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Comments regarding:

November 9, 2021 Proposed Rule to List the Alligator Snapping Turtle as a Threatened Species with a Section 4(d) Rule under the Endangered Species Act

Submitted by:

Energy and Wildlife Action Coalition

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Public Comments Processing
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Docket No. FWS-R4-ES-2021-0115

The Energy and Wildlife Action Coalition (“EWAC”)¹ submits these comments in response to the U.S. Fish and Wildlife Service’s (“Service”) November 9, 2021 Proposed Rule to List the Alligator Snapping Turtle as a Threatened Species with a Section 4(d) Rule under the Endangered Species Act (“Proposed Rule”).² EWAC provides these comments on the Proposed Rule based on the knowledge and experience of its membership.

EWAC supports the agency’s use of species-specific 4(d) rules to identify what activities would be subject to the “take” prohibition of Endangered Species Act (“ESA”) section 9 relative to threatened species. Use of species-specific 4(d) rules better reflects the distinction Congress made when it enacted the ESA and applied the section 9 prohibitions on take only to species listed as endangered. Use of carefully tailored species-specific 4(d) rules that focus protection on the key threats faced by the species also conserves the limited resources of the Service and the public by reducing the instances in which project proponents are obliged to seek take authorization and, therefore, reduces the Service’s workload. This, in turn, allows the Service to give more focused attention and devote its limited resources to other important matters, such as species of higher conservation need, completing Service review and processing of incidental take permit applications and engaging in formal and informal consultations under ESA section 7, completing species status reviews and responding to petitions to list and delist species, and designating or removing critical habitat.

If the Service ultimately determines that listing the alligator snapping turtle as threatened is supported by the best available scientific and commercial information, EWAC agrees that the use of a 4(d) rule for the species would be biologically and legally appropriate. Given the communities and regions that would be affected by a listing of the alligator snapping turtle, Service adoption of a well-tailored 4(d) rule would further the Biden Administration’s goals to reduce greenhouse gas emissions and bolster resilience to the impacts of climate change³ and deliver much

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. 62,434 (Nov. 9, 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); Executive Order 14008, 86 Fed. Reg. 48,745 (Aug. 31, 2021). A 4(d) rule that is not well-tailored 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/>.

needed improvement of this nation’s electric and communications infrastructure,⁴ particularly to communities who are historically underserved.⁵

Below, EWAC: (1) offers recommendations to clarify uncertainty EWAC has identified with respect to the application of the take prohibition described by the Proposed Rule; and (2) offers suggestions for additional exemptions that would help ensure that any final 4(d) rule is narrowly tailored to species threats to avoid hindering activities that may further the Biden Administration’s goals.

I. The exemptions related to construction, operation and maintenance would benefit from some clarifying language.

Under the Proposed Rule, “take” of alligator snapping turtles would be prohibited unless an exemption applies.⁶ EWAC appreciates the inclusion of the following exemptions to the take prohibition related to construction, operation, and maintenance activities:

- (i) Construction, operation, and maintenance activities that occur near and in a stream, such as installation of stream crossings, replacement of existing instream structures (e.g., bridges, culverts, water control structures, boat launches, etc.), operation and maintenance of existing flood control features (or other existing structures), and directional boring, when implemented with industry and/or State-approved best management practices for construction.⁷

However, EWAC believes that this provision would benefit from several revisions.

First, any final 4(d) rule should be clear that the exemption applies to maintenance activities related to water intake structures. EWAC suggests the following revision to address this issue (new language in boldface):

- (i) Construction, operation, and maintenance activities that occur near and in a stream, such as installation of stream crossings, replacement of existing instream structures (e.g., bridges, culverts, water control structures, boat launches, etc.), operation and maintenance of existing flood control features **and water intake structures** (or other existing structures), and directional boring, when implemented with industry and/or State-approved best management practices for construction.⁸

Second, any final 4(d) rule should clarify that “near and in a stream” means within 200 meters of a stream. This clarification would align with the maximum distance that female

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, 86 Fed. Reg. 7037 (Jan. 25, 2021).

⁶ 86 Fed. Reg. 62,434, 62,462 (Nov. 9, 2021).

⁷ *Id.* at 62,463.

⁸ *Id.*

alligator snapping turtles travel from the water's edge to lay their eggs, as described by the Proposed Rule.⁹

Third, and as detailed in section II below, any final 4(d) rule should be clear that exempted maintenance activities include, but are not limited to, mowing, use of herbicides, and mechanical side trimming.

Fourth, any final 4(d) rule should recognize that not all provisions of industry or state-approved best management practices ("BMPs") may be applicable to a certain activity. In such cases, a project proponent's failure to implement each and every provision of a given set of BMPs should not make this exemption inapplicable to the activity in question.

Finally, where industry-specific or state-approved BMPs do not exist, any final 4(d) rule should clarify that the exemption from the take prohibition also applies where a project proponent implements conservation measures designed to avoid or minimize the following major threats to alligator snapping turtle habitat, which are identified in the Proposed Rule:

- dredging,
- deadhead logging (removal of submerged or partially submerged snags, woody debris, and other large vegetation for wood salvage),
- removal of riparian cover,
- channelization,
- stream bank erosion,
- siltation, and
- change in land use adjacent to rivers (e.g., clearing land for agriculture).¹⁰

These clarifications and revisions would help remove uncertainty when administering any final rule and minimize threats to the species identified by the Service.

II. Construction, operation, and maintenance of electric transmission and distribution lines should be exempt from the "take" prohibition.

EWAC recommends that any final 4(d) rule include an exemption for construction, operation, and maintenance activities associated with electric transmission and distribution lines. As noted above, the Proposed Rule identifies the following major threats to alligator snapping turtle habitat: dredging; deadhead logging (removal of submerged or partially submerged snags, woody debris, and other large vegetation for wood salvage); removal of riparian cover; channelization; stream bank erosion; siltation; and land use adjacent to rivers (e.g., clearing land

⁹ *Id.* at 62,438.

¹⁰ *Id.* at 62,458.

for agriculture). The limited nature of the project footprint and implementation of standard BMPs applicable to linear infrastructure (e.g., stormwater pollution protection plans, co-location of lines) inherently minimizes the potential impacts of linear infrastructure to the alligator snapping turtle and its habitat. Therefore, construction, operation, and maintenance of electric transmission and distribution lines will not be a source of the major threats to alligator snapping turtle habitat identified in the Proposed Rule.

A 4(d) rule that includes an exemption for maintenance activities associated with electric transmission and distribution lines ultimately would minimize impacts to the alligator snapping turtle. An exemption for maintenance of electric transmission and distribution line infrastructure should clearly specify that vegetation management, including, but not limited to, mowing, use of herbicides, and mechanical side trimming are included in the exemption. Because line maintenance is prophylactic, providing an exemption for transmission and distribution line maintenance can avoid much more damaging impacts should vegetation management not be undertaken. For example, removing limbs or trees on an as-needed basis results in fewer soil disturbances than would rebuilding lines damaged by fallen trees and overgrown limbs. Thus, impacts to the alligator snapping turtle can be minimized under a regime that fosters vegetation management for transmission and distribution lines. Maintenance activities exempted under our proposed exemption should also include powerline and pole placements and replacements; replacement of critical structural components, such as crossarms, insulators, conductors, etc.; and directional boring by utility owners for the same reasons.

An express exemption for construction, operation, and maintenance activities associated with electric transmission and distribution activities would also prevent unnecessary disruption of electric transmission and distribution projects, particularly those that are under construction or are in late-stage development. Linear infrastructure projects are contracted years in advance, and revisiting project siting choices or re-initiating permitting processes is generally infeasible once planning has gotten to a late stage—for example, when most or all of the regulatory approvals have already been obtained. Delayed timelines and unforeseen costs caused by new take prohibitions and the need to address the same could result in the commercial infeasibility of much-needed energy generation and transmission projects and run counter to the Biden Administration’s objectives of grid modernization and environmental justice.¹¹

Electric transmission and distribution line operators must be able to operate and maintain their lines quickly and efficiently to ensure the distribution of safe, reliable, and affordable energy—including distribution to historically underserved, rural communities. Many communities within the range of the alligator snapping turtle are low income, with some counties persistently at or below the poverty line. Given that the alligator snapping turtle’s range expands across numerous rural communities, ensuring the availability of safe, reliable, and affordable electricity is of paramount importance. For these reasons EWAC encourages the Service to exempt construction, operation, and maintenance of electric transmission and distribution lines.

¹¹ 86 Fed. Reg. 7037 (Jan. 25, 2021).

III. Conclusion

EWAC is appreciative of the effort undertaken by the Service to formulate a 4(d) rule for the alligator snapping turtle, and respectfully requests that these comments be given due consideration. EWAC believes a carefully tailored 4(d) rule can conserve the alligator snapping turtle while supporting efficient development, construction, operation, and maintenance of renewable energy projects and transmission and distribution of safe, reliable, affordable, and increasingly cleaner electric power to all communities. EWAC encourages the Service to analyze the degree to which any final 4(d) rule may hamper the development and delivery of safe, reliable, and affordable energy across the country and to communities in need in particular. Any final rule should not conflict with the Biden Administration's stated goals relating to climate change, clean energy, and environmental justice.¹²

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¹² See *id.*