

February 16, 2016

Comments regarding the January 15, 2016 Notice of Draft Methodology for Prioritizing Status Reviews and Accompanying 12-Month Findings on Petitions for Listing Under the Endangered Species Act

Submitted by:

Energy and Wildlife Action Coalition

Filed electronically to the attention of:

Public Comments Processing
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The Energy and Wildlife Action Coalition (“EWAC”) submits these comments in response to the U.S. Fish and Wildlife Service (“Service”) January 15, 2016 notice of a draft methodology for prioritizing status reviews and accompanying 12-month findings on petitions for listing (“Prioritization Methodology”) under the Endangered Species Act (“ESA”).¹ EWAC is a national coalition formed in 2014 whose member entities consist of electric utilities, electric transmission providers, and renewable energy companies operating throughout the United States. The fundamental goals of EWAC are to evaluate, develop, and promote sound environmental policies for federally protected wildlife and closely related natural resources while ensuring the continued generation and transmission of reliable and affordable electricity. EWAC supports public policies, based on sound science, that protect wildlife and natural resources in a reasonable, consistent, and cost-effective manner.

The Prioritization Methodology appears designed to further the ESA-related goals announced by the Service in 2015,² and further, to coordinate with the 2015 proposed revisions to the regulations for listing petitions (“Petitions Rule”),³ the latter of which EWAC supported in public comment. EWAC continues to support the Service’s goal of improving the efficiency of the ESA petitions and listing determination processes while ensuring that those processes employ the best scientific and commercial data available. This Prioritization Methodology appropriately recognizes the backlog of species that continue to await 90-day findings, status reviews, and 12-month findings as a result of the numerous petitions, listing lawsuits, and settlements of recent years. Experience has shown that “these statutory [listing] deadlines have often proven not to be achievable given the workload in the listing program and the available resources.”⁴ While EWAC fully understands how problematic these deadlines can be for the Service, particularly when increased appropriations to facilitate a timely listing program are not expected, as an overall matter EWAC believes the Prioritization Methodology could do more to affirmatively state the agency’s commitment to striving to meet its statutory deadlines. The scant indication of the intended or

¹ Draft Methodology for Prioritizing Status Reviews and Accompanying 12-Month Findings on Petitions for Listing Under the Endangered Species Act, 81 Fed. Reg. 2229 (Jan. 15, 2016).

² In 2015, the Service announced efforts to improve the effectiveness of the ESA, which include: (1) assuring utilization of the best available science early in the process; (2) focusing resources in a way that will generate successes under the ESA; (3) incentivizing private conservation efforts; and (4) engaging the states. Press Release, U.S. Fish and Wildlife Service, NOAA Propose Actions to Build on Successes of Endangered Species Act (May 18, 2015), available at <http://www.doi.gov/news/pressreleases/us-fish-and-wildlife-service-and-noaa-propose-actions-to-build-on-successes-of-endangered-species-act.cfm>.

³ Endangered and Threatened Wildlife and Plants; Revisions to the Regulations for Petitions, 80 Fed. Reg. 29,286 (May 21, 2015).

⁴ 81 Fed. Reg. at 2230.

achievable pace of listing determinations is concerning.⁵ However, EWAC welcomes the Service's intention to develop a comprehensive, multi-year National Listing Workplan aimed to coherently and strategically address the outstanding workload, while also providing valuable transparency to stakeholders.

Overall, the Prioritization Methodology aligns with the Service's longstanding and statutorily-required prioritization of those species facing the greatest and most immediate threats.⁶ EWAC supports according the highest priority to listing actions for petitions for which solid scientific evidence points toward "critically imperiled" status. Progression through the bins 1 through 3, which are based upon the status of the available science, appears to be a reasoned approach to efficiently reaching defensible listing decisions. The lower prioritization of bin 4—which would include instances where conservation efforts are organized, underway, and likely to address the species—provides a valuable opportunity for the Service to evaluate the likely effectiveness of prelisting conservation efforts while allowing the greatest number of landowners and other entities to participate prior to any listing decision. We further suggest, as an additional factor for inclusion in bin 4, whether or not the species in question has a substantial portion of its known habitat or range on federal lands, since this provides a level of protection prior to ESA listing. This prioritization of bins 1, 2, and 3 over petitions for which active private conservation efforts are underway is sensible from the twin perspectives of pursuing the overarching species conservation mission of the ESA and furthering the widely-shared, critical goal of encouraging voluntary and creative solutions for species protection.

While EWAC thus is generally supportive of the rationale behind the prioritization bins 1 through 4, bin 5—where limited data is currently available for a species that is the subject of a petition—raises significant concerns. The Prioritization Methodology in general fails to differentiate between not knowing whether reliable scientific information is available and knowing that no reliable scientific information is available. Whenever the Service reaches the latter conclusion, the Service should make denying the petition the highest priority. Furthermore, the Service should not let the condition of not knowing whether reliable scientific information is available mean that a petition remains in low priority bin 5 indefinitely, as if in limbo, awaiting the possibility of pertinent information being supplied or discovered. If, after the prescribed statutory deadlines have run, the

⁵ "This draft methodology is attended to address the outstanding workload . . . as our resources allow . . ." *Id.*

⁶ *See* Endangered and Threatened Species Listing and Recovery Priority Guidelines, 48 Fed. Reg. 43,098 (Sept. 21, 1983).

Service has no basis to believe the petition can be moved to bins 1, 2, or 3, then action to deny the petition should become a high priority.

The dual statutory duties of the Service to base its listing decisions on the best scientific and commercial data available and to reach timely determinations appear to dictate such an approach. This is particularly so in the context of 90-day findings, where the Service is required to make its determinations within the statutory deadline to the maximum extent practicable and where the Service has repeatedly recognized that it has no duty to conduct any additional research in response to a petition. Rather than relegating such a petition to the lowest priority, the Service should reach a timely “not warranted” finding in a situation where “we know almost nothing about its threats or status.” Somewhat alarmingly, bin 5 also does not contain a statement analogous to that found in bin 3, that “species do not remain in this bin indefinitely.” Relatedly, given the explanation of bin 3 (new science underway to inform key uncertainties), it is implied that, for petitions placed in bin 5, no research is currently underway or expected to be completed within the statutory timeframe for listing decisions or perhaps longer. EWAC would agree with the Service that species in bins 1 through 4 merit higher priority, but the Service must dispose of petitions for species where “not warranted” findings are known to be appropriate because either it is known that no information is available or that insufficient information has come into light through the petition or other sources. The Service has no statutory basis for retaining these petitions beyond the statutory deadlines, while additional research may or may not be initiated, where a petition does not merit listing. Further—when considered in conjunction with the proposed Petitions Rule’s requirements that all available data be provided by the petitioner and that state agency data be gathered and submitted with the petition—there is little room to assert that placement of a petition in bin 5 is intended to allow the Service time to gather relevant data, as that burden has been placed on the petitioner. The retention of petitions in bin 5 for a prolonged and indeterminate period, instead of dismissing them for lack of supporting data, would almost certainly complicate interagency consultations under section 7 and the development of habitat conservation plans under section 10. Thus, EWAC requests that the Service reconsider the definition of a bin 5 and instead determine initially whether such petitions warrant placement in any bin. Species for which both petitioner and agency “know almost nothing about” should likely receive timely “not warranted” determinations at the 90-day finding stage rather than being placed at the end of a lengthy queue that has an indeterminate completion date. In such

an instance, a petitioner would have the opportunity to file a new petition in the event new scientific and commercial data indicate that listing may be warranted.

In addition, in the interest of transparency and predictability, the Service should establish a fixed date or timeframe on which it will update the contemplated publicly-available National Listing Workplan. Regular, scheduled updates (e.g., quarterly or semi-annually) could provide transparent reporting on progress made on individual species' listing determinations as well as any transfer of petitions between bins. While the Prioritization Methodology states that the National Listing Workplan will be updated "prior to the start of each fiscal year . . . as new information is obtained," this statement is unclear and fails to provide the predictability and transparency that the Service intends and that would be valued by all stakeholders. The Service should reconsider and clarify the means by which the public will be informed of progress and changes made in any National Listing Workplan.

The Service's continued efforts to improve its efficiency and regulatory effectiveness by developing a strategic National Listing Workplan, by employing the best available science, by recognizing private conservation efforts, and by affording transparency and predictability to stakeholders during the decision-making processes are highly valued by the regulated and environmental communities alike. EWAC looks forward to working with the Service in its efforts to continually improve implementation of the ESA and other federal wildlife laws.

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