



January 5, 2018

Public Comments Processing
Division of Policy, Performance, and Management Programs
U.S. Fish and Wildlife Service
MS: BPHC
5275 Leesburg Pike
Falls Church, VA 22041-3803

Attention: Attn: Docket No. [FWS-HQ-ES-2015-0165]

Response to Request for Comments, U.S. Fish and Wildlife Service Endangered Species Act Compensatory Mitigation Policy, 82 Fed. Reg. 51382 (November 6, 2017)

Dear Mr. Sheehan:

With this letter, API, IPAA, AXPC, IAGC, and Western Energy Alliance (together “the Associations”) are pleased to submit these comments in response to the captioned public notice, published in the Federal Register November 6, 2017, in which the U.S. Fish and Wildlife Service (FWS or the Service) requests public comment to the use of the terms “net conservation gain” and “no net loss” to describe planning goals for the Service’s Endangered Species Act (“ESA”) Compensatory Mitigation Policy. We appreciate the FWS seeking public comments on this policy. However, we have significant concerns with many aspects of the policy as discussed below. As such, we request the FWS withdraw and revise this policy.

API is a national trade association representing over 625 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% 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. API and its members are dedicated to meeting environmental requirements, while economically developing and supplying energy resources for consumers.

IPAA represents thousands of independent oil and gas explorers and producers that will be the most significantly affected, either positively or negatively, by permit requirements for drilling and production operations that could be driven by the Compensatory Mitigation Policy. Independent producers develop 90 percent of the nation’s oil and natural gas wells. These companies account for 54 percent of America’s oil production, 85 percent of its natural gas production, and support over 2.1 million American jobs. IPAA’s members are participants in federal, state, and private efforts to protect and conserve endangered and threatened species and their ecosystems. IPAA’s member companies have enrolled millions of acres in

conservation plans and committed tens of millions of dollars to fund habitat conservation and restoration programs.

The American Exploration & Production Council is a national trade association representing 32 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 business, such as downstream refining and marketing. AXPC's members are leaders in developing and applying the innovative and advanced technologies necessary to explore for and produce crude oil and natural gas, and that allow our nation to add reasonably priced domestic energy reserves in environmentally responsible ways.

IAGC is the international trade association representing the industry that provides geophysical services (geophysical data acquisition, processing and interpretation, geophysical information ownership and licensing, and associated services and product providers) to the oil and natural gas industry. IAGC member companies play an integral role in the successful exploration and development of hydrocarbon resources through the acquisition and processing of geophysical data.

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

I. General Comments

Members of the Associations engage in the exploration for and the development of oil and natural gas resources under a combination of Federal and State laws and regulations, and in some cases, under the additional regulations of Tribal or Local Governments. Our members share the FWS's objective that projects for exploration or development of oil and natural gas resources be designed, built, and operated so as to minimize the adverse effects from these projects on the environment and wildlife resources. Mitigation measures at a scale appropriate to the scale of a project and its reasonably foreseeable impacts are thus an element of project design that our members undertake.

To secure the tremendous benefits of domestic energy production for our nation and to achieve the goal of "energy dominance" that the Administration has described as a policy objective, it is important for government to assure a stable and predictable regulatory environment, and to align management of America's public lands with the direction provided by law. The use of the terms "net conservation benefit" and "no net loss" to describe planning goals in the Compensatory Mitigation Policy make a stable and predictable regulatory environment more difficult to achieve. The Associations previously submitted comments to the Compensatory Mitigation Policy when revisions to it were proposed in September of 2016 (81 Fed. Reg. 61,032). Our comment letter, dated October 17, 2016, is submitted to this docket along with this letter.

By adopting the mitigation goals of "net conservation gain" and "no net loss," the FWS inappropriately attempts to rewrite the statutory standards in sections 7 and 10(a)(1)(B) of the ESA, as well as the regulatory standards implementing section 404 of the Clean Water Act. The Service cannot promulgate advisory recommendations that exceed its authority under the ESA, and under the ESA the Service's imposition of mitigation measures is limited by the jurisdiction of an action agency. The Policy imposes impractical and ineffective requirements and, as worded, can compel decisions that are based on inappropriate speculation over objective science, or decisions that do not adequately consider avoidance and minimization of project impacts.

The Compensatory Mitigation Policy prioritizes conservation objectives over the statutory mandate favoring multiple use on public lands not otherwise designated wilderness or other special purpose under the

Federal Land Policy and Management Act, 43 U.S.C. §§ 1701-1785. Although the FWS cites several statutes as providing it with authority to recommend or require compensatory mitigation to fish, wildlife, plants, or their habitats,¹ these statutes do not give the FWS authority to prioritize fish, wildlife, plants, and their habitats above all other resources or societal needs and economic development.

The Associations are particularly concerned that the Compensatory Mitigation Policy dramatically and improperly expands the FWS's authority over unlisted fish and wildlife. In any revision of the Policy, we believe it to be very important for FWS to clarify that the extent of its mitigation authority only applies to those federal trust resources specifically identified by the ESA. FWS should explicitly state that the Compensatory Mitigation Policy does not apply to unlisted species under the ESA so that it does not conflict with the States' management authority.

II. Comments Regarding the Mitigation Goals of “Net Conservation Benefit” and “No Net Loss”

In the context of these foregoing concerns, the Associations are encouraged that in its notice published November 6, 2017, the FWS specifically requested comment on the mitigation planning goal of “net conservation gain”, described in the November 6 notice as follows:

The Service's mitigation planning goal is to improve (*i.e.*, a net gain) or, at minimum, to maintain (*i.e.*, no net loss) the current status of affected resources, as allowed by applicable statutory authority and consistent with the responsibilities of action proponents under such authority.

Because these elements of the Compensatory Mitigation Policy present the particular risk that it could be applied to impose mitigation requirements on projects beyond the scale of the impacts resulting from such projects or beyond the FWS's statutory authority to require mitigation, the terms “net conservation gain” and “no net loss” should be removed from the Policy.

There is no agreed-upon definition for “No Net Loss” or “Net Conservation Gain”: Even though the Compensatory Mitigation Policy contains a “definitions” section, the FWS did not define “net conservation gain” in the Policy. Without an express definition of “net conservation gain,” the FWS risks inconsistent application of this standard by its regional and field offices, as well as other agencies. The lack of an express definition will lead to confusion and uncertainty regarding which impacts require compensatory mitigation and how much is required. In addition, mitigation necessary to address short-term, temporary disturbances is not the same as the mitigation necessary to address long-term, more permanent effects. The Policy, however, fails to distinguish between these different impacts.

The FWS lacks authority under Section 7 of the ESA to apply these terms as criteria to evaluate mitigation measures at the project level: FWS must have explicit statutory authority to apply a “net conservation gain” as part of a mitigation determination and there is no statutory authority to impose such requirements in the Section 7 consultation context. The Policy's goals of “net conservation gain” or “no net loss,” however, are inconsistent with the section 7 requirement that federal actions not “jeopardize the continued existence” of listed species or “result in the destruction or adverse modification” of critical habitat. Because the standards in the ESA allow federal actions to have some impact to listed species or their critical habitat, the FWS lacks the authority to require federal agencies or project proponents to mitigate to a “net conservation gain” or “no net loss” standard in order to reach findings of “no jeopardy” and “no destruction or adverse modification.”

¹ Endangered Species Act, 16 U.S.C. §§ 1531–1539, Fish and Wildlife Coordination Act, 16 U.S.C. §§ 661-667e, National Environmental Policy Act, 42 U.S.C. §§ 4321 *et seq.*, Oil Pollution Act, 33 U.S.C. §§ 2701 *et seq.* 81 Fed. Reg. 99,335.

The FWS lacks authority under Section 10 of the ESA to apply these terms as criteria to evaluate mitigation measures at the project level: FWS needs to re-examine how it will apply the mitigation goals articulated in the Compensatory Mitigation Policy when evaluating incidental take permits under section 10(a)(1)(B) of the ESA. FWS cannot apply the goals of “net conservation gain” and “no net loss” to habitat conservation plans (HCPs) and incidental take permits under section 10(a)(1)(B) of the ESA because they are inconsistent with the statutory standard for obtaining incidental take permits. Section 10(a)(2)(B) requires the Service, when issuing incidental take permits, 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 language of the ESA and its legislative history demonstrate that the FWS may not require mitigation that yields a “net conservation gain” or “no net loss.”

The application of these terms as criteria by which to evaluate mitigation measures presents a risk of compensable taking: The FWS may not condition the approval of a land use permit on a “net conservation gain” standard without risking a compensable taking under the Fifth Amendment of the U.S. Constitution. A requirement that a project proponent provide mitigation that yields a “net conservation benefit” could result in a compensable taking because it requires a proponent to provide more mitigation than necessary to offset an impact. The amount of mitigation therefore lacks a “rough proportionality” to the impact, leading to a compensable taking. *See, e.g., Koontz v. St. Johns River Water Mgmt. Dist.*, ___ U.S. ___, 133 S. Ct. 2586, 2595 (2013). The FWS should not retain a mitigation standard that can lead to compensable takings. *See* Executive Order No. 12630, 53 Fed. Reg. 8859 (Mar. 15, 1988) (directing that agencies “should review their actions carefully to prevent unnecessary takings”).

Finally, consistent with the foregoing comments, the Associations request that the “Interim Guidance for Implementing the Endangered Species Act Compensatory Mitigation Policy” dated January 17, 2017 be withdrawn and a revision of this Interim Guidance issued following FWS’ final action relating to planning goals for the ESA Compensatory Mitigation Policy that is consistent with that final action. Also, please note that concurrent with the submittal to this docket, we are submitting comments to the Service’s Mitigation Policy in response to the Request for Comments, U.S. Fish and Wildlife Service Mitigation Policy, 82 Fed. Reg. 51382 (November 6, 2017). Docket No. FWS-HQ-ES-2015-0126 that will address these and related issues.

Thank you for considering these recommendations as you undertake the effort described in the captioned public notice. Should you have any questions, please contact Richard Ranger of API at 202.682.8057, or via e-mail atrangerr@api.org, Samantha McDonald of IPAA at 202.857.4722, or via e-mail at smcdonald@ipaa.org, Tripp Parks of Western Energy Alliance at 303.623.0987, or via e-mail at tparks@westernenergyalliance.org, Dustin Van Liew at IAGC at 713.957.8080, or by email at dustin.vanliew@iadc.org, or Bruce Thompson of AXPC at 202.347.7578, or by email at bthompson@axpc.us.

Sincerely,



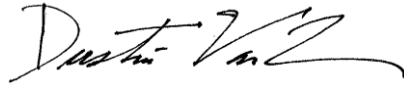
Richard Ranger
Senior Policy Advisor
American Petroleum Institute



Dan Naatz
Senior Vice President of Government
Relations and Public Affairs
Independent Petroleum Association of America



Tripp Parks
Manager of Government Affairs
Western Energy Alliance



Dustin Van Liew
VP, Regulatory & Governmental Affairs
International Ass'n of Geophysical Contractors



V. Bruce Thompson
President
American Exploration & Production Council