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Comments Regarding the February 9, 2023 Proposed Rule Regarding Revisions to the Issuance of Enhancement of Survival and Incidental Take Permits under Section 10 of the Endangered Species Act

Department of the Interior
U.S. Fish and Wildlife Service

Submitted by:

Energy and Wildlife Action Coalition

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The Energy and Wildlife Action Coalition ("EWAC")[1] submits these comments in response to the United States Fish and Wildlife Service's ("Service") February 9, 2023 proposed rule to revise the regulations concerning the issuance of enhancement of survival and incidental take permits under section 10 of the Endangered Species Act ("Proposed Rule").[2] EWAC generally supports Service initiatives that would provide greater efficiency in the agency's processing of incidental take permits ("ITP") and enhancement of survival ("EOS") permits under section 10 ("Section 10") of the Endangered Species Act ("ESA"). To that end, we believe incorporating some aspects of the Service's existing policy and guidance into the agency's regulations found at 50 C.F.R. Parts 13 and 17 will be beneficial and could help further the Biden Administration's climate goals and the implementation of the Inflation Reduction Act by reducing the time it takes for a project proponent to complete the ITP and EOS permitting processes.

As described in greater detail below, while EWAC anticipates that a number of the changes described in the Proposed Rule will be beneficial, other proposed changes aim to codify practices that consistently result in delays in the permitting process or have proven unworkable for project proponents. The Service's failure to sufficiently improve these issues in the ITP and EOS permitting process will result in continued protraction of the permit negotiation and issuance processes, depletion of Service resources, and delayed implementation of conservation measures for listed and other sensitive species. In some cases, the proposed changes appear to erode the applicant's role in leading the Section 10 permitting process and place the Service at the helm. This change is a substantial departure from the original congressional intent of the Section 10 program to be applicant driven and contrary to the Service's own guidance.[3] Additionally, as written, the proposed revisions appear to omit, or incorrectly reference, portions of the existing rules that provide "No Surprises" assurances to Section 10 permittees. While presumably inadvertent, these errors must be corrected in any final rule revising the agency's Section 10 regulations.

The purposes of this comment letter are: (1) to provide support for aspects of the Proposed Rule that will result in greater permitting efficiency; (2) to identify aspects of the Proposed Rule that will slow permit processing or otherwise result in permits that are unworkable for the regulated community; (3) to seek correction of errors in the Proposed Rule that may have the effect of confusing application of the existing No Surprises regulations; and (4) to provide input on how the Service may ensure any final rule improves the Section 10 permitting program. We also identify areas where clarification is required to ensure that unpredictability and uncertainty do not discourage participation in the Section 10 permitting program.

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[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] 88 Fed. Reg. 8380 (Feb. 9, 2023).

[3] U.S. Fish & Wildlife Principal Deputy Director, Guidance on trigger for an incidental take permit under section 10(a)(1)(B) of the Endangered Species Act where occupied habitat or potentially occupied habitat is being modified, (Apr. 26, 2018) ("The HCP process is applicant driven . . . . Project proponents can take Service input into account and proceed in a number of ways, based upon their own risk assessment.").

EWAC is committed to supporting the Service's efforts to improve the ITP and EOS permitting programs under Section 10 and welcomes additional discussion with the Service on solutions that would result in greater efficiency in the Section 10 permitting process and in sensible and effective conservation for listed and sensitive species.

I. Support for Certain Provisions of the Proposed Rule

EWAC supports codification of aspects of existing Service guidance and policy that result in efficient and legally-grounded permit processing and permit application decision-making by the agency. In the following sections, we highlight several aspects of the Proposed Rule that we believe will be particularly valuable and should be included in any final rule.

a. Proposed codification on the purpose of permits under Section 10 will ensure appropriate scope of review.

EWAC supports the Service's proposal to amend its regulations to clarify that EOS permits and ITPs authorize the incidental take of species covered by those permits and do not authorize the underlying activities that are the cause of such take.[4] This position mirrors that of the agency's 2016 Habitat Conservation Planning and Incidental Take Permitting Handbook ("HCP Handbook"),[5] and has been helpful in the ITP and EOS permitting processes as a reminder to the Service, project proponents, and third parties on the appropriate scope of agency review. Among other things, language clarifying the scope of the Service's role in processing ITP and EOS permit applications will better ensure that the agency's analyses under other frameworks, such as the National Environmental Policy Act ("NEPA"), section 7 of the ESA, and the National Historic Preservation Act ("NHPA"), are not overbroad or wasteful of agency resources.

b. Clarification on the scope of review for permit amendments and renewals will encourage continued long-range conservation planning and should be fully adopted in any final rule.

Many of EWAC's members rely on long-term ITPs and EOS permits to provide regulatory assurances for future development and operation of renewable energy and electric transmission and distribution projects. As projects extend their lifespans, additional species are listed, or as additional technologies and approaches to managing species evolve, permittees consider whether to renew or amend existing ITPs and EOS permits. In the past, some permittees have been hesitant to seek an amendment of an existing ITP or EOS permit. This hesitancy often is based on the fear that doing so could result in the Service requiring additional changes to the conservation plan (e.g., conservation measures or monitoring requirements) that are not the focus of the proposed

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[4] 88 Fed. Reg. at 8383.

[5] U.S. Fish & Wildlife Service, Habitat Conservation Planning & Incidental Take Permit Processing Handbook, 4-14 (Dec. 21, 2016) ("HCP Handbook"), https://www.fws.gov/sites/default/files/documents/habitat-conservation-planning-handbook-entire.pdf ("A basic tenet underlying incidental take permit applications is that the Services are not authorizing the applicant's activities that are causing the take. Instead, the Services are authorizing the incidental take that results from the applicant's covered activities.").

amendment requested by the permittee and that could be unworkable for the permittee. For that reason, EWAC supports the Service's proposed clarification that where an applicant seeks to renew or amend an existing EOS permit or ITP, the scope of the Service's "decision extends only to the requested amendment, not the previously approved permit or unchanged portions of the conservation benefit agreement or plan" and that "[t]he terms of the original permit, including the take authorization and assurances, remain in effect."[6]

EWAC is concerned, however, that the above-quoted language appears only in the preamble ("Preamble") to the Proposed Rule. The Proposed Rule states that the "[e]valuation of an amendment extends only to the portion(s) of the conservation plan, conservation benefit agreement, or permit for which the amendment is requested."[7] It does not include the helpful clarification from the Preamble that the Service's decision does not extend to "the previously approved permit or unchanged portions of the conservation benefit agreement or plan" and that "[t]he terms of the original permit, including the take authorization and assurances, remain in effect."[8] EWAC requests this quoted language from the Preamble be included in any final rule.

We believe clarifying regulations governing ITP amendments as set forth above will encourage the regulated community to seriously consider amending or renewing existing permits, and is likely to result in more efficient compliance and administration of the ESA (e.g., adding new species, adjusting the permit or plan area, etc.).

c. Consolidation of CCAAs and SHAs into a single conservation benefit agreement is a logical change to ESA section 10(a)(1)(A) permit administration.

EWAC supports the Service's proposal to eliminate the distinction between candidate conservation agreements with assurances ("CCAAs") and safe harbor agreements ("SHAs") and to adopt a single "conservation benefit agreement" that can address listed and/or unlisted species.[9] This change is a logical extension of the agency's 2016 Candidate Conservation Agreements with Assurances Policy ("2016 CCAA Policy")[10] wherein the Service clarified that the "net conservation benefit" standard that must be demonstrated by applicants is the same for EOS permits accompanied by CCAAs and SHAs.[11] EWAC agrees with the Service that this consolidation will simplify the process for obtaining EOS permits.

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[6] 88 Fed. Reg. at 8384.
[7] *Id*. at 8392.
[8] *Id.* at 8392, 8384.
[9] *Id.* at 8382.
[10] 81 Fed. Reg. 95,164 (Dec. 27, 2016).
[11] *Id.* at 95,167.

d. Allowing permittees under EOS permits to return to baseline will improve the permit program.

EWAC supports the Service's proposal to allow all applicants for EOS permits the option to return to baseline condition at the end of the agreement term.[12] Currently, only the SHA program allows EOS permittees the option to return to baseline conditions at the end of the SHA term, while no such option is available for CCAA program. Irrespective of whether the Service ultimately finalizes its proposal to consolidate the CCAA and SHA programs, EWAC supports the Service's proposal to allow all EOS permittees the option to return to baseline and agrees with the Service that such an approach will provide more flexibility in the EOS permitting program and encourage increased participation in the same.[13]

II. General Concerns with the Proposed Rule

While EWAC supports some aspects of the Proposed Rule, finalization of other provisions will result in exacerbating existing problems with ITP and EOS permitting processes. In the following sections, we point to several of the Service's proposals that may prove especially problematic for the regulated community, including those responsible for renewable energy generation, and electric transmission and distribution.

a. Service explanation of "complete" applications remains vague and subject to abuse.

In the Preamble, the Service notes that it has "successfully implemented measures to ensure efficient processing" of applications the agency has deemed "complete," but indicates it has not been "as successful" in making the pre-application process more efficient despite the adoption of the 2016 HCP Handbook and other Service policies aimed at maximizing efficiency.[14] In order to address this situation, the Service proposes to codify portions of the HCP Handbook, Five-Point Policy, and other agency policy and practices to clarify what an applicant must do in order for the Service to: (1) deem an application for an ITP or EOS permit complete; (2) publish receipt of the application in the Federal Register; (3) begin processing the application; and (4) make a decision on the application.[15] In theory, EWAC agrees that codification of Service guidance regarding "complete" applications should expedite the ITP and EOS permit application process, but the reality is that some Service field offices view applications as incomplete whenever an applicant refuses to agree to terms or conditions suggested by the agency.

EWAC requests that in any final rulemaking, the Service clarify that a disagreement over a particular term or terms requested by the agency does not render an application incomplete. EWAC members frequently experience significant—sometimes years-long—delays caused by

[12] 88 Fed. Reg. at 8382. In the Proposed Rule, the Service also clarifies what the definition of a baseline condition is. *See id.* at 8390.
[13] *Id.* at 8382.
[14] *Id.*
[15] *Id*.

agency field offices that refuse to process ITP applications on the basis that they are supposedly incomplete. Often, this alleged "incompleteness" is because agency personnel seek to extract conditions from applicants that go beyond the legal requirements of Section 10. Oftentimes, these additional conditions and terms do not take into account the practical considerations applicants must factor into their project design and costs.[16] This proposed clarification regarding application completeness also directly conflicts with the HCP Handbook and other Service guidance that indicates that the role of the Service during an applicant's ***voluntary*** development of a habitat conservation plan ("HCP") and ITP is to provide technical ***assistance*** to determine whether the applicant will satisfy the ESA's express statutory requirements.[17] While EWAC supports collaboration between the Service and ITP applicants during the HCP development process, particularly collaboration involving exchange of technical expertise and other relevant information, EWAC suggests that any final rule include direction that even where staff is concerned over one or more aspects of an HCP, they should move forward with processing the ITP application where the applicant provides written notice that it does not intend to make substantive changes to the HCP. Ultimately, where the Service believes an ITP or EOS permit application does not meet statutory issuance criteria, the correct action by the agency is not to stall processing of the application, but to formally deny the application.

EWAC members recognize that instances arise where there are legitimate disagreements between the Service field office staff and permittees relating to a permit's terms or measures. To address such occurrences, EWAC recommends that the Service adopt an elevation process where a permittee may request a review by the regional leadership, and if not resolved, the permittee can request input by either the Regional Director or Service headquarters personnel specifically tasked with resolving these disagreements. The resolution process could be substantially similar to the existing review procedures for appealing a permit denial, but with explicit recognition that any resolution must give heavy weight to applicant statements regarding practicability, funding assurances, and other applicant-specific capabilities.[18] In order to ensure efficiency, the Service could require that any appeal be submitted within 45 days of the Service field office's determination as to a permit's completeness and the permittee should be required to clearly state the reasons against the inclusion of the disputed terms or measurements in the appeal.[19] To streamline the process and limit the potential for abuse, the regulations could expressly limit the number of times an applicant may utilize the process and could require the Service to identify all issues that are preventing the permit's completion within a reasonable time (e.g., 90 days) after the notice of appeal. The regulations should also require that after completion of the resolution elevation process, if the Service and applicant do not agree as to one or more terms or conditions, the Service must process the ITP application and make a final decision (issuance or denial) on the ITP application.

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[16] EWAC members have also experienced that the Service's regional offices are usually reluctant to override their field office staff. This reluctance means that the processing of HCPs may continue to stall until the field office's requested provisions are incorporated regardless of the regulatory standards.
[17] *See* HCP Handbook, *supra* note 4, at 2-7 ("Remember the HCP is the applicant's document . . . [the Service] cannot force requirements into an HCP that applicants are not willing to undertake.").
[18] 50 C.F.R. § 13.29 (2023).
[19] *See id.* at § 13.29(e).

Finally, EWAC strongly encourages the Service to adopt deadlines for Service processing of ITP and EOS permit applications. Adopting permit processing deadlines would help ensure a more efficient process. While EWAC understands the Service may be reticent to obligate itself to regulatory deadlines for processing permit applications, it has been EWAC's experience that the existence of deadlines (such as those adopted for NEPA review in 2020[20] and those provided in the ESA section 7 regulations) encourages federal agencies and applicants to work together to find solutions to difficult problems in an efficient manner.

Therefore, in order for the Service's proposed changes to effectively improve ITP processing efficiency, the Service must remove the problematic barriers surrounding an application's completeness. As discussed above, these changes include limiting the Service's use of the "completeness" standard as a way to stall ITP processing, imposing deadlines on the Service to complete processing ITP applications, and establishing a mechanism for elevation where significant disagreement exists between the Service and applicant on key issues.

III. EWAC's Concerns Relating to Incidental Take Permits

a. The Service should recognize in any final rule that the use of surrogates to quantify take is appropriate and should provide additional guidance relative to the same.

In the Proposed Rule, the Service provides greater detail concerning the requirements for HCPs. Notably absent from these additions is guidance concerning the use of surrogate measures to quantify take of listed species.[21] EWAC recommends the Service incorporate in any final rule language mirroring the permissive use of surrogates currently found in ESA section 7 implementing regulations. Those regulations state:

> A surrogate (*e.g.*, similarly affected species or habitat or ecological conditions) may be used to express the amount or extent of anticipated take provided that the . . . incidental take statement: Describes the causal link between the surrogate and take of the listed species, explains why it is not practical to express the amount or extent of anticipated take or to monitor take-related impacts in terms of individuals of the listed species, and sets a clear standard for determining when the level of anticipated take has been exceeded.[22]

Indeed, the Five-Point Policy states clearly:

> It may or may not be appropriate to include counting of populations or individuals. The appropriate unit of measure in a monitoring program depends on the specific

[20] *See* 88 Fed. Reg. 43,304, 43,326 (July 16, 2020).
[21] 88 Fed. Reg. at 8387 (The Proposed Rule states that the covered species under the plan are quantified by measuring "the number of individuals to be taken and the age and sex of those individuals, if known").
[22] 50 C.F.R. § 402(i)(1)(i).

impacts and operating conservation program within the HCP and the biological goals and objectives of the HCP.[23]

The Proposed Rule does not incorporate this important concept from the Five-Point Policy. In many circumstances, counting individuals or populations may not be appropriate for an HCP. The use of surrogates to quantify take in HCPs has always been a key part of the Section 10 process, and the regulated community and Service personnel would benefit from codification of the same.

Additionally, any final rule language addressing surrogates should also make clear that surrogates can be used ***in lieu of*** individual or population monitoring, not in addition to individual or population monitoring. This clarification will help ensure consistency with the Five-Point Policy's directive that an HCP's compliance monitoring should be commensurate with the impacts of the take (*see* section III.c below).

b. The Proposed Rule implies HCPs must fully offset impacts to covered species, contrary to the requirements of Section 10.

In its Proposed Rule, the Service states that an HCP must describe measures that "will be taken to minimize and mitigate the impacts of the incidental take . . . ***commensurate with the taking***."[24] The Service has previously explained in its HCP Handbook that the phrase "fully offset" means that "mitigation is ***commensurate (equal)*** with the impacts of the taking."[25] The statutory standard imposed by Section 10 is "the applicant will, to the maximum extent practicable, minimize and mitigate the impacts of such taking."[26] The Service acknowledges that this standard means that something short of "fully offset" is sufficient to support ITP issuance.[27] The HCP Handbook recognizes that "fully offset" is a higher threshold than the statutory standard—that an applicant for an ITP must demonstrate it will minimize and mitigate impacts of the incidental take to the "***maximum extent practicable***"—will always be met where an HCP demonstrates the impacts of the incidental take will be ***fully offset***.[28] The Service also acknowledges that the maximum extent practicable standard will also be met where an applicant demonstrates that minimization and mitigation measures proposed in an HCP are the most the applicant can "practicably accomplish" even where impacts are not fully offset.[29]

By proposing to require an HCP demonstrate minimization and mitigation measures be "commensurate with the taking," the Service, in fact, inappropriately would require HCPs demonstrate they will ***fully offset***, exceeding the statutory standard. This is counter to the specific language of ESA section 10(a)(2)(A)-(B) and should be eliminated from any final rulemaking.

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[23] 65 Fed. Reg. at 35,246 (June 1, 2000).
[24] 88 Fed. Reg. at 8387.
[25] HCP Handbook, *supra*, note 4, at 9-28 (emphasis added).
[26] 16 U.S.C. § 1539(a)(2)(B)(ii).
[27] HCP Handbook, *supra*, note 4, at 16-4, 9-36 (citing *Union Neighbors United, Inc. v. Jewell*, 831 F.3d 564 (D.C. Cir. 2016) to explain the Service's decision on making the maximum extent practicable finding).
[28] HCP Handbook, *supra*, note 4, at 9-28.
[29] *Id.*

c. **The Service omitted a key aspect of the Five-Point Policy addressing the appropriate scope of incidental take permit compliance monitoring programs.**

In the Proposed Rule, the Service proposes to codify select language from its Five-Point Policy[30] regarding the role of compliance monitoring, including a requirement that an applicant provide "the steps the applicant will take to monitor and adaptively manage to ensure the goals and objectives of the [HCP] are met . . . ."[31] While this language is consistent with the language in the Five-Point Policy, the Service omits critical language from the Five-Point Policy that explains the appropriate scope of any compliance monitoring program.

The Service omitted language that states that "[t]he scope of the monitoring program should be ***commensurate*** with the scope and duration of the operating conservation program and the project impacts."[32] The codification of this language is especially salient to EWAC given the Service frequently insists on compliance monitoring programs for operating wind energy projects that are significantly disproportionate to project impacts. For example, in some regions, the Service refuses to process a permit application unless the permittee includes use of Evidence of Absence ("EoA") for compliance monitoring. For projects with low levels of expected take, the requirement to use EoA-based monitoring results in millions of dollars of unnecessary costs merely to satisfy the Service's preference for applicants to use a particular compliance demonstration method.

The Five-Point Policy recognizes the objective of compliance monitoring is to demonstrate compliance, inform biological goals and objectives, and inform adaptive management. The Five-Point Policy importantly recognizes that the extent and magnitude of a compliance monitoring program must be commensurate with the impacts of the take being authorized. The "commensurate" language is absent from the Proposed Rule. In the final rule, the Service should include language properly limiting the scope of compliance monitoring programs.

d. **The Service should clarify that the terms and conditions of an ITP cannot differ from those agreed upon by the ITP applicant.**

One of the changes set forth in the Proposed Rule in connection with ITPs is a new provision that appears to expand upon the current language in ESA section 10(a)(2)(A)(iv). ESA section 10(a)(2)(A)(iv) states that "no permit may be issued" by the Service unless an applicant submits a conservation plan specifying "such other measure that the [Service] may require as being necessary or appropriate for purposes of the plan."[33] The Service has often used this "catch-all" statutory criterion to add various conditions to ITPs that go beyond the applicant's HCP commitments. These conditions often are unrelated to ESA compliance (e.g., measures focused on addressing the Migratory Bird Treaty Act ["MBTA"]). The language set forth in the Proposed Rule would

[30] 65 Fed. Reg. 35,242.
[31] 88 Fed. Reg. at 8391.
[32] 65 Fed. Reg. at 35,254. This language is also reflected in the Service HCP Handbook. *See* HCP Handbook, *supra*, note 4, at 10-1 ("The scope of an HCP's monitoring, reporting and adaptive management program should be commensurate with the scope, duration, and certainty of the HCP's conservation program and project impacts.").
[33] 16 U.S.C. § 1539(a)(2)(A)(iv).

broaden the above statutory language by explicitly allowing the agency to add to ITPs terms and conditions the Service:

> deems necessary or appropriate to carry out the purposes of the permit and the conservation plan, ***including, but not limited to additional conservation measures, specified deadlines, and monitoring and reporting requirements*** deemed necessary for determining whether the permittee is complying with those terms and conditions.[34]

The seemingly unconstrained breadth of the proposed language is problematic as it could be interpreted to allow the Service to require additional conservation measures, monitoring schemes, or other requirements to the ITP beyond what an applicant has previously agreed to include in an HCP. The provision is also inconsistent with the Service's No Surprises Policy because it would allow the Service to tack on additional requirements to permits without the consent of the applicant.[35] Finally, such expansion undermines the applicant-driven process that is the hallmark of Section 10 permitting.

The breadth of the language could also be interpreted to suggest the Service has authority to include terms and conditions unrelated to species covered by ITPs. Given the Service's long-standing position that ITPs authorize take rather than the underlying activities that are the cause of such take, it is not appropriate for the Service to use vague catch-all language as justification to include additional measures that go beyond the applicant's HCP commitments and beyond the species for which the applicant is seeking take authorization. While the Service often justifies these additions as consistent with its duty to ensure that the incidental take being authorized is "otherwise lawful," EWAC reminds the Service that "otherwise lawful" is not a condition precedent to ITP issuance.[36] Indeed, the HCP Handbook clearly states that:

> compliance with all other applicable Federal, State, or local laws generally would be considered incidental to an otherwise lawful activity and could be authorized by an incidental take permit. Although compliance with those other laws is the applicant's responsibility, we must be able to reasonably assume that their activities are otherwise lawful.[37]

Despite clear instruction on the proper application of "otherwise lawful" in the HCP Handbook, the Service's ***improper*** application of this concept in both ESA and Bald and Golden Eagle Protection Act permitting has resulted in confusion, significant delay, and occasional litigation relating to permit processing and issuance.[38] EWAC requests the Service reconsider its catch-all language and clarify that: (1) the terms and conditions set forth in an ITP cannot differ from those

[34] 88 Fed. Reg. at 8391, 8394.
[35] 50 C.F.R. §§ 17.22(b), 17.32(b) (2023).
[36] *See* HCP Handbook, *supra* note 4 at 16-3 ("Although compliance with those other laws is the applicant's responsibility, we must be able to reasonably assume that their activities are otherwise lawful.").
[37] *Id.* at 16-3.
[38] *See Ctr. for Biological Diversity v. U.S. Fish & Wildlife Serv.*, 450 F.3d 930 (9th Cir. 2006); *Env't Prot. Info. Ctr. v. U.S. Fish & Wildlife Serv.*, No. C 04-4647 CRB, 2005 WL 3877605, at *4 (N.D. Cal. Apr. 22, 2005).

agreed upon by the ITP applicant; and (2) the Service should not use ITP terms and conditions as a tool to extract commitments from applicants that are unrelated to species covered by the ITP.

e. Proposed revisions to 50 C.F.R. §§ 17.22(b)-(c), and 17.32(b)-(c) relating to No Surprises assurances are unclear and contain incorrect cross-references.

The Proposed Rule sets out the revised sections of 50 C.F.R. §§ 17.22(b)-(c) and 17.32(b)-(c), in their entirety, without ellipses or other clear indications that only pertinent, revised parts of these sections are being presented. Reading sections (b) and (c), as set forth in the Proposed Rule, the Service has omitted the portions of these sections that explicitly provide No Surprises assurances to Section 10 permittees upon the occurrence of changed or unforeseen circumstances. With respect to EOS permits, the Proposed Rule indicates in §§ 17.22(c)(5) and 17.32(c)(5) that No Surprises assurances provided in subsection (ii) of those sections apply to EOS permits that are being properly implemented, apply only to species covered by the EOS permit, and are effective until the EOS permit expires.[39] However, 50 C.F.R. §§ 17.22(c) (5)(ii) and 17.32(c)(5)(ii) of the Proposed Rule address incidental take coverage for neighboring landowners rather than No Surprises assurances and no other subsection under paragraph (c) addresses No Surprises Assurances. While this likely is a simple cross-referencing or drafting error, the current Proposed Rule appears to remove No Surprises assurances from the EOS permitting program.

EWAC requests that in the final rule, the Service rectify these apparent, inadvertent omissions and errors and provide full versions of sections 17.22(b)-(c) and 17.32(b)-(c) that include the No Surprises assurances regulations presently in effect. Further, we request that the Service clarify that the existing No Surprises assurances remain unaffected by the revisions to the Section 10 rules and correct cross-referencing errors.

IV. Concerns Relating to Enhancement of Survival Permits

a. EOS permits should be available to energy developers for unlisted species.

In the Preamble, the Service states that ITP and EOS permits are not interchangeable and that the Service seeks to clarify the appropriate application of each permit type.[40] To support this distinction, the Service provides specific examples of activities that would be more appropriately covered by an ITP rather than an EOS permit and lists "energy development" as one such example.[41] EWAC has several concerns with the Service's implied view that EOS permits are not an appropriate avenue for energy development (and other lawful activities such as residential and commercial development and resource extraction) to obtain regulatory assurances for species that are not currently listed under the ESA.

[39] *See* 88 Fed. Reg. at 8393, 8396.
[40] *Id.* at 8382.
[41] *Id.*

The Service's view is particularly disconcerting given the agency has approved multiple CCAAs and SHAs that include some sort of energy development as a covered activity, including but not limited to:

- Candidate Conservation Agreement with Assurances for the Dunes Sagebrush Lizard (*Sceloporus arenicolus*) developed by the Texas Comptroller of Public Accounts;[42]
- Candidate Conservation Agreement with Assurances for Sonoran Desert Tortoise (*Gopherus morafkai*) developed by the Arizona Electric Power Cooperative, Inc.;[43]
- Candidate Conservation Agreement with Assurances for Sagebrush Steppe Assemblage and Shortgrass Prairie Assemblage with integrated Candidate conservation Agreement and Conservation Agreement developed by Thunder Basin Grasslands Prairie Ecosystem Association;[44]
- Nationwide Candidate Conservation Agreement for Monarch Butterfly on Energy and Transportation Lands developed by the University of Illinois at Chicago;[45] and
- Safe Harbor Agreement with Chevron Products Company, Hawaii Refinery at James Campbell Industrial Park, Oahu.[46]

As is described in greater detail below, the Service should reconsider its position that EOS permits are generally not appropriate for energy development and similar activities.

i. The Service should not dictate which type of Section 10 permit an applicant should use for unlisted species.

In the case of non-listed species, it is not appropriate for the Service to require a project proponent to utilize an ITP. ITPs were created specifically by Congress to authorize take of species ***listed*** as endangered under the ESA:

> The [Service] may permit, under such terms and conditions as [it] shall prescribe—
> …

[42] *See* Candidate Conservation Agreement with Assurances for the Dunes Sagebrush Lizard (*Sceloporus arenicolus*) Developed by: Texas Comptroller of Public Accounts, 24 (2019), https://comptroller.texas.gov/programs/natural-resources/docs/cca-dsl.pdf.

[43] Candidate Conservation Agreement with Assurances for Sonoran Desert Tortoise (*Gopherus morafkai*) (May 2019), https://ecos.fws.gov/docs/plan_documents/ccaa/ccaa_2307.pdf.

[44] Candidate Conservation Agreement with Assurances for Sagebrush Steppe Assemblage and Shortgrass Prairie Assemblage (Dec. 8, 2020), https://www.tbgpea.org/resources/document-library?download=1:ccaa-agreement. There are eight species covered by this CCAA including the greater sage-grouse (*centrocercus urophasianus*), sagebrush sparrow (*artemisiospiza nevadensis*), brewer's sparrow (*spizella breweri*), sage thrasher (*oreoscoptes montanus*), black-tailed prairie dog (*cynomys ludovicianus*), mountain plover (*charadrius montanus*), burrowing owl (*athene cunicularia*), ferruginous hawk (*buteo regalis*).

[45] Candidate Conservation Agreement with Assurances for the Monarch Butterfly (*Danaus plexippus*) (March 2020), https://www.fws.gov/sites/default/files/documents/Final_CCAA_040720_Fully%20Executed.pdf.

[46] Safe Harbor Agreement with Chevron Products Company, Hawaii Refinery at James Campbell Industrial Park, Oahu (2004), https://dlnr.hawaii.gov/forestry/files/2013/09/Chevron_SHA_final.pdf.

> (B) Any taking otherwise prohibited by [ESA section 9(a)(1)(B)] if such taking is incidental to, and not the purpose of the carrying out of an otherwise lawful activity.[47]

ESA section 9(a)(1)(B) states:

> Except as provided in [ESA sections 4(g)(2) and 10]…with respect to any endangered species of fish or wildlife listed pursuant to [ESA section 4] it is unlawful for any person subject to the jurisdiction of the United States to—
>
> (B) take any such species within the United States or territorial sea of the United States.[48]

The take prohibition of ESA section 9 does not apply to unlisted species (indeed, it is only through regulation under ESA section 4(d) that the Service may apply the take prohibition to species listed as threatened).[49] The Service only has the authority over those species protected under express federal wildlife statutes, including the ESA, MBTA, and the Marine Mammal Protection Act. Until such time as a species is listed under the ESA, or otherwise federally protected, it is a trust species of the relevant state or states. While EWAC does not argue here that the Service lacks the authority to include unlisted species in an ITP where an applicant requests such coverage,[50] we believe the Service goes beyond its statutory authority to ***require*** project proponents utilize ITPs. Where a project proponent seeks to implement voluntary conservation measures for unlisted species (e.g., such as preserving habitat, implementing operational controls, or funding research)—species for whom the take prohibition does not apply—the Service should not dictate what type of conservation agreement should be used. This seems especially apparent given that the CCAA and SHA programs were conceived entirely through Service guidance and regulation.

EWAC notes that, as provided in the Service's 2016 CCAA Policy, one of the primary purposes of the CCAA program (and accompanying EOS permit) was to provide a mechanism to conserve unlisted species and potentially preclude the need to list such species.[51] EWAC is concerned that requiring project proponents to utilize ITPs will result in fewer proponents being willing to undertake any process to benefit a species prior to listing.

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[47] 16 U.S.C. § 1539(a)(1)(B).
[48] *Id*. at 1538(a)(1)(B).
[49] *Id.* at 1533(d) ("The Secretary may by regulation prohibit with respect to any threatened species any act prohibited under section 1538(a)(1) of this title.").
[50] EWAC notes that ESA section 10(a)(1)(B) does not appear to contemplate that the Service may issue an ITP that includes no listed species and the Service's proposal to allow ITPs for solely unlisted species is a reversal of long-standing Service policy, which has previously required at least one listed species be included in any application for an ITP. *See* HCP Handbook, *supra* note 4, at 3-2 (stating that an ITP and HCP are needed "where ESA-listed species are known to occur and where [an] activity or activities are reasonably certain to result in incidental take").
[51] *See* 81 Fed. Reg. 95,164, 95,164 (Dec. 27, 2016).

ii. Applicants should be able to pursue the permit that properly highlights their conservation efforts and adequately protects the covered species.

Generally speaking, the nature of ITPs invites more public scrutiny than EOS permits. Consequently, the processing time and process for ITPs tend to be longer and more onerous than EOS permits. The governing statutes of ITPs and EOS permits differ in how they frame each permit's purpose and this difference can influence the public sentiment evoked with each permit. On its face, the purpose of an EOS permit is to "***enhance the propagation or survival*** of the affected species." Compare this language to the ITP, whose purpose is to allow for "any ***taking*** otherwise ***prohibited***."[52] EWAC has repeatedly stated that it is important that the burdens and conditions imposed on applicants seeking to obtain protection for a species must be commensurate to the level of preservation that is required for the species. Applicants should be able to pursue the type of authorization that appropriately addresses their needs relative to unlisted unprotected species.

iii. The heightened conservation standard for EOS permits would better serve unlisted species than the "maximum extent practicable" standard of ITPs.

Finally, the EOS permit provides for more robust protections for unlisted species than the species receives under the ITP. This is because the "net conservation benefit" standard required under the EOS permit is more protective than the ITP's standard of "minimize and mitigate to the maximum extent practicable."[53] The EOS permit standard of protection holistically ties the permit's goal to the species' conservation by requiring that the "condition of the covered species or the amount or quality of its habitat is reasonably expected to be greater at the end of the agreement period than at the beginning."[54] In contrast, the ITP's standard simply provides the objective goal of the permittee to "minimize and mitigate the impacts of the taking."[55] This "maximum extent practicable" standard required by the ESA for ITPs necessarily implies that in some circumstances, conservation measures will not offset or be to the net conservation benefit of the subject species. The Service itself has argued that the maximum extent practicable standard allows applicants to "do something less than fully maximize and mitigate the impacts of the take where to do more would not be practicable."[56] It has been EWAC's experience that project proponents often undertake proactive measures for unlisted species in an attempt to prevent the species' condition from requiring a listing in the first place; therefore, the "net conservation benefit" standard required for EOS permits is better suited for addressing unlisted species in the long-term.

[52] 16 U.S.C. § 1539(a)(1).
[53] *See* 88 Fed. Reg. 8380, 8386, 8391.
[54] *Id.* at 8390.
[55] *Id.* at 8394.
[56] *Union Neighbors United, Inc. v. Jewell*, 83 F. Supp. 3d 280 (D.D.C. 2015), Federal Defs' Cross-Mot. for Summ. J., at 20.

b. The Service should carefully consider the language granting incidental take coverage to neighboring property owners.

The Proposed Rule includes an additional EOS permit issuance criterion that would require an applicant to include in its conservation benefit agreement "[a] description of the enrollment process to provide neighboring property owners incidental take coverage . . . or any other measures developed to protect the interests of neighboring property owners."[57] While EWAC generally views this proposed criterion as potentially beneficial, it arguably goes beyond the plain language of the ESA and could, in some circumstances, create conflict with neighboring property owners. Some neighboring property owners may welcome a ready avenue for ESA authorization. However, it is also possible that neighboring property owners that are not joining as applicants and who do not have a role in conservation plan development may take issue with having a prescribed process for their participation in which they had no input. This is particularly true with respect to long linear projects with multiple adjacent property owners and owners and operators of renewable energy projects in some portions of the country who are increasingly encountering strong local resistance to their projects. Often, neighboring property owners have interests and views starkly opposed to owners and operators of renewable energy and transmission and distribution facilities. EWAC is not suggesting that the Service require applicants to consult with neighboring property owners as that also may discourage and impede conservation plan development. Rather, EWAC suggests the Service reconsider including this provision as a requirement and, instead, give EOS permit applicants the ***option*** to consider neighboring property owners where it makes sense for the applicant.

V. Conclusion

EWAC members believe that the efficient and consistent administration of the Section 10 permit program will reduce the workload of the Service, will potentially incentivize project proponents across different industries to utilize Section 10 permits where they otherwise would not have done so, will result in additional conservation benefits to listed and sensitive species, and will reduce the time and costs associated with production and delivery of reliable clean energy. EWAC looks forward to continuing to work with the Service in the agency's efforts to improve implementation and would welcome further dialogue with the Service on any of the topics above.

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[57] 88 Fed. Reg. at 8392.