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January 22, 2018

Comments regarding the Regulations for Candidate Conservation Agreements with Assurances and Candidate Conservation Agreements with Assurances Policy

Submitted by:

Energy and Wildlife Action Coalition

Filed electronically to the attention of:

Public Comments Processing
Attn: FWS-HQ-ES-2017-0075
U.S. Fish and Wildlife Service, MS: BPHC
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Falls Church, VA 22041-3803

Public Comments Processing
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Division of Policy, Performance, and Management Programs
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The Energy and Wildlife Action Coalition ("EWAC") submits these comments in response to the U.S. Fish and Wildlife Service ("Service") November 22, 2017 announcements[1] of the public comment periods for policy review of the Candidate Conservation Agreements with Assurances ("CCAA") policy ("CCAA Policy") and CCAA regulations ("CCAA Rule") issued under the Endangered Species Act ("ESA").[2]

EWAC is a national coalition formed in 2014 whose members consist of electric utilities, electric transmission providers, and renewable energy entities operating throughout 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.

The Service issued a revised CCAA rule and CCAA policy on December 27, 2016. EWAC had filed comments jointly addressing the proposed rule and draft policy (attached),[3] and EWAC's comments supported the sensible clarifications provided by the changes proposed. EWAC expressed its support for the following aspects of the proposed rule and draft policy:

- Clarification of CCAA permit requirements;
- Provision of reassurance to landowners participating in CCAAs that additional conservation measures and resource use restrictions would not be required or imposed should a species become listed;
- Definition of "property owner" to expressly include entities owning any interest in property that carries with it the authority to conduct the CCAA management activities on that property;
- Clarification of transfer of ownership of CCAA-enrolled properties; and
- Replacement of the CCAA Rule's confusing reference to hypothetical conservation measures implemented on "other necessary properties" with a new, defined conservation standard.

In general, EWAC members support voluntary conservation tools, such as CCAAs, that encourage proactive conservation efforts.[4] However, a few aspects of the final revised CCAA Rule and CCAA Policy concern EWAC. These aspects are described briefly below.

"Net Conservation Benefit" is not an appropriate standard for CCAAs

EWAC appreciates the replacement of the CCAA Rule's prior standard that incorporated hypothetical conservation measures implemented on "other necessary properties" with a new,

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[1] Candidate Conservation Agreements with Assurances Policy, 82 Fed. Reg. 55625 (Nov. 22, 2017); Regulations for Candidate Conservation Agreements with Assurances, 82 Fed. Reg. 55550 (Nov. 22, 2017). The announcement of the policy review of the CCAA Policy was a joint publication with the Service and National Marine Fisheries Service, but for ease of writing, we refer only to the Service throughout these comments.

[2] 81 Fed. Reg. 95164 (Dec. 27, 2016).

[3] Candidate Conservation Agreements with Assurances Policy, 81 Fed. Reg. 26,817 (May 4, 2016); Revisions to the Regulations for Candidate Conservation Agreements with Assurances, 81 Fed. Reg. 26,769 (May 4, 2016).

[4] 82 Fed. Reg. at 55,550; 82 Fed. Reg. 55,626.

defined conservation standard. However, the introduction of a "net conservation benefit" standard into the CCAA Rule and CCAA Policy is unsupported by statutory authority and the Services do not cite to any statutory authority when imposing this arguably heightened standard. EWAC is concerned that setting too high a standard will discourage use of CCAAs. Even the ESA section 10 permitting process — which authorizes Service issuance of incidental take permits ("ITP") for non-federal activities, and is the only circumstance in which the ESA requires mitigation — does not require that such permits achieve a net conservation benefit to listed species. Instead, section 10 requires that an applicant, "to the maximum extent practicable," "minimize and mitigate" the impacts of the take of listed species for which it seeks an ITP. While the Service does use a "net conservation benefit" for its Safe Harbor Agreement ("SHA") program, the SHA program applies only to species that are already listed. In the case of CCAAs, covered species are not ESA-protected and may never be listed.

A CCAA is ultimately a permitting action, as the CCAA converts to an ESA section 10(a)(1)(A) "Enhancement of Survival" permit in the event that a species covered by the CCAA is listed. An impermissible denial of a governmental permit may be a constitutionally cognizable injury.[5] Supreme Court precedent stakes out constitutional limitations on takings of private property, including exactions, requiring an "essential nexus" and "rough proportionality" to the impacts being mitigated.[6] Basing the availability of a permit upon a regulatory standard that is not grounded in statutory authority potentially implicates takings considerations. A more flexible standard that incentivizes the public would be better suited to the CCAA program. The CCAA is unique in that it applies to species that are not yet listed and may never be listed. EWAC suggests that the Service withdraw the "net conservation benefit" standard and replace it with something more aligned with existing ESA policy towards unlisted species, such as the Service's Policy for Evaluation of Conservation Efforts When Making Listing Decisions.[7]

Existing and effective management should be sufficient for a CCAA.

EWAC suggested in its July 5, 2016 comments that the CCAA Rule and CCAA Policy should clarify that, when species and habitat are already effectively managed on a particular property (and those actions will continue), approval of a CCAA could be appropriate even where no additional improvement of habitat quality or population increase can be anticipated to occur on the enrolled property. In its December 27, 2016 response to this comment, the Service responded that "CCAAs that are designed to preserve habitat could be approved under the revised policy, as long as the property owners continued to manage their property for the species and addressed likely future threats that are under their control."[8] The Service also stated that, "the property owner will be required to address the key threat(s) to the covered species that are under the landowner's control in order to participate in a CCAA and achieve a net conservation benefit for the species."[9] Any suggestion that property owners address future threats or "key

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[5] *See, e.g.,* Koontz v. St. John's River Mgmt. Dist., 133 S. Ct. 2586 (2013); Nollan v. Cal. Coastal Comm'n, 483 U.S. 825 (1987); Dolan v. City of Tigard, 512 U.S. 374 (1994).

[6] *See, e.g.,* Koontz v. St. John's River Mgmt. Dist., 133 S. Ct. at 2603 (holding "that the government's demand for property from a land-use permit applicant must satisfy the requirements of Nollan and Dolan even when the government denies the permit and even when its demand is for money").

[7] Otherwise known as the "PECE Policy." 68 Fed. Reg. 15100 (Mar. 28, 2003).

[8] 81 Fed. Reg. 95164, 95169 (Dec. 27, 2016) (emphasis added).

[9] *Id.* at 95165.

threats" beyond the status quo — where the species and its habitat are already being effectively managed — should be removed from the CCAA Rule and CCAA Policy.

CCAAs should be made available to numerous areas of economic and infrastructure activity.

The Service has so far been reluctant to negotiate and support CCAAs that provide assurances to major infrastructure and commercial and public facility development. In its December 27, 2016 announcement of the final revised CCAA Rule and CCAA Policy, the Service stated, "Some types of activities such as adding housing developments, mining, or other energy-development activities, are inappropriate for CCAAs."[10] However, those types of activities may yield the largest benefits to both species and the economy. This language may have the unfortunate effect of preventing the use of CCAAs for energy-development and infrastructure, despite the successful use of CCAAs for these purposes in the cases of the lesser prairie chicken and dunes sage brush lizard. CCAAs are an efficient and readily available permitting tool that should be available to all commercial and public activities with the potential to affect unlisted species. The Service should reconsider this position and instead encourage the use of CCAAs across a broad spectrum of economic activity. Again, EWAC is wholly supportive of permitting tools that encourage voluntary and proactive conservation efforts.

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EWAC appreciates the opportunity to comment on the Service's policy review and looks forward to participating in any future public comment opportunities related to the CCAA Rule and CCAA Policy.

Please do not hesitate to contact the following EWAC representatives:

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[10] *Id.* at 95169.

Attachment

July 5, 2016

Comments regarding the May 4, 2016

Proposed Revisions to the Regulations for Candidate Conservation Agreements With Assurances and Draft Revised Candidate Conservation Agreements With Assurances Policy

Submitted by:

Energy and Wildlife Action Coalition

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Public Comments Processing
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The Energy and Wildlife Action Coalition ("EWAC") submits these comments in response to the U.S. Fish and Wildlife Service ("Service") and National Marine Fisheries Service May 4, 2016 announcement of a draft revised Candidate Conservation Agreements with Assurances ("CCAA") policy ("Revised CCAA Policy") as well as the Service's concurrent proposed revisions to the regulations for CCAAs ("Revised CCAA Rule") issued under the Endangered Species Act ("ESA").[1] EWAC is a national coalition formed in 2014 whose members consist of electric utilities, electric transmission providers, and renewable energy entities operating throughout 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 sensible clarifications provided in the Revised CCAA Policy and Revised CCAA Rule, which together seek to simplify the CCAA program, create greater certainty and reassurance for program participants, and potentially facilitate greater participation in prelisting conservation actions. EWAC values the Service's effort to clarify permit requirements and to reassure landowners participating in CCAAs that additional conservation measures and resource use restrictions would not be required or imposed should a species become listed. Further, the Revised CCAA Policy's expanded definition of "property owner"—to expressly include entities owning any interest in property that carries with it the authority to conduct the CCAA management activities on that property—will facilitate greater accessibility to the CCAA program. Similarly, the Revised CCAA Policy's clarification of transfer of ownership of CCAA-enrolled properties is also beneficial.

Replacement of the CCAA regulations' confusing reference to hypothetical conservation measures implemented on "other necessary properties" with a new, defined conservation standard is appreciated. However, the introduction of a "net conservation benefit" standard (or even a "no net loss" standard) is unsupported by statutory authority, and the Service has cited none in announcing this heightened standard. Even in the context of the ESA section 10 permitting process—which authorizes Service issuance of incidental take permits ("ITP") for non-federal activities and is the only circumstance in which the ESA requires mitigation—does not require that such permits achieve a net benefit or no net loss to listed species.[2] Instead, section 10 requires that an applicant, "to the maximum extent practicable," "minimize and mitigate" the impacts of the take of listed species for which it seeks an ITP.[3] In a permitting context, an impermissible denial of a governmental benefit may be a constitutionally cognizable injury,[4] and a CCAA is ultimately a permitting action, as the CCAA converts to an ITP in the event that a species covered by the CCAA is listed.[5] Supreme Court precedent stakes out constitutional limitations on takings of private property, including exactions, requiring an

[1] Candidate Conservation Agreements With Assurances Policy, 81 Fed. Reg. 26,817 (May 4, 2016); Revisions to the Regulations for Candidate Conservation Agreements With Assurances, 81 Fed. Reg. 26,769 (May 4, 2016).
[2] 16 U.S.C. § 1539.
[3] *Id.*
[4] *See, e.g., Koontz v. St. John's River Mgmt. Dist.*, 133 S. Ct. 2586 (2013); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987); *Dolan v. City of Tigard*, 512 U.S. 374 (1994).
[5] 50 C.F.R. § 17.22(d).

"essential nexus" and "rough proportionality" to the impacts being mitigated.[6] If the benefit of a CCAA is denied based upon an applicant's failure to meet a conservation standard that is inconsistent with the standard set forth in the ESA itself, then a takings violation is possible in addition to violations arising from the promulgation of a regulatory standard that exceeds the ESA standard and authority. Any final CCAA rule or policy should also clarify that when species and habitat are already effectively managed on a particular property, a CCAA could be appropriate even where no improvement of habitat quality or population increase can be anticipated to occur on the enrolled property, because such improvement is unnecessary. In these instances, the species should benefit and the landowner should receive "assurances" even if the CCAA simply maintains the status quo on the enrolled property. EWAC asks the Service to provide this clarification and to reconsider introduction of the "net conservation benefit" standard into this and other proposed rules and policies implementing the ESA.[7]

EWAC finds the proposed revisions to the CCAA rule and policy generally positive and conducive to future CCAA program successes in preventing the need to list species as endangered or threatened under the ESA. EWAC looks forward to continuing to work with the Service in its efforts to continually improve implementation of the ESA and other federal wildlife laws. Please feel free to contact the following EWAC representatives:

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[6] *See, e.g., Koontz v. St. John's River Mgmt. Dist.*, 133 S. Ct. at 2603 (holding "that the government's demand for property from a land-use permit applicant must satisfy the requirements of *Nollan* and *Dolan* even when the government denies the permit and even when its demand is for money").

[7] *See* EWAC Comments Regarding the March 8, 2016 Proposed Revisions to the U.S. Fish and Wildlife Service Mitigation Policy, 81. Fed. Reg. 12,379 (Mar. 8, 2016) (filed June 13, 2016).