

**Testimony of**  
**Ryan Yates, Chairman of the National Endangered Species Act Reform Coalition**

*before*

**The Senate Committee on Environment and Public Works**  
**Subcommittee on Fisheries, Water, and Wildlife**

*on*

**Reviewing the Proposed Revisions to the U.S. Fish and Wildlife Service Mitigation Policy**

**September 21, 2016**

Chairman Sullivan, Ranking Member Whitehouse, and Members of the Subcommittee:

My Name is Ryan Yates. I currently serve as Chairman of the National Endangered Species Act Reform Coalition, also known as NESARC, and I am pleased to provide testimony today on the United States Fish and Wildlife Service's ("FWS") proposed revisions to its Mitigation Policy.

NESARC is the country's oldest broad-based, national coalition dedicated solely to achieving improvements to the Endangered Species Act ("ESA") and its implementation. NESARC's membership includes agricultural interests, cities and counties, commercial real estate developers, conservationists, electric utilities, energy producers, farmers, forest product companies, home builders, landowners, oil and gas companies, ranchers, water and irrigation districts, and other businesses and individuals throughout the United States. NESARC and its members are committed to promoting effective and balanced legislative and administrative improvements to the ESA that support the protection of fish, wildlife, and plant populations as well as responsible land, water, and resource management.

**Summary of Concerns**

The business concerns and activities of NESARC's members frequently require them to seek approval from federal agencies for permitting and authorization decisions. A necessary element of these federal permitting and authorization decisions is the review, under the applicable statute, of potential avoidance and minimization measures that may be required to reduce the effects of a proposed project on environmental resources. NESARC's members invest a significant amount of time and resources in designing and implementing projects, and use a variety of avoidance, minimization, and compensatory mitigation tools to address adverse environmental effects. Our members seek clear and consistent standards that are within the scope of the applicable governing law and that will guide the implementation of mitigation for a particular permit or authorization.

NESARC's primary concern with the proposed revisions to the Mitigation Policy, and the Administration's other recent policies addressing mitigation, is that they test the boundaries of agency authority and likely exceed the scope of the applicable statutory framework without offering clear and transparent guidance to the regulated community. Federal agencies cannot, by fiat,

attempt to impose a net conservation gain as an absolute mitigation requirement, absent a clear grant of such authority from Congress. In addition to the lack of authority to impose a net conservation gain standard, FWS should not implement policies that discourage innovation and are inflexible in application. For a discussion of additional concerns, I request the inclusion of the complete set of comments that NESARC submitted to FWS with respect to the Mitigation Policy in the hearing record.

Compounding the issues regarding implementation of the Mitigation Policy, FWS has recently published its draft ESA Compensatory Mitigation Policy (“CMP”). The CMP contains many of the same issues and deficiencies that are inherent in the general Mitigation Policy. NESARC is still reviewing the proposed CMP in order to submit comments and is awaiting FWS’s response to our request for an extension of the comment period.

### **Lack of Statutory Authority for Implementation of the Mitigation Policy**

The Mitigation Policy assumes a level of FWS authority that is inconsistent with the statutes that invest authority in the agency. While FWS proposed the Mitigation Policy in response to directives from the President and the Secretary of the Interior, these policies cannot supplant, expand, or allow deviations from FWS’s existing statutory responsibilities and obligations; these responsibilities and obligations are grants from Congress and cannot be created by executive action. Before implementation, FWS must provide additional, specific guidance on how the Mitigation Policy will be applied within the various statutory frameworks that are referenced in the policy and must clarify the interplay between the authorizations given to FWS under a particular statute and the application of the Mitigation Policy. FWS also must recognize that the imposition of any mitigation measures under the Mitigation Policy is constrained by, and cannot exceed, the scope of authority provided by an applicable statute.

Particularly problematic is FWS’s proposal to abandon present policies and apply the Mitigation Policy to actions undertaken pursuant to the ESA. The ESA establishes specific standards and requirements for the scope and nature of any avoidance, minimization and mitigation measures that may be imposed by FWS. Further, the ESA requires specific analysis and evaluation of impacts to listed species and designated critical habitat. The Mitigation Policy would impermissibly expand the scope of the ESA to rely upon landscape-scale approaches, net conservation gains, and evaluation of species in a manner that is inconsistent with the requirements of ESA Section 7 and Section 10. These statutory requirements cannot be overridden or undermined by the application of a general FWS Mitigation Policy.

The Mitigation Policy also fails to explain the statutory basis or provide guidance on implementation of certain elements. For example, the Mitigation Policy fails to recognize that FWS cannot recommend or require “no action” or the “avoidance of all impacts” unless it has the specific statutory authority to do so. Further, FWS fails to identify the statutory mechanisms or procedures that are to be used to coordinate with other Federal agencies and seek implementation of the Mitigation Policy.

### **No Basis for the Imposition of a “Net Conservation Gain” Standard**

The central goal of the Mitigation Policy is to effectuate a “net conservation gain” (or, at a minimum, no net loss) in the status of affected resources. However, the Mitigation Policy fails to

provide the basis and authority for imposing a net conservation gain requirement and needs additional clarification on how the implementation of such a requirement would occur in practice.

Under the ESA, there is no mandatory obligation to improve or maintain the current status of affected resources. On the contrary, the statute provides specific standards in Sections 7 and 10 regarding what may be required of a project proponent. Under ESA Section 7, FWS must evaluate whether a federal action is likely to jeopardize the continued existence of any listed species or result in the destruction or adverse modification of critical habitat. Jeopardy occurs when an action would “reduce appreciably the likelihood of both the survival and recovery of a listed species,” and adverse modification occurs when an action would “appreciably diminish the value of critical habitat for the conservation of a listed species.” Further, if take of a listed species will occur, FWS will provide an incidental take statement and the reasonable and prudent measures considered “necessary or appropriate to minimize such impact.” The ESA requirements to avoid jeopardy or adverse modification and to minimize the impact of any take of listed species do not equate to the “no net loss” or “net conservation gain” standards articulated in the Mitigation Policy, and there is no statutory authority to impose such requirements in the Section 7 consultation context.

Similarly, under ESA Section 10, an applicant for an incidental take permit must submit a habitat conservation plan (“HCP”) that addresses several criteria, including the impacts resulting from the take of the species and the steps that will be taken to minimize and mitigate such impacts. FWS will issue the permit if it finds, in part, that the applicant “will, to the maximum extent practicable, minimize and mitigate the impacts of such taking,” and the survival and recovery of the species will not be appreciably reduced. In its longstanding interpretation of these criteria, FWS stated that neither the ESA nor its implementing regulations require that an HCP result in a “net benefit to affected species.” Thus, as FWS has recognized, Section 10 does not provide authority to require applicants to achieve a net conservation gain.

A further problem posed by FWS’s approach is that not only is there a lack of statutory authority, but also, the term “conservation gain” is not easily defined. In practice, this concept of a “conservation gain” is likely to evade consistent application and will have additional consequences that have not been fully considered. For example, in some cases, FWS may be able to quantify the specific extent of an impact (e.g., acres of wetlands or number of species taken) and thereby calculate a corresponding amount of mitigation. But FWS is absolutely silent as to whether net conservation gain is to be solely measured on a numerical basis or whether FWS intends to undertake a qualitative judgement as to the level of mitigation that actually achieves this ephemeral standard. In many other circumstances, it will not be possible for FWS to make such definitive calculations (e.g., multiple species, varied habitat features, etc.), which will then undermine the ability to assess any mitigation obligation with specificity. Further complicating matters, if FWS uses a net conservation gain approach to require mitigation that is not commensurate with the impacts to species or habitat, FWS’s application of a “net conservation gain” standard could result in a regulatory taking.

### **The Landscape-Scale Approach is Overly Expansive and Fails to Consider the Role of States and Local Jurisdictions in Species Conservation**

A central component of the Mitigation Policy is the adoption of a “landscape approach” that attempts to place all FWS decisions—including species-specific actions under the ESA—into a decision framework that emphasizes analysis under a broader ecological, or “landscape-scale”

context. However, FWS cannot incorporate landscape-scale mitigation into permitting decisions or authorizations without explicit statutory authority that requires such a broad ecological approach. Further, FWS's definition of landscape and its reliance on a landscape-scale approach are not conducive to consistent application and would undermine the role of States and other local jurisdictions in the management of species and habitat.

FWS fails to recognize that the use of a landscape approach is often precluded by a more limited scope of impact analysis required by the underlying statute for which the analysis is being undertaken. For example, when there will be incidental take pursuant to an action analyzed in ESA Section 7 consultation, FWS is required to develop reasonable and prudent measures that will "minimize such impact." Similarly, for an incidental take permit under ESA Section 10, the applicant must "minimize and mitigate the impacts of such taking" to the maximum extent practicable. FWS cannot convert this limited scope of authority, which is focused on the impact of take of the species in a particular area, to an authorization to expand the minimization component to a landscape scale. Likewise, developing minimization measures for a particular action does not equate to an obligation to prevent fragmented landscapes or to restore core areas and connectivity for species.

If FWS retains the proposed landscape-scale approach in its Mitigation Policy, it must be refined through more specific criteria and guidance on its implementation. As proposed, FWS' approach could be construed to incorporate an infinite number of factors that may be incapable of resolution under FWS's limited authorities. Instead, the Mitigation Policy must be limited to application in those instances where there is a nexus between the geographic area that may be impacted by a proposed project, the area where mitigation may be appropriate, and the scope of the landscape that FWS will consider based on additional ecosystem stressors. In particular, FWS cannot rely upon a "landscape approach" to attempt to address climate-related impacts which often cannot be reduced to analysis at a local or project-level scale. FWS should also ensure that mitigation requirements achieve an efficient result—in terms of timing, benefits and costs incurred—and the proponent of an activity with a small permanent footprint and/or temporary effects should not be burdened by escalating mitigation measures based upon other activities or effects within a landscape.

Finally, any application of a landscape approach must consider the role of States, counties and other government entities in managing fish and wildlife resources and their habitats, and the associated costs and benefits of imposing mitigation requirements in particular circumstances. Given the need for, and documented success of, local conservation efforts in conserving species and habitats, FWS should ensure that these efforts are considered and not undermined through the application of a larger-scale mitigation analysis.

### **The Mitigation Policy Must Provide for Flexibility and Innovation to Encourage Conservation Efforts**

Assuming that FWS demonstrates the requisite statutory authority, to be successful, the Mitigation Policy must provide incentives and reduce the barriers for landowner participation. FWS must recognize voluntary conservation planning efforts that are associated with a particular species, habitat, or activity and allow such efforts to be applied as mitigation under the Mitigation Policy. In addition, FWS must emphasize the incorporation of streamlined permitting reviews, the reduction of excessive federal bureaucracy, and the flexibility to allow new approaches to mitigation.

The Mitigation Policy currently requires that compensatory mitigation be implemented before there are impacts associated with a particular project. This requirement for advance compensatory mitigation is unrealistic and incompatible with the process by which project permitting and financing determinations are made. Depending upon the species or habitat, compensatory mitigation may not be available at the time impacts from a project occur. In such cases, FWS should not deny regulatory approval for, or delay the initiation of, projects that impact that species. As a related issue, in most instances, funding for compensatory mitigation is not available and will not be advanced until after a permitting decision is complete and other project milestones have been achieved. FWS must recognize that strict adherence to advance mitigation requirements can have negative implications on the ability to secure necessary funding for a project to proceed towards implementation.

The Mitigation Policy also states that compensatory mitigation must be in addition to any existing or foreseeably expected conservation efforts planned for the future. This restriction will have a chilling effect on any voluntary efforts that a party may be willing to undertake. For example, during the development phase of a project, a landowner or project proponent may modify the scope or location of the contemplated activity to avoid or minimize impacts to species or habitats. In other circumstances, parties often will undertake conservation efforts with the expectation that other future activities may require offsetting mitigation (e.g., a county initiating a long-term planning process to improve water quality before a specific project within the watershed is developed). FWS must take these proactive measures into consideration when assessing any mitigation associated with the activity under review. Otherwise, FWS will create a strong disincentive for parties to incorporate avoidance and minimization strategies into the design of their actions and will undermine efforts to promote the long-term conservation of species and habitats.

## **Conclusion**

While NESARC recognizes that mitigation is a tool which can be required in the application and approval of certain federal permits, the proposed FWS Mitigation Policy is overly broad and lacks the requisite statutory authority for implementation. Unless revised and clarified, the Mitigation Policy will introduce uncertainty into project planning, impose significant additional costs, delay or prevent the issuance of necessary permits and authorizations, and reduce incentives for participation in efforts that would conserve species and their habitat. FWS must reevaluate its approach to the imposition of mitigation requirements to ensure that it is consistent with applicable law and encourages cost-effective solutions, where necessary, that promote stakeholder participation.

Thank you again for the opportunity to testify. I am happy to answer any questions you might have.