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Public Comments Processing
Division of Policy, Performance and Management
U.S. Fish and Wildlife Service
5275 Leesburg Pike, ABHC-PPM
Falls Church, VA 22041-3803

Re: Comments on the Notice of Proposed Revisions to the U.S. Fish and Wildlife Service Mitigation Policy (81 FR 12379, March 8, 2016)
Docket No. FWS-HQ-ES-2015-0126

This letter contains Western Urban Water Coalition ("WUWC") comments on the notice of proposed Revisions to the U.S. Fish and Wildlife Service Mitigation Policy (81 FR 12379, March 8, 2016) ("Revised Policy").

Created in 1992 to address the West's unique water issues, the WUWC consists of the largest urban water utilities in the West, serving over 35 million western water consumers in 15 metropolitan areas in five states. The membership of the WUWC includes the following urban water utilities: Arizona - Central Arizona Project, City of Phoenix and Salt River Project; California - 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 - City of Aurora, City of Colorado Springs, and Denver Water; Nevada - Las Vegas Valley Water District, Southern Nevada Water Authority and Truckee Meadows Water Authority.

In general, we support the issuance of the Revised Policy. Landscape scale mitigation, if done in a timely manner, based upon science and not bogged down by excessive bureaucracy, would generally be beneficial for species and the environment. The WUWC members are strong proponents of the use of mitigation to advance conservation initiatives and to provide a flexible tool for assisting resource development projects to proceed in an environmentally responsible manner. Mitigation has been used frequently in water resource management projects, and we look forward to working with the Fish and Wildlife Service ("the Service" or "FWS") to develop and implement the mitigation policy in a manner that is consistent with the comments set forth below.

The key to a successful mitigation policy involving water resource projects is to establish a voluntary and flexible program that allows for mitigation to be tailored to the specific factual

situation involved without adherence to rigid formulas or aspirational goals that, while desirable from a conservation perspective, may make project development unreasonably expensive or impractical. From our perspective, utilization of the mitigation approaches identified under the Revised Policy should remain within the prerogative of the water resource project proponent and be the product of collaboration between applicants and other stakeholders.

Our primary concerns are that the policy not create significant or unauthorized added burdens to water resource developers and providers through the adoption of a policy that is extremely complex and difficult to implement, that mandates species assessments beyond those already required by law, or that significantly increases costs to the regulated community who will be delivering the required mitigation. This letter describes these concerns and proposes modifications that would provide greater clarity and certainty.

Comments on the Revised Policy

I. Application of the Revised Policy

The Revised Policy is vague in distinguishing where FWS has authority to require compensatory mitigation and where FWS may only recommend it. This likely depends upon the role that FWS is playing in the permitting process. Please clarify the different practical effects of the Revised Policy when FWS is the lead agency, when it is a permitting agency and when it is not the permitting agency and whether and how the Revised Policy is intended to bind other federal agencies.

The Revised Policy should exclude potential incidental impacts to migratory birds protected under the Migratory Bird Treaty Act until FWS establishes any statutory or regulatory authority to require landowners to obtain incidental take authorization prior to undertaking otherwise lawful land use activities.

We understand that the Revised Policy is not intended to be retroactive, *id.* at 12384, but we are concerned that when finalized FWS intends to apply it to projects then under review. Concerning application of any new mitigation policy to existing projects and valid existing rights, we think it is critical that existing projects be exempted from any new mitigation requirements. Current projects have been designed and developed in reliance on the existing mitigation framework and must be allowed to proceed accordingly. The Service should make clear that any new mitigation policy and related procedural or other requirements apply only prospectively to new project applications or proposals.

II. Capacity of the Service, Project Proponents and the Public to Carry Out or Implement the Revised Policy

The Revised Policy will (1) be difficult for FWS to carry out at current staffing levels, (2) impose additional duties on other federal and state agencies, and (3) require activities by the private sector that FWS can only encourage but not control.

The Revised Policy is an enormous expansion of the 1981 FWS Mitigation Policy, in particular by including FWS responsibilities under the ESA. We are concerned about the capacity of FWS to implement the Revised Policy without delaying its own permitting and the permitting process of other agencies. For example, Section 5.8 of the Revised Policy addresses how FWS will work with project proponents to choose areas for mitigation. *Id.* at 12393. This appears to require much new work from FWS Field Offices to identify sites; define study needs, objectives and methods; choose and coordinate the “evaluation species” with other agencies; and provide recommendations to project proponents. It is difficult to imagine FWS Field Offices meeting the requirements of the Revised Policy with their current staffing levels, let alone doing so in a timely manner. The capacity of FWS Field Offices is already under heavy pressure to meet its Section 7(a)(2) obligations under the ESA.

The Revised Policy references the use of “established conservation plans” to achieve “the greatest effectiveness.” *Id.* at 12386-87. We question whether the landscape level information is now available to meet the requirements of the policy. FWS intends to rely on mitigation and habitat restoration plans developed by federal and state agencies. In our experience, U.S. Forest Service and Bureau of Land Management land management plans, FWS species recovery plans, and state and local wildlife management plans often have different levels of specificity regarding wildlife and habitat management objectives. This is likely to lead to inconsistent application of the Revised Policy. Where FWS is the responsible agency for the development and delivery of such plans, this responsibility will likely be delegated to the FWS Field Offices that already have expressed staffing challenges to meet existing responsibilities.

III. Section 7 Comments

The Revised Policy continues the current FWS policy to allow conservation measures voluntarily included in a project proposal to reduce impact on species below levels that would require formal Section 7(a)(2) consultations. *Id.* at 12395. We agree with the retention of this policy.

Nonetheless, we request clarification about how the Revised Policy will affect Section 7 consultations. We are concerned that FWS will use Section 7 biological opinions to impose ESA-like mitigation for non-listed species that use the same habitat as the listed species by wrapping non-listed species into the same biological opinion. We question the legal authority of FWS to do so when (1) the non-listed species is not subject to FWS jurisdiction, and (2) the level of mitigation imposed for the non-listed species is not required by law.

IV. Unworkable Standards

Current FWS policy is “no net loss” of existing habitat values. 1981 FWS Mitigation Policy, 46 FR 7656 at 7657 (January 23, 1981). The Revised Policy would allow FWS to require a “net conservation gain” (NCG). 81 FR 12384. There is no apparent limit to “NCG,” adding to project proponent uncertainty. Moreover, while FWS might consider NCG for various environmental or resource values as an aspirational goal, we question whether FWS has any legal authority to impose NCG as a requirement upon water resource projects.

The Revised Policy also strongly favors advance mitigation. *Id.* at 12386. In many instances, advance mitigation may require permits from federal and state agencies to accomplish. This dual-permitting could extend project permitting inordinately.

The Revised Policy recommends or requires for durability purposes that mitigation measures maintain their intended purposes “as long as impacts of the action persist on the landscape.” *Id.* at 12385. This standard is unrealistic and misleading. In practice, impacts from water resource projects are permanent. Under this standard, the Revised Policy would require permanent mitigation. In fact, mitigation sites are intended to replace lost natural resources. Conservation resources are subject to the vagaries of the natural environment and, therefore, potential degradation. We recommend that “durability” be clarified and limited to the monitoring and maintenance period of mitigation, while including a protective land covenant such as a deed restriction protecting the land from another inconsistent use in perpetuity when one can be obtained. Mitigation of unforeseeable duration would deplete available project and maintenance funds and add financial uncertainty to the project.

For habitats determined to be “high-value,” the Revised Policy recommends or requires avoidance of all impacts by imposing limitations on the timing, location and operation of the project and adding structural features such as fish and wildlife passages. *Id.* at 12389. Such added costs can further stress already constrained project budgets.

The Revised Policy states: “The Service has the opportunity to engage several thousand Corps permit actions affecting aquatic habitats and wildlife annually, and to assist the Corps of Engineers in developing permit terms that avoid, minimize, or compensate for permitted impacts.” *Id.* at 12396. We are concerned that this language provides a “back door” method of requiring mitigation on projects where FWS could not previously do so by using the Corps to impose them. For example, projects may affect but not likely adversely affect a listed species, but still require a Clean Water Act Section 404 permit.

In this vein, mitigation must be for impacts proximately caused by the project; otherwise requirements on project proponents could run far afield. “But for causation” is not enough. *See Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 774 (1983) (NEPA requires a “reasonably close causal relationship” akin to proximate cause in tort law).

As stated above, WUWC is concerned about the availability of the landscape level information necessary to meet the requirements of the policy. Conservation plans should be in place before trying to enforce this on developers. FWS should not attempt to fill in the blanks where the development of a conservation plan is the duty of another federal or state agency. In addition, WUWC is concerned that for mitigation on lands that are not subject to approved federal or state plans FWS may rely on information from sources that have not been properly vetted or subject to scientific scrutiny. We recommend that FWS establish standards for assessing the quality of information about conservation values on lands not subject to federal or state planning mechanisms.

V. Uncertain or Vague Standards

The Revised Policy provides guidance on valuing habitat for determining the amount of mitigation required. The value of affected habitats to evaluation species will be “based on their scarcity, suitability, and importance to achieving conservation objectives.” *Id.* at 12388-89. We are concerned that these criteria are open to considerable interpretation by FWS Field Offices and perhaps even project opponents. Disagreements over interpretation leads to uncertainty about the potential scale of required mitigation and would likely add additional time to project development. We recommend that FWS develop very specific additional guidance documents to standardize methods among FWS Field Offices. This guidance should be open to public comment before finalization.

The wildlife and habitat assessments envisioned by the Revised Policy could entail highly complex analyses, if not carefully defined. We recommend that FWS provide clear guidance to federal and state agencies for these assessments, including examples and templates in order to avoid inefficiencies incurred through multiple iterations of assessment revision. In addition, the process for developing wildlife and habitat assessment methodologies should be open to public comment.

Adaptive management aspects of the Revised Guidance raise the concern that FWS will get a second or third bite of the apple in imposing mitigation, thus increasing uncertainty for project proponents. Please clarify in greater detail how the Revised Policy will provide certainty when adaptive management applies to project permitting.

What constitutes an “evaluation species” is vague. The Revised Policy suggests that FWS can request mitigation for any species that it believes is under threat, whether listed or not or whether it could be a single species or a group of species. Vagueness in this definition could result in FWS Field Offices requesting mitigation for impacts to almost any sort of habitat.

VI. Lack of Standards or Gaps in Standards

As discussed above, state and local wildlife management plans often have different levels of specificity regarding wildlife and habitat management objectives. As these plans interface, there are likely to be gaps. We caution that FWS not fill in the gaps of state plans with policies not adopted by state officials, unless they involve species over which FWS has regulatory authority.

We are concerned about the quality of information on conservation values for lands outside of federal lands or lands subject to state jurisdiction. For mitigation outside of these areas the FWS should avoid reliance on information from sources that have not been properly vetted or subject to scientific scrutiny.

VII. Conflicting Mitigation Standards

The Revised Policy should address conflicts between federal and state mitigation policies. For example, federal policies adopting climate change science might call for mitigation out of state while state policies may limit mitigation to in-state. In such a case, the proponent is likely to be required to mitigate twice for the same impact, once to satisfy FWS and once to satisfy state requirements.

The Revised Policy expresses a preference for mitigation to occur on the same ownership classification as the impacts, e.g., impacts to public lands would be most appropriately mitigated on other public lands. *Id.* at 12392. This preference may constrain water resource agencies and other entities with pipelines that impact many different ownership classifications. Moreover, ownership classification is irrelevant to good mitigation. We recommend that there be consideration for the type of project and the nature of the lands involved, rather than the type of ownership, when determining mitigation preference.

VIII. Other Comments

Mitigation sequencing as defined in the Revised Policy is required in many federal review processes and can be helpful to projects in planning, timing, and costs. *Id.* at 12384. We agree with this part of the Revised Policy.

Given the likely additional burdens on water resource projects and likely permitting delays arising from the Revised Policy, we recommend an analysis of the economic impacts of the Revised Policy.

It would be very helpful if the Revised Policy identified activities and projects that are exempt from the policy.

Other federal agencies are also responding to the President's November 3, 2015 Mitigation Memorandum. This creates the opportunity for the Service to enter into memoranda of agreement with other federal agencies, such as the U.S. Forest Service and Bureau of Reclamation, to work together on the implementation of similar mitigation policies and to avoid conflicts, delays and inefficiencies that would harm project proponents without benefitting federal lands or species found thereon.

We appreciate the opportunity to provide these comments. If you have any questions regarding our comments, please contact Paul Smyth of Perkins Coie LLP at (202) 654-6251.

Sincerely,



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Chair
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