EWAC®
Energy and Wildlife Action Coalition

March 30, 2026

Comments Regarding February 26, 2026 Notification of Initiation of Status Review for the Lesser Prairie-Chicken

Submitted by:

Energy and Wildlife Action Coalition

Filed electronically to the attention of:

Public Comments Processing
Attn: Docket No. Docket No. FWS-R2-ES-2025-1661
U.S. Fish and Wildlife Service
MS: PRB/3W
5275 Leesburg Pike, Falls Church, VA 22041-3803

Docket No. FWS-R2-ES-2025-1661

The Energy and Wildlife Action Coalition ("EWAC")[1] submits these comments in response to the U.S. Fish and Wildlife Service's ("Service") February 26, 2026, notice ("Notice") of the initiation of a "Status Review for the Lesser Prairie-Chicken" ("Status Review").[2] The Status Review has been initiated in response to a court order vacating the Service's November 25, 2022 rule listing the lesser prairie-chicken ("Listing Rule").[3] As indicated in the Notice, the Status Review is intended to serve as a new 12-month finding on a 2016 petition to list the lesser prairie-chicken ("LEPC") as endangered under the Endangered Species Act ("ESA"), to list the LEPC as three distinct population segments ("DPS"), and to emergency list two of the DPSs ("Petition"). EWAC previously provided comments to the Service ("Prior Comments")[4] in connection with the agency's June 1, 2021 proposed rule to list the LEPC as two DPSs and to issue a proposed 4(d) rule with respect to one DPS.[5]

In the Notice, the Service indicates it is particularly interested in information that either was not considered in the Listing Rule or that has become available since publication of that rule.[6] Since EWAC's submission of the Prior Comments, new scientific data has been published that is relevant to the status of the LEPC. Following is a summary of some of the new information that is directly relevant to two of the listing factors the Service will consider in determining whether the species should be listed: Listing Factor A—the present or threatened destruction, modification, or curtailment of the LEPC habitat or range; and Listing Factor E—other natural or manmade factors affecting the species' continued existence.[7] Additionally, EWAC requests that the Service review and fully consider the Prior Comments in connection with the Status Review, which are attached hereto as Appendix A and fully incorporated herein, as we believe information provided by the Prior Comments may not have been considered in the Listing Rule. EWAC provides comments in response to the Status Review based on the knowledge and experience of its membership, and hopes these comments will be helpful to the Service as it considers whether the best available scientific and commercial information indicates listing the LEPC is warranted.[8]

I. Listing Factor A: Presence of Anthropogenic Structures Alone Should Not Be Presumed to Result in Habitat Loss

Among the primary threats identified in the Petition and in the Listing Rule is fragmentation of LEPC habitat and, specifically, fragmentation caused by LEPC avoidance of

[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] 91 Fed. Reg. 9,547 (Feb. 26, 2026) ("Notice").
[3] 87 Fed. Reg. 72,674 (Nov. 25, 2022) ("Listing Rule").
[4] *See* docket no. FWS-R2-ES-2021-0015-0365.
[5] 86 Fed. Reg. 29,432 (June 1, 2021).
[6] Notice at 9,547.
[7] 16 U.S.C. § 1533(a)(1).
[8] *See id*. § 1533(a).

anthropogenic structures.[9] The Petition cites to studies indicating LEPC avoid anthropogenic structures at various distances. One study cited by the Petition indicates that LEPC may avoid areas within two kilometers ("km") of electric transmission lines. Another study cited by the Petition recommends wind turbines be sited no closer than 1.4 km from active leks or nests (even though the Petition acknowledged that there was a lack of empirical data at that time concerning the impacts of wind turbines on LEPC avoidance behaviors).[10] The Listing Rule relied on a geospatial analysis assuming LEPC avoidance of habitat within 1,800 meters of wind turbines and within 700 meters of transmission lines.[11] These distances are described in greater detail in the most recent LEPC species status assessment ("SSA")[12] and appear to be based in large part on studies involving other grouse species. Within the ascribed impact distances, the Service presumed all habitat "lost" on the basis that it is unsuitable for use by LEPC due to the species' avoidance behavior.[13] EWAC's Prior Comments highlighted our concern that the SSA did not indicate how these impact distances were derived or how these distances were tied directly to LEPC death or injury or a reduction in LEPC population. Additionally, EWAC provided a number of studies specific to wind energy facilities and electric transmission lines demonstrating that the impact distances adopted by the Service in the Listing Rule and recommended by many of the studies cited by the Petition, which were not specific to LEPC, relied on faulty assumptions or were otherwise unsupported by the best available scientific and commercial information.

The following studies published since the Listing Rule further confirm that the species does not exhibit avoidance behavior to the degree assumed by the Petition or by the Service in the SSA or Listing Rule, and that avoidance behavior is more nuanced than the simple presence or absence of an anthropogenic structure.

- *Patterns in lek persistence and attendance by lesser prairie-chicken (Tympanuchus pallidicinctus) near a wind energy facility in southern Kansas (2025)*.[14] In this study of a major Kansas wind energy facility covering 2017-2024, the authors found that leks located in areas with relatively higher abundance of turbines and with lower annual attendance were less stable, and leks located in areas with relatively higher grass cover were less likely to be abandoned over the eight-year study period. This study reported a positive trend in total lek attendance over the study period, and indicates that LEPC population persistence depends more on availability of preferred grassland habitat than the presence of wind turbines.
- *Using multiscale graph theoretic methods to understand spatial patterns of decline: a case study with lesser prairie-chickens (2025)*.[15] Recent advancements in modeling technology appear to demonstrate that landscape-scale connectivity

[9] *See, e.g.*, Petition at 50-53 and Listing Rule at 72,677.
[10] Petition at 65-66.
[11] Listing Rule at 72,685.
[12] Species Status Assessment Report for the Lesser Prairie-Chicken (*Tympanuchus pallidicinctus*) (March 2022).
[13] See sections 3.3 and 4.3 of the SSA.
[14] *Patterns in lek persistence and attendance by lesser prairie-chicken (Tympanuchus) near a wind energy facility in southern Kansas.* Wildlife Biology (2025: e01438).
[15] *Using multiscale graph theoretic methods to understand spatial patterns of decline: a case study with lesser prairie-chickens.* Dawsey et al. 2025. Landscape Ecology (40:187).

rather than localized development features drives LEPC persistence. This study appears to suggest that lek persistence is driven primarily by regional connectivity among core leks with declines concentrated in isolated peripheral networks, and appears to support maintaining or enhancing connectivity "backbones" in order to influence species viability rather than relying on broad disturbance buffers around infrastructure.

Together with the studies described in the Prior Comments, which found little evidence of LEPC displacement resulting from the presence of wind energy infrastructure, these newer studies indicate that previous LEPC threat assessments both oversimplified and overstated in a significant way the impact of wind turbines on LEPC populations.[16] Instead, the most current empirical data continue to show no measurable connection between simple turbine presence and demographic collapse. It is becoming increasingly clear that LEPC response to anthropogenic structures is highly contextual and is often less severe than the assumptions inherent in the modeled impact radii. Moreover, the more recent studies cited here support previous recommendations for the Service to prioritize a range-wide connectivity strategy rather than relying on generalized disturbance radii that lack empirical justification.[17]

II. Listing Factor E: Voluntary Conservation Efforts for LEPC are Robust, and Substantially Reduce Threats to the Species

ESA section 4 and Service policy require the agency to consider certain pre-listing conservation measures when making a decision on whether to list a given species. Specifically ESA section 4(b) requires the Service to take "into account those [conservation] efforts, if any, being made by any State . . . or political subdivision of a State" to protect species in making a listing decision.[18] Additionally, ESA section 4(b)(1) directs the Service to consider any "manmade factors" affecting a species' continued existence. Likewise, the Service's Policy for Evaluation of Conservation Efforts When Making Listing Decisions ("PECE Policy") acknowledges the agency's statutory obligation to consider formalized conservation efforts when making listing decisions.[19] The PECE Policy describes "formalized conservation efforts" as those that are "identified in a conservation agreement, conservation plan, management plan, or

[16] *See, e.g.*, Placement of Wind Energy Infrastructure Matters: A Quantitative Study Evaluating Response of Lesser Prairie Chicken to a Wind Energy Facility. Wind Wildlife Research Fund (Apr. 13, 2020); found at http://www.awwi.org; LeBeau, C., S. Howlin, A. Tredennick, and K. Kosiuch. 2020b. Grouse Behavioral Response to Wind Energy Turbines: A Quantitative Review of Survival, Habitat Selection, and Lek Attendance. Prepared for the National Wind Coordinating Collaborative, Washington, D.C. Prepared by Western EcoSystems Technology, Inc. Found at: https://awwi.org/wp-content/uploads/2020/11/NWCC-Grouse-and-Wind-Energy-Meta-Analysis-03_11_20.pdf; LeBeau, K. Smith, K. Kosciuch. 2023. Lesser prairie-chicken habitat selection and survival relative to a wind energy facility located in a fragmented landscape. Wildlife Biology 2023: e01091.

[17] EWAC also notes that these studies underscore that many areas that are identified as a category 3 or 4 by the Southern Great Plains Critical Habitat Mapping Tool ("CHAT") may not be central to long-term persistence of the species and calls into question the approach taken by the Service's Framework for Review of LEPC Voluntary Conservation Programs, which recommends project proponents who impact areas within CHAT category 3 or 4 offset those impacts by a ratio of 2:1 and 1.25:1, respectively.

[18] 16 U.S.C. § 1533(b)(1)(A).

[19] 68 Fed. Reg. 15,100 (Mar. 28, 2003).

similar document,"[20] and recognizes that formalized conservation actions can be undertaken by federal agencies, tribal governments, businesses, organizations, or individuals.

Very few species have benefited from pre-listing voluntary conservation to the degree enjoyed by the LEPC. As recognized in the SSA, significant conservation efforts have been undertaken by federal, state, and local governments throughout the LEPC's range through a variety of government-funded programs, Service-approved conservation approaches, and partnerships with the environmental and regulated communities. Millions of acres have been conserved or are being managed for the species' benefit. While EWAC does not endeavor here to recount every voluntary pre-listing (or post-listing) conservation action that has been taken for the benefit of the LEPC, we want to highlight the continued success of the Natural Resources Conservation Service's ("NRCS") Lesser Prairie-Chicken Initiative ("LCPI"). The purpose of the LCPI is to provide technical and financial assistance to ranchers to restore and conserve LEPC grassland habitat and improve the sustainability of associated grazing lands. According to the most recent LCPI Progress Report (2023), since the program's inception in 2010, nearly $50 million have been invested by NRCS to support increased health and productivity of the grasslands necessary to support LEPC.[21] Those monies have gone toward restoring and improving more than 1.9 million acres of grasslands across the range of the LEPC. According to the progress report, efforts have focused on addressing threats to the LEPC posed by degraded rangeland, invasive conifers and mesquite, cultivation of grazing lands, and lack of fire in grassland habitats. In 2023 alone, NRCS invested nearly $1 million to support conservation efforts covering nearly 35,000 acres of land within the LEPC's range.

In line with the ESA and Service policy, EWAC urges the Service to give full weight and consideration to every effort being undertaken by federal, state and local governments, conservation organizations, and the regulated community for the benefit of the LEPC. Many of these efforts were initiated and continue to be carried on for the express purpose of providing sufficient conservation for the LEPC such that listing the species is unnecessary. Failure to fully consider the benefit of these efforts when analyzing the degree to which identified threats have or are currently being ameliorated is likely to reduce substantially the circumstances in which state and local governments and the regulated community are willing to undertake meaningful voluntary pre-listing conservation measures in the future for the LEPC or other sensitive species.

III. Conclusion

EWAC appreciates the opportunity to provide information to support the Status Review. In undertaking the Status Review, EWAC encourages the Service to rely solely on the best scientific and commercial data available, as required by ESA section 4, and without reliance on the precautionary principle where such data are unavailable.[22] EWAC would welcome the opportunity to discuss these comments in greater detail with the Service.

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[20] *Id*. at 15,113.
[21] Lesser Prairie Chicken 2023 Progress Report (NRCS); available at: https://www.nrcs.usda.gov/programs-initiatives/lesser-prairie-chicken-initiative.
[22] *Maine Lobstermen's Association v. National Marine Fisheries Service*, 70 F. 4th 582 (D.C. Cir. 2023).

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Appendix A

Energy and Wildlife Action Coalition, *Comments Regarding the June 1, 2021 Notice of a Proposed Rule Listing Two Distinct Population Segments of the Lesser Prairie-Chicken under the Endangered Species Act and Proposed Issuance of a Section 4(d) Rule* (September 1, 2021)

September 1, 2021

Comments Regarding the June 1, 2021 Notice of a Proposed Rule Listing Two Distinct Population Segments of the Lesser Prairie-Chicken under the Endangered Species Act and Proposed Issuance of a Section 4(d) Rule

Submitted by:

Energy and Wildlife Action Coalition

Filed electronically to the attention of:
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Attn: FWS-R2-ES-2021-0015
U.S. Fish and Wildlife Service
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Docket No. FWS-R2-ES-2021-0015

The Energy and Wildlife Action Coalition ("EWAC")[1] submits these comments in response to the United States Fish and Wildlife Service's ("Service") June 1, 2021 notice of a proposed rule to list two distinct population segments ("DPS") of the lesser prairie-chicken ("Proposed Listing Rule") and to issue a proposed 4(d) rule ("Proposed 4(d) Rule") with respect to one of the DPSs (together, the "Proposed Rules").[2]

EWAC provides comments on the Proposed Rules based on the knowledge and experience of its membership. EWAC hopes these comments will be helpful to the Service as it considers whether and in what capacity to ultimately list the lesser prairie-chicken ("LEPC"), and how to formulate any 4(d) rule or rules. Our comments have been divided into three overarching segments, the first focusing on the Proposed Listing Rule, the second focused on the Proposed 4(d) Rule; and third providing input on the Service's continued use of the LEPC crucial habitat assessment tool ("CHAT").

Proposed Listing Rule

The scientific and commercial data available do not support the Service's assertions that the LEPC will avoid anthropogenic structures to the degree asserted in the Proposed Rules. Further, the Service has not adequately considered the significant conservation measures already in place for the LEPC. For these reasons, and others, EWAC encourages the Service to undertake additional analysis on whether either DPS warrants listing, and whether the Southern DPS may warrant listing as threatened rather than endangered.

1. Recent surveys conducted in the Shinnery Oak Prairie Region indicate a stable and increasing population of LEPC.

The Proposed Listing Rule appears to give too little weight to a recent study of the LEPC across its range.[3] The study, prepared by Western EcoSystems Technology for the Western Association of Fish and Wildlife Agencies ("WAFWA") indicates a stable and increasing population of LEPC, particularly in the Shinnery Oak Prairie Region—the purported Southern DPS—which the Service has proposed listing as endangered.[4] Additionally, the study concluded that "there was a statistically significant…annual rate of increase of the total [LEPC] population

[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. 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] 86 Fed. Reg. 29,432 (June 1, 2021).

[3] Range-Wide Population Size of the Lesser Prairie-Chicken 2012-2020; Western EcoSystems Technology, Inc. (October 12, 2020); *available at*: https://wafwa.org/wpdm-package/range-wide-population-size-of-the-lesser-prairie-chicken-2012-to-2020/.

[4] *Id*. at ii.

size from 2013 to 2020 with the average rate of increase being 3,237 per year (standard error = 461).[5] EWAC believes the results of the study do not support listing the proposed Southern DPS as endangered.

2. Available data do not indicate LEPC avoid anthropogenic structures to the degree contemplated by the Proposed Listing Rule.

In connection with the threats analysis associated with the Proposed Listing Rule, the Service specifically examined the impacts of LEPC avoidance as a result of development of wind energy infrastructure and transmission lines. In the Service's geospatial analysis, the agency used an impact radius of 1,800 meters to calculate the indirect effects of wind turbines and an impact distance of 700 meters for indirect effects caused by transmission lines.[6] These distances are described in greater detail in the species status assessment ("SSA") and appear to be based, to a large degree, on studies involving other grouse species. The Service has concluded that habitat becomes unsuitable for the species within these impact distances. Neither the Proposed Listing Rules nor the SSA indicate precisely how the impact distances for anthropogenic structures were derived, or how these distances are tied directly to death or injury to LEPCs. Moreover, and as acknowledged in the recently published Renewable (Wind and Solar) Energy, Power Line, and Communication Tower Habitat Conservation Plan for the Lesser Prairie-Chicken; Colorado, Kansas, New Mexico, Oklahoma and Texas ("Renewable Energy HCP"), there is "limited empirical data on the effects of wind, solar energy, and power line development on [the] LEPC…"[7] These impact distances are overly broad and are not supported by sufficient scientific information on which to base a listing decision. We provide additional information below.

a. Wind energy impact distances are unreasonable.

The 1,800-meter impact distance adopted by the Service with respect to wind turbines is unreasonable and not supported by the best available scientific and commercial information. EWAC is unaware of any LEPC-specific data supporting the adoption of this impact distance.

Rather, recent studies indicate that the species does not appear to exhibit avoidance behavior to the degree assumed by the Service in the Proposed Listing Rule. An April 2020 study prepared on behalf of the American Wind Wildlife Institute ("AWWI") tracked 43 male and 32 female LEPCs over a three-year period following development of a wind energy facility. That study found "little evidence to suggest that [wind energy infrastructure] was displacing LEPC during the nesting period…" and that there was "no evidence that females and males were being displaced by the [wind energy infrastructure]…"[8] A 2020 technical report by LeBeau et al. covering similar grouse species made findings consistent with the AWWI report.[9] Multiple other

[5] *Id*. at 22.
[6] 86 Fed. Reg. at 29,447.
[7] Renewable Energy HCP at 30; *found at:* https://www.fws.gov/southwest/es/ArlingtonTexas/pdf/FR00004240%20LEPC%20Renewables%20HCP_12.02.2020_508%20compliant%20v.3_mcd.pdf.
[8] Placement of Wind Energy Infrastructure Matters: A Quantitative Study Evaluating Response of Lesser-Prairie Chicken to a Wind Energy Facility. Wind Wildlife Research Fund (April 13, 2020); found at: http://www.awwi.org.
[9] LeBeau, C., S. Howlin, A. Tredennick, and K. Kosciuch. 2020b. Grouse Behavioral Response to Wind Energy Turbines: A Quantitative Review of Survival, Habitat Selection, and Lek Attendance. Prepared for the National Wind

studies covering grouse species similar to LEPC have variously found that the presence of wind turbines do not affect nest site preference or selection, brood site preference, brood survival, or adult female home range size.[10] EWAC understands that publication of additional, relevant studies is imminent and should be considered carefully by the Service in connection with the Proposed Rules even if the studies are published after the close of the public comment period. The information provided in the studies will be critically relevant to the Service's ultimate LEPC listing decision and, in particular, the analysis of threats to the species and treatment of wind energy infrastructure in the final rule. For this reason, EWAC reserves the right to submit the studies to the Service, once available, for consideration in the listing decision.

b. Impact distance for transmission lines is overly broad.

Similar to our concerns above, the 700-meter impact distance that has been adopted by the Service with respect to electric transmission lines is overbroad and unsupported by the best available science. Studies of greater sage grouse utilizing radiotelemetry and banding indicate that the presence (or distance from) to a 230-kV transmission line had no effect on survival of that species,[11] and a 2019 study specific to the LEPC recommended a buffer of 550 meters.[12]

Coordinating Collaborative, Washington, D.C. Prepared by Western EcoSystems Technology, Inc. (WEST). *Found at:* https://awwi.org/wp-content/uploads/2020/11/NWCC-Grouse-and-Wind-Energy-Meta-Analysis-03_11_20.pdf

[10] *See, e.g.*, McNew, L.B., L.M. Hunt, A.J. Gregory, S.M. Wisely, and B.K. Sandercock. 2014. Effects of wind energy development on nesting ecology of greater prairie-chickens in fragmented grasslands. Conservation Biology 28: 1089-1099; Harrison, J. O., M. B. Brown, L. A. Powell, W. H. Schacht, and J. A. Smith. 2017. Nest site selection and nest survival of greater prairie-chickens near a wind energy facility. The Condor 119:659–672; LeBeau, C. W., G. D. Johnson, M. J. Holloran, J. L. Beck, R. M. Nielson, M. E. Kauffman, E. J. Rodemaker, and T. L. McDonald. 2017a. Greater Sage-Grouse Habitat Selection, Survival, and Wind Energy Infrastructure. Journal of Wildlife Management 81(4): 690-711. doi: 10.1002/jwmg.21231; Proett, M., S. B. Roberts, J. S. Horne, D. N. Koons, and T. A. Messmer. 2019. Columbian sharp-tailed grouse nesting ecology: wind energy and habitat. Journal of Wildlife Management 83:1214-1225; Raynor, E. J., J. O. Harrison, C. E. Whalen, J. A. Smith, W. H. Schacht, A. J. Tyre, J. F. Benson, M. B. Brown, and L. A. Powell. 2019. Anthropogenic noise does not surpass land cover in explaining habitat selection of greater prairie-chicken (Tympanuchus cupido). The Condor 121 (4):1–15; Winder, V.L., L.B. McNew, A.J. Gregory, L.M. Hunt, S.M. Wisely, and B.K. Sandercock. 2014a. Effects of wind energy development on the survival of greater prairie-chickens. Journal of Applied Ecology 51: 395-405; Smith, J. A., M. B. Brown, J. O. Harrison, and L. A. Powell. 2017. Predation risk: a potential mechanism for effects of a wind energy facility on greater prairie-chicken survival. Ecosphere 8 (6): e01835; Winder, V. L., L. B. McNew, A. J. Gregory, L. M. Hunt, S. M. Wisely, and B. K. Sandercock. 2014b. Space Use by Female Greater Prairie-Chickens in Response to Wind Energy Development. Ecosphere 5(1): 1-17. doi: 10.1890/ES13-00206.1; Smith, J. A., C.E. Whalen, M. Bomberger Brown, and L.A. Powell. 2016. Indirect Effects of an Existing Wind Energy Facility on Lekking Behavior of Greater Prairie-Chickens. Ethology 122: 419–429. doi: 10.1111/eth.12489; LeBeau, C. W., J. L. Beck, G. D. Johnson, R. M. Nielson, M. J. Holloran, K. G. Gerow, and T. L. McDonald. 2017b. Greater Sage-Grouse Male Lek Counts Relative to a Wind Energy Development. Wildlife Society Bulletin 41(1): 17-26. doi: 10.1002/wsb.725; Van Pelt, W.E., S. Kyle, J. Pitman, D. Klute, G. Beauprez, D. Schoeling, A. Janus, and J. Haufler. 2013. The lesser prairie-chicken range-wide conservation plan. Western Association of Fish and Wildlife Agencies (WAFWA). Cheyenne, Wyoming. Table 7, page 95. Available at: https://wafwa.org/wpdm-package/the-lesser-prairie-chicken-range-wide-conservation-plan/.

[11] Nonne, D., E. Blomberg, and J. Sedinger. 2013. Dynamics of greater sage-grouse (Centrocercus urophasianus) populations in response to transmission lines in central Nevada. Progress report: Year 10. Department of Natural Resources and Environmental Sciences, University of Nevada, Reno, Nevada.

[12] Plumb, R. T., J. M. Lautenbach, S. G. Robinson, D. A. Haukos, V. L. Winder, C. A. Hagen, D. S. Sullins, J. C. Pitman, and D. K. Dahlgren. 2019. Lesser prairie-chicken space use in relation to anthropogenic structures. Journal of Wildlife Management 83:216–230.

c. The Service has no basis to ascribe LEPC impacts to distribution lines.

In the preamble to the Proposed Rules, the Service indicated that "distribution lines are another important source of habitat loss and fragmentation" but stated "no data were available to quantify the potential independent impacts of distribution lines on habitat loss and fragmentation."[13] EWAC recommends the Service remove distribution lines as a cause of habitat loss and fragmentation until it has data to support that assumption.

d. The Science is lacking with respect to wind turbine noise and impacts on LEPC.

Because the study of noise on LEPCs and, particularly, noise impacts from wind turbines on LEPCs, is in its infancy, EWAC requests the Service explicitly recognize that there is currently no clear link between noise generated by wind turbines and negative effects on the LEPC. Indeed, in the Service's preamble to the Proposed Rules, the Service recognizes that the "study of wind energy development noise on grouse is almost unprecedented"[14] and that "[n]o data are available to quantify the areas of [LEPC] habitat rangewide that have been affected by noise."[15] The SSA also addresses the issue of noise impacts caused by wind turbines. The SSA notes the work of Raynor et al. (2019) which concluded that "female greater prairie-chickens…showed no response in space use based on wind turbine noise or distance to wind turbines."[16] Another study, Whalen et al. (2019) apparently reported "differences in background noise and signal-to-noise ratio of boom chorus of leks in relation to distance to turbine," but cautioned further investigations were needed to determine the underlying cause and response.[17] Other studies cited by the Service in its SSA called the precise degree of noise impacts on the LEPC "uncertain."[18]

Nevertheless, the Service predicts that noise:

> could cause lek attendance to decline, disrupt courtship and breeding activity, and reduce reproductive success. Noise can also cause abandonment of otherwise usable habitat and, as a result, contribute to habitat loss and degradation.[19]

Additional study is warranted regarding the impacts of noise on the LEPC and the impacts of wind turbine noise specifically. Until additional studies are complete, EWAC cautions the Service on making assumptions about indirect LEPC habitat loss or impacts as a result of noise and recommends the Service not base a listing decision to any large degree on the existence of noise as a result of wind turbine operations.

[13] 86 Fed. Reg. at 29,465.
[14] *Id*. at 29,451.
[15] *Id*.
[16] SSA at 32.
[17] *Id*.
[18] *Id*. at 41.
[19] 86 Fed. Reg. at 29,451.

3. Significant conservation is in place for the LEPC across its range and Service is required to give due consideration of the same.

Even if one were to assume that the LEPC will avoid anthropogenic structures at the distances contemplated in the Proposed Rules, EWAC notes that the LEPC enjoys significant on-the-ground conservation across its range. Indeed, few non-listed species have received the degree of conservation and efforts aimed at recovery that are enjoyed by the LEPC. The SSA provides an extensive summary of conservation efforts made by federal, state, and local governments throughout the LEPC range through a variety of government-funded programs, Service-approved conservation approaches, and partnerships with the environmental and regulated community. These efforts have resulted in hundreds of thousands (if not millions) of acres conserved for the benefit of the LEPC. As discussed further below, the reluctance of the Service to give serious weight to conservation measures voluntarily taken by the regulated community is a disincentive for future efforts toward species conservation. While the Service provided limited discussion of existing LEPC conservation programs, it is clear from the Proposed Rules that the Service failed to consider fully the benefits those programs continue to provide the LEPC. EWAC notes that it is neither lawful nor advisable for the Service to give short shrift to conservation solutions implemented by the regulated community. Many millions of dollars have been poured into LEPC conservation across the species range and resulted in significant management and preservation of habitat. A significant percentage of those dollars have come from the pockets of tax and rate payers within affected states. Those efforts should be duly recognized.

Section 4 of the ESA and Service policy require the agency to consider certain pre-listing conservation measures when making a decision on whether to list a given species. The substantial conservation measures described in the Service's SSA and preamble to the Proposed Rules should be given due weight in the agency's listing decision.

Section 4(b) of the ESA requires the Service to take "into account those [conservation] efforts, if any, being made by any State…, or political subdivision of a State" to protect species in making a listing decision.[20] Additionally, ESA section 4(a)(1) directs the Service to consider any "manmade factors" affecting a species' continued existence.

In 2003, the Service and the National Marine Fisheries Service announced the Policy for Evaluation of Conservation Efforts When Making Listing Decisions ("PECE Policy"),[21] in which the agencies acknowledged their statutory obligation to consider formalized conservation efforts.[22] "Formalized conservation efforts" are "conservation efforts identified in a conservation agreement, conservation plan, management plan, or similar document."[23] The PECE Policy acknowledges that the ESA obligates the agencies to consider formalized conservation actions made by "State and…Federal agencies, Tribal governments, businesses, organizations, or individuals that positively affect the species' status." According to the PECE Policy, the Service will also consider in a listing decision conservation efforts that have not yet been implemented or demonstrated their

[20] 16 U.S.C. 1533(b)(1)(A).
[21] 68 Fed. Reg. 15,100 (March 28, 2003).
[22] *Id*. at 15,113.
[23] *Id.*

effectiveness at the time the decision is made, so long as the Service evaluates the certainty that the effort will be implemented and effective.[24]

In 2015, the U.S. District Court for the Western District of Texas vacated the Service's 2014 rule listing the LEPC ("2014 Listing Decision") as a threatened species on the basis that the Service's failure to properly apply the PECE Policy to the 2014 Listing Decision was a material error and therefore rendered the decision arbitrary and capricious. Importantly, the court explained that the Service had made a "critical" error in evaluating WAFWA's Lesser Prairie-chicken Range-wide Conservation Plan ("RWP") under the PECE Policy by assuming that "if a listing of the [LEPC] is precluded" because of the RWP, "most of the incentive for industry to enroll in the [RWP] would be removed…." The court further explained that the Service's "conclusory assumption was arbitrary and capricious" because the Service provided "no substantive basis…legitimate or otherwise" and, moreover, the assumption conflicted with the Service's stated position in the PECE Policy that "the PECE criteria will actually increase the voluntary participation in conservation agreements by increasing the likelihood that parties' voluntary efforts and commitments that have yet to be implemented or have yet to demonstrate results" and, therefore, will "play a role in a listing decision."

EWAC is not aware that any other non-listed species is subject to the degree of on-the-ground conservation enjoyed by the LEPC. Nevertheless, the Service—contrary to its existing policies—includes minimal discussion in the Proposed Listing Rule of this range-wide, substantial, and voluntary conservation. The preamble to the Proposed Rules provides insight that such efforts are not worthwhile for consideration because they are "targeted toward voluntary, incentive-based actions in cooperation with private landowners"[25] and that the "level of future voluntary participation in these programs can be highly variable depending on available funding, opportunities for other revenue sources, and many other circumstances."[26] The Service's dismissal of such voluntary conservation efforts violates the ESA and the agency's own policies and guidance. In accordance with its obligations under the ESA and existing policies, the Service must give careful consideration to these conservation measures and analyze whether listing either DPS is, in fact, necessary given the existing efforts of states, state agencies, and others. EWAC would caution the Service from repeating the mistake made in the 2014 Listing Decision, and not discount the impact of the existing substantial conservation on the status of the LEPC.

4. Proposed Rules may have the unintended effect of chilling future efforts toward voluntary conservation

Should the Service decide to move forward with an endangered listing or threatened listing with broad take prohibitions under ESA section 4(d), it could have a chilling effect on future voluntary conservation efforts. As the Service is aware, many of the conservation mechanisms described briefly above (and in greater detail in the SSA and Proposed Rules), were initiated for the very purpose of providing sufficient conservation to keep the LEPC from being listed at all. Should the Service decide to list the LEPC despite the extensive conservation efforts in place for the species, it would signal to the regulated community that these efforts are futile and are not worth the time and expense. Moreover, it could signal to states and local governments that

[24] *Id*. at 15,114.
[25] 86 Fed. Reg. at 29,454.
[26] *Id*. at 26,429.

expending taxpayer resources on such efforts provides insufficient benefit to warrant the measures. Finally, if the regulated community believes that providing for conservation of unlisted species is unlikely to keep species from being listed, fewer funds could flow into conservation organizations from project proponents for the purpose of acquiring and managing conservation lands.

In enacting the ESA, Congress established conservation as the very cornerstone of the statute—to "provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved"—and declared that states and other interested parties should be encouraged by federal assistance and other incentives to "develop and maintain conservation programs."[27] The Service has established a policy concerning voluntary "prelisting conservation actions" taken for species prior to their listing under the ESA ("VPCA Policy").[28] The purpose of the VPCA Policy is to incentivize the public to implement conservation actions for unlisted species. The VPCA Policy provides landowners, governmental entities, and other entities incentives to undertake voluntary conservation actions for unlisted species by allowing benefits the species derive from such voluntary prelisting conservation actions to be used – either by the person undertaking the activity or a third party – at a later time to mitigate for detrimental action taken after the species is listed. Under the VPCA Policy, the Service will treat a qualifying voluntary prelisting conservation action as either (1) a measure to minimize and mitigate the impact of a taking pursuant to ESA section 10(a)(1)(B), or (2) an intended compensatory measure of a proposed Federal agency action subject to the consultation requirements of ESA section 7(a)(2) or 7(a)(3).[29] The VPCA Policy identifies a number of examples of what constitutes a "voluntary prelisting conservation action," including: acquisition of land or water interests for conservation purposes; restoration, preservation, or commitment to continue management of habitat for a species; and reintroduction or augmentation of a species.[30]

EWAC recommends the Service give serious consideration to the impact a listing decision could have on future voluntary conservation.

5. In the event the Service does list the LEPC, the Service should carefully craft take and no-take guidance in any final listing rule to avoid generalized assumptions based on limited data.

In the Proposed Rules, the Service indicates that actions causing LEPC avoidance of an area during one or more seasonal periods may potentially violate the ESA (including construction of vertical structures supporting energy development).[31] Additionally, the Service indicates in the preamble to the Proposed Rules that in the case of petroleum and wind energy production, the extent of the impact from the threat "is not just the original site, but also the roads, powerlines, and other infrastructure associated with the sites, and noise…that may interfere with communication between male and female birds."[32]

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[27] 16 U.S.C. 1531.
[28] Policy Regarding Voluntary Prelisting Conservation Actions, Appendix 1 to 735 FW 1, available at: https://www.fws.gov/policy/a1735fw1.pdf. .
[29] *Id.* at 31.
[30] *Id.* at 32.
[31] 86 Fed. Reg. at 29,476.
[32] *Id*. at 29,471.

As noted above, there currently exists limited empirical data on the effects of wind and solar energy and power line development and operations on the LEPC. For habitat modification to rise to the level of take of listed species, there must be actual death or injury to a member of a listed species and there must be a sufficient causal link between the underlying activity and such death of injury.[33] While habitat modification can rise to the level of take of a listed species, Service policy emphasizes that any such habitat modification must be "significant," must "significantly impair" essential behavioral patterns such as breeding, feeding, and sheltering, and must be "likely to result in the actual killing or injury of wildlife."[34] Federal courts have also held that while a species may be indirectly harmed by habitat modification, habitat modification on its own does not constitute harm unless it "actually kills or injures wildlife."[35] The U.S. Court of Appeals for the Ninth Circuit has held that the "mere potential for harm…is insufficient."[36] LEPC avoidance of habitat to the extent posited by the Service has not been demonstrably tied to the actual death or injury to one or more LEPCs.

Further, the Proposed Rule posits that noise on the landscape, including noise caused by wind turbines, may result in behavioral avoidance and thus is a source of habitat loss or degradation. However, the Proposed Rule states plainly that the Service does not have sufficient data to quantify such effects. Specifically, the Service admits "[n]o data are available to quantify areas of [LEPC] habitat rangewide that have been affected by noise…" and yet the agency indicates it nevertheless has "inherently accounted" for "all or some" of the LEPC's purported response to noise produced by anthropogenic features. Noise and other human activity should not automatically be considered as causing take unless they demonstrably result in take as defined by the ESA and its implementing regulations.

To the degree that the Service ultimately lists one or both LEPC DPSs, EWAC recommends the Service carefully craft its take and no-take guidance in any final rule to be consistent with the best available science and applicable case law.

Proposed 4(d) Rule

1. EWAC generally supports use of 4(d) rules.

EWAC supports the agency's use of species-specific 4(d) rules to identify what activities would be subject to the "take" prohibition of ESA section 9 relative to threatened species. Use of species-specific 4(d) rules better reflects the distinction Congress made when it enacted the ESA and applied the section 9 prohibitions on take only to species listed as endangered. Use of species-specific 4(d) rules also conserves the limited resources of the Service and the public by reducing the instances in which project proponents are obliged to seek take authorization and, therefore,

[33] *See, e.g., Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 708-711 (Justice O'Connor concurring); *Aransas Project v. Shaw*, 756 F.3d 801 (5th Cir. 2014); *Defenders of Wildlife v. Bernal*, 204 F.3d 920 (9th Cir. 1999); *Arizona Cattle Growers' Association v. U.S. Fish and Wildlife Service*, 273 F.3d 1229 (9th Cir. 2001).

[34] Guidance on trigger for an incidental take permit under section 10(a)(1)(B) of the Endangered Species Act where potentially occupied habitat is being modified. U.S. Fish and Wildlife Service (April 26, 2018). *Available at*: https://www.fws.gov/northflorida/Guidance-Docs/067974-Guidance-on-When-to-Seek-an-Incidental-Take-Permit-Signed.pdf.

[35] *Defenders of Wildlife v. Bernal*, 204 F.3d 920 (9th Cir. 1999).

[36] *Arizona Cattle Growers' Association v. U.S. Fish and Wildlife Service*, 273 F.3d 1229 (9th Cir. 2001).

reduces the Service's workload. This, in turn, allows the Service to give more focused attention and devote its limited resources to other important matters, such as species of higher conservation need, completing Service review and processing of incidental take permit applications and engaging in formal and informal consultations under ESA section 7, completing species status reviews and responding to petitions to list and delist species, and to designate or remove critical habitat.

If the Service determines listing one or both DPSs of the LEPC as threatened is supported by the best available scientific and commercial information, the use of a 4(d) rule for the species would be biologically and legally appropriate. Given the communities and regions that would be affected by a listing of the LEPC, well-tailored 4(d) rules would assist the Biden Administration in meeting its goals to reduce greenhouse gas emissions and bolster resilience to the impacts of climate change[37] and deliver much needed improvement of this nation's electric and communications infrastructure,[38] particularly to communities who are historically underserved.[39]

2. The Service should expand the scope of the Proposed 4(d) Rule.

As stated above, EWAC does not agree that it is a given that LEPC will experience death or injury as a result of avoidance of anthropogenic structures and certainly not to the magnitude suggested by the Service. Currently available scientific and commercial information does not indicate that LEPC will incur death or injury to the degree the Service has assumed in the SSA and Proposed Rules. However, should the Service continue forward with its position regarding LEPC take, EWAC provides the following suggestions for improving the Proposed 4(d) Rule for the Northern DPS. EWAC recommends that if the Service ultimately lists the Southern DPS as threatened rather than endangered, the same exemptions should apply.

a. Any final 4(d) rule should exempt from take activities enrolled in the WAFWA range-wide plan or other Service-approved conservation programs.

Projects that are enrolled in WAFWA's RWP[40] or have purchased conservation credits or provided LEPC conservation through other Service-approved conservation banks or similar

[37] *See* Executive Order 13990: Protecting Health and the Environment and Restoring Science to Tackle the Climate Crisis, 86 Fed. Reg. 7037 (Jan. 25, 2021). Should the Service generally adopt the impact distances set forth in this HCP for all renewable energy and electric transmission projects within the range of the LEPC, it could significantly impede development of renewable energy and the transmission necessary to deliver it, and would be at cross-purposes with the Biden Administration's goal of creating a carbon pollution-free power sector by 2035. 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; found 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/. Recent studies have indicated that to reach this goal, there would need to be a two to three-fold increase of current installed capacity.

[38] *See* Fact Sheet: The American Jobs Plan, found at: https://www.whitehouse.gov/briefing-room/statements-releases/2021/03/31/fact-sheet-the-american-jobs-plan/.

[39] EWAC notes the Biden Administration's focus on advancing environmental justice when addressing the climate crisis. *See* Executive Order 13990.

[40] The RWP is a voluntary program administered by state wildlife agencies within the LEPC's range through WAFWA and identifies a two-pronged approach to LEPC conservation: (1) coordinated, incentive-based landowner programs;

mechanisms should be exempted from take in any ultimate ESA section 4(d) rule. As the Service is aware, many companies have expended significant resources to provide for LEPC conservation through participation in the RWP. As noted above, giving "credit" to companies who have engaged in voluntary conservation provides incentives to the regulated community to undertake creative solutions to species conservation pre-listing. To ignore or discount such efforts would likely stifle future formulation of the same.

b. Any final 4(d) rule should exempt routine and emergency maintenance of existing infrastructure from the take prohibition.

EWAC requests the Service explicitly exempt from the take prohibition routine and emergency maintenance of existing infrastructure within the landscape and clarify that maintenance of existing infrastructure includes rebuilding existing transmission lines and other infrastructure within existing rights-of-way or project footprints. This exemption is reasonable and would not result in additional impacts to the LEPC, as any LEPC habitat associated with such infrastructure would, according to the assumptions set forth in the Proposed Rules already have experienced impacts.

c. Any final4(d) rule should expressly exempt existing structures on the landscape from the take prohibition.

EWAC recommends an express exemption for projects existing on the landscape at the time a final 4(d) rule is effective. The Proposed Rules identify LEPC avoidance of vertical structures involved in wind energy production as posing a threat to the LEPC.[41] The Proposed Rules also indicate that noise caused by roads, power lines, and other infrastructure may "interfere" with LEPC communication.[42] While there has, to date, been no explicit statement that structures existing on the landscape will be charged with take or otherwise be required to mitigate for LEPC impacts, the nature of the alleged impacts set forth in the Proposed Rules (e.g., that the LEPC will avoid otherwise suitable habitat because of the presence of vertical structures) could cause some Service personnel or third parties to attempt to enforce the ESA against projects that existed on the landscape long before the LEPC was listed. Given the lack of demonstrable causal connection between the existence of vertical structures and actual death or injury to LEPCs, EWAC believes such an exemption would be appropriate.

d. Any final 4(d) rule should expressly exempt from the take prohibition new activities on lands that have been previously impacted.

In the preamble to the Proposed Rules, the Service explains that habitat loss affecting the LEPC can be caused by direct or indirect impacts. The Service indicates indirect habitat loss occurs "when the vegetation still exists, but the areas adjacent to a disturbance (the disturbance can be

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and (2) implementation of a mitigation framework aimed at reducing threats to LEPC and providing for off-site conservation. The RWP was adopted specifically to "preclude the need to list the [LEPC] under the [ESA]." RWP at 1. *Found at*: https://wafwa.org/wpdm-package/the-lesser-prairie-chicken-range-wide-conservation-plan/. According to the Service's Proposed Rules, as of August 1, 2020, WAFWA had placed more than 128,000 aces under conservation contracts through the RWP. 86 Fed. Reg. at 29,454.

[41] 86 Fed. Reg. at 29,471.

[42] *Id*.

natural or manmade) are no longer used by the [LEPC], are used at reduced rates, or the disturbance negatively alters demographic rates or behavior in the affected area."[43] The Service further explains that "the effects of fragmentation often compound effects of habitat loss and produce even greater population declines than habitat loss."[44]

Placement of new infrastructure within or adjacent to existing cleared or otherwise impacted areas should be exempted from take under any final 4(d) rule for two reasons. First, based on the language in the preamble to the Proposed Rules, the Service considers these areas already impacted (and, ostensibly, not critically important to LEPC conservation, as demonstrated by the Service's acceptance and reliance on the CHAT approach, which has dismissed areas around existing infrastructure as having been already impacted). Second, exempting from the take prohibitions activities within or adjacent to already impacted areas would incentivize project proponents to limit the effects of fragmentation by not creating new impact areas. Any such exemption should cover linear projects (e.g., electric transmission or distribution lines constructed within existing rights-of-way or through existing, active agricultural lands) as well as non-linear projects (e.g., infrastructure constructed within previously cleared croplands).

"Impacted areas" should not be limited to those containing man-made structures, but also areas impacted by invasive woody vegetation such as mesquite and eastern red cedar, specifically identified in the Proposed Rule as contributing to habitat degradation, loss, and fragmentation.[45] In addition to the vegetation itself, buffer areas around such vegetation should be expressly exempt in any ultimate 4(d) rule.

e. Any final 4(d) rule should explicitly exclude from the take prohibition new activities that occur directly adjacent to existing rights-of-way.

Because the Proposed Rule assumes that LEPCs will avoid areas within certain distances from various anthropogenic structures, EWAC recommends that any ultimate 4(d) rule exempt from take construction, operation, and maintenance of new structures (e.g., transmission or distribution lines) that occur immediately adjacent to existing anthropogenic structures and within the impact distances assumed for those structures. Such areas would, according to the assumptions of the Proposed Rule, already be impacted and not ideal for LEPC habitation.

f. Any final 4(d) rule should explicitly exclude from the take prohibition projects that are under construction at the time a final rule is effective.

EWAC recommends that wind, solar, and electric transmission projects that have broken ground as of the effective date of any final LEPC listing rule should not be subject to the take prohibitions set forth in a final 4(d) rule.

Where projects are being constructed in potential LEPC habitat, it is possible those project proponents would be forced to choose between stopping construction to apply for an incidental take permit under ESA section 10 or risking enforcement under the ESA. As the Service is aware,

[43] *Id*. at 29,445.
[44] *Id*.
[45] *See, e.g., id*. at 29,444.

obtaining an individual incidental take permit often takes years and many activities cannot occur while a permit application is pending.[46] Were these projects ground to a halt, not only would project proponents incur significant costs to de-mobilize, it could severely disrupt the nation's supply of clean, renewable energy, including delivery of safe, reliable, and affordable power to rural communities and those that have historically been underserved. Given the Administration's goal of reducing greenhouse gas emissions and guard against the impacts of climate change,[47] this result would be extremely disruptive.

g. Any final 4(d) rule should exempt from the take prohibition projects not yet under construction, but in late-stage planning.

Planning for construction of new wind and solar energy generation and electric transmission and distribution facilities is a multi-year endeavor involving complex legal, financial, and regulatory processes and considerations. Significant economic resources are invested during the project planning phase. Because project construction is contracted years in advance of ground-breaking, projects cannot at this late-stage revisit project siting choices or re-initiate permitting processes. Delayed timeline and unforeseen costs as a result of new species listings could cause much-needed clean energy generation and transmission to be commercially infeasible.

Like projects under construction at the time of a final listing, projects for which planning has gotten to a late stage—for example, those for which most or all of the necessary regulatory approvals have been obtained—would be particularly hard hit if there were no exemption from take. To the degree these projects would be constructed within areas considered to be habitat for the LEPC, the project proponent would either be forced to delay construction in order to obtain incidental take authorization, or to move the planned placement of infrastructure outside of potential habitat areas where possible. Moving infrastructure would, for many projects, essentially require starting the planning process over from scratch, causing significant financial burden and potential violation of existing contracts for the project proponent. Under either scenario, generation and delivery of electricity would be delayed likely by years.

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[46] Even if the Service approves the recently announced Renewable (Wind and Solar) Energy, Power Line, and Communication Tower Habitat Conservation Plan for the Lesser Prairie-chicken (86 Fed. Reg. 19,634 [April 14, 2021) ("Renewable Energy HCP"), which would provide a more expedient mechanism for obtaining incidental take authorization, as demonstrated by the financial modeling in the examples provided in EWAC's formal public comments on the same, the cost of participating in that plan would be prohibitively expensive. For the Service's reference, EWAC attaches to this letter as Exhibit B comments we filed in connection with the Service's review of the Renewable Energy HCP. As set forth with greater detail in section II.C of those comments, the cost for a 30,781-acre, 200MW wind energy project situated entirely in CHAT 4 to obtain take authorization under that plan would be $96 million, or $7.6 million per turbine. The cost of placing a turbine in CHAT 2 would be $14.1 million. EWAC has estimated that mitigation costs associated with electric transmission lines could double the per-mile cost of construction even if one were to assume that 66 percent of potential habitat identified by an initial desktop analysis is not, in fact, suitable LEPC habitat. Project proponents cannot bear such costs and continue to generate and deliver affordable and reliable energy.

[47] *See* Executive Order 13990: Protecting Health and the Environment and Restoring Science to Tackle the Climate Crisis, 86 Fed. Reg. 7037 (Jan. 25, 2021). See also: 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; found at: https://www.whitehouse.gov/briefingroom/statements-releases/2021/04/22/fact-sheet-president-biden-sets-2030-greenhouse-gas-pollution-reductiontarget-aimed-at-creating-good-paying-union-jobs-and-securing-u-s-leadership-on-clean-energy-technologies. Recent studies have indicated that to reach this goal, there would need to be a two to three-fold increase of current installed capacity.

For these reasons, EWAC requests the Service exempt from the take prohibitions late-stage projects that are not under construction on the effective date of a listing, but are so far along in the development process that adjusting project footprints or adjusting project financing so that funding could be provided for ESA permitting would be impractical.

In 2017, and in the context of new permitting procedures under the Bald and Golden Eagle Protection Act ("BGEPA"), the Service recognized that strict compliance with permitting regulations would not be possible for some not-yet-operational projects because of construction schedules and/or contractual obligations[48] and explained how the Service would process BGEPA permits in those cases. While the ESA and BGEPA are, of course, separate statutes with separate legal obligations, precedent exists for the Service to consider and come up with creative solutions for the agency's administration of permitting and enforcement for projects that would face serious negative consequences as a result of new regulatory regimes.

h. Any final 4(d) rule should exempt from the take prohibition construction and operation of distribution lines.

EWAC recommends construction and operation of distribution lines be exempted from the take prohibition under ESA section 4(d), given the lack of data indicating distribution lines cause take.

i. Any final 4(d) rule should exempt from the take prohibition activities conducted in habitat after surveys demonstrate LEPC absence.

The Proposed 4(d) Rule does not contemplate that project proponents would have the ability to move forward with construction in areas of suitable, but unoccupied LEPC habitat. As mentioned above, for habitat modification to constitute take, there must be actual death or injury to a member of a listed species and there must be a sufficient causal link between the underlying activity and such death of injury. Modification of suitable or potential habitat, alone, is not take. Rather, Service regulations indicate that in order for habitat modification to result in incidental take of a listed species, the modification must be significant and must result in actual death or injury to a member of the listed species.[49] Service guidance further explains that habitat modification must be significant, must significantly impair an essential behavioral pattern, and that impairment must be likely to result in the "actual killing or injury of [listed] wildlife."[50]

EWAC suggests that where preconstruction surveys document a lack of LEPC, alteration of otherwise suitable habitat within those areas would not be considered take under the ultimate 4(d) rule.

[48] Memorandum from Assistant Director for Migratory Birds titled Pre-construction Eagle Survey Waivers under Certain Exceptional Circumstances for Wind Energy Projects (Dec. 18, 2017); found at: https://www.fws.gov/policy/m0402.pdf.
[49] 50 C.F.R. 17.3.
[50] 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 (April 26, 2018); found at: https://www.fws.gov/endangered/esa-library/pdf/Guidance-on-When-to-Seek-an-Incidental-Take-Permit.pdf.

3. Without revisions, the Proposed 4(d) Rule would disproportionately affect low income areas.

Many communities within the range of the LEPC are low income, with some counties persistently at or below the poverty line. Of the 86 counties that appear to include some portion of the LEPC range, over half (52.3%) of the counties have populations larger populations living at or below the federal poverty line than the general U.S. population. Eighty-five percent of the counties (73) have low income populations that exceed the general U.S. population considered as low income. In addition, six counties are classified as persistent poverty counties—those that have had poverty rates of 20 % or greater for at least 30 years.[51] If the Proposed Rules are adopted without change and no changes are made to how the Service assesses LEPC impacts or mitigation, development of clean and affordable energy, and efficient and affordable delivery of that energy, could be significantly impeded. This, in turn, would reduce the number of construction-related jobs in affected communities and would limit the degree to which these communities would benefit from cleaner energy. These results would be directly contrary to the stated goals of the Administration and, in particular, Executive Order 13990, Protecting Health and the Environment and Restoring Science to Tackle the Climate Crisis.[52] Executive Order 13990 states that it is the Administration's policy to "…create well-paying union jobs and more opportunities for women and people of color in hard-hit communities, including rural communities, while reducing methane emissions, oil and brine leaks, and other environmental harms from tens of thousands of former mining and well sites." The Executive Order further explains that "[a]s the Nation shifts to a clean energy economy, Federal leadership is essential to foster economic revitalization of and investment in these communities."

Comments on the Service's Crucial Habitat Assessment Tool

Many of the Service's positions with respect to the LEPC stem from the Service's continued use of the CHAT in the context of assessing impacts to the LEPC.

The LEPC-specific CHAT was developed by Oklahoma Department of Wildlife Conservation, Kansas Department of Wildlife, Parks, and Tourism, and LEPC Interstate Working Group in connection with the 2013 RWP. The RWP describes the CHAT as a "spatial model put together to designate and prioritize areas for [LEPC] conservation activities and industry development."[53] The CHAT is used to "encourage development activities to occur outside of high priority areas" and to identify "priority habitat, including connecting corridors that can be used in the early stages of development or conservation planning."[54] CHAT categories 3 and 4 are

[51] Population information from the US Census American Community Survey (ACS) 5-Year estimates, a data set representative of less populous areas. The most current (2019) survey covers 2015-2019. Based on the 2019 ACS 1-Year estimate, 12.3% of the general US population lived at or below the federal poverty line and 28.9% were considered low income, living at or below 200% of the federal poverty line. Please see comments submitted by the National Rural Electric Cooperative Association for additional information on this point.

[52] 86 Fed. Reg. 7037 (Jan. 25, 2021).

[53] RWP at 54.

[54] *Id*.

potential (not actual) habitat without targeted conservation goals. Nonetheless, the Service has continued to assess impacts and prescribe mitigation for activities within these CHAT categories.[55]

a. The Service should consider other approaches to impacts assessments.

EWAC understands that when the CHAT was developed, it was one of the only tools for assisting in project siting and identifying LEPC conservation priorities. However, in the years since the CHAT was developed, additional survey and other work has been done in the LEPC range that may be more useful to the scientific and regulated communities than continued dependence on the CHAT. Given how an impact assessment affects project planning and cost, a higher-resolution standardized dataset could be used in lieu of the lower-resolution CHAT layer. For example, outside of intact LEPC focal areas, lek presence may be the most important indicator of habitat suitability irrespective of the CHAT category in which the project sits and could be used in lieu of applying the CHAT category.

b. The Service should reconsider current mitigation strategies.

Should the Service continue utilizing the CHAT approach for the LEPC, the Service should rethink its approach to the LEPC mitigation structure. As noted above and in greater detail in EWAC's comments on the Renewable Energy HCP, the current approach to LEPC impact assessments and mitigation means that even where projects are sited within CHAT 3 and CHAT 4, the project proponent would be responsible for unreasonable and unsupported levels of mitigation for areas that may not be habitat or occupied by the species. If the purpose of the CHAT is, as stated, to encourage prioritization of conservation in and development of projects outside key LEPC focal areas, then the Service's mitigation structure should not penalize projects that have appropriately been sited outside of these focal areas.

EWAC realizes that the Proposed Rules themselves would not mandate a particular mitigation framework; however, it has been EWAC's experience that Service-approved plans for LEPC conservation continue to place onerous burdens on wind, solar, and electric transmission and distribution that, if not reconsidered, would have a significant chilling effect on renewable energy and electric transmission and distribution development within the LEPC's range.

Conclusion

EWAC appreciates the Service's consideration of these comments and, in particular, comments relating to the impact of a carefully tailored 4(d) rule that would conserve the LEPC while supporting efficient development, construction, operation, and maintenance of renewable energy projects and transmission and distribution of safe, reliable, affordable, and increasingly cleaner electric power to all communities. EWAC encourages the Service to analyze the degree to which any final listing and/or 4(d) rule may hamper the development and delivery of clean energy across the country and to communities in need in particular. Any final rule should not conflict with the Biden Administration's stated goals relating to climate change, clean energy, and

[55] *See* RWP; *see also* Notice of Availability and Request for Comments in connection with Renewable (Wind and Solar) Energy, Power Line, and Communication Tower Habitat Conservation Plan for the Lesser Prairie-chicken; Colorado, Kansas, New Mexico, Oklahoma, and Texas, 86 Fed. Reg. 19,634 (April 14, 2021).

environmental justice.[56] EWAC would welcome the opportunity to discuss the comments in greater detail with the Service.

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[56] *See* Executive Order 13990, "Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis," 86 Fed. Reg. 7037 (January 25, 2021).