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**Docket No. FWS-HQ-ES-2015-0016**

RE: Comments of the Independent Petroleum Association of America and the American Petroleum Institute on the Proposed Revisions to the Regulations for Petitions under the Endangered Species Act

On May 21, 2015, the United States Fish and Wildlife Service (“FWS”) and the National Marine Fisheries Service (“NMFS”) (collectively, “the Services”) proposed a series of amendments to the regulations at 50 CFR § 424.14 that govern the content and consideration of petitions filed with the Services pursuant to the Endangered Species Act (“ESA”).<sup>1</sup> The proposed amendments are intended to “improve the specificity of petitions and to enhance the efficiency and effectiveness of the petition process to support species conservation.”<sup>2</sup> The Independent Petroleum Association of America (“IPAA”) and the American Petroleum Institute

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

<sup>2</sup> *Id.* at 29287.

(“API”) strongly support the efforts of the Services to achieve those goals by, among other things: 1) requiring that petitions be limited to a single species; 2) requiring consultation with states prior to the submission of petitions; 3) ensuring 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; 4) providing clear direction as to the information necessary for submission of a complete petition; and 5) clarifying that a petitioner’s submission of supplemental information after filing of a petition will re-start the statutory timeframe for review. What follows are suggested additions and changes to the proposed amendments and revisions to 50 CFR § 424.14 that we believe will aid in the achievement of those goals.

IPAA is a national trade association representing the thousands of independent crude oil and natural gas explorer/producers in the United States. It also operates in close cooperation with 44 unaffiliated independent national, state and regional associations, which together represent thousands of royalty owners and the companies which provide services and supplies to the domestic industry. IPAA is dedicated to ensuring a strong, viable domestic oil and natural gas industry, recognizing that an adequate and secure supply of energy developed in an environmentally responsible manner is essential to the national economy.

API is a national trade association representing over 625 member companies involved in all aspects of the oil and natural gas industry. API’s members include producers, refiners, suppliers, pipeline operators, and marine transporters, as well as service and supply companies that support all segments of the industry. API and its members are dedicated to meeting environmental requirements, while economically developing and supplying energy resources for consumers.

### Regulatory Authority

The ESA contemplates that “interested persons” may petition the Services to have a species listed or delisted, or to revise a critical habitat designation. However, the ESA does not describe what information a petition must contain to qualify as a petition and to trigger the Services’ duty to conduct a 90-day review. The ESA states only that, to obligate the Services to take further action beyond a 90-day review, a petition to list or delist must “present substantial scientific or commercial information indicating that the petitioned action may be warranted;” and a petition to revise a critical habitat designation must “present substantial scientific information indication that the revision may be warranted.” This lack of detail in the ESA about what a petition must contain to qualify as a petition leaves gaps in the statute that the Services are authorized to fill through rulemaking. The Services’ proposed changes to their regulations for petitions are a reasonable exercise of that gap-filling authority.

### Proposed paragraph (b)(2)

We strongly support the provision that states that “one and only one species may be the subject of a petition.” The 90-day and 12-month time schedules specified in the ESA present considerable challenges to completing comprehensive and thorough reviews of listing petitions for multiple species. Given the new information and petition completeness requirements that the Services are proposing, limiting listing petitions to one species will at least allow the opportunity for a reasonable period for public review and comment on each listing petition.

### Proposed paragraph (b)(9)

This paragraph requires a petitioner to certify in any petition filed with the FWS “pertaining to species found within the United States” that it provided a copy of its petition to the relevant management and conservation agencies in “each State where the species occurs at least

30 days prior to submission to the Service,” and that it has included in the petition any “data or written comments” received from any such agency. The requirement is intended to “encourage greater communication and cooperation among would-be petitioners and State conservation agencies prior to the submission” of a petition.<sup>3</sup>

We strongly support this provision. States play a key role in the management and conservation of fish, plant, and wildlife resources; and have valuable information that should inform the petition and be readily available to those who are reviewing or commenting on it.

To realize the full benefit of the provision, however, we recommend that proposed paragraph (b)(9)(i) be revised to require the petitioner to request comments from the State agencies to which the petition is provided; including, but not limited to, the agencies’ opinion as to the merits of the petition, the status of the species under State law, if applicable, and any data or information pertaining to the species. In addition, we recommend that proposed paragraph (b)(9)(i) be revised to require that the petition be provided to the State agencies at least 90 days, rather than 30 days, prior to submission to the Service. The additional time will ensure that the State agencies have adequate time to respond in a thorough and meaningful manner.

As proposed, the paragraph would not apply to petitions filed with NMFS. As a reason for the exclusion, the Services note “the relatively greater logistical difficulties that would be posed to petitioners if they were required to identify and coordinate with all interested States regarding marine species and wide-ranging anadromous species.”<sup>4</sup> However, the Services specifically “seek public comment on whether [proposed paragraph (b)(9)], if adopted, should also apply to petitions filed” with NMFS.<sup>5</sup>

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<sup>3</sup> *Id.*

<sup>4</sup> *Id.* at 29288.

<sup>5</sup> *Id.*

For the following reasons, we strongly recommend that this provision be extended to petitions filed with NMFS. First, the “logistical difficulties” of filing a petition with respect to a species that occurs off the shores of more than one state are not “relatively greater” than the “logistical difficulties” of filing a petition (as often happens) with respect to a species that occurs within the boundaries of more than one state. Thus, there is no justification for exempting petitioners who file petitions with the NMFS from the requirement to communicate and cooperate with all “interested” states prior to the submission of a petition. Second, even without being subject to proposed paragraph (b)(9), a petitioner who is filing a petition with NMFS will have to provide in the petition, as required by proposed paragraph (b)(8), “information on the current geographic range of the species, including range States.” To comply, the petitioner will have to identify all of the states that may have an interest in the species. Once that identification has been made, it would not be difficult for the petitioner to send a copy of its petition to each interested state and to then report the response, if any, from each of those states in the petition. Thus, in our view, the burden of requiring a petitioner to NMFS to communicate in some cases with more than one state prior to submitting a petition does not outweigh the benefit to the listing process that would be realized by requiring petitioners to NMFS to communicate and cooperate with all interested states.

Finally, we recommend against limiting proposed paragraph (b)(9) to petitions “pertaining to species found within the United States.” We believe that the same benefits could be realized to the listing process by applying proposed paragraph (b)(9) to petitions pertaining to species found outside the United States as well, and by requiring petitioners to communicate and cooperate with the governments in the countries where the species occur prior to submitting their petitions. For example, certain geographical range distributions and migration corridors traverse

national borders, which may make cross-border collaboration among neighboring countries an essential element in addressing those species.

Proposed paragraph (b)(10)

This paragraph applies to all types of petitions and requires a petitioner to certify that it “has gathered all relevant information (including information that may support a negative 90-day finding),” and “append[] [it] to the petition.” The Services should make clear that “all relevant information” means “the best available scientific and commercial data,” and that it includes the best available scientific and commercial data that support the petition as well as any such data that may refute the petition. In addition, for the sake of both the petitioners and the Services, we believe, as discussed below, that it would be helpful if some more specific parameters could be established for the search that the petitioner must conduct to insure that it “has gathered all relevant information.” A failure to find all relevant studies or omitting potentially relevant studies from a literature review may result in bias and, consequently, false or imprecise conclusions. Therefore, we do not support the alternative mentioned by the Services of “limiting the requirement under (b)(10) to extend only to gathering and certifying submission of relevant information publicly available on affected States’ websites.”

We recommend that the petitioner be required to conduct a systematic search of all relevant databases and develop a list of papers screened for relevance to the status of the species in question. The petitioner should be required to identify in its certification: 1) all databases and other sources searched; 2) the dates of the last search for each database and the period searched; 3) full search strategies (including all search terms) for each database; and 4) any language or publication status restrictions used. Transparency in the search process and adequate reporting

will make it possible for others reading the review to judge the thoroughness of the search, and thereby the potential of bias in the review.

Moreover, in view of the requirement in proposed paragraph (b)(10) that the petitioner certify that it has “gathered all relevant information (including information that may support a negative 90-day finding),” and the petitioner “append” such information to the petition, the rules should make clear that the petitioner is also required to discuss the significance of any such information in the “detailed narrative justification” it will have to provide pursuant to proposed paragraph (b)(4) of “the information presented.” In other words, the rules should make clear that the information “gathered” and “appended” to the petition pursuant to (b)(10) is the same as the information “presented” pursuant to (b)(4). Accordingly, we recommend that (b)(4) be revised to read as follows:

A detailed narrative justification for the recommended action that contains an analysis of all of the information gathered in accordance with paragraph (b)(10).

The Services will not fully achieve their goal of “ensur[ing] that any petition submitted to the Secretary is based on reliable and unbiased information and does not consist simply of unrepresentative, selected data,” if they do not require petitioners to analyze all of the information they are required to gather in their “detailed narrative justification.”

Proposed paragraph (c)(3)

We support the requirement that petitioners include “a description of the magnitude and imminence of the threats.” A description of the immediacy of the threats a species faces will aid the Services in prioritizing their work and will insure that listings are not made based on speculative threats that may or may not occur in the distant future. We recommend that the requirement be subject to the requirements of (b)(5), (6), and (10), including the recommendations that we have made for these paragraphs above. This will ensure that the

discussion of the “magnitude and imminence of the threats” will be based on a thorough research of the best available science and commercial data. As explained below, we also support the Services’ clarification in proposed paragraphs (g) and (h) about the meaning of the phrase “substantial information,” which is used here and elsewhere in the regulations.

Proposed paragraph (d)(5)

This paragraph specifies information that must be included in a petition to designate as critical habitat areas “that were outside the geographical area occupied by the species at the time it was listed” (“unoccupied areas”). It states that the petition must include “information indicating why the petitioned areas are or are not essential for the conservation of the species.” This requirement is not consistent with paragraph 50 CFR § 424.12(e) of the current regulations and should be revised accordingly. To be consistent with § 424.12(e), paragraph (d)(5) must also require that the petition demonstrate why the occupied areas are “inadequate to ensure the conservation of the species.”

We are aware that the Services have proposed to delete § 424.12(e) from the current regulations so as to make it possible to designate unoccupied areas as critical habitat even if the occupied areas are not presently “inadequate to ensure the conservation of the species,” and even if the unoccupied areas are only projected to be “essential to the conservation of the species” at some point in the future. Docket No. FWS-HQ-ES-2012-0096. IPAA and API both filed detailed comments in opposition to that proposal. We reiterate that to delete § 424.12(e) or to amend it in a manner that violates the ESA is impermissible.

As the Services may only add additional areas to an area designated as critical habitat “after taking into consideration the economic impact” of doing so, we recommend that paragraph (d)(5) (and paragraph (d)(3)) also require the petition to contain information explaining the



economic impact of the petitioned action. If the Services determine that the petitioned action may be warranted, having information available on the economic impact of the petitioned action will aid the Services in determining “how [they] intend[] to proceed” with the petitioned action, and thus help achieve their goal of improving “the efficiency and effectiveness of the petition process.”

For these reasons, proposed paragraph (d)(5), to be consistent with current regulations, should read as follows:

For any areas petitioned to be added to critical habitat that were outside the geographical area occupied by the species at the time it was listed, information explaining: 1) why the species’ present range is inadequate to ensure its conservation; 2) why the petitioned area presently contains features essential to the conservation of the species; and 3) how the designation will impact, economically and otherwise, the use of the petitioned area for other purposes. For any areas petitioned to be removed from critical habitat that were outside the geographical area occupied by the species at the time it was listed, information indicating why the petitioned areas are no longer essential to the conservation of the species.

Proposed paragraph (d)(6)

This paragraph is confusing when read in the light of proposed paragraphs (b)(4) and (b)(10). As explained above, proposed paragraph (b)(10) requires a petitioner filing any type of petition to certify that it has “gathered all relevant information ... that is reasonably available,” and that it has “appended [that information] to the petition.” Proposed paragraph (b)(4) requires that the petition contain a “detailed narrative justification for the recommended administrative action that contains an analysis of the information presented.” Proposed paragraph (d)(6), on the other hand, purports to identify “additional information,” beyond that required by proposed paragraphs (b)(4) and (b)(10), that must be included in petitions to “revise critical habitat.” It requires that the petition include “a complete presentation of the relevant facts, including an

explanation of what sources of information the petitioner consulted in drafting the petition, as well as any relevant information known to the petitioner not included in the petition.”

When the three proposed paragraphs are read together, it is difficult (if not impossible) to discern what “additional information” proposed paragraph (d)(6) requires or may be referring to beyond that required by proposed paragraphs (b)(4) and (b)(10). How does “a complete presentation of the relevant facts” differ from a “detailed justification for the recommended administrative action that contains an analysis of the information presented”? For that reason, we conclude that proposed paragraph (d)(6) is not necessary and therefore recommend that it not be adopted.

Proposed paragraphs (g)(1)(i) and (h)(1)(i)

Both of these paragraphs seek to clarify the “substantial information” standard that is to be applied in reviewing petitions. We support the clarification, but recommend that the Services also make clear that in determining whether a petitioned action may be warranted, they shall consider “all relevant information” gathered in compliance with proposed paragraph (b)(10). It would defeat the purpose of proposed paragraph (b)(10) if a “substantial information” determination could be made without taking into account “all relevant information,” both that which may tend to support the need for the petitioned action and that which may tend to refute the need for the petitioned action.

Proposed paragraph (g)(2)(iii)(B)

We support this paragraph, which would link a determination of “expeditious progress” on pending petitions to the availability of funds to consider those petitions. We recommend that a determination of “expeditious progress” also be linked to the Services’ prioritization of

pending petitions and suggest that the Services change the word “qualified” to “the” to avoid any confusion about what constitutes a “qualified species.”

Conclusion

IPAA and API strongly support the Services’ efforts to “improve the specificity of petitions and to enhance the efficiency and effectiveness of the petition process to support species conservation.” In our comments, we have made a number of constructive suggestions that, if adopted, would aid the Services in the achievement of those goals. We therefore urge their careful consideration by the Services.

Respectfully submitted,



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