

September 18, 2015

The Honorable Dan Ashe
Director
U.S. Fish and Wildlife Service
1849 C Street, NW
Washington, DC 20240

The Honorable Kathryn Sullivan
Administrator
NOAA
1401 Constitution Avenue, NW
Washington, DC 20230

Re: Revisions to Endangered Species Act Petition Regulations

Dear Director Ashe and Administrator Sullivan:

On behalf of our tens of millions of members, we ask you to immediately withdraw the U.S. Fish and Wildlife Service’s and National Marine Fisheries Service’s (together, the “Services”) proposed revisions to the regulations that govern petitions to protect species as endangered or threatened under the Endangered Species Act (“ESA”).¹ The proposed changes would impose unprecedented restrictions on the right of citizens to petition the federal government to protect endangered species and exceed the Services’ statutory authority. More than that, if finalized the revisions would set a dangerous, far-reaching precedent that would undermine the rights of citizens to petition the government to vindicate their rights under an array of environmental, social justice, and other laws. We are concerned that this proposal does not evidence careful consideration to the panoply of problems that the proposed revisions present.

The right to petition the federal government for redress of grievances is “among the most precious of liberties safeguarded by the Bill of Rights” — indeed, it is a “value beyond question.”² In 1946, Congress codified this right by passing the Administrative Procedure Act (“APA”), which allows any “interested person,” to exercise his or her constitutional right to petition any federal agency for the “issuance, amendment, or repeal of a rule.”³ Ever since, petitions filed by citizens under the APA have galvanized the federal government to take actions to protect our environment, to safeguard human health, and to promote the general welfare.

Indeed, the fundamental right to petition federal agencies to protect the environment and human communities is particularly important in our modern society because of the federal government’s powers to create uniform national standards and prevent the undue influence of vested interests on state governments. Recognizing this fact, Congress has expanded and strengthened the right to petition beyond what is provided for in the APA under many laws including the Clean Air Act, the Comprehensive Environmental Response, Cleanup, and

¹ 16 U.S.C. §§ 1531-1544 (ESA).

² *United Mine Workers of America, Dist. 12 v. Illinois State Bar Ass’n*, 389 U.S. 217, 222 (1967); *McDonald v. Smith*, 472 U.S. 479, 482 (1985).

³ 5 U.S.C. §§ 551-59, 701-06 (APA); *id.* at § 553(e) (rulemaking provision).

Liability Act (CERCLA), as well as the ESA.⁴ Thus, whether it is to protect clean air and water, to clean up a toxic waste site, to address environmental injustice, to improve worker safety, or to protect imperiled species, petitions to the federal government are often submitted because state government efforts have proven inadequate.

The proposed changes to the current rules, which have successfully governed the citizen petition process under the ESA since 1984, would require a petitioner to submit a copy of a petition seeking protections for an imperiled species, to all States where the declining species is found, at least 30 days before submitting that petition for review to the U.S. Fish and Wildlife Service.⁵ The petitioner must then submit any and all information received from a State as an appendix to his or her petition. The petitioner is also required to attach all information received, even if a State is hostile to the petition's objective — *e.g.*, because it believes that listing a species under the ESA would represent a loss of regulatory control over wildlife within its borders —and even if that information is false or deliberately undermines the petition. The petitioner would also be required to submit (and certify) that s/he has submitted “all relevant information” about the species that s/he seeks to protect under the ESA, a requirement that would be virtually impossible to meet, and could cost a petitioner thousands of dollars to comply with.⁶ If the petitioner fails to comply with these new mandates and incur these financial burdens, the petition would be summarily rejected.

Nothing in the ESA supports the imposition of such onerous mandates on a would-be petitioner. Nor does the language of the APA or any other environmental law suggest that a petitioner must submit his or her petition to any other entity prior to filing it with a federal agency. Herein lies the danger: Because the proposal is divorced from all statutory text in both the ESA and APA, it would be a precedent without limitation. Other federal agencies could follow suit and require petitioners to submit their petitions to third parties as well, including State governments or other entities that are hostile to the petition's objectives, regardless of what procedures the APA or underlying laws actually require.

Under the Surface Mining Control and Reclamation Act (“SMCRA”), for example, a citizen can petition the Office of Surface Mining to request the termination of a State's authority of coal-mining within its boundaries if the State fails to comply with SMCRA's regulatory requirements.⁷ The Office of Surface Mining (OSM) could follow the Services' example and

⁴ See, *e.g.*, 42 U.S.C. §§ 7671a(c)(3) and 9605(d); 33 U.S.C. § 1311(g)(4); 16 U.S.C. § 1533(b).

⁵ 50 C.F.R. Part 424; see also 49 Fed. Reg. 38,900 (Oct. 1, 1984) (noting that the citizen petition process under the ESA is “designed to ensure that decisions in every phase of the listing process are based *solely* on biological considerations, and to prohibit considerations of economic or other non-biological factors from affecting decisions regarding endangered or threatened status”) (emphasis in original).

⁶ Many scientific journals charge \$25-45 dollars to access an individual journal article. As an example, the U.S. Fish and Wildlife Service recently cited more than 180 journal articles in its recent decision to list the Northern Long-eared Bat (*Myotis septentrionalis*). See Docket #: FWS-R5-ES-2011-0024-3615. If half of those articles were behind a pay wall, the cost to a petitioner would easily exceed \$2,000.

⁷ See, *e.g.*, APPALACHIAN CATHOLIC WORKERS ET AL., SECTION 733 PETITION BEFORE THE U.S. DEPT. OF INTERIOR, OFFICE OF SURFACE MINING, RECLAMATION, AND ENFORCEMENT SEEKING TERMINATION OF WEST VIRGINIAN'S APPROVED SMCRA PROGRAM AND IMMEDIATE IMPLEMENTATION AND PROMULGATION OF A FEDERAL REGULATORY PROGRAM. (June 24, 2013). Available at:

<http://s3.documentcloud.org/documents/717004/733-petition-to-osm-june-2013.pdf>.

require a petitioner to submit the petition for review by the very State that s/he is petitioning OSM to strip of regulatory authority, and even require the petitioner to include false or misleading information from the affected State in “support” of his or her petition.

Likewise, a citizen can petition the Environmental Protection Agency (“EPA”) to revoke a State’s delegated administration of the Clean Water Act’s permit program under the National Pollution Discharge Elimination System program if the State has failed to comply with the mandatory requirements of the Clean Water Act.⁸ Following the Services’ lead, the EPA could require a petitioner to submit his or her petition for review by the very State for which s/he is petitioning the EPA to reclaim regulatory oversight over water quality.

The far-reaching impact of the proposed revisions to the ESA citizen petition regulations could extend far beyond the environmental context. Under the APA, for example, a citizen may petition the Occupational Safety and Health Administration (“OSHA”) to enact regulations to protect workers from injury. In 2013, for example, several non-governmental organizations petitioned OSHA to enact rules with speed limits on production lines in meatpacking and poultry industries, in order to minimize the risk of serious and crippling musculoskeletal disorders, amputations, and other injuries for workers.⁹ OSHA should not take a cue from the Services and burden petitioners by requiring petitioners to first submit their petition to regulated business, so as to shirk its responsibility to respond to citizen calls for protections against workplace abuses.

There would be an enormous chilling effect on citizens’ fundamental right to petition their government if other federal agencies emulate the rules the Services are proposing here. State governments have enormous power compared to a citizen petitioner, and could quickly assemble thousands of pages of material that is intended to undermine and muddle the issues that a petition presents. The effectiveness of petitions as a driver of environmental protection and social justice would be diminished immediately, and would undeniably harm the interests of the petitioner. And because there is no statutory basis for such pre-filing requirements in petitions, future administrations might even enact more-burdensome regulations requiring that a petitioner first notify industry interests that may be affected by the petition.

Thanks to the APA, the United States’ bedrock regulatory law, anyone can exercise the right to petition any federal agency to better protect citizens from social ills and injustices. Petitions have been filed by citizens seeking better implementation of the Emergency Planning and Community Right-to-know Act, the Federal Food, Drug and Cosmetic Act, the National Forest Management Act, the Toxic Substances Control Act, the Resource Conservation and Recovery Act, the Animal Welfare Act, the National Park Service Organic Act, the Wilderness Act, the Fur Products Labeling Act, and many other laws. In this way,

⁸ See, IOWA CITIZENS FOR COMMUNITY IMPROVEMENT ET AL., PETITION FOR WITHDRAWAL OF THE NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM PROGRAM FROM THE STATE OF IOWA (Sept. 20, 2007). Available at: http://www.environmentalintegrity.org/documents/IowaCWAPetition_09-19-07_.pdf

⁹ See Petition from Southern Poverty Law Center et al., to Thomas Perez, Secretary of Labor, et al. (Sept. 3, 2013), Available at: <http://www.splcenter.org/get%20informed/news/splc%20urges%20federal%20agencies%20to%20protect%20poultry%20meatpacking%20plant%20workers/Petition>

the APA serves its purpose of leveling the playing field against powerful special interests. The Services' proposed revisions to the ESA citizen petition process are wholly inconsistent with this principle and would weaken the ability of petitioners to ask the federal government to counterbalance unreasonable actions by governmental and private actors which undermine the interests of our environment, our communities, and our most vulnerable citizens.

To ensure that this does not happen, we ask you to withdraw the proposed changes to the regulations restricting petitions under the ESA.

Sincerely,

Center for Biological Diversity

Greenpeace U.S.A.

Food & Water Watch

Prison Ecology Project

Public Citizen

PEER

The Sierra Club

Advocates for Snake Preservation

Alameda Creek Alliance

Alaska Wildlife Alliance

Alaska Wilderness League

Alliance for the Wild Rockies

All Creatures

Animal Legal Defense Fund

Animas Valley Institute

Animal Welfare Institute

Anne Arundel Bird Club

Appalachian Mountain Advocates

Association for the Tree of Life

Audubon Society of Corvallis

Battle Creek Alliance

Big Blackfoot Riverkeeper

Born Free, USA

Boulder Rights of Nature

Cahaba River Society

California Native Plant Society

California Wildlife Foundation/California Oaks

Caney Fork Headwaters Association

Center for a Sustainable Coast

Center for Effective Government

Humane Society of the United States

Friends of the Earth

Center for Food Safety

Human Rights Defense Center

Oceana

MoveOn

National Lawyers Guild

Center for Justice and Democracy at New York Law School
Chukchi Sea Watch
Citizen's Committee to Complete the Refuge
Citizens for Sludge-Free Land
Ciudadanos Del Karso
Clean Air Watch
Clean Ocean Action
Coast Range Association
Coastal Environmental Rights Foundation
Columbia Riverkeeper
Communities for a Better Environment
Community Science Institute
Conservation Council for Hawai'i
Conservation Northwest
CORALations
Cornucopia Network of New Jersey
Cottonwood Environmental Law Center
Cumberland Countians for Peace & Justice
Crawford Stewardship Project
Crosstimbers Connection
DC Environmental Network
Desert Tortoise Council
Dogwood Alliance
Don't Waste Arizona
Earth Day Coalition
East Bay Chapter of the California Native Plant Society
Endangered Habitats League
Endangered Small Animal Conservation Fund
Endangered Species Coalition
Environmental Defense Center
Everglades Earth First!
Fairmont, Minnesota Peace Group
Flycasters, Inc. of San Jose
Footloose Montana
For the Fishes
Friends of Animals
Friends of Bumping Lake
Friends of the Columbia River Gorge
Friends of Harbors, Beaches and Parks
Friends of Lana'i
Friends of Merrymeeting Bay
Friends of the Bitterroot
Friends of the Santa Clara River
Friends of Whitehaven Park
GuardaMar Caribe Inc.
Glen Canyon Institute
Global Justice Ecology Project

Golden Gate Raptor Observatory
Grand Canyon Trust
Grand Canyon Wildlands Council
Great Old Broads for Wilderness
GreenFaith
GuardaMar Caribe Inc.
Gulf Restoration Network
Gunpowder Riverkeeper
Hells Canyon Preservation Council
Hilton Pond Center for Piedmont Natural History
Humboldt Baykeeper
Iniciativa para un Desarrollo Sustentable (IDS)
International Fund for Animals
International Marine Mammal Project of the Earth Island Institute
Juniata Valley Audubon Society
Justice for Wolves
Kettle Range Conservation Group
Keystone Prairie Dogs
Klamath-Siskiyou Wildlands Center
Lane County Audubon Society
League of Humane Voters, Nevada
Life of the Land
Los Padres ForestWatch
Massachusetts Forest Watch
Maryland Ornithological Society
Midshore Riverkeeper Conservancy
Midwest Environmental Advocates
Mission Peak Fly Anglers
Nature Coast Conservation, Inc.
NC Warn
Network for Environmental & Economic Responsibility, United Church of Christ
Nevada Wildlife Alliance
New England Aquarium
New Mexico Wilderness Alliance
North Cascades Conservation Council
Northeast Oregon Ecosystems
Northwest Environmental Advocates
Ocean Conservation Research
Ohio Valley Environmental Coalition
Oregon Natural Desert Association
Oregon Wild
Palm Beach County Environmental Coalition
PALS: Protect All Living Species
Predator Defense
Preserve Lamorinda Open Space
Preserve Wild Santee
Project Coyote

Rainforest Relief
Reef Relief
RESTORE: The North Woods
Rocky Mountain Recreation Initiative
Rocky Mountain Wild
Russian Riverkeeper
Sequoia Forestkeeper
San Bernardino Valley Audubon Society
Save Our Sky Blue Waters
Save the Cumberland
Save the Frogs
Save the Scenic Santa Rita
Sequoia Forestkeeper
Seven Generations Ahead
Sky Island Alliance
Slow Food USA
South Carolina Coastal Conservation League
South Florida Audubon Society
Sustainable Arizona
SustainUS: The US Youth Network for Sustainable Development
Tennessee Clean Water Network
The California Chaparral Institute
The California Wolf Center
The Center for Effective Government
The Cloud Foundation
The Cougar Fund
The Ecology Party of Florida
The Rewilding Institute
The Shalom Center
The Wolf Conservation Center
Tualatin Riverkeepers
Turtle Island Restoration Network
Upstate Forever
Ventana Wilderness Alliance
Virginia Organizing
Western Lands Project
Western Nebraska Resources Council
Western Watersheds Project
Western Wildlife Conservancy
West Virginia Highlands Conservancy
Wild and Scenic Rivers
Wild Equity Institute
Wildcoast
WildEarth Guardians
Wildlands Network
Wildlife Advocacy Project
Winter Wildlands Alliance