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Public Comments Processing
Attention: Docket Nos. FWS-HQ-ES-2015-0126; FWS-HQ-ES-2015-0165
Division of Policy, Performance and Management Programs
U.S. Fish and Wildlife Service
MS: BPHC
5275 Leesburg Pike
Falls Church, VA 22041-3803

Re: The U.S. Fish and Wildlife Service Mitigation Policy and Endangered Species Act
Compensatory Mitigation Policy, 82 Fed. Reg. 51,382 (Nov. 6, 2017).

To Whom It May Concern:

The Associated General Contractors of America (AGC) appreciates the opportunity to comment on the U.S. Fish and Wildlife Service's (FWS) request¹ for public comment on portions of the existing Mitigation Policy² and the Endangered Species Act Compensatory Mitigation Policy (ESA-CMP)³. The Mitigation Policy establishes a framework or general policy and principles to guide the Service's recommendations for all types of mitigation across programs. The ESA-CMP incorporates the new framework into the Service's compensatory mitigation practices under the ESA. Specifically, the FWS requests feedback on "whether to retain or remove net conservation gain as a mitigation planning tool within [its] mitigation policies."⁴

AGC is concerned that the "net conservation gain" goal would require more mitigation than the ESA requires, adding further cost and delay to construction projects without legal justification. Construction contractors also have expressed concern that the anticipated increase in demand for suitable mitigation measures, as the Service lists more species as "threatened" or "endangered," may strain the few existing mitigation banks for species and habitat. For these reasons, AGC urges the FWS to remove "net conservation gain" from its mitigation policies.

AGC is the nation's leading construction trade association. It dates back to 1918, and today, it represents more than 26,000 construction contractor firms, suppliers and service providers across the nation, and has members involved in all aspects of nonresidential construction. Through a nationwide network of chapters in all 50 states, DC and Puerto Rico, AGC contractors are engaged in the construction of the nation's public and private buildings, shopping centers, factories, warehouses, highways, bridges, tunnels, airports, water works facilities and multi-

¹ 82 Fed. Reg. 51,382 (Nov. 6, 2017).

² 81 Fed. Reg. 83,440 (Nov. 21, 2016).

³ 81 Fed. Reg. 95,316 (Dec. 27, 2016).

⁴ 82 Fed. Reg. 51,382 (Nov. 6, 2017).

family housing units, and they prepare sites and install the utilities necessary for housing development.

Construction projects must consider impacts to endangered or threatened species and critical habitat and are therefore directly affected by the mitigation policies throughout the construction process. Endangered species and habitat concerns are addressed during the National Environmental Policy Act (NEPA) process, when NEPA review is applicable. Construction projects also are subject to ESA Section 7 consultation and Section 10 incidental take permits if the project may affect or result in a take of a listed species or critical habitat. For example, ESA Section 7 consultations are necessary when a project requires a permit under Section 404 of the Clean Water Act (CWA). Additionally, the CWA Section 402 stormwater permitting program for construction activities requires consideration of ESA eligibility.

At a minimum, mitigation and species considerations increase project costs and impact scheduling; a "net conservation gain" goal will raise those costs. Currently, costs can include biological assessments and studies, as well as fees for professional consultants. Mitigation costs can include purchasing credits and/or property for conservation, incorporating on the ground the mitigation measures, undergrounding electrical utility lines, or restoring habitat. Scheduling impacts depend on the species and may dictate when construction activity can occur, e.g., avoiding spawning or nesting seasons. In regions where the window for construction is already brief, this can further limit the time in which work on a project can commence and potentially add years to a project.

To provide background, on Nov. 3, 2015, the Obama Administration released a Presidential Memorandum: "Mitigating Impacts on Natural Resources from Development and Encouraging Related Private Investment,"⁵ that among other things, established the net gain goal that is the focus of this request for public feedback and required the FWS to release new mitigation policies. In 2016, FWS finalized the Mitigation Policy and the ESA-CMP. Both policies emphasize FWS' goal to strive for a "no net loss" or a "net gain" for protected species, despite comments from stakeholders that there is no requirement under the ESA to achieve such an outcome. In early 2017, President Trump issued Executive Order on Promoting Energy Independence and Economic Growth⁶ (EO 13783) to rescind the Presidential Memorandum of Nov. 3, 2015, and direct a reexamination of the mitigation policies and practices of the federal government to balance conservation strategies and policies with the need for creating jobs. On Oct. 24, 2017, the Department of Interior released a report⁷ outlining the agency's progress toward implementing EO 13783. Among other details, the report mentioned the policies would be opened for reevaluation, further comment, and also legal review. On Nov. 6, 2017, FWS published a request⁸ for public comments limited to the policies' mitigation planning goals.

⁵ See <https://www.whitehouse.gov/the-press-office/2015/11/03/mitigating-impacts-natural-resources-development-and-encouraging-related> (accessed, Jan. 5, 2018).

⁶ See <https://www.whitehouse.gov/the-press-office/2017/03/28/presidential-executive-order-promoting-energy-independence-and-economy-1> (accessed, Jan. 5, 2018).

⁷ See https://www.doi.gov/sites/doi.gov/files/uploads/interior_energy_actions_report_final.pdf.

⁸ 82 Fed. Reg. 51,382 (Nov. 6, 2017).

Net Conservation Gain Mitigation Policy Goal

AGC echoes concerns that several commenters raised during the initial public comment periods for the policies on whether the Service has the legal authority to require additional mitigation. In response to those comments,⁹ time and again, the Service indicated that the commenters were often correct. The Service lists 11 statutes that provide the Service a role in mitigation planning. However, the Service admits it has limited authority to require mitigation and has mostly an advisory role except in very specific circumstances, such as for example, actions that the Service carries out or funds, restoration after oil spills, and permits and authorizations for incidental takes. Of most relevance to construction are under Sections 7 and 10 of the ESA, where the Service requires an incidental take statement (minimize the impact on the species) or an incidental take permit (minimize and mitigate the impacts on the species), respectively.¹⁰

The Service's admission that "[i]n most cases, applications of this Policy are advisory"¹¹ is unhelpful when, in practice, the policy continues to blur the line between recommendations and requirements. This causes confusion and perpetuates situations where vital infrastructure projects could be held up (or considerable monies spent in an attempt to avoid project delays) in order to satisfy non-statutory recommendations. This is especially true when the Service's stated mitigation goal is "net conservation gain." When the sky is the limit, it becomes unclear how much mitigation is lawfully sufficient.

The uncertainty of how little or how much mitigation will ultimately be settled on for a project -- including required mitigation and any additional agreed upon recommended measures -- adds to project uncertainties and costs. Construction contractors often enter the Section 7 consultations not knowing what mitigation will be required; and, therefore, they do not know what mitigation measures to include in the bidding documents and budget for any given project. This forces contractors to add cost contingencies resulting in higher construction costs for the owner. AGC members indicated that clarity is needed to provide a verifiable standard on habitat quality criteria, up-to-date and verified maps and aerial photographs. Providing more clarity on required mitigation will help contractors and other project proponents plan accordingly.

Compensatory Mitigation Considerations

AGC appreciates the steps that FWS is taking to advance the development of mitigation mechanisms (e.g., conservations banks and in-lieu fee programs) so that these options are available to construction project proponents who may encounter unavoidable impacts to

⁹ 81 Fed. Reg. 83,440 (Nov. 21, 2016).

¹⁰ *Ibid.* When federal agencies consult with FWS regarding actions they authorize, fund or carry out under Section 7 of the ESA, FWS is charged with ensuring that the action is not likely to jeopardize the continued existence of the listed species or destroy or adversely modify their critical habitat. 16 U.S.C. Section 1536(a)(2). When a private party obtains an ESA "take" permit using a habitat conservation plan under Section 10, FWS must ensure that the permit applicant will "to the maximum extent practicable, minimize and mitigate the impacts" of the authorized incidental take. 16 U.S.C. Section 1539(a)(2)(B). Neither section requires the imposition of a net gain standard.

¹¹ *Ibid.*

species/habitat during the course of their important work. AGC members support the establishment and operation of clear mitigation standards; however, as this letter explains, current FWS guidance has stepped beyond what is permissible under applicable law and must be revised accordingly. To assist FWS in crafting a workable strategy that promotes species conservation and economic growth, AGC offers these comments and recommendations.

AGC maintains that project proponents should have the flexibility to choose the mitigation option that is most appropriate for their project, considering factors such as cost-efficiency and availability. For example, consolidated compensatory mitigation (landscape planning) may not always be the most appropriate mechanism. And project proponents must retain the ability to utilize permittee-responsible avoidance, minimization or mitigation measures.

AGC opposes a stated preference for compensatory mitigation in advance of impacts. This approach is inflexible and perhaps incompatible with the process by which most construction projects are permitted and financed. Requiring advance mitigation fails to recognize the realities of project funding and permitting and may negatively impact an applicant's ability to secure both.

But note, AGC does recognize the benefit and importance of FWS providing flexibility for project sponsors and/or lead agency partners to develop advanced mitigation programs and then receive credit for this mitigation, where appropriate. To this end, FWS should give substantial weight to programmatic mitigation plans.

Lack of Mitigation Banking Capacity

Overall, AGC maintains that a well-implemented, credit-based mitigation policy could provide high-quality, cost-effective mitigation.¹² Unfortunately, however, mitigation banks for endangered species remain limited. It appears that FWS has only approved banks in 10 states.¹³ In-lieu fee (ILF) scenarios often are not available, which further limits options. Even in areas with these mitigation programs, they may not cover the habitat or species affected by a proposed project. Without mitigation markets, the permittee is held responsible, which slows down permitting schedules, limits the ability to find and develop mitigation, and increases the cost of the project. Construction contractors remain wary that increased demand for mitigation will only strain an undeveloped market.

To address the lack of mitigation banking capacity in many regions of the country, FWS should develop a national ILF mitigation option whereby sponsors of large projects may contribute

¹² To help improve the FWS ability to evaluate the effectiveness of its compensatory mitigation strategies and ensure that the agency appropriately plans the obligations necessary for this purpose, a 2017 GAO report recommends that FWS establish a timetable with milestones for modifying the RIBITS database to incorporate FWS's in-lieu fee program information. U.S. Fish and Wildlife Service's American Burying Beetle Conservation Efforts, GAO-17-154: Published: Dec 22, 2016. FWS concurred with this recommendation." (AGC notes that the mitigation and conservation banking portion of Service's website currently points to RIBITS, accessed Jan. 5, 2018.)

¹³ Geographically, these banks are concentrated in California, accounting for nearly 80% of approved, pending and sold-out banks nationwide.

funding, at mitigation market rates, to a national account when bank credits are unavailable. The funding from the national account would be apportioned among the FWS Regions, based on where impacts were taken and applied toward species/habitat preservation and promoting banking opportunities. Although not currently set up for species/habitat, the State of North Carolina (NC) operates a state-wide ILF program¹⁴ for streams and wetlands that may serve as a perfect model for AGC's recommended national program. NC Department of Environmental Quality (DEQ) has operated the state-wide ILF program since the 90's. The state administers the program with DEQ staff and contracts out for the mitigation design and construct. AGC understands the program brings stability and predictability to the credit market.

Additional Recommendations on Mitigation

AGC also recommends that FWS issue guidance that would:

- Further ensure compliance with statutory deadlines for the Section 7 consultation process.
- Provide nationwide ratio or mitigation evaluation criteria for permanent impacts at a federal level. Note: this would require significant cooperation from the U.S. Army Corps of Engineers (USACE) and the Service.
- Exempt temporary impacts from the requirement to provide compensatory mitigation, if the resource is restored to preconstruction conditions and functions within a reasonable (predetermined) timeframe.
- Establish agency guidelines to coordinate on the criteria for managing construction "seasonal windows to work" (i.e., timing restrictions) and mitigation requirements for species/habitat protection and resources (e.g., wetlands, fish migration and spawning, bird nesting and foraging, etc.).

Collaboration and Coordination

AGC members have found that coordination and collaboration among agencies and project proponents in addressing mitigation and species/habitat protections during the permitting process is one of the challenges to get important infrastructure projects approved and moving forward. The FWS plays an advisory role during the NEPA process as well as for CWA Section 404 permitting. The framework of FWS's 2016 Mitigation Policy relies on collaboration and coordination with "action proponents and with ... State, Federal, and tribal conservation partners in mitigation."¹⁵ AGC would like to take this opportunity to specifically mention ways in which coordination during the permitting and review process can streamline approvals.

- The NEPA and the ESA Section 7 "consultation" processes should interact in the early phases of the environmental analysis of a project.
- Conditions for species protection, mitigation plans, approved construction windows that limit the impact on species, and other related requirements should be included as part of the NEPA Record of Decision in order to: streamline and provide consistency for permitting;

¹⁴ See <https://deq.nc.gov/about/divisions/water-resources/water-resources-permits/wastewater-branch/401-wetlands-buffer-permitting/compensatory-mitigation> (accessed Jan. 5, 2018).

¹⁵ 81 Fed. Reg. 83,440 (Nov. 21, 2016).

facilitate agency coordination; and ensure that project limitations are realized by the owner and properly addressed by the contractor during bidding and scheduling.

- Build an online database of technical information (e.g., on distributions of endangered species, critical habitat, biological opinions or previous permit requirements) so that new information does not have to be gathered anew for every project operating in a similar watershed or geographic area.
- Allow environmental reviews to adopt material from previously completed environmental reviews from the same geographic area.
- Remove the “net conservation gain” goal and align the policy with the USACE’s “no net loss” standard to improve coordination and reduce confusion during the CWA Section 404 permitting process.¹⁶

Over the last year, AGC has prepared materials on improving the federal environmental review and permitting process. In particular, we suggest the Service review AGC’s recommendations¹⁷ to Congress on reforming the ESA as well as AGC’s recommendations¹⁸ to the USACE on permit streamlining where those suggestions address coordination between agencies.

In conclusion, AGC is concerned that the “net conservation gain” goal could require more mitigation than the ESA legally requires, and construction contractors have expressed concern that the increase demand may strain mitigation banks. For these reasons, AGC urges the FWS to remove “net conservation gain” from its mitigation policies. Again, AGC members support coordinated mitigation planning and efforts to reduce transaction costs; they seek certainty upfront regarding requirements for and availability of suitable mitigation.

AGC appreciates this opportunity to provide recommendations on behalf of its construction industry member companies. If you have any questions, please contact Melinda Tomaino directly at tomainom@agc.org or (703) 837-5415.

Respectfully,



Melinda Tomaino
Director, Environmental Services

¹⁶ The issue of aligning the USACE and FWS mitigation policies is addressed in comments from the Waters Advocacy Coalition submitted to this docket (dated Jan. 5, 2018) and which AGC incorporates by reference.

¹⁷ See

<http://newsmanager.commpartners.com/agcleg/downloads/AGC%20Response%20to%20House%20NR%20Oversight%20Committee%205-23-17%20FINAL.pdf>.

¹⁸ See <http://newsmanager.commpartners.com/agcfed/downloads/USACE%20Reg%20Reform%20-%20AGC.pdf>.