



November 17, 2016

Public Comments Processing
Attn: FWS-R6-ES-2016-0106
U.S. Fish and Wildlife Service Headquarters, MS: BPHC
5275 Leesburg Pike
Falls Church, VA 22041-3803

Submitted Electronically via eRulemaking Portal to FWS-R6-ES-2016-0106

Re: NRECA Comments on the U.S. Fish and Wildlife Service's Proposed Rule for the North American Wolverine; 81 *Fed. Reg.* 71670 (October 18, 2016), Docket No. FWS-R6-ES-2016-0106

The National Rural Electric Cooperative Association (NRECA) respectfully submits the following comments in response to the above-referenced notice and reopened comment period from the U.S. Fish and Wildlife Service (USFWS). We appreciate the opportunity to submit comments on the USFWS's 2013 proposed rule to list the distinct population segment (DPS) of wolverine occurring in the contiguous U.S. as threatened, under the Endangered Species Act of 1973, as amended (ESA).¹

NRECA is the national service organization dedicated to representing the interests of rural electric utilities and the consumers they serve. NRECA represents more than 900 rural electric cooperatives that provide electricity to over 42 million people in 47 states or nearly 13 percent of the nation's electric customers. Electric cooperatives are private, independent, not-for-profit electric utility businesses that are owned by the customers they serve. NRECA's members include approximately 65 generation and transmission (G&T) cooperatives, which generate and transmit power to 668 of the 838 distribution cooperatives. Remaining distribution cooperatives receive power directly from other generation sources within the electric utility sector. The typical distribution cooperative is a small business entity that serves 13,000 member-consumers. Collectively, electric cooperatives own and maintain 2.5 million miles or 42 percent of the nation's electric distribution lines, covering 75 percent of the U.S. landmass. Both distribution and G&T cooperatives were formed to provide reliable electric service to their member-owners at the lowest reasonable cost.

Many NRECA members are concerned about the continued listing of species based on long-term climate modeling. NRECA is a member of the Utility Air Regulatory Group (UARG), which jointly filed extensive comments with the American Petroleum Institute (API) on the USFWS's 2013 proposed listing.² UARG and API have submitted additional comments on the reopening of the proposed listing and we support their comments. In addition, NRECA believes that the USFWS's 2014 decision to withdraw its proposal to list the wolverine (Withdrawal Decision)³ was rational and based on the best available information.

The wolverine situation, past and present, is an unfortunate example of misguided implementation of the ESA. We are dismayed and baffled by the amount of time and money that has been spent and

¹ 78 *Fed. Reg.* 7863 (February 4, 2013).

² See Docket No. FWS-R-2012-0107-12410 (December 2, 2013).

³ 79 *Fed. Reg.* 47521 (August 13, 2014).

continues to be spent by agencies, attorneys, and non-governmental organization staff to attempt listing a species that does not need ESA protection. Even if the wolverine were listed, it would receive little benefit because the ESA is not the appropriate mechanism to address climate change. Wolverines are abundant in Canada and Alaska, and continue to recover from their previous extirpation within the conterminous United States without ESA protection.⁴ We are particularly dismayed that the conservation status of this species is being driven primarily by a flawed DPS policy that is giving inappropriate weight to a biologically meaningless political boundary between the United States and Canada that wolverines have been demonstrated to ignore.⁵ The USFWS must re-evaluate the appropriateness of the wolverine DPS designation as a threshold matter before further evaluation of potential threats is conducted. As the USFWS is aware, there is limited funding for ESA implementation and species conservation in general. The continued expenditure of time and resources on a species that clearly does not warrant protection serves to re-direct efforts away from those species that truly warrant ESA protection and society's collective attention.

In addition to our overarching concern regarding the appropriateness of the DPS designation, NRECA also disagrees with the USFWS's original interpretation of scientific information used in the 2013 proposed listing of the wolverine. The USFWS primarily used two studies, Copeland (2010) and McKelvey (2011), to justify that wolverine habitat may be threatened due to climate change. Copeland (2010) used satellite imagery to define suitable wolverine habitat as those areas that contained deep snow on May 15th (an arbitrary date) in at least one of seven years. McKelvey (2011) then modeled how climate change might reduce wolverine suitable habitat, using the Copeland (2010) suitable habitat study results. There is a mixture of uncertainty and skepticism among USFWS personnel and peer reviewers of the 2013 proposed listing. One issue is that metrics used in Copeland (2010) do not reflect habitat on which wolverines are dependent.⁶ In addition, suitable wolverine habitat is not limited to only those areas identified in the Copeland (2010) study. For example, there is now evidence of wolverines using non-snow dens.⁷ Also, the climate change modeling itself has limitations; limits that were pushed beyond what the model builders claimed could credibly be predicted. The modeling relied on projections of complex temperature and precipitation interactions on a small geographical scale too far into the future. The USFWS misinterpreted these studies and the agency's 2014 Withdrawal Decision explained the reasons why USFWS had departed from the preliminary conclusions it relied upon in the 2013 proposed listing, incorporated and explained all new data and analysis, and provided detailed justification for the final determination.

The Withdrawal Decision was challenged by numerous groups, resulting in the District of Montana remanding the issue back to USFWS for further consideration.⁸ Notably, the court decision does not require the USFWS to consider any of the potential threats to the wolverine that were raised in the plaintiffs' arguments. The USFWS can comply with the court order by more fully explaining how it derived its conclusions for the Withdrawal Decision rather than necessarily proposing to list wolverine. Multiple studies exist that were either not considered by USFWS or were published after its Withdrawal Decision. These studies support the Withdrawal Decision's determination that wolverines are not likely to be driven to the brink of extinction within the foreseeable future. The USFWS should especially provide more detail on its interpretation of wolverines' relationship with snow. New information exists

⁴ Inman et al., (2011).

⁵ See Zigarus (2013), Rico (2015), McKelvey (2014).

⁶ Inman, Magoun (2013).

⁷ Inman (2013).

⁸ *Defenders of Wildlife v. Jewell*, CV 14-246-M-DLC (D. Mont., April 4, 2016).

that not only disputes that wolverines have an obligate relationship with snow as described by Copeland (2010), but supports the rationale of the Withdrawal Decision. While this information could not be used in court in support of the Withdrawal Decision because it was not a part of the administrative record, NRECA urges the USFWS to consider this information in the remand. The USFWS should take this opportunity to bolster its explanation in the administrative record.

The development of the 2013 proposed listing was due to a misreading⁹, by agency staff, of the USFWS's obligations under the 2011 Settlement Agreement with the Center for Biological Diversity (CBD) and WildEarth Guardians.¹⁰ The proposal was, therefore, not created by an open-ended scientific inquiry. The USFWS should not just revert back to reopening the 2013 proposed listing since the agency knows that the proposal is not only procedurally flawed, but based on outdated information. In addition, reverting to the old proposal violates the ESA's requirement that both proposed and final listings use the best scientific and commercial data available. In addition, there are other binding statutes and executive orders, such as the Information Quality Act (IQA), which prohibit the USFWS from using the exact 2013 proposed listing. The court order remands the USFWS to go back to the proposed rule stage not the same exact 2013 proposed listing. As mentioned above, there is new relevant data and research available on wolverines since the 2013 proposed listing, some of which was identified in the Withdrawal Decision. The USFWS should fully review and revise the proposed listing utilizing the newly available information as well as re-consider the appropriateness of its previous DPS designation. In addition, the USFWS should draft a new proposed rule and conduct a new analysis of potential impacts to the species.

Thank you for considering our comments. Please do not hesitate to contact me by phone at (703) 907-5790 or email at janelle.lemen@nreca.coop should you have any questions regarding our comments.

Respectfully,



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⁹ Sartorius, Inman et al. (2011).

¹⁰ *Endangered Species Act Section 4 Deadline Litigation*, Misc. Action No. 10-377 (EGS), MDL Docket No. 2165 (D.D.C.).