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Re: Comments on Joint U.S. Fish and Wildlife Service and National Marine Fisheries Service Habitat Conservation Planning Handbook Draft Revision, 81 Fed. Reg. 41986 (June 28, 2016)

Dear Ms. Adams and Ms. Coll:

The Independent Petroleum Association of America (IPAA), American Petroleum Institute (API), American Exploration & Production Council (AXPC), Petroleum Association of Wyoming (PAW) and Western Energy Alliance (Alliance) (the Trades) submit these comments on the joint U.S. Fish and Wildlife Service (FWS) and National Marine Fisheries Service (NMFS) (the Services) draft revision to their Habitat Conservation Planning Handbook (Draft HCP Handbook), 81 Fed. Reg. 41986 (June 28, 2016).

The Trades' members support conserving at-risk species and their habitat. Our members have initiated voluntary habitat conservation plan (HCP) processes with the Services in multiple instances as part of an application for an incidental take permit (ITP) pursuant to section 10(a)(1)(B) of the Endangered Species Act (ESA). The Trades' members echo concerns acknowledged by the Services that the HCP process is too costly, inefficient, and results are uncertain. 81 Fed. Reg. 41987; Draft HCP Handbook Section 1.2.3 at 1-5 to 1-6. Unfortunately, however, the revisions to the HCP process as provided in the Draft HCP Handbook will further impede rather than improve the process. In addition, the FWS has missed an opportunity to encourage the use of voluntary HCPs by making the process too complex, onerous, and costly.

The Services' revisions and additional process created in the Draft HCP Handbook substantively alter the way HCPs are developed by project proponents and processed by the Services despite being explained in the Federal Register as only "ranging from clarification of existing guidance to policy-level changes." These revisions create a more complex and regimented process that will reduce flexibility in HCP development, contradict the definition of adaptive management defined by the Services', eliminate the potential for innovative new conservation tools that can be incorporated into HCPs, provide little or no additional benefit to subject species and their critical habitat, and result in less certainty for parties seeking voluntary conservation agreements.

The Draft HCP Handbook incorporates recently released policies and executive orders by the White House and Executive Branch agencies related to the conservation of threatened and endangered species and their habitat. These new conservation and mitigation policies are presented as new required standards for ITP issuance, despite a lack of statutory authority for such requirements, and when, in fact, some of these policies (e.g., draft FWS Mitigation Policy) are acknowledged by the Services to be only in draft form at this time while other such policies (e.g., draft NMFS mitigation policy(ies)) have not yet been developed. These new required standards (i.e., policies) are being prematurely incorporated into the Draft HCP Handbook, complicating rather than simplifying the applicant permitting process, and the Services' HCP review and approval process.

The Draft HCP Handbook references a 'Toolbox', which the Services state will include important resources, detailed instructions, examples, and useful advice, however, the 'Toolbox' ¹is not included in the Draft HCP Handbook for review and comment. If the Services' believe the HCP Handbook Toolbox is equally important to understanding the HCP program as the information in the body of the Handbook, stakeholders should be given reasonable time to review and comment on the Toolbox before publication of the final HCP Handbook.

The proposed revisions provided in the Draft HCP Handbook do not achieve the Services' stated goals of providing efficiency, cost-controls, and more certainty in the process. Instead, the Draft HCP Handbook prescribes an overly rigid framework that will stymie voluntary conservation efforts and stifle responsible development. In particular, the draft handbook mandates how an HCP is developed and the conservation and mitigation measures the HCP must contain. While the handbook should provide guidelines for developing and processing HCPs subject to the existing statutory and regulatory requirements, the draft handbook ostensibly creates a series of obstacles—at every turn—that the applicant must successfully traverse to avoid a summary denial of the application. This could not have been the Services' intent and it most

¹ The "Toolbox" is noted on page 1-14 of the Draft HCP Handbook, as follows: "Some processes and requirements for developing and approving HCPs can be quite lengthy. Rather than interrupting the flow of the HCP phases in the body of the Handbook, we placed related detailed information in appendices and in the HCP Handbook Toolbox [*Link will be added in final version*]. The HCP Handbook Toolbox is intended to be dynamic and includes important resources, such as more detailed instructions, examples, templates, and other useful tips and advice. The appendices and HCP Handbook Toolbox are equally important to understanding the HCP program as the information in the body of the Handbook."

assuredly does not reflect Congress' desire to encourage voluntary conservation for imperiled species.

Instead of providing guidelines for HCP creation and explaining the HCP and ITP process as provided in the 1996 HCP Handbook, the Draft HCP Handbook seemingly now requires project proponents to undergo a detailed pre-development and negotiation process with the Services to either achieve a conservation plan designed by the Services or risk ITP application denial. The pre-development and negotiation process offers no assurances of timely agency response at any time in the revised process or consistency in how consultations between the Services and applicants will proceed in an adaptive management framework, further increasing the uncertainty of the entire HCP process.

In practice, the Services' staff have historically considered the HCP Handbook as more than guidance, treating its provisions as quasi-regulatory requirements. Significantly, the revised Draft HCP Handbook contains provisions exceeding the Services' authority under the ESA with relation to mitigation standards for an ITP. The broad-ranging revisions and additions to the Draft HCP Handbook are much more than clarifications of guidance and policy; as such, the revisions and additions to the Draft HCP Handbook should be accomplished via informal rulemaking.

The Trades request the Services withdraw the Draft HCP Handbook in its entirety and re-revise the 1996 HCP handbook consistent with the stated goals of the proposed revisions and existing regulatory framework and after addressing the Trades' comments, concerns and suggested revisions detailed below. The Trades request that the Services create an appropriate guide for streamlining the developing and processing of HCPs that incentivizes voluntary conservation, including efficient collaboration and participation in the HCP process. The HCP Handbook should provide reasonable and rational means to achieving ITP approval within the Services' statutory and regulatory authority. The Trades also request the Services release a re-revised Draft HCP Handbook for public review and comment prior to finalizing the re-revised HCP Handbook.

I. Trades' Interests

IPAA is the national association representing the thousands of independent crude oil and natural gas explorer/producers in the United States. It also operates in close cooperation with 44 unaffiliated independent national, state, and regional associations, which together represent thousands of royalty owners and the companies which provide services and supplies to the domestic industry. IPAA is dedicated to ensuring a strong and viable domestic oil and natural gas industry, recognizing that an adequate and secure supply of energy developed in an environmentally responsible manner is essential to the national economy.

API is a national trade association representing over 640 member companies involved in all aspects of the oil and natural gas industry. API's members include producers, refiners, suppliers, pipeline operators, and marine transporters, as well as service and supply companies that support all segments of the industry. API member companies are leaders of a technology-driven industry that supplies most of America's energy, supports more than 9.8 million jobs and 8 percent of the U.S. economy, and since 2000, has invested nearly \$2 trillion in U.S. capital projects to advance all forms of energy, including alternatives.

AXPC is a national trade association representing 31 of America's largest and most active independent natural gas and crude oil exploration and production companies. AXPC's members are "independent" in that their operations are limited to the exploration for and production of natural gas and crude oil. Moreover, its members operate autonomously, unlike their fully integrated counterparts, which operate in additional segments of the energy industry, such as refining and marketing. AXPC's members are leaders in developing and applying the innovative and advanced technologies necessary to explore for and produce natural gas and crude oil and that allows our nation to add reasonably priced domestic energy reserves in environmentally responsible ways.

PAW is Wyoming's largest oil and gas trade association, members of which produce over ninety percent of the natural gas and eighty percent of the crude oil in the state.

The Alliance represents over 300 companies engaged in all aspects of environmentally responsible exploration and production of oil and natural gas in the West. Alliance members are independents, the majority of which are small businesses with an average of fifteen employees.

II. Summary of Comments

Although proposed by the Services as a clarification and simplification of the HCP process, the Draft HCP Handbook contains 391 pages (17 chapters, 3 appendices) plus an undetermined number of documents and pages included in its associated "Toolbox" versus 306 pages (8 chapters, 18 appendices) for the current, 1996 HCP and ITP Processing Handbook (1996 HCP Handbook). The Draft HCP Handbook provides substantive process, procedure and requirements that project proponents must achieve to obtain an ITP and be able to continue or initiate new, lawful activity within threatened and endangered species' habitat.

As noted in the 1996 HCP Handbook, "Congress . . . intended this [HCP] process to reduce conflicts between listed species and economic development activities, and to provide a framework that would encourage 'creative partnerships' between the public and private sectors and state, municipal, and Federal agencies in the interests of endangered and threatened species and habitat conservation." 1996 HCP Handbook Chapter 1.C. at 1-2 (citing H.R. Rep. No. 97-835, 97th Congress, Second Session). If our perspective is accurate, it doesn't appear the revisions will foster "creative partnerships". Congress did not intend such an inefficient, ineffective, expensive process. Congress specifically directed the within the ESA that if a project proponent meets certain issuance criteria, "the Secretary shall issue the permit."²

- The proposed revisions in the Draft HCP Handbook substantively alter the way HCPs are developed and analyzed, in exceedance of the Services' statutory and regulatory authority and in violation of the Administrative Procedure Act (APA).

² 16 U.S.C. § 1539 (a)(2)(B). The use of the term "Secretary" refers to either the Secretary of the U.S. Department of the Interior or the Secretary of the U.S. Department of Commerce. 16 U.S.C. § 1532(15).

- The Draft HCP Handbook must clearly state ITP statutory and regulatory issuance criteria and ensure that the guidance and staff direction contained in the Draft HCP Handbook is consistent with, and bound by, that statutory authority.
- The Draft HCP Handbook must recognize that the ESA’s ITP provision provides for minimization and mitigation to a “maximum extent practicable” and does not require mitigation to a “net benefit” or “no net loss” standard. The Draft HCP Handbook cannot unilaterally revise or ignore the maximum extent practicable standard.³
- The Draft HCP Handbook cannot impose mitigation requirements that exceed the Services’ authority under the ESA through imposition of a “net benefit” and “no net loss” standard.
- The Draft HCP Handbook cannot hold the HCP process to a recovery standard, which exceeds Congressional intent in creating the ITP process.
- The Draft HCP Handbook must recognize that while the HCP development process is collaborative, ultimately the HCP is the applicant’s proposal and should be viewed through the lens of the applicant’s purpose and need for the project.
- The Draft HCP Handbook must acknowledge the inherent uncertainties associated with attempting to predict climate change impacts on site-specific actions and cannot make ITP issuance contingent on climate change analysis that is not aptly supported by science, is unsuited for analysis at the scale of the typical HCP, and would undermine the certainty to landowners that Congress intended for the HCP process to provide.
- The Draft HCP Handbook should ensure that adaptive management guidance allows for scientific uncertainty, provides a means for conservation and mitigation measures to increase and decrease based on new information, and provides certainty in the process.
- The Draft HCP Handbook should recognize the role of the National Environmental Policy Act (NEPA) analysis in informing agency decision-making throughout the HCP process.
- The Draft HCP Handbook must remove complex additional requirements for HCP development that discourage voluntary conservation in contravention of the intent of Congress.

For these reasons the Trades request the Services withdraw the entire Draft HCP Handbook and revise the HCP Handbook consistent with these comments.

³ 50 C.F.R. §§ 17.22, 17.32(b)(2)(i); 50 C.F.R. § 222.307(c).

III. The Draft HCP Handbook Cannot Impose Requirements that Exceed the Services' Statutory and Regulatory Authority or Seek to Unlawfully Amend the ESA

The Services cannot exceed their statutory and regulatory authority by modifying issuance criteria through revisions in the Draft HCP Handbook. The HCP process is designed to result in issuance of an ITP, allowing for take of a threatened or endangered species where such taking is “incidental to, and not the purpose of” an otherwise lawful activity. 16 U.S.C. § 1539(a)(1)(B). Congress provided this exception to the provisions of the ESA to allow private entities to continue existing or initiate new lawful projects within threatened or endangered species' habitat without violating federal law.

The Services cannot create wholesale revisions to the Draft HCP Handbook under the guise of “clarification” or otherwise modify issuance standards for an ITP that exceed statutory and regulatory authority without formal rulemaking. Congress provided that, upon an applicant's showing that take of a federally-listed species is incidental to, and not the purpose of, an otherwise lawful activity, the Services are required to issue an ITP if they find that the application, including the HCP, meets the requisite issuance criteria.

Issuance criteria includes:

- (i) the taking will be incidental;
- (ii) the applicant will, to the maximum extent practicable, minimize and mitigate the impacts of such taking;
- (iii) the applicant will ensure that adequate funding for the plan will be provided; [and]
- (iv) the taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild

16 U.S.C. § 1539(a)(2)(B). Both the statute and the Services' implementing regulations make clear that if these issuance criteria are met, “the Secretary shall issue the permit.” *Id.* (emphasis added); *see also* 50 C.F.R. §§ 17.22, 17.32; 50 C.F.R. §§ 222.25, 222.27, 222.31. Accordingly, while there is discretion in the findings that the Services have to make, there is no discretion in issuing the permit once the criteria have been satisfied.

Despite this clear mandate, the Draft HCP Handbook is filled with language requiring a project proponent to consult with Service staff prior to developing and during development of an HCP in order to negotiate provisions and satisfy Service expectations for the proposed HCP. Repeated consultation and negotiation requirements will create HCPs that while following Service-approved conservation and mitigation precedent, do not allow for flexibility or innovation. While the Draft HCP Handbook reminds the Services that in the processing phase of permitting “the HCP is the applicant's document,” it makes clear that an HCP will likely only meet preliminary requirements if there has been close coordination throughout the development of the HCP process. Draft HCP Handbook Section 14.3 at 14-6. Such continued consultations and negotiations allow the Services to mandate that project proponents incorporate rigid, inflexible and

overly burdensome conservation and mitigation standards instead of incentivizing and encouraging project proponents to propose and develop innovative tools for the benefit of a species. The Draft HCP Handbook should encourage consultations and negotiations that allow the Services and the project proponents to incorporate the most appropriate and reasonable conservation and mitigation measures for the benefit of a species.

The Services should review a proposed HCP based on statutory and regulatory issuance criteria and not based on whether the Services actively participated in development of the HCP. The Services must provide flexibility to allow for incidental take from lawful activities, and must issue an ITP once the statutorily-provided issuance criteria are met.

Requested Action: The Draft HCP Handbook should be revised to clearly state ITP issuance criteria and the standards used by staff to evaluate compliance. The revised handbook should also make clear that all permitting decisions are based on satisfying statutory issuance criteria instead of making approval of the HCP and issuance of an ITP contingent on a series of subjective negotiations between the Service and project proponents.

IV. The Draft HCP Handbook Cannot Impose Mitigation Requirements that Exceed the Services' Statutory and Regulatory Authority

The Draft HCP Handbook's goal that every HCP fully offset impacts of covered activities to achieve a "no net loss" standard, and that large-scale HCPs provide landscape conservation to achieve a "net benefit" standard is a *de facto* and unilateral revision of regulatory requirements that exceeds the Services' authority under Section 10(a)(2)(B) of the ESA and implementing regulations without complying with formal rulemaking under the APA. For incidental take permits, Congress expressly allowed incidental take of threatened and endangered species without a "no net loss" or "net benefit" standard. The Services cannot discard Congress' specific direction through revisions in the Draft HCP Handbook.

A. The Draft HCP Handbook's Mitigation Requirements Exceed the Services' Authority under Section 10(a)(1)(B) of the ESA

The Draft HCP Handbook's incorporation of the November 6, 2015 Presidential Memorandum regarding mitigation exceeds the Services' statutory authority under Section 10 and goes beyond the bounds of Congressional intent for the HCP program and analysis of ITP applications. The Services cannot require "net benefit" and "no net loss" standards to HCPs and ITPs under section 10(a)(1)(B) of the ESA because these standards are inconsistent with the issuance criteria provided for ITP approval. Section 10(a)(2)(B) requires the Services, when issuing ITPs, to find that permit applicants will "minimize and mitigate" the impacts of the proposed taking "to the maximum extent practicable." 16 U.S.C. § 1539(a)(2)(B)(ii). The issuance criteria does not require that the mitigation—or even that the HCP as a whole—result in a "net benefit" or in "no net loss."⁴

⁴ 16 U.S.C. § 1539(a)(2)(A)(iv) allows the Secretary to request certain additional requirements of an HCP for the benefit of a species. However, this statutory requirement does not provide the Secretary *carte blanche* to ask for any requirement he might desire. E.g., this provision cannot be cited to require an

The fact that the Services lack authority to require mitigation that produces a “net benefit” from permit applicants under section 10(a)(1)(B) is underscored by the ESA’s legislative history. A draft version of the ESA contained a requirement that HCPs yield a benefit for species by “promot[ing] the conservation of listed species or critical habitat.” See S. 2309, 97th Cong. § 7(o)(1)(A) (as introduced, Mar. 30, 1982). Congress intended that a conservation plan would address “the habitat throughout the area and *preserve[] sufficient habitat* to allow for *enhanced survival* of the species.” 1982 USCACAN 2860 at 2873 (emphasis added). Congress elected to only require that HCPs “minimize and mitigate” the impacts of a taking “to the maximum extent practicable.” See 16 U.S.C. § 1539(a)(2)(A)(ii). Accordingly, the legislative history of the ESA confirms that Congress never intended that the Services could require mitigation that produces a “net benefit.” In other words, the purpose of an HCP is to identify measures that minimize and mitigate the effect of the specific “take” that would otherwise occur. The Draft HCP Handbook’s incorporation of the Presidential Memorandum on mitigation ignores Congress’ intent and the standards it incorporated into the ESA.

Revising the HCP Handbook to include “net benefit” and to require “no net loss” is a *de facto* unilateral revision of regulatory requirements. See *Alaska Prof’l Hunters Ass’n, Inc. v. FAA*, 177 F.3d 1030, 1034 (D.C. Cir. 1999); see also *Paralyzed Veterans of America v. D.C. Arena*, 117 F.3d 579, 586 (D.C. Cir. 1997). The Draft HCP Handbook should be revised to be consistent with the 1996 HCP Handbook, which expressly recognizes that “[n]o explicit provision of the ESA or its implementing regulations requires that an HCP must result in a net benefit to affected species.” 1996 HCP Handbook Section 3(B)(3)(b) at 3-21. Further, the 1996 HCP Handbook emphasizes that the Services may only *encourage* minimization and mitigation measures that yield a “net benefit.” In contrast, the Draft HCP Handbook plainly states that “HCPs should at a minimum fully offset their impacts which results in a ‘no net loss’ of resources . . . [and] large scale plans . . . should confer a net benefit to conservation” Draft HCP Handbook Section 9.0 at 9-3.

In sum, the language of the ESA and its legislative history demonstrate that the Services may not require mitigation that yields a “net benefit” or “no net loss” from ITP applicants. The Services cannot unilaterally revise regulatory requirements as set forth by Congress through revisions in the Draft HCP Handbook. The Services may not require “net benefit” and “no net loss” standards to HCPs and associated ITP applications under section 10(a)(1)(B).

Requested Action: The Draft HCP Handbook should be revised to remove any requirement that mitigation achieve a “net benefit” or “no net loss” standard. While this can be a goal for the Services, it must be clearly articulated as such. Further, the Handbook should clearly state that mitigation to a “maximum extent practicable” standard is the proper authorized standard for issuance criteria.

applicant to minimize and mitigate impacts of a taking beyond the maximum extent practicable. Rather, the Secretary can require additional measures that account for changed circumstances, unforeseen circumstances, duration, and discontinuation.

B. The Draft HCP Handbook’s Mitigation Requirements Unlawfully Exceed the Services’ Authority under Section 7 of the ESA

The Services cannot require mitigation to a “net benefit” or “no net loss” standard for jeopardy analysis. As the Services are aware, section 7 of the ESA requires that federal agencies, “in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species” 16 U.S.C. § 1536(a)(2).

The standards in the ESA allow federal actions to have some impact to listed species or their critical habitat, as long as the impact does not jeopardize the continued existence of a listed species or destroy or adversely modify its critical habitat. *See, e.g., Conservation Cong. v. U.S. Forest Serv.*, 720 F.3d 1048, 1057 (9th Cir. 2013) (“Even completely destroying 22 acres of critical habitat does not necessarily appreciably diminish the value of the larger critical habitat area.”); *Wild Fish Conservancy v. Salazar*, 628 F.3d 513, 523 (9th Cir. 2010) (observing that an action can impact the survival or recovery of listed species without jeopardizing the species’ continued existence); *Butte Envtl. Council v. U.S. Army Corps of Eng’rs*, 620 F.3d 936, 948 (9th Cir. 2010) (concluding that “[a]n area of a species’ critical habitat can be destroyed without appreciably diminishing the value of critical habitat for the species’ survival or recovery.”); *Pac. Coast Fed’n of Fisherman’s Ass’ns v. Gutierrez*, 606 F.Supp.2d 1195, 1208 (E.D. Cal. 2008) (rejecting interpretation of “adverse modification” that “would lead to irrational results, making any agency action that had any effects on a listed species a ‘jeopardizing’ action”). Just this year, the FWS recognized that impacts to critical habitat may occur without resulting in its “destruction or adverse modification.” *See* 81 Fed. Reg. 7,214, 7,222 (Feb. 11, 2016).

Congress allowed federal agencies to take actions that have some impacts on listed species or their critical habitat. Thus, the Services cannot require project proponents to mitigate to a “net benefit” or “no net loss” standard in order to reach findings of “no jeopardy” and “no destruction or adverse modification.” Accordingly, the Service’s required mitigation standards in the Draft HCP Handbook are inconsistent with section 7 of the ESA.

Requested Action: The Draft HCP Handbook should be revised to make clear that mitigation to a “net benefit” or “no net loss” standard is not required for a finding that a species will not be jeopardized by a proposed HCP and incidental take application.

C. The Draft HCP Handbook’s Mitigation Requirements Amend Existing Regulation Governing Incidental Take Permits in Violation of the Administrative Procedure Act

The Draft HCP Handbook’s mitigation requirement for a “net benefit” or “no net loss” standard is a substantive rule imposing new criteria for determining whether an HCP is sufficient. This mitigation standard constitutes a substantive rule and cannot be imposed without informal rulemaking under the APA.

The Draft HCP Handbook’s mitigation requirements amend the Services’ existing regulations governing incidental take permits under the ESA. The Draft HCP Handbook’s “net

benefit” and “no net loss” mitigation requirements impose new requirements on permit applicants and reflect legislative line-drawing. The Services cannot amend mitigation requirements without following APA guidance for informal rulemaking.

The Draft HCP Handbook’s requirement that mitigation achieve a “net benefit” or “no net loss” constitutes a substantive rule because it modifies the Services’ requirements for issuance of ITPs under the ESA. When agencies seek to change procedures set forth in their regulations, they must amend those regulations through notice and comment rulemaking under section 553 of the APA. *City of Idaho Falls v. Fed. Energy Regulatory Comm’n*, 629 F.3d 222, 231 (D.C. Cir. 2011). If an agency action “adopts a new position inconsistent with existing regulations, or otherwise effects a substantive change in existing law or policy,” the action is a legislative rule requiring compliance with the notice and comment procedures at 5 U.S.C. § 553. *Mendoza v. Perez*, 754 F.3d 1002, 1021 (D.C. Cir. 2014).

Here, the Draft HCP Handbook directs the Services to require compensatory mitigation yielding a “net benefit” or “no net loss” when issuing ITPs. This is inconsistent with the Services’ regulations that require an applicant to mitigate the impacts of a taking “to the maximum extent practicable.” 50 C.F.R. § 17.22(b)(2)(i)(B). Therefore, the Draft HCP Handbook’s mitigation requirements constitute a substantive rule under the APA, and cannot be implemented without informal rulemaking.

Requested Action: The Draft HCP Handbook’s mitigation requirements of “net benefit” or “no net loss” should be removed unless and until informal rulemaking modifies regulation allowing for a higher mitigation requirement for ITP applicants.

D. The Draft HCP Handbook’s Mitigation Requirements Will Result in a Regulatory Taking

The Services cannot require mitigation to a “net benefit” or “no net loss” standard without risking a compensable taking under the Fifth Amendment of the U.S. Constitution. The U.S. Supreme Court has held that a compensable taking occurs when the government conditions approval of a land use permit on the dedication of property or money to the public unless there is a “nexus” and “rough proportionality” between the government’s requirements and the impacts of the proposed land use. *Koontz v. St. Johns River Water Mgmt. Dist.*, ___ U.S. ___, 133 S. Ct. 2586, 2595 (2013); *Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994); *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825, 837 (1987). The Court reasoned that “[e]xtortionate demands for property in the land-use permitting context run afoul of the Takings Clause not because they take property but because they impermissibly burden the right not to have property taken without just compensation.” *Koontz*, 133 S. Ct. at 2589-90.

A requirement that an HCP provide mitigation that yields a “net benefit” or “no net loss” could result in a compensable taking because it requires a project proponent to provide more mitigation than required by section 10(a)(1)(B)’s maximum extent practicable standard. The “net benefit” or “no net loss” mitigation standard therefore lacks a “rough proportionality” to the impact, leading to a compensable taking. The Services should remove the “net benefit” or “no net loss” requirements from the Draft HCP Handbook.

Requested Action: The Draft HCP Handbook should be revised to remove the “net benefit” or “no net loss” mitigation standard as requirements for permit approval.

V. The HCP Process Cannot Be Held To a Recovery Standard Under the ESA

The Services cannot hold the HCP process to a recovery standard. An HCP is designed as a conservation plan and cannot be required to implement mitigation measures to provide a net benefit for the affected species. Section 10 of the ESA specifically authorizes taking of a threatened or endangered species that is otherwise prohibited by section 9(a)(1)(B). As part of the ITP process allowing a legal taking, section 10 requires a *conservation* plan, not a *recovery* plan.

The Draft HCP Handbook is inconsistent in its treatment of required standards for an HCP. Although the Draft HCP Handbook explains that the Services review an HCP to assess whether “the proposed action is likely to cause an appreciable reduction in the likelihood of [the] . . . recovery of the species,” Draft HCP Handbook Section 14.12.1 at 14-28, the document also suggests that the HCP process is a recovery tool:

- Revisions contained in the Draft HCP Handbook “will ensure this Handbook is a viable and powerful tool for conservation and the recovery of threatened and endangered species.” Draft HCP Handbook Section 1.4.3 at 1-14.
- Asking whether a conservation provision in a draft HCP will “increase conservation and contribute to species recovery” in order to determine if the provision is appropriate to use in the HCP. *Id.* Section 2.2.2 at 2-4.
- Services “encourage applicants to develop conservation plans that contribute to the recovery of covered species.” *Id.* Section 2.2.4 at 2-5.

The ESA provides guidelines for the Services in preparing a recovery plan following the listing of any species, which is the Services’ responsibility to create. 16 U.S.C. § 1533(f). A recovery plan is in addition to any private conservation plan established and should not be substituted or replaced by a conservation plan.

While Congress directed the Services to consider the extent to which an HCP “is likely to enhance the habitat of the listed species or increase the long-term survivability of the species or its ecosystem,” H.R. Report No. 97-835, 97th Congress, Second Session, the FWS itself has acknowledged in the past that an ITP provides a mitigation standard, not a recovery standard. *See Spirit of Sage Council v. Kempthorne*, 511 F. Supp. 2d 31, 42 (D.D.C. 2007). In *Spirit of Sage Council*, FWS justified its implementing regulations for ITP issuance, and argued against an interpretation of ITPs that would require an HCP insure the survival and recovery of listed species. *Id.* Based on FWS’s arguments, the court held that ITP requirements “speak to minimizing impact upon species, but do not address at all the recovery of species.” *Id.* The court further held that “while applicants must submit a ‘conservation’ plan, the statutory text [of the ESA] makes clear that ITPs can be granted even if doing so threatens the recovery of a listed species.” *Id.* at 43.

The Services, through the Draft HCP Handbook, cannot now create a wholesale change and interpret the HCP process to require project proponents to meet a net benefit, recovery

standard. HCPs must continue to be held to a mitigation standard only, requiring ITP issuance where mitigation reaches the maximum extent practicable.

Requested Action: The Draft HCP Handbook should be revised to emphasize that while it may be beneficial for an HCP to contain certain conservation measures from an existing recovery plan for a species, the HCP in no way replaces a recovery plan or the Services' obligation to prepare one, nor is an HCP held to a recovery standard.

VI. The Draft HCP Handbook Should Ensure Flexibility and Collaboration in the ITP/HCP Process

The Trades agree with the Services that there should be collaboration between project proponents and the agency during the development of voluntary HCPs. Such collaboration will ensure that all parties have a full understanding of the proposed action. The Services must recognize that the proposed action is the applicant's action and must keep in mind the applicant's purpose and need for the project when discussing conservation, mitigation and other measures proposed as part of its action. However, the extent to which collaboration should occur is not consistent in the draft Handbook. As the Draft HCP Handbook states, the HCP is the applicant's document. Draft HCP Handbook Section 14.3 at 14-6. This principle should be clearly set forth throughout the Draft HCP Handbook, including at the start of the HCP development process, instead of emphasized only at the field office review stage in the revised process.

In the Draft HCP Handbook the Services introduce the concept of starting slow in the HCP development in order to go fast through final review of the HCP and ITP application. The existing process under the 1996 HCP Handbook is already cumbersome, costly and inefficient. The Draft HCP Handbook does nothing to streamline the process and now expressly encourages its personnel to lengthen the process further by "starting slow." This is completely contrary to Congress's intent and the goals of project proponents. In fact, a common complaint from project proponents is the extraordinary time and expense needed to navigate the byzantine HCP process. This is due largely to the amount of consultation that the Services, at both the regions and headquarters, requires to process, review, and comment on a proposal through first draft, second draft and a final document. By expressly taking the position in the Draft HCP Handbook that the process should "start-slow" and having the temerity to suggest within the document that a finished HCP could take as long as fifty months, the Services are encouraging their personnel to actually lengthen an already unnecessarily long and unnecessarily expensive process.

HCP proponents recognize that consultation with the Services is important but it should be measured and appropriate for the type and complexity of a given project. In practice, repeated consultations through multiple hierarchical levels often create unnecessary obstacles that project proponents must clear each at great time and expense. In the meantime, funds that could have been devoted to conservation are funneled away by the process. Further, repeated consultations, often on the same subject matter, creates a process that stifles innovation and ensures that this is a Service-driven process. With additional requirements for consultation throughout the HCP development process and statements that approval of the HCP and ITP application will be contingent on Service-driven outcomes, it is clear that the proposed HCP development process is intended to include a series of negotiations wherein the project proponent's conservation ideas and strategies must yield to and potentially be entirely replaced by the Services' preferred conservation

tools. To strike the proper balance, the HCP process must start with a recognition of the goals and objectives of the project proponent's proposed action, and work towards achieving an ITP within the proposed conservation parameters to the extent possible, including consideration of the costs and benefits of the proposed action.

To maximize conservation, the Draft HCP Handbook should not rely solely on existing conservation tools and pre-determined outcomes, but emphasize flexible, innovative and dynamic approaches to conservation and mitigation. The Draft HCP Handbook must recognize that HCPs are species and habitat specific. As such, avoidance, minimization and mitigation measures must be tailored to the needs of the species and associated habitat that the HCP is designed to conserve.

The Draft HCP Handbook must elaborate clearly on the methodology of the adaptive management process, specifically on the guidance of HCP creation, in the types and levels of conservation implemented, and in the ability to modify the conservation plan through adaptive management as new information is obtained through scientific studies and through the monitoring component of the HCP. Without this focus on flexibility, the Service will have failed to achieve its desired end; the HCP process will remain expensive and inefficient, and will not provide the necessary flexibility and certainty that incentivizes project proponents to undertake voluntary conservation. Indeed many of the concerns raised by individuals and entities who have been involved in the HCP process to date stem from a lack of flexibility rather than from lack of consultation throughout the process.

It should be the goal of all parties involved in the HCP development process to achieve a permit application package that will meet issuance criteria. This will require collaboration and a substantive understanding of the proponent's proposed conservation measures. Where there is open dialogue between the Services and the applicant, the parties can constructively address and resolve potential misconceptions and ensure that the parties are maximizing their working relationship. The Draft HCP Handbook should emphasize this need for constructive collaboration and provide a consistent approach to the collaboration process throughout the document. Further, the Draft HCP Handbook should recognize that adaptive management provides a safety net for the Services in the face of any uncertainty, allowing the Services to deploy diverse conservation tools on the landscape and then through adaptive management refine, over time, to ensure conservation measures that are successful and beneficial to the species.

Requested Action: The Draft HCP Handbook should be revised to incentivize voluntary conservation efforts and emphasize effective collaboration and flexibility throughout the HCP process while also recognizing from the start, that the HCP is the applicant's proposal, not the agency's. The Draft HCP Handbook should encourage the applicants and Services to work together to ensure a mutual understanding of the applicant's purpose and need for the proposal and alignment with the requisite ITP statutory issuance criteria.

VII. The Draft HCP Handbook Must Recognize Minimization and Mitigation in the Context of a Maximum Extent Practicable Standard

The Draft HCP Handbook may not alter the issuance criteria to require applicants to minimize and mitigate impacts beyond the statutory requirement, i.e., the maximum extent practicable. 50 C.F.R. §§ 17.22, 17.32(b)(2)(i); 50 C.F.R. § 222.307(c). Rather, the HCP

Handbook must recognize that issuance criteria allows minimization and mitigation to a “maximum extent practicable” standard. As previously noted, the Services cannot use the Draft HCP Handbook to require a higher or different minimization and mitigation standard. The proposed revisions to the handbook are equivalent to a *de facto* and unilateral revision of regulatory requirements that the Services have no authority to make.

The minimization and mitigation standard for an ITP is not an absolute mandate that focuses only on “maximum extent” but that “maximum extent *practicable*” must be examined in the context of what the applicant can actually and realistically achieve. Specifically, the courts have given meaning to the phrase “maximum extent practicable” to mean what is “feasible or possible” and does not give the Services “unbridled discretion” to impose additional requirements. As stated in the *Fund for Animals v. Babbitt*, “[o]bviously, the phrase ‘to the maximum extent practicable’ does not permit an agency unbridled discretion. It imposes a clear duty on the agency to fulfill the statutory command to the extent that it is feasible or possible.” 903 F. Supp. 96, 107 (D.D.C. 1995) citing *Doe v. Board of Educ. of Tullahoma City Schools*, 9 F.3d 455, 460 (6th Cir. 1993); *SMS Data Products Group, Inc. v. United States*, 853 F.2d 1547, 1553 (Fed. Cir. 1988); *Cape May Greene, Inc. v. Warren*, 698 F.2d 179, 191 (3d Cir. 1983). Important to this understanding, “maximum extent practicable” does not require addressing (or an attempt to address) “each possibility.” *Fund for Animals*, 903 F. Supp. at 107.

The words “maximum extent practicable” “signify that the applicant may do something less than fully minimize and mitigate the impacts of the take where to do more would not be practicable.” *Nat’l Wildlife Fed’n v. Norton*, 306 F. Supp. 2d at 928 (emphasis added). Further, “the statutory language does not suggest that an applicant must ever do more than mitigate the effect of its take of species.” *Id.*

As explained in the Draft HCP Handbook, maximum extent practicable means: “within the available means, the applicant can feasibly do no more to minimize or mitigate the impacts of their take” Draft HCP Handbook Section 9.1.2 at 9-10. However, the Draft HCP Handbook then explains that use of the “maximum extent practicable” standard can be controversial so places a high burden on an applicant who wishes to utilize this mitigation standard, stating that “[d]emonstrating the conditions for which the maximum extent practicable has been reached can be complicated and controversial, so the applicant must have sound justification for the Service to even consider invoking this approach.” *Id.* at 9-11. Controversy should not be an outcome-determinative factor or a variable that justifies increased mitigation despite the fact that impacts would be fully offset by the proposed conservation plan. Further, even in instances where impacts are fully mitigated, ITP approval can still be controversial. *See Union Neighbors United, Inc. v. Jewell*, No. 15-5147, 2016 U.S. App. LEXIS 14377, at *45 (D.C. Cir. Aug. 5, 2016) (plaintiffs challenge that more mitigation could be achieved despite FWS statement that impacts are fully offset).

Courts have interpreted “maximum extent practicable” to mean that mitigation in an HCP “is rationally related to the level of take under the plan.” *WildEarth Guardians v. U.S. Fish and Wildlife Service*, 622 F. Supp. 2d 1155, 1165 (D. Utah 2009) (upholding FWS decision regarding ITP issuance despite plaintiff allegations that more mitigation could be done); *Nat’l Wildlife Fed’n v. Norton*, 306 F. Supp. 2d 920, 928 (E.D. Cal. 2004) (same).

Under the ESA, the Services are not “required to pick the best alternative or the one that would most effectively protect the [species] from jeopardy.” *San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581, 624 (9th Cir. 2014) (citing *Sw. Ctr. for Biological Diversity v. U.S. Bureau of Reclamation*, 143 F.3d 515, 523 (9th Cir. 1998)). Rather, the Services need only adopt a final plan “which complie[s] with the jeopardy standard and which could be implemented by the agency.” *Id.*; see also *San Luis & Delta-Mendota Water Authority v. Jewell*, 747 F.3d 581, 624 (9th Cir. 2014) (same); *Cowlitz Indian Tribe v. F.E.R.C.*, 186 Fed. Appx. 806, 809 (9th Cir. 2006) (same). The Services cannot deny an ITP application simply because all impacts to a species or its habitat cannot be fully mitigated, or because of controversy or because a complaint is lodged.

Requested Action: Consistent with the ESA, the Draft HCP Handbook should be revised to be consistent with the agencies’ existing authority and to allow project proponents to minimize and mitigate lawful incidental take of a species to the maximum extent practicable. Controversy cannot be an outcome-determinative factor justifying increased mitigation. Decision making must be based on substantiated scientific data in conformity with regulatory requirements.

A. The 1996 HCP Handbook Appropriately Explained the Level of Support for the Record when Utilizing the “Maximum Extent Practicable” Standard

The Draft HCP Handbook’s requirement that a project proponent must justify invoking use of the “maximum extent practicable” standard for minimization and mitigation with a five-step justification process is a *de facto* and unilateral revision of regulatory requirements that contradicts the ESA. Draft HCP Handbook Section 9.1.4 at 9-11. The 1996 HCP Handbook more appropriately explains the level of support needed in the administrative record when the “maximum extent practicable” standard is used.

The Draft HCP Handbook states that the applicant “must have sound justification” for not fully mitigating impacts to the covered species. Draft HCP Handbook Section 9.1.2 at 9-11. Further, “the applicant must provide written justification, with supporting documentation, to the Service that it cannot practicably do any more to offset the impacts of take.” *Id.* Section 9.1.3 at 9-11. The 1996 HCP Handbook more appropriately explains what should be the requisite justification consistent with the ESA:

particularly where the adequacy of the mitigation is a close call, the record must contain some basis to conclude that the proposed program is the maximum that can be reasonably required by that applicant. This may require weighing the costs of implementing additional mitigation, benefits and costs of implementing additional mitigation, the amount of mitigation provided by other applicants in similar situations, and the abilities of that particular applicant. Analysis of the alternatives that would require additional mitigation in the HCP and NEPA analysis, including the costs to the applicant is often essential in helping the Services make the required finding.”

1996 HCP Handbook Section 7(B)(2) at 7-3 to 7-4.

Nowhere in the statute or implementing regulations do Congress or the Services place the burden of proving that the applicant will, to the maximum extent practicable, minimize and

mitigate the impacts of taking. In fact, the 1996 HCP Handbook, which has guided the HCP process for 20 years, provides that the record need only provide “some basis” to conclude that mitigation to the maximum extent practicable is appropriate. *Id.* at 7-3. Instead of making a *de facto* unilateral revision to existing regulatory requirements by requiring a five-step process for demonstrating sufficient mitigation as proposed in the Draft HCP Handbook, the Services should work with the applicant to ensure appropriate information is contained in the record documenting that mitigation is to the maximum extent practicable standard. If the standard needs to be revised that is for Congress, and not the Services, to decide and implement.

Requested Action: The Draft HCP Handbook should be revised to recognize 20 years of existing precedent and litigation and explain that the maximum extent practicable standard is the appropriate mitigation standard. Further, the Draft HCP Handbook should be revised to direct the Services to work with the applicant to ensure that the record contains adequate support for the Services’ decision without creating an overly-burdensome process to do so.

B. The Administrative Record Need Only Provide a Rational Basis to Support Satisfaction of a “Maximum Extent Practicable” Standard

Under the governing statutory and legal frameworks, the administrative record need only show a rational basis for satisfaction of the maximum extent practicable standard. Requiring further justification is unnecessary, and the proposed HCP revisions do not provide a legal basis, nor could they, for departing from this long-established legal tenet.

From a legal standpoint, under the APA and NEPA, as long as an HCP has sufficient supporting documentation in the record to provide a rational basis for the approved mitigation, then the HCP is legally defensible and can stand alone on the record supporting it. 5 U.S.C. § 706(2)(A); *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (explaining that the duty of a court reviewing agency action under the APA is to ascertain whether the agency examined the relevant data and articulated a rational connection between the facts found and the decision made); *see also Marsh v. Oregon Natural Res. Council*, 490 U.S. 360, 378 (1989); *Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560, 1575 (10th Cir. 1994).

In litigation based on an administrative record, a court looks to whether, based on the record before the agency, the challenged decision is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A); *see also Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 413-14, 419 (1971); *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 378 (1989).

An agency’s actions must be supported by facts in the record. *Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560, 1575 (10th Cir. 1994). In reviewing the record, a court “will uphold a decision of less than ideal clarity if the agency’s path may reasonably be discerned.” *Bowman Transp., Inc. v. Arkansas- Best Motor Freight Sys.*, 419 U.S. 281, 286 (1974); *Woods Petroleum Corp. v. Dep’t of Interior*, 47 F.3d 1032, 1050 (10th Cir. 1995). “[T]he Secretary’s decision is entitled to a presumption of regularity.” *Overton Park*, 401 U.S. at 416.

In *Union Neighbors United v. Jewell*, the U.S. Court of Appeals for the District of Columbia recently turned to the language in the 1996 HCP Handbook to determine whether the

FWS had sufficient support in the administrative record to affirm issuance of an ITP. Because the 1996 HCP Handbook has a cursory explanation of what needs to be in the administrative record to support mitigation standards, the court was able to affirm the FWS's decision to issue a permit based on FWS's explanation in response to comments. No. 15-5147, 2016 U.S. App. LEXIS 14377, at *44-45 (D.C. Cir. Aug. 5, 2016). Where the Draft HCP Handbook sets a higher burden for justifying mitigation standards, the agency will also have a higher burden in explaining its decision within a final permit. That burden and the requisite support were set by Congress and are not for the Service to unilaterally alter.

The standard of review is narrow and highly deferential to the agency. *Overton Park*, 401 U.S. at 415-16. Judicial deference to agency decisions is particularly appropriate when the decisions are based on the agency's special expertise and professional opinions of its own experts. *Marsh*, 490 U.S. at 378. "A court is not empowered to substitute its judgment for that of the agency." *Overton Park*, 401 U.S. at 416. The Draft HCP Handbook should continue to provide that there be adequate support for mitigation within the administrative record, but this support should not be fully on the applicant to provide.

Requested Action: The Draft HCP handbook should be revised to recognize and explain that there need only be a rational basis in the administrative record to support use of the maximum extent practicable standard.

VIII. The Draft HCP Handbook Should not Assess HCP Sufficiency Based on Climate Change Analysis

The Draft HCP Handbook incorporates guidance on addressing climate change within the HCP process despite acknowledging the lack of scientific certainty in climate change models. Because of the scientific uncertainty, the Services cannot rely on climate change considerations as a determinative factor for whether an HCP provides sufficient conservation and mitigation benefits for a species and its habitat.

The Draft HCP Handbook suggests that climate change analysis factors into three stages of the HCP process: (1) identifying climate changes; (2) assessing the effects of climate changes; and (3) identifying appropriate adaptive measures. Draft HCP Handbook Section 7.7.1 at 7-17. The Services recognize that integrating climate change considerations into the HCP process can be "challenging" as "scientific literature on climate change and its impacts, as well as analysis tools, experience with climate adaptation measures, and related guidance are relatively new and are changing as new information becomes available." *Id.* Section 1.2.3 at 1-6. The Draft HCP Handbook explains that "[i]n all cases it will be important to understand the appropriate uses and limitations of the [climate change modeling] tools, as well as best practices for interpreting and using model outcomes or other information." *Id.* Section 7.7.1 at 7-17. The document further states that "[c]limate change, its effects, and climate adaptation approaches are the subject of continuously evolving scientific work . . ." *Id.* Section 9.0.1 at 9-5.

Despite the challenges associated with applying climate change factors when assessing impacts to species and their habitats, and when assessing the effects of mitigation on species, the Draft HCP Handbook requires that climate change be a component of HCP analysis. Based on the

Draft HCP Handbook revisions, climate change could be a determinative factor in whether an ITP application is approved.

It is inappropriate for the Services to rely on potential climate change projections over the life of a permit. The science and modeling of climate change impacts do not provide reliable predictions of species' response to climate change, nor do they provide reliable predictions of how mitigation efforts will benefit species affected by climate change.

Requested Action: The Draft HCP Handbook should be revised to make clear that the Services cannot make decisions on the sufficiency of an HCP and its mitigation measures based on climate change analysis, given the inherent uncertainties associated with attempting to predict the potential impacts of climate change on species and habitat at the scale to be expected in an HCP.

A. Obstacles that Prevent Detailed Climate Change Analysis

Climate change is a complex, global issue, and it is difficult to downscale global effects to specific project, local and regional effects. At present, federal agencies, industry, academia, and the scientific community do not have sufficient scientific information (e.g. long term (decades) of empirical data or routine monitoring) or a computer model that can accurately calculate the effects of climate change based upon site-specific information for a particular project.

Challenges to obtaining viable data to inform agency decision making include but are not limited to:

- federal agencies lack precise computational models for local projections of expected climate change impacts to a given action area;
- models are unable to account for climate variability associated with natural earth cycles versus anthropogenic causes; and,
- federal agencies lack historic detailed inventories and monitoring sites and systems for an appropriate spatial and temporal baseline understanding of local species and ecosystem conditions, which are needed to assess potential climate change impacts.

In establishing the ITP process, Congress recognized that “non-Federal property owners seeking HCP permits would need to have economic and regulatory certainty regarding the overall cost of species mitigation over the life of the permit.” 63 Fed. Reg. 8859, 8860 (Feb. 23, 1998). Congress envisioned “regulatory assurances” through the incidental take process. *Id.* Congressional intent, however, is unraveled by the Draft HCP Handbook’s climate change proposals.

Given the absence of viable computational tools and lack of adequate baseline data or inventories, it is not technically or analytically feasible to determine through the HCP process the potential direct, indirect, and cumulative impacts of climate change at the project level. Due to the various obstacles identified above, modeling and analyzing potential climate change impacts on species and their habitat is not appropriate.

Requested Action: The Draft HCP Handbook should be revised to clearly acknowledge and detail the limitations of climate change analysis. The Services cannot make decisions on the sufficiency of an HCP and its mitigation measures based on climate change analysis.

B. Addressing Climate Change in NEPA Documents

Due to the wide ranging variety of studies and reports on global warming and climate change, NEPA documents should only utilize reference materials which are peer-reviewed data and studies that are generally accepted as being scientifically sound or best available science.

1. Environmental Assessments (EAs)

Consideration of GHGs and climate change are not appropriate for every EA. The level of discussion should depend upon the scope of the project, and it should be recognized that an HCP is site and species specific. Given the technical limitations of climate change analysis, it is not appropriate for project level NEPA documents to attempt to analyze impacts from climate change at the project-level. Indeed, even approximating climate change impacts at the local level would be very speculative and qualitative in nature, and would not provide real substance to aid in informing the public or in agency decision making for the proposed project being analyzed under NEPA.

The EA and project decision record should not attempt to provide a significance determination, because such conclusion is not currently technically feasible.

2. Environmental Impact Statements (EISs)

For EISs, the Council on Environmental Quality (CEQ) NEPA regulations contain a provision that provides guidance to agencies as to how to address NEPA analysis where, as with climate change issues, there are significant information gaps. *See* 40 C.F.R. § 1502.22.

In addition to the legal contours and limitations summarized above, this regulation should also be emphasized in the Draft HCP Handbook.

Section 1502.22 of the CEQ regulations, titled “Incomplete or Unavailable Information,” provides in pertinent part:

When an agency is evaluating reasonably foreseeable significant adverse effects on the human environment in an environmental impact statement and there is incomplete or unavailable information, the agency shall always make clear that such information is lacking. . . .

(b) If the information relevant to reasonably foreseeable significant adverse impacts cannot be obtained because the overall costs of obtaining it are exorbitant or the means to obtain it are not known, the agency shall include within the environmental impact statement:

- (1) a statement that such information is incomplete or unavailable;

(2) a statement of the relevance of the incomplete or unavailable information to evaluating reasonably foreseeable significant adverse impacts on the human environment;

(3) a summary of existing credible scientific evidence which is relevant to evaluating the reasonably foreseeable significant adverse impacts on the human environment, and

(4) the agency's evaluation of such impacts based upon theoretical approaches or research methods generally accepted in the scientific community.

For the purposes of this section, reasonably foreseeable includes impacts which have catastrophic consequences, even if their probability of occurrence is low, provided that the analysis of the impacts is supported by credible scientific evidence, is not based on pure conjecture, and is within the rule of reason.⁵

Requested Action: The Draft HCP Handbook should be revised to acknowledge and detail the limitations of climate change analysis in preparation of NEPA documents (EA or EIS).

IX. The Draft HCP Handbook Should Recognize NEPA's Purpose of Informing Agency Decision-Making

The Draft HCP Handbook, as a guide to Service staff, must explain that the purpose of NEPA analysis is to allow review of the proponent's proposed action and reasonable alternatives within the purpose and need of the proposed action. While the scale of NEPA analysis is determined based on the size of the HCP project proposal, information learned from the NEPA process should help inform the agency decision whether through a categorical exclusion, an EA or an EIS.

At the EA and EIS level, the Services consider, as part of the NEPA analysis, reasonable alternatives to the proposed HCP. The NEPA alternatives requirement is limited, however, by a notion of feasibility. *See Vt. Yankee Nuclear Power Corp. v. National Res. Defense Council*, 435 U.S. 519, 551 (1978); *see also Natural Res. Defense Council v. Hodel*, 865 F.2d 288, 295 (D.C. Cir. 1988). "Alternatives that do not accomplish the purpose of an action are not reasonable and need not be studied in detail by the agency." *Citizens' Comm. to Save our Canyons v. U.S. Forest Serv.*, 297 F.3d 1012, 1031 (10th Cir. 2002); *Custer Cnty Action Ass'n v. Garvey*, 256 F.3d 1024, 1041 (10th Cir. 2001); *Colorado Environmental Coalition v. Dombeck*, 185 F.3d 1162, 1174-75 (10th Cir. 1999). "[I]f an alternative does not achieve the purpose of the proposed action" the federal agency "does not err in failing to consider that alternative." *Great Basin Mine Watch*, 159 IBLA 324, 326 (2003).

In light of the issuance criteria for an ITP as discussed above and depending on the scope of the NEPA analysis, the Services must constrain analysis to reasonable alternatives that provide mitigation measures that are practicable and achievable by the applicant. *See Draft HCP*

⁵ 40 C.F.R. § 1502.22

Handbook Section 13.3.2 at 13-6. Analyses of alternatives that are not technically or economically feasible on the part of the permit applicant are not reasonable and should not be included in the NEPA document.

Requested Action: The Draft HCP Handbook should be revised to fully explain to Service staff the role of NEPA analysis and limitations on the range of alternatives in EAs and EISs based on the proposed action. The agency should be reminded to limit alternatives analyzed to only those alternatives that are reasonable and technically and economically feasible.

A. NEPA Should Inform Agency Decision-Making

The NEPA analysis is part of the HCP process and should help inform agency decision making rather than justify the agency decision. Even where there are differences of opinion between the agency and the project proponent regarding the sufficiency of the conservation plan, the Draft HCP Handbook should make clear that the NEPA process should be initiated in order to better inform the agency as well as the applicant.

NEPA's implementing regulations make clear that environmental analysis serves "as an important contribution to the decision-making process and will not be used to rationalize or justify decisions already made." 40 C.F.R. § 1502.5 (referencing *id.* §§ 1500.2(c), 1501.2, and 1502.2). NEPA's implementing regulations are designed to "ensure that environmental information is available to public officials and citizens before decisions are made and actions are taken." *Id.* § 1500.1(b).

Until the NEPA process is complete and a decision record is issued, "no action concerning the proposal shall be taken which would . . . [l]imit the choice of reasonable alternatives." 40 C.F.R. § 1506.1(a). Courts have held that predetermination occurs when an agency "irreversibly and irretrievably commits itself to a plan of action that is dependent upon the NEPA environmental analysis producing a certain outcome, before the agency has completed the environmental analysis—which of course is supposed to involve an objective, good faith inquiry into the . . . proposed action." *Wyoming v. U.S. Dep't of Agric.*, 661 F.3d 1209, 1264 (10th Cir. 2011) (citation omitted).

The NEPA analysis must provide an "objective, good faith" review of the proposed action and should not serve as an opportunity to impose additional requirements on a conservation plan not achieved through collaboration and negotiation.

Requested Action: The Draft HCP Handbook should be revised to direct Service staff to utilize the NEPA process to inform agency action and lead to a rational decision with regard to the ITP application.

B. Purpose and Need Statement

The Draft HCP Handbook should better explain that the purpose and need statement for the NEPA document is based on the goals and objectives of the project proponent.

CEQ regulations implementing NEPA require that an EA or EIS contain a purpose and need statement “that shall briefly specify the underlying purpose and need to which the agency is responding in proposing the alternatives including the proposed action.” 40 C.F.R. § 1502.14(a). Importantly, “[w]here the action subject to NEPA review is triggered by a proposal or application from a private party, it is appropriate for the agency to give substantial weight to the goals and objectives of that private actor.” *Citizens’ Comm. to Save Our Canyons v. U.S. Forest Serv.*, 297 F.3d 1012, 1030 (10th Cir. 2002). The Draft HCP Handbook fails to adequately acknowledge the applicant’s purpose and need for the proposed project. Draft HCP Handbook Section 13.1 at 13-2.

The purpose and need statement for a project “defines the range of alternatives” that the FWS should consider. *Fuel Safe Wash. v. F.E.R.C.*, 389 F.3d 1313, 1323 (10th Cir. 2004) (“In deciding whether an agency has adequately considered reasonable alternatives, ‘courts look closely at the objectives identified in an EIS’s purpose and need statement.’”). The Draft HCP Handbook must ensure that the applicant’s purpose and need for the proposed project are respected when drafting the purpose and need statement for an EA or EIS.

Requested Action: The Draft HCP Handbook should be revised to direct Service staff to recognize an applicant’s goals and objectives when writing the purpose and need statement of the NEPA document.

X. The Draft HCP Handbook’s Adaptive Management Strategy Should Allow for Scientific Uncertainty While Incorporating Certainty in Implementation

The Draft HCP Handbook should direct Service staff to utilize the adaptive management section of an HCP as a tool to account for scientific uncertainty while also incorporating certainty in HCP implementation.

Instead of requiring additional conservation and mitigation measures to account for scientific uncertainty regarding a species, adaptive management should be available to provide flexibility in the conservation plan while also accounting for the needs of species. Scientific uncertainty should be addressed through triggers in the HCP that require more controls, including conservation and mitigation, based on certain new science, but also allow for triggers that reduce controls based on other certain new science. The same should be available based on plan monitoring results. Adaptive management should allow increases and decreases in conservation measures.

In implementing the revised adaptive management provisions in the Draft HCP Handbook, the Services must allow for certainty in implementation. Adaptive management must be based on stringent triggers that necessitate adaptive management changes, such as peer reviewed scientific information, instead of compelling ongoing adjustments to a conservation plan each time a new scientific study is released or new monitoring results are compiled. Land users such as oil and gas operators require certainty in order to plan future activities, and ongoing adjustments to conservation plans undermine such certainty. The Services should support adaptive management changes based on a schedule that accommodates land users’ need for certainty and allows for proper input by the affected land user and other affected stakeholders.

Requested Action: The Draft HCP Handbook should be revised to clarify that an appropriate adaptive management strategy accounts for scientific uncertainty, allows conservation measures to increase or decrease as appropriate, and provides certainty in the process by avoiding ongoing adjustments.

XI. NEPA Analysis Should Recognize Additional Conservation Measures for Species

The Draft HCP Handbook should explain that when the agency examines an HCP proposal through the NEPA process, the agency must recognize and acknowledge the benefits of the HCP, when added to past, present and reasonably foreseeable benefits implemented from other conservation programs. Under NEPA, the Services cannot examine an HCP in a vacuum and as a sole conservation plan while ignoring other conservation benefits that may also be implemented from other plans and programs.

An agency may not examine single projects in isolation if there are past or foreseeable future projects in the region that might add to the environmental impact (or conservation benefits in the context of an HCP). *Natural Res. Def. Council v. U.S. Forest Serv.*, 421 F.3d 797, 816 (9th Cir. 2005).

Requested Action: The Draft HCP Handbook should be revised to emphasize that in an EA or EIS an HCP should be analyzed as one part of a package of possible conservation measures in place to protect and benefit a species.

XII. The Draft HCP Handbook Must Allow Project Proponents to Determine the Species Covered by an HCP Proposal

The Draft HCP Handbook must acknowledge that it is the project proponent's role to determine what species are covered by an HCP and ITP. The Services cannot mandate that all candidate, threatened, endangered or otherwise special status species in a project area be covered by an applicant's HCP proposal and ITP application. Contrary to the indications of the Draft HCP Handbook, it is up to the project proponent to propose species for coverage under the HCP. *See* Draft HCP Handbook Section 7.2 at 7-5. While the Services can determine what special status species are in a certain proposed project area, the Services cannot dictate which species are covered by that HCP proposal.

Requested Action: The Draft HCP Handbook should be revised to recognize that the Services cannot mandate which species are included for conservation in an HCP.

XIII. The Draft HCP Handbook Should Encourage Private Landowner Participation

The Draft HCP Handbook should further encourage communication and coordination with local landowners in species' habitat in order to increase conservation options available under the HCP, and account for the significant implications of different easement options.

The proposed revisions in the Draft HCP Handbook discourage landowner participation. The Services, through the Draft HCP Handbook, have made the HCP process more complex and onerous. Further, the monitoring requirements in the Draft HCP Handbook have been

significantly expanded so that significantly less funding for the HCP can go to on-the-ground efforts that benefit the species and its habitat.

While permanent conservation through easements can provide a benefit to certain species in perpetuity, incorporating partnerships with private landowners for term conservation contracts could result in greater conservation being implemented on the ground as landowners implement conservation actions on their properties for the benefit of species. Term contracts could result in uplift or creation of habitat benefiting the species at issue while simultaneously providing more flexibility for adaptive management

The Handbook should clearly highlight the non-species implications of pursuing different easement strategies. When land/mineral use is restricted through a restrictive easement, changed land valuation carries a range of tax implications for the property owner and local jurisdictions. Likewise, when dealing with split estate rights, the surface owner may not be able to commit to an absolute easement in conflict with the mineral rights owner. By addressing the full implication of the vehicle by which land is conserved, the Services can support more flexible options that encourage conservation.

Additionally, incentivizing landowners to participate in conservation measures tied to an HCP will have the direct benefit of providing additional information to better inform population estimates and habitat occurrence of species. HCPs with a strong landowner tie should be encouraged to expand the breadth of conservation happening on the ground for the benefit of a species. The Draft HCP Handbook should recognize the benefits of partnerships with private landowners in conservation, and should encourage such partnerships throughout the HCP process.

Requested Action: The Draft HCP Handbook should be revised to encourage flexible and creative partnerships with private landowners to achieve conservation measures for the benefit of a species.

XIV. Conclusion

IPAA, API, AXPC, PAW and the Alliance appreciate the Services' consideration of these comments. The Trades request that the Services withdraw in entirety the Draft HCP Handbook and revise the 1996 HCP Handbook consistent with the comments and concerns raised in this letter.

Sincerely,



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