

by the language of the Act, to require us to consider both current actions that affect a species' status and sufficiently certain future actions—either positive or negative—that affect a species' status.

Issue 38: Several commenters stated that PECE's "sufficient certainty" standard is inconsistent with the Act's "best available science" standard. They stated that courts have ruled that any standard other than "best available science" violates the plain language and the Congressional intent of the Act. The commenters also stated that the "sufficient certainty" standard violates Congressional intent because it weakens the standard required by the Act to list species and can result in unnecessary, and potentially harmful, postponement of affirmative listing.

Response 38: We agree that our listing decisions must be based on the best available science. PECE does not address or change the listing criteria and procedures established under section 4 of the Act. Listing analyses include the evaluation of conservation efforts for the species under consideration. PECE is designed to help ensure a consistent and rigorous review of formalized conservation efforts that have yet to be implemented or efforts that have been implemented but have not yet shown effectiveness by establishing a set of standards to evaluate the certainty of implementation and effectiveness of these efforts.

Issue 39: Several commenters stated that PECE reduces or eliminates public comment on proposed rules to list species and is in violation of the Administrative Procedure Act (APA). Further, they stated that PECE violates the APA by allowing submission of formalized conservation measures after the proposed rule is issued to list species as threatened or endangered. Receiving "conservation agreements or plans before the end of the comment period in order to be considered in final listing decision" encourages landowners to submit conservation agreements at the last minute to avoid public scrutiny, and the PECE process could be a potential delay tactic used by landowners to postpone the listing of species. They stated that the Courts agree that failure of the Services to make available to the public conservation agreements on which listing decisions are based violates the public comment provision of the APA.

Response 39: All listing decisions, including those involving formalized conservation agreements, will comply with the requirements of the APA and ESA. If we receive a formalized conservation agreement or plan during an open comment period and it presents

significant new information relevant to the listing decision, we would either extend or reopen the public comment period to solicit public comments specifically addressing that plan or agreement. We recognize, however, that there may be situations where APA requirements must be reconciled with the ESA's statutory deadlines.

Issue 40: Several commenters expressed their concern that conservation efforts do not have binding obligations.

Response 40: While PECE does not require participants to have binding obligations, the policy does require a high level of certainty that a conservation effort will be implemented and effective at the time we make our listing decision. Furthermore, any subsequent failure to satisfy one or more PECE criteria would constitute new information and, depending on the significance of the formalized conservation effort to the species' status, may require a reevaluation of whether there is an increased risk of extinction, and whether that increased risk indicates that the species' status is threatened or endangered.

Funding Issues

Issue 41: Several commenters requested that we further specify our criteria stating that "a high level of certainty that the party(ies) to the agreement or plan that will implement the conservation effort will obtain the necessary funding is provided." In addition, one commenter questioned whether "a high level of certainty" for authorizations or funding was really an improvement over the status quo and suggested that we either list the required elements we will use to evaluate completeness of the conservation efforts or quantitatively define an evaluation standard.

Response 41: A high level of certainty of funding does not mean that funding must be in place now for implementation of the entire plan, but rather, it means that we must have convincing information that funding will be provided each year to implement relevant conservation efforts. We believe that at least 1 year of funding should be assured, and we should have documentation that demonstrates a commitment to obtain future funding, e.g., documentation showing funding for the first year is in place and a written commitment from the senior official of a state agency or organization to request or provide necessary funding in subsequent budget cycles, or documentation showing that funds are available through appropriations to existing programs and the

implementation of this plan is a priority for these programs. A fiscal schedule or plan showing clear links to the implementation schedule should be provided, as well as an explanation of how the party(ies) will obtain future necessary funding. It is also beneficial for entities to demonstrate that similar funding was requested and obtained in the past since this funding history can show the likelihood that future funding will be obtained.

Issue 42: One commenter suggested that the PECE policy holds qualifying conservation efforts to a higher standard than recovery plans. The commenter quoted several existing recovery plans that included disclaimers about budget commitments associated with specific tasks. Therefore, the commenter concluded that it is unrealistic and unreasonable to mandate that funding be in place when a conservation effort is evaluated.

Response 42: The Act does not require that certainty of implementation be provided for recovery management actions for listed species or conservation efforts for nonlisted species. Likewise, the PECE does not require that certainty of implementation be provided for during development of conservation efforts for nonlisted species. It is inappropriate to consider the PECE as holding conservation plans or agreements to a higher standard than the standard that exists for recovery plans because the PECE does not mandate a standard for conservation plans or agreements at the time of plan development. Rather, the PECE provides us guidance for the evaluation of conservation efforts when making a listing decision for a nonlisted species.

Recovery plans for listed species and conservation plans or agreements for nonlisted species identify needed conservation actions but may or may not provide certainty that the actions will be implemented or effective. However, when making a listing decision for nonlisted species, we must consider the certainty that a conservation effort will be implemented and effective. The PECE establishes criteria for us to use in evaluating conservation efforts when making listing decisions.

It is possible that we would evaluate a management action identified in a recovery plan for a listed species using the PECE. If, for example, a yet-to-be-implemented task identified in a recovery plan for a listed species would also benefit a nonlisted species, we, in making a listing decision for the nonlisted species, would apply the PECE criteria to that task to determine whether it could be considered as contributing to a decision not to list the