May 23, 2016

Comments regarding the April 21, 2016
Proposed Revisions to the Regulations for Petitions

Submitted by:

Energy and Wildlife Action Coalition

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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 and National Marine Fisheries Service (together, "Services") April 21, 2016 announcement of a revised proposed rule amending the regulations concerning petitions ("Revised Petitions Rule") brought under the Endangered Species Act ("ESA").[1] EWAC is a national coalition formed in 2014 whose members consist of electric utilities, electric transmission providers, and renewable energy entities 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.

EWAC expressed its support in July 2015 for the Services' previous proposed rule amending the petitions regulations. The May 21, 2015 proposal was praised for furthering the Services' goal of improving the efficiency and effectiveness of the ESA petitions processes by requiring that a petitioner solicit species information from states, append all relevant and readily-available information to a petition, and address a single species in a petition. EWAC supported the Services' rulemaking effort to ensure that higher-quality information is available to the Services early in the petition process. However, the April 21, 2016 Revised Petitions Rule steps back from many of the reasonable and purposeful requirements sought to be implemented in the prior proposal, resulting in a weakened proposed rule that introduces serious concerns surrounding the redefinition of the substantial information requirement to require "new" information. A number of material changes were made that would ease what were proposed to be heightened requirements for petitions to list species as endangered or threatened. Perhaps more importantly, other changes would greatly diminish the ability to file effective, successful petitions to delist species or to change species' status and would inappropriately enhance the importance of prior Service analyses of species status.

I. The Proposed Rule Revises the "Substantial Information" Standard in an Impermissible Manner that Conflicts with Existing Regulations

The Revised Petitions Rule presents a novel explanation of the manner in which the "substantial scientific or commercial information" standard is applied to petitions. These changes depart from the statutory and existing regulatory standards by injecting an undefined concept of

[1] Revisions to the Regulations for Petitions, 81 Fed. Reg. 23,448 (Apr. 21, 2016).

"new information" that may be legally impermissible. By shifting the definition of "substantial information" in a manner that could be interpreted to limit "information" to scientific data or studies—rather than also including new analysis or interpretation of previously-considered information—this rulemaking could severely limit the ability to file delisting petitions that assert flaws in the Services' prior consideration of information, which is one of three bases for delisting as provided by Services rules.[2]

The current petitions regulation defines the "substantial information" standard broadly, stating, "'substantial information' is that amount of information that would lead a reasonable person to believe that the measure proposed in the petition may be warranted…"[3] The Revised Petitions Rule proposes the addition of a wholly-new subsection of the regulations:

> The "substantial scientific or commercial information" standard must be applied in light of any prior reviews or findings the Services have made on the listing status of the species that is the subject of the petition. [1] Where 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, reclassify, or delist 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. [2] Where the prior review resulted in a final agency action, a petition 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 not previously considered.[4]

The preamble explains, as the rationale for the addition of the sentence [2], above, that it "would maximize efficiency by allowing the Services to rely on previous final agency actions unless new information has since become available."[5] While it is correct that prior species reviews should be considered in analysis of a subsequent petition, the requirement of "new information" is vague and could be interpreted by Services' staff to preclude delisting petitions grounded in "information" that takes the form of new interpretation or analysis rather than new data or studies. The Services

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[2] 50 C.F.R. § 424.11(d).
[3] 50 C.F.R. § 424.14(b)(1).
[4] 81 Fed. Reg. at 23,455 (to be codified at 50 C.F.R. § 424.14(g)(iii)).
[5] 81 Fed. Reg. at 23,449.

appear to recognize this potential interpretation in the preamble, if not the text, of the Revised Petitions Rule, stating:

> In the case of prior reviews that led to final agency actions (such as final listings, 12-month not warranted findings, and 90-day not-substantial findings), a petition generally would not be found to provide substantial information unless the petition provides new information *or a new analysis* not previously considered in the final agency action. By "new" we mean only that the information was not considered by the Services in the prior determination.[6]

The "new information" requirement is a meaningful and significant departure from the ESA's statutory requirement of "substantial information." It is essential that the final version of the Revised Petitions Rule abandon this impermissible interpretation of "substantial" due to the inevitable confusion it will cause and its conflict with existing regulations.

In current practice, delisting petitions often do not present new data or studies that were not previously considered by the Services. Rather, delisting petitions frequently assert that information the Services previously considered was incorrect, misused, misrepresented, or misinterpreted. Because one of the three grounds for delisting is that a the original data for species classification was in error, often the only means of asserting this basis for delisting is to request reconsideration and reevaluation of existing information already contemplated by the Services.

As a practical matter, final agency actions must not preclude a possible future assertion that a listing action was in error. It is often the case that, by the time a listing error is discovered and a delisting petition is filed, the statute of limitations for challenging the original listing rule (or any more recent final agency action involving the species) has expired. Final agency actions for which the Administrative Procedure Act ("APA") statute of limitations has run should be given no particular deference, because the evidence of error may have arisen after the opportunity to challenge the action has closed.

Further, while the Revised Petitions Rule purports to limit the conclusiveness (where no "new information" is provided) of prior findings and reviews to situations where a final, reviewable agency action resulted, EWAC is concerned that the Revised Petitions Rule can be read as implying an intention to give an increased weight to the Services' prior non-final findings and reviews.[7] While

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[6] 81 Fed. Reg. at 23,451 (emphasis added).

[7] "Prior reviews represent a significant expenditure of the Services' resources, and it would be inefficient and unnecessary to require the Services to revisit issues for which a determination has already been made, unless there is a basis for reconsideration." 81 Fed. Reg. at 23,451.

the preamble does not explicitly state an intention to rely on the Services' own analyses that are not "final agency actions," and are thus not reviewable under the APA, EWAC would value clarification of the Services' intention to place no special weight on prior findings or reviews that were not final agency actions. Prior findings or reviews that were not final agency actions should receive no special weight because, in addition to their likely immunity from legal challenge, they may not have provided an opportunity for public involvement and comment. Relatedly, an explicit statement in the rule that status reviews are not "final agency actions" would clarify and simplify implementation of this rule.

II. The Requirement that Petitioners Acquire and Provide State Data Should be Retained in the Final Rule

EWAC continues to support the requirement that petitioners pre-coordinate with states and gather information from state wildlife agencies. The new revision does more than "streamline" the process for according state fish and game agencies notice of petitions; the revision intentionally weakens what EWAC considered to be a strength of the proposed rule that would provide the Services with balanced petitions and high-quality information early in the petition review process.

The new revisions affording merely a 30-day notice to the affected states prior to submission of a petition conflicts with the goal that petitioners consider available information during development of petitions. The states are often in possession of "best available science" that is highly relevant to the consideration of "current population status and trends and estimates of current population sizes and distributions…" as well as knowledge of "the factors under 4(a)(1) of the Act that may affect the species and where these factors are acting upon the species," both referenced in proposed new section 424.14(c)(1) and (2). While we understand the confidential nature of species occurrences and limits on the ability of certain states to disclose such information, by not requiring petitioners to at least consider input and feedback from the affected states, petitions are likely to miss an important source of information and therefore be incomplete. Further, a 30 day notice is likely to be near the end of the petition preparation process, and states should alternatively be notified closer to the start of the petition preparation process and given a greater amount of time. Accordingly, at a minimum, the final rule should require a 60-day notice to states prior to submission and should require that any information a state voluntarily provides to a petitioner must be submitted along with the petition.

III. Revisions to this Iteration of the Petitions Rule Unduly Weaken its Reasonable Requirements for Petitions

EWAC would like to express its concern that the revisions to the initially-proposed rule appear designed to placate frequent listing petitioners and weaken many sensible, purposeful petition requirements delineated in the initial proposed rule. For example, the revisions backtrack on the requirement that petitions include "all relevant information" on a species,[8] the revisions allow a single petition to cover a "taxonomic species"—which could include multiple subspecies or distinct population segments[9]—and the revisions grant the Services discretion to consider and process petitions that have not met all of the relevant requirements for consideration, even in those requirements' weakened state.[10] The Revised Petitions Rule does less to further the Services' goal of ensuring that higher quality information is available earlier in the petition process. By significantly lowering the bar from the first proposed rule and adding little to the requirements of the current rule for what constitutes an administratively complete petition, the Revised Petitions Rule may be of limited value in improving the quality of petitions.

IV. Conclusion

While EWAC supports a more robust petitions rule akin to that originally proposed, the greatest of EWAC's concerns focuses on the problematic insertion of the concept of "new" information into the explanation of what constitutes "substantial information." "Information" must be interpreted to include assertions that information the Services previously considered was misused, misrepresented, or misinterpreted in order for delisting petitioners to exercise one of the fundamental bases for delisting—that the listing decision was in error. Further, such a basis for delisting must remain available even after the statute of limitations for challenging a listing decision has expired, and the Revised Proposed Rule would thwart the availability of review of such erroneous listings if improved scientific understanding and interpretation is not achieved within that window of time. EWAC maintains that there is a firm legal basis for its understanding that a new interpretation or a new analysis would constitute "new information" sufficient to meet the statutory "substantial scientific or commercial information" standard. While EWAC recognizes that full utilization and consideration of the Services' prior analyses is efficient and valuable to any later analysis of a species, placement of any special weight on such prior reviews is unwarranted.

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[8] 81 Fed. Reg. at 23,450.
[9] 81 Fed. Reg. at 23,449.
[10] 81 Fed. Reg. at 23,450.

EWAC looks forward to continuing to work with the Services in their efforts to continually improve implementation of the ESA and other federal wildlife laws. Please feel free to contact the following EWAC representatives:

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