



July 13, 2012

Public Comments Processing
Attn: FWS-R9-ES-2011-0099
Division of Policy and Directives Management
U.S. Fish and Wildlife Service
4401 N. Fairfax Drive, MS 2042-PDM
Arlington, VA 22203

RE: National Hydropower Association's Comments on the Fish and Wildlife Service's Advanced Notice of Proposed Rulemaking – Expanding Incentives for Voluntary Conservation Actions Under the Endangered Species Act – Docket No. FWS-R9-ES-2011-0099

Dear Mr. Serfis,

On March 15, 2012, the Fish and Wildlife Service (FWS) issued and requested comments on an Advanced Notice of Proposed Rulemaking (ANPR) *Expanding Incentives for Voluntary Conservation Actions Under the Endangered Species Act*. The National Hydropower Association (NHA)¹ is pleased to submit the following comments on the ANPR.

I. Introduction

NHA applauds the Department of Interior's (DOI) response to President Obama's Executive Order 13563 and for engaging stakeholders in the process for developing DOI's *Plan for Retrospective Regulatory Review* (Regulatory Review). We appreciate the FWS following up on the Regulatory Review report by issuing this ANPR and taking the initiative to consider changes to its regulations and policies in order to create incentives for voluntary conservation actions. Regulatory polices, such as the Endangered Species Act (ESA) and its implementation, can significantly affect the hydropower industry, both in terms of daily operations and in long-term management and planning.

As America's leading renewable electricity resource, hydropower currently provides approximately 8 percent of our nation's total electricity supply and two-thirds of America's renewable electricity. This results in hundreds of thousands of domestic jobs. NHA's members and hydroelectric facility owners and operators are stewards of the rivers where their facilities are located, and value river resources and a diverse ecosystem. Every year, the industry spends hundreds of millions of dollars on environmental conservation, mitigation, protection and enhancement measures, and fish passage.

Numerous recent studies have demonstrated tremendous growth potential in the tens of thousands of megawatts of clean, renewable power generation across the waterpower sector, including new conventional hydropower resources. As the hydropower industry prepares for this growth, retrospective review of agency regulations and processes, such as this ANPR, is welcomed and appreciated.

¹ NHA is a national non-profit association dedicated exclusively to advancing the interests of the U.S. hydropower industry, including conventional, pumped storage, and new marine and hydrokinetic technologies. NHA's membership consists of more than 180 organizations, including consumer-owned utilities, investor-owned utilities, independent power producers, project developers, equipment manufacturers, environmental and engineering consultants, and attorneys.

NHA believes the FWS can create incentives that would encourage the hydropower industry to participate in voluntary conservation actions. First, NHA recommends that the FWS consider better utilizing existing ESA tools in order to achieve their goals. Second, and alternatively, we provide specific comments on the questions raised in the ANPR. Third, we offer additional comments to further the FWS's guiding objectives. NHA looks forward to working with you and other stakeholders in this effort to improve ESA implementation and to continue conserving at-risk species.

II. Improving Existing FWS Process & Regulations

In the ANPR, the FWS requests proposals for changes to its ESA regulations that would create incentives for landowners and others to take voluntary conservation actions to benefit species that are likely to become threatened or endangered. The ANPR specifically requests proposals for regulatory improvements that would promote predictability and reduce uncertainty, using the least burdensome tools to achieve the FWS' regulatory ends (i.e., species protection).

As an initial matter, NHA believes that the FWS can more efficiently and effectively achieve its goal of advancing voluntary conservation actions by promoting more and better use of existing ESA tools, rather than developing a new regulatory scheme. The hydropower industry currently operates within a structure that provides numerous opportunities to promote species protection, before and after species listing. Such opportunities are a critical component of the ESA's regulatory scheme. However, those opportunities are often lost because the existing regulatory tools are implemented inconsistently across U.S. regions, by species, and over time.

Therefore, NHA recommends the FWS develop a policy, preferably recorded in an agency guidance document, that promotes the predictable, uniform, and effective use of existing ESA measures to advance voluntary conservation actions. Examples of how the existing authorities can be used to promote such actions include, but are not limited to, the following:

- Threatened Listing Determinations: Under Section 4(d) of the ESA, the FWS in listing threatened species "shall issue such regulations as it deems necessary and advisable to provide for the conservation of a listed species." Under the ESA, there is no one-size fits all numeric way to give credit to governmental bodies or the regulated community for pre-listing actions that result in species protection, whether those actions were taken voluntarily or taken as the result of another regulatory program. A species' 4(d) rule, however, may be an appropriate place to give credit for such action, and thus incentivize it, by excluding certain activities from the ESA's Section 9 take prohibition where those activities are associated with conservation actions that FWS deems to be providing benefits to the species being listed.
- Endangered Listing Determinations: For species being listed as endangered (i.e., where a 4(d) rule is not an available tool), FWS should identify in its listing determinations ongoing conservation measures that are expected to benefit the species being listed and recognize in listings that such measures should be part of the "environmental baseline" for Section 7 consultations of the species, once listed. In subsequent Section 7 consultations, FWS staff should be directed to incorporate that information and adjust the baseline to account for species improvements as conservation measures are implemented over time.

For example, hydropower licenses include requirements to implement protection, mitigation and enhancement (PM&E) measures for affected resources, including threatened and endangered species, for terms of up to 50 years. Often, those PM&E measures are the result of recommendations submitted by FWS or the state fish and wildlife agency under Section 10(j) of the

Federal Power Act. In addition, stakeholders, including FWS, frequently sign settlement agreements specifying the types of PM&E measures that they propose the Federal Energy Regulatory Commission include as binding license terms. FWS should, as a rule, recognize these types of conservation actions in its listing determinations, and require that FWS staff update the baseline discussion in Section 7 consultations to reflect the benefits those measures provide over time.

- Voluntary Conservation Agreements: FWS should promote and streamline the process for developing Candidate Conservation Agreements (CCA), Safe Harbor Agreements (SHA) and Habitat Conservation Plans (HCP)², and should make these tools more easily available to landowners and others implementing conservation actions. These tools are rarely used in the hydropower licensing context, although successful examples exist,³ but could be a valuable tool for establishing early and significant conservation actions while providing certainty to hydropower owners and operators regarding ESA compliance issues.
- Critical Habitat Exclusions: FWS could use its discretion under Section 4(b)(2) of the ESA to exclude areas from critical habitat designations where the habitat is already the subject of agreements or requirements to implement protection, restoration or enhancement measures. For example, hydropower licenses and settlement agreements frequently include habitat enhancement funds or specific measures to protect and enhance species and their habitat. FWS should review hydropower licenses and settlement agreements for these types of measures for the purpose of excluding affected areas from critical habitat designations.

Section 4(b)(2) was added to the ESA by Congress in 1978 to promote just this kind of commonsense approach to species protection. Congress' goal was to balance species' needs against the needs of the nation. The statute provides that "[t]he Secretary shall designate critical habitat, and make revisions thereto ... after taking into consideration the economic impact, the impact on national security, and any other relevant impact, of specifying any particular area as critical habitat. The Secretary may exclude any area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat ..."

Since 1978, Section 4(b)(2)'s exclusion has been applied inconsistently. This inconsistency has hindered the implementation of the ESA, and ultimately species conservation, because it results in litigation over proposed 4(b)(2) exclusions and creates unpredictability (and thus increased burden) for the regulated community and FWS alike. In order to end the inconsistent application of Section 4(b)(2) and to promote recognition of conservation measures through appropriate critical habitat exclusions, NHA recommends the promulgation of a regulatory standard to govern review of a FWS decision to grant or deny a request for 4(b)(2) exclusion. At a minimum, NHA requests the development of FWS guidance on the factors and considerations that should govern a Section 4(b)(2) request, and proposes that those standards encourage exclusions when conservation measures are already being implemented in a particular location.

² It is essential that the FWS continue to protect the No Surprises Policy which is a crucial aspect of HCPs. Further, we encourage the FWS to fully fund the HCP program and retain an institutional knowledge of HCP agreements in order to ensure their effective implementation.

³ For example, three hydropower projects operate on the mid-stem of the Columbia River under negotiated HCPs.

- Recognizing and Relying on Conservation Benefits in Section 7 Consultations: In its Section 7 biological opinions, FWS regulations require that it take into account any beneficial conservation measures included by the action agency or applicant as part of the proposed action.⁴ To rely on conservation measures in a biological opinion, the measures must be “reasonably specific, certain to occur, and capable of implementation; they must be subject to deadlines or otherwise-enforceable obligations, ...”⁵ FWS staff, action agencies and applicants alike would benefit from clarification of this “reasonable certainty” standard as it has been applied to conservation measures. Guidance on this point could encourage recognition of conservation measures so long as they are part of the proposed action and reasonably specific.⁶ It could also emphasize that FWS must rely on the best available science and need not be certain of the mitigation’s success at the time they issue a biological opinion.⁷

In summary, NHA recommends the FWS establish a policy to aggressively and efficiently use the tools currently available before considering or developing new tools by which to promote voluntary conservation actions under the ESA.

III. Responses to Specific Questions in the ANPR

- A. *How can the Service allow for the recognition of conservation credits for voluntary action taken in advance of listing in a manner that is efficient, readily understood, and faster? How can this be accomplished in an expeditious manner?*

The success of any conservation credit system depends on its design. The system must be broad enough to incentivize adequate participation, be flexible and balance environmental benefits, but also ensure certainty into the future. The integrity of the system and future certainty are perhaps the most critical aspects that will drive acceptance and participation.

Developing clearly written and simple guidelines that would be used across the FWS for implementing a voluntary conservation credit program would help expedite any program. It is important for the FWS to define, up front, the elements or categories that, if implemented, would result in a credit. The agreed upon elements or categories would be the measures the FWS deems to be the most effective conservation methods designed to benefit at-risk species the most. Categories could include, but are not limited to:

- Habitat improvement measures,
- Pre- or post-construction monitoring/impact studies,
- Conservation easements,

⁴ See 50 C.F.R. § 402.14(g)(8) (in formal consultation, Services must “give appropriate consideration to any beneficial actions taken by the Federal agency or applicant. . . .”); *id.* § 402.02 (defining “action” broadly to include conservation measures); see also U.S. Fish and Wildlife Service and National Marine Fisheries Service “Endangered Species Consultation Handbook” at 4-19 (March 1998) (“Handbook”) (proposed action includes any conservation measures proposed as part of that action); see *id.* at 4-25 (biological opinions may discuss beneficial effects if applicant so requests).

⁵ *Center for Biological Diversity v. Rumsfeld*, 198 F.Supp.2d 1139, 1152 (D. Ariz. 2002); see also *National Wildlife Federation v. NMFS*, 254 F.Supp.2d 1196, 1207 (D.Or. 2003) (quoting same).

⁶ See Handbook at 1-6 (agency must reinstate if mitigation does not have intended beneficial effects).

⁷ See *Greenpeace Action v. Franklin*, 14 F.3d 1324, 1337 (9th Cir. 1992) (rejecting argument that NMFS must be certain that mitigation measures will be effective; it is sufficient that NMFS premised management measures “on a reasonable evaluation of available data, not on pure speculation.”); *Loggerhead Turtle v. County Council of Volusia County, Fla.*, 120 F.Supp.2d 1005 (M. D. Fla. 2000) (deferring to USFWS as to efficacy of mitigation because it had a reasonable basis for its decision).

- Financial support or operation of wildlife rescue/rehabilitation services, and
- Financial support or operation of fish hatcheries/incubators

The methods ultimately decided upon should automatically be taken into account by the permitting agency for purposes of permit take allowances or credit against permit conditions. Additionally, while determining how voluntary conservation efforts and credits could be recognized, NHA encourages the FWS to consider whether and how the following would be included:

- The use of best available science and adaptive management principles,
- Trading and banking of the conservation credits,
- The transferability of the credits across multiple watersheds or species (ecosystem approach),
- Determining baseline status and a verification process, and
- The use of regional experts, as appropriate, for review of actions

B. *Should credits recognized for voluntary conservation actions taken prior to listing be available for use solely by the person who created them or should they be transferable to third parties?*

It is vital that any conservation credits generated by voluntary actions taken prior to a listing be available for transfer to third parties. The flexibility and option to transfer the credits would be a strong incentive to participate in a voluntary program.

C. *If voluntary conservation actions undertaken prior to listing generate conservation credits that can be used to offset impacts of post-listing activities, should they be based solely on the beneficial actions of the person undertaking them, or should they be based on the net impacts of both beneficial and detrimental actions?*

Any conservation credits generated should be based only on actions that provide or are assumed to provide beneficial outcomes. Discounting credits by including detrimental actions or those based on net impacts would create a disincentive and inhibit the use and adoption of the credit system. Further, credits based on beneficial actions or assumed benefits could encourage innovative thinking that otherwise might not occur.

D. *What role should the States play in recognizing and overseeing the development of credits from voluntary conservation actions taken for species not yet listed?*

States play an important role in developing and accepting voluntary conservation credits, and in some cases voluntary actions could maintain a state's oversight and management of a particular species. However, state involvement must encourage cooperation and recognition of the voluntary actions, thereby reducing delays and expense.

For example, state agencies as well as tribal and federal agencies can be co-managers of natural resources and therefore may have shared managerial responsibilities either directly or through enabling agreements. In these circumstances it would be important for co-managers to have a role in a voluntary conservation credit system. In situations where there are no co-managers, it will be important for states and tribes to recognize the actions and support the credit system.

- E. *How could the Service use pilot projects to demonstrate that the ESA can provide landowners with credits and regulatory assurances for actions intended to benefit candidate species? Are there existing situations where such pilot projects could facilitate conservation for candidate species?*

Pilot programs are an effective way to test the credit system and design elements. Potential pilot projects could include existing HCPs, SHAs, and CCAs, as these pre-existing agreements can provide the FWS with valuable data, experiences and examples.⁸ As described in Section II above, focusing on streamlining the process for developing new HCPs, SHAs and CCAAs would also serve to utilize existing tools to incentivize voluntary actions.

Further, pilot projects provide participants with opportunities to try new approaches and to work through processes and procedures while protecting the participants from future action if the species is listed. The FWS must be willing to take some risks to initiate a pilot program since a participant will need assurances from the FWS even if the processes and projects fail to produce the desired results.

- F. *How can a landowner use such voluntary “prelisting mitigation” activities to satisfy requirements arising from any future section 7 consultation (such as “conservation measures,” “reasonable and prudent measure,” or “reasonable and prudent alternatives”)?*

NHA believes the FWS has the ability to take prelisting conservation and mitigation activities and their resulting outcome into account when drafting biological opinions. In these cases, the FWS can recognize the voluntary activities as either having been completed or as on-going. This would not preclude the FWS from including other measures that the FWS deems necessary, but it does provide recognition of the prelisting activities and the conservation benefit of the actions within the biological opinion.

IV. Suggestions that Further the FWS’s Guiding Objectives

A. *Jurisdictional Issues*

NHA notes that there are many species that are managed by more than one federal agency. For example, anadromous fish species may be managed under the ESA by either the FWS or the National Oceanic and Atmospheric Administration’s National Marine Fisheries Service (NMFS). However, other agencies with potential management responsibilities are not included in the ANPR, which could ultimately undermine the integrity of a credit system. Developing a credit system for voluntary conservation actions should be developed cooperatively by, and apply equally to, all agencies with potential oversight responsibilities.

For example, as drafted, would NMFS recognize voluntary conservation actions, and the resulting credits, taken under this proposal for species under its jurisdiction? Particularly in the context of when a conservation project is done with the intent to protect one species under FWS jurisdiction, but that same project also benefits another species under NMFS jurisdiction, what is the result? How will these additional benefits be recognized and accounted for? NHA suggests that the FWS work with NMFS and other appropriate agencies to address this issue at the agency level and develop guidelines that outline how the respective agencies will recognize the relevant actions and resulting credits.

⁸ An example to consider is the Wisconsin Karner Blue Butterfly HCP Partnership. Information is available at: <http://dnr.wi.gov/topic/forestplanning/karnerhcp.html>

B. *The Role and Recognition of Voluntary Conservation Actions During Hydropower Licensing and Relicensing*

There are numerous statutes and regulations in addition to the ESA that affect hydropower operations. Most notable among these is the Federal Power Act (FPA), which requires that a license be obtained through the Federal Energy Regulatory Commission (FERC) for the majority of the nation's non-federal hydropower projects. Cooperation between the agencies and compatibility among their enabling legislation and regulation is critical. Any incentive system for voluntary conservation actions under the ESA should recognize as credits, any beneficial actions taken under a FERC license to manage, conserve or enhance at-risk species.

Mitigation measures taken as a result of a license specifically to mitigate for adverse effects on previously listed ESA species could be credited towards other at-risk, but not yet listed species. Conversely, actions taken in advance of an original or new license from FERC should be recognized in the license. Coordinating with FERC and obtaining recognition of voluntary actions in license terms would add a key incentive for hydropower licensees to participate in voluntary actions now, rather than waiting to undertake the beneficial action until a license expires. This could involve for example, requiring the FWS to recognize advance voluntary conservation measures in their comments to the FERC during the licensing proceedings.

C. *Miscellaneous*

- In some circumstances, NHA members have entered into settlement agreements with the FWS as part of the hydropower licensing process. These agreements often include management plans for unlisted species. The FWS should consider these settlement agreements and corresponding management plans in the same way they consider other voluntary actions if the species of concern is listed or critical habitat is designated.
- To achieve the goals and guiding principles in the ANPR, the FWS could consider increasing funding for the Ecological Services offices.
- The FWS should consider collaborating with participants in all aspects and stages of voluntary conservation efforts related to unlisted as well as listed species. Including participants in the development and review of relevant documents relating to voluntary conservation efforts will also help reduce the time it takes to finalize documents and plans.
- The FWS should consider developing an appeals process related to any conservation credit denied or significantly modified. The appeals process could follow the trial-type hearing prescribed by the FPA relating to fish passage as prescribed in 16 U.S.C. § 811 (FPA § 18).
- It would be beneficial for the FWS to review its approach and role in relation to citizens suits against persons who have taken or are undertaking voluntary conservation actions under this ANPR. For example, citizen suits are immediately allowed after a species is listed. But, if a landowner is pursuing conservation credits or is enrolled in a program that may result from this ANPR, then that landowner should be afforded some protection and not be penalized while undertaking good faith voluntary actions. If a landowner receives a 60-day notice under the citizen suit provisions of the ESA, then the threatened suit could be stayed in order to allow the conservation process to continue and allow for the issuance of an incidental take permit (ITP). For example, the FWS could allow for the submittal of an abbreviated ITP application that lists the voluntary actions undertaken by the applicant, which would provide the basis for the FWS to issue an ITP in recognition of the advance voluntary actions.

V. Conclusion

NHA and its members work closely with FWS staff throughout the United States and together we are seeing tremendous results in managing, conserving, and recovering our valuable natural resources. Although our comments reflect improvement opportunities, we also want to recognize the dedication and hard work of FWS staff and note that some of our recommendations are occurring in various regions.

NHA appreciates the opportunity to submit comments on this ANPR, and we commit to working with the FWS and other stakeholders on creating proper incentives under the ESA for voluntary conservation actions.

Respectfully submitted,

A handwritten signature in cursive script that reads "Linda Church Ciocci".

Linda Church Ciocci
Executive Director
National Hydropower Association