



September 18, 2015

Submitted via Federal eRulemaking Portal: <http://www.regulations.gov>

Public Comments Processing
Attn: FWS-HQ-ES-2015-0016
U.S. Fish and Wildlife Service
MS: BPHC
5275 Leesburg Pike
Falls Church, VA 22041

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 (FWS) and National Marine Fisheries Service (NMFS) (collectively, the Services) issued a proposed rule to amend the existing regulations governing Endangered Species Act (ESA) petitions under 50 C.F.R. §424.14.¹ Western Energy Alliance supports improvements to the ESA that protect fish, wildlife, and plant populations while also providing for responsible resource management and energy development. The Alliance is therefore generally supportive of the proposed rule and appreciative of the Services' intent in updating the procedures for submission of petitions seeking the listing, delisting and change in status for a species.

Western Energy Alliance represents over 450 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.

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 requires action on 757 species over seven years.

The 2011 settlements did not bring an end to large, multi-species petitions. Since the settlement, petitions have been filed with FWS requesting listing or uplisting action on at least 129 species, including one petition that identified 53 species, while NMFS has

¹ 80 Fed. Reg. 29286 (May 21, 2015).

received at least 26 petitions covering 155 species. Additionally, these petitions have resulted in 43 lawsuits covering more than 100 species. In fact, the two environmental groups that FWS settled with are themselves responsible for 72% of all new petitions covering 88% of petitioned species.² We believe the proposed rule is a good start at getting this abuse of the petition process under control.

It is clear some parties are repeatedly employing a strategy of overwhelming FWS with listing petitions and bringing subsequent legal actions to force FWS to act on these petitions. The goal of this approach is ultimately to reach a settlement with FWS that requires expedited consideration of numerous species. This “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 proposed changes are intended to “improve the content and specificity of petitions and to enhance the efficiency and effectiveness of the petitions process to support species conservation.” The key components of the improved process are:

- Allowing for one and only one species to be the subject of a petition
- Requiring consultation with relevant state agencies at least 30 days 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
- Clarifying the statutory timeframes for the petition and resetting the deadlines if supplemental information is provided by the petitioner before an initial finding is made

Western Energy Alliance believes that each of these proposed changes would represent an improvement on the current process. Below are our suggestions for further improvement of these components.

1. One and Only One Species May be the Subject of a Petition

As noted in the proposed 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.”³

² [Sue-and-Settle Legal Analysis](#), Western Energy Alliance, August, 2015.

³ 80 Fed. Reg. 29287 (May 21, 2015).

Specifying that each petition may only include one species will promote a clearer understanding of the justifications with legitimate supporting data for a particular listing or de-listing decision. It would also promote a reduction in the bottleneck of the Services' resources created by petitioners bundling species to deliberately slow other proponent activities and state management policies. Finally, the burden of proof for a warranted listing decision would be placed on the petitioner instead of the Services, which would result in a more thorough petition. Western Energy Alliance supports this proposed requirement.

II. Consultation with Relevant Agencies

States and local governments play a crucial role in the management, best available science, and protection of threatened and endangered species in their jurisdiction. Furthermore, as the supplementary information sheet acknowledges, states and localities have significant expertise regarding the local land use and habitat that will affect a species.

Requiring petitioners to first consult with the states in which a species is located will certainly encourage cooperation and communication "among would-be petitioners and State conservation agencies prior to the submission of listing or critical habitat petitions to the Secretary."⁴ It may also result in fewer petitions to the FWS 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 reduce the use of the Services' resources on petitions that lack basic scientific justification.

Western Energy Alliance supports this component of the proposed rule, and also believes it should be extended to incorporate county and local government consultation prior to a petition. This change would accord with other sections of the ESA such as §4(b)(5)(A)(ii), which provides that for any listing proposal issued by the Secretary of the Interior, the Services must "give actual notice of the proposed regulation (including the complete text of the regulation) to the State agency in each State in which the species is believed to occur, **and to each county or equivalent jurisdiction in which the species is believed to occur**, and invite the comment of such agency, and each such jurisdiction, thereon."⁵

Although states have primary jurisdiction over the protection of wildlife in the absence of a Service listing and management of habitat, county and local governments can also play a key role in management and conservation of a species. Local land use activities and habitat conditions are important factors in any listing decision, and the state, counties and local governments who monitor and report on these factors ultimately have the most complete and accurate data. Excluding these jurisdictions from the consulting process may lead to a less-than-complete record for the Services to evaluate. The ESA clearly recognizes the value of county and local government involvement in the listing process, and expanding the consultation process in the proposed rule to include those government bodies would strengthen the petition process.

⁴ *Id.* At 7.

⁵ 16 U.S.C. §1533(b)(5)(A)(ii).

Western Energy Alliance further recommends that the consultation period be extended to 90 days from the 30 days currently required in the proposed rule. This change will allow for robust interaction between the petitioners and the states, ensuring a complete view of the status of a particular species. The proposed 30 day comment period is simply too short for states, counties and other localities to adequately review and comment upon the petition. A longer review period will allow for a comprehensive review by the states and counties, which will in turn lead to the most efficient assessment of the petition by the Services.

Western Energy Alliance believes the addition of counties and local governments in the consultation process, and a 90 day comment period, would be valuable to the ESA petition process.

III. All Relevant Information Provided by Petitioners

Western Energy Alliance supports the component of the proposed rule 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.⁶ This requirement would ensure a full record of best available information for review by the Services, rather than an incomplete record that may be biased towards a finding of warranted. We further support the provision that would allow the Secretary to reject the request without making a finding if the petition does not supply all relevant information.

IV. Statutory Timeframes and Supplemental Information

Finally, Western Energy Alliance supports the clarification of the statutory timeframes that apply to the petition process. Requests that do not meet the statutory requirements would be rejected without a finding, which would ease the burden on the Services in responding to spurious petitions. For those that do meet the requirements, the clock would begin to run, with a formal notice of receipt of the petition sent within 30 days. The Service would also have 90 days from submission to make a finding on whether there is sufficient information available that the petitioned action may be warranted, and one year in which to make a final determination.

Importantly, the proposed rule clarifies that supplemental information received by the Service within the above timeframe would be treated as a new petition, and the statutory deadlines would be reset from the time of receipt of the supplemental information. Western Energy Alliance supports this change to ensure the Service has sufficient time to review all available information, including any information that was omitted from the initial petition and new information which might be discovered after the petition process has begun.

⁶ 80 Fed. Reg. 29294 (May 21, 2015).

V. Response to Specific Requests for Comments

Beginning on Page 26 of the supplementary information sheet, the Services request responses to specific questions.

Question: “We specifically seek comment on proposed paragraph (b)(9), requiring petitioner coordination with States prior to submission of a petition to the Fish and Wildlife Service, and paragraph (b)(10), requiring certification that all reasonably available information, including relevant information publicly available from affected States’ Web sites, has been gathered and appended to a petition filed with either Service. We note that either of these two provisions could stand alone, or both could be included in a final rule, as shown in the proposed regulatory text. We also suggested an alternative to (b)(10) that would require a certification only that relevant information from affected States’ Web sites has been gathered and appended to a petition filed with either Service. We seek information on which alternatives, alone or in combination, would be most consistent with law and best achieve our goals of fostering better-informed petitions and greater cooperation with States.”

Response: Western Energy Alliance supports the inclusion of both proposed paragraphs in the final rule. These paragraphs will work in tandem to ensure the most robust record of available data is provided to the Services in a listing or delisting petition. Requiring petitioners to coordinate with the relevant states and certify they have provided all readily available information on a species will produce the most accurate information for the Services in the most efficient manner. We believe this requirement should be extended to coordination with counties and local governments as well.

Further, Western Energy Alliance believes that it would be helpful if more narrow parameters were developed for listing petitions to ensure a petitioner has gathered “all relevant information.” The petitioner should be required to identify in its certification: 1) all databases and other sources searched; 2) the dates of the last search for each database and the period searched; 3) full search strategies (including all search terms) for each database; and 4) any language or publication status restrictions used. Transparency on the search process and adequate reporting makes it possible for others reading the review to judge the thoroughness of the search, and thereby the potential of bias in the review.

Question: “We also seek comments and information regarding any other alternative the public may suggest to achieve the goals of greater coordination with States and better supported petitions.”

As discussed above, extension of the comment period for state consultation from 30 days to 90 days and including local government participation will allow for a more complete review of available data prior to submission of a petition.

Western Energy Alliance believes the proposed rule, with small modifications, would mark a significant, positive step towards ensuring the ESA petition process is as effective and efficient as possible. The Alliance greatly appreciates the opportunity to provide these comments to the Services, and respectfully requests you take these comments into full consideration when finalizing a proposed rulemaking.

Sincerely,



Kathleen M. Sgamma
Vice President of Government & Public Affairs