



June 5, 2013

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

**RE: American Petroleum Institute's Questions Regarding the Proposed Special Rule under Section 4(d) of the ESA (78 Fed. Reg. 26302 (May 6, 2013)).**

Dear Sir/Madam:

On March 11, 2013, the American Petroleum Institute, the Independent Petroleum Association of America, International Association of Drilling Contractors, Mid-Continent Oil and Gas Association of Oklahoma, New Mexico Oil and Gas Association, Oklahoma Independent Petroleum Association, Panhandle Producers & Royalty Owners Association, and Western Energy Alliance (collectively "the Associations") submitted comments on the Fish and Wildlife Service's ("FWS" or "the Service") Proposed Rule to List the Lesser Prairie-Chicken ("LPC") as a Threatened Species under the Endangered Species Act ("ESA").<sup>1</sup> As detailed therein, the Associations believe FWS's final determination must be that listing the LPC as "threatened" is not warranted at this time, in part because of the significant ongoing conservation efforts that are already in place. The Associations appreciate the Service's consideration of those comments and the Service's apparent willingness to consider a special rule under ESA section 4(d), if FWS finalizes its listing of the LPC as threatened. The proposed 4(d) Special Rule, however, raises significant substantive and procedural questions that require clarification by FWS. The Associations herein provide FWS with those inquiries and respectfully request that the Service extend or reopen the comment period to: (1) allow FWS to fully answer the questions below; (2) allow stakeholders to draft comments with the benefit of those answers; and, most importantly, (3) await final versions of key documents on which comment is sought. Without this information, stakeholders have limited ability to provide input.

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<sup>1</sup> 77 Fed. Reg. 73828 (Dec. 11, 2012).

## **Questions on the Consideration and Use of the Draft Rangewide Plan:**

1. FWS asks for comment on the effectiveness for the purpose of conserving the LPC of the draft Rangewide Conservation Plan for the LPC (“Draft Rangewide Plan”) that is under development by the Western Association of Fish & Wildlife Agencies (“WAFWA”), should the Plan be implemented. WAFWA however, closed the comment period for the Draft Rangewide Plan on May 15, 2013. Given this situation:
  - a. Now that FWS appears to be considering the Draft Rangewide Plan as a factor in determining the listing status of the LPC, does the Service expect that stakeholders will be given an opportunity to provide comment on the substance of the plan?
  
2. FWS asks for comment on whether, and to what extent, the Draft Rangewide Plan would impact the Service’s consideration of LPC status under ESA Section 4(a)(1). The Service’s request in this respect raises serious questions:
  - a. How can stakeholders comment on the potential efficacy or implementation of a plan that has not yet been finalized and which is likely to change?
  - b. Once the Draft Rangewide Plan is finalized, will FWS re-open the comment period to allow for comments on the actual document that will inform its proposed listing and 4(d) rule?
  - c. What is the latest point at which FWS may consider WAFWA’s final Rangewide Plan in its listing determination?
  
3. FWS proposes to not prohibit take of LPC incidental to activities conducted pursuant to comprehensive conservation programs developed by, or in accordance with, state fish and wildlife agencies. In the December 11, 2012 proposed listing, FWS indicates that the Draft Rangewide Plan may be such a program.<sup>2</sup> However, the FWS has not sought comment on whether the Draft Rangewide Plan would meet the criteria of the proposed 4(d) Special Rule.
  - a. If the FWS finalizes the 4(d) Special Rule as proposed, what process would it use to determine whether a conservation plan meets the criteria outlined in the rule and particularly whether the plan demonstrates a net conservation benefit for the species? Will the public be involved in this process?
  - b. A criteria set forth in the 4(d) Special Rule for conservation plans is that the conservation plan be periodically reviewed by the FWS. Will the public be involved in this review process?
  
4. FWS has stated that “[a]ny final action resulting from the proposed rules will be based on the best available scientific and commercial data available and be as accurate and effective as possible.”<sup>3</sup> This statement outlines an important goal, but the Associations are concerned that the manner in which FWS is limiting comment to a draft document may not further that goal.

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<sup>2</sup> 77 Fed. Reg. 73828 at 73837-73838.

<sup>3</sup> 78 Fed. Reg. at 26303.

- a. How can these final actions be based on the best available scientific and commercial data available under ESA Section 4(b)(1)(A) when they are based on a draft plan?
- b. How can these final actions be based on the best available scientific and commercial data available under ESA Section 4(b)(1)(A) if comments are not solicited on, and considered for, the final Rangewide Plan?
- c. How can stakeholders receive a reasonable opportunity to provide input in accordance with Section 553(c) of the Administrative Procedure Act if the Service does not provide a comment opportunity after the Draft Rangewide Plan is finalized?

5. The Service request comments on whether it should expand the scope of this 4(d) specialrule to allow incidental take of lesser prairie-chickens if the take results from implementation of a comprehensive lesser prairie-chicken conservation program that was developed by an entity other than a State agency or their agent(s). Stakeholders have limited ability to provide input on this question without the details of another conservation program, how another program would function with the State's conservation program, how it would benefit the LPC and how it would impact stakeholders.

- a. Will FWS provide these details to stakeholders so that they may craft responsive comments?
- b. Also, will stakeholders have an opportunity to provide input into the development of such a program by an entity other than a State?

6. The Service issued a conference report<sup>1</sup> to the Natural Resources Conservation Service ("NRCS") in connection with the NRCS's Lesser Prairie Chicken Initiative ("LPCI") on June 30, 2011 in which the Service determined that the proposed action, which incorporates the procedures, practice standards, and conservation measures of the LPCI, is not likely to jeopardize the continued existence of the lesser prairie-chicken.

- a. Does the Service plan to conduct a similar type analysis on the Rangewide Plan?

### **Request for Extension of the Comment Period**

The Service provided only 45 days-for public notice and comment on the proposed 4(d) Special Rule and the Draft Rangewide Plan. That time is not sufficient for several reasons.

As demonstrated above, there are significant questions regarding what the Service is taking comment on and how those comments are to be used and considered. FWS needs time to examine and answer these questions, and stakeholders need time to draft and submit comments that are based on, and informed by, the Service's responses to these questions. More fundamentally, however, the Service must consider, and allow stakeholders the opportunity to comment upon, the *final* Rangewide Plan that will inform the Service's Section 4(a)(1) status evaluation. Failure to do so effectively eliminates the opportunity to provide comment. This lost opportunity is not remedied by taking comment

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<sup>1</sup> [http://www.nrcs.usda.gov/Internet/FSE\\_DOCUMENTS/stelprdb1044884.pdf](http://www.nrcs.usda.gov/Internet/FSE_DOCUMENTS/stelprdb1044884.pdf)

on the Draft Rangewide Plan because that version is, itself, subject to significant change. Indeed, FWS has already requested that WAFWA drastically change the plan.

In consideration of the forgoing, the Associations request that FWS reopen the comment period and allow at least 60 days following the finalization of the Draft Rangewide Plan for comment on the proposed listing and the proposed 4(d) Special Rule. As explained in the Association's March 11, 2013 comments, the ESA provides procedural protections that permit FWS to extend the one-year period for a final listing by an additional six months where there is substantial disagreement regarding the sufficiency or accuracy of the available data relevant to a listing determination.<sup>4</sup> In establishing the ESA, Congress included this six-month extension as a procedural protection to help ensure that the Service was not compelled to reach a listing decision when additional data was still being gathered and analyzed. The CBD/WEG settlement under which this listing was proposed does not preclude FWS from seeking to utilize this procedural protection and includes mechanisms to seek extensions to listing deadlines. The Service has availed itself of these terms and conditions before.

### **Conclusion**

The Associations appreciate the Service's consideration of these important questions and this request for sufficient time to provide meaningful input. As we have demonstrated in our prior submission, the best scientific and commercial data available strongly weigh in favor of a finding that listing the LPC is not warranted. However, if FWS is determined to proceed with a final listing of the LPC as threatened, it must provide stakeholders an adequate opportunity to comment on the proposal and *final* key documents in support thereof.

Respectfully submitted,

A handwritten signature in cursive script that reads "Richard Ranger".

Richard Ranger

Senior Policy Advisor  
American Petroleum Institute

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<sup>4</sup> ESA §4(b)(6)(B).

