THE PETROLEUM ALLIANCE
OF OKLAHOMA

April 10, 2023

Submitted via: http://www.regulations.gov

Public Comments Processing
Attention: FWS-HQ-ES-2021-0152
U.S. Fish and Wildlife Service
MS: PRB/3W
5275 Leesburg Pike
Falls Church, VA 22041-3803

Ms. Lisa Ellis
Chief, Branch of Recovery and Conservation Planning
U.S. Fish and Wildlife Service
5275 Leesburg Pike
Falls Church, VA 22041-3803

Re: Comments on the U.S. Fish and Wildlife Service's Proposed Rule to Revise the Regulations Concerning the Issuance of Enhancement of Survival and Incidental Take Permits under the Endangered Species Act, Docket No. FWS-HQ-ES-2021-0152

Dear Ms. Ellis:

The Petroleum Alliance of Oklahoma ("The Alliance") is submitting the following comments on the U.S. Fish and Wildlife Service's ("FWS") proposed rule to revise the regulations concerning the issuance of enhancement of survival ("EOS") and incidental take ("IT") permits under the Endangered Species Act ("Proposed Rule").[1] The Alliance appreciates the opportunity to provide these comments.

The Alliance represents more than 1,400 individuals and member companies and their tens of thousands of employees in the upstream, midstream, and downstream sectors and ventures ranging from small, family-owned businesses to large, publicly traded corporations. Their members produce, transport, process and refine the bulk of Oklahoma's crude oil and natural gas.

Our members support policies and programs designed to incentivize conservation efforts that can conserve at-risk species and their habitat, and they work hard to ensure that their activities avoid and minimize impacts to species and their habitat. Our members participate in habitat conservation plans, candidate conservation agreements, candidate conservation agreements with assurances, and many other programs to benefit species and their habitat. Our members have a history of coordinating with federal regulatory agencies including the FWS on candidate and listed species and conservation as well as working with various state agencies to ensure that oil and gas development is accomplished in a manner that protects species and their habitat.

[1] 88 Fed. Reg. 8380 (February 9, 2023).

We support the comments submitted by the Permian Basin Petroleum Association and other industry trade groups, and we provide the following comments to emphasize specific concerns with the Proposed Rule.

I. Executive Summary

The Proposed Rule attempts to "clarify the appropriate use of enhancement of survival permits and incidental take permits; clarify the FWS authority to issue these permits for non-listed species without also including a listed species; simplify the requirements for enhancement of survival permits by combining safe harbor agreements and candidate conservation agreements with assurances into one agreement type; and include portions of our five-point policies for safe harbor agreements, candidate conservation agreements with assurances, and habitat conservation plans in the regulations to reduce uncertainty." *Id.* The FWS goes on to state that the "proposed regulatory changes are intended to reduce costs and time associated with negotiating and developing the required documents to support the applications" and, "We anticipate that these improvements will encourage more individuals and companies to engage in these voluntary programs, thereby generating greater conservation results overall." *Id.*

The Proposed Rule fails these goals. The FWS fails to clearly articulate the need for many of the provisions, what the changes mean, the resulting impacts of the changes, creates new issues of concern, and it fails to address the most costly and burdensome issues (e.g., application requirements, issuance criteria, and permit conditions). The FWS also proposes provisions that are outside its jurisdiction as designated by Congress and the Endangered Species Act ("ESA"), e.g., Section 10 of the ESA does not authorize the FWS to issue IT permits for species that are not listed as threatened or endangered nor does it allow a net conservation benefit for these types of permits.

Overall, the Proposed Rule will not reduce or minimize costs and burdens associated with developing the required documents for EOS and IT permits nor will it encourage more entities to engage in conservation efforts. As such, we request that FWS withdraw the Proposed Rule, revise it to address the following issues, and repropose it to allow the public an opportunity to provide fully informed comments.

II. General Comments

A. The FWS lacks authority to regulate unlisted species. The FWS proposes to issue permits for unlisted species, treating them as listed species. Section 10 of the ESA does not permit the FWS to issue permits for unlisted species and it is unclear what the basis of authority the FWS is using to expand its authority. This type of overreach of Federal policy onto species that are clearly under the state's authority creates unnecessary costs, inefficiencies in implementing conservation, and potential disincentive for voluntary participation on private lands. In addition, the FWS proposes that "covered species" are those that "have a reasonable potential to be considered for listing during the permit's duration." Yet the FWS provides no information on what "reasonable potential" is or how that is determined. The FWS is creating an alternative approach to a listing determination that is outside the ESA.

Action Requested. We request the FWS remove this requirement to regulate unlisted species from the Proposed Rule as it is outside its authority under the ESA.

B. The Proposed Rule fails to address the most costly and burdensome requirements for EOS and IT permits. The Proposed Rule makes it more difficult and costly for property owners to conserve candidate or listed species and their habitat by making the application requirements and issuance criteria more stringent, and it increases regulatory uncertainty (e.g., additional permit conditions the FWS deem necessary). First, the conservation agreement requirements alone are too onerous and costly. For instance, the conservation agreement requires detailed information and defined outcomes of the conservation measures, measurable biological goals and objectives of the conservation measures, the baseline condition of the property to be enrolled, the net conservation benefit resulting from the conservation measures, costly and detailed monitoring, and allows the FWS to include other unknown requirements for issuance. Then, the FWS may require additional permit conditions of the applicant and/or permittee or dictate the permit duration to achieve an unknown net conservation benefit. There really is no way for an applicant, permittee, participant, or enrollee to have any regulatory certainty regarding the process, costs, or burdens. Additionally, the FWS provides no information on how they will consistently implement the Proposed Rule from species to species. Finally, the environmental analysis and the associated costs are borne by the applicant which can vary widely in cost and level of detail. All these requirements necessitate the hiring of trained professionals that discourages conservation by property owners. Until the FWS addresses the underlying issues associated with the costs and burdens, the use of conservation agreements to conserve candidate and listed species will be underutilized.

Action Requested. We request the FWS withdraw and repropose the Proposed Rule to address the underlying issues that unnecessarily increase costs and burdens on applicants, permittees, participants, and enrollees.

C. The FWS fails to assess the cost impacts and speculates on the benefits of the Proposed Rule. The FWS states that the intent of the Proposed Rule is to "reduce costs and time associated with negotiating and developing the required documents to support the applications." *Id.* The FWS goes on to say, "that applicants for certain conservation plans must provide a financial analysis by an independent, qualified third party. Even if there are some increased costs associated with meeting this or other requirements in the proposed rule, we anticipate that those costs will be offset by the revisions streamlining and clarifying the application and decision-making process, which will save applicants and permittees time and money." *Id*. However, the FWS provides no cost impact information on the requirements, how the Proposed Rule accomplishes the intent or supports statements made in the Proposed Rule.

Action Requested. We request the FWS withdraw and repropose the Proposed Rule to provide information on cost impacts of the requirements so that the public can provide informed comments.

D. The FWS should not finalize the Proposed Rule without all provisions being made available for public review and comment. The FWS states that "Based on comments received on this proposed rule and from our advance notice of proposed rulemaking **related to regulatory reform (77 FR 15352, March 15, 2012), and on our experience in administering the ESA, the final rule may include revisions to any provisions in parts 13 and 17 that are a logical outgrowth** of this proposed rule, consistent with the Administrative Procedure Act (5 U.S.C. 551 et seq.)." *Id.* (emphasis added). There is no urgency or immediate need for the Proposed Rule, and it would be inappropriate for the FWS to finalize the Proposed Rule with provisions that were not presented in the draft rule and did not afford the public the opportunity to review and provide informed comments. In addition, we think it is inappropriate that the public would have to review comments submitted and contemplate all the possible "logical outgrowth" implications of the 2012 proposed rule as well as this Proposed Rule and provide comments to the FWS on such scenarios.

Action Requested. We request the FWS withdraw and repropose this rule if it plans to incorporate revisions that were not specifically provided in this Proposed Rule.

E. The FWS should not combine Safe Harbor Agreements ("SHA") and Candidate Conservation Agreements with Assurances ("CCAA") into a "one-size-fits-all" agreement.

The ESA treats candidate and listed species differently under the Act. However, the FWS proposes to combine post listing SHA and pre-listing CCAAs into one agreement but fails to adequately explain its authority to combine them, the goals of each agreement, and the resulting ramifications by combining them. The Proposed Rule sets a higher regulatory hurdle by formalizing that the requirements for conservation agreements for candidate species that are meant to avoid a listing will now be as stringent as post listing agreements that are designed to aid in the recovery of a listed species.

CCAA agreements have been highly successful. Even the FWS acknowledges this in the Proposed Rule. "Since the initial policy and regulations were published, the Service has issued 65 enhancement of survival permits for non-listed species in association with a CCAA; 59 of these continue to be implemented." *Id.* CCAAs are a valuable tool to allow the FWS to focus its efforts on more critical listed species, and they provide property owners flexibility to utilize tools to manage their property while implementing conservations efforts for candidate species and their habitat to avoid a listing. Under the Proposed Rule, property owners are no worse off if a listing occurs. Combining the two agreements will make it more onerous, burdensome, and costly for applicants, permittees, participants, and enrollees to overcome the higher regulatory hurdles (a recovery standard) to conserve candidate species. It is unclear why the FWS is proposing such requirements. The FWS's Proposed Rule lacks specificity and clarity on this issue and does not provide the public with adequate information to fully understand the ramifications and submit informed comments and recommendations.

Action Request. We request the FWS remove this provision in the Proposed Rule that combines SHAs and CCAAs into a "one-size-fits-all" agreement. If the FWS proceeds with this provision, it must revise and repropose the rule to fully explain its authority under the ESA and justification for its departure from the CCAA framework that will allow the public to provide informed comments.

F. The FWS's Proposed Rule fails to prioritize the conservation of candidate and listed species to maximize the use of available funds for species in most need. Instead, the FWS proposes to expand its authority to issue permits for unlisted species regardless of the science or need to determine a species as a candidate or a listed species. The FWS fails to include a rationale for its "shot gun" approach instead of a reasoned approach that prioritizes candidate and listed species to maximize the use of available funds for conservation.

Action Requested. We request the FWS withdraw the Proposed Rule and incorporate revisions that focus on prioritization of candidate and listed species that maximizes the use of available funds for conservation.

III. Specific Comments

A. Definitions

1. Applicant and Permittee. The FWS proposes a definition of applicant and permittee to exclude company affiliates, associates, subsidiaries, corporate families, and assigns of an applicant limiting the scope of coverage under the EOS and IT permits. The FWS fails to provide its rationale on why it is excluding these entities.

Action Requested. We request these entities be included in this definition and covered by the EOS and IT permits. If the FWS moves forward with this definition, it should withdraw and repropose the Proposed Rule to provide the public with its rationale on why it is excluding these entities and allow informed public comment.

2. Baseline condition. The FWS proposes a new definition for baseline condition to mean "…population estimates and distribution or habitat characteristics on the enrolled land that could sustain seasonal or permanent use by the covered species at the time a conservation benefit agreement is executed by the Service…" *Id.* The FWS does not provide any information on how "baseline condition" is determined. This effort will require the applicant to expend significant funds to hire a trained professional(s) to conduct such an analysis. Additionally, the FWS fails to provide any cost impact estimates for this requirement.

Additionally, it is unclear what the FWS means by "could sustain seasonal or permanent use by the covered species" when baseline conditions at the time

the agreement is executed would mean the current or existing conditions, which may or may not sustain seasonal or permanent use by covered species.

Action Requested. We request the FWS repropose this rule with information on how baseline conditions are determined and a cost impact analysis of this requirement. Also, we request the FWS revise the definition to replace "could" with "currently sustains" to more accurately reflect existing conditions of the enrolled land.

3. Net conservation benefit. The FWS proposes a definition for net conservation benefit; however, the ESA does not provide the FWS authority to require a "net conservation benefit" while implementing the ESA.[2] Additionally, it provides no regulatory certainty to applicants, permittees, participants, and enrollees as to what this means, how this is determined or how it is achieved. As a practical measurement comparison, it is unclear if this means one inch or one mile of additional "net conservation benefit". In addition, the FWS provides no information on how it will consistently and transparently implement this concept.

Action Requested. We request the FWS remove net conservation benefit from the Proposed Rule. Additionally, if the FWS maintains this definition in the final rule, it must provide its authority for its use, clarify what it means, how it is determined and how it is achieved to provide regulatory certainty and transparency.

4. Property owner. The FWS proposes a new definition of property owner that specifically removes "a person with a fee simple, leasehold," from the definition. The FWS fails to explain the purpose or need for this revision, and why these entities are specifically being excluded as property owners. We think this revision is unnecessary and not justified.

Action Requested. We request the FWS remove this revised definition from the Proposed Rule.

B. The FWS proposes unknown permit durations. The Proposed Rule states that, " The duration of permits issued under paragraph (c) of this section **must be sufficient to provide a net conservation benefit** to the species" and "In determining the duration of a permit, the Director will consider the duration of the planned activities, the **uncertainties related to the impacts of the taking, and the positive and negative effects of the planned activities** covered by the permit on species covered by the conservation benefit agreement."[3]

[2] 83 Fed. Reg. 36469 (July 30, 2018).

[3] 88 Fed. Reg. 8380 (February 9, 2023).

(emphasis added) Again, this does not provide applicants, permittees, participants and enrollees any regulatory certainty or transparency as to the duration of a permit.

Action Requested. The FWS must withdraw, revise and repropose the rule to incorporate regulatory text that clarifies "permit durations" to provide applicants, permittees, participants and enrollees regulatory certainty and the opportunity to provide informed comments.

C. The Proposed Rule provides the FWS with significant latitude in determining when applications, permit amendments or renewals, and issuance criteria are complete or adequate. The FWS's Proposed Rule clarifies that the "Evaluation of an amendment extends only to the portion(s) of the conservation benefit agreement or permit for which the amendment is requested." *Id.* This is positive, but then the FWS goes on to say that "Amendment or renewal applications must **meet issuance criteria based upon the best available commercial and scientific data at the time of the permit decision**." *Id.* (emphasis added) The clarity provided in the first statement is negated by the last sentence as the FWS has significant latitude in determining when issuance criteria have or have not been met.

The FWS also proposes to incorporate into its issuance criteria "net conservation benefit" and "other measures that the Director may require as necessary or appropriate in order to meet the issuance criteria". *Id.* As previously discussed above, the FWS has no authority to include a net conservation benefit and there is considerable regulatory uncertainty associated with "other measures" the FWS deems necessary for issuance.

Finally, the FWS has significant latitude to determine when an application is complete. The FWS states that they "will process an application when **we have determined** it to be complete." *Id.* (emphasis added) without providing additional details on what that means or how that is determined.

Collectively, the FWS's Proposed Rule fails to provide applicants, permittees, participants and enrollees clarity or transparency as to what is adequate or complete.

Action Requested. At a minimum, the FWS must address this uncertainty. We request the FWS withdraw, revise, and repropose the rule to provide greater clarity and regulatory certainty on these issues.

IV. Conclusion

The FWS's Proposed Rule includes provisions that are outside the ESA and its Congressionally mandated authority. It makes prelisting CCAA agreements as stringent as post listing SHA, and it fails to provide clarity and regulatory certainty for EOS and IT permits that the Proposed Rule claims it will do. More importantly, it fails to address the most costly and burdensome requirements that discourages the conservation of candidate and listed species and their habitat. We request the FWS withdraw, revise, and repropose the Proposed Rule to address the issues identified above.

THE PETROLEUM ALLIANCE
OF OKLAHOMA

The Alliance appreciates your consideration of these comments. If you have any questions, please do not hesitate to contact me at 405-601-2124.

Sincerely,

Angie Burckhalter

Angie Burckhalter
Sr. V.P. of Regulatory and Environmental Affairs
The Petroleum Alliance of Oklahoma