



December 28, 2017

Craig Aubrey  
Division of Environmental Review  
U.S. Fish and Wildlife Service  
5275 Leesburg Pike  
Falls Church, VA 22041-2803

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

Re: Mitigation Policies of the U.S. Fish and Wildlife Service; (Docket No. FWS-HQ-ES-2015-0126-0196)

Dear Mr. Aubrey:

The National Association of Conservation Districts (NACD) represents the 3,000 locally-led conservation districts across the country that help millions of landowners and operators manage and protect natural resources on private and public lands. Established under state law, conservation districts are local units of government that share a single mission: to work cooperatively with the private sector and federal, state, and other local resource management agencies to provide world-class conservation assistance.

### **Background**

On March 28, 2017, President Donald Trump issued Executive Order 13783, *Promoting Energy Independence and Economic Growth*<sup>1</sup>. The EO rescinded President Barack Obama's memorandum on *Mitigating Impacts on Natural Resources From Development and Encouraging Related Private Investment*<sup>2</sup>. The presidential memorandum directed all federal agencies' mitigation policies to set a net-benefit goal, or at minimum, a no-net-loss goal for natural resources.

A day later, Secretary of the Interior Ryan Zinke issued Secretarial Order 3349, *American Energy Independence*<sup>3</sup>, which rescinded a Secretarial Order 3330, *Improving Mitigation Policies and Practices of the Department of the Interior*<sup>4</sup>. The SO on mitigation policies, established a Department of the Interior (DOI) wide mitigation strategy to ensure consistency and efficiency in the review and permitting of infrastructure-development projects and in conserving natural and cultural resources.

These now rescinded administrative actions were the basis for the United States Fish and Wildlife Service (Service) to formally revise its 1981 mitigation policy and establish a framework for the Service to recommend or require mitigation at appropriate landscape scales to

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<sup>1</sup> Exec. Order No.13783; [82 FR 16093-97](#).

<sup>2</sup> Presidential Memorandum; [80 FR 68732-68747](#).

<sup>3</sup> DOI, [Sec. Order No.3349](#), March 29, 2017.

<sup>4</sup> DOI, [Sec. Order No.3330](#), October 31, 2013.



achieve a net conservation gain, or no net loss, of Federal trust and other resources from proposed actions. The result was the Service issuing a new mitigation policy<sup>5</sup> in November and an accompanying Endangered Species Act - Compensatory Mitigation Policy (ESA-CMP)<sup>6</sup> in December of 2016. NACD participated in the public comment periods of both policies. Our comments can be found here:

- [Revisions to the US Fish and Wildlife Service's Mitigation Policy](#)
- [Endangered Species Act - Compensatory Mitigation Policy](#)

Secretary Zinke's order also directed DOI bureaus to re-examine mitigation policies and practices to better balance conservation strategies and policies with job creation for American families. In June of 2017, NACD submitted a letter to Secretary Zinke recommending the DOI, as part of the review, withdraw the Service's revisions to the mitigation policy and the [ESA-CMP](#).

NACD respectfully submits the below comments on the Service's mitigation policy with a focus on the policy's mitigation goals.

### **General Mitigation Goal Concerns**

As mentioned in our previous comments, 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. This lack of specificity to assess mitigation obligations definitively is why NACD's May 2016 public comments on the proposed revision to the mitigation policy recommend removing the absolute floor of no net loss to account for natural disasters that damage or destroy critical habitat. In the final policies released in November and December 2016, the Service continues to push for mitigation 'net gains' and 'no net loss'.

Local conservation districts were established out of nation's greatest environmental catastrophe, the Dust Bowl. Over the last 80 years, conservation districts have proven local expertise and knowledge of actions necessary to restore and reclaim damaged lands. As recent events have demonstrated, natural disasters can reverse decades of conservation work in a short period of time and can result in a net conservation loss that is difficult to mitigate. . These final policies should more fully recognize the highly variable and destructive capacity of natural disasters.

While the policies do not require project proponents achieve a 'net gain' outcome, the Service puts a strong focus on 'net gain' when developing mitigation measures. When responding to our comment asking how conservation gain will be measured, the Service responded, "The geographical and ecological breadth of this policy ... make the detailed specifications for calculating 'no net loss' or 'net gain' impossible to include. Such determinations will be either made on a case-by-case basis or will be addressed through additional guidance or planning process."<sup>7</sup>

Because of the lack of definitive guidance, the Service has established conservation planning

<sup>5</sup> Final Revisions to the US Fish and Wildlife Service's Mitigation Policy, [81 FR 83440-83492](#), November 21, 2016.

<sup>6</sup> Final ESA Compensatory Mitigation Policy, [81 FR 95316-95339](#), December 27, 2016.

<sup>7</sup> 81 Fed. Reg. at 95325 (Comment 27 and Response).



policies that is vague and as a result capable of very broad application and or interpretation. In addressing a similar comment, the Service said, “The purpose of the net conservation goal in mitigation planning is to improve conservation outcomes to affected resources ... The Policy provides a framework for Service recommendations to conserve.”<sup>8</sup> The framework of sections 5.1 through 5.9 only furthers the ability for broad application and interpretation.

While the Service can with the policy define conservation objectives as “a measurable expression of a desired outcome for a species or its habitat resources, “specific quantifiable measures are required in order to assure equal assessment of conservation gain or loss in order to prevent the potential for a needless increase in the regulatory burden of project sponsors.

Also of concern in both our comments, was the Service’s commitment to collaborate and coordinate in the development of mitigation programs. In addressing similar concerns, the Service said, “we have common goals with our partners and achieve much better outcomes when we work together ... The Service intends to continue working with all of our partners.”<sup>9</sup> The policies continue to shift the planning and implementation of mitigation from a project-by-project to landscape-scale approach. The Service 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 said area. These programs are often led or conducted by the local conservation district.

In that vein, we once again 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 recognizes the efforts made by the Service to amend section 5.2, *Collaboration and Coordination*, to better acknowledge local governments. However, who is the authority that determines when it is “appropriate” for the Service to “consider resources and plans made available by State, local, and tribal governments”?<sup>10</sup>

### **Species Evaluation**

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-

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<sup>8</sup> 81 Fed. Reg. at 83450 (Comment 32 and Response).

<sup>9</sup> 81 Fed. Reg. at 95331 (Comment 74 and Response).

<sup>10</sup> 81 Fed. Reg. at 83474.



Grouse. Without protection, the willingness of landowners to participate in voluntary programs will evaporate.

While the Service is right in that evaluation species is not a new term and was mentioned in the 1981 policy, the revised policy raises many questions regarding its use.<sup>11</sup> The Service states, “[they] will recommend the smallest set of evaluation species necessary to relate the effects of an action to the full suite of affected resources.”<sup>12</sup> The policy provides 12 characteristics of evaluation species that are useful in mitigation planning. In the same sentence, the Service also includes ‘may include, but are not limited to’ which leads to further broad interpretation by reviewer and potential for projects even on a case-by-case process to be reviewed under different standards. This has the potential to lead to an unwarranted listing of a species or increased regulations.

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 local conservation districts, landowners, and other appropriate entities to assist in the protection of candidate species.

### **ESA-CMP**

In responding to a comment on how the ESA-CMP will establish an inconsistent ESA framework as the National Marine Fisheries Service (NMFS) did not adopt the Service’s mitigation policy, the Service stated: “This policy was required under the Presidential Memorandum on Mitigation, the Department of the Interior Secretarial Order 3330, and 600 DM 6.”<sup>13</sup>

Without the pressure of the memorandum and Secretarial Order, maybe the Service would have more time to develop a policy that the National Oceanic Atmospheric Administration (NOAA) and NMFS might have been willing to also implement. It is concerning that NMFC did not adopt this policy even after the Service stated it had “coordinated development of both this policy and

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<sup>11</sup> Evaluation species defined as fish, wildlife, and plant resources in the affected area that are selected for effects analysis and mitigation planning.

<sup>12</sup> 81 Fed. Reg. at 83453

<sup>13</sup> 81 Fed. Reg. at 95331 (Comment 70 and Response)



the Service mitigation policy with NOAA, and incorporated their suggestions and modifications.”<sup>14</sup> \The Service acted contrary to the typical practice of promulgating joint regulations by the two agencies that then provide for uniform application of the ESA. Without a change, project sponsors have the potential to face increased regulations based on the possibility of a species being affected.

When addressing another comment, the Service said, “This policy [ESA-CMP] adopts mitigation principles established the Service’s mitigation policy and establishes compensatory mitigation standards to guide the use of compensatory mitigation under the ESA.”<sup>15</sup> The Service goes further with its explanation, “The mitigation goal of ‘net gain’ or, at a minimum, ‘no net loss,’ is to assist the Service and its partners in developing mitigation programs and projects to further the purposes of the ESA.”<sup>16</sup>

NACD remains concerned over the use of the mitigation goal of ‘net gain’ in compensatory mitigation and continues to believe that the goal and the landscape scale approach exceeds the ESA statutory authority and standards under Sections 7 and 10. While the Service admits it cannot aggregate statutory provisions to unilaterally generate a ‘greater impetus’ to conserve species or habitat beyond what Congress has specifically authorized or required under the ESA, through the use of the word ‘recommend’ the revised policy attempts to circumvent that limitation. The Service asserts in the policy that they can ‘recommend’ compensatory mitigation to offset the adverse impacts of actions under certain provisions of the ESA, as well as other statutory authorities like the National Environmental Policy Act.<sup>17</sup>

### **Closing**

Thank you for the opportunity to submit comments on the U.S. Fish and Wildlife’s new mitigation policy. We appreciate your consideration and look forward to continuing to work with the Service as it continues to conduct its review of the revisions made to the 1981 mitigation policy.

Sincerely,

A handwritten signature in black ink that reads "Brent Van Dyke".

Brent Van Dyke  
NACD President

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<sup>14</sup> Ibid.,

<sup>15</sup> 81 Fed. Reg. at 83450. (Comment 34 and Response)

<sup>16</sup> 81 Fed. Reg. at 95324. (Comment 24 and Response)

<sup>17</sup> 81 Fed. Reg. at 95334. (listing as supplemental authority, in addition to NEPA, the Fish and Wildlife Coordination Act)