

## Public Advisory: Information to Consider When Submitting a Petition under the Endangered Species Act

Under the Endangered Species Act (Act<sup>1</sup>) anyone can submit a written petition requesting one of the following actions:

- Add a species to (“list”) or delete a species from (“delist”) the Lists of Endangered or Threatened Wildlife and Plants;
- Change the status of (“reclassify”) a species already on one of the lists from an endangered species to a threatened species or a threatened species to an endangered species; or
- Revise an existing critical habitat designation.

Once a petition is received, either the Secretary of the Interior (acting through the U.S. Fish and Wildlife Service (FWS)) or the Secretary of Commerce (acting through the National Oceanic and Atmospheric Administration’s National Marine Fisheries Service (NMFS)) will review the petition, depending on which agency has jurisdiction over the species that is the subject of the petition. FWS has jurisdiction primarily over terrestrial and freshwater species while NMFS primarily has jurisdiction over marine and anadromous species. There are some instances when there is joint agency jurisdiction, such as in the case of certain anadromous fish or sea turtles. However, in such instances, even if the petitioner only sends the petition to one agency, both agencies will coordinate on sharing jurisdiction to appropriately address the requested action.

Under the Act, a “species” is defined as any species or subspecies of fish, wildlife, or plant, or any “distinct population segment” (DPS) of any species of vertebrate fish or wildlife which interbreeds when mature.

Petitions to designate critical habitat (for species without existing critical habitat) or adopt special rules under sections 4(d), 4(e) or 10(j) of the Act to provide for the conservation of a species are authorized by the Administrative Procedure Act, and are not addressed here. See 50 C.F.R. § 424.14(d).

Please note that petitioners may request listing on an emergency basis; however, the Act does not provide for emergency listing petitions; therefore, the Services treat such a request as regular listing petition and to follow the statutory timelines for responding to the petition as a regular listing petition. At any time, if one of the Services determines that there is an emergency posing a significant risk to the well-being of a species, it is within that Service’s discretion under Section 4(b)(7) to consider promulgating a regulation that takes effect immediately.

### Petition Guidelines

The regulations that apply to petitions submitted under the Act are found in Title 50 of the Code of Federal Regulations (C.F.R.); the contents of petitions to list, delist, or reclassify species are addressed in 50 C.F.R. § 424.14(c) and (d), and the contents of petitions to revise critical habitat are addressed in § 424.14(c) and (e). (The full text of the C.F.R. is available online at <http://www.gpoaccess.gov/cfr/index.html>). Please note that, additionally, petitioners are required to notify States of their intent to file a petition addressing species occurring within those States, under §

424.14(b), and to include copies of notification letters or emails when submitting a petition. The following is a summary of the minimum regulatory requirements for petitions, as well as recommendations for information that you should include to facilitate thorough and timely review of the issues raised in your petition.

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<sup>1</sup>The full text of the Endangered Species Act is available online at <http://www.fws.gov/endangered/laws-policies/index.html>.

### Requirements for all petitions

The required notification of States of intent to file a petition (50 C.F.R. § 424.14(b)) is as follows:

For a petition to list, delist, or reclassify a species, or for petitions to revise critical habitat, petitioners must provide notice to the State agency responsible for the management and conservation of fish, plant, or wildlife resources in each State where the species that is the subject of the petition occurs. This notification must be made at least 30 days prior to submission of the petition. This notification requirement shall not apply to any petition submitted pertaining to a species that does not occur within the United States.

The Association of Fish and Wildlife Agencies (AFWA), which is a professional association for State, provincial and territorial fish and wildlife agencies, is a helpful resource in determining contact information for State agencies (See <http://www.fishwildlife.org/index.php?section=social-media>). Further, in researching the information to support the petitioned request, the petitioner should look for range information, and thereby find the State(s) in which the species occurs.

The required elements for all petitions (50 C.F.R. § 424.14(c)) are as follows:

- (1) The name, signature, address, telephone number, if any, and the association, institution, or business affiliation, if any, of the petitioner;
- (2) The scientific name and any common name of a species of fish or wildlife or plants that is the subject of the petition. Only one species may be the subject of a petition, which may include, by hierarchical extension based on taxonomy and the Act, any subspecies or variety, or (for vertebrates) any potential distinct population segments of that species;
- (3) A clear indication of the administrative action the petitioner seeks (e.g., listing of a species or revision of critical habitat);
- (4) A detailed narrative justifying the recommended administrative action that contains an analysis of the information presented;
- (5) Literature citations that are specific enough for the Services to readily locate the information cited in the petition, including page numbers or chapters as applicable;
- (6) Electronic or hard copies of supporting materials, to the extent permitted by U.S. copyright law, or appropriate excerpts or quotations from those materials (e.g., publications, maps, reports, letters from authorities) cited in the petition;
- (7) For a petition to list, delist, or reclassify a species, information to establish whether the subject entity is a "species" as defined in the Act;
- (8) For a petition to list a species, or for a petition to delist or reclassify a species in cases where the species' range has changed since listing, information on the current and historical geographic range of the species, including the States or countries intersected, in whole or part, by that range; and
- (9) For a petition to list, delist or reclassify a species, or for petitions to revise critical habitat, copies of the notification letters or electronic communication which petitioners provided to the State agency or agencies responsible for the management and conservation of fish, plant, or wildlife resources in each State where the species that is the subject of the petition currently occurs. (Please note that these letters/emails should clearly indicate the petitioner's contact information, the name of the State office or agency to whom the notification was addressed, and the date the letter or email was sent.)

### Evaluation of petitions to list, delist, or reclassify species

We evaluate whether a petition to list, delist, or reclassify species presents substantial scientific or

commercial information indicating that the petitioned action may be warranted. For this purpose, “substantial scientific or commercial information” refers to credible scientific or commercial information in support of the petition’s claims such that a reasonable person conducting an impartial scientific review would conclude that the action proposed in the petition may be warranted. Conclusions drawn in the petition without the support of credible scientific or commercial information will not be considered “substantial information.” The Service’s determination as to whether the petition provides substantial scientific or commercial information indicating that the petitioned action may be warranted will depend in part on the degree to which the petition includes the following types of information (50 C.F.R. § 424.14(d)):

(1) Information on current population status and trends and estimates of current population sizes and distributions, both in captivity and the wild, if available;

(2) Identification of the factors under section 4(a)(1) of the Act that may affect the species and where these factors are acting upon the species;

(3) Whether and to what extent any or all of the factors alone or in combination identified in section 4(a)(1) of the Act may cause the species to be an endangered species or threatened species (i.e., the species is currently in danger of extinction or is likely to become so within the foreseeable future), and, if so, how high in magnitude and how imminent the threats to the species and its habitat are;

(4) Information on adequacy of regulatory protections and effectiveness of conservation activities by States as well as other parties, that have been initiated or that are ongoing, that may protect the species or its habitat; and

(5) A complete, balanced representation of the relevant facts, including information that may contradict claims in the petition.

The Services may also consider information readily available at the time the determination is made. It is appropriate for the Services to consider readily available information that provides context in which to evaluate whether or not the information that a petition presents is timely and up-to-date, and whether it is reliable or representative of the available information on that species, in making its determination as to whether the petition presents substantial information.

Further, the Services are not required to consider any supporting materials cited by the petitioner if the cited document is not provided in accordance with paragraph (c)(6) of this section. Where a petitioner believes a source material to be protected by copyright laws, they should consider including limited excerpts or quotations from such material that they believe support their statements. This will fulfill the petitioners’ obligation to present information to support the statements in the petition, without creating potential conflicts with copyright protections. Where materials are subject to copyright protection, the Services may not be able to obtain such materials.

#### Evaluation of petitions to revise critical habitat

We evaluate whether a petition to revise critical habitat presents substantial scientific information indicating that the revision may be warranted. For this purpose, “substantial scientific or commercial information” refers to credible scientific or commercial information in support of the petition’s claims such that a reasonable person conducting an impartial scientific review would conclude that the action proposed in the petition may be warranted. Conclusions drawn in the petition without the support of credible scientific or commercial information will not be considered “substantial information.” The Service’s determination as to whether the petition provides substantial scientific information indicating that the petitioned action may be warranted will depend in part on the degree to which the petition includes the following types of information (50 C.F.R. § 424.14(e)):

(1) A description and map(s) of areas that the current designation does not include that should be included, or includes that should no longer be included, and a description of the benefits of designating or not designating these specific areas as critical habitat. Petitioners should include sufficient supporting information to substantiate the requested changes, which may include GIS data or boundary layers that relate to the request, if appropriate;

(2) A description of physical or biological features essential for the conservation of the species and whether they may require special management considerations or protection;

(3) For any areas petitioned to be added to critical habitat within the geographical area occupied by the species at time it was listed, information indicating that the specific areas contain one or more of the physical or biological features (including characteristics that support ephemeral or dynamic habitat conditions) that are essential to the conservation of the species and may require special management considerations or protection. The petitioner should also indicate which specific areas contain which features;

(4) For any areas petitioned for removal from currently designated critical habitat within the geographical area occupied by the species at the time it was listed, information indicating that the specific areas do not contain the physical or biological features (including characteristics that support ephemeral or dynamic habitat conditions) that are essential to the conservation of the species, or that these features do not require special management considerations or protection;

(5) For areas petitioned to be added to or 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 or are not essential for the conservation of the species; and

(6) A complete, balanced representation of the relevant facts, including information that may contradict claims in the petition.

In addition, petitioners may include information on impacts (economic, national security, or other relevant impacts) as well as benefits that they believe result from the inclusion of specific areas in the existing critical habitat designation, for the Services to consider in evaluating inclusion or exclusion under Section 4(b)(2), as well as information on whether or not inclusion of an area is necessary to avoid extinction. Petitioners may also include descriptions of permitted and non-permitted conservation plans or agreements by States and other parties, that have been initiated or that are ongoing, that may protect the species' habitat, and that should be considered in any future exclusion analyses. Similarly, petitioners may provide information about anticipated actions that may affect such habitat.

The Services may also consider information readily available at the time the determination is made. It is appropriate for the Services to consider readily available information that provides context in which to evaluate whether or not the information that a petition presents is timely and up-to-date, and whether it is reliable or representative of the available information on that species, in making its determination as to whether the petition presents substantial information.

Further, the Services are not required to consider any supporting materials cited by the petitioner if the cited document is not provided in accordance with paragraph (c)(6) of this section. Where a petitioner believes a source material to be protected by copyright laws, they should consider including limited excerpts or quotations from such material that they believe support their statements. This will fulfill the petitioners' obligation to present information to support the statements in the petition, without creating potential conflicts with copyright protections. Where materials are subject to copyright protection, the Services may not be able to obtain such materials.

#### Adding Additional Information to a Petition

A petitioner submitting supplemental information later in time from their original petition has the option to specify whether or not the information being submitted is intended to be part of the petition. Specifying that the supplemental information is intended to be part of the petition will have the consequence that the Services will be obligated to consider it in the course of reaching a finding on the petition. It will also, however, have the related consequence that the timeframes under section 4 of the Act for when findings are due will be reset and begin from the time the supplemental information is received. In contrast, if the petitioner does not specify that the information is intended to be part of the petition, the Services will treat the supplemental information as they would any readily available information from any source. The Services have discretion to consider such information as appropriate to place the petition in context, but are not required to consider such information. Because the Act requires that the 90-day finding evaluate whether the petition presents substantial information to indicate that the petitioned action may be warranted, the submission of new information intended to supplement a petition is in effect a new petition. It is thus reasonable and necessary to reset the timeframe when new information intended to supplement the petition is received. This ensures that the Services have adequate time to consider the supplemental information relevant to a petition, and that the process is not interrupted by receipt of new information that may fundamentally change the evaluation. Also, by providing clear notice of this process, the Services are encouraging petitioners to assemble all the information necessary to support the petition prior to sending it to the Services for consideration, further enhancing the efficiency of the petition process.

#### How the Services Will Respond to Petitions

If a request fails to contain all of the required elements of a petition as outlined above, it will be returned within a reasonable timeframe, with an explanation of what specific elements were lacking. Once a request is accepted as a petition, it will be indicated on the appropriate Service's website.

To the maximum extent practicable, within 90 days of receiving a petition to add a species to the lists, remove a species from the lists, or change the listed status of a species, the Services will make a finding as to whether the petition presents substantial scientific or commercial information indicating that the petitioned action may be warranted. The Services will publish the finding in the **Federal Register**.

Please note that when the Services have already conducted a finding on, or review of, the listing status of that species (whether in response to a petition or on the Services' own initiative), the Services will evaluate any petition received thereafter seeking to list, delist, or reclassify that species to determine whether a reasonable person conducting an impartial scientific review would conclude that the action proposed in the petition may be warranted despite the previous review or finding. Where the prior review resulted in a final agency action, a petitioned action generally would not be considered to present substantial scientific and commercial information indicating that the action may be warranted unless the petition provides new information (or a new interpretation of that information) not previously considered.

The next steps following a 90-day petition finding are outlined in Section 4(b)(3) of the Act and in our regulations at 50 C.F.R. § 424.14 (h) and (i). In general, if we deny the petition (make a "not substantial" finding), we take no further action. For petitions to list, delist, or reclassify, if the finding is positive (substantial), we then assemble the best available scientific and commercial information and conduct a thorough review of the status of the species (see section 4(b)(3)(A) of the Act). When the status review is complete, we must then make and publish one of three possible findings within 12 months after the date we received the petition (a "12-month finding"), per Section 4(b)(3)(B):

1. The petitioned action is not warranted (no further action is taken);
2. The petitioned action is warranted (in which case we are required to publish a proposed regulation to implement the petitioned action; once we publish a proposed rule for a species, section 4(b)(5) and 4(b)(6) of the Act govern further procedures); or
3. The petitioned action is warranted, but (a) the immediate proposal and timely promulgation of a final regulation implementing the petitioned action is precluded by other pending proposals to list, delist, or change the listed status of species; and (b) expeditious progress is being made to list, delist, or change the listed status of qualified species. We refer to this as a “warranted-but-precluded finding.”

When we make a warranted-but-precluded finding on a petition, we are to treat such a petition as one that is resubmitted on the date of such a finding. Thus, we are required to review our previous finding and publish a new 12-month finding on this “resubmitted” petition once each year until we either (i) decide the petitioned action is not warranted or (ii) propose a regulation to implement the petitioned action (e.g., a proposed rule to add the species to the List of species protected under the Act in the case of a petition to list a species). See Section 4(b)(3)(C) of the Act.

For petitions to revise critical habitat, if the Services find that the petition presents substantial information that the requested revision may be warranted, the Services will determine, within 12 months of receiving the petition, how to proceed with the requested revision, and will publish notice of such intention in the **Federal Register**. This notice may take a form similar to one of the findings described above.

#### Withdrawal of a Petition

A petitioner may withdraw the petition at any time during the petition process by submitting such request in writing. If a petition is withdrawn, the Services may, at their discretion, discontinue action on the petition finding, even if the Services have already made a 90-day finding that there is substantial information indicating that the requested action may be warranted.

#### **Paperwork Reduction Act Statement**

We are disclosing the following according to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501):

In accordance with the Endangered Species Act (16 U.S.C. 1531 et seq.), we are authorized to collect this information. We use to the contents of petitions to determine whether the petition presents substantial information indicating that the requested action to list, delist, or reclassify species or revise critical habitat may be warranted. Federal agencies may not conduct or sponsor and you are not required to respond to an information collection unless it displays a currently valid OMB control number. OMB has approved this collection of information and assigned Control No. 1018-0165.

#### **Estimated Burden Statement**

We estimate that the public reporting burden for this information can averages 120 hours per response, although individual responses will vary widely depending on the complexity of the petition. Our estimate includes time for gathering information, and for completing, reviewing and submitting the information. You may send your comments about these instructions to the Service Information Collection Clearance Officer, U.S. Fish and Wildlife Service, 5275 Leesburg Pike, MS: BPHC, Falls Church, VA 22041-3803. Please do not send your petition to this address.