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Submitted via www.regulations.gov and Email

Office of the Executive Secretariat – ATTN: Reg. Reform
U.S. Department of the Interior
1859 C Street NW., Mail Stop 7328
Washington, DC 20240
(202) 208-5257
Regulatoryreform@ios.doi.gov

Re: Request for Comment on Interior Department Regulatory Reform; 82 *Fed. Reg.* 28429 (June 22, 2017); U.S. Fish and Wildlife Service Document No. DOI-2017-0003-0009

To Whom It May Concern:

The National Rural Electric Cooperative Association (NRECA) submits these comments in response to the request by the Department of the Interior (Interior) for input on methods to improve implementation of regulatory reform initiatives and policies. These comments also identify regulations for repeal, replacement, or modification, as requested by Interior under Executive Order (EO) 13777, “Enforcing the Regulatory Reform Agenda.” EO 13777 requires the Regulatory Reform Task Force to seek input from entities significantly affected by federal regulations including, among others, trade associations. NRECA appreciates the opportunity to recommend regulations for burden reduction consideration and supports comments submitted by the Energy and Wildlife Action Coalition (EWAC), the National Endangered Species Act Reform Coalition (NESARC), and the Utility Water Act Group (UWAG).

NRECA is the national service organization for America’s electric cooperatives. NRECA represents the interests of the nation’s more than 900 rural electric utilities responsible for keeping the lights on for more than 42 million people across 47 states. Co-ops are member-owned, not-for-profit small businesses serving member-consumers facing significant economic challenges, especially in rural areas. Affordable electricity is the lifeblood of the American economy, and for 75 years electric co-ops have been proud to keep the lights on. Because of their critical role in providing affordable, reliable, and universally accessible electric service, electric cooperatives are vital to the economic health of the communities they serve.

Electric cooperatives and their member-owners value and deserve a healthy environment. NRECA members are proud of their environmental compliance and natural resource conservation efforts. Nonetheless, the economic challenges faced by so many cooperatives and their consumer-owners underscore the importance of ensuring that environmental regulations are cost-effective, consistent, and streamlined to alleviate unnecessary burdens.

NRECA appreciates Interior’s efforts already underway to reconsider, modify, or rescind several regulations and policies of utmost concern to our members, including, but not limited to the following:

- Interior Solicitor’s Opinion M-37041 on Incidental Take Prohibited Under the Migratory Bird Treaty Act (MBTA), suspended and temporarily withdrawn (February 6, 2017).

- Mitigation and climate change policies, to be reviewed per EO 13783 (March 28, 2017) and Interior Secretarial Order 3349 (March 29, 2017).
- Migratory Bird Permit Programmatic Environmental Impact Statement (PEIS), withdrawn (April 11, 2017).
- Deliberate and active coordination of energy policy within the Interior per Secretarial Order 3351 (May 1, 2017)
- Streamlining environmental reviews and permitting processes for infrastructure per EO 13807 (August 15, 2017) and Interior Secretarial Order 3355 (August 31, 2017).
- Critical habitat rules and policies currently in litigation, where plaintiffs have asked for rules to be vacated.

Each of these, as well as regulations and guidance discussed below, has significant substantive and procedural deficiencies that, among other things, are unnecessary and ineffective, create serious inconsistencies, and impose costs that exceed benefits. We look forward to working with the Interior on addressing these issues. The following comments focus on ways to improve implementation of regulatory reform initiatives related to the U.S. Fish and Wildlife Service (USFWS). Where there is overlap of USFWS and National Marine Fisheries Service (NMFS) jurisdiction on Endangered Species Act (ESA)-related issues, the agencies are encouraged to work together to address these concerns to ensure consistent consideration and regulatory reform.

1) Improve Section 7 Consultation.

Under ESA Section 7, all federal agencies must ensure their actions, including those they fund or authorize, do not jeopardize the continued existence of any listed species or result in the destruction or adverse modification of designated critical habitat. However, ESA Section 7 consultations are inconsistently applied, overly burdensome, and costly. Excessive time and resources are required to get through the permitting, approval, and construction process, which presents reliability problems and other challenges for installing and maintaining NRECA member infrastructure. Revisions to the consultation process are necessary to remove inefficiencies and inconsistencies, while still affording protections to ESA-listed species.

The USFWS should amend existing consultation regulations and guidelines with input from industry stakeholders and other project stakeholders to ensure reasonable, workable solutions can be identified and achieved. Many key elements in the Section 7 consultation process are overly vague and inconsistently applied and should be clarified, including 1) the scope of impacts to be evaluated, 2) establishment of an environmental baseline, and 3) definitions used (*e.g.*, “effects of the action,” “adverse modification,” and “biological assessment”).

For example, the environmental baseline is critical to the analysis of potential jeopardy or adverse modification determinations at the time of the consultation. Yet, there are recent instances where the USFWS misconstrued this concept including in their joint-consultation with NMFS on the final rule by US Environmental Protection Agency (EPA) to establish requirements for cooling water intake structures at existing facilities under Clean Water Act (CWA) Section 316(b). Instead of evaluating if requiring the proposed 316(b) standards at existing facilities would cause potential jeopardy or adverse modification, the analysis only estimated effects using an artificial baseline where these intakes did not operate at all. This resulted in an overestimation of the actual effects of the rule. The USFWS should limit its analysis scope to determine the effects of the action based on existing baseline conditions.

The “Endangered Species Consultation Handbook: Procedures for Conducting Consultation and Conference Activities Under Section 7 of the Endangered Species Act” (the Handbook) was primarily developed to aid USFWS field staff in the consultation process. However, the Handbook was developed almost twenty years ago and is out of date. It should be revised through a public input process to not only assist USFWS field staff, but other individuals participating in the consultation process including, but not limited to, project proponents, action agencies, and consultants. The Handbook updates should also address important issues such as environmental baseline. USFWS field staff should then be trained on any of the Handbook revisions. This would better facilitate federal agencies and their applicants’ fulfillment of Section 7(a)(2) obligations, foster consistent consultation implementation, and increase collaboration between field offices and applicants.

Upon the initiation of a formal Section 7 consultation, the USFWS is required by statute to ensure that a biological opinion, including an incidental take statement, is prepared and delivered to the federal action agency within 135 days. If additional time is required to complete the formal consultation, the USFWS can request an extension up to 60 days, but the action agency must agree to the extension and the updated schedule for completing the consultation. The official start of a formal consultation is often not well communicated or transparent effectively make the 135-day statutory deadline useless. Upon starting a consultation, the USFWS should communicate its anticipated schedule for completion and provide notice as soon as it is determined that a formal extension is necessary. Project tracking, accountability for meeting deadlines, and increased communication with federal action agencies would improve the overall formal consultation process and enhance cooperation for species recovery.

Although deadlines are often missed, a formal Section 7 consultation at least includes required statutory deadlines to ensure timely completion. Unfortunately, this is not the case for informal consultation. The USFWS should establish timelines for completing informal consultation, thus allowing for the timely issuance of any required concurrence that a proposed action will not likely adversely affect a listed species or any designated critical habitat. Thirty days should be considered adequate time for the USFWS to review and approve federal actions where prohibited incidental take is not likely to occur. If the USFWS does not respond in thirty days, the federal action agency should be allowed to consider its Section 7 consultation responsibilities fulfilled. This would not only provide greater certainty regarding the end-result for infrastructure improvements and other projects, but ensure USFWS resources are used more effectively to recover listed species.

2) Revise the 2016 Habitat Conservation Planning (HCP) Handbook.

The joint USFWS and NMFS revisions to the HCP Handbook increases burden to project proponents. As compared to the original publication in 1996, the 2016 HCP Handbook increases documentation and data requirements, requires separate preparation of HCP and NEPA documents, and diminishes "No Surprise Assurances." In addition, it raises the threshold for HCP approval, requiring mitigation that goes beyond the statutory authority of the ESA. The revisions exacerbate inefficiencies previously identified with the 1996 version and creates unnecessary complexity.

While NRECA supports updating this outdated HCP Handbook, the USFWS should retract and rewrite it to ensure the guidance does not go beyond ESA statutory authority, erode "No Surprise Assurances," or place unnecessary burden on project proponents. The HCP Handbook is also heavily geared towards providing guidance on complex, large-scale HCPs. Amendments should be made to better address

project-scale and low-effect HCPs to provide clarity that the more onerous procedures and analyses of large-scale HCPs are not applicable. The USFWS should encourage the use of project-scale and low-effect HCPs. Although some regional offices already successfully do this, the USFWS should assure consistency nationwide and direct all field staff to follow this approach. NRECA recommends training for USFWS field staff to ensure consistent HCP reviews and approvals. These improvements would help remove costly, inefficient processes and help infrastructure projects be completed in a timely manner.

3) Prioritize Species Recovery and De-listing.

The ESA’s ultimate goal is to recover species. As such, the USFWS is directed to develop and implement recovery plans that contain objective, measurable criteria for down-listing or delisting species. Recovery plans provide guidance on how best to achieve recovery for listed species, a process that removes or reduces threats to endangered or threatened species to the point that ESA protection is no longer necessary. What is problematic is that most efforts are focused on getting a species listed and administering regulations for listed species, but fall well short in establishing recovery plans; therefore, little or no criteria exist for achieving recovery goals. In addition, the USFWS has often missed required statutory deadlines for addressing down-listing and delisting petitions.

Delisting a species that no longer requires ESA protection must become a priority by the USFWS so they focus resources on species truly in need of protection and to help move those species towards ESA recovery goals. The USFWS should amend its “Methodology for Prioritizing Status Reviews and Accompanying 12-Month Findings on Petitions for Listing Under the ESA” to include factors relevant to recovery. Then, the USFWS should establish a methodology for prioritizing recovery plan development and implementation for those listed species most likely to benefit from such plans. This would ensure recovery criteria are established and transparent to all stakeholders. Industry, action agencies, and other stakeholders can be partners in species recovery, if USFWS facilitated the process by providing transparent milestones and periodic updates of the progress in lay terms. For example, understanding the expectations for meeting recovery objectives in advance would be beneficial during infrastructure planning, construction, and maintenance activities.

In addition to being objective and measurable, recovery criteria also need to be practicable and cost-effective to implement. Further, the “National Listing Workplan” (Workplan) should be updated to include planned delisting activities. Along with petitions and the Workplan, priority and prompt attention should be given to those species where best available science indicates down-listing or delisting criteria have been met.

4) Do Not Apply Guidance as *De Facto* Regulation.

NRECA and its members support appropriately applied voluntary guidance as beneficial to the regulated community. However, oftentimes, a voluntary guidance document becomes mandatory in the way it is interpreted and applied. This is *de facto* regulation by the USFWS and is particularly concerning because voluntary guidance rarely undergoes a public notice and comment process. Voluntary guidance is just that – voluntary. NRECA recommends increased training for USFWS field staff to ensure guidance is consistently applied and not treated as mandatory through either informal or regulatory processes. The USFWS should route any proposed guidance documents through the USFWS Solicitor’s Office for review. In addition, these documents should go through the public notice and comment process before final issuance.

5) Encourage Voluntary Conservation Efforts.

Proactive voluntary conservation has proven to aid in species recovery and can prevent additional species from ever needing ESA protections. Once a species is listed, ESA requirements can seriously impact the ability of NRECA members to site and maintain infrastructure. The USFWS should strongly encourage and then support, voluntary conservation efforts by states, tribes, local governments, industry, and private landowners. Collaborative efforts are critical to a species' recovery success, especially since many species occur primarily or solely on private land.

The USFWS should also evaluate existing pre- and post- listing conservation programs and identify opportunities for streamlining. For example, Habitat Conservation Plans (HCP) for incidental take permits under ESA Section 10 should be streamlined to reduce approval delays and excessive costs associated with development and implementation. For any voluntary conservation program, the application process should not be complex. The USFWS should further incentivize the use of voluntary conservation programs and tools by providing assurances to signatories that additional conservation measures will not be required in the future, land use will not be prohibited, and committed efforts will not result in an ESA violation. These improvements would encourage participation in voluntary conservation efforts for at-risk species. USFWS field staff should be directed to focus on the conservation benefits from collaborating with private landowners, industry, and other stakeholders.

Existing voluntary tools such as Candidate Conservation Agreements with Assurances (CCAAs) and Safe Harbor Agreements (SHAs) attempt to encourage voluntary conservation, but have yet to be accepted for adoption by a large number of private landowners. Because these voluntary tools in several ways have similar procedures as those of a regulatory process, landowners may become disinterested or reconsider participation due to fear of land use restrictions and/or the complexity of setting up such programs. These existing voluntary programs are useful tools for conservation and should be further evaluated to consider changes that increase landowner interest and participation. NRECA appreciates the USFWS review of the CCAA regulations and accompanying policy and recent request for public comment.

6) Withdraw or Modify the 2016 Mitigation Policies.

In 2016, the USFWS revised its umbrella mitigation policy (81 *Fed. Reg.* 83440) and issued a new ESA-specific compensatory mitigation policy (81 *Fed. Reg.* 95316). Both policies include standards that are inconsistent and overreach USFWS statutory authority under the ESA. The policies include the use of "net benefit goals," "no net loss," and a "landscape scale" approach to guide mitigation measures. The policies also stress the use of sequential mitigation or mitigation hierarchy, emphasizing avoidance as a component of mitigation, which conflicts with recent court decisions. The conservation objectives of these policies are vague and open to broad interpretation and application by USFWS field staff. Overall, the policies impose onerous requirements and costs that exceed benefits.

NRECA greatly appreciates the Administration's steps to rescind Executive and Secretarial Orders that directed the use of the abovementioned mitigation standards. NRECA thanks the USFWS for reviewing these mitigation policies and other related, existing agency actions for suspension, revision, or rescission. We applaud the USFWS for recently soliciting public review and comment on the umbrella mitigation policy and ESA compensatory mitigation policy. Once comments are received, NRECA asks that the USFWS act expeditiously to withdraw or modify both policies.

7) Develop Eagle Incidental Take General Permit.

The USFWS issues permits to electric utilities, renewable energy facilities, and others where eagle takes are unavoidable. In 2016, the USFWS finalized revisions to the 2009 regulations for the issuance of incidental take permits for bald and golden eagles, but these were tailored to wind energy operations and failed to address the unique application for electric transmission and distribution infrastructure. The USFWS should develop implementation guidance specifically for electric utilities. This guidance should provide a flexible framework and not a one-size-fits-all approach as individual companies differ in size, location, scope, and risk.

The costs to obtain and implement an eagle incidental take permit are overly burdensome. Applying for a permit is daunting given the expense, feasibility, and uncertainty of how to conduct surveys and use third-party monitoring along tens to hundreds of thousands of miles of power lines as presented in the 2016 revision. It also offers no streamlined permitting process for lower risk electrical infrastructure or provides incentive to the electric industry or others that apply for a permit. In addition, only a limited number of incidental take permits have been issued by the USFWS even with the recent rule revisions. A delay in receiving a permit could prohibit an applicant from developing or properly maintaining infrastructure in eagle use areas. Given these unique challenges and the presence of infrastructure that operates with minimal effects to eagle populations or effects that have already been considered in the population baseline, the USFWS should establish a low-risk general permit for electric utilities.

NRECA applauds the USFWS for its evaluation of the merits of a general permit program and encourages expeditious action to reduce the burden on industry. The USFWS should collaborate with electric cooperatives and other affected utilities and stakeholders to ensure that the program is workable and cost-effective. A streamlined permitting process would reduce burdens and delays and provide legal certainties for infrastructure projects. This would likely result in an increase in participation by the electric industry and improvement to infrastructure, while expanding eagle conservation opportunities.

Conclusion

NRECA appreciates this opportunity to provide initial recommendations for opportunities to reduce regulatory burden from certain regulations while protecting the environment. NRECA welcomes an opportunity to discuss these issues further with your team.

Respectfully,



Janelle Lemen
Regulatory Director, Environmental Policy
National Rural Electric Cooperative Association

cc: T. Cromwell, NRECA
R. Cronmiller, NRECA
P. Sharma, SBA Office of Advocacy
D. Rankin, RUS