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Re: Violation of the Paperwork Reduction Act Regarding the Proposed Rule: *Revisions to the Regulations for Petitions* and Request for Additional Public Comment Period

Dear Director Ashe and Administrator Sullivan:

We write to notify you that the U.S. Fish and Wildlife Service and National Marine Fisheries Service (together, the "Services") appear to be in substantial violation of the Paperwork Reduction Act ("PRA"), 44 U.S.C. 3501 *et. seq.*, with respect to the proposed rule *Revisions to the Regulations for Petitions* ("Proposed Rule").[1] The Services have proposed several burdensome information-collection requirements upon the public with respect to petitions to list and delist endangered species under the Endangered Species Act ("ESA"). The Proposed Rule requires a petitioner to submit a copy of a listing or delisting petition to each state where the imperiled species is found at least 30 days before submitting the petition to the Services for review.[2] The petitioner must then receive and transmit any and all information received from a state as an appendix to his or her petition. Furthermore, the petitioner would be required to certify that he/she has also collected and submitted "all relevant information" about the species.[3]

These requirements — as well as several others in the Proposed Rule — appear to represent a "collection of information" within the meaning of the PRA; and each of these requirements is exceptionally burdensome, difficult to fully comply with, and could easily require thousands of dollars in compliance costs for the petitioner. Because the Services appear to have failed to conduct the necessary analysis under PRA, appear not to have submitted a request to the Office of Management and Budget ("OMB") to collect such information from the public at any point thus far in the rulemaking process, and have not

[1] *Revisions to the Regulations for Petitions*, 80 Fed. Reg. 29286 (May 21, 2015) (hereafter "PROPOSED RULE").
[2] *Id*. at 29,294.
[3] *Id*.

offered the public an opportunity to comment on an Information Collection Requirement ("ICR"), the Services are likely in violation of the PRA.[4] We ask that you complete this required analysis and open a public comment period on the ICR at the appropriate time for additional input prior to the finalization of the Proposed Rule.

The PRA prohibits any federal agency from adopting regulations which impose paperwork requirements on the public unless the information is not available to the agency from another source within the federal government.[5] For paperwork that is required, agencies must "minimize the burden on the public to the extent practicable."[6] Agencies must submit an ICR to the OMB for review prior to imposing any burden on the public, and must notify the public that they have done so.[7] Furthermore, if an ICR is approved, the agency must provide a period of public comment, although this can be done within the related proposed rule if the ICR is connected to a new regulation.[8]

Information collection requests are quite varied and encompass a very broad spectrum of potential records held by the public. As the U.S. Supreme Court explained, ICRs "share at least one characteristic: The information requested is provided to a federal agency, either directly or indirectly … to generate information to be used by the agency in pursuing some other purpose."[9] The new requirements in the Services' Proposed Rule also share this characteristic. In essence, the Proposed Rule seeks to significantly shift the information-collection burden for the 12-month status review under the ESA — a responsibility that the law makes clear belongs with the Services[10] and a responsibility that the Services acknowledged in the past[11] — onto average citizens, scientists and non-governmental organizations. The Proposed Rule would make average citizens the middle-man that is required to convey information from state governments to the federal government, when in

[4] The Center recognizes the potential distinction between a "collection of information requirement" in a regulation, 44 U.S.C. § 3504, versus a "information collection request" ("ICR") ,44 U.S.C. § 3507(a)(2)(A), which involves information used by an agency to further some other agency purpose. We believe that this type of information request is best classified as an ICR because the information will be used to make a 90-day and 12-month finding under the ESA in response to a petition. This is different than a regulation that simply requires types of information from the regulated community or the public. However we note that even if the Proposed Rule's collection should be considered a "collection of information requirement," this too contains a process that the Services must follow involving OMB approval of the collection. If an agency fails to provide OMB notice no later than the publication of the notice of proposed rulemaking, then OMB can disapprove of the rule. 44 U.S.C. § 3504(h)(5)(B).

[5] *Dole v. United Steelworkers of America*, 494 U.S. 26, 33 (1990).

[6] *Id*. at 33; *see also* 44 U.S.C. § 3507(a)(1).

[7] 44 U.S.C. § 3507(a)(2)(B).

[8] *Id. at* § 3506(c)(2)(B).

[9] *United Steelworkers of America*, 494 U.S. 26 at 33.

[10] 16 U.S.C. § 1533(b)(3)(A) ("the *Secretary* shall promptly commence a review of the status of the species concerned.") (emphasis added).

[11] *See Rules for Listing Endangered and Threatened Species and Designating Critical Habitat*, 45 Fed. Reg. 13010, 13016 (Feb. 27, 1980) ("The principal responsibility of a petitioner is to present substantial evidence relating to the status of the species. This may be less than that required to propose or finalize a listing. The Services intend to gather information from as many sources as are available before proposing an action, and *bear the primary responsibility for gathering sufficient information on which to base such actions*.") (emphasis added).

the past, state governments could easily transmit information directly to the federal government. Finally, the Proposed Rule requires average citizens to collect information on imperiled species that is in the control of the federal government, including the U.S. Department of Defense, the U.S. Forest Service, the Bureau of Land Management, the National Park Service, the Bureau of Indian Affairs and even other branches within the U.S. Fish and Wildlife Service and the National Oceanic and Atmospheric Administration.[12]

We recognize that an ICR focused on supporting materials for an administrative petition has likely never been approved by the OMB, and that such an ICR would also likely be unprecedented. However the reason for this is quite simple. In the history of the Administrative Procedure Act, no federal agency has ever proposed an information-collection burden as a prerequisite to filing a citizen petition. There is no statutory support for an agency to collect the universe of relevant information in order to review a petition, and no agency has ever proposed that members of the public act as a middle-man to transfer information from a state agency to the federal government. Because of the unprecedented type of ICR that such a requirement could represent, it is actually quite surprising that the Services have not sought OMB review and approval prior to publishing the Proposed Rule.

It is quite disappointing that the Services attempted to completely avoid this issue altogether by omitting *any* discussion of the PRA in the Proposed Rule. There does not appear to be any legitimate reason for the Services' decision to omit all reference to the PRA in the *Required Determinations* section of the Proposed Rule. In *every* other regulatory proposal that the Services have made as part of the administration's retrospective review initiative, the Services have made a finding regarding the PRA. The Services determined that the final *Significant Portion of its Range* policy,[13] *Incidental Take Statements* final rule,[14] *Definition of Adverse Modification* proposed rule,[15] *Revisions to the 424 Regulations* proposed rule,[16] *Timing of Critical Habitat Analysis* final rule,[17] *Draft Methodology for Prioritizing Status Reviews* policy,[18] and the *Policy Regarding Voluntary Prelisting Conservation Actions*[19] all would "not impose recordkeeping or reporting requirements on state or local governments, individuals, businesses, or organizations." How can it be that the one proposal that clearly imposes a burden on the public to collect massive amounts of information does not even mention compliance with the PRA? This omission is perhaps the most telling indication that an ICR is required here. The Services' omission seems deliberate in light of their past practice with every one of their regulatory reform proposals over the last five years.

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[12] Proposed Rule at 29,294 (The Services require petitioners to: "Certification that the petitioner has gathered all relevant information (including information that may support a negative 90-day finding) that is reasonably available." This requirement does not include information already held by other branches of the federal government).

[13] *Final Policy on Interpretation of the Phrase "Significant Portion of Its Range" in the Endangered Species Act's Definitions of "Endangered Species" and "Threatened Species*," 79 Fed. Reg. 37,578 (July 1, 2014).

[14] *Incidental Take Statements*, 80 Fed. Reg. 26,823 (May 11, 2015).

[15] *Definition of Destruction or Adverse Modification of Critical Habitat*, 79 Fed. Reg. 27,060 (May 12, 2014).

[16] *Implementing Changes to the Regulations for Designating Critical Habitat*,79 Fed. Reg. 27066 (May 12, 2014).

[17] *Revisions to the Regulations for Impact Analyses of Critical Habitat*, 78 Fed. Reg. 53,058 (Aug. 28, 2013).

[18] *Draft Methodology for Prioritizing Status Reviews and Accompanying 12-Month Findings on Petitions for Listing Under the Endangered Species Act*, 81 Fed. Reg. 2,229 (Jan. 15, 2016).

[19] *Policy Regarding Voluntary Prelisting Conservation Actions*, 79 Fed. Reg. 42,525 (Jul. 22, 2014).

The omission of any discussion of the PRA deprives the public an opportunity to submit comments on this topic during the notice and comment period for the underlying rule, and thus represents a clear violation of the APA. If the Services believed that the PRA does not apply to the Proposed Rule, why not just say as much using the usual boilerplate included in every other regulatory reform, and allow the public an opportunity to consider this? Given the requisite sophistication to even notice that the PRA discussion was omitted from the *Required Determinations* section, it is simply unfair to the public to take this approach to the rulemaking process. As explained by the D.C. Circuit, "If the APA's notice requirements mean anything, they require that a reasonable commenter must be able to trust an agency's representations about which particular aspects of its proposal are open for consideration."[20] Arbitrarily picking and choosing when to consider the applicability of the PRA, and then hoping no one notices, simply violates the APA's notions of fairness in the rulemaking process.

The Center continues to maintain that the Proposed Rule violates the Endangered Species Act, the Administrative Procedure Act and First Amendment, and therefore should be withdrawn. However, we request that the Services at a minimum comply with all applicable procedural legal requirements, including the PRA, as they continue to move forward this fatally flawed proposal.

Sincerely,

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CC:

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[20] *Environmental Integrity Project v. Environmental Protection Agency*, 425 F.3d 992, 993 (D.C. Cir. 2005) (emphasis added); *see also*, *American Medical Ass'n v. United States*, 887 F. 2d 760, 768 (7th Cir. 1989) ("a rule will be invalidated if no notice was given of an issue addressed by the final rules. Moreover, courts have held on numerous occasions that notice is inadequate where an issue was only addressed in the most general terms in the initial proposal, or where a final rule changes a pre-existing agency practice which was only mentioned in an NPR in order to place unrelated changes in the overall regulatory scheme into their proper context. The crucial issue, then, is whether parties affected by a final rule were put on notice that their interests were at stake").

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