From: Boroja, Maria
To: Shauna Ginger
Cc: Jana Affonso; Lee Corum; Drue DeBerry
Subject: Re: Region 6 comments of the revised mitigation policy
Date: Monday, March 16, 2015 2:16:12 PM
Attachments: DTS059114 R6 Comments on Revised Draft Mitigation Policy.pdf

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Yes, sorry I did not forward them out, crazy busy.

On Mon, Mar 16, 2015 at 2:40 PM, Shauna Ginger <shauna_ginger@fws.gov> wrote:

> Hi Maria,
>
> Did we send in tri-region GRSG comments?
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>
> Shauna Ginger
>
> Ecosystem Services Biologist
> USFWS Oregon Field Office
> Portland, OR | 503-231-6949
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> *Learn more about USFWS & Ecosystem Services here*
>
> **From:** Boroja, Maria [mailto:maria_boroja@fws.gov]
> **Sent:** Monday, March 02, 2015 3:13 PM
> **To:** Jason Miller
> **Cc:** Larry Bright; Jana Affonso; Shauna Ginger; Lee Corum; Nicole Alt; Michael Thabault; Bridget Fahey; Drue DeBerry
> **Subject:** Region 6 comments of the revised mitigation policy
>
> Hi Jason,
>
> As promised here are our comments on the revised policy. Please do not hesitate to call with any questions and thanks for the effort to integrate the emerging issues in this effort.
>
> Best regards,
>
> Maria

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Maria T. Boroja

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United States Department of the Interior

FISH AND WILDLIFE SERVICE
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FWS/R6/ES

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134 Union Boulevard
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MAR 2 2015

Memorandum

To: Director
(Attn: Jason Miller)

From: Deputy Regional Director, Mountain Prairie Region

Subject: Draft Revised Service Mitigation Policy

Thank you for the opportunity to provide comments on the "Draft Revised Service Mitigation Policy" (Draft Policy). An umbrella national mitigation policy will help the Service achieve better results for species and habitat conservation in the mitigation process if it sets a clear framework of standards and processes for the Service and its partners to follow. We believe the Draft Policy makes significant strides towards this end and offer the following comments to ensure clarity, local flexibility and transparent implementation guidance to support this effort. We also include a compilation of our tri-Regional review of the Draft Policy with an eye to potential implications the Draft Policy may have on our ongoing Greater sage-grouse mitigation efforts. We recommend any final Policy be concise and present our authorities in an integrated manner to clarify for staff and our partners our role and responsibility in requiring mitigation. The current Draft Policy conflates policy and implementation guidance, is confusing and as such may not achieve desired conservation outcomes. In general, we support the goals outlined in the Draft Policy and offer the following comments to identify some general and specific concerns we have identified in our review.

General Comments on the Draft Policy:

Purpose:
The intended purpose of the Draft Policy is to articulate where the Service has the statutory and regulatory authority to recommend or require mitigation for impacts to fish, wildlife, plants and their habitats. It should also include our intention to provide increased transparency of the regulatory process and for more program predictability. One of the keys to a successful mitigation program is having equivalent standards for all forms of mitigation for a given resource which ultimately fosters early project coordination. Bringing our partners to the table in the early stages of project planning provides more regulatory awareness, predictability and offers

participants on both sides of mitigation negotiations awareness that their actions are compliant with relevant statutory requirements.

Authority:
This section would benefit from including a table of each of these statutes that includes: their purpose (e.g., conserve the ecosystems upon which listed species depend via the Endangered Species Act (ESA)); identifies when mitigation is appropriate or not (e.g., the requirement for compensatory mitigation for any take of golden eagles) via our authorities under the Bald and Golden Eagle Protection Act (BGEPA); and a platform to illustrate our overlapping authorities to seek mitigation as well as strengthen our own and our partners understanding of when mitigation should be applied in the planning process. In relegating the discussion of these statutes to Appendix A, we lose the ability to inform and educate our staff and partners on our overarching authority to achieve our conservation mission.

Complexity:
The Draft Policy seems much more complex than the 1981 Policy and will likely be difficult to understand by both staff and our partners. It is particularly important for partner understanding, because except in limited circumstances when the Service issues authorizations under ESA, Migratory Bird Treaty Act, BGEPA or the National Wildlife Refuge System Administration Act, most mitigation achievements are the result of cooperative negotiations with project proponents. The mitigation sequencing hierarchy is relatively easy to explain to novices but the ten step process described under section V.B. Mitigation Planning Policies (V.B.) is difficult to articulate, comprehend and may be challenging to apply consistently without further implementation guidance. In addition, the prescriptive nature of section V. B. would benefit from having more flexibility for effective and consistent implementation.

Conservation Outcomes:
This section discusses our goal of achieving a conservation objective of no net loss for affected resources which implies we have an existing overarching, strategic approach that identifies Service-wide Conservation Outcomes. If this is the case, a reference to the Conservation Outcomes document would be helpful for our staff and our partners to increase awareness of what these are.

Workload Considerations:
The Draft Policy includes several new processes that may require additional staff and resources to complete. First, it is not clear if we must establish and map habitats according to "Resource Categories" and whether we have to identify "Evaluation Species" prior to implementing the final Policy. If we must identify and establish these prior to implementing the final Policy this may constitute a considerable staff commitment and effort that we currently do not have to support. It is also not clear whether we must apply the prescribed 10 step process in section V.B. for all projects reviews and mitigation recommendations or just for large landscape-scale mitigation recommendations. If the intent is to apply the V.B. 10 step process for all project reviews this will require a significant amount of staff time that we currently do not have. In

section V.B.8. *Documentation Standards*, the Draft Policy states that we will provide our recommendations in writing early during the initial project planning phase and again in advance at the final decision for the action, in many circumstances this adds an additional set of written recommendations from our staff that we currently do not provide. We recommend that this not be explicitly stated in the final Policy and instead be conveyed in implementation guidance. Finally, we recommend that the final Policy include clarification that we do not intend to conduct or perform independent third party impact assessments in the absence of our partners and other project proponents as the Draft Policy currently implies.

Applicability to small-scale projects:
While we appreciate the landscape-scale approach that the Draft Policy articulates, many Service trust resources are heavily impacted by multiple small scale projects that cumulatively become important, even though singularly they may seem trivial. The process for achieving compliance with all aspects of the Draft Policy looks extremely time consuming and may deter Service biologists from attempting to use it on small scale projects, especially on projects where we are providing advisory comments only. We recommend that the Draft Policy be modified so that Service employees can use parts of the Policy, without strict adherence to the ten step process under section V. B. Mitigation Planning Policies which should allow small scale mitigation to be achieved in more streamlined and efficient methods. Given the work load that may be involved in strict compliance with the ten step process under section V. B. Mitigation Planning Policies, it may make sense for the mitigation Draft Policy to adopt a National Environmental Policy Act (NEPA) style categorization for engagement based on the scope of the impacts. Much like NEPA has Environmental Impact Statement's to Record of Decision's or Environmental A's to FONSI, or categorical exclusions, all dependent upon project impacts, our mitigation policy should allow Service employees to tailor the level of investment in mitigation efforts/plans to anticipated project impacts. This would allow Service biologists to still engage on smaller scale projects to achieve mitigation without the workload that might be associated in developing a mitigation plan more appropriate for a large scale impactful project that rigorously follows the ten step process under section V. B. Mitigation Planning Policies.

Definitions:
Please reconcile terms defined in the Draft Policy with those already defined in Service regulations and policies to avoid confusion with other statutory and regulatory definitions. For example, there are existing codified definitions for cumulative effects, effects (direct and indirect) and conservation that are defined for the purposes of the ESA that do not align with the definitions presented herein. The Draft Policy creates new terminology that may result in confusion for staff and our partners such as equivocating all impacts with "adverse impacts", introducing new definitions for "affected area" which is similar to the existing definition of "action area" that we suggest should be resolved prior to the publication of a final Policy.

Relationship to other Mitigation Policies:
It would be helpful to acknowledge the relationship of the final Policy to other existing mitigation policies and programs such as the Clean Water Act section 404 permitting program. This writing it is not clear if Service staff will be required to re-assess and evaluate those

activities in the context of the final Policy.

Citations:
There are a considerable number of references to habitat loss statistics and new science that are without sufficient citation. It would be helpful if the final Policy included references to add support to the seriousness of new threats and the need to update the Policy.

Specific comments on the Draft Policy:

Page 3 – Discussion: We recommend that the Discussion section include reference to relevant strategies (e.g., the National Fish, Wildlife and Plant Climate Adaptation Strategy) which support the need for coordinated mitigation and adaptation strategies to address our landscape-scale conservation challenges in the face of a changing climate.

Page 7 – Conservation Measures: We recommend that this section be expanded to include language from the Pre-Listing Mitigation Policy to ensure consistency between the two policies.

Page 9 – Scope: Given the scope and coverage of the Policy to potentially tens of thousands of projects annually, applying the ten step process will likely only be feasible on the largest or most impactful of the projects that may get reviewed by a Service office in a given year. Without some recognition that many Service offices review hundreds or thousands of individual projects annually and only the most resource impactful projects are likely to be evaluated under all ten steps, the public could get the misimpression about the Service's capabilities to implement our current revised mitigation policy.

Page 10 – The first sentence under exclusions reads:

"This policy does not apply retroactively to completed actions or to actions specifically exempted under statute from Service review."

It would be helpful to include an example or two of actions the Service is statutorily exempted from review.

Page 14 – Contains a list of definitions used in the Draft Policy. Some examples include:

***Mitigation Planning Goal**: The Service's goal for mitigation planning is to ensure that an action results in no net loss toward achieving conservation objectives for the affected resources.*

It could be hard for our partners/public to understand what is meant by "*no net loss toward achieving conservation objectives for the affected resources*".

Perhaps including examples that illustrate a common scenario such as a Forest Service National Grassland or Bureau of Land Management lands that are already in native cover (grassland or shrub lands) where energy development is being considered. Such an example could illustrate

how the Policy would apply to this relatively common scenario. For example, oil and gas operations impacts associated with the development of well pads and access roads that have a defined footprint of the project but do not necessarily have straightforward ways to address impacts to native cover types associated with the indirect impacts such as fragmentation. How will the no net loss concept compensate for the footprint impacts on lands that are already well vegetated and then then further address the indirect impacts of the proposed action on federal land already in native cover? We recommend providing example scenarios, in implementation guidance, that would provide staff with a better framework to assess the total or aggregate impact of the action.

***Scarcity**: the relative spatial extent (rare, common, or abundant) of the habitat type in the landscape context.*

Current and future readers of the policy would benefit by knowing what the Service means by the terms "rare, common, or abundant". These are key terms used in describing the "Resource Categories" and the more clarity and context we can provide to clarify these terms now might prevent future misinterpretations. Also, please see our comments above in the "*Definitions*" section.

Page 15 – Identifies some mitigation principles including one entitled *"Observe an appropriate mitigation sequence"* that allows some flexibility for the Service to apply the mitigation sequence. This is a valuable component and we encourage retention of this flexibility in the final policy.

Page 18 – *3. Assessment Principles* We recommend the inclusion of Tribes and Tribal resources that may be affected or have resources that are potentially at risk.

Page 21 – We recommend the necessary flexibility described in the last paragraph be included for all project review, especially in cases where it makes conservation sense to move a habitat away from encroaching development rather than avoiding the area which is likely to be compromised in the future. We recommend this flexibility in the application of the mitigation sequencing hierarchy be retained in the final Policy.

Page 24 – Does the Service have any policies regarding who can designate a "Resource Category" one, i.e. only Regional Directors, and if so it should be mentioned here.

Page 27 – the last paragraph begins: *"In general, the Service does not support compensatory mitigation on public land that is already permanently protected for the purpose of conserving natural resources. In the case of federal lands, there is an expectation that the government will adequately fund all future conservation requirements."*

The second sentence seems an overly optimistic sense of congressional interest and doesn't seem to recognize that for some species, particularly listed ones that may depend on federal lands, those nonfederal resources expended on federal land can make a very effective form of

mitigation in some circumstances.

The next sentence in that paragraph reads:

"*In particular, the Service does not support compensatory mitigation on public lands for impacts to evaluation species on private lands due to the risk of facilitating a long-term net loss of conservation for evaluation species.*"

And that sentence seems contrary to one sentence later that reads:

"The Service recognizes that under certain circumstances, compensatory mitigation on public lands may be appropriate."
We recommend the Draft Policy not overly restrict mitigation options on public lands where high benefit might be achieved for evaluation species. Clarity could be added to this section to make certain that the new policy does allow it.

Page 34 – part *e. Compensate for the impact by replacing or providing substitute resources or environments.*

This section describes the application of the fifth tier of the mitigation hierarchy – Compensation – and is difficult to understand. For instance it is unclear whether preservation of existing habitat, presumably at some ratio, like the 1981 Policy, allowed is still an option in this section. We recommend that long term preservation of habitat remain an option to compensate for impacts to a habitat. For example native grasslands, while still somewhat common in some areas, are very expensive and difficult and perhaps impossible to replant and get the assemblage of flora and fauna that previously existed. Thus, it may make sense in some instances to purchase perpetual easements on other existing native grasslands at some enhanced ratio for protection against the key threat which is conversion to cropland rather than trying to replant some cropland back to planted prairie. While this may result in a potential net loss of native grasslands it recognizes that protecting other existing native prairie may produce greater benefits to evaluation species verses replanting cropland back to grasslands over the long run.

Page 35 – Reads – "The *Service supports the application of equivalent ecological, procedural, and administrative standards for all compensatory mitigation mechanisms.*"

This sentence does not give the Service the same flexibility to ensure our efforts at compensatory mitigation are commensurate with the expected impacts or benefits to "Evaluation Species" and conservation. It seems we need to indicate in this Draft Policy that there may be many projects (of a small scale or low impact) that we may not apply the same intensity or effort on mitigation planning we would on large scale projects with extensive impacts.

<u>Greater sage-grouse General and Specific Comments</u>

As this Draft Policy will serve as a national framework, we reviewed the document with an eye

towards its potential to support mitigation policy or guidance for at-risk species, and specifically candidate-status greater sage-grouse. We coordinated with staff from Regions 1 and 8 on the Draft Policy's potential to support mitigation policy or guidance for at-risk species (not listed as threatened or endangered), specifically the ESA candidate greater sage-grouse (sage-grouse). Overall, while it appears that the Draft Policy will not hinder our ongoing efforts, there are some edits that could ease Service negotiations over establishing mitigation programs for sage-grouse, and perhaps other candidate or at risk species in general.

No Net Loss:
Ensuring no net loss should be part of the Service's mitigation planning goal, but no net loss is not a goal in and of itself. We are concerned stating this important principle as a goal gives the impression it is something to reach for rather than to achieve. We recommend changing the title of this principle to read "Ensuring no net loss" and adjusting similar language throughout.

We support the statements that encourage seeking net gain in conservation outcomes when appropriate. We believe that mitigation for at-risk species (species not listed as threatened or endangered under the ESA) is one area where the Service can and has recommended a net gain for mitigation programs. We offer the following edit to reflect this specific recognition.

> (pg.16) ...carry out programs for the conservation of <u>at-risk,</u> endangered and threatened species (Endangered Species Act, section 7(a)(1);

Striving for net gain is especially important when attempting to compensate for unavoidable impacts since having a higher conservation target can guard against the risk of failure inherent in compensatory mitigation. We suggest the following addition to incorporate this concept.

> (pg.34) ...the cost of land purchase and management. <u>The Service also encourages proponents to aim for net gain when using compensatory mitigation. There is the risk that species will not use substitute resources as effectively as the lost resources, providing substitute resources that exceed the resources lost will help to reduce the likelihood of decreased utilization.</u>

Regardless of whether no net loss or net gain is recommended, the Draft Policy should clearly describe the challenges to achieving these bars. It is important to stress early on in the Draft Policy that buffering against risk and uncertainty and meeting standards for additionality, durability, and effectiveness will be necessary.

Mitigation and Land Ownership:
As long as compensatory mitigation meets standards for additionality, durability, siting, timing, effectiveness, and monitoring land ownership should not be of concern. While we understand that there are possible limitations where land ownership is concerned (especially federal land), we see many circumstances where flexibility in where to put mitigation is necessary to provide the greatest benefit to a species. The current Draft Policy language is unnecessarily limiting and lacks explanation. We offer the following edits to the "Preferences for locating mitigation on

public or private lands" section:

> Standards for compensatory mitigation include: (1) all appropriate sequencing for mitigation of impacts has occurred in accordance with this policy; (2) the location will provide the greatest contribution towards achieving conservation objectives for the evaluation species; (3) the additional conservation benefit above and beyond that attainable under the existing land designation can be demonstrated and quantified; (4) the durability of the compensatory mitigation has been adequately addressed; and (5) it is consistent with and not otherwise prohibited by all relevant statutes, regulations, and policies. For compensatory mitigation proposed for siting on National Wildlife Refuge (NWR) lands, additional considerations covered in the Service's Final Policy on the NWR System and Compensatory Mitigation Under the section 10/404 Program (64 FR 49229-49234) may apply.
>
> After considering what resources can provide the greatest benefit to evaluation species, the Service may recommend or require that compensatory mitigation be established on private, public, or tribal lands. Lands already designated for conservation purposes cannot be used as compensatory mitigation, unless the proposed compensatory mitigation project would provide additional conservation benefit above and beyond that attainable under the existing land designation. Also, the Service will not support a mitigation arrangement in which federal funds are used to subsidize a federal compensatory mitigation requirement for private project proponents.
>
> Ensuring the durability of compensatory mitigation on public lands may require multiple tools beyond land use plan designations, including right-of-way grants, withdrawals, disposal, or lease of land for conservation, conservation easements, cooperative agreements, and agreements with third parties.
>
> Mechanisms to ensure durability of land protection for compensatory mitigation on public lands varies among agencies, but should preclude conflicting uses and ensure protection and management of the mitigation land is commensurate with the magnitude and duration of impacts.

At-risk Species Considerations:
We found few references in the policy to encourage mitigation for at-risk species, and we recommend that wherever possible the policy include at-risk species to encourage conservation of these species which may "head off" needing to list species under ESA.

- We recommend you expand the "Conservation Measures" section to include the vital role that considering beneficial actions prior to the initiation of consultation plays in incentivizing at-risk species mitigation efforts. The language in the 2014 "Proposed Policy Regarding Voluntary Pre-listing Conservation Actions" provides an example:

... If requested to do so by the person or Federal, State, Tribe, or local government agency ...or by a third party to whom the credits have been transferred, the Service will treat the action as (1) a measure to minimize and mitigate the impact of the taking of an endangered or threatened species pursuant to section 10(a)(1)(B) of the Act, or (2) an intended compensatory measure of a proposed Federal agency action subject to the consultation requirements of section 7(a)(2) or 7(a)(3) of the Act. Specifically, in the course of section 7 consultations, the Service will consider the beneficial effects of ...actions to be included as part of the environmental baseline for the action under consideration if requested by the action agency or, in the case of an agency action involving a permit application, by such applicant...

- Perhaps the final Policy could highlight how programs developed with states, tribes or local entities for at-risk species can provide efficiencies. We suggest adding the following language to "Features of Advanced Planning":

  Advance mitigation plans developed for at-risk species with state or local partners will provide strategically placed, early conservation value which may improve the status of the species.

- At the end of "Mitigation Means and Measures" remove the list and description of the three most common mitigation mechanisms. By listing just these three in this umbrella policy, it gives the appearance that the Service may not accept other types of mechanisms including those common with at-risk species programs (e.g. credit exchanges and term mitigation plans).

- Expand the "Endangered Species Act" section to include Service authorities for conservation of at-risk species. This will provide a reference base for future at-risk species mitigation guidance or policy.

Federal Funding:
Mitigation programs are often hindered from significant up-front capital requirements. Ensure that language in this Draft Policy does not preclude the use of federal or public funds for revolving loans or other programs (where the entity is paid back) to jumpstart mitigation programs.

In closing, we appreciate the opportunity to review and provide comments on the Draft Policy and look forward to your continued cooperation to improve our overall mitigation policy to further our conservation mission. Should you have further questions or desire any clarifications on the points raised herein please feel free to contact myself or Maria Boroja of my staff at (303) 236-4518.