WUWC
WESTERN URBAN WATER COALITION

November 6, 2014

Jim Serfis
Chief, Office of Communications and Candidate Conservation
Public Comments Processing
Division of Policy and Directives Management
U.S. Fish and Wildlife Service
4401 N. Fairfax Dr.
MS 2042-PDM
Arlington, VA 22203

Attention: Docket No. FWS-R9-ES-2011-0099; 79 FED REG 42525

Re: Comments on policy regarding voluntary prelisting actions

Dear Mr. Serfis:

The Western Urban Water Coalition (WUWC) appreciates the opportunity to comment on the U.S. Fish and Wildlife Service's (USFWS) proposed policy on crediting voluntary prelisting conservation actions taken for species prior to their listing under the Endangered Species Act of 1973 (ESA), as amended. Furthermore, WUWC requests the USFWS consider these comments when finalizing its proposed policy.

I. Introduction

Leaders of several western municipal water suppliers created the WUWC in June 1992 to address the West's unique water issues. The WUWC's goals and initiatives have evolved to address challenges created by climate change, fluctuations in weather patterns, rampant wildfires and drought, population growth, aging water infrastructure, and increased regulatory oversight.

The WUWC consists of the largest urban water utilities in the western United States, who serve more than 35 million water consumers in 16 metropolitan areas across five states, some of which also operate wastewater and hydroelectric facilities. WUWC's membership includes

- Arizona—Central Arizona Project and City of Phoenix
- California —East Bay Municipal Utility District, Eastern Municipal Water District, Los Angeles Department of Water and Power, Metropolitan Water District of Southern California, San Diego County Water Authority, City and County of San Francisco Public Utilities Commission, and Santa Clara Valley Water District
- Colorado —Aurora Water, Colorado Springs Utilities, and Denver Water

- Nevada —Las Vegas Valley Water District, Southern Nevada Water Authority, and Truckee Meadows Water Authority
- Washington —Seattle Public Utilities

The WUWC is committed to presenting a new perspective on the management of water resources in the modern West. The WUWC articulates the needs and values of western cities to provide a reliable, high-quality urban water supply for present and future generations, while preserving the unique environmental and recreational attributes of the West.

The WUWC is an active public and legislative advocate for progressive water and resource management. It encourages water sharing and transfers, supports an adequate supply of water for environmental and recreational purposes, advances multipurpose storage opportunities, promotes water conservation, and advocates for effective and practicable approaches to implement environmental-protection programs in a time when water is becoming scarcer and more critical to the West's sustainability. Many WUWC members are at the forefront of water reuse, conservation, and optimization. WUWC members consistently seek water supplies from non-traditional sources. Many of the foregoing activities WUWC members undertake involve critical habitat and trigger ESA's consultation requirements. For these reasons, WUWC is encouraged by the new policy USFWS proposed on crediting voluntary prelisting conservation actions.

The WUWC has actively commented on earlier proposals involving implementation of the ESA. Throughout its long track record of working with the ESA, the WUWC has stressed the importance of reasonable administrative reform to make the ESA work better—both for species and for reasonable and responsible resource development. For example, we played an active role in the development of and support for Secretary Babbitt's five-point ESA plan and Secretary Kempthorne's cooperative conservation initiative. Our members have been active participants in habitat conservation plans (HCPs), safe-harbor agreements, and candidate conservation agreements. We have opposed unnecessary legislation that would weaken ESA. We take pride in these actions, and they have made a difference.

In 2012, we submitted comments on the Department of the Interior's advance notice of proposed rulemaking for Expanding Incentives for Voluntary Conservation Actions Under the Endangered Species Act, 77 Fed. Reg. 15,352 (March 15, 2012). In our comments, we supported developing a program that

- facilitated the voluntary conservation of candidate species to lessen the likelihood that listing ultimately will be necessary
- provided regulatory certainly in the event listing does occur

We also urged the USFWS to develop a program under which recovery credits for the conservation of a species could be obtained and applied to future development projects.

WUWC sincerely appreciates the USFWS's inclusion of these incentives in its proposed policy. We believe, however, that for the program to fully "incentivize voluntary conservation efforts on behalf of species before they are listed as endangered or

threatened under the Endangered Species Act," additional consideration needs to be given to how the program is managed. Specifically, because the credits will be used as mitigation and compensatory measures for a federally listed endangered or threatened species, we believe the management of this program should properly be with the USFWS. WUWC also is concerned that states may be unwilling or unable to establish a meaningful voluntary prelisting conservation-action crediting system as the policy proposes. Therefore, we encourage continued discussion among all stakeholders on how this incentive program would be administered and credits issued.

II. General comments

WUWC urges the USFWS to reconsider moving the primary responsibility for the management of this proposed program from an individual or a collective group of states to a federally administered system. Currently the policy allows for a state to choose to participate in the voluntary prelisting conservation-action crediting system. There is no requirement that a state participate in this program, and the USFWS only will assist a state if it is requested to do so and if resources allow. Under the proposed policy, the states (or a third-party designee) are responsible for maintaining a register of all voluntary prelisting conservation actions taken pursuant to a state plan. The states may use section 6 funds "to measure, monitor, and oversee the implementation of the pre-listing conservation actions as they relate to candidate species" (FR 42529). There is no indication from the proposed policy that additional funds will be made available to the states to adequately staff, implement, and monitor this program or that these programs will be prioritized in section 6 grant proposals. Without the certainty of adequate funding, consistent programs, and full state participation, the purpose of the proposed policy—to incentivize voluntary conservation efforts before a species is listed under the ESA—cannot be fully realized.

Furthermore, we urge the USWS to reconsider limiting credits earned through voluntary conservation actions to the geographical boundary of each state and for the credits to apply only to that same species for which the credit was earned. By restricting the credits earned through participation in the program to a specific state and species, the policy is seemingly inconsistent with the best available science and USFWS's current policies.

A. State authority and resource allocation

WUWC recognizes a state's primacy in managing candidate conservation species or wildlife not listed as threatened or endangered under the ESA. In fact, our members collaborate with state fish and wildlife agencies on many projects. As the proposed policy is drafted, however, incentives only will be realized by parties that undertake a voluntary conservation action if a species becomes federally listed. Specifically, the USFWS will treat the voluntary prelisting conservation action, proposed in the policy to be administered by the states, as a measure to minimize or mitigate the incidental taking of an endangered or threatened species pursuant to section 10(a)(1)(B), 7(a)(2), or 7(a)(3) of the ESA.

The USFWS has been tasked by Congress to make an incidental take determination and also presumably assumes any litigation risk along with such a determination. The

"incidental take permit" process established under section 10(a)(1)(B), 7(a)(2), or 7(a)(3) of the ESA authorizes the secretary of the Interior and secretary of Commerce to authorize the taking of federally listed wildlife or fish if such taking occurs incidentally during otherwise legal activities. The secretaries of Interior and Commerce subsequently charged the directors of the USFWS and the National Marine Fisheries Service, respectively, with regulating the incidental taking of listed species under their jurisdiction.

The proposed policy does not affirm the federal role in this incidental-take authorization or the subsequent mitigation process. In fact, Section 5 of the proposed policy simply states the services will review any voluntary prelisting conservation program for consistency with this and other USFWS policies. There is no federal approval of state crediting programs required in the draft policy or any national standards that are being proposed. Being void of these terms, USFWS's ability to defend the application of these mitigation measures in court pursuant to an incidental take may present a challenge.

For example, the Ninth Circuit recently found that while conservation agreements can help ensure that listed species are not "jeopardized" by an action with a federal nexus, the terms of those agreements must be enforceable under the ESA (*Center for Biological Diversity v. Bureau of Land Management*, No. 10-72356 (9th Cir. Oct. 22, 2012)). In this decision, the court considered the enforceability and projected beneficial effects of a conservation action plan for its conclusion that the project would not jeopardize nine listed fish species or adversely affect critical habitat (*Id. at 12721*). The court found unless the conservation action plan is binding under the ESA, the USFWS will be unable to use the ESA's "strict civil and criminal penalties" to ensure that the plan is implemented (*Id. citing Gifford Pinchot Task Force v. U.S. Fish & Wildlife Serv., 378 F.3d 1059, 1063 (9th Cir. 2004*)). Moreover, the court recognized "[t]he primary responsibility for insuring that federal projects do not harm endangered species or their habitats rests with the FWS" (*Id at 12728 citing Sierra Club v. Marsh, 816 F.2d 1376, 1387 (9th Cir. 1987) at 1379*).

While we recognize that this case's facts may be distinguished from the proposed policy, we ask that the USFWS consider the issue of the federal nexus and enforceability of the proposed policy under the ESA. As the proposed policy would allow states or their designee to manage and administer this program based on state plans subject only to the USFWS's review, not approval, we are concerned the program may not provide the required federal enforceability nexus. Therefore, we believe the authority to manage and administer this program should rest with the USFWS.

WUWC also is concerned that many states do not currently have the infrastructure to administer this program. Across the country many state fish and wildlife agencies are experiencing budget reductions and hiring freezes, and they are being forced to make difficult decisions on resource management. Furthermore, while the proposal allows the states to use section 6 funding for these purposes, the states' current requests for funding under these grants far exceed the project applications they have submitted.

The proposed policy also directs that a voluntary prelisting conservation action be undertaken as part of a state or multi-state–administered program, including the most

recent version of a state wildlife action plan or other state conservation strategy. Congress created the State and Tribal Wildlife Grants program in 2000 to address the longstanding need to fund actions to conserve declining fish and wildlife species before they become threatened or endangered (*Measuring the Effectiveness of State Wildlife Grants: Final Report, Association of Fish & Wildlife Agencies' Teaming With Wildlife Committee April 2011*). This grant program is considered the core federal program for preventing future endangered species listings. Congress identified eight elements that each state's wildlife action plan must address, but states were given wide latitude to use methodologies and approaches that conformed to their individual needs and varying capacities, and also allowed for innovation.

The WUWC recognizes the importance of these plans and applauds the state fish and wildlife agencies for successfully developing state wildlife action plans in every state and territory. We agree with the states that efforts to identify the species and habitats in greatest conservation need, key threats, and conservation actions needed are important steps to prevent endangered-species listings and spur recovery (*Best Practices for State Wildlife Action Plans, Nov. 2012 p. vii).* As each state plan is unique to that state's needs, WUWC believes voluntary conservation actions that an entity undertakes may not be consistent with every state's plan as they vary. WUWC respects the states' ability to manage a non-listed species and recognizes their sovereign rights to do so prior to the species being federally listed. As the proposed crediting system only applies once a species is federally listed and the provisions of the ESA are in full effect, however, we once again request that the USFWS manage a nationally consistent program.

B. USFWS current policies

The WUWC supports the application of the best available science to apply earned credits for the benefits of species, and we continue to urge consistency in any aspect of how the ESA is applied. Therefore, because the credits will be used as mitigation and compensatory measures for an endangered or threatened species, and post-listing environmental compliance is not limited to state boundaries, it is not consistent with existing law and policy that credits can only be used (by the original applicant or a third party) within a state where they were earned.

There are numerous examples where the USFWS looks at the entire range of a species in deciding what impact actions may have on the status of that species. We would like to amplify some of those provisions including:

- Under section 3(16) of the ESA, "the term 'species' includes any subspecies of fish or wildlife or plants, and any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature." Species are not defined or listed by political state boundaries.

- Under section 7(a)(2) of the ESA, federal agencies are to ensure that a proposed action will not likely "jeopardize the continued existence of a listed species or result in the destruction or adverse modification of critical habitat." 50 CFR §

402.02 defines "jeopardize the continued existence of" as "to engage in an action that reasonably would be expected, directly or indirectly, to appreciably reduce the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species." 50 CFR § 402.02 defines "destruction or adverse modification" as "a direct or indirect alteration that appreciably diminishes the value of critical habitat for both the survival and recovery of a listed species. Such alterations include, but are not limited to, alterations adversely modifying any of those physical or biological features that were the basis for determining the habitat to be critical." Thus, jeopardy and critical habitat destruction/adverse modification are not assessed within political state boundaries.

- Under section 10(a)(2)(A) of the ESA, incidental-take permit applicants are required to submit HCPs that specify measures the permit applicant will undertake to minimize and/or mitigate such impacts. These mitigation measures are not limited by political state boundaries.

- In 2003, the USFWS issued a Guidance for the Establishment, Use, and Operation of Conservation Banks memorandum that discussed "protection of off-site listed species habitat through purchase of credits in a conservation bank" under sections 7 and 10 of the ESA (*Conservation Banking Guidance Memorandum at p. 3-4*). The memorandum states "the Service Area [of a conservation bank] should be based on the conservation needs of the species," such as within recovery units or focal areas, described in recovery plans (*Id. at p. 8*). Thus, recovery needs for a species are not based on political state boundaries.

- With respect to a species' historic range, 50 CFR 17.11(e) and 17.12(e) state that once a species is determined to be an endangered species or threatened species, the protections of the ESA apply "to all individuals of the species, wherever found." Again ESA is not limiting the species to a political state boundary.

Therefore, WUWC encourages redrafting the proposed rule to include the ability to apply earned mitigation credits across state boundaries. This change will ensure consistency with current law and USFWS policy.

III. Specific comments

In addition to WUWC's overarching concerns about the preferred management of this program and the need to be consistent with law and policy, we also would like to address two other issues that could have unintended consequences on the successful implementation of this program as the policy is drafted.

A. The proposed policy contains a significant amount of ambiguity with respect to the basis in which the impacts of voluntary prelisting conservation actions are evaluated.

WUWC is concerned that there is too much flexibility in "moving the ball" in terms of

what would qualify as "beneficial" in section 6 of the proposed policy (FR 42529). As public and private entities plan ahead in terms of resource allocation, there needs to be greater certainty on the scientific baseline for undertaking voluntary prelisting conservation action. Specifically, the policy does not discuss what metrics would be used to determine when new or revised science would be applied. The discussion within the policy that "over time, new scientific information may indicate that the metric may need revision or a new metric should be used" should be clarified. WUWC suggests that greater certainty should be made available so that entities are more apt to engage in this type of conservation planning.

B. The requirement that a voluntary conservation action must be "not required by any Federal, State, or local law, regulation, permit or other regulatory mechanism" should be more precisely defined.

WUWC requests that the USFWS more precisely define what is meant by "not required by any Federal, State, or local law, regulation, permit or other regulatory mechanism." Specifically, it could be argued that contracts entered into between an entity and a state or local municipality to perform certain work is thereafter required through state or federal contact law. While presumably not the intent of the proposed policy, this issue should be clarified as authorizations to expend funds or enter into a contract in local jurisdictions are often done through local ordinances. For example, the Portland City Counsel authorized the director of the Bureau of Environmental Services to enter into a contract amendment for $62,577 with USFWS for monitoring and a watershed assessment to determine project effectiveness and partnering with other jurisdictions (*Portland City Counsel Ordinance 186806*). This action to contract or authorize the expenditures of funds, simply authorized through a city ordinance, may be seen as a requirement of local law prior to the implementation of a voluntary conservation action. Therefore, WUWC believes the policy should be clarified.

IV. Conclusion

The WUWC appreciates the USFWS's response to our previous comments and the inclusion of incentives for voluntary conservation measures in this proposed policy. To fully "incentivize voluntary conservation efforts on behalf of species before they are listed as endangered or threatened under the Endangered Species Act," however, we believe management of this program should properly be with the USFWS. We encourage continued discussion among all stakeholders on how this incentive program would be administered and credits issued. We would be happy to meet with agency officials to discuss our concerns. Please contact our counsel, Donald Baur of Perkins Coie, LLP at 202-654-6200 to discuss this request.

Sincerely,

David Modeer / by Don Baur

David Modeer
Chair
Western Urban Water Coalition

cc: Perkins Coie LLP
700 Thirteenth St. NW, Suite 600
Washington, D.C. 20005-3960