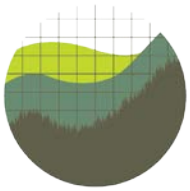

Institute *for*
Policy Integrity
NEW YORK UNIVERSITY SCHOOL OF LAW

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Gregory Sheehan, Principal Deputy Director, FWS

Dockets: FWS-HQ-ES-2015-0126 & FWS-HQ-ES-2015-0165

Subject: Comments on Mitigation Policies of the U.S. Fish and Wildlife Service—Advantages of Retaining a "Net Conservation Gain" Goal to Facilitate Robust Market-Based Mitigation Programs

I served as consultant to the Administrative Conference of the United States on their recently adopted *Recommendation 2017-4 on Marketable Permits*, as published in the *Federal Register* last week.[1] That Recommendation and my related work for the Administrative Conference are relevant to FWS's mitigation policies because conservation banks and in-lieu fee programs are types of marketable permit programs. FWS has called for comments on whether now to retain or remove the goal of net conservation gain within its mitigation policies as adopted in 2016,[2] and I submit these comments to highlight the important role of a net conservation goal in facilitating the successful use of market-based mitigation programs like conservation banks and in-lieu fees. While the rationales given in 2016 for FWS's net conservation goal—namely, to decrease the gap between the current and the desired status of a resource pursuant to the agency's statutory missions,[3] and to promote "conservation" under the Endangered Species Act by helping species recover to the point where they no longer need to be listed as endangered[4]—may be sufficient bases for preserving that goal, the aspiration to facilitate the continued use of market-based mitigation approaches provides an independent and powerful justification for the net conservation goal.

Mitigation banks and in-lieu fee programs are an increasingly used and especially cost-efficient means of achieving conservation goals without unnecessarily burdening project developers with the costs and inefficiencies of permittee-managed mitigation.[5] FWS has repeatedly recognized the value of such market-based approaches, and the agency specifically noted in 2016 that one benefit of its mitigation policy was the "opportunity it creates for a market-based approach."[6]

As the Administrative Conference recognized in its Sixth Recommendation on Marketable Permits, the success of an offset credit program depends on the ability of the regulator to "verif[y] that credits represent *real* offsets."[7] The consultant's report supporting the Recommendation elucidates what a "real" offset credit entails. Real credits must be "additional," meaning they reflect actions that would not have occurred without the financial incentive provided by the regulatory market.[8] Real credits must

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[1] 82 Fed. Reg. 61,728, 61,730 & n.1 (Dec. 29, 2017) (citing my report as consultant).

These comments do not necessarily reflect the views of ACUS or of New York University. The views expressed here are my own.

[2] 82 Fed. Reg. 51,382 (Nov. 6, 2017).

[3] 81 Fed. Reg. 83,440, 83,450 (Nov. 21, 2016).

[4] 81 Fed. Reg. 95,316, 95,336 (Dec. 27, 2016).

[5] Jason Schwartz, *Marketable Permits: Recommendations on Applications and Management*, Final Report to the Administrative Conference of the United States (2017), https://www.acus.gov/sites/default/files/documents/Marketable%20Permits%20Report-final.pdf.

[6] 81 Fed. Reg. at 95,333.

[7] 82 Fed. Reg. 61,728, 61,733 (Dec. 29, 2017) (emphasis added).

[8] Schwartz, *supra*, at 55.

also be sufficiently certain and permanent: if the mitigation is not fully completed in advance of the credit's submission to the regulator as proof of compliance, there could be considerable uncertainty on whether the promised mitigation outcome for the relevant species or habitat will actually materialize and endure.[9]

A net conservation gain policy is an effective tool to help regulators ensure that approved offset credits generated by conservation banks and in-lieu fee programs are real, additional, and sufficiently certain and permanent. By pushing beyond the point of simply no net loss, a net gain goal provides a beneficial buffer to ensure that, at minimum, at least no net loss will result. Should some portion of the mitigation offset credit's intended outcomes fail to materialize and endure—for example, should some acres of habitat fail to thrive due to natural disaster, financial mismanagement, or scientific uncertainty around a complex ecosystem—such a buffer can help ensure that, overall, no net harm is done.

In 2016, FWS explained that to design measures to achieve the goal of net conservation gain, regulators "should take into account the degree of risk and uncertainty associated with both predicted project effects and predicted outcomes of the mitigation measures."[10] FWS further connected the net gain goal with the concept of additionality.[11] In short, when allowed by relevant statutory authority,[12] applying a goal of net conservation gain prompts regulators to build in an adequate buffer to protect against the risk that promised mitigation outcomes will not materialize, endure, or be additional beyond the status quo. As FWS put it in 2016: "To buffer risk and reduce uncertainty, it is often helpful to design compensatory mitigation programs and projects to achieve measures beyond no net loss to attain sufficient conservation benefits for the species."[13] Indeed, FWS observed that applicants often request additional measures "for greater future assurances,"[14] and the buffer created by the net gain goal can increase regulatory predictability and shorten project reviews for regulated parties.[15]

Market-based approaches to mitigation could lose the support of the public if credits are not generally additional, certain, and permanent, and could lose the support of regulated parties if the approval process for market-based programs is not predictable or is unduly lengthy. Because a net conservation gain goal creates a buffer that promotes real credits and predictable compliance obligations, the net gain goal is especially important to the continued success of mitigation banks and in-lieu fees. Though mitigation banks and in-lieu fee programs obviously thrived in the years before the goal of net conservation gain was officially enshrined in the 2016 mitigation policy, the goal could prove crucial to the continued expansion of banks and in-lieu fees in the future, by building an adequate buffer against risk and uncertainty into all mitigation project approvals. Because these market-based approaches reduce compliance costs, reduce administrative burdens, and achieve environmental objectives as—or more—effectively than other approaches,[16] promoting the continued or increased use of banks and in-lieu fees is a worthwhile aim.

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[9] *Id.* at 56-57; *see also id.* at 56-57 on leakage.

[10] 81 Fed. Reg. at 83,475.

[11] 81 Fed. Reg. at 95,330.

[12] The 2016 Mitigation Policies made clear that the net gain goal was a goal, not a requirement, and it applied only when consistent with statutory authority. 81 Fed. Reg. at 83,472.

[13] 81 Fed. Reg. at 95,343.

[14] 81 Fed. Reg. at 95,338.

[15] 81 Fed. Reg. at 95,343.

[16] *See generally* Schwartz, *supra*.

Furthermore, because mitigation banks and in-lieu fee programs facilitate landscape-scale mitigation projects that naturally achieve net gains through economies of scale,[17] a default goal of net conservation gain will encourage greater use of efficient market-based approaches versus less efficient, permittee-managed mitigation.

To preserve and build on the success of market-based approaches in habitat and species mitigation requirements, FWS should preserve the goal of net conservation gain in its mitigation policies.

Sincerely,

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[17] 81 Fed. Reg. at 95,338.