WESTERN ENERGY ALLIANCE

August 31, 2017

Submitted via www.regulations.gov

The Honorable Ryan Zinke
Secretary
U.S. Department of the Interior
1859 C Street, NW
Mail Stop 7328
Washington D.C. 20240

Re: U.S. Fish and Wildlife Service Regulatory Reform, DOI-2017-0003-0009

Dear Secretary Zinke:

Western Energy Alliance appreciates the opportunity to provide comment on how the Department of the Interior (DOI) can improve implementation of regulatory reform initiatives and policies and identify regulations, policies, and guidance documents for repeal, replacement, or modification. The comments contained in this document specifically address regulatory reform at the U.S. Fish and Wildlife Service (FWS), as well as suggesting statutory changes to the Migratory Bird Treaty Act (MBTA) and the Endangered Species Act (ESA), both of which are implemented by FWS.

Western Energy Alliance represents over 300 companies engaged in all aspects of environmentally responsible exploration and production of oil and natural gas across the West. The Alliance represents independents, the majority of which are small businesses with an average of fifteen employees.

The comments in this letter focus on three main areas for reform at FWS: the ESA and conservation agreements, mitigation and climate change policies, and MBTA implementation. While specific concerns in these three areas vary, the overarching issues are consistent. Previous administrations have interpreted various laws to push onerous regulatory burdens on resource development, including oil and natural gas, timber, mining, and grazing, often in excess of statutory authority or inconsistent with the agency's mission.

FWS can and should take specific steps to rein in regulatory overreach and balance species protection with economic development and job creation. Each section below identifies specific actions FWS can take to achieve regulatory reform. These recommendations will also help address the problems of shrinking budgets and a lack of personnel resources at FWS by reducing unnecessary layers of red tape.

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Endangered Species Act

Carrying out the intent of the ESA has become an overly cumbersome process where more resources are spent by FWS in paperwork and responding to litigation than providing on-the-ground conservation actions that benefit the species and its habitat. The lack of effectiveness of the ESA is clear in that only about 2% of listed species have actually been recovered. Furthermore, the ESA has far too often been used as a means to prevent or delay responsible economic activity rather than for species protection. When applied too broadly or for species that do not truly warrant a listing, the ESA can have very negative economic and job impacts on states, local communities, and the nation without commensurate benefits to species or their habitat.

When making ESA listing decisions, FWS has a statutory duty to cooperate with states regarding agreements to manage the conservation of threatened or endangered species. In addition, the Policy for Evaluation of Conservation Efforts (PECE) requires FWS to evaluate voluntary conservation agreements and their effect on a species. However, FWS has not properly followed its statutory mandate or the PECE policy in several important listing decisions, such as the Lesser Prairie Chicken listing which was subsequently overturned by a federal court. When FWS makes listing decisions that ignore state, local and private plans or ongoing voluntary conservation efforts, it seems to be using the ESA as a tool to restrict resource development rather than a true effort to protect threatened and endangered species.

Federal ESA listings often thwart existing state, local and private efforts to protect species, and can even be a disincentive to successful voluntary conservation efforts. Rather than imposing one-size-fits-all species listings that harm communities and obstruct on-the-ground conservation, FWS should support and defer to state protection plans, voluntary conservation agreements, and common-sense management policies. Allowing these efforts time to be implemented will benefit the species and in many cases may preclude a listing.

Furthermore, FWS should work to streamline conservation agreements such as Habitat Conservation Plans (HCP) and Candidate Conservation Agreements with Assurances (CCAA). Currently, the process is burdensome, time consuming, and costly. The HCP Handbook and the CCAA rule and policy, all of which were finalized last year, should be revoked and replaced to encourage, rather than inhibit, voluntary conservation efforts. The National Environmental Policy Act analysis associated with these types of conservation agreements should also be streamlined to reduce the time frames for finalizing conservation agreements that will benefit the species and its habitat.

One other obstacle to state, local, and private conservation efforts is the rigid ESA timeframes that were enacted in the statute. As such, we support legislative modification of the ESA so that FWS can defer a 12-month finding or determination on a petition while a conservation plan is being developed or finalized. FWS could conduct a periodic review

of the conservation efforts to determine if there is progress towards finalization or if conservation agreements in place are beneficial. Meanwhile, FWS would retain the ability to list the species in emergency situations.

A statutory change of ESA deadlines is supported by the Western Governors' Association (WGA), which produced a number of recommendations for ESA reform at the conclusion of a multi-year, broad stakeholder effort. Their recommendations are detailed here, and we wish to express our full support for the WGA effort and encourage FWS to coordinate with WGA staff as it continues its broad reform initiative.

In addition to considering conservation efforts under development or already in place, socioeconomic impacts should be taken into account. FWS should balance species protection with sustaining economic activities and the needs of states and local communities. Specifically, the Secretary should have the authority to preclude a listing due to significant adverse economic impacts. This change is proposed under H.R. 717, the "Listing Reform Act," which we strongly support.

Finally, the ESA is frequently used by obstructionist groups as a means to hinder or prevent human activities ranging from recreation to mineral extraction. Environmental groups often submit large petitions covering numerous species which make it impossible for FWS to adhere to the rigid timelines required in the statute. The bulk petition tactic sets the agencies up for failure and diverts resources away from real species protection and recovery into unending status reviews and associated litigation. The legal defense required when FWS unsurprisingly fails to meet the deadline is costly, time-consuming, and most importantly undermines the intent of the ESA.

It is time to modernize the Act so that it is refocused back on protecting and recovering species, and away from serving special-interest groups and rewarding lawyers at the expense of important economic activities across the West and the nation. FWS should work with Congress to pass legislation to update the ESA with sensible, targeted changes to improve the consistency and effectiveness of the law, increase transparency and regulatory certainty, and update the scientific standards by which decisions are made. Reforms should include:

- Ensuring a greater focus is placed on species recovery and listing only truly at-risk species

- Recognizing, incentivizing, and relying on the efforts of states, tribes, local governments, industry, landowners, and others for on-the-ground species and habitat conservation, and granting flexibility in statutory deadlines to allow these conservation efforts time to develop before a listing decision is made

- Reducing litigation and the practice of sue-and-settle. The Equal Access to Justice Act (EAJA) should be amended to prevent taxpayer dollars from funding large environmental groups. A firm cap should also be placed on attorneys' fees

- Standards should be set for attorney fee reimbursement to ensure that real public good results from litigation rather than reimbursing for simply prevailing on minor issues. We support H.R. 3131, "the Endangered Species Litigation Reasonableness Act," and H.R. 1033/S. 378, the "Open Book on Equal Access to Justice Act," which would help achieve this goal

- Ensuring counties, states, landowners, industry, and other entities directly affected by listing decisions are given a seat at the table for ESA lawsuits and settlements. We support S. 375, "A bill to amend the Endangered Species Act of 1973 to establish a procedure for approval of certain settlements"

- Requiring more transparency and accountability of data and science used in ESA decisions. FWS often relies on unpublished work from just one scientist or self-referential team of scientists, which introduces extreme bias into the system. FWS should be required to base listing decisions on at least two credible scientific studies published in peer-reviewed journals from at least two scientists or groups of scientists working independently. Preliminary data, findings, or reports that have not gone through a rigorous peer review and do not meet the standard should not be considered

- Petitions should not be considered by FWS for the full twelve-month ESA status review if they are not based on at least two scientific studies, and there should be limitations on petitions to prevent abuse of the process. In June 2015, FWS released a draft revision to the process that would eliminate multi-species petitions and require petitioners to show actual scientific justification for a listing. After a significant delay, FWS released a final rule that weakened the provisions in the draft rule. FWS should rescind the final rule, issued in September 2016, and adopt the June 2015 draft

- Publish notice of petitions received by FWS in the Federal Register and make the best scientific and commercial data it plans to use in a listing determination available to the public, other scientists, and state and local governments affected by a petition so that it can be independently reviewed and verified. We support H.R. 1273/S. 376, the "21st Century Endangered Species Transparency Act" and H.R. 1274/S. 735, the "State, Tribal, and Local Species Transparency and Recovery Act."

Mitigation and Climate Change

The March 28, 2017 Secretarial Order for a review of all mitigation and climate change policies created under the previous administration set a timeline for carrying out the Executive Order's directive to the agency. We appreciate the recognition that the previous

administration went too far with its mitigation and climate change policies, and eagerly await the final review pursuant to the Secretarial Order.

While DOI works to determine which policies and guidance to review and possibly rescind, field offices are continuing to operate under the previous administration's policies, resulting in increased regulatory burden on projects, higher costs, and project delays. We urge FWS to expeditiously complete its review and move, as soon as possible, to establish reasonable mitigation and climate change policies that follow the core principles described below.

Mitigation

FWS should rescind and replace the following policies, most of which were developed in response to a November 2015 Presidential Memorandum on mitigation that has now been rescinded:

- Endangered and Threatened Wildlife and Plants; Endangered Species Act Compensatory Mitigation Policy, December 27, 2016
- U.S. Fish and Wildlife Service Mitigation Policy, November 21, 2016
- Fish and Wildlife Service Policy Regarding Voluntary Prelisting Conservation Actions, January 18, 2017
- Candidate Conservation Agreements With Assurances Policy and Endangered and Threatened Wildlife and Plants; Revisions to the Regulations for Candidate Conservation Agreements With Assurances, December 27, 2016
- Joint U.S. Fish and Wildlife Service and National Marine Fisheries Service Habitat Conservation Planning Handbook, December 21, 2016
- Critical Habitat Designation Procedures, Listing Endangered and Threatened Species and Designating Critical Habitat; Implementing Changes to the Regulations for Designating Critical Habitat, February 11, 2016
- Adverse Modification of Critical Habitat, Interagency Cooperation-Endangered Species Act of 1973, as Amended; Definition of Destruction or Adverse Modification of Critical Habitat, February 11, 2016
- Policy Regarding Implementation of Section 4(b)(2) of the Endangered Species Act, February 11, 2016
- Departmental Manual Release, Landscape-Scale Mitigation Policy, 600 DM 6, October 23, 2015

- DOI Strategy for Improving Mitigation Policies and Practices of the Department of the Interior, April 8, 2014.

FWS should institute new mitigation policies that follow a few basic principles. An emphasis should be placed on use of the widely-accepted mitigation hierarchy–avoid, minimize, and rectify–and compensatory mitigation should not be an automatic requirement. Mitigation, when needed, should be commensurate with project impacts. Developers should be able to use a variety of mitigation options, rather than being required to use conservation banks, and if mitigation ratios are used, they should be reasonable and appropriate. Following these principles would create a mitigation framework that accords with statutory intent and balances responsible resource development with species protections.

Climate Change

Climate change is woven throughout FWS policies and procedures and is considered in listing decisions. As a result, FWS is engaging in significant speculation in order to consider climate change when assessing impacts to species and their habitats. Specifically, it is inappropriate to rely on speculative climate change projections over a lengthy time period without documented cause-and-effect relationships linking observable or reliably predictable data on climate change to demonstrable effects in specific areas. The science and modeling of climate change impacts do not provide reliable predictions of species' response to climate change.

These significant limitations have been recognized by the Intergovernmental Panel on Climate Change (IPCC) in its most recent evaluation of the state of climate modeling science.[1] Climate models are "the primary tools available for investigating the response of the climate system to various forcings, for making climate predictions on seasonal to decadal time scales and for making projections of future climate over the coming century and beyond."[2] However, even the most complex models have limitations and no model accurately simulates all climate-related processes.

The IPCC report describes in detail the many limitations and uncertainties that characterize current models. As a result of these limitations, models cannot at this time accurately replicate climate over the observable past, and even if models could replicate past climate, "there is no direct means of translating quantitative measures of past performance into confident statements about fidelity of future climate projections."[3]

Given the inherent uncertainties associated with attempting to predict the alleged impacts of climate change on species, FWS should not attempt to speculate on the impacts of

[1] *Climate Change 2013: The Physical Science Basis*, IPCC, 2013.
[2] *Id.* at 746.
[3] *Id.* at 745.

climate change on species. Listing decisions must be based on the best available science, and climate modeling should not be considered adequate scientific justification for a listing.

Pursuant to the March 2017 Secretarial Order, we recommend the following documents should be rescinded and replaced:

- Secretarial Order No. 3289: Addressing the Impacts of Climate Change on America's Water, Land, and Other Natural and Cultural Resources, September 14, 2009
- Secretarial Order No. 3289A1: Addressing the Impacts of Climate Change on America's Water, Land, and Other Natural and Cultural Resources, February 22, 2010
- Department of the Interior Climate Change Adaptation Plan, January 2014
- Department of the Interior Departmental Manual Part 523 Chapter 1: Climate Change Adaption Policy, December 20, 2012
- National Fish, Wildlife and Plants Climate Adaptation Strategy, April 1, 2013.

Migratory Bird Treaty Act

The MBTA was enacted by Congress in 1918 as a criminal statute in order to address hunting and poaching of migratory birds. According to MBTA, it is unlawful "at any time, by any means or in any manner, to pursue, hunt, take, capture, kill, attempt to take, capture or kill, possess, offer for sale, . . . [or transport] any migratory bird, any part, nest, or egg of any such bird." This language clearly applies to actions that are intended to harm a migratory bird. In 2001, however, Executive Order (EO) 13186 from President Clinton declared that that the MBTA applies to take that occurs incidentally during an otherwise lawful activity.

Whether the MBTA grants FWS authority to regulate incidental take has been a question for the courts on numerous occasions since 2001. The statute fails to provide a *mens rea* requirement, leaving it to the courts to determine statutory intent, and this has resulted in split decisions amongst the Circuit Courts. The Tenth Circuit Court of Appeals has upheld FWS's interpretation of the Act, finding that the "take" and "kill" prohibitions apply to any activity that results in harm to migratory birds, regardless of intent. However, the Eighth and Ninth Circuits have strongly disagreed with this interpretation. The split among Circuits demonstrates that FWS does not have clear statutory authority to regulate incidental take under MBTA.

A DOI Solicitor's Opinion (SO) issued in the final month of the Obama Administration pronounced that incidental take was prohibited under MBTA, but the SO was suspended almost immediately by the Trump Administration. Nevertheless, the threat of criminal enforcement for incidental take by FWS is unjustifiably causing delays or preventing permitting of projects on federal lands. FWS often prohibits companies from accessing existing wells or drilling new wells on federally-managed lands when a raptor nest is present. In some cases, this prevents necessary upkeep on wells that in turn causes safety issues.

Even worse, field offices are not consistently enforcing the incidental take measures, causing uncertainty for companies as to when, exactly, they must comply with MBTA. Ultimately, the inconsistent implementation and enforcement of incidental take of migratory birds (including nests and their habitat) in accordance with EO 13186 is inhibiting oil and natural gas development. FWS should work with the administration to overturn the EO and replace the now-rescinded SO with guidance that MBTA does *not* give FWS the authority to regulate incidental take for migratory birds.

Thank you for the opportunity to submit these comments. Please do not hesitate to contact us with any questions.

Sincerely,

Tripp Parks
Manager of Government Affairs