



National Association of Conservation Districts

May 6, 2016

Chief Tina Campbell
Attention: Docket No. FWS-HQ-ES-2015-0126
Division of Policy, Performance and Management
U.S. Fish and Wildlife Service
5275 Leesburg Pike
Falls Church, VA 22041-3802

Submitted via Federal Rulemaking portal: <http://www.regulations.gov>

RE: Comments on Proposed Revisions to the U.S. Fish and Wildlife Service Mitigation Policy (Docket No. FWS-HQ-ES-2015-0126)

Chief Campbell:

America's wildlife are precious, and need quality habitat to thrive. The majority of the nation's wildlife habitat is interspersed over privately owned landscapes. For over 70 years, America's 3,000 conservation districts have worked with various partners to assist landowners and managers with the myriad problems and opportunities associated with wildlife habitat management.

The National Association of Conservation Districts (NACD) respectfully submits the below comments on U.S. Department of Interior, Fish and Wildlife Service (Service) Proposed Revisions to the U.S. Fish and Wildlife Service Mitigation Policy.

Specific Policy Comments at Request of the U.S. Fish and Wildlife Service:

- 1. Principles established by the policy in Section 4, including the Service's mitigation planning goal of a net conservation gain, or at a minimum no net loss, i.e., maintaining the current status of affected resources.**

No Net Loss/Net Conservation Gain

Conservation districts came into existence as a result of one of the nation's greatest environmental catastrophes—the Dust Bowl of the 1930s. They know what it takes to reclaim seriously damaged lands and have worked successfully over the years to restore them. But natural disasters can erase decades of conservation work in a matter of minutes. In recent years, many western states have experienced catastrophic wildfires that have damaged or destroyed millions of acres of forest lands and rangelands which has impacted critical habitat for species such as the Greater Sage-Grouse. The U.S. Fish and Wildlife Service should consider the probable ramifications of natural disasters when establishing and enforcing this goal. In many instances, it will not be possible for the Service to quantify the specific

extent of an impact (e.g., acres of wetlands or numbers of species taken) and thereby calculate a corresponding amount of mitigation. The lack of definitive calculations will undermine the ability of the Service to assess any mitigation obligation with specificity, and should therefore remove the absolute floor of no net loss in order to account for natural disasters that damage or destroy critical habitat.

The U.S. Fish and Wildlife Service should recognize the currently ongoing, voluntary conservation planning efforts utilized throughout the country. We encourage the Service to work on creating incentives for farmers and ranchers to participate in habitat restoration efforts targeted at the recovery and eventual delisting of endangered species. An important incentive would be the inclusion of “safe haven” provisions, thereby allowing farmers and ranchers to work on restoration efforts without losing the utility of or access to their land.

Lack of Explanation of Standard for Measuring Net Gain

Under Section 5.5 – *Habitat Valuation*, the U.S. Fish and Wildlife Service “will assess the value of affected habitats to evaluation species based on their scarcity, suitability, and importance to achieving conservation objectives.” The Service further says that “this valuation will determine the relative emphasis the Service will place on avoiding, minimizing, and compensating for impacts to habitats of evaluation species.” The terms used in this evaluation however are not backed by further clarification and as such are open to interpretation. This lack of clarification provides for the potential for lengthy disputes.

Section 5.6 – *Means and Measures*, further demonstrates the need for clarifications. In the section, the Service does not state what the standard will be for the measuring of net conservation gains. The lack of a standard could lead to inconsistent conservation ratios among projects. The inconsistent conservation ratios have the potential to contribute to project bias and ultimately delays during the mitigation planning review process.

Partnerships

When establishing and fostering partnerships, the U.S. Fish and Wildlife Service should acknowledge and work with existing conservation plans developed by state and local governments and any voluntary science-backed conservation practices and programs being conducted in the area, such as that done by conservation districts. Conservation districts should be considered as one of the primary partners; through their statutory authority, conservation districts are uniquely established to bring local knowledge in working with private landowners to treat natural resource issues. Conservation districts have a proven track record in bringing diverse organizations and local stakeholders to the table in collaborative efforts to plan and implement projects that restore the ecological health of watersheds and wildlife habitat. Conservation districts work with landowners and communities to restore wildlife habitat, improve water quality, and protect other natural resources. They understand that the benefits of restoration surpasses beyond private landowners and producers and that recreationists, such as wildlife enthusiasts, hunters, and anglers, will have quality habitat for their species of choice to thrive.

2. Integration of mitigation planning into a broader ecological context with applicable landscape-level conservation planning, by steering mitigation efforts in a manner that will best contribute to achieving conservation objectives

Section 5.2 – *Collaboration and Coordination*

On page 12387, Section 5.2 – *Collaboration and Coordination*, the first sentence says “The Services shares responsibility for conserving fish and wildlife with State, local and tribal governments and other Federal agencies and stakeholders.” The paragraph ends with, “The Service must work in collaboration and coordination with other governments, agencies, organizations, and action proponents to implement this policy.” However Sections 5.2(a) and 5.2(d) do not include the word “local” in the list of government entities involved:

5.2(a) - *“Coordinate activities with the appropriate Federal and State agencies, tribes, and other stakeholders who have responsibilities for fish and wildlife resources when developing mitigation recommendations for resources of concern.”*

5.2(d) – *“Collaborate with Federal and State agencies, tribes, and other stakeholders in the formulation of landscape-level mitigation plans.”*

Local units of government such as conservation districts need to be included in all collaboration and coordination planning. Conservation districts work every day with landowners and communities to restore wildlife habitat, improve water quality, and protect other natural resources. Every change we make to the landscape impacts wildlife and ecosystem health; therefore, careful forethought is needed both on working lands and in developing areas. Conservation districts play a critical role at the local level by emphasizing the importance of wildlife resources. Instead, the U.S. Fish and Wildlife Service has chosen to neither collaborate nor coordinate with local conservation districts.

Assumptions

Under Section 5.3 – *Assessments, subsection 3(c)*, the Proposed Revision states that the U.S. Fish and Wildlife Service “will use the best available effect assessment methodologies that predict effects over time, including changes to affected resources that would occur with and without the action, changes induced by climate change, and changes resulting from reasonably foreseeable actions.” *Section 5.3.3(e)* adds that the assessments should be “sufficiently sensitive to estimate the type and relative magnitude of effects across the full spectrum of anticipated beneficial and adverse effects.” Appendix B – *Cumulative Effects Analyses*, is additionally vague, stating, “to the extent practicable, cumulative effects analyses should address the synergistic effects of multiple foreseeable resource stressors.” In the *Analysis of Climate Change*, the Proposed Revision argues that “the analyses of climate change effects should address effects to and changes for the evaluation species, resource categories, mitigation measures, and the potential for changes in the effects of mitigation measure. Anticipated changes may result in the need to choose different or additional evaluation species and habitat, at different points in time.”

By relying on climate change assumptions during the mitigation planning process, an undue burden is placed on those who mitigate. They may not have anything to do with the climate change cause and may not reasonably or affordably provide a solution to the problem.

Currently the Proposed Revision allows for the Service to make several assumptions, and the policy fails to address how to assess qualitative effects. The term “foreseeable” is ambiguous, and its application raises issues associated with the temporal extent of the analysis. In 2009, the Solicitor of the Department of the Interior issued an M-Opinion which emphasizes that “the foreseeable future extends only so far as the Secretary can explain reliance on data to formulate a reliable prediction.”

Prior to the publishing of the final Revised Mitigation Policy, the U.S. Fish and Wildlife Service should provide additional procedures and safeguards which ensure that any assessment of impacts are not based upon assumption, speculation, or preconception. The Service should ensure that: (i) the 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 action being considered and not too attenuated or influenced by intervening factors.

Section 3.3 – Exclusions

On page 12384, the U.S. Fish and Wildlife Service should clarify the proposed language to provide exclusion protection to landowners who have participated or are participating in voluntary programs that protect endangered species from any pending action elections. NACD supports local management of habitat and species, rather than a top-down approach. Conservation districts are already leading local efforts by helping producers create habitat for endangered, threatened, and candidate species. Through voluntary, locally-led conservation practices, stakeholders have collaborated to enhance both the health of the land and recovery of species, including the New England Cottontail, Lesser Prairie-Chicken, and Greater Sage-Grouse. Without protection, the willingness of landowners to participate in voluntary programs will evaporate. The Service should recognize that a landscape-scale approach to mitigation is not appropriate in certain circumstances. The proponent of an activity with a small ecological effects footprint should not be burdened by escalating mitigation measures imposed based upon other activities or effects within that landscape. Accordingly, the Service should acknowledge that certain activities with a *de minimus* impact are exempt from application of the Mitigation Policy.

Section 5.6 – Means and Measures

On page 12390, under Section 5.6.2 – *Minimize (Includes Rectify and Reduce Over Time)*, the U.S. Fish and Wildlife Service states that “minimizing is reducing the intensity of the impact (e.g., population loss, habitat loss, reduced habitat suitability, reduced habitat connectivity, etc.)” and then lists measures to minimize such impact.

When applying any landscape-scale approach, the U.S. Fish and Wildlife Service should be cognizant of the role of states and other local government entities in managing fish and wildlife resources and their habitats. Given the need for and documented success of local conservation efforts in conserving species

and habitats, the Service should ensure that these efforts are considered and not undermined through the application of a larger scale mitigation analysis.

The proposed measures may not be minimal to a landowner who has to improve or change conservation practices and infrastructure. Water diversions and installation of screens, fences, signs, markers, “and other measures necessary to protect resources from impacts” could require a significant amount of capital on behalf of the landowner. The management decisions landowners make regarding the stewardship of their land cannot be addressed separately from their essential need: to support themselves and their families.

Credits should be stackable to ensure that landowners can receive payments for a variety of environmental benefits they provide.

Section 5.6.3(b) – Mitigation/Conservation Banking

In establishing a mitigation banking program, NACD recommends:

- a) allowing a restoration completed according to an approved plan to be available immediately for crediting to a mitigation bank;
- b) generating protocols and procedures to initiate and standardize physically and biologically oriented monitoring work among districts and other agencies—local, state or, federal—for restoration and habitat enhancement projects; and
- c) having all affected agencies develop simple guidelines and procedures to assist conservation districts in setting up and operating mitigation banks.

NACD currently encourages conservation districts to establish mitigation banks for use by agricultural producers using these guidelines. Since maintenance will be a key to the success of a mitigation banking program, such a program should make it practicable for individual farmers and local farm or conservation organizations to form or sponsor mitigation banks.

3. The integration of all applicable authorities that allow the Service to recommend or require mitigation within a single Mitigation Policy.

Elevation of U.S. Fish and Wildlife Service authority to all land use Private and Public

The Proposed Revision does not provide enough detail to warrant the promotion of U.S. Fish and Wildlife Service authority. The language lacks consistency and allows for a dangerous level of interpretation by the Service’s employees with little input from other federal agencies; state, local, and tribal governments; and landowners. The current level of review is imperative.

Under Section 5.1, the Proposed Revision calls for mitigation planning to be an integral part of “planning and regulatory processes for specific landscapes and/or classes of actions within a landscape.” The goal is to integrate mitigation planning into other conservation planning. The Proposed Revision does not explain how and if it would be applied to resource management plans run by the Bureau of Land Management or land management plans run by the Forest Service. The U.S. Fish and Wildlife Service

should include language to clarify the criteria that they will use to identify what conservation plan documents to use in mitigation.

On page 12392, under Section 5.7.2 – Recommendations for Locating Mitigation on Public or Private Lands, the Proposed Revision states, “The Service will generally but not always, recommend compensatory mitigation on lands with the same ownership classification as the lands where impacts occurred.” The Proposed Revision also states that, “the Service generally only supports locating compensatory mitigation on (public or private) lands that are already designated for the conservation of natural resources if additionality ... is clearly demonstrated and is legally attainable.” The U.S. Fish and Wildlife Service should consider that across the western states, there are large blocks of public land and small blocks of private land.

The Proposed Revision undermines many of the current mitigation systems in the West that rely on the interlinking of public and private lands. The U.S. Fish and Wildlife Service should increase deference and recognition of conservation plans prepared by state and local governments. The State of Nevada’s Conservation Credit System is an example of a current mitigation system that the Proposed Revision will impact. Nevada’s Credit System, “creates new incentives to avoid and minimize impacts from anthropogenic disturbances to important species habitat, and for private landowners and public land managers to preserve, enhance, and restore habitat, while reducing threats to important habitat for species.” The Credit System’s goal is for impacts from anthropogenic disturbances to be offset by habitat enhancement and protection that results in a net benefit for Greater Sage-Grouse in the State of Nevada. Nevada’s Conservation Credit System is just one of many mitigation systems that under the Proposed Revision will no longer be able to function, as many of the impacts on public lands are primarily mitigated through efforts conducted on private lands. If a landowner, action agency, state, permit applicant, or other party has no certainty that the Service will actually accept the credits produced, then a significant incentive for prelisting conservation measures is removed.

Furthermore, the Proposed Revision provides no clear distinctions between the circumstances where the U.S. Fish and Wildlife Service has the authority to require compensatory mitigation and the circumstances where the Service only has the authority to recommend compensatory mitigation. Before increasing any U.S. Fish and Wildlife Service authorities, the Proposed Revision should include clear and concise descriptions of the different levels or types of authority held by the Service.

Section 5.4 – Evaluation of Species

On page 12388, the Proposed Revision states, “The purpose of the Service mitigation planning is to develop a set of recommendations that would improve or, at a minimum maintain the current status...Therefore, following those species for which we must provide a regulatory determination...are the principle choices for selection as evaluation species.” This is not an effective way to protect other species as the evaluation species could be less-resistant to drought or fire than the affected area. This difference would give an inaccurate judgement to the U.S. Fish and Wildlife Service and potentially lead to an unwarranted listing of a species.

When identifying evaluation species for mitigation purposes, the Service should acknowledge that there are other factors that will inform the appropriateness of including certain species. For example, species exhibit different degrees of resiliency to different environmental stressors or impacts. Thus, the selection of a species that is less resilient than other species in that geographic area could skew the results of the mitigation assessment and suggest the imposition of greater mitigation measures than would otherwise be necessary. The Service should also consider other factors, such as species diversity, prevalence, population status, etc., in a particular location as compared to the greater range of the species. Individuals of a species may be more susceptible to project impacts in locations at the outskirts of their range where existence is more attenuated than it would be in areas where it is better established. Similarly, areas of low species occurrence at the project-level may not be representative of the overall health of the species, or the threats it faces at the taxonomic level.

Adequate statutory language and funds should be provided for efforts to recover candidate species to preclude the need for listing. Where opportunities exist, the Service should enter into agreements with conservation districts, landowners, and other appropriate entities to assist in the protection of candidate species.

Application of Mitigation Policy to the Endangered Species Act (ESA)

The U.S. Fish and Wildlife Service's 1981 Mitigation Policy did not apply to species listed under the ESA. The Proposed Revision states that mitigation is an "essential component" in achieving the purpose of the ESA, specifically under Section 7 and 10. The Service fails to provide a detailed explanation of how the revised Mitigation Policy will be integrated with and applied through the ESA. Instead of including an explanation while the Proposed Revision is being considered, on page 12383 the Service states that they anticipate publishing a subsequent policy that will specifically address compensatory mitigation under the ESA and provide operational details.

All actions on the Endangered Species Act should be removed from the Proposed Revision until the U.S. Fish and Wildlife Service releases its proposed policy specific to compensatory mitigation under the ESA and provide additional operational detail. At this time, there are numerous inconsistencies that need to be addressed before any implementation of the Mitigation Policy. For example, the central goal of the Mitigation Policy is to effectuate a net conservation gain (or, at a minimum, no net loss) in the status of the affected resource. Under, 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.02, Section 7 of the ESA has a standard of no jeopardy or adverse modification. The Service's evolution species cannot be used to impose higher levels of mitigation than required for the listed species under the ESA. ESA consultations are limited to those species that are listed as threatened or endangered, and the Service cannot consider effects of an action on non-listed species.

The Proposed Revision will establish an inconsistent ESA framework due to the National Marine Fisheries Service not adopting the U.S. Fish and Wildlife Service's Mitigation Policy. This approach is contrary to the typical practice of promulgating joint regulations by the two agencies that provide for uniform application of the ESA. By unilaterally proposing the Mitigation Policy, FWS is creating disparate requirements that will impose significant additional impacts to project sponsors solely based on the particular species that may be affected.

The National Association of Conservation Districts thanks the U.S. Fish and Wildlife Service for the opportunity to submit the above comments and looks forward to working with the Service on future ways to improve their Mitigation Policy. We respectfully ask that the Service reviews our comments and addresses the areas of concern prior to publishing a final revised policy.

Sincerely,

A handwritten signature in black ink that reads "Lee D. McDaniel". The signature is written in a cursive style with a light blue background behind it.

Lee McDaniel
President