

# Summary of Comments and U.S. Fish and Wildlife Service Response

Notice of Availability and Request for Comments:  
Draft **Environmental Assessment or Environmental Impact Statement** and  
Draft **Name of HCP** Conservation Plan for the  
**Species** in **State**

**FR citation (e.g., 79 FR 21480)**

**Date**

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## Summary of Comments

The U.S. Fish and Wildlife Service (Service) received five sets of comments during the 14-day comment period. The first comment was received on April 16, 2014, from Janelle Rieland to inquire about incorrect website link within the Federal Register Notice. The website address was corrected the following day, on April 17, 2014. The Service

received a second set of comments from Daniel Howard and Carrie Hall (Howard and Hall), professors of biology at Augustana College in Sioux Falls, South Dakota, on April 29, 2014; a third set of comments from the Oklahoma Department of Wildlife Conservation on April 29, 2014; a fourth set of comments from Devon Energy Corporation (Devon), a member of OIPA and participant in the ICP development, on April 30, 2014; and a fifth set of comments from the Oklahoma Independent Petroleum Association (OIPA) on April 30, 2014.

The Service received a sixth set of comments from Amy Smith (Smith) on May 19, 2014, after the comment period had closed.

### **HCP comments**

*ICP Comment 2 (Hall & Howard):* Areas Unfavorable for the ABB; “Pastures or grasslands that have been maintained through frequent mowing, grazing, or herbicide application at a height of 20 cm (8 inches) or less.” Grazed or mowed pastures have been shown to hold high numbers of ABBs across the species range, including in Oklahoma. This statement should be clarified so that proponents and impactors are not confused and conclude that the Service is saying that simply because a grassland site has been recently disturbed through grazing, mowing, or fire, that it is unsuitable for ABBs. The term ‘maintained’ is ambiguous.

*Service Response to ICP Comment 2:* Due to the life history and limited research related to habitat requirements and movements of the ABB, knowledge on specific habitat restrictions for the ABB is limited. The Service is providing general recommendations of areas that are considered unfavorable for the ABB and will work with Permittees during the Permit application and IPP process to ensure that confusion is minimized. We invite the commenters to provide data that may help inform future decisions.

*ICP Comment 55 (Devon II-D):* The following sentence should be clarified by adding the bolded text to make clear that monitoring for invasive species is only required for temporary or permanent cover change impacts and is required during the five-year period during which restoration must occur:

Because vegetation composition may change the carrion base (small mammal and bird composition) of an area, Permittees will monitor project sites **with temporary or permanent cover change impacts** following post-construction restoration and document any invasive species . . . in their annual reports during the **five-year** restoration period.

*Service Response to ICP Comment 55:* The Service agrees and has added the requested language within the ICP.

*ICP Comment 70 (Smith):* I wish to commend you for the “Interim Oil and Gas Industry Conservation Plan” (ICP). I sincerely hope that this encourages the development and application of conservation measures that enhance the American burying beetle (ABB) in Oklahoma; adds to our knowledge of the species; and streamlines the process for staff. It is clear that much thought has gone into the ICP which incorporates the many documents that have emerged over the last few years.

*Service Response to ICP Comment 70:* Thank you for your comment.

### **EA Comments**

*EA Comment 1 (Devon III-A):* The Service may conclude that approval of the ICP and issuance of Permits will not significantly impact the human environment. In the draft EA, the Service assessed the impacts of approving the ICP and issuing Permits on a variety of resources, including geology, soils, water resources, water quality, air quality, vegetation, wetlands, wildlife, threatened and endangered species, land use, aesthetics, noise, socioeconomics, environmental justice, tribal resources, and cultural resources. *See* EA, chs. 3, 4. It compared these impacts to the impacts of the no-action alternative, which would result from operators either avoiding take of the ABB or developing Habitat Conservation Plans (“HCPs”) on a case-by-case basis. *See id.*; EA, pg. 2-1; Forty Most Asked Questions Concerning CEQ’s NEPA Regulations, 46 Fed. Reg. 18,026, 18,027 (March 23, 1981) (directing inclusion of “predictable actions by others” in the no-action alternative); *see also Young v. Gen. Serv. Admin.*, 99 F. Supp.2d 59, 74 (D. D.C. 2000). Based on this analysis, the Service appropriately concluded that impacts from approval of the ICP and issuance of Permits will not be significant. EA, pgs. 4-4, 4-6, 4-8, 4-9, 4-12, 4-14 – 4-15, 4-19, 4-22 – 4-23, 4-27 – 4-28, 4-31, 4-32 – 4-33, 4-34, 4-35, 4-35 – 4-36, 4-37, 4-38. This finding is consistent with the Service’s guidance. “Normally, the Service believes that analysis at the level of an EA will be sufficient for HCPs.” Habitat Conservation Planning Handbook, pg. 5-3. Accordingly, the Service appropriately concluded that approval of the ICP and issuance of the Permit will not significantly impact the human environment.

*Service Response to EA Comment 1:* Thank you for your comment.

*EA Comment 23 (Devon III-F):* The EA’s statement that applicants must “avoid any impacts to Indian sacred sites” and “not limit access to Indian sacred sites on Federal lands” appears to derive from Executive Order No. 13007, which imposes obligations on

federal agencies when managing federal lands. Section 1(a) of the Executive Order states: “In managing Federal lands, each executive branch agency with statutory or administrative responsibility for the management of Federal lands shall, to the extent practicable, permitted by law, and not clearly inconsistent with essential agency functions, (1) accommodate access to and ceremonial use of Indian sacred sites by Indian religious practitioners and (2) avoid adversely affecting the physical integrity of such sacred sites.” The language of the EA should be aligned with the responsibilities imposed on the Service by the Executive Order.

*Service Response to EA Comment 23:*           The Service has corrected the language in the EA as recommended.

## **General Comments**

### **Species Assessment and Mitigation Calculations (Species Assessment) Comments**

*Species Assessment Comment 1 (Devon IV-C):*       Question 3 states that a project will not result in take of ABB if the action area does not include “potentially suitable ABB habitat.” The ABB Impact Assessment for Project Reviews uses different terminology to describe “potentially suitable habitat,” referring instead to areas “favorable for use by ABB.” ABB Impact Assessment for Project Reviews, pg. 8. Because the Species Assessment should use the same terminology as the ABB Impact Assessment for Project Reviews, the reference to “potentially suitable habitat” should be changed to “areas favorable for use by ABB.”

*Service Response to Species Assessment Comment 1:*       The Service agrees and has revised the Question 3 to reference “areas favorable for use by ABBs.”

### **Conservation Strategy for the Establishment, Management, and Operations of Mitigation Lands (ABB Conservation Strategy)**

*ABB Conservation Strategy Comment 1 (Devon IV-D):*       The Conservation Strategy for the Establishment, Management, and Operations of Mitigation Lands contains a statement regarding the location of mitigation lands that appears to conflict with a requirement of the ICP. The Conservation Strategy for the Establishment, Management, and Operations of Mitigation Lands states: “Greater than or equal to 95% of the proposed mitigation land property must be comprised of ABB habitat and within ABB CPAs.” The ICP, however, suggests that all mitigation lands must be within ABB CPAs: “All offsite

mitigation provided for the ABB under this ICP must be within an ABB CPA.” ICP, pg. 49. The Service must reconcile these requirements.

*Service Response to ABB Conservation Strategy Comment 1:* The Service has corrected language within the ABB Conservation Strategy to clarify the original intent. “Greater than or equal to 95% of the proposed mitigation land property must be comprised of ABB habitat. All proposed mitigation land property must be within an ABB CPA.”

### **Take Avoidance Measures for Non-Covered Species Related to Oil and Gas Projects within the ABB Range in Oklahoma (Take Avoidance Measures)**

*Take Avoidance Measures Comment 1 (Devon IV-E):* The Take Avoidance Measures for Non-Covered Species direct the preparation of spill prevention and response plans to avoid take of many species. For example, the avoidance measures for the harperella require “frequent inspection of ongoing operations and contingencies for rescue of harperella, as necessary, subject to approval of the Service.” Take Avoidance Measures for Non-Covered Species, pg. 17; *see also id.* pgs. 26–27, 34. Similarly, another measure requires training “at least annually” for spill prevention and response teams. *Id.* pgs. 34, 45. However, U.S. Environmental Protection Agency (“EPA”) regulations require the preparation of Spill Prevention, Control and Countermeasure Plans and Oil Spill Contingency Plans in certain circumstances and defined the contents of these plans. The Take Avoidance Measures may not alter these regulatory requirements.

*Service Response to Take Avoidance Measures Comment 1:* The Service’s use of “spill prevention and response teams” discussed within the Take Avoidance Measures is not intended to replace or alter regulatory requirements under the EPA’s Spill Prevention, Control, and Countermeasure Plans and Oil Spill Contingency Plan. The Service does feel, however, that avoidance of take for the species within the document is best addressed as described and therefore has not changed language within the document related to spill prevention and response teams.

### **Survey Protocol Comments**

## **Impact Assessment Document Comments**

### **Permit Language/Application Comments**

### **Comments Unrelated to ICP/EA/Associated Documents**

*Unrelated Comment 2 (OIPA I):* Due to the inherent urgency of the industry to obtain a Permit mechanism for the ABB. OIPA accepts that Service developed this ICP based on scientific assumptions the industry may have otherwise challenged. For example, there remains to be a significant variance in the “best available science” and the transparency of information as it relates to this species. OIPA is hopeful that the Service will continue to enhance the visibility of these materials and be more transparent in their use and justification of available science for this species, and how the use of these assimilated data points from the experts translated into biological goals and conservation strategies implemented for this species.

*Service Response to Unrelated Comment 2:* Thank you for your comment.