

## **U.S. Fish and Wildlife Service Guidance on Making 90-Day Petition Findings Under Section 4(b)(3)(A)<sup>1</sup> of the Endangered Species Act**

### **Statutory and Regulatory Background**

Under the Endangered Species Act (ESA), the public may petition us to list, delist, or reclassify a species. Under section 4(b)(3)(A) of the ESA, we must “to the maximum extent practicable, within 90 days after receiving the petition... make a finding as to whether the petition presents substantial scientific or commercial information indicating that the petitioned action may be warranted.”

### **Petition Review**

Appendix C (Petition Review Form) provides the template for conducting a 90-day petition finding for petitionable actions under section 4(b)(3)(A), including “boilerplate” language and specific directions. Appendix E provides links to examples of recent 90-day listing and delisting petition findings. The information in these attachments is intended to illustrate the key elements of substantial and not-substantial findings described below.

The following sections provide guidance on completing the Petition Review Form.

### *Information Considered in Making a 90-day Petition Finding*

Neither the ESA nor our implementing regulations at 50 CFR 424.14 directs us to consider information beyond that presented in the petition. For us to find that a petition presents substantial information that the petitioned action may be warranted, the petition must itself present that information. We need not, and should not, resort to information outside of the petition to bolster, plug gaps in, or otherwise supplement a petition that is inadequate on its face. However, it is appropriate for us to consider information readily available that we are aware of at the time the determination is made that provides context in which to evaluate whether the information that a petition presents is substantial. For example, if a petition presents information that superficially appears to support the conclusion that listing may be warranted, but we are aware that the information presented is out of date, unreliable, or unrepresentative of the great bulk of available data, we may consider this contextual information in making its determination as to whether the petition presents substantial information. Note that if we determine that it is appropriate to consider such contextual information, we must consider the information representative of totality of contextual information (in other words, we should not ourselves rely on unrepresentative information to rebut information presented in the petition).

If the petitioner refers to supporting information but does not provide an electronic or hard copy of a reference or valid links to public websites, it is not considered “available” and will not be used in our evaluation of the petition.

<sup>1</sup> Petitions findings under section 4(b)(3)(D) of the Endangered Species Act to revise critical habitat will be addressed in separate guidance.

The approach outlined above is consistent with our regulations in that the petition should contain a detailed justification for the actions based on available information (i.e., the petitioner is responsible for making a case that the petitioned action may be warranted). It also prevents us from unnecessarily finding information to be substantial when we have information to the contrary.

### *Listable Entity Evaluation*

When evaluating a petition, we must consider whether the petitioned entity is a listable entity under the ESA, i.e., a species, a subspecies, or a distinct vertebrate population segment (DPS) of a vertebrate species or subspecies. The evaluation of the taxonomic status of a species, subspecies, or DPS, centers on whether the information presented reaches the substantial information threshold. Substantial information is that amount of information that would lead a reasonable person to believe that the requested action may be warranted. It is not within our purview to determine taxonomic status in a 90-day petition evaluation, but rather to evaluate information submitted by the petitioners to determine whether the information indicates the petitioned entity may be a “listable entity” under the ESA.

A petition to list, delist, or reclassify a generally recognized species or subspecies need not present information on the validity of the taxon. Additionally, a petition to list, delist, or reclassify an entity that the Service has already recognized as being a species, subspecies, or DPS need not present information that the entity is a listable entity. On the other hand, if the petition alleges that an entity is a species or subspecies, but that taxonomic status is not generally recognized, the petition must present substantial information that the entity may indeed be a valid species or subspecies. Similarly, if the petitioned entity is alleged to be a DPS that the Service has not already recognized, the petition must present substantial information that the petitioned entity may satisfy both the “discreteness” and “significance” elements of our DPS policy (61 FR 4722; February 7, 1996; See Appendix F).

With respect to alleged taxa that are not generally recognized, we will continue to follow the November 30, 1995, Director’s memorandum clarifying the standard for evaluating petitions on undescribed species. A taxon will be considered to be described for the purposes of a 90-day finding if a description has been prepared and has passed scientific peer review, either as part of acceptance for publication or through some other equivalent review. This same standard should be applied to petitions to reclassify or delist an entity due to taxonomic changes (e.g., taxonomic split or combining of taxa). The petition should include this type of information to support the validity of the taxon. If the petition is found to be substantial, we will include an evaluation of the taxonomic status as part of our status review in preparation of the 12-month finding.

If the petitioned entity is found not to be a listable entity under the ESA, a detailed explanation of the basis for that determination is required. An evaluation of the five factors is unnecessary if the basis for our not-substantial finding is that the petitioned entity is not a valid listable entity.

## Appendix B: 90-day Petition Finding Guidance

### *Scope of Petitions*

At the 90-day stage, we will make a finding based on the listable entity (species, subspecies, or DPS) the petitioner includes in the petition. We will not expand the scope of our evaluation beyond this entity, including various combinations of a DPS. For example, if we receive a petition to list a subspecies, we evaluate information for the subspecies but will not do any evaluation at the species level if it was not requested by the petitioner. However, if we find the petition to be substantial, we may at the 12-month stage find that the petitioned entity is part of a larger taxon (or combinations of DPSs) that may warrant listing and conduct our assessment on the larger entity, or DPSs.

### *Multiple Petitions for the Same Action*

#### Petition Supplements

When a petitioner, after filing a petition with us, submits additional information relevant to the petitioned action and requests us to consider this information in its 90-day finding, we will treat the new information as a new petition that supersedes the original petition. The statutory timeframes will be recalculated based on the date that we received the supplemental information. When making our 90-day finding, we will base our evaluation of the petition on the information originally submitted along with the supplementary information.

#### Secondary Petitions

A petition is considered a secondary petition when it requests the same action for the same entity as a petition received previously. For a petition that is equivalent to a petition for which a 90-day finding has not yet been made, the later petition will be combined with the earlier petition, and a combined 90-day finding will be prepared in time to meet the earlier 90-day due date, if possible. If not, the combined finding should be prepared in time to meet the deadline for the next quarter. If a substantial 90-day finding has been made on the first petition and a 12-month finding is pending, the petitioner will be notified, either through letter or email, that a status review is being conducted on the entity petitioned and that the information submitted with the petition will be considered in the status review.

A petition to list a candidate species (one for which sufficient information is available to indicate that a listing proposal is appropriate) requires an entry in the annual Candidate Notice of Review (CNOR), in which we review available information on candidates to ensure that a proposed listing is justified, reevaluates the listing priority number for each candidate species, and evaluate the need to emergency list any candidates. The information in the petition can be used for the annual candidate notice of review. The entry should articulate the reasons the species warrants listing and indicate that this entry in the CNOR constitutes a 90-day and 12-month finding on the petition.

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## *Petition Finding*

In addition to the requirements listed in the *Listable Entity Evaluation* section above, we must determine whether there is substantial information presented in the petition to support the petitioned action. Implementing regulations at 50 CFR 424.14(b) define substantial information as “that amount of information that would lead a reasonable person to believe that the measure proposed in the petition may be warranted.” The word “substantial” refers to the quality of the information (scientific methods and results) and not the quantity or aggregate size of publications or reports.

The substantial information should be relevant to one or more of the following five listing factors in section 4(a) of the ESA that are used to determine whether a listable entity is a threatened species or an endangered species:

- (A) The present or threatened destruction, modification, or curtailment of its habitat or range;
- (B) Overutilization for commercial, recreational, scientific, or educational purposes;
- (C) Disease or predation;
- (D) The inadequacy of existing regulatory mechanisms; or
- (E) Other natural or manmade factors affecting its continued existence.

Petitions to list a species must present substantial information that the petitioned entity may be a “threatened species” or “endangered species” as defined by the ESA. It is not enough for the petition to just indicate that threats to the species or its habitat exist, without providing some information to reasonably connect those threats to the negative impact on the status of the species. That is, the petition must present sufficient information to suggest that factors may be negatively acting on the species or its habitat such that the species may be in danger of extinction (endangered species) or likely to become in danger of extinction in the foreseeable future (threatened species). Additionally, it is not sufficient for a petitioner to provide only supporting materials and request that the Service draw a conclusion that the petitioned action may be warranted, without articulating in the petition itself how the purported threats negatively impact the status of the species such that it warrants listing.

Petitions to list a species that is widely accepted as extinct would likely result in a not-substantial petition finding unless the petition presents substantial information that the species may be extant. However, where information submitted with the petition indicates only that the species may be extinct in the wild, but the species is not widely accepted to be extinct, the 90-day finding should be based on the assumption that the species is extant, and should result in a substantial petition finding if the petition presents substantial information indicating that the species may warrant listing. A determination of whether the species is extinct or extant will be made in the 12-month finding.

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Petitions to reclassify either a listed entity or a subset of a listed entity (e.g., subspecies or DPS) must provide substantial information that the listed entity's current status may no longer be applicable and may warrant a different listing classification, not merely that the species may warrant listing.

We may delist a species according to 50 CRF 424.11(d) if the best available scientific and commercial data indicate that the species is neither endangered nor threatened for one or more of the following reasons:

- (1) The species is extinct;
- (2) The species has recovered and is no longer endangered or threatened; or
- (3) The original scientific or commercial data used at the time the species was classified, or the interpretation of such data, were in error.

We must consider the same five factors listed above in delisting a species due to recovery or an error in the available data on the species and/or threats to the species, or the interpretation of such data, when the species was listed. Petitions to delist a species for these reasons must include substantial information relevant to the above five factors. To result in a substantial finding, the petition must present information indicating that all threats may be ameliorated, or may no longer be relevant to the species, such that the listed entity may no longer meet the definition of an endangered species or threatened species and removal from the list may be warranted.

To determine if the petition presents substantial information, the person reviewing the petition should review the sources cited in the petition to determine if the information supports the claims of the petitioner. The person reviewing the petition is encouraged to do a thorough review of the petition and address each factor the petitioner claims to be a threat. However, legally we may determine that a petition to list or reclassify a species is substantial as long as there is information under at least one threat factor that would lead a reasonable person to conclude that the petitioned action may be warranted.

We may determine a petition to delist a species is substantial as long as there is substantial information that supports that the species may be neither an endangered species nor a threatened species due to extinction, error in the original data for classification, or recovery (50 CFR 424.11(d)). If we are petitioned to delist a species because the petitioner believes it is extinct or an error in the data available when the species was listed, or the interpretation of such data, indicates an entity is not a valid entity, we must consider whether the information reaches the substantial information threshold. Evidence that supports that the entity may be extinct or may not be a listable entity would be the basis for a substantial finding and an evaluation of the five factors would be unnecessary. If we find that the petitioner did not provide substantial information indicating the species may be extinct or may not be a listable entity, a detailed explanation of the basis for that determination is required. Proceed to the Petition Finding section of the Petition Review Form.

When we determine that sources provide substantial information, only citations with relevant page numbers need to be provided in the Petition Review Form (Appendix C). When we determine that sources cited in the petition do not provide substantial information, a detailed

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explanation, including citations of references, is required. In some instances, the information in a single source may not be considered substantial, but when combined with information in other citations may be considered substantial. In this situation, the “+” sign should be used to string a series of citations together (e.g., Smith 2014, p. 3 + Connor *et al.* 2010, pp 4-5 + Johnson 2009, p. 14).

The information provided in a petition does not have to present conclusive evidence. The courts have stated that a standard requiring conclusive evidence to support a particular action is inappropriate for a 90-day finding. Courts have also indicated that when evaluating information presented in a petition for a 90-day finding, the absence of other information is not enough to render the information presented not-substantial. In other words, when a petition presents credible information to support the petitioned action, the failure to provide a greater level of evidence is not grounds for making a not-substantial finding. (See Appendix G for a summary of relevant court rulings.) Thus, in making a 90-day finding, we are evaluating the information to determine if it would lead a reasonable person to believe the petitioned action may be warranted (i.e., raises a question that the petitioned action may be warranted).

It is possible for information in the petition to be contradicted by other information in the petition or in our files. If the issue has not been resolved in the literature, we should take into consideration: (1) whether the information is outdated; (2) whether study results have been duplicated; (3) whether the information is based on new, potentially more reliable technology or methodology; (4) how the information is generally treated by the relevant scientific community; and (5) other factors as appropriate to the situation. The number of publications supporting a conclusion may or may not be an important factor when considering apparent contradictions. If the contradictory information is not reconciled through this examination, we will document the contradiction, but will not use the contradiction as a basis for a 90-day finding that the petition fails to present substantial information. If we find that the petition presents substantial information, we will undertake further analysis of this contradictory information as part of a status review for the 12-month finding.

Based on the evaluation of the information presented in the petition and, in appropriate limited cases, the information readily available at the time the determination is made, we indicate our determination by completing the Petition Finding section of the PRF. For multi-species petitions, we make a Finding for each species, separately. A substantial petition is one in which the petitioner has made an argument that the petitioned action may be warranted and that argument is supported by substantial information contained in the petition. All of the information provided in the petition does not have to be substantial for the petition as a whole to be substantial.

The detailed explanations required when we find that the petition does not present substantial information in the PRF should provide clear support for our determinations to ensure that the finding is legally defensible.

## **Soliciting Information as a Result of a Substantial 90-day Finding**

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If we determine that the petition presents substantial information indicating that the petitioned action may be warranted, we will solicit information from the States, Tribes, federal agencies, applicable foreign countries, and the public to help us complete a status review for the species. (Note: since we are not initiating rulemaking procedures, this is neither a public comment period nor a formal request for public comments.) In the Federal Register notice of our 90-day finding, we will state that in order to have sufficient time to complete the status review, the information should be submitted within 60 days after the date of publication. However, information can be accepted at any time and if there is a significant delay between the 90-day and 12-month findings, we may publish an additional request for information to ensure the best available data is used to make a classification determination.

### *Specific Requests for Information*

In the Petition Review Form, list any information that is needed in addition to the following standard information requests:

- (1) The species' biology, range, and population trends, including:
  - a. Habitat requirements;
  - b. Genetics and taxonomy;
  - c. Historical and current range, including distribution patterns;
  - d. Historical and current population levels, and current and projected trends; and
  - e. Past and ongoing conservation measures for the species, its habitat, or both.
- (2) The factors that are the basis for making a listing, reclassification, or delisting determination for a species under section 4(a) of the ESA (16 U.S.C. 1531 *et seq.*), which are:
  - a. The present or threatened destruction, modification, or curtailment of its habitat or range;
  - b. Overutilization for commercial, recreational, scientific, or educational purposes;
  - c. Disease or predation;
  - d. The inadequacy of existing regulatory mechanisms; or
  - e. Other natural or manmade factors affecting its continued existence.
- (3) The potential effects of climate change on this species and its habitat.

### **References Cited**

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Refer to Appendix H: Guidance for References Memo