June 20, 2025

Via Regulations.gov
U.S. Department of the Interior
Office of the Solicitor
1849 C Street NW
Washington, D.C. 20240

Re: The American Exploration and Production Council's Comments in Response to the Department of Interior's Request for Comments on Regulations that Should be Modified or Repealed (90 Fed. Reg. 21,504 (May 20, 2025); DOI-2025-0005).

To the Department of Interior:

The American Exploration & Production Council ("AXPC") appreciates the opportunity to comment on the Department of Interior's ("DOI's" or "the Department's") Request for Information ("RFI") on existing regulations, rules, policies, directives, guidance documents, and other requirements that should be modified or repealed.[1] As requested in the Department's RFI, we have attempted to compile and summarize in this comment letter those DOI rules, regulations, and other requirements that are needlessly burdensome or complex, outdated or ineffective, or which otherwise unnecessarily undermine American energy independence and/or DOI's stewardship of our public lands and resources. In addition to the recommendations set forth in these comments, AXPC supports the recommendations submitted by the American Petroleum Institute.

In the sections that follow, AXPC recommends rescissions, modifications, and reforms in the following areas.

TABLE OF CONTENTS

[1] 90 Fed. Reg. 21,504 (May 20, 2025)/DOI-2025-0005.

I. AXPC'S INTERESTS

AXPC is a national trade association representing leading independent oil and natural gas exploration and production companies in the United States. AXPC companies support millions of Americans in high-paying jobs and invest a wealth of resources in our communities. Dedicated to safety, stewardship, and technological advancement, our members strive to deliver affordable, reliable energy to consumers while positively impacting the economy and the communities in

which we live and operate. Our association works with regulators and policymakers to help them understand our operations so that they will be able to create sound, fact-based public policies that result in the safe and responsible exploration and production of America's vast oil and natural gas resources. Our goal is to provide technical and regulatory knowledge, making AXPC a rich repository of resources on the industry and the science behind our operations.

AXPC's members are uniquely positioned to provide comments on this RFI and describe how multiple regulations, rules, and other requirements promulgated by DOI and its bureaus and offices adversely affect the development of projects that are vital to revitalizing the American energy industry. Unlike downstream oil and natural gas entities with permanent, stationary, refineries and other sites, AXPC's members explore for and develop essential energy resources on federal, state, and private natural gas and oil leases across the nation. Responsibly developing these resources and safely transporting them to consumers requires the construction and operation of pads, pipelines, utility lines, offshore platforms, and other infrastructure. As such, AXPC members have extensive experience working with the Bureau of Land Management ("BLM") and routinely engage with Fish and Wildlife Services ("FWS") staff and other DOI personnel in a variety of contexts.

In light of our member's frequent hands-on experience with public lands and DOI's bureaus and offices, AXPC has long supported efforts to improve the efficiency and consistency of the regulations governing the exploration, development, and use of public lands, alongside other relevant DOI, BLM, FWS, and Office of Natural Resources Revenue ("ONRR") regulatory developments. Indeed, AXPC and its members have for many years submitted detailed comments on and meaningfully participated in nearly every major rulemaking proceeding undertaken by DOI and its various bureaus and offices. AXPC's motivation to frequently contribute to federal permitting and public lands rulemakings is intuitive: our members are uniquely positioned provide comments on how regulations over the exploration and development of public lands impact our nation's energy supply.

Moreover, in each of these rulemaking dockets, AXPC has expressly reiterated its strong commitment to the responsible and sustainable use of public lands. Our members are constantly improving their environmental and land management practices in order safely and responsibly meet our nation's critical resource needs while minimizing the impacts of their operations, protecting wildlife, and respecting neighboring communities.

Importantly, the country is now seeing the positive outcomes arising from AXPC's members' safe and responsible resource development practices that continue to be critical to the Great American Comeback. In addition to AXPC members' best practices and technical advancements, implementation of the Clean Air Act, the Clean Water Act, and the Safe Drinking Water Act have improved the protection of our waters and dramatically improved air quality in the United States. According to EPA, in the United States, from 2005 to 2022, total energy-related CO_2 emissions fell by 20 percent while the United States became the number one energy producer in the world.[2] And, since 1990, American natural gas production has increased from approximately 128,000 million cubic feet ("MCF") per day to nearly 41,425,000 MCF per day.[3] At the same time, United

[2] American Exploration & Production Council, Presentation: Climate Leadership (2025), https://axpc.org/wp-content/uploads/2025/03/AXPC-EE-Deck_1.2025.pdf#page=31.

[3] *See* U.S. ENERGY INFORMATION ADMIN., U.S. Natural Gas Marketed Production, updated monthly at https://www.eia.gov/dnav/ng/hist/n9050us2a.htm.

States Geological Survey data shows that CO_2 and methane emissions from the extraction of oil and natural gas are likewise continuing to significantly decrease.[4]

In light of these promising trends both in terms of improved environmental protection and increased production, AXPC welcomes this Administration's efforts to streamline and remove unnecessary roadblocks to safely and responsibly achieving domestic energy dominance.[5] AXPC similarly welcome and appreciate DOI's present outreach on regulations, rules, policies, directives, guidance documents, and other requirements that should be modified or repealed.

AXPC hopes that the recommendations that follow are helpful to the Department. We also hope that DOI views them as the start of a renewed and constructive dialogue on ways to responsibly and lawfully improve the efficiency and consistency of DOI's rules and requirements governing the exploration, development, and use of public lands.

II. DOI REGULATIONS, DIRECTIVES, AND GUIDANCE

a. Modify, Update, and Where Necessary, Rescind Outdated and Impermissible NEPA Regulations and Guidance

AXPC has long supported efforts to improve the efficiency and consistency of the National Environmental Policy Act ("NEPA") review process while also reorienting those reviews so that they more clearly focus on achieving NEPA's central goal of improving agency decision-making. Decades of increasingly confusing and ambiguous analytical requirements, inconsistent agency approaches and procedures, and extensive litigation have unfortunately led to excessively lengthy NEPA review documents full of information that has no reasonable bearing on agencies' decision-making processes, and increasingly protracted review periods resulting from agencies compiling and reviewing information largely extraneous to the decisions they had to make. In the 40 years since the Council on Environmental Quality ("CEQ") promulgated its first regulations implementing NEPA, the average environmental impact statement ("EIS") expanded to 661 pages, with over 1,000 additional pages of appendix materials.[6] And the average time to complete these increasingly voluminous EISs increased to roughly 2.2 years.[7]

This is not what Congress intended when it enacted NEPA. Nor is it consistent with the NEPA reform Congress more recently included in the Fiscal Responsibility Act of 2023 ("FRA")[8] in the hope of reducing agencies' unnecessarily excessive procedures and analyses, and reorienting agencies' implementation of NEPA to the efficient and effective decision-making tool that Congress intended.

AXPC therefore welcomes this administration's recognition of the need to substantially reform the manner in which federal agencies implement NEPA. Indeed, we believe that President Trump's January 20, 2025 Executive Order entitled *Unleashing American Energy* ("EO 14154")[9] and CEQ's February 19, 2025 Memorandum for Federal Departments and Agencies on the Implementation of the National Environmental Policy Act ("CEQ's February 19 Guidance") are critical to reigning in needlessly complex and protracted NEPA reviews and facilitating the

[4] *See generally*, U.S. GEOLOGICAL SURVEY, Federal Lands Greenhouse Gas Emissions and Sequestration in the United States (2024), https://pubs.usgs.gov/sir/2024/5103/sir20245103.pdf.
[5] *See* Executive Order 14154 on Unleashing American Energy (90 Fed. Reg. 8,353 (Jan. 29, 2025)).
[6] Council on Environmental Quality, Length of Environmental Impact Statements (2013-2018) (June 12, 2020).
[7] Council on Environmental Quality, Environmental Impact Statement Timelines (2010-2024) (Jan 13, 2025).
[8] Fiscal Responsibility Act of 2023, Pub. L. No. 118-5, 137 Stat. 10, 38 (2023).
[9] 90 Fed. Reg. 8,353 (Jan. 29, 2025).

efficient and statutorily-supported permitting and decision-making that are critical to America's domestic energy industry.

In light of the foregoing, AXPC urges DOI to comprehensively inventory and update all of the NEPA regulations, policies, guidelines, instructional memoranda, and other directives that over many years have proliferated within DOI and in each of its various bureaus and offices. This comprehensive review of NEPA rules and guidelines is necessary because, under prior administrations, the NEPA review process was often used to pursue anti-development policy goals and climate change objectives that were outside the DOI's jurisdiction and irrelevant to the NEPA analyses DOI and its bureaus and offices were required to conduct. The strained statutory interpretations on which many of these rules and policies were based will no longer pass legal muster in the wake of the U.S. Supreme Court's ("Supreme Court's" or "the Court's") decision in *Loper Bright Enterprises v. Raimondo*.[10]

In its June 28, 2024 *Loper Bright* decision, the Supreme Court overturned its long-standing "*Chevron* Doctrine," which required courts to afford special deference to a federal administrative agency's interpretation of applicable law within its enforcement purview on the theory that an agency specializing in, say, environmental regulation, has a special expertise in the environmental laws it enforces. While the *Loper Bright* decision allows courts to afford "respect" to agencies' factual and technical determinations, it requires courts to consider questions of law *de novo* and exercise independent judgement to determine the "single, best meaning" of a statutory provision.[11]

This doctrinal change means that courts will no longer defer to agency interpretations simply because they are permissible constructions of a statute. When courts have cases challenging agencies' interpretations of their governing statutes, they must now set aside any agency rule, policy or other directive that is based on an interpretation that does not reflect the "single, best meaning" of a statute. Many of the prior administration's NEPA rules and policies, including those issued by DOI and its various bureaus and offices were based on overzealous reinterpretations of NEPA and are therefore now legally vulnerable.

As DOI works to update its department-wide rules, policies, and procedures, AXPC urges the agency to consider and incorporate the following in order to ensure that its NEPA rules, policies, and procedures reflect the "single, best meaning" of the statute and, to the greatest extent possible, eliminate unnecessarily excessive procedures and analyses, and reorient DOI's implementation of NEPA to the efficient and effective decision-making tool that Congress intended.

- Meaningfully Implement the FRA's NEPA Reforms: As previously noted, on June 3, 2023, President Biden signed into law the FRA, which included numerous amendments to NEPA to streamline the permitting process for infrastructure and energy projects. These statutory revisions, which included changes to the applicability of NEPA and the scope of agency reviews, page and time limits for reviews, and other streamlining measures, were not meaningfully implemented or utilized during the prior administration. AXPC therefore urges DOI to comprehensively review and revise its NEPA rules and policies to fully and lawfully incorporate the FRA's statutorily mandated NEPA revisions and ensure that all DOI bureaus and offices dutifully implement and utilize the reform and streamlining measures Congress provided through the FRA.

[10] 603 U.S. __ (2024); 144 S. Ct. 2244 (2024).
[11] *Loper Bright* 144 S. Ct. at 2266 (citing *Wisconsin Central Ltd. v. U.S.*, 585 U. S. 274, 284 (2018)).

- Model DOI's NEPA Rules and Policies on CEQ's 2020 NEPA Rule: CEQ's February 19 Guidance[12] recommends that agencies revise and update their NEPA rules and policies consistent with CEQ's final 2020 rule entitled "Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act" ("2020 NEPA Regulations").[13] to guide future NEPA reviews. AXPC supported the 2020 NEPA Regulations because we believed they provided long-overdue regulatory reforms that, if dutifully implemented by agencies, could reorient the NEPA review process back to the Act's core purpose of improving agency decision- making, and away from the litigation-fueled dysfunction and delay that have become the statute's hallmarks. As such, we recommend that DOI utilize the procedures and guidelines in the 2020 NEPA Regulations to the extent those procedures and guidelines are permitted by law and consistent with EO 14154 and the February 19 Guidance.

- Ensure DOI's NEPA Rules and Policies Conform to the Supreme Court's May 29, 2025 Decision in In *Seven County Infrastructure Coalition v. Eagle County("Seven County")*:[14] The Supreme Court's decision in *Seven County* marks a significant "course correction" in how federal agencies must conduct environmental reviews under NEPA. The case arose from a proposal to construct an 88-mile railway that would connect Utah's Uinta Basin to Gulf Coast refineries. The U.S. Surface Transportation Board ("STB") prepared a 3,600-page EIS that analyzed the environmental effects of the railway but did not fully analyze the potential environmental effects of increased upstream oil drilling in the Uinta Basin or downstream refining activities in the Gulf. STB's final EIS were challenged in the U.S. Court of Appeals for the D.C. Circuit ("D.C. Circuit"), which vacated the approval, holding that the EIS violated NEPA by failing to adequately consider the reasonably foreseeable environmental impacts of upstream and downstream oil-related activities.

  The Supreme Court unanimously reversed the D.C. Circuit. In addition to holding that the D.C. Circuit failed to afford the STB the "substantial deference" required under NEPA and the Administrative Procedure Act ("APA"), the majority opinion held that NEPA does not obligate agencies to analyze environmental effects of upstream or downstream activities that are "separate in time or place" from the "project at hand" and "fall outside the agency's regulatory authority." The Court drew a distinction between indirect environmental effects (like "run-off into a river that flows many miles from the project and affects fish populations elsewhere") that should be considered as part of a NEPA review of a project, and environmental effects from "future or geographically separate projects," (like upstream oil production and downstream refining activities) that constitute separate independent projects that agencies are not required to review. In explaining what constitutes a separate project, the Court explained that "the textually mandated focus of NEPA is the 'proposed action.'" In addition to the statutory text, the Court held that a "but for" relationship alone does not require an agency to explore a particular effect in an EIS. Instead, relevant environmental effects must be "interrelated and close in time and place to the project at hand."

  As applied here, NEPA *does not* require DOI to consider effects that might result from separate projects that "break[] the chain of proximate causation [from] the project at hand,"

[12] CEQ's February 19 Guidance at p. 4.
[13] 86 Fed. Reg. 43,304 (July 16, 2020).
[14] No. 23-975, 605 U.S. ___ (2025).

The fact that other projects might follow as a foreseeable consequence of a DOI approval or permit, or "but for" DOI's approval, is insufficient. Particularly so if DOI "no regulatory authority over those separate projects," as was the case in *Seven County* itself because STB lacks authority to base approvals on the nature of the materials to be transported or over oil and gas projects more broadly.

In light of the foregoing, AXPC urges DOI to fully conform its NEPA rules and policies to the Supreme Court's holding in *Seven County*. Doing so will not only ensure that DOI's rules and policies lawfully interpret NEPA, it will also allow the Department to avoid needlessly expending resources and delaying approvals to analyze activities that are "separate in time or place" from the "project at hand" and/or "fall outside the agency's regulatory authority."

b. <u>Eliminate Mandatory Compensatory Mitigation Requirements Across DOI</u>

In recent years, DOI and many of its bureaus and offices have impermissibly issued multiple rules, policies, and directives that explicitly or implicitly imposed compensatory mitigation requirements on lessees and other public land users. BLM's 2024 Conservation and Landscape Health Rule and FWS's 2024 revisions to its ESA Section 7 implementing regulations, which AXPC discusses elsewhere in this letter, represent particularly egregious examples of rules in which DOI's bureaus and offices have imposed compensatory mitigation requirements without the requisite statutory authority to do so. But these are far from the only instances in which DOI has impermissibly required compensatory mitigation. Explicit or implicit compensatory mitigation requirements have proliferated in a variety of rules, policies, guidelines, permits, and other authorizations.

Given the considerable extent to which these impermissible compensatory requirements have permeated agency policies, AXPC believes that DOI should issue a solicitor's opinion or similarly binding guidance which comprehensively and explicitly clarifies that existing statutory limits on DOI's authority to recommend or require compensatory mitigation. In particular, DOI should clarify that mitigation is only allowed (but never required) as part of the NEPA review process and under Sections 7 and 10 of the ESA. Neither the Mineral Leasing Act ("MLA") nor Federal Land Policy and Management Act ("FLPMA") allow DOI, BLM, FWS, or any other agency to require or condition approvals on compensatory mitigation.

In those narrow instances where DOI and its bureaus and offices can allow operators to voluntarily use compensatory mitigation, DOI and its bureaus and agencies should issue rules specifying that mitigation must be proportional to presumed impacts, and expressly prohibit agencies from requiring compensatory mitigation for activities unlikely to adversely impact federal lands or protected species. DOI should further specify that their employees cannot require or recommend that project proponents mitigate or otherwise compensate for their proposed projects' potential indirect climate change impacts or other indirect impacts over which the project proponent has no control.

III. BLM REGULATIONS, DIRECTIVES, AND GUIDANCE

a. Rescind the Conservation and Landscape Health Rule

AXPC recognizes and appreciates that on April 30, 2025, BLM sent to the Office of Management and Budget ("OMB")[15] a proposal to rescind the Bureau's 2024 Conservation and Landscape Health Rule ("2024 Rule" or "2024 Conservation and Landscape Health Rule").[16] This 2024 Rule significantly changed BLM's regulations implementing the FLPMA as well as BLM's longstanding approach to managing public lands under principles of multiple use and sustained yield.

AXPC supports BLM's current efforts to rescind this rule for several reasons. Not only is this effort consistent with EO 14219, but it is also necessary because the 2024 Conservation and Landscape Health Rule exceeds BLM's statutory authority, is inconsistent with the Bureau's organic statutes, and impermissibly constrains BLM's ability to promote the responsible and productive use of public lands.

Congress, through FLPMA and multiple other resource management statutes, directed BLM to manage approximately 245 million surface acres and 700 million subsurface acres of public lands in a way that facilitates and prioritizes certain productive uses, and provided BLM with a variety of mechanisms to ensure that public lands are responsibly and productively utilized. These resource management laws include statutes such as the General Mining Law of 1872, the Mineral Leasing Act of 1920, the Taylor Grazing Act of 1934, and the FLPMA.

In contrast, Congress enacted other statutes that provide for the conservation of federal lands and the preservation of larger landscapes for the use and enjoyment of the American public. These public land conservations statutes include the Yellowstone National Park Act of 1872, Antiquities Act of 1906, National Park Service Organic Act of 1916, National Wildlife Refuge System Act of 1966, Wilderness Act of 1964, and Parks and Public Lands Management Act of 1996.

By enacting these two types of statutes, Congress established an overarching framework for the use, management, and conservation of different types of public lands within the large and varied landscapes overseen by the Federal government. On the one hand, Congress, through FLPMA established a national policy that "the public lands be managed in a manner which recognizes the Nation's need for domestic sources of minerals, food, timber, and fiber from the public lands."[17] To that end, FLPMA and various other land use statutes authorized BLM to "regulate… the use, occupancy, and development of the public lands" "through easements, permits, leases, licenses, published rules, or other instruments" according to the principle of "multiple use and sustained yield."[18] In setting the terms and conditions for the productive use of federal land, BLM may consider conservation, but only as necessary to maintain, in perpetuity, "a high-level annual or regular periodic output of the various renewable resources of the public lands consistent with multiple use."[19]

---

[15] REGINFO.GOV, EO 12866 MEETING 1004-AF03, https://www.reginfo.gov/public/do/viewEO12866Meeting?viewRule=true&rin=1004-AF03&meetingId=908873&acronym=1004-DOI/BLM (last visited June 16, 2025).
[16] 89 Fed. Reg. 40,308 (May 9, 2024)/BLM-2023-0001.
[17] 43 U.S.C. § 1701(a)(12).
[18] 43 U.S.C. § 1732(b).
[19] 43 U.S.C. § 1702(h).

On the other hand, in order to preserve specific federal lands and landscapes, Congress may (and often does) prohibit productive uses on certain federal lands or otherwise set them aside for conservation. This authority to conserve federal lands and restrict productive uses is highly circumscribed and carefully guarded. As particularly relevant to this proposed rule, Congress authorized BLM to set aside federally managed lands covered by FLPMA for non-use only in the narrowest of circumstances constrained by strict procedural guardrails.

Recission of the 2024 Conservation and Landscape Health Rule is appropriate and necessary because the 2024 Rule impermissibly contravenes the national public lands management framework that Congress selected and only Congress can revise. The 2024 Rule's elevation of conservation as a "use" on par with the productive uses enumerated in FLPMA undermines Congress's intent to facilitate productive uses of federal land for the benefit of the nation. The two new categories of leases established by the 2024 Conservation and Landscape Health Rule, mitigation leases and restoration leases (collectively, "conservation leases") are inconsistent with the statutory scheme that Congress directed us to implement, and claim unheralded new authority for BLM to set aside potentially vast expanses of public land for conservation, that Congress either expressly reserved for itself or narrowly delegated for use in tightly limited circumstances and only after observance of important procedures.

The single best interpretation of FLPMA is that the terms "use" or "uses" mean productive uses, and not "non-use" or the preclusion of productive uses. Contrary to the Bureau's assertions in promulgating the 2024 Conservation and Landscape Health Rule, FLPMA does not authorize BLM to use its highly circumscribed authority to designate "areas of critical environmental concern" ("ACECs") to impose comprehensive new restrictions across larger landscapes with fewer procedural hurdles, including public engagement procedures expressly required by FLPMA. Nor did Congress confer to BLM through FLPMA or other resource management statutes authority to require compensatory mitigation in the manner set forth in the 2024 Rule.

In addition to being warranted based on its impermissibility with multiple of BLM's governing statutes, AXPC believes that recission of the 2024 Conservation and Landscape Health Rule is compelled by Congressional Review Act ("CRA").[20] On March 27, 2017, Congress passed a joint resolution under the CRA to disapprove a 2016 BLM "Resource Management Planning" rule commonly referred to as the "Planning 2.0" rule, which made a number of changes to BLM's regulations that are substantially the same as many of the revisions BLM promulgated in the 2024 Conservation and Landscape Health Rule.[21] Under the CRA, enactment of a joint resolution disapproving a rule prohibits an agency from reissuing the rule in "substantially the same form" or issuing a "new rule that is substantially the same" as the disapproved rule, "unless the reissued or new rule is specifically authorized by a law enacted after the date of the joint resolution disapproving the original rule."[22]

While AXPC supports BLM's continued efforts to protect and conserve public lands, the Bureau cannot lawfully do so in the manner set forth in the 2024 Conservation and Landscape Health Rule. "Regardless of how serious the problem an administrative agency seeks to address, [] it may not exercise its authority 'in a manner that is inconsistent with the administrative structure that

[20] 5 U.S.C. Chapter 8 *et seq*.
[21] 81 Fed. Reg. 89,670 (Dec. 12, 2016).
[22] 5 U.S.C. § 801(b)(2).

Congress enacted into law.'"[23] As it were, the 2024 Rule is not only inconsistent with BLM's statutory authority, it directly and irreconcilably contravenes the "multiple use and sustained yield" directive Congress imposed under FLPMA and MLA. And because it is inconsistent with Congress's expectation that BLM facilitate the productive use of public lands, the 2024 Conservation and Landscape Health Rule significantly impedes harm important, economically beneficial, and statutorily supported uses, such as oil and natural gas development, which is critical to America's energy dominance, supports a large number of high-paying jobs, and provided taxpayers nearly $9 billion in revenue in each of the last two years.

This is not what Congress intended or what BLM's governing statutes allow. AXPC therefore supports BLM's initial efforts to rescind the 2024 Conservation and Landscape Health Rule and urges the Bureau to continue to work expeditiously to rescind this impermissible rule.

b. Modify Regulations to Streamline Issuance of Drilling Permits ("APDs")

The overwhelming majority of BLM's permitting actions with respect to upstream oil and natural gas development involve the processing of Applications for Permits to Drill ("APDs"). Unfortunately, the APD process has long faced several well-documented challenges that result in delays, inefficiencies, and unpredictability.

Despite both statutory and regulatory directives for BLM to adhere to specific timelines, operators currently endure 6-18 month waiting periods for BLM APD approvals, with delays stemming from technical glitches from a data system known to have significant reliability and data integrity problems,[24] staffing shortages, administrative bottlenecks, and a variety of operational inefficiencies. The operational filings and approvals required by BLM are duplicative and unnecessarily expansive of state-level APD requirements. And, for lower-risk wells, opportunities for streamlining required environmental reviews have not been fully utilized. These challenges can deter investment and reduce competitiveness of federal oil and gas development compared to state or private lands.

This Administration's efforts to fully utilize our Nation's vast domestic energy resources more fully and achieve energy dominance therefore necessitates that BLM prioritize efforts to streamline and improve its APD approval process. Reasonable and modest changes to improve the efficiency of the APD permitting process can substantially decrease BLM's administrative burdens and provide operators with a more efficient and predictable means of obtaining authorization to access energy resources on public lands.

To decrease unnecessary burdens on BLM resources and improve the administration of APD permitting, AXPC urges BLM to promulgate a rule to create a permit-by-rule system ("PBR System") for APDs. These rules would allow for the automatic approval of drilling permits in certain areas for qualified projects with low environmental concerns. For these qualifying areas, the PBR System would put the burden on operators and BLM-approved contractors to de-risk the proposed activity on the front end and certify applicability and compliance with a standardized set of terms and conditions for these similarly situated wells. Upon receipt of a qualifying APD submission, BLM would have 45 days to review the application for completeness, and if Bureau

[23] *Food and Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 125 (2000) (quoting *ETSI Pipeline Project v. Missouri*, 484 U.S. 495, 517 (1988)).

[24] U.S. GOV'T ACCOUNTABILITY OFF., GAO-24-107223, Oil and Gas: Interior Urgently Needs Leadership to Modernize Systems (2024).

staff do not raise objections during that 45-day period, the permit is deemed to take effect thereby allowing the operator to commence operations.

This framework most closely mirrors EPA's successful stormwater discharge construction permit system, balancing development and permitting efficiency with environmental protection. Of note, this process would not circumvent regulatory obligations for environmental protection or review. Rather, it would merely provide a narrow set of low-impact projects, such as those which would met established categorical exclusions, with a pathway for ADP approval that is less encumbered by bureaucratic inefficiencies, resource limitations, and unnecessary paperwork exercises. Areas that would qualify for a permit by rule include:

- Areas where there are existing oil and gas wells within a five (5) mile radius, and for which an approved land use plan or any environmental document was prepared within the last ten years pursuant to NEPA.
- Locations where drilling has occurred within the past 10 years prior, and the proposed operations do not increase the surface disturbance on the location or well pad site.
- Areas where there is a surface disturbance of less than ten (10) acres so long as the total surface disturbance on the lease is not greater than 150 acres.
- On state or fee surface areas in order to develop federal mineral interests that are or will be located within the boundaries of a communitization agreement or unit agreement.
- Areas where a categorical exclusion applies for oil and gas activities.
- Other areas where BLM has determined that development under a permit by rule is appropriate.

Additionally, this rulemaking would include:

- Authorization for third-party contractors to conduct and approve all necessary surveys; and
- The creation of Federal Minerals Access Waivers for mixed ownership scenarios.

As previously noted, NEPA reviews constitute another significant source of delay and inefficiency in the APD approval process. Therefore, AXPC also believes that BLM should also prioritize efforts to improve the efficiency of NEPA reviews specifically in the context of the APD approval process. Fortunately, Congress has already provided an effective but heretofore underutilized tool to avoid needlessly miring down certain types of APD approvals in lengthy NEPA reviews. The Energy Policy Act of 2005 contains the following categorical exclusions that can be used by field offices to help expedite NEPA reviews:

- Drilling an oil or gas well at a location or well pad site at which drilling has occurred previously within 5 years prior to the date of spudding the well.
- Drilling an oil or gas well within a developed field for which an approved land use plan or any environmental document prepared pursuant to NEPA analyzed such drilling as a reasonably foreseeable activity, so long as such plan or document was approved within 5 years prior to the date of spudding the well.

These categorical exclusions are available and ready for use by BLM offices, and we therefore urge BLM to direct its offices to utilize them immediately and to the fullest extent possible. AXPC also believes that BLM can help maximize the use of these statutorily prescribed categorical

exclusions by developing internal guidance and rules facilitating the issuances of PBR, clarifying the application of categorical exclusions under NEPA, and updating/amending numerous Resource Management Plans ("RMPs"), including those RMPs elsewhere discussed in this letter.

In addition to better facilitating the use of these statutorily prescribed categorical exclusions, AXPC urges BLM to develop its own categorical conclusions for other similar types of lower-risk and lower-impact activities. BLM has adopted at least one categorical exclusion that applies to the drilling of wells. We urge the Bureau to use this existing categorical exclusion as a model for adopting similar exclusions in the future.

c. Modify Needlessly Restrictive Resource Management Plans ("RMPs")

In recent years, BLM has finalized multiple RMPs that have collectively imposed needlessly burdensome restrictions on oil and gas activities on millions of acres of public lands. These RMPs constrain AXPC members' ability to safely and responsibly access and produce critical energy resources, and therefore also present a significant barrier to achieving domestic energy dominance.

While AXPC shares BLM's interest in protecting and conserving public lands and critical habitats, many of the restrictions in these recent RMPs appear to be based on the previous Administration's climate change and energy policy objectives, rather than actual conservation concerns within the various planning areas. This is not permissible. Congress conferred BLM authority to adopt and implement RMPs for the purpose of managing public lands to achieve multiple uses and sustained yields—not to reshape national energy policy or achieve unrelated administrative climate change objectives.

The following recent RMPs do not allow for the reasonable and balanced approach to public lands management that Congress intended when it enacted FLPMA. These RMPs therefore do not reflect the best meaning of the statute, and consequently should be modified to lawfully allow for responsibly conducted oil and gas activities.

- Greater Sage-Grouse RMP Amendments: BLM finalized these RMP amendments and a Record of Decision ("ROD") on January 17, 2025.[25] The Greater Sage-Grouse RMP already encompasses 77 separately land use plans covering over 65 million acres of public land in ten western states. The 2025 amendments that BLM adopted to supplement this already restrictive RMP were not based on the best available science, perpetuated impermissible compensatory mitigation requirements, and needlessly imposed expansive surface restrictions in many areas that are not necessary for greater sage-grouse conservation.
- Rock Springs RMP: BLM published notice of its approval of this RMP on January 7, 2025.[26] The RMP covers approximately 3.6 million acres of public land in Wyoming, and it significantly restricts oil and gas activities on nearly a third of this acreage. These restricted areas and additional areas subject to the RMP's more stringent rights-of-way requirements overlap with many active leases, and therefore also impermissibly interfere with the rights of current lessees. These unnecessary and impermissible RMP restrictions are the product of BLM's outdated and deeply flawed assessments about the surface footprints and potential impacts of oil and gas operations on public lands.

[25] 90 Fed. Reg. 5986.
[26] 90 Fed. Reg. 1186.

- North Dakota RMP: BLM published notice of its approval of this RMP on January 15, 2025.[27] This RMP adversely impacts mineral development on public lands throughout North Dakota. In addition to severely restricting access to oil and gas resources across the state, the RMP would prohibit the development of all federally owned coal outside of a four-mile radius surrounding current lease boundaries, which effectively precludes the development of over 90% of the known federal coal deposits in North Dakota.

d. Implement Measures to Ensure that BLM's Permitting for Split Estates is Consistent with the Bureau's Jurisdiction and Streamlined

AXPC urges BLM to implement measures to improve the clarity, consistency, and legality of its permitting processes and requirements for drilling into and producing leased federal minerals from well pads in non-federal locations. BLM's current approach to reviewing and approving APDs for operations on fee and state-owned is often inconsistent, unnecessarily complicated, inefficient, and overreaching. This inconsistent and overly complicated process frequently results in either permitting delays or the imposition of onerous permit conditions that are outside of BLM jurisdiction because they relate to the use of, and impacts to, the non-federal surface estate.

As such, to ensure that BLM does not impermissibly delay or condition APD approvals on non-federal surface uses and impacts over which the Bureau has no jurisdiction, AXPC urges BLM to issue a Solicitor's Opinion or a similar guideline or directive that expressly clarifies that BLM lacks jurisdiction to govern surface use on fee or state-owned surface lands. Along with this clarification, AXPC urges BLM to develop a more simplified APD application packet for wells with facilities located on fee or state surface acreage that are drilled horizontally to develop federal minerals. This APD package should be streamlined to reflect the limited scope of BLM's jurisdiction in such split estate scenarios. Accordingly, AXPC proposes that BLM's simplified split estate APD package include the following conditions:

- That any analyses or compliance obligations under NEPA, ESA Section 7, NHPA, and the applicable RMP are limited to the scope of the federal action/undertaking—the approval of the APD;
- That BLM has no authority to enter fee lands without the surface owner's consent, and cannot use the inability to access as grounds to delay or unreasonably delay issuance of an APD;
- That BLM has no authority to require a bond to protect the fee surface owner's interests; and,
- That BLM's inspection and enforcement authority is generally limited to downhole operations, wellbore integrity, and production accountability directly related to the production of federal minerals.

Additionally, AXPC urges BLM consider developing and implementing a policy under which a federal permit to drill for an oil and gas lease under the MLA would not be required for an action occurring within an oil and gas drilling or spacing unit if: (1) less than ten percent of the minerals within the oil and gas drilling or spacing unit are minerals owned by the federal government; and (2) the federal government does not own or lease the surface estate within the area directly impacted by the action. This clarification and streamlined permitting approach would reduce

[27] 90 Fed. Reg. 3915.

unnecessary administrative burdens, improve operational efficiency, and promote responsible development of federal mineral resources while respecting state and private property rights.

e. Revise Commingling Rules

One of the most expedient and effective ways BLM could help promote this Administration's goal of increasing domestic oil and gas production is by expressly allowing and facilitating the commingling of production. Surface commingling is the practice of combining oil or gas production from multiple federal leases or wells at a shared surface facility before measurement. By allowing operators to consolidate production infrastructure, surface commingling reduces capital costs, minimizes duplicative equipment, and streamlines transportation and measurement operations, which helps reduce overall surface footprint and environmental impacts of facilities. This efficiency can be critical to enabling the development of marginal wells or leases that may not be viable on their own, thereby supporting broader resource recovery goals.

Commingling is allowed under BLM's authority to generally regulate onshore oil and gas operations under the MLA—which covers using facilities to collect that production.[28] BLM currently regulates and permits the commingling of facilities under 43 C.F.R. § 3173.14(b) – regulating the commingling of production.[29] BLM has allowed commingling since 2011, after it issued an instructional memorandum and detailed procedure on this subject.[30] Though it is not disputed that the MLA already provides authority, and BLM has regulations for commingling, in most cases the agency will only approve for limited situations, such as when the areas to be commingled have 100% the same federal interest, royalty rate, and revenue distribution, and when the producing properties are economically marginal. However, diverse ownership scenarios, as opposed to 100% scenarios, are what are more commonly found across the landscape.

Diverse ownership can occur through differences in royalty rates or in differences in the number of net mineral acres owned by the federal government in each source (i.e., lease or contract area). The result of BLM resistance has ended up requiring operators to build duplicative facilities in order to keep production separate, with a larger footprint overall in the field development and greater environmental impacts, at a great expense to the operator, making the development of federal minerals less competitive compared to fee and state lands, and in some scenarios likely leads to stranded resources. Whereas BLM's existing authority is sufficient to also allow for the approval of commingling applications when there is diverse ownership, similar to what states have allowed for many years,[31] and for the same reasons it has justified for 100% ownership scenarios and exception scenarios.

---

[28] Mineral Leasing Act of 1920, as amended, 30 U.S.C. § 189 – Grants the Secretary of the Interior authority to prescribe necessary and proper rules and regulations for the leasing of public lands for oil and gas development, including production handling.; Further, the BLM's implementing regulations 43 C.F.R. § 3162.3-2—Subsurface and surface commingling—allows BLM to approve proposals for commingling production from different leases, communitized areas, or participating areas, provided certain conditions are met.

[29] See also BUREAU OF LAND MANAGEMENT, PRESENTATION, BLM REGULATION: COMMINGLING OF PRODUCTION (May, 2024).

[30] See BUREAU OF LAND MANAGEMENT, MINIMUM REQUIREMENTS FOR COMMINGLING AND ALLOCATION APPROVALS AND OFF-LEASE MEASUREMENT APPROVALS. This instructional memorandum was then later replaced with regulations that are currently contained within the CFR. *See, e.g.,* 43 C.F.R. § 3170.3.

[31] For example, the New Mexico Oil Conservation Division regulates surface commingling through NMAC §19.15.12.10; Wyoming regulates surface commingling through Chapter 3, Section 34 of its rules, found at WYO. CODE R. 055-0001-3.

BLM's current regulations allow BLM to approve commingling with greater flexibility under certain 'exception' scenarios such as extending the current producing life of otherwise uneconomic properties; and when a communitization includes a non-federal lease. Indeed, the Congressional Budget Office ("CBO") notes that "commingling can produce larger yields over shorter periods than is likely with permitting and drilling separate wells."[32] And for the exact same reasons, it can be significantly valuable for new development, even potentially unlocking federal mineral acreage that might otherwise be uneconomic or cost-prohibitive to develop because of its disposition within state and private development.

Commingling also significantly reduces the environmental footprint of oil and gas operations by limiting the need for multiple well pads, access roads, and processing facilities, which in turn decreases land disturbance, truck traffic, and associated emissions. These benefits align with BLM's statutory obligation and authority under the Mineral Leasing Act (MLA) to ensure diligent development and maximum recovery of federal resources while securing a fair return for taxpayers. It is a commonsense solution that promotes cost-effective, environmentally responsible energy production on federal lands.

Combining oil or gas production from multiple federal leases at a shared surface facility before measurement, offers *significant* operational, environmental, and primarily economic advantages for resource recovery. Approved more broadly, commingling could reduce the costs of each federal well by $6–8 million (which can equate to $100 million or more per well pad) in some circumstances in addition to reducing surface footprints and lowering emissions. This efficiency lowers the overall cost of developing federal minerals, making them more competitive investments compared to opportunities on state and fee lands, and frees up hundreds of millions in capital that can be reinvested in additional development.

Today, BLM approves about 300-400 per year, however the use of commingling would be much greater if it was not limited to only identical ownership scenarios and exception criteria (e.g. economically marginal properties, etc.). Allowing for this operational efficiency enhances resource recovery, increase royalty revenues to the federal government, and improves the overall economic viability of federal leases—thereby encouraging greater industry participation and potentially resulting in higher bonus bids at future lease sales.

BLM should therefore revise its regulations in 43 C.F.R. §§ 3173.14 and 3173.15 and associated policies to explicitly allow for the commingling of production from two or more sources (including the area of an oil and gas lease, the area included in a drilling spacing unit, a unit participating area, a communitized area, or non-Federal property) before production reaches the point of royalty measurement regardless of ownership, the royalty rates, and the number or percentage of acres for each source if the applicant agrees to install measurement devices for each source, utilize an allocation method that achieves volume measurement uncertainty levels within plus or minus two percent during the production phase reported on a monthly basis, or utilize an approved periodic well testing methodology. Production from multiple oil and gas leases, drilling spacing units, communitized areas, or participating areas from a single wellbore under this scenario should be considered a single source. This expansion should be in addition to BLM continuing its current

[32] CONG. BUDGET OFF., CBO PUB. NO. 61420, ESTIMATED BUDGETARY EFFECTS OF A BILL TO PROVIDE FOR RECONCILIATION 4 (May 27, 2025).

practice of exercising discretion to authorize higher percentage volume measurement uncertainty levels if appropriate technical and economic justifications have been provided.

AXPC believes a greater use of surface commingling within BLM's program would allow operators to streamline operations, reduce duplication, and minimize environmental footprints. This approach would enable operators to consolidate infrastructure, improve efficiency, and optimize resource recovery while maintaining accurate production accounting and compliance with royalty obligations. Indeed, with modest revisions to the Bureau's commingling rules and policies, AXPC believes that BLM will be able to promote cost-effective development, enhance resource stewardship, and support the economic competitiveness of U.S. energy production.

f. Revise Site Security and Measurement Rule

In addition to revising its commingling rules, AXPC requests that BLM also promulgate revisions to its 2017 Site Security and Measurement Rule ("SSM Rule") to reduce unnecessarily burdensome requirements, increase regulatory certainty, and improve production and royalty accountability.

Since they took effect in January 2017, BLM's rules governing site security and measurement of oil and natural gas leases have imposed substantial unnecessary burdens on and created significant implementation challenges for both BLM and the oil and gas industry. Although the first Trump Administration proposed modifications to the SSM Rule in 2020, that proposal was withdrawn by the Biden Administration and never finalized. As a result, multiple gaps and inconsistencies measurement accuracy, verifiability, and accountability continue to hinder implementation and compliance to this day.

To address these issues, AXPC urges BLM should promulgate a regulatory provision allowing for approval of commingling applications using measurement devices for each source or utilize an allocation method in accordance with API Manual of Petroleum Measurement Standards ("MPMS") Chapter 20, which have been in effect since December 2017 and provide the proper technical support for accurate commingling, without imposing undue hardship from restrictive measurement tolerances or special equipment. AXPC believes that allocation by well test is preferable to allocation by meter (which would serve as a backup approach) because it would greatly reduce the Facility Measurement Points ("FMPs"), which have tighter uncertainty requirements.

AXPC also urges BLM to adopt the API/GPA standards of production measurement in their entirety; and accept measurement devices that meet applicable standards (rather than requiring BLM to review and approve each device proposed). This would substantially reduce the burden on both BLM and industry. It would also obviate the need for a separate NTL-5 dealing with equipment approvals. Developing these equipment lists has presented a significant resource challenge for BLM. Therefore, AXPC urges the Bureau to remove references to approved measurement equipment (*e.g.*, for LACT meters and flow conditioners in 43 CFR 3174 and 3175).

In addition to these proposed regulatory revisions, AXPC recommends BLM take the following actions to improve production and royalty accountability while simultaneously reducing unnecessary burdens:

- Establish a minimum rederal-interest threshold for application of the SSM Rule: There are many unit agreements and Communitization agreements ("CA") where the Federal lease acreage committed to the agreement is a small proportion of the total agreement

acreage. For many of these agreements, all operations occur only on the state or fee lands committed to the agreement. For this reason, AXPC recommends that BLM create reasonable exclusions when a development area only contains a small amount of federal interest, which could be established by creating a minimum Federal interest threshold.

- Eliminate the BLM electronic gas sampling database ("GARVS"); GARVS requires operators to submit gas analysis data to the BLM in a predetermined format and, in turn, receive sample frequency requirements from the BLM in a separate predetermined format. Operators throughout the industry utilize a wide variety of software systems for receiving and validating gas analysis data. These software systems are developed by various third parties or may be developed in-house. Each of these software systems require redevelopment to allow for the creation of the GARVS submittal data and for the receipt of the GARVS revised frequency requirements. Making the necessary changes to the various software systems in order to send and receive the data from GARVS development, testing, and implementation is needlessly costly and time-consuming. AXPC therefore recommends that BLM eliminate GARVS requirements.

- Rescind requirement that surface owners give BLM unrestricted access for off-lease measurement: Unrestricted access poses potentially serious safety concerns and is not necessary from a compliance perspective. Proper training and PPE are critical to entering many of these locations as there may be dangerous conditions, such as hydrogen sulfide. Moreover, it may be necessary to provide surface owners advance warning, as owners and their agents can be wary of unannounced, unfamiliar visitors. BLM inspectors may also not be aware of site-specific conditions imposed by law and by agreement. These may include endangered species restrictions that may limit driving during breeding seasons. Additionally, in places like Wyoming, where the BLM owns very little of the surface estate, operators often rely on existing surface use agreements that may include specific routing and gate/cattle guard access, as well as limitations on where vehicles can be parked. Access is often restricted by agreement as to the time of day and time of year to account for hunting seasons, animal migration, or breeding seasons. Operators are held accountable for access violations, damage to roads and gates, health risks, and environmental damage. Personnel with access are typically required to have extensive training and must have intimate knowledge of conditions and restrictions of a given facility on the day they will be accessing it. AXPC therefore requests that BLM rescind this unrestricted access requirements and instead providing operators adequate notice of BLM's access needs. Doing so will ensure the safety BLM inspectors and allow BLM and operators to accommodate significant surface restrictions in an effective manner.

g. Formally Withdraw Proposed Adoption of Notice to Lessees No. 5

On November 14, 2024, BLM proposed to adopt Notice to Lessees No. 5 ("NTL-5"), which purports to clarify "when and how operators are expected to comply with certain requirements in the oil and gas measurement regulations" at 43 C.F.R. part 3170.[33] While BLM has not published a final version of NTL-5, insofar as AXPC is aware, the Bureau has also not withdrawn this infeasible proposed NTL. As such, in order to provide certainty to AXPC members and other

[33] 89 Fed. Reg. 90,037.

entities that will not be subject to proposed NTL-5's infeasible implementation timelines, we urge BLM to formally withdraw the November 2024 proposal as soon as possible.

AXPC's principal concern with the proposed NTL-5 relates to BLM's proposed enforcement of the provisions in Subparts 3174 and 3175 concerning uses of approved equipment and software for the measurement of oil and gas. Fundamentally, more than seven years after the development of Subparts 3174/3175, BLM still lacks resources and procedures for timely approval of measurement equipment.

Insofar as AXPC is aware, BLM has not approved any new oil and gas measurement equipment under the Subpart 3174/3175 standards. Threatening to take enforcement action in this context is improper and unworkable given BLM's current inability to approve equipment and software in a timely manner and the potential supply chain issues associated with operators of an estimated 89,000 wells seeking to acquire equipment that might be approved in the future. Moreover, proposed NTL-5 fails to adequately explain how existing equipment would be treated for enforcement purposes. Many thousands of separate pieces of existing equipment in the field should not be rendered obsolete and non-compliant.

Formally withdrawing proposed NTL-5 would provide lessees needed assurance that that they will not soon be at risk of noncompliance based on the NTL's infeasible deadlines and presently unworkable requirements. Formally withdrawing the NTL would also provide BLM the opportunity to reassess its proposed approach and implement a more realistic and achievable framework that promotes regulatory clarity while avoiding unnecessary disruptions to operations.

h. Modify Fluid Mineral Leases and Leasing Process Rule

On April 23, 2024, BLM issued a new final rule to revising its regulations governing fluid mineral leases and the leasing process ("2024 Fluid Mineral Lease Rule").[34] The Bureau characterized this rule as necessary to implement new fiscal lease terms enacted in the Inflation Reduction Act ("IRA"), but the scope of the 2024 Fluid Mineral Lease Rule's regulatory revisions extended far beyond those necessary to implement provisions of the IRA. The rule also created a new leasing process that is not authorized by, and is impermissible under, the MLA.

More specifically, BLM's 2024 Fluid Mineral Lease Rule created a new prioritization system for determining which lands under BLM's jurisdiction can be leased under the MLA. However, no such system exists under the MLA. Rather, Congress prescribed that the purpose of the MLA is to promote the orderly development of oil and gas resources on the public lands through private enterprise, and more specifically "to provide incentives to explore new, unproven oil and gas areas through noncompetitive leasing, while assuring through competitive bidding adequate compensation to the government for leasing in producing areas."[35] In contrast, the 2024 Fluid Mineral Lease Rule focuses BLM's leasing program primarily on the parcels' proximity to existing oil and gas development, and on the Bureau's subjective analysis concerning potential for oil and gas development—which again prioritizes proximity to existing development.

The MLA does not dictate or allow for this prioritization process. And even if the MLA could conceivably be construed to allow for this prioritization scheme, this radical new prioritization process certainly does not reflect the best reading of BLM's statutory authority under the MLA. Given that the statutory goal of the MLA is to provide taxpayers with a fair return for mineral

[34] 89 Fed. Reg. 30,916.
[35] *Arkla Exploration Co. v. Texas Oil & Gas Corp.*, 734 F.2d 347, 358 (8th Cir. 1984).

development, BLM should now modify the 2024 Fluid Mineral Lease Rule to focus on factors, such as commercial viability and geologic analyses, which are of interest to those who will invest in these types of opportunities.

AXPC also recommends that BLM modify certain provisions in the 2024 Fluid Mineral Lease Rule to remove the inappropriate and subjective leasing prioritization process, clarify BLM's obligation to hold lease sales and limit BLM's discretion to defer lease sales, and improve the lease nomination and expression of interest process. More specifically, AXPC recommends that BLM promulgate revisions to the 2024 Fluid Mineral Lease Rule that conform to BLM's limited statutory discretion to defer lease sales and promote the lawful implementation of a leasing program pursuant to the MLA by:

- directing when and how lease sales will be held by BLM offices;
- requiring compliance with the quarterly lease sale requirements specified in the MLA, which was historically followed by the BLM until around 2021;
- providing guidance on how BLM will accept fees for expressions of interest for acreage nominated for lease sales, including:
    - allowing for a refund or partial refund of these fees when the acreage is not actually put up for lease;
    - specifying who should pay the expression of interest fee (potentially the successful bidder after the lease is issued);
- setting a prioritization process for acreage put up during a lease sale based on a commercial and geologic analysis;
- requiring more extensive NEPA analysis or programmatic NEPA analysis to be conducted at the leasing stage and memorialize BLM's authority to tier to that analysis for further approvals;
- expanding options for meeting required financial assurance for lease obligations that includes other financial tools and does not limit lessees to only the use of bonds; and,
- clarifying approvals for wells in temporary abandonment status.

i. Modify the Waste Prevention Rule

On April 10, 2024, BLM issued a new final rule entitled "Waste Prevention, Production Subject to Royalties, and Resource Conservation" ("Waste Prevention Rule").[36] The Waste Prevention Rule established a new system for determining when loss of gas was avoidable or unavoidable from oil and gas operations; and for then determining when royalties are due on such lost gas. This new system for preventing waste and calculating royalties on "wasted" gas included several new technical requirements that BLM did not subject to notice and comment.

The Waste Prevention Rule also created new definitions for oil well and gas wells that are wholly different from and inconsistent with BLM's decades-old definitions for these terms. As a result, this rule has created substantial confusion and has been incredibly difficult to implement. BLM's rule also included certain inspection and recordkeeping requirements that are duplicative of requirements imposed by U.S. Environmental Protection Agency ("EPA") requirements, or which

[36] 89 Fed. Reg. 25,378.

otherwise do not result in meaningful waste reductions. Therefore, AXPC recommends that BLM promulgate revisions to the Waste Prevention Rule to better align the rule with the MLA and historic agency practice for gas that is not economic to capture, and to rescind provisions that are duplicative of EPA rules or do not result in significant waste reduction.

More specifically, AXPC urges BLM to address the following by promulgating revisions to the Waste Prevention Rule:

- The new calculation for emissions through low pressure sources needs to be revised. This formula was not subject to notice and comment and operators are finding that it includes fuel used for low-pressure flares that is not royalty bearing. Also, this formula deviates from better valuations practices that have long been used in the industry;
- The definition of "gas wells" does not align with state definitions. As a result, the paperwork for oil and gas permits is now very confusing. Operators are required to include portions of their state paperwork which clearly denote that a well is a gas well under state rules and then file contradictory entries in BLM AFMSS submissions stating that the well is an oil well for BLM's purposes. BLM personnel have already begun requiring industry members to seek changes to long-standing state field and pool rules, which could take years to achieve. At the same time, the preamble for BLM's Waste Prevention Rule clearly states that BLM will defer to state pool and field rules;
- ONRR does not have reporting forms that accommodate reporting of all the information required by BLM's Waste Prevention Rule. Therefore, the rule either needs to be updated to reflect that there are insufficient reporting mechanisms available or ONRR needs to update its reporting forms prior to the new requirements taking effect;
- Because BLM did not provide knowledgeable stakeholders notice or an opportunity to comment on the Waste Prevention Rule's gas sampling provisions, there are multiple significant technical loopholes that need to be clarified or otherwise addressed; and,
- An exceptions process needs to be created within the Waste Prevention Rule to meaningfully account for those situations when it is uneconomic to capture natural gas, including how to satisfactorily make such a determination.

j. Finalize the Proposed Rescission of the 2024 NPR-A Rule

On May 7, 2024, BLM substantially revised its governing regulations for the management of surface resources within the National Petroleum Reserve-Alaska ("NPR-A") through an final rule entitled "Management and Protection of the National Petroleum Reserve in Alaska" ("2024 NPR-A Rule").[37] AXPC believes that this rule impermissibly treated the NPR-A like wilderness instead of a petroleum reserve in contravention of Congress's clearly expressed intent in multiple different statutory authorities. As a result of ignoring express congressional intent and interpreting its governing statutes in a manner that did not reflect the best reading of those authorities, BLM's 2024 NPR-A rule imposed overly restrictive regulations that have limited access to critical energy resources, increased operational costs, and created so much regulatory uncertainty as to significantly discourage investment. Notwithstanding BLM's previous characterizations of the rule, the 2024 NPR-A Rule plainly hindered the responsible energy development that has received

[37] 89 Fed. Reg. 38,712.

broad local support in Alaska and reduced the economic opportunities that these responsibly conducted activities afford Alaskan communities.

AXPC therefore appreciates and supports BLM's June 3, 2025 proposal to rescind the 2024 NPR-A Rule.[38] We also fully concur with BLM's proposed conclusion that the 2024 NPR-A Rule "conflicts with and exceeds its statutory authority under the Naval Petroleum Reserves Production Act of 1976, undermines the purpose that Act, and is inconsistent with National energy policy."[39] AXPC intends to submit comments in support of BLM's proposed recission of the 2024 NPR-A Rule, and we respectfully urge BLM to finalize this proposed rescission as expeditiously as possible.

k. Modify BLM NEPA Implementation Rules and Guidance

In addition to the revisions to NEPA rules and regulations that AXPC, in Section II(a) above, recommended that DOI implement Department-wide, we also herein provide certain NEPA improvement recommendations that are focused on BLM specifically. These BLM-specific include:

- Providing Clarity on Categorical Exclusions: BLM should direct and protect the use of categorical exclusions as preferential whenever a project reasonably meets the specified conditions. The Bureau should also promulgate a rule or issue guidance that clarifies the process for adopting and applying categorical exclusions established by other agencies, as recently authorized by the Fiscal Responsibility Act.
- Ensuring Utilization of Congressionally-Directed NEPA Efficiencies: BLM should ensure that Section 390 of the Energy Policy Act of 2005 is implemented to the fullest extent possible by expressly directing that when a proposed action falls within a Section 390 categorical exclusion, no further NEPA review—including review for extraordinary circumstances—is required. BLM staff are limited to considering only those factors specified by Congress, eliminating unwarranted discretion and aligning BLM practice with statutory mandates and court rulings.
- Increasing Use of Tiering Under NEPA: BLM should provide its offices with enhanced guidance regarding when it is appropriate to tier to a prior NEPA analysis for an agency action. BLM could also streamline many NEPA reviews by undertaking more extensive or programmatic analyses at the leasing stage and then direct its employees on the means by which they can tier to that analysis when processing permits and authorizations that were already considered and accounted for in the analysis conducted at the leasing stage.

In addition to these recommendations, AXPC urges BLM to promulgate a rule to expand the use of third-party contractors with specialized expertise—such as climate and aquifer impacts—to help meet NEPA requirements, even allowing approved contractors to act as the agency's Responsible Official under certain safeguards. This reform is needed to help develop an efficient Permit-by-Rule program for APDs at BLM.

Changing BLM's NEPA implementation rules to allow approved third-party contractors—experts in NEPA review and complex environmental analysis—to serve as Responsible Officials for the preparation of NEPA documents can help the Bureau satisfy the growing technical demands of

[38] 90 Fed. Reg. 23,507.
[39] 90 Fed. Reg. at 23,507.

modern environmental review, including analysis of climate, greenhouse gas emissions, and other specialized issues, and the need for greater efficiency in the NEPA process. Under the rule that AXPC proposes BLM promulgate:

- Qualified, approved contractors will be able to oversee, prepare, and certify NEPA documents, including Environmental Assessments ("EAs") and EISs, on behalf of BLM.
- Contractors must enter into written agreements with BLM, certify no conflicts of interest, and work under agency oversight, ensuring integrity and transparency.
- By drawing on specialized expertise, the use of contractors as Responsible Officials is expected to enhance the quality of NEPA analyses, accelerate review timelines, and expand the BLM's technical capacity without straining agency resources.

In sum, by standardizing the application of categorical exclusions and leveraging the expertise of qualified contractors as Responsible Officials, AXPC believes that BLM can substantially reduce permitting times, costs, and regulatory burdens associated with NEPA compliance. These proposed changes will facilitate more efficient energy and infrastructure development, improve the consistency and quality of NEPA analyses, and ensure that the statutory intent behind categorical exclusions—to streamline routine approvals and reduce unnecessary litigation—is realized.

l. Issue Solicitor's Opinions to Ensure Conformance with BLM's Governing Statutes

In addition to the regulatory and policy rescissions and revisions that we recommended in the forgoing subsections, AXPC urges BLM to consider utilizing Solicitor's Opinions to provide additional guidance and clarity on recurring legal questions regarding the manner in which BLM's governing statutes may compel or limit the Bureau's authority to take certain actions.

Solicitor's Opinions are not official agency actions but are instructive in their ability to help inform how ambiguous statutory and regulatory terms should be interpreted and applied by agency employees. In this respect, Solicitor's Opinions can also help BLM in preventing and, if necessary, defending against lawsuits and other legal challenges.

As such, consistent with the regulatory and policy recommendations set forth above AXPC recommends that BLM consider developing and publishing Solicitor's Opinions on the following aspects of BLM's statutory jurisdiction:

- Interpreting FLPMA: It would be instructive to have a Solicitor's Opinion concerning the legality of BLM's 2024 Conservation & Landscape Health Rule Provisions related to:
    - Conservation/Restoration/Mitigation Leasing;
    - ACEC Determinations; and,
    - Compensatory Mitigation.
- BLM Lease Sale Requirements under the MLA: It would be helpful is the Solicitor's Office issued a legal opinion outlining BLM's responsibility to hold regular lease sales under the MLA.

- Use of Tiering Under NEPA: BLM employees tasked with NEPA compliance would likely benefit from legal guidance regarding when it is appropriate to tier to a prior NEPA analysis for an agency action.
- Addressing Split Estate Situations: It would be helpful for the Solicitor's Office to issue a legal opinion which outlines the Bureau's jurisdiction to regulate facilities not located on federal surface estates or on the surface of a federal oil and gas lease.
- State and Field Office Permitting Transparency: The Solicitor's Office could help promote the legality and transparency of BLM's permitting process by requiring the publication of state and field office permitting data, including permits submitted, permits approved, and should redefine the" waiting on operator" category used in APD reporting to ensure data does not include time in which companies are actually waiting upon BLM.
- State and Field Office Leasing Transparency: The Solicitor's Office could help promote the legality and transparency of BLM's leasing process by requiring BLM offices to provide writing a rationale whenever lands that are available for oil and gas leasing under a land use plan and are nominated for leasing are not included in an upcoming lease sale. BLM offices should also be required to clearly specify the precise corrective actions necessary to make nominated lands available in accordance with the current land use plan.

III. FWS

AXPC identified the following rules and policies for rescission or revision pursuant to Executive Order 14154, *Unleashing American Energy*, and Executive Order 14192, *Unleashing Prosperity through Deregulation*, and this Administration's to "[achieve] a meaningful reduction in regulatory burdens" while meeting "statutory obligations, and "advance[ing] American energy independence."[40] As previously discussed, these two EOs emphasize the importance that agencies' regulations comport with statutory mandates, and do not exceed their authority granted to them by Congress. As reflected by the recommendations below, many of the U.S. Fish and Wildlife Service ("FWS" or the "Service") regulations promulgated by the prior administration failed to consider, or properly weigh, the economic impacts of such actions, or the additional regulatory burden needless imposed on industries that already face immense administrative headwinds in their efforts to responsibly develop American energy.

a. Rescind the 2024 "Blanket" 4(d) Rule

Section 4(d) of the Endangered Species Act ("ESA") the Secretary of the Interior to issue protective regulations deemed "necessary and advisable to provide for the conservation of" threatened species.[41] In 2019, FWS issued a rulemaking that adopted a species-specific process for issuing protective regulations in a manner that aligned the Service's approach toward threatened species with that of the National Marine Fisheries Service ("NMFS") and longstanding agency practice. However, in 2024, FWS issued a rule altering this approach to impose an overly broad, one-size-fits-all approach to regulation that failed to delineate between protections for endangered versus threatened species, and similarly fails to account for species-specific needs[42] The rule, known as the "Blanket" 4(d) rule, automatically extends the "take" protections for endangered

[40] Regulatory Reform – Request for Information, 90 Fed. Reg. 21,504 (May 2025).
[41] 16 U.S.C. § 1533(d).
[42] Endangered and Threatened Wildlife and Plants; Regulations Pertaining to Endangered and Threatened Wildlife and Plants, 89 Fed. Reg. 23,919 (Apr. 2024).

species to those listed as threatened, undermining the intended distinction provided in the ESA between these two designations. This approach has resulted in unnecessary regulation and litigation that has delayed energy and infrastructure development, while failing to improve recovery rates as compared to more tailored protections and conservation strategies. The sum result of this approach is unnecessary restrictions, regulatory uncertainty, and increased compliance costs without effectively promoting species recovery.

Given the current administration's efforts to unburden the energy sector from some of the more egregious and unnecessary administrative roadblocks to development, the Service should rescind the Biden-era rule, and replace it with the prior 2019 FWS rule that properly distinguished between the ESA's approach to threatened and endangered species, and facilitated more tailored protections and conservation strategies. [43]

b. Rescind and Replace the 2024 Revisions for Listing/Delisting Species and Designating Critical Habitat Under the ESA

AXPC is concerned that certain aspects of the 2024 revisions[44] to the listing and delisting of species, as well as the designation of critical habitat, are inconsistent with the ESA and court decisions interpreting the Act, undermining the conservation benefits that would occur with clear and consistent, statutorily-supported, listing a delisting standards and procedures. The 2024 rule specified that listing determinations are to be made "without reference to possible economic or other impacts of such determination," among other provisions.[45] Further, it revised criteria to allow FWS to be able to designate unoccupied areas as critical habitat without first determining whether occupied habitat is inadequate. This policy directly conflicts with Section 4 of the ESA, which requires a consideration of the economic impact of a critical habitat designation, and any other relevant impacts.[46]

In its place, FWS should reinstate the (since rescinded) approach it finalized on December 18, 2020 amending ESA Section 4(b)(2) to provide more objective and judicially reviewable standards for excluding areas from critical habitat designations when the benefit of excluding the areas outweigh the benefit of including areas.[47] The reassertion of this rule would revise FWS's current approach, which provides no standards for these determinations, does not require exclusion even when benefits of exclusion clearly outweigh benefits of inclusion, and inappropriately suggests these decisions are not judicially reviewable.

c. Rescind and Replace the 2024 Revisions Regarding Interagency Coordination Under Section 7 of the ESA

Under ESA Section 7(a)(2), federal agencies must consult with FWS and NMFS ("the Listing Services") regarding the potential effects of a discretionary federal action upon a listed species and any designated critical habitat.[48] The Section 7 consultation process is the primary mechanism

[43] Endangered and Threatened Wildlife and Plants; Regulations Pertaining to Endangered and Threatened Wildlife and Plants, 89 Fed. Reg. 23,919 (Apr. 2024); Endangered and Threatened Wildlife and Plants; Regulations for Prohibitions to Threatened Wildlife and Plants, 84 Fed. Reg. 44,753, 44,754 (Aug. 2019).
[44] Endangered and Threatened Wildlife and Plants; Listing Endangered and Threatened Species and Designating Critical Habitat, 89 Fed. Reg. 24,300 (Apr. 5, 2024).
[45] 89 Fed. Reg. at 24,335.
[46] 16 U.S.C. 1533(b)(2).
[47] Endangered and Threatened Wildlife and Plants; Regulations for Designating Critical Habitat, 85 Fed. Reg. 82,376.
[48] 16 U.S.C. § 1536(a)(2).

through which these discretionary federal actions are reviewed under the ESA and potentially modified or conditioned as part of the jeopardy, adverse modification, and incidental take inquiry that the Listing Services undertake alongside the various action agencies. This consultation process has grown increasingly complex and unwieldy, which the Services have appropriately recognized as an ongoing issue, as reflected by 2019 revisions to the implementing regulations for ESA Section 7, which aimed to streamline the process.[49]

In 2024, FWS and NMFS revised this Section 7 interagency process in a manner that undermined the reforms in the first Trump Administration's 2019 Section 7 regulatory revisions and made the Listing Services' rules less clear and consultation processes less efficient.[50] As discussed in our comments to the Listing Services on the proposed 2024 revisions, the Services' proposal to delete 50 C.F.R. § 402.17 in its entirety makes the regulatory definition of the phrase "effects of the action" substantially less clear and seemingly allows for consideration of impacts wholly inconsistent with those allowed for under ESA Section 7. We also expressed concern that the Services' revisions to 50 C.F.R. § 402.14 glaringly misconstrue the Services' authority to require or recommend "reasonable and prudent measures" ("RPM") as part of the consultation process.[51] In part, these changes reversed a long-held FWS position that compensatory mitigation could not be imposed in the consultation process regarding incidental take statements.[52] These changes policy represents a stark departure from established agency practice and an expansion of the Listing Services' authority that is inconsistent with the plain language of the ESA. It will cause significant uncertainty and impose additional administrative and financial burden on project applicants.

In place of the Biden-era regulatory revisions, FWS should re-promulgate aspects of the 2019 regulatory reforms that, if dutifully implemented, could make Section 7 consultations more consistent and efficient thereby minimizing unnecessary delay and litigation. These 2019 reforms include, but not limited to:

1. A new definition of "destruction or adverse modification" that would potentially reduce the number of federal actions that would trigger Section 7 consultation requirements.
2. A new definition of "effect" as an impact that would not occur but for the agency action; require that the "effect" be foreseeable and reasonably certain to occur; and establish the environmental baseline from which to measure if an "effect" requires consultation.
3. Clearly exclude from consultation requirements actions where the agency has no direct involvement or control; where the action would not appreciably change the conservation status or is not the proximate cause of risks to a listed species or its habitat.

[49] Endangered and Threatened Wildlife and Plants; Regulations for Interagency Cooperation, 84 Fed. Reg. 44,976 (Aug. 27, 2019).
[50] Endangered and Threatened Wildlife and Plants; Regulations for Interagency Cooperation, 89 Fed. Reg. 24,268 (Apr. 5, 2024).
[51] 88 Fed. Reg. at 40,756–757.
[52] Endangered and Threatened Wildlife and Plants; Regulations for Interagency Cooperation, 89 Fed. Reg. 24,268 (Apr. 5, 2024).

d. Reinstate the Regulatory Definition of "Habitat" that FWS Rescinded in 2022

In 2022, FWS rescinded the regulatory definition of "habitat" it promulgated in December of 2020 ("2020 Habitat Definition"). [53] The 2020 Habitat Definition defined "habitat" as the "abiotic and biotic setting that currently or periodically contains the resources and conditions necessary to support one or more life processes of a species."[54] Thus, the 2020 Habitat Definition also provided, for the first time since the enactment of the ESA, a reasonable, science-based, and statutorily supported mechanism for distinguishing areas that may be appropriately considered habitat for a species from areas which are unlikely to include those physical and biological features needed for a species to survive and reproduce. And, because the ESA only allows for the Listing Services to designate "habitat" as "critical habitat," the definition served as a restraint to prevent FWS from designating as "critical habitat" areas that are completely uninhabitable to the species.

In addition to being useful and necessary, Supreme Court precedent further supports the continued use of the 2020 Habitat Definition. The Court, ruling in *Weyerhaeuser Co v. U.S. Fish & Wildlife Serv.*, noted that while there was no express requirement to adopt a regulatory definition for "habitat," the word itself was *crucial* to assessing the scope of the Services' authority to designate "critical habitat."[55] While there is no doubt that unoccupied areas may fall within the definition of both "habitat" and "critical habitat," areas which are entirely uninhabitable to a listed species do not, and should not, fall within the confines of either definition.

As such, the 2020 Habitat Definition should be reinstated by the Service. FWS could compliment this approach by amending ESA Section 4(b)(2) to provide more objective and judicially reviewable standards for excluding areas from critical habitat designations when the benefit of excluding the excluding areas outweigh the benefit of including areas. This revision would shift FWS's current approach, which provides no standards for determinations, does not require exclusion even when benefits of exclusion clearly outweigh benefits of inclusion, and suggests these decisions are not judicially reviewable.

e. Rescind and Replace the Regulatory Definition of "Harm"

In the interests of lawfully interpreting the ESA and reducing unnecessary regulatory burdens associated with the implementation of the Act, AXPC agrees with FWS and NMFS that the current regulatory definition of "harm" does not reflect the best meaning of the term as it is used in the Act, as is required by the Supreme Court's holding in *Loper Bright*.[56] As used in the Act, "harm" refers to an "affirmative act[ ] . . . directed immediately and intentionally against a particular animal—not [an] act[ ] or omission[ ] that indirectly and accidentally cause[s] injury to a population of animals."[57] As such, the best reading of this statute, as explained by the dissenting justices in *Sweet Home Chapter of Communities for a Great Oregon v. Babbitt* ("*Sweet Home*"), requires affirmative action on the part of the individual—knowing causation.[58]

---

[53] Endangered and Threatened Wildlife and Plants; Regulations for Listing Endangered and Threatened Species and Designating Critical Habitat, 87 Fed. Reg. 37,757 (June, 2022).
[54] Endangered and Threatened Wildlife and Plants; Regulations for Listing Endangered and Threatened Species and Designating Critical Habitat, 85 Fed. Reg. 81,411 (Dec., 2020) ("2020 Habitat Definition").
[55] 139 S.Ct. 361, 372 (2018).
[56] *Loper Bright,* 144 S.Ct. at 2273.
[57] Rescinding the Definition of "Harm" Under the Endangered Species Act, 90 Fed. Reg. 16,102, 16,103 (Apr. 17, 2025).
[58] 515 U.S. 687 (1995).

However, AXPC is concerned that an outright rescission of the regulatory definition of "harm" may increase the likelihood of divergent interpretations that could needlessly create confusion and uncertainty. If the definition as a whole were rescinded as is proposed, and the term "harm" would be wholly undefined, which may invite challenges by litigious groups intent on using the ESA as a tool for constraining industry operations, rather than a tool for conservation. As a result, we urge FWS and NMFS to consider promulgating a revised regulatory definition of "harm" based on the interpretation described in the preamble to the proposed rescission.[59]

f. Rescind and Replace the Regulatory Definition of "Harass"

The regulatory definition for "harass" under the ESA should be rescinded and replaced for the same reasons that FWS previously proposed to rescind the "harm" definition.[60] Revisions should focus on eliminating current regulatory definition's inclusion of "negligent" acts or "omissions."[61] By defining "Harass" under the ESA to include intentional or *negligent* acts or *omissions* that create the "likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding, or sheltering,"[62] the Listing Services are expanding the reach of the ESA beyond what Congress intended.

As stated above, the single best reading of the ESA is that it only prohibits affirmative actions directed at the species.[63] The word "harass" is found among nine other words, all of which imply a form of direct or purposeful action to kill or control a species.[64] Consistent with the Listing Services' efforts to conform their regulatory definition "harm" in line with a proper reading of the statute, this regulatory definition of "harass" should reflect the Act's single best meaning. As such, the Listing Services should ensure that this lawful and necessary interpretation of the ESA is codified by enacting a definition of "harass" that explicitly it to affirmative and purposeful actions directed at the protected species. As with the regulatory definition of "harm," promulgating a lawful definition of "harass" can help prevent needlessly introducing any litigation risks, uncertainty, and confusion that may be associated with the absence of any regulatory definition.

g. Modify Regulations and Guidance to Promote Voluntary Conservation

Congress passed the ESA in 1973 to "provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved [and] to provide a program for the conservation of such endangered and threatened species…"[65] While conservation remains a tenet of the Service's organizational purpose and the ESA's mandate to FWS, a handful of groups have exploited the citizen suit provisions of the ESA to compel FWS to subjugate the goal of

---

[59] *90 Fed. Reg.* at 16,102. In addition to the above discussion, AXPC recently provided comments discussing this issue at length. (See American Exploration & Production Council, Comments on Proposed Changes to Endangered Species Act Regulations, 90 Fed. Reg. 16,102, FWS-HQ-ES-2025-0034 (May 19, 2025)).

[60] Rescinding the Definition of "Harm" Under the Endangered Species Act, 90 Fed. Reg. 16,102, 16,103 (Apr. 17, 2025).

[61] 50 C.F.R. § 17.3.

[62] 50 C.F.R. § 17.3.

[63] *Sweet Home*, 515 U.S. at 719–20.

[64] *Id*. at 720 (noting that "harm" is "merely one of 10 prohibitory words in [the ESA's definition of "take"], and the other 9 fit the ordinary meaning of 'take' perfectly. To 'harass, pursue, hunt, shoot, wound, kill, trap, capture, or collect' are all affirmative acts (the provision itself describes them as 'conduct,' see § 1532(19)) which are directed immediately and intentionally against a particular animal—not acts or omissions that indirectly and accidentally cause injury to a population of animals.").

[65] 16 U.S.C. § 1531(b).

species conservation in favor of a strategy to petition to list as many species as possible under the ESA regardless of conservation benefit, and at the price of fulfilling its conservation mandate. According to a law review article published by an Attorney-Advisor at DOI directly involved with the citizen suit issue:

> The Fish and Wildlife Service's (FWS) program to list species under the Endangered Species Act (ESA) has been mired in litigation and controversy for decades. Much of that litigation has addressed not substantive decisions, but FWS's inability to comply with the ESA's deadlines for taking action. With limited resources, effectively unlimited workload, and strict statutory deadlines, each management or litigation strategy that FWS has used to try to address this conundrum ultimately failed. As a result, court orders and settlement agreements swamped the listing program and FWS lost any ability to prioritize its efforts and get the most bang for the buck in protecting imperiled species. This race-to-the-courthouse environment decreased the program's efficiency and further limited the number of species actually listed and protected by the ESA.[66]

The means by which these groups compelled this shift from a conservation-driven agenda to a listing-volume agenda that was later compelled in legal settlements are numerous and beyond the scope of these comments. The result of this shift, however, is fairly evident and extremely troubling from both a governance and conservation perspective.

In settlements executed with the Service's primary litigants, FWS agreed to undertake hundreds of listing actions while at the same time refraining from finding, as the ESA allows, that listing some species may be warranted but precluded by higher priority species.[67] Not only did the settlement require that FWS refrain from utilizing its statutory authority to triage at-risk species, it removed this resource-based prioritization authority at a time when resources were most scarce.

Unfortunately, lawsuits and settlements like this have continued to proliferate, thereby further transforming FWS's ESA implementation practices toward a volume-based listing and designation approach and further away from the statute's conservation objectives. Absent the ability to prioritize species facing the greatest threats or the resources to direct to those species' recovery, FWS must therefore look to voluntary conservation as one of the few means by which FWS can meet its conservation objectives and ESA mandates.

AXPC is proud of our industry's commitment to species protection, and is keenly interested in working with FWS on a new, more effective model for protecting species that is primarily focused on collaborative voluntary conservation—not an automatic default to the inflexible restrictions of the ESA. We believe that the challenging litigation and regulatory environment faced by FWS provides a unique opportunity—in fact, the necessity—to find a better, more efficient mechanism to protect species. We believe the foremost mechanism for achieving that goal is a robust and collaborative voluntary conservation program. And we believe that the following reforms can help FWS effectively promote these collaborative and voluntary conservation efforts:

---

[66] Jesup, Benjamin, *Endless War or End This War? The History of Deadline Litigation Under Section 4 of the Endangered Species Act and the Multidistrict Litigation Settlements*; 14 VERMONT J. OF ENV. L. (Dec., 2013).

[67] *In re Endangered Species Act Section 4 Deadline Litigation*, No.10-377 [EGS], MDL Docket No. 2165 (D.D.C. May 10, 2011).

- Meaningfully Engage and Collaborate with State Conservation Partners: A successful voluntary and collaborative conservation program requires the active engagement of State and local governments. Section 6(a) of the ESA requires such a partnership in directing that "in carrying out the program authorized by the Act, the Secretary shall cooperate to the maximum extent practicable with the States."[68] State and local governments have the greatest knowledge of the species, habitat, and conservation plans within their jurisdictions, they are actively involved in landowner engagement, surveying, biological research, and the development of highly effective conservation plans like many of those referenced herein. As such, AXPC recommends that the Services make every effort to collaborate more closely with state wildlife agencies on conservation efforts and utilize their often superior insights to achieve better conservation outcomes for listed and at-risk species.

- Devote Resources to Voluntary Conservation Activities: AXPC believes that FWS should strengthen and promote private stewardship by better coordinating existing federal grants and assistance programs for voluntary conservation activities, providing technical assistance to property owners seeking to protect species on their private land, and developing model form agreements, conservation practices guidance, and other means to facilitate individual conservation activities. We recognize that each of these efforts will require the expenditure of funds and resources that are increasingly scarce given the resources required to respond to litigation and serial-petitioning groups, but believe that investing in expansion of voluntary conservation programs will likely have the greatest impact on species conservation.

  This investment signals to those considering undertaking voluntary conservation measures that FWS supports these efforts and makes its support tangible through the investment of Service resources. Further, because private industry and landowners bear the majority of the costs to undertake voluntary conservation efforts, modest increases in the Service's investment in collaborative conservation can leverage a substantially larger total investment from industry and private landowners.

- Increase Transparency: AXPC urges FWS to provide industries, landowners, and other conservation stakeholders with a greater understanding of the types of conservation efforts and level of conservation effort necessary to avert listing under the ESA. Potential stakeholders in voluntary conservation are frequently dissuaded from undertaking conservation efforts when the benefits of their action are uncertain.

  AXPC recognizes that the Services' listing determinations must be based on the listing factors mandated by the ESA and that FWS often cannot state with certainty the precise actions which, if implemented, would avert the need to list a species. That being said, in the conduct of its listing analysis, FWS, from an early stage, is attempting to identify and quantify the threats that may ultimately lead to a final listing determination. If FWS were to bring voluntary conservation stakeholders into those discussions, or at least share interim conclusions, those stakeholders would be in a much better position to target their efforts at the impacts of greatest concern to FWS and avoid the proliferation of divergent efforts based on different stakeholders' best guess of what is most likely to avert a listing.

[68] 16 U.S.C. § 1355.

- Develop a More Streamlined and Nimble Approach to the Development and Approval of Candidate Conservation Agreements with Assurances ("CCAA"): CCAAs are tremendously useful tools for conservation and, as a consequence of the assurances therein, provide industries and landowners significant incentives to participate. CCAAs, however, are also time-consuming to develop and cumbersome to implement. Some of these complexities may be unavoidable when the CCAA is designed to cover a broad geographic range, multiple participants, and multiple land-use industries.

  Notwithstanding their complexity, these larger CCAAs remain necessary and appropriate where threats to species are best managed on a macro-scale and the interests of the jurisdictions and stakeholders allow for the development of CCAAs of this scale. In addition to these more common large-scale CCAAs, AXPC recommends that FWS also support the development of smaller, less complex, CCAAs.

  Smaller, more nimble CCAAs can be approved and implemented more quickly, thereby providing species with the benefit of early intervention. Moreover, smaller-scale CCAAs allow conservation measures to be tailored to sub-habitat scales and allow the requirements to be drafted with precision to incentivize participation by specific types of landowners or land-use industries.

- Improve the Habitat Conservation Plan ("HCP") Program:[69] Like CCAAs, HCPs are useful tools to incentivize voluntary conservation by insulating participating landowners from ESA liabilities and restrictions through issuance of an incidental take permit ("ITP"). Unfortunately, HCPs also share with CCAAs many of the same impediments to widespread adoption, such as cost concerns, considerable delay, and residual uncertainty.

  An HCP is costly to develop and implement, particularly so when it is designed to cover a broad geographic range or multiple species. FWS appropriately assists States and territories to manage these costs through programs like the HCP Assistance and HCP Land Acquisition Grant programs, but there are no similar assistance programs available to private landowners. While AXPC recognizes that FWS does not have unlimited resources for grant programs, we believe that providing funding to private landowners and entities under the HCP program can leverage additional private investment and thus result in a greater conservation benefit.

  In addition to cost issues, expansion of conservation efforts through HCPs is hampered by the time frequently required for development and subsequent approval of HCPs. FWS should address the routine delays in the HCP approval process by mandating adherence to approval deadlines, and devoting the funds and technical assistance necessary to meet those mandates. Without some expectation of a realistic approval timeframe, HCPs will continue to be dismissed by some landowners as not worth the effort, rather than a useful tool for incentivizing voluntary conservation.

  AXPC also recommends that FWS should issue rules that promote and facilitate increased reliance on HCPs and voluntary conservation more generally by appropriately interpreting

[69] AXPC acknowledges and appreciates that FWS recently published a request for information on ESA Section 10(a) Program Implementation. (90 Fed. Reg. 24,285 (June 9, 2025). AXPC intends to submit comments similar to these in response to that request.

a reasonable scope of intra-FWS consultation under ESA for incidental take permits. Such reforms could include:

- Clarifying that FWS's issuance of the permit only authorizes incidental take of the covered species and does not grant FWS authority to regulate or authorize the covered activities, and that the scope of any intra-FWS Section 7 consultation is limited to the impacts of the taking on covered species rather than potential impacts associated with non-federal covered activities.
- Formalizing and strengthening the FWS "no surprises policy," pursuant to the language in ESA Section 10 to allow for cost recovery agreements under which non-agency parties can reimburse FWS for services provided.
- Finally, FWS should consider whether it is the authority to provide enhanced mechanisms for regional, habitat-specific, and state-driven HCPs.

- Utilize the Policy for Evaluation of Conservation Efforts When Making Listing Decisions ("PECE") More Consistently and Effectively: AXPC urges FWS to utilize the full extent of the Service's authority under the ESA and the Policy for Evaluation of Conservation Efforts When Making Listing Decisions ("PECE") to meaningfully consider the comprehensive impact of voluntary conservation measures against the need to list species. Foremost among the considerations under which a landowner or company makes a decision to invest in voluntary conservation is the prospect of averting the need to list a species.

  Listing decisions are governed by section 4(b)(1) of the ESA, which requires that a listing decision be made "solely on the basis of the best scientific and commercial data . . . *and after taking into account those efforts, if any, being made by any state or foreign nation or political subdivision of a state or foreign nation to protect such species* . . . ."[70] The plain language of the ESA thus requires the FWS to consider conservation measures currently being undertaken by other entities in determining whether listing of a species is warranted. The implementing regulations for the ESA similarly provide that the Secretary "*shall* take into account . . . those efforts, if any, being made by any State or foreign nation or any political subdivision of a State or foreign nation to protect such species . . . ."[71]

  Further, one of the listing factors FWS must consider is "other natural or manmade factors" that affect a species' continued existence.[72] FWS has interpreted this provision to require the Service "to consider the conservation efforts of not only State and foreign governments but also of Federal agencies, Tribal governments, businesses, organizations, or individuals that positively affect the species' status."[73]

  Similarly, in promulgating PECE, the Services explained that, when making a listing decision, the ESA requires consideration of all conservation efforts being undertaken.[74] PECE "identifies criteria [the Services] will use in determining whether formalized conservation efforts that have yet to be implemented or to show effectiveness contribute to

[70] 16 U.S.C. § 1533(b)(1)(A) (emphasis added).
[71] 50 C.F.R. § 424.11(f) (emphasis added).
[72] 16 U.S.C. § 1533(a)(1).
[73] 68 Fed. Reg. 15101, 15,113 (Mar. 28, 2003).
[74] 68 Fed. Reg. 15,100 (Mar. 28, 2003).

making listing a species as threatened or endangered unnecessary."[75] PECE sets forth two fundamental criteria that guide the Service's evaluation of whether new conservation measures may be considered in a listing decision: (1) the certainty that the conservation measure will be implemented; and (2) the certainty that the conservation measure will be effective.[76]

FWS, therefore, has not only ample authority, but also a specific process, to determine that listing species is not warranted based on the existence of voluntary conservation measures. While we are certain that FWS is aware of this authority, AXPC is aware of numerous conspicuous instances, such as the Service's listing of the lesser prairie chicken and recent proposed listing of the monarch butterfly, in which FWS declined to fully exercised this authority and failed to recognize the full extent of the benefits associated with a wide array of voluntary conservation efforts.

- Subject Listing Petitions to an Appropriate Level of Scientific Scrutiny and Reject Those that Fail to Meet the ESA's Listing Standards: As we have noted extensively in these comments, FWS is continually barraged by petitions to list different species, subspecies, and distinct population segments—some demanding action on dozens to hundreds of species at a time. While we recognize that the resources needed to respond to these petitions (and frequently, related litigation) have made voluntary conservation the Service's foremost option for meeting its ESA mandates and departmental objectives, AXPC is concerned about the impact on voluntary conservation if FWS continues to sacrifice analytical rigor to meet statutory deadlines for responding to so many petitions in order to avoid the inevitable litigation if the Service were to fail to respond.

  The opportunity to expand the role of voluntary conservation that is presented by the current environment faced by FWS could be squandered if the Service does not begin holding listing petitions to the ESA's high listing standards and, as a result, continues to subject stakeholders to a level of listing activity that overwhelms their ability and willingness to engage in further voluntary conservation.

  There are no conservation goals served by filing a petition to list hundreds of species. These petitions are strategically designed to overwhelm the Service's ability to respond within the ESA's 12-month requirement. This 12-month requirement, however, cannot be read in isolation. The ESA permits the Secretary to list species only,

  > . . . on the basis of the best scientific and commercial data available to [the Secretary] . . . *after* conducting a review of the status of the species and after taking into account those efforts, if any, being made by any State or foreign nation, or any political subdivision of a State or foreign nation, to protect such species, whether by predator control, protection of habitat and food supply, or other conservation practices, within any area under its jurisdiction; or on the high seas.[77]

  As the language reveals, "the best scientific and commercial data" does not become available to FWS until it can conduct a status review and a fairly comprehensive accounting

[75] 68 Fed. Reg. 15,100.
[76] 68 Fed. Reg. 15,100.
[77] 16 U.S.C. § 1533(b)(1)(A) (emphasis added).

of multijurisdictional conservation efforts. Based on this clear requirement, the only rational interpretation of the 12-month deadline is that the FWS must make listing decisions based on the best scientific and commercial information it is capable of reviewing within 12 months of receiving a petition. If, due to resource constraints or the filing of petitions for numerous species at once, FWS is not able to complete a review of relevant data within 12 months, *then the proper determination in such cases is that listing is not warranted.* Indeed, courts have held that, when faced with incomplete or inconclusive information, the listing services' determination must be to *not* list.

> Under Section 4, the default position for all species is that they are not protected under the ESA. A species receives the protections of the ESA only when it is added to the list of threatened species after an affirmative determination that it is "likely to become endangered within the foreseeable future." Although an agency must still use the best available science to make that determination, *Conner* [*v. Burford,* 848 F.2d 1441 (9th Cir. 1988)] cannot be read to require an agency to "give the benefit of the doubt to the species" under Section 4 if the data is uncertain or inconclusive. Such a reading would require listing a species as threatened if there is any possibility of it becoming endangered in the foreseeable future. This would result in all or nearly all species being listed as threatened.[78]

Certainly, it is not the case that the ESA requires, *or even permits*, FWS to respond within 12 months to a petition to list dozens or hundreds of species with a similar omnibus listing of so many species. Nor should the ESA be interpreted to allow the Service's listing process to be so easily manipulated by groups purposely overwhelming the Service with so many petitions to list that FWS cannot comply with the 12-month deadline. The ESA requires FWS to conduct a meaningful analysis of five different listing factors[79] that the listing services' themselves describe as "comprehensive" and "thorough."[80] FWS simply cannot meet these analytical requirements when, for instance, a group petitions to list 404 different aquatic and aquatic-dependent species[81] or 52 different amphibians and reptiles across 45 States.[82]

Private landowners and land-use industries, like the oil and gas industry, have demonstrated a willingness to undertake extensive voluntary conservation efforts, but, in order to sustain

---

[78] *Trout Unlimited v. Lohn*, 645 F. Supp. 2d 929, 947 (D. Or. 2007); *see also Ctr. for Biological Diversity v. Lubchenco*, 758 F. Supp. 2d 945, 955 (N.D. Cal. 2010) (finding that the "benefit of the doubt" concept does not apply in the § 4 listing context); *Or. Nat'l Res. Council v. Daley,* 6 F. Supp. 2d 1139, 1152 (D. Or. 1998) (ESA requires a determination as to the likelihood – rather than merely the prospect – that a species will or will not become endangered in the foreseeable future); *Fed'n of Fly Fishers v. Daley*, 131 F. Supp. 2d 1158, 1165 (N.D. Cal. 2000) ("The ESA cannot be administered on the basis of speculation or surmise.").

[79] 16 U.S.C. § 1533(a)(1)(A-E).

[80] See 79 Fed. Reg. 52,276, 52,277 (Sept. 3, 2014).

[81] Center for Biological Diversity, Petition to List 404 Aquatic, Riparian and Wetland Species from the Southeastern U.S. as Threatened or Endangered under the Endangered Species Act (Apr. 20, 2010), available at https://www.biologicaldiversity.org/programs/biodiversity/1000_species/the_southeast_freshwater_extinction_crisis/pdfs/SEPetition.pdf.

[82] *See* Center for Biological Diversity, Petition to List 53 Amphibians and Reptiles in the U.S. as Threatened or Endangered Species under the Endangered Species Act (July 11, 2012), available at https://www.biologicaldiversity.org/campaigns/amphibian_conservation/pdfs/Mega_herp_petition_7-9-2012.pdf.

that level of cooperative conservation, FWS needs to be willing to use the full authority provided by the ESA to manage the universe of species on which to ask these voluntary conservation stakeholders to focus their efforts. Were FWS to take steps to push back against those groups seeking to misuse the ESA through manipulation of the listing process, the Service could build the trust necessary to grow the universe of private landowners who, like the oil and gas industry, see voluntary efforts as an effective conservation tool and a sound business practice.

h. Issue a Rule Clarifying that the Migratory Bird Treaty Act Prohibits Only Intentional Actions

In April 2025, DOI issued Solicitor's Opinion M-37085, which withdrew a Biden-era legal opinion that determined the Migratory Bird Treaty Act's ("MBTA's") prohibitions apply to the accidental or incidental taking of migratory birds.[83] This Biden Administration interpretation of the MBTA broadly and impermissibly placed private citizens and entities at risk of criminal liability for countless otherwise lawful everyday activities (like driving a car, plowing a field, or owning a building with large windows) that may incidentally take any of the 1,800+ bird species protected by the MBTA. As such, AXPC appreciates FWS' rescission of the Biden-era opinion, and reinstatement of M-37050, a 2017 solicitor's opinion that determined the MBTA to only apply to affirmative actions aimed at taking or killing migratory birds, their nests, or their eggs.[84]

AXPC recommends that FWS update M-37050 to explicitly note, consistent with the Supreme Court's holding in *Loper Bright*, that it is based on the single best meaning of the MBTA that was fixed at the time it was enacted in 1918.[85] We also urge FWS to also consider promulgating a regulatory interpretation of the MBTA to accompany Solicitor's Opinion M-37050.

i. Promulgate Other Reforms to Improve ESA Implementation and Compliance

Given the inefficient and ineffective manner in which FWS has implemented the ESA in the past, AXPC believes that FWS can, and should, use promulgate rules and/or issue guidance to help reorient implementation of the ESA toward conservation by reining in interpretations and implementation approaches that have allowed litigation and unrelated policy goals to needlessly drain FWS's resources.

1. Revise "Distinct Population Segment" ("DPS") Definition and Guidance

The ESA applies to distinct taxonomic species, "any subspecies of fish or wildlife or plants, and any distinct population segment of any species of vertebrate fish or wildlife that interbreeds when mature."[86] The aspects of this definition that relate to DPS were intensely scrutinized during congressional debate for fear that, through recognition of DPS, the ESA could be manipulated to disaggregate a species to such an extent that even healthy and abundant species could be found to be endangered.

Congress' 1978 addition of the phrase "DPS" was, in fact, designed to constrain language in the 1973 version of the ESA which extended the statute to "any other group of fish or wildlife of the

[83] DOI Solicitor's Opinion M-37085, Withdrawal of Solicitor Opinion M-37065 " Permanent Withdrawal of Solicitor Opinion M-37050 'The Migratory Bird Treaty Act Does Not Prohibit Incidental Take'" (Apr. 11, 2025).
[84] DOI Solicitor's Opinion M-37050, The Migratory Bird Treaty Act Does Not Prohibit Incidental Take (Dec. 22, 2017), available at https://www.doi.gov/sites/default/files/uploads/m-37050.pdf.
[85] *Loper Bright*, 144 S.Ct. at 2273.
[86] 16 U.S.C. § 1532(16).

same species or smaller taxa in common special arrangement that interbreed when mature."[87] Still, the U.S. General Accounting Office ("GAO") warned that use of a DPS could lead to unnecessary subdivision that did little more than lead to the listing of segments of healthy and abundant species.[88] In response to such concerns, Congress noted in the Conference Report on the 1978 ESA Reauthorization that it "is aware of the great potential for abuse of this authority," and therefore included an admonition that the listing services use their DPS authority "sparingly and only when then biological evidence indicates that such action is warranted."[89]

Initially, FWS and the National Marine Fisheries Service (collectively "the Listing Services") generally respected the high bar that Congress demanded be used to designate a DPS, but that has changed significantly in recent years. Now, when faced with a range-wide species that does not meet the ESA's definition of a threatened or endangered species, petitioning groups and FWS alike are increasingly inclined to disaggregate range-wide population of species into multiple smaller DPSs until the population segments are small enough and vulnerable enough to be listable in the judgement of FWS.

The reason this disaggregation practice has proliferated alongside increased misuse of the ESA to achieve policy goals unrelated to consideration is because the concept of a "DPS" is used in conservation biology—it is a term that was created and used, but never defined, in the ESA. In the absence of a statutory definition, the Listing Services in 1996 established a DPS policy ("DPS Policy") that generally Congress's intended high bar to designating DPSs, but remained to subjective to prevent the disaggregation abuses that have been observed in recent years.[90] Under the DPS Policy, for a population segment to be considered a DPS under the 1996 DPS Policy, the segment must meet two criteria: (1) it must be discrete; and (2) it must be significant.[91] While the policy goes on to explain the elements required to be considered under these two criteria, as evidenced by listing actions such as lesser prairie chicken and North American wolverine, these guidelines and criteria have proven ineffective at preventing FWS from unscientifically dividing otherwise healthy range-wide population of species into smaller "listable" units.

As such, AXPC recommends that FWS revise its DPS Policy to include more objective science-based criteria for DPSs are designated "sparingly" as Congress intended. We further recommend that FWS consider adopting these enhanced DPS designation criteria within the Service's regulations rather than as a policy directive or guidance document.

2. "Establish Best Available Evidence Standard"

The ESA requires FWS to use the "best commercial and scientific data" available when: (1) making listing and critical habitat determinations under Section 4; (2) preparing biological opinions under Section 7; and, (3) determining that unforeseen circumstances exist with respect to an HCP under Section 10. However, neither the Act nor the Service's regulations define what constitutes the "best commercial and scientific data." Thus, in practice, the evaluation of scientific data under the ESA has been inconsistent and unpredictable. And, given the ESA's lack of

[87] *See* U.S. General Accounting Office, Endangered Species: A Controversial Issue Needing Resolution (1979).
[88] *See* U.S. General Accounting Office, Endangered Species: A Controversial Issue Needing Resolution (1979).
[89] S. Rep. No. 95-151, at 7 (1979), reprinted in ESA Legislative History at 1397.
[90] 61 Fed. Reg. 4,722 (Feb. 7, 1996).
[91] 61 Fed. Reg. at 4,725. If the species is both discrete and significant, it is considered a DPS, but that DPS is not then protected under the ESA unless and until the listing agency determines that the DPS is either threatened or endangered under the ESA.

definitional terms, and the fact that biological and conservation data are, by their very nature, often ambiguous and subjective rather than objectively quantifiable, court decisions reviewing FWS's scientific determinations are often equally ambiguous and inconsistent.

In 1994, the Listing Services issued an interagency policy statement "to provide criteria, establish procedures, and provide guidance to ensure that decisions made by the Services under the authority of the [ESA] represent the best scientific and commercial data available."[92] While this policy sets forth reasonable practices for the review of scientific data, like preventing bias, promoting impartiality, utilizing peer review, and evaluating whether information is credible or reliable, it remains too subjective and prone to abuse. In fact, FWS has frequently relied on this policy when based listing decision on highly speculative and unverifiable habitat modeling results simply because, in the absence of alternative habitat modeling efforts, the Service viewed the speculative and unreliable modeling projections as the "best" available. But, "[t]he ESA cannot be administered on the basis of speculation or surmise."[93]

Thus, AXPC recommends that FWS work with NMFS to bolster the 1994 policy on the ESA's information standards. Additionally, to ensure that this policy is consistently followed by the various FWS field offices, we believe it should be codified in the Service's regulations. This codification would raise the level of awareness, both within FWS and among the regulated community, of the Act's information quality requirements. It would also make the policy's requirements enforceable, rather than merely guidance.

3. Promulgate a Regulatory Definition for "Extinction"

The ESA sets a high standard for listing a species, subspecies, or DPS as threatened or endangered. And while courts have not done so as consistently as AXPC believes is necessary, the judiciary has generally interpreted these listing standards to reflect Congress' intent that the decision to list a species as threatened or endangered not be based on speculation or a misplaced intent to err on the side of species conservation:

> Under Section 4, the default position for all species is that they are not protected under the ESA. A species receives the protections of the ESA only when it is added to the list of threatened species after an affirmative determination that it is 'likely to become endangered within the foreseeable future.' Although an agency must still use the best available science to make that determination, *Conner* [*v. Burford,* 848 F.2d 1441 (9th Cir. 1988)] cannot be read to require an agency to 'give the benefit of the doubt to the species' under Section 4 if the data is uncertain or inconclusive. Such a reading would require listing a species as threatened if there is any possibility of it becoming endangered in the foreseeable future. This would result in all or nearly all species being listed as threatened.[94]

---

[92] Interagency Cooperative Policy on Information Standards Under the Endangered Species Act, 59 Fed. Reg. 34271 (July 1, 1994).

[93] *Federation of Fly Fishers v. Daley*, 131 F. Supp. 2d 1158, 1165 (N.D. Cal. 2000).

[94] *Trout Unlimited v. Lohn*, 645 F. Supp. 2d 929, 947 (D. Or. 2007); *see also Center for Biological Diversity v. Lubchenco*, 758 F. Supp. 2d 945, 955 (N.D. Cal. 2010) (finding that the "benefit of the doubt" concept does not apply in the Section 4 listing context); *Oregon Natural Resources Council v. Daley,* 6 F. Supp. 2d 1139, 1152 (D. Or. 1998) (ESA requires a determination as to the likelihood—rather than the mere prospect—that a species will or will not become endangered in the foreseeable future); *Federation of Fly Fishers v. Daley*, 131 F. Supp. 2d 1158, 1165 (N.D. Cal. 2000) ("The ESA cannot be administered on the basis of speculation or surmise.").

As this holding reflects, whether a species should be listed under the ESA (or not) is not a question of whether the species is important, iconic, or deserving of conservation. Nor can species be listed based on a finding that they are being harmed, may be harmed in the future, that their abundance and range had declined, or that there are limits to the species' future population growth.

Unfortunately, in recent years, FWS began basing listing decisions on precisely these types of factors. Species are increasingly being listed based, not on their likelihood of extinction, but on the fact that they are considered "charismatic megafauna,"[95] or the mere existence of risks, previous population declines, or pessimistic future habitat projections.

The reasons for this diminishment of the ESA's listing standards are numerous, but all are attributable to the lack of any statutory or regulatory definition of "extinction." Absent a statutory or regulatory definition of "extinction," FWS has been increasingly emboldened to list species based only on risk factors, population declines, and the potential for future declines. But this approach confuses potential causes of distinction (*e.g.*, population declines, potential habitat declines, and other risk factors) with "extinction" itself, which is the "dying out or extermination of a species."[96] These risk factors have a role to play in FWS's listing determinations, but ultimately the ESA requires listing status be based on the prospect that the species will cease to exist.

AXPC acknowledges that assessing the prospect of extinction is necessarily imprecise, but it is important that FWS recognize that the question the ESA requires FWS to answer does not change: Is this species at risk of extinction today, or is a risk of extinction likely to arise in the foreseeable future? To better facilitate listing decisions that conform to these high statutory standards for listing species, AXPC therefore urges FWS to promulgate a regulatory definition of "extinction" and ensure that future listing decisions are based on a reasonable assessment of the likelihood that species are presently at risk of ceasing to existing (*i.e.*, endangered) or likely to become so within the foreseeable future (*i.e.*, threatened).

4. Memorialize the 2008 Solicitor's Opinion Regarding Greenhouse Gas ("GHG") Emissions and ESA Section 7 Consultation

On October 3, 2008, DOI issued a Solicitor's Opinion[97] concluding that proposed actions involving the emission of GHGs do not meet the "may affect" threshold set forth in the ESA and the Service's regulations implementing the Act, and, therefore, these actions do not trigger the consultation requirements under Section 7 of the ESA. AXPC supports this Solicitor's Opinion and urges FWS to memorialize its reasoning within the Service's regulations.

The Solicitor's Opinion recognized that for climate change to be considered a "direct effect" in a proposed action involving GHG emissions, the emissions would need to cause an immediate effect. While GHG emissions from a single source may ultimately contribute to global concentrations of GHGs, such emissions do not themselves have a discernibly direct or immediate effect on climate change. Moreover, as the Solicitor's Opinion noted, for climate change to be considered an indirect

[95] Bellon, Alejandro M. "Does animal charisma influence conservation funding for vertebrate species under the US Endangered Species Act?." *Environmental Economics and Policy Studies* 21.3 (2019): 399-411.
[96] *Extinction*, BRITTANICA, https://www.britannica.com/science/extinction-biology (last visited Jun. 17, 2025).
[97] Memorandum from David Bernhardt, Solicitor, U.S. Department of the Interior, "Guidance on the Applicability of the Endangered Species Act's Consultation Requirements to Proposed Actions Involving the Emissions of Greenhouse Gases," to Dirk Kempthorne, Secretary, Department of the Interior (Oct. 3, 2008).

effect, the observed effect would have to be "caused by" the proposed action, occur later in time than the "direct effects" of the proposed action, and be reasonably certain to occur.

Because the causal links required for the "may affect" test cannot be made between GHG emissions from a proposed agency action and a specific localized climate change impacting a listed species or critical habitat, the Solicitor's Opinion concluded that a proposed action involving GHG emissions is not subject to consultation under the ESA and its implementing regulations solely as a result of such emissions.

This common-sense Solicitor's Opinion is consistent with the ESA, reasonably reflects the global nature of climate change impacts and its diffuse causes, and is necessary for the administrability of the ESA and the preservation of resources that may otherwise be devoted to assessing potential global climate change impacts that are beyond any single agency's ability to control. As such, in order to ensure that this Solicitor's Opinion continues to be fully and consistently implemented, AXPC urges FWS to promulgate regulatory revisions to memorialize the 2008 Solicitor's Opinion.

j. Reconsider Specific Listing Decisions under the ESA

The following list represents a number of species that were listed under the ESA on grounds that are either unsupported by the statute and law, or otherwise scientifically unfounded. As noted above, the ESA sets a high standard for listing a species, subspecies, or DPS as threatened or endangered. An "endangered" species is statutorily defined as one that is presently in danger of extinction throughout all or a significant portion of its range.[98] A "threatened" species is one that is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.[99] When evaluating the status of a species, FWS must consider the following five factors:

(1) the present or threatened destruction, modification, or curtailment of its habitat or range;

(2) overutilization for commercial, recreational, scientific, or educational purposes;

(3) disease or predation;

(4) the inadequacy of existing regulatory mechanisms; and

(5) other natural or manmade factors that affect the species' continued existence.[100]

In making these assessments, FWS must use "the best scientific and commercial data available" after conducting a review of the status of the species and taking into account the efforts being made by any nation or political subdivision of a nation to protect the species, including through predator control, protection of habitat and food supply, or other conservation practices.[101]

Courts have interpreted these listing standards to reflect Congress' intent that the decision to list a species as threatened or endangered not be based on speculation or a misplaced intent to err on the side of species conservation. As such, the following species under the Act fail to meet the high standards required for listing, whether due to a lack of scientific evidence, or failure to consider mitigating factors such as volunteer efforts to protect the species. Pursuant to EOs 14154 and 14192, FWS must ensure that its listings reflect this plain meaning, and that any such listings do

[98] 16 U.S.C. § 1532(6).
[99] 16 U.S.C. § 1532(20).
[100] 16 U.S.C. § 1533(a)(1).
[101] 16 U.S.C. § 1533(b)(1)(A).

not "potentially burden the development of domestic energy."[102] As such, the listings, or proposed listings, of each of the below-described species should be reconsidered as they have all imposed significant burdens on the "identification, development, [and] use of domestic energy resources."[103]

1. Dunes Sagebrush Lizard

In its rulemaking listing the dunes sagebrush lizard ("DSL") as an endangered species, many public commenters argued that FWS did not provide scientific evidence or documentation that the population of the DSL is presently or soon will be endangered. Further, the Service provided no evidence that the lizard's population would be impacted by the human activity FWS cited in the listing rule as its basis for the designation.[104] Indeed, recent data shows robust populations in New Mexico and extensive state and voluntary protections throughout the DSL's range.[105]

2. Lesser Prairie Chicken

The best scientific and commercial information available demonstrates that neither the range-wide population of the lesser prairie chicken ("LPC"), nor the FWS-designated Southern and Northern DPSs meet the ESA's definitions of either a threatened or endangered species. The 2021 species status assessment ("SSA") on which the Service based its listing decision failed to consider the most recent surveys and conservation data on the species' population. These surveys and conservation data demonstrated that the LPC is highly unlikely to be at risk of extinction now or in the foreseeable future, particularly given its notable population rebound from historic lows in the past.[106] The Service's listing decision also failed to provide any conservation benefits above and beyond the significant conservation benefits already being realized through vast array of state and voluntary conservation efforts in place to protect the LPC and its habitat.

3. Northern Long-Eared Bat

It is a widely known fact that the northern long-eared bat ("NLEB"), like many bat species across North America, are suffering from a fungal threat known as white-nose syndrome. This is a fungus not caused or exacerbated by activities conducted by AXPC members or other industry operators. In its joint comments submitted to the Service, AXPC and other commenters emphasized its support for the conservation of the NLEB, noting that many member entities already implement a number of conservation measures to protect their populations, such as training operators and employees on ways to avoid or mitigate impacts, restrictions on trimming and herbicides, and avoiding work during the pup season when possible.[107]

However, the listing of the species by FWS resulted in a number of concerning requirements that continue to complicate and delay efforts to reinvigorate American energy infrastructure and

---

[102] Exec. Order No. 14,154, 90 Fed. Reg. 8,353, 8,354 (Jan. 20, 2025).
[103] Exec. Order No. 14,154, 9 Fed. Reg. at 8,354.
[104] *See* Endangered and Threatened Wildlife and Plants; Endangered Species Status for the Dunes Sagebrush Lizard, 89 Fed. Reg. 43,748, 43,761 (2024).
[105] *See* U.S. FISH & WILDLIFE SERVICE, SPECIES STATUS ASSESSMENT FOR THE DUNES SAGEBRUSH LIZARD VERSION 1.3, 39 (Apr. 2024).
[106] American Exploration and Production Council, *et al.*, Comments on Comments on the U.S. Fish and Wildlife Service's Proposal to List Two District Population Segments of the Lesser Prairie Chicken under the Endangered Species Act, 86 Fed. Reg. 29,432, FWS-R2-ES-2021-0015 26–28 (Sept. 1, 2021).
[107] Chamber of Commerce, *et al.*, Comments on Endangered and Threatened Wildlife and Plants; Endangered Species Status for Northern Long-Eared Bat, 87 Fed. Reg. 16,441, FWS-R3-ES-2021-0140 6–7 (May 24, 2022).

production. For example, any activity involving the trimming or clearing of vegetation with greater than a three inch diameter, such as clearing for transmission lines, removing dead timber to prevent wildfires, and conducting emergency repairs, could implicate regulated activities under the listing. Although the final rule did include a list of specific activities unlikely to result in incidental take, as requested by AXPC and other commenters, we urge the Service to continue to evaluate and consider creative implementation strategies that protect the NLEB without needlessly constraining the operational and economically beneficial activities that in no way led to the NLEB's listing.

4. Regal Fritillary

FWS proposed the listing of the two subspecies of the regal fritillary butterfly in August of 2024, proposing the Eastern Regal Fritillary to be listed as endangered, and the Western regal fritillary as threatened.[108] As with other listing decisions discussed herein, the regal fritillary has been the subject of significant ongoing conservation efforts, particularly within North Dakota. These efforts have stemmed from close collaboration between state and local governments and the industrial and business communities, and they provide the butterfly widespread habitat protections and enhancements that are improving the status of the species. However, more broadly, imposing these restrictions again stands in direct contrast with the Administration's aims of protecting and reinvigorating American energy dominance, which has faced death by a thousand cuts in the form of regulatory burdens such as those that would be in place were this listing to be finalized. AXPC supports ongoing conservation efforts to preserve the butterfly and its habitat, and believe that FWS can best support those efforts by declining to finalize its proposed listing of the regal fritillary butterfly, and instead renewing the Service's efforts to work with states and provide sector operators on more collaborative and effective conservation approaches.

5. Suckley's Cuckoo Bumblebee

In December, 2024, FWS proposed the listing of the Suckley's cuckoo bumble bee under the ESA. This parasitic species is incredibly difficult to survey and detect, as it lives among the nests of host species, making regulatory compliance highly burdensome. The elusive and uncertain nature of the bee could lead to unnecessary restrictions on land use and industry operations, creating broad regulatory burdens without any tangible conservation benefit. Additionally, because the species is dependent on the viability of its host species, its presence is inherently linked to broader ecosystem conditions that may not be influenced by direct regulatory action. As such, proceeding to finalize this proposed listing would not promote the conservation of the species, but would needlessly result in regulatory restrictions in contradiction with Section 3 of EO 14154, *Unleashing American Energy*, which directs agencies to suspend, revise, or rescind, agency actions that would "potentially burden the development of domestic energy."

6. Pecos River Pupfish

The Service is currently considering listing the Pecos River pupfish as a threatened species under the ESA.[109] AXPC fully supports the conservation of this species, but asks that the Service consider the conservation efforts already underway to conserve and protect the species and its habitats. For instance, the Pecos Watershed Conservation Initiative has, for nearly ten years, strengthened the habitat along the Pecos River and its many tributaries in the American Southwest, and sought to

[108] Endangered and Threatened Wildlife and Plants; Endangered Status for the Eastern Regal Fritillary, and Threatened Status With Section 4(d) Rule for the Western Regal Fritillary, 89 Fed. Reg. 63,888 (Aug. 6, 2024).

[109] Endangered and Threatened Wildlife and Plants; Threatened Species Status With Section 4(d) Rule for Pecos Pupfish and Designation of Critical Habitat, 89 Fed. Reg. 92,744 (Nov. 22, 2024).

improve water quality and grassland management in an effort to preserve the habitat areas utilized by the Pecos pupfish as well as several other species.

7. Eastern Hellbender

The Service is also currently considering listing the Eastern hellbender as an endangered species under the Act.[110] FWS had previously determined that a specific DPS in Missouri was endangered in 2021, but released a proposed rule in November, 2024, regarding the species' status at large.[111] Going forward with listing this species would unduly burden the energy sector across Appalachia in a time where the federal government is seeking to improve compliance and permitting efficiency for industries engaged in the exploration and development of American energy resources. As with the other listed species discussed above, AXPC urges FWS to reconsider whether finalizing this listing decision would be consistent with the ESA and sound science, or whether it would needlessly impose regulatory burdens on the energy industry without conferring the species any concordant conservation benefits.

8. Rusty Patch Bumblebee

AXPC believes that FWS improperly designated the rusty patch bumblebee as an endangered species in early 2017 by applying the incorrect standard, and utilizing an underdeveloped and unreliable administrative record.[112] As such, we urge the Service to reevaluate the rusty patch bumblebee listing.

When FWS proposed the rusty patch bumblebee listing, AXPC and other commenters voiced concern that the listing standard FWS used to evaluate the bee's status did not conform to the listing standard Congress prescribed in the ESA, and could not be reconciled in a manner that allowed interested parties the opportunity to meaningfully comment.[113] Instead of using the ESA's definition of endangered, which requires listing a species if it is "in danger of extinction throughout all or a significant portion of its range," the Service relied upon the species' "overall viability," defined in the proposed rule as "the ability of the species to persist over the long term and, conversely, to avoid extinction."[114] This definition added a contradictory use of timing into the ESA's statutory standard, which instead focuses on an immediate risk of extinction.

Further, the data used by the Service to support its listing decision was flawed and incomplete, and therefore did not satisfy the ESA requirement that FWS utilize the best scientific and commercial information available.[115] AXPC therefore requests that FWS reconsider this listing decision, and to that end, directs the Service to our 2016 comments for a detailed discussion of the impermissible analytical and procedural flaws referenced above.

---

[110] Endangered and Threatened Wildlife and Plants; Endangered Species Status for Eastern Hellbender, 89 Fed. Reg., 100,934 (Dec. 13, 2024).
[111] Endangered and Threatened Wildlife and Plants; Endangered Species Status for the Missouri Distinct Population Segment of Eastern Hellbender, 86 Fed. Reg. 13,465 (Mar. 9, 2021).
[112] Endangered and Threatened Wildlife and Plants; Endangered Species Status for Rusty Patched Bumble Bee, 82 Fed. Reg. 3,186 (Jan. 11, 2017).
[113] Independent Petroleum Association of America, American Petroleum Institute, and American Exploration & Production Council, Comments on the U.S. Fish & Wildlife Service's Proposed Decision to List the Rusty-Patched Bumble Bee as Endangered under the Endangered Species Act, 81 Fed. Reg. 65,324, FWS-R3-ES-2015-0112 2, 4 (Nov. 21, 2016).
[114] *Id*. at 4.
[115] 16 U.S.C. § 1533(b).

9. Monarch Butterfly

The Service has proposed to list the monarch butterfly as a threatened species under the Act and to designate certain areas as critical habitat.[116] While AXPC supports efforts to conserve this species, and does not contest the designation of critical habitat, we have concerns about the process that lead FWS to propose this listing. The designation gives insufficient consideration to conservation efforts already undertaken and in process across the country.

AXPC members have made significant efforts to protect and conserve monarch habitat, employing measures such as preconstruction surveys to avoid milkweed and other plants important to the species, site selection criteria and construction timing to best avoid breeding and migratory areas and patterns, and undertaking habitat restoration projects, among other best practices. However, the Service's proposed monarch listing decision did not take these significant conservation efforts into consideration as the ESA requires.

The Service's proposed monarch listing also failed to adequately consider new research and survey data indicating that the western and eastern populations of the monarch butterfly may be stabilizing and calling into question the historical population assessments used by the agency in making its listing determination.[117] FWS's listing proposal also failed to consider the status and health of international and nonmigratory populations.

Finally, FWS erroneously considered potential threats to the monarch's migration patterns as part of its statutorily required assessment of whether the species itself is threatened with extinction. The proposed listing recognizes that nonmigratory populations monarchs are able to reside continuously without the need for migration, indicating that the inability for the butterflies to migrate is not necessarily indicative of an extinction threat. Based on these factors, it is AXPC's position that the listing of the monarch butterfly as threatened is not warranted. We respectfully request that FWS consider refraining from finalizing this listing, or at minimum, ensuring that any final listing comprehensively excludes a wide variety of economically beneficial activities and conservation actions under ESA Section 4(d).[118]

IV. ONRR

AXPC offers the following recommendations to ensure that ONRR's regulations and policies are reflective of realistic market conditions, promote a fairer approach for those making significant investments on public lands as well as for taxpayers, and respect the limits of ONRR's statutory authority. In particular, AXPC believes that ONRR should consider rescinding or substantially revising the following:

- Transportation and processing allowances are heavily scrutinized by ONRR and oftentimes the agency requests amounts that are completely different from actual costs. This creates

[116] Endangered and Threatened Wildlife and Plants; Threatened Species Status With Section 4(d) Rule for Monarch Butterfly and Designation of Critical Habitat, 89 Fed. Reg. 100,662 (Dec. 12, 2024).
[117] *See* Meehan T.D & Crossley M.S., *Change in Monarch Winter Abundance over the Past Decade: A Red List Perspective*, 16 INSECT CONSERVATION & DIVERSITY, 566–573 (2023).
[118] American Exploration & Production Council, Comments on the U.S. Fish and Wildlife Service's Proposal to List the Monarch Butterfly as a Threatened Species, Establish a Section 4(d) Rule for the Conservation of the Species, and Designate Critical Habitat, 89 Fed. Reg. 100,662, FWS-R3-ES-2024-0137 (Mar. 12, 2025).

numerous inefficiencies, and it is difficult to track and manage. This often leads to audits (both internal for companies to ensure compliance and external from third parties or ONRR). A more efficient path forward would include modifying ONRR's policies and procedures for allowance reporting to better match actual operator costs. Lessees have long been allowed to deduct their "reasonable, actual" costs of transportation. As a precaution against excessive claims of allowance, the Department limited the deduction to an initial fifty percent of the value of oil, unprocessed gas, residue gas, or gas plant products; but the lessee could demonstrate its excess costs were reasonable, actual, and necessary. In the 2016 Rules, the Department eliminated provisions allowing approval of costs in excess of fifty percent. The full sum of its explanation was this: "The 50-percent limitation is a sufficient transportation allowance." 81 Fed. Reg. 43343 (oil) & 43352 (gas). Absolutely nothing in the record for that rulemaking supported the agency's fiat. The Department also removed language allowing lessees to exceed the sixty-six-and two-thirds percent limit on natural gas processing costs. In 2020, the Administration made changes to better reflect language contained in lease agreements. However, more recently the ONRR reverted to once again using caps. Hard transportation and processing allowance caps with no exception requests allowed are difficult to implement and do not align with actual market actions. These arbitrary caps ignore market factors (i.e., low or negative residue gas pricing);

- The default provision that allows the Secretary or his/her designee to determine value at will does not reflect the terms of actual oil and gas lease agreements and causes needless audits and work. Instead, both operators and ONRR should be focused on negotiated market prices—not at will valuation determinations made by one party to the agreement, without potential regard for market forces.
- The arbitrary disallowance of subsea gathering (known as transportation from 1999-2016) has led to unnecessary disagreements and audits between operators and ONRR and should be reconsidered by the agency;
- Removal of the explicitly stated boosting disallowance regulation[119] that was implemented prior to widespread use of modern cryogenic gas processing that requires temperature and pressure drops to extract natural gas liquids); this provision is being used to disallow recompression costs.
- The ONRR 2016 Rules ended acceptance of a lessee's arm's-length sales of gas prior to processing and sales under so-called "keepwhole" contracts. 81 Fed. Reg. at 43348; 30 C.F.R. § 1206.142. Under both agreements, the lessee receives no value from natural gas liquid sales. The 2016 Rules demand a share of the value of the liquids the lessee does not receive. The 2016 Rules are arbitrary in their treatment of arm's-length sales of gas before it is processed into liquid products such as ethane, propane, and butane. It has been common in the industry to sell natural gas at the wellhead to third parties. The pricing clause in those contracts commonly provides that the lessee is paid on a percentage either of (1) an index price for gas sold downstream from the lease or (2) the proceeds the buyer receives from selling the liquids and "residue gas" that result from processing the gas. These are called "percentage-of-index" ("POI") and "percentage-of-proceeds" ("POP") contracts, respectively. Under the rule before 2016, arm's-length sales under these contracts were

[119] 30 C.F.R. § 1202.151(b); 30 C.F.R. § 1206.153(c)(8).

valued as sales of "unprocessed gas." 30 C.F.R. § 1206.152 (2016). The royalty value for the gas was the gross proceeds the lessee actually received. Id. § 1206.152(a)(1), (b)(1)(i) (2016). For example, if the buyer resold liquids and residue gas for $100,000, and the POP clause called for the lessee to receive 80 percent, then the total value on which royalty would be based would be $80,000. If the royalty were one-eighth, then the federal royalty share would be $10,000. To report and pay royalties accurately, the lessee did not need to know what it actually cost its buyer to transport the gas away from the lease or the cost to process it. That was the buyer's business. The Rule now treats arm's-length sales under POI and POP contracts as sales of "processed gas." Id. § 1206.142(a)(2); 81 Fed. Reg. at 43,381. Treating gas sold before processing as processed gas is arbitrary. Since 2016, ONRR has continued to apply greater restrictions on keepwhole agreements, causing numerous audits and much confusion with royalty reporting. This system is inefficient and does not actually reflect market practices, resulting in unnecessary disputes and audits.

- The means by which ONRR eliminated "unbundling" has also created confusion and unnecessary inefficiencies. The premise that ONRR uses is based on the "marketable condition rule" and case law. The way it is administered results in unnecessarily burdens on the agency (because ONRR has technical staff assigned exclusively to this work, in lieu of actually analyzing actual costs incurred) and the payors. This approach does not seem like a reasonable way to eliminate the marketable condition rule in total if marketable condition is defined as the point when a lessee turns the gas over to the field transportation system. The issue is ONRR has generally defined the market as the tailgate of the gas processing plant, and as a result, it disallows many legitimate transportation and processing allowances; and,
- ONRR's reliance on dynamic gas sampling frequency regulations[120] in favor of regular scheduled sampling at appropriate intervals based on production. ONRR lacks authority to oversee gas sampling. The root of the issue is that BLM's regulations regarding gas sampling do not align with the actual technology available or used. As a result, the implementation of BLM's gas sampling requirements has been paused for almost a decade. In the face of unworkable BLM gas sampling requirements, ONRR has attempted to fill this void to help with its own valuation determinations by turning to a reliance on dynamic gas sampling, which not even BLM can implement. It is difficult for operators to know what to do in this situation. This creates numerous problems and inefficiencies. Instead, BLM and ONRR need to realign their policies with technology and reporting requirements that are feasible and more commonly used in industry. This will create more efficient reporting.
- dynamic gas sampling frequency regulations in favor of regular scheduled sampling at appropriate intervals based on production.

AXPC also recommends that ONRR consider the following areas for improving the efficacy, efficiency, and consistency of their operations:

- AXPC members are not currently allowed to use FERC-approved tariff rates for transportation deductions on regulated pipelines if we operate them. This creates an

[120] 43 C.F.R. § 3175.115.

unnecessary administrative burden for ONRR and companies to calculate a separate rate for federal royalty when FERC has already reviewed and approved the tariff rate.

- The regulations governing cross-lease netting and interest billing processes currently state that the volumes must net to zero across the leases as well as the values. But companies cannot calculate interest on volumes. Interest is calculated on the royalty value minus allowances. For interest calculations, the value should be netted across leases by beneficiary by sales month without regard for volume or product type. If the beneficiary had the money the whole time and it was a reporting issue, there is no reason the payor should incur interest.
- There are several issues with the federal index methodology for product valuation. AXPC members would like a reasonable index method option for federal royalty valuation that can be elected for both arm's-length and non-arm's length sales.
- ONRR should change S&P BBB Bond Rate for non-arm's length transportation and processing calculations. The S&P BBB Bond Rate is now a subscription only item, and it is wrong for ONRR to force companies to pay another company for a data point that is required by the regulations. If ONRR opts to continue use of the S&P BBB Bond Rate going to be required, ONRR should provide it for companies' use.
- Reinstate the multiplier 1.3*BBB Bond Rate for non-arm's length transportation and processing allowance calculations.
- Reinstate the extraordinary processing allowance. This provision currently affects only a limited number of companies, but for those impacted companies, this change is very important.
- Cease valuing flared gas using the index method, and instead value flares using the sales contract price net of allowances if there is a contract in place.
- Issue enforcement guidance to reform ONRR's audit and enforcement procedures:
    - Revise the statute of limitations for minor reporting errors;
    - Revise the audit process to make it more efficient and less burdensome; and,
    - Require audits to be more specific and targeted,
- Implement measures to better integrate ONRR with BLM and improve operational efficiency:
    - Allow BLM reporting information to auto-populate in ONRR reporting to ensure that BLM and ONRR use the same information regarding wells;
    - Ensure BLM and ONRR regulations, directives, and other guidance use the same terms and names for items of information;
    - Ensure ONRRs reporting codes better match items reported to BLM regarding well and facility information;
    - Create a common software system and use better technology for ONRR, BLM submissions. and NEPA reviews.
- Update portions of the Indian Gas Valuation regulations in Title 30, Subpart E of Title 30:

- Add a gas index zone price for the Ft. Berthold designated area. This region has seen dramatic growth since the original regulations were developed. The current process that ONRR uses to calculate the Major Portion Price for gas results in the Indian owner not receiving final valuation of their gas stream until 18 months after the final sales period in the year (*i.e.,* final valuation for all months in 2024 will not be completed until June 2026). Having an index price to fulfill the Major Portion provision accelerates the gas valuation into the current period rather than up to 2 ½ years after the fact.
- This will reduce the administrative burden on the ONRR and the payor. ONRR will only have to calculate and publish the index price versus having to calculate the Major Portion Price manually and payors will not be stuck in an endless loop of prior period adjustments into perpetuity. Using an index price to remit the original payments, a payor will have reasonable certainty that the amount paid fulfills its royalty requirement.

- Update the regulatory Natural Gas Liquids ("NGL") Minimum Value for the Ft. Berthold (North Dakota) area. Currently, payors that elect Actual Dual Accounting, are required to compare their NGL value to Conway less $0.07[121] and pay the higher of the values. This is not representative of the current market for NGLs flowing from North Dakota.
- Additionally, there is a provision requiring comparison of pricing in an index zone when the lessee elected Alternative Dual Accounting, and its gas is sold under an arm's length dedicated contract. According to the preamble to the original rules when published, this was included because there was a concern about a couple of sales contracts that lessees had that resulted in a gas price higher than the index value. The provision is now being used to cause additional unnecessary comparisons. It should be removed from 30 C.F.R. § 1206.172(b)(3).

V. CONCLUSION

AXPC appreciates DOI's efforts to understand and address DOI rules, regulations, and other requirements that are needlessly burdensome or complex, outdated or ineffective, or which otherwise unnecessarily undermine American energy independence and/or DOI's stewardship of our public lands and resources. We further appreciate the opportunity to provide these comments and recommendations. If you have any questions or would like to discuss these comments, please feel free to contact Wendy Kirchoff at 281-386-7324 or wendy.kirchoff@axpc.org.

Respectfully submitted,

[121] 30 CFR 1206.174(g).

Wendy Kirchoff
Senior Vice President of Policy
American Exploration & Production Council