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Comments regarding the September 2, 2016
Notice of Availability and Request for Public Comment on
U.S. Fish and Wildlife Service
Draft Endangered Species Act Compensatory Mitigation Policy

Submitted by:

Energy and Wildlife Action Coalition

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5275 Leesburg Pike
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The Energy and Wildlife Action Coalition ("EWAC") submits these comments in response to the U.S. Fish and Wildlife Service's ("Service") September 2, 2016 notice of availability and request for public comment (the "NOA") on its draft Endangered Species Act Compensatory Mitigation Policy (the "Proposed Policy").[1] EWAC is a national coalition formed in 2014 whose members consist of electric utilities, electric transmission providers, and renewable energy entities operating throughout the United States. The fundamental goals of EWAC are to evaluate, develop, and promote sound environmental policies for federally protected wildlife and closely related natural resources while ensuring the continued generation and transmission of reliable and affordable electricity. EWAC supports public policies, based on sound science, that protect wildlife and natural resources in a reasonable, consistent, and cost-effective manner.

EWAC appreciates that the Service has developed and released for public comment a policy that addresses mitigation in the specific context of the Endangered Species Act ("ESA"); however, EWAC has concerns that, among other things, the Proposed Policy may exceed the statutory authority under which the policy would operate. Below, we offer comments and recommendations for the Service's consideration on how the Proposed Policy might be improved upon in its final iteration. While EWAC believes that significant improvements to the Proposed Policy could be made, EWAC nevertheless would like to take this opportunity to say that its members have enjoyed partnering with the Service to accomplish numerous and significant mitigation transactions. These comments are in no way intended to diminish that positive history of collaboration and coordination; rather, EWAC is confident that, once revised to incorporate the recommendations and considerations discussed below, the Proposed Policy can achieve positive outcomes for listed species, Service funding and personnel resources, and project proponents alike.

I. SUPPORTIVE COMMENTS

EWAC supports the Service's inclusion of the following concepts in the Proposed Policy, and, in some cases, suggests ways in which these concepts may be improved:

- EWAC agrees that programmatic mitigation approaches can expedite the regulatory process so long as such approaches do not become a requirement. A final policy should allow for flexibility where a programmatic approach is not in place but a given project must proceed.
- EWAC appreciates the Service's affirmation that compensatory mitigation programs that use credits are voluntary, and that permittees are not required to purchase credits from these sources.
- While the Service acknowledges that incidental take permits ("ITPs") "will" be issued if the ESA section 10 issuance criteria are met, ESA section 10 actually uses the term "shall." The Service should use the statutory language as it has particular legal meaning.
- The Proposed Policy correctly recognizes that mitigation credit can be given ahead of impacts to encourage advanced implementation of mitigation, but the Proposed Policy should make this point clearer. While mitigation in advance of impacts should not be a requirement, where an applicant has the opportunity to provide mitigation prior to the finalization of authorization under ESA section 7 or 10, the Service should allow for

[1] 81 Fed. Reg. 61031 (Sept. 2, 2016).

advance credit. On a related matter, EWAC notes that, particularly with respect to regional-scale habitat conservation plans, strategic delays in implementing mitigation can allow for pooling of mitigation funds that can and does result in greater landscape-scale benefits to affected species. This fact is expressly noted in the Service's current Incidental Take Permitting and Habitat Conservation Planning Handbook (the "HCP Handbook").[2]

- The Proposed Policy correctly emphasizes that mitigation ratios should be reserved for dealing with "true" uncertainty of a mitigation program or for policy incentives, and that ratios should not be used to compensate for a lack of understanding of a species' needs. Too often, mitigation ratios are applied where proposed mitigation would more than offset the impacts of the taking. It should be made clear that greater than 1:1 ratios should be the exception rather than the rule. The Service also should ensure that any mitigation program aligns with the U.S. Supreme Court decisions in *Nollan, Dolan*, and *Koontz, which require that mitigation have both an "essential nexus" and "rough proportionality" to the effects it seeks to mitigate*.[3] EWAC provided a more detailed discussion of *Nollan, Dolan, and Koontz* in its comments to the Service's March 8, 2016 Draft Mitigation Policy,[4] which were filed on June 13, 2016.

II. GENERAL COMMENTS

The Proposed Policy states that its primary intent is

> to provide Service personnel with direction and guidance in the planning and implementation of compensatory mitigation, primarily through encouraging strategic planning at the landscape level and setting standards and providing minimum criteria that mitigation programs and projects must meet to achieve conservation that is effective and sustainable.[5]

As an initial matter, EWAC is concerned that, similar to the Draft HCP Handbook, the Proposed Policy makes the mitigation process seem exceedingly complex. We recognize that mitigation associated with landscape-scale authorizations (e.g., multi-state, multi-species ITPs) often involves complex negotiations among the Service, project proponents, state wildlife agencies, ENGOs, and potentially other federal agencies. EWAC also understands the Service's preference for landscape-scale planning. However, not all authorizations under the ESA are landscape in scale, and the "minimum criteria" established in the Proposed Policy may not assist the Policy in meeting its stated goal, which is to achieve conservation that is "effective and sustainable." For project-specific authorization, mitigation transactions should be (and currently are) simpler undertakings. EWAC recommends that the Proposed Policy be revised to reflect that mitigation programs should always be commensurate or proportional to the impacts at issue and to the particular need(s) of a project or project proponent rather than applied as if all projects are

[2] The HCP Handbook states that "[s]ometimes, the HCP applicant may need to conduct activities prior to the time when replacement habitats can be provided…One…method is requiring a specified cash payment into a mitigation fund prior to commencement of HCP activities…Mitigation funds have often been used in regional HCPs in which the responsible party for habitat mitigation under the HCP is a state or local governmental agency." HCP Handbook at 3-22.

[3] *See, e.g., Koontz v. St. John's River Mgmt. Dist.*, 133 S. Ct. 2586 (2013); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); and *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987).

[4] 81 Fed. Reg. 12379 (March 8, 2016).

[5] Proposed Policy at 61032.

landscape in scale. For example, while the Proposed Policy indicates that "[a]ll compensatory mitigation sites require site protection assurances, a management plan, and financial assurances,"[6] these requirements should be scaled to the size of the actual mitigation project. It may not be practicable—or necessary—for a permittee-responsible mitigation site to adhere to the more burdensome requirements established under the Proposed Policy. Indeed, financial assurances should not be required of regulated entities such as electrical utilities with the ability to fund and manage projects without such assurances, or at most such assurances should be simple and streamlined. Other examples of the Proposed Policy potentially overcomplicating the compensatory mitigation process include, but are not limited to, the prohibition on governmental entities accepting or managing endowment funds[7] and the compliance tracking requirements.[8]

The Proposed Policy largely is silent with respect to permittee-responsible and project-specific mitigation and, where it is addressed, assumes that permittee-responsible mitigation is less reliable, less beneficial, and riskier than mitigation provided by conservation banks and similar programs. This is not always the case, has not been substantiated by the Service and, in any event, ESA section 10, which is the only section in the ESA that authorizes the Service to require compensatory mitigation in the first place, states no preference for and does not require any particular mitigation method or option. There are circumstances in which permittee-responsible mitigation may actually benefit the species to a greater degree than larger, landscape-scale mitigation, as site-specific mitigation can be targeted to the needs of a particular taxon in both space and time. For example, the Indiana bat may receive greater benefit from the protection of a single known maternity roost tree with adjacent habitat enhancements in a particular location than it would if a project proponent funded reforestation of a large area further from the project site. As we note throughout our comments to the Proposed Policy, ESA section 10 and its implementing regulations require that an applicant will, "to the maximum extent practicable, minimize and mitigate the impacts of [the proposed] taking."[9] EWAC recommends that any discussion of the Service's preference for landscape-scale mitigation be carefully worded to recognize that the Service cannot mandate an ITP applicant or project proponent to provide more mitigation than is statutorily required.

III. PROPOSED POLICY MAY EXCEED STATUTORY AUTHORITY

The Proposed Policy may exceed the Service's statutory authority in several respects. In the following paragraphs, we point out areas of concern.

A. Generally.

1. *The Proposed Policy Should not be Prescriptive.*

Despite statements that the Proposed Policy is non-binding guidance, the Proposed Policy also includes statements recommending—or even requiring—that federal agencies and applicants meet certain standards (e.g., ensure no net loss) that exceed the mandates of the ESA. Terms such as "prescriptive" and "require" appear throughout the Proposed Policy.[10] EWAC is concerned that these types of statements will result in applicants being asked to undertake

[6] *Id.* at 61047.
[7] *Id.* at 61055.
[8] *Id.*
[9] 16 U.S.C. 1539(a)(2)(B).
[10] See, e.g., Proposed Policy at 61033.

measures that are not, in fact, required under the law, and that applicants will be asked to adhere to such "guidance" with little choice but to accede or face delays.

For example, in the background section of the Proposed Policy, the Service appears to indicate that all or parts of the Proposed Policy will be applied prescriptively. Indeed, the Service states:

> Compensatory mitigation programs and projects designed and implemented in accordance with the standards set forth in this draft policy and that also adhere to *prescriptive* guidance provided in this draft policy would be expected to achieve the best conservation outcomes for listed, proposed, and at-risk species through effective management of the risks associated with compensatory mitigation.[11]

Similarly, in section 8, the Proposed Policy states: "Compensatory mitigation proposals must meet minimum criteria described in this policy to be acceptable."[12]

EWAC requests that the Service clarify that the guidance provided in the Proposed Policy is just that, and that the Proposed Policy will not be applied in a prescriptive fashion.

2. *The Service's authority to require compensatory mitigation is limited.*

The Proposed Policy indicates that the ESA limits the Service's authority to require compensatory mitigation, but then lists several other federal laws – including the National Environmental Policy Act ("NEPA") and the Clean Water Act – that the Service apparently will use "in combination with, or to supplement the authorities under, the ESA to recommend or require compensatory mitigation for a variety of resources including at risk species and their habitats."[13] The ESA, however, does not provide a mechanism by which the Service may utilize other federal laws to expand the Service's authority to require compensatory mitigation in the context of the ESA, and other federal laws do not give the Service the authority to require compensatory mitigation for impacts to listed species and other resources. Rather, and as described in greater detail throughout this comment document, ESA sections 7 and 10 establish clear and specific frameworks regarding compensatory mitigation within which the Service must operate. EWAC recommends that the Service avoid indicating a preference for certain approaches outside of these specific frameworks, to prevent such preferences from becoming de facto requirements over time or from being applied inconsistently among the Service's Field Offices.

Given the existence of the Draft Mitigation Policy, EWAC recommends that, with respect to the Proposed Policy, the Service limit its discussion of compensatory mitigation to its application in the context of the ESA.

3. *Proposed Policy Focuses on Conservation without Context*

The Proposed Policy places a heavy focus on the conservation goals of the ESA without recognizing the limitations placed upon the Service by the ITP and incidental take statement ("ITS") provisions set forth in ESA sections 10 and 7. While EWAC acknowledges that ESA section 7(a)(1), to which the Service cites, encourages federal agencies to conserve listed species,

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[11] Id. at 61033 (emphasis added).
[12] *Id.* at 61049.
[13] *Id.* at 61031. EWAC notes that NEPA prescribes a process that federal agencies must follow under certain circumstances, and that mitigation cannot be required pursuant to NEPA.

the Proposed Policy at times blurs the line between what is encouraged under the ESA and what is required. For example, the Proposed Policy states that the Service should:

> [r]ecommend[], where applicable, that Federal agencies use their authorities to fully mitigate the adverse effects of their actions (i.e., ensure no net loss in the status of affected resources) is consistent with the Presidential memorandum (80 FR 68743), the Department's and the Service's proposed mitigation planning goal, and the purposes of the ESA. Effective mitigation that fully offsets the impacts of an action prevents that action from causing a decline in the status of affected species (i.e., achieves no net loss).[14]

This statement blends requirements and terminology from the November 3, 2015 Presidential Memorandum titled "Mitigating Impacts on Natural Resources from Development and Encouraging Related Private Investment" regarding mitigating natural resources impacts[15] (the "Presidential Memorandum") and other policies and "goals" which are not directly relevant and are not binding with respect to actions under the ESA. Indeed, outside of the ITP and ITS frameworks, the Service does not have the authority to require compensatory mitigation—or conservation—under the ESA at all. EWAC provides further discussion on the meaning of ESA section 7(a)(1) elsewhere in this comment letter. With respect to compensatory mitigation in the context of ESA sections 7 and section 10, EWAC recommends that the Service refrain from including any language that strays from the actual statutory and regulatory requirements, as "recommendations" oftentimes morph into requirements over time.

Another example of the Proposed Policy's focus on conservation without appropriate context is a statement in section 4.2 that:

> [c]ompensatory mitigation must be in-kind for…species affected by the proposed action. The same requirement does not necessarily apply to the habitat type affected, as the best conservation outcome for the species may not be an offset of the same habitat type or ecological attribute of the habitat impacted by the action.[16]

As we highlight throughout our comments, however, compensatory mitigation is relevant only in the context of an ITP issued pursuant to section 10 of the ESA. The ESA does not require that a party obtain an ITP. Rather, ESA section 10 provides a voluntary mechanism available to non-federal parties whose activities may incidentally take listed species. Under that framework, an applicant for an ITP sets forth in the HCP the minimization and mitigation that will be offered by the applicant. The Service then determines whether the minimization and mitigation offered meets the issuance criteria established by ESA section 10 and its implementing regulations. If an application for an ITP, including the HCP, meets the issuance criteria, the Service "shall" issue the ITP. Neither ESA section 10 nor its implementing regulations require that mitigation provide the "best conservation outcome" to the species covered by the ITP. Rather, the relevant requirements are that impacts of the taking must be minimized and mitigated to the "maximum extent practicable" and that the taking "not appreciably reduce the likelihood of the survival and

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[14] *Id.* at 61034.

[15] Presidential Memorandum: Mitigating Impacts on Natural Resources from Development and Encouraging Related Private Investment, found at: https://www.whitehouse.gov/the-press-office/2015/11/03/mitigating-impacts-natural-resources-development-and-encouraging-related.

[16] Proposed Policy at 61037.

recovery of the species in the wild." There is no reference to "in-kind" compensatory mitigation or "conservation outcomes."

4. *Service Definition of Compensatory Mitigation is Overbroad.*

The Proposed Policy defines "compensatory mitigation" as:

> [C]ompensation for remaining unavoidable impacts after all appropriate and practicable avoidance and minimization measures have been applied, by replacing or providing substitute resources or environments (see 40 CFR 1508.20) through the restoration, establishment, enhancement, or preservation of resources and their values, services, and functions (part 600, chapter 6 of the Departmental Manual (600 DM 6.4C)).[17]

As an initial matter, EWAC is troubled that in defining compensatory mitigation as that term is to be applied specifically in the context of the ESA, the Service borrows concepts from NEPA – a procedural statute which covers a far greater range of topics and issues than the ESA – and a Service departmental manual addressing treatment of federal lands. With respect to ITPs, compensatory mitigation under the ESA occurs with respect to activities that are private – rather than federal – in nature. Applying a federal land management standard to private activities may not be appropriate, except in the rare circumstance where an HCP proposes mitigation on federal lands. Moreover, while NEPA and the ESA both touch and address natural resources, the purposes of those statutes are completely different. NEPA mandates a process rather than an outcome. Compensatory mitigation may be offered by an agency or an underlying applicant, but is not a required component of NEPA compliance. By contrast, compensatory mitigation is a required component of an application for an ITP under section 10 of the ESA. Thus, an agency suggesting broad and significant compensatory mitigation in the context of NEPA does not have the same effect as the Service—the expert resource agency—suggesting mitigation in the context of an application for an ITP.

Moreover, the Proposed Policy's definition of compensatory mitigation is limited to replacing habitats, resources, and environments and does not consider in any detail other reasonable means of mitigation such as education and research. The Service has approved ITPs that include research and education as part of the suite of compensatory mitigation measures. Given that little is known about many species listed as threatened and endangered, in some cases, research may actually be of greater benefit than habitat replacement. For example, research concerning the spread—and prevention—of white nose syndrome ("WNS") in certain listed bat species, such as the northern long-eared bat, may very well provide significantly greater benefit to affected bat species than preservation or reforestation of relevant habitat. Likewise, for virtually all bat species, research regarding migration behavior may yield untold benefit as a better understanding of migration behavior can lead to more intelligent siting decisions and more precise take estimates. As EWAC indicated in its comments to the Service's Draft Mitigation Policy, there often are situations where an increased knowledge of a species' life cycle requirements, susceptibility to certain environmental stressors, or other issues may be just as critical to ensuring long-term conservation as simply preserving a particular parcel of habitat. In fact, such knowledge could improve the efficacy of future mitigation projects and management of the species. A recent guidance document out of the Service's Pacific Islands field offices recognizes this fact, and is discussed in greater detail in section XIV below. In sum, EWAC

[17] *Id.* at 61032-33.

recommends the Proposed Policy go further to support the use of compensatory mitigation measures besides replacing habitats and resources, particularly where the species would benefit from such alternative mitigation.

Another example of the Proposed Policy's broad application of compensatory mitigation can be found in the background section of the NOA:

> While this policy addresses only the role of compensatory mitigation under the ESA, avoidance and minimization of impacts retain their central role in both the Section 7 and Section 10 processes. Guidance on the application of the mitigation hierarchy is provided in our draft Mitigation Policy (81 FR 12380, March 8, 2016), regulations implementing the ESA, and other policies and guidance documents specific to various sections of the ESA.[18]

Neither section 7 nor section 10, however, requires avoidance of impacts. As discussed in greater detail below, ESA section 7 requires that federal agencies ensure that activities they authorize, fund, or carry out *do not jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat.*[19] Thus, while a federal agency must avoid jeopardizing a species or destroying or adversely modifying critical habitat, a federal agency is not required to avoid impacts. Likewise, ESA section 10 provides a mechanism whereby the Service is directed to issue permits authorizing take of listed species so long as the applicant for such permit meets certain issuance criteria, including a requirement that impacts be minimized and mitigated to the maximum extent practicable. As EWAC has noted in its comments on the Draft Mitigation Policy and its comments on Draft HCP Handbook, while an applicant for an ITP is free to implement avoidance measures as part of project design, an applicant is not required to implement avoidance measures in order to receive an ITP. In the following section, we discuss further the topic of mitigation sequencing, and the fact that such sequencing is neither required by the ESA nor historically favored by the Service or federal courts.

5. *"At risk" species should not be included*

The Proposed Policy purports to apply to proposed actions adversely affecting "at risk" species (in addition to those species already listed or proposed for listing). In a section of the "discussion" portion of the Proposed Policy titled, *Compensatory Mitigation under Sections 7 and 10 of the ESA*, the Service states that "[t]he additive effects of impacts adversely affecting…at-risk species as a result of many past and current human-caused actions are significant…stressors are putting even more species at risk and compromising the essential functions of ecosystems necessary to improve the status of these species…" [20]

The Service's inclusion of "at-risk" species in a policy specifically addressing mitigation in the context of the ESA is problematic for several reasons. The term "at risk" is defined as "candidate species and other unlisted species that are declining and are at risk of becoming a candidate for listing under" the ESA. This means that the term "at risk" is intended to capture species that are neither listed nor have been proposed for listing. This is important because while ESA section 7 includes a conference requirement for species that have been proposed for listing, the conference requirement does not apply to species that are candidates but have not formally been proposed for listing. Nor does ESA section 7 include a provision for considering "unlisted

[18] *Id.* at 61033.
[19] *See* 16 U.S.C. 1536.
[20] Proposed Policy at 61034.

species…at risk of becoming a candidate for listing" in the section 7 context. Likewise, the incidental take permitting provisions of section 10 do not require compensatory mitigation for—or even consideration of—unlisted species.[21] While EWAC shares the Service's concern that there are unlisted species that may be at risk, the ESA contains no mechanism to *require* compensatory mitigation for these species.

EWAC recommends that the Proposed Policy be revised to explicitly state that providing compensatory mitigation for "at risk" species is voluntary and cannot be imposed by the Service upon a permit applicant, federal action agency, or applicant for federal funding, permit, or other federal approval. EWAC is concerned, that inclusion of "at risk" species may result in a de facto expansion of the statutory reach of the ESA. For example, many bird species covered by state lists that fall within the definition of "at risk" species under the Proposed Policy are birds protected by the Migratory Bird Treaty Act ("MBTA"). Inclusion of a discussion of "at risk" species in the Proposed Policy highlights the need for the Service to finalize its Draft Policy Regarding Voluntary Prelisting Conservation Actions[22] ("Draft Prelisting Policy") so that the regulated community can understand how the Service will allow for advanced crediting for those applicants that choose to implement compensatory mitigation ahead of listing. EWAC provided the Service with its comments on the Draft Prelisting Policy on November 6, 2014.

6. *Mitigation "sequencing" is inappropriate.*

Another way in which the Service appears to exceed its authority under the ESA is in the Proposed Policy's utilization of mitigation sequencing (first avoid impacts, then minimize any unavoidable impacts to the maximum extent practicable, then mitigate to the maximum extent practicable). As noted in EWAC's comments to the Draft Mitigation Policy and the Service's draft HCP Handbook,[23] sequencing is not required by the ESA, a point argued by the Service itself in a recent case in the D.C. Circuit Court of Appeals.[24]

In *Union Neighbors United v. Jewell* ("*Union Neighbors*"), plaintiffs sued the Service over the its issuance of an ITP authorizing take of Indiana bats at the Buckeye Wind Power Project in Ohio. Specifically, plaintiffs claimed that the Service erred in granting the ITP because the Service did not find that the applicant minimized the impacts of the taking to the maximum extent practicable before evaluating the mitigation measures. In its motion for summary judgment in *Union Neighbors*, the Service itself stated that plaintiffs were incorrect in interpreting the maximum extent practicable standard "as a qualifier that indicates a Congressional intent to require minimization of individual take numbers until impracticable."[25] The D.C. Circuit Court of Appeals agreed, finding the Service's interpretation that ESA section 10 does not require sequencing of minimization and mitigation measures was reasonable and was entitled to *Chevron* deference. In a telling passage from that decision, the D.C. Circuit Court explained:

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[21] An ITP applicant may choose to cover unlisted species in an ITP. In that case the applicant is required to meet issuance criteria for unlisted species as well.
[22] 79 Fed. Reg. 42525 (July 22, 2014).
[23] Habitat Conservation Planning and Incidental Take Permit Processing Handbook (USFWS & NMFS 1996), found at: https://www.fws.gov/midwest/endangered/permits/hcp/hcphandbook.html.
[24] *Union Neighbors United, Inc. v. Jewell*, 2016 WL 4151237 (D.C. Cir. 2016).
[25] *Union Neighbors United, Inc. v. Jewell*, 83 F. Supp.3d 280 (D. D.C. 2015), Federal Defendant's Cross-Motion for Summary Judgment at 22.

> …the Service's interpretation that the phrase "minimize and mitigate" creates a single duty is more persuasive and consistent with the statutory text. Specifically, the statute provides that the Secretary must find that "the applicant will, to the maximum extent practicable, minimize and mitigate the impacts of such taking…First, the statute uses the conjunctive "and" between "minimize" and "mitigate," rather than "then," suggesting that the terms should be read together, not as a sequence. Further demonstrating that "minimize and mitigate" should be treated together is their shared object, "the impacts of such taking." Additionally, the structure of the statute, which enumerates independent findings the Secretary must make, supports this reading. Minimize and mitigate are part of a single finding the Secretary must make…If they had to be made independently, the duties could have been imposed as independent findings the Secretary would have to make. If the Secretary finds that the applicant can "minimize and mitigate the impacts," the Secretary will have complied with its statutory duty…Accordingly, the text of the ESA supports reading "minimize and mitigate" jointly, and determining whether it has been done "to the maximum extent practicable."[26]

Thus, while mitigation sequencing may not be "per se" unlawful, requiring such sequencing would constitute a major change in long-standing policy and precedent without the degree of explanation required by existing federal jurisprudence.

With the above in mind, EWAC recommends that the Service revise the definition of "compensatory mitigation," and reframe the discussion particularly with respect to ESA sections 7 and 10, as the statute, regulations, and case law provide a specific framework in which the Service must operate.

B. ESA Section 10

As noted above, the Proposed Policy's broad application goes beyond the parameters established in ESA section 10 and its implementing regulations. Throughout the document, the Service includes statements that, if applied in the field, would vastly – and inappropriately – increase an ITP applicant's mitigation obligations. For example, the Proposed Policy states that Service personnel are encouraged "to recommend *or require*…the inclusion of compensatory mitigation for all unavoidable adverse impacts to listed, proposed, and at-risk species and their habitat anticipated as a result of any proposed action."[27] With respect to the framework for an ITP, this statement contains several significant errors.

First, an ITP exists for the purpose of providing an exception to the "take" prohibition set forth in ESA section 9. That section and its implementing regulations prohibit take of listed species. The term "take" has a precise legal definition, which includes impacts to species' habitat only where such impacts involve "significant habitat modification or degradation" and must actually result in death or injury to a member of the listed species.[28] Impacts to habitat that are unavoidable, but do not meet the definition of harm, do not constitute take under the ESA. Likewise, there is no prohibition in the ESA or its implementing regulations prohibiting adverse impacts – unavoidable or otherwise – to species not listed under the ESA. While an applicant for

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[26] *Union Neighbors United,* 2016 WL 4151237 at *13 (internal citations omitted).
[27] Proposed Policy at 61034 (emphasis added).
[28] 50 C.F.R. 17.3. *See also Babbitt v. Sweet Home Chapter of Communities for a Greater Oregon*, 515 U.S. 687 (1995).

an ITP is free to include unlisted species as covered species under the ITP and receive no surprises assurances for those species should they be listed in the future, there is no legal basis for the Service to require such inclusion.

Second, the ITP issuance criteria set forth in ESA section 10 require that impacts of the *proposed taking* be "minimized and mitigated to the maximum extent practicable." Nothing in the statute, its implementing regulations, or relevant jurisprudence suggests that an applicant for an ITP must mitigate for impacts to species other than those to be covered by the ITP itself. The decision to pursue an ITP, including what species to cover and what minimization and mitigation measures to propose in the underlying HCP, are within the discretion of the applicant. The Service's role is to determine whether or not the section 10 issuance criteria have been met and, if they have been met, to issue an ITP. Where an ITP applicant chooses not to include proposed or "at-risk" species in its HCP, there is no mechanism under ESA section 10 by which the Service is authorized to require mitigation for adverse impacts to such species.

In the following sections, we provide additional examples where we believe the Proposed Policy exceeds the statutory authority of ESA section 10.

1. *ESA Section 10 does not require that compensatory mitigation result in no net loss.*

As EWAC discussed in its comments to the Draft HCP Handbook, Congress' focus in amending the ESA in 1982 to include the ITP program was to resolve the conflicts that arise between non-federal project proponents and listed species. Requiring no net loss in the context of an ITP is not consistent with the relevant ESA statutory provisions defining ITP issuance criteria, which require issuance of an ITP upon a finding that the applicant's HCP "will, to the maximum extent practicable, minimize and mitigate the impacts of such taking" and that "the taking will not appreciably reduce the likelihood of survival and recovery of the species in the wild," among other things.[29] None of the statutory—or regulatory—criteria impose a mandatory no net loss requirement. In fact, both criteria set forth above contemplate and allow a net loss to the species and appear to recognize—correctly—that no net loss is the maximum that can be required. Indeed, the vast majority of mitigation provided and preferred under Service-approved HCPs is the preservation of other existing habitat. Thus, there is in all of those HCPs by definition a loss in the acres of habitat available to the species. This is considered nonetheless beneficial to the species because the mitigation lands are then perpetually protected from the relevant threats.

An applicant's obligation to provide minimization and mitigation measures ends at practicability. As the Service's current Incidental Take Permit and Habitat Conservation Planning Handbook ("HCP Handbook") instructs, "[m]itigation programs should…be practicable and commensurate with the impacts they address."[30] The Service itself has argued in federal court that the maximum extent practicable standard does not mean the "most that can possibly be done" or "the most the developers could pay while still going forward with the project."[31] In *Union Neighbors*, the Service pointed to an existing federal district court opinion as support for its argument that the maximum extent practicable standard allows the applicant to "do something less than fully minimize and mitigate the impacts of the take where to do more

[29] See 16 U.S.C. 1539(a)(2)(B).
[30] HCP Handbook at 3-19. http://www.nmfs.noaa.gov/pr/pdfs/laws/hcp_handbook.pdf
[31] *Union Neighbors*, Federal Defendants' Cross-Motion for Summary Judgment at 20.

would not be practicable."[32] The D.C. Circuit Court of Appeals upheld the Service's approach. Further, the current HCP Handbook explicitly states that an HCP is not required to "recover listed species, or contribute to their recovery objectives. This reflects the fact that HCPs were designed by Congress to authorize incidental take and not to be mandatory recovery tools."[33]

With the above in mind, EWAC recommends that any discussion of the Service's preference for "no net loss" in the context of an HCP be removed, particularly because there is a chance that even "preferences" may be applied as "requirements" in the field. To the extent the Service elects to include in the Proposed Policy a preference for "no net loss," EWAC recommends that any discussion be made explicitly aspirational, and that the Service provide its regional and field offices with explicit instructions that any such guidance may not be imposed on project proponents as a precondition to the issuance of an incidental take permit under ESA section 10 or incidental take statement under ESA section 7. As a general matter, the Proposed Policy would be greatly improved if the Service simplified the policy to focus only on the actual legal requirements associated with ESA sections 7 and 10, relevant implementing regulations, and federal case law.

2. *The ESA does not require that compensatory mitigation achieve the "best" outcome for the species.*

The Service indicates in several places that adherence with the Proposed Policy will achieve the "best" conservation outcome for listed species.[34] To achieve the best conservation outcomes, the Service includes requirements such as that found in section 4.1, which states:

> Compensatory mitigation will be sited in locations that have been identified in landscape-scale conservation plans or mitigation strategies as areas that will meet conservation objectives and provide the greatest long-term benefit to the listed, proposed, and/or at-risk species and other resources of primary conservation concern. In the absence of such plans, conservation needs of the species will be assessed at scales appropriate to inform the selection of sustainable mitigation areas that are expected to produce the best ecological outcomes for the species using the best available science.[35]

Further, the Service notes in section 6.2.2 that it has a preference that impacts occurring on private lands should only be mitigated with public lands under certain circumstances, including when "[p]rivate lands suitable for compensatory mitigation are unavailable or are available but cannot provide an equivalent or greater contribution towards offsetting the impacts to meet the mitigation planning goal for the species."[36]

While EWAC understands the Service's desire that compensatory mitigation provide the "best possible conservation outcome"[37] for listed species, ESA section 10 requires only that impacts of the taking be minimized and mitigated to the maximum extent practicable. There is no implicit "best conservation outcome" requirement, just as Congress did not include a "no net loss" or "net gain" requirement, as discussed above. Importantly, in many circumstances,

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[32] *Id. See also Nat'l Wildlife Federation v. Norton,* 306 F.Supp.2d 928 (E.D. Cal. 2004).
[33] 1996 HCP Handbook at 3-20, found at: https://www.fws.gov/midwest/endangered/permits/hcp/hcphandbook.html.
[34] *See, e.g.*, Proposed Policy at 61033, 61035, and 61037.
[35] *Id.* at 61037.
[36] Id. at 61043.
[37] *Id.*

regulated entities such as utility service providers are prohibited by state law, regulation, and/or policy from doing anything more than complying with relevant federal law, and would not lawfully be able to provide compensatory mitigation beyond the minimum required under ESA section 10. Finally, in some cases, it may not be practicable for a project proponent to provide compensatory mitigation that results in the best possible conservation outcome for impacted species, particularly if mitigation must be provided in advance of the impacts. EWAC believes that the Proposed Policy could be improved upon by removing the phrase "best possible conservation outcome" when addressing mitigation related to impacts occurring pursuant to an ITP and conservation actions occurring under candidate conservation agreements with assurances and safe harbor agreements under ESA section 10.

3. *The Proposed Policy, as written, should not be applied to permittee-responsible mitigation.*

Like the recently published Draft HCP Handbook, the Proposed Policy focuses heavily on large, landscape-scale mitigation actions. As such, without significant revision to account for permittee-responsible mitigation (e.g., mitigation occurring in connection with project-specific ITPs or ITSs), the Proposed Policy should not be applied to those types of projects, as such application could be overly burdensome to project proponents. This concern is described in greater detail in section II above.

C. ESA Section 7

With respect to consultation under ESA section 7, and as we noted in our comments to the Draft Mitigation Policy, compensatory mitigation cannot be and is not required. The Proposed Policy in various places directly contradicts the Service's Consultation Handbook with respect to compensatory mitigation, as we point out in the following paragraphs. As a starting point to our discussion of compensatory mitigation in the context of ESA section 7 consultations, EWAC points to an important statement contained in the Consultation Handbook: "Section 7 requires minimization of the level of take. It is not appropriate to require mitigation for the impacts of incidental take."[38] The majority of EWAC's comments with respect to section 7 center on this fact.

1. *Reasonable and Prudent Measures Should Not Include Requirement for Compensatory Mitigation*

The Proposed Policy indicates that compensatory mitigation can be required as part of reasonable and prudent measures ("RPMs")[39] in an incidental take statement issued in connection with a non-jeopardy biological opinion. For example, in section 4.7 of the Proposed Policy, the Service states:

> The Service has authority to conduct direct oversight of all compensatory mitigation programs and projects for which we have exempted or permitted incidental take under the ESA…Incidental take exemptions provided by statute to Federal agencies and applicants through the ESA section 7 process require that mandatory terms and conditions included with the take statement must be

[38] Consultation Handbook at 4-53 (emphasis in the original)("…remember that the objective of the incidental take analysis under section 7 is minimization, not mitigation").

[39] RPMs are defined as "those actions the [Service] believes necessary or appropriate to minimize the impacts, i.e., the amount or extent, of incidental take." 50 C.F.R. 402.02.

implemented by the federal agency or its applicant to activate the exemption in 7(o)(2) of the [ESA].[40]

However, and as indicated above, the Service should not require compensatory mitigation as part of RPMs. In fact, unlike ESA section 10 and relevant implementing regulations addressing ITPs, the term "mitigation" does not appear in ESA section 7 or the regulations governing section 7 consultation promulgated jointly by the Service and the National Marine Fisheries Service. Although the Service certainly may encourage action agencies and project proponents to provide compensatory mitigation, EWAC is concerned that such encouragement may be ill-advised as there is a strong potential that it could become an implicit requirement as applied in the field. To that end, EWAC recommends that, to the extent the concept of compensatory mitigation in the context of non-jeopardy biological opinions is not written entirely out of the Proposed Policy, the Service make clear that Service personnel may merely provide information and input to action agencies and project proponents who voluntarily seek to implement compensatory mitigation measures.

2. *ESA Section 7 does not Require RPMs to Result in No Net Loss*

The Service's stated "mitigation goal" with respect to applying the Proposed Policy to section 7 consultations is described as "…[to] encourage Federal agencies and applicants to include compensation as part of their proposed actions to offset any anticipated impacts to these resources that are not avoided to achieve a net gain or, at a minimum, no net loss in the conservation of listed species."[41] As noted above, EWAC recommends that if the concept of compensatory mitigation is not written out of the Proposed Policy with respect to non-jeopardy biological opinions, the Service should make clear that compensatory mitigation cannot be required of federal agencies or applicants. Moreover, it is important to note that, like ESA section 10, federal agencies are not required to restore or recover the listed species or critical habitat at issue. Rather, and as the Service recently noted in its decision not to designate critical habitat for the Northern long-eared bat, ESA section 7 merely requires the agency to "implement reasonable and prudent alternatives to avoid destruction or adverse modification of critical habitat."[42]

3. *Service Should Not Require Compensatory Mitigation as Part of Reasonable and Prudent Alternatives*

Section 5.1.2.2 of the Proposed Policy indicates that the Service "may include any and all forms of mitigation, including compensatory mitigation…" as part of Reasonable and Prudent Alternatives ("RPAs") designed to avoid jeopardy or adverse modification, so long as any such mitigation measures are consistent with the definition of RPAs set forth in 50 C.F.R. 402.02. However, ESA section 7, its implementing regulations, and the Service's own Consultation Handbook are silent with respect to including compensatory mitigation in formulating RPAs. EWAC notes that the Service infrequently makes jeopardy determinations as the ESA and relevant jurisprudence sets a high bar with respect to any such determination.

EWAC is concerned that in formulating RPAs, the Service may look solely to compensatory mitigation to the exclusion of other, potentially less burdensome alternatives. EWAC recommends that the Proposed Policy track the statutory and regulatory language relating

[40] Proposed Policy at 61038.
[41] *Id.* at 61040.
[42] 81 Fed. Reg. 24707, 24709 (April 27, 2016).

to RPA formulation, including, without limitation, that development of RPAs must be done in coordination with the action agency and any applicant.

4. *Application of the Mitigation Sequence is not Appropriate for Section 7 Consultations.*

The Proposed Policy indicates that the Service will work with action agencies and project proponents to implement the "full mitigation sequence," which includes first avoiding impacts. There are several problems with this approach, however. First, and as noted above, avoidance of impacts is not required under section 7. Rather, an action agency is required under section 7(a)(2) to avoid jeopardy and/or destruction or adverse modification of critical habitat. Second, the Service cannot require compensatory mitigation under section 7, as mitigation is not a required component of consultation. Finally, and as described in greater detail above, the Service's new approach requiring sequencing of mitigation is inconsistent with the statute, relevant Service regulations, and recent case law. Therefore, EWAC requests that the Service remove the mitigation sequencing concept from the Proposed Policy where the policy addresses compliance with ESA sections 7 and 10.

5. *Section 7 does not require "Conservation" to be part of Consultation.*

The Proposed Policy emphasizes the role of conservation in the context of section 7 consultations; however, conservation is not a statutory requirement associated with consultation, and emphasizing conservation places an additional requirement on the action agency and underlying project proponents that was not required by Congress in enacting the consultation procedures. While ESA section 7(a)(1) does instruct agencies to "utilize their authorities in furtherance of the purposes of [the ESA] by carrying out programs for the conservation of [listed species]," this directive has never been interpreted to place an affirmative duty of conservation upon federal agencies or non-federal project proponents undergoing section 7 consultation. Importantly, the Service's own Consultation Handbook defines "conservation recommendations" as:

> …the Services' *non-binding* suggestions resulting from formal or informal consultation that…(3) include suggestions on how an action agency can assist species conservation as part of their action and in furtherance of their authorities under section 7(a)(1) of the [ESA].[43]

The Consultation Handbook goes on to state that "discretionary conservation recommendations under section 7(a)(1) are not a substitute for reasonable and prudent measures as a means of minimizing the impacts of incidental take"[44] and notes further that any such conservation recommendations are "voluntary"[45] and are not to be "incorporated anywhere in the biological opinion or incidental take statement where they may be confused with the opinion or take statement itself."[46] Finally, the Consultation Handbook states, "[conservation] recommendations are <u>never</u> a precondition for a subsequent finding of no jeopardy or to reduce the impacts of anticipated incidental take."[47]

[43] Consultation Handbook at xii (emphasis added).
[44] *Id.* at 4-54.
[45] *Id.* at 4-62.
[46] *Id.* at 4-63.
[47] *Id.* (emphasis in the original).

Thus, the Service itself has recognized that any conservation measures put forth by the Service are not required to be adopted by the action agency or project proponent, but that the agency or applicant is free to incorporate the measures or to disregard altogether. Federal courts have also held that the provisions of ESA section 7(a)(1) are highly discretionary and while the provision applies to agency programs, it does not apply to agency actions.[48]

As such, EWAC recommends that the Proposed Policy clearly state that conservation recommendations cannot be made compulsory upon the action agency or applicant in the context of a section 7 consultation.

6. *At-risk Species Should not be Included.*

Section 5.1.3 of the Proposed Policy cites to ESA section 7(a)(4) as the basis for authorizing the Service to "encourage" federal action agencies to "avoid and minimize adverse impacts to proposed and at-risk species…using the full mitigation sequence."[49] While ESA section 7(a)(4) requires federal agencies to confer with the Service when proposed action is likely to jeopardize species proposed for listing or result in adverse modification or destruction of proposed critical habitat, section 7(a)(4) does not in any way require or even contemplate that federal agencies would confer with the Service regarding species that merely are "at-risk." Indeed, section 7(a)(4) does not even require federal agencies to confer with the Service when proposed actions may jeopardize species that are candidates—but have not been formally proposed—for listing. EWAC recommends the Service remove all references to "at-risk" species in the context of ESA sections 7 and 10.

IV. PUBLIC NOTICE AND COMMENT

The Proposed Policy indicates that species-level mitigation protocols, mitigation instruments, and other species-specific documents are forthcoming. As precedent for the Service's historical use of landscape-scale mitigation, the Service references a mitigation guidance document it developed for two songbirds (the golden-cheeked warbler and black-capped vireo) found in central Texas.[50] This particular example highlights an important consideration that the Service should include in the Proposed Policy. The golden-cheeked warbler and black-capped vireo guidance was not published for public review and comment. However, the requirements set forth in the songbirds' mitigation guidance document impacted the regulated community. This guidance should have had the input of both the regulated and scientific communities prior to finalization. Any similar species- or landscape-specific guidance document should receive public input to ensure that the needs of the regulated community are considered, along with any relevant input from the scientific community.

Similarly, any conservation banking instrument used by the Service as a template for mitigation agreements, conservation banks, and/or in-lieu fee programs should be provided for public review and comment. For example, the Service's Region 2 insists that conservation bank sponsors use and stick as closely as possible to a template that was never submitted to public

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[48] *See, e.g., Northwest Environmental Advocates v. EPA*, 268 F.Spp. 2d 1255 (D. Ore. 2003); *Oregon Natural Resources Council Fund v. U.S. Army Corps of Engineers*, 2003 WL 117999 (D. Ore. 2003); *San Francisco Baykeeper v. U.S. Army Corps of Engineers*, 219 F.Supp. 2d 1001 (N.D. Cal. 2002); Grant School District No. 3, et al. v. Dombeck, No. CV 99-01263 (D. Ore. April5, 2000).

[49] Proposed Policy 61040.

[50] https://www.fws.gov/southwest/es/Documents/R2ES/Cons_Bank_Mitigation_Guidance_for_GCW_and_BCV.pdf

review prior to its adoption by Region 2. That template would benefit from input from the regulated community.

V. ADDITIONALITY

Section 4.4 of the Proposed Policy states that compensatory mitigation

> must provide benefits beyond those that would otherwise have occurred through routine or required practices or actions, or obligations required through legal authorities or contractual agreements. A compensatory mitigation measure is ''additional'' when the benefits of the measure improve upon the baseline conditions of the impacted resources and their values, services, and functions in a manner that is demonstrably new and would not have occurred without the compensatory mitigation measure (600 DM 6.4G).

The Service's requirement of "additionality" is based on a new chapter in the Service's Departmental Manual – released the same day as the Presidential Memorandum – dealing with treatment of federally-managed lands and resources. EWAC is concerned that the Service may require the regulated community to adhere to Service directives for federally-managed lands in the context of the ESA, which has very explicit requirements with respect to compensatory mitigation. Moreover, implementing a requirement of "additionality" could place a significant burden on the regulated community, including project proponents needing ESA authorization as well as those who set out to establish mitigation banks or similar programs. Both preservation of existing habitat and implementation of existing restrictions that provides benefit to the species should be credited, where appropriate, without the need to demonstrate additionality. Existing precedent indicates that the Service itself appears to have long-recognized that placing existing habitat under permanent preservation provides substantial benefits to listed species, as preservation of such habitat has been the preferred compensatory mitigation measure in countless Service-approved ITPs. EWAC requests that the Service reconsider the additionality requirement, taking into account situations where, for example, a project proponent is required per a state approval to undertake certain measures (e.g., revegetation requirements pursuant to a stormwater discharge permit) that have incidental benefits to listed species. Overlapping state and federal permits may present complex additionality questions that may not be considered fully in the Proposed Policy. To the extent the Service maintains a requirement of additionality, EWAC requests that the Service provide specific guidance as to how it will quantify and credit compensatory mitigation efforts including, but not limited to, preservation, enhancement, and creation of listed species habitat. Development of this guidance would be one best suited for highly qualified biologists both from within and outside the Service itself and should be put out for public notice and comment.

VI. SITING CONSIDERATIONS

The Proposed Policy sets forth siting requirements that are too burdensome for permittee-responsible mitigation or for smaller-scale projects. Below, EWAC addresses some of the ways in which the Proposed Policy is impractical and may unnecessarily exclude viable mitigation sites.

A. Landscape-scale mitigation within the "Service Area" for the species may be impossible or impracticable.

While EWAC understands the Service's general desire for landscape-scale mitigation in the Service Area for a given species,, the reality on the ground is that often there are no banks or in-lieu fee programs available for the relevant species at the relevant time. Also, EWAC members have experienced cases where state wildlife resource agencies and/or Service field offices request that mitigation for certain species that are also state listed be performed within the state where the impact occurs. This desire for "in-state" mitigation can make landscape-scale mitigation difficult if the only mitigation bank or in-lieu fee program is located in a different state. Nevertheless, deadlines, finances, and other legal requirements often necessitate that projects – and any associated mitigation – move forward.

In addition to the landscape-scale and in-state constraints, the Proposed Policy indicates a significant preference for mitigation within a "Service Area" for a species "unless otherwise approved by the Service."[51] This adds another layer of constraint upon potential compensatory mitigation opportunities. To the extent that the final policy retains the preference for compensatory mitigation in a given Service Area, EWAC requests that the Service highlight that Service Areas, for purposes of compensatory mitigation should be defined broadly.[52] In particular, boundaries should be defined broadly by habitat types and species' ranges. At the least, the final policy should explicitly recognize that compensatory mitigation outside the Service Area (even broadly defined) still provides benefits to the species and should be approved given a biologically sound justification by the project proponent.

EWAC believes a less constrained, more flexible approach to identifying potential compensatory mitigation options will provide a better compensatory mitigation program overall. Further, ESA section 10 does not require that the mitigation proffered be the best possible option, and that is the case even where landscape-scale, in-state, or Service Area-bound mitigation options are available. Rather, ESA section 10 mandates that minimization and mitigation measures, when taken together, address the impacts of the take requested by the permit applicant to the maximum extent practicable. With the above in mind, EWAC requests that the Service revise the Proposed Policy to carefully track statutory and regulatory language when discussing compensatory mitigation in the context of ESA sections 7 (voluntary) and 10 (compulsory) and to recognize that compensatory mitigation should be commensurate with the particular impacts to occur under a given ITP, and allow for greater flexibility in identifying suitable compensatory mitigation parcels.

B. Presence of threat should not be required.

The Proposed Policy includes in its list of mitigation siting considerations, the degree of threat to a proposed site. The Service should not require as a threshold matter that a particular site be under threat. Judging such threat in most cases is speculative at best, as indicators such as agricultural commodity, timber, and land prices can fluctuate sharply by diverse and complex market drivers. Lack of protection or management for the needs of the relevant listed species should be sufficient to make a parcel eligible for use as mitigation.

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[51] Proposed Policy at 61044.

[52] The U.S. Army Corps of Engineers, for example, bases wetlands mitigation bank service areas on watersheds. EWAC is not suggesting that watersheds would be appropriate for species, as those are not necessarily representative for species mitigation, but EWAC suggests a similar approach based instead on species biology.

C. Climate change should be a voluntary consideration.

EWAC recommends that the Service remove "climate change projections" from the list of compensatory mitigation siting factors. It is far too speculative to base – even partially – siting of mitigation projects on potential changes to the landscape due to projected climate change that will occur decades in the future. The Service should view climate change as a voluntary, rather than prescriptive, consideration in the context of mitigation siting. For example, if an applicant desires to mitigate with habitat that would protect a species in the event climate change makes current habitat unsuitable, the Service should be authorized to approve such mitigation, but should not require it.

Furthermore, EWAC is concerned that the Service assumes that climate change will be addressed by adaptive management of mitigation lands, particularly since the Service acknowledges the fact that it will become more challenging for adaptive management – an already complex process – to be structured and transparent and be "based on science."[53] As EWAC pointed out in its comments to the Draft HCP Handbook, the ESA does not require a resource owner to implement measures to prevent adverse effects to listed species caused by climate change. This principle carries over to the ITP issuance criteria. The point of compensatory mitigation is to replicate habitat conditions as they exist at the time of permit issuance. The anticipated effects of climate change on that compensatory habitat would be part of the baseline for purposes of the mitigation criterion, meaning that the ITP applicant should not be required to compensate above the baseline condition, or if they voluntarily do so, these efforts would count towards the Service's requirement for "additionality."

D. Consideration of mineral rights should be voluntary.

In several places, the Proposed Policy indicates that the Service prefers compensatory mitigation sites that do not have split estates such as separate ownership of surface and subsurface mineral rights. However, in certain parts of the country, it is unrealistic to expect that compensatory mitigation lands be limited only to those where mineral and surface rights are united. In large areas of the country, particularly west of the Mississippi River, very little land meets this standard. Furthermore, it is not practical to expect project proponents to attempt to reunite severed mineral interests, which may be owned by multiple parties, potentially including the Federal government in some instances. Not only could reuniting these interests – if even possible – prove prohibitively expensive, there likely are also state law considerations that would vary widely from state to state. Finally, any mineral developer that may impact a mitigation site for listed species would be responsible for addressing those impacts in accordance with the ESA. EWAC recommends that the Service make clear that reuniting mineral interests will not be a required component of compensatory mitigation.

E. Consideration of timber, water, mineral, or other reserved rights.

The Proposed Policy includes as a form of acceptable compensatory mitigation the transfer of timber, water, mineral or other severed rights to an existing conservation site.[54] EWAC requests that the Service include in the Proposed Policy an explicit statement that while such transfer is not a required element of compensatory mitigation, a project proponent will be given additional conservation credit or other consideration when he or she elects to transfer severed rights to a conservation site.

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[53] *Id.* at 61045.
[54] *Id.* at 61048.

VII. ADAPTIVE MANAGEMENT AND OTHER REQUIREMENTS

The Proposed Policy should encourage the careful consideration of adaptive management and other requirements for compensatory mitigation projects. Adaptive management provisions can have a significant impact on the cost and predictability of compensatory mitigation, and various kinds of "assurances" required by the Proposed Policy may be impracticable or even prohibited under state and local law.

Throughout the Proposed Policy the Service states that conservation banks and similar programs are more cost effective than permittee-responsible compensatory mitigation options. This is not always the case, however. Adaptive management provisions required by the Service for large-scale mitigation sites can result in a much higher cost of site management, which is then passed along to the ultimate credit purchaser.

For example, section 8.2.3.6 of the Proposed Policy, which discusses financial assurances required of compensatory mitigation projects, states

> In reviewing the proposed financial assurance, the Service will consider the cost of providing replacement mitigation, including costs for land acquisition, planning and engineering, legal fees, mobilization, construction and monitoring, and long-term stewardship. Financial assurances should be in place prior to commencing the action authorizing the impact action.[55]

Advanced funding for potential replacement mitigation places an excessive burden on project-specific mitigation projects, and may very well be cost-prohibitive for individuals and entities undertaking small-scale take. This is particularly the case where a landscape-scale mitigation bank or similar program is not in place in the relevant geographical area. The risk that full replacement would be needed is not high enough to justify placing such an onerous financial burden on the mitigation provider and, ultimately, on those in need of compensatory mitigation. Reasonable incorporation of contingency funds is often preferable to including poorly defined and contingent liabilities.

Another example of an area where further consideration by the Service is warranted can be found in section 8.2.3.5 of the Proposed Policy, in which the Service sets forth "real estate assurances" that will be required of compensatory mitigation projects:

> Proposed mitigation sites must be vetted prior to acceptance by the Service to ensure they are biologically appropriate and legally able to be encumbered with a site protection instrument. A perpetual conservation easement held by a qualified entity, not the fee title owner, is the required site protection instrument when mitigation is to be permanent and where not prohibited by law.[56]

While EWAC appreciates the Service's preference for conservation easements, we hope the Service will recognize that there are many different ways to achieve conservation value and will embrace the various options. As a practical matter, for certain types of entities, such as electric utilities, the opportunities to own or purchase any type of easement is limited. Nevertheless, these types of entities may hold many thousands of acres of land—via right-of-way easements and other mechanisms—that hosts a number of listed species, and the entities should receive credit for managing such land for the benefit of listed species. These permittee-responsible

[55] *Id.* at 61053.
[56] *Id.* at 61052.

mitigation options, such as managing onsite habitat for the benefit of listed species, can provide benefits to listed species, meet statutory requirements, and provide cost-effective, efficient opportunities.

EWAC recommends that the Service make clear in the Proposed Policy that adaptive management provisions, associated contingency costs and other mitigation land requirements be reasonable, practicable, and cost-efficient, and that such provisions will be commensurate with the impacts and risks they are intended to address.

VIII. RETROACTIVE APPLICATION IS INAPPROPRIATE

Section 3 of the Proposed Policy indicates that the Service will apply the Proposed Policy to amendments and modifications to existing conservation banks, in-lieu fee programs, and third party compensatory mitigation agreements.[57] Applying the Proposed Policy to approved conservation banks or in-lieu fee programs where, for example, the mitigation sponsor expands or adds another phase to its program could have a profound effect not only on pricing for project proponents seeking compensatory mitigation, but on the viability of the mitigation banks and other programs themselves, which rely on project proponents to purchase mitigation.

The Policy should make clear that any application of the Proposed Policy should not occur where No Surprises assurances are in place or when an existing mitigation program has been approved with anticipated expansions, additions of phases, and the like. Also, existing mitigation agreements and projects should not be subject to the application of the Proposed Policy where existing regulations, in fact, prevent such application.

Finally, the description of when the Proposed Policy will – and will not – apply could be confusing both to Service personnel and the regulated community. EWAC recommends the Service revise Proposed Policy section 3 to provide a clear and concise description of when the Proposed Policy will and will not apply, and the Service should provide an opportunity for comments on the revised section prior to its adoption.

IX. MITIGATION IN ADVANCE OF IMPACTS

The Proposed Policy requires that compensatory mitigation projects achieve "conservation objectives within a reasonable timeframe and for at least the duration of the impacts" and should be implemented in advance of the adverse impacts.[58] As an initial matter, EWAC recommends that the Proposed Policy make clear that compensatory mitigation should be commensurate with the expected duration of the impacts being addressed. For example, with respect to an ITP authorizing take associated with the operation of a wind energy facility, once the facility ceases to operate, and direct take no longer occurs, there is no longer a need to mitigate those impacts. This was a point the Service made in its Draft Mitigation Policy and should be emphasized in the Proposed Policy as well.

The foregoing requirements are problematic for several reasons. Project proponents should not be penalized for situations where there is a temporary loss of habitat or impact to species that occurs while mitigation actions are pending or underway, particularly where securing mitigation may be complicated (e.g., no available conservation banks or similar programs). In the context of an ITP, additional mitigation should not be required where mitigation reasonably follows impacts and the benefits of such mitigation meet issuance criteria.

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[57] *Id.* at 61036.
[58] *Id.* at 61038.

The Service and the species can benefit from mitigation packages that may take longer to implement but offer higher quality solutions than may be available at the time the impacts occur. Furthermore, for various reasons, it may be economically impracticable for a project proponent to undertake mitigation actions prior to or precisely simultaneously with impacts to species. Additionally, for some species, including migratory species, impacts may occur in a timeframe in which the species may not suffer any impacts, and it would not gain anything for mitigation to be implemented precisely at the same time. There is a wealth of precedent indicating the Service's past willingness to allow mitigation to follow impacts, and we are not aware of scientific data indicating that such precedent was harmful to the relevant species. Finally, as a practical matter, the availability of conservation banks, which often provide the most efficient means of providing compensatory mitigation to the regulated community, is not well-established across the country. Moreover, even where a region may have several species conservation banks, not all species in a region may have established conservation banks. In these instances, it is challenging to provide compensatory mitigation in advance of impacts.

The Proposed Policy should be revised to reflect the fact that project proponents have vastly different needs and resources, and those needs and resources must be taken into account in developing compensatory mitigation strategies. Moreover, advance implementation of compensatory mitigation may not be as critical to some listed species as it is to others, and Service personnel should have the flexibility to permit mitigation occurring later in time, particularly when the ultimate result to the species is no different than it would have been had the mitigation been provided in advance.

X. "TEMPORAL" IMPACTS

The Proposed Policy requires that a project proponent provide compensatory mitigation for "temporal" losses to affected species:

> [i]deally, compensatory mitigation should be implemented in advance of the action that adversely impacts the species…When this is not possible or practicable, temporal losses to the affected species must be compensated through some means (e.g., increased mitigation ratio that reflects the degree of temporal loss)…Temporal loss to the species as a result of both direct and indirect adverse effects must be addressed when determining appropriate compensatory mitigation.[59]

While EWAC understands the Service's desire that temporary losses to listed species and their habitats be mitigated, EWAC members have experienced much confusion in the field as to what constitutes a "temporary" impact. Service offices are inconsistent with respect to defining what kinds of impacts are temporary and, additionally, there does not seem to be consensus concerning actual species effects due to temporary impacts. Below, we set forth several recommendations with respect to dealing with temporary impacts.

First, EWAC notes that the Service's definition of "short-term impact" in section 7.2 of the Proposed Policy is overly burdensome. For example, the Service states:

> [i]nherent in applying short-term compensatory mitigation is the recovery of the affected species' populations to pre-disturbance levels and any additional increase

[59] *Id.*

> in population levels that was anticipated to occur if the action had not taken place…[60]

However, the Proposed Policy does not indicate how the Service would determine a loss in the "additional increase in population levels" that would have occurred had the action not taken place.

Moreover, it has been EWAC's experience that, depending on the project, there may be a range of "temporary" impacts, including "short-term temporary" impacts that last for one year or less, and "long-term temporary" impacts that may last longer than one year, but not last for the duration of the project. EWAC recommends that the Service distinguish between compensatory mitigation for both "short-term temporary" and "long-term temporary" impacts.

EWAC appreciates that the Proposed Policy directs the Service to consider the specific needs of the species in determining the amount and duration of necessary compensatory mitigation; however, EWAC is concerned that the Proposed Policy also states that "[o]pportunities for short-term compensation are likely to be very limited and may not apply to most species."[61] Thus, it appears that the Service, in reality, presupposes that most impacts to listed species will be long-term in nature.

Finally, EWAC recommends that in the very rare circumstances where compensatory mitigation for short-term impacts to listed species is appropriate, the Service contemplate establishing a program—and providing for public notice and comment—whereby project proponents may pay a fee either to the Service or an authorized third party for temporary impacts to listed species. Establishment of such a program could simplify compensatory mitigation for short-term impacts nationwide. Again, EWAC notes that compensatory mitigation for short-term impacts should be the exception rather than the rule.

XI. EFFECTIVE CONSERVATION OUTCOMES AND ACCOUNTABILITY

In section 4.7 of the Proposed Policy, the Service indicates that it may rely on "third-party evaluations to provide project-specific information on ecological and administrative compliance through monitoring and other reports." The Service further requires the cost for any such services be "built into and covered by the mitigation project."[62]

EWAC has several concerns with this approach. First, the Service does not indicate that mitigation providers would be given the opportunity to vet any such third party evaluators. Project proponents and/or mitigation providers should have a significant role in selecting and approving any third party evaluating compliance of a mitigation project. Second, there should be a dispute resolution procedure built in for circumstances were a third party evaluator (or the Service) claims that mitigation is not achieving desired results and the mitigation provider disagrees, particularly since the Proposed Policy appears to require replacement mitigation in that circumstance. Finally, EWAC does not agree that project proponents should be made to bear additional costs where the Service opts to use a third party for compliance monitoring without input and assent from the project proponent. While EWAC understands that Service personnel have limited resources and the use of third party contractors may lessen the burden for the Service and even provide some benefit to the regulated community potentially by allowing

[60] Proposed Policy at 61048.
[61] *Id.*
[62] *Id.* at 61038.

for more timely resolutions of issues arising with respect to compensatory mitigation sites, EWAC requests that the Service consider the requests made above and provide greater detail concerning the use of third party evaluators in the final version of the Proposed Policy.

XII. STACKING

The Service recognizes that the stacking of mitigation credits is possible in certain circumstances, but does not provide sufficient detail concerning when and how stacking may occur. In the past, the Service has been reluctant to provide adequate credit where ITP applicants provide mitigation lands that may benefit several species and resources. While the Proposed Policy indicates that stacking may be available, it also prohibits "double-counting," which is defined as "using a credit…representing the same unit of ecosystem function or service on a mitigation site more than once."[63] The reluctance of the Service to permit "double-counting," however, may be misplaced. In EWAC member experiences, the Service has been hesitant to encourage stacking in the species context, oftentimes citing to competition among various species for the resources on a given parcel. However, EWAC questions the biological validity for this concern. Biodiversity indicates that areas with multiple species are high-quality areas. Niche partitioning within a potential compensatory mitigation parcel minimizes inter-species competition, and populations are unlikely to be resource limited. Thus, purchasing these high-quality parcels with multiple species likely confers greater benefits to the species.

EWAC believes that stacking should be encouraged as it incentivizes project proponents to deliver high quality, biologically diverse, compensatory mitigation projects. Taking a more holistic approach to compensatory mitigation efforts that benefit multiple species and other natural resources (e.g., wetlands, water quality, biological carbon sequestration etc.), will result in greater overall natural resource conservation benefits. In sum, providing a coherent stacking policy will encourage the preservation of ecologically rich and diverse sites which will benefit listed species and the regulated community alike.

EWAC recommends that the Service clarify when stacking is appropriate and how it may be applied. While the Presidential Memorandum did not meaningfully address this issue, multiple other federal programs contemplate or authorize stacking (e.g., wetlands mitigation banking pursuant to section 404 of the Clean Water Act). The Service should consider drafting a stacking policy for all federal programs in which the agency is involved, and may be able to use existing federal programs (e.g., wetlands) as a starting point. Finally, EWAC requests that the Service provide an opportunity for comments on such a policy prior to its adoption.

XIII. QUALIFICATIONS FOR HOLDERS OF MITIGATION SITES

The Proposed Policy requires that an "accredited land trust" must hold conservation easements for Service-approved mitigation sites where such land trusts are available and willing.[64] As an initial matter, EWAC understands that only a small fraction of land trusts are "accredited" as contemplated by the Proposed Policy. This requirement could potentially limit significantly the number of otherwise qualified entities and organizations that could hold a conservation easement on a compensatory mitigation site. Even where an entity is accredited, where such entity "fails to maintain accreditation," the Proposed Policy indicates that the Service can require the conservation easement or endowment fund be transferred to another entity. The Service should not have the unilateral right to require a transfer solely because an entity does not

[63] *Id.* at 61059.
[64] *Id.* at 61054.

maintain accreditation. If the entity properly manages the easement or endowment fund, there is no need for a transfer and one should not be required. Moreover, some areas of the country are not served by a local land trust, accredited or otherwise. The Proposed Policy's accreditation requirement essentially prevents use of conservation easements in such cases. Finally, governmental entities may be capable of holding conservation easements, and governmental agencies should be considered acceptable as an easement owner. EWAC requests that the Service revise the Proposed Policy to account for more flexibility.

XIV. RESEARCH AND EDUCATION

EWAC appreciates that the Service includes research as a potential mitigation option; however, EWAC is concerned that the Service caveats that research should be included as a mitigation option only in "rare circumstances." There are numerous listed species about which little is known. Particularly in scenarios where species populations are primarily impacted by causes other than those that are anthropogenic (e.g., white nose syndrome for bats), funding research could result in greater conservation benefit for the species than habitat preservation alone. Similarly, where little is known about a species, public outreach as a component of education could provide measurable benefit. EWAC recommends, therefore, that the Service further emphasize the availability of research and education as compensatory mitigation options and not merely reference the Draft Mitigation Policy.

XV. RE-SALE OF CREDITS

The Proposed Policy should make clear that if a project proponent does not "use" mitigation credits (e.g., an applicant for an ITP over-purchased mitigation credits from a conservation bank to ensure there would be enough mitigation in support of its take authorization), the project proponent is authorized to sell any extra or unused credits to another project proponent.

XVI. DISPUTE RESOLUTION PROCESS

Section 8 of the Proposed Policy sets forth a dispute resolution process that appears to have the potential to be exceedingly complex, particularly if the process applies to project-specific or permittee-responsible mitigation projects. Specifically, EWAC is concerned that the Service intends that the same Mitigation Review Team ("MRT") or Interagency Review Team ("IRT") used for conservation banks, in-lieu fee programs, and habitat credit exchanges also review permittee-responsible mitigation and other third-party mitigation arrangements. With respect to permittee-responsible or project-specific mitigation projects, having an MRT or IRT review permittee-responsible compensatory mitigation would increase inefficiency and likely would result in major schedule delays. At present, Service approval of permittee-responsible compensatory mitigation and other third party arrangements is often a lengthy and complicated process, and requiring an additional level of review would only exacerbate the issue. Moreover, mitigation banks and in-lieu fee programs are subject to additional requirements to which permittee-responsible compensatory mitigation rarely need adhere. EWAC recommends that the Service clarify that the dispute resolution process set forth in section 8 of the Proposed Policy does not apply to permittee-responsible or project-specific compensatory mitigation projects.

XVII. GLOSSARY OF TERMS RELATED TO COMPENSATORY MITIGATION

EWAC has concerns with several of the definitions set forth in Appendix B to the Proposed Policy. The Service should consider deleting Appendix B to avoid possible confusion

with terms specifically defined by the ESA. If the Service elects to retain Appendix B, EWAC believes that the Service should use relevant definitions from the ESA only, rather than definitions found in NEPA, Service Departmental Manuals not related to the ESA, and other sources. Additionally, EWAC makes the following recommendations, which should not be considered exhaustive:

- "Additive impacts, additive effects." EWAC is concerned that, within this definition, the Service assumes that additive effects are necessarily negative. Additive impacts or effects may also be insignificant or even beneficial. We suggest that the Service revise this definition accordingly.
- "Baseline." EWAC recommends that the Service revise the definition of "baseline" specifically to include climate change so that climate change is viewed as part of the existing environment and circumstance, rather than a new circumstance triggering adaptive management.
- "Enhancement" and "Establishment." EWAC recommends the Service revise the definitions to provide for the circumstance where enhancement or establishment of habitat for the species at issue may, indeed, negatively affect other resources. Creation or enhancement of habitat for listed species often negatively impacts other resources.
- "Impact(s)." EWAC recommends that this definition be revised to consider that projects and other actions may actually have beneficial – rather than solely adverse – impacts to listed species.
- "Landscape Scale Approach." As noted throughout these comments, EWAC strongly recommends that mitigation sequencing be removed from this definition. Neither of the take authorization mechanisms established under the ESA (i.e., ITP under section 10 or ITS under section 7) authorize the Service to require mitigation be provided in hierarchical fashion. Avoidance of impacts is not required under either authorization mechanism, and at least one federal circuit court has held that mitigation sequencing is unlawful.

XVIII. DRAFT MITIGATION POLICY

The Proposed Policy "adopts the mitigation principles established in the [Service's Draft Mitigation Policy] (81 FR 12380, March 8, 2016)." EWAC is concerned that the Proposed Policy adopts the Draft Mitigation Policy even though the draft has not been revised (or finalized) to address comments received during the public comment period. EWAC recommends the Service remove references to the Draft Mitigation Policy until that Policy is finalized.

Additionally, as EWAC recommended in its June 13, 2016 comments to the Draft Mitigation Policy, all references to the ESA should be removed from that document. Some of the issues with which EWAC took issue in the Draft Mitigation Policy – and about which we continue to have concern – include: mitigation sequencing (avoid, then minimize, then mitigate); requiring no net loss; preferring net gain for fish, wildlife, plants, and their habitats; requiring implementation of mitigation in advance of impacts; and requiring compensatory mitigation in the context of section 7 consultations.

XIX. CONCLUSION

EWAC appreciates the Service's consideration of these suggestions and recommendations as it continues to evaluate the Proposed Policy. EWAC looks forward to continuing to work with the Service in its effort to continually improve implementation of federal wildlife laws and the effectiveness of compensatory mitigation programs in connection with those laws. Please feel free to contact the following EWAC representatives should the Service seek additional clarity on any of the above:

Richard J. Meiers, EWAC Policy Chair, jim.meiers@duke-energy.com, 980-373-2363

Alan M. Glen, Nossaman, LLP, aglen@nossaman.com, 512-813-7943