October 17, 2016

Daniel M. Ashe  
Director  
Fish and Wildlife Service  
U.S. Department of Interior  
1849 C Street, N.W.  
Washington DC 20240


Dear Director Ashe:

The American Association of State Highway and Transportation Officials (AASHTO) welcomes the opportunity to submit these comments on the proposed Compensatory Mitigation Policy published by U.S. Fish and Wildlife Service ("USFWS" or "Service") in the Federal Register on September 2, 2015. (81 FR 61032, Sept. 2, 2016) We incorporate by reference in these comments our previous comments, submitted on May 9, 2016, on the Service’s proposed revisions to its 1981 Mitigation Policy (81 FR 12379, March 8, 2016).

AASHTO is a nonprofit, nonpartisan association representing the State transportation departments in the 50 states, the District of Columbia, and Puerto Rico. It represents the departments with respect to all five transportation modes: air, highways, public transportation, rail, and water. Its primary goal is to foster the development, operation, and maintenance of an integrated national transportation system. Our members work closely with USDOT agencies to operate, maintain, and improve the nation’s transportation system.

Our members are responsible for carrying out thousands of road improvement projects every year, ranging from road repair or widening projects to the construction of entirely new roads. Many of these projects involve impacts on species that fall within the purview of the proposed policy. These responsibilities give State departments of transportation an interest in the mitigation standards and policies for species affected by these projects.

As stated in our comments on the Services’ proposed revisions to 1981 Mitigation Policy, we support efforts to promote landscape-scale approaches to mitigation, provided that mitigation decisions are made in a timely manner and are based on science. We expressed concerns with several aspects of that policy that we felt could increase the complexity, cost, and uncertainty of the environmental review process for transportation projects.
In considering the proposed Compensatory Mitigation Policy, we again express support for the policy’s emphasis on landscape-level approaches to mitigation, while noting concerns related to the potential compliance burdens and uncertainty that could be created by the new policy.

1. **Required vs. Recommended Mitigation**

The proposed policy recognizes that the Service’s authority to require mitigation under the Endangered Species Act is limited; it refers in several places to mitigation measures that the Service may “recommend or require.” (81 FR 61034; 61036; 61039). While we welcome these statements, we are concerned that the revised Mitigation Policy, together with this Compensatory Mitigation Policy, could become viewed in practice as imposing a general requirement to mitigate, at ratios specified by the Service, for impacts to threatened and endangered species, migratory birds, and other species and their habitats.

We urge the Service to address explicitly the distinction between “recommended” and “required” mitigation, and to specify the limited circumstances under which the Service would have authority to require mitigation. We also urge the Service to make clear that there is no general “duty to mitigate” all impacts to species and their habitats.

2. **Ability to Use Credits to Mitigate Impacts**

The proposed policy defines the conditions under which project sponsors can use credits from conservation banks as mitigation for impacts of a project, as an alternative to project sponsor-provided mitigation. Such a system has the potential to yield better environmental outcomes while at the same time reducing costs and compliance burdens on project sponsors. Our potential concern with this type of system relates to project sponsors’ ability to use the credits given the potential complexity of establishing an accepted system of credits applicable to a wide range of species and habitat types.

The proposed policy states that metrics “must be science-based, quantifiable, consistent, repeatable, and related to the conservation goals for the species” and that the “[m]etrics used to calculate credits should be the same as those used to calculate debits for the same species or habitat type.” (81 FR 61037) This policy envisions credits as a currency that can be bought and sold, with a value that can be determined by a market. Such a system is challenging to implement even in the context of wetlands permitting, because credits developed for one wetland type in one watershed may not be usable for a different wetland type or in a different watershed. By comparison, a credits system for species is far more complex given the far larger number of species and habitat types that may need to be mitigated.

For this type of system to be viable, it must allow for development of credits that can be readily used to mitigate for a variety of impacts. The policy recognizes this point by allowing for the “stacking” of mitigation credits, but also recognizes that “Using a stacked credit separately to reflect its various values is an ecologically challenging accounting exercise.” (81 FR 61055)

We agree – and we encourage the Service in the policy to provide specific direction about ways that credits for species protection and wetlands protection can be bundled to maximize the availability of credits for projects within a given geographic region.
3. Development of Landscape-Level Conservation Plans

The proposed policy envisions that mitigation decisions will be based on “landscape-scale conservation plans” (81 FR 61037) and recognizes that such plans may be developed by “Federal, State, and/or local government agencies, Tribes, or appropriate non-governmental organizations, in consultation with relevant stakeholders.” (81 FR 61058) While this concept holds merit for its intentions of being inclusive of a variety of stakeholders, the implementation challenge lies in the development of those plans for the wide range of species and habitat types for which mitigation may be needed. The proposed policy encourages the development of such plans, but provides relatively little direction about what such plans should include, nor is there a mechanism for ensuring such plans are developed and are based on science as opposed to specific organizational interests. If conservation plans are not in place, or are deemed inadequate by the Service, it will be difficult to achieve the landscape-scale approach envisioned by this policy.

To address this concern, we encourage the Service to provide a template for development of conservation plans that can be relied upon as the basis for mitigation decisions under this policy. This guidance should explain clearly what level of detail is expected in the plan in order for the Service to rely upon the plan as the basis for approving the use of mitigation credits. We also encourage the Service to recognize programmatic mitigation plans, developed under 23 USC 169, as a potential tool for developing conservation plans in accordance with this policy.

4. Public Agencies’ Ability to Develop Conservation Banks and In-Lieu-Fee Programs

The proposed policy encourages the establishment of conservation banks, in-lieu-fee programs, habitat credit exchanges, and other third-party mitigation arrangements. (81 FR 61034) As the policy notes, these types of arrangements are “instrumental to achieving effective compensatory mitigation on the landscape and encouraging private investment in compensatory mitigation.” (81 FR 61033) We support the policy of incentivizing the private sector to invest in compensatory mitigation, but we believe it is equally important to ensure that public agencies can establish conservation banks and other arrangements that can be used to provide credits for mitigating the impacts of the agencies’ own projects.

In particular, we are concerned that some of the financial assurances required may be difficult for a State agency to meet, including the requirements in Section 8.3 of the policy. (81 FR 61054 to 61055). We recommend that the final policy identify financial assurance tools usable by government agencies that could be accepted by the USFWS to achieve a balanced market-based mitigation policy that results in acceptable mitigation costs.

5. Requirement for In-Kind Mitigation for Species

The proposed policy states that compensatory mitigation “must be in-kind for the listed, proposed, or at-risk species affected by the proposed action” but also states that this 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” (81 FR 61037) Our concern is that these statements may create confusion about when, and whether, in-kind mitigation is required. For example, if a project impacts habitat used for nesting, could that impact be mitigated with habitat used by the same species for a different life stage? Or by the same species for the same life stage, but in a different geographic area? We recommend that the final policy clarify the statement that in-kind mitigation is required for impacts to species but is not necessarily required for impacts to habitat.

6. Mitigation Ratios

The proposed policy states that mitigation ratios can be used as a risk-management tool but notes that they “should be reserved for dealing with the true uncertainty of any mitigation program or for policy-based incentives and not to compensate for limited understanding of species’ conservation needs” and “must be based in science, readily explained and understood, and consistently applied.” (81 FR 61046) We agree with these statements and encourage the Service to retain them in the final policy.

Further, as noted earlier in our comments, the policy should encouraging the “bundling” of mitigation credits so that credits from a single bank or other instrument can be used to compensate for impacts to multiple species and other resources. To that end, it would be helpful if the final policy were to address the use of mitigation ratios in the context of the bundling of mitigation credits.

7. Relationship to Section 7 Consultation

As the policy recognizes, “[c]ompensatory mitigation is a conservation measure that can be used within an appropriate context under section 7 of the ESA to address proposed actions that may result in incidental take of listed species that cannot be avoided.” (81 FR 61034) The policy also states that when an incidental take statement is included in a Biological Opinion, the incidental take statement may specify compensatory mitigation as one of the “reasonable and prudent measures” that is required as a condition of the incidental take statement.

Our concern is that this policy, together with the Service’s proposed Mitigation Policy, may be construed more broadly to establish a general “duty to mitigate” for any project that requires section 7 consultation. We urge the Service to ensure that the policy directs Service staff to maintain a clear distinction in Section 7 consultation between mitigation that is required (as a term of an incidental take statement) and mitigation that is simply recommended as a conservation measure that could be incorporated into the project.

Thank you for the opportunity to submit comments. If you would like additional input, please contact Shannon Eggleston, Program Director for Environment at (202) 624-3649 or seggleston@aashto.org.

Sincerely,

Jim Tymon
Chief Operating Officer