PACIFIC LEGAL FOUNDATION

September 14, 2015

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U.S. Fish and Wildlife Service
Attn: Docket No. FWS-HQ-ES-2015-0016
5275 Leesburg Pike
Falls Church, VA 22041-3803

National Marine Fisheries Service
Attn: DOC 150506429-5429-01
1315 East-West Highway
Silver Spring, MD 20910

Re: PLF Comments on the proposed *Revision to Petition Regulations*

Dear Mr. Douglas Krofta and Ms. Angela Somma:

Pacific Legal Foundation (PLF) appreciates this opportunity to comment on the proposed revision of the regulations governing listing petitions, to make that process more clear, efficient, and scientifically sound. PLF agrees with these goals and supports the proposal. Requiring petitions to contain relevant, unbiased information—including information from the states chiefly responsible for protecting wildlife—will improve the petition process. Hopefully, the proposed revisions will reduce the number of species improperly listed, a problem that needlessly depletes the agencies' limited resources, which could otherwise go to recovering species actually in need of protection.

PLF is a non-profit law firm that litigates in defense of a balanced approach to environmental protection, which respects property and other constitutional rights. PLF has extensive experience litigating Endangered Species Act and property rights issues in courts nationwide. It has also regularly participated in the administrative process by commenting on proposed regulations.

Although PLF supports the proposed revisions, some added clarity regarding the standards for subsequent petitions would benefit everyone, including the Services. This comment will explain why and respond to some of the overblown criticisms of the proposed revisions.

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I

THE PETITION PROCESS ISN'T WORKING VERY WELL

It's no secret that the Services are under a deluge of petitions to list species—and the litigation that inevitably results from this process.[1] This drain on the agencies' resources distracts from their ability to pursue proactive conservation efforts for the species in most urgent need.

One problem with the current petition process is that, because the Services must make initial decisions about petitions based only on the information in the petition, petitioners may easily cherry-pick data or provide an incomplete picture of a species' prospects, needlessly wasting the agencies' time and resources.[2] Activists have a strong incentive to get species listed—even if a listing isn't warranted—because the resulting restrictions on government projects and private activities may help them achieve other goals, unrelated to species recovery. The listing of a species generally triggers a prohibition on private activities that may affect a single member of it, and significant review and consultation requirements for other activities, meaning opponents of development projects can use the listing process in order to control land uses they dislike.[3] For instance, the Sierra Club Legal Defense Fund's Andy Stahl once explained that the group's "ultimate goal" in seeking the listing of the northern spotted owl was "to delay the harvest of old growth forests"—activity which the group opposed for reasons unrelated to its impacts on the owl.[4]

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[1] Todd Woody, *Wildlife at Risk Face Long Line at U.S. Agency*, N.Y. Times, Apr. 20, 2011, *available at* http://www.nytimes.com/2011/04/21/science/earth/21species.html.

[2] *See, e.g.*, Proposed Rule to Delist the Johnston's frankenia, 76 Fed. Reg. 66,018 (Oct. 25, 2011) (explaining that the species was improperly listed based on a petition claiming that only 1,500 of the plants existed at the time of listing, when in actuality there were more than 4 million).

[3] *See* Jonathan Adler, *Rebuilding the Ark: New Perspectives on Endangered Species Act Reform* 21-22 (Adler, ed. 2011).

[4] *See* Ike C. Sugg, *Caught in the Act: Evaluating the Endangered Species Act, Its Effects on Man and Prospects for Reform*, 24 Cumb. L. Rev. 1, 53 (1993). Stahl went on to add, "I've often thought that 'thank goodness the spotted owl evolved in the Northwest, for it if hadn't, we'd have to genetically engineer it.'" *See id.*

Another problem is that petitions can be unnecessarily complex and opaque. Mega-petitions—petitions calling for the listing of many species at once—are particularly problematic. Such petitions can be difficult to understand, as the petitioner may not explain precisely how each of the species is at risk of extinction and eligible for protection under the Act. Rather, they tend to identify some general threat—like climate change or ecosystem change—then call for the listing of hundreds of species in the areas potentially affected, often based only on cherry-picked data or the fact that the species hasn't been extensively surveyed.[5] Despite the fact that the sheer number of species and the unclear links between threats and species makes responding to such petitions extremely difficult and time-consuming, the same 90-day and 12-month deadline applies to such petitions as apply to a straightforward petition seeking a decision on a single species.

U.S. Fish and Wildlife Service settled a deadline lawsuit with the Center for Biological Diversity and other interest groups by creating a five-year plan to respond to several petitions calling for the listing of more than 700 species.[6] As the Service nears the end of this plan in the next few years, there is a substantial risk that the problem will recur.[7] The consequences of a return to the pre-settlement deluge are easy to predict. The agencies' limited resources will be syphoned off from species protection to meeting deadlines and responding to litigation. As Gary

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[5] *See, e.g.*, Center for Biological Diversity, *Petition to List 53 Amphibians and Reptiles in the United States as Threatened or Endangered Species Under the Endangered Species Act* (July 11, 2012), *available at* http://www.biologicaldiversity.org/campaigns/amphibian_conservation/pdfs/Mega_herp_petition_7-9-2012.pdf (using general threats to amphibians and reptiles worldwide to call for listing any found in the United States if there is "some" information indicating the species' population is declining); Center for Biological Diversity, *Petition to List 404 Aquatic, Riparian and Wetland Species From the Southeastern United States as Threatened or Endangered Under the Endangered Species Act* (Apr. 20, 2010), *available at* http://www.biologicaldiversity.org/programs/biodiversity/1000_species/the_southeast_freshwater_extinction_crisis/pdfs/SE_Petition.pdf (relying on general claims of conflict between human development and environmental values to justify listing species across the entire southeastern region of the country).

[6] *See In re Endangered Species Act Section 4 Deadline Litigation*, No. 10-377 (D.D.C. 2011), *available at* http://www.biologicaldiversity.org/programs/biodiversity/species_agreement/pdfs/proposed_settlement_agreement.pdf.

[7] *See* Allison Winter, *Petitions for new species protection wobble balance in FWS settlement, agency says*, E&E News, Aug. 7, 2012, *reproduced at* http://naturalresources.house.gov/blog/?postid=306049.

Frazer, Assistant Director for Endangered Species for the Fish and Wildlife Service has explained: "We found ourselves in the first decade of this century being overwhelmed with the volume of new petitions. We have limited resources, and certainly the volume exceeded the capability that we had for deadlines. . . . The settlement was to sit down and restore a balanced approach and provide protection to species that need it, as opposed to simply chasing statutory deadlines."[8]

All of this might be nothing more than an inconvenience if the agencies' resources were limitless. But in the real world, where resources are constrained and tradeoffs are inevitable, inefficiencies in the petition process translate into reduced recovery prospects for imperiled species.[9] How well the Endangered Species Act has been working in practice is sharply contested. But it shouldn't be. As Michael Bean, the Assistant Secretary for Fish and Wildlife at the Department of Interior, has explained: "In a word, the Act's goal is recovery."[10] By that standard, the Act, as implemented in practice, hasn't been achieving its goal very well. Approximately one percent of the roughly 1,500 listed species have recovered. Nearly as many species have been removed from the list because the original listing was in error—either because the listed entity didn't satisfy the statute's definition of "species" or because the data on which the species was listed was incomplete or errant.[11]

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[8] *See id.*

[9] *See* Jonathan Adler, *supra* note 3, at 2; *see also* Katrina Miriam Wyman, *Rethinking the ESA to Reflect Human Dominion Over Nature*, 17 N.Y.U. Envtl. L.J. 490, 501-02 (2008) ("[L]imited amounts of public funding available for species recovery are allocated primarily based on political and bureaucratic considerations[.]").

[10] *See* Adler, *supra* note 3, at 10.

[11] *See* M. Lynne Corn & Kristina Alexander, *The Endangered Species Act (ESA) in the 113th Congress: New and Recurring Issues*, Cong. Res. Serv. Rep. 7-5700 at 6 (Jan. 13, 2014), *available at* http://nationalaglawcenter.org/wp-content/uploads/assets/crs/R42945.pdf.

The proper allocation of limited resources is essential because merely listing a species—without devoting resources to proactive recovery efforts—can be detrimental to species.[12] This is most likely due to the perverse incentives created by the statute's burdensome restrictions on private property owners.[13] The Act's strictures can encourage property owners to prevent their property from becoming suitable habitat or destroying that habitat before the species is listed.[14] Consequently, the best conservation results appear to come from federal spending to better manage its land to promote species recovery and incentivizing state and private recovery efforts on other lands.[15] Any resources the Services have to waste trying to connect the dots in an unnecessarily complicated or confusing petition or responding to a petition that cherry-picks data come at the expense of species' recovery.

II

THE PROPOSED PETITION REGULATIONS ARE A POSITIVE STEP

The proposed revisions to the regulations governing Endangered Species Act petitions are a positive step towards fixing some of these problems. Particularly helpful are the requirements that a petition address a single species and that petitioners include far more—*i.e.*, unbiased—information so that the Service can get a complete picture of a species' condition. Naturally, any regulations that require petitioners to more clearly explain why a species merits listing under the Endangered Species Act or limits the selective use of data will lead to outcry by

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[12] *See* Adler, *supra* note 3, at 13.

[13] *See id.* at 14-18.

[14] *See* Richard A. Epstein, *The Classical Liberal Constitution: The Uncertain Quest for Limited Government* 356-57 (2014); Brian Seasholes, *Fulfilling the Promise of the Endangered Species Act: The Case for an Endangered Species Reserve Program*, Reason Found. Policy Study No. 433 at 9-22 (2014), *available at* http://reason.org/files/endangered_species_act_reform.pdf; Ronald Bailey, *"Shoot, Shovel, and Shut Up": Celebrating 30 Years of Failing to Save Endangered Species*, REASON MAGAZINE, Dec. 31, 2003, *available at* http://reason.com/archives/2003/12/31/shoot-shovel-and-shut-up; *see generally* Dean Lueck & Jeffrey A. Michael, *Preemptive Habitat Destruction Under the Endangered Species Act*, 46 J.L. & ECON. 27 (2003).

[15] *See* Adler, *supra* note 3, at 13-14.

interest groups. But such concerns are overstated.[16] The proposed regulations will impose only modest burdens on petitioners while increasing the efficiency of the petition process.

1. Requiring Petitions to Focus On a Single Species Will Enhance Clarity Without Unduly Burdening Petitioners

Although, in theory, a single petition addressing multiple species with a common threat might appear to be more efficient, in practice, this hasn't been borne out. Rather, "it has often proven to be difficult to know which supporting materials apply to which species, and has sometimes made it difficult to follow the logic of the petition."[17] Although it might be better to directly require petitions to be clear and coherent, such standards would likely prove unadministrable and would only increase unnecessary litigation.

The proposal is a reasonable way to pursue increased clarity and coherency in petitions. For instance, the new requirement that a petitioner seeking to have a new entity listed must include information in the petition to demonstrate that it meets the statute's definition of "species" is a sensible step to try to reduce the number of improper listings. Although the definition of species is broad, it is nonetheless limited. It includes species, subspecies, and

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[16] A case in point are the dozens of duplicative comments claiming that any regulation of the petition process runs afoul of the First Amendment's guaranty of the right to petition the government. U.S. Const. amend. 1. This argument is specious. The proposed regulations in no way limit anyone's ability to contact anyone in the legislative or executive branches (or anyone else, for that matter) to voice their concerns about anything. They only provide that, if a petitioner wants the Service to take a particular action, she has to give it sufficient information, articulated in a reasonably decipherable manner, to allow it to determine whether the action is warranted. This is perfectly permissible under the First Amendment, which only guarantees the right to petition, not the right to have the government take the petitioned action. *See* David Bernstein, *Freedom of Assembly and Petition* in The Heritage Guide to the Constitution (2012), *available at* http://www.heritage.org/constitution#!/amendments/1/essays/141/freedom-of-assembly-and-petition.

[17] Proposed Revisions to the Regulations for Petitions, 80 Fed. Reg. 29,286, 29,287 (May 21, 2015).

distinct population segments of a species.[18] Populations below a distinct population segment of a species—such as a distinct population segment of a subspecies or ecotype—aren't listable entities. In the past, the Services have improperly listed populations that it later admitted didn't meet the statute's definition of a "species."[19] Since eligibility for listing under the Endangered Species Act is a necessary step to determine whether listing may be warranted, listing petitions should be required to contain information demonstrating that the entity is eligible for listing.[20]

The proposal would also require the petitioner to identify what information and materials are relevant for a species, by including it in that species' specific petition. This would encourage petitioners to articulate why information and materials that aren't obviously relevant are nonetheless useful. For instance, information about threats to one species might be relevant to another. Absent explanation, inclusion of information about a species other than the subject of the petition would appear irrelevant or inadvertent. To avoid this appearance, petitioners would have little choice but to explain the basis for any connection. In mega-petitions, the need for these explanations can be lost because the apparent irrelevance of such information is less obvious to the petitioner.

This increased clarity and coherency would come at exceedingly modest costs. Although some commenters may harp that requiring single-species petitions will be excessively burdensome and will discourage public participation in the listing process, such claims are implausible. With modern word processing applications, the cost of duplicating information relevant to multiple petitions is only a few keystrokes. A mega-petition could easily be converted into separate species-specific petitions by copying and pasting the relevant material.

As explained above, the proposal may burden petitioners by requiring them to do a better job identifying relevant information and explaining why it demonstrates that the petitioned action

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[18] 16 U.S.C. § 1532(16).

[19] *See, e.g.*, U.S. Fish & Wildlife Serv., 12-Month Finding on a Petition to Delist the Southern Selkirk Mountains Population of Woodland Caribou, 79 Fed. Reg. 26,504, 26,506 (May 8, 2014).

[20] *See* 16 U.S.C. § 1533(b)(3) (requiring timely responses to petitions to list or delist "a species").

may be warranted. But that would be a feature, not a bug. Without this information and analysis, the petition would be based only on unexplained conclusions that wouldn't lead a reasonable person conducting an impartial review to conclude that the requested action should be taken.[21] Since the petitioner is in the best position to articulate her reasoning, she should do so rather than leaving it to the Service to guess—with the threat of litigation looming if its guesswork misses the mark.

The proposal might also marginally increase printing and postage costs for petitioners. To the extent that such minor inconveniences are concerning, the problem is easily remedied. The Services should set up a website or email address where such petitions could be electronically submitted, making it both easier and cheaper to submit petitions.

2. Requiring Petitioners to Acknowledge and Address the Weight of Readily Available Information Will Improve Petitioner and Agency Decision-making

The proposed regulations would also require petitioners to include a presentation of all reasonably available, relevant data on the species and its status, including evidence that tends to refute the petition. The purpose of this requirement is to enhance the reliability of petitions and avoid wasting agency resources responding to petitions that merely cherry-pick biased data that clearly go against the weight of authority. The "reasonably available" standard—though necessarily vague, given that it has to apply to all petitions—would require petitioners to include information that can easily be found, including from state government websites.[22] Unless the Services' aims are to use this standard to play "gotcha"—refusing to consider petitions because the Services found some rather obscure source that the petitioner missed—this is a reasonable proposal.

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[21] *See* 80 Fed. Reg. 29,295 (discussing the proposal's clarification of the "substantial scientific or commercial information" standard).

[22] Appending this information to a petition may marginally increase the cost of preparing and submitting a petition, but this can easily be remedied by making it easier to electronically submit petitions and supporting documents, as suggested above.

Some commenters decry this proposed language as unduly burdensome and discouraging to science-based petitions. But this argument makes little sense. A petitioner who has an isolated bit of data can't know whether it warrants changing a species' status under the Endangered Species Act unless she knows how that data fits into the existing body of evidence. It may be that the new information calls the weight of authority into doubt, but a petition can't demonstrate that by omitting the contrary authority and making no attempt to explain why the new information is better. The Services can be confident that petitioners can meet this requirement because petitioners seeking to delist or downlist species have long had to do so.[23] Critics who argue that identifying and grappling with existing, reasonably available evidence will excessively discourage the filing of some petitions ignore that such petitions fail to explain why the petitioned action should be taken. Because these petitions have the same persuasiveness as petitions that cherry-pick data in order to achieve a predetermined result, they are precisely what the proposed rule seeks to discourage.

3. Getting States Involved Early in the Process Will Improve the Integrity of the Listing Process and Increase the Chances That Alternative Conservation Measures Will Render Listing Unnecessary

Perhaps the most innovative aspect of the proposed regulation is the requirement that petitions be submitted to the agency responsible for the management and conservation of wildlife in each state where the species occurs at least 30 days[24] before they are submitted to the Fish and Wildlife Service. This is to take advantage of the substantial experience, expertise, and information that these agencies have developed through their day-to-day management of wildlife. If a state agency responds with data or comments regarding the petition's accuracy or completeness, this must be included in the petition when it is submitted to the Service. This is a

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[23] *See, e.g.*, Petition of the Center for Environmental Science, Accuracy and Reliability, et al., to Remove the Coastal California Gnatcatcher From the List of Threatened Species Under the Endangered Species Act (May 29, 2014), *available at* http://blog.pacificlegal.org/wp/wp-content/uploads/2014/06/SIGNED-DELIST-PET.pdf.

[24] 30 days may not be enough time for a state agency to adequately review and respond to a petition. Since the Endangered Species Act provides the Services 90 days to make their initial determination, due respect for the time and fiscal constraints state agencies face suggests that they should receive a similar amount of time.

reasonable requirement that will enhance the information available to the Service when it initially screens petitions. It also shows due regard for federalism and the states' primary responsibility for managing the wildlife within their borders.[25]

This requirement would also have another laudable benefit not mentioned in the proposal. By involving the states early in the listing process, it would allow them to develop their own conservation strategies that could ameliorate the threats to a species, eliminating the need for the species' listing.[26] Such state-led efforts, in conjunction with private conservation efforts, can both reduce burdens on individuals and better recover species.[27] Involving the states early might also enable them to alert the Service to the possibility that prohibiting the "take"[28] of that species would exceed the federal government's constitutional power.[29]

The only burdens that this reasonable requirement would impose on petitioners are finding the relevant state agencies, a slight delay in submitting a petition to the Service, and the cost of appending the state's response, if any, to the petition. These burdens are extremely slight. It isn't difficult to identify the relevant state agencies. A simple Google search quickly leads

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[25] *See Geer v. Connecticut*, 161 U.S. 519, 527-28 (1896); *see also Hughes v. Oklahoma*, 441 U.S. 322, 335-36 (1979).

[26] *See* Jonathan Wood, *There are many ways to protect endangered species*, PLF Liberty Blog (June 9, 2015), *available at* http://blog.pacificlegal.org/there-are-many-ways-to-protect-endangered-species/; *see also* Policy for Evaluation of Conservation Efforts When Making Listing Decisions, 68 Fed. Reg. 15,100 (Mar. 29, 2003).

[27] Numerous recent decisions not to list species have relied on state and private conservation efforts that began as a result of the proposed listing and, according to the Fish and Wildlife Service, achieve better conservation results than a listing would. *See, e.g.*, Withdrawal of the Proposed Rule to List the Bi-State Distinct Population Segment of Greater Sage-Grouse and Designate Critical Habitat, 80 Fed. Reg. 22,828 (Apr. 23, 2015); Withdrawal of the Proposed Rule to List Dunes Sagebrush Lizard, 77 Fed. Reg. 36,872 (June 19, 2012).

[28] 16 U.S.C. § 1532(19).

[29] *See People for Ethical Treatment of Property Owners v. U.S. Fish and Wildlife Serv.*, 57 F. Supp. 3d 1337 (D. Utah 2014) (no federal authority to regulate take of a wholly intrastate species with no appreciable connection to interstate commerce).

anyone to a database[30] of the relevant agencies on the Association of Fish and Wildlife Agencies' website. The 30-day delay is minor, and reflects a tiny fraction of the time the Services spend reviewing a petition. Although the Endangered Species Act requires the Services to make final decisions within 12 months, they rarely, if ever, do so. Finally, any minuscule inconvenience or costs imposed by the requirement to append a state's response to the petition could easily be mitigated by facilitating electronic submission of petitions, as suggested above.

III

THE REQUIREMENTS FOR RECONSIDERATION PETITIONS SHOULD BE CLARIFIED

One aim of the proposed revisions is to quickly dispatch duplicative petitions. This is an admirable goal, and should improve the efficiency of the petition process. However, without further clarification, the proposed language may unduly burden petitioners seeking to delist species which were improperly listed in the first place. The proposed regulation provides that subsequent petitions must provide

> sufficient *new* information or analysis not considered in the previous determination (or previous 5-year review, if applicable) such that a reasonable person conducting an impartial scientific review would conclude that the action proposed in the petition may be warranted despite the previous determination.[31]

The purpose of this language is to easily reject petitions that only raise evidence and arguments that have previously been rejected. But, unfortunately, a redundancy in the language—information or analysis must be both "new" and "not considered in the previous determination"—could bar meritorious delisting petitions. For example, a petition that calls for a population to be delisted because it doesn't meet the statute's definition of species could be said to contain no *new* information or analysis—even if the argument hadn't been raised and

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[30] http://www.fishwildlife.org/index.php?section=social-media. If the Services are concerned that Googling may prove too taxing for petitioners, it could easily add a contact list for the relevant agencies on its own website.

[31] 80 Fed. Reg. at 29,295 (emphasis added).

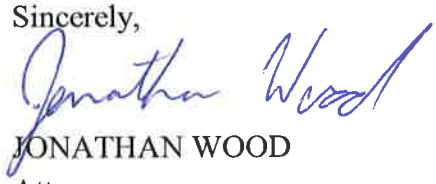
considered in the previous determination—because the information supporting the argument was available at the time of the errant listing decision. This problem could be easily avoided by deleting "new" from the proposed regulation. Doing so wouldn't frustrate the Services' ability to screen out petitions that merely raise information or analysis that had previously been rejected.

Relatedly, the Service should make explicit that a petition is valid notwithstanding that it relies only on information and analysis previously considered in a five-year review *if* the petition requests that the Service follow the recommendation from that review. This exception is necessary because a five-year review's conclusion that a species' status should be changed is not immediately effective or binding.[32] Due to time and financial restraints, the Service often fails to act on its scientists' recommendations until a petition is filed.[33] No purpose would be served by barring these petitions and it would lead to the nonsensical result that the agencies would not consider a petition seeking a status change because it had previously determined that the requested change is warranted.

CONCLUSION

The proposed revisions to the petition regulations would represent a positive step in bringing additional efficiency and clarity to the petition process. By incorporating the modest changes recommended by PLF, the Service can avoid some unnecessary—and likely unanticipated—anomalous results that would occur if the proposal was finalized as currently drafted.

Sincerely,



JONATHAN WOOD
Attorney

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[32] *See Coos Cnty. Bd. of Cnty. Com'rs v. Kempthorne*, 531 F.3d 792 (9th Cir. 2008).

[33] *See, e.g.*, Christina Martin, *PLF files petition to downlist the West Indian Manatee*, PLF Liberty Blog (Dec. 14, 2012), *available at* http://blog.pacificlegal.org/plf-files-petition-to-downlist-the-west-indian-manatee/; Reed Hopper, *The bald eagle still flying high*, PLF Liberty Blog (Dec. 14, 2012).