



## **DEPARTMENT OF THE INTERIOR**

### **Fish and Wildlife Service**

#### **50 CFR Chapter I**

**[Docket No. FWS–HQ–ES–2015–0126]; [FXHC1122090000–156–FF09E33000]**

#### **U.S. Fish and Wildlife Service Mitigation Policy**

**AGENCY:** Fish and Wildlife Service, Interior.

**ACTION:** Policy; withdrawal.

**SUMMARY:** We, the U.S. Fish and Wildlife Service (Service), announce we are withdrawing the Mitigation Policy published November 21, 2016, which guides Service recommendations on mitigating the adverse impacts of land and water developments on fish, wildlife, plants, and their habitats. In our document of November 6, 2017, we requested additional public comments regarding this policy’s overall mitigation planning goal of net conservation gain. We are now withdrawing this policy as it is no longer appropriate to retain the “net conservation gain” standard throughout various Service-related activities and is inconsistent with current Executive branch policy. Until further notice, all policies that were superseded by the 2016 Mitigation Policy are reinstated,

including the Fish and Wildlife Service Mitigation Policy (46 FR 7644–7663) published in the *Federal Register* on January 23, 1981.

**DATES:** Withdrawal effective on [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

**ADDRESSES:** Comments and materials received, as well as supporting documentation, are available on the Internet at <http://www.regulations.gov> at Docket Number FWS–HQ–ES–2015–0126.

**FOR FURTHER INFORMATION CONTACT:** Craig Aubrey, U.S. Fish and Wildlife Service, Division of Environmental Review, 5275 Leesburg Pike, Falls Church, VA 22041–3803, telephone 703–358–2442.

**SUPPLEMENTARY INFORMATION:**

The Mitigation Policy (81 FR 83440, November 21, 2016) was developed to ensure consistency with directives in effect at the time of issuance, including former President Obama's Memorandum on Mitigating Impacts on Natural Resources From Development and Encouraging Related Private Investment (November 3, 2015). Under the memorandum, all Federal mitigation policies were directed to clearly set a net-benefit goal or, at minimum, a no-net-loss goal for natural resources, wherever doing so is allowed by existing statutory authority and is consistent with agency mission and established natural resource objectives. The Presidential Memorandum was subsequently

rescinded by Executive Order 13783, “Promoting Energy Independence and Economic Growth” (March 28, 2017).

The Mitigation Policy also described its consistency with the Secretary of the Interior's Order 3330 on Improving Mitigation Policies and Practices of the Department of the Interior (October 31, 2013), which established a Department-wide mitigation strategy to ensure consistency and efficiency in the review and permitting of infrastructure-development projects and in conserving natural and cultural resources. The Secretary's Order was subsequently revoked by Secretary of the Interior's Order 3349 on American Energy Independence (March 29, 2017). It directed Department of the Interior bureaus to reexamine mitigation policies and practices to better balance conservation strategies and policies with job creation for American families.

In light of the revocation of the 2015 Presidential Memorandum and Secretary's Order 3330, on November 6, 2017, the Service requested comment on the Mitigation Policy, as well as the Endangered Species Act – Compensatory Mitigation Policy (81 FR 95316, December 27, 2016), specifically “regarding whether to retain or remove net conservation gain as a mitigation planning goal within our mitigation policies.” Mitigation Policies of the U.S. Fish and Wildlife Service; Request for Comment (82 FR 51382, 51383, November 6, 2017). The comment period for this request ended on January 5, 2018.

Under Supreme Court precedent, the Takings Clause of the Fifth Amendment of the United States Constitution limits the ability of government to require monetary exactions as a condition of permitting private activities, particularly private activities on private property. In *Koontz v. St. Johns River Water Management District*, 570 U.S. 595

(2013), the Supreme Court held that a proposal to fund offsite mitigation proposed by the State of Florida as a condition of granting a land-use permit must satisfy the test established in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987) and *Dolan v. City of Tigard*, 512 U.S. 374 (1994). Specifically, “a unit of government may not condition the approval of a land-use permit on the owner’s relinquishment of a portion of his property unless there is a ‘nexus’ and ‘rough proportionality’ between the government’s demand and the effects of the proposed land use.” *Id.* at 599.

Compensatory mitigation requirements in particular raise serious questions of whether there is a sufficient nexus between the potential harm and the proposed remedy to satisfy constitutional muster. Further, because by definition compensatory mitigation does not directly avoid or minimize the anticipated harm, its application is particularly ripe for abuse. These concerns are particularly acute when coupled with a net conservation gain standard, which necessarily goes beyond mitigating actual or anticipated harm to forcing participants to pay to address harms they, by definition, did not cause.

In light of the change in national policy reflected in Executive Order 13783 and Secretary’s Order 3349, the comments received by the Service, and concerns regarding the legal and policy implications of compensatory mitigation, particularly compensatory mitigation with a net conservation gain policy, the Service has concluded that it is no longer appropriate to retain references to or mandate a net conservation gain standard in the Service’s overall mitigation planning goal within each document. Because the net conservation gain standard is so prevalent throughout the Mitigation Policy, the Service is implementing this conclusion by withdrawing the Mitigation Policy.

## **Summary of Comments and Responses**

Executive Order 13783 – "Promoting Energy Independence and Economic Growth" (March 28, 2017) – rescinded the Presidential Memorandum on Mitigating Impacts on Natural Resources from Development and Encouraging Related Private Investment. The Secretary of the Interior subsequently issued Secretarial Order 3349 on American Energy Independence (March 29, 2017), which directed Department of the Interior (DOI) bureaus to reexamine mitigation policies and practices to better balance conservation strategies and policies with job creation for American families. Pursuant to Secretarial Order 3349, we published a notice on November 6, 2017 (82 FR 51382), requesting additional public comments specifically addressing the advisability of retaining or removing references to net conservation gain as a mitigation planning goal within our mitigation policies. In addition, in carrying out Executive Order 13777, "Enforcing the Regulatory Reform Agenda," DOI published a document with the title "Regulatory Reform" in the *Federal Register* of June 22, 2017 (82 FR 28429). The document requested public comment on how DOI can improve implementation of regulatory reform initiatives and policies and identify regulations for repeal, replacement, or modification. This notice addresses comments that DOI has received in response to the regulatory reform docket that relates to the Service's use of mitigation.

During the combined comment periods, for the Service-wide Mitigation Policy we received approximately 427 comments from Federal, State, and local government entities, industry, trade associations, conservation organizations, nongovernmental organizations, private citizens, and others. Two of those submissions transmitted the

discrete comments from an additional 1,756 citizens expressing support for the Service's mitigation policy approach. The range of comments otherwise varied from those that provided general statements of support or opposition to the draft or final Policy, to those that provided extensive comments and information supporting or opposing the draft or final Policy, or specific aspects thereof. The majority of comments submitted included detailed suggestions for revisions addressing major concepts as well as editorial suggestions for specific wording or line edits.

We considered all of the comments we received in the comment period beginning November 6, 2017 (82 FR 51382), and following the DOI's "Regulatory Reform" *Federal Register* announcement (June 22, 2017, 82 FR 28429); we respond to the substantive comments below.

*A. Policy addresses multiple authorities*

*Comment (1):* One commenter stated there were constitutional limits on requiring mitigation, referencing the *Koontz v. St. Johns River Water Management District* case decided by the U.S. Supreme Court, 570 U.S. 595 (2013). This commenter noted that any compensatory mitigation measures must have an essential nexus with the proposed impacts and be roughly proportional, or have a reasonable relationship between the permit conditions required and the impacts of the proposed development being addressed by those permit conditions.

*Response:* The Service agrees that the *Koontz* case, as well as predecessor cases including, but not limited to, *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994), raise serious constitutional

concerns about the viability of some elements of the Service's mitigation programs. These concerns are particularly acute for offsite compensatory-mitigation programs and programs that seek a net conservation gain. Offsite compensatory-mitigation programs raise concerns regarding an appropriate nexus between the anticipated impact and the mitigation requirement. As mitigation moves further away from the direct impacts of a project, the risk that the connection between required compensation and the initial project becomes more attenuated increases. Further, by seeking to err on the side of mitigating above and beyond the impacts of the specific project at issue, a net conservation gain standard raises inherent concerns about proportionality, as well as the appropriate nexus between project impacts and mitigation methods, particularly where mitigation is in essence being used to rectify past, unrelated harms. We, like all agencies, must implement our authorities consistent with any applicable case law as appropriate. Consideration of the Constitutional standard set forth in *Koontz* is one reason, though not the only reason, that the Service is withdrawing its previous Mitigation Policy. In light of the *Koontz* case and any other relevant court decisions, the Service, in using its previous policies (e.g., 1981 Policy), will make sure that any statutorily authorized mitigation measures will have a clear connection (i.e., have an essential nexus) and be commensurate (i.e., have rough proportionality) to the impact of the project or action under consideration.

*Comment (2):* Several commenters addressed aspects of the Service's authority under the Bald and Golden Eagle Protection Act (Eagle Act). One commenter supported the acknowledgement that compensatory mitigation for bald and golden eagles may include preservation of those species' habitats and enhancing their prey base. The

commenter noted that existing regulations establishing a permit program for the non-purposeful take of bald and golden eagles recognize these options but that these options have not been used. One commenter stated the Service was incorrect in stating in the proposed Policy: “the statute and implementing regulations allow the Service to require habitat preservation and/or enhancement as compensatory mitigation for eagle take.” The commenter said that Congress has not exercised jurisdiction over the habitats of eagles, meaning the Service lacks authority to require mitigation for impacts to eagle habitats. One commenter suggested the Policy should articulate whether compensatory mitigation would be in addition to current requirements of a 1-for-1 take offset.

*Response:* We agree that the authority of the Eagle Act is limited, and the Service has outlined its authority in its regulations (50 CFR part 22). Nothing in the Eagle Act directly addresses eagle habitat, or requires that the Service apply a net conservation gain standard. Accordingly, the withdrawal of the 2016 Mitigation Policy and reinstatement of the 1981 Mitigation Policy will not change our authority under the Eagle Act.

*Comment (3):* Several commenters addressed the Service’s authority under the Migratory Bird Treaty Act (MBTA). One commenter said the Service was incorrect in describing implied authority to permit incidental take of migratory birds under the MBTA and noted that the Service has no authority to require compensatory mitigation for incidental take of migratory birds. Several commenters said that mitigation for migratory birds exceeds MBTA authority and that the Policy should exclude potential incidental impacts to migratory birds under the MBTA until the Service establishes statutory or regulatory authority to require landowners to obtain incidental take authorization prior to

undertaking otherwise lawful activities. They added that the MBTA does not directly address mitigation or habitat impacts.

One commenter said the Service was incorrect in writing that the Fish and Wildlife Conservation Act implicitly provided for mitigation of impacts to migratory birds. The commenter said that the language does not authorize the Service to engage in any management activities associated with migratory birds, particularly over private parties, only directing the Service to monitor and assess population trends and species status of migratory nongame birds.

*Response:* DOI's Office of the Solicitor issued M-Opinion 37050, The Migratory Bird Treaty Act Does Not Prohibit Incidental Take (M-Opinion), on December 22, 2017, which concludes that the take of birds resulting from an activity is not prohibited by the MBTA when the underlying purpose of that activity is not to take birds. In addition, the Service does not have specific statutory authority pursuant to the MBTA to require Federal action agencies and/or their permittees to provide compensatory mitigation for unavoidable impacts to (loss of) migratory bird habitat resulting from federally conducted or approved, authorized, or funded projects or activities. Like the Eagle Act, the MBTA does not directly protect habitat. When the Service authorizes otherwise prohibited intentional take, however, it can make that authorization subject to appropriate conditions, including non-compensatory mitigation, such as measures to avoid, minimize, reduce, or rectify anticipated harm. In addition, Executive Order (E.O) 13186 directs Federal agencies "taking actions that have, or are likely to have, a measurable negative effect on migratory bird populations" to sign a Memorandum of Understanding with the Service "that shall promote the conservation of migratory bird populations."

*Comment (4):* One commenter specifically questioned the treatment of Natural Resource Damage Assessment actions conducted under the Comprehensive Environmental Response, Compensation, and Liability Act, Oil Pollution Act, and the Clean Water Act, stating that the Presidential Memorandum on Mitigating Impacts on Natural Resources from Development and Encouraging Related Private Investment, dated November 3, 2015, requires that separate guidance be developed for when restoration banking or advance restoration would be appropriate.

*Response:* The Presidential Memorandum on Mitigation was rescinded by Executive Order 13783, Promoting Energy Independence and Economic Growth (March 28, 2017). Furthermore, when a release of hazardous substance or oil injures natural resources subject to the natural resource damage assessment and restoration trusteeship of States, Tribes, or the Federal Government, appropriate restoration is determined by the scope and scale of the injury and the nexus of the restoration action to that specific injury.

#### *B. Net Conservation Gain / No Net Loss*

*Comment (5):* Many commenters addressed the Policy's mitigation planning goal of improving (i.e., a net gain) or, at minimum, maintaining (i.e., no net loss) the current status of affected resources. A number of commenters supported the goal while a number of commenters opposed the inclusion of a net conservation gain. Of commenters opposed to net conservation gain, their specific reasons included:

- (a) The Service lacks the statutory authority to implement the net conservation gain goal for mitigation planning.

- (b) The net conservation gain goal imposes a new standard for mitigation and that mitigation requirements should be commensurate with the level of impacts.
- (c) Concern about the costs associated with achieving net conservation gain.
- (d) Questions about the ability to achieve net conservation gain and how it would be measured.
- (e) The Policy does not provide the methodology to assess or measure the net conservation gain.
- (f) Net conservation gain is incompatible with the standards of the ESA sections 7 and 10. One commenter asked that we clarify that the net conservation gain goal does not modify or expand proponents' obligations under ESA sections 7 or 10 permitting programs. One commenter stated that the Policy's goal would have limited relevance to section 10 decisions other than serving as an aspiration or goal for negotiating conservation measures. One commenter asked that we specify how the Policy's goal will be applied to processing incidental take permit applications under section 10(a)(2)(B)(ii), especially for projects predicted to directly kill listed species. This commenter added that neither no net loss nor net gain is an appropriate goal under section 10 if the goal implies that impacts at the individual level will not be minimized to the maximum extent practicable.

*Response:* We agree with concerns expressed by commenters that the Service generally lacks the statutory authority to implement "net conservation gain" for mitigation planning. No statute within the Service's purview mandates that the Service directly apply a net conservation gain standard. For example, under the Endangered Species Act (ESA), the standard for section 7 is that a "Federal agency shall, in

consultation with and with the assistance of the Secretary, insure that any action ... is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat” (§ 7(a)(2)); under section 10, the requirement is “to the maximum extent practicable, minimize and mitigate the impacts of such taking” (§ 10(a)(2)(B)(ii)). As one court has noted, “[t]he words ‘maximum extent practicable’ signify that the applicant may do something less than fully minimize and mitigate the impacts of the take where to do more would not be practicable. Moreover, the statutory language does not suggest that an applicant must ever do more than mitigate the effect of its take of species.” *National Wildlife Federation v. Norton*, 306 F. Supp. 2d 920, 928 (E.D. Cal. 2004); *see also Union Neighbors United, Inc. v. Jewell*, 831 F.3d 564 (D.C. Cir. 2016) (holding that the obligation to minimize and mitigate to the maximum extent practicable was satisfied by a plan that the Service found to fully offset the impact of the proposed taking). Since what is “practicable” may not fully offset proposed take, the “maximum extent practicable” standard is inconsistent with both a general net conservation gain and a no-net-loss mitigation objective. Nothing in the ESA requires that the Service apply a net conservation gain or no-net-loss standard.

Those commenters supporting the goal generally asserted, among other points, that the Service has the authority to require compensatory mitigation, found the measures to be clear, and thought the policy encouraged consistent implementation. While we appreciate these comments, for the reasons described above, we are not persuaded.

As “net conservation gain” was central to and integrated throughout the policies, in addition to the more recently issued 2017 Executive and Secretarial Orders, modifying these policies would likely have caused even more confusion. Thus, we are withdrawing

the 2016 Mitigation Policy, and restoring the policies and guidance that were superseded by the 2016 policies.

*C. Landscape-scale Approach*

*Comment (6):* Several commenters described their concerns with the implications of the Policy’s inclusion of a landscape-scale approach:

- (a) There is no statutory authority for taking a landscape-scale approach.
- (b) Including a landscape-scale approach would lead to the Service seeking mitigation for impacts beyond a project under review, including impacts that happened in the past or in unrelated locations. They said that meeting the standards of an applicable authority within the narrow geographic scope of their project is the proponent’s only responsibility.
- (c) General concern that a landscape-scale approach would mean Federal overreach, including disregard for the plans, processes, and resource interests of States, tribes, and local governments.

*Response:* We agree with commenters that proponents’ and action agencies’ responsibilities include the provisions of relevant authorities and that those responsibilities do not extend to impacts unrelated to their action. Requiring mitigation to impacts unrelated to a proponent’s action would likely conflict with the “essential nexus” required under *Koontz* for property development (see Comment 1 above). Accordingly, any effort to apply a landscape-scale approach to mitigation must ensure that there is an essential nexus between the proposed activity and the contemplated

mitigation and that mitigation is not being imposed to correct for past impacts by other actors.

Section 5 of the Mitigation Policy, “Mitigation Framework,” calls for both consideration of a landscape-scale approach in addition to “net conservation gain.” Because net conservation gain is integral to the policies, even though considerations of landscape-scale approaches may be useful in some cases, withdrawing these policies will reduce confusion over the net conservation gain goal. This notice does not affect the Service authorities that already allow the flexibility to consider landscape-scale approach. In some cases, taking the broader ecological context of both impacts and mitigation opportunities into account by applying a landscape-scale approach is an effective means of implementing the Service’s mission in a way that also benefits proponents.

*National Environmental Policy Act (NEPA)*

We have analyzed the withdrawals of this policy in accordance with the criteria of the National Environmental Policy Act, as amended (NEPA) (42 U.S.C. 4332(c)), the Council on Environmental Quality’s Regulations for Implementing the Procedural Provisions of NEPA (40 CFR parts 1500–1508), and the Department of the Interior’s NEPA procedures (516 DM 2 and 8; 43 CFR part 46). Issuance of policies, directives, regulations, and guidelines that are of an administrative, financial, legal, technical, or procedural nature, or whose environmental effects are too broad, speculative, or conjectural to lend themselves to meaningful analysis and will later be subject to the NEPA process, either collectively or case-by-case may be categorically excluded under NEPA (43 CFR 46.210(i)). We have determined that a categorical exclusion applies to

withdrawing this policy.

*Paperwork Reduction Act of 1995*

This policy withdrawal does not contain any new collections of information that require approval by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.). OMB has reviewed and approved the information collection requirements for applications for incidental take permits, annual reports, and notifications of incidental take for native endangered and threatened species for safe harbor agreements, candidate conservation agreements with assurances, and habitat conservation plans under OMB Control Number 1018-0094, which expires on March 31, 2019. We may not conduct or sponsor and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number.

*Government-to-Government Relationship with Tribes*

In accordance with the President's memorandum of April 29, 1994, "Government-to-Government Relations with Native American Tribal Governments" (59 FR 22951), Executive Order 13175 "Consultation and Coordination with Indian Tribal Governments," and the Department of the Interior Manual at 512 DM 2, we have considered possible effects on federally recognized Indian tribes and have determined that there are no potential adverse effects of withdrawing this policy. Our intent with withdrawing these policies is to reduce confusion of mitigation programs, projects, and

measures, including those taken on Tribal lands. We will work with Tribes as applicants proposing mitigation as part of proposed actions and with Tribes as mitigation sponsors.

**Authority**

The multiple authorities for this action include the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*); Fish and Wildlife Coordination Act, as amended, (16 U.S.C. 661–667(e)); and National Environmental Policy Act (42 U.S.C. 4371 *et seq.*).

Dated: July 24, 2018

Gregory J. Sheehan

*Principal Deputy Director, U.S. Fish and Wildlife Service.*

Billing Code 4333–15

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