



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
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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”).¹ 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,² 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.

¹ 81 Fed. Reg. 2229 (Jan. 15, 2016).

² 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.”³ 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.⁴ 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.

³ 81 Fed. Reg. at 2230.

⁴ 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.⁵ 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.⁶ 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.⁷

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

⁵ 16 U.S.C. §1533(b)(3)(A).

⁶ 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.

⁷ 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."⁸ 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.⁹

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.¹⁰ 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.¹¹ 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."¹² Thus, FWS cannot delay a listing determination while it awaits "better data."¹³

⁸ 81 Fed. Reg. at 2231 (emphasis added).

⁹ 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.

¹⁰ 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.

¹¹ 16 U.S.C. § 1533(b)(1)(A).

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

¹³ *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.¹⁴ 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.¹⁵ 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.”

¹⁴ 81 Fed. Reg. at 2230.

¹⁵ 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."¹⁶

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.¹⁷ 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.¹⁸ 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.

¹⁶ 81 Fed. Reg. at 2230.

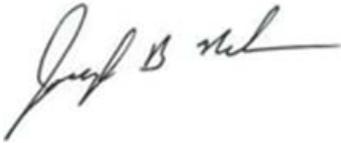
¹⁷ 81 Fed. Reg. at 2229.

¹⁸ 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 black ink, appearing to read "Joseph B. Nelson". The signature is written in a cursive style with a long horizontal stroke at the end.

Joseph B. Nelson
NESARC Counsel