



**EWAC**

Energy and Wildlife  
Action Coalition

**August 8, 2022**

Comments regarding:

**June 7, 2022 Proposed Rule to Revise Regulations Concerning Experimental Populations of Endangered and Threatened Species 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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U.S. Fish and Wildlife Service  
MS: PRB/3W  
5275 Leesburg Pike  
Falls Church, VA 22041-3803

Docket No. FWS-HQ-ES-2021-0033

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”) June 7, 2022 proposed rule (“Proposed Rule”)<sup>2</sup> to revise the regulations concerning experimental populations of endangered and threatened species under the Endangered Species Act (“ESA”). EWAC provides these comments on the Proposed Rule based on the knowledge and experience of its membership.

EWAC respects the Service’s work to protect endangered, threatened, and at-risk species and recognizes that one way to advance species conservation is by addressing threats caused by climate change. As proponents of the generation, transmission, and distribution of renewable energy, EWAC members recognize the importance of combatting climate change, and are committed to building a more sustainable power grid as efficiently as is possible.<sup>3</sup>

Through these public comments, EWAC offers both its support for aspects of the Proposed Rule that it thinks provides clarity to the regulated community, as well as some suggestions on how the Proposed Rule might be improved. Most crucially, EWAC urges the Service to take care that in finalizing the Proposed Rule, the agency does not inadvertently impede the development of renewable energy projects and the electric transmission and distributions lines to deliver this energy, or otherwise hamper modernization of the energy grid, delaying delivery of reliable, affordable, and increasingly clean, electricity to communities in need.

**I. EWAC supports the Service’s use of clear language describing what constitutes “habitat” for purposes of ESA section 10(j).**

EWAC supports the Service’s decision to clarify that, for purposes of establishing experimental populations, the term “habitat” means areas, which are “necessary to support one or more life history stages.” The definition of “habitat” in the Proposed Rule aligns with comments submitted by EWAC in 2020, when the Service and National Marine Fisheries Service were contemplating adding a definition of “habitat” to the agencies’ regulations in the context of critical habitat designations.<sup>4</sup> Clarification of the term “habitat” for purposes of establishing experimental populations helps provide greater predictability to the regulated community.

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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, affordable, and increasingly clean 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> 87 Fed. Reg. 34,625 (June 7, 2022).

<sup>3</sup> See Executive Order 13990: Protecting Health and the Environment and Restoring Science to Tackle the Climate Crisis, 86 Fed. Reg. 7,037 (Jan. 25, 2021); Executive Order 14008, 86 Fed. Reg. 48,745 (Aug. 31, 2021). *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*; available 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/>.

<sup>4</sup> 85 Fed. Reg. 47,333 (Aug. 5, 2020).

**II. The Service should explicitly recognize the value of mitigation in areas outside a species' historical range.**

Should the Service finalize the Proposed Rule, there will be regulatory confirmation that the agency believes areas outside a species' historical range can serve valuable conservation purposes (e.g., as different areas become able to support a life stage due to the effects of climate change or other factors). Where the Service has introduced an experimental population outside the species' historical range, the agency should also allow project proponents having impacts to the species within the historical range to provide compensatory mitigation in areas outside the historical range in which the Service has introduced the experimental population. For example, where the Service has established an experimental population outside a species' historical range, permittees receiving incidental take permits under ESA section 10 or incidental take statements under ESA section 7 for impacts to the species within their historical ranges subsequent to the establishment of the experimental population should be allowed to implement any required mitigation or conservation measures within the new range established by the species' ESA section 10(j) rule. This approach would provide flexibility for the regulated community, and could be a useful tool to provide additional habitat for at-risk species whose ranges may shift in response to climate change and other stressors.

**III. The Service should create exceptions to the consultation requirements for nonessential experimental populations located outside the species' historical range.**

The Service's current regulations governing ESA section 7 require consulting agencies to treat a non-essential experimental population as a 'species proposed for listing' for the purposes of consultation.<sup>5</sup> These current regulations only trigger an ESA section 7 consultation for non-essential experimental populations when a proposed action is likely to jeopardize the continued existence of the species.

While EWAC recognizes the consultation obligations for non-essential experimental populations is lower than the threshold for listed species generally and for experimental populations deemed essential for conservation, the mere existence of listed species (including essential and non-essential experimental populations) in the vicinity of a proposed project triggers additional regulatory process for project proponents, including in connection with renewable energy generation, transmission, and distribution projects of EWAC members. For example, where a renewable energy generation, transmission, or distribution project has a federal nexus, or is unsure as to how (and how quickly) relevant federal agencies will comply with ESA section 7 consultation requirements, these uncertainties could pose major financial concerns or result in significant delays in project construction and commissioning that could result in project cancellation. With the foregoing in mind, EWAC recommends the Service revise the Proposed Rule to clarify that that impacts to non-essential experimental populations that have been introduced outside the species' historical range will not trigger consultation obligations under ESA section 7. While such a provision would not meaningfully alter the trajectory of the species, it

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<sup>5</sup> 50 C.F.R. 17.83(a).

could make a critical difference in the Biden-Harris Administration’s goal of expediently delivering clean energy on a large scale.

**IV. The Service should recognize the Blanket 4(d) Rule does not apply to experimental populations and should further create a blanket exception to the take prohibition for nonessential experimental populations located outside the species’ historical range.**

ESA section 10(j) requires that, except with respect to ESA section 7 obligations, each member of an experimental population be treated as a threatened species.<sup>6</sup> Section 9 of the ESA prohibits “take” of species listed as endangered.<sup>7</sup> Prior to September 26, 2019, the Service, by regulation, applied the “take” prohibition to most species listed as threatened (the “Blanket 4(d) Rule”).<sup>8</sup> On August 27, 2019, the Service published a final rule (which became effective 30-days post-publication) revising its regulations regarding threatened species to remove the Blanket 4(d) Rule and require species-specific rules relating to whether and to what extent take of threatened species would be prohibited.<sup>9</sup> A recent decision by the U.S. District Court for the Northern District of California vacating three ESA regulations adopted in 2019<sup>10</sup> likely will result in the reinstatement of the Blanket 4(d) Rule. Reinstatement of the Blanket 4(d) Rule means that, absent a species-specific 4(d) rule, the take prohibition will automatically apply to threatened species. The Service previously has recognized that when the agency adopts an ESA section 10(j) rule for a given species, “the general regulations that extend most section 9 prohibitions to threatened species *do not apply* as the 10(j) rule contains the prohibitions and exemptions necessary and appropriate to conserve that species.”<sup>11</sup> EWAC recommends that in adopting any final rule authorizing introduction of experimental populations outside a species’ historical range, the Service reiterate that the Blanket 4(d) Rule does not apply to such populations.

Further, where the Service elects to promulgate an ESA section 10(j) rule prohibiting take of experimental populations, the Service should establish a blanket exception for incidental take of non-essential experimental populations introduced outside the species’ historical range. Otherwise, ESA section 10(j) rules prohibiting take outside of historical ranges would introduce unnecessary uncertainty for the construction and/or operation of renewable energy and transmission and distribution projects. To the extent the Service introduces experimental populations outside the historical range of those species, and where the agency prohibits take of such species through an ESA section 10(j) rule, project proponents and facility owners and operators may be faced with the need to obtain take coverage for species in areas where they could not have anticipated or prepared for the species’ presence during the project planning or purchasing process. For example, if the Service elected to introduce an experimental population of a listed avian or bat species outside the historical range of that species and promulgated an ESA section 10(j) rule that prohibited incidental take, an operational wind energy facility that poses a risk of

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<sup>6</sup> 16 U.S.C. § 1536(j)(2)(C).

<sup>7</sup> *Id.* at 1538.

<sup>8</sup> 50 C.F.R. 17.31.

<sup>9</sup> 84 Fed. Reg. 44,753 (Aug. 27, 2019).

<sup>10</sup> *Center for Biological Diversity v. Haaland*, 2022 WL 2444455 (N.D. Cal. July 5, 2022), *appeal docketed*, No. 22-16094 (9th Cir. Jul. 26, 2022).

<sup>11</sup> Establishment of a Nonessential Experimental Population of Endangered Whooping Cranes in Southwestern Louisiana, 76 Fed. Reg. 6,067 (Feb. 3, 2011) (emphasis added).

collision to one or more members of that non-essential experimental population would then be faced with ESA compliance considerations based on circumstances that would not have been reasonably anticipated at the time facility owner or operator constructed or purchased the property. Given the potential implications a prohibition on incidental take outside of a species' historical range could have on renewable energy generation, transmission, and generation facilities, EWAC recommends that the Service establish a blanket exception to incidental take for non-essential experimental populations introduced outside the species' historical range.

## **V. Conclusion.**

EWAC appreciates the Service's consideration of these comments and, in particular, comments relating to ensuring renewable energy can be developed, transmitted, and distributed efficiently and that all communities are afforded with reliable, clean, and affordable energy. EWAC welcomes the opportunity to discuss the comments in greater detail with the Service.

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Please feel free to contact the following EWAC representatives:

Jennifer A. McIvor, EWAC Policy Chair, [jennifer.mcivor@brkenergy.com](mailto:jennifer.mcivor@brkenergy.com), 712-352-5434

John M. Anderson, EWAC Executive Director, [janderson@energyandwildlife.org](mailto:janderson@energyandwildlife.org), 202-508-5093

Brooke Marcus, Nossaman LLP, [bmarcus@nossaman.com](mailto:bmarcus@nossaman.com), 512-813-7941