



NATIONAL ENDANGERED SPECIES ACT  
REFORM COALITION

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November 1, 2017

Mr. Mark Lawyer  
Office of the Executive Secretariat  
Attn: Reg. Reform, DOI-2017-0003-0009  
U.S. Department of the Interior  
1859 C Street NW  
Mail Stop 7328  
Washington, DC 20240

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

**Re: NESARC Comments on Regulatory Reform and Reducing Regulatory Burdens**

Dear Mr. Lawyer:

On June 22, 2017, the Department of the Interior (“DOI”) requested comments on improving implementation of regulatory reform initiatives and policies and identifying regulations for repeal, replacement, or modification.<sup>1</sup> The National Endangered Species Act Reform Coalition (“NESARC”) respectfully provides the following comments and recommendations on improvements that the U.S. Fish and Wildlife Service (“FWS”) should make to regulations under the Endangered Species Act (“ESA”).

NESARC is the country’s oldest broad-based, national coalition dedicated solely to achieving improvements to the ESA and its implementation. As detailed in the membership list attached to these comments,<sup>2</sup> NESARC includes agricultural interests, cities and counties, commercial real estate developers, conservationists, electric utilities, energy producers, farmers, forest product companies, home builders, landowners, oil and gas companies, ranchers, realtors, water and irrigation districts, and other businesses and individuals throughout the United States. NESARC and its members are committed to promoting effective and balanced legislative and administrative improvements to the ESA that support the protection of fish, wildlife, and plant populations as well as responsible land, water, and resource management.

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<sup>1</sup> *Regulatory Reform*, 82 Fed. Reg. 28,429 (June 22, 2017).

<sup>2</sup> See Appendix A.

## **I. Recommendations for Regulatory Improvements to the ESA**

The ESA was originally enacted in 1973, and the statute has remained largely unchanged and unauthorized for nearly a quarter of a century. The operative statutory provisions are implemented through regulations promulgated by the FWS and the National Marine Fisheries Service (“NMFS”) (collectively, the “Services”). While there have been piecemeal revisions to these regulations over the years, implementation of the ESA would benefit significantly from a holistic review of the regulatory structure. By conducting this type of review, FWS, in collaboration with NMFS, can best identify and incorporate efficiencies and improvements that have been learned during the past 40 years of ESA implementation.<sup>3</sup>

The listing of a species as threatened or endangered and the designation of critical habitat have significant regulatory, economic, and other consequences. Private landowners, state and local governments, commercial entities, and other parties are required to conduct Section 7 consultation on any Federal action that may affect a listed species or its critical habitat or seek a permit under Section 10 to avoid liability for a prohibited take of the species. While the goal of the ESA is to ultimately recover and delist these species, there has only been limited success to date. There are regulatory improvements that can and should be made to each of these ESA components to alleviate unnecessary economic impacts on the regulated community, reduce administrative inefficiency, and modernize implementation of the Act.

### **A. Improvements to the Section 7 Consultation Process**

Revisions to the ESA Section 7 consultation regulations are necessary to improve the efficiency and nature of the process while maintaining the core protections of the ESA. The consultation process has proven to be unwieldy—too complex for simple permits and inadequate for application to complex regulatory actions, such as pesticide registrations under the Federal Insecticide, Fungicide, and Rodenticide Act. The Services should improve the process by streamlining the existing procedures, clarifying certain regulatory definitions, and ensuring that the implementation of biological opinions is more cost effective and reliable. In addition, the Services should encourage greater collaboration with applicants so that reasonable, workable solutions can be identified and achieved, and that consultation can be concluded within the deadlines provided by statute.<sup>4</sup> NESARC requests that FWS, in collaboration with NMFS, take the following actions:

- Promulgate regulations recognizing that consultation is not required for agency actions with discountable, insignificant, or beneficial effects on a species or its critical habitat. This guidance is currently contained in the Services’ Consultation Handbook,<sup>5</sup> but should be formally adopted as regulations to provide certainty and further inform the “not likely to adversely affect” determination.

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<sup>3</sup> On August 21, 2017, NESARC submitted similar comments to NMFS in Docket No. NOAA-NMFS-2017-0067.

<sup>4</sup> See, e.g., Water Infrastructure Improvements for the Nation Act, Pub. L. No. 114-322, § 4004, 130 Stat. 1628, 1858 (2016).

<sup>5</sup> FWS and NMFS, *Endangered Species Consultation Handbook, Procedures for Conducting Consultation and Conference Activities under Section 7 of the Endangered Species Act* at 3-12 (1998).

- Revise the definition of “environmental baseline” to focus on current environmental conditions.<sup>6</sup> The environmental baseline is intended to provide a “snapshot” of a species’ health at the time of the consultation. Preapproved and preexisting activities, projects and facilities, and the associated operational effects on species and habitat, must be included in the baseline for any consultation that may be required for ongoing operations or proposed new actions carried out, authorized, or funded by federal agencies.
- Revise the definition of “effects of the action” to ensure that consideration of “direct effects” and “indirect effects” incorporates the principles of proximate causation and reasonable foreseeability.<sup>7</sup> There must be a close causal and measurable connection between the proposed action and any effects—i.e., the action must “directly produce” the resulting effect on the species or critical habitat. A direct or indirect effect should not be included if it will occur irrespective of the proposed action.
- Revise the definition of “cumulative effects” to exclude “future Federal activities that are physically located within the action area of the particular Federal action under consultation.”<sup>8</sup> This is consistent with the Service’s long-held policy which states that, because future Federal actions will be separately subject to Section 7 consultation, “their effects will be considered at that time and will not be included in the cumulative effects analysis.”<sup>9</sup>
- Revise the definition of “biological assessment” to include other documents that contain an analysis of the potential effects of a proposed action on listed species and critical habitat.<sup>10</sup> Such documents may include environmental assessments or environmental impact statements prepared pursuant to the National Environmental Policy Act or other similar documents that contain the information required to initiate consultation.
- Reconsider the definition of “destruction or adverse modification” to prevent the over-expansive and unduly burdensome application of this statutory concept.<sup>11</sup> Contrary to the Services’ current interpretation, the regulatory phrase “appreciably diminishes” must be construed to mean a “considerable reduction” in the value of critical habitat. In addition, any adverse modification must be based on impacts to actual physical or biological features, and not encompass alterations that “preclude or significantly delay development” of features that do not currently exist. Finally, the focus on “conservation

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<sup>6</sup> 50 C.F.R. § 402.02.

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

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

<sup>9</sup> *Interagency Cooperation*, 51 Fed. Reg. 19,932, 19,933 (1986).

<sup>10</sup> 50 C.F.R. § 402.02.

<sup>11</sup> *Id.* For additional information, see NESARC’s comments, dated October 9, 2014, submitted in Docket No. FWS-R9-ES-2011-0072.

of a listed species” impermissibly converts the Section 7 consultation analysis into the imposition of a recovery standard.

- Establish deadlines for the completion of informal consultation and the timely issuance of any required concurrence by FWS or NMFS that a proposed action will not likely adversely affect a listed species or any critical habitat. ESA Section 7 provides statutory deadlines for the completion of formal consultation, and the Services should include corresponding deadlines for informal consultation to ensure that the entire consultation process proceeds in an expedient manner.
- Expand the use of informal consultation, programmatic consultation, and other consultation strategies to improve efficiency. For example, the Services should establish a “categorical approval” for various types of activities undertaken with certain species-protective best management practices. The Services should more fully utilize the expertise of action proponents and consulting agencies to inform the consultation process. For each category of proposed actions, the Services should also develop standard operating procedures for consultations that draw on relevant, reliable, and qualified data.

## **B. Revisions to the Procedures for the Designation of Critical Habitat**

The process for designating critical habitat needs to be further reformed to reduce the resulting economic and regulatory burdens placed on affected entities. While the Services recently revised these regulations,<sup>12</sup> additional changes are necessary to conform the regulations to Congressional intent and the explicit statutory criteria.<sup>13</sup> Critical habitat designations in occupied areas can only include those areas where essential physical or biological features are currently found. For unoccupied areas, the Services must first determine that the area is habitable, and then that the designation of occupied areas, alone, is insufficient for conservation of the species. The Services cannot rely on speculative effects of climate change to designate areas that currently lack essential habitat features in an attempt to anticipate future changes in habitat or species distribution. Finally, the scale of any critical habitat designation must be limited to “specific areas” and not include broad expanses of lands and waters that extend “as far as the eyes can see and the mind can conceive.”<sup>14</sup> NESARC requests that FWS, in collaboration with NMFS, take the following actions:

- Clarify that critical habitat can only be designated in areas, whether occupied or unoccupied, that already contain the elements necessary to provide habitat for the species.

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<sup>12</sup> *Implementing Changes to the Regulations for Designating Critical Habitat*, 81 Fed. Reg. 7,414 (February 11, 2016).

<sup>13</sup> For additional information, see NESARC’s comments, dated October 9, 2014, submitted in Docket No. FWS–HQ–ES–2012–0096.

<sup>14</sup> 124 Cong. Rec. 38,131 (1978).

Congress included a clear habitability requirement in the ESA, and this must be reflected in the regulations.<sup>15</sup>

- For both occupied and unoccupied habitat, ensure that the scope of any designation is limited to “specific areas.” The Services have impermissibly expanded their discretion to designate areas “at a scale determined by the Secretary to be appropriate.”<sup>16</sup> Instead, the scale of any critical habitat designation must be consistently applied and be at a level of specificity that ensures that homes, businesses, and other areas that do not contain essential physical or biological features (for occupied areas) or essential habitat (for unoccupied areas) are not broadly swept into a critical habitat designation.
- Revise the definition of “geographical area occupied by the species” to only include areas with sustained or regular use by the species.<sup>17</sup> Occupation of an area requires a level of residency or control over an area, not mere transient or temporary presence, and cannot be conflated with a species’ range. Range is a broader concept that encompasses areas that are both occupied and unoccupied by the species.<sup>18</sup>
- Revise the definition of “physical or biological features” to reflect that an occupied area cannot be designated based upon “habitat characteristics that support ephemeral or dynamic habitat conditions.”<sup>19</sup> The ESA is clear that occupied areas may be designated as critical habitat only where essential physical and biological features “are found.”<sup>20</sup> The requisite features must actually exist in the specific area at the time of designation, and the Services cannot include areas merely because there is a possibility for such features to develop at some future time.
- Further revise the definition of “physical or biological features” to recognize that such features must have a greater biological significance than simply “support[ing] the life-history needs of the species.”<sup>21</sup> Congress explicitly required that the identified physical or biological features must be “essential to the conservation of the species.”<sup>22</sup> “Essential” is a higher standard (i.e., absolutely necessary or indispensable) that does not include any or all habitat features that support a species.

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<sup>15</sup> 16 U.S.C. § 1533(a)(3)(A)(i) (“The Secretary . . . shall . . . designate any habitat of such species which is then considered to be critical habitat”).

<sup>16</sup> 50 C.F.R. § 424.12(b)(1), (2).

<sup>17</sup> *Id.* § 424.02.

<sup>18</sup> 16 U.S.C. § 1533(c)(1) (requiring the Services to “specify with respect to each such [listed] species over what portion of its range it is endangered or threatened, and specify any critical habitat within such range.”) (emphasis added).

<sup>19</sup> 50 C.F.R. § 424.02.

<sup>20</sup> 16 U.S.C. 1532(5)(A)(i).

<sup>21</sup> 50 C.F.R. § 424.02.

<sup>22</sup> 16 U.S.C. § 1532(5)(A)(i).

- Account for the existence of state, county, local and voluntary management and protection measures when determining whether physical or biological features “may require special management considerations or protection.”<sup>23</sup> Areas with existing habitat management and protective measures (included those provided by habitat conservation plans, candidate conservation agreements with assurances, safe harbor agreements, etc.) may render critical habitat redundant, and designation of those areas may provide no added benefits for the species. The Services should consult with and take input from the managers of the voluntary conservation plans before designating critical habitat.
- Revise the regulations to provide specific criteria for the designation of unoccupied habitat.<sup>24</sup> Without such standards, the Services cannot consistently determine whether an unoccupied area is essential for conservation of the species. The Services should also reinstate their previous requirement that a designation of unoccupied habitat will only occur “when a designation limited to its present range would be inadequate to ensure the conservation of the species.”<sup>25</sup> This regulation is consistent with Congressional intent, and maintains the proper relationship between occupied and unoccupied habitat.

### **C. Revisions to Economic Analysis of Critical Habitat Designations**

The Services must also revise how the economic and other impacts of a critical habitat designation will be determined and analyzed when considering whether to exclude an area from critical habitat.<sup>26</sup> Most importantly, the use of an incremental impacts analysis (i.e., “with and without the designation”) is insufficient for fulfilling the economic impacts analysis required under ESA Section 4(b)(2).<sup>27</sup> By attributing almost all of the regulatory burdens and economic costs arising under the ESA to the listing decision, the Services incorrectly identify only those marginal costs that are “solely” attributed to a later designation of critical habitat. This approach ignores baseline economic conditions and fails to fully consider how a critical habitat designation will impact a particular area, such as the effect on future property values and lost conservation opportunities on private land. In addition, rather than considering impacts at a scale that the Secretary determines to be appropriate, the Services should use a scale that ensures that the economic analysis can be relied on to determine, consistent with the ESA, that a “particular area” may be excluded.<sup>28</sup> Finally, the Services should use quantitative assessment methodologies, to the maximum extent practicable, and only rely on qualitative assessments of economic impacts when there is insufficient quantitative data available to conduct an economic impacts analysis consistent with the requirements of the ESA and the Data Quality Act.

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<sup>23</sup> 50 C.F.R. § 424.12(b)(1)(iv).

<sup>24</sup> *Id.* § 424.12(b)(2).

<sup>25</sup> *Id.* § 424.12(e) (2015).

<sup>26</sup> For additional information, see NESARC’s comments, dated October 23, 2012, submitted in Docket Nos. FWS-R9-ES-2011-0073 & NOAA-120606146-2146-01.

<sup>27</sup> 50 C.F.R. § 424.19(b).

<sup>28</sup> 16 U.S.C. § 1533(b)(2).

#### **D. Clarify the Listing Process and Increase State and Local Government Involvement**

Species do not receive protection under the ESA until they are listed as either endangered or threatened.<sup>29</sup> These decisions are frequently dictated by petitions to list species, which trigger mandatory and inflexible statutory deadlines for the Services to act.<sup>30</sup> The Services have no ability to prioritize actions for imperiled species, lack the resources to act in a timely manner, and are often forced to make decisions without full and thorough consideration of scientific data. These petition deadlines are enforced through litigation and settlements, without public involvement, which further perpetuates the underlying problem.<sup>31</sup>

To help alleviate these issues, the Services should identify opportunities for the greater involvement of, and collaboration with, state and local government agencies.<sup>32</sup> State and local governments have unique authorities and expertise on the management, protection, and conservation of species and habitat within their jurisdiction. However, other than requiring petitioners to provide notice to State agencies prior to submitting petitions,<sup>33</sup> and notices to State agencies and counties of proposed regulations,<sup>34</sup> the expertise of these entities has been largely marginalized in the implementation of listing and critical habitat decisions. The Services should better use the expertise and abilities of State and local government agencies by providing a greater role in the listing and critical habitat designation process.<sup>35</sup>

The Services should also promulgate regulations to define the operative terms within the statutory definitions of “endangered species” and “threatened species.”<sup>36</sup> The phrases “in danger of extinction,” “foreseeable future,” and “significant portion of its range” (“SPR”) are vague and demand codification through the rulemaking process. In addition, when a species is determined to be threatened or endangered within a SPR, the Services should limit the listing classification (and any designated critical habitat) to that identified portion of the species’ range, and not apply it range-wide.<sup>37</sup> Further clarification of these terms is necessary to provide regulatory certainty to the ESA listing process.

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<sup>29</sup> *Id.* § 1533(a)(1).

<sup>30</sup> *Id.* § 1533(b)(3).

<sup>31</sup> For revisions that could be made to improve the petition process, see NESARC’s comments, dated September 18, 2015 and May 23, 2016, submitted in Docket No. FWS-HQ-ES-2015-0016.

<sup>32</sup> 16 U.S.C. § 1535(a) (“In carrying out the program authorized by this chapter, the Secretary shall cooperate to the maximum extent practicable with the States.”).

<sup>33</sup> 50 C.F.R. § 424.14(b).

<sup>34</sup> 16 U.S.C. § 1533(b)(5)(A)(ii).

<sup>35</sup> For example, the Services should ensure that the best scientific and commercial data available is provided to state and local governments and is also publicly available on the internet. *See* State, Tribal, and Local Species Transparency and Recovery Act, H.R. 1274, 115th Cong. § 2 (as amended and reported by H. Comm. on Nat. Res., Oct. 4, 2017).

<sup>36</sup> *Id.* § 1532(6), (20).

<sup>37</sup> For additional information, see NESARC’s comments, dated March 8, 2012, submitted in Docket No. FWS-R9-ES-2011-0031.

### **E. Improve Recovery Planning to Achieve the Goal of Delisting Species**

The primary purpose of the ESA is to identify threatened and endangered species and to undertake efforts to protect and, ultimately, recover such species. Section 4(f) of the ESA directs FWS, with limited exceptions, to develop and implement recovery plans for listed species.<sup>38</sup> FWS is required, to the maximum extent practicable, to prioritize the recovery of those listed species most likely to benefit from such plans, and to also include “objective, measurable criteria” for delisting species.<sup>39</sup> However, many species do not have recovery plans and, consequentially, no criteria for delisting.

The Services’ regulations state that “[a] species may be delisted on the basis of recovery only if the best scientific and commercial data available indicate that it is no longer endangered or threatened.”<sup>40</sup> This provision should be revised to better link the recovery planning process with the actual delisting of species. Given that recovery plans are required to include “objective, measurable criteria,” the regulations should require the establishment of meaningful and enforceable delisting criteria, with measures that are practicable and affordable to implement, and require the delisting of a species when those criteria are achieved.

### **F. Promote and Enhance the Use of Voluntary Conservation Measures**

Voluntary conservation efforts have been at the heart of most successful species recovery efforts. NESARC strongly urges FWS to promote and encourage these conservation efforts by creating new avenues for States, local governments, private property owners and other non-federal entities to proactively participate in species recovery efforts. In addition, NESARC requests that FWS, in collaboration with NMFS, take the following actions:

- Identify opportunities to streamline the development and approval of habitat conservation plans (“HCPs”) for incidental take permits.<sup>41</sup> By reducing delays and minimizing the costs, the Services can further incentivize the use of HCPs as a conservation mechanism.
- Eliminate the policy, currently followed in the Pacific Northwest regions, that prohibits a single Service from issuing a Section 10 permit if it would cover lands and practices that may affect a listed species under the jurisdiction of the other Service.
- Issue guidance insisting on cooperation with the NMFS in processing proposed HCPs and other conservation agreements, and further instruct FWS staff to focus on the conservation benefits from working with landowners and other stakeholders.

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<sup>38</sup> 16 U.S.C. § 1533(f)(1).

<sup>39</sup> *Id.* §§ 1533(f)(1)(A), 1533(f)(1)(B)(2).

<sup>40</sup> 50 C.F.R. § 424.11(d)(2).

<sup>41</sup> For additional information, see NESARC’s comments on the Services’ draft HCP Handbook, dated August 29, 2016, submitted in Docket Nos. FWS-HQ-ES-2016-0004 & NOAA-NMFS-2016-0004.



- Encourage agency staff to pursue conservation partnerships through voluntary projects with private landowners and others and increased the use of candidate conservation agreements with assurances and Section 4(d) rules for threatened species.
- Revoke Section 9 of the HCP Handbook adopted in December 2016.<sup>42</sup> This section establishes agency policy on applying the “maximum extent practical” mitigation standard for HCPs. It requires detailed economic analysis of the applicant’s financial books and implies that if the applicant would still make a profit from its intended lawful activities, there is not sufficient mitigation. The concept of practicality needs to be applied to both the applicant and the agency, and must account for limited agency resources and maintain incentives for the applicant to implement the HCP.

## II. Rescission of Mitigation and Compensatory Mitigation Policies

In a 2015 Presidential Memorandum entitled “Mitigating Impacts on Natural Resources,” DOI and other agencies were directed to implement a “net benefit goal” for mitigating impacts to natural resources. In response, FWS published two policies that established a net conservation gain or no net loss standard for mitigation and ESA compensatory mitigation, and adopted a preference for a landscape-scale approach to conservation.<sup>43</sup> As NESARC explained previously, these policies impermissibly exceed FWS’s statutory authority under the ESA, include vague and overly broad conservation objectives, and unnecessarily burden the regulated community.<sup>44</sup> When applied to voluntary conservation efforts for at risk and listed species, they discourage participation and create substantial impediments to such projects.

On March 26, 2017, the President issued Executive Order 13783, entitled “Promoting Energy Independence and Economic Growth,” which revoked the 2015 Presidential Memorandum and generally directed the suspension, revision, or rescission of existing agency actions related to or arising from it. Following the Executive Order, Secretary Zinke issued Secretarial Order 3349 which initiated a review of all such agency actions, and established deadlines for the completion of the review and identification of subsequent measures to address the covered policies. In accordance with these directives, NESARC requests that FWS act expeditiously to rescind both the Mitigation Policy and the ESA Compensatory Mitigation Policy.

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<sup>42</sup> *Joint U.S. Fish and Wildlife Service and National Marine Fisheries Service Habitat Conservation Planning Handbook*, 81 Fed. Reg. 93,702 (Dec. 21, 2016).

<sup>43</sup> *Mitigation Policy*, 81 Fed. Reg. 83,440 (Nov. 21, 2016); *ESA Compensatory Mitigation Policy*, 81 Fed. Reg. 95,316 (Dec. 27, 2016).

<sup>44</sup> For additional information, see NESARC’s comments on the Mitigation Policy, dated June 13, 2016, submitted in Docket No. FWS-HQ-ES-2015-0126; and NESARC’s comments on the ESA Compensatory Mitigation Policy, dated October 17, 2016, submitted in Docket No. FWS-HQ-ES-2015-0165.

### **III. Conclusion**

NESARC greatly appreciates the opportunity to provide these comments to DOI. We respectfully request that you take these comments into full consideration when contemplating revisions to FWS's ESA regulations and policies.

Sincerely,

A handwritten signature in blue ink, appearing to read "Tyson Kade". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Tyson Kade  
NESARC Counsel



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## NESARC Membership Roster

**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**  
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**Association of California Water Agencies**  
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**Central Electric Cooperative**  
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**Central Platte Natural Resources District**  
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*Lake Andes, South Dakota*

**Coalition of Counties for Stable  
Economic Growth**  
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**Codington-Clark Electric Cooperative, Inc.**  
*Watertown, South Dakota*

**Colorado River Energy Distributors Association**  
*Phoenix, Arizona*

**Colorado River Water Conservation District**  
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**Colorado Rural Electric Association**  
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**County of Eddy**  
*Carlsbad, New Mexico*

**County of Sierra**  
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*Boise, Idaho*

**NAIOP**

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**National Association of Counties**

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**National Association of Conservation Districts**

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**National Association of Realtors**

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**National Association of State Departments of Agriculture**

*Arlington, Virginia*

**National Association of Wheat Growers**

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**National Cattleman's Beef Association**

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**National Rural Electric Cooperative Association**

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**National Water Resources Association**

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*Yakima, Washington*

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**Wheat Belt Public Power District**

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