



August 3, 2020

Texas Sunset Advisory Commission
ATTN: Danielle Nasr, *Project Manager*
Robert E. Johnson Bldg., 6th Floor
1501 North Congress Avenue
Austin, TX 78701

RE: Comments & Recommendations for Texas Parks & Wildlife Department

Dear Ms. Nasr:

The Texas Public Policy Foundation (“TPPF”) submits these comments and recommendations regarding the Sunset Advisory Commission’s ongoing review of Texas Parks & Wildlife Department (“TPWD” or the “Department”). TPPF is a 501(c)3 non-profit, non-partisan research institute dedicated to promoting and defending individual liberty, personal responsibility, private property rights, and free enterprise. Pursuant to such efforts, TPPF has recently become engaged in ensuring that TPWD remains faithful to its properly limited role with regard to regulating threatened plant and animal species.

While TPWD’s efforts do not involve a species’ “critical habitat,” the Department’s regulation of threatened species still limits the activities that Texans may engage in on their own land with regard to the animals listed. TPPF firmly believes that government control over landowners should be a last resort instead of a first impulse, only to be exercised in the most exigent of circumstances. And species conservation is no exception to these principles. Accordingly, TPPF’s comment here is in no way meant to concur in TPWD’s rapid expansion of a regulatory scheme that was previously limited and mostly benign. However, to the extent that policymakers find this recent administrative growth necessary, TPPF urges that these developments be accompanied by reforms to ensure that these threatened species programs are more prudently administered.

EXECUTIVE SUMMARY

This Commission’s newly issued Staff Report correctly recognizes that much of TPWD’s strategic planning lacks “concrete objectives and outcome-based performance measures to better guide the agency’s operations.”¹ This certainly holds true in relation to the Department’s conservation efforts toward threatened species. TPWD’s threatened species program is in need of more precise, better defined goals. Once developed, those goals should serve as the yard stick against which the program’s success is measured.

¹ Sunset Advisory Comm’n, Sunset Staff Review of the *Texas Parks and Wildlife Department* 1 (June 2020).

Additionally, the processes for making additions to the state's threatened species lists need substantial improvement. The factors to be considered when making listing decisions are vague and poorly defined, while the criteria adopted by TPWD internally is questionable. Further, the proposals themselves fail to adequately explain and support listing decisions. This truncated process of proposing listings without support and then adopting those proposals without explanation is in stark contrast with the rigorous multi-step procedures observed when listing species on the federal level.

TPWD's accounting standards in relation to threatened species conservation are also inadequate. Not only does threatened species status play very little role in determining how Department resources are allocated, but there is insufficient tracking of the funds being expended on conservation efforts. While TPWD undoubtedly administers programs that tangentially effect threatened species, the level of spending on efforts that are directly pointed toward conserving such species is unknown because it is not specifically tracked.

Finally, the process for removing species from the threatened species lists also merits review and reform. Species all too often remain on the state's threatened lists long after such a listing can be justified—even following being delisted federally. Further, TPWD has failed to apply the same standards that it adopted internally for adding species toward species removal. Nor is there a clear mechanism for the public to step in to correct these oversights.

To reform these shortcomings, we respectfully request that the Texas Sunset Advisory Commission consider and ultimately incorporate the recommendations below into its Final Report on the TPWD. We recommend that the Texas Legislature:

- provide clear statutory guidance on the goals of threatened species regulation;
- formulate outcome-based performance metrics to measure TPWD's progress toward these goals;
- specify the factors that are to be considered in making listing determinations, including the extent to which NatureServe should be relied upon for such decisions (if at all);
- require that any proposal to add species include the reasoning and evidence supporting such an addition;
- implement procedures that will bring about a closer examination of proposed listings and more widespread participation in the listing process;
- require regular reporting of funds being expended with the specific purpose of conserving state threatened species;
- automatically sunset species listings, with such listings expiring after a set number of years unless formally readopted through a notice and comment regulatory process;
- mandate that any change in a species' federal status will trigger an automatic review of its state listing status with a presumption that the same change should be made at the state level;
- ensure that the same criteria used for adding species to the threatened species lists also be applied to removing species from those lists;

- clarify whether TPWD may be petitioned for removal of a species from the state’s threatened species lists and, if so, whether the petitioner must be an “interested person”² or can be “any person”³; and
- authorize, create, and publicize a simple, streamlined process for persons to petition for species to be removed from the threatened species lists.

The rationales underlying these recommendations are discussed in detail below.

BRIEF HISTORY

The Department’s recent efforts to expand its regulatory reach began in September 2019, with its initial proposal to significantly increase the number of state-listed species,⁴ which was subsequently retracted⁵ and then reissued with slight variations in December.⁶ The December proposal sought to add 45 species to the threatened plant and animal species lists while removing only 13, resulting in a 28 percent increase in the total number of threatened species from 115 to 147. Such an expansion was truly unprecedented, as additions had only been made to these lists five times over the prior two decades, with only one species being added on four of those five occasions.⁷ The additions were officially adopted following a Texas Parks and Wildlife Commission meeting on January 23, 2020.⁸

For over half a century, regulation of imperiled species has been primarily a federal responsibility. Pursuant to the first major federal statute aimed at protecting endangered species—the Endangered Species Preservation Act of 1966⁹—the Department of Interior issued its first list of endangered species in March 1967.¹⁰ A few years later, Congress sought to address a perceived shortcoming of these prior efforts by establishing two distinct categories of federally regulated species—“endangered” and “threatened.”¹¹ The Endangered Species Act’s purpose was expansive, including both “to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved” and “to provide a program for the conservation of such endangered species and threatened species.”¹² By contrast, listing and regulation of threatened species on the state level is of a relatively recent vintage and has historically had much more humble aims. Indeed, the creation of a threatened animal species list is not even directly referenced in the Texas Parks and Wildlife Code. TPWD was instead able to conjure the list by

² Tex. Gov’t Code § 2001.021.

³ 31 Tex. Admin. Code § 51.2.

⁴ 44 Tex. Reg. 5375 (Sept. 20, 2019).

⁵ 44 Tex. Reg. 7035 (Nov. 15, 2019).

⁶ 44 Tex. Reg. 7821, 7821-23, 7825-26 (Dec. 20, 2019) (no longer proposing to list the Concho Water Snake or Dunes Sagebrush Lizard, among other changes).

⁷ See 42 Tex. Reg. 3404 (June 30, 2017) (adding the Neches River rose-mallow); 35 Tex. Reg. 249 (Jan. 8, 2010) (adding 15 freshwater mussel species); 34 Tex. Reg. 2793 (May 8, 2009) (adding the San Felipe gambusia); 30 Tex. Reg. 1953 (Apr. 1, 2005) (adding geocarpon minimum); 26 Tex. Reg. 3220 (Apr. 27, 2001) (adding the Pecos sunflower).

⁸ 45 Tex. Reg. 2090, 2188-92 (Mar. 27, 2020).

⁹ Pub. L. No. 89-669, 80 Stat. 926 (1966) (repealed 1973).

¹⁰ 32 Fed. Reg. 4001 (Mar. 11, 1967).

¹¹ See generally Endangered Species Act of 1973, Pub. L. 93-205, 87 Stat. 884 (1973).

¹² 16 U.S.C. § 1531(b).

relying upon its statutory authority to regulate “nongame species of fish and wildlife.”¹³ Interpreting the statutory powers granted the Department in Chapter 67 of the Code to include the creation of a threatened species list in the first place is itself a reach.

Despite these issues, listing species as “threatened” activates serious legal requirements and restrictions. In general, an individual may not “take, possess, propagate, transport, import, export, sell, or offer for sale” any threatened animal species.¹⁴ Similarly, no person may “take, possess, transport, or sell ... [a] threatened ... native plant for commercial purposes from private lands unless that person possesses a valid commercial plant permit authorizing such activity.”¹⁵ Violating these restrictions subjects individuals to significant penalties, including criminal sanctions. With regard to threatened animals, offenders are subject to a Class C Parks and Wildlife Code misdemeanor for the first offense, a Class B misdemeanor for the second offense, and a Class A misdemeanor for all subsequent offenses.¹⁶ While violations involving threatened plant species are generally subject to a Class C Parks and Wildlife Code misdemeanor, more severe penalties attach for repeat offenders or those that engage in commercial activity without both the payor and payee possessing the proper permit.¹⁷ Class C misdemeanors may be punished with a fine ranging from \$25 to \$500.¹⁸ Class B misdemeanors may be punished with a fine ranging from \$200 to \$2,000, up to 180 days in jail, or both.¹⁹ And Class A misdemeanors may be punished with a fine ranging from \$500 to \$4,000, up to one year in jail, or both.²⁰ While there is no evidence of abusive or even particularly widespread enforcement of these provisions today, that by no means ensures that they will not be wielded against Texas landowners tomorrow.

I. TPWD’S REGULATION OF THREATENED SPECIES LACKS CLEAR OBJECTIVES.

TPWD’s regulation of threatened plant and animal species lacks concrete, clearly defined goals against which success may be measured. The threatened animal species list was originally intended to “fulfill the department's statutory duty to insure the continued ability of nongame fish and wildlife to perpetuate themselves successfully.”²¹ More recently, one TPWD official touted additions to the threatened plant and animal species lists as a means to “avert the need for federal intervention and to keep these species under [the] state's jurisdiction.”²² And the two most relevant guides to TPWD’s functions and operations—the *Land and Water Resources Conservation and Recreation Plan* and the *Natural Agenda* strategic plan—contain little more than a generalized statement that “TPWD will protect and assist in the recovery of threatened, endangered and high-priority species.”

¹³ See 21 Tex. Reg. 8899 (Sept. 17, 1996).

¹⁴ 31 Tex. Admin. Code § 65.171(b)(2).

¹⁵ 31 Tex. Admin. Code § 69.1(2).

¹⁶ Tex. Parks & Wild. Code § 67.005; 31 Tex. Admin. Code § 65.177(1).

¹⁷ Tex. Parks & Wild. Code § 88.011; 31 Tex. Admin. Code § 69.9.

¹⁸ Tex. Parks & Wild. Code § 12.406.

¹⁹ Tex. Parks & Wild. Code § 12.405.

²⁰ Tex. Parks & Wild. Code § 12.404.

²¹ 21 Tex. Reg. 8899 (Sept. 17, 1996).

²² TPW Commission Work Session (Aug. 21, 2019), available at https://tpwd.texas.gov/business/feedback/meetings/2019/0822/transcripts/work_session/.

Noticeably absent from any of these official pronouncements, however, are specific metrics for evaluating program performance. Indeed, there may be an incongruity between some of the stated goals themselves under certain circumstances, such as when ensuring a species' ability to perpetuate itself has been achieved but federal intervention has not yet ceased. Given the possibility of such a scenario, TPWD must be required to clearly articulate its goals and demonstrate its progress—or lack thereof—toward those goals through regularly reporting its compliance with objective conservation criteria. Without a clear idea of what success looks like from the beginning, it is difficult for a fair decision to be made about when such regulations should end.

II. TPWD'S LISTING PROCESS LACKS TRANSPARENCY AND LIMITS PUBLIC PARTICIPATION.

Furthermore, the process for adding species to the threatened species lists is overly opaque and not conducive to public participation. By contrast, the federal statutory framework provides not only a generic definition of what constitutes a threatened species,²³ but also a specific list of factors to be considered when assessing whether a species is threatened.²⁴ A detailed explanation and public disclosure of evidence supporting these decisions is also typical at the federal level. By contrast, TPWD relies almost exclusively on the NatureServe Conservation Rank Calculator. While this calculator does involve the assessment of ten specific biological and external factors, many other potentially relevant factors remain absent from this assessment, including both the extent of a species' connection to Texas and its current federal listing status. Additionally, these NatureServe factors are not well-publicized by TPWD, nor are they specifically referenced by the Department as a means of publicly explaining its listing decisions. A thorough review and supplementation of this listing criteria should be undertaken. Additionally, a public explanation of how the criteria is employed in specific listing decisions is in order. Adopting such reforms would help ensure that state level listing decisions are subject to sufficient public scrutiny.

A. Formulating Criteria and Improving Processes for Adding Species

State threatened species are defined as those that are “likely to become endangered in the future,”²⁵ with endangered species being those that are indigenous or native to Texas and either included on the federal list of endangered species or determined by the Director of TPWD to be “threatened with statewide extinction.”²⁶ Unlike on the federal level, these general descriptions are not accompanied by any further explanation or criteria to guide listing decisions. However, this overly broad and somewhat vague statutory text at minimum points to both the extent of a species' connection to the Texas geographic region and its federal status as being important factors to consider. But such considerations rarely play a meaningful role in TPWD's listing decisions.

²³ 16 U.S.C. § 1532(20).

²⁴ 16 U.S.C. § 1533(a)(1) (listing the five factors relevant to such decisions).

²⁵ 31 Tex. Admin. Code § 65.175 (defining threatened animal species); *see also* Tex. Parks & Wild. Code § 88.001(2) (defining “threatened plant” as “a species of plant life that is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range”).

²⁶ *See* Tex. Parks & Wild. Code §§ 68.002 & 88.002.

For example, one of the most recent additions to the state’s threatened animal species list—the West Indian manatee—has no permanent population in Texas.²⁷ Nonetheless, TPWD decided to add the manatee because it had been spotted passing through during summer migrations.²⁸ Additionally, of the 147 species now listed by the state as threatened, only 21 have an equivalent federal status, with an additional nine species currently under review for such a listing. That leaves 117 species, or approximately 80% of state listed species, that are neither federally regulated nor being considered for such regulation. Such a wide divergence between the volume of listings on the state and federal levels is cause for concern.

One likely reason for the excess in state listings is the more rigorous process for adding species at the federal level. Under the Endangered Species Act, species may be added to the federal threatened species list pursuant to either a listing petition from the public²⁹ or the relevant agencies’ own independent assessment.³⁰ With regard to the former, the agency must first determine, within 90 days, whether a “petition presents substantial scientific or commercial information indicating that the petitioned action may be warranted.”³¹ If the petition presents such information, the agency must then conduct “a review of the status of the species concerned” and, within 12 months of the date the petition was received, make a finding as to whether that status is warranted.³² Not only must the proposed rule then be published in the *Federal Register*,³³ but a public hearing on the proposed addition must be promptly held if any person makes a request within 45 days of the general notice.³⁴ Within one year of the general notice being published, the agency must make its ultimate decision on whether to adopt a final rule listing the species.³⁵

Compare these intentionally arduous federal procedures with the overly accommodating state-level process. Adding state threatened species is accomplished in two easy steps: 1) propose additions without much explanation;³⁶ and then 2) adopt additions with very little further examination.³⁷ To prevent the continued disproportionate expansion of the state’s threatened species lists, the Texas Legislature should first define with greater precision what considerations are relevant and thresholds must be met in order for a species to be listed. It should then mandate more rigorous procedures that will generate a closer examination of proposed listings as well as elicit more widespread participation in the listing process.

B. Publicly Supporting and Explaining Listing Decisions

Absent such legislative guidance, TPWD has adopted its own internal standard for adding new species to the state’s threatened species lists. Specifically, TPWD has chosen to fill in the gaps by utilizing the conservation status ranking system developed by NatureServe. But the NatureServe

²⁷ 44 Tex. Reg. 7821, 7822 (Dec. 20, 2019).

²⁸ *Id.*

²⁹ *Id.* at § 1533(b)(3).

³⁰ *See* 16 U.S.C. § 1533(b)(5).

³¹ *Id.* at § 1533(b)(3)(A); 50 C.F.R. § 424.14(h).

³² *Id.* at § 1533(b)(3)(A)-(B); 50 C.F.R. § 424.14(h).

³³ *Id.* at §§ 1533(b)(3)(B)(ii); 1533(b)(5)(A).

³⁴ *Id.* at § 1533(b)(5)(E).

³⁵ *Id.* at § 1533(b)(6).

³⁶ *See, e.g.*, 44 Tex. Reg. 7821, 7821-23, 7825-26 (Dec. 20, 2019).

³⁷ *See, e.g.*, 45 Tex. Reg. 2090, 2188-92 (Mar. 27, 2020).

database's questionable track record has been well documented.³⁸ One particularly notable example came before the United States District Court for New Mexico in 2011.³⁹ In that case, a nonprofit environmental group challenged the rejection of its petition to federally list 475 species, including the “many-flowered unicorn plant.” The court observed that the plaintiff’s petition lacked any written statement providing individual support for the proposed listing, instead stating only that it “hereby incorporate[d] all analysis, references, and documentation provided by NatureServe in its on-line database . . . by reference, including all data and analysis underlying its conservation status classification scheme.”⁴⁰ As recounted by the District Court, the Interior Department’s 90-day finding properly rejected the group’s reliance on the NatureServe database since it not only failed to address specific threats to the species, but also employed only imprecise descriptors such as “large,” “small,” or “numerous” instead of quantitative metrics when referring to population size or abundance.⁴¹

While TPWD does not rely on NatureServe’s information directly, the Department has fully incorporated its criteria. TPWD begins its process of determining which species will be considered for a listing by referencing the previously determined NatureServe conservation status of species on the state’s more expansive Species of Greatest Conservation Need (“SGCN”) list.⁴² When TPWD then convenes a working group of experts to determine whether to propose that a species be listed as “threatened,” that group again utilizes NatureServe via its Conservation Rank Calculator. Even without employing data directly from NatureServe’s website, the consecutive uses of the NatureServe calculator merely serve to double down on the same inadequate process. After all, if the process is deficient at step one, then utilizing the same criteria at step two does little to ameliorate those shortcomings.

Despite these procedural flaws, TPWD now supports its listing decisions with the same kind of vague references to NatureServe that were rejected by the District Court in New Mexico. For example, the only justification included in the most recent proposed rule for adding threatened species was a boilerplate paragraph generally explaining NatureServe’s Conservation Status Assessment protocol and ending with the conclusory statement that “[o]n the basis of this protocol, staff have determined that the species being proposed for listing as threatened species are species likely to become endangered in the future.”⁴³ The proposal made no attempt to justify the proposed additions to the threatened animal species list individually and, worse still, failed to even identify the plant species to be added within the text of the proposal, forcing the reader to do a side-by-side comparison between the proposed list and current list in order to determine exactly which species were to be added. This was in stark contrast to the proposals to add or remove species from the endangered species lists, which individually analyzed each species. Such a perfunctory

³⁸ See, e.g., *Champions Retreat Golf Founders, LLC v. Commissioner*, No. 4868-15, 2018 Tax Ct. Memo LEXIS 146, at *12-13 (T.C. 2018) (observing that the discrepancy between a particular species’ G5 global NatureServe ranking, S1 state NatureServe ranking, and S3 ranking by Georgia’s Natural Heritage Program was likely “due to NatureServe’s use of outdated information regarding Georgia’s Natural Heritage Program”).

³⁹ See *WildEarth Guardians v. Salazar*, No. 10-116-MV-RHS, 2011 U.S. Dist. LEXIS 158322 (D.N.M. 2011).

⁴⁰ *Id.* at 7.

⁴¹ *Id.* at 7.

⁴² See Exhibit E (stating on numbered page 11 that NatureServe had been used “to rank the >1300 Species of Greatest Conservation Need” in order to “lay[] the groundwork for consistently maintaining and regularly updating the State List of Threatened and Endangered Species”).

⁴³ 44 Tex. Reg. 7821, 7822 (Dec. 20, 2019).

justification is entirely insufficient to “provide for public participation in the rulemaking process,” which is one of the primary purposes of this state’s Administrative Procedure Act.⁴⁴

TPPF recommends a thorough reevaluation of the role that NatureServe plays in deciding whether to add species to the threatened plant or animal species lists. At minimum, procedures should be mandated to ensure that the shortcomings inherent in NatureServe can be identified and compensated for through other tools and methods available to TPWD. To the extent that working groups are meant to supplement this reliance on NatureServe, better guidance is needed for how they are to analyze and weigh the relevant scientific evidence. This evidence and analysis should then be made available in the proposed rule itself so that the public may judge whether the Department’s rationales make sense and respond with particularity as appropriate.

III. TPWD FAILS TO SPECIFICALLY ACCOUNT FOR SPENDING ON THREATENED SPECIES.

One key aspect of tracking the performance of TPWD’s efforts to conserve threatened species is accurately accounting for the funds spent toward such efforts. Indeed, another purported justification for making additions to the state’s threatened species lists has been that listed species “receive priority for research and conservation funding,” and so listing species gives TPWD an “opportunity to really focus [their] limited resources and efforts” on those species.⁴⁵ However, as demonstrated by the TPWD documents discussed below, threatened species status plays very little role in how programs and funds are prioritized by TPWD. And even in the relatively rare circumstances where state listings are a factor to some extent, TPWD does not account for how such funds are expended.

For example, one internal TPWD document lists various programs administered by TPWD,⁴⁶ including the Texas Farm and Ranch Lands Conservation Program,⁴⁷ Nongame Grants & Research,⁴⁸ and Texas Conservation Action Plan.⁴⁹ While the document states that “[s]pecies on the state threatened list often increase the scoring criteria for many of the cost-share programs listed below,” in many instances this seems to overstate the role that threatened species status plays. For example, the scoring criteria for the Texas Farm and Ranch Lands Conservation Program awards points for proposals that “[s]upport conservation or recovery of federal or state listed species, Texas Conservation Action Plan (TCAP) species of greatest conservation need, or species in decline.”⁵⁰ In other words, the same points are awarded for conservation of species that are on the SGCN list as for those included in the threatened species list, even though the former is much larger than the latter and includes within it all listed threatened species. Status as a state-listed threatened species also appears to be irrelevant under the Nongame Grants & Research programs, where eligibility is instead predicated on either the federal status of a species or its inclusion on the SGCN list. Similarly, while the Texas Conservation Action Plan largely revolves

⁴⁴ See Tex. Gov’t Code § 2001.001(2).

⁴⁵ *Id.*

⁴⁶ See Exhibit A.

⁴⁷ <https://tpwd.texas.gov/landwater/land/private/farm-and-ranch/>

⁴⁸ https://tpwd.texas.gov/huntwild/wild/wildlife_diversity/nongame/grants-research/

⁴⁹ https://tpwd.texas.gov/huntwild/wild/wildlife_diversity/nongame/tcap/

⁵⁰ https://tpwd.texas.gov/publications/pwdforms/media/pwd_1397b_w7000_tfrlep_scoring_criteria.pdf

around SGCN status, the state’s threatened species list appears to play virtually no role in prioritizing efforts under the plan.

Another TPWD document lists programs said to be involved in the conservation of state threatened species under the umbrella of the River Studies Program, but these programs have an even more tangential connection to such species.⁵¹ The document relates that the Texas Instream Flow Program issued two reports that studied “state threatened mussels *and other aquatic and riparian taxa*.”⁵² The Bioblitz Initiative prioritized watersheds based in part on “the probability of containing Species of Greatest Conservation Need, a subset of which are listed as state-threatened,” and trumpeted that “[s]tate-threatened mussel species are occasionally encountered during these surveys.” The San Felipe Creek Project focuses on a river that “is home to several state-threatened fishes,” while the Devils River Monitoring and Research project also has “one state-threatened mussel species” in addition to such fish. These descriptions certainly demonstrate that TPWD expends funds and administers programs that effect threatened species. However, what is also apparent is the complete lack of any evidence that these efforts were undertaken *because* of their anticipated effect on such species. Indeed, in almost every instance it seems that TPWD would have taken the exact same action regardless of whether these species were listed.

Internal emails from TPWD staff forthrightly admit that the Department’s tracking and accounting of the funds that are expended to conserve threatened species is woefully inadequate. For example, in an email discussing our information requests, one Program Leader admitted that “the conservation programs we fund benefit a wide suite of species, and we don’t track spending by individual species very often if at all.”⁵³ Typical internal responses to these inquiries regarding the expenditure of funds included only the total acres involved in broad regulatory programs and the total cost of those programs. Occasionally there were also comments such as that the “only legit grassland loving species confined to a few of our Focal counties are...Texas Kangaroo Rat and maybe Texas Horned Lizard”⁵⁴ or that a particular project’s “work is tangential to the conservation of white-faced ibis and wood stork” but any claim that “the work was done for them is really stretching it.”⁵⁵ That no one seemed to know how much money was being spent on which specific species is remarkable. Accordingly, we recommend that some system be implemented for tracking all expenditures made pursuant to the conservation of threatened species. Without such accounting procedures, determining the cost effectiveness and efficiency of these efforts will continue to prove illusive.

IV. TPWD’S DELISTING PROCESS FAILS TO TIMELY REMOVE SPECIES.

Finally, it is not only TPWD’s process for adding species that is badly in need of reform: Species removal is equally deficient. The snail-like pace of delisting, even when a species clearly does not belong on the list, is unfortunately nothing new. For example, a small wild cat known as the “margay” was not removed from the threatened animal species list until 2015, despite the fact that

⁵¹ See Exhibit B.

⁵² *Id.* (emphasis added).

⁵³ See Exhibit C.

⁵⁴ *Id.*

⁵⁵ See Exhibit D.

“the last documented occurrence was in the mid-19th century with no observations since.”⁵⁶ Worse still, besides this century-and-a-half old sighting, the only other evidence that it ever existed in Texas at all was based on findings of fossilized remains.⁵⁷ Because species often linger on the state’s threatened lists long after such a listing can be justified, TPPF recommends that all listings should automatically expire by statute after a set number of years. If TPWD believes that a species still warrants listing, that species should undergo a fresh round of notice-and-comment rulemaking.

Additionally, species may currently remain on the state threatened species lists even after being federally delisted. For example, U.S. Fish and Wildlife Service declared the Arctic peregrine falcon to be recovered in 1994.⁵⁸ However, that species was only removed from the state’s threatened animal species list a decade-and-a-half later.⁵⁹ Processes must be put into place that will overcome such bureaucratic inertia. Accordingly, TPPF recommends that any change in a species’ federal status should automatically trigger a full review of that species’ status on the state level. If a species is no longer considered to be “threatened” by the federal government, then the presumption should be that listing the species as “threatened” on the state level is similarly unwarranted.

More recently, while TPWD’s adoption of the NatureServe ranking criteria has increased the volume and pace of species additions, the Department has failed to employ that criteria toward removing species from the list with anywhere near the same vigor. Indeed, there are at least 20 species currently listed as threatened by the state that are not only not federally listed, but that TPWD’s own internal criteria would not allow to be added today. That criteria stipulate that species with a NatureServe rank of S2S3, S3, S3S4, S4, S4S5, and S5 do not meet the Department’s internal thresholds for being listed as threatened. However, species such as the White-tailed Hawk (S4B), White-faced Ibis (S4B), Rafinesque's Big-eared Bat (S3), Northern Scarlet Snake (S3 with a G5T5 global rank), and Mexican Treefrog (S3 with a G5 global rank) are all still listed, just to name a few. Regardless of what criteria for species additions is ultimately adopted, that same criteria should be applied equally to species removals.

Finally, TPWD’s hesitance to remove species may be related to the lack of clarity regarding whether concerned citizens may petition for removal. On the federal level, “[a]ny interested person may submit a written petition” to delist a species.⁶⁰ There is also a clear process in place at the state level that allows for the submission of petitions to “delete species of fish or wildlife from the statewide extinction list,” which in turn would require their removal from the state’s endangered animal species list.⁶¹ However, there is currently no analogous provision in the Parks and Wildlife Code that unambiguously allows for a petition to remove endangered plant species, threatened plant species, or threatened animals species. Further, it remains unclear whether the more general

⁵⁶ 40 Tex. Reg. 1711 (Mar. 20, 2015).

⁵⁷ *Id.*

⁵⁸ 59 FR 50796 (Oct. 5, 1994).

⁵⁹ 34 Tex. Reg. 2793 (May 8, 2009).

⁶⁰ 50 CFR § 424.14.

⁶¹ Tex. Parks & Wild. Code § 68.005.

provisions contained in either the state's Administrative Procedure Act⁶² or the Texas Administrative Code⁶³ include the right to petition for these species to be delisted.

Given TPWD's demonstrated failure to pursue species removals on its own volition, both before and after implementing its new NatureServe protocol, an unambiguous process by which interested persons could petition for species to be delisted is badly needed. Because there should be a presumption that favors individual liberty over government regulation, this process should be simple, straightforward, and streamlined in comparison to the procedure for listing species. To the extent that such a process is already in place, the right to petition for delisting should be clarified and its existence better publicized. And if such a process either does not currently exist or does not meet the standards outlined above, TPPF recommends that changes be made to better align with those standards. Such reforms would go a long way toward allowing for greater public participation in the removal of species that no longer warrant listing.

CONCLUSION

TPPF agrees that TPWD continues to play an important role in protecting Texas' natural resources and providing outdoor recreation opportunities. But the Department's regulation of threatened plant and animal species needs substantial reform. The Texas Legislature should take this opportunity to both provide better guidance toward achieving more clearly articulated goals and to ensure that TPWD is held accountable for its performance in meeting those goals. Increased transparency and public participation in listing and delisting decisions is also vital. By implementing these reforms, the Texas Legislature can ensure that TPWD's role in species conservation better responds to the needs of all Texans. Accordingly, we ask this Commission to adopt the foregoing recommendations in its final report.

Sincerely,



Robert Henneke
Texas Public Policy Foundation

⁶² Tex. Gov't Code § 2001.021 (allowing for an interested person to petition for the adoption of a rule); *see also* Tex. Gov't Code § 2001.003(6)(b) (defining "rule" to include "the amendment or repeal of a prior rule").

⁶³ 31 Tex. Admin. Code § 51.2(a) (allowing "[a]ny person" to submit "an administratively complete petition" requesting that TPWD "adopt, amend, or repeal a rule").