

significant energy action. FRA has evaluated this final rule in accordance with Executive Order 13211. FRA has determined that this final rule is not likely to have a significant adverse effect on the supply, distribution, or use of energy. Consequently, FRA has determined that this regulatory action is not a "significant energy action" within the meaning of Executive Order 13211.

Privacy Act

Anyone is able to search the electronic form of all our comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70; Pages 19477-78) or you may visit <http://dms.dot.gov>.

List of Subjects in 49 CFR Part 225

Investigations, Penalties, Railroad safety, Reporting and recordkeeping requirements.

The Rule

■ In consideration of the foregoing, FRA amends part 225 of chapter II, subtitle B of title 49, Code of Federal Regulations, as follows:

PART 225—[AMENDED]

■ 1. The authority citation for part 225 continues to read as follows:

Authority: 49 U.S.C. 103, 322(a), 20103, 20107, 20901-02, 21301, 21302, 21311; 28 U.S.C. 2461, note; and 49 CFR 1.49.

■ 2. Amend § 225.19 by revising the first sentence of paragraph (c) and revising paragraph (e) to read as follows:

§ 225.19 Primary groups of accidents/incidents.

* * * * *

(c) *Group II—Rail equipment.* Rail equipment accidents/incidents are collisions, derailments, fires, explosions, acts of God, and other events involving the operation of on-track equipment (standing or moving) that result in damages higher than the current reporting threshold (*i.e.*, \$6,700 for calendar years 2002 through 2005, \$7,700 for calendar year 2006, and \$8,200 for calendar year 2007) to railroad on-track equipment, signals, tracks, track structures, or roadbed, including labor costs and the costs for acquiring new equipment and material.

* * * * *

(e) The reporting threshold is \$6,700 for calendar years 2002 through 2005,

\$7,700 for calendar year 2006, and \$8,200 for calendar year 2007. The procedure for determining the reporting threshold for calendar years 2006 and beyond appears as paragraphs 1-8 of appendix B to part 225.

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Issued in Washington, DC, on December 29, 2006.

Joseph H. Boardman,

Administrator.

[FR Doc. E7-112 Filed 1-9-07; 8:45 am]

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DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

RIN 1018-AV17

Endangered and Threatened Wildlife and Plants; Clarification of Significant Portion of the Range for the Contiguous United States Distinct Population Segment of the Canada Lynx

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Clarification of findings.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service) provide a clarification of the finding we made in support of the final rule that listed the contiguous U.S. Distinct Population Segment of the Canada lynx (*Lynx canadensis*) (lynx) as threatened. In that rule, we found that, "collectively, the Northeast, Great Lakes, and Southern Rockies do not constitute a significant portion of the range of the DPS (Distinct Population Segment)." In response to a court order, we now clarify that finding.

ADDRESSES: The complete file for this clarification is available for inspection, by appointment, during normal business hours at the Montana Ecological Services Office, 585 Shepard Way, Helena, MT 59601 (telephone 406/449-5225).

FOR FURTHER INFORMATION CONTACT: Mark Wilson, Field Supervisor, Montana Fish and Wildlife Office, at the above address (telephone 406/449-5225).

SUPPLEMENTARY INFORMATION: The Service listed the Canada lynx, hereafter referred to as lynx, as threatened on March 24, 2000 (65 FR 16052). After listing the lynx as threatened, plaintiffs in the case of *Defenders of Wildlife v. Kempthorne* (Civil Action No. 00-2996 (GK)) initiated action in Federal District Court challenging the listing of the lynx

as threatened. On December 26, 2002, the Court issued a Memorandum of Opinion and Order to have the Service explain our 2000 finding that "[c]ollectively the Northeast, Great Lakes and Southern Rockies do not constitute a significant portion of the [lynx] DPS." Pursuant to that order, the Service published a notice of remanded determination and clarification of our 2000 finding on July 3, 2003 (68 FR 40075). In that notice, the Service attempted to address the court's order and issued a new finding that the lynx is not endangered throughout a significant portion of its range. Plaintiffs subsequently brought further action claiming that the Service violated the court's 2002 order.

On September 29, 2006, the Court issued another Memorandum of Opinion and Order remanding the same portion of the Service's March 24, 2000, determination of status for the lynx. The court remanded the finding so that "the Service may clearly and specifically address the finding it was ordered to explain three years ago: That '[c]ollectively the Northeast, Great Lakes, and Southern Rockies do not constitute a significant portion of the [lynx] DPS' (Order at 3)." This finding appeared in the final rule that listed the contiguous U.S. DPS of the lynx as threatened (65 FR 16052; March 24, 2000). Because the court remanded the 2000 listing determination for further explanation of how the Service at that time reached its conclusion the Northeast, Great Lakes, and Southern Rockies do not constitute a significant portion of the lynx DPS, the following discussion addresses the basis for the Service's decision in 2000. The conclusions reached in 2000, and the basis for those conclusions, do not necessarily represent the Service's current views, given new information regarding the lynx as well as the evolving views of the courts and the Service regarding the meaning of the definitions of "endangered species" and "threatened species." In fact, when the Service completed the first remand decision, it did not reiterate its conclusion from 2000 on this issue; instead, it based its new conclusion on a different line of reasoning. The Service recently requested that the Office of the Solicitor examine the definition of "endangered species." As a result, the explanation of the Service's rationale for its decision in 2000 provided here may not reflect how the Service will apply the definition of "endangered species" in the future.

Background

The Endangered Species Act of 1973, as amended (16 U.S.C. 1531 et seq.) (Act), defines an “endangered” species as one that is “in danger of extinction throughout all or a significant portion of its range” and a “threatened” species as one that is “likely to become endangered within the foreseeable future throughout all or a significant portion of its range” (16 U.S.C. 1532(6); 16 U.S.C. 1532(20); 50 CFR 424.02(e) and (m)). The Secretary of the Interior “shall publish in the **Federal Register** a list of all species determined * * * to be endangered species and * * * threatened species. Each list shall refer to the species contained therein by scientific and common name or names, if any, specify with respect to [each] such species over what portion of its range it is endangered or threatened, and specify any critical habitat within such range” (16 U.S.C. 1533(c)(1)).

Apart from the statutory and regulatory definitions of “threatened” and “endangered,” no formal guidance shaped the Service’s analysis in the 2000 final listing rule of what was to be considered when evaluating the “significance” of any particular area of a species’ range. Furthermore, at that time there was no case law concerning what should be considered in a determination of a “significant portion” of a species’ range. Since publication of the 2000 final listing rule, several courts have interpreted the meaning of “significant portion of its range.” See, *Defenders of Wildlife v. Norton* 258 F. 3d 1136 (9th Cir. 2001); *Center for Biological Diversity v. Norton*, 411 F. Supp. 2d 1271 (D.N.M. 2005); *Southwester Center for Biological Diversity v. Norton*, 2002 U.S. Dist. Lexis 13661 (D.D.C. July 29, 2002); *Defenders of Wildlife v. Norton*, 239 F. Supp. 2d 9 (D.D.C. 2002); *Center for Biological Diversity v. Lohn*, 296 F. Supp. 2d 1223 (W.D. Wash. 2003); *Environmental Protection Information Ctr. v. National Marine Fisheries Service*, Civ. No. 02–5401 ED2 (N.O. Cal. Mar. 1, 2004); *Defenders of Wildlife v. Norton*, Civ. No. 99–02072 HHK (D.D.C. Dec. 13, 2001); *Defenders of Wildlife v. Secretary, U.S. Department of Interior*, 354 F. Supp. 2d 1156 (D. Or. 2005); *National Wildlife Federation v. Norton*, 386 F. Supp. 2d 553 (D. Vt. 2005).

The historical and current range of the Canada lynx north of the contiguous United States includes Alaska and that part of Canada that extends from the Yukon and Northwest Territories south across the border with the contiguous United States and east to New

Brunswick and Nova Scotia. In the contiguous United States, the current (and historical) range of the lynx extends into four geographic areas: the Northeast, including the States of Maine, New Hampshire, Vermont, and New York; the western Great Lakes, including the States of Minnesota, Michigan, and Wisconsin; the Southern Rocky Mountains in the States of Colorado and Wyoming; and the Northern Rocky Mountains/Cascades, including the States of Montana, Washington, Idaho, Utah, Wyoming, and Oregon. It is notable that the range of the lynx has not been radically contracted or reduced.

When the Service listed the lynx, we followed the Policy Regarding the Recognition of Distinct Vertebrate Population Segments Under the Endangered Species Act (DPS Policy) to evaluate whether the lynx population in the contiguous United States constituted a DPS and thus was a listable entity under the Act (61 FR 4722; February 7, 1996). Under the DPS Policy, a population must meet two criteria to qualify as a DPS: First, the population in question must be determined to be discrete from other members of the taxon, and second, the population in question must be determined to be significant to the taxon. In this case, the taxon is the species *Lynx canadensis*, whose range extends throughout Alaska and Canada into the contiguous United States, as described above.

The DPS Policy allows the use of international boundaries to define discreteness if there are differences in control of exploitation, management of habitat, conservation status, or regulatory mechanisms between the two countries. In the final rule, we determined that, because Canada had no overarching forest practices legislation governing management of national lands and/or providing for consideration of wildlife habitat requirements, and also because of lynx harvest regulations that exist in Canadian Provinces, the differences in management of lynx and lynx habitat between Canada and the United States were sufficient to enable us to use the international boundary between Canada and the contiguous United States to delineate the DPS according to the discreteness criterion (65 FR 16060; March 24, 2000).

In the final rule, we found that lynx in the contiguous United States are significant to the taxon under the DPS Policy because of the climatic, vegetative, and ecological differences between lynx habitat in the contiguous United States and that in northern latitudes in Canada and Alaska. In the contiguous United States, lynx

distribution occurs in habitats at the southern extent of the range of the boreal forest, comprising subalpine coniferous forest in the West and southern boreal forest/hardwoods in the East (for ease of description, we use the general term “southern boreal forest” to describe lynx habitat in the contiguous United States); whereas in Canada and Alaska, lynx inhabit the classic boreal forest ecosystem known as the taiga. Furthermore, lynx and snowshoe hare population dynamics in the contiguous United States are different from those in northern Canada and Alaska (65 FR 16060; March 24, 2000).

Based on the above factors, we determined that the lynx population in the contiguous United States was discrete and significant under the DPS Policy and, therefore, qualified as a listable entity under the Act (65 FR 16060; March 24, 2000).

We then further considered whether individually any of the four geographic areas (Northeast, Great Lakes, Southern Rockies, and Northern Rockies/Cascades) that make up the current range of the lynx within the contiguous United States fulfilled the DPS Policy criteria (65 FR 16060; March 24, 2000). We determined that, within the contiguous United States, each of these areas was discrete from the others. However, we found none of the areas to be significant.

Because of the extensive range of the lynx within the contiguous U.S. DPS, we structured the 2000 final listing to describe the status of the species in the four geographic areas (Northeast, Great Lakes, Southern Rockies, and Northern Rockies/Cascades) (65 FR 16060; March 24, 2000). We determined “that collectively, the Northeast, Great Lakes, and Southern Rockies regions do not constitute a significant portion of the DPS range.” The final rule prefaced this finding with the following discussion:

Within the contiguous United States, the relative importance of each region to the persistence of the DPS varies. The Northern Rockies/Cascades Region supports the largest amount of lynx habitat and has the strongest evidence of persistent occurrence of resident lynx populations, both historically and currently. In the Northeast (where resident lynx populations continue to persist) and Southern Rockies regions, the amount of lynx habitat is naturally limited and does not contribute substantially to the persistence of the contiguous United States DPS. Much of the habitat in the Great Lakes Region is naturally marginal and may not support prey densities sufficient to sustain lynx populations. As such, the Great Lakes Region does not contribute substantially to the persistence of the contiguous United States DPS. We conclude the Northern Rockies/Cascades Region is the primary region

necessary to support the long-term existence of the contiguous United States DPS (65 FR 16061, 16082).

In summary, the Service determined that, collectively, the Northeast, Great Lakes, and Southern Rockies regions do not constitute a significant portion of the range of the DPS because (1) the amount of lynx habitat in the Northeast and Southern Rockies is naturally limited and (2) much of the habitat in the Great Lakes Region is marginal and may not support prey densities sufficient to sustain lynx.

The analysis in the 2000 final listing rule concerning "significance" specifically addressed and focused on the biological "significance" of areas of habitat within the range of the lynx (65 FR 16060; March 24, 2000). The biological context that we viewed as important in the 2000 final listing rule included the distribution of lynx and the contribution of each area to the life-history needs of the species. For example, the final listing rule found that lynx exist in areas with forest types and vegetation that can support snowshoe hares, the primary prey of lynx, and where cover exists for denning. Lynx are highly specialized predators of snowshoe hares. Both lynx and snowshoe hares have evolved to survive in areas that receive fluffy and/or deep snow. Snowshoe hares prefer dense forest understories for forage, cover to escape from predators, and protection during extreme weather (Wolfe et al. 1982; Monthey 1986; Hodges 1999a, 1999b). Lynx use large woody debris, such as downed logs and windfalls, to provide denning sites with security and thermal cover for kittens (McCord and Cardoza 1982; Koehler 1990; Koehler and Britnell 1990; Squires and Laurion 1999; J. Organ, U.S. Fish and Wildlife Service, *in litt.* 1999).

In the 2000 final listing rule, we evaluated "significance" primarily in this biological context. In that rule, we expressed the belief (which we still maintain) that significance should not be determined based on the size of an area alone. We considered the ability of the area to support populations needed for recovery to be the primary consideration. We did not consider sizable area with poor-quality habitat for the species or prey limitations to be significant from a biological perspective.

Thus, we viewed a significant portion to be an important portion, not just a geographically large portion. "Important," in turn, we viewed in the larger context of the Act. The primary purpose of the Act is to conserve imperiled species. See 16 U.S.C. § 1531(b). Moreover, the use of science in pursuing this goal is a theme in the

Act. In particular, in identifying endangered and threatened species, the Act requires that we use "the best scientific and commercial data available." Id. § 16 U.S.C. 1533(b)(1)(A). In this context, we concluded in 2000 that the importance of a portion of a species' range should be measured with respect to the conservation of imperiled species, and we looked to all of the tools of conservation science available to help define what portion of the range of the lynx was important.

In the case of the lynx, despite the extensive contiguous U.S. range, not all of the existing range contains high-quality habitat. Many areas within what is generally described as the historical (and current) range of lynx have never been capable of supporting resident lynx populations because the habitat is naturally marginal. As such, this habitat cannot be biologically "significant" because, even in its original (pre-European settlement) state, it could not support lynx populations or prevent the species from becoming extinct if habitat elsewhere (the "significant" portion of the habitat) were to lose its value as lynx habitat.

As explained in the 2000 final listing rule, much of the area depicted on range maps for lynx in the contiguous United States contains only naturally patchy habitat because that area is the southern edge of the boreal forest, where the boreal forest is transitional with other forest types. Because of the naturally patchy condition of southern boreal forests, snowshoe hares (the primary prey of lynx) are unable to achieve densities similar to those in Canada and Alaska, where the northern boreal forest is expansive and continuous, enabling snowshoe hares to reach extremely high densities (65 FR 16053, 16077, 16081). Lower snowshoe hare densities in the contiguous United States in turn naturally limit the lynx populations. The quality and size of habitat patches affect the ability of areas to support lynx.

The persistence of a species may depend on whether the reproductive success of individuals in good habitats, or sources, exceeds that of individuals in marginal habitats, or sinks. In sink habitats, local recruitment into the population (through reproduction or immigration) is lower than mortality. Patches of higher quality and larger size are more likely to act as "sources" of lynx or support resident lynx populations, whereas smaller patches and/or patches where habitat quality is marginal likely act as "sinks" because such areas are less likely to be able to support lynx populations (McKelvey et al. 1999a; 65 FR 16052, March 24, 2000).

We must clarify here that, just because habitat is marginal, does not mean that lynx can no longer live there, as may be the impression of the Court. Instead, marginal habitat means that such areas cannot and may never have supported resident lynx populations. They may support breeding pairs over a short term, or the regular presence of nonbreeding individuals, migrating into or passing in and out of such areas from source ("significant") habitats. These areas also may be natural "sinks," where lynx mortality is greater than recruitment and lynx are lost from the overall population.

Furthermore, the habitat is marginal because it is at the southern edge of the boreal forest, where the boreal forest is naturally in transition with other forest types. Therefore, the Service did not view the overall size of an area mapped as lynx habitat to be directly relevant to the analysis of "significance" without consideration of the quality of the habitat. Marginal habitat for lynx, no matter how large, is not a significant portion of the range of the lynx because it cannot, and has never been able to, support resident lynx populations for any length of time.

The 2000 final rule described what habitat values existed in the Northeast, Great Lakes, and Southern Rockies regions. Specifically, we carefully explained that:

Northeast Region—Most lynx occurrence records in the Northeast were found within the "Mixed Forest—Coniferous Forest—Tundra" cover type (McKelvey et al. 1999b). This habitat type occurs along the northern Appalachian Mountain range from southeastern Quebec, western New Brunswick, and western Maine, south through northern New Hampshire. This habitat type becomes naturally more fragmented and begins to diminish to the south and west. Most of the historical lynx records from this region were from Maine and northern New Hampshire, which are directly connected with lynx populations in Quebec and New Brunswick, Canada.

To further clarify this, we note that in Vermont, only four verified records of historic lynx occurrence exist (McKelvey et al. 1999b). In fact, we have no evidence of a breeding population ever occurring in Vermont.

Great Lakes Region—The majority of lynx occurrence records in the Great Lakes Region are associated with the "mixed deciduous-coniferous forest" type (McKelvey et al. 1999b) found primarily in northeastern Minnesota, northern Wisconsin, and the western portion of Michigan's upper peninsula. Most of the historical lynx records in this region are from northeastern Minnesota, which supported higher

habitat quality in addition to being directly connected with lynx populations in adjacent Ontario, Canada. In our 2000 final listing rule, we found that, although the mixed deciduous-coniferous forest covers an extensive area of the Great Lakes Region, we considered much of this area to be marginal habitat for lynx because it is a transitional forest type at the edge of the snowshoe hare range. Habitat at the edge of snowshoe hare range supports lower hare densities (Buehler and Keith 1982) that may not be sufficient to support lynx reproduction (65 FR 16056).

Southern Rockies Region—Colorado represents the extreme southern edge of the range of the lynx. The southern boreal forest of Colorado and southeastern Wyoming is isolated from southern boreal forest in Utah and northwestern Wyoming by the Green River Valley and the Wyoming basin (Findley and Anderson 1956 in McKelvey *et al.* 1999b). These habitats likely act as a barrier that reduces or precludes opportunities for immigration and emigration from the Northern Rocky Mountains/Cascades Region and Canada. A majority of the lynx occurrence records in Colorado and southeastern Wyoming are associated with the “Rocky Mountain Conifer Forest” type. The occurrences in the Southern Rockies were generally at higher elevations (1,250 to over 3,750 meters (m) [4,100–12,300 feet (ft)] than were all other occurrences in the West (McKelvey *et al.* 1999b). The montane and subalpine forest ecosystems in Colorado are naturally highly fragmented (Thompson 1994), as they occur at higher elevations at this latitude, which we believed limited the size of lynx populations in this area (65 FR 16059; March 24, 2000).

Further, Colorado has never supported many lynx. A total of 78 lynx reports rated as positive (22) or probable (56) exist in State records since the late 1800s (J. Mumma, Colorado Division of Wildlife, 1998); although McKelvey *et al.* (1999b) considered only 17 of these records “verified.”

Northern Rockies/Cascades region—In this region, the majority of lynx occurrences were associated at a broad

scale with the “Rocky Mountain Conifer Forest.” Most of the lynx occurrences are in the 1,500–2,000 m (4,920–6,560 ft) elevation class (McKelvey *et al.* 1999b). These habitats are found in the Rocky Mountains of Montana, Idaho, eastern Washington, and Utah, and in the Cascade Mountains in Washington and Oregon. The majority of historical verified lynx occurrences in the contiguous United States and, at the time of the 2000 final listing rule, the confirmed presence of resident populations were from this region. Washington, Montana, and Idaho are contiguous with lynx habitat in adjacent British Columbia and Alberta, Canada. Within this region, Washington, Montana, and the Greater Yellowstone area have a long historical record of resident lynx populations. In the final listing rule, the Service stated that “the Northern Rockies/Cascades region supports the most viable resident lynx populations in the contiguous United States” (65 FR 16059; March 24, 2000).

Therefore, we assessed each of the above areas, and concluded that the Northern Rockies/Cascades Region was the primary region necessary to support the long-term existence of the contiguous U.S. DPS. Because the amount of good-quality lynx habitat in the Northeast, Great Lakes, and Southern Rockies regions was limited, the Service did not consider these areas individually or collectively to be a biologically significant portion of the species’ range. We concluded that the overwhelming majority of lynx found in these areas were, and historically had been, those that migrated into the area from source populations in Canada and the Northern Rockies/Cascades, respectively, and eventually died out, to be replaced by new migrants.

The fact that we did not use area estimates for the Northeast or Great Lakes in our final rule demonstrates that we did not focus primarily on the size of any area in our analysis. Furthermore, the only area estimates we used in the final rule were for the Southern Rockies, Northern Rockies, and Cascades; these area estimates were used only in “Factor A” to analyze Federal land management allocations in lynx forest types in these

areas. These estimates were not used to determine whether any of the areas constituted a significant portion of the range of the lynx. As a result, it is important to note at this juncture that any contention that the Great Lakes, Southern Rockies, and Northeast consist of three-quarters of the species’ range has no basis because the habitat in these Regions will not now, and historically did not, support a population of lynx sufficient to maintain the species if lynx habitat in Canada, Alaska and the Northern Rockies/Cascades were lost.

In summary, the Service’s determination that “[c]ollectively the Northeast, Great Lakes, and Southern Rockies do not constitute a significant portion of the [lynx] DPS” was based on an assessment of the biological context of the habitat conditions and lynx status within its contiguous U.S. range. The 2000 final listing rule found that habitat for lynx in the contiguous United States is of varying quality, and much of it was naturally incapable of supporting adequate densities of snowshoe hare sufficient to sustain resident lynx populations. Quality of habitat is an important factor in determining “significance” because marginal habitat, no matter how large, cannot support stable or expanding populations of lynx, except by migration of individual lynx from high quality (“significant”) habitat; and, in fact, may serve as a population sink where lynx mortality is greater than recruitment and lynx are lost from the overall population.

References Cited

A complete list of all references cited herein is available upon request from the Montana Field Office (see **ADDRESSES**).

Authority

The authority for this action is the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*).

Dated: December 27, 2006.

Kenneth Stansell,

Acting Director, U.S. Fish and Wildlife Service.

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