

September 18, 2015

**Docket: FWS-HQ-ES-2015-0016**

Public Comments Processing  
U.S. Fish and Wildlife Service  
MS:BPHC  
5275 Leesburg Pike  
Falls Church VA 22041

**Re: Comments on *Endangered and Threatened Wildlife and Plants; Revisions to the Regulations for Petitions*, 80 Fed. Reg. 29286 (May 21, 2015), Docket # FWS-HQ-ES-2015-0016**

To Whom It May Concern:

The undersigned forestry associations offer the following comments on the proposed regulations to amend the petition processes under the Endangered Species Act (“ESA”) released jointly by the Fish and Wildlife Service and the National Marine Fisheries Service (“Services”): *Endangered and Threatened Wildlife and Plants; Revisions to the Regulations for Petitions*, 80 Fed. Reg. 29286 (May 21, 2015, Docket # FWS-HQ-ES-2015-0016.

**General**

We support the Services’ efforts to update and clarify the procedures and requirements for submission of petitions seeking the listing, delisting and change in status for a species as well as petitions for the revision of critical habitat. In particular, we support the following core improvements:

- Requiring petitions to focus on a single species;
- Providing for consultation with affected States prior to the submission of petitions;
- 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;
- Providing clear direction as to the information necessary for submission of a complete petition; and
- Clarifying that a petitioner’s submission of supplemental information after filing of a petition will re-start the statutory timeframe for review.

However, we do have some concerns and suggestions for improvement.

**Response to Questions**

In the proposed rulemaking, the Services asked for responses on several specific questions.

Question: *“We specifically seek comment on proposed paragraph (b)(9), requiring petitioner coordination with States prior to submission of a petition to the Fish and Wildlife Service, and paragraph (b)(10), requiring certification that all reasonably available information, including relevant information publicly available from affected States’ Web sites, has been gathered and appended to a petition filed with either Service. We note that either of these two provisions could stand alone, or both could be included in a final rule, as shown in the proposed regulatory text. We also suggested an alternative to (b)(10) that would require a certification only that relevant information from affected States’ Web sites has been gathered and appended to a petition filed with either Service. We seek information on which alternatives, alone or in combination, would be most consistent with law and best achieve our goals of fostering better-informed petitions and greater cooperation with States.”*

Comment: We strongly recommend that both provisions be retained in the final regulation with the following suggestions:

- The requirement for submittal of a petition and consultation with States should extend to all species, including those under the jurisdiction of the National Marine Fisheries Service (NMFS). Many species under NMFS jurisdiction have a coastal range, are anadromous, or provide commercial value to a state. Thus, a State is just as likely to have information about these species as it will about species under FWS jurisdiction.
- Under the proposed rule, the prospective petitioner must submit a copy of the petition to the relevant State and report whether the State has provided data or written comments regarding the accuracy of the petition. To avoid confusion, we recommend that the document be referred to as the “draft petition” in order to encourage revision after reviewing the State’s comments. Second, we recommend that the scope of consultation with the States should be clarified to include the provision of data and comments on the species status and habitat conditions. As written, the proposed rule creates an unnecessary limitation of review to the precise content of the petition. The State review should be comprehensive. Finally, we recommend that the petitioner be required to identify which state agencies were contacted, including the name and address of any official contacted by name, and the manner of the contact, e.g., e-mail, certified mail, first class mail, and also be required to append any negative response if received in writing or by e-mail.
- The consultation period should be extended to ninety (90) days to ensure a full opportunity for States to review and comment on the accuracy and completeness of the petition as well as the overall status of the species. A 30-day review period creates an unnecessary burden on the States. We also recommend that the petition must be filed with the Service within 12 months of receipt of the State’s response or the petitioner must re-contact the State.

Question: *“We also seek comments and information regarding any other alternative the public may suggest to achieve the goals of greater coordination with States and better supported petitions.”*

Comment: Section 4(b)(5)(A)(ii) of the ESA requires the Services to provide notice of a proposed regulation to States and “to each county or equivalent jurisdiction in which the species is believed to occur.” We therefore recommend that the petition consultation process should be extended to counties or equivalent jurisdictions in which the species is believed to occur.

Question: *“Finally, we seek comment on the criteria in paragraph (d), including comments on the utility of the criteria, the adequacy of the criteria, and the effect of the criteria on the workload on the petitioner.”*

Comment: In paragraph (d), the Services propose criteria for petitions to revise a critical habitat designation which are procedurally consistent with the overall framework of the broader petition procedures. However, these provisions appear to anticipate adoption of the proposed revisions to the critical habitat regulations that the Services proposed last year. See 79 Fed. Reg. 27066 (May 12, 2014). Many of the undersigned commented on the critical habitat proposal and objected to these changes, particularly with respect to the treatment of occupied and unoccupied habitat and the proposed change from present consideration of primary constituent elements in the designation of critical habitat to the use of a new definition of physical and biological features.

We urge the Services to proceed promptly with final regulations on petitions. If the final petition regulations precede the final critical habitat regulations, the petition regulations should reflect existing critical habitat regulations and should not pre-determine how those rules may be amended in the future.

## **Other Comments**

The proposed regulations require that petitioners provide with their petitions all reasonable available information, both supporting and divergent, that is relevant to the petition. We strongly support these requirements but have the following recommendations:

- The final rules should be clear about what is required. For example, proposed § 424.14(b)(6) and (10) both require inclusion of all relevant information. However, paragraph 10 merely states “appended it to the petition” while paragraph (6) spells out either hard copy or electronic. We recommend that paragraph 10 cross reference paragraph (6): “appended to the petition in the format required at paragraph (b)(6) of this section.”
- The Services should post all information from a petition under review on a public website if a species status review is begun. The final rules should therefore require that all information submitted with or referenced in a petition be in a format capable of being posted to such a website. The services should also require that information in their possession be similarly posted at the beginning of any status review.
- Proposed § 424.14(g)(ii) provides: “The Secretary will not consider any supporting materials cited by the petitioner that are not provided to us by the petitioner in the format required at paragraph (b)(6) of this section *or otherwise readily available in*

*our possession.*” (Emphasis added.) We urge clarification of the italicized clause. If material is within the Services’ possession, then the petitioner should be required to identify which Service employee and office has custody of the material. We recommend that the final regulations contain this requirement.

- Occasionally, a petitioner will reference oral remarks as support for a particular point. We recommend that the final regulations require petitioners to include in the petition the name and contact information of the person providing the information to the petitioner, as well as the date and manner of the conversation.
- Petitioners occasionally reference unpublished data. The proposed rules contain no criteria for use of and access to this data. We recommend the Services adopt such criteria.
- We recommend that the final regulations should advise petitioners that each argument made in support of listing must be documented by appropriate references. Allegations without supporting information should be considered unpersuasive.

## **Conclusion**

We thank the Services for both proposing these critical improvements to the petition process and for the opportunity to provide these comments. We urge the Services to fully consider our recommendations in the final regulations and to issue those final regulations as expeditiously as possible.

Sincerely,

Alabama Forestry Association  
American Forest Foundation  
American Forest & Paper Association  
American Loggers Council  
American Wood Council  
Appalachian Hardwood Association, Inc.  
Arkansas Forestry Association  
Associated California Loggers  
Associated Logging Contractors – Idaho  
Associated Oregon Loggers, Inc.  
Association of Consulting Foresters  
Black Hills Forest Resource Association  
California Forestry Association  
Colorado Timber Industry Association  
Empire State Forest Products Assn.  
Florida Forestry Association  
Forest Industry National Labor  
Management Committee  
Forest Landowners Association  
Georgia Forestry Association

Great Lakes Timber Professionals Assn.  
Green Diamond Resource Company  
Hancock Natural Resource Group  
Hardwood Federation  
Hardwood Plywood and Veneer Assn.  
Intermountain Forest Association  
Kentucky Forest Industries Association  
Lake States Lumber Association  
Louisiana Forestry Association  
Maine Forest Products Council  
Maple Flooring Manufacturers Assn.  
Minnesota Forest Industries  
Minnesota Timber Producers Assn.  
Mississippi Forestry Association  
Missouri Forest Products Association  
Molpus Woodlands Group  
Montana Wood Products Association  
National Alliance of Forest Owners  
National Woodland Owners Association

New Hampshire Timberland Owners  
Association  
North Carolina Forestry Association  
Oklahoma Forestry Association  
Oregon Forest Industries Council  
Oregon Small Woodlands Association  
Oregon Women In Timber  
Pennsylvania Forest Products Assn.  
Plum Creek Timber Co.  
Port Blakely Tree Farms, L.P.  
Potlatch Corp.  
Professional Logging Contractors of  
Maine  
Rayonier  
Resource Management Service, LLC

Small Woodland Owners  
Association of Maine  
Southeastern Lumber Manufacturers  
Association  
Tennessee Forestry Association  
Texas Forestry Association  
Virginia Forest Products Association  
Virginia Forestry Association  
Washington Forest Protection Assn.  
West Virginia Forestry Association, Inc.  
Wisconsin County Forests Association  
Wisconsin Paper Council  
Wood Component Manufacturers Assn.