



November 4, 2013

Submitted via Federal eRulemaking Portal: <http://www.regulations.gov>

Public Comments Processing
Attn: No. FWS-R9-ES-2011-0080
Division of Policy and Directives Management
U.S. Fish and Wildlife Service
4401 N. Fairfax Drive, MS 2042-PDM
Arlington, Virginia 22203

RE: U.S. Fish and Wildlife Service and National Marine Fisheries Service Proposed Changes to Regulations Governing Consultation under Section 7 of the Endangered Species Act regarding Incidental Take Statements (Docket No. FWS-R9-ES-2011-0080)

Dear Sir or Madam:

Western Energy Alliance and the U.S. Oil and Gas Association (USOGA) submit the following comments to the U.S. Fish and Wildlife Service and the National Marine Fisheries Service (services) in response to the proposal to amend the regulations governing consultation under section 7 of the Endangered Species Act of 1973 (ESA) regarding Incidental Take Statements.

Western Energy Alliance represents over 400 companies engaged in all aspects of environmentally responsible exploration and production of natural gas and oil across the West. USOGA is the nation's oldest oil and natural gas trade association and advocates for those who build and sustain the U.S. petroleum industry, including companies of all sizes in the domestic industry: majors, independents, family owned companies, small partnerships as well as single entrepreneurships.

We have has a vested interest in the decisions made by the services regarding section 7 of the ESA that will impact informal and formal consultation for oil and natural gas exploration and development activities, and, therefore, a direct interest in the proposal. Since the proposal will have an impact upon the domestic oil and natural gas industry, it will also impact important ancillary revenue for states, job creation in rural communities, and the national economy.

We support improvements to regulations governing consultation under Section 7 and appreciate the services' efforts to further address the use of surrogates to express the

amount or extent of anticipated incidental take. We strongly feel that any rule changes must improve the consistency in the application of regulations, the clarity of the process for obtaining an incidental take statement, and overall regulatory certainty associated with consultation under section 7.

We appreciate the services' willingness to engage the oil and natural gas industry and other public stakeholders in this effort and hope that they will continue to engage the public in a meaningful way throughout the development of these rules. On January 18, 2011, President Obama issued Executive Order 13563 (EO 13563), which directs all federal agencies to adopt regulations through a process involving public participation. Specifically, EO 13563 directs that affected stakeholders have an opportunity to participate and provide input.

We endorse and incorporate by reference comments submitted on this matter by the National Endangered Species Act Reform Coalition (NESARC), of which Western Energy Alliance is a member. We agree with the suggested conditions and requirements for the use of surrogates in anticipated incidental take that are described in NESARC's comments and respectfully request they be adopted by the services in the final rule.

Proposed Rule Changes Related to the Use of Surrogates

In general, we support the use of surrogates to express the amount or extent of anticipated take within an Incidental Take Statement provided a number of key conditions, which are outlined in comments submitted by NESARC, are met. The use of surrogates provides an otherwise unavailable value that can be quantified and monitored to determine the impact of incidental take, which enhances the services' overall ability to implement the ESA.

Further, we support the services' statements that the proposed rules will have prospective effect only and will not result in the reevaluation of any previously completed biological opinions or associated Incidental Take Statements (*78 FR 54437*). Retroactive reevaluation of existing biological opinions and associated Incidental Take Statements would have a number of harmful effects, including exposing oil and natural gas companies that have previously been issued lawful Incidental Take Statements to unwarranted legal liability.

Incidental Take Statements for Programmatic Actions

We request that the services withdraw the proposed provisions regarding programmatic Incidental Take Statements from this proposed rule. The proposed rule changes on Incidental Take Statements related to programmatic matters are not fully explained or clearly defined in the Federal Register notice. As a result, we are unable to fully understand the proposed rule and its potential impact on domestic oil and natural gas activities that may involve programmatic biological opinions under section 7. In addition, without a full explanation and definition of the proposed action and its potential effects, future implementation of the proposed rule would be impractical. As such, we request

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that the services fully consider the purpose, scope, intent, and effect of the proposed rules before attempting to promulgate them.

Conclusion

We appreciate the opportunity to comment on the service's proposal to amend the regulations governing consultation under section 7 of the ESA regarding Incidental Take Statements and request that you give our comments and suggestions serious consideration. We look forward to working cooperatively with the services and other stakeholders to ensure consistency in the issuance of Incidental Take Statements and the overall regulatory certainty associated with consultation under section 7. Please do not hesitate to contact us for any further discussion.

Sincerely,



Kathleen Sgamma
Western Energy Alliance



Albert Modiano
U.S. Oil & Gas Association