From:	Affonso, Jana
To:	Shauna Ginger
Cc:	Maria Boroja; Drue DeBerry; Lee Corum
Subject:	Re: Region 6 comments of the revised mitigation policy
Date:	Wednesday, March 18, 2015 12:05:35 PM
Attachments:	2-26-15_R8_Mitigation policy comments.pdf

Here is ours. Sorry, I forgot to forward it to you all.

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Jana Affonso
Deputy Division Chief
Section 7, Section 10, and Habitat Conservation
U.S. Fish & Wildlife Service
Region 8 Ecological Services
2800 Cottage Way, Room W-2606
Sacramento, CA 95825-1846
916-414-6593 (voice)

On Mon, Mar 16, 2015 at 3:35 PM, Shauna Ginger <shauna_ginger@fws.gov> wrote:

> Ok – thanks!
>
> --
>
> Shauna Ginger
>
> Ecosystem Services Biologist
> USFWS Oregon Field Office
> Portland, OR | 503-231-6949
>
> *Learn more about USFWS & Ecosystem Services here*
>
> **From:** Boroja, Maria [mailto:maria_boroja@fws.gov]
> **Sent:** Monday, March 16, 2015 3:35 PM
> **To:** Shauna Ginger
> **Cc:** Drue DeBerry; Lee Corum; Jana Affonso
>
> **Subject:** Re: Region 6 comments of the revised mitigation policy
>
> There were not - it was decided that we would not try to get all of the RD's signatures on it and since R6 has the lead we would put the collective set forward. Region 8 put theirs in their comment letter and I never did hear from Estyn what they did.

On Mon, Mar 16, 2015 at 3:20 PM, Shauna Ginger <shauna_ginger@fws.gov> wrote:

These are the R6 comments. Was there a sage-grouse only set signed by all 3 regions? Or was the decision to just leave the individual regions to account for grouse in their comments?

--

Shauna Ginger

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Learn more about USFWS & Ecosystem Services here

From: Boroja, Maria [mailto:maria_boroja@fws.gov]
Sent: Monday, March 16, 2015 2:16 PM
To: Shauna Ginger
Cc: Jana Affonso; Lee Corum; Drue DeBerry
Subject: Re: Region 6 comments of the revised mitigation policy

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?

--

Shauna Ginger

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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

--

Maria T. Boroja

Acting Colorado Field Office Supervisor

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United States Department of the Interior

FISH AND WILDLIFE SERVICE
Pacific Southwest Region
2800 Cottage Way, Room W-2606
Sacramento, California 95825-1846

In Reply Refer to:
FWS/R8/AES

FEB 26 2015

Memorandum

To: Director

From: Regional Director, Region 8

Subject: Region 8 Comments on the Draft Revised Service Mitigation Policy

See the attached comments on the Service's Draft Revised Service Mitigation Policy. We are providing general comments on concepts and authorities, as well as comments in track changes incorporated into the draft policy. Overall, we support the purposes of this revised draft policy, and we appreciate the opportunity to review and provide suggestions prior to this draft being published for public review. We recommend that before publishing the draft revised policy, the Service address the following points: (1) existing regulatory constraints which may limit the application of "no net loss" as a mitigation standard in some circumstances, particularly in the case of the Endangered Species Act; (2) more emphasis on pre-listing conservation of at-risk species, including the greater sage-grouse; (3) workload considerations; (4) allowing additional flexibility for mitigation on lands under a different ownership than the impact site, especially in light of our experiences with mitigation on refuge lands and through the Desert Renewable Energy Conservation Plan; and (5) the importance of monitoring and enforcement. These points are discussed in more detail in the attachment, along with specific comments on several of the authorities discussed in the draft revised policy. Generally, our suggestions in the track changes document aim to reduce redundancy and provide clarity to avoid confusion later.

If you have any questions regarding these comments, please contact Jana Affonso at (916) 414-6593.

Attachments

Region 8 Comments on Draft Mitigation Policy

General Concepts

Overall, we support the general purpose and methods described in this draft policy. Revising the 1981 policy is overdue and national consistency and transparency is needed across all programs and authorities. We strongly support the goals outlined in the policy, especially the mitigation sequence, landscape-scale approach, consistency and transparency, scientifically-based decision making, and durability. We also support the statement "It is not the Service's role to support or oppose lawful actions for which the primary purpose is unrelated to our conservation mission, and the Service respects the rights and authorities of action proponents and other agencies."

We support the inclusion of "Preferences" and particularly outlining the "Preferred characteristics of compensatory mitigation projects." In Region 8, we have strived for consistency across all mitigation types (conservation banks, turn-key sites, in-lieu fee, etc.) to ensure that mitigation is as effective as possible and to provide predictability for our partners. We look forward to the step-down Endangered Species Act Compensatory Mitigation Policy to further guide our offices, action agencies, and other partners to perpetuate consistency across the country.

In general, we recommend that the policy incorporate Strategic Habitat Conservation (SHC) to achieve the best conservation outcomes. We believe SHC concepts allow the necessary flexibility to develop the best biologically-based recommendations that complement the processes already outlined in the policy (landscape-level conservation, Resource Categories, etc.) An example of the necessary flexibility includes considerations for geographic proximity (e.g., depending on conservation and recovery objectives, the most appropriate mitigation land might not be the land in closest proximity to the impact site).

No Net Loss

While we generally believe this is an important goal in principle, we observe general confusion about whether no net loss is a goal or a directive of this policy. We recommend that this policy better describe and clarify how the processes for developing mitigation recommendations will be implemented within the confines of existing statutes and regulations. We foresee that in the absence of regulatory revisions this policy will cause confusion in the future in instances where the Service is issuing permits or carrying out activities. For example, the ESA and its implementing regulations for section 7 consultation do not require action agencies or applicants to fully replace habitat that they impact. For projects that do not result in a jeopardy determination, the regulatory requirement is to minimize the amount or extent of incidental take. Requiring habitat or individuals be replaced require revisions to the implementing regulations. However, encouraging action agencies and applicants to mitigate to achieve "no net loss" should be strongly encouraged.

We are concerned that the "no net loss" goal could be interpreted over-simplistically (such as acre-for-acre) without consideration for more general and scientifically-based conservation objectives. This goal may not be realistic or necessary for some situations; therefore, we recommend the policy allow flexibility in certain circumstances and, if possible, include examples of where "no net loss" is not realistic or necessary. For example, some activities may result in low levels of "take" or short-term negative impacts to habitat of listed species, but ultimately may provide for long-term benefits to that species. Sometimes, it's not realistic to replace habitat, as is the case with old-growth forest. In those instances, it is not feasible to expect "no net loss," but we would work with agencies and project proponents to avoid and minimize those impacts as much as practicable. Some habitat types cannot be created in the timescale necessary to mitigate for a project impact, and we question whether "no net loss" is even possible under future climate change scenarios, given that species distribution and habitat conditions will likely shift as a result. Any unavoidable impacts would be held to existing regulatory standards (e.g., the jeopardy standard pursuant to section 7(a)(2)). We recommend this policy describe and provide for more flexibility in these instances.

Leveraging Federal grant funds with non-Federal matching funds derived from mitigation requirements has allowed States to acquire significant and larger properties that they may not have otherwise. By prohibiting the use of all compensatory mitigation funds as non-Federal match to avoid the potential of a net loss, we may be limiting our ability to achieve landscape-scale conservation. As a result, we may be creating onerous requirements on States and partners to segment or subdivide properties and projects to ensure that mitigation funds don't appear to be mixing with Federal funds. These work-a-rounds can be time consuming and expensive with no real change to the overall outcome of projects.

The policy is unclear for instances where the Service is funding or carrying out a project that involves habitat loss if the Service, or a grantee, would be required or expected to mitigate to achieve no net loss.

We support the sequence of the five mitigation types outlined in the policy: avoid, minimize, rectify, reduce over time, and compensate. However, not all five of these types are designed to achieve no net loss, specifically minimization and reducing over time. This should be acknowledged to reduce confusion during implementation of this policy. Also, we are encouraged that avoidance is first and foremost, and recommend further emphasis of this concept in this policy and other step-down policies.

At Risk Species

We coordinated with staff from Regions 1 and 6 on this 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). 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.

While it appears that the policy will not hinder our efforts, there are some edits that could ease Service negotiations over establishing mitigation programs for sage-grouse, and perhaps candidate species in general.

We have been working with the states and private entities on developing advanced crediting/mitigation systems. These systems will provide strategic, early conservation value which may improve the status of the species. One of the fundamental principles that we anticipate from these systems is that they will provide a "net conservation gain" to the sage-grouse. Unlike for federally-listed species, we are not hindered by statutory and regulatory standards, and we believe that mitigation for at-risk species is one area where the Service can and has recommended a net gain for mitigation programs. 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 recommend expanding 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..."

Workload Considerations

If this policy is a directive rather than a goal, it may result in an increase in workload associated with developing mitigation recommendations or measures, presumably with no additional staff. While we support having a defensible, transparent process for development of mitigation recommendations, this process is considerably more labor intensive than previous methods, and we are concerned this may result in delaying delivery of permits or recommendations. When we communicate this draft policy to the public, we recommend being transparent about potential ramifications to allow the public to evaluate ideals versus pragmatic ramifications. A potential solution would be to require the Resource Categorization process only in the event of

disagreement between the Service and the project proponent. If there is no disagreement on mitigation measures, there is less need to document this process.

Land Ownership Preferences

While we understand that there are possible limitations where land ownership is concerned (especially federal land), we see many circumstances in which flexibility in where to put mitigation will provide the greatest benefit to a species. We support the general concept of mitigation occurring on lands of the same ownership classification as the impacted lands. We are concerned, however, that the seven requirements listed in the policy are too restrictive ("appropriate only when…(1)-(7). There may be instances when it would be appropriate to compensate for private land impacts on public land even when all seven criteria are not met. For example, in the Desert Renewable Energy Conservation Plan, we propose compensating for private land impacts on BLM land in some circumstances. Compensating in this way will contribute to landscape-scale conservation in the plan area and to recovery of covered species. We think this is a situation in which an overall benefit to conservation may accrue even though Criterion 6 may not be met (i.e., while private land might be available, using public land provides the greater benefit to conservation).

For Refuge projects, the policy appears to require the Service to offset the impacts on Federal land but presumably not on Refuge land because that land is already set aside for conservation. It is unclear from this policy what type of Federal land would be appropriate for that mitigation, what the landowning agency's role would be, and what would need to occur if no other Federal agency is willing to designate their land for compensatory mitigation for that Refuge project.

The language in this policy primarily references the 1999 Refuge Mitigation Policy. We recommend emphasizing the "high bar" for mitigating private land impacts on Refuge lands, and the high level review and approval that is necessary for this exception to be made. Also, this policy should outline the approval process for these exceptions, similar to the one described in the Refuge Mitigation Policy. Based on our experience in Region 8, this process should entail the Regional Director recommending the exception to the Director for approval.

Monitoring and Enforcement

There are general references to monitoring the effectiveness of mitigation. We suggest that the importance of monitoring be emphasized, particularly as it relates to improving mitigation techniques and recommendations for future projects. We recommend emphasizing that monitoring should be the responsibility of those responsible for the mitigation, as the Service lacks the capacity to monitor and enforce these measures.

Comments on Authorities

National Environmental Policy Act

We are encouraged to see the draft policy emphasize the importance of incorporating mitigation planning early in NEPA processes, both our own and when we are involved in other agency NEPA processes as subject matter experts. Appendix B of the draft policy spells out how and where mitigation planning can be incorporated in specific phases of the NEPA process. We recommend the policy also direct agencies to include mitigation measures in any Record of Decision that is rendered in order to emphasize the importance of mitigation in any decision to move forward with a federal action.

Migratory Bird Treaty Act

Because incidental take cannot be authorized under the MBTA, the current standard is to recommend adherence to best management practices. Our interpretation of this policy is that it raises the bar significantly by requiring offset of impacts to individuals and habitat. For example, the Service and the States jointly set duck hunting levels. We are concerned that this policy may require the Service to offset impacts to harvestable levels of waterfowl. A harvestable level is a level that does not diminish the breeding population. We suggest that impacts to individuals above that level do not need to be mitigated, and we recommend that this example be included in the policy.

Bald and Golden Eagle Protection Act

The policy contains the statement that "For direct take under the Eagle Act, there must be a demonstrable connection between compensatory mitigation and offsets to population level effects." This is a huge change from the current policy. Currently, the Eagle Act standard is "stable or increasing breeding populations." Thus, our interpretation of the mitigation policy is that for bald eagles in the Chesapeake Bay, Florida, Alaska, and other locations, take of individuals above and beyond those needed to maintain breeding populations would not need to be mitigated. We suggest this interpretation be made consistent with current Eagle Act policy.

Notwithstanding regulatory requirements, we recommend that this policy not foreclose future options for mitigation to provide for an overall benefit to eagles. In addition, we recommend that the Eagle Act should be listed separately and not as a subset of Migratory Bird Authorities.

Endangered Species Act

Region 8 has been at the forefront of Endangered Species Act (ESA) mitigation for many years. We have learned what works (and what doesn't) and are encouraged that our experience has contributed to the development of national policy. We believe there is a solid rationale for including mitigation in ESA processes, including section 7 consultations and section 10 Habitat

Conservation Plans (HCPs). We provide the following comments and suggestions to improve integration of mitigation concepts into these processes.

We recommend that the "Applicability to the Endangered Species Act" section more heavily emphasize front-loading mitigation into the conservation measures proposed by federal action agencies and their applicants. In the context of section 7, including compensatory mitigation measures in Reasonable and Prudent Measures (RPMs) should only be considered only after all efforts to include those measures into the Proposed Action have been exhausted. We have had great success in working with action agencies and applicants to front-load mitigation measures in joint recognition that federal action agencies have a responsibility under section 7(a)(1) to conserve listed species and their habitats, and that it behooves us all to try and improve the status of listed species to ensure their future actions comply with section 7(a)(2). Neither the statute nor the regulations implementing section 7 contain direct provisions that allow for the Service directing federal action agencies to mitigate for their actions. Because statute and regulations trump policy, we believe a regulatory revision is the best and most legally defensible way to codify the ability to include compensatory mitigation measures as RPMs. A regulation revision could also help clarify how the minor change rule applies to such measures. While we agree and support the concept that certain types and amounts of mitigation are appropriate as RPMs, we believe additional guidance and regulations are the best way to achieve this intention.

Section 10/HCPs provide an opportunity to establish conservation objectives with the goal of "no net loss," but we are concerned that this could create confusion about how this standard comports with the existing regulatory mitigation standard for HCPs. The policy should describe that the mitigation component for the section 10 process allows incidental take for actions as long as the permit meets the "issuance criteria." The issuance criteria include that the "taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild", which is consistent with the "not likely to jeopardize the continued existence of listed species" for section 7. We believe this policy would also benefit from a description of the form in which mitigation is accepted and applied for HCPs, specifically the adequacy of the mitigation program in providing substantial benefits to the species and offsetting the impact of the take to the maximum extent that can be practically implemented by the applicant.

We recommend that a caveat be added in the "Resource Categories" section that federally-listed species and critical habitat are, by definition, rare or under threat.

Since the Service and NOAA Fisheries share a handbook for Section 7 consultations, we recommend consideration be given to having NOAA Fisheries provide input into this policy, if that has not already occurred.

Fish and Wildlife Coordination Act

The Fish and Wildlife Coordination Act may not be equally important in all areas throughout the U.S., but in some areas it can play a major role in the Service's conservation efforts. The Service

often takes the lead in coordinating fish and wildlife concerns and responsibilities and makes sure that these are given full consideration in federal water-related projects through the Fish and Wildlife Coordination Act. Although specific habitat effects assessment procedures (e.g., HEP) are not discussed in the mitigation policy, the actual application of the policy may be compromised somewhat by the policies of other agencies involved in the application of FWCA. Specifically, the Army Corps of Engineers has adopted a policy that limits habitat assessment to the application of only certified models to qualify habitat. This can limit the effectiveness of conservation efforts, as some habitats can only be assessed in a limited way because suitable certified models are not always available. We recommend the Service coordinate with other agencies before this policy is finalized so that these agency national policies don't conflict and to ensure the most applicable habitat evaluations are used.

We recommend the policy include additional guidance on ways to ensure that any recommendations we provide under FWCA on federally-listed species allow for flexibility in any future section 7 consultation for that project.

The acronym 'FWCA' should not be used for both the Fish and Wildlife Conservation Act and the Fish and Wildlife Coordination Act.