IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

FEDERAL DEFENDANTS' REPLY IN SUPPORT OF THEIR MOTION FOR PARTIAL SUMMARY JUDGMENT ON THE LISTING CLAIMS

Pursuant to Rule 56 of the Federal Rules of Civil Procedure, Local Civil Rule 7(h), and the Court's August 25, 2017, Minute Order, Federal Defendants the United States Fish and Wildlife Service; Greg Sheehan, in his official capacity as Acting Director of the United States Fish and Wildlife Service; and Ryan Zinke, in his official capacity as Secretary of the United States Department of the Interior, hereby file the following reply in support of their motion for summary judgment on Claims I through III in Center for Biological Diversity, *et al.*'s first Amended Complaint, ECF No. 27; and Claims I and II in Defenders of Wildlife's Complaint, ECF No. 1.

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APA	Administrative Procedure Act
COSEWIC	Committee on the Status of Endangered Wildlife in Canada
ESA	Endangered Species Act
ESU	Evolutionary Significant Unit
ESA	Endangered Species Act
FWS	United States Fish and Wildlife Service
LAR	Listing Administrative Record
MSJ	Motion for Summary Judgment
NMFS	National Marine Fisheries Service
Pd	*Pseudogymnoascus destructans*
SuppAr	Supplemental Administrative Record
SPR00	Significant Portion of its Range Administrative Record
WNS	White nose syndrome

I. INTRODUCTION

Federal Defendants have already demonstrated that the United States Fish and Wildlife Service ("FWS")'s decision to list the northern long-eared bat ("Bat") as a threatened species under the Endangered Species Act ("ESA") was based on an exhaustive analysis of the best scientific and commercial information available and a reasonable application of the ESA's definitions of "endangered species" and "threatened species." See Threatened Species Status for the Northern Long-Eared Bat with 4(d) Rule, 80 Fed. Reg. 17,974 (Apr. 2, 2015) ("listing determination"); 16 U.S.C. § 1532(6), (20). Federal Defendants also established that FWS's and the National Marine Fisheries Service's (collectively, the "Services") joint policy interpreting the ambiguous phrase "significant portion of its range" in the definition of "endangered species" is lawful because it: (1) does not render any of the bases for listing a species superfluous; and (2) is based on logic derived from the ESA and two judicial court decisions. See Final Policy on Interpretation of the Phrase "Significant Portion of Its Range" in the Endangered Species Act's Definitions of "Endangered Species" and "Threatened Species", 79 Fed. Reg. 37,578 (July 1, 2014) ("Final SPR Policy").

Despite having 110 pages of briefing, Plaintiffs have not met their burden of proving that either the listing determination or the Final SPR Policy is arbitrary, capricious, or manifestly contrary to the statute. Regarding the listing determination, Plaintiffs have not and cannot establish that FWS failed to consider each of the ESA's listing factors, use the best available science, or rationally apply the ESA's definition of "threatened species" of "endangered species" to the Bat. As for the Final SPR Policy, none of Plaintiffs' scattershot arguments establish that the Final SPR Policy renders any of the bases for listing a species superfluous or that it is otherwise unlawful. Therefore, this Court should uphold the listing determination and the Final SPR Policy and grant summary judgment to Federal Defendants on the appropriate claims.

II. ARGUMENT

A. FWS Considered Each of the ESA's Listing Factors and the Current Status of the Bat and Utilized That Information to Reach a Reasonable Conclusion

As explained in Federal Defendants' opening brief, FWS fully and properly considered each of the five listing factors in 16 U.S.C. § 1533(a)(1) using the best available commercial and scientific data. See Fed. D.'s MSJ, ECF No. 53 at 19-22. FWS also carefully analyzed the current status of the Bat throughout its range. See id. at 24-25. Following that detailed analysis, FWS applied the definitions of "endangered species" and "threatened species" to this data and reached the reasoned conclusion that the Bat is properly classified as a threatened species. Id. at 25-28.

When deciding to list the Bat as a threatened species rather than an endangered species, FWS recognized that the distinction between those two classifications is largely temporal—a threatened species is one that is likely to become on the brink of extinction in the wild within the foreseeable future, while an endangered species is currently on the brink of extinction. See 80 Fed. Reg. at 18,020-22; Fed. D.'s MSJ at 26-27; 16 U.S.C. § 1532(6), (20); LAR 23069 ("Polar Bear Memo"). FWS concluded that several factors, in the aggregate, "indicate a current condition where the species, while likely to become in danger of extinction at some point in the foreseeable future, is not on the brink of extinction at this time." 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). In addition, in the area not yet affected by WNS (about 40 percent of the species' total geographic range), the species has not yet suffered declines and appears stable. Finally, the species still persists in some areas impacted by WNS, thus creating at least some uncertainty as to the timing of the extinction risk posed by WNS. Even in New York, where WNS was first detected in 2007, small numbers of [Bats] persist despite the passage of approximately 8 years. Finally, coarse population estimates [] for this species indicate a population of potentially several million [Bats] still on the landscape across the range of the species.

Id.

In light of the five listing factors, the current status of the Bat, and the temporal distinction

between the definition of "endangered species" and "threatened species" in the ESA, FWS made not only a reasonable decision that the Bat was a threatened species, but also the correct one. Although Plaintiffs may have preferred a different result, Congress entrusted FWS with the authority to determine the proper status of a species and FWS's decision should not be disturbed absent evidence from Plaintiffs that it was arbitrary or capricious. See Chevron U.S.A. v. Nat. Res. Def. Council, 467 U.S. 837, 842-44 (1984); Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or., 515 U.S. 687, 708 (1995).

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

Plaintiffs argue that FWS's interpretation of "in danger of extinction" contained in the Polar Bear Memo is not entitled to Chevron deference. In Plaintiffs' view, the fact that the Polar Bear Memo did not undergo notice and comment acts as a complete bar to the application of Chevron deference. But, as stated by the Supreme Court, "as significant as notice-and-comment is in pointing to *Chevron* authority, the want of that procedure here does not decide the case, for we have sometimes found reasons for *Chevron* deference even when no such administrative formality was required and none was afforded." United States v. Mead Corp., 533 U.S. 218, 230-31 (2001). Therefore, "[t]he fact that the [Polar Bear Memo] was not a product of such formal process does not alone [] bar the application of *Chevron*." Id. at 231.

Applying the two-step Chevron framework, this Court has previously held that Congress has not directly spoken to the definition of "endangered species" and therefore the term (including the phrase "in danger of extinction") is ambiguous. See In re Polar Bear Endangered Species Act Listing & § 4(d) Rule Litig., 748 F. Supp. 2d 19, 27 (D.D.C. 2010). For this reason, the phrase "in danger of extinction" is properly analyzed under Chevron step two, which requires the Court to uphold any reasonable agency interpretation of ambiguous statutory language. See Chevron, 467

U.S. at 843-44; In re Polar Bear Endangered Species Act Listing, 794 F. Supp. 2d 65, 87 (D.D.C. 2011). Contrary to Plaintiffs' assertions, this Court has upheld FWS's interpretation of "in danger of extinction" reflected in the Polar Bear Memo under Chevron step two, concluding that it was a permissible construction of the statute. In re Polar Endangered Species Act Listing, 794 F. Supp. 2d at 89-90. Accordingly, Plaintiffs' argument that FWS's interpretation of "in danger of extinction" deserves no deference[1] and FWS should be "foreclosed from relying upon it" fails.[2] See Pls' MSJ, ECF No. 52 at 36, n.10.

Moreover, FWS is not legally required to submit the Polar Bear Memo for notice and comment. Although Plaintiffs argue that notice and comment is required under 16 U.S.C. § 1533(h)(2), the Polar Bear Memo does not establish "criteria for making the findings required under [16 U.S.C. § 1533(b)(3)] with respect to petitions." See 16 U.S.C. § 1533(h)(2). 16 U.S.C. § 1533(b)(3) refers to petitions from interested persons looking to "add a species to, or to remove a species from" the list of endangered and threatened species or to revise a critical habitat designation. 16 U.S.C. § 1533(b)(3)(A)-(D). In response to those petitions, the Services are required to publish findings concluding whether the petition presents substantial scientific or commercial information indicating that the petitioned action may be warranted (known as "90-day

[1] Even if the Polar Bear Memo is not entitled to deference under Chevron it is still entitled to Skidmore deference. See Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).

[2] The court in Alliance for the Wild Rockies v. Zinke, -- F. Supp. 3d ---, 2017 WL 3610545 (D. Mont. Aug. 22, 2017), incorrectly determined that the Polar Bear Memo did not warrant deference under either Chevron or Skidmore. Id. at *11-13. The court in that case ignored the substance of the Polar Bear Memo, which details an interpretation of "in danger of extinction" that FWS has consistently utilized in listing determinations for years, and focused on the fact that the Memo had not undergone notice and comment and that the Memo stated it was "not intended to set forth a new statement of agency policy or a new 'rule' pursuant to the [Administrative Procedure Act ("APA")]." Id. at * 12. That case and the present case are also factually distinct. In this present case, FWS included a detailed analysis about whether the Bat was currently on the brink of extinction. Compare id. at *13 with 80 Fed. Reg. at 18,020-23.

findings"). 16 U.S.C. § 1533(b)(3)(A). If those 90-day findings are positive, the Services are required to publish a finding within 12 months stating whether the petitioned action is warranted, not warranted, or warranted but precluded by other pending proposals (known as "12-month findings"). 16 U.S.C. § 1533(b)(3)(B). No matter the Services' conclusion, they are required to publish that finding in the Federal Register. 16 U.S.C. § 1533(b)(3)(B)(i)-(iii). The 90-day finding and 12-month finding process is not used to discern whether a species should be classified as either a threatened species or an endangered species. See 16 U.S.C. § 1533(b)(3)(A)-(B). Instead, the purpose of this process is to simply determine whether listing the species at all is warranted under the ESA. See id. The Polar Bear Memo is not utilized in that process. The Polar Bear Memo looked back at FWS listing determinations historically and identified patterns for when FWS has found species to be endangered and when it has found species to be threatened. FWS considers those patterns, after FWS has already concluded that a species warrants listing, when it evaluates whether the species should be listed as either a threatened species or an endangered species. See Polar Bear Memo. Therefore, under the ESA's very own terms, the Polar Bear Memo does not need to undergo notice and comment. See id.; 16 U.S.C. § 1533(b)(3)(A)-(B); id. at § 1533(h)(2).

C. Plaintiffs Have Not Demonstrated That the Listing Determination is Unlawful

Plaintiffs argue that FWS's "four rationales[3], individually and as a whole, lack any reasoned basis in the best available scientific data."[4] See Pls' Opp., ECF No. 59 at 19. However, FWS considered the best available scientific data in developing each of those four rationales and

[3] The four rationales that Plaintiffs refer to are quoted supra in Section A.

[4] Plaintiffs also argue, for the first time in their opposition/reply brief, that FWS required "absolute scientific certainty" that the Bat was endangered before it would list the species. Pls' Opp. at 19-22. By not raising this argument earlier, Plaintiffs have waived it. See Network IP, LLC v. FCC, 548 F.3d 116, 128 n.10 (D.C. Cir. 2008) (holding that any arguments not made in opening brief are waived).

came to a rational conclusion based on that data. This Court must accept FWS's conclusions as long as they are reasonable.

1. The 8 to 13 Year Timeframe for the Spread of Pd/WNS Indicated a Threatened Listing

FWS estimated in its listing determination that *Pseudogymnoascus destructans* ("Pd") and white-nose syndrome ("WNS") would spread throughout the entirety of the Bat's range in 8 to 13 years from the date of the listing determination, or 2023-2028. See 80 Fed. Reg. at 18,022. FWS used a two-step process to arrive at this estimate. First, FWS used two facts—that WNS was first discovered in New York in 2007 and that it had spread to at least 25 states and 5 Canadian provinces as of February 2015—to calculate that "the area affected by Pd in North America is expanding at an average rate of roughly 175 miles [] per year." Id. at 17,997-98. Based on this calculation, FWS was able to project that Pd "can be expected to occur throughout the range of the [Bat] in an estimated 8 to 9 years from December 2014," or in 2022-2023. Id. Second, FWS examined the estimate created by the Canadian agency responsible for listing endangered and threatened species pursuant to their Species at Risk Act, the Committee on the Status of Endangered Wildlife in Canada ("COSEWIC"). See id. at 17,998. Using a similar method as FWS to calculate the spread of Pd, COSEWIC estimated that Bat's range would be infected with Pd within 12 to 15 years from November 2013, or 2025-2028. Id. (citing COSEWIC 2013, p. xiv). Therefore, FWS combined their estimate with COSEWIC's and determined that Pd and WNS would spread throughout the species' entire range in 8 to 13 years or 2023-2028. See id. at 18,022.

FWS utilized its final estimate to determine whether the Bat met the definitions of either an endangered species or threatened species. "[B]ecause the fungus that causes WNS (Pd) may not spread throughout the species' range for another 8 to 13 years [and] because no significant declines have occurred to date in the portion of the range not yet impacted by the disease," FWS concluded

that the Bat "is not currently in danger of extinction throughout all of its range." Id. at 18,008. However, "because Pd is predicted to continue to spread, [FWS] also determine[d] that the [Bat] is likely to be in danger of extinction within the foreseeable future." Id. Therefore, FWS reasonably concluded that the species should be listed as a threatened species. Id.

Nonetheless, Plaintiffs assert that FWS's 8 to 13 year timeframe is arbitrary for two reasons. Pls' Opp. at 22. First, Plaintiffs proclaim that FWS did not analyze what the rangewide spread of WNS would mean for the Bat. Id. However, the listing determination states in several places that, absent a way to stop the disease, the spread of WNS to currently uninfected areas would lead to similar population declines that Bats have suffered in WNS-impacted areas. 80 Fed. Reg. at 18,021 ("Once WNS becomes established in new areas, we can expect similar, substantial losses of bats beginning in the first few years following infection."); see also id. at 17,996, 17,998.[5]

Second, Plaintiffs argue that it was arbitrary and capricious for FWS to rely on its 8 to 13 year timeframe to conclude that the Bat is a threatened species "when [FWS] 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." Pls' Opp. at 25. But FWS's decision to change its position on the Bat's status between the proposed rule and the final rule does not render scientific statistics, like FWS's 8 to 13 year timeframe, arbitrary and capricious. FWS's timeframe is only arbitrary and capricious if FWS: (1) relied on factors which Congress had not intended it to consider; (2) entirely failed to consider an important aspect of the problem; (3) offered an explanation for its decision that runs counter to the evidence before the agency; or (4) based the decision on an analysis that is so implausible that it could not be ascribed

[5] Plaintiffs also argue that Defendants "d[id] not respond to [their] argument [] that the determination also unlawfully failed to define rationally the Bat's 'foreseeable future'." Pls' Opp. at 18. These statements in the listing determination respond to Plaintiffs' argument.

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). Plaintiffs have not alleged that FWS did any of those things in developing its 8 to 13 year timeframe for the rangewide spread of WNS. In fact, Plaintiffs apparently do not even dispute that the 8 to 13 year timeframe constitutes the best available science.[6]

Plaintiffs actually take issue with FWS's decision to list the species as threatened, when the proposed rule suggested that the species should be listed as endangered. See Pls' Opp. at 23-25. As Federal Defendants argued in our opening brief, federal agencies are allowed to reconsider and amend their proposed rules. See Nat'l Mining Ass'n v. Mine Safety & Health Admin., 512 F.3d 696, 699 (D.C. Cir. 2008) ("An agency's final rules are frequently different from the ones it published as proposals. The reason is obvious. Agencies often 'adjust or abandon their proposals in light of public comments or internal agency reconsideration.'") (quoting Kooritzky v. Reich, 17 F.3d 1509, 1513 (D.C. Cir. 1994)). In this case, FWS reconsidered the information it already had, analyzed any new information that was acquired or developed during notice and comment, and determined that the Bat was properly classified as threatened. Although Plaintiffs would have preferred that FWS stick with the conclusions it made in its proposed rule, FWS's decision to amend its proposed rule after careful consideration and reevaluation is not arbitrary or capricious.

2. WNS-Free Areas in the Species' Range Indicated a Threatened Listing

In its listing determination, FWS stated that "about 40 percent of the species' total

[6] Plaintiffs assert that FWS has "mischaracterized [their] argument as a challenge to whether the Service's estimated timeframe for rangewide WNS spread was based on the best available science." Pls' Opp. at 23. Apparently, Plaintiffs do not believe they raised that issue in their briefing. See id.; but see Pls' Opp. at 19; Pls' MSJ at 38; First Am. Compl., ECF No. 27 at ¶ 124; Defenders of Wildlife's Compl., ECF No. 1 at ¶ 160. FWS accepts Plaintiffs' apparent concession that the 8 to 13 year timeframe is based on the best available science. See Pls' Opp. at 23.

geographic range" had not yet been affected by WNS. 80 Fed. Reg. at 18,021. This percentage, which was calculated by FWS, was accurate at the time of the listing determination. See id. at 17,996 (citing FWS 2015, unpublished data ("Pd now affects an estimated 60 percent of the [Bat's] total geographic range . . . ."); see also LAR 49295. Because WNS had not impacted that portion of the species' geographic range, Bats in those areas "ha[d] not declined" and "appear[] stable" according to recent surveys. See 80 Fed. Reg. at 18,018, 18,021-22 ("[I]n the currently uninfected areas we have no evidence that [Bat] numbers have declined, and the present threats to the species in those areas are relatively low."); id. at 17,983-84 (citing research documenting Bats in WNS-free areas). The fact that Bats have maintained their historical populations in the 40 percent of the species' geographic range that has not been impacted by WNS indicates that the species as a whole is not currently on the brink of extinction (i.e., endangered). See id. at 17,983-84, 18,021-22. However, as FWS fully recognizes, the species is likely to become endangered in the foreseeable future due to the spread of WNS and the corresponding declines in Bat populations. See id. at 18,021. Therefore, FWS reasonably concluded at the time of the listing determination—when 40 percent of the species' range was WNS-free—that Bats are a threatened species as defined by the ESA. See id.

Plaintiffs attempt to counter FWS's reasonable conclusion by arguing that the agency "ignored the explicit findings stated in the final rule that the Bat has always been uncommon to rare in the as-yet-infected areas" and "omit[ted] any discussion of the extensive evidence . . . summarized in the Rule of the species' (formerly) high population density in WNS-infected areas and low population density in uninfected areas" in making its listing determination. Pls' Opp. at 26-27. However, as Plaintiffs recognize in these very sentences, the listing determination does discuss the fact that Bats were historically more common in the WNS-impacted Northeastern and

Midwestern portions of its range than in the WNS-free portions of its range. See 80 Fed. Reg. at 17,975-84; Pls' MSJ at 42 (quoting 80 Fed. Reg. at 17,976, 17,979, 17,981-83). FWS actually devotes over eight pages of its listing determination to analyzing the populations of the species in all five of its ranges. 80 Fed. Reg. at 17,975-84. Moreover, Plaintiffs conceded that the listing determination discusses the fact "that the species' pre-WNS populations were concentrated in its northeastern and midwestern ranges, with much lower population densities in the northwestern, western, and extreme southern ranges." See Pls' MSJ at 42. Therefore, any argument that the listing determination did not consider that Bats are less common in some places than in others is disingenuous and contradicted by Plaintiffs' own briefing.

Plaintiffs also argue that FWS is required to "provide a rational explanation for why the same data [regarding WNS's impacts to the species' core range] can support" a proposed endangered determination in FWS's proposed rule to list the species, but a threatened determination in the final listing. See Pls' Opp. at 27. But FWS does not have a legal obligation to explain its change of position from a proposed rule to a final rule as long as the agency provided a rational explanation of its ultimate decision—that the Bat is a threatened species. See Nat. Res. Def. Council v. Evans, 254 F. Supp. 2d 434, 441-42 (S.D.N.Y. 2003); Fed'n of Fly Fishers v. Daley, 131 F. Supp. 2d 1158, 1163 (N.D. Cal. 2000). The case cited by Plaintiffs, Ctr. for Native Ecosystems v. FWS, does not change this legal principle. 795 F. Supp. 2d 1199, 1207-08 (D. Colo. 2011); Pls' Opp. at 27.

In Ctr. for Native Ecosystems, the plaintiffs challenged a final rule withdrawing a proposed rule to list a species as threatened under the ESA. 795 F. Supp. 2d at 1204-05. The final rule summarily stated that the numerous threats to the species detailed in the proposed rule were "not significant" and therefore listing the species was not warranted. Id. at 1205 (citing AR 119). In its

analysis of whether the final rule was arbitrary and capricious, the court stated:

> Remembering that FWS had previously found that energy development was a significant threat which made the listing of [the species] a high priority in 2004 and 2005, and that the 2006 proposed rule concluded that energy development was a serious threat, it is difficult to reconcile this record with the Final Rule's conclusion of no foreseeable threat. No explanation is given for why these previously perceived threats had been significantly eliminated.

Id. at 1207 (internal record citations omitted). The court went on to conclude that, "[i]n its briefing and proposed order, FWS does not really deny the absence of discussion of future threats of energy development" on the species as required by 16 U.S.C. § 1533(b)(1)(A). Id. at 1208. Therefore, the court held that FWS "failed to consider the best information available concerning the impact of energy development presently and in the future" and (for this and other reasons) found that the final rule was arbitrary and capricious. Id. The deficiency that led to the court's holding was not that FWS had changed its position from the proposed rule to the final rule. Rather, it was that FWS did not "discuss or address in any detail" the threats' impact on the species. Id. at 1207-08. Unlike in Ctr. for Native Ecosystems, FWS thoroughly analyzed all the threats to the Bat and the associated impacts (including the impacts of WNS on the species both within WNS-impacted areas and in the 40 percent of the species' range that was WNS-free) using the best available science and arrived at a reasonable conclusion. See Fed. D.'s MSJ at 19-28.

Finally, Plaintiffs argue that FWS ignored a statement generated by the Epidemiology, Etiology, and Ecological Research Working Group that Bats in the westward and southern periphery of their range may be primarily summer residents in the region and that the core of their hibernating distribution occurs entirely in hibernacula currently or imminently affected by WNS. See Pls' Opp at 27-28; LAR 47746. Therefore, according to the Group, Bats could migrate to the western and southern regions from hibernacula already affected by WNS "hastening the range-wide population impacts to this species." LAR 47746. Bats are not long-distance migrants. 80 Fed.

Reg. at 17,987 (citing studies suggesting that Bats disperse only 35 to 55 miles between their summer roosts and winter hibernacula). Based on this information, it is likely that WNS-infected bats could migrate to non-Pd infested hibernacula on the periphery of WNS-infected areas thereby spreading the disease. See id. at 18,000. However, it is unlikely that Bats could migrate outside of that range and infect hibernacula hundreds of miles away, "hastening" the spread of the disease. For example, a WNS-infected Bat in Wisconsin could probably not migrate to British Columbia and thereby infect the west coast. See id. at 17,987. By considering the actual spread of WNS and Pd to date in their 8 to 13 year estimate, FWS accounted for every possible factor that contributes to the spread of the disease—including that Bats could infect hibernacula on the periphery of WNS-infected areas due to their migration distances. See id. at 18,000.

3. Population Data for the Midwest Range of the Species Indicated a Threatened Listing

Between issuance of the proposed and final listing determination, FWS received new data regarding the population size of Bats in the species' Midwest range (Missouri, Illinois, Iowa, Indiana, Ohio, Michigan, Wisconsin, and Minnesota). 80 Fed. Reg. at 17,979. The agents of the Midwest Wind Energy Multi-Species Habitat Conservation Plan[7] submitted information to FWS in 2015 estimating that there were 4,088,258 Bats in the states of Illinois, Iowa, Indiana, Ohio, Michigan, and Missouri as of 2013. This "rough estimate" was calculated by: (1) documenting the 2013 Indiana bat winter population within those six states; (2) determining the ratio of Bats to Indiana bats caught in summer mist-net surveys in 2013; and (3) using that ratio to determine the Bats' winter population. Id. at 17,979; LAR 57311. FWS noted that "[t]his estimate has limitations" because it "is based on data that were primarily gathered prior to the onset of WNS in

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

the Midwest; thus declines that have occurred in WNS-affected States are not reflected in the estimated number." Id. at 17,979. Because of this limitation, FWS took into account the documented effects of WNS in the Midwest as of 2015 (population declines due to WNS were primarily limited to Ohio and Illinois at that time) before concluding that "there may still be several million bats" within that six-state area. Id. FWS cautioned that "there is uncertainty as to the accuracy of this estimate, and it should be considered a rough estimate." Id. Even so, FWS's revised estimate for that six-state area was based on the best scientific and commercial data available. FWS used this population estimate, along with scientific evidence that Bats exist in portions of the species' range not yet impacted by WNS and even in places impacted by WNS for years (like Long Island, New York and West Virginia), to conclude that there were "potentially several million [Bats] still on the landscape across the range of the species." See id. at 18,021. A population estimate of "potentially several million" Bats indicates a species that is not currently on the brink of extinction. See id. But rather it indicates a threatened species—a species that is likely to become in danger of extinction at some point in the foreseeable future upon the spread of WNS and the subsequent population declines.

Plaintiffs argue that FWS's reliance on the Midwest Wind Energy Multi-Species Habitat Conservation Plan's summer mist-net survey data as a basis for their estimate that there may "be potentially be millions of bats" within that six-state area is unlawful. See Pls' Opp. at 28, 30. In Plaintiffs' view, summer mist-net survey data is not the best available science because FWS has stated that the "preferred method for monitoring" Bats are hibernacula counts. See id. at 30 ("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."); see LAR 40575. However, as the United States Court of Appeals for the District of

Columbia Circuit has explained, FWS "must utilize the 'best scientific . . . data *available*', not the best scientific data *possible*." Bldg. Indus. Ass'n of Superior Cal. v. Norton, 247 F.3d 1241, 1246 (D.C. Cir. 2001) (internal quotations omitted); see also In re Polar Endangered Species Act Listing, 794 F. Supp. 2d at 106. In this case, the Midwest Wind Energy Multi-Species Habitat Conservation Plan's summer mist-net surveys were conducted in a similar manner in six separate states. LAR 57312. Plaintiffs have "pointed to no information [hibernacula counts in those areas] that was superior" to those mist-net surveys. In re Polar Endangered Species Act Listing, 794 F. Supp. 2d at 106. Because "an agency is prohibited only from disregarding scientifically superior evidence available at the time," FWS could lawfully rely on the summer mist-net data in estimating Bat population size in the six-state area. See Defs. of Wildlife v. Jewell, 70 F. Supp. 3d 183, 194 (D.D.C. 2014), aff'd, 815 F.3d 1 (D.C. Cir. 2016).

Plaintiffs also argue that "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 . . . constitute the best scientific data available." Pls' Opp. at 29. But FWS is not required to independently verify all of the data submitted to it by scientists, experts, states, other government agencies, or the public. See Friends of Blackwater v. Salazar, 691 F.3d 428, 434-35 (D.C. Cir. 2012) (holding that under the best available scientific and commercial data available standard FWS "is entitled to rely upon the best data available to it . . . rather than conducting its own population count in order to determine whether a species is endangered."); see also Sw. Ctr. for Biological Diversity v. Babbitt, 215 F.3d 58, 60 (D.C. Cir. 2000). Moreover, although hibernacula counts are considered a preferred method for monitoring Bats, summer-mist net

surveys are a scientifically recognized alternative to hibernacula counts[8] and reliable method of estimating Bat populations. See 80 Fed. Reg. at 17,976-85 (detailing the dozens of summer mist-net surveys for Bats conducted by scientists across the country); LAR 40575.

In a final effort to disparage FWS's conclusion that there are "potentially millions" of Bats, Plaintiffs argue that FWS's population estimate was based solely on the six-state survey discussed above and not on evidence of other Bat populations across the species' range. Pls' Opp. at 29-30. However, FWS's listing determination is unambiguous: "The presence of potentially millions of [Bats] across the species' range (see *Distribution and Relative Abundance*, above), while by no means dispositive on its own right, also indicates a current condition in which species is not 'on the brink' of extinction." 80 Fed. Reg. at 18,022. The listing determination explicitly states that potentially millions of Bats could exist "across the species' range," not just in the six-state area. Id. It also refers the reader to its *Distribution and Relative Abundance* section, which describes Bat populations in WNS-free areas and the populations that have survived in WNS-impacted areas. Id. Therefore, FWS's population estimate was not limited to the six state area. See id. It includes Bats in other Midwestern states, remnant survivors in the Bat's WNS-impacted range, and all Bats in areas of the range not impacted by WNS.[9] See id.

4. The Continuing Presence of the Species in WNS-Impacted Areas Indicated a Threatened Listing

The listing determination discusses the fact that some Bat populations continue to exist in areas (like Long Island, New York and West Virginia) that have been impacted by WNS for years.

[8] As discussed in Federal Defendants' opening brief, there are difficulties associated with counting or even observing Bats in their hibernacula. See Fed. D.'s MSJ at 38.

[9] As an aside, FWS determined that there may still be "several million bats" within the six-state area. Id. at 17,979. So even if FWS's ultimate "potentially millions" population estimate was based solely on the six-state area (which it was not), FWS's estimate of the entire Bat population is still accurate. Id. at 18,022.

See id. at 17,978, 17,997. Although it is not known how these particular Bat populations survive in WNS-impacted areas, "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, [or] whether those populations have been reduced below supportable levels," the fact remains that these Bats persist. Id. at 18,021-22. Based on the "presence of surviving [Bats] in areas infected by WNS for up to 8 years," FWS determined that there is "at least some question as to whether this species is displaying some degree of long-term resiliency."[10] Id. at 18,021.

Although FWS recognized that the declines in the species as a whole still may be unsustainable, the Bat populations that have survived in WNS-impacted areas for nearly a decade raised "some uncertainty as to the *timing* of the extinction risk posed by WNS." Id. (emphasis added). In other words, when combined with the fact that WNS will not reach the furthest portions of the Bat's range for 8-13 years from the date of the listing determination, these populations indicate that the species is not currently on the brink of extinction. See 16 U.S.C. § 1532(6); Polar Bear Memo. Rather, the species is likely to become endangered in the foreseeable future (i.e., a threatened species). See 16 U.S.C. § 1532(20).

Plaintiffs' numerous attempts to attack this complete and well-reasoned analysis are meritless. First, Plaintiffs assert that FWS "had no credible basis" for stating that some Bats persist in WNS-impacted areas. Pls' Opp. at 31 (capitalization altered). However, numerous observations, reports, and scientific studies constituting the best scientific data available at the time of the listing determination clearly show that some Bat populations continue to exist in areas that have been impacted by WNS for years. For example, a full eight years after WNS first appeared in New York,

[10] As noted in Federal Defendants' opening brief, resiliency "means having the ability to withstand natural environmental fluctuations and anthropogenic stressors over time." 80 Fed. Reg. at 18,021; Fed. D's MSJ at 39 n. 8.

Bats have been observed and documented on Long Island[11] by FWS, the New York State Department of Environmental Conservation, the National Parks Service, and environmental scientist Michael S. Fishman. LAR 23553-54 (FWS documenting 782 passes of Bats using acoustic methods at the National Wildlife Refuge Complex in New York between June 1 and July 15, 2014); LAR 33503 (New York State Department of Environmental Conservation detailing capture rates of Bats and stating "[t]his is close to the average pre-WNS capture rate for all mist net surveys on record in NY"); LAR 34159 (biologist stating that he "can confidently predict that CPUE [catch per unit effort] for netting [of Bats] on Long Island this summer is WAY higher than we have seen elsewhere in NY in recent years. Similar to statewide pre-WNS numbers"); LAR 55191 (reports of the National Park Service having "success" in 2014 trapping Bats at the Fire Island National Seashore); LAR 57719 (Michael S. Fishman's "Remnant Populations of Northern Long-Eared Bat in Coastal Communities" "report[s] on a recently discovered remnant population on Long Island, New York . . . [C]atch per effort in the small area sampled is similar to that experienced elsewhere in NY before arrival of WNS. Hints of similar abundance in other coastal habitats in the Northeast have also been reported"). Additionally, researchers have documented Bats across West Virginia seven years after WNS was first confirmed in the state, although in more limited numbers than in pre-WNS years. LAR 31691, 31695 (data aggregated from researchers showing that capture rates of Bats "has remained around 20% [of all species captured] for the last three summers [2014, 2013, 2012]" but is less than the 32.5% capture rate in 2008 when WNS was first documented in the state); 80 Fed. Reg. at 17,978. This information is a credible basis for FWS

[11] Plaintiffs continue to assert that Bats are "trapped" on Long Island and imply that their purported isolation from other parts of WNS-impacted New York could be the only reason that this population of Bats continues to exist. See Pls' MSJ at 46-47; Pls' Opp. at 31. However, Bats are not "trapped" on Long Island; they are biologically capable of flying to and from Long Island as they wish. See LAR 34135.

to conclude that some Bats exist in areas post-WNS.

Next, Plaintiffs go so far as to claim that FWS "lacks any record support" whatsoever for determining that there is "at least some question as to whether this species is displaying some degree of long-term resiliency." Pls' Opp. at 31; 80 Fed. Reg. at 18,021. But, as detailed in the above paragraph, the administrative record is replete with information showing that Bats can survive in areas that have been impacted by WNS for nearly a decade. See LAR 23553-54; LAR 31691, 31695; LAR 33503; LAR 34159; LAR 55191; LAR 57719. While FWS does not know how these populations survive in the face of WNS, they do. See id.; 80 Fed. Reg. at 18,021-22. That is more than enough information for FWS to reasonably state that there is "at least some question" about the Bat's resiliency.[12] See 80 Fed. Reg. at 18,021.

Finally, Plaintiffs proclaim that FWS "ignor[ed]" the fact that Bats are highly susceptible to WNS, no individual Bat has been known to survive WNS, and that the Bat's biology "raises serious doubts that the species can persist in stable and viable populations in the face of WNS." Pls' Opp. at 31. However, the listing determination clearly acknowledged the species' susceptibility to WNS. 80 Fed. Reg. at 17,988, 18,012 (stating that the Bat "has been found to be one of the most highly susceptible bat species to WNS" and that there is "little, if any, data to support" Bats surviving multiple years of WNS exposure and infection). FWS also concludes in the listing determination that, even with the populations that have survived in WNS-impacted areas like Long Island and West Virginia, "we believe the declines seen in this species may be unsustainable." Id. at 18,021. FWS explicitly stated that it made this conclusion "based upon our best understanding of conservation biology" and referenced the section of the listing determination

[12] Contrary to Plaintiffs' implications, FWS did not determine that the species is in fact resilient—the listing determination simply states that there is a question as to whether the species is resilient based on the surviving populations. Id.

that discusses the Bat's biology. Id. at 18,021-22. Far from ignoring this information, FWS took it into consideration in making its listing determination as it is legally required to do. See 16 U.S.C. § 1533(b)(1)(A). Plaintiffs are well aware that FWS did not ignore these facts given that their briefs cite to the exact pages in the listing determination containing the information. See Pls' MSJ at 23-24 (citing 80 Fed. Reg. at 17,998, 18,012), 46-47 (citing 80 Fed. Reg. at 18,021-22); Pls' Opp. at 31 (citing 80 Fed. Reg. at 18,021-22).

D. FWS Considered the Cumulative Effects of Threats to the Species

In making its decision to list the Bat as a threatened species, FWS considered the impacts of the threats to the species in almost 20 pages of analysis. See 80 Fed. Reg. at 17,989-18,006. During this analysis, FWS also discussed the cumulative effect that the particular factor being analyzed might have in combination with WNS—the primary factor affecting the Bat. See id. at 17,993, 18,001, 18,005-06; see also Fed. D.'s MSJ at 23-24 (quoting FWS's discussion of cumulative effects in each of the listing factors). In addition, FWS examined the cumulative impacts of these threats on the species in a section of the listing determination entitled "Cumulative Effects from Factors A Through E" and in response to public comments. See id. at 18,006, 18,014 ("[A]s [WNS] continues to spread and cause mortality, other sources of mortality could further diminish the species' resilience or ability to survive. . . . We expect that [Bat] populations with smaller numbers and with individuals in poor health will be less able to persist or to rebound."), 18,017. Ultimately, FWS concluded that "WNS is currently the predominant threat to the species, and if WNS had not emerged or was not affecting [Bat] populations to the level it has, we presume the species would not be experiencing the dramatic declines that it has." Id. at 17,989.

Despite this in-depth analysis of cumulative effects, Plaintiffs argue that the listing determination "fail[s] to consider whether the cumulative effects of threats under listing factors (A), (D), and (E), together with WNS, warrant an endangered listing." Pls' Opp. at 32. In Plaintiffs'

view, FWS "dismissed these cumulative effects findings out of hand in the Determination section." Id. Plaintiffs provide no further explanation of how FWS "dismissed" the cumulative effects findings. See id. at 32-33. Given FWS's lengthy discussion and analysis of the cumulative effects and Plaintiffs' lack of support for their assertion, Plaintiffs' argument is meritless.

E. The Final SPR Policy

Plaintiffs have asserted a facial challenge to the Final SPR Policy and a challenge to FWS's application of the Final SPR Policy to the Bat. See Pls' MSJ at 15. As discussed fully in Federal Defendants' opening brief, both of Plaintiffs' challenges fail. See Fed. D.'s MSJ at 40-63. Regarding the facial challenge, Plaintiffs have failed to meet their burden of establishing that no set of circumstances exists under which the Final SPR Policy is valid as required by the Supreme Court and the Court of Appeals for the District of Columbia Circuit. Id. at 41-43. Furthermore, under the Chevron framework, the Final SPR Policy is a reasonable interpretation of the ambiguous phrase "significant portion of its range" in the ESA. Id. at 44-63. Plaintiffs' as-applied challenge also fails because FWS properly applied the Final SPR Policy to the Bat. Id. at 63-70.

As explained below, the arguments raised in Plaintiffs' opposition brief did nothing to help their case. While Plaintiffs may believe that the Final SPR Policy is only a reasonable interpretation of the ESA in "Superman Comics' Bizarro world, where reality is turned upside down," they have failed to meet their very real world burden of establishing that the Final SPR Policy is arbitrary, capricious, or manifestly contrary to the ESA. See Pls' Opp. at 57 (quoting Nat. Res. Def. Council v. Daley, 209 F.3d 747, 754 (D.C. Cir. 2000)).

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

The Supreme Court's "no set of circumstances" test applies in this case because it was extended to facial challenges to agency rules by Cellco P'ship v. FCC, 700 F.3d 534, 549 (D.C.

Cir. 2012). See United States v. Salerno, 481 U.S. 739 (1987) (establishing the "no set of circumstances" test). Applying the test here, Plaintiffs' facial challenge to the Final SPR Policy fails because Plaintiffs cannot "establish that no set of circumstances exists under which the [Final SPR Policy] would be valid." Reno v. Flores, 507 U.S. 292, 301 (1993) (quoting Salerno, 481 U.S. at 745); Cellco P'ship, 700 F.3d at 549. In fact, Plaintiffs have conceded that there is at least one set of circumstances where applying the Final SPR Policy would result in an endangered listing based on a species' status in a significant portion of its range—when the species is not classified as a threatened species or an endangered species throughout all of its range. See Pls' MSJ at 63; Fed. D.'s MSJ at 52-53.

Plaintiffs assert that the Final SPR Policy fails under Salerno because Defendants "do not point to any instance" where a species has been determined to be "threatened" throughout its range and also "endangered" in a significant portion of its range. Pls' MSJ at 41. Plaintiffs' argument misses the mark. As explained above, Salerno requires that Defendants show that there are circumstances under which the Final SPR Policy is valid, not that the Final SPR Policy is valid under all circumstances. See Salerno, 481 U.S. at 745.

Additionally, despite Plaintiffs' contentions, courts have not "limited the 'no circumstances' test to facial challenges of procedural regimes established by regulations involving considerable agency discretion prior to the actual implementation of those regulations." Pls' Opp. at 37-38. In particular, neither Flores nor Cellco P'ship hold that the "no set of circumstances" test is subject to such limitations. Additionally, the district court cases relied upon by Plaintiffs in support of their argument that Chevron applies because the question presented is "one of pure statutory interpretation" are neither binding nor instructive. See Pls' Opp. at 38. Those cases merely highlight the fact that courts in this Circuit do not take a consistent approach when deciding

whether to apply Flores or Chevron to facial challenges to regulations. Chamber of Commerce of United States of Am. v. Nat'l Labor Relations Bd., 118 F. Supp. 3d 171, 185 n.8 (D.D.C. 2015); Am. Petroleum Inst. v. Johnson, 541 F. Supp. 2d 165, 188 (D.D.C. 2008)). Therefore, it would be completely reasonable for this Court to evaluate Plaintiffs' challenge to the Final SPR Policy under the "no set of circumstances" test established by Salerno and extended to regulations by Flores and Cellco P'ship. If it did so, the Court would conclude (as Plaintiffs have conceded) that there is at least one set of circumstances where the Final SPR Policy is valid and the Policy must be upheld.

2. Chevron Step One - "Significant Portion of Its Range" is Ambiguous

If the Court determines that the "no set of circumstances" test is not the appropriate standard for reviewing the Services' interpretation of "significant portion of its range," the Court must review the Services' interpretation under the Chevron framework, 467 U.S. 837. Under Chevron step one, the Court answers "the question whether Congress has directly spoken to the precise question at issue." Id. at 842. The "precise question at issue" in a particular matter is the "specific issue addressed by the regulation" or rule. See id.; K Mart Corp. v. Cartier, Inc., 486 U.S. 281, 291 (1988). If the specific issue addressed by the regulation or rule is clear, "that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." Chevron, 467 U.S. at 842-43. But, "[i]f the statute is silent or ambiguous with respect to the specific issue," the Court must move on to Chevron step two. Id. at 843.

Congress has not directly and unambiguously spoken on the "specific issue addressed by the" Final SPR Policy—how the Services should interpret the phrase "significant portion of its range." See K Mart Corp., 486 U.S. at 291; 79 Fed. Reg. at 37,579. Congress did not define the phrase "significant portion of its range" or any of the words that comprise that phrase in the ESA. See 16 U.S.C. § 1531 *et seq.* Additionally, it is not clear from the other provisions in the ESA or the ESA's legislative history how this phrase should be interpreted. See id. Based on these facts,

every court that has ever considered the issue has held that Congress has not directly spoken on the definition of "significant portion of its range" and therefore the phrase is ambiguous under Chevron step one. See Fed. D.'s MSJ at 53 (citing to cases holding that phrase is ambiguous). As recently as March 2017, the D.C. Circuit called the phrase "significant portion" in the ESA "ambiguous." Defs. of Wildlife v. Zinke, 849 F.3d 1077, 1092 (D.C. Cir. 2017). Even the Plaintiffs have recognized that courts have found the phrase to be ambiguous. See Pls' MSJ at 60.

In response to this pertinent and controlling case law, Plaintiffs assert that the "issue presented by [their] claim is not whether the phrase 'significant portion' of its range is ambiguous." Pls' Opp. at 43; see also id. at 43-44 (referring to Federal Defendants' arguments that the phrase "significant portion of its range" is ambiguous as a "non sequitur" and "irrelevant"). However, when a court reviews an agency's interpretation of a statute it administers under the Chevron framework, the first step must answering the question of whether Congress has directly and unambiguously spoken on how to interpret that statute. See 467 U.S. at 842-43. In this case, this Court must first answer the question of whether Congress has directly and unambiguously spoken on how to interpret the phrase "significant portion of its range" in the ESA. See id.; K Mart Corp., 486 U.S. at 291; 79 Fed. Reg. at 37,579. Therefore, despite Plaintiffs' argument to the contrary, whether the phrase "significant portion of its range" is ambiguous is necessarily at issue and must be resolved by this Court.

Even if this Court was to consider the Final SPR Policy under Chevron step one, the Policy complies with the plain language of the ESA because it does not render any of the bases for listing superfluous. See Fed. Def's MSJ at 39-45. However, because the phrase "significant portion of its range" is in fact ambiguous, every court to consider the issue has concluded that it is ambiguous, and Plaintiffs have presented no argument or case law hinting otherwise, the Final SPR Policy

must be analyzed under Chevron step two.

3. Chevron Step Two – The Services' Interpretation of "Significant Portion of its Range" Is Reasonable

Under Chevron step two, the Court must determine "whether the agency's answer [to the specific issue] is based on a permissible construction of the statute." 467 U.S. at 843. In answering this question, the Court "may not substitute its own construction of a statutory provision for a reasonable interpretation" made by the agency. Id. at 844. The Court must defer to an agency's interpretation of the statute unless it is arbitrary, capricious, or manifestly contrary to the statute. Id.

The Services' Final SPR Policy is a reasonable interpretation of the undefined and ambiguous phrase "significant portion of its range" for the three reasons that were completely and thoroughly discussed in Federal Defendants' opening brief. Fed. D.'s MSJ at 48-62. First, the Final SPR Policy gives independent meaning to each of the four bases for listing and, contrary to Plaintiffs' assertions, the Final SPR Policy does not render any of the bases for listing superfluous. Id. at 49-55. Second, the Final SPR Policy is consistent with both the logical underpinnings of the ESA providing that a species cannot be both a "threatened species" and an "endangered species" and two district court decisions holding that FWS cannot list an entity smaller than a "species" as defined by the ESA. Id. at 55-59. Third, the Final SPR Policy does not "subvert the ESA's conservation goal" or require FWS to consider any other factors in listing a species besides the five mandatory factors in 16 U.S.C. § 1533(a)(1). Id. at 59-62. Nonetheless, Plaintiffs assert that the Final SPR Policy is unlawful under Chevron step two's deferential standard in a scattershot of unpersuasive arguments. As explained below, Plaintiffs' arguments do not establish that the Final SPR Policy is unreasonable, arbitrary or capricious, or manifestly contrary to the ESA.

a. The Final SPR Policy Gives Independent Meaning to All Four Bases for Listing a Species

In response to Federal Defendants' argument that the Final SPR Policy does not render any bases for listing a species "superfluous," Plaintiffs argue that FWS has "subordinate[ed]" one of the four bases for listing a species. See Pls' Opp. at 45. Plaintiffs assert that the use of the word "or" in both parts of the definitions of "endangered species" and "threatened species" does not authorize FWS to subordinate the "endangered in a significant portion of its range" basis for listing to the other bases for listing a species. Pls' Opp. at 45. However, the Final SPR Policy does not treat any of the bases for listing as inferior.

The Services are well aware that the definitions of "endangered species" and "threatened species" indicate that there are four discrete bases for listing a species under the ESA, each of which must have its own separate meaning. 79 Fed. Reg. at 37,582; see 16 U.S.C. § 1532(6), (20). The Services also know that any interpretation they develop for the phrase "significant portion of its range" must include a path for a species to be listed because of one of the four bases for listing. See 79 Fed. Reg. at 37,582; Defs. of Wildlife v. Norton, 258 F.3d 1136, 1141-43 (9th Cir. 2001); Fed. D.'s MSJ at 39-44. That is why, under the Final SPR Policy, "there is at least one set of facts that falls uniquely within each of the four bases [] without simultaneously fitting the standard of another basis[]." 79 Fed. Reg. at 37,582; 37,585. The Final SPR Policy does not "subordinate" any of the bases for listing; it merely establishes a protocol for analyzing the bases for listing. See id. at 37,585. There is no language in the ESA that requires the Services to analyze and make a determination on each of the remaining bases for listing *after* the Services determine that one of the bases for listing is applicable. See 16 U.S.C. § 1531 *et seq.*

Nor have Plaintiffs been able to point to any applicable authority that stands for that proposition. See generally Pls' MSJ; Pls' Opp. The case law cited by Plaintiffs for the assertion that an agency singling out one statutory factor from four others even though "no weights" were

assigned by Congress is inapposite. See Pls' Opp. at 45 (citing Am. Corn Growers Ass'n v. EPA, 291 F.3d 1, 5 (D.C. Cir. 2002)). In American Corn Growers, the United States Environmental Protection Agency promulgated a rule in an effort to address regional haze. Id. at 2. The final rule required states to consider five factors in determining what Best Available Retrofit Technology ("BART") requirements to put on major stationary sources: "the costs of compliance, the energy and nonair quality environmental impacts of compliance, any existing pollution control technology in use at the source, the remaining useful life of the source, and the degree of improvement in visibility which may reasonably be anticipated to result from the use of such technology." Id. at 5-6; see 42 U.S.C. § 7491(g)(2). The rule required states to consider the first four factors on a source-specific basis, but the fifth factor on an area-wide basis. Am. Corn Growers, 291 F.3d at 6. The court determined that the Haze Rule's "splitting of the statutory factors is consistent with neither the text nor the structure of the statute." Id. at 6. Because the factors "were meant to be considered together . . . [t]o treat one of the five statutory factors in such a dramatically different fashion distorts the judgment Congress directed the states to make for each BART-eligible source." Id.

The four bases for listing a species under the ESA are not factors to be considered simultaneously by the Services. See 16 U.S.C. § 1532(6), (20). They are four separate and independent bases for listing species. See id.; Norton, 258 F.3d at 1141-43. Additionally, unlike the conjunctive factors discussed in American Corn Growers, the four bases for listing a species under the ESA are disjunctive. See 291 F.3d at 6; compare 42 U.S.C. § 7491(g)(2) (listing the first four factors "*and*" the fifth factor) with 16 U.S.C. § 1532(6), (20) (endangered species means "any species which is in danger of extinction throughout all or a significant portion of its range"; threatened species means "any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range"). Given these two

distinctions, and the fact that the Services did not treat one of the bases for listing "in such a dramatically different fashion" from the others, the American Corn Growers case is not instructive. See 291 F.3d at 6.

b. The Final SPR Policy Is Consistent with ESA Principles

The Services' Final SPR Policy is a reasonable interpretation of "significant portion of its range" because it complies with both logic and two judicial decisions that were decided after the Services' previous attempts to develop a significant portion of its range policy. The Services' Final SPR Policy is logical because it ensures that a species does not simultaneously meet the definitions of "endangered species" and "threatened species." Under the definition of "significant" in the Final SPR Policy, a portion of a species' range can be significant only if the species does not warrant listing throughout all of its range. 79 Fed. Reg. at 37,580-81. As discussed in detail in the Policy, defining "significant" in this way precludes the possibility of having a species meet the definition of "threatened species" or "endangered species" due to its status throughout all of its range, but also meet the other definition due to its status in a significant portion of its range. Id. The Final SPR Policy is also consistent with the two judicial decisions because it ensures that a "species" that qualifies as a threatened species or an endangered species must be listed in its entirety and protections of the ESA applied to all individuals of the species wherever found. See WildEarth Guardians v. Salazar, No. CV-09-00574-PHX-FJM, 2010 WL 3895682, at *6 (D. Ariz. Sept. 30, 2010); Defs. of Wildlife v. Salazar, 729 F. Supp. 2d 1207, 1217 (D. Mont. 2010)[13]. In response to these facts, which are fully detailed in Federal Defendants' opening brief at pages 55-59, Plaintiffs raise several ineffective arguments.

[13] Because many cases cited in this brief would be short cited as either Defenders of Wildlife or Salazar, Defendants will refer to the case as Defs. of Wildlife v. Salazar.

i. Plaintiffs' Arguments Regarding the Definitions of "Endangered Species" and "Threatened Species" are Meritless

First, Plaintiffs claim that, because the Services "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" in the Final SPR Policy, Defendants are not allowed to make that argument now. Pls' Opp. at 44. However, the Services did speak to this issue in the Final SPR Policy. See 79 Fed. Reg. at 37,580-81.

Second, Plaintiffs argue, with respect to the definitions of "endangered species" and "threatened species," that the Services have found that the ESA "does not specify the relationship between the two provisions and therefore Defendants cannot argue that a species cannot simultaneously be both an endangered species and threatened species. Pls' Opp at 36 (quoting 79 Fed. Reg. at 37,580). However, Plaintiffs' citation to the Final SPR Policy for their proposition completely misses the mark. An examination of that portion of the Final SPR Policy in context shows that the Services were discussing the relationship between the provisions "throughout all" of a species' range and in "a significant portion" of its range, not the relationship between "endangered species" and "threatened species." 79 Fed. Reg. at 37, 580. "As discussed in our draft policy (76 FR 76987, p. 76992), we have concluded that we must give both the 'all' language and the SPR phrase operational effect. In other words, there must be some circumstances in which each provision results in listing species. The Act, however, does not specify the relationship between the two provisions." Id.

Third, Plaintiffs claim that "Defendants' position that there can be no overlap between listing categories is not supported by the draft or final policy." Pls' Opp. at 46. Whether the Draft SPR Policy supports Federal Defendants' position is irrelevant because the Services explained the basis for their ultimate decision in the Final SPR Policy, which is the only final agency action

challenged here. Furthermore, species analyzed under the Draft SPR Policy could meet the definitions of "endangered species" and "threatened species" simultaneously.[14] Fed. D.'s MSJ at 58-59; see 76 Fed. Reg. at 77,002 ("If the species was threatened throughout all of its range, we would limit our SPR analysis to the question of whether the species is in danger of extinction in a significant portion of its range; if so, we would list the species as endangered; if not, we would list the species as threatened."). Naturally, the Draft SPR Policy would not contain statements that there can be no overlap between listing categories. Fed. D.'s MSJ at 58.

The Final SPR Policy, in contrast, establishes a protocol for analyzing a species' status that ensures the four categories cannot "overlap." 79 Fed. Reg. at 37,585; see Fed. D.'s MSJ at 51, 57. Under the Final SPR Policy, if the Services determine that a species is either in danger of extinction or likely to become so in the foreseeable future throughout all of its range, the species must be listed as, respectively, either an endangered species or threatened species in its entirety, and that is the end of the analysis. 79 Fed. Reg. at 37,585. Similarly, if a species is not in danger of extinction or likely to become so in the foreseeable future throughout all of its range, but is in danger of extinction or likely to become so in the foreseeable future in a significant portion of its range, it is listed as the appropriate status in its entirety. See id. As explained thoroughly in Federal Defendants' opening brief, the text of the ESA (including the definitions of "species," "endangered species," and "threatened species") as well as the two judicial decisions in WildEarth Guardians and Defenders of Wildlife v. Salazar, support the Final Policy's protocol that ensures the four listing categories do not overlap. See Fed. D.'s MSJ at 55-59.

[14] Under the Draft SPR Policy, the Services would have listed a species in this situation as an endangered species. However, as explained in Federal Defendants' opening brief, listing the species as an endangered species would have come with its own set of problems. See Fed. Def's MSJ at 59.

ii. Plaintiffs' Arguments Regarding Whether the Services Can List Anything Less Than a Species are Meritless

Plaintiffs argue that the two district court cases cited by Federal Defendants as supportive of the Final SPR Policy are "inapposite." See Pls' Opp. at 45. But the two cases cited by Defendants are directly on point. See WildEarth Guardians v. Salazar, 2010 WL 3895682, at *6; Defs. of Wildlife v. Salazar, 729 F. Supp. 2d at 1217. Both cases hold that the Services can only list plants, insects, and animals that meet the ESA's definition of "species." See id.; 16 U.S.C. § 1532(16) (defining "species" to include "any subspecies of fish or wildlife or plants, and any distinct population segment of any species of vertebrate fish or wildlife"). Since the Final SPR Policy requires the Services to list a species throughout all of its range if it warrants listing in a significant portion of its range, the Policy is consistent with those court decisions. See Fed. D.'s MSJ at 57-59, 62.

In Defenders of Wildlife v. Salazar, FWS issued a final rule establishing a northern Rocky Mountain gray wolf distinct population segment and simultaneously delisting all gray wolves in the northern Rocky Mountain distinct population segment "except for [those in] Wyoming." 729 F. Supp. 2d at 1213 (citing 74 Fed. Reg. 15,123-15,125) (Apr. 2, 2009). As described by the court, "the fulcrum of Plaintiffs' principal argument is that the Service violated the plain terms of the ESA by listing something less than a [distinct population segment] as endangered." Id. at 1215. In support of this argument, plaintiffs stated in their briefing that the ESA "authorizes the listing and delisting only of 'species'. 16 U.S.C. § 1533(a)(1). The term 'species' is defined to include (1) species; (2) 'any subspecies of fish or wildlife or plants;' and (3) 'any distinct population segment of any species of vertebrate fish or wildlife.' *Id.* § 1532(16)."[15] See 9:09-cv-77 (D. Mont.), Reply

[15] Curiously, the plaintiffs who made this argument in Defenders of Wildlife were some of the same Plaintiffs who are now disputing that the argument is applicable in this case: Defenders of Wildlife, Center for Biological Diversity, and Sierra Club.

Memorandum in Support of MSJ, ECF No. 136 at 8. The court agreed with plaintiffs and determined that, under Chevron step one, the meaning of "species" in the ESA is unambiguous. See 729 F. Supp. 2d at 1221-22. "The ESA requires the agency to determine whether any species is an endangered or threatened species. The words used in the ESA make clear that 'species' excludes distinctions below that of a DPS." Id. at 1221 (internal quotations and citations omitted). Therefore, the court vacated FWS's final rule. Id. at 1229.

In the other case that Plaintiffs believe is inapplicable, WildEarth Guardians, FWS issued a 12-month finding concluding that listing the Gunnison's prairie dog warranted listing within the "montane portion" of its range. 2010 WL 3895682, at *2. However, the 12-month finding also concluded that the Gunnison's prairie dog did not warrant listing in the remaining portion of its range. Id. In addition, FWS determined that the montane prairie dogs are not a "subspecies" or "distinct population segment," although there is a possibility that future research could support such a designation. Id. (citing 73 Fed. Reg. 18,754, 18,754) (Apr. 7, 2008)). In response to the 12-month finding, plaintiff filed a lawsuit alleging "that [FWS] impermissibly determined that something other than a species was an endangered or threatened species which warranted listing." Id. at *3. After determining that Congress had directly defined "species" in the ESA and quoting that definition twice, the court held that FWS "cannot determine that anything other than a species, as defined by the ESA, is an endangered or threatened species" under Chevron step one. Id. at *6. "Because the montane Gunnison's prairie dog cannot warrant listing in accordance with the plain language of the ESA unless there is a species called the montane Gunnison's prairie dog, we set aside the defendant's [] finding and remand the matter to the agency." Id. These cases clearly hold that only "species" as defined by the ESA can be listed and therefore, the Services' Final SPR Policy allowing only "species" as defined by the ESA to be listed is consistent with those cases.

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

Finally, Plaintiffs attempt to argue that the Final SPR Policy is an "unreasonable statutory interpretation" under Chevron step two, because it "subverts the ESA's conservation goals." Pls' Opp. at 48, 52. Plaintiffs avow that the Services have "substitute[d] 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." Id. However, the Final SPR Policy does not even suggest that the Services use anything other than the best scientific and commercial data available and the five enumerated factors in 16 U.S.C. § 1533(a)(1) when deciding whether to list a species. See 79 Fed. Reg. at 37,578. Rather, the Final SPR Policy merely establishes a protocol that the Services follow when they are deciding which one of the four bases applies to the species. See 79 Fed. Reg. at 37,585 ("[I]f we determine that the species is in danger of extinction, or likely to become so in the foreseeable future, throughout all of its range, we will list the species as endangered (or threatened) and no SPR analysis will be required. If the species is neither endangered nor threatened throughout all of its range, we will determine whether the species is endangered or threatened throughout a significant portion of its range. If it is, we will list the species [in its entirety] as endangered or threatened, respectively; if it is not, we will conclude that listing the species is not warranted."). The Final SPR Policy does not introduce cost considerations or any other factors beyond best available science into the listing determination.

Unlike the cases Plaintiffs cite in their brief, the Services have not used their limited resources "as an excuse for the Services' failure to comply with the ESA's clear commands." See Pls' Opp. at 49. First, as discussed fully in Federal Defendants' opening brief, the Final SPR Policy complies with the ESA and the Services have not ignored any "clear commands." See id.; Fed. D.'s MSJ at 48-62. Second, the Services have not used their limited resources "as an excuse" for

the Final SPR Policy. See Pls' Opp. at 49. The Final SPR Policy was adopted for a wide variety of both textual and practical reasons discussed in the Final SPR Policy and Federal Defendants' opening brief. The Services noted that there is a "related benefit of limiting the applicability of the SPR language" because it "reduce[s] the circumstances in which additional legal determinations are necessary," saving the Services' "limited resources to undertake additional actions required in administering the [ESA] to further its conservation purposes." 79 Fed. Reg. at 37,581. However, the Final SPR Policy was not developed for the purpose of conserving resources—it was developed to "resolv[e] ambiguities" in the interpretation of "significant portion of its range" and to "provid[e] guidance" for implementing the developed protocol. Id. at 37,591-92.

Plaintiffs assert that the Services could conserve more resources by adopting an alternative approach to the phrase "significant portion of its range." See Pls' Opp. at 50. "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 . . . that species will be afforded the highest level of protection for which it qualifies and listed as endangered." Id. (internal quotations omitted). But under the statutory interpretation logic Plaintiffs use in this case, if the Services determined that a species was in danger of extinction throughout all or a significant portion of its range, they must still analyze whether the species was threatened throughout all of its range or threatened in a significant portion of its range. See Fed. D.'s MSJ at 54. And if FWS did not analyze each of the four bases for listing, the bases for listing that were not analyzed would be rendered superfluous. See id.

F. FWS Lawfully Applied the Final SPR Policy to the Bat

When applying the Final SPR Policy to a particular species, the Services are first required to "determine whether the species is endangered or threatened throughout all of its range and, if so, list the species accordingly." 79 Fed. Reg. at 37,582. If the species is not endangered or

threatened throughout all of its range, then the Services "look further to determine whether it is endangered or threatened throughout a significant portion of its range." Id. When FWS applied the Final SPR Policy to the Bat, it followed that protocol precisely:

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

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

Plaintiffs do not dispute that FWS correctly applied the Final SPR Policy to the Bat. See Pls' MSJ at 67-69; Pls' Opp. at 56-57. Plaintiffs' only argument is that the Final SPR Policy is, in their opinion, arbitrary and capricious. See id. So, in Plaintiffs' view, even the correct application of the Final SPR Policy to the Bat makes the decision to list the Bat as a threatened species unlawful. See id. As explained in Federal Defendants' opening brief, the Final SPR Policy is lawful because it is a reasonable interpretation of the ambiguous phrase "significant portion of its range." Fed. D.'s MSJ at 44-62; supra Section E. Because FWS properly applied the Final SPR Policy to the Bat, FWS's listing determination concluding that the Bat is a threatened species is also lawful.

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

The Final SPR Policy and the listing determination satisfy the APA's notice and comment requirements for the two reasons that were fully discussed in Federal Defendants' opening brief. First, the responsible agencies provided the public with notice and an opportunity to comment on the draft versions of both documents. Second, because the Final SPR Policy and the listing determination are logical outgrowths of their respective draft documents, the Services were not required to engage in yet another round of comment. Nonetheless, Plaintiffs argue that they were

deprived of a "meaningful" opportunity to comment because the final documents were not logical outgrowths of the proposed documents. See Pls' Opp. at 53-56; Pls' MSJ at 65.

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

The Final SPR Policy is a logical outgrowth of the Draft SPR Policy because interested parties "should have anticipated that the change was possible, and thus reasonably should have filed their comments on the subject during the notice-and-comment period." See CSX Transp. v. Surface Transp. Bd., 584 F.3d 1076, 1079-80 (D.C. Cir. 2009) (internal citations omitted). In other words, Plaintiffs should have anticipated that it was possible the Services would change the Draft SPR Policy to preclude the problematic situation where a species simultaneously qualifies as threatened throughout all of its range and endangered in a significant portion of its range, and provided comments on that issue. See id.; 76 Fed. Reg. at 77,004. In fact, in the Draft SPR Policy, the Services specifically requested comments on how to resolve that issue:

> We recognize that under the draft policy, a species can be threatened throughout all of its range while also being endangered in an SPR. For the reasons discussed in this document, in such situations we would list the entire species as endangered throughout all of its range. However, we recognize that this approach may raise concerns that the Services would be applying a higher level of protection where a lesser level of protection may also be appropriate, with the consequences that the Services would have less flexibility to manage the species and that scarce conservation resources would be diverted to species that might arguably better fit a lesser standard if viewed solely across its range. The Services are particularly interested in public comment on this issue.

76 Fed. Reg. at 77,004. In this paragraph, the Services put the public on notice that there was an analytical and possibly legal problem with the Draft SPR Policy—a species could be a threatened species throughout all of its range while also being an endangered species in a significant portion of its range. See id. Under the Draft SPR Policy, the Services' proposed solution to this problem was to list species that fell within both categories as endangered species so that they would receive "a higher level of protection [although] a lesser level of protection may be appropriate." See id.

However, the Services recognized that this solution would have "the consequence[] that [they] would have less flexibility to manage the species and that scarce conservation resources would be diverted to species that might arguably better fit a lesser standard." Id. Additionally, the Services' proposed solution in the Draft SPR Policy did not fully solve the underlying legal problem—a single species could still meet the definitions of both an endangered species and a threatened species at the same time. See Fed. D.'s MSJ at 58-49 (arguing that, for this reason, the Draft SPR Policy does not comport with logic undergirding the ESA and two court decisions). Recognizing the quandaries created by this portion of the Draft SPR Policy, the Services specifically invited the public to submit comments on this issue. 76 Fed. Reg. at 77,004. As requested, the Services did receive numerous comments addressing this particular matter. See, e.g., SPR002042; SPR002573; SPR002680; SPR002801; SPR003017. Contrary to Plaintiffs' arguments, this is not a case "where the proposed rule gave no indication that the agency was considering a different approach, and the final rule revealed that the agency had completely changed its position." See CSX Transp., 584 F.3d at 1081. Plaintiffs were on notice that the Services not only "might" reconsider this provision, but probably would reconsider it. See id. at 1082.

Plaintiffs incorrectly argue that public comments from others are irrelevant to the issue of whether Plaintiffs received adequate notice. See Pls' Opp. at 55. The D.C. Circuit has "taken into account the comments, statements and proposals made during the notice-and-comment period," along with whether the agency has asked for comments on a particular issue, to determine whether the final rule is a logical outgrowth of the proposed rule. See Nat'l Mining Ass'n, 512 F.3d at 699; CSX Transp., 584 F.3d at 1081. Additionally, Plaintiffs' cited cases do not stand for the proposition that public comments are irrelevant to whether a final rule is a logical outgrowth of the proposed rule. In Plaintiffs' first cited case, Small Refiner Lead Phase-Down Task Force v.

EPA, the agency argued that a single public comment submitted to the agency during notice and comment rulemaking provided adequate notice that the agency would adopt the comment's proposal. 705 F.2d 506, 549 (D.C. Cir. 1983). The court held that the agency failed to provide adequate notice because the proposed rule did not indicate that the proposal was even under consideration and "[a]s a general rule, [the agency] must *itself* provide notice of a regulatory proposal." Id. The court did not hold that it could not look at public comments to help determine whether the final rule is a logical outgrowth of the proposed rule. Furthermore, the Court in National Association of Psychiatric Health Systems v. Shalala did not hold that "the adequacy of notice cannot be judged by the number and type of comments in response to the [proposed rule]." See Pls' Opp. at 55 (quoting 120 F. Supp. 2d 33, 40 (D.D.C. 2000)). The Court was merely describing the defendant's argument: "Finally, Defendant notes that some commentators did comment on the face-to-face assessment requirement, but that in any event, the adequacy of notice cannot be judged by the number and type of comments in response to the [proposed rule]." Nat'l Ass'n Psych. Health Sys., 120 F. Supp. 2d at 40.

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

Like the Final SPR Policy, the listing determination complies with the APA's notice and comment requirements because it is a logical outgrowth of the proposed listing determination. Plaintiffs acknowledge that there are only three possible scenarios for a species' categorization under the ESA: listed as endangered, listed as threatened, or not listed. See 16 U.S.C. § 1553. When FWS issued its proposed listing determination for the Bat it wrote, "We, the U.S. Fish and Wildlife Service [], announce a 12-month finding on a petition to list . . . the [Bat] (*Myotis septentrionalis*) as endangered or threatened under the Endangered Species Act of 1973." 78 Fed. Reg. at 61,046, 61,046 (Oct. 2, 2013). Plaintiffs were on notice that the rulemaking was initiated

by a petition, from Plaintiff Center for Biological Diversity, to list the species as either endangered *or* threatened. See id. at 61,047. Plaintiffs also admit that the draft Section 4(d) rule published in January 2015, while the comment period for the proposed listing determination for the Bat was still open, "signaled the strong possibility of a final threatened listing." Pls' Opp. at 27; see 80 Fed. Reg. at 17,975 (stating that the comment period on the proposed listing determination was open until March 17, 2015). Plaintiffs should have anticipated that the final rule could categorize the Bat as either status. If Plaintiffs had recognized the obvious, they could have submitted comments "present[ing] evidence and rais[ing] objections to try to convince FWS that the law and the science required an endangered listing" on any one of the seven dates on which they submitted public comments. See Pls' MSJ at 29 n.8.

Nonetheless, Plaintiffs argue that the listing determination is not a logical outgrowth of the proposed rule because FWS did not allow the public an opportunity to comment on: (1) the Polar Bear Memo; (2) the Final SPR Policy; or (3) the four rationales that support the threatened species determination. First, as explained in Federal Defendants' opening brief and above, FWS is not required to provide the public with notice and an opportunity to comment on the Polar Bear Memo under the ESA because it does not fall within any of the categories delineated in 16 U.S.C. § 1533(h). See Fed. D.'s MSJ at 29-30. Moreover, because FWS applies its interpretation of "in danger of extinction" in the Polar Bear Memo on a species-by-species basis, the public has already had notice and numerous opportunities to comment on FWS's application of its interpretation, including as to the Bat. See id. at 30. Second, as discussed in the previous section, the public has also had notice and an opportunity to comment on the Final SPR Policy. See supra Section G.1.

Finally, the D.C. Circuit has held that, to avoid "perpetual cycles of new notice and comment periods," a final rule that is the logical outgrowth of a proposed rule "does not require

an additional round of notice and comment even if the final rule relies on data submitted during the comment period." Norton, 247 F.3d at 1246. Because the final listing determination was a logical outgrowth of the proposed listing determination, FWS did not need to reinitiate new notice and comment periods for every piece of information that it used in developing its final rule. See id. Although Plaintiffs argue that the Norton case held that "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,'" that was not the court's holding. See Pls' Opp. at 34. "[A] final rule *that is* a logical outgrowth of the proposal does not require an additional round of notice and comment *even if* the final rule relies on data submitted during the comment period." Norton, 247 F.3d at 1246 (emphasis added). As long as the final rule *is already* a logical outgrowth of the proposed rule, FWS can rely on data submitted during the comment period. See id. Like the present case, in Norton FWS originally proposed to list various species as endangered species, but in the final rule FWS changed its position. Id. at 1243. FWS ultimately chose to list one species as a threatened, withdraw its proposal on another species, and list three as endangered. The court determined that the final rule was a logical outgrowth of the proposed rule and therefore, the new study relied on in the listing determination did not need to undergo notice and comment. See id. at 1246. Solite Corp. v. EPA, which was cited by the court in Norton, supports this reading:

> At the same time, consistent with the APA, an agency may use "supplementary" data, unavailable during the notice and comment period, that "expands on and confirms" information contained in the proposed rulemaking and addresses "alleged deficiencies" in the pre-existing data, so long as no prejudice is shown. Community Nutrition Institute v. Block, 242 App. D.C. 28, 749 F.2d 50, 57-58 (D.C. Cir. 1984); see also Air Transport Ass'n [v. Civil Aeronautics Bd.], 732 F.2d [219], 224 [D.C. Cir. 1984] (APA requirements met despite agency's reliance on internal staff studies unavailable to public before rule's adoption, *because* "critical elements" of proposal did not change and "final rule was a 'logical outgrowth' of the proposed rule").

952 F.2d 473 (D.C. Cir. 1991) (quoting Small Refiner Lead Phase-Down, 705 F.2d at 547)

(emphasis added).

In this case, the data supporting the four rationales expands on and confirms information contained in the proposed listing determination. See id. Plaintiffs have already argued that the data underlying the 8 to 13 year timeframe was considered by FWS in the proposed listing determination. See Pls' Opp. at 25. The proposed listing determination also discusses the species' range, which areas of that range have already been impacted by WNS, and that a substantial portion of the Bat's range is WNS-free. See 78 Fed. Reg. 61,051, 61,061, 61,064. This was the precursor to FWS's estimate that 40% of the species' range had not yet been impacted by WNS. See 80 Fed. Reg. at 18,021. Additionally, while the population estimate for Bats in the six state area was submitted to FWS after the proposed rule, it confirmed FWS's determination that the species was still fairly common in that area and had not yet declined. See 78 Fed. Reg. at 61,064 ("We have not yet seen the same level of decline in the Midwest[]."); id. at 61,052-53 (discussing Midwest populations). Finally, the proposed listing determination discussed data indicating that some Bat populations have survived in both West Virginia and New York. See id. at 61,052.

III. CONCLUSION

Plaintiffs have failed to meet their burden of establishing that the listing determination is in any way arbitrary, capricious, or manifestly contrary to the statute. Plaintiffs' preferences regarding the status of the species do not outweigh FWS's thorough analysis of the best available science or the agency's reasoned conclusion. Likewise, Plaintiffs have not established that the Final SPR Policy is in any way unlawful. Plaintiffs do not get to retroactively dictate the Services' policies because they do not approve of the result. For the reasons set forth above and in Federal Defendants' opening brief, the Court should enter summary judgment in favor of Federal Defendants and deny Plaintiffs' motion for summary judgment on their listing claims.

Dated: September 15, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 15, 2017, I filed the foregoing electronically though the CM/ECF system, which caused the following parties or counsel to be served by electronic means, as more fully reflected on the Notice of Electronic Filing.

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