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Public Comments Processing
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Submitted via Federal eRulemaking Portal: http://www.regulations.gov

Re: NESARC Comments on the U.S. Fish and Wildlife Service's Draft Endangered Species Act Compensatory Mitigation Policy

Dear Sir/Madam:

On September 2, 2016, the U.S. Fish and Wildlife Service ("FWS") announced the availability of a draft Endangered Species Act ("ESA") Compensatory Mitigation Policy ("Draft Policy").[1] The Draft Policy is intended to implement recent Executive Office and Department of Interior mitigation policies and provide direction and guidance in the planning and implementation of compensatory mitigation programs under the ESA. Pursuant to the *Federal Register* notice, the National Endangered Species Act Reform Coalition ("NESARC") respectfully provides its comments and recommendations on FWS's Draft 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.

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[1] Endangered Species Act Compensatory Mitigation Policy, 81 Fed. Reg. 61,031 (Sept. 2, 2016).

[2] *See* Appendix A.

I. Overview of Comments

Because the Draft Policy is intended to carry out actions under the ESA, it must stay within the statutory authorities and framework of the specific ESA sections through which it will be applied. The Draft Policy fails this fundamental test. FWS describes the Draft Policy as guiding the implementation of compensatory mitigation, with a focus on encouraging conservation at the landscape level and setting minimum criteria for mitigation programs to achieve effective and sustainable conservation.[3] In turn, the Draft Policy proposes the use of compensatory mitigation to achieve the goal of a net gain or, at a minimum, no net loss of affected resources. Core elements of the Draft Policy, including the net gain/no net loss standard and preference for landscape level conservation, are inconsistent with the established ESA framework. Furthermore, it is impermissible for FWS to attempt to use other statutes to unilaterally impose a higher set of standards and scope of mitigation than allowed for under the ESA.

NESARC appreciates FWS's efforts to promote the development of mitigation mechanisms (e.g., conservation banks, in-lieu fee programs, habitat credit exchanges) so that these options are available in cases where mitigation may be required or where an agency or permit applicant may wish to undertake mitigation with respect to its activities. While these mechanisms should not supplant or be prioritized above the ability to utilize permittee-responsible avoidance, minimization or mitigation measures, NESARC believes that providing clear standards for their establishment and operation will be beneficial in creating more mitigation options for the regulated community. Here, in the ESA context, however, FWS has stepped beyond what is permissible under applicable law. Accordingly, FWS must revise its Draft Policy to ensure that compensatory mitigation standards are set and implemented within the scope of the ESA's authorities.

II. Comments on the Draft Policy

A. The Draft Policy Exceeds FWS's ESA Statutory Authority

FWS cannot aggregate statutory provisions to unilaterally generate a "greater impetus" to conserve species or habitat beyond what Congress specifically authorized and required under the ESA. In its Draft Policy, FWS explicitly acknowledges that its "authority to require compensatory mitigation under the ESA is limited."[4] However, FWS then attempts to circumvent these limitations by asserting that it can "recommend" compensatory mitigation to offset the adverse impacts of actions under certain provisions of the ESA, as well as under other statutory authorities such as NEPA.[5] Without identifying the specific statutory provisions providing this authority, FWS broadly states that these statutes, used either in combination with or to supplement the ESA, allow the agency to "recommend or require" compensatory

[3] 81 Fed. Reg. at 61,032.

[4] *Id*. at 61,034, 35.

[5] *Id*. at 61,035 (listing as supplemental authority, in addition to NEPA, the Fish and Wildlife Coordination Act; Federal Land Policy Management Act; Oil Pollution Act; Clean Water Act; and Federal Power Act).

mitigation.[6] Contrary to FWS's assertions, its authority to establish and apply compensatory mitigation standards under the ESA are, by law, limited to the scope, jurisdiction and specific standards established within the ESA.

1. The ESA Does Not Authorize a Net Gain or No Net Loss Standard

FWS recognizes that its "authority to require a 'net gain' in the status of listed or at-risk species has little or no application under the ESA."[7] Notwithstanding, the Draft Policy would implement a mitigation goal to "improve (i.e., a net gain) or, at a minimum, to maintain (i.e., no net loss) the current status of affected resources."[8] However, there is no legal basis within the ESA for imposing a compensatory mitigation goal of net gain or no net loss.[9]

The ESA provides specific standards in Sections 7 and 10 regarding what may be required of a non-federal party or project proponent. Under ESA 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.[10] 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."[11] Based on a finding of jeopardy or adverse modification, FWS will provide a reasonable and prudent alternative ("RPA") 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."[12] If take of a listed species will occur, FWS will provide an incidental take statement and the reasonable and prudent measures ("RPMs") considered "necessary or appropriate to minimize such impact."[13]

The ESA Section 7 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 "net gain" standards articulated in the Draft Policy, and there is no statutory authority to impose such requirements in the consultation context.[14] Thus, the ESA contemplates that a project or activity may have some impact to listed species or their critical habitat, as long as the impacts do not rise to the level of jeopardizing the continued existence of a listed species or destroy or adversely modify its critical habitat. Moreover, to the extent that jeopardy or adverse modification is

[6] *Id*. at 61,036.

[7] *Id*. at 61,035.

[8] *Id*. at 61,036.

[9] In addition, if the amount of recommended mitigation is not commensurate with the impacts to species or habitat, FWS's application of a "net conservation gain" standard could result in a regulatory taking. *See Koontz v. St. Johns River Water Mgmt. Distr.*, 133 S. Ct. 2586, 2595 (2013).

[10] 16 U.S.C. § 1536(a)(2).

[11] 50 C.F.R. § 402.02.

[12] *Id.*

[13] 16 U.S.C. § 1536(b)(4)(C)(ii); 50 C.F.R. § 402.14(i)(1)(ii).

[14] *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).

determined to occur, the adoption of an RPA does not equate to a no net loss or net gain standard. Rather, the RPA must: (1) be consistent with the intended purpose of the action; (2) be consistent with the scope of the action agency's legal authority and jurisdiction; (3) economically and technologically feasible; and (4) avoid the likelihood of jeopardizing the continued existence of the species or destroying or adversely modifying critical habitat.[15]

Similarly, the requirement for the adoption of RPMs to address identified "take" of a listed species as part of a Section 7 biological opinion does not rise to a net gain/no net loss standard. Rather, when such take will occur, the ESA requires that the FWS specify the impact of such incidental taking on the species and develop RPMs that will "minimize such impact" (*i.e.*, the amount or extent of incidental take).[16] FWS cannot conflate a requirement to minimize impacts to the species with an obligation to achieve a net conservation gain or no let loss in affected resources.

Under ESA Section 10, an applicant for an incidental take permit must submit a habitat conservation plan ("HCP") that addresses several criteria, including the impacts resulting from the take of the species, and the steps that will be taken to minimize and mitigate such impacts.[17] 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," and the survival and recovery of the species will not be appreciably reduced.[18] In its longstanding interpretation of these criteria, FWS stated "[n]o explicit provision of the ESA or its implementing regulations requires that an HCP must result in a net benefit to affected species."[19] Thus, as FWS has recognized, Section 10 does not provide authority to require applicants to achieve a net conservation gain or no let loss in affected resources.

2. FWS's Landscape-Scale Approach is Constrained by the ESA

FWS states that the Draft Policy "is needed to implement recent Executive Office and Department of Interior mitigation policies that necessitate a shift from project-by-project to landscape-scale approaches to planning and implementing compensatory mitigation."[20] FWS's draft Mitigation Policy 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 that are meaningful to the conservation objectives for the resource under consideration."[21] FWS's landscape-scale approach to compensatory mitigation is evidenced by the Draft Policy's preference for compensatory mitigation mechanisms that "consolidate

[15] 50 C.F.R. § 402.02.

[16] 16 U.S.C. § 1536(b)(4)(C)(ii); 50 C.F.R. § 402.02.

[17] 16 U.S.C. § 1539(a)(2)(A).

[18] *Id*. § 1539(a)(2)(B).

[19] HCP Handbook (1996) at 3-21.

[20] 81 Fed. Reg. at 61,032.

[21] Mitigation Policy at 12,394.

compensatory mitigation on the landscape," sited within certain priority conservation areas identified in existing landscape-scale conservation plans. [22]

The November 2015 Presidential Memorandum relating to mitigation of impacts to natural resources stemming from federal agency activities, including the issuance of permits or approvals, directs federal agencies "to avoid and then minimize harmful effects to land, water, wildlife, and other ecological resources (natural resources) caused by land- or water-disturbing activities, and to ensure that any remaining harmful effects are effectively addressed." However, the Memorandum provides that federal agencies should implement such policy in a manner that is "consistent with existing mission and legal authorities."[23] Thus, in implementing the Presidential Memorandum, FWS may not incorporate landscape-scale mitigation into ESA 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 RPMs that will "minimize such impact."[24] 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.[25] FWS cannot convert this limited scope of ESA authority, which is focused on the minimizing and avoiding the impact of an action upon the listed species or designated critical habitat, to an authorization to broadly expand all ESA mitigation measures to a landscape scale.[26] At most, FWS might consider how case-by-case mitigation fits into overall landscape-level efforts in support of a given species and its habitat, but landscape considerations should not drive the review.

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. The use of a "landscape approach" to establishing mitigation requirements, either on-site or off-site, 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. 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 conserving species and habitats, FWS should ensure that these efforts are considered and not undermined through the application of a larger scale mitigation analysis.

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[22] 81 Fed. Reg. at 61,042.

[23] Presidential Memorandum: Mitigating Impacts on Natural Resources from Development and Encouraging Related Private Investment, Section 1 (Nov. 3, 2015) (emphasis added).

[24] 16 U.S.C. § 1536(b)(4)(C)(ii).

[25] *Id*. § 1539(a)(2)(B)(ii).

[26] While FWS cannot require landscape-scale mitigation, it is a tool that should be available to applicants or permittees for utilization in circumstances that they deem appropriate or warranted (e.g., proponents of a multi-species or large-scale HCP may find that landscape approach will facilitate effective implementation of the plan and provide conservation benefits to the species to be protected under the plan).

Finally, before embarking on a landscape approach, FWS must consider the costs and benefits of particular compensatory mitigation requirements to ensure an efficient result—in terms of timing, benefits and costs incurred. Any 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 Draft Policy.

3. The ESA Does Not Require the Inclusion of At-Risk Species

The Draft Policy states that its "primary focus" is listed and proposed endangered and threatened species, and designated and proposed critical habitat.[27] At the same time, the Draft Policy goes further by adding that "[c]andidates and other at-risk species would also benefit from adherence to the standards set forth in this policy," and encouraging the development of compensatory mitigation programs to conserve at-risk species.[28]

Even if it were the case that at-risk species would benefit from compensatory mitigation, there is no authority to mandate mitigation for at-risk species under ESA Sections 7 or 10. Section 7 consultations are limited to species that are listed as threatened or endangered, and FWS cannot consider effects of an action on non-listed species, or require mitigation for effects on non-listed species.[29] For candidate species or proposed critical habitat, a federal action agency must "confer" with FWS regarding a proposed action is likely to jeopardize a species proposed for listing or destroy or adversely modify proposed critical habitat.[30] However, any measures that are identified in a conference report or opinion are not binding unless the species is listed or critical habitat is designated.[31]

With respect to Section 10, FWS is authorized to issue an incidental take permit covering *listed* species if the applicant submits a HCP that satisfies the issuance criteria.[32] While an HCP may cover unlisted species, doing so is voluntary and at the discretion of the applicant. Thus, the Draft Policy should acknowledge that the inclusion of candidate and at-risk species is not required, and these species may only be included if proposed by an applicant. To the extent that an applicant or agency voluntarily undertakes mitigation or other measures to protect at-risk species or their habitat, they should receive full credit for such activities.[33]

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[27] 81 Fed. Reg. at 61,036.

[28] *Id*.

[29] 16 U.S.C. § 1536(a)(2).

[30] 16 U.S.C. § 1536(a)(4); 50 C.F.R. § 402.10.

[31] 50 C.F.R. § 402.10(c) ("During the conference, the Service will make advisory recommendations, if any, on ways to minimize or avoid adverse effects.").

[32] 16 U.S.C. § 1539(a).

[33] Likewise, FWS should fully honor "no surprises" commitments made in HCPs, safe harbor and candidate conservation with assurances agreements.

B. FWS May Not Rely on Supplemental Statutory Authority to Expand the Scope of the ESA

In the Draft Policy, FWS asserts that although its authority to require compensatory mitigation is "limited" under the ESA, when combined with other statutory authorities, it may "recommend or require compensatory mitigation for a variety of resources including at-risk species and their habitats."[34] FWS may not rely on supplemental statutory provisions for authority to require compensatory mitigation when it lacks such authority under the ESA.[35]

In particular, FWS states that the "supplemental mandate of NEPA adds to the existing authority and responsibility of the Service to protect the environment when carrying out [its] mission under the ESA."[36] However, FWS misstates the nature of NEPA. NEPA is a procedural statute concerned with ensuring that federal agencies assess the environmental consequences of proposed actions and alternatives to the proposed actions.[37] NEPA "does not mandate particular substantive environmental results; rather, it focuses Government and public attention on the environmental effects of proposed agency action."[38] NEPA requires that FWS identify and analyze the environmental consequences of its actions; but it does not require FWS to reach any particular conclusion. According to the Supreme Court, "[o]ther statutes may impose substantive environmental obligations on federal agencies, but NEPA merely prohibits uninformed-rather

[34] 81 Fed. Reg. at 61.036.

[35] In addition, within the Section 7 context, FWS's imposition of any mitigation is constrained by the action agency's scope of legal authority and geographic jurisdiction. *See Sierra Club v. U.S. Army Corps of Engineers*, 803 F.3d 31, 46-47 (D.C. Cir. 2015) ("The Corps' implementation of the ITS through its Clean Water Act verifications was federal action that required NEPA review, but the NEPA obligations arising out of that action extended only to the segments under the Corps' asserted Clean Water Act jurisdiction."). Further, it is the action agency, not FWS, that determines the scope of its authorities. To this point, the FWS policy must make clear that the FWS has no authority to impose requirements under the ESA that extend beyond the action agency's authority and that the action agency's advice as to scope and extent of its authorities particular to the action under review is to be followed by FWS personnel in fashioning all requirements and recommendations made within the context of the specific ESA action. *See Platte River Whooping Crane Critical Habitat Maintenance Trust v. F.E.R.C.*, 962 F.2d 27, 34 (D.C. Cir. 1992) (noting that the ESA "does not *expand* the powers conferred on an [action] agency by its enabling act") (emphasis in original); *Pac. Rivers Council v. Thomas*, 936 F. Supp. 738, 744 (D. Idaho 1996) ("After meaningful consultation, however, the Federal [action] agency . . . possesses the ultimate decisionmaking authority to determine whether it may proceed with an action.").

[36] 81 Fed. Reg. at 61,036.

[37] *See, e.g., Vermont Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 558 (1978) ("NEPA does set forth significant substantive goals for the Nation, but its mandate to the agencies is essentially procedural."); *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 23, (2008) ("NEPA imposes only procedural requirements to ensure that the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts.") (citation and quotation marks omitted); *WildEarth Guardians v. Jewell*, 738 F.3d 298, 302 (D.C. Cir. 2013) ("NEPA is an essentially procedural statute intended to ensure fully informed and well-considered decisionmaking").

[38] *Theodore Roosevelt Conservation P'ship v. Salazar*, 661 F.3d 66, 68 (D.C. Cir. 2011) (quoting *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 371 (1989)); *see also Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989).

than unwise-agency action."[39] Therefore, contrary to FWS's assertion, NEPA does not "add to" the existing authority under the ESA, and FWS cannot rely on NEPA to create requirements for compensatory mitigation that are not authorized by the ESA itself.

C. Application of the Draft Policy

1. *Section 7 Consultations*

The Draft Policy provides guidance on how compensatory mitigation could be applied within the ESA Section 7 consultation framework. However, FWS must recognize that the Section 7 consultation process follows established procedures that include established roles for FWS, the action agency, and the applicant, as well as timeframes for completion of the process and the scope of measures that may be required to minimize impacts.[40] These established procedures may not be revised through a guidance document. Further, FWS must explain how the application of compensatory mitigation standards under the Draft Policy will be undertaken within the established ESA framework, including existing statutory and regulatory requirements.

a. *Appropriate Treatment of Offsetting Measures Within a Project Proposal*

The Draft Policy states that FWS personnel should "encourage Federal agencies and applicants to include compensation as part of their proposed actions to offset any anticipated impacts . . . to achieve a net gain or, at a minimum, no net loss in the conservation of listed species."[41] FWS cannot directly or indirectly require applicants to adopt compensatory mitigation in project proposals—much less impose a net gain or no net loss standard as a criterion for offsetting measures in the project proposal. Longstanding FWS policy recognizes this limitation, as the Joint Endangered Species Consultation Handbook ("Joint Handbook") states that "[t]he Services can evaluate only the Federal action proposed, not the action as the Services would like to see that action modified."[42] Similarly, while the ESA consultation regulations provide for the consideration of "any beneficial actions taken by the Federal agency or applicant," these regulations do not provide FWS with the authority to *require* beneficial actions in the form of compensatory mitigation.[43] FWS must revise its guidance accordingly to clearly recognize that level of offsetting measures incorporated into a proposed action is at the discretion of the proposing agency (which also must operate within its own authority) or party.

[39] *Methow Valley Citizens Council*, 490 U.S. at 350 (comparing NEPA, which does *not* impose substantive obligations on an agency, with Section 7 of ESA, which requires agencies to *insure* that its actions do not jeopardize threatened or endangered species).

[40] 16 U.S.C. 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14.

[41] 81 Fed. Reg. at 61,040.

[42] U.S. Fish and Wildlife Service and National Marine Fisheries Service, Endangered Species Consultation Handbook at 4-33 (March 1998).

[43] 50 C.F.R. § 402.14(g)(8).

b. Ensuring Timely Decisions on Compensatory Mitigation Measures

Another flaw in the framework of the Draft Policy is its failure to ensure compliance with statutory deadlines for completion of the consultation process. By statute, Section 7 consultations are typically required to be completed within 90 days from the date on which it was initiated, unless an extension is authorized under the applicable statutory provisions.[44] Further, within 45 days of conclusion of the consultation process, FWS must issue its biological opinion.[45] While the Draft Policy sets forth detailed requirements for the qualification and establishment of compensatory mitigation mechanisms, FWS does not explain how this process will affect, or be consistent with, the statutory and regulatory deadlines for completion of the consultation process.[46] In the final version of the Draft Policy, FWS must adopt guidance and procedures that ensure that FWS's review and approval of compensatory mitigation measures will be completed within the applicable statutory timeframes.[47]

c. Treatment of Reasonable and Prudent Measures

In its Draft Policy, FWS states that RPMs, which are adopted as part of the authorization of incidental take within a biological opinion, "can include compensatory mitigation, in appropriate circumstances, if such measure minimizes the effect of the incidental take on the species . . . ."[48] This policy statement requires further clarification to emphasize that the scope of such "compensatory mitigation" is limited, by the ESA, to only be measures necessary or appropriate to minimize the impact of the take.[49] In other words, FWS must clearly discern between *minimizing* the effect of a take, as contemplated by RPMs in an incidental take statement, from the typical approach to compensatory mitigation as *mitigating* the impacts of a take.

In ESA Section 7 consultation, the project proponent may voluntarily include a number of beneficial actions, such as contributions to conservation banks or other compensatory mitigation actions, as part of the proposed project for which authorizations or permits are sought from the action agency. However, these voluntary actions are clearly distinguished from measures that FWS may impose within the context of a RPM or RPA in a formal biological opinion. For FWS's actions under Section 7, the agency must remain consistent with its long-standing guidance set forth in the Joint Handbook, which states "Section 7 requires minimization of the level of take . . . . **It is not appropriate to require mitigation for the impacts of**

[44] 16 U.S.C. § 1536(b)(1)(A); 50 C.F.R. § 402.14(e).

[45] 50 C.F.R. § 402.14(e)(3).

[46] *See* 16 U.S.C. § 1536(b); 81 Fed. Reg. at 61,049-57.

[47] FWS states that it "does not have mandated timelines for review of conservation banks, in-lieu fee programs, or other compensatory mitigation projects that are not part of a consultation or permit decision." 81 Fed. Reg. at 61,045. Given that mitigation projects may not be created as part of a consultation or permit decision, but may be preferred or necessary as sources of mitigation for those actions, FWS should establish predictable timeframes for the review and approval of mitigation projects. If FWS cannot commit to reviewing and approving these projects in an expeditious manner, FWS should not include a preference for their use over permittee-responsible mitigation.

[48] 81 Fed. Reg. at 61,040.

[49] *Id*.

incidental take."[50] Thus, "compensatory mitigation" measures can only be included as an RPM when they can reasonably and prudently be adopted to *minimize* the impacts of a take. FWS cannot use an RPM to extract a level of compensatory mitigation for impacts to a species that remain after application of appropriate avoidance and minimization measures.

2. *Use of Mitigation Within Section 10 HCPs*

The Draft Policy provides that FWS "should work with applicants to assist them in developing HCPs that achieve a net gain or, at a minimum, no net loss in the conservation of covered species and critical habitat."[51] However, FWS recognizes that "the statute does not require this of HCP applicants."[52]

As discussed above, NESARC opposes the application of a net gain/no net loss mitigation standard as being outside the scope of ESA's authorities. For HCPs, ESA Section 10(a)(2) conditions approval of an incidental take permit and the overall plan upon a finding that the applicant will "to the maximum extent practicable, minimize and mitigate the impacts of such taking."[53] Here, while mitigation is an acknowledged element of an HCP, its focus remains on minimizing the impacts of a taking—and does not create an implied or explicit net gain or no net loss standard. NESARC agrees that an applicant may voluntarily provide additional mitigation beyond minimizing and mitigating the impacts of a take to the maximum extent practicable, and that FWS may assist these efforts when requested. However, FWS must modify its Draft Policy to explicitly acknowledge that the ESA does not require an applicant to do so.

3. *Use of Compensatory Mitigation Within a Section 4(d) Rule*

The Draft Policy states that "the inclusion of compensatory mitigation in a species-specific [Section] 4(d) rule may help offset habitat loss, and could hasten recovery or preclude the need to reclassify the species as endangered."[54] Prior to adoption of such approach in any final policy, FWS must further explain the legal basis and circumstances in which it would impose compensatory mitigation within a Section 4(d) rule.

ESA Section 4(d) allows FWS to issue regulations that it deems necessary and advisable for the conservation of threatened species.[55] In addition, FWS states that it relies on this authority to extend by regulation any of the prohibitions contained in Section 9 (e.g., the prohibition on take) to threatened species. FWS has issued a "blanket 4(d) rule" applying most of these prohibitions to all threatened species,[56] and FWS will modify the application of this prohibition on a species-specific basis. In the establishment of species-specific rules, the

[50] Joint Handbook at 4-53.

[51] 81 Fed. Reg. at 61,041.

[52] *Id*.

[53] 16 U.S.C. § 1538(a)(2)(B)(ii).

[54] 81 Fed. Reg. at 61,042.

[55] 16 U.S.C. § 1533(d).

[56] 50 C.F.R. § 17.31.

purpose of the Section 4(d) rule is the identification of measures that do and do not constitute "take" for purposes of enforcement of the ESA's prohibitions against the take of a species.

For purposes of a species-specific 4(d) take rule, the Draft Policy fails to recognize that take and the mitigation of the effects of any take are distinct and disparate concepts. Notably, take is defined as to "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in such conduct."[57] Thus, while a 4(d) rule can identify the activities, or circumstances for certain activities, that would not constitute take, the prohibition on take cannot be alleviated by the imposition of compensatory mitigation. FWS has not incorporated compensatory mitigation in any of its previous 4(d) rules, and doing so would appear to impermissibly conflate its authorities under Sections 4(d) and 10(a).[58]

D. Barriers to Implementation of the Draft Policy

NESARC encourages FWS to review and improve its Draft Policy to remove barriers to the effective use of compensatory mitigation measures. As an initial matter, the Draft Policy includes a number of overly-burdensome "preferences" relating to the location, timing, and type of compensatory mitigation.[59] These measures will create artificial barriers to the effective implementation of compensatory mitigation. Further, the Draft Policy also sets forth additional standards that lack clarity and, when combined with FWS's preferences, may unnecessarily constrain project proponents and potentially hinder the proponent's ability to accomplish the desired mitigation or the project itself.

1. Barriers Created by Unnecessary Preferences

a. Siting Should Not be Contingent upon Landscape-Scale Plans

The Draft Policy establishes a preference for compensatory mitigation projects "sited within the boundaries of priority conservation areas identified in existing landscape-scale conservation plans."[60] In the absence of such plans, "conservation needs of the species will be assessed at scales appropriate to inform the selection of sustainable mitigation areas that are expected to produce the best ecological outcomes for the species using the best available science."[61] The heightened preference for areas identified in existing landscape-scale conservation plans will unnecessarily restrict the development of compensatory mitigation projects.

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[57] 16 U.S.C. § 1532(19).

[58] Under Section 10(a)(1)(B), FWS can issue an incidental take permit authorizing otherwise prohibited take if the applicant will minimize and mitigate the impacts of such taking. The Draft Policy suggests that FWS may rely on Section 4(d) to establish an analogous framework, or to impose similar requirements, on a species-by-species basis for threatened species.

[59] NESARC notes that FWS's characterization of these elements is inconsistent, and that certain components are alternatively classified as preferences and standards.

[60] 81 Fed. Reg. at 61,042.

[61] *Id*. at 61,037.

As an initial matter, FWS must realistically assess this proposed preference with the practical reality that many areas presently have no options for mitigation projects. For example, it appears that FWS has only approved conservation banks in 15 states, and in-lieu fee programs are only available in about 20 states. Even in areas with these mitigation programs, they may not cover the habitat or species affected by a proposed project. Further, it is unclear under what authority and oversight "priority conservation areas" are designated and for what purposes. While FWS indicates that these conservation areas may be identified in a species status assessment, recovery plan, or five-year review, FWS has not established any criteria for their identification, scientific justification, or verification.[62] These procedures must be developed, and made available for public review and comment, before FWS attempts to rely upon such documents to dictate the location of any compensatory mitigation measures.

Importantly, the Draft Policy must allow applicants with the flexibility to move forward with the compensatory mitigation option that is most appropriate for the project and that meets the statutory requirements under the ESA. As previously noted, the ESA does not require or even contemplate the circumscription of avoidance and minimization measures to a "landscape" scale. Moreover, not only are there very few "landscape-scale" conservation plans, but such plans may have wider and fundamentally different missions and scopes that have little or no relevance to a particular endangered or threatened species. Under the ESA, the requirement for adoption of avoidance and minimization measures is specific to the species and critical habitat affected by a particular activity. It is incongruous for FWS to announce a "preference" for compensatory mitigation projects that are within the boundaries of landscape-scale plans that are developed under other statutory authorities and serve other interests and missions. FWS should strike the preference for mitigation projects sited in "landscape-scale" plans.

To the extent this proposal is retained, FWS must address how it will be applied to certain linear projects—which may cross multiple states and, certainly, many different habitat types and landscapes. In such circumstances, application of such a preference could have the contradictory effect of mandating piecemeal siting of mitigation across the varied areas in which the linear project is located.

b. There Should Be No Preference Between Mitigation on Private or Public Lands

The Draft Policy also encourages compensatory mitigation on private lands, as opposed to public lands, by including unrealistic standards by which the appropriateness of public lands will be determined. Mitigation efforts on public lands can be a valuable tool in ensuring the conservation of species and habitat. 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 promote species conservation through measures on public lands. FWS should not adhere to a strict policy of discouraging compensation or other activities in support of species or their habitat on public lands. Instead, to maximize conservation opportunities, FWS should assess the location of mitigation and other

[62] Notwithstanding, these documents may not be available, or contain the requisite information, for listed species. For example, of the listed species in the United States, only about 72% have active recovery plans (1606 U.S. species and 1156 active recovery plans).

supportive projects based upon the best and most efficient means to provide benefits for the resource at issue.

c. Mitigation in Advance of Impacts is Impractical

The Draft Policy includes a preference for mitigation that is implemented before the impacts of a project occur.[63] According to FWS, "[d]emonstrating that mitigation is successfully implemented in advance of impacts provides ecological and regulatory certainty that is rarely matched by a proposal of mitigation to be accomplished concurrent with, or subsequent to, the impacts of the actions even when that proposal is supplemented with higher mitigation ratios."[64] While a notable interest, this is an unachievable and impractical requirement.

The preference for advance mitigation is inflexible and incompatible with the process by which project permitting and financing determinations are made. Mitigation measures, as opposed to projects themselves, often have longer time frames for development and operation. Under the Draft Policy, projects could conceivably be delayed for multiple years pending successful demonstration of a mitigation project. Further, depending on the species or the habitat, compensatory mitigation (especially a form of "preferred" mitigation discussed above) simply may not be available at the time impacts from a project occur. Additionally, requiring advance mitigation fails to recognize the practical reality of project funding—in that full funding for all measures—including compensatory mitigation –often are not available until the time at which a project receives all permits and other pertinent milestones are completed. In fact, requiring compensatory mitigation in advance of impacts may negatively affect an applicant's ability to secure necessary funding for completing the project in the first place.

NESARC does not object to consideration of the time required for realization of mitigation benefits as an element of the evaluation process. However, adopting a "preference" for advance mitigation is unrealistic and counter-productive.[65] As noted above, the practical realities of project funding and development timelines must be recognized in the choice of mitigation in the first instance. Moreover, granting a preference to advance mitigation may have the unintended consequence of promoting quick fixes and, potentially, cosmetic benefits at the expense of an approach that would allow for investment in, and development of, more productive, long-term mitigation projects.

d. Preserving Flexibility in the Selection of Compensatory Mitigation Options

The Draft Policy expresses a preference for mitigation mechanisms that "consolidate compensatory mitigation on the landscape such as conservation banks, in-lieu fee programs, and habitat credit exchanges," as opposed to "small, disjunct compensatory mitigation sites spread across the landscape."[66] The Draft Policy states that consolidated mitigation is preferable to

[63] *Id*. at 61,042.

[64] *Id*.

[65] As noted below, FWS should provide credits to those entities that can, or choose to, perform advance mitigation. These credits could then be used to offset the impacts associated with the proposed project.

[66] *Id*.

permittee-responsible mitigation because conservation is difficult to achieve on a small scale because smaller sites "are often not ecologically defensible" and it is "often difficult to ensure long-term stewardship of these sites."[67]

Project proponents should maintain the flexibility to choose the mitigation option that is most appropriate for the project, including the option that is most cost-efficient and available. FWS must balance the benefits of certain mitigation mechanisms with the burdens on applicants to ensure the most efficient result. Particularly, compensatory mitigation must be capable of cost-effective implementation. From a practical perspective, consolidated compensatory mitigation may not always be the most appropriate mechanism. For example, the proponent of an activity with a small footprint or temporary effects should not be required to provide consolidated compensatory mitigation, especially when permittee-responsible on-site mitigation is sufficient to ensure conservation. On the other hand, proponents whose activities involve large footprints may have the ability to provide on-site mitigation that will be the most efficient option. In addition, as noted earlier, many areas do not have established compensatory mitigation mechanisms or programs (e.g., conservation banks, in lieu fee programs, wetlands banks, etc.). FWS should recognize this limited availability and other potential constraints, and refrain from imposing a general preference for consolidated mitigation.

2. Changes and Clarifications to the Compensatory Mitigation Standards

a. Additionality Must Account for Previously Planned Conservation Efforts

The Draft Policy states that compensatory mitigation "must provide benefits beyond those that would otherwise have occurred through routine or required practices or actions, or obligations required through legal authorities or contractual agreements."[68] According to FWS, a compensatory mitigation measure is "additional" when "the benefits of the measure improve upon the baseline conditions of the impaired resources and their values, services, and functions in a manner that is demonstrably new and would not have occurred without the measure."[69]

This "additionality" requirement by which compensatory mitigation must improve upon baseline conditions, without taking previously initiated conservation efforts into account, will discourage voluntary conservation efforts. FWS will create a perverse incentive for parties to never voluntarily take actions that may, in the future, raise the baseline conditions for future projects. Oftentimes, when a party has future plans for a particular site, it will manage that site with such future activities in mind. Moreover, for financial reasons, parties may actually seek to take certain steps to initiate environmental protections (for example, improving stormwater drainage protection systems or improving riparian habitats) on owned or controlled property well before a project permitting process is initiated. Further, applicants may incorporate a host of beneficial measures intended to avoid or minimize project impacts in the course of developing the project proposal and meeting permitting requirements. For example, an applicant could

[67] *Id*. at 61,034.

[68] *Id*. at 61,037.

[69] *Id*.

include such measures for purposes of receiving a "not likely to adversely affect" or "no jeopardy" determination under Section 7. Yet, these very types of improvements would be counted against project proponents under the FWS policy and have a chilling effect on voluntary environmental protection measures. This "chilling effect" will ultimately undermine the goal of conserving species and their habitat. As drafted, FWS would essentially penalize a party for having the foresight to expect and plan for future impacts from its activities by incorporating all such beneficial measures into the baseline. [70]

Instead, FWS should revise the Draft Policy to accommodate, and account for, voluntary or pre-activity conservation efforts. For example, FWS should allow entities' voluntary conservation and advance or pre-impact mitigation measures to generate tradeable mitigation credits through which other entities can join and further promote the voluntary conservation activities that have been initiated by the project proponent. The generated credits should be transferable so that the generating entity (e.g., the project proponent or landowner, etc.) could either sell them to a third party or use them itself to offset the impacts of a future projects. Expanding mitigation crediting in this manner will more accurately reflect accrued conservation benefits and promote and incentivize conservation efforts.

b. Clarification of In-Kind Mitigation for Species

The Draft Policy states that compensatory mitigation must be "in-kind" for the species affected by the proposed project. [71] The Draft Policy requirement for "in-kind" mitigation for species is unclear and appears contradictory. With respect to affected habitat, FWS states that in-kind mitigation may not necessarily be required, because the best conservation measure for the affected species may not be the same habitat type impacted by the project. In addition, the Draft Policy states that compensatory mitigation to minimize the impacts of incidental take on listed species "can be based on habitat or another surrogate such as a similarly affected species or ecological conditions. . . ."[72] These statements present a conflicting and incomplete picture of what is intended by FWS's directive for "in-kind" mitigation.

Presumably, FWS's intent in seeking "in-kind" mitigation is that any mitigation must benefit the same species impacted by the action. [73] However, as drafted, the Draft Policy can be interpreted to mean that compensatory mitigation for a species must directly replace or provide substitute species for those taken. This approach is not biologically possible outside of hatchery or artificial propagation programs. Further, while the Draft Policy recognizes that mitigation could be measured based on benefits to surrogate species or habitats, this appears to be inconsistent with the emphasis on in-kind mitigation for species. As a result, this standard is

[70] The "additionality" requirement also contradicts FWS's proposed Policy Regarding Voluntary Prelisting Conservation Actions by not excluding voluntary conservation efforts as a source of compensatory mitigation. 79 Fed. Reg. 42,525 (July 22, 2014).

[71] 81 Fed. Reg. at 61,037.

[73] Traditionally, "in-kind" refers to the provision of non-monetary services. In the Draft Policy, FWS appears to be incorporating a "like-for-like" concept with respect to mitigation benefits. FWS must clarify its intent or terminology to ensure consistent and transparent application.

unclear and must be revised and further explained prior to finalizing the policy. FWS should consider deleting the "in kind" provision and focus instead more generally on mitigation that will benefit the species and habitat at issue.

c. Clarification Regarding Application of Reliable and Consistent Metrics

The Draft Policy states that metrics "must be science-based, quantifiable, consistent, repeatable, and related to the conservation goals for the species," and that "metrics used to calculate credits should be the same as those used to calculate debits."[74] Metrics must account for among other things, duration of the impact, temporal loss to the species, and management of risk. The Draft Policy notes that precision is rarely possible, but that uncertainty should be documented and metrics must be based on the best scientific data available.[75]

The Draft Policy lacks clarity and detail with respect to how metrics should be used to measure ecological functions and/or services. While NESARC generally agrees with the criteria that FWS has identified regarding the selection of an appropriate metric, the Draft Policy lacks the requisite information guiding how a metric would actually be applied in practice. For example, FWS should explain how a selected metric should measure valuation, duration of impacts, temporal losses, and risk. Without definitive standards guiding the application of these elements, the Draft Policy is vague and subject to inconsistent interpretation and application on a project-by-project basis.

d. Clarification of Mitigation Ratios and Prohibition Against Preclusive or Punitive Ratios

The Draft Policy states that mitigation ratios can be used as a risk-management tool to address uncertainty, ensure durability, or implement policy decisions to meet the net gain or no net loss goal.[76] For example, FWS indicates that when compensatory mitigation cannot be provided in advance of an action, temporal losses to the affected species must be compensated through some means, such as increased mitigation ratios.[77] In addition, FWS states that mitigation ratios can be used to achieve conservation goals by adjusting the ratios upward to incentivize the avoidance of certain areas or downward to incentivize the use of a particular mitigation mechanism (e.g., a particular conservation bank instead of permittee-responsible mitigation).

FWS must provide clear and consistent standards for the application of mitigation ratios. Greater than 1 to 1 mitigation ratios should be the exception rather than the rule, especially in cases where proposed mitigation would fully offset the impacts of the taking. NESARC is particularly concerned that mitigation ratios could be applied on an *ad hoc* basis that would create disparities between projects, geographic locations, and within FWS regional offices.

[74] *Id*.

[75] *Id*.

[76] *Id*. at 61,046.

[77] *Id*. at 61,038.

Instead, for example, FWS should promulgate agency-wide regulatory standards that would apply to the calculation of mitigation ratios for temporal loss or other uses.

Temporal loss should be measured from the time when impacts occur to the point they are mitigated, not longer, and should reflect the nature of impacts in the context of the particular species involved. Thus, if an activity is permitted at one point in time but not constructed until a later point in time, the time between permitting and construction should not be considered as temporal loss. In addition, if a migratory species is not present when construction is undertaken, and mitigation is in place before the species returns, that should not constitute temporal loss.

In addition to fully explaining the appropriate basis for mitigation ratios and setting applicable standards, FWS also must establish clear limits on their application to avoid abusive or inappropriate practices in setting ratios. For example, FWS cannot use the threat of elevated mitigation requirements to effectively preclude the development of a project based upon the imposition of artificial economic considerations. Similarly, FWS should not artificially manipulate mitigation ratios to reflect a preference for a particular mitigation mechanism. Particularly, project proponents should not be penalized for pursuing permittee-responsible mitigation through the application of discriminatory or preferential ratios that drive applicants to a particular form of mitigation measures.

e. Appropriate Use of Monitoring and Adaptive Management

The Draft Policy states that compensatory mitigation programs "will be assessed to determine if they are achieving their conservation objectives through the use of science-based, outcome-based ecological performance criteria that are reasonable, objective, measureable, defensible, and verifiable."[78] FWS states that monitoring and evaluation protocols must be "developed and implemented with an adaptive framework where adaptive management may be used to modify a program as needed if the program does not meet the objectives."[79] If unforeseen circumstances beyond the control of the party prevent the mitigation program from achieving its objectives, FWS indicates that a process for achieving remediation or alternative mitigation is necessary.[80]

FWS cannot avoid or undermine the long-standing No Surprises Rule through application of monitoring and adaptive management protocols in compensatory mitigation projects. With respect to an HCP, FWS regulations implementing the No Surprises Rule specify the obligations and responsibilities for both the permittee and the FWS to address and respond to "changed circumstances" and "unforeseen circumstances."[81] 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.[82] Similarly, if unforeseen circumstances occur, the Services can only require minimal

[78] *Id*.

[79] *Id*.

[80] *Id*.

[81] 50 C.F.R. § 17.3 (defining terms).

[82] 50 C.F.R. §§ 17.22(b)(5)(ii), 17.32(b)(5)(ii).

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.[83]

At a minimum, for application of compensatory mitigation in the HCP context, the Draft Policy must recognize the importance of the No Surprises Rule and clearly state that remediation and alternative mitigation will not erode the protections afforded by the rule. In addition, FWS should apply the principles of the No Surprises Rule more broadly to promote the utilization of compensatory mitigation. Expanding the scope of the No Surprises Rule to voluntary participation in compensatory mitigation projects will incentivize additional conservation efforts by providing the necessary protections to those parties pursuing such voluntary measures.

E. Limitations on Retroactive Application

FWS states that the Draft Policy does not apply retroactively to approved mitigation programs.[84] However, FWS notes that the Draft Policy would apply to amendments and modifications to existing conservation programs and mechanisms, unless otherwise stated in the mitigation instrument. Similarly, FWS states that the Draft Policy would apply to already permitted or approved Federal or non-Federal actions if the action may require additional compliance review under the ESA. FWS would generally not apply the Draft Policy to pending actions where it has already agreed in writing to mitigation measures, but would allow FWS offices to determine whether it would apply to actions that are under review at the time of final policy publication.

FWS should revise the Draft Policy to explicitly state that it will not apply retroactively to any mitigation program, Federal or non-Federal action, or other covered activity that has either been approved or permitted or has submitted an application for such permitting or approval, irrespective of whether there is a subsequent amendment or new information. In such cases, the project or program proponent has already invested resources in constructing or operating the project or mitigation program or in developing the permit application, necessary scientific studies, and other supporting documents. To reflect these investments, such projects and programs should be grandfathered under the mitigation requirements and policies currently in existence. Furthermore, the potential for application of the Draft Policy to amendments to existing mitigation programs will dissuade any mitigation sponsor or provider from seeking such revisions to avoid the reopening of their mitigation agreement and the application of the Draft Policy. Finally, FWS cannot use adaptive management provisions to apply the Draft Policy to existing actions or mitigation programs. The instruments or permits containing these provisions have already been negotiated, and adaptive management does not allow for the unilateral imposition of the Draft Policy's compensatory mitigation requirements on existing projects.

[83] 50 C.F.R. §§ 17.22(b)(5)(iii), 17.32(b)(5)(iii).

[84] 81 Fed. Reg. at 61,036.

III. Conclusion

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

Sincerely,

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APPENDIX A

NATIONAL ENDANGERED SPECIES ACT
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American Agri-Women
Manhattan, KS

American Farm Bureau Federation
Washington, DC

American Forest and Paper Association
Washington, DC

American Petroleum Institute
Washington, DC

American Public Power Association
Washington, DC

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, DC

Dixie Escalante Rural Electric Association
Beryl, Utah

Dugan Production Corporation
Farmington, New Mexico

Eastern Municipal Water District
Perris, California

Edison Electric Institute
Washington, DC

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, DC

National Association of Counties
Washington, DC

National Association of Conservation Districts
Washington, DC

National Association of Home Builders
Washington, DC

National Association of State Departments of Agriculture
Arlington, Virginia

National Cattleman's Beef Association
Washington, DC

National Rural Electric Cooperative Association
Washington, DC

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, DC

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