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Comments regarding:

March 19, 2024 Proposed Rule to List the Bushy Whitlow-wort as an Endangered 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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Docket No. 2024-05700

The Energy and Wildlife Action Coalition (“EWAC”)¹ submits these comments in response to the United States Fish and Wildlife Service’s (“Service”) March 19, 2024 Notice of Proposed Rulemaking (“Proposed Rule”)² to list the bushy whitlow-wort (*Paronychia congesta*) as endangered under the Endangered Species Act (“ESA”). EWAC provides these comments on the Proposed Rule and the Species Status Assessment (“SSA”) based on the knowledge and experience of its membership.

As developers and operators of renewable energy facilities and electric transmission and distribution infrastructure, EWAC applauds the Biden-Harris Administration’s (“Administration”) clean energy goals and initiatives,³ as well as the Administration’s prioritization to achieve a nationwide energy transition toward a carbon pollution-free electricity sector.⁴ Achieving these goals will necessitate the deployment of renewable energy and associated transmission and distribution. EWAC is concerned that the Service’s proposed listing of the bushy whitlow-wort attributes wind energy development as a significant threat to the species without sufficient scientific information to do so. EWAC encourages the Service to reconsider the threats analysis in the Proposed Rule, which lists wind energy as a major threat to the bushy whitlow-wort, and ensure any final listing decision is based on the best scientific and commercial information available.

I. The Service lacks sufficient data to support listing the bushy whitlow-wort as endangered.

The Executive Summary of the SSA, upon which the Service relied in issuing the Proposed Rule, is filled with statements demonstrating that the Service has precious little information about the bushy whitlow-wort, including:

- “The very few recorded observations of bushy whitlow-wort have yielded *little information* about its life history.”⁵

¹ EWAC is a trade association formed in 2014 whose members consist of electric utilities, electric transmission providers, and renewable energy entities operating throughout the United States, and related industry 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 89 Fed. Reg. 19,526 (March 19, 2024) (“Proposed Rule”).

³ 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>.

⁴ Executive Order 14057: Catalyzing Clean Energy Industries and Jobs Through Federal Sustainability, 86 Fed. Reg. 70,943 (Dec. 13, 2021).

⁵ U.S. Fish and Wildlife Service, Species Status Assessment of Bushy Whitlow-Wort (October 2023) at ii (“SSA”).

- “**We know nothing** about the pollinators, pollination biology, seed dispersal, seed dormancy, seed germination, rates of recruitment, mortality, demographic trends, reproductive age, or lifespan.”⁶
- “Based on available botanical surveys, we estimate that less than 1 percent of [thousands to tens of thousands of hectares of] this potential habitat has been surveyed by botanists qualified to identify the species.”⁷
- “It is also possible that an unknown number of resilient populations may remain undiscovered in south Texas and Coahuila, Mexico, and that the species’ redundancy, representation, and overall viability are more secure than we now know.”⁸

Despite acknowledging almost nothing is known about the species’ life history, demographic trends, seed dispersal and dormancy, reproductive age, or lifespan, the Service then makes the following critical assumptions about the bushy whitlow-wort that inform the entire SSA analysis:

- “[P]rovisionally estimat[ing] that viable populations have at least 1,500 individuals of reproductive age.”⁹
- “[P]rovisionally estimat[ing] that the species’ viability requires an intermediate value of 10 or more resilient populations that are distributed over the species’ known range.”¹⁰
- “[P]rovisionally adopt[ing] the NatureServe default minimum separation distance of 1.0 km (0.6 mi) to delineate populations.”¹¹

In EWAC’s view, the lack of data undermines the reliability of the SSA and the findings in the Proposed Rule. The Service has twice removed the species from the agency’s list of candidate species due to lack of information,¹² and it is unclear why the Service now believes that same dearth of information now warrants listing the species.

II. The Service lacks sufficient data to identify wind energy development as a significant threat to the bushy whitlow-wort.

The SSA indicates that “[w]ind energy development is a currently severe threat throughout the species range”,¹³ and the Service bases the Proposed Rule primarily on the threats to the species posed by wind energy development.¹⁴ However, wind energy constitutes

⁶ *Id.*

⁷ *Id.* at iii.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² 45 Fed. Reg. 82,480 (December 15, 1980); 71 Fed. Reg. 53,756 (September 12, 2006).

¹³ SSA at iii.

¹⁴ Proposed Rule at 19,526.

a small percentage of development in the region and as evidenced by the SSA itself, there is no data indicating wind energy development has occurred or is proposed to occur in areas actually **occupied** by the bushy whitlow-wort. For example, the first statement in the section of the SSA describing threats to the species observes: “[w]e are not aware of **any current land use changes** within the two known occupied habitats of bushy whitlow-wort since they were first discovered in 1963 and 1987...”¹⁵ Further, despite statements in the SSA that wind energy facilities have been placed or are proposed to be placed within or near areas the Service “identif[ies] as potential habitats for the bushy whitlow-wort”, the SSA illustrates known occurrences and estimated potential habitat of the species are mostly distinct from both existing and proposed turbines.¹⁶ Indeed, the SSA acknowledges the “two documented populations of bushy whitlow-wort occupy exposed slopes of calcareous rock and/or indurated caliche” at greater than 8 percent slope¹⁷—areas that are sub-optimal for wind turbine installation. Accordingly, there is a low likelihood that wind energy has or will intersect areas occupied by the species.

III. Certain information upon which the Proposed Rule relies has not been, but should be made available for public review.

In the preamble to the Proposed Rule, the Service refers to “information on wind turbines near bushy whitlow-wort populations” provided by the Texas Parks and Wildlife Department (“TPWD”) that “prompted [the Service] to reevaluate the immediacy of the threat of wind development.”¹⁸ EWAC is concerned that the information from TPWD that prompted the Service to reevaluate the immediacy of the threat of wind development on the bushy whitlow-wort has not been made available to the public for review. Without the underlying data, it would be nearly impossible for the public to provide meaningful comment on the Proposed Rule, including how the information provided by TPWD demonstrates increased “immediacy of the threat of wind development” that warrants listing the species as endangered.¹⁹

IV. Reliance on the Precautionary Principle is an improper basis on which to list the bushy whitlow-wort in the face of insufficient data.

The SSA and Proposed Rule make clear, as described above, that the Service lacks even basic information about the bushy whitlow-wort, including its life history and distribution. Without this basic information, it is clear that the Service has based the Proposed Rule not on the best scientific and commercial information available, but on applying the precautionary principle, which resolves every unknown about a species by giving the benefit of the doubt to the species. Employment of the precautionary principle is an improper basis on which to list the bushy whitlow-wort. Recently, the U.S. Court of Appeals for the D.C. Circuit held in *Maine*

¹⁵ SSA at 19 (emphasis added).

¹⁶ *Id.* at 22-24.

¹⁷ *Id.* at 4, 10.

¹⁸ Proposed Rule at 19,528.

¹⁹ *Id.*

Lobstermen’s Association v. National Marine Fisheries Service (“*Maine Lobstermen’s Association*”) that agencies cannot rely on worst-case scenarios when assessing the impact that an activity may have on a species.²⁰ The Service has not provided sufficient justification that points to a “likely” negative outcome for the bushy whitlow-wort should it remain unlisted, as required by *Maine Lobstermen’s Association*.

The Service’s identification of wind energy development as a primary threat to the species because “occupied and potential habitats of bushy whitlow-wort are closely aligned with areas of the highest average wind speed in South Texas,”²¹ and because wind energy facilities have been constructed “near and within areas” the Service identifies as “potential habitat” for the species provides insufficient justification for listing the species as endangered. In addition to the informational gaps noted above, the SSA and the Proposed Rule fail to take into consideration the fact that siting a wind energy facility involves the consideration of many factors. High wind speed alone does not necessarily mean a location is suitable for wind energy facilities and that development of wind energy infrastructure is likely or imminent. The likelihood of wind energy infrastructure development in the region is no greater than the likelihood of any other industry choosing to site its infrastructure here.

An endangered species is one that is “in danger of extinction throughout all or a significant portion of its range.”²² The Service has failed to demonstrate how overlap of potential (rather than actual, occupied) bushy whitlow-wort habitat and areas of high average wind speeds has negatively impacted the species or imminently threatens the species with extinction. Instead, the Proposed Rule and SSA reflect the agency’s overreliance on the precautionary principle. Accordingly, the Service should reconsider the Proposed Rule. Considering the above, the Service should consider withdrawing the Proposed Rule and ensure that any future SSA is based on the best available scientific and commercial information, as required by section 4 of the ESA.²³

²⁰ See *Maine Lobstermen’s Ass’n et. al. v. Nat’l Marine Fisheries Serv.*, 70 F.4th 582 (D.C. Cir. 2023).

²¹ Proposed Rule at 19,532.

²² 16 U.S.C. § 1532(6).

²³ 16 U.S.C. § 1533(b)(1)(A).

V. Conclusion

EWAC appreciates the Service's consideration of these comments and encourages the agency to ensure its listing decisions and related threat assessments (particularly with respect to renewable energy and electric infrastructure development and operations) are well-supported by the best available scientific and commercial information, and do not at best mischaracterize a sector's potential impacts, and at worst unnecessarily impede the Administration's goals for transitioning rapidly to a clean energy economy and providing a reliable electric grid nationwide. EWAC would welcome the opportunity to discuss its comments in greater detail with the Service.

Please feel free to contact the following EWAC representatives:

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