



October 10, 2016

Public Comments Processing, Attn: FWS-R2-ES-2016-0077
U.S. Fish and Wildlife Service
MS: BPHC
5275 Leesburg Pike
Falls Church, VA 22041-3803

Re: Comments on Proposed Endangered Species Status for Texas Hornshell
81 FR 52796 (August 10, 2016)

Gentlemen and Ladies:

The American Petroleum Institute (API), the Independent Petroleum Association of America (IPAA), American Exploration & Production Council (AXPC), and Western Energy Alliance (Alliance) (collectively, the Trades), submit these comments to the U.S. Fish and Wildlife Service (the Service) in response to the captioned proposed rule to list the Texas Hornshell (*Popenaias popeii*) as endangered under the Endangered Species Act (Act).

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.

IPAA is the national association representing the thousands of independent crude oil and natural gas explorer/producers in the United States. It also operates in close cooperation with 44 unaffiliated independent national, state, and regional associations, which together represent thousands of royalty owners and the companies which provide services and supplies to the domestic industry. IPAA is dedicated to ensuring a strong and viable domestic oil and natural gas industry, recognizing that an adequate and secure supply of energy developed in an environmentally responsible manner is essential to the national economy.

AXPC is a national trade association representing 31 of America's largest and most active independent natural gas and crude oil exploration and production companies. AXPC's members are "independent" in that their operations are limited to the exploration for and production of natural gas and crude oil. Moreover, its members operate autonomously, unlike their fully integrated counterparts, which operate in additional segments of the energy industry, such as refining and marketing. AXPC's members are leaders in developing and applying the innovative and advanced technologies necessary to explore for and produce natural gas and crude oil and that allows our nation to add reasonably priced domestic energy reserves in environmentally responsible ways.

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

It is the Trades' position that a listing of the Texas Hornshell is not warranted. While the Trades do not have additional information to provide to the Service on the status of populations of the Texas Hornshell, a review of the Species Status Assessment Report (SSA Report) indicates that numerous specimens of the species were collected in Mexico (where as much as half to two-thirds of the species' range is found) as recently as the 1980s, but the SSA Report provides no information on collections or surveys of the species' populations in Mexico since that time. Despite the absence of more recent data the SSA Report reaches an entirely unsupported conclusion stating that the species is believed to be extirpated from much of Mexico. Pursuant to the Act's instruction, the Service must make its determination "solely on the basis of the best scientific and commercial data available." 16 U.S.C. § 1533(b)(1)(A). A mere absence of recent data cannot be the basis of such a determination. If the best scientific data available for a significant portion of the species' range are the surveys conducted in the 1980s, then the Trades believe the requirements of the Act have not been met, and that the Act requires the Service to determine that a listing of the species is not warranted. At a minimum, due to the uncertainty of whether the species is currently found in Mexico, which constitutes a significant portion of the species' range, the Trades contend that there is insufficient data to warrant an endangered listing for the Texas Hornshell.

Should the Service nonetheless proceed with the proposed listing, the Trades strongly urge the Service to recognize in any final listing rule that the Trades' activities that occur within Texas Hornshell habitat are not expected to rise to the level of "take" under the Act. With this letter we are also submitting comments on the question of designating critical habitat for the species. Specifically, we submit these comments so that the administrative record for the proposed action reflects that the activities of our member companies do not present threats of destruction, modification, or curtailment of the Texas Hornshell's habitat. We note that the SSA Report does not single out the activities our member companies engage in, and states that there are three influences that pose the largest risk to future viability of the species. The SSA Report indicates that these risks are primarily related to habitat changes: (1) the accretion of fine sediments; (2) the loss of flowing water; and (3) impairment of water quality. None are attributed to the activities of our industry in the region.

Having reviewed the SSA Report, we can state that our member companies which include the companies exploring for or producing crude oil, natural gas and condensate in the region where the Texas Hornshell is found do not conduct operations in the species' habitat as described in the report. Industry practices and the terms and conditions of the permits under which we operate for drilling, production, gathering, and transportation activities set requirements and provide guidelines to prevent this from occurring.

It is true that drilling and production operations, and activities in support of these operations, are carried out near waters where the Texas Hornshell is found. However, any such operations are carried out in compliance with permits issued by the state of New Mexico or the state of Texas, depending upon the site of the operation. These permits, and commonly accepted industry practices, guide the

pre-work, construction, drilling, reclamation, site maintenance and operations activities in such a manner as to: locate operations at a protective distance from waters containing the Texas Hornshell, minimize the generation and distribution of material that could produce fine sediments, prevent runoff from drilling and production sites, and prevent and/or contain spills and other contaminating influences that might adversely affect water quality. Operators design and construct their infrastructure in compliance with stormwater construction plans and permits, and Spill Prevention, Control, and Countermeasure (SPCC) plans. These permits and plans include construction and maintenance of secondary containment equipment and structures.

In both Texas and New Mexico, drilling and production water use is subject to state law. Texas has consolidated the allocation of surface water into a unified water permit system granting a holder the use of a specific amount of water, at a specific location, for a specific purpose. Groundwater use is subject to the Texas Groundwater Act and the rule of capture. The Texas Groundwater Act recognizes groundwater districts as the state's preferred method for managing groundwater. In general, these districts have the power to regulate use to prevent depletion, loss of artesian pressure, waste and subsidence. These regulations often take the form of rules that may restrict pumping, require permits for wells, delineate well spacing, establish maximum rates of water use, and define out-of-district export requirements.

In New Mexico, all ground and surface waters belong to the public and are subject to appropriation under the Doctrine of Prior Appropriation. Anyone wanting to use water in New Mexico must have a permit from the Office of the State Engineer. When evaluating an application for a new appropriation or to change the place and/or purpose of use of an existing water right, the State Engineer is required to first determine that water is available, the appropriation will not impair existing rights, the intended use meets state water conservation efforts, and the intended use is not detrimental to the public welfare.

Consequently, drilling and production water use in each state take place subject to a strict permitting regime that provides the Texas Hornshell and its habitat a level of protection greater than that afforded by the Act. In addition, where needed, water required for support of drilling and well completion is sourced from water-bearing strata far below the surface and, in all but a few cases, has total dissolved solids concentrations (TDS) that render the water non-potable as well as unsuitable for the Texas Hornshell. With the full implementation of the Clean Water and Safe Drinking Water Acts, the Trades have no record of water use associated with drilling and production operations affecting the rivers in which the Texas Hornshell is found.

Drilling and production water use is dwarfed by other water uses. For example, the New Mexico Office of the State Engineer "Water Use by Categories 2010" summarized that all surface and groundwater use by the mining sector (which in New Mexico includes oil and gas operations) accounted for 41,559 acre feet of the state's total water withdrawal of 3,815,945 acre feet or only 1.09% of the total water withdrawals by all users.¹ Of this mining total, oil and gas use was reported as just 5.4% of the total of 2244 acre feet. In the Pecos River basin (where the Texas Hornshell occurs), the N.M. Office of State Engineer reported that there were no surface water withdrawals by the mining sector.² In other words, the water use by oil and gas operations is so small as to have no

¹ N.M. Office of the State Engineer, New Mexico Water Use by Categories 2010 (Technical Report 54) (2013).

Retrieved from

<http://www.ose.state.nm.us/Pub/TechnicalReports/TechReport%2054NM%20Water%20Use%20by%20Categories%20.pdf>.

² *Id.*, Table 6.

appreciable effect on the Texas Hornshell and its habitat. Furthermore, this actually represents a decline when compared to the water withdrawals reported in 2005.³

The Trades and their member companies request that if the Texas Hornshell is listed, that a final listing rule include guidance specifying that drilling and production operations conducted in compliance with appropriate permits and located at a sufficient distance from waters where the Texas Hornshell is found will not result in “take” of the species nor will it adversely modify critical habitat if and when the Service designates critical habitat.

Thank you for considering these comments.



Richard Ranger
API



Dan Naatz
IPAA



Bruce Thompson
AXPC



Kathleen Sgamma
Western Energy Alliance

³ N.M. Office of the State Engineer, New Mexico Water Use by Categories 2005 (Technical Report 52) (2008). Retrieved from <http://www.ose.state.nm.us/Pub/TechnicalReports/TechReport-052.pdf>.