



NATIONAL ENDANGERED SPECIES ACT
REFORM COALITION

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Public Comments Processing

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Division of Policy, Performance, and Management Programs

U.S. Fish and Wildlife Service

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

Re: NESARC Comments on the Joint U.S. Fish and Wildlife Service and National Marine Fisheries Service Habitat Conservation Planning Handbook

Dear Sir/Madam:

On June 28, 2016, the U.S. Fish and Wildlife Service (“FWS”) and National Marine Fisheries Service (“NMFS” and, collectively, the “Services”) announced the availability of draft revisions to the joint Habitat Conservation Plan (“HCP”) Handbook (the “Draft Handbook”).¹ The Draft Handbook describes requirements, procedures, and guidance for the development of habitat conservation plans supporting the issuance of incidental take permits under Section 10 of the Endangered Species Act (“ESA”). Pursuant to the *Federal Register* notice, the National Endangered Species Act Reform Coalition (“NESARC”) respectfully provides its comments and recommendations on the Services’ revised Draft Handbook.

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. 41986 (June 28, 2016).

² See Appendix A.

NESARC appreciates the Services' continued support for the development and implementation of Section 10 incidental take permits ("ITPs") and HCPs. We believe that these measures are important conservation tools that are mutually beneficial to species and property owners. We commend the Services for revising the Handbook in an effort to reflect the experiences gained and lessons learned over the 30-year history of implementing the HCP program. Given that the existing Handbook has not been significantly revised since its issuance in 1996, this effort provides an important opportunity to address existing inefficiencies and to streamline the HCP development, approval, and implementation processes. In furtherance of these goals, NESARC provides the following comments on the Draft Handbook to further improve and maximize the intended effectiveness of the proposed revisions.

I. Comments on the Draft Handbook

The Services state that the goal of revising the Handbook is to help streamline and improve the efficiency of the HCP program. To accomplish this goal, the Services attempt to address stakeholder concerns that the HCP and incidental take development and approval processes are inefficient due to: the length of time and costs associated with HCP development, the complexity of negotiations, implementation expense, lack of certainty, and lack of readily apparent benefits associated with the HCP program.

While well-intentioned and providing some measurement of improvement in certain areas, the Services' present revisions in the Draft Handbook do not fully address the ambiguities, complexities and lack of certainty that the Services have acknowledged as persisting in the process for developing and approving HCPs. In particular, the Services' proposed revisions appear to exacerbate previously identified inefficiencies and impose more burdensome documentation and data requirements. Moreover, and of particular concern, the Draft Handbook appears to put in place administrative measures that raise the threshold for HCP approval and erode the No Surprises commitment that has been so fundamental in encouraging voluntary development of HCPs. Without further improvements, NESARC expects that the Draft Handbook will act as a disincentive for participation in habitat conservation planning.

A. The Draft Handbook Should Be Further Revised to Provide More Practical and Straight-Forward Guidance for External HCP Practitioners

NESARC recognizes that the Services prepared the Draft Handbook for the primary purpose of instructing FWS and NMFS staff on how to assist applicants in the development of HCPs. In this regard, the Draft Handbook documents the internal processes, considerations, documentation, and decision points that Services staff would address as part of HCP development, approval, and implementation. However, the focus on these internal processes and components has unfortunately resulted in a Handbook that is overly bureaucratic, complicated, and difficult for use by non-Service personnel.

In addition to serving as an instructional aid for Services staff, the Handbook is heavily relied upon by HCP practitioners, such as applicants, consultants, and partners. When making additional revisions, the Services should look for opportunities to improve the usability and clarity of the Handbook for these external stakeholders. Parties seeking to develop an HCP and

obtain an ITP in order to proceed with activities in manner protective of listed species should not have to navigate a 400-plus page document or an equally complex process. In particular, the Services should reorganize the Handbook to clearly segregate administrative advice to Services staff from those parts of the Handbook that address core requirements for the development, review and approval of HCPs.³ The end result should be a revised Handbook that is instructional, concise, and helpful to both Service staff and external practitioners. Just as with National Environmental Policy Act (“NEPA”) analyses, brevity and simplicity are helpful for all involved.

B. The Draft Handbook Includes Guidance that Exceeds the Scope of ESA Section 10

1. Consideration of Climate-Related Impacts Must be Consistent with Existing ESA Standards and Not Undermine the Need for Regulatory Certainty

The Draft Handbook emphasizes that climate change and its effects must be included and addressed as part of the HCP development process. The ESA has a clear statutory framework for addressing the potential adverse effects of certain activities upon listed species and designated critical habitat. These boundaries and purposes cannot be usurped by a unilateral directive to include climate change considerations in HCP development and implementation.

Responses to potential climate change impacts on fish and wildlife are undoubtedly complex, not without controversy, and have the potential to affect a wide array of stakeholders. As the Services acknowledge, incorporating climate change considerations into HCPs and related ESA Section 7 and NEPA documents is challenging based, in part, on the still developing science and analytical tools and the variability associated with making predictions for different geographic areas, different time periods, and different species and habitat types.⁴ In many instances, it remains difficult to predict the specific environmental conditions that fish and wildlife will face in the future. Moreover, climatic conditions are just one factor, among many, that could affect the management and conservation needs for fish and wildlife populations.⁵ For these reasons, introducing flexibility and adaptability in the Services’ approach to the management and protection of species should not be considered solely as a response to concerns regarding potential climate change impacts. Instead, the Services must recognize that such climate considerations cannot disregard the framework of protection and mandates established by the ESA. Further, the Services should ensure that any climate adaptation and management strategies do not undermine the long-acknowledged need for regulatory certainty—particularly as formed through the No Surprises Rule.

³ For example, Chapter 4 of the Draft Handbook describes communication and coordination, but the discussion focuses primarily on the Services’ outreach activities with little guidance on the role of the applicant or recognition that HCP development is an applicant driven process.

⁴ Draft Handbook at 1-6, 9-5.

⁵ Maxwell, S.L. et al., *The Ravages of Guns, Nets, and Bulldozers*, 536 Nature 143, 144 (Aug. 11, 2016) (climate change is not the most prevalent threat to biodiversity, only affecting 19% of species on the IUCN Red List).

Instead of advocating for a broad incorporation of climate change, the Services first must clarify that the scope and extent of any climate-related considerations will be dictated by the best available science standard.⁶ This standard ensures that the ESA is not “implemented haphazardly, on the basis of speculation and surmise.”⁷ Moreover, it is widely recognized that current climate change science is incapable of predicting site-specific impacts from climate change. Thus, any assessment of projected climate change and the related effects and responses of species and habitat (e.g., species distribution, habitat fragmentation or degradation, invasive species, etc.) can only be included in an HCP to the extent there is scientific data to support the analyses. Similarly, impacts resulting from an incidental take permit must be reasonably foreseeable, and the applicant need only propose minimization and mitigation measures that are practicable. The Services cannot rely upon future climate change projections to require applicants to develop and adopt minimization and mitigation measures for potential scenarios that are unlikely to occur, are not based on the best available science, or are too speculative to be appropriately planned for in an HCP. The Handbook should include these cautionary principles.

2. *Imposition of “Fully Offset” and “Maximum Extent Practicable” Standards*

As part of the Draft Handbook, the Services require that the staff review the HCPs to ensure that the proposed measures “fully offset” the impacts of the taking and re-interpret the “maximum extent practicable” standard. If implemented as set forth in the Draft Handbook, the Services will have impermissibly raised the threshold for HCP approval. First, neither the ESA nor the Services’ implementing regulations include the phrase “fully offset” in any context. Second, even if it’s appropriate, the newly created “fully offset” standard can only apply to impacts related to the taking of the species. Finally, the Services’ definition of the “maximum extent practicable” standard creates an unrealistically high threshold for HCP approval.

a) *No Authority for the Use of a “Fully Offset” Standard*

The Draft Handbook states that “[t]he permit issuance criteria require the Services to determine if the applicant has fully offset the impacts, and if not has minimized and mitigated the impact of the taking to the maximum extent practicable.”⁸ The Draft Handbook explains that “fully offset” equates to “a ‘no net loss’ of resources or individual animals or plants.”⁹ The Draft Handbook also states that the Services “mitigation policies should establish a net benefit goal or, at a minimum, a no net loss goal for natural resources.”¹⁰

The Services’ introduction and use of a “fully offset” requirement steps beyond the scope of the clear standards established under the ESA. Section 10 provides that an applicant for an incidental take permit must propose measures to minimize and mitigate the impact resulting from

⁶ See, e.g., Draft Handbook at 2-7 (“Staff should engage the applicant in assembling the best available scientific information.”).

⁷ *Bennett v. Spear*, 520 U.S. 154, 176 (1997).

⁸ Draft Handbook at 7-3.

⁹ Draft Handbook at 9-3.

¹⁰ *Id.*

the taking.¹¹ Further, each Service is directed to issue the incidental take permit if it finds, in part, that the applicant “will, to the maximum extent practicable, minimize and mitigate the impacts of such taking.”¹² In the existing Handbook, the Services state that “[n]o explicit provision of the ESA or its implementing regulations requires that an HCP must result in a net benefit to affected species.”¹³ Thus, there is no statutory requirement that the applicant meet a “net benefit” or “no net loss” standard.¹⁴ Any implementation of a “fully offset” standard as a minimum criterion for HCP approval, much less a no net loss standard or a net conservation benefit requirement, unequivocally, is inconsistent with the HCP approval criteria under ESA Section 10.

Any assertion that ESA Section 7 overrides and applies a higher standard for HCP approval that would allow for consideration of a “no net loss” or “net conservation benefit” standard is equally unavailing. First and foremost, Section 7 does not apply to the development of HCPs, which are governed by Section 10. In addition, consultation pursuant to Section 7 is a fact-specific inquiry that addresses the particular circumstances of the proposed project and the species present status as a whole, and consultation looks solely to whether the proposed project is likely to jeopardize the continued existence of any listed species or result in the destruction or adverse modification of critical habitat.¹⁵ 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.”¹⁶ Importantly, neither the jeopardy nor adverse modification determination equates to a universal “no net loss” or “net conservation benefit” standard. On the contrary, if take of a listed species will occur, the Services provide an incidental take statement and the reasonable and prudent measures that are considered “necessary or appropriate to minimize the impacts, *i.e.*, amount or extent, of incidental take.”¹⁷

The ESA Section 7 and 10 requirements to avoid jeopardy or adverse modification and to minimize and mitigate the impact of any take of listed species do not equate to the “fully offset,” “no net loss,” or “net benefit” standards articulated in the Draft Handbook. Lacking the requisite statutory authority to impose such requirements, the Services are precluded from adopting these measures in the final Handbook.

b) HCPs Only Address Impacts Associated with the Taking of a Species

The Services also err by adopting an overly expansive interpretation of “impacts of the taking” that is inconsistent with the requirements of the ESA. The Draft Handbook states that:

¹¹ 16 U.S.C. § 1539(a)(2)(A)(ii).

¹² *Id.* § 1539(a)(2)(B)(ii).

¹³ HCP Handbook (1996) at 3-21.

¹⁴ *Id.*

¹⁵ 16 U.S.C. § 1536(a)(2).

¹⁶ 50 C.F.R. § 402.02.

¹⁷ 50 C.F.R. §§ 402.02, 402.14(i)(1)(ii); 16 U.S.C. § 1536(b)(4)(C)(ii).

it isn't just the quantity of take impacts that needs to be minimized and mitigated for, rather it is the 'impacts of the taking' that must be minimized and mitigated for. Biologically, these are not necessarily the same. Impacts of the taking depend on the specific situation and could include more than just the loss of individuals or loss of habitat.¹⁸

The Services state that minimization and mitigation apply to the lost "biological value" of the affected resource, and that applicants should consider compensation for the amount of "natural resource services" that the affected resources would have provided.¹⁹ This approach impermissibly repurposes an HCP from addressing impacts to species into a landscape mitigation and management plan.

Under Section 10, the proper focus of an HCP is on the impact that will result from the taking of the species. An HCP is intended as a means by which a person or entity which might otherwise "take" a listed species in a manner prohibited by ESA Section 9 can adopt measures to minimize and mitigate the impacts of such "take."²⁰ The definition of "take" focuses on conduct that is directed toward a listed species, and not on activities that generally effect habitat.²¹ For example, the word "harm," as used in the definition of "take," includes significant habitat modification or degradation, but only when "it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering."²² Thus, an HCP is supposed to develop measures that minimize and mitigate the effect of the specific "take" that would otherwise occur. Effects on habitat associated with a covered activity are only relevant to the extent that they are causally connected to the death or injury of a listed species. This also is consistent with the generally recognized principle that habitat can be lost or degraded without a corresponding effect on the species or a reduction in its survival or recovery.²³

The Services previously recognized that the impacts analysis focuses on the effect of the take on the species. In their Five Point Policy, the Services state that "Section 10(a)(2)(A) requires that an HCP specify the impact which will likely result from the take to be permitted."²⁴ Further, when evaluating an HCP, the Services "use the amount of incidental take as a main

¹⁸ Draft Handbook at 9-6.

¹⁹ Draft Handbook at 9-7 & 9-8.

²⁰ 16 U.S.C. § 1539(a)(1)(B) ("The Secretary may permit . . . (B) any taking otherwise prohibited by section 1538(a)(1)(B) of this title is such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity."); 16 U.S.C. § 1538(a)(1)(B) ("unlawful for any person subject to the jurisdiction of the United States to-- . . . (B) take any such species within the United States or the territorial sea of the United States.")

²¹ "Take" is defined as "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C. § 1532(19).

²² 50 C.F.R. § 17.3; *see also* 50 C.F.R. § 222.102.

²³ *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).

²⁴ 65 Fed. Reg. at 35,245.

indicator of the impact the proposed project will likely have on the species.”²⁵ Thus, the “impacts of the taking” cannot consider the lost “biological value” or “natural resource services” of affected habitat. Instead, the Services must clarify that the impacts for minimization and mitigation purposes only relate to those associated with the taking of the species.

c) *The “Maximum Extent Practicable” Definition Sets an Unrealistically High Threshold for HCP Approval*

Under Section 10, an incidental take permit may be issued if the Service finds that “the applicant will, to the maximum extent practicable, minimize and mitigate the impacts of such taking.”²⁶ In the Draft Handbook, the Services define “maximum extent practicable” as requiring an applicant to “develop HCPs to provide conservation that is commensurate with the amount and significance (i.e. impacts) of the taking.”²⁷ Further, the Draft Handbook provides that if impacts cannot be fully offset, then the applicant should provide “the most [conservation] they can practically do” to minimize and mitigate taking impacts.²⁸ The Services’ approach imposes an unrealistically high burden on applicants that is not in line with any common sense interpretation of practicability.

The Draft Handbook fails to incorporate an appropriate interpretation of what minimization and mitigation measures may be “practicable.” The Draft Handbook identifies two limitations on practicability—(1) insufficient implementation options; and (2) financial constraints. While these issues are appropriate considerations, the Services also must weigh other factors that influence a determination regarding what measures are practicable for implementation. For example, the existing Handbook states that a practicability determination includes: “weighing the costs of implementing additional mitigation, benefits and costs of implementing additional mitigation, the amount of mitigation provided by other applicants in similar situations, and the abilities of that particular applicant.”²⁹ The Services should incorporate these additional considerations into any final Handbook.

The purpose of including “practicable” in the statutory requirement is to provide a real-world constraint upon the scope of measures that may be included in an HCP. Obviously, a conservation measure that has a significant cost to implement but a minimal benefit to the species would not be practicable. In other words, the question as to what measures can be adopted to minimize or mitigate impacts of the “take” to the maximum extent practicable is not merely a question of the “most” commitments and measures that can be extracted from an HCP applicant. Rather the question of what is required and practicable looks both at what the applicant may be able to implement, and the minimization and mitigation benefits that might be

²⁵ *Id.* “Identifying the amount of incidental take contributes to the analysis of whether the proposed incidental take permit will appreciably reduce the likelihood of survival and recovery of the species.” *Id.*

²⁶ 16 U.S.C. § 1539(a)(2)(B)(ii).

²⁷ Draft Handbook at Glossary-17.

²⁸ *Id.*; see also Draft Handbook at 9-10 (“Maximum extent practicable means: within the available means, the applicant can feasibly do no more to minimize or mitigation the impacts of their take”).

²⁹ HCP Handbook (1996) at 7-3.

derived from such measures. If the Services fail to recognize and include a cost-benefit component to what is considered to be the “maximum extent practicable,” the costs associated with HCP implementation will become prohibitive and there will be little incentive for applicants to pursue this conservation option.

3. *The Draft Handbook Should Not be the Mechanism to Set Policies under the MBTA and Other Related Statutes*

NESARC recognizes the need to provide guidance on how non-ESA listed species will be covered, if necessary, in an HCP. However, the Draft Handbook is not the proper mechanism to establish direct policies on the implementation of other statutes. While the Services should appropriately address how protections for non-listed species may be integrated into an HCP, the applicant—and not the Services—decide whether to include such species. Further, the Services should avoid including “guidance” on compliance with other statutes into the Handbook because those statutes, their implementing regulations, and overall legal scope may change over time. Rather, such guidance should be extracted from the Handbook and independently adopted and implemented.

The treatment of the Migratory Bird Treaty Act (“MBTA”) within the Draft Handbook is an example of the confusion that may result by inclusion of substantive guidance on compliance with the MBTA within an ESA-specific Handbook. In discussing the potential for an HCP to cover a species that also is protected under the MBTA, the Handbook suggests—as guidance—that the proponent consider development of a “Bird and Bat Conservation Strategy” and goes further to identify nest avoidance and disturbance buffers as appropriate measures. Yet, the Services then note that the “[m]igratory bird permit regulations are currently under review and may change in the near future.”

NESARC appreciates and encourages FWS’s efforts to provide transparency in how it may implement the MBTA—but the Handbook is not the right vehicle to present such guidance. Moreover, if potential changes in the MBTA regulatory scheme occur, the Handbook’s attempt at guidance on such matters will undoubtedly become out of date. Instead, the Handbook should recognize and accommodate the potential inclusion in HCPs of measures that might satisfy other statutes such as the MBTA, while cross-referencing to the applicable regulations and guidance that are external to the Handbook.

C. The Draft Handbook Incorporates Guidance that Erodes the Protections Provided by the No Surprises Rule

The No Surprises Rule is an essential component of any HCP and associated ITP. The No Surprises Rule provides regulatory assurances to the holder of an HCP incidental take permit that no additional land use restrictions or financial compensation will be required with respect to covered species even if unforeseen circumstances arise after permit issuance indicating that additional mitigation is needed.³⁰ The overarching purpose is to provide non-federal property

³⁰ *Habitat Conservation Plan Assurances (“No Surprises”) Rule*, 63 Fed. Reg. 8859, 8859 (Feb. 23, 1998).

owners with “economic and regulatory certainty regarding the overall cost of species conservation and mitigation.”³¹

The regulations implementing the No Surprises Rule specify the obligations and responsibilities for both the permittee and the Services to address and respond to “changed circumstances”³² and “unforeseen circumstances.”³³ An HCP should address “reasonably foreseeable changes in circumstances”³⁴ and, if they occur, the permittee must implement the conservation and mitigation measures specified in the plan.³⁵ Importantly, if there are changed circumstances that were not addressed in an HCP, the Services cannot require the implementation of any additional conservation and mitigation measures without the permittee’s consent.³⁶ Similarly, if unforeseen circumstances occur, the Services can only require minimal additional measures of the permittee. The original terms of the HCP must be maintained to the maximum extent possible and, importantly, the Services may not require the “commitment of additional land, water, or financial compensation or additional restrictions on the use of land, water, or other natural resources” without the permittee’s consent.³⁷

NESARC is concerned that Draft Handbook includes guidance that would erode the important protections and assurances provided to permittees. First, the Handbook encourages the Services to expansively interpret what future conditions can be reasonably foreseeable for inclusion as a “changed circumstances” which increases the level of commitments imposed on a permittee beyond what is intended by the No Surprises Rule. Second, the Handbook encourages the use of broader adaptive management measures that would conflict with the No Surprises commitment. In both instances, as described below, the Services’ guidance is contrary to the intent, purpose and scope of the Services’ adoption of the No Surprises Rule and will disincentivize HCP development.

³¹ 63 Fed. Reg. at 8860.

³² “Changed circumstances” are defined as “changes in circumstances affecting a species or geographic area covered by a conservation plan or agreement that can reasonably be anticipated by plan or agreement developers and the Service and that can be planned for (e.g., the listing of new species, or a fire or other natural catastrophic event in areas prone to such events).” 50 C.F.R. §§ 17.3 (FWS) and 222.102 (NMFS).

³³ “Unforeseen circumstances” are defined as “changes in circumstances affecting a species or geographic area covered by a conservation plan or agreement that could not reasonably have been anticipated by plan or agreement developers and the Service at the time of the conservation plan’s or agreement’s negotiation and development, and that result in a substantial and adverse change in the status of the covered species.” 50 C.F.R. §§ 17.3 (FWS) and 222.102 (NMFS).

³⁴ 63 Fed. Reg. at 8863.

³⁵ 50 C.F.R. §§ 17.22(b)(5)(i), 17.32(b)(5)(i), 222.307(g)(1).

³⁶ 50 C.F.R. §§ 17.22(b)(5)(ii), 17.32(b)(5)(ii), 222.307(g)(2).

³⁷ 50 C.F.R. §§ 17.22(b)(5)(iii), 17.32(b)(5)(iii), 222.307(g)(3)(ii).

1. The Services Can Only Require an HCP to Address Changed Circumstances That May be Anticipated to Occur Over the Duration of the Permit, and Cannot Require Consideration of Hypothetical Future Events or Circumstances

The purpose of addressing changed circumstances in an HCP is to identify the types of circumstances that may require additional conservation and mitigation measures and the additional measures that may be required of the permittee should such changed circumstances occur during the life of the permit. Including these provisions provides important certainty regarding the scope of any additional measures and the associated costs of implementation. As the Services have recognized, “the no surprises rule places the preponderance of the responsibility for protection beyond the terms of a specific HCP upon the Services.”³⁸ Lacking any additional authority or justification, the Services cannot shift the burden of this responsibility back to the permittee by expanding the scope of what constitute changed circumstances for inclusion in an HCP.

In the Draft Handbook, the Services state that “[c]hanged circumstances should include any significant event that would change the conditions or add threats in the plan area that the applicant can reasonably predict to occur during the permit term.”³⁹ The Services also explain that:

[w]e cannot require additional actions or funds be expended without the permittee’s consent; so it is important to identify upfront in the plan all reasonably foreseeable changed circumstances that may occur during the permit term and feasible responses to them. The no surprises regulation prohibits us from requiring mitigation involving any additional commitment of land, water, or financial resources or additional restrictions on the use of land, water, or other natural resources beyond the level otherwise agreed on in the HCP. If a condition arises that should have been-but was not identified as a changed circumstance in the HCP, we cannot require the permittee to address it. This makes the process to identify changed circumstances during plan development extremely important.⁴⁰

These two statements can be clearly interpreted as an intent by the Services to use the HCP review and approval process to circumvent and ultimately undermine the whole purpose of the No Surprises Rule. The Services’ staff are essentially being told to do whatever is possible to avoid having future measures subject to the No Surprises Rule.

In establishing what constitutes changed circumstances, the Services cannot deviate from the applicable regulatory standard to expand the scope beyond those circumstances that can “reasonably have been anticipated.”⁴¹ This means that the Services cannot require consideration of hypothetical future events or circumstances that have a remote probability or low risk of

³⁸ 63 Fed. Reg. at 8862.

³⁹ Draft Handbook at 9-36.

⁴⁰ Draft Handbook at 9-37.

⁴¹ 50 C.F.R. §§ 17.3 (FWS) and 222.102 (NMFS)..

occurring. Instead, the Services should clarify that an HCP is only required to address changed circumstances that are likely to occur over the duration of the permit. In addition, to warrant inclusion in an HCP, any changed circumstance must also have a reasonably anticipated effect on a covered species or habitat. A permittee is not required to implement additional mitigation in response to changes that will have a beneficial effect or that occur in areas where the species or habitat are already adapted to such circumstances and will recover or regenerate naturally.

Finally, the Draft Handbook states that the Services and the permittee “should work together to shift priorities to best meet goals and objectives” when additional, un-specified conservation measures are necessary to respond to changed circumstances.⁴² This suggestion can be read as allowing the Services to dictate additional measures and, if so, would be contrary to the regulatory requirements governing a response to changed circumstances and, if not revised, would undermine the protections afforded by the No Surprises rule. While the Services can “request” that a permittee adjust its use of any conservation and mitigation measures, the Services cannot “require” a permittee to implement any such measures in a different manner or scope than what is provided in the HCP. On the contrary, if additional conservation and mitigation measures are determined to be necessary, and they are not specified as part of the response to changed circumstances, the Services can only seek implementation if the permittee gives consent.

2. *Adaptive Management Measures Do Not Supplant the Specified Responses to Changed Circumstances*

To be compatible with the No Surprises Rule, the Services cannot simply rely upon a general application of adaptive management to dictate future responses if the underlying data or assumptions are currently uncertain. As part of the development of the HCP, the permittee and Services must first determine whether it is necessary to include adaptive management provisions and, if so, specify the range of any additional management measures and the associated resource commitments that may be required. This process is intended to monitor and adapt existing management measures selectively, as needed, to ensure their effectiveness and to refine their implementation. Adaptive management is not intended to be a backdoor means by which unforeseen circumstances—which are the subject of the No Surprises Rule—can impose additional financial commitments and other measures upon the HCP proponent.

NESARC recognizes that it may be appropriate to include selected adaptive management measures within an HCP, as needed, to ensure that the proposed minimization and mitigation measures are effective in addressing the anticipated “take” of the species. However, as the Services have recognized, “[a]daptive management should not be a catchall for every uncertainty or a means to address issues that could not be resolved during negotiations of the HCP.”⁴³

⁴² Draft Handbook at 9-37.

⁴³ *Notice of Availability of a Final Addendum to the Handbook for Habitat Conservation Planning and Incidental Take Permitting Process*, 65 Fed. Reg. 35242, 35252 (June 1, 2000).

The Draft Handbook now proposes an approach to incorporating adaptive management that would be inconsistent with the intended and appropriate role of adaptive management as a tool of refinement and would undermine the No Surprises commitment.

Adaptive management is intended to recognize that refinements can be made to reflect new information about how to continue implementation of a particular measure. Moreover, the Services have always recognized that for the inclusion of an adaptive management strategy to be appropriate, the HCP must:

clearly state the range of possible operating conservation program adjustments due to significant new information, risk, or uncertainty. This range defines the limits of what resource commitments may be required of the permittee. This process will enable the applicant to assess the potential economic impacts of adjustments before agreeing to the HCP.⁴⁴

In this context, adaptive management has a specific purpose of refinement of existing measures and a clear range of possible adjustments that define the limits of resource commitments that can be required as part of an adaptive management program. While the Draft Handbook briefly notes these requirements, the Services then encourage the shaping of adaptive management programs that go beyond its purpose as a refining tool.

The Services should revise the guidance to provide clear procedures on how to incorporate selected, modest, and reasonable adaptive management into HCPs within the framework of the No Surprises Rule. For example, the Draft Handbook should clearly limit adaptive management programs to refinement of HCP conservation measures rather than as a means to later adopt new requirements or measures to address unforeseen changed circumstances. The Draft Handbook must also recognize that the Services cannot require a permittee to implement any adaptive management provision that is beyond the scope or range of measures already agreed to and incorporated into the HCP.

D. The Draft Handbook is too Dependent upon a “One Size Fits All” Approach

The Draft Handbook distinguishes between “low effect” HCPs and other HCPs. The import of this distinction is that “low effect” HCPs are considered “small and simple,” and they may not need in-depth goals and objectives, may only need to account for uncertainty to a small degree, may have less burdensome mitigation requirements, and may qualify for a categorical exclusion from NEPA review.⁴⁵ However, other than this “low effect” category, the Services do not distinguish between different types of HCP and, instead, apply a “one size fits all” approach to the applicable requirements.

⁴⁴ 65 Fed. Reg. at 35253; *see also* Draft Handbook at 10-29 (“[b]efore we issue a permit, there should be a clear understanding and agreement between the Services and the permittee as to the range of adjustments to the management actions that might be required as a result of any adaptive management provisions.”)

⁴⁵ Draft Handbook at 9-2, 9-31, 13-11.

The Services should expand the application of a scaled-approach to data collection and analysis beyond just “low effect” HCPs. While some HCPs may require more robust data and analyses based upon geographic scope, covered species, and permit duration considerations, the Services should acknowledge that many HCPs do not trigger these concerns. To accommodate these circumstances, and to minimize the burden on applicants, the Services should recognize that it also may be appropriate to impose scaled data collection and analysis requirements for other types of HCPs. For example, an HCP with a short duration may not have any associated uncertainty or trigger adaptive management provisions. Likewise, an HCP with a broad geographic scope may only involve a small number of covered species. While these examples may not qualify as a “low effect” HCP, they also do not necessarily require the full panoply of measures and procedures specified in the Draft Handbook. The Services should identify other types of HCP that may be appropriate for the use of less robust data collection and analysis requirements.

E. The Draft Handbook’s Attempt to Streamline the NEPA Process will Increase the Burdens on Applicants

NESARC appreciates the Services’ efforts to streamline the review process under NEPA. The purpose of conducting a review under NEPA is to encourage public participation and analyze the environmental impacts associated with issuing a proposed incidental take permit.⁴⁶ Depending on the scope and potential impacts of a proposed HCP, the NEPA review process may involve the application of a categorical exclusion (“CatEx”) or the preparation of an environmental assessment (“EA”) or an environmental impact statement (“EIS”). As the Services have acknowledged, “the NEPA review level controls much of the time and effort put into development of the HCP and review of the incidental take permit application,” and thus can “significantly affect HCP review timelines.”⁴⁷

NESARC agrees with the Services that the automatic application of, and overreliance on an EIS level of review, burdens applicants with unwarranted, costly, and time-consuming NEPA review processes.⁴⁸ With this in mind, NESARC commends the Services for recommending “the lowest level of NEPA review that meets the requirements of [the Services’] NEPA analysis.”⁴⁹ Additionally, NESARC supports the policy change outlined in the Draft Handbook that will allow for the consideration of mitigation and minimization measures in determining whether a proposed HCP may be categorized as “low-effect” and qualify for a CatEx.⁵⁰ NESARC also appreciates the Services’ continued acceptance of “mitigated EAs,” where proven mitigation

⁴⁶ Draft Handbook at 1-10.

⁴⁷ Draft Handbook at 13-9, 3-23 (noting that a categorical exclusion may be issued within a few months, whereas an EIS-scale HCP usually will take more than one year to complete).

⁴⁸ Draft Handbook at 3-23. *See also id.* at 13-6 (noting that “we should not, as we have done too often in the past, automatically prepare an EIS whenever there is uncertainty”).

⁴⁹ Draft Handbook at 13-9.

⁵⁰ Draft Handbook at 13-11, 15-8 (noting that previously, applicants “couldn’t mitigate to a CatEx”).

measures can mitigate potential significant effects of an HCP that would otherwise require an EIS.⁵¹

NESARC also supports the revised review and public comment periods, and the provision of draft findings and decision documents to the public in conjunction with the draft HCP and environmental document.⁵² NESARC believes the above revisions and measures will help facilitate the Services' goal to "restore proportion" to the NEPA analysis process.

While NESARC appreciates the above revisions and measures, other proposals may undermine the Services' goal of streamlining the NEPA process by increasing burdens, costs, and risks for applicants. In particular, the Draft Handbook contains a policy change with respect to combined HCP and environmental analysis documents. The policy set forth in the existing Handbook was to "combine the HCP and NEPA analysis into a single document" so as to streamline the analyses as much as possible.⁵³ The existing Handbook notes that "the CEQ regulations specifically permit NEPA documents to be combined with other agency documents to reduce duplication and paperwork."⁵⁴

However, the Draft Handbook changes course by presenting a policy norm that the HCP and NEPA documents should be developed separately, and that combining the two works in "few rare circumstances."⁵⁵ The Services have not identified any authority that would allow them to deviate from the well-established CEQ NEPA regulations. According to the Draft Handbook, combining the documents "places the Services in the position of negotiating the content of the EA, which is [the Services'] document, and blurs the distinct requirements of the two documents."⁵⁶ NESARC disagrees with the Services' revised approach, and urges the Services to continue following the CEQ regulations, which allow environmental documents to be combined with "any other agency document to reduce duplication and paperwork."⁵⁷ For example, the applicant is responsible for developing the HCP and supporting documents. FWS can and should rely upon those studies and analyses, and incorporate them into the NEPA review to avoid duplication of efforts.

Not only does the Draft Handbook propose a significant policy change with respect to preparation of the HCP and NEPA documents, it also sets forth an additional barrier by requiring, or in some cases preferring, that separate consultants prepare the HCP and the NEPA

⁵¹ Draft Handbook at 13-8, 13-12.

⁵² Draft Handbook at 13-9, 15-3, 16-2.

⁵³ HCP Handbook (1996) at 5-5.

⁵⁴ HCP Handbook (1996) at 5-5 (citing 40 C.F.R. §1506.4).

⁵⁵ Draft Handbook at 3-25.

⁵⁶ Draft Handbook at 3-25.

⁵⁷ 40 C.F.R. § 1506.4.

documents.⁵⁸ The Services also propose the requirement that two different consulting firms prepare the documents.⁵⁹ Preparation of separate HCP and NEPA documents, by independent consultants and consulting firms, will exponentially increase the time investment and financial burden on applicants and may discourage parties from seeking an HCP. Not only will this requirement significantly increase the costs and time to prepare the HCP and NEPA documents, it poses a substantial litigation risk if the two documents are inconsistent. With the Services maintaining strict control over the NEPA document, the applicant will be entirely dependent upon the Services to develop analysis that is defensible down the road if challenged in court.

The separation requirements thus undermine the Services' goal of streamlining the NEPA process, and increase the risk that the HCP will be successfully challenged on NEPA grounds in the future. Therefore, NESARC urges the Services to reconsider its policy change and focus on developing a cooperative process where the applicant and Services work together to develop a document that satisfies both the ESA and NEPA and is capable of withstanding legal scrutiny.

F. The Draft Handbook Fails to Fully Incorporate and Recognize New Regulations and Policies

In several instances, the Draft Handbook relies upon or references outdated ESA regulations and policies. For example, the definition of the phrase "destruction or adverse modification" with respect to critical habitat should be updated to reflect the Services' promulgation of the final rule codifying the revised regulatory definition.⁶⁰ In addition, the Services should update Section 7.5.1.1 of the Draft Handbook to reflect the final policy on excluding areas from a critical habitat designation.⁶¹ These regulations and policies should be fully incorporated into the Handbook prior to finalization to ensure that future application and implementation is consistent with the Services' existing authorities and guidance.

G. The Services Should Conduct Stakeholder Engagement to Inform Further Revision to the Draft Handbook before Finalization

As the Services consider further revisions to the Draft Handbook, they should seek further coordination, involvement, and input from stakeholders who have experience in developing and implementing HCPs of varying scope and in various parts of the country. While the Draft Handbook is drafted primarily to provide guidance and instruction to the Services' staff on the HCP process, it also serves as an important resource to non-Service HCP practitioners. To improve its use by both Service staff and non-Service practitioners, the final Handbook

⁵⁸ Draft Handbook at 3-24 ("For an EIS, we generally require that consultants who prepared the HCP not be involved in the EIS development. While not required for an EA, we strongly prefer a similar degree of separation between the consultant team preparing the HCP from that preparing the EA document.").

⁵⁹ Draft Handbook at 3-24 ("Although we prefer and recommend that these teams be from different firms, if we agree, the applicant may use the same firm, but different staff on the two documents.").

⁶⁰ *Definition of Destruction or Adverse Modification of Critical Habitat*, 81 Fed. Reg. 7214 (Feb. 11, 2016).

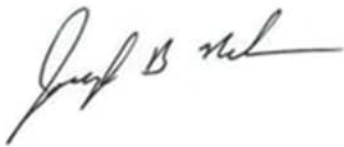
⁶¹ *Policy Regarding Implementation of Section 4(b)(2) of the Endangered Species Act*, 81 Fed. Reg. 7226 (Feb. 11, 2016).

would benefit by building on the experience of those practitioners who have been involved in past and current HCP programs. These practitioners are often better situated to develop and provide recommendations on how to further improve the HCP development, approval, and implementation processes, and their unique perspectives would further inform the Services' efforts to incorporate greater efficiencies into the Handbook. NESARC requests that, in addition to the request for public comments, the Services conduct outreach and engagement directly with stakeholders to solicit additional revisions and recommendations that will improve the practical application and utilization of the Handbook.

II. Conclusion

NESARC greatly appreciates the opportunity to provide these comments to the Services. We respectfully request that you take these comments into full consideration before finalizing the Handbook.

Sincerely,

A handwritten signature in cursive script, appearing to read "Joseph B. Nelson".

Joseph B. Nelson
NESARC Counsel



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NAIOP
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National Alliance of Forest Owners
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National Association of Counties
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National Association of State Departments of Agriculture
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Nebraska Farm Bureau Federation
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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
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Wheat Belt Public Power District
Sidney, Nebraska

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