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Wildlife Agencies Propose Overhaul of ESA's Petition Process for Species Listings

The U.S. Fish and Wildlife Service and the National Marine Fisheries Service ("the Services"), the two agencies that administer the Endangered Species Act ("ESA"), recently published a proposed rule designed to improve the content and effectiveness of the species listing petition process. See 80 Fed. Reg. 29,286 (May 21, 2015), available [here](#). The proposed rule seeks to streamline the petition process for the Services and increase the quality of petitions by eliminating multi-species petitions and requiring petitioners to coordinate with the state agencies in locations where each species lives.

If implemented as proposed, the rule would lead to a more efficient and better-informed species listing process. Unfortunately, the proposal is almost certain to garner significant opposition. Comments on the proposal are currently due July 20, 2015.

Background

The ESA requires the Services to make decisions about whether to list, delist, or re-classify a species as threatened or endangered "solely on the basis of the best scientific and commercial data available." 16 U.S.C. § 1533(b)(1)(A). Listing determinations are central to the Act, because listing a species as either threatened or endangered entitles it to federal protection under the ESA, including the "take" prohibition of Section 9 and the consultation requirements of Section 7.

The Services may decide to list a species on their own initiative or "any interested person" may initiate the listing process by filing a petition to list a species, reclassify a listed species, or revise a species' critical habitat designations. The Services evaluate petitions by making a preliminary finding within 90 days about whether the petition presents "substantial scientific or commercial information indicating that the petitioned action may be warranted." If the 90-day finding is positive, the Services have twelve months from the date of the petition to determine if the petitioned action is unwarranted, warranted, or "warranted but precluded" (meaning that other ongoing agency actions take precedence), and to act accordingly.

Over the years, due in part to resource and budget constraints, the petition process has taken on an increasingly significant role under the ESA. One tactic environmental groups have used with growing regularity is to submit a single petition covering multiple species without differentiating among the data cited to support the listing of each species. In other instances, petitioners have submitted petitions to initiate 90-day reviews based on inadequate data and later sought to supplement their submissions after the review process has

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begun. In both cases, the Services have been forced to expend scarce agency resources to piece together the petitioners' submissions or to evaluate clearly deficient petitions. The Services now are attempting to address these problems by proposing important changes to the petition process.

The Services' Proposed Rule

There are two key aspects of the Services' proposal. First, it would require each petition to cover just one species. The Services state that while they have accepted multi-species petitions in the past, doing so is inefficient because the supporting materials that petitioners provide oftentimes apply to different species, making it difficult to follow the logic of the petition. Under the proposal, petitioners could still petition to list multiple species, but they would have to do so in individual and independent, species-specific petitions.

Second, the proposed rule would require that petitioners to the FWS (but not NMFS) confer with relevant state agencies before submitting a petition. Petitioners then would have to certify that they provided a copy of the petition to the state agencies responsible for the management and conservation of fish, plant, or wildlife resources in each state where the species occurs at least 30 days prior to submission to the FWS, and that the submitted petition includes any data and comments by those state agencies as to the accuracy or completeness of the petition. In that way, the proposal would further the ESA's goal of maximizing cooperation with the states and encourage greater communication and cooperation between petitioners and state conservation agencies. The proposal also recognizes that the states have jurisdiction and responsibility for managing and conserving freshwater fish, wildlife and plant species that are not listed under the ESA and have developed substantial experience, expertise, and information relevant to the conservation of those species.

Additionally, the proposed rule would identify for the first time the types and quality of information that the Services must consider in listing petitions. The proposal would require that all petitions describe the magnitude and immediacy of threats to each species, which the Services believe will help them assess the listing priority of species for which a warranted-but-precluded finding is made. Further, petitions to revise critical habitat designations would need to demonstrate that the existing designation incorrectly includes or excludes specific areas, the benefits of designating additional areas, and the informational needs associated with evaluating habitat unoccupied by the species at the time of listing.

The proposed rule also establishes a framework for the Services to respond to listing petitions. Petitions that fail to satisfy the mandatory requirements would be returned without further determination so that agency resources are not needlessly diverted from higher priorities. Requests that comply with mandatory requirements would be acknowledged in writing within 30 days of receipt. In situations where a petitioner supplements a petition with additional information at a later date and requests that the agency take the new information into account, the proposed rule would reset the statutory deadlines for the petition process – an issue that has been a matter of some debate recently. The proposed rule would also clarify that the Services may consider information readily available in the relevant agency's possession at the time it makes a 90-day finding, even if such information is not included in the petition itself.

Implications and Next Steps

The proposed rule, if implemented in its current form, would go a long way towards conserving agency resources, making the petition process more efficient, and helping to prioritize the focus of petitioners and the Services on the species in greatest need of the ESA's protections. The proposal would conserve agency resources by clarifying procedural aspects of the petition process that have served as impediments in recent years, codifying informal agency practices, and relying more on data and expertise of state agencies. Individual species petitions buttressed with more state agency input and data should lead to smarter decisions by the Services and superior conservation outcomes for species than multi-species petitions that are vague or lack relevant data. Moreover, establishing information quality standards for listing petitions will further help to streamline the process and conserve agency resources by instilling a measure of consistency into petitions.

The Services request comments and information evaluating the proposed changes, particularly the requirement of petitioner coordination with states prior to submission of a petition to the FWS and whether that requirement should be expanded to include petitions to NMFS. All comments are currently due July 20, 2015.

Beveridge & Diamond's Endangered Species Act practice provides strategic counseling and compliance advice to project proponents in all industries to minimize the impacts of threatened and endangered species listings and critical habitat designations on our clients' activities. For more information on this proposed rule or to discuss strategies for efficiently navigating your project through the complex and overlapping federal resources regulatory programs, please contact the authors or any member of our [Endangered Species Act practice group](#).