Glenn Hegar Texas Comptroller of Public Accounts

July 15, 2015

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

Re: Comments on proposed changes to the regulations for petitions under the Endangered Species Act (Docket No. FWS-HQ-ES-2015-0016)

To Whom It May Concern:

Thank you for the opportunity to provide input on the U.S. Fish and Wildlife Service's (FWS) and the National Marine Fisheries Service's (NMFS) (collectively, the Services) proposed revision to the regulations for petitions for endangered and threatened wildlife and plants.

My duties as Texas Comptroller include serving as the presiding officer of the Interagency Task Force on Economic Growth and Endangered Species (Task Force). This Task Force is required by Texas statute and reviews actions taken under the Endangered Species Act (ESA) that could impact the state's economy and works to assist efforts at all levels of government and in the private sector to protect species and comply with the ESA as efficiently and effectively as possible.

I support the changes proposed by the Services to limit petitions to single species, include affected states in the process and require more information from petitioners. These revisions will help make the review process more efficient and thorough and ensure efforts are spent on species most truly in need of listing.

As the Services move forward with this proposal, I offer the following comments and suggestions to allow meaningful input from states and increase the transparency and efficacy of the petition process.

Comments on the Services' Proposed Rules

424.14 (b)(2) …The scientific and any common name of the species that is the subject of the petition. One and only one species may be the subject of a petition.

I strongly support the proposal to limit petitions to only one species. This will confine the information in the petition to the population and threats of the species for which it seeks an action. With a petition focused solely on one species, the Services will be better able to evaluate the information presented within the narrow time frame allowed by the ESA and clearly articulate the basis for its decision on the 90-day petition. It further will allow the public and affected entities to adequately prepare for and participate in the 12-month review for any species that the Services find that listing may be warranted.

424.14 (b)(9)(i) That a copy of the petition was provided to the State agency(ies) responsible for the management and conservation of fish, plant, or wildlife resources in each State where the species occurs at least 30 days prior to submission to the Service.

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a. State Participation in the 90-Day Decision Process Is an Essential Element in the Cooperation Mandated by the ESA

I applaud the Services' attempt to create a meaningful role for the States in the initial phase of the petition process. The proposed utilization of the States in the petition process is consistent with the ESA's recognition of the state's expertise and informational resources. Incorporating the states into the beginning of the petition process follows from the requirement in Section 6 that the Services cooperate with the states to the "maximum extent practicable" and gives significant substance to Section 4(b)'s requirement that the Services take into account efforts by the State or any political subdivision to protect the species.

Requiring state notification will provide an additional view on the accuracy and completeness of the scientific or commercial information included in the petition. States are likely to have information on the status of petitioned species and the habitats on which they depend as well as the adequacy of their regulatory protections and conservation activities statewide. Examples of such information may include monitoring program data, harvesting data, habitat availability and quality data, information gathered by qualified employees in the field or knowledge of on-going or recently completed studies that have not yet been released. States often know the most about conservation or regulatory programs and efforts in their state and how those programs are working.

With this understanding of the petitioned species and related habitat, State comment can assist the Services by providing a fuller view of the status and potential need to list the species. Moreover, inclusion of State input in the 90-day finding process can provide additional indicia of reliability to the Service's 90-day findings.

In recognition of the States' expertise and to be consistent with the mandate of Section 6, I urge that this provision apply to both the Services, not just the FWS. For states like Texas along the coast that are involved with and affected by marine species, it is just as important to have input into the review process for marine life as it is for terrestrial and freshwater species.

b. The Services Should Provide a Broad Definition of the State Agency(ies) to Which a Petitioner Must Provide the Petition

Although I strongly support the inclusion of the States in the petition process, I believe the proposed rule does not provide a sufficiently broad definition of the state agencies to which the petitioners must provide a copy of the petition. Limiting the recipients of a copy of the petition to "*State agency(ies) responsible for the management and conservation of fish, plant, or wildlife resources,*" will not ensure that the petitioners and the Services receive pertinent information to inform a decision on whether the petitioned species' listing may be warranted.

Multiple agencies in states, beyond those strictly "responsible" for the management and conservation of a species, have information relevant to whether or not a listing may be warranted. In many states, including Texas, several agencies are routinely engaged in activities that bear directly on the five factors described in Section 4(a) of the Act that must be considered when determining whether any species warrants listing. To limit the opportunity to comment on a petition before it is submitted to a single agency or agencies directly responsible for the management and conservation of a species arbitrarily deprives the FWS of essential, relevant information.

In Texas, the Texas Parks and Wildlife Department (TPWD), has the mission to manage and conserve the natural resources of the state and to provide hunting, fishing and outdoor recreational opportunities for present and future generations. However, stewardship of species and their varied habitats goes well beyond the responsibilities of the TPWD. In our State, numerous agencies are involved in monitoring, restoring and conserving species and their related habits as part of their mandated duties. These agencies have first-hand information on species, regulatory mechanisms, conservation programs and other factors that may affect the

continued existence of a species. While these agencies often work together and collaborate successfully on projects, most have their own biologists, ecologists or other scientists and maintain their own records and programs.

Additionally, because of the diverse nature of Texas and very limited publicly owned and managed land, most conservation efforts occur on private property. As of 2014, TPWD was assisting more than 8,000 landowners in implementing wildlife management plans on more than 29 million acres. However, since 2010, the Texas State Soil and Water Conservation Board (TSSWCB) has also developed more than 1,600 plans with private landowners on more than 1 million acres to protect water quality and more than 500 plans to enhance water supply on more than 700,000 acres. Thus, contacting just the TPWD would not guarantee a petitioner would receive all readily available information regarding such programs.

My office (CPA) has gathered information on species of concern in Texas since 2009. We are charged by the Legislature to lead the Task Force consisting of five state agencies. Other member agencies of the Task Force include TPWD, the Texas Department of Agriculture (TDA), Texas Department of Transportation (TxDOT) and the Texas State Soil and Water Conservation Board (TSSWCB) – all agencies with a prominent involvement with species protection.[1]

CPA also is working to develop scientific data on the status of species of concern in the State. In 2013, we received $5 million in funding from the Texas Legislature to fund research by state public universities on at risk species and the threats to those species. The Legislature provided an additional $5 million for the biennium beginning in 2015. To date, working with FWS, the Task Force members, and other stakeholders, the CPA has funded research on 20 species of concern. This research gives us direct access to the best available science through quarterly, annual and final reports and meetings with the investigators. We have knowledge about what studies are underway, what will soon be published, and the gaps that exist in the fundamental understanding of the biological needs of certain species in Texas.

To allow for the diversity of agencies with pertinent information, I suggest the Services adopt a broader definition of State agency(ies) in the final rule that allows the petitioners and the FWS to fully assess whether "substantial information" exists that listing a particular species may be warranted. I suggest the following definition be added to the rules.

> *424.14(9)(iii) State agency(ies) is defined as "any and all state agencies with responsibility for or involvement with the protection and management of the petitioned fish, plant, or wildlife or the habitats upon which it depends."*

To assist petitioners in identifying the appropriate agencies to contact, we suggest FWS request the Governor's office in each state provide a list of the agencies that meet the definition in its state. FWS should post these lists on its website and make clear in the preamble to the final rule that any petitioner should provide a copy of the petition to the head of each agency on the list in the states in which the species is believed to reside.

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[1] The TDA is the lead agency in the State for regulating pesticide and herbicide use and application to minimize impacts to agriculture while increasing protection for species of interest. TDA also works closely with agriculture landowners and producers across the state and understands where, when, how and what kinds of pesticides and herbicides are being applied as well as the current status and trends of agriculture production in the state. The TxDOT works with local communities to plan highway expansions and uses native vegetation and no-mow areas along thousands of miles of Texas roadways. It supports research on species of concern. The TSSWCB works closely with the U.S. Department of Agriculture Natural Resources Conservation Service on programs to promote, enhance and monitor native grasslands and their associated species. With its emphasis on local governance, the TSSWCB knows through relationships with landowners how grasslands are being used, where they are and what is being done to restore or degrade them across the state. It also knows which landowners are engaged in conservation efforts, are interested in conservation programs or may be willing to change their management practices to protect biodiversity.

c. Additional Time Should Be Allowed for State Review

While I wholeheartedly support the decision to provide the States a role in the 90-day finding, the 30-day period for review and comment does not enable meaningful state participation. Thirty days is simply inadequate time for an agency to review a "cold" petition, identify potentially relevant information and expertise in the agency and its field offices, search files and databases to collect and then copy relevant data and prepare comments. State agencies, like FWS, are woefully understaffed. Any effort to fully respond to a petition in 30 days will certainly require resources to be pulled off projects and other agency responsibilities and still produce a less than complete product.

To fully meet the goal of the proposed revision to "encourage greater communication and cooperation among would-be petitioners and State conservation agencies" and incorporate the State's expertise and information relevant to the species, States should be given 90 days to review a petition.

FWS has provided that it "may elect" to consider such subsequently submitted information "if sufficient time remains to do so." However, the opportunity for a State to provide information after a petition is filed, because it was unable to provide it to the petitioner within 30 days, is not a substitute for giving the State an adequate opportunity to provide information and comment prior to the petition being submitted. Given that the Services are retaining absolute discretion with regards to consideration of subsequent comments and the extensive time required for the Service's surname process, the additional window being offered to the States is actually very narrow and offers little incentive to agencies, whose resources are overstressed to begin with, to make the effort to provide comments.

Most importantly, the appropriate time for State input is before the Services begin their review of the petition and views are formed on the petition's merits. This can be achieved by providing additional time for State input before the petition is filed.

424.14 (b)(10) Certification that the petitioner has gathered all relevant information (including information that may support a negative 90-day finding) that is reasonably available, such as that available on Web sites maintained by the affected States, and has clearly labeled this information and appended it to the petition.

I strongly support the Services' requirement that a petitioner must provide *all* relevant information reasonably available - not just that which supports their view. While the threshold for the 90-day finding is lower than the standard for a listing decision, this first step in the listing process under the ESA must, nonetheless, be based on accurate information. By making a positive 90-day finding, the Services are concurring that the information indicates the petitioned action may be warranted and beginning to move to potentially list the species. For local communities, businesses and private landowners, having a species with a positive 90-day finding on their land or in their operational area can cause unnecessary uncertainty and economic damage that cannot be fully remedied by a subsequent 12-month "not warranted" determination. Accordingly, even at the initial stage, the Services should make a strong effort to ensure that the decision is not made on unrepresentative and selective data and take advantage of the States' expertise and on the ground experience.

Requiring state input and requiring the petitioner to set out information that both supports and refutes the action sought is an important step in ensuring the 90-day finding is based on credible science. Examining both information that may support a negative 90-day finding and a positive 90-day finding will preserve the Services' resources for higher priority actions. It will also spare private landowners, communities and businesses from the unnecessary stigma associated with the possibility of a species found on their property simply because a petitioner presented an incomplete petition.

424.14(g)(1)(i)…substantial scientific or commercial information' refers to credible scientific or commercial information in support of the petition's claims…Conclusions drawn in the petition without the support of credible scientific or commercial information will not be considered "substantial information."

I support the Services' proposal to limit its determination to whether substantial information has been presented and that a listing may be warranted due to credible scientific or commercial information and excluding unsupported conclusory statements. Because the 90-day finding has consequences both in terms of the Services' resources and priorities and the effects on private property interests, the decision should not be made based on the skilled, and potentially biased, arguments of a petitioner. Ultimately, the final listing decision must be based on the "best available scientific and commercial information." With that in mind, it only makes sense to begin the listing process by limiting the 90-day finding to credible scientific or commercial information and avoid later confusion by allowing argument and sophistry to substitute for credible science.

Thank you for your consideration of these comments. By implementing these suggested revisions, we can save time and resources of the Services as well as states, communities private landowners and affected industries and focus our efforts on those species most in need.

Please contact my office if you have any questions or if we can provide additional information regarding these proposed rules.

Sincerely,

Glenn Hegar

cc: The Honorable John Cornyn
The Honorable Ted Cruz
Texas Congressional Delegation