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Via the Federal eRulemaking Portal:

Docket No. FWS–HQ–ES–2015–0016

RE: Comments on the U.S. Fish and Wildlife Service and National Marine Fisheries Service's Joint Proposed Revisions to the Regulations Focusing on Petitions to List, Delist, and Reclassify Species and to Revise Critical Habitat Designations for Species Under the Endangered Species Act, 80 Fed. Reg. 29,286 (May 21, 2015).

Dear Director Ashe and Assistant Administrator Sobeck:

Defenders of Wildlife (Defenders) submits the following comments to the U.S. Fish and Wildlife Service (FWS) and National Marine Fisheries Service (NMFS) (collectively the Services) on their joint proposed revisions to the regulations focusing on petitions to list, delist, and reclassify species and to revise critical habitat designations for species under the Endangered Species Act (ESA). 80 Fed. Reg. 29,286 (May 21, 2015). Defenders is dedicated to the protection of all native animals and plants in their natural communities. With more than 1.2 million members, supporters, and activists, Defenders is a leading advocate for the protection of threatened and endangered species and their habitat. As part of this advocacy, Defenders occasionally submits ESA listing petitions and petitions to designate or revise critical habitat, all of which would be affected by the proposed changes to these regulations. While we recognize the Services' desire to increase the efficiency of the listing process, we believe that some of the proposed changes would produce the opposite effect and are contrary to the requirements of the ESA. Our comments describe those concerns and suggest revisions.

A. STATUTORY BACKGROUND

The ESA, 16 U.S.C. §§ 1531-44, was enacted in 1973 "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, [and] to provide a program for the conservation of such endangered species and threatened species . . ." 16 U.S.C. § 1531(b). The protections of the ESA only apply to species that have been listed as endangered or threatened under the statute. This makes the prompt listing of species that need ESA protection of vital importance to their conservation. Similarly, critical habitat must be designated before it is protected, making designation vital to species recovery.

1. Listing Petition Background

The Administrative Procedure Act (APA) provides that "[e]ach agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule." 5 U.S.C. § 553(e). In recognition of this right, the ESA allows interested persons to petition the Services to add or remove species from the endangered species list, to reclassify species, and to revise critical habitat designations. *See* 16 U.S.C. §§ 1533(b)(3)(A), (D) (citing 5 U.S.C. § 553(e)). As a result, listings of species and revisions of critical habitat designations are frequently the result of petitions from

individuals and organizations outside of the Services. These proposed regulatory revisions affect the implementation of these provisions of the ESA.

2. Listing, Delisting, and Status Revision Petitions for Species

The ESA requires that, "to the maximum extent practicable," the Services must make initial findings on whether petitions to list, delist, or revise the status of a species under the ESA present "substantial scientific or commercial information indicating that the petitioned action may be warranted" within 90 days of receipt. 16 U.S.C. § 1533(b)(3)(A). This is referred to as a "90-day finding." A "negative" 90-day finding ends the petition process and is a final agency action subject to judicial review. 16 U.S.C. § 1533(b)(3)(C)(ii). A "positive" 90-day finding leads to a formal, more comprehensive "status review" and a "12-month finding" determining, based on the best available science, whether the proposed action is warranted, not warranted, or warranted but precluded by other pending listing proposals for higher priority species. 16 U.S.C. § 1533(b)(3)(B). "Not warranted" and "warranted but precluded" 12-month findings are also subject to judicial review. 16 U.S.C. § 1533(b)(3)(C)(ii). If the Services propose to list a species in their 12-month finding, they must publish notice and invite comment from, *inter alia*, state agencies and each county or equivalent jurisdiction in which the species is believed to occur and are required to hold a public hearing if requested. *See* 16 U.S.C. § 1533(b)(5). As the statutory structure makes clear, the 90-day and 12-month findings are two separate stages of review with differing proof, depth of review, and notice requirements at each stage.

3. Critical Habitat Designations and Revision Petitions

The Services are required to promulgate final regulations designating critical habitat for species concurrently with their determination that the species is endangered or threatened. *See* 16 U.S.C. § 1533(b)(6)(C). The definitions of the terms "critical habitat" and "conservation" in the ESA indicate that, in designating critical habitat, the Services must consider the species' ultimate recovery, and not just survival, as a primary purpose of critical habitat designation. *See* 16 U.S.C. §§ 1532(3), (5)(A). Similar to species listing petitions, the ESA provides that "[t]o the maximum extent practicable" the Services must make an initial finding on whether critical habitat revision petitions present "substantial scientific information indicating that the revision may be warranted" within 90 days of receipt. 16 U.S.C. § 1533(b)(3)(D)(i). Within 12 months of receiving a petition that received a positive 90-day finding, the Services "shall determine how [they] intend to proceed with the requested revision . . ." 16 U.S.C. § 1533(b)(3)(D)(ii). If the Services propose to revise critical habitat for a species, they must publish notice and invite comment from, *inter alia*, State agencies and each county or equivalent jurisdiction in which the species is believed to occur and are required to hold a public hearing if requested. *See* 16 U.S.C. § 1533(b)(5). As the statutory structure makes clear, the 90-day and 12-month determinations for petitioned critical habitat revisions are also two separate stages of review with differing proof, depth of review, and notice requirements at each stage.

4. The Lower Standard of Review for 90-Day Findings

In reviewing negative 90-day findings, the courts have consistently held that the evidentiary threshold at the 90-day review stage is much lower than the one required under a 12-month review. *See, e.g.*, *Ctr. for Biological Diversity v. Kempthorne ("CBD v. Kempthorne II")*, No. CV 07-0038-PHX-MHM, 2008 WL 659822, at *8 (D. Ariz. Mar. 6, 2008) ("[T]he 90-day review of a listing petition is a cursory

review to determine whether a petition contains information that warrants a more in-depth review."); *see also Humane Soc'y of the U.S. v. Pritzker*, 75 F. Supp. 3d 1, 10-13 (D.D.C. 2014) *appeal dismissed sub nom.*, No. 15-5038, 2015 WL 1619247 (D.C. Cir. Mar. 17, 2015) (holding that NMFS was arbitrary and capricious when it determined that conflicting evidence or "some level of uncertainty" was sufficient to show that the petitioner had failed to provide "substantial evidence" that listing was appropriate at the 90-day finding stage); *Moden v. U.S. Fish & Wildlife Serv.*, 281 F. Supp. 2d 1193, 1203, 1204 (D. Or. 2003) (holding that the substantial information standard is defined in "non-stringent terms" and that it "does not require conclusive evidence.").

Courts have characterized the 90-day finding determination as a mere "threshold determination" and have held that it contemplates a "lesser standard by which a petitioner must simply show that the substantial information in the Petition demonstrates that listing of the species *may* be warranted." *See Pritzker*, 75 F. Supp. 3d at 15 (quoting *Colo. River Cutthroat Trout v. Kempthorne,* 448 F. Supp. 2d 170, 176 (D.D.C. 2006)); *Morgenweck*, 351 F. Supp. 2d at 1141 (emphasis added); *see also Ctr. for Biological Diversity v. Kempthorne ("CBD v. Kempthorne I")*, No. C 06-04186 WHA, 2007 WL 163244, at *3 (N.D. Cal. Jan. 19, 2007). In fact, the *Pritzker* court determined that NMFS' expressed need for more conclusive information was itself sufficient to suggest a reasonable person "might conclude 'a review of the status of the species concerned' was warranted." 75 F. Supp. 3d at 11.

5. Information That May Properly Be Considered at the 90-Day Finding Stage

At the 90-day finding stage, the Services have repeatedly recognized that they may only consider information that is contained in the submitted petition and information in their own files. For example, in its recent positive 90-day finding for the smooth hammerhead shark, NMFS explained that:

> At the 90-day finding stage, we evaluate the petitioners' request based upon the information in the petition including its references and the information readily available in our files. We do not conduct additional research, and we do not solicit information from parties outside the agency to help us in evaluating the petition. We will accept the petitioners' sources and characterizations of the information presented if they appear to be based on accepted scientific principles, unless we have specific information in our files that indicates the petition's information is incorrect, unreliable, obsolete, or otherwise irrelevant to the requested action.

80 Fed. Reg. at 48,054. This is consistent with the ESA's plain language, which provides that at the 90-day finding stage the Services "shall make a finding as to whether *the petition* presents substantial scientific or commercial information indicating that the petitioned action may be warranted." 16 U.S.C. § 1533(b)(3)(A) (emphasis added); *see also* 16 U.S.C. § 1533(b)(3)(D)(i). The courts have repeatedly prohibited the Services from taking review at the 90-day finding stage outside of its statutorily-envisioned scope. It is well-settled law that the Services cannot solicit outside information from state or federal agencies or other entities to aid in their consideration of a petition at the 90-day finding stage and must instead rely only on the submitted petition and information in their own files or on the submitted petition alone.[1]

[1] *See Wildearth Guardians v. U.S. Sec'y of the Interior*, No. 4:08-CV-00508-EJL-LM, 2011 WL 1225547, at *4 (D. Idaho Mar. 28, 2011) (citation omitted); *Wildearth Guardians v. U.S. Sec'y of the Interior*, No. 4:08-CV-00508-EJL-LM, 2011 WL 1225558, at *8 (D. Idaho Feb. 11, 2011) *report and recommendation*

The limitation on the scope of the Services' review at the 90-day finding stage is consistent with the structure of the ESA as well, which requires that threshold determinations be made at the 90-day finding stage with more extensive review, including research and request for public comments, occurring at the 12-month finding stage. *See* 16 U.S.C. §§ 1533(b)(3)(A), (B), (D). Inviting comment on a petition before the Services have published a 90-day finding in the Federal Register would be in violation of this principle as it would import targeted review by third parties into the constrained 90-day finding evidentiary record. Such review is only appropriate at the 12-month finding stage.

6. This Rulemaking

The regulations implementing the provisions of the ESA discussed above are located at 50 C.F.R. § 424.14. The Services have proposed a number of revisions to these regulations. *See generally* 80 Fed. Reg. 29,286. The following comments offer recommendations that Defenders believes will make the Services' implementation of the ESA more effective and efficient at conserving species.

B. GENERAL COMMENTS

The Services explain that the changes to their ESA petition regulations are intended "to improve the content and specificity of petitions and to enhance the efficiency and effectiveness of the petitions process to support species conservation." 80 Fed. Reg. at 29,286, 29,287. The

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adopted, 2011 WL 1225547 (D. Idaho Mar. 28, 2011) ("At the 90–day finding stage, the agency may only consider information within the four corners of the petition.") (citations omitted); *McCrary*, 2010 WL 520762, at *6-8 (holding that NMFS' consideration of materials outside of the four corners of the petition at the 90-day finding stage by soliciting information from third-parties on a petition to delist a species was arbitrary and capricious because that meant "the agency ha[d] relied on factors which Congress has not intended it to consider.") (quoting *Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 43 (1983)); *CBD v. Kempthorne II*, 2008 WL 659822, at *13 ("When deciding whether a petitioned listing action may be warranted, the FWS may analyze only the petition itself and information in the agency's files. The FWS may not solicit information from outside parties until the FWS makes a positive 90-day finding and initiates a formal status review.") (citations omitted); *W. Watersheds Project v. Hall*, No. CV 06-0073-S-EJL, 2007 WL 2790404, at *6 (D. Idaho Sept. 24, 2007) *aff'd*, 338 F. App'x 606 (9th Cir. 2009) ("It was improper for [FWS] to make an outside solicitation or inquiry about the Petition and consider the responses when making its 90-Day Finding.") (citation omitted); *W. Watersheds Project v. Norton*, No. CV 06-00127SEJL, 2007 WL 2827375, at *7 (D. Idaho Sept. 26, 2007) ("The ESA expressly limits [FWS] to reviewing the information presented in the Petition and the information contained in [its] files.") (citing 16 U.S.C. § 1533(b)(3)(A)); *Colo. River Cutthroat Trout,* 448 F. Supp. 2d at 177 (holding that, even where FWS claimed that information in the relevant petition had become stale in the three years since it was filed, solicitation of comments on the petition from state and federal agencies was inappropriate because "[b]oth the statute setting forth the 90-day review requirements, 16 U.S.C. § 1533(b)(3)(B), and its implementing regulation, 50 C.F.R. § 424.14(b), make plain that the 90-day review is to be based on the petition alone or in combination with [FWS'] own records."); *Morgenweck*, 351 F. Supp. 2d at 1143 ("FWS's consideration of outside information and opinions provided by state and federal agencies during the 90-day review was overinclusive of the type of information the ESA contemplates to be reviewed at this stage.").

revisions hope to accomplish this by allowing the Services to "mak[e] the best use of available resources" and by "improv[ing] the quality of petitions," thus allowing the Services to focus on petitions that are more likely to be meritorious. *Id.* at 29,287. Defenders is concerned that some of these revisions would instead prevent meritorious petitions from being filed, or, if filed, from being substantively reviewed, by creating additional burdens on would-be petitioners. Defenders identifies these issues and suggests changes that may better meet the Services' stated goals.

Defenders supports revisions that clarify and reorganize the regulations, but does not support changes that would impose unreasonable requirements on otherwise meritorious petitions. The sections of the ESA authorizing citizen petitions are an important part of ensuring its goals are met. *See* 16 U.S.C. §§ 1533(b)(3)(A), (D). Regulations that would limit citizen engagement, regardless of their intended purpose, are inconsistent with the ESA and its goals. *See id.* § 1531(b).

Before addressing the proposed revisions individually, Defenders requests a change that is more generally applicable. The proposed revisions remove the word "shall" that is currently used in multiple provisions of 50 C.F.R. § 424.14 and replace it with the word "will." *Compare, e.g.,* 50 C.F.R. § 424.14(b) (" . . . the Secretary *shall* make a finding . . .") (emphasis added); 80 Fed. Reg. at 29,295 (proposed 50 C.F.R. § 424.14(g)(1), which states that " . . . the Secretary *will* make a finding . . .") (emphasis added). Defenders requests that the use of the word "shall" be carried over from the current ESA petition regulations into the revised regulations. Not only does the use of "shall" maintain consistency with the statutory language of the ESA (*see, e.g.,* 16 U.S.C. § 1533(3)(A) (" . . . the Secretary *shall* make a finding . . .") (emphasis added)), but it also has a legally-operative meaning in well-settled case law where, by using "shall," the courts recognize that "Congress could not have chosen stronger words to express its intent that [the covered action] be mandatory . . ." *United States v. Monsanto,* 491 U.S. 600, 607 (1989); *see also Ctr. for Biological Diversity v. Norton,* 254 F.3d 833, 837–38 (9th Cir. 2001) ("'Shall' means shall.") (quoting *Forest Guardians v. Babbitt,* 174 F.3d 1178, 1187–88 (10th Cir. 1999)); *Brower v. Evans*, 257 F.3d 1058, 1068 n.10 (9th Cir. 2001) (same). While the word "will" also speaks of a mandatory duty, the change here appears unnecessary. As such, Defenders requests that the use of "shall" be carried over in the revised regulations.

For the sake of brevity, Defenders will omit discussion of those sections that merely relate to reorganization of the regulations, that restate the statutory requirements of the ESA, or that Defenders otherwise supports.

C. MAJOR REQUESTED REVISIONS

1. Proposed 50 C.F.R. § 424.14(b), *Requirements for petitions.*

Proposed 50 C.F.R. § 424.12(b) contains many of the most problematic revisions. The Services explain that "[a] request that fails to meet [all of the elements of this proposed paragraph] would be screened out from further consideration, [under proposed 50 C.F.R. § 424.14(e)(1)], because a request cannot meet the statutory standard for demonstrating that the petitioned action may be warranted if it does not contain at least some information on each of the areas relevant to that inquiry." 80 Fed. Reg. at 29,288. However, a petition that provides "substantial information" that the petitioned action "may be warranted" requires a positive 90-day finding, and several requirements of this paragraph would go beyond that clear standard. *See, e.g., id.* at 29,294 (proposed 50 C.F.R. § 424.14(b)(10) would require "*all relevant information* . . . that is reasonably available . . .") (emphasis added). Rejecting petitions that satisfy the ESA's statutory standard based on their failure

to satisfy the requirements of this paragraph would be contrary to the ESA. Defenders recommends significant changes to this proposed paragraph to ensure that meritorious petitions receive legitimate substantive review.

a. Proposed 50 C.F.R. § 424.14(b)(2)

Proposed 50 C.F.R. § 424.14(b)(2) states in part that "[o]ne and only one species may be the subject of a petition." 80 Fed. Reg. at 29,294. The rationale for this change is that, "[a]lthough the Services in the past have accepted multi-species petitions, in practice 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." *Id.* at 29,287. Unfortunately, this prohibition is likely to have the effect of limiting the number of species that can be effectively petitioned. In addition, it may result in charismatic, but comparatively less threatened, species being disproportionately petitioned while less charismatic, but more imperiled, species remain un-petitioned because of limited resources on the part of petitioners. Defenders instead encourages the Services to provide standards for these multi-species petitions instead of prohibiting them outright.

The Services' two identified difficulties with multi-species petitions can be effectively remedied absent an outright prohibition. For instance, by requiring species-specific sections in every multi-species petition, the Services could more easily reference the citations in those sections to determine which sources applied to which species. From there, the citations in the common threats or more general sections, if any, would apply to all or most of the species in the petition and would therefore function similarly to citations for more general threats in a single-species petition. Difficulties related to following the logic of multi-species petitions could be addressed by creating standards for determining when species, or threats to those species, are sufficiently related that considering them in one multi-species petition is appropriate. Alternatively, the Services could instead require that petitioners explicitly discuss why considering the species together is more appropriate and efficient than considering them separately. Reasons could include geographic proximity, similar habitat requirements, exploitation of an entire genus for the pet trade, or other such themes that would make consideration of threats to more than one species preferable to consideration of multiple single-species petitions.

An absolute prohibition on multi-species petitions would likely have the unintended consequence of increasing the Services' workload and expenses related to ESA petitions and undermine the Services' longstanding policy and practice of managing for ecosystem integrity. For multi-species petitions, the Services often respond by producing multi-species 90-day and 12-month findings. *See, e.g.,* 78 Fed. Reg. 63,941 (October 25, 2013) (90-day findings for 23 species of corals from a multi-species petition); 80 Fed. Reg. 40,969 (July 14, 2015) (12-month findings for 3 angelshark species from a multi-species petition). As a result, petitioning the species in this way is ultimately an efficient way for both the petitioners and the Services to get ESA listing determinations for imperiled species. Of course would-be petitioners could respond to the proposed prohibition on multi-species petitions by including all common information verbatim in a collection of single-species petitions, but that would be inefficient and create more work for the Services as they re-assess the common information and make separate findings for each species. In addition to this increase in workload, making individual findings would be much costlier for the Services. Even assuming that the cost of having the Services' employees make these separate determinations would be the same, instead of issuing one Federal Register notice for a collection of species, the Services would instead need to issue a Federal Register notice on each of the many

separate petitions. At over $400 per page for a Federal Register publication, the costs add up quickly. This increased cost would continue as the Services need to issue 12-month findings for each species that received a positive 90-day finding instead of for groups of species.

Defenders encourages the Services to consider an approach to multi-species petitions that does not paint with such a broad brush. The Services can improve listing petition efficiency by encouraging organized and high-quality multi-species petitions and Defenders strongly recommends that they do so in the proposed revisions.

b. Proposed 50 C.F.R. § 424.14(b)(9)

Proposed 50 C.F.R. § 424.14(b)(9) is one of the most problematic revisions. This section states that, for petitions submitted to FWS, petitioners must certify that "a copy of the petition was provided to the State agency(ies) responsible for the management and conservation of fish, plant, or wildlife resources in each State where the species occurs at least 30 days prior to submission to [FWS]" and that the agency(ies) either provided comments as to the "accuracy or completeness of the petition," which must be appended to the petition, or that they did not provide any such comments. 80 Fed. Reg. at 29,294. FWS is the most appropriate entity to solicit information related to petitions from states, especially for species that occur in multiple states. Further, citizens have statutory rights under both the APA and the ESA to petition the government for these actions, and proposed 50 C.F.R. § 424.14(b)(9) is inconsistent with those rights. For a 90-day finding, the ESA requires nothing more than "substantial information" in the petition combined with any information in FWS' files.

This process could inundate FWS with more information than it could analyze in 90 days. FWS has historically experienced difficulty meeting the statutory deadlines for both 90-day and 12-month findings on ESA petitions. The proposed revisions would exacerbate this problem by prompting FWS to review potentially voluminous data from state agencies during the 90-day finding window. Additionally, instead of reviewing state data and comments only once (during the 12-month finding), FWS would review it twice, once for each finding. We find this outcome especially peculiar because the threshold for a positive 90-day is relatively low.

This proposed section would also have additional practical burdens. For example, private individuals in particular would likely have difficulty locating all "State agency(ies) responsible for the management and conservation of fish, plant, or wildlife resources in each State where the species occurs…." *Id.* at 29,294. This would require that petitioners research state administrative agencies, unintentionally omitting any at their own peril. This complication would increase where multiple state agencies have overlapping or similar jurisdiction or where the agency is not relevant to the petition at hand (e.g., for a plant listing petition, the regulations would seem to require that petitioners contact agencies responsible for fish and wildlife, even though there is no reason to believe that they would possess relevant information on the petitioned plant). Further, imperiled species are often cryptic with widely-separated, fragmented populations. As a result, new, isolated populations are sometimes found that expand the species' known range. In addition, as an unfortunate consequence of their trends toward extinction, many of these species are experiencing ongoing range contraction and extirpations that make delineation between their current and historical range difficult. This provision appears to require definitive knowledge of the species' range and would penalize petitioners for good faith omissions through rejection of their petitions.

In addition to being burdensome for petitioners, this system would be inefficient for them because it makes them an involuntary middleman between the states and FWS. Under this proposed rule, the petitioner would have to ask the state for comments that the petitioner would then have to pass on to FWS. Such an approach would be an anomaly. A seemingly less burdensome and more efficient approach would involve FWS asking the states for this information. However, as described earlier in Section A. 5. "Information That May Properly Be Considered at the 90-Day Finding Stage," well-settled case law holds that FWS cannot ask for such information until after it has promulgated a 90-day finding. FWS cannot avoid this binding, unambiguous case law merely by requiring that petitioners, and not FWS, solicit for the states' comments. The structure of the ESA still requires that FWS consider only the petition and the information in its own files at the time the petition is filed when making a 90-day finding. By considering the comments of the States at this stage, FWS in essence skips the 90-day finding stage and moves right to a modified 12-month finding without an opportunity for the public at large to comment. This requirement is therefore inconsistent with the language and structure of the ESA as well as the relevant case law.

A related problem with the proposed revision is that only states are allowed to comment on the listing petition as part of a 90-day finding. Academics and naturalists may have far more information than state agencies on a species, but lack any opportunity to opine at that early stage. FWS offers no convincing explanation for this biased arrangement and should maintain the current petition process.

If states would like to comment on a petition, they already have ample opportunity to do so. The Services must "promptly publish" notice of any listing or critical habitat revision petition that receives a positive or negative 90-day finding in the Federal Register. *See* 16 U.S.C. §§ 1533(b)(3)(A), (D)(i). These 90-day findings provide the states with their first formal opportunity to comment on these petitions. Next, the Services must "promptly publish" in the Federal Register any 12-month finding that they make on listing petitions, which must include the complete text of the proposed listing rule for warranted findings. *Id.* § 1533(b)(3)(B). Similarly, the Services must "promptly publish" notice of how they intend to proceed with petitioned critical habitat revisions at the 12-month finding stage in the Federal Register. *Id.* § 1533(b)(3)(D)(ii). These 12-month findings provide the states with their second formal opportunity to comment on these petitions. The Services have also often reopened the public comment period for their decisions in recent years to provide all interested parties, including states, with a third formal opportunity to comment on a proposed rule. *See* 16 U.S.C. § 1533(b)(6)(B)(i) ("[i]f the [Services find] with respect to a proposed [listing or critical habitat revision] that there is substantial disagreement regarding the sufficiency or accuracy of the available data relevant to the determination or revision concerned, the [Services] may extend the one-year period [for finalizing or withdrawing the proposed regulation] for not more than six months for purposes of soliciting additional data."); *see also, e.g.* 79 Fed. Reg. 68,657 (November 18, 2014) (FWS reopening comment period on its proposed northern long-eared bat (*Myotis septentrionalis*) listing). Finally, in addition to these commenting opportunities, at least 90 days before the effective date for a regulation to list a species or revise its critical habitat, the Services are also required to "give actual notice of the proposed regulation (including the complete text of the regulation) to the State agency in each State in which the species is believed to occur . . . and invite the comment of such agency . . . thereon." 16 U.S.C. § 1533(b)(5)(A)(ii). This provision is aimed directly at informing the states of the proposed rule and allowing them to comment on it. Therefore, the ESA already provides a multitude of opportunities for the states to provide their input on petitions, even where the petitioned action would likely not have effects within their borders. Even when the FWS lists a species using its emergency listing authority, it is required to

provide "actual notice of such regulation to the State agency in each State in which such species is believed to occur." *Id.* § 1533(b)(7)(B). Adding an additional state comment opportunity is unnecessary and conflicts with the ESA's carefully laid out structure for state cooperation in these decisions.

Defenders does not dispute that the states "often have considerable experience and information on the species within their boundaries . . ." and would never contend that they should not have the right to comment on ESA petitions. *See* 80 Fed. Reg. at 29,287. Indeed, such a contention would be in direct opposition to the opportunities for state participation that were carefully built into the ESA and the requirement that listing decisions be based on the best available scientific data. However, we doubt whether the proposed petition requirements would further the espoused goal of "encourag[ing] greater communication and cooperation among would-be petitioners and State conservation agencies prior to the submission of listing or critical habitat petitions to the Secretary." Instead, the requirements are likely to create a more adversarial relationship between petitioners and the states because petitioners must delay filing their petitions as they wait for comments that they can, and indeed must, submit unopposed. This is not an ideal way to foster cooperation. Additionally, it could likely increase the dissension between the Services and the states as confusing coordination will be inevitable and inadvertent omissions for review purposes may not be known until after a decision is made.

We emphatically urge FWS to abandon this proposed section, as NMFS has done. The differences between how FWS and NMFS implement the ESA are not large enough to warrant imposing the requirements of this section unevenly between the agencies. At a time when the Services are striving to improve the clarity and consistency of ESA implementation, the proposed section does the very opposite.

c. Proposed 50 C.F.R. § 424.14(b)(10)

Proposed 50 C.F.R. § 424.14(b)(10) is another one of the most problematic revisions. Under this section, the petitioner would be required to certify that it has "gathered all relevant information (including information that may support a negative 90-day finding) that is reasonably available, such as that available on Web sites maintained by the affected States, and has clearly labeled this information and appended it to the petition." 80 Fed. Reg. at 29,294. However, a full review of all scientific literature is not necessary or appropriate at the 90-day finding stage. Requiring petitioners to provide such a review is unduly burdensome and could effectively deny petitioners, especially private parties, their statutory right to petition for these actions. While limiting the required document review to documents available on state websites would be less burdensome than proposed 50 C.F.R. § 424.14(b)(10), it would still be inconsistent with the requirements of the ESA as petitioners would not need all of these documents to meet the 90-day finding standard in all cases.

In addition to being inconsistent with the requirements of the ESA, the ambiguity in the terms "relevant" and "reasonably available" is clearly subjective and would hamper petitioners' attempts to comply with this regulation and the Services' ability to consistently administer it. For instance, for a species affected by climate change, would this regulation require all "reasonably available" information on climate change? This information, or some subset of it, would at least arguably be relevant to the species' extinction risk, but it may include many thousands of scientific articles and other sources. Would information on threats or life history characteristics of related species be relevant such that petitions would have to include all "reasonably available" information

on these additional species as well? Would an article that (in terms of relevant information) is entirely duplicative of sources already cited or that is based on stale science that no longer represents the scientific understanding of a species or threat still be relevant? If not, how could petitioners know? Relevance is a concept that is fraught with subjectivity and decisions about what to include as relevant in their petition should be left to the petitioner. The decision as to what is reasonably available is also a subjective determination best left to the petitioner. For instance, it is unclear whether sources that are only available in paid databases, through subscription services, or in foreign languages would be considered reasonably available under proposed 50 C.F.R. § 424.14(b)(10). Would sources that are only obtainable through recourse to state or federal open records laws be considered reasonably available? Would archaic texts that are only available in print or other sources (e.g., microfilm) that petitioners fail to locate or review in spite of a good faith effort to compile all sources be considered reasonably available? This ambiguity inserts an enormous amount of uncertainty into a statement that the petitioner must certify. The petitioner is forced to allege a negative: namely that there is no relevant information that is reasonably available that they did not cite, when they do not have a reasonable way of discerning what the operative words entail. This would also seemingly require comprehensive literature reviews up to and including the day of filing the petition, whereas normally the majority of research would precede writing and editing a petition. The Services would have excessive difficulty enforcing this requirement and it would be difficult, or perhaps impossible, for petitioners to comply with.

Assuming that petitioners were able to comply with the standard set out in this proposed section, this requirement may actually have the unintended consequence of making the Services' review of petitions less efficient, or at least less timely. This required "document dump" would oftentimes leave the Services to sort through an enormous amount of material, much of which may be duplicative, potentially irrelevant, or contradicted by more recent sources, in time to meet the 90-day finding deadline. As discussed above, the Services have historically often already had trouble meeting these deadlines, even with the presumably lesser document review burden presently in place. *See* Section B. 1. b. "proposed 50 C.F.R. § 424.14(b)(9)," *supra*. This is why the ESA provides for a more limited review at the 90-day finding stage with the more comprehensive review saved for the 12-month finding stage. *See* Section B. 1. b. "proposed 50 C.F.R. § 424.14(b)(9)," *supra*. This longer time period is required to independently review and consider all of the relevant information that is reasonably available on the petition. Instead, the Services would have to complete a more thorough review for the comparatively larger number of species that are considered at the 90-day finding stage, many of which receive negative 90-day findings and do not get status reviews or 12-month findings. This would likely result in decreased efficiency and increased cost overall.

Requiring that petitioners produce these documents would also likely be redundant. First, under proposed 50 C.F.R. § 424.14(b)(9) the states would already be able to provide any information and analysis in their files that they believe is relevant. However, even if the Services remove proposed 50 C.F.R. § 424.14(b)(9), as we recommend, this provision would still place a heavy burden on petitioners with little or no additional benefit. This is because, in order to effectively enforce this regulation, the Services would have to complete a comprehensive literature review of every petition at the 90-day finding stage to ensure that no relevant, reasonably available sources had been omitted. If the Services were already undertaking this comprehensive literature review at this stage, then it would be inefficient to have the petitioner undertake this review in the first instance. However, if the Services were to undertake such a review before issuing a 90-day finding, their actions would be inconsistent with the ESA. These literature reviews, and indeed any independent research on the part of the Services, is to be reserved for the status review and 12-month finding

stage. Were the Services to avoid enforcing this regulation to avoid these issues, the data requirement would cease to have utility. Therefore it should be removed.

The Services propose limiting this section's requirements to extend "only to gathering and certifying submission of relevant information publicly available on affected States' Web sites." While limiting this proposed section would be a step in the right direction, many of the problems we identified earlier remain. For example, the ESA requires that petitioners identify the information needed to survive a 90-day finding. The alternative language contradicts this requirement by forcing petitioners to include data from a state's website, irrespective of whether the data inform the 90-day finding. Instead of limiting proposed 50 C.F.R. § 424.14(b)(10), the Services should remove it altogether. If the Services choose not to entirely remove this section, Defenders requests clarification of the terms "relevant" and "reasonably available" sufficient to allow petitioners to comply with this requirement and for the Services to implement it within the bounds of the law. Defenders also requests that the required documents be limited to those that would necessarily be required to provide substantial information that the petitioned action may be warranted.

2. Proposed 50 C.F.R. § 424.14(d), *Additional information to include in petitions to revise critical habitat.*

a. Proposed 50 C.F.R. § 424.14(d)(6)

Proposed 50 C.F.R. § 424.14(d)(6) requires "[i]nformation demonstrating that the petition includes a complete presentation of the relevant facts, including an explanation of what sources of information the petitioner consulted in drafting the petition, as well as any relevant information known to the petitioner not included in the petition." 80 Fed. Reg. at 29,294-95. Defenders urges the Services to remove this requirement from its proposed regulations for the same reasons we described earlier on the proposed changes to 50 C.F.R. §§ 424.14(b)(9), (10).

In addition to requiring information that is beyond the scope envisioned by the ESA, proposed 50 C.F.R. § 424.14(d)(6) appears to be redundant with several of the other proposed revisions. For example, proposed 50 C.F.R. § 424.14(b)(10) requires "[c]ertification that the petitioner has gathered all relevant information (including information that may support a negative 90-day finding) that is reasonably available, such as that available on Web sites maintained by the affected States, and has clearly labeled this information and appended it to the petition." Additionally, under proposed 50 C.F.R. § 424.14(b)(9) the states would already be able to provide any information and analysis in their files that they believe is relevant. It is unclear what additional information beyond what would already be gathered through these other two provisions would be required under this proposed section. In addition, even if proposed 50 C.F.R. §§ 424.14(b)(9), (10) were removed, as recommended by Defenders, this provision would still require petitioners to undertake review that is redundant of the Services' review. This is because, in order to effectively ensure that this regulation was being followed, the Services would have to do a comprehensive literature review of every petition at the 90-day finding stage to ensure that no sources have been omitted. If the Services were already undertaking this comprehensive literature review at this stage, then it would be inefficient to have the petitioner undertake this review in the first instance. However, having the Services undertake such a review before issuing a 90-day finding is also in contravention of the ESA. These literature reviews, and indeed any independent research on the part of the Services, are to be reserved for the status review and 12-month finding stage. Were the

Services to avoid enforcing this regulation to avoid these issues, it would cease to have utility. Therefore it should be removed.

3. Proposed 50 C.F.R. § 424.14(e), *Response to requests.*

Defenders requests that proposed 50 C.F.R. § 424.14(e) be removed from the final regulations in its entirety. This is because the "gatekeeping" mechanism in proposed 50 C.F.R. § 424.14(e)(1) would preemptively reject petitions that could still meet the standard for a positive 90-day finding. *See* 80 Fed. Reg. at 29,295. While a minimally demanding gatekeeping mechanism for petitions that ensured they could be identified and reviewed (i.e. one that required that the petitioner and species be identifiable from the petition and that the requested action be clear) would be acceptable, proposed 50 C.F.R. § 424.14(e)(1) goes too far. The ESA requires that petitions that present "substantial information" that the petitioned action "may be warranted" receive positive 90-day findings. *See* 16 U.S.C. §§ 1533(b)(3)(A), (D). However, proposed 50 C.F.R. § 424.14(e) would reject petitions that did not meet all of the requirements of proposed 50 C.F.R. § 424.14(b). Notably, proposed 50 C.F.R. § 424.14(b) as written does not contain any discussion of the ESA listing factors from 16 U.S.C. 1533(a)(1), which are to be the sole basis on which listing decisions are made. The discussion of these factors and the effects that they may be having on the species' extinction risk are instead contained in proposed 50 C.F.R. § 424.14(c). Before a listing petition can be denied, a decision as to whether it presents substantial information that the requested listing may be warranted must consider these factors. *See* 16 U.S.C. § 1533(b)(3)(A). In addition, the relevant factors that the Services must consider when assessing a petition to revise critical habitat are also not included in proposed 50 C.F.R. § 424.14(b), but are instead located in proposed 50 C.F.R. § 424.14(d). *See* 80 Fed. Reg. at 29,294; 16 U.S.C. § 1532(5). Because proposed 50 C.F.R. § 424.14(e) does not provide for consideration of these dispositive factors and would reject petitions that may very well provide this information, it is contrary to 16 U.S.C. § 1533(b)(3)(D).

Finally, the Services should include a "cure provision" wherein rejections must explain the basis for the rejection and the steps that the petitioners would need to undertake before re-submitting that petition in order to receive review at the 90-day finding stage. If petitioners are provided with insufficient information as to why their petitions were rejected, then this would greatly hamper their ability to effectively petition the government.

D. ADDITIONAL REQUESTED REVISIONS

1. Proposed 50 C.F.R. § 424.14(b), *Requirements for petitions.*

a. Proposed 50 C.F.R. § 424.14(b)(5)

Proposed 50 C.F.R. § 424.14(b)(5) would require that sources be cited with enough specificity for the Services "to locate the information cited in the petition, including page numbers or chapters as applicable." 80 Fed. Reg. at 29,294. Defenders supports the requirement that this information be included in petitions, but notes that it could cause some confusion on the part of petitioners for some sources. Defenders therefore requests clarification on how petitioners should comply with this section. For instance, when citing to a website, would these "pin cites" still be required even though the original source lacks pagination? If so, would it be sufficient to cite the pagination derived from saving the website in an electronic format, such as a pdf file, or from printing the website? This section should also take into account that sometimes it is most

appropriate to cite to a source generally where the entire source relates to the proposition that it is cited for. Requiring a pin cite in such cases would not be useful to the Services in locating the information that the petitioner relies on as the pin cite would have to encompass all the pages the source covers.

With the requested clarification, Defenders supports this change as a reasonable way for the Services to improve the efficiency of their petition review. As a corollary, Defenders suggests that the Services should consider including this citation requirement in all their own 90-day findings, status reviews, and 12-month findings as well. Without this information it is often difficult for petitioners and other interested parties to adequately review these decisions. With the Services' recognition of the helpfulness of this information, such a policy would improve the implementation of the ESA's petitioning provisions.

b. Proposed 50 C.F.R. § 424.14(b)(6)

Proposed 50 C.F.R. § 424.14(b)(6) would require that petitions be accompanied by "[e]lectronic or hard copies of any supporting materials (*e.g.,* publications, maps, reports, letters from authorities) cited in the petition, or valid links to public Web sites where the supporting materials can be accessed." 80 Fed. Reg. at 29,294. Defenders supports requiring provision of sources *that the petitioners choose to rely on* in their petitions. However, in combination with some of the other proposed revisions discussed in these comments, this requirement could become extremely burdensome and expensive. *See, e.g.,* Section C. 1. c. "Proposed 50 C.F.R. § 424.14(b)(10)," *supra* (requiring "all relevant information (including information that may support a negative 90-day finding) that is reasonably available . . ."). This requirement cannot be met for some sources. For instance, where the cited material is from the author's own personal knowledge of a species or threat or is the result of the personal comments of another person with these types of knowledge, it may not have a printed source that can be readily shared. These types of data can be extremely important, especially for data-poor species and for threats whose bases are still emerging or are poorly known. Defenders requests that the Services clarify that this section's requirements would not relate to these types of data and would cover only sources that the petitioners choose to rely on for their petitions.

c. Proposed 50 C.F.R. § 424.14(b)(8)

Proposed 50 C.F.R. § 424.14(b)(8) relates only to petitions to list, delist, or revise the status of a species and would require that those petitions provide information on the current geographic range of the species, including range states and countries. 80 Fed. Reg. at 29,294. Defenders supports this requirement assuming that petitioners are not held accountable for good faith mistakes or omissions. As discussed in Section C. 1. b. "Proposed 50 C.F.R. § 424.14(b)(9)," *supra*, it will often be impossible to have definitive knowledge of an imperiled species' range. Therefore, Defenders suggests that this section be changed to read as follows (proposed additions in italics):

> For a petition to list a species, delist a species, or change the status of a listed species, information on the current geographic range of the species, including range States or countries*, to the extent that petitioners have this information.*

2. Proposed 50 C.F.R. § 424.14(c), *Types of information to be included in petitions to add or remove species from the lists, or change the listed status of a species.*

a. Proposed 50 C.F.R. § 424.14(c)(3)

Defenders supports proposed 50 C.F.R. § 424.14(c)(3)'s clarification that petitions include a discussion of the listing factors from 16 U.S.C. § 1533(a)(1). 80 Fed. Reg. at 29,294. Such a discussion is of course necessary to determine the level of protection that the species at issue requires. However, Defenders requests clarification as to the requirement that this include "a description of the magnitude and imminence of the threats." 80 Fed. Reg. at 29,294. As such, Defenders requests that this final clause be omitted or clarified by amending it to state (proposed additions in italics):

> . . . including*, where available,* a description of the magnitude and imminence of the threats.

b. Proposed 50 C.F.R. § 424.14(c)(5)

Defenders supports proposed 50 C.F.R. § 424.14(c)(5). Deletion of the requirement that petitioners include, in petitioning for designation of critical habitat in conjunction with a listing or reclassification, information indicating "any benefits and/or adverse effects on the species that would result from such designation" is consistent with the ESA. *See id.* at 29,289, 29,294. That information is irrelevant under the ESA and Defenders supports this proposed change.

3. Proposed 50 C.F.R. § 424.14(f), *Supplemental information.*

Proposed 50 C.F.R. § 424.14(f) addresses information that the petitioner provides to the Services after they have already submitted their petition. Where petitioners provide this information before the Services make a finding on the petition, proposed 50 C.F.R. § 424.14(f) would treat this submission as effectively "restarting the clock" for 90-day and 12-month findings. *See* 80 Fed. Reg. at 29,295. Defenders understands that providing the Services with additional information when they have already begun their review complicates their decision-making process and that the Services have already been following this rule in practice. *See id.* at 29,289. However, Defenders recommends a more efficient way to deal with these materials. First, where petitioners intend to submit a new petition and make that intention clear, the Services should restart the clock for 90-day and 12-month findings. However, where the petitioner merely provides some new or clarifying material, the Services should consider that material to the extent that they are able to, within the already existing, statutorily mandated timetables.

Many species have historically waited years from the time they are petitioned for listing or for a revision of their critical habitat until the time that those petitions receive a final determination. This rule would force petitioners to decide whether to avoid providing additional, potentially important information to the Services or to maintain the current decision-making timeline for species and habitat that they think need urgent ESA protection. Also, while the proposed policy would be more defensible at the 90-day finding stage where the Services are not conducting independent research, it makes much less sense at the 12-month finding stage where the Services will already be looking for and finding new information on their own. Because the Services will

continually be reviewing new information at the 12-month finding stage, it is inequitable to delay petitions where petitioners hope to aid the Services in their research by providing additional information. Other organizations and individuals are able to provide additional information at both the 90-day and 12-month finding stages without affecting the Services' decision-making timeline, why treat the petitioner differently? In short, this provision would penalize petitioners, and ultimately the species or their critical habitat that are the focus of the petitions, for providing the Services with information that would be helpful in making their decision. As a result, this paragraph should be removed.

Should the Services maintain this paragraph, then Defenders recommends that it be limited to petitions that have not yet received 90-day findings. This would be more consistent with the more limited information that can be considered at that stage of the petition review process. It should also exempt the petitioners' provision of new sources without further analysis to ensure the Services that they have all of the available information but that they are not faced with what, in effect, could arguably be considered a new or supplemental petition. This would help avoid some of the perverse incentives that Defenders has identified while also protecting the Services' interests in being able to adequately consider all of the information that they have before them.

4. Proposed 50 C.F.R. § 424.14(g), *Findings on petitions to add or remove a species from the lists, or change the listed status of a species.*

a. Proposed 50 C.F.R. § 424.14(g)(1)(ii)

Proposed 50 C.F.R. § 424.14(g)(1)(ii) states that the Services would consider the information referenced in proposed 50 C.F.R. §§ 424.14(b), (c), and (f) when making listing decisions. 80 Fed. Reg. at 29,295. Defenders recommends that several provisions of those paragraphs be revised or removed. To avoid redundancy, Defenders incorporates its comments related to those paragraphs here by reference and requests that this section be amended consistent with those comments.

Defenders agrees with the Services' statement that they may consider information in their files as well as the petition when making a 90-day finding. The proposed language of this section states that the Services may "consider information readily available in the agency's possession *at the time the determination is made* in reaching [their] initial finding on the petition." 80 Fed. Reg. at 29,295 (emphasis added). The Services recognize that they "should not engage in outside research or an effort to comprehensively compile the best available information," but that they still "must be able to place the information presented in the petition in context." *Id.* at 29,290. While the proposed language is not as explicit on this point as it could be, assuming that the Services clarify that this would never involve additional research or contacting third parties to retain their information or opinions, then Defenders supports this change. This would include a constrained interpretation of the "online databases" that the Services contend they can reference. *See id.*

b. Proposed 50 C.F.R. § 424.14(g)(2)(iii)(B)

Proposed 50 C.F.R. § 424.14(g)(2)(iii)(B) relates to the expeditious progress requirement for warranted but precluded decisions. It states, in part, that the Services "will make a determination of expeditious progress in relation to the amount of funds available after complying with nondiscretionary duties under section 4 of the Act and court orders and court-approved settlement agreements to take actions pursuant to section 4 of the Act." Defenders recognizes that the Services

must prioritize their limited resources and that they cannot avoid complying with these nondiscretionary duties. However, Defenders requests that the Services clarify that they understand that complying with the expeditious progress provisions of the ESA is also nondiscretionary.

5. Proposed 50 C.F.R. § 424.14(h), *Findings on petitions to revise critical habitat.*

a. Proposed 50 C.F.R. § 424.14(h)(1)(ii)

Proposed 50 C.F.R. § 424.14(h)(1)(ii) states that the Services consider the information referenced in proposed 50 C.F.R. §§ 424.14(b), (d), and (f) when making a listing decision. 80 Fed. Reg. at 29,295. Defenders recommends that several provisions of those paragraphs be revised or removed. To avoid redundancy, Defenders incorporates its comments related to those paragraphs here by reference and requests that this section be amended consistent with those comments.

Similar to its discussion of 50 C.F.R. § 424.14(g)(1)(ii), Defenders supports the Services' contentions that, in addition to the submitted petitions, they "may also consider information readily available in the agency's possession at the time the determination is made in reaching [their] initial finding on the petition." 80 Fed. Reg. at 29,295; *see also* Section D. 4. a. "Proposed 50 C.F.R. § 424.14(g)(1)(ii)," *supra*. However, Defenders again requests that the Services clarify what sources of information and efforts this would include, being mindful that a constrained interpretation is appropriate at the 90-day finding stage.

6. Proposed 50 C.F.R. § 424.14(i), *Petitions to designate critical habitat or adopt special rules.*

The regulations related to designation of critical habitat and adoption of special rules remain essentially unchanged in proposed 50 C.F.R. § 424.14(i). *Compare* 50 C.F.R. § 424.14(d); 80 Fed. Reg. at 29,295. Instead, Defenders encourages the Services to take this opportunity to inform petitioners what standard decisions on such petitions will be judged by and what the Services will require for positive findings on such petitions. This information would allow petitioners to provide the Services with sufficient information to meet these requirements and would ensure that the Services get higher-quality petitions that would streamline their review by the Services.

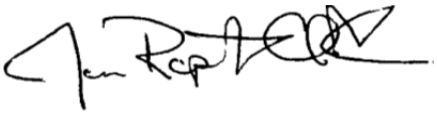
7. Proposed 50 C.F.R. § 424.14(j), *Withdrawal of petition.*

Proposed 50 C.F.R. § 424.14(j) would newly allow the petitioner to withdraw their petition even if a 90-day finding had already been made on the petition. 80 Fed. Reg. at 29,295-96. Assuming that the Services maintain the discretion to continue review of a withdrawn petition, Defenders supports this addition. *Id.* at 29,296. This proposed rule appears to draw a reasonable line between both the petitioners' and the Services' interests.

* * * * *

Thank you for the opportunity to comment on the proposed rulemaking. Please do not hesitate to contact us if you have questions or wish to discuss further.

Sincerely,



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