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Public Comments Processing
Attn: FWS-HQ-ES-2015-0016
Division of Conservation and Classification
U.S. Fish and Wildlife Service
5275 Leesburg Pike
Falls Church, VA 22041-3803

**Re: Proposed Rule Changes Regarding ESA Petition Process
Docket ID FWS-HQ-ES-2015-0016**

Dear Director Ashe:

The Oregon Water Resources Congress (OWRC) is submitting comments on the proposed rule, issued May 21, 2015 by the U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS), that will revise regulations governing the substance and evaluation of petitions under section 4(b)(3) of the Endangered Species Act (ESA). The proposed rule as written enhanced the efficiency and effectiveness of the petition process; however, it relies too heavily on state agencies and does not require the petitioners to provide sufficient information to validate their ESA requests. OWRC requests that you revise the rule to require the petitioner to adequately present the requisite level of information needed to justify a listing, inclusive of all available information, not just the information that may be available on a state agency website.

OWRC is a non-profit association of local governments that provide irrigation water to roughly a third of all irrigated land in Oregon. Our members include irrigation districts, water control districts, drainage districts, and other agricultural water providers. Since our incorporation in 1912, OWRC has promoted the development, control, conservation, preservation, and utilization of land and water resources in Oregon. OWRC and its member districts have been longtime partners with FWS and NMFS in developing collaborative approaches to species conservation, and we support the efforts to enhance the efficiency and effectiveness of the petition process and to make the best use of the agencies' limited resources.

While OWRC supports the FWS and NMFS's efforts to improve the petition process, we request the final rule shift the burden of presenting sufficient information to justify a requested listing decision *on petitioners* to reflect the intent of the ESA, specifically: "the [Act] places the obligation squarely on the petitioner to present the requisite level of information." 80 Fed Reg at 29,290. Specifically, we urge the Services (1) to require state agency submission under proposed paragraph (b)(9) for petitions filed with both the FWS *and* NMFS, and (2) to *not* limit the certification requirement under paragraph (b)(10) to information available on state agency websites.

Required Submission to State Agencies

OWRC strongly supports the proposed rule's emphasis on federal-state cooperation. Proposed paragraph (b)(9) directs petitioners to submit a copy of their petition to the "State agency(ies) 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 Service.” 80 Fed Reg at 29,294. State agency data or comments, if any, must then be appended to the petition that is submitted. The state submission requirement reflects the emphasis on state and federal cooperation that is evidenced in the Act. Section 6 of the Act requires the Secretary to cooperate with the states “to the maximum extent practicable,” and section 4(b) requires the Secretary to take into account a state agency’s protection efforts when making listing determinations. This requirement also elevates federal-state cooperation by providing a vehicle for state agency input at the initial stages of the petition process. As acknowledged by the FWS and NMFS, the states have developed substantial experience, expertise, and information relevant to the conservation of fish, wildlife, and plant species. Such knowledge should be shared to improve petition evaluation and to promote the efficient use of Service resources.

In light of the value in such cooperation, OWRC would like FWS and NMFS to apply the state submission requirement to *all* petitions, including those submitted to the National Marine Fisheries Service. As proposed, the requirements in paragraph (b)(9) would apply only to petitions filed with the FWS. However, the rationale for requiring state submission for petitions submitted to FWS applies with equal force to petitions submitted to the NMFS, and therefore should require state agency submission for all petitions, because state expertise and experience is equally valuable to the evaluation of all species.

Our organization respectfully disagrees with the conclusion that petitions filed with the NMFS would pose prohibitive logistical difficulties for petitioners. The rule describes that petitioners must “coordinate” with state agencies but fails to clarify how the proposed rule requires such coordination. 80 Fed Reg at 29,288. Paragraph (b)(9) requires only two things: (1) that petitions be submitted to state agencies 30 days prior to submission to the Service, and (2) that state agency comments, if any, be labeled and attached to the petition. The petitioner need not respond to, or even read, state agency comments. The requirements placed on petitioners by paragraph (b)(9) are minimal.

Additionally, the rule does not explain why petitions relating to marine and anadromous species pose greater logistical hurdles than petitions concerning other species. Anadromous species often have a geographic range that overlaps with species listed by FWS. For instance, certain steelhead may be found in the same streams as bull trout. Moreover, many species listed by the FWS, like those listed by the NMFS, have expansive habitat ranges. Endangered terns, for example, are listed in 18 states. We feel the proposed rule arbitrarily distinguishes between species regulated by the FWS and by the NMFS.

In order to promote the federal-state cooperation envisioned in the Act, the final rule should require that petitions be first submitted to state agencies, *regardless* of whether the petition is filed with FWS or NMFS.

Required Certification of All Relevant Information

OWRC commends the objective to improve the quality of petitions by ensuring that all relevant, reasonably available information is included in petitions. Requiring that petitions include such information will allow FWS and NMFS to conduct more meaningful review of petitions, and are in harmony with the Act’s intent to place the burden *on the petitioner* for collecting information to support the petition’s requested action. Section 4(b) of the Act requires petitioners to “present[] substantial scientific or commercial information indicating that the petitioned action may be warranted.” We support the certification requirement in paragraph (b)(10) because it reflects the intention of the Act.

Although the proposed rule is properly shifting the burden of information gathering away from the FWS and NMFS, the proposed rule suggests an alternative that would limit the information-gathering burden to information available on state wildlife agency websites. OWRC feels this would improperly limit petitioners' burden, and we encourage the proposed rule be revised to require that petitions include *all* readily available information, not just information on state websites.

Our primary concern with restricting paragraph (b)(10) is the potential lack of consistency among state agency websites. The scope and depth of information included on state agency websites varies significantly. By limiting the extent of petitioners' requisite fact-finding to state websites, the proposed rule could allow petitioners to avoid conducting reasonable due diligence before submitting a petition and to exclude readily available evidence that would cut against the proposed listing. A petitioner should not be absolved of the duty to present readily available information for no reason other than the sparsity of a state agency's website.

The proposed rule should adhere to the Act's requirement placing the burden of gathering relevant, readily available information on petitioners, regardless of the comprehensiveness of a petitioner's state agency's website.

Single Species Limit

OWRC agrees with the proposed rules single species limit, contained in paragraph (b)(2), because the limit promotes the efficient use of agency resources and will likely lead to better listing decisions. The single species limit has the potential to reduce the time and effort wasted when FWS and NMFS are forced to "connect the dots" between various species and the large quantities of undifferentiated supporting materials that are included in petitions. Further, the single species limit will result in higher quality petitions that will better enable the agencies to identify those species most in need of protection. The proposed rule does not limit the number of single species petitions that an interested party may submit. Thus, the single species limit would not bar consideration of a potentially threatened or endangered species.

Rejection of Inadequate Petitions

The proposed rule clarifies the Services' authority to reject requests that fail to satisfy minimum petition requirements. Proposed paragraph (e)(1) specifies that the Secretary will reject inadequate requests without making a finding. OWRC supports this proposed rule change, because it is consistent with the goal to more efficiently and effectively review petitions. Given the high volume of requests received, the agencies should not waste time and personnel resources on incomplete petitions. This rule change allows the FWS and NMFS to conserve resources by screening out facially inadequate requests and to devote those resources to the evaluation of complete petitions.

Substantial Information Standard

OWRC welcomes the clarification provided by the proposed rule in paragraph (g)(1). Clear standards will guide interested parties to produce higher quality petitions and ensure that petitions are evaluated consistently. Unambiguous guidelines will also conserve agency resources by streamlining the review process.

As pointed out by FWS and NMFS, ESA places the obligation squarely on the petitioner to supply sufficient support for the requested action. OWRC believes that the proposed rule's

substantial information standard reflects this intention in its treatment of subsequent petitions. By requiring subsequent petitions to present new information or analysis, the proposed rule avoids the unnecessary duplication of agency efforts.

Conclusion

OWRC supports FWS and NMFS' goal of enhancing the efficiency and effectiveness of the petition process for ESA listings. As noted by the Services, the petition process is a central feature of the ESA. Given the high volume of petitions and limited amount of agency resources, the petition evaluation process must be streamlined to allow for meaningful review of petitions. While OWRC endorses many of the revisions made in the proposed rule, we caution the FWS and NMFS against relying too heavily on state agencies and requiring too little of petitioners. The final rule must reflect the fact that the Act places the burden *on petitioners* to present sufficient information to justify a requested action.

Thank you for the opportunity to share our comments and concerns.

Sincerely,

April Snell
Executive Director