

# Administration Proposes Improvements to ESA Petition Process

By Joseph Nelson and Jordan Smith

The U.S. Fish and Wildlife Service (FWS) and National Marine Fisheries Service (NMFS) are currently reviewing comments received on proposed revisions announced last spring to the Endangered Species Act (ESA) petition process. These proposed regulations would impose additional procedural and substantive requirements on the submission and consideration of petitions seeking to list, delist, or reclassify species or modify designated critical habitat.

Listing determinations are central to the ESA because listing a species as either threatened or endangered entitles it to federal protection, including the take prohibition of section 9 and the consultation requirements of section 7. The proposed rule would make much-needed reforms to the existing petition process, including requiring more rigor and scientific documentation in the submission of petitions, increasing the role of state governments, and imposing a one-species-per-petition rule.

In recent years, the petition process has taken on an increasingly significant role under the ESA. The act currently requires the FWS and the NMFS to make decisions about whether to list, delist, or reclassify a species as threatened or endangered solely on the basis of the “best scientific and commercial data available.” Multispecies petitions do not differentiate among the data cited to support the listing of each species. As a result, the FWS and the NMFS have been forced to expend limited agency resources to evaluate these mega-petitions.

Further, if the FWS and the NMFS miss their statutory deadlines to finalize such review, which often occurs, environmental groups file lawsuits against the agencies for violation of the statutory timelines. In doing so, the environmental groups gain a seat at the table with the agencies and dictate the timing of petitions considerations. It is this type of rigged petition and sue-and-settle practice that has led to the multispecies listing settlement through which the present administration has increased the endangered and threatened species list by more than 20 percent since the end of 2011.

The FWS and the NMFS now are attempting



to address these problems by proposing important changes to the petition process. Specifically, the proposed rule would ensure the following:

- **One species at a time.** This change would end a strategy favored by the environmental community in recent years by which a single petition covering tens, if not hundreds, of species is submitted, but can never be adequately analyzed within the statutorily required time frames.
- **Consultation with states on FWS species.** For species or critical habitat under the FWS’s jurisdiction, the petitioner must submit a copy of the petition to the appropriate fish and wildlife management agencies in states where the species occurs at least 30 days before submission of the petition to the FWS and include any comments received from the states as part of the petition submittal.
- **Disclosure of positive and negative information.** Petitions must identify all relevant, reasonably available information, including information that may support a negative finding

- (i.e., that the requested action is not warranted).
- **Restarting review time frames for supplemental information.** The petitioner’s submission of supplemental information after a petition has been filed would be treated as a new petition that combines the original and supplemental information and restarts the statutory time frames for review.
  - **Higher standards for subsequent petitions.** Petitions seeking the revision of a prior determination (e.g., a petition for reclassification or delisting of a previously listed species) would be subject to a higher standard. Such subsequent petitions would be required to present sufficient new information or analysis that was not considered in the prior determination on the species or critical habitat. Further, the rule creates a presumption against a revision to the prior determination, such that a warranted finding could only be made on a subsequent petition if the FWS determines that a reasonable person conducting an impartial scientific review would conclude that the proposed action is warranted despite the previous determination.

The proposed rule also revises several definitions and standards applicable to the petition review process, including the following:

- **Adequacy determination for petitions.** Within 30 days of receipt of a petition, the secretary of the interior must inform the petitioner whether the petition meets the mandatory content requirements. The secretary would retain discretion to reject a petition for failure to meet these requirements without making a statutory finding as to whether the requested action is or is not warranted.
- **Substantial scientific or commercial definition.** For purposes of the warranted/not warranted determination, the proposed rule would define *substantial scientific or commercial information* to mean “credible scientific or commercial information in support of the petition’s claims such that a reasonable person conducting an impartial scientific review would conclude that the action proposed in the petition may be warranted.”
- **Funding limitations and candidate species status.** The proposed rule defines *expeditious progress* for purposes of the warranted but precluded finding that precipitates classification of a species as a candidate for listing. Through the proposed revision, the warranted but precluded determination could be based on the limitation of funds available for the FWS and the NMFS to conduct listing determinations after fulfillment of nondiscretionary

duties (e.g., statutorily required determinations under section 4, court orders, and court-approved settlement agreements).

- **Treatment of noncomplying information.** The FWS and the NMFS propose an explicit rule that they will not consider supporting material cited by the petitioner that has not been made readily available to the FWS and the NMFS by the petitioner or is not otherwise in the FWS’s and the NMFS’s possession.

The proposed rule received significant widespread support from the regulated community, including the National Endangered Species Act Reform Coalition, the country’s only broad-based coalition of organizations dedicated to improving and updating the ESA.

In its comments, the coalition expressed support for the overall purpose of the proposed rule, while also suggesting improvements, including

- integrating counties or equivalent jurisdictions into the petition review and comment process presently proposed for states.
- expanding the state review and comment process to all species, rather than just FWS-jurisdictional species.
- ensuring that the petition and supporting information is submitted in a form that allows for public posting and access via the web.

As the administration reviews comments received on the proposed rule through the public rulemaking process, congressional lawmakers are considering legislation to codify some of the changes proposed in the listing petition rule. Many landowners and businesses with irrigation and agricultural interests have expressed support for these actions, and the National Endangered Species Act Reform Coalition encourages continued engagement with the administration and Congress on this important issue.

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