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U.S. Fish and Wildlife Service
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5275 Leesburg Pike
Falls Church, VA 22041-3803

Attn: Docket No. FWS-HQ-ES-2021-0152

Re: Comments on the Proposed Revision to Regulations Concerning the Issuance of Enhancement of Survival and Incidental Take Permits under the ESA

Docket No. FWS-HQ-ES-2021-0152
88 FR 8380 (2023-02690)
February 9, 2023

Gentlemen and Ladies:

The Permian Basin Petroleum Association ("PBPA"), the Western Energy Alliance, The Petroleum Alliance of Oklahoma, the Petroleum Association of Wyoming, and our collective member companies (together as "we" or the "represented organizations") provide the following comments to the February 9, 2023 proposed revisions (the "Revisions") and request for comment from the U.S. Fish and Wildlife Service ("FWS" or "Service") to regulations concerning the issuance of Enhancement of Survival and Incidental Take Permits under the Endangered Species Act of 1973, as amended ("ESA" or the "Act")[1].

The PBPA is the largest regional oil and gas association in the United States. Since 1961, the PBPA has been the voice of the Permian Basin oil and gas industry. The PBPA's mission is to promote the safe and responsible development of our oil and gas resources while providing legislative, regulatory, and educational support services for the petroleum industry. The PBPA membership includes the smallest exploration and services companies as well as some of the largest companies with world-wide operations. The Permian Basin is the largest inland oil and gas reservoir and the most prolific oil and gas producing region in the world.

Western Energy Alliance represents 200 member companies engaged in all aspects of environmentally responsible exploration and production of oil and natural gas in the West. The Alliance represents independent oil and gas producers, the majority of which are small businesses with an average of fourteen employees.

The Petroleum Alliance of Oklahoma represents more than 1,400 individuals and member companies and their tens of thousands of employees in the upstream, midstream, and

[1] 88 Fed. Reg. 8380 (February 9, 2023).

downstream sectors and ventures ranging from small, family-owned businesses to large, publicly traded corporations. Their members produce, transport, process and refine the bulk of Oklahoma's crude oil and natural gas.

The Petroleum Association of Wyoming (PAW) represents the state's oil and gas industry including production, midstream processing, pipeline transportation, and oil field service companies. The Association also represents affiliated companies offering oil and gas related legal, accounting, oilfield services, and consulting services. Eighty-five percent of the oil and gas companies operating in Wyoming are classified as small businesses.

We greatly support the stated intentions of the offered Revisions to clarify the authority of the Service to implement the number of varying conservation measures that have been developed over the years. However, we believe the offered Revisions go beyond the authority of the Service as determined by Congress and in several areas create more concern than clarity. Without a listing under the ESA, direct and indirect regulation of unlisted species is beyond the legal authority of the Fish and Wildlife Service. Further, these types of expansion of Federal policy, with regard to species that are clearly under state authority, creates unnecessary costs and inefficiencies in implementing conservation, and potential disincentives for voluntary participation on private lands.

While certain proposed changes could reduce the costs and time incurred in the implementation of conservation measures, others are highly likely to result in ambiguity, lack of transparency, additional cost and ultimately trigger need for legal action to definitively establish authority and intent.

For example, we oppose the Service's combining of post listing conservation efforts, such as Safe Harbor Agreements, and pre-listing conservation efforts, such as Candidate Conservation Agreements with Assurances, into one-size-fits-all agreements. As discussed herein, we believe the proposed language to do so undermines the Service's stated intent to simplify the process to encourage conservation. The proposed changes -- which appear to raise the bar for pre-listing conservation agreements -- in fact would limit, if not completely negate, any benefits that could have been achieved.

Based on the discussion and recommendations provided herein, we request the Service withdraw the Revisions as drafted to address the identified issues and repropose revisions to the rule before finalizing any changes to the issuance of Enhancement of Survival and Incidental Take Permits under the ESA.

Our specific concerns are outlined below:

Authority & Priority of the Service

As provided in the ESA, and as recited in the background section for these proposed Revisions, the purpose of the ESA is to "…provide a means to conserve the ecosystems upon which listed species depend…[and]…to develop a program for the conservation of listed species…"[2]

The Service's proposed Revisions go well beyond actions in support of candidate or listed species and instead openly expand actions to include those taken in support of any species, including non-listed species, for which any applicant sees the need for protection, regardless of any concrete determination of a possible need for listing in the future. While for decades, the Service has allowed as a matter of practice coverage of an unlisted species under incidental take permits, this has only been when a listed species is already covered by that permit. This drastic change is argued for in the background of the Revisions by saying this approach is "encouraging conservation of fish and wildlife before species become depleted to the point that they require listing."[3] This equates to convicting someone of a crime before it is committed and is well outside the bounds of the Service's legal authority.

Specifically, we do not believe the Service has the authority to expand this rule under § 17.2 from covering only "endangered and threatened wildlife and plants" to now include any "wildlife and plant species" not listed but for which "…the Service determines have a reasonable potential to be considered for listing during the permit's duration."[4]

This proposal is especially concerning when, based on the language as provided, permit duration could be infinite. Further, a "reasonable potential" determination with no offered description for how such a determination will be made, means such determinations will be made subjectively.

Again, we do not see any authority granted by Congress for the proposed broad expansion of authority. If authority can be cited, however, in the least, a requirement that data and science be necessary to support any such determination should be included. We also recommend that there be more finite language as to how long the duration of a permit will be if a permit can be approved for conservation activities for a non-listed species as long as "…the Service determines [those species] have a reasonable potential to be considered for listing during the permit's duration."[5]

Taken to its extreme, which is allowed under the current open-ended language, one could argue that every species on the planet could "have a reasonable potential to be considered for listing during [a] permit's duration" when a permit's duration could be infinite. In this regard, we not only see the Service as acting outside of its authority, but also not focusing on what should be its priority, being the "…conservation of listed species."[6]

[2] *Id.*, at 8381 (emphasis added).
[3] *Id.*, at 8382 (emphasis added).
[4] *Id.*, at 8390 (emphasis added).
[5] *Id.*
[6] *Id.*, at 8381 (emphasis added).

In addition, the issuance of such an open-ended permit, issued prior to listing, will likely have the chilling effect of discouraging activities in the areas covered. So, a pre-authorized and issued permit has the practical effect of "freezing of the use of the land" and establishing, in effect, listing conditions for purposed actions toward use of the land.

Instead of focusing on updates to Section 10 that would prioritize at risk species, the Service proposes to expand its authority to issue permits for unlisted species regardless of the authority, science or need to determine a species as a candidate or a listed species. Unlimited resources do not exist to address all species that "have a reasonable potential to be considered for a listing during [a] permit's duration."

"Complete" Applications

In the Service's proposed Revisions to the Section 10 regulations, the number of criteria that an applicant must satisfy before the Service determines the application is "complete" under Section 10 has greatly increased. This increases, not decreases, the complexity of such determinations, the timelines by which such applications are likely to be determined complete, and delays or prevents, the ability for redress by applicants wanting or needing to reconcile differences regarding proper action taken by the Service in the courts.

Specifically, the proposed language does attempt to clarify when applications are "complete," but other additional language in the proposed regulation would provide the Service with significant subjective authority regarding when an application is truly "complete," resulting in perpetual indecision for certain applications. This possible state of indecision, which is a result of the Service's position that it has no obligation to process an application for either an Enhancement of Survival or Incidental Take Permit, raises a number of concerns. One of which being that the Service can use what it determines as a lack of "completeness" to demand mitigation, monitoring, or other measures that go beyond the statutory requirements. Application "completeness" should not be a mechanism used by the Service to extract measures or terms that go beyond the statutory requirements of Section 10.

Additionally, if the Service refuses to deem an application "complete" or "denied" this prevents the applicant from seeking redress outside the Service. With no decision made on an application one way or the other, this means there would likely be no "final" agency action which is typically required by the Administrative Procedures Act to seek redress in the courts. As opposed to leaving the date for consideration of an application open-ended, action one way or another to approve or deny the application should be required by the Service. For instance, if an applicant for an Incidental Take Permit has indicated that it will make no further changes to its conservation plan, the Service should be required to process that application, even if it means the application will be denied.

While the Service may be attempting to utilize such changes to limit litigation, this is not a collaborative way to accomplish simplicity, but only a path that leads to elongated application timelines, significant costs incurred, and gridlock that could prevent desired conservation.

Definitions of an Applicant, Property Owner and Other Terms

The Service has proposed definitions for "applicant"[7] and "permittee"[8] which would exclude affiliates, associates, subsidiaries, corporate families, and assigns of an applicant.

This limits the scope of coverage under both Enhancement of Survival and Incidental Take Permits and reduces the number and nature of entities that can participate. We could not find in the proposed Revisions the Service's rationale for excluding these entities.

We therefore request the Service withdraw and repropose the Revisions to provide the public with its rationale on why these entities should be excluded from being considered an "applicant" or a "permittee." Without rationale, we request that these entities be included in the definition of an "applicant" and a "permittee" and covered by the Enhancement of Survival and Incidental Take Permits.

We are concerned with the changes to the definition of a "property owner"[9] as provided for in the proposed Revisions which on one hand can be too open-ended and on the other could be too restrictive. The language offered currently provides much more murkiness than clarity.

Under the current proposed language, there is great concern that small interest owners in property (i.e. a person or entity that owns a 1% or less interest in property) could encumber larger, majority interest owners of that property by entering into conservation agreements for unlisted but "covered" species as provided for under this Revision.

In circumstances with private land ownership where mineral interests can be severed from surface interests and where both of these estates can be incredibly fractured in ownership, to subject majority owners of private property interests to limitations of use of their property for unlisted yet "covered" species amounts to an eminent domain type of taking without just compensation.

Conversely, the Service's proposed Revision still does not address entities with the actual power of eminent domain, such as public utilities or state and local governments, which could benefit from the use of conservation tools but not qualify as a "property owner" under the offered definition.

It is unclear as to why "property owners" would include the smallest of interest owners, giving those owners what is in effect eminent domain authority, but would not include entities with actual eminent domain authority.

[7] *Id.*
[8] *Id.*, at 8391
[9] *Id.*

We request the Service take into consideration the above concerns in redrafting the proposed Revisions to clarify the definition of "property owner."

The Service is also proposing a new definition for "baseline condition."[10] The Service, however, has not provided any information on how a "baseline condition" is to be determined. We are concerned this lack of clarity will require many if not most applicants to expend significant funds to hire or contract with trained professionals to conduct such an analysis. In saying these proposed Revisions will result in reduced costs, it appears the Service has failed to provide any cost impact for this requirement and the additional analysis that will be required.

The proposed definition for "baseline condition" is "…population estimates and distribution or habitat characteristics on the enrolled land that could sustain seasonal or permanent use by the covered species at the time a conservation benefit agreement is executed by the Service…" It is unclear what the Service means by "…could sustain seasonal or permanent use by the covered species…" when baseline conditions at the time the agreement is executed would mean the current or existing conditions, which may or may not sustain seasonal or permanent use by the covered species. This is further complicated by the fact that under the proposed Revisions, there is no differentiation for the needs of species that are not warranted for listing by the Service under the ESA, but are still included in the new "covered species" category, when compared to the needs for a species that is listed by the Service. If a species is not qualified to be listed under the ESA, there should be a requirement that scientific research discerning whether or not the current population estimates, distribution and habitat characteristics on the enrolled land can currently sustain seasonal or permanent use by the subject species before such a species could be included as a "covered species."

If the Service insists on moving forward with this proposed revision, we request the Service repropose this rule with information on how "baseline conditions" are determined and a cost impact analysis of this requirement. Also, we request the Service revise the definition to replace "could" with "currently sustains" to more accurately reflect existing conditions of the enrolled land.

In the proposed Revisions, the Service proposes a definition for "net conservation benefit"[11]; however, the ESA does not provide the Service the authority to require a "net conservation benefit." Additionally, the Service does not provide regulatory certainty to applicants, permittees, participants and enrollees as to what "net conservation benefit" really means, how it would be determined, and how it can be achieved to provide regulatory certainty and transparency. As a practical measurement comparison, it is unclear if the language proposed by the Service means just one inch, one foot, one acre or even more of additional "net conservation benefit."

We request the Service remove "net conservation benefit" from the proposed Revisions. Additionally, if the Service maintains this definition in the final rule, it must clarify what "net conservation benefit" truly means, how such a benefit will be determined, and how it ca be achieved to provide regulatory certainty and transparency.

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[10] *Id.*, at 8390
[11] *Id.*

Attempts to Reduce Costs and Increase Clarity

While the Service has stated the intention of this Revision is to "reduce costs and time"[12] in the conservation agreement application process, as written the proposed Revisions do not address previously raised concerns, some of which we see as the most costly and burdensome requirements for Enhancement of Survival and Incidental Take Permits in association with conservation benefit agreements. These include application requirements, issuance criteria, additional permit conditions, and NEPA analysis.

Further, under the proposed Revisions, the Service reserves the right to include any additional terms or conditions that it "deems necessary or appropriate…including, but not limited to additional conservation measures, specified deadlines, and monitoring and reporting requirements…"[13] The "not limited to" portion of this new language is highly concerning as it provides no limits whatsoever for additional terms to be required for the acceptance of an application by the Service, leaving applicants in a position of either accepting the terms, regardless of their germaneness, be at risk of their application being denied or, possibly worse, having the Service take no action on the application.

We are highly concerned this would be the ultimate result with the language as proposed. More defined sideboards, as opposed to open-ended language, are needed here to truly provide clarity, transparency and to reduce cost.

Also, even though the Service claims one of the intentions of these provisions is to reduce costs, it does not appear that a cost benefit analysis was actually undertaken to determine if there really would be any decrease in costs to the applicant with the proposed Revisions. Such an analysis should be conducted and provided for public review and comment prior to the finalization of this proposal.

In this regard, the Service states in the published pre-amble that "…the final rule may include revisions to any provisions…that are a logical outgrowth of this proposed rule."[14] To achieve true transparency, a final rule should not be determined by the Service until any proposed language is made available to the public for review and comment.

Conclusion

The member companies of the organizations represented in this letter have proven themselves to be trustworthy stewards of the land and supporters of effective conservation efforts. We have compiled a record of accomplishment and partnership in this area of which we are very proud.

For example, over $65 million has been spent by industry participants, and millions of acres with beneficial conservation practices have been implemented to conserve the lesser prairie chicken ("LPC") across it range. With over 100 active agreements in the Range wide Oil and Gas Candidate Conservation Agreement with Assurances ("CCAA") with total enrolled acreage of

[12] *Id.*, at 8381 and 8382.
[13] *Id.*, at 8394.
[14] *Id.*, at 8384.

more than six million acres across the LPC's range, and with over an additional 40 oil and gas companies enrolled in the New Mexico Candidate Conservation Agreement and CCAA with total enrollment, including the New Mexico State Land Office, of more than two million acres.

More importantly, that commitment goes beyond dedicating land and resources. Among other activities, members of the represented organizations have implemented strict avoidance and minimization measures (such as collocating wells or targeting already impacted areas for pad location) that resulted in a decrease in impacts to LPC habitat.

In addition, the represented organizations' member companies have a proven track record – over more than a decade, across multiple agreements resulting in acres under conservation programs totaling a geographic equivalency about the size of New York State – of working effectively with various partners in a collaborative effort to maintain working landscapes while benefitting a multitude of species.

We are enthusiastic about proposals to improve the conservation agreement process for species throughout the states in which our companies operate. However, the Service's proposed Revisions fail to provide clarity or regulatory certainty for the public and particularly for those looking to engage in conservation under issuance of Enhancement of Survival and Incidental Take Permits. Further, the Revisions fail to address the most costly and burdensome requirements associated with these permitting processes. To truly accomplish improvement to the issuance of Enhancement of Survival and Incidental Take Permits under the ESA, we believe the current Revisions should be withdrawn and the Service's efforts reproposed to take into consideration and address each of the concerns discussed herein.

Thank you for your consideration

Regards,

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