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January 5, 2018

Gregory Sheehan, Principal Deputy Director  
U.S. Fish and Wildlife Service  
U.S. Department of the Interior  
1849 C Street, N.W., Room 3331  
Washington, D.C. 20240

Dear Mr. Sheehan:

The Western Governors' Association (WGA) appreciates the opportunity to respond to the U.S. Fish and Wildlife Service's (FWS or Service) request for comments on the FWS Mitigation Policy [[81 FR 83440, November 21, 2016](#)] and the Endangered Species Act Compensatory Mitigation Policy [[81 FR 95316, December 27, 2016](#)].

#### **STATEMENT OF INTEREST**

WGA represents the Governors of the 19 western states and 3 U.S. territories in the Pacific. The Association is an instrument of the Governors for bipartisan policy development, information-sharing and collective action on issues of critical importance to the western United States.

Western Governors appreciate the Service's efforts to review both agency-wide and compensatory mitigation (CMP) policies (collectively referred to as "mitigation policies") under the Endangered Species Act (ESA). Mitigation plays an important role in wildlife management and conservation, and Governors rely on its use in developing and executing species conservation strategies. Governors bear responsibility for managing state interests, authorities and property rights within state borders – including fish and wildlife – and oversee state agencies charged with properly managing wildlife, habitat and related resources within their states. Where state mitigation standards are in place, consistency with existing state policy should be a guiding principle for any revision to the Service's mitigation policies. In circumstances where the primary trust responsibility rests with the Service, close coordination, consultation, and adherence to appropriate notice and comment procedures as required under the Administrative Procedure Act can help ensure that mitigation approaches are informed by the best available science and data, are responsive to state specific conservation and development needs, and are positioned to support recovery and long-term management objectives.

Western Governors, in [a letter](#) dated January 21, 2014, requested that any Department of the Interior (DOI) mitigation requirements with the potential to affect state and private land be:

- Developed in cooperation with the Governors in whose states DOI lands are situated; and
- Clearly defined and predictably implemented so proper and reasonable mitigation can be incorporated in project planning.

## **NET CONSERVATION GAIN / NO NET LOSS**

The mitigation policies were developed in 2016 to adhere to existing directives established under former President Obama's Memorandum on Mitigating Impacts on Natural Resources from Development and Encouraging Related Private Investment (November 3, 2015). The Presidential Memorandum directed federal agencies to adopt the mitigation hierarchy of avoidance, then minimization for harmful effects to land, water, wildlife and other natural resources resulting from development or disturbance activities. Remaining impacts that cannot be abated through avoidance and minimization were to be addressed through compensatory mitigation. This direction broadly affirms the existing guidance and longstanding practice regarding the mitigation hierarchy established in 1978 under the Council of Environmental Quality's implementing regulations.<sup>1</sup> In addition, under the Presidential Memorandum, federal mitigation policies were to achieve a net-benefit goal (net conservation gain) or, at a minimum, to result in no net loss of natural resources.

President Trump's Executive Order 13783, Promoting Energy Independence and Economic Growth (March 28, 2017), rescinded the Obama Presidential Memorandum. Consequently, a review of the "net conservation gain" standard established under the Service's 2016 mitigation policies is appropriate and timely.

In their [comments](#) dated June 9, 2016, Western Governors note:

Governors are concerned by the significant amount of uncertainty surrounding the "net conservation gain" goal. The proposal does not delineate how FWS will determine that "net conservation gain" has occurred, or is likely to occur. The proposal also does not identify parameters to ensure the "net conservation gain" principle is applied and implemented consistently throughout the West. Finally, the Proposal does not consider what role – if any – states will have in defining "net conservation gain" or assessing mitigation plans and actions to determine the "net conservation gain."

Governors recognize that diversity of conceivable species, habitat, and project-specific circumstances make quantifying measures, with clearly defined goals, for compensatory mitigation difficult. Nevertheless, Governors remain concerned about the potential inconsistent use and lack of assessment criteria of a "net conservation gain" goal, and they believe that measures should be designed to avoid inappropriate uses of the goal that disproportionately place the burden of responsibility for recovery objectives upon a limited set of project proponents. While Governors remain concerned about the application of the "net conservation gain" goal, they recognize that mitigation of development impacts to habitat or natural resources must account for a level of risk and uncertainty that a particular mitigation action may fail to adequately offset impacts to wildlife and habitat. The Service should acknowledge a variety of tools and measures for incorporating risk and uncertainty based on the diverse experiences of states.

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<sup>1</sup> [40 CFR 1508.20](#)

Any revision to the Service's 2016 mitigation policies should be developed in cooperation with Governors, and the state agency officials they designate, to achieve the following objectives:

- Provide measurable habitat and conservation values, services and functions that are at least equal to the lost or degraded values, services and functions caused by the impact.
- Incorporate measures to account for a level of risk that a particular mitigation action may fail or not achieve its stated objectives, and uncertainty about the level and duration of estimated impacts.
- Provide benefits that are durable and in place for at least the duration of the residual impacts.
- Offer transparency and certainty to developers and regulators.

States have the responsibility to establish appropriate statutes, regulations, policies and programs to manage wildlife within their borders. This responsibility extends to the development of mitigation standards and implementation of compensatory mitigation for species under their management purview. Compensatory mitigation approaches vary from state to state, but they are designed to fully offset residual impacts to habitat function.

Governors' urge the Service to adopt and implement state-supported compensatory mitigation programs and policies. Consistency between the Service's mitigation standards and those in state-supported programs allows wildlife managers, state and federal regulators, and developers to use a consistent compensatory mitigation program across differing land ownership within a state.

## **LANDSCAPE-SCALE CONSERVATION**

Former Secretary of the Interior Sally Jewell issued a Secretarial Order (S.O.) on October 13, 2013 entitled Improving Mitigation Policies and Practices of the Department of the Interior. The S.O. called for a landscape-scale approach to development and conservation planning, including mitigation. Secretary Zinke issued an S.O. on March 29, 2017, entitled American Energy Independence which revoked Secretary Jewell's S.O. and called for "a thorough reexamination... of the policies set out in Secretary Jewell's Order."

Governors recognize the need for flexibility in approaching mitigation based on unique circumstances and individual state population objectives. Governors also recognize that, in some cases, it is necessary to consider both site-specific and cumulative effects of any disturbance action. However, questions persist regarding how landscape-scale efforts are defined in terms of scale, scope, funding, and scientific consistency and a nation-wide landscape-scale conservation approach may not be appropriate for all states and circumstances. The Service's policy should more affirmatively acknowledge state plans such as State Wildlife Action Plans and should incorporate, where applicable, state data to inform deliberations regarding an appropriate scale for mitigation. Furthermore, close consultation with states is paramount at both the landscape and site-specific scales when dealing with mitigation strategies in areas of mixed land ownership. Mitigation should only be required at spatial and temporal scales, which have been determined by sound science. As determined by the WGA Species Conservation and ESA Initiative (Initiative), the term "landscape-

scale” is multi-faceted and can have different meanings to different stakeholders. We refer you to the Initiative’s [Special Report](#) and [Appendix](#) for a fuller discussion of these issues.

Through our efforts in respective WGA Initiatives on Species Conservation and the Endangered Species Act, National Forest and Rangeland Management, and Biosecurity and Invasive Species, Western Governors are actively engaged in working with each other and federal partners to engage in cross-boundary land management strategies. We invite DOI to continue working with us on those Initiatives and associated conversation on cross-cutting management activities across the western working landscape.

## COORDINATION

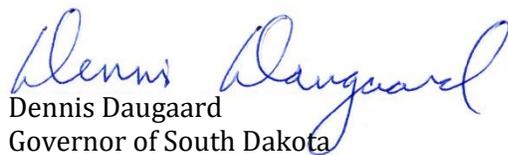
Throughout the review process on the Service’s 2016 mitigation policies, Western Governors requested that the Service engage in substantive and ongoing coordination with Governors to create clarity around compensatory mitigation in the West and any potential modifications to the “net conservation gain” standard. That request went largely unanswered by DOI.

Governors strongly urge DOI and the Service to engage with Western Governors in development of a federal-state coordination process that would facilitate cooperation on land management challenges such as mitigation policy. Western Governors have articulated a detailed vision of what that model should entail in WGA Policy Resolution [2017-01](#), *Building a Stronger State-Federal Relationship*<sup>2</sup>.

## CONCLUSION

Western Governors welcome the opportunity to engage with the Service on this very important issue. We hope and expect to work closely with DOI and the Service on development of federal land management tools that can benefit western lands.

Respectfully,



Dennis Daugaard  
Governor of South Dakota  
Chair, WGA



David Ige  
Governor of Hawaii  
Vice Chair, WGA

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<sup>2</sup> “Each Executive department and agency should be required to have a clear and accountable process to provide each state – through its Governors as the top elected official of the state and other representatives of state and local governments as he or she may designate – with early, meaningful and substantive input in the development of regulatory policies that have federalism implications. This includes the development, prioritization and implementation of federal environmental statutes, policies, rules, programs, reviews, budgets and strategic planning.”