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Public Comments Processing
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U.S. Fish and Wildlife Service
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RE: Docket No. FWS-HQ-ES02025-0049
Comments on Endangered Species Act Section 10(a) Program

To U.S. Fish and Wildlife Service:

Western Energy Alliance (the Alliance) is the leader and champion for independent oil and natural gas companies in the western United States. Working with a vibrant membership base for over 50 years, the Alliance stands as a credible leader, advocate, and champion of industry. Alliance members engage in all aspects of environmentally responsible exploration and development of oil and natural gas. Our expert staff, active member committees, and committed board members form a collaborative and welcoming community of professionals dedicated to abundant, affordable energy and a high quality of life for all.

The Alliance welcomes the opportunity to comment and provide information to the U.S. Department of the Interior (Interior) and U.S. Fish and Wildlife Service (USFWS) on the improvement of voluntary conservation agreements, plans and permits developed and implemented under of Section 10(a) of the Endangered Species Act (ESA). The Alliance shares the goal of improving the efficacy and efficiency of the conservation programs implemented under Section 10(a) of the ESA.

The Alliance's Conservation Expertise. Alliance members support conserving at-risk species and their critical habitat. Alliance member companies are among the foremost participants in federal and state, and private efforts to protect and conserve endangered and threatened species. We have played a key role in voluntary conservation efforts to protect species such as the dune's sagebrush lizard, lesser prairie-chicken, greater sage-grouse, hookless cactus, American burying beetle, Dakota Skipper, and many more species.

Our member companies have initiated voluntary conservation plans, enrolled millions of acres in conservation plans, and committed millions of dollars to fund

habitat conservation and restoration programs. We have innate knowledge of processes that work, and do not work, to maximize private landowner and industry participation in these plans and ensure viable, functional plans that conserve the species and habitat.

I. Specific Comments

A. Incentivizing Private Landowners

1. Conservation Plans Must Account for Complex Land and Mineral Ownership

Species and habitat encompass a combination of federal, state, and private lands. Land and subsurface ownership are among the many legal complexities and challenges to developing and implementing viable and sustainable conservation programs.

Private landowner participation is essential to a successful and sustainable conservation strategy for species on private land. The conservation strategy should uphold and respect private property rights and incentivize both private landowners and industry participants.

There is often different surface and subsurface ownership (called “split estate”), where the surface owner does not own any rights to the mineral estate, which is owned by a different individual. There are a variety of split estate scenarios, such as (1) federally owned surface and underlying privately owned minerals; (2) privately owned surface and underlying federally owned minerals; and (3) federal or private surface, with multiple private mineral owners for different subsurface mineral formations underlying a single parcel of privately owned surface.

Under the majority view that includes most western states and Texas, the mineral estate is the dominant estate over the surface. A subsurface mineral owner cannot be prevented from developing their minerals, and the surface owner cannot unilaterally enter into surface agreements, such as a wildlife conservation easement to preserve habitat, which may constrain oil and gas development.

Yet, under current USFWS practice, most voluntary conservation plans do not provide flexibility to address this critical issue. In fact, USFWS often tries to leverage the permit holder and plan participants to attempt to dictate practices to other private land and/or mineral owners that are not enrolled in the conservation plan, in the form of mandatory requirements or other components that create substantial burdens on the permit holder beyond their legal control.

2. Viable Conservation Plans Must Respect Private Property Rights and Incentivize Private Landowner Participation

Private landowner participation is essential to a successful and sustainable conservation strategy for species. Conservation plans should uphold and respect private property rights and incentivize both private landowners and industry participants.

Key incentives that must be included in voluntary conservation plans include:

- a. reasonable participation fees;
- b. confidentiality provisions that respect the privacy of the landowner;
- c. flexible conservation tools where the private landowner is empowered and able to direct the parameters for conservation measures to be employed on their land;
- d. flexible conservation options that do not burden privately owned land in perpetuity and allow the private landowner flexibility for term-based conservation contracts.

Flexibility is Paramount. Providing reasonable and flexible conservation and mitigation options for private landowners is essential for any voluntary conservation plan. Often farmers and ranchers do not want to tie up their lands in perpetuity so that they can preserve operational flexibility of their lands for future family generations.

Moreover, a centralized “command and control” approach used for species management is not viable on private land because, among other things, private oil and gas leases do not contain the same lease stipulation mechanisms found in federal oil and gas leases. Attempts to use a centralized conservation approach on private land has resulted in alienation of private landowners, broader distrust of federal conservation programs for species on private land, and less conservation being implemented on-the-ground.

Permanent Conservation Requirements are Not Viable. While USFWS historically and currently favors and prioritizes permanent conservation requirements in most voluntary conservation plans, voluntary conservation efforts for species located primarily on private lands and involving private minerals must provide flexibility and options for private landowners that either do not desire to or legally cannot enter conservation easements on their land in perpetuity.

Durable Term Conservation Contracts. Conservation programs for private landowners must offer opportunities for durable conservation in a manner that is favored by the landowners, such as those utilized by the U.S. Department of Agriculture's highly successful Conservation Reserve Program (CRP) administered by USDA's Farm Service Agency.

3. Case Study on Success – Texas Conservation Plan for the Dunes Sagebrush Lizard

The Texas Conservation Plan (TCP) for the dunes sagebrush lizard (DSL) has successfully conserved DSL habitat for the past 13 years. After a collaborative effort involving a broad stakeholder group, including the oil and gas industry, agriculture and ranching stakeholders, academia, and the Texas Farm Bureau, on February 17, 2012, the USFWS approved the TCP and issued an Enhancement of Survival Permit (Permit) under Section 10 of the ESA.

The TCP includes significant innovative components that incentivize both private landowner and industry participation. As reported in the TCP's 2024 Annual Report submitted to UFWS, the current gross acreage enrolled in the TCP as of September 30, 2024, was 572,017 acres of privately owned land.

The plan effectively minimizes habitat disturbance by requiring plan participants to implement conservation measures aimed at avoiding, minimizing, and mitigating new habitat disturbances. Over time, implementation of the TCP has led to a shift in the oil and gas industry's operational behavior in DSL habitat, including the utilization of directional drilling, the minimization of development footprints, and the reclamation of abandoned locations. Thus, the TCP allows enrolled oil and gas participants to conduct their normal operations while simultaneously protecting and enhancing DSL habitat through the implementation of conservation measures.

The TCP provides a successful example of a voluntary conservation plan that incentivized both industry and private landowner participation. Moreover, this plan was formulated by a broad and diverse group of stakeholders, including

industry, academia, agricultural and ranching organizations, the Texas Farm Bureau, and Texas Parks and Wildlife Service.

B. Barriers

1. Key Barriers and Disincentives Imposed by USFWS on Voluntary Conservation Plans

The following requirements can be significant barriers to successful programs:

- a. Centralized, “command and control” conservation programs for private lands and minerals based on federal lands and federal minerals management;
- b. Imposing a 100% habitat avoidance requirement, particularly when split estates, range-wide species habitat, and/or multiple land and mineral owners, are prevalent;
- c. Using tiered mitigation fee structures that focus on collecting funds rather than putting conservation and mitigation on the ground;
- d. “Net Conservation Gain” requirements, particularly for range-wide species over broad geographic areas;
- e. Unreasonable compensatory mitigation requirements with unrealistic and/or inflated mitigation ratios;
- f. Emphasis on total avoidance without a mechanism to allow for mitigation, and without due recognition of valid existing rights and private property rights;
- g. Utilizing suitable habitat, as opposed to confirmed occupied habitat as a proxy for “take” particularly for private lands and range wide species;
- h. Utilizing undefined or vaguely worded biological standards (i.e., “positive biological response”) as a basis for measuring implementation of the conservation program, and whether implementation is successful;
- i. Utilizing vague or overbroad metrics to evaluate plan performance, such as USFWS’s preferred use of an undefined “positive biological response” metric.

2. Regulatory Uncertainty and Plan Inflexibility

Regulatory certainty is essential so voluntary participants can accurately assess costs and benefits and develop trust in voluntary programs. Fluctuating interpretations of fundamental concepts such as mitigation and critical habitat hinder conservation by creating regulatory uncertainty and distrust. Regulatory uncertainty obscures the costs and benefits of participation in a voluntary conservation program.

3. Cost Uncertainty and Lack of Transparency Regarding the Allocation of Enrollment and Mitigation Fees

Cost is a driving factor for participation in voluntary conservation programs. Failure to minimize costs deters participation.

USFWS typically promotes and requires numerous fees and costs that cumulatively act as a significant deterrent to enrollment and participation. These fees include enrollment fees, conservation fees, mitigation fees, and administrative fees.

The voluntary conservation program should include a requirement for an annual third-party audit to ensure that the funds collection from conservation plan participants are being utilized appropriately with a priority for on-the-ground conservation. Past plans have resulted in misuse of funds, such as purchase of office buildings, trucks, and office computers, which provide no benefit to the species.

Section 10(a) permit holders for large conservation plans, such as those covering a range wide species spanning a large geographic area and/or multiple states, should be required to demonstrate financial stability with pre-existing necessary infrastructure to administer the plan.

C. Methods to Streamline

1. Reform, Revision, and Codification of PECE Policy

To successfully streamline and reform the voluntary conservation plan program under Section 10(a) of the ESA, it is important to also reform and streamline the ultimate evaluation of these plans when the USFWS evaluates them as part of its decision-making on whether to list a species as threatened or endangered under the ESA.

For example, the USFWS Policy for Evaluation of Conservation Efforts When Making Listing Decisions (PECE), 68 Fed. Reg. 15100 (March 23, 2003), should be revised and codified to provide more flexibility in evaluating conservation plan performance and efficacy. The USFWS created PECE to ensure consistent and adequate evaluation of formalized conservation efforts when making listing decisions under the ESA. PECE provides non-comprehensive criteria for the USFWS' evaluation of formal conservation efforts. Under PECE, USFWS is supposed to consider all appropriate factors and recognizes that certainty of implementation and effectiveness may also depend on species-specific, habitat-specific, location-specific, and effort-specific factors.

The ESA regulations must be revised to provide flexibility for voluntary conservation programs in terms of implementation of preferred conservation measures supported by private landowners and conservation plan participants. While achieving 100% participation and 100% of conservation measure implementation is always a laudable goal, voluntary conservation plans must allow flexibility and recognize that even a 60% or 80% rate that provides conservation benefits to species and/or their habitat is better than having zero participation or minimal conservation implementation.

Moreover, a revised PECE regulation must reflect a holistic approach to conservation and mitigation to account for multiple biological and ecological benefits. Limiting conservation or mitigation "credit" to a single species does not account for full benefits that accrue to other species and habitats and increases costs.

2. Require Conservation Plans to Utilize and Reflect Most Current Industry Technology and Development Practices

Frequently, USFWS does not utilize current data on industry development practices. For example, in its decision to list the dunes sagebrush lizard as "endangered" under the ESA in June 2024, USFWS utilized antiquated development forecasting based on the drilling of high surface density vertical wells, a practice that has not been employed by industry in New Mexico or West Texas in almost two decades.

For additional information on this significant issue, please see the Alliance's comments submitted on the proposed USFWS rule to list the dunes sage brush lizard as endangered (Docket No. FWS-R2-ES-2022-0162), attached to this comment letter as Attachment 1 for ease of reference.

Technological advancements in industry drilling and development practices have significantly reduced oil and gas surface disturbance in Texas and throughout the western United States. These innovations include the use of horizontal wells and multi-pad drilling. Horizontal wells can span laterally up to 3 miles and can result in significantly less surface disturbance (up to 85%) than vertical wells and enable the avoidance of sensitive species habitat.

In addition, the use of multi-well pad drilling, which consolidates multiple wells on a single pad, and centralized production facilities, significantly reduces surface disturbance. Instead of needing one well pad and one vertical well every 10, 20 or 40 acres on the surface, a horizontal well on a multi-well pad can produce even more oil with significantly less surface density.

D. Communication and Engagement Strategies

USFWS can improve voluntary conservation plans under Section 10(a) of the ESA through strategic and proactive communication. The strategies listed below are keys to building trust, clarifying expectations, reducing regulatory uncertainty, and enhancing private landowner participation.

1. Early and Transparent Engagement to Establish Clear Expectations.

- a. Initiate dialogue early in the planning or permitting process to align conservation goals with landowner or developer objectives;
- b. Provide clear, concise explanations of the Section 10 process, including the benefits of participation and obligations;
- c. Share case studies of successful voluntary plans to demonstrate tangible outcomes.

2. Tailored Messaging to Stakeholder Groups to Communicate Benefits in Terms Stakeholders Care About.

- a. Frame messages in non-regulatory, benefit-focused language (e.g., habitat protection as a long-term asset, conservation plans offer an “insurance policy” to mitigate risk to operations);
- b. Delineate stakeholders (e.g., farmers, ranchers, developers, local communities) and develop messaging aligned with their economic and cultural values;
- c. Highlight flexibility and assurances, especially the “no surprises” policy and potential cost savings and benefits from early mitigation.

3. Make Technical Information Accessible and Engaging.

- a. Replace legal and regulatory jargon with plain language in fact sheets;
- b. Use infographics, interactive maps, and short videos to illustrate biological, legal, and financial aspects of Section 10(a) conservation plans;
- c. Provide flowcharts showing step-by-step processes and timelines for developing and implementing plans.

4. Dedicated Outreach Personnel or Liaisons; Build ongoing, trusted relationships in local communities.

- a. Assign regional liaisons with deep knowledge of local communities, local species, land uses, and socio-economic dynamics;
- b. During plan implementation, host periodic field visits, workshops, or town halls with landowners to answer questions and co-develop solutions;
- c. Encourage peer-to-peer outreach, allowing participating landowners to share positive experiences with others.

5. Collaborative Planning Platforms; Empower Shared Ownership of Conservation Outcomes.

- a. Establish stakeholder working groups to work collaboratively to develop voluntary conservation plans;
- b. Leverage online collaboration platforms for drafting, reviewing, and tracking progress on plans;
- c. Provide feedback loops—mechanisms for stakeholders to raise concerns and propose adaptive management solutions.

6. Performance Transparency and Recognition to Demonstrate Credibility and Reward Participation.

- a. Regularly report measurable outcomes (e.g., acres conserved, species trends) to the public and stakeholders;
- b. Develop a recognition program (e.g., certificates, press coverage, conservation awards) for participating landowners or developers;
- c. Share success stories in local and national media, highlighting both ecological and community benefits.

7. Partnerships with Trusted Intermediaries to Broaden Reach and Amplify Credibility.

- a. Partner with state wildlife agencies and local community leaders;
- b. Use third-party technical assistance providers to guide landowners through permitting and plan implementation;
- c. Support joint training programs for USFWS staff and local partners to ensure consistent messaging and knowledge-sharing.

8. Adaptive Communication Based on Feedback to Continuously Improve Outreach Effectiveness.

- a. Use surveys and feedback forms after outreach events to assess clarity, tone, and effectiveness of communication;
- b. Monitor participation rates and plan success metrics to refine strategies;
- c. Revise communication materials and methods based on what resonates with diverse audiences.

E. Roles and Responsibilities

The following recommendations could help clarify roles and responsibilities:

- a. Identify key USFWS staff leads and subject matter experts who can review plan amendments, coordinate applicant timelines, reviews, as well as coordinate with industry contacts in field offices;
- b. Additionally, have designated personnel for conflict resolution when required and a clear escalation policy.

F. Funding and Supporting Resources

USFWS could expand the traditional meaning of conservation to include research and development of the new reclamation techniques that enhance the existing landscape/habitat. This would provide proving ground for untested conservation techniques and allow for the enhancement of current and future best practices. This would bolster the current funding opportunities and may provide additional resources to evaluate and develop localized conservation practices in a controlled, scientifically approachable manner. Examples of expanded cooperators could include:

- a. Private landowners;
- b. Industry partners;

- c. 3rd party habitat and species specialist;
- d. Local municipalities;
- e. County agencies;
- f. Federal agencies (USFS, BLM, BIA, USFWS, BOR, USACOE...);
- g. State agencies (State forestry, Oil and Gas Commissions, State wildlife agencies...);
- h. State grant funding;
- i. University Partnerships and summer work programs;
- j. Various local trade groups.

G. Pilot Program Proposal

The USFWS should develop a voluntary conservation plan pilot program and framework similar to the U.S. Department of Agriculture's successful Conservation Reserve Program (CRP).

The CRP is a voluntary land conservation program administered by the Farm Service Agency (FSA) and implemented by the USDA's Natural Resources Conservation Service (NRCS). Its goal is to protect environmentally sensitive land by incentivizing farmers and landowners to remove such land from agricultural production and instead plant species that improve environmental health and quality of the land.

CRP addresses soil erosion, water quality, and wildlife habitat loss through long-term land conservation. Major environmental benefits include: (1) reduced soil erosion; (2) improved water quality; and (3) enhanced wildlife habitat.

Key concepts and components of this program could be utilized for reforming USFWS's voluntary conservation program. In particular, the CRP is a good template that could be utilized to garner substantially more private landowner participation in voluntary conservation programs under Section 10(a) of the ESA.

Private landowners favor the CRP program because it provides certainty, flexibility, a secondary revenue stream for their lands, and does not burden their lands in perpetuity.

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Under the CRP program, in exchange for a yearly rental payment, farmers commit to remove environmentally sensitive land from agricultural production and improve land (e.g., plant grasslands for lesser prairie chicken) to enhance habitat quality.

Contracts for land enrolled in CRP are from 10 to 15 years in length and can be renewed. Participants must establish and maintain the approved conservation practices and are subject to periodic inspections and compliance monitoring. These contracted conservation measures help re-establish valuable land cover to help improve water quality, prevent soil erosion, and reduce loss of wildlife habitat.

While the CRP program is funded through Congressional funding of the Commodity Credit Corporation (which we do not propose here), in the context of USFWS Section 10(a) voluntary conservation programs, funding for these types of contracts could occur through plan participant enrollment fees. This approach would also ensure that fees collected from Section 10(a) conservation programs are invested in on-the-ground conservation, rather than for tangential use, such as third-party research, or purchase of equipment or office material.

II. Conclusion

The Alliance would enjoy the opportunity to discuss these important issues with Interior and USFWS further. We stand ready to serve as a resource for this important initiative.

Thank you for your time and consideration of these comments and recommendations. Please do not hesitate to contact me if you have any questions or would like additional information.

Sincerely,

Melissa Simpson
President, Western Energy Alliance