

- What problems or issues do you see affecting management or public use of the Refuge?
- What improvements do you recommend for the Refuge?
- What changes, if any, would you like to see in the management of the Refuge?

The Service has provided the above questions for your optional use. The Service has no requirement that you provide information. The Planning Team developed these questions to facilitate finding out more information about individual issues and ideas. Comments received by the Planning Team will be used as part of the Planning process; individual comments will not be referenced in our reports or directly responded to.

An opportunity will also be provided for public input at an open house on September 18, 1999, (schedule of activities can be obtained from the Fish Springs National Wildlife Refuge at above address). All information provided voluntarily by mail, phone, or at public meetings becomes part of the official public record (i.e., names, addresses, letters of comment, input recorded during meetings). If requested under the Freedom of Information Act by a private citizen or organization, the Service may provide copies of such information.

The environmental review of this project will be conducted in accordance with the requirements of the National Environmental Policy Act of 1969, as amended (42 U.S.C. 4321 et seq.), NEPA Regulations (40 CFR parts 1500–1508), other appropriate Federal laws and regulations, Executive Order 12996, the National Wildlife Refuge System Improvement Act of 1997, and Service policies and procedures for compliance with those regulations.

Dated: September 3, 1999.

**Elliott Sutta,**

*Acting Regional Director, Denver, Colorado.*

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## DEPARTMENT OF THE INTERIOR

### Fish and Wildlife Service, Interior

#### Final Policy on the National Wildlife Refuge System and Compensatory Mitigation Under the Section 10/404 Program

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

**ACTION:** Notice.

**SUMMARY:** The U.S. Fish and Wildlife Service announces the final policy on

the National Wildlife Refuge System and Compensatory Mitigation under the Section 10/404 program. We are establishing guidelines regarding the use of the National Wildlife Refuge System for compensatory mitigation requirements for water resource development projects authorized by the Department of the Army under Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act. The purpose of the policy is to provide guidance to our personnel when they are evaluating whether a National Wildlife Refuge should be considered as a site for wetland restoration, enhancement, or creation to replace wetlands lost to dredge and fill impacts authorized by a Section 10/404 permit.

In general, we will not allow compensatory mitigation on National Wildlife Refuge System lands because these lands are already targeted for restoration, and we will be restoring these lands in the future. We recognize that under some limited and exceptional circumstances, compensatory mitigation on a National Wildlife Refuge may be appropriate. If compatible activities occurring on a National Wildlife Refuge require compensatory mitigation, the mitigation must occur within the boundaries of the National Wildlife Refuge being affected and must meet specific criteria. We will not support the use of National Wildlife Refuge System lands for establishment of mitigation banks. We may accept mitigation banks or mitigation projects as additions to the National Wildlife Refuge System subject to specific criteria. Where habitats have already been protected or restored under other Federal programs designed to increase the Nation's wetlands, we will not support the preservation of such restored wetlands as compensatory mitigation for habitat losses from other projects authorized under the Section 10/404 program, except in limited and exceptional circumstances.

**EFFECTIVE DATE:** The policy becomes effective on October 12, 1999.

**FOR FURTHER INFORMATION CONTACT:** U.S. Fish and Wildlife Service, Dr. Benjamin N. Tuggle, Chief, Division of Habitat Conservation, 400 ARLSQ, Washington, D.C. 20240, telephone (703) 358–2161; or Dr. Richard A. Coleman, Chief, Division of Refuges, 600 ARLSQ, Washington, D.C. 20240, telephone (703) 358–1744.

#### SUPPLEMENTARY INFORMATION:

##### Background

The national goal of no net loss of wetlands recognizes the importance and the special significance of wetlands to a variety of functions and values

including water quality, flood damage reduction, groundwater recharge, and reduced sedimentation. In addition, wetlands are some of the most important habitats for fish and wildlife resources on the landscape. We (the U.S. Fish and Wildlife Service) strongly support and contribute to this national goal by helping to reduce wetland losses, by restoring lost or degraded wetlands, and by protecting valuable wetlands by bringing them into the National Wildlife Refuge System.

We administer over 92 million acres of land and water within the National Wildlife Refuge System, and we have at least one National Wildlife Refuge in each of the 50 states. The mission of the National Wildlife Refuge System is to administer a national network of lands and waters for the conservation, management, and where appropriate, restoration of the fish, wildlife, and plant resources and their habitats within the United States for the benefit of present and future generations of Americans. We may allow public uses of National Wildlife Refuge System lands, such as wildlife dependent recreation, when they are compatible with the purposes of the refuge. However, the National Wildlife Refuge System was established and is being managed first and foremost for fish, wildlife, and plant conservation.

At times, we have acquired lands that have been disturbed by past human activities. As such, some National Wildlife Refuges contain degraded fish and wildlife habitats. The development community, and others, have asked if these degraded habitats could be used as mitigation sites for wetland and wildlife habitat losses that occur outside the National Wildlife Refuge System. In the past, we have discouraged the use of National Wildlife Refuge System lands for compensatory mitigation, because we are authorized to restore degraded habitats within the National Wildlife Refuge System and we will be restoring these lands in the future, irrespective of off-Refuge development. However, until now, we have not had a specific policy that outlines when, or if, compensatory mitigation on National Wildlife Refuge System lands might be appropriate.

We recognize that allowing compensatory mitigation on a refuge could result in some resource gains within the National Wildlife Refuge System. However, if we were to target the National Wildlife Refuge System for compensatory mitigation, we could be facilitating a significant net loss of wetlands within the watershed. But we also recognize there may be some limited and exceptional circumstances where allowing compensatory

mitigation to be implemented on a refuge may be in the best interest of the fish, wildlife, and wetland resources in the area. Therefore, the policy provides guidance and flexibility to our personnel when they are determining whether, or under what circumstances, we might allow the National Wildlife Refuge System to be used for compensatory mitigation under the Section 10/404 program.

#### Previous Federal Action

We published the "Draft Policy on the National Wildlife Refuge System and Compensatory Mitigation under the Section 10/404 Program" in the **Federal Register** on July 31, 1998 (60 FR 58605). The public comment period closed on September 29, 1998.

#### Summary of Modifications

We modified the draft policy in response to the public comments and additional internal review. Here is a summary of the important changes:

1. We clarified how the policy relates to private lands and to wetlands that have been restored under other Federal programs, such as the Partners for Fish and Wildlife Program.

2. We clarified our explanation of why the policy does not apply to impacts to threatened or endangered species. Any impacts associated with these species are addressed separately under the Endangered Species Act.

3. We modified the "grandfather clause" in Part 7 of the policy. We inserted a statement indicating that mitigation projects currently being implemented are exempt from the policy. The policy will only apply to future projects.

4. We rewrote the policy in "Plain Language", updated and modified several definitions, and changed several technical terms for consistency.

#### Responses to Comments

The following is a summary of the major comments raised during the public comment period. We have included a summary of the comments, our response, and any modifications to the policy.

*Comment:* Several commenters asked about the scope of the policy, what we mean by "National Wildlife Refuge System land" and whether the policy applies to other forms of compensatory mitigation.

*Response.* The policy applies to all lands and waters within the National Wildlife Refuge System being considered for use as compensatory mitigation for activities authorized under the Section 10/404 program. The policy does not include lands that are

within the authorized refuge acquisition boundary, unless they are already owned by the Fish and Wildlife Service as part of the NWRS. In addition, we recognize there are other forms of mitigation being conducted on NWRS lands, such as under Section 4(f) of the Department of Transportation Act of 1966; however, the policy only addresses compensatory mitigation required under the Section 10/404 program.

*Comment:* Several commenters are concerned that we are applying this policy to private lands, particularly wetlands restored under the Conservation Reserve Program, the Wetlands Reserve Program, and the Partners for Fish and Wildlife Program.

*Response:* This policy provides guidance to Service personnel evaluating compensatory mitigation proposals for activities authorized under the Section 10/404 program. In contrast to circumstances in which mitigation is proposed on lands within the National Wildlife Refuge System and thus under the control of the Service, our recommendations regarding mitigation proposals on private lands are advisory and not controlling upon the permitting agency.

Preservation of existing wetland habitat compensates for permitted wetland loss in only those limited and exceptional circumstances in which a change in ownership or protection status serves to maintain habitat that would otherwise be certain to be lost. We expect that many private landowners who have used Federal conservation programs to restore wetlands on their lands will allow those wetlands to remain after the term of their restoration agreement or easement expires. Accordingly, we will not recommend or support preservation of those restored wetlands as compensatory mitigation, except in the limited and exceptional circumstances in which their future loss is assured in the absence of additional conservation measures.

*Comment:* Several commenters stated that if wetlands restored under the Partners for Fish and Wildlife Program or the Conservation Reserve Program cannot be used for compensatory mitigation, they may be converted to non-wetland uses (e.g., agriculture) after the 10-year agreement expires. The commenters believe that Section 10/404 permit holders should target these lands for compensatory mitigation (i.e., preservation) to avoid conversion.

*Response:* We have clarified the policy to indicate that where wetlands have been restored under Federal wetland restoration programs, such as

the Partners for Fish and Wildlife Program, we will not support the use of these lands as compensatory mitigation under the Section 10/404 program, during the term of the agreement (e.g., 10 years). Upon expiration of the wetland restoration agreement, we will not support the preservation of such restored wetlands as compensatory mitigation for wetland losses under the Section 10/404 program, except in limited and exceptional circumstances. This is consistent with our Mitigation Policy and the Federal guidelines for establishing, using, and operating mitigation banks.

*Comment:* Several commenters asked that we delete the restrictions on adding mitigation bank lands to a refuge.

*Response:* The policy retains the restrictions on accepting mitigation bank lands. We recognize the policy may necessitate changes in how mitigation banking and wetland restoration is done in conjunction with National Wildlife Refuge System lands. However, the purpose of the policy is to ensure national consistency regarding compensatory mitigation under the Section 10/404 program and the National Wildlife Refuge System.

*Comment:* Several commenters asked why we are adopting such rigid guidelines for accepting donated mitigation bank lands into the National Wildlife Refuge System since mitigation banking represents an important opportunity to expand our refuges.

*Response:* We recognize that accepting a mitigation bank into the National Wildlife Refuge System is an opportunity to protect wetlands and other wildlife habitat produced by compensatory mitigation projects. That is why we included specific provisions that allow these transfers to proceed. However, we want to avoid bringing wetlands and other habitats into the National Wildlife Refuge System that are either not fully restored, do not have sufficient operation and maintenance funding, have mitigation credits running, or otherwise diminish the responsibilities of the Section 10/404 program to fulfill its wetland preservation goals. That is, we are willing to accept donated mitigation bank lands only when they are clear of any outstanding mitigation requirements and associated liabilities.

*Comment:* Several commenters asked why the policy prohibits mitigation banks on National Wildlife Refuge System lands under all circumstances, since mitigation banking is another form of compensatory mitigation.

*Response:* If we allow mitigation banks to be established on National Wildlife Refuge System lands, it could

result in a net loss of wetlands in the watershed. Since National Wildlife Refuge System lands are already protected and we will be restoring these lands, allowing mitigation banking on National Wildlife Refuge System lands would not replace the off-Refuge wetland functions and values that are lost to permitted development. By establishing mitigation banks on National Wildlife Refuge System lands and selling the mitigation credits, we would be "trading" off-Refuge wetlands for accelerated restoration of on-Refuge wetlands. Although this may result in some short-term habitat gains on National Wildlife Refuge System lands, in the long-term, it could facilitate a net loss of wetlands in the watershed.

In addition, there are several other concerns:

1. There may be an appearance of a conflict of interest if we are also commenting on and developing mitigation options for the permitted development through the Section 10/404 program;
2. If we allow mitigation banking on National Wildlife Refuge System lands, we might be assigned some degree of liability for future operation and maintenance of the bank if the bank sponsor abandons the project prior to satisfying all mitigation responsibilities; and
3. If we allow Section 10/404 permittees to establish mitigation banks on National Wildlife Refuge System lands, this may undermine entrepreneurial (i.e., economically-based) efforts to develop private mitigation banks elsewhere in the watershed.

*Comment:* One commenter asked why the policy does not apply to threatened or endangered species. The commenter is concerned that if a listed species is adversely affected by development permitted under Section 10/404, we might allow compensatory mitigation for threatened or endangered species to occur on National Wildlife Refuge System lands.

*Response:* We have clarified the policy to specifically state that consideration of impacts to threatened or endangered species is not within the scope of this policy. Any such concerns are addressed under the Endangered Species Act and its associated regulations at 50 CFR Parts 17, 402, and 424.

*Comment:* The "grandfather clause" in the policy could allow a significant amount of mitigation activities to be implemented on NWRs lands which are inconsistent with the policy. In the draft policy, the clause states: "The policy does not apply to existing mitigation

agreements with the Service in effect at the time of policy issuance." However, we currently have several long-term agreements with various organizations and agencies that allow compensatory mitigation to be conducted in conjunction with National Wildlife Refuges. These agreements could provide a permanent exemption from the policy.

*Response:* We have deleted the statement that exempts existing mitigation agreements from the policy. Instead, we have stated that the policy does not apply to existing mitigation projects that are currently being implemented. However, we will review all mitigation agreements, and modify them as necessary, to ensure they are consistent with the policy. In other words, all mitigation projects currently underway are exempt, but any new projects must comply with the policy.

#### *Record of Compliance*

We have prepared a Record of Compliance documenting that this rule-making action complies with the various statutory, Executive Order, and Department of the Interior requirements that are applicable to rulemakings. A copy is available upon request. (See **FOR FURTHER INFORMATION CONTACT.**)

The number of acres of wetlands restored on National Wildlife Refuge System lands in FY96 was 79,291, but only approximately 10 acres were restored as compensatory mitigation under the Section 10/404 program. Likewise, of the 60,708 acres of wetlands restored on National Wildlife Refuge System lands in FY97, only 75 acres were restored under the Section 10/404 program. Since the policy was developed to reflect the informal practices currently used by Service personnel, the policy will serve to codify, but not significantly change, agency practice. Therefore, the numbers of acres of wetlands restored on National Wildlife Refuge System lands as mitigation for activities authorized under the Section 10/404 program will probably not change significantly with the policy.

This policy was reviewed under Executive Order 12866. As discussed above, only 85 acres during fiscal years 1996 and 1997 were restored on national wildlife refuges as a result of compensatory mitigation while a more than 130,000 acres were restored. Accordingly, this policy will not have a significant economic effect on a substantial number of small entities as defined under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). Similarly, this policy is not a major rule under 5 U.S.C.

804(2), the Small Business Regulatory Enforcement Fairness Act.

In accordance with the Unfunded Mandates Reform Act (2 U.S.C. 1501, *et seq.*), this policy does not affect State, local, and tribal governments since it only applies to lands and activities within the National Wildlife Refuge System. This policy does not produce a Federal mandate of \$100 million or greater in any year, therefore, it is not a "significant regulatory action" under the Unfunded Mandates Reform Act.

In accordance with Executive Order 12630, the policy does not have significant takings implications. This policy will not result in takings since it only applies to lands and activities within the National Wildlife Refuge System.

In accordance with Executive Order 12612, the policy does not have significant Federalism effects. This policy will not affect other governments since it only applies to lands and activities within the National Wildlife Refuge System. This policy will not affect small governments.

In accordance with Executive Order 12988, the Office of the Solicitor has determined that the policy does not unduly burden the judicial system and meets the requirements of sections 3(a) and 3(b)(2) of the Order. This policy does not require any information collection for which Office of Management Budget approval is required under the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*).

We have analyzed this policy in accordance with the criteria of the National Environmental Policy Act and 318 DM 2.2(g) and 6.3(D). This policy does not constitute a major Federal action significantly affecting the quality of the human environment. An environmental impact statement/assessment is not required. We have determined there are no effects on Federally recognized Indian tribes since it only applies to lands and activities within the National Wildlife Refuge System. The action is categorically excluded under Departmental NEPA procedures (516 DM 2, Appendix 1.10), which applies to policies, directives, regulations, and guidelines of an administrative, legal, technical, or procedural nature; or the environmental effects of which are too broad, speculative, or conjectural to lend themselves to meaningful analysis and will be subject later to the NEPA process, either collectively or case-by-case.

**Final Policy on the National Wildlife Refuge System and Compensatory Mitigation Under the Section 10/404 Permit Program**

*Part 1. What Is the Purpose of This Policy?*

We are establishing a national policy on the National Wildlife Refuge System and compensatory mitigation requirements for water resource development activities administered by the Department of the Army under Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act. Our purpose is to provide guidance to our personnel that have a decision making role for the use of lands within the National Wildlife Refuge System as it applies to the Section 10/404 program.

The mission of the National Wildlife Refuge System is to administer a national network of lands and waters for the conservation, management, and where appropriate, restoration of the fish, wildlife, and plant resources and their habitats within the United States for the benefit of present and future generations. The Federal government established National Wildlife Refuges for the restoration, preservation, development, and management of wildlife and wildlands habitat; for the protection and preservation of endangered or threatened species and their habitat; and for the management of wildlife and wildlands to obtain the maximum benefits from these resources (50 CFR 25.11(b)). We are currently managing National Wildlife Refuge System lands to obtain the maximum fish, wildlife, and ecological benefits. Therefore, our management and restoration activities will occur regardless of other activities, including those authorized under the Section 10/404 program.

We provide recommendations to the Department of the Army, Corps of Engineers, for mitigation using the Clean Water Act, the Section 404(b)(1) guidelines, the Fish and Wildlife Coordination Act, the National Environmental Policy Act, and our Mitigation Policy (January 23, 1981, 46 FR 7644). These authorities and guidance documents state that the biological impacts must be determined by comparing the environmental conditions with the project in place (the "with-project conditions") against the environmental conditions without the project in place (the "without-project conditions"). Under our Mitigation Policy, we recommend compensatory mitigation for unavoidable adverse impacts to fish and wildlife resources only after project sponsors have taken

all practicable actions to avoid or minimize the impacts.

We will continue to restore wetlands and wildlife habitat on National Wildlife Refuge System lands independent of off-Refuge water resource development activities; therefore, our NWRS restoration activities are part of the environmental conditions that would occur without the development project authorized by the Section 10/404 permit. If we allow wetland restoration activities to occur on National Wildlife Refuge System lands as compensatory mitigation for off-Refuge impacts authorized under Section 10/404, we could be facilitating a long-term net loss of wetlands within the watershed. Therefore, we will not recommend or allow compensatory mitigation on National Wildlife Refuge System lands for activities authorized under the Section 10/404 program, except as provided in this policy.

*Part 2. What Are Definitions Used in This Policy?*

There are numerous technical terms that are used throughout the policy. We are providing the definitions to ensure clarity and consistency.

*Appropriate.* The determination of what level of mitigation constitutes "appropriate" is based on the comparison between the functions and values of the aquatic resources that will be impacted and the potential of the proposed creation, restoration, enhancement, and/or preservation at the mitigation site to replace the lost functions and values after subtracting the baseline functions and values of the mitigation site.

*Bank sponsor.* Any public or private entity responsible for establishing and, in most circumstances, operating a mitigation bank.

*Compensatory mitigation.* For purposes of Section 10/404, compensatory mitigation is the restoration, creation, enhancement, or in exceptional circumstances, preservation of wetlands and/or other aquatic resources for the purpose of compensating for unavoidable adverse impacts which remain after all appropriate and practicable avoidance and minimization has been achieved (Federal Guidance for the Establishment, Use and Operation of Mitigation Banks (60 FR 58605)).

*Credit.* A unit of measure representing the accrual or attainment of aquatic functions at a mitigation bank; the measure of function is typically indexed to the number of wetland acres restored, created, enhanced, or preserved (Federal Guidance for the Establishment, Use

and Operation of Mitigation Banks (60 FR 58605)).

*Direct effects* are caused by the action and occur at the same time and place. (CEQ NEPA regulations; 40 CFR 1508.8(a)).

*Director* means the Director of the United States Fish and Wildlife Service.

*Fish and wildlife resources* means birds, fish, mammals, and all other classes of wild animals and all types of aquatic and land vegetation upon which wildlife is dependent (U.S. Fish and Wildlife Service Mitigation Policy, Manual Chapter 501 FW 2).

*Habitat* means the area which provides direct support for a given species, population, or community. It includes all environmental features that comprise an area such as air quality, water quality, vegetation and soil characteristics and water supply, including both surface and groundwater. (U.S. Fish and Wildlife Service Mitigation Policy, Manual Chapter 501 FW 2).

*Indirect effects* are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable (CEQ NEPA regulations; 40 CFR 1508.8(b)).

*Minimize* means to reduce to the smallest practicable amount or degree. (U.S. Fish and Wildlife Service Mitigation Policy, Manual Chapter 501 FW 2).

*Mitigation* includes: (a) avoiding the impact altogether by not taking a certain action or parts of an action; (b) minimizing impacts by limiting the degree or magnitude of the action and its implementation; (c) rectifying the impact by repairing, rehabilitating, or restoring the affected environment; (d) reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action; and (e) compensating for the impact by replacing or providing substitute resources or environments." (CEQ NEPA regulations; 40 CFR 1508.20(a-e)).

*Mitigation bank.* A mitigation bank is a site where wetland and/or other aquatic resources are restored, created, enhanced, or in exceptional circumstances, preserved expressly for the purpose of providing compensatory mitigation in advance of authorized impacts to similar resources. For purpose of Section 10/404, use of a mitigation bank may only be authorized when impacts are unavoidable (Federal Guidance for the Establishment, Use and Operation of Mitigation Banks (60 FR 58605)).

*National Wildlife Refuge* means a designated area of land, water or an interest in land or water within the

National Wildlife Refuge System, but does not include Coordination Areas (*National Wildlife Refuge System Administration Act of 1966* (16 U.S.C. 668dd–668ee; 80 Stat. 927, as amended).

*National Wildlife Refuge System* means all lands, waters, and interests administered by the U.S. Fish and Wildlife Service as wildlife refuges, areas for the protection and conservation of fish and wildlife species threatened with extinction, wildlife ranges, game ranges, wildlife management areas, or waterfowl production areas, and other areas for the protection and conservation of fish and wildlife (*National Wildlife Refuge System Administration Act of 1966* (16 U.S.C. 668dd–668ee; 80 Stat. 927, as amended)).

*Practicable*. Available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes (Federal Guidance for the Establishment, Use and Operation of Mitigation Banks (60 FR 58605)).

*Project* means any action, planning or approval process relating to an action that will directly or indirectly affect fish and wildlife resources (U.S. Fish and Wildlife Service Mitigation Policy, Manual Chapter 501 FW 2).

*Purposes of the refuge* means the purposes specified in or derived from law, proclamation, executive order, agreement, public land order, donation document, or administrative memorandum establishing, authorizing, or expanding a refuge, refuge unit, or refuge subunit (*National Wildlife Refuge System Administration Act of 1966* (16 U.S.C. 668dd–668ee; 80 Stat. 927, as amended)).

*Restoration*. Re-establishment of wetland and/or other aquatic resource characteristics and function(s) at a site where they have ceased to exist, or exist in a substantially degraded state (Federal Guidance for the Establishment, Use and Operation of Mitigation Banks (60 FR 58605)).

### *Part 3. What Are the Restrictions Regarding Compensatory Mitigation on National Wildlife Refuge System Lands?*

We will not allow compensatory mitigation for habitat losses authorized through the Section 10/404 program to be implemented on lands and waters within the National Wildlife Refuge System, except under limited and exceptional circumstances. The criteria for considering compensatory mitigation within the National Wildlife Refuge System are as follows:

(a) The proposed water resource development project, including the mitigation plan, is consistent with the

Section 404(b)(1) guidelines, has undergone all appropriate sequencing for avoidance and minimization of impacts, and is consistent with the U.S. Fish and Wildlife Service's Mitigation Policy (Manual Chapter 501 FW 2); and

(b) The proposed mitigation plan supports the mission of the National Wildlife Refuge System, is consistent with the purposes for which the refuge was established, and is consistent with an approved Comprehensive Conservation Plan or other approved management plan(s) for the refuge; and

(c) The mitigation would result in significantly increased natural resource benefits when compared to other appropriate, off-site mitigation options as determined by the Ecological Services Field Office supervisor and the Refuge manager; and

(d) The mitigation plan is written to ensure we are under no obligation to allow compensatory mitigation on any National Wildlife Refuge System lands in the future; and

(e) The Regional Director recommends the mitigation plan to the Director for approval.

### *Part 4. What Are the Restrictions for Mitigation Banks on National Wildlife Refuge System Lands?*

We will not allow use of National Wildlife Refuge System lands for mitigation banks to compensate for the effects of activities authorized by the Section 10/404 program. We may accept mitigation banks as additions to the National Wildlife Refuge System under the following conditions:

(a) The mitigation bank is directly related to the purposes for which the refuge was established and is consistent with an approved Comprehensive Conservation Plan or other approved management plan(s) for the refuge, as determined by the Refuge manager;

(b) The mitigation bank is consistent with the mitigation banking agreement as determined by the appropriate Ecological Services Field Office supervisor;

(c) The bank sponsor fully funds the transfer, management, and protection of the mitigation bank/project as outlined in the "Federal Guidance for the Establishment, Use, and Operation of Mitigation Banks, II. E. Long-Term Management, Monitoring, and Remediation" (November 28, 1995; 60 FR 58605);

(d) The mitigation bank is an established, functioning wetland (or other wildlife habitat as appropriate) and the bank sponsor ensures that all success criteria have been met in accordance with the approved mitigation plan; and

(e) The bank sponsor withdraws or forfeits all mitigation credits before we acquire the bank. The Regional Director may grant exceptions to the requirement that all mitigation credits must be withdrawn or forfeited prior to acquisition. However, if we accept a mitigation bank before all credits are withdrawn, the bank sponsor must remain responsible for meeting the criteria in the mitigation banking agreement and must remain accountable for the mitigation credits.

The Regional Director must approve the addition of a mitigation bank to a National Wildlife Refuge. If lands within the authorized refuge acquisition boundary have been fully acquired, inclusion of a mitigation bank must be approved by the Director.

### *Part 5. What Are the Requirements for Compensatory Mitigation for Direct Effects on National Wildlife Refuge System Lands?*

If we allow development activities under a Section 10/404 permit to occur on a National Wildlife Refuge that require compensatory mitigation, the mitigation must occur on the National Wildlife Refuge being directly affected by the activity. However, before we can authorize these activities on National Wildlife Refuge System lands, the Refuge manager must:

(a) Determine the activity is compatible;

(b) Ensure the project sponsor has made every effort to avoid and minimize the effects before they request compensatory mitigation;

(c) Determine the mitigation activities support the mission of the National Wildlife Refuge System and are consistent with the purposes of the refuge;

(d) Issue a special use permit, if appropriate; and

(e) Coordinate with the appropriate Ecological Services Field Office supervisor.

### *Part 6. How Do We Treat Lands Protected by Other Federal Wetland Programs?*

Where habitats are protected or restored under other Federal programs or activities designed to increase the Nation's wetlands, we will not recommend, support, or advocate the use of these lands as compensatory mitigation, including mitigation banks, for habitat losses authorized under Section 10/404, under any circumstances, during the term of the restoration agreement. These other Federal programs and activities include easement areas associated with inventory and debt restructure

properties under the Food Security Act, lands protected or restored for conservation purposes under fee title transfers, lands protected by a habitat management agreement with the Service, or habitats protected by programs authorized by the Consolidated Farm and Rural Development Act, and the Food Security Act of 1985. After the wetland restoration agreement has expired, we will not recommend, support, or advocate the preservation of such restored wetlands as compensatory mitigation for habitat losses authorized under the Section 10/404 program, except in limited and exceptional circumstances.

#### *Part 7. What Is the Scope of the Policy?*

This policy applies to all lands and waters within the National Wildlife Refuge System considered for use as compensatory mitigation for activities authorized under Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act. The policy does not apply to existing mitigation projects currently being implemented. However, we will review all mitigation agreements currently in effect, and modify them as necessary, to ensure consistency with this policy.

The policy does not apply to public lands administered by other government agencies nor does it apply to private lands. However, the purpose of the policy is to provide guidance to our personnel when they are evaluating proposals for compensatory mitigation regarding a proposed Section 10/404 permit. These proposed permits could be for development actions occurring on either public or private lands.

This policy does not apply to threatened or endangered species. The requirements for threatened and endangered species are covered in the Endangered Species Act of 1973 and accompanying regulations at 50 CFR Parts 17, 402, and 424. Under Section 7 of the Endangered Species Act, as amended, all Federal agencies shall ensure that activities authorized, funded, or carried out by them are not likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat. Mitigating adverse impacts of a project would not in itself be viewed as satisfactory agency compliance with Section 7. Furthermore, it is clear to the Service that Congress considered the traditional concept of mitigation to be inappropriate for Federal activities impacting listed species or their critical habitat.

#### *Part 8. What Are the Authorities for This Policy?*

We are establishing this policy in accordance with the following authorities:

*Fish and Wildlife Act of 1956* (16 U.S.C. 742(a)-754). This Act authorizes the development and distribution of fish and wildlife information to the public, the Congress, and the President; and the development of policies and procedures that are necessary and desirable to carry out the laws relating to fish and wildlife.

*Fish and Wildlife Coordination Act* (16 U.S.C. 661-667(e)). This Act authorizes the U.S. Fish and Wildlife Service, the National Marine Fisheries Service, and the State agencies responsible for fish and wildlife resources to investigate all proposed Federal undertakings and non-Federal actions needing a Federal permit or license which would impound, divert, deepen, or otherwise control or modify a stream or other body of water and to make mitigation and enhancement recommendations to the involved Federal agency.

*Watershed Protection and Flood Prevention Act* (16 U.S.C. 1001-1009). This Act allows the Secretary of the Interior to make surveys, investigation, and “\* \* \* prepare a report with recommendations concerning the conservation and development of wildlife resources on small watershed projects”.

*National Environmental Policy Act of 1969* (42 U.S.C. 4321-4347). This Act and its implementing regulations (40 CFR part 1500-1508) requires that Federal agencies, such as the U.S. Fish and Wildlife Service, be notified of all major Federal actions affecting fish and wildlife resources and their views and recommendations solicited. In addition, the Act provides that the Congress authorize and directs that, to the fullest extent possible, all agencies of the Federal Government identify and develop methods and procedures which will ensure that presently unquantified environmental values may be given appropriate consideration in decision making along with economic and technical considerations.

*National Wildlife Refuge System Administration Act of 1966* (16 U.S.C. 668dd-668ee; 80 Stat. 927, as amended). This Act states that the mission of the National Wildlife Refuge System is to administer a national network of lands and waters for the conservation, management, and where appropriate, restoration of the fish, wildlife, and plant resources and their habitats within the United States for the benefit of

present and future generations of Americans. The Act requires, among other things, the Secretary of the Interior: to maintain the biological integrity, diversity, and environmental health of the National Wildlife Refuge System; to develop comprehensive conservation plans for National Wildlife Refuges; and not to initiate or permit a new use of a refuge or expand, renew, or extend an existing use of a refuge, unless the use has been determined to be compatible.

#### *Part 9. What References Are Cited in This Policy?*

Federal Guidance for the Establishment, Use, and Operation of Mitigation Banks, II. E. Long-Term Management, Monitoring, and Remediation (November 28, 1995, 60 FR 58605).

U.S. Fish and Wildlife Service Draft Policy on the National Wildlife Refuge System and Compensatory Mitigation under the Section 10/404 Program; Notice of Draft Policy and request for comments (July 31, 1998, 63 FR 40928-40932).

U.S. Fish and Wildlife Service Mitigation Policy; Notice of Final Policy (January 23, 1981, 46 FR 7644) as corrected.

Dated: March 12, 1999.

**Jamie Rappaport Clark,**  
Director, U.S. Fish and Wildlife Service.  
[FR Doc. 99-23627 Filed 9-9-99; 8:45 am]  
BILLING CODE 4310-55-U

## DEPARTMENT OF THE INTERIOR

### Bureau of Land Management

[OR-094-09-1920-00-4012: GP9-0303]

#### Temporary Closure of Public Lands; Lane County, Oregon

**AGENCY:** Bureau of Land Management, Interior.

**ACTION:** Temporary closure of public lands in Lane County, Oregon.

**SUMMARY:** Notice is hereby given that certain public lands in Lane County, Oregon are temporarily closed to all public use, including recreation, parking, camping, shooting, hiking and sightseeing, from September 1, 1999 through October 31, 1999. The closure is made under the authority of 43 CFR 8364.1.

The public lands affected by this temporary closure are specifically identified as follows:

Federal lands located in Section 29, Township 17 South, Range 4 West of the Willamette Meridian, Oregon, more generally described as follows: All