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Public Comments Processing
Attn: Docket No. FWS-HQ-ES-2015-0126
Division of Policy, Performance and Management
U.S. Fish and Wildlife Service
5275 Leesburg Pike, ABHC-PPM
Falls Church, VA 22041-3803

Re: Proposed Revisions to the U.S. Fish and Wildlife Service Mitigation Policy

Dear Sir or Madam,

Western Energy Alliance appreciates the opportunity to comment on proposed revisions to the U.S. Fish and Wildlife Service's (FWS) 1981 mitigation policy. The proposed policy would put in place overly restrictive mitigation requirements that would drastically reduce domestic energy development. The policy is also unacceptably vague in numerous areas, exceeds FWS's authority in others, and provides limited guidance to companies who would be affected by the policy. FWS should withdraw the proposed mitigation policy and reconsider its approach to addressing the November 3rd, 2015 Presidential Memorandum on mitigation.

Western Energy Alliance represents over 300 companies engaged in all aspects of environmentally responsible exploration and production of oil and natural gas in the West. Alliance members are independents, the majority of which are small businesses with an average of fifteen employees.

Legal Authority

The Alliance is concerned that FWS provides little guidance on how the mitigation policy would be implemented in practice, especially as it relates to the legal authority. The section entitled *Authority* references eleven statutes, which it says "provide the Service...specific authority for conservation...and that give the Service a role in mitigation planning for actions affecting them."

FWS must identify the statutory authority and circumstances warranting a mitigation requirement that a project proponent avoid "all impacts." There is no basis allowing FWS to unilaterally set aside land through the creation of no-development areas. Under the ESA, FWS must ensure that a federal action is not likely to result in the destruction or adverse modification of critical habitat. Given that critical habitat is defined as specific areas where physical or biological features "essential" to the conservation of the species are found, presumably, FWS would assign such areas a high value. Even in this context,

there is no requirement to avoid all impacts. Instead, during Section 7 consultation, FWS will propose a reasonable and prudent alternative to the action that would avoid the likelihood of adverse modification (i.e., appreciably diminishing the value of that critical habitat for the conservation of the species). FWS should revise the mitigation policy to reflect the obligations imposed by the ESA, and to clarify that the assessment of any impacts to habitat must be considered in relation to effects on the habitat and species as a whole.

Although the proposed policy provides a framework and a description of various elements of mitigation in general, FWS fails to provide reasonable limitations to its guidance on how the mitigation policy would be applied within the various statutory frameworks that are referenced as being potentially applicable. Furthermore, the proposed policy is unclear as to the relationship between the authorization given to FWS under a particular statute and the application of the mitigation policy.

FWS should also recognize that the mitigation policy is not an independent grant of authority in and of itself, so any mitigation requirements it seeks to impose under this policy will be constrained by the scope of authority granted in the Migratory Bird Treaty Act, the Bald and Golden Eagle Protection Act, and the ESA. Once again, the proposed policy fails to clarify these constraints and how they will affect application of mitigation requirements.

Application to the Endangered Species Act

As FWS recognizes in the proposed policy, the 1981 mitigation policy did not apply to species listed under the Endangered Species Act (ESA). However, under the *Applicability to the Endangered Species Act* section, the proposed policy states that “[t]his policy supersedes this exclusion for the Service.” FWS further notes that mitigation is an “essential component” in achieving the purpose of the ESA. However, other than a few general statements, FWS has not explained how the mitigation policy will interact with the ESA.

Instead, the policy states that in the future a “policy specific to compensatory mitigation under the ESA” will be published with “additional operational detail.” FWS should not publish two separate mitigation policies that both claim to be applicable to the ESA, as this approach is unnecessarily redundant and would create potentially inconsistent policies that must both be adhered to by affected parties. FWS should maintain the 1981 mitigation policy’s position that it does not apply to the ESA. Separately, FWS can then choose to develop an ESA-specific mitigation policy that is consistent with the requirements of the ESA.

If FWS proceeds with applying this mitigation policy to ESA measures, then it must further clarify how the proposed policy would be applied under the ESA. There are numerous differences between this mitigation policy and current ESA practice, which will create confusion and inconsistencies. For example, the proposed policy would require a net

conservation gain or at a minimum, no net loss, which differs from and exceeds the ESA Section 7 standard of “no jeopardy/no adverse modification.”

FWS’s approach to compensatory mitigation in the proposed policy is similarly incomplete without the ability to review and assess the forthcoming ESA-specific compensatory mitigation policy. At this time, it is unclear how FWS will determine mitigation measures when a proposed action impacts both listed and non-listed species. FWS cannot rely upon evaluation species to impose higher levels of mitigation than what would be required under the ESA for listed species, and FWS should ensure that the general mitigation policy does not undermine its policies on the treatment of voluntary conservation plans. However, meaningful comment on these and other ESA-related issues cannot be provided until all applicable policies are provided for review.

Finally, the mitigation policy would also use a landscape-scale approach, which would assuredly be much larger in size than the “action area” for which effects of an action are determined during an ESA Section 7 consultation. State and local conservation efforts can play a key role in conserving species and habitats, so FWS should ensure that these efforts are considered and not undermined through the application of a larger scale mitigation analysis.

Landscape Scale Management

One of the most significant revisions to the 1981 mitigation policy is the use of a “landscape approach” that will evaluate and require mitigation through a broader ecological context. Landscape is defined as “[a]n area encompassing an interacting mosaic of ecosystems and human systems that is characterized by a set of common management concerns...the landscape is not defined by the size of the area, but rather the interacting elements that are meaningful to the conservation objectives for the resource under consideration.” FWS would consider climate change and other factors that could “affect ecosystem integrity and the resilience of fish and wildlife populations.”

Such a broadly defined landscape-scale approach would allow FWS to require mitigation for areas that species have not historically occupied based solely on predictions related to climate change and habitat adaptation. It appears that this change is largely driven by FWS’s intent to expand its authority to address habitat adaptation resulting from climate change. FWS, however, does not have this authority under the ESA. Predictions related to impacts from climate change, potential habitat variations or other geophysical conditions are uncertain and not appropriate for use in requiring mitigation of the effects to a species.

We also believe that FWS has not adequately considered the impact on the federalism balance between states and the federal government. A landscape-scale approach has the potential to disregard state borders and the important role states play in managing wildlife. While we understand that wildlife does not respect state borders, our constitution does, and it cannot be easily overlooked for purposes of expanding FWS jurisdiction. States

remain the primary entity for wildlife management, and FWS must respect state borders and directly involve all governors of the states in which species is found and mitigation is required.

The proposed policy makes repeated reference to the need for project proponents to evaluate and mitigate the potential effects of climate change on species. The policy is entirely lacking, however, any detail on how these impacts are to be quantified. The most in-depth description for how this is to be done is provided in a one-paragraph section entitled "Analysis of Climate Change," which reads as follows:

"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 measures. Anticipated changes may result in the need to choose different or additional evaluation species and habitat, at different points in time."

The description of climate change analysis above gives zero guidance on how impacts are to be calculated, which is a clear admission that there is no scientific basis for doing so. The policy states that "climate change vulnerability assessments can be a valuable tool for identifying or screening new evaluation species." However, it provides no additional information on what these vulnerability assessments entail. Failing to provide specific, empirical data on how FWS and project proponents could go about determining the impact means that the policy is fundamentally flawed, and is an inappropriate attempt to do something even scientists cannot.

The policy is simply not achievable given currently available science. Were FWS to find supporting science, it would have to modify the policy substantially and then provide it for additional public comment prior to finalization. In the meantime, this requirement must be removed.

We are further concerned that once the FWS makes a flawed assessment on the supposed impacts from climate change it will try to apply the Social Cost of Carbon (SCC) and Social Cost of Methane (SCM). We have documented elsewhere how the SCC and SCM are based on flawed data, and will not go into great detail here because FWS has not specifically indicated the intention to use them. Should that be the intention, the proposed policy must be reissued for public comment with such information included.

Suffice it to say that the methodologies behind these various models for attempting to assess the impacts of climate change are intended to evaluate global impacts. They suffer from a high degree of uncertainty and are insufficient for use on a project-level basis. These models are not suitable for extrapolating global climate data into specific "landscape-level" or project impacts. To our knowledge, no such fit-for-purpose tools exist to do so. FWS must clarify how it expects the climate change analysis would be conducted and what tools are or will be made available to do so.

A similar situation applies to the concept of “expected natural species succession,” another term with little to no guidance in the proposed policy. Project proponents must evaluate and consider expected natural succession, but it is entirely unclear how FWS expects that projection to occur. Predictions for impacts that are beyond the control of a project proponent cannot be required without a clear methodology in place, and the proposed policy has not provided any such tool. Until FWS clarifies how these analyses are to be conducted, it should remove these requirements from the proposed policy.

Similarly, the mitigation policy states that it only applies to the mitigation of “impacts to fish, wildlife, plants, and their habitats that are reasonably foreseeable from such proposed actions.” FWS should clarify that the definition of reasonably foreseeable impacts does not include climate change impacts. Recent court decisions clearly demonstrate that there are significant uncertainties and speculation associated with attempts to project future changes to habitat, particularly in the context of climate change, and the resulting impacts on species.¹

Prior to implementation of the mitigation policy, FWS also needs to provide additional procedures and safeguards to ensure that any assessment of impacts is not based upon assumption, speculation, or preconception. FWS must ensure that assessment of impacts to species and their habitats can be identified and assessed with reliable predictability, which will require that any impacts are directly related to the action being considered and not too attenuated or influenced by intervening factors.

As written in the proposed policy, FWS’s definition of landscape and its reliance on a landscape-scale approach is not capable of consistent application and is not supported by existing scientific literature. FWS needs to refine the landscape approach through more specific criteria and guidance prior to its implementation. For instance, as currently written there does not appear to be a nexus between the geographic area that may be impacted by a proposed project, the area where mitigation may be appropriate, and the scope of the landscape that FWS will consider based on additional ecosystem stressors. This disparity is particularly evident regarding the consideration of climate-related impacts which typically evade analysis at the local or project scale.

Finally, the sheer scale of a landscape level approach will require additional time and resources given its novelty and the degree of complexity and burden added. It is therefore imperative that FWS provide guidance to determine when to take and what constitutes a landscape approach to promote consistency and avoid misinterpretation and misuse.

¹ *Alaska Oil and Gas Ass’n v. Pritzker*, 2014 WL 3726121, at *15 (D. Ak. July 25, 2014); *Alaska Oil and Gas Ass’n v. National Marine Fisheries Service*, 2016 WL 1125744, at *14 (D. Ak. March 17, 2016) (NMFS “lack[ed] any reliable data as to the actual impact on the [species] as a result of the loss of sea-ice”).

FWS should recognize that a landscape-scale approach to mitigation is not appropriate in certain circumstances. An activity with a small footprint should not be burdened by escalating mitigation measures imposed based upon other activities or effects within that landscape. Therefore, FWS should acknowledge that certain activities with a de minimis impact are exempt from application of the mitigation policy.

We are concerned FWS is attempting, through the landscape approach, to redefine mitigation as a process as opposed to an action. Avoidance is a practice that is conducted whenever possible. If avoidance cannot occur, minimization efforts are undertaken to decrease any impacts. If impacts cannot be minimized, then mitigation can ensue thereafter. However, the proposed policy is written in such a way that indirect effects are pre-eminent and the options for avoidance and minimization are no longer available due to the landscape approach. De minimis activities are exactly that and should not be subject to any form of mitigation.

Relationship to Other Agencies

FWS has only been granted authority to manage species that fall under the Migratory Bird Treaty Act, the Bald and Golden Eagle Protection Act, and those listed under the ESA. Therefore, the mitigation policy should acknowledge that states have the sole authority for resource management for all other species and should also limit the application of the mitigation policy to just federally protected species so as not to conflict with states' authority.

The proposed policy would also lead to increased interaction with other federal agencies, such as the Bureau of Land Management (BLM), which will inevitably lead to increased delays for actions by the other agencies. BLM, for example, is already understaffed and facing a resource strain that leads to unacceptable delays in permitting oil and natural gas activities. FWS staff in regional offices often admit to us that they do not have adequate resources to conduct their current workloads of section 7 consultations, delisting petitions, and other obligations. Adding new cooperation requirements between BLM and FWS on top of all the other obligations imposed by existing statute and new regulations at both agencies will exacerbate these delays. FWS should clearly outline how this proposed policy will affect its operations as well as interagency relationships and evaluate what delays will result, as well as how they can be avoided.

Exceeds Authority

FWS states that the mitigation policy applies to federal trust fish and wildlife resources and that "[t]he types of resources for which the Service is authorized to recommend or require mitigation also include those that contribute broadly to ecological functions that sustain species." Yet FWS lacks authority to manage species beyond those that fall under the Migratory Bird Treaty Act, the Bald and Golden Eagle Protection Act, and those listed under the ESA.

As proposed, the scope of the resources potentially affected by the mitigation policy is exceedingly large and should be narrowed. Most importantly, FWS should acknowledge that the underlying statute, whether the Migratory Bird Treaty Act, the Bald and Golden Eagle Protection Act, or the ESA, dictates the type of resources that can be evaluated for purposes of mitigation determinations. As currently drafted, the mitigation policy could be interpreted to support mitigation for impacts to nearly any species, which is contrary to law. In addition, plants listed under the ESA are not afforded special protections on private lands, and this policy should not be used to encroach on that aspect of the ESA.

FWS states that it will identify certain “evaluation species” that it will evaluate for mitigation purposes. FWS indicates that it will “select the smallest set of evaluation species necessary to relate the effects of an action to the full suite of affected resources and applicable authorities. Where FWS is required to issue a biological opinion, permit, or regulatory determination for specific species, FWS “will identify such species, at minimum, as evaluation species,” and it “may consider evaluation species that are not currently present in the affected area” based on certain circumstances.

Such an approach to evaluation species is completely beyond FWS’s statutory authority and should be removed from the proposed policy. Under the ESA, the procedures and protections of the Act are directed towards listed species and designated critical habitat and, to a lesser extent, proposed species and proposed critical habitat. While these listed species could be considered as “evaluation species,” there is no basis for evaluating other non-listed species when assessing actions under the ESA.

Further, during Section 7 consultation, the effects of the action are assessed based upon the species that may be present in the action area. FWS cannot expand the scope of analysis to include species that are not present in the action area based upon an assumption that the species will occur in the affected area at some point in the foreseeable future due to natural species succession.

When identifying evaluation species for mitigation purposes, FWS 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 impacts, so 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.

Finally, we are concerned that FWS will not be positioned to provide species-specific mitigation strategies to project proponents when needed. As a result, the burden of gathering additional data, such as habitat distribution/density within the landscape setting, and physio-chemical parameters of suitable habitat, to shape those strategies will fall on the project proponent rather than FWS. The lack of detailed species-specific mitigation strategies negates the benefit of having a standardized policy, i.e., predictability in project planning. FWS should reconsider its approach to evaluation species, especially as the proposed policy exceeds its statutory authority.

Net Conservation Gain

FWS is imposing a new standard for mitigation in the proposed policy, “to improve (i.e., a net gain) or, at minimum, to maintain (i.e., no net loss) the current status of affected resources.” Under the ESA, however, there is no obligation to improve or maintain the current status of affected resources. Instead, the statute provides specific standards regarding what may be required of a project proponent.

Under Section 7 consultation, FWS must ensure that any federal action is not likely to jeopardize the continued existence of any listed species or result in the destruction or adverse modification of critical habitat. Jeopardy occurs when an action would “reduce appreciably the likelihood of both the survival and recovery of a listed species,” and adverse modification occurs when an action would “appreciably diminish the value of critical habitat for the conservation of a listed species.”

The ESA requirements to avoid jeopardy or adverse modification and to minimize the impact of any take of listed species do not equate to the no net loss or conservation gain standard articulated in the mitigation policy, and there is no statutory authority to impose such requirements in the consultation context. Where the underlying statute provides no basis for requiring conservation gains, FWS cannot rely upon the mitigation policy as the source of authority to require such mitigation measures. FWS should adopt the statutory language of no jeopardy/no adverse modification rather than arbitrarily imposing a higher standard.

Furthermore, conservation gain is not an easily defined and consistently applied term. In certain contexts or for certain actions FWS may be able to quantify the specific extent of an impact and thereby calculate a corresponding amount of mitigation. However, in many other circumstances it will not be possible for FWS to make such definitive calculations, which will then undermine the ability to assess any mitigation obligation with specificity.

FWS indicates that, while its goal is a conservation gain, the acceptable level of mitigation is that which will achieve no net loss. The proposed policy does not explain how FWS will determine or impose mitigation measures to meet a mitigation target that exists somewhere between maintaining and improving the status of affected resources. Further clarification is necessary regarding when and how FWS will determine just how much mitigation is required for a given project.

On a related note, net conservation gain may not always mean simply more acres. A net gain could also be the removal of an inhibitor such as invasive species or wildfire fuels and this should be recognized.

The proposed policy further lacks any mechanism for crediting a project proponent for avoidance or minimization. For example, an oil and natural gas operator may add a well to an existing well pad that is outside of critical habitat at considerable expense, rather than constructing a new well pad in critical or sensitive habitat that would allow the cost of the

additional well to be lower. The current policy would not give the operator any credit for this action. FWS should formulate a mechanism for doing so.

Another concern with a net conservation gain standard is that it could result in a regulatory taking. When imposing any mitigation obligations, FWS must ensure that measures have an essential nexus and rough proportionality to the impact of the proposed project. While the practical details regarding the implementation of the mitigation policy are not yet known, FWS must exercise restraint in the amount of recommended mitigation to ensure that it is commensurate to the impact to species or habitat.

Finally, FWS should identify opportunities where a net conservation gain can be readily achieved without extensive data collection and analysis. Measures that can be implemented through available and cost-effective resources could be widely applied without having to conduct a review and approval process each time a similar approach or measure is proposed.

Impact on Operations

FWS states it will “recommend or require that compensatory mitigation be implemented before the impacts of an action occur and be additional to any existing or foreseeably expected conservation efforts planned for the future.” The preference for advance compensatory mitigation is unrealistic, for several reasons, and should be removed from the mitigation policy.

Depending upon the species or habitat, compensatory mitigation may not be available at the time impacts from a project occur. For example, for a species that is recently listed, it may take some time for a mitigation bank to acquire necessary habitat, get regulatory approval, and generate mitigation credits. In such cases, FWS should not deny regulatory approval or delay the initiation of projects. In most instances, funding for compensatory mitigation is not available and will not be advanced until after a permitting decision is complete and other project milestones have been achieved. FWS must recognize the pragmatic realities of project implementation and funding in establishing mitigation requirements that can be effectively achieved.

Furthermore, requiring advance mitigation in tandem with requiring durable mitigation ignores the reality of developing oil and natural gas. Under the proposed policy, mitigation must last at least as long as the impact to the land occurs. For any given well, however, it is unknown prior to drilling how productive it will be and thus how long it will operate on and impact the land. The impacts could last for decades, or in the case of a dry well the affected area might be reclaimed in a few short years.

Prior to drilling a well, such knowledge is unavailable. With an advance mitigation requirement, the operator would be forced to purchase mitigation in anticipation of a successful well, at a much greater cost and for a longer period of time than may be necessary if the well does not produce. Since it is unlikely there will be any mechanism for

a refund or a secondary market to transfer the mitigation credits in order to recoup costs, the operator would have overpaid, perhaps drastically, with no recourse. Adding this element of uncertainty to the normal costs of drilling a well would discourage any operations that would fall under the proposed policy.

Finally, the financial assurances section of the proposed policy is also concerning. There are currently extensive bonding requirements in place for oil and natural gas drilling, and the policy would add another bonding requirement that applies only to the mitigation. It appears this is intended to impose a cost over and beyond the cost of the mitigation itself, which is unnecessary, punitive, and a further discouragement to development. FWS should provide a better definition of what the financial assurances requirement means and the associated costs.

Voluntary Actions

FWS's approach to compensatory mitigation would also have a chilling effect on any voluntary efforts that an operator may be willing to undertake, and would therefore undermine the goal of conserving species and their habitat. Under a voluntary conservation plan, the benefits to a species from voluntary mitigation actions undertaken prior to listing would accrue as a benefit to the operator. However, in the mitigation policy, FWS appears to suggest that such prelisting conservation actions would not be considered as a potential source of compensatory mitigation.

FWS needs to clarify these apparent inconsistencies to provide necessary certainty regarding the availability and application of mitigation credits. 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.

Habitat Valuation

FWS states that the "primary purpose of habitat valuation is to determine the relative emphasis the Service will place on avoiding, minimizing, and compensating for impacts to habitats of evaluation species." FWS intends to assess the overall value of habitat through a consideration of scarcity, suitability for evaluation species, and importance to the conservation of evaluation species. For affected habitat used by more than one evaluation species, FWS will use the highest valuation to determine mitigation recommendations or requirements. FWS states that for habitats determined to be of high value, it "will seek avoidance of all impacts."

Further, FWS must provide additional clarification on how it will value affected habitat when it is used by more than one evaluation species. Specifically, FWS states that "the highest valuation will govern" the mitigation recommendations or requirements. Given the multitude of biological factors that must be considered for each species (e.g., life history needs, development stages, ecosystem relationships, and habitat quality), it is unclear how

FWS will standardize a particular valuation such that it can be compared across multiple species. FWS must provide the methodology it will utilize for determining the highest valuation for habitat utilized by multiple evaluation species, and it must ensure that such a determination is not arbitrary and is conducted in a transparent manner with involvement of the affected project proponent.

Conclusion

The proposed mitigation policy has a number of troublesome and/or unclear provisions that should be reconsidered, clarified, or simply removed before FWS moves forward with finalizing its policy. Given the scope of the necessary changes, Western Energy Alliance recommends FWS address and incorporate the above recommendations and then reissue the proposed policy for further public comment. Thank you for considering our comments, and please do not hesitate to contact me should you have questions.

Sincerely,



Kathleen M. Sgamma
Vice President of Government & Public Affairs