



November 6, 2014

Public Comments Processing
Attn: FWS-R9-ES-2011-0099
Division of Policy and Directives Management
U.S. Fish and Wildlife Service
4401 N. Fairfax Drive, Suite 222
Arlington, VA 22203

RE: Policy Regarding Voluntary Prelisting Conservation Actions

A. Introduction

These comments are filed on behalf of the Independent Petroleum Association of America (IPAA), the American Exploration & Production Council (AXPC), Association of Energy Service Companies (AESCC), the American Association of Professional Landmen (AAPL), the International Association of Drilling Contractors (IADC), the International Association of Geophysical Contractors (IAGC), the National Stripper Well Association (NSWA), the Petroleum Equipment & Services Association (PESA), the Public Lands Advocacy (PLA), the US Oil & Gas Association (USOGA) and the following organizations:

Arkansas Independent Producers and Royalty Owners Association
California Independent Petroleum Association
Coalbed Methane Association of Alabama
Colorado Oil & Gas Association
East Texas Producers & Royalty Owners Association
Eastern Kansas Oil & Gas Association
Florida Independent Petroleum Association
Illinois Oil & Gas Association
Independent Oil & Gas Association of New York
Independent Oil & Gas Association of West Virginia
Independent Oil Producers Agency
Independent Oil Producers Association Tri-State
Independent Petroleum Association of New Mexico

Indiana Oil & Gas Association
Kansas Independent Oil & Gas Association
Kentucky Oil & Gas Association
Louisiana Oil & Gas Association
Michigan Oil & Gas Association
Mississippi Independent Producers & Royalty Association
Montana Petroleum Association
National Association of Royalty Owners
Nebraska Independent Oil & Gas Association
New Mexico Oil & Gas Association
New York State Oil Producers Association
North Dakota Petroleum Council
Northern Alliance of Independent Producers
Northern Montana Oil and Gas Association
Ohio Oil & Gas Association
Oklahoma Independent Petroleum Association
Panhandle Producers & Royalty Owners Association
Pennsylvania Independent Oil & Gas Association
Permian Basin Petroleum Association
Petroleum Association of Wyoming
Southeastern Ohio Oil & Gas Association
Tennessee Oil & Gas Association
Texas Alliance of Energy Producers
Texas Independent Producers and Royalty Owners Association
Utah Petroleum Association
Virginia Oil and Gas Association
West Virginia Oil and Natural Gas Association

Collectively, these groups represent the thousands of independent oil and natural gas explorers and producers, as well as the service and supply industries that support their efforts, that will be the significantly impacted by the Proposed Policy on Voluntary Prelisting Conservation Actions. Independent producers drill about 95 percent of American oil and natural gas wells, produce about 54 percent of American oil, and more than 85 percent of American natural gas. Many of their activities require federal permits, and thus are subject to the full range of Endangered Species Act (“ESA”) requirements that apply once a species is listed. As a result, they support voluntary prelisting conservation actions that would eliminate the need to list a particular

species. For the reasons explained in detail below, the Independent Petroleum Association of America (IPAA) and aforementioned cooperating associations conclude that the draft “Policy Regarding Voluntary Prelisting Conservation Actions” (“Policy”) fails to achieve its objective of incentivizing “voluntary conservation efforts on behalf of species before they are listed as endangered or threatened species under the Endangered Species Act,”¹ and should therefore be withdrawn and re-formulated to better achieve that objective.

B. The Proposed Policy

On March 15, 2012, the United States Fish and Wildlife Service (“Service”) published an advanced notice of proposed rulemaking in the Federal Register.² The notice requested: suggestions and input from the public on how best to establish clear mechanisms to encourage landowners and other potentially regulated interests to fund or carry out voluntary conservation actions beneficial to candidate and other at-risk species by providing assurances that, in the event the species is listed, the benefits of appropriate conservation actions will be recognized as offsetting the adverse effects of activities carried out after listing by that landowner or others.³ The mechanisms were to be in addition to the Service’s already existing mechanisms for encouraging voluntary conservation actions—i.e., Habitat Conservation Plans (HCPs), Safe Harbor Agreements (SHAs) and Candidate Conservation Agreements with Assurances (CCAAs). The mechanisms were to provide “a new type of assurance [i.e., different from the ones obtainable through HCPs, SHAs, and CCAAs] that, in the event the species is listed, the

¹ 79 FR 42528.

² 77 FR 15352

³ *Id.* at 15354..

benefits of appropriate voluntary conservation actions will be recognized as offsetting the adverse effects of activities carried out by the landowner or others after listing.”⁴

Based on the “suggestions and input” it received, the Service has now proposed a “Policy Regarding Voluntary Prelisting Conservation Actions.” As background to our comments on the Policy, we outline here in brief our understanding of how it would work:

1. The State in which an at-risk species is found develops a conservation strategy for that species.

2. The strategy identifies “both the type and the location of conservation actions [that could be taken by landowners and other persons] that would be the most beneficial for particular species.”⁵

3. Landowners (both private and federal) and any other interested persons may then decide whether to voluntarily implement any of the identified actions.

4. If a person decides to implement an action, and if the implementation of the action is started prior to the final listing of the species at issue, the person undertaking the action earns a credit that may then be used “as a measure to minimize and mitigate the impact of the taking of any endangered or threatened species pursuant to Section 10(a)(1)(B) of the Act, or as an intended part of any proposed Federal action subject to the consultation requirements of section 7(a)(2) or 7(a)(3) of the Act.”⁶

⁴ *Id.* 15353.

⁵ 79 FR 42527.

⁶ *Id.* at 42529.

5. If, subsequent to listing, the person who earns the credit applies for an Incidental Take Permit, the prelisting action he has taken will be counted as “a measure to minimize or mitigate any future impact of [a] taking,”⁷ and be incorporated into the permit.

6. If, subsequent to listing, the person who earns the credit is required to consult pursuant to section 7 of the ESA about an activity that he is proposing to take, the prelisting action he has taken will be counted for purposes of the consultation as a compensatory measure taken to avoid the likelihood that his action will “jeopardize the continued survival” of the species at issue or result in the “destruction or adverse modification” of the species’ critical habitat.

7. Instead of using the credit himself, the person earning the credit may transfer the credit to a third party, and that third party may use the credit, but only for the same species [for which the credit was earned] and within the same State where the credit was earned.”⁸

C. Comments on the Proposed Policy

“The proposed policy seeks to give landowners, government agencies, and others incentives to carry out voluntary conservation actions for nonlisted species by allowing the benefits to the species from a voluntary conservation action undertaken prior to listing under the Act to be used—either by the person who undertook such action or by a third party—to mitigate or to serve as a compensatory measure for the detrimental effects of another action undertaken after listing.”⁹ While incentivizing individual voluntary conservation efforts is a worthy goal, and one that IPAA supports, the Policy fails to achieve it.

⁷ *Id.*

⁸ *Id.* at 42528.

⁹ *Id.* at 42525.

1. The Policy Fails To Promote The Goal Of Incentivizing Prelisting

Actions In Order To Avoid The Need To List A Species

There is widespread agreement that “if the need to list a species under the Act can be avoided [by the taking of voluntary prelisting conservation actions], everyone, including the species, benefits.”¹⁰ But, as FWS pointed out in its advance notice of proposed rulemaking, “there are often inadequate incentives for many people to undertake conservation actions for species prior to listing.”¹¹ This is so for two reasons. First, “those who do undertake such actions in the hope that doing so will avert the need to list the species are often disappointed or frustrated by the fact that listing nevertheless occurs.” Second, “such voluntary actions prior to listing may actually result in those persons being subject to greater restrictions after listing than they would have been had they done nothing at all (because, for example, their voluntary actions make the species more numerous or more widespread on their property than it otherwise would have been,”¹² Unfortunately, the Policy does not eliminate (or even significantly ameliorate) either of these two disincentives to the taking of voluntary prelisting actions. Thus, it does not solve the problem that FWS set out to solve.

First , the Policy does nothing to assure individuals that their voluntary prelisting actions, when combined together with those of others, will avoid the need for a listing. Instead, the focus of the Policy is on explaining the nature of the consolation prize—i.e., its focus is on explaining the “reward” individuals will get if, in spite of their actions, the species is listed.¹³ The Service

¹⁰ *Id.* at 42526.

¹¹ 77 FR 15353.

¹² *Id.*

¹³ 79 FR 42526.

obviously hopes that the promise of a post-listing credit will spur individuals to take voluntary prelisting actions, even without a reasonable assurance that those actions will avoid the need to list a species. Unfortunately, however, it is not the possibility of receiving a consolation prize that will be the predominant motivation for persons contemplating taking voluntary prelisting actions. If the Service wants the policy to bear fruit, it needs to develop ways of providing such parties stronger and more reliable assurances that their prelisting actions will avoid the need for species to be listed.

Given the Service's recent listing of the lesser prairie chicken, notwithstanding the significant voluntary prelisting efforts that were made to avoid a listing, the Service currently lacks credibility in asserting that "voluntary conservation actions, if carried out on a sufficient scale, could contribute to precluding the need to list a species."¹⁴ Unless and until the Service can find a way to convince people that voluntary prelisting actions will avoid the need to list a species, the incentive for individuals to take such actions in return for the consolation prize will be a weak one.

Moreover, as explained in section 4 below, even if the availability of a consolation prize incentivizes a person to take a voluntary prelisting conservation action, under the Policy he will have to do more to get that prize—i.e., to get credit for his action as a mitigating measure--than if he waited to take the action until after listing. This is perverse. If the Service is seeking to incentivize the taking of prelisting actions, it should be just the other way around.

Second, the Policy does not give individuals adequate assurance that their voluntary prelisting actions will not "result in those persons being subject to greater restrictions after listing

¹⁴ *Id.*

than they would have been if they had done nothing at all.” Instead, the Policy specifically reserves the right for FWS to “require,” post-listing, “a mitigation or compensatory measure alternative that clearly produces a better, or more certain, environmental outcome” than the prelisting action that was taken.¹⁵

2. The Policy Fails To Incentivize The Taking Of Voluntary Prelisting

Actions To Mitigate The Impact Of A Taking

The Policy does little, if anything, to incentivize voluntary prelisting actions by a person who, if the species at issue is ultimately listed, may need to obtain an Incidental Take Permit in order to continue his activities without fear of being held liable for a taking.

The risk/reward calculation of a person in that position is likely to be as follows:

1. There is no guarantee or even reasonable assurance that any voluntary prelisting action I take in accordance with a State conservation plan will, in combination with other voluntary actions, avoid the need to list the species at issue. Thus, there is little, if any, incentive, to take the action if my primary goal is to avoid a listing.

2. Even if the Service tells me that, in the event the species is listed, I will earn a credit that I can use “to minimize or mitigate impact of [a post-listing] taking” of the species, I have to take account of the fact that the species may ultimately not be listed. Thus, any prelisting action I voluntarily take, even if it earns me a credit, may ultimately not be necessary, and, indeed, may increase the risk that I may cause a taking, if the species is listed, because my voluntary prelisting action may “make the species more numerous or more widespread on [my] property

¹⁵ *Id.* at 42528.

that it otherwise would have been.”¹⁶ Unlike under a CCAA, I will not be given in advance of listing an Enhancement of Survival Permit that will “become active” if the species is listed and that will then protect me from liability for incidental take.

3. Even if the species is ultimately listed, I must take account of the fact that the listing process may take several years to complete. Thus, it may not make sense to incur the expense associated with the taking of a voluntary prelisting action now, particularly if there is little chance that my action, when combined with others, will avoid the need for a listing.

4. Even if I voluntarily take a prelisting action and earn a credit that I can use as “a measure to minimize or mitigate the impact of [a post-listing] taking,” there is no guarantee that the credit will be enough for me to procure an Incidental Take Permit if one is needed. Even with my credit, the Service may require that I take other mitigating actions in addition to the one I have already taken to obtain a permit. Indeed, under its Policy, the Service will not even consider itself bound to honor the credit I have earned. Incredibly, the Service states that its Policy “does not require that in all cases the Service must use prelisting conservation actions as mitigation ... for post-listing detrimental actions.” According to the Policy, “[w]here there is a mitigation ... alternative that clearly produces a better, or more certain, environmental outcome, the Service can require ... its use.”¹⁷ So why not wait and see what other things may be required of me, and how best to implement them as a package, before taking a prelisting action that the Service, in the end, may not count as mitigation?

¹⁶ 77 FR 15353.

¹⁷ 79 FR 42528.

5. If I am seeking “a reasonable assurance” at the prelisting stage that my post-listing activities will not result in liability for a taking, my only option is to develop a multispecies HCP or enter into a CCAA. Taking a voluntary prelisting action under the Policy is fraught with too much uncertainty.

3. The Policy Fails To Incentivize The Taking Of Voluntary Prelisting Actions For Use As Compensatory Measures In Section 7 Consultations

The Policy does little, if anything, to incentivize voluntary prelisting actions by a person who, if the species at issue is ultimately listed, may at some point be subject to the section 7 consultation requirements and have to demonstrate that an action he is proposing to take will not be likely to “jeopardize the continued existence” of the species or result in the “destruction or adverse modification” of its critical habitat.

The risk/reward calculation of a person in that position is likely to be as follows:

1. There is no guarantee or even reasonable assurance that any voluntary prelisting action I take in accordance with a State conservation plan will, in combination with other voluntary actions, avoid the need to list the species at issue. Thus, there is little, if any, incentive, to take the action if my primary goal is to avoid a listing.

2. Even if the Service tells me that, in the event the species is listed, I will earn a credit that I can use as “a compensatory measure for the detrimental effects of another action [that I am considering taking] after listing,” I have to take account of the fact that the species may ultimately not be listed. Thus, any prelisting action I voluntarily take to earn a credit may ultimately not be necessary.

3. Even if the species is ultimately listed, I have to take account of the fact that the listing process, including especially the determination as to whether any land I own will be designated as critical habitat, may take several years to complete. Thus, it may not make economic sense to make the investment in prelisting actions now.

4. If I am a landowner, I must take account of the fact that, at the prelisting stage, it will be difficult, if not impossible, to determine if my land will ultimately be designated as critical habitat once a species is listed. Thus, it will be difficult, if not impossible, to predict whether any credit I earn for taking a prelisting action will ultimately have any value to me or to a third person as a section 7 compensatory measure for activities that will be conducted on my land.

5. If I am a non-federal landowner, I must take account of the fact that, even if my land is designated as critical habitat, such a designation will only affect me or a third person if I or the third person proposes to take an action on my land that requires a federal permit and thus becomes subject to the section 7 consultation requirement. Thus, there will be little, if any, incentive for me to take a voluntary prelisting action unless I am reasonably sure that my land will be designated as critical habitat and that I or someone else will propose to conduct an activity on my land in the future that will require a federal permit.

6. Even if I can reasonably predict that my land will be designated as critical habitat and that I or a third person will propose to take an action on my land post-listing that will trigger the section 7 consultation requirement, there is no guarantee that the credit I earn by taking a voluntary prelisting action will be sufficient to avoid a conclusion that the action I or the third person is planning to take will likely jeopardize the existence of a species or destroy or adversely modify its critical habitat. The Service may require that I take other actions in addition to

whatever prelisting action I have already taken in the hope of avoiding such a conclusion. Indeed, the Service states that its Policy “does not [even] require that in all cases the Service must use prelisting conservation actions as ... a compensatory measure for post-listing detrimental actions.” According to the Policy, “[w]here there is a ... compensatory measure alternative that clearly produces a better, or more certain, environmental outcome, the Service can require ... its use.”¹⁸ So why not wait and see what other things may be required of me, and how best to implement them as a package, before taking a voluntary prelisting action that the Service may, in the end, not even credit as a compensatory measure?

7. Finally, under the Service’s existing regulations, I will, in effect, automatically earn a credit that will be used to my advantage if I propose to take an action that triggers the section 7 consultation requirement, even if the Policy is never adopted and implemented. This is because the Service, as part of the consultation, must determine the current status of a species before it can determine if the effects of my proposed action will be likely to “jeopardize the continued existence” of a listed species. It will do so by first determining the “environmental baseline” for the species, which consists of an analysis of the impacts to which the species is and will be subject even without the taking of the proposed action. The “environmental baseline” includes (1) the past and present impacts of all federal, state, or private actions and other human activities in the action area, (2) the anticipated impacts of all proposed federal projects in the action in the action area that have already undergone formal or early section 7 consultation; and (3) the impact of state or private actions that are contemporaneous with the consultation in process.¹⁹ Thus,

¹⁸ *Id.*

¹⁹ 50 CFR § 402.2.

any prelisting action I take will automatically become part of the “environmental baseline” as a past action and I will automatically get credit for whatever beneficial effect it may have on the species as the Service makes its jeopardy determination. Thus, any future action I propose to take will, to that extent, be less likely to cause jeopardy.

Incredibly, the Policy makes no mention of this fact. Instead, it proposes to take a step back from what the regulations already provide. According to the Policy, “the beneficial effects of voluntary prelisting conservation actions” will only be “included as part of the environmental baseline for the action under consideration if requested by the action agency or, in the case of an agency action involving a permit application, by such applicant.”²⁰ This is clear violation of the regulations.

4. The Policy Sets A Higher Standard For Crediting Prelisting Actions Than The ESA Requires For Crediting Post-listing Actions

Under the ESA, a person proposing to take an action that requires a federal permit in an area that has been designated as critical habitat must demonstrate that his action will not be likely to “jeopardize the continued existence “ of a listed species or “destroy or adversely modify” its critical habitat. To make that demonstration, the person may agree to implement various compensatory measures that will reduce the detrimental impacts of the action for which he is seeking a permit. Put simply, he must demonstrate that the action he is proposing to take, when mitigated by the compensatory measures he is agreeing to take, will not make things worse for the species; he does not have to demonstrate that his proposed action, when mitigated by the compensatory measures, will assist in the recovery of the species from its listed condition.

²⁰ 79 FR 42528.

Under the Policy, however, a higher standard is set. To get credit for a prelisting action as a compensatory measure in a post-listing consultation, the Policy states that the benefit of the prelisting action “must be greater than the detriment from the action for which the credit is used, that is, the benefit from the prelisting action, combined with the detriment from a later action, must result in a positive assistance to the recovery of the species.”²¹ In other words, to get credit for a prelisting action, the person who took the action must demonstrate not only that the prelisting action, when combined with the detrimental effects of the post-listing action he is proposing to take, will not make things worse for the species, but will actually make it better. While the wisdom of this requirement as a policy matter might be debatable, it is obvious that it will not incentivize persons to take voluntary prelisting actions; instead, it will likely discourage them from taking prelisting actions that, while not providing “positive assistance to the recovery of the species,” would nonetheless be of great benefit to the species in that they would prevent further deterioration in the species’ condition. Moreover, it would typically be difficult, if not impossible, for persons who are contemplating taking a voluntary prelisting action to predict whether it would be sufficient to make things better for the species in the context of some post-listing action that he may at some point want to take. Thus, there would be significant uncertainty about whether the taking of the action would earn a post-listing credit.

²¹ *Id.* at 42529.

Thank you in advance for your consideration of these comments.

Sincerely,

A handwritten signature in black ink that reads "Dan Naatz". The signature is written in a cursive style with a large, stylized 'D' and 'N'.

Dan. Naatz
Vice President of Federal Resources & Political Affairs
Independent Petroleum Association of America