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Endangered Species Listing Process

Technical Brief — *Environment, Water Availability and Resource Risk Management*

The Listing Process and Where EPRI/ EPRI Members Have Opportunities to Provide Input

The process of listing a species as endangered or threatened is complex, but deserves attention to understand where in the process it is possible to provide information to advance the scientific basis for making endangered species listing decisions. As well, there may be opportunities to economically protect candidate species to avoid listing. The graphic on the next page provides an overview, with ☆ indicating potential opportunities for input.

From Petition to 'the Maybe Pile' (Candidate Status)

Most species start the listing process by a formal petition for protection, usually promoted by a non-profit group. In fact, 90% of the petitions received by the U.S. Fish and Wildlife Service since 2007 have come from two groups: the Center for Biological Diversity and Wild Earth Gaurdians. There has been an increase of mega-petitions from these organizations. In 2010 alone, the two organizations petitioned 1,683 species.

U.S. FWS can also 'petition' a species through their Candidate Review process. Whatever the instigation, the U.S. FWS has 90 days to review scientific information and make a decision as to whether the species warrants a more thorough 12-month review. The U.S. FWS considers the following factors in listing decisions:

- "The present or threatened destruction, modification, or curtailment of its habitat or range;
- Overutilization for commercial, recreational, scientific, or educational purposes;
- Disease or predation;
- The inadequacy of existing regulatory mechanisms; and
- Other natural or manmade factors affecting its survival."

☆ Prior to the 12-month review, there is a public comment period published in the Federal Register. One can submit comments, information or data to inform the factors that the U.S. FWS considers during the review.

After the 12-month review process, the U.S. FWS makes a finding that the species is either "not warranted" for listing, is "warranted but precluded," or "listing is warranted." The "warranted but precluded" status indicates that the U.S. FWS has found evidence that the species is worthy of protection, but other species have priority for efforts and funding. These species are 'candidates' for protection, thus the term "candidate species." Candidate species are reviewed annually by U.S. FWS staff along with state and other partners, and this ☆ annual candidate review process is another opportunity to provide input to U.S. FWS on any new information about the species including reductions of threats or increased conservation (personal communication, Karen Anderson and Julie Moore, U.S. FWS, 2013). If the U.S. FWS finds "listing is warranted," then a proposed rule will be published in the Federal Register, again with a public comment period. ☆

In addition to filing petitions to list species, non-profit groups additionally filed suits to catalyze the U.S. FWS to make final listing decisions on hundreds of species that were lingering on the maybe pile. As a result of this "multi-district litigation," the federal government has agreed to make decisions on hundreds[1] of species within the next several years (see 2013-2018 workplan). These hundreds of candidate species will either be "warranted" for protection and will move to a proposed rule to list the species or they will be determine to be "not warranted" and taken off the candidate species list, reducing that 'Maybe' pile. While this settlement decision provides some degree of finality for this set of species, many other species remain on the candidate list and new species continue to be petitioned.

Pre-Compliance Mitigation

☆ One other opportunity in the listing process is to undertake conservation actions to provide regulatory certainty or even preclude listing. Pre-compliance mitigation could theoretically be more cost-effective, prevent disruptions to operations, and provide an incentive to voluntarily recover species. A Candidate Conservation Agreement with Assurances, or CCAA, is a means of pre-compliance mitigation.

[1] We were unable to determine the exact number of candidate species requiring final decision in the multi-district litigation. A July 2011 U.S. FWS press release mentions "more than 250", a WildEarth Guardians press release about a May 2011 settlement mentions 252, and a Center for Biological diversity press release about the a separate July 2011 settlement agreement between [U.S. DOI Secretary] Salazar and Center for Biological Diversity mentions 757 species – but part of this figure overlaps with the species in the May 2011 settlement and another portion of the number includes initial reviews, not final listing decisions. Note that the 2013-2018 workplan includes 458 candidate species from the multi-district litigation as well as other candidate species.

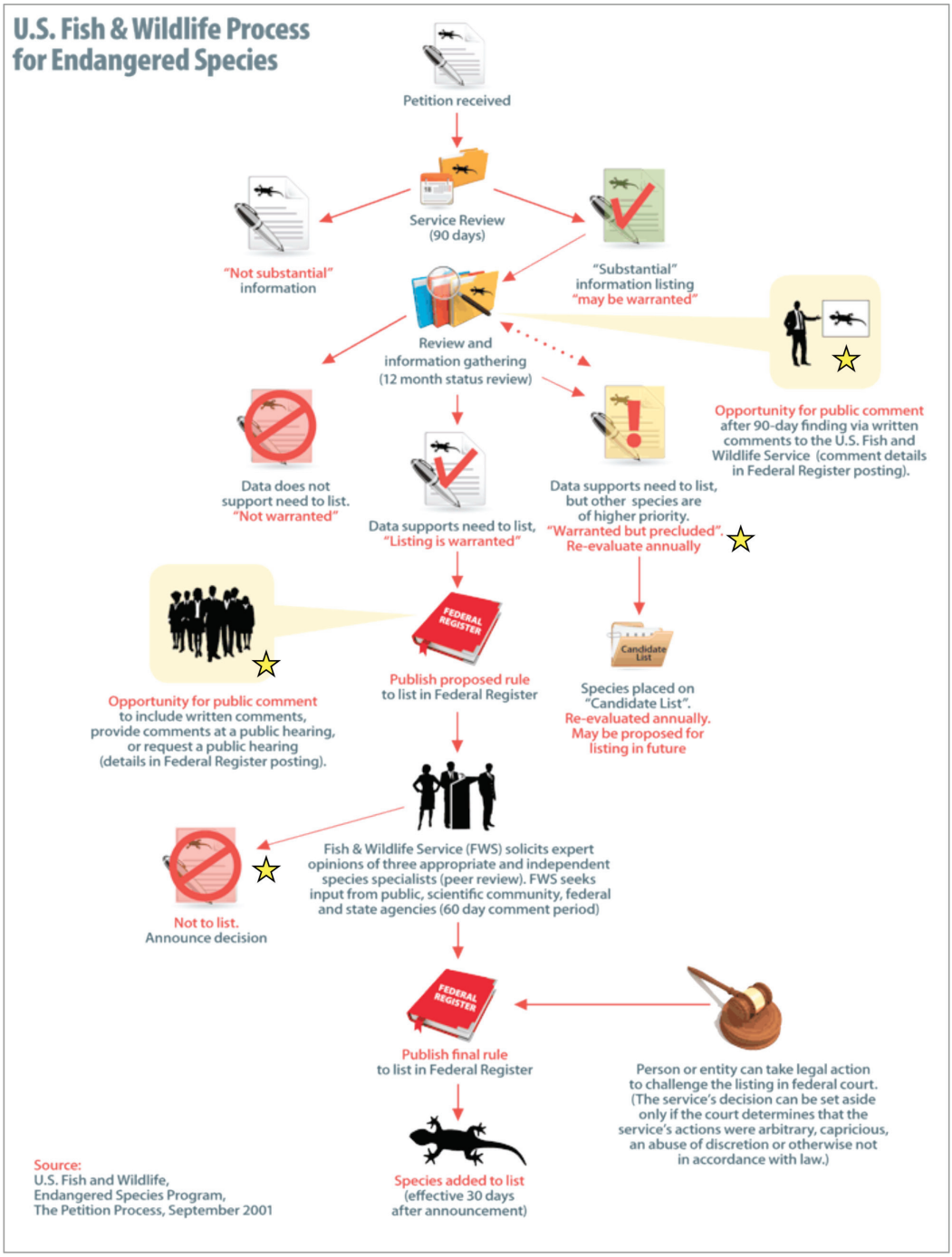

Figure 1. U.S. Fish and Wildlife Process for Endangered Species. Graphic used with permission from the Texas Public Comptroller of Public Accounts

*"A **Candidate Conservation Agreement with Assurances** provides non-Federal property owners who voluntarily agree to manage their lands or waters to remove threats to candidate or proposed species assurances that their conservation efforts will not result in future regulatory obligations in excess of those they agree to at the time they enter into the Agreement…*

Property owners may protect and enhance existing populations and habitats, restore degraded habitat, create new habitat, augment existing populations, restore historic populations, or undertake other activities on their lands to improve the status of candidate or proposed species." (U.S. FWS 2002 CCAA factsheet)

While CCAAs are still a relatively new tool—a recent report cited that there are 26 CCAAs nationwide—they provide regulatory certainty that may prove to be a cost-effective means of species mitigation. The U.S. FWS has even made several decisions not to list a species based on the protections of CCAAs. U.S. FWS decided not to list the Adams Cave beetles based on a CCAA in 2005, and in 2012 decided not to list the dunes sagebrush lizard because of CCAAs developed in New Mexico and West Texas.

There are other indications that pre-compliance mitigation may be a new focus for U.S. FWS. Interior Secretary Ken Salazar "remarked that the public should 'take inspiration' from the

withdrawal decision" of the dunes sagebrush lizard as a way to conserve the greater sage grouse which is up for listing decision by 2015. At a recent conference, Paul Souza, the Deputy Assistant Director of Ecological Services at the U.S. FWS official noted that they were finalizing review of public comments from a 2012 Advanced Notice of Proposed Rulemaking on "Expanding Incentives for Voluntary Conservation Actions under the Endangered Species Act."

Summary of Conversations with U.S. FWS and Other Stakeholder Groups

The Water Availability and Resource Risk Management Program's Endangered Species Advisory Committee and Program staffers have engaged in multiple dialogues over the last several months. Individual contacts are listed below, and a summary of stakeholder involvement in promotion or research related to endangered species is provided in table 1.

Contacts

- Paul Souza, Deputy Assistant Director, Ecological Services at the U.S. FWS
- Karen Anderson, Candidate Conservation, Ecological Services, U.S. FWS
- Julie Moore, Ecological Services, U.S. FWS
- Julia Bell, Independent Petroleum Association of America (IPAA)
- Cary DuPuy, Natural Resource Policy Advisor, Texas Public Comptroller's office
- Erin Chen, Director of Development, NatureServe
- Chris Galik, Duke University's Nicholas Institute
- Al Lucier, NCASI, Senior Vice President
- Southeast Regional office, U.S. FWS

Table 1. Stakeholder involvement in promotion or research related endangered species

Subject Area	Group	Activities
Tracking news for constituents	IPAA	IPAA maintains an ESAwatch.org blog and weekly newsletter
	Texas Public Comptroller's office	Provides information on website, tracks economics impacts of ESA
	NCASI	Seeks to increase awareness of members about recent trends in listing and potential implications to their operations
Identifying high priority species	IPAA	Prioritizes wide-ranging species with potential high economic impact: sage grouse, lesser prairie chicken; tracks open comment periods in Federal Register
	Texas Public Comptroller's office	Identified 100+ species up for review, maps the species by county, tracks this 'watch list' and provides information on comment periods online and in species updates
	The Nicholas Institute	Graduate student project identified southeastern watersheds with multiple endangered & proposed species; the Institute proposes to research listing proposals to identify most affected stakeholders
	U.S. FWS – Nationwide	Reviews and prioritizes candidate species – in a range from 1 to 12 (with 1 being highest priority for listing)
	U.S. FWS – SE Region	Mapped the number of candidate and petitioned species in the southeast by watershed
	NatureServe	Have their own ranking system for extinction risk/conservation status, provides information on legal status (e.g., endangered, threatened, candidate status)
	UWAG	Asked members to prioritize candidate species – outcome unknown
Conducting research	Texas Public Comptroller's office	The office (+ partners) compiled data and survey protocols for species under review, discussed how to gather this data effectively, identified gaps in needed data and are looking at options to address the gaps; supported University of Texas-Austin research on potential reduced water availability for proposed listings
	The Nicholas Institute	Propose scientific research (species ranges, grouping, life history characteristics, risks, water data) and policy research on cost and benefits of novel policy options
	U.S. FWS – various levels	Research on species occurrence, range, threats
	NatureServe	Along with their natural heritage partners in states, NatureServe gathers, manages, and analyzes biological and ecological data; provides data
Stakeholder coordination	The Nicholas Institute	Propose to engage and coordinate stakeholders and policymakers in the SE (or broader) to disseminate data and look for regional ecosystem management/pre-compliance opportunities

Table 1 (continued). Stakeholder involvement in promotion or research related endangered species

Subject Area	Group	Activities
Pre-compliance species mitigation	Texas Public Comptroller's office	Led the CCAA for Dunes sagebrush lizard in west Texas
	U.S. FWS – Nationwide	Supporting pre-compliance; have chosen not to list Dunes sagebrush lizard because of CCAA; have requested public comments on incentives for voluntary conservation; are considering conservation banking policy update to include pre-compliance banking
	The Nicholas Institute	Exploring the advantages and disadvantages of multiple species management and pre-listing conservation
Advocating for Endangered Species Act reform	NESARC	National Endangered Species Act Reform Coalition - dedicated to improving and updating the ESA
	House group	In May, the U.S. House of Representatives launched an endangered species act working group to *"examine the impacts of litigation along with a number of other specific topics and questions including: how to measure ESA progress; how to define success; if the ESA is working to achieve its goals; the role of state and local governments in recovering species; whether the ESA conserves species while ensuring property and water rights protection; the need for public engagement and input; and more."* (link)

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