



February 8, 2016

Public Comment Processing

Attn: Docket No. FWS-HQ-ES-2015-0169

USFWS- MS: BPHC

5275 Leesburg Pike,

Falls Church, VA 22041-3803

RE: Methods for priority of reviews

Docket Nos. [Docket No. FWS-HQ-ES-2015-0169; 4500030113]

Dear Sirs:

Please accept this correspondence as the statement of support for the Proposed revisions to the Endangered Species Act ("the Act") petitioning/management process identified in the above docket numbers (hereinafter "the Proposal"). The Organizations believe that this Proposal represents a good first step in the overhaul of the Act and related process to make the Act more effective in benefitting species on the ground. The Organizations are very aware that the Act when taken in combination with other pieces of legislation, mainly the equal access to justice act, has created a cottage industry for several Organizations where suing the Service is the business model. Clearly this issue cannot be resolved by the Service but the Organizations submit that the proposed steps are moving toward resolution of this issue.

The Organizations submit that reform of the Act and related process is very important to the continued recreational usage of public lands throughout the country. Often recreational access is lost due to non-specific concerns regarding a possible impact to species that were only generally address in a petition for listing under the Act. Many of the factors identified as challenges to the Service in the Proposal are also issues that have directly impacted recreational usage of public lands as the Petitioning process often results in gridlock for land managers that are cautious of being sued for decisions and want to appear to be responsive on these types of issues.

Prior to addressing the specific reasons for our support of the Proposal, we believe a brief summary of each Organization is needed. The Colorado Off-Highway Vehicle Coalition ("COHVCO") is a grassroots advocacy organization the 150,000 registered OHV users in Colorado seeking to represent, assist, educate, and empower all OHV recreationists in the protection and promotion of off-highway motorized recreation throughout Colorado. COHVCO is an environmental organization that advocates and promotes the responsible use and conservation of our public lands and natural resources to preserve their aesthetic and recreational qualities for future generations.

The Trail Preservation Alliance ("TPA") is a 100 percent volunteer organization whose intention is to be a viable partner, working with the United States Forest Service (USFS) and the Bureau of Land Management (BLM) to preserve the sport of trail riding. The TPA acts as an advocate of the sport and takes the necessary action to insure that the USFS and BLM allocate to trail riding a fair and equitable percentage of access to public lands.

Colorado Snowmobile Association ("CSA") was founded in 1970 to unite winter motorized recreationists across the state to enjoy their passion. CSA advocates for the 30,000 registered snowmobiles in the State of Colorado. CSA has become the voice of organized snowmobiling seeking to **advance, promote and preserve the sport of snowmobiling** by working with Federal and state land management agencies and local, state and federal legislators. For purposes of this document, CSA, COHVCO and TPA are identified as "the Organizations". The Organizations have been heavily involved in a wide range of Endangered Species Act related issues and the Organizations submit that a vibrant wildlife population is a critical component of providing a high quality recreational experience and this recreational experience is made better when recreational users are able to experience a species that was once listed and has recovered to the degree that ESA listing is no longer necessary.

1. The Organizations submit that the Proposal is both critically necessary and an appropriate use of limited resources.

The Organizations would like to address the legal standard articulated by the US Supreme Court when agencies are addressing the situation where limited resources are directed towards minimally significant issues and more major concerns are not being addressed. The Court stated as follows:

“And it is particularly so in an age of limited resources available to deal with grave environmental problems, where too much wasteful expenditure devoted

to one problem may well mean considerably fewer resources available to deal effectively with other (perhaps more serious) problems.”¹

While this decision does not directly relate to the Act, the Organizations believe that the principals and intent articulated by the Court are HIGHLY relevant to this discussion. Given this clear statement of concern over the wasteful expenditure of agency resources for minimally beneficial activities in an attempt to manage an environmental issue, the Organizations believe that current efforts and changes to the administration of the ESA are both legally defensible and an expected function of the agency. Clearly creating legal briefs and other documents necessary for litigation creates minimal benefit to the species as management budgets that could benefit species on the ground are often lost in an attempt to offset these litigation costs.

2. A lack of science is not the basis for a listing of a species on the ESA list.

The Organizations are entirely too familiar with the fact that many petitions for listing of a species or designation of critical habitat for a species already listed are based on a **lack** of science surrounding the species. This lack of science is then relied on by petitioners to artificially create a sense of urgency to support the listing rather directing resources towards a truly science based management concern for a particular species. The Organizations are aware that often assertions of the lack of scientific research are surrounding species that were only recently identified as a separate species in the petitioning process. The Organizations are concerned that this creates a self-fulfilling prophecy as species are divided and then the lack of research into the species is relied on for listing of the species as threatened or endangered.

These issues are directly highlighted by the recent CBD petition to obtain designation of the Mohave Shoulderband Snail as threatened or endangered. This petition submits the listing of the snail is warranted as "land snails as a group are poorly known and understudied".² The Organizations submit that this position is clearly not based on best available science and clearly evidences a need for research and investigation into the species and its possible decline and is very telling as to the faulty basis for the emergency listing. The Organizations are aware that similar concerns are raised around a wide range of amphibians and other smaller sized creatures, where threats are often diverse and distant and may not be able to be addressed under the Act. This type of a concern is properly reflected in the categorization of these concerns as a low priority listing but as a heightened priority for research.

¹ See, *Entergy Corp v. Riverkeeper Inc et al*; 475 F3d 83; (2009) Opinion of Breyer J, at pg 4

² See, DOI; Before the Secretary of the Interior; *Emergency petition to list the Mohave Shoulderback Snail (Helminthoglypta(Coyote) Greggii) as threatened or endangered under the Endangered Species Act*; CBD petition; January 31, 2015 at pg 6.

3. Too often the ESA is relied on by those who are opposed to projects and failed to be involved in the NEPA process.

It has been the Organizations experience that the ESA listing process allows an entirely separate course of action to allow those opposed to a project to derail collaborative efforts that might be in place to benefit the species that have been developed in the NEPA process. The Organizations are aware of numerous trail improvement projects that are derailed by ESA issues raised by those that are merely opposed to multiple use. It has been the Organizations experience that the driving force of some of these efforts has more to do with a personal interest opposing a project or philosophical opposition to a particular activity. This must be addressed in any revision to the prioritization of issues under the Act.

4. The §7 consultation process must be amended to insure that both positive and negative benefits from planning efforts are reflected.

Too often the Organizations are aware that land managers stop analysis of ESA issues at determinations of "no negative impact" from planning in the §7 consultation process. The Organizations submit that stopping at this point precludes viable opportunities for management actions to benefit species as managers often continue without asking if the proposal is even related to the threats to the species. The impacts of such an arbitrary limitation on analysis recently occurred in the Bear Creek area outside Colorado Springs, CO. Managers were sued regarding recreational usage of lands around Bear Creek and possible impacts on genetically pure cutthroat trout. Litigation was settled and NEPA was commenced but no one ever identified the threats to the species at the location or that a very old and deteriorated dam was the only obstruction between the genetically pure fish and their primary threat, mainly reintroduced hybrid fish. This arbitrary limitation on analysis should be avoided as limited resources can easily be directed towards issues that are entirely unrelated to the species decline.

5. Increased consultation with State Wildlife agencies must be addressed.

The Organizations are aware of recent rulemaking efforts from USFWS that are seeking to incorporate expanded consultation with State Wildlife Agencies as part of a listing or period review.³ While the Organizations are concerned regarding the increased administrative burdens that may result to state wildlife agencies from these new filing requirements, these

³ See, Docket Nos. FWS-HQ-ES-2015-0016; DOC 150506429-5429-01.

risks are minimized if these costs are clearly addressed in the development of the new process outlined in the Proposal. While many of the species that are the basis of petitions have a respectable amount of information easily available for public review, there is an ongoing discussion regarding what is a species, and the Organizations are concerned that a significant amount of work could result to state agencies resulting from applications regarding species that have been recently identified as a newly found species. Often these decisions are highly complex and rely on a large amount of professional expertise. These costs and efforts should be specifically addressed in the mechanisms developed in the Proposal.

The Organizations believe state involvement and consultation is critical in developing a meaningful petition. The rulemaking proposal seeking increased state involvement properly recognizes that state wildlife managers are often the primary source of information for a species that is not listed on the ESA list. The Organizations believe any concerns of state wildlife managers must be meaningfully reviewed as State Wildlife managers are often faced with the same ever declining budgets as Federal wildlife managers are faced with.

6. The question of "What is a species?" simply must be resolved.

Currently if a possible species fails any portion of the questions used to define "what is a species" is the species is listed separately under the Act until such time as it can be proven there is or is not truly a separation of the species from others not listed. The Organizations are aware that the question of "what is a species" is the basis for ongoing and vigorous discussion in the scientific community. Currently listing criteria can result in two species looking identical with slightly different genetic traits, arguably be broken into separate populations and both be listed. On the conversion, species can look very different and be genetically identical and again both be listed. This situation has been exemplified with the Alabama sturgeon, Greater/Gunnison Sage Grouse and is exceptionally common in the listing of various plants, where exceptionally minimal differences are identified as the basis for an ESA listing and a common weed. The Organizations are intimately aware that answering this question has profound impacts on many facets of ESA actions but it must be looked at. The ever changing target of what is a species makes conservation efforts difficult if not impossible. If there are questions similar to this involved in a listing, the Organizations submit that these questions must be resolved and that placing these proposals into lower priority categories would reflect the proper management of this issue.

7. Science based population targets should be included in the listing petition process.

The Organizations submit that an additional requirement for placement of an ESA petition into a higher priority category must be included, which is the inclusion of a population objective for the species if the petition should be granted. It has been the Organizations experience that often the desire to always want more of a particular species is controlling in the listing process rather than true science based management objectives. It has been the Organizations experience that often target populations, and the scientific basis for these goals, are sometimes discussed when either listing was avoided or listing of a species on the ESA list occurred are dimmed with the passage of time. Often there are delays between initial decisions on a species and subsequent review of the decision and as a result participants in the original listing are no longer available or memories have been dimmed. With the passage of time, assertions of always needing more of a particular species never seem to dim or lose steam, making any position that species population goals being achieved difficult if not impossible to support. If there are these types of goals available, this should heighten the species on the priority category list.

The Organizations also vigorously assert that such population goals are required in all governmental proceedings by Executive Order. On January 18, 2011, President Barack Obama issued Executive Order 13563, which specifically required that all agencies:

"(4) to the extent feasible, specify performance objectives, rather than specifying the behavior or manner of compliance that regulated entities must adopt;"⁴

The Organizations are unable to provide any reason why this Executive Order would not be fully applicable to ESA listing petitions and related actions. The Organizations submit that clear and definite population objectives are a critical to actually benefitting the species and avoiding management that targets behaviors that are often unrelated to the decline of the species. The failure to provide these goals and objectives simply casts a cloud over the entire ESA process.

The Organizations believe that population goals are important for another reason, which is directly related to ongoing discussions to address what is a species. Too often traditionally recognized species, such as the grouse have been broken into dozens of separate species. Population goals would allow each of these new subspecies to be more accurately tracked and meaningfully analyzed to insure that the listing, associated management objectives and populations remain viable on the ever reducing habitat areas that are being occupied by each newly found species of the Grouse.

⁴ See, Executive Order No. 135623, 76 Fed. Reg 3821 (2011).

8. Conclusion.

The Organizations support the proposed revisions to the ESA petitioning process identified in the above docket numbers. The Organizations believe that this Proposal represents a good first step in the overhaul of the ESA listing/petitioning process to make the act more effective in benefitting species on the ground. The Organizations submit that there are several other issues that should be addressed in the revisions to the petition process to make the process more cost effective, minimize impacts to unrelated parties from petitions that are verging on entirely frivolous and insure that efforts actually benefit the species at issue.

Please feel free to contact Scott Jones at 518-281-5810 or via email at scott.jones46@yahoo.com or via USPS mail at 508 Ashford Drive, Longmont, CO 80504 for copies of any documentation that is relied on in this appeal or if you should wish to discuss any of the concerns raised further.

Respectfully Submitted,

A handwritten signature in blue ink, appearing to read "Scott Jones".

Scott Jones, Esq.
COHVCO/TPA Authorized Representative
CSA President

A handwritten signature in blue ink, appearing to read "Don Riggle".

D.E. Riggle
Director of Operations
Trails Preservation Alliance