



July 1, 2016

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Public Comments Processing
Attn: Docket Nos. FWS-HQ-ES-2015-0171
and FWS-HQ-ES-2105-0177
U.S. Fish and Wildlife Service
5275 Leesburg Pike
MS: BPHC
Falls Church, VA 22041

Re: Comments of the Independent Petroleum Association of America

To Whom It May Concern:

I. INTRODUCTION

The Independent Petroleum Association of America (“IPAA”) submits these comments on the changes proposed by the United States Fish and Wildlife Service (“Service”) “to the regulations concerning enhancement of survival permits issued under the Endangered Species Act” (“ESA”),¹ and on the related “proposed revisions to the Candidate Conservation Agreements with Assurances policy.”²

IPAA represents thousands of independent oil and natural gas exploration and production companies, as well as the service and supply industries that support their efforts. 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.

IPAA’s members strongly support policies and programs designed to incentivize voluntary conservation measures by property owners that can benefit at-risk species, such as the current Candidate Conservation Agreements with Assurances (“CCAAs”) policy. The policy not only furthers the Service’s overarching goal of encouraging early and voluntary conservation, but also provides property owners with flexible, often innovative, tools with which to manage their property without sacrificing regulatory certainty. While IPAA and its members strongly support the Service’s efforts to incentivize voluntary conservation prior to listings, the proposed revisions will discourage, rather than encourage, voluntary conservation.

¹ 81 Fed. Reg. 26,769 (May 4, 2016).

² 81 Fed. Reg. 26,817 (May 4, 2016).

According to the Federal Register notice, the proposed changes to the regulations and policy are intended “to clarify the level of conservation effort that [the Service] require[s] each [Candidate Conservation Agreement with Assurances (“CCAA”)] to include in order for the Service to approve” it.³ However, as explained below, the proposed changes do not simply clarify the level of conservation effort that is needed in a CCAA. Rather, the proposal represents a marked departure from the existing regulatory framework, including new, substantive requirements that fundamentally change the focus, review and approval process required for CCAs.

Given that the proposals do not further the Service’s goal of incentivizing voluntary conservation for at-risk species, do not provide a justification for the significant departure from established policy and practice, and conflict with the regulatory scope of the ESA, IPAA requests that the proposed changes with both the proposed rule and draft revised policy be withdrawn. The Service should, instead, focus on streamlining the requirements for CCAs, and on providing more incentives for their use. This approach, consistent with Executive Order 13563 and other existing policies, would promote predictability, reduce uncertainty, and lend itself to the “best, most innovative, and least burdensome tools for achieving regulatory ends.”⁴

II. ADMINISTRATIVE PROCEDURE ACT DEFICIENCIES

With respect to the proposed revisions to the Candidate Conservation Agreement with Assurances Policy, the Service indicates that in addition to adding a new definition, “net conservation benefit” and deleting the definition of “other necessary properties,” additional language in the policy has been revised to improve clarity.⁵ A redline comparison of the Service’s current policy and the draft revised policy indicates that the changes are numerous and significant, rather than minor revisions to improve clarity. As a result, the public is not fairly apprised of the proposed changes under the Administrative Procedures Act (“APA”) so as (1) to ensure that agency regulations are tested via exposure to diverse public comment, (2) to ensure fairness to affected parties, and (3) to give affected parties an opportunity to develop evidence in the record to support their objections... and thereby enhance the quality of judicial review.⁶ The Service must cure this deficiency by reissuing the draft policy for Candidate Conservation Agreements with Assurances with adequate explanations of the changes to ensure that notice to interested and affected parties is sufficient and affords sufficient time for the public to submit comments, information and recommendations.

III. REQUEST FOR AN EXTENSION OF TIME

³ 81 Fed. Reg. 26,769 and 81 Fed. Reg. at 26,818.

⁴ Exec. Order No. 13,563, 76 Fed. Reg. 3821 (Jan. 21, 2011).

⁵ 81 Fed. Reg. at 26,819.

⁶ *Prometheus Radio Project v. F.C.C.*, 652 F.3d 431 (3rd Cir. 2011), *cert. denied* 133 S.Ct. 63 (2012), *cert. denied*, 133 S.Ct. 64 (2012), *cert. denied* 133 S.Ct. 73 (2012), *on remand* 2014 WL 1466887.

IPAA's members request that the Service provide additional time for interested parties to provide comments, information and recommendation on the proposed rule and draft policy. The changes the Service proposes have broad implications for parties that have negotiated, are negotiating or may negotiate CCAAs in the future. The Service published the rule in the Federal Register on May 4, 2016 and provided interested parties 60-days to respond. IPAA is aware of dozens of CCAAs covering millions of acres of private property. A 60-day notice is insufficient given the number of entities and acres of land likely impacted by the proposed changes. If the Service moves forward with its proposed changes, IPAA requests that the Service provide an additional comment period of not less than 90 days.

IV. COMMENTS

As previously stated, the Service should withdraw the proposed rule and draft revised policy; however, if it proceeds ahead, the Service should reissue its draft revised policy and proposed rule to comply with the APA and extend the time period for comment, IPAA provides the following comments in response to the Service's solicitation of comments, information and recommendations.

Comment 1 – Over the past sixteen years, the existing policy language is sufficiently clear, has been extensively relied upon in approving CCAAs and no revision is necessary or warranted. Under its existing policy, the Service has successfully negotiated and approved dozens of CCAA's covering millions of acres of private property. The current program has been successful in incentivizing voluntary conservation efforts. Large-scale CCAAs have garnered such high levels of participation that they have helped preclude the need to list species such as the greater sage-grouse and dunes sagebrush lizard. *See* 79 Fed. Reg. 71,444 (Dec. 2, 2014) (announcing availability of draft CCAA for the greater sage-grouse in multiple Oregon counties); 79 Fed. Reg. 48,243 (Aug. 15, 2014) (announcing availability of draft CCAA for the greater sage-grouse in two Oregon counties); 79 Fed. Reg. 2683 (Jan. 15, 2014) (announcing availability of draft CCAA for the greater sage-grouse in Harney County, Oregon); 78 Fed. Reg. 9066 (Feb. 7, 2013) (announcing availability of draft CCAA for the greater sage-grouse in Wyoming); 74 Fed. Reg. 36,502 (July 23, 2009) (announcing availability of draft CCAA for the greater sage-grouse in Idaho); 76 Fed. Reg. 62,087 (Oct. 6, 2011) (announcing availability of draft CCAA for the dunes sagebrush lizard in Texas); 73 Fed. Reg. 62,526 (Oct. 21, 2008) (announcing availability of draft CCAA for the lesser prairie-chicken and dunes sage-brush lizard in New Mexico). Other large-scale CCAAs have generated significant participation, yielding significant conservation benefits. *See, e.g.,* 78 Fed. Reg. 76,693 (Dec. 18, 2013) (announcing availability of multi-state CCAA for the lesser prairie-chicken). As the above examples illustrate, there is no need for the Service to provide clarification, and IPAA therefore recommends that the Service withdraw both its proposed rule and draft revised policy.

Comment 2 – Although the preamble to both the proposed rule and draft revised policy assert that the purpose of the changes are to clarify the level of conservation effort required in each agreement in order for the Service to approve a CCAA, it appears that the effort to define the term “net conservation benefit” is in direct response to the Presidential Memorandum:

Mitigating Impacts on Natural Resources from Development and Encouraging Related Private Investment. However, changes to the Service rules and the CCAA are not needed because the very nature of the existing rules and policy already establish principles of avoid, minimize and/or mitigate that achieve demonstrated outcomes. IPAA recommends that the Service withdraw both its proposed rule and draft revised policy.

Comment 3 – “Through its [current] Candidate Conservation program, one of [Service’s] goals is to encourage the public to implement specific conservation measures for declining species prior to them being listed under the ESA.”⁷

Under the current policy, two benefits are offered to the property owner to entice voluntarily conservation measures on the landscape prior to the listing of a species. First, in exchange for entering into a CCAA and implementing certain conservation measures, a private property owner receives assurances that additional conservation measures will not be required of the property owner and additional resource use or land use restrictions will not be applied should the species subsequently be listed. Second, the property owner who enters into a CCAA is given an enhancement of survival permit that becomes effective and provides a certain amount of incidental take if the species is subsequently listed. Both benefits provide property owners with regulatory certainty so there is no question as to what will be required if the species is ever listed.

The goal of CCAAs, under the existing policy, is to provide incentive to implement voluntary conservation measures that might avoid the need to list a species.⁸ To that end, in order to enter into a CCAA, the “Services must determine that the benefits of the conservation measures implemented by the property owner under a CCAA, when combined with those benefits that would be achieved if it is assumed that conservation measures were also to be implemented on other necessary properties, would preclude or remove any need to list the covered species.”⁹ There is, thus, an incentive for property owners to undertake voluntary conservations measures with the hope that the species will never need to be listed. That benefit, along with the regulatory assurances identified above, is what inures to the landowner in exchange for implementing early, voluntary conservation. This type of agreement also benefits the Service by allowing it to direct its attention and resources to the species most at-risk and, if the combined efforts are successful, precludes the need for the service to list the species, resulting in reduced costs and administrative oversight.

Citing “confusion” after more than sixteen years and numerous success stories about the level of effort needed in a CCAA, the proposal seeks to remove the reference to conservation on “other necessary properties” and, instead, require property owners to demonstrate that the conservation measures proposed in the CCAA will provide a “net conservation benefit” to the species. The proposal defines “net conservation benefit” as “the cumulative benefits of specific conservation measures designed to improve the status of a covered species by removing or

⁷ 81 Fed. Reg. at 26,818.

⁸ *Id.*

⁹ *Id.*

minimizing threats, stabilizing populations, and increasing its numbers and improving its habitat.”¹⁰

On its face, the proposal discourages rather than encourages voluntary conservation measures. Under the existing framework, property owners need to show that the voluntary conservation measures provided for in the CCAA will not make a species’ situation worse. Under the proposed framework, landowners will need to show that the conservation measures will make the species’ situation better. This shift to the concept of “net benefit” is a significant change and will discourage the use of CCAAs. Indeed, the Service has previously acknowledged as much. When the Service issued its first draft CCAA policy in 1997, it included the concept of “net benefit” and “[s]ome commenters questioned the use of the term ‘net benefit’ in the draft policy.” In response, the Service stated that “[t]he term ‘net benefit’ was erroneously included in the draft policy and has been eliminated in the final policy.” The Service pointed out that “[n]et benefit is a concept more appropriately used in ‘Safe Harbor’ Agreements,”¹¹ which are designed to aid in the recovery of a [listed] species—i.e, in “making the species’ situation better”—than in CCAAs, which are designed to avoid a listing—i.e., to “avoid making the species’ situation worse.” Remarkably, the Service now seeks to require property owners to demonstrate that the conservation measures implemented will not only “avoid making the species’ situation worse,” but also require the applicant to demonstrate the conservation measures will “stabilize [the] population” *and* increase both the species’ population numbers and the quality of its habitat. This is a much higher regulatory hurdle for property owners to clear, and the Service must, at a minimum, provide a more thorough explanation for its departure from its long-standing previously stated position. If the Service moves forward with its new position, a property owner will likely never be able to overcome that hurdle, and it will be exceedingly difficult, if not impossible, for the Service to approve a CCAA. The Service cannot credibly argue that the proposed revisions satisfy its expressed purpose to encourage broad participation of early and voluntary conservation if it has no means by which to approve such measures, and they should therefore not be adopted.

Perhaps more concerning, it is not readily apparent what benefit the property owner receives under the present proposal. The burden of proving the proposed conservation benefit is higher or equal to what an applicant must demonstrate to receive an incidental take permit for a listed species; therefore, there is little incentive for the landowner to proactively engage with the Service to preclude a listing. Indeed, with this proposal, a landowner is no worse off in the event a listing occurs. In the face of that reality, it is difficult to comprehend how the proposal “encourage[s] the public to implement specific conservation measures for declining species prior to them being listed under the ESA.” IPAA submits that it does not and, if the Service ultimately disagrees, IPAA requests that the Service explain the basis for its assertion.

¹⁰ 81 Fed. Reg. at 26,821.

¹¹ 64 Fed. Reg. 32,726, 32,733 (June 17, 1999).

Comment 4 –The Service should provide a justification for its significant departure from existing regulation and established policy, particularly given the disparate treatment of candidate and listed species under the ESA.

The ESA does not require an applicant for an enhancement of survival permit to prove that implementation of a prescribed set of conservation measures will result in a “net conservation benefit” to a covered species. As IPAA similarly pointed in its comments regarding the Service’s Mitigation policy and its proposal to require a “Net Conservation Gain,” the Service should specifically cite the authority that it relies on in requiring a “Net Conservation Benefit.”

The ESA treats candidate and listed species differently under the Act. Here, however, the proposal states that one of the primary purposes for the proposed revision is to make CCAA’s “more consistent with Safe Harbor Agreement requirements.”¹² No justification is cited for this new consistency requirement. In fact, Congress specifically chose to treat unlisted and listed species differently when it passed the ESA. Despite clear Congressional intent and its own past determination to the contrary when faced with this issue, the Service now proposes to impose a recovery standard on applications for a CCAA. The Service does so without any regard for the fact that candidate species are not listed-- i.e. they are not designated as either threatened or endangered under the ESA. The imposition of such a standard arbitrarily conflates conservation measures and standards that the Service requires to “recover” a threatened or endangered species with conservation measures and standards designed specifically to encourage voluntary conservation for species that have not yet been listed.

The distinction between candidate and listed species is, without question, an important one. Since a listed species is either “in danger of extinction throughout all or a significant portion of its range” or “likely to become an endangered species within the foreseeable future” Congress required that “[t]he protective measures to counter species extinction take effect when a species is listed” and not before. Put simply, unless and until a species is listed, there is nothing to “recover” or substantively protect under the Act. Indeed, the purpose of a CCAA is to encourage broad participation to preclude or remove the need for a listing. To require a “recovery” standard for a species that is not yet listed and may never need to be listed is inconsistent with the intended purpose of CCAAs and beyond the scope of the Act.

The Service should withdraw its draft revised policy and proposed rule. If the Service feels compelled to proceed with its action, at a minimum, the Service should revise the proposal to provide a specific source of authority for such action and an express justification for the significant departure from its existing CCAA framework. Without reference to a specific source of authority and an express justification for its abrupt change in position, the public cannot fully and meaningfully comment on the Service’s proposal.

¹² 81 Fed. Reg. at 26,818.

Comment 5 – Property owners cannot be required to reduce or eliminate future threats to species.

In the Service’s 1999 policy, it states, “The Services will not enter into an Agreement unless (1) the threats to and the requirements of the covered species are adequately understood so that the Services can determine that the agreed upon conservation measures will be beneficial to the covered species; and the effects of the agreed upon conservation measures are adequately understood so that the Services can determine that they will not adversely affect listed species or adversely modify critical habitat or (2) any information gaps relating to the requirements of the covered species or the effects of the conservation measures on the covered species or listed species can be adequately addressed by incorporating adaptive management principles into the Agreement. The Services believe that, in many Agreements, the conservation measures prescribed for the covered species will also benefit other species, including listed ones.”¹³ The Service goes on to say, “Moreover, the Services have significant resources and conservation authorities that can be used to address the needs of species covered by Agreements with assurances when unanticipated changes in circumstances cause a need for additional conservation measures. Some funding for additional conservation measures may come from existing appropriations for either candidate conservation or recovery, depending on whether the species is listed. When necessary, the Services will work with other Federal, State, and local agencies, Tribal governments, conservation groups, and private entities to implement additional conservation measures for the species. Finally, the Services are prepared as a last resort to revoke a permit implementing a Candidate Conservation Agreement with assurances where continuation of the permitted activity would be likely to result in jeopardy to a species covered by the permit. Prior to taking such a step, however, the Services would first have to exercise all possible means to remedy such a situation.”¹⁴ It goes on to say, “By incorporating adaptive management into Agreements with assurances and associated enhancement of survival permits, the Services believe that these Agreements will have sufficient flexibility to enable the Services and property owners to address reasonably foreseeable changes in circumstances or new information.”¹⁵ It is unclear why the Service is now proposing to require the property owner reduce or eliminate unknown future threats when the Service has already stated it has significant resources and conservation authorities that can be used to address the needs of species covered by Agreements with assurances when unanticipated changes in circumstances occur.

Comment 6 – If the Service proceeds with the adoption of the proposed changes, IPAA has fundamental concerns about the proposed changes, as expressed in the comments above, IPAA has separate concerns about the ambiguous and conflicting nature of the language that Service is proposing to adopt.

1. The definition of “net conservation benefit” is ambiguous – “Net conservation benefit” is defined as “the cumulative benefits of specific conservation measures designed to improve the status of a covered species by removing or minimizing threats, stabilizing populations, and

¹³ 64 Fed. Reg. at 32,728.

¹⁴ *Id.*

¹⁵ *Id.*

increasing its numbers and improving its habitat.” This definition is ambiguous for several reasons, particularly when read together with other provisions in the proposed policy.

First, “net conservation benefit” is defined as “the cumulative benefits of specific conservation measures designed to improve the status of a covered species by ... stabilizing populations, and increasing its numbers.” However, the definition then states that the “benefit [for purposes of determining “net benefit”] is measured by the projected increase in the species population.” Does that mean that a CCAA that is designed only to “stabilize populations” will never be approved? And if so, how can that be reconciled with Part 4 of the proposed policy, which states that the “expected benefits” which may be considered in determining whether the implementation of a CCAA will achieve a “net conservation benefit” include “maintenance of populations numbers”? FWS should make clear that a “net conservation benefit” can be achieved by the implementation of conservation measures that are projected only to “maintain population numbers.” FWS should also make clear that a “projected increase in the species population” means a “projected increase” on the land owned by the property owner. Finally, FWS needs to present for public comment its explanation of how much of an increase in the species population must be projected in order for the “cumulative benefits of specific conservation measures” to qualify as a “net benefit”? The absence of clear guidance on this issue will act as a disincentive to the development of CCAAs and will create confusion at the field level where the policy is implemented.

Second, “net conservation benefit” is defined as “the cumulative benefits of specific conservation measures designed to improve the status of a covered species by ... improving its habitat.” Does this mean that a CCAA that is designed only to preserve habitat may never be approved? And if so, how can that be reconciled with Part 4 of the proposed policy, which states that the “expected benefits” which may be considered in determining whether the implementation of a CCAA will achieve a “net conservation benefit” include “preservation of habitat”? FWS should make clear that a “net conservation benefit” can be achieved by the implementation of conservation measures that are projected only to preserve habitat. FWS also needs to present for public comment its explanation of how much habitat must be improved or preserved in order for the “cumulative benefits of specific conservation measures” to qualify as a “net benefit”? The absence of clear guidance on this issue will act a disincentive to the development of CCAAs will create confusion at the field level where the policy is implemented.

Third, the definition states that the “benefit is measured by the projected increase in the species population or improvement of the species habitat” (emphasis added). FWS should clarify that this means that FWS will approve a CCAA if there is a “projected improvement of the species habitat,” even if there is no “projected increase in the species population,” and vice versa.

Fourth, the definition states “any off-setting adverse effects attributable to the incidental taking allowed by the enhancement of survival permit” must be subtracted from the “cumulative benefits” to get the “net benefit.” By regulation, however, the effects of incidental taking that occurs in compliance with an enhancement of survival permit may “not appreciably reduce the

likelihood of survival and recovery in the wild of any species.” Accordingly, FWS should delete this provision from the draft policy.

Fifth, the definition states that “[i]n the case where the species and habitat is already adequately managed to the benefit of the species, a net conservation benefit will be achieved when the property owner commits to manage the species for a specified period with the anticipation that the population will increase or habitat quality will improve.” The Service should revise the draft policy to clarify that if a property owner is managing his property to the “benefit of the species” at the time he applies for approval of a CCAA through efforts to preserve habitat or stabilize populations, he need only commit to continue to manage his land in that manner for a period of time specified by the Service in order to get his CCAA approved.

2. The definition of “net conservation benefit” in the proposed policy is not consistent with its definition in other FWS policies and regulations – For example, the Service has defined “net conservation gain” in its Greater Sage-Grouse Range-Wide Mitigation Framework (2014), and previously defined “net conservation benefit” in its policy on Safe Harbor Agreements, yet these definitions differ from each other and from the definition in the proposed CCAA policy. Under the Greater Sage-Grouse Range-Wide Mitigation Framework, a “net conservation gain” is an improvement over baseline conditions whereas under the Safe Harbor Agreement policy, a “net conservation benefit” must contribute toward the recovery of a listed species. These differences need to be resolved or thoroughly explained to avoid confusion on the part of landowners and regulators alike as they prepare and review CCAAs. This is particularly the case with respect to the definition of “net conservation benefit” in the Safe Harbor Agreement policy, which appears to have been the model for the definition in the proposed CCAA policy, and yet is different in some respects from that definition.¹⁶ Thus, IPAA strongly urges that the “net conservation benefit concept” not be incorporated into the CCAA policy until FWS has presented for public comment a comprehensive discussion of the various ways and contexts in which it is using the concept, and has resolved or satisfactorily explained any differences.

3. The standard for approval of a CCAA is ambiguous – The Service should revise the third sentence in the second paragraph of Part I of the draft policy to be consistent with the rest of the policy. The proposed new sentence states that FWS will enter into a CCAA only when it determines “that the conservation measures to be implemented ... will result in a net conservation benefit to the covered species.” This is inconsistent with the statement in the fifth paragraph in Part 1, and the statement in Part 4, which state that the FWS “must determine [only]

¹⁶ In the Safe Harbor Policy, the Service defined “net conservation benefit” as “the cumulative benefits of the management activities identified in a Safe Harbor Agreement that provide for an increase in a species’ population and/or the enhancement, restoration, or maintenance of covered species’ suitable habitat within the enrolled property, taking into account the length of the Agreement and any off-setting adverse effects attributable to the incidental taking allowed by the enhancement of survival permit. Net conservation benefits must be sufficient to contribute, either directly or indirectly, to the recovery of the covered species.” 64 Fed. Reg. 32,717, 32,722 (June 17, 1999).

that the benefits of the conservation measures to be implemented ... are reasonably expected to result in a net conservation benefit.” FWS should revise the sentence to read that FWS will enter into a CCAA when it determines “that the conservation measure to be implemented ... are reasonably expected to result in a net conservation benefit.”

4. The revocation provision needs to be clarified – Part 5 of the proposed policy states that the Service “is prepared as a last resort to revoke a permit implementing a CCAA where continuation of the permitted activity would be likely to result in jeopardy to a species covered by the permit.” In view of the fact that an enhancement of survival permit will be issued based on a projection of what the implementation of a CCAA can reasonably be expected to achieve by way of an increase in species population or an improvement in habitat, FWS needs to make clear that a permit will not be revoked simply because, notwithstanding the property owner’s full compliance with the CCAA, the projected benefits are not achieved.

III. CONCLUSION

IPAA appreciates Service’s consideration of these comments. For the reasons explained above, IPAA requests that Service withdraw the draft revised policy and proposed rule, and focus its efforts instead on streamlining and reducing the costs to develop CCAAs and on identifying additional incentives for property owners to use them.

Sincerely,

A handwritten signature in black ink, appearing to read "Dan Naatz". The signature is fluid and cursive, with the first name "Dan" being more prominent than the last name "Naatz".

Dan Naatz
Senior Vice President of Government Relations & Political Affairs
Independent Petroleum Association of America