



Energy and Wildlife Action Coalition  
c/o Nossaman LLP  
1666 K Street, NW  
Suite 500  
Washington, DC 20006  
[www.energyandwildlife.com](http://www.energyandwildlife.com)

August 31, 2017

**Comments regarding the June 21, 2017, Information Request  
Department of the Interior Regulatory Reform Initiative  
U.S. Fish and Wildlife Service (DOI-2017-0003-0009)**

Agency/Docket Number:  
**133D5670LC DS10100000 DLCAP0000.000000 WBS DX.10120**

Document Number:  
**2017-13062**

Submitted by:

**Energy and Wildlife Action Coalition**

Filed electronically to the attention of:

Office of the Executive Secretariat  
U.S. Department of the Interior  
1859 C Street NW  
Mail Stop 7328  
Washington, DC 20240  
ATTN: Reg. Reform  
Email: [regulatoryreform@ios.doi.gov](mailto:regulatoryreform@ios.doi.gov)

The Energy and Wildlife Action Coalition (“EWAC”) submits this summary in response to **Executive Order 13783, “Promoting Energy Independence and Economic Growth,”** Secretarial Order 3349, “American Energy Independence,” and the resulting U.S. Department of the Interior (“DOI”) request for public comments (Document No. 2017-13062) regarding how DOI can improve implementation of regulatory reform initiatives and policies and identifying regulations for repeal, replacement, or modification.<sup>1</sup>

EWAC is a national coalition formed in 2014 whose members consist of electric utilities, electric transmission providers, 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.

Since its inception, EWAC has provided extensive comments to the U.S. Fish and Wildlife Service (“USFWS”) in response to numerous rulemakings, guidance documents, and policy statements that have shaped federal wildlife regulation in recent years. While the majority of EWAC’s previous public comments addressed the proposed versions of rules, policies, and guidelines, in most instances our comments/recommendations were not addressed, and the final versions of these rules, policies, and guidance documents remained largely consistent with the proposed versions. Given the lack of meaningful change between proposed and final versions of rules and policies with respect to EWAC’s concerns, we believe EWAC’s prior comments remain relevant to the current DOI regulatory reform initiative and ask that they be given additional consideration at this time. We have endeavored to make this public comment letter a short summary of prominent regulatory issues that have arisen—primarily under the Endangered Species Act and the Bald and Golden Eagle Protection Act—and to provide DOI and USFWS with a toolbox to consider our complete comments on these issues (see individual links to lengthier comments and papers provided within the table below).

We appreciate the opportunity to raise these persistent concerns and to assist DOI in a targeted reconsideration of prior regulatory and administrative actions. Should any questions arise, please feel free to contact the following EWAC representatives:

Richard J. Meiers, EWAC Policy Chair, [jim.meiers@duke-energy.com](mailto:jim.meiers@duke-energy.com), 980-373-2363

John M. Anderson, EWAC Policy Director, [janderson@nossaman.com](mailto:janderson@nossaman.com), 202-887-1441

Alan M. Glen, Nossaman, LLP, Partner, [aglen@nossaman.com](mailto:aglen@nossaman.com), 512-813-7943

---

<sup>1</sup> 82 Fed. Reg. 28,429 (June 22, 2017).

**USFWS Regulations, Policies, and Practices in Need of Modification as  
Identified by the Energy and Wildlife Action Coalition**

| USFWS Regulation,<br>Policy, or Practice  | Summary of EWAC Concerns  | Recommended USFWS Actions   |
|---|---|---|
| <b><i>Endangered Species Act – Section 10 Incidental Take Permitting</i></b>  |   |   |
| <p>1. Joint U.S. Fish and Wildlife Service and National Marine Fisheries Service Habitat Conservation Planning and Incidental Take Permit Processing Handbook, 81 Fed. Reg. 93,702 (Dec. 21, 2016) (“HCP Handbook”)</p> | <p>The original HCP Handbook has proved helpful to the regulated community since its publication in 1996. However, the 2016 revisions to the HCP Handbook create unnecessary complexity and are geared primarily to large-scale HCPs, neglecting the project-scale or low-effect HCPs that make up the majority of HCPs. Further, the revised HCP Handbook contains inconsistent language regarding the compensatory mitigation standards under the Endangered Species Act (“ESA”).</p> | <p>EWAC recommends that the U.S. Fish and Wildlife Service (“USFWS”) and National Marine Fisheries Service (“NMFS”) (together, “Services”) withdraw, refine, and re-propose the December 21, 2016, revision of the HCP Handbook. The Services should revise the HCP Handbook to be consistent with foundational ESA requirements (including the appropriate mitigation standard) and to be less fixated on complex, large-scale HCPs, which could perhaps be addressed in a separate chapter or appendix covering special considerations for large-scale HCPs. As currently written, the HCP Handbook at least implies that ordinary HCPs will be burdened with procedures and analyses that should be reserved only to large-scale HCPs.</p> <p>The Services should also ensure that a final Handbook clearly delineated the need for national consistency on similarly situated issues and should establish a clear chain of command for addressing the key issues that frequently arise.</p> <p><i>See prior EWAC comments, “2015-09-16 EWAC Review of ESA Handbooks” and “2016-08-29 EWAC Comments on Draft HCP Handbook,” both available at <a href="https://nossaman.sharefile.com/d-s70a59f495274af49">https://nossaman.sharefile.com/d-s70a59f495274af49</a>.</i></p> |

| USFWS Regulation, Policy, or Practice |                      | Summary of EWAC Concerns   | Recommended USFWS Actions  |
|---------------------------------------|----------------------|--|--|
| 2.                                    | ITP monitoring costs | Over the past decade, USFWS has increasingly focused on seeking an unattainable level of precision and predictability when advising on monitoring programs for HCPs. This has led to excessive costs, and, in some instances, the costs of monitoring exceed mitigation/conservation costs. Often, data generated through compliance monitoring is of little value in informing permit management or assisting with future agency decision making. Project proponents do not possess boundless budgets to implement HCPs. In many instances, by increasing the costs of monitoring, funds are diverted away from potential conservation actions. | Through either guidance or rulemaking, USFWS should establish a policy that simplifies monitoring to be commensurate with the impacts of the authorized incidental take. Monitoring requirements for HCPs should be reasonable in terms of both the type and amount of data USFWS seeks to collect as well as the costs of the monitoring effort. EWAC members would prefer that permitting costs prioritize species conservation over monitoring precision. |
| 3.                                    | Low-effect HCPs      | Under even the best circumstances, the process to obtain an ITP often takes two to 10 years. USFWS has created a mechanism—the “low-effect HCP”—to streamline projects that seek an ITP where impacts to the environment are low. However, this mechanism is used inconsistently across USFWS Regions. A nationwide policy that encourages the use of low-effect HCPs could decrease some existing disincentives for seeking incidental take authorization and would help to reduce the burden on the regulated community and USFWS resources.   | USFWS should issue a policy to provide guidance to Service Regions and to the regulated community regarding the use of low-effect HCPs. USFWS should emphasize increased deployment of this permitting mechanism.  |

| USFWS Regulation, Policy, or Practice   | Summary of EWAC Concerns  | Recommended USFWS Actions  |
|---|---|--|
| <b><i>Endangered Species Act - Various</i></b>  |   |  |
| <p>4. Services' joint 2016 critical habitat rules and policy:</p> <p>Implementing Changes to the Regulations for Designating Critical Habitat, 81 Fed. Reg. 7,414 (Feb. 11, 2016) (codified at 50 C.F.R. §§ 424.01, 424.02, 424.12)</p> <p>Definition of Destruction or Adverse Modification of Critical Habitat, 81 Fed. Reg. 7,214 (Feb. 11, 2016) (codified at 50 C.F.R. § 402.02)</p> <p>Policy Regarding Implementation of Section 4(b)(2) of the Endangered Species Act, 81 Fed. Reg. 7,226 (Feb. 11, 2016)</p> | <p>The 2016 critical habitat rules and policy greatly expand USFWS' authority to designate critical habitat, including the asserted authority to designate unoccupied habitat prior to designating occupied habitat and to designate areas that do not now contain physical or biological features of suitable habitat for a given species but could potentially gain the features needed by the species in the future. Under the Services' new interpretation of what is "essential" for the conservation of a species (i.e., critical habitat), unoccupied habitat may now be designated as critical habitat where it is unoccupied, unsuitable habitat at the time of designation. Courts have previously held that each of the elements of the ESA section 3 definition of critical habitat must be satisfied for a critical habitat designation to be valid. <i>See, e.g., Cape Hatteras Access Preservation Alliance v. U.S. Dep't of the Interior</i>, 344 F.Supp.2d 108 (D.D.C. 2004); <i>Home Builders Ass'n of N. Cal. v. U.S. Fish and Wildlife Serv.</i>, 268 F.Supp.2d 1197 (E.D. Cal. 2003). The rulemakings and policy appear designed to counteract these decisions and to provide the Services with greater flexibility to designate critical habitat that is not consistent with the statutory criteria. The previous critical habitat rules were faithful to the structure, language, and longstanding USFWS interpretation of the ESA sections 3 and 4 critical habitat provisions.</p> | <p>USFWS should initiate a new rulemaking to rescind the 2016 critical habitat rules and policy and to reinstate the critical habitat rules that were previously in place.</p> <p><i>See prior EWAC comments</i>, "2014-10-09 EWAC Comments re CH Proposed Rules and Policy," <i>available at</i> <a href="https://nossaman.sharefile.com/d-s70a59f495274af49">https://nossaman.sharefile.com/d-s70a59f495274af49</a>.</p> |

| USFWS Regulation, Policy, or Practice |                                 | Summary of EWAC Concerns  | Recommended USFWS Actions  |
|---------------------------------------|---------------------------------|---|--|
| 5.                                    | Threatened species designations | <p>While the language of ESA section 9(a)(1) applies the “take” prohibition only to endangered wildlife species, USFWS in 1978 promulgated what is referred to as a “blanket rule” that extended the “take” prohibition to all threatened wildlife species, whether already designated or designated at any time in the future, unless a “special” 4(d) rule is promulgated for a particular threatened species. 43 Fed. Reg. 18,181 (Apr. 28, 1978), amended 44 Fed. Reg. 31,580 (May 31, 1979) and 70 Fed. Reg. 10,493 (Mar. 4, 2005), codified at 50 C.F.R. § 17.31. USFWS adopted the blanket rule under its discretionary authority, found in ESA section 4(d), to extend some or all of the section 9 “take” prohibition to a threatened species. NMFS takes the opposite approach; the ESA section 9 “take” prohibition does not extend to threatened species unless NMFS promulgates a species-specific 4(d) rule to apply some or all of the “take” prohibition to that species.</p> | <p>USFWS should amend its regulations to no longer apply the “take” prohibition universally to all threatened species through the “blanket rule” and, instead, to require USFWS to make a decision whether the “take” prohibition should apply to each individual threatened wildlife species. If the determination is yes, then USFWS can promulgate a species-specific rule that tailors the “take” prohibition to that particular species’ characteristics and risk factors. This approach would align with the approach taken by NMFS.</p> |

| USFWS Regulation, Policy, or Practice |   | Summary of EWAC Concerns   | Recommended USFWS Actions   |
|---------------------------------------|---|--|---|
| 6.                                    | ESA status reviews on delisting petitions | <p>Oftentimes USFWS does not meet its statutorily-required deadlines for downlisting and delisting petitions (e.g., for the Ute ladies' tresses orchid, USFWS made a positive 90-day finding back in 2004, but has yet to complete and publish the status review and the 12-month finding).</p> <p>USFWS' exclusion of downlistings and delistings in its National Listing Workplan and its Methodology for Prioritizing Status Reviews and Accompanying 12-Month Findings on Petitions for Listing Under the Endangered Species Act means that USFWS decisions on downlisting and delisting petitions likely will be delayed and postponed. Downlisting and delisting petitions, in instances where the best available science is clear that the species merits downlisting or delisting, should be given high priority and receive prompt attention.</p> | <p>USFWS should update its National Listing Workplan to include delisting activities. The USFWS Methodology for Prioritizing Status Reviews and Accompanying 12-Month Findings on Petitions for Listing Under the Endangered Species Act should also be amended to incorporate factors relevant to delistings.</p> <p>As part of this proposed exercise, USFWS should also consider updating its recovery planning processes by incorporating criteria for downlistings and delistings into recovery plans. By including this information in the recovery plans, transparent goals will be established at the outset for all stakeholders to work towards in removing species from the ESA lists.</p> <p>Further, as many species do not have recovery plans, USFWS should establish a methodology to ensure that a recovery plan for each ESA-listed species is prioritized and completed in order to move towards recovery goals.</p> |

| USFWS Regulation,<br>Policy, or Practice   | Summary of EWAC Concerns  | Recommended USFWS Actions   |
|--|---|---|
| <b><i>Bald and Golden Eagle Protection Act – Incidental Take Permitting</i></b>  |   |   |
| 1. Revisions to Regulations for Eagle Incidental Take and Take of Eagle Nests, 81 Fed. Reg. 91,494 (Dec. 16, 2016) (codified at 50 C.F.R. part 22) | Since inception of the BGEPA eagle incidental take permit program in 2009, USFWS has issued a limited number of eagle incidental take permits (e.g., only a few for wind energy facilities). Currently, over 60 permit applications are pending, with other developers/operators waiting for the process to improve before filing an application. The USFWS-approved method of modeling calculates a measure of risk at nearly every wind energy facility, suggesting the need for each to seek an eagle permit. Absence of a streamlined eagle incidental take permitting process remains a significant disincentive for project proponents that may otherwise seek permits for projects that pose a moderate or low risk to eagles. Industry is supportive of an eagle incidental take permit program so long as it provides a reasonable and efficient permitting process and so long as mitigation is based on the degree of risk and is commensurate with impacts. | USFWS should establish a low-risk permit pathway for bald eagles and golden eagles under the BGEPA eagle incidental take permit program through which the vast majority of facilities (e.g., wind energy, electric transmission/distribution, etc.) can receive incidental take coverage under a general permit.<br><br><i>See prior EWAC comments, “2014-09-22 EWAC Comments re NOI to Prepare Eagle Permit EA or EIS” and “2016-07-05 EWAC comments re Revisions to Eagle Rule,” both available at <a href="https://nossaman.sharefile.com/d-s70a59f495274af49">https://nossaman.sharefile.com/d-s70a59f495274af49</a>.</i> |



| USFWS Regulation, Policy, or Practice  | Summary of EWAC Concerns   | Recommended USFWS Actions  |
|--|--|--|
| <p>2. Implementation of the eagle incidental take permit program (50 C.F.R. part 22)</p> | <p>USFWS' December 16, 2016, revisions to the rules governing the eagle incidental take permit program ("2016 Rule") include requirements that significantly increase the cost of the program for the regulated community. On several occasions, EWAC has heard that USFWS has not determined how to implement several aspects of the revised eagle permit program regulations. This acknowledged gap in effective USFWS administration of the program creates delays and uncertainties, posing a significant problem for the regulated community.</p> | <p>In general, USFWS should prioritize reducing the burden under the eagle incidental take permit program through guidance and/or amendment of 50 C.F.R. § 22.26 in order to:</p> <ul style="list-style-type: none"> <li>• Update the USFWS collision risk model to more realistically predict eagle incidental take for bald eagles and golden eagles, distinctly. The agency's current approach significantly overestimates mortalities. Erring on the extreme conservative end of estimates dramatically increases the minimization and mitigation costs for the regulated community.</li> <li>• Remove the third-party monitoring requirement.</li> <li>• Clarify the availability of waivers for preconstruction survey requirements. Waivers should be available to: (1) existing projects; (2) projects with pending applications for eagle incidental take permits; and (3) projects that had coordinated survey efforts with USFWS prior to December 2016.</li> </ul> <p>Please note that EWAC members are not suggesting that the 2016 Rule be rescinded. Rather, EWAC seeks improvements to the 2016 Rule and the implementation of the eagle permit program that would result in a reduction of burden on the regulated community and USFWS staff and resources.</p> |

| USFWS Regulation,<br>Policy, or Practice    | Summary of EWAC Concerns  | Recommended USFWS Actions  |
|---|---|--|
| <b><i>General Administrative Issues</i></b> |   |  |
| 1.  | <p>Permitting administration issues</p> <p>Permitting delays, excessive permit conditions, and related permit processing issues are largely caused by the lack of adequate program funding, personnel shortages, and the tasking of field staff with administration of permit programs where those staff, in many instances, are not incentivized to issue permits and are not formally trained in project management. These deficiencies can prolong permitting timelines by years and create inconsistencies in analyses of applications, interpretation of regulations, and permit conditions between offices and regions.</p> | <p>In order to address this, USFWS should: (1) ensure that adequate funding and resources are provided to effectively manage the permitting programs; and (2) establish a Permitting Office both at Headquarters and at each of the regional offices to serve as a centralized clearinghouse for ESA and BGEPA permits. This Permitting Office would oversee, prioritize, and ensure uniformity in permit processing, thereby increasing consistency and predictability for the regulated community in, and the efficacy of, the permitting programs. Under this recommended Permitting Office organization, the permitting officers would serve the role of managing processes, ensuring consistencies across offices and regions, and expediting permit processing. Field staff would continue to serve as valuable technical experts during the permitting process, analyzing information provided by the applicant and providing recommendations to the permitting officer(s).</p> <p><i>See prior EWAC comments, “2017-04-26 EWAC Comments re Migratory Birds Eagles OBM Information Collection,” available at <a href="https://nossaman.sharefile.com/d-s70a59f495274af49">https://nossaman.sharefile.com/d-s70a59f495274af49</a>.</i></p> |

| USFWS Regulation, Policy, or Practice |   | Summary of EWAC Concerns   | Recommended USFWS Actions   |
|---------------------------------------|---|--|---|
| 2.                                    | Use of guidance as <i>de facto</i> regulation | EWAC believes that voluntary guidance is often very beneficial to the regulated community; EWAC members have a long history working with the Services and other appropriate stakeholders on the development of voluntary guidance documents such as the Land-Based Wind Energy Guidelines. However, EWAC is particularly concerned that either at the time guidance is adopted, or subsequent to its adoption, what may have initially been considered by the Services to be voluntary guidance in effect becomes mandatory, <i>de facto</i> regulation although it has not undergone any public notice and comment process. | <p>EWAC suggests the following key principles for the Services' consideration:</p> <ol style="list-style-type: none"> <li>1. The Services should create and maintain consistent approaches across its regions and field offices for developing all regulatory guidance.</li> <li>2. Field personnel should be trained that voluntary guidance is just that and shall not to be treated as mandatory either through informal assertion or other regulatory processes, such as a condition to unrelated permitting.</li> <li>3. The relative level of outside involvement in the development of guidance should depend on the degree of potential impacts to protected wildlife and the relative burdens the guidance may place on the regulated community.</li> <li>4. There should be a national point of contact within both NMFS and USFWS to review instances in which guidance may have been inappropriately developed or applied.</li> <li>5. Any proposal by the Services to develop written guidance should always receive review by and input from the offices of the Solicitor (USFWS) or the General Counsel (NMFS) concerning the process through which any such guidance is planned to be developed and applied.</li> </ol> |

|    | USFWS Regulation, Policy, or Practice   | Summary of EWAC Concerns  | Recommended USFWS Actions  |
|----|---|---|--|
| 3. | <p>U.S. Fish and Wildlife Service Mitigation Policy, 81 Fed. Reg. 83,440 (Nov. 21, 2016) (revising the 1981 USFWS Mitigation Policy)</p> <p>U.S. Fish and Wildlife Service Endangered Species Act Compensatory Mitigation Policy, 81 Fed. Reg. 95,316 (Dec. 27, 2016)</p> | <p>Both policies adopt standards that exceed USFWS authority. The revised Mitigation Policy stresses use of full mitigation hierarchy (i.e., first avoid, then minimize, then mitigate), expresses a preference for deployment of “advance mitigation,” and incorporates the new “net benefit” (or at least “no net loss”) mitigation standard (to the extent these do not conflict with specific statutory authorities). USFWS also incorporates the new, heightened mitigation standard of “net benefit” or “no net loss” in the ESA Compensatory Mitigation Policy and seeks to require mitigation sequencing, both of which are inconsistent with the ESA’s own mitigation standards and courts’ interpretations of ESA “minimize and mitigate” language.</p> | <p>While DOI Secretarial Order 3349 (issued March 29, 2017) pulled back the Obama-era mitigation policies, no such policies are currently in place to replace them. Yet, fundamental issues associated with these policies remain, and USFWS staff often seeks to apply the 1981 Mitigation Policy despite its express statement of inapplicability to mitigation under the ESA. Therefore, USFWS should revisit, rework, and reissue these policies to ensure consistency throughout all permit programs that rely on these policies. A refined and re-proposed ESA Compensatory Mitigation Policy that is consistent with the statutory language and limitations of the ESA could be helpful to both the regulated community and USFWS.</p> <p><i>See prior EWAC comments</i>, “2016-06-13 EWAC comments re Proposed Revisions to FWS Mitigation Policy” and “2016-10-17 EWAC Comments on ESA Compensatory Mitigation Policy,” <i>both available at</i> <a href="https://nossaman.sharefile.com/d-s70a59f495274af49">https://nossaman.sharefile.com/d-s70a59f495274af49</a>.</p> |