



American
Exploration & Production
Council



INDEPENDENT PETROLEUM
ASSOCIATION OF AMERICA



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Public Comments Processing

Attn: Docket No. FWS-HQ-ES-2017-0074

Division of Policy, Performance, and Management Programs

U.S. Fish and Wildlife Service

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Falls Church, Virginia 22041

Attention: Attn: Docket No. [FWS-HQ-ES-2017-0074]

Candidate Conservation Agreements With Assurances Policy, 82 Fed. Reg. 55,625 (November 22, 2017)

Dear Mr. Sheehan:

With this letter, API, IPAA, AXPC, and IAGC (together “the Associations”) are pleased to submit these comments in response to the U.S. Fish and Wildlife Service’s (“FWS”, or “the Service”) Candidate Conservation Agreements with Assurances (CCAAs) Policy (“Policy”), which the Services announced that they were intending to review and possibly to revise in a notice published at 82 Fed. Reg. 55,625 (November 22, 2017). The Services finalized a revision of the CCAA policy on December 27, 2016 (81 FR 95164). The Associations request the FWS revise the existing policy as described below.

API is a national trade association representing over 625 member companies involved in all aspects of the oil and natural gas industry. API’s members include producers, refiners, suppliers, pipeline operators, and marine transporters, as well as service and supply companies that support all segments of the industry. API member companies are leaders of a technology-driven industry that supplies most of America’s energy, supports more than 9.8 million jobs and 8% of the U.S. economy and since 2000 has invested nearly \$2 trillion in U.S. capital projects to advance all forms of energy, including alternatives. API and its members are dedicated to meeting environmental requirements, while economically developing and supplying energy resources for consumers.

IPAA represents thousands of independent oil and gas explorers and producers that will be the most significantly affected, either positively or negatively, by changes to the CCAA Policy. Independent producers develop 90 percent of the nation’s oil and natural gas wells. These companies account for 54 percent of America’s oil production, 85 percent of its natural gas production, and support over 2.1 million American jobs. IPAA’s members are participants in federal, state, and private efforts to protect and conserve endangered and threatened species and their ecosys-

tems. IPAA's member companies have enrolled millions of acres in conservation plans and committed tens of millions of dollars to fund habitat conservation and restoration programs.

The American Exploration & Production Council is a national trade association representing 32 of America's largest and most active independent natural gas and crude oil exploration and production companies. AXPC's members are "independent" in that their operations are limited to the exploration for and production of natural gas and crude oil. Moreover, its members operate autonomously, unlike their fully integrated counterparts, which operate in additional segments of the energy business, such as downstream refining and marketing. AXPC's members are leaders in developing and applying the innovative and advanced technologies necessary to explore for and produce crude oil and natural gas, and that allow our nation to add reasonably priced domestic energy reserves in environmentally responsible ways.

IAGC is the international trade association representing the industry that provides geophysical services (geophysical data acquisition, processing and interpretation, geophysical information ownership and licensing, and associated services and product providers) to the oil and natural gas industry. IAGC member companies play an integral role in the successful exploration and development of hydrocarbon resources through the acquisition and processing of geophysical data.

I. SUMMARY

CCAAs are a useful tool in the conservation toolkit to support an incentive-based approach to encourage conservation practices on non-federal property to protect and manage species and their habitats to achieve desired positive outcomes. CCAAs can encourage such actions at an early stage in the development of a project when these actions can be more effective in exchange for assurances as to the continued use of the property should the species of concern be listed. The high levels of participation in the species conservation efforts carried out under CCAAs prior to the adoption of the current Policy, Candidate Conservation Agreements With Assurances Policy, 81 Fed. Reg. 95164 (Dec.27, 2016), show that a properly designed CCAA Policy can achieve its twin goals of encouraging voluntary conservation efforts and benefiting candidate species, species proposed for listing, and species that may become candidate species, consistent with the Endangered Species Act of 1973, as amended (ESA).

We believe that the Services should continue support for CCAAs, but as described in this letter we request that the Services withdraw and as described below revise the current CCAA policy to encourage additional participation by owners of private property and by entities in the private sector proposing projects for economic and resource development. As the Services undertake a review of the CCAA policy they should clarify the interrelationship between the authorities delegated to the Services by statute and the application of the policy. Specifically, the Services should first reassert the recognition under a revised CCAA standard of the conservation value of the hierarchy of avoidance, minimization, and mitigation measures, as well as improvements to species population or habitats. And, as importantly, the Services should remove the "net conservation benefit" standard in a revised CCAA policy, and substitute for it a standard of "beneficial contribution to conservation of the species or its habitat". This standard is more consistent with the intent and purpose of CCAAs and provides for an appropriate measure of positive contributions to species conservation.

In addition, as described in Part II of this letter, the Associations urge that current Policy be revised to accomplish the following:

- Emphasize improvement of covered species and restore the CCAA policy's past directive that CCAAs "preclude or remove any need to list" and adopt flexibility in evaluating proposals for CCAAs;
- Avoid a "one-size-fits-all" standard for evaluating conservation benefits and encourage achievable conservation outcomes;
- Avoid potentially arbitrary standards like "net conservation benefit" that discourage voluntary participation; and
- Avoid evaluation of CCAA proposals based on speculation

Additional recommendations are found in Part III of this letter.

II. DETAILED RECOMMENDATIONS FOR REVISION TO THE CURRENT POLICY

A. Restore the CCAA policy's past directive that CCAAs "preclude or remove any need to list" and adopt flexibility in evaluating proposals for CCAAs

First, the Services should remove the term "net conservation benefit" from the CCAA policy and restore the language "preclude or remove any need to list the species." Such an approach will align the scope of a given CCAA with the characteristics of the property to be enrolled and the capabilities of the property owner, particularly given that individual property owners do not possess the capability to remove the need to list a species. Prior to the 2016 revisions to both the CCAA policy and regulations, the concept of "preclude or remove any need to list" had been understood as key to the importance of CCAAs. The potential that a CCAA may preclude the need to list a species can provide a significant incentive for property owners to participate in the CCAA. The Associations believe that in order to promote early and voluntary conservation, the Service must retain the concept that CCAAs must "preclude or remove any need to list" the covered species.

The Services recognized in the Final Policy for Candidate Conservation Agreements with Assurances published June 17, 1999:

The kinds of conservation measures specified in an Agreement with assurances will depend on the types, amounts, and conditions of, and need for, the habitats existing on the property and on other biological factors. Different kinds of conservation measures may benefit different life stages or serve to fulfill different life history requirements of the covered species. The amount of benefit provided by an Agreement with assurances will depend on many factors, particularly the size of the area on which conservation measures are implemented and the degree of conservation benefit possible (e.g., through habitat restoration or reduction of take). For example, an Agreement with assurances for a property with a small area of severely degraded habitat could be designed to achieve greater benefits than one for a property with a large amount of slightly degraded habitat.

64 Fed. Reg. 32,726, 32,732.

It will be important for the Services to retain this understanding in any revision of the CCAA policy. The Services should clarify that achieving only one of the objectives identified for conservation measures may suffice for approval of a CCAA, again because it is unlikely that an individual property owner or project proponent will be able to undertake conservation measures and management activities that will achieve the full suite of results that may be sought for a candidate species. The Services should also adopt a position of flexibility with respect to the nature of the benefits that may be derived from measures to be carried out under a CCAA. As the 1999 CCAA Policy stated, these “expected benefits” can include “restoration, enhancement, or preservation of habitat; maintenance or increase of population numbers; and reduction or elimination of incidental take” (Volume 64 Fed. Reg. 32726, June 17, 1999, at page 32735) or other similar benefits (see III.A. below).

B. Avoid “one-size-fits-all” standard for evaluating conservation benefits and encourage achievable conservation outcomes.

A revised CCAA policy should avoid imposition of a one-size-fits-all standard for evaluating conservation benefits across numerous and varied conservation programs. In fact, this concern points out the problem with the “net conservation benefit” standard, which does not afford property owners flexibility in developing CCAs tailored to their own needs and the needs of individual species. Depending on the land use activity involved and the conservation needs of a species, different conservation strategies may be necessary and the CCAA policy should allow property owners to develop conservation measures tailored to their individual needs and the needs of the covered species. The FWS even acknowledges on its website “[a]lthough a single property owner's activities may not eliminate the need to list, conservation, if conducted by enough property owners throughout the species' range, can eliminate the need to list.”¹

A revised CCAA policy must recognize that achievable conservation benefits will be dictated, in part, by the property that is enrolled in a CCAA. While the Services have recognized that conservation measures and management activities must address the “current and future threats on the property that are under the property owner’s control”, Candidate Conservation Agreements With Assurances Policy, 81 Fed. Reg. 95164, 95,170 (December 27, 2016) the scope of threats that are addressed under a particular CCAA may not be sufficient to achieve an increase in population or improvement in habitat. This is especially the case for owners of small property parcels or non-fee or other property interests (e.g., water rights). Indeed, among the Associations’ objections to the current CCAA Policy is that the “net conservation benefit” criterion in the current policy sets the expectation that the landowner or project proponent will also address “likely future threats”, requiring speculation on the part of both that party and the appropriate Service, and that the measure of the benefit will be the “projected increase in the species' population or improvement of the species' habitat”, requiring both speculation and recourse to circumstances out of the party’s control. 81 Fed. Reg, 95164, 95171.

In a revised CCAA policy, the Services must acknowledge that CCAA measures be based upon what is economically and technologically feasible for the property owner to implement on the enrolled property. While the needs of the species inform actions to be undertaken under a CCAA, the scale or scope of any adopted measure should be informed by the resources available to the

¹ <https://www.fws.gov/midwest/endangered/permits/enhancement/ccaa/index.html> (last updated October 4, 2016)

property owner and located on the enrolled property. By including a more expansive consideration of benefits, the Services will encourage broader enrollment in CCAAs which will ultimately promote the conservation of covered species. In this regard, the Associations urge that a revised should create incentives for oil and natural gas operators to avoid and minimize the impacts of development by using technologies that reduce surface disturbance and habitat fragmentation.

C. Avoid potentially arbitrary standards like “net conservation benefit” that discourage voluntary participation.

We also believe that the “net conservation benefit” standard should be removed because it is ambiguous, and holds the potential to be used arbitrarily in its application. It fails to convey to the public or the Services the amount of benefit that a CCAA must provide before a Service may approve it. Although the definition of “net conservation benefit” suggests that some degree of improvement is required in order for a Service to approve a CCAA, this definition raises the question of how much improvement is necessary to allow the Services to approve CCAAs. Without answering the question of “how much is enough,” the definition of net conservation benefit will create confusion among Service staff and inconsistent decision making between offices. Such a result will discourage participation by landowners and project proponents, and thus forego the benefits that a broad and diverse mix of private conservation approaches can achieve.

By incorporating a net conservation benefit standard that was developed for Safe Harbor Agreements, the Services have failed to account for the differences between of pre-listing and post-listing activities, when pre-listing activities will be the context in which private parties consider applying for a CCAA. Instead, the Services should utilize a CCAA standard that focuses on incentivizing voluntary participation and enhancing covered species by providing measures that will beneficially contribute to the conservation of a species or habitat. This standard is more consistent with the intent and purpose of CCAAs and provides for an appropriate measure of positive contributions to species conservation.

The current CCAA policy states:

The overall goal of the Service's candidate conservation program is to encourage the public to voluntarily develop and implement conservation plans for declining species prior to them being listed under the ESA. The benefits of such conservation actions may contribute to not needing to list a species, to list a species as threatened instead of endangered, or to accelerate the species' recovery if it is listed.

81 Fed. Reg. 95164, 95170).

However, use of the term “net conservation benefit” in the CCAA policy is likely to result in a program that will discourage participation by being overly restrictive with respect to specific proposals by private landowners and project proponents, and failing to recognize the benefits that may be derived from a program that encourages greater participation across a spectrum of landowners. The Associations urge that when assessing the merits of a CCAA, the Services should acknowledge and consider the current condition of the species and its habitat and whether the conservation measures and management activities proposed or carried out in a CCAA improve such conditions or ameliorate decline. It is worth noting that often at the stage in which CCAAs are under development, the species may be decreasing in numbers. Consistent with the current policy's acknowledgement noted above, there will be benefits to the species associated with actions that accomplish one or more of the following: remove, reduce or minimize threats; prevent

or limit habitat degradation; promote resiliency; or slow or stabilize a declining population trajectory. The results of the measures implemented under a specific CCAA may not be expressed as an “increase in population or improvement in habitat,” but there will still be a benefit that enhances the status of the species relative to its condition at the time a CCAA is initiated. The Associations recommend that the Services take a more expansive view of the benefits, not just population increases or improvement in habitat.

D. Avoid evaluation of CCAA proposals based on speculative criteria

In the course of reviewing CCAA proposals for approval, the Services cannot require property owners to reduce or eliminate unknown or speculative threats. As noted above, the use of the “net conservation benefit” in the current Policy requires property owners to reduce or eliminate both “current and likely future threats” on the property that are under the property owner’s control (81 Fed. Reg. 95164, 95171). The Services should remove the reference to “future” threats. The term “future threats” does not explicitly appear in the ESA or its implementing regulations. *See* 16 U.S.C. § 1533; 50 C.F.R. part 424. Moreover, in CCAAs, the Services and property owners should not speculate as to future threats to species.

By defining “net conservation benefit” in relation to expected conservation benefits, the standard raises a question of whether a failure to achieve expected conservation benefits affects the assurances provided in the associated enhancement of survival permit. Such a requirement undermines the primary incentive for participation – the assurance that a participant’s conservation efforts will not result in future regulatory obligations in excess of those that are agreed upon at the time they enter into agreement with the Service. The “future threats” requirement decreases regulatory certainty, and would most likely reduce the number of participating parties, and thus reduce conservation of at risk species. The Associations urge the Services to recognize that any CCAA standard must evaluate the benefits of the agreement solely at the time it is approved. The Services should not be empowered to revisit or modify the terms of CCAAs if they later anticipate that the expected increases in populations or habitat will not occur. Likewise, the Services ought not to be able to revoke the assurances provided by the CCAA and permit if the expected increases in populations or habitat do not occur. Otherwise, the Services would eliminate a significant incentive to participating in CCAAs.

III. ADDITIONAL RECOMMENDATIONS

A. Concerning the terms “management actions” and “conservation measures” as used in the Policy

Because CCAAs are in effect local or regional in nature, the Services should recognize that population stabilization is a benefit to species within the areas covered by proposed or existing conservation agreement. The Services’ focus on adoption or continuation of management measures on a specific property will encourage a greater number of property owners to enroll in a CCAA which will provide a benefit to the species and habitat. However, the Services should make the following revisions to the provision.

- First, the terms “management actions” and “management activities” should be defined, particularly since these terms are used independently of “conservation measures”. Both a

definition of “management” and its distinction from “conservation” will be necessary to inform the regulated community.

- Second, in the definition of “conservation measures” as these apply to CCAAs, the Services should recognize that a management commitment can be made for the species or *certain habitat* for a specified period of time. This change would be consistent with the focus of a CCAA and expressly allow property owners to also manage property in a manner that benefits the covered species.
- Third, the conservation measures and management activities covered by a CCAA must be designed to reduce or eliminate those threats on the property that are *under the property owner’s control*, in order to contribute to the health of species populations or habitat.
- Fourth, in the definition of “conservation measures” as these apply to CCAAs the Services should recognize that increasing species populations and improving habitat quality are not the only objectives necessary for CCAA recognition. For example, a benefit can be provided through management actions that alleviate threats to the species, prevent habitat degradation, or promote resiliency. Thus, for example, a CCAA should be available if a property owner continues to adequately manage enrolled property so that it provides a beneficial contribution to the species or its habitat even if there is no population increase or habitat improvement. Because these outcomes will also serve the purpose of potentially delaying or precluding the need to list a species, they provide additional bases for approving a CCAA in those circumstances when a species and its habitat are currently adequately managed.

B. Treat “Habitat Disturbance Fees” under CCAAs as compensatory mitigation

The Services should include clarification language in appropriate regulations that “habitat disturbance fees” required by CCAAs should be considered compensatory mitigation to avoid requiring additional compensatory mitigation later for the same activity.

C. Incentivize cooperation between the Services and state agencies

Any changes to the Policy should enhance coordination with state agencies. The ESA implicitly recognizes that state agencies possess valuable information and data related to wildlife within their borders and, moreover, are in the best position to evaluate the economic impacts of wildlife management strategies. State agencies particularly have valuable information related to candidate species, which are not subject to federal management under the ESA.

D. Duration of a CCAA, and Enhancement of Survival Permits

The duration of a CCAA covered by a permit issued under the policy and regulations must be sufficient to achieve a beneficial contribution to the species’ population or habitat, taking into account both the duration of the Agreement and any offsetting adverse effects attributable to the incidental taking allowed by the enhancement of survival permit. Given that incidental take coverage is a significant incentive for property owners to enroll in a CCAA, The Associations also support issuance of enhancement of survival permits under Section 10 (a)(1)(A) of the ESA where appropriate, including incidental take authorization, at the time of entry in-

to the CCAA. However, in the event the Services should determine that the potential adverse effects from incidental takings reach a threshold that justifies their treatment as an offset to the benefits of a CCAA this should be very clearly described. The enhancement of survival permit only goes into effect if, and when, the covered species is listed. Thus, any incidental taking would occur at some unforeseeable future time (if ever) and, until such a listing, there is no prohibited take. The Services should clarify that any adverse effects only accrue from the time the species is listed.

E. Definition in the Policy of “property owner”

- The Proposed Policy defines property owner as: “a person with a fee simple, leasehold, or other property interest (including owners of water rights or other natural resources), or any other entity that may have a property interest, sufficient to carry out the proposed management activities, subject to applicable State law, on non-Federal land.” The Services should expand this definition, or its application to CCAAs, to accommodate activities that may occur on or in aquatic environments.
- The Services also should revise this definition to allow CCAAs on lands or water under federal ownership or control, for the benefit of parties that lease federal surface or mineral rights. We strongly encourage the Services to revisit this general policy and recognize that this policy is actually hindering, rather than helping, the conservation of species. Provided that the federal agency responsible for management of the particular lands or water resource has agreed to participate in a conservation effort, there should be no artificial barriers to a public/private or federal/state or local governmental authority partnership for enhancement of species or habitat that will occur on federal lands or waters. In addition, many times, a CCAA is developed for private/state lands adjacent to federal lands. There is no reason to expend resources and funds to develop a separate CCA for federal lands that is nearly identical to a CCAA for state and private lands when one plan is all that’s needed.

F. Use of the term “landscape” in the Policy

The Services state that a CCAA will, in part, identify or include “consideration of the existing and anticipated condition of the landscape of the contiguous lands or waters not on the participating owner’s property” for purposes of assessing suitability as a habitat corridor or as a source of species to populate the property. 81 Fed. Reg, 95164, 95172. The current Policy does not define “landscape” or explain what it encompasses. The Services should delete the phrase “of the landscape” to reduce confusion and redundancy. If the Services retain the reference to “landscape,” the Services must provide a definition of the term and explain how it will be applied and considered in the CCAA context

The Associations appreciate the Services’ consideration of these comments and requests that the Services withdraw and revise the current Policy to benefit candidate species and to encourage additional participation by owners of private property and by entities in the private sector proposing projects for economic and resource development. Should you have any questions, please contact Richard Ranger of API at 202.682.8057, or via e-mail at rangerr@api.org, Samantha

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Sincerely,



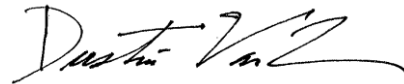
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