



May 23, 2016

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

**Re: Revisions to the Regulations for Petitions for Listing Under the Endangered Species Act  
81 Fed. Reg. 23448-23455 (Thursday, April 21, 2016):**

**Comments of the American Petroleum Institute and the Independent Petroleum Association  
of America**

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

Dear Madam or Sir:

The American Petroleum Institute (“API”) and the Independent Petroleum Association of America (“IPAA”) submit these comments on the revisions to the proposed regulations for petitions for listing species under the Endangered Species Act (“ESA”).

API is a national trade association representing over 640 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.

IPAA is a national trade association representing the thousands of independent crude oil and natural gas explorers and producers in the United States. It also operates in close cooperation with forty-four unaffiliated independent national, state, and regional associations, which together represent thousands of royalty owners and the companies that provide services and supplies to the domestic industry. IPAA is dedicated to ensuring a strong and 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 and IPAA support the overall objective of the U.S. Fish and Wildlife Service and the National Marine Fisheries Service (“the Services” or “the agencies”) to clarify and enhance the procedures and stand-

ards by which the Services will evaluate petitions under section 4(b)(3) of the Endangered Species Act of 1973, as amended (ESA or Act; 16 U.S.C. 1531 et seq.), and to provide greater clarity to the public on the petition-submission process. However, we believe that in some important particulars as noted below in this letter the most recent revisions poorly serve this overall objective and the interest that the Services and the public share in a focused review of candidate species and in a science-based decision process.

API and IPAA have commented on several past occasions on the requirements for listing petitions. On September 18, 2015, we provided comments that offered qualified support for the proposed rule regarding the listing petition process that the Service published jointly with the National Marine Fisheries Service. In those comments, we said:

IPAA and 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.

We also stated that the Services should make clear that, as the ESA requires, "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. With this letter we incorporate those comments by reference (Please see comments filed in **Docket No. FWS-HQ-ES-2015-0016**).

On February 16, 2016, we provided comments to the Draft Methodology for Prioritizing Status Reviews and Accompanying 12-Month Findings on Petitions for Listing and in those comments identified certain themes that we believe govern the development of a methodology for prioritizing listing decisions and the implementation of that methodology once it is developed:

- 1) adoption of a systematic approach to the management of the agency's workload so to prioritize work;
- 2) consultation taking place between the Service and state wildlife resource agencies;
- 3) decisions being reached through a transparent, clearly communicated and documented process; and
- 4) objective and science-based consideration of the information on which decisions are based.

With this letter, we likewise incorporate those comments by reference. (Please see comments filed in **Docket No. FWS-HQ-ES-2015-0169**).

In this letter, we direct our comments to specific revisions to the regulations proposed in the April 21 Notice that we believe fail to meet the criteria described above.

On page 23449 of the Notice, in describing changes proposed to Sec. 424.14 (b) of the rule, the Services write:

We add clarification at proposed Sec. 424.14(b)(2) that the requirement that only one "species" be the subject of each petition applies to "taxonomic species." A petition may therefore address any configuration of members of that single taxonomic or biological species as defined by the Act (the full species, one or more subspecies, and, for vertebrate species, one or more distinct population segments (DPSs)). In other words, one petition may request consideration of, for example, both the full species entity and a subspecies of that entity, or, in the case of vertebrate species, one or more DPSs of the subject species as well. Separate petitions are not needed in this case.

API and IPAA object to this new wording that the Services propose. The Services' inquiry and analysis of petitions to list species will be best served by having more information about each species for which a petition is submitted. API and IPAA believe that it is broadly recognized in the literature and in the consideration of the health of species populations – as well as by the practice of the Services in carrying out their responsibilities under the ESA – that "species" (as opposed to "taxonomic species") are sufficiently distinct that petitioners should be required to distinguish between them, and should submit one species per petition as initially proposed.

On page 23450 of the Notice, in describing changes proposed to Sec. 424.14 (b) of the rule, the Services write:

At proposed Sec. 424.14(b)(9), we replace text concerning pre- coordination of petitioners with States and gathering of information from State wildlife agencies with new text *requiring only that petitioners notify affected States* (italics supplied) of their intention to file a petition to list, delist, change the status of, or revise critical habitat for a species, at least 30 days before submitting a petition to the Services . . . requiring this early notice to the States is consistent with the direction in Section 6 (16 U.S.C. 1535) to coordinate with States to the maximum extent practicable. This proposed provision would allow the Services to benefit from the States' considerable experience and information on the species within their boundaries because the States would have an opportunity to submit to the Services any information they have on the species early in the petition process. The Services would have the option, in formulating an initial finding, to use their discretion to consider any information provided by the States (as well as other readily available information) as part of the context in which they evaluate the information contained in the petition. If a subsequent status review is conducted, the Services would of course consider all relevant data and information, including that provided by States and any other interested parties, in making their determination.

API and IPAA object to these changes in the requirements that were originally included in the proposed revisions and respectfully disagree that "requiring this early notice to the States is consistent with the direction in Section 6 (16 U.S.C. 1535)". Simply *requiring only that petitioners notify affected States* would not allow states to submit information as part of the petition, thus not allowing States to be part of the petition finding. Recognizing that Section 4 (B)(3)(a) requires the Secretary to make a finding based on information in the petition as to whether the petitioned action may be warranted, API and IPAA assert that the Rule should strongly encourage petitioners to work and coordinate with States to gather information for the benefit of the petition. This would better ensure the Secretary is making a more informed finding based on the petition and that the finding is consistent with the direction in Section 6 (16 U.S.C. 1535) to coordinate with States to the maximum extent practicable.

States have a unique responsibility for the management and conservation of fish, plant and wildlife resources within their jurisdiction, and arising from that role possess both expertise and information and data that can be critical to the understanding of the status and health of species. Concerns about slowing down the petition process should not be overcome by the need to collect information from the States that are often the entities with substantial information about the species spanning time and possible population cycles. This information is often derived from agency-conducted field work or from research carried out by academic institutions or other organizations. 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. An interest in the speed with which review may be conducted should not trump the accuracy and completeness of the process, and taking maximum advantage of the information that the States possess will strengthen the petition process by encouraging consideration of the status of the species in the context of land uses and other conditions in the range of a species of concern. At the very least, a petitioner should have to obtain and submit an indication from the State(s) as to whether the State(s) will submit information, so that the Service will know that State information will be provided and the Service can prepare to incorporate that information into its decision-making process .

Also on page 23451, in discussing responses to requests under Sec. 424.14 (e), the Services state:

In this revised proposal we add language clarifying that the Services retain discretion to consider a request to be a petition and process that petition where the Services determine there has been substantial compliance with the relevant requirements. For example, if a petitioner cites 50 references, but provides copies of only 49 of the 50 references with the petition, it is not likely that the Services would choose to reject the request without making a finding (unless the missing reference was a keystone in supporting the request). However, we do want to encourage the petitioner to be careful to ensure all cited materials are included with the petition, as this is an important part in making the petitioner's case. If the petitioner cites a source as giving support to an element in a petition, the petitioner should have actually reviewed that source and thus should be able to provide it along with the petition.

API and IPAA acknowledge the merits of the discretion the Services' wish to retain in this context. However, we urge that the Services clarify in the text of the rule that this discretion will be used sparingly to ensure that the exception does not swallow the rule. For example, the new paragraph could start with "However, in rare cases where the petition does not satisfy the relevant requirements due to minor mistakes..."

On page 23450, in discussing findings on a petition to list, delist, or reclassify under Sec. 424.14 (g), the Services state:

In Sec. 424.14(g)(1)(ii), which describes what additional information the Services may use in evaluating a petition, beyond that which is provided with the petition, we propose to delete the phrase "in the agency's possession" and revise this statement to simply state, "The Services may also consider information readily available at the time the determination is made . . . ." That information may not only be stored in the traditional hard copy format in files, but may be electronic data files as well, or stored on Web sites created by the Services or other Web sites routinely accessed by the Services. Further, the Services may consider information that they are able to retrieve through a quick Internet search. However, the Services are not required to search for or consider such information in making an initial finding on a petition, and would use that information only to provide context for evaluating the information in the petition rather than to supplement the petition.

In this context, API and IPAA urge that the language of the rule should make clear that the Services will only consider "credible scientific or commercial information readily available," and not non-credible information. We propose that the wording of the relevant sentence be changed to read: "The Services may also consider credible scientific or commercial information readily available at the time the determination is made in reaching the initial finding on the petition."

With the changes API and IPAA recommend in this letter, the revisions proposed to the rule will accomplish the purpose the Service seeks to the quality of petitions through carefully considered requirements

for content and will focus the Services' resources on species that merit further analysis, supported by a robust record for the decisions the Services are charged to make under the Act.

API and IPAA appreciate the opportunity to provide these comments.

Sincerely,



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Independent Petroleum Association of America