

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-2015-0126]
Response to Request for Comments, U.S. Fish and Wildlife Service 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 portions of the Service’s Mitigation Policy. We appreciate the FWS seeking public comments on this policy. However, we have significant concerns, as discussed below. 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 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 a significant element of project design.

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. Our concerns over the Mitigation Policy are based on the belief that the Policy in its present form makes a stable and predictable regulatory environment more difficult to achieve. The IPAA and API previously submitted comments with reference to the current Policy when revisions to it were proposed in March of 2016 (81 Fed. Reg. 12,380). That comment letter, dated May 9, 2016, is submitted along with this letter. Western Energy Alliance also submitted separate comments at the same time, and that comment letter is also submitted with this letter.

As revised in November of 2016, the Mitigation Policy imposes requirements that conflict with 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. The Policy is insufficiently clear and could be read to extend the reach of FWS to non-federal trust resources, which would conflict with management authority over those resources retained by the states. By adopting the 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 Endangered Species Act (ESA). The Policy also imposes impractical and ineffective requirements, and, as worded, can compel agency decisions that are based on inappropriate speculation rather than objective science, or decisions that do not adequately consider and utilize avoidance and minimization of project impacts

The Mitigation Policy prioritizes conservation objectives over congressional multiple use mandates. Although the FWS cites several statutes as providing it with authority to recommend or require 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. Although the ESA, the Migratory Bird Treaty Act (MBTA), the Bald and Golden Eagle Protection Act (Eagle Act), and the Marine Mammal Protection Act (MMPA) impose on the FWS a heightened obligation to protect trust resources, many of the other statutes the FWS cites as authority for the Mitigation Policy require that conservation be balanced with other land and resource uses.

The Associations are particularly concerned that the 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 relevant statute. FWS should explicitly state that the Mitigation Policy does not apply to non-federal trust resources (such as unlisted species under the ESA) so that it does not conflict with the States' management authority. Congress has only charged the FWS with management of trust resources under the ESA, MBTA, the Eagle Act and MMPA. *See* 16 U.S.C. §§ 668-668c, 703-712, 1361-1423h, 1531-1539. Although Congress has conferred some authority over non-trust resources under other statutes, this authority is limited to particular roles or projects.

II. The mitigation goals of “Net Conservation Benefit” and “No Net Loss” should be removed from the Policy

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 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. These elements of the Policy were not well-considered when they were adopted, and are based on Department of Interior Policies that are no longer in effect, notably Secretarial Order 3330.

No agreed-upon definition exists for “No Net Loss” or “Net Conservation Gain”: Even though the 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 regarding which impacts require mitigation. Mitigation necessary to address short-term, temporary effects 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.

¹ Endangered Species Act, 16 U.S.C. §§ 1531-1539 (ESA), Bald and Golden Eagle Protection Act, 16 U.S.C. §§ 668-668d (“Eagle Act”), Federal Land and Policy Management Act, 43 U.S.C. §§ 1701-1787 (FLPMA), Marine Mammal Protection Act, 16 U.S.C. §§ 1361-1423h (MMPA), Migratory Bird Treaty Act, 16 U.S.C. §§ 703-712 (MBTA), National Environmental Policy Act, 42 U.S.C. §§ 4321-4347 (NEPA), and the Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1388 (“Clean Water Act”). 81 Fed. Reg. at 12,383.

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. Conservation gain is not an easily defined and consistently applied term, and FWS fails to provide an explicit definition in the Mitigation Policy. The Mitigation 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.”

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 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”).

III. Considering Mitigation in Relation to the Projects under Review

Among the concerns that drove our organizations’ prior comments to the Mitigation Policy when the revisions to it were proposed in 2016 was the concern that the Policy diminished regulatory certainty, and risked burdening operators with mitigation responsibilities that extended well beyond the scale and scope of the projects to which the policy might be applied. In that regard, we offer the following additional comments:

Mitigation measures recommended or required should be proportional to project effects: As noted above, the amount of mitigation recommended or required for a project should be reasonably proportional to the impacts and similar in kind. Calculations must be defensible but need not be overly precise, and agencies must strive for a “rough proportionality” to the impact.

The Mitigation Policy should establish limits on liability for project proponents: The Mitigation Policy should direct the agencies to create clear limits on the boundaries of liability for project proponents and mitigation providers. First, to the extent possible, the pre-project habitat, land and wildlife conditions

should be documented to establish a baseline for equivalent mitigation requirements. For project proponents, the Policy should clarify that when permit approval is contingent on mitigation measures, those measures should be finite and capable of being estimated. This is essential for project proponents to plan and budget projects and to secure project financing. In addition, uncertainty around the performance of mitigation measures should not be addressed through infinite liability into the future.

The Mitigation Policy must consider the cost to the land user or project proponent: Any mitigation policy must take note of the accepted mitigation hierarchy of avoidance, mitigation and compensation, and should thus require an agency to consider the cost to the land user for avoiding and minimizing impacts. Otherwise, the policy will encourage land users to forgo avoidance and minimization measures and provide compensatory mitigation to account for such impacts. If the FWS fundamentally places the highest value on avoidance and minimization measures, then its mitigation hierarchy must not discount the cost of these measures to land users. Rather, the mitigation hierarchy should allow the FWS to balance the conservation and development uses of the land to yield a compromise that best serves all interests.

The Mitigation Policy's requirement for "Additionality" is improper: The Policy's requirement that mitigation be additional to any existing or foreseeably expected conservation efforts may deter land users from undertaking voluntary conservation efforts. Additionally, it may have an unintended consequence of making additional regulatory efforts more politically difficult. Conceivably, state and local governments may not be willing to adopt conservation regulations because such regulations will raise the baseline against which mitigation will be measured. Moreover, the reference in this connection to "foreseeably expected" conservation efforts is confusing and will lead to disagreements between the FWS and the public regarding what efforts are "foreseeably expected." Therefore, the Policy improperly includes an "additionality" requirement that should likewise be removed.

The Mitigation Policy should encourage voluntary conservation/mitigation measures: FWS must recognize voluntary conservation planning efforts that are associated with a particular species, habitat, or activity and allow such efforts to be applied as mitigation under the Mitigation Policy. For example, during the development phase of a project, a landowner or project proponent may modify the scope or location of the contemplated activity to avoid or minimize impacts to species or habitats. FWS must take these proactive measures into consideration and consider the resource conservation value created and cost and burden of these commitments when assessing any mitigation associated with the activity under review. Otherwise, FWS will create a strong disincentive for project proponents to follow the mitigation hierarchy and to incorporate avoidance and minimization strategies into the design of their actions and, instead, rely upon compensatory mitigation measures which may not be as ecologically/environmentally beneficial or economically efficient.

IV. Additional Concerns and Recommendations

The Mitigation Policy does not provide an appropriate criterion for scientific information relied upon when the Policy is to be applied: In the Mitigation Policy, the FWS states it will use "best available science" to formulate and monitor the long-term effectiveness of its mitigation recommendations and decisions. Additionally, the FWS states that it "will rely upon existing conservation plans that are based upon the best available scientific information . . ." The FWS' paraphrasing of the ESA and MMPA standard as a "best available science" standard ignores the statutory mandates that agencies consider the best available "commercial data" in addition to the best available scientific information. See 16 U.S.C. §§ 1362(19)(B), 1373(a), 1533(b)(1)(A), 1536(a)(2). Rather than attempting to fashion a universal information standard for decisions under the Policy, the FWS should require that it evaluate information in a

manner consistent with applicable statutory standards, the Department of the Interior's Data Quality Guidelines, and the FWS' own Data Quality Guidelines.

- FWS must provide additional procedures and safeguards by which to ensure that assessments of potential impacts are not based upon assumption, speculation, or preconception. In particular, FWS must ensure that: (i) the spatial and temporal scope of the impacts analysis is well defined and supported by the best available scientific and commercial data; and (ii) that assessment of impacts to species and their habitats can be identified and assessed with reliable predictability. This will require a consideration of causation to ensure that any impacts are directly related to the proposed action being considered and not significantly attenuated or influenced by intervening factors. Consistent with these guidelines for assessment of impacts, FWS must not require mitigation before impacts occur that are intended to be addressed by the mitigation measures in question. Requiring mitigation to be implemented before impacts occur can greatly increase timing uncertainty for development proponents, and could discourage applicants from proposing voluntary mitigation as part of their projects. Project proponents should have the ability to propose mitigation in advance of the occurrence of impacts, consistent with encouragement of voluntary conservation measures, but mitigation in advance should not be a requirement imposed by FWS.
- In selecting methodologies for use in mitigation assessments, FWS must ensure that the chosen methodology is sufficiently rigorous to provide reliable estimates of future conditions. For example, one of the issues in projecting climate-related impacts is the broad divergence of climate models as the analysis extends into the future. After a certain time period into the future, the model projections are too speculative for use in a natural resource management context. Thus, FWS should establish additional procedures and criteria to ensure that a particular methodology is accurate and fits within established confidence intervals appropriate for scientific projections.

The Mitigation Policy relies upon criteria that are inadequate to assess the effectiveness of mitigation measures: In its assessment of the effects of mitigation measures, FWS should utilize widely accepted methods that are clear and straight-forward, and should avoid using methods that are highly technical, complex, and complicated. Such an approach will promote stakeholder understanding of natural resource management decisions and allow assessments of mitigation measures, and the need for such measures, to be more transparent and accepted. When such methods are not available, FWS should use existing best available scientific information. Where it is not possible to assess impacts of an action in a quantitative manner, FWS needs to provide criteria and analytical approaches that specify how such non-quantitative impacts will be reviewed and incorporated into the mitigation assessment. To the extent that FWS employees apply “best professional judgment” to assess impacts and to develop mitigation requirements, these qualitative measures should be consistent with established scientific practices. FWS must clearly explain how this judgment was exercised, what factors were considered, and the implications of this judgment.

The Mitigation Policy should apply standards for evaluation of mitigation measures that are appropriate to the resources to be protected: FWS should consider adopting different mitigation standards for different resources and habitat qualities. To the extent possible, the pre-project habitat, land and wildlife conditions should be documented to establish a baseline for different resources and habitat qualities, allowing for development of equivalent mitigation requirements for resources and habitats. The Mitigation Policy's requirement that all impacts to any resource, no matter its importance, scarcity, or sensitivity, be mitigated to the same standard is arbitrary. FWS should adopt different mitigation goals for different types or values of resources and provide a rationale that will explain how resources are prioritized, or characterized as “important, scarce, or sensitive.”

The Mitigation Policy does not authorize FWS to Require a “No Action Alternative”: In the Mitigation Policy, the FWS identifies situations in which it will recommend or require avoidance of impacts and specifically recognizes that in these situations it will recommend or require adoption of the “no action”

alternative. Specifically, the FWS explains that it will recommend “avoiding all impacts to high-value habitats” and that it may recommend the “no action” alternative “when appropriate and practicable means of avoiding significant impacts to high-value habitats and associated species are not available”. The FWS, however, lacks authority to recommend or require a “no action alternative.”² Furthermore, adoption of the “no action” alternative can effectuate a regulatory taking when private property rights are involved. Indeed, in its 1981 Mitigation Policy, the Service conceded that “the legal authorities for the mitigation policy do not authorize the Service to exercise veto power over land and water development activities.”

Properly employed, the Mitigation Policy should acknowledge and use State and Local Conservation Plans: The Mitigation Policy does not explain how the FWS will identify and use conservation and mitigation plans adopted by a variety of entities, including state governments, local governments, other federal agencies, and private parties. A revised policy should direct the FWS to explore opportunities to work closely with states and develop future guidance on state coordination and delegation. The FWS must utilize landscape conservation plans adopted by state governments, local governments, other federal agencies (such as the Bureau of Land Management), and private parties to inform mitigation decisions. The FWS should not duplicate, contradict, or negate existing conservation plans; any changes to existing plans may only be made through the appropriate amendment or revision processes. Additionally, the FWS must identify the criteria it will use to evaluate the adequacy of a conservation plan to inform mitigation implementation, particularly when multiple, competing plans exist. Such criteria should include whether a plan was subject to public review and comment³.

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,



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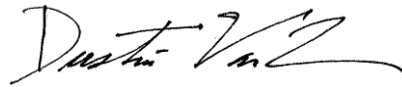
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² The Service’s direction that it may recommend or require adoption of the “no action” alternative must be distinguished with the requirement under NEPA that agencies analyze the environmental impacts of the “no action” alternative. *See* 40 C.F.R. § 1502.14(d). Although NEPA requires that agencies analyze the impacts of a “no action” alternative, it imposes no substantive obligation that agencies adopt this alternative. *See Baltimore Gas & Electric Co. v. Natural Res. Defense Council, Inc.*, 462 U.S. 87, 100 (1983) (“NEPA does not require agencies to adopt any particular internal decision-making structure”).

³ Notably, API and IPAA do not advocate for a requirement that all plans be subject to public notice and comment before the Service may utilize them to inform mitigation implementation. When a private party or nonprofit entity develops a conservation plan and seeks to utilize it to inform mitigation that will offset impacts from its own projects, public notice and comment is not necessary. In contrast, if the Service seeks to rely on a plan developed by one entity to inform mitigation associated with another entity’s development project, the party with the development project should be afforded the opportunity to review and comment on the plan.



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