



Texas Public Policy Foundation

June 20, 2025

****SUBMITTED VIA REGULATIONS.GOV****

Gregory Zerzan
Acting Solicitor
U.S. Department of the Interior
1849 C Street NW
Washington, D.C. 20240

RE: Response to Regulatory Reform Request for Information, 90 Fed. Reg.
21,504 (May 20, 2025)

Dear Mr. Zerzan:

On behalf of the General Land Office of the State of Texas (TXGLO), Texas Public Policy Foundation (TPPF) submits these comment in response to the Department of the Interior's Regulatory Reform Request for Information, 90 Fed. Reg. 21,504 (May 20, 2025). TXGLO is the oldest state agency in Texas and, among other things, is charged with maximizing revenues from Texas public lands dedicated to the Permanent School Fund. TXGLO derives those revenues from selling and mineral leasing public school lands, which under the Texas Constitution flow to the Permanent School Fund via TXGLO. TXGLO also owns and maintains State Veterans Homes that provide care and dignity for veterans, their spouses, and Gold Star parents, as well as State Veterans Cemeteries to honor those who have served. TPPF is a 501(c)(3) non-profit, non-partisan research institute whose mission is to promote and defend liberty, personal responsibility, and free enterprise in Texas and the nation.

Last year, TXGLO was victorious in a case against the Biden-era Department of the Interior. In *Gen. Land Office of Tex. v. United States DOI*, 750 F. Supp. 3d 740 (W.D. Tex. 2024), TXGLO challenged the golden-cheeked warbler's ("Warbler") listing as an endangered species. The Warbler is a small migratory songbird that breeds exclusively in the mixed Ashe juniper and woodlands of Central Texas. TXGLO owns large land tracts in the Warbler's habitat. The Warbler's ESA listing makes development in this area more costly and subject to federal permitting. Following approximately nine years litigation, the court in *Gen. Land Office of Tex.* held that

the Department applied an improperly heightened standard to a petition to delist the Warbler and ordered the Department to issue a 90-day finding under the ESA.

Following that victory, the Department issued a positive 90-day finding and announced it would initiate a 12-month review under 16 U.S.C. § 1533(b)(3)(B). Endangered and Threatened Wildlife and Plants; 90-Day Findings for Eight Species, 90 Fed. Reg. 7038, 7041 (Jan. 21, 2025). Around the same time, the Department completed a five-year status review that recommended downlisting the Warbler from endangered to threatened. U.S. Fish and Wildlife Service, Golden-Cheeked Warbler 5-Year Status Review 72 (Jan. 6, 2025), <https://tinyurl.com/45s7mjc8>. While this is a welcome step, the appropriate action at this time is to delist the Warbler from the Endangered Species Act (ESA).

These comments address the questions posed by the request for comments in connection with President Trump’s Executive Order 14219 and provide details regarding why the Warbler should be delisted from the ESA’s List of Endangered and Threatened Species.

Responding to RFI Questions

The Department’s RFI asks nine questions. These comments address questions numbered 1, 2, 3, and 5.

Question 1 asks if the regulation falls into any of the seven categories listed in section 2 of Executive Order 14219. The Warbler’s ESA listing falls into subsection (iii) regarding regulations that are not the best reading of the statutory authority, subsection (v) regarding regulations that impose significant costs on private parties, and subsection (vi) regarding regulations that impede infrastructure development, economic development, energy production, and land use. 90 Fed. Reg. 10,583 (Feb. 25, 2025). As set forth in more detail hereinafter, the best reading of the ESA shows that the Warbler meets the five statutory factors the Secretary must use to determine whether to delist a species. 16 U.S.C. § 1533(a)(1).

Regarding costs and infrastructure development, the Warbler’s listing under the ESA imposes significant costs on TXGLO and substantially impedes productive uses of its lands. When a species is listed under the ESA, property owners must seek permits or approval of activities on their land that could potentially “take” the species. See 16 U.S.C. § 1539(a). A “take” is broadly defined as harassing, harming, pursuing, hunting, shooting, wounding, killing, trapping, capturing, or collecting, or attempting to engage in any such conduct. See 16 U.S.C. § 1532(19). This makes developing any land with Warbler habitat extremely difficult. As an example, TXGLO received an appraisal for a 2,316 acre property it owns in Bexar and Kendall counties.

The appraisal found that 84% of the property contained Warbler habitat. As a result, the property value is 35% less than comparable properties without Warbler habitat. Additionally, if TXGLO were to develop the property for any other use—including infrastructure or energy production—TXGLO would have to go through a lengthy federal permitting process. Under current regulations, TXGLO would have to replace every one acre of developed land with three acres of new Warbler habitat. These ESA restrictions triggered by the Warbler’s listing impose significant costs on TXGLO and other private landowners,¹ as well as impede infrastructure development, economic development, energy production, and land use.

Question 2 asks if the regulation is unnecessary or ill-advised. As explained in more detail below, there are other regulatory mechanisms available to protect the Warbler. These include the Texas Endangered Species Act, federal Migratory Bird Treaty Act, the Balcones Canyonlands National Wildlife Refuge, and habitat conservation measures in place at Fort Hood and on private land. These protective measures make the Warbler’s continued ESA listing unnecessary.

Question 3 asks if the regulation is outdated. The original 1990 listing relied on population estimates that were incorrect at the time, and more recent studies show the Warbler’s population is 19 times higher than originally estimated.

Question 5 asks if the regulation unnecessarily obstructs, delays, curtails, or imposes significant costs on siting, permitting, or delivery of energy infrastructure projects. The ESA imposes costly requirements for landowners developing land containing Warbler habitat. This includes land used for energy infrastructure. TXGLO commonly uses mineral leasing to generate revenue from its land holdings to support Texas public schools and veteran services. The Warbler’s listing under the ESA substantially obstructs, delays, curtails, and imposes significant costs on these energy development and production activities.

Warbler Listing History

The Fish and Wildlife Service (“the Service”) first categorized the Warbler as endangered in response to an emergency listing petition filed on February 2, 1990. Endangered and Threatened Wildlife and Plants; Proposed Rule to List the Golden-cheeked Warbler as Endangered, 55 Fed. Reg. 18,846 (May 4, 1990). The Service justified this listing on the basis of “ongoing and imminent habitat destruction.” *Id.*

¹ Although TXGLO is a state agency, the ESA subjects it to the same burdensome regulations as a private landowner. Moreover, TXGLO seeks to maximize the returns on its land to meet its duty to generate revenue for the Permanent School Fund and for state veteran programs.

at 18,844. The Service indicated that Central Texas contained prime Warbler habitat, and that increased development in the region threatened this habitat. *Id.*

The Service permanently listed the Warbler on December 27, 1990. Endangered and Threatened Wildlife and Plants; Final Rule to List the Golden-cheeked Warbler as Endangered, 55 Fed. Reg. 53,153 (Dec. 27, 1990). Its final rule estimated there were about 15,000–17,000 Warblers and between 79,400–263,750 acres of suitable habitat. *Id.* at 53,154. In the Final Rule, the Service found the Warbler should be listed due to (1) present or potential habitat destruction, (2) possible nest predation, (3) a lack of regulatory protection for Warbler habitat, and (4) a lack of reproduction of certain trees within Warbler habitat. *Id.* at 53,157–59. However, the Service deferred designating critical habitat for the Warbler. *Id.* at 53,159. To this day, the Service has not designated critical habitat. *See Gen. Land Office of Tex*, 750 F. Supp. 3d at 762.

The ESA requires the Service to conduct a review of each listed species every five years. 16 U.S.C. § 1533(c)(2)(A). The Service completed its first five-year status review of the Warbler in 2014—24 years after the species’ initial listing. U.S. Fish and Wildlife Service, Golden-Cheeked Warbler 5-Year Review (Aug. 26, 2014), <https://tinyurl.com/2ev8p6h3>. The Service was required to conduct five-year status reviews of the Warbler in 1995, 2000, 2005, and 2010. *See* 16 U.S.C. § 1533(c)(2)(A). It failed to do so, and the Service never explained why it failed to meet its statutory duty. Following the 2014 review, the Service was required to conduct five-year status reviews in 2019 and 2024. The Service completed its most recent five-year status review earlier this year. U.S. Fish and Wildlife Service, Golden-Cheeked Warbler 5-Year Status Review (Jan. 6, 2025), *supra*.

The Warbler Meets the ESA’s Criteria to Delist

An interested person may petition the Service to list, delist, or reclassify the status of a species. 16 U.S.C. § 1533(b)(3)(A). The Service reviews listing and delisting petitions for “substantial scientific or commercial information indicating that the petitioned action may be warranted.” *Id.* (emphasis added). At the time TPPF submitted its petition, substantial information was defined as “that amount of information that would lead a reasonable person to believe that the measure proposed in the petition may be warranted.” 50 C.F.R. § 424.14(b)(1) (2014). The Service must use the same five factors for delisting a species that it uses for listing a species. 16 U.S.C. 1533(a)(1). These are:

- (A) the present or threatened destruction, modification, or curtailment of its habitat or range;

- (B) overutilization for commercial, recreational, scientific, or educational purposes;
- (C) disease or predation;
- (D) the inadequacy of existing regulatory mechanisms; or
- (E) other natural or manmade factors affecting its continued existence.

Id. In 2015, TPPF and several others petitioned the Service to delist the Warbler. That petition presented scientific evidence showing the Warbler's 1990 listing was made in error because the Department significantly underestimated the Warbler's population. It also cited a 2015 study showing the Warbler's population was 19 times larger than was believed in 1990. The petition presented additional information showing that habitat and fragmentation and urbanization do not threaten the Warbler, and that conservation plans exist to mitigate the Warbler's probability of extinction. The petition's evidence is summarized below. That evidence meets the ESA's standard to delist a species. 16 U.S.C. 1533(a)(1); 50 C.F.R. § 424.11(d)(2)–(3).

First, recent scientific studies show that Warbler breeding habitat is sufficient to support a stable population. Although the 1990 listing decision estimated a habitat size between 551,668–1,771,552 hectares, recent studies have shown actual habitat to be on the high end of that range. The Duarte Study found 1,678,281 hectares of Warbler habitat. Adam Duarte et al., *Spatiotemporal Variation in Range-Wide Golden-Cheeked Warbler Breeding Habitat*, 4 Ecosphere 5 (2013) [hereafter "Duarte Study"]. The Collier Study found 1,678,053 hectares of habitat. Bret A. Collier et al., *Predicting Patch Occupancy in Fragmented Landscapes at the Rangewide Scale for an Endangered Species: An Example of the American Warbler*, 18 Diversity & Distrib. 158 (2012) [hereafter "Collier Study"]. The Collier Study indicates that there is five times more warbler breeding habitat than identified at the time of the Warbler's listing. The Mathewson Study estimated the 2012 population of male warblers at 263,339. Heather A. Mathewson et al., *Estimating Breeding Season Abundance of Golden-Cheeked Warblers in Texas, USA*, 76 J. Wildlife Mgmt. 1117 (2012) [hereafter "Mathewson Study"]. That figure is 19 times higher than the population estimated at the time of the Warbler's listing. 55 Fed. Reg. at 53,154 (estimating the Warbler population to be between 15,000–17,000 birds). The Alldredge study found that the probability of the Warbler's extinction is low as long as enough habitat exists to support more than 3,000 breeding pairs in each of the eight defined recovery regions. Matthew W. Alldredge et al., *Golden-Cheeked Warbler (Dendroica chrysoparia) in Texas: Importance of Dispersal toward Persistence in a Metapopulation*, in Species Conservation and Management: Case Studies (2004) [hereafter "Alldredge Study"]. The Mathewson Study confirmed the total amount of available Warbler habitat exceeds that threshold.

Second, disease and predation is not a serious threat to Warblers. The original 1990 listing suggests fire ants could become a threat to young warblers. 55 Fed. Reg. at 53,158 But there has been no evidence supporting this theory. Documented warbler predators (adults and young) include snakes, birds, mammals, and red-imported fire ants. Mike M. Stake et al., *Video Identification of Predators at Golden-Cheeked Warbler Nests*, 75 J. Field Ornithology 337 (2004) [hereafter “Stake Study”]. The Stake Study noted that the height of Warbler nests reduced the risk of fire ant predation and that Warblers are not the main target of other birds or mammals. Brood parasitism is uncommon and represents a small risk to overall Warbler nest survival. At most there is one documented outbreak in 2012 of avian pox that was confirmed on Balcones Canyonlands Preserve in Austin, Texas. This appears to be an isolated event and there are no other disease detection records for this species. Thus there is little threat to Warblers from disease and predation.

Third, existing regulatory mechanisms are adequate to protect the Warbler even absent ESA protection. Most notably, the Warbler is protected under the 1975 Texas Endangered Species law. *See* Tex. Parks & Wildlife Code § 68.001 et seq. This listing is separate from the federal ESA. Additionally, Warbler habitat is protected in Balcones Canyonlands National Wildlife Refuge, conservation plans on Fort Hood, and approximately 160 habitat conservation plans on private lands that are enforceable by FWS. The Alliance for the Conservation of Mesoamerican Pine-Oak Forests protects Warbler habitat outside the United States in its Central American migrating grounds. Warbler habitat is actively managed on many Texas Parks and Wildlife Management Areas, Nature Conservancy properties in Texas, and on other public and private lands. In contrast, the Service has never designated critical habitat for the Warbler under the ESA. Even if the Warbler is delisted under the ESA, the Warbler may continue to be protected under the Migratory Bird Treaty Act. These regulatory mechanisms provide more than adequate protections for both the Warbler and its habitat.

Finally, the Service’s 1990 listing decision overstated the effects that urbanization (both encroachment and noise) have on the Warbler population. The Butcher Study found that warblers establish territories in patches as small as approximately 2.6 hectares in rural landscapes. Jerrod A. Butcher et al., *Evidence of a Minimum Patch Size Threshold of Reproductive Success in an Endangered Songbird*, 74 J. Wildlife Mgmt. 133 (2010). Follow-up research conducted in the Austin area found that minimum patch size requirements for territory establishment were of similar size (about 13 hectares). Dianne Hali Robinson, *Effects of Habitat Characteristics on Occupancy and Productivity of a Forest-Dependent Songbird in an Urban Landscape* (May 2013) (unpublished M.S. thesis, Texas A&M University). As to noise, the Lackey Study found comparable warbler abundance, pairing success, and fledging success across road-noise-only sites, road construction sites, and control

sites. Melissa A. Lackey et al., *Experimental Determination of the Response of Golden-cheeked Warblers* (Setophaga chrysoparia) to Road Construction Noise, 74 Ornithological Monographs 91 (2012). Similarly, Warblers at the Fort Hood Military Reservation occupy and breed in patches exposed to active military activity and there is no correlation between Warbler reproductive success and noise level. Roel Lopez et al., Support to Military Land Management and Training on Fort Hood, Texas: Year 5 Final Annual Report (Cumulative) (2012). Other than urbanization, oak wilt is another listed concern for Warbler habitat. Oak wilt does not affect territorial placement or fledgling success, but does have some detrimental effect on pairing success. Laura R. Stewart et al., *Spatial and Temporal Distribution of Oak Wilt in Golden-Cheeked Warbler Habitat*, 38 Wildlife Soc’y Bulletin 288 (2014) [hereafter “Stewart Study”]. The Stewart Study found that oak wilt is more likely to occur outside Warbler habitat. These other natural and manmade factors do not present a threat to the Warbler population.

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Despite the substantial scientific information presented in TPPF’s petition to delist, the Service denied the petition in 2016. Endangered and Threatened Wildlife and Plants; 90-Day Findings on Two Petitions, 81 Fed. Reg. 35,698 (June 3, 2016). In denying the petition, the Service applied an “inappropriately heightened” standard by requiring the petition to include new information rather than substantial information. *Gen. Land Office of Tex. v. United States DOI*, 947 F.3d 309, 321 (5th Cir. 2020). TPPF represented TXGLO in a lawsuit against the Department that forced it to apply the correct standard. Following TXGLO’s lawsuit, the Fifth Circuit remanded the first 90-day finding for the Service to apply the correct legal standard.

The Service issued a second 90-day finding in 2021 that again denied the petition to delist. Endangered and Threatened Wildlife and Plants; 90-Day Findings for Three Petitions, 86 Fed. Reg. 40,186 (July 27, 2021). This 90-day finding also imposed an improperly heightened standard by requiring the petition to show conclusive evidence of Warbler population recovery. *Gen. Land Office of Tex.*, 750 F. Supp. 3d at 765–56. TXGLO again sued the Service for applying the incorrect legal standard. The district court granted summary judgment to TXGLO and remanded the second 90-day finding for reconsideration. *Id.* at 763. The third 90-day finding finally granted the 2015 petition and instituted the ESA’s in-depth 12-month review. Endangered and Threatened Wildlife and Plants; 90-Day Findings for Eight Species, 90 Fed. Reg. 7038, 7041 (Jan. 21, 2025). Shortly beforehand, the Service had issued a five-year review that recommended downlisting the Warbler from endangered to threatened. U.S. Fish and Wildlife Service, Golden-Cheeked Warbler 5-Year Status Review (Jan. 6, 2025), *supra*.

Current Status

The Service is currently conducting a 12-month review of the Warbler's status. 90 Fed. Reg. at 7041. That process will determine whether the Warbler should be downlisted from endangered to threatened, or whether it should be delisted altogether. This review must be completed by January 2026. *See* 16 U.S.C. § 1533(b)(3)(B).

Conclusion

The Department should delist the Warbler from the ESA. The Warbler's listing imposes significant costs and impedes productive land uses, including infrastructure and energy development. The original listing decision is based on inaccurate and outdated information. The delisting petition presents substantial scientific data showing that the Warbler was initially listed in error, and that more recent science shows the Warbler does not meet the ESA's criteria for listing. As the Service conducts its 12-month review of the Warbler, the Department should consider the deregulatory principles embodied in Executive Orders 14,154, 14,192, and 14,219. Those policies confirm that the Warbler should be delisted.

Thank you for the opportunity to provide these comments.

Sincerely,

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