July 9, 2025

Comments Regarding the June 9, 2025 Notice Requesting Public Input on Endangered Species Act Section 10(a) Program Implementation; Development of Conservation Benefit Agreements and Habitat Conservation Plans, and Issuance of Associated Enhancement of Survival and Incidental Take Permits

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

Submitted by:

Energy and Wildlife Action Coalition

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To the attention of:

Public Comments Processing
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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 ("Service") request for public input on improving development and implementation of habitat conservation plans ("HCPs"), conservation benefit agreements ("CBAs"), and the associated permits issued under Endangered Species Act ("ESA") section 10 ("Notice").[2]

EWAC is pleased to provide comments and suggestions on the Notice. Judicious revisions to regulations implementing ESA sections 10(a)(1)(A) and 10(a)(1)(B) (collectively, "Section 10") will improve the overall efficacy of HCPs and CBAs and reduce administrative burdens on the regulated community and on Service personnel. HCPs and CBAs have been useful and important tools, providing regulatory certainty for this nation's electric infrastructure, while advancing conservation and recovery of listed and at-risk species. As the Service recognizes in its Notice, however, the process associated with development of HCPs and CBAs and the Service's issuance of Section 10 permits has become cumbersome, time consuming, and costly. Rather than providing meaningful species conservation, in EWAC's opinion, the Section 10 permitting process often results in a circumstance where permit administration and implementation costs outweigh actual conservation funding. Since EWAC's inception, we have advocated for sensible changes to regulations and guidance influencing the Section 10 permitting process, and we appreciate the Service's efforts to improve the same. As is described in greater detail below, EWAC makes the following recommendations:

- Application of section ESA section 10(a)(1)(A) ("Section 10(a)(1)(A)") permits should be expanded;
- Process associated with ESA section 10(a)(1)(B) ("Section 10(a)(1)(B)") permits should be streamlined;
- Service should closely follow statutory standards and caselaw in administration of Section 10(a)(1)(B);
- HCP development should not be based on worst-case scenario planning; and
- Other improvements should be made to the Section 10 process.

I. EWAC recommends a broader view of applicability of Section 10(a)(1)(A).

EWAC supports the use of enhancement of survival permits ("EOS Permits") under Section 10(a)(1)(A) and associated CBAs to incentivize voluntary conservation and to prevent species reaching endangered or threatened status. The existing Nationwide Candidate Conservation Agreement with Assurances for the Monarch Butterfly on Energy and Transportation Lands

[1]EWAC is a national 501(c)(6) trade association formed in 2014 whose members consist of electric utilities, electric transmission providers, and independent power producers 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.

[2] 90 Fed. Reg. 24,285 (June 9, 2025) ("Notice").

("Monarch CCAA") and its companion Conservation Benefit Agreement for At-Risk Bumble Bees on Energy and Transportation Lands ("Bumble Bee CBA"), which is currently under Service review, are great examples of how the energy and transportation sectors have worked with the Service to achieve large-scale efficiencies through EOS Permits issued under Section 10(a)(1)(A) for wide-ranging species.

The Service should continue to encourage use of EOS Permits across sectors and should ensure that its regulations and policies do not stymie innovative, industry-led approaches to conservation. In the preamble to the Service's current Section 10 implementing regulations, which were issued on April 12, 2024 ("2024 Regulations"), the agency indicated that in determining whether an EOS Permit or an ITP is the appropriate avenue for Section 10 permitting, the Service considers the "primary purpose of the project and anticipated conservation outcomes."[3]The Service then went on to state that, generally, "energy development projects do not have a primary purpose of habitat and species conservation and should seek [ITPs]."[4] Given successes like the Monarch CCAA, EWAC urges the Service to revise its Section 10 implementing regulations so they do not unduly limit the applicability of the EOS Permit program and to clarify that EOS Permits are available to any segment of the regulated community that can demonstrate a net conservation benefit will result from implementation of the CBA.

With respect to species that have not yet been listed under the ESA, EWAC has long believed coverage of such species under an ITP issued under Section 10(a)(1)(B) an ill-fit. While unlisted species have been included in ITP alongside listed species, EWAC believes unlisted species are better addressed through EOS permits issued under Section 10(a)(1)(A) and by CBAs prepared in connection with the same. Prior to the Service's issuance of the 2024 Regulations wherein the CBA was created, non-listed species were addressed by candidate conservation agreements with assurances ("CCAAs"), while safe harbor agreements ("SHAs") could address listed or unlisted species. Covering unlisted species under Section 10(a)(1)(A) is appropriate given the primary purpose of CCAAs and SHAs as originally envisioned was to provide a conservation benefit to listed and at-risk species, and, in the case of CCAAs, to provide a level of conservation that, if carried out on all necessary properties, would preclude the need to list species covered by the CCAA.[5] Changes made by the 2024 Regulations to limit application of CBAs only to those activities whose *primary* purpose is conservation seems to burden both the regulatory community and the Service unnecessarily. Projects whose primary purpose is, say, to generate electricity, but provide meaningful conservation to unlisted species, should be free to utilize the Section 10(a)(1)(A) permitting vehicle, so long as the conservation program results in a net benefit to the species. Limiting the Section 10(a)(1)(A) program to foreclose its use by the energy sector seems to fly in the face of the intent of why these regulatory vehicles were created in the first place—particularly given unlisted species remain trust species of the state(s) until such a time as these species are listed under the ESA.

[3] 89 Fed. Reg. 26,070, 26,074 (April 12, 2024).
[4] *Id*. at 27,076.
[5] *See, e.g*., Announcement of Final Policy for Candidate Conservation Agreements with Assurances, 64 Fed. Reg. 32,726 (June 17, 1999) and Final Rule regarding Safe Harbor Agreements and Candidate Conservation Agreements with Assurances, 64 Fed. Reg. 32,706 (June 17, 1999).

II. EWAC Recommends Improvements to the Section 10(a)(1)(B) process.

EWAC members have significant experience with incidental take permits ("ITP") under Section 10(a)(1)(B) and agree that the ITP application process has become increasingly burdensome, and certain regulatory updates could make the process more efficient. Based on this experience, EWAC makes the following recommendations.

A. Deadlines

Neither Section 10 itself nor existing Section 10(a)(1)(B) and related implementing regulations provides a deadline by which the Service is required to respond to an application for an ITP. Service review and approval of HCPs and issuance of ITPs frequently takes years—in some cases more than a decade—to complete. EWAC members have experienced situations where, after months or years of coordination and negotiation with the Service, a new concern arises, which then stalls HCP processing even further. EWAC has been encouraged by actions taken by multiple administrations to place deadlines on completing National Environmental Policy Act ("NEPA") review, which were ultimately adopted by Congress,[6] and believes similar actions would benefit the HCP development process.[7] Specifically, EWAC recommends the Service adopt regulations establishing deadlines for completing various levels of HCPs, as follows:

- For template HCPs approved by the Service and developed for use by a particular industry or category of activities, the Service should be required to make an ITP issuance decision within 60 days of an applicant submitting the application.
- For low-effect HCPs, the Service should be required to make an ITP issuance decision within three months of an applicant submitting its application.
- For project-specific HCPs, the Service should be required to make an ITP issuance decision within nine months of an applicant submitting its application.
- For programmatic-scale HCPs, the Service should be required to make an ITP issuance decision within 12 months of an applicant submitting its application.

The Service should also include in any final regulation a specific trigger for starting the clock on the deadline. EWAC suggests this trigger should be an applicant's initial submittal of an ITP application it believes meets issuance criteria through the Service's ePermits portal (with changes made to that process recommended by EWAC in section V of this letter), along with all the required elements of the same (i.e., an HCP containing the provisions established by Section 10 and Service implementing regulations, an application form that has been completed and signed, and the necessary application fee), and a written statement that the applicant requests the Service

[6] *See* Fiscal Responsibility Act of 2023, Pub. L. No. 118-5.

[7] EWAC also notes this Administration's focus on permitting efficiency, including through use of technology to streamline permitting. See, e.g., Executive Order 14303, Restoring Gold Standard Science (May 23, 2025); Presidential Memorandum, Updating Permitting Technology for the 21st Century (April 15, 2025); Memorandum from Katherine R. Scarlett, Council on Environmental Quality Chief of Staff, to Heads of Federal Departments and Agencies Establishing of Permitting Innovation Center (April 30, 2025); Executive Order 14262, Strengthening the Reliability and Security of the United States Electric Grid (April 8, 2025).

process the application. For clarity's sake the Service could develop an application checklist form containing a list of the basic elements that should be submitted to the Service in order for an application to be administratively (rather than substantively) complete, and could require applicants to sign the form indicating all elements are included. EWAC also suggests that, to the degree the Service is concerned that the HCP or other materials provided by the applicant may not meet the statutory issuance criteria of Section 10(a)(1)(B), the Service may request a six-month extension of the deadline to work through the concerns raised by the agency; however, an applicant should be given the opportunity to decline the extension and ask the Service to make a decision on the application as submitted. In section V of this letter, EWAC provides additional recommendations on how disputes between the Service and applicant should be handled.

B. Applicant-Driven Process

In April 2018, the Service's Deputy Principal Director issued a memorandum providing guidance on when an applicant should consider applying for an ITP ("Director's Memorandum").[8] The Director's Memorandum also highlighted that "[t]he Section 10 process is applicant-driven" and that the "biological, legal, and economic risk assessment regarding whether to seek a permit belongs with the private party determining how to proceed." EWAC recommends the Service build on the guidance in the Director's Memorandum and clarify in its regulations that the Section 10 process is driven by the applicant rather than the Service. Specifically, it should be the applicant's prerogative to determine:

- Which permit pathway (EOS Permit or ITP) to pursue
- Which species to include in the permit application
- Which changed circumstances to include in HCP
- Whether or not a measure is practicable (*see* section III(B) below)
- The type and extent of financial assurances

C. Designated Permitting Staff

ITP processing has significant variability across Service offices. EWAC recommends that the Service have a sufficient number of designated staff in each ecological service field office who have received specific training in how to evaluate and process ITP applications to increase certainty and predictability. Additionally, each of the Service's regional offices should have two or more staff with specific, detailed training on the statutory and regulatory requirements associated with ITP applications. These staff members should be required to work with the regional solicitors to ensure that the HCP negotiation process complies with, but does not exceed, the legal requirements established by Congress in Section 10. For example, Service staff should receive

[8] U.S. Fish & Wildlife Service 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) ("Director's Memorandum"). On April 22, 2024, the Director of the Service rescinded the Director's Memorandum Service rescinded the Director's Memorandum on the basis that the administration, at that time, disagreed with the portions of the guidance discussing the agency's interpretation of the term "harass" in the regulatory definition of "take." U.S. Fish & Wildlife Service Director, Rescission of the 2018 Principal Deputy Director Memorandum (April 22, 2024).

regular training and that training should include emphasizing that ITPs are not, under the terms of Section 10, recovery tools and are, instead, mechanisms by which non-federal entities may receive authorization for take that is reasonably certain to occur as a result of otherwise lawful activities. As noted in section V(c) below, the Service could also consider relying on outside, expert contractors to assist in the HCP review process.

D. Dispute Resolution

As previously noted, the HCP negotiation process regularly takes years—and even a decade or more—because the applicant and Service cannot come to agreement over particular terms, conditions, or even underlying data. In order to limit protracted HCP negotiations, where disagreement over the substance of an HCP exists, EWAC recommends the Service adopt an elevation process where a permittee may request a review by regional leadership and, if not resolved, the permittee may request input by Service headquarters personnel specifically tasked with resolving these disagreements. The resolution process could be substantially similar to existing Service procedures for appealing a permit denial,[9] but with the explicit recognition that any resolution must give heavy weight to applicant statements regarding practicability, funding assurances, and other applicant-specific capabilities. To streamline the process and limit the potential for applicants to overuse this process, the regulations could establish 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 continue to disagree 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, as is described in greater detail immediately below.

E. Application Completeness

In the preamble to the proposed version of the 2024 Regulations, the Service recognized that the agency had not been successful in making the pre-ITP application process more efficient despite the adoption of the HCP Handbook and other agency policies aimed at maximizing efficiency.[10] It has been the experience of EWAC that one of the most significant problems in HCP administration is the Service's failure to consider an application complete where the agency disagrees with the applicant over a particular term or terms. Often, the alleged "incompleteness" is because agency personnel seek to extract additional conditions from applicants that go beyond the legal requirements of Section 10 and that do not take into account the practical considerations applicants must factor into their project design and costs.[11] Nevertheless, the 2024 Regulations added the following language: "[t]he Service will process the application when the Director determines the [ITP] application is complete."[12]

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[9] *See* 50 C.F.R. § 13.29.

[10] 88 Fed. Reg. 8380, 8382 (Feb. 9, 2023).

[11] EWAC members have also experienced that the Service's regional offices are reluctant to override 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 statutory standards.

[12] 50 C.F.R. §§ 17.22(b)(1)(i), 17.32(b)(1)(i).

While the Service has adopted procedures for reconsideration of and appeal from a decision to deny an ITP application,[13] regulations currently only allow appeal of an actual, final decision rather than a failure of the Service to move the application forward in the permitting process. The results are a lack of accountability for the Service to meet any timeframes in its review and response to an ITP application, situations where applicants receive multiple and even conflicting comments and responses from different reviewers in various Service offices or the Solicitor's Office, protracted or indefinite review process, and multiple rounds of negotiation without a final agency action giving the applicant the ability to seek a court's intervention and determination as to whether the Service is exceeding its authority under the ESA. EWAC is aware of multiple circumstances where applicants have engaged with the Service for years, and in some instances for a decade or more, without ever receiving a final decision on an ITP application. In a number of these circumstances, Service staff claimed the applications were incomplete because of the applicant's refusal to accept a proffered term or condition. In one case, the applicant—out of desperation—went through the Service's process for reconsideration and appeal of ITP denial and was told that the process was unavailable to the applicant because the agency had only refused to process the permit application and had not officially denied the application.

EWAC recognizes that instances arise where there are legitimate disagreements between Service field office staff and applicants relating to measures proposed in an HCP or the necessary terms and conditions of an ITP. For that reason, EWAC has suggested, in section II(E) above, that the Service establish a process by which disputes between Service staff and ITP applicants may be addressed efficiently. Ultimately, however, EWAC believes, that the presence of disagreements should not render an application incomplete. As noted elsewhere in this letter, EWAC believes an application should be deemed complete when an applicant has provided the Service with all statutorily-required elements (i.e., an HCP containing all components set forth in Section 10, a completed application form, and the necessary application fee) and has provided a written statement that the applicant requests the Service formally process the application. Any disagreement over the substance of the HCP and any ITP terms and conditions should be resolved during the processing phase.

F. ITP Conditions

Section 10 implementing regulations should instruct that the terms and conditions of an ITP cannot differ from those set forth in the HCP or what is provided in the Service's general permit regulations found at 50 C.F.R. Pt. 13. In order to effectuate this, the 2024 Regulations need to be revised. Currently, the language in the 2024 Regulations expand upon the language set forth in Section 10(a)(2)(A)(iv) which states "no permit may be issued" by the Service unless an applicant submits a conservation plan specifying "such other measures that the [Service] may require as being necessary or appropriate for purposes of the plan."[14] 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 are often unrelated to ESA compliance (e.g., measures focused on

[13] 50 C.F.R. § 13.29.
[14] 16 U.S.C. § 1539(a)(2)(A)(iv).

addressing the Migratory Bird Treaty Act ("MBTA"). Language in the 2024 Regulations explicitly allows the Service to add to ITPs terms and conditions the agency:

> 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.[15]

The seemingly unconstrained breadth of the language in the 2024 Regulations could be interpreted to allow the Service to require additional conservation measures, monitoring schemes, or other requirements in the ITP beyond what an applicant has previously agreed to include in an HCP. Indeed, the Service appeared to acknowledge its intent in the preamble to the 2024 Regulations, stating "while we have the statutory authority to require additional measures, we rarely exercise this authority without the consent of the applicant."[16] Finally, such expansion undermines the applicant driven process that is the hallmark of Section 10 permitting. EWAC believes that the criteria adopted by Congress in Section 10(a)(2)(A)(iv)—that the Service will not issue an ITP unless the HCP includes "such other measures that the [Service] may require as being necessary or appropriate for the purposes of the [HCP]"[17]—and Section 10(a)(2)(B)(v)—which provides that an ITP will "contain such terms and conditions as the [Service] deems necessary or appropriate to carry out the purposes of [Section 10], including, but not limited to, such reporting requirements…necessary for determining whether such terms and conditions are being complied with"—actually limits the Service to adopting terms to carry out the underlying purposes of the HCP and ensures the conservation program is being implemented and does not give the Service broad authority to bring in terms and conditions unrelated to those negotiated with the applicant during the HCP development process.

EWAC requests the Service remove the catch-all language inserted into the 2024 Regulations and, instead, clarify that the terms and conditions set forth in an ITP cannot differ from those agreed upon by the ITP applicant or as set forth in the Service's general permitting regulations found at 50 C.F.R. Part 13.

III. The Services Should Closely Follow Statutory Standards and Case Law when administering Section 10(a)(1)(B)

Congress gave the Services the clear authority to issue permits under Section 10 and clear standards by which to measure compliance,[18] and the Services should be careful to ensure their regulations do not exceed this authority. The following provides several recommendations on how Section 10 implementing regulations may be revised to improve administration of the statutory criteria.

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[15] 50 C.F.R. §§ 17.22(b)(3), 17.32(b)(3); 89 Fed Reg. at 26,096 (emphasis added).
[16] 89 Fed. Reg. at 26,080.
[17] 16 U.S.C. § 1539(a)(2)(A)(iv).
[18] Section 10(a)(1)(B) states that where an ITP application meets the standards set forth therein, the Service "shall issue" the ITP.

A. Application of "Otherwise Lawful"

As noted above, Section 10(a)(2)(A)(iv) states "no permit may be issued" by the Service unless an applicant submits a conservation plan specifying "such other measures that the [Service] may require as being necessary or appropriate for purposes of the plan."[19] In the experience of EWAC members, the Service frequently uses this language as 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 take, it is not appropriate for the Service to use vague catch-all language as justification to include additional measures that go beyond an 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," the Service's own guidance indicates that "otherwise lawful" is not a condition precedent to ITP issuance:

> 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***.[20]

Despite this clear instruction on the proper application of "otherwise lawful" in the HCP Handbook, some Service staff improperly apply the concept and require detailed showings that statutes such as the Bald and Golden Eagle Protection Act ("BGEPA"), MBTA, and National Historical Preservation Act ("NHPA") have been considered and complied with. This has resulted in confusion, significant delay, and occasional litigation relating to permit processing and issuance.[21] Section 10 implementing regulations should recognize the statute significantly limits the Service's discretion in processing applications and issuing ITPs.

Section 10 establishes that once the Service makes the five statutorily defined findings with respect to the permit application and related HCP and receives other necessary assurances, the agency "shall" issue the permit.[22] Section 10 preserves discretion only for the Service to require "such other measures that the [Service] may require as being necessary or appropriate for purposes of the plan."[23] This language significantly limits the discretion of the Secretary to consider other concerns.

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[19] 16 U.S.C. § 1539(a)(2)(A)(iv).
[20] HCP Handbook (2016) at 16-3 (emphasis added).
[21] *See Ctr. for Biological Diversity v U.S. Fish and 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 WWL 3877605, at *4 (N.D. Cal. 2005).
[22] *Id.* at § 1539(a)(2)(B).
[23] 16 U.S.C. § 1539(a)(2)(A)(iv); *see id.* at § 1539(a)(1) ("The Secretary *may* permit, under such terms and conditions as he shall prescribe . . .) (emphasis added); *see also id*. at § 1539(a)(2)(B) ("The permit shall contain such terms and conditions as the Secretary deems necessary or appropriate to carry out the purposes of this paragraph. . . .").

Consistent with the statute, Section 10 regulations should define the scope of the Service's discretion as limited to requiring other measures "as being necessary for the purposes of the plan" and imposing associated Section 10 permit terms as "necessary or appropriate to carry out the purposes" of Section 10. For example, regulatory language could instruct:

> ***Limitation on Discretion.*** In issuing a permit under this section pursuant to 16 U.S.C. § 1539(a)(1)(B), the Service's discretion is limited to requiring measures, terms, and conditions necessary or appropriate for the purposes of the conservation plan. Review under 42 U.S.C. § 4321 et seq. [NEPA], 16 U.S.C. § 1536 [ESA section 7] and 54 U.S.C. § 306108 [Section 106 NHPA] is similarly limited.

The regulation would, in other words, clarify that the scope of the NEPA analysis, ESA section 7 ("Section 7") consultation, and NHPA consultation would be constrained to review only those other measures and terms and conditions that are within the purview of the Service as it relates to the requested take authorization. This interpretation is consistent with the text of Section 10 and with the legal principles that neither Section 7 nor NEPA apply to non-discretionary agency actions and that NHPA similarly does not apply to ministerial actions. Despite agency guidance indicating that the federal action at issue in a Section 7 consultation covering an ITP application is the Service's issuance of an ITP (rather than its approval of the underlying activities), field and regional offices frequently require NEPA documents and NHPA consultation to include lengthy analyses of impacts far beyond the scope of the taking sought to be authorized by an ITP. While the ESA prohibits unauthorized "take" of endangered species,[24] there is no provision of the ESA that requires a project proponent to apply for an ITP. EWAC suggests that given the scope of the agency's action in issuing an ITP is focused solely on authorizing incidental take, the ITP application process is both voluntary and applicant driven, and, in most cases, the underlying activities subject to the ITP application could proceed without any federal authorization, the scope of NEPA and NHPA compliance should be narrowly tailored.[25] The federal appellate courts, and U.S. Supreme Court, have affirmed and reaffirmed these principles, including in the following cases:

- **NEPA:** *Dep't of Transp. v. Pub. Citizen*,[26] holding that "where an agency has no ability to prevent a certain effect due to its limited statutory authority over the relevant actions, the agency cannot be considered a legally relevant 'cause' of the effect" and therefore "the agency need not consider these effects in its [environmental analysis]. . . ."; *Flint Ridge Dev. Co. v. Scenic Rivers Ass'n of Oklahoma*,[27] finding NEPA did not apply when relevant statutory authority prevented the Secretary of Housing and Urban Development from delaying an automatic effective date of land sale disclosures to allow sufficient time for NEPA review; *Seven County Infrastructure Coalition v. Eagle County*,[28] recognizing

[24] 16 USC § 1539.
[25] EWAC notes that because living species of wildlife are not eligible properties under the NHPA, review under NHPA section 106 should not be triggered at all by an ITP application.
[26] 541 U.S. 752, 770 (2004).
[27] 426 U.S. 776 (1976).
[28] 605 U.S. ___, WL 3354899 (2025).

that NEPA does not require an agency to "speculate about the effects of a separate project that is outside its regulatory jurisdiction".

- **ESA Section 7:** *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*,[29] holding that Section 7 consultation was not triggered by the Environmental Protection Agency's ("EPA") decision under the Clean Water Act to approve a state's application to assume authority over a National Pollutant Discharge Elimination System permitting program where the statute mandates approval of a state's application once nine statutory criteria are met and the EPA therefore lacked discretion to consider the effects on listed species.[30]
- **NHPA:** *Sugarloaf Citizens Ass'n v. F.E.R.C.*,[31] concluding that certification of an incinerator as a qualifying small power production facility under Section 210 of the Public Utility Regulatory Policies Act was a ministerial act by the Federal Energy Regulatory Commission ("FERC") because the statute did not give FERC "discretion to deny certification to any facility which meets the enumerated criteria" and therefore, given the lack of discretionary decision-making authority, FERC's decision triggered neither NEPA nor NHPA.[32]

EWAC notes that updates to the Service's NEPA procedures adopted by the Department of the Interior ("DOI") pursuant to its Interim Final Rule regarding DOI NEPA implementing procedures ("IFR") and Appendix 2 to DOI's Handbook of NEPA Procedures ("Handbook Appendix 2")[33]

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[29] 551 U.S. 644, 661-62, 673 (2007).

[30] The principle has been repeatedly affirmed by federal appellate courts. *See Sierra Club v. Babbitt*, 65 F.3d 1502 (9th Cir. 1995) (holding that the Bureau of Land Management was not required to consult under Section 7 regarding a right-of-way for a construction project, as Section 7 does not apply where a federal agency lacks the discretion to influence the outcome of a private activity for the benefit of a listed species); *Alaska Wilderness League v. Jewell*, 788 F.3d 1212 (9th Cir. 2015) (holding that Bureau of Safety and Environmental Enforcement (BSEE) was not required to consult under Section 7 before approving oil spill response plans because the Clean Water Act mandates BSEE to approve plans that meet specified statutory criteria, and the agency therefore lacked discretion to impose additional environmental conditions); *Nat'l Wildlife Fed'n v. Sec. of the U.S. Dep't of Trans.*, 960 F.3d 872 (6th Cir. 2020) (holding that the Pipeline and Hazardous Materials Safety Administration's (PHMSA) approval of oil spill response plans did not trigger consultation, as the statute's mandatory language left no room for discretionary decision-making).

[31] 959 F.2d 508, 513 (4th Cir. 1992).

[32] *See also Woodham v. Federal Transit Admin.*, 125 F.Supp.2d 1106, 1110 (N.D. Ga. 2000) (NHPA not triggered because "[a]s long as the proposal satisfied the statutory and regulatory requirements, the [federal agency] had no choice but to concur in the plan"); *Lee v. Thornburgh*, 877 F.2d 1053, 1057 (D.C. Cir. 1989) ("clearing" a project with federal agencies that did not have "the authority to grant or refuse permission" did not amount to a federal licensing of the project); *Sheridan Kalorama Historical Ass'n v. Christopher*, 49 F.3d 750 (D.C. Cir. 1995) (the Secretary of State's failure to disapprove Turkey's chancery proposal under § 205 of the Foreign Missions Act did not render the project a federally licensed undertaking for purposes of § 106 of the NHPA); *Yerger v. Robertson*, 981 F.2d 460, 465 (9th Cir.1992) (holding Forest Service refusal to renew land-use permit does not trigger § 106 even though refusal was "clearly preparatory to action that will affect the site's historical aspects"); *Waterford Citizens' Ass'n v. Reilly*, 970 F.2d 1287, 1292 (4th Cir. 1992) (holding EPA continuing authority to exercise control over project does not render project a federal undertaking).

[33] *See* 90 Fed. Reg. 29,498 (July 2, 2025) and Appendix 2 to DOI's Handbook of NEPA Procedures, available at: https://www.doi.gov/media/document/doi-nepa-appendix-2.

appear to have broadened the previous HCP-related categorical exclusion ("CatEx") which, by its terms, applied only to "low-effect" HCPs.[34] Handbook Appendix 2 contains CatExes adopted or adopted for use of DOI bureaus, including the Service. Section C(2) of Handbook Appendix 2 provides that "issuance of Section 10(a)(1)(B) [ITPs] that, individually or cumulatively, have a minor or negligible effect on the species covered in the [HCP]" will be categorically excluded from NEPA review. EWAC appreciates the updated treatment of HCPs in Handbook Appendix 2 and believes it is appropriate given the narrow scope of an ITP (authorizing incidental take of listed species rather than authorizing underlying activities) and that many HCPs processed by the Service could fall into this category, and could serve to buttress the Administration's efforts to reduce unnecessary regulation.[35] Given the agency's acknowledgment that, through ITPs, the Service "authorizes take and not the underlying activities themselves,"[36] and the U.S. Supreme Court's recent holding that NEPA does not require an agency to address environmental effects of activities that are separate in time and place from the action under consideration or over which the agency has no jurisdiction,[37] EWAC believes narrowing the scope of NEPA review for most ITPs is appropriate, useful, and lawful.

Likewise, to eliminate redundant intra-Service Section 7 consultations, and considering that the standard for ITP issuance (the taking must "not appreciably reduce the likelihood of survival and recovery of the species in the wild")[38] includes a standard nearly identical to that required by Section 7 (agencies must ensure their actions will not "jeopardize the continued existence of any [listed] species"),[39] the agency should consider whether it is necessary at all to conduct intra-Service consultations for ITPs that do not include designated critical habitat within the plan area.[40] Alternatively, given the standards for ITP issuance and compliance with Section 7 are similar, the Service should consider whether consultations on the agency's issuance of ITPs could be substantially streamlined.

B. The Service Should Clarify Application of the Maximum Extent Practicable Standard

Pursuant to Section 10(a)(2)(B), the Service will issue an ITP where it finds, among other things, that the applicant will "to the maximum extent practicable, minimize and mitigate the impacts" of the taking that is subject to the application (the "MEP Standard").[41] While neither the ESA statutory language nor the Service's Section 10 implementing regulations define the phrase "maximum extent practicable," substantial time and resources are frequently expended during the HCP negotiation process over whether the conservation measures proposed by an applicant will

[34] *See* 516 DM 8.5(C)(2) (2020).
[35] *See, e.g.*, Executive Order 14192, Unleashing Prosperity Through Deregulation, 90 Fed. Reg. 9065 (Feb. 6, 2025); Secretarial Order 3421, Achieving Prosperity through Deregulation (Feb. 8, 2025).
[36] 89 Fed. Reg. 26,070, 26,073 (April 12, 2024).
[37] See 605 U.S. ___, WL 3354899 (2025).
[38] 16 U.S.C. § 1539(a)(2)(B)(iv).
[39] 16 U.S.C. § 1536(a)(2).
[40] EWAC acknowledges that Section 7 requires federal agencies to ensure actions they fund, authorize, or carry out do not result in destruction or adverse modification of designated critical habitat, which is a separate inquiry from whether or not an activity will jeopardize listed species.
[41] 16 U.S.C. § 1539(a)(2)(B).

meet the MEP Standard. While the statute simply includes the MEP Standard, a reading of the 2024 Regulations along with its policies established by the HCP Handbook appears to have expanded upon the MEP Standard to require applicants demonstrate that the conservation program of an HCP will, in fact, fully offset the impacts of the taking authorized by an ITP. Specifically, the 2024 Regulations added to the statutory MEP Standard that an HCP must demonstrate the conservation program will "minimize and mitigate the impacts of the incidental take for all covered species ***commensurate with the taking***."[42] The HCP Handbook, in turn, explains that "mitigation ***is commensurate (equal)*** with the impacts of the taking" when such mitigation ***fully offsets that take***.[43] The HCP Handbook additionally recognizes that "fully offset" is a higher threshold than the MEP Standard established by Section 10 and that an HCP that demonstrates impacts of the take will be fully offset will *always* meet the MEP standard.[44] Nevertheless, the HCP Handbook explicitly recognizes that "the statutory standard will be met where the applicant demonstrates that the HCP will not completely offset the impacts of the taking, the minimization and mitigation measures provided in the [HCP] represent the most the applicant can practicably accomplish."[45] By contrast, the 2024 Regulations make no such recognition and, instead, inappropriately raise the statutory bar for obtaining an ITP by requiring HCPs demonstrate they will fully offset impacts, exceeding the statutory standard and the authority granted to the Service by Congress. Indeed, the Service previously has indicated that the MEP Standard implies something less than full offset.[46]

EWAC believes it would be beneficial to the Service and the regulated community for the Service to adopt a regulatory definition for the MEP Standard which does not exceed Congressional authority and considers concepts such as demonstrable biological effectiveness, logistical constraints, financial constraints, and current and available technology. EWAC recommends further that the Service explicitly clarify in its regulations that meeting the MEP Standard does <u>not</u> require a showing that the conservation program of an HCP fully offsets the impacts of a proposed take. These concepts are addressed to some degree in the HCP Handbook and caselaw,[47] as well as included in the definition of "practicability" contained in the Service's BGEPA implementing regulations.[48]

[42] 50 C.F.R. §§ 17.22(b)(1)(v)(A); 50 C.F.R. 17.32(b)(1)(v)(A) (emphasis added).
[43] HCP Handbook at 9-28 (emphasis added).
[44] *Id.*
[45] *Id*.
[46] *Id*. 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).
[47] *Id*.
[48] *See* HCP Handbook at 9-28 (stating that "the statutory standard will also be met where the applicant demonstrates that while the HCP will not completely offset the impacts of the taking, the minimization and mitigation measures provided in the plan represent the most the applicant can practicably accomplish"); 50 C.F.R. 22.6 (in the context of BGEPA, "practicable" means "available and capable of being done after taking into consideration existing technology, logistics, and cost in light of a mitigation measure's beneficial value to eagles and the activity's overall purpose, scope, and scale").

IV. The Service Should Reject Reliance on the Precautionary Principle in HCP Development.

It has been EWAC's experience that the HCP development process has increasingly become bogged down by the Service's insistence on worst-case scenario planning. While this happens in a number of contexts, in this letter, EWAC highlights two primary issues, each of which is addressed in greater detail below: (1) reliance on the precautionary principle to drive most aspects of HCP development; and (2) hyperfocus on precision with respect to compliance monitoring, take estimates, calculating mitigation offsets, and establishing new mitigation approaches.

A. Precautionary Principle Historical Use

On June 16, 2023, the U.S. Court of Appeals for the D.C. Circuit ("D.C. Circuit") issued its decision in *Maine Lobstermen's Association v. National Marine Fisheries Service* ("*Maine Lobstermen's*"), in which that court reviewed a biological opinion issued under Section 7. In finding the biological opinion unlawful, the D.C. Circuit held that "[h]ighly unlikely and overly precautionary assumptions and scenarios should only be relied upon in agency decision-making where required by law."[49] The court explained:

> the ESA and its implementing regulations call for an empirical judgment about what is ***likely***…[t]he Service's role as an expert is undermined, not furthered, when it ***distorts that scientific judgment by indulging worst-case scenarios and pessimistic assumptions to benefit a favored side***.[50]

On May 23, 2025, President Trump issued Executive Order 14303 ("EO 14303") titled "Restoring Gold Standard Science." EO 14303 was issued to ensure, among other things, that federal agencies "acknowledge[] scientific uncertainties" and "evaluate[] scientific findings objectively" and cited *Maine Lobstermen's* as an example of the need for the order.[51]

It has been EWAC's experience that the Service frequently relies on the precautionary principle when engaging in negotiations over the content of HCPs. Two common examples include viewing species displacement as causing incidental take and dealing with take uncertainty by requiring complicated, overly-conservative compliance monitoring regimes which can lead to an ITP being at risk of suspension or revocation despite no actual evidence that a permittee is out of compliance. With respect to displacement, the Service often points to displacement from anthropogenic sources as a form of take, despite a lack of data to support a finding that actual death or injury to a listed species is reasonably certain to occur as a result of the placement of such structures. As a result, the Service will require project proponents adopt substantial setbacks of structures from potential listed species habitat, with little data to support the setbacks and no consideration on whether the effects of structure placement (if any) diminish depending on the habitat's proximity to the same. For example, with respect to western grouse species, without strong scientific evidence, the Service considers habitat "fully impacted" at great distances from the structure, and requires that

[49] *Maine Lobstermen's Ass'n v. National Marine Fisheries Service*, 70 F.4th 582 (D.C. Cir. 2023).
[50] *Id*. at 586.
[51] 90 Fed. Reg. 22,601 (May 29, 2025).

project proponents provide the same degree of mitigation whether the "impacted" habitat abuts the structure or occurs at significant distance from it. The precautionary principle is also being relied upon by the Service as a way to deal with uncertainty. The Service often is unwilling to tolerate any degree of uncertainty and insists upon onerous monitoring and adaptive management provisions that significantly impact cost and predictability for project proponents. With this context in mind, EWAC provides recommendations on improving Section 10 implementing regulations to limit continued improper use of the precautionary principle in the permitting process.

B. Delays Caused by Hyperfocus on Precision in the Context of Compliance Monitoring

The 2024 Regulations state that "the scope of the monitoring program for [ITPs] should be commensurate with the scope and duration of the operating [HCP] and the project impacts."[52] However, under current Service practice, monitoring and reporting requirements often extend beyond proof of compliance with minimization and mitigation measures, and in some instances are the most financially burdensome element of an ITP, at times even surpassing the cost of compensatory mitigation.[53] Monitoring efforts often provide little conservation benefit to species, in part because the Service rarely utilizes collected monitoring data to further inform species recovery planning. Nevertheless, HCP development processes are often delayed as a result of negotiations over the duration, intensity, and precision of compliance monitoring. Indeed, in the context of HCPs addressing impacts to certain avian and bat species, the Service frequently requires permittees to use an extensive and costly statistical model developed for evaluating the probability of rare events rather than for evaluating compliance. This approach results in circumstances where the model will provide conclusions estimating that listed species fatalities have occurred even if ***no*** listed species are found at a facility during the course of the monitoring, and based on this, the Service will consider a permittee to be out of compliance with the terms of an ITP and require the permittee to take costly corrective action.

EWAC recommends the Service address this issue by setting meaningful limits on the costs that permits will impose for monitoring and reporting. To support this position, it is important to recognize that the ESA establishes that, with respect to ITPs, an HCP must include "such reporting requirements as the [Service] deems necessary for determining whether [the ITP's] terms and conditions are being complied with."[54] Therefore, the regulations should make it clear that this statutory threshold is met where reporting requirements are sufficient to demonstrate the permittee is complying with minimization and mitigation measures. Additionally, the regulation should establish that costs of monitoring and reporting will be included in determining if an HCP will meet the MEP Standard. If additional monitoring and reporting efforts desired by the Service would represent a prohibitive financial constraint on the viability of a plan, and the Service is unable to document using reliable scientific data as to why more intensive monitoring is needed and how covered species conservation would be increased through this level of effort, the agency

[52] 50 C.F.R. § 17.22(b)(1)(viii).
[53] *See* Electric Power Research Institute, Energy Endangered Species Act Compliance Costs: Review and Cost Summary of Published Energy Habitat Conservation Plans (Nov. 9, 2021); available at: https://www.epri.com/research/products/000000003002021467.
[54] 16 U.S.C. § 1539(a)(2)(B).

should be required to defer to the monitoring and reporting plan proposed by the applicant. Finally, EWAC recommends the Service's implementing regulations cap monitoring and reporting costs such that they do not exceed a specific percentage of the overall costs of HCP implementation (including, but not limited to the minimization and mitigation measures). Establishing this cap will ensure that monitoring and reporting is not overshadowing the actual investment in efforts to conserve impacts to species covered under the HCP.

The Service has recognized that "in many cases, the biology of the listed species or the nature of the proposed action makes it impractical to detect or monitor take of individuals of the listed species."[55] Indeed, the Service's 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 impacts and operating conservation program within the HCP and the biological goals and objectives of the HCP.[56]

Operational HCPs (particularly those that are based on species' collision with electric infrastructure) do not have a long-established surrogate like construction impacts (e.g., acres, discreet geographic features, etc.) to readily estimate take and associated impacts. As a result, the negotiation process associated with take monitoring requirements is often onerous, exacting, and results in an over-emphasis on precise accounting of individuals, which is absent from discussions when using habitat features as a surrogate. This precise counting, in turn, leads to strenuous compliance monitoring and adaptive management provisions to "prove out" the take estimates, even for low-impact HCPs. The cost associated with achieving this precision often outweighs the magnitude of impacts to the species. As discussed immediately below, EWAC recommends the Service adopt a regulation on how to estimate take for operational HCPs—for example, clear support for the use of surrogates where take of individual species is impracticable to determine or measure (e.g., use of habitat acres as a surrogate for take of listed avian species, using caves as a proxy for individual cave-dwelling invertebrates, etc.)[57]—and steer the Service away from overly complex take estimation and compliance monitoring methods that complicate HCP development and implementation.

C. Delays Caused by Overly Conservative Assumptions Regarding Take Estimates

EWAC has advocated for the Service to adopt a regulation providing guidance on the use of surrogate measures to quantify take of listed species. Such a regulation could mirror the permissive use of surrogates currently found in 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

[55] 80 Fed. Reg. 26,832 (May 11, 2015); *see also* 50 C.F.R. § 402.14(i)(1)(i).
[56] 65 Fed. Reg. 35,242, 35,246 (June 1, 2000).
[57] *See, e.g.*, Service revision of ESA implementing regulations to "address the use of surrogates to express the amount or extent of anticipated incidental take" in the context of Section 7 consultations. 80 Fed. Reg. 26,832 (May 11, 2015), codified at 50 C.F.R. § 402.14(i)(1)(i).

> 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.[58]

In many circumstances, counting individuals or populations may not be appropriate for an HCP. The use of surrogates—use of a measure such as acres of habitat or a measurable ecological condition—to quantify take of species 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. Any final rule language should make clear that the use of surrogates to estimate take in an ITP is appropriate and should further make clear that the surrogate used should be tailored to the specific circumstances of the HCP at hand (e.g., that the surrogate used in one HCP may not be appropriate for another HCP).

D. Mitigation

Similar to problems inherent in calculating take, the HCP development process often is bogged down by the Service's request for precision in how mitigation is calculated. Rather than a hyperfocus on measuring whether an HCP has proposed mitigation that precisely offsets the take to be covered by an ITP, and particularly given Congress established in Section 10 the MEP Standard (rather than requiring a particular degree of precision), the Service's regulations should allow the agency flexibility to be solution-oriented when it comes to identifying appropriate mitigation measures. This could mean being creative about identifying new mitigation opportunities, such as meaningful research to address stressors beyond those addressed in an HCP and the overall underlying threats faced by listed species. This is especially true in situations where an ITP is sought to address take of species associated with an activity that is not the primary threat to the species, such as where the Service seeks habitat-based mitigation where the impact to the covered species in an HCP results from collision and where the species is not primarily threatened by habitat loss and would not significantly benefit from such mitigation. Further, particularly with respect to large-scale, programmatic HCPs, the Service should explicitly recognize that these plans may be better positioned to providing conservation in a manner and location where it is most beneficial to the covered species rather than being limited to providing mitigation in close proximity to the impacts.

V. Other Recommendations

In addition to the changes set forth above, EWAC makes the following recommendations to improve the Section 10 permitting process.

A. Updates to the ePermits Portal

While Congress has designed the Section 10 permitting process to be applicant-driven, EWAC notes that the Service's ePermits portal is configured such that an applicant cannot submit an application for a Section 10 permit on the applicant's own initiative. Instead, an applicant must wait for the Service to open the portal in order for the application to be submitted. EWAC is aware of one circumstance in which an ITP applicant had coordinated with the Service for several months

[58] 50 C.F.R. § 402.14(i)(1)(i).

and received concurrence from the agency that the HCP was complete and would meet issuance standards, and yet the Service did not open the ePermits portal for four additional months, citing the need for a completeness review by the DOI Solicitor before being able to "accept" the application. For many projects, lack of access to the ePermits portal forecloses any mechanism for submittal because many Service offices will reject applications submitted electronically by email or in hardcopy. The same aforementioned project sent an application via email and a hardcopy by mail, which was returned to the applicant with no rationale or forewarning. While this circumstance certainly implicates issues relating to Service determination of "completeness" described in section II(E) above, the ministerial practices of the Service can prevent applicants from submitting applications, causing needless inefficiency and delay.

EWAC recommends including in the Section 10 regulations a defined permit application submittal process and providing direction for the electronic submittal of applications. Consistent with the President's April 15, 2025 Presidential Memorandum on *Updating Permitting Technology for the 21st Century*, which directs agencies to "make maximum use of technology in environmental review and permitting processes," including by "eliminat[ing] the use of paper-based application and review processes," the regulations should establish a standard process for electronic submission of applications.[59] The regulations should also clarify that applications are deemed submitted, and review timelines triggered, upon electronic submission. The electronic process should allow application submission at any time, without a mechanism for gatekeeping, and should allow for flexible methods for submitting payment of application fees, in consideration of the fact that the policies and practices of corporate applicants vary widely with respect to how fees are paid.

B. Formalizing Allowable Minimization and Mitigation Measures

While the Service has multiple policy documents discussing activities that would be acceptable minimization and mitigation measures, these policies are subject to change from administration to administration and often do not undergo public review and comment. This has led to inconsistent treatment by the Service as well as uncertainty for the regulated community. EWAC recommends the Service adopt regulations providing guidance on the types of minimization and mitigation measures that may be relied upon in HCPs. While the regulation need not provide an exhaustive list, the regulation should provide enough examples and concepts that the regulated community and Service have a reliable framework to consider. The regulatory text could clarify that the sufficiency of specific measures is driven by the facts of each application and the inclusion of a particular measure in one HCP does not mean that the same measure is required of another HCP covering the same species. In all events, the regulations should emphasize that the minimization and mitigation measures of any HCP must be practicable for the applicant in that specific instance and be based on the best ***available*** scientific and commercial information.

The list of acceptable measures could be taken from those that have been used in existing, approved HCPs as well as those that are included in the Service's General Mitigation Policy and

[59] *Available at*: https://www.whitehouse.gov/presidential-actions/2025/04/updating-permitting-technology-for-the-21st-century/.

the Compensatory Mitigation Policy.[60] For example, the regulation could provide the following examples:

- Avoidance or reduction of impacts, including on habitat;
- Replacement of impacted habitat;
- Habitat restoration and enhancement;
- Provision of equivalent substitute resources;
- In-lieu fee or mitigation banking programs;
- Research on threats to covered species with the goal of improved management or recovery, such as to address white-nose syndrome in bats;[61]
- Education;
- Captive propagation program (young animals raised in captivity and then released into the wild);
- Genetic rescue and gene flow augmentation;
- Covered species reintroduction and translocation;
- Adaptive management;
- Transfer of severed property rights (e.g., mineral rights) on existing conservation sites;
- Restriction of human access (e.g., gating of caves);
- Administration of vaccination programs;
- Retrofitting power poles;
- Construction of wildlife overpasses or underpasses; and
- Programs to reduce exposure to contaminants in the environment.

C. Use of Consultants to Facilitate ITP Processing

Since 2003, the Service has seen a reduction in its workforce of at least 20 percent, even as the number of listed species has increased by 39 percent.[62] These figures do not account for more declines in staffing levels in 2025 as part of government-wide reductions in federal staffing. Service staff capacity is a limiting factor in timely review of ITP applications, causing many applications to languish, even where there are not significant issues to work through. Regulatory

[60] *See* Service's Mitigation Policy at Section 6.6.3.2 (p. 14); ESA Compensatory Mitigation Policy at pp. 6-11. *See also* U.S. Fish & Wildlife Serv., Research as a Mitigation Option for Wind Power HCPs Affecting White-nose Syndrome-impacted Bats (Jul. 26, 2023) ("This memo serves to establish that funding research is an acceptable mitigation option for wind power Habitat Conservation Plans (HCPs) that cover bat species affected by white-nose syndrome."), available at https://static1.squarespace.com/static/611cc20b78b5f677dad664ab/t/653929e15a79f50688578a54/1743020565654/.

[61] *See, e.g.*, Memorandum to Regional Directors from Assistant Director for Ecological Services, Research as a Mitigation Option for Wind Power HCPs Affecting White-nose Syndrome-impacted Bats (July 26, 2023).

[62] Report to Congress on Review of the ESA Interagency Section 7 Consultation Process and Recommendations for Improving the Process (March 2023) at p. 2, available at https://naturalresources.house.gov/uploadedfiles/fws_sect.7_report.3.29.2023.pdf.

solutions are therefore needed to facilitate review of ITP applications and timely issuance of permits.

Some ITP applicants have attempted to fill Service staffing gaps by entering into reimbursable agreements in order to fund staff time for permit application review and processing, as is authorized in annual appropriations act language.[63] However, the negotiation of these agreements can be protracted and cause delay. Moreover, even with a reimbursable agreement, Service staff can only devote time that is actually available. For these reasons, EWAC believes the use of contractors may be more expeditious and better suited to certain discrete tasks like initial permit processing.

Section 10 implementing regulations could be revised to clarify that in addition to entering into a reimbursable agreement to fund staff time for application review, an applicant may request that the Service use a contractor to aid in review of ITP applications, with the cost of the contractor being borne by the applicant. To avoid any potential conflict of interest concerns, and to facilitate the orderly administration of consultant work, the regulations could include provisions such as:

- Allowing an applicant to request use of a particular contractor at the time the application is submitted, so long as such contractor is different from any contractor involved in preparation of the application;
- Allowing the Service to approve or reject any contractor suggested by the applicant, but providing that if the Service rejects an applicant-suggested contractor, the Service must provide to applicant a list of alternatives from which the applicant may select;
- Requiring the Service to provide guidance to the contractor as to scope and process of review and direct all work performed by the contractor;
- Requiring contractor to provide a recommendation to the Service as to whether the application meets the ITP issuance criteria;
- Ensuring the Service is ultimately responsible for independent evaluation of the application after reviewing a recommendation from the contractor to determine whether the ITP issuance criteria have been met;
- Confirming that the use of a contractor does not exempt the Service from compliance with or otherwise extend any mandatory application review timelines; and
- Confirming all costs associated with use of a contractor are borne by the applicant.

The above provisions are consistent with and modeled after DOI's NEPA regulations establishing the process for the use of contractors to facilitate environmental analysis under NEPA. The use of a contractor in the Section 10 process would similarly facilitate and expedite FWS's review of Section 10 applications.

A regulation could also be developed to provide further detail on the reimbursement of contractor costs by the applicant, including categories of fee waivers (e.g., where the applicant is a

[63] *See* 264 FW 1, Exhibit 1, Authorities and Guidance for Part 264, Cost Recovery and Reimbursable Agreements (December 29, 2020), available at https://www.fws.gov/sites/default/files/policy/pdfs/e1264fw1.pdf; 264 FW 2, Reimbursable Agreements – Policies and Procedures (June 22, 2023), available at https://www.fws.gov/policy-library/264fw2.

governmental entity, for emergency applications, or where the covered activity will provide a valuable benefit to the public or DOI).

D. HCP Handbook Updates

EWAC recommends the Service work together with the National Marine Fisheries Service ("NMFS") to update the agencies' joint HCP Handbook and publish draft updates for public comment as they have done in the past. Updating the HCP Handbook to reflect changes to the Service's Section 10 implementing regulations and to Service policy regarding ITP and EOS permit application processing would provide clarity for the Service, NMFS, and regulated community alike. To assist the Service and NMFS in any future update to the HCP Handbook, EWAC has attached a table to this letter reflecting changes we believe should be made to ensure the HCP Handbook is as effective as possible.

VI. Conclusion

EWAC and its members believe that the efficient and consistent administration of the Section 10 permitting 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 safe, affordable, and reliable energy. EWAC looks forward to continuing to work with the Service in the agency's efforts to improve implementation of Section 10 and would welcome further dialogue on any of the topics identified herein.

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