

## **Prelisting Conservation Actions Policy Questions and Answers**

### **What action is the U.S. Fish and Wildlife Service taking?**

The U.S. Fish and Wildlife Service (Service) is announcing a Director's Order establishing a policy on crediting voluntary conservation actions taken for species prior to their listing under the Endangered Species Act (ESA) that implement a species conservation strategy developed by one or more states. The purpose of the policy is to establish another vehicle to encourage and reward voluntary actions to conserve our nation's most at-risk species. It provides a mechanism for landowners, government agencies and others to obtain credits for current conservation efforts benefitting declining species.

The policy, effective immediately, empowers states, on their own initiative, to develop voluntary prelisting conservation programs for at-risk species. Credits generated through such programs can be used either by the person or organization who undertook such actions or by a third party to whom the credit has been transferred or sold. These credits will mitigate or serve as a compensatory measure for the negative effects of another action undertaken after listing. This policy will help us further the Service's efforts to protect native species and conserve the ecosystems on which they depend. Under this policy, landowners can obtain conservation credits for efforts that benefit declining species. These credits can later be redeemed to offset or mitigate actions that are detrimental to a species should it subsequently be listed under the ESA. For a state voluntary prelisting conservation program to satisfy this policy, each conservation action must generate at least 10 percent more credits that would be allowed to be used, thus providing an overall net conservation benefit for the species.

On March 15, 2012, the Service published in the *Federal Register* an advance notice of proposed rulemaking (ANPR), opening a 60-day comment period until May 14, 2012, inviting the public to identify potential changes or additions to our policies and regulations under the ESA. The Service extended the comment period for an additional 60 days until July 13, 2012. On July 22, 2014, the Service published the proposed Voluntary Pre-Listing Conservation policy in the *Federal Register*, opening a 60-day comment period September 22, 2014, and extended the comment period an additional 60 days until November 6, 2014. One of the Service's goals was to create additional incentives, and improve or expand existing incentives, for landowners and others to invest in early voluntary conservation actions to benefit species that may be considered for listing under the ESA. The final Voluntary Pre-Listing Conservation Policy responds to all comments and recommendations.

### **What are the differences between the proposed policy and final policy?**

Based on comments the Service received on the draft policy and discussions with state conservation or wildlife agencies, the following changes were made to this final policy:

- 1) Added a definitions section to the policy to explain key terms.
- 2) Earned credits can be used within a "service area" that is based on the biological needs of the species, rather than on state boundaries and included a definition of the term "service area." This is in place of where the draft policy stated that the credits earned by undertaking a pre-listing conservation action may be transferred to a third party but must occur within the same state where the credit was originally earned.
- 3) Clarified that qualifying conservation actions must be part of a conservation program that is operational and generating conservation benefits for the species before the date on which a proposed rule to list the species under the ESA is published in the *Federal Register*. The

conservation actions must be started before the effective date of a final rule to list the species under ESA protection.

- 4) Updated language in section 4 of the policy, where rather than using the phrase “positive assistance to the recovery of the species,” the Service indicated that the benefit from the prelisting actions combined with the detriment of an action taken after listing must result in a “net conservation benefit” to the species and provided a definition of this phrase.
- 5) Expanded the policy by incorporating, by reference, requirements and program elements that are contained in other Service mitigation policies to further define and govern voluntary pre-listing conservation actions taken as part of a pre-listing conservation program.
- 6) Clarified that the Service may assist a state in any aspect of a voluntary prelisting conservation program, but only if requested by the state.
- 7) Expanded section 7 of the policy to incorporate, by reference, principles and requirements contained in Service mitigation policies that pre-listing crediting programs need to encompass.
- 8) Included a new section in the policy to further explain the relationship between this policy and [candidate conservation agreements](#): both Candidate Conservation Agreements (CCAs) and Candidate Conservation Agreements with Assurances (CCAAs).

### **Under the final policy, how would the Service treat voluntary pre-listing conservation actions?**

The policy sets forth principles and requirements for states to follow in setting up a program through which they will give credit to voluntary pre-listing conservation actions. In the event a species is eventually listed as threatened or endangered under the ESA, the policy explains how the Service will treat these credits.

There are two possibilities for how this could happen: First, for non-federal actions that would harm a listed species and require a take permit under section 10 of the ESA, credits from pre-listing conservation actions can be carried forward and treated as mitigation to offset the impacts to that species from a development action. Second, for federal actions affecting a listed species and requiring consultation under section 7 of the ESA, credits from voluntary pre-listing conservation actions already undertaken can be used to offset the adverse effects of the action. It is a long established practice that federal agencies or their permit applicants can incorporate mitigating measures into their projects to reduce their overall impact. This policy codifies that voluntary pre-listing conservation measures can be used in this manner.

The policy also established that *anyone* (e.g., federal agency or private entity) who wants to participate can undertake a voluntary pre-listing conservation action and carry credits forward as long as the action occurs in a participating state within the framework of an established conservation strategy for the species. Conservation actions are based on a conservation strategy for the species that are developed with the state, and should guide all conservation efforts for at-risk unlisted species, including federal, state, Tribal and private conservation actions. A strategy can be authored by any one of these entities, but ideally it is created as a collaborative effort, with states playing a primary role, and the public participating in the process.

### **How does the policy define pre-listing conservation actions?**

A pre-listing conservation action must be undertaken as part of a state-administered program for conservation of the species that includes the requirements outlined in the policy. As such, the policy is designed in anticipation of the active engagement of states in designing and implementing a program to encourage voluntary pre-listing conservation actions. The action must also be undertaken before the

species it is intended to benefit is listed under the ESA, and it must be truly voluntary, meaning it is not required by any other federal, state or local regulation.

The policy also makes it clear that states can use federal funds to monitor species and the impacts of conservation actions, and to provide oversight to ensure the successful implementation and maintenance of the voluntary pre-listing conservation actions as they relate to species that are candidates for ESA listing.

### **What is the relationship of these prelisting conservation agreements to Candidate Conservation Agreements with Assurances and other, similar agreements?**

Although CCAAs and voluntary pre-listing conservation actions covered by the policy serve the same purpose – conservation of species before they become listed – they employ different mechanisms, have different approval requirements and have other important differences. First, CCAAs are available only to non-federal property owners, whereas the pre-listing conservation policy applies to any property owner (federal or non-federal).

Second, CCAAs provide assurances to the landowner that if the species covered by the CCAA is later listed as threatened or endangered, no new restrictions or conservation obligations will be imposed for that species so long as the landowner operates under the approved conservation agreement. In contrast, the pre-listing conservation policy provides credits that can be carried forward and used to mitigate the impacts of actions carried out subsequent to listing, either by the landowner who earned the credit or by a third party to whom it has been transferred or sold. This pre-listing conservation policy provides no assurances regarding future mitigation requirements that a landowner or third party may face, other than to establish that credits from voluntary pre-listing conservation actions may be applied.

Third, to qualify for a CCAA, a non-federal property owner must commit to carrying out conservation measures that are designed to reduce or eliminate those key current and future threats on an enrolled property that are under the control of the property owner, in order to provide a net conservation benefit to the covered species. In contrast, to be treated as a voluntary pre-listing conservation action under the policy, an action need only benefit one specific species; the policy requires no specific magnitude of benefit.

### **How will beneficial and detrimental impacts be quantified?**

Providing credit for an effort to mitigate or serve as a compensatory measure for the impacts of a detrimental action on a species requires measuring both the detrimental impact and the offsetting benefit of a mitigation action or compensatory measure. The policy provides that states must use the same standards and metrics to quantify both the detrimental impact and offsetting benefit. The policy does not specify what those uniform criteria, standards or metrics are, or how they should be developed. The criteria will need to be developed separately and are likely to vary from species to species, or situation to situation.

Ultimately, the benefit of a voluntary pre-listing conservation action for which credit is given must be greater than the detriment from the action for which the credit is later redeemed, providing an overall benefit to the species. The specific manner in which this net gain is to be achieved will depend on the species and the nature of the actions.

In addition, a voluntary pre-listing conservation action can be supplemented with additional post-listing conservation actions so the combined benefit of pre-listing and post-listing conservation actions is greater than the detriment from the post-listing detrimental actions.

**What is the Service’s role in implementing this new policy?**

The Service’s role includes assisting states in any aspect of a voluntary pre-listing conservation program, if requested by a state. The Service will review any voluntary pre-listing conservation program for consistency with this policy and other mitigation policies and guidelines established by the Service, and evaluate annual reports from state voluntary pre-listing conservation programs. In addition, the Service will collaborate with states and review conservation strategies that are to be used in conjunction with voluntary pre-listing conservation programs.

**How will Farm Bill conservation efforts align with this new policy?**

As a general matter, conservation actions on non-federal lands that are supported by Farm Bill program funding or an associated non-federal match are not eligible to accrue credits for purposes of this policy. However, credit can be accrued for actions on those same lands that provide additional conservation benefits to those generated by the federal funds and the associated non-federal match (e.g., if a landowner maintains the conservation action beyond the term of the federally-funded conservation effort). For example, when USDA Natural Resources Conservation Service (NRCS) Working Lands for Wildlife funds are used to fund habitat restoration for a species, a landowner may participate in a voluntary pre-listing conservation program once the financial term of the NRCS conservation plan contract expires.

**Where can I find more information?**

For a copy of the Director’s Order, policy and more information, please visit:  
[https://www.fws.gov/endangered/improving\\_ESA/prelisting-conservation.html](https://www.fws.gov/endangered/improving_ESA/prelisting-conservation.html).