

Procedures for Making 90-day Petition Findings Under Section 4(b)(3)(A)¹ and Publication of Findings in the *Federal Register*

Purpose: This document outlines pre-finding procedures and the basic process for completing 90-day findings under section 4(b)(3)(A) of the Endangered Species Act (ESA) and publishing the finding in the *Federal Register*. You will be referred to the specific documents needed for each step of the process.

Introduction

The Administrative Procedure Act (APA) allows members of the public to petition agencies for rulemaking 5 U.S.C. § 553(e). The ESA overlays various substantive and procedural requirements for responding to petitions for certain types of rulemaking under the ESA.

Therefore, we receive two types of petition requests for rulemaking under the ESA: (1) petitions for actions governed by section 4(b)(3) of the ESA, and (2) petitions for actions governed only by the Administrative Procedures Act (APA). Actions petitionable under section 4(b)(3) of the ESA include petitions to list, reclassify, or delist species and petitions to revise critical habitat. The regulations for petitions governed by section 4(b)(3) are found at 50 CFR 424.14. Under the ESA, we must make an initial finding (the 90-day finding) on these petitions within 90 days of the receipt of the petition, to the maximum extent practicable. If our initial finding is that the petition presents substantial information indicating that the petitioned action may be warranted, we must then make a determination on whether the petitioned action is warranted, warranted but precluded by higher priority actions, or not warranted within 12 months of receiving the petition.

Actions that are not petitionable under section 4(b)(3) of the ESA include emergency action (e.g., emergency listing) and designation of critical habitat. We always consider the need for critical habitat designation (domestic and United States transboundary species only) when listing species. Since the ESA does not provide for emergency listing petitions, we treat petitions to emergency list a species as standard listing petitions, and will consider whether the species warrants emergency listing as part of the standard process for making the petition finding when emergency listing is requested. We also consider any petitions that are not expressly authorized under section 4(b)(3) of the ESA—such as petitions to designate critical habitat or to adopt or revise a species-specific rule under section 4(d) for the conservation of a species—to be petitions under the APA. The general Departmental regulations for addressing APA petitions, 43 CFR part 14, apply to these petitions, as does 50 CFR 424.14(d). Although there are no specific statutory deadlines for making petition findings under the APA, the APA does impose a general timeframe—that petitions be addressed within a reasonable time (5 U.S.C. §706(1) authorizes courts to “compel agency action unlawfully withheld or unreasonably delayed”). The remainder of this guidance does not apply to petitions governed solely by the APA.

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

To reach our goal of making 90-day and 12-month petition findings under section 4(b)(3)(A) of the ESA within the statutory time frames, while ensuring that we conduct an adequate review of the information provided in the petition, we have developed a process to streamline initial petition findings. This streamlined process includes the use of a Petition Review Form (PRF) to determine whether a petition presents substantial scientific or commercial information indicating the petition action may be warranted. The PRF will constitute the 90-day petition finding.

The ESA, our regulations (50 CFR 424.14), and our policies do not specify how much information we must include in petition findings and notices; therefore, we have great discretion in defining our process. To improve our implementation of the ESA, we will batch summaries of substantial and not-substantial 90-day petition findings under section 4(b)(3)(A) (listing, reclassification, and delisting for domestic and foreign species) into a single *Federal Register* notice on a quarterly basis (see table below under Making a 90-day Finding) . The advantages of batching 90-day findings are:

- A more efficient process that will allow us to complete more 90-day findings within the statutory timeframe;
- Simplified review and approval process for Regions, Headquarters, and the Department of the Interior, and
- Reduced *Federal Register* publication costs.

The process for pre-finding procedures, completing 90-day petition findings, and publishing a batched petition finding notice in the *Federal Register* is provided in this document and the following appendices.

Appendix A	Acknowledgment Letter Template
Appendix B	Guidance on Making 90-day Petition Findings ^{FORO}
Appendix C	Petition Review Form ^{FORO}
Appendix D	2012 Director's Memorandum
Appendix E	Examples of Petition Review Forms and <i>Federal Register</i> Notices
Appendix F	1996 DPS Policy
Appendix G	Summary of 90-day Findings Case Law
Appendix H	2006 Guidance for References
Appendix I	Guidance on Batching 90-Day Findings for Publication in the <i>Federal Register</i> ^{HQ}
Appendix J	Batched <i>Federal Register</i> Notice Template ^{HQ}
Appendix K	Briefing Paper Template ^{HQ}
Appendix L	Package Table of Contents
Appendix M	Document Review Request Form ^{HQ}

^{FORO} These documents will be used mostly by FOs and ROs

^{HQ} These documents will be used mostly by HQ

Initial Steps *(completed within 30 days of receipt of petition)*

When we receive a document purporting to be a petition for a domestic species, a United States transboundary species, or a foreign species, Headquarters will complete an initial evaluation of the petition and upload the document into the Environmental Conservation Online System (ECOS). Headquarters staff determines whether the action requested in the document is an action that is petitionable under the ESA. Any person or organization can petition the Service to add or remove a species from the Lists of Endangered and Threatened Wildlife and Plants, revise the listed status of a species (section 4(b)(3)(A) of the ESA), or revise a critical habitat designation for a listed species (section 4(b)(3)(D); addressed under separate guidance) (see also 50 CFR 424.14(a)).

Next, Headquarters staff should check the document for required information (the below requirements are subject to change following publication of the revised petition regulations). The document must:

- Clearly identify itself as a petition under the ESA and be dated, and
- Contain the name, signature, address, telephone number, if any, and the association, institution, or business affiliation, if any, of the petitioner.

If the document requests an action that is petitionable under the ESA and contains the required information, it qualifies as an ESA petition and should then be uploaded into ECOS.

Headquarters will determine the lead Region for petitions for domestic or United States transboundary species and send the petition to them; petitions for foreign species will be assigned to the Branch of Foreign Species. In instances where the species crosses multiple Regions, Headquarters will send the petition to all of the affected Regions and the Regional Offices will determine which Region will take the lead.

The lead Region will confer with the lead Field Office to determine whether the Field Office or Regional Office can review the petition and draft a recommended finding (i.e., complete the PRF) within the given timeframe (see Table below under Making a 90-day Finding). If neither the Field Office nor the Regional Office is able to complete the petition finding within the given timeframe, the lead Region should contact Headquarters for assistance in considering alternative arrangements. Alternative arrangements could include a revised timeframe (i.e., batching the finding in a later FY Quarter) or assistance from Headquarters or other Regions in completing the finding.

Emergency Listing

When we receive a petition requesting emergency listing, we first review the petition to determine whether the information suggests emergency listing is warranted. A species should be considered for emergency listing when the immediacy of a threat is so great to a significant proportion of the total population of the species that, within the time needed to follow the standard statutorily required listing process, the species will be faced with significant risk of extinction (Endangered Species Listing Handbook 1994, p. 109, click [here](#) for access).

The purpose of the emergency-rule provision of the ESA is to prevent species from becoming extinct by affording them immediate protection while the normal rulemaking procedures are followed. If the Field Office, Regional Office, and Headquarters agree emergency listing is warranted, the lead office prepares an emergency listing rule instead of a PRF. See the Listing Handbook for more information on emergency listing guidance and process.

Petition Acknowledgement (subject to change following publication of the revised petition regulations)

Within 30 days of receiving the petition, the lead office will send a letter acknowledging receipt of the petition to the petitioner as required under 50 CFR 424.14(a). The acknowledgement letter should include confirmation of the exact date of receipt of the petition and, if requested emergency listing, our determination on whether emergency listing is warranted for the petitioned entity (See Appendix A for a template).

Making a 90-day Finding

Use the U.S. Fish and Wildlife Service Guidance on 90-Day Petition Findings Under Section 4(b)(3) of the Endangered Species Act (Appendix B) to conduct a review of the petition and make a 90-day petition finding. This guidance includes instructions on completing a PRF (Appendix C). Links to examples of completed Petition Review Forms can be found in Appendix E.

Surname and Signature Authority

Pursuant to the November 9, 2012, Director's memorandum on procedures for developing substantial 90-day petition findings (Appendix D), PRFs with substantial 90-day findings for domestic and transboundary species will be signed by the Regional Director for the lead Region. PRFs with 90-day substantial findings for foreign species will be signed by the Assistant Director for Ecological Services. As noted in the November 9, 2012, Director's memorandum, individual substantial 90-day findings do not require Solicitor's Office surname.

The PRF is also used for not-substantial" findings and the process for completing them is the same as substantial findings. However, because not-substantial 90-day findings are final agency actions and may be challenged in court, the form must be reviewed and surnamed by an attorney in the Solicitor's Office and must be signed by the Director.

To expedite the surname and signature process for foreign species petition findings, the Branch of Foreign Species will schedule a briefing with reviewers (e.g., Branch chief and Division of Conservation and Classification chief) on the petition finding(s) made in a given quarter. Regional Offices will decide whether to follow the same process to obtain surname/signature or create their own process to expedite their review of findings on petitions for domestic or transboundary species.

Regional Offices will submit signed (substantial findings) or surnamed (not-substantial findings) PRFs to Headquarters for batching following the schedule summarized in the table below. For petitions to list a species or reclassify a species from threatened to endangered, the PRF is sent to the Branch of Listing. For petitions to delist or reclassify a species from endangered to threatened, the PRF is sent to the Branch of Recovery and State Grants. Not-substantial findings will be reviewed and surnamed by the appropriate Branch staff and Branch Chief before being batched in the *Federal Register* notice (see **Review Process for 90-day Not-Substantial Petition Findings** at the end of this document). Substantial findings may be reviewed for formatting consistency.

If a finding for domestic or transboundary species petition is completed in Headquarters, the lead Regional Office will be notified of the outcome of the finding (substantial or not-substantial) in a sufficient timeframe to assess and prepare for outreach needs. A copy of the completed PRF will be sent to the Regional Office after it has received an initial surname (i.e., after the Branch Chief surnames). The PRF will follow a similar process as petitions for foreign species to obtain surname and signature (see **Review Process for 90-day Petition Findings** flow charts at the end of this document). Copies of revised not-substantial PRF may be sent to the Regional Office following review by the Solicitor's Office. Substantial PRFs completed in Headquarters will be signed by the Assistant Director for Ecological Services; not-substantial PRFs will be signed by the Director. Final versions of PRFs will be available for download on www.regulations.gov.

See also **Review Process for 90-day Petition Findings and Federal Register Notices** flow charts at the end of this document.

FY Quarter	Petitions Received In	PRFs Due to HQ	Notice Delivered to OFR
1	Oct, Nov, Dec	Jan 1	February
2	Jan, Feb, Mar	Apr 1	May
3	Apr, May, Jun	Jul 1	August
4	Jul, Aug, Sep	Oct 1	November

Batching 90-day Findings for Publication

Headquarters will be responsible for batching quarterly petition findings into a single *Federal Register* notice and drafting a single briefing paper. The Guidance on Batching 90-day Findings for Publication in the Federal Register (Appendix I) includes instructions on quarterly gathering of petition findings, instructions for completing the *Federal Register* notice template (Appendix J), and details of the surname process. Links to examples of published *Federal Register* Notices

can be found in Appendix E. See also **Review Process for 90-day Petition Findings and Federal Register Notices** flow charts at the end of this document.

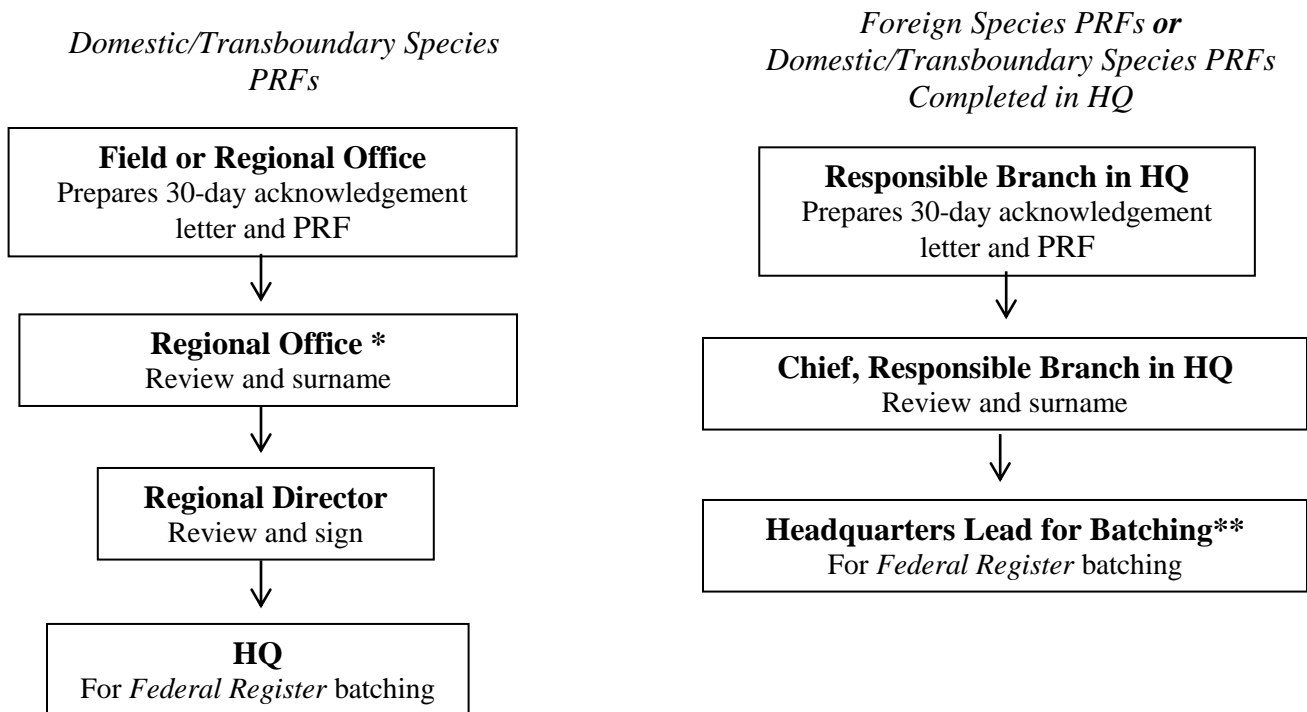
Publication in the *Federal Register*

Once the notice is signed by the Director and cleared by the Department of the Interior, and a publication date is coordinated with Regions to ensure staff are available to conduct outreach efforts, Headquarters staff will send the notice to the Office of the Federal Register. Once a publication date is confirmed, Headquarters will notify the affected Regions of the publication date; for notices that include foreign species, International Affairs and Law Enforcement may also be notified. The lead Field Office or Regional Office (for domestic and transboundary species) and the Branch of Foreign Species (for foreign species) are responsible for notifying petitioners and other interested stakeholders of the publication of petition findings.

Because the *Federal Register* notice is a Headquarters action, Headquarters' External Affairs program will send a basic bulletin to those Regions with species in the batched *Federal Register* notice. Outreach for each species will be the responsibility of the Regions.

The Office of Policy, Performance, and Management Programs (PPMP) in Headquarters will collect the information the public submits in response to the notice and post it to www.regulations.gov. For substantial findings that trigger a status review, it will be the responsibility of the designated lead Field Office or Regional Office contact to download information specific to their species from the appropriate docket (see *Federal Register* batch notice for docket number) at www.regulations.gov for use in the status review and subsequent 12-month finding. PPMP is also available to facilitate export of the comments for you. You may send a request for a bulk extract to Marcia_cash@fws.gov or michel_bagbonon@fws.gov. Please provide the Docket Number and the time period for the comments you want. The extract is usually available for download the next day.

Review Process for 90-day Substantial Petition Findings

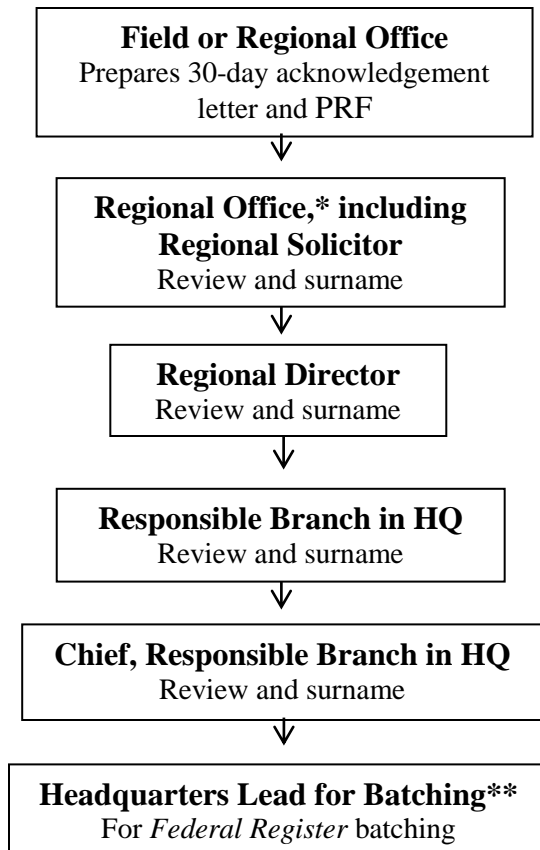


* This is one option. It is up to the Regional Office to determine the appropriate process.

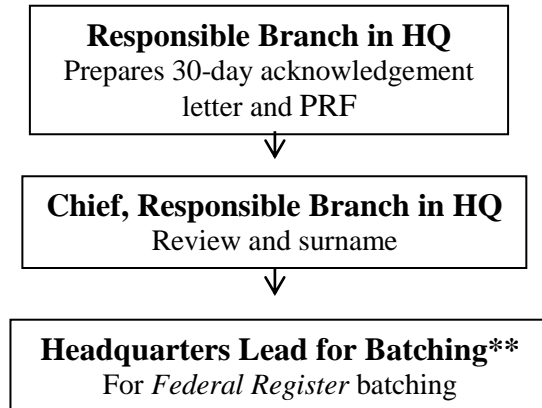
** PRFs surnamed by the Branch Chief will go through the surname/signature process in Headquarters with the *Federal Register* notice. See **Review Process for Batched Federal Register Notice** below.

Review Process for 90-day Not-Substantial Findings

Domestic/Transboundary Species PRFs



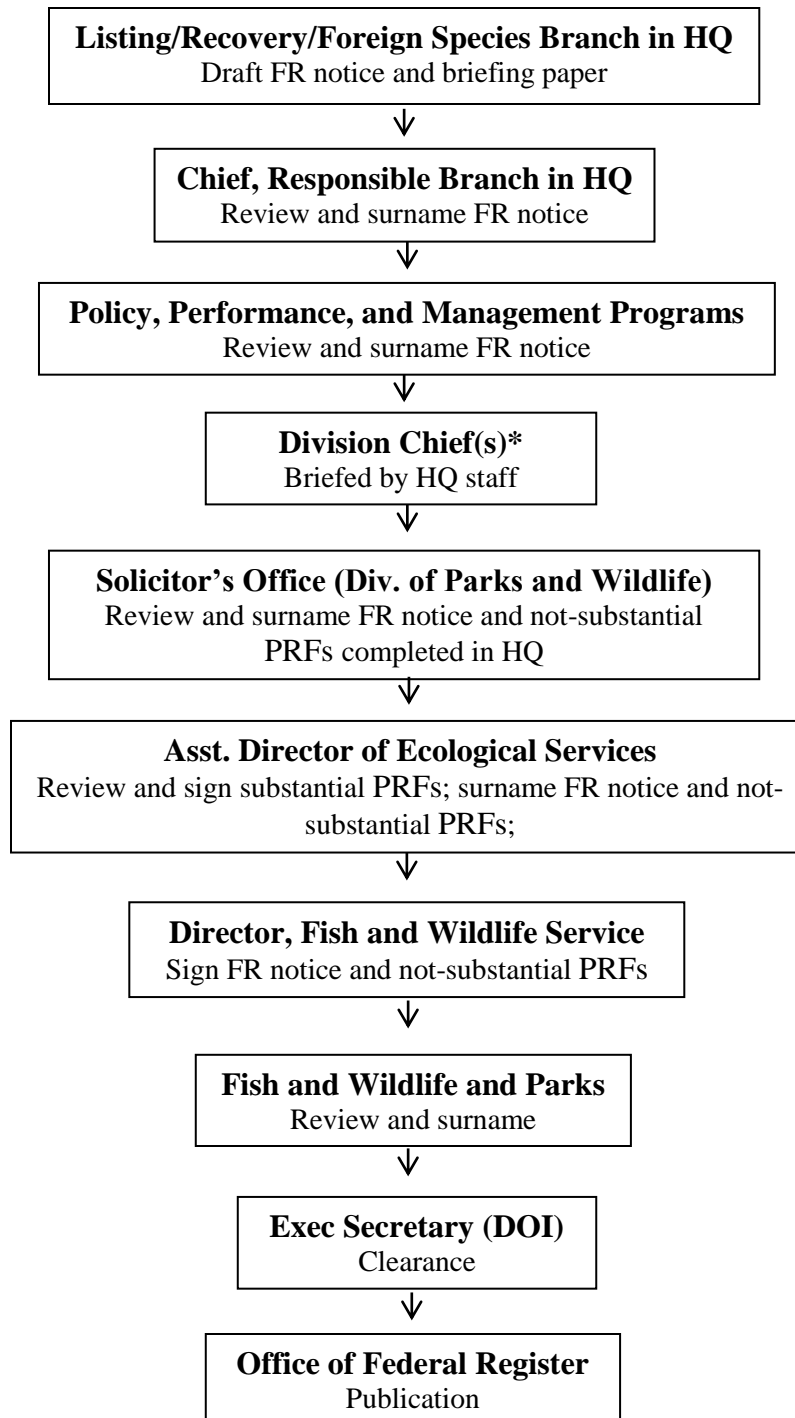
Foreign Species PRFs or Domestic/Transboundary Species PRFs Completed in HQ



* This is one option. It is up to the Regional Office to determine the appropriate process.

** PRFs surnamed by the Branch Chief will go through the surname/signature process in Headquarters with the *Federal Register* notice. See **Review Process for Batched Federal Register Notice** below.

Review Process for Batched *Federal Register* Notice and Petition Review Forms



* Briefings by branch staff should be scheduled with Division chief(s) (Division of Conservation and Classification and/or Division of Restoration and Recovery depending on the actions being petitioned). Briefings for domestic/transboundary species may take place after the Petition Review Form is sent to Asst. Director of Ecological Services.