

ENDANGERED SPECIES LAW & POLICY



Changing the ESA Listing Petition Process? Not as Much as You Might Think.


By Stephanie Clark on April 27th, 2016

On April 21, 2016, the U.S. Fish and Wildlife Service and National Marine Fisheries Service (collectively, “Service”) announced revisions to their proposed modifications to the Endangered Species Act (“ESA”) petition process. 81 Fed. Reg. 23,448 (Apr. 21, 2016) (pdf). In May 2015, the Service announced proposed changes to the petition process for listing a species or seeking to change the listing status of a species under the ESA. 80 Fed. Reg. 29,286 (May 21, 2015) (pdf). The Service’s proposed rule originally required petitions to list species to address only one species, contain information about a species’ current range (including the states and/or countries included in a species’ range), and certify that the petition provided all relevant information regarding the species. The proposed rule also required a petitioner, in every state where the species occurs, to coordinate with the State in the development of relevant information and to serve a copy of the petition on the State resources agency at least 30 days prior to submitting the petition to the Service. As previously detailed here, these proposed changes represented a significant departure from the petition process that currently exists.

The Service stated that the May 2015 proposed rule was intended to both comply with the Service’s obligation under section 6 of the ESA to cooperate with the States to the maximum extent possible, and to maximize efficiency in processing listing and re-classification petitions. In response to comments received on the proposed rule, the Service announced that it was making “small revisions in language in the proposed regulation text” for “clarity and simplicity.” Contrary to this characterization, however, many in the environmental community view the revisions as a significant scaling back or narrowing of the original changes, as reported by E&E’s Greenwire and the Center for Biological Diversity, making the listing petition process more favorable to conservation organizations.

Among the revisions to the previously proposed changes are:

- **Less Cooperation with the States.** The requirement that petitioners coordinate with States and gather information from State wildlife agencies about a particular species was eliminated. Rather, petitioners must simply provide affected states with notice of their intent to file a petition for listing and/or reclassification at least 30 days prior to submitting the petition to the Service.
- **Relaxation of the One Species per Petition Rule.** Previously, the Service envisioned restricting a petition to addressing a single species or distinct population segment. However, in the proposed revisions,



the Service states that constraining a petition to a single species means constraining the petition to a single “taxonomic species.” Meaning that a petition can include multiple subspecies of the same species or multiple distinct population segments of a species.

- **All Relevant Information Not Required.** One of the most dramatic revisions is the removal of the requirement that petitioners certify that they have provided all relevant information with a petition to list or reclassify a species. Comments received regarding this requirement asserted that it “would be difficult to implement and enforce.”

The Service also clarified in the revisions that it even if a petition fails to comply with the petition content requirements, it will retain the discretion to process a petition that “substantially complies” with the content requirements. Finally, the Service clarified that its review of a petition will include “all information readily available” and that its ultimate finding that the petitioned action may be, is, or is not warranted will be published in the Federal Register.

Due to the revisions, the Service reopened the public comment period for the proposed regulations. The Service will accept comments until May 23, 2016.



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