



Grey, Hope <hope_grey@fws.gov>

Comments of PETA in Response to 1018-0093

1 message

Amanda Schwoerke <AmandaSchwoerke@petaf.org>

Tue, Feb 18, 2014 at 8:17 PM

To: "hope_grey@fws.gov" <hope_grey@fws.gov>

Dear Ms. Grey:

Please find attached PETA's comments in response to 1018-0093. Exhibits will be attached in following emails.

Thank you.

Regards,

Amanda Schwoerke

Counsel

PETA Foundation

1536 16th Street, NW

Washington, DC 20036

PH (571) 357-2287

FAX (202) 540-2208

"[One] can never have observed with attention the character of animals, not to have distinguished among them the different voices of need, of suffering, of joy, of pain, of love, of anger, and of all their affections. It would be very strange that they should express so well that they could not feel." ~Voltaire, *Traité sur la Tolérance*



Comments of PETA in Response to 1018-0093 (00151296xB39F9).pdf

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Comments of People for the Ethical Treatment of Animals in Response to 1018-0093

People for the Ethical Treatment of Animals (“PETA”) submits the following comments in response to the U.S. Fish & Wildlife Service’s (“FWS”) information collection covering Endangered Species Act (“ESA”) permit applications and reports. Proposed Information Collection, 78 Fed. Reg. 76313 (Dec. 17, 2013). PETA urges the FWS to require applicants for ESA permits to submit their applications online, as well as to make ESA permit applications and related materials available to the public online. Transitioning to an online system will ensure that the public has adequate time to comment on permit applications and that the FWS provides the public all information received as part of the applications. It will also increase the probability that permit applicants will submit all required information. The National Marine Fisheries Service’s (“NMFS”) APPS system is a perfect example of how the FWS can manage ESA permit applications and related materials online.

I. Making Application Materials Available Online Will Ensure that the Public Has Sufficient Time to Meaningfully Comment on ESA Permit Applications.

Section 10(c) of the ESA provides that “[i]nformation received by the Secretary as part of any application shall be available to the public as a matter of public record at every stage of the proceeding.” 16 U.S.C. § 1539(c). PETA requests that the FWS make all ESA permit applications and other “[i]nformation received by the Secretary as part of any application” available to the public online.

Interested parties have thirty days after the FWS publishes notice of a permit application in the Federal Register to submit “written data, views, or arguments with respect to the application.” *Id.* However, the FWS has routinely failed to provide application materials to PETA until a week or more after it has requested them, significantly eroding its time for commenting. PETA waited *ten days* before receiving requested application materials at least *ten times* in 2013, eight days at least eleven times, and seven days at least five times, even though both PETA and the FWS generally correspond via email. In 2012, out of just thirteen requests for application materials, PETA waited ten days before receiving requested materials three times, eight days once, and seven days twice. And, on June 23, 2011, PETA requested application materials, but did not receive them until July 6, 2011—*two weeks later*. Another two days passed before PETA received the applicant’s facility file, which contained background materials on the applicant and was, according to the FWS, considered part of the application. *E.g.*, Ex. 1,

Email from Amanda Schwoerke, Counsel, PETA Foundation, to Brenda Tapia, Program Analyst/Data Administrator, Branch of Permits, Division of Management Authority, FWS (Dec. 30, 2013) (noting that PETA did not receive a copy of PRT-690136 until eight days after requesting the materials); Ex. 2, Email from Teresa Marshall, Coordinator of Captive Animal Law Enforcement, PETA Foundation, to Brenda Tapia (Apr. 4, 2013) (following up on request for application materials, which had not been received after ten days); Ex. 3, Email from Matthew Strugar, Senior Litigation Counsel, PETA Foundation, to Brenda Tapia (Nov. 8, 2012) (noting that PETA requested application materials on October 18, 2012, but did not receive them until October 30, 2012); Ex. 4, Email from Lindsay Waskey, Counsel, PETA Foundation, to Lisa Leirheimer, Division of Management Authority, FWS (Apr. 19, 2012) (noting that PETA still had not received application materials ten days after requesting them); Ex. 5, Email from Delcianna Winders, Director, Captive Animal Law Enforcement, PETA Foundation, to Timothy Van Norman, Chief, Branch of Permits, Division of Management Authority, FWS (July 22, 2011) (noting that PETA waited thirteen days to receive requested application materials). Yet, the FWS has customarily refused to extend the comment period to mitigate this breakdown in the process. *See, e.g.*, Ex. 6, Email from Timothy Van Norman to Amanda Schwoerke (Jan. 2, 2014) (stating that the agency would not extend the comment period despite providing application materials to PETA a week after they were requested).

“An agency commits serious procedural error when it fails to reveal” information, upon which it is basing a permit decision, “in time to allow for meaningful commentary.” Ex. 7, *Solite Corp. v. EPA*, 952 F.2d 473, 484 (D.C. Cir. 1992) (quoting *Conn. Light & Power Co. v. NRC*, 673 F.2d 525, 530-31 (D.C. Cir. 1982), *cert. denied*, 459 U.S. 835 (1982)). For all intents and purposes, the FWS is routinely reducing the *de facto* comment period for ESA permit applications to between fifteen and twenty-three days. A fifteen-day comment period is only permissible when there is an “urgent necessity for rapid administrative action under the circumstances.” Ex. 8, *Omnipoint Corp. v. FCC*, 78 F.3d 620, 629 (D.C. Cir. 1996). Making permit applications and related materials available online to the public will make it more likely that interested parties like PETA are not deprived of a meaningful opportunity to comment.¹

¹ There should be no privacy or similar concerns with making application materials available online since § 10(c) of the ESA already makes these materials part of the “public record at every stage of the proceeding.” 16 U.S.C. § 1539(c). In addition, permit application forms warn applicants that “[d]isclosures outside the Department of the Interior may be made without the consent of an individual” for multiple enumerated uses and requires that

II. Interested Parties Will Be More Likely to Receive All Application Materials if the FWS Collects Permit Applications and Related Materials Online.

The FWS has also routinely failed to provide the public with all “[i]nformation received by the Secretary as part of an[] application,” as § 10(c) of the ESA mandates. 16 U.S.C. § 1539(c). *See, e.g.*, Ex. 9, Email from Amanda Schwoerke to Brenda Tapia (Feb. 12, 2014) (noting that CD referenced in the permit application was excluded from the application materials received by PETA); Ex. 10, Email from Brenda Tapia to Carney Anne Chester, Counsel, Captive Animal Law Enforcement, PETA Foundation (Mar. 21, 2013) (attaching additional application materials); Ex. 11, Email from Anna Barry, Senior Biologist, Division of Management Authority, FWS, to Amanda Schwoerke (Apr. 2, 2012) (attaching application materials, which were not included in the initial materials provided to PETA); Ex. 12, Email from Brenda Tapia to Delcianna Winders (Sept. 14, 2011) (“I mistakenly omitted some information from the documents that I sent to you earlier concerning Hawthorn Corporation. I went back to the file and I noticed some extra information.”).

This is likely due in large part to the fact that many records are lost or misfiled. According to a leading information-science journal, 7.5 percent of all documents get lost, and three percent of the remainder are misfiled. Ex. 13, Deb Hunt, *The Accidental Knowledge Manager: Another Role for Independent Information Manager: Another Role for Independent Information Professionals*, 37 BULLETIN OF THE AMERICAN SOCIETY FOR INFORMATION SCIENCE AND TECHNOLOGY 53, 53 (2010).

Compiling all application materials in a centralized online database, where they are available to the public, will make it less likely that they are lost and misfiled because, once captured, there is never a need to physically remove and re-file an item, and digitized records are subject to usual network backup procedures. Consequently, the public will be more likely to receive *all* “[i]nformation received by the Secretary.” 16 U.S.C. § 1539(c).²

businesses include a “non-confidential summary of [any] confidential information” marked “Business Confidential,” which can be uploaded in lieu of any confidential business information. Ex. 14, Federal Fish and Wildlife Permit Application Form no. 3-200-41, at 5.

² This should also save the agency money since it costs an average of \$120 in labor to find a misfiled document and \$220 in labor to reproduce a lost document. Ex. 13, Deb Hunt, *The Accidental Knowledge Manager: Another Role for Independent Information Manager: Another Role for Independent Information Professionals*, 37 BULLETIN OF THE AMERICAN SOCIETY FOR INFORMATION SCIENCE AND TECHNOLOGY 53, 53 (2010).

III. Requiring Online Applications Will Increase the Probability that Permit Applicants Provide All Required Information.

ESA permit applicants have regularly failed to provide all required information. *See, e.g.*, Ex. 15, Comments of PETA in Opposition to PRT-24177B, at 9-10 (Feb. 12, 2014) (listing omitted information, including, among others, the construction materials used to build enclosures and documentation addressing how the applicant intends to maintain genetic vitality in its captive population); Ex. 9, Email from Amanda Schwoerke to Brenda Tapia (Feb. 12, 2014) (listing omitted information, including, among others, the number of births/hatches who survived beyond thirty days and mortalities of species similar to those requested); Ex. 16, Email from Rachel Mathews to Brenda Tapia (Feb. 6, 2014) (identifying omitted information, including, among others, photographs or other evidence clearly depicting the required facilities); Ex. 17, Email from Rachel Mathews to Brenda Tapia (Jan. 17, 2014) (same); Ex. 1, Email from Amanda Schwoerke to Brenda Tapia (Dec. 30, 2013) (identifying missing required information, including, among others, a summary detailing activities conducted under the permit and the year of successful births/hatches); Ex. 18, Email from Delcianna Winders to Brenda Tapia (July 26, 2013) (listing omitted required information, including, among others, a key to which species were in which enclosures and sources for the requested species).

The FWS cannot issue a permit if “[t]he applicant has failed to disclose material information required . . . in connection with his application.” 50 C.F.R. § 13.21(b)(2); *see also id.* § 17.22 (the FWS may only issue a § 10 permit “[u]pon receipt of a complete application”). Requiring ESA permit applicants to file their applications online will increase the probability that applicants submit all required information. The FWS can easily design the online system to prevent applicants from submitting their applications without filling out all required fields. For example, question 5 of the captive-bred-wildlife-registration application mandates: “Provide a specific description of how your proposed activities are going to facilitate captive breeding of the species identified above, including your long-term goals and intended disposition of any progeny.” Ex. 14, Federal Fish and Wildlife Permit Application Form no. 3-200-41, at 2. An online application system can break this question into multiple required fields, such as “[p]rovide . . . your long-term goals” and “[p]rovide . . . [the] intended disposition of any progeny”—which permit applicants must answer before the system allows them to submit their application. This will preclude applicants inadvertently omitting required information.

IV. The NMFS's APPS Online System Provides an Excellent Model for the FWS.

The NMFS shares responsibility with the FWS for administering the ESA. The NMFS's APPS system is a perfect example of how the FWS can manage ESA permit applications and related materials online. APPS:

- allows applicants to apply for ESA permits online (<https://apps.nmfs.noaa.gov/index.cfm>);
- provides the public online access to records open for public comment—including application responses and attachments (https://apps.nmfs.noaa.gov/preview/preview_open_for_comment.cfm);
- enables permit holders to submit annual reports online;
- and allows the public to search by multiple criteria for and view active and expired permits (<https://apps.nmfs.noaa.gov/search/search.cfm>).

V. Conclusion

For these reasons, PETA urges the FWS to require applicants for ESA permits to submit their applications online, as well as to make ESA permit applications and related materials available to the public online. Transitioning to an online system will ensure that the public has adequate time to comment on permit applications and that the FWS provides the public all information received as part of the applications. It will also increase the probability that permit applicants will submit all required information.