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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, MS 2042-PDM
Arlington, VA 22203

Via Federal Rulemaking Portal

Re: RIN 1018-AY29. Federal Register Notice March 15, 2012, Expanding Incentives for Voluntary Conservation Actions Under the Endangered Species Act

To the Division of Policy and Directives Management:

The American Petroleum Institute (“API”) appreciates the opportunity to comment on the Notice published by the U.S. Fish and Wildlife Service (FWS), March 15, 2012, inviting public comment to help identify potential changes to the agency’s regulations that would create incentives for property owners¹ and others to take voluntary conservation actions to benefit species that may be likely to become threatened or endangered species.

API is a national trade association representing over 500 member companies involved in all aspects of the oil and natural gas industry. API’s members include producers, refiners, suppliers, pipeline operators, and marine transporters, as well as service and supply companies that support all segments of the industry. API and its members are dedicated to meeting environmental requirements, while economically developing and supplying energy resources for consumers. API members carry out operations within areas where candidate species or species actually listed as threatened or endangered under the Endangered Species Act of 1973, 16 U.S.C. § 1531 et seq. (the “ESA”) may occur, and carry out these operations in compliance with the ESA and in ways that avoid harm to species populations, or unmitigable harm to resources on which these species rely during their life cycles.

The objective of the ESA is to assure progress toward the recovery of species of concern to the point where these species are delisted and no longer need the protections of the ESA. According to the Government Accountability Office (“GAO”), over 90 percent of the species listed as threatened or

¹ “Property owner” as defined in 50 C.F.R. § 17.3, Definitions, “means a person with a fee simple, leasehold, or other property interest (including owners of water or other natural resources), or any other entity that may have a property interest, sufficient to carry out the proposed management activities, subject to applicable State law, on non-Federal land.”

endangered under the ESA have some or all of their habitat on non-Federal lands; two-thirds have over 60 percent of their total habitat on non-Federal lands; and one-third are entirely dependent on non-Federal lands for their habitat². In light of these figures, it is clear that actions by property owners and other private citizens are essential to achieving the goal of the ESA to conserve threatened and endangered species. Effective and common sense implementation of the ESA not only includes certainty and reliable science in the standards applied and measures required for the protection of species, but also the use of incentives for private action and conservation measures to complement the work of FWS staff in the implementation of the ESA.

To improve opportunities for voluntary species conservation efforts FWS should develop a better set of tools to support voluntary conservation efforts that benefit endangered, threatened and candidate species under the ESA. Among the improvements that should be made:

- Promote private stewardship through better coordination of existing federal grants and assistance programs for voluntary conservation activities, provide technical assistance to property owners seeking to protect species on their property and develop for model form agreements, conservation practices guidance and other means to facilitate individual conservation activities;
- Develop a more streamlined and less cumbersome approach to the development of Candidate Conservation Agreements with Assurances (CCAAs) between FWS and property owners;
- Improve the Habitat Conservation Plan (HCP) program to reduce the cost and time involved in developing HCPs and provide for more consistency in the development of mitigation standards and required HCP elements;
- Incorporate “No Surprises” assurances into voluntary conservation agreements; and
- Exclude from critical habitat designations, land and water already protected through voluntary conservation activities including: voluntary species management and protection efforts (individual or within federal, state or local government sponsored programs); HCPs; Safe Harbor Agreements; and properties enrolled in the conservation reserve program (or similar federal programs).

A common element of the improvements noted above is *recognition and actual support* of voluntary conservation efforts within FWS’ administration of the ESA. Specifically, FWS must move beyond generalized statements of support for voluntary conservation to specific programs and policies that encourage and provide a better platform for conservation measures to be undertaken.

The potential benefit of enlisting the cooperation and the ideas of property owners was recognized by Michael Bean, then with the Environmental Defense Fund, in a September 23, 1997 hearing before the Senate Committee on Environment and Public Works:

In other areas of environmental policy, incentives are a commonly used tool to achieve congressional goals . . . To achieve the goals of the Endangered Species Act, we have thus far relied almost exclusively on the “stick” of penalties and prohibitions to deter harmful conduct, and have generally neglected the “carrot” of incentives to reward beneficial conduct. The shortcomings of this “all stick and no carrot” approach are evident. The stick does not always work, and it is often resented. Moreover, even if it did always work, at best it would preserve only the status quo. Thus, ultimately, the most significant shortcoming of an all stick and no carrot approach is that it misses the opportunities to improve upon the current situation by giving landowners an incentive to create or restore habitat that will aid in the recovery of imperiled species.

² GAO. Information on Species Protection on Nonfederal Lands [GAO/RCED – 95 – 16]. December 1994.

Many property owners are willing to carry out management measures on their lands to benefit species that have not yet been listed, including candidate species. Under the practices that have largely governed enforcement of the ESA to date, however, incentives for most property owners to do so have been relatively few in number, and inconsistently applied when available. Measures such as HCPs that allow mitigation credits through habitat acquisition, protection, management or creation have been shown to be effective where implemented in enlisting landowner cooperation and improving species and habitat conservation. Similarly, Safe Harbor Agreements (SHAs) to encourage property owners to undertake voluntary conservation measures without concerns that their land uses will be restricted if endangered species are later discovered have been approved in a number of situations. Net conservation benefits to the species that may result from these agreements may include a reduction in habitat fragmentation, an increase in population numbers, and opportunities to field test innovative management techniques. For property owners, safe harbor agreements again provide some degree of certainty that they will be able to use their property in the future consistent with the terms of the agreements.

CCAAs for species that the Services have not listed as endangered or threatened but might later list provide a means to encourage initiatives by property owners in a manner analogous to HCPs or SHAs by providing a framework for negotiations between landowners and the FWS to determine a baseline of covered species and habitat characteristics, lay out management actions, and estimate conservation benefits from those actions. Another method available is the establishment of a Habitat Conservation Banking Agreement between a property owner and FWS, a concept modeled after mitigation banks for wetlands under Section 404 of the Clean Water Act. Under a Conservation Banking Agreement with the FWS, a property owner is authorized to grant a conservation easement to a third party, and to fund large and long-term management programs. In return, the FWS allows the property owner to sell mitigation credits to project proponents within the service area. The creation of credits is contingent upon the property owner's agreement to safeguard habitats through permanent protection by conservation easements.

Rulemaking and guidelines for these and similar approaches have remained dormant since 2008. Environmental regulation approaches that offer flexibility and that encourage public-private cooperation are often more effective than the familiar methods of central command, control and enforcement. Such arrangements can produce contextually tailored means of conserving species or habitats of concern; encourage information feedback, and continuous adjustment of ends and means in light of lessons learned during the course of carrying out otherwise lawful activities. Such arrangements allow property owners to explore different methods to achieve compliance with the ESA and to choose the approach that best meets their needs and can encourage locally developed solutions to listed species conservation. The opportunities presented to FWS are many and varied, but the key to their realization is to provide regulatory certainty to participating property owners, including protection from incidental take liability.

API would also like to call attention to the fact that in the case of this particular policy there have been numerous earlier listening sessions, proposed policies and ESA-related initiatives by FWS that have not resulted in the development of a final policy determination. Particularly, in May 2009, this Administration requested public comments on improvements to the ESA, Section 7 consultation process. API and other interested parties, submitted comments identifying a number of measures and actions that could improve implementation of the Section 7 consultation process. However since that time, FWS has yet to take any formal actions to improve the Section 7 consultation process. The fact that FWS chose an ANPR, with no specific timeline or plan announced for next steps on finding ways to facilitate voluntary conservation, raises a significant concern that this effort could be similarly delayed or derailed. API respectfully requests that FWS take all necessary steps to ensure that timely and effective action is taken in facilitating voluntary conservation measures.

Tools to enlist the cooperation of property owners exist. It should be the policy of FWS to increase their use, and to provide the necessary training and encouragement to agency staff to develop plans and programs appropriate to regional, local and species-specific conservation priorities that can inspire and engage the public to participate in the protection and restoration of habitat. FWS policy should also embrace flexibility to allow tailoring of approaches that benefit conservation of species or habitats in the context of a property owner's uses and activities on the land subject to an agreement. We also agree with Public Lands Advocacy that many property owners will have limited resources to devote to conservation practices. Because of this it will be important for the costs of mitigation to be clearly established up front and for the program to be kept as uncomplicated and streamlined as possible while focusing on the elimination or reduction of scientifically identified threats to the species of concern.

API endorses the comments being provided by the National Endangered Species Act Reform Coalition that are being submitted in response to this notice.

Should you have any questions, please contact the undersigned at 202.682.8057, or via e-mail at ranger@api.org.

Thank you for considering these comments.

Very truly yours,

A handwritten signature in cursive script that reads "Richard L. Ranger". The signature is written in black ink and is positioned above the typed name and title.

Richard L. Ranger
Senior Policy Advisor

Att.

Responses to Specific Questions from FWS Regarding Voluntary Conservation Actions from March 15 Federal Register Notice

How can the FWS make recognition of voluntary conservation credits more efficient, clear, and timely?

- FWS should seek to design conservation programs that are simple and transparent. We recognize that a single “credit” or measurement of benefit is unlikely to be effective for all species. However, FWS must work to ensure that there is transparency in the valuation of credits/benefits and that such valuation process is applied on a nondiscriminatory basis to all individuals seeking to have their voluntary conservation measures qualified as advance mitigation. The ability to qualify for advance mitigation must be open to all entities that may be subject to compliance obligations under the ESA, and FWS should not place arbitrary limitations on the eligibility for recognition of a party’s voluntary conservation measures.
- Offering a credit and banking system at the candidate stage would provide landowners with an additional incentive to participate in conservation efforts prior to species listing. This could be achieved by offering landowners a menu of pre-set options that will be rewarded with a set number of credits. A small number of credits could be rewarded for cooperating early in the process, for example allowing a survey on private property. A medium number of credits could be rewarded for beneficial projects that stop short of a perpetual easement, and the most number of credits could be rewarded to landowners who place land in a permanent conservation easement. Additional credits could be awarded to landowners whose land includes the range of multiple candidate, threatened or endangered species.
- FWS should work with landowners to provide more economic incentives to establish candidate conservation banks/credits so that the incentives will have a direct financial incentive to the landowner even if the species is not ultimately listed. For example, if a species is not listed, the landowners could retire credits as a tax incentive. If the species is listed, the credit should roll over to the threatened or endangered program
- FWS must conduct National Environmental Policy Act (“NEPA”) analyses for all Candidate Conservation Agreements with Assurances (“CCAA”) and enhancement of survival permits under the Endangered Species Act (“ESA”). (The permit triggers NEPA compliance.) Federal agencies can satisfy NEPA requirements either by preparing an Environmental Assessment (“EA”) or Environmental Impact Statement (“EIS”) or by showing that the proposed action is categorically excluded from individual NEPA analysis. If Federal agencies cannot show the proposed action is categorically excluded from individual NEPA analysis, they are required to prepare either an EA or EIS.
- There are several incentives for Voluntary Conservation Actions under the ESA that include less assurance than a CCAA but more assurance than a Candidate Conservation Agreement (“CCA”):
 1. CCA with Letter of Concurrence (“LOC”) from FWS: This follows an approach similar to that followed by the National Marine Fisheries Service (“NMFS”) when that agency issues a LOC under the Marine Mammal Protection Act when it determines a project with proposed mitigation will not likely result in “incidental takes”. Since this option does not require a permit, NEPA does not apply. Since the applicant is not issued a permit there is still risk of NMFS enforcement when “incidental takes” occur during the project. However, the LOC reduces the likelihood of enforcement. (See 50 CFR 216.104.) FWS could adopt a similar LOC regulation.
 2. CCA with LOC and Compliance Agreement (“CA”) with stipulated penalty provision: In addition to the above, a CCA could include “incidental take” monitoring and reporting requirements and a CA that includes a stipulated penalty for “incidental takes” occurring during the project.

Should conservation credits be transferrable to third parties?

- Yes, conservation credits should be transferrable to third parties. Creating, trading, or selling conservation credits must involve a for-profit incentive or most landowners will be unwilling to enroll their private lands in a conservation program. Without rewarding participating landowners with a transferrable credit, it is unlikely that such a program would be successful.

In issuing conservation credits, should FWS also take into account any detrimental actions by the landowner in addition to the voluntary beneficial action?

- As a general rule, the effects of an action upon wildlife or habitat cannot be ascertained until long-term monitoring has been completed. Therefore, when first instituted, conservation actions should be evaluated based upon their perceived benefit. FWS and the landowner should agree on a program to gather data on the Voluntary Conservation Actions being undertaken to enable each to assess the effects of the Actions using methods appropriate to the site and its circumstances in the context of other activities on and near the lands in question. Subsequent findings based upon this data-gathering approach, not modeling, could be used if necessary to modify the conservation action through careful negotiation with the landowner or entity responsible for applying the conservation measure(s).

What role should states play in recognizing and administering conservation credits for candidate species?

- When developing conservation strategies, FWS should solicit more feedback from state wildlife agencies. At the candidate level, FWS should encourage states to take consistent approaches to conservation (for example, incentivizing/educating states with an open hunting season on a candidate species to take a more proactive stance on conservation when adjoining states have extensive voluntary conservation efforts ongoing).

In promoting voluntary conservation programs in which state and local governments act as the lead, there are several elements that FWS should ensure are incorporated:

- Voluntary participation by landowner/operators;
 - Eliminate duplicative reviews. Where the program addresses listed species, a single Section 7 consultation review should occur regarding the overall state program;
 - Ensure certainty. Participants in the state or local conservation programs must receive incidental take authorization so that they are not exposed to “take” enforcement under Section 4(d) rules or Section 9 with respect to activities consistent with the voluntary program;
 - Encourage use of non-regulatory mechanisms. If the state or local program places regulatory restrictions on a participant’s activities, there first must be a demonstration that no non-regulatory alternatives existed to achieve the same effect for the species;
 - Emphasize collaboration between the landowners/operators and the states. Affected stakeholders must be afforded the right to fully participate in the development of the State or local governmental program;
 - Establish consistent standards for program approval. FWS review and approval of such programs must be based on specific, enumerated criteria focused on the ability of the proposed program to contribute to achieving the established recovery objectives for the listed species within that state or local government’s jurisdictional borders;
 - Ensure flexibility. Allow programs to cover listed, candidate species and other species that have been identified by the state as a species of concern;
 - No Surprises. Provide “No Surprises” type assurance that participation in the program will be sufficient for compliance with ESA Sections 7 and 9; and
 - Recognize common interests and avoid conflicts. Programs that minimize the social and economically adverse impacts on communities are more likely to garner the public support necessary to be effective.
- State wildlife agencies should have the opportunity to administer a conservation credit system and/or the ESA program for both candidate and listed species, similar to the delegation of other federal programs such as the Clean Water Act (CWA) and Clean Air Act (CAA). Experience with the delegated programs has demonstrated that states are able to more efficiently administer a federal program and provide flexibility to the regulated community while achieving the goals of the federal law. Federal funding should be funneled from the FWS to the state wildlife agencies to help offset the cost of state administration of the ESA program. If this is not feasible without a legislative change, appropriate legislation should be enacted to support funds transfers to states for this purpose.

- For a conservation banking program, this would include approval of conservation banks for both candidate and listed species, determining the number of credits available for sale from any given parcel(s) of land or bank, and approval of the sale of credits.

How can FWS quantify the value of conservation actions taken prior to listing?

- Policy for Evaluation of Conservation Efforts (PECE) compliant conservation efforts garner more weight in the listing process than non PECE-compliant conservation efforts. However, in practice few conservation programs are PECE compliant because it is difficult to earn PECE status. Thus, the PECE Policy should be revamped and simplified with the goals of remaining protective of candidate species, but providing all stakeholders with the ability to identify data requirements and the conservation actions needed to achieve the PECE goals.
 - One issue with PECE is that it was originally written to address small-scale conservation efforts. However, it should be updated to encourage large-scale conservation efforts for a candidate species, i.e., the sage grouse.

How can FWS' conservation banking policy be used to allow for pre-listing conservation credits?

- The ability of a conservation banking policy to allow the use of conservation credits identified as a result of voluntary actions taken prior to listing must be a fundamental component of any conservation credit program. Without this element, there would be little incentive for landowners or other entities to undertake voluntary conservation measures for unlisted species.

What Changes are needed to 50 CFR Parts 13, 17, and 402?

- The various federal agencies should ensure consistency in application of the ESA. In particular, FWS, BLM and USDA should better coordinate efforts to develop conservation plans for federal lands and/or actions that utilize the same studies and/or conservation strategies.

How can FWS use pilot projects to demonstrate that pre-listing credits are administratively feasible and protective of candidate species?

- Many opportunities exist for pilot projects throughout the Western States that could provide landowners with details of how such a program is intended to work. Actions being taken to conserve the Greater Sage-grouse present FWS with a host of possibilities, particularly in Wyoming. Private landowners and the oil and gas industry have undertaken many measures designed to conserve the Greater Sage-grouse without the possibility of credit for their voluntary conservation actions. Selecting any of these efforts as a pilot project would assist FWS and landowners in the region to understand how administratively feasible and functional pilot projects could be organized and implemented in a timely and cost-effective manner.

How can pre-listing credits be used to satisfy a future Section 7 consultation?

- Pre-listing credits should be assigned through a CCAA/Conservation Banking program. If a candidate species later becomes listed, the pre-listing credits should automatically be rolled over into a listed species credit. The purpose of any voluntary conservation instrument is to provide the basis for acceptable practices to conserve the species regardless of its listing status.