



EWAC[®]
Energy and Wildlife
Action Coalition

May 14, 2021

Comments regarding:

Notice of Availability and Request for Comments for the Renewable (Wind and Solar) Energy, Power Line, and Communication Tower Habitat Conservation Plan for the Lesser Prairie-chicken; Colorado, Kansas, New Mexico, Oklahoma and Texas and Draft Environmental Assessment

Submitted by:

Energy and Wildlife Action Coalition

Filed by electronic mail to:

Debra Bills

Field Supervisor, U.S. Fish and Wildlife Service

Arlington, Texas, Ecological Services Office

arles@fws.gov

Docket No. FWS-R2-ES-2020-N125

The Energy and Wildlife Action Coalition (“EWAC”)¹ submits these comments in response to the United States Fish and Wildlife Service’s (Service) Notice of Availability and Request for Public Comment on the Renewable (Wind and Solar) Energy, Power Line, and Communication Tower Habitat Conservation Plan for the Lesser Prairie-chicken; Colorado, Kansas, New Mexico, Oklahoma and Texas (“HCP”) and Draft Environmental Assessment (“Notice”).² The HCP was submitted by LPC Conservation LLC, who will also serve as the HCP Administrator.

The Notice describes the HCP and the alternatives to the proposed incidental take permit (“ITP”) considered by the Draft Environmental Assessment (“Draft EA”), which includes approving a candidate conservation agreement with assurances (“CCAA”) with the same terms as the proposed HCP and issuing an enhancement of survival permit under section 10(a)(1)(A) of the Endangered Species Act (“ESA”) rather than an ITP pursuant to ESA section 10(a)(1)(B).

EWAC supports the HCP’s goal of conserving the lesser Prairie-chicken (LEPC) and providing an efficient means of authorizing take of the LEPC in the event the species is listed. A streamlined and cost-effective mechanism for ESA compliance throughout the LEPC’s range would provide a broad benefit not only to the regulated community, but also to the public and the LEPC itself. To that end, we believe that the overall structure—including specifically the impacts assessment and mitigation framework—ultimately adopted in the HCP and approved by the Service should be designed to encourage robust enrollment and be appropriately balanced to meet the requirements of the ESA and conserve the species in a reasonable and cost-effective manner. As currently drafted, EWAC is concerned that enrollment is likely to be cost-prohibitive for many companies and not commensurate with the indirect effects development and operations of electricity infrastructure might have on the species. Additionally, EWAC is concerned that available take authorization under the HCP would be exhausted by enrollment of only a handful of projects (or less), thereby limiting the utility of the plan. Limited participation in the HCP could cut against the goals of the Biden Administration to reduce greenhouse gas emissions and bolster resilience to the impacts of climate change,³ slow the pace of much needed improvement of this

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. EWAC is a majority-rules organization and therefore specific decisions made by the EWAC Policy Committee may not always reflect the positions of every member.

² 86 Fed. Reg. 19,634 (April 14, 2021).

³ See Executive Order 13990: Protecting Health and the Environment and Restoring Science to Tackle the Climate Crisis, 86 Fed. Reg. 7037 (Jan. 25, 2021). Should the Service generally adopt the impact distances set forth in this HCP for all renewable energy and electric transmission projects within the range of the LEPC, it could significantly impede development of renewable energy and the transmission necessary to deliver it, and would be at cross-purposes with the Biden Administration’s goal of creating a carbon pollution-free power sector by 2035. Fact Sheet: President Biden Sets 2030 Greenhouse Gas Pollution Reduction Target Aimed at Creating Good-Paying Union Jobs and Securing U.S. Leadership on Clean Energy Technologies; found at: <https://www.whitehouse.gov/briefing-room/statements-releases/2021/04/22/fact-sheet-president-biden-sets-2030-greenhouse-gas-pollution-reduction-target-aimed-at-creating-good-paying-union-jobs-and-securing-u-s-leadership-on-clean-energy-technologies/>. Recent studies have indicated that to reach this goal, there would need to be a two to three-fold increase of current installed capacity. .

nation's electric and communications infrastructure,⁴ and may have the unintended consequence of overburdening electric cooperatives who are responsible for bringing safe, reliable, and affordable power to rural communities who may not have the means to absorb the costs.⁵

Below, EWAC provides comments it believes that, if addressed, would result in an HCP and ITP that would potentially garner greater participation by the renewable energy and electric transmission sectors and, therefore, provide a greater conservation benefit for the LEPC. EWAC recognizes and reiterates that HCPs are voluntary and applicant-driven, and hopes the comments provided in this letter are helpful and informative for both the Service and LPC Conservation LLC as they assess whether to modify the HCP at the close of the public review and comment period.

I. Application of impact distances as a result of potential displacement should not set the standard for LEPC take authorizations

EWAC notes that, as currently drafted, the HCP focuses primarily on indirect impacts to the LEPC resulting from the placement of renewable energy and transmission infrastructure in the species' range. Specifically, the HCP theorizes that take of the LEPC will be caused by displacement of the species into lower quality habitat, decreased survivorship or fecundity due to compromised access to suitable foraging, nesting, sheltering, and wintering habitat, or reduced or altered access to essential habitat components of the LEPC lifecycle.

Based on this theory, the HCP calculates impacts to the LEPC by applying "impact distances" to various types of structures (measured from the anthropogenic source) as set forth in Table 3 of the HCP.⁶ Specifically, the HCP requires a potential enrollee to account for the direct impacts of a given project (removal of potential LEPC habitat) as well as the indirect impacts (application of the impact distance radii set forth in Table 3). Due to the application of the impact distances set forth in Table 3, the overwhelming majority of take authorized by the HCP is based on indirect impacts as dictated by the impact distances.

EWAC notes the HCP does not provide a clear explanation as to how the impact distances set forth in Table 3 were derived and how these distances are specifically tied to take of LEPC.⁷ Indeed, the HCP acknowledges there is "limited empirical data on the effects of wind, solar energy, and power line development on LEPC..."⁸ As the Service is aware, in order for habitat modification to rise to the level of take of listed species, there must be actual death or injury to a member of a listed species and there must be a sufficient causal link between the underlying activity and such death or injury.⁹ EWAC believes the impact distances set forth in Table 3 for wind energy, solar energy, and transmission infrastructure are overly broad and have not been demonstrably tied to the actual death or injury to one or more LEPCs.

⁴ See Fact Sheet: The American Jobs Plan, found at: <https://www.whitehouse.gov/briefing-room/statements-releases/2021/03/31/fact-sheet-the-american-jobs-plan/>.

⁵ EWAC notes the Biden Administration's focus on advancing environmental justice when addressing the climate crisis. See Executive Order 13990.

⁶ HCP at 38.

⁷ *Id.* at 30.

⁸ *Id.*

⁹ See 50 C.F.R. 17.3; *see also Babbitt v. Sweet Home Chapter of Communities for a Greater Oregon* (requiring a showing of actual death or injury to one or more members of a listed species).

Indeed, after the impact distances set forth in the HCP were developed by the Service in 2016,¹⁰ several wind energy projects were constructed within the EOR of the LEPC. Several studies have been conducted on those projects, and those studies demonstrate that LEPCs do not, in fact, avoid all areas within 1,800 meters of a wind turbine. For example, an April 2020 study by the American Wind Wildlife Institute (“AWWI”) tracked 43 male and 32 female LEPCs over a three-year period following the development of a wind energy facility.¹¹ That study found “little evidence to suggest that [wind energy infrastructure] was displacing LEPC during the nesting period...”¹² and that there was “no evidence that females and males were being displaced by the [wind energy infrastructure]...”¹³ Similarly, a 2020 technical report by LeBeau et al. covering similar grouse species made findings consistent with the AWWI report.¹⁴ Multiple other studies covering grouse species similar to LEPC have variously found that the presence of wind turbines do not affect nest site preference or selection, brood site preference, brood survival, or adult female home range size.¹⁵

Similarly, EWAC notes that impact distances set forth in connection with transmission lines are not supported by the best available science. The HCP utilizes scientific literature dated

¹⁰ See Recommendation for the Characterization of Effects of Wind Energy on the Lesser Prairie-Chicken (USFWS 2016).

¹¹ *Placement of Wind Energy Infrastructure Matters: A Quantitative Study Evaluating Response of Lesser-Prairie Chicken to a Wind Energy Facility*. Wind Wildlife Research Fund (April 13, 2020); found at: [Lesser Prairie-Chicken Response to Wind Energy - American Wind Wildlife Institute \(awwi.org\)](https://awwi.org/wp-content/uploads/2020/11/NWCC-Grouse-and-Wind-Energy-Meta-Analysis-03_11_20.pdf).

¹² *Id.* at 23.

¹³ *Id.* at 28.

¹⁴ LeBeau, C., S. Howlin, A. Tredennick, and K. Kosciuch. 2020b. Grouse Behavioral Response to Wind Energy Turbines: A Quantitative Review of Survival, Habitat Selection, and Lek Attendance. Prepared for the National Wind Coordinating Collaborative, Washington, D.C. Prepared by Western EcoSystems Technology, Inc. (WEST). Available online: https://awwi.org/wp-content/uploads/2020/11/NWCC-Grouse-and-Wind-Energy-Meta-Analysis-03_11_20.pdf

¹⁵ See, e.g., McNew, L.B., L.M. Hunt, A.J. Gregory, S.M. Wisely, and B.K. Sandercock. 2014. Effects of wind energy development on nesting ecology of greater prairie-chickens in fragmented grasslands. *Conservation Biology* 28: 1089-1099; Harrison, J. O., M. B. Brown, L. A. Powell, W. H. Schacht, and J. A. Smith. 2017. Nest site selection and nest survival of greater prairie-chickens near a wind energy facility. *The Condor* 119:659–672; LeBeau, C. W., G. D. Johnson, M. J. Holloran, J. L. Beck, R. M. Nielson, M. E. Kauffman, E. J. Rodemaker, and T. L. McDonald. 2017a. Greater Sage-Grouse Habitat Selection, Survival, and Wind Energy Infrastructure. *Journal of Wildlife Management* 81(4): 690-711. doi: 10.1002/jwmg.21231; Proett, M., S. B. Roberts, J. S. Horne, D. N. Koons, and T. A. Messmer. 2019. Columbian sharp-tailed grouse nesting ecology: wind energy and habitat. *Journal of Wildlife Management* 83:1214-1225; Raynor, E. J., J. O. Harrison, C. E. Whalen, J. A. Smith, W. H. Schacht, A. J. Tyre, J. F. Benson, M. B. Brown, and L. A. Powell. 2019. Anthropogenic noise does not surpass land cover in explaining habitat selection of greater prairie-chicken (*Tympanuchus cupido*). *The Condor* 121 (4):1–15; Winder, V.L., L.B. McNew, A.J. Gregory, L.M. Hunt, S.M. Wisely, and B.K. Sandercock. 2014a. Effects of wind energy development on the survival of greater prairie-chickens. *Journal of Applied Ecology* 51: 395-405; Smith, J. A., M. B. Brown, J. O. Harrison, and L. A. Powell. 2017. Predation risk: a potential mechanism for effects of a wind energy facility on greater prairie-chicken survival. *Ecosphere* 8 (6): e01835; Winder, V. L., L. B. McNew, A. J. Gregory, L. M. Hunt, S. M. Wisely, and B. K. Sandercock. 2014b. Space Use by Female Greater Prairie-Chickens in Response to Wind Energy Development. *Ecosphere* 5(1): 1-17. doi: 10.1890/ES13-00206.1; Smith, J. A., C.E. Whalen, M. Bomberger Brown, and L.A. Powell. 2016. Indirect Effects of an Existing Wind Energy Facility on Lekking Behavior of Greater Prairie-Chickens. *Ethology* 122: 419–429. doi: 10.1111/eth.12489; LeBeau, C. W., J. L. Beck, G. D. Johnson, R. M. Nielson, M. J. Holloran, K. G. Gerow, and T. L. McDonald. 2017b. Greater Sage-Grouse Male Lek Counts Relative to a Wind Energy Development. *Wildlife Society Bulletin* 41(1): 17-26. doi: 10.1002/wsb.725; Van Pelt, W.E., S. Kyle, J. Pitman, D. Klute, G. Beauprez, D. Schoeling, A. Janus, and J. Haufler. 2013. The lesser prairie-chicken range-wide conservation plan. Western Association of Fish and Wildlife Agencies (WAFWA). Cheyenne, Wyoming. Table 7, page 95. Available at: <https://wafwa.org/wpdm-package/the-lesser-prairie-chicken-range-wide-conservation-plan/>.

through 2011 to support the distances set required for transmission lines by the HCP. However, a 2013 study utilizing radiotelemetry and banding of the greater sage grouse indicated that the presence (or distance from) to a 230-kV transmission line had no effect on survival of that species.¹⁶ A 2019 study specific to the LEPC recommended a 550m buffer from electric transmission lines¹⁷—less than the 700m distance required under the HCP.

Overly conservative impact assessments could have a chilling effect on participation and reduce the potential for LEPC conservation that could be accomplished through the HCP.

EWAC understands that tradeoffs are sometimes made in large-scale HCP development that result in coarser-grained impact calculations for the sake of broader applicability. However, if the conservative impact assessments set forth in Table 3 are not revised downward prior to Service approval of the HCP, EWAC encourages the Service not to automatically assume that the impact distances set forth in this HCP represent the best available science. Rather, we encourage the Service to examine the best scientific and commercial information available at during the listing determination, and to not unnecessarily hold future project proponents seeking authorization under ESA sections 7 or 10 to the same standards adopted under this HCP.¹⁸ In other words, given the lack of causal link between the impact distances and actual death or injury to LEPC, the Service should not require the standard set forth in this HCP to become the standard for impact calculations under ESA sections 10 and 7 in the future. Related, the HCP includes a changed circumstance that allows revision of the impact distances based on updates to the best available science. Because of the importance of the impact distances to enrollees' impact calculations, which then directly influences mitigation calculations required under the HCP, EWAC recommends the HCP provide greater clarity on how “best available science” will be determined and applied by the Service, and on what timeframe/schedule (e.g. rolling basis, annually, etc.).

Finally, given the fact that the impact distances prescribed by the HCP are based on project type, EWAC questions why COI applicants would nevertheless be required to provide a detailed description of activities to be performed by the applicant within the project limits. Similarly, EWAC questions why COI applicants would also be required to analyze areas within a 6-mile buffer of a given project if those areas do not inform the impact analysis and/or mitigation requirements. EWAC suggests the HCP be revised to reduce the administrative burden on COI applicants, the HCP Administrator, and the Service by removing requirements that do not directly inform the take and mitigation calculations under the HCP.

¹⁶ Nonne, D., E. Blomberg, and J. Sedinger. 2013. Dynamics of greater sage-grouse (*Centrocercus urophasianus*) populations in response to transmission lines in central Nevada. Progress report: Year 10. Department of Natural Resources and Environmental Sciences, University of Nevada, Reno, Nevada.

¹⁷ Plumb, R. T., J. M. Lautenbach, S. G. Robinson, D. A. Haukos, V. L. Winder, C. A. Hagen, D. S. Sullins, J. C. Pitman, and D. K. Dahlgren. 2019. Lesser prairie-chicken space use in relation to anthropogenic structures. *Journal of Wildlife Management* 83:216–230.

¹⁸ Further, EWAC reiterates that HCPs are an applicant-driven process, and a future applicant for an ESA section 10 permit may have site-specific data and studies that support a different approach to assessing impacts.

II. Mitigation framework may have chilling effect on participation

A. Mitigation ratios depart from precedent

The HCP indicates that impacts of the proposed taking will be fully offset by the mitigation program described in the HCP.¹⁹ However, the mitigation ratios required under the HCP appear to go well beyond fully offsetting the impacts of the proposed incidental taking without explaining why these high ratios are necessary to offset the impacts authorized. For example, the HCP requires mitigation well above a 1:1 ratio for all LEPC impacts²⁰ – including for indirect habitat impacts— and additionally requires that mitigation provided be of equivalent or greater Crucial Habitat Assessment Tool (“CHAT”) category.²¹ This is a significant departure from how HCPs typically prescribe mitigation ratios for indirect impacts. For example, myriad Service-approved HCPs for the endangered golden-cheeked warbler require a mitigation ratio of 0.5:1 for indirect habitat impacts.²²

EWAC recommends the HCP be revised to reduce the mitigation ratios described in the HCP in recognition of the fact that (1) there is not currently a demonstrable link between placement of anthropogenic structures in proximity to LEPC habitat and actual death or injury to a member of the species to the degree ascribed in Table 3; and (2) to be consistent with how other HCPs assign mitigation to indirect impacts. EWAC also notes that impacts would be fully offset with a simple 1:1 ratio for impacts to LEPC habitat, particularly given the HCP’s commitment to replacing impacted habitat with habitat of the same or better quality.

B. HCP should clarify that impacts to non-habitat areas should not be counted against COI applicants

Finally, we recommend the HCP explicitly state that areas within the impact distances that lack actual suitable habitat whether demonstrated by the CHAT tool, desktop analysis, or by habitat assessments performed in the field be removed from the impact and mitigation calculations required of COI applicants. While examples provided in the HCP appear to contemplate that some areas will be removed from the impacts and mitigation assessments required of COI applicants, EWAC believes a more direct statement is warranted. These adjustments could help encourage participation in the HCP. Moreover, these adjustments remain consistent with ESA statutory standards.

C. Mitigation costs are prohibitive for wind, solar, and electric transmission or distribution projects

The HCP’s projected \$2,500 per acre cost for mitigation seems reasonable on its face. However, when one applies the per-acre cost to the impact distances set forth in Table 3 and the required mitigation ratios, enrollment in the HCP is likely to be cost-prohibitive for almost any

¹⁹ HCP at 6.

²⁰ *Id.* at 58.

²¹ *Id.*

²² *See, e.g.*, Habitat Conservation Plan for the Davis Ranch in San Antonio, Bexar County, Texas, Southern Edwards Plateau Habitat Conservation Plan, LCRA Transmission Services Corporation Transmission System Habitat Conservation Plan (note: this HCP also includes indirect impact mitigation ratios at 0.5:1 for other listed species); Heart of Texas Wind Habitat Conservation Plan.

wind or solar energy or electric transmission or distribution project. To illustrate this point, EWAC has used the information provided in Tables 3 and 4 of the HCP to determine the potential impact calculation for a, hypothetical wind energy project, hypothetical solar energy project, and hypothetical electric transmission line and applied the mitigation ratios applicable to CHAT 2 and 4 categories. We also note that generation tie-ins for wind and solar energy generation facilities are not addressed in the examples below, nor do the calculations include meteorological evaluation towers (impact distance of 667m) or improved gravel roads (impact distance of 67m) common at wind energy facilities, yet each of these structures would additionally increase mitigation costs for these facilities.

Put simply, these per-project mitigation costs far exceed what has been required of energy and transmission projects for any other species²³ and these exorbitant costs will likely limit enrollment in the plan.

Wind energy project

Table 3 of the HCP assumes an impact distance radius of 1,800m around each turbine within potentially suitable LEPC habitat.²⁴ Table 4 assumes that a 200MW project will impact approximately 30,781 acres (inclusive of infrastructure and impact distance).²⁵ If one were to assume that those 30,781 acres were exclusively situated in the CHAT 4 category, an enrollee would be required to provide 1.25 acres of mitigation (or 1.25 credit) for every acre impacted within CHAT 4. The HCP estimates that mitigation will cost \$2,500/acre.²⁶ Thus, this hypothetical project would be responsible for \$96 million in mitigation costs. If, on the other hand, the entire project were situated in CHAT 2 and, thus, mitigating at a 1:2.25 ratio, mitigation costs would soar to \$173 million. Put another way, if one assumes an 1,800m buffer around each turbine, the cost for mitigating LEPC impacts for each turbine located in CHAT 4 would be \$7.9 million. And the cost to put a single turbine in CHAT 2 would be \$14.1 million.

EWAC also estimated the potential mitigation costs of a project currently on the ground as if that project had obtained a COI through the HCP. In order to reduce to the extent practicable adverse impacts to the LEPC, the project proponent would have exercised significant avoidance of CHAT 1 and CHAT 2, and primarily sited its project in CHAT 3 and CHAT 4. Despite significant revision to the project layout, had this project sought coverage under the HCP, it would have been responsible for more than \$310m in mitigation costs. Nearly \$290m of those costs would have been due to portions of the project located in CHAT 3.

Solar energy project

Similar to the high costs to mitigate a wind energy project, and using the same tables and mitigation ratios, the cost to provide mitigation for a 64MW (1,000-acre) solar energy project, which is a fairly small-scale project by current utility-scale project development standards, would

²³ For example, mitigation costs for HCPs in the Midwest authorizing take of the Indiana bat in connection with wind energy projects consistently range from \$1m to \$7m. *See*:

<https://www.fws.gov/midwest/endangered/permits/hcp/r3hcps.html>. Project-specific.

²⁴ HCP at 38.

²⁵ *Id.* at 43.

²⁶ *Id.*, Appendix E, Table E1.

exceed \$3 million if the project were located exclusively in CHAT 4, and would cost a project proponent \$5.6 million if the project were sited solely in CHAT 2.

EWAC's concern is also demonstrated by applying the HCP to larger-scale solar energy facilities. For example, using the assumptions of the HCP, a current 150MW solar energy facility would directly or indirectly impact approximately 6,900 acres. Applying a desktop analysis to the potentially impacted acreage revealed that only 3,800 acres contained potentially suitable habitat. Assuming that the potential habitat was distributed evenly between CHAT 3 and CHAT 4, had this project enrolled in the HCP, the project proponent would have paid approximately \$15.4m in mitigation costs. These in-the-field costs are more than 60% higher per MW than the example provided in the HCP.

Electric transmission line

EWAC members have estimated that mitigation costs conservatively could double the per-mile cost of constructing an electric transmission line even if one were to assume that 66 percent of the potential habitat identified in an initial desktop analysis is not, upon closer examination, suitable LEPC habitat. Specifically, a hypothetical 15-mile project within the range of the LEPC occurring solely within CHAT 4 would cost roughly \$500,000 per mile to construct, but would be required to mitigate under the HCP at a cost of at least \$509,000 per mile. In other words, the cost of mitigating potential impacts to LEPC in CHAT 4 would be at least \$8m, and could potentially be much higher if there are not significant portions within CHAT 4 that could be excluded based on the absence of actual suitable habitat. These additional costs would impede a utility from providing reliable and affordable power to its customers. In some cases a utility may abandon the project rather than pass the cost on to rate payers, or seek alternate means of ESA compliance, which would likely be more time consuming. Any of these results could limit the success of the goals of the Biden Administration to improve the electric infrastructure for communities in need and bolster resilience to the impacts of climate change.

III. Impact distance framework would allow enrollment of only a small handful of projects

EWAC is also concerned that the take calculation metrics would result in only a small handful of projects being able to enroll before hitting the 500,000-acre cap set forth in HCP section 4.3.²⁷ For example, the HCP estimates that the collective footprint of electric transmission lines within potentially suitable LEPC habitat, after a 15 percent discount because of existing impacts on the landscape, is 238,000 acres.²⁸ Thus, full participation by the electric transmission and distribution industry could potentially consume nearly half of the available incidental take authorization.²⁹ Using the estimates provided in Table 4 a single 200-MW (30,781-acre) wind energy project enrolling in the plan would quickly deplete 6% of the available incidental take authorization.³⁰ If those estimates held true, enrollment in the plan would be exhausted by 16 wind energy projects without any enrollment by any other industry.

²⁷ HCP at 36.

²⁸ *Id.* at 41.

²⁹ *Id.* at 43.

³⁰ *Id.*

IV. Minimization measures that include timing restrictions may be impracticable

EWAC notes that the minimization measures set forth in section 5.3.2 of the LEPC HCP lack detail and do not appear to account for situations common to construction and operation of wind, solar, and electric transmission projects that may necessitate deviating from the timing and seasonal construction restrictions.

Specifically, Section 5.3.2.2 requires minimization of “noise and blasting, traffic volume and speed, and access points” between March 1 and July 15, but does not indicate whether this minimization measure applies to all lands enrolled in the LEPC HCP or only those areas that are within a certain distance from an active lek. EWAC notes that even the Western Association of Fish and Wildlife Agencies’ range-wide conservation plan, which for a number of reasons is unworkable for some in the electric power and transmission industries, more narrowly tailored a similar minimization measure to specify that this restriction applied only within 1.25 miles of a lek recorded as active within the last five years. EWAC recommends the HCP clarify that these types of minimization measures only apply within 1.25 miles of a lek recorded as active within the last five years.

Section 5.3.2.2 further restricts construction, operations, and routine maintenance activities for non-emergencies during the LEPC breeding season between the hours of 3:00am and 9:00am in areas within three miles of known leks active within the previous five years. By contrast, the WAFWA range-wide plan contains a similar restriction, but includes a smaller area in which the measure is required (1.25 miles rather than 3). EWAC suggests that there are circumstances that likely would not qualify as “emergencies” that nevertheless require construction, operations, and maintenance between the hours of 3:00am and 9:00am during LEPC breeding season. For example, LEPC breeding season includes months with high temperatures and/or humidity; for construction, maintenance, and operations crews, work often begins before dawn to ensure timely and uninterrupted delivery of electric power and the safety of the crews. EWAC recommends that the HCP’s restriction on breeding season construction, operation, and maintenance in the early hours of the day be flexible enough to allow less disruptive non-emergency work where compliance would be impracticable or create health and safety concerns.

V. HCP requirements concerning Bald and Golden Eagle Protection Act and National Historic Preservation Act are unnecessarily onerous

EWAC understands that ESA section 10 requires that the take authorized by an ITP must be related to activities that are “otherwise lawful”; however, we believe that the HCP provisions relating to compliance with the Bald and Golden Eagle Protection Act (“BGEPA”) and National Historic Preservation Act (“NHPA”) go beyond the statutory requirements of the ESA and other programmatic HCPs issued by the Service, and require Service involvement to a degree that may undercut the efficiency of the HCP. EWAC addresses these concerns below.

A. BGEPA compliance mechanism

Section 1.7.2 of the HCP requires that applicants for certificates of inclusion must provide “a brief description of [their] planned BGEPA compliance approach.”³¹ Proof of compliance with

³¹ *Id.* at 11.

other statutes is not a prerequisite to issuing ITPs.³² Given risk to LEPC generally arises during construction, and risk to eagles may not arise until operations, potential applicants may elect to pursue ESA authorization in advance of completing eagle risk assessments and developing BGEPA compliance strategies. Participation in the HCP – and the concomitant conservation of LEPC – should not be discouraged while the details of BGEPA compliance are negotiated between the project proponent and the Service. Furthermore, because application for ITPs and permits under BGEPA are voluntary, it is inappropriate to make compliance with the ESA and BGEPA interdependent. Section 10 of the ESA does not mandate a showing of BGEPA compliance in order for the Service to issue an ITP. Likewise, BGEPA does not mandate compliance with the ESA.

For these reasons, EWAC recommends the HCP be revised to simply include an acknowledgment that applicants for certificates of inclusion are aware of the potential applicability of BGEPA to a given project, including the Service’s enforcement authority relating thereto.

B. NHPA process is onerous and goes beyond what the ESA requires

EWAC appreciates that the HCP describes a NHPA “undertaking” in connection with an ITP as the Service’s authorization of take rather than its authorization of an underlying activity. Likewise, we agree the area of potential effect (“APE”) is appropriately limited to those portions of projects seeking authorization under the HCP. Nevertheless, because of the broad area covered by the impact distances set forth in the HCP, the APE for any given project will, in fact, be extraordinarily large and that, in some cases, it will be impracticable to comply with the extensive coordination process set forth in Worksheet 8 of the HCP in a timely manner.³³ This, in turn, undercuts the ability of the HCP to provide an efficient ESA permitting mechanism for covered industries.

In EWAC’s view, the process set forth for NHPA coordination in Worksheet 8 also significantly impairs the efficiency the HCP strives to provide the Service. Specifically, for each application for a certificate of inclusion, the Service is required, among other things, to review and approve the applicant’s proposed APE, to review and consult with the relevant state historic preservation officer (“SHPO”) and/or tribal historic preservation officer (“THPO”) regarding the applicant’s project and maps and the proposed procedures in place to address inadvertent discoveries of regulated artifacts, to review and coordinate with SHPO/THPO on any field work, and to engage in negotiations on how best to address historic properties (including potentially collaborating on creating a memorandum of agreement to resolve adverse effects to the same). EWAC encourages the Service to consider taking an approach similar to that adopted in the recently approved Nationwide Candidate Conservation Agreement for Monarch Butterfly on Energy and Transportation Lands (“Monarch CCAA”), which requires enrollees to, among other things: (1) determine whether a ground-disturbing activity would occur within a known cultural site and make documentation of any conclusions available to the Service or program administrator; (2) where an activity occurs within a known cultural site and cannot be modified to avoid the boundaries of such a site, assume there is potential to affect an historic property; and (3) follow

³² See *Center for Biological Diversity v. U.S. Fish and Wildlife Service*, 450 F.3d 930, 942 (9th Cir, 2005); *Environmental Protection Information Center v. U.S. Fish and Wildlife Service*, 2005 WL 3877605, at *4 (N.D. Cal. Apr. 22, 2005).

³³ HCP Appendix B, Worksheet 8.

the steps laid out by the Monarch CCAA to coordinate and consult with the SHPO and/or THPO.³⁴ Notably, the Service has minimal involvement in this process unless and until the project proponent and SHPO/THPO begin to resolve adverse effects to cultural resources pursuant to 36 C.F.R. 800.6. We also encourage the HCP to include a list of specific activities that would be exempt from NHPA section 106 review consistent with 36 C.F.R. 800.3(a)(1) as the Monarch CCAA has done.

From a practicability standpoint, many circumstances may arise in which a COI holder may be unable to grant the HCP Administrator or other access to the vast area covered by the LEPC impact buffers. Oftentimes individual landowner agreements associated with a given wind, solar, or electric transmission or distribution projects dictate access and use, and often prohibit cultural resource surveys specifically. We suggest that the NHPA the HCP recognize that not all COI applicants will be able to strictly comply with the NHPA process and that such inability should not preclude a project from enrollment.

VI. Service should clarify that additional review under the National Environmental Policy Act and ESA section 7 will not be required.

Given the degree of Service involvement in the review and approval of certificates of inclusion (“COI”) under the HCP, EWAC recommends the Service confirm its commitment to its 2013 Final Guidance for Endangered Species Act Incidental Take Permits Covering Multiple Projects or Project Owners,³⁵ which among other things clarifies that issuance of COIs by a master permittee does not require additional National Environmental Policy Act (“NEPA”) or ESA section 7 process, so long as the activities covered by the COI are within the scope of the NEPA and ESA section 7 analyses performed in connection with the issuance of the master ITP. EWAC notes that detailed involvement of the Service in the COI process strains the limited resources of the agency and would seem to negate the efficiency otherwise gained through a programmatic approach.

VII. Funding assurances required of certificate of inclusion applicants are onerous and beyond that required under similar programmatic HCPs

The HCP requires that each applicant for a COI demonstrate funding sufficient to cover the cost of implementing the conservation measures required under the individual COI or risk denial of enrollment.³⁶ Among the costs to COI applicants are application fees, enrollment fees, annual administration fees, mitigation fees, and contingency fees.³⁷ EWAC notes that many of the funds seem duplicative of one another, have no estimate, and are subject to significant swings in cost based on the level of overall enrollment or are entirely discretionary on the part of the HCP Administrator or mitigation provider. For example, the HCP requires COI applicants to fund a “contingency buffer” equal to five percent of the total mitigation cost required under the COI that

³⁴ Monarch CCAA, Appendix C at C-5, C-6; *found at*: https://www.fws.gov/savethemonarch/pdfs/Final_CCAA_040720_Fully%20Executed.pdf.

³⁵ Found at: <https://www.fws.gov/endangered/esa-library/pdf/FWS%20multiple%20project%20and%20project%20owner%20itp%20guidance%20April%2030%202013.pdf>.

³⁶ HCP at 72.

³⁷ *Id.* at 73-77.

must be provided through a guarantee held through a third-party guarantor and evidence must be provided to the HCP Administrator at the time of application.

EWAC recommends the funding assurances for COI applicants be revised to reduce duplicative costs, to include estimates of costs and administrative fees be provided for planning purposes, and to remove the requirement of a contingency buffer since mitigation for impacts to LEPC is paid prior to impacts and then managed by the HCP administrator and mitigation providers, who would have had to ensure appropriate management and maintenance of mitigation parcels in order to be an approved provider. EWAC notes that there is no requirement under the ESA, implementation regulations, or case law that a permittee provide “contingency buffers” for its mitigation program.

Finally, EWAC requests the HCP be revised to allow COI holders to pay all administration fees upfront (rather than on an annual basis)³⁸ so that such costs can be capitalized.

VIII. HCP administration should be managed so as not to place additional burdens on COI applicants

EWAC recommends the HCP provide greater clarity on the process that will be used to adjust mitigation and other administrative fees, and suggests that staffing and administrative costs be managed to avoid unnecessarily raising the costs of enrollment and place financial burdens on COI applicants. The HCP’s apparent permission of significant unknown administrative costs, in combination with other duplicative costs as described above, may discourage participation.

IX. HCP advisory board should include industry representation

EWAC supports the HCP’s incorporation of an advisory board to assist with oversight and implementation of the HCP. While the HCP indicates the advisory board will include representatives from a number of sectors, including industry members, the HCP also notes that the Administrator has full discretion on membership. EWAC recommends the HCP specify that the advisory board will be equally seated with representatives from each of the industries included in the HCP (either individual companies or trade associations) and remaining stakeholders. Further, EWAC recommends the advisory board’s industry members be equally represented by individual industry members and trade groups.

X. COI holders should not be required to pay damages in event of breach.

Section 8.6 of the HCP addresses damages in the event of a COI holder breach of the terms of participation. Specifically, the HCP requires that a COI holder in violation of the terms of its enrollment pay damages in the amount of \$250,000 and that the COI holder pay any outstanding enrollment fees in addition to these damages. EWAC notes that other programmatic HCPs do not contain such stark provisions relating to COI breach and instead contain provisions limiting the effect of potential breach on the master permit (or the effect of a breach by the master permittee on COI holders).³⁹ Likewise, the recently approved Nationwide Candidate Conservation

³⁸ *Id.* at 75.

³⁹ *See, e.g.*, Williamson County Regional Habitat Conservation Plan, Hays County Habitat Conservation Plan, Comal County Regional Habitat Conservation Plan.

Agreement for Monarch Butterfly on Energy and Transportation Lands states explicitly that “[n]o party shall be liable in damages for any breach of this Agreement, any performance or failure to perform an obligation under this Agreement, or any other cause of action arising from this Agreement.”⁴⁰ In sum, we recommend that the HCP remove the requirement that a COI holder in breach of the terms of its enrollment pay damages and outstanding enrollment fees, and instead provide robust cross-default language and rely on the revocation of a COI and the Service’s power of enforcement under ESA section 11.

XI. Service should recognize enrollment in programmatic HCPs is voluntary

When finalizing the Draft EA, the Service should reiterate its long-standing position that an application for an HCP is voluntary and applicant-driven, particularly now that the agency has set the precedent of approving an HCP that does not include any currently listed species. For example, the Service’s 2016 Habitat Conservation Planning Handbook (“HCP Handbook”) states that “seeking an incidental take permit is a voluntary action by an applicant.”⁴¹ Similarly, 2018 guidance from the Department of the Interior indicates it is “vital that Service staff recognize that whether to apply for a[n ESA] section 10(a)(1)(B) permit is a decision of the applicant.”⁴² Reiterating this point here is particularly important to limit the potential that field offices will insist that project proponents enroll in this plan, or insist that project proponents develop HCPs for unlisted species of concern, not associated with this HCP, in the future.

XII. HCP should provide for periodic public review of performance

EWAC appreciates that the HCP is a voluntary program that will be run by a non-federal HCP administrator. However, given that this HCP may influence the Service’s technical assistance to those who elect not to enroll in the HCP, EWAC suggests that the HCP contemplate a periodic (e.g., every 5-year) public informational comment period on the impact distances, mitigation ratios, and other information relevant to HCP performance. Information gathered could help to inform the advisory board regarding adaptive management and other provisions, and would provide a means for COI holders to provide input to the HCP Administrator and advisory board on how the process is working from the perspective of the regulated community.

XIII. HCP should include a timeframe for approving a COI application

EWAC strongly recommends an estimated timeframe be provided for the COI application and approvals process. Specifically, because the Service is tasked with approving the impact assessment (which ultimately defines a project’s mitigation requirements), significant delays in this process could result in missed construction deadlines which, in turn, would cause increases in construction costs and, potentially, fines for missing any state- or federally-mandated operation commencement date. While EWAC understands that neither the Service nor the HCP Administrator likely can commit to a precise timeline, providing guidance to COI applicants would be helpful for project planning.

⁴⁰ Nationwide Candidate Conservation Agreement for Monarch Butterfly on Energy and Transportation Lands at 86.

⁴¹ HCP Handbook at 3-2.

⁴² Guidance on trigger for an incidental take permit under section 10(a)(1)(B) of the Endangered Species Act (April 26, 2018) at 1.

XIV. HCP should contemplate applicability to projects subject to ESA section 7 consultation

As currently drafted, the HCP does not appear to consider that projects with an ESA section 7 nexus (e.g., projects occurring in whole or in part on federal lands, projects that require authorization under one or more nationwide permits pursuant to section 404 of the Clean Water Act) could benefit from an expedited consultation process by enrolling in and abiding by the terms and conditions of the HCP. EWAC recommends the Service consider the analysis in the HCP and in its future biological opinion as fully addressing effects from activities in the covered sectors, so long as projects with federal nexi follow the impacts analysis, and avoidance, minimization, and mitigation measures set forth in the HCP and so long as the HCP has sufficient take authorization to cover the impacts from a given project. While EWAC understands that a project with a federal nexus who has enrolled in the HCP may still be required to undergo formal consultation, EWAC believes any such consultation would be significantly streamlined, as there could be no jeopardy to the LEPC.

XV. Other comments

In addition to the comments set forth above, EWAC also makes the following recommendations:

- Figures 3 and 4 of the HCP appear to have a discrepancy in the polygons concerning the LEPC's "estimated occupied range" and "current range" in Colorado. Figure 3 appears to indicate the estimated occupied range in Kit Carson County, Colorado, which is outside the HCP Plan Area and differs from the depiction in Figure 4 of the species' "current range." EWAC recommends this discrepancy be corrected.
- Figure 3 should be revised to clarify the extent of the HCP Plan Area and HCP Permit Area to make clearer which areas are, in fact, eligible for coverage.
- The HCP is not entirely clear whether the LEPC conservation banks referenced in the plan will be available to parties that do not enroll, or whether all such credits are reserved for the enrollees of this HCP.

XV. Conclusion

EWAC appreciates the Service taking an innovative approach to ESA permitting to support efficient development, construction, and operations and maintenance of renewable energy projects and transmission and distribution of safe, reliable, affordable, and increasingly cleaner electric power to all communities, and reiterate our belief that, with the changes suggested above, the HCP could achieve robust conservation of the LEPC while significantly streamlining and establishing cost-effective ESA compliance for the power sector. EWAC would welcome the opportunity to discuss in greater detail the comments provided herein.

Please feel free to contact the following EWAC representatives:

Tim Rogers, EWAC Policy Chair, timothy.g.rogers@xcelenergy.com, 612-330-1955

John M. Anderson, EWAC Executive Director, janderson@energyandwildlife.org, 202-508-5093

Rebecca Hays Barho, Nossaman LLP, rbarho@nossaman.com, 512-813-7942