WESTERN ENERGY ALLIANCE

May 20, 2016

Via Federal eRulemaking Portal: http://www.regulations.gov

Public Comments Processing
Attn: Docket No. FWS-HQ-ES-2015-0016
U.S. Fish and Wildlife Service
MS: BPHC
5275 Leesburg Pike
Falls Church, VA 22041-3803

Re: Endangered and Threatened Wildlife and Plants; Revisions to the Regulations for Petitions

Dear Sir/Madam:

On May 21, 2015, the U.S. Fish and Wildlife Service and National Marine Fisheries Service (collectively, the Services) issued a proposed rule to amend the existing regulations governing Endangered Species Act (ESA) petitions. Western Energy Alliance submitted comments on the proposed rule that were generally supportive, and we urged the Services to adopt the revisions with only minor changes. Nearly a year later, the Services have now released an updated draft rule that effectively removes all of the positive revisions to the ESA petition process in the original draft, in a transparent attempt to mollify the very groups that have abused the process in the past. Western Energy Alliance strongly opposes the current draft rule (updated draft) and urges the Services to adopt the May 2015 version (original draft) of the proposed rule instead.

Western Energy Alliance represents over 300 members involved in all aspects of environmentally responsible exploration and production of oil and natural gas in the West. The Alliance represents independents, the majority of which are small businesses with an average of fifteen employees.

As we highlighted in our September 18, 2015 comments, improvements to the petition process are necessary because the current process has been frequently abused to increase the number of listed species, regardless of merit. Over the last decade the number of petitioned species has increased dramatically, as certain parties have used the petition process to force the Services to make voluminous listing determinations. The most egregious example of this tactic was a single petition in 2010 that identified over 400 species, leading to a legal settlement with FWS that required action on 757 species over seven years.

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It is clear some parties are repeatedly employing a strategy of overwhelming the Services with listing petitions and bringing subsequent legal actions to force the Services to act on these petitions. The goal of this approach is ultimately to reach a settlement with the Services that requires expedited consideration of numerous species. The "sue-and-settle" tactic clearly undermines the ESA petition process and the law in general, and we support changes that would eliminate its use. The Services are spending too much time on often frivolous petitions, which takes resources away from species truly deserving of protection. The updated draft, however, is not an effective response to sue-and-settle tactics.

The key components of an improved process are:

- Allowing for one and only one species to be the subject of a petition
- Requiring consultation with relevant state agencies and affected counties prior to submission to the Services
- Certifying that all information relevant to the petition and the species is provided by the petitioner, including information that may lead to a negative finding on the petitioned action. This information should include actual credible science, and not mere speculation and opinion.

For all three components, the original draft properly identified and addressed the need to change current practice, and in all three cases the updated draft has failed to do so. As a result, the updated draft will fail to improve the petition process.

Under the updated draft, a petition may now "address any configuration of members of that single taxonomic or biological species as defined by the Act (the full species, one or more subspecies, and, for vertebrate species, one or more distinct population segments (DPSs))." The original draft had limited petitions to one species, including one and only one subspecies or DPS. The Services proposed this change in the original draft because, as noted in the draft rule, "although the Services in the past have accepted multi-species petitions, in practice it has often proven to be difficult to know which supporting materials apply to which species, and has sometimes made it difficult to follow the logic of the petition."[1]

The difficulty in evaluating which supporting materials apply to which species would be most acutely felt in the case of separate subspecies and population segments of one species, where minute variations exist. It is therefore puzzling why the Services now propose to allow multiple subspecies to be included in one petition; is the confusion discussed in the original draft no longer a concern?

Regardless of the logic for the updated language on subspecies, we continue to support the original draft language that requires each petition to include one and only one species,

[1] 80 Fed. Reg. 29287 (May 21, 2015).

not including separate subspecies and DPSs. Such a change would promote a reduction in the bottleneck of the Services' resources created by petitioners bundling species.

The second key to an improved petition process is a requirement that petitioners consult with relevant state agencies and local governments prior to submitting a petition. States and local governments play a crucial rule in the management and protection of threatened and endangered species in their jurisdiction. Furthermore, as the original draft rule acknowledged, states and localities have significant expertise regarding the best available science on species, as well as local land use and habitat that will affect a species.

Requiring petitioners to first consult with the states in which a species is located would result in fewer petitions to the Services in instances where data from a state agency shows that further evaluation of a listing decision is not warranted based on the science. Prior consultation would therefore reduce the use of the Services' resources on petitions that lack basic scientific justification.

The updated draft eliminates the state consultation requirement. Under proposed Section 424.14(b)(9), the Services "replace text concerning pre-coordination of petitioners with States and gathering of information from State wildlife agencies with new text requiring only that petitioners notify affected States of their intention to file a petition" at least 30 days before filing. The Services would then "have the option, in formulating an initial finding, to use their discretion to consider any information provided by the States (as well as other readily available information) as part of the context in which they evaluate the information contained in the petition."

In other words, states have a right to be informed of a petition, but they have no right under the proposed rule to participate in the 90-day findings process; states would only be involved if the Services deem it appropriate on a case-by-case basis. The state consultation language change is the clearest example of the Services intentionally weakening the proposed revisions in the updated draft. Western Energy Alliance strongly opposes this new language and requests the Services replace it with the language from the original draft. The Services are ill-advisedly giving deference to unelected, unaccountable environmental groups rather than the states, which are governed by elected representatives of the people and have the actual expertise and on-the-ground experience managing wildlife. The Services have misplaced their trust in a special interest rather than the People's representatives.

Finally, the third component of an improved petition process is the use of the best available information on a species, including any and all information that may lead to a negative finding on the petition. Western Energy Alliance supported the language in the original draft that would require petitioners to submit "all relevant information (including information that may support a negative 90-day finding) that is reasonably available" with their petition.[2] In the original draft, the Secretary would be allowed to reject the request

[2] 80 Fed. Reg. 29294 (May 21, 2015).

without making a finding if the petition did not supply all relevant information. Such a requirement would have ensured a full record of best available information for review by the Services, rather than an incomplete, biased record.

The updated draft replaces this information requirement with a grant of discretion to the Secretary to consider a petition "where the Services determine there has been substantial compliance with the relevant requirements." The draft then "encourages" petitioners to submit all relevant information. Replacing a requirement with an encouragement completely neuters the impact of this language; petitioners will assuredly continue to intentionally omit information from their petition that would support a negative finding.

Western Energy Alliance recognizes that petitioners may not have the ability to identify and submit absolutely all information that is available on a given species. In the example provided in the rule, where 50 references are identified but only 49 are provided, it is reasonable to continue with evaluation of the petition. However, the Services should require some level of best efforts to provide all relevant information, and there should be a firm requirement that petitioners cannot knowingly omit information that does not support the petition. The Services should revise this language to reflect an approach that will yield the best available information on a species.

The three critical components of an improved petition process have all been eliminated from the updated draft. Western Energy Alliance strongly opposes the changes from the original draft, and urges the Services to adopt the original language. The Alliance greatly appreciates the opportunity to provide these comments to the Services. Please do not hesitate to contact me with any questions.

Sincerely,

Kathleen M. Sgamma
Vice President of Government & Public Affairs