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Comments regarding the Notice of Availability and Opening of Public Comment Period for 26 Draft Recovery Plan Amendments for 42 Species Across the United States

Submitted by:

Energy and Wildlife Action Coalition

Submitted electronically to the attention of:

Re: FWS-HQ-ES-2018-N112

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The Energy and Wildlife Action Coalition (“EWAC”)¹ submits these comments in response to the U.S. Fish and Wildlife Service’s (“Service”) January 31, 2019 *Notice of Availability and Opening of Public Comment Period for 26 Draft Recovery Plan Amendments for 42 Species Across the United States* (the “January Notice”).² The January Notice indicated that the Service proposes to amend recovery criteria (“Proposed Amendments”) for 42 species addressed by 26 recovery plans (collectively, “Existing Recovery Plans”) in order to assist the Service in determining when a species may be down-listed from endangered to threatened or removed from the list of threatened or endangered species.³ The Service also indicated in the January Notice that the Proposed Amendments are a “subset of a larger effort” to revise 182 recovery plans addressing as many as 305 species in order to follow the Department of the Interior’s (“DOI”) Agency Priority Performance Goal (“Priority Performance Goal”) as set forth in the Department’s Strategic Plan for Fiscal Years 2018-2022.⁴ The Priority Performance Goal states, among other things: “By September 30, 2019, 100% of all [Service] recovery plans will have quantitative criteria for what constitutes a recovered species.”⁵

EWAC commends the Service for reviewing and updating the Existing Recovery Plans, particularly for those species whose plans are more than a decade old. For many of the species addressed in the Proposed Amendments, new and significant information has been developed in the years since the Existing Recovery Plans were adopted. Updating these plans can serve to better inform the Service, the regulated community, and federal, state, and local resource agencies.

EWAC does not provide comments on specific aspects of the Proposed Amendments; however, because the Proposed Amendments are the first of many similar amendments, EWAC respectfully requests the Service to consider several issues as the agency moves ahead in its efforts.

First, because of the importance of recovery plans to the Service’s planning efforts, EWAC requests that the Service carefully consider the impact the Proposed Amendments and any future proposals to amend recovery plans not included in the January Notice (collectively, “Proposals”) may have on the regulated community. Specifically, EWAC requests that in formulating recovery criteria that differs from the criteria set forth in the Existing Recovery Plans, the Service consider whether recovery of listed species could be achieved with measures that would be less burdensome on federal agencies and the regulated community than the existing criteria. Similarly, EWAC requests that where the Service proposes to adopt recovery criteria that could be more burdensome on federal agencies and the regulated community than the criteria set forth in the Existing Recovery Plans, the Service specifically identify that potential in any Federal Register notice announcing such Proposals and seek comment from the public on ways recovery could be achieved in a manner that would be less onerous.

Second, EWAC requests that, in finalizing any Proposals, the Service carefully consider conservation efforts that have been put into place for species addressed in the Proposals since the previous iteration of the relevant recovery plan. For example, where one or more species subject to the Proposals

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.

² 84 Fed. Reg. 790 (Jan. 31, 2019). On February 5, 2019, the Service published a corrected notice of availability, wherein the Service provided working URL addresses to each of the Proposed Amendments. 84 Fed. Reg. 1782 (Feb. 5, 2019). The URL addresses set forth in the January Notice were incorrect and did not allow a reader to view the Proposed Amendments.

³ *Id.* at 791.

⁴ Found at: <https://www.doi.gov/sites/doi.gov/files/uploads/fy2018-2022-strategic-plan.pdf>.

⁵ DOI Strategic Plan at p. 18.

benefits from the establishment of species conservation banks, from state, local, or private efforts to conserve species or their habitat, or have been included as covered species in a large-scale or programmatic incidental take permit (“ITP”) pursuant to section 10(a)(1)(B) of the Endangered Species Act (“ESA”),⁶ such conservation should be given specific consideration as the Service formulates the recovery criteria to be established or amended by its Proposals. This is especially important where the Service itself has supported such efforts, such as where species conservation has been funded by grants provided under ESA section 6 and similar programs. Likewise, the Service should determine whether ongoing species conservation efforts beneficially address one or more of the listing factors set forth in ESA implementing regulations addressing species listings and designation of critical habitat.⁷ Failing to consider the current species baseline—including the conservation efforts benefitting such species—may stifle ongoing or discourage future voluntary conservation initiatives led by the regulated community and others.

Third, EWAC requests that the Service be mindful of the impacts that recovery plan criteria can have on the section 7 process for the regulated community. While federal courts have held—and some Service guidance indicates—that recovery plans serve only as guidance for the Service and do not carry the force of law in the agency’s determination as to whether or not a listed species has recovered (and, therefore, necessitates delisting),⁸ it has been EWAC’s experience that the Service and other federal resource agencies (e.g., U.S. Forest Service) sometimes request that recovery criteria be addressed in biological assessments required under section 7 of the ESA or in other planning processes addressing listed species. Where a project proponent proposes to undertake activities that may not align with the specific criteria set forth in a relevant species’ recovery plan, federal agencies may be more likely to find or consider finding that a proposed activity or project may “jeopardize the continued existence” of the relevant species⁹ and may, as a result, require the project proponent to implement more stringent minimization measures to ensure against a perceived threat of jeopardy.¹⁰ This could be particularly

⁶ The Service’s Habitat Conservation Planning Handbook (“HCP Handbook”) distinguishes between programmatic or “landscape scale” habitat conservation plans (“HCPs”) and project-specific HCPs. Specifically, the HCP Handbook recognizes that programmatic HCPs can provide a significant benefit to species covered therein. See, e.g., HCP Handbook at 1-3 (“...we strongly support a landscape-scale approach when appropriate, because it can provide more opportunities for strategically placing appropriate conservation in an ecosystem context.”) and 9-3 (“...larger scale plans can provide a landscape scale conservation vision and programmatic approach which can confer a net benefit to conservation by their scale and strategic approach to conservation design.”).

⁷ 50 C.F.R. § 424.11(c).

⁸ See *Friends of Blackwater v. Salazar*, 691 F.3d 428, 434 (D.C. Cir. 2012); *Fund for Animals, Inc. v. Rice*, 85 F.3d 535, 547 (11th Cir. 1996); *Conservation Congress v. Finley*, 774 F.3d 611, 664 (9th Cir. 2014); *Friends of Animals v. U.S. Fish & Wildlife Serv.*, Case No. 6:14-cv-01449, 2015 WL 4429147 at *5 (D. Or. July 16, 2015), *appeal docketed* No. 15-35639 (9th Cir. Aug. 7, 2015); see also *Final Rule—Definition of Destruction or Adverse Modification of Critical Habitat* (“Final Critical Habitat Rule”), 81 Fed. Reg. 7214, 7223 (Feb. 11, 2016) (“The Service[] agree[s] that recovery plans convey guidance and are not regulatory documents that compel any action to occur.”); see also *Final Rule Removing the Black-capped Vireo from the Federal List of Endangered and Threatened Wildlife*, 83 Fed. Reg. 16228, 16230 (April 16, 2018) (“Recovery plans are not regulatory documents; instead they are intended to establish goals for long-term conservation of listed species and define criteria that are designed to indicate when the threats facing a species have been removed or reduced to such an extent that the species may no longer need the protections of the [ESA].”)

⁹ See 16 U.S.C. § 1536(a)(2). ESA implementing regulations define “jeopardize the continued existence of” as “to engage in an action that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species.” 50 C.F.R. § 402.02.

¹⁰ It has been the experience of some EWAC members that federal action agencies and/or the Service also occasionally indicate that a proposed project’s impacts to critical habitat may prevent strict adherence to a recovery plan, will thereby preclude recovery, and thus will result in adverse modification.

troublesome where significant conservation of that species has occurred since the adoption of the Existing Recovery Plans, but is not recognized in the Proposals.

Fourth, EWAC requests that in formulating the Proposals, the Service consider whether the recovery criteria proposed are, in fact, achievable. EWAC is aware of at least one instance where Service personnel indicated that the recovery criteria for a particular species were impossible to meet. Section 4 of the ESA states that the Service must, “to the maximum extent practicable,” incorporate into recovery plans “objective, measurable criteria which, when met, would result in a determination” that species addressed in such recovery plans be delisted.¹¹ Including unattainable recovery criteria in recovery plans could render such plans meaningless, which seems contrary to the intent of Congress in requiring the formulation of such plans and could create greater discord between the Service’s recovery priorities, as described in any Proposals, and the priorities established by the Service in connection with other conservation actions (e.g., species conservation banks, programmatic-scale ITPs, acquisition of species habitat pursuant to ESA section 6 grant monies, etc.). Additionally, and as noted above, recovery plan criteria impact ESA processes; having unattainable criteria may impede these processes. To the extent that any Existing Recovery Plans include unattainable recovery criteria, EWAC requests the Service consider amending those plans to include criteria that are, in fact, achievable, and would, if met, result in proposals to delist species.

Finally, EWAC notes that recovery plans exist to further the “conservation and survival” of listed species,¹² and recommends that any Proposal should incorporate the full panoply of current information available for any given species. The January Notice presents the Proposed Amendments in small, piecemeal amendments to the Existing Recovery Plans. While EWAC encourages updates to Existing Recovery Plans, EWAC fears that where the plans are decades old or where significant information has been developed since the adoption of such plans, it will be difficult for the Service and the public to evaluate the Proposals when presented in a piecemeal fashion. EWAC recommends that the Service undertake a careful review of the Existing Recovery Plans and consider whether the Existing Recovery Plans (including those addressed by the Proposed Amendments announced in the January Notice) should be revised or replaced in their entirety rather than amended in part. EWAC additionally requests the Service delay finalizing any Proposed Amendments where significant information on the species’ status, numbers, range, or conservation activities has been developed since the Existing Recovery Plan was adopted and, instead, consider whether such a recovery plan should be completely rewritten rather than simply amended.

EWAC thanks the Service for the opportunity to provide these general comments on the Proposed Amendments and any future Proposals. We hope the Service will take into consideration the recommendations EWAC has made above as the Service moves forward with the Proposals. EWAC would be happy to engage in further discussions should the Service find it useful.

If you have any questions regarding these comments, please feel free to contact the following EWAC representatives:

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¹¹ 16 U.S.C. § 1533(f)(1)(B)(ii).

¹² *Id.* at (f)(1).