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50 CFR Part 424

Endangered and Threatened Wildlife and Plants; Revisions to the Regulations for Petitions; Final Rule

**DEPARTMENT OF THE INTERIOR****Fish and Wildlife Service****DEPARTMENT OF COMMERCE****National Oceanic and Atmospheric Administration****50 CFR Part 424**

[Docket Nos. FWS-HQ-ES-2015-0016 and DOC 150506429-6767-04; 4500030113]

RIN 1018-BA53; 0648-BF06

**Endangered and Threatened Wildlife and Plants; Revisions to the Regulations for Petitions**

**AGENCY:** U.S. Fish and Wildlife Service (FWS), Interior; National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

**ACTION:** Final rule.

**SUMMARY:** We, the U.S. Fish and Wildlife Service and the National Marine Fisheries Service (Services), finalize changes to the regulations concerning petitions, to improve the content and specificity of petitions and to enhance the efficiency and effectiveness of the petition process to support species conservation. Our revisions to the regulations clarify and enhance the procedures by which the Services evaluate petitions under section 4(b)(3) of the Endangered Species Act of 1973, as amended. These revisions will also maximize the efficiency with which the Services process petitions, making the best use of available resources.

**DATES:** This rule is effective October 27, 2016.

**FOR FURTHER INFORMATION CONTACT:** Douglas Krofta, U.S. Fish and Wildlife Service, Division of Conservation and Classification, 5275 Leesburg Pike, Falls Church, VA 22041-3803; telephone 703/358-2171; facsimile 703/358-1735; or Angela Somma, National Marine Fisheries Service, Office of Protected Resources, 1315 East-West Highway, Silver Spring, MD 20910; telephone 301/427-8403. If you use a telecommunications device for the deaf (TDD), call the Federal Information Relay Service (FIRS) at 800-877-8339.

**SUPPLEMENTARY INFORMATION:****Background**

The Administrative Procedure Act (APA; 5 U.S.C. 553(e)) gives interested persons the right to petition for the issuance, amendment, or repeal of an agency's rule. The U.S. Fish and Wildlife Service and the National

Marine Fisheries Service (Services) use the rulemaking process in our administration of the Endangered Species Act of 1973 (Act; 16 U.S.C. 1531 *et seq.*), as amended, in particular section 4. Section 4(b)(3) of the Act establishes deadlines and standards for making findings on petitions to conduct rulemakings under section 4. Thus, in this context, the primary purpose of the Act's petition process is to empower the public, in effect, to direct the attention of the Services to (1) species that may be imperiled and may warrant listing, but whose status the Services have not yet determined, (2) changes to a listed species' threats or other circumstances that may warrant reclassification of that species' status (*i.e.*, "downlisting" the species from an endangered species to a threatened species, or "uplisting" from a threatened species to an endangered species) or delisting of the species (*i.e.*, removing the species from the Federal List of Endangered and Threatened Wildlife or List of Endangered and Threatened Plants), or (3) information that would support making revisions to critical habitat designations. The petition process is a central feature of the Act, and serves a beneficial public purpose.

**Purpose of Revising the Regulations**

The Services are revising the regulations at 50 CFR 424.14 concerning petitions to improve the content and specificity of petitions in order to enhance the efficiency and effectiveness of the petition process to support species conservation. Our revisions to § 424.14 clarify and enhance the procedures by which the Services will evaluate petitions under section 4(b)(3) of the Act (16 U.S.C. 1533(b)(3)). The revised regulations pertaining to the petition process will provide greater clarity to the public on the petition-submission process, which will assist petitioners in providing complete petitions. These revisions will also maximize the efficiency with which the Services process petitions, making the best use of available resources. These changes will improve the quality of petitions through clarified content requirements and guidelines, and, in so doing, better focus the Services' resources on petitions that merit further analysis. In the following discussion, we first summarize the comments received during the two public comment periods; we then summarize the changes and explain the benefits of making these changes.

**Summary of Comments and Recommendations**

In the proposed rule published on May 21, 2015 (80 FR 29286), we requested that all interested parties submit written comments on the proposal by July 20, 2015. We did not receive any requests for a public hearing. We received several requests for an extension of the public comment period, and on July 17, 2015 (80 FR 42466), we extended the public comment period to October 18, 2015. In total, we received 347 comments.

After further consideration of the issues, we revised the proposed rule and reopened a comment period for an additional 30 days on April 21, 2016 (81 FR 23448), to allow the public an opportunity to comment on proposed changes made in response to the comments we received on the original proposal. In that revised rule, we also requested comment on the information collection aspects of the proposed rule under the Paperwork Reduction Act. We received 27 comments on the revised proposed rule. All substantive information and relevant comments provided during the comment periods have been considered, and where appropriate, have either been incorporated directly into this final rule or addressed in the more specific responses to comments below. Comments are grouped into categories.

**General Comments**

**Comment (1):** Several commenters expressed concern that the proposal would create a substantial burden and restriction of petitioners' rights under various authorities, including the First Amendment, APA, and Executive Order 13563.

**Our Response:** These regulations do not restrict or limit a citizen's right to petition the Services, but rather clarify the petition process for the public by identifying what would make the process most efficient and effective for both citizens and agencies. Although the First Amendment to the U.S. Constitution guarantees members of the public the rights to, among other things, "petition the Government for a redress of grievances" and to express their views, it does not require a Federal agency to treat every such expression as a petition under the APA. The APA requires Federal agencies to give "an interested person the right to petition for the issuance, amendment, or repeal of a rule," 5 U.S.C. 553(e), but does not speak to the particulars of the petition process. As a result, agencies have discretion to design a reasonable and efficient process for receiving and

considering petitions. Many Federal agencies have developed regulations to govern the petition process, including setting out requirements for the content and informational support of petitions similar to those included in this final rule. See Jason A. Schwartz and Richard L. Revesz, "Petitions for Rulemaking: Final Report to the Administrative Conference of the United States" (Nov. 5, 2014). In further response to the comment, we note that executive orders such as E.O. 13563 set out guidance for Federal agencies, but do not create substantive or procedural rights in any party.

*Comment (2):* A commenter noted that general claims about efficiency do not justify restrictions on fundamental rights.

*Our Response:* The revised regulations do not restrict the right of the public to petition the Services under the Act. Rather, they provide clarification to petitioners as to what they must include in a petition in order for the Services to be able to evaluate whether or not the petition contains substantial information indicating that the petitioned action may be warranted. As noted above, agencies have discretion to devise reasonable requirements as to the format, content and informational support of petitions to ensure that agency resources are used effectively.

*Comment (3):* A commenter noted that the Services' proposed rule departs significantly from the case law that states the threshold for a substantial 90-day finding is low, and therefore should not necessitate a petitioner assembling all the information available on a species. The Services should make a preliminary finding on a petition without access to all of the scientific information that could be discovered; that approach is more appropriate in a status review.

*Our Response:* The Act places the obligation squarely on the petitioner to present the requisite level of information to meet the "substantial information" test to demonstrate that the petitioned action may be warranted. Therefore, in determining whether the petition presents substantial information, the Services are not required to seek out any supporting source materials beyond what is included with a given petition. As a result, the Services will not base their 90-day findings on any claims for which supporting source materials have not been provided in the petition. However, as discussed in more detail below in the section, *Findings on a Petition to List, Delist, or Reclassify—Paragraph (h)*, the Services are confirming that they have

the discretion to consider, as appropriate, readily available information that provides context necessary to evaluate whether the information that a petition presents is timely and up-to-date, and whether it is reliable or representative of the available information on that species, in making a determination as to whether the petition presents substantial information. If the Services were to consider petitions in a vacuum, this could lead to consequences that would be at odds with the purposes of the Act by diverting agency resources to matters that only appear superficially to meet the statutory and regulatory standards for further consideration. In these regulatory amendments, the Services have crafted a balanced approach that will ensure that the Services may evaluate the information readily available to us, without conducting a more wide-ranging collection of information and analysis more appropriate for a 12-month status review.

*Comment (4):* Several commenters expressed concern that the initially proposed requirements could potentially be cost-prohibitive with respect to the provisions for State pre-coordination and gathering all relevant data. Thus, whether an interested person submits a petition to the Services may be influenced by the financial capacity of the petitioner, and not based on the best scientific evidence available.

*Our Response:* Based on public feedback and reconsideration of the issues, the Services revised our original proposal, as discussed in our April 21, 2016 revised proposed rule (81 FR 23448). In the re-proposal, we modified the originally proposed requirement for pre-coordination with States and the proposed requirement to provide all relevant data. For further discussion of these changes, please see comments and responses below under *Paragraph (b)—Requirement for State Coordination Prior to Petition Submission to FWS* and *Paragraph (c)—All Relevant Data Certification*.

*Comment (5):* A commenter stated that the Services should provide examples of good and bad petitions.

*Our Response:* In the revised regulation, we provide greater clarity and detail as to what elements make up a thorough, complete, and robust petition. The facts of each petition may vary significantly, so it is difficult to extrapolate that across the board. However, each petition and subsequent finding is available on <http://www.regulations.gov>, so the public can evaluate the petitions and findings themselves.

*Comment (6):* A commenter stated that there should be a nominal filing fee for each petition. This requirement could serve as a deterrent for filing hundreds of petitions at a time.

*Our Response:* Petitioning the Services is a right the public has under the Act and the APA. Neither of those authorities provides for assessing fees. We conclude that the petition process is not like an application for a permit, where charging a fee may be appropriate; petitioners do not receive any tangible authorizations or rights through submission of a petition. Instead, the intent of the petition process is to allow the public to direct the Services' attention to a matter concerning the status of a species under their jurisdictions and authority.

*Comment (7):* A commenter stated that the Services should publish in the **Federal Register** notices indicating that they received petitions to list, delist, or reclassify a species, or publish the petitions themselves. Further, the Services should post all information from a petition under review on a public Web site if a species status review is begun.

*Our Response:* The Services are required, to the maximum extent practicable, to reach an initial finding on a petition within 90 days of receiving the petition and to promptly publish such finding in the **Federal Register**. The Act does not include a requirement to publish notices of the receipt of a petition. To publish separate **Federal Register** notices simply to announce our receipt of petitions would unnecessarily burden this process and take resources away from evaluating petitions and conducting higher-priority conservation work. The Services provide information on publicly accessible Web sites showing all currently active petitions (see <https://ecos.fws.gov/ecp/report/table/petitions-received.html> and <http://www.nmfs.noaa.gov/>), and we make the petitions available as supporting information on [http://www/regulations.gov](http://www.regulations.gov) when we publish our 90-day findings.

*Comment (8):* A commenter stated that the Services should set up a Web site for electronic submission of petitions to offset any potential increased cost of printing and mailing of multiple petitions.

*Our Response:* We currently receive many petitions electronically by email, and encourage petitioners to submit petitions electronically as well. Current contact information for both Services may be found on their respective Web sites, at <https://www.fws.gov/ecological-services/map/index.html> and <http://www.nmfs.noaa.gov/pr/contact.htm>.

However, given the file size of source information typically provided with petitions, it may not always be practicable to provide source material by email. In such cases, we recommend that petitioners mail appropriate digital-storage media (or hard copies, if preferable to the petitioner) to the appropriate office. This should help reduce printing costs for petitioners. Further, we are not requiring that copies of petitions be mailed to States.

*Comment (9):* A commenter noted that a similar alteration in the citizen petition process in a 1996 policy was rejected by the Ninth Circuit Court of Appeals and the District of Columbia Court (*Ctr. For Biological Diversity v. Norton*, 254 F.3d 833 (9th Cir. 2001); *Am. Lands Alliance v. Norton*, 360 F. Supp. 2d 1, 6 (D.D.C. 2003)). The proposed rule change at issue here has the same effect.

*Our Response:* We have revised the language of the rule to make clear that the cases the commenter references do not apply to this rule. Those cases involved a provision of the 1996 Petition Management Guidance (PMG) that stated, “[A] petition to list a candidate species is redundant and will be treated as a second petition.” The PMG also provided that a second petition would require only a prompt response informing the submitter of the prior petition, and would be treated as a comment on the previous petition. The courts held that this “redundancy” provision in the PMG violated the Act, because it allowed the Secretary to avoid explaining why the petitioned action was precluded, did not create a sufficient record to allow for meaningful judicial review of any finding on a “redundant” petition, and circumvented the statutory requirement that the Service comply with deadlines for making petition findings. In contrast, this rule, as revised, does not provide for treating petitions to list a candidate species as second petitions. Rather, § 424.14(h)(1)(iii) provides that any previous reviews or findings contributes to the context for making a petition finding:

The “substantial scientific or commercial information” standard must be applied in light of any prior reviews or findings the Services have made on the listing status of the species that is the subject of the petition. Where the Services have already conducted a finding on, or review of, the listing status of that species (whether in response to a petition or on the Services’ own initiative), the Services will evaluate any petition received thereafter seeking to list, delist, or reclassify that species to determine whether a

reasonable person conducting an impartial scientific review would conclude that the action proposed in the petition may be warranted despite the previous review or finding. Where the prior review resulted in a final agency action, a petitioned action generally would not be considered to present substantial scientific and commercial information indicating that the action may be warranted unless the petition provides new information not previously considered.

As explained in response to *Comment (55)*, below, all requests which meet the requirements of § 424.14(c) are considered petitions, will be evaluated, and a finding will be made. Therefore, § 424.14(h)(1)(iii) does not suffer from the deficiencies that the courts identified with respect to the “redundancy” provision in the PMG. The Services will still evaluate and make petition findings on all petitions they receive regardless of whether the species is already a candidate or a finding on a petition requesting the same action has already been made. In making such a petition finding, we would have created a record that would allow for meaningful review not only of any determination that listing is warranted, but also of any determination that listing is precluded by higher-priority listing actions and we are making expeditious progress towards adding qualified species to the lists. Finally, the findings on such a petition will still be subject to the Act’s statutory deadlines.

*Comment (10):* A commenter stated that petitioners should be advised if their request was screened out and provided with the reasons for the petition rejection. The Services could develop a form letter indicating which mandatory requirements the petition was missing. This way, a petitioner may easily understand which items of information should have been included in the petition but were not.

*Our Response:* Section 424.14(e)(1) of the revised proposed rule (81 FR 23448; April 21, 2016) (§ 424.14(f)(1) in this rule) does provide that, if the Services reject a petition for not meeting the requirements of proposed § 424.14(b) (§ 424.14(c) in this rule), they will, within a reasonable timeframe, notify the sender and provide an explanation of the rejection. It further provides that the Services will generally reject the request without making a finding; therefore, the submitter could rectify the deficiencies in the petition and resubmit it. We appreciate the suggestion of form letters, and will identify which elements are missing in our responses.

*Comment (11):* A commenter stated that the Services propose to replace the title “the Secretary” or “the Secretaries” with “the Services” throughout the regulation text because the Services are the designees of the Secretaries of Commerce and the Interior in implementing the Act. The commenter disagreed with the change. Although the Services are the agencies designated to implement the Act, the Secretaries are those designated and confirmed by Congress to serve on the Cabinet and responsible for carrying out those specific acts given to the Executive Branch by the Legislative Branch of the government.

*Our Response:* While we agree that the authority for making decisions under the Act ultimately rest with the Secretaries of Commerce and the Interior, the Secretaries have formally delegated authority to make petition findings to the Services. As such, we have maintained the language as “the Services.”

*Paragraph (b)—Requirement for State Coordination Prior To Petition Submission to FWS*

*Comment (12):* We received many comments raising concerns with the requirement for State pre-coordination, as originally proposed on May 21, 2015 (80 FR 29286). These included concerns that the provision would be too burdensome, potentially requiring a petitioner to mail thousands of pages of petition material; it is outside the responsibility of the petitioner to do this coordination; it is the responsibility of the Services to coordinate with the States; it could result in adversarial relationships between petitioners and States; and it would slow the petition process. Concerns were also expressed that the coordination requirement could create a significant amount of additional work for State agencies. In addition, most State commenters requested a longer coordination period, as long as 120 days.

*Our Response:* We have removed the requirement for coordination from this final rule, and replaced it with the simpler requirement that a prospective petitioner send a notification letter to the State(s) within the current range of the species stating the intent to file a petition with either Service at least 30 days prior to filing the petition. This notification will allow States time and opportunity to send data directly to the Services, should they desire. This change acknowledges the special role of States as evidenced in section 6 of the Act while not overly burdening petitioners.

While not required under this final rule, we encourage members of the public who are preparing a petition to coordinate with the appropriate State agencies when gathering information; this coordination will help in preparing a complete petition with adequate information. Additionally, we value the input and expertise of our State partners and wish to provide them the opportunity to be aware that species in their States are the subject of petitions and to provide pertinent information on those species to the Services, should they have such information and wish to share it.

*Comment (13):* Several States and other commenters expressed concerns that the Services removed the originally proposed requirement for full State pre-coordination, which would have assured the States a role in the petition process.

*Our Response:* Affected States will have the opportunity to submit data and information to the Services in the 30-day period before a petition is filed. Further, § 424.14(h)(1)(ii) of this revised regulation allows us to consider data and information readily available at the time the finding is made. Because information received after the petition is filed would be readily available at the time the finding is made, the Services could consider any information received up until the time the Services make their findings (including any data and information States have voluntarily sent to the Services in response to the notification letters).

The requirement of a petitioner to notify States at least 30 days prior to filing a petition is a minimum. We encourage petitioners to notify States earlier, even as soon as they contemplate petitioning a species for protection under the Act. Further, we encourage petitioners to contact State wildlife agencies and consult State Web sites as valuable sources of information on their subject species, and incorporate any such information in their petitioned requests.

The use of such information, up until the time the Services make their findings, is a change from prior practice. However, we find that this change will expand the ability of the States and any interested parties to take the initiative of submitting input and information for the Services to consider in making 90-day findings, thereby making the petition process both more efficient and more thorough. In addition, this interpretation is consistent with the statutory purpose and with case law. It is consistent with the statutory purposes of the Act because providing for consideration of all information,

regardless of when it was received, will put the Services in a better position to make the statutorily required finding—whether or not the petition presents substantial information indicating that the petitioned action may be warranted—by providing factual context in which to evaluate the information provided in the petition. Further, nothing in the Act precludes consideration of information up until the time a decision is made. It is consistent with case law because it stops short of allowing the Services to solicit new information for purposes of a 90-day finding, which courts have held to be beyond the scope of a 90-day finding. *E.g., Colorado River Cutthroat Trout v. Kempthorne*, 448 F. Supp. 2d 170 (D.D.C. 2006). Please see *Findings on a Petition to List, Delist, or Reclassify—Paragraph (h)* under Summary of Changes to Previous Regulations at 50 CFR 424.14, below, for further discussion.

*Comment (14):* A commenter expressed concern that the changed requirement for State coordination undermines our expectation that petitioners present unbiased and balanced information. If petitioners are not required to seek State information, they may keep their awareness of the complete information intentionally low.

*Our Response:* While we encourage prospective petitioners to contact State wildlife agencies for information on their subject species as part of creating a robust, well-balanced petition, we conclude that at the 90-day finding stage, it is not appropriate to expect petitioners to coordinate on the contents of a petition with another entity.

*Comment (15):* A commenter requested that the Services increase the timeframe for States to respond to a petition to at least 60 days.

*Our Response:* The Services think that a minimum of 30-day notification prior to filing a petition provides time for States to engage the Services during the petition process without substantially increasing the likelihood that the Services will be unable to meet the 90-day timeframe. Further, while we encourage States to submit any information within this 30-day time period, the States (and any interested parties) are able to submit information up until the finding is made (please see our response to *Comment (13)*, above).

The requirement that a petitioner notify States at least 30 days prior to filing a petition is, as noted, a minimum. Also, we encourage petitioners to contact State wildlife agencies and consult State Web sites as valuable sources of information on their subject species, and incorporate any

such information in their petitioned requests.

*Comment (16):* Several commenters expressed concern that the revised requirement for State coordination would create a burden on State agencies, because it would shift the States' role from determining what information was missing from a petition to directing their limited resources towards providing potentially all of the relevant information on a petitioned species, even if this is redundant with what the petitioner eventually provides.

*Our Response:* This final rule does not require the States to submit information to the Services; whether they do so will be their choice. If a relevant State would like to have a copy of the petition, they may ask petitioners or the Services for a copy, or obtain a copy from the respective Service's Web sites after the petition has been filed.

*Comment (17):* Commenters noted that nothing in the Act requires consultation (with respect to petitions) with anyone. A requirement to notify a third party, specifically State agencies, prior to the submission of a petition under the Act or the APA is without legal support. The APA provides the right of each citizen to petition the government, and the Act provides the right to petition for the listing, delisting, or reclassifying of a species.

*Our Response:* Section 4(b)(1)(A) and 6 of the Act require the Services to take into consideration those efforts by States to protect species and their habitats and coordinate with States on the conservation of listed species and species at risk. Our modified language requiring petitioners to notify State wildlife agencies of their intent to file a petition with respect to a species found in those States with the appropriate Service assists us in meeting the requirements of the Act regarding State coordination. Our revised requirement for State coordination does not infringe on the right of the public to submit petitions under section 4 of the Act. Rather, it allows States the opportunity, should they choose, to participate in the petition process by providing information to the Services, while at the same time removing any potentially onerous requirements on petitioners.

*Comment (18):* Several commenters asked how they determine to which State agencies they must send letters of intent to file a petition. One commenter seemed to suggest that the Services provide each State the opportunity to designate all appropriate agencies to receive a copy of the petition, and maintain a master contact list for petitioners to access when contacting States.

*Our Response:* Petitioners must send letters to the State(s) that are in the known, current geographic range of the species. Section 3(18) of the Act defines the term “State agency” to mean any State agency, department, board, commission, or other governmental entity which is responsible for the management and conservation of fish, plant, or wildlife resources within a State. The Association of Fish and Wildlife Agencies (AFWA), which is a professional association for State, provincial and territorial fish and wildlife agencies, is a helpful resource in determining contact information for State agencies. Further, in researching the information to support the petitioned request, the petitioner should look for range information, and thereby find the State(s) in which the species occurs. We note that when there are multiple range States and in cases where there is some ambiguity about the extent of range, we would not envision rejecting a petition because the petitioner did not notify every State in question, as long as it appears that the petitioner made an attempt to do so.

*Comment (19):* A commenter recommended that, to further reduce the burden on petitioners, petitioners be allowed to send (email) notification letters to State wildlife agencies electronically instead of limiting the requirement to mailing hard copy letters.

*Our Response:* We appreciate this suggestion, and clarify in this rule that petitioners are to include copies of notification letters or emails as a required part of their petition submission.

*Comment (20):* One commenter stated that the minimum 30-day requirement for notifying States of intent to file a petition improperly extends the mandatory timelines that Congress established. Another commenter stated that a required 30-day coordination timeframe with States could be to the detriment of imperiled species, especially those petitioned for emergency listing.

*Our Response:* The Act directs the Services to make a finding on whether a petition presents substantial scientific or commercial information indicating that the petitioned action may be warranted within 90 days of the receipt of the petition, to the maximum extent practicable. The 30 days’ notice that will be given under the regulations prior to submitting a petition is by definition not part of the 90-day statutory timeframe that begins to run from receipt of the petition. Further, the State notification requirement need not delay petitioners from filing their petitions

close to the time they would have done so in the absence of the notification requirement. In fact, we encourage prospective petitioners to contact States notifying them of their intent to file a petition on a subject species as soon as they contemplate doing so. Thus, some or all of the notification period could run concurrently with the time that the petitioner is researching and preparing the petition submission.

Petitioners may request listing on an emergency basis; however, the Services are only required to treat such requests as a regular listing petition, and to follow the statutory timelines for responding to the petition as a regular listing petition. At any time, if one of the Services determines that there is an emergency posing a significant risk to the well-being of a species, it is within that Service’s discretion under Section 4(b)(7) whether to consider promulgating a regulation that takes effect immediately.

*Comment (21):* A commenter noted that petitions regarding species under NMFS jurisdiction should also be subjected to the provision of pre-coordination with States within the range of the petitioned species. They stated that the rationale of increased logistical difficulties for petitions on NMFS species is not a valid argument because many terrestrial and freshwater species under FWS jurisdiction are also wide-ranging and would theoretically present the same logistical problems.

*Our Response:* In our revised proposed rule (81 FR 23448; April 21, 2016), we revised the requirement for petitioners to simply notify States of their intent to file petitions at least 30 days prior to submission of petitions to the Services, and we applied this requirement to petitions sent to either Service. Therefore, this final rule applies to submissions to both NMFS and FWS.

*Comment (22):* Several commenters were opposed to the provision in the original proposal requiring the petitioner to certify inclusion of data from State Web sites, as the information on those sites is superficial and not adequate for a species review.

*Our Response:* After reviewing public comment on the May 21, 2015, proposed rule (80 FR 29286), we developed a revised proposal that removed this provision. This final regulation in no way limits petitioners to the sources of information they may consult and include in petitions. We encourage petitioners to use a broad range of source materials, in order to create a well-balanced presentation of facts, including information provided by researchers, species experts, State data,

and Tribal information, as well as other sources.

*Comment (23):* A commenter encouraged the Services to reject petitions that do not include data and information from the affected States because, in their view, these would not present a complete, balanced representation of the relevant facts.

*Our Response:* As noted, we encourage petitioners to use a broad range of source materials, including information from State wildlife agencies, which often have considerable experience and information on the species within their boundaries. However, we would evaluate the petition and supporting evidence on a case-by-case basis to determine whether it presents substantial information to indicate that the action may be warranted. We note that, in this final rule, § 424.14 (d)(5) and (e)(6) state that, in determining whether a petition presents substantial information indicating that the petitioned action may be warranted, one of the factors the Services will consider is whether the petition presents a complete and balanced representation of the relevant facts. Because it is not required in section (c), the inclusion of a complete and balanced representation of the relevant facts is not part of the essential information that is required for all petitions to be accepted as a petition. Rather, whether such a presentation is included is one of the factors the Services will consider in making our finding of whether a petition presents substantial information that the requested action may be warranted. We nevertheless encourage petitioners to check for availability of such information, to contact State wildlife agencies or consult State Web sites in researching species that are the subject of their requests, and to include in the petition any State information that would contribute to providing the detailed narrative and/or citations required under § 424.14(c)(4) and (c)(5).

*Comment (24):* A commenter noted that the discretion for the Services to choose whether or not to consider information provided by States is a disincentive to the States to undertake the considerable work necessary to provide information.

*Our Response:* The Services appreciate all information and data provided by States, and generally intend to consider timely information provided by the States, along with other readily available information, to put the information in the petition in context. Further, following substantial 90-day findings, the Services will carefully evaluate all information provided in

conducting subsequent status reviews. For further discussion, please see *Findings on a Petition to List, Delist, or Reclassify—Paragraph (h)*, in Summary of Changes to Previous Regulations at 50 CFR 424.14, below.

*Comment (25):* A commenter suggested that the Services add a requirement that petitioners must inform the affected States of the actual date that they intend to submit their petitions to one of the Services. If, for example, a petitioner gives a State notice 12 months before submitting a petition and that State provides data to the Services within 30 days of receiving that notice, the State's data that the Services ultimately use to consider the petition could be outdated.

*Our Response:* We encourage petitioners to give the States an estimate of when the petitioner will be submitting the petition to the Services, but we do not require it. While we appreciate the commenter's concern that the Services be provided the best, most current information, we do not think it will pose a problem if a petitioner chooses to notify States of their intent to file a petition more than 30 days prior to submission to the Services. In fact, we encourage prospective petitioners to notify States earlier than 30 days before submission, to allow States more time to submit species information to the Services.

*Comment (26):* A commenter noted that Congress chose to provide States the same procedural rights that every other stakeholder is provided—an opportunity to provide their perspectives on positive 90-day findings and to submit any relevant information concerning the finding and species during the 12-month review process. They should not have an opportunity to comment on petitions before the Services have made their 90-day findings.

*Our Response:* We have revised our original proposed rule (80 FR 29286; May 21, 2015) such that we do not require petitioners to provide copies of their petitions to States before submission to the Services. However, we do note the special role envisioned for States under section 6 of the Act and find it is helpful for States to receive notifications of intent to file petitions on species found within their borders, to afford States the opportunity to provide information to the Services on those species, should they choose. If, in response to the required notification letter, any such State information is received before the 90-day finding is made, it may be useful in placing the information in the petition in context. Further, we encourage States to provide

the Services with information they may have on species of concern at any time. Finally, during any subsequent status reviews, it is the practice of the Services to request additional information from all interested parties, including State wildlife agencies.

*Comment (27):* A commenter suggested adding a new paragraph in § 424.14(h)(2): “During the 12-month finding, the Service will fully include State biologists in evaluating the current status of the species proposed for listing. Status assessments will typically include: developing population and habitat models, identifying and evaluating threats, habitat requirements, and current species distributions. When possible, authorship of the Species Status Assessments will be shared between State and Service biologists to balance workload and promote data sharing.”

*Our Response:* The scope of this regulation only includes how the Services will conduct 90-day petition findings, so it would not be appropriate to include the proposed language. However, to the extent practicable and appropriate, we will consult with and involve State agencies and other appropriate experts when conducting status reviews. The ability and need to do so will vary case-by-case, and depend on the expertise and resources available. However, the Act specifically charges the Services with the authority and obligation to implement the provisions of the Act; the Services are ultimately responsible for making determinations under the Act and cannot delegate that authority to other agencies.

The Services recognize the expertise and in-depth knowledge many State wildlife agencies have concerning species under their jurisdictions, value greatly our partnerships with State wildlife agencies, and take seriously the provisions of section 4 and 6 of the Act in coordinating and cooperating with the States. It is the practice of the Services to contact State wildlife agencies during status reviews to seek information on the subject species, and we invite States at any time to provide information and data they may have on species within the State. Many States provide frequent, regular updates to the Services on information about species that occur in their States.

*Comment (28):* Several commenters suggested adding Tribal entities to the originally proposed requirement for petitioners to send copies of petitions to State wildlife agencies, and incorporating any materials States send as part of the petition. They cited Secretarial Order 3206 and the

Presidential Memorandum of 1994, which set forth the general conditions under which these consultative actions are to occur, and cited Executive Order 13175, which specifically provides guidance for coordination and collaboration on policies that have Tribal implications. Further, FWS' tribal policy supports early coordination with Tribes, and states that the “Service will consult with Native American governments on fish and wildlife resource matters of mutual interest and concern,” and that the “goal is to keep Native American governments involved in such matters *from initiation* to completion of related Service activities” [emphasis added].

*Our Response:* The Services greatly value the conservation partnerships we have with Tribes, as reflected in the intra-governmental guidance documents cited, and appreciate the conservation efforts and programs many Tribes have established. While there are no specific notification requirements for petitioners regarding Tribes, we encourage prospective petitioners, should they find that the range of a species includes Tribal lands, to contact the appropriate Tribes to coordinate with them and obtain information which they may have, and include this information in their petition documents. Further, during any subsequent status reviews, the Services are committed to proactively coordinating with Tribes on any species of interest on Tribal lands and to incorporating information and data Tribes provide into our reviews of those species.

*Comment (29):* In response to our revised proposed rule (81 FR 23448; April 21, 2016), a commenter noted that the Services should expand the requirements to send a letter to States of intent to file a petition to also include other government entities. Many county-level governments have dedicated wildlife departments that manage and monitor species and that could provide additional data on species status and habitat requirements.

*Our Response:* It would be difficult for petitioners to determine all county-level or other level government agencies that may have information on a subject species, and contact all such entities. Therefore, it would be unrealistic to make this a requirement for a request to qualify as a petition. However, we do encourage petitioners to avail themselves of such potential information sources whenever they are aware of them.

*Paragraph (c)—Single Species Petition Limitation*

*Comment (30):* We received several comments expressing concerns about the single species per petition requirement. These included concerns that limiting a petition to a single species will lead to an increase in the Services' processing time, a decrease in the efficiency of the listing process, and a reduction in listing species under the Act.

*Our Response:* By having multiple well-organized and complete single-species petitions, we anticipate that in many cases we will be able to evaluate each petition much more efficiently and effectively compared to a multi-species petition. It has been our experience that the quality of the information varies from species to species in the multi-species petitions we have received. Multispecies petitions have often generalized or referenced information across species, which significantly complicates the evaluation process, because it is unclear which references apply to which species. Because the Act requires us to make a finding on each petitioned action and species individually, we have determined that the approach outlined in this final rule will greatly enhance efficiency and effectiveness for both the public and the Services. Further, we do not think it will take appreciably more time or effort for the petitioner to provide a series of well-organized and complete single-species petitions than it would to produce one well-organized and complete multi-species petition.

*Comment (31):* One commenter asserted that requiring separate petitions to list species, or one or more subspecies or distinct population segment (DPS) of the same species will result in an increase to the Services' workload. Another commenter noted that if a petitioner seeks an action on a subspecies or DPS, the petition must present substantial scientific or commercial information indicating that the action may be warranted for each specified subspecies or DPS. The petitioner cannot rely upon general information regarding the species to support petitioned actions related to particular subspecies or DPS.

*Our Response:* We agree with the comments regarding the petitioner's burden to provide specific information to support requested actions for all "species" included in the petition. We clarify in this final rule that a petition may address either a single species or any number and configuration of "species" as defined by the Act (including subspecies of fish or wildlife

or subspecies or varieties of plants, and DPSs of vertebrate species) that consist of members of a single species. Please see a more detailed discussion of this issue in Summary of Changes to Previous Regulations at 50 CFR 424.14, *Requirements for Petitions—Paragraph (c)*, below.

We encourage members of the public to write their petition so that it addresses the appropriate rank (species, subspecies, variety, or population segment), but we also recognize that it is sometimes difficult to clearly determine the appropriate rank with the available information. We do not expect members of the public who may not have the expertise in taxonomy or genetics to make independent determinations on conflicting taxonomic assessments that may be available in the scientific literature. Along a similar line, if there is information to suggest that a vertebrate species occurs in population segments that may be discrete and significant (per the DPS Policy), then the petitioner may request that we consider one or more of these population segments as DPSs. Such a petitioner should include information to allow the Services to determine whether a given population segment of a vertebrate species may qualify as a DPS (*i.e.*, whether it may be both discrete and significant to the taxon to which it belongs). Thus, when the appropriate rank for listing is not clear to a petitioner, it is reasonable for a petition to address multiple entities, potentially at various ranks, as long as they all refer to the same species. In any case, as noted above, the petitioner has the burden to demonstrate that any entity not already recognized as a "species" under the Act may qualify as such, and to provide specific information to demonstrate that listing may be warranted.

*Comment (32):* Commenters expressed the opinion that species sharing the same habitat types or facing the same threats, or having other commonalities in data should be allowed to be included in one petition for the sake of efficiency as to the preparation of petitions and review of petitions. Other commenters noted that, if the Services find the petition does not provide sufficient information for one species, the Services have the right to make a negative finding for that species.

*Our Response:* The Act requires us to make findings for each petitioned species individually. Therefore, multi-species petitions do not save the Services time, even for species within similar habitat or facing similar threats. Even if species are found within similar habitats or face similar threats, we must

be able to demonstrate the relevance of general information to each individual species in order to support our finding. The petition needs to clearly link the information provided to particular species and claims made. The petition needs to make the case for each individual species. However, nothing would prevent petitioners from submitting a batch of separate but related petitions for species occurring in the same habitats or experiencing similar threats. While petitioners might prefer to prepare a request that addresses species in groups for their own convenience, we find that the purposes of the statute are directly furthered by requiring petitions to present information species-by-species, because this will promote clarity and facilitate making the determinations required under the Act.

*Comment (33):* Several commenters cited the 1994 Services' Interagency Policy for the Ecosystem Approach to the Endangered Species Act. In that document, the first stated policy of the Services is to "[g]roup listing decisions on a geographic, taxonomic, or ecosystem basis where possible." The commenters stated that the proposed rule does not acknowledge that these other ecosystem-based policies exist, or that there may be practical consequences stemming from these proposed changes.

*Our Response:* While in some instances it has proven to be efficient for the Services to adopt an ecosystem-based approach to listing several species in the same ecosystem facing the same threats, we have found through experience that applying this approach to petitions has proven impractical. As noted above, we must make individual findings on each species for which we receive a petition. Species-specific petitions facilitate the Services' ability to make the determinations for each species efficiently. However, if the Services find that multiple species warrant listing in a specific ecosystem, then we can propose a listing rule setting out determinations for each of several species in that common ecosystem. The Services have found great efficiencies in resources and time in grouping determinations into a single rule, and that approach comports with our 1994 policy.

*Paragraph (c)—All Relevant Data Certification*

*Comment (34):* We received many comments expressing concerns about the requirement for including all relevant data in petitions and certifying to that effect, as we originally proposed. The commenters raised various



concerns regarding the practicality and legality of this provision.

*Our Response:* The Services appreciate the difficulty of determining whether all relevant information on a subject species has been gathered. Therefore, in our April 21, 2016 (81 FR 23448), revised proposed rule, we removed this requirement, and instead require petitioners to include a “detailed narrative justification for the recommended administrative action that contains an analysis of the information presented,” and recommend that petitioners provide a “complete, balanced representation of the relevant facts, including information that may contradict claims in the petition.” In availing themselves of the petition process, petitioners seek to direct the Services’ focus and resources to particular species. They should be forthcoming as to the known, relevant facts so that the Services have an accurate basis from which to evaluate the merits of the petition while making efficient use of its focus and resources.

*Comment (35):* Several commenters expressed support for the provision requiring submitters to include all relevant data in petitions and to certify that they have done so, because it would provide supporting and refuting information and avoid limiting the Services to consideration of only biased information. Other commenters support the provision authorizing the Services to reject petitions if they do not meet the “all relevant data” requirement.

*Our Response:* We realize that it would be difficult to provide all relevant data, and difficult to assess (and certify) that all information concerning a species has been discovered; for example, not all species information is publicly available, and research for many species is ongoing. Therefore, we have revised this final rule so that we encourage petitioners to provide a complete, balanced presentation of facts, including those which may tend to refute or contradict claims in the petition. However, that is not part of the essential information that is required in all petitions. Rather, it is one of the factors that the Services will consider when making the 90-day finding on the petition. This change is to encourage prospective petitioners to include in the petition a complete, balanced presentation of facts for the Services to evaluate in the 90-day finding and, if the finding is substantial, to consider in a species status assessment, without establishing it as an essential requirement that could unduly burden petitioners.

We are revising the regulations to clearly communicate the essential

information that is required in all petitions (§ 424.14(c)), and identified the specific information which will help the Services in reaching their finding (§ 424.14(d) and § 424.14(e)). The Services retain discretion to consider a request to be a petition and process a petition where the Services determine there has been substantial, but not full technical, compliance with the relevant requirements (see discussion under *Responses to Requests—Paragraph (f)*, in Summary of Changes to Previous Regulations at 50 CFR 424.14, below).

*Comment (36):* A commenter noted that petitioners need to let the Services know what sources were consulted. If an obvious source is missing or used incorrectly, then the Services should be able to quickly and efficiently reject the petition.

*Our Response:* Under the revised regulations, requests for agency action must contain electronic or hard copies of supporting materials, or appropriate excerpts or quotations from those materials, to qualify as petitions. Therefore, the Services are not required to consider claims for which cited source materials are not included with the petition. The Services will review this information to ensure compliance with the provisions set forth in this rule, and will take into consideration the extent to which the source materials included with the petition support a complete, balanced presentation of the facts, in any 90-day findings on petitions.

*Comment (37):* A commenter stated that there is a lack of peer-reviewed science in petitions. Further, data in petitions should be reviewed by the affected States’ wildlife agencies using local information, science, and observations to corroborate the findings before the data could be used in a petition.

*Our Response:* We encourage petitioners to conduct a review of the peer-reviewed literature on the species at issue as thoroughly as possible in order to ensure the petition is well-supported. While State review of petitions and their supporting information would be helpful, it would be impractical to require this during the time frame associated with our making 90-day findings. However, should the Services make a substantial 90-day finding, States and members of the public will have an opportunity to review and provide comments on source materials used in the petition at that time, as well as provide additional information.

*Comment (38):* A commenter stated that the removal of the proposed requirement that petitioners coordinate

with States before submitting a petition also removes the element of cooperation that was being fostered through the original proposal. Anything the Services can do to foster increased dialogue between petitioners, other interest groups and State agencies engaged in wildlife conservation will ultimately be for the benefit of the species.

*Our Response:* By requiring the notification of States at least 30 days prior to submission of a petition, it is the Services’ intention both to inform, and to foster the cooperation of, State partners while balancing the desire for State coordination with the required timeframes associated with petition findings and the rights of petitioners. This change provides a role for State agencies that the current regulations do not have. We agree that communication and collaboration between State agencies or other interested parties and the Services generally helps further the conservation of species. State agencies may send the Services any information relevant to a petition after they have been notified of a petition’s pending submission. In order for the information to be available to be considered as context for the petition, it should be submitted in a timely fashion.

#### *Paragraph (c)—Other Requirements*

*Comment (39):* A commenter stated the requirement of proposed § 424.14(b)(6) (§ 424.14(c)(6) in this rule), concerning providing electronic or hard copies of supporting material) could become burdensome and quite expensive for petitioners. Additionally, the Services should clarify that the provisions of proposed § 424.14(b)(6) would cover only sources that the petitioners choose to rely on for their petitions. The commenter further suggested revising proposed § 424.14(b)(8) to: “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.”

*Our Response:* Copies of source material cited in support of a petitioned action are key information needed by the Services to evaluate a petition efficiently and effectively. The Services are not required to search out source materials not provided in the petition to find justification for claims in the petition. Therefore, it is the petitioner’s responsibility to provide justification for the claims in the detailed narrative; this responsibility includes providing the source material on which they base their claims. These sources may be provided in hard copy or in electronic form. Most

petitioners opt to provide source materials electronically, which saves mailing and printing costs and provides an efficient way to include this essential part of a petition to the Services.

Further, a robust petition should provide a balanced presentation of facts, including those which may be contradictory. Including such information and source material demonstrates that the petitioner has diligently investigated the important issues addressed in their petition and not merely compiled an unrepresentative sample of information. Including contradictory information also gives the petitioner the opportunity to offer their analysis or explanation as to why that contradictory information is not conclusive.

Finally, the suggested language regarding requiring geographic range and range State information is already covered in this rule at § 424.14(c)(8), and would be redundant. This is important information to include in a petition, and we do not think it unreasonable to make this a requirement under § 424.14(c)(8).

*Comment (40):* A commenter stated that the Services should carefully consider the implications of requiring petitioners to include “electronic or hard copies of supporting materials (e.g., publications, maps, reports, letters from authorities) cited in the petition.” Petitioners often cite publications that are available only through paid databases that restrict the distribution and use of those publications through copyright law. Because publications appended to listing petitions are presumably accessible to the public (e.g., through Freedom of Information Act (FOIA; 5 U.S.C. 552) requests), there may be conflicts between the supporting materials requirement and the legal restrictions under which petitioners obtain certain publications.

*Our Response:* We have clarified in section (c)(6) of the final regulations that petitioners may provide either full copies of supporting materials or appropriate excerpts or quotations that support the assertions in the petition. Where a petitioner believes a source material to be protected by copyright laws, they should consider including limited excerpts or quotations from such material that they believe support their statements. This will fulfill the petitioners’ obligation to present information to support the statements in the petition, without creating potential conflicts with copyright protections. Where materials are subject to copyright protection, the Services may not be able to obtain such materials.

*Comment (41):* A commenter stated forcing petitioners to append information from the States interferes with a petitioner’s rights under the APA because it no longer allows for a balanced presentation of information to the Federal Government.

*Our Response:* Based on public comments on our May 21, 2015, proposed rule (80 FR 29286), we published a revised proposed rule (81 FR 23448; April 21, 2016) removing the requirement that petitioners must include information from States in their petitions. As a result, in this final rule, we clarify that petitioners should include information from various sources in support of their requests, and we require that copies of the cited source information be included with submitted requests, in order for the Services to be able to evaluate the claims in the petition. In determining whether the petition presents substantial information, the Services are not required to consider claims for which supporting materials are not included with the petition. In the past, we have found that that information in petitions can be incomplete, misrepresented, or one-sided. As a result, we have revised these regulations to encourage petitioners to provide a complete, balanced presentation of facts, including any information the petitioner is aware of that contradicts claims in the petition.

*Comment (42):* A commenter noted that petitioners occasionally reference unpublished data. The proposed rules contain no criteria for use of and access to these data. We recommend the Services specify that such material is subject to the same requirements.

*Our Response:* We agree that copies of all information used to support a petitioned action should be provided with the petition for the Services to consider and evaluate.

*Paragraph (d)—Types of Information To Be Included in Petitions To List, Delist, or Change the Status of a Listed Species*

*Comment (43):* Some comments related to our definitions and usage of the terms “substantial information” and “substantial scientific and commercial information.” These comments included a suggestion to define the relevant terms in the first paragraph in which they appear and to be consistent in the use of the terminology throughout the rule.

*Our Response:* We appreciate the comments. We have revised the text of this rule to reflect the specific language of the Act setting out the standard that applies to each type of petition. The standard that applies to petitions to list, delist, or reclassify a species is that the

petition must present “substantial scientific or commercial information” indicating that the petitioned action may be warranted (§ 4(b)(3)(A)), whereas a petition to revise a critical habitat designation must present “substantial scientific information” (§ 4(b)(3)(D)(i)). Note that the statute does use the term “substantial information” in § 4(b)(3)(B) and 4(b)(3)(D)(ii). In the final rule, we continue to define the relevant terms directly in the respective subsections setting out how we make findings on each type of petition. For example, our explanation of what we consider to be substantial scientific or commercial information appears in final § 424.14(h)(1)(i), because paragraph (h) explains the standards we use in making findings on petitions to list species, delist listed species, or reclassify listed species, and is therefore the most logical place for that explanation, even though the term is first used in § 424.14(d) (which alludes to the standard that the Secretary must apply but primarily is setting out recommended content items).

*Comment (44):* A commenter suggested changing proposed § 424.14(c)(3) (§ 424.14(d)(3) in this rule), concerning inclusion of magnitude and imminence of threats in the petition) by omitting the final clause and replacing it with: “. . . including, where available, a description of the magnitude and imminence of the threats.”

*Our Response:* The change the commenter is requesting is the addition of the condition “where available” with respect to including a description of the magnitude and imminence of threats to a species. Please note that the elements of § 424.14(d) in this rule are not absolute requirements to qualify as a petition, but the Services’ findings will depend, in part, on the degree to which the petition includes this type of information. The magnitude and imminence of threats are generally key determinants of whether a species may or may not warrant protection under the Act. Thus, although we would not reject a petition for not including information on magnitude and imminence of threats, our evaluation of whether the petition presents substantial information indicating that the petitioned action may be warranted would need to take into consideration the presence, the imminence, and the severity of threats. Therefore, we think it advisable to include in petitions information regarding the threat severity (magnitude) and the timing of those threats (currently occurring, imminent, in the foreseeable future, etc.).

*Paragraph (e)—Information to Be Included in Petitions to Revise Critical Habitat*

*Comment (45):* Several commenters noted that the requirement of proposed § 424.14(d)(6) for “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,” would be duplicative and indiscernible from the requirements of proposed § 424.14(b) (§ 424.14(c) in this rule), and recommended proposed § 424.14 (d)(6) not be adopted. Another commenter asked how “a complete presentation of the relevant facts” differs from a “detailed justification for the recommended administrative action that contains an analysis of the information presented.”

*Our Response:* Based on comments received on the original proposal, we revised our proposal to address these issues. Recognizing that it could be an undue burden to require petitioners to include all relevant information that is reasonably available, and certify to that effect, in this rule we have removed the certification requirement from the § 424.14(c) list of essential requirements for all petitions. Section 424.14(c) retains the more-general essential requirement that all petitions include a detailed narrative justification for the recommended administrative action that contains an analysis of the information presented. The Services will reject petitions that do not meet this detailed-narrative requirement, but petitioners could still resubmit their petition after adding a detailed narrative in accordance with § 424.14(c). In this rule, paragraphs (d) and (e) of § 424.14(d) and (e), on the other hand, do not prescribe essential requirements for all petitions, and instead identify factors that the Services will consider in making 90-day findings. One of these factors, set forth at § 424.14(d)(5) and § 424.14(e)(6), is the degree to which the petition includes “[a] complete, balanced representation of the relevant facts, including information that may contradict claims in the petition.” A request will not be rejected as a petition for failing to meet § 424.14(d)(5) or § 424.14(e)(6). It may be difficult for a non-scientist to locate and present all of the relevant facts completely, and, although the Services encourage petitioners to provide a balanced presentation of facts, there may not always be information contradicting claims made in the petition. As a result, the Services will consider this

information, along with readily available information we may consult for context on the species and the requested action, when determining if the petition presents substantial information indicating that the petitioned action may be warranted.

*Comment (46):* Many commenters noted the language of proposed § 424.14(d)(5) (§ 424.14(e)(5) in this rule) was inconsistent with the previous regulations at 50 CFR 424.12 in that the proposed petition regulations do not reference a “determination” that occupied areas are not enough for conservation of a species before moving on to consideration of unoccupied areas (e.g., limiting the designation of critical habitat to the species’ current range would be inadequate to conserve the species).

*Our Response:* This rule is consistent with the revised 50 CFR 424.12 regulations that became effective on March 14, 2016 (81 FR 7414; February 11, 2016). The current 50 CFR 424.12(b) states “Where designation of critical habitat is prudent and determinable, the Secretary will identify specific areas within the geographical area occupied by the species at the time of listing and any specific areas outside the geographical area occupied by the species to be considered for designation as critical habitat.” The Services are no longer required to consider whether a designation limited to the occupied areas would be sufficient before considering unoccupied areas. Therefore, no additional language is needed in the provision of § 424.14(e)(5) of this rule.

*Comment (47):* A commenter stated that the requirement to describe the physical or biological features (PBFs) provides little value because the Services have already described them in the final critical habitat rule for the species.

*Our Response:* In requests to revise critical habitat in occupied areas, it is essential to provide information on whether the PBFs are present or absent in those areas (see § 424.14(e)(4): “For any areas petitioned for removal from currently designated critical habitat within the geographical area occupied by the species at the time it was listed, information indicating that the specific areas do not contain the physical or biological features. . . .”). In some cases, petitioners may believe that we have misidentified or not included all PBFs, and that recognizing a different set of PBFs would lead to additional areas of occupied habitat qualifying for inclusion in a designation, or certain areas of the existing designation no longer qualifying. Similarly, PBFs may

have moved (no longer present in one area, but more recently developed in others), or there may be newer information on a species’ needs and, consequently, PBFs may change, PBFs previously identified may no longer be essential to the conservation of the species, or new PBFs may be identified. Therefore, the Services will consider petitions seeking to modify the description of PBFs in an original designation where recognizing a different set of PBFs would result in changes to the areas of occupied habitat that would qualify for inclusion. PBFs are analyzed in the course of developing designations, but it is the specific areas as shown on a map that are designated. Quite often scientific understanding of essential features advances after a designation is made, and the Services must consider the best available information when conducting section 7 consultations, not just what was described at the time of designation. Thus, even without a rule revising a critical habitat designation, the Services will always consider the best available, current information about the essential PBFs and what makes them essential in the course of section 7 consultations. Petitions seeking to “revise” a list of features, with no consequential changes to areas of occupied habitat that are included in a designation, are thus both unnecessary and ineffective.

*Comment (48):* A commenter suggested specific wording revisions to proposed § 424.14(d)(5) (§ 424.14(e)(5) in this rule): “For any areas petitioned to be added to critical habitat that were outside the geographical area occupied by the species at the time it was listed, information explaining: (1) Why the species’ present range is inadequate to ensure its conservation; (2) why the petitioned area presently contains features essential to the conservation of the species; and (3) how the designation will impact, economically and otherwise, the use of the petitioned area for other purposes. For any areas petitioned to be removed from critical habitat that were outside the geographical area occupied by the species at the time it was listed, information indicating why the petitioned areas are no longer essential to the conservation of the species.”

*Our Response:* We appreciate the commenter’s concern that unoccupied habitat not be added to an existing critical habitat designation without good reason, but choose to retain the proposed language at § 424.14(e)(5): “For areas petitioned to be added to or removed from critical habitat that were outside the geographical area occupied by the species at the time it was listed,

information indicating why the petitioned areas are or are not essential for the conservation of the species.” There are several reasons for this:

- In light of recent revisions to 50 CFR 424.12, the Services are not required to first consider whether a designation limited to present range is adequate to ensure conservation.
- This provision needs to address requests to add as well as remove unoccupied areas from a critical habitat designation.
- The language is consistent with the definition of critical habitat in the Act (16 U.S.C. 1532(5)(A)(ii)), which includes unoccupied areas, that is, “specific areas outside the geographical area occupied by the species at the time it is listed in accordance with the provisions of section 4 of this Act, upon a determination by the Secretary that such areas are essential for the conservation of the species.” Unlike the geographical areas occupied by the species at the time it is listed, unoccupied areas need not include the essential PBFs (see 16 U.S.C. 1532(5)(A)(i) of the Act). Therefore, it would be inconsistent with the Act to require such information in requests to revise unoccupied critical habitat.

- A determination as to whether unoccupied areas are essential for the conservation of the species is made by the Services, not the petitioner. However, it may be helpful if the petitioners include information indicating why the petitioned areas are or are not essential for the conservation of the species.

#### *Paragraph (f)—Response to Requests*

*Comment (49):* A commenter stated the Services should accept petitions that make a good faith effort to comply with provisions of the regulations and not reject for minor procedural flaws. The Services should include a “cure” provision in which the Services alert the petitioner to flaws in the petition and the steps that must be taken to remedy them and allow a specified amount of time for the petitioner to fix the flaws. Unless petitioners are supplied with constructive feedback, this will greatly hamper the petition process.

*Our Response:* In this rule at § 424.14(f), the Services retain discretion to treat as a petition a request that the Services determine substantially complies with the relevant requirements. Therefore, it is unlikely that a request will be rejected for minor omissions. However, if the Services determine that the request does not meet the requirements set forth at § 424.14(c), they will, as noted at paragraph § 424.14(f)(1), within a

reasonable timeframe, notify the sender and provide an explanation of the rejection. The petitioner will then be able to correct the request and resubmit to the Services at their convenience.

*Comment (50):* Some commenters asked whether petitioners would be notified when a request is determined not to constitute a petition and given the reasons for such determination. As drafted, the proposed rule does not indicate the Services will notify petitioners of a compliant petition.

*Our Response:* As noted above, submissions that do not qualify as petitions will be returned to the sender, along with a form letter or checklist describing what components are missing. However, for expediency, we will generally not notify petitioners of acceptance of petitions in a separate communication; in most cases, publication of the Services’ 90-day findings will serve as such notifications.

*Comment (51):* A commenter supported the deletion of the phrase “in the agency’s possession” as it relates to information the Services may consider when analyzing a petition. In the past, the “in the agency’s possession” requirement has been interpreted as the inability of the Services to even do a simple Internet search for helpful information after a petition has been received. The Services should not be limited to the use of information they have in their possession at the time they receive a petition. Such a limitation could lead to a “substantial” 90-day finding, not because a species may be at risk, but simply because the petition presents a skewed or impartial view of the facts.

*Our Response:* We agree. The phrase “in the agency’s possession” was interpreted by some as meaning hard (paper) copies of information materials stored in agency office files at a physical location. Most information and data are now accessed and stored electronically. Therefore, it is appropriate for the Services to place petitions in context by consulting readily available information, such as information that is stored electronically in databases routinely consulted by the Services in the ordinary course of their work. For example, it would be appropriate to consult online databases such as the Integrated Taxonomic Information System (<http://www.itis.gov>), a database of scientifically credible taxonomic nomenclature information maintained in part by the Services. This rule allows the Services to use readily available information to provide context for the claims in the petition, even should it be received after the time the petition is filed, up to the time we make the

finding. Please see *Findings on a Petition to List, Delist, or Reclassify—Paragraph (h)* under Summary of Changes to Previous Regulations at 50 CFR 424.14, below, for further discussion.

#### *Paragraph (h)—Findings on Petitions To List, Delist, or Reclassify*

*Comment (52):* Several commenters expressed concerns about the information standard we use in evaluating petitioned requests. Some specifically noted the addition of the term “credible” in definition of the substantial scientific or commercial information standard in proposed § 424.14(g) (§ 424.14(h) in this rule). One commenter expressed concern that the Services would define credible as precluding certain categories of information or data, such as traditional ecological knowledge or gray literature that may not be published or available in traditional scientific journals. Conversely, another commenter noted that the Services should only consider peer-reviewed literature provided in a petition to be credible, sound science.

*Our Response:* Section 4(b)(3)(A) of the Act directs the Services to make a finding as to whether a petition presents “substantial scientific or commercial information indicating that the petitioned action may be warranted.” This is the threshold required of the information provided in a petition, and is the standard we use at § 424.14(h) in this rule. The Act notably does not require that the Services make 90-day findings on the basis of the “best scientific and commercial data available.” Nevertheless, we are cognizant that positive “substantial information” findings require that the Services devote additional time and resources towards completing status assessments for those species, as well as 12-month findings. Therefore, we have concluded that it would be more efficient and would better advance the purposes of the Act to clarify for petitioners that—for a petition to indicate that the petitioned action may be warranted, and thereby merit this additional expenditure of the Services’ resources—the information provided in the petition must, at a minimum, be credible. “Credible scientific or commercial information” may include all types of data, such as peer-reviewed literature, gray literature, traditional ecological knowledge, etc.

*Comment (53):* A commenter stated that the Secretaries still appear to have broad discretion in establishing the definition of “reasonable person.” The commenter asserts that the definition leaves open the very type of arbitrary or

capricious litigation the Service is attempting to resolve by citing the reasoning in the Congressional Conference Report. The courts typically defer to the agencies' interpretation of scientific information. Therefore, petitioners are left without remedy when placed in disagreement with the Secretary's conclusion.

*Our Response:* The Act requires the Services to consider whether a petition presents substantial information to demonstrate that the requested action may be warranted, but does not define "substantial information." The Services therefore have discretion to adopt a reasonable interpretation of this foundational standard that furthers the statutory purposes and reflects the scientific context in which the Service makes decisions.

In the interest of providing greater clarity and transparency to the public, we have promulgated this rule to clarify and more thoroughly explain what is required in a petition and how the Services make their findings. We thus explain that the "substantial scientific or commercial information" standard (which applies to listing, delisting, and reclassification petitions) refers to credible scientific or commercial information in support of the petition's claims such that a reasonable person conducting an impartial scientific review would conclude that the action proposed in the petition may be warranted. (We similarly interpret the "substantial scientific information" standard that applies to petitions seeking critical habitat revisions.) This interpretation clarifies that the Services must evaluate petitions in their capacity as biologists with the scientific expertise to investigate whether a species may be imperiled. As such, the Services analyze and decide whether petitions present "substantial information" consistent with the analyses and decisions that a hypothetical reasonable biologist would make. In addition, this hypothetical reasonable scientist would need to be impartial and approach the question as he or she would any scientific inquiry. Finally, the hypothetical person evaluating the information in the petition would need to perceive that the information is credible; conclusions drawn in the petition without the support of credible scientific or commercial information will not be considered "substantial information." These concepts are in no way new to the Services' practice; this is how we have and must evaluate petitions. Further, we believe this clarification aligns with the House Conference report, which states that, when courts review such a decision, the "object of [the judicial]

review is to determine whether the Secretary's action was arbitrary or capricious *in light of the scientific and commercial information available* concerning the petitioned action." (H.R. Conf. Rep. No. 97-835, at 20 (1982), reprinted in 1982 U.S.C.C.A.N. 2860, 2862) [emphasis added]. Finally, a "reasonable person" standard is commonly used in legal contexts.

If a person disagrees with a Service's finding, in the case of 90-day petition findings in which the Service finds there is substantial information indicating that the petitioned action may be warranted (in other words, not a final agency action), that person could provide additional information regarding the species to help inform future agency actions such as the subsequent 12-month finding. In the case of not-substantial 90-day findings (which are final agency actions), one remedy would be to submit a new petition with further justification and rationale for the requested action. Also, final agency actions are judicially reviewable.

*Comment (54):* Proposed § 424.14(g)(1)(i) (§ 424.14(h)(1)(i) in this rule) expands on the "substantial scientific or commercial information" standard of the Act. Under the existing petitions regulation, "substantial scientific or commercial information" means "that amount of information that would lead a reasonable person to believe that the measure proposed in the petition may be warranted." Now, the Services add to this "a reasonable person conducting an impartial scientific review would conclude that the action proposed in the petition may be warranted." Normally, reasonable people do not, in the course of their daily lives, conduct impartial scientific reviews.

*Our Response:* Section 424.14(h)(1)(i) clarifies and expands on the substantial-information standard by defining it as credible scientific and commercial information that would lead a reasonable person conducting an impartial scientific review to conclude that the action proposed in the petition may be warranted. (We similarly define the "substantial scientific information" standard that applies to petitions seeking revisions to critical habitat at 424.12(i)(1)(i).) As discussed in response to Comment 53, the Services have the discretion and a need to adopt a reasonable interpretation of this key standard, which is not defined in the statute. We have included the term "credible," because—for a petition to indicate that the standard for the petitioned action may have been met, and thereby merit the additional

expenditure of the Services' resources—the information provided in the petition must, at a minimum, be credible. In other words, the Services must evaluate whether the information in the petition is substantiated and not mere speculation or opinion. Only those claims or conclusions drawn in the petition with the support of credible scientific or commercial information should be considered "substantial information."

The addition of "conducting an impartial scientific review" to the reasonable person standard for what constitutes "substantial scientific and commercial information" similarly clarifies to petitioners the context against which the Services will necessarily evaluate petitions. The Services must evaluate petitions on the basis of the scientific validity of the request; that is, impartially evaluate whether there is a scientific basis for the requested action, and not just unsubstantiated claims. Because the context for this action involves evaluating scientific information, it is appropriate and necessary to take as our reference a person conducting an impartial scientific review. There is nothing in the Act to suggest that 90-day findings should be evaluated based on what persons lacking scientific background would conclude, and to adopt a generic standard would not further the purposes of the Act or reflect how the Services must and do actually go about evaluating petitions.

*Comment (55):* Several commenters raised questions regarding the Services' treatment of a subsequent petition, including the definitions and interpretations of the terms "considered" and "sufficient"; how our determination would relate to other reviews, such as 5-year reviews; and how new information or new analyses, such as models, would be evaluated.

*Our Response:* In this rule, § 424.14(h)(1)(iii) addresses situations in which the Services have already made a finding on or conducted a review of the listing status of a species, and, after such finding or review, receive a petition seeking to list, delist, or reclassify that species. The provisions at § 424.14(h)(1)(iii) do not state or imply that such petitions will be rejected outright; indeed, as noted below, we will consider all requests that meet the requirements of § 424.14(c) to be petitions, and we will evaluate all petitions and make findings on them. Instead, we include this provision to provide prospective petitioners greater predictability and clarity, by making clear that we must evaluate such petitions in light of the previous

findings or determinations. Thus, if no new information or analysis is provided in such a petition, the outcome will likely (but not always) be a not-substantial 90-day finding.

To clarify some of the terms we used, by using the term “considered” in the phrase “new information not previously considered,” we mean that information or analysis was evaluated in a previous finding, status review, or listing determination. “Sufficient” new information is that information or analysis which would lead a reasonable person conducting an impartial scientific review to conclude that the action proposed in the petition may be warranted, despite the previous review or finding.

With respect to prior listing determinations, the prospective petitioner may review the final listing rule and any supporting documentation to see what information was considered and evaluated. Five-year status reviews are not published in the **Federal Register** but are posted on the Services’ Web sites. FWS status reviews and **Federal Register** documents are posted on the species profile pages maintained in FWS’ Environmental Conservation Online System (ECOS). Species profiles may be accessed by searching on the species name at <http://www.ecos.fws.gov/ecp>. NMFS’ documents can be found at <http://www.nmfs.noaa.gov>. In conducting status reviews, the Services may reevaluate data they already considered in previous status reviews. Petitioners may similarly present a new analysis of existing data in support of their requests, and the Services will evaluate such requests on that basis. A petitioned request could be based on discovery of an error in research regarding information previously considered by the Services.

Unless such a petition provides different data, or a different analysis or interpretation of, or errors discovered in, the data, model or analytic methodology used in a previous finding, review, or determination, the conclusions may be the same, and the Services may find that such a petition does not provide substantial information indicating that the petitioned action may be warranted.

We make the distinction that, in the case of prior reviews that led to final agency actions (such as final listings, 12-month not-warranted findings, and 90-day not-substantial findings), a petition would generally be presumed not to provide substantial information unless the petition provides new information or a new analysis not previously considered in the final

agency action. On the other hand, if the previous status review did not result in a final agency action, the petition would not be required to overcome the presumption that, unless it includes information or analysis that was not considered in the previous status review, it generally will not present substantial information indicating that the petitioned action may be warranted.

*Comment (56):* One commenter stated that the “new information” requirement in the revised proposed rule (81 FR 23448; April 21, 2016) could severely limit the ability to file delisting petitions that assert flaws in the Services’ prior consideration of information. Petitioners should be able to assert that information the Services previously considered was misused, misrepresented, or misinterpreted, or that the original data for the species’ classification were in error as the basis for delisting.

*Our Response:* This rule will not limit the ability to file delisting or other petitions. In cases where petitioners request an outcome that differs from the outcome reached in a previous Service finding or determination, the rule simply recognizes that the courts apply a presumption that agency actions are valid and reasonable, and therefore the petitioner should provide new or additional information or a new analysis not previously considered. We add this requirement to prevent the petition process from being used inefficiently—in effect, to voice disagreement with a previous determination by one of the Services without providing any new information or analysis relevant to the question at issue, and instead of using the appropriate judicial forum to challenge the previous determination directly. An appropriate showing may include an explanation of how information used in the previous analysis was misused, misrepresented, or misinterpreted. Also, this rule does not prevent a petitioner from requesting a delisting of a listed entity based on error in classification of that listed entity.

*Paragraph (h)—Use of Information in Agency Files*

*Comment (57):* Several commenters support the agencies’ use of additional information as described in the proposed rule, as long as it is clear that such information is readily available and does not serve as a justification for the Service to actively supplement the petition or initiate new data collection processes, contracts or research as part of the 90-day finding process.

*Our Response:* The Services recognize that the statute places the obligation

squarely on the petitioner to present the requisite level of information to meet the “substantial information” test; therefore, the Services should not seek to supplement petitions. However, in determining whether the petition presents substantial scientific or commercial information, it may be appropriate to consider readily available information to provide context to the information the petition presents. It is not the intent of the Services to initiate any data collection or research methods, nor is there time for the Services to conduct such methods in the 90-day petition finding process.

*Comment (58):* A commenter stated that, to the extent that the Service intends to review and rely upon readily available information, there first must be a public notice and availability of such information for review and comment by the public. Otherwise, the public would not be made aware of such information and afforded the ability to comment on the accuracy, sufficiency and relevance of such information.

*Our Response:* The statute does not provide for a public comment process at the 90-day stage of review of petitions. The Services provide public notice and request information when publishing a positive 90-day finding and initiating a 12-month status review in response to a petition, but it is neither appropriate nor feasible to do this prior to making a 90-day finding due to statutory time constraints. Although the Services may consider readily available information to provide context in which to evaluate the information presented in a petition, the 90-day petition finding is based on the information provided in the petition. A 90-day finding is an initial assessment of information provided in the petition and, when appropriate, information readily available to the Services. When our 90-day findings are published in the **Federal Register**, the petition and supporting information, and any other information we may have relied upon for our finding, is posted online and made available to the public. If we find the petition presents substantial information that the action may be warranted, we announce the initiation of a status review and request information from the public, which may include feedback on the accuracy, sufficiency, and relevance of any information considered in making the finding. For petitions that are found to be not substantial, we publish the finding and make available the petition and any supporting information considered for the finding. The public is invited to submit information on any species at any time, which may include

evaluation of information considered for any finding.

*Comment (59):* A commenter raised a question regarding proposed § 424.14(g)(1)(ii) (§ 424.14(h)(1)(ii) in this rule), asking how can the Services state that “the intent is not to solicit new information,” when the proposed regulations at § 424.14(b)(10) would require the petitioner to gather “all relevant information” about a species, as well as information from every State where a species could possibly be found.

*Our Response:* In this final rule, we have removed the proposed requirements to which the commenter refers (*i.e.*, that petitioners pre-coordinate with States and certify that they have provided all relevant data). In this rule, § 424.14(h)(1)(ii) describes the type of readily available additional information the Services may consider to place a petition in context when making their findings. Section 424.14(h)(1)(ii) states that, in reaching the initial finding on the petition, the Services will consider information submitted by the petitioner and may also consider information readily available at the time the determination is made. This provides a balanced approach that will ensure that the Services may take into account the information available to us to provide context for assessing the petition, without opening the door to the type of wide-ranging information request more appropriate for a status review. The intent of this approach is for the Services to be able to use readily available information to provide context in which to evaluate the information presented in the petition, not for the Services to solicit new information on which to make a finding.

#### *Comment on National Environmental Policy Act*

*Comment (60):* A commenter stated that the Services must prepare an environmental impact statement (EIS) for the proposed rule because the net effect of the changes to the existing regulations will be fewer species being protected under the Act, more extinctions, and consequently more ecosystems upon which endangered species depend being degraded and lost.

*Our Response:* We do not anticipate that the changes to the regulation set forth in this rule will result in fewer species being listed. By providing clearer requirements and expectations to prospective petitioners, the quality and completeness of petitions will likely improve, leading to more accurate 90-day findings and consequently more efficient use of limited resources.

As discussed in greater detail in the National Environmental Policy Act Determination section below and in the Environmental Action Statement (available at <http://www.regulations.gov>, under Docket Nos. FWS–HQ–ES–2015–0016 and DOC 150506429–5429–01), we have concluded that this final rule revising the regulations at 50 CFR 424.14 falls within categorical exclusions from NEPA under both applicable DOI regulations and NOAA guidance. Specifically, the regulation falls within the DOI categorical exclusion for “[p]olicies, directives, regulations, and guidelines: That are of an administrative, financial, legal, technical, or procedural nature.” 43 CFR 46.210(i). It also falls within the substantially identical NOAA categorical exclusion for “policy directives, regulations and guidelines of an administrative, financial, legal, technical or procedural nature.” See NOAA Administrative Orders (NAOs) 216–6A (section 6.01) and 216–6 (section 6.03c.3(i)).

We do not anticipate that this final rule will change the outcomes of the Services’ 90-day findings as to whether petitions present substantial information indicating that the petitioned actions may be warranted, because it is administrative and procedural in nature, and is designed merely to clarify and streamline the petition process consistent with statutory language, legislative history, and case law. Moreover, the revised regulations do not limit Secretarial discretion, because they do not mandate particular outcomes in future decisions regarding whether a request should be accepted as a petition or whether a petition presents substantial information that a petitioned action may be warranted.

Although the revised regulations expand on what information must be included in a request for it to qualify as a petition under section 4(b)(3) of the Act, they also provide for a process to inform petitioners when the request fails to meet the required criteria and allow discretion for the Services to consider a request that substantially complies with the required elements even if there is not full technical compliance. The Services will, within a reasonable timeframe, notify the petitioners of the required information that is missing. This will allow the submitters to cure any deficiencies before resubmitting the petition to the Services, should they choose to do so. Therefore, we do not expect that this additional procedural requirement will affect the substantive outcomes of 90-day findings on well supported

petitions; rather, it will make the Services’ consideration of petitions more efficient.

#### **Summary of Changes to Previous Regulations at 50 CFR 424.14**

##### *General*

Throughout the regulation text we replace the title “the Secretary” or “the Secretaries” with “the Services,” as the Services are the formal designees of the Secretaries of Commerce and the Interior who have the delegated authority to implement the Act.

We also change the overall organization of the regulations. Instead of organizing all aspects of the regulations into the two categories of petitions under the Act (petitions to list, delist, or reclassify a species are discussed in current paragraph (b), and petitions to revise critical habitat are discussed in current paragraph (c)), the new regulations are organized by function. Requirements that apply to all petitions under the Act appear first (in new paragraphs (a), (b), (c)), followed by the list of factors the Services will consider in making findings on the two categories of petitions, respectively, (in new paragraphs (d) and (e)). Similarly, procedures that apply to all petitions under the Act are set out first (in new paragraphs (f) and (g) (and also (k)), followed by procedures that apply to the different categories of petitions (in new paragraphs (h) and (i) (and also at (j), which provides procedures for APA petitions)). We move some of the specific provisions from the previous regulations accordingly to fit better into this overall structure.

##### *Ability To Petition—Paragraph (a)*

Section 424.14(a) retains the substance of the first sentence of the current section, stating that any interested person may submit a written petition to the Services requesting that one of the actions described in § 424.10 be taken for a species.

##### *Notification of Intent To File Petition—Paragraph (b)*

In our April 21, 2016, revised proposed rule (81 FR 23448), we included in § 424.14(b)(9) the requirement that, at least 30 days prior to filing a petition, the petitioners provide State agencies responsible for the management and conservation of wildlife with notice, by letter or electronic mail, of their intent to file a petition with the Services, and that copies of these letters or communications be included with the petition when it is submitted to the Services. In finalizing this rule, we



realized that the requirement to provide notice to State agencies did not belong with the rest of paragraph (b), because that paragraph outlined a list of information to be included with a petition submission, not actions required of a petitioner before filing. Therefore, for clarity and consistency, we have reformatted the regulation by adding a new paragraph (b) requiring that petitioners notify States before filing petitions. The list of required information that was formerly contained in paragraph (b) has now been redesignated as paragraph (c). All subsequent paragraphs have been appropriately redesignated.

Therefore, new § 424.14(b) requires that for a petition to list, delist, or reclassify a species, or for petitions to revise critical habitat, petitioners must provide notice to the State agency or agencies primarily responsible for the management and conservation of fish, plant, or wildlife resources in each State where the species that is the subject of the petition occurs. Petitioners must notify the State agency of their intent to file a petition, with either Service, at least 30 days prior to petition submission. If the State agency has data or information on the subject species that it would like to share with the Services, the agency may submit the data and information directly to FWS or NMFS. This provision will allow the Services to benefit from the States' considerable experience and information on the species within their boundaries, because the States would have an opportunity to submit to the Service any information they have on the species early in the petition process. The Services, in formulating an initial finding, may use their discretion to consider any information provided by the States (as well as other readily available information, including any information they have received from other interested parties before the initial finding) as part of the context in which they evaluate the information contained in the petition.

Also in § 424.14(b), we added the following sentence for clarification to the language of the revised proposed rule (81 FR 23448; April 21, 2016): "This notification requirement shall not apply to any petition submitted pertaining to a species that does not occur within the United States." This addition is to clarify that this provision does not apply to foreign species that do not occur in the United States, and further that, consistent with the definition in the Act at 16 U.S.C. 1532(17), "States" refers only to the States, the District of Columbia, and the

territories and commonwealths of the United States.

#### *Requirements for Petitions—Paragraph (c)*

As stated earlier, new § 424.14(c) incorporates the substance of the revised proposal's (81 FR 23448; April 21, 2016) § 424.14(b), setting forth a number of minimum content requirements for a request for agency action to qualify as a petition for the purposes of section 4(b)(3) of the Act, 16 U.S.C. 1533(b)(3). These include some of the minimum requirements from the second and third sentences of current paragraph (a). As with § 424.14(b) in the revised proposal, new § 424.14(c) also expands upon the list of requirements for a petition, drawing in part from the provisions in current paragraph (b)(2).

New § 424.14(c)(2) requires that a petition address only one species. However, we revised the language from this statement in the revised proposal (81 FR 23448; April 21, 2016) to clarify that a petition addressing only one species could include any configuration of members of that single species as defined by the Act (the full species, one or more subspecies or varieties, and, for vertebrate species, one or more distinct population segments (DPSs)). The taxonomic (biological) classification system is hierarchical, which means a taxon of the rank of species also includes all subspecies or varieties, if any, under that species. Similarly, applying the concept of hierarchical entities to the Act's use of the term "species," a vertebrate species would also include any potential DPSs. Therefore, a single-species petition may address (a) one species of fish, wildlife, or plant; (b) one or more subspecies (variety) of fish, wildlife, or plant; or (c) one or more population segments of any vertebrate species (which FWS or NMFS will evaluate per the Services' Policy Regarding the Recognition of District Vertebrate Population Segments (61 FR 4722; February 7, 1996) (DPS Policy) as to whether it qualifies as a DPS). As such, the petitioner need not file separate petitions to address different hierarchical configurations of the same species.

Although 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. That has at times made it difficult to follow the logic of the petition. Because petitioners can submit multiple petitions, this requirement does not place any limitation on the ability of an interested party to petition for section 4 actions, but does ensure that petitioners

organize the information in a way (on a species-by-species basis) that is necessary to inform the species-specific determinations required by the Act and will allow more efficient action by the Services.

The first six requirements (§ 424.14(c)(1) through (c)(6)) apply to each type of petition recognized under section 4(b)(3) of the Act. The first four requirements (§ 424.14(c)(1) through (c)(4)) were all contained in the previous regulations at § 424.14(a) and (b). The fifth and sixth requirements (§ 424.14(c)(5) and (c)(6)) clarify and expand on the previous provisions at § 424.14(b)(2)(iv) regarding a petition's supporting documentation.

At § 424.14(c)(5), we use the word "readily" before "locate the information cited in the petition, including page numbers or chapters as applicable." The Services should not have to search through reference material to locate specific information; the petition should provide clear, specific citations that allow the supporting information to be located readily.

The seventh requirement (§ 424.14(c)(7)) applies only to petitions to list, delist, or reclassify a species from an endangered species to a threatened species (i.e., downlisting) or from a threatened species to an endangered species (i.e., uplisting), and requires that information be presented to demonstrate that the subject entity is or may be a "species" as defined in the Act (which includes a species, a subspecies or variety, or a distinct population segment of a vertebrate species that FWS or NMFS may determine to be a DPS). We note that currently-listed species are generally recognized by the Services as species under the Act; therefore, petitions regarding already-listed species need only refer to that species, except when the petition seeks a change in the delineation of a "species" under the Act (for example, to divide a species into more than one species, delist or reclassify a portion of a listed species, a change in how FWS or NMFS delineates a DPS, or otherwise reconfigure the current listing). Section 4(b)(3)(A) of the Act applies only to "a petition . . . to add a *species* to, or to remove a *species* from, either of the lists [of endangered or threatened wildlife and plants]" [emphasis added]. This provision screens from needless consideration those requests that clearly do not involve a species, subspecies, or distinct population segment of a vertebrate species.

The eighth requirement (§ 424.14(c)(8)), applies only to petitions to list a species, and to petitions to delist or reclassify a species in cases



where the species' range has changed since listing, and requires that information be included in the petition describing the current and historical range of the species, including range States or countries, as appropriate. It is important that the Services have information on both the current and historical range of the species; for example, a historical range that is significantly larger than the current range would show range contraction, which may be an important consideration. The previous regulations at § 424.14(b)(2)(ii) identified as one of the factors the Services will consider in evaluating listing, delisting, and reclassification petitions the degree to which the petition contains a detailed narrative describing "past and present . . . distribution of the species. . . ." New § 424.14(c)(8) now expands on this requirement and includes it as one of the essential requirements for a petition.

The ninth requirement, § 424.14(c)(9) relates to the requirement of § 424.14(b) that petitioners must provide notice to the State agency responsible for the management and conservation of fish, plant, or wildlife resources in each State where the species that is the subject of the petition occurs, at least 30 days prior to petition submission. Copies of the letter or electronic communication from the petitioner notifying the State agency of the petitioner's intent to file a petition with either Service must be included with the petition when it is submitted; such copies are considered a required part of the petition.

Please note that any decision to provide the protections of the Act to a species in an expedited manner under the Act's section 4(b)(7) (*i.e.*, emergency listing) is at the discretion and determination of the Services upon a review of the best available scientific information. In any case, because the Services retain discretion to consider a petition that has only substantially complied with the requirements for filing petitions, they retain discretion to consider such petitions in appropriate circumstances, such as where it appears to the Services that expedited listing may be warranted. The Services also have discretion to simply treat them as petitions seeking the species listing on a non-emergency basis.

The Services apply § 424.14(c) to identify those requests that contain all the elements of a petition, so that consideration of the request will be an efficient and wise use of agency resources. A request that fails to meet these elements may be screened out from further consideration, as discussed below, 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. However, as discussed further below, the screening out of petitions due to missing required information does not constitute a petition finding under Section 4(b)(3)(A) of the Act. In such a situation, the Services will explain to petitioners what information was missing so that the petitioners can have an opportunity to cure the deficiencies in a new petition and obtain a finding on the petition under section 4(b)(3)(A) of the Act.

*Information To Be Included in Petitions To List, Delist, or Change the Status of a Listed Species—Paragraph (d)*

Section 424.14(d) describes the types of information that are relevant to the Services' determinations as to whether the petition provides substantial scientific or commercial information that the petitioned action may be warranted. Petitioners are advised that compliance with paragraph (c) is the minimum necessary to require the Services to consider their petition, but to provide a more complete and robust petition, petitioners should include as much of the types of information listed in paragraph (d) as possible, to the extent that it is relevant to the type of petition being filed.

The informational elements for listing, delisting, and reclassification petitions in § 424.14(d)(1) through (d)(3) are rooted in the substance of current paragraphs (b)(2)(ii) and (iii). These elements clarify in the regulations the key considerations that are relevant when the Services are determining whether or not the petition presents "substantial scientific or commercial information indicating that the petitioned action may be warranted," which is the standard for making a positive 90-day finding as described in section 4(b)(3)(A) of the Act, 16 U.S.C. 1533(b)(3)(A).

Section 424.14(d)(3) refers to inclusion in a petition of a description of the magnitude and immediacy of threats. This type of information regarding the severity of threats on the species or its habitat is generally needed in conducting status reviews, and is therefore relevant to determining whether the petition presents substantial information indicating that the petitioned action may be warranted. In addition, this information may assist FWS in assessing the listing priority number of species if FWS subsequently makes a warranted-but-precluded finding under FWS' September 21, 1983, guidance, which requires assessing, in part, the magnitude and

immediacy of threats (48 FR 43098). In addition to being useful for status reviews, this information should be included to assist in determinations on uplisting requests. While such information may also be useful to NMFS, NMFS has not adopted the 1983 FWS guidance, and so would not apply that guidance to petitions within its jurisdiction.

Section 424.14(d)(4) refers to inclusion in a petition of information on any conservation actions that States, or other parties, have initiated or that are ongoing, that benefit the subject species. Because this information is relevant to an ultimate determination of whether or not listing a species is warranted (the 12-month finding standard), it is indirectly relevant and may be useful in evaluating whether the action may be warranted (the 90-day finding standard).

We add a new § 424.14(d)(5), stating that a petitioner should provide a complete, balanced presentation of facts pertaining to the petitioned species, which would include any information the petitioner is aware of that contradicts claims in the petition. The intent of this provision is not to place an unnecessary burden on petitioners, but rather to encourage petitioners to avoid presenting in a petition only information that supports the claims in the petition. This is particularly true for information publicly available from affected States or Tribes, who often have important and relevant species data and information, as well as special status and concerns with respect to implementation of the Act. Fostering greater inclusion of such data will help ensure that any petition submitted to the Services is based on reliable and unbiased information and does not consist simply of selected data. We find that, to further the purposes of the Act, petitioners should be forthcoming as to the known, relevant facts so that the Services have an accurate basis from which to evaluate the merits of the petition. Fostering a more transparent and informed petition process will ensure that the Services' resources are directed productively and not diverted to matters that only superficially appear meritorious.

Section 424.14(d) does not include the language in current paragraph (b)(2) that describes information a petitioner may include for consideration in designating critical habitat in conjunction with a listing or reclassification. We have deleted these two sentences because, at the initial stage, the Services focus their evaluation of the information to make a finding on whether the petition presents substantial information indicating that

the species may warrant listing, delisting, or reclassification. If the Services find that the petition presents substantial information that listing may be warranted and proceeds to initiating a status review, the Services will seek information concerning critical habitat at that time.

*Information To Be Included in Petitions To Revise Critical Habitat—Paragraph (e)*

Section 424.14(e) sets forth the kinds of information a petitioner should include in a petition to revise a critical habitat designation. The Service's determination as to whether the petition provides "substantial scientific information indicating that the revision may be warranted" (16 U.S.C. 1533(b)(3)(D)(i)) will depend in part on the degree to which the petition includes this type of information.

The items set out at new § 424.14(e) are an expanded and reworded version of the substance of current paragraph (c)(2). Section 424.14(e)(1) advises that, to help justify a revision to critical habitat, it is important to demonstrate that the existing designation includes areas that should not be included or does not include areas that should be included. The petition should discuss the benefits of designating additional areas, or the reasons to remove areas from an existing designation. Additionally, including maps with sufficient detail to clearly identify the particular area(s) being recommended for inclusion or exclusion will be useful to the Services in making a petition finding.

New § 424.14(e)(2), (e)(3), and (e)(4) are drawn from the substance of current paragraphs (c)(2)(i) and (ii), which have been reorganized and clarified. Sections 424.14(e)(2), (e)(3), and (e)(4) clarify that several distinct pieces of information are helpful in analyzing whether any area of habitat should be designated, beginning with a description of the "physical or biological features" that are essential for the conservation of the species and which may require special management. If a petitioner believes that the already-identified physical or biological features in an existing critical habitat designation have been incorrectly identified, the petition should provide information supporting the recognition of a different set of features and explain how the different set of features would lead to identification of different areas as qualifying for inclusion in a designation of occupied critical habitat. (See also our response to comment 47). In other words, petitioners requesting revisions to critical habitat designations need not

provide information on which physical or biological features are essential unless the relevant areas were occupied at the time of listing and the petitioners contend that some features recognized at the time of designation as essential are not, or that features not recognized in the designation as essential should be.

Also, paragraphs (e)(3) and (e)(4) of § 424.14 detail the informational needs the Services will have in considering whether the petition presents substantial information indicating that it may be warranted to add to, or remove from, the critical habitat designation specific areas occupied by the species at the time of listing. Further, we clarify that "features" specifically refers to the "physical or biological features," as described in our recent revision to 50 CFR 424.12 (81 FR 7414; February 11, 2016). Further, to use the same language as the revised 50 CFR 424.12, we replace the clause "(including features that allow the area to support the species periodically, over time)" with "(including characteristics that support ephemeral or dynamic habitat conditions)."

Section 424.14(e)(5) describes the particular informational needs associated with evaluating habitat that was unoccupied at the time of listing—that is, information that fulfills the statutory requirement that any specific areas designated are "essential for the conservation of the species." See section 3(5)(A)(ii) of the Act, 16 U.S.C. 1532(5)(A)(ii).

Section 424.14(e)(6) mirrors the revised § 424.14(d)(5), stating that a petitioner should provide a complete, balanced presentation of facts pertaining to the species' potential critical habitat, which would include any information the petitioner is aware of that contradicts claims in the petition. This provision recognizes that, in availing themselves of the petition process, petitioners seek to direct the Services' focus and resources to particular species.

*Responses to Petitions—Paragraph (f)*

Section 424.14(f) sets out the possible responses the Services may make to requests. Section 424.14(f)(1) clarifies that a request that fails to satisfy the mandatory elements set forth in paragraph (c) will generally be returned by the Services with an explanation of the reason for the rejection, but without a determination on the merits of the request. In light of the volume of petitions received by the Services, it is critical that we have the option to identify in a reasonable timeframe those requests that on their faces are

incomplete, in order to ensure that agency resources are not diverted from higher priorities. Although this authority is implied in the current regulations, making the point explicit in these revised regulations provides additional notice to petitioners and will result in better-quality petitions and more efficient and effective (in terms of species conservation) use of agency resources.

The Services retain discretion to determine whether a request constitutes a petition and to process that petition where the Services determine there has been substantial compliance with the relevant requirements. The Services need to maintain some discretion in order to apply common-sense principles in accepting or rejecting petitions. Petitions will not likely be rejected for minor omissions of the requirements set forth at § 424.14(c). The Services also recognize that not all elements will be as crucial for particular kinds of petitions (e.g., petitions to delist a species due to recovery need not provide information on the validity of the entity; currently-listed species can be assumed to be valid entities as the Services routinely review such matters for listed species under our jurisdiction), and maintain discretion regarding acceptance of petitions accordingly.

We would apply such discretion judiciously. If most of the cited source materials have been provided, the Services may accept the petition and may evaluate the petition without considering those claims for which the source materials have not been provided. Thus, even if the petition is accepted, the absence of cited source materials may make it more likely to result in a finding that the petition does not present substantial information. To avoid rejection of the petition or an increased likelihood of a "not substantial" finding, we encourage the petitioner to include all cited materials with the petition, as this is an important step in substantiating the petitioner's claims. It should not present a hardship to provide the source material that the petitioner used in preparing the petitioned request.

Section 424.14(f)(1) states that the Services will determine whether or not a request contains all of the requisite information for qualifying as a petition "within a reasonable timeframe." Although this does not establish a specific timeframe, the Act already prescribes a number of binding, enforceable deadlines for making petition findings, and we do not intend to create a new one with this provision. Our goal is to minimize the amount of

time it will take the Services to review a request and determine whether it qualifies as a petition. We anticipate that the determination can be made within weeks of receiving the request.

The revision to § 424.14(f)(2) confirms that a request that complies with the mandatory requirements will be acknowledged (as required under current 424.14(a)); however, we have removed the requirement to provide the acknowledgement in writing within 30 days of the receipt of the petition. We make this revision to allow the Services greater flexibility in the means and timing of communicating with the petitioner its determination of whether the petition complies with the mandatory requirements. This revision also reflects the fact that, in light of current electronic means of communication, it is more efficient for petitioners to refer to the Services' online lists of active petitions, which are accessible to the public at <http://ecos.fws.gov/ecp/report/table/petitions-received.html> and <http://www.nmfs.noaa.gov>, or on individual species profile pages accessed by searching for the species at <https://www.ecos.fws.gov> and <http://www.nmfs.noaa.gov>. We find that continuing the practice of sending confirmations via formal letter no longer provides the most effective or efficient means of communicating to all interested parties regarding the status of petitions.

#### *Supplemental Information—Paragraph (g)*

We clarify in § 424.14(g) that a petitioner submitting supplemental information later in time from their original petition has the option to specify whether or not the information being submitted is intended to be part of the petition. Specifying that the supplemental information is intended to be part of the petition will have the consequence that the Services will be obligated to consider it in the course of reaching a finding on the petition. It will also, however, have the related consequence that the timeframes under section 4 of the Act for when findings are due will be reset and begin to run anew from the time the supplemental information is received. In contrast, if the petitioner does not specify that the information is intended to be part of the petition, the Services will treat the supplemental information as they would any readily available information from any source. As we have explained, the Services have discretion to consider such information as appropriate to place the petition in context, but are not required to consider such information.

Because the Act requires that the 90-day finding evaluate whether the petition presents substantial information to indicate that the petitioned action may be warranted, the submission of new information intended to supplement a petition is in effect a new petition. It is thus reasonable and necessary to reset the timeframes when new information intended to supplement the petition is received. The final regulation thus strikes a balance that is fair to petitioners by giving them the choice to determine the consequences of submitting new information.

This provision will ensure the Services have adequate time to consider the supplemental information relevant to a petition and that the process is not interrupted by receipt of new information that may fundamentally change the evaluation. Also, by providing clear notice of this process, the Services are encouraging petitioners to assemble all the information necessary to support the petition prior to sending it to the Services for consideration, further enhancing the efficiency of the petition process.

#### *Findings on a Petition To List, Delist, or Reclassify—Paragraph (h)*

Section 424.14(h) explains the kinds of findings the Services may make on a petition to list, delist, or reclassify a species, and the standards to be applied in that process. Section 424.14(h)(1) is drawn largely from current paragraph (b)(1), with some revisions. Most significantly, § 424.14(h)(1)(i) clarifies the substantial-information standard for 90-day findings by defining it as credible scientific and commercial information that would lead a reasonable person conducting an impartial scientific review to conclude that the action proposed in the petition may be warranted. Thus it makes clear that conclusory statements made in a petition without the support of credible scientific or commercial information are not “substantial information.” For example, a petition that states only that a species is rare, and thus should be listed, without other credible information regarding its status and threats, likely does not provide substantial information. As demonstrated by the Scott's riffle beetle case (*WildEarth Guardians v. Salazar*, No. 10-cv-00091-WYD (D. Colo. Sept. 14, 2011)), the inclusion of this statement clarifies, but does not alter, the Services' standard for evaluating 90-day findings. In that case, FWS made a negative 90-day finding, because the petition did not present any information of any potential threat currently affecting the species or reasonably likely

to do so in the foreseeable future, nor did it indicate a population decline. The court rejected a merits challenge to that petition finding, and found that information as to the rarity of a species, without more information, is not “substantial information” that listing the species may be warranted.

In § 424.14(h)(1)(ii), we have added a new sentence to clarify that the Services are not required to consider any supporting materials cited by the petitioner if the cited documents, or relevant excerpts or quotations from the cited documents, are not provided in accordance with paragraph (c)(6) of this section. Additionally, we clarify that the Services may consider information provided in a petition in the context of other information that is readily available at the time it makes a 90-day finding. For purposes of § 424.14(h)(1), the Services recognize that the statute places the obligation squarely on the petitioner to present the requisite level of information to meet the “substantial information” test, and that the Services should not seek to supplement petitions. (See the Columbian sharp-tailed grouse case (*WildEarth Guardians v. U.S. Secretary of the Interior*, No. 4:08-CV-00508-EJL-LMB (D. Idaho Mar. 28, 2011)), which provided, among other things, that the petitioner has the burden of providing substantial information.) In order for the Services to find that a petition presents substantial information indicating that the petitioned action may be warranted, the petition should itself present that information. The Services need not resort to supplemental information to bolster, plug gaps in, or otherwise supplement a petition that is inadequate on its face.

However, in determining whether a petition is substantial or not, the Services must determine whether the claims are credible. Therefore, it is appropriate for the Services to consider readily available information that provides context in which to evaluate whether or not the information that a petition presents is timely and up-to-date, and whether it is reliable or representative of the available information on that species, in making its determination as to whether the petition presents substantial information.

The precise range of information considered will vary with circumstances. In a discussion of judicial review of the Secretary's 90-day findings on petitions, a House Conference report states that, when courts review such a decision, the “object of [the judicial] review is to determine whether the Secretary's

action was arbitrary or capricious *in light of the scientific and commercial information available* concerning the petitioned action” [emphasis added] (H.R. Conf. Rep. No. 97–835, at 20, reprinted in 1982 U.S.C.A.N. 2860, 2862). By requiring courts to evaluate the Secretary’s substantial information findings in light of information “available,” this statement suggests that the drafters anticipated that the Secretary could evaluate petitions in the context of scientific and commercial information available to the Services, and not limited arbitrarily to the subset of available information that is presented in the petitions. In these regulatory amendments, the Services have crafted a balanced approach that will ensure that the Services may take into account the information readily available to us as context for the information provided in a petition, without opening the door to the type of wide-ranging survey more appropriate for a status review.

Although the Services are mindful that, at the stage of formulating an initial finding, they should not engage in outside research or an effort to comprehensively compile the best available information, they must be able to place the information presented in the petition in context. The Act contemplates a two-step process in reviewing a petition. The 12-month finding is meant to be the more in-depth determination and follows a status review, while the 90-day finding is meant to be a quicker evaluation of a more limited set of information. However, based on our experience in administering the Act, the Services conclude that evaluating the information presented in the petition in a vacuum can lead to inaccurately supported decisions and misdirection of resources away from higher priorities. It would be difficult for the Services to bring informed expertise to their evaluation of the facts and claims alleged in a petition without considering the petition in the context of other information of the sort that the Services have readily available and would routinely consult in the course of their work. It is reasonable for the Services to be able to examine the information and claims included in a petition in light of readily available scientific information prior to committing limited Federal resources to the significant expense of a status review. Some examples of readily available information that the Services may use include information sent to the Services by State wildlife agencies or other parties, State fish and wildlife

databases, the Integrated Taxonomic Identification System (ITIS), the International Union for the Conservation of Nature (IUCN), the Intergovernmental Panel on Climate Change (IPCC), stock assessments, and fishery management plans (this list is not all-inclusive).

The information the Services may use may not only be stored in the traditional hard copy format in files, but may also be electronic data files as well, or stored on Web sites created by the Services or other Web sites routinely accessed by the Services. As noted, the range of information considered readily available will vary with circumstances, but could include the information physically held by any office within the Services (including, for example, NMFS Science Centers and FWS Field Offices), and may also include information stored electronically in databases routinely consulted by the Services in the ordinary course of their work. For example, it would be appropriate to consult online databases such as ITIS (<http://www.itis.gov>), a database of scientifically credible taxonomic nomenclature information maintained in part by the Services.

Section 424.14(h)(1)(iii) addresses situations in which the Services have already made a finding on or conducted a review of the listing status of a species, and, after such finding or review, receive a petition seeking to list, delist, or reclassify that species. Such prior reviews constitute information readily available to the Services and provide important context for evaluation of petitions. Although the substantial-information standard applies to all petitions under section 4(b)(3)(A) of the Act, the standard’s application is influenced by the context in which the finding is being made. The context of a finding after a status review and determination is quite different from that before any status review has been completed. Further, prior reviews represent a significant expenditure of the Services’ resources, and it would be inefficient and unnecessary to require the Services to revisit issues for which a determination has already been made, unless there is a basis for reconsideration. In the case of prior reviews that led to final agency actions (such as final listings, 12-month not warranted findings, and 90-day not-substantial findings), a petition generally would not be found to provide substantial information unless the petition provides new information or a new analysis or interpretation not previously considered in the final agency action. By “new” we mean that the information was not considered by

the Services in the prior determination or that the petitioner is presenting a different interpretation or analysis of that data.

These revisions are not meant to imply that the Service’s finding on a petition addressing the same species as a prior determination would necessarily be negative. For example, the more time that has elapsed from the completion of the prior review, the greater the potential that substantial new information has become available. As another example, the Services may have concluded a 5-year status review in which we find that a listed species no longer warrants listing, but we have not as yet initiated a rulemaking to delist the species (in other words, have not yet undertaken a final agency action). If we receive a petition to delist that species, in which the petitioner provides no new or additional information than was considered in the 5-year status review, we would likely still find that the petition presents substantial information that the petitioned action may be warranted.

Paragraph (h)(2) is substantially the same as current paragraph (b)(3). Among other changes, we added new language clarifying the standard for making expeditious-progress determinations in warranted-but-precluded findings, including (in paragraph (h)(2)(iii)(B)) a clear acknowledgement that such determinations are to be made in light of resources available, after complying with nondiscretionary duties, court orders, and court-approved settlement agreements to take actions under section 4 of the Act. In this rule, we are redesignating current paragraph (b)(4) as paragraph (h)(3), although we have removed the reference in the current language that “no further finding of substantial information will be required,” as it merely repeats statutory language.

In § 424.14(h)(2), we replace the conditional clause “If a positive finding is made” (as we used in our proposed rule published on May 21, 2015 (80 FR 29286)) with “If the Services find that the petition presents substantial information indicating that the petitioned action may be warranted,” for clarity, and to avoid introducing an additional, undefined term. We also add clarity in § 424.14(h)(2), by adding the phrase, “At the conclusion of the status review,” before the reference to the obligation of the Services to make a 12-month finding.

*Findings on a Petition To Revise Critical Habitat—Paragraph (i)*

Paragraph (i) explains the kinds of findings that the Services may make on

a petition to revise critical habitat. Paragraph (i)(1) is essentially the same as current paragraph (c)(1), and describes the standard applicable to the Service's finding at the 90-day stage. Please refer to the discussion of the "substantial information" standard discussed in the description of § 424.14(h)(1), above. Paragraph (i)(2) specifically acknowledges, consistent with the statute, that a 12-month determination on a petition that presents substantial information indicating that a revision to critical habitat may be warranted may, but need not, take a form similar to one of the findings called for at the 12-month stage in the review of a petition to list, delist, or reclassify species. Section 4(a)(3)(A) of the Act establishes a mandatory duty to designate critical habitat for listed species to the maximum extent prudent and determinable at the time of listing, but provides with respect to subsequent revision of such habitat only that the Services "may, from time-to-time thereafter as appropriate, revise such designation" [emphasis added] (16 U.S.C. 1533(a)(3)(A)(ii)).

The Services' broad discretion to decide when it is appropriate to revise critical habitat is evident in the differences between the Act's provisions discussing petitions to revise critical habitat, on the one hand, and the far more prescriptive provisions regarding the possible findings that can be made at the 12-month stage on petitions to list, delist, or reclassify species, on the other. Section 4(b)(3)(B) of the Act includes three detailed and exclusive options for 12-month findings on petitions to list, delist, or reclassify species. In contrast, section 4(b)(3)(D)(ii) requires only that, within 12 months of receipt of a petition to revise critical habitat that has been found to present substantial information that the petitioned revision may be warranted, the Secretaries (acting through the Services) determine how they intend "to proceed with the requested revision" and promptly publish notice of such intention in the **Federal Register**. The differences in these subsections indicates that the statute does not mandate that the 12-month finding procedures for petitions to list, delist, or reclassify species be followed in determining how to proceed with petitions to revise critical habitat. See *Sierra Club v. U.S. Fish and Wildlife Service*, 930 F. Supp. 2d 198 (D.D.C. 2013) (leatherback sea turtle) (12-month determinations on petitions to revise are committed to the agency's discretion by law, and thus unreviewable under the Administrative Procedure Act); and

*Morrill v. Lujan*, 802 F. Supp. 424 (S.D. Ala. 1992) (revisions to critical habitat are discretionary); see also *Barnhart v. Sigman Coal Co., Inc.*, 122 S. Ct. 941, 951 (2002) (noting that "it is a general principle of statutory construction that when 'Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion'" (citing *Russello v. United States*, 464 U.S. 16, 23 (1983)); *Federal Election Commission v. National Rifle Ass'n of America*, 254 F.3d 173, 194 (D.C. Cir. 2001) (same)).

Further, the legislative history for the 1982 amendments that added the petition provisions to the Act confirms that Congress intended to grant discretion to the Services in determining how to respond to petitions to revise critical habitat. After discussing at length the detailed listing petition provisions and their intended meaning, Congress said of the critical habitat petition requirements, "Petitions to revise critical habitat designations may be treated differently" (H.R. Rep. No. 97–835, at 22 (1982), reprinted in 1982 U.S.C.C.A.N. 2860, 2862).

The Services may find in particular situations that terminology similar to that used in the listing-petition provisions is useful for explaining their determination at the 12-month stage of how they intend to proceed on a petition to revise critical habitat. For example, the Services have, at times, used the term "warranted" to indicate that requested revisions of critical habitat would satisfy the definition of critical habitat in section 3 of the Act. However, use of the listing-petition terms in a determination of how the Services intend to proceed on a petition to revise critical habitat would not mean that the associated listing-petition procedures and timelines apply or are required to be followed with respect to the petition. For example, if the Services find that a petitioned revision of critical habitat is, in effect, "warranted," in that the areas would meet the definition of "critical habitat," that finding would not require the Services to publish a proposed rule to implement the revision in any particular timeframe. Similarly, a finding on a petition to revise critical habitat that uses the phrase "warranted but precluded," or a functionally similar phrase, to describe the Secretary's intention would not trigger the requirements of section 4(b)(3)(B)(iii) or section 4(b)(3)(C) (establishing requirements to make particular findings, to implement a monitoring system, etc.).

Although the Services have discretion to determine how to proceed with a petition to revise critical habitat, the Services think that certain factors regarding conservation and recovery of the species at issue are likely to be relevant and potentially important to most such determinations. Such factors may include, but are not limited to: The status of the existing critical habitat for which revisions are sought (e.g., when it was designated, the extent of the species' range included in the designation); the effectiveness or potential of the existing critical habitat to contribute to the conservation of the listed species at issue; the potential conservation benefit of the petitioned revision to the listed species relative to the existing designation; whether there are other, higher-priority conservation actions that need to be completed under the Act, particularly for the species that is the subject of the petitioned revision; the availability of personnel, funding, and contractual or other resources required to complete the requested revision; and the precedent that accepting the petition might set for subsequent requested revisions.

At § 424.14(i)(2), compared to our revised proposal of the rule (81 FR 23448; April 21, 2016), we add the introductory clause, "If the Services find that the petition presents substantial information that the requested revision may be warranted," for clarity.

#### *Petitions To Initially Designate Critical Habitat and Petitions for 4(d), 4(e), and 10(j) Rules—Paragraph (j)*

Paragraph (j) is substantially the same as current paragraph (d), which refers to petitions to "designate critical habitat or adopt special rules." In this regulation, for clarity, we expressly refer to the types of petitions that are covered, which are those requesting that the Services initially designate critical habitat or adopt rules under sections 4(d), 4(e), or 10(j) of the Act.

#### *Withdrawn Petitions—Paragraph (k)*

Paragraph (k) describes the process for a petitioner to withdraw a petition, and the Services' discretion to discontinue action on the withdrawn petition. Although the Services may discontinue work on a 90-day or 12-month finding for a petition that is withdrawn, in the case of a petition to list a species, the Services may use their own process to evaluate whether the species may warrant listing and whether it should become a candidate for listing. In the case of the withdrawal of a petition to delist, uplist or downlist a species, the Services may use the 5-year review

process or the annual candidate review to further evaluate the status of the species, or elect to consider the issue at any time.

#### Required Determinations

##### *Regulatory Planning and Review (Executive Orders 12866 and 13563)*

Executive Order (E.O.) 12866 provides that the Office of Management and Budget's Office of Information and Regulatory Affairs (OIRA) will review all significant rules. The OIRA has determined that this rule is not significant.

E.O. 13563 reaffirms the principles of E.O. 12866 while calling for improvements in the nation's regulatory system to promote predictability, to reduce uncertainty, and to use the best, most innovative, and least burdensome tools for achieving regulatory ends. The executive order directs agencies to consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public where these approaches are relevant, feasible, and consistent with regulatory objectives. E.O. 13563 emphasizes further that regulations must be based on the best available science and that the rulemaking process must allow for public participation and an open exchange of ideas. We have developed this rule in a manner consistent with these requirements. This rule is consistent with E.O. 13563, and in particular with the requirement of retrospective analysis of existing rules, designed "to make the agency's regulatory program more effective or less burdensome in achieving the regulatory objectives."

##### *Regulatory Flexibility Act*

Under the Regulatory Flexibility Act (as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996; 5 U.S.C. 601 *et seq.*), whenever a Federal agency is required to publish a notice of rulemaking for any proposed or final rule, it must prepare, and make available for public comment, a regulatory flexibility analysis that describes the effect of the rule on small entities (*i.e.*, small businesses, small organizations, and small government jurisdictions). However, no regulatory flexibility analysis is required if the head of an agency, or his designee, certifies that the rule will not have a significant economic impact on a substantial number of small entities. SBREFA amended the Regulatory Flexibility Act to require Federal agencies to provide a statement of the factual basis for certifying that a rule will not have a

significant economic impact on a substantial number of small entities. Pursuant to section 605(b), the Chief Counsel for Regulation, Department of Commerce, certified to the Chief Counsel for Advocacy, Small Business Administration that this final rule, if promulgated, will not have a significant economic impact on a substantial number of small entities. The Director of the U.S. Fish and Wildlife Service also certifies that this rule will not have a significant economic impact on a substantial number of small entities. The following discussion explains our rationale.

This rule will revise and clarify the regulations governing documentation needed by the Services in order to effectively and efficiently evaluate petitions under the Act. While some of the changes may require petitioners to expend some time (such as notifying State(s)) and effort (providing complete petitions), we do not expect this will prove to be a hardship, economically or otherwise. Further, following a review of entities that have petitioned the Services, we find that most are individuals or organizations that are not considered small business entities. And while small entities may choose to petition the Services, any economic effects would be minimal because any increase in costs (such as notification to States or electronic filing of the petition versus hardcopy should they choose) will be nominal, *i.e.*, not a significant economic impact. As a result, we have determined that these revised regulations will not result in a significant economic impact on a substantial number of small entities.

##### *Unfunded Mandates Reform Act (2 U.S.C. 1501 et seq.)*

In accordance with the Unfunded Mandates Reform Act (2 U.S.C. 1501 *et seq.*):

(a) On the basis of information contained in the *Regulatory Flexibility Act* section above, this rule will not "significantly or uniquely" affect small governments. We have determined and certify pursuant to the Unfunded Mandates Reform Act, 2 U.S.C. 1502, that this rule will not impose a cost of \$100 million or more in any given year on local or State governments or private entities. A Small Government Agency Plan is not required. As explained above, small governments will not be affected because the rule will not place additional mandates on any city, county, or other local municipalities.

(b) This rule will not produce a Federal mandate on State, local, or tribal governments or the private sector of \$100 million or greater in any year; that

is, this rule is not a "significant regulatory action" under the Unfunded Mandates Reform Act. This rule will impose no obligations on State, local, or tribal governments.

##### *Takings (E.O. 12630)*

In accordance with E.O. 12630, this rule will not have significant takings implications. This rule will not pertain to "taking" of private property interests, nor will it directly affect private property. A takings implication assessment is not required because this rule (1) will not effectively compel a property owner to suffer a physical invasion of property and (2) will not deny all economically beneficial or productive use of the land or aquatic resources. This rule will substantially advance a legitimate government interest (conservation and recovery of endangered and threatened species) and will not present a barrier to all reasonable and expected beneficial use of private property.

##### *Federalism (E.O. 13132)*

In accordance with E.O. 13132, we have considered whether this rule will have significant Federalism effects and have determined that a federalism summary impact statement is not required. This rule pertains only to the petition process under the Endangered Species Act, and will not have substantial direct effects on the States, on the relationship between the Federal Government and the States, or on the distribution of power and responsibilities among the various levels of government.

##### *Civil Justice Reform (E.O. 12988)*

This rule does not unduly burden the judicial system and meets the applicable standards provided in sections 3(a) and 3(b)(2) of Executive Order 12988. This rule will clarify the petition process under the Endangered Species Act.

##### *Government-to-Government Relationship With Tribes*

In accordance with Executive Order 13175 ("Consultation and Coordination with Indian Tribal Governments," November 6, 2000), the Department of the Interior Manual at 512 DM 2, the Department of Commerce (DOC) Tribal Consultation and Coordination Policy (May 21, 2013), DOC Departmental Administrative Order (DAO) 218-8, and NOAA Administrative Order (NAO) 218-8 (April 2012), we have considered possible effects of this final rule on federally recognized Indian Tribes. Following an exchange of information with tribal representatives, we have determined that this rule, which

clarifies the general process for submission and review of petitions, does not have “tribal implications” as defined in Executive Order 13175. This rule will assist petitioners in providing complete petitions and enhance the efficiency and effectiveness of the petition process to support species conservation. We will continue to collaborate with Tribes on issues related to federally listed species and their habitats and work with them as we implement the provisions of the Act. See Joint Secretarial Order 3206 (“American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act,” June 5, 1997).

*Paperwork Reduction Act of 1995 (PRA)*

This final rule contains information collections for which the Office of Management and Budget (OMB) approval is required under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). We (National Marine Fisheries Service and U.S. Fish and Wildlife Service, Services) may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. OMB has approved the information

collection requirements associated with this rule and assigned OMB Control Number 1018–0165, which expires September 30, 2019.

Any interested person may submit a written petition to the Services requesting to add a species to the Lists of Endangered or Threatened Wildlife and Plants (Lists), remove a species from the Lists, change the listed status of a species, or revise the boundary of an area designated as critical habitat. OMB has approved the following information collection:

*Petitions.* § 424.14(c) of this rule specifies the information that must be included in petitions.

*Notification of States.* § 424.14(b) requires that petitioners must notify applicable States of their intention to submit a petition to list, delist, or change the status of a species, or to revise critical habitat. This notification must be made at least 30 days prior to submission of the petition. Copies of the notification letters must be included with the petition.

The burden table below includes information for both NMFS and FWS. Based on the average number of species per year over the past 5 years regarding which FWS and NMFS were petitioned, we estimate the average annual number

of petitions received by both Services combined to be 50 (25 for FWS and 25 for NMFS). Because each petition will be limited to a single species under the regulations, the average number of species included in petitions over the past 5 years may be more accurate than the average number of petitions as a gauge of the number of petitions we are likely to receive going forward. This estimate of the number of petitions the Services will receive in the future may be generous. We estimate that there will be a need for a petitioner to notify an average of 10 States per petition. Many species are narrow endemics and may only occur in one State, but others are wide-ranging and may occur in many States. However, we are erring on the side of over-estimating the potential number of States petitioners will need to notify on average.

*OMB Control No:* 1018–0165.

*Title:* Petitions, 50 CFR 424.14.

*Service Form Number(s):* None.

*Description of Respondents:* Individuals, businesses, or organizations.

*Respondent’s Obligation:* Required to obtain or retain a benefit.

*Estimated Annual Number of Respondents:* 50.

*Frequency of Collection:* On occasion.

Activity/requirement	Total annual responses	Completion time per response (hours)	Total annual burden hours
Petitioner—prepare and submit petitions .....	50	120	6,000
Petitioner—notify States .....	500	1	500
<b>Total .....</b>	<b>550</b>	<b>.....</b>	<b>6,500</b>

*Total Annual Nonhour Cost Burden:* \$1,000.00, based on \$20 per petition (for materials, printing, postage, data equipment maintenance, etc).

During the proposed rule stage, we solicited comments for a period of 30 days on the information collection requirements. We received one comment.

*Comment:* The commenter agreed that most petitions can be prepared in approximately 120 hours, but more complex petitions can take much more time to assemble the information within the petition.

*Response:* We agree that in some cases, time to prepare a petition submission may be considerably greater than our estimate, while in other cases, it may be less. We believe 120 hours is a reasonable estimate for the average petition, acknowledging that there could be a small proportion of submissions that require more or less time. We have

retained our estimate of 120 hours. All comments on the rule are addressed in the preamble above.

The public may comment, at any time, on any aspect of the information collection requirements in this rule and may submit any comments to the Information Collection Clearance Officer, U.S. Fish and Wildlife Service, MS: BPHC, 5275 Leesburg Pike, Falls Church, VA 22041–3803 (mail); or [hope\\_grey@fws.gov](mailto:hope_grey@fws.gov) (email).

*National Environmental Policy Act*

We have analyzed this regulation in accordance with the criteria of the National Environmental Policy Act (NEPA; 42 U.S.C. 4321 *et seq.*), the Department of the Interior regulations on Implementation of the National Environmental Policy Act (43 CFR 46.10–46.450), the Department of the Interior Manual (516 DM 1–6 and 8), and NOAA Administrative Orders

(NAOs) 216–6A and 216–6. Our analysis includes evaluating whether this action is administrative, legal, technical, or procedural in nature and, therefore, a categorical exclusion applies.

Following a review of the changes to the regulations at 50 CFR 424.14 and our requirements under NEPA, we find that the categorical exclusion found at 43 CFR 46.210(i) applies to these regulation changes. At 43 CFR 46.210(i), the Department of the Interior has found that the following category of actions would not individually or cumulatively have a significant effect on the human environment and are, therefore, categorically excluded from the requirement for completion of an environmental assessment or environmental impact statement: “Policies, directives, regulations, and guidelines: That are of an administrative, financial, legal, technical, or procedural nature.”



NAO 216–6 contains a substantially identical exclusion for “policy directives, regulations and guidelines of an administrative, financial, legal, technical or procedural nature” (§ 6.03c.3(i)).

At the time DOI’s categorical exclusion was promulgated, there was no preamble language that would assist in interpreting what kinds of actions fall within the categorical exclusion. However, in 2008, the preamble for a language correction to this categorical exclusion gave as an example of an action that would fall within the exclusion the issuance of guidance to applicants for transferring funds electronically to the Federal Government. In addition, an example of a recent **Federal Register** notice invoking this categorical exclusion was a final rule that established the timing requirements for the submission of a Site Assessment Plan or General Activities Plan for a renewable energy project on the Outer Continental Shelf (78 FR 12676; February 26, 2013). These regulations fell within the categorical exclusion because they affected the process inherent to an agency action rather than the agency action itself, or clarified, rather than changed, the substance of the agencies’ analyses or outcomes of their decisions.

The changes to the petition regulations are similar to these examples of actions that are fundamentally administrative, technical, and procedural in nature. The changes to the regulations at 50 CFR 424.14 clarify the procedures for submitting and evaluating petitions under Section 4 of the Act. In addition, the regulation revisions provide transparency for the practices and interpretations that the Services have adopted and applied as a result of case law or pragmatic considerations. The Services also make minor wording and formatting revisions throughout the regulations to reflect plain-language standards. The regulation revision as a whole carries out the requirements of Executive Order 13563 because, in this rule, the Services have analyzed existing rules retrospectively “to make the agencies’ regulatory program more effective or less burdensome in achieving the regulatory objectives.”

We also considered whether any “extraordinary circumstances” apply to this situation, such that the DOI categorical exclusion would not apply. See 43 CFR 46.215 (“Categorical Exclusions: Extraordinary Circumstances”). We determined that no extraordinary circumstances apply. Although the final regulations would revise the implementing regulations for

section 4 of the Act to provide greater clarity to petitioners on information that is likely to improve efficiency and accuracy in processing petitions, the effects of these proposed changes would not “have significant impacts on species listed, or proposed to be listed, on the List of Endangered or Threatened Species or have significant impacts on designated Critical Habitat for these species,” as nothing in the revised regulations is expected to determine or change the outcome of any status review of a species or any decision on a petition to revise critical habitat. Furthermore, the revised regulations do not “[e]stablish a precedent for future action or represent a decision in principle about future actions with potentially significant environmental effects” (43 CFR 46.215(e)). None of the extraordinary circumstances in 43 CFR 46.215(a) through (l) apply to the revised regulations.

Nor would the final regulations trigger any of the extraordinary circumstances of NAO 216–6. This rule does not involve a geographic area with unique characteristics, is not the subject of public controversy based on potential environmental consequences, will not result in uncertain environmental impacts or unique or unknown risks, does not establish a precedent or decision in principle about future proposals, will not have significant cumulative impacts, and will not have any adverse effects upon endangered or threatened species or their habitats (§ 5.05c).

We completed an Environmental Action Statement for the Categorical Exclusion for the revised regulations in 50 CFR 424.14.

#### *Energy Supply, Distribution or Use (E.O. 13211)*

Executive Order 13211 requires agencies to prepare Statements of Energy Effects when undertaking certain actions. This rule is not expected to affect energy supplies, distribution, or use. Therefore, this action is not a significant energy action, and no Statement of Energy Effects is required.

#### **List of Subjects in 50 CFR Part 424**

Administrative practice and procedure, Endangered and threatened species.

#### **Regulation Promulgation**

Accordingly, we amend part 424, subchapter A of chapter IV, title 50 of the Code of Federal Regulations, as set forth below:

#### **PART 424—LISTING ENDANGERED AND THREATENED SPECIES AND DESIGNATING CRITICAL HABITAT**

■ 1. The authority citation for part 424 continues to read as follows:

*Authority:* 16 U.S.C. 1531 *et seq.*

■ 2. Add § 424.03 to read as follows:

#### **§ 424.03 Has the Office of Management and Budget approved the collection of information?**

The Office of Management and Budget reviewed and approved the information collection requirements contained in subpart B and assigned OMB Control No. 1018–0165. We use the information to evaluate and make decisions on petitions. We may not conduct or sponsor and you are not required to respond to a collection of information unless it displays a currently valid OMB control number. You may send comments on the information collection requirements to the Information Collection Clearance Officer, U.S. Fish and Wildlife Service, at the address listed at 50 CFR 2.1(b).

■ 3. Revise § 424.14 to read as follows:

#### **§ 424.14 Petitions.**

(a) *Ability to petition.* Any interested person may submit a written petition to the Services requesting that one of the actions described in § 424.10 be taken for a species.

(b) *Notification of intent to file petition.* For a petition to list, delist, or reclassify a species, or for petitions to revise critical habitat, petitioners must provide notice to the State agency responsible for the management and conservation of fish, plant, or wildlife resources in each State where the species that is the subject of the petition occurs. This notification must be made at least 30 days prior to submission of the petition. This notification requirement shall not apply to any petition submitted pertaining to a species that does not occur within the United States.

(c) *Requirements for petitions.* A petition must clearly identify itself as such, be dated, and contain the following information:

(1) The name, signature, address, telephone number, if any, and the association, institution, or business affiliation, if any, of the petitioner;

(2) The scientific name and any common name of a species of fish or wildlife or plants that is the subject of the petition. Only one species may be the subject of a petition, which may include, by hierarchical extension based on taxonomy and the Act, any subspecies or variety, or (for vertebrates)



any potential distinct population segments of that species;

(3) A clear indication of the administrative action the petitioner seeks (e.g., listing of a species or revision of critical habitat);

(4) A detailed narrative justifying the recommended administrative action that contains an analysis of the information presented;

(5) Literature citations that are specific enough for the Services to readily locate the information cited in the petition, including page numbers or chapters as applicable;

(6) Electronic or hard copies of supporting materials, to the extent permitted by U.S. copyright law, or appropriate excerpts or quotations from those materials (e.g., publications, maps, reports, letters from authorities) cited in the petition;

(7) For a petition to list, delist, or reclassify a species, information to establish whether the subject entity is a "species" as defined in the Act;

(8) For a petition to list a species, or for a petition to delist or reclassify a species in cases where the species' range has changed since listing, information on the current and historical geographic range of the species, including the States or countries intersected, in whole or part, by that range; and

(9) For a petition to list, delist or reclassify a species, or for petitions to revise critical habitat, copies of the notification letters or electronic communication which petitioners provided to the State agency or agencies responsible for the management and conservation of fish, plant, or wildlife resources in each State where the species that is the subject of the petition currently occurs.

(d) *Information to be included in petitions to add or remove species from the lists, or change the listed status of a species.* The Service's determination as to whether the petition provides substantial scientific or commercial information indicating that the petitioned action may be warranted will depend in part on the degree to which the petition includes the following types of information:

(1) Information on current population status and trends and estimates of current population sizes and distributions, both in captivity and the wild, if available;

(2) Identification of the factors under section 4(a)(1) of the Act that may affect the species and where these factors are acting upon the species;

(3) Whether and to what extent any or all of the factors alone or in combination identified in section 4(a)(1) of the Act

may cause the species to be an endangered species or threatened species (i.e., the species is currently in danger of extinction or is likely to become so within the foreseeable future), and, if so, how high in magnitude and how imminent the threats to the species and its habitat are;

(4) Information on adequacy of regulatory protections and effectiveness of conservation activities by States as well as other parties, that have been initiated or that are ongoing, that may protect the species or its habitat; and

(5) A complete, balanced representation of the relevant facts, including information that may contradict claims in the petition.

(e) *Information to be included in petitions to revise critical habitat.* The Services' determinations as to whether the petition provides substantial scientific information indicating that the petitioned action may be warranted will depend in part on the degree to which the petition includes the following types of information:

(1) A description and map(s) of areas that the current designation does not include that should be included, or includes that should no longer be included, and a description of the benefits of designating or not designating these specific areas as critical habitat. Petitioners should include sufficient supporting information to substantiate the requested changes, which may include GIS data or boundary layers that relate to the request, if appropriate;

(2) A description of physical or biological features essential for the conservation of the species and whether they may require special management considerations or protection;

(3) For any areas petitioned to be added to critical habitat within the geographical area occupied by the species at time it was listed, information indicating that the specific areas contain one or more of the physical or biological features (including characteristics that support ephemeral or dynamic habitat conditions) that are essential to the conservation of the species and may require special management considerations or protection. The petitioner should also indicate which specific areas contain which features;

(4) For any areas petitioned for removal from currently designated critical habitat within the geographical area occupied by the species at the time it was listed, information indicating that the specific areas do not contain the physical or biological features (including characteristics that support ephemeral or dynamic habitat conditions) that are essential to the

conservation of the species, or that these features do not require special management considerations or protection;

(5) For areas petitioned to be added to or removed from critical habitat that were outside the geographical area occupied by the species at the time it was listed, information indicating why the petitioned areas are or are not essential for the conservation of the species; and

(6) A complete, balanced representation of the relevant facts, including information that may contradict claims in the petition.

(f) *Response to petitions.* (1) If a request does not meet the requirements set forth at paragraph (c) of this section, the Services will generally reject the request without making a finding, and will, within a reasonable timeframe, notify the sender and provide an explanation of the rejection. However, the Services retain discretion to process a petition where the Services determine there has been substantial compliance with the relevant requirements.

(2) If a request does meet the requirements set forth at paragraph (c) of this section, the Services will acknowledge receipt of the petition by posting information on the respective Service's Web site.

(g) *Supplemental information.* If the petitioner provides supplemental information before the initial finding is made and states that it is part of the petition, the new information, along with the previously submitted information, is treated as a new petition that supersedes the original petition, and the statutory timeframes will begin when such supplemental information is received.

(h) *Findings on petitions to add or remove a species from the lists, or change the listed status of a species.* (1) To the maximum extent practicable, within 90 days of receiving a petition to add a species to the lists, remove a species from the lists, or change the listed status of a species, the Services will make a finding as to whether the petition presents substantial scientific or commercial information indicating that the petitioned action may be warranted. The Services will publish the finding in the **Federal Register**.

(i) For the purposes of this section, "substantial scientific or commercial information" refers to credible scientific or commercial information in support of the petition's claims such that a reasonable person conducting an impartial scientific review would conclude that the action proposed in the petition may be warranted. Conclusions drawn in the petition without the

support of credible scientific or commercial information will not be considered “substantial information.”

(ii) In reaching the initial finding on the petition, the Services will consider the information referenced at paragraphs (c), (d), and (g) of this section. The Services may also consider information readily available at the time the determination is made. The Services are not required to consider any supporting materials cited by the petitioner if the cited document is not provided in accordance with paragraph (c)(6) of this section.

(iii) The “substantial scientific or commercial information” standard must be applied in light of any prior reviews or findings the Services have made on the listing status of the species that is the subject of the petition. Where the Services have already conducted a finding on, or review of, the listing status of that species (whether in response to a petition or on the Services’ own initiative), the Services will evaluate any petition received thereafter seeking to list, delist, or reclassify that species to determine whether a reasonable person conducting an impartial scientific review would conclude that the action proposed in the petition may be warranted despite the previous review or finding. Where the prior review resulted in a final agency action, a petitioned action generally would not be considered to present substantial scientific and commercial information indicating that the action may be warranted unless the petition provides new information not previously considered.

(2) If the Services find that a petition presents substantial information indicating that the petitioned action may be warranted, the Services will commence a review of the status of the species concerned. At the conclusion of the status review and within 12 months of receipt of the petition, the Services will make one of the following findings:

(i) The petitioned action is not warranted, in which case the Service shall publish a finding in the **Federal Register**.

(ii) The petitioned action is warranted, in which case the Services

shall publish in the **Federal Register** a proposed regulation to implement the action pursuant to § 424.16; or

(iii) The petitioned action is warranted, but:

(A) The immediate proposal and timely promulgation of a regulation to implement the petitioned action is precluded because of other pending proposals to list, delist, or change the listed status of species; and

(B) Expeditious progress is being made to list, delist, or change the listed status of qualified species, in which case such finding will be published in the **Federal Register** together with a description and evaluation of the reasons and data on which the finding is based. The Secretary will make any 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.

(3) If a finding is made under paragraph (h)(2)(iii) of this section with regard to any petition, the Services will, within 12 months of such finding, again make one of the findings described in paragraph (h)(2) of this section with regard to such petition.

(i) *Findings on petitions to revise critical habitat.* (1) To the maximum extent practicable, within 90 days of receiving a petition to revise a critical habitat designation, the Services will make a finding as to whether the petition presents substantial scientific information indicating that the revision may be warranted. The Services will publish such finding in the **Federal Register**.

(i) For the purposes of this section, “substantial scientific information” refers to credible scientific information in support of the petition’s claims such that a reasonable person conducting an impartial scientific review would conclude that the revision proposed in the petition may be warranted.

Conclusions drawn in the petition without the support of credible scientific information will not be considered “substantial information.”

(ii) The Services will consider the information referenced at paragraphs

(c), (e), and (g) of this section. The Services may also consider other information readily available at the time the determination is made in reaching its initial finding on the petition. The Services are not required to consider any supporting materials cited by the petitioner if the cited documents are not provided in accordance with paragraph (b)(6) of this section.

(2) If the Services find that the petition presents substantial information that the requested revision may be warranted, the Services will determine, within 12 months of receiving the petition, how to proceed with the requested revision, and will promptly publish notice of such intention in the **Federal Register**. That notice may, but need not, take a form similar to one of the findings described under paragraph (h)(2) of this section.

(j) *Petitions to designate critical habitat or adopt rules under sections 4(d), 4(e), or 10(j) of the Act.* The Services will conduct a review of petitions to designate critical habitat or to adopt a rule under section 4(d), 4(e), or 10(j) of the Act in accordance with the Administrative Procedure Act (5 U.S.C. 553) and applicable Departmental regulations, and take appropriate action.

(k) *Withdrawal of petition.* A petitioner may withdraw the petition at any time during the petition process by submitting such request in writing. If a petition is withdrawn, the Services may, at their discretion, discontinue action on the petition finding, even if the Services have already made a 90-day finding that there is substantial information indicating that the requested action may be warranted.

Dated: September 15, 2016.

**Michael J. Bean,**

*Principal Deputy Assistant Secretary for Fish and Wildlife and Parks.*

Dated: September 12, 2016.

**Samuel D. Rauch III,**

*Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.*

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