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item 11c



Nevada Association of Counties

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October 17, 2016

Public Comments Processing

Attn: Docket No. FWS-HQ-ES-2015-0165

Division of Policy, Performance and Management Programs MS: BPHC

U.S. Fish and Wildlife Service

5275 Leesburg Pike

Falls Church, VA 22041-3803

Submitted via Federal eRulemaking Portal: <http://www.regulations.gov>

Re: Public Comment on the USFWS “Endangered and Threatened Wildlife and Plants; Endangered Species Act Compensatory Mitigation Policy; Notice” at 81 Fed. Reg. 61032 (Sept. 2, 2016)

The Nevada Association of Counties (NACO) hereby submits this comment letter on the U.S. Fish and Wildlife Service's (FWS) proposed Endangered Species Act (ESA) Compensatory Mitigation Policy. This comment letter is a response to the Notice published in the Federal Register at 81 Fed. Reg. 61032 on September 2, 2016.

The following points highlight concerns and needs as well as recommendations for resolution, in no particular order:

1. The Service should clearly describe its existing authorities and distinguish between what it can require and what it can only recommend. The three directives cited at 81 Fed. Reg 61033 direct agencies on mitigation standards only to the extent allowable by their implementing statutes.¹ The FWS may not use the NEPA process to compel the adoption of additional conditions on an ESA permit applicant.² The FWS acknowledges the requirement for a net conservation benefit exceeds agency authority under the ESA.³

¹ Presidential Memorandum: Mitigating Impacts on Natural Resources from Development and Encouraging Related Private Investment, 80 Fed. Reg. 68743 (Nov. 6, 2015); Improving Mitigation Policies and Practices of the Department of the Interior, Secretarial Order 3330 (October 31, 2013); A Strategy for Improving the Mitigation Policies and Practices of the Department of the Interior, (Clement et al. 2014).

² *Natural Res. Def. Council, Inc. v. U.S. EPA*, 822 F.2d 104, 127 (D.C. Cir. 1987) (EPA I) (citations omitted) (“NEPA, as a procedural device, does not work a broadening of the agency's substantive powers”); *Natural Res. Def. Council, Inc. v. U.S.*

2. For what the FWS can only recommend, it should encourage and fund local conservation efforts and forge better partnerships with State and local governments to holistically accomplish these goals.
3. It is unclear how "Compensatory Mitigation" differs from "Mitigation" or "Conservation Efforts" when At-Risk Species and pre-listing efforts are being included within its application.⁴ Compensatory Mitigation seems to apply only to mitigation measures adopted under Section 7 and 10 of the ESA once a species has already been listed and to offset impacts from a particular project. Efforts for At-Risk Species, however, are broader; as the goal of the ESA is to conserve species such that they do not need to be on any list. Yet there is no discussion in this policy regarding how "Conservation Efforts" and the FWS's Policy for Evaluation of Conservation Efforts (PECE) Policy fit into the larger conservation and mitigation picture. This includes discussions regarding advance mitigation and additionality. To support these positive incentives, for example, additionality must account for previously planned conservation efforts.
4. It is unclear how "priority conservation areas" will be identified, by which agency within the Department of Interior, under which authorities, and whether those areas qualify under the ESA as offsetting the impacts to a particular species at issue in a take permit.
5. The Service should explain how it will address critical habitat restoration requirements within landscape level compensatory mitigation. For example, if a project proponent contributes to a landscape-level in-lieu fee program, those funds may be directed towards the restoration of non-critical habitat portions of a "priority conservation area". In this scenario, landscape level compensatory mitigation may adversely affect a listed species because there is no guarantee those contributions or resources will be used to offset the project proponent's impacts to the critical habitat of that impacted species.
6. The FWS proposed policy of allowing the enhancement or restoration of public lands as a form of stakeholder agreed upon compensatory mitigation, including for projects with impacts that do not occur on public lands, should require the public land manager to commit to providing long-term protection and management of compensatory mitigation occurring on public lands. Further, the Service should require the public land manager to implement and fully fund alternative compensatory mitigation in the event that there is a change in law that allows incompatible uses to occur on mitigation lands. If the land is outside of critical habitat, there is no trigger for consultation.
7. The FWS should ensure that the policy preserves flexibility to apply the various approaches and mechanisms currently being used to accomplish compensatory mitigation in a way that does not inadvertently reduce local innovation and enthusiasm.
8. In lieu fee mitigation should help fund local conservation efforts through a grant program.

EPA, 859 F.2d 156, 169 (D.C. Cir. 1988) (EPA II) (citations omitted) ("NEPA does not, however, expand the range of final decisions an agency is authorized to make); *South Coast Air Quality Management District v. FERC* 621 F.3d 1085 (9th Cir. 2010) ("... NEPA may not be used to broaden [the federal agency's] congressionally limited role").

³ "This policy is focused on compensatory mitigation that can be achieved under the ESA. The Service's authority to require mitigation is limited, and our authority to require a 'net gain' in the status of listed or at-risk species has little or no application under the ESA." 81 Fed. Reg. 61034-5.

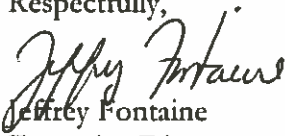
⁴ 81 Fed. Reg. 61032.



9. To address potential concerns that the advance mitigation approach is pre-decisional, the policy could provide that “Points of Tentative Agreement” and “Mitigation Credit Letters” may be revisited if information received during public comment indicates that there was a mistake such that the conservation opportunity is actually not suitable compensatory mitigation.
10. The mitigation policy should adopt an approach similar to that taken in the Section 10 of the Handbook to identify exceptions to the requirement to mitigate in advance of impacts.

Thank you for your time and consideration of NACO’s comments. NACO supports the comments provided by the Clark County Desert Conservation Program- Multiple Species Habitat Conservation Plan, the State of Nevada, and the National Association of Counties. All of Nevada’s counties are important stakeholders that will potentially be affected by this proposed change in policy. We look forward to a final policy that provides project proponents with increased certainty and that contains flexibility to leverage the benefits that can be obtained through regional compensatory mitigation approaches.

Respectfully,



Jeffrey Fontaine
Executive Director

JF/ts

Cc: file





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May 9, 2016

Public Comments Processing

Attn: Docket No. FWS-HQ-ES-2015-0126

Division of Policy, Performance, and Management

U.S. Fish and Wildlife Service

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Via eRulemaking Portal: <https://www.regulations.gov/#!docketDetail;D=FWS-HQ-ES-2015-0126>

Re: Proposed Revisions to the U.S. Fish and Wildlife Service Mitigation Policy (81 F.R. 12380)

The Nevada Association of Counties (“NACO”) hereby submits this comment letter on the U.S. Fish and Wildlife Service’s (FWS) proposed revisions to its mitigation policy. This comment letter is a response to the Notice published in the Federal Register at 81 F.R. 12380 on March 8, 2016. The draft policy departs significantly from existing policy and practices under the Endangered Species Act (ESA). Specifically, the policy emphasizes avoidance as the preferred form of mitigation and further establishes a “net benefit” or “no net loss” standard for mitigation. The following points highlight concerns with the draft policy as well as recommendations for resolution:

- The Service should continue to exclude application of the mitigation policy to the ESA and consolidate all ESA policies into the ESA-specific policy document that is currently under development.
- To improve clarity, the Service should clearly describe its existing authorities and distinguish between what it can require and what it can only recommend. The recent Presidential Memorandum issued on November 5, 2015 directs agencies on mitigation standards only to the extent allowable by their implementing statutes.¹ If a federal agency lacks the statutory authority to require certain conditions of a permit applicant, it may not, for example, use the NEPA process to compel the adoption of such conditions.²

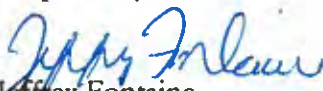
¹ Presidential Memorandum: Mitigating Impacts on Natural Resources from Development and Encouraging Related Private Investment. 80 Fed. Reg. 68743 (Nov. 6, 2015).

² *Natural Res. Def. Council, Inc. v. U.S. EPA*, 822 F.2d 104, 127 (D.C. Cir. 1987) (EPA I) (citations omitted) (“NEPA, as a procedural device, does not work a broadening of the agency’s substantive powers”); *Natural Res. Def. Council, Inc. v. U.S. EPA*, 859 F.2d 156, 169 (D.C. Cir. 1988) (EPA II) (citations omitted) (“NEPA does not, however, expand the range of final decisions an agency is authorized to make”); *South Coast Air Quality Management District v. FERC* 621 F.3d 1085 (9th Cir. 2010) (“... NEPA may not be used to broaden [the federal agency’s] congressionally limited role”).

- To improve certainty, the FWS should adopt a revised mitigation policy that provides project proponents with certainty early in the process regarding the suitability of compensatory mitigation lands.
- The FWS proposed policy of allowing the enhancement or restoration of public lands as a form of stakeholder agreed upon compensatory mitigation, including for projects with impacts that do not occur on public lands, should require the public land manager to commit to providing long-term protection and management of compensatory mitigation occurring on public lands. Further, the Service should require the public land manager to implement and fully fund alternative compensatory mitigation in the event that there is a change in law that allows incompatible uses to occur on mitigation lands.
- To address potential concerns that the advance mitigation approach is pre-decisional, the policy could provide that “Points of Tentative Agreement” and “Mitigation Credit Letters” may be revisited if information received during public comment indicates that there was a mistake such that the conservation opportunity is actually not suitable compensatory mitigation.
- A requirement for a net conservation benefit exceeds agency authority. As the FWS Habitat Conservation Planning Handbook notes, “[m]itigation programs should . . . be practicable and *commensurate* with the impacts they address.” We question how the Service can decide to apply this revised policy to the ESA program, given the constraints on authority under Sections 7 and 10 of the Endangered Species Act.
- The mitigation policy should adopt an approach similar to that taken in the Section 10 of the Handbook to identify exceptions to the requirement to mitigate in advance of impacts.
- The FWS should ensure that the policy preserves flexibility to apply the various approaches and mechanisms currently being used to accomplish compensatory mitigation.

Thank you for your time and consideration of NACO’s comments. NACO supports the comments provided by the Clark County Desert Conservation Program– Multiple Species Habitat Conservation Plan. All of Nevada’s counties are important stakeholders that will potentially be affected by this proposed change in policy. We look forward to a final policy that provides project proponents with increased certainty and that contains flexibility to leverage the benefits that can be obtained through regional compensatory mitigation approaches.

Respectfully,



Jeffrey Fontaine
Executive Director

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Hi, Dagny and Tori – this is about the best we can do right now as far as an overview of the noxious weed EIS. We're anticipating beginning scoping as soon as January 2018. We're drafting the cooperating agency letters right now. Sorry for the delay in sending this – couldn't get my computer to cooperate this morning.

The HTNF proposes to implement treatment and restoration actions using an integrated and adaptive management strategy to prevent, control, or eradicate non-native invasive plant infestations across the HTNF, and to promote or restore native vegetation and resilient, healthy vegetative communities. The strategy is designed to treat known infestations, and just as importantly, to treat new species and infestations as they are discovered across the landscape in the future. The strategy also allows for use of technology and methods that are not available today but may be developed and approved in the future.

This integrated and adaptive approach is derived from the Forest Service National Strategic Framework for Invasive Species Management (2013), Forest Service National Strategy and Implementation Plan for Invasive Species Management (2004), Strategy for Noxious and Nonnative Invasive Plant Management (USDA Forest Service 1998a), and the Forest Service Invasive Species Management Manual (FSM 2900), all of which direct National Forests to implement adaptive integrated invasive species management programs.

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