



NATIONAL ENDANGERED SPECIES ACT  
REFORM COALITION

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[www.nesarc.org](http://www.nesarc.org)

May 23, 2016

U.S. Fish and Wildlife Service  
Public Comments Processing  
Attn: FWS–HQ–ES–2015-0016  
MS: BPHC  
5275 Leesburg Pike  
Falls Church, VA 22041-3803

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

**Re: NESARC Comments on the Proposed Rule Revising the Regulations for  
Petitions, FWS–HQ–ES–2015-0016**

Dear Ms. Fahey and Ms. Somma,

On April 21, 2016, the U.S. Fish and Wildlife Service (“FWS”) and National Marine Fisheries Service (“NMFS”) (collectively, the “Services”) issued a revised proposed rule to amend the regulations governing the submittal of petitions under Section 4 of the Endangered Species Act (“ESA”).<sup>1</sup> Pursuant to the Federal Register notice, the National Endangered Species Act Reform Coalition (“NESARC”) respectfully provides its comments and recommendations on the Services’ Revised Proposed Rule.

NESARC is the country’s oldest broad-based, national coalition dedicated solely to achieving improvements to the ESA and its implementation. As detailed in the membership list attached to these comments,<sup>2</sup> NESARC includes agricultural interests, cities and counties, commercial real estate developers, conservationists, electric utilities, energy producers, farmers, forest product companies, home builders, landowners, oil and gas companies, ranchers, water and irrigation districts, and other businesses and individuals throughout the United States. NESARC and its members are committed to promoting effective and balanced legislative and administrative improvements to the ESA that support the protection of fish, wildlife, and plant populations as well as responsible land, water, and resource management.

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<sup>1</sup> 81 Fed. Reg. 23,448 (April 21, 2016) (“Revised Proposed Rule”). The Services initially published the proposed rule to revise the ESA petition regulations on May 21, 2015. 80 Fed. Reg. 29,286 (“Proposed Rule”).

<sup>2</sup> See Appendix A.

## **I. NESARC Reiterates and Requests that the Services Incorporate Its Comments and Recommendations on the Initial Proposed Rule**

On September 18, 2015, NESARC submitted comments and recommendations on the initial Proposed Rule to revise the petition regulations.<sup>3</sup> In the Revised Proposed Rule, the Services have modified certain components of the initial proposal upon which NESARC provided comments. However, in all accounts, the basis and issues being addressed in NESARC's comments remain valid and should be addressed in any final rule, including for both FWS and NMFS:

- The integration of States into the listing petition process should also extend to counties or equivalent jurisdictions in which the species is believed to occur;
- Notification to the States and other local government entities of a planned petition submission must include data on the subject species (including species population estimates and presence/absence information) and habitat conditions that are central to the petitioned for action; and
- Upon receipt of the notice, States and local government entities still should have the opportunity to provide the petitioner with comments on the accuracy and completeness of a petition, and these comments should be provided to the Services with the petition.<sup>4</sup>

NESARC requests that the Services consider and incorporate these comments and recommendations in any final rule revising the petition regulations.

## **II. Comments on the Revised Proposed Rule**

NESARC is concerned that many of the positive revisions that the Services initially proposed have been significantly weakened or removed in the Revised Proposed Rule. In addition to the comments noted above on the initial Proposed Rule, the Services should modify several of their new proposed changes to incorporate common sense revisions that will improve the efficiency and effectiveness of the petition process.

### **A. The Services Should Retain Communication and Cooperation with States and Other Entities**

In the initial Proposed Rule, the Services considered requiring that a petitioner 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 FWS and include any

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<sup>3</sup> See Appendix B.

<sup>4</sup> The Services should extend the petition comment period to ninety (90) days to ensure a full opportunity for States and counties to review and comment on the accuracy and completeness of the petition.

comments received from the States as part of the petition submittal.<sup>5</sup> The Services explain that, based on concerns that the obligation to contact and gather data from multiple agencies would unduly burden a petitioner, the Revised Proposed Rule now only requires petitioners to “provide notice,” but no further supporting information, to the relevant State wildlife agency at least 30 days prior to submission of a petition.<sup>6</sup> This revision does not satisfy the Services’ original goal of promoting communication and cooperation with the States and other affected governmental authorities prior to the submission of petitions.

The Services should retain the initial Proposed Rule’s requirement that petitioners provide a copy of the petition to State wildlife agencies and append any received comments to the petition when submitted to the Service.<sup>7</sup> NESARC believes that any burdens associated with the initial proposed requirement are vastly overstated. First and foremost, the submission of comments by States (as well as other local governmental entities) is at the choice of the commenting governmental entity. There is no mandate for the submission of these comments and, therefore, any additional “burden” (apart from the notice requirement currently proposed) relates solely to compiling and appending any petition comments that are actually provided. Assuming that the petition and any responses are transmitted electronically, any burden on petitioners will be minimal. Moreover, the Services’ abandonment of this fundamental act of good government and cooperation with State and local government entities is to forego the opportunity to have petitions incorporate and reflect better quality and more relevant data which will better inform the relevant decision-making process.

If the Services retain the current “notice” approach, the Services still must make the following changes:

- As indicated above, in addition to States, the notice of the petition should also be submitted to affected counties or equivalent jurisdictions (i.e., local government entities);
- The notice must conform to a common format that identifies the species, subspecies, or distinct population segment (“DPS”) involved; provides, to the maximum extent practicable, available, relevant information regarding the status of the subject species; including population estimates; presence/absence information; and habitat conditions of concern; and
- Along with the notice, petitioners must include a copy of the petition and all supporting materials.

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<sup>5</sup> 80 Fed. Reg. at 29,287. While this requirement would have only applied to species under FWS’s jurisdiction, NESARC supports the removal of this limitation in the Revised Proposed Rule so that FWS and NMFS species are covered by the regulatory provision.

<sup>6</sup> 81 Fed. Reg. at 23,450.

<sup>7</sup> As noted in our initial comment letter, this requirement should be expanded to include counties and equivalent jurisdictions.

Notice without information is meaningless. Accordingly, the Services must ensure that early integration of affected States and local governmental entities is effectively accomplished through the provision of substantive information regarding the subject species and the petitioned-for action.

### **B. The Services Must Ensure that Appropriate Information is Considered and Provided**

In the initial Proposed Rule, the Services considered requiring that a petitioner certify that it gathered all relevant information that is reasonably available and append this information to the petition.<sup>8</sup> This requirement would have included the obligation that petitioners provide information that may support a negative 90-day finding. The Services have removed these provisions from the Revised Proposed Rule based on concerns that they would be difficult to implement and enforce.<sup>9</sup>

The Services' complete removal of the certification requirement is overbroad and counterproductive. A petitioner should be held to certain standards of good faith, and the overall goal of having petitions include all relevant information, including negative information, should not be abandoned. To the extent that the Services are wary of an absolute mandate or certification requirement, the better means for addressing this concern is to simply require that: "to the maximum extent practicable, a petition shall include all relevant information that is reasonable available, including information that may support a negative 90-day finding."

Further, the Services should require that petitioners analyze and submit the "best scientific and commercial data available" in support of a petition to list, delist, or change the status of a listed species, and that petitioners analyze and submit the "best scientific data available" in a petition to revise critical habitat.<sup>10</sup> These revisions are consistent with the data standards provided in ESA Section 4,<sup>11</sup> and would ensure that the Services receive the type of information necessary to inform their petition determinations.

As part of the Revised Proposed Rule, the Services have defaulted to a more generally stated requirement that petitioners provide "[a] complete, balanced representation of the relevant facts, including information that may contradict claims in the petition." NESARC prefers and urges that the Services instead retain the explicit requirement that petitioners append to any

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<sup>8</sup> 80 Fed. Reg. at 29,288.

<sup>9</sup> 81 Fed. Reg. at 23,450.

<sup>10</sup> Under Section 4 of the ESA, parties only may submit petitions for the revision of critical habitat. 16 U.S.C. § 1533(b)(3)(D). It is recognized that some parties have submitted petitions for the initial designation of critical habitat under Section 553 of the Administrative Procedures Act ("APA"). To the extent that the Services consider critical habitat petitions under the APA, NESARC assumes and supports, at a minimum, the application of the same procedures and requirements as applied to petitions to revise a critical habitat designation. Thus, for example, the requirements of proposed paragraph 424.14(d) should apply to APA petitions to designate critical habitat as well as to ESA petitions to revise critical habitat

<sup>11</sup> 16 U.S.C. § 1533(b)(1)(A) & (2).

petition information supporting a negative 90-day finding.<sup>12</sup> The Services' modified approach does not ensure that contradictory information is presented in a reliable and unbiased manner. Because the Services are only requiring a "representation" of the information, petitioners could arguably satisfy this provision by providing a high-level summary that lacks the factual details and supporting literature citations necessary to ensure accuracy and appropriate treatment. Moreover, if the information is not cited in the petition, the petitioner would avoid the obligation to provide electronic or hard copies of the material—again limiting the development of a complete administrative record.<sup>13</sup>

### **C. The Services Must Ensure that Appropriate Information is Provided to Support any Petition Involving a Subspecies or DPS of a Taxonomic Species**

In the Revised Proposed Rule, the Services relax the proposed requirement that a petition include "one and only one species." Instead, the Services would allow petitions to address "one taxonomic species, along with any subspecies or distinct population segments of that species."<sup>14</sup>

NESARC supported the initial requirement that a petition may only cover a single species in proposed section 424.14(b)(2). In its Revised Proposed Rule, the Services would now allow a petition to cover requested actions for the entire species plus one or more subspecies plus one or more DPS of the species or subspecies. We understand that the purpose of the original "one species" per petition requirement was to compel clarity in a petition and organize the petitioner's rationale to focus on the species at issue. In explaining this approach, the Services noted that they found it difficult to follow the logic of multi-species petitions or to understand how the supporting materials were to be applied.<sup>15</sup> By opening petitions up to multiple subcategories of a species in the Revised Proposed Rule, the Services have not solved this concern, even if the subject species subcategories are within the same taxonomic species.

NESARC recognizes that separate petitions may not always be necessary for those recognized subcategories of a taxonomic species.<sup>16</sup> However, the Services should continue to have a general rule of one petition, one requested action. While the Services may have the discretion to consider a petition covering subcategories of a taxonomic species, they must clarify that the information requirements for petition submittals must be met for each subcategory of the taxonomic species that is the subject of the petition. For example, if a petitioner seeks action on

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<sup>12</sup> As noted in our initial comment letter, the Services should clarify the requirements for the citation and submittal of information. The Services must ensure that petitions review, analyze, and submit the best available science (both positive and negative). The Services should require the submittal of this information, irrespective of whether it is actually cited in the petition.

<sup>13</sup> Proposed 50 C.F.R. § 424.14(b)(6); *see also* Proposed 50 C.F.R. § 424.14(g)(1)(ii) & (h)(1)(ii) (stating that the Services are not required to consider supporting material if the documents are not provided with the petition).

<sup>14</sup> 81 Fed. Reg. at 23,449; Proposed 50 C.F.R. § 424.14(b)(2).

<sup>15</sup> 80 Fed. Reg. at 29,287.

<sup>16</sup> The ESA defines species as "any subspecies of fish or wildlife or plants, and any distinct population segment of any species of vertebrate fish or wildlife which interbreed when mature." 16 U.S.C. § 1532(16).

a subspecies or DPS, the petition must present substantial scientific or commercial information indicating that the action may be warranted for each specified subspecies or DPS. The petitioner cannot rely upon general information regarding the taxonomic species to support petitioned actions related to particular subspecies or DPSs.

#### **D. The Services Should Retain the Procedures for Submission of Information Relating to Evaluation of Critical Habitat**

Under the existing regulations, a petitioner may submit information describing any recommended critical habitat, including boundaries, physical features, and any benefits and/or adverse effects.<sup>17</sup> In the initial Proposed Rule, the Services proposed to revise this regulatory provision to allow the submission of information regarding whether a critical habitat designation is prudent and determinable, the recommended boundaries and physical features, and the habitat requirements of the species.<sup>18</sup> In both cases, the information would not be a basis for determining the substantiality of the petition.

In the Revised Proposed Rule, the Services now propose to delete the request for information regarding potential critical habitat designations because it is beyond the scope of information needed for a 90-day finding and should be considered during a status review and proposed listing determination.<sup>19</sup> While NESARC agrees that such information should not be considered as part of the 90-day finding, if a petitioner is advocating for the designation of critical habitat concurrent with or subsequent to any listing decision, then the petitioner should be obligated to provide information relevant to the requested critical habitat designation at the earliest possible time—i.e., at the time the species is petitioned for listing.

The Services' critical habitat regulations state that “[t]o the maximum extent prudent and determinable, we will propose and finalize critical habitat designations concurrent with issuing proposed and final listing rules, respectively.”<sup>20</sup> Thus, contrary to the Services' characterization of timing considerations, information on critical habitat should be submitted with a petition to list so that, assuming a positive 90-day finding is made and listing is warranted, the Services can begin assessing whether designation of critical habitat is prudent and determinable and evaluating habitat conditions and needs, including the identification of relevant physical and biological features that may be essential for the conservation of a species, concurrent with development of the proposed rule to list the species.<sup>21</sup>

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<sup>17</sup> 50 C.F.R. § 424.14(b)(2).

<sup>18</sup> Initial Proposed 50 C.F.R. § 424.14(c)(5).

<sup>19</sup> 81 Fed. Reg. at 23,450.

<sup>20</sup> 50 C.F.R. § 424.12(a).

<sup>21</sup> Further, to the extent that a petition includes information relevant to the designation of critical habitat, States (and local government entities) would have the ability to review and comment on the relevant data. This would provide the Services with necessary information relevant to any critical habitat designation, including prudence, determinability, physical and biological features essential to conservation, special management considerations, and economic, national security, and other relevant impacts.

### **E. Noncompliant Petitions Must be Rejected**

In the Revised Proposed Rule, the Services add language stating that they will “generally” reject a noncompliant petition, but that they “retain discretion to process a petition where the Services determine there has been substantial compliance with the relevant requirements.”<sup>22</sup> The Services should remove this new standard because it is unduly vague and capable of inconsistent and arbitrary application.

NESARC requests that the Services revert to the language proposed in their initial Proposed Rule. The terms “generally” and “substantial compliance” are vague and undermine the Services’ stated purpose of “encourage[ing] the petitioner to be careful.”<sup>23</sup> By including these discretionary provisions, the Services are removing the incentive for petitioners to provide accurate and complete information in any petition. By retaining clear requirements for the processing of petitions, the Services will ensure that the necessary information is provided in an appropriate manner which will improve the ability to review and respond to petitions in an efficient and timely fashion.

The Services’ compliance/noncompliance provisions in sections 424.14(e)(1) and (e)(2) also should be clarified to extend to the minimum information requirements set forth in 424.14(c) (petitions to add/remove species or to change species listing status of a species) and 424.14(d) (petitions to revise critical habitat). By extending this same treatment to petitions seeking a change in species status and critical habitat, the Services will be extending equal treatment to all petitions and also provide for further administrative efficiency in the evaluation of petitions.

### **F. The Services Should Acknowledge that “New Information” May Not be Necessary to Support a Subsequent Petition**

The Revised Proposed Rule seeks to clarify how the Services will address petitions submitted following a status review or decision on the listing status of a species.<sup>24</sup> The Services state that the “substantial scientific or commercial information” standard would not be satisfied unless the petitioner provides “new information” or a “new analysis” not previously considered in the final agency action.<sup>25</sup> By requiring that any information or analysis be “new,”<sup>26</sup> the Services are imposing an unnecessary constraint on petitions to revise a listing determination. Moreover, should the “new information” policy be retained, the Services should clarify that “new information” includes information demonstrating that prior-considered information was erroneous or was based on erroneous assumptions or modeling.

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<sup>22</sup> Proposed 50 C.F.R. § 424.14(e)(1).

<sup>23</sup> 81 Fed. Reg. at 23,450.

<sup>24</sup> Proposed 50 C.F.R. § 424.14(g)(1)(iii).

<sup>25</sup> 81 Fed. Reg. at 23,451. NESARC notes that while the preamble states a requirement for “new information or a new analysis,” the proposed regulation only specifies “new information.”

<sup>26</sup> The Services explain that “new” means that “the information was not considered by the Services in the prior determination.” 81 Fed. Reg. at 12,351

As noted in our comments on the initial Proposed Rule, in many cases, new information or analyses would be needed in order to support a petition to revise previous ESA actions. However, the Services should recognize that such revisions may be necessary and supportable without new information or analyses. For example, an initial decision could be based upon assumptions or modeling projections that were subsequently found to be erroneous or overstated. In this circumstance, it may not be possible to provide “new information” when a reconsideration of existing data may support a revised listing status.

#### **G. The Services Need to Clarify how the New Critical Habitat Regulations Will Apply to Petitions**

On February 11, 2016, the Services published a final rule revising their regulations regarding the designation of critical habitat.<sup>27</sup> The Services stated that the new designation requirements apply to proposed critical habitat rules published after March 14, 2016.<sup>28</sup> As part of any final rule, the Services should clarify how they will evaluate petitions requesting revisions to critical habitat that were submitted prior to the effective date of the new critical habitat regulations. Because a petition to revise critical habitat submitted before the effective date would be based upon the preexisting standards, the Services should require that the petitioner resubmit the petition to reflect the new regulatory requirements prior to the Service’s consideration. Similarly, where a listing petition that was filed prior to the effective date of the new critical habitat regulations included discussion of potential critical habitat, the Services should request that the petitioner supplement its initial petition to provide any requisite information under the now applicable critical habitat regulations.

#### **H. The Services Need to Reconcile FWS’s Draft Methodology for Prioritizing Status Reviews with the Proposed Petition Regulations**

On January 15, 2016, FWS issued a draft methodology for prioritizing status reviews and accompanying 12-month findings on petitions for listing species under the ESA.<sup>29</sup> In the Draft Methodology, FWS proposed to establish several “priority bins” that appear to address circumstances where a petition presented inadequate information or insufficient support for listing a species.<sup>30</sup> This approach is inconsistent with the petition requirements included in the Revised Proposed Rule. To the extent that FWS intends to finalize the Draft Methodology, FWS must make the necessary revisions to ensure that only those petitions presenting “substantial scientific or commercial information” in accordance with the proposed petition requirements receive a “may be warranted” determination and proceed to the development of a status review.

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<sup>27</sup> 81 Fed. Reg. 7,414 (Feb. 11, 2016).

<sup>28</sup> *Id.*

<sup>29</sup> 81 Fed. Reg. 2,229 (Jan. 15, 2016) (“Draft Methodology”).

<sup>30</sup> *Id.* at 2,230-31. NESARC submitted comments on the Draft Methodology, which are attached as Appendix C.



### **I. Other Clarifications in the Proposed Regulatory Text**

In reviewing the Revised Proposed Rule, NESARC has identified the following clarifications and improvements that warrant consideration:

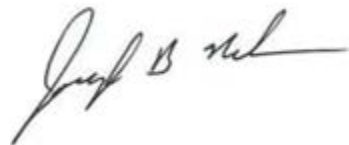
First, in keeping with the preamble to the Revised Proposed Rule, the Services should note in the proposed regulation at paragraph 424.14(b)(7) that, for petitions to uplist or downlist an already listed species, the petitioner can simply rely upon the Services' initial listing determination to demonstrate that the species qualifies as a "species" under the ESA.<sup>31</sup> At the same time, the Services should clarify that a petitioner, or others commenting on the petition, can present relevant new information as to whether the species continues to qualify as a "species" under the ESA, should they wish to do so.

Further, the Services' Revised Proposed Rule introduces, without definition, terms and phrases such as "GIS data," "boundary layers," and "characteristics that support ephemeral or dynamic habitat conditions." To avoid ambiguity, as well as inconsistent and unduly broad interpretation, NESARC encourages the Services to further clarify the intended scope of these terms and phrases for purposes of petition submittal requirements.

### **III. Conclusion**

NESARC greatly appreciates the opportunity to provide these comments to the Services. We respectfully request that you take these comments into full consideration and adopt the proposed revisions when finalizing the applicable regulatory language.

Sincerely,



Joseph B. Nelson  
NESARC Counsel

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<sup>31</sup> 81 Fed. Reg. at 23,449.

**National Endangered Species Act Reform Coalition**  
**Comments on the Proposed Rule Revising the Regulation for Petitions**

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**May 23, 2016**

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REFORM COALITION

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**National Endangered Species Act Reform Coalition  
Membership Roster**

**American Agri-Women**  
*Washington, D.C.*

**American Farm Bureau Federation**  
*Washington, D.C.*

**American Forest and Paper Association**  
*Washington, D.C.*

**American Petroleum Institute**  
*Washington, D.C.*

**American Public Power Association**  
*Washington, D.C.*

**Association of California Water Agencies**  
*Sacramento, California*

**Basin Electric Power Cooperative**  
*Bismark, North Dakota*

**Central Electric Cooperative**  
*Mitchell, South Dakota*

**Central Platte Natural Resources District**  
*Grand Island, Nebraska*

**Charles Mix Electric Association**  
*Lake Andes, South Dakota*

**Coalition of Counties for Stable  
Economic Growth**  
*Glenwood, New Mexico*

**Codington-Clark Electric Cooperative, Inc.**  
*Watertown, South Dakota*

**Colorado River Energy Distributors Association**  
*Phoenix, Arizona*

**Colorado River Water Conservation District**  
*Glenwood Springs, Colorado*

**Colorado Rural Electric Association**  
*Denver, Colorado*

**County of Eddy**  
*Carlsbad, New Mexico*

**County of Sierra**  
*Truth or Consequences, New Mexico*

**CropLife America**  
*Washington, D.C.*

**Dixie Escalante Rural Electric Association**  
*Beryl, Utah*

**Dugan Production Corporation**  
*Farmington, New Mexico*

**Eastern Municipal Water District**  
*Perris, California*

**Edison Electric Institute**  
*Washington, D.C.*

**Frank Raspo & Sons**  
*Vernalis, California.*

**Empire Electric Association, Inc.**  
*Cortez, Colorado*

**Garrison Diversion Conservancy District**  
*Carrington, North Dakota*

**Guadalupe Blanco River Authority**  
*Seguin, Texas*

**High Plains Power, Inc.**  
*Riverton, Wyoming*

**Idaho Mining Association**  
*Boise, Idaho*

**NAIOP**  
*Herndon, Virginia*

**National Alliance of Forest Owners**  
*Washington, D.C.*

**National Association of Counties**  
*Washington, D.C.*

**National Association of Conservation Districts**  
*Washington, D.C.*

**National Association of Home Builders**  
*Washington, D.C.*

**National Rural Electric Cooperative Association**  
*Washington, D.C.*

**National Water Resources Association**  
*Arlington, Virginia*

**Nebraska Farm Bureau Federation**  
*Lincoln, Nebraska*

**Northern Electric Cooperative, Inc.**  
*Bath, South Dakota*

**Northwest Horticultural Council**  
*Yakima, Washington*

**Northwest Public Power Association**  
*Vancouver, Washington*

**Public Lands Council**  
*Washington, D.C.*

**Renville-Sibley Cooperative Power Association**  
*Danube, Minnesota*

**San Luis Water District**  
*Los Banos, California*

**Southwestern Power Resources Association**  
*Tulsa, Oklahoma*

**Sulphur Springs Valley Electric Cooperative**  
*Willcox, Arizona*

**Teel Irrigation District**  
*Echo, Oregon*

**Washington State Potato Commission**  
*Moses Lake, Washington*

**Washington State Water Resources Association**  
*Yakima, Washington*

**Wells Rural Electric Company**  
*Wells, Nevada*

**West Side Irrigation District**  
*Tracy, California*

**Western Business Roundtable**  
*Lakewood, Colorado*

**Western Energy Alliance**  
*Denver, Colorado*

**Wheat Belt Public Power District**  
*Sidney, Nebraska*

**Whetstone Valley Electric Cooperative, Inc.**  
*Milbank, South Dakota*

**Wilder Irrigation District**  
*Caldwell, Idaho*

**Wyrulec Company**  
*Lingle, Wyoming*

**Y-W Electric Association, Inc.**  
*Akron, Colorado*

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

**Re: NESARC Comments on the Proposed Changes to 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, “Services”) issued a proposed rule to amend the existing regulations governing submission of petitions under 50 C.F.R. §424.14.<sup>1</sup> Pursuant to the Federal Register notice, the National Endangered Species Act Reform Coalition (“NESARC”) respectfully provides its comments and recommendations on the Services’ proposed regulations governing the submission of petitions pursuant to §4(b)(3) of the Endangered Species Act (“ESA”). As further discussed in these comments, NESARC supports the Services’ overall approach to modifying the petition process and provides the recommendations discussed in these comments as measures that will further clarify and improve these procedures.

NESARC is the country’s oldest broad-based, national coalition dedicated solely to achieving improvements to the ESA and its implementation. As detailed in the membership list attached to these comments,<sup>2</sup> NESARC includes farmers, cities and counties, rural irrigators, electric utilities, forest product companies, homebuilders, agricultural interests, mining companies, and other businesses and individuals throughout the United States. NESARC and its members are committed to promoting effective and balanced legislative and administrative improvements to the ESA that support the protection of fish, wildlife, and plant populations as well as responsible land, water, and resource management.

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<sup>1</sup> 80 Fed. Reg. 29286 (May 21, 2015).

<sup>2</sup> See Appendix A.

## **I. Overview**

NESARC supports the Services' efforts to update and clarify the procedures and requirements for submission of petitions seeking the listing, delisting and change in status for a species as well as petitions for the revision of critical habitat. In particular, the proposed rule includes several core improvements:

- Requires petitions to focus on a single species;
- Provides for consultation with affected States prior to the submission of petitions;
- Ensures that petitions identify, clearly label and append all reasonably available information relevant to the petitioned action and species, including information that may support a finding that the petitioned action is not warranted;
- Provides clear direction as to the information necessary for submission of a complete petition; and
- Clarifies that a petitioner's submission of supplemental information after filing of a petition will re-start the statutory timeframe for review.

We support these core concepts as they will help to restore balance to the petition process going forward. However, certain elements merit further refinement as discussed below.

## **II. Recommendations for Improvements to the Proposed Regulations**

In the preamble, the Services explain that the proposed rule is intended to improve the content and specificity of petitions as well as to enhance the efficiency and effectiveness of their review of such petitions. It is equally important that the regulations allow for meaningful public engagement on these petitions. NESARC has identified several modifications which will further these multiple goals of improvement to the petition process, efficiency in agency review and facilitation of meaningful public engagement.

### *A. Improvements to the Process for State Review and Comments on Petitions*

NESARC supports the proposed requirement for a petitioner to first submit its petition to, and seek comment from, affected States. This requirement recognizes the key role that States have in the management and conservation of fish, plant and wildlife resources within their jurisdiction. States have a unique expertise and volume of information that can be critical to the understanding of a species' status—including marine and anadromous species. Moreover, local governments, particularly counties or equivalent jurisdictions, have an equally acknowledged expertise and resources of information regarding land use and habitat that can support the development of an appropriate and complete petition. The beneficial role that States and counties serve in the protection and management of species has long been recognized within the

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ESA. Most notably, ESA §4(b)(5)(A)(ii) provides that, when proposing the listing of a species or designation of critical habitat:

[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. *16 U.S.C. §1533(b)(5)(A)(ii)*.

This same relationship and recognition should be further integrated into the petition consultation process. Particularly, the following improvements should be made:

- The requirement for submittal of a petition and consultation with States should extend to all species, not merely those under FWS jurisdiction.
- Similar to ESA §4(b)(5)(A)(ii), the consultation requirement should extend to each county or equivalent jurisdiction in which the species is believed to occur.
- The scope of consultation with the States/counties should be clarified to include the provision of data and comments on the species status and habitat conditions (including species population estimates and presence/absence information).
- To facilitate effective review and comment by the States/counties, petitions should be required to include population estimates and other data on species status and habitat conditions on both a State and county-level (or equivalent jurisdiction) basis.
- The consultation period should be extended to ninety (90) days to ensure a full opportunity for States and counties to review and comment on the accuracy and completeness of the species as well as the overall status of the species.

*Application to All Species.* Under the proposed rule, a petition covering a species under the jurisdiction of the FWS must be preceded by submission of the petition for review and comments by each State in which the species occurs. This requirement provides the opportunity for the State to review and comment, but is not a mandate obligating any State action. If a State chooses to review and comment on the accuracy and completeness of the petition, the comments and data provided by the State must be appended to the petition and would be considered by the Services in their review of, and action upon, the petition.

As proposed, this submission of a petition and opportunity for State review and comment would not extend to petitions relating to species under NMFS' jurisdiction. In explaining the proposal to limit the consultation to only species under FWS jurisdiction, the Services assert a generalized concern with the "logistical difficulties" that would be required to identify and coordinate with interested States regarding marine species and wide-ranging anadromous species. However, that assertion is fundamentally at odds with the overall implementation of the

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ESA and the practical reality of federal/state cooperation on species protection and management—including with respect to marine mammals and anadromous species.<sup>3</sup>

*Integration of Counties or Equivalent Jurisdictions.* While States have primary responsibility for management and conservation of wildlife, local land use is largely a matter of county, or even city, jurisdiction. Local conditions within a species' habitat or range as well as the nature of present regulatory mechanisms affecting land use can be key factors in fully assessing the status of a species. Moreover, local land use activities and habitat conditions are often a focus of the petitioner's rationale for a proposal to list or a change the status of a species. The accuracy and completeness of a petition's discussions of matters relating to local land use and habitat conditions are matters within the specific expertise of counties or equivalent jurisdictions that have the ultimate responsibility for local land use, planning and zoning determinations. Incorporating counties and equivalent jurisdictions into the petition review and comment process will further strengthen the petition process through early input of such local land use expertise and knowledge.

*State/County Data and Input on Species Status and Habitat Condition.* The Services proposed that a petitioner would be required to certify that it has submitted a copy of its petition to the State and report whether the State has provided to the petitioner data or written comments regarding the accuracy or completeness of the petition. Further, any data or comments provided must be appended to the petition.

NESARC recommends further improvements to the submission process. First, in order to allow for effective review by States/counties, petitions should be required to include a breakdown of data on a State and county-level (or equivalent jurisdiction) basis. Further, the certification of petition submittal must include information detailing: (1) the date of transmittal to the State/county; (2) identification of the agency contact and address to which the petition submittal was made; and (3) a copy of the petition and bibliography of all data transmitted to the State/county for review and comment. As a practical matter, the State/county comments are likely to make references to specific sections or data discussed in the reviewed version of the petition. This requirement will ensure full transparency and avoid any later discrepancies or loss of context in the Services' understanding the State/county comments.

NESARC also recommends clarification of the scope of petition review and comment process. In its present formulation, the consultation requirement could be interpreted to be limited to review and comment only upon the petition and information contained therein. The Services specifically should clarify that, as part of assessing the accuracy and completeness of the petition, the State/county may provide data and comments on the species status, habitat

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<sup>3</sup> Many states have enacted statutes or undertaken fishery management plans supporting the protection and restoration of anadromous and marine species. See e.g., Alaska Anadromous Fish Act, AS 16.05.871; New Hampshire Anadromous Fisheries Program [www. http://www.wildlife.state.nh.us/fishing/fm-anadromous.html](http://www.wildlife.state.nh.us/fishing/fm-anadromous.html); and Florida Manatee Sanctuary Act, F.S., Section 379.2431(2). Moreover, many of these programs include cooperation and coordination with the Services on species restoration and protection efforts. Given the Services' own history in coordination with states on such matters, the concern as to "logistical difficulties" in allowing for early engagement with the states on potential species petitions is simply not supported.



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conditions and other factors or information relevant to the species that is subject of the petition. For example, there should be no doubt that a State or county can provide to the petitioner new or existing data that is not addressed in the draft petition but is relevant to the Services consideration of listing factors under the ESA. Put simply, the focus of the State or county's review and comment is not merely upon the "petition" and whether it is in a procedural format that is consistent with the Services' regulations. Rather, the primary purpose of the State/county review and comment is to further ensure that the Services are presented with a petition that contains all of the reasonably available, relevant information and/or data regarding the species that is the subject of the petition.

*Ninety (90) Day State/County Review Period and Timing of Final Submission to the Services.* Two "timing" improvements should be made to the Services' petition procedures. First, the petition review and commenting process should be extended to ninety (90) days. As a practical matter, a thirty (30) day comment period will provide States/counties with an unrealistically short window in which to review and comment upon the draft petition (especially given the recent volume of petitions) and would hamper the ability of the State or county to adequately assemble and provide data that could better inform the review of a species' status and habitat conditions. Moreover, a longer review and comment period allows for an early and effective engagement by partnering States and counties that will improve the quality and extent of information available to the Services and facilitate efficient review and assessment of the petition by the Services.

It is equally important that the petitioner avoid submission of "stale" comments or data. Under the proposed rule, the petitioner does not have a specific deadline, after close of the State/county review period, upon which the petition must be finalized and submitted to the Service. Thus, it is possible that a petitioner could submit a version of a petition to affected States and counties, receive those comments and then delay actual filing of the petition for such a period of time that the State/county comments and data are no longer current. This "staleness" problem can be easily remedied by requiring that, if a petition is not submitted within 12 months of the close of the initial State/county review period, then the petitioner must resubmit the petition and request that the State/county provide any further comments or new information that are relevant to the subject matter of the petition.

*B. Procedures for Submission of Reasonably Available Information Should be Clarified and Ensure Public Access to Supporting Data*

NESARC supports the requirement that petitioners provide all reasonably available information (both positive and negative) that is relevant to the petition. However, further clarity to the information submittal and citation process is warranted. Moreover, the Services should ensure that all information provided by the petition is in a form that allows for public posting of the data for access by the public.

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As proposed, a petition would be required to include:

- ...
- (4) A detailed narrative justification for the recommended administrative action that contains an analysis of the information presented;
  - (5) Literature citations that are specific enough for the Secretary to locate the information cited in the petition, including page numbers or chapters as applicable;
  - (6) Electronic or hard copies of any supporting materials (e.g., publications, maps, reports, letters from authorities) cited in the petition, or valid links to public Web sites where the supporting materials can be accessed; ...

(Proposed 50 C.F.R. §424.14(b)(4)-(6))

Further, the petitioner must submit:

- ...
- (10) Certification that the petitioner has gathered all relevant information (including information that may support a negative 90-day finding) that is reasonably available, such as that available on Web sites maintained by the affected States, and has clearly labeled this information and appended it to the petition.

(Proposed 50 C.F.R. §424.14(b)(10))

NESARC recommends consolidation and clarification of these requirements. For example, the requirements of paragraph (4), for narrative justification of the recommended action, refers to “an analysis of the information presented” while paragraph (10) more clearly establishes a requirement for presentation of all relevant information that is reasonably available, including data supporting a negative 90-day finding. Further, while paragraph (10) requires that all relevant information is “clearly labeled” and “appended” to the petition, paragraphs (5) and (6) imply that citation to publicly available information may be sufficient. These inconsistencies should be addressed in any final rule so that there are clear requirements for:

- Collection and submission of all reasonably available information that is relevant to the species that is the subject of the petition and the recommended administrative action sought by the petition, including information supporting a negative determination;
- Procedures for treatment of any information that has been verbally communicated that includes a requirement for memorialization and certification of the verbal communication documenting the date, identity and affiliation of the party providing such information;

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- Production and submission of such information in electronic or hard copy formats that are capable of being posted to, and accessed through, a public website; and
- Consistent standards for labeling of all submitted information and citation of such information within the petition that allows the public to locate the data or supporting materials that are cited in support of the petitioned action.

NESARC respectfully requests that the Services consolidate and modify the requirements set forth in proposed §424.14(b)(4)-(6) and (10) consistent with these core principles.

Documentation of the information submitted and considered by the Services also is warranted with respect to information that is within the Services' "possession." Under the proposed rule, the Services have clarified Section 424.14(g)(1)(ii) to state that the Services may consider information that is readily available in the relevant agency's possession at the time it makes a 90-day finding. What is left unstated, however, is how the public is made aware of such information and afforded the ability to comment on the accuracy, sufficiency and relevance of such information. This flaw should be corrected. Specifically, to the extent that the Service intends to review and rely upon information that is in the Service's possession, there first must be a public notice and availability of such information for review and comment by the public.

*C. The Services Should Further Clarify its Treatment of a "Subsequent Petition"*

The Services propose that "[w]here the Secretary has already conducted a status review of that species (whether in response to a petition or on the Secretary's own initiative) and made a final listing determination, any petition seeking to list, reclassify, or delist that species will be considered a 'subsequent petition.'" (Proposed 50 C.F.R. §424.14(g)(1)(iii)) Further, such subsequent petitions would not be considered by the Service unless they present "sufficient new information or analysis" that was not considered in the previous determination or 5-year status review.

NESARC respectfully requests that the Services reconsider and clarify their proposed treatment of "subsequent" petitions. As an initial matter, the Services should clarify that the "subsequent petition" classification only applies to a petition requesting the same action for which a previous determination has been made. Namely, the prior determination must address the same subject matter and request for action as sought in the new petition (e.g., a subsequent petition to list a species after the Service has previously denied a listing petition for the species; or a subsequent petition to delist a species after a prior delisting petition has been denied). However, where the Service has made a prior determination on a petition to list the species as threatened, and it then receives a petition to delist the species or change the status from threatened to endangered, the subject matter of the petition is different and it should be treated as a "new" petition.

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NESARC also requests that the Services clarify and further detail their intended treatment of any such “subsequent” petition. As proposed, the Services’ treatment of a subsequent petition raises a host of additional questions:

- What constitutes having information “considered” in a previous determination?
- What constitutes “sufficient” new information or analysis?
- How would an individual confirm if the data being relied upon in a petition has, in fact, been considered by the Services in a 5-year status review or as part of a prior listing determination?
- If the 5-year status review may reconsider and re-analyze existing data that the Services have in their possession, why would the Services bar such data from being the basis of a new petition?
- Would a “subsequent petition” be limited to only presentation and analysis for new information? If so, how would the Services treat the prior existing data and any prior conclusions it has made on such data?
- Under this standard, could a petition be based on a discovery of an error in research that the Service previously “considered?”
- How would the Services treat a petition that relies upon a model or analytic methodology that was considered in a prior determination?
- Would information or analysis that was not the subject of public notice and comment in a prior determination but in the possession of the Services be treated as “considered” in a prior determination and/or status review and therefore excluded as a basis of a subsequent petition?

NESARC appreciates and understands the Services’ desire to avoid repetitive petitions that seek to re-dispute matters that have been previously addressed by the Services. However, the present formulation of this standard is overly vague and assumes a level of transparency and accuracy in the “information and analysis” considered by the Services that does not exist. In fact, in its present formulation, the Services’ 5-year status review process could be asserted as a bar to the exercise of the clear statutory right to petition for action on a listed species. To the extent that the Services believe there has been an abuse of the petitioning process by parties with respect to existing listed species or designated critical habitat, they can address such matters through more reasonable and targeted means.

### **Response to Specific Requests for Comments**

*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: As is stated above, the Services should retain and further improve the consultation requirements so that: consultation with states occurs for all species (rather than only FWS-jurisdictional species); such consultation is with the affected States and counties in harmony with ESA §4(b)(5)(a)(ii); and all information relevant to the petitioned action (either positive or negative) is not only provided to the Services but its submission is in a form that allows for public posting of such information to facilitate public comment thereon. The Services should not limit the requirement to certify and append only that relevant information from affected States’ Web sites. There are ample other publicly available data and information sources that may provide relevant information beyond that found on States’ Web sites.*

*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.”*

*Response: The Services will better facilitate full State/county participation by extending the consultation period to ninety days and ensuring that such consultation is not merely limited to review of a petition, but rather is a consultation with, and request for input from, the State/county on the status of the species in relation to the requested action under the petition.*

*Question: “Finally, we seek comment on the criteria in paragraph (d), including comments on the utility of the criteria, the adequacy of the criteria, and the effect of the criteria on the workload on the petitioner.”*

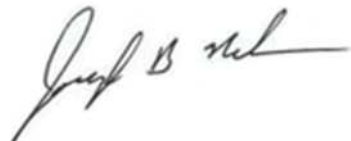
Response: The Services' proposal for criteria for petitions for revisions to a critical habitat designation, while procedurally consistent with the overall framework of the broader petition procedures, appears to rely upon and incorporate a series of terms and concepts that are the subject of a separate proposed rulemaking docket covering the designation of critical habitat. NESARC has raised significant concerns with many of the core elements of that proposed rule, particularly with respect to the treatment of occupied and unoccupied habitat and the divergence from present consideration of primary constituent elements in the designation of critical habitat to the use of a new definition of physical and biological features.<sup>4</sup>

NESARC supports expeditious issuance of a final rule on petition procedures—consistent with the principles of due process and after full opportunity for public review and comment. If the petition procedures are finalized prior to any final action on the critical habitat rule, it would then be appropriate for the Services to consider, as part of the critical habitat rule, whether any further clarifications or modifications of the petition requirements for critical habitat modifications must be made to be harmonized with the final critical habitat designation rule. Should that be necessary, the Services may propose, through a new notice of proposed rulemaking, further changes to their regulations to harmonize the petition procedures with any final critical habitat designation rules. Alternatively, should the Services' critical habitat rule precede final action on the petition regulations, we expect that the Services will reflect the final formulation of the critical habitat designation procedures in these petition regulations. At that time, the Services must then consider whether the changes made are so substantial as to require further public review and comment. In either case, NESARC urges the Services to adopt the proposed changes identified in both these immediate comments on the petition regulations as well as NESARC's prior comments on the proposed critical habitat designation rule.

#### **IV. Conclusion**

NESARC greatly appreciates the opportunity to provide these comments to the Services. We respectfully request that you take these comments into full consideration and adopt the proposed revisions when finalizing the applicable regulatory language.

Sincerely,



Joseph B. Nelson  
NESARC Counsel

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<sup>4</sup> See Appendix B.



NATIONAL ENDANGERED SPECIES ACT  
REFORM COALITION

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Public Comments Processing  
Attn: Docket No. FWS-HQ-ES-2015-0169  
U.S. Fish and Wildlife Service  
MS: BPHC  
5275 Leesburg Pike  
Falls Church, VA 22041-3803

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

**Re: NESARC Comments on the Draft Methodology for Prioritizing Status Reviews and Accompanying 12-Month Findings on Petitions for Listing under the Endangered Species Act**

Dear Sir/Madam:

On January 15, 2016, the U.S. Fish and Wildlife Service (“FWS”) issued a draft methodology for prioritizing status reviews and accompanying 12-month findings on petitions for listing species under the Endangered Species Act (“ESA”).<sup>1</sup> Pursuant to the Federal Register notice, the National Endangered Species Act Reform Coalition (“NESARC”) respectfully provides its comments and recommendations on FWS’ draft methodology.

NESARC is the country’s oldest broad-based, national coalition dedicated solely to achieving improvements to the ESA and its implementation. As detailed in the membership list attached to these comments,<sup>2</sup> NESARC includes farmers, cities and counties, rural irrigators, electric utilities, forest product companies, homebuilders, agricultural interests, mining companies, and other businesses and individuals throughout the United States. NESARC and its members are committed to promoting effective and balanced legislative and administrative improvements to the ESA that support the protection of fish, wildlife, and plant populations as well as responsible land, water, and resource management.

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<sup>1</sup> 81 Fed. Reg. 2229 (Jan. 15, 2016).

<sup>2</sup> See Appendix A.

## **I. Overview**

NESARC recognizes that FWS is in a difficult position, having to complete status reviews and make 12-month findings on more than 500 species that are presently subject to ESA listing petitions. Furthermore, NESARC acknowledges the benefits of addressing this backlog in a strategic and transparent manner. However, NESARC is concerned that the draft methodology is inconsistent with several ESA statutory requirements and existing FWS guidelines for prioritizing candidate species. In addition, FWS needs to explain how the draft methodology would be applied in the context of its proposed, multi-year National Listing Workplan, which will include actions (*i.e.*, candidate species, critical habitat designations) that are not presently addressed by the “priority bins.”

## **II. Comments on Draft Methodology**

### **A. FWS Should Support ESA Amendments That Bring Common-Sense to the Petition Review Process and Eliminate the Deadline Lawsuit Abuse**

In its public notice, FWS notes that the ESA’s “statutory deadlines have often proven not to be achievable given the workload in the listing program and the available resources.”<sup>3</sup> It has long been recognized that certain environmental groups have abused the listing process by submitting multiple petitions covering, in some cases, hundreds of species.<sup>4</sup> Further, these petitions have been filed with the clear knowledge that there is no reasonable likelihood that the FWS would be able to adequately address and complete the required 90-day and 12-month findings, regardless of resource constraints. When the deadlines inevitably are not met, the subsequent lawsuit and order or settlement gives the petitioner a privileged seat at the table with respect to the prioritization and timing of petition reviews. Moreover, all other interested parties are left with no similar voice or opportunity to comment on such prioritization and timing determinations.

There is now ample evidence that the 90-day and 12-month statutory deadlines need to be reconsidered, and that a more workable petition review process must be established. While FWS’ prioritization proposal may help inform the agency’s allocation of resources, the better option would be to shift from re-arranging deck chairs and instead focus on righting the ship. NESARC has long advocated for the review and reconsideration of the petition review process—with respect to both the information required to support a petition and also the flexibility provided in the consideration of a petition. Put simply, the statute should be amended to recognize that certain petitions and species reviews may take longer to complete. Further, limits should be placed on when and on what basis a petitioner may seek judicial intervention into FWS’ decision-making timeframe.

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<sup>3</sup> 81 Fed. Reg. at 2230.

<sup>4</sup> NESARC notes that FWS recently proposed measures to address this abuse of the petition process. *See* 80 Fed. Reg. 29286 (May 21, 2015). NESARC supports key improvements provided in this proposed rule, particularly limiting petitions to one species, clarifying the “substantial information” standard and incorporating the expertise from affected States. *See NESARC Comments on the Proposed Changes to Regulations for Petitions* (submitted September 18, 2015).



**Recommendation:** We urge FWS to engage with Congress and the public in addressing common sense improvements to the petition review process, including adoption of more realistic timelines for petition reviews and limits on procedural “deadline” lawsuits and “sue and settle” actions that are pervasively used today. While the proposed prioritization process may serve as an important tool in managing resources, it should not displace the obvious need for Congressional action on statutory improvements to the petition review process.

**B. If the Best Available Science is Inadequate or Inconclusive at the 12-Month Deadline, FWS Must Issue a “Not Warranted” Determination**

The ESA requires that, within 90 days of the receipt of a petition, FWS must first determine whether a petition contains substantial scientific or commercial information indicating that the petitioned action may be warranted prior to commencing a status review for such species.<sup>5</sup> If a petition is incomplete or otherwise does not meet the substantial information threshold, it must be denied. If the substantial information threshold has been met, then within 12 months of receiving a petition to list a species, FWS must determine whether, based on the best scientific and commercial data available, listing the species is warranted or not warranted.<sup>6</sup> Notably, both the 90-day and 12-month finding timeframes were unequivocally intended to prevent status reviews and decisions on listing and delisting petitions from continuing indefinitely.<sup>7</sup>

If FWS finds that a petition fails to meet the substantial information standard, the listing petition must be immediately denied. Likewise, if FWS determines that the best scientific and commercial data available does not support the listing of a species, the petition must be denied. These conclusions are required by law and cannot be undermined or delayed by a species “prioritization” process.

FWS must clarify that the use of prioritization categories will not become an excuse for refraining from making a determination based on the inadequacy of a petition or on the insufficient support for a listing determination under the best scientific and commercial data available standard. At present, FWS proposes a “Priority Bin 3,” covering instances where scientific uncertainty may be resolved in a reasonable time by emerging science. However, such prioritization must be clearly conditioned upon the petition first meeting the substantial information standard. In other words, an inadequately supported petition, by statute, must be denied and cannot be moved forward for evaluation upon a claim of scientific uncertainty. Further, in applying the scientific uncertainty categorization, FWS cannot use the “reasonable time” criterion to extend the 12-month deadline. The ESA unequivocally requires evaluation of a species based on the best scientific and commercial data available—within the 12-month

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<sup>5</sup> 16 U.S.C. §1533(b)(3)(A).

<sup>6</sup> 16 U.S.C. §1533(b)(3)(B). FWS also can make a determination that a species’ listing “is warranted but precluded.” See 50 CFR § 424.14(b)(3)(iii). However, this option is predicated upon first finding that a listing is warranted.

<sup>7</sup> See *Endangered Species Act Amendments of 1982*, S. Rept. No. 97-418 at 13 (May 26, 1982).

timeframe for which evaluation is to take place. FWS cannot rely upon scientific uncertainty to justify a perpetual delay of its determination. If there is uncertainty about threats to the species or the magnitude and timing of related effects of those threats that will not be resolved within the 12-month timeframe for completion of the species' status review, then the best available scientific and commercial information does not support listing the species. In that instance, FWS must issue a not warranted determination and deny the petition.

The same principle of taking definitive action where warranted also applies to those species to be covered in "Priority Bin 5" which would include "[s]pecies for which we know almost nothing about its threats or status."<sup>8</sup> As presently stated, this prioritization category is identifying petitions where the best available scientific and commercial data does not support a listing determination. In these instances, the answer is not to place such petitions at the bottom of the prioritization list, but rather, to dismiss the petitions on the basis that a listing is not warranted. Moreover, it is unclear how FWS would rationalize this prioritization category given that petitions lacking substantial information should be denied at the 90-day stage.<sup>9</sup>

**Recommendation:** The use of prioritization categories cannot become an excuse for refraining from making a determination based on inadequacy of data. As described above, both Priority Bins 3 and 5 should be modified to make clear that a petition can and will be dismissed at the 90-day deadline if a petition lacks substantial information for commencement of a status review and at the 12-month deadline where the best available scientific and commercial information does not support a listing determination. FWS cannot use the proposed prioritization process to place species into a perpetual holding pattern while awaiting additional or more robust data.

### **C. Prioritization Criteria That Rely Upon Determinations of the Quality or Quantity of the Science Should be Reconsidered and Clarified**

FWS indicates that it will base several prioritization categories upon the "strength" of the associated scientific data.<sup>10</sup> Without clarification, this approach could lead to instances where the ESA's requirement that listing determinations are to be made solely on the basis of the best scientific and commercial data available is subverted.<sup>11</sup> The application of the best scientific and commercial data available requires that FWS rely upon *available data*. The courts have explained that FWS must "utilize the 'best scientific . . . data available,' not the best scientific data possible."<sup>12</sup> Thus, FWS cannot delay a listing determination while it awaits "better data."<sup>13</sup>

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<sup>8</sup> 81 Fed. Reg. at 2231 (emphasis added).

<sup>9</sup> The interested party submitting a petition to list has the obligation to present "substantial scientific or commercial information indicating that the petitioned action may be warranted." 50 C.F.R. § 424.14(b)(1). A petition containing "almost nothing" about the threats to the species or its status would not satisfy this informational threshold for further consideration.

<sup>10</sup> Priority Bin 2 is for species with "strong information" concerning the species' status; Priority Bin 3 is for species with uncertain status that can be resolved within a "reasonable timeframe" because emerging science is underway; and Priority Bin 5 is for species that FWS "know[s] almost nothing about its threats or status." 81 Fed. Reg. at 2230-31.

<sup>11</sup> 16 U.S.C. § 1533(b)(1)(A).

<sup>12</sup> *Building Indus. Ass'n of Superior Cal. v. Norton*, 247 F.3d 1241, 1246 (D.C.Cir.2001) (emphasis in original).

<sup>13</sup> *Southwest Center for Biological Diversity v. Babbitt*, 215 F.3d 58, 61 (D.C.Cir.2000).

While typically raised to support the listing of a species, these same standards also apply to decisions not to list a species. Thus, FWS must make a warranted or not warranted determination in a timely manner and cannot delay its decision simply because the data is weak or inconclusive.

To the extent that FWS retains the prioritization of species based on the quantity or perceived “strength” of data, it must ensure that this assessment is applied fairly and consistently to all pending species decisions. There is a significant difference between the quantity of data that may be available and the application of the best scientific and commercial information available standard. FWS must be careful that the use of such a “strength of data” criterion does not become a basis for fast-tracking listing determinations while delaying determinations that a listing is not warranted. To the extent that FWS is prioritizing petition reviews, it must conduct a neutral and unbiased review of the availability or “strength” of the scientific data. This assessment must be kept separate from a finding that listing a species is or is not warranted based upon the best scientific and commercial information available. Otherwise, FWS would essentially be cherry-picking species to list without regard to the statutory requirement that decisions to list and not list both occur by a specified deadline.

**Recommendation:** FWS should clarify that its “Priority Bin 2” criterion of assessing strength of data solely relates to the availability of information and does not prejudice the Secretary’s neutrality in undertaking the review of the best scientific and commercial information available on the species’ status when acting on the petition.

#### **D. FWS Should Include Downlisting and Delisting Actions**

FWS notes that the draft methodology would not apply to downlisting or delisting actions.<sup>14</sup> NESARC is concerned that FWS has adopted an artificial constraint given that downlisting and delisting petitions are subject to the same requirements and deadlines as petitions to list.<sup>15</sup> Furthermore, NESARC is concerned that FWS does not appear to include downlisting or delisting actions as part of the contemplated annual workplan. FWS has the same obligation to timely address delisting and downlisting petitions. In order to provide full transparency and consistency with its ESA obligations, FWS should include downlisting and delisting actions in both its prioritization methodology and any annual workplan.

**Recommendation:** FWS should apply its prioritization methodology to downlisting and delisting actions and ensure that such actions also are included in the FWS workplan. Further, to properly recognize its scope, the workplan should be renamed as the “Petition and Species Status Review Workplan.”

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<sup>14</sup> 81 Fed. Reg. at 2230.

<sup>15</sup> See 16 U.S.C. § 1533(b)(3)(A).

### **E. FWS Should Further Explain the Prioritization of All ESA Actions Included in its Annual Workplan**

FWS must assess and explain how the prioritization methodology would be applied to other ESA actions. While the primary focus of FWS' methodology is to prioritize those species that have a pending status review and accompanying 12-month finding, FWS also indicates that the prioritization methodology will inform the creation of a workplan that will include a broader range of ESA listing actions. Specifically, FWS states that the draft methodology will "be useful in prioritizing other actions in the listing program."<sup>16</sup>

FWS provides no further information on how its prioritization methodology will be applied to other ESA actions. Moreover, FWS does not explain how it will harmonize its prioritization categories with other existing procedures. For example, FWS already ranks candidate species using a different methodology that appears to be inconsistent with the proposed process.

**Recommendation:** Prior to implementation, FWS must provide further information to the public on how the methodology will be applied to other ESA actions and provide a similar opportunity for public comment on such measures.

### **F. For Each Species or Action, FWS Should Annually Report on its Prioritization Ranking**

FWS emphasizes that the draft methodology is intended to provide transparency to stakeholders regarding the prioritization of upcoming workload.<sup>17</sup> However, simply publishing the methodology and subsequently sharing the annual workplan online does not provide the transparency that is needed. Instead, concurrent with the issuance of any annual workplan, FWS should provide a summary, on a species-by-species basis, of the status of its planned action and the reason for assigning the required action a particular priority level. A similar process already is in place with respect to FWS' annual Candidate Notice of Review.<sup>18</sup> Such further transparency in prioritization will better assist states, tribes, and the public in managing their own engagement with FWS on pending petition matters.

**Recommendation:** Concurrent with the public release of any annual workplan, FWS should provide a summary of the status of the ESA action and the basis of its prioritization.

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<sup>16</sup> 81 Fed. Reg. at 2230.

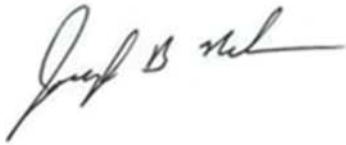
<sup>17</sup> 81 Fed. Reg. at 2229.

<sup>18</sup> See 80 Fed. Reg. 80,584 (Dec. 24, 2015).

### **III. Conclusion**

NESARC greatly appreciates the opportunity to provide these comments. We respectfully request that you take these comments into full consideration and revise the draft methodology accordingly before implementation.

Sincerely,

A handwritten signature in cursive script, appearing to read "Joseph B. Nelson".

Joseph B. Nelson  
NESARC Counsel