



American  
Exploration & Production  
Council



January 22, 2018

Public Comments Processing

Attn: Docket No. FWS-HQ-ES-2017-0075

Division of Policy, Performance, and Management Programs

U.S. Fish and Wildlife Service

5275 Leesburg Pike

MS: BPHC

Falls Church, Virginia 22041

**Attention: Attn: Docket No. [FWS-HQ-ES-2017-0075]**

**Proposed Revisions to Regulations for Candidate Conservation Agreements with Assurances, re 82 Fed. Reg. 55,550 (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) Regulations (“Regulations”) found at 50 C.F.R. 17.22(d) and 17.32(d), which the Service announced that it was intending to review and possibly to revise in a notice published at 82 Fed. Reg. 55,550 (November 22, 2017). We request the FWS revise the existing rule 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 permit requirements for drilling and production operations that could be affected by the Regulations. 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 ecosystems. 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. A REGULATORY APPROACH THAT ENCOURAGES CCAAS CAN PROVIDE CONSERVATION BENEFITS**

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 Candidate Conservation Agreements with Assurances Policy, 81 Fed. Reg. 95,164 (Dec. 27, 2016), reflect that a properly designed policy informing effective regulations can enable a CCAA program to achieve the twin goals of encouraging voluntary conservation efforts and benefiting candidate species.

Large-scale CCAAs have garnered such high levels of participation that they have helped preclude the need to list species such as the greater sage-grouse and dunes sagebrush lizard. *See* 79 Fed. Reg. 71,444 (Dec. 2, 2014) (announcing availability of draft CCAA for the greater sage-grouse in multiple Oregon counties); 79 Fed. Reg. 48,243 (Aug. 15, 2014) (announcing availability of draft CCAA for the greater sage-grouse in two Oregon counties); 79 Fed. Reg. 2683 (Jan. 15, 2014) (announcing availability of draft CCAA for the greater sage-grouse in Harney County, Oregon); 78 Fed. Reg. 9066 (Feb. 7, 2013) (announcing availability of draft CCAA for the greater sage-grouse in Wyoming); 74 Fed. Reg. 36,502 (July 23, 2009) (announcing availability of draft CCAA for the greater sage-grouse in Idaho); 76 Fed. Reg. 62,087 (Oct. 6, 2011) (announcing availability of draft CCAA for the dunes sagebrush lizard in Texas); 73 Fed. Reg. 62,526 (Oct. 21, 2008) (announcing availability of draft CCAA for the lesser prairie-chicken and dunes sage-brush lizard in New Mexico). Other large-scale CCAAs have generated significant participation, yielding significant conservation benefits. *See, e.g.,* 78 Fed. Reg. 76,693 (Dec. 18, 2013) (announcing availability of multi-state CCAA for the lesser prairie-chicken). The diverse nature of these conservation efforts reflects the flexibility afforded by the previous regulations and poli-

cy. Some of these efforts focus on avoidance and minimization measures, others emphasize compensatory mitigation, and others rely on a mixture of avoidance, minimization, and mitigation measures. Finally, it is notable that no court has set aside an approved CCAA because the Service misapplied the previous CCAA standard.

With this letter, we recommend certain revisions to the regulations. Included in these recommendations is removal of the term “net conservation benefit” to be replaced with the term “beneficially contribute to the conservation of an affected covered species or its habitat”. The Associations believe that the “net conservation benefit” standard disregards the conservation benefits that avoidance and minimization measures yield and would likely result in a one-size-fits-all standard for evaluating conservation benefits across numerous and varied conservation programs that would discourage initiatives by private landowners – initiatives that in the aggregate could help conserve wildlife and habitat resources. Further, the “net conservation benefit” standard, especially as informed by the 2016 CCAA Policy, risks decisions for approval of applications for CCAAs that would expect property owners to reduce or eliminate unknown or speculative threats, or threats beyond their ability to control. The “net conservation benefit” standard thus undermines the assurances provided in CCAAs and the associated enhancement of survival permits.

The revisions to the regulations proposed here, coupled with the revisions we recommend to the CCAA Policy in a separate letter also submitted today, are steps that will encourage private landowners and project proponents to propose terms for conservation agreements for the Service’s review and approval. A flourishing CCAA program will in turn foster an increasing number and diversity of private conservation initiatives to benefit species and habitat.

## **II. RECOMMENDATIONS FOR REVISION TO APPLICATION REQUIREMENTS FOR PERMITS FOR ENHANCEMENT OF SURVIVAL THROUGH CCAAS, 50 C.F.R. § 17.22(d) AND 50 C.F.R. § 17.32(d)**

### **A. Recommended revisions to 50 C.F.R. 17.22 Permits for scientific purposes, enhancement of propagation or survival, or for incidental taking.**

50 C.F.R. § 17.22 pertains to permits issued for enhancement of survival of species deemed threatened under the ESA. The current regulatory criterion of “net conservation benefit” set forth in the “Issuance Criteria” in 50 C.F.R. § 17.22(d)(2)(ii) sets too high a threshold for approval of an enhancement of survival permit allowing incidental take for a species covered under this section, and risks disallowing approval of CCAAs that could achieve incremental benefits to populations of such species, or their habitat. The Associations recommend revision to the wording of 50 C.F.R. § 17.22(d)(2)(ii) as follows:

(ii) The implementation of the terms of the CCAA is reasonably expected to beneficially contribute to the conservation of an affected covered species or its habitat, and the CCAA otherwise complies with the Candidate Conservation Agreement with Assurances policy available from the Service. In the case where the covered species and its habitat are already adequately managed for the benefit of the species, a beneficial contribution will be achieved under this rule if an applicant commits to continue the management activities described in the application.

The Service 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.

The revision to the wording of the regulation proposed above reflects this understanding of the range of benefits to be achieved through CCAAs, even if in cases of some properties these may be incremental. It also allows consideration of applications under this rule where an applicant commits to continue management activities rather than proposing to initiate or undertake new ones. 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. Also, 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 listed species, the Service 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. The recommended language would allow this outcome.

Consistent with the foregoing, the criteria for the duration of a CCAA covered by a permit issued under 50 C.F.R. § 17.22(d) should also be revised as follows:

**(8) Duration.** The duration of a CCAA covered by a permit issued under this paragraph (d) must be sufficient to achieve a beneficial contribution to the species' population or habitat, taking into account both the duration of the CCAA and any offsetting adverse effects attributable to the incidental taking allowed by the enhancement of survival permit, and otherwise comply with the Candidate Conservation Agreement with Assurances policy available from the Service.

#### **B. Recommended revisions to 50 C.F.R. § 17.32 Permits - general**

For the purpose of consistency, the language of 50 C.F.R. § 17.32(d)(ii), which pertains to permits issued for enhancement of survival of species deemed threatened under the ESA, should likewise be changed

**(ii)** The implementation of the terms of the CCAA is reasonably expected to beneficially contribute to the conservation of an affected covered species or its habitat, and the CCAA otherwise complies with the Candidate Conservation Agreement with Assurances policy available from the Service. In the case where the covered species and its habitat are al-

ready adequately managed for the benefit of the species a beneficial contribution will be achieved under this rule if an applicant commits to continue the management activities described in the application.

Similarly, the language of 50 C.F.R. § 17.32(d)(8) should also be changed:

**(8) Duration.** The duration of a CCAA covered by a permit issued under this paragraph (d) must be sufficient to achieve a beneficial contribution to the species' population or habitat, taking into account both the duration of the CCAA and any offsetting adverse effects attributable to the incidental taking allowed by the enhancement of survival permit, and otherwise comply with the Candidate Conservation Agreement with Assurances policy available from the Service.

### III. FOR ADDITIONAL INFORMATION

The Associations appreciate the Service's consideration of these recommendations and requests that the Service review and revise the relevant portions of 50 C.F.R. § 17.22 and 50 C.F.R. § 17.32 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 [atrangerr@api.org](mailto:atrangerr@api.org), Samantha McDonald of IPAA at 202.857.4722, or via e-mail at [smcdonald@ipaa.org](mailto:smcdonald@ipaa.org), Dustin Van Liew at IAGC at 713.957.8080, or by email at [dustin.vanliew@iadc.org](mailto:dustin.vanliew@iadc.org), or Bruce Thompson of AXPC at 202.347.7578, or by email at [bthompson@axpc.us](mailto:bthompson@axpc.us).

Sincerely,



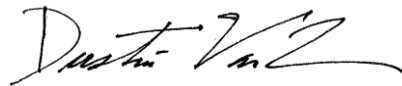
Richard Ranger  
Senior Policy Advisor  
American Petroleum Institute



Dan Naatz  
Senior Vice President of Government  
Relations and Public Affairs  
Independent Petroleum Association of America



V. Bruce Thompson  
President  
American Exploration & Production  
Council



Dustin Van Liew  
VP, Regulatory & Governmental Affairs  
International Ass'n of Geophysical Contractors