



January 10, 2014

Public Comments Processing
Attn: FWS-R2-ES-2012-0071
Division of Policy and Directives Management
United States Fish and Wildlife Service
4401 North Fairfax Drive, MS 2042-PDM
Arlington, VA 22203

RE: Proposed rule; Listing the Lesser Prairie-Chicken as a Threatened Species With a Special Rule, 78 FR 75306 (December 11, 2013) Docket No. FWS-R2-ES-2012-0071

Via E-Mail to <http://www.regulations.gov>

To the Division of Policy and Directives Management:

The American Petroleum Institute (“API”), the Independent Petroleum Association of America (“IPAA”), Western Energy Alliance (“WEA”), Colorado Oil and Gas Association (“COGA”), Oklahoma Independent Petroleum Association (“OIPA”), the International Association of Geophysical Contractors (“IAGC”), and the International Association of Drilling Contractors (“IADC”), collectively the “Associations”), appreciate this opportunity to comment on the U.S. Fish and Wildlife Service’s (“FWS”) December 11, 2013 notice Listing the Lesser Prairie-Chicken (“LPC”) as a Threatened Species With a Special Rule. 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 may be subjected to Endangered Species Act (“ESA”) requirements and restrictions that would impact their business operations.

IPAA represents our nation's independent producers of oil and natural gas. With companies operating in more than 30 states, IPAA members are the primary producers of America's oil and natural gas resources. IPAA's members develop 95 percent of American oil and natural gas wells, account for 85 percent of American natural gas production and 54 percent of American oil production.

WEA represents more than 430 companies engaged in all aspects of environmentally responsible exploration and production of oil and natural gas in Colorado and across the West.

COGA is a nationally-recognized trade association with the purpose of fostering and promoting the beneficial, efficient, responsible and environmentally sound development, production and use of Colorado oil and natural gas.

OIPA represents approximately 2,550 small to large independent operators that are primarily involved with the exploration and production of crude oil and natural gas in the state. In addition, OIPA represents a number of companies which provide services that support exploration and production activities. "Independent" producers are non-integrated companies which receive the majority of their revenues from production at the wellhead. They are exclusively in the exploration and production segment of the industry with no marketing or refining operations. Independent oil and gas companies range in size from large companies with thousands of employees to hundreds of smaller "mom and pop" type companies. In Oklahoma, independent producers make up the majority of the energy industry producing 96% of the state's crude oil and 88% of the state's natural gas.

IADC is a trade association representing the interests of drilling contractors, onshore and offshore, operating worldwide. IADC's mission is to advance drilling and completion technology; improve industry health, safety, environmental and training practices; and champion sensible regulations and legislation which facilitate safe and efficient drilling.

IAGC is an international trade association representing the industry that provides geophysical services (geophysical data acquisition, processing and interpretation, geophysical information ownership and licensing, associated services and product providers) to the oil and natural gas industry. IAGC member companies play an integral role in the successful exploration and development of hydrocarbon resources through the acquisition and processing of geophysical data.

API has previously submitted written comments to this docket, and with this letter, incorporates those prior comments by reference. API believes that the best scientific and commercial information requires a determination that listing the LPC is not warranted at this time. In declining to list, FWS would give a proper consideration of existing conservation measures intended to protect the LPC, as required by law and FWS's own policies. In the LPC's range, federal, state and local regulations and conservation programs already ensure that the land and water are protected; that wastes, emissions, and surface disturbances are minimized; and that land is returned to a natural state as soon as possible after development activity. These factors are acknowledged as contributing to the conservation of the LPC in the Lesser Prairie-Chicken Range-wide Conservation Plan ("RWP"), prepared by the Western Association of Fish and Wildlife Agencies' ("WAFWA") Lesser Prairie-Chicken Interstate Working Group and endorsed by FWS.

In its letter to FWS dated June 20, 2013, API requested a sector-specific special rule under Section 4(d) of the ESA that would allow take incidental to lawfully conducted oil and gas development activity. This approach has been utilized by FWS in a number of analogous circumstances wherein: (1) the activity was lawful; (2) the take was incidental; (3) the threat was negligible or not well understood; and (4) there were rational reasons to avoid subjecting that economic activity to additional regulation.

The starting point for the Service's evaluation of its proposed rule to delineate the activities necessary to minimize LPC take is to formulate an understanding of what is already being done. The oil and gas

industry has demonstrated a long-standing commitment to environmental stewardship in general and conservation of the LPC and its habitat in particular. Any takes of the LPC from lawfully conducted oil and gas operations are incidental to the development of the resources that are developed and produced through those operations. As with other lawful activities carried on within the range of the species, incidental take from oil and gas operations, to the extent it occurs, is a consequence of carrying out these operations within the range of the species, and does not present a risk to the species.

Advances in oil drilling technology have permitted industry to reduce its already small environmental footprint. Well pad size has been substantially reduced, in many cases to less than 3 acres per pad. Advances in directional drilling technology permits clustering and the use of multi-well pads thereby further minimizing new surface impacts and reducing the number of pads on the landscape. Furthermore, the oil and gas industry is minimizing its already negligible impact on the LPC through technological advances, compliance with existing regulations and permit requirements, environmental stewardship, voluntary conservation activities, and technological advances. This is evidenced by the voluntary avoidance, minimization and mitigation measures the industry has developed for operations in the LPC's range. Some of these practices are described in the recently noticed Candidate Conservation Agreement with Assurances ("CCAA") (78 FR 76639, Volume 78, Number 243, Pages 76639–76641) which was derived from these voluntary measures.

Prior to a decision on listing and afterwards, should listing occur, FWS should recognize and support *all* pre- and post-listing voluntary conservation efforts that will benefit the species or its habitat, including any of the substantial conservation measures that are already being implemented by the affected states, many private interests and the federal government. Voluntary programs such as those coordinated by the Department of Agriculture, the various existing CCAs and CCAAs, the Range Wide Plan adopted by WAFWA (and recently endorsed by the Service) form the foundation of collaborative conservation among public and private stakeholders and should be encouraged. One example is the Restore New Mexico program, through which governmental agencies, ranching and agricultural interests, and oil and gas companies worked together to restore over 1 million acres of LPC habitat in the New Mexico portion of the Permian Basin. An effective conservation plan – or selection of plans – should recognize the importance of other stakeholder activities that take place in the species' range, *including energy development*, and seek to achieve a balance of these interests with conservation objectives, and provide clear parameters and administrative processes that offer the regulatory certainty required for business investment.

API maintains that a 4(d) rule should exempt oil and gas operations. If, however, the FWS elects to issue a 4(d) rule that authorizes take that is incidental to implementing specific LPC conservation plan(s), the proposed rule should be expanded to allow any conservation plan endorsed by FWS and determined to benefit the LPC be included in the exemption from take prohibition. Furthermore, if FWS issues a 4(d) rule that differs from what is currently proposed, an additional opportunity for public review and comment to a new or revised 4(d) rule must be provided.

API believes it is premature to list the LPC without (among other steps):

- Further examination of the relative significance of habitat fragmentation to other factors affecting the LPC at a population level, *and*,
- With respect to habitat fragmentation, the relative significance of oil and gas operations carried out under modern, permit compliant, environmentally responsible practices as compared with other factors that are perceived as sources of habitat fragmentation.

API concurs with the judgment of the five state wildlife agencies in the RWP, that there is significant evidence to support a not warranted listing decision for the LPC.

API and its members believe that based on the information available in the rulemaking record, FWS' assumptions about the incidental take that might be attributable to oil and gas development are not well

supported. In its December 11, 2012, proposed listing, FWS alleged threats from oil and gas activities, but, in doing so, was unable to isolate potential impacts from oil and gas operations from other variables that may affect the LPC. API and its members are concerned that alleged threats to the LPC that are not specific to oil and gas development, such as roads, power lines, and noise, may be improperly attributed exclusively to oil and gas development. A number of other specific ‘potential’ anthropogenic threats are also said to contribute to habitat loss and fragmentation. The FWS speculates these threats include conversion of grasslands to agricultural uses, encroachment by invasive woody plants, petroleum production, roads, and presence of manmade vertical structures including towers, utility lines, fences, turbines, wells, and buildings.

The basis for the listing decision rests on two principal threats, habitat loss and fragmentation. Yet the analysis in the proposed rule fails to provide data on the actual effect of specific threats or the interaction among them. Neither does this analysis provide context for a range-wide assessment of the effects discussed. We further believe that it is premature to suggest, to assume or to determine that a particular factor is a threat, without evidence of adverse effects and without consideration of other relevant factors, including location or type of habitat, degree of isolation, population size, effects of drought, or any other pertinent factor.

We are very concerned that a precautionary approach reflected in the proposed rule may be improperly substituted for a rigorous identification of factors which could present real threats to the LPC at a population level. API and its members are also concerned about the assumption expressed in the notice that any threat, no matter what the intervening circumstances might be, is experienced at the same level throughout the range and across time. However, what might be a threat under some circumstances (e.g., during a drought) might not be a threat in a normal year. Without adequate supporting data or analysis, the proposed rule asserts that the principal habitat threats amplify the effect of myriad other anthropogenic activities. But this approach is insufficient, because for effective management of the species it is necessary to be able to measure, with reference to actual data, either habitat loss and its population level effects or population changes.

Furthermore, because the analysis in the proposed rule fails to establish the range-wide extent of the effects on LPC populations from factors purportedly associated with habitat loss and fragmentation, and fails to provide adequate supporting data or analysis to link purported threats to anthropogenic activities, critical habitat for the LPC is not determinable, and designation of critical habitat (CH) is neither feasible nor appropriate at this time. In addition a significant portion of the LPC range is comprised of private lands and split estate issues that arise from ownership patterns on these lands have not been adequately determined. In the FWS’s Conservation Needs of the Lesser Prairie-Chicken Technical White Paper (July 2012), the FWS determined that management of the LPC requires securing interests in both the surface and mineral estate. Otherwise, the designation of CH may create conflicts with management of the LPC and development of the mineral estate. Finally, designation of CH is not necessary at this time because of the number of voluntary conservation measures now being undertaken, and those measures that are shortly to be undertaken pursuant to pre and post-listing conservation efforts.

We reiterate our request for a sector-specific special rule under Section 4(d) of the ESA that would allow take incidental to lawfully conducted oil and gas development activity. The Section 4(d) flexibility to narrowly tailor protections for threatened species and to opt against prohibiting all takes has been fully utilized by the listing agencies in other situations¹. The listing agencies typically refrain from imposing full Section 9 take prohibitions when: (1) take is incidental to a lawfully conducted industrial sector activity; (2) where incidental take potentially attributable to the activity is negligible or not well

¹ *Alsea Valley Alliance v. Lautenbacher*, 2007 U.S. Dist Lexis 60203 (D.Or. 2007); *Washington Environmental Council v. NMFS*, 2002 U.S. Dist Lexis 5432 (W.D. Wash 2002); *State of Louisiana v. Verity*, 853 F.2d 322 (5th Cir. 1988).

understood; and, (3) where there are economic and policy reasons to avoid unnecessarily damaging regulations on an industry². API believes that these principles should inform FWS' promulgation of a 4(d) Special Rule for the LPC by removing all prohibitions for takes incidental to lawfully conducted oil and gas operations, because lawfully conducted oil and gas activities already serve to protect the environment, and the LPC's habitat in the vicinity of these activities. Such a Special Rule can provide a complement to a strategy to address threats to the LPC throughout its range, based on measurable biological goals and objectives, and a framework to achieve them.

Finally, API requests extending the listing decision deadline from March 31, 2014 until June 11, 2014. This extension of the listing decision deadline will allow additional on-the-ground conservation measures to be implemented through any existing or soon to exist pre or post listing voluntary conservation efforts. The requested extension will still satisfy statutory requirements of a 1-year listing decision and a 6-month extension from the proposed listing that was published in the Federal Register on December 11, 2012.

Thank you in advance for your consideration of these comments. Please feel free to contact me at your convenience should you wish to discuss this letter via e-mail at ranger@api.org, or by telephone at 202.682.8057.

Very truly yours,



American Petroleum Institute



Independent Petroleum Association of America



Western Energy Alliance



Colorado Oil and Gas Association

² 7 See Utah Prairie Dog (77 Fed. Reg. 46158 (Aug. 2, 2012)); Central Population of the California Tiger Salamander (69 Fed. Reg. 47212 (Aug 4, 2004)); Preble's Meadow Jumping Mouse (66 Fed. Reg. 28125 (May 22, 2011)),(67 Fed. Reg. 61531 (Oct. 1, 2002)),(69 Fed. Reg. 29101 (May 20, 2004)).



Oklahoma Independent Petroleum Association



International Association of Geophysical
Contractors



International Association of Drilling Contractors