



February 16, 2016

Via Federal eRulemaking Portal

Public Comments Processing
U.S. Fish and Wildlife Service
MS: BPHC
5275 Leesburg Pike
Falls Church, VA 22041-3803

Re: Draft Methodology for Prioritizing Status Reviews and Accompanying 12-Month Findings on Petitions for Listing under the Endangered Species Act, FWS-HQ-ES-2015-0169

To Whom It May Concern:

The Fish and Wildlife Service's (FWS) draft methodology for prioritizing status reviews under the Endangered Species Act (ESA) could be useful for resolving the backlog of petitioned species. However, the proposed methodology contains several flaws that should be addressed prior to finalization, as discussed below.

Western Energy Alliance represents over 450 companies engaged in all aspects of environmentally responsible exploration and production of oil and natural gas in the West. Alliance members are independents, the majority of which are small businesses with an average of fifteen employees.

FWS is in the position of needing to prioritize ESA status reviews due to the abuse of the listing process by a few environmental groups. Their practice of submitting petitions that cover multiple species, sometimes numbering into the hundreds, has created a backlog that prevents FWS from meeting statutory deadlines and addressing species that are truly threatened or endangered. FWS is separately considering modifications to the rules for the petition process, and Western Energy Alliance supports that effort. Meanwhile, it does make sense to prioritize pending petitions, but the draft methodology contains several issues that should be addressed prior to a final rule.

Under the proposed methodology, FWS proposes a priority bin which would include "[s]pecies for which we know almost nothing about its threats or status."

Species that would be placed in Priority Bin 5 do not have sufficient scientific support for a listing determination, so their petitions should be dismissed as not warranted rather than simply placed in the lowest priority bin. FWS must clarify the need for this category given that petitions lacking substantial information should be denied at the petition review stage. Further, if the best available science reveals “almost nothing” about the species by the 12-month deadline, FWS must make a “not warranted” determination.

On the other hand, Western Energy Alliance strongly supports Bin 4, for species where conservation efforts are in development or underway. State, local, and private efforts to conserve species are the most effective means to avoid a listing and preserve a population, and the draft methodology properly recognizes these efforts and lowers the priority for these species. It is important to note that the draft methodology specifically states that these conservation efforts “should be completed in time for consideration in the status review and accompanying 12-month finding...” FWS recognizes with this language that statutory deadlines still apply and timely action is necessary.

FWS must also take definitive action in a timely manner for those species it would place in Priority Bin 3, which covers instances where scientific uncertainty may be resolved in a reasonable time by emerging science. FWS does not explain what constitutes a “reasonable time” for the resolution of scientific uncertainty, and it should clarify that the statute does not provide for an exception to the 12-month deadline if scientific uncertainty exists but may later be resolved.

FWS indicates that it will determine the proper priority bin for each species based upon the strength of the associated scientific data. Species with weak available data will be placed in a lower category. Again, FWS should make clear in the final rule that it cannot delay a listing decision while it awaits stronger data, and it must still make a warranted or not warranted determination in a timely manner, as stated in the language describing Bin 4. FWS cannot delay its decision simply because the data is weak or inconclusive and future data may be stronger. Rather, it should make a finding that listing is not warranted.

FWS must also be careful that the use of a strength-of-data criterion does not lead to prioritizing listing determinations while delaying determinations that a listing is not warranted. Assessment of the proper priority bin must be kept separate from the ultimate listing determination, otherwise FWS would essentially be picking species to list without regard to the statutory requirement that decisions to list and not list both occur by a specified deadline.

Finally, Western Energy Alliance is concerned that the draft methodology would not apply to downlisting or delisting actions. Downlisting and delisting petitions are subject to the same statutory requirements and deadlines as listing petitions, so they should be accounted for in the prioritization methodology or through a similar, parallel process.

The backlog in ESA listing petition determinations will ultimately only be addressed by statutory or regulatory changes to the rules which created it. In the meantime, Western Energy Alliance supports FWS' efforts to reduce the backlog, and believes the prioritization methodology could be a useful tool if the recommended changes are made. Thank you for considering our comments, and please do not hesitate to contact me with any questions.

Sincerely,



Kathleen Sgamma
Vice President of Government & Public Affairs