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Public Comments Processing
Attn: FWS-R9-MB-2011-0094
Division of Policy, Performance, and Management Programs
U.S. Fish and Wildlife Service, MS: BPHC
5275 Leesburg Pike
Falls Church, VA 22041-3803

Re: Docket No. FWS-R9-MB-2011-0094
Eagle Permits; Revisions to Regulations for Eagle Incidental Take and Take of Eagle Nests

Gentlemen and Ladies:

The American Petroleum Institute (API) submits these comments on the U.S. Fish and Wildlife Service's (FWS or "the Service") proposed revisions to its Regulations for Eagle Incidental Take and Take of Eagle Nests (81 FR 27933, May 6, 2016).

API is a national trade association representing over 640 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 member companies are leaders of a technology-driven industry that supplies most of America's energy, supports more than 9.8 million jobs and 8 percent of the U.S. economy, and since 2000, has invested nearly \$2 trillion in U.S. capital projects to advance all forms of energy, including alternatives.

Members of API regularly engage in activities that may require an eagle take permit under the Bald and Golden Eagle Protection Act, 16 U.S.C. §§ 668-668d ("Eagle Act"). API supports the goal of the Service to enhance protection of eagles throughout their ranges through implementation of avoidance and minimization of, and compensatory mitigation for, adverse impacts from otherwise lawful activities, and believe this goal can be achieved in conjunction with responsible development of our nation's natural resources. As these comments will explain, however, we have recommendations for this program, in order that it may achieve its objectives and avoid unreasonable burdens on the activities of our industry.

In any revisions to these regulations and in implementation of any such revised regulations, FWS staff authorized to issue permits should be guided and encouraged to use common sense and professional judgment in assessing the potential risks of human activities of any kind carried out where eagles may be present, and to

draw meaningful and balanced distinctions among different types of activities reviewed in the course of issuing such permits.

Where possible, FWS should encourage and expand the use of best management practices (“BMPs”) including any practices that are particularly appropriate to protection of eagles in Avian Protection Plans (“APPs”). The oil and gas industry already has a well-developed body of BMPs, identified over the course of decades and in close collaboration with federal and state wildlife agencies. These BMPs are included in the Bureau of Land Management’s programmatic planning documents, such as resource management plans, and are applied as Conditions of Approval to individual oil and gas permits, sundry notices, or rights-of-way. In fact, many operators are already proactively including avian protection measures in their federal permit applications as project design features. FWS should instead focus its efforts and limited resources to build on existing BMPs and develop flexible but effective APP guidelines for the oil and gas industry operations located in the vicinity of eagle roosts or nests similar to the guidelines developed for the electric utility industry.¹ An APP is a company-specific document that delineates a program designed to reduce the operational and avian risks that result from avian interactions with company facilities. Although each company’s APP will be different, the overall goal of any APP should be to reduce mortality to eagles.

APPs should also include adaptive management protocols to identify areas of potential take and to modify operations and activities in those areas. API requests that in a final rule FWS provide a more detailed description of elements of an adaptive management program suitable for protection of eagles, to include: details on the process for development of an APP; opportunities for regulated entities to participate in discussions about adding or removing mitigation measures in an APP; mitigation measures that FWS identifies as suitable for the objective of reduced eagle disturbance or mortality; and at 5 year reviews, the process for determining which mitigation measures will be included in a APP for a subsequent 5 year period. An APP guidance document would serve as a tool box from which industry can select and tailor components as necessary to operate under, monitor activities, and voluntarily report any passive “take.” Companies can either choose to rely on the guidelines or may choose instead to develop their own internal construction standards that meet or exceed these guidelines.² An APP policy could couple the use of BMPs with a commitment by FWS to the exercise of enforcement discretion for situations in which the BMPs did not avoid all impacts to eagles.³

The development of APPs is an approach that emphasizes long-term proactive conservation partnerships between the oil and gas industry, the conservation community, and the Service. It can provide a framework for addressing potential hazards to eagles, committing participating oil and gas companies to evaluate their operations and to work with the Service to conserve eagles in the vicinity of their operations.

In addition, oil and gas operations should qualify for a general or programmatic permit recognizing the well-developed body of existing BMPs, and permits must contain sensible conditions. These BMPs are continually evolving, as operators gain additional experience and develop innovative new methods to minimize takes. FWS should also consider an activity-based programmatic approach similar to that under the Clean Water Act’s nationwide permit program. That program covers specific activities that may be used across a number of industry sectors. Similarly, the Service should consider an approach utilizing the permit-by-rule method, which may also improve the approval process for activities that present known hazards and with known and

¹ See FISH AND WILDLIFE SERV. AND THE EDISON ELECTRIC INSTIT. AVIAN POWER LINE INTERACTION COMMITTEE (APLIC), AVIAN PROTECTION PLAN GUIDELINES (Apr. 2005).

² Considering the potential for differences among areas as different as the Gulf of Mexico and the North Slope of Alaska, effective guidelines and a well-supported voluntary program are more likely than a universal permitting program to achieve an optimum balance of conservation benefit and economic impacts.

³ See, e.g., U.S. FISH AND WILDLIFE SERV., LAND-BASED WIND ENERGY GUIDELINES (Mar. 23, 2012).

effective mitigation techniques. Finally, the Service should evaluate an alternative under which *de minimis* levels of passive “take,” including at oil and gas facilities, would be explicitly exempted from regulation under the ITP program. The Service should provide detailed criteria for these levels supported by science and authorized by applicable law.

With this letter, we wish to incorporate by reference our letter to the Service of May 9, 2016, jointly signed and submitted with the Independent Petroleum Association of America (IPAA) on Proposed Revisions to the U.S. Fish and Wildlife Service Mitigation Policy, 81 Fed. Reg. 12,380 (Mar. 8, 2016), Docket No. FWS-HQ-ES-2015-0126. In that letter, we raised concerns about, among other things, the Service’s use of ambiguous and undefined standards with respect to mitigation requirements and the Service’s discounting and discouraging of measures to avoid and minimize impacts to species and their habitats. We reiterate the concerns raised in that letter with respect to the application of mitigation requirements under the Eagle Act.

We also urge that any revisions to these regulations recognize the challenges in obtaining an incidental take permit through an efficient, timely and predictable process, including a systematic approach to estimate the number of takes that would result from a certain activity, and the need for any compensatory mitigation program to be reasonable and not cost-prohibitive. Additionally, we strongly urge FWS not to remove the distinction between “standard” (one-time take) and “programmatically” (recurring take) in favor of a single eagle take permit system. Certain activities, such as well-pad construction, pipeline and utility ROW construction, and tree clearing are truly one-time operations and not ongoing. We support the Service’s stated goal of access to incidental take permits under the Eagle Act, and we urge that that the program needs to be designed to ensure that the conditions for obtaining a permit are achievable. In particular, with respect to the proposed practicability standard, API recommends adding the word “safety” to the FWS’ definition, such that the new definition should read in part, “available and capable of being done after taking into consideration safety, existing technology, logistics...”

Finally, we support the increase in the maximum length of incidental take permits from 5 to up to 30 years at FWS discretion, and the rationale that 30-year take permits are appropriate for projects that are long-term. Oil and gas production projects are customarily much longer than five years, and FWS staff should have the discretion to establish the term of an incidental take permit issued under the implementation of this rule with reference to the attributes of the activity for which the permit is being requested .

Should you have any questions, please contact the undersigned at 202.682.8057, or via e-mail at rangerr@api.org.

We appreciate the Service’s consideration of these comments.

Very truly yours,

A handwritten signature in black ink that reads "Richard Ranger". The signature is written in a cursive, flowing style.

Richard Ranger
Senior Policy Advisor
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American Petroleum Institute