



National Association of Conservation Districts

10/14/2016

Chief Tina Campbell
Attention: Docket No. FWS-HQ-ES-2015-0165
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 81 FR 61031, *Endangered and Threatened Wildlife and Plants; Endangered Species Act Compensatory Mitigation Policy* (Docket No. FWS-HQ-ES-2015-0165)

Chief Campbell,

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

The National Association of Conservation Districts (NACD) respectfully submits the following comments on U.S. Department of Interior, Fish and Wildlife Service (Service) Proposed Endangered Species Act (ESA) Compensatory Mitigation Policy (CMP).

Comments on Proposed CMP

The Service's proposed ESA CMP and their previously proposed draft Mitigation Policy Revision [81 FR 12379, March 8, 2016] are the result of recent Presidential and Interior Department memorandums. The Service's 1981 Mitigation Policy did not apply to species listed under the ESA. As such, in order to abide by the memoranda - not congressional mandates - the Service proposed revisions to its mitigation policy in which they have described mitigation as an "essential component" in achieving the purpose of the ESA, specifically under Sections 7 and 10.

In its March proposal, the Service failed to provide a detailed explanation of how the revised Mitigation Policy would be integrated with and applied through the ESA. Instead of including an explanation when the proposed revision was initially considered, the Service said it anticipated

publishing a subsequent policy that will specifically address compensatory mitigation under the ESA and provide operational details [81 FR 12383, March 8, 2016]. The proposed CMP is this promised policy.

The implementation of the CMP 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 CMP and the Mitigation Policy, FWS is creating disparate requirements that will impose significant and additional regulations on project sponsors based on the possibility of a species being affected.

Net Conservation Gains and Limited Authority of the Service

NACD is troubled further by the Service's continued push for net conservation gains. States and local communities created conservation districts during the nation's greatest environmental catastrophe—the Dust Bowl of the 1930s. They know what it takes to reclaim damaged lands and have proven over the last 80 years that they know what it takes to restore them, too. 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 forests and rangelands, which have in turn, degraded critical habitat for vulnerable species such as the greater sage-grouse. Similar to the Service's proposed revisions to the U.S. Fish and Wildlife Service Mitigation Policy [81 FR 12379, March 8, 2016], the proposed CMP fails to consider the probable ramifications of natural disasters when establishing and enforcing their goal of no net loss/net conservation gain. As referenced in our public comments submitted in May (attached below), NACD does not believe the Service will be able to quantify impact with specificity (e.g., acres of wetlands or numbers of species taken) in most instances, and as a result, will not be able to calculate corresponding amounts of mitigation accurately. Because the Service will not be able to assess mitigation obligation definitively, it should consider removing the absolute floor of no net loss to account for natural disasters that damage or destroy critical habitat.

The Service states that the proposed CMP would encourage the use of market-based compensatory mitigation programs, such as conservation banking in conjunction with programmatic approaches to ESA section 7 consultations and habitat conservation plans that can be designed to achieve a no net loss or net gain mitigation goal" [81 FR 61003, September 2, 2016]. However, the Service has limited authority to require mitigation under the ESA (such authority also differs between Sections 7 and 10) and little or no authority to require a net gain for species status under the ESA. The Service acknowledges their limited authority in Section 2 – *Authorities and Coordination*, arguing "we (the Service) can recommend the use of mitigation, and in particular compensatory mitigation, to offset the adverse impacts of actions under the ESA. This line between recommendation and requirement becomes cloudy in Section 5.2.2 –

Habitat Conservation Plans (HCP), where the Service states that “the Service should work with applicants to assist them in developing HCPs that achieve a net gain or, at a minimum, no net loss in the conservation of covered species and critical habitat. Though the statute does not require this (net gain/no net loss) of HCP applicants.” Under the ESA, there is no mandatory obligation to improve or maintain the current status of affected resources. By encouraging Service staff to work with applicants to implement net gain/no net loss conservation, the judgement of applications will no longer be standardized. The Service has yet to confirm whether net conservation gain will be solely measured on a numerical basis or under what circumstances the Service will make a qualitative judgment as to the level of mitigation that achieves this standard. If the Service uses a conservation gain approach to require mitigation that is not commensurate with the impacts to species or habitat, the Service’s application of a net conservation gain standard could result in regulatory taking.

Candidate Conservation Agreements with Assurances (CCAAs)

Under Section 5.2.1 – *Safe Harbor and Candidate Conservation Agreements*, the Service states that “CCAAs and Safe Harbor Agreements (SHAs) are not intended to be mitigation programs ... however, they are required to meet a similar conservation standard (i.e. net conservation benefit) as compensatory mitigation projects, as described in the proposed amendments to the regulations concerning enhancement of survival permits under the ESA [81 FR 26769, May 4, 2016] and revisions to the policy implementing these proposed regulations [81 FR 26817, May 4, 2016].” The Service argues that CCAAs and SHAs have similar purposes because they provide a conservation benefit to the covered species while also providing assurances to participating property owners. In doing so, however, the Service ignores the fact that CCAAs are pre-listing measures with no regulatory expectation of a subsequent species listing that would necessitate the use of a “net conservation benefit” standard.

While the assurances under both CCAAs and SHAs are provided by an ESA Section 10(a)(1)(A) enhancement of survival permit, this similarity does not warrant the imposition of the same net conservation benefit standard. The species covered by CCAAs and SHAs have different statuses under the ESA—SHAs apply to listed species and CCAAs apply to candidate species, species proposed for listing, or species that are likely to be listed in the near future. To make these classifications, the ESA imposes different standards and prohibitions with respect to pre-listing versus post-listing activities. By incorporating the net conservation benefit standard used for SHAs, the Service fails to account for these differences and conflates its treatment of pre-listing and post-listing activities. This decision if kept in the final version of the CMP would appear have the potential to invite an increased number of lawsuits against the Service and further slow the review process.

NACD believes the imposition of this standard would subvert efforts to avoid the listings of species by applying ESA standards that are only appropriate for species that are already listed. This sends the wrong signal to landowners and will discourage pre-listing conservation efforts.

Lack of Acknowledgement for Ongoing Voluntary Conservation Efforts

As the Service continues to implement policies that shift the planning and implementation of compensatory mitigation from a project-by-project to a landscape-scale approach, they should acknowledge and work with existing conservation plans developed by state and local governments and any voluntary science-based conservation practices and programs being conducted in the area, such as those led or conducted by conservation districts.

We encourage the Service to view NACD and our member conservation districts as one of the primary planning and implementation partners. Through statutory authority and decades of experience, conservation districts have developed a thorough understanding of local natural resource issues and strong partnerships with private landowners. Conservation districts also have a proven track record of bringing diverse organizations and local stakeholders to the table to plan and implement collaborative projects that restore aquatic, riparian, and terrestrial ecosystems. They understand the benefits of restoration go well beyond higher property values and improved recreational opportunities; they see the extensive habitat benefits created for wildlife species.

NACD applauds the decision by the Service to not apply the ESA CMP retroactively to approved programs or where the Service has already agreed in writing to mitigation for pending actions or ESA exempted actions. We would encourage the Service will establishing and achieving the agency's policy, to also not apply the policy to any permitted or approved actions that still have additional compliance review under the ESA (circumstances triggering reinitiation of consultation).

NACD thanks the Service for the opportunity to submit our comments and looks forward to working with the agency on ways to improve their Compensatory Mitigation Policy in the future. We respectfully ask that the Service reviews our comments and addresses the areas of concern prior to publishing a final revised policy.

Sincerely,



Lee McDaniel
President