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ENDANGERED SPECIES PETITION MANAGEMENT GUIDANCE

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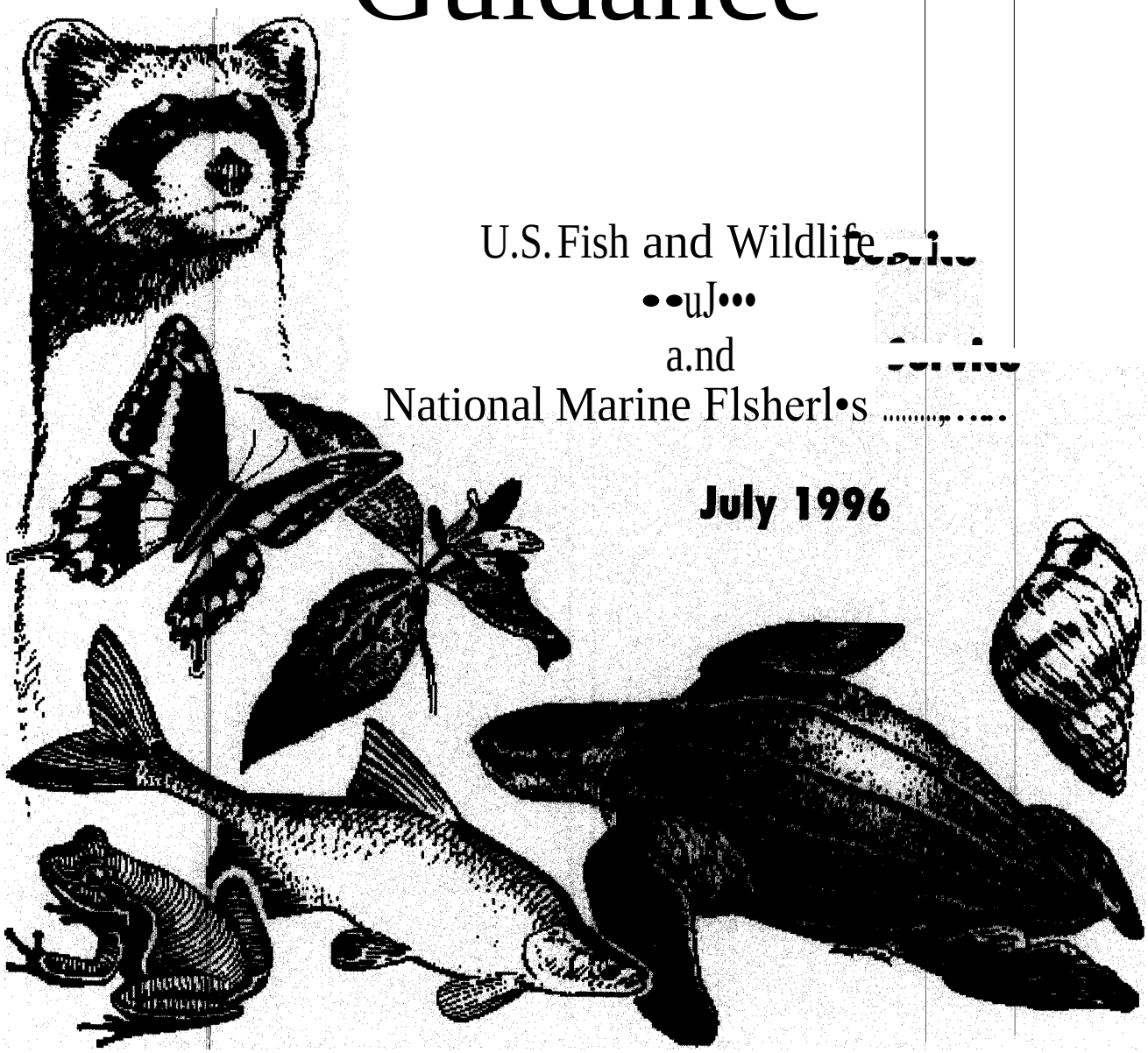

U.S. Fish and Wildlife Service

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National Marine Flsherl•s Service

July 1996

ENDANGERED SPECIES PETITION MANAGEMENT GUIDANCE

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U.S. Department of the Interior
Fish and Wildlife Service
Washington, D.C. 20240

and

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I. INTRODUCTION

Section 4(b)(3) of the Endangered Species Act of 1973, as amended (ESA), allows any interested individual to petition the Fish and Wildlife Service or the National Marine Fisheries Service, as appropriate, to list, delist, or reclassify species, or to revise a listed species' critical habitat.

This document provides policy and guidance for managing petitions to promote efficiency and nationwide consistency. Specific guidance is provided on data/information submission standards, preparation of administrative findings, and finding notifications.

II. GENERAL GUIDANCE AND RESPONSIBILITIES

A. Petition Identification

The administrative standard for a petition is given at 50 CFR 424.14. A document must clearly identify itself as a petition and be dated. It must contain the name, signature, address, telephone number, if any, and the association, institution, or business affiliation, if any, of the petitioner. If the document clearly identifies itself as a petition, but any of the required information is missing, the responsible Service's lead Region will inform the petitioner who may then resubmit an acceptable document. To be considered a petition, a document should also clearly indicate what action is being requested. A document that merely suggests listing of a species or provides comments in response to a notice of review that solicits information is not considered a petition (unless the writer states that it is a petition). Clarification of the defining characteristics of a petition is necessary to limit the Services' burden of responding to inadvertent "petitions" from individuals unaware that they may be triggering the ESA's petition process. If there is doubt whether to consider a request as a comment or a petition, consult with the Washington Office Division of Endangered Species (TE) for the Fish and Wildlife Service or the Headquarters Endangered Species Division (PR8) for the National Marine Fisheries Service. Generally, uncertainty is resolved by requesting clarification from the author of the document.

B. Distribution of Petitions

Petitions reach the Services through a variety of routes (*i.e.*, are addressed to persons at various levels within the Department of the Interior or the Department of Commerce). If a petition is addressed to an individual in the Washington Office (*e.g.*, Secretary of the Interior, Director of the Fish and Wildlife Service, or the Headquarters Office of the National Marine Fisheries Service), TE or PR8 will retain a high-quality copy of the petition and will immediately forward the original petition to the appropriate Regional Office for processing. If a Region receives a petition directly, a high-quality copy of the petition should be immediately forwarded to TE or PR8. If a Region receives a petition directly, and it is obvious that the petition is the responsibility of another Region, the original petition should be immediately forwarded to the responsible Regional Office and a high quality copy of the petition should be immediately forwarded to TE or PR8.

C. Lead Region

The following information is provided for assistance in determining the appropriate lead Region for petitions received:

1. An established lead Region is automatically the responsible Region for a single-species petition or a listed-species petition (except one involving widespread species with distributed Regional responsibilities, such as the bald eagle, gray wolf, or chinook salmon). If one of the Services receives a petition to list a vertebrate population or a subspecies (or variety) of animal or plant that geographically occurs in a Region other than the lead Region for the entire species, the geographic Region and lead Region will work together to determine which Region will take responsibility for the petition.

2. Lead responsibility not already established for a petitioned species should be established in accordance with the guidelines for lead Region selection. When the range of a species crosses a regional boundary, regional responsibility is determined by agreement among the Regions involved. The need for petition acknowledgement within 30 days of petition receipt (see Petitioner Acknowledgement section) lends urgency to this process. See 50 CFR 424.14(a).

3. For petitions dealing with more than one species and different lead Regions, the affected Regions will work together to determine which Region will coordinate petitioner acknowledgement, administrative finding and notice preparation, and petitioner notification tasks. Each Region will coordinate evaluation with respect to the species for which it has lead responsibility, and prepare recommended text for administrative findings and notices of finding.

If there is any doubt about the appropriate lead Region or, in some cases, the appropriate lead agency for species under joint jurisdiction of the two Services, consult TE or PR8. A potential petitioner who requests information on where to submit a petition should be instructed to submit it to the Regional Director of the lead Region or to the Director of the Fish and Wildlife Service or the Assistant Administrator (AA) for the National Marine Fisheries Service if lead Region designation is in doubt.

D. Role of States and Tribes

State and Tribal governments have broad authorities affecting native plants and animals within their jurisdictions and often can provide key information of use in evaluating a petition. They should be consulted as early as possible in the evaluation process, so that their views, recommendations, and information can be fully considered within the timeframes that must be observed under the Act.

E. Types of Petitions

Three general groups of petition requests are those for actions (1) petitionable under the provisions of section 4(b)(3) of the ESA, (2) encompassed by other provisions of the ESA, and (3) petitionable <u>only</u> under the Administrative Procedure Act (APA). Types (2) and (3) petitions will be referred to as "near petitions" throughout the remainder of this document.

1. *Petitions for Actions under Section 4(b)(3) of the Endangered Species Act*

Section 4 of the ESA assigns strict deadlines to these types of petitions, and they fit into one of two subgroups: (1) petitions to <u>list, reclassify, or delist species</u> (revise the Lists of Endangered and Threatened Wildlife and Plants (50 CFR 17.11 and 17.12)), and (2) petitions to <u>revise critical habitat</u>. Second (or subsequent) petitions of these types are treated as supplements to a primary (first-time) petition for the same species or critical habitat revision (see Second (or Subsequent) Petitions section).

a. <u>Petitions to List, Reclassify, or Delist Species</u> (see flow chart on next page). The responsible Service acknowledges these petitions within 30 days of receipt as required under 50 CFR 424.14(a). The acknowledgement should also include confirmation of the exact date of receipt of the petition.

b. <u>Petitions to Revise Critical Habitat</u>. The Services also acknowledge these petitions within 30 days of receipt. The acknowledgement should include confirmation of the exact date of receipt of the petition.

2. *Petitions for Actions Encompassed by Other Provisions of the Endangered Species Act*

Two examples of petitioned actions encompassed by other provisions of the ESA are those for (1) emergency action, and (2) designation of critical habitat in conjunction with a proposed listing rule. The Services always consider the need for an emergency rule or critical habitat designation when listing species, so petitions that specify such actions are considered in the

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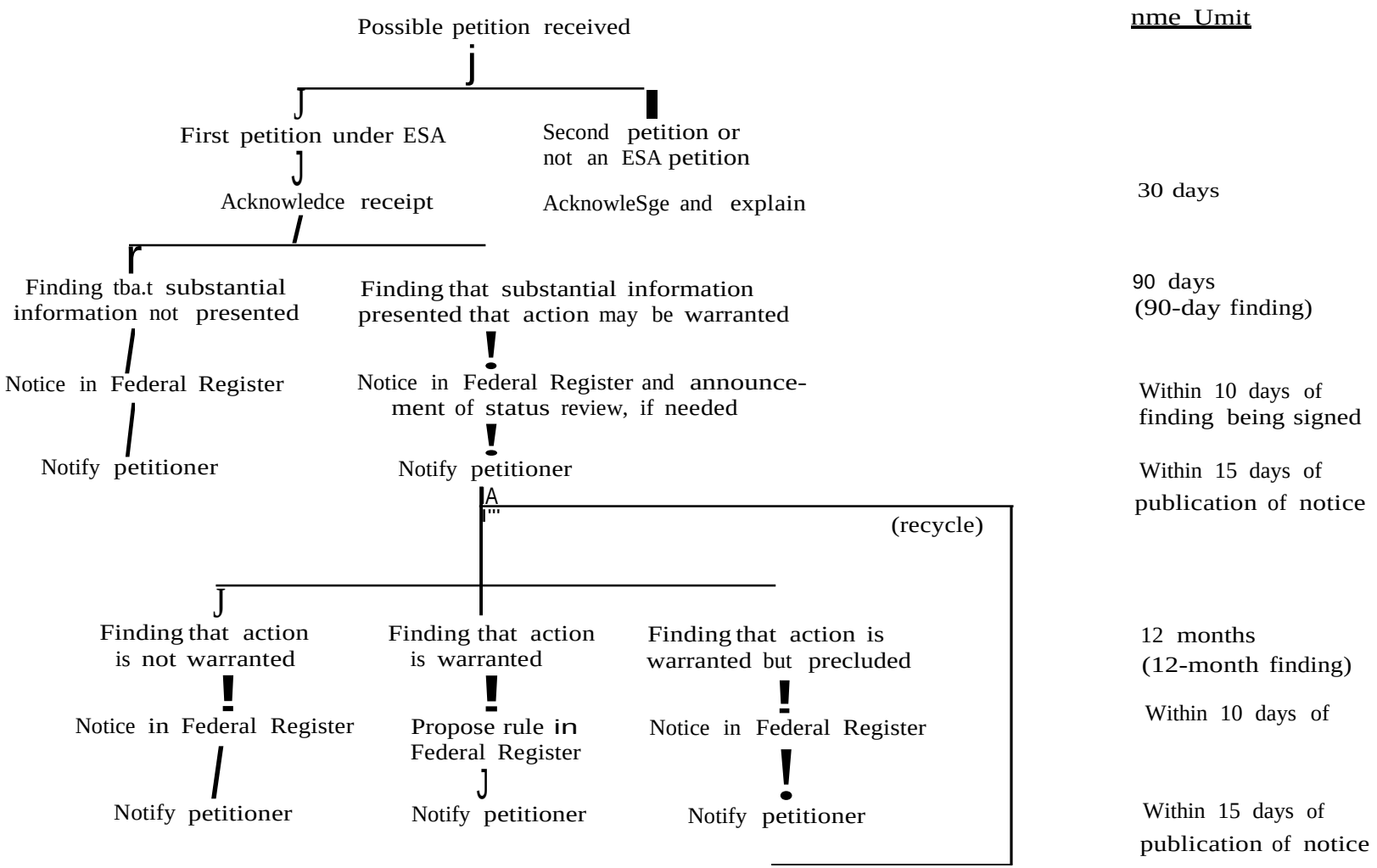

context of the listing action, and any decisions are reviewable under APA standards. Requirements related to critical habitat considerations and emergency rules are described in the Fish and Wildlife Service's Listing Handbook. Although emergency listing or concurrent designation of critical habitat are frequently requested by petitioners, they are not subject to the ESA's petition provisions. When relevant, the Services' obligations and prerogatives for these should be pointed out in responses to petitioners.

3. *Petitions for Actions under the Administrative Procedure Act*

Two examples of requests petitionable only under the APA are those for (1) designation of new (rather than revision of existing) critical habitat for a listed species, and (2) issuance of (or revision of existing) special rules.

These petitions are for actions not specifically mentioned in the petition provisions of the ESA and that are otherwise discretionary with the Services. They are not subject to the strict deadlines mandated for petitions under the ESA. Section 553(e) of the APA states: "Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule." Section 555(e) states that "prompt notice shall be given of the denial in whole or part of a written application, petition, or other request of an interested person made in connection with agency proceedings." A petition must be acknowledged and considered by the responsible Service, and the petitioner must be promptly notified of any action taken. Federal Register notice and public comment are not required, but may be helpful to the Services for reaching a decision on the request (for the Fish and Wildlife Service see Department of the Interior Regulations at 43 CFR part 14). The Department of Commerce and the National Oceanic and Atmospheric Administration do not have specific regulations for rulemaking petitions.

F. **Second (or Subsequent) Petitions**

A petition for an action on a species or critical habitat "identical" or "equivalent" to a petition still pending (or active) requires only a prompt (*i.e.*, within 30 days) response informing the submitter of the prior petition and its status; Federal Register publication of this response is not required. The second petition is treated as a comment on the previous petition. The Fish and Wildlife Service now defines "candidate species" as one for which sufficient information is available to indicate that a listing proposal is appropriate. A petition for a candidate species for which the Fish and Wildlife Service has lead, inasmuch as the Service has already made a decision regarding the species status and assigned it a listing priority, the Service considers such candidate species as under petition and covered by a "warranted but precluded" finding under Section 4(b)(3)(B)(iii) of the Act. Therefore, a petition to list a candidate species is redundant and will be treated as a second petition. Any later petitioner(s) should be informed of all subsequent actions taken in regard to the primary (and still pending) petition or candidate review.

Petitions that are greater in scope and that broaden the area of review of a petition still pending are treated as first-time petitions (*e.g.*, a petition requesting listing of an entire species while an earlier petition only requested listing of a population of that same species would be considered a first-time petition). Keep in mind that once a "not warranted" finding is made on a petition, a subsequent petition submitted for the same action can be accepted as a first-time petition if it provides new information. This restarts the entire petition process for the action.

In the past, the Services have considered a petition to list a species as threatened equivalent to a petition to list it as endangered, and vice versa. However, section 4(c)(1) of the ESA makes a

distinction between the list of endangered species and the list of threatened species. Technically, a petitioner can request that a taxon be added to one of these lists rather than the other. If a petitioner requests an endangered listing and a threatened listing results, the petition to list as "endangered" has been, in effect, denied. The same holds true if a petitioner requests a threatened listing and an endangered listing results. Therefore, a petition to list a species as threatened is not equivalent to a petition to list a species as endangered. As a result, a later petition to list a species under a status different from an earlier petition for the same species will be handled as follows:

1. If a 90-day finding has not yet been made for the earlier petition, the later petition will be combined with the earlier petition, and a combined 90-day finding will be prepared in time to meet the earlier 90-day due date.

2. If a "substantial" 90-day finding has been made and a 12-month finding is pending on the earlier petition, a separate 90-day finding will need to be made on the later petition. However, unless a large amount of new substantive information has been submitted, the 90-day finding for the later petition should be relatively quick and easy to produce since a 90-day review of the best available scientific data on the species was recently completed.

3. If the earlier petition is no longer active, the later petition will be treated as a first-time petition.

Descriptions of two "equivalent" situations where a petition is considered to be a second (or subsequent) petition are provided below.

Situation 1: A petition to list an unlisted species that does not directly state that it is also requesting designation of critical habitat still requires consideration of whether or not to propose critical habitat pursuant to section 4(a)(3) of the ESA. A petition to list a species and designate its critical habitat is equivalent to one to list the same species where no request is made to designate critical habitat. Therefore, if one of the Services accepts a petition to list a species with no request to designate critical habitat, it can treat a subsequent petition for the same species that also requests designation of critical habitat as a second petition (and vice versa), requiring only a letter of response.

Situation 2: A petition for an emergency listing is treated under the ESA as a petition for listing only. However, in accordance with section 4(b)(7) of the ESA, the Services take into consideration any evidence indicating that an emergency action is warranted and respond accordingly. A petition to emergency list a species is equivalent to one to list the same species under the ESA's normal listing provisions. Therefore, if one of the Services accepts a petition to list a species under the ESA's normal listing provisions, it can treat a subsequent petition to emergency list the same species as a second petition (and vice versa), requiring only a letter of response.

G. Scope of Petitions

The Services often receive petitions to list vertebrate populations or subspecies (or varieties) of animals and plants. In most instances, the responsible Service's review is focused on the petitioned entity. However, it is always the Services' prerogative to broaden (but not lessen) the scope of review if available information indicates such an action is appropriate. For example, if a petitioner requests the listing of a subspecies, the responsible Service may consider listing the entire species if that action is determined to be appropriate.

H. Tracking Petitions

Regions should ensure that petition follow-up tasks occur in the following order: (1) tracking, (2) acknowledgement, (3) administrative finding evaluation, and (4) notice preparation. Tracking, and even acknowledgement, in some instances, may have to be started while the lead Region is being determined. Tracking is a centralized function performed by TE and PR8 and includes the following steps:

Step 1: The date of receipt of a petition by any employee of the Services or the headquarters of the Department of the Interior or Commerce should be stamped or plainly written on the first page of the petition document. The date of receipt of a petition is very important. Individuals opening and distributing mail in the Field, Regional, and Headquarters Offices must be alerted to date stamp any document that may appear to be a petition. This is the most effective method for determining when the "clock starts."

Step 2: Immediately upon receipt of a petition by a Regional Office, a good quality copy of the entire petition, as well as copies of date stamps for receipt of the petition, will be forwarded to TE. Conversely, in cases where a petition is addressed to an individual in the Headquarters Office (*e.g.*, Secretary of the Interior, Secretary of Commerce, Director of the Fish and Wildlife Service, or Assistant Administrator for Fisheries), TE or PR8 will maintain a high quality copy of the petition and immediately forward the original petition to the appropriate Regional Office for processing. For complex petitions involving multiple Regions and/or species, the initial central tracking will include distribution to the involved Regions, initiation of acknowledgement planning, and lead Region designation. TE will maintain a copy of the petition and forward the original petition to the lead Region once it has been designated.

Step 3: For each petition, TE or PR8 will assign a petition number and keep the following records:

a. Date of petition;
b. Date of Department/Service receipt;
c. The common and scientific names of the species;
d. Name(s), affiliation(s), and address(es) of petitioner(s);
e. Regions and States included; and
f. Lead Region decisions and assignments.

Step 4: TE or PR8 will track the dates of the events listed below. However, the lead Region is responsible for providing copies of petitioner acknowledgement and notification of finding letters to TE or PR8 to ensure timely tracking.

a. Petitioner acknowledgement date(s),
b. Administrative finding due dates,
c. Administrative finding approval dates,
d. Federal Register notice publication dates, and
e. Petitioner notification of finding dates.

TE or PR8 will also number and file "near petitions" (see Types of Petitions section) and track Service responses. Regions must ensure that copies of associated documentation are forwarded to TE or PR8 for tracking purposes.

I. Petitioner Acknowledgement

A letter of acknowledgement must be mailed to the petitioner by the lead Region within 30 days of receipt of a petition or "near petition" by the appropriate Service (see Appendix B for examples of acknowledgement letters). The Regional Director of the lead Region or his/her designate is responsible for acknowledging receipt of a petition regardless of to whom the petition was addressed. The Assistant Regional Director for Ecological Services for the Fish and Wildlife Service or the Regional Director for the National Marine Fisheries Service or his/her designee in the lead Region is normally designated in the petitioner acknowledgement letter as the contact person for the petition.

In most cases, the letter of acknowledgement is a form response telling the petitioner(s)--

1. That the document has been received by the Service;
2. That the Service is the authorized respondent agency;
3. The date when the document was received, starting the deadline clock;
4. Any disagreement about identity of or names that the Service uses for the subject species;
5. When (and if) to expect findings to be made and reported in the Federal Register; and
6. The name, title, address, and telephone number of the contact person for the petition.

Each Region should maintain a current address file for all primary and secondary (or subsequent) petitioners for whose petitions they have the lead. Within 15 working days of publication, the petitioners should be sent copies of all Federal Register notices that include findings relevant to their petitions. Regions should also notify TE or PR8 of any known changes of petitioners' addresses to ensure that up-to-date information is maintained in the petition tracking database.

When the Services receive a petition determined not to be valid because it requests an action that the responsible Service lacks authority to carry out, a prompt (*i.e.*, within 30 days) response will be made informing the submitter that the petition is not valid and explaining the basis for that determination. (See Appendix C for an example.)

J. Internal Service Coordination

For Fish and Wildlife Service, the Regional Offices are responsible for coordinating recommendations and concurrence for 12-month petition findings with all appropriate Assistant Regional Directors (*i.e.*, Fisheries for fish petitions and Refuges and Wildlife for migratory bird petitions) or arranging for review or concurrence by these program offices in the Washington Office.

For both Services, for species that occur in more than one Region, the lead Region is responsible for ensuring coordination with all other affected Service Regions throughout the petition process. A non-lead Region is responsible for coordination within the Region and for providing requested information to the lead Region. To the maximum extent possible, Regions are expected to reach consensus on petition findings prior to submission to TE or PR8. In order to expedite the petition finding process, affected non-lead Regions simultaneously review the draft findings and notices as they are provided by the lead Region and provide concurrence or nonconcurrence memoranda from the non-lead Regional Director to the lead Regional Director within 30 days. These memoranda may provide simple statements of support for the lead Region's determinations or raise concerns and offer comments. Copies of non-lead Region concurrence/nonconcurrence memoranda are submitted to TE or PR8 with administrative petition findings and notices. The TE or PR8 will coordinate any unresolved disputes among Regions.

K. Status Reviews

Some confusion exists regarding the difference between status surveys, status reports, and status reviews. Status surveys are activities funded or conducted by one of the Services or others to study the status of a species. Status surveys generally include, as appropriate, field surveys, museum research (*e.g.*, for historic distribution), and literature searches in order to compile complete information. A status report is a written document that is the end product of a status survey. (Status surveys are unnecessary when sufficient reliable status information already is available.)

Status reviews are required by section 4(b)(1)(A) of the ESA. A status review is the act of reviewing all the available information on a species to determine if it should be provided protection under the ESA. A status review should also use the knowledge of experts; the greater the extent to which Service biologists can build an external consensus using the expertise of various parties (*e.g.*, Federal, State, Tribal, University, Heritage programs), the better. The Services must conduct the review after soliciting comments from the public by publishing a notice in the Federal Register and notifying State, Tribal, and Federal officials and other interested parties of the need for information. A status review must be initiated for a species whenever a listing petition for the species is found to be "substantial."

L. **Judicial Review**

For petitions to list, reclassify, or delist species, section 4(b)(3)(C)(ii) of the ESA makes all "not substantial" 90-day, "not warranted" 12-month, and "warranted but precluded" 12-month findings subject to judicial review (*i.e.*, such findings can be challenged in court). The object of the review is to determine whether the responsible Service's finding was arbitrary and capricious in light of the best scientific and commercial information available concerning a petitioned action. All petition findings must be biologically based, and any delay cited in a "warranted but precluded" finding must be supported by genuine progress being made on listing higher priority species (see pages 21-22 of the 1982 Conference Report, HR Report No. 97-835, in Appendix D). For the National Marine Fisheries Service, a “warranted but precluded” finding must also entail the existence of pending listing decisions for previously received petitions. It is essential that the administrative record clearly supports the Service’s finding on a particular petition.

III. **ADMINISTRATIVE PETITION FINDINGS**

An administrative petition finding is a document that clearly details and explains the essential facts and the basis for the responsible Service's conclusion about the appropriateness of a petitioned action. Petition findings need to be rooted in the here-and-now of a species' current status and whatever trends can be confidently discerned. Just as we would not as a general matter list a species that now appears to be secure on the basis of an uncertain future threat, we cannot, in most cases, reject listing a species that is clearly now declining on the basis of an unproven promise of future favorable management.

The Regional Director of the lead Region is responsible for preparation and approval of a draft administrative finding for the Service at 90 days and, if a "substantial" 90-day finding is made, 12 months after petition receipt.

A. **Petitions to List, Reclassify, or Delist Species**

Once a request has been identified as a petition and determined not to be a second (or subsequent) petition, the responsible Service must process the petition according to the statutory requirements of the ESA. To the maximum extent practicable, within 90 days of receipt of such a petition, an administrative finding (the 90-day finding) is required on whether the petition presents substantial information that the petitioned action may be warranted. Public notice of the finding must

be published promptly in the Federal Register. If a "substantial" 90-day finding is made, initiation of a status review of the species should be announced in the same Federal Register notice that announces the 90-day finding.

Within 12 months of receipt of a petition with a "substantial" 90-day finding, a second (or 12-month) finding is required, again with prompt publication in the Federal Register as to whether (1) the action is not warranted; (2) the action is warranted, and a proposed rule is published; or (3) the action is warranted but precluded by other pending proposals falling in the same class (i.e. listing or delisting), and expeditious progress is being made on the listing or delisting of species. A petition finding (either 90-day or 12-month) must not be delayed to gather additional information or data. When making a 90-day finding, the responsible Service will use the information provided by the petitioner and information already available in the Service's files. Any appropriate State agency or affected Tribal government will also be provided a copy of the petition, advised of the need for a timely finding, and requested to provide its views. When making 12-month findings, in addition to the information provided by the petitioner and already available in the Service's files, the Service will, through the required status review, collect and review relevant literature, review data submitted by public commenters, and contact experts on the subject. However, the collection of relevant literature and contacting of experts shall not be carried out in a manner that prevents issuing a timely 12-month finding on the merits of the petition.

As a procedural matter, a "warranted" 12-month finding is normally in the form of a proposed rule, where the signatory approval constitutes the administrative finding and is followed by Federal Register publication. A "warranted" finding in a form other than a proposed rule would circumvent the established rule approval process itself, and ordinarily should not be undertaken. If it becomes necessary in exceptional cases, a "warranted" 12-month finding and a proposed rule may be produced separately, but it must be done with the full knowledge and prior approval of the Director or the AA, because it commits the responsible Service and Department to expeditious approval of a proposed rule to accomplish the action. In cases where a Region intends to propose critical habitat, but cannot do so within the 12-month timeframe, a "not determinable" critical habitat finding should be made in combination 12-month finding/proposed rule.

For "not warranted" and "warranted but precluded" 12-month findings on petitions to list, reclassify, or delist a species, the administrative finding should address each of the five factors for listing a species under the ESA. For "not warranted" findings, information should be provided under each of the five factors explaining why the scientific and commercial data applicable to the factors do not support the petitioned action or that not enough data are available to determine affirmatively that proposing to list (or delist) the species is appropriate. For "warranted but precluded" findings, information should be provided under each of the five factors explaining how any of the factors apply to the petitioned species.

For actions determined to be "warranted but precluded," the petition is annually reviewed (recycled), and a subsequent 12-month finding is required, again requiring a choice of one of the three alternatives (*i.e.*, "not warranted," "warranted," "warranted but precluded"). This recycling continues at 12-month intervals until ended by either a "warranted" (*i.e.*, publication of proposed rule) or "not warranted" finding.

The 1982 amendments to the ESA sanctioned a "scientifically sound" listing priority system based on degree and immediacy of threats (see 48 FR 43098 in Appendix E). As a result, "warranted but precluded" findings are made for petitioned actions precluded from immediate proposal by pending proposals for other, higher priority rules, provided that "expeditious progress" is being made to list and appropriately reclassify or delist species that qualify for those actions.

The Fish and Wildlife Service's annual notice of review of candidate species incorporates recycled "warranted but precluded" findings coming due during the following 12 months along with an account of the Service's progress in listing, delisting, and reclassifying species during the previous year. Non-petitioned candidate species, as discussed above, are treated by the Service as under petition and covered by "warranted but precluded" findings. The National Marine Fisheries Service does not intend to make "warranted but precluded" findings unless it experiences a severe backlog of listing actions, which it does not anticipate. Because the National Marine Fisheries Service's candidate species are not necessarily "warranted but precluded," no such recycling is required.

The Services will process administrative petition findings as follows (the processing needs for "near petitions" were described earlier):

Step 1: The Regional Director of the lead Region is responsible for preparation and approval of a draft administrative finding for the responsible Service at 90 days and, if a "substantial" 90-day finding is made, at 12 months after petition receipt. The Regional Director of the lead Region is also responsible for preparing draft Federal Register notices announcing the findings (see the PETITION FINDING NOTICES AND PETITIONER NOTIFICATION section). The finding is a decision document and should include an approval line for the Director or the AA. The Director's or AA's approval establishes the date of the petition finding for the record. A finding has not been made until the draft document is reviewed, approved, and signed by the Director or AA.

Step 2: The draft due date for a 90-day finding to TE or PR8 is the 76th day after receipt of the petition or the first working day thereafter. The draft due date for a 12-month finding to TE or PR8 is the 351st day after receipt of the petition or the first working day thereafter. This provides 2 weeks (10 working days) for TE or PR8 policy review and approval before the actual due date. Exception: In the case of a combination "warranted" 12-month finding/proposed rule, the draft due date to TE or PR8 is the 305th day after receipt of the petition or the first working day thereafter (*i.e.*, 60 days prior to the 12-month due date).

Step 3: The draft finding is reviewed for policy adherence and biological substantiation by TE or PR8 as part of the surname and approval process.

Step 4: TE prepares and publishes notice at least yearly for recycled petitions as part of the candidate notice of review, which will also document expeditious progress. TE and PR8 findings will be prepared by the lead Regions involved. TE findings will be "warranted," "warranted but precluded" for species recognized as candidates and "not warranted" for species not recognized as candidates. PR8 findings will be "warranted," "warranted but precluded" or "not warranted." If "not warranted" or "warranted but precluded," and concern over its status still remains, the National Marine Fisheries Service may add the species to its candidate species list. TE and PR8 will contact the Regions prior to preparation of the notice to request input, including required administrative findings, for this composite finding. Each Region is responsible for preparing the initial 12-month finding for any petition found to present substantial information at 90 days. An initial 12-month finding and the notice announcing it will be submitted to the Director for approval in time to meet the 12-month deadline.

Step 5: An administrative finding becomes part of the permanent administrative record and is sent to the petitioner with a notification letter. An administrative finding will also be available to anyone else who requests it. Limit the explanation within an administrative finding to the essential facts and the basis for the conclusion.

B. **Petitions to Revise Critical Habitat**

An initial finding must be made, as above, within 90 days, with prompt notification in the Federal Register. If a "substantial" 90-day finding is made, within 12 months of receipt of the petition the responsible Service must determine how it intends to proceed with the revision and must publish its intention promptly in the Federal Register.

C. **Assessment of Petitions for Actions under Section 4(b)(3) of the Endangered Species Act**

Situations are described under each of the four petition categories listed below to assist employees and promote consistency in 90-day and 12-month findings. Analysis of petitions for multiple species should follow the same assessment as those for single species. Employees must make an independent assessment for each species included in a multiple species petition. When the Fish and Wildlife Service is petitioned to list a species throughout its range and a subspecies or population of that species is currently listed as a candidate, the assessment will involve only the non-candidate entity. When the National Marine Fisheries Service is petitioned the species and any subspecies will be assessed throughout its range. Examples of 90-day and 12-month petition findings are provided in Appendices H and I, respectively.

1. *Petitions to List Species*

a. 90-Day Finding Analysis

In determining whether substantial information exists for a petition to list a species, the Services will take into account information submitted with and referenced in the petition and all other information readily available in the responsible Service's files, including any information provided by State agencies and Tribal governments. Because of the 90-day time constraint, the Services will not necessarily make efforts to request data from other potential sources at this time.

In assessing the substantiality of a petition to list a species, in essence one is assessing the potential candidacy of the species. Therefore, when one of the Services makes a "substantial" 90-day finding on a petition to list a species, it is also making a determination that the species may warrant candidate status.

When a petition requests listing of a taxon that does not meet the definition of "species" under section 3(16) of the ESA, the responsible Service will explain in writing to the petitioner that the petition is not valid on this basis (*i.e.*, information submitted is not sufficient to show that the "entity" is eligible for listing).

The Services' standard for substantial information is stated at 50 CFR 424.14(b) as "that amount of information that would lead a reasonable person to believe that the measure proposed in the petition may be warranted." Evaluation of a petition for substantiality addresses the adequacy and reliability of information supporting the action advocated by the petition. A "substantial" finding is made when adequate and reliable information has been presented or is available --

a. to establish that the subject of the petition is eligible for treatment as a species under the Act and

b. that would lead a reasonable person to believe that the petitioned action may be warranted. (See Appendix A, November 30, 1995, memorandum.)

(1) "Not Substantial" Findings.

Situation 1: *The entity petitioned for listing does not meet the definition of "species" under section 3(16) of the ESA.* In some cases, a petition may be received but it is determined that the petitioned entity does not satisfy the definition of "species." In this case, no amount of information can satisfy the substantiality requirement. Therefore, the responsible Service will make a "not substantial" 90-day finding on the basis that substantial information was not available to demonstrate that the petitioned action may be warranted. (Refer to the Services' February 7, 1996, vertebrate population policy, Appendix K, for guidance on determining whether an entity meets the definition of "species" under the ESA. For Pacific salmonids under the jurisdiction of the National Marine Fisheries Service, refer to 56 FR 5862, November 20, 1991, policy on applying the definition of species under the ESA to Pacific salmon.)

Situation 2: *The prospective listing of the petitioned species has weak or incomplete support in the submitted data, and the "reasonable-person" test is not satisfied.* In this case, the responsible Service will make a "not substantial" 90-day finding.

(2) "Substantial" Findings.

Situation 1: *A petition to list a species presents adequate and reliable information sufficient to lead a reasonable person to believe that listing may be warranted.* The responsible Service will make a "substantial" 90-day finding on a petition if information submitted with and referenced in the petition and all other information currently in the Service's files show affirmatively, through data on biological vulnerability and threat to the species and/or its habitat, that the petitioned action may be warranted and that the petitioned entity satisfies the Act's definition of "species."

b. 12-Month Finding Analysis

(1) "Not Warranted" Findings.

Situation 1: *A petition to list a species was found at 90 days to present information indicating that listing may be warranted.* The responsible Service will make a "not warranted" finding if the status review does not provide convincing information to conclude that a proposal is warranted. If, at the end of a 12-month review, convincing data on biological vulnerability and threat are not available to support a proposal to list, a finding of "not warranted" will be made.

(2) "Warranted" Findings.

Situation 1: *A petition to list a species was found at 90 days to present information indicating that listing may be warranted.* The responsible Service will make a "warranted" finding if the status review provides convincing information to conclude that a proposal is warranted, and action is not precluded by other higher

priority listing actions. When a "warranted" determination is made by the Fish and Wildlife Service, the species will be assigned a listing priority number. The listing priority number will then be used to determine whether or not listing is precluded. The National Marine Fisheries Service does not assign listing priority numbers for determinations. The existence of pending listing petitions itself will be used to determine whether or not listing is precluded. If it is determined that listing is not precluded, a listing proposal will be prepared and will represent the final finding on the petition. (If it is determined that listing is precluded by other higher priority listing actions, see the "Warranted But Precluded" Findings section below.) If a listing proposal cannot be prepared in time for the 12-month finding, a "warranted" finding cannot be made; in this case, a "warranted but precluded" finding will be made. **Note:** If it becomes necessary in exceptional cases, a "warranted" 12-month finding and a proposed rule may be produced separately, but it must be done with the full knowledge and prior approval of the Director or the AA, because it commits the responsible Service and Department to expeditious approval and publication of a proposed rule.

(3) "Warranted But Precluded" Findings.

Situation 1: *A petition to list a species was found at 90 days to present information indicating that listing may be warranted.* The Services will make a "warranted but precluded" finding if the status review provides convincing information to conclude that a proposal is warranted, and the listing priority assigned to the species is low enough that listing is precluded by higher-priority listing activities. If it is determined that a listing proposal is precluded, the 12-month finding will indicate that the species is now assigned to candidate status and will identify its listing priority number. (If it is determined that listing is not precluded, see the "Warranted" Findings section above.)

2. *Petitions to Reclassify or Delist Species*

a. 90-Day Finding Analysis

Similar to the 90-day finding analysis for petitions to list species, the 90-day determination to reclassify or delist species should be based on the information presented by the petitioner. However, additional practical considerations must first be taken into account. For example, if new status and threat information was added to a species' file after it was listed but before the responsible Service was petitioned to reclassify or delist it, and that new information has never been assessed by the Service, it should also be taken into consideration.

(1) "Not Substantial" Findings.

Situation 1: *A petition to reclassify (from endangered to threatened) or delist a species presents no new information indicating that the species may meet the recovery objectives for reclassification or delisting or that it may be extinct.* Because the Services monitor the status of listed species through their recovery planning efforts, they already possess information on how species are doing in terms of meeting recovery objectives for reclassification or delisting. Therefore, the responsible Service will make a "not substantial" 90-day finding if information submitted with and referenced in the petition and unassessed information added to

the Service's files after the species was listed does not indicate that the species has achieved the recovery objectives for reclassification or delisting or that the species may be extinct. For those species for which recovery plans will not be prepared, a functional equivalent to a recovery plan (*e.g.*, a State management plan or multi-agency management plan) may be used to determine if reclassification or delisting is appropriate. **Note:** If neither a recovery plan nor a functional equivalent is available, contact TE or PR8 for more specific guidance.

Situation 2: *A petition to reclassify a species (from threatened to endangered) presents no new information indicating that the species' listing status may need to be elevated.* The responsible Service will make a "not substantial" 90-day finding if information submitted with and referenced in the petition and unassessed information added to the Service's files after the species was listed does not indicate any change in the status of the species and/or biological vulnerability and threat to a species and/or its habitat that might result in elevation of the species' listing status.

Situation 3: *A petition to delist a species presents no new information indicating that the original data for listing the species may be in error.* Occasionally, the Services receive petitions to delist species on the basis that the original data for listing were in error (*e.g.*, information presented under the five factors for listing the species were in error, the taxonomy of the species has been modified such that the entity no longer meets the ESA's definition of "species" or the taxonomy of the species has been modified and the new taxonomic entity is not appropriately classified as "endangered" or "threatened." The responsible Service will make a "not substantial" 90-day finding if information submitted with and referenced in the petition and unassessed information added to the Service's files after a species was listed does not indicate that any of these events actually may be the case.

(2) "Substantial" Findings.

Situation 1: *A petition to reclassify (from endangered to threatened) or delist a species presents new information indicating that the species may meet the recovery objectives for reclassification or delisting or that it may be extinct.* Because the Services monitor the status of listed species through their recovery planning efforts, they already possess information on how species are doing in terms of meeting recovery objectives for reclassification or delisting. Therefore, the responsible Service will make a "substantial" 90-day finding if information submitted with and referenced in the petition and unassessed information added to the Service's files after a species was listed indicates that the species may have achieved the recovery objectives for reclassification or delisting or that the species may be extinct. The responsible Service also will indicate its intention to conduct a status review to determine if the new information justifies reclassification or delisting of the species. For those species for which recovery plans will not be prepared, a functional equivalent to a recovery plan (*e.g.*, a State management plan or multi-agency management plan) may be used to determine if reclassification or delisting is appropriate. **Note:** If neither a recovery plan nor a functional equivalent is available, contact TE or PR8 for more specific guidance.

Situation 2: *A petition to reclassify a species (from threatened to endangered) presents new information indicating that the species' listing status may need to be elevated.* The responsible Service will make a "substantial" 90-day finding if

information submitted with and referenced in the petition and unassessed information added to the Service's files after the species was listed indicates any change in the status of a species and/or biological vulnerability and threat to the species and/or its habitat that might result in elevation of the species' listing status. The responsible Service also will indicate its intention to conduct a status review to determine if the new information justifies reclassification of the species.

Situation 3: *A petition to delist a species presents new information indicating that the original data for listing the species may be in error.* Occasionally, the Services receive petitions to delist species on the basis that the original data for listing were in error (*e.g.*, information presented under the five factors for listing the species were in error, the taxonomy of the species has been modified so that the entity no longer meets the ESA's definition of "species" or the taxonomy of the species has been modified and the new taxonomic entity is not appropriately classified as "endangered" or "threatened." The responsible Service will make a "substantial" 90-day finding if information submitted with and referenced in the petition and unassessed information added to the Service's files after a species was listed indicates that any of these events actually may be the case. The responsible Service also will indicate its intention to conduct a status review to determine if the new information justifies delisting of the species.

b. 12-Month Finding Analysis

(1) "Not Warranted" Findings.

Situation 1: *A petition to reclassify (from endangered to threatened) or delist a species was found at 90 days to present new information indicating that the species may meet the recovery plan objectives for reclassification or delisting or that it may be extinct.* The responsible Service will make a "not warranted" finding if the status review does not provide convincing information to conclude that the species has achieved the recovery objectives for reclassification or delisting or that the species is extinct.

Situation 2: *A petition to reclassify a species (from threatened to endangered) was found at 90 days to present new information indicating that the species' listing status may need to be elevated.* The responsible Service will make a "not warranted" finding if the status review does not provide convincing information to conclude that the species now meets the definition of an endangered species under the ESA.

Situation 3: *A petition to delist a species was found at 90 days to present new information indicating that the original data for listing the species may be in error.* The responsible Service will make a "not warranted" finding if the status review does not provide convincing information to conclude that the original data for listing the species were in error.

(2) "Warranted" Findings.

Situation 1: *A petition to reclassify (from endangered to threatened) or delist a species was found at 90 days to present new information indicating that the species*

may meet the recovery plan objectives for reclassification or delisting or that it may be extinct. The responsible Service will make a "warranted" finding if the status review provides convincing information to conclude that the species has achieved the recovery objectives for reclassification or delisting or that the species is extinct and that reclassification or delisting is not precluded by other higher priority listing or reclassification/delisting actions. In this situation, a proposal to reclassify or delist the species will represent the finding on the petition. If a proposal to reclassify or delist cannot be prepared in time for the 12-month finding, a "warranted" finding cannot be made; in this case, a "warranted but precluded" finding will be made. **Note:** If it becomes necessary in exceptional cases, a "warranted" 12-month finding and a proposed rule may be produced separately, but it must be done with the full knowledge and prior approval of the Director or AA, because it commits the responsible Service and Department to expeditious approval and publication of a proposed rule.

Situation 2: *A petition to reclassify a species (from threatened to endangered) was found at 90 days to present new information indicating that the species' listing status may need to be elevated*. The responsible Service will make a "warranted" finding if the status review provides convincing information to conclude that the species now meets the definition of an endangered species under the ESA and that reclassification is not precluded by other higher priority listing or reclassification/delisting actions. In this situation, a proposal to reclassify the species will represent the finding on the petition. If a proposal to reclassify cannot be prepared in time for the 12-month finding because of pending listing actions, a "warranted" finding cannot be made; in this case, a "warranted but precluded" finding will be made. **Note:** If it becomes necessary in exceptional cases, a "warranted" 12-month finding and a proposed rule may be produced separately, but it must be done with the full knowledge and prior approval of the Director or AA, because it commits the responsible Service and Department to expeditious approval and publication of a proposed rule.

Situation 3: *A petition to delist a species was found at 90 days to present new information indicating that the original data for listing the species may be in error*. The responsible Service will make a "warranted" finding if the status review provides convincing information to conclude that the original data for listing the species were in error and that a delisting proposal is not precluded by other higher priority delisting actions. In this situation, a proposal to delist the species will represent the finding on the petition. If a delisting proposal cannot be prepared in time for the 12-month finding, a "warranted" finding cannot be made; in this case, a "warranted but precluded" finding will be made. **Note:** If it becomes necessary in exceptional cases, a "warranted" 12-month finding and a proposed rule may be produced separately, but it must be done with the full knowledge and prior approval of the Director or AA, because it commits the responsible Service and Department to expeditious approval and publication of a proposed rule.

(3) "Warranted But Precluded" Findings.

Situation 1: *A petition to reclassify (from endangered to threatened) or delist a species was found at 90 days to present new information indicating that the species may meet the recovery plan objectives for reclassification or delisting or that it may be extinct*. The responsible Service will make a "warranted but precluded" finding if

the status review provides convincing information to conclude that the species has achieved the recovery objectives for reclassification or delisting or that the species is extinct but such action is precluded by other higher priority listing or reclassification/delisting actions.

Situation 2: *A petition to reclassify a species (from threatened to endangered) was found at 90 days to present new information indicating that the species' listing status may need to be elevated.* The responsible Service will make a "warranted but precluded" finding if the status review provides convincing information to conclude that the species now meets the definition of an endangered species under the ESA but such action is precluded by other higher priority listing or reclassification/delisting actions or for the National Marine Fisheries Service, other pending listing or reclassification/delisting petitions.

Situation 3: *A petition to delist a species was found at 90 days to present new information indicating that the original data for listing the species may have been in error.* The responsible Service will make a "warranted but precluded" finding if the status review provides convincing information to conclude that the original data for listing the species were in error but preparation of a proposal to delist the species is precluded by other higher priority listing or reclassification/delisting actions or for the National Marine Fisheries Service, other pending listing or reclassification/delisting petitions.

3. *Petitions to Revise Critical Habitat*

a. 90-Day Finding Analysis

The 90-day determination to revise critical habitat for a listed species should be based on the information presented by the petitioner. However, additional practical considerations must first be taken into account. For example, if new information on habitat was added to a species' file after critical habitat was designated but before the petition was received to revise it, and that new information has never been assessed by the responsible Service, it should also be taken into consideration.

(1) "Not Substantial" Findings.

Situation 1: *A petition to revise critical habitat presents no new information on the species' habitat or habitat needs indicating that revision of critical habitat may be warranted.* Because the responsible Service already considered all information available at the time of the original critical habitat designation and is provided the opportunity to revise critical habitat if necessary based on new information that has become available, the Service will make a "not substantial" 90-day finding if information submitted with and referenced in the petition and unassessed information on the species' habitat or habitat needs added to the Service's files after critical habitat was designated does not indicate that revision of critical habitat may be appropriate.

(2) "Substantial" Findings.

Situation 1: *A petition to revise critical habitat presents new information on the species' habitat or habitat needs indicating that revision of critical habitat may be warranted.* The responsible Service will make a "substantial" 90-day finding if information submitted with and referenced in the petition and unassessed information on the species' habitat or habitat needs added to the Service's files after critical habitat was designated indicates that revision of critical habitat may be appropriate. The responsible Service also will indicate its intention to conduct a review to determine if the new information justifies revision of critical habitat.

b. 12-Month Finding Analysis

Section 4(b)(3)(D)(ii) of the ESA provides that "Within 12 months after receiving a petition... found... to present substantial information indicating that the requested revision [of critical habitat] may be warranted, the Secretary shall determine how he intends to proceed with the requested revision, and shall promptly publish notice of such intention in the Federal Register." Situations are provided below to assist in the 12-month determinations for petitions to revise critical habitat.

(1) "Not Warranted" Findings.

Situation 1: *A petition to revise critical habitat was found at 90 days to present new information on the species' habitat or habitat needs indicating that revision of critical habitat may be warranted.* The responsible Service will make a "not warranted" finding if the review does not provide convincing information to conclude that revision of critical habitat is appropriate.

(2) "Warranted" Findings.

Situation 1: *A petition to revise critical habitat was found at 90 days to present new information on the species' habitat or habitat needs indicating that revision of critical habitat may be warranted.* The responsible Service will make a "warranted" finding if the review provides convincing information to conclude that revision of critical habitat is appropriate. A proposal to revise critical habitat need not accompany the final finding on the petition. The Service must only announce how it intends to proceed with the requested revision.

IV. PETITION FINDING NOTICES AND PETITIONER NOTIFICATION

A. Petition Finding Notices

1. Petition finding notices are documents prepared for Federal Register publication to announce administrative petition findings. The lead Region should submit a draft notice for Federal Register publication to the Headquarters Office concurrent with submittal of the administrative finding with the following exception. In the case of a "warranted" 12-month finding on a listing petition, a proposed rule constituting the 12-month finding should be submitted.

2. An administrative petition finding (90-day or 12-month) should contain the bulk of the information on which the finding is based, and a petition finding notice should simply announce and *briefly* summarize the administrative finding. In cases where a "warranted" 12-month finding is incorporated into a proposed rule, the rule should contain the detailed information

upon which the 12-month finding is based (in this case, a separate administrative finding is not necessary).

3. A 90-day finding notice should also include a due date for receiving comments (30 to 60 days is recommended). This informs the public of the date by which the responsible Service needs to receive comments in order to use them in making a 12-month finding. A 12-month finding notice should also convey the results of the status review, if conducted, and provide a relatively brief summary of the reasoning that led to the conclusions in the finding.

4. The "SUPPLEMENTARY INFORMATION" text for each species' petition finding notice should typically consist of two to four paragraphs. Contact persons and their addresses and phone numbers are also needed for each species' finding. The remaining petition notice text is very standardized, but slightly different for 90-day and 12-month findings (see the Listing Handbook and examples provided in Appendices H and I for notice format). Exception: In cases where a "warranted" 12-month finding is incorporated into a proposed rule, the Federal Register document (*i.e.*, the proposed rule) should contain the detailed information upon which the 12-month finding is based.

5. With regard to recycled "warranted but precluded" findings, TE is responsible for publishing notice of at least one composite administrative finding each year as part of the annual notice of review for candidate species. This will account for pre-1982 amendment petitions, which fall due on October 13 each year, as well as post-1982 amendment petitions recycling on their own schedules that will come due within the following 12 months. A lead Region should submit a recommendation for any recycled finding within its area of responsibility as part of its annual contribution to the notice of review.

Note: Determining that a petitioned action to list, reclassify, delist, or revise critical habitat is "warranted" differs little from deciding to propose a rule for a non-petitioned action. The notice of finding is incorporated in the last paragraph(s) of the "Background" section of the proposed rule. It should mention that the action was petitioned (with dates), name the petitioner(s), provide an accounting of significant petition findings, and state that the proposed rule constitutes a required finding for that petition.

B. Petitioner Notification

A lead Region should provide the primary, as well as any secondary, petitioners with a copy of each Federal Register notice regarding a petition within 15 days of the notice publication (this includes notifying petitioners of recycled findings). A petitioner should not be notified prior to filing of the notice at the Office of the Federal Register without the approval of the Director or AA. Examples of petitioner notification of finding letters are provided in Appendix J.

C. Outreach

Each notice package should include an appropriate outreach plan, including information on the known or anticipated media interest in the action. The Region must include in the package sent to TE or PR8 a draft news release cleared by the Regional Public Affairs Office. Congressional delegations and Committees should be notified through the Office of Legislative Services or Office of Legislative Affairs and offered briefings. In cases involving particular public interest or controversy, briefings for non-governmental organizations are also appropriate. The Services have an opportunity at the point of making a petition finding to explain their actions and the rationale for them. Early and effective notification at this stage may reduce ill-informed controversy later in the process.

APPENDIX A

November 30, 1995, Memorandum Clarifying Standards for 90-day Findings

APPENDIX B

Example Petitioner Acknowledgement Letters

APPENDIX C

Example Reply to Petition to List Ineligible Entity

APPENDIX D

Conference Report No. 97-835 for the 1982 Amendments

APPENDIX E

Listing and Recovery Priority Guidelines

APPENDIX F

Listing Endangered and Threatened Species and Designating Critical Habitat; Amended Procedures to Comply with the 1982 Amendments to the Endangered Species Act

APPENDIX G

Example Recycled 12-Month Administrative Petition Finding/Notice

APPENDIX H

Example 90-Day Administrative Petition Findings/Notices

This appendix contains several 90-day administrative petition findings and the Federal Register documents announcing them that may be useful to Field Office staff during document preparation. These examples were prepared prior to the distribution of the Petition Management Guidance and do not necessarily conform to it in all respects. Where the examples and the Petition Management Guidance diverge, defer to the Petition Management Guidance.

APPENDIX I

Example 12-Month Administrative Petition Findings/Notices

This appendix contains several 12-month administrative petition findings and the Federal Register documents announcing them that may be useful to Field Office staff during document preparation. These examples were prepared prior to the distribution of the Petition Management Guidance and do not necessarily conform to it in all respects. Where the examples and the Petition Management Guidance diverge, defer to the Petition Management Guidance.

APPENDIX J

Example Petitioner Notification of Finding Letters

APPENDIX K

Distinct Population Policy

APPENDIX L

Recovery Planning Guidelines, National Marine Fisheries Service