



**December 10, 2024**

Comments regarding:

**October 11, 2024 Draft Environmental Impact Statement for a General Conservation Plan for the Desert Tortoise in California**

Submitted by:

**Energy and Wildlife Action Coalition**

Filed electronically to the attention of:

Public Comments Processing  
Attn: FWS-R8-ES-2023-0084  
U.S. Fish and Wildlife Service  
MS: PRB/3W  
5275 Leesburg Pike  
Falls Church, VA 22041-3803

Docket No. FWS-R8-ES-2023-0084

The Energy and Wildlife Action Coalition (“EWAC”)<sup>1</sup> submits these comments in response to the United States Fish and Wildlife Service’s (“Service”) October 11, 2024 Draft Environmental Impact Statement for a General Conservation Plan for the Desert Tortoise in California (“Proposed GCP”) that would be available to project proponents seeking take authorization for the federally threatened desert tortoise (*Gopherus agassizii*) under the Endangered Species Act (“ESA”).<sup>2</sup> EWAC provides these comments on the Proposed GCP based on the knowledge and experience of its membership.

## **I. EWAC Generally Supports the Use of Streamlined Solutions to Incidental Take Coverage Where the Solutions Are Developed by Stakeholders or with Their Input.**

EWAC appreciates the Service’s efforts to create a streamlined incidental take permitting process to assist project proponents with ESA compliance; however, the Service should ensure that any general conservation plan (“GCP”) is developed in close coordination with affected stakeholders and incorporate the input of those members of the regulated community that will be utilizing those plans. The Service’s 2007 Final General Conservation Plan Policy notes that a GCP may not be an appropriate tool where the scope and magnitude of activities exceeds the Service’s expertise and abilities.<sup>3</sup> Thus, GCPs designed to cover specific types of development will be most successful when developed collaboratively, with stakeholder input from those who engage in such activities, to ensure that the GCP is workable for those that will be responsible for implementing it and “attractive” enough to garner widespread participation. Without stakeholder engagement during the development of these tools and incorporation of stakeholders’ input, key aspects of the GCPs, such as minimization and mitigation measures, may prove to be infeasible and result in low participation. Given one of the stated goals of the Proposed GCP is to free up agency resources to provide a greater focus on desert tortoise recovery, EWAC urges the Service to coordinate closely with stakeholders during and following the public notice and comment period.

---

<sup>1</sup> EWAC is a national 501(c)(6) 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 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> 89 Fed. Reg. 82,618 (Oct. 11, 2024); U.S. Fish & Wildlife Service, *Draft Environmental Impact Statement for a General Conservation Plan for the Desert Tortoise in California* (Oct. 11, 2024), available at: <https://www.federalregister.gov/documents/2024/10/11/2024-23573/draft-environmental-impact-statement-for-a-general-conservation-plan-for-the-desert-tortoise-in>; U.S. Fish & Wildlife Service, *Desert Tortoise Draft General Conservation Plan* (Oct. 11, 2024), available at: <https://downloads.regulations.gov/FWS-R8-ES-2023-0084-0017/content.pdf>; U.S. Fish & Wildlife Service, *General Conservation Plan for the Desert Tortoise in California Draft Environmental Impact Statement* (Oct. 11, 2024), available at: <https://downloads.regulations.gov/FWS-R8-ES-2023-0084-0016/content.pdf>.

<sup>3</sup> U.S. Fish & Wildlife Service, *Memorandum from Service Director to Assistant Regional Directors re Final General Conservation Plan Policy* (Oct. 5, 2007), available at: [https://www.law.uh.edu/faculty/thester/courses/Environmental-Practicum-2016/1%20-%20Final%20General%20Conservation%20Plan%20Policy%20\(Hall%20Memo\).pdf](https://www.law.uh.edu/faculty/thester/courses/Environmental-Practicum-2016/1%20-%20Final%20General%20Conservation%20Plan%20Policy%20(Hall%20Memo).pdf).

## **II. The Service Should Instruct Field Offices that the Existence of the Proposed GCP Does Not Preclude Applicants from Use of Other Approaches to Comply with the ESA.**

EWAC recommends that the Service remind its local field offices in the Planning Area (as defined in the Proposed GCP) that the availability of a GCP does not mandate project proponents' use of the same to obtain authorization under ESA section 10 ("Section 10") or otherwise comply with the ESA. Where an applicant elects to obtain take authorization through an incidental take permit ("ITP"), so long as the applicant has met the issuance criteria set forth in Section 10, the Service should not refuse to issue an ITP even if that applicant has proposed different measures than those set forth in the Proposed GCP.<sup>4</sup> In other words, applicants proposing legally-sufficient approaches in an individual habitat conservation plan ("HCP") should not be forced to adopt the conservation measures in the Proposed GCP. In some circumstances, the Proposed GCP measures may be unworkable for a given project or activity, and an applicant may, as a result, elect to develop an HCP that is more tailored to the needs at hand.

The Proposed GCP does not contain an explicit statement acknowledging that landowners and project proponents that meet the Proposed GCP's eligibility criteria may choose whether they wish to adopt the GCP when applying for an ITP or whether they prefer to develop an applicant-specific HCP. To avoid any future confusion in the implementation of Section 10 in the Planning Area, EWAC requests that the Service add language in any final GCP and provide clear written guidance to Service field offices, clarifying that adoption of the GCP is just *one* of the ways to satisfy the conservation plan component of an ITP application.

## **III. The Service Should Consider How Solutions Like the Proposed GCP Could Be Replicated in Other Geographic Areas and Cover Additional Activities.**

Should the Proposed GCP be finalized and result in significant participation and use, EWAC encourages the Service to consider how it can replicate solutions like the Proposed GCP in other parts of the desert tortoise's range and for other potential sources of impact, again through consultation with relevant stakeholders. EWAC recognizes that the Service would need to consider adapting any future GCPs based on the desert tortoise's ecological setting and region-specific needs in those areas.

## **IV. Conclusion.**

EWAC appreciates the Service's consideration of these comments, and believes that incorporation of EWAC's comments in any final GCP will result in a document that is consistent with the Service's existing guidance and will encourage regulatory certainty for those managing risk under the ESA. EWAC would welcome the opportunity to discuss the comments in greater detail with the Service.

\*\*\*

Please feel free to contact the following EWAC representatives:

---

<sup>4</sup> See 16 U.S.C. § 1539(a)(2)(A).

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), 202-674-8569

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