



NATIONAL ENDANGERED SPECIES ACT  
REFORM COALITION

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[www.nesarc.org](http://www.nesarc.org)

November 6, 2014

U.S. Fish and Wildlife Service  
Public Comments Processing  
Attn: Docket No. FWS-R9-ES-2011-0099  
Division of Policy and Directives Management  
4401 N. Fairfax Drive, PDM-2042  
Arlington, VA 22203

Submitted via Federal eRulemaking Portal: <http://www.regulations.gov>

**Re: NESARC Comments on the FWS Draft Policy Regarding Voluntary Prelisting Conservation Actions**

Dear Sir/Madam,

The National Endangered Species Act Reform Coalition (“NESARC”) respectfully submits these comments and recommendations on the U.S. Fish and Wildlife Service’s (“Service”) draft “Policy Regarding Voluntary Prelisting Conservation Actions” (“Draft Policy”).<sup>1</sup>

NESARC is the country’s oldest broad-based, national coalition dedicated solely to achieving improvements to the Endangered Species Act (“ESA”) and its implementation. As detailed in the attached membership list,<sup>2</sup> NESARC includes farmers, cities and counties, rural irrigators, electric utilities, forest product companies, homebuilders, agricultural interests, mining companies, and other businesses and individuals throughout the United States. NESARC and its members are committed to promoting effective and balanced legislative and administrative improvements to the ESA that support the protection of fish, wildlife, and plant populations as well as responsible land, water, and resource management.

With the Draft Policy, the Service seeks to incentivize landowners, government agencies, and others to undertake voluntary conservation actions aimed at benefiting non-listed species before those species are listed as threatened or endangered under the ESA. Moreover, the Service seeks to provide a measure of credit to the party undertaking such activities for compliance with the ESA, if the species is later designated as threatened or endangered under the ESA. These “credits” could then be used by a landowner or a third party “to mitigate or to serve as a compensatory measure for the detrimental effects of another action undertaken after listing.”<sup>3</sup>

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<sup>1</sup> 79 Fed. Reg. 42525 (July 22, 2014).

<sup>2</sup> Appendix A

<sup>3</sup> 79 Fed. Reg. at 42525.

### ***Need for Measures Promoting Voluntary Conservation Efforts***

NESARC has consistently advocated for improvements to the ESA to facilitate the opportunity for, and implementation of, voluntary conservation measures for species conservation.<sup>4</sup> NESARC's members are actively involved in a broad range of voluntary species conservation efforts including:

- Farmland enrollment and cooperation with the Department of Defense on species protection programs for the Golden Cheeked Warbler and Black Capped Vireo;
- Recovery implementation programs such as the Upper Colorado and San Juan Rivers Endangered Fish Recovery Implementation Programs and Platte River Endangered Species Recovery Program;
- Numerous habitat conservation plans ("HCPs") ranging from county-wide HCPs for multiple uses to single-parcel HCPs for agricultural and timber operations.
- Pre-listing voluntary conservation measures for the purpose of avoiding the need to list a species including: participation in Candidate Conservation Agreements with Assurances, State-initiated species protection efforts, such as those underway for Greater Sage Grouse and Lesser Prairie Chicken;
- Development and implementation of observation, research, and monitoring programs for candidate species; and
- Participation in Safe Harbor Agreements.

These voluntary conservation measures are being actively implemented and positively contribute to species protection efforts. However, hurdles exist to their effective implementation. Specifically, the Service does not have a consistent policy on how to recognize such measures in the context of Section 7 consultations or within the context of the review, approval, and implementation of HCPs. Accordingly, promoting *and recognizing* the development of voluntary pre-listing measures is a critical improvement to the implementation of the ESA and one that deserves the Service's highest priority.

### ***Request for Further Engagement with States and Stakeholders***

While NESARC supports the spirit and intent of the Service's effort to facilitate voluntary conservation actions, the Draft Policy contains several significant policy and procedural deficiencies that warrant revision. Moreover, NESARC believes that it is imperative that the Service further engages with the States and all stakeholders on ways to develop a more comprehensive and effective pre-listing voluntary conservation policy. To that end, NESARC encourages the Service to reach out and engage with the States and other stakeholders on ways to further improve this policy. Importantly, such outreach and engagement will provide the Service

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<sup>4</sup> In July 2012, NESARC provided comments to the Service on measures that can be taken to encourage voluntary conservation measures for listed and candidate species. Those comments are attached in Appendix B.

with valuable feedback with respect to how it should ultimately structure and implement this policy. NESARC is prepared to engage with the Service and other stakeholders in developing a workable policy.

### ***Concerns with the Draft Policy***

NESARC offers the following specific comments on issues of concern that we have identified in this version the Draft Policy:

- 1. The Service's estimate of participation by only 10 States underscores the deficiencies of the Draft Policy.*

As part of its Draft Policy, the Service reports that “[w]e estimate that 10 States will choose to participate [in the pre-listing conservation credits program].”<sup>5</sup> The Service’s estimate of such a low level of participation underscores the need for further engagement with the States and stakeholders on ways to develop an effective program incentivizing voluntary pre-listing conservation measures, including ways to undertake a program when State governments may not be able to actively participate in the effort.

NESARC believes that a key reason for such a low estimate of potential participation is the structure of the Draft Policy as proposed by the Service. States have long demonstrated their commitment to promoting voluntary conservation of species. Through this policy, the Service has the opportunity to promote cooperation of private parties and the States on measures to protect species and their habitat. However, for that cooperation and engagement to occur, fundamental improvements to this policy must be pursued.

- 2. The Draft Policy lacks a consistent process for quantifying, evaluating and assigning credits for voluntary conservation measures.*

The Service must work to ensure that there is transparency in the valuation of credits/benefits and that the valuation process is applied on a nondiscriminatory basis to all individuals seeking to have their voluntary conservation measures qualified as advanced mitigation. Under the Draft Policy, the Service’s basis for credit valuation is vaguely defined and is subject to later unilateral modification of metrics by the Service. For example, the Draft Policy states that the Service will evaluate credits for voluntary prelisting conservation actions “according to the same criteria, standards, and metrics that it uses to evaluate the beneficial impacts of other mitigating or compensatory measures and the detrimental impacts of activities that give rise to mitigating or compensatory measures.”<sup>6</sup> However, the Draft Policy does not articulate what, exactly, these criteria, standards, and metrics are, nor does the policy reference any Service policy documents detailing these evaluation measures. Moreover, the Draft Policy notes that:

[O]ver time, new scientific information may indicate that the metric may need revision or a new metric should be used. The Service will work with the landowner to advise them on the need for a change. In cases where failure to utilize a new or

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<sup>5</sup> *Id.* at 42531 (emphasis added).

<sup>6</sup> *Id.* at 42529.

revised metric would appreciably reduce the likelihood of survival and recovery of the affected species in the wild, the Service will require a new or improved metric as appropriate and will alert the landowner.<sup>7</sup>

Allowing such unilateral modifications of metrics applying to a landowner's ongoing species protection efforts creates a significant risk that the total value of credits (i.e., the metric by which the credits are awarded or measured for purpose of compensatory mitigation) may change over time. This approach injects an unreasonable level of uncertainty that will discourage participation in a voluntary conservation program. Particularly, if a landowner risks losing the benefit of his or her original bargain, then the landowner may be unwilling to engage in voluntary conservation measures in the first instance.

*3. The Service must ensure certainty in the availability and application of credits.*

Another measure of certainty that is important to encouraging participation in a crediting program is the ability to utilize and apply the produced credits. Here, again, the Draft Policy lacks a consistent policy. Specifically, the Service states:

The [Draft Policy] does not require that in all cases the Service must use prelisting conservation actions as mitigation or a compensatory measure for post-listing detrimental actions. Where there is a mitigation or compensatory measure alternative that clearly produces a better, or more certain, environmental outcome, the Service can require or encourage its use.<sup>8</sup>

Taken at face value, the Service appears to reserve the right to reject an entity's request to apply credits produced under a voluntary conservation program. This approach undermines an animating purpose in engaging in a voluntary conservation program at all. If a landowner, action agency, State, permit applicant, or other party has no certainty that the Service will actually accept the credits produced, then a significant incentive for prelisting conservation measures is removed. For these reasons the Service must ensure that any policy allows for certainty in the application of produced credits.

*4. The Draft Policy does not provide equal opportunity to qualify for advanced credits.*

The Draft Policy requires that a voluntary conservation action "be undertaken as part of a State-administered program."<sup>9</sup> This requirement is intended to encourage State engagement in the design and implementation of voluntary conservation programs, but in reality it significantly limits the Draft Policy's scope of applicability. Moreover, it creates the distinct possibility that there will be a patchwork of applicability where certain individuals or entities may be denied the availability of advanced credits from voluntary conservation measures by virtue of being located in a State that has not developed a State-administered program, while others, possibly in the same vicinity, but a different State, would have access to such a program. The Draft Policy therefore forecloses the protection of key habitats that may contribute to species protection and recovery but are located in

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<sup>7</sup> *Id.* at 42527-28.

<sup>8</sup> *Id.* at 42528.

<sup>9</sup> *Id.* at 42527.

a State that lacks an established program. In those instances, a Service-administered program must be available to ensure equality of availability.

Moreover, the Draft Policy (and the accompanying preamble) often refers, narrowly only to landowners. In many instances, an individual or entity that does not own the property operates on a parcel and may be undertaking the voluntary conservation activities that are to be promoted by this Draft Policy. In any final policy, the Service must ensure that the policy applies to any person or entity that has undertaken voluntary conservation activities. This will further ensure the appropriate scope of eligible participants and afford an equal opportunity to qualify for advanced mitigation.

*5. The Service should allow wider application of credits.*

Species and their habitats do not fall squarely within state boundaries. At present, however, the Service artificially limits the application of credits to “the same species and within the same State where the credit was earned.”<sup>10</sup> The Service should not limit the application of credits to the State in which the original conservation action occurred. Instead, the Service should permit the exchange of credits between State registries. Further, in the absence of a State registry, the Service should permit the application of credits to an activity under a Service-administered program—again without regard for State boundaries.

NESARC also suggests that the Service develop a process through which credits for protection and enhancement of habitat can be applied to another species that benefits from the same habitat. Oftentimes, voluntary conservation efforts for a specific species will provide collateral benefits to other species. For example, pre-listing conservation efforts for an aquatic species also may result in benefits to an endangered or threatened avian species using the same waterbody for stopover or roosting habitat. Similarly, conservation efforts to improve existing sagebrush steppe would benefit not only sage grouse, but also other ground dwelling animals and big game species. In those cases, the Service should allow for application of produced credits to all listed species that derive benefits from the pre-listing conservation activity.

*6. The transferability of credits needs to be further expanded and clarified.*

Any program for crediting voluntary conservation efforts must have an effective means for transferring produced credits. While the Service proposes that a produced credit may be transferred by a landowner to a third party, further clarity and improvement to the transfer mechanisms will be important for an effective crediting program. Among the key concerns with the Service’s approach to transferability are:

- The Service should not limit transfer of credits to within the State that the credit is produced. Species, habitat and even voluntary conservation activities (and their benefits) are not confined to State boundaries. The purpose of a conservation crediting program is to recognize the value and benefit provided to a species created by virtue of voluntary habitat

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<sup>10</sup> *Id.* at 42528.

and species protection efforts. Limiting tradability to a single State will hinder the full recognition of that value and also may create a significant disincentive to parties considering the investment of time and resources into a species protection effort.

- Procedures must be in place with respect to transferability of credits. Such transferability should cover: (1) a sale of the property upon which the voluntary conservation measures take place in which the new owner takes over the conservation activity; (2) assignment of credits for changes in legal status of the registered party; such as the transfer of legal holdings to successors in interest (heirs, corporate restructuring, municipalization, etc.); and (3) transfer or assignment of accrued credits to an unrelated third party. Importantly, to have a fully functioning program, credits must be fully bankable and transferable without being inextricably limited to the individual who has undertaken the measures or used the property where the credits are located.
- There must be a consistent policy regarding valuation of credits at the time of transferability. Valuation of credits at the time of a transfer is a key factor in allowing for effective trading of credits.

7. *The Draft Policy establishes too high a threshold for “credit” to be accrued and used.*

Under the Draft Policy, conservation activity must produce a “positive assistance to the *recovery* of the species.”<sup>11</sup> Moreover, the Service proposes that, in application of credits, a party must have sufficient credits such that the benefits of the voluntary conservation activity must be greater than the detrimental effect of the action for which the credit is applied. Additionally, the conservation measures must relate to a species that “is, or may become, a candidate or proposed for listing.”<sup>12</sup>

The purpose of the Service’s Draft Policy is to encourage voluntary pre-listing conservation measures. At the time such measures are adopted and initiated, the species benefitting from these measures will not have been listed under the ESA. The purpose of voluntary conservation measures is focused on the protection and enhancement of the species’ population and habitat to preclude the need to list the species, not necessarily on “recovery” of a species as it is defined under the ESA. Thus, actions taken to preclude a listing can, and should, be viewed based on the Section 4 listing factors—namely, alleviating a threat to the species’ habitat or reducing the overutilization of the species. While these actions may not rise to the level of promoting recovery, they could delay or prevent the decline of the species population such that listing is not necessary. In addition, the Service should not emphasize whether the goal of a particular prelisting measure was avoidance, minimization, survival, or even attainment of recovery. Rather, the Service should focus on recognizing the benefit accrued to the species by that measure in the end. By establishing a threshold of “positive assistance to recovery,” the Service appears to be disregarding a significant pool of benefits to the species.

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<sup>11</sup> *Id.* at 42529 (emphasis added). The Service also states that conservation actions are those that “could contribute to precluding the need to list the species.” *Id.* at 42526.

<sup>12</sup> *Id.* at 42528.

Further, the proposed use of these credits is within a Section 7 consultation or as part of the development or compliance with HCPs under Section 10. However, neither Section 7 nor Section 10 imposes a “positive assistance to recovery” standard for avoidance and minimization measures or other compensatory measures. Thus, the accrual of credits must be consistent with the regulatory framework in which they will be used (i.e., the Section 7 “jeopardy”, “adverse modification” and “incidental take” authorization determinations and approval and implementation of measures under a Section 10 HCP).

Another concern arises with respect to the basis for use or application of an accrued credit. As noted above, the Service proposes that the benefits of the applied credits “must be greater than the detrimental effect of the action for which the credit is applied.”<sup>13</sup> Literally applied, this means that there can be no “partial” credit or reduction of impact. Yet, oftentimes avoidance and minimization measures, as well as compensatory mitigation, actually occur through a package or suite of measures that address the potential impact. Thus, it is important that the Service allow the application of credits as an element of an overall avoidance and minimization proposal and not require that the credit, alone, achieve that goal. At a minimum, the Service should revise Section 3 of the Draft Policy to clarify that voluntary prelisting conservation actions can be supplemented with other actions to avoid listing or to address protection measures for a listed species required under Sections 7 and 10.

The Service also should clarify and confirm that it *is not* limiting eligibility to only those conservation activities that are beneficial to *candidate or species proposed for listing* species. In Section 3 of the Draft Policy, the Service states that a qualifying voluntary conservation action must be “[b]eneficial to a species that is, or may become, a candidate or proposed for listing as threatened or endangered.”<sup>14</sup> NESARC supports the recognition of voluntary conservation measures that benefit a species that is later listed. While the Service’s Draft Policy appears to be consistent with that approach, further clarity and certainty on this approach should be provided. Specifically, credits should be awarded for voluntary measures that are taken for the benefit of any species that later is designated as threatened or endangered under the ESA—without regard to whether such measures were initiated at the time the species was a candidate or under consideration for designation as threatened or endangered under the ESA.

8. *The Draft Policy should not be limited to measures initiated after finalization of the policy.*

The Service has stated that actions qualifying for accrual of credits must be “[s]tarted prior to the final listing of the benefitted species as an endangered or threatened species under the Act, and after the date this policy is finalized.”<sup>15</sup> A restriction on qualifying activities to those that are “started” after finalization of the crediting policy would exclude ALL of the significant voluntary conservation activities that the Service has recently encouraged and have otherwise organically been developed by concerned stakeholders and States. For example, conservation actions for Greater Sage Grouse currently being undertaken – when they are most needed to potentially prevent the need for a listing – would be discouraged under this policy. There is no rational basis

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<sup>13</sup> *Id.* at 42528.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 42527.

for such exclusion since the eligibility of such existing pre-listing measures can be adequately addressed through appropriate qualification criteria.

*9. The Draft Policy places an undue burden on the States.*

NESARC is concerned that the Draft Policy may impose a significant burden on States. Section 4 of the Draft Policy requires a State to undertake significant responsibility for establishing and administering voluntary prelisting conservation action programs. These responsibilities include establishing and maintaining registry systems and mechanisms for recording any transfer of rights to credits to third parties. States must also provide “appropriate oversight to ensure effective implementation and maintenance of voluntary prelisting conservation actions and provide a mechanism to notify the Service of each voluntary prelisting conservation action.”<sup>16</sup> By contrast, the Service’s role is limited to its review/acceptance of credits within Section 10(a)(1)(B) and Section 7 decisions.

NESARC recognizes that current fiscal realities require that the Service operate under a reduced budget. However, States are likewise faced with lean budgets, especially for conservation initiatives. Ultimately, the Service’s pre-listing conservation policy is aimed at implementation of federal policy for encouraging voluntary pre-listing conservation and will be realized in the application of the Service’s implementation of Sections 7 and 10 of the ESA. For these reasons, it is incumbent upon the Service to take the leading role in the overall administration of the policy, while allowing States the option to take a lead role as to one or more given species rather than attempting to unilaterally place such a burden upon the States.

***Responses to Questions***

As part of its notice and request for comments, the Service posed a series of questions for which it requested input from interested stakeholders.<sup>17</sup> As a supplement to the comments discussed above, NESARC provides the following brief responses:

**(1) The policy requires an overall positive assistance to the species; how should we define this benefit?**

NESARC opposes the Service’s proposed use of a “positive assistance” standard. First, a focus on “positive assistance to recovery” is too narrow when considered in the listing context. Instead, actions taken to preclude the need to list a species can address survival or recovery. For example, when considered based upon the Section 4 listing factors, an appropriate action could partially alleviate a threat to the species’ habitat or reduce the overutilization of the species. This may not rise to the level of promoting recovery, but it could delay or prevent the decline of the species population such that listing is not necessary. Moreover, the appropriate definition should not depend upon the categorization of whether the goal of a particular prelisting measure was avoidance, minimization, survival, or even

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<sup>16</sup> *Id.* at 42529.

<sup>17</sup> *Id.*

attainment of recovery—but should focus on recognizing the benefit accrued to the species by that measure in the end. By establishing a threshold of “positive assistance to recovery,” the Service appears to be disregarding a significant pool of benefits that may accrue to the species.

Second, neither Section 7 nor Section 10 imposes a “positive assistance to recovery” standard for avoidance and minimization measures or other compensatory mitigation measures. Moreover, literally applied, this means that there can be no “partial” credit or reduction of impact. Oftentimes a suite or combination of measures are adopted to avoid and minimize impacts of a proposed project and reach a determination that the proposed project will not jeopardize the continued existence of a species or result in the adverse modification of designated critical habitat. Under the Service’s proposal, it appears that the “positive assistance” standard would require that, for any use of accrued credits, the prelisting conservation measure (i) alone, would have to achieve the requisite level of protections to achieve a no jeopardy/no adverse modification determination; and (ii) actually go beyond avoidance of jeopardy/adverse modification to also have a “positive assistance” to the species’ recovery. Such a threshold would be unworkable in relation to the normal approach of using a combination of measures to avoid and minimize project impacts. Further, it would create an implicitly higher standard – “positive assistance” – for the use of credits as opposed to the standards already provided for under the requisite Section 7 and Section 10 inquiries. Thus, it is important that the Service adopt a standard that is consistent with the review requirements under Section 7 and Section 10 for purposes of accrual of credits/benefits and also for the Service to allow for the application of credits as an element of an overall avoidance and minimization proposal and not require that the credit, alone, achieve that goal.

**(2) The policy requires that a prelisting conservation action be part of a State plan. What approach should we take if there is no State plan for the species?**

The Service’s proposal that a conservation action be part of a State plan is a significant deficiency in the Draft Policy. Specifically, this proposal creates the distinct possibility that there will be a patchwork of applicability. In turn, this patchwork could mean that certain landowners may be denied the availability of advanced credits from voluntary conservation measures by virtue of being located in a State that has not developed a State-administered program, while a landowner, possibly in the same vicinity but a different State, would have access to such a program. The Draft Policy therefore forecloses the protection of key habitats that may yield species recovery but are located in a State that lacks an established program.

In those instances where a State plan is not available, a Service-administered program must be available to ensure equality of availability. In addition, the Service should consider allowing a State to adopt another State’s plan or modify that plan to fit the circumstances of the State. The development of such “backstop”

plans is a key element that should be further discussed with stakeholders (as proposed by NESARC) prior to any finalization of this policy.

- (3) For those species for which the State does not have the authority or jurisdiction, should we revise the policy to allow prelisting conservation actions for these species to receive credit? If so, how would these prelisting conservation actions be tracked and monitored?**

Yes. As discussed above, eligibility to obtain credits for prelisting conservation activities should not be limited to States in which a plan has been developed. We believe the Service-administered backstop program can be used in all States and can accommodate those instances where a State plan has not been adopted or the State, itself, does not have authority or jurisdiction over such species.

- (4) How should we quantify the value of the voluntary prelisting conservation actions and credits?**

It is unclear whether the Service is referring to how the conservation credits should be “valued” in the context of transfer transactions, the valuation of benefits accrued for purposes of establishing the volume of credits accrued by a party, or both. The quantification of the value of voluntary conservation measures—both for purposes of credits to be applied within the context of ESA Sections 7 and 10 as well as the valuation of credits within a transfer transaction—is a matter that should be addressed through further facilitated discussions with stakeholders. Development of credit valuations can be a complex matter with a number of interrelated factors ranging from the number of acres under conservation development, the timeframe for manifestation of desired benefits and even the extent of financial resources required to achieve the desired benefit. It is important that the Service does not attempt to develop a valuation mechanism within a vacuum. Further, a single Q&A on this matter will not provide the level and detail of stakeholder input that is likely required for development of a workable valuation process. For these reasons, we encourage the Service to hold stakeholder meetings or workshops to explore these issues in an open and transparent forum.

- (5) Based on the species and the nature of the actions, how should we determine the percentage set aside?**

The Service’s discussion of the need for a “set aside” within the Draft Policy is confusing and requires further clarification. The passage in question provides that:

*However, the benefit of a voluntary prelisting conservation action for which credit is given must be greater than the detriment from the action for which the credit is used, that is, the benefit from the prelisting action, combined with the detriment from a later action, must result in a positive assistance to the recovery of the species. This would be achieved by setting aside a specific percentage of the credits to gain a positive assistance to the recovery of the species.*

*The specific percentage will depend on the species and the nature of the actions.*

As noted previously, NESARC opposes the “positive assistance” standard proposed by the Service as an unworkable threshold. Moreover, the use of a “set aside” in this context requires clarification. As proposed, the Service is seeking to recognize the benefits of a voluntary prelisting conservation measure by awarding a credit for measured benefits derived from the conservation measure. Thus, what should occur is not a “set aside,” but rather an “accrual” of benefits. Moreover, that accrual of benefits should be measured from the baseline habitat conditions that existed at the beginning of the conservation measures. To the extent that the Service’s use of the term “set aside” is actually meant to be a requirement for a certain threshold of “benefits” to have been achieved—and for which no credits are ever accrued for such benefits—NESARC opposes such a measure. All improvements to a habitat or area from a conservation measures are benefits achieved from that voluntary conservation measure and should be eligible for accrual of benefits.

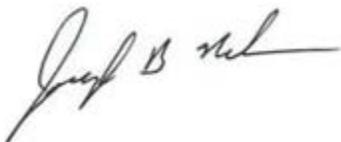
**(6) The policy allows for the transfer of credits. How could we develop an uncomplicated trading system mechanism?**

The development of a trading system mechanism is inextricably linked with the valuation and accrual of credits. As noted above, NESARC believes these matters require a facilitated discussion between the Service and stakeholders so that all factors and considerations can be fully explored and a workable mechanism can be established.

**Conclusion**

NESARC greatly appreciates the opportunity to provide these comments to the Service and to initiate a further discussion on ways to improve the Draft Policy. We hope that the Service will continue to collaborate with the public on such measures. Thank you.

Sincerely,

A handwritten signature in black ink, appearing to read "Joseph B. Nelson". The signature is fluid and cursive, with a long horizontal stroke at the end.

Joseph B. Nelson  
NESARC Counsel



NATIONAL ENDANGERED SPECIES ACT  
REFORM COALITION

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## National Endangered Species Act Reform Coalition Membership Roster

**American Agri-Women**  
*Washington, D.C.*

**American Farm Bureau Federation**  
*Washington, D.C.*

**American Forest and Paper Association**  
*Washington, D.C.*

**American Petroleum Institute**  
*Washington, D.C.*

**American Public Power Association**  
*Washington, D.C.*

**Association of California Water Agencies**  
*Sacramento, California*

**Basin Electric Power Cooperative**  
*Bismark, North Dakota*

**Central Electric Cooperative**  
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**Central Platte Natural Resources District**  
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**Charles Mix Electric Association**  
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**Coalition of Counties for Stable  
Economic Growth**  
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**Edison Electric Institute**  
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**National Alliance of Forest Owners**  
*Washington, D.C.*

**National Association of Counties**  
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**National Association of Conservation Districts**  
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**National Association of Home Builders**  
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**National Rural Electric Cooperative Association**  
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**National Water Resources Association**  
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**Nebraska Farm Bureau Federation**  
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**Northern Electric Cooperative, Inc.**  
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**Northwest Horticultural Council**  
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**Northwest Public Power Association**  
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**Public Lands Council**  
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**Y-W Electric Association, Inc.**  
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U.S. Fish and Wildlife Service  
Public Comments Processing  
Attn: FWS-R9-ES-2011-0099  
Division of Policy and Directives Management  
4401 North Fairfax Drive, MS 2042  
Arlington, VA 22203

Submitted via Federal eRulemaking Portal: <http://www.regulations.gov>

**Re: Comments on Advanced Notice of Proposed Rulemaking for Support of  
Voluntary Conservation Activities**

Dear Sir/Madam,

On March 15, 2012, the U.S. Fish & Wildlife Service (“FWS”) published an Advance Notice of Proposed Rulemaking (“ANPR”) seeking comments on potential improvements to regulations, policies and guidance under the Endangered Species Act (“ESA”) in order to better promote voluntary conservation efforts—including conservation measures adopted and implemented prior to a species’ designation as either threatened or endangered under the ESA. In addition to a general invitation for comment, FWS posed a series of questions for specific responses. Pursuant to the *Federal Register* notice, the National Endangered Species Act Reform Coalition (“NESARC”) respectfully provides its comments on the FWS ANPR.

NESARC is the country’s oldest broad-based, national coalition dedicated solely to achieving improvements to the ESA and its implementation. As detailed in the membership list<sup>1</sup> attached to these comments, NESARC includes farmers, cities and counties, rural irrigators, electric utilities, forest product companies, homebuilders, agricultural interests, mining companies, and other businesses and individuals throughout the United States. NESARC and its members are committed to promoting effective and balanced legislative and administrative improvements to the ESA that support the protection of fish, wildlife, and plant populations as well as responsible land, water, and resource management.

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<sup>1</sup> See Attachment A.

From its inception, NESARC has advocated for improvements to the ESA to facilitate the opportunity for, and implementation of, voluntary conservation measures for species conservation. In fact, NESARC members are actively involved in a broad range of voluntary species conservation efforts including:

- Farmland enrollment and cooperation with the Department of Defense on species protection programs for the Golden Cheeked Warbler and Black Capped Virio;
- Recovery implementation programs such as the Upper Colorado and San Juan Rivers Endangered Fish Recovery Implementation Program and Platte River Endangered Species Recovery Program;
- Numerous habitat conservation plans ranging from county-wide habitat conservation plans (“HCPs”) for multiple uses to single parcel HCPs for agricultural operations; and
- Observation, research and monitoring programs for listed and candidate species.

For this reason, NESARC is encouraged by the publication of the ANPR and strongly recommends that FWS act expeditiously on the development and implementation of voluntary conservation measures.

NESARC also must acknowledge that its encouragement in the issuance of the ANPR is tempered by the fact that there have been numerous earlier listening sessions, proposed policies and ESA-related initiatives by FWS that have not come to fruition. Particularly, in May 2009, this Administration requested public comments on improvements to the ESA, Section 7 consultation process. NESARC, along with many other interested parties, submitted comments identifying a number of measures and actions that can effectively improve implementation of the Section 7 consultation process.<sup>2</sup> Yet, over 3 ½ years later, FWS has not taken any formal actions to improve the Section 7 consultation process. The fact that FWS chose an ANPR, with no specific timeline or plan announced for next steps on finding ways to facilitate voluntary conservation, raises a significant concern that this effort could be similarly delayed or derailed. NESARC respectfully requests that FWS take all necessary steps to ensure that timely and effective action is taken in facilitating voluntary conservation measures.

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<sup>2</sup> NESARC’s comments on measures to improve the Section 7 consultation process were submitted to FWS and the National Marine Fisheries Service on August 3, 2009. A copy of these comments can be found in Attachment B.

## COMMENTS

**FWS Efforts to Facilitate Voluntary Conservation:** FWS can take a number of concrete steps to improve opportunities for voluntary species conservation efforts. At the heart of any effort must be the development of a better set of tools to support voluntary conservation efforts that benefit endangered, threatened and candidate species under the ESA. Among the improvements that should be made:

- Promote private stewardship through better coordination of existing federal grants and assistance programs for voluntary conservation activities, provide technical assistance to landowners seeking to protect species on their property and develop for model form agreements, conservation practices guidance and other means to facilitate individual conservation activities;
- Improve the HCP program to reduce the cost and time involved in developing HCPs and provide for more consistency in the development of mitigation standards and required HCP elements;
- Incorporate “No Surprises” assurances into voluntary conservation agreements; and
- Exclude from critical habitat designations, land and water already protected through voluntary conservation activities including: voluntary species management and protection efforts (individual or within federal, state or local government sponsored programs); HCPs; Safe Harbor Agreements; and properties enrolled in the conservation reserve program (or similar federal programs).

A common element of the improvements noted above is *recognition and actual support* of voluntary conservation efforts within FWS’ administration of the ESA. Specifically, FWS must move beyond generalized statements of support for voluntary conservation to specific programs and policies that encourage and provide a better platform for conservation measures to be undertaken.

**Advance Mitigation:** NESARC supports the development of regulations, policies and guidance that will allow for the full recognition of the protections and conservation values created by voluntary conservation measures. While discussed in the ANPR as primarily related to “pre-listing” measures, this improvement should encompass voluntary conservation measures adopted at any stage (pre- or post-listing) and must recognize the benefits afforded by voluntary conservation in all elements of ESA administration—from the review of listing petitions, species status reviews, critical habitat designations, development of Section 4(d) “take” rules for threatened species, development of baseline conditions for Section 7 consultations, granting of incidental take authorization under ESA, Sections 7(o)(2) or 10, approval of HCPs and other programs under the ESA.

Accounting for the benefits of voluntary conservation measures can take multiple forms. For example, FWS can:

- Develop programmatic incidental take permits or authorizations that cover a landowner's compliance with protective measures that have been developed by a State or local agency with regulatory oversight of such species.
- With respect to conservation measures undertaken prior to a species' listing, create a registry by which properties for which voluntary conservation measures have been adopted can be excluded from any critical habitat designation and the landowner or operator is granted incidental take authorization to continue such conservation measures.
- Recognize an entity's voluntary participation in a habitat mitigation/conservation bank or conservation crediting program (through active property management, the contribution of funds or purchase of credits) as eligible mitigation that may be required for such party's compliance with ESA, Section 7, development of reasonable and prudent measures for authorization of incidental take under Section 7(o)(2) and/or development of mitigation measures to be incorporated into an HCP, Safe Harbor Agreement or other ESA-related conservation agreement.

While the form and mechanism of recognizing advance mitigation can vary, there are several elements that must be addressed. First, there must be a consistent process for evaluating and assigning mitigation credits for voluntary conservation measures. We recognize that a single "credit" or measurement of benefit is unlikely to be effective for all species. However, FWS must work to ensure that there is transparency in the valuation of credits/benefits and that such valuation process is applied on a nondiscriminatory basis to all individuals seeking to have their voluntary conservation measures qualified as advance mitigation. Second, the ability to qualify for advance mitigation must be open to all entities that may be subject to compliance obligations under the ESA. Specifically, FWS should not place arbitrary limitations on the eligibility for recognition of a party's voluntary conservation measures. Finally, there must be a basis for allowing transferability of recognized advance mitigation in the event that the property or programs implementing the voluntary conservation measures are sold or otherwise have changes to their legal ownership or structure. As an example, where a farmer sells a property that has been operated pursuant to voluntary conservation measures, the advanced mitigation credits recognized for those measures should always relate to the initiation and conduct of the measures itself, not the legal identity or ownership of the party implementing the measures.

**Role of State and Local Governments (including political subdivisions and special districts):** FWS must increase their recognition of the role States and local governments have in fostering voluntary conservation measures. States and local governments are often better situated than federal agencies to develop and maintain cooperative efforts between stakeholders to protect and manage the local resources and species. Among the

improvements that FWS can consider to foster voluntary conservation measures through the efforts of State and local governments are:

- Better utilize the authorities under Section 6 cooperative agreements to facilitate voluntary conservation programs by State and local governments (including political subdivisions)
- Recognize and promote State and local government efforts that can act as umbrella programs for small landowners
- In promoting voluntary conservation programs in which State and local governments act as the lead, there are several elements that FWS should ensure are incorporated:
  - *Voluntary participation* by landowner/operators;
  - *Eliminate duplicative reviews*—Where the program addresses listed species, a single Section 7 consultation review should occur regarding the overall State program;
  - *Ensure certainty* – Participants in the State or local conservation programs must receive incidental take authorization so that they are not exposed to “take” enforcement under Section 4(d) rules or Section 9—with respect to activities consistent with the voluntary program;
  - *Encourage use of non-regulatory mechanisms*- If the State or local program places regulatory restrictions on a participant’s activities, there first must be a demonstration that no non-regulatory alternatives existed to achieve the same effect for the species;
  - *Emphasize collaboration between the landowners/operators and the State*-- Affected stakeholders must be afforded the right to fully participate in the development of the State or local governmental program;
  - *Establish consistent standards for program approval* – FWS review and approval of such programs must be based on specific, enumerated criteria focused on the ability of the proposed program to contribute to achieving the established recovery objectives for the listed species within that State or local government’s jurisdictional borders;
  - *Ensure flexibility* – Allow programs to cover listed, candidate species and other species that have been identified by the State as a species of concern;
  - *No Surprises* – Provide “No Surprises” type assurance that participation in the program will be sufficient for compliance with ESA Sections 7 and 9; and

- *Recognize common interests and avoid conflicts* – Programs that minimize the social and economically adverse impacts on communities are more likely to garner the public support necessary to be effective.

**HCPs and No Surprises:** While HCPs have shown promise and FWS has worked to streamline the HCP process, further improvement is still necessary. The use of HCPs remains hindered by the time and cost involved in the preparation and approval of these plans. HCPs continue to be used mostly by parties with significant financial resources that can afford the expense and bear the risk of a multi-year effort to develop and gain approval of an HCP. Further, ambiguities in mitigation standards and inconsistent interpretations of the required elements for HCPs by agency personnel create a level of uncertainty that further discourages the use of HCPs. Among the improvements that should be made are:

- Continue to streamline the HCP development and approval process to avoid excessive preparation costs and development time
  - Mandate timeframes for HCP decisions
  - Provide technical assistance for HCP development
  - Issue model form agreements and best management practices that can be incorporated into HCPs for small landowners
- Expand financing options for HCP development and implementation
- Review and update the HCP Handbook to provide better guidance to field personnel
- Maintain and strengthen the “No Surprises” assurances policy
- Clarify standards and criteria for issuance of incidental take permits under Section 10(a)(1) including:
  - The “maximum extent practicable” standard should be met when mitigation is rationally related to the level of “take” contemplated under the HCP
  - The term “appreciably reduce the likelihood of .... recovery,” should be satisfied if the activity, plus minimization and mitigation measures, are not inconsistent with or otherwise do not preclude recovery objectives.

**Responses to Specific FWS Questions:** NESARC also provides the following, brief, responses to the questions posed with the ANPR. These responses reflect the discussions and comments provided above.

- (1) 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?

**See discussion on Advance Mitigation above.**

- (2) 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?

**Credits for voluntary conservation actions must be transferable. This is particularly crucial to the extent that voluntary conservation measures are initiated for a property or program, but the legal title or structure of the property or program later changes. Recognition of the credits should attach to the voluntary conservation measures themselves and be transferable to third parties.**

- (3) 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?

**The question as to the basis of the value assigned to conservation credits cannot be adequately answered in a vacuum without understanding the scope and details of a conservation crediting program. Accordingly, NESARC has no specific response at this time.**

- (4) What role should the States play in recognizing and overseeing the development of credits from voluntary conservation actions taken for species not yet listed?

**See above discussion on promotion of voluntary conservation measures by State and local governments.**

- (5) How can or should the Service specify in advance of listing the manner in which it will quantify the value of voluntarily undertaken conservation actions?

**The process for valuing conservation credits must be fully documented, transparent and nondiscriminatory. Such procedures should not be developed on a species-by-species basis. Rather, there must be an umbrella program and process for quantifying conservation actions.**

- (6) How the Service’s conservation banking policy could be revised to allow for the use of conservation credits accrued from voluntary actions taken prior to listing?

**The conservation banking policy must allow for broad participation from governmental and non-governmental parties and ensure that all types of voluntary conservation measures are accommodated and recognized. The conservation banking policy must ensure that there is a consistent and fully-defined standard for valuation and redemption of credits. In addition, recovery or conservation credits should be fully transferable.**

- (7) What changes, if any, are needed to the following regulations, policies and guidance (The handbooks and policy are available at <http://www.fws.gov/endangered/esa-library/index.html>.) to clarify mechanisms by which the Service can give “credit” for beneficial actions for unlisted species:

- a. 50 CFR part 13
- b. 50 CFR part 17
- c. 50 CFR part 402
- d. The Service’s section 7 Handbook
- e. The Service’s HCP Handbook
- f. The Service’s Conservation Banking Policy

**The question as to what regulatory and policy changes would be necessary cannot be adequately answered in a vacuum without understanding the scope and details of a conservation crediting program. Accordingly, NESARC has no specific response at this time.**

- (8) 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?

**The nature and potential use of pilot projects cannot be adequately answered in a vacuum without understanding the scope and details of any conservation crediting program or proposals for regulatory assurances. Accordingly, NESARC has no specific response at this time.**

- (9) 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”)?

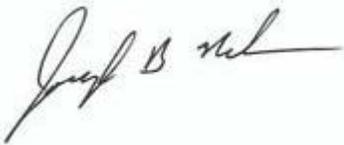
**Voluntary conservation measures should be taken into account in all aspects of the Section 7 consultation—in the conduct of informal consultations, the**

**establishment of the environmental baseline conditions, FWS's biological opinion addressing the existing or occurrence of jeopardy or adverse modification from the proposed federal agency action, the identification of any necessary reasonable and prudent alternatives and identification of mitigation or adoption of reasonable and prudent measures for purpose of the authorization of incidental take of a species.**

#### CONCLUSION

NESARC greatly appreciates the opportunity to provide these comments to FWS and to initiate a further discussion on ways improve and facilitate voluntary conservation measures for specie. We hope that FWS will act expeditiously on developing specific programs and proposals on this matter and will continue to collaborate with the public on such measures. Thank you.

Sincerely,

A handwritten signature in black ink, appearing to read "Joseph B. Nelson", is written over a light blue rectangular background.

Joseph B. Nelson  
Counsel, National Endangered Species Act Reform Coalition