



July 9, 2025

Via Regulations.gov

U.S. Fish and Wildlife Service
MS: PRB/3W
5275 Leesburg Pike
Falls Church, Virginia 22041-3803

Re: The American Exploration and Production Council’s Comments in Response to the U.S. Fish and Wildlife Service’s Request for Information on Ways to Improve the Efficacy and Efficiency of Conservation under Section 10(a) of the Endangered Species Act (90 Fed. Reg. 24,285 (June 9, 2025); FWS-HQ-ES-2025-0049.

To the Fish and Wildlife Service:

The American Exploration & Production Council (“AXPC”) appreciates the opportunity to comment on the U.S. Fish and Wildlife Service’s (“FWS’s” or “the Service’s”) Request for Information (“RFI”) on ways to improve the development and implementation of enhancement of survival permits associated with conservation benefit agreements (“CBAs”) and issue incidental take permits (“ITPs”) associated with habitat conservation plans (“HCPs”) under Section 10(a) of the Endangered Species Act (“ESA” or “the Act”).¹ AXPC shares FWS’s interest in enhancing voluntary conservation of species and their habitats, and supports the Service’s efforts to reduce unnecessary regulatory burdens associated with implementation of ESA Section 10(a) and to more broadly promote voluntary and cooperative conservation.

In accordance with the Service’s request, this letter identifies what we believe to be regulatory and administrative barriers to more expansive development and implementation of CBA and HCPs and to the adoption of voluntary conservation measures more broadly. In addition to these comments, AXPC has co-signed and expressly supports the comments submitted by the American Petroleum Institute and other aligned energy associations.

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.

¹ 90 Fed. Reg. 24,285 (June 9, 2025).

AXPC's members are uniquely positioned to provide comments on this RFI and describe why we believe efforts to enhance voluntary conservation opportunities coincides with and supports this Administration's efforts to revitalize 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. These and other actions can often occur in proximity to threatened and endangered species or their habitat. As such, AXPC members have extensive experience working with FWS staff in a variety of contexts.

Our industry employs a wide variety of protective and/or beneficial practices and technologies during all phases of our operations to enable the safe and responsible development of the nation's oil and natural gas resources while reducing and/or mitigating potential impacts to species, habitats, land, water, and other natural resources. For instance, some AXPC members use the Service's "Information for Planning and Consultation" tool for site selection and project planning, and many others routinely help protect and conserve species by scheduling construction activities to minimize or significantly abate any potential adverse impacts their operations may have on species during their most vulnerable life stages. These conservation measures and technologies have helped our industry minimize its impacts on wildlife and the environment while still providing much-needed resources to the American public.

AXPC members also routinely employ a variety of advanced technologies that can significantly reduce surface disturbances and minimize the impacts of our operations on wildlife and habitat. The following technological advances benefit numerous listed and unlisted species and represent just one part of a continuously improving evolution of industry's capability to operate in proximity to species and their supporting habitats:

- Horizontal and Directional Drilling: Through technological advancements like horizontal and directional drilling, our industry has taken significant steps to minimize its impacts on wildlife and the environment while still providing much-needed resources to the American public. The shift to horizontal drilling has changed modern oil and gas development's disturbance, fragmentation, and activity profiles. It provides for a 70 percent reduction in the surface footprint associated with our member's operations.²
- Use of Closed-Loop Drilling Fluid Systems: To further minimize our operations' potential adverse impacts on protected species and habitat, the oil and natural gas industry has adopted closed-loop drilling fluid systems that recycle drilling fluids, thereby decreasing water consumption and the risk of contamination to nearby water sources.
- Advanced Well Control Systems: The oil and natural gas industry's development of advanced well control systems, including automated shutdown mechanisms and real-time monitoring, has significantly reduced the risk of spills and blowouts in the upstream sector. These systems protect habitat areas around drilling sites by allowing operators to promptly identify and address any anomalies in real-time to make our drilling operations safer and more protective of ecological resources.

² D. Applegate & N. Owens, *Oil and Gas Impacts on Wyoming's Sage grouse: Summarizing the Past and Predicting the Foreseeable Future*, HUMAN-WILDLIFE INTERACTIONS, Vol. 8, Iss. 2, Article 15 (2014).

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 CO₂ emissions fell by 20 percent while the United States became the number one energy producer in the world.³ 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.⁴ At the same time, United States Geological Survey data shows that CO₂ and methane emissions from the extraction of oil and natural gas are likewise continuing to significantly decrease.⁵

Nonetheless, even AXPC members’ responsibly conducted and otherwise lawful activities can potentially subject them to liability for the incidental take of listed species. Companies often attempt to mitigate incidental take liability risks by participating in HCPs and CBAs. While these are important mechanisms for managing incidental take liability under the ESA, developing and implementing HCPs and CBAs is often costly, confusing, and time-consuming.

As such, AXPC welcomes FWS’s interest in enhancing voluntary conservation efforts and offers in Section II below, recommendations for streamlining and improving the Service’s implementation of ESA Section 10(a). These comments also note and suggest approaches to better facilitate the central role Congress intended voluntary and cooperative conservation to serve in fulfilling the Service’s mandate to protect and conserve at-risk species and their habitats.

II. RECOMMENDATIONS FOR PROMOTING VOLUNTARY AND COOPERATIVE 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...”⁶ 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 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

³ American Exploration & Production Council, Presentation: Climate Leadership (2025), https://axpc.org/wp-content/uploads/2025/03/AXPC-EE-Deck_1.2025.pdf#page=31.

⁴ See U.S. ENERGY INFORMATION ADMIN., U.S. Natural Gas Marketed Production, updated monthly at <https://www.eia.gov/dnav/ng/hist/n9050us2a.htm>.

⁵ 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>.

⁶ 16 U.S.C. § 1531(b).

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.⁷

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.⁸ 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.

a. 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.”⁹ 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

⁷ 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).

⁸ *In re Endangered Species Act Section 4 Deadline Litigation*, No.10-377 [EGS], MDL Docket No. 2165 (D.D.C. May 10, 2011).

⁹ 16 U.S.C. § 1355.

efforts and utilize their often superior insights to achieve better conservation outcomes for listed and at-risk species.

b. 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.

c. 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 conservations are frequently dissuaded from undertaking conservation efforts when the benefits of their actions 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.

d. Recognize that the ESA Merely Allows for, but Does Not Permit FWS to Require, Compensatory Mitigation

Under the Biden Administration, FWS, the Department of Interior, and other agencies and bureaus impermissibly issued multiple rules, policies, and directives that explicitly or implicitly imposed compensatory mitigation requirements on lessees and other public land users. FWS's 2024 revisions to its Section 7 implementing regulations,¹⁰ 2023 Mitigation Policy and Compensatory Mitigation Policy revisions,¹¹ and 2022 proposed conservation banking standards¹² represent

¹⁰ Endangered and Threatened Wildlife and Plants; Regulations for Interagency Cooperation, 89 Fed. Reg. 24,268 (Apr. 5, 2024).

¹¹ <https://www.fws.gov/policy-library/A1501fw2>.

¹² 87 Fed. Reg. 45,067 (July 27, 2022).

particularly egregious examples of efforts through which FWS previously sought to impose compensatory mitigation requirements without the requisite statutory authority to do so.

While ESA Section 7 and 10 contain mechanisms whereby applicants/permittees can volunteer to use compensatory mitigation to offset impacts of their projects on listed species, these statutory provisions cannot be read to require, or even permit, the use of compensatory mitigation in the manner suggested by the prior Administration. In addition to being impermissible under the Act, the Service's previous efforts to explicitly compel applicants/permittees to undertake compensatory mitigation or implicitly use incidental take liability concerns to inappropriately leverage mitigation efforts on scales disproportionate to project impacts, protection of unlisted species, or prohibitions on siting projects in certain areas or habitats undermined voluntary and cooperative conservation. These efforts exceeded the Service's statutory authority, eroded the trust and cooperation necessary to promote public-private conservation efforts, and needlessly complicated and protracted the processes by which FWS issued ITPs, and developed and implemented HCPs and CBAs.

As such, AXPC recommends that FWS promulgate a rule or issue similarly binding guidance that, consistent with the interpretation of the ESA set forth in Subsections II.d.1 and II.d.2 below, that explicitly clarifies the existing statutory limits on FWS's authority to recommend or require compensatory mitigation. In those narrow instances where FWS can allow operators to voluntarily use compensatory mitigation, the Service should specify that mitigation must be proportional to presumed impacts and expressly prohibit FWS offices from requiring compensatory mitigation that is unnecessary or intended to achieve policy objectives unrelated to protected species or habitat. FWS should further specify that their employees cannot require or recommend that operators mitigate or otherwise compensate for potential indirect climate change impacts or other indirect impacts over which the project proponent has no control. AXPC believes that these efforts to conform the Service's compensatory mitigation practices to the limited authority conferred by the ESA can increase the trust and cooperation necessary for effective conservation and reduce the delay, uncertainty, and complexity associated with FWS's prior efforts to utilize compensatory mitigation for purposes unrelated to conservation.

1. ESA Section 7:

Under Section 7(a)(2) of the ESA, each federal agency must “insure that any action authorized, funded, or carried out, by such agency . . . is not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of [critical] habitat.” In a Section 7(a)(2) consultation, FWS prepares a biological opinion to explain and document its determination of the potential impact of the federal action on the species or its habitat.

For actions that are not likely to jeopardize listed species or cause adverse modification of critical habitat, but that may nonetheless result in incidental take of listed species, FWS will include an incidental take statement (“ITS”) in the biological opinion that specifies: (1) the impact of the incidental taking on species; (2) “reasonable and prudent measures that the Secretary considers necessary or appropriate to minimize such impact;” and (3) measures, if any, necessary to comply

with the Marine Mammal Protection Act. (“MMPA”).¹³ The ITS also includes “terms and conditions” to implement the measures.¹⁴

Reasonable and prudent measures (“RPM”) are defined as “those actions the Director believes necessary or appropriate to minimize the impact of the incidental take on the species”¹⁵ While FWS has some discretion to design the elements of an ITS, they must be commensurate with and proportional to the impacts associated with the action. Additionally, “[r]easonable and prudent measures, along with the terms and conditions that implement them, cannot alter the basic design, location, scope, duration, or timing of the action” and “may involve only minor changes.”¹⁶

Thus, when FWS issues an ITS under ESA Section 7(a)(2), that ITS can only require the minimization of potential project impacts. While the means by which impacts are minimized can include various forms of mitigation, the Service’s ITS-issuance authority under Section 7(a)(2) does not allow FWS to require or recommend applicants/permittees to offset all potential project impacts or achieve a net conservation gain.

Similarly, when FWS issues a finding of jeopardy or adverse modification of critical habitat, the Service includes Reasonable and Prudent Alternatives (“RPAs”) intended to avoid jeopardizing the continued existence of the species or destroying/adversely modifying critical habitat. As with RPMs, RPAs cannot alter the basic design, location, scope, duration, or timing of the action and may involve only minor changes. RPAs are also only intended to be applied to avoid or offset the presumed impacts of the proposed action. Agencies can only adopt or require RPAs to the extent the alternatives are consistent with the agencies’ existing authorities and are shown to be economically and technologically feasible.¹⁷

While RPAs can include compensatory mitigation, they cannot be used to conscript applicants into mitigating impacts unrelated to the “intended purpose of the action.” RPAs are not generalized conservation obligations that can be imposed on all parties’ pursuing proposed actions that may jeopardize listed species or destroy/adversely modify critical habitat. RPAs are supposed to be designed solely to offset the impacts anticipated from the proposed project and may only be implemented if feasible and if consistent with the federal agency’s legal authority. Under ESA Sections 7(a)(2) and 7(a)(4), RPAs can only be required to offset impacts on species that are listed or proposed to be listed or on critical habitat that is designated or proposed to be designated.

2. ESA Section 10

Under ESA Section 10, an applicant for an ITP must submit an HCP that addresses several criteria, including the impacts resulting from the take of the species, and the steps that will be taken to minimize and mitigate such impacts.¹⁸ And under Section 10(a)(1)(b), FWS will issue the permit if it finds, in part, that the applicant “will, to the maximum extent practicable, minimize and

¹³ 16 U.S.C. § 1536(b)(4).

¹⁴ 16 U.S.C. § 1536(b)(4).

¹⁵ 50 C.F.R. § 402.02.

¹⁶ 50 C.F.R. § 402.14(i)(2).

¹⁷ 50 C.F.R. § 402.02.

¹⁸ 16 U.S.C. § 1539(a)(2)(A).

mitigate the impacts of such taking,” and the survival and recovery of the species will not be appreciably reduced.¹⁹

As the text of Section 10 makes clear, FWS does not have authority to impose or recommend compensatory mitigation measures to achieve “net conservation gain” or “no net loss.” Nor does this provision allow FWS to disfavor short-term mitigation as compensation for short-term impacts. Rather, the Service can only condition an ITP on reasonable assurance that the applicant will minimize and mitigate potential impacts on listed species “to the maximum extent practicable.”²⁰

Thus, like Section 7 of the ESA, Section 10 expressly prohibits FWS from requiring or recommending compensatory mitigation that results in “net conservation gain,” or landscape-scale mitigation/conservation. Nor do these statutory provisions allow FWS to impose compensatory mitigation requirements to address impacts to unlisted species or which require applicants/permittees avoid “high value” habitats, however defined.²¹

e. Develop a More Streamlined and Nimble Approach to the Development and Approval of CBAs

CBAs are tremendously useful tools for conservation and, as a consequence of the assurances therein, provide industries and landowners significant incentives to participate. CBAs, however, are also time-consuming to develop and cumbersome to implement. Some of these complexities may be unavoidable when the CBA is designed to cover a broad geographic range, multiple participants, and multiple land-use industries.

Notwithstanding their complexity, these larger CBAs 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 CBAs of this scale. In addition to these more common large-scale CBAs, AXPC recommends that FWS also support the development of smaller, less complex, CBAs.

Smaller, more nimble CBAs can be approved and implemented more quickly, thereby providing species with the benefit of early intervention. Moreover, smaller-scale CBAs 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.

f. Improve and Streamline the HCP Program

Like CBAs, HCPs are useful tools to incentivize voluntary conservation by insulating participating landowners from ESA liabilities and restrictions through issuance of an ITP. Unfortunately, HCPs also share with CBAs 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 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

¹⁹ 16 U.S.C. § 1539(a)(2)(B).

²⁰ 16 U.S.C. § 1539(a)(1)(B)(ii).

²¹ 87 Fed. Reg. 45,067.

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 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.

g. Promulgate Categorical Exclusions for CBAs and HCPs

As another means of streamlining the development of CBAs and HCPs, AXPC recommends that FWS consider adopting measures to eliminate delays associated with unnecessary additional reviews under the National Environmental Policy Act (“NEPA”).

A categorical exclusion “is a class of actions that a Federal agency has determined . . . do not individually or cumulatively have a significant effect on the human environment and for which, therefore, neither an environmental assessment[“EA”] nor an environmental impact statement [“EIS”] is normally required.”²² Actions under ESA Section 10 plainly fall within this class of actions because CBAs and HCPs are specifically designed to confer, and may only be approved if they are reasonably anticipated to confer, conservation benefits.

As such, “the use of categorical exclusions can reduce paperwork and save time and resources” associated with conducting more extensive NEPA analyses.²³ AXPC therefore urges FWS to adopt categorical exclusions under NEPA that allow CBAs and HCPs to be developed and approved without the need to develop EA or EISs.

²² <https://ceq.doe.gov/nepa-practice/categorical-exclusions.html>.

²³ <https://ceq.doe.gov/nepa-practice/categorical-exclusions.html>.

h. 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 . . .*”²⁴ 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 . . .*”²⁵

Further, one of the listing factors FWS must consider is “other natural or manmade factors” that affect a species’ continued existence.²⁶ 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.”²⁷

Similarly, in promulgating PECE, the Services explained that, when making a listing decision, the ESA requires consideration of all conservation efforts being undertaken.²⁸ 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 making listing a species as threatened or endangered unnecessary.”²⁹ 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.³⁰

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 exercise this authority and failed to recognize the full extent of the benefits associated with a wide array of voluntary conservation efforts.

²⁴ 16 U.S.C. § 1533(b)(1)(A) (emphasis added).

²⁵ 50 C.F.R. § 424.11(f) (emphasis added).

²⁶ 16 U.S.C. § 1533(a)(1).

²⁷ 68 Fed. Reg. 15101, 15,113 (Mar. 28, 2003).

²⁸ 68 Fed. Reg. 15,100 (Mar. 28, 2003).

²⁹ 68 Fed. Reg. 15,100.

³⁰ 68 Fed. Reg. 15,100.

i. 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. AXPC recognizes that FWS must devote substantial resources to respond to these petitions (and frequently, related litigation) but we are 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 current environment offers FWS a unique chance to expand the role of voluntary conservation. However, this opportunity could be lost if the Service does not start holding listing petitions to the ESA’s high standards. If listing activity continues at overwhelming levels, stakeholders may lose the 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.³¹

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 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.

³¹ 16 U.S.C. § 1533(b)(1)(A) (emphasis added).

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.³²

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 factors³³ that the listing services' themselves describe as "comprehensive" and "thorough."³⁴ FWS simply cannot meet these analytical requirements when, for instance, a group petitions to list 404 different aquatic and aquatic-dependent species³⁵ or 52 different amphibians and reptiles across 45 States.³⁶

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 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.

³² *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.").

³³ 16 U.S.C. § 1533(a)(1)(A-E).

³⁴ See 79 Fed. Reg. 52,276, 52,277 (Sept. 3, 2014).

³⁵ 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.

³⁶ 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.

III. CONCLUSION

AXPC appreciates FWS's efforts to identify ways to improve the development and implementation of enhancement of survival permits associated with CBAs and issue ITPs with HCPs under ESA Section 10(a). AXPC shares FWS's interest in enhancing voluntary conservation of species and their habitats, and supports the Service's efforts to reduce unnecessary regulatory burdens associated with implementation of ESA Section 10(a) and to more broadly promote voluntary and cooperative conservation.

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,

A handwritten signature in cursive script that reads "Wendy Kirchoff".

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