

Background

Section 4(b)(3)(A) of the Endangered Species Act of 1973, as amended (Act) (16 U.S.C. 1531 *et seq.*), requires that we make a finding on whether a petition to list, delist, or reclassify a species presents substantial scientific or commercial information to demonstrate that the petitioned action may be warranted. This finding is to be based on all information available to us at the time we make the finding. To the maximum extent practicable, this finding is to be made within 90 days of our receipt of the petition, and the notice of the finding is to be published promptly in the **Federal Register**. Our standard for substantial information within the Code of Federal Regulations (CFR) with regard to a 90-day petition finding is "that amount of information that would lead a reasonable person to believe that the measure proposed in the petition may be warranted" (50 CFR 424.14(b)(1)). If we find that substantial information was presented, we are required to promptly commence a review of the status of the involved species, if one has not already been initiated under our internal candidate assessment process.

In 1989, we were petitioned to list a portion of the trumpeter swans in North America (Rocky Mountain Population (RMP), see below) as threatened. However, the petition presented information that we deemed insufficient to warrant proceeding with a status review (55 FR 17646–17648; April 16, 1990).

On August 25, 2000, we received a petition to list the Greater Yellowstone (Tri-State) breeding population of the trumpeter swan as threatened or endangered. The petitioners, the Biodiversity Legal Foundation and Fund for Animals, assert that the Tri-State Area flock meets the definition of a DPS, as defined in our policy published February 7, 1996 (61 FR 4722), and, therefore, warrants listing because of its low population numbers and other threats, including the allowed take of trumpeter swans during the hunting seasons in Utah and Nevada.

On September 22, 2000, we notified the petitioners that our Listing Priority Guidance, published in the **Federal Register** (64 FR 57114) on October 22, 1999, designated the processing of new listing petitions as a Priority 4 activity (*i.e.*, of lower priority than processing emergency listings, processing determinations on proposed species, and resolving the status of candidate species). We further informed the petitioners that we consider the Tri-State Area trumpeter swan flock as a

portion of the RMP, which has had an increasing number of swans since the 1960s. Therefore, we did not find a compelling reason to consider the petition under emergency listing criteria, and no funds were available to proceed with an administrative finding at that time.

On October 25, 2000, the petitioners and the Utah Environmental Congress, Margaret Pettis, and Mack P. Bray, filed a formal complaint in Federal District Court for the District of Columbia (*Fund for Animals v. Clark*, 00–CV–02558) alleging that we violated the Act by failing to publish a 90-day finding for their petition. Plaintiffs also allege that the Service violated provisions of the MBTA, the National Environmental Policy Act (NEPA), and the Administrative Procedures Act by allowing implementation of a limited trumpeter swan hunting season in 2000. The case was settled on March 23, 2001, when we agreed to reevaluate our compliance with the MBTA and NEPA for the 2002 hunting season regulations.

On February 5, 2001, we received a 60-day notice of intent from Meyer and Glitzenstein, legal representatives for the petitioners, alleging that we had violated the Act by failing to make a finding as to whether the petition to list the Tri-State Area trumpeter swan flock presented substantial information indicating that listing may be warranted. We responded on April 4, 2001, reiterating that we would not be able to begin an evaluation of the petition until the work on the higher-priority activities was completed. On September 6, 2001, Meyer and Glitzenstein filed another 60-day notice alleging that we violated the Act by failing to make a 12-month finding within 1 year of the receipt of the trumpeter swan petition.

On October 3, 2001, plaintiffs were joined by the Humane Society of the United States in a new complaint alleging that our reevaluation of the swan hunting regulations was not adequate, and that we had violated the Act by failing to prepare a 90-day finding on the swan petition (*Fund for Animals et al. v. Norton*, 01–CV–2078 (RMU)).

On March 5, 2002, plaintiffs filed an amended complaint to include the allegation that we had violated the Act by failing to complete a 12-month finding on the swan petition. The case has been briefed and a decision is pending from the court.

Petitioners' Assertions

Petitioners assert that the Tri-State "population segment" of trumpeter swans, a group of largely non-migratory swans that breed and winter in the

Greater Yellowstone area in and around Yellowstone National Park in Wyoming, Montana, and Idaho, qualifies as a listable entity under the Act in accordance with our DPS policy cited above. The petition asserts that the Tri-State segment is geographically and biologically distinct from other trumpeter swan groups in North America and the United States. The petitioners propose that the segment is discrete because it is separated by physical, physiological, ecological, behavioral, "or other factors," and is separated by approximately 400 miles from any other significant breeding groups of this species. Petitioners also assert that the Tri-State Area flock is distinct from other swan flocks in Canada by reason of the international boundary and alleged differences in exploitation and management of this species between Canada and the United States.

Petitioners allege that the Tri-State Area flock has lost "more than 30 percent of its adults in the past decades, and is in an imperiled situation." The petition recommends that we consider emergency listing of the petitioned DPS.

Distinct Population Segment Analysis

Under the Act, we must consider for listing any species, subspecies, or, for vertebrates, any DPS of these taxa, if sufficient information is present to indicate that such action may be warranted.

To implement the measures prescribed by the Act and its Congressional guidance, we developed policy that addresses the recognition of DPSs for potential listing actions (61 FR 4722; February 17, 1996). The policy allows for more refined application of the Act that reflects the biological needs of the taxon being considered and avoids the inclusion of entities that do not require its protective measures.

The Act's legislative history (Senate Report 96–151, 1st Session) indicates that Congress expects the Services (Fish and Wildlife Service and National Marine Fisheries Service) to use the DPS designation "*sparingly and only when the biological evidence indicates that such action is warranted*" (emphasis added).

The background information included with the publication of our final DPS policy indicates that any interpretation adopted for DPS determination should be consistent with the purposes of the Act (*i.e.*, "*to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, to provide a program for conservation of such endangered species and threatened species, and to*