



Proposed U.S. Fish and Wildlife Service Mitigation Policy

On November 3, 2015, President Obama issued a Presidential Memorandum on Mitigating the Impacts on Natural Resources from Development and Encouraging Related Private Investment. The Memorandum directed the Department of Defense, Department of the Interior, U.S. Department of Agriculture, the National Oceanic and Atmospheric Administration, and the U.S. Environmental Protection Agency to establish a “net benefit goal, or at minimum, a no net loss goal for natural resources the agency manages that are important, scarce, or sensitive.” Specifically, the memo directed that “agencies shall adopt a clear and consistent approach for avoidance and minimization of, and compensatory mitigation for, the impacts on their activities and the projects they approve.”

On March 8, 2016, the U.S. Fish and Wildlife Service (Service) issued proposed revisions (FWS-HQ-ES-2015-0126) to its mitigation policy that would provide a policy framework for applying a landscape-scale approach to achieve through the application of mitigation hierarchy a net gain, or no net loss, in conservation outcomes. On May 9, 2016, the Independent Petroleum Association of America (IPAA) [submitted comments](#) on the draft policy. The following day, the Service extended the comment deadline until June 13, 2016. Given the numerous issues outlined below, IPAA has requested that the Service withdraw its policy, unless re-proposed with significant changes.

Concerns with the Proposed Draft Mitigation Policy

By adopting the goals of “net conservation gain” and “no net loss,” the Service inappropriately attempts to rewrite the statutory standards under the Endangered Species Act (ESA) and the Marine Mammal Protection Act, as well as the regulatory standards of implementing section 404 of the Clean Water Act. No legal basis exists for this standard, and its application may result in a compensable taking under the Fifth Amendment of the U.S. Constitution.

The Draft Policy improperly expands the Service’s authority over unlisted fish and wildlife. The Service’s asserted authority is defined so broadly that it effectively would allow the Service to require mitigation of any impacts to the natural environment in the United States. The policy inappropriately expands the Service’s authority by allowing the Service to “veto” development projects. Not only would the policy further delay development by requiring that mitigation be implemented before impacts occur, the policy would also compound the mitigation requirements such that they bear no relationship to the actual impact of a project.

The Draft leaves significant decisions to the discretion of individual Service employees. Given that the Service is frequently sued for failing to meet its obligations under the ESA, the Service cannot realistically assume responsibility for overseeing mitigation efforts as envisioned in the Draft Policy.

The public has also not had a meaningful opportunity to comment on the Service’s mitigation strategy. The Draft reflects only one part of a larger mitigation strategy that the Service is unveiling in bits and pieces. The public must have the opportunity to review the entire strategy and assess how it integrates with other elements as a whole. Further, the Service has not complied with procedural requirements under the Administrative Procedure Act (APA), nor has it disclosed the legal authority on which it is based. The Service has also failed to prepare a regulatory flexibility analysis as required by the Regulatory Flexibility Act.

Given the breadth of application of this draft policy, IPAA’s member companies will be impacted and therefore have urged the Service to revise this flawed proposal.

For more information on IPAA’s Endangered Species Watch educational campaign and to subscribe to ESA news clips, visit www.ESAwatch.org or e-mail Samantha McDonald at smcdonald@ipaa.org.