

January 5, 2018

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Public Comments Processing

Attn: Docket Nos. FWS-HQ-ES-2015-0126 and FWS-HQ-ES-2015-0165

Division of Policy, Performance, and Management Programs

US Fish and Wildlife Service

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Re: Request for Comments on the Mitigation Policies of the US Fish and Wildlife Service; 82 *Fed. Reg.* 51382 (November 6, 2017)

To Mr. Aubrey:

The National Rural Electric Cooperative Association (NRECA) submits these comments in response to the request by the US Fish and Wildlife Service (USFWS) for public input on its existing Mitigation Policy (81 *Fed. Reg.* 83440) and Endangered Species Act (ESA) Compensatory Mitigation Policy (81 *Fed. Reg.* 95316) (collectively, the “Mitigation Policies”), 82 *Fed. Reg.* 51382 (November 6, 2017).

NRECA is the national service organization for America’s electric cooperatives. NRECA represents the interests of the nation’s more than 900 rural electric utilities responsible for keeping the lights on for more than 42 million people across 47 states. Electric cooperatives are member-owned, not-for-profit small businesses serving member-consumers facing significant economic challenges, especially in rural areas. They are driven by their purpose to power communities and empower their members to improve their quality of life. Affordable electricity is the lifeblood of the American economy, and for 75 years electric co-ops have been proud to keep the lights on. Given their critical role in providing affordable, reliable, and universally accessible electric service, electric cooperatives are vital to the economic health of the communities they serve.

Electric co-ops have legal public service obligations to provide reliable electric service to their member-consumers. To do so, they construct, own, operate, and maintain generation facilities, transmission and distribution lines, substations, and other electric infrastructure. These activities often subject electric co-ops to ESA Section 7 consultation as many NRECA members rely on financial assistance offered through the US Department of Agriculture’s Rural Development program – the Rural Utilities Service (RUS) – to provide much-needed electric infrastructure and infrastructure improvements. In addition, ESA compliance is triggered when projects require permits under Clean Water Act Section 404 or cross federal lands. Given the scope of the Mitigation Policies, NRECA members are impacted and any potential policy revisions are important to them, their operations and continued ability to meet their public service obligations.

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NRECA thanks the USFWS for reviewing these Mitigation Policies and other related, existing agency actions like Candidate Conservation Agreements with Assurances (CCAAs) (82 *Fed. Reg.* 55625) for suspension, revision, or rescission. The USFWS is specifically soliciting public comment on whether to retain or remove “net conservation gain” as a mitigation planning goal within the Mitigation Policies. This standard is inconsistent and overreaches USFWS statutory authority under the ESA. In addition, the conservation objectives of the Mitigation Policies are vague and open to broad interpretation and application by USFWS field staff. Overall, the Mitigation Policies impose onerous requirements and costs that exceed benefits for affected resources. Therefore, NRECA is recommending that the USFWS remove all references to the “net conservation gain” mitigation planning goal. Furthermore, NRECA urges the USFWS to broaden its review of the Mitigation Policies and reconsider other main components of the policies such as landscape-scale approach and advance mitigation.

NRECA appreciates the opportunity to provide recommendations on how to revise the Mitigation Policies and supports comments submitted, during both the previous proposed rulemaking stages and current policy review periods, by the Energy and Wildlife Action Coalition (EWAC), the National Endangered Species Act Reform Coalition (NESARC), the Utility Water Act Group (UWAG), and the Waters Advocacy Coalition (WAC). NRECA strongly encourages the USFWS to review these comments and ensure that any revised policies reflect our collective concerns and recommendations.

### **1) Remove “Net Conservation Gain” Planning Goal.**

The Mitigation Policies set a mitigation planning goal of “net conservation gain,” which seeks to improve the status of affected resources, and, at a minimum, maintain the status of those resources (*i.e.*, “no net loss”). The USFWS acknowledges that it has no authority to require “net conservation gain.” Yet, the USFWS attempts to circumvent this limitation by asserting that it can “recommend” it under certain ESA provisions, as well as under other statutory authorities such as the National Environmental Policy Act (NEPA). Contrary to the USFWS’s assertions, its authority to establish and apply mitigation standards under the ESA are, by law, limited to the scope, jurisdiction and specific standards established within the ESA. NRECA and its members are also concerned that if the Mitigation Policies contain language recommending “net conservation gain,” it may be misapplied or adopted as *de facto* regulation by USFWS field staff.

In addition, both Mitigation Policies were developed to ensure consistency with existing directives at the time of issuance, including former Presidential Memorandum (November 3, 2015) and Secretarial Order 3330 (October 31, 2013). These charged all federal mitigation policies to set the “net conservation gain” planning goal. Subsequently, the Presidential Memorandum has been rescinded by Executive Order 13783 (March 28, 2017) and the Secretary’s Order is revoked via Secretarial Order 3349 (March 29, 2017). For these reasons, NRECA and its members ask that the USFWS remove all references to “net conservation gain” from the overall mitigation planning goal within each policy.

### **2) Remove Landscape-Scale Approach Directive.**

A comprehensive landscape-scale approach to planning and implementing mitigation programs is a directive set forth in the Mitigation Policies. There is no explicit statutory authority for such an expansive approach and therefore, the USFWS should not incorporate it into permitting decisions or authorizations. Further, providing mitigation measures on a local or project-scale basis may have better outcomes for affected resources, thus the USFWS should not forego other options to strictly adhere to a landscape-scale approach.

The costs and benefits of particular mitigation requirements should also be considered to ensure an efficient result, in terms of timing, benefits and costs incurred. Any mitigation must be capable of cost-effective implementation and, from this practical perspective, a landscape-scale approach to mitigation often will not be appropriate. For example, projects with small permanent footprints and/or temporary effects should not be burdened by escalating mitigation measures imposed based upon other activities or effects within a landscape. If the landscape-scale approach is retained, the USFWS should explicitly exempt activities with a *de minimus* impact, both spatially and temporally, from application of the Mitigation Policies.

### **3) Do Not Require Advance Compensatory Mitigation.**

Within the Mitigation Policies, the USFWS states its preference for project proponents to implement compensatory mitigation measures in advance of project impacts. Although this is not a firm requirement, the USFWS notes that this is a standard practice by field staff. The USFWS's preference (or recommendation) for advance mitigation is inflexible and incompatible with the processes by which project permitting and financing determinations are made. As opposed to projects themselves, mitigation measures often have longer time frames for development and operation. In addition, compensatory mitigation options may not be available at the time impacts from a project occur depending upon the species, habitat, or other factors. For example, it may take years to set up a mitigation bank for newly listed species – from acquiring necessary habitat, getting regulatory approval, and generating mitigation credits. Under the Mitigation Policies, projects could conceivably be delayed for multiple years pending successful demonstration of a mitigation project. In such cases, the USFWS should not deny regulatory approval for, or delay the initiation of, projects that impact that species.

The realities of obtaining project financing also make advance mitigation problematic. In some cases, full project financing, including compensatory mitigation funds, may not be available until a project completes all pertinent environmental analyses, receives all applicable permits, and/or completes other relevant milestones. NRECA and its members are concerned that requiring compensatory mitigation in advance of impacts may negatively affect an applicant's ability to secure necessary funding for completing the project in the first place. NRECA recommends that the USFWS adopt a practical policy that recognizes that concurrent mitigation or mitigation occurring after impacts may be necessary. The USFWS should also provide additional assurances to project proponents that mitigation in such circumstances will not impair or delay any regulatory approvals.

### **4) Remove Inclusion of "At-Risk" Species.**

The Mitigation Policies encourage USFWS field staff to recommend or require compensatory mitigation for all anticipated unavoidable adverse impacts to "at-risk" species and their habitat as a result of any proposed action. This is problematic because the ESA does not mandate mitigation for "at-risk" species. ESA Section 7 consultations are limited to species that are listed as threatened or endangered. Additionally, federal action agencies are only required to "conference" with the USFWS regarding whether a proposed action will jeopardize a proposed or candidate species or destroy or adversely modify proposed designated critical habitat. More importantly, any measures identified in a conference report or biological opinion are not legally binding unless the species is listed or critical habitat is actually designated under the ESA. Furthermore, under ESA Section 10, the USFWS is only authorized to issue an incidental take permit covering listed species if the applicant submits a satisfactory Habitat Conservation Plan (HCP). While an HCP may cover unlisted species, doing so is voluntary and at the discretion of the applicant. The USFWS

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should remove references within the Mitigation Policies to evaluating and providing mitigation for “at-risk” species. In addition, the USFWS should clarify that the extent of its mitigation authority only applies to those species specifically identified by the relevant statute.

### **Conclusion**

Again, NRECA appreciates the opportunity to provide comments on how to revise the Mitigation Policies. We ask that the USFWS remove all references to the “net conservation gain” mitigation planning goal and perform a broader evaluation of all components of the Mitigation Policies. Given the impact these policies have on electric co-op and other stakeholder activities, NRECA urges the USFWS to act expeditiously to withdraw or modify the Mitigation Policies. We welcome an opportunity to discuss our recommendations further with your team.

Sincerely,



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Regulatory Director, Environmental Policy  
National Rural Electric Cooperative Association

cc: T. Cromwell, NRECA  
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