

## **Key Aspects of the Policy for Evaluation of Conservation Efforts When Making Listing Decisions (PECE)**

The Policy for the Evaluation of Conservation Efforts When Making Listing Decisions (PECE) was published in the Federal Register by the U. S. Fish and Wildlife Service and the National Marine Fisheries Service (Services) on March 28, 2003 (68 FR 15100).

### **Origin of the Policy**

Under the Endangered Species Act (Act), a determination of whether a species is threatened or endangered must be made solely on the basis of the best scientific and commercial data available after conducting a review of the status of the species and “*after taking into account those efforts, if any, being made...to protect such species, whether by predator control, protection of habitat and food supply, or other conservation practices*”<sup>1</sup> (*italics* in this document are emphasis added). This provision is interpreted by the Services to apply also to efforts being made by other federal agencies, tribal governments, or private entities.

Courts have upheld consideration of *existing* conservation efforts where the administrative record clearly showed an effort had reduced or removed a threat to the species. PECE was developed after several court rulings found that the Services inappropriately relied on conservation efforts that had not yet been implemented or had not yet demonstrated effectiveness in having reduced or eliminated a threat to a species:

- “We referenced past adverse decisions when we published the draft [PECE] policy. The purpose of PECE, in part is to address situations similar to those in which some courts found past conservation efforts insufficient. We developed the PECE to establish a set of consistent standards for evaluating certain formalized conservation efforts at the time of a listing decision and to ensure with a high level of certainty that formalized conservation efforts will be implemented and effective. *We agree we may not rely on speculative promises of future action when making listing decisions.*”<sup>2</sup>

### **Purpose of PECE**

The purpose of PECE is “to ensure consistent and adequate evaluation of formalized conservation efforts ... when making listing decisions under the Act. This policy may also guide the development of conservation efforts that sufficiently improve a species’ status so as to make listing the species as threatened or endangered unnecessary.”<sup>3</sup> PECE does not establish standards for how much conservation is needed to make listing unnecessary; rather, it is a process for identifying whether a conservation effort that has not been implemented or has not yet demonstrated effectiveness can be considered as part of a basis for a listing determination.

### **Policy Scope and Definitions**

“Listing decisions covered by the policy include findings on petitions to list species, and decisions on whether to assign candidate status, remove candidate status, issue proposed listing rules, and finalize or withdraw proposed listing rules.”<sup>4</sup>

“This policy applies to those formalized conservation efforts that *have not yet been implemented or have been implemented, but have not yet demonstrated whether they are effective* at the time of a listing decision.”<sup>5</sup> Thus, conservation efforts that are being implemented and have demonstrated effectiveness are not within the scope of PECE; the effect of such efforts on the status of a species is considered as part of analysis of the five listing factors in section 4(a)(1) of the Act.

“This policy applies to formalized conservation efforts developed with or without a specific intent to influence a listing decision and with or without the involvement of the Services”<sup>6</sup>

*Formalized conservation efforts* “are conservation efforts identified in a conservation agreement, conservation plan, management plan, or similar document. An agreement or plan may contain numerous conservation efforts.”<sup>7</sup> *Conservation efforts* “are specific actions, activities, or programs designed to eliminate or reduce threats or otherwise improve the status of a species. Conservation efforts may involve restoration, enhancement, maintenance, or protection of habitat; reduction of mortality or injury; or other beneficial actions.”<sup>8</sup>

### **Requirement to Evaluate Individual Efforts**

PECE is specific that it applies to individual formalized conservation efforts:

- “Because the certainty of implementation and effectiveness of formalized conservation efforts may vary, we will evaluate each effort individually ....”<sup>9</sup>

Thus, PECE is not used to evaluate an entire conservation plan (or agreement, etc) -- rather, we are required to evaluate individual efforts that are part of such documents. This is reinforced in the definition of formalized conservation efforts: “An agreement or plan may contain numerous conservation efforts,”<sup>10</sup> and by text in the Policy: “An agreement or plan may contain numerous conservation efforts, not all of which are sufficiently certain to be implemented and effective.”<sup>11</sup> Although an evaluation is made of individual efforts, there are a variety of logical ways to group sets of efforts (e.g. actions by the same entity with the same funding source, etc) to make the evaluation as efficient and timely as possible.

### **Evaluation Criteria**

To direct our analysis, PECE provides 15 criteria – 9 for the certainty that a conservation effort will be implemented and 6 for the certainty that it will be effective.<sup>12</sup> (Attachment 1). Information for evaluating an effort can come from various sources, e.g. the plan containing the effort, a project description, or other relevant sources. PECE does not provide a quantitative threshold for determining when an individual criterion has been met: “The specific circumstances will also determine the amount of information necessary to satisfy these criteria.”<sup>13</sup> Also, we are not limited to the 15 criteria provided in PECE: “These criteria should not be considered comprehensive evaluation criteria. The certainty of a formalized conservation effort may also depend on species-specific, habitat-specific, location-specific, and effort-specific factors. We will consider all appropriate factors in evaluating formalized conservation efforts.”<sup>14</sup> Reasonable flexibility is involved in applying the criteria. For example, a high level of certainty of funding does not mean all funds for an effort that will occur in stages over several years must be in place; rather, at least 1 year of funding should be assured, with documentation of a commitment to obtain future funding (e.g. a commitment to request or provide funding in future budget cycles).

### **The PECE Standard**

- “To consider that a formalized conservation effort(s) contributes to forming a basis for not listing a species or listing a species as threatened rather than endangered, we must find that the conservation effort is sufficiently certain to be implemented and effective so as to have contributed to the elimination or adequate reduction of one or more threats to the species identified through the section 4(a)(1) analysis...conservation efforts that are not sufficiently certain to be implemented and effective cannot contribute to a determination that listing is unnecessary or a determination to list as threatened rather than endangered.”<sup>15</sup>

The policy does not provide a quantitative interpretation of “sufficiently certain” but does provide a qualitative clarification by referring to having a “high level of certainty.”

- “We will determine whether a formalized conservation effort that has yet to be implemented or has recently been implemented but has yet to show effectiveness provides a *high level of certainty* that that the effort will be implemented and/or effective and results in the elimination or adequate reduction of the threats.”<sup>16</sup>

The Supplementary Information section of PECE also refers to a *high level of certainty* several times and states: “At the time of the listing decision, we must find, with *minimal uncertainty*, that a particular formalized conservation effort will be implemented and will be effective, in order to find that the effort has positively affected the conservation status of a species.”<sup>17</sup>

### **Reduction of Threats As of the Time of the Decision**

In reaching a conclusion about whether a conservation effort meets the standard in PECE, we have to be certain enough about implementation and effectiveness to conclude that the effort already has contributed to the reduction or elimination of one or more threats as of the time of the listing decision, even though the effort may not yet have been implemented. In other words, saying that an effort “will” contribute to reducing a threat (i.e., in the future) does not meet the standard in PECE:

- “...we must determine *at the time of the listing decision* that the conservation effort *has improved* the status of the species.”<sup>18</sup>
- “We may determine that a formalized conservation effort that has not yet been implemented *has reduced or removed a threat* to a species when we have sufficient certainty that the effort will be implemented and will be effective.”<sup>19</sup>

### **Consideration of Efforts in Draft Plans**

With regard to conservation efforts contained in a plan that is not yet final, PECE states:

- “Plans that have not been finalized and, therefore, *do not conform to the PECE criteria*, may have some conservation value for the species. For example, in the process of developing a plan, participants and the public may become more informed about the species and its conservation needs. We will consider any benefits to a species that have accrued prior to the completion of an agreement or plan in our listing decision, under section 4(b)(1)(A). However, *the mere existence of a planning process does not provide sufficient certainty to actually improve the status of a species.*”<sup>20</sup>

### **Services’ Obligation to Track the Status of Efforts**

PECE specifies that the Services will track the status of efforts that contribute to a decision that listing is unnecessary and, if any of certain events occurs, will reevaluate the status of the species and consider whether initiating the listing process is necessary:

- “If we make a decision not to list a species...based in part on the contributions of a formalized conservation effort, we will track the status of the effort including the progress of implementation and effectiveness of the conservation effort. If any of the following occurs: (1) a failure to implement the effort in accordance with the implementation schedule; (2) a failure to achieve objectives;(3) a failure to modify the conservation effort to adequately address an increase in the severity of a threat or to address other new information on threats; or (4) we receive any other new information indicating a possible change in the status of the species, then we will reevaluate the status of the species and consider whether initiating the listing process is necessary. Initiating the listing process may consist of designating the species as a candidate species and assigning a listing priority, issuing a proposed rule to list, issuing a proposed rule to reclassify, or issuing an emergency listing rule.”<sup>21</sup>

## **Attachment: PECE Standard & Criteria**

The Policy for Evaluation of Conservation Efforts When Making Listing Decisions (PECE) (68 FR 15100, March 28, 2003), applies to formalized conservation efforts that are not yet been implemented or have not yet demonstrated whether they are effective and have reduced a threat at the time of a listing decision. **The standard that must be met under PECE is: “To consider that a formalized conservation effort(s) contributes to forming a basis for not listing a species or listing a species as threatened rather than endangered, we must find that the conservation effort is sufficiently certain to be implemented and effective so as to have contributed to the elimination or adequate reduction of one or more threats to the species identified through the section 4(a)(1) analysis.”** Each effort is evaluated individually using the PECE criteria below; other criteria may be used as appropriate (68 FR 15114-15115). For efficiency, it often is possible to evaluate sets of individual efforts to which the same information applies (e.g. several efforts may have identical information for most criteria). The “Supplementary Information” section of PECE provides important information for interpreting and applying individual criteria.

### **A. Certainty that the Conservation Effort Will Be Implemented:**

1. The conservation effort, the party(ies) to the agreement or plan that will implement the effort, and the staffing, funding level, funding source and other resources necessary to implement the effort are identified.
2. The legal authority of the party(ies) to the agreement or plan to implement the formalized conservation effort, and the commitment to proceed with the conservation effort, are described.
3. The legal procedural requirements (e.g. environmental review) necessary to implement the effort are described, and information is provided indicating that fulfillment of these requirements does not preclude commitment to the effort.
4. Authorizations (e.g. permits, landowner permission) necessary to implement the conservation effort are identified, and a high level of certainty is provided that the party(ies) to the agreement or plan that will implement the effort will obtain these authorizations.
5. The type and level of voluntary participation (e.g. the number of landowners allowing entry to their land, or number of participants agreeing to change timber management practices and acreage involved) necessary to implement the conservation effort is identified, and a high level of certainty is provided that the party(ies) to the agreement or plan that will implement the conservation effort will obtain that level of voluntary participation (e.g., an explanation of how incentives to be provided will result in the necessary level of voluntary participation).
6. Regulatory mechanisms (e.g. laws, regulations, ordinances) necessary to implement the conservation effort are in place.
7. A high level of certainty is provided that the party(ies) to the agreement or plan that will implement the conservation effort will obtain the necessary funding.
8. An implementation schedule (including incremental completion dates) for the conservation effort is provided.
9. The conservation agreement or plan that includes the conservation effort is approved by all parties to the agreement or plan.

### **B. Certainty that the Conservation Effort Will Be Effective:**

1. The nature and extent of the threats being addressed by the conservation effort are described, and how the conservation effort reduces the threats is described.
2. Explicit incremental objectives for the conservation effort and dates for achieving them are stated.
3. The steps necessary to implement the conservation effort are identified in detail.
4. Quantifiable, scientifically valid parameters that will demonstrate achievement of objectives, and standards for these parameters by which progress will be measured, are identified.
5. Provisions for monitoring and reporting progress on implementation (based on compliance with the implementation schedule) and effectiveness (based on evaluation of quantifiable parameters) of the conservation effort are provided.
6. Principles of adaptive management are incorporated.

## **Footnotes**

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- 1        ESA section 4(b)(1)(A)
- 2        68 FR 15106, Supplementary Information, *Response 30*
- 3        68 FR 15112, Policy, *Policy Purpose*
- 4        68 FR 15113, Policy, *Policy Scope*
- 5        68 FR 15113, Policy, *Policy Scope*
- 6        68 FR 15113, Policy, *Policy Scope*
- 7        68 FR 15113, Policy, *Definitions*
- 8        68 FR 15113, Policy, *Definitions*
- 9        68 FR 15114, Policy, *Evaluation Criteria*
- 10      68 FR 15113, Policy, *Definitions*
- 11      68 FR 15115, Policy, *Evaluation Criteria*
- 12      68 FR 15114-15115, Policy, *Evaluation Criteria*
- 13      68 FR 15115, Policy, *Evaluation Criteria*
- 14      68 FR 15115, Policy, *Evaluation Criteria*; see also Response 16 (68 FR 15104): “Because conservation needs vary, it is not possible to state all of the factors that might determine the ultimate effectiveness of formalized conservation efforts. The species-specific circumstances will also determine the amount of information necessary to satisfy these criteria.”
- 15      68 FR 15115, Policy, *Evaluation Criteria*
- 16      68 FR 15114, Policy, *Policy Scope*
- 17      68 FR 15104, Supplementary Information, Background p. 15101; Summary of Comments and Recommendations, *Response 16* “minimal uncertainty” at 68 FR 15104, and 68 FR 15103 –15108, *Responses 12, 22, 28, 30, 33, and 40* referring to having a high level of certainty
- 18      68 FR 15114, Policy, *Policy Scope*
- 19      68 FR 15113, Policy, *Policy Scope*; see also the text on page 15114 for examples
- 20      68 FR 15104, Supplementary Information, *Response 17*
- 21      68 FR 15114, Policy, *Policy Scope*; see also 68 FR 15108, *Response 40*