July 5, 2016

Comments regarding the May 4, 2016

Proposed Revisions to the Regulations for Candidate Conservation Agreements With Assurances and Draft Revised Candidate Conservation Agreements With Assurances Policy

Submitted by:

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Filed electronically to the attention of:

Public Comments Processing

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The Energy and Wildlife Action Coalition ("EWAC") submits these comments in response to the U.S. Fish and Wildlife Service ("Service") and National Marine Fisheries Service May 4, 2016 announcement of a draft revised Candidate Conservation Agreements with Assurances ("CCAA") policy ("Revised CCAA Policy") as well as the Service's concurrent proposed revisions to the regulations for CCAAs ("Revised CCAA Rule") issued under the Endangered Species Act ("ESA").[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. 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 supports the sensible clarifications provided in the Revised CCAA Policy and Revised CCAA Rule, which together seek to simplify the CCAA program, create greater certainty and reassurance for program participants, and potentially facilitate greater participation in prelisting conservation actions. EWAC values the Service's effort to clarify permit requirements and to reassure landowners participating in CCAAs that additional conservation measures and resource use restrictions would not be required or imposed should a species become listed. Further, the Revised CCAA Policy's expanded definition of "property owner"—to expressly include entities owning any interest in property that carries with it the authority to conduct the CCAA management activities on that property—will facilitate greater accessibility to the CCAA program. Similarly, the Revised CCAA Policy's clarification of transfer of ownership of CCAA-enrolled properties is also beneficial.

Replacement of the CCAA regulations' confusing reference to hypothetical conservation measures implemented on "other necessary properties" with a new, defined conservation standard is appreciated. However, the introduction of a "net conservation benefit" standard (or even a "no net loss" standard) is unsupported by statutory authority, and the Service has cited none in announcing this heightened standard. Even in the context of the ESA section 10 permitting process—which authorizes Service issuance of incidental take permits ("ITP") for non-federal activities and is the only circumstance in which the ESA requires mitigation—does not require that such permits achieve a net benefit or no net loss to listed species.[2] Instead, section 10 requires that an applicant, "to the maximum extent practicable," "minimize and mitigate" the impacts of the take of listed species for which it seeks an ITP.[3] In a permitting context, an impermissible denial of a governmental benefit may be a constitutionally cognizable injury,[4] and a CCAA is ultimately a permitting action, as the CCAA converts to an ITP in the event that a species covered by the CCAA is listed.[5] Supreme Court precedent stakes out constitutional limitations on takings of private property, including exactions, requiring an

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[1] Candidate Conservation Agreements With Assurances Policy, 81 Fed. Reg. 26,817 (May 4, 2016); Revisions to the Regulations for Candidate Conservation Agreements With Assurances, 81 Fed. Reg. 26,769 (May 4, 2016).
[2] 16 U.S.C. § 1539.
[3] *Id.*
[4] *See, e.g., Koontz v. St. John's River Mgmt. Dist.*, 133 S. Ct. 2586 (2013); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987); *Dolan v. City of Tigard*, 512 U.S. 374 (1994).
[5] 50 C.F.R. § 17.22(d).

"essential nexus" and "rough proportionality" to the impacts being mitigated.[6] If the benefit of a CCAA is denied based upon an applicant's failure to meet a conservation standard that is inconsistent with the standard set forth in the ESA itself, then a takings violation is possible in addition to violations arising from the promulgation of a regulatory standard that exceeds the ESA standard and authority. Any final CCAA rule or policy should also clarify that when species and habitat are already effectively managed on a particular property, a CCAA could be appropriate even where no improvement of habitat quality or population increase can be anticipated to occur on the enrolled property, because such improvement is unnecessary. In these instances, the species should benefit and the landowner should receive "assurances" even if the CCAA simply maintains the status quo on the enrolled property. EWAC asks the Service to provide this clarification and to reconsider introduction of the "net conservation benefit" standard into this and other proposed rules and policies implementing the ESA.[7]

EWAC finds the proposed revisions to the CCAA rule and policy generally positive and conducive to future CCAA program successes in preventing the need to list species as endangered or threatened under the ESA. EWAC looks forward to continuing to work with the Service in its efforts to continually improve implementation of the ESA and other federal wildlife laws. Please feel free to contact the following EWAC representatives:

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[6] *See, e.g., Koontz v. St. John's River Mgmt. Dist.*, 133 S. Ct. at 2603 (holding "that the government's demand for property from a land-use permit applicant must satisfy the requirements of *Nollan* and *Dolan* even when the government denies the permit and even when its demand is for money").

[7] *See* EWAC Comments Regarding the March 8, 2016 Proposed Revisions to the U.S. Fish and Wildlife Service Mitigation Policy, 81. Fed. Reg. 12,379 (Mar. 8, 2016) (filed June 13, 2016).