

September 18, 2015

The Honorable Dan Ashe  
Director  
U.S. Fish and Wildlife Service  
1849 C Street, NW  
Washington, DC 20240

The Honorable Kathryn Sullivan  
Administrator  
NOAA  
1401 Constitution Avenue, NW  
Washington, DC 20230

**Re: Revisions to Endangered Species Act Petition Regulations**

Dear Director Ashe and Administrator Sullivan:

On behalf of our tens of millions of members, we ask you to immediately withdraw the U.S. Fish and Wildlife Service’s and National Marine Fisheries Service’s (together, the “Services”) proposed revisions to the regulations that govern petitions to protect species as endangered or threatened under the Endangered Species Act (“ESA”).<sup>1</sup> The proposed changes would impose unprecedented restrictions on the right of citizens to petition the federal government to protect endangered species and exceed the Services’ statutory authority. More than that, if finalized the revisions would set a dangerous, far-reaching precedent that would undermine the rights of citizens to petition the government to vindicate their rights under an array of environmental, social justice, and other laws. We are concerned that this proposal does not evidence careful consideration to the panoply of problems that the proposed revisions present.

The right to petition the federal government for redress of grievances is “among the most precious of liberties safeguarded by the Bill of Rights” — indeed, it is a “value beyond question.”<sup>2</sup> In 1946, Congress codified this right by passing the Administrative Procedure Act (“APA”), which allows any “interested person,” to exercise his or her constitutional right to petition any federal agency for the “issuance, amendment, or repeal of a rule.”<sup>3</sup> Ever since, petitions filed by citizens under the APA have galvanized the federal government to take actions to protect our environment, to safeguard human health, and to promote the general welfare.

Indeed, the fundamental right to petition federal agencies to protect the environment and human communities is particularly important in our modern society because of the federal government’s powers to create uniform national standards and prevent the undue influence of vested interests on state governments. Recognizing this fact, Congress has expanded and strengthened the right to petition beyond what is provided for in the APA under many laws including the Clean Air Act, the Comprehensive Environmental Response, Cleanup, and

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<sup>1</sup> 16 U.S.C. §§ 1531-1544 (ESA).

<sup>2</sup> *United Mine Workers of America, Dist. 12 v. Illinois State Bar Ass’n*, 389 U.S. 217, 222 (1967); *McDonald v. Smith*, 472 U.S. 479, 482 (1985).

<sup>3</sup> 5 U.S.C. §§ 551-59, 701-06 (APA); *id.* at § 553(e) (rulemaking provision).

Liability Act (CERCLA), as well as the ESA.<sup>4</sup> Thus, whether it is to protect clean air and water, to clean up a toxic waste site, to address environmental injustice, to improve worker safety, or to protect imperiled species, petitions to the federal government are often submitted because state government efforts have proven inadequate.

The proposed changes to the current rules, which have successfully governed the citizen petition process under the ESA since 1984, would require a petitioner to submit a copy of a petition seeking protections for an imperiled species, to all States where the declining species is found, at least 30 days before submitting that petition for review to the U.S. Fish and Wildlife Service.<sup>5</sup> The petitioner must then submit any and all information received from a State as an appendix to his or her petition. The petitioner is also required to attach all information received, even if a State is hostile to the petition's objective — *e.g.*, because it believes that listing a species under the ESA would represent a loss of regulatory control over wildlife within its borders —and even if that information is false or deliberately undermines the petition. The petitioner would also be required to submit (and certify) that s/he has submitted “all relevant information” about the species that s/he seeks to protect under the ESA, a requirement that would be virtually impossible to meet, and could cost a petitioner thousands of dollars to comply with.<sup>6</sup> If the petitioner fails to comply with these new mandates and incur these financial burdens, the petition would be summarily rejected.

Nothing in the ESA supports the imposition of such onerous mandates on a would-be petitioner. Nor does the language of the APA or any other environmental law suggest that a petitioner must submit his or her petition to any other entity prior to filing it with a federal agency. Herein lies the danger: Because the proposal is divorced from all statutory text in both the ESA and APA, it would be a precedent without limitation. Other federal agencies could follow suit and require petitioners to submit their petitions to third parties as well, including State governments or other entities that are hostile to the petition's objectives, regardless of what procedures the APA or underlying laws actually require.

Under the Surface Mining Control and Reclamation Act (“SMCRA”), for example, a citizen can petition the Office of Surface Mining to request the termination of a State's authority of coal-mining within its boundaries if the State fails to comply with SMCRA's regulatory requirements.<sup>7</sup> The Office of Surface Mining (OSM) could follow the Services' example and

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<sup>4</sup> See, *e.g.*, 42 U.S.C. §§ 7671a(c)(3) and 9605(d); 33 U.S.C. § 1311(g)(4); 16 U.S.C. § 1533(b).

<sup>5</sup> 50 C.F.R. Part 424; see also 49 Fed. Reg. 38,900 (Oct. 1, 1984) (noting that the citizen petition process under the ESA is “designed to ensure that decisions in every phase of the listing process are based *solely* on biological considerations, and to prohibit considerations of economic or other non-biological factors from affecting decisions regarding endangered or threatened status”) (emphasis in original).

<sup>6</sup> Many scientific journals charge \$25-45 dollars to access an individual journal article. As an example, the U.S. Fish and Wildlife Service recently cited more than 180 journal articles in its recent decision to list the Northern Long-eared Bat (*Myotis septentrionalis*). See Docket #: FWS-R5-ES-2011-0024-3615. If half of those articles were behind a pay wall, the cost to a petitioner would easily exceed \$2,000.

<sup>7</sup> See, *e.g.*, APPALACHIAN CATHOLIC WORKERS ET AL., SECTION 733 PETITION BEFORE THE U.S. DEPT. OF INTERIOR, OFFICE OF SURFACE MINING, RECLAMATION, AND ENFORCEMENT SEEKING TERMINATION OF WEST VIRGINIAN'S APPROVED SMCRA PROGRAM AND IMMEDIATE IMPLEMENTATION AND PROMULGATION OF A FEDERAL REGULATORY PROGRAM. (June 24, 2013). Available at:

<http://s3.documentcloud.org/documents/717004/733-petition-to-osm-june-2013.pdf>.

require a petitioner to submit the petition for review by the very State that s/he is petitioning OSM to strip of regulatory authority, and even require the petitioner to include false or misleading information from the affected State in “support” of his or her petition.

Likewise, a citizen can petition the Environmental Protection Agency (“EPA”) to revoke a State’s delegated administration of the Clean Water Act’s permit program under the National Pollution Discharge Elimination System program if the State has failed to comply with the mandatory requirements of the Clean Water Act.<sup>8</sup> Following the Services’ lead, the EPA could require a petitioner to submit his or her petition for review by the very State for which s/he is petitioning the EPA to reclaim regulatory oversight over water quality.

The far-reaching impact of the proposed revisions to the ESA citizen petition regulations could extend far beyond the environmental context. Under the APA, for example, a citizen may petition the Occupational Safety and Health Administration (“OSHA”) to enact regulations to protect workers from injury. In 2013, for example, several non-governmental organizations petitioned OSHA to enact rules with speed limits on production lines in meatpacking and poultry industries, in order to minimize the risk of serious and crippling musculoskeletal disorders, amputations, and other injuries for workers.<sup>9</sup> OSHA should not take a cue from the Services and burden petitioners by requiring petitioners to first submit their petition to regulated business, so as to shirk its responsibility to respond to citizen calls for protections against workplace abuses.

There would be an enormous chilling effect on citizens’ fundamental right to petition their government if other federal agencies emulate the rules the Services are proposing here. State governments have enormous power compared to a citizen petitioner, and could quickly assemble thousands of pages of material that is intended to undermine and muddle the issues that a petition presents. The effectiveness of petitions as a driver of environmental protection and social justice would be diminished immediately, and would undeniably harm the interests of the petitioner. And because there is no statutory basis for such pre-filing requirements in petitions, future administrations might even enact more-burdensome regulations requiring that a petitioner first notify industry interests that may be affected by the petition.

Thanks to the APA, the United States’ bedrock regulatory law, anyone can exercise the right to petition any federal agency to better protect citizens from social ills and injustices. Petitions have been filed by citizens seeking better implementation of the Emergency Planning and Community Right-to-know Act, the Federal Food, Drug and Cosmetic Act, the National Forest Management Act, the Toxic Substances Control Act, the Resource Conservation and Recovery Act, the Animal Welfare Act, the National Park Service Organic Act, the Wilderness Act, the Fur Products Labeling Act, and many other laws. In this way,

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<sup>8</sup> See, IOWA CITIZENS FOR COMMUNITY IMPROVEMENT ET AL., PETITION FOR WITHDRAWAL OF THE NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM PROGRAM FROM THE STATE OF IOWA (Sept. 20, 2007). Available at: [http://www.environmentalintegrity.org/documents/IowaCWAPetition\\_09-19-07\\_.pdf](http://www.environmentalintegrity.org/documents/IowaCWAPetition_09-19-07_.pdf)

<sup>9</sup> See Petition from Southern Poverty Law Center et al., to Thomas Perez, Secretary of Labor, et al. (Sept. 3, 2013), Available at: <http://www.splcenter.org/get%20informed/news/splc%20urges%20federal%20agencies%20to%20protect%20poultry%20meatpacking%20plant%20workers/Petition>

the APA serves its purpose of leveling the playing field against powerful special interests. The Services' proposed revisions to the ESA citizen petition process are wholly inconsistent with this principle and would weaken the ability of petitioners to ask the federal government to counterbalance unreasonable actions by governmental and private actors which undermine the interests of our environment, our communities, and our most vulnerable citizens.

To ensure that this does not happen, we ask you to withdraw the proposed changes to the regulations restricting petitions under the ESA.

Sincerely,

Center for Biological Diversity

Humane Society of the United States

Greenpeace U.S.A.

Friends of the Earth

Food & Water Watch

Center for Food Safety

Prison Ecology Project

Human Rights Defense Center

Public Citizen

Oceana

PEER

MoveOn

The Sierra Club

National Lawyers Guild

Advocates for Snake Preservation

Alameda Creek Alliance

Alaska Wildlife Alliance

Alaska Wilderness League

Alliance for the Wild Rockies

All Creatures

Animal Legal Defense Fund

Animas Valley Institute

Animal Welfare Institute

Anne Arundel Bird Club

Appalachian Mountain Advocates

Association for the Tree of Life

Audubon Society of Corvallis

Battle Creek Alliance

Big Blackfoot Riverkeeper

Born Free, USA

Boulder Rights of Nature

Cahaba River Society

California Native Plant Society

California Wildlife Foundation/California Oaks  
Caney Fork Headwaters Association  
Center for a Sustainable Coast  
Center for Effective Government  
Center for Justice and Democracy at New York Law School  
Chukchi Sea Watch  
Citizen's Committee to Complete the Refuge  
Citizens for Sludge-Free Land  
Ciudadanos Del Karso  
Clean Air Watch  
Clean Ocean Action  
Coast Range Association  
Coastal Environmental Rights Foundation  
Columbia Riverkeeper  
Communities for a Better Environment  
Community Science Institute  
Conservation Council for Hawai'i  
Conservation Northwest  
CORALations  
Cornucopia Network of New Jersey  
Cottonwood Environmental Law Center  
Cumberland Countians for Peace & Justice  
Crawford Stewardship Project  
Crosstimbers Connection  
DC Environmental Network  
Desert Tortoise Council  
Dogwood Alliance  
Don't Waste Arizona  
Earth Day Coalition  
East Bay Chapter of the California Native Plant Society  
Endangered Habitats League  
Endangered Small Animal Conservation Fund  
Endangered Species Coalition  
Environmental Defense Center  
Everglades Earth First!  
Fairmont, Minnesota Peace Group  
Flycasters, Inc. of San Jose  
Footloose Montana  
For the Fishes  
Friends of Animals  
Friends of Bumping Lake  
Friends of the Columbia River Gorge  
Friends of Harbors, Beaches and Parks  
Friends of Lana'i  
Friends of Merrymeeting Bay

Friends of the Bitterroot  
Friends of the Santa Clara River  
Friends of Whitehaven Park  
GuardaMar Caribe Inc.  
Glen Canyon Institute  
Global Justice Ecology Project  
Golden Gate Raptor Observatory  
Grand Canyon Trust  
Grand Canyon Wildlands Council  
Great Old Broads for Wilderness  
GreenFaith  
GuardaMar Caribe Inc.  
Gulf Restoration Network  
Gunpowder Riverkeeper  
Hells Canyon Preservation Council  
Hilton Pond Center for Piedmont Natural History  
Humboldt Baykeeper  
Iniciativa para un Desarrollo Sustentable (IDS)  
International Fund for Animals  
International Marine Mammal Project of the Earth Island Institute  
Juniata Valley Audubon Society  
Justice for Wolves  
Kettle Range Conservation Group  
Keystone Prairie Dogs  
Klamath-Siskiyou Wildlands Center  
Lane County Audubon Society  
League of Humane Voters, Nevada  
Life of the Land  
Los Padres ForestWatch  
Massachusetts Forest Watch  
Maryland Ornithological Society  
Midshore Riverkeeper Conservancy  
Midwest Environmental Advocates  
Mission Peak Fly Anglers  
Nature Coast Conservation, Inc.  
NC Warn  
Network for Environmental & Economic Responsibility, United Church of Christ  
Nevada Wildlife Alliance  
New England Aquarium  
New Mexico Wilderness Alliance  
North Cascades Conservation Council  
Northeast Oregon Ecosystems  
Northwest Environmental Advocates  
Ocean Conservation Research  
Ohio Valley Environmental Coalition

Oregon Natural Desert Association  
Oregon Wild  
Palm Beach County Environmental Coalition  
PALS: Protect All Living Species  
Predator Defense  
Preserve Lamorinda Open Space  
Preserve Wild Santee  
Project Coyote  
Rainforest Relief  
Reef Relief  
RESTORE: The North Woods  
Rocky Mountain Recreation Initiative  
Rocky Mountain Wild  
Russian Riverkeeper  
Sequoia Forestkeeper  
San Bernardino Valley Audubon Society  
Save Our Sky Blue Waters  
Save the Cumberland  
Save the Frogs  
Save the Scenic Santa Rita  
Sequoia Forestkeeper  
Seven Generations Ahead  
Sky Island Alliance  
Slow Food USA  
South Carolina Coastal Conservation League  
South Florida Audubon Society  
Sustainable Arizona  
SustainUS: The US Youth Network for Sustainable Development  
Tennessee Clean Water Network  
The California Chaparral Institute  
The California Wolf Center  
The Center for Effective Government  
The Cloud Foundation  
The Cougar Fund  
The Ecology Party of Florida  
The Rewilding Institute  
The Shalom Center  
The Wolf Conservation Center  
Tualatin Riverkeepers  
Turtle Island Restoration Network  
Upstate Forever  
Ventana Wilderness Alliance  
Virginia Organizing  
Western Lands Project  
Western Nebraska Resources Council

Western Watersheds Project  
Western Wildlife Conservancy  
West Virginia Highlands Conservancy  
Wild and Scenic Rivers  
Wild Equity Institute  
Wildcoast  
WildEarth Guardians  
Wildlands Network  
Wildlife Advocacy Project  
Winter Wildlands Alliance