



May 23, 2016

Submitted via Federal eRulemaking Portal
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Public Comments Processing
U.S. Fish and Wildlife Service
MS: BPHC
5275 Leesburg Pike
Falls Church, VA 22041-3803

Attn.: Docket Nos. FWS–HQ–ES–2015–0016

Re: Comments on the Proposed Rule on Endangered and Threatened Wildlife and Plants; Revisions to the Regulations for Petitions
Docket Nos. FWS–HQ–ES–2015–0016; DOC 150506429–5429–01; 4500030113

This letter provides comments on behalf of the Western Urban Water Coalition (WUWC) on the revisions to the proposed rule jointly published by the U.S. Fish and Wildlife Service (FWS) and the National Oceanic and Atmospheric Administration’s National Marine Fisheries Service (NMFS) (together, the Services) to improve the content and specificity of petitions and to enhance the efficiency and effectiveness of the petitions process. See 81 Fed. Reg. 23448 (April 21, 2016) (Proposed Rule). WUWC appreciates the opportunity to comment on the Services’ Proposed Rule.

Created in June 1992 to address the West’s unique water issues, WUWC consists of the largest urban water utilities in the West, serving over 35 million western water consumers in major metropolitan areas. The membership of WUWC includes the following urban water utilities: Arizona – Central Arizona Project, City of Phoenix and Salt River Project; California – Eastern Municipal Water District, Los Angeles Department of Water and Power, the Metropolitan Water District of Southern California, San Diego County Water Authority, San Francisco Public Utilities Commission, and Santa Clara Valley Water District; Colorado – Aurora Water, Colorado Springs Utilities, and Denver Water; and Nevada – Las Vegas Valley Water District, Southern Nevada Water Authority, and Truckee Meadows Water Authority.

The WUWC commented generally in favor of the initial proposed rule on revisions to the regulations for petitions (WUWC’s letter dated September 17, 2015 is attached). As we commented at that time, the initial proposal included several common sense provisions that would make the petition process more efficient, effective and transparent. In particular, we supported the aspects of the proposed rule that would require petitioners to take deliberate steps to gather the best available scientific information as part of their request, including a description of the sources of information that were contacted or researched in preparing the request. Generally, such information should involve communications with the relevant state agencies.

The new proposed rule drops the requirement (at § 424.14(b)(9)) for pre-coordination with the state agencies and proposes instead a notice obligation to advise such agencies of the intent to submit a petition. The WUWC supports the notice requirement, as it ensures that state agencies will be made aware of petitions involving species for which they have relevant information. What should be added, however, is a clear statement in the rule that if a State advises the Service that a petition does not include relevant information on the species in the possession of a State, then a presumption would exist that the petitioner has not submitted the best available scientific information.

Under this approach, the rule would not impose an affirmative duty on the petitioner to coordinate with a State, which some commenters claimed would violate the section 4 listing process requirements and be contrary to case law. If the petitioner elects to skip such a step and, as a result, fails to submit relevant information, then the State should be able to trigger denial of the petition by notifying the Service that no consultation occurred and that important information is not included. The rule should also provide that the petitioner must submit its petition to the State wildlife agency at the same time it is filed with the Service. Doing so would make it possible for the State agency to then review the petition to see if relevant information in its possession had been omitted. The State agency should not be required to submit the missing information, but it will be in the position to do so or to simply note that information is missing from the petition. Following this process will keep the burden of proof on the petitioner, but maintain a process where it remains voluntary for the petitioner to decide which steps it will take to ensure that all relevant data sources are checked.

The WUWC further comments that the requirement to certify the sources of information that were contacted or researched in preparing a petition should be retained (see § 424.14(d)(6)). This requirement simply makes it more efficient for the Service to determine the completeness of a petition; it does not impose a procedural step that is inconsistent with the ESA section 4 mandates. The petitioner can still use any research it wants to in developing its request, but it also has to let the Service know what sources were consulted. If an obvious source is missing or used incorrectly, then the Service would be able to quickly and efficiently reject the petition.

The WUWC agrees with the decision to drop the factor of considering the precedent that accepting the petition might set for subsequent requested critical habitat revisions. As stated in our comments on the first proposed rule, this is not a relevant factor and decisions regarding revisions to critical habitat should be made based on the conservation and recovery of the relevant species.

Finally, we restate our desire to participate in additional administrative steps that the Services plan to undertake to improve the administration of the ESA, as discussed in our initial comment letter.

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Thank you for considering these comments. Please contact our national counsel, Donald C. Baur of Perkins Coie at (202) 654-6200, if you have any questions.

Sincerely,



Michael P. Carlin

Chair

Western Urban Water Coalition

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