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BEFORE THE UNITED STATES SENATE
COMMITTEE ON ENVIRONMENT AND
PUBLIC WORKS
HEARING: "Reviewing the Proposed Revisions
To the U.S. Fish and Wildlife Service Mitigation Policy"

September 21, 2016

Key Points:

- **Mitigation of impacts to its "trust resources" is a multifaceted mission for the Fish & Wildlife Service involving both its direct enforcement of statutory standards and its broader advice-giving roles;**
- **The Fish & Wildlife Service's policy goal is to provide a coherent framework within which agency discretion across a broad range of statutory authorities and programs should be exercised;**
- **Two key program areas, the Endangered Species Act and National Environmental Policy Act, have both seen the prevalence and relevance of "mitigation" increase significantly since 1981;**
- **Courts have generally supported agency efforts to adopt unifying policies that structure and justify exercises of agency discretion that would otherwise remain ad hoc.**

I would like to thank Chairman Sullivan, Ranking Member Whitehouse and the rest of the Fisheries, Water and Wildlife Subcommittee for the opportunity to testify at this hearing on the U.S. Fish and Wildlife Service's proposed mitigation policy update. It is an honor and privilege to be with you today. My name is Jamie Colburn and I am a Professor of Law at Penn State University. I have been conducting research on policies like this one and their impacts and significance in the legal system

for about 15 years. Before I left practice and went into teaching full time I served as Assistant Regional Counsel at the United States Environmental Protection Agency from 1998 to 2000. I am the author of more than a dozen articles, book chapters, and monographs on the Endangered Species Act and the National Environmental Policy Act, two statutes where "mitigation" has become extremely important.

I would like to highlight a few general points about the policy before I delve into specifics. First, this policy is a guidance issued to subordinate personnel in the U.S. Fish and Wildlife Service ("FWS"). It does not have the force of law and U.S. federal courts are not bound by it. Second, the policy can be disabled immediately by any subsequent executive branch action should FWS and/or U.S. Department of Interior leadership so choose. Finally, in citing eleven (11) different federal statutes that supply FWS, through delegation by the Secretary of the Interior, "specific authority for conservation of [fish, wildlife, plants, and their habitats] and that give [FWS] a role in mitigation planning for actions affecting them," 81 Fed. Reg. at 12383, the agency is obviously aiming to bring a coherent and consistent approach to an otherwise diverse array of actions and deliberations. Policies of this kind inevitably involve administrative discretion that subordinates must deploy

otherwise on an ad hoc basis. A single guidance of this kind that informs all actions, service-wide, resolving the agency's advice on mitigation and approach to mandatory mitigation can bring a level of transparency and predictability to agency operations that would otherwise be lacking.

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FWS already has a policy on "mitigation" recommendations and requirements, dating from 1981. *See* U.S. Fish & Wildlife Serv., Proposed Revisions to the U.S. Fish & Wildlife Serv. Mitigation Policy, 81 Fed. Reg. 12380, 12381 (2016). A principal reason to update such a policy is how much the science of fish, wildlife and plant conservation has improved in the last 35 years. Indeed, FWS notes that its 1981 policy was largely structured around the 1978 Council on Environmental Quality rules implementing National Environmental Policy Act § 102(2) and those rules' definition of "mitigation." *See* id.

Because "mitigation" of impacts and threats to "trust resources," which FWS defines as "migratory birds, federally listed endangered and threatened species, certain marine mammals, and interjurisdictional fish," 81 Fed. Reg. at 12383, is broad in scope, the proposed update provides for a range of applications and goals. Consistently throughout, however, the Service carefully notes that its policy is to "recommend or

require" actions as appropriate. In some contexts, FWS is asked for its *recommendations*, as is often the case with, for example, the Fish and Wildlife Coordination Act, 16 U.S.C. §§ 661-667e, where FWS recommendations to action agencies developing water-related projects are to give FWS recommendations full and equal consideration with other project purposes. In other contexts, FWS is tasked with the enforcement of statutory standards, as is the case with Endangered Species Act § 7(a)(2) consultations involving action agencies considering actions that may jeopardize the continued existence or adversely modify the designated critical habitat of listed taxa. *See* 16 U.S.C. 1536(a)(2).

A policy organizing the considerations germane to all efforts to "mitigate" unavoidable impacts on fish, wildlife, plants and their habitats necessarily ranges across FWS deliberations that end in both "recommended" and mandatory mitigation. This does not mean the policy adds any greater force to FWS's conclusions in those (future) contexts reached by this policy. The proposal simply tenders a unified approach to reaching those conclusions and does so entirely in keeping with the Office of Management & Budget's "good guidance" guidelines on the development of policies like this. *See* Office of

Management and Budget, Final Bulletin for Agency Good Guidance Practices (Bulletin No. 07-02), 72 Fed. Reg. 3432 (2007).

The Supreme Court has made clear that policy changes of this kind need not entail the Administrative Procedure Act's "notice and comment" rulemaking procedure merely for being a change in a long-standing interpretation(s) of law. *See* Perez v. Mortgage Bankers' Ass'n., 135 S. Ct. 1199 (2015). Indeed, the use of the publication process that FWS has undertaken for its mitigation policy update is to be encouraged, according to OMB's bulletin, in order to "channel the discretion of agency employees" and "enhance fairness" to the public by being more transparent about agency expectations in these discretionary contexts. *See* Final Bulletin, 72 Fed. Reg. at 3432.

Policies like FWS's mitigation proposal fill gaps that exist as the necessary result of our administrative state. They are readily revised by subsequent presidential administrations, but this hardly diminishes their utility to the agencies that maintain them. *See* Elena Kagan, *Presidential Administration,* 114 **Harv. L. Rev**. 2245, 2331-46 (2001). In effect, the use of transparent, publicly-adopted policies to guide administrative discretion enhances the agency's predictability to others, highlights important exercises of discretion to all subsequent

presidential administrations, and orients agency personnel to a consistent baseline.

Any policy of this kind inevitably touches the legal authority(s) on which the agency acts. The FWS proposal on mitigation is no exception, listing almost a dozen federal statutes necessitating FWS decisions about mitigation, either as a "recommendation" to others or as an interpretation of law. *See* 81 Fed. Reg. at 12383. I will consider two of the statutes invoked by way of example: the Endangered Species Act (ESA) and the National Environmental Policy Act (NEPA).

In ESA contexts, FWS is often called upon to recommend or to find that various mitigation measures fulfill applicable statutory requirements. For example, before FWS may permit the "taking" of listed taxa pursuant to ESA § 10(a)(1), 16 U.S.C. § 1539(a)(1), it must find that its permit applicant will take steps to "minimize and mitigate" any "impacts" resulting from the taking. Id. at § 1539(a)(2)(B)(ii). This is to be a public process, *see* id. at § 1539(c), and knowing the applicable policies FWS personnel ought to abide by in advance of any conclusions of law or findings of fact being published empowers permittees and other interested persons to participate in the issuance of ESA § 10 permits.

Likewise, FWS often consults with any federal agency whose actions may jeopardize the continued existence or adversely modify designated critical habitat of a listed taxon pursuant to ESA § 7(a)(2), 16 U.S.C. § 1536(a)(2). Consultation where "take" may be involved often turn to FWS's specifying "those reasonable and prudent measures that . . . [are] necessary or appropriate to minimize" impact on the taxon. Id. at § 1536(b)(4).

In these contexts, it can be critical to focus agency personnel on all of those factors and *only* those factors called for by the applicable statute. *See, e.g.*, Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971); Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983). The Administrative Procedure Act situates agencies like FWS in an "uneasy tension" wherein discretionary actions to which *any* law applies are judicially reviewable to determine whether the use of that discretion has been 'arbitrary and capricious.' *See* American Canoe Ass'n v. EPA, 30 F. Supp.2d 908, 925 (E.D. Va. 1998). Policies like FWS's mitigation proposal serve the vital function of queuing and regularizing exercises of discretion throughout the agency. This can be especially important in ESA § 10 contexts involving multiple, often large-scale conservation plan-backed permits. Those

permits are to provide for the mitigation of impacts to the taxon to the "maximum extent practicable," a substantive standard that admits of disparate interpretations. *Cf*. Bldg. Indus. Ass'n v. State Water Res. Control Bd., 22 Cal. Rptr. 3d 128, 145 (Ct. App. 2005) ("[T]he maximum extent practicable standard is a highly flexible concept that depends on balancing numerous factors . . . [and] is a term of art, and is not a phrase that can be interpreted solely by reference to its everyday or dictionary meaning."). The standard makes it a challenge to balance a permittee's needs against the wider public interest in the adjudication. Having a coherent policy that explains the agency's broader goals and connects them to site- or taxon-specific actions can be critical. Finally, given the fact that once an ESA § 10 permit is issued, the permittee is assured of not having to supply any further mitigation because of changed circumstances, *see* 50 C.F.R. § 17.22(b)(5)(iii)(B) (2015), these are high stakes adjudications that merit the utmost care with the discretion being employed.

Secondly, FWS is often called upon to supply advice and technical expertise pursuant to NEPA. NEPA § 102(2)(C) provides that "[p]rior to making any detailed statement [Environmental Impact Statement], the responsible Federal official shall consult with and obtain the comments of any Federal which has

jurisdiction by law or special expertise with respect to any environmental impact involved." 42 U.S.C. § 4332(2)(C). For FWS, as guardian of so many fish, wildlife, plant and habitat resources, this means a constant flow of requests for advice on how impacts can be mitigated. The Council on Environmental (CEQ) regulations implementing NEPA § 102(2) define "mitigation" very similarly to the hierarchy FWS has proposed. *See* 40 C.F.R. § 1508.20; 81 Fed. Reg. at 12395.

But NEPA consultations of this kind are often at the more preliminary stages of the "detailed statement" inquiry, stages where mitigation efforts are undertaken in order to avoid having to prepare the detailed statement at all. *See, e.g.*, Council on Environmental Quality, Notice of Availability: Final Guidance for Federal Departments and Agencies on the Appropriate Use of Mitigation and Monitoring and Clarifying the Appropriate Use of Mitigated Findings of No Significant Impact, 76 Fed. Reg. 3843, 3845 (2011). Here, again, mitigation commitments from third parties must be carefully scrutinized at conservation's very earliest stages because they are often not readily enforced after-the-fact. *See, e.g.,* City of Blue Ash v. McLucas, 596 F.2d 709, 712 (6th Cir. 1979).

When an action agency finds its proposal will not result in a significant enough impact in the environment to necessitate a

"detailed statement" pursuant to § 102(2)(C), it issues a "finding of no significant impact" (FONSI). *See* 40 C.F.R. § 1501.4(e). Increasingly, it is these FONSIs themselves that are adopted on the basis of proposed "mitigation" measures which aim to reduce the impact of the subject action below the § 102(2)(C) "significance" threshold. And, increasingly, these mitigation promises have become the subject of federal court scrutiny. *See, e.g.*, National Parks & Conserv. Ass'n v. Babbitt, 241 F.3d 722, 731-37 (9th Cir. 2001); Friends of Back Bay v. U.S. Army Corps of Eng'rs, 681 F.3d 581, 583-89 (4th Cir. 2012).

So-called "mitigated FONSIs," thus, often involve FWS in assessing the likely efficacy of proposed mitigation measures to lessen the impact of a proposal below a legal threshold, § 102(2)(C) "significance," which is, itself, a quagmire (so to speak). *See, e.g.*, Jamison E. Colburn, *The Risk in Discretion: Substantive NEPA's Significance,* 41 **Colum. J. Envtl. L.** 1 (2016). CEQ regulations require some discussion of mitigation in the event a detailed statement is prepared. *See* 40 C.F.R. § 1502.14(f). But "mitigated FONSIs" can present much harder questions about what consequential mitigation entails, what level of certainty must obtain to the mitigation measures proposed, and who is responsible. Mitigation discussions in these contexts are not simply for information purposes, *see*

Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 352 (1989), but rather for purposes of ensuring every covered action that triggers the § 102(2)(C) threshold is in fact the subject of a "detailed statement" on its impacts and alternatives.

It is no doubt in the action agency's best interest (and, beyond the agency, any ostensible permittee's best interest) for FWS to have a consistent, justifiable approach to mitigation before offering its advice/consultation ad hoc. This is especially true where mitigation allowed to affect the NEPA threshold determination can be considered "off-site." *See, e.g.*, Preservation Coalition, Inc. v. Pierce, 667 F.2d 851, 860-61 (9th Cir. 1982) (differentiating between mitigation actions that are on- versus off-site and project-related versus unrelated); People ex rel. Van de Kamp v. Marsh, 687 F. Supp. 495, 500-01 (N.D. Cal. 1988) (rejecting off-site mitigation lacking sufficient assurances by permittee that plan would be implemented as wrongly included in NEPA § 102(2)(C) "significance" threshold determination).

CEQ takes the position that mitigated FONSIs are appropriate only where sufficient legal authority and sufficient resources exist to conclude that mitigation-in-fact is likely to occur. In that event, though, CEQ also counsels agencies that the mitigation commitments "should be clearly described in the

mitigated FONSI document" and that "appropriate public involvement during the development of the . . . FONSI" are necessary to the "integrity of the NEPA process." Council on Envtl. Quality, Final Guidance, 76 Fed. Reg. at 3848. To whatever extent FWS's mitigation policy, through its hierarchy of needs, landscape-scale ambitions, coordination prompts, and substantive guidance on what constitutes actual, adequate mitigation of impacts to its "trust resources," improves the clarity of selected "means and measures," it will improve the action agency's threshold NEPA determinations and, presumably, the quality of its exercises of discretion.

Conclusion

In conclusion, the proposed policy on mitigation is an internal guidance document that aims to regularize agency uses of discretion, increase agency transparency, and connect individual cases in the field to broader agency priorities and agency expertise latent within the institution. The courts have repeatedly signaled in a variety of contexts that, in general, such actions are to be encouraged from administrative agencies. I see no reason to distinguish FWS's proposal from that broader inter-branch dynamic. I would like to thank Chairman Sullivan, Ranking Member Whitehouse and the rest of the Subcommittee again

for the opportunity to participate in today's hearing. It has been my pleasure to be with you today.