)[5] spread and impact the species throughout its entire range." Id. at 18,021. FWS acknowledges that "[o]nce WNS becomes established in new areas, we can expect similar, substantial losses of bats beginning in the first few years following infection." Id. FWS also admits that there is currently no effective means to stop the spread of WNS or to minimize bat mortalities associated with the disease. Id. FWS concluded that the spread of WNS and its expected impact are reasonably foreseeable, meaning that the species is likely to become an endangered species within the foreseeable future. Id.

At this point in its analysis, FWS had determined that listing the northern long-eared bat is warranted based on the spread of WNS and that the species at least qualifies for listing as a threatened species because it is likely to become an endangered species in the foreseeable future due to WNS. See id.; 16 U.S.C. § 1532(20). However, one question still remaining was whether the species was endangered (i.e., on the brink of extinction) at the time of the listing determination. See 80 Fed. Reg. at 18,021. FWS concluded that, "while the species is likely to become an

[5] A discussion of exactly how FWS arrived at this estimate is below in Section C.

endangered species within the foreseeable future, it is not at the present time in danger of extinction." Id. FWS stated that several factors, in the aggregate, support a finding that the species is not currently endangered:

> For example, WNS has not yet been detected throughout the entire range of the species, and will not likely affect the entire range for some number of years (again, most likely 8 to 13 years). In addition, in the area not yet affected by WNS (about 40 percent of the species' total geographic range), the species has not yet suffered declines and appears stable. Finally, the species still persists in some areas impacted by WNS, thus creating at least some uncertainty as to the timing of the extinction risk posed by WNS. Even in New York, where WNS was first detected in 2007, small numbers of northern long-eared bats persist despite the passage of approximately 8 years. Finally, coarse population estimates where they exist for this species indicate a population of potentially several million northern long-eared bats still on the landscape across the range of the species.

Id. (internal citations omitted). FWS then stated that while "[n]o one factor alone conclusively establishes whether the species is 'on the brink' of extinction. . . [t]aken together [] the data indicate a current condition where the species, while likely to become in danger of extinction at some point in the foreseeable future, is not on the brink of extinction at this time." Id.

In light of the five listing factors, the current status of the northern long-eared bat, and the temporal distinction between the definition of "endangered species" and "threatened species" in the ESA, FWS made not only a reasonable and rational decision that the species was threatened, but also the correct decision. Although Plaintiffs may have preferred a different result, Congress entrusted FWS with the authority to determine whether a species is threatened or endangered and FWS's decision should not be disturbed absent evidence from Plaintiffs that it was somehow arbitrary or capricious. See Chevron, 467 U.S. at 842-44; Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or., 515 U.S. 687, 708 (1995) ("When it enacted the ESA, Congress delegated broad administrative and interpretive power to the Secretary. The task of defining and listing endangered and threatened species requires an expertise and attention to detail that exceeds the

normal province of Congress. . . . When Congress has entrusted the Secretary with broad discretion, we are especially reluctant to substitute our views of wise policy for his.") (internal citations omitted)).

C. Plaintiffs Have Not Demonstrated That FWS's Listing Determination Is Arbitrary, Capricious, an Abuse of Discretion, or Otherwise Not in Accordance with Law

Plaintiffs argue that "the four rationales FWS invokes to support the threatened determination[6] are contradicted by the best available scientific data" and thus the listing determination is arbitrary and capricious. Plaintiffs' Motion for Summary Judgment ("Pls' MSJ"), ECF No. 52 at 38. However, all four of Plaintiffs' arguments fail for the same reason: FWS did fully consider the best available scientific data for each issue and came to a rational conclusion based on that data. Although Plaintiffs might have reached, or preferred FWS to reach, a different conclusion based on the same data, FWS is responsible for making listing determinations under the ESA and the Court must accept FWS's conclusions as long as they are reasonable.

1. FWS's Application of the Phrase "In Danger of Extinction" is Entitled to Deference

As a preliminary matter, Plaintiffs argue that FWS's interpretation of "in danger of extinction" in the definition of "endangered species" is not entitled to deference "because it represents a litigation position and has never been appropriately promulgated through the rulemaking requirements of section 4(h) of the ESA." Pls' MSJ at 35. Plaintiffs' arguments are unavailing.

First, despite Plaintiffs' assertions, FWS's interpretation of "in danger of extinction" contained in the Polar Bear Memo is not a mere litigation position. See Pls' MSJ at 35, n.10. FWS created the Polar Bear Memo after this Court, in In re Polar Bear Endangered Species Act Listing

[6] The four rationales that Plaintiffs refer to are quoted supra in Section B.

& § 4(d) Rule Litig., remanded to FWS its final listing determination for the polar bear "for the limited purpose of providing additional explanation for the legal basis of its listing determination, and for such further action as it may wish to take in light of the Court's finding that the definition of an 'endangered species' under the ESA is ambiguous." 748 F. Supp. 2d at 30; LAR 23067. However, as the Polar Bear Memo itself makes clear, the interpretation of "in danger of extinction" contained in the Memo represents "long-standing Service practice and usage" over the 37 plus years that it has administered the ESA. LAR 23067, 23084. As Plaintiffs point out, the Polar Bear Memo did not create any new rules or policies because all it did was summarize past practice. See LAR 23068 ("[T]he explanation set forth in this memorandum does not represent a new interpretation of the statute and is not a prospective statement of agency policy"); see also Pls' MSJ at 35 n.10. The Polar Bear Memo's creation as part of this Court's Order does not make the interpretations contained within it, which FWS has employed for decades, a litigation position.

Second, 16 U.S.C. § 1533(h) does not require FWS to provide the public with notice and an opportunity to comment on FWS's synthesis of how the agency has historically interpreted "in danger of extinction" that is reflected in the Polar Bear Memo. See 16 U.S.C. § 1533(h). 16 U.S.C. § 1533(h) provides that the "Secretary shall establish, and publish in the Federal Register, agency guidelines to insure that the purposes of this section are achieved efficiently and effectively." Id. The Section gives specific examples of the agency guidelines that must be published in the Federal Register:

> (1) procedures for recording the receipt and the disposition of petitions submitted under subsection (b)(3) of this section;
>
> (2) criteria for making the findings required under such subsection with respect to petitions;
>
> (3) a ranking system to assist in the identification of species that should receive priority review under subsection (a)(1) of this section; and

> (4) a system for developing and implementing, on a priority basis, recovery plans under subsection (f) of this section.

Id. The Secretary is required to "provide to the public notice of, and opportunity to submit written comments on, any guideline (including any amendment thereto) proposed to be established under this subsection." Id. FWS's summary of how the agency has historically interpreted "in danger of extinction," clearly does not fall into any of the above categories and therefore did not need to be released for public notice and comment. See 16 U.S.C. § 1533(h); 16 U.S.C. § 1532(6). In addition, because FWS applies its interpretation of "in danger of extinction" on a species-by-species basis, the public has in fact had notice and numerous opportunities to comment on FWS's application of its interpretation.

Third, FWS's summary of how the agency has historically defined "in danger of extinction" as reflected in the Polar Bear Memo is entitled to deference under Chevron. See 467 U.S. 837 at 842. When a court reviews an agency's interpretation of a statute it is charged with administering, like this Court reviewing FWS's interpretation of the definition of "in danger of extinction," the two-step Chevron review framework applies. See id.; In re Polar Endangered Species Act Listing, 794 F. Supp. 2d 65, 87 (D.D.C. 2011). Chevron step one requires the Court to answer the "question whether Congress has directly spoken to the precise question at issue." 467 U.S. at 842, 843 n.9. This Court has previously held that Congress has not directly spoken to the definition of "endangered species" and therefore the term (including the phrase "in danger of extinction") is ambiguous. See In re Polar Bear Endangered Species Act Listing & § 4(d) Rule Litig., 748 F. Supp. 2d at 27 ("[T]he Court finds that the overall structure of the ESA suggests that the definition of an endangered species was intentionally left ambiguous. . . . Indeed, under the ESA, Congress broadly delegated responsibility to the Secretary to determine whether a species is

'in danger of extinction' in light of the five statutory listing factors and the best available science for that species."). For this reason, the phrase "in danger of extinction" is properly analyzed under Chevron step two, which requires the Court to uphold any reasonable agency interpretation of ambiguous statutory language. See Chevron, 467 U.S. at 843-44; In re Polar Endangered Species Act Listing, 794 F. Supp. 2d at 87. This Court has already upheld FWS's interpretation of "in danger of extinction" that is reflected in the Polar Bear Memo under Chevron step two, concluding that it was a permissible construction of the statute and warranted Chevron deference. In re Polar Endangered Species Act Listing, 794 F. Supp. 2d at 89-90. Accordingly, Plaintiffs' argument that FWS's interpretation of "in danger of extinction" deserves no deference and FWS should be "foreclosed from relying upon it" fails. See Pls' MSJ at 35, n.10.

As a final note, Plaintiffs do not appear to argue that FWS misapplied its interpretation of "in danger of extinction" when deciding that the northern long-eared bat did not qualify as an endangered species. See Pls' MSJ at 35-36. Instead, Plaintiffs argue that FWS's interpretation of "in danger of extinction" itself is unlawful. See id. "[I]f the Bat—which has already suffered up to 99% population declines through the core of its range, with all evidence indicating that the species faces functional extinction when WNS reaches it peripheral range—does not meet the agency's interpretation of 'in danger of extinction,' [the] interpretation is fundamentally flawed." Id. As discussed above, FWS's understanding of how it has interpreted of "in danger of extinction" has already been upheld by this Court as consistent with congressional intent under Chevron step two. In re Polar Endangered Species Act Listing, 794 F. Supp. 2d at 89-90. Therefore, Plaintiffs have no remaining argument.

2. FWS's 8 to 13 Year Timeframe is a Reasonable Estimate of the Rate of Spread of Pd/WNS and was Properly Used to Determine that the Species is Threatened

Plaintiffs argue that FWS's reliance on its own estimate that Pd/WNS would not spread range wide for another 8 to 13 years from April 2015, was not supported by the best available science. Pls' MSJ at 39. However, FWS's estimate of when Pd/WNS would spread range wide was based on the best available scientific and commercial information available at the time of listing and was thus reasonable. See 80 Fed. Reg. at 18,021; 16 U.S.C. § 1533(b)(1)(A).

In making its listing determination, FWS examined numerous models that purported to predict the spread of Pd and WNS. See 80 Fed. Reg. at 17,997-98; 18,010-11; 18,015-16. All of the models indicated that Pd, and thus WNS, would continue to spread throughout the northern long-eared bat's range in approximately 2 to 40 years. Id. at 17,997 (citing Maher *et al.* 2012, pp. 5–7; Ihlo 2013, unpublished; Hallam *et al.*, unpublished). Although FWS considered those models, FWS ultimately determined that all of the models had significant limitations that prevented them from accurately predicting the spread of Pd and WNS. Id. For example, the models did not account for the transmission of WNS through non-cave hibernacula (researchers have detected the presence of viable Pd in a maternity roost), WNS's spread through Canada, counties in the United States with insufficient data, the fact that Pd is expanding its ecological niche in North America by demonstrating its viability in previously unexposed environments, and other various biological aspects of disease transmission. Id. at 17,996-97; 18,016. In fact, it turned out that the models did not accurately predict the spread of WNS, either overestimating or underestimating the time at which WNS would arrive in certain counties. Id. at 17,997. WNS arrived to surveyed sites 1 to 5 years earlier than predicted by the Ihlo model. Id. Conversely, WNS arrived 1 to 4 years later than predicted by the Maher model in approximately 75 counties. Id.

Because of the "limitations and uncertainties with relying on these models to predict the rate at which the fungus will spread to currently unaffected areas," FWS decided to use known

facts and logic to calculate a projected rate of WNS spread through the remaining portions of the northern long-eared bat's range. Id. at 17,997-98. Knowing two facts, that WNS was first discovered in New York in 2007 and that it had spread to at least 25 states and 5 Canadian provinces as of February 2015, FWS was able to calculate that "the area affected by Pd in North America is expanding at an average rate of roughly 175 miles (280 km) per year." Id. Based on this calculation, FWS was able to project that Pd could "be expected to occur throughout the range of the northern long-eared bat in an estimated 8 to 9 years from December 2014," or in 2022-2023. Id. The Canadian agency responsible for listing endangered and threatened species pursuant to their Species at Risk Act, the Committee on the Status of Endangered Wildlife in Canada ("COSEWIC"), used a similar method to calculate the spread of Pd and reached an analogous estimate to FWS. See id. at 17,998. In COSEWIC's estimation, the entire range of the northern long-eared bat would be infected within 12 to 15 years from November 2013. Id. (citing COSEWIC 2013, p. xiv). Combining these two estimates, FWS determined that Pd and WNS would spread throughout the entirety of the northern long-eared bat's range between 2023 and 2028. See id. at 18,022.

FWS's estimate of when Pd and WNS would spread range wide was based on the best scientific and commercial information available at the time of listing. See 16 U.S.C. § 1533(b)(1)(A). Unlike the models examined by FWS that had proven to be inaccurate, FWS's time estimate for Pd and WNS spread was based on the actual spread of Pd and WNS to date, which would account for every possible factor that contributes to the spread. See id. at 17,997-98. Furthermore, FWS's estimated rate of spread is extremely similar to the estimate made by another agency with vast knowledge and experience in wildlife biology and ecology, COSEWIC. Id. at 17,998; 18,022 (citing COSEWIC 2013, p. xiv). Therefore, FWS could reasonably rely on its 8 to

13 year timeframe to determine that the northern long-eared bat was not currently in danger of extinction at the time of listing, but was likely to be in danger of extinction in the foreseeable future at some point following the spread of the disease throughout the bat's range. Id. at 18,021 (relying on this estimate to determine that the northern long-eared bat currently met the definition of a "threatened species," but not an "endangered species").

Plaintiffs also argue that FWS "fail[ed] to explain rationally how the 8 to 13-year timeframe meaningfully differs from the 'in a short timeframe' articulation" in the proposed rule to list the northern long-eared bat as an endangered species. Pls' MSJ at 39 (quoting 78 Fed. Reg. at 61,076). But FWS does not have a legal obligation to explain differences between a proposed rule and a final rule as long as the agency has provided a rational explanation of its ultimate decision. See NRDC v. Evans, 254 F. Supp. 2d 434, 441-42 (S.D.N.Y. 2003) (holding that "an agency does not have a burden to explain a change in position from a proposed rule to the final rule, and a lack of an explanation for the change is not in itself evidence of arbitrariness") (alteration and citation omitted); Fed'n of Fly Fishers v. Daley, 131 F. Supp. 2d 1158, 1163 (N.D. Cal. 2000) (same). The reason why is obvious. There is an expectation that, after an agency submits a proposed rule for notice and comment, the agency will reassess its proposed rule considering the information it already had and any new information that was acquired or developed during the notice and comment process, and develop a "somewhat different and improved" final rule. See Trans-Pacific Freight Conference v. Fed. Maritime Comm'n, 650 F.2d 1235, 1249 (D.C. Cir. 1980); see also Kooritzky v. Reich, 17 F.3d 1509, 1513 (D.C. Cir. 1994) (stating that agencies often "adjust or abandon their proposals in light of public comments or internal agency reconsideration"). The rule of law that Plaintiffs advocate would cause an agency to limit itself to language that is in the proposed rule, which has not been reassessed or tested by public comment,

due to concern that a court may find its minute change unjustified or arbitrary and capricious.

Moreover, even if FWS was required to justify why the 8 to 13 year timeframe differed from the "short timeframe" mentioned in the proposed rule, it did so. In the proposed rule to list the northern long-eared bat, FWS did not attempt to develop its own estimate of when Pd and WNS would spread throughout the northern long-eared bat's range based on known data. See 78 Fed. Reg. at 61,064-65. Nor did FWS mention or cite to the COSEWIC estimate of rate of spread given that the 2013 COSEWIC report had not been approved when the proposed rule was published on October 2, 2013. See id.; SuppAR 239547 at iii. Those two estimates were first considered in the final rule listing the northern long-eared bat and can account for the new more specific timeframe. See 80 Fed. Reg. at 17,997-98. As every agency should do, FWS took the data that it already had in the proposed rule, included new data that represented the best available scientific and commercial data, and developed a more specific final rule. Those actions can hardly be classified as unreasonable or arbitrary and capricious.

3. FWS's Statement that "40% of the Total Geographic Range" is Not Yet Affected by WNS is Accurate and was Properly Used to Determine that the Species is Threatened

As part of its decision to list the northern long-eared bat as threatened as opposed to endangered, FWS stated that the species had not yet suffered declines and appears stable in the areas not yet affected by WNS—"about 40 percent of the species' total geographic range." 80 Fed. Reg. at 18,021. At the time of the listing, this percentage was accurate, based on data obtained by FWS. See id. at 17,996 (citing FWS 2015, unpublished data) ("Pd now affects an estimated 60 percent of the northern long-eared bat's total geographic range . . . ."); see also LAR 49295 (providing an estimate of between 37 percent and 42 percent of the species' range that had not yet been affected by WNS). At no point did FWS mischaracterize this data or attempt to "mislead"

the public about what it means. See Pls' MSJ at 41. FWS's statement means exactly what it says: "about 40 percent of the species' total *geographic range*" is not affected by WNS and the populations in that area appear stable. 80 Fed. Reg. at 18,021 (emphasis added); 17,996. FWS was not attempting to hide the fact that northern long-eared bats are less common in certain areas than in others. As Plaintiffs fully admit, FWS acknowledges this fact in over eight pages of analysis in its listing determination:

> The proposed and final rules are consistent in stating that the species' pre-WNS populations were concentrated in its northeastern and Midwestern ranges, with much lower population densities in the northwestern, western, and extreme southern range. *Compare* 78 Fed. Reg. at 61,051-54 *with* 80 Fed. Reg. at 17,976 ("[h]istorically, the [Bat] was widely distributed in the eastern part of its range" and was consistently caught during summer mist-nest surveys, detected during acoustic surveys, and known to occur in many hibernacula); *id.* at 17,979 (in Midwestern range, the species was historically considered one of the more frequently encountered species in mist-net surveys, although observed infrequently and in small numbers in hibernacula); *id.* at 17,981-82 (with the southern range, species is more common in more northerly states and less common in southerly states); *id.* at 17,983 (in western range, species is historically less common; it is considered uncommon or rare in the western extremes (e.g., Wyoming, Kansas, and Nebraska) and considered common only in small portions (e.g., Black Hills of South Dakota); *id.* (species "found in higher abundance in eastern than in western Canada).

Pls' MSJ at 42; 80 Fed. Reg. at 17,975-84. The northern long-eared bat's population status in areas without WNS does not contradict FWS's statement that in areas without WNS (about 40% of the species' total geographic range), the species has not yet suffered declines and appears stable. Therefore, FWS could reasonably and rationally rely on this data to make its determination that northern long-eared bats are threatened and not endangered.

4. FWS Used the Best Available Science When Analyzing the Population Data Provided to it for the Midwest Range of the Species

In its listing determination, FWS discussed recent data it had received regarding the population size of northern long-eared bats in the species' midwest range (Missouri, Illinois, Iowa, Indiana, Ohio, Michigan, Wisconsin, and Minnesota). 80 Fed. Reg. at 17,979. FWS noted that

"[t]here are no firm population size estimates for the northern long-eared bat rangewide . . . however, a rough estimate of the population size in a portion of the Midwest has been calculated." Id. That estimate, which was developed for the Midwest Wind Energy Multi-Species Habitat Conservation Plan,[7] was calculated by: (1) documenting the 2013 Indiana bat winter population within six states (Missouri, Illinois, Iowa, Indiana, Ohio, and Michigan); (2) determining the ratio of northern long-eared bats to Indiana bats caught in summer mist-net surveys in 2013; and (3) using that ratio to determine the northern-long eared bats' winter population. Id. at 17,979; LAR 57311. Based on this methodology, there were an estimated 4,088,258 northern long-eared bats in those six states in 2013. See LAR 57311. However, as Plaintiffs note, this estimate was based on data that was primarily gathered prior to the onset of WNS in the midwest and that estimate might not reflect the declines that have occurred in WNS-affected states. See Pls' MSJ at 45. FWS also understood that the estimate might not be entirely accurate due to the arrival of WNS in those six states after the data was collected. 80 Fed. Reg. at 17,979 ("This estimate has limitations, however. The principal limitation is that the estimate is based on data that were primarily gathered prior to the onset of WNS in the Midwest; thus declines that have occurred in WNS-affected States are not reflected in the estimated number."). That is why FWS did not stop its analysis of the population size in the midwest range at this point, but also took into account "the documented effects of WNS in the Midwest to date (declines currently primarily limited to Ohio and Illinois)." Id. Based on the pre-WNS estimate developed for the Midwest Wind Energy Multi-Species Habitat Conservation Plan and the effects that WNS had on those midwest states as of April 2015 when the listing determination was published, FWS concluded that "there may still be several million

[7] FWS, state natural resources agencies, and wind energy industry representatives are developing this plan to address the rapid wind energy development in the Midwest and the effect that development may have on listed species. Id. at 18,005.

bats within the six-State area." Id. However, FWS cautioned that "there is uncertainty to the accuracy of this estimate, and it should be considered a rough estimate." Id. Nonetheless, FWS's revised estimate was based on the best scientific and commercial data available, contrary to Plaintiffs' assertions that FWS "did not confront[] the fact that it could not credibly rely on pre-WNS data to estimate post-WNS populations." See id.; Pls' MSJ at 45. In fact, if FWS had not used the data presented to it (as Plaintiffs advocate), FWS would then not have used the "best available commercial and scientific science" as required by the ESA, and FWS's failure to do so would have been arbitrary and capricious.

On a final note, FWS's ultimate population estimate for the northern long-eared bat was not limited to the few midwestern states covered by the wind-industry population estimate. Rather, FWS found that there were "potentially several million . . . *across the range of the species*." 80 Fed. Reg. at 18,021 (emphasis added). This includes bats in other midwestern states (such as Minnesota, where WNS was not yet manifest at the time of listing, see id. at 17,994), remnant survivors throughout the WNS-impacted range of the bat, and all bats in areas of the range not impacted by WNS. See id.

Furthermore, Plaintiffs are simply incorrect that the midwest population estimate is not based on the best available science because it is based on summer mist-net survey as opposed to winter hibernacula counts. See Pls' MSJ at 46. Although winter hibernacula colony counts are considered a "preferred method for monitoring" northern long-eared bats, there are difficulties associated with observing or counting northern long-eared bats in hibernacula as the bats are known to alternate hibernacula during the winter and roost in small crevices or cracks in hibernacula where they are barely visible. LAR 40575-76. That is why summer mist-net survey data can also be a useful tool in determining northern long-eared bat populations and trends. See

generally id.; 80 Fed Reg. at 17,974.

5. FWS Used the Best Available Science When it Determined the Continuing Presence of Individual Northern Long-Eared Bats in Some WNS-Infected Areas to be Germane to the Temporal Component of the Extinction Risk

Small numbers of northern long-eared bats have been observed during summer surveys on Long Island, New York, a full eight years after WNS first appeared in the state. 80 Fed. Reg. at 17,997. However, FWS noted that "these observations are unproven at this point and are the basis for ongoing research." Id. Additionally, northern long-eared bats can still be found across West Virginia although WNS was first confirmed in that state seven years earlier. Id. at 17,978; 17,994 (Table 1). FWS did note that according to studies and reports, there have been "marked declines in capture rates" in West Virginia, but the species is still present. Id. at 17,978 (citing Francl *et al*. 2012, p. 35; Johnson *et al*. 2014, unpaginated). Based on these observations, studies, and reports, FWS concluded that there is "*at least some question* as to whether this species is displaying some degree of long-term resiliency."[8] Id. at 18,021 (emphasis added). However, according to FWS, "it is unknown whether some populations that have survived the infection are now stabilizing at a lower density or whether the populations are still declining in response to the disease, and whether those populations have been reduced below sustainable levels." Id. FWS concluded its discussion of resiliency by stating that, in the long term, based upon its best understanding of conservation biology, FWS believes "the declines seen in the species may be unsustainable." Id. at 18,021-22. However, the fact remains that some northern long-eared bats are found in WNS-affected areas, even years after WNS has decimated the remainder of the local population. See id. at 17,978; 17,997.

[8] Resiliency "means having the ability to withstand natural environmental fluctuations and anthropogenic stressors over time." Id.

This analysis demonstrates that, contrary to Plaintiffs' argument, FWS understands that northern long-eared bats have suffered dramatic declines in areas that are infected by WNS and will likely continue to do so when WNS spreads. "Given that we do not as of yet have a means to stop the spread of WNS and we anticipate the same impact (high mortality) observed to date to occur as WNS spreads across the range, substantial losses in redundancy and representation are likely as well." Id. at 18,022. However, it also demonstrates that some northern long-eared bats survive in WNS-impacted parts of the country, for unknown reasons. See id. This introduces at least some uncertainty as to the timing of the long-term effect of the disease on the species as a whole. See id. When combined with the fact that WNS will not reach the furthest portions of the northern long-eared bat's range for many years, this paints a picture of a species that is not currently in danger of extinction, but likely to become endangered within the foreseeable future. FWS took this information into consideration, as it is required to do, when making its listing determination. Id. at 17,978; 17,997; see 16 U.S.C. § 1533(a)(1)(B).

Plaintiffs infer a significance to these surviving bats that FWS, for its part, never did. Rather than find that these surviving bats paint a picture of healthy (non-imperiled) species, FWS ultimately found that the species itself is likely to become in danger of actual extinction within the foreseeable future. The presence of surviving bats in WNS-infected states, therefore, is chiefly relevant to *when* the species will be "in danger of extinction," not *if* the species will be in danger of extinction.

D. The Final SPR Policy

In their motion for summary judgment, Plaintiffs assert both a facial challenge to the Final SPR Policy as well as a challenge to the Services' application of the Final SPR Policy to the northern long-eared bat. See Pls' MSJ at 15 ("Plaintiffs challenge the SPR Policy both facially and

as applied to the Bat"). Both of Plaintiffs' challenges fail. Regarding the facial challenge, Plaintiffs have failed to meet the heavy burden of establishing that there is no set of circumstances that exists under which the Final SPR Policy is valid as required by the United States Supreme Court and the United States Court of Appeals for the District of Columbia Circuit. Furthermore, under the Supreme Court's Chevron framework, the Final SPR Policy is a reasonable interpretation of the undefined and ambiguous phrase "significant portion of its range" in the ESA. Plaintiffs' as-applied challenge also fails because FWS properly applied the lawful Final SPR Policy to the northern long-eared bat. Therefore, this Court should uphold both the challenged aspect of the Services' Final SPR Policy and the Services' application of the Final SPR Policy to the northern long-eared bat.

1. Plaintiffs' Have Not Met their Burden of Establishing that the Final SPR Policy is Facially Unlawful and Cannot Do So

Plaintiffs appear to argue that the Final SPR Policy is facially unlawful because it is contrary to the ESA's language: If the Services determine that a species is likely to become an endangered species in the foreseeable future throughout all of its range, they will not go on to consider whether it is currently in danger of extinction in a significant portion of its range. See id. at 56-63. In Plaintiffs' view, this renders one of the four bases for listing a species—listing a species because it is in danger of extinction in a significant portion of its range—superfluous and the Final SPR Policy facially unlawful. See id. Plaintiffs' facial challenge to the Services' Final SPR Policy fails for two independent reasons. First, Plaintiffs have not even attempted to meet the formidable burden established by the Supreme Court and the D.C. Circuit for succeeding on facial challenges. Second, even if Plaintiffs had attempted to meet their burden, they would not be able to do so because, as the Plaintiffs have acknowledged, there is at least one set of circumstances that exists where the Services' Final SPR Policy would be valid.

To prevail on their facial challenge, Plaintiffs were required to demonstrate that "no set of circumstances exists" under which the Services' Final SPR Policy would be valid. See United States v. Salerno, 481 U.S. 739, 745 (1987) (establishing and applying "no set of circumstances" test when the plaintiff asserted a facial challenge to a legislative act); Reno v. Flores, 507 U.S. 292, 301 (1993) (applying the test when a plaintiff asserted a facial challenge to an agency's regulation); Cellco P'ship v. FCC, 700 F.3d 534, 549 (D.C. Cir. 2012) (applying the test when a plaintiff asserted a facial challenge to an agency's legally binding rule). In other words, Plaintiffs had to show that the Final SPR Policy is unlawful in all of its applications, not simply "that a possible application of the [Final SPR Policy] . . . violated federal law." See Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442, 449 (2008); Anderson v. Edwards, 514 U.S. 143, 155 n.6 (1995). Plaintiffs' motion for summary judgment is devoid of any argument that the Final SPR Policy is unlawful in all of its applications or that "no set of circumstances exists" where the Services' Final SPR Policy would be valid. See Pls' MSJ. Plaintiffs cannot succeed on its facial challenge—"the most difficult challenge to mount successfully"—if they do not put forth an argument to meet their burden. See Salerno, 481 U.S. at 745. Therefore, in the absence of any argument, Plaintiffs' facial challenge fails.

Additionally, even if Plaintiffs had attempted to meet their substantial burden, they would not have been able to do so. As Plaintiffs point out in their motion for summary judgment, there is at least one set of circumstances where the Final SPR Policy could be applied lawfully—even under Plaintiffs' interpretation of the ESA and the Final SPR Policy:

> In other words, under the [Final SPR] Policy, the *only* situation in which a SPR analysis would lead to an endangered listing would be if (1) a portion of a species range was "significant" and the species is "endangered" in only that portion of the range and (2) the remainder of the species' range was viable (i.e., the species is not threatened throughout its range.).

Pls' MSJ at 63 (emphasis in original). Under Plaintiffs' scenario, the Services would utilize the Final SPR Policy and consider each of the four independent bases for listing during the listing process: whether a species is in danger of extinction throughout all of its range, likely to become an endangered species in the foreseeable future throughout all of its range, in danger of extinction in a significant portion of its range, or likely to become an endangered species in the foreseeable future in a significant portion of its range. See 79 Fed. Reg. 37,582 ("Under this final policy, we first determine whether the species is endangered or threatened throughout all of its range and, if so, list the species accordingly. [However,] [i]f the species is not endangered or threatened throughout all of its range, then we look further to determine whether it is endangered of threatened in a significant portion of its range.").[9] By acknowledging that there is at least one situation in which the Final SPR Policy does not render the in danger of extinction in a significant portion of its range basis for listing superfluous, Plaintiffs have conceded that the Final SPR Policy is not facially unlawful under the test established by the Supreme Court and the D.C. Circuit. See Salerno, 481 U.S. at 745; Cellco P'ship, 700 F.3d at 549. For this reason, Plaintiffs' argument that the Final SPR Policy is facially unlawful fails.

[9] In fact, this set of circumstances has led to NMFS listing one species, the Tanzanian distinct population segment of the African coelacanth, as threatened. Final Rule to List the Tanzanian DPS of African Coelacanth, 81 Fed. Reg. 17,398 (Mar. 29, 2016). In its analysis, NMFS first determined that the species was not endangered or threatened throughout all of its range. Id. at 17,401. Having made that determination, NMFS turned to whether the species was endangered or threatened throughout a significant portion of its range. Id. "Based on the information presented, and as described in the proposed listing rule, because we found the African coelacanth species overall to not warrant listing on the basis of the range wide analysis, we applied the SPR Policy and considered whether any portions of the range of the species would be likely to be both significant to the species and at risk of extinction now or within the foreseeable future." Id. After considering all four bases for listing, NMFS concluded that the species was threatened in a significant portion of its range and therefore listed the distinct population segment of the species as threatened. Id. NMFS has also issued a proposed rule to list the giant manta ray as a threatened species based on its status in a significant portion of its range. 12-Month Finding on a Petition to List Giant and Reef Manta Rays as Threatened or Endangered, 82 Fed. Reg. 3,694 (Jan. 12, 2017).

2. The Final SPR Policy is a Reasonable Interpretation of the Phrase "Significant Portion of Its Range" Under Chevron

Even if Plaintiffs were to argue that the "no set of circumstances" test does not apply to this litigation, the Court must review the Services' interpretation of "significant portion of its range," under the two-step review framework established by the Supreme Court in Chevron, 467 U.S. 837. Chevron step one requires the Court to answer the "question whether Congress has directly spoken to the precise question at issue" using traditional tools of statutory construction. Id. at 842, 843 n.9. Although Chevron did not elaborate on what constitutes the "precise question at issue" in a particular matter, the Supreme Court later described it as "the specific issue addressed by the regulation" or rule. See id.; K Mart Corp. v. Cartier, 486 U.S. 281, 291 (1988) (describing Chevron step one as whether "the statute is silent or ambiguous with respect to the specific issue addressed by the regulation"); see also New Mexico v. Dep't of the Interior, 854 F.3d 1207, 1222 (10th Cir. 2017) ("Thus, in *K Mart*, the Court indicated that, at *Chevron* step one, courts should frame a question that correlates to the specific problem the regulation is designed to address or answer."). If Congress' intent regarding the specific issue addressed by the regulation or rule is clear, "that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." Chevron, 467 U.S. at 842-43. But, "[i]f the statute is silent or ambiguous with respect to the specific issue," this Court moves on to step two and asks "whether the agency's answer [to the specific issue] is based on a permissible construction of the statute." Id. at 843. In answering this question, the Court "may not substitute its construction of a statutory provision for a reasonable interpretation" made by the agency. Id. at 844. Instead, the Court must defer to an agency's interpretation of the statute unless it is arbitrary, capricious, or manifestly contrary to the statute. Id. The Services' Final SPR Policy is lawful under the two-step Chevron test because Congress has not spoken on the precise question at issue—how to interpret

the phrase "significant portion of its range"—and the Services' interpretation of that phrase is reasonable.

a. Chevron Step One – Congress Has Not Directly Spoken to the Precise Question at Issue

Congress has not directly and unambiguously spoken on the "specific issue addressed by the" Final SPR Policy—how the Services should interpret the phrase "significant portion of its range." See K Mart Corp., 486 U.S. at 291; 79 Fed. Reg. 37,579. Congress did not define the phrase "significant portion of its range" or even the word "significant" in the ESA. See 16 U.S.C. § 1531 *et seq*. Nor is it clear from other provisions of the ESA or the ESA's legislative history how exactly the Services should define that specific phrase. See id. That is why every court that has considered the issue (including this Court), has held that Congress has not directly spoken on the definition of "significant portion of its range," the phrase is ambiguous under Chevron step one, and the Services' interpretation of the phrase is properly analyzed under Chevron step two. See Humane Soc'y v. Jewell, 76 F. Supp. 3d 69, 128 (D.D.C. 2014) ("The parties do not dispute that the phrase 'significant portion of its range' is, for Chevron purposes, ambiguous, and the Court concurs.") (citations omitted); WildEarth Guardians v. Salazar, 741 F. Supp. 2d 89, 99 (D.D.C. 2010) (holding that the phrase "significant portion of its range" is ambiguous); see also Defenders of Wildlife v. Norton, 258 F.3d 1136, 1141 (9th Cir. 2001) (the phrase is "inherently ambiguous" and "puzzling"); In re Polar Bear Endangered Species Act Listing and § 4(d) Rule Litig., 748 F. Supp. 2d 19, 27 (D.D.C. 2010) (holding that the definition of "endangered species," which includes the phrase "significant portion of its range," is inherently ambiguous). Plaintiffs even concede that courts have found the phrase to be ambiguous: "Courts have concluded the phrase 'significant portion of its range' in the definition of 'endangered species' is ambiguous. *See e.g.*, *Humane Soc'y of the U.S. v. Jewell*, 76 F. Supp. 3d 69, 128-29 (D.D.C. 2014) (collecting decisions from this

district)." Pls' MSJ at 60. Because Congress has not directly spoken on how to interpret the phrase "significant portion of its range," making the phrase ambiguous, the Services' Final SPR Policy is properly analyzed under Chevron step two. See Humane Soc'y, 76 F. Supp. 3d at 128-29 (holding that the phrase "significant portion of its range" is ambiguous and analyzing the agency's interpretation of the phrase under Chevron step two).

Despite the pertinent case law and the fact that Congress did not define "significant portion of its range" or explain how to interpret that phrase, Plaintiffs contend that the Final SPR Policy "fails the Chevron step one test." Pls' MSJ at 61. Plaintiffs argue that, even though courts have found the phrase "significant portion of its range" to be congressionally undefined and ambiguous, the word "or" found between the two bases for listing a species as endangered is not. See id. at 61 ("But the question of what Congress intends when it includes 'or' in a statute is clear. Canons of statutory interpretation provide that when Congress uses 'or' it does so to give the words it connects separate meaning. *See United States v. Woods*, -- U.S. --, 134 S. Ct. 557, 566 (2013)"); 16 U.S.C. § 1532(6) ("The term 'endangered species' means any species which is in danger of extinction throughout all *or* a significant portion of its range") (emphasis added). Therefore, in Plaintiffs' view, the word "or" requires the Services to consider each of the two bases for listing an endangered species, whether the species is in danger of extinction throughout all of its range *and* whether the species is in danger of extinction throughout a significant portion of its range, every time the Services analyze whether a particular species should be listed—including when the Services have already determined that a species fits the statutory definition of being a threatened species because it is threatened throughout all of its range. Id. at 60-61. As a result, Plaintiffs believe that the Services' Final SPR Policy is unlawful. Id.

Plaintiffs cannot masquerade their substantive Chevron step two argument relating to

whether the Services' Final SPR Policy is "arbitrary, capricious, or manifestly contrary to the statute," as a Chevron step one argument. See Chevron, 467 U.S. at 844. The only question that this Court must answer under Chevron step one is whether Congress has directly spoken on how to interpret the phrase "significant portion of its range." See id. at 842 ("First, always, is the question whether Congress has directly spoken to the precise question at issue."); K Mart Corp., 486 U.S. at 291 (describing the precise question at issue as "the specific issue addressed by the regulation" or rule); 79 Fed. Reg. at 37,579 (stating that purpose of the Final SPR Policy is to interpret the phrase "significant portion of its range" in the definitions of "endangered species" and "threatened species"). Plaintiffs' argument that the Services' Final SPR Policy renders one of the four bases for listing a species superfluous does not relate to whether Congress has directly spoken on how to interpret the precise phrase "significant portion of its range." See Chevron, 467 U.S. at 844. Plaintiffs did not argue in their motion for summary judgment that Congress has directly spoken on how to interpret "significant portion of its range" or that the phrase is somehow unambiguous. See Pls' MSJ at 60. Instead, Plaintiffs' argument relates to whether or not the Services' interpretation of "significant portion of its range" is "manifestly contrary to [other parts of] the statute." See Chevron, 467 U.S. at 844 (holding that, under Chevron step two, an agency's interpretation of its own statute is "given controlling weight unless [it is] arbitrary, capricious, or manifestly contrary to the statute"); Pls' MSJ at 61 ("Because the SPR Policy renders a portion of the "endangered species" definition superfluous, it fails the Chevron step one test."); see also Ctr. for Biological Diversity v. Jewell, 2017 WL 2438327 at *6, No. CV-14-02506-TUC-RM (D. Ariz. Mar. 29, 2017)[10] (applying Chevron step two, not Chevron step one, to Center for Biological

[10] Federal Defendants have filed a motion for reconsideration in this case which, at the time of this filing, has not yet been ruled on by the court. Id. at ECF No. 76.

Diversity's and Defenders of Wildlife's argument that the Final SPR Policy renders portions of the ESA superfluous).

Therefore, Plaintiffs' argument that the Final SPR Policy is contrary to the other provisions in the ESA can only be analyzed under Chevron step two, which affords deference to the Services' interpretation. See Ctr. for Biological Diversity, 2017 WL 248327 at *6.

b. Chevron Step Two – The Services' Interpretation of the Phrase "Significant Portion of Its Range" is Reasonable

The Services' Final SPR Policy is a reasonable interpretation of the undefined and ambiguous phrase "significant portion of its range" in the ESA for three reasons that are relevant to this litigation. See Chevron, 467 U.S. at 844 (holding that an agency's interpretation of a statutory provision should be upheld if it is reasonable and not arbitrary, capricious, or manifestly contrary to the statute); State Farm, 463 U.S. at 43 (holding that an agency rule is arbitrary and capricious if the agency "has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise"). First, the Final SPR Policy gives independent meaning to each of the four bases for listing and, contrary to Plaintiffs' assertions, the Final SPR Policy does not render any of the bases for listing superfluous. Second, the Final SPR Policy complies with both the logical underpinnings of the ESA and two district court decisions holding that FWS cannot list an entity smaller than a "species" as defined by the ESA. Third, the Final SPR Policy does not "subvert the ESA's conservation goal" or require FWS to consider any other factors in listing a species besides the five factors outlined by Congress in 16 U.S.C. § 1533(a)(1). See Pls' MSJ at 64.

i. The Final SPR Policy Does Not Render Any Bases for Listing "Superfluous"

Being the joint administrators of the ESA, the Services are well aware that the definitions of "endangered species" and "threatened species" indicate that there are four discrete bases for listing a species under the ESA, each of which must have its own separate meaning: (1) a species is in danger of extinction throughout all of its range; (2) a species is in danger of extinction in a significant portion of its range; (3) a species is likely to become an endangered species in the foreseeable future throughout all of its range; and (4) a species is likely to become an endangered species in the foreseeable future in a significant portion of its range. 79 Fed. Reg. at 37,582; see 16 U.S.C. § 1532(6), (20). The Services also know that any interpretation the Services develop for the phrase "significant portion of its range" must include a path for a species to be listed as one of the four bases for listing. See 79 Fed. Reg. 37,582; Norton, 258 F.3d at 1141-43. If not, part of the statutory language in the ESA will be rendered superfluous. See 79 Fed. Reg. 37,582; Norton, 258 F.3d at 1141-43. That is exactly why the Services developed and adopted the particular interpretation included in the Final SPR Policy. See 79 Fed. Reg. 37,582.

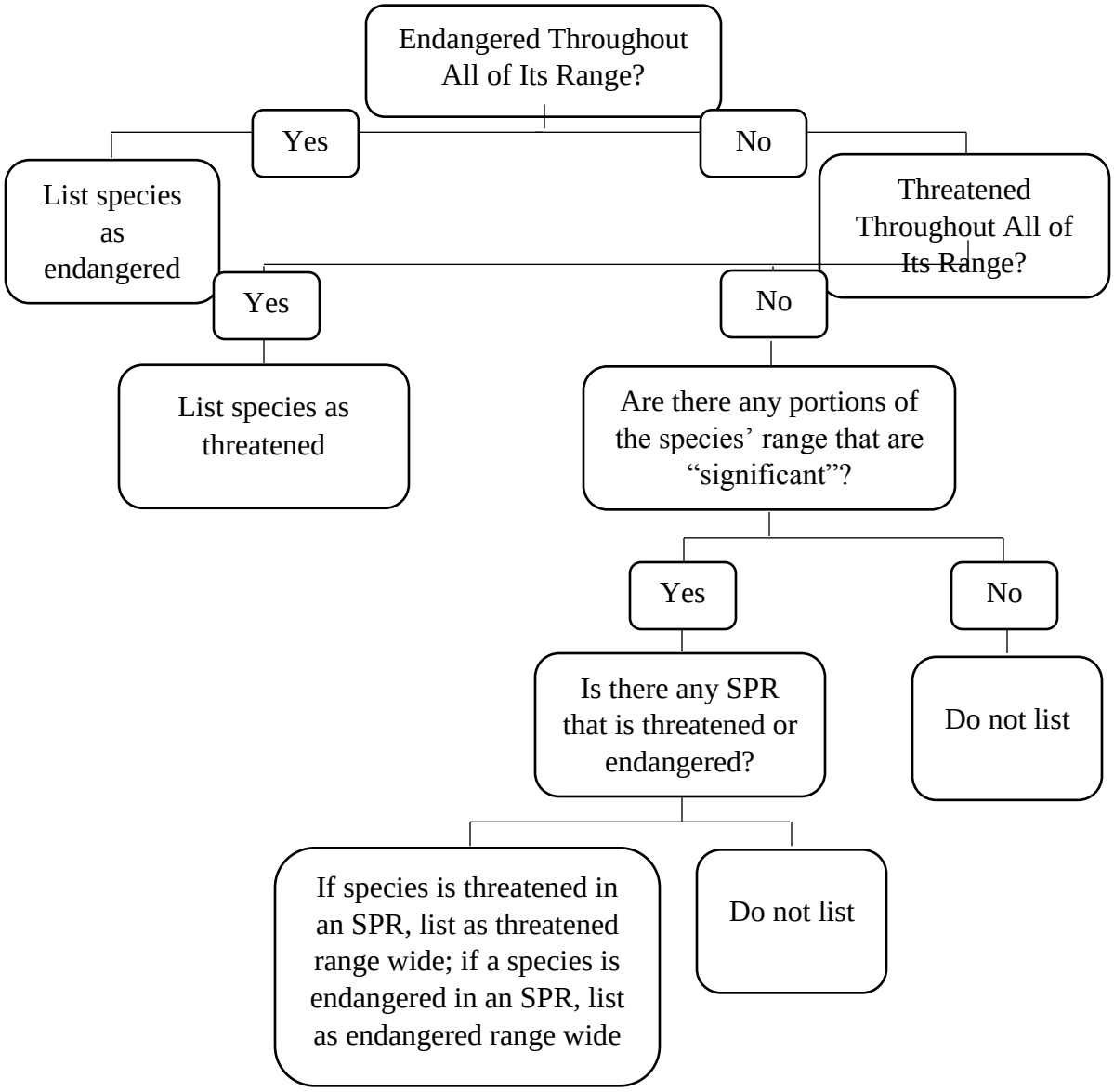
Under the Final SPR Policy, "there is at least one set of facts that falls uniquely within each of the four bases [] without simultaneously fitting the standard of another basis[]." Id. As stated in the Final SPR Policy and as demonstrated by the Final SPR Policy Diagram below, a species that is endangered or threatened throughout all of its range will be listed range wide as endangered or threatened, respectively. Id. at 37,585 ("[I]f we determine that the species is in danger of extinction, or likely to become so in the foreseeable future, throughout all of its range, we will list the species as endangered (or threatened)"); Final SPR Policy Diagram. The Final SPR Policy also provides a path for listing a species that is neither endangered nor threatened throughout all of its range, based on its status in a significant portion of its range. 79 Fed. Reg. at 37,585 ("If the species is neither

endangered nor threatened throughout all of its range, we will determine whether the species is endangered or threatened throughout a significant portion of its range. If it is, we will list the species [range wide] as endangered or threatened, respectively; if it is not, we will conclude that listing the species is not warranted."); Final SPR Policy Diagram. The Final SPR Policy even provides a hypothetical example of circumstances under which a species could be listed as threatened or endangered based solely on their status in a significant portion of its range:

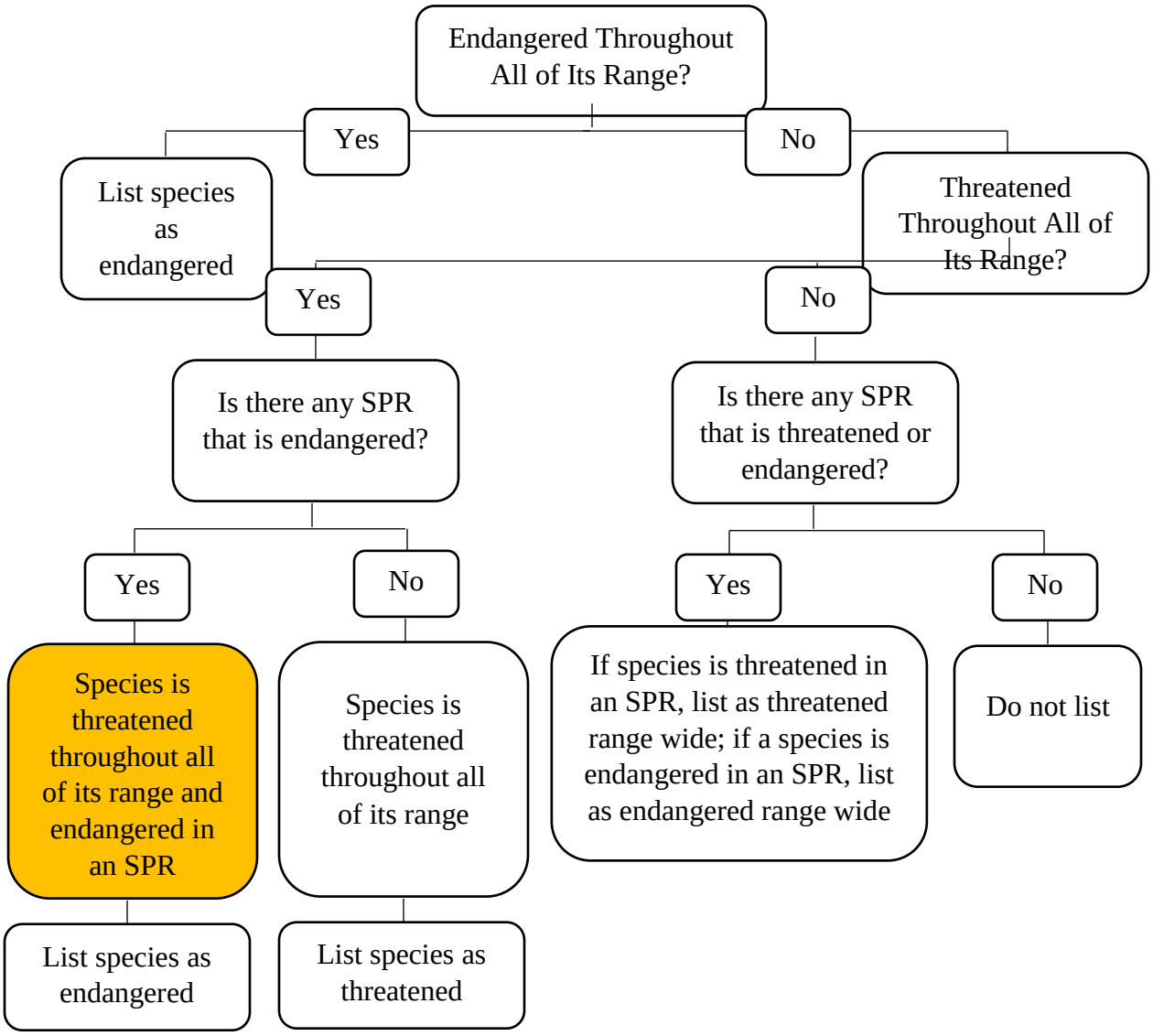
> [A] species may have two main populations. The first of those populations (found in Portion Y) currently faces only moderate threats, but that population occurs in an area that is so small or homogenous that a stochastic (*i.e.*, random, unpredictable, due to chance) event could devastate that entire area and the population inhabiting it. Therefore, if it were the only population, the species would be so vulnerable to stochastic events that it would be in danger of extinction. . . . Thus, without the portion of the range currently occupied by the second population (Portion X), the species would be in danger of extinction. But, as long as Portion X contained an extant population, the resiliency and redundancy of the two portions combined would be sufficient that the species would not be in danger of extinction, or likely to become so in the foreseeable future, throughout all of its range [meaning that it cannot be listed because it is endangered or threatened throughout all of its range]. . . . Portion X would be an SPR under this policy because the species would not be endangered or threatened throughout all of its range, but the hypothetical loss of Portion X would cause the species to become endangered. Therefore, we would need to consider whether the species was endangered or threatened in Portion X, and, if so, we would list the species.

79 Fed. Reg. at 37,582. Additionally, NMFS has in actuality listed a species, the Tanzanian distinct population segment of the African coelacanth, based on its status in a significant portion of its range. See supra n.9. Even more recently, NMFS proposed listing another species, the giant manta ray, based on its status in a significant portion of its range. See id.

Final SPR Policy Diagram



Draft SPR Policy Diagram



Plaintiffs do not dispute that there are four distinct and separate bases for listing a species under the Final SPR Policy. See generally Pls' MSJ at 57-63 (arguing that the Final SPR Policy renders only one of the four bases for listing—listing a species because it is in danger of extinction in a significant portion of its range—superfluous; but also conceding that there is at least one situation in which the Final SPR Policy would lead to a species being listed because it is in danger of extinction in a significant portion of its range). Instead, Plaintiffs argue that the Services' implementation of the Final SPR Policy somehow renders one of these four bases for listing superfluous because the Services do not analyze whether a species is in danger of extinction in a significant portion of its range after they have already made a determination that the species is likely to become an endangered species in the foreseeable future throughout all of its range. See id. at 61. Plaintiffs' argument has no basis in the ESA's language or in logic.

As discussed above, because Congress used the word "or" in the definitions of "endangered species" and "threatened species," there are four independent bases for listing a species under the ESA. See 16 U.S.C. § 1532(6), (20); 79 Fed. Reg. at 37,582. This language requires the Services to ensure that, under any interpretation of the phrase "significant portion of its range," there is a possibility that a species can be listed because it is in danger of extinction throughout all of its range *or* is likely to become so in the foreseeable future throughout all of its range *or* in danger of extinction in a significant portion of its range *or* likely to become so in the foreseeable future in a significant portion of its range—which the Final SPR Policy does. See 16 U.S.C. § 1532(6), (20); 79 Fed. Reg. at 37,582; Norton, 258 F.3d at 1141. However, there is no language in the ESA that requires the Services to analyze and make a determination on each of the remaining bases for listing *after* the Services determine that one of the bases for listing is applicable to the species. See 16 U.S.C. § 1531 *et seq.* Nor is there any language in the ESA that dictates in what order the

Services should analyze the four bases for listing. See id. If anything, Congress's placement of the "throughout all" language before the "significant portion of its range" language in the definitions of endangered species and threatened species indicates that Congress intended the Services to focus their analysis on a species' status throughout all of its range. See 16 U.S.C. § 1532(6), (20); 79 Fed. Reg. at 37,580.

It would also be illogical for the Services to continue analyzing whether a species fits within the three remaining bases for listing after they determine that a particular basis for listing is applicable to a species.[11] For example, under Plaintiffs' logic, if the Services determined that a species was clearly in danger of extinction throughout all of its range and thus met the definition of an "endangered species,"[12] the Services would still be required to analyze whether the species was endangered in a significant portion of its range, threatened throughout all of its range, or threatened in a significant portion of its range. According to Plaintiffs' argument, if the Services failed to analyze the other three bases for listing after determining that a species was endangered throughout all of its range, the three other bases for listing a species would be rendered "superfluous" because they were not considered by the agencies. See Pls' MSJ at 60-61. While the Services were making these completely unnecessary and time-consuming determinations, the species would remain unprotected. Or, for another example, if the Services went through their analysis in the Final SPR Policy and found that a species was not endangered or threatened throughout all of its range, but was endangered in a significant portion of its range, under Plaintiffs' logic, the Services could not simply list the species as an endangered species and extend the

[11] In fact, if the Services did perform this analysis, it would lead to confusing results under the ESA. See infra at Section D.2.b.ii.

[12] Take for example, a species with similar population numbers to the California condor in 1982, which at the time only had a world-wide population of 23.

protections of the ESA to the species. The Services would still have to develop and justify a determination that the species is not threatened in a significant portion of its range, wasting more time and resources that could be used conserving the species or analyzing whether other species warrant listing. Although Plaintiffs would undoubtedly prefer that the Services also analyze whether a species is endangered in a significant portion of its range even after the Services have determined that the species is threatened throughout all of its range (which, in Plaintiffs' view, could lead to a species being listed as endangered and "automatically receiv[ing] the full protections of the ESA"), the ESA's language does not require it and logic would not advise it. See 16 U.S.C. § 1531 *et seq.*; Babbitt, 515 U.S. at 708 ("When it enacted the ESA, Congress delegated broad administrative and interpretive power to the Secretary. The task of defining and listing endangered and threatened species requires an expertise and attention to detail that exceeds the normal province of Congress. . . . When Congress has entrusted the Secretary with broad discretion, we are especially reluctant to substitute our views of wise policy for his.") (internal citations omitted); Pls' MSJ at 60.

ii. The Final SPR Policy Complies with ESA Principles

The Services' Final SPR Policy provides a reasonable interpretation of "significant portion of its range" because, unlike Plaintiffs' preferred interpretation of "significant portion of its range" in the Draft SPR Policy, the Final SPR Policy complies with both logic and two judicial decisions that were handed down after the Services' previous attempts to develop a significant portion of its range policy. The logic undergirding the Services' interpretation is that a species cannot simultaneously meet the definitions of "endangered species" and "threatened species." Because a threatened species is one that is "likely to become an endangered species," by definition, a threatened species cannot qualify as an endangered species. See 16 U.S.C. § 1532(20), (6); see

also 16 U.S.C. § 1533(a)(1) ("The Secretary shall by regulation . . . determine whether any species is an endangered species *or* a threatened species.") (emphasis added); Reiter v. Sonotone Corp., 442 U.S. 330, 339 (1979) ("Canons of construction ordinarily suggest that terms connected by a disjunctive [like 'or'] be given separate meanings, unless the context dictates otherwise; here it does not.").

The two judicial decisions state that the Services can only list plants, insects, and animals that meet the ESA's definition of "species." See 16 U.S.C. § 1532(16)[13]; WildEarth Guardians v. Salazar, No. CV-09-00574-PHX-FJM, 2010 WL 3895682, at *6 (D. Ariz. 2010) ("[FWS] cannot determine that anything other than a species, as defined by the ESA, is an endangered or threatened species."); Defenders of Wildlife v. Salazar, 729 F. Supp. 2d 1207, 1217 (D. Mont. 2010) (holding the same). Because the ESA defines "species" to include only the species as a whole (i.e., the entire taxonomic group), a subspecies, or a distinct population segment of a vertebrate species, the Services (under the above two decisions) cannot list any other "unit" of plants, insects, or animals. As applicable to this case, that means the Services (once again, under the holdings of the above two decisions) cannot list a species solely in a significant portion of its range unless the members of the species in that range qualify as a taxonomic species, subspecies, or distinct population segment of a vertebrate species. See id. Similarly, the Services cannot list the members of a species that exist solely outside of the species' significant portion of its range unless those members qualify as a taxonomic species, subspecies, or distinct population segment of a vertebrate species. See id.

[13] NMFS also allows "evolutionary significant units" of biological species to be listed as threatened or endangered pursuant to the ESA. See Policy on Applying the Definition of Species under the Endangered Species Act to Pacific Salmon, 56 Fed. Reg. 58,612 (Nov. 20, 1991). The agency considers "evolutionary significant units" to be distinct population segments, and therefore a "species" as defined by the ESA. See id.; 79 Fed. Reg. 37,599 ("ESUs identified under NMFS' [evolutionary significant unit] policy are [distinct population segments], and for the purposes of this policy will be treated as [distinct population segments].") (internal citations omitted).

As a result, a "species" that qualifies as a threatened species or endangered species must be listed in its entirety and protections of the ESA applied to all individuals of the species wherever found. See id.

As demonstrated by the above Final SPR Policy Diagram, the Services' interpretation of the phrase "significant portion of its range" in the Final SPR Policy is consistent with both logic and the court decisions. The Final SPR Policy guarantees that a "species" cannot simultaneously meet the statutory definitions of being both an endangered species and threatened species. Under the Final SPR Policy, if the Services determine that a species is either in danger of extinction or likely to become so in the foreseeable future throughout all of its range, the species must be listed as either an endangered species or threatened species in its entirety and protections of the Act applied to all individuals of the species wherever found, and that is the end of the analysis. 79 Fed. Reg. at 37,585; Final SPR Policy Diagram. Similarly, if a species is not in danger of extinction or likely to become so in the foreseeable future throughout all of its range, but is in danger of extinction or likely to become so in the foreseeable future in a significant portion of its range, it is listed as the appropriate status in its entirety and protections of the Act applied to all individuals of the species wherever found. See id. Therefore, there is no possible set of circumstances under the Final SPR Policy where certain members of the species could qualify as being "endangered" while other members would qualify as "threatened." See id. Additionally, under the Final SPR Policy, the Services can never be faced with the decision of whether to list a unit smaller than a species, subspecies, or distinct population segment, in order to ensure that members of the species had the appropriate listing status. See id. Because the Final SPR Policy comports with the two court decisions and the logical underpinnings of the ESA described above, it is a reasonable interpretation of the ambiguous phrase "significant portion of its range."

The Draft SPR Policy, which Plaintiffs believe "gave each part of the ESA's definition of 'endangered species' and 'threatened species' independent meaning," does not comport with the two court decisions and logic described above. See Pls' MSJ at 59. Under the Draft SPR Policy, the Services would first analyze whether a species is endangered or threatened throughout all of its range. Draft Policy on the Interpretation of the Phrase "Significant Portion of Its Range" in the Endangered Species Act's Definitions of "Endangered Species" and "Threatened Species", 76 Fed. Reg. 76,987, 77,002 (Dec. 9, 2011) ("The first step in our analysis of the status of a species would be to determine the status of the species in all of its range."); see Draft SPR Policy Diagram. Then, if the Services determined that a species was threatened throughout all of its range, the Services would analyze whether the species was also in danger of extinction in a significant portion of its range. 76 Fed. Reg. at 77,002 ("If the species was threatened throughout all of its range, we would limit our SPR analysis to the question of whether the species is in danger of extinction in a significant portion of its range; if so, we would list the species as endangered; if not, we would list the species as threatened."); see Draft SPR Policy Diagram. Therefore, under the Draft SPR Policy, it is possible that a single "species" could meet the definition of both "endangered species" and "threatened species"—it would be threatened throughout all of its range while simultaneously being endangered in a significant portion of its range. 76 Fed. Reg. at 77,002; see Draft SPR Policy Diagram. Not only would this result be confusing, it would also not comply with the principle of logic discussed above because the species would have two listing statuses simultaneously. 79 Fed. Reg. at 37,579-81; 37,599 (explaining that the Services revised their interpretation of "significant portion of its range" in part because "commenters were concerned that a species simultaneously meeting the definitions of an 'endangered species' and a 'threatened species' would be extremely confusing"); see 16 U.S.C. § 1532(6), (20); 16 U.S.C. § 1533(a)(1) ("The Secretary shall by

regulation . . . determine whether any species is an endangered species *or* a threatened species." (emphasis added)). Furthermore, because the Services cannot apply two listing statuses to the same species, the Services would be faced with two possibilities about what listing status to apply to a species. See 16 U.S.C. § 1532(6), (20); 16 U.S.C. § 1533(a)(1). The Services could divide the species into those members of the species that are endangered in a significant portion of its range and those members that are not in the significant portion of its range but are threatened and list those portions accordingly. But this would be inconsistent with the two district court decisions holding that the Services cannot list any "unit" of a species other than a species, subspecies, or distinct population segment. See WildEarth Guardians, 2010 WL 3895682, at *6; Defenders of Wildlife v. Salazar, 729 F. Supp. 2d at 1217. Alternatively, the Services would have to pick a species status and apply that status to the entire species. This could lead to a species receiving more protections than the ESA requires. For example, if the Services were to decide that a species that qualifies for two listing statuses should be listed as an "endangered species" range wide, the members of those species that qualify as a "threatened species" now receive more protections than Congress anticipated when it enacted the ESA. See 16 U.S.C. § 1533(d) (providing different protections for endangered species and threatened species). Furthermore, if the Services picked this option, any litigant could legitimately argue that the Services violated the ESA by listing the species as threatened as opposed to endangered, or vice versa (since the species also meets the other definition).

c. The Final SPR Policy Does Not Subvert the ESA's Conservation Goal or Require the Services to Consider Improper Listing Factors

In their attempt to argue that the Services' Final SPR Policy is an "unreasonable" interpretation of the phrase "significant portion of its range" under Chevron step two, Plaintiffs raise two substantive arguments. First, in two sentences, Plaintiffs argue that, because threatened

species "do not automatically receive the broad protections conferred upon endangered species, the SPR Policy subverts the ESA's conservation goal by foreclosing any consideration of whether a species threatened throughout its range should be listed as endangered because of the threats it faces in a significant portion of its range." Pls' MSJ at 64. Second, Plaintiffs assert that the Final SPR Policy "injects impermissible considerations into the listing determination process." Id. Plaintiffs are wrong on both counts.

In no way does the Services' Final SPR Policy "subvert[] the ESA's conservation goal." Id. The ESA was enacted in part "to provide a program for the conservation of [] endangered species *and* threatened species." 16 U.S.C. § 1531(b) (emphasis added). As demonstrated by the plain language of this provision, Congress intended for there to be two categories of listed species: endangered species and threatened species. 16 U.S.C. § 1531(b); see also 16 U.S.C. § 1532(6), (20). Both of these categories of species are "conserve[d]" under the ESA, meaning that they receive protections which are designed to bring them "to the point at which the measures provided pursuant to [the ESA] are no longer necessary." 16 U.S.C. § 1532(3). Congress determined that endangered species, being more imperiled than threatened species, should receive all of the protections enumerated in the ESA. See 16 U.S.C. § 1532(6); 16 U.S.C. § 1538(a) (detailing prohibited acts relating to "endangered species of fish or wildlife"). On the other hand, Congress determined, that when a species is listed as threatened, "the Secretary shall issue such regulations as he deems necessary and advisable to provide for the conservation of such species," which might or might not include all of the protections given to endangered species under the ESA. See 16 U.S.C. § 1533(d).[14] When analyzing a species under the Final SPR Policy, the relevant Service

[14] Pursuant to this statute, the Secretary of the Interior has automatically extended all of the protections afforded to endangered species to threatened species by regulation. See id.; 50 C.F.R. § 17.31; supra n.4. However, the Secretary is still entitled to develop a "special rule" for a

determines whether that species is an endangered species or a threatened species. 79 Fed. Reg. 37,587; see also supra Section D.2.b.ii (a species can only be listed as one status, not both). Regardless of the Service's determination, the ESA requires the Service to provide for the conservation of the species according to its status. See 16 U.S.C. § 1538(a); id. at § 1533(d). Plaintiffs' argument that a species listed as threatened under the Final SPR Policy are somehow not "conserved" is meritless.

Contrary to Plaintiffs' assertions, the Final SPR Policy does not mandate or even suggest that the Services should consider factors other than those outlined in 16 U.S.C. § 1533(a)(1) or make decisions that are not based on the best scientific and commercial data available in determining whether or not to list a species. See 79 Fed. Reg. at 37,578; 16 U.S.C. § 1533(a)(1) (enumerating five factors that the Services consider when making listing determinations); 16 U.S.C. § 1533(b)(1)(a) (requiring the Services to utilize the best available science when making these determinations). Rather, as the Services stated in the Final SPR Policy, the Policy reflects the Services' "lawful and completely appropriate" effort of "resolving ambiguities in the [ESA] and providing guidance for its implementation . . . consider[ing] a wide variety of factors" including "both textual and practical reasons." 79 Fed. Reg. at 37,580; 37,591-92. In addition to these reasons, the Services noted that there is a "*related benefit* of limiting the applicability of the SPR language." 79 Fed. Reg. at 37,581 (emphasis added). The Final SPR Policy "reduce[s] the circumstances in which additional legal determinations are necessary," saving the Services' "limited resources to undertake additional actions required in administering the [ESA] to further

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particular species enumerating the conservation measures he deems necessary and advisable for that species, which may include some, all, or none of the Section 9 prohibitions applicable to endangered species by statute. Id. In this case, FWS developed a special 4(d) rule for the northern long-eared bat, which Plaintiffs have challenged and the parties will brief in a subsequent round of briefing.

its conservation purposes." Id. However, this practical benefit has no bearing on what factors the Services consider when determining "whether any species is an endangered species or a threatened species." See id.; 16 U.S.C. § 1533(a)(1). When making that determination, the Services analyze the five enumerated factors in 16 U.S.C. § 1533(a)(1), not how much time and resources they can conserve by listing a species as a threatened species as opposed to an endangered species or vice versa. See 16 U.S.C. § 1533(a)(1)(A)-(E); 80 Fed. Reg. at 17,989-18,006 (analyzing all five listing factors, and only those factors, in deciding to list the northern long-eared bat as threatened).

3. FWS Lawfully Applied the Final SPR Policy to the Northern Long Eared Bat

The Final SPR Policy requires FWS to "first determine whether the species is endangered or threatened throughout all of its range and, if so, list the species accordingly." 79 Fed. Reg. at 37,582. If the species is "not endangered or threatened throughout all of its range, then [FWS] look[s] further to determine whether it is endangered or threatened in a significant portion of its range." Id. In applying the Final SPR Policy to the northern long-eared bat, that is exactly what FWS did:

> Under the Act and our implementing regulations, a species may warrant listing if it is endangered or threatened throughout all or a significant portion of its range. Because we have determined that the northern long-eared bat is threatened throughout all of its range, no portion of its range can be "significant" for purposes of the definitions of "endangered species" and "threatened species." See the Final Policy on Interpretation of the Phrase "Significant Portion of its Range, in the Endangered Species Act's Definitions of "Endangered Species" and "Threatened Species" (79 FR 37577, July 1, 2014).

80 Fed. Reg. at 18,022; see also id. at 18,018.

Plaintiffs do not dispute that FWS correctly applied the Final SPR Policy, as it is written, to the northern long-eared bat. See Pls' MSJ at 67-69 ("[B]ecause FWS determined that the Bat is threatened throughout its entire range because of the impending arrival of WNS in its non-core

range, FWS concluded its analysis with a threatened determination and never considered whether the Bat is endangered in a significant portion of its range. The SPR Policy thus directly enabled the agency to *not consider* whether the Bat is in danger of extinction in a significant portion of its range."). Instead, Plaintiffs argue that, because the Final SPR Policy is in their opinion unlawful, even the correct application of the Final SPR Policy to the northern long-eared bat makes the decision to list the bat as a threatened species unlawful. See id. ("By applying the SPR Policy to the Bat, FWS failed to undertake the necessary analysis of whether the species is in danger of extinction throughout a significant portion of its range."). As discussed above, under Chevron step two, the Final SPR Policy is a reasonable and therefore lawful interpretation of the undefined and ambiguous phrase "significant portion of its range." See supra Section D.2.b. Thus, because Plaintiffs do not argue that FWS misapplied the Final SPR Policy as written to the northern long-eared bat, their argument is meritless. FWS's application of the Final SPR Policy to the northern long-eared bat was correct and lawful.

E. The Final SPR Policy and the Listing Determination Satisfy the APA's Notice and Comment Requirements

The Final SPR Policy and the listing determination satisfy the APA's notice and comment requirements for two related and very simple reasons. First, FWS provided the public with both notice and a full and fair opportunity to comment on the draft versions of both of those documents. Second, because the Final SPR Policy and the listing determination are logical outgrowths of the Draft SPR Policy and the proposed listing determination, respectively, the Services were not required to engage in yet another round of notice and comment.

The APA requires federal agencies to publish "general notice[s] of proposed rule making" in the Federal Register and allow "interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments" pertaining to the proposed rule.

5 U.S.C. § 553(c), (b). These notice and comment requirements "allow the agency to benefit from the expertise and input of the parties who file comments with regard to the proposed rule, and . . . see to it that the agency maintains a flexible and open-minded attitude towards its own rules." Nat'l Tour Brokers Ass'n v. United States, 591 F.2d 896, 902 (D.C. Cir. 1978). As a result of the notice and comment process, federal agencies frequently reconsider, amend, or even withdraw their proposed rules. See Nat'l Mining Ass'n v. Mine Safety & Health Admin., 512 F.3d 696, 699 (D.C. Cir. 2007) ("An agency's final rules are frequently different from the ones it published as proposals. The reason is obvious. Agencies 'often adjust or abandon their proposals in light of public comments or internal agency reconsideration.'") (quoting Kooritzky, 17 F.3d at 1513). A federal agency's decision to alter their proposed rule following the notice and comment period does not automatically subject the newly revised rule to an additional round of notice and comment. "The requirement of submission of a proposed rule for comment does not automatically generate a new opportunity for comment merely because the rule promulgated by the agency differs from the rule it proposed, partly at least in response to submissions." Int'l Harvester Co. v. Ruckelshaus, 478 F.2d 615, 632 (D.C. Cir. 1973). Whether a federal agency is required to provide further notice and comment on the revised proposal depends on whether the revised proposal is a logical outgrowth of the original proposal. Nat'l Mining Ass'n, 512 F.3d at 699.

A final rule is a logical outgrowth of a proposed rule if interested parties "should have anticipated that the change was possible, and thus reasonably should have filed their comments on the subject during the notice-and-comment period." CSX Transp., Inc. v. Surface Transp. Bd., 584 F.3d 1076, 1079-80 (D.C. Cir. 2009) (internal quotations and citations omitted). To determine whether an interested party should have anticipated that the change was possible, courts frequently analyze the "comments, statements and proposals made during the notice-and-comment period"

including whether the federal agency "asked for comments on a particular issue." Nat'l Mining Ass'n, 512 F.3d at 699; CSX Transp., Inc., 584 F.3d at 1081. In contrast, a final rule is not a logical outgrowth of a proposed rule if interested parties "would have had to divine the agency's unspoken thoughts, because the final rule was surprisingly distant from the proposed rule." CSX Transp, Inc., 584 F.3d at 1080 (internal quotations and citations omitted). Therefore, D.C. Circuit cases "finding that a rule was not a logical outgrowth have often involved situations where the proposed rule gave no indication that the agency was considering a different approach, and the final rule revealed that the agency had completely changed its position." Id. at 1081. For example, in CSX Transp, Inc., the federal agency's final rule was not a logical outgrowth of the proposed rule because, although the draft rule "proposed several revisions to the existing system, *it nowhere even hinted* that the Board *might consider* [changing the data submission requirements]." Id. at 1082 (emphasis added). In fact, the agency requested comments "on no particular issue at all." Id.

1. Final SPR Policy is a Logical Outgrowth of the Draft SPR Policy

In this case, the Services provided the public, including Plaintiffs, with notice and a full and fair opportunity to comment on the Draft SPR Policy. See 76 Fed. Reg. at 77,004. In the notice of Draft SPR Policy published in the Federal Register, the Services dedicated an entire section to soliciting pertinent information and requesting public comments. Id. The Services stated that they "intend that the final policy on interpretation of the phrase 'significant portion of its range' in the Act's definitions of 'endangered species' and 'threatened species' will consider information and recommendations from all interested parties." Id. Therefore, the Services "solicit[ed] comments, information, and recommendations from governmental agencies, Native American tribes, the scientific community, industry groups, environmental interest groups, and any other interested parties" for over two months Id. at 77,004; 76,897. At the urging of the public, including Plaintiff

Defenders of Wildlife, the Services subsequently extended the deadline to provide comments by an additional month and once again "encourag[ed] all interested parties to provide us with information and comments regarding the draft policy." Notice of Extension of Comment Period, 77 Fed. Reg. 6,138 (Feb. 7, 2012); SPR002032. The public took advantage of this comment period, providing approximately 42,000 comments.[15] 79 Fed. Reg. at 37,587. Pursuant to the Services' request for information and public comments, Plaintiffs Center for Biological Diversity and Defenders of Wildlife both provided comments on the Draft SPR Policy. SPR001065; SPR002847; SPR002896; SPR001215.

Although Plaintiffs argue in their motion for summary judgment that "[n]either [they] nor the public were aware that FWS was considering" changing the portion of the Draft SPR Policy that allowed a species to simultaneously qualify as both threatened throughout all of its range and endangered in a significant portion of its range, the Services had indeed put the public on notice that this change might occur. See Pls' MSJ at 65; 76 Fed. Reg. at 77,004. Unlike the federal agency in CSX Transp., Inc., the Services not only "hinted" that they "might consider" changing a particular aspect of the proposed rule, but specifically elicited public comment on the very issue for which Plaintiffs allege that FWS failed to provided notice. See 76 Fed. Reg. at 77,004; CSX Transp, Inc., 584 F.3d at 1082. Specifically, the Draft SPR Policy states in its "Request for Information" section:

> We recognize that under the draft policy, *a species can be threatened throughout all of its range while also being endangered in an SPR*. . . . However, *we recognize that this approach may raise concerns* that the Services would be applying a higher level of protection where a lesser level of protection may also be appropriate, with the consequences that the Services would have less flexibility to manage the species and that scarce conservation resources would be diverted to species that might arguably better fit a lesser standard if viewed solely across its range. *The Services*

[15] Approximately 41,500 of those comments were form letters and an additional 100 comments were duplicate submissions. Id.

are particularly interested in public comment on this issue.

76 Fed. Reg. at 77,004 (emphasis added); see also id. at 76,996 (discussing the possibility of a species being threatened throughout all of its range while also being endangered in a significant portion of its range). Moreover, in the comments received from the public pertaining to the draft policy, many groups directly addressed this particular issue. See, e.g., SPR002042; SPR002573; SPR002680; SPR002801; SPR003017. Evidently, these groups understood that FWS not only "might" reconsider this provision, but that they probably would reconsider it. Plaintiffs were also on notice and "should have anticipated that the change was possible, and thus reasonably should have filed their comments on the subject during the notice-and-comment period." See CSX Transp., Inc., 1079-80 (internal quotations and citations omitted). For the foregoing reasons, the Final SPR Policy is a logical outgrowth of the Draft SPR Policy and the Services were not required to provide Plaintiffs with notice and a further opportunity to comment under the APA. See 5 U.S.C. § 553(b), (c).

2. The Listing Determination was a Logical Outgrowth of the Proposed Listing Determination

Like the Final SPR Policy, the listing determination complies with the APA's notice and comment requirements. Plaintiffs assert that FWS's listing determination violated the ESA's and APA's notice and comment requirements "not because FWS changed its mind, but because it relied on key policy documents that themselves have never undergone a public process as well as brand-new rationales for the threatened determination that were never made public for comment." Pls' MSJ at 54; see 5 U.S.C. § 553(b), (c). The D.C. Circuit rejected a similar argument in Bldg. Indus. Ass'n v. Norton, 247 F.3d 1241 (D.C. Cir. 2011), holding "a final rule that is a logical outgrowth of the proposal does not require an additional round of notice and comment even if the final rule relies on data submitted during the comment period." Id. at 1246. In that case, FWS originally

proposed to list various fairy shrimp species as endangered, but in the final rule FWS chose to withdraw one species, list another as threatened, and list only three as endangered. Id. at 1243. In making its final decision, the FWS relied heavily on a study that was submitted during the comment period but did not itself undergo notice and comment. Id. at 1245. The Court reasoned that its holding was necessary to avoid "perpetual cycles of new notice and comment periods." Id. at 1246 (quoting Ass'n of Battery Recyclers v. EPA, 208 F.3d 1047, 1058 (D.C. Cir. 2000)). By the same logic, as long as its final rule is a "logical outgrowth," FWS did not need to initiate new notice and comment periods for every piece of information that formed the basis of its final rule in this case.

With regard to the ESA, there are only three possible scenarios for a species' categorization at any given time: listed as endangered, listed as threatened, or not listed. See 16 U.S.C. § 1553. When the agency issued its initial proposed rule it wrote, "We, the U.S. Fish and Wildlife Service [], announce a 12-month finding on a petition to list . . . the northern long-eared bat (*Myotis septentrionalis*) as endangered *or threatened* under the Endangered Species Act of 1973." 78 Fed. Reg. at 61,046 (emphasis added). Plaintiffs were on notice that the rulemaking was initiated by a petition, from Plaintiff Center for Biological Diversity, to list the species as either endangered or threatened. See id. at 61,047. Plaintiffs should have anticipated that the final rule could categorize the bat in either category.

Plaintiffs acknowledge in their brief that the proposed rule "generated opposition" from industries, state lawmakers, state wildlife agencies, and members of Congress, some of whom recommended a threatened determination instead of endangered. Pls' MSJ at 27. When it published the listing determination, FWS explained that it had re-evaluated its proposed listing "based on our review of the public comments, comments from other Federal and State agencies, peer review

comments, issues raised at the public hearing, and new relevant information that has become available since [] October 2, 2013." 80 Fed. Reg. 17,974; 18,006. The final listing determination is an example of the agency properly "adjusting . . . their proposal in light of public comments or internal agency reconsideration." Kooritzky, 17 F.3d at 1513.

Plaintiffs also allege that they were prejudiced because they were "denied a meaningful opportunity to present evidence and raise objections to try to convince FWS that the law and the science required an endangered listing." Pls' MSJ at 55. Yet Plaintiffs acknowledge that they "provided comments, presented arguments, and supplied numerous scientific studies throughout the many comment periods on the Bat listing." Pls' MSJ at 29 n.8. Plaintiffs list at least seven dates on which they submitted input. Id. Their preferences and opinions about the northern long-eared bat's listing category were well documented throughout the process, and therefore no claim of prejudice can be supported. For the foregoing reasons, FWS's listing determination complied with the ESA's and APA's notice and comment requirements.

3. To the Extent the Services Were Required to Submit the Final SPR Policy and Listing Determination for Notice and Comment Pursuant to 16 U.S.C. § 1533(h), They Fully Complied

Plaintiffs assert in their motion for summary judgment that the Services' Final SPR Policy and listing determination also violate a separate notice and comment requirement that exists in the ESA, 16 U.S.C. § 1533(h). See Pls' MSJ at 2, 66. Neither the Final SPR Policy nor the listing determination fall within the four categories identified in 16 U.S.C. § 1533(h). But, even assuming for the sake of argument that FWS was required to provide notice and comment on these documents pursuant to 16 U.S.C. § 1533(h), FWS did provide adequate notice and an opportunity for comment. See supra Section E.1-2.; Nw. Ecosystem Alliance v. FWS, 475 F.3d 1136, 1142 (9th Cir. 2007) ("In substance, the formality § 1533(h) requires for policy statements is

indistinguishable from notice-and-comment rulemaking under the APA. *Compare* 16 U.S.C. § 1533(h) *with* 5 U.S.C. § 553."). For these reasons alone, Plaintiffs' ESA notice and comment requirement argument fails.

V. CONCLUSION

As demonstrated above, FWS acted in accordance with the relevant statutory and regulatory authorities, biology, and logic in determining that the northern long-eared bat is not currently in danger of extinction, but is likely to become an endangered species within the foreseeable future throughout all of its range. FWS conducted an extraordinarily careful and thorough review of the best scientific and commercial information available and considered the relevant factors, precisely as the ESA requires. FWS's rulemaking process was transparent and its evaluation of the available information was objective and balanced. This case is, at bottom, a policy disagreement: Plaintiffs would prefer endangered status for the northern long-eared bat when that position is not warranted by the facts or the law. This policy disagreement does not show a violation of law, and it does not provide grounds for vacating FWS's listing determination. Furthermore, the Services' Final SPR Policy is a lawful and reasonable interpretation of an ambiguous statutory phrase within the ESA. For the reasons set forth above, the Court should enter summary judgment in favor of Federal Defendants and deny Plaintiffs' motion for summary judgment on their listing claims.

Dated: July 7, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 7, 2017, I filed the foregoing electronically though the CM/ECF system, which caused the following parties or counsel to be served by electronic means, as more fully reflected on the Notice of Electronic Filing.

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