WESTERN URBAN WATER COALITION

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Public Comments Processing
Division of Policy, Performance and Management
U.S. Fish and Wildlife Service
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Re: Comments on the Announcement of Draft Policy: U.S. Fish and Wildlife Service Endangered Species Act Compensatory Mitigation Policy
81 FR 61032, September 2, 2016
Docket No. FWS-HQ-ES-2015-0165

This letter contains Western Urban Water Coalition ("WUWC") comments on the U.S. Fish and Wildlife Service ("the Service" or "FWS") announcement of the draft Endangered Species Act Compensatory Mitigation Policy (81 FR 61032, September 2, 2016) (Draft 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, and as explained in WUWC's May 9, 2016 Comments submitted regarding the FWS Notice of Proposed Revisions to the FWS Mitigation Policy (81 FR 12379, March 8, 2016, Docket No. FWS-HQ-ES-2015-0126), we support the issuance of the Draft Policy. Compensatory mitigation, if done in a timely manner, based upon the best available science and facilitated by efficient administrative review, is generally 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 projects, as we have discussed in our meetings with Department of the Interior

and FWS officials on this topic. We look forward to working with the FWS to develop and implement the Draft 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 it unreasonably expensive or impractical to undertake projects. From our perspective, utilization of the mitigation approaches identified under the Draft 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 suppliers developing and operating projects 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 Draft Policy

1. Landscape-scale focus

The focus on landscape-scale conservation is a laudable goal, but the Draft Policy introduces new processes and standards that could make achieving this goal more costly, time-consuming, and burdensome. The Service asserts that the Draft Policy will "achieve greater consistency, predictability, and transparency" in the implementation of the ESA, "achieve the best conservation outcomes" for listed species, and encourage the use of efficient "market-based" mitigation programs. These benefits may be possible, but it is equally as possible – if not probable – that the Draft Policy will stifle conservation by making it more difficult to implement. Landscape-scale conservation will be more difficult to achieve if fewer project proponents need mitigation or need less of it. If the Service intends for the Draft Policy to truly move toward landscape-scale conservation for listed species, then the Draft Policy should focus more on finding ways to incentivize the creation of landscape-scale mitigation projects that capitalize on the multiple ecosystem services and efficiencies that landscapes provide. More consideration for the self-regulating aspects of natural landscapes that should reduce management and monitoring burdens (lowering costs), and the ability to unstack credits for different listed species when their habitats overlap in space but not in function (increasing market returns) would go a long way towards making landscapes a priority for the conservation marketplace.

We are also concerned that by using landscape level conservation planning as the basis for listed species conservation under the ESA that the Service may overlook important small habitat for critically impacted species. How will landscape level planning help the conservation and success of species when the last remaining patches of habitat may occur at only one or two locations? We believe that the Draft Policy should recognize the need to continue to allow project proponents the opportunity to design and implement their own mitigation proposals as long as those satisfy the requirements of the ESA and its regulations.

Finally, as we noted in our prior comments on the Mitigation Policy, the Endangered Species Act is primarily concerned with species and habitat that is essential to the conservation of the species. While the Draft Policy uses commonly accepted and widely understood scientific terms such as habitat, critical habitat, ecosystem, and ecosystem function, landscape level planning is a relatively new concept that has not been used by the Service to guide its actions under the ESA. Current conservation of listed species occurs at the habitat and ecosystem levels. It is unclear why the required inclusion of adjacent ecosystems and human systems, which is how landscapes are defined, into conservation plans will provide a benefit to species that do not require those habitats or ecosystems for survival. The Service should explain whether it intends for the need to conduct mitigation consistent with a landscape scale plan to require grouping of permittee proposed compensatory mitigation projects or grouping of project proponents, and in situations where this is desired, the benefits should be explained.

2. Out-of-date and poorly vetted conservation strategies

We note that the Draft Policy directs the Service to rely on landscape-scale conservation plans for listed species, such as recovery plans, status reviews, and similar documents. The Department of the Interior has noted that "advancing landscape-scale mitigation involves assessing existing and projected landscape conditions; establishing management goals and strategies for the landscape; incorporating those goals and strategies into plans and actions; identifying landscape-scale issues, threats, and impacts; tailoring strategies to address those threats or impacts; and developing and implementing monitoring and evaluation protocols and metrics in an adaptive framework."[1] At the present time, few of these activities or plans have been completed and are ready for use for evaluating projects. While well-intentioned, we note that most species lack an up-to-date analysis of conservation status, let alone forward-looking strategies that the Service intends to rely on in the implementation of the Draft Policy. Furthermore, not all of the types of landscape-scale conservation strategies noted by the Service are peer-reviewed, publicly vetted, scientifically sound, or without controversy. If the Service intends to place reliance upon such strategies in the context of preparing recovery plans, status reviews, and similar documents, then these landscape-scale conservation strategies and the process for implementing them must be vastly improved. We suggest that the level of effort needed to put in place recent, robust, and properly vetted conservation strategies for the full roster of listed and at-risk species (which is expanding at a quick pace) will further strap the resources of the overburdened Service and come to represent a fatal flaw in the implementation of the Draft Policy. Instead, the Service should let the conservation market do the heavy lifting on identifying lands that represent valuable conservation targets and take advantage of the "market efficiencies" that it indicates are a benefit of the conservation banking and in-lieu fee forms of mitigation.

[1] Clement, J.P. et al. 2014. A strategy for improving the mitigation policies and practices of the Department of the Interior. A report to the Secretary of the Interior from the Energy and Climate Change Task Force, Washington, D.C., 25 p.10.

3. Species mitigation is not the same as wetland mitigation

We note that much of the language related to the new standards and processes for implementing mitigation seems to derive from the rigorous EPA/USACE regulations for implementing compensatory mitigation for aquatic resources under the Clean Water Act. Wetland mitigation credits are very expensive, often running tens to hundreds of thousands of dollars per acre. For wetland mitigation, the amount of mitigation that most project proponents need is often measured in square feet. To accomplish landscape-scale conservation, actions that conserve hundreds to thousands of acres are necessary – an improbable outcome if the cost of such conservation is made to be too high. Landscapes are, for the most part, self-regulating systems that require less intense intervention by people to maintain ecosystem functions. The Draft Policy would benefit from greater recognition that activities associated with the management, monitoring, protections, and assurances need not be as robust in such instances, yet will achieve a functional landscape that is capable of supporting the conservation of listed and at-risk species, different from the actions necessary to provide compensatory mitigation for wetlands and other aquatic resources. By making mitigation less costly to put on the landscape, project proponents will be able to support more of it before hitting the limits of practicability.

4. Protection vs. Restoration, Enhancement, and Creation

Wetland mitigation is also different from most forms of mitigation used to offset impacts to listed species under the ESA, since the wetland mitigation regulations do not generally accept "preservation" as an acceptable form of mitigation aquatic resource impacts. In contrast, most species mitigation relies on the protection of existing, occupied habitats. While there may be some instances where the Service accepted lands as mitigation (outside of "buffer" credits) that were not already high quality, occupied habitat for the species of concern, these situations are rare. The difference is important, since the restoration, enhancement, or creation of new wetlands or aquatic resources involves more intensive management, with more risk regarding the ultimate success of the project. Preservation of existing habitat, on the other hand, does not often require intensive manipulation of the landscape; often times, the habitats we seek to protect were created and exist in the absence of targeted management for the direct and specific benefit of a listed species. If the Service intends to accept more lands as mitigation that are degraded or even completely lacking in habitat, then the Draft Policy would be improved by making a distinction in the process needed to implement habitat restoration, enhancement, and creation vs. the process needed for proposed mitigation via the preservation of existing, quality habitats. Furthermore, the Draft Policy should also emphasize that the Service will accept mitigation proposals that do not involve high quality, occupied habitats, when such proposals include sound measures to improve baseline conditions for listed species.

5. Market efficiencies

In an attempt to "improve consistency" in the use of mitigation under the ESA, the Draft Policy erodes the substantial benefits of market-based forms of mitigation and interjects unnecessary bureaucracy into the process of approving and operating all forms of mitigation projects. The Draft Policy essentially seeks to have all providers place mitigation in the same areas, use the same metrics, implement the same management and monitoring provisions, and apply the same

legal and financial instruments. This emphasis on consistency and equivalency stifles innovation in delivering more mitigation at lower cost and is contrary to the landscape-scale goals of the Draft Policy. The Draft Policy should recognize that each potential conservation opportunity is unique and that rigid adherence to standardized policies does not always result in the best outcomes for the species.

The Draft Policy notes a recent example of mitigation guidance developed by the Service for two Texas birds as a "proactive approach" that "encourage[s] the establishment of conservation banks and other mitigation opportunities." This example is misleading, since it's application has actually caused one landscape-scale conservation bank to decline to implement its approved banking instrument and caused another conservation bank to give up on attempts to expand its credit offerings to other species due to the management and monitoring "requirements" (and related costs) imposed by the Service through this un-vetted guidance document. The Service also requires rigid adherence to its "guidance" and "recommendations" for these species, compelling mitigation providers to conduct and provide financial assurances for expensive management and monitoring activities even when these measures are not warranted based on the specific circumstances of the conservation properties.

6. Requiring compliance with a recommendation

The Draft Policy is unclear and inconsistent in describing what measures are required with respect to mitigation under the ESA, and what measures are recommended, encouraged, or preferred. For example, the Draft Policy states that "compensatory mitigation proposals must meet the minimum criteria described in this policy to be acceptable." But, how will the Service address circumstances when project proponents elect to not implement Service recommendations for mitigation that may exceed the requirements of the ESA, but nonetheless yield a conservation benefit? We are concerned that the Service will apply mitigation "guidance" as if it were rule, withholding approvals until its preferences for mitigation are adopted, even when a project proponent has met its legal and regulatory obligations under the ESA, or has provided effective mitigation measures that will achieve the desired result but do so under a method different from the Services preferred action. The WUWC strongly encourages the Service to build flexibility into the mitigation guidance.

The Draft Policy, as currently proposed, exemplifies this concern by including overarching statements like "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," but then focusing on the processes and standards that MUST be met to achieve Service approval. The Draft Policy indicates that many of these proposed processes and standards are needed to create that mitigation that achieves landscape-scale conservation and "no net loss" goals, even though those goals are recognized as voluntary and permissive. The Final Policy should emphasize that there are no prescribed standards that will dictate mitigation, but that every situation will be considered fact-specific and flexible and be based upon the voluntary actions of the proponent.

7. Focus on providing guidance for implementing mitigation

The Draft Policy would benefit from focusing narrowly on the implementation of voluntary mitigation actions under the ESA, instead of providing additional guidance for when or how much mitigation is necessary under regulatory procedures such as sections 7 or 10. The Service already has guidance in the form of the HCP Handbook and Consultation Handbook that address these topics. We also note several errors in the Service's discussion of how mitigation fits into the ESA Section 7 and 10 regulatory processes that take away from the primary intent of the Draft Policy, which is to encourage mitigation providers to put in place conservation that achieves objectives beyond simply satisfying regulatory obligations. For example:

- The Service references the need to "fully offset" impacts, follow a "mitigation hierarchy," or achieve "no net loss" or "net gain" in the status of a listed species. Nowhere in the ESA or its implementing regulations are these standards required of action agencies or project proponents to achieve authorization for or exemption from the prohibitions on incidental take.

- The Service states that reasonable and prudent measures (RPMs) "can include compensatory mitigation in appropriate circumstances, if such a measure minimizes the effect of the incidental take on the species, and as long as the measure is consistent with the interagency consultation regulations…." However, the section 7 regulations require minimizing the amount or extent of incidental take, not the "effects" of the taking on the species. In addition, the Consultation Handbook emphasizes that RPMs do not include mitigation. Therefore, compensatory mitigation cannot be a valid, non-discretionary RPM imposed by FWS because mitigation does not satisfy an action agency's obligations to minimize the amount or extent of take. Furthermore, the section 7 regulations define RPMs as measures that "cannot alter the basic design, location, scope, duration, or timing of the action and may involve only minor changes" to the action. Compensatory mitigation that occurs off-site, in advance of the action, or that expands the scope of the action would not meet the definition of a RPM. We believe that the Service should be able to consider the beneficial effects of mitigation if voluntarily proposed as part of an agency action, but it is inaccurate to state that the Service has the ability to require mitigation as an RPM. Instead, mitigation can be applied, with the agreement of the action agency and project proponent, to reduce the likelihood or magnitude of incidental take and lessen, or eliminate, the need for RPMs.

8. Intersection of the ESA and the 2008 Compensatory Mitigation Rule for Losses of Aquatic Resources

The Service suggests that the Draft Policy would replace the EPA-USACE 2008 Compensatory Mitigation Rule for Losses of Aquatic Resources for the purposes of implementing the ESA. It is unclear how the Draft Policy would "replace" rules promulgated by other federal agencies (the EPA and USACE) for guiding implementation of different federal laws (the Clean Water Act

and Rivers and Harbors Act) and different natural resources (waters of the U.S.). We request that the Service explain how the EPA-USACE 2008 Mitigation Rule applies to ESA actions and what exactly the Draft Policy would change with respect to this existing federal rule.

9. Definition of "compensatory mitigation"

The proposed definition for "compensatory mitigation" does not faithfully represent the authorities and obligations of the ESA and its implementing regulations. The proposed definition indicates that compensatory mitigation addresses "remaining unavoidable impacts after all appropriate and practicable avoidance and minimization measures have been applied." This phrasing suggests that project proponents have an obligation to first avoid and minimize impacts before evaluating if mitigation is necessary or appropriate or how much mitigation is appropriate. The phrasing also suggests that any remaining impacts must be "unavoidable," not simply "un-avoided." Section 10 of the ESA does not include an obligation for observing a mitigation hierarchy and gives the project proponents substantial deference to design a conservation program that minimizes and mitigates the impact of its proposed taking to the maximum extent practicable. As described elsewhere in our comments, mitigation that replaces or provides substitute resources for the taken species logically cannot satisfy the obligation to minimize the amount or extent of take to be authorized under section 7. The proposed definition also fails to specify that mitigation in the ESA applies not to general "impacts," but is specifically focused on addressing the "impacts of the taking" on a listed species – which is an exercise that must assess how the conservation status of a listed species (as a whole) is affected by the death (via kill) or injury (via harm, pursue, hunt, shoot, wound, trap, capture, or collect) of identifiable members of the species, even when a surrogate metric is used to track the amount or extent of take. We suggest a more precise definition of mitigation for the purposes of the ESA be phrased as: "compensation for the impacts of anticipated take of a listed or at-risk species after any proposed avoidance and minimization measures have been applied…."

10. Definition of "mitigation"

The Draft Policy references the Services' more general draft Mitigation Policy and its proposed adoption of the term "mitigation" for application to the ESA. This proposed definition of "mitigation" in the context of the ESA is inappropriately circular, since "mitigate" would include concepts of avoidance and minimization – both of which are used separately in the ESA. Similarly, the Draft Policy defines "minimize" in a manner that makes circular reference to actions that compensate for impacts (i.e., "we also use the term 'minimize' in the broad sense throughout this Draft Policy to include any conservation measures, including compensation, which would lessen the impact of the action on the species or other affected resource"). These circular definitions are inconsistent with plain language of the ESA that uses separate terms for "minimize" and "mitigate," and has no requirement to avoid impacts to listed species short of causing jeopardy or adverse modification of critical habitat. We strongly recommend that the Service remain faithful to the plain language meaning of these distinct concepts and not introduce substantial and substantive confusion into the application of the ESA with circular definitions. By maintaining the distinct meaning of avoid, minimize, and mitigate, the Service would avoid the need to create a new and redundant term ("compensatory mitigation") that has the potential to create considerable confusion.

11. Implementing a "preference"

Proposals for mitigation usually come to the Service from project proponents seeking incidental take authorization, either under sections 7 or 10, or from prospective mitigation providers seeking to serve project proponents. The conservation opportunities available to project proponents and mitigation providers are, in the vast majority of cases, limited to a specific property with its own unique set of characteristics (i.e., resources, conservation values, and management needs). The Service indicates that it "prefers" mitigation that meets particular siting, timing, and contextual considerations. The Service indicates other "preferences" and "recommendations" for mitigation throughout the Draft Policy – indeed, the entire policy provides non-regulatory guidance that, by definition, is only a formal recommendation and not a strict requirement.

How does the Service intend to implement these preferences and recommendations when the agency itself does not control what mitigation proposals or opportunities are presented to it? Will the Service withhold approval of mitigation proposals that do not meet its preferences or recommendations? We suggest that the Service instead provide incentives to mitigation providers that meet the Services preferences, such as granting more conservation credit per acre of mitigation or reducing burdens for ongoing management, monitoring, or financial assurances. Providing incentives to mitigation providers that encourage them to help the Service achieve its policy goals, rather than prescribing mitigation standards that exceed regulatory authority, would build true partnerships for the conservation of listed species and avoid creating unnecessary conflict with the regulated community.

12. Use of public lands as mitigation

The Draft Policy indicates that "any agreements enabling mitigation on public lands should include provisions for equivalent alternative mitigation if subsequent changes in public land management directives result in action on public land that are incompatible with the conservation needs of the species." This provision essentially requires a project proponent or mitigation provider to provide at least financial assurances for achieving 2x the amount of mitigation proposed. This measure creates an unnecessary burden that exceeds regulatory authority, is dismissive of conservation actions taken by public agencies, and will ultimately undercut the expressed objectives of the Draft Policy.

13. Service areas

The Draft Policy's discussion of service areas for mitigation sites indicates that Service approval for mitigation transactions is needed regardless of whether or not a transaction occurs within or across service area boundaries. Each transaction that creates conservation credits or uses conservation credits appears to require case-by-case approval by the Service, making the entire concept of a service area unnecessary. We recommend that the Service consider reverting to current policy where additional Service approval is not needed to use conservation credits within established service areas. The Service should also better identify and explain the factors it will use to delineate service areas and evaluate credit transactions. We also recommend that the

Service err in favor of large service areas with the largest potential markets as a means to incentivize conservation banking.

14. Trading credits

The Draft Policy indicates that once a credit is sold by the mitigation provider, it is automatically extinguished. Similarly, the Draft Policy states that permittee-responsible mitigation created for one project cannot be used for a different project. However, the sale or transfer of a conservation credit (or establishment of a preserve as mitigation) is a very different concept than the use or application of a conservation credit to offset a debit. This new guidance erodes a key market benefit of the conservation credit concept – the ability to treat conservation value as a tradable and shelf-stable commodity. Regional habitat conservation plans, for example the successful Williamson County Regional Habitat Conservation Plan, have used third-party conservation banks to obtain conservation credits in bulk at competitive prices and then offer those credits to its own plan participants – essentially re-selling the credit to another party. Conservation bankers also benefit from large credit sales that off-set the typically substantial upfront costs of creating a conservation bank. Large credit sales are usually only possible through deals that anticipate some future transfer of credits to other projects or parties. Some project proponents may have mitigation obligations in their permits that adjust based on a final "as-built" accounting of actual impacts, potentially leaving them with more mitigation on the ground than they need. In such cases, the ability to reapply unused mitigation is critical. The Draft Policy would make these practices unacceptable and interfere in the very credit market that the Service believes brings benefit to the implementation of compensatory mitigation. We recommend that the Service instead work with mitigation providers to find ways of tracking credits until the credit value is actually applied to a specific debit.

15. Reserve credit accounts

It is inappropriate for the Service to place the burden of addressing the impacts of unforeseen circumstances or the actions of other parties (i.e., adjacent landowners, split estate holders, or entities using the power of eminent domain) on the mitigation provider. The Service already requires costly adaptive management, partial "buffer" crediting, ongoing coordination with continued Service approvals, and financial assurances to address risk and uncertainty. Adding another obligation to reserve a portion of its sellable credits for the impacts of unforeseen or third party actions is an undue burden when considering the substantial upfront and ongoing commitments that are already required. The Service should consider making reserve credit accounts an alternate means of addressing uncertainty, not an additional measure necessary to obtain approval.

16. Short-term mitigation

We applaud the Service for acknowledging that short-term mitigation can be appropriate to address certain types of short-term impacts to listed species. However, the Draft Policy states that it is the Service that determines what an appropriate mitigation ratio would be for addressing short-term impacts. That does not comport with the regulatory process for ESA authorizations or the concept of voluntary mitigation. It is the project proponent that proposes a conservation

program that minimizes and mitigates to the maximum extent practicable, commensurate with the level of impacts.

17. Rejection of mitigation proposals

The Draft Policy indicates that the "Service has the discretion to reject a proposed mitigation site that is unsuitable." We have two concerns about this statement: 1) the Service does not indicate what it might consider "unsuitable"; and 2) how the Service intends to apply this discretion in light of the specific issuance criteria for incidental take permits. The question regarding what conditions might make a potential mitigation project unsuitable is substantially complicated by the Draft Policy's function as a "guidance" document establishing Service preferences and recommendations for mitigation, with confusing or conflicting statements about what might be "required" and what is merely "preferred," and aspects of the Draft Policy that exceed the Service's regulatory authority. While the Service may have the discretion to reject proposals for conservation banks or in-lieu fee programs that entitle mitigation separate and apart from a specific permitting action, it is not clear that the Service has this same discretion when it relates to mitigation actions that are proposed as part of a specific permitting action. In such instances, the project proponent has substantial discretion over what it offers as part of its conservation program to minimize and mitigate impacts of its taking to the maximum extent practicable. The Service is obliged to evaluate whether or not a mitigation proposal – in the context of a complete application for an incidental take permit - meets the statutory issuance criteria. We recommend that the Service provide more clarification as to how it will evaluate mitigation proposals in light of the specific statutory and regulatory considerations unique to the ESA.

18. Assurances of sufficient water rights

This requirement that proposals involving proposed aquatic habitats must include assurances of sufficient water rights is overly burdensome to and impractical for those providing mitigation involving aquatic resources. If a potential mitigation site has sufficient conservation value with its existing water supplies, then that should be sufficient for the purposes of the ESA. If in the future, the actions of other parties change the allocation of water in an aquatic system, any potential impacts of that action on listed species would properly be their obligation to address. Thus, the requirement is not necessary to ensure that adjoining landowners will not use their properties for purposes that may be incompatible with the needs of species protected on a mitigation site. To achieve the desired goals of the Draft Policy, the Service should allow project proponents the option of placing their restoration actions in areas with suitable amounts and quality of waters even though water rights are owned by others. The Draft Policy should be revised to require only a demonstration that sufficient water exists to make the proposed aquatic habitat mitigation possible, and not to require demonstration of or acquisition of "water rights."

19. Conservation easements for permanent protection

The Draft Policy indicates that, unless prohibited by law, conservation easements are the only valid means for ensuring the protection of a mitigation site. This approach is unnecessarily narrow and discounts the protections that may be afforded to lands under public ownership and management. At a minimum, the Draft Policy should be expanded to include other public

landowners (not just federal agencies) in the provision that would allow for a conservation easement to be placed on the property if the land is transferred out of public ownership in the future. Failing to recognize that public entities can implement effective conservation without a formal conservation easement held by a third party does not accomplish the Service's desire for encouraging collaboration in mitigation.

20. Perpetual endowments and financial assurances

The Draft Policy states that perpetual endowments are the only acceptable form of financial assurance for long-term operation of a mitigation site. This guidance is inconsistent with other proposed Service policy (i.e., the draft revised HCP Handbook) and is unnecessarily narrow when many other forms of financial assurance are available. Indeed, the Draft Policy identifies four other types of financial assurances that may satisfy this regulatory obligation.

Financial assurances requirements should be flexible in cases where the permittee is a public agency, particularly a ratepayer-funded water supply agency undertaking mitigation on its own lands or other public lands. Typically, compensatory mitigation actions will be self-funded in these situations and undertaken using agency forces, and it does not make sense to require an endowment that will fully fund the long-term mitigation costs. Public entities, for example, routinely manage open spaces for conservation purposes without specific endowments.

Endowments – particularly non-wasting endowments – require a substantial amount of upfront capital that can greatly affect the practicability of mitigation proposals. The Service should acknowledge that the amount and form of financial assurance may affect the amount of mitigation that a project proponent is obligated to provide and should allow for site- and applicant-specific situations.

It would be very helpful if the Draft 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 a 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 Don Baur of Perkins Coie LLP at (202) 654-6234 or dbaur@perkinscoie.com.

Sincerely,

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