



NATIONAL ENDANGERED SPECIES ACT  
REFORM COALITION

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

September 24, 2018

U.S. Fish and Wildlife Service  
Public Comments Processing  
Attn: FWS-HQ-ES-2018-0007  
MS: BPHC  
5275 Leesburg Pike  
Falls Church, VA 22041-3803

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

**Re: NESARC Comments on the Proposed Rule on the Revision of the Regulations for Prohibitions to Threatened Wildlife and Plants**

Dear Ms. Fahey:

On July 25, 2018, the U.S. Fish and Wildlife Service (“FWS”) issued a proposed rule to revise the regulations for prohibitions related to threatened wildlife and plants under Section 4(d) of the Endangered Species Act (“ESA”).<sup>1</sup> This Proposed Rule would prospectively provide that, at the time of a determination to list a species as “threatened,” FWS will determine the scope of take prohibitions to be applied through the issuance of a species-specific “Section 4(d) rule.” This approach aligns with the long-standing practice of the National Marine Fisheries Service (“NMFS”) in its implementation of take prohibitions for threatened species. FWS’s Proposed Rule is a long-overdue action that properly carries out the purposes of ESA Section 4(d).

The National Endangered Species Act Reform Coalition (“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 farmers, cities and counties, rural irrigators, electric utilities, forest product companies, homebuilders, agricultural interests, mining companies, 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

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<sup>1</sup> 83 Fed. Reg. 35,174 (July 25, 2018) (“Proposed Rule”).

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

support the protection of fish, wildlife, and plant populations as well as responsible land, water, and resource management.

NESARC appreciates the opportunity to comment on the proposed regulations and recommends that FWS expeditiously adopt a final rule for application of species-specific Section 4(d) rules.

**I. NESARC Supports FWS’s Efforts to Bring Its Regulatory Approach to the Adoption of “Take” Prohibitions for Threatened Species in Line with the Clear Terms of Section 4(d) and NMFS’s Historical Practice.**

NESARC supports the Proposed Rule. Bringing FWS’s regulations and practices into line with NMFS’s historical practices regarding Section 4(d) will provide regulated entities with certainty and clear guidance on how to conduct activities in a manner that appropriately protects threatened species. There are numerous benefits gained through the application of species-specific Section 4(d) rules to threatened species. First, species-specific rules allow the agency to tailor its “take” regulations to the individual species based on the species’ status and actual threats. Second, specificity within a Section 4(d) rule provides certainty in application—which is often missing under FWS’s present approach. Finally, utilizing species-specific rules also will allow FWS to better utilize its conservation-focused resources and personnel by targeting their efforts on the causes contributing to the impacts on threatened species.

NESARC also supports FWS’s decision to implement the Proposed Rule on a prospective basis. The prospective application of species-specific rules to newly listed species will avoid any confusion as to the management of already listed species. That said, although this Proposed Rule does not require any changes to the management of presently listed threatened species, the same benefits that support prospective species-specific Section 4(d) rules also support developing such rules for presently listed threatened species as opportunities arise in the future.

**II. FWS Must Clarify the Interaction between Section 4(d) Rules for Threatened Species and Other Aspects of the ESA.**

While NESARC supports the change to the adoption of species-specific take prohibitions for threatened species under Section 4(d), there must be commensurate recognition and harmonization of those take prohibitions as applied to existing conservation mechanisms for the relevant species. In particular, there are a number of mechanisms by which voluntary conservation measures may be adopted prior to a listing determination, including Candidate Conservation Agreements (with and without assurances) (“CCA/As”), Habitat Conservation Plans (“HCPs”), and Section 7 conference opinions. These conservation measures are then afforded prospective protection through the application of incidental take authorization at the time of a species’ listing.

The Proposed Rule does not address the treatment of existing voluntary conservation mechanisms which, by their terms, will have incidental take authorizations applied at the time of

listing.<sup>3</sup> To address and reduce this uncertainty, NESARC recommends that FWS adopt the following steps:

- At the time of a proposed listing determination in which a species will be designated as threatened, FWS should compile information on any existing CCA/As, HCPs, Section 7 conference opinions, or other voluntary conservation agreements or plans that cover the applicable species;
- Develop a compendium of the activities covered by these conservation mechanisms and all measures adopted to avoid or minimize the impacts upon a species or its habitat for which incidental take authorization would be extended upon any listing determination;
- Where the Section 4(d) rule determines that certain activities will not result in prohibited take, the exclusion should explicitly extend to such activities being undertaken under a pre-existing conservation mechanism; and
- Confirm that under the species-specific Section 4(d) rule, incidental take authorizations for the identified conservation mechanisms are applicable—without requiring further modification unless authorized by the terms of those existing mechanisms.

### **III. FWS Should Adopt Species-Specific Rules Concurrent with Final Listing Rules to the Extent Necessary and Practicable.**

In the Proposed Rule, FWS requests comments on its intention to finalize species-specific Section 4(d) rules concurrent with final listing rules or reclassification determinations.<sup>4</sup> NESARC generally supports FWS's approach, but notes that species-specific Section 4(d) rules should only be adopted to the extent they are necessary and should be promulgated concurrent with final listing rules or reclassification determinations to the extent practicable. FWS should commit to publishing species-specific Section 4(d) rules in a timely manner to put agencies and the public on notice about the applicable restrictions for newly listed threatened species. However, in some cases, it may not be possible to finalize the appropriate or necessary species-specific measures concurrent with a final listing rule or reclassification determination. In such circumstances, FWS should publish the proposed species-specific Section 4(d) rule with the final listing rule or reclassification determination, and identify the anticipated publication date of the subsequent final 4(d) rule.

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<sup>3</sup> A commensurate level of uncertainty will exist to the extent that FWS later modifies a Section 4(d) rule for a species that is the subject of formal biological opinions and other incidental take authorizations.

<sup>4</sup> Proposed Rule at 35,175.

#### **IV. Conclusion**

NESARC greatly appreciates the opportunity to provide FWS with these comments on its proposed revisions to the regulations governing the prohibitions applicable to threatened wildlife and plants. We respectfully request that FWS take NESARC's comments into consideration when finalizing the regulatory language.

Sincerely,

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

Tyson C. 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 Fuel and Petrochemical  
Manufacturers**  
*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*

**High Plains Power, Inc.**  
*Riverton, Wyoming*

**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 Realtors**  
*Washington, DC*

**National Association of State Departments of Agriculture**  
*Arlington, Virginia*

**National Association of Wheat Growers**  
*Washington, DC*

**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*

**Salt River Project**  
*Phoenix, AZ*

**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*

**Western Energy Supply and Transmission (WEST) Associates**  
*Tucson, AZ*

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

**Western Business Roundtable**  
*Lakewood, 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*