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Comments on the Draft Policy Regarding Prelisting Conservation Actions

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I. INTRODUCTION

The Energy and Wildlife Action Coalition (EWAC) respectfully submits these comments in response to the Draft Policy Regarding Voluntary Prelisting Conservation Actions (Draft Policy), published by the U.S. Fish and Wildlife Service (Service) on July 22, 2014. EWAC was formed in 2014 with 16 member companies consisting of electric utilities, electric transmission providers, and renewable energy companies across the United States. The fundamental goals of EWAC are to evaluate, develop, and promote sound environmental policies for federally protected wildlife and closely related natural resources while ensuring the continued generation and transmission of reliable and affordable electricity. EWAC supports public policies, based on sound science, that protect wildlife and natural resources in a reasonable, consistent, and cost-effective manner.

EWAC supports the Draft Policy concept and applauds the Service for its effort to develop it. The Draft Policy introduces a promising concept for improving the incentives private and public landowners, public governments, and agencies have for investing resources in the conservation of species in ways that can help reduce listing of more species as endangered or threatened under the Endangered Species Act (ESA) and, more importantly, could lead to meaningful conservation benefits for the species. The core idea of the Draft Policy is that "voluntary prelisting conservation actions" producing "positive assistance to the recovery of the species" will receive a form of transferable "credit." These credits then can be used if the species is listed to satisfy mitigation requirements of section 10(a)(1)(B) permits or to be included in the environmental baseline in section 7(a)(2) inter-agency consultations. Such a program, if appropriately designed with landowner incentives, administrative resources, and species conservation in mind, would go far

towards complementing the programs the Service has already put in place to promote pre- and post-listing participation by landowners in the conservation of species, such as Candidate Conservation Agreements with Assurances (CCAA), Safe Harbor Agreements (SHA), Conservation Banks, and Recovery Crediting.

Many landowners, including federal public land management agencies, already engage in voluntary pre-listing conservation actions without participating in formal CCAAs or CCAs given the more limited scope of that program. The opportunity to generate transferable credits that can be used as post-listing permit mitigation or incorporated in a post-listing consultation environmental baseline can in principle provide a meaningful incentive for landowners to expand their pre-listing conservation actions. EWAC supports the Service for moving in the direction the Draft Policy takes. Indeed, EWAC believes that the Draft Policy provides an excellent platform for building even more diversified and stronger conservation incentives into the pre-listing context. EWAC thus offers these comments in the spirit of constructive collaboration with the Service and will be pleased to work closely with the Service to craft a policy that will fulfill the overall intent of enhancing landowner incentives to engage in species conservation actions.

Rather than detailing comments on a section-by-section basis, EWAC has identified four general themes we believe present potential opportunities for enhancing the program the Service has outlined: (1) broadening the program's scope; (2) providing more security for landowners; (3) providing flexibility for the proposed credit program to work in conjunction with existing landowner incentive programs; and (4) providing baseline standards and procedures for approval of state programs. EWAC describes specific

examples of each of these opportunities and offers recommendations for how to build them into the program outlined in the Draft Policy. In summary, EWAC recommends that:

- The Service consider expanding the scope of the credit program to qualifying conservation actions carried out under reliable public and private conservation actions, and that the Service clarify the post-listing status of qualifying actions.
- The Service provide greater security to landowner engaging in qualifying conservation actions.
- The Service coordinate the Voluntary Conservation Action Program with existing landowner incentive programs.
- The Service provide details regarding standards and procedures for approval of state programs.

Following the general comments and recommendations, EWAC responds to the specific questions the Service raised in its request for information at the conclusion of the Draft Policy. Some of these questions raise significant issues regarding the scope and design of the proposed credit program, but without much indication of the directions the Service is moving on them. EWAC thus would be pleased to engage in a continuing dialogue regarding proposals that come out of our and other stakeholder responses to the questions.

Finally, EWAC anticipates that, if the Service finalizes and implements a policy for pre-listing conservation actions, the Service at some point after adoption will develop additional guidance for implementation of the policy. If development of such guidance is undertaken, EWAC respectfully requests that the guidance, like the Draft Policy, be made available for public review and comment prior to becoming final.

II. COMMENTS ON DRAFT POLICY

As suggested above, the Draft Policy contains a very promising concept for enhancing landowner participation in species conservation. The Service's existing landowner conservation incentive programs have made a great difference since implemented, but could be modified to promote landowner management actions benefitting overall species recovery. The Draft Policy clearly is a substantial step in the right direction toward filling those gaps, but several features of the incentive program as proposed could be built upon to provide an even more effective credit program.

A. EXPANDING THE SCOPE OF THE CREDIT PROGRAM

1. EXPANDING QUALIFYING ACTIONS BEYOND STATE-ADMINISTERED PROGRAMS WILL STRENGTHEN THE ADVANCE CREDITS POLICY

The Draft Policy generally would establish a program for recognition of voluntary conservation actions "qualifying" for credit. Two significant criteria for qualifying actions are that an action be "undertaken as part of a State- or multi-State administered program…intended to encourage voluntary conservation"[1] and that it be "started prior to the final listing of the benefitted species as an endangered or threatened species under the Act."[2] Although EWAC fully supports the participation of states as providing models for conservation programs and appreciates that the focus of the Draft Policy is pre-listing conservation, EWAC believes that with appropriate safeguards qualifying credits should be allowed to be generated in conjunction with non-State programs and in certain post-listing contexts.

[1] See Federal Register Vol. 79, No. 140, July 22, 2014 p. 42529
[2] See Federal Register Vol. 79, No. 140, July 22, 2014 p. 42528

The Draft Policy does not explain why it limits qualifying conservation actions to those undertaken as part of a State- or multi-State administered program. The preamble to the Draft Policy states that this provision "acknowledg[es] the jurisdiction of the States over nonlisted species" and "ensure[s] the primacy of the States in conserving species before they are listed."[3] EWAC appreciates that states have substantial conservation program capacity and expertise, but non-state conservation entities do as well, and the Service has worked directly with such entities under its other conservation programs. For example, the Service directly administers the CCAA program, the very purpose of which is to promote landowner conservation on behalf of nonlisted species and which does not require that the actions be undertaken as part of a state-administered program. Non-state actors, public and private, have also demonstrated the capacity to successfully design and implement conservation actions under the SHA, Conservation Bank, and Recovery Crediting programs, as well as in the form of large-scale Habitat Conservation Plans (HCP), without necessarily coordinating their actions through a state conservation program. EWAC encourages the Service to make such opportunities available in the closely-analogous advance credits program.

There are a number of advantages to expanding qualifying actions to those carried out under reliable non-state programs. First, some states may lack the incentives or capacity to develop a program that meets the Service's criteria (which, as discussed below, are unclear from the Draft Policy). If significant demand exists in private and public landowner markets for engaging in prelisting voluntary conservation actions, the lack of a

[3] See Federal Register Vol. 79, No. 140, July 22, 2014 p. 42527

state program should not be reason to turn that demand away. Just as it does for other conservation incentive programs, the Service could review a private or public voluntary conservation action proposal to ensure it meets the "positive assistance to the recovery of the species" standard and any other procedural and substantive criteria (which also, as discussed below, are unclear from the Draft Policy).

EWAC certainly is in agreement that if a state does step forward and develop a program that fulfills the purposes the Draft Policy outlines, it might make sense for many landowners to use that plan as a vehicle for coordinating prelisting voluntary conservation actions in that state. But that should only be one of the pathways into the prelisting voluntary conservation actions program. When other public and private conservation plan strategies are devised for a particular species, the requirement that they be conformed to a state program could limit creativity and innovation. For example, a private party could be motivated to undertake a voluntary conservation measure in multiple states where it operates, but may need or desire to have the same program implemented in each state. Depending on the state plan, which could differ from state to state, this could dissuade undertaking the plan at all.

To the extent the Service concludes nonetheless that only state-led programs can generate qualifying credits, EWAC encourages the Service to consider a broader range of roles the states can assume to stimulate and accommodate the generation of public and private conservation solutions. In some cases, for example, the state might be willing to serve as the registry of actions, but not as the approver and monitor of actions. In those cases the state could be authorized to delegate such authority to the plan developer under criteria the Service develops, or the Service could fill that role. In other cases a state may

simply decide, for whatever reasons, not to participate at all. In those cases the Service could fill the shoes the Draft Policy outlines for the states. [4]

Recommendation: EWAC encourages the Service to consider expanding qualifying credits to conservation actions carried out under reliable public and private conservation actions. This approach will align this program with the more direct role the Service has taken for the related conservation incentive programs. To the extent the Service, for whatever reason, elects not to create that opportunity, EWAC recommends that it reconsider the requirement that qualifying conservation actions include only those undertaken directly as part of a State- or multi-State administered program. One way of doing so, suggested above, would be to provide the states more latitude in defining their roles, allowing them, for example, to delegate to approved private (e.g., an industry group) and public (e.g., a federal agency or local government) entities the functions the Draft Policy now restricts to state government based on a finding that the entity has developed a qualifying conservation action strategy. Following the Service's guidance (which would need to be more detailed than provided in the Draft Policy), states could develop the template for approval of such actions and from there allow the actors to implement their strategies. In essence, this would position the states to fill the shoes the Service normally assumes when administering the other conservation incentive programs.

[4] EWAC appreciates that any time a federal agency approval is proposed, a host of pre-approval processes, such as the National Environmental Policy Act (NEPA) and section 7 of the ESA, come into play. This would be true in some states as a matter of state law as well. In any event, the nature of the advance credits program suggests that these processes would not be burdensome given the likely net positive effects of the conservation actions. For example, landowners are unlikely to propose conservation actions for an unlisted species that would adversely affect a listed species and thus require incidental take authorization under the ESA. And qualifying conservation actions are likely to have net positive effects for the environment in general, meaning ESA and NEPA compliance processes could be handled expeditiously. Moreover, if the sole function the Service performed were the registry and monitoring function, no pre-approval review procedures would apply.

2. CLARIFYING THE POST-LISTING STATUS OF QUALIFYING ACTIONS WILL ENHANCE INCENTIVES TO ENGAGE IN CONSERVATION PROGRAMS

The Draft Policy proposes that only "prelisting" conservation actions will qualify for generating credits, stating that the action must be "started prior to the final listing" but that "ongoing actions initiated prior to listing would continue."[5] Given the broad range of conservation actions that might be undertaken under the proposed program, however, greater clarity regarding what "started" and "ongoing" mean relative to the time of listing will help landowners plan their actions. For example, consider a conservation action meeting state program requirements (assuming there must be a state program) that involves enhancing 1000 acres of habitat and which will take five to ten years to complete in distinct phases of 200 acres each phase. If in year two of the project the species is listed, what has been "started" and "initiated" and what is "ongoing" for purpose of the Draft Policy? If the answer is that only the 400 acres enhanced at the time of the listing qualify and any further enhancement of the remaining 600 acres will not generate credits under the advance credits program, then this limitation reduces the incentive to engage in a long-term enhancement project of a significant scale. If, however, the answer is that all 1000 acres of enhancement have been "started" and "initiated" and are "ongoing," the proposed program would provide significant incentives for large-scale conservation actions.

One possible rationale for the sharp pre/post-listing divide could be that actions taken post-listing could require some form of take approval if the action affects the species, such as through relocation techniques or habitat modification when the species is present.

[5] See Federal Register Vol. 79, No. 140, July 22, 2014 p. 42527

But this could be easily handled. Post-listing continuation of actions with no federal nexus that do not affect the species would require no further action—they may continue the course. Actions that do involve a federal nexus but would have no effect on the species could expeditiously satisfy informal consultation procedures under section 7. Actions that do present the potential for affecting the species could follow one of several paths. For federal actions, one solution would be to have conducted a conference under section 7(a)(4) of the ESA prior to the listing, thus allowing immediate conversion to a finished consultation after the listing. Alternatively, if the impacts are minimal and no pre-listing conference has been conducted, the agency could suspend the action long enough for consultation to produce a no jeopardy opinion with an incidental take statement. For non-federal actions, any impacts are likely to fit the Service's Low Effect Habitat Conservation Plan criteria, or the action could be converted into a Conservation Bank (see more on this suggestion below).[6]

Recommendation: EWAC recommends that the Service clarify the circumstances under which qualifying conservation started prior to the listing and ongoing at the time of listing continue to generate credits after listing. Also, to provide incentives for conservation actions meeting advance credits program standards to begin after listing and generate credits, the Service should clarify how the proposed program and the Conservation Banking program relate (EWAC provides further suggestions on this recommendation

[6] The reality, moreover, is that post-listing regulatory entanglements beyond rather uncomplicated scenarios is likely not a significant concern. Given the purpose of the proposed voluntary conservation actions program, it is highly unlikely that an action qualifying for pre-listing generation of credits is going to pose any significant concern for the species after it is listed. Granted, the criterion for credit generation is "positive assistance to the recovery of the species," which if understood to be a net determination does accommodate some impacts on the negative side of the ledger. But it seems implausible that many actions meeting this net positive standard will involve significant pre-netting negative impacts that would require take authorization beyond the streamlined and expeditious mechanisms suggested above.

below). Finally, the Service should also outline the post-listing ESA compliance matrix of options described above for actions that are ongoing at the time of the listing.

B. PROVIDING GREATER SECURITY TO LANDOWNERS ENGAGING IN QUALIFYING CONSERVATION ACTIONS

The Draft Policy states that the proposed credit program "seeks to give landowners, government agencies, and others incentives to carry out voluntary conservation actions for nonlisted species."[7] The Service recognizes that the success of the program in producing landowner incentives will depend in large part on its providing "reasonable assurance" that credits generated prior to species listing will continue to be recognized after species listing.[8] The Draft Policy also states that qualifying credits will receive "preferential use," apparently meaning the Service will give them priority over other mitigation mechanisms such as conservation banks.[9] Yet the Draft Policy provides no further details on the assurances or preferential treatments. This ambiguity could reduce the incentive for landowners to participate in qualifying programs.

The Draft Policy also contains provisions that could reduce the security landowners could place on the post-listing value of credits generated prior to listing. For example, the Draft Policy states that the Service reserves unilateral discretion to decide that a crediting "metric may need revision or a new metric should be used,"[10] and further that the Draft Policy "does not require that in all cases the Service must use prelisting conservation actions as mitigation or a compensatory measure for post-listing detrimental actions."[11]

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[7] See Federal Register Vol. 79, No. 140, July 22, 2014 p. 42525
[8] See Federal Register Vol. 79, No. 140, July 22, 2014 p. 42528
[9] *Id.*
[10] See Federal Register Vol. 79, No. 140, July 22, 2014 p. 42527
[11] See Federal Register Vol. 79, No. 140, July 22, 2014 p. 42528

This uncertainty could reduce the incentives for landowners to participate in qualifying programs.

Finally, the Draft Policy does not provide much detail about how the Service will recognize transferability of qualifying credits. Indeed, one of the questions the Service raises for further input goes to the design of transfer mechanisms. Designing a flexible transfer mechanism, including in particular the ability to transfer credits within a species' range regardless of state boundaries, will go far to enhance landowner incentives to participate in qualifying programs.

To address these aspects of the proposed program, EWAC believes that the Draft Policy can provide greater security to landowners in the following respects.

1. PROVIDING CREDIT VALUE ASSURANCE WILL ENHANCE LANDOWNER INCENTIVES

CCAAs, Safe Harbors, and HCPs have built-in landowner assurances because the Service recognized when it developed each program that long-term predictability of the economics of participating in the program is essential to attract landowner commitments. The same is true for prelisting voluntary conservation actions program. Such actions usually will involve some economic commitment by the landowner, and, as the Service puts it, the credit is the "reward."[12] If the credit value can be adjusted downward at will by the Service, however, or even devalued to zero, the investment in credits becomes a high-risk proposition with all the risk borne by the landowner. The obvious effect will be less incentive to engage in qualifying voluntary conservation actions — in short, fewer volunteers.

[12] See Federal Register Vol. 79, No. 140, July 22, 2014 p. 42526

Recommendation: To avoid this dilution of the voluntary conservation incentive, EWAC recommends that the Service provide assurances that credits generated in compliance with whatever standards and procedures the final program contains will be treated on an equal credit-to-credit basis with any mitigation mechanisms that come on line after listing, such as Conservation Banks and Recovery Crediting. In other words, a development project proposing to purchase 100 credits of mitigation could do so from a Conservation Bank started after listing or a prelisting voluntary conservation action project started before listing, with no premium or penalty applied to either credit source.

2. PROTECTING BASELINE CONDITIONS WILL ENHANCE LANDOWNER INCENTIVES

The more problematic effect of exposing credits to devaluation is that landowners suffering such a devaluation not only will have lost the economic value of their conservation investment, but also will likely be subject to ESA regulation, meaning the property value will be negatively affected. The objective of many prelisting voluntary conservation actions will be to attract the species to or near enhanced habitat. If the credits generated by that prelisting action are devalued after the species is listed, or if the conservation program under which the credits were generated fails to continue as a qualifying program, the landowner could be placed in the position of owning property occupied or relied upon by the now-protected species, but with much lower than expected, or zero, credit values. That prospect alone may deter landowners from participating in qualifying programs. Indeed, the core concept of Safe Harbor Agreements is to protect the landowner from such a dilemma. It seems appropriate that a landowner engaging in

qualifying voluntary conservation actions under an advance credits program should have the same protection.

Recommendation: The Service should institute a credit value assurance commitment as described above. Also, the Service should provide landowners the assurance that, if for any reason, the credits they have generated under a qualifying program are devalued or not recognized, they may restore the properties to their previous baseline conditions without need of HCP permit or Section 7 consultation, the same way a Safe Harbor Agreement provides such baseline protection.

3. PROVIDING FLEXIBLE CREDIT TRANSFER MECHANISMS, PARTICULARLY CROSS-STATE TRANSFER WITHIN A SPECIES' RANGE, WILL ENHANCE LANDOWNER INCENTIVES

As the Draft Policy recognizes, transferability of qualifying credits will be key to providing robust incentives for landowners to participate in qualifying conservation programs. As with any such credit transfer program, such as Conservation Banking and the Clean Water Act Section 404 wetlands compensatory mitigation program, defining the service area within which credits can be transferred is essential to the design of the program. Given that the purpose of the proposed advance credits program is to reduce the threats to a species as a whole, EWAC encourages the Service to promote credit transfers throughout a species' range.

This broad transferability principle will be of particular importance in the case of species with ranges that extend outside a single state—for example, aquatic species in a multi-state river basin or avian species that migrate along multi-state flyways. The objective of the proposed program should be to provide pre-listing incentives for

conservation actions where they are most needed for a species, which may not always be where post-listing credits are most valued within the species' range. If all of the states represented in a species' range coordinate their conservation programs to allow such transfers, cross-state transferability will be assured. But there is no assurance that all (or even any) states within a species range will create and coordinate qualifying conservation programs. Given the emphasis the Draft Policy places on state conservation programs, therefore, it will be important for the proposed program to allow cross-state credit transfers within a species' range regardless of whether a state has initiated a qualifying conservation program. This approach will not only deliver the greatest benefit to the species, but will allow participating landowners the greatest opportunity to transfer credits and will allow landowners with property and operations in many states, as is the case for many EWAC members, to closely manage their qualifying conservation actions and credits, thus enhancing incentives to engage in such actions.

Recommendation: The Service should clarify that credit transfers are permissible throughout a species' range, including when a credit is created in one state, whether under that state's program or a non-state program, and transferred to apply to HCP or consultation actions in other states.

C. COORDINATING THE VOLUNTARY CONSERVATION ACTION PROGRAM WITH EXISTING LANDOWNER INCENTIVE PROGRAMS

The Draft Policy outlines a promising conservation actions incentive program, but in several respects it isolates the advance credits program from the other existing conservation action programs. By providing greater flexibility for conservation actions to move between, or to combine with, the various programs, this new program could

substantially expand the overall effectiveness of the Service's conservation incentive strategy. This would also allow conservation actions to take a broader, landscape level and ecologically sound approach to conservation in alignment with current goals and objectives of the Service.

1. PRE-LISTING: CCAAS

The Service accurately explains how, despite their same general policy purposes, qualifying voluntary conservation actions carried out prior to listing would differ from CCAAs.[13] In particular, the standard for issuance of a CCAA is higher, requiring net positive benefits which, assuming conservation actions carried out generally for the species, would preclude the need to list. The proposed advance credit program, by contrast, requires only some net benefit to generate credits. The Service identifies these differences as reason to preclude treating a conservation action as qualifying under both programs.

To be sure, it makes sense to restrict a voluntary conservation action from enjoying the benefits of a CCAA if it does not meet the standards for a CCAA. Nevertheless, it is entirely possible that after commencement of a qualifying voluntary conservation action the net benefit to the species could be determined to satisfy the CCAA standard, and the landowner may prefer to secure the property under a CCAA as the most efficient use. Likewise, it is entirely possible that a landowner who has entered into a CCAA might decide that the ability to sell credits to other landowners should the species be listed is a more efficient use of the property. In either scenario, there is no diminishment of the conservation value to the species from allowing the landowner to shift from one program

[13] See Federal Register Vol. 79, No. 140, July 22, 2014 p. 42527

to the other so long as the conservation actions do not change in a way that reduces benefits to the species. The ability to do so, by providing landowners to make what they believe to be the most efficient use of their property, will provide an added incentive to participate in both programs.

Recommendation: The Service should explicitly acknowledge that landowners participating in a voluntary conservation action prior to listing can, with minimal procedural steps and assuming the standards are met, convert the action into a CCAA, and vice versa, provided the conservation actions do not change in a way that diminishes conservation value to the species.

2. POST-LISTING: SHA, CONSERVATION BANKS, AND RECOVERY CREDITING

Similarly, much as would be the effect of allowing conversion *before* listing between qualifying voluntary conservation actions and CCAAs, allowing seamless conversion between qualifying voluntary conservation actions and other conservation incentive programs *after* listing enhances landowner incentives at no cost to species conservation. If the Service continues to impose a formal termination of credit generation from a qualifying voluntary conservation action at the time of listing, then the "What then?" question is easily answered by promoting easy conversion to another program. For example, the landowner may wish to continue generating credits from the property on which conservation actions have not yet been completed in the eyes of the policy, in which case conversion to a Conservation Bank would be appropriate. Or, if the landowner wishes to continue conservation actions but retain flexibility over the ultimate use of the property, conversion to a SHA would be appropriate. And if the landowner is a federal agency wishing to

continue the conservation actions on remaining property, the Recovery Crediting program is the appropriate fit for conversion. Presumably, the Service already would have no objection to landowners in these scenarios applying to enter into any of these programs. But the Draft Policy is silent on the prospect and offers no guidance for how to take advantage of it. Making the possibility of relatively easy and expeditious program conversion an explicit feature of the voluntary conservation actions program is likely to promote better design of actions prior to listing so as to increase the probability of successful conversion after listing.

Recommendation: The Service should describe processes and standards for procedurally expeditious conversion of continued implementation of a voluntary conservation action on additional land to a Conservation Bank, Safe Harbor Agreement, or Recovery Crediting program after the species is listed.

3. PROVIDING DETAILS REGARDING THE STANDARDS AND PROCEDURES FOR APPROVAL OF STATE PROGRAMS

EWAC appreciates that, as illustrated by the specific Request for Information questions posed for comment and recommendations,[14] the Service is still working out details of the final policy. The specific questions, however, do not cover all the areas for which further details are needed for anyone to evaluate the proposed Draft Policy. EWAC responds to the specific questions below and here provides comments on a component of major dimension and importance to the Draft Policy but for which few details are provided: standards and procedures for approval of state programs.

[14] See Federal Register Vol. 79, No. 140, July 22, 2014 p. 42529

First, to the extent the Service retains the restriction of qualifying conservation programs to state-led programs, the Draft Policy provides that state programs necessary for landowners to participate in the program must be "the most recent version of a State Wildlife Action Plan or other State conservation strategy that is intended to encourage voluntary conservation measures for the species."[15] It is not clear how the "most recent" qualifier interacts with the "ongoing actions" provision discussed above. For example, if the state develops a plan and a multi-year, multi-phase voluntary action commences, and before completion the state revises its Wildlife Action Plan, what is the effect on completed phases of the voluntary action? What is the effect on uncompleted phases?

Beyond that, the Draft Policy provides no description of what the state program must provide other than (1) maintain a register of qualifying actions; (2) record credit transfers; (3) provide oversight of implementation and maintenance of qualifying actions; and (4) notify the Service of qualifying actions. If those are the only necessary components of a state program, it would be useful for the Service to so state. If there are other standards necessary for the Service to be satisfied that the state program "is intended to encourage voluntary conservation measures," the Service should state what those standards require.

In addition, the Draft Policy is silent with regard to how states and landowners will know that a state's program meets the standards, whatever the Service ultimately defines those to be. The Draft Policy states that the Service, "when requested, will assist the State" with the four functions described above, but does not provide any process for Service

[15] See Federal Register Vol. 79, No. 140, July 22, 2014 p. 42529

approval or endorsement of a state program as qualifying for Service recognition of credits. The concern, of course, is that when landowners or their credit transferees attempt to use credits generated under state programs, the Service will conclude that the state program was inadequate and will devalue or refuse to recognize the credits. With so little detail about what a state program must provide, that concern strikes EWAC as calling for significantly more attention in the Draft Policy to fleshing out the details of state programs.

Finally, the proposed program should be built around overall consistency between states, so that state-led and non-state conservation programs maximize their effectiveness in providing conservation benefits to species with multi-state ranges. EWAC appreciates that the proposed program will benefit from fostering of innovative state programs, but to the maximum extent possible the Service should work to ensure the proposed program encourages consistency across and collaboration between state programs. Providing a more detailed framework for minimum components of state-led and non-state programs thus would be an important step in developing the next version of the Draft Policy.

Recommendation: The Service should provide additional details of the standards and procedures for recognition that a state program qualifies for the Draft Policy. If the Service follows EWAC's recommendation that the Draft Policy not be limited to state-led programs, the same definition of standards and procedures will be needed for actions carried out by other public and private entities. Promoting consistency across and collaboration between all state-led and non-state programs will further enhance the conservation potential of the Draft Policy.

III. RESPONSES TO SPECIFIC QUESTIONS

1. The policy requires an overall positive assistance to the species; how should we define this benefit?

As the Draft Policy acknowledges, the Service has "criteria, standards, and metrics that it uses to evaluate the beneficial impacts of mitigating or compensatory measures and the detrimental impacts of activities that give rise to mitigating or compensatory measures."[16] Presumably this refers to the take and mitigation evaluation metrics used in section 10 HCPs and section 7 consultations. EWAC believes those metrics are appropriate for the determination of "overall positive assistance," and that "overall positive assistance" is satisfied whenever the beneficial impacts exceed the detrimental impacts by an amount that will assist recovery of the species in any degree. This leaves it to landowners to decide how most efficiently to invest in conservation actions generating net beneficial impacts. A landowner is unlikely to invest heavily in an action that produces little net benefit, and thus little credit value, but some landowners do so already without the prospect of receiving a transferable credit. And, if a modest investment yielding a modest net benefit is worth the investment to the landowner, that should be the landowner's decision. In short, "overall positive assistance" should be defined as being satisfied when the benefits of the actions implemented by a landowner, when combined with those benefits that would be achieved if it is assumed that the actions were also to be implemented on other necessary properties, would preclude or remove any need to list the covered species. This is akin to the standard for CCAAs.

[16] See Federal Register Vol. 79, No. 140, July 22, 2014 p. 42529

2. The policy requires that a prelisting conservation action be part of a State plan. What approach should we take if there is no State plan for the species?

EWAC has offered its recommendations for this question above in its general comments. In summary, EWAC does not believe the policy should require that a prelisting conservation action be part of a state plan. If state involvement is the desired default rule, states should be allowed to delegate the functions the Service outlines[17] to other public and private entities approved by the state. In the absence of any state participation, the Service can work directly with such entities.

3. For those species for which the State does not have the authority or jurisdiction, should we revise the policy to allow prelisting conservation actions for these species to receive credit? If so, how would these prelisting conservation actions be tracked and monitored?

EWAC has offered its recommendations for this question above in its general comments. In summary, EWAC does not believe the policy should require that a prelisting conservation action be part of a state plan. If state involvement is the desired default rule, states should be allowed to delegate the functions the Service outlines[18] to other public and private entities approved by the state. In the absence of any state participation, the Service can work directly with such entities.

4. How should we quantify the value of the voluntary prelisting conservation actions and credits?

The methods for quantifying credit may depend on the context of the species—e.g., in some cases number of individuals might work, while in other cases acres of habitat, perhaps with gradations of habitat quality, would be appropriate. EWAC recommends that

[17] See Federal Register Vol. 79, No. 140, July 22, 2014 p. 42529
[18] See Federal Register Vol. 79, No. 140, July 22, 2014 p. 42529

the credit quantification approaches taken under the Conservation Bank and Recovery Crediting programs would be the most appropriate for use in the voluntary conservation actions program.

5. Based on the species and the nature of the actions, how should we determine the percentage set aside?

As EWAC understands it, the percentage set aside is designed to ensure that the net benefits to the species reflected in the quantified credits are not entirely offset by the net detrimental effects of later actions to which the credits are assigned. However, given that the qualifying voluntary conservation action has generated the net benefits, it seems inequitable to place the burden of ensuring "overall positive assistance" on the holder of the credits. A more appropriate approach would be to require the entity carrying out the action for which mitigation or compensation is required to obtain credits generated from this program at a greater than 1:1 ratio relative to the action's net detrimental effects, with the ratio depending on the recovery impact on the species. If the Service retains the percentage set aside as mandatory or optional, however, the Service will have to balance the recovery needs of the species with the economic feasibilities of the conservation action. An excessive set aside will require landowners to recoup the value of those retained credits through the market transactions, which could put those credits at a substantial competitive disadvantage compared to other mitigation and compensatory sources such as Conservation Banks. The risk of an excessive set aside is even more pronounced and unpredictable given that the Service retains the authority to fix the set aside after the species is listed. Overall, these complications suggest that the ratio approach, which shifts risk to the entity carrying out the detrimental action, is a more appropriate means for

ensuring "overall positive assistance." In any event, whichever approach the Service takes, it is likely that fixing the appropriate set aside percentage or credit ratio will depend on the circumstances of each species, suggesting that these determinations are most appropriately made at the time the species is listed, with the input of affected states, non-state conservation program providers, and participating landowners.

6. The policy allows for the transfer of credits. How could we develop an uncomplicated trading system mechanism?

EWAC believes the Wetlands Mitigation Banking program administered under section 404 of the Clean Water Act provides a useful model for these purposes, though it can be improved upon through adoption of a "manifest" system. Each qualifying voluntary conservation action, whether state-led, multi-state, or non-state, should maintain a publicly available online accounting of credits awarded, with each credit assigned a numeric or other distinguishing label. Every transfer, whether to an intermediary or to an end user, must be recorded on the site by the transferor and transferee, continuing down the chain of transfers until the end user. The Service could develop either the template for these sites or could establish a nationwide site for use by landowners who have generated credits and by all credit transferees. Assuming such a recording system is established, EWAC believes the actual transfer system is best left to the market, such as is the case for wetlands banking and Clean Air Act SO_2 emissions trading.

IV. CONCLUSIONS

In closing, the EWAC enthusiastically supports the underlying principles and objectives of the Draft Policy, and with the enhancements and clarifications we have suggested above, EWAC believes the policy can provide even stronger incentives for

landowners to engage in pre-listing conservation actions. We believe these relatively minor adjustments and classifications articulated in our comments will further strengthen the Draft Policy and provide more robust incentives to landowners to use this promising concept to increase benefits to species. We hope the Service will take the recommendations EWAC has made above into its consideration as it moves forward with this policy. We greatly appreciate this opportunity to comment, and would be happy to engage in further discussions should the Service find it useful.

If you have any questions regarding these comments please feel free to contact the following EWAC representatives:

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