



NATIONAL ENDANGERED SPECIES ACT
REFORM COALITION

1050 Thomas Jefferson Street, NW, 6th Floor
Washington, DC 20007
tel. 202.333.7481 fax 202.338.2416
www.nesarc.org

June 13, 2016

Public Comments Processing
Attn: Docket No. FWS-HQ-ES-2015-0126
Division of Policy, Performance and Management
U.S. Fish and Wildlife Service
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 U.S. Fish and Wildlife Service Mitigation Policy

Dear Sir/Madam:

On March 8, 2016, the U.S. Fish and Wildlife Service (“FWS”) issued proposed revisions to its 1981 Mitigation Policy.¹ Pursuant to the Federal Register notice, the National Endangered Species Act Reform Coalition (“NESARC”) respectfully provides its comments and recommendations on FWS’ proposed Mitigation 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,² 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.

¹ 81 Fed. Reg. 12380 (March 8, 2016) (“Mitigation Policy”).

² See Appendix A.

I. Overview of Concerns

NESARC is concerned that the Mitigation Policy assumes a level of FWS authority that is inconsistent with the organic statutes which bind and direct the agency. Before any implementation, FWS must clarify and harmonize the interplay between the authorizations given to FWS under a particular statute and the application of this Mitigation Policy. The Mitigation Policy is not an independent grant of authority. Therefore, FWS must explicitly state within the Mitigation Policy that, in all instances, the imposition of any mitigation measures is constrained by the scope of authority provided by the applicable statute and cannot exceed FWS' underlying statutory authority.

NESARC is particularly concerned with FWS's proposal to abandon present policies and apply this Mitigation Policy to actions undertaken pursuant to the Endangered Species Act ("ESA"). The ESA establishes specific standards and requirements for the scope and nature of any avoidance, minimization and mitigation measures that may be imposed by FWS. Further, the ESA requires specific analysis and evaluation of impacts to listed species and designated critical habitat. These statutory requirements cannot be overridden or undermined by the application of a general FWS Mitigation Policy. Accordingly, FWS should reinstate its previous position that the Mitigation Policy does not apply to threatened or endangered species under the ESA. To the extent that FWS believes additional clarity is needed, FWS should develop a separate, specifically tailored guidance document to address mitigation issues in the ESA context in place of the proposed general Mitigation Policy.

NESARC also is concerned that the Mitigation Policy fails to explain the statutory basis or provide guidance on implementation of certain elements. For example, the Mitigation Policy fails to recognize that FWS cannot recommend or require "no action" or the "avoidance of all impacts" unless it has the specific statutory authority to do so. Further, FWS fails to identify the mechanism or procedures that are to be used to coordinate with other Federal agencies and seek implementation of the Mitigation Policy.

II. Comments on the Proposed Mitigation Policy

While these comments focus on NESARC's concerns with the Mitigation Policy within the context of any application to ESA matters, they also apply more broadly to situations in which the activities of NESARC's members may be exposed to the Mitigation Policy. In addition to consideration of these comments within FWS' general Mitigation Policy, NESARC also requests that these comments be considered for any development of an ESA-specific mitigation policy.

A. *Coordination with the Endangered Species Act*

Issue: FWS recognizes that the 1981 mitigation policy did not apply to species listed under the ESA. In proposing to supersede this exclusion in the new Mitigation Policy, FWS states that mitigation is an “essential component” of achieving the purpose of the ESA. FWS notes the role of mitigation under ESA Sections 7 and 10 to address the conservation needs of listed species within the context of the action and the impacts of the action on the species.

Comment: FWS has not legally justified its application of a general FWS Mitigation Policy to actions undertaken pursuant to the specific requirements of the ESA. NESARC has the following concerns with the proposed integration of the Mitigation Policy with the ESA:

First, NESARC opposes the application of this present Mitigation Policy to ESA matters. While the Mitigation Policy is intended to provide overarching guidance, FWS states that it anticipates publishing a subsequent policy that will specifically address compensatory mitigation under the ESA and provide operational details.³ This approach would introduce unnecessary redundancy and burden the regulated community with potentially inconsistent policies. Instead, FWS should reinstate its position that the Mitigation Policy does not apply to the ESA. Further, to the extent that FWS believes it is necessary to clarify the role of mitigation in the ESA context, FWS should issue a separate ESA-specific mitigation policy (or expand the forthcoming ESA compensatory mitigation policy) to address all ESA-related mitigation guidance in a single document. This approach of an ESA-specific policy, which should be developed and implemented jointly by FWS and the National Marine Fisheries Service (NMFS), is in keeping with the directions of the Presidential Memorandum and would avoid redundancies and allow for efficient implementation of mitigation measures with respect to actions affecting ESA-listed species and their habitats.

Second, if the FWS’s general Mitigation Policy is to apply to ESA measures, then FWS must further refine and clarify how it will be applied under the current statute. Specifically, the central goal of the Mitigation Policy is to effectuate a net conservation gain (or, at a minimum, no net loss) in the status of affected resources.⁴ This target differs and exceeds the ESA Section 7 standard of no jeopardy or adverse modification and the ESA Section 10 standard of minimizing and mitigating impacts of incidental taking.⁵ Similarly, the Mitigation Policy would

³ 81 Fed. Reg. at 12383; see also *Presidential Memorandum on Mitigating Impacts on Natural Resources from Development and Encouraging Related Private Investment* § 4(c) (Nov. 3, 2015) (requiring revised mitigation policy that applies to all of FWS’s authorities and trust responsibilities and an additional policy that applies to compensatory mitigation under the ESA).

⁴ *Id.* at 12384.

⁵ 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.02 (“*Jeopardize the continued existence of* means to engage in an action that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species.”); *Id.* (“*Destruction or adverse modification* means a direct or indirect alteration that appreciably diminishes the value of critical habitat for the conservation of a listed species. Such alterations may include, but are not limited to, those that alter the physical or biological features essential to the conservation of a species or that preclude or significantly

rely upon a landscape-scale approach that contradicts the more specific analysis regarding effects of the proposed action within the “action area” required for ESA Section 7 consultation reviews. Finally, regarding the use of “evaluation species” for mitigation planning purposes, FWS states that where it “is required to issue a biological opinion, permit, or regulatory determination for specific species, the Service will identify such species, at minimum, as evaluation species.”⁶ The FWS’s “at a minimum” caveat must be struck. Section 7 consultation is limited to those species that are listed as threatened or endangered and FWS cannot consider effects of an action on non-listed species.⁷

Third, because the National Marine Fisheries Service (“NMFS”) is not adopting the Mitigation Policy, FWS would create an inconsistent ESA framework by adopting the policy. This approach is contrary to the typical practice of promulgating joint regulations by the two agencies that provide for uniform application of the ESA. By unilaterally proposing the Mitigation Policy and having it apply in the ESA context, FWS is creating disparate requirements that will impose significant additional impacts to project sponsors solely based on the particular species that may be affected.

B. Several Definitions Require Additional Clarification

1. Conservation Objective

Issue: The Mitigation Policy defines “conservation objective” as “[a] measurable expression of a desired outcome for a species or its habitat resources.”⁸ In turn, “conservation” is defined as “a general label for the collective practices, plans, policies, and science that are used to protect and manage species and their habitats to achieve desired outcomes.”⁹

delay development of such features.”); 16 U.S.C. § 1536(b)(4)(C)(ii) (Secretary provides written statement that “specifies those reasonable and prudent measures that the Secretary considers necessary or appropriate to minimize such impact.”); *id.* § 1539(a)(2)(B)(ii) (incidental take permit “will, to the maximum extent practicable, minimize and mitigate the impacts of such taking”).

⁶ 81 Fed. Reg. at 12388.

⁷ FWS can conduct a conference on species proposed for listing. 16 U.S.C. § 1536(a)(4). While a conference is required when a proposed action is likely to jeopardize a species proposed for listing or destroy or adversely modify proposed critical habitat, it is otherwise a voluntary process. Any measures identified in a conference report or opinion are not binding unless the species is listed or critical habitat is designated.

⁸ 81 Fed. Reg. at 12394. Within this definition, the Mitigation Policy explains that “[p]opulation objectives are expressed in terms of abundance, trend, vital rates, or other measurable indices of population status,” and that “[h]abitat objectives are expressed in terms of the quantity, quality, and spatial distribution of habitat required to attain population objectives, as informed by knowledge and assumptions about factors influencing the ability of the landscape to sustain species.” *Id.*

⁹ *Id.*

Comment: The definition of “conservation” is overly vague and contains no targets or benchmarks to guide its application. For example, the phrase “desired outcome(s)” suggests that FWS will have unlimited discretion to determine how conservation will be pursued and when it will be complete (if at all). Furthermore, the term “conservation” is defined differently within applicable statutes,¹⁰ and it is unclear how FWS would articulate its “conservation objectives” for case-specific mitigation determinations under specific statutes.¹¹ FWS should develop and utilize different terms (e.g., “mitigation objective”) to avoid confusion with existing definitions of conservation and to clarify what mitigation is required for a particular action.

NESARC requests that FWS provide further specificity regarding the establishment of the “conservation objective” in order to promote transparent application of the Mitigation Policy. FWS should explain, for example:

- (1) How the conservation objective will be expressed (e.g., population threshold, amount of habitat, etc.)?
- (2) Who will determine the conservation objective?
- (3) What process will be used?
- (4) What level of input will permit applicants and stakeholders have in determining the conservation objective?
- (5) At what scale will the conservation objectives will be established (e.g., by species, by habitat type, by project type, etc.)?

Moreover, FWS must recognize that “conservation objectives” used for purposes of mitigation must stay within the applicable statutory authorization. Thus, for ESA-listed species, the determination of conservation objectives must be consistent with the particular ESA section and implementing regulations under which FWS is acting, and cannot be a means to raise the bar or standards to be applied for identification of effects or specification of avoidance, minimization or mitigation measures.

2. Conservation Planning

Issue: In defining “conservation planning” for use in the Mitigation Policy, FWS describes such plans as “the identification of strategies for achieving conservation objectives” and then asserts that “[c]onservation plans include, but are not limited to, recovery plans, habitat

¹⁰ The ESA, in part, defines “conservation” as “to use and the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this chapter are no longer necessary.” 16 U.S.C. § 1532(3). The Marine Mammal Protection Act, in part, defines “conservation” to mean “the collection and application of biological information for the purposes of increasing and maintaining the number of animals within species and populations of marine mammals at their optimum sustainable population.” 16 U.S.C. § 1362(2).

¹¹ FWS notes that “some Service authorities define some of the terms in this section differently or more specifically, and the definitions herein do not substitute for statutory or regulatory definitions in the exercise of those authorities.” 81 Fed. Reg. at 12394. This approach is inadequate. Notwithstanding this disclaimer, FWS must still explain how the Mitigation Policy and its terminology will be applied in the relevant statutory contexts.

conservation plans, watershed plans, green infrastructure plans, and others developed by Federal, tribal, States, counties or other local government agencies or nongovernmental organizations.”¹²

Comment: The definition of “conservation planning” is extremely broad and appears to encompass any type of document that could be submitted by any entity. FWS must clarify the criteria that it will use to identify conservation plan documents for use through the Mitigation Policy. In terms of substance, to be considered, a conservation plan must involve active, “on-the-ground” activities, and not a compilation of “wish list” measures that are hoped for but are either not being implemented or that lack any commitments for implementation. Moreover, such plans must be directly related to the resources under evaluation and relevant to the statute under which FWS is acting. For example, States, counties and local governmental entities often develop comprehensive plans for integrated land use that focus on the fish, wildlife and habitat within specific areas and are aimed at directly achieving localized benefits. Such plans are not only relevant for review and utilization in mitigation decisions within such localities or regions, they warrant a level of deference in light of the fact that States, counties and local governments are typically most familiar with, and affected by, activities and mitigation efforts occurring in a particular location.

In addition, and as discussed further below, FWS must recognize voluntary conservation planning efforts that are associated with a particular species, habitat, or activity and allow such efforts to be applied as mitigation under the Mitigation Policy. For example, during the development phase of a project, a landowner or project proponent may modify the scope or location of the contemplated activity to avoid or minimize impacts to species or habitats. FWS must take these proactive measures into consideration when assessing any mitigation associated with the activity under review. Otherwise, FWS will create a strong disincentive for project proponents to incorporate avoidance and minimization strategies into the design of their actions and, instead, project proponents may rely upon compensatory mitigation measures which may not be as ecologically beneficial or economically efficient.

3. Landscape-Scale Approaches, Strategies and Plans

Issue: One of the central components of the Mitigation Policy is the adoption of a “landscape approach” that will involve the integration of mitigation into a broader ecological context.¹³ FWS defines “landscape” as:

[a]n area encompassing an interacting mosaic of ecosystems and human systems that is characterized by a set of common management concerns. . . . The landscape is not defined by the size of the area, but rather the interacting elements

¹² *Id.* at 12394.

¹³ *Id.* at 12384.

that are meaningful to the conservation objectives for the resource under consideration.”¹⁴

Further, FWS states that it will “design mitigation strategies that will prevent fragmented landscapes and restore core areas and connectivity necessary to sustain species.”¹⁵

Comment: FWS cannot incorporate landscape-scale mitigation into permitting decisions or authorizations without explicit statutory authority requiring such an expansive approach. In addition, FWS must recognize that the use of a landscape approach is often precluded by a more limited scope of impact analysis required by the underlying statute for which the analysis is being undertaken. For example, when there will be incidental take pursuant to an action analyzed in ESA Section 7 consultation, FWS is required to develop reasonable and prudent measures that will “minimize such impact.”¹⁶ Similarly, for an incidental take permit under ESA Section 10, the applicant must “minimize and mitigate the impacts of such taking” to the maximum extent practicable.¹⁷ FWS cannot convert this limited scope of authority, which is focused on the impact of take of the species, to an authorization to expand the minimization component to a landscape scale. Likewise, developing minimization measures for a particular action does not equate to an obligation to prevent fragmented landscapes or to restore core areas and connectivity for species.

Prior to its application (if retained at all), FWS must refine the landscape approach through more specific criteria and guidance on its implementation. First, FWS’s definition of landscape is not capable of consistent application and is not supported by existing scientific literature. By focusing on “interacting elements that are meaningful to the conservation objectives for the resource,” FWS’s approach could be construed as incorporating an infinite number of factors that may be incapable of resolution under FWS’s limited authorities (e.g., global greenhouse gas emissions). Further, the Mitigation Policy’s “landscape approach” must be limited to application in those instances where there is a nexus between the geographic area that may be impacted by a proposed project, the area where mitigation may be appropriate, and the scope of the landscape that FWS will consider based on additional ecosystem stressors. In particular, FWS cannot rely upon a “landscape approach” to attempt to address climate-related impacts which often cannot be reduced to analysis at a local or project-level scale.

Any application of a landscape approach also must take into consideration the role of States, counties and other government entities in managing fish and wildlife resources and their habitats. Given the need for, and documented success of, local conservation efforts in

¹⁴ *Id.* at 12394. FWS defines “landscape-scale approach,” in part, as “appl[ying] the mitigation hierarchy for impacts to resources and their values, services, and functions at the relevant scale, however, narrow or broad, necessary to sustain, or otherwise achieve, established goals for those resources and their values, services, and functions.” *Id.*

¹⁵ *Id.* at 12385.

¹⁶ 16 U.S.C. § 1536(b)(4)(C)(ii).

¹⁷ *Id.* § 1539(a)(2)(B)(ii).

conserving species and habitats, FWS should ensure that these efforts are considered and not undermined through the application of a larger scale mitigation analysis.

Finally, before embarking on a landscape approach, FWS must consider the costs and benefits of particular mitigation requirements to ensure an efficient result—in terms of timing, benefits and costs incurred. Mitigation must be capable of cost-effective implementation and, from this practical perspective, a landscape-scale approach to mitigation often will not be appropriate. For example, the proponent of an activity with a small permanent footprint and/or temporary effects should not be burdened by escalating mitigation measures imposed based upon other activities or effects within a landscape. Thus, FWS should explicitly exempt activities with a *de minimus* impact (both spatially and temporally) from application of the Mitigation Policy.

C. Scope of the Mitigation Policy

1. Resources

Issue: FWS states that the Mitigation Policy applies to federal trust fish and wildlife resources.¹⁸ In addition, FWS states that “[t]he types of resources for which the Service is authorized to recommend or require mitigation also include those that contribute broadly to ecological functions that sustain species.”¹⁹

Comment: The scope of the resources potentially implicated by the Mitigation Policy is exceedingly large and requires additional specificity. As one immediate improvement, FWS should acknowledge that the underlying statute dictates the type of resources that can be evaluated for purposes of mitigation determinations.²⁰ The Mitigation Policy, as currently drafted, could be interpreted to ignore this constraint and, instead, authorize an overly expansive scope of application to all species and their habitats irrespective of statutory justification.

FWS should clarify that the extent of its mitigation authority only applies to those federal trust resources specifically identified by the relevant statute. FWS should explicitly state that the Mitigation Policy does not apply to non-federal trust resources (such as unlisted species under the ESA) so that it does not conflict with the States’ management authority. This clarification would better recognize the oversight and management role that States have with regard to resource management.

¹⁸ Notwithstanding, FWS states that “Service Regions and field stations retain discretion to engage actions on an expanded basis under appropriate authorities.” 81 Fed. Reg. at 12383.

¹⁹ *Id.* at 12383.

²⁰ For example, while the Migratory Bird Treaty Act applies to a hawk, the statute cannot be extended to give FWS regulatory authority over a tree because it grows a nut that feeds a squirrel that sustains the hawk.

2. Applicability to Service Actions and Foreseeable Impacts

Issue: The Mitigation Policy states that it applies only to the mitigation of “impacts to fish, wildlife, plants, and their habitats that are reasonably foreseeable from such proposed actions.”²¹ Furthermore, FWS defines “impacts” as “adverse effects” on the resource.²²

Comment: Subject to the clarifications discussed below, NESARC agrees that the Mitigation Policy should only apply to impacts that are reasonably foreseeable in order to avoid unnecessary speculation. Furthermore, NESARC agrees that only those impacts “from” proposed actions need to be addressed. However, FWS should clarify that there must be an established causal connection between the proposed action and the identified impact for any mitigation obligation to apply.²³ Finally, NESARC supports the proposed definition of “impacts” because it properly recognizes that only adverse effects need to be mitigated.

Notwithstanding, FWS needs to clarify what impacts are reasonably foreseeable and what criteria apply to make that determination. The term “foreseeable” is ambiguous, and its application raises issues associated with the temporal extent of the analysis. Under the ESA, the statutory definition of “threatened species” includes the term “foreseeable future.” The Solicitor of the Department of the Interior has issued an M-Opinion that emphasizes that “the foreseeable future extends only so far as the Secretary can explain reliance on data to formulate a reliable prediction.”²⁴ This definition is consistent with Supreme Court precedent stating that the “ESA [is] not [to] be implemented haphazardly, on the basis of speculation or surmise.”²⁵

Recent court decisions clearly demonstrate that there are significant uncertainties and speculation associated with attempts to project future changes to habitat, particularly in the context of climate change, and the resulting impacts on species. For example, NMFS listed the Beringia DPS of bearded seal and the Arctic subspecies of ringed seal as threatened based on projected losses of sea ice through the end of the 21st century.²⁶ However, in vacating these listings, the court recognized that NMFS “lack[ed] any reliable data as to the actual impact on the [species] as a result of the loss of sea-ice.”²⁷ In addition, the courts have acknowledged that

²¹ *Id.* at 12384.

²² *Id.* at 12394.

²³ *See, e.g., Aransas Project v. Shaw*, 775 F.3d 641, 661-63 (5th Cir. 2014) (no causal connection between the issuance of water withdrawal permits by a State agency and whooping crane deaths due to multiple, natural, independent, unpredictable, and interrelated forces affecting the species’ environment).

²⁴ DOI Office of the Solicitor, M-37021, The Meaning of “Foreseeable Future” in Section 3(20) of the Endangered Species Act at 8 (Jan. 16, 2009).

²⁵ *Bennett v. Spear*, 520 U.S. 154, 176 (1997).

²⁶ 77 Fed. Reg. 76,740 (Dec. 28, 2012) (bearded seal); 77 Fed. Reg. 76,706 (Dec. 28, 2012) (ringed seal).

²⁷ *Alaska Oil and Gas Ass’n v. Pritzker*, 2014 WL 3726121, at *15 (D. Ak. July 25, 2014) (emphasis added); *Alaska Oil and Gas Ass’n v. National Marine Fisheries Service*, 2016 WL 1125744, at *14 (D. Ak. March 17, 2016).

the temporal extent of what is foreseeable may vary depending upon life history, generation time, and the adequacy of modeling projections of future conditions.²⁸

FWS must provide additional procedures and safeguards by which to ensure that assessments of impacts are not based upon assumption, speculation, or preconception. In particular, FWS must ensure that: (i) the temporal scope of the impacts analysis is well defined and supported by the best available scientific and commercial data; and (ii) that assessment of impacts to species and their habitats can be identified and assessed with reliable predictability. This will require a consideration of causation to ensure that any impacts are directly related to the action being considered and not too attenuated or influenced by intervening factors.

D. General Policy and Principles

1. Net conservation gain

Issue: The Mitigation Policy states that FWS’s mitigation planning goal is “to improve (i.e., a net gain) or, at minimum, to maintain (i.e., no net loss) the current status of affected resources, as allowed by applicable statutory authority and consistent with the responsibilities of action proponents under such authority, primarily for important, scarce, or sensitive resources, or as required or appropriate.”²⁹

Comment: FWS must have explicit statutory authority to apply a “net conservation gain” as part of a mitigation determination. However, FWS fails to provide a legal basis for imposing a requirement for net conservation gain. Moreover, including an “as required or appropriate” caveat does not absolve FWS from first establishing its authority to impose such a standard within a Mitigation Policy. Where the underlying statute provides no basis for requiring conservation gains, FWS cannot rely upon the Mitigation Policy as the source of authority to require such mitigation measures.

Conservation gain is not an easily defined and consistently applied term, and FWS fails to provide an explicit definition in the Mitigation Policy. In certain contexts, or for certain actions, FWS may be able to quantify the specific extent of an impact (e.g., acres of wetlands or number of species taken) and thereby calculate a corresponding amount of mitigation. In many

²⁸ *E.g.*, *In re Polar Bear Endangered Species Act Listing & 4(d) Rule Litig.*, 794 F. Supp. 2d 65, 95 (D.D.C. 2011) (upholding a 45-year or three-generation timeframe for the foreseeable future for polar bear); *Ctr. for Biological Diversity v. Lubchenco*, 758 F. Supp. 2d 945, 965 (N.D. Cal. 2010) (“since there was little reliability, NMFS did not err in determining that models after 2050 were too variable to be part of the foreseeable future”); *W. Watersheds Project v. Ashe*, 948 F. Supp. 2d 1166, 1180-81 (D. Idaho 2013) (upholding decision not to list pygmy rabbit when FWS could not define the foreseeable future due to a lack of sufficient population data or data linking population trends and potential threats); *Alaska Oil and Gas Ass’n v. Pritzker*, 2014 WL 3726121, at *15 (D. Ak. July 25, 2014) (scientific data regarding forecasting more than 50 years into the future is too speculative and remote to support listing the Beringia DPS of bearded seal); *Alaska Oil and Gas Ass’n v. National Marine Fisheries Service*, 2016 WL 1125744, at *14 (“forecasting more than some 80 years into the future is simply too speculative and remote to support a determination that the Arctic ringed seal is in danger of becoming extinct”).

²⁹ 81 Fed. Reg. at 12384.

other circumstances, it will not be possible for FWS to make such definitive calculations (e.g., multiple species, varied habitat features, etc.), which will then undermine the ability to assess any mitigation obligation with specificity. Furthermore, to the extent FWS has statutory authority to apply the “conservation gain” standard, FWS should clarify that the standard will apply only to “important, scarce, or sensitive resources.” Finally, FWS indicates that, while its goal is a conservation gain, the acceptable level of mitigation is that which will achieve no net loss. FWS does not explain how it will determine or impose mitigation measures to meet a mitigation target that exists somewhere between maintaining and improving the status of affected resources.

Under the ESA, there is no mandatory obligation to improve or maintain the current status of affected resources. On the contrary, the statute provides specific standards in Sections 7 and 10 regarding what may be required of a project proponent. Under Section 7, FWS must evaluate whether a federal action is likely to jeopardize the continued existence of any listed species or result in the destruction or adverse modification of critical habitat.³⁰ Jeopardy occurs when an action would “reduce appreciably the likelihood of both the survival and recovery of a listed species,” and adverse modification occurs when an action would “appreciably diminish the value of critical habitat for the conservation of a listed species.”³¹ Based on a finding of jeopardy or adverse modification, FWS will provide a reasonable and prudent alternative that, in part, “would avoid the likelihood of jeopardizing the continued existence of listed species or resulting in the destruction or adverse modification of critical habitat.”³² If take of a listed species will occur, FWS will provide an incidental take statement and the reasonable and prudent measures considered “necessary or appropriate to minimize such impact.”³³

The ESA requirements to avoid jeopardy or adverse modification and to minimize the impact of any take of listed species do not equate to the “no net loss” or “conservation gain” standards articulated in the Mitigation Policy, and there is no statutory authority to impose such requirements in the Section 7 consultation context.³⁴ Similarly, under Section 10, an applicant for an incidental take permit must submit a habitat conservation plan that includes, in part, steps that will be taken to minimize and mitigate the impact resulting from the taking.³⁵ FWS will issue the permit if it finds, in part, that the applicant “will, to the maximum extent practicable, minimize and mitigate the impacts of such taking.”³⁶ In the HCP Handbook, FWS states that “[n]o explicit provision of the ESA or its implementing regulations requires that an HCP must

³⁰ 16 U.S.C. § 1536(a)(2).

³¹ 50 C.F.R. § 402.02.

³² *Id.*

³³ 16 U.S.C. § 1536(b)(4)(C)(ii); 50 C.F.R. § 402.14(i)(1)(ii).

³⁴ *E.g., Butte Envtl. Council v. U.S. Army Corps of Eng’rs*, 620 F.3d 936, 948 (9th Cir. 2010) (recognizing that an area of critical habitat can be destroyed without diminishing the value for the survival or recovery of the species).

³⁵ 16 U.S.C. § 1539(a)(2)(A)(ii).

³⁶ *Id.* § 1539(a)(2)(B)(ii).

result in a net benefit to affected species.”³⁷ Thus, while FWS may “encourage” a permit applicant to develop an HCP that results in a “net benefit” to a listed species, there is no statutory requirement that the applicant do so.³⁸ FWS must explicitly recognize this distinction in the Mitigation Policy.

Moreover, FWS should clarify that it is not necessary to apply the “net conservation gain” or “no net loss” standards universally to all species and habitats. Instead, FWS should adopt different mitigation standards and thresholds depending upon the abundance or quality of the impacted resource. For example, it is not necessary to require conservation gains for an abundant species with wide distribution that faces minimal threats to its persistence. This approach would recognize and take into account the relative value of affected resources, and would allow compensatory mitigation to be directed towards the species or habitat of greatest concern and greatest potential benefit.

Finally, reconsideration of the “net conservation gain” standard also is warranted in light of the fact that its application could result in a regulatory taking. When imposing any mitigation obligations, FWS must ensure that measures have an essential nexus and rough proportionality to the impact of the proposed project.³⁹ While the practical details regarding the implementation of the Mitigation Policy are not yet known, FWS must exercise restraint in the amount of recommended mitigation to ensure that it is commensurate to the impact to species or habitat.

2. Compensatory mitigation timing

Issue: FWS states that it will “recommend or require that compensatory mitigation be implemented before the impacts of an action occur and be additional to any existing or foreseeably expected conservation efforts planned for the future.”⁴⁰

Comment: FWS’s proposed requirement for advance compensatory mitigation is unrealistic, overbroad, and incompatible with the process by which project permitting and financing determinations are made.

As a practical matter, mitigation measures often have longer time frames for development and operation. Depending upon the species or habitat, compensatory mitigation may not be available at the time impacts from a project occur. For example, for a species that is recently listed, it may take some time for a mitigation bank to acquire necessary habitat, get regulatory approval, and generate mitigation credits. In such cases, FWS should not deny regulatory approval for, or delay the initiation of, projects that impact that species. As a related issue, in

³⁷ HCP Handbook at 3-21.

³⁸ *Id.*

³⁹ *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2595 (2013).

⁴⁰ 81 Fed. Reg. at 12385; *Id.* at 12392 (“When compensatory mitigation is necessary, the Service prefers compensatory mitigation measures that are implemented and earn credits in advance of project impacts.”).

most instances, funding for compensatory mitigation is not available and will not be advanced until after a permitting decision is complete and other project milestones have been achieved. FWS must recognize that strict adherence to advance mitigation requirements can have negative implications on the ability to secure necessary funding for a project to proceed towards implementation.

In addition, a requirement or recommendation for advance compensatory mitigation will have a chilling effect on any voluntary efforts that a project proponent may be willing to undertake and will undermine the goal of conserving species and their habitat. Particularly, parties often will undertake conservation efforts with the expectation that other future activities may require offsetting mitigation. For example, a county may initiate a long-term planning process focused on improving water quality well before a specific project within the watershed arises. As drafted, FWS would essentially penalize the county for having the foresight to expect and plan for future impacts from its activities within a watershed by treating all such benefits as an existing measure and requiring further mitigation to be undertaken.

Similarly, FWS's approach to compensatory mitigation is contrary to FWS's efforts to develop incentives that promote the implementation of voluntary conservation actions before a species is listed under the ESA, such as the proposed Policy Regarding Voluntary Prelisting Conservation Actions.⁴¹ In that proposed policy, FWS would allow the benefits to a species from voluntary conservation actions undertaken prior to listing to mitigate or serve as compensatory mitigation for the detrimental effects of another action undertaken after listing.⁴² However, in the Mitigation Policy, FWS appears to suggest that such prelisting conservation actions, as an existing conservation effort, would not be considered as a potential source of compensatory mitigation. FWS should clarify these apparent inconsistencies to provide necessary certainty regarding the availability and application of mitigation credits. If a landowner, action agency, State, county, 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.

FWS must also recognize the beneficial actions that may be incorporated into a project for purposes of meeting permitting requirements or to avoid or minimize project impacts. For example, a project proponent may include such measures for purposes of receiving a "not likely to adversely affect" or a "no jeopardy" determination under ESA Section 7. These actions must be included and considered as mitigation under the Mitigation Policy—and cannot be disregarded as a "foreseeably expected conservation effort" due to the fact that the applicant has incorporated such measures into the project proposal in the first instance.

Finally, without the forthcoming ESA-specific compensatory mitigation policy, FWS's approach to compensatory mitigation is incomplete and incapable of meaningful review. At this time, there are a number of issues that require further clarification in order to understand how

⁴¹ 79 Fed. Reg. 42,525 (July 22, 2014).

⁴² *Id.*

mitigation will be applied in the ESA-specific context, including: the determination of mitigation measures when a proposed action impacts both listed and non-listed species; the inability to rely upon evaluation species to impose higher levels of mitigation than what can be required for ESA-listed species; and the role and treatment of voluntary conservation plans. Meaningful comment on these and other ESA-related issues cannot be provided until all applicable policies are provided for review.

3. Durability

Issue: FWS states that it will require or recommend that “mitigation measures are durable, and, at a minimum, maintain their intended purpose for as long as impacts of the action persist on the landscape.”⁴³ FWS further notes that this includes “implementation assurances” that must assure the development, maintenance, and long-term viability of the mitigation measure.⁴⁴

Comment: FWS should acknowledge that all liabilities associated with proponent-responsible mitigation cease when transferred to a third party with the specific goal of monitoring and completing the mitigation actions for a mitigation land acquired by fee title (similar to an in-lieu fee program). States and FWS are often named as third-party beneficiaries that can step in when mitigation actions by a third-party manager are not completed or are not successful. Applicants typically transfer the fee title of a mitigation parcel to a third-party non-profit group (with an approved endowment and management plan), and action proponents should have no further liabilities to said lands. FWS should recognize that proponent-responsible mitigation lands that have been transferred are protected in perpetuity through a conservation easement or other deed restrictions. Similar to in-lieu fee programs, the responsibility for ensuring compensatory mitigation activities are successful is transferred from the action proponent to the in-lieu fee program operator.

E. Mitigation Framework

1. Integrating mitigation with conservation planning

Issue: In discussing the integration of mitigation with conservation planning, FWS states that a focus will be on “measures to improve the resilience of resources in the face of climate change or otherwise increase the ability to adapt to climate and other landscape change factors.”⁴⁵

Comment: FWS fails to recognize that there are significant issues associated with determining what impacts are “reasonably foreseeable” for purposes of projecting future climate-

⁴³ 81 Fed. Reg. at 12385.

⁴⁴ *Id.*

⁴⁵ 81 Fed. Reg. at 12386.

related changes to habitat. In part, the current state of climate projections does not allow agencies to assess specific impacts with sufficient granularity to make mitigation determinations. Given the obligation to utilize the best available scientific information, FWS cannot impose haphazard or speculative mitigation obligations at the project-specific scale based upon modeling projections that can only assess climate effects at the regional or continental scale.

FWS must clarify the basis of authority directing the agency to improve resource resiliency for purposes of addressing projected impacts from climate change. The ability to address any climate-related impacts to species resiliency is limited depending upon the particular statute that is applicable. For example, under the ESA, FWS can address jeopardy, adverse modification, and the minimization of incidental take under Section 7 and mitigation for incidental take permits under Section 10.⁴⁶ However, the scope of these measures is limited, and FWS cannot utilize the Mitigation Policy to expand its authority to take actions regarding the resiliency of species or habitat beyond the bounds authorized by Congress.

2. Assessment

Issue: FWS presents several principles that will guide its assessment of anticipated effect and the expected effectiveness of mitigation measures.⁴⁷ One of these principles is the use of the “best available effect assessment methodologies.”⁴⁸ This appears to be a new phrase developed for use in the Mitigation Policy. While FWS provides some description of the components of the methodology, additional clarification is needed prior to implementation.

Comment: In selecting methodologies for use in mitigation assessments, FWS needs to ensure that the chosen methodology is sufficiently rigorous to provide reliable predictions of future conditions. For example, one of the issues in projecting climate-related impacts is the broad divergence of climate models as the analysis extends into the future. After a certain point, the projections are too speculative for use in the natural resource management context. Thus, FWS should establish additional procedures and criteria to ensure that a particular methodology is accurate and fits within established confidence intervals appropriate for scientific projections.

NESARC supports FWS’s goal of using methods that are practical and cost-effective. In addition, FWS should utilize methods that are clear and straight-forward, and should avoid using methods that are highly technical, complex, and complicated. Such an approach will promote stakeholder understanding of natural resource management decisions and allow assessments of mitigation measures, and the need for such measures, to be more transparent and accepted. When such methods are not available, FWS should use existing best available scientific information. To the extent that FWS employees apply “best professional judgment” to assess

⁴⁶ 16 U.S.C. §§ 1536(b)(4) & 1539(a)(2)(B)(ii).

⁴⁷ 81 Fed. Reg. at 12387-88.

⁴⁸ *Id.* at 12387.

impacts and to develop mitigation requirements, FWS needs to clearly explain how this judgment was exercised, what factors were considered, and the implications of this judgment.

In some circumstances, FWS will be unable to assess impacts of an action in a quantitative manner. For example, when designating critical habitat under the ESA, FWS is required to consider the probable economic, national security, and other relevant impacts of the designation upon proposed or ongoing activities.⁴⁹ These impacts may be described qualitatively or quantitatively.⁵⁰ FWS needs to explain how qualitative effects will be addressed under the Mitigation Policy. Typically, these types of impacts are not capable of consideration or analysis through scientific methodologies. To address such circumstances, FWS needs to provide additional criteria and analytical approaches specifying how such non-quantitative impacts will be reviewed and incorporated into the mitigation assessment.

3. Evaluation species

Issue: FWS states that it will identify certain “evaluation species” that it will evaluate for mitigation purposes. FWS indicates that it will “select the smallest set of evaluation species necessary to relate the effects of an action to the full suite of affected resources and applicable authorities.”⁵¹ Where FWS is required to issue a biological opinion, permit, or regulatory determination for specific species, FWS “will identify such species, at minimum, as evaluation species.”⁵² FWS states that it “may consider evaluation species that are not currently present in the affected area” based on certain circumstances.⁵³

Comment: FWS must further explain how its approach to identifying and relying upon “evaluation species” is appropriate. For example, under the ESA, the procedures and protections of the Act are directed towards listed species and designated critical habitat and, to a lesser extent, proposed species and proposed critical habitat. While these listed species could be considered as “evaluation species,” there is no basis for evaluating other non-listed species when assessing actions under the ESA. Further, during Section 7 consultation, the effects of the action are assessed based upon the species that are present in the action area.⁵⁴ FWS cannot expand the scope of analysis to include species that are not present in the action area based upon an assumption that the species will occur in the affected area at some point in the foreseeable future due to natural species succession.

⁴⁹ 50 C.F.R. § 424.19(b).

⁵⁰ *Id.*

⁵¹ 81 Fed. Reg. at 12388.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ 50 C.F.R. § 402.12(c) & (d) (preparation of a list of any listed or proposed species or designated or proposed critical habitat “that may be present in the action area”).

When identifying evaluation species for mitigation purposes, FWS should proceed on a case-by-case basis and avoid adhering to rigid presumptions in the evaluation of potential impacts. FWS should acknowledge that there are other factors that will inform the appropriateness of including certain species. For example, species exhibit different degrees of resiliency to different environmental stressors or impacts. Thus, the selection of a species that is less resilient than other species in that geographic area could skew the results of the mitigation assessment and suggest the imposition of greater mitigation measures than would otherwise be necessary. FWS should also consider other factors, such as species diversity, prevalence, population status, etc., in a particular location as compared to the greater range of the species. Individuals of a species may be more susceptible to project impacts in locations at the outskirts of their range where existence is more attenuated than it would be in areas where it is better established. Similarly, areas of low species occurrence at the project-level may not be representative of the overall health of the species, or the threats it faces at the taxonomic level. FWS must ensure that these factors are considered and properly assessed during its selection of evaluation species when appropriate in the particular context.

4. Habitat valuation

Issue: FWS states that the “primary purpose of habitat valuation is to determine the relative emphasis the Service will place on avoiding, minimizing, and compensating for impacts to habitats of evaluation species.”⁵⁵ FWS intends to assess the overall value of habitat through a consideration of scarcity, suitability for evaluation species, and importance to the conservation of evaluation species. For affected habitat that is used by more than one evaluation species, FWS will use the highest valuation to determine mitigation recommendations or requirements.⁵⁶ FWS states that, for habitats determined to be of high value, FWS “will seek avoidance of all impacts.”⁵⁷

Comment: FWS must provide additional clarification on how it will value affected habitat when it is used by more than one evaluation species. Specifically, FWS states that “the highest valuation will govern” the mitigation recommendations or requirements. Given the multitude of biological factors that must be considered for each species (*e.g.*, life history needs, development stages, ecosystem relationships, habitat quality, etc.), it is unclear how FWS will standardize a particular valuation such that it can be compared across multiple species. FWS must provide the methodology that it will utilize for determining the highest valuation for habitat that is utilized by multiple evaluation species, and it must ensure that such a determination is not arbitrary and conducted in a transparent manner with involvement of the affected project proponent.

⁵⁵ 81 Fed. Reg. at 12388.

⁵⁶ *Id.* at 12389.

⁵⁷ *Id.*

NESARC opposes the overbroad statement that FWS can require “avoidance of all impacts.” Such a determination must be within FWS’s existing statutory authority, and FWS must identify the statutory authority and circumstances warranting such a mitigation requirement.

There is no basis allowing FWS to unilaterally set aside land through the creation of no development areas. Under the ESA, FWS must insure that a federal action is not likely to result in the destruction or adverse modification of critical habitat.⁵⁸ Given that critical habitat is defined as specific areas where physical or biological features “essential” to the conservation of the species are found, presumably, FWS would assign such areas a high value. Even in this context, there is no requirement to avoid all impacts. Instead, during Section 7 consultation, FWS will propose a reasonable and prudent alternative to the action that would avoid the likelihood of adverse modification (*i.e.*, appreciably diminishing the value of that critical habitat for the conservation of the species).⁵⁹ FWS should revise the Mitigation Policy to reflect the obligations imposed by the ESA, and to clarify that the assessment of any impacts to habitat must be considered in relation to effects on the habitat and species as a whole.⁶⁰

5. Recommendations

Issue: FWS states that it will provide recommendations to mitigate the impacts of proposed actions.⁶¹ In part, FWS states that, “on a case-by-case basis, [it] may recommend the ‘no action’ alternative.”⁶² FWS notes that, for example, “when appropriate and practicable means of avoiding significant impacts to high-value habitats and associated species are not available, the Service may recommend the ‘no action’ alternative.”⁶³ In addition, FWS states that it “will generally, but not always, recommend compensatory mitigation on lands with the same ownership classification as the lands where impacts occurred.”⁶⁴ Specifically, FWS “usually does not support offsetting impacts to private lands by locating compensatory mitigation on public lands” unless certain specified conditions exist.⁶⁵

Comment: FWS fails to provide the justification or authority supporting its purported ability to recommend a “no action” alternative or its preference for restricting mitigation to lands

⁵⁸ 16 U.S.C. § 1536(a)(2).

⁵⁹ 50 C.F.R. § 402.02.

⁶⁰ *E.g.*, *Rock Creek Alliance*, 663 F.3d at 442 (FWS “did not err by conducting a large-scale analysis and by relying on the relative size of Rock Creek critical habitat to evaluate the mine's impact on the bull trout”); *Butte Envtl. Council*, 620 F.3d at 948 (recognizing that “project would destroy only a very small percentage of each affected species' critical habitat, whether viewed on a unit or nationwide basis”).

⁶¹ 81 Fed. Reg. at 12392.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

with the same ownership classification. These proposals will have significant impacts on project proponents and fail to promote the efficient and economical implementation of mitigation measures.

- a. *FWS must show that it has authority in a given case to recommend a no action alternative, and should use that authority sparingly*

FWS must clarify its authority to recommend a “no action” alternative, and provide additional explanation for when such a determination would be made. Importantly, FWS must establish that it has the statutory authority to make such a determination in the first instance.⁶⁶ Assuming that FWS can establish this threshold basis for issuing such a recommendation, FWS must also explain the process and procedures that it will follow prior to making a “no action” determination—*i.e.*, what constitutes a “significant impact,” what is the range of “appropriate and practicable means,” and how it will coordinate with other federal agencies and the project proponent. For example, in Section 7 consultation under the ESA, a reasonable and prudent alternative must be consistent with the intended purpose of the action; within the scope of the action agency’s legal authority and jurisdiction, and economically and technologically feasible.⁶⁷ Further, FWS is required to both discuss the availability of any reasonable and prudent alternative with both the action agency and any applicant, and utilize the expertise of the action agency and any applicant in identifying these alternatives.⁶⁸ FWS should ensure that similar procedures are in place to inform any no action recommendation, should such conclusion be warranted.

- b. *Requiring mitigation on lands with the same ownership classification is unnecessarily restrictive*

FWS should not impose an artificial prohibition on the use and improvement of federal lands to mitigate for impacts on non-federal lands—and vice versa. Mitigation efforts on public lands can be a valuable tool in ensuring the conservation of species and habitats. This is particularly true, and necessary, in the Western portion of the United States where there are large blocks of federal land and relatively small blocks of private land. In fact, it may only be possible to provide the greatest conservation benefit to species and habitat by utilizing compensatory mitigation on public lands. Thus, FWS should not adhere to a bright line requirement regarding compensation on lands with the same ownership classification, but should assess compensation location based upon the best and most efficiently means to provide mitigation benefits for the resource at issue and allow lower cost options that provide greater benefits even if on a different class of lands.

⁶⁶ The existing mitigation policy states that “the legal authorities for the mitigation policy do not authorize the Service to exercise veto power over land and water development activities.” 46 Fed. Reg. 7644, 7647 (Jan. 23, 1981). FWS has not identified any subsequent authority that would warrant changing this conclusion.

⁶⁷ 50 C.F.R. § 402.02.

⁶⁸ 50 C.F.R. § 402.14(g)(5).

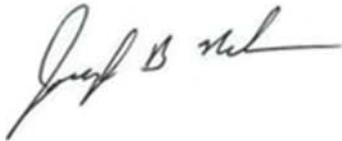
III. Additional Revisions and Public Comment Are Necessary Before the Mitigation Policy Is Finalized

Given the expansive scope of the proposed Mitigation Policy, the nature of the issues raised herein, and the potential significant impacts upon the regulated community, FWS needs to further revise the Mitigation Policy. As part of this process, FWS must further engage with the regulated community on the mitigation options that are available and provide an opportunity for additional comment before adopting a final policy and before any implementation occurs. Continuing transparency and engagement on mitigation approaches will ultimately benefit FWS, the public, and the resources to be protected.

IV. Conclusion

NESARC greatly appreciates the opportunity to provide these comments and to initiate a further discussion on ways to improve FWS's Mitigation Policy. We respectfully request that you take these comments into full consideration before finalizing the proposed policy.

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

1050 Thomas Jefferson Street, NW, 6th Floor
Washington, DC 20007
tel. 202.333.7481 fax 202.338.2416
www.nesarc.org

**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
Mitchell, South Dakota

Central Platte Natural Resources District
Grand Island, Nebraska

Charles Mix Electric Association
Lake Andes, South Dakota

**Coalition of Counties for Stable
Economic Growth**
Glenwood, New Mexico

Codington-Clark Electric Cooperative, Inc.
Watertown, South Dakota

Colorado River Energy Distributors Association
Phoenix, Arizona

Colorado River Water Conservation District
Glenwood Springs, Colorado

Colorado Rural Electric Association
Denver, Colorado

County of Eddy
Carlsbad, New Mexico

County of Sierra
Truth or Consequences, New Mexico

CropLife America
Washington, D.C.

Dixie Escalante Rural Electric Association
Beryl, Utah

Dugan Production Corporation
Farmington, New Mexico

Eastern Municipal Water District
Perris, California

Edison Electric Institute
Washington, D.C.

Frank Raspo & Sons
Vernalis, California.

Empire Electric Association, Inc.
Cortez, Colorado

Garrison Diversion Conservancy District
Carrington, North Dakota

Guadalupe Blanco River Authority
Seguin, Texas

High Plains Power, Inc.
Riverton, Wyoming

Idaho Mining Association
Boise, Idaho

NAIOP
Herndon, Virginia

National Alliance of Forest Owners
Washington, D.C.

National Association of Counties
Washington, D.C.

National Association of Conservation Districts
Washington, D.C.

National Association of Home Builders
Washington, D.C.

National Rural Electric Cooperative Association
Washington, D.C.

National Water Resources Association
Arlington, Virginia

Nebraska Farm Bureau Federation
Lincoln, Nebraska

Northern Electric Cooperative, Inc.
Bath, South Dakota

Northwest Horticultural Council
Yakima, Washington

Northwest Public Power Association
Vancouver, Washington

Public Lands Council
Washington, D.C.

Renville-Sibley Cooperative Power Association
Danube, Minnesota

San Luis Water District
Los Banos, California

Southwestern Power Resources Association
Tulsa, Oklahoma

Sulphur Springs Valley Electric Cooperative
Willcox, Arizona

Teel Irrigation District
Echo, Oregon

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