September 21, 2017

Submitted via www.regulations.gov

The Honorable Ryan Zinke
Secretary
U.S. Department of the Interior
1859 C Street, NW
Mail Stop 7328
Washington D.C. 20240

Re: U.S. Fish and Wildlife Service Regulatory Reform, DOI-2017-0003-0009

Dear Secretary Zinke:

The Independent Petroleum Association of America (IPAA) submits the following comments in response to the Department of Interior's (DOI's) request for public comment on ways to improve implementation of regulatory reform initiatives, policies, and identify regulations for repeal, replacement or modification under Executive Order 13777, "Enforcing the Regulatory Reform Agenda." The comments contained herein specifically address regulatory reform at the U.S. Fish and Wildlife Service (FWS or the Service).

IPAA represents the thousands of independent oil and gas explorers and producers that will be the most significantly affected, either positively or negatively, by potential changes to regulations by the Service. IPAA believes energy development and conservation can coexist. IPAA's members are participants in federal, state, and private efforts to protect and conserve endangered and threatened species. The oil and gas industry continues to play a key role in voluntary conservation efforts to protect the dunes sagebrush lizard, the lesser prairie chicken, the greater sage grouse and countless other species. IPAA's member companies have enrolled millions of acres in conservation plans and committed tens of millions of dollars to fund habitat conservation and restoration programs. Our comments in this letter will primarily focus on regulatory changes to the Endangered Species Act (ESA), Mitigation and the Migratory Bird Treaty Act (MBTA).

Endangered Species Act

The ESA is a broken vehicle for achieving protection and recovery of threatened and endangered species. With less than a two percent success rate, reform is required to turn the litigation-focused law away from a weapon yielded by litigious environmental organizations against development to a modernized tool for proactive conservation of imperiled species.

Over the past several years, IPAA has submitted detailed comments on proposed regulatory changes to the ESA. Several themes can be extrapolated from these comments which have centered around transparency, flexibility and a focus on recovery of imperiled species – which should be the main focus of the ESA.

The Service has not evenly balanced delisting efforts with responding to the barrage of sue-and-settle listing reviews which are being thrown at the agency. Species seem all too easily to find their way into the protective fold of the ESA with no plan or pathway to delisting. For example, IPAA has been actively involved with a coalition to delist the American Burying Beetle, and, to-date, the FWS has not met one of the deadlines. The agency's commitment to only focus on settlement-related workplans is not adequately protecting or recovering our nation's imperiled species. Recovery needs to be a priority for the Service. Recovery plans should be released within a narrow time frame after listing a species. These plans should focus on delisting and be built around specific thresholds which provide clarity on when it may be appropriate to consider a species recovered and allow the agency to delist. This process must be fixed.

Transparency is needed, most specifically in ESA related decisions. IPAA supports efforts to notify the public and stakeholders when petitions are submitted. This would allow entities impacted by the petition to collect or compile available data, to anticipate when the 90-day and 12-month reviews (arbitrary deadlines that are rarely, if ever met) begin, anticipate deadline lawsuits or to build more time into those review times, and to potentially develop conservation agreements that can benefit the species and its habitat. In that same vein, conservation cannot be done on the federal level alone. IPAA supports efforts by the Service to notify affected state wildlife agencies of petitions within their borders. Further, IPAA believes petitions should be limited to one species, not subspecies or distinct populations. The ultimate goal would be to allow the agency to create a prioritization schedule for petitioned species that is inclusive of the credibility of the petition, the current state of the science and threats for that species, and recognizes existing listing priorities and the Services paramount goal of recovery for species already on the list. Recovery should be coupled with critical habitat planning by requiring the Service to make the official critical habitat designation during the recovery planning process instead of at the time of listing.

There are several terms that the Service needs to define or provide additional guidance to enhance the flexibility of the Act. Clear definitions are needed for "critical habitat", "adverse modification", "foreseeable future", and "significant portion of the range," among others. The lack of clarity has lasting implications in listing decisions. For example, in defining the term "significant portion of the range", agencies will seek to pull in larger geographic areas. A species may be doing well in a number of areas, but if one area is at risk, it could result in a listing. Creating a more flexible definition would maximize the efficiency of committed resources and minimize economic impacts.

Voluntary efforts by state and private entities need to be recognized. Flexible conservation measures should focus on incentivizing landowners to participate, rather than constricting them. All ESA decisions and conservation measures must be based on the use of sound scientific information and adequate commercial data to support making a positive listing decision. Some subtle changes to the regulatory framework of the ESA could fulfill its promise of protecting species for future generations.

Mitigation

President Obama's 2015 Memorandum on Mitigating the Impacts on Natural Resources from Development and Encouraging Related Private Investment recommended that agencies impose a "no net loss" or "net conservation gain" threshold when approving projects. IPAA has always maintained that there is no statutory authority to proceed with this new standard. While we appreciate the Trump Administration's withdrawal of this proposal, the foundations of this memorandum still exist in several final rules, particularly several of those pertaining to mitigation (see ESA Compensatory Mitigation Policy, FWS Mitigation Policy, Candidate Conservation Agreements with Assurances Policy, etc.). IPAA supports rescission and reworking of these policies to ensure the tentacles of the memorandum are properly withdrawn.

Currently, the uncertainty about the mitigation standard seems to have created confusion among FWS Field Offices, who are still operating under the previous Administration's policies. Compensatory mitigation should not be an automatic requirement. Mitigation should be commensurate with project impacts and should not be required to exceed those impacts or provide a "net conservation gain." Most importantly, project proponents should be able to employ a variety of mitigation options. IPAA members believe the Department of Interior should devise a holistic mitigation approach and adopt a fair and flexible standard that places an emphasis on the mitigation hierarchy of avoid, minimize and rectify.

Migratory Bird Treaty Act

The MBTA was signed into law in 1918 as an effort to thwart the illegal hunting and poaching of migratory birds. Since that time, the term "take" under MBTA remains dubious, as a few courts have found that the MBTA also prohibits otherwise lawful activities that result in unintended or incidental death of migratory birds. The Fifth Circuit in agreement with the Eighth and Ninth Circuits have limited "takes" to hunting and poaching activities and that "taking" is limited to deliberate, intentional acts. Meanwhile, the Second and Tenth Circuits "have read the MBTA broadly" and "hold that because the MBTA imposes strict liability, it must forbid acts that accidentally or indirectly kill birds." In 2015, the Service announced a Notice of Intent to prepare a programmatic environmental impact statement to evaluate the potential environmental impacts of a proposal to authorize incidental take of migratory birds. In January 2017, just prior to the Obama Administration's departure, the DOI's Office of the Solicitor issued a memorandum arguing incidental take is prohibited under the MBTA. In February 2017, the Trump Administration's Interim Office of Solicitor withdrew the previous opinion.

IPAA supports the conservation of migratory birds. Many of our companies have FWS-approved Avian Protection Plans that further enhances bird conservation and MBTA compliance. IPAA, however, contends that the Service does not have the appropriate legal standing to impose regulations on

incidental take as the MBTA prohibits only direct human action against migratory birds. For instance, hunting and poaching these birds is illegal under the MBTA, but indirect or "passive" dangers to migratory birds such as power lines or oil and gas facilities, are otherwise legally operated facilities that sometimes come into incidental conflict with bird movements.

While we appreciate this Administration's efforts on MBTA, more is needed to provide clarification in the field offices. The inflexibility of the MBTA can be seen for example in certain Bureau of Land Management offices, where our members have requested relief from raptor nesting timing stipulations through use of a Migratory Bird Conservation Plan. In recent months, several companies have been denied raptor stipulation exemption requests to perform various operation and maintenance activities at locations, even though surveys show nests are inactive and therefore would be unimpacted. Denial of exception requests for well workovers can result in complete loss of production for months during the raptor nesting season. In the short term, we would recommend rescinding the Clinton Executive Order 13186 and January 2017 Obama DOI Solicitor Opinion, and support new orders ceasing enforcement and prosecution of take that is incidental to activities undertaken and not being deliberate in nature. Longer-term actions would be to promulgate a rulemaking to clarify that the MBTA does not include incidental take.

IPAA looks forward to working with the Service as it works to enhance conservation and reduce unnecessary burdens on oil and gas producers. Thank you for the opportunity to provide comment.

Respectfully submitted,

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