



[EXTERNAL] OMB 1018-0119; Comments to Agency Information Collection Activities; Policy for Evaluation of Conservation Efforts When Making Listing Decisions (PECE)

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Mon, Apr 30, 2018 at 4:16 PM

To: info_coll@fws.gov

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Attached is a document containing our comments to the Agency Information Collection Activities; Policy for Evaluation of Conservation Efforts When Making Listing Decisions (PECE), OMB 1018-0119. We appreciate the opportunity to provide comments on this fish and wildlife service information collection activity.

Best regards,

Myles

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Comments to ICR re. PECE OMB Control 1018-0119 (043018).pdf

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April 30, 2018

VIA e-mail at: Info_Coll@fws.gov; OMB Control Number 1018-0119

Information Collection Clearance Office
US Fish and Wildlife Service, MS: BPHC
5275 Leesburg Pike
Falls Church, VA 22041-3803

Subject: Comments on Agency Information Collection Activities; Policy for Evaluation of Conservation Efforts When Making Listing Decisions (PECE); OMB Control Number 1018-0119

Dear Messrs.:

Occidental Petroleum Corporation submits these comments in response to the United States Fish and Wildlife Service's ("Service") request for comment on the Service's Information Collection Activities in connection with implementation of the Service's Policy for Evaluation of Conservation Efforts When Making Listing Decisions ("PECE" or "the Policy"). OMB Control Number 1018-0119, 83 Fed. Reg. 8698 (February 28, 2018). These comments address, in particular, the Service's request for input on whether the collection is necessary to the proper functions of the Service, whether the collected information will be used in a timely manner, and how to enhance the quality, utility and clarity of the information to be collected. Id.

The PECE is a critically important requirement that the Service itself imposed upon its process for considering listing decisions. It is designed to encourage private parties, as well as State and local governments, to undertake voluntary conservation efforts with the objective of addressing threats to species and their habitats in such a manner that listing may become unnecessary. Under the Policy, the Service is committed to assessing conservation efforts that have yet to be implemented or yet to demonstrate success by applying specific criteria under which the Service will evaluate the likelihood of implementation and likelihood of success for such efforts.

Occidental is committed to preserving rare wildlife and plants on its lands and works closely with national, regional, and local resource agencies, university researchers, and nonprofit organizations to study native flora and fauna in its operating locations, minimize disruption of those species, and preserve and restore essential habitat. As described in greater detail in this letter, in New Mexico, Occidental has enrolled over 450,000 acres in candidate conservation agreements (CCA's) on federal lands and candidate conservation agreement with assurances (CCAA's) on private lands. In Texas, Occidental has enrolled approximately 425,000 acres in CCAA's. Through these several agreements, Occidental provides funds to restore and enhance

habitat for a number of species including the lesser prairie chicken (LPC), dunes sagebrush lizard (DSL) and the recently listed Texas hornshell mussel. Each of these agreements also require Occidental to comply with a variety of conservation actions designed to avoid or minimize surface disturbing activities.

In addition, Occidental is a founding partner in the Pecos Watershed Conservation Initiative (PWCI). The PWCI is a new and innovative partnership between the National Fish and Wildlife Foundation (NFWF), Anadarko Petroleum, Chevron, Noble Energy, Occidental Petroleum, Shell Oil Company, XTO Energy Inc., and the U.S. Department of Agriculture's Natural Resources Conservation Service in New Mexico and Texas. The initiative supports conservation projects in the Pecos River Watershed, which extends from eastern New Mexico into West Texas, and comprises a large portion of the energy-rich Permian Basin. The initiative identifies strategic conservation opportunities and works to enhance and restore the natural resources and wildlife habitat in the region.

The PWCI will:

- Strengthen the health of existing habitats along the Pecos River and its tributaries in eastern New Mexico and West Texas,
- Protect some of the last remaining populations of native fish and other aquatic species found only in the Chihuahuan Desert,
- Improve the management and function of native grasslands,
- Address water quality and scarcity concerns for wildlife and agricultural uses, and
- Identify opportunities to expand species to areas of their range where they have been lost, or bolster small remnant populations.

In March 2018, NFWF and the PWCI announced the first slate of \$1.4 million in grants to restore and preserve riparian and grassland habitats and the species that depend on them in the Pecos River Watershed of eastern New Mexico and West Texas. The seven grants will generate \$2.3 million in matching contributions from grantees, for a total conservation impact of more than \$3.7 million. Occidental is one of the companies that took the lead in championing the PWCI, and is pleased to be an initial funder.

Occidental is only one of many private companies and landowners across the United States which diligently work to protect ESA-threatened, endangered, and candidate species. In 2013, the Service acknowledged that “[p]rivate landowners play a very important role in the management and conservation of threatened and endangered species. In fact, nearly 75 percent of listed species occur on private lands, in part because private landowners prove to be committed land stewards.” 78 Fed. Reg. 58923, 58925 (Sept. 25, 2013). The ambitious goals of the ESA cannot be met without the support and work of private landowners.

The central role of private landowners in protecting species and conserving habitat is even more pronounced in the case of the LPC. Approximately 95 percent of the 25,101-square-mile occupied range of the LPC occurs on private land in five States -- Colorado, Kansas, New Mexico, Oklahoma and Texas. Collaborating through the Western Association of Fish and Wildlife Agencies ("WAFWA"), those five States developed the Lesser Prairie-Chicken Range-wide Conservation Plan ("RWP"), a conservation effort to improve the status of the LPC and ensure its long-term persistence into the foreseeable future (50 years) throughout its range. As of March 2018, WAFWA had established enrollment and development agreements with 212 companies, with 147 companies covering over seven million acres, and had collected nearly \$65 million to fund off-site mitigation actions for the benefit of the LPC.

A sizable portion of the LPC's occupied range falls within the Permian Basin, a large oil and gas producing region in the western part of Texas and the southeastern part of New Mexico. The Permian Basin accounts for about 20 percent of the oil produced in the United States. Occidental accounts for approximately 9% of the oil produced from the Permian Basin; we are the leading operator in the Basin, with an inventory of more than 11,200 drilling locations across some 2.5 million net developed and undeveloped acres. Occidental's strong position and substantial investment in the Permian Basin means that we have a significant interest in LPC conservation efforts, including the RWP.

Over the course of three years, Occidental enrolled 180,026 acres in a CCA and 165,787 acres in a CCAA to protect habitat for two species in New Mexico, the Dunes Sagebrush Lizard and the LPC. Occidental's voluntary efforts occur pursuant to formal conservation agreements developed through a collaboration among the oil and gas and ranching industries, the State of New Mexico, the Service, the Bureau of Land Management ("BLM") and the Center of Excellence for Hazardous Materials Management, which administers the program. These agreements guide the implementation of conservation measures, including habitat restoration and enhancement and minimizing surface disturbance, which are above and beyond those established by the BLM in its "Special Status Species Resource Management Plan Amendment" for southeast New Mexico.

In 2014, Occidental also enrolled 306,048 acres in its oil and gas interests in Texas under the voluntary Oil and Gas CCAA for the LPC, which was developed in coordination with the Service and WAFWA. The Oil and Gas CCAA represents a collaborative approach to facilitate responsible oil and gas development and habitat conservation for the LPC throughout the bird's range.

In 2017, Occidental enrolled approximately 21,626 acres in the Texas Conservation Plan ("TCP"), a voluntary agreement to conserve the habitat of the dunes sagebrush lizard. And in 2018, Occidental enrolled 121,970 in three different CCA's and CCAA's on federal, state and private lands in New Mexico to conserve the habitat of the Texas hornshell mussel. In total, Occidental has enrolled almost 800,000 acres of its holdings in various conservation agreements.

As these commitments demonstrate, Occidental is engaged in species conservation efforts for the long term. We believe it is essential that the Service properly evaluate conservation efforts under the PECE, and we offer the following comments on the collection and assessment of information that will enable the Service to meet that objective.

In *Permian Basin Petroleum Assn. v. Dept. of the Interior*, 127 F.Supp.3d 700 (WD TX 2015), the court focused intently on the Service's implementation of the PECE in its evaluation of the RWP for the LPC. The court was highly critical of the Service's PECE implementation in three principal respects: (1) The Service failed to collect and analyze information that would enable it to make informed predictions as to the likely implementation and success of the RWP; (2) the Service failed to evaluate factual information at its disposal, but relied instead on unfounded assumptions drawn from stale data; and (3) the Service evaluated the RWP in isolation from all of the many other conservation efforts and governmental habitat conservation programs. Occidental urges the Service to address these shortcomings in designing and carrying out its information gathering activities going forward.

1. Gather the Right Types of information to Support Predictive Analyses.

The *Permian Basin* court correctly emphasized that proper implementation of PECE, like decision making under the ESA generally, is predictive in nature. PECE requires the Service to make a judgment as to whether conservation efforts are well-designed, likely to be implemented and likely to succeed in the future. *Id.* at 710-18. Similarly, the ESA requires the Service to decide whether a species is in danger of extinction in the future or likely to become endangered in the future.¹⁶ U.S.C. Sections 1532(6), 1532 (20). In making these predictions, the Service has an obligation to gather and analyze the types of information that would enable it to project current conditions into the future by taking into account the likelihood that conservation efforts will be implemented in such a way as to make a difference in the threats facing the species. For example, then-Director Dan Ashe approved the RWP, but conditioned his approval upon a finding under PECE that it would be properly implemented.

Thus, the court in *Permian Basin* fairly criticized the Service for drawing negative conclusions about the likelihood that sufficient numbers and types of parties would participate from the fact that landowner enrollment, which had just begun under the RWP, was nonexistent at the time of the assessment. 127 F.Supp.3d at 714. The court said:

Forecasting requires an assessment of multiple factors, particularly if the confidence in such an assessment is to be high. FWS should have considered factors not presently included in the record, such as prior industry and landowner participation in other conservation efforts in the area and FWS's assessment of RWP's incentives (e.g.,

Was it a good deal? Would those incentives make landowner participation more likely?), among other things.

Id. at 714. The court leveled the same criticism at the Service's perfunctory conclusion that it lacked certainty as to the commitment to RWP implementation. Id. at 716.

Fundamentally, in predicting the likely success of conservation efforts in reducing specific threats to a species, the Service will need to look well beyond the current status of existing activity and the threat reduction achieved thus far. The Service will need to evaluate program managers' specific plans for future habitat conservation activity, both near-term and longer-term; plans for future fundraising; plans for prioritizing actions to address the most prevalent threats; and plans for focusing on sub-areas of the species' range where habitat improvement and/or population gains are most likely, or most needed. In short, predictions must be grounded in a solid understanding of the direction, timing and available resources of each conservation effort, and the Service will have to exert a real effort in order to gain the level of understanding needed to formulate and defend the predictions required under its PECE.

In designing future information gathering activities, the Service therefore needs to thoroughly consider the *types of information* and the level of detail required to make predictions about future implementing actions and results. It will no longer be sufficient to simply request copies of plans and snapshots of key features such as current enrollment and funding. The Service should articulate – and justify – the factors it believes will be predictive of future trends, and should then request the information needed to evaluate implementation and the likelihood of success according to those factors. Failure to take this essential, preliminary step may well result in arbitrary and capricious decision making, as it did in *Permian Basin*.

2. Plan to Update and Consider Current Information Prior to Decision Making.

The Service will make reasonable and reliable decisions under the PECE only to the extent it gathers and evaluates the most current information. Because the Service's decisions under the PECE are couched in terms of the degree of certainty it has about the likely implementation and success of conservation efforts, those decisions frequently will be biased toward negative assessments whenever the Service attempts to rely on stale data or the lack of information. Indeed, the lack of information concerning some aspects of the RWP led the Service to conclude that it lacked certainty about those aspects, but the *Permian Basin* court held that the Service's approach was arbitrary and capricious.

It is the *Service's obligation* to gather the information it needs. And when the Service has available to it fairly current information that would contribute to predictions required by the PECE, the Service must not fail to incorporate that information into its assessments. In *Permian Basin*, for example, the Service possessed, but failed to analyze the most recent enrollment information for the RWP even though it knew that recent enrollment had been "rapid and extremely

significant.” *Id.* at 714. The court also pointed out that data on pending landowner applications should have informed the Service’s forecast of future enrollment. *Id.* The court concluded that “[p]roperly analyzing the risks of an action requires the agency to use updated information or data; reliance on out-of-date or incomplete information may render the analysis of effects speculative and uncertain....” *Id.* (quoting *City of Dallas, Tex. v. Hall*, 562 F.3d 712, 720 (5th Cir. 2009)).

It is not unusual for the Service to find itself rushing to meet a statutory or court-ordered deadline to make a listing decision for which the associated PECE assessment is essential. Given that conservation efforts to be analyzed under the PECE are relatively recent and likely undergoing rapid change, it will be especially important to plan for adjustments well before the deadline. In such circumstances, the Service must build into its information gathering activities a “last minute” assessment of changing data in order to consider the most recent information and to identify, if possible, any apparent trends revealed by comparing recent data to prior information. Initial information requests should flag for respondents the likely need for future updates and the timeframes in which those updates will be requested.

3. Gather information to Analyze All Conservation Efforts and Programs Cumulatively.

Finally, the Service must avoid the mistake it made when, in applying the PECE to the RWP, it ignored other conservation efforts and habitat conservation programs that will result in benefits to the species. Information gathering activities must be designed to elicit information about all relevant efforts and programs so that comparable data is developed for each. The Service can then make a predictive assessment as to the *cumulative* benefits to be expected in the aggregate from all pertinent efforts and programs, as required by the PECE. Because conservation efforts and programs are not all created to address the same constellation of threats, the Service’s information gathering process should be designed at the very outset on a threat-by-threat basis.

There is no question that the Service must undertake a cumulative benefits analysis. In promulgating its PECE, the Service emphasized that “[w]e will evaluate the status of the species in the context of all factors..., including all known conservation efforts whether planned, under way, or fully implemented. 68 Fed. Reg. 15,102 (March 28, 2003). The court in *Permian Basin* underscored the Service’s PECE commitment to undertake a cumulative benefits analysis by holding that the Service had failed to properly implement the PECE because its conclusions concerning the RWP’s likely effectiveness “should have been considered in conjunction with all other pending and presently implemented efforts....” 127 F.Supp.3d at 723.

Proper analysis of the RWP for the LPC, including a cumulative PECE assessment, would have informed the Service’s conclusions and the likely outcome of a listing decision. In addition to the specific program embodied in the RWP, *over twenty other conservation efforts and governmental programs* are being implemented to address threats to the LPC. Those programs cover millions of acres within the range of the LPC and address the full array of threats to the

species. Beyond that, another 3-4 million acres are being managed for a multitude of purposes within the range of the LPC by land trusts, land banks, government agencies and businesses; the conservation of these lands provides benefits to the LPC even though it was not specifically designed to do so. Obviously, the effectiveness of the RWP, considered in the context of all other contributing conservation efforts, should be seen far more positively than would be the case when considering the RWP in isolation. The PECE requires this type of cumulative assessment, and the Service's information gathering activities must be designed to produce the data needed to undertake it.

CONCLUSION

The key concepts outlined above – gathering data to support a predictive analysis, ensuring that up-to-date data are acquired in the final stages of preparing a listing decision, and gathering information from all relevant sources to enable a cumulative assessment – are central to the Service's mission in implementing its PECE. Occidental believes the Service needs to undertake a planning and scoping exercise in advance of preparing each information request in order to meet these needs. Such an exercise should be undertaken in consultation with the managers and supporters of each relevant conservation effort for a target species in order to forge consensus on the scope and types of information to be collected. Where Occidental is involved with the conservation of a particular species, we would be pleased to participate in appropriate planning exercises of this sort.

Sincerely,



Myles P. Culhane
Assistant General Counsel