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**Comments regarding the April 5, 2019
Proposed Rule to Establish a Nonessential
Experimental Population of the California
Condor in the Pacific Northwest and the
Northern California Condor Restoration
Program Environmental Assessment**

Submitted by:

Energy and Wildlife Action Coalition

Filed electronically to the attention of:

Public Comments Processing
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The Energy and Wildlife Action Coalition (“EWAC”)¹ submits these comments in response to the U.S. Fish and Wildlife Service’s (“Service”) April 5, 2019 Notice of the Proposed Establishment of a Nonessential Experimental Population of the California Condor in the Pacific Northwest (“Proposed Rule”) and the Northern California Condor Restoration Program Environmental Assessment (“EA”) prepared jointly by the Service and the National Park Service (“Park Service”) in cooperation with the Yurok Tribe.² EWAC supports the recovery of species at risk of extinction, including the California condor (“Condor”) which is iconic and culturally significant. EWAC greatly appreciates the opportunity to comment on the Proposed Rule and offer some suggestions below.

On February 28, 2017, EWAC provided the Service and the Park Service comments (“Prior Comments”) on the California Condor Restoration Plan (“Restoration Plan”), which the agencies were reviewing at that time, along with the Yurok Tribe. Under Alternative 1 of the Public Scoping documents, associated with the Restoration Plan, the Service proposed to establish a Condor population in the Redwood National Park (“REDW”) pursuant to section 10(j) of the Endangered Species Act (“ESA”) (hereafter, “Section 10(j)"). In its Prior Comments, EWAC encouraged the Service to propose designating the REDW population of Condors as a non-essential, rather than essential, experimental population under Section 10(j), and also encouraged the Service to exempt electric transmission and distribution lines and wind energy facilities (collectively, “Facilities”) from the “take” prohibition of ESA section 9 with respect to the experimental population, which is consistent with the final rule establishing the nonessential experimental population of California condor in Northern Arizona.³ EWAC appreciates that the Service appears to have considered the Prior Comments in connection with the Proposed Rule and EA and made some revisions in response to those comments.

EWAC supports the Proposed Rule and Alternative 1 (the “Preferred Alternative”) described in the EA with the clarifications described below.

I. Add wind energy and electric transmission facilities to the list of activities that are considered lawful in the language of the rule

EWAC is pleased that the Service appears to have given due consideration to EWAC’s Prior Comments, and indicated in the preamble to the Proposed Rule that the effects of wind power and utility transmission lines are compatible with the conservation of the Condor.⁴ EWAC is also pleased that the Service indicates that the agency “expect[s] few restrictions on these activities because most incidental take...would not be prohibited” under the Proposed Rule.⁵ While the preamble to the Proposed Rule is clear that placement or maintenance of Facilities further than 200 meters from active Condor nests will not constitute incidental take, EWAC requests the Service explicitly include construction, operation, and maintenance of Facilities in the list of lawful activities included in 50 C.F.R. 17.84(i)(2). This suggested addition will confirm that the take prohibition does not extend to construction, operation, and maintenance of Facilities, providing certainty to the regulated community and simplifying the Service’s take in administering the rule.

Specifically, the Service has proposed to amend 50 C.F.R. § 17.84 (Special rule—vertebrates) to add new paragraph (i) and attendant subsections. Current subsection (i)(2) reads:

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, and related trade associations. 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.

² 84 Fed. Reg. 13,587 (April 5, 2019).

³ Endangered and Threatened Wildlife and Plants: Establishment of a Nonessential Experimental Population of California Condors in Northern Arizona, 61 Fed. Reg. 54,044, 54,056 (Oct. 16, 1996).

⁴ 84 Fed. Reg. at 13,597.

⁵ *Id.*

(2) *What take of the California condor is allowed in the NEP area?* (i) Throughout the California condor NEP, you will not be in violation of the [ESA] if you unavoidably and unintentionally take a California condor...provided such take is non-negligent and incidental to a lawful activity, such as hunting, ranching, driving, or recreational activities, and you report the take as soon as possible...

Unlike the preamble, it is not as clear from the examples that this subsection includes other commercial activities, such as construction, operation, and maintenance of the Facilities. EWAC is concerned that future Service personnel, looking at the rule language may conclude that construction, operation, and maintenance of the Facilities are or may be subject to the take prohibition. EWAC requests the Service add “electric transmission and distribution and wind energy generation facilities” to the list of activities the Service names in subsection (i)(2) of the Proposed Rule and remove the term “non-negligent”,⁶ so that the Proposed Rule reads as follows (suggested deletions in ~~strike through~~ and additions in *italics*):

(2) *What take of the California condor is allowed in the NEP area?* (i) Throughout the California condor NEP, you will not be in violation of the [ESA] if you unavoidably and unintentionally take a California condor...provided such take is ~~non-negligent and~~ incidental to a lawful activity, such as hunting; ranching; driving; *constructing, operating, and maintaining wind energy generation and/or electric transmission and distribution facilities*; or *engaging in* recreational activities, and you report the take as soon as possible...

Whereas the preamble to the Proposed Rule will be given weight in interpreting the text of the final rule to the extent it is ambiguous, the Service should reduce such ambiguity by making the changes described above to the language of the rule itself. This benefits the regulated community, regulators, and other interested stakeholders by facilitating the fair and consistent application of the law. Such a change also finds support in the EA, in which the Service explains:

Based on public input and additional internal discussions, the proposed 10(j) regulations were revised to focus protections around active nests and to remove specific prohibitions against incidental take from wind turbines and power lines. The reasons for this change included: (1) wind turbines or power lines are not limiting the growth of the existing condor populations; (2) the change would more closely align the proposed 10(j) rule with the existing 10(j) rule for condors in Arizona, Utah, and Nevada; (3) the number of wind turbines within the area likely to be occupied by condors released in the Pacific Northwest in the foreseeable future is small; and (4) the likelihood that power companies will take effective action to avoid and minimize condor deaths from interactions with power lines, given the history of partnerships with these companies...⁷

EWAC agrees with the position of the Service outlined in the EA and set forth immediately above. EWAC notes an alternative approach to ensuring that application of the ultimate rule is consistent among field offices would be to provide a definition of the phrase “unavoidably and unintentionally” as the Service has in other ESA 10(j) rules, including the 10(j) rule for the nonessential experimental population of grizzly bears in the Bitterroot area of Montana and Idaho.⁸ The following proposed language borrows heavily from the grizzly bear ESA 10(j) rule, which includes a definition for unavoidable and

⁶ EWAC notes that removing the term “non-negligent” achieves greater consistency with the ESA section 10(j) rule for the non-essential experimental population of California condors in northern Arizona. 50 C.F.R. § 17.84. EWAC also notes the absence of the term “non-negligent” from other ESA section 10(j) rules establishing non-essential experimental populations, such as the Service’s establishment of a non-essential experimental population of the American burying beetle in Southwest Missouri, 77 Fed. Reg. 16,712, 16,718 (Mar. 22, 2012), or its establishment of a non-essential experimental population of whooping cranes in the Eastern United States, 66 Fed. Reg. 14,107, 14,118 (Mar. 9, 2001).

⁷ EA at 70.

⁸ 65 Fed. Reg. 69,623 (Nov. 17, 2000).

unintentional take. EWAC suggests the following definition apply for “unavoidable and unintentional” take of Condors:

Take that occurs unavoidably and unintentionally is that which occurs despite reasonable care and is not done on purpose. Examples of take that occurs unavoidably and unintentionally includes that associated with commercial activities, such as construction of a building, or constructing and operating a utility pole, wind turbine, or transmission line more than 200 meters from an active nest.⁹

Moreover, EWAC suggests that where take of Condors is not reasonably certain to occur (such as when Condors are infrequently in a given project area), project proponents should not be required to take extraordinary measures to avoid the possibility of such uncertain take. For example, wind energy operators should not be required to alter turbine operations or utilize biological monitors or technological detection and/or deterrent systems to meet the “unavoidably and unintentionally” standard.

Revising the Proposed Rule along the lines set forth above, and making corresponding changes to the EA, could greatly improve application of the ultimate rule among the Service’s field offices.

II. Provide further guidance to Service personnel on the distinction between “negligent” and “non-negligent” take

Should the Service elect to maintain the term “non-negligent” in the text of the rule, EWAC requests the Service consider providing guidance in the preamble of any final Condor 10(j) Rule on what kinds of conduct would be viewed by the Service as “negligent.” This is of particular importance given that take of Condors that is not “non-negligent” would be prohibited under the Proposed Rule, even if such take otherwise was unavoidable and unintentional. For example, EWAC suggests that rare or even occasional presence of one or more Condors in a given project area should not create a duty on the part of a project proponent to engage in affirmative avoidance actions in order for the Service to conclude that the take is “non-negligent.” While EWAC understands that the Service and Park Service may not be able to describe every conceivable circumstance in which take would be considered “negligent,” EWAC nevertheless believes it crucial to provide further information to ensure the consistent application of the rule. EWAC suggests that, at a minimum, take of Condors should not be deemed negligent where there have been infrequent or inconsistent occurrences of the species within a given project area, or where a given instance of take is the first occurrence.

III. Revise northern boundary for the NEP

EWAC also requests that the Service reconsider its northern boundary for the NEP or clarify that Condors found north of the NEP boundary will be characterized and treated as part of the NEP for purposes of ESA protections. The EA states that the NEP boundary was established based on the Condor’s historical range.¹⁰ EWAC understands that Condors historically were widespread and locally abundant from Canada to Baja California, Mexico¹¹ and Figure 9 of the EA shows historical Condor observations in Washington.¹² Further, D’Elia et al. (2015) indicates that Washington contains both roosting and foraging habitat for Condors.¹³ D’Elia also indicates that, along with areas in northwestern California and southern Oregon, the Hell’s Canyon region in northeastern Oregon and southeastern Washington has the “most expansive areas of modeled nesting, roosting, and feeding habitat that are proximate,” which implies

⁹ *Id.* at 69,637-38.

¹⁰ *Id.* at 4.

¹¹ See Koford, *The California Condor*. Research Report No. 4. National Audubon Society (1953); Snyder et al., *Introduction to the California Condor*. University of California Press (2015); D’Elia et al., *Activity-specific ecological niche models for planning reintroductions of California condors (*Gymnogyps californianus*)*, *Biological Conservation* (2015) (“D’Elia 2015”).

¹² EA at 38.

¹³ D’Elia 2015 at 95 (Fig. 2).

higher relative suitability for reintroduction.¹⁴ Given this information, along with the fact that Condors are known to travel expansive distances for foraging and other aspects of their lifecycle, it is reasonable to assume that the NEP may expand north into Washington within the next 20 years. However, with the current NEP boundary being drawn along the Oregon/Washington state line it is unclear whether future expansion of Condor populations into Washington in the future would be treated as part of the NEP for purposes of the application of ESA section 9 take prohibition. Whereas, the preamble to the Proposed Rule clarifies that Condors in the NEP may travel south and comingle with the listed population and would be treated as part of the endangered population, and clarifies that Condors from the listed population may travel north and comingle with the NEP and would be then treated as part of the NEP, the Proposed Rule does not address Condors that travel north of the NEP boundary. Given that modeling efforts demonstrate that Washington can support Condors and because there is information indicating Condors have historically been found in Washington, the Service should either revise its boundary to include Washington or clarify that Condors that travel north of the NEP boundary will be treated as part of the NEP population.

IV. Clarify in the EA what kinds of additional measures could be required should high Condor mortality occur

The Service and Park Service indicate in the EA that incidental take associated with wind energy and electric transmission would not be prohibited under the Preferred Alternative. However, the EA indicates that should monitoring of Condors demonstrate high mortality was occurring and preventing establishment of a self-sustaining population, wind energy and electric transmission companies may be faced with “additional measures” to address electrocution and collision threats.¹⁵ EWAC respectfully requests that that Service and Park Service revise the EA to: (1) provide greater clarity on what level of mortality would be considered so “high”¹⁶ that a self-sustaining population could not be established and would, therefore, trigger “additional measures”; (2) describe with specificity what types of “additional measures” could be imposed on wind energy and electric transmission providers and operators should Condors experience such high mortality; and (3) to evaluate the costs of any such “additional measures.”

V. Additional comments on the EA

Chapter 4 of the EA noted that the State of California did not have a mechanism similar to the Service’s ability to designate a NEP and exempt that NEP from the take prohibition.¹⁷ The EA went on to state that because stakeholders would not realize the “benefit of the NEP designation” if there was no mechanism to exempt take of an NEP, the Service would not finalize a 10(j) rule until the State of California enacted legislation to address the issue.¹⁸ The EA did note ongoing legislative efforts to address the issue.¹⁹

As the preamble to the Proposed Rule acknowledges, on September 20, 2018, California Governor Jerry Brown signed into law Assembly Bill No. 2640 (“AB 2640”), which provides that if the California Department of Fish and Wildlife finds that a NEP designation for the Condor is consistent with the objectives of the state, then take of Condors is exempt from the prohibitions set forth in section 3511 of the California Fish and Game Code.²⁰ EWAC recommends the EA be revised to recognize that that the State of California enacted AB2640, and that there is no state-law barrier to finalizing the 10(j) rule.

¹⁴ *Id.* at 95- 96 (Fig. 4).

¹⁵ EA at 85.

¹⁶ Given that no Condor take has occurred at a wind energy facility to date, and take related to overhead electric power lines is extremely limited, even one mortality event could be viewed as “high.”

¹⁷ EA at 80.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ Assem. Bill No. 2640 (2017-2018 Reg. Sess.) § 2.

EWAC thanks the Service for the opportunity to provide these comments and is available to discuss any questions the Service may have.

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