**UNITED STATES DISTRICT COURT**
**DISTRICT OF COLUMBIA**

| | |
|---|---|
| CENTER FOR BIOLOGICAL DIVERSITY *et al.*,<br><br>Plaintiffs,<br>v.<br><br>GREG SHEEHAN[1] *et al.*,<br><br>Federal Defendants,<br><br>AMERICAN FOREST & PAPER ASSOCIATION *et al.*,<br><br>Defendant-Intervenors. | No. 1:15-cv-00477-EGS |
| DEFENDERS OF WILDLIFE,<br><br>Plaintiffs,<br>v.<br><br>GREG SHEEHAN[2] *et al.*,<br><br>Federal Defendants,<br><br>AMERICAN FOREST & PAPER ASSOCIATION *et al.*,<br><br>Defendant-Intervenors. | No. 1:16-cv-00910-EGS<br>(Consolidated Case) |

**PLAINTIFFS' REPLY IN SUPPORT OF THEIR MOTION FOR PARTIAL SUMMARY JUDGMENT ON THEIR LISTING CLAIMS AND IN OPPOSITION TO DEFENDANTS' AND INTERVENORS' CROSS-MOTIONS FOR SUMMARY JUDGMENT**

[1] Pursuant to Fed. R. Civ. P. 25(d), Greg Sheehan, Acting Director, U.S. Fish and Wildlife Service is substituted in his official capacity for Defendant Jim Kurth in No. 1:15-cv-00477-EGS.

[2] Pursuant to Fed. R. Civ. P. 25(d), Greg Sheehan, Acting Director, U.S. Fish and Wildlife Service is substituted in his official capacity for Defendant Jim Kurth in No. 1:15-cv-00477-EGS.

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**page(s)**

**Cases**

**Statutes**

**Other Authorities**

Plaintiffs submit this memorandum in support of their motion for partial summary judgment on their listing claims (ECF No. 52) and in opposition to Defendants' cross-motion for partial summary judgment (ECF No. 53) ("Def. Br.") and Intervenors' cross-motion for partial summary judgment (ECF No. 56) ("Int. Br."). For the reasons stated in Plaintiffs' opening brief ("Pl. Br.") and below, Plaintiffs respectfully request that the Court grant their motion and deny Defendants' and Intervenors' cross-motions.

## INTRODUCTION

This case concerns the U.S. Fish and Wildlife Service's (FWS or Service) dereliction of its duty to protect the northern long-eared bat (Bat) as an endangered species under the ESA. Of the seven North American hibernating bat species that have been devastated by white-nose syndrome (WNS) since this fungal disease was first identified in New York in February 2006, the Bat is one of the hardest hit. It suffers the highest fungal loads of any WNS-susceptible species. It also suffers the highest mortality rate of any WNS-susceptible species. There is no evidence that any Bat has ever survived WNS infection. Although scientists are racing the clock to develop and test interventions to treat WNS-infected bats, to disinfect WNS-infected hibernacula, and even to protect bats from WNS infection, these experimental strategies are still unproven on a landscape scale.

In January 2001, four years into the epidemic, Plaintiff Center for Biological Diversity petitioned the Bat for ESA listing. Nine years into the epidemic, when FWS finally issued its April 2015 threatened listing rule, WNS had annihilated the Bat throughout the core of its range. In the northeastern U.S. and Canada, where it was previously common and abundant, the Bat had suffered population declines of 96 to 99 percent. In the midwestern U.S., where the Bat had been

relatively common, WNS had already pushed the species into its precipitous and inexorable decline.

By the Service's own estimates, WNS will spread throughout the remotest reaches of the Bat's peripheral range within eight to thirteen years of 2015 (now within the next six to eleven years). The Service's decision to list the Bat as threatened—and to deny the species the far more stringent statutory protections that an endangered listing would have conferred—cannot be reconciled with the conclusive data on the Bat's precarious status or with the requirements of the ESA and APA.

## ARGUMENT

### I. The Threatened Determination for the Bat is Arbitrary

In the eighteen months between publication of the proposed endangered listing rule, 78 Fed. Reg. 61,046 (Oct. 2, 2013), and the final threatened rule, 80 Fed. Reg. 17,974 (April 2, 2015), FWS received additional data on WNS' continued spread and its devastating impacts on Bat populations. This data confirmed what the agency already knew—that the Bat's catastrophic rate of decline, combined with WNS' inevitable rangewide spread, placed the species squarely in danger of extinction. At a December 2014 meeting, however, regional directors and top agency officials relied on the Polar Bear Memo to decide that the Bat should be listed as threatened with a special 4(d) rule containing broad exemptions to the ESA's take protections. Thereafter, the final rule (without a draft threatened determination) and the threatened determination (without a draft rule) proceeded on entirely separate drafting, review, and approval tracks.[1]

[1] Intervenors contend that, absent evidence to the contrary, this agency's bifurcated decision-making process is entitled to a presumption of regularity. Int. Br. at 9–12. However, while an agency's decision and processes are entitled to a presumption of regularity, "that presumption does not shield [the agency's] action from a thorough, probing, in-depth review" to determine whether it was "based on a consideration of the relevant factors and whether there has

At the conclusion of this highly irregular decision making process, FWS arbitrarily and unlawfully listed the Bat as threatened. The Service employed unreasonable statutory interpretations of "endangered" and "threatened" to reach its threatened determination. The Service also relied on an aggregation of four rationales that purported to prove that the Bat will only be in danger of extinction in the foreseeable future. With these rationales, FWS artificially created and relied on uncertainties and speculative assumptions that the Bat is not quite as imperiled as the data prove, in direct contradiction to the record and the rule itself. FWS also failed to analyze the cumulative effects of non-WNS threats in determining the Bat's listing status. Finally, FWS denied Plaintiffs any opportunity for meaningful comment on the factual, legal, and policy bases for its final decision.

Defendants' and Intervenors' arguments in opposition amount to little more than a plea for deference to the agency's statutory interpretations and the four rationales. But FWS is only entitled to deference where it exercised its expert scientific judgment to draw logical connections between the best available scientific data and its four rationales and where it based its decision-making on reasonable interpretations of statutory requirements. It did neither here. Because FWS violated the ESA and APA in listing the Bat as threatened, Plaintiffs are entitled to summary judgment.

### A. The Threatened Determination's Interpretations of "Endangered" and "Threatened" Are Unreasonable

The Service's threatened determination for the Bat relied on unreasonable interpretations of the statutory terms "endangered" and "threatened." Pl. Br. at 23–26. FWS unjustifiably relied

---

been a clear error of judgment. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415–16 (1971). Here, ample record evidence firmly rebuts the presumption of regularity, both as to the highly irregular decision-making process that separated the production, review, and approval of the final rule and the determination (Pl. Br. at 2, 17–18), and as to the arbitrary and unlawful decision to list the Bat as threatened in violation of the ESA and APA. Pl. Br. at 21–57.

on the Polar Bear Memo ("Memo") to interpret "in danger of extinction" as "currently on the brink of extinction." This unlawfully stringent interpretation renders the ESA's definition of an "endangered" species virtually meaningless. Even if its interpretation were plausible, FWS failed to present a rational explanation for why the Bat was not "*currently* on the brink of extinction" where it had suffered near-total population losses in its core range and where it was certain to suffer equally catastrophic losses in its peripheral range in the near future. *Id.* at 23–24. FWS paired this extreme interpretation with an arbitrary formulation of the Bat's "foreseeable future." While conceding that WNS is certain to spread throughout the Bat's remaining range within just 8 to 13 years of 2015, FWS entirely failed to analyze the effects of WNS on the Bat over that time—i.e., that will render the Bat not merely "in danger" of extinction, but functionally extinct, throughout its range. Instead, FWS equated the 8 to 13-year timeframe with the Bat's "foreseeable future" solely because the future is not the present. *See* 80 Fed. Reg. at 18,021.

The Service's paired interpretations as articulated in the Bat determination allow the "threatened" designation to occupy virtually the entire field of scenarios for an imperiled species. Following this logic, until the Bat is on the brink of extinction *at the very moment the listing determination is made*—i.e., until it is conclusive that the Bat is functionally extinct in the wild—it is merely threatened. This logic guarantees that the ESA's strongest protections for endangered species will come too late to ensure the Bat's, or any species', survival, let alone recovery. Pl. Br. at 25–26.

These statutory interpretations are beyond the pale of any reasonable construction of the ESA. Congress directed FWS to list a species like the Bat as endangered where it is "in danger of extinction," not to wait until the extinction event itself is imminent and certain. Similarly, Congress intended FWS to utilize the threatened designation to protect less immediately

imperiled species proactively, not to delay protections for highly imperiled species until the extinction trajectory is irreversible. *Cf. Defenders of Wildlife v. Babbitt*, 958 F. Supp. 670, 679–80 (D.D.C. 1997) ("best available data" standard rather than "conclusive evidence" standard comports with congressional intent of requiring FWS "to take preventive measures *before* a species is 'conclusively' headed for extinction"); *see also Defenders of Wildlife v. Norton*, 258 F.3d 1136, 1142 (9th Cir. 2001) (Congress intended to give FWS "the ability not only to protect the last remaining members of the species but to take steps to insure that species which are likely to be *threatened* with extinction never reach the state of being presently endangered").[2]

Defendants contend that the "difference between a threatened species and an endangered species is largely temporal," and that, as articulated in the Memo, a species must be "currently on the brink of extinction" to warrant an endangered listing. Def. Br. at 15–16.[3] Defendants then argue that the Memo's "currently on the brink of extinction" interpretation merits *Chevron*

---

[2] *See also* LAR 23074 ("This structural distinction between stringent prohibitions that apply automatically to the most imperiled species, and more flexible restrictions that can be applied flexibly and as needed to less imperiled species comports well with the Service's distinction between species currently on the brink of extinction and those not yet there. The former, by virtue of their recent dramatic declines or near-term catastrophic threats, generally need stringent protection. For species not yet on the brink of extinction, particularly for those that have yet to experience any notable decline in numbers or range, section 4(d) offers the flexibility to fashion restrictions according to the needs of the species, which reflects the generally longer time frames available to test differing conservation strategies.").

[3] Intervenors take this argument even further, claiming that the temporal distinction "is the *only* distinction Congress drew between endangered and threatened species," and that to fail to give effect to this "undeniable reading" is to "entirely nullif[y]" Congress' intent to differentiate between endangered and threatened species. Int. Br. at 14. This echoes the "imminent danger of extinction" interpretation FWS previously claimed is compelled by the plain language and legislative history of the ESA, a contention this Court has squarely rejected. *In re Polar Bear Endangered Species Act Listing and § 4(d) Litigation (Polar Bear I)*, 748 F. Supp. 2d 19, 26–27 (D.D.C. 2010).

deference and that this Court has already accorded this interpretation such deference. Def. Br. at 18–21.[4] Defendants' deference arguments are wrong on both counts.

*Chevron* deference applies when two requirements are met: first, when "it appears that Congress delegated authority to the agency generally to make rules carrying the force of law," and second, when "the agency interpretation claiming deference was promulgated in the exercise of that authority." *U.S. v. Mead Corp.*, 533 U.S. 218, 226–27 (2001). "Interpretations such as those in opinion letters—like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant *Chevron*-style deference." *Christensen v. Harris County*, 529 U.S. 576, 587 (2000).

The Memo fails *Mead*'s second requirement because it did not undergo notice and comment, as expressly required by the statutory mechanism for the exercise of the Service's authority to establish listing guidelines and criteria with the force of law:

> 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. . . . The Secretary shall 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.

16 U.S.C. § 1533(h). "Such guidelines shall include, but are not limited to . . . (2) criteria for making the findings required [under section 4(b)(3)] with respect to [listing] petitions." 16 U.S.C. § 1533(h)(2). Although Defendants contend that the Service's interpretation of "in danger of extinction" need not comply with this statutory mandate, Def. Br. at 19–20, the "findings required" under section 4(b)(3) are precisely whether a petitioned species warrants listing as

[4] Defendants suggest that Plaintiffs do not challenge the application of the Memo to the Bat determination, but rather solely challenge the definition itself. Def. Br. at 20. This is incorrect. Pl. Br. at 23–26. It is precisely Plaintiffs' contention that, as FWS applied it in listing the Bat as threatened, the Memo's interpretation of "endangered" is demonstrably and unlawfully narrow.

threatened or endangered. Therefore, any legally-binding interpretation of when a species is "in danger of extinction" (i.e. "endangered") is necessarily a "guideline" relating to "criteria" for determining a petitioned species' listing status. *See Nw. Ecosystem All. v. USFWS*, 475 F.3d 1136, 1141–42 (9th Cir. 2007).

For this reason, courts have applied *Chevron* deference to the Service's policies for ESA listing determinations, precisely where those policies have undergone notice and comment. *See, e.g.*, *id.* at 1142 (*Chevron* deference appropriate for Distinct Population Segment Policy because "the formality § 1533(h) requires for policy statements is indistinguishable from notice-and-comment rulemaking under the APA"); *Trout Unlimited v. Lohn*, 559 F.3d 946, 954 (9th Cir. 2009) (*Chevron* deference appropriate for Hatchery Listing Policy where it underwent notice and comment under 16 U.S.C. § 1533(h)); *Ctr. for Biological Diversity v. Jewell*, – F. Supp. 3d –, 2017 WL 2438327, at *6 (D. Ariz. Mar. 29, 2017) (*Chevron* applies to review of SPR Policy because it "was enacted after the notice-and-comment rulemaking procedures required by 16 U.S.C. § 1533(h)").

Defendants' assertion that the agency's "currently on the brink of extinction" interpretation represents "long-standing Service practice and usage" is irrelevant. Def. Br. at 19 (quoting LAR 23067). Because the Memo was "unaccompanied by those procedural safeguards ensuring proper administrative practice," i.e., the notice and comment procedures required by section 4(h), *Chevron* deference cannot apply. *Menkes v. U.S. Dept. of Homeland Sec.*, 637 F.3d 319, 345 (D.C. Cir. 2011). Furthermore, by the Memo's express terms, it lacks the force of law: "[t]his explanation does not set forth a new statement of agency policy, nor is it a 'rule' as defined in the [APA]. . . . [This memorandum] is not a prospective statement of agency policy."

LAR 23067–68.[5] Where FWS has expressly disclaimed any binding effect of the Memo's interpretation of "in danger of extinction," it cannot now claim *Chevron* deference.

Defendants wrongly aver that this Court upheld the Memo's general interpretation of "in danger of extinction" under *Chevron* step two in the polar bear litigation. Def. Br. at 21. To the contrary, this Court "expressly did not require the agency to adopt independent, broad-based criteria or prospective policy guidance regarding the interpretation of the phrase 'in danger of extinction' in the ESA. Further, this Court expressly did not require the agency to conduct notice-and-comment rulemaking procedures . . . ." *In re Polar Bear Endangered Species Act Listing and § 4(d) Litigation (Polar Bear II)*, 794 F. Supp. 2d 65, 89 (D.D.C. 2011); *see also In re Polar Bear Endangered Species Act Listing and § 4(d) Litigation (Polar Bear I)*, 748 F. Supp. 2d 19, 30 n.18 (D.D.C. 2010). Because this Court's limited purpose following remand was to determine the reasonableness of the specific decision to list the polar bear as threatened, the "agency's *general* understanding of the definition of an endangered species [was] not the primary focus of the Court's inquiry." *Polar Bear II*, 794 F. Supp. 2d at 89. Ultimately, this Court concluded that "the agency's Supplemental Explanation sufficiently demonstrates that the Service's definition of endangered species, *as applied to the polar bear*, represents a permissible construction of the ESA and must be upheld under step two of the *Chevron* framework." *Id.* at 90 (emphasis added). This narrowly-drawn, species-specific holding cannot be generalized beyond its explicit limits, and certainly cannot be read to endorse any "currently on the brink of

[5] *See also* LAR 23069 (because listing determinations are "contextual and fact-dependent," FWS "has not promulgated a binding interpretation of 'in danger of extinction' or even explicit non-binding guidance on the meaning of the phrase that may be applied uniformly in those determination").

extinction" interpretation applied to a listing determination for a different species such as the Bat.

In defending the Service's "currently on the brink of extinction" interpretation, Intervenors emphasize a different aspect of the Memo—the "four typical fact patterns meeting the 'endangered' standard of a species 'on the brink of extinction in the wild.'" Int. Br. at 14–15 (citing LAR 23070–72). Intervenors' argument highlights another error FWS committed in making the threatened determination. In the Memo, although explicitly acknowledging that "there is no single metric for determining if a species is 'in danger of extinction,'" LAR 23070, FWS purported to illustrate the consistency of its practice over time by identifying four categories of endangered species that listings could be sorted into after the fact. In the Bat determination, however, FWS treated these categories as if they also constitute listing guidelines. FWS asserted that, because the Bat "still has relatively widespread distribution, but has nevertheless suffered ongoing major reductions in numbers, range, or both as a result of factors that have not been abated," the species "resides firmly in th[e fourth] category where no distinct determination exists to differentiate between endangered and threatened." 80 Fed. Reg. at 18,020 (citing LAR 23072).[6] FWS thus violated the ESA by relying on the Memo's "fourth category" as a listing guideline, when the Memo has not been put through the section 4(h) notice and comment process. *See* Pl. Br. at 23 n.10 and *supra* at 6–7.[7] Following through with this "no

[6] The Memo in no way supports the Service's claim in the Bat determination that the lines between endangered and threatened are "indistinct" for species with widespread distribution. It explicitly states that the distinction between endangered and threatened depends on a species-specific analysis of life history and ecology, the nature of the threats, and population numbers and trends. LAR 23072.

[7] Even if the Memo's categories legitimately constituted guidelines applicable to the Bat listing determination—which they do not—FWS did not explain why the Bat would not fall into either the first category ("species facing a catastrophic threat from which the risk of extinction is imminent and certain") or the third category ("species formerly more widespread that have been

distinct determination" theme, FWS unlawfully relied on purported "uncertainties" as to the timing of when the Bat would be in danger of extinction to justify its threatened determination. 80 Fed. Reg. at 18,021–22. *See* Pl. Br. at 27–41 and *infra* at 11–23.

Defendants do not respond to Plaintiffs' argument, Pl. Br. at 24–26, that the determination also unlawfully failed to define rationally the Bat's "foreseeable future." Def. Br. at 18–21 (defending Memo on *Chevron* grounds), 21–25 (defending 8 to 13-year timeframe as a rational estimate for the spread of WNS throughout Bat's range). Intervenors argue that the Service's myopic focus on the rate of spread of WNS rangewide was reasonable because WNS is the most significant threat to the Bat. Int. Br. at 16–19. Yet, by the Service's own standards, the agency "must look not only at the foreseeability of *threats*, but also at the foreseeability of the *impact of the threats on the species*[.]" M-Opinion (ECF No. 52-2) at 10 (emphasis added); *see also id.* at 9 ("Consequently, the foreseeable future is not necessarily reducible to a particular number of years. Rather, it relates to the predictability of the impact or outcome for the specific species in question.").[8] That analysis was wholly lacking here, both for the "in danger of extinction" and "foreseeable future" findings—that is, a correlation of each threat with the life

---

reduced to such critically low numbers or restricted ranges that they are at a high risk of extinction due to threats that would not otherwise imperil the species"). LAR 23070–71. The latter is especially salient given the agency's total failure to analyze how the cumulative impacts of non-WNS threats, when added to the devastating impacts of WNS itself, should inform the endangered versus threatened determination.

[8] Intervenors inaccurately claim that FWS did not "rely on polar bear biology" in its foreseeable future analysis for that species. Int. Br. at 17. The Service's 45-year "foreseeable future" analysis was based not only on the predictability of climate change projections but also in significant part on the polar bear's life-history, population dynamics, and generation time. *See* 72 Fed. Reg. 1,064, 1,070–71 (Jan. 9, 2007) (proposed rule); 73 Fed. Reg. 28,212 (May 15, 2008) (final rule); *see id. at* 28,237, 28,239–40, 28,253–54 (two-page analysis of 45-year foreseeable future based on both reliability of climate change models and life history of species). Regardless of the grounds on which the appellate court determined this timeframe was reasonable, Int. Br. at 17, the M-Opinion indisputably requires FWS to correlate threats with different life history stages across multiple generations. M-Opinion at 5.

history of the species, including different life history stages and multiple generations. *Id.* at 5; *see also* LAR 23069, 23073. Where an individual Bat may live as long as 18½ years, it was wholly arbitrary for FWS to ignore the species' foreseeable future over a single Bat's expected lifespan, let alone over several generations.[9] Pl. Br. at 24–25. The Service's failure to undertake a rational "foreseeable future" analysis, coupled with its unreasonably narrow "currently on the brink of extinction in the wild" interpretation, render its threatened determination arbitrary because it obviates any rational and reasonable meaning of "endangered" for the Bat. *Id*. at 25–26.

### B. FWS Artificially Created Competing Inferences with the Best Available Scientific Data and Its Rationales Are Not Supported by the Record

In justifying the threatened determination, FWS cobbled together four rationales that, "in the aggregate," purport to show that the Bat is not currently in danger of extinction and will not become so until some point in the foreseeable future. 80 Fed. Reg. at 18,021–22; Pl. Br. at 26. Defendants and Intervenors urge the Court to defer to the Service's conclusions, characterizing Plaintiffs' claims as mere disputes to the outcome of the agency's expert scientific judgments rather than as challenges to identifiable legal errors. Def. Br. at 21–30; Int. Br. at 16, 22–24. Defendants' and Intervenors' arguments must fail. The four rationales, individually and as a whole, lack any reasoned basis in the best available scientific data. FWS committed two fundamental legal errors that permeate and invalidate each of the rationales individually and "in the aggregate." Pl. Br. at 26–39.

First, FWS violated its statutory duty to determine whether the Bat is in danger of extinction based solely on the best available scientific data, not based on absolute scientific

---

[9] Similarly, FWS arbitrarily ignored the Bat's other highly relevant life history characteristics, such as its social and colonial survival and reproductive strategies and its low reproductive rate, in the "in danger of extinction" and "foreseeable future" analysis. Pl. Br. at 11–13, 15, 37–38.

certainty. 16 U.S.C. § 1533(b)(1)(A); *see also* 50 C.F.R. § 424.11(b) ("The Secretary shall make any [listing determination] ***solely*** on the basis of the best available scientific and commercial information regarding a species' status, without reference to possible economic or other impacts of such determination.") (emphasis in original); *see also Rocky Mountain Wild v. USFWS*, 2014 WL 7176384 at *2 (D. Mont. Sept. 29, 2014) ("The agency is required by Congress by virtue of the [APA] to engage in rational decision-making and it is bound by the ESA to use the best available science."). "[L]isting decisions under the ESA must be made solely on the basis of the best available science which requires far less than conclusive evidence" of a species' imminent destruction. *Trout Unlimited v. Lohn*, 645 F. Supp. 2d 929, 949 (D. Or. 2007). The ESA requires FWS to "utilize the 'best scientific data available,' not the best scientific data possible," in making listing decisions. *Bldg. Indus. Ass'n v. Norton*, 247 F.3d 1241, 1246–47 (D.C. Cir. 2001). The 'best available scientific data' standard does not permit FWS to "demand a greater level of scientific certainty than has been achieved in the field to date," nor does it require FWS to "'act only when it can justify its decision with absolute confidence.'" *Defenders of Wildlife v. Jewell*, 176 F. Supp. 3d 975, 1003 (D. Mont. 2016) (quoting *Ariz. Cattle Growers' Ass'n v. Salazar*, 606 F.3d 1160, 1164 (9th Cir. 2010)).

FWS explicitly states that the four rationales, "in the aggregate," support the threatened determination for the Bat and that "[n]o one [rationale] alone *conclusively* establishes whether the species is 'on the brink' of extinction." 80 Fed. Reg. at 18,021 (emphasis added). By imposing this "stringent standard" and requiring "conclusive evidence" that the Bat is in danger of extinction, FWS violated the ESA. *Defenders of Wildlife v. Babbitt*, 958 F. Supp. at 679; *see also Greater Yellowstone Coal. v. Servheen*, 665 F.3d 1015, 1028 (9th Cir. 2011) ("It is not enough for the Service to simply invoke 'scientific uncertainty' to justify its action."). The

Service's legal error is plain: it demanded a level of absolute scientific certainty that the Bat is in danger of extinction today and construed the slightest doubts about the timing of that danger against an endangered determination.

Second, in demanding this level of absolute scientific certainty, FWS violated its bedrock APA obligation to provide rational explanations for the connections between the facts found (i.e., the best available scientific data) and its four rationales. *See Trout Unlimited*, 645 F. Supp. 2d at 949 (quoting *PPL Wallingford Energy LLC v. FERC*, 419 F.3d 1194, 1198 (D.C. Cir. 2005)) (a listing decision survives review under the APA only where the agency has "articulate[d] a satisfactory explanation for its action including a rational connection between the [best available scientific data] and the choice made"). Wherever it could allege uncertainty on whether and when WNS would cause the Bat's functional extinction, FWS used that uncertainty to put a checkmark in the "threatened" column, without providing a reasoned explanation of why the best available scientific data supported that conclusion.[10] "The Service must rationally explain why the uncertainty regarding [a particular rationale] counsels in favor of [a threatened determination]

[10] *See, e.g.*, 80 Fed. Reg. at 18,021 ("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")) (emphasis added); *id.* ("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"); *id.* ("a population of *potentially* several million [Bats] still on the landscape"); *id.* ("'[the] presence of surviving [Bats] in areas infected by WNS for up to 8 years creates at least some question as to whether this species is displaying some degree of long-term resiliency. 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.* at 18,022 ("we must acknowledge at least some uncertainty as to whether species numbers in WNS-affected areas in North America represent dramatically reduced, but potentially sustainable populations"); *id.* ("some bats persist many years later in some geographic areas impacted by WNS (for unknown reasons)").

rather than the opposite conclusion." *Rocky Mountain Wild*, 2014 WL 7176384 at *5. It did not do so here.

By manufacturing uncertainty and then relying on that purported uncertainty to reach an arbitrary conclusion that the Bat is threatened, not endangered, FWS abrogated its congressionally-delegated responsibility to protect this critically imperiled species before it is too late. Again, "the clear intent and purpose of Congress in enacting the ESA was to provide preventive protection for species before there is 'conclusive' evidence that they have become extinct." *Defenders of Wildlife v. Babbitt*, 958 F. Supp. at 681. The fundamental conservation purposes of the Act prohibit FWS from relying on speculation and purported uncertainty to deny the Bat the full protections of the ESA until its functional extinction is all but guaranteed. *Oregon Nat. Res. Council v. Daley*, 6 F. Supp. 2d 1139, 1152 (D. Or. 1998) ("The whole purpose of listing species as "threatened" or "endangered" is not simply to memorialize species that are on the path to extinction, but also to compel those changes needed to save the species from extinction.").

For these and the reasons described below, none of the four rationales withstands scrutiny. Because FWS relied on these rationales "taken together" and "in the aggregate" to support the threatened determination, if the Court concludes that any one or more of these rationales violates the ESA and APA standards, the entire determination must fall.

### 1. FWS Arbitrarily Relied on the 8 to 13-Year Rationale to Conclude that the Bat Was Not Yet in Danger of Extinction

The first rationale—that the likely 8 to 13-year period for the rangewide spread of WNS meant that the Bat was "in danger of extinction" only in the foreseeable future—was arbitrary because FWS neither analyzed what that rangewide spread would mean for the Bat nor why the Bat was not already "in danger of extinction." Pl. Br. at 27–28.

Defendants mischaracterize this argument as a challenge to whether the Service's estimated timeframe for rangewide WNS spread was based on the best available science. Def. Br. at 22. They disclaim any legal obligation to explain the difference between the proposed and final determinations "as long as the agency has provided a rational explanation of its ultimate decision." *Id.* at 24. Defendants claim that a rational explanation is to be found in the "new data" that purportedly led to the final rule's "more specific" calculation of the 8 to 13-year timeframe, *id.* at 22–23, supposedly an improvement over the proposed rule because the latter "did not attempt to develop its own estimate" of rangewide WNS spread. *Id.* at 25. Intervenors echo this assertion, arguing that "a more precise estimate" for rangewide spread informed the agency's judgment that the Bat was only threatened and not endangered. Int. Br. at 22–23.

These arguments miss the point. The record, which Defendants do not dispute, is clear—FWS did not base its threatened determination on any new data of the observed rate of spread. Pl. Br. at 27–28, 28 n.14 (collecting record citations). Moreover, FWS actually cited the same predictive models in both the proposed and final rules, acknowledging their limitations in both documents. *Compare* 78 Fed. Reg. 61,064–65, *with* 80 Fed. Reg. at 17,997–98. Although Defendants emphasize the final rule's recognition of the limitations of the predictive models of WNS spread, both rules acknowledged that the observed rate of WNS spread had frequently proved to exceed the models' predictions. *Id.*; *see also* LAR 40664–65 (White Paper); LAR 40688 ("These models all have significant limitations for predicting timing of spread and in many instances have overestimated the time WNS would arrive in currently uninfected counties by as much as 45 years.") (emphases omitted).

Nor were the "facts and logic" used to calculate the annual rate of linear spread in any way new information. Def. Br. at 22–23 FWS explicitly premised its proposed endangered

determination on the observed rapid rate of WNS' spread—the same "facts and logic" used to calculate the 175 miles per year rate stated in the final rule. *See* 78 Fed. Reg. at 61,064 ("The current rate of spread has been rapid, spreading from the first documented occurrence in New York in February 2006, to 22 states and 5 Canadian provinces by July 2013."); *id.* at 61,065 ("Furthermore, the rate at which WNS has spread has been rapid: it was first detected in New York in 2006, and has spread west at least as far as Illinois and Missouri, south as far as Georgia and South Carolina, and north as far as southern Quebec and Ontario as of 2013."); *id.* at 61,076 (WNS "is currently or is expected in the near future to impact the remaining populations").

Defendants also argue that the COSEWIC 2013 report[11] (SuppAR 239456)[12] was "first considered" in the final rule and supports the Service's quantification of the 8 to 13-year timeframe for rangewide spread. Def. Br. at 23, 25. Although FWS may have "considered" the COSEWIC analysis for the first time, its analysis was already before FWS at the time of the proposed rule. The COSEWIC 2012 report (SuppAR 239523), containing the Canadian agency's calculations on the annual linear rate of spread, was published 18 months prior to the October 2013 proposed rule.[13] As a matter of fact, the COSEWIC 2012 report had estimated the timeframe for WNS to spread throughout Canada (and therefore to the furthest part of the Bat's range) would be 11 to 22 years (2023 to 2034). SuppAR 239523 at 2, 4, 12–13. But the COSEWIC 2013 report shortened that estimate, to 12 to 15 years. SuppAR 239456 at xiv, xvi,

---

[11] COSEWIC stands for Committee on the Status of Endangered Wildlife in Canada. This committee prepared assessment and status reports on three bat species, including the Bat, in 2012 and 2013. These resulted in an emergency endangered listing for the Bat, followed by a confirmation of the emergency listing, under the Canadian Species at Risk Act (SARA). Pl. Br. at 33 n.18.

[12] The COSEWIC 2012 and 2013 reports are included in the Supplemental Administrative Record (SuppAR) but were not given internal Bates numbers.

[13] *See* 78 Fed. Reg. at 61,054 (citing COSEWIC 2012); *see also* LAR 02437 (email of March 7, 2012).

55–56.[14] Thus, the final rule's estimate of 8 to 13 years for the rangewide spread of WNS (2023 to 2028), which relied on COSEWIC 2013 for the outer limit of the estimate, 80 Fed. Reg. at 18,022, was in fact a *shorter* timeframe than the agency could have calculated in the proposed rule based on the available COSEWIC 2012 estimate.

Regardless, the COSEWIC calculations are fundamentally irrelevant because they were not before the regional directors when they reached their threatened determination based on the 2014 White Paper's estimate of U.S.-wide Pd spread by 2018 and entire rangewide spread in only eight years. LAR 40664; *see also* LAR 40687–88; NLEB-03577; LAR 58584–86, 58588–89. Solely on the basis that eight years constituted the foreseeable future rather than the present in light of the agency's redirected focus on its interpretations of "endangered" and "threatened," FWS determined that the same data that had supported its proposed endangered listing actually supported a threatened listing instead. Pl. Br. at 28 n.14. In the final analysis, Defendants and Intervenors simply fail to grapple with Plaintiffs' challenge to the 8 to 13-year rationale: that it was arbitrary for FWS to rely on this timeframe to justify its conclusion that the Bat was not yet "in danger of extinction," when it had no new information or data to support a conclusion that the expected annual rate of spread would be any slower than could have been predicted when it proposed to list the Bat as endangered.

### 2. The "40% of Geographic Range" Rationale Is Arbitrary Because It Ignores that WNS Had Already Devastated the Bat's Core Range

The second rationale was that the Bat was purportedly "stable" and had "not yet declined" in the "40% of its total geographic range" not yet infected by WNS as of 2015. 80 Fed.

[14] As for Defendants' assertion that the credibility of the Service's estimated rate is bolstered by its corroboration with the COSEWIC estimate, Def. Br. at 23, FWS recognized that the COSEWIC reports had derived most of their information from the United States. LAR 58580, NLEB-03574.

Reg. at 18,021–22. In relying on this rationale to support the its threatened determination, FWS arbitrarily ignored the explicit findings stated in the final rule that the Bat has always been uncommon to rare in the as-yet-infected areas. FWS also arbitrarily ignored directly relevant evidence presented to the December 2014 decision makers that Bats in the far-flung parts of the range might primarily be summer residents, with the core of the species' hibernating distribution entirely in the WNS-infected range. Pl. Br. at 29–32.

Defendants limit their response to the statement that the Bat's "population status in areas without WNS does not contradict the Service'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." Def. Br. at 25–26. Therefore, "FWS could reasonably and rationally rely on this data[15] to make its determination that [Bats] are threatened and not endangered." *Id.* at 26. Yet Defendants' disavowal of any attempt to mischaracterize the data, *id.*. at 25–26, rings hollow. Although FWS claims that its threatened determination "is guided by the best available data on the biology of this species," 80 Fed. Reg. at 18,020, the determination omits any discussion of the extensive evidence in the record and summarized in the Rule of the species' (formerly) high population

[15] The "data" Defendants cite in response to Plaintiffs' charge that the final rule fails to explain the basis for the 40% number, Pl. Br. at 29–30, consists of an email from Service biologist Erik Olson explaining his math calculation estimating that 63% of the forested acres within the Bat's range are within 150 miles of counties with known WNS-infected hibernacula. Def. Br. at 25 (citing LAR 49295). This email first appears in the record at LAR 40718 (Dec. 12, 2014), immediately prior to the December 2014 regional director decision-makers' meeting.

Mr. Olson was the GIS biologist tasked with producing the color maps reproduced in Plaintiffs' opening brief at 11 (LAR 35655–66) and 19 (LAR 42365). The latter was included in the White Paper presented to the regional directors at the December 2014 meeting. LAR 40654, 40672. All three of these maps illustrate that WNS has hit Bats the hardest in the core of their range, and that they were always less abundant in their non-infected peripheral range. Consistent with the best available scientific data in the administrative record and documented in the final rule, the White Paper emphasizes that the Bat was previously most abundant in the areas hardest-hit by WNS (the northeast), and was always rarer in the western portion of its range. LAR 40657, 40659–61 (northeast), 40663 (west).

density in WNS-infected areas and low population density in uninfected areas. *Compare* Pl. Br. at 29 n.15, 30–31 (summarizing record and rule citations), *with* 80 Fed. Reg. at 18,021–22 ("WNS has not yet extended throughout the species' range. . . . [I]n the currently uninfected areas, [Bat] numbers have not declined, and the present threats to the species in those areas are relatively low.").

Defendants' reliance on the mathematical accuracy of the Service's areal percentage calculation fails to rebut Plaintiffs' central claim: that FWS had no rational basis for concluding that the Bat's population status in its peripheral range, where it was always uncommon or rare, supported a threatened determination. The Service's arbitrary reliance on the "40% of geographic range" rationale is particularly glaring where, in the proposed rule, FWS found that the same data on WNS's devastating impacts in the species' core range supported an endangered listing. *See* 78 Fed. Reg. at 61,064–65. Again, the Service should provide a rational explanation for why the same data can support two opposing conclusions. *See Ctr. for Native Ecosystems v. USFWS*, 795 F. Supp. 2d 1199, 1207–08 (D. Colo. 2011) (remanding decision to withdraw proposed listing rule where final rule failed to explain why threats identified in the proposed rule had been eliminated).

Defendants do not explain why FWS disregarded significant and timely expert opinion on the immediacy of the threat of WNS to Bats in its remaining peripheral range. *See* Pl. Br. at 31–32 (discussing the Epidemiology, Etiology and Ecological Research Working Group's December 2014 statement). This group of leading WNS scientists informed FWS—indeed, specifically warned the regional directors during their December 2014 meeting—that any Bats in the westward and southern periphery of the species' range are likely primarily summer residents only, and that the core of the species' hibernating distribution was in areas already infected or

imminently facing WNS infection. LAR 42486–87; LAR 42481 (Fig. 2). This evidence directly undermines two of the Service's rationales—that WNS had not yet spread to Bats in the species' peripheral range and that the species has another 8 to 13 years before it would do so. Where FWS disregarded this "significant conflicting data," its reliance on "selective data" to support its predetermined outcome was arbitrary and capricious. *San Luis v. Badgley*, 136 F. Supp. 2d 1136, 1148–49 (E.D. Cal. 2000); *see also Conner v. Burford*, 848 F.2d 1441, 1454 (9th Cir. 1988).

### 3. FWS Had No Credible Basis for Asserting that "Potentially Millions of Bats" Continued to Exist Rangewide

The Service's reliance on its third rationale—that there were "potentially millions of Bats across the species' range"—was arbitrary for several reasons. First, this number was based on pre-WNS summer mist net survey data from six midwestern states, states that were already squarely in the WNS hot zone by the time of the final threatened determination in 2015. Pl. Br. at 32–33; *see also* 80 Fed. Reg. at 17,997 ("Early reports from WNS-affected States in the Midwest reveal that similar rates of decline in [Bats] are already occurring or are fast approaching."). Second, FWS itself found that "winter surveys"—not summer mist net surveys—"represent the best available data for assessing population trends for this species." 80 Fed. Reg. at 17,996; *see also id.* at 18,008 (winter hibernacula counts are "the only method with enough history to assess trends over time"); *id.* at 18,010–11 (rejecting commenters' suggestion to base its listing decision on summer survey data). Finally, because FWS could not estimate a population size for the Bat, but instead relied on population trends, *id.* at 18,015, 18,021, it was illogical for the agency to turn around and find that the Bat was not in danger of extinction based on sheer speculation on the species' remaining population size. Pl. Br. at 34.

Defendants argue that, because FWS qualified its "millions of Bats across the species' range" estimate with the modifier "potentially," the threatened determination appropriately relied

on the best available scientific data. Def. Br. at 27–28. This is nonsense. FWS made no effort to evaluate the reliability of these population estimates in light of its explicit findings that winter hibernacula counts and population trends based on those counts, not summer mist net surveys and population estimates, constitute the best scientific data available to assess the Bat's status. The mere addition of the qualifier "potentially"—the sole extent of the Service's "adjustment" of the population estimates to account for WNS, Pl. Br. at 33 n.19—simply cannot be construed as expert scientific judgment. More broadly, FWS failed to explain how it rationally determined that its speculative "potentially millions" population estimate should be given greater weight than the extraordinary amount of concrete data it already had on catastrophic population declines and outright extirpations throughout the core of the Bat's range.

Defendants also argue that the "potentially millions of Bats" estimate is credible because it included Bats in other midwestern states, such as Minnesota, surviving Bats in WNS-infected states, and the remaining non-WNS-infected states across the Bat's range. Def. Br. at 28; *see also* Int. Br. at 5 (asserting additional data on Bats in Tennessee and Kentucky factored into the Service's "rough estimate of the numbers of [Bats] on the landscape in the Final Rule."). This is untrue. The record shows that the "coarse population estimates where they exist" rationale, 80 Fed. Reg. at 18,021, was based on the six-state estimate cited in the final rule, 80 Fed. Reg. at 17,979, and on a separate estimate of Bats in Indiana that the final rule did not cite.[16] *See* Pl. Br.

[16] The December 2014 White Paper mentions an estimate of 1.8 million Bats in Indiana as a "preliminary estimate" developed in a draft habitat conservation plan for state forest lands. LAR 40662–63. The December 2014 RD meeting participants considered this estimate, LAR 58578, 58581; NLEB-03573. *See also* LAR 37964–65 (describing state agency's estimation process (including use of summer surveys for Bats) but noting that data was based on 2005–2013 and state-wide population has been in decline from WNS in this timeframe); LAR 55743–48 (state estimation process); NLEB-27309. There is no indication in the record that the midwestern six-state, four-million Bat population estimate was presented to the December 2014 decision-

at 32–33, 33 n.17, 33 n.18 (collecting record citations). Conversely, the record does not support Defendants' assertion that the "potentially millions" estimate included population estimates from Minnesota,[17] Long Island, or the other U.S. range states or western Canada where the Bat was always uncommon to rare. Defendants' and Intervenors' post hoc rationalizations may not supply an explanation for the Service's action that is not supported by the record. *Camp v. Pitts*, 411 U.S. 138, 142 (1973) (review of agency action must be based solely on administrative record, not "some new record made initially in the reviewing court").

Finally, both Defendants and Intervenors misconstrue Plaintiffs' challenge to the Service's reliance on summer mist net survey data for the "potentially millions of Bats" estimate. Def. Br. at 28–29; Int. Br. at 23–24. Although the summer mist net survey information certainly constituted *available* scientific data, it was—by the Service's own standards—not the *best* available data on the Bat's conservation status. Therefore, FWS, arbitrarily and without explanation, relied on the "coarse population estimates" derived from (pre-WNS) summer mist net surveys, when it had already found that that best available scientific data to determine the Bat's status comes from population trend data from winter hibernacula counts. Pl. Br. at 34. Nor did FWS explain how it could rationally compare and weigh two entirely different metrics. "This is not a situation in which the court should defer to [the Service's] resolution of conflicting

---

makers; rather, this number first came up in the determination drafting process following that meeting. LAR 56043; LAR 56583.

[17] Even assuming FWS relied on Minnesota population estimates, which it did not, that reliance would have been arbitrary for the same reasons that relying on the other pre-WNS estimates was arbitrary. The fungus that causes WNS was present in Minnesota as of 2011–2012. 80 Fed. Reg. at 17,981, 17,994. The same is true for Intervenors' assertions about Bats in Tennessee and Kentucky. Int. Br. at 5. WNS has been present in Tennessee since 2009–2010 and in Kentucky since 2010-2011, with documented bat mortalities. 80 Fed. Reg. at 17,994; *see also id.* at 17,981 (documenting 60 WNS-infected Bat hibernacula in Kentucky, plus Bat mortality; documenting WNS-caused Bat mortality in Tennessee).

scientific evidence." *Trout Unlimited*, 645 F. Supp. 2d at 964. By failing to explain how the "potentially millions of Bats" rationale is supported by the best available scientific data, FWS acted arbitrarily.

#### 4. FWS Had No Credible Basis for Asserting that "Some Bats Persist" Post-WNS

The fourth rationale, that there is at least some uncertainty whether Bats are resilient to WNS because "some bats persist" in WNS-infected areas, lacks any record support. The Bat is highly susceptible to WNS; no individual Bat has been known to avoid or survive WNS.[18] Pl. Br. at 11–12. The Bat's life history as a long-lived, slow-reproducing colonial animal raises serious doubts that the species can persist in stable and viable populations in the face of WNS. *Id*. at 12–13, 34–39. While ignoring this information (and the expert opinions of its peer reviewers highlighting its critical importance, *see id*. at 14–15, 37–38) FWS relied instead on the fact that a few Bats continue to be trapped on Long Island to advance this rationale. 80 Fed. Reg. at 18,021–22. FWS knew full well that this was the slenderest of speculative reeds to support a resilience hypothesis; indeed, its own scientists had already discredited it. Pl. Br. at 35–38 (collecting record citations).

Defendants justify the "some bats persist" rationale by asserting that "[t]he presence of surviving bats in WNS-infected states [] is chiefly relevant to *when* the species will be 'in danger of extinction,' not *if* the species will be in danger of extinction." Def. Br. at 30. Not so. What is chiefly relevant is that FWS cut its "some bats persist" rationale from whole cloth. It constituted "an explanation for [the Service's] decision that [ran] counter" to the best available scientific

---

[18] Despite the rule's explicit statements that no individual Bats are known to have avoided or survived WNS, 80 Fed. Reg. at 17,996, 18,010, 18,012, the determination explicitly claims that some *populations* have survived the infection. *Id.* at 18,021.

data, one that was "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).

### C. FWS Unlawfully Failed to Analyze the Cumulative Effects of Non-WNS Threats in the Threatened Determination

FWS violated its duty to consider the five statutory listing factors in combination when ignoring the acknowledged cumulative effects of non-WNS threats in its determination. Pl. Br. at 39–41. Defendants' brief quotes extensively from the "Summary of Factors Affecting the Species" section of the final rule, Def. Br. at 12–14, but is silent on the determination's failure to consider whether the cumulative effects of threats under listing factors (A), (D), and (E), together with WNS, warrant an endangered listing. Intervenors' brief, meanwhile, supplies another explanation nowhere apparent in the final rule itself: that the Service's analysis is adequate because any cumulative impacts must already have been accounted for in the observed population trends. Int. Br. at 24. This post hoc rationalization is irrelevant. *Camp*, 411 U.S. at 142.

Neither Defendants nor Intervenors can explain away the agency's plain legal error: despite the Summary section's explicit findings that various non-WNS threats "may have direct or indirect effects on the continued existence of [Bats]," 80 Fed. Reg. at 18,005, FWS dismissed these cumulative effects findings out of hand in the Determination section. *Compare* 80 Fed. Reg. at 18,006, 18,014, 18,017 *with id.* at 18,021. This nicely illustrates how the bifurcated drafting and review process resulted in a logical disconnect between the final rule (less the determination) and the determination itself. Pl. Br. at 17–18. The best available scientific data underlying the agency's conclusions on the significance of the cumulative impacts of non-WNS

threats did not change between the proposed and final rules.[19] Only the agency's reasoning—or omission thereof—did. But "[t]he Service cannot discount activities merely on the basis that they may be individually insignificant" without acting "arbitrarily and capriciously." *Rocky Mountain Wild*, 2014 WL 7176384 at *7. In failing to analyze the cumulative effects of all listing factors on the Bat in rendering its threatened determination, FWS violated the ESA. *Ctr. for Native Ecosystems v. USFWS*, 795 F. Supp. 2d at 1207; *WildEarth Guardians v. Salazar*, 741 F. Supp. 2d 89, 101–03 (D.D.C. 2010).

### D. The Final Threatened Rule Was Not a Logical Outgrowth of the Proposed Endangered Rule

FWS denied Plaintiffs the opportunity for meaningful comment during the Bat listing decision process in violation of both the ESA and the APA. First, the record demonstrates that FWS had already determined to list the Bat as threatened prior to the close of the last comment period; thus, the public's comments did not meaningfully inform the final decision. Pl. Br. at 41–42. Second, the final rule was not a logical outgrowth of the proposed rule. In the threatened listing rule, FWS relied on its reinterpretation of "endangered" or "threatened" based on the Polar Bear Memo, four entirely new rationales supporting its threatened determination, and on the SPR Policy to avoid considering whether the Bat is endangered in a significant portion of its range—none of which were discussed in the proposed rule, in any subsequent notice re-opening the comment period, or in the proposed 4(d) rule. *Id.* at 42–44. Defendants and Intervenors do

---

[19] By contrast, the proposed rule's cumulative effects analysis justifying the proposed endangered finding found:

> Although these [non-WNS] threats (prior to WNS) have not in and of themselves had significant impacts at the species level, they may increase the overall impacts to the species when considered cumulatively with WNS. . . . In addition [to WNS] other factors are acting in combination with WNS to reduce the overall viability of the species.

78 Fed. Reg. at 61,076.

not address these procedural failures. Instead, they generally argue first, that a threatened ruling was foreseeable because it is one of three potential outcomes of any listing process and second, that FWS provided multiple comment periods in which Plaintiffs participated. Def. Br. at 57–59; Int. Br. at 7–9.

Plaintiffs do not dispute that a threatened determination is one of three potential outcomes (endangered, threatened, or not warranted) of any final ESA listing decision. Whatever that outcome, though, it must be a logical outgrowth of the proposed rule, as *Building Industry Ass'n of Superior California v. Norton*, 247 F.3d 1241, 1246 (D.C. Cir. 2011) (cited by Defendants at Def. Br. 57–58) makes clear. There, the appellate court held that the Service's decision to list three fairy shrimp species as endangered and one as threatened was a logical outgrowth of the proposed rule to list these species as endangered, notwithstanding the agency's failure to provide notice and comment on a study it received during the comment period and cited heavily in the final rule. *Id.* But the fairy shrimp final listing rule was a logical outgrowth of the proposed rule precisely *because* the "study, while the best available, only confirmed the findings delineated in the proposal." *Id.* Therefore, "[i]n relying on it, the Service 'did no more than provide support for the same decision it had proposed to take.'" *Id.* (quoting *Int'l Fabricare Inst. v. EPA*, 972 F.2d 384, 399 (D.C. Cir. 1992) (per curiam)). "Essentially, the proposal advanced for comment a hypothesis and some supporting data[,]" and the new study only "provided additional support for that hypothesis—indeed, better support than was previously available—but it did not reject or modify the hypothesis such that additional comment was necessary." *Id.* (citation omitted).

Unlike the fairy shrimp final listing rule, the final threatened listing rule for the Bat was by no conceivable metric a logical outgrowth of the proposed endangered listing rule. The

Service's final threatened determination did not confirm "the findings delineated in the proposal" to list the Bat as endangered. The four rationales did not "provide[] additional support" for the "hypothesis and some supporting data" underlying the proposed endangered listing but wholly contradicted it. Instead, in reaching an entirely different decision—i.e., switching from a proposed endangered listing to a final threatened listing—FWS "reject[ed] or modif[ied] the hypothesis such that additional comment was necessary." *Id.* After it published the proposed endangered rule, FWS never provided the public with any "indication that the agency was considering a different approach," such as relying on the Polar Bear Memo, the four rationales, or the SPR Policy, until "the final rule revealed that the agency had completely changed its position." *CSX Transp., Inc. v. Surface Transp. Bd.*, 584 F.3d 1076, 1081 (D.C. Cir. 2009)

Intervenors cite the multiple extensions of the comment period on the proposed rule and Plaintiffs' comment letters as evidence that Plaintiffs were adequately on notice of a potential final threatened decision. Int. Br. at 4–5, 8–9. These letters, however, demonstrate the quandary facing Plaintiffs and other members of the public who supported the proposed endangered listing. Plaintiffs were aware that opponents of an endangered listing had demanded (and received) multiple re-openings of the comment period and a six-month extension of the deadline for the final rule, Pl. Br. at 16–17, that FWS was facing tremendous political opposition to an endangered listing, *id.* at 15–16, and that the publication of the draft 4(d) rule in January 2015 signaled the strong possibility of a final threatened listing. 80 Fed. Reg. 2317 (Jan. 16, 2015). But at no point did FWS ever allow public comment on the four rationales, statutory interpretations, or policy considerations that it ultimately relied on to justify the threatened listing. *See* SuppAR 69755 ("Yet, the Service has failed to propose a threatened listing for the bat – let alone provide the public with an opportunity to comment upon the agency's rationales

for such a listing in contravention of the ESA and [APA]."). Plaintiffs' comment letters, Pl. Br. at 17 n.8, illustrate that they were left to attempt to "divine [the Service's] unspoken thoughts" as to why it might ultimately justify listing the Bat as threatened when its proposed rule so clearly stated that a threatened determination was not warranted.[20] *CSX Transp., Inc.*, 584 F.3d at 1079–80 (quoting *United Mine Workers*, 407 F.3d 1250,1259–60 (D.C. Cir. 2005)). The protracted comment process notwithstanding, Plaintiffs were deprived of any meaningful opportunity to submit their informed objections to the statutory interpretations, rationales, and policies that FWS relied on to list the Bat as threatened. The Service's procedural violations of both the ESA and APA notice and comment requirements prejudiced Plaintiffs and support their claims for relief.

## II. The Significant Portion of Range Policy is Unlawful

The SPR Policy explicitly forecloses the Service from considering whether a species is in danger of extinction in a significant portion of its range if that species is first determined to be threatened throughout its range:

> Thus, there are two situations (or factual bases) under which a species would qualify for listing: a species may be endangered or threatened throughout all of its range or a species may be endangered or threatened throughout *only* a significant portion of its range. . . .
>
> Significant: A portion of the range of a species is 'significant' *if the species is not currently endangered or threatened throughout its range . . . .*

79 Fed. Reg. 37,578, 37,609 (Jul. 1, 2014) (emphasis added).

The SPR Policy is facially irreconcilable with the ESA's unambiguous command to list any species as endangered if it is "in danger of extinction . . . [in] a significant portion of its

[20] *See* 78 Fed. Reg. at 61,076 ("We find that a threatened species status is not appropriate for the northern long-eared bat because the threat of WNS has significant effects where it has occurred and is expected to spread rangewide in a short timeframe.").

range[.]" 16 U.S.C. § 1532(6). Because this interpretation violates Congress' clear directive to list as endangered *any* species that is endangered in a significant portion of its range, it must be vacated under *Chevron* step one. Pl. Br. at 47–51. Alternatively, the SPR Policy fails at *Chevron* step two because it forecloses an independent basis for listing, undermines the ESA's purposes and principles, and injects impermissible policy considerations into listing decisions. *Id*. at 51–54. Additionally, because the SPR Policy was not a logical outgrowth of the draft Policy, it must be set aside for violating ESA and APA notice and comment requirements. *Id*. at 53–54. Finally, the SPR Policy is arbitrary as applied to the Bat because it foreclosed FWS from considering whether the Bat must be listed as endangered based on its status in a significant portion of its range, even though WNS has caused the species to experience catastrophic population declines to the point of extinction in the core of its range. *Id*. at 55–57.

### A. *Chevron,* Not *Salerno,* Supplies the Proper Standard of Review

Defendants erroneously claim that "Plaintiffs [are] required to demonstrate that 'no set of circumstances exists' under which the Services' SPR Policy would be valid." Def. Br. at 32 (quoting *U.S. v. Salerno*, 481 U.S. 739, 745 (1987)). But *Salerno* does not displace the standard two-part test set forth in *Chevron*. The "no set of circumstances" test does not apply to Plaintiffs' challenge. Even if *Salerno* applied, the SPR Policy would fail because, under the Policy, in no set of circumstances will the Service consider whether a species is in danger of extinction in any significant portion of its range after first determining it to be threatened throughout its range.

*Salerno*'s limited "no set of circumstances" test was intended to address statutory, not regulatory, challenges based on constitutional grounds—in other words, legal challenges that "often rest on speculation" and might lead to judicial resolution before an actual record of implementation has developed. *Wash. State Grange v. Wash. State Republican Party*, 552 U.S.

442, 450 (2008) (explaining that *Salerno*'s "no set of circumstances" test was developed to dissuade facial challenges that "raise the risk of 'premature interpretation of statutes on the basis of factually barebones records'" (quoting *Sabri v. United States*, 541 U.S. 600, 609 (2004))); *see also Reno v. Flores*, 507 U.S. 292, 300–01 (1993) (extending "no set of circumstances" test to a facial, pre-implementation regulatory challenge because there were "no findings of fact, indeed no record, concerning the [the agency's] interpretation of the regulation or the history of its enforcement[,]" thus raising the risk of premature interpretation). Accordingly, courts have limited the "no set of circumstances" test to facial challenges of procedural regimes established by regulations involving considerable agency discretion prior to the actual implementation of those regulations. *See Cellco P'ship v. FCC*, 700 F.3d 534 (D.C. Cir. 2012) (applying "no set of circumstances" test to facial, not as-applied, pre-implementation challenge to an FCC rule).[21] However, where "the agency ha[s] . . . define[d] a statutory term" by regulation and that definition precludes the agency from exercising its discretion in implementing that regulation, the question becomes "one of pure statutory interpretation" properly reviewed under *Chevron*. *Chamber of Commerce v. NLRB*, 118 F. Supp. 3d 171, 185 n.8 (D.D.C. 2015).

Plaintiffs' challenge to the SPR Policy does not involve pre-implementation review. FWS has already applied the Policy to foreclose all consideration of whether the Bat is endangered in any significant portion of its range after it first determined that the species is threatened throughout its range. 80 Fed. Reg. at 18,022; Pl. Br. at 55–57. Indeed, although the Service

---

[21] *See also Cellco P'ship v. FCC*, 700 F.3d at 549 (explaining that *Reno* applied to a plaintiff's facial challenge to a rule due to the "discretion carved out in the … rule's text"); *Sherley v. Sebelius*, 644 F.3d 388, 397 (D.C. Cir. 2012) (relying on the "no set of circumstances" test to reject a facial challenge to discretionary portions of a National Institutes of Health guideline); *Chamber of Commerce v. NLRB*, 118 F. Supp. 3d 171, 185 (D.D.C. 2015) (extending *Sherley* to reject a "facial challenge to the discretionary provisions" of a contested regulation).

claimed that its reliance on this aspect of the Policy would be "infrequent," *see* 79 Fed. Reg. at 37,579, FWS has already applied it in at least thirteen listing decisions to foreclose any consideration of whether "threatened throughout" species are endangered in any significant portion of their ranges.[22]

Moreover, this case does not concern a regulatory provision that implicates agency discretion in its implementation. Under the plain terms of the SPR Policy, the Service retains *no* discretion to consider whether a species is endangered in "a significant portion of its range" after first finding that that species is at least threatened throughout its range. 79 Fed. Reg. at 37,585 ("If 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) and no SPR analysis will be required."). Accordingly, the question for this Court—whether this aspect of the Policy is a permissible interpretation of the ESA—is purely one of statutory interpretation that is properly reviewed under *Chevron*. *See Am. Corn Growers Ass'n v. EPA*, 291 F.3d 1, 8 (D.C. Cir. 2002) (applying *Chevron* to vacate portions of an EPA rule that foreclosed states from exercising discretion to implement the rule consistent with the statute's plain terms); *see also Am. Lands All. v. Norton*, 242 F. Supp. 2d 1, 16 (D.D.C.), *recons. granted*

---

[22] *See* 79 Fed. Reg. 54,627, 54,633 (Sept. 12, 2014) (Georgia rockcress); 79 Fed. Reg. 63,672, 63,741 (Oct. 24, 2014) (Dakota skipper); 79 Fed. Reg. 69,192, 69,305 (Nov. 20, 2014) (Gunnison sage-grouse); 80 Fed. Reg. 60,468, 60,486 (Oct. 6., 2015) (black pinesnake); 81 Fed. Reg. 20,450, 20,478 (Apr. 7, 2016) (Big Sandy crayfish); 81 Fed. Reg. 62,826, 62,831 (Sept. 13, 2016) (white fringeless orchid); 81 Fed. Reg. 66,842, 66,862 (Sept. 29, 2016) (Blodgetts' wild mercury (silverbush)); 81 Fed. Reg. 67,193, 67,210 (Sept. 30, 2016) (eastern massasauga rattlesnake); 81 Fed. Reg. 68,963, 68,980 (Oct. 5, 2016) (Kentucky arrow darter); 81 Fed. Reg. 69,417, 69,423 (Oct. 6, 2016) (Suwannee moccasinshell); 82 Fed. Reg. 16,668, 16,702 (Apr. 5, 2017) (West Indian manatee); 79 Fed. Reg. 73,705 (Dec. 11, 2014). Plaintiff CBD is also challenging the Service's use of this aspect of the SPR Policy in the Gunnison sage-grouse listing determination. *See In re Gunnison Sage-Grouse Endangered Species Act Litigation* (*Ctr. for Biological Diversity v. USFWS*), 1:15-cv-00130-CMA-STV (D. Colo.).

*by*, *vacated in part on other grounds by* 360 F. Supp. 2d 1 (D.D.C. 2003) ("[A] guideline [or policy] that allows the defendants to avoid compliance with congressionally mandated, non-discretionary duties set forth in [the ESA] must be found invalid.") (citing *Ctr. for Biological Diversity v. Norton*, 254 F.3d 833, 840 (9th Cir. 2001)).

*Chevron*, not *Salerno*, provides the standard of review here because "various factors—including 'the uneven application of the no-set-of-circumstances test, the confusion surrounding the doctrine, and [because] *Chevron* is adequately deferential to the decisions of administrative agencies'—all counsel in favor of evaluating facial challenges to regulations on statutory grounds under *Chevron*." *Am. Petrol. Inst. v. Johnson*, 541 F. Supp. 2d 165, 188 (D.D.C. 2008) (quoting *Mineral Policy Ctr. v. Norton*, 292 F. Supp. 2d 30, 40 (D.D.C. 2003)); *see also Chamber of Commerce*, 118 F. Supp. 3d at 185 n.8 (*Chevron* analysis is appropriate where "the question presented [i]s one of pure statutory interpretation" rather than one in which "plaintiffs are challenging a procedural regime that involves considerable discretion and for which there is no history of enforcement").[23]

[23] In practice, "neither the Supreme Court nor the D.C. Circuit has consistently utilized the *Salerno* standard to review statutory challenges to administrative rules." *Mineral Policy Ctr.*, 292 F. Supp. 2d. at 39–40; *see also Sullivan v. Zebley*, 493 U.S. 521 (1990) (invalidating regulations promulgated by the agency as facially inconsistent with the relevant statute under *Chevron*, notwithstanding the presence of clearly valid applications of that regulation); *see also City of Chicago v. Morales*, 527 U.S. 41, 55 n.22 (1999) (Stevens, J., plurality opinion) ("To the extent we have consistently articulated a clear standard for facial challenges, it is not the *Salerno* formulation, which has never been the decisive factor in any decision of this Court, including *Salerno* itself."); *Washington v. Glucksberg*, 521 U.S. 702, 740 (1997) (Stevens, J., concurring opinion) (observing that the Supreme Court has never applied "such a strict standard, even in *Salerno* itself, and the Court does not appear to apply *Salerno* here"). Thus, although the D.C. Circuit has never directly held that *Chevron* displaces the "no set of circumstances" test, *Am. Petrol. Inst.*, 541 F. Supp. 2d at 188, where (as here) the question turns purely on statutory interpretation, courts in this jurisdiction consistently apply *Chevron* when reviewing challenges to agencies' regulatory or policy interpretations of enabling legislation. *Id.*

Even if *Salerno* applied, the "no set of circumstances" test is functionally indistinguishable from a *Chevron* step one analysis where, as here, a regulation or policy is facially inconsistent with a statute. Where a rule is facially inconsistent with its enabling legislation, "the arguably stricter *Salerno* standard is met and there would be no set of circumstances under which the counterpart regulations could be valid because their very terms violate the relevant statute." *Wash. Toxics Coal. v. U.S. Dep't of Interior*, 457 F. Supp. 2d 1158, 1176 (W.D. Wash. 2006); *see also Am. Corn Growers Ass'n*, 291 F.3d at 6 (invalidating a rule under *Chevron* step one because discrete portions of the regulation were "consistent with neither the text nor the structure of the statute"); *Ohio v. U.S. Dep't of the Interior*, 880 F.2d 432, 444 (D.C. Cir. 1989) (rejecting EPA's interpretation of CERCLA under *Chevron* step one despite the possibility of valid applications of the rule).

Defendants argue that so long as the agency can point to a single instance in which a regulation or policy comports with its enabling legislation, the agency's statutory interpretation articulated in that regulation or policy is valid. Def. Br. at 32. But Defendants do not point to any instance in which either FWS or the National Marine Fisheries Service (NMFS) has considered whether a "threatened throughout" species is nevertheless endangered in a significant portion of its range, let alone listed a species as endangered on that basis. Plaintiffs have been unable to locate a single such listing decision. *See supra* at 31 n.22. Instead, Defendants offer the African coelacanth final listing rule and giant manta ray proposed listing rule as examples of the SPR Policy's facial consistency with the ESA. Def. Br. at 33 n.9. These examples underscore Plaintiffs' point. Both the coelacanth and giant manta ray were listed or proposed to be listed as threatened (not endangered) in significant portions of their ranges after NMFS found that they were not endangered or threatened throughout their ranges. 81 Fed. Reg. 17, 398, 17,401 (Mar.

29, 2016) (African coelacanth); 82 Fed. Reg. 3,694, 3,710 (Jan. 12, 2017) (giant manta ray).[24] Neither instance illustrates a lawful implementation of the aspect of the SPR Policy Plaintiffs challenge.

Nor can Defendants dispute that, via the SPR Policy, the Service deliberately foreclosed its discretion to determine whether any species threatened throughout its range is endangered in a significant portion of its range. Therefore, consistent with the SPR Policy, under no set of circumstances may the Service consider whether a species is in danger of extinction in a significant portion of its range once it has already determined that the species is threatened throughout its range. Hence, even if it applied, *Salerno*'s "no set of circumstances" test would be satisfied here.

### B. The SPR Policy Fails at *Chevron* Step One

Plaintiffs demonstrated that the SPR Policy renders "endangered in a significant portion of its range" superfluous as a basis for listing as endangered any species that is at least threatened throughout its range. Pl. Br. at 47–51. Thus, the Policy is inconsistent with the ESA's plain language as well as its design and must be vacated under *Chevron* step one. *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) ("In ascertaining the plain meaning of the statute, the court must look to the particular statutory language at issue, *as well as the language and design of the statute as a whole*.") (emphasis added)); *see also Polar Bear I*, 748 F. Supp. 2d at 26 ("[A] plain meaning analysis does not end with the language of the relevant provision. Instead, the Court must analyze the language and design of the statute as a whole.") (internal quotation marks and citation omitted).

[24] Additionally, the coelacanth listing rule "merely indicates that the Service has had difficulty accurately applying the Final SPR Policy." *Ctr. for Biological Diversity*, 2017 WL 2438327, at *13.

Defendants do not attempt to establish that the SPR Policy is lawful under *Chevron* step one. Instead, they argue that courts have observed that the phrase "significant portion of its range" is "ambiguous," and that the interpretation of this phrase must be analyzed under *Chevron* step two. Def. Br. 35–38. Defendants' response is a non sequitur. The issue presented by Plaintiffs' claim is not whether the phrase "significant portion of its range" is ambiguous. The issue is whether the Service must consider a species' status in a "significant portion of its range"—however defined—*at all*, in situations where that species is also threatened throughout its range. On this point, the ESA's plain language is unambiguous. The statute instructs FWS to list a species as "endangered" where it is in danger of extinction "throughout all . . . of its range" *or* where it is in danger of extinction "throughout . . . a significant portion of its range." 16 U.S.C. § 1532(6). By ignoring the second category in the definition of "endangered" in situations where a species is also threatened throughout its range, the Service fails to give any meaning to this statutory language. Pl. Br. 48–49. Accordingly, the SPR Policy must fail under a straightforward *Chevron* step one analysis.

The Service recognized in both the draft and final SPR Policy notices that the plain language of the ESA unambiguously requires "four discrete bases, or categories, for listing." 79 Fed. Reg. at 37,582; 76 Fed. Reg. 76,987, 76,996 (Dec. 9, 2011). Defendants do not disavow this statement. But by its express terms, the Policy eliminates one of these four bases: for any species that is threatened throughout its range, the Service will not further consider whether it warrants listing as endangered based on its status in a significant portion of its range. The outcome of the SPR Policy is therefore exactly the opposite of what Congress intended when it enacted the ESA in 1973 to replace prior endangered species laws—to broaden the Act's protections by creating two distinct bases for listing species as endangered to ensure that the statute's most stringent

protections extended to any species endangered in a significant portion of its range. Pl. Br. at 50. Indeed, the SPR Policy generates perverse results, subverting Congress' express purpose. Species A, which may potentially be less imperiled because it is endangered in only a significant portion of its range, but viable in the remainder, will receive greater statutory protections ("endangered" status) than Species B (such as the Bat), which is threatened throughout its range *and also* endangered in a significant portion of its range, but will be protected merely as threatened. *Id.* at 50–51. Indeed, Species B—as with the Bat— may receive few to no "take" protections whatsoever. *See* 16 U.S.C. §§ 1533(d), 1538(a).

Nonetheless, based on their (irrelevant) assertion that the phrase "significant portion of its range" is ambiguous, Defendants argue that the SPR Policy should be upheld under *Chevron* step two. Their primary argument, however, is based on an erroneous interpretation of the language of the statute and is properly analyzed under *Chevron* step one. Defendants and Intervenors assert that a species cannot simultaneously be *both* threatened throughout its range *and* endangered in a significant portion of its range. Def. Br. at 45, 47; Int. Br. at 20. As an initial matter, in the SPR Policy, the Service never asserted that a species could not simultaneously meet the legal qualifications of an "endangered species" and "threatened species" as a matter of statutory interpretation.[25] Rather, it found that "[t]he Act … does not specify the relationship between the two provisions." 79 Fed. Reg. at 37,580. Therefore, Defendants' and Intervenors' litigation position merits no deference; the basis of the Service's Final SPR Policy must be judged "solely by the grounds invoked by the agency" in the decision. *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947).

[25] The SPR Policy is clear that it was revised to eliminate the possibility of a species being both threatened throughout its range and endangered in a significant portion of its range to assuage commenters' concerns about "potential confusion." 79 Fed. Reg. at 37,579, 37,581.

Regardless, there is no canon of statutory interpretation establishing that the use of "or" signifies mutually exclusive terms. Further, the use of the word "or" in both parts of the "endangered" definition and both parts of the "threatened" definition creates distinct categories; it does not authorize FWS to subordinate "endangered in a significant portion of its range" to "threatened throughout its range." *See Am. Corn Growers Ass'n*, 291 F.3d at 5 (rejecting at *Chevron* step one a rule that singled out one statutory factor "in … a dramatically different fashion" from four other statutory factors even though "no weights were assigned" by Congress). The Service's latitude to interpret "significant portion of its range" is circumscribed by its obligation to give independent meaning to "endangered . . . in a significant portion of its range."

In support of their statutory argument, Defendants argue that it is a "principle of logic" that a species cannot qualify for two listing statuses. Def. Br. at 45–49. The cases cited by Defendants are inapposite. *Id.* (citing *WildEarth Guardians v. Salazar*, 2010 WL 3895682 (D. Ariz. Sep. 30, 2010); *Defenders of Wildlife v. Salazar*, 729 F. Supp. 2d 1207 (D. Mont. 2010)). These cases stand for the proposition that if a species is (biologically) endangered in a significant portion of its range, it must be protected as (legally) endangered throughout its range.[26] *WildEarth Guardians*, 2010 WL 3895682, at *14–*15 (finding that if a species is in danger of extinction in a significant portion of its range, it must be listed as an endangered species and protected across its entire range); *Defenders of Wildlife v*, 729 F. Supp. 2d at 1218 ("[T]he phrase 'significant portion of its range' does not qualify *where* a species is endangered, but rather qualifies *when* it is endangered."). These cases say nothing about whether the Service may

[26] FWS acknowledged as much when it relied on these cases in the draft SPR Policy to justify the very same point—that a species in danger of extinction in a significant portion of its range must be listed as endangered throughout its range. 76 Fed. Reg. at 76,993.

lawfully choose to list a species as "threatened" when it is "endangered" in a significant portion of its range.

Moreover, Defendants' position that there can be no overlap between listing categories is not supported by the draft or final Policy. The Service acknowledged in the draft Policy that "under [its] interpretation of the statutory definitions," "there is likely to be much overlap among [the] four categories." 76 Fed. Reg. at 76,996. Indeed, it will often be the case that a species biologically endangered in a significant portion of its range will also be biologically threatened throughout its range. [27] *Id.*; *see also Ctr. for Biological Diversity*, 2017 WL 2438327, at *15 (noting the overlap and finding that the SPR Policy limits its application "to situations in which it is unnecessary[,]" giving "as little substantive effect as possible to the SPR language of the ESA in order to avoid providing range-wide protection to a species based on threats in a portion of the species' range"). In the final Policy, the Service never denied that the four categories overlap. Instead, it relied on factors Congress never intended it to consider to justify giving primacy to a species' entire range, purportedly to avoid "confusion" [28] and to "reduce the circumstances in which additional legal determinations are necessary." 79 Fed. Reg. 37,580–81.

---

[27] The draft Policy explained that the best available scientific data:

> may simultaneously support determinations that a species appears to have the status of 'endangered' in a significant portion of its range and also to have the status of 'threatened' throughout its range. This would occur if a species is found to be not only currently endangered in, but also likely in the foreseeable future to become extirpated from, a significant portion of its range.

76 Fed. Reg. at 76,996.

[28] As noted *supra* at 36 n.25, the SPR Policy relied on "potential confusion" to justify the change from the draft Policy. Defendants' brief echoes this purported concern. Def. Br. at 44 n.11, 48. Yet in the draft Policy, the Service explicitly considered and rejected the concern that "two status" listings would create confusion. 76 Fed. Reg. at 76,996 (stating that a species could not be both threatened and endangered because the more protective legal status would apply rangewide); *id*. ("we conclude that in practice it will not be a significant hurdle to implementing our draft policy"). These concerns about "extreme confus[ion]," 79 Fed. Reg. at 37,581, are unfounded. Under both the draft and final versions of the Policy, species that are endangered or

Defendants also assert that the placement of the "throughout all" language before "significant portion of its range" indicates that the Service should focus its analysis on a species' status throughout all of its range. Def. Br. at 44. As with Defendants' other statutory arguments, this assertion is not supported by any canon of statutory construction, and was previously addressed by Plaintiffs. Pl. Br. at 49. Defendants have offered no new support for this argument.

In sum, to accept the SPR Policy and Defendants' argument would be to "add to or alter the words employed to effect a purpose which does not appear on the face of the statute." *Hanover Bank v. Comm'r of Internal Revenue*, 369 U.S. 672, 687 (1962). The SPR Policy alters the definition of "endangered species" to "any species which is in danger of extinction throughout all or a significant portion of its range [unless threatened throughout all of its range]." 16 U.S.C. § 1532(6). In doing so, the Service deprives species endangered in a significant portion of their range the full protections of the Act, effecting a purpose that is contrary to "[t]he plain intent of Congress … to halt and reverse the trend toward species extinction, whatever the cost[;]" an intent that is "reflected not only in the stated policies of the Act, but in literally every section of the statute." *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 184 (1978); *Defenders of Wildlife v. Norton*, 239 F. Supp. 2d 9, 19 (D.D.C. 2001), *vacated in part on other grounds*, 89 F. App'x 273 (D.C. Cir. 2004) (noting Congress's intent to provide "the expansive protection intended by the ESA . . . to a species endangered only in a 'significant portion of its range'"). Because the SPR Policy renders a key provision of the definition of "endangered species" superfluous, and is inconsistent with the ESA's plain meaning and design, as demonstrated by the statute's legislative history, Pl. Br. at 50–51, it must be set aside under *Chevron* step one.

---

threatened in an SPR receive that listing status rangewide. Therefore, if a species is endangered in an SPR, it is listed as endangered rangewide—obviating any "two status" problem.

### C. The SPR Policy Also Fails at *Chevron* Step Two

Even if the Court determines that the SPR Policy survives *Chevron* step one review, it should set aside the policy under *Chevron* step two for offering an unreasonable statutory interpretation. Pl. Br. at 51–54. In response, Defendants offer rationales that are not found in the SPR Policy itself. Def. Br. at 45–49. However, Defendants' new arguments, like the justifications offered in the SPR Policy itself, subvert the ESA's conservation goals and inject impermissible policy considerations into listing decisions. Because the SPR Policy advances "a statutory interpretation that does not effectuate Congress' intent" it must fail on *Chevron* step two grounds. *Ctr. for Biological Diversity v. U.S. Dep't of Interior*, 563 F.3d 466, 484 (D.C. Cir. 2009).

Congress' inclusion of two classifications for protecting imperiled species, endangered and threatened, was intended to "provide incremental protection to species in varying degrees of danger . . . ." *Defenders of Wildlife v. Norton*, 258 F.3d at 1143. Under this two-tiered approach, endangered species receive stricter substantive legal protections than do threatened species, helping to ensure that management accurately accounts for the magnitude of threats that species face. *Id.*; *see also, e.g.*, 16 U.S.C. § 1538(a) (detailing prohibited acts relating to endangered species of fish or wildlife). Similarly, Congress specifically amended the ESA to extend those stricter substantive legal protections to any species in danger of extinction "in a significant portion of its range." *See* Pl. Br. at 50–51.

Defendants argue that the ESA does not require the Service to consider any of the "remaining bases for listing *after* the Services determine that one of the bases for listing is applicable[,]" Def. Br. at 43, and that to do so would be illogical and a waste of resources. *Id.* at

44–45. But it is not "illogical" or a waste of agency resources to consider whether a species is in danger of extinction in a significant portion of its range, even if it is also threatened throughout its range. In fact, that was Congress's specific intent in enacting the ESA, and is entirely consistent with the statute's mandate to recover imperiled species to the point where they no longer require listing. *See* Pl. Br. at 50, 52.

The ESA is clear that the Service may only make listing determinations based solely on the best available scientific data. 16 U.S.C. § 1533(b)(1)(A); 50 C.F.R. § 424.11(b); *see also* 49 Fed. Reg. 38,900 (Oct. 1, 1984). It is inconsistent with this mandatory, non-discretionary duty for the Service to inject its own economic concerns (i.e., "limited resources") into the SPR Policy to determine as a matter of agency practice that the Service will refuse even to consider whether a species should be listed as endangered in a significant portion of its range if it is threatened throughout its range. This subverts Congress' express command to list a species as endangered if, based solely on the best available scientific data, it is endangered in a significant portion of its range. Pl. Br. at 52–53.

Indeed, courts have rejected "limited resources" as an excuse for the Service's failure to comply with the ESA's clear commands. For example, in rejecting the Service's argument that it could avoid its mandatory duties under Section 4 by invoking a policy based in part on the need to maximize its listing budget resources, Judge Walton of this district held that "it is beyond th[e] Court's authority to excuse congressional mandates for budgetary reasons." *Am. Lands All.*, 242 F. Supp. 2d at 18; *see also Forest Guardians v. Babbitt*, 174 F.3d 1178, 1184 (10th Cir. 1999) (holding that "resource limitations can[not] justify the Secretary's failure to comply with mandatory, non-discretionary duties imposed by the ESA"); *cf. Ctr. for Biological Diversity v. EPA*, 861 F.3d 174, 188 n.10 (D.C. Cir. 2017) (citations omitted) ("[A]n agency may not duck its

[ESA section 7] consultation requirement, whether based on limited resources, agency priorities or otherwise.").

Even if the Service's budgetary constraints were a valid basis for policies determining how species will be listed under section 4 of the ESA, the Service provided no support in the administrative record for its assertion that its resources are so limited that it cannot evaluate whether a species that is threatened throughout its range is endangered in any significant portion of its range, or that to do so would divert conservation and management resources away from higher-priority species. Nor has FWS explained why its limited resources should not be prioritized for species that are at a greater risk of extinction—because (biologically) they are endangered in a significant portion of their range and threatened throughout their range.

Nor would a lawful interpretation of the ESA force FWS to spend agency resources to consider whether a species is threatened throughout its range or threatened in a significant portion of range where to do so would be redundant. If FWS determines that a species is endangered throughout its range or in a significant portion of its range, it can end the analysis there, because, as the Service observed in the draft Policy, that species will be "afforded the highest level of protection for which it qualifies" and listed as endangered. 76 Fed. Reg. at 76,996. If a species is threatened (but not endangered) throughout its range, however, the agency must then consider "the question of whether the species is in danger of extinction in a significant portion of its range; if so [the Service] would list the species as endangered; if not, [the Service] would list the species as threatened." *Id.* Consistent with the ESA's conservation purposes, the Service would thereby ensure that the species receives the appropriate level of statutory protection necessary to ensure its survival and recovery.

Intervenors argue that Plaintiffs' real objective is to strip the Service of its authority to tailor ESA protections for threatened species. Int. Br. at 20–21. This argument also misses the mark. FWS will maintain its authority under section 4(d) to tailor the ESA's protections to the needs of a threatened species with or without the SPR Policy—but only after properly determining that a species should be designated as threatened based solely on the best available scientific data and the five listing factors.[29] Only if the species is listed because it is threatened in all or a significant portion of its range, but is not also endangered in any significant portion of its range, may FWS appropriately exercise its discretion to promulgate a species-specific 4(d) rule. The prospect of regulatory flexibility implemented via a 4(d) rule cannot dictate the listing determination itself, and policy concerns regarding "over-regulation" cannot justify a statutory interpretation that rewrites the statute. Pl. Br. at 52–53.

The SPR Policy reflects that the Service also implicitly endorsed the policy objective of management flexibility, in effect adopting the policy recommendations of industry and state commenters who complained "that it was inappropriate to protect the entire range of a species as endangered if the species, viewed rangewide, met the definition of a 'threatened species.'" SPR000076; SPR044724–28 (CropLife America); SPR001126 (National Mining Association). However, the desire for management flexibility cannot supersede the ESA's command to base

[29] Intervenors argue that the order in which the Service "should evaluate . . . whether a species qualifies [as threatened or endangered] is left to the Service's scientific judgment." Int. Br. at 20. But the SPR Policy's wholesale elimination of any consideration of whether a species is in danger of extinction in a significant portion of its range (if threatened throughout its range) was based on policy reasons, not the Service's "scientific judgment." *See* 79 Fed. Reg. at 37,579, 37,580–81. Indeed, the Service specifically foreclosed its discretion to exercise its scientific judgment based on species-specific best available data to determine, on a case-by-case basis, whether a species that is threatened throughout its range warrants listing as endangered in a significant portion of its range.

listing determinations solely on the best available scientific data, 16 U.S.C. §§ 1533(a)(1), 1533(b)(1)(A); 50 C.F.R. § 424.11(b); *see also* Pl. Br. 51–52.

Any flexibility to list certain populations of a species as threatened, and others as endangered, must found in the Distinct Population Segment Policy—not in an impermissible interpretation of "significant portion of its range." *Humane Soc'y of the United States v. Zinke*, – F.3d –, 2017 WL 3254932, at *8 (D.C. Cir. Aug. 1, 2017) ("[T]he statutory text leaves room … to list most of a species as threatened, while dividing out a distinct population segment for listing as endangered based on its unique circumstances and conditions.");[30] *WildEarth Guardians*, 2010 WL 3895682 at *17 (noting that the ESA provides "the flexibility to provide different levels of protection to the same species," by designating "subspecies and distinct population segments," not by "altering Congress's definition of endangered and threatened species"); *see also Defenders of Wildlife*, 729 F. Supp. 2d at 1227–28 (noting that the addition of the "significant portion of its range" language alters only "*when* a species can be listed, but in no way suggests that the phrase changes what must be listed and protected" and that "[t]hat managerial and statutory flexibility stems from the definition of 'species,' not from the 'where' portion of the species' range").

At bottom, the SPR Policy subverts the ESA's conservation goals by substituting impermissible policy considerations for the statute's explicit command to render listing decisions solely on the best available scientific data and the five listing factors. Pl. Br. at 51–54.

---

[30] *Humane Soc'y of the United States* primarily addressed whether FWS could carve out of an already-listed species a distinct population segment for the purpose of delisting that segment. 2017 WL 3254932, at *6. Although it also discusses the SPR Policy, the opinion addresses the Service's interpretation that "'range' refers to a species' current range at the time its status is evaluated or reevaluated for listing." *Id.* at *13. The appellate court did not address the specific aspect of the SPR Policy's definition of "significance" at issue here.

Defendants argue that Congress intended both endangered and threatened species to be conserved under the ESA. Def. Br. at 50. Plaintiffs agree. But Congress also emphasized that endangered species are to receive the Act's most stringent protections, whether they are endangered throughout their ranges or endangered in a significant portion of their ranges. *See Defenders of Wildlife*, 258 F.3d at 1144–45; *Defenders of Wildlife*, 239 F. Supp. 2d at 13. The Service's SPR Policy is an unreasonable construction of the ESA, is contrary to congressional intent, injects impermissible policy considerations into listing decisions, and fails under *Chevron* step two.

### D. The Final SPR Policy Was Not a Logical Outgrowth of the Draft SPR Policy

The SPR Policy's decision to foreclose any consideration of whether a species is endangered in a significant portion of its range if it is determined to be threatened throughout its range was not a logical outgrowth of the draft Policy. Accordingly, Defendants violated their ESA and APA obligations to provide a meaningful opportunity for notice and comment. Pl. Br. at 53–54.

Defendants' response amounts to little more than that Plaintiffs should have anticipated, and therefore commented on, the possibility that the Service would do a total—and unlawful—about-face. Def. Br. at 53–57. Defendants claim that the public had sufficient notice that the Service not only "might reconsider" but "probably would reconsider" its draft interpretation because the draft SPR Policy solicited comment on concerns that it might apply "a higher level of protection where a lesser level of protection may also be appropriate." *Id*. at 56–57 (citing 76 Fed. Reg. at 76,996, 77,074). Yet the Service gave no indication that it was contemplating the

"solution" that the SPR Policy implemented—i.e., deciding *never* to undertake any endangered in an SPR analysis for a species determined to be threatened throughout its range.[31]

To the contrary, the language in the draft Policy Defendants cite, *see* Def. Br. at 57, specifically assured the public that the "partial overlap among categories" (i.e., both threatened throughout and endangered in a significant portion of range) "will not be a significant hurdle to implementing our draft policy." 76 Fed. Reg. at 76,996. As the Service explained, this conclusion was compelled by its understanding of the statute and the relevant court decisions:

> [C]onsistent with the recent court decisions discussed in *Case Law* above, under our interpretation of the statutory definitions, the Services would list and protect a species throughout its range if it meets the categories of endangered or threatened in a significant portion of its range. Viewed against the backdrop of the four categories for listing created in the definitions of 'endangered species' and 'threatened species,' this leads us to conclude that a species *should be afforded*, at the rangewide level, the highest level of protection for which the best available science indicates it is qualified in any significant portion of its range.

*Id.* (emphasis added).

Because the Service specifically stated that its interpretations of the statutory definitions, as well as its understanding of the relevant case law, compelled its legal conclusion, it is patently unreasonable to require Plaintiffs to have anticipated (and commented) that the Service was likely to turn around and violate the law by implementing a final policy wholly inconsistent with its prior legal analysis, as well as the ESA's plain language and intent. Indeed, Plaintiff Defenders of Wildlife commented approvingly on the Service's appropriate legal analysis of the

---

[31] The Service specifically considered "three alternative statutory interpretations of the phrase 'significant portion of its range'": (1) that the SPR and DPS language constitute a single authority; (2) that the SPR language clarifies the endangered and threatened definitions; and (3) that the SPR language provides an independent basis for listing such that protections of the ESA would apply only in the SPR. 76 Fed. Reg. at 76,996. However, the Service rejected each of these alternatives because it deemed them "less acceptable" due to inconsistencies with the plain language of the statute, inconsistencies with court decisions on SPR, or both. *Id.* at 76,997.

statutory definitions and court decisions that led it to the conclusion quoted above. *See* SPR001065–67 ("We agree that the consequences of a species being in danger of extinction or likely to become so in a significant portion of its range should be that the entire species shall be listed throughout its range. This is the most historically and textually consistent approach to listing species under the ESA."). Plaintiffs cannot reasonably have been required to anticipate and preemptively comment on the Service's ultimate unlawful reversal of its position.

Defendants also erroneously assert that, because other commenters urged the unlawful reversal the Service ultimately implemented, Plaintiffs had adequate notice. Def. Br. at 57. The fact that parties submitted comments on the draft Policy urging the unlawful statutory interpretation ultimately adopted by the SPR Policy does not mean that the Service provided adequate notice of its unlawful reversal. The Service cannot "bootstrap notice from a comment." *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 549 (D.C. Cir. 1983); *Nat'l Assn. Psych. Health Sys. v. Shalala*, 120 F. Supp. 2d 33, 40 (D.D.C. 2000) ("The adequacy of notice cannot be judged by the number and type of comments in response to the [proposed rule.]").

In short, the Service failed to provide Plaintiffs a meaningful opportunity to comment on the SPR Policy. Courts in this circuit "have refused to allow agencies to use the rulemaking process to pull a surprise switcheroo" on the public where the final rule is not a logical outgrowth of the proposed rule. *Environmental Integrity Project v. EPA*, 425 F.3d 992, 996 (D.C. Cir. 2005); *see also id.* at 998 ("Whatever a 'logical outgrowth' of this proposal may include, it certainly does not include the Agency's decision to repudiate its proposed [statutory] interpretation and adopt its inverse."); *Am. Lands All.*, 242 F. Supp. 2d at 14–15 (FWS Petition Management Guidance Policy violated section 4(h) of the ESA because the agency denied the

public "a meaningful opportunity to participate in the comment process" where it proposed one version of the guideline then adopted a completely different final guideline). Because the SPR Policy is not a "logical outgrowth" of the draft SPR Policy and violated the APA's and ESA's notice and comment requirements, it must be set aside.

### E. The SPR Policy is Unlawful as Applied to the Bat

FWS unlawfully applied the SPR Policy to forego any consideration of whether the Bat is endangered in a significant portion of its range. Pl. Br. at 55–57. Had FWS undertaken a significant portion of range analysis, it would have had to determine whether the Bat is endangered in, for example, the core of the Bat's historic range in the northeastern U.S. and Canada, where winter hibernacula counts have demonstrated 96–99% declines and local extinctions. *Id*. at 10–12, 29–32; *see* 80 Fed. Reg. at 17,976–77. In the areas where the Bat was once most abundant, WNS has resulted in the species' total or near-total annihilation. 80 Fed. Reg. 17,975–83; *id.* at 17,996–97.

Defendants' only response is that Plaintiffs' as-applied challenge must fail because the SPR Policy is a reasonable interpretation under *Chevron* step two and because the Service applied the SPR Policy precisely as written in the Bat determination. Def. Br. at 52–53. But as Plaintiffs demonstrated in their opening brief and above, the SPR Policy must fail at *Chevron* step one. The Policy's application to the Bat determination exemplifies how FWS has rendered the term "endangered . . . in a significant portion of its range" superfluous by considering only two of the four statutory bases for listing: whether the Bat is endangered throughout all of its range or threatened throughout all of its range. 80 Fed. Reg. at 18,020–22.

Further, even if the Court determines it must evaluate the reasonableness of the SPR Policy under *Chevron* step two, the Service's application of the Policy here could not provide a

more perfect illustration of how the Policy "so completely diverges from any realistic meaning of the [ESA] that it cannot survive scrutiny under *Chevron* Step Two." *NRDC v. Daley*, 209 F.3d 747, 753 (D.C. Cir. 2000). On the evidence before it of the Bat's near-total elimination from its core range, the Service's reliance on the SPR Policy to forego any significant portion of range analysis subverted the ESA's mandate to confer the statute's most stringent protections on imperiled species like the Bat before their trajectory toward extinction is irreversible. As the threatened determination for the Bat demonstrates, "[o]nly in Superman Comics' Bizarro world, where reality is turned upside down[,]" is the SPR Policy a reasonable interpretation of the ESA. *Id.* at 754.

## CONCLUSION

For the reasons explained in Plaintiffs' opening brief and above, Plaintiffs respectfully request that the Court grant their motion for summary judgment, deny Defendants' and Intervenors' cross-motions for summary judgment, and grant Plaintiffs their requested relief and such other relief as the Court deems appropriate.

Respectfully submitted this 18th day of August, 2017.

*/s/ Ryan Shannon*
Ryan Shannon (D.C. Bar No. OR 00007)
CENTER FOR BIOLOGICAL DIVERSITY
P.O. Box 11374
Portland, OR 97211
(214) 476-8755 (tel)
rshannon@biologicaldiversity.org

Counsel for Plaintiffs Center for Biological Diversity, Sierra Club, Coal River Mountain Watch, and Ohio Valley Environmental Coalition

*/s/ Jane P. Davenport*
Jane P. Davenport (D.C. Bar. No. 474585)
DEFENDERS OF WILDLIFE
1130 17th St NW
Washington, DC 20036
(202) 772-3274 (tel)
jdavenport@defenders.org

Counsel for Plaintiff Defenders of Wildlife