



NATIONAL ENDANGERED SPECIES ACT  
REFORM COALITION

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Public Comments Processing

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U.S. Fish and Wildlife Service

MS: BPHC

5275 Leesburg Pike, ABHC-PPM

Falls Church, VA 22041-3803

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

**Re: NESARC Comments on the Proposed Revisions to the Regulations and Policy for Candidate Conservation Agreements with Assurances**

Dear Sir/Madam:

On May 4, 2016, the U.S. Fish and Wildlife Service (“FWS”) issued proposed revisions to its Endangered Species Act (“ESA”) regulations for Candidate Conservation Agreements with Assurances (“CCAA”),<sup>1</sup> and FWS and the National Marine Fisheries Service (“NMFS” and, collectively, the “Services”) issued a draft revised CCAA Policy.<sup>2</sup> Pursuant to the Federal Register notices, the National Endangered Species Act Reform Coalition (“NESARC”) respectfully provides its comments and recommendations on the Proposed Rule and Proposed Policy.

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 attached to these comments,<sup>3</sup> NESARC includes agricultural interests, cities and counties, commercial real estate developers, conservationists, electric utilities, energy producers, farmers, forest product companies, home builders, landowners, oil and gas companies, ranchers, water and irrigation districts, 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> 81 Fed. Reg. 26,769 (May 4, 2016) (“Proposed Rule”).

<sup>2</sup> 81 Fed. Reg. 26,817 (May 4, 2016) (“Proposed Policy”).

<sup>3</sup> See Appendix A.

NESARC appreciates the Services' continued support of the development and implementation of CCAAs. We believe that CCAAs are important conservation tools that are mutually beneficial to species and property owners. It is critically important that the Services take actions to encourage the continued use of CCAAs and to ensure that their own actions do not create new barriers to CCAA development and implementation. Accordingly, NESARC provides the following comments on the Proposed Rule and Proposed Policy, respectively, in order to further improve the CCAA development and approval process and maximize the intended effectiveness of the proposed measures.

## **I. Comments on the Proposed Rule**

The Proposed Rule would revise FWS's regulations to include and define the term "net conservation benefit," and eliminate the consideration of "other necessary properties" when determining the benefits of the CCAA.<sup>4</sup> First, NESARC wishes to express its concerns regarding the application of a "net conservation benefit" standard to CCAAs. We believe that the imposition of this standard would directly subject efforts that are intended to avoid the listing of species to ESA standards that are only appropriate for species that are already listed. This sends the wrong signal to property owners and will discourage pre-listing conservation efforts. With respect to other elements of the CCAA proposal, NESARC's comments recommend additional clarifications and improvements that should be made to ensure an improved and effective CCAA program.

### **A. The Appropriate Standard for CCAAs Under Section 10(a)(1) is Beneficial Contribution to the Conservation of the Species or its Habitat, Not a Net Conservation Benefit**

FWS proposes to include the term "net conservation benefit" to clarify the level of conservation effort necessary to approve a CCAA and the associated permit.<sup>5</sup> FWS rationalizes this approach on the basis that Safe Harbor Agreements (SHAs), which cover listed species and provide for a species enhancement permit under ESA Section 10(a)(1)(A) already utilize a net conservation benefit standard.<sup>6</sup> FWS further explains its view that CCAAs and SHAs have similar purposes because they provide a conservation benefit to the covered species while also providing assurances to participating property owners.<sup>7</sup> This approach, however, ignores the fact that CCAAs are pre-listing measures with no regulatory expectation of a subsequent species listing that would necessitate the use of a "net conservation benefit" standard.

While the assurances under both CCAAs and SHAs are provided by an ESA Section 10(a)(1)(A) enhancement of survival permit, this similarity does not warrant the imposition of the same net conservation benefit standard because, ideally, a robust CCAA program should avoid the need to list covered species. The species covered by CCAAs and SHAs have different statuses under the ESA—SHAs apply to listed species, and CCAAs apply to candidate species,

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<sup>4</sup> Proposed Rule at 26,770.

<sup>5</sup> Proposed Rule at 26,770.

<sup>6</sup> Proposed Policy at 26,818.

<sup>7</sup> *Id.*

species proposed for listing, or likely to become so in the near future. Given these disparate classifications, the ESA imposes different standards and prohibitions with respect to pre-listing versus post-listing activities. By incorporating the net conservation benefit standard used for SHAs, FWS fails to account for these differences and conflates its treatment of pre-listing and post-listing activities. Instead, FWS should utilize a CCAA standard that focuses on incentivizing voluntary participation and *enhancing* covered species by providing measures that will beneficially contribute to the conservation of a species or habitat. This standard is more consistent with the intent and purpose of CCAAs and provides for an appropriate measure of positive contributions to species conservation.

**B. If Retained, the Inclusion of “Cumulative Benefits” in the Definition of “Net Conservation Benefit” Is Inexact and Could be Misinterpreted to Require the Consideration of Actions Protecting the Species on Other Properties.**

In the preamble, FWS states that the revised CCAA standard would “require a net conservation benefit to the covered species specifically on the property to be enrolled.”<sup>8</sup> However, in contrast, FWS proposes to define “net conservation benefit” to mean:

“the cumulative benefits of specific conservation measures designed to improve the status of a covered species by removing or minimizing threats, stabilizing populations, and increasing its numbers and improving its habitat.”<sup>9</sup>

As explained below, the inclusion of the phrase “cumulative benefits” creates ambiguity and suggests that the net conservation benefit determination could depend on actions occurring on other properties that are outside the control of the participant. NESARC is concerned that in practice, this ambiguity could unintentionally undermine the primary purpose of the Proposed Rule.

The term “cumulative” is often used under the ESA and other environmental statutes to connote a broad inquiry that places the specific action under review into a broader complex of actions that are, or may be, occurring. For example, under the ESA and the National Environmental Policy Act (“NEPA”), the definitions of the analogous terms “cumulative effects” and “cumulative impacts” both involve the analysis of other actions in addition to the federal action under review.<sup>10</sup> Further, FWS states that one of the goals of the candidate conservation program is to encourage the public to take specific conservation actions with the “cumulative outcome” resulting in not needing to list a species or listing a species as threatened instead of endangered.<sup>11</sup> Thus, without clarification or revision by FWS, parties may similarly interpret

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<sup>8</sup> Proposed Rule at 26,770.

<sup>9</sup> Proposed Rule at 26,772 (proposed 50 C.F.R. §§ 17.22(d)(8) & 17.32(d)(8)).

<sup>10</sup> “Cumulative effects” under the ESA are defined as “those effects of future State or private activities, not involving Federal activities, that are reasonably certain to occur within the action area of the Federal action subject to consultation.” 50 C.F.R. § 402.02. “Cumulative impact” under NEPA is defined as “the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions.” 40 C.F.R. § 1508.7.

<sup>11</sup> Proposed Rule at 26,769.

the use of “cumulative benefits” to necessitate the review of a particular applicant’s activities within the broader scope of actions protecting the species beyond the boundaries of enrolled properties.

NESARC assumes that FWS’s intent in using “cumulative benefits” was not to require a broader review of actions, but rather to be inclusive in the measures considered in assessing the net conservation benefit standard. In other words, the reference to “cumulative benefits” actually is intended to mean the *totality* of benefits that may be derived from the measures proposed in the CCAA. Further, we assume that FWS intends to evaluate net conservation benefits in relation to the specific conservation measures to be undertaken solely on the property or properties to be enrolled.

In light of the confusion that may be created by the use of the term “cumulative benefits,” NESARC proposes that FWS modify this definition to refer to the “totality of qualitative and quantitative benefits from implementation of specific conservation measures identified in the CCAA on the property or properties to be enrolled.” This clarified language, as well as other suggested improvements to the definition of net conservation benefit, is provided in Section I.I of these comments.

### **C. FWS Should Clarify and Expand the Focal Points of CCAA Measures for Purposes of Measuring a Net Conservation Benefit**

As proposed, FWS would apparently define “net conservation benefit” solely as an improvement in the status of a covered species “by removing or minimizing threats, stabilizing populations, and increasing its numbers and improving its habitat.”<sup>12</sup> First, the prescriptive listing of “benefits” is overly restrictive and does not recognize the full suite of benefits that may be derived. Further, based upon the construction of this phrase (i.e., the use of “and”), all of the listed outcomes must be achieved in order to demonstrate that the included conservation measures improve the status of the species.

It is highly unlikely that a property owner will be able to undertake conservation measures and management activities on an enrolled property that will achieve the collective suite of results listed in the proposed definition. Instead, FWS should clarify that achieving only one of the identified objectives is sufficient for a CCAA. In addition, FWS must provide additional flexibility in the nature of benefits that may be derived from the CCAA measures. First, as noted above, benefits should be recognized as being either qualitative or quantitative in nature. Further, the Services should allow for more flexibility in the focus of measures to be undertaken. Accordingly, FWS should revise the definition to state that the status of a covered species can be improved by “by removing, ~~reducing~~ or minimizing threats, stabilizing populations, ~~and~~ increasing its numbers, ~~and~~ improving its habitat or addressing other factors that are threatening the species continued existence.”

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<sup>12</sup> Proposed Rule at 26,772 (proposed 50 C.F.R. §§ 17.22(d)(8) & 17.32(d)(8)).

#### **D. Requiring an Increase in Population or Improvement of Habitat Sets Too High a Threshold for CCAA Approval**

As a component of the definition of “net conservation benefit,” FWS states that “[t]he benefit would be measured by the projected increase in the species’ population or improvement of the species’ habitat. . . .”<sup>13</sup> Similarly, the CCAA’s conservation measures and management activities must be designed to ultimately “increase the species populations or improve its habitat.”<sup>14</sup> While NESARC acknowledges that increasing populations and improving habitat can be goals of a CCAA, by identifying these as the only goals, FWS sets too high a standard for approval and fails to recognize that the status of a species can be improved in other ways.

The candidate conservation program encourages the implementation of conservation actions for declining species so that listing under the ESA is not necessary or that the species is listed as threatened instead of endangered.<sup>15</sup> When assessing benefits, conservation measures, and management activities, FWS should consider the current baseline condition of the species and its habitat in assessing the benefits of the CCAA. Particularly, at the stage in which CCAAs are under development, the species is often decreasing in numbers. Thus, there will be benefits to the species associated with actions that, for example, remove, reduce or minimize threats, prevent or limit habitat degradation, promote resiliency, or otherwise slow or stabilize a declining population trajectory.<sup>16</sup> The results of these measures may not be expressed as an “increase in population or improvement in habitat,” but there will still be a benefit that enhances the status of the species relative to its baseline condition.<sup>17</sup>

Furthermore, FWS must recognize that achievable benefits will be dictated, in part, by the property that is enrolled in a CCAA. While FWS recognizes that conservation measures and management activities must address the “current and future threats on the property that are under the property owner’s control,” the scope of threats that are controlled may not be sufficient to effectuate an increase in population or improvement in habitat. This is especially the case for owners of small property parcels or non-fee or other property interests (e.g., water rights). By including a more expansive consideration of benefits, FWS will encourage broader enrollment in CCAAs which will ultimately promote the conservation of covered species.

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<sup>13</sup> Proposed Rule at 26,772 (proposed 50 C.F.R. §§ 17.22(d)(8)(i) & 17.32(d)(8)(i)).

<sup>14</sup> *Id.* (proposed 50 C.F.R. §§ 17.22(d)(8)(ii) & 17.32(d)(8)(ii)). The Proposed Policy defines “conservation measures” differently as actions that, in part, “will result in an improvement or expansion of the species’ habitat with the potential for an increase in the species’ population numbers.” Proposed Policy at 26,820.

<sup>15</sup> Proposed Rule at 26,769.

<sup>16</sup> While FWS acknowledges some of these improvements in the definition of “net conservation benefits,” the provisions in subparts (i) and (ii) are inconsistent with this definition and narrowly focused solely on increasing populations and improving habitat. *See also* Proposed Policy at 26,821 (noting that benefits “could include, but are not limited to: removal or reduction of current and anticipated future threats for a specified period of time; restoration, enhancement, or preservation of habitat; maintenance or increase of population numbers; and reduction or elimination of impacts to the species from agreed-upon, ongoing property management actions.”).

<sup>17</sup> In the CCAA Policy, FWS states that threats to the covered species must be reduced to “contribute to the conservation and stabilization” of species populations and habitat. Proposed Policy at 26,820. This articulation of the standard more accurately reflects the benefits that may be achieved through a CCAA.

Accordingly, FWS should revise the proposed regulatory provisions as follows:

(i) The benefit would be measured by the projected beneficial contribution to ~~increase in~~ the species' population or ~~improvement of~~ the species' habitat, taking into account the duration of the Agreement and any off-setting adverse effects attributable to the incidental taking allowed by the enhancement of survival permit.

(ii) The conservation measures and management activities covered by the agreement must be designed to reduce or eliminate those current and future threats on the property that are under the property owner's control, in order to contribute to the goals of increasing the species populations or improving its habitat.

#### **E. FWS Should Clarify how Adverse Effects Attributable to the Incidental Taking will be Determined**

FWS states that the measurement of benefits would take into account "any off-setting adverse effects attributable to the incidental taking allowed by the enhancement of survival permit."<sup>18</sup>

Given that incidental take coverage is a significant incentive for property owners to enroll in a CCAA, NESARC supports FWS's issuance of the enhancement of survival permit, including incidental take authorization, at the time of entry into the CCAA. However, FWS should provide additional clarification on how the potential adverse effects of incidental takings will be determined and applied as an "off-set" to the benefits of a CCAA. The enhancement of survival permit only goes into effect if, and when, the covered species is listed. Thus, any incidental taking would occur at some unforeseeable future time (if ever) and, until such a listing, there is no prohibited take.<sup>19</sup> FWS should clarify that any adverse effects only accrue from the time the species is listed.

#### **F. Clarify Application when Species and Habitat is Already Adequately Managed**

FWS states that "[i]n the case where the species and habitat is already adequately managed to the benefit of the species, a net conservation benefit will be achieved when the property owner commits to manage the species for a specified period of time with the anticipation that the population will increase or habitat quality will improve."<sup>20</sup>

NESARC supports the acknowledgement that adoption or continuation of management measures on a property is an appropriate focus of a CCAA. The inclusion of this provision will allow a greater number of property owners to enroll in a CCAA which will provide a benefit to

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<sup>18</sup> Proposed Rule at 26,772 (proposed 50 C.F.R. §§ 17.22(d)(8)(i) & 17.32(d)(8)(i)).

<sup>19</sup> 16 U.S.C. § 1538(a)(1)(B) (for endangered species); 16 U.S.C. § 1533(d) (determination of take of threatened species is dependent upon the promulgated regulation).

<sup>20</sup> Proposed Rule at 26,772 (proposed 50 C.F.R. §§ 17.22(d)(8)(iii) & 17.32(d)(8)(iii)).

the species and habitat. However, FWS should make two revisions to the provision. First, FWS should recognize that a management commitment can be made for the species or *certain habitat* for a specified period of time. This change would be consistent with the focus of a CCAA and expressly allow property owners to also manage property in a manner that benefits the covered species. Second, as mentioned above, FWS should recognize that increasing species populations and improving habitat quality are not the only objectives necessary for CCAA approval. For example, a benefit can be provided through management actions that alleviate threats to the species, prevent habitat degradation, or promote resiliency. Thus, for example, a CCAA should be available if a property owner continues to adequately manage enrolled property so that it provides a beneficial contribution to the species or its habitat even if there is no population increase or habitat improvement. Because these outcomes will also serve the purpose of potentially delaying or precluding the need to list a species, they provide additional bases for approving a CCAA in those circumstances when a species and its habitat are currently adequately managed.

Accordingly, FWS should revise the proposed regulatory provisions as follows:

(iii) In the case where the species and habitat is already adequately managed to the benefit of the species, a net conservation benefit will be achieved when the property owner commits to manage the species or habitat for a specified period of time with the anticipation that there will be a beneficial contribution to the species' population or the species' habitat ~~population will increase or habitat quality will improve.~~

#### **G. FWS Should Retain the Deletion of “Preclude or Remove any Need to List” Standard**

NESARC supports FWS’s proposed revision that would delete the “preclude or remove any need to list” standard for issuance of a CCAA. This revision is consistent with the deletion of the requirement to consider “other necessary properties,” and properly aligns the scope of the CCAA determination with the property to be enrolled. Given that property owners may not be able to individually preclude or remove the need to list, the proposed focus on improving the status of a covered species is appropriate.

#### **H. NMFS Should Promulgate Corresponding CCAA Regulations**

Instead of relying upon the CCAA Policy, NMFS should promulgate regulations setting forth the CCAA-specific application, issuance, and revocation requirements along with the assurances provided to the permittee. Such regulations should be consistent with the corresponding FWS regulations. Promulgating CCAA regulations, instead of relying upon a policy document, would provide those members of the regulated community that are contemplating a CCAA with the regulatory certainty necessary to proceed.

## I. Proposed Revisions to “Net Conservation Benefit” Definition

NESARC is providing the following black-lined version of the Proposed Rule’s regulatory provisions to reflect the revisions suggested herein:<sup>21</sup>

(8) *Duration of the Candidate Conservation Agreement.* The duration of a Candidate Conservation Agreement covered by a permit issued under this paragraph (d) must be sufficient to achieve a beneficial contribution~~net conservation benefit~~, which is defined as the totality of qualitative and quantitative benefits from implementation of specific conservation measures identified in the CCAA on the property or properties to be enrolled which are cumulative benefits of specific conservation measures~~designed to improve the status of a covered species by removing, reducing or minimizing threats, stabilizing populations, and increasing its numbers, and improving its habitat or addressing other factors that are threatening the species continued existence.~~

(i) The benefit would be measured by the projected beneficial contribution~~to increase in the species’ population or improvement of the species’ habitat~~, taking into account the duration of the Agreement and any offsetting adverse effects attributable to the incidental taking allowed by the enhancement of survival permit.

(ii) The conservation measures and management activities covered by the agreement must be designed to reduce or eliminate those current and future threats on the property that are under the property owner’s control, in order to contribute to the goals of increaseing~~the species populations or improveing~~ its habitat.

(iii) In the case where the species and habitat is already adequately managed to the benefit of the species, a net conservation benefit will be achieved when the property owner commits to manage the species or habitat for a specified period of time with the anticipation that there will be a beneficial contribution to the species’ population or the species’ habitat~~population will increase or habitat quality will improve.~~

## II. Comments on the Proposed Policy

In addition to the Proposed Rule, the Services have revised their CCAA policy to incorporate the proposed regulatory revisions and make additional changes. NESARC requests that the Services also consider and apply the comments above to the Proposed Policy. In addition, NESARC provides the following additional comments.

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<sup>21</sup> These revisions would apply to both 50 C.F.R. §§ 17.22(d)(8) and 17.32(d)(8).



**A. Services Should Clarify What “Property Management Actions” May Be Included in a CCAA**

The Services do not clearly define what “property management actions” are appropriate for coverage by the enhancement of survival permit accompanying the CCAA. The Proposed Policy states that the permit will provide incidental take coverage for the agreed-upon conservation measures and “routine property management actions (e.g., agricultural, ranching, or forestry activities)” that result in take of the covered species. The statement appears to unnecessarily narrow the types of activities that could be eligible for inclusion.

The Services should revise the Proposed Policy to clarify the scope of activities that may qualify for incidental take coverage under a CCAA. For example, FWS’s regulations state that incidental take authorization can be requested for “land use or water management activit[ies].”<sup>22</sup> While the Proposed Policy identifies agricultural, ranching, or forestry activities as examples, the Services should add a statement explicitly noting that property management actions “include, but are not limited to” these activities. Furthermore, the description should also be broad enough to address activities that could take species under NMFS’s jurisdiction. Finally, FWS should delete the word “routine” because it is ambiguous and not relevant to determining what actions qualify for incidental take coverage.

**B. Services Should Clarify the Process for Identifying Measures Appropriate for Inclusion in a CCAA**

The Services state that “appropriate conservation measures . . . will be based on the best available scientific information relative to the conservation needs of the species such as those contained in an up-to-date conservation strategy.”<sup>23</sup>

The Services should acknowledge that CCAA measures must be based upon what is economically and technologically feasible for the property owner to implement on the enrolled property. While the needs of the species can inform actions to be undertaken under a CCAA, the scale or scope of any adopted measure should be informed by the resources available to the property owner and located on the enrolled property. If the Services impose requirements that are too burdensome, property owners will not have an incentive to participate, which would result in a less effective CCAA program.

Furthermore, the Services should delete the reference to an “up-to-date conservation strategy” as vague and redundant. First, most non-listed species do not have an existing “conservation strategy” as implied by the policy. Further, the definition already states that CCAA measures will be based on the “best available scientific information.” This standard is consistent with the ESA, and provides adequate guidance on what measures may be appropriate for adoption in a CCAA.

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<sup>22</sup> 50 C.F.R. § 17.22(d)(1)(ii).

<sup>23</sup> Proposed Policy at 26,820. The Services also define conservation measures as actions that “will result in an improvement or expansion of the species’ habitat with the potential for an increase in the species’ population numbers.” *Id.* The Services should revise this definition as requested by NESARC’s comments provided on the Proposed Rule.

If the reference is retained, the Services need to explain what constitutes a “conservation strategy.”<sup>24</sup> Without additional clarification or definition, it appears that a “conservation strategy” could include an expansive array of options ranging from unwritten thoughts to vague outlines to published documents. To the extent that a “conservation strategy” will provide the basis for selecting conservation measures, NESARC suggests prioritizing documents that have been prepared or approved by an entity with jurisdiction over the species or the included property. For example, States, counties and local governmental entities often develop plans for integrated land use that focus on the fish, wildlife and habitat within specific areas and are aimed at directly achieving localized benefits. These types of documents, and similar plans prepared by the Services, should be utilized when developing the appropriate measures for inclusion in a CCAA.

### **C. The Definition of Property Owner Should be Modified to Allow for Broader CCAAs.**

The Proposed Policy defines property owner as: “a person with a fee simple, leasehold, or other property interest (including owners of water rights or other natural resources), or any other entity that may have a property interest, sufficient to carry out the proposed management activities, subject to applicable State law, on non-Federal land.”<sup>25</sup>

The Services should expand this definition, or its application to CCAAs, to accommodate activities that may occur on or in aquatic environments. Imposing a terrestrial limitation on management activities creates an artificial constraint on the area of application and the scope of measures that could be included within a CCAA. While activities that are conducted in the aquatic environment may be less prevalent, the Services should ensure that the Proposed Policy is sufficiently broad to include such actions.

The Services also should revise this definition to allow CCAAs on lands or water under federal ownership or control. NESARC recognizes that, to date, the Services have not approved CCAAs in such circumstances due to concerns with how such measures might otherwise affect activities or obligations of Federal agencies aimed at the conservation of listed species under ESA Section 7(a)(1) on lands or waters under their management responsibility. We strongly encourage the Services to revisit this general policy and recognize that this policy is actually hindering, rather than helping, the conservation of species. Provided that the federal agency responsible for management of the particular lands or water resource has agreed to participate in a conservation effort, there should be no artificial barriers to a public/private or federal/state or local governmental authority partnership for enhancement of species or habitat that will occur on federal lands or waters. At present, the Services’ approach is standing in the way of incentives and opportunities for non-Federal entities to voluntarily conserve species, especially in the Western United States where the large areas of Federal land ownership currently preclude the use of CCAAs. For example, in some cases, an entity may have a special use authorization or other permission to use Federal lands that provides an opportunity to conduct activities that would

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<sup>24</sup> The Services also need to provide the temporal criteria for when any “conservation strategy” would need to be prepared to be considered “up-to-date.”

<sup>25</sup> Proposed Policy at 26,821. NESARC recognizes that the Services are essentially incorporating the existing regulatory definition of “property owner” at 50 C.F.R. § 17.3.

benefit species or their habitat. The Services should expand the availability of CCAAs to provide additional conservation tools for activities conducted on areas under Federal ownership or control.

**D. The Services Should Delete the Reference to “Landscape” with Respect to the Condition of Contiguous Lands or Waters**

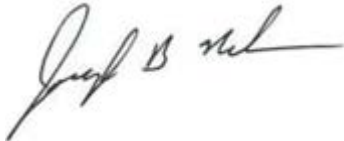
The Services state that a CCAA will, in part, identify or include “consideration of the existing and anticipated condition of the landscape of the contiguous lands or waters not on the participating owner’s property” for purposes of assessing suitability as a habitat corridor or as a source of species to populate the property.<sup>26</sup> The Proposed Policy does not define “landscape” or explain what it encompasses.

The Services should delete the phrase “of the landscape” to reduce confusion and redundancy. For example, simplifying the required consideration to focus on the “existing and anticipated condition of the contiguous lands or waters. . .” appears to achieve the same purpose as the proposed language, but without extraneous terminology. If the Services retain the reference to “landscape,” the Services must provide a definition of the term and explain how it will be applied and considered in the CCAA context.<sup>27</sup>

**III. Conclusion**

NESARC greatly appreciates the opportunity to provide these comments to the Services. We respectfully request that you take these comments into full consideration and adopt the proposed revisions when finalizing the applicable regulatory language.

Sincerely,



Joseph B. Nelson  
NESARC Counsel

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<sup>26</sup> Proposed Policy at 26,821.

<sup>27</sup> NESARC notes that FWS’s recently proposed revisions to its mitigation policy and included a definition of “landscape.” 81 Fed. Reg. 12,380, 12,394 (Mar. 8, 2016) (defining “landscape” in part as “[a]n area encompassing an interacting mosaic of ecosystems and human systems that is characterized by a set of common management concerns.”). However, given the context within which “landscape” is used in the Proposed Policy, the definition from the draft mitigation policy does not appear relevant or applicable.



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**National Endangered Species Act Reform Coalition  
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**Washington State Potato Commission**  
*Moses Lake, Washington*

**Washington State Water Resources Association**  
*Yakima, Washington*

**Wells Rural Electric Company**  
*Wells, Nevada*

**West Side Irrigation District**  
*Tracy, California*

**Western Business Roundtable**  
*Lakewood, Colorado*

**Western Energy Alliance**  
*Denver, Colorado*

**Wheat Belt Public Power District**  
*Sidney, Nebraska*

**Whetstone Valley Electric Cooperative, Inc.**  
*Milbank, South Dakota*

**Wilder Irrigation District**  
*Caldwell, Idaho*

**Wyrulec Company**  
*Lingle, Wyoming*

**Y-W Electric Association, Inc.**  
*Akron, Colorado*