



**January 24, 2022**

Comments regarding:

**November 23, 2021 Proposed Rule to List the Pearl River Map Turtle as a Threatened Species with a Section 4(d) Rule under the Endangered Species Act**

Submitted by:

**Energy and Wildlife Action Coalition**

Filed electronically to the attention of:

Public Comments Processing  
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Docket No. FWS-R4-ES-2021-0097

The Energy and Wildlife Action Coalition (“EWAC”)<sup>1</sup> submits these comments in response to the U.S. Fish and Wildlife Service’s (“Service”) November 23, 2021 Proposed Rule to List the Pearl River map turtle as a Threatened Species with a Section 4(d) Rule under the Endangered Species Act (“Proposed Rule”).<sup>2</sup> 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 Pearl River map 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. Service adoption of a well-tailored 4(d) rule would further the Biden Administration’s goals of modernizing this nation’s electric and communications infrastructure by providing more efficient ESA compliance mechanisms for entities constructing, operating, and maintaining such infrastructure,<sup>3</sup> and thereby aiding in timely delivery of electricity and communication capability particularly to communities who are historically underserved.<sup>4</sup> Adoption of a 4(d) rule would also conserve Service resources, enabling the agency to focus on processing permits and completing consultations in connection with activities that would cause measureable impacts to the species.

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

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<sup>1</sup> 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.

<sup>2</sup> 86 Fed. Reg. 66,624 (Nov. 23, 2021).

<sup>3</sup> 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/>.

<sup>4</sup> 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).

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 Pearl River map turtles would be prohibited unless an exemption applies.<sup>5</sup> 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-stream, such as installation of stream crossings, replacement of existing in-stream 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.<sup>6</sup>

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.<sup>7</sup>

Second, any final 4(d) rule should clarify that “near- and in-stream” means within 55 meters (180’) of a stream. This clarification would align with the maximum distance that female Pearl River map turtles travel from the water’s edge to lay their eggs, as described by the Proposed Rule.<sup>8</sup>

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

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<sup>5</sup> 86 Fed. Reg. at 62,651.

<sup>6</sup> *Id.* at 62,652.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at 66,631.

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 the Pearl River map turtle, which are identified in the Proposed Rule:

- Habitat degradation and loss due to reduced water quality and increased concentrations of contaminants, including by:
  - Utility crossings;
  - Agricultural practices;
  - Construction activities;
  - Stormwater runoff; and
  - Mining.<sup>9</sup>
- Channel and hydrology modifications and impoundments;<sup>10</sup>
- Urbanization;<sup>11</sup>
- Mining;
- Loss of riparian habitat and deadwood abundance;<sup>12</sup>
- Collection; and
- Climate change.<sup>13</sup>

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 the species: habitat

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<sup>9</sup> *Id.* at 66,632.

<sup>10</sup> *Id.* at 66,633.

<sup>11</sup> *Id.* at 66,634.

<sup>12</sup> *Id.* at 66,631.

<sup>13</sup> *Id.* at 66,650.

degradation and loss due to impoundments, dams, agricultural runoff, development, mining, loss of riparian habitat and deadwood abundance, collection, and climate change.<sup>14</sup> The Proposed Rule indicates actions that could trigger consultation include those that would increase sediment deposition within the stream channel (including dredging, road and bridge construction, desnagging, and other land-disturbing activities within the watershed and floodplain).<sup>15</sup> However, 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 Pearl River map 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 the Pearl River map turtle identified in the Proposed Rule.

In addition, a 4(d) rule that includes an exemption for maintenance activities associated with electric transmission and distribution lines ultimately would minimize impacts to the Pearl River map 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 routine preventative line maintenance is proactive, 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 Pearl River map 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.<sup>16</sup>

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 Pearl River map turtle are low income, with some counties

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<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> 86 Fed. Reg. 7037 (Jan. 25, 2021).

persistently at or below the poverty line. Given that the Pearl River map 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.

### **III. Conclusion**

EWAC is appreciative of the effort undertaken by the Service to formulate a 4(d) rule for the Pearl River map turtle, and respectfully requests that these comments be given due consideration. EWAC believes a carefully tailored 4(d) rule can conserve the Pearl River map 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.<sup>17</sup>

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<sup>17</sup> See *id.*