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Public Comments Processing
Attn: Docket No. FWS-HQ-ES-2015-0016
U.S. Fish and Wildlife Service, MS: BPHC
5275 Leesburg Pike
Falls Church, Virginia 22041-3803

Re: Revisions to the Regulations for Petitions, Docket No. HQ-ES-2015-0016

Dear Sir or Madam:

Devon Energy Production Company, L.P. ("Devon") offers the following comments in response to the U.S. Fish and Wildlife Service's ("FWS") and National Marine Fisheries Service's (collectively, the "Services") request for comments on the proposed revisions to their regulations for petitions to list species as threatened or endangered under the Endangered Species Act ("ESA"), 80 Fed. Reg. 29,286 (May 21, 2015) ("Proposed Rule"). Devon supports the Services' efforts to enhance the efficiency of the petition process and appreciates the opportunity to provide input on the Proposed Rule. In addition to these comments, Devon also incorporates and adopts as its own comments submitted by the Western Energy Alliance, the Independent Petroleum Association of American and the American Petroleum Institute.

Devon is a leading independent oil and natural gas exploration and production company and its portfolio of oil and gas properties provides stable, environmentally responsible production and a platform for future growth. Devon conducts operations, has non-operating interests, and/or owns mineral interests in federal, state, and private minerals in or near habitats of species that are listed as threatened or endangered under the ESA.

Summary of Comments

- Devon supports the Services' efforts to enhance the efficiency and effectiveness of the petition process.

- Devon supports the proposal to limit petitions to one species.

- Devon requests that the Services revise the Proposed Rule to strengthen the opportunity for states to provide data and comments on petitions before they are submitted to the FWS. The Services should increase the amount of time afforded to states for review of petitions to 90 days. Additionally, the Services should broadly define the state agency(ies) to which petitioners must provide petitions.

- Devon supports the requirement that petitioners certify they have gathered all reasonably available, relevant information.

- The Services should revise the proposed language of section 424.14(c) to align with section 4(b) of the ESA. Additionally, the Services should revise the proposed language of section 424.14(c)(4) to align with section 4(a)(1) of the ESA and the Policy on the Evaluation of Conservation Efforts When Making Listing Decisions ("PECE Policy").

- The Services should revise the Propose Rule to include a requirement that they publish in the Federal Register notices that they received petitions to list or delist species or change the status of listed species.

- The Services should pursue additional rulemakings to improve administration of the ESA, including rules to define "best available scientific and commercial data," develop additional mechanisms to encourage voluntary conservation, and promote recovery and delisting of listed species.

Devon Supports the Services' Efforts to Enhance the Efficiency of the Petition Process.

Devon supports the Services' goal of "improv[ing] the content and specificity and to enhance the efficiency and effectiveness of the petitions process to support species conservation." 80 Fed. Reg. at 29,286. As the Services are well aware, they have limited resources that they must allocate to initially review petitions to list or delist species or change the status of listed species. For example, as of December 2014, the FWS alone had a backlog of 609 90-day and 12-month petition findings. U.S. Dep't of the Interior, *Budget Justifications and Performance Information Fiscal Year 2016, Fish & Wildlife Service* at ES-6. By "enhanc[ing] the efficiency and effectiveness of the petitions process," *see* 80 Fed. Reg. at 29,286, the Services can focus on making 90-day findings in a timely manner and meeting its other listing obligations.

Comments on Proposed Revisions to Section 424.14

A. <u>Proposed Section 424.14(b)</u>

1. Devon Supports the Proposal to Limit Petitions to One Species.

Devon supports the proposed language of section 424.14(b)(2) requiring that "[o]ne and only one species may be the subject of a petition." *See* 80 Fed. Reg. at 29,294. As the Services note, both the express language of the ESA ("a petition . . . to add a species to, or to remove a species from . . .") and its directive that the Services reach an initial finding within 90 days of the receipt of a petition (to the maximum extent practicable) do not contemplate petitions that cover multiple species. *See* 16 U.S.C. § 1533(b)(3)(A). In recent years, however, the Services have received "mega-petitions" that encompass dozens of species. Most notably, in 2010, the Services received a single petition to list 404 species. *See* Center for Biological Diversity, *Petition to List 404 Aquatic, Riparian and Wetland Species from the Southeastern United States as Threatened or Endangered Under the Endangered Species Act* (2010). Similarly, in 2012, the FWS received a single petition to list 53 species. *See* Center for Biological Diversity, *Petition to list 53 Amphibians and Reptiles in the United States as Threatened or Endangered Species Under the Endangered Species Act* (July 11, 2012). Petitions covering dozens or hundreds of species tax the Services' limited resources by requiring an initial finding on the petitions within 90 days of their receipt to the maximum extent practicable. *See* 16 U.S.C. § 1533(b)(3)(A). Devon encourages the Services to retain this provision in their final rule.

2. The Services Should Revise the Proposed Rule to Strengthen the Opportunity for States to Provide Data and Comments on FWS Petitions.

Devon commends the Services' proposal in section 424.14(b)(9) to require that petitioners provide FWS petitions to the state agencies responsible for the management and conservation of the species in each state where the species occurs. *See* 80 Fed. Reg. at 29,294. As the Services note, "the States have developed substantial experience, expertise, and information relevant to the conservation of" species, *id.* at 29,288, and the states should have the opportunity to provide relevant information at the outset of the listing process. Furthermore, the opportunity for states to provide information on petitions early in the listing process is consistent with Congress' directive that the Services cooperate with the states to the "maximum extent practical." *See* 16 U.S.C. § 1535(a).

The proposal that the states receive petitions at least 30 days prior to submission to the FWS, however, does not allow states an adequate amount of time to review and provide the petitioner with data or comments. Given that the Services often do not make 90-day findings within the 90 days recommended by the ESA, *see* 16 U.S.C. § 1533(b)(3)(A), the Services cannot reasonably expect state agencies to review petitions and provide petitioners data or written comments regarding the accuracy or completeness of petitions within 30 days. Because of the states' expertise, the Services should provide state agencies sufficient time to provide valuable, substantive information regarding the petitions. Devon strongly encourages the Services to enlarge the timeframe for states to respond to petitioners to 90 days, consistent with the ESA's timeframe for the Services' initial decision-making.

Finally, the Services should broadly define the state agency(ies) to which a petitioner must provide a petition. Presently, the rule requires that a petitioner provide a copy of its petition to "State agency(ies) responsible for the management and conservation of fish, plant, or wildlife resources." 80 Fed. Reg. at 29,294. Numerous state agencies may have data about the affected species or may be implementing programs to conserve the species, even if the state agencies are not "responsible for the management and conservation of fish, plant, or wildlife resources." For example, in Texas, the Texas Parks and Wildlife Department manages wildlife, but a variety of other agencies and state officials are involved in monitoring, restoring, and conserving species, including the Texas Comptroller of Public Accounts, Texas State Soil and Water Conservation Board, Texas Department of Agriculture, and Texas Department of Transportation. The Services should revise section 424.14(b)(9)(i) to expand the types of state agencies to which a petitioner must provide a petition to include all state agencies that are involved with the protection and management of the petitioned species.

3. Devon Supports the Requirement that Petitioners Certify They Have Gathered All Reasonably Available, Relevant Information.

Devon generally supports the requirement in proposed section 424.14(b)(10) that petitioners certify they have gathered all relevant information that is reasonably available, including from Web sites maintained by the affected states, and have clearly labeled and appended the information to the petition. *See* 80 Fed. Reg. at 29,294. Petitions should not present only information that supports the actions they propose; similarly, petitions should not present incomplete information. Moreover, the Services should not bear the burden of researching, obtaining, and reviewing information that was available to petitioners but that petitioners chose not to present. Rather, petitioners should be required to diligently research and present all relevant information, even if the information does not support the petitioners' position.

Devon is concerned about the proposal that "reasonably available" information include information available on Web sites maintained by affected states. States sometimes do not maintain the most current or most comprehensive information on their Web sites, and the rule should not indirectly obligate states to update their Web sites. Rather, "reasonably available" should include information made available to petitions by contacting state wildlife agencies directly.

The alternative provision that the Services are considering does not go far enough. Although Devon generally supports the requirement that petitioners gather and certify submission of relevant information publicly available on affected states' Web sites, *see* 80 Fed. Reg. at 29,288, Devon believes the Services should also require petitioners to obtain "reasonably available" information. It is not a hardship or burden to require petitioners to obtain "reasonably available" information. Often, petitioners are nongovernmental organizations, scientists, or scientific organizations with access to scientific journals and publications.[1] These petitioners have the expertise and resources to locate "reasonably available" information. With their limited budgets and limited timeframe for decision-making, the Services should not bear the burden of locating information "reasonably available" to petitioners in order to make an informed 90-day determination. Accordingly, the Services should require petitioners to certify they have gathered all relevant information that is reasonably available, including from Web sites maintained by the affected states, and have clearly labeled and appended the information to the petition.

Devon, however, asks the Services to clarify in the final rule that they have the discretion to determine whether information is "relevant" and "reasonably available" and therefore whether it should have been included in a petition. The Services also may wish to identify, in the preamble to any final rule, information they consider to be "reasonably available." "Reasonably available" information may include studies or data referenced in studies cited in a petition, as well as studies or data published in journals that are available on the Web (regardless of whether the Services' Web sites link to the journals or studies).

B. Proposed Section 424.14(c)

1. The Services Should Revise the Proposed Language of Section 424.14(c) to Align with Section 4(b) of the ESA.

The Services should revise the proposed language of section 424.14(c) to be consistent with the language of section 4(b) of the ESA. Section 424.14(c) states that a petition's "failure to include adequate information" on any one of the factors identified in the section "may result in the Secretary finding that the petition does not present substantial information." *See* 80 Fed. Reg. at 29,294 (emphasis added). Because the ESA requires the Secretary to determine whether a petition presents "substantial scientific or commercial information," *see* 16 U.S.C. § 1533(b)(3)(A) (emphasis added), the requirement in section 424.14(c) that a petition need only present "adequate information" on any one of the factors identified in the section appears inconsistent with the ESA. The Services should revise section 424.14(c) to state a petition's "failure to include substantial information" on any one of the factors identified in the section may result in a finding that the petition does not present substantial information.

2. The Services Should Revise the Proposed Language of Section 424.14(c)(4) to Align with Section 4(a)(1) of the ESA and Their PECE Policy.

The Services should revise the proposed language of section 424.14(c)(4) to be consistent with both section 4(a)(1) of the ESA and their PECE policy. Section 424.14(c)(4) states that the Secretary may find that a petition does not present substantial information if it does not include adequate information regarding the "adequacy of regulatory protections and conservation activities initiated or currently in place that may protect the species or its habitat." 80 Fed. Reg. at 29,294. Devon requests that the Services revise the phrase "adequacy of regulatory protections" to "adequacy of regulatory mechanisms" so that the language is consistent with section 4(a)(1) of the ESA. *See* 16 U.S.C. § 1533(a)(1) (directing

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[1] Of the species petitioned for listing since 2011, 89 percent were petitioned by two nongovernmental organizations. *See* Western Energy Alliance, *Sue-and-Settle*, at http://www.westernenergyalliance.org/knowledge-center/legal/sue-and-settle (last visited July 12, 2015).

the Services to consider "the inadequacy of existing regulatory mechanisms" when determining whether to list a species as threatened or endangered).

Additionally, Devon requests that the Services revise the phrase "conservation activities initiated or currently in place" to "formalized conservation efforts." The phrase "conservation activities initiated or currently in place" suggests that the Services may only consider those conservation activities that have been implemented when making listing decisions. The PECE policy, however, allows the Services to consider "formalized conservation efforts" that have not yet been implemented when making listing decisions. *See* 68 Fed. Reg. 15,100, 15,113 (Mar. 28, 2003). The Services should revise the language of section 424.14(c)(4) to be consistent with their PECE policy. Accordingly, Devon requests that the Services revise section 424.14(c)(4) to state:

> *(4) Information on adequacy of regulatory mechanisms and formalized conservation efforts that may protect the species or its habitat; and*

C. Proposed Section 424.14(d)

The Services must revise proposed section 424.14(d)(5) to be consistent with their existing regulations related to the designation of critical habitat. Proposed section 424.14(d)(5) would allow the Secretary to find that a petition to add or remove from critical habitat areas that are outside the geographical area occupied by the species at the time it was listed does not present substantial information if the petition failed to include information indicating why the petitioned areas are or are not essential for the conservation of the species. 80 Fed. Reg. at 29,294. The Services' current regulations, however, allow them to designate unoccupied areas as critical habitat "only when a designation limited to its present range would be inadequate to ensure the conservation of the species." 50 C.F.R. § 424.12(e). Although the Services have proposed to eliminate this limitation, *see* 79 Fed. Reg. 27,066, 27,073 (May 12, 2014), the Services have not published a final rule that eliminates it and conceivably may not do so. The Services should revise proposed section 424.14(d)(5) to be consistent with the Services' regulation at 50 C.F.R. § 424.12(e). Specifically, the Services should revise proposed section 424.14(d)(5) to allow the Secretary to find that a petition to add critical habitat areas that are outside the geographical area occupied by the species at the time it was listed does not present substantial information if the petition failed to include information demonstrating that a designation limited to the species' present range would be inadequate to ensure the conservation of the species.

D. The Services Should Publish a Notice of Receipt of Petitions.

As part of the Proposed Rule, the Services should require that they publish petitions to list or delist species or change the status of a listed species in the Federal Register upon receipt. This notice would inform interested members of the public and potentially affected land users that a petition has been received and thus allow the public to begin gathering information and data related to the petition. Because the ESA requires that the Services make listing decisions in relatively short timeframes, *see* 16 U.S.C. § 1533(b)(3)(B) and (b)(6), the Services often afford the public short comment periods on 90-day findings, 12-month findings, and proposed rules to list or delist. These public comment periods often are too brief to allow the public the opportunity to gather and submit data on the petitioned action. The public would benefit by knowing that a petition to list or delist a species or change the status of a listed species has been submitted so that it could begin to assemble data and information relevant to the Services' decision-making.

Presently, however, the Services have no obligation to inform the public when they receive a petition to list or delist the species or change the status of a listed species. Although the FWS maintains

a list of petitions under review on its Web site,[2] the Web site does not identify when the FWS last updated the petitions list and has no obligation to keep this information current. Furthermore, to identify new petitions on this Web site, the public must regularly search the petitions list and compare it to prior lists to determine which petitions are new. Notification in the Federal Register that the Services have received a petition would allow the public the opportunity to more meaningfully participate in the listing process.

The Services Should Pursue Additional Rulemakings to Improve Administration of the ESA.

Not only does Devon support the Proposed Rule, Devon encourages the Services to undertake similar rulemakings to improve administration of the ESA. Specifically, Devon encourages the Services to undertake rulemakings to define the term "best available scientific and commercial data," develop additional mechanisms to encourage voluntary conservation, and promote recovery and delisting of species.

A. The Services Should Define "Best Available Scientific and Commercial Data."

The Services should define "best available scientific and commercial data" as used in section 4(b)(1)(A) of the ESA. "Best available" information must be scientifically defensible and credible. The Services, however, can base listing decisions on outdated information under the rationale that it is the "best available" information. Similarly, the Services have relied on information that has not been subjected to truly independent peer review in their listing decisions. *See* Majority Staff Report, Committee on Natural Resources, Office of Oversight and Investigations, *Under the Microscope: An Examination of the Questionable Science and Lack of Independent Peer Review in Endangered Species Act Listing Decisions* (2014); ESA Congressional Working Group, *Report, Findings and Recommendations* 25-26 (2014). The Services should adopt a rule that defines "best available scientific and commercial data" to prefer hard data over unpublished reports or professional opinions. Additionally, the Services should require that such data meet Information Quality Act guidelines. *See* Consolidated Appropriations Act of 2001, Pub. L. No. 106-554, § 515, 114 Stat. 2763A-153 (2000). Furthermore, the definition should allow the Services to exclude information or data that are outdated. Finally, the rule should require the Services to justify why data relied upon for ESA decisions are the "best available" and why such data are deemed "accurate" and "reliable."

B. The Services Should Promote Voluntary Conservation Mechanisms.

The Services should continue to explore mechanisms to encourage voluntary conservation, particularly those that will preclude the need to list a species as threatened or endangered. In recent years, there has been a renewed interest in pre-listing conservation efforts, such as those to protect the dunes sagebrush lizard, the lesser prairie-chicken, and the Gunnison and greater sage-grouses. These efforts have yielded unprecedented levels of conservation and habitat restoration for candidate species. Candidate Conservation Agreements with Assurances (CCAAs) presently are the only formal mechanism the FWS makes available to conserve species prior to listing; however, CCAAs are cumbersome, time-consuming, and expensive to prepare. *See* ESA Congressional Working Group, *Report, Findings and Recommendations* 63 (2014). The FWS should examine how it can streamline the development of CCAAs to make them more attractive to potential participants. Additionally, the Services should explore other pre-listing conservation opportunities that can be utilized as alternatives to, or in addition to, CCAAs.

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[2] *See* FWS, Environmental Conservation Online System, at http://ecos.fws.gov/tess_public/reports/ad-hoc-species-report-input.

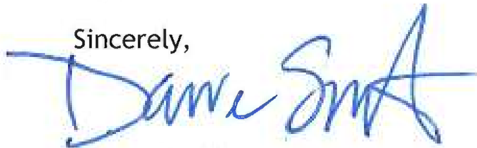
C. The Services Should Develop Rules that Promote Recovery and Delisting of Listed Species.

The goal of the ESA is to "conserve" listed species so that the protections of the act are no longer needed. *See* 16 U.S.C. §§ 1531(b) and (c), 1532(3). It is well known, however, that only two percent of listed species have been recovered and removed from the list of threatened and endangered species. Likewise, more than a quarter of listed species that exist in the United States lack recovery plans.[3] The Services should develop rules that prioritize and promote the recovery of listed species, including the development of recovery plans. Furthermore, the Services should adopt rules that require them to delist species promptly after they determine the species have recovered. The Services have not acted swiftly to delist the handful of species that have recovered. As a congressional report observed, "in 1999, the FWS announced the recovery of the iconic bald eagle and formally proposed to delist it from ESA, yet took eight years to act, and only acted after having been forced to by court order." ESA Congressional Working Group, *Report, Findings and Recommendations* 15-16 (2014) (citing 72 Fed. Reg. 37,346 (July 9, 2007) and *Contoski v. Scarlett*, 2006 WL 2331180 (D. Minn. Aug. 10, 2006)). The Services should adopt rules that prompt the recovery and timely delisting of listed species.

Conclusion

Devon appreciates the opportunity to submit comments on the Proposed Rule. Devon supports the Proposed Rule and the Services' efforts to enhance the efficiency and effectiveness of the petitions process; further, Devon encourages the Services to propose rules that continue to increase efficiency in their administration of the ESA. If you have any questions about the information presented in these comments, please contact Angie Burckhalter, Corporate EHS Policy Supervisor, at (405) 552-8069 or angie.burckhalter@dvn.com.

Sincerely,



Darren Smith
Manager, EHS Policy and Regulatory Affairs

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[3] Summary of Listed Species Listed Populations and Recovery Plans as of Sun, 12 Jul 2015 23:05:34 GMT, at https://ecos.fws.gov/tess_public/pub/boxScore.jsp.