AGRICULTURAL & FOOD
LAW CONSORTIUM

Fourth Annual Mid-South Agricultural and Environmental Law Conference

AGENDA

Friday, June 9th

7:30 am	**Registration**
8:00 am	**Welcome & Announcements**
8:15-9:15 am	**Farm & Ranch Estate Planning: Daddy's Gone, How Do We Move On?** Christy Bartee, Batson Nolan Vance Cook, Attorney at Law
9:15-10:00 am	**Ag Lending in a Down Economy: Ag Liens, Secured Transactions and Best Practices** Jeff Peterson, Gray Plant Mooty Greg Cole, President and CEO of AgHeritage Farm Credit Services
10:00-10:15 am	***Break***
10:15-11:00 am	**Ag Lending in a Down Economy (con't)**
11:00 am-12:00 pm	**USDA Conservation Program Compliance: Pitfalls and Pointers** Grant Ballard, Ark Ag Law, PLLC
12:00-1:00 pm	**Lunch** (provided)
1:00-2:00 pm	**Considerations for Legal Ethics: "When my Picker Ain't Picking" and Other Tales from the Farm** Robert Serio, Ark Ag Law, PLLC
2:00-2:15 pm	***Break***
2:15-3:15 pm	**Compensatory Mitigation and the Future of Ag Land Use** Kerry L. McGrath, Hunton & Williams LLP
3:15-4:00 pm	**Agricultural & Environmental Law Update for the Mid-South** Panel presentations by Consortium members moderated by Harrison Pittman, Director, National Agricultural Law Center.
4:00 pm	**Adjourn**

NATIONAL AGRICULTURAL LAW CENTER
THE OHIO STATE UNIVERSITY
PennState Law
Sea Grant Law Center

Farm & Ranch Estate Planning: Daddy's Gone, How Do We Move On?

Christy Bartee, Batson Nolan
Vance Cook, Attorney at Law

Fourth Annual Mid-South Agricultural and Environmental Law Conference
June 8-9, 2017

Prepared By:
Vance W. Cook - Attorney at Law
120 East Main Street
Princeton, Kentucky 42445
270-365-6003
vancecook@bellsouth.net

REFLECTIONS ON TWENTY-FIVE YEARS OF BEING A FARM LAWYER

Topics for Presentation

- Federal Taxes to Consider
- Most Common Estate Planning Mistakes
- Most Common Problem for the Farmer's Estate and Estate Plan
- Planning for Client's Imminent Death
- Final Thoughts on Being the Lawyer for the Farmer's Estate

Federal Estate Tax

- $5,490,000 Applicable Exclusion Amount for 2017
- Portabilty (any DSUE from a predeceased spouse??)
- Unlimited Marital Deduction (U.S. Citizen)
- 40% rate above Applicable Exclusion

Federal Gift Tax

- $5,490,000 Lifetime Gift Exclusion in 2017
- 40% rate above Lifetime Exclusion
- Unlimited Marital Deduction for Gifts
- $14,000 Annual Exclusion for 2017
- Plus DSUE from a predeceased spouse??
- DON'T FORGET ABOUT DIFFERENCES IN FEDERAL GIFT TAX AND STATE GIFT TAX LAWS

Generation Skipping Transfer Tax

$5,490,000 Lifetime GSTT Exclusion in 2017

40% rate above Lifetime Exclusion

Annual Exclusion (for lifetime taxable gifts) does not apply to GSTT

Requires allocation of Exemption on 706

Portability of Exclusion Amount

- Allows a surviving spouse (W) to elect to preserve (unused exclusion amount (DSUE) from deceased spouse (H1)
- Preserved from "last deceased spouse"
- DSUE can be lost with subsequent re-marriage of surviving spouse (W) and then W surviving death of second spouse (H2). W's DSUE now comes from H2 not H1

Portability of Exclusion Amount

- Warning: Requires timely filed Form 706 for estate of first spouse to die even if estate does not meet filing threshold for 706
- Potential liability if attorney or CPA fails to advise client?
- Recommended for attorney/CPA to advise in writing of availability of Portability and have client sign statement not to file 706

Most Common Estate Planning Mistakes I Have Observed

- Failure to provide sufficient assets to fund credit shelter trust
- Failure to keep estate plan current with tax law changes
- Failure to properly draft QTIP Trust language
- Failure to seek appropriate counsel
- Failure to use appropriate tax clause
- Overuse of LLC's
- Failure to designate beneficiary for IRA's
- Case study: Post Mortem Planning: What not to do

Failure to provide sufficient assets to utilize exclusion amount

- The best drafted estate plan is worthless if the decedent has no assets to capture exclusion amount.
- Due diligence requires examination of all client assets to determine legal ownership.
- Re-titling assets and changing beneficiary designations is often more time consuming than drafting the estate plan.

Failure to provide sufficient assets to utilize exclusion amount

- Probate vs. Non-probate assets
- Probate assets consist of individually owned real property and personal property which do not have a separate beneficiary designation. Probate assets generally pass pursuant to the Decedent's Will
- Non-Probate assets typically pass to a surviving joint owner or designated beneficiary
- Consider disclaimers to realign assets
- Portability can potentially minimize this problem

Failure to properly draft QTIP Trust

- A properly drafted QTIP Trust qualifies for the federal estate tax marital deduction.
- The QTIP Trust must provide that all trust net income will be distributed to surviving spouse for life. Undistributed trust net income at spouse's death must be distributed to estate.
- No Trustee discretion allowed with respect to income distribution.

Failure to revise estate plan when estate tax laws change

- Consider common estate plan when exclusion amount was $600K
- Will leaves to children from prior marriage "amount equal to federal estate tax exemption ($600K when Will was drafted in 1996)
- Excess passes to surviving spouse outright
- In 2017, kids would receive $5.49M before spouse receives any property
- Wills and Trusts should be reviewed at least every 4-5 years
- Are we responsible to notify client's of tax law changes? Consider "dis-engagement letter"

Failure to seek appropriate counsel to prepare estate plan

- Most general practice attorneys in rural communities do not understand the federal estate tax laws
- Unfortunately, many attorneys will attempt to prepare an estate plan when they should engage co-counsel
- If a mistake is made, the attorney should have malpractice insurance, but client will have to make a claim against attorney and possibly file a lawsuit for economic damages

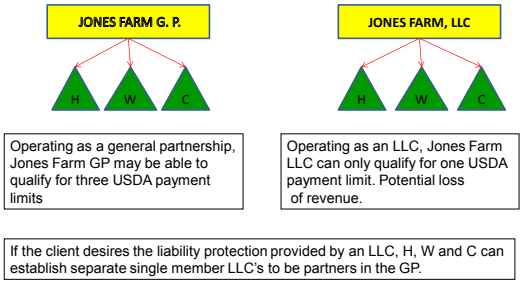
Failure to use proper tax payment clause in Will

- Many Wills use a generic tax clause which says "Pay all death taxes from residuary estate"
- So, the taxes get paid out of the probate estate
- However, the death taxes are calculated based on all assets included in taxable estate, not just probate assets
- Beneficiaries receiving non-probate assets may not have to pay any taxes
- This can potentially wipe out bequests under the Decedent's Will
- Consider blended families where Decedent has children from prior marriage and new spouse
- If significant assets pass as non-probate assets, better choice may be to use apportionment tax clause

Overuse of LLC's

- Frequently estate planning attorneys not familiar with agriculture will convince client to form LLC or Corp to carry on farming operation
- LLC is now "operator" for USDA purposes
- LLC or Corp considered one "person" for USDA payment limit purposes
- Joint operation operating as general partnership may qualify for multiple limits

Over Use of LLC's



Failure to Designate Beneficiary (DB) for IRA

- Naming a spouse as DB allows for rollover and continued tax deferral
- Naming a child may allow the child to withdraw over life expectancy
- Naming Estate as DB requires payout in no more than five years
- Failure to name a DB usually defaults to Estate being DB and five year payout
- Relief may be available if spouse is sole beneficiary of Estate (PLRs 8911006; 9402023; 9351041. Also see "Life and Death Planning for Retirement Benefits," Third Edition; by Natalie Choate)

Case Study: What Not To Do

- H & W have Wills with basic credit shelter trust and marital deduction language
- H & W have $1.2 M in assets
- Each spouse had $600K exclusion amount available
- W dies first
- Attorney and CPA fail to review Deeds
- Turns out all assets held by H & W as JTWROS
- So, all assets pass to H as surviving owner

Case Study: What Not To Do

- W has no assets to fund credit shelter trust
- H now has $1.2 M in assets and $600k exemption amount
- Easy solution was for H to disclaim W's ½ interest in jointly owned real estate
- The disclaimed ½ interest then falls into W's estate and can be used to fund credit shelter trust. Problem solved, right?

Case Study: What Not To Do

- Attorney and CPA decide H should transfer all real estate to general partnership (GP) in which Son owns ½. H & W's Trust for H also owns ½ of GP
- H has just made taxable gift to Son
- H dies shortly thereafter
- Forms 706 prepared poorly claiming 2032A discount for W's and H's Estates
- IRS audits Forms 706, reviews deeds, determines neither W's nor H's Estates qualify for 2032A valuation discount; IRS wants $

Case Study: What Not To Do

- Client forced to make malpractice claim against their first attorney (a friend)
- After 2 years of brief writing and going to IRS Appeals conference, IRS settles for $30K tax deficiency.
- Attorney's malpractice insurance paid tax deficiency and attorney fees to fix the situation.
- The Rest of the Story

Case Study: What Not To Do

- The initial attorney had three opportunities to fix the situation
- First, attorney should have reviewed client's deeds to discover survivorship provision
- Second, attorney should have advised H to file qualified disclaimer for ½ interest in jointly owned real estate. Reg. §25.2518-2(c)(4)(i)
- Third, even after missing opportunity to file disclaimer, if H had not transferred real estate to GP, H could have avoided entire estate tax liability through use of 2032A valuation discount

Most Common Problem for a Farmer's Estate: Jointly Owned Real Estate

- Dealing with jointly owned real estate
- Will leaves land to children in equal shares
- One child farms and wants to keep the land and buy out siblings; Can not agree on price
- Other children want to auction land
- Partition action pursuant to state law
- Consequences: legal fees, anger, animosity, farmland is sold (a/k/a "LAWYER FUEL")

- Most Common Problem for a Farmer's Estate: Jointly Owned Real Estate

- Solutions to avoid jointly owned real estate:
- Specific devise of real estate to one child
- Option to purchase in Will
- With multiple parcels, allocate specific parcels of land to each Child as part of equal shares; equalize with cash or life insurance
- Devise land to one child, purchase life insurance for other children (use ILIT?)
- Deed parcel of land to Child with parents reserving life estate (Prevents "Will Contest")
- Include limited powers of appointment in Trusts to provide surviving spouse flexibility to adjust

Most Common Problem for a Farmer's Estate: Jointly Owned Real Estate

- Problem: Multiple children; none involved in farming operation
- Parents want children want to continue to own farmland and not sell. How to keep farm together?
- Solution: Parents convey farmland to LLC
- Draft LLC operating which requires super majority of members to sell land or amend operating agreement
- Include first right of refusal in operating agreement if any child wants to cash out

Another Frequent Problem: Old C Corp holding appreciated farmland

- Pre 1986, C Corps were great choice for farmers until repeal of General Utilities doctrine (resulted in double taxation on liquidation of C Corp)
- Built In Gains Tax ("BIG Tax"): IRC §1374 adopted to prevent old C Corp from making S election and liquidating appreciated assets without double taxation
- IRC §1374 establishes separate corporate level tax to capture gain on liquidation of appreciated assets soon after S election

Another Frequent Problem: Old C Corp holding appreciated farmland

- 10* year holding period after S election to avoid BIG Tax (*holding period has been adjusted from time to time by tax legislation)
- Solution: Make S Corp Tax Election ASAP
- Appraise ↓ farmland at time of S Election to minimize exposure to BIG Tax (IRC §1374)
- Appraisal establishes appreciation at time of S election
- Wait out holding period before liquidating assets to avoid BIG Tax

Another Frequent Problem: Old C Corp holding Appreciated Farmland

- Watch out for old E & P still on the books at the time of the S election
- Can result in separate corporate level tax on "excess passive investment income" (IRC § 1375)
- Results in termination of S election if Corp derives more than 25% of gross receipts from passive investment income (farm rent?) for three consecutive taxable years after S election.
- Solution: Dividend (or deemed dividend) to shareholders to clear old E & P off the balance sheet

Another Frequent Problem: Operating Entity Owns all the farmland

- Family operates farm as general partnership
- Parents, children & spouses all general partners (to max out FSA payment limits)
- GP owns all the farmland
- Creates significant income tax and gift tax issues when family members want to enter or exit farming operation
- Solution: Conduct farming operation through GP that owns very few assets. Minimizes tax issues with change of general partners

Planning for Eminent Death

- Terminal Diagnosis for Farmer/Client
- Makes sure Wills, Trusts, POA's & LWD's in effect and updated
- Consider transferring depreciable assets to healthy spouse to obtain stepped up basis at death
- But don't forget about IRC§1014(e). Transfers of appreciated property to decedent within one year of death do not obtain basis adjustment on DOD
- Consider shifting ownership of assets to help qualify for 2032A limitations

Planning for Eminent Death

- Consider growing crops and grain inventory
- If not contracted for sale, "tax basis" for growing crops and grain inventory should adjust to fair market value on date of death [IRC§1014(a)(1).
- If crops already contracted for sale, no basis increased for sale. Considered IRD
- Also, no basis increase for land owner crop share proceeds
- If time allows, don't contract but utilize futures market to protect price points

Consider Crop CRUT for retiring Farmer

- H & W establish CRUT reserving income for lifetime (maybe kids lifetimes?) and designating charitable beneficiaries
- Unsold grain transferred to CRUT and sold by Trustee. Grain must not be contracted for sale prior to transfer to Trust
- Trustee sells grain & re-invests proceeds
- Sale of grain by Trustee not subject to income tax or SEP. H & W obtain current income tax charitable deduction.
- Assets eventually pass to charity and provide estate tax charitable deduction
- But no charitable income tax deduction if crop inputs deducted by H & W
- See PLR 9413020, Rev. Rul. 55-531, Rev. Rul. 55-138

FINAL THOUGHTS ON 25 YEARS OF BEING A FARM LAWYER

- Consider all the tax issues. If you do not have the skill set, bring in someone that does. Establish an Estate Team (attorney, CPA, appraiser, family)
- Communicate with the Team frequently
- Never forget about Basis [IRC§1014(a)(1)
- Insist for client to obtain appraisals for all assets included in gross estate even when federal estate tax is not an issue
- We often create more in tax savings for the client than we charge. Remind client of the value you are providing

Ag Lending in a Down Economy: Ag Liens, Secured Transactions and Best Practices

Jeff Peterson, Gray Plant Mooty
Greg Cole, President and CEO of AgHeritage Farm Credit Services

Ag Lending in a Down Economy: Ag Liens, Secured Transactions and Best Practices

Jeffrey A. Peterson; Gray Plant Mooty, St. Cloud, MN

Agenda

- Agricultural workouts (and unique issues)
- Statutory agricultural liens
- Agricultural bankruptcy

Agricultural workouts

- Understand the borrower and borrower's operation
  - Critical borrower issues and objectives
  - Obtaining information from borrower (status and location of crops/livestock, expected sales, material contracts, short term operating needs, etc.)
  - Collateral review and inspection; documentation
- Review loan documents
- Review title encumbrances and UCC-1 filings
- Use of workout or forbearance agreement
  - Require additional sources of repayment or collateral
  - Correct attachment or perfection issues
  - Obtain lender release
  - Require partial liquidation of collateral (*In re Hall*, 617 F.3d 1161 (2012) issue)
  - Measurable objectives
  - Offer a "carrot" (discounted payoff, debt held in abeyance, lien release, etc)

Agricultural workouts

- Unique issues
  - Agricultural liens
  - Operational issues (use of operating entities; seasonal cash flow; third party financing)
  - Government programs and payments (collateral assignments)
  - State and federal trust fund claims (Perishable Agricultural Commodities Act and Packers and Stockyards Act)
  - Federal Food Security Act (CNS/EFS notice and recourse against farm product buyers).
  - State and federal law considerations (Chapter 12 bankruptcy; required pre-foreclosure mediation; homestead exemption; statutory right of redemption; statutory right of first refusal)

Statutory Agricultural Liens

- Revised Article 9
  - A security interest is "an interest in personal property or fixtures which secures payment or performance of an obligation". UCC §9-315(a). Serves as "blanket" security interest on identifiable proceeds. UCC §§9-315(a).
- Statutory Agricultural Liens
  - An agricultural lien is "an interest, other than a security interest, in farm products: (A) which secures payment or performance of an obligation for: (i) goods or services furnished in connection with a debtor's farming operation; or (ii) rent on real property leased by a debtor in connection with its farming operation; (B) which is created by statute in favor of a person that: (i) in the ordinary course of its business furnished goods or services to a debtor in connection with a debtor's farming operation; or (ii) leased real property to a debtor in connection with the debtor's farming operation; and (C) whose effectiveness does not depend on the person's possession of the personal property." UCC §9-102(a)(5).

Statutory Agricultural Liens

- Interplay between Revised Article 9 and Statutory Agricultural Liens
  - Prior to the adoption of Revised Article 9 in 2001, statutory liens were not incorporated into Article 9. Statutory liens were stand alone liens. With the adoption of Revised Article 9 statutory agricultural liens were partially incorporated into Revised Article 9. UCC §§ 9-102(a)(5), 9-109(a)(2) and 9-302. Revised Article 9 controls the law that governs the agricultural liens, however, Revised Article 9 does not control the attachment, perfection and priority of agricultural liens. UCC §9-302. The specific state agricultural lien statute controls the attachment, perfection and priority of the respective agricultural liens. UCC §9-302, comment 2.
- Handout Material. Differences in Security Interest and Agricultural Lien.

Statutory Agricultural Liens

- Agricultural Liens under Revised Article 9
  - Livestock
    - Feeder or Agister Lien (Tenn. Code Ann. 66-20-101; Ark. Code Ann. 18-48-101 and 18-48-201; Miss. Code. Ann. 85-7-103)
    - Veterinarian Lien (Tenn. Code Ann. 63-12-134)
  - Crops
    - Landlord Lien (Tenn. Code Ann. 66-12-101; Ark. Code Ann. 18-41-101; Miss. Code. Ann. 89-7-51 and 89-7-53)
    - Crop Production Input Lien (Ark. Code Ann. 18-43-118)
    - Harvester Lien (Ark. Code Ann. 18-43-118)
    - Laborer Lien (Tenn. Code Ann. 66-12-113; Ark. Code Ann. 18-43-101; Miss. Code. Ann. 85-7-1; 31)
    - Processor Lien (Tenn. Code Ann. 66-15-101 and 66-15-102; Ark. Code Ann. 18-48-501)
    - Employer Lien (Ark. Code Ann. 18-42-101; Miss. Code. Ann. 85-7-1; 31)

7

Statutory Agricultural Liens

- Scope and attachment
  - *Great Western Bank v. William Poultry*, 780 N.W.2d 437 (N.D. March 23, 2010) (North Dakota "feed supplier" lien extends to unpaid young stock)
  - *In re Voss*, 426 B.R. 326 (Bankr. Mont. March 24, 2010) (North Dakota "feed supplier" lien extends to unpaid barn rent but does not extend to unpaid barn repairs and damage caused to a tractor).
- Perfection
  - Revised Article 9. Under Article 9, a security interest must be perfected in order to obtain any priority over competing security interests and other agricultural liens since conflicting security interests and agricultural liens are generally afforded priority on a first to file or perfect basis. UCC § 9-322(a).
  - Statutory Agricultural Liens. An agricultural lien is perfected if it has become effective and all of the applicable requirements for perfection under Article 9 have been satisfied.
- State of Perfection
  - Revised Article 9. The state the debtor is located. UCC §9-301.
  - Statutory Agricultural Liens. The state the farm product is located. UCC §9-302. *See Stockman Bank of Montana v. Mon-Kota, Inc.,* 180 P.3d 1125 (Mont. 2008)

8

Statutory Agricultural Liens

- Proceeds
  - Revised Article 9. Only as to the identifiable proceeds of the collateral. UCC §9-315(a)(2).
  - Statutory Agricultural Liens.
    - State statute must provide that an agricultural lien arises in such proceeds and only then will the rules of Article 9 apply to the lien on such proceeds. Comment 9, UCC § 9-315. *See Barley Clark, The Law of Secured Transactions Under the Uniform Commercial Code*, Linda J. Rusch, *Farm Financing Under Revised Article 9*, The American Bankruptcy Law Journal, Volume 73, Winter 1999, 237. Vol. 2, Section 8.09, p. 8-121; Drew L. Kershen and Alvin C. Harrell, *Agricultural Finance: Comparing the Current and Revised Article 9,* Uniform Commercial Code of Law Journal, 169-224, 181-82. (Fall 2000); *but see Stockman Bank of Montana v. Mon-Kota, Inc.*, 180 P.3d 1125 (Mont. 2008) (acknowledging but held proceeds held in check form are identifiable proceeds); *Oyens Feed Supply, Inc. v. Primebank*, 808 N.W.2d 186 (Iowa 2011) (acknowledging but "found" enabling language in Iowa statute).
- Priority
  - Revised Article 9. First to file. UCC § 9-322(a)(1).
  - Statutory Agricultural Liens. A perfected agricultural lien has priority over a conflicting unperfected security interest or agricultural lien. UCC § 9-322(a)(2).

9

Statutory Agricultural Liens

- Crops/Livestock that Move to Another State
  - UCC §9-316 provides that an Article 9 security interest remains perfected if the collateral moves to another state. However, UCC §9-316 does not apply to agricultural liens. *See* Comment 7.
    - Example 10. Supplier holds an agricultural lien on corn. The lien arises under an Iowa statutes. Supplier perfects by filing a financing statement in Iowa, where the corn is located. UCC § 9-302. Debtor stores the corn in Missouri. Assume the Iowa agricultural lien survives or an agricultural lien arises under Missouri law (matters that this Article does not govern). Once the corn is located in Missouri, Missouri becomes the jurisdiction whose law governs perfection. UCC § 9-302. Thus, the agricultural lien will not be perfected unless Supplier files a financing statement in Missouri.
    - *See generally, Barkley Clark, The Law of Secured Transactions Under the Uniform Commercial Code; Linda J. Rusch; Farm Financing Under Revised Article 9*, The American Bankruptcy Law Journal, Volume 73, Winter 1999, 227; Vol. 2, Section 8.09, p. 8-121; *Drew L. Kershen and Alvin C. Harrell; Agricultural Finance: Comparing the Current and Revised Article 9,* Uniform Commercial Code of Law Journal, 169-224, 180 (Fall 2000).
  - Issue: What if the new state does not provide a statutory agricultural lien? UCC §9-302 provides that the state the crops/livestock are located governs the perfection and the priority of the agricultural lien. Revised Article 9 does not contemplate or provide a structure for the priority of agricultural liens. Article 9 defaults to state law.

10

Statutory Agricultural Liens

- Strict Statutory Compliance
  - *Minnwest v. Chadley Arends, et al.*, 802 N.W. 2d 412 (Minn. App. 2011) (Minnesota feed supplier lien requires strict compliance; notice must be properly given)
  - *In re Shulista*, 451 B.R. 867 (Bankr. N.D. Iowa 2011) (Iowa agricultural supplier dealer lien is limited to 31 day look back period).
  - *First National Bank v. Profit Pork, LLC*, et al, No. A11-1732 (Minn. App. 2012) (Feed supplier who provides additional value added services does not "contribute" to the feeding or care of the livestock to qualify for a Minnesota feeder's lien).
- Liberal Proceed Tracing Requirement
  - *Stockman Bank of Montana v. Mon-Kota, Inc.*, 180 P.3d 1125 (Mont. 2008) (proceeds held in check form are identifiable proceeds); *Oyens Feed Supply, Inc. v. Primebank*, 808 N.W.2d 186 (Iowa 2011) ("found" enabling language in Iowa statute).

11

Statutory Agricultural Liens

Buyer of Farm Products (Federal Food Security Act).

- Applicable to agricultural liens ("as created by the seller" issue)?
- Direct notice states (Tennessee and Arkansas)
  - Strict Compliance
    - Farm Credit Midsouth, PCA v. Farm Fresh Catfish Company, 371 F.3d 450 (8th Cir. 2004); *State Bank of Cherry v. CGB Enterprises, Inc.*, 964 N.E.2d 604 (Ill. Ct. App. 2012) (failure to identify county where crops were grown invalidates notice); *CNH Capital v. Trainor Grain and Supply Co. (In re Printz),* 2012 LEXIS 4506 (Bankr. C.D. Ill. Sept. 27, 2012) (failure to identify debtor's social security number and proper description of crops invalidates notice); *Great Plains National Bank, N.A. v. Jamie Mount and Cattle Consultants, LLC*, 2012 COA 66 (Colo. Ct. App. 2012) (the state that the farm products were "produced in" controls where notice should be directed)
  - Substantial Compliance
    - *First Nat'l Bank & Trust v. Miami County Cooperative Ass'n*, 897 P.2d 144 (Kan. 1995); *Farm Credit Services of MidAmerica, ACA v. Rudy, Inc.*, 680 NE2d 637 (Ohio Ct. App. 1996); *Lisco State Bank v. McCombs Ranches, Inc*., 752 F. Supp. 329, 13 UCC Rep. 2d 928 (D. Neb. 1990)
  - Isn't clear
    - *Peoples Bank v. Bryan Brothers Cattle Co*., 504 F.3d 549, 64 UCC Rep. 2d 113 (5th Cir. 2007) (as interpreted by *State Bank of Cherry v. CGB Enterprises, Inc.*, 964 N.E.2d 604 (Ill. Ct. App. 2012)).

12

Statutory Agricultural Liens

- Representing the Bank (Article 9 secured lender)
  - Attachment.
    - Did the livestock actually consume or did the crops actually benefit from the goods/services provided by the lien claimant?
    - Is the lien claimant able to identify the proceeds from the sale of livestock or crops that actually consumed or benefited from the goods/services provided?
    - Does the state lien statute provide that the lien attaches to the proceeds from the sale of the livestock or crops? See UCC §9-315, cmt 9.
    - How were payments applied in relation to any "lien window"?
  - Perfection.
    - Did the lien claimant file the lien in the state that the livestock/crops were located? See UCC §9-302.
    - Did the livestock or crops go into another state, and if so, did the lien claimant properly perfect in the new state? See UCC §9-316, cmt 7.

13

Statutory Agricultural Liens

- Representing the Agricultural Lien Creditor
  - Agricultural lien properly perfected?
  - Multi-state issue. Were the livestock/crops moved outside of the state where the lien was perfected? Should the lien clamant also perfected in the state that the livestock/collateral were transferred to or sold?
  - Identifiable proceeds issue. Does the state agricultural lien statute provide that the lien extends to the proceeds of the livestock/crops? Should the lien claimant file (for central filing states) or give notice (for direct notice states) to farm product buyers to limit the commingling of livestock/crop proceeds?

14

Agricultural Bankruptcy

- Chapter 12
  - Access to cash collateral; cash collateral and adequate protection agreed order
    - Acknowledgment of claim; perfection
    - Cash collateral budget
    - Adequate protection payments
    - Timeframe to file and confirm Chapter 12 plan
    - Events of default
    - Rights/remedies in the event of default; "drop-dead" stay relief
  - Confirmation issues
    - Eligibility
    - Plan terms
    - Feasibility
  - Related issues
    - Non-dischargeability action
    - Related parties; co-debtor stay issues
    - Adverse actions against buyers of farm products

15

Conclusion

Jeff Peterson
320.202.5339
jeffrey.peterson@gpmlaw.com

GPM 4882713

16

Differences Between Security Interest and Agricultural Lien

	Article 9 Security Interest	Statutory Agricultural Liens
Definition	A security interest is "an interest in personal property or fixtures which secures paymnet or performance of an obligation.	An "agricultural lien" is: "an interest, other than a security interest, in farm products: (A) which secures payment or performance of an obligation for: (i) goods or services furnished in connection with a debtor's farming operation; or (ii) rent on real property leased by a debtor in connection with its farming operation; (B) which is created by statute in favor of a person that: (i) in the ordinary course of its business furnished goods or services to a debtor in connection with a debtor's farming operation; or (ii) leased real property to a debtor in connection with the debtor's farming operation; and (C) whose effectiveness does not depend on the person's possession of the personal property." 9-102(a)(5).
Choice of Law: State to Perfect	The law of the jurisdiction in which the debtor is located governs perfection, the effect of perfection or nonperfection, and the priority of an agricultural lien.	The law of the jurisdiction in which farm products are located governs perfection, the effect of perfection or nonperfection, and the priority of an agricultural lien.This choice of law provision will require secured parties who are relying upon an agricultural lien to perfect their agricultural lien by filing a financing statement in the state to which farm products are transported by the debtor if they are removed from the state in which they were produced.
Perfection	Under Article 9, a security interest must be perfected in order to obtain any priority over competing security interests and other agricultural liens since conflicting security interests and agricultural liens are generally afforded priority on a first to file or perfect basis. 9-322(a).	Under Article 9, an agricultural lien must be perfected in order to obtain any priority over competing security interests and other agricultural liens since conflicting security interests and agricultural liens are generally afforded priority on a first to file or perfect basis. 9-322(a). An agricultural lien is perfected if it has become effective and all of the applicable requirements for perfection under Article 9 have been satisfied. 9-308(b). A financing statement must be filed in order to perfect an agricultural lien. 9-310(a). Possession is not available as a means of perfection for agricultural liens. 9-313(a).
Proceeds	9-315 (a) provides that a security interest or an agricultural lien continues in collateral notwithstanding its sale, lease, license, exchange or other disposition unless the secured party authorized the disposition free of the security interest or agricultural lien. However, 9-315(a)(2) provides that only a security interest attaches to identifiable proceeds of collateral.	9-315 (a) provides that a security interest or an agricultural lien continues in collateral notwithstanding its sale, lease, license, exchange or other disposition unless the secured party authorized the disposition free of the security interest or agricultural lien. If the enabling statute provides that an agricultural lien arises in such proceeds, then the rules of Article 9 applicable to agricultural liens will apply to the lien on such proceeds. Comment 9, 9-315.

0

Priority	Security interests generally have priority according to priority in time of filing or perfection. 9-322(a)(1). A perfected security interest has priority over a conflicting unperfected security interest or agricultural lien. 9-322(a)(2). The first security interest or agricultural lien to attach or become effective has priority if a conflicting security interest or agricultural lien is unperfected. 9-322(a)(3).	As with security interests, agricultural liens generally have priority according to priority in time of filing or perfection. 9-322(a)(1). A perfected agricultural lien has priority over a conflicting unperfected security interest or agricultural lien. 9-322(a)(2). The first security interest or agricultural lien to attach or become effective has priority if a conflicting security interest or agricultural lien is unperfected. 9-322(a)(3). Significantly, however, 9-322(g) provides that if a statute under which an agricultural lien in collateral is created provides that the agricultural lien has priority over a conflicting security interest or agricultural lien in the same collateral, the statute governs priority if the agricultural lien is perfected. Thus, individual states may opt out of the first to file or perfect priority rule of Article 9 with respect to agricultural liens. Some state agricultural lien statutes take advantage of this provision by establishing specific priority rules for agricultural liens which may be different than the general "first to file or perfect" priority rule of Article 9. See, e.g., Minn. Stat. §§ 514.964, 514.966.

GPM 4882711

Ag Lending in a Down Economy:
Ag Liens, Secured Transactions and Best Practices

Jeffrey A. Peterson
Gray Plant Mooty, St. Cloud, MN
320.202.5339
jeffrey.peterson@gpmlaw.com

Table of Contents

I. UCC REVISED ARTICLE 9 / AGRICULTURAL LIENS

A. Agricultural Liens

1. Feed supplier is required to file a UCC-1 every 31 days to maintain super-priority Iowa agricultural supply dealer lien; for livestock born at the producer's facilities, the "acquisition price" for purposes of calculating the lien amount was zero. Crooked Creek Corporation (the "Debtor") operated a farrow-to-finish hog farm. The Debtor was indebted to Primebank (the "Secured Creditor") and the debt was secured by a security interest in the hogs of the Debtor. The Debtor contracted with Oyens Feed Supply, Inc. (the "Feed Supplier") to supply feed. The Debtor was indebted to the Feed Supplier and the Feed Supplier filed an agricultural supply dealer lien under Iowa Code 570A. The Debtor filed a Chapter 12 bankruptcy. The Secured Creditor and Feed Supplier asserted priority liens in the escrowed proceeds from the sale of the hogs. In an earlier certified request to the Iowa Supreme Court, the Iowa Supreme Court held that the Feed Supplier was not required to give any notification to the Secured Creditor to have an enforceable super-priority agricultural supply dealer lien under Iowa Code 570A. *Oyens Feed Supply, Inc. v. Primebank,* 808 N.W.2d 186 (Iowa 2011). There remained unresolved legal issues as to whether: (a) the agricultural supply dealer was required to file a new UCC-1 financing statement every thirty-one (31) days in order to maintain perfection of its agricultural supply dealer's lien as to feed supplied within the preceding thirty-one (31) day period; and (b) the "acquisition price" for purposes of calculating the lien amount was zero for livestock born in the producer's facility. Another certified request was made to the Iowa Supreme Court and the Iowa Supreme Court held that: (a) an agricultural supply dealer is required to file a new financing statement every 31 days in order to maintain perfection of its lien, and (b) the "acquisition price" for purposes of calculating the lien amount was zero for livestock was born in the producer's facility. The producer's overhead costs and costs of production should not be considered because the status provides for "acquisition price" not "acquisition costs". The Feed Supplier is entitled to a super-priority lien for the full extent of the value of feed consumed by the hogs without any reduction for any "acquisition price" of the producer. *Oyens Feed & Supply, Inc. v. Primebank,* 879 N.W.2d 853 (Iowa 2016).

Comment. This case should be read in conjunction with *Farmers Coop. Co. v. Ernst & Young Inc. (In re Big Sky Farms Inc.),* 512 B.R. 212 (Bankr. N.D. Iowa 2014) and *In re Shulista*, 808 N.W.2d 186 (Iowa 2011) and 451 B.R. 867 (Bankr. N.D. Iowa 2011).

2. Iowa agricultural supply dealers' lien notice must be issued every 31 days to have an uninterrupted lien. Farmer Cooperative Company (the "Feed Supplier") supplied feed to Big Sky Farms, Inc. (the "Debtor") on an open account. The Debtor became insolvent and filed bankruptcy in Canada. Under

operation of Chapter 15 of the U.S. Bankruptcy Code, the issues of priority were deferred to the Iowa Court. The Feed Supplier asserted a statutory Iowa agricultural supply dealers' lien on the livestock under IA Stat. § 570A.5. The Canadian bankruptcy receiver, Ernst & Young, Inc. (the "Receiver"), did not dispute the lien but asserted that the Feed Supplier was only entitled to a lien for the feed supplied within 31 days prior to filing the lien notification. The Court agreed. Both the Receiver and the Feed Supplier moved to amend this ruling and the Court analyzed each motion. First, the Court determined that its ruling on the 31-day rule should stand, which means suppliers only have perfected agricultural liens for purchases made 31 days prior to each of its filed financing statements. Next, the Court amended its ruling on the amount of the Feed Supplier's perfected agricultural lien to find a genuine issue of material fact existed as to the unpaid amount of the Feed Supplier's claim as well as the secured status of its claim. As a result, these issues were left for determination at trial. *Farmers Coop. Co. v. Ernst & Young Inc. (In re Big Sky Farms Inc.)*, 512 B.R. 212 (Bankr. N.D. Iowa 2014).

Comment. The *Farmers Coop. Co.* decision should be read in conjunction with the *Oyens Feed & Supply Inc.*, 808 N.W.2d 186 (Iowa 2011) and *In re Shulista*, 808 N.W.2d 186 (Iowa 2011) and 451 B.R. 867 (Bankr. N.D. Iowa 2011).

3. Revised Article 9 entitles the agister to a priority lien under the Idaho agister lien statute. Green River Dairy, LLC (the "Debtor") owned and operated a dairy farm and was indebted to Farmers National Bank (the "Secured Creditor"). The debt was secured by a security interest in certain personal property including the dairy cows of the Debtor. The Secured Creditor filed a UCC-1 finance statement. The Debtor and J & M Cattle Co., LLC (the "Agister") contracted for the Agister to provide food, care and other services to the Debtor's dairy cattle. The Debtor failed to pay the Agister and the Agister asserted a possessory Idaho agister lien under Idaho Code 45-805. The Agister commenced a legal action. The Secured Creditor argued that because the Idaho statute did not expressly address priority of the lien, but the statute did expressly state that the secured creditor should be paid before the lien creditor, that the Agister was limited to a junior lien. The Court disagreed. UCC § 9-333(b) provides a possessory lien has priority over a security interest unless the lien statute expressly provides otherwise. Because the Idaho lien statute was silent as to lien priority, the general rule under UCC § 9-333(b) controlled and the Agister was entitled to a priority lien. *J & M Cattle Co. v. Farmers National Bank*, 330 P.3d 1048 (Idaho 2014).

4. Iowa agricultural supply dealers' lien extends to the proceeds of the livestock. The debtor Donald Molstad ("Debtor") was indebted to Cooperative Credit Company ("Secured Creditor") and the indebtedness was secured by a security interest in the farm products and livestock of the Debtor. Watonwan Farm Service ("Feed Supplier") supplied feed to the Debtor on an open account.

The Debtor filed a Chapter 12 bankruptcy and the Secured Creditor and the Feed Supplier asserted liens in the livestock and the proceeds from the livestock. The Feed Supplier asserts a statutory Iowa agricultural supply dealers' lien under IA Stat. §570A.5. The Secured Creditor did not challenged the lien on the livestock, but the Secured Creditor challenged whether the lien attached to the proceeds of the livestock on the basis that statutory liens must specifically state that the lien attaches to the proceeds of the livestock. The Secured Creditor argued that attachment provision of UCC §9-315 does not extend to statutory liens and, therefore, the lien statute must affirmatively state the lien attaches to the proceeds. The Court disagreed and held the agricultural lien extended to any resulting sales proceeds on equitable grounds. The Court stated, "[g]iving an agricultural supply dealer a lien that can only be enforced against the collateral (in this case, the pigs) but not the proceeds of that collateral could lead in many circumstances—like this one—to provide little protection for the agricultural supplier." *Schley v. Peoples Bank (In re Schley),* No. 10-03252, Adversary No. 10-09255, 2014 Bankr. LEXIS 1724 (Bankr. N.D. Iowa Apr. 18, 2014).

Comment. The Court elected to expand the scope of the Iowa agricultural supply dealers' lien on equitable grounds. Revised Article 9 and the attachment language of the Iowa agricultural supply dealers' lien do not expand the scope of the lien to attach to the proceeds. *See Stockman Bank of Montana v. Mon-Kota, Inc.*, 3432 Mont. 115 (Mont. 2008) (Montana lien does not attach to the proceeds because the statute must specifically provide the lien attaches to the proceeds).

5. Livestock not "agricultural products" under Idaho agricultural lien statute. The debtor Green River Dairy, LLC ("Debtor") was indebted to Famers National Bank ("Secured Creditor") and the indebtedness was secured by a security interest in the dairy cows of the Debtor. The Debtor purchased feed on credit from various feed suppliers ("Feed Suppliers"). The Debtor went insolvent and the Feed Suppliers asserted priority statutory liens against the dairy cows under Idaho Stat. §45-1802 on the basis that the statutory lien in the feed consumed by the livestock extended to the livestock. The Secured Creditor argued that the dairy cows that consumed the feed were not "agricultural products" under Idaho law and, therefore, the Feed Supplier did not have a valid lien in the livestock. The Court agreed holding that "[l]ivestock, including dairy cows, are not an agricultural product that may be the subject of an agricultural lien" and the consumption of feed that is the subject to a statutory lien does not extend to the livestock that consume the feed. *Farmers Nat'l Bank v. Green River Dairy, LLC*, 318 P.3d 622 (Idaho 2014).

6. Supplier of feed and other related services is limited to a livestock production lien under Minnesota law, and is also not entitled to the higher priority feeder's lien. The feed supplier Wilmont-Adrian Cooperative supplied feed and provided nutritional analysis and custom nutrition plans to the hog producer Profit Pork. New Vision Coop only supplied feed to the hog producer.

The hog producer went insolvent and the feed suppliers asserted various statutory liens against certain proceeds from the sale of hogs. Wilmont-Adrian Cooperative argued that it was entitled to a higher priority feeder's lien under Minnesota law because the Minnesota feeder's lien included any one that "stores, cares for, or contributed to the keeping, feeding… or other care of livestock." The Court held implied that a lien claimant may only be entitled to one lien category and to be eligible for the feeder's lien the supplier must directly care for or contribute to the feeding of the livestock. Because the livestock input lien was more applicable to the goods and services provided by Wilmont-Adrian Cooperative, the Court held that it was not also entitled to the high priority feeder's lien. *First Nat'l Bank v. Profit Pork, LLC,* 820 N.W.2d 592, 2012 Minn. App. LEXIS 96 (Minn. Ct. App. 2012).

7. Failure to properly identify the hogs in the UCC-1 filing under the Iowa agricultural supply dealer's lien causes the lien to be unperfected. The supply dealer filed a UCC-1 that stated "All livestock located at [certain barn location]." The Bankruptcy Court ruled that for any hogs not located at the barn locations listed in the UCC-1, the lien was unperfected. *First Nat'l Bank v. Farmers Coop Soc'y (In re Coastal Plains Pork, LLC)* 2012 WL 6571102 (E.D. N.C. Bankr. 2012)

Comment Note. The Court implied that had the UCC-1 just stated "[A]ll livestock" the UCC-1 would have properly identified all of the hogs. The assumption is that that the Court deferred to the general principles under Revised Article 9 (UCC § 9-504 and § 9-108(2)(a)-(f)) that a UCC-1 that describes a general category of collateral is sufficient to prefect a security interest. The take away is that the UCC-1 filer should either not attempt to identify the specific barn locations or, the UCC-1 should state "all livestock, including but not limited to, the livestock located at the following barn locations: [and then list the barn locations]".

8. Factual issues in the calculation of a priority lien under the Iowa agricultural supply dealer's lien preclude granting summary judgment. The Iowa agricultural supply dealer's lien (Iowa Code § 570A.5(3)), provides that if properly perfected, the supply dealer is entitled to a priority lien for the difference between the acquisition price of the livestock and the fair market value of the livestock at the time the lien attaches or the sale of the livestock, whichever is greater. The Bankruptcy Court ruled that there remains factual issues as to: (1) the acquisition price of the hogs and whether feed, transportation, shelter and supervision expenses should be considered in the acquisition cost; (2) the value of the hogs considering some hogs did not consume any of the unpaid feed; and (3) whether the lien includes non-feed charges for interest and financing. *First Nat'l Bank v. Farmers Coop Soc'y (In re Coastal Plains Pork, LLC)* 2012 WL 6571102 (E.D. N.C. Bankr. 2012).

B. Buyer of Farm Products (Federal Food Security Act).

1. Secured creditor not limited by a grain buyer's contractual right of setoff. David Walker (the "Debtor") was a grain farmer and was indebted to Guaranty Bank & Trust Co. (the "Secured Creditor"). The debt was secured by a security interest in the crops and contract rights of the Debtor. The Secured Creditor filed a UCC-1 finance statement with the State of Mississippi. The Debtor had assumed several contracts to deliver grain to Agrex, Inc. (the "Buyer") which contained the contractual right of the Buyer to offset future deliveries against any unpaid debts. The Debtor failed to deliver on a few contracts and was indebted to the Buyer. The Debtor subsequently sold $417,033 in grain to the Buyer and the Buyer contractually offset the $417,033 in grain sales against the $359,853 in earlier debts owed to the Buyer. The Secured Creditor commenced a legal action against the Buyer and the Buyer argued that it was entitled to the $359,853 because the rights of the Secured Creditor are limited to the rights of the Debtor in the grain contracts. Because the rights of the Debtor are contractually limited by the right of offset in the grain contracts, the rights of the Secured Creditor were also contractually limited by the right of offset in the grain contracts. The District Court disagreed and the Buyer appealed. The 5th Circuit held that the Secured Creditor is not limited to its security interest in the contract rights of the Debtor. Although the Secured Creditor had a security interest in the contract rights of the Debtor, the Secured Creditor also had a security interest in the crops of the Debtor and, therefore as the 8th Circuit held in *Farm Credit Services of America, PCA v.Cargill, Inc.*, 750 F.3d 965 (8th Cir. 2014), the security interest takes priority over the contract rights of the Buyer. The court distinguished *Consolidated Nutrition, L.C. v. IBP, Inc.*, 669 N.W.2d 126 (S.D. 2003) on the basis that in the South Dakota case the secured creditor failed to file an effective financing statement with the State of Dakota and, therefore, the buyer purchased the crop free and clear of any liens of the secured creditor under the Food Security Act. As a result of the extinguished security interest, the buyer in *Consolidated Nutrition, L.C* was entitled to offset against unpaid debts owed to the buyer over the objection of the secured creditor. *Guar. Bank & Trust Co. v. Agrex, Inc.*, 820 F.3d 790 (5th Cir. 2016).

2. Buyer of farm products not entitled to assert statutory right of offset under UCC §9-404. The debtors Bryan and Susan Stec and Stec Brothers, LLC ("Debtors") were indebted to Farm Credit Services ("Secured Creditor") and the debt was secured by a security interest in the crops of the Debtors. The Secured Creditor filed a CNS statement as to the crops. The Debtors sold corn to Cargill ("Buyer"). The Secured Creditor filed a lawsuit against Cargill seeking recovery of the Debtors' delivered corn crops. The Secured Creditor argued that the Buyer purchased the farm product subject to the Debtors prior security interest and unless the Buyer obtains a waiver or makes the check jointly payable to the Secured Creditor under 7 U.S.C. § 1631(e), the Buyer buys subject to their Article 9 security interest. The Buyer did not make the check jointly payable to the

Secured Creditor. The Buyer argued that it had a right of offset under UCC §9-404 because the Debtor assigned its right of payment to the Secured Creditor and the statutory right of offset under Revised Article 9 pre-empted 7 U.S.C. § 1631(e). The Eighth Circuit disagreed and held that the sale of the farm product "does not switch [the Secured Creditor's] lawsuit from one seeking corn to one seeking a right to payment on an account" and, therefore, the Court did not need to address whether UCC §9-404 pre-empts 7 U.S.C. § 1631(e). *Farm Credit Servs. of Am., PCA v. Cargill, Inc.* No. 13-1911, 2014 U.S. App. LEXIS 8287 (8th Cir. May 2, 2014).

3. The Federal Food Security Act pre-empts Revised Article 9. The Illinois Court of Appeals affirmed a trial court decision that the Food Security Act preempts Revised Article 9. The Court adopted the reasoning in *Farm Credit Midsouth, PCA v. Farm Fresh Catfish Co.*, 371 F.3d 450 (8th Cir. 2004), relying on the Supremacy Clause of the Constitution, the language of UCC § 9-109 ("This Article does not apply to the extent that: a statute . . . of the United States preempts this Article.") and the language of the Food Security Act § 1631(d) ("notwithstanding any other provision of Federal, State, or local law[.]") in support of its decision. *State Bank of Cherry v. CGB Enterprises, Inc.*, 964 N.E.2d 604 (Ill. Ct. App. 2012); (*affirmed by State Bank of Cherry v. CGB Enters.*, 984 N.E.2d (Ill. 2013)).

4. The State that the farm products were "produced in" controls where notice should be directed. When determining whether a buyer purchases farm products subject to the seller's security interest and where the notice should be directed, the term "produced in" means "the location where farm products are furnished or made available for commerce." The primary question on appeal was whether 206 head of cattle bought by the Colorado buyer were "produced in" Oklahoma (the state the buyer believed the cattle were located and where the seller resided) or in Missouri (the state that the cattle were actually located and for which the seller acquired the cattle from the cattle broker). Oklahoma has a central filing system. The FSA does not define "produced in," nor does any case law, so the court implemented standard statutory interpretation canons. The Court rejected buyer's argument that "produced in" should mean the geographic origin of the farm products—not the location from which the farm products were sold. The Court concluded that "purchased in" means "the location where farm products are furnished or made available for commerce." The Court emphasized that this interpretation "allows lenders to discern where they must file notice . . . and ensures a practical means for buyers to discover otherwise unknown security interests in farm products." Here, the seller delivered the cattle to the buyer in Oklahoma and the buyer had the cattle shipped to Colorado. Therefore, because the seller made the cattle available in Oklahoma, for the purposes of the FSA, the cattle were produced in Oklahoma. Because Oklahoma is a central filing state, the seller's lender was required to register with the State of Oklahoma and the buyer was required to review the filing and make the payment jointly payable to

the seller's lender and the seller to purchase the cattle free and clear of the claims. *Great Plains National Bank, N.A. v. Jamie Mount and Cattle Consultants, LLC,* 2012 COA 66 (Colo. Ct. App. 2012).

5. The county were the crops are processed is not relevant for purposes of the Food Security Act. The Secured Creditor filed two CNS farm product financing statements with Mississippi Secretary of State. Each CNS listed sweet potatoes as the farm product, included the county codes for two counties and listed the six parcels within those two counties. The debtor planted crops on the six parcels, but also in an unlisted county. However, the sweet potatoes grown in the unlisted county were processed in one of the listed counties. A produce company bought the sweet potatoes and did not make the check payable to the producer and the secured creditor. The Secured creditor argued that the CNS is not limited to the location the crop is grown but, instead, includes the location the crop is processed. The Court disagreed and held that the county were the crops are processed is not relevant because the CNS must identify the county were the crops are grown. *In re Moore*, 2013 Bankr. LEXIS 2060 (Bankr. N.D. Miss. May 17, 2013).

6. Direct Notice States

a. Failure to identify county where crops were grown invalidates notice. The secured creditor failed to include the names of certain counties where the debtor grew crops. The secured creditor argued that it was not required to strict comply with the notice requirements and, that by identifying the other counties were crop were grown, the secured creditor was in substantial compliance. The Court disagreed and held that the Federal Food Security Act expressly requires the secured party to provide a description of the farm products subject to the security interest created by the debtor and the name of each county where the farm products are located. The Court recognized some conflicting and non-binding state case law as to "substantial compliance" with the notification statute. Accordingly, the buyer purchased debtor's crop free of the secured creditor's security interest despite knowing of the secured creditor's security interest.[1] *State Bank of Cherry v. CGB Enterprises, Inc.*, 964

1 As noted in the case summary, there is conflicting case law as to whether the direct notice provisions of the FSA require strict or substantial compliance. The Illinois Court of Appeals in this case relied on the 8th Circuit decision in *Farm Credit Midsouth* for holding that the secured creditor must strictly comply with the statute. Alternatively, *First Nat'l Bank & Trust v. Miami County Cooperative Ass'n,* 897 P.2d 144 (Kan. 1995); *Farm Credit Services of MidAmerica, ACA v. Rudy, Inc.,* 680 NE2d 637 (Ohio Ct. App. 1996); and *Lisco State Bank v. McCombs Ranches, Inc.,* 752 F. Supp. 329, 13 UCC Rep. 2d 928 (D. Neb. 1990) have all held that the standard is substantial compliance. As for the 5th Circuit, even the majority and dissent in *State Bank of Cherry* disagreed whether the holding in *Peoples Bank v. Bryan Brothers Cattle Co.,* 504 F.3d 549, 64 UCC Rep. 2d 113 (5th Cir. 2007), required strict or substantial compliance.

N.E.2d 604 (Ill. Ct. App. 2012) (*affirmed by State Bank of Cherry v. CGB Enters.*, 984 N.E.2d (Ill. 2013)).

b. Failure to identify debtor's social security number and proper description of crops invalidates notice. The secured creditor failed to include the social security number of the debtor on the CNS statement and failed to properly identify the county were the crops were being grown. The secured creditor argued that it was not required to strict comply with the notice requirements. The Court disagreed and held that the failure of the secured creditor to include the debtor's social security number and a proper description of the crops in the Food Security Act notice invalidates the notice and allowed a grain elevator to purchase the crops free and clear of any claims of the secured creditor. *CNH Capital v. Trainor Grain and Supply Co. (In re Printz)*, 2012 LEXIS 4506 (Bankr. C.D. Ill. Sept. 27, 2012).

7. Central Filing States.

Priority limited to locations specified in the CNS statement. The secured creditor filed two CNS farm product financing statements with Mississippi Secretary of State. Each CNS listed sweet potatoes as the farm product, included the county codes for two counties and listed the six parcels within those two counties. The debtor planted crops on the six parcels, but also in an unlisted county. A produce company bought the sweet potatoes and did not make the check payable to the producer and the secured creditor. The Court found that for the two counties that the secured creditor properly listed, the produce company failed to comply with the Food Security Act and the secured creditor took priority. However, for the third unlisted county, the Court held that the produce company took priority because the secured creditor limited its CNS to the listed six parcels. *In re Moore*, 2013 Bankr. LEXIS 2060 (Bankr. N.D. Miss. May 17, 2013).

Comment Note. The creditor should not limit the scope of its CNS statement but, instead the creditor should identify all crops and all counties in the state in the CNS to avoid this outcome.

8. Set-off by Buyer.

Buyer is not entitled to set-off. A buyer of farm products is not entitled to set-off the obligation owed to the seller for the sale of grain against the prior indebtedness owed by the seller to the buyer. The Food Security Act allows a buyer of farm products to purchase the farm products free and clear of any security interests. However, the Food Security Act does not allow a buyer of farm products to acquire the proceeds of the farms

products (through a common law set-off) free and clear of any security interest in the sale proceeds. The FSA only defines a "security interest" as "an interest in farm products that secured payment or performance of an obligation." The term does not reference or include within its definition the proceeds of the security interest. The Court reasoned that at the moment the grain buyer set-off against the debt owed to the seller, the grain buyer was no longer a buyer in the ordinary course of business but, instead, a creditor. To allow the common law setoff would circumvent Revised Article 9. *CNH Capital v. Trainor Grain and Supply Co. (In re Printz)*, 2012 LEXIS 4506 (Bankr. C.D. Ill. Sept. 27, 2012)

II. BANKRUPTCY.

A. Case Administration.

1. Preventing a dairy herd from going "dry" provided a quantifiable benefit to secured creditors and justified a surcharge to the lien claims of the secured creditors. The debtors Tollenaar Holsteins, Friendly Pastures and T Bar M Ranch (the "Debtors") are related dairy producers who filed Chapter 11 bankruptcy petitions. The cases were administratively consolidated. The Debtors were indebted to Bank of the West and Hartford Accidental and Life Insurance Company (the "Secured Creditors") and the debts were secured by the assets of the Debtors. The trustee requested a surcharge of the collateral of the Secured Creditors to pay the reasonable and necessary expenses incurred in preserving the estate under 11 U.S.C. § 506(c), specifically, for expenses incurred in keeping the debtors' dairy herd "wet" before the herd was sold. The Secured Creditors objected on the basis that the surcharge would not provide a quantifiable benefit to the Secured Creditors, the applicable test under 11 U.S.C. § 506(c). The Court disagreed and held that the payment of these expenses would prevent the loss of valuable permits if the dairy cows went dry. *In re Tollenaar Holsteins*, 538 B.R. 830 (Bankr. E.D. Cal. 2015).

2. Automatic stay extends to post-confirmation property vested with a debtor under his Chapter 12 plan. The debtor filed and confirmed a Chapter 12 plan that vested the property of the bankruptcy estate with the debtor at plan confirmation. The Chapter 12 plan provided that the debtor would receive his discharge upon completion of the payments under the plan. Post-confirmation, but before discharge, a creditor commenced a legal action against the debtor without obtaining stay relief. The creditor argued that the property was no longer property of the estate and, therefore, no stay was in effect. The Court disagreed and held that even though the property vested with the debtor in his Chapter 12 plan, under Code § 362(c)(5), the creditor was still stayed from taking legal action against property of the debtor. *In re Blankenship*, 2013 Bankr. LEXIS 1767 (Bankr. S.D. Ohio April 29, 2013).

B. Creditors, Debtors and the Bankruptcy Estate.

1. Property of the Bankruptcy Estate.

Appreciated proceeds from the post-confirmation sale of land are not property of the bankruptcy estate subject to distribution to creditors. David and Patricia Smith (the "Debtors") were crop farmers and confirmed a Chapter 12 plan. Post-confirmation the Debtors sold some crop land for $295,576 and sought to capture the difference between the sale price and the $100,000 value in the confirmed plan. Creditors and the Chapter 12 trustee objected on the basis that the proceeds from the post-confirmation sale should be characterized as "disposable income" and distributed to the creditors. The Court disagreed and held: (a) the property vested with the Debtors at plan confirmation and, therefore, the appreciated value is not property of the bankruptcy estate; and (b) appreciated assets are not disposable income. Appreciated proceeds cannot be considered regular income as it only occurs following the one-time sale of property and, therefore, falls outside of the disposable income definition which generally requires a steady stream of payments. *In re Smith*, 514 B.R. 464 (Bankr. N.D. Tex. 2014).

2. Administrative Claims.

Secured Creditor entitled to recover advances made to pay insurance as an administrative claim. Byron Jarriel (the "Debtor") was indebted to Tippins Bank & Trust (the "Secured Creditor"). The debt was secured by a security interest in various collateral including two pieces of equipment. In order to protect its interest, the Secured Creditor required the Debtor to obtain insurance on the collateral. The Debtor filed a Chapter 12 bankruptcy. The Debtor failed to maintain insurance. The Secured Creditor made a post-petition protective advance to pay the insurance. The Debtor elected to sell the collateral post-petition and pay off the Secured Creditor in full. The Secured Creditor failed to include the costs it incurred for the insurance in tis payoff and, subsequently argued that the Secured Creditor was entitled to reimbursement for these "administrative expenses." The Debtor argued that the Secured Creditor failed to prove that the insurance was a reasonable and necessary expense of the bankruptcy estate. The Court disagreed and held that Code Section 503 governs administrative expenses and gives such post-petition expenses priority over pre-petition claims. The Court applied a two-prong test and determined the Secured Creditor's claim qualified under § 503 as it (1) arose from a post-petition transaction between the Secured Creditor and the Debtor, and (2) was an actual and necessary expense to preserve the bankruptcy estate. Because the Secured Creditor acted in good faith and in the best interests of the estate, the Secured Creditor was entitled to an administrative claim for its post-petition advances to pay the insurance

premiums. *Tippins Bank & Trust v. Jarriel (In re Jarriel)*, 518 B.R. 140 (Bankr. S.D. Ga. 2014).

3. Non-dischargeability actions.

a. Sale of collateral without consent of secured creditor does not constitute larceny or embezzlement; may constitute willful and malicious injury. David and Kristen Pitz (the "Debtors") owned and operated a crop farm. The Debtors were indebted to Peoples Savings Bank (the "Secured Creditor"). The debt was secured by a security interest in the crops of the Debtors. The Debtors sold the crops and did not apply the crop proceeds against the loan. The Debtors filed bankruptcy. The Secured Creditor filed an adversary action asserting that the sale of crops constituted larceny, embezzlement, or a willful and malicious injury and, therefore, the debt should be non-dischargeable under 11 U.S.C. § 523(a)(4) and (6). The court dismissed the larceny and embezzlement claims under § 523(a)(4) because a security interest is not the property of another. The court held there was sufficient legal basis to proceed to trial on the willful and malicious injury claim under § 523(a)(6) because there was a factual issue as to whether the Debtors intended to defraud the Secured Creditor. *In re Pitz*, 2016 WL 1530003 (Bankr. N.D. Iowa 2016).

b. Sale of collateral without consent of secured creditor constitutes willful and malicious injury and is non-dischargeable. Mark and Tammy Shelmidine (the "Debtors") were married and owned and operated a dairy farm. The Debtors took out three loans from the Farm Service Agency (the "Secured Creditor") which were each secured by farm equipment, machinery, crops, and cattle (the "Collateral"). The Secured Creditor perfected its security interests and each of the security agreements required the Debtors to receive FSA approval before selling or otherwise altering the Collateral. The Debtor sold cattle without the Secured Creditor's authorization. The Debtors used the proceeds from these sales to pay off other creditors but never offered any of the proceeds to the Secured Creditor. The Debtor filed a Chapter 7 bankruptcy. The Secured Creditor filed an adversary action under 11 U.S.C.A. § 523(a)(6) asserting willful and malicious injury. The Secured Creditor argued that the Debtors' use of the cash proceeds from the unauthorized sale was willful and malicious under § 523(a)(6). The Debtors maintained that the close, "supervised credit" relationship between the Debtors and the Secured Creditor meant the sales were impliedly authorized by the Secured Creditor. The Court disagreed and found in favor of the Secured Creditor following a two-part analysis under § 523(a)(6) that required (1) willful injury and (2) malice. First, the court found the Debtors subjectively intended to injure the Secured Creditor when it sold the cattle

and failed to apply the proceeds to any of the debt held by the FSA. Second, the Court found the Debtors used the proceeds from the collateral sales to elevate certain creditors over the Secured Creditor, which implied malice. The Court ruled that the debt held by the Secured Creditor was non-dischargeable. *United States v. Shelmidine (In re Shelmidine)*, 519 B.R. 385 (Bankr. N.D.N.Y. 2014).

C. Chapter 12.

1. Eligibility.

a. "Farming Operation" Requirement.

i. Contracting with a third party for the planting and harvesting of a crop constitutes farming. Larry and Sandra Williams (the "Debtors") rented farmland and contracted with their son to plant and harvest the crop on the rented farmland. The Debtors filed a Chapter 12 bankruptcy. The Chapter 12 Trustee moved to dismiss the bankruptcy arguing that the Debtors were not eligible to be debtors under Chapter 12 because they were not "engaged in a farming operation" for purposes of 11 U.S.C. § 101(18). The court disagreed and held that a Chapter 12 debtor does not have to own the land upon which the farming occurred nor does the debtor have to do all of the physical labor involved with farming. The Debtors entered into the lease contract with their son for their own benefit, owned the farm equipment, purchased the seed, fertilizer, and materials used in the operation, entered into insurance contracts in their own names, and made all of the decisions as to what crops would be planted and incurred all profits and losses. The court held that the Debtors were sufficiently involved with the farming operation to be engaged in a farming operation for purposes of Chapter 12 eligibility. *In re Williams*, 2016 WL 1644189 (Bankr. W.D. Ky. 2016).

ii. Game farm constitutes a farming operation for purposes of Chapter 12 eligibility. Marone Acee (the "Individual Debtor") operated a bird game farm on the property of a related entity Boulder Meadows (the "Corporate Debtor"). The Individual Debtor and the Corporate Debtor filed for Chapter 12 bankruptcy. Two creditors objected to the Chapter 12 plan on the basis that the Individual Debtor was not eligible for Chapter 12 bankruptcy because a bird game farm is not a "farming operation" for purposes of 11 U.S.C.A. § 109(e) and § 101(21). The Bankruptcy Court disagreed and held, that under the totality of the circumstances test, the Individual Debtor was engaged in a farming operation because

the Individual Debtor fed, maintained, protected and released the game birds and experienced the traditional risks associated with farming such to risk of disease and death. The Court held the Corporate Debtor was not eligible for Chapter 12 because the Corporate Debtor did not have this same involvement in the game farm. *United States Dist. Court N. Dist. of N.Y. Marone Acee v. Oneida Sav. Bank*, 529 B.R. 494 (N.D.N.Y. 2015).

iii. Cattle raised under a production contract constitutes a "farming operation" for the purposes of eligibility. The debtors Randy and Geneva Perkins ("Debtors") received social security benefits, raised 262 head of cattle under a production contract and raised and sold 37 head of cattle in their names. The Debtors filed a Chapter 12 bankruptcy. A creditor objected to the Chapter 12 plan on the basis that raising cattle under a production contract is not a "farming operation" for purposes of 11 U.S.C. §101(21). The Court disagreed and held that, under totality of the circumstances test, the Debtors were engaged in a farming operation because the Debtors performed the physical labor associated with raising cattle. *In re Perkins*, 2013 Bankr. LEXIS 4539 (Bankr. E.D. Tenn. Oct. 30, 2013).

Comment. In re Perkins evidences the trend of looking beyond just the traditional risks associated with farming to include individuals who raise livestock under production contracts.

b. 50% Farming Income Requirement.

i. CRP payments and strawberry and game farm proceeds are farm income for the purposes of eligibility. The debtor Marone Acee ("Debtor") owned and operated a bird game farm. The Debtor filed a Chapter 12 bankruptcy. Two creditors objected to the Chapter 12 plan on the basis that the Debtor was not eligible for Chapter 12 bankruptcy because the Debtor failed to have sufficient farm income for purposes of 11 U.S.C. §101(18). The Court disagreed and held that because over 50% of the Debtor's gross income was as a result of CRP payments, a strawberry crop and product proceeds, and pheasant-related income the Debtor did qualify. *See In re Acee*, 2013 Bankr. LEXIS 4789 (Bankr. N.D.N.Y. Nov. 12, 2013).

ii. A settlement payment from a lawsuit that arose from farming activities can qualify as farming income. The debtor David McLawchlin ("Debtor") was previously a rice farmer but, because of a permanent disability, had limited mobility. The only

source of farm income was $30,000 from the settlement of a lawsuit for crop loses in 2006, 2007 and 2008. The Debtor filed a Chapter 12 bankruptcy. A creditor objected to the Chapter 12 plan on the basis that the Debtor was not eligible for Chapter 12 bankruptcy because the Debtor failed to have sufficient farm income for purposes of 11 U.S.C. §101(18). The Court disagreed and held that the settlement proceeds arose out of a farming operation and were sufficient to meet the farm income requirements, even though the conduct that gave rise to the settlement occurred many years before. *In re McLawchlin*, 511 B.R. 422 (Bankr. S.D. Tex. Jun. 5, 2014).

c. 50% Farming Debt Requirement.

i. When the debtor secured by the principal residence does not arise from the farming operation, the amount of principal residence debt is excluded entirely from the Chapter 12 eligibility calculation. Marone Acee (the "Individual Debtor") operated a bird game farm on the property of a related entity Boulder Meadows (the "Corporate Debtor"). The Individual Debtor and the Corporate Debtor filed for Chapter 12 bankruptcy. Two creditors objected to the Chapter 12 plan on the basis that the Individual Debtor was not eligible for Chapter 12 bankruptcy because less than 50% of the debtor's aggregate, noncontingent, liquidated debts arose out of the farming operation, as required by 11 U.S.C.A. § 109(e) and § 101(18). The Bankruptcy Court agreed and held that the Individual Debtor failed to prove his personal residence should be included in the calculation (i.e. prove it arose out of the farming operation) and, as a result, he did not reach the 50% threshold. The Individual Debtor appealed. The District Court overruled and held, in reliance on *In re Woods*, 743 F.3d 689 (10th Cir. 2014), that because the principal residence debt was not farm related, it should be completely excluded from the debt calculation. *United States Dist. Court N. Dist. of N.Y. Marone Acee v. Oneida Sav. Bank*, 529 B.R. 494 (N.D.N.Y. 2015).

ii. For Chapter 12 eligibility purposes, all claims enforceable against either the debtor or its property are allowed. Carolyn Davis (the "Debtor") owned a ranch and other properties in California. The Debtor filed for Chapter 7 in July 2010 and received a discharge that released her from personal liability for the unsecured claims associated with her properties. Then, in March 2011, the Debtor filed a Chapter 12 bankruptcy. At the time of her filing, her properties were valued at $1.6 million. The liens on those properties totaled $4.1 million, $2.5 million of

which was unsecured. The Bankruptcy Court dismissed her petition on the basis that the $4.1 million was over the $3,792,650 aggregate debt limit on eligibility for filing Chapter 12. The Debtor appealed, arguing that the unsecured portions of her secured creditor's claims should not be included in her aggregate debt total for Chapter 12 eligibility purposes. The Bankruptcy Appellate Panel disagreed and affirmed the bankruptcy court's decision dismissing the Chapter 12. It stated that the aggregate debt calculation, as required by 11 U.S.C.A. § 109(e) and § 101(18), includes all obligations enforceable against the Debtor's property, even if such obligations were not enforceable against the Debtor personally or if there was sufficient value in the property. The Ninth Circuit affirmed this decision and explained that a creditor's claim is still a "debt" if it is enforceable against either the debtor or the debtor's property. Therefore, regardless of the Debtor's Chapter 7 discharge, the "aggregate debt" still includes the full amount of all creditors' claims against the property of the debtor for purposes of calculating Chapter 12 eligibility. *In re Davis*, 778 F.3d 809 (9th Cir. 2015).

iii. "Direct use" test is appropriate test for determination of farming debt in the 10th Circuit. The debtors Reson and Shuan Woods ("Debtors") owned and operated a hay farming operation. The Debtors filed a Chapter 12 bankruptcy. A creditor objected to the Chapter 12 plan on the basis that the Debtor was not eligible for Chapter 12 bankruptcy because the Debtor failed to have sufficient farm debt for purposes of 11 U.S.C. §101(18). The Court agreed and held that a home construction loan that was used to pay off a loan for the purchase of their farmland was not excluded from the debt total because it arose from the farm operations. The bankruptcy court had applied the "some connection" test to the Debtors' farming activities, and concluded that the presence of the farming operation's office and records in the residence, and its proximity to the farm resulted in the construction loan being connected to the farming activities. The creditor appealed and the 10th Circuit held the bankruptcy court applied the wrong test, and remanded for a determination under the "direct use" test whether the Debtors' loan "arises out of" their farming operation. The court explained that the "direct use" test is most proper because it is singularly focused on whether the loan proceeds were directly applied to or used in a farming operation, and best embodies the "direct-and-substantial" standard for connection between the loan and the farming operations. *First Nat'l Bank v. Wood (In re Woods)*, 743 F.3d 689 (10th. Cir. 2014).

iv. Presumption that the home mortgage note secures non-farm debt. The debtor Acee ("Debtor") owned and operated a bird game farm. The Debtor filed a Chapter 12 bankruptcy. Two creditors objected to the Chapter 12 plan on the basis that the Debtor was not eligible for Chapter 12 bankruptcy because the Debtor failed to have sufficient farm debt for purposes of 11 U.S.C. §101(18). The Court agreed and held that because the home mortgage debt did not secure farm debt the home mortgage debt was not farming debt for purposes of Chapter 12 eligibility *See In re Acee*, 2013 Bankr. LEXIS 4789 (Bankr. N.D.N.Y. Nov. 12, 2013). The Debtor appealed and the District Court affirmed on the basis that 11 U.S.C.A. §101(18)(A) creates a presumption that residential debt is not farm-related debt. Although the presumption can be overcome with evidence of a connection between the residential debt and the farming operation, there was no evidence present in this case. *In re Acee*, 2014 Bankr. LEXIS 89 (Bankr. N.D.N.Y. Jan. 10, 2014).

2. Dismissal/Conversion.

a. Stay relief motion must have been filed in first bankruptcy to disqualify debtor in second bankruptcy; stipulation granting stay relief is not sufficient to dismiss second bankruptcy. Craig and Lynda Herremans (the "Debtors") were indebted to American Farm Mortgage Company (the "Secured Creditor"). The Debtors filed a Chapter 12 bankruptcy and confirmed a Chapter 12 plan (the "First Bankruptcy"). In conjunction with the confirmed Chapter 12 plan, the Debtors agreed that if the Debtors failed to make payment to the Secured Creditor that the Secured Creditor would be entitled to stay relief after filing an affidavit with the court. The Debtors failed to make a payment and the Secured Creditor filed the affidavit. The Debtors dismissed the First Bankruptcy and subsequently filed another bankruptcy (the "Second Bankruptcy"). The Secured Creditor moved to dismiss arguing that the combination of the right to stay relief in the First Bankruptcy and the filing of the Second Bankruptcy disqualified the Debtors from Chapter 12 under the serial filing restrictions under 11 U.S.C. § 109(g)(2). The court disagreed and held that § 109(g)(2) is only effective if "a request for relief" or stay relief motion has been filed in the first bankruptcy. In this case, the Secured Creditor never filed a stay relief motion in the First Bankruptcy. Instead, the Debtors just consented to stay relief in the First Bankruptcy in the event of a payment default. The filing of the affidavit was not a "request for relief" for purposes of § 109(g)(2). *In re Herremans*, 532 B.R. 701 (Bankr. W.D. Mich. 2015).

b. Chapter 12 bankruptcy case dismissed after Debtor engaged in acts that negatively impacted the estate and destroyed value for his creditors. Charlie Dickenson (the "Debtor") filed for Chapter 12 in August 2013. The

Chapter 12 Trustee filed a motion to dismiss under § 1208 and the Court granted on the basis that the Debtor (1) failed to fully disclose on his petition schedules, (2) failed to mention sales/exchanges he entered into immediately preceding (and even immediately following) his bankruptcy filing, (3) failed to identify his business partnerships, (4) made incorrect property valuations, (5) transferred encumbered assets, and (6) failed to develop a confirmable plan. *In re Dickenson*, 517 B.R. 622 (Bankr. W.D. Va. 2014).

c. Debtor's Chapter 12 case was dismissed because the Debtor failed to show a reasonable likelihood of success. Keith's Tree Farms, a general partnership (the "Debtor") grew and sold trees. The Debtor filed for Chapter 12 bankruptcy. The Debtor proposed four Chapter 12 plans. Upon filing the fourth Chapter 12 plan, the Trustee moved to dismiss the bankruptcy under Code Section 1208(c)(5). The Court agreed and held the Debtor was unable to confirm a feasible plan based on the Debtor's historical performance as well as the current condition of the Debtor's business. The Court found testimony from the general partners regarding the partnership's financials to be unreasonably optimistic and containing no reasonable data or projections to support confirmation of a Chapter 12 plan. *In re Keith's Tree Farms*, 519 B.R. 628 (Bankr. W. Dist. Va. 2014).

d. Filing proposed plan after 90 day deadline is not absolute right to dismiss. The debtors Herman and Hendrina Vander Vegt ("Debtors") were indebted to First Security Bank & Trust Company ("Secured Creditor") and the indebtedness was secured by a security interest in its equipment and farm products. The Secured Creditor properly filed a UCC-1. The Debtor field a Chapter 12 bankruptcy. The Debtors did not file a Chapter 12 plan within the 90 days required under 11 U.S.C. §1221. The Secured Creditor moved to dismiss. The Court held that §1221 was not an absolute deadline and the delays were caused by "the creditor's resistances to the Debtor's motions and the bankruptcy court's issuance of orders". *In re Vander Vegt*, 499 B.R. 631 (Bankr. N.D. Iowa. Oct. 16, 2013). The Secured Creditor appealed and the District Court affirmed holding that the Debtor may have additional time to file a plan if the delay was not the debtor's fault. *First Sec. Bank & Trust Co. v. Vander Vegt*, 511 B.R. 567 (N.D. Iowa May 27, 2014).

3. Plan.

a. Administration Claims.

i. Priority Stripping of Tax Claims. The claims of the IRS and Iowa Department of Revenue were subject to the priority-stripping effect of Code § 1222(a)(2)(A). The debtor was a partner in a farming operation that dissolved in 2010. Although the debtor retained some farm assets, the debtor agreed to transfer substantially all of the farm assets to the other partner. The debtor filed a Chapter 12 bankruptcy and the IRS

argued that the debtor was not eligible for the benefits of Code § 1222(a)(2)(A) because the Supreme Court decision in *Hall* applied to the pre-petition transfer of farm assets by the debtor through the dissolution of the farming partnership. The Court disagreed and held that *Hall* was limited to the sale of post-petition assets and, therefore, the debtor was entitled to treat the resulting tax liability from the transfer of the partnership assets as a unsecured claim. *In re Hemann*, 2013 Bankr. LEXIS 1385 (Bankr. N.D. Iowa Apr. 3, 2013).

ii. Debtor Can Not Use Estate Assets to Pay Post-Petition Capital Gains Taxes. The debtor proposed to use the equity from the sale of 48 acres to pay post-petition capital gains incurred by the debtor from the earlier sale of equipment. The objecting creditors and Chapter 12 trustee argued that, under the U.S. Supreme Court decision in *Hall*, estate assets cannot be used to pay post-petition capital gains taxes. The debtor argued that *Hall* was not applicable; arguing that *Hall* only limited the debtor from categorizing capital gains as a general unsecured claim for purposes of plan confirmation. The Court disagreed and held that *Hall* was more expansive than just the treatment of capital gains taxes and prohibited to use of estate assets to pay post-petition capital gains taxes because the tax obligations were not tax obligations of the bankruptcy estate; and instead, are tax obligations of the individual. *Hall* held that post-petition taxes are outside Section 503(b) and, therefore, the taxes are not an allowed claim that may be treated within a Chapter 12 plan. *In re Ferguson*, 2013 Bankr. LEXIS 6 (Bankr. C.D. Ill. Jan. 2, 2013).

iii. Proceeds of livestock and crops are not farm assets "used in a farming operation" and, therefore, the debtor was not eligible to treat the related tax liability as an unsecured claim. The debtor raised crops and finished cattle. The debtor filed a Chapter 12 bankruptcy and argued that the sale of crops, cattle and the crop insurance proceeds received by the debtor were farm assets "used in the debtor's farming operations" and, therefore, under Code § 1222(a)(2)(A) the debtor was entitled to treat the related tax liability as a general unsecured claim. The Court disagreed and held that, although the proceeds from the sale of farm products and crop insurance proceeds were farm assets, the proceeds were not "used in the debtor's farming operation" and, therefore, the debtor was not eligible for beneficial treatment under Code § 1222(a)(2)(A). *In re Keith*, 2013 Bankr. LEXIS 2802 (Bankr. D. Kan. 2013).

iv. The marginal method (as opposed to the proportional method) is the appropriate calculation of the Code § 1222(a)(2)(A) claims. The debtor raised crops and finished cattle. The debtor filed a Chapter 12 bankruptcy and the IRS argued, for purposes of Code § 1222(a)(2)(A), the Court should apply the proportional method to calculate the resulting

unsecured claim of the IRS. The Court disagreed and held that the marginal method adopted by *Knudsen* and *Ficken* (and not overturned by the Supreme Court in *Hall*) represent the proper calculation. *In re Keith*, 2013 Bankr. LEXIS 2802 (Bankr. D. Kan. 2013).

v. Treatment of Capital Gains. Income taxes recognized from the sale of a farm during Chapter 12 bankruptcy are not dischargeable and must be paid by the debtor. In a 5-4 decision authored by Justice Sotomayor (joined by C.J. Roberts, Scalia, Thomas, and Alito), the Supreme Court held that a federal income tax liability recognized from a farm sale during Chapter 12 bankruptcy proceedings is not incurred by the bankruptcy estate and therefore is not dischargeable. Under Code § 1222(a)(2)(A), certain governmental claims resulting from the disposition of farm assets are reduced to unsecured, general claims that may be discharged after incomplete satisfaction. That rule, however, only applies to claims in the debtor's plan that are "entitled to priority under section 507." Section 507 lists ten categories of claims—two of which relate to taxes. The pertinent exception here is Code § 507(a)(2). That provision covers "administrative expenses allowed under section 502(b)." Code § 502(b) includes "any tax incurred by the estate." Therefore, for post-petition taxes to be entitled to priority under section 507 and eligible for the section 1222(a)(2)(A) exception, the taxes must be "incurred by the estate." *Lynwood D. Hall, ET UX. v. United States,* 132 S. Ct. 1882, 182 L. Ed. 2d 840 (2012).

b. Secured Claims.

i. Plan confirmation denied because treatment of secured claim was not commercially reasonable and inconsistent with customary lending practices and market rates. Richard and Mark Howe (the "Individual Debtors") and Howe Farms, LLC (the "LLC Debtor") filed Chapter 12 bankruptcies. NBT Bank (the "Secured Creditor") was an secured creditor which held a first priority, perfected security interest in the Debtors' personal property, including accounts, livestock, and farm equipment. The Debtors' plan proposed a twelve-year amortization period at 6% interest with a balloon payment after seven years. Secured Creditor objected to this plan on the basis that the terms were not commercially reasonable and it would not receive the present value of its claims under 11 U.S.C.A. § 1225(a)(5)(B). The Court agreed and held for a loan secured only by livestock and farm equipment, the customary lending term ranged from five to seven years. Additionally, for high-risk borrowers like the Debtors here, the interest rate should range between 9% and 10%. As a result, the plan failed to meet the requirements of cram down and plan

confirmation was denied. *In re Howe Farms LLC*, 2014 Bankr. LEXIS 4385 (Bankr. N.D.N.Y. 2014).

ii. Proposed interest of 2.5% does not adequately address the risk of loss. The debtors Randy and Geneva Perkins ("Debtors") were indebted to Farm Credit ("Secured Creditor") and the indebtedness was secured by a security interest in the farm products of the Debtor. The Secured Creditor objected to the proposed Chapter 12 plan because the 2.5% fixed interest rate did not adequately address the risk of loss of the Secured Creditor under *Till v. SCS Credit Corp*, 541 U.S. 465 (2004). The Court agreed and held the appropriate interest rate on a secured claim was 2% over the prime rate of interest or 5.75%. *In re Perkins*, 2013 Bankr. LEXIS 4539 (Bankr. E.D. Tenn. Oct. 30, 2013).

iii. 15 year amortized term loan on cropland at prime plus 2.5% is customary and provides a sufficient risk factor to the secured creditor. The debtor proposed a 15 year amortization term loan on cropland at prime plus 2.5%. The secured creditor objected arguing that it is customary for loans secured by crop land to mature within five years and that the customary interest rate would be 6.25% to 8%. The Court disagreed and held in favor of the debtor on the basis that to preserve the farming operation a 15 year term is required. Prime plus 2.5% provides a sufficient risk factor under the U.S. Supreme Court decision in *Till. In re Wise*, 2013 Bankr. LEXIS 2299 (Bankr. D.S.C. June 3, 2013).

iv. 25 year amortized term loan on ranch property is not reasonable. The debtors owned a 900 acre ranch. The debtors filed a Chapter 12 bankruptcy and proposed to pay the secured creditor over 25 years. The secured creditor objected on the basis that the terms were not reasonable. The Court agreed and held that a 25 year term was not reasonable under current market conditions for purposes of Code § 1225(a)(5)(B). *In re Standley*, 2013 Bankr. LEXIS 1114 (Bankr. D. Mont. Mar. 22, 2013).

v. Prime plus 1.25% is customary and provides a sufficient risk factor to the secured creditor. The debtors owned a 900 acre ranch. The debtors filed a Chapter 12 bankruptcy and proposed to pay the secured creditor over 25 years at prime plus 1.25%. The secured creditor objected on the basis that the interest rate was not reasonable. The Court disagreed and held that prime plus 1.25% is reasonable for purposes of Code § 1225(a)(5)(B). *In re Standley*, 2013 Bankr. LEXIS 1114 (Bankr. D. Mont. Mar. 22, 2013).

c. Feasibility.

i. Partial liquidation of farming operation did not result in feasible plan. Bruce and Stacie Meinders (the "Debtors") were dairy farmer and were indebted to State Savings Bank (the "Secured Creditor"). The indebtedness was secured by mortgages on farmland. The Debtors filed a Chapter 12 Plan (the "Plan") that proposed to sell a robotic milking machine and use the proceeds to purchase fifty (50) additional dairy cows. The Secured Creditor objected and the court agreed that the proceeds from the robotic milker would not be enough to purchase the minimum number of the cows needed to support the Plan and, therefore, the Plan was not feasible. *In re Meinders*, 2016 WL 1599508 (Bankr. N.D. Iowa 2016).

ii. Failure to propose a feasible Chapter 12 plan is cause to dismiss. Keith's Tree Farm (the "Debtor") was a tree farm. The Debtor is indebted to Grayson National Bank (the "Secured Creditor"). The debt is secured by the real property of the Debtor. The Debtor filed a series of five Chapter 12 bankruptcy cases; with the Debtor unable to confirm a plan in the first four cases. In filing the fifth bankruptcy the Debtor changed its management and liquidated certain assets. The Secured Creditor filed a motion to dismiss arguing that even with the change in management and liquidation of assets the proposed Chapter 12 plan was not feasible, as required by 11 U.S.C. § 1225, and the case should be dismissed. The court agreed and held that the record establishes that the Debtor would not be able to make all payments under the plan or otherwise comply with the plan, that the Debtor had failed to show any reasonable likelihood of reorganization, and that the unreasonable delay in proposing a confirmable plan to the court the Debtor's gross mismanagement in failing to provide accurate financial information constituted cause to dismiss under 11 U.S.C. § 1208. *In re Keith's Tree Farm*, 2016 WL 1086758 (Bankr. W.D. Va. 2016).

Comment. It is not entirely clear why the Secured Creditor allowed five Chapter 12 bankruptcies to be filed and elected not to file a motion for stay relief in an earlier bankruptcy. Had stay relief order been entered in an earlier bankruptcy, 11 U.S.C. § 109(g)(2) restricts the debtor from filing a later Chapter 12.

iii. Chapter 12 plan was feasible even though projected revenue and expenses were optimistic. Bright Harvesting, Inc. (the "Debtor") was a custom harvester company and farmed some cropland. The Debtor is indebted to Farm Credit of New Mexico (the "Secured Creditor"). The debt is secured by the real property of the Debtor. The Debtor filed a proposed Chapter 12 plan. The Secured Creditor objected and argued that that the proposed Chapter 12 plan was not feasible, as required by 11 U.S.C. § 1225. The court disagreed and held that although the projected revenue and expenses were generally optimistic there was enough

evidence in the record after modification of the plan terms by the court to find that the plan had a reasonable likelihood of success. *In re Bright Harvesting, Inc.*, 2015 WL 7972717 (Bankr. D.N.M. 2015).

iv. Past financial history provides no reasonable probability that the plan terms will be satisfied. The debtors Randy and Geneva Perkins ("Debtors") were indebted to Farm Credit ("Secured Creditor") and the indebtedness was secured by a security interest in the farm products of the Debtor. The proposed Chapter 12 plan proposed to make a significant balloon payment at the end of the plan term. The Secured Creditor objected to the proposed Chapter 12 plan because the plan was not feasible and there was no reasonable probability that the plan terms will be satisfied. The Court agreed and held the Debtor did not have the ability to sustain and fund the plan based on their financial history. *In re Perkins*, 2013 Bankr. LEXIS 4539 (Bankr. E.D. Tenn. Oct. 30, 2013).

d. Post-Confirmation.

i. A change in law does not satisfy the substantial or unforeseeable change in circumstances requirement necessary to modify a confirmed Chapter 12 plan. Victoria Gardner (the "Debtor") owned various parcels of real estate including property jointly owned by her and her husband, as well as property that included a historic residence listed on the National Register of Historic Places. The Debtor filed a Chapter 12 bankruptcy and confirmed a Chapter 12 plan (the "Plan"). The Plan required, among other things, that the Debtor sell the historic property within twenty-seven (27) months after the Plan's confirmation. If the sale did not take place within that time frame, one of the junior priority lien holders (the "Junior Creditor") would be allowed to commence a legal action to foreclose its lien. Upon expiration of the allowed time, the Debtor moved to modify the Plan, claiming she was unable to sell the property within the allocated period due to the expiration of a state tax credit for historic sites that was critically important to a sale. The Junior Creditor objected and the Court agreed on the basis that a change in the law (1) was not a change in the Debtor's financial circumstances, (2) was reasonably foreseeable, and (3) was not a substantial change. To modify a confirmed Chapter 12 plan under 11 U.S.C.A. § 1229, the modification statute, the Court required the Debtor to show the Debtor experienced a substantial and unanticipated change in financial condition post-confirmation. Based on this test, the Court found that the change in law did not impact the Debtor's financial circumstances and, even if it had, it was not a substantial or unforeseeable impact and a modification was unjustified. *In re Gardner*, 522 B. R. 137 (Bankr. W.D.N.C. 2014).

ii. Chapter 12 plan modification is only allowed upon satisfaction of 11 U.S.C.S. § 1229(b). Colby Daniels (the "Debtor") filed for Chapter 12 bankruptcy and confirmed a Chapter 12 plan (the "Plan"). Subsequently, the Debtor proposed plan modifications under § 1229(b) to sell certain farmland. The Chapter 12 Trustee objected and the Court held that the sale price should be settled via auction. The Court eventually found that the Debtor failed to meet his burden with regard to the feasibility of his modified plan and, therefore, failed to meet the burden to modify a confirmed Chapter 12 plan under 11 U.S.C.A. § 1229(b). *In re Daniels*, 2015 Bankr. LEXIS 1609 (Bankr. W.D. La. 2015).

iii. Chapter 12 trustee is not entitled to compensation from the sale of farm property. The debtors Kenneth and Melissa McLendons ("Debtors") own and operate a sod farm. The Debtors filed a Chapter 12 bankruptcy and, in conjunction with the filing, sold certain property. The sale was not contemplated by the Chapter 12 plan. The Debtors sought to apply the proceeds of the sale to a secured claim. The Trustee objected and argued that he was entitled to a statutory 10% fee from the proceeds. The Court disagreed and held that the trustee was not entitled to the statutory 10% fee on the proceeds of the sale because additional compensation was not allowed under 11 U.S.C. §326. The Trustee is only entitled to fees only for payments made under a confirmed plan. Because the sale of the farm was not contemplated in the confirmed Chapter 12 plans the Trustee was not entitled to his compensation. *In re McLendon*, 506 B.R. 243 (Bankr. N.D. Miss. Oct. 18, 2013).

GP:4895269 v1

USDA Conservation Program Compliance: Pitfalls and Pointers

Grant Ballard, Ark Ag Law, PLLC

UNITED STATES DEPARTMENT OF AGRICULTURE
OFFICE OF THE SECRETARY
NATIONAL APPEALS DIVISION
DIRECTOR REVIEW DETERMINATION

In the Matter of	)	
	)	
XXXXX	)	
XXXXX	)	
Appellants	)	Case No. 2015W000319
	)	
and	)	
	)	
NATURAL RESOURCES	)	
CONSERVATION SERVICE	)	
Agency	)	

Introduction

This appeal involves a dispute between **XXXXX** and **XXXXX** (Appellants) and the Natural Resources **Conservation** Service (NRCS) that arose when NRCS determined that Appellants' joint venture is ineligible to participate in the **Conservation Stewardship Program** (CSP) because it did not meet the System for Award Management (SAM) registration requirement.[1] Appellant appealed NRCS's decision to the National Appeals Division (NAD). After holding a hearing, a NAD Administrative Judge determined that NRCS did not err when it declined to award Appellants' joint venture a CSP contract.[2] Appellants then filed this request for Director review, requesting that I exercise my equitable relief authority to require NRCS to accept their CSP contract application. Based on my review of the entire record, I uphold the Administrative Judge's decision, and I grant Appellants' request for equitable relief.

Issue in This Case

The issue on Director review is whether exercise of my equitable relief authority under 7 U.S.C. § 6998(d) is warranted in this case. To resolve this issue, I must determine whether Appellants, despite failing to comply fully with the requirements of the CSP **program**, either detrimentally relied on the advice of an authorized agency official, or made a good faith effort to comply with the requirements of the **program** under circumstances that warrant equitable relief. *See* 7 U.S.C. § 7996(b)(1) and (2).

Background

The purpose of the CSP **program** is to encourage producers to address resource concerns in a comprehensive manner by undertaking additional **conservation** activities and by improving, maintaining, and managing existing **conservation** activities. Through the CSP **program**, NRCS provides financial and technical assistance to participants for the **conservation** and improvement of the quality of soil, water, air, habitat, and other related natural resources, and for any similar **conservation** purpose as determined by NRCS. *See* 7 C.F.R. § 1470.1. NRCS provides annual payments under the **program** to compensate a participant for installing and adopting additional **conservation** activities, and improving, maintaining, and managing existing **conservation** activities. *See* 7 C.F.R. § 1470.24(a).

Appellants farm over 3,000 acres in **XXXXX**, **XXXXX**. In 2012, **XXXXX** applied as an individual for a CSP contract. In 2013, Appellants revised **XXXXX** CSP application so as to make their joint venture the applicant. In August 2014, NRCS informed Appellants that their joint venture was next in line to receive CSP funding.

NRCS informed Appellants that they had to complete at least one **conservation** enhancement project prior to September 30, 2014, for their joint venture to be eligible to participate in the CSP **program** for the 2014 fiscal year. Although completing the enhancement project would not guarantee their acceptance into the CSP **program**, NRCS advised them that not completing the project prior to the end of the fiscal year would exclude them from the **program**. Appellants heeded NRCS's advice and installed a variable frequency drive pump at a cost of $2,700. At the end of August, NRCS directed its field office to proceed with a field verification of Appellants' land, and following its completion, NRCS determined that Appellants met the criteria for inclusion in the CSP **program**.

On September 15, 2014, NRCS informed Appellants that they had to obtain a **Dun** & Bradstreet Data Universal Numbering System (**DUN**S) number for their joint venture and complete the SAM registration before receiving funding.[3] Appellants responded immediately to NRCS's request. Meanwhile, NRCS accepted Appellants' joint venture into the CSP **program** and agreed to provide $34,848 in annual cost share assistance for five years as part of their **conservation** plan. However, on September 30, NRCS informed Appellants that it would not approve their CSP contract because their joint venture did not maintain a current SAM registration. Nine days later, Appellants received notification that their SAM registration was complete.

Appellants appealed the NRCS decision to the FSA county committee. The county committee acknowledged the time and money that Appellants had spent as a result of their late acceptance into the **program** and the short notice they received to complete the SAM registration. Nevertheless, the county committee denied their appeal because NRCS does not obligate a contract unless the SAM registration is completed.

Appellants then appealed to the FSA state committee. The state committee found that NRCS did not notify Appellants of the SAM and **DUN**S registration requirement until two weeks after their application was selected for field verification. This two week delay, the state committee noted, could have made a difference in Appellants' ability to meet the requirement. The state committee further noted that NRCS should not have accepted their application without the SAM registration because an entity is required to be registered before submitting an application. Upon such circumstances, the state committee granted Appellants' appeal, finding that Appellants made a good faith effort to comply with the requirements of the CSP **program** and requested the NRCS State **Conservation**ist to reinstate their contract.

The State **Conservation**ist declined to reinstate Appellants' CSP contract on the grounds that NRCS did not have authority to enter into a contract with an entity that did not maintain a current SAM registration. The State **Conservation**ist noted that the registration requirement was an applicant's responsibility and that that the delay in notifying Appellants of the registration requirement did not change the underlying legal requirement. The state committee then informed Appellants of the State **Conservation**ist's decision not to reinstate their CSP contract and provided Appellants appeal rights if they believed the State **Conservation**ist's decision to be erroneous.

Appellants appealed the NRCS decision to NAD. Following a hearing, a NAD Administrative Judge upheld the NRCS's decision finding that Appellants' joint venture was ineligible to participate in the CSP **program** because it was not registered in the SAM management system at the time of contract approval. With respect to equitable relief, the Administrative Judge found:

> Appellants acted promptly after learning of the [SAM] requirement. Through its accountant, the joint venture applied for the [SAM] registration on the same day that NRCS informed Appellants of the registration requirement. Through no fault of Appellants, the joint venture did not obtain the [SAM] registration until October 9, 2014. … Moreover, given that the joint venture received its [SAM] registration nine days after the CSP deadline, it is almost a certainty that NRCS's two-week delay materially contributed to the joint venture's failure to timely obtain the [SAM] registration.
>
> Other than obtaining the [SAM] registration, the joint venture fully complied with the CSP requirements. Moreover, the joint venture sought, and received, permission to implement a **conservation** enhancement prior to contract approval. Implementation of at least one enhancement prior to September 30, 2014 was required in order for the joint venture to remain eligible to participate

in the CSP for the 2014 fiscal year. Appellants spent approximately $2,700 to install a variable frequency drive pump before September 30, 2014.

Appeal Determination at 6 (citations omitted).[4] Appellants then filed this request for Director review asking that I exercise my equitable relief authority and require NRCS to accept their CSP contract application. NRCS did not respond to Appellants' request for Director review.

Legal Authorities and Standard for Review

I may grant equitable relief in cases involving covered **program**s administered by the Secretary of Agriculture in the same manner and to the same extent as provided to the Secretary under Section 26 of the Food and Agriculture Act of 1962. *See* 7 U.S.C. §§ 6998(d) and 7996(b). The CSP **program** is a covered **program** for equitable relief purposes. *See* 7 U.S.C. § 7996(a)(2)(A)(ii). Equitable relief may be appropriate if a participant, despite failing to comply fully with the requirements of a covered **program**, either detrimentally relied on the action or advice of an authorized agency representative, or made a good faith effort to comply fully with the requirements of the **program**. *See* 7 U.S.C. § 7996(b)(1) and (2).

Analysis

On Director review, Appellants do not challenge the merits of the Administrative Judge's decision. Instead, they request that I exercise my authority to grant equitable relief. Therefore, I uphold the Administrative Judge's decision on the merits and focus solely on Appellants' request for equitable relief.

Appellants argue that NRCS failed to notify them of the **DUN**S number and SAM registration requirement in a timely and efficient manner. Appellants contend that if they had been made aware of the requirements in August, they would have met the requirements within the timeline. Request for Review at 1. Appellants claim that they worked diligently to meet the requirements and did so in a good faith effort to complete the process within the timeline provided.

Finally, Appellants suggest that they were treated disparately from other farmers.[5] Overall, Appellants request that I exercise my equitable relief authority and require NRCS to accept their CSP contract application and provide financial support for money expended on the contract and their attempt to resolve this dispute.

As stated above, when considering whether equitable relief is warranted in a particular case, I must determine whether a participant, despite failing to comply fully with the requirements of a covered **program**, either made a good faith effort to comply with the requirements of a covered **program** under circumstances that warrant equitable relief or whether the participant detrimentally relied on the action or advice of an authorized agency representative. *See* 7 U.S.C. § 7996(b).

In considering an appellant's request for equitable relief, I focus on whether the appellant made a good faith effort to comply with a **program**'s requirements. *See* 7 U.S.C. § 7996(b)(2). When assessing whether an appellant has made a good faith effort to comply with the requirements of a **program**, I focus on the specific efforts the appellant has undertaken to comply. *See* NAD Case No. 2013E000247 (Dir. Rev., May 30, 2013). Also relevant is whether the efforts expended by an appellant have advanced the objectives of the **program**. *See* NAD Case No. 2013W000586 (Dir. Rev., Oct. 29, 2014) (finding that an agency received a benefit when a participant maintained a **conservation** practice for seven years of the contract period). I further consider any factors that may have prevented an appellant from complying with a **program**'s requirements, including factors that may have been beyond an appellant's control.

In this case, Appellants fully complied with the requirements of the CSP **program** with the exception of their failure to complete their SAM registration before the close of the fiscal year. The record shows that Appellants' failure to comply with this requirement was due to factors beyond their control. NRCS delayed in notifying Appellants of the SAM and **DUN**S registration requirement, leaving them only two weeks in which to complete the registration before the end of the fiscal year on September 30, 2014.[6]

This case is similar to another recent case in which I granted equitable relief to a participant who did not maintain an active SAM registration at the time it submitted its application to renew its participation in the CSP **program**. In that case, NRCS did not advise the appellant of the registration and reporting requirements for federal financial assistance or note that such information was missing from its application at the time the application was filed. Despite the appellant's quick response to NRCS's **program** requirements, the appellant's SAM registration remained inactive as it awaited the assignment of a Commercial and Government Entity Code by the Defense Logistics Agency. Thus, for reasons that were beyond the appellant's control, it was unable to obtain the **program** payments to which it was otherwise entitled. I granted the appellant's request for equitable relief and ordered NRCS to accept the appellant's application to renew its participation in the CSP **program** as timely filed. *See* NAD Case No. 2015E000535 (Dir. Rev., March 10, 2016).

It is important to note there is no dispute that Appellants performed the tasks that they were advised to perform in order to participate in the CSP **program**. This resulted in the USDA receiving a benefit for which it has not had to pay. I have previously recognized in other NAD cases the inherent unfairness of denying a participant any payment when the agency has received the benefit from the participant's compliance with the requirements of the agency's **program**. *See*, *e.g.*, NAD Cases No. 2015W000165 (Dir. Rev., Dec. 10, 2015); *see also* NAD Case No. 2013W000586 (Dir. Rev., Oct. 29, 2014) (finding that an agency received a benefit when a participant maintained a **conservation** practice for seven years of the contract period).

In sum, I find that equitable relief is warranted because Appellants exercised good faith in carrying out the purposes of the **program** and failed to comply with the SAM registration requirement for reasons that were beyond their control. That the USDA received **program**matic benefits as a result of Appellants' performance under the **program** contributes to my assessment that equitable relief is warranted in this case. Accordingly, I grant Appellants' request for equitable relief and order NRCS to accept their 2014 CSP contract application and provide **program** benefits that they are entitled to receive.

Conclusion and Order

Based on the foregoing discussion, I uphold the Administrative Judge's determination. I also grant Appellants' request for equitable relief. NRCS shall accept Appellants' 2014 contract application to participate in the CSP **program** and provide **program** benefits that Appellants are entitled to receive.

/S/
Steven C. Silverman
Director

05/26/2016
Date

---

[1] The Appeal Determination named the Farm Service Agency as the administrative agency in this appeal; however, NRCS issued the decision that was adverse to Appellants, and an NRCS representative participated in this appeal. Hearing Audio at 0:52-0:59.

[2] NAD's regulations provide that a Hearing Officer will adjudicate an appeal that a **program** participant files with NAD. *See* 7 C.F.R. § 11.8. In a memorandum dated November 25, 2014, I changed the working title of Hearing Officer to "Administrative Judge" for all adjudicative duties, including conducting hearing and issuing determinations under 7 C.F.R. Part 11. This change became effective on December 1, 2014.

[3] **Dun** & Bradstreet is a public company that provides a unique numeric identifier, referred to as a **DUN**S number, for business entities. *See* http://www.dnb.com/. The System for Award Management (SAM) is the official U.S. Government system that consolidates several federal procurement systems, including the Central Contractor Registration (CCR), into one system. *See* https://www.sam.gov/. In 2010, the Office of Management and Budget (OMB) required applicants for Federal financial assistance awards to have a **DUN**S number and maintain a current registration in the CCR. *See* 75 Fed. Reg. 55671 (September 14, 2010).

[4] NAD's enabling statute confers authority to the Director to grant equitable relief in the same manner and to the same extent as such authority is provided to the Secretary in accordance with 7 U.S.C. § 7996 and other laws. *See* 7 U.S.C. § 6998(d). The Administrative Judge develops a record from which the Director will determine whether equitable relief should be granted. *See* 7 C.F.R. § 11.8(c)(5)(ii).

[5]

I do not address Appellants' argument of disparate treatment as the record consists solely of Appellants' case and not of other CSP applicants.

[6] The NRCS State **Conservation**ist determined that completing the SAM registration was Appellants' responsibility. The record, however, shows that NRCS was in possession of Appellants' CSP application throughout the 2014 fiscal year and approved it without addressing a **DUN**S number or SAM registration requirement until two weeks prior to the close of the fiscal year. It is unreasonable to expect participants to have a better understanding of **program** requirements than the agency's own officials. *See* NAD Case No. 2014W000121 and 2014W000122 (Dir. Rev., June 12, 2014) (finding that it was unreasonable to expect a participant to have a better understanding of **program** requirements when agency misaction was a factor that led to the participant's failure to comply with those requirements).

STEVE BASS; TERRY H. BASS, Plaintiffs - Appellants, v. TOM VILSACK, Secretary United States Department of Agriculture, Defendant - Appellee.

No. 14-1017

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Argued: October 30, 2014
December 31, 2014

UNPUBLISHED

Appeal from the United States District Court for the Eastern District of North Carolina, at Wilmington. Malcolm J. Howard, Senior District Judge. (7:11-cv-00239-H)

Before SHEDD, AGEE, and WYNN, Circuit Judges.

Affirmed by unpublished per curiam opinion.

ARGUED: Thomas A. Lawler, LAWLER & SWANSON, Parkersburg, Iowa, for Appellants. Matthew Fesak, OFFICE OF THE UNITED STATES ATTORNEY, Raleigh, North Carolina, for Appellee. **ON BRIEF:** Thomas G. Walker, United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Raleigh, North Carolina, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

Page 2

PER CURIAM:

The "Swampbuster" provision of the Food Security Act, 16 U.S.C. § 3821, prohibits persons who participate in programs administered by the United States Department of Agriculture ("USDA" or "the agency") from converting wetlands to agricultural use without authorization. Appellants Steve and Terry Bass (collectively "the Basses") seek judicial review of a final decision of the USDA finding them in violation of this provision. Because we agree with the district court that the agency conformed with controlling statutes and did not commit a clear error of judgment in its decision, we affirm.

I.

This case centers around a piece of farmland in Sampson County, North Carolina, referred to as Farm 3188, Tract 8355, Field UN2 ("Field UN2"). Joe Bass, the original owner of this tract, filed an application in 1994 with the USDA seeking a wetland determination in anticipation of clearing Field UN2 for agricultural crop production. The National Resources Conservation Service ("NRCS"), the division of the USDA responsible for making wetland determinations, concluded that

Page 3

Field UN2 contained approximately 38 acres of wetlands.[1] Joe Bass was properly notified of this determination and informed that clearing, draining, or altering these areas to make possible the planting of a commodity crop would render him ineligible for most USDA farm programs. Joe Bass took no further administrative action regarding the NRCS determination, which thus became final.

In 2004, Joe Bass again filed an application seeking to convert Field UN2 to farmland, falsely representing that he had not "previously received a wetland determination or delineation on this tract from [NRCS.]" (J.A. 103.) Apparently unaware of the 1994 wetland determination, an NRCS wetland specialist completed an on-site inspection of Field UN2, which resulted in another NRCS wetland determination, issued March 23,

2005, concluding that the tract contained at least 28 acres of wetlands.

NRCS informed Joe Bass that this determination would become final unless he requested further review or mediation within thirty days. However, the NRCS letter did not include, as required by USDA regulations, a notice that he could also appeal to the USDA's National Appeals Division ("NAD"). This defect

Page 4

rendered the 2005 determination procedurally deficient. Nonetheless, Joe Bass did not pursue an appeal and he later died. His interest in Field UN2 passed to the Basses.

NRCS was required and did notify the U.S. Army Corps of Engineers ("USACE") of its 2005 wetlands determination, which prompted the USACE to issue a letter to the Basses advising that it might also have jurisdiction over Field UN2 under the Clean Water Act. The USACE letter recommended having the property inspected. The Basses then hired a private consultant, the Land Management Group, Inc. ("LMG"), to provide wetland mapping for the tract. LMG prepared a report finding no wetlands on Field UN2, but its evaluation did not meet any of NRCS's requirements for determining the presence of wetlands under the Food Security Act.

In response to the LMG report, the USACE conducted a site visit and found waters of the United States over which it had jurisdiction along the southern boundary of Field UN2. The USACE then notified the Basses that this determination only "applies to Section 404 of the Clean Water Act," and that it "may or may not be valid for identifying wetlands or waters subject to the rules of the Food Security Act." (J.A. 434.)

Without contacting or seeking any information from NRCS, the Basses drastically altered Field UN2 by removing the natural forest and woody vegetation through logging, stump removal,

Page 5

drainage, and disking to prepare the tract for agricultural use. The Basses sought a cropland acreage determination from the USDA, which triggered an investigation by NRCS to determine if the Food Security Act was violated by the alteration of the tract.

NRCS conducted an on-site inspection and determined that Field UN2 contained wetland hydrology prior to its alteration. As part of its investigation, NRCS also examined whether the Basses could qualify for a minimal effects exemption under 16 U.S.C. § 3822(f), which permits alteration of a wetland if the changes have only a "minimal effect on the functional hydrological and biological value of the wetlands in the area[.]" Id. The exemption did not apply because NRCS determined that the effects of the wetland conversion were greater than minimal.

NRCS then worked with the Basses to determine the feasibility of mitigating the converted wetlands on Field UN2, but those efforts proved unsuccessful. Consequently, NRCS issued a final technical determination in June 2010 finding that Field UN2 contained at least 13.5 acres of converted wetlands. The Basses were then declared ineligible for programs or benefits administered by the USDA.

The Basses timely filed an administrative appeal with the NAD, which held a lengthy evidentiary hearing. In a written

Page 6

decision, the NAD affirmed NRCS's final determination that Field UN2 contained converted wetlands in violation of 16 U.S.C. § 3821. The hearing officer found that NRCS had met its burden of proving that wetlands

were present on Field UN2 prior to its alteration, and it now contained at least 13.5 acres of converted wetlands. In addition, the hearing officer found NRCS's evidence and testimony more credible, specifically observing that the Basses' private consultant did not complete its wetland survey in compliance with the applicable guidelines.

Pertinent here, the Basses attempted to argue that no wetlands existed on Field UN2 prior to their conversion activities. The hearing officer found this issue barred under 7 C.F.R. § 12.30(c)(4), which provides that once a final wetland determination has been made any appeal regarding a potential conversion is "limited to the determination that the wetland was converted[.]" Id. Noting the absence of any evidence that NRCS had rescinded its 1994 determination or that the property's prior owner had appealed that determination, the hearing officer precluded the Basses from presenting evidence that the property did not contain wetlands.

The Basses then filed this lawsuit seeking judicial review of the USDA's final action. Their complaint raised several claims, but only two are now at issue on appeal: (1) did the NAD hearing officer err by limiting their appeal in the manner noted

Page 7

above; and (2) did NRCS incorrectly perform a minimal effects determination in compliance with 16 U.S.C. § 3822(f)?

The district court granted the USDA's motion for summary judgment, finding no error in the hearing officer's decision to preclude the Basses from re-litigating the question of whether wetlands ever existed on Field UN2. Specifically, the court held:

> [T]here was at least one valid prior certified wetland determination in existence at the time of the plaintiffs' conversion of Field UN2. In such circumstances, the review of the agency's 2010 determination that conversion occurred is properly limited to that question of conversion on appeal before the agency, and thus to this court as well. . . .
>
> . . . .
>
> . . . The agency reasonably interpreted its own regulations by limiting the scope of review to whether a conversion took place, thus the court must defer to the agency.

(J.A. 62-64.) The district court also held that it lacked jurisdiction over the minimal effects claim because the Basses never pursued this argument during the administrative process and thus "failed to exhaust their administrative remedies[.]" (J.A. 64.)

The Basses timely appealed, and this Court has jurisdiction pursuant to 28 U.S.C. § 1291.

Page 8

II.

We review the district court's ruling on summary judgment de novo. See Holly Hill Farm Corp. v. United States, 447 F.3d 258, 262 (4th Cir. 2006). However, this Court, like the district court, reviews the underlying decision from the USDA pursuant to the Administrative Procedures Act ("APA"), under which the agency's decision must be upheld unless "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law[.]" 5 U.S.C. § 706(2)(A); see also Holly Hill Farm Corp., 447 F.3d at 262-63

(applying APA judicial review to a final determination of the NAD). Following this narrow standard, we are "not empowered to substitute [our] judgment for that of the agency." Md. Dep't of Human Res. v. U.S. Dep't of Agric., 976 F.2d 1462, 1475 (4th Cir. 1992) (citation and internal quotation marks omitted). Rather, our task is "to determine whether the agency conformed with controlling statutes," and "whether the agency has committed a clear error of judgment." Id. (citations and internal quotation marks omitted).

A.

The NAD hearing officer limited the Basses' appeal pursuant to 7 C.F.R. § 12.30(c)(4), which provides that if a prior wetlands determination exists for purportedly converted

Page 9

property, any administrative appeal is limited to the issue of whether wetlands were converted. After remarking that the 2005 wetland determination was deficient, the hearing officer found that the 1994 determination was a final, certified decision for purposes of this regulation.

The Basses argue that the NAD hearing officer contravened 16 U.S.C. § 3822(a)(4) in reaching that conclusion, citing the statutory language that provides "[a] final [wetland] certification . . . shall remain valid and in effect . . . until such time as the person affected by the certification requests review of the certification by the Secretary." 16 U.S.C. § 3822(a)(4). Relying on this provision, the Basses contend that the 1994 wetland determination was made void when Joe Bass requested a new wetland determination in 2004. They conclude that, because the 1994 determination was invalid at the time of their appeal, "7 C.F.R. § 12.30(c)(4)'s limitation [could] not apply [and] [t]he hearing officer's ruling to the contrary is an error of law." (Opening Br. 21.)

We find this argument to lack merit. By its plain terms, § 3822(a)(4) ends the validity of an existing wetland determination only when an aggrieved landowner "requests review" of that decision. We agree with the USDA's position (regardless of the deference applied) that Joe Bass's actions in 2004 were

Page 10

not a request for review, making this provision inapplicable.[2] Accordingly, the NAD hearing officer did not act contrary to law in concluding that the 1994 determination was a valid wetland decision that limited the Basses' appeal.

Furthermore, even assuming the hearing officer erred in the manner alleged, the result in this case would be unaffected because the evidence was overwhelming that Field UN2 contained wetlands prior to its conversion. Any error on the part of the USDA was therefore harmless, and the Basses' argument fails. See Ngarurih v. Ashcroft, 371 F.3d 182, 190 n.8 (4th Cir. 2004) (noting that the harmless-error doctrine is available in judicial review of administrative actions).

Page 11

B.

The Basses next claim that NRCS did not correctly perform a minimal effects determination under 16 U.S.C. § 3822(f). The district court determined it lacked jurisdiction to adjudicate this claim because the Basses never raised it during their administrative appeal. While we agree that the Basses are foreclosed from pursuing this claim on appeal, we reach that result on a different basis than the district court.

The Supreme Court has long held that it is inappropriate for courts to consider

arguments not developed before an administrative agency because doing so usurps the agency's function. See Woodford v. Ngo, 548 U.S. 81, 88-91 (2006); United States v. L.A. Tucker Truck Lines, Inc., 344 U.S. 33, 36-37 (1952); see also Pleasant Valley Hosp., Inc. v. Shalala, 32 F.3d 67, 70 (4th Cir. 1994) ("As a general matter, it is inappropriate for courts reviewing appeals of agency decisions to consider arguments not raised before the administrative agency involved."). As explained by the Supreme Court,

> orderly procedure and good administration require that objections to the proceedings of an administrative agency be made while it has opportunity for correction in order to raise issues reviewable by the courts. . . . [C]ourts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice.

Page 12

L.A. Tucker Truck Lines, Inc., 344 U.S. at 37.

In Sims v. Apfel, 530 U.S. 103 (2000), the Supreme Court further explained that the need for issue exhaustion is, first and foremost, a question of statutory construction and that agencies generally have the power to adopt regulations requiring issue exhaustion. Id. at 107-08. Where the relevant statutes and regulations do not clearly require exhaustion, however, a court-imposed issue exhaustion requirement may be appropriate. Id. at 108. "[T]he desirability of a court imposing a requirement of issue exhaustion depends on the degree to which the analogy to normal adversarial litigation applies in a particular administrative proceeding." Id. at 109. Where the parties are expected to fully develop the dispute during the course of an adversarial proceeding, the rationale for requiring issue exhaustion is at its strongest. Id. at 110. Conversely, where an administrative proceeding is not adversarial, the reasons for requiring issue exhaustion are much weaker. Id.

There is no statute or regulation that mandates issue exhaustion in this case. See Mahon v. U.S. Dep't of Agric., 485 F.3d 1247, 1256 (11th Cir. 2007) ("[T]here is no express issue exhaustion requirement in the NAD regulations[.]"). However, the regulations that describe the review process before the USDA reflect that this process is adversarial and that issue exhaustion should be required. Id. ("The NAD's procedures

Page 13

provide an adversarial system in which parties are given a full and fair opportunity to make their arguments and present evidence, and, as a corollary, to attempt to challenge the arguments and evidence presented by the agency."); see also Downer v. U.S. Dep't of Agric., 97 F.3d 999, 1005 (8th Cir. 1996) (noting that a general exhaustion of remedies is insufficient in the context of a wetlands determination, and specific issue exhaustion is required). Indeed, every court to address this question has found that issue exhaustion applies to similar proceedings before the USDA. See, e.g., Ballanger v. Johanns, 495 F.3d 866, 868-71 (8th Cir. 2007); Care Net Pregnancy Ctr. of Windham Cnty. v. U.S. Dep't of Agric., 896 F. Supp. 2d 98, 110 (D.D.C. 2012). Finding these cases persuasive, we agree that an issue exhaustion requirement applies.

The Basses had ample opportunity to raise the minimal effects claim at each phase of the administrative proceeding and before the NAD, yet they failed to do so. Instead, the Basses focused their administrative appeal on arguing that Field UN2 did not contain wetlands prior to its conversion. This course of action denied the USDA an opportunity to

exercise its discretion and expertise in considering any minimal effects claim. On these facts, preclusion is appropriate. See Mahon, 485 F.3d at 1256-57 (precluding claims raised for the first time

Page 14

in federal court and never presented to the NAD during the plaintiffs' administrative appeal).

Although the district court incorrectly viewed the foregoing as a jurisdictional bar, see Pleasant Valley Hosp., Inc. , 32 F.3d at 70 ("[T]his general rule is not a strict jurisdictional bar, it is a prudential one[.]"), it was ultimately correct in its decision to forego review of this claim. Accordingly, we find the district court's decision without reversible error.[3]

III.

For the foregoing reasons, the judgment of the district court is

AFFIRMED.

Footnotes:

[1.] NRCS was then known as the Soil Conservation Service. For ease of reference, we refer to this division and its predecessors as NRCS.

[2.] Citing to SEC v. Chenery, 332 U.S. 194 (1947), the Basses contend that this argument is unavailable because it was not relied upon by the NAD hearing officer in the administrative decision below. While generally a reviewing court may only judge the propriety of an agency decision on the grounds invoked by the agency, see id. at 196-97, the court is not so bound when, as here, the issue in dispute is the interpretation of a federal statute. See N.C. Comm'n of Indian Affairs v. U.S. Dep't of Labor, 725 F.2d 238, 240 (4th Cir. 1984) ("We do not . . . perceive there to be a Chenery problem in the instant case because the question of interpretation of a federal statute is not 'a determination or judgment which an administrative agency alone is authorized to make.'" (citation omitted)).

[3.] Apparently forecasting this hurdle, the Basses argue that plain error would result if we decline to consider this claim. Under this doctrine, as applied in our civil jurisprudence, we will correct an error not raised previously if it is "'plain' and our refusal to consider it would result in a miscarriage of justice." Nat'l Wildlife Fed'n v. Hanson, 859 F.2d 313, 318 (4th Cir. 1988) (citation omitted). Plain error analysis, in the noncriminal context, is very rarely available, and then only to correct particularly egregious errors. See In re Under Seal, 749 F.3d 276, 285-86 (4th Cir. 2014). It is not at all evident that NASD erred in its minimal effects determination in the manner alleged. Moreover, this type of error does not constitute a "miscarriage of justice" as defined in our case law. See Holly Hill Farm Corp., 447 F.3d at 268; see also In re Celotex Corp., 124 F.3d 619, 631 (4th Cir. 1997). We therefore find this doctrine inapplicable.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
SOUTHERN DIVISION

No. 7:11-CV-239-H

TERRY H. BASS & STEVE BASS, Plaintiffs, v. TOM VILSACK, Secretary, United States Department of Agriculture, Defendant.	)	**ORDER**

This matter is before the court on defendant's motion for summary judgment. Plaintiffs have responded, and the parties have also provided the court with supplemental briefing as ordered. The time for further filing has expired, and this matter is ripe for adjudication.

BACKGROUND

This is an action for judicial review of a final administrative decision of the United States Department of Agriculture ("USDA"). Plaintiffs are owners of real property located in Sampson County, North Carolina, which the USDA refers to as Sampson Co. Farm 3188, Tract 8355, Field UN2 ("Field UN2"). Between 1994 and 2010, the USDA's Natural Resources Conservation Service ("NRCS") and its predecessor agency issued

a number of preliminary and final determinations regarding the existence of wetlands on Field UN2. Most recently, on June 21, 2010, NRCS made a Certified Wetland Determination and Final Technical Determination that Field UN2 contains 13.5 acres of converted wetlands. Plaintiffs appealed NRCS's Final Technical Determination to the USDA's National Appeals Division.

Following a hearing held over a period of four days, Glenna J. Sheveland, National Appeals Division Hearing Officer, upheld NRCS' 2010 wetland determination, concluding that plaintiffs had failed to meet their burden of proving that the NRCS' Final Technical Determination was erroneous. In reaching this conclusion, Hearing Officer Sheveland determined that a final certified wetland determination existed prior to NRCS' 2010 determination - that in 1994 the agency found the existence of 28 acres of wetlands on Field UN2. Citing the absence of any evidence that NRCS had rescinded its 1994 determination or that the property's prior owner had appealed the determination, Hearing Officer Sheveland further determined that plaintiffs were precluded from presenting any evidence to support their position that the property did not contain wetlands. R. 161 (containing the Agency Decision and citing 7 C.F.R. § 12.30(c)(4)).

Plaintiffs filed complaint in this court on November 18, 2011, seeking review of the final administrative decision.

 Conservation Program, 14

Defendant answered the complaint [DE # 13] and filed a transcript of the administrative record in this case, which is lodged under docket number 7:12-MC-2-H. Additionally, plaintiffs filed a brief in support of petition for judicial review [DE # 29], to which defendant incorporated its response in defendant's memorandum in support of the instant motion for summary judgment [DE # 33]. Plaintiffs responded to the motion for summary judgment [DE # 34] and filed a reply to defendant's response regarding the petition for judicial review [DE # 35]. Upon review of the case, on May 3, 2013, the court ordered supplemental briefing on the validity of NRCS's 1994 determination. In response to the order, plaintiffs submitted a supplemental brief [DE # 38] and defendant responded [DE # 40].

STATEMENT OF THE FACTS

Field UN2 was originally owned by Mr. Joe Bass. Upon his death, it was inherited by plaintiffs. In or around 1994,[1] Joe Bass filed a Form AD-1026 to determine if there were wetlands present on Field UN2, which was forwarded to NRCS. R. 152. NRCS made a determination on February 7, 1994, that Field UN2 contained 38 acres of wetland. R. 152, 1375-80. That determination stated: "Before clearing, draining or altering these areas for any use . . . complete a new Form AD-1026.

[1] The record is unclear as to precisely when Joe Bass first filed this form, presumably because it was referred to NRCS by a local agency. See R. 152, 1362, 1376.

Failure to do so could result in loss of eligibility for USDA benefits for all the land you farm." R. 1376. Joe Bass was also notified in the 1994 determination of his right to appeal. R. 1376.

On December 15, 2004, Joe Bass filed another Form AD-1026 along with a Form NRCS-CPA-38, again seeking to convert Field UN2 to farmland. R. 1381-85. Form NRCS-CPA-38 asked if Joe Bass "previously received a wetland determination or delineation on this tract from [NRCS]," and the "NO" box was marked. R. 1383. These request forms were referred to NRCS, which sent a resource wetland specialist to complete an on-site inspection of Field UN2 on February 2, 2005.

The on-site inspection resulted in a preliminary technical determination, which NRCS issued on March 23, 2005, concluding that Field UN2 contained at least 28 acres of wetlands. R. 1386-1400. Joe Bass was provided with documentation as to the basis for the agency's determination, including the type of soil and vegetation which indicated wetlands, and several maps, which corresponded to markers on the property, delineating where wetlands and non-wetlands were located.

As to his appeal rights, Joe Bass was informed that "this preliminary technical determination will become final within 30 days unless you request . . . either [a field visit] or [mediation]." Joe Bass was further informed that once the

determination became final, it "may be appealed to the Farm Service Agency Sampson County committee." R. 1388. However, Joe Bass was not informed, as required by the agency's own regulations, that he could also appeal the final technical determination to the USDA's National Appeals Division. Joe Bass took no further action as to the 2005 determination. The United States Army Corps of Engineers ("COE") was also notified of this determination, as it makes wetland determinations pursuant to the Clean Water Act. NRCS has exclusive responsibility for wetland determinations under the Food Security Act, which is at issue in this case.[2]

In 2005 Joe Bass died and his estate passed to plaintiffs. On September 11, 2006, plaintiff Steve Bass hired a private consultant to provide "[p]reliminary wetland mapping" of the property at issue. R. 3135. By November 2007, the private consultant had prepared a report finding no wetlands on the property, which it sent to COE. R. 3136-58. The consultant dug one data point[3] from which he recorded information and formed the conclusion that no wetlands existed on the property. The private consultant's review did not meet any of NRCS's requirements (laid out in the National Food Security Act Manual)

---

[2] Plaintiffs were aware of this division of responsibility between NRCS and COE. See R. 155.

[3] At some point plaintiffs contended to NRCS that the consultant used more than one data point, but there is no evidence in the record to support that assertion, and it appears to be abandoned at this stage. See R. 155.

for determining the presence of and delineating the boundaries of wetlands. R. 155

At some point between August 2007 and January 2008, without contacting or seeking any information from NRCS, plaintiffs drastically altered Field UN2. It had been covered by natural forest and woody vegetation, in no condition to support agricultural production. R. 1376-80, 1410-17. Plaintiffs then logged, removed stumps, root raked, improved drainage and channels, and disked Field UN2 in order to prepare the area for agricultural use. R. 1467, 1874. In fact, plaintiffs planted corn on the property during crop year 2008. R. 158.

In response to the consultant's report, COE visited the property in January 2008 and found waters of the United States, which it had jurisdiction to regulate pursuant to the Clean Water Act, along the southern boundary of the tract. R. 3159-66. COE's inspection did not follow the guidelines for making a wetland determination in the National Food Security Act Manual. R. 155. COE followed its determination with a letter to plaintiff Steve Bass, notifying him that this determination "applies to Section 404 of the Clean Water Act," and advising him that it "may or may not be valid for identifying wetlands or waters subject to the rules of the Food Security Act." R. 1856. Plaintiff Steve Bass was further advised in that letter to "contact [NRCS] for their determination regarding your

eligibility for the USDA program benefits for agricultural lands." R. 1856.

In January 2008, plaintiff Steve Bass requested a cropland acreage determination for Field UN2 from the Sampson County Farm Services Agency, which triggered an investigation by NRCS. NRCS conducted an on-site field investigation on January 31, and February 1, 2008, to determine if noncompliance with the Food Security Act had occurred.[4] R. 731. NRCS made initial determinations in February 2008, but then rescinded those determinations and decided to perform another review of the property. R. 1484-87. In April 2008, NRCS conducted another on-site field review to determine the extent of the converted wetland, in accordance with the National Food Security Act Manual.

NRCS worked with plaintiffs to determine the feasibility of mitigating the converted wetland at Field UN2, but found plaintiffs did not meet any exemptions, pursuant to the regulations, that would allow plaintiffs to continue to receive benefits from USDA. R. 158.

NRCS issued preliminary technical determinations finding converted wetland at Field UN2 in 2008 and 2009. Finally, on June 21, 2010, NRCS made its final technical determination that

---

[4] NRCS informed plaintiff Steve Bass that the 2005 determination was still in place.

 Conservation Program, 19

Field UN2 contained at least 13.5 acres of converted wetland, which plaintiffs appealed to the National Appeals Division. NRCS's determination was upheld on agency appeal, and is now before the court.

COURT'S DISCUSSION

I. Standard of Review

Summary judgment is appropriate pursuant to Rule 56 of the Federal Rules of Civil Procedure when no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986). The party seeking summary judgment bears the initial burden of demonstrating the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986).

Once the moving party has met its burden, the non-moving party may not rest on the allegations or denials in its pleading, Anderson, 477 U.S. at 248, but "must come forward with 'specific facts showing that there is a genuine issue for trial.'" Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986) (quoting Fed. R. Civ. P. 56(e)). Summary judgment is not a vehicle for the court to resolve disputed factual issues. Faircloth v. United States, 837 F. Supp. 123, 125 (E.D.N.C. 1993). Instead, a trial court

reviewing a claim at the summary judgment stage should determine whether a genuine issue exists for trial. Anderson, 477 U.S. at 249.

In making this determination, the court must view the inferences drawn from the underlying facts in the light most favorable to the non-moving party. United States v. Diebold, Inc., 369 U.S. 654, 655 (1962) (per curiam). Only disputes between the parties over facts that might affect the outcome of the case properly preclude the entry of summary judgment. Anderson, 477 U.S. at 247-48. The evidence must also be such that a reasonable jury could return a verdict for the non-moving party. Id. at 248. Accordingly, the court must examine "both the materiality and the genuineness of the alleged fact issues" in ruling on this motion. Faircloth, 837 F. Supp. at 125.

Pursuant to the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706, a person "adversely affected or aggrieved by agency action . . . is entitled to judicial review thereof." 5 U.S.C. § 702. "The reviewing court shall . . . hold unlawful and set aside any agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). "In determining whether agency action violates § 706(2)(A), we perform only the limited, albeit important, task of reviewing

agency action to determine whether the agency conformed with controlling statutes, and whether the agency has committed a clear error of judgment." Holly Hill Farm Corp. v. United States, 447 F.3d 258, 263 (4th Cir. 2006) (internal quotation marks omitted). "Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency." Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971).

II. Analysis

The "Swampbuster" provision of the Food Security Act of 1985 prohibits farmers who participate in USDA programs from converting wetlands and then producing an agricultural commodity on those converted wetlands. 16 U.S.C. § 3821(a). In 1990, Congress concluded that this law did not sufficiently discourage inappropriate agricultural uses of valuable wetlands. Accordingly, ineligibility for USDA benefits was extended to "any person who in any crop year . . . converts a wetland by draining, dredging, filling, leveling, or any other means for the purpose, or to have the effect, of making the production of an agricultural commodity possible on such converted wetland." 16 U.S.C. § 3821(c). Ineligibility for USDA benefits continues for all land the farmer controls until the wetland is restored

or the loss mitigated. 16 U.S.C. §§ 3821(c), 3822(i).

NRCS is responsible for determining whether any portions of a farmer's land are subject to Swampbuster restrictions. This responsibility involves determining whether any agricultural lands involved in an application are wetlands and delineating the specific boundaries of any wetlands that are present. See 7 C.F.R. § 12.2(a). Wetland is defined by statute as land that:

> (A) has a predominance of hydric soils;
> (B) is inundated or saturated by surface or groundwater at a frequency and duration sufficient to support a prevalence of hydrophytic vegetation typically adapted for life in saturated soil conditions; and
> (C) under normal circumstances does support a prevalence of such vegetation.

16 U.S.C. § 3801(a)(27).

Review of a wetlands determination may only be requested if "a natural event alters the topography or hydrology of the subject land . . . or if NRCS concurs with an affected person that an error exists in the current wetland determination." 7 C.F.R. § 12.30(c)(6). Once a wetlands determination has been made, and the wetlands have been converted for agricultural use, NRCS must still make another on-site determination that such a conversion has been made before USDA can withhold benefits. On appeal, that decision to withhold benefits "shall be limited to the determination that the wetland was converted," instead of re-assessing whether any wetlands ever existed on the property.

7 C.F.R. § 12.30(c)(4).

In opposition to summary judgment, plaintiffs argue that: (1) NRCS's final decision is not in accordance with law because 16 U.S.C. § 3822(a)(4) requires treating the 1994 determination as invalidated by the 2005 determination; (2) NRCS's substantive position is contrary to law because the requirements for wetlands are unmet; and (3) NRCS's refusal to consider a minimal effects determination is contrary to 16 U.S.C. § 3822(f)(1). In sum, plaintiffs are seeking a new determination, from the agency or this court, that wetlands were never located on their property in order to receive benefits from the USDA.

"A final certification . . . shall remain valid and in effect as long as the area is devoted to an agricultural use or until such time as the person affected by the certification requests review of the certification by the Secretary." 16 U.S.C. § 3822(a)(4). Plaintiffs argue that when Joe Bass began the application process that resulted in the 2005 determination, he was actually requesting review of the 1994 determination. Defendant responds that even if the 1994 determination was invalid, reliance on it instead of solely the 2005 determination would be immaterial to the outcome of this case.

The 1994 determination found wetlands and was not appealed, the 2005 determination found wetlands and was not appealed, and finally the 2010 determination at issue here found conversion of

wetlands, which was affirmed on appeal by the agency. NRDC's review on appeal of that 2010 determination was limited to whether a conversion occurred because wetlands had already been found on the property, and it is difficult to ascertain whether wetlands existed on a property after it has been changed to accommodate crops.

Procedurally, defendant admits NRDC failed to notify Joe Bass of both avenues of appeal of available to him in regards to the 2005 determination. The 1994 determination contained no such notification error. Thus, when applying the regulations, the National Appeals Division of USDA relied on the 1994 determination, which plaintiffs now argue was invalidated by the 2005 determination.[5]

However, there was at least one valid prior certified wetland determination in existence at the time of the plaintiffs' conversion of Field UN2. In such circumstances, the review of the agency's 2010 determination that conversion occurred is properly limited to that question of conversion on appeal before the agency, and thus to this court as well. See 7 C.F.R. § 12.30(c)(4) ("If the prior determination was a certified wetland determination, an appeal of the NRCS on-site determination shall be limited to the determination that the

[5] This matter was further clarified in the supplemental briefing, which revealed NRDC's determinations were not likely ever subject to a five year limitation for purposes of administering Swampbuster provisions.

wetland was converted in violation of this part."). Plaintiffs cannot, as they seek to do now, reopen the question of whether wetlands ever existed on the property in the first place.

This court finds no clear error of judgment in the agency's reliance on the 1994 certification, considering that both the 1994 and 2005 certifications found wetlands to be present and plaintiffs proceeded with the conversion in complete disregard for both determinations.

As to plaintiffs' second argument, the court does not have jurisdiction to determine whether wetlands were in place before the conversion because that is outside of its review of the 2010 determination.[6] The agency reasonably interpreted its own regulations by limiting the scope of review to whether a

---

[6] Even assuming, arguendo, that the scope of review before the agency on appeal should have included re-examining whether wetlands ever existed on the property, defendant has provided substantial evidence in the record to support the determination that Field UN2 contained wetlands because of the hydric soils and hydrophytic vegetation located there. See, e.g., R. 162-63 (concluding that Field UN2 contained a "predominance of hydric soils" and a "prevalence of hydrophytic vegetation"); R. 1774, 1806-809, 1850 (containing soil maps of the area that identify hydric soil); R. 153, 156-57, 1394, 1793 (showing the information collected during the 2005 and 2008 field inspections as to soil profiles); R. 1780-85 (showing that the property was densely forested between 1986 and 2006); R. 153, 156, 1393, 1447 (containing information about hydrophytic vegetation observed during the 2005 and 2008 on-site inspections); R. 154, 3145-46 (noting that plaintiff's consultant found an eighty percent prevalence of hydrophytic vegetation on the property). Furthermore, there is ample evidence that the hydrology of Field UN2 was consistent with a wetlands determination. See, e.g., R. 157, 163 (finding hydrology criterion were met); R. 1393 (indicating the presence of oxidized root channels in the upper twelve inches of soil during the 2005 field investigation); R. 157, 1528-29, 1803 (depicting remotely sensed data identifying portions of Field UN2 as palustrine forested, broad-leaved deciduous, with temporarily flooded and/or a seasonally flooded wetland); R. 157, 1772, 1798-1800 (indicating Field UN2 does not possess sufficient slope to preclude soil saturation); R. 158, 1793 (evaluating hydrology indicators of a comparison site).

conversion took place, thus the court must defer to the agency. See Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843-45 (1984). Ultimately, plaintiffs are asking this court to substitute its judgment for that of the agency, which is outside the scope of review. See Citizens to Preserve Overton Park, 401 U.S. at 416.

Finally, the minimal effect exemption allows a farmer to continue receiving benefits from the USDA after crop production on a converted wetland, if "[t]he action, individually and in connection with all other similar actions authorized by the Secretary in the area, will have a minimal effect on the functional hydrological and biological value of the wetlands in the area, including the value to waterfowl and wildlife." 16 U.S.C. § 3822(f)(1); see also 7 C.F.R. 12.5(b)(1)(v) (providing that to meet the minimal effect exemption NRCS has to make that determination as to the actions in question and authorize such actions).

Plaintiffs never requested for NRCS to make a minimal effect determination, or pursued this argument before the agency during the administrative hearing. See R. 3108-10. Therefore, plaintiffs failed to exhaust their administrative remedies with respect to this argument and the court cannot consider it for lack of subject matter jurisdiction. See Pleasant Valley Hosp., Inc. v. Shalala, 32 F.3d 67, 70 (4th Cir. 1994).

CONCLUSION

In summary, this court finds the agency acted reasonably when it found plaintiffs ineligible for USDA benefits because they converted wetlands, and as a result affirms the USDA's final administrative decision. For the foregoing reasons, defendant's motion for summary judgment is GRANTED [DE # 32]. The clerk is directed to close this case.

This 7th day of November 2013.

MALCOLM J. HOWARD
Senior United States District Judge

At Greenville, NC
#33

UNITED STATES DEPARTMENT OF AGRICULTURE
OFFICE OF THE SECRETARY
NATIONAL APPEALS DIVISION

In the Matter of	)	
	)	
XXXXX	)	
XXXXX	)	
	)	
and	)	Case No. 2016W000529
	)	
FARM SERVICE AGENCY	)	

-

APPEAL DETERMINATION

XXXXX, a retired schoolteacher, and XXXXX, a risk management and contract specialist, (Appellants) own 615 acres of inherited farmland. Beginning in 1997, Appellants have received annual payments to implement a **conservation** plan on their farmland through two consecutive ten-year **Conservation Reserve Program** (CRP) contracts. On May 31, 2016, Farm Service Agency (Agency or FSA) notified Appellants, that they must repay the Agency the $131,573.70 in annual payments that Appellants received from their 2007 CRP Contract (Contract). The letter also notified Appellants that the Agency had disapproved their request to reinstate the Contract. The Agency terminated the Contract because Appellants had not implemented two scheduled **conservation** plan treatments, described as mid-management activities (mid-cover management).[1]

Appellants appealed the Agency's May 31, 2016 adverse decision. In support of their appeal they first argue that they did not violate the Contract and that the Agency erred by not providing proper advance notice of the required mid-cover management. Next, they argue that the County Committee had the ability to reinstate their contract and that the Agency erred when it revoked the County Committee's reinstatement decision. Lastly, Appellants argue that the Agency's Deputy Administrator for Farm **Program**s (DAFP) abused his discretion when he declined to reinstate Appellants' Contract. In addition to these challenges, Appellants request equitable relief from the National Appeals Division (NAD).

At Appellants' request, I held an in-person hearing on September 29, 2016, in XXXXX. I left the record open at the conclusion of the hearing to allow the parties to submit additional evidence and closed the record on January 3, 2017. I subsequently reopened the record on January 9, 2017, to allow for the Appellants' additional consideration of an Agency submission. I closed the record again on January 13, 2017.

After evaluating the evidence and the applicable regulations, I conclude that the Agency's adverse decision was erroneous. I have also developed the record so the NAD Director may consider equitable relief should Appellants request a Director Review.

PROGRAM BACKGROUND

The objectives of CRP include reducing water and wind erosion, protecting the Nation's long-term capability to produce food and fiber, reducing sedimentation, improving water quality, and creating and enhancing wildlife habitat. To meet those objectives, CRP authorizes the Agency to sign contracts with eligible participants to convert land to a conserving use. Participants receive financial and technical assistance during the contract period in return for converting their land. *See Title Seven of the Code of Federal Regulations (7 C.F.R.) Sections (§§) 1410.1 and 1410.3.*

The regulations require each CRP participant to conduct "mid-cover management" as scheduled in a management plan

developed for the participant's CRP contract. *7 C.F.R. § 1410.22(f).* The Agency interprets that provision to require that participants employ at least one management activity during the life of the contract. Under the provisions of the Agency's handbook, the management plan must schedule such mid-cover management activities before the end of the 6th year for 10-year contracts. A participant may not perform mid-cover management activities during the final three years of a contract. *See FSA Handbook 2-CRP (CRP Handbook), Paragraph (¶) 428A.*

STATEMENT OF THE ISSUES

The dispute in this case is whether the Agency's May 31, 2016 adverse decision is consistent with applicable laws and regulations. The decision informed Appellants that DAFP had declined to reinstate Appellants' Contract, and that Appellants must refund payments and pay interest and damages. The core issues for my consideration are:[2]

1. Did Appellants violate their Contract by failing to perform mid-cover management?

2. Was the Agency required to notify Appellants of Appellants' failure to complete the required mid-cover management?

3. Did the Agency err when it determined the County Committee had no authority to reinstate a participant's CRP contract?

4. Did the County Committee have authority to reconsider its decision to terminate Appellants' Contract?

5. If only DAFP had authority to reverse the County Committee's action, did he abuse his discretion when he denied Appellants' request to reinstate the Contract?

6. What arguments do Appellants present for equitable relief?

FINDINGS OF FACT (FOF)

1. Appellants are third generation owners of 615.5 acres of XXXXX farmland, known as farm number 2826 (Farm). Appellant XXXXX (Appellant) is a retired schoolteacher who received her Master of Arts degrees in English and Educational Leadership. Appellant XXXXX (Brother) is employed as a risk management contract specialist and received his Master of Business Administration degree. Brother gave Appellant a power of attorney to manage his 50% of the Farm's Contract. Appellants inherited the Farm from their mother, who had also entered the Farm into CRP contracts beginning around 1985. Prior to entering the Farm into its first CRP contract, the Farm's crop production was very poor and the Farm had very poor erosion control. During the later years of her mother's life, Appellant managed the Farm's CRP contract for her mother. *Testimony of Appellant, HA, 1:11:00-1:11:16; 1:41:45-1:43:01; 1:43:02-1:43:07; 2:55:01-2:55:55; 2:56:00-2:58:00; 4:13:11-4:13:18.*

2. Since entering the Farm into CRP contracts, Appellants have always fully complied with the terms of their CRP contracts and promptly completed the Agency's verbal requests or instructions. However, Appellants' compliance

was entirely based upon their reliance upon the Agency's verbal explanations and notifications of the contracts' terms. While Appellants read their contracts, they relied solely upon the Agency to identify, explain, and notify them of the contracts' necessary or important terms. *Testimony of Appellants, HA, 1:02:30-1:03:05; 4:32:17-4:37:11.*

3. Starting in 2004, the Agency began including in its contracts the requirement that all CRP participants perform mid-cover management activities. Mid-cover management included activities such as light discing and burning. *Agency Record (AR), page 19; Agency's Post Hearing Exhibit 1, pages 1-2; Testimony of the Agency Representative, HA, 4:51:00-4:51:45.*

4. Appellants signed their Contract on July 28, 2008. Its effective dates were October 1, 2007 to September 30, 2017. The Contract outlined Appellants' agreement to implement its **Conservation** Plan. It also incorporated by reference an Appendix to CRP-1 (appendix). Appellants did not read, were not provided, and did not receive a copy of the appendix.[3] Attached to the Contract was a **Conservation** Plan, a **Conservation** Plan Schedule of Operations (Plan Schedule), and a Revision of Plan or Schedule of Operations or Modification of a Contract (Amended Schedule). Two of the Amended Schedule's planned **conservation** treatments were mid-cover management activities and were scheduled to occur on half of the Farm's entire acreage, once in 2012 and again 2013.[4] The schedules were prepared by the Natural Resources **Conservation** Service (NRCS) and signed by the Appellants prior to their executing the Contract. *AR, pages 97, 106, and 109-110; Agency's Post Hearing Exhibit A, pages 1-7.*

5. Appellants did not perform mid-cover management on half of the Farm's acres in 2012 or 2013. However, between 2007 and 2012 the following activities were approved by the Agency and conducted on the property: (1) in September of 2007, half of the Farm was hayed; (2) in 2007, seismic tests were performed and an oil well was installed; (3) in July of 2008, an overhead powerline was installed to connect power to the oil well; and (4) in late 2011, a fiber optic line and an oil pipeline were laid across part of the Farm. In each activity listed above, if the Farm's vegetation was uprooted during the activity, the disturbed area was seeded and re-seeded. The cost of performing mid-cover management on the Farm's total acreage between 2012 and 2013 would have been $14.50 an acre or $8,925. *Testimony of Appellant, HA, 53:20-1:01:00, 1:21:00-1:23:03, 2:24:01-2:24:49; AR, pages 81-82.*

6. In 2011 Appellant was diagnosed with rheumatoid arthritis and secondary hyperparathyroidism and had surgical procedures performed as part of her treatment for these conditions. In June of 2012, Appellant had her first hip replaced and in December of 2015, she had her second hip replaced. As a result of her treatments, from 2011 through 2014, Appellant experienced a significant amount of pain. Between 2011 and 2013, the pain from her recovery left her at less than a 60% capacity to function normally. *Testimony of Appellant, HA, 2:27:01-2:33:24; AR, pages 83-84.*

7. During the term of Appellants' Contract and during their prior CRP contract Appellant visited the Agency's County office twice each year. These visits were in addition to the times she contacted the Agency to request permission for the utility and oil activities on the property. Each time Appellant went into the Agency's County office or contacted them by telephone, she asked the Agency whether there was anything that she needed to do to complete the Contract, and whether she was "good to go." Excluding the times the Agency requested she do something, she was always told everything was okay and that she was good to go. *Testimony of Appellant, HA, 44:27-45:00; 46:30-49:40; 51:18-51:29.*

8. During the Contract's effective term and prior to the end of the mid-cover management deadline, the Agency arbitrarily sent notices to some similarly situated CRP participants. The notices warned and reminded the other participants of the mid-cover management requirement. The Agency did not send Appellants one of these notices. The reason the Agency did not send notices to all similarly situated CRP participants was likely due to its understaffed county office. Subsequent to the termination of Appellants' Contract, the Agency's state office amended the Agency's state handbook to require that it provide advance notice to all CRP producers of possible mid-cover management violations. *Testimony of Appellant, HA, 1:34:44-1:36:06; Testimony of Agency*

Representative, HA, 5:44:37-5:47:00.

9. On April 20, 2015, the Agency sent Appellant a letter notifying her that it did not have any documentation to show that Appellants' had completed the Contract's mid-cover management requirement. The letter requested that Appellant respond by submitting any evidence of the completion of the mid-cover management or that she list the reasons for not completing it. *AR, page 95.*

10. Upon receiving the letter Appellant called the Agency's county office. She asked the Agency to explain its letter and suggest how she should respond. The Agency told Appellant to write a brief letter explaining how she had acted in good faith. Appellant followed the instructions of the Agency. She responded to the Agency's request by asserting that she had acted in good faith and that during the term of the Contract she had hayed various fields and ensured that disturbed areas had been seeded and re-seeded. *AR, page 94; Testimony of Appellant, HA, 2:33:00-2:33:25*.

11. On June 8, 2015, the County Committee reviewed Appellant's letter and its records and decided that Appellants had not performed the required mid-cover management activities. It determined that the 2007 haying was performed prior to the Contract's effective date and did not discuss Appellants' seeding and reseeding activity. Because there was no evidence to support a finding of Appellants' good faith, it decided to terminate Appellants' Contract. It provided Appellants notice of its decision on July 17, 2015. When the County Committee made its decision, it understood that it had the authority to reconsider and reinstate Appellants' Contract. Had the County Committee realized it could not reinstate the Contract, it would not have terminated Appellants' Contract. *AR, pages 63, 86, 92-93, 98, and 134; Testimony of Agency Representative, HA, 6:06:50-6:07:13*.

12. Appellants requested that the County Committee reconsider its June 8, 2015 termination decision, on August 21, 2015. The County Committee reconsidered its decision on September 15, 2015. After reconsideration it concluded that, while Appellants had not complied with the Contract's mid-cover management requirement, they had acted in good faith to comply. To support its finding of good faith the County Committee noted that, although Appellants were not informed of the mid-cover management requirements, they had been diligent in asking if anything in the Contract was pending, and they had been repeatedly told by the Agency that nothing needed to be completed. In light of these findings the County Committee imposed a fine upon the Appellants and allowed them to repay it through the offset of the Contract's future payments, thereby reversing its prior termination. Appellants paid the fine and did not appeal the County Committee's second decision. *AR, pages 67-68 and-72-70; Testimony of Appellant, HA, 1:44:42-1:46:30*.

13. Paragraph 573 of the Agency's handbook notes that the County Committee does not have the authority to reinstate a terminated CRP contract. It specifies that terminated CRP contracts may only be reinstated by DAFP. This note was added on April 29, 2012. It is based upon the Agency's interpretation of 7 C.F.R. § 1410.52. *AR, page 40.*

14. On November 24, 2015, the State Committee notified the County Committee that it did not have the authority to reinstate Appellants' Contract and that a decision to reinstate the Contract could only be made by DAFP. After being notified, the County Committee recommended Appellants' reinstatement to the State Committee who in turn recommended reinstatement to DAFP. The State Committee's recommendation outlined the relevant facts and the timeline of events. It also included the minute notes of the State and County Committee meetings. *AR, pages 53-54, 56-57, and 59-60; Testimony of Agency Representative, HA, 4:54:11-4:55:54*.

15. On April 25, 2016, DAFP, after finding that Appellants had demonstrated a good faith effort to comply, denied the State and County Committee's recommendation. In support of his decision DAFP found that a good faith effort was not a basis upon which he could authorize relief. He further found that allowing reinstatement would establish a bad precedent that could result in inequitable treatment of future participants. *AR, page 52.*

16. When making a decision whether to terminate a CRP contract, the County Committee is required to consider whether a participant made a good faith effort to comply. In this appeal, after the County Committee decided the Appellants acted in good faith it could not, pursuant to its handbook, terminate the Contract. *AR, page 31-33; Testimony of the Agency Representative, HA, 6:01:30-6:06:00*.

17. The County Committee informed Appellants of DAFP's decision by letter on May 31, 2016. Its letter notified Appellants that they were required to repay the Agency, $131,573.75. To obtain sufficient funds to make this payment, Appellants would have to sell their property, downsize their homes and / or liquidate their retirement savings. Appellant has a fixed monthly income of $1,800 and no cash **reserve**s. Appellants request that their contract be reinstated and that they be allowed to be considered for re-enrollment in the CRP in 2017. *AR, page 45-48; Testimony of Appellants, HA, 2:19:00-2:20:00; 3:21:00-3:30:00; 3:54:50-3:56:41; 4:00:48-4:02:26; 4:07:12-4:08:01*.

18. Subsequent to their receipt of the Agency's May 31, 2016 decision, the Appellants hayed the entire Farm and received $4,425 from that haying. *Testimony of Appellants, HA, 4:08:43-4:10:29*.

19. Over the course of its enrollment in the CRP Appellants' Farm has developed into an area where wildlife thrive and erosion is controlled. The Agency does not dispute that, excluding the potential benefits of mid-cover management, it received the full **conservation** benefit from Appellants' Contract. *Testimony of Agency Representative, HA 5:50:33-5:59:00*.

DISCUSSION

The regulations found at 7 C.F.R. Parts 11, 780 and 1410 govern the appeal and the issues on appeal. I also considered the CRP Handbook. The handbook provisions outline the Agency's interpretation of its regulations and provide guidance for implementing Agency **program**s.

It is Appellants' burden to prove by a preponderance of the evidence that the Agency's May 31, 2016 adverse decision was erroneous. *7 C.F.R. § 11.8(e)*. The U.S. Federal Circuit Court of Appeals explained that a preponderance of the evidence is, "evidence which is … more convincing than the evidence … offered in opposition to it ." *Greenwich Collieries v. Director, 990 F.2d 730, 736 (3d Cir. 1993)*. An agency's adverse decision is erroneous when it is inconsistent with the laws and regulations of the agency or the generally applicable interpretations of those laws and regulations. *7 C.F.R. § 11.10(b)*.

1. Appellants violated their Contract by failing to perform mid-cover management.

In order to enroll land in the CRP a participant must enter into a contract with the Agency. *7 CFR §1410.32(a)*. By regulation a CRP contract must contain: (1) the terms and conditions for participation; (2) a **conservation** plan; and (3) any other materials or terms deemed necessary by DAFP. *7 CFR §1410.32(b)*. It must be: (1) within the dates established by DAFP; and (2) signed by the producers and or owners. *7 C.F.R. § 1410.32(d)*. It may be terminated if the participant is not in compliance with the terms and conditions of the contract. *7 C.F.R. § 1410(f)(3)*.

In this case the Amended Schedule for Appellants' Contract contained two specific mid-cover management activities. *FOF 4*. The inclusion of a mid-cover management activity was mandated by regulation. *7 C.F.R. § 1410.22(f)*. In Appellants' Contract the activities listed the number of acres to be treated and the year each treatment must occur.[5] *FOF 4*. Appellants did not apply the specified treatments on the listed acres within the two-year time limit. *FOF 5*. Given these facts I am not persuaded the Agency erred in deciding Appellants violated the Contract. *7 C.F.R. § 1410(f)(3)*.

2. The Agency was not required to provide advance notice of Appellants' failure to complete the required mid-cover management.

In my review of the rules and regulations, I am unable to find any that require that the Agency check, remind or warn a participant of possible contract compliance problems. *7 C.F.R. § 1410 et. al*. To the contrary, the regulations

generally impose responsibility for contract compliance on CRP participants. *See, e.g. 7 C.F.R. § 14.20 (Participants must implement their* ***conservation*** *plans).*

Noting their lack of regulatory responsibility the Agency concedes that during the relevant time period it treated similarly situated CRP participants unequally. *FOF 8*. It provided advance notice to some and none to others. *FOF 8*. While some of Appellants' colleagues received notice Appellants did not. *FOF 8*. Appellants do not dispute that the Agency's failure to provide them notice was un-intentional and most likely the result of a well intentioned but understaffed Agency county office.

It was clear at the hearing that these facts left both the Agency representative and the Appellants unsettled. It is further noteworthy that the Agency's state office has amended its handbook to require that its county offices provide advance notice to future CRP participants. *FOF 8.* The Deputy Director of the National Appeals Division has explained that if an agency, through its handbook, directs that specific notice be provided, that the agency must follow its handbook even when the regulations are silent. *See NAD Case No. 2013W000151 (Dir. Rev., July 9, 2013)*. However, those facts are not present in this appeal. The effective date of the state amendment was July 1, 2015, and not applicable to the events in this appeal.

Here advance notice of Appellants' CRP violation was not required by handbook or regulation. Accordingly, the Agency did not err when it did not provide advance notice to Appellants. Moreover, contrary to Appellants' assertion of reliance on Agency instruction, NAD precedent establishes that producers have an obligation to exercise due diligence to understand the terms and conditions of any **program** contracts they sign. *FOF 2; See NAD Case No. 2015S000328 (Dir. Rev., Mar. 17, 2016).*

3. The Agency erred when it determined the County Committee had no authority to reinstate a participant's CRP contract.

The Agency's handbook instructs that terminated CRP contracts may only be reinstated by DAFP. *FOF 13*. This instruction is derived from its interpretation of 7 C.F.R. § 1410.52(b). Appellants argue that this interpretation is unreasonable and internally inconsistent. *Appellants' Post Hearing Exhibit A, pages 5-6.*

NAD will defer to an agency's interpretation of its own regulation unless the interpretation is plainly erroneous or inconsistent with the regulation. *NAD Case. No. 2015S000134 (Dir. Rev. May 11, 2016)*. Under this standard the question I will analyze is whether the Agency's interpretation of 7 C.F.R. § 1410.52 is inconsistent with the requirements of that regulation.

Both DAFP and the County Committee derive their CRP authority from 7 C.F.R. §1410.1. This section grants DAFP, together with certain other persons and entities, general supervisory authority over the implementation of the CRP regulations. *7 C.F.R. § 1410.1(a) and (d)*. Saliently, the same section vests the authority to implement its regulations in its state and county committees.[6] Absent a specific regulatory exclusion, these grants of supervisory or implementation authority apply to each regulation within Part 1410 and task a county committee with the implementation of each. Subsequent to these original grants, the exceptions, if any, are specifically identified. *7 C.F.R. § 1410 et. al*. Both reason and the common cannons of statutory construction support this approach.[7]

The Agency's interpretation that Section 1410.52(b) grants DAFP the sole authority to reinstate terminated contracts is inconsistent with a county committee's Section 1410(a) grant of implementation authority. In pertinent part, Section 1410.52(b) provides,

> (a)(1) If a participant fails to carry out the terms and conditions of a CRP contract, CCC[8] may terminate the CRP contract.
>
> . . . .
>
> (b) If the Deputy Administrator determines such failure does not warrant termination of such contract, the Deputy Administrator may authorize relief as the Deputy Administrator deems appropriate.

When read as a whole, a plain reading of this regulation does not relieve a county committee of its authority to implement this regulation. It merely expands the supervisory authority of DAFP to include additional implementation authority, its mention made necessary by its general absence in section 1410.1(a).

Furthermore when applied to Part 1410 as a whole, the Agency's interpretation is both unreasonable and unworkable. As noted above, many sections of Part 1410 contain additional grants of implementation authority to the supervisory authority of the CCC and DAFP. If the Agency's interpretation were applied equally to the entire part, the implementation authority of the county committee would effectively be nullified.[9] Accordingly, I find that the Agency's handbook instruction is inconsistent with its regulations.

4. The County Committee had authority to reconsider its decision to terminate Appellants' Contract.

Alternatively, in addition to discussing the regulatory inconsistency of the Agency's interpretation of 7 C.F.R. § 1410.52(b), it is necessary to discuss the County Committee's ability to reconsider a termination decision that was not final. Appellants argue in the alternative, that even if DAFP had the sole authority to reinstate a terminated contract, the Agency erred when it de-authorized the County Committee's decision to reverse its termination of the Contract. *Appellants' Post Hearing Exhibit A, pages 6-8.* In support of this decision they argue that the County Committee's first termination decision was not final. *Appellants' Post Hearing Exhibit A, pages 6-8.* The Agency did not specifically respond to Appellants' argument.

Part 780 of 7 C.F.R. outlines the Agency's informal appeal regulations. It first provides **program** participants with the right to request reconsideration from the decision maker or to appeal to the next level reviewing authority. *7 C.F.R. §§ 780.4(b), 780.7, and 780.10.* Second it defines when a decision is final. *7 C.F.R. § 780.2.*

As set forth by the regulations, a final decision is one rendered by a decision maker upon the written request of a participant that remains final because it is not appealed to a state committee or NAD. *7 C.F.R. §§ 780.2 and 780.7.* Accordingly, a county committee decision is not final unless it is made upon the written request of the participant and is not under reconsideration or appeal. *7 C.F.R. § 780.2.*

In this appeal, after receipt of the County Committee's June 8, 2015 decision to terminate the Contract, Appellants exercised their appeal rights by requesting reconsideration through a written request. *FOF 12; 7 C.F.R. §§ 780.2, 780.4(b), and 780.7.*[10] The County Committee received Appellants' request, and re-considered and reversed its initial decision. *FOF 13.* Appellants did not appeal the County Committee's reversal and second decision, and they paid the amount assessed by the County Committee. *FOF 12.* Appellants' written request for reconsideration, decision to pay the fine, and their decision not to exercise their appeal rights, made the County Committee's second decision the final decision for purposes of the regulation.[11]

Appellants timely exercised their rights to request reconsideration of the County Committee's June 8, 2015 action. *FOF 12.* Under the above provisions, the June 8, 2015 action of the County Committee was not final while Appellants exercised their review rights, the Contract had not been terminated. The County Committee had authority to reverse its June 8, 2015 action and treat the Contract as still active. The provisions of 7 C.F.R. § 1410.52(b) giving DAFP sole authority to reinstate terminated CRP contract were never invoked.[12] Accordingly, the Agency erred when it required that the matter be forwarded to DAFP and the adverse decision was not in compliance with the Agency's regulations.

5. DAFP abused his discretion when he denied Appellants' request to reinstate their Contract.

In July of 2016, the Director of the National Appeals Division, citing the United States Supreme Court, explained that an abuse of discretion review analyzes, "whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *NAD Case No. 2015S000287 (Dir. Rev. July 7, 2016) citing,*

Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971). When conducting such a review it is critical that the reviewing official does not substitute his or her own judgment for that of the agency.

Here, as explained by the Agency and as set forth by its own rules, once the Agency's decision maker[13] determines that a participant made a good faith effort to comply, the Agency is not allowed to terminate that participant's CRP contract. *FOF 16; AR, page 31-33*. In his April 25, 2016 letter, DAFP violated these rules when he found good faith but failed to reinstate the contract. *FOF 15*. His violation of the Agency's rules in the absence of any recognized exception constitutes clear error. *NAD Case No. 2015S000287 (Dir. Rev. July 7, 2016)*.

6. What facts and arguments do Appellants present for equitable relief?

Equitable relief may be appropriate if a participant, despite failing to comply fully with the requirements of a covered **program**, either detrimentally relied on the action or advice of an authorized agency representative, or made a good faith effort to comply fully with the requirements of the **program**. *See 7 U.S.C. § 7996(b)(1) and (2)*. The CRP **program** is a covered **program** for equitable relief purposes. *See 7 U.S.C. § 7996(a)(2)(A)(ii)*.

Appellants request that they be relieved from having to repay the $131,573.70 mandated by the Agency's May 31, 2016 letter and that their Contract be reinstated. *FOF 17*. In support of their requests they refer to the facts set forth below. Additionally they cite to what they argue is the disproportionate cost of mid-cover management as compared to the termination penalty. They also emphasize the unequal **conservation** benefit received by the Agency. *FOF 5 and 17.*

During the hearing, several issues were identified as possibly relevant to a decision analyzing equitable relief. I will identify each in turn and outline the facts I believe may be helpful to an equitable relief determination should Appellants request equitable relief from the NAD Director.

Did the Agency advise Appellants that they were in compliance with all of the terms of their Contract? If so, did Appellants rely upon this statement to their detriment?

Appellant visited the Agency's county office at least twice each year. She also occasionally spoke with the Agency's county office employees by telephone. During each of these visits or telephone conversations, she specifically asked whether there were tasks in the contract that she needed to accomplish that she had not yet accomplished. Each time she asked this question she was assured that there were no outstanding tasks to be performed. *FOF 7*.

These assurances were given to Appellant in the same year that the Agency's county office was sending other similarly situated CRP participants advance notice of possible mid-cover management violations. Appellants were not given advance notice. *FOF 7 and 8.*

After receiving the County Committee's April 20, 2015, notice of possible mid-cover management violation, Appellant telephoned the Agency's county office and received instruction from an Agency employee regarding how to respond. Appellant followed the advice she was given and provided the County Committee a short explanation. The brevity of Appellant's initial explanation was one of the reasons the County Committee decided to terminate the Contract. *FOF 10 and 11*.

What purposes, if any, of the CRP contract were fulfilled?

Outside of any potential benefits that the mid-cover management may have provided to the Farm,[14] and the income derived from subsequently haying the farm, the parties do not dispute that the Agency received full benefit from the Contract. *FOF 18 and 19*. The Farm is an area where wildlife thrive and erosion is controlled. *FOF 19*.

Did Appellants make a good faith effort to comply with the terms of the Contract?

Facts which might support a finding of good faith include: Appellants' history of compliance with prior a CRP contract and Appellant's efforts to continue to reach out to the Agency and inquire about their level of compliance while recovering from painful medical treatments. *FOF 1 and 6.*

Some facts which might rebut a finding of good faith include: Appellants' uncommunicated complete reliance upon the verbal instructions of the Agency and their failure to inform the Agency of Appellant's incapacity and request relief, despite their education and effort to read the Contract. *FOF 2.*

What additional arguments and evidence do the parties present concerning equitable relief?

The required mid-cover management activities were scheduled to be performed during the years when Appellant was experiencing the highest amounts of incapacity while recovering from her medical treatments. *FOF 6.*

As a NAD Administrative Judge, I have no authority to make a determination on equitable relief. In accordance with 7 C.F.R. § 11.9(e), the NAD Director has the authority to grant equitable relief to the same extent as such authority is provided the Agency. The Administrative Judge will not determine the matter, but is responsible for developing a record to enable the Director to make a determination as to whether he should grant equitable relief. Although I have found in Appellants' favor if they wish to request equitable relief, they should do so in a request for a Director Review.

DETERMINATION

Seven C.F.R. § 11.8(e) provides that an appellant bears the burden of proving an agency's adverse decision is erroneous by a preponderance of the evidence. In this case, Appellants met this burden. The Agency's adverse decision was erroneous.

This is a final determination of the Department of Agriculture unless a party files a timely request for review.

Dated and mailed this 10th-day of February 2017.

/s/
SAMUEL S. BAILEY
Administrative Judge
National Appeals Division

---

[1] At the hearing and throughout the record the parties referred to the activity in question as "mid-contract management" or "mid-contract maintenance." However, in this determination I will use the regulatory term "mid-cover management" as a substitute to avoid confusion. *See Title Seven of the Code of Federal Regulations, Section 1410.22(f).*

[2] I have shortened and re-worded the issues presented at the hearing to better conform to the evidence and to increase readability.

[3] In their closing argument Appellants renewed their objection to the admission and consideration of the appendix. Given NAD's practice to consider all relevant evidence, that objection is over-ruled. *7 C.F.R. 11.8(b)(5).*

[4] The Amended Schedule required that mid-cover management be applied to no more than 50% of the Contract acreage and performed before the end of the 6th year of the Contract. Both the Plan Schedule and the Amended Schedule incorrectly referenced the Appellants' prior CRP contract. The insertion of the incorrect number was an inadvertent typographical mistake. It was the understanding of each of the parties that the Amended Schedule applied to the Contract and they treated it accordingly. *AR pages 97, 105, and 109-110.*

[5] Appellants argue that because the mid-cover management's general descriptive language provided that the treatment was to apply to no more

than 50% of the Contract acreage, that the treatment could be satisfied even if it was not applied, 0% being less than 50%. *FOF 4; Appellants' Post Hearing Exhibit A, page 3*. Appellants supported their argument by citing to Appellants' experiences as a teacher and risk management specialist and to their graduate degrees. I am not persuaded by Appellants' argument. Here, the Amended Schedule lists the specific amount of acres to be treated as well as the treatment years. *FOF 4.* This specificity is sufficient to overcome any ambiguity contained in the general description.

I am also not persuaded by the Appellants' argument that the Amended Schedule did not apply to the Contract because it referenced Appellants' prior CRP contract. The Agency's error was typographical. It is insufficient to invalidate Appellants' obligation to perform the delineated mid-cover management. Given the applicable facts of when and how it was prepared and executed, it is clear the inclusion of an incorrect contract number was inadvertent and each party understood the Amended Schedule's applicability to the Contract. *7 C.F.R. § 1410.32(b) and (d)*; *FOF 4*.

Lastly Appellants argue that the haying and or other activities performed on the Farm satisfied their mid-cover management obligation. *FOF 5; Appellants' Post Hearing Exhibit A, page 4*. The County Committee determined that because the haying occurred prior to the effective date of the Contract it could not be used to satisfy the Contract's mid-cover management requirement. The other efforts were also performed on an undetermined but small percentage of the Farm. Given the specificity of the Amended Schedule I am not persuaded the Agency erred by not applying the haying or other activities.

[6] I note here that Subsection 1410.1(b) additionally instructs that a county committee does not have the authority to waive any of the provisions of Part 1410 unless specifically authorized. As explained further below I do not find that this section restricts a county committee's ability to implement the regulation's provisions, absent their specific exclusion.

[7] The common cannons of statutory construction promote a plain language and holistic reading of the entire act or part, where exceptions are interpreted narrowly. *William N. Eskridge, Jr., Philip P. Frickey, Foreword: Law As Equilibrium, 108 Harv. L. Rev. 26, 98-99 (1994)*. The U.S. Supreme Court explained that specific sections must first be read by reference to the whole act. Citing the cannons of statutory construction the Court often warns against the following inconsistencies:

1. Interpreting a provision in a way inconsistent with the policy of another provision;
2. Interpreting a provision in a way that is inconsistent with a necessary assumption of another provision;
3. Interpreting a provision in a way that is inconsistent with the structure of the statute; and
4. Broad readings of statutory provisions when Congress has specifically provided for the broader policy in more specific language elsewhere.

William N. Eskridge, Jr., Philip P. Frickey, Foreword: Law As Equilibrium, 108 Harv. L. Rev. 26, 98-99 (1994).

[8] CCC as used in Part 1410 of the CFR is an abbreviation for Commodity Credit Corporation.

[9] Some examples of this include the DAFP's authority to terminate found in 7 C.F.R. §1410.33(d) and a county committee's similar ability to terminate explained in paragraph 571 of CRP Handbook 2 CRP (Rev. 5) Amend. 22. *See CRP Handbook ¶ 571*. Another example is DAFP's authority to reduce a demand for refund in 7 C.F.R. § 1410.52(c) and a county committee and state committee's similar authority in CRP Handbook ¶¶ 576-578.

[10] Review options under Part 780 include a participant's right to request that a county committee reconsider its actions. *7 C.F.R.§§ 780.4(b) and 780.7.* For purposes of a complete discussion, I note that 7 C.F.R. § 780.7(c) provides that a **program** participant has a right to reconsideration unless the "decision-maker" is DAFP or some other Agency official outside of the Agency's informal appeals process. It might be argued here that DAFP, with his regulatory reinstatement authority, is the decision-maker and, hence, a participant has no right to request reconsideration.

When viewing the regulations as a whole I find this interpretation to be unreasonable and impractical. The plain meaning of that section is that if DAFP makes the initial adverse decision, a county committee has no authority to reconsider it. For example, under circumstances similar to this appeal, if DAFP had been the one who initially decided to terminate Appellants' Contract, the County Committee would not have had authority to reconsider DAFP's action. DAFP was not, however, the decision-maker here. The County Committee was the decision-maker, and it could reconsider its own actions when they were not yet final.

[11] An additional section of Part 780 makes the question of finality clear. Seven C.F.R. § 780.15(e) states that decisions appealable under Part 780 "are final *unless review options under [Part 780] are timely exercised." 7 C.F.R. § 780.15(e)(emphasis added)*. CRP decisions are appealable under Part 780. *7 C.F.R. § 1410.59(a).*

[12] The above is a harmonious interpretation of Sections 1410.52(b), 1410.59(a), 780.2, and 780.15(e) because it gives full effect to all of the provisions. Reading various parts of a statute (or regulation) as a whole and interpreting the provisions so as to give effect to each of the parts has long been a cardinal rule of statutory construction. *See United States v. Boisdorè's Heirs, 49 U.S. 113, 122 (1850); United Savings Ass'n v. Timbers of Inwood Forest Associates, 484 U.S. 365, 371(1988)*.

[13] The Agency's handbook through inference identifies the county committee as its primary fact finder and decision maker. However here, based upon the information provided by the County Committee, the State Committee and DAFP also made findings and conclusions of Appellants' good faith efforts. These findings were based upon information gathered and reported by the County Committee as the primary fact finder.

[14] No evidence was presented of the specific benefits performing mid-cover management affords CRP contract lands.

UNITED STATES DEPARTMENT OF AGRICULTURE
OFFICE OF THE SECRETARY
NATIONAL APPEALS DIVISION

In the matter of	)	
	)	
XXXXX	)	
	)	
and	)	Case No. 2017E000273
	)	
NATURAL RESOURCES **CONSERVATION** SERVICE	))	

-

APPEAL DETERMINATION

XXXXX (Appellant) filed an appeal challenging a Natural Resources **Conservation** Service (Agency) adverse decision dated January 26, 2017. In that decision, the Agency, after reconsideration, upheld its decision to terminate Appellant's **Conservation Stewardship Program** (CSP) contract and not pay Appellant the 2016 CSP contract payment. The Agency terminated Appellant's CSP contract because Appellant did not comply with the operator of record provisions of the CSP contract when he changed the operator of the land in the Farm Service Agency (FSA) records management system from himself to his son's limited liability company and failed to notify the Agency of the change. The Agency contends that with the change in operator the Appellant did not have effective control of the farming operation for 2016, the final year of the contract, and no eligible **transfer**ee assumed the contract during the 2016 period of performance. The Agency waived liquidated damages and repayment of the 2012-2015 CSP **program** payments Appellant received under the contract.

Appellant argues that he completed the 2016 **conservation** practices according to the CSP contract and that he is entitled to the 2016 **program** payment. Appellant asserts that he changed the name of the operator in the FSA records strictly for crop insurance purposes and that operation of the farm did not change. Appellant explained that he and his son farm together and his son wanted to obtain crop insurance coverage for the 2016 soybean crop. Appellant's son obtained crop insurance under the name of the son's limited liability company, XXXXX (LLC). Appellant contends that after purchasing crop insurance his son learned that crops had to be sold under the same name as the crop insurance policy. After meeting with staff at FSA, Appellant changed the name of the farm operator from himself to the LLC. Appellant contends that he did not know that there was a connection between the FSA farm records and the Agency's CSP **program**. Appellant argues that neither FSA nor the Agency informed him of what was involved with a change in operator name or how a change he made with FSA could affect his eligibility for the CSP. Appellant asserts that he and his son would have done things differently had they understood the consequences of changing the operator name with FSA. Appellant further contends that he signed the CSP contract in 2012 and could not be expected four years later to remember everything in the contract. Appellant argues that he should not be penalized for obtaining crop insurance to protect his assets and that this situation could have been avoided if the Agency or FSA had told him what he needed to do.

I have interpreted some of Appellant's arguments as a request for equitable relief consideration from the National Appeals Division (NAD) Director. As an Administrative Judge, I have no authority to render a decision on Appellant's equitable relief request. Appellant may request equitable relief from the NAD Director in accordance with the instructions contained in this Appeal Determination.

At Appellant's request, I held a telephone hearing on April 10, 2017, and closed the record on the same day. Based on the evidence and arguments the parties submitted, and the **program** regulations that apply to this situation, I conclude that the Agency decision was not in error. The rationale for my decision follows.

STATEMENT OF THE ISSUES

I had to determine whether the Agency correctly applied its regulations when it terminated Appellant's CSP contract. To make this determination, I had to resolve the following questions:

1. Did Appellant violate the CSP contract when he changed the operator of record in the FSA farm records for the land subject to his CSP contract without notice to the Agency? If so, did the Agency properly terminate Appellant's CSP contract?

2. What evidence and arguments does Appellant present for equitable relief consideration from the NAD Director?

FINDINGS OF FACT (FOF)

1. On May 22, 2012, Appellant, as the sole participant, entered into CSP contract number 815E34121MV with the Agency. The contract extended through December 31, 2016, and provided for Appellant to receive an annual CSP payment of $3,847.00 for years 2012 through 2016. In exchange for the annual CSP payments, Appellant agreed to implement and maintain specific **conservation** practices on Farm number 6062, Tract number 3984 and Farm number 6926, Tract numbers 308 and 331 (enrolled land), as set forth in the **Conservation** Plan or Schedule of Operations. Appellant's contract required **conservation** practices WQL04, WQL10, and WQL25[1], which are performed early in the season or prior to planting. *[Agency Record, Pages 10-43; Hearing Audio, Track 1, 27:54-28:23, 51:37-52:09, 53:08-54:26]*

2. The appendix incorporated into Appellant's CSP contract specified that the participant must be the operator of record in the FSA farm records management system for the agricultural operation enrolled in the CSP **program** and have effective control of the land for the contract period. The appendix required Appellant to notify the Agency within 60 days of the **transfer** of interest to an eligible **transfer**ee who accepted the contract's terms and conditions or the Agency would terminate the contract. The appendix provided that a participant may be required to refund all or a portion of any assistance earned if the participant sold or lost control of the land under the contact and the new owner or **transfer**ee was either not eligible for the **program** or refused to assume responsibility under the contract. The appendix further stated that the Agency may require a participant to refund payments and pay liquidated damages if the participant violated the terms of the contract. *[Agency Record, Pages 10-43; Hearing Audio, Track 1, 26:54-27:53]*

3. Appellant received the 2012, 2013, 2014, and 2015 annual payments under the CSP contract. *[Hearing Audio, Track 1, 54:45-55:20]*

4. Appellant and his son farm together on the enrolled land. In 2016, their crops included soybeans. *[Hearing Audio, Track 1, 17:20-17:28]*

5. In March 2016, Appellant's son decided he wanted to get crop insurance for the soybean crop. Appellant's son obtained crop insurance for the soybean crop in the name of the LLC. Appellant's son created the LLC in approximately 2014, and is the sole member of the LLC. *[Hearing Audio, Track 1, 17:28-17:39]*

6. After purchasing crop insurance, Appellant's son found out from the crop insurance agent that grains must be sold under the name in which the crop insurance policy is written. On March 23, 2016, Appellant met with FSA staff about the crop insurance requirements and decided to change the operator of the land from himself to his son's LLC in the FSA farm records management system. *[Hearing Audio, Track 1, 17:39-19:20]*

7. On March 23, 2016, Appellant met with the Agency District **Conservation**ist and filled out an application to renew the CSP contract for an additional 5-year period. Appellant did not notify the Agency that he changed the operator of the enrolled land from himself to the LLC in the FSA farm records. *[Agency Exhibit 1; Hearing Audio, Track 1, 18:13-19:20, 32:51-33:45]*

8. On June 2, 2016, during the scoring process for CSP renewal, the Agency discovered that the FSA farm records management system listed the LLC as the operator for the enrolled land. On August 31, 2016, the Agency verified with FSA that Appellant **transfer**red the enrolled land to the LLC on March 23, 2016. *[Agency Record, Pages 37-43; Hearing Audio, Track 1, 30:15-32:46]*

9. The Agency terminated Appellant's CSP contract because Appellant no longer retained control of the enrolled land according to the FSA farm records and failed to notify the Agency of the **transfer**. In a letter dated December 8, 2016, the Agency notified Appellant of the contract termination, that he would not receive the final annual payment under the contract, and that the Agency waived liquidated damages. *[Agency Record, Pages 1, 5-16]*

10. On December 27, 2016, Appellant requested informal review of the Agency's decision to terminate the CSP contract. On January 26, 2017, following reconsideration, the Agency upheld its decision to terminate Appellant's contract and not pay the 2016 **program** payment. The Agency waived liquidated damages and did not seek repayment of the 2012-2015 **program** payments. *[Agency Record, Pages 1-4; Agency Exhibit 1]*

DISCUSSION

Part 11 of Title 7 of the Code of Federal Regulations (7 C.F.R.) governs the appeal. Seven C.F.R. Part 1470, the **Conservation Program** Contract Form NRCS-CPA-1202 (Contract), and Appendix to Form NRCS-CPA-1202 **Conservation Program** Contract for CSP (Appendix) govern the issues on appeal.

Contract Termination

Appellant violated the CSP contract when he changed the operator of record in the FSA farm records for the land subject to his CSP contract without notice to the Agency; thus, the Agency properly terminated Appellant's CSP contract. A participant in the CSP must be identified as the operator of the agricultural operation in the FSA farm records management system. *See* 7 C.F.R. § 1470.6(a)(1). The Agency may grant exceptions to the operator of record requirement under certain circumstances. *See* 7 C.F.R. § 1470.6(a)(1). Operator means an individual, entity, or joint operation who is determined by the FSA county committee to be in control of the farming operations on the farm. *See* 7 C.F.R. § 718.2 (definitions). At least one CSP participant must be the operator of record in the FSA farm records management system for the agricultural operation being offered for enrollment in the **program** and have effective control of the land for the contract period. *See* Appendix Section 1D. The participant is responsible for notifying the Agency prior to any voluntary or involuntary **transfer** of land under contract.

See 7 C.F.R. § 1470.25(d)(1). If all or part of the land is **transfer**red, the contract terminates with respect to the **transfer**red land unless the **transfer**ee of the land provides written notice within 60 days to the Agency that all duties and rights under the contract have been **transfer**red to, and assumed by, the **transfer**ee, and the **transfer**ee meets the eligibility requirements of the **program**. *See* 7 C.F.R. § 1470.25(d)(2)(i)-(ii), and Appendix, Section 3(7).

Appellant argues that he changed the name of the farm operator in the FSA records from himself to the LLC strictly for crop insurance purposes and that operation of the farm did not change. In 2012, Appellant signed as the sole participant on the CSP contract for the enrolled land. (FOF 1) The contract required that the participant be the operator of record for the enrolled land in the FSA farm records. (FOF 2) In March 2016, Appellant changed the name of the farm operator for the enrolled land in the FSA farm records from himself to the LLC. (FOF 1, 7) Appellant is not a member of the LLC. (FOF 5) Appellant did not notify the Agency of the farm operator change. (FOF 7) The Agency only learned of the operator change when it checked the FSA farm records to process Appellant's contract renewal application. (FOF 8) Had Appellant notified the Agency prior to the change in operator or within 60 days of the change, the Agency could have considered whether exceptions to the operator of record requirement were applicable to Appellant's situation or whether the LLC was eligible to assume the contract for **program** year 2016. As it happened; however, Appellant did not notify the Agency of the change and the Agency became aware of the change after the period of performance for the 2016 **conservation** practices. (FOF 1, 8) Since Appellant did not comply with the operator of record requirement and failed to notify the Agency of the change in operator as required, I conclude that the Agency did not err when it terminated Appellant's CSP contract and determined Appellant ineligible for the final **program** payment.

Equitable Relief

I have interpreted some of Appellant's arguments as a request for equitable relief consideration from the NAD Director. The Director has the authority to grant equitable relief to the same extent such authority is provided an agency. *See* 7 C.F.R. § 11.9(e). The Director of NAD may grant equitable relief in cases involving covered **program**s administered by the Secretary of Agriculture. *See* 7 U.S.C. §§ 6998(d) and 7996(a)(2). CSP is a covered **program**. *See* 7 U.S.C § 7996(a)(2)(A)(ii). When a participant has been determined to not be in compliance with the requirements of a covered **program**, the participant may seek equitable relief if, acting in good faith, he or she detrimentally relied on the action or advice of an agency representative. *See* 7 U.S.C. § 7996(b)(1). Equitable relief may also be granted where a **program** participant fails to fully comply with the terms and conditions of a covered **program** but made a good faith effort to abide by all of the terms and conditions of the **program**. *See* 7 C.F.R. § 635.4(b).

Appellant presents the following arguments and evidence in support of his request for equitable relief. Appellant asserts that he completed the **conservation** practices required by the contract for **program** year 2016 and should be paid. The Agency did not doubt Appellant's assertion that he completed the 2016 practices; however, the Agency noted that because it terminated the contract the Agency did not certify Appellant's completion of the 2016 **conservation** practices. Appellant argues that he changed the operator from himself to his son's LLC strictly for crop insurance purposes and that operation of the enrolled land did not change as a result of the operator change. Appellant maintains that he did not understand the implications of his decision to change the farm operator with FSA and did not realize the FSA farm records were connected to CSP eligibility. Appellant argues that the Agency should not penalize him for insuring his crop. Appellant further contends that the Agency should not expect him in 2016, the final year of the contract, to remember everything in the contract and appendix that he signed in 2012. Appellant faults FSA and the Agency for not telling him what he needed to do to comply with the CSP contract requirements. I, as an Administrative Judge, have no authority to grant or deny equitable relief. In accordance with 7 C.F.R. § 11.9(e), the Director has the authority to grant equitable relief to the same extent such authority is provided an agency. I will not determine the matter, but am responsible for developing a record to enable the Director to make a determination as to whether equitable relief should be granted. If Appellant wishes to request equitable relief, the request should be made in the request for Director review.

DETERMINATION

Seven C.F.R. § 11.8(e) provides that an appellant bears the burden of proving that an agency's adverse decision is erroneous by a preponderance of the evidence. In this case, Appellant did not meet this burden. The Agency decision is not erroneous.

This is a final determination of the Department of Agriculture unless a timely request for review is filed.

Dated and mailed this 10th day of May 2017.

/s/
Elizabeth A. Brown
Administrative Judge

Attachments:
Notice of Right to Request Director Review and/or Copy of Audio Recording
Request for Director Review

[1]

___ WQL04 is plant tissue tests and analysis to improve nitrogen management, WQL10 is plant a cover crop that will scavenge residual nitrogen, and WQL25 is split applications of nitrogen based on a pre-sidedress soil nitrate test (PSNT). S*ee* https://www.nrcs.usda.gov/wps/portal/nrcs/detailfull/national/**program**s/financial/csp.

Considerations for Legal Ethics: "When my Picker Ain't Picking" and Other Tales from the Farm

Robert Serio, Ark Ag Law, PLLC

MY PICKER AIN'T PICKIN'
AND OTHER TALES FROM THE FARM

BY

ROBERT G. SERIO
A Partner in Ark Ag Law, PLLC

I have been asked to give a presentation on ethics. We all know that the only real ethics rule is "Do Unto Others As You Would Have Them Do Unto You". Lawyers, however, as did the Pharisees and the Sadducees, had to embellish on that simple formula. Arkansas has established thirteen responsibilities and eight rules with numerous subsections under each rule. I will attempt to give some life to some of those rules under the scenarios presented below.

RULES AND RESPONSIBILITIES TO BE APPLIED.

As advocate, a lawyer zealously assets the client's position under the rules of the adversary system. As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealing with others. (Preamble, Arkansas Rules of Professional Conduct)

Rule 1.6. Confidentiality of information.

A lawyer shall not reveal information relating to representation of a client unless the client gives informed consent.

Rule 3.3. Candor toward the tribunal:

A lawyer shall not knowingly make a false statement or fail to correct a false statement of fact or law to a tribunal or offer evidence that the lawyer knows to be false;

A lawyer shall take reasonable remedial measures to prevent his clinet from engaging in fraudulent conduct related to the proceedings.

Rule 3.4. Fairness to opposing party and counsel.

A lawyer shall not unlawfully obstruct another party's access to evidence or conceal a document or other material having potential evidentiary value;

A lawyer shall not falsify evidence or assist a witness to testify falsely.

Rule 4.1. Truthfulness in statements to others:

A lawyer shall not knowingly make a false statement of a material fact to a third party

SCENARIO I:

MY PICKER AIN'T PICKIN'

Top Grower comes into your office and tells you his cotton picker ain't pickin'. He purchased his new $650,000 picker in August. He takes it to the field in middle of October to begin picking his cotton crop. The picker runs a couple of hours and stops. He calls is local dealer, who sends out its service people. They don't know what's wrong and take it into the shop. A week later the dealer returns the picker to Top Grower, who cranks it up and begins picking cotton. Within an hour the picker stops picking. This fact pattern is repeated several more times to the point that the picker is out of action until late November, when it is finally repaired. By then, rains have set in and most of the cotton crop is on the ground. Top Grower has been pleading with dealer since the second break-down to supply him with another picker. Lawsuit ensues. Depositions are taken. Parties agree to meet and attempt settlement. Settlement negotiations are going great for Top Grower. Offer is made to settle. You take Top Grower into room to finalize settlement and during discussion Top Grower tells you that he had another old picker in his shop that he never used during the break-downs. He has never been asked about additional picker in his possession.

Do you reveal this development to opposing counsel?
Do you go back and settle and get out of Dodge?
Do you end settlement negotiations and let matter go to trial?
How do you instruct client to answer if he is asked about a second picker?

Do you act differently if your client has stated in deposition that he did not have a second picker?

SCENARIO II

THE EMANATIONS FROM THE BARN
ARE OMINOUS

Hog Man raises hogs from piglets to porkers. Those little pigs get the best food. Hog Man has gotten his little piggies up to large porkers and it is time for them to make their journey to the abattoir. Off they go to Iowa in a nice big limo eighteen wheeler. On the way those big ol' juicy hogs are intercepted by the FDA and placed in a holding pen in Iowa with other hogs and no water. This is a stressful situation and hogs don't like stress. The FDA calls Hog Man and says that the nice pig porkers have eaten grain contaminated with dioxin. He can either come and get his hogs or the FSA is going to execute them.

Hog Man decides to bring them home knowing that they may have picked up diseases from the other hogs.

The hogs are returned and place back in the confinement house. The hogs have lost a lot of weight because of stress and heat. They look pitiful. Sure enough those hogs and other hogs in the facility begin to die.

Meanwhile, FDA calls Hog Man and says that FDA tested three of his hogs and there was no dioxin found. (True is, dioxin is not assimilated into the meat of a hog and it turns out that the grain Hog Man bought was not contaminated.)

Hog Man is mad and despondent. He comes to you to get satisfaction. He tells you that the company that provided him the food never notified him that the company was under investigation for selling dioxin contaminated food.

You are also righteously indignant and you sue the granery. You enter negotiations with no luck. A trial is had. During your trial preparation you become aware that on the day Hog Man shipped his porkers and prior to him loading the hogs he had a visit from an agent of the FDA advising him that there was a possibility that his hogs had been contaminated with dioxin because grain purchased from the granery during the time he had purchased grain had been found to contain unacceptable levels of dioxin.

Hog Man never told you that. Granery lawyers never directly asked Hog Man if the FDA had made him aware of the possibility of dioxin contamination prior to shipment.

Your theory of liability is constructive fraud. In other words, this whole case is about notice.

Do you reveal this development to opposing counsel?

What do you tell Hog Man if he is asked about receiving notice from the FDA?

Do you even mention to Hog Man what you have found out about the FDA visit?

Would your action change if Hog Man had answered in deposition that he had not been visited by the FDA?

Would your action change if Hog Man told you he had forgotten about the visit because his hogs had already been moved to the shipping pen, the truck was on premises, and it was not economically feasible to delay shipping?

SCENARIO III

CAN I HAVE THE LAND AND PLOW IT TOO

Plowboy has the opportunity to buy an interest in a 40 acre tract next to his farming operation. He is told he is buying a 75% interest in the 40 acres. He likes the deal and purchases the land. He then retains you to partition the 40 acres. You file suit for partition and name the owners of the 25% interest as defendants and obtain proper service. There is no response from the defendants and you begin to prepare an order for partition. You do another search of the title just to make sure you have your facts straight when you discover that the person who claimed to have a three-fourths interest only had a 68.25% interest. Your research reveals that the seller did not purchase the interest of one of his siblings. The family claims to have lost tract of the sibling and seller says he has claimed the land as his for twenty years.

Do you present the order to the judge for signature just like you filed the complaint?
Do you inform the Court of what you have filed and ask for guidance?
Do you file an amended complaint and publish notice for the missing heir?
Do you make a concerted effort to locate the lost sibling or his heirs or do you simply take the word of the seller that sibling has not been heard from in over 20 years?

Rule 3.3 Candor Toward The Tribunal

(a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

(2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

(c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

Rule 3.3 Candor Toward The Tribunal - Comment

[1] This Rule governs the conduct of a lawyer who is representing a client in the proceedings of a tribunal. See Rule 1.0(m) for the definition of "tribunal." It also applies when the lawyer is representing a client in an ancillary proceeding conducted pursuant to the tribunal's adjudicative authority, such as a deposition. Thus, for example, paragraph (a)(3) requires a lawyer to take reasonable remedial measures if the lawyer comes to know that a client who is testifying in a deposition has offered evidence that is false.

[2] This Rule sets forth the special duties of lawyers as officers of the court to avoid conduct that undermines the integrity of the adjudicative process. A lawyer acting as an advocate in an adjudicative proceeding has an obligation to present the client's case with persuasive force. Performance of that duty while maintaining confidences of the client, however, is qualified by the advocate's duty of candor to

the tribunal. Consequently, although a lawyer in an adversary proceeding is not required to present an impartial exposition of the law or to vouch for the evidence submitted in a cause, the lawyer must not allow the tribunal to be misled by false statements of law or fact or evidence that the lawyer knows to be false.

Representations by a Lawyer

[3] An advocate is responsible for pleadings and other documents prepared for litigation, but is usually not required to have personal knowledge of matters asserted therein, for litigation documents ordinarily present assertions by the client, or by someone on the client's behalf, and not assertions by the lawyer. Compare Rule 3.1. However, an assertion purporting to be on the lawyer's own knowledge, as in an affidavit by the lawyer or in a statement in open court, may properly be made only when the lawyer knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry. There are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation. The obligation prescribed in Rule 1.2(d) not to counsel a client to commit or assist the client in committing a fraud applies in litigation. Regarding compliance with Rule 1.2(d), see the Comment to that Rule. See also the Comment to Rule 8.4(b).

Legal Argument

[4] Legal argument based on a knowingly false representation of law constitutes dishonesty toward the tribunal. A lawyer is not required to make a disinterested exposition of the law, but must recognize the existence of pertinent legal authorities. Furthermore, as stated in paragraph (a)(2), an advocate has a duty to disclose directly adverse authority in the controlling jurisdiction that has not been disclosed by the opposing party. The underlying concept is that legal argument is a discussion seeking to determine the legal premises properly applicable to the case.

Offering Evidence

[5] Paragraph (a)(3) requires that the lawyer refuse to offer evidence that the lawyer knows to be false, regardless of the client’s wishes. This duty is premised on the lawyer’s obligation as an officer of the court to prevent the trier of fact from being misled by false evidence. A lawyer does not violate this Rule if the lawyer offers the evidence for the purpose of establishing its falsity.

[6] If a lawyer knows that the client intends to testify falsely or wants the lawyer to introduce false evidence, the lawyer should seek to persuade the client that the evidence should not be offered. If the persuasion is ineffective and the lawyer continues to represent the client, the lawyer must refuse to offer the false evidence. If only a portion of a witness's testimony will be false, the lawyer may call the witness to testify but may not elicit or otherwise permit the witness to present the testimony that the lawyer knows is false.

[7] The duties stated in paragraphs (a) and (b) apply to all lawyers, including defense counsel in criminal cases. In some jurisdictions, however, courts have required counsel to present the accused as a witness or to give a narrative statement if the accused so desires, even if counsel knows that the testimony or

statement will be false. The obligation of the advocate under the Rules of Professional Conduct is subordinate to such requirements. See also Comment [9].

[8] The prohibition against offering false evidence only applies if the lawyer knows that the evidence is false. A lawyer's reasonable belief that evidence is false does not preclude its presentation to the trier of fact. A lawyer's knowledge that evidence is false, however, can be inferred from the circumstances. See Rule 1.0(f). Thus, although a lawyer should resolve doubts about the veracity of testimony or other evidence in favor of the client, the lawyer cannot ignore an obvious falsehood.

[9] Although paragraph (a)(3) only prohibits a lawyer from offering evidence the lawyer knows to be false, it permits the lawyer to refuse to offer testimony or other proof that the lawyer reasonably believes is false. Offering such proof may reflect adversely on the lawyer's ability to discriminate in the quality of evidence and thus impair the lawyer's effectiveness as an advocate. Because of the special protections historically provided criminal defendants, however, this Rule does not permit a lawyer to refuse to offer the testimony of such a client where the lawyer reasonably believes but does not know that the testimony will be false. Unless the lawyer knows the testimony will be false, the lawyer must honor the client's decision to testify. See also Comment [7].

Remedial Measures

[10] Having offered material evidence in the belief that it was true, a lawyer may subsequently come to know that the evidence is false. Or, a lawyer may be surprised when the lawyer's client, or another witness called by the lawyer, offers testimony the lawyer knows to be false, either during the lawyer's direct examination or in response to cross-examination by the opposing lawyer. In such situations or if the lawyer knows of the falsity of testimony elicited from the client during a deposition, the lawyer must take reasonable remedial measures. In such situations, the advocate's proper course is to remonstrate with the client confidentially, advise the client of the lawyer's duty of candor to the tribunal and seek the client's cooperation with respect to the withdrawal or correction of the false statements or evidence. If that fails, the advocate must take further remedial action. If withdrawal from the representation is not permitted or will not undo the effect of the false evidence, the advocate must make such disclosure to the tribunal as is reasonably necessary to remedy the situation, even if doing so requires the lawyer to reveal information that otherwise would be protected by Rule 1.6. It is for the tribunal then to determine what should be done — making a statement about the matter to the trier of fact, ordering a mistrial or perhaps nothing.

[11] The disclosure of a client's false testimony can result in grave consequences to the client, including not only a sense of betrayal but also loss of the case and perhaps a prosecution for perjury. But the alternative is that the lawyer cooperate in deceiving the court, thereby subverting the truth-finding process which the adversary system is designed to implement. See Rule 1.2(d). Furthermore, unless it is clearly understood that the lawyer will act upon the duty to disclose the existence of false evidence, the client can simply reject the lawyer's advice to reveal the false evidence and insist that the lawyer keep silent. Thus the client could in effect coerce the lawyer into being a party to fraud on the court.

Preserving Integrity of Adjudicative Process

[12] Lawyers have a special obligation to protect a tribunal against criminal or fraudulent conduct that undermines the integrity of the adjudicative process, such as bribing, intimidating or otherwise unlawfully communicating with a witness, juror, court official or other participant in the proceeding, unlawfully destroying or concealing documents or other evidence or failing to disclose information to the tribunal when required by law to do so. Thus, paragraph (b) requires a lawyer to take reasonable remedial measures, including disclosure if necessary, whenever the lawyer knows that a person, including the lawyer's client, intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding.

Duration of Obligation

[13] A practical time limit on the obligation to rectify false evidence or false statements of law and fact has to be established. The conclusion of the proceeding is a reasonably definite point for the termination of the obligation. A proceeding has concluded within the meaning of this Rule when a final judgment in the proceeding has been affirmed on appeal or the time for review has passed.

Ex Parte Proceedings

[14] Ordinarily, an advocate has the limited responsibility of presenting one side of the matters that a tribunal should consider in reaching a decision; the conflicting position is expected to be presented by the opposing party. However, in any ex parte proceeding, such as an application for a temporary restraining order, there is no balance of presentation by opposing advocates. The object of an ex parte proceeding is nevertheless to yield a substantially just result. The judge has an affirmative responsibility to accord the absent party just consideration. The lawyer for the represented party has the correlative duty to make disclosures of material facts known to the lawyer and that the lawyer reasonably believes are necessary to an informed decision.

Withdrawal

[15] Normally, a lawyer's compliance with the duty of candor imposed by this Rule does not require that the lawyer withdraw from the representation of a client whose interests will be or have been adversely affected by the lawyer's disclosure. The lawyer may, however, be required by Rule 1.16(a) to seek permission of the tribunal to withdraw if the lawyer's compliance with this Rule's duty of candor results in such an extreme deterioration of the client-lawyer relationship that the lawyer can no longer competently represent the client. Also see Rule 1.16(b) for the circumstances in which a lawyer will be permitted to seek a tribunal's permission to withdraw. In connection with a request for permission to withdraw that is premised on a client's misconduct, a lawyer may reveal information relating to the representation only to the extent reasonably necessary to comply with this Rule or as otherwise permitted by Rule 1.6.

Rule 3.4 Fairness To Opposing Party And Counsel

A lawyer shall not:

(a) unlawfully obstruct another party' s access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;

(b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;

(c) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists;

(d) in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party;

(e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused; or

(f) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

(1) the person is a relative or an employee or other agent of a client; and

(2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

Rule 3.4 Fairness To Opposing Party And Counsel - Comment

[1] The procedure of the adversary system contemplates that the evidence in a case is to be marshalled competitively by the contending parties. Fair competition in the adversary system is secured by prohibitions against destruction or concealment of evidence, improperly influencing witnesses, obstructive tactics in discovery procedure, and the like.

[2] Documents and other items of evidence are often essential to establish a claim or defense. Subject to evidentiary privileges, the right of an opposing party, including the government, to obtain evidence through discovery or subpoena is an important procedural right. The exercise of that right can be frustrated if relevant material is altered, concealed or destroyed. Applicable law in many jurisdictions makes it an offense to destroy material for purpose of impairing its availability in a pending proceeding or one whose commencement can be foreseen. Falsifying evidence is also generally a criminal offense. Paragraph (a) applies to evidentiary material generally, including computerized information. Applicable law may permit a lawyer to take temporary possession of physical evidence of client crimes for the purpose of conducting a limited examination that will not alter or destroy material characteristics of the

evidence. In such a case, applicable law may require the lawyer to turn the evidence over to the police or other prosecuting authority, depending on the circumstances.

[3] With regard to paragraph (b), it is not improper to pay a witness's expenses or to compensate an expert witness on terms permitted by law. The common law rule in most jurisdictions is that it is improper to pay an occurrence witness any fee for testifying and that it is improper to pay an expert witness a contingent fee.

[4] Paragraph (f) permits a lawyer to advise employees of a client to refrain from giving information to another party, for the employees may identify their interests with those of the client. See also Rule 4.2.

Rule 4.1 Truthfulness In Statements To Others

In the course of representing a client a lawyer shall not knowingly:

(a) make a false statement of material fact or law to a third person; or

(b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

Rule 4.1 Truthfulness In Statements To Others - Comment

Misrepresentation

[1] A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts. A misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false. Misrepresentations can also occur by partially true but misleading statements or omissions that are the equivalent of affirmative false statements. For dishonest conduct that does not amount to a false statement or for misrepresentations by a lawyer other than in the course of representing a client, see Rule 8.4.

Statements of Fact

[2] This Rule refers to statements of fact. Whether a particular statement should be regarded as one of fact can depend on the circumstances. Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are ordinarily in this category, and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud. Lawyers should be mindful of their obligations under applicable law to avoid criminal and tortious misrepresentation.

Crime or Fraud by Client

[3] Under Rule 1.2(d), a lawyer is prohibited from counseling or assisting a client in conduct that the lawyer knows is criminal or fraudulent. Paragraph (b) states a specific application of the principle set forth in Rule 1.2(d) and addresses the situation where a client's crime or fraud takes the form of a lie or misrepresentation. Ordinarily, a lawyer can avoid assisting a client's crime or fraud by withdrawing from the representation. Sometimes it may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm an opinion, document, affirmation or the like. In extreme cases, substantive law may require a lawyer to disclose information relating to the representation to avoid being deemed to have assisted the client's crime or fraud. If the lawyer can avoid assisting a client's crime or fraud only by disclosing this information, then under paragraph (b) the lawyer is required to do so, unless the disclosure is prohibited by Rule 1.6.

Compensatory Mitigation and the Future of Ag Land Use

Kerry L. McGrath, Hunton & Williams LLP

HUNTON& WILLIAMS

Compensatory Mitigation and the Future of Ag Land Use

Mid-South Ag & Envtl Law Conference
June 9, 2017
Kerry L. McGrath

HUNTON& WILLIAMS

What Is Compensatory Mitigation?

- Gains in resources to offset losses of aquatic and/or species resources caused by permitted activities
  - Gains – "credits"
  - Losses – "impacts" or "debits"
- Wetlands/Streams
  - Restoration, enhancement, establishment, and/or preservation of aquatic resources to offset losses of jurisdictional waters and wetlands
- Species
  - Large areas of preserved and/or restored species habitat formally approved to compensate for impacts to similar species habitat

2

HUNTON& WILLIAMS

Previous Approaches to Mitigation

- Focus on on-site mitigation, but often surrounded by development

3

HUNTON& WILLIAMS

Shift to Landscape-Scale Mitigation

Source: http://willamettepartnership.org/

- Increased focus on need to do landscape-scale conservation and mitigation
- Selecting land based on ecological and watershed suitability and not just price and availability

4

HUNTON& WILLIAMS

Obama-Era Mitigation Policies

5

HUNTON& WILLIAMS

USDA Wetland Mitigation Banking Program

- Program created by the 2014 Farm Bill
- Funds made available through nationwide competitive process
- NRCS investing more than $7 million to fund agricultural wetland mitigation banks in 10 Midwest and Northern Great Plain states
- Incentivizes 3rd parties to develop mitigation banks specifically for agricultural producers subject to Wetland Conservation Compliance provisions of the 1985 Farm Bill
- Avoids competition for mitigation credits with other large developers

Source: USDA, Natural Resources Conservation Service, Webinar: NRCS Wetland Mitigation Banking Program.

2015 Presidential Memo

- *Presidential Memorandum: Mitigating Impacts on Natural Resources from Development* (Nov. 2015)
  - Established federal principles
    - Net benefit goal
    - Landscape-scale
    - Advance compensation
    - Long-term financial assurances
    - Avoidance of impacts to "irreplaceable resources
  - Essentially directed other agencies (BLM, USFS, and FWS) to adopt mitigation framework similar to Corps'
  - Legal authority?


Presidential Memorandum: Mitigating Impacts on Natural Resources from Development and Encouraging Related Private Investment

7

FWS Mitigation Policy

- Finalized on December 27, 2016
- Implements Presidential Memo
  - Extends to ESA species
  - "Net conservation benefit" (or at a minimum, no net loss)
  - Advance compensation
  - No impacts on "high value" habitat areas
- Gives Service significant discretion to impose mitigation requirements
- Services would implement through § 7 consultation, § 10 Incidental Take Permits, NEPA processes

8

Broad Regulatory Expansion

- Obama-era regs and policies more expansive and gave more agency discretion
  - WOTUS Rule
  - Critical Habitat Rules
- Broad expansion in regulatory requirements means more permitting
- Drives demand for mitigation

9

Potential Implications for Agriculture

- **Increased permitting requirements for Ag**
  - Impacting more federally protected resources
- **Rise in mitigation banks**
  - More farmland to be taken out of ag use for mitigation purposes
  - Can be business opportunities in this area
  - But can also be high risk
    - High transaction costs, doesn't allow for flexibility
- **Questions about compatible uses**
  - E.g., can you still have cattle grazing on mitigation lands?
    - Different answers from different Corps Districts

10

Trump Admin Review

- EO on Promoting Energy Independence and Economic Growth
  - Revokes Obama Presidential Memo of Nov. 2015
  - Directs reexamination of Dept of Interior mitigation policies
- Secretary Zinke Order on American Energy Independence
  - Orders review of Dep't Interior mitigation policies – FWS policy, BLM Handbook
  - Reconsider, modify, or rescind

11

Mitigation Banking



12

Different Compensation Sources

- Permittee-responsible mitigation (on- or off-site)
  - Permittee or contractor does compensatory mitigation project
  - Permittee retains responsibility
- Mitigation Banks
  - One or more sites where resources are restored, established, enhanced, and/or preserved for purpose of offsetting permitted impacts
  - Sells compensatory mitigation credits to permittees
  - Commercial bank or single client bank
  - Responsibility transferred to bank sponsor
- In-lieu fee programs
  - Limited to government or non-profit natural resource management entities
  - Collects fees from permittees to do larger compensatory mitigation projects
  - Responsibility transferred to in-lieu fee program sponsor

13

Different Compensation Sources

U.S. Army Corps of Engineers: 2008 Mitigation Rule Retrospective

- Increasing reliance on mitigation bank and in-lieu fee program credits

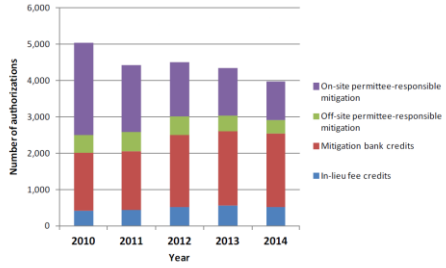
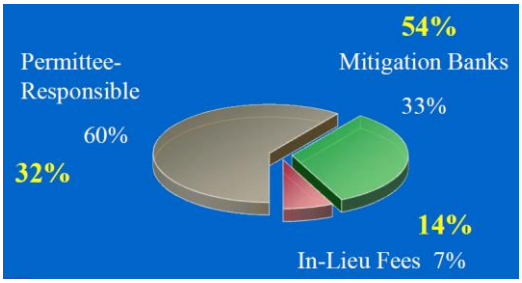


Figure 13. Number of all authorizations (individual permits and general permits) requiring compensatory mitigation, by mitigation source, during the period of 2010-2014

Different Compensation Sources

Types of Compensatory Mitigation 2015



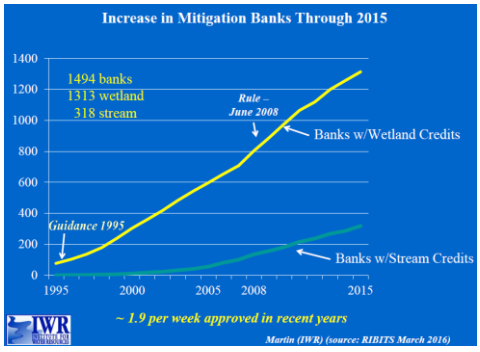
15

What is a Mitigation Bank?

- Sells compensatory mitigation credits to permittees whose obligation to provide compensatory mitigation is then transferred to the mitigation bank sponsor
- Operation and use governed by mitigation bank instrument
- Market-oriented approach
- Advantages of third party compensation
  - Watershed/landscape scale
  - Responsibilities are clear
  - Severance of liability
  - Reduce time to permit
- Highly regulated

16

Increase in Mitigation Banks



17

Wetland and Stream Mitigation Banks

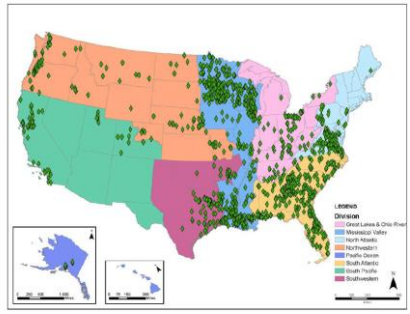


Figure 21. Locations of all approved mitigation bank sites through 2014

18

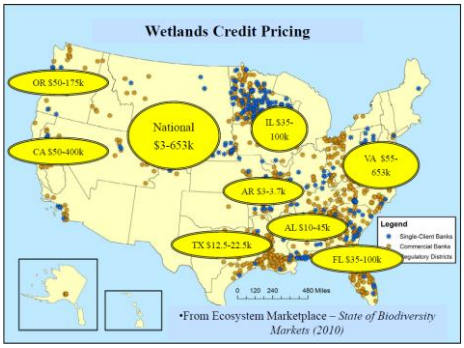
Wetlands Mitigation Bank

- Site where wetlands resources restored, established, enhanced, and/or preserved for purpose of offsetting losses of jurisdictional wetlands
- Wetlands banking is most established
  - As of 2015, at least 600,00 acres approved for banking
  - Average of 10,000 acres of permitted wetland impacts requiring mitigation annually
- Annual wetland mitigation market size - $1.2 billion

Source: http://www.cityofchesapeake.net/

19

Wetlands Credit Pricing



•From Ecosystem Marketplace – *State of Biodiversity Markets (2010)*

20

Banks Providing Wetland Credits

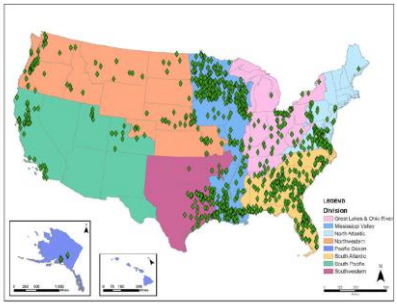
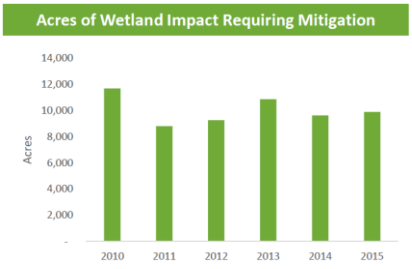


Figure 22. Locations of approved mitigation bank sites providing wetland credits as of 2014

21

Wetland Impacts Requiring Mitigation



- Average of 10,032 acres of permitted wetland impacts require mitigation annually

22

Stream Mitigation Bank

- Increased regulatory focus on stream mitigation since 2008 Mitigation Rule
  - Number of banks providing stream mitigation credits has more than doubled since 2008
- Annual Stream Mitigation Market Size – $2.2 billion

Source: Charlotte Observer

23

Banks Providing Stream Credits

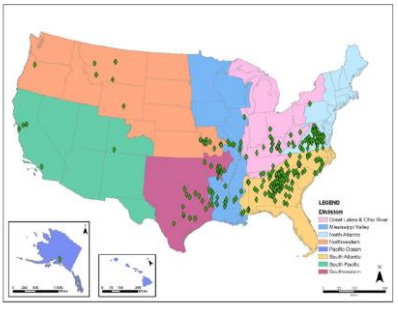
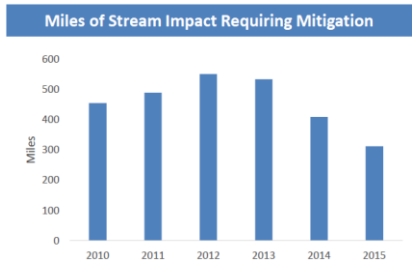


Figure 23. Locations of approved mitigation bank sites providing stream credits as of 2014

24

Stream Impacts Requiring Mitigation



- Average of 458 miles of permitted stream impacts require mitigation annually

25

Conservation Bank

- Large areas of preserved and/or restored species habitat formally approved to compensate for impacts to similar species habitat
- No regulations with specific requirements/instructions or performance criteria
- Less than 200 conservation banks have been approved

Source: http://www.wyofile.com

26

Approved Conservation Banks

27

Wetlands/Stream v. Species Banks

Wetlands/Streams	Species
• CWA requires mitigation	• No ESA mitigation reqs
• Clear requirements and performance standards from Corps 2008 Mitigation Rule	• FWS policy may be revised or rescinded
• "No net loss"	• Preservation and "recovery" of species
• Service areas tied to watersheds	• Service areas tied to species range

28

Mitigation Bank Implementation

- Site selection
  - Carefully selecting piece of property is VERY important
  - Watershed, market for credits, title issues
- Business Plan & Prospectus
  - To secure commitment from agencies on service area, credits, and design approach
  - Align financial and ecological perspectives
- Bank Document
- Construction/Habitat Implementation
  - Plans, bids, contracting
- Long-Term Management and Monitoring
  - Monitor, manage, maintain

29

Litigation Risks

30

HUNTON& WILLIAMS

Litigation Risks

- Potential challenges to FWS mitigation policy
  - Does FWS have statutory authority to require net conservation benefits?
  - NGOs could challenge rescinded/revised policies
- Mitigation bank challenges
  - Challenges to mitigation bank approvals
    - *Sierra Club v. St. Johns River Water Management District* - failure to do NEPA review
  - Challenges on Corps requiring permittee to obtain credits from one bank v. another
    - *Walther & Pioneer Reserve v. United States*- breach of contract claim

31

HUNTON& WILLIAMS

Kerry L. McGrath
Hunton & Williams LLP
2200 Pennsylvania Avenue, NW
Washington, DC 20037
(202) 955-1519
kmcgrath@hunton.com

Federal Register
Vol. 80, No. 215
Friday, November 6, 2015

Presidential Documents

Title 3—

The President

Memorandum of November 3, 2015

Mitigating Impacts on Natural Resources From Development and Encouraging Related Private Investment

Memorandum for the Secretary of Defense[,] the Secretary of the Interior[,] the Secretary of Agriculture[,] the Administrator of the Environmental Protection Agency[, and] the Administrator of the National Oceanic and Atmospheric Administration

We all have a moral obligation to the next generation to leave America's natural resources in better condition than when we inherited them. It is this same obligation that contributes to the strength of our economy and quality of life today. American ingenuity has provided the tools that we need to avoid damage to the most special places in our Nation and to find new ways to restore areas that have been degraded.

Federal agencies implement statutes and regulations that seek simultaneously to advance our economic development, infrastructure, and national security goals along with environmental goals. As efforts across the country have demonstrated, it is possible to achieve strong environmental outcomes while encouraging development and providing services to the American people. This occurs through policies that direct the planning necessary to address harmful impacts on natural resources by avoiding and minimizing impacts, then compensating for impacts that do occur. Moreover, when opportunities to offset foreseeable harmful impacts to natural resources are available in advance, agencies and project proponents have more options to achieve positive environmental outcomes and potentially reduce permitting timelines.

Federal agencies can, however, face barriers that hinder their ability to use Federal resources for restoration in advance of regulatory approval of development and other activities (e.g., it may not be possible to fund restoration before the exact location and scope of a project have been approved; or there may be limitations in designing large-scale management plans when future development is uncertain). This memorandum will encourage private investment in restoration and public-private partnerships, and help foster opportunities for businesses or non-profit organizations with relevant expertise to successfully achieve restoration and conservation objectives.

One way to increase private investment in natural resource restoration is to ensure that Federal policies are clear, work similarly across agencies, and are implemented consistently within agencies. By encouraging agencies to share and adopt a common set of their best practices to mitigate for harmful impacts to natural resources, the Federal Government can create a regulatory environment that allows us to build the economy while protecting healthy ecosystems that benefit this and future generations. Similarly, in non-regulatory circumstances, private investment can play an expanded role in achieving public natural resource restoration goals. For example, performance contracts and other Pay for Success approaches offer innovative ways to finance the procurement of measurable environmental benefits that meet high government standards by paying only for demonstrated outcomes.

Therefore, by the authority vested in me as President by the Constitution and the laws of the United States of America, and to protect the health of our economy and environment, I hereby direct the following:

Section 1. *Policy*. It shall be the policy of the Departments of Defense, the Interior, and Agriculture; the Environmental Protection Agency; and

the National Oceanic and Atmospheric Administration; and all bureaus or agencies within them (agencies); to avoid and then minimize harmful effects to land, water, wildlife, and other ecological resources (natural resources) caused by land- or water-disturbing activities, and to ensure that any remaining harmful effects are effectively addressed, consistent with existing mission and legal authorities. Agencies shall each adopt a clear and consistent approach for avoidance and minimization of, and compensatory mitigation for, the impacts of their activities and the projects they approve. That approach should also recognize that existing legal authorities contain additional protections for some resources that are of such irreplaceable character that minimization and compensation measures, while potentially practicable, may not be adequate or appropriate, and therefore agencies should design policies to promote avoidance of impacts to these resources.

Large-scale plans and analysis should inform the identification of areas where development may be most appropriate, where high natural resource values result in the best locations for protection and restoration, or where natural resource values are irreplaceable. Furthermore, because doing so lowers long-term risks to our environment and reduces timelines of development and other projects, agency policies should seek to encourage advance compensation, including mitigation bank-based approaches, in order to provide resource gains before harmful impacts occur. The design and implementation of those policies should be crafted to result in predictability sufficient to provide incentives for the private and non-governmental investments often needed to produce successful advance compensation. Wherever possible, policies should operate similarly across agencies and be implemented consistently within them.

To the extent allowed by an agency's authorities, agencies are encouraged to pay particular attention to opportunities to promote investment by the non-profit and private sectors in restoration or enhancement of natural resources to deliver measurable environmental outcomes related to an established natural resource goal, including, if appropriate, as part of a restoration plan for natural resource damages or for authorized investments made on public lands.

Sec. 2. *Definitions*. For the purposes of this memorandum:

(a) ''Agencies'' refers to the Department of Defense, Department of the Interior, Department of Agriculture, Environmental Protection Agency, and National Oceanic and Atmospheric Administration, and any of their respective bureaus or agencies.

(b) ''Advance compensation'' means a form of compensatory mitigation for which measurable environmental benefits (defined by performance standards) are achieved before a given project's harmful impacts to natural resources occur.

(c) ''Durability'' refers to a state in which the measurable environmental benefits of mitigation will be sustained, at minimum, for as long as the associated harmful impacts of the authorized activity continue. The ''durability'' of a mitigation measure is influenced by: (1) the level of protection or type of designation provided; and (2) financial and long-term management commitments.

(d) ''Irreplaceable natural resources'' refers to resources recognized through existing legal authorities as requiring particular protection from impacts and that because of their high value or function and unique character, cannot be restored or replaced.

(e) ''Large-scale plan'' means any landscape- or watershed-scale planning document that addresses natural resource conditions and trends in an appropriate planning area, conservation objectives for those natural resources, or multiple stakeholder interests and land uses, or that identifies priority sites for resource restoration and protection, including irreplaceable natural resources.

(f) ''Mitigation'' means avoiding, minimizing, rectifying, reducing over time, and compensating for impacts on natural resources. As a practical matter, all of these actions are captured in the terms avoidance, minimization, and compensation. These three actions are generally applied sequentially, and therefore compensatory measures should normally not be considered until after all appropriate and practicable avoidance and minimization measures have been considered.

Sec. 3. *Establishing Federal Principles for Mitigation*. To the extent permitted by each agency's legal authorities, in addition to any principles that are specific to the mission or authorities of individual agencies, the following principles shall be applied consistently across agencies to the extent appropriate and practicable.

(a) Agencies should take advantage of available Federal, State, tribal, local, or non-governmental large-scale plans and analysis to assist in identifying how proposed projects potentially impact natural resources and to guide better decision-making for mitigation, including avoidance of irreplaceable natural resources.

(b) Agencies' mitigation policies should establish a net benefit goal or, at a minimum, a no net loss goal for natural resources the agency manages that are important, scarce, or sensitive, or wherever doing so is consistent with agency mission and established natural resource objectives. When a resource's value is determined to be irreplaceable, the preferred means of achieving either of these goals is through avoidance, consistent with applicable legal authorities. Agencies should explicitly consider the extent to which the beneficial environmental outcomes that will be achieved are demonstrably new and would not have occurred in the absence of mitigation (i.e. additionality) when determining whether those measures adequately address impacts to natural resources.

(c) With respect to projects and decisions other than in natural resource damage cases, agencies should give preference to advance compensation mechanisms that are likely to achieve clearly defined environmental performance standards prior to the harmful impacts of a project. Agencies should look for and use, to the extent appropriate and practicable, available advance compensation that has achieved its intended environmental outcomes. Where advance compensation options are not appropriate or not available, agencies should give preference to other compensatory mitigation practices that are likely to succeed in achieving environmental outcomes.

(d) With respect to natural resource damage restoration plans, natural resource trustee agencies should evaluate criteria for whether, where, and when consideration of restoration banking or advance restoration projects would be appropriate in their guidance developed pursuant to section 4(d) of this memorandum. Consideration under established regulations of restoration banking or advance restoration strategies can contribute to the success of restoration goals by delivering early, measurable environmental outcomes.

(e) Agencies should take action to increase public transparency in the implementation of their mitigation policies and guidance. Agencies should set measurable performance standards at the project and program level to assess whether mitigation is effective and should clearly identify the party responsible for all aspects of required mitigation measures. Agencies should develop and use appropriate tools to measure, monitor, and evaluate effectiveness of avoidance, minimization, and compensation policies to better understand and explain to the public how they can be improved over time.

(f) When evaluating proposed mitigation measures, agencies should consider the extent to which those measures will address anticipated harm over the long term. To that end, agencies should address the durability of compensation measures, financial assurances, and the resilience of the measures' benefits to potential future environmental change, as well as ecological relevance to adversely affected resources.

(g) Each agency should ensure consistent implementation of its policies and standards across the Nation and hold all compensatory mitigation mechanisms to equivalent and effective standards when implementing their policies.

(h) To improve the implementation of effective and durable mitigation projects on Federal land, agencies should identify, and make public, locations on Federal land of authorized impacts and their associated mitigation projects, including their type, extent, efficacy of compliance, and success in achieving performance measures. When compensatory actions take place on Federal lands and waters that could be open to future multiple uses, agencies should describe measures taken to ensure that the compensatory actions are durable.

Sec. 4. *Federal Action to Strengthen Mitigation Policies and Support Private Investment in Restoration*. In support of the policy and principles outlined above, agencies identified below shall take the following specific actions.

(a) Within 180 days of the date of this memorandum, the Department of Agriculture, through the U.S. Forest Service, shall develop and implement additional manual and handbook guidance that addresses the agency's approach to avoidance, minimization, and compensation for impacts to natural resources within the National Forest System. The U.S. Forest Service shall finalize a mitigation regulation within 2 years of the date of this memorandum.

(b) Within 1 year of the date of this memorandum, the Department of the Interior, through the Bureau of Land Management, shall finalize a mitigation policy that will bring consistency to the consideration and application of avoidance, minimization, and compensatory actions or development activities and projects impacting public lands and resources.

(c) Within 1 year of the date of this memorandum, the Department of the Interior, through the U.S. Fish and Wildlife Service, shall finalize a revised mitigation policy that applies to all of the U.S. Fish and Wildlife Service's authorities and trust responsibilities. The U.S. Fish and Wildlife Service shall also finalize an additional policy that applies to compensatory mitigation associated with its responsibilities under the Endangered Species Act of 1973. Further, the U.S. Fish and Wildlife Service shall finalize a policy that provides clarity to and predictability for agencies and State governments, private landowners, tribes, and others that take action to conserve species in advance of potential future listing under the Endangered Species Act. This policy will provide a mechanism to recognize and credit such action as avoidance, minimization, and compensatory mitigation.

(d) Within 1 year of the date of this memorandum, each Federal natural resource trustee agency will develop guidance for its agency's trustee representatives describing the considerations for evaluating whether, where, and when restoration banking or advance restoration projects would be appropriate as components of a restoration plan adopted by trustees. Agencies developing such guidance will coordinate for consistency.

(e) Within 1 year of the date of this memorandum, the Department of the Interior will develop program guidance regarding the use of mitigation projects and measures on lands administered by bureaus or offices of the Department through a land-use authorization, cooperative agreement, or other appropriate mechanism that would authorize a project proponent to conduct actions, or otherwise secure conservation benefits, for the purpose of mitigating impacts elsewhere.

Sec. 5. *General Provisions*. (a) This memorandum complements and is not intended to supersede existing laws and policies.

(b) This memorandum shall be implemented consistent with applicable law, and subject to the availability of appropriations.

(c) This memorandum is intended for the internal guidance of the executive branch and is inapplicable to the litigation or settlement of natural resource damage claims. The provisions of section 3 this memorandum encouraging

restoration banking and advance restoration projects also do not apply to the selection or implementation of natural resource restoration plans, except to the extent determined appropriate in Federal trustee guidance developed pursuant to section 4(d) of this memorandum.

(d) The provisions of this memorandum shall not apply to military testing, training, and readiness activities.

(e) Nothing in this memorandum shall be construed to impair or otherwise affect:

(i) the authority granted by law to an executive department, agency, or the head thereof; or

(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(f) This memorandum is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

(g) The Secretary of the Interior is hereby authorized and directed to publish this memorandum in the *Federal Register*.

THE WHITE HOUSE,
Washington, November 3, 2015

[FR Doc. 2015–28466
Filed 11–5–15; 8:45 am]
Billing code 4310–10–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[Docket No. FWS–HQ–ES–2015–0126; FXHC11220900000–156–FF09E33000]

U.S. Fish and Wildlife Service Mitigation Policy

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of final policy.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), announce revisions to our Mitigation Policy, which has guided Service recommendations on mitigating the adverse impacts of land and water developments on fish, wildlife, plants, and their habitats since 1981. The revisions are motivated by changes in conservation challenges and practices since 1981, including accelerating loss of habitats, effects of climate change, and advances in conservation science. The revised Policy provides a framework for applying a landscape-scale approach to achieve, through application of the mitigation hierarchy, a net gain in conservation outcomes, or at a minimum, no net loss of resources and their values, services, and functions resulting from proposed actions. The primary intent of the Policy is to apply mitigation in a strategic manner that ensures an effective linkage with conservation strategies at appropriate landscape scales.

DATES: This Policy is effective on November 21, 2016.

ADDRESSES: Comments and materials received, as well as supporting documentation used in the preparation of this Policy, including an environmental assessment, are available on the Internet at *http://www.regulations.gov* at Docket Number FWS–HQ–ES–2015–0126.

FOR FURTHER INFORMATION CONTACT: Craig Aubrey, U.S. Fish and Wildlife Service, Division of Environmental Review, 5275 Leesburg Pike, Falls Church, VA 22041–3803, telephone 703–358–2442.

SUPPLEMENTARY INFORMATION: The revised Policy integrates all authorities that allow the Service either to recommend or to require mitigation of impacts to Federal trust fish and wildlife resources, and other resources identified in statute, during development processes. It is intended to serve as a single umbrella policy under which the Service may issue more detailed policies or guidance documents covering specific activities in the future. Citations for the many statutes and other authorities referenced in this document are in Appendix A.

Background

The primary intent of revising the 1981 Mitigation Policy (1981 Policy) is to apply mitigation in a strategic manner that ensures an effective linkage with conservation strategies at appropriate landscape scales, consistent with the Presidential Memorandum on Mitigating Impacts on Natural Resources from Development and Encouraging Related Private Investment (November 3, 2015), the Secretary of the Interior's Order 3330 entitled ''Improving Mitigation Policies and Practices of the Department of the Interior'' (October 31, 2013), and the Departmental Manual Chapter (600 DM 6) on Implementing Mitigation at the Landscape-scale (October 23, 2015). Within this context, our revisions of the 1981 Policy: (a) Clarify that this Policy addresses all resources for which the Service has authorities to recommend mitigation for impacts to resources; and (b) provide an updated framework for applying mitigation measures that will maximize their effectiveness at multiple geographic scales.

By memorandum, the President directed all Federal agencies that manage natural resources to avoid and minimize damage to natural resources and to effectively offset remaining impacts, consistent with the principles declared in the memorandum and existing statutory authority. Under the memorandum, all Federal mitigation policies shall clearly set a net benefit goal or, at minimum, a no net loss goal for natural resources, wherever doing so is allowed by existing statutory authority and is consistent with agency mission and established natural resource objectives. This Policy implements the President's directions for the Service.

Secretarial Order 3330 established a Department-wide mitigation strategy to ensure consistency and efficiency in the review and permitting of infrastructure development projects and in conserving natural and cultural resources. The Order charged the Department's Energy and Climate Change Task Force with developing a report that addresses how to best implement consistent, Department-wide mitigation practices and strategies. The report of the Task Force, ''A Strategy for Improving the Mitigation Policies and Practices of the Department of the Interior'' (April 2014), describes guiding principles for mitigation to improve process efficiency, including the use of landscape-scale approaches rather than project-by-project or single-resource mitigation approaches. This revision of the Service's Mitigation Policy complies with a deliverable identified in the Strategy that seeks to implement the guiding principles set forth in the Secretary's Order, the corresponding Strategy, and subsequent 600 DM 6.

In 600 DM 6, the Department of the Interior established policy intended to improve permitting processes and help achieve beneficial outcomes for project proponents, affected communities, and the environment. By implementing this Manual Chapter, the Department will:

(a) Effectively mitigate impacts to Department-managed resources and their values, services, and functions;

(b) provide project developers with added predictability and efficient and timely environmental reviews;

(c) improve the resilience of resources in the face of climate change;

(d) encourage strategic conservation investments in lands and other resources; increase compensatory mitigation effectiveness, durability, transparency, and consistency; and

(e) better utilize mitigation measures to help achieve Departmental goals.

The final Policy implements the Department's directions for the Service. As with the 1981 Policy, the Service intends, with this revision, to conserve, protect, and enhance fish, wildlife, plants, and their habitats for future generations. Effective mitigation is a powerful tool for furthering this mission.

Changes From the Draft Policy

This final Policy differs from the proposed revised Policy in a few substantive respects, which we list below, and contains many editorial changes in response to comments we received that requested greater clarity of expression regarding various aspects of the Policy purpose, authorities, scope, general principles, framework for formulating mitigation measures, and definitions. The most common editorial change to the final Policy addresses the concern that the proposed revised Policy was unclear regarding the Service's authorities to either recommend or require mitigation. The proposed revised Policy frequently used the phrase ''recommend or require'' as a general descriptor for Service-formulated mitigation measures, because we have authority to require mitigation in some contexts, but not in others. The final Policy adds new text to the Authority section that identifies those circumstances under which we have specific authority to require, consistent with other applicable laws and regulations, one or more forms of

mitigation for impacts to fish and wildlife resources.

This Policy provides a common framework for the Service to apply when identifying mitigation measures across the full range of our authorities, including those for which we may require mitigation, but the Policy cannot and does not alter or substitute for the regulations implementing any of our authorities. We summarize below the few substantive changes to the proposed revised Policy, listed by section.

In section 4 of the Policy, General Policy and Principles, we added a principle to emphasize the importance of the avoidance tier of the mitigation hierarchy. This new principle reinforces existing direction in the proposed revised Policy that Service staff will recommend avoidance of all impacts to high-value habitats as the only effective means of mitigating impacts at these locations.

In section 5.5, Habitat Valuation, we clarify that habitats of ''high-value'' to an evaluation species are scarce and of high suitability and high importance. As with the proposed revised Policy, the final Policy directs Service personnel to seek avoidance of all impacts to high-value habitats.

In section 5.6.3, Compensation, we added a paragraph that describes onsite compensation and distinguishes it from rectifying impacts. We added another paragraph that indicates how third parties may assume the responsibilities for implementing proponent-responsible compensation. Other revisions to this section are editorial in nature, intended to better communicate Service intentions about the use of compensation in mitigating impacts to species. These revisions include reorganizing material into new subsections at 5.6.3.1, Equivalent Standards, and at 5.6.3.2, Research and Education.

In section 6, Definitions, we added definitions for ''baseline'' and ''habitat credit exchange'' and modified the definition of ''practicable.''

In Appendix A, Authorities and Direction for Service Mitigation Recommendations, we updated the listed authorities, regulations, and guidance documents where necessary. To better reflect their relationship with this Policy and to respond to comments received, we have modified the discussions of the Bald and Golden Eagle Protection Act, Clean Water Act, Fish and Wildlife Conservation Act, Marine Mammal Protection Act, Migratory Bird Treaty Act, and Natural Resource Damage Assessment and Restoration processes.

We made clarifying edits and additions to Appendix C, Compensatory Mitigation in Financial Assistance Awards Approved or Administered by the U.S. Fish and Wildlife Service. We added a sentence in the first paragraph recognizing that the regulations at 50 CFR part 84 authorize the use of Natural Resource Damage Assessment funds as a match in the National Coastal Wetlands Conservation Program. In part B, we added ''the proposed use of mitigation funds on land acquired with Federal financial assistance'' as a common issue related to mitigation in financial assistance. In part G, we clarified the circumstances under which the Service can approve financial assistance to satisfy mitigation requirements of State, tribal, or local governments. In part H, we revised the topic question from ''Can a mitigation proposal be located on land acquired under a Service financial assistance award?'' to ''Can a project on land already designated for the conservation of natural resources generate credits for compensatory mitigation?'' and revised the answer accordingly. We added a topic to those included in the proposed revised Policy at part I: ''Does the Service's Mitigation Policy affect financial assistance programs and awards managed by other Federal entities?'' This addition describes the various circumstances in which this question is relevant.

Discussion

The Service's motivations for revising the 1981 Policy include:

- Accelerating loss, including degradation and fragmentation, of habitats and subsequent loss of ecosystem function since 1981;
- Threats that were not fully evident in 1981, such as effects of climate change, the spread of invasive species, and outbreaks of epizootic diseases, are now challenging the Service's conservation mission;
- The science of fish and wildlife conservation has substantially advanced in the past three decades;
- The Federal statutory, regulatory, and policy context of fish and wildlife conservation has substantially changed since the 1981 Policy; and
- A need to clarify the Service's definition and usage of mitigation in various contexts, including the conservation of species listed as threatened or endangered under the Endangered Species Act of 1973, as amended (ESA), which was expressly excluded from the 1981 Policy.

Mitigation Defined

In the context of impacts to environmental resources (including their values, services, and functions) resulting from proposed actions, ''mitigation'' is a general label for measures that a proponent takes to avoid, minimize, and compensate for such impacts. The 1981 Policy adopted the definition of mitigation in the Council on Environmental Quality (CEQ) National Environmental Policy Act (NEPA) regulations (40 CFR 1508.20). The CEQ mitigation definition remains unchanged since codification in 1978 and states that ''Mitigation includes:

- Avoiding the impact altogether by not taking a certain action or parts of an action;
- minimizing impacts by limiting the degree or magnitude of the action and its implementation;
- rectifying the impact by repairing, rehabilitating, or restoring the affected environment;
- reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action; and
- compensating for the impact by replacing or providing substitute resources or environments.''

This definition is adopted in this Policy, and the use of its components in various contexts is clarified. In 600 DM 6, the Department of the Interior states that mitigation, as enumerated by CEQ, is compatible with Departmental policy; however, as a practical matter, the mitigation elements are categorized into three general types that form a sequence: Avoidance, minimization, and compensatory mitigation for remaining unavoidable (also known as residual) impacts. The 1981 Policy further stated that the Service considers the sequence of the CEQ mitigation definition elements to represent the desirable sequence of steps in the mitigation planning process. The Service generally affirms this hierarchical approach in this Policy. We advocate first avoiding and then minimizing impacts that critically impair our ability to achieve conservation objectives for affected resources. We also provide guidance that recognizes how action- and resource-specific circumstances may warrant departures from the preferred mitigation sequence; for example, when impacts to a species may occur at a location that is not critical to achieving the conservation objectives for that species, or when current conditions are likely to change substantially due to the effects of a changing climate. In such

circumstances, relying more on compensating for the impacts at another location may more effectively serve the conservation objectives for the affected resources. This Policy provides a logical framework for the Service to consistently make such choices.

Scope of the Revised Mitigation Policy

The Service's mission is to conserve, protect, and enhance fish, wildlife, and plants, and their habitats for the continuing benefit of the American people. This mission includes a responsibility to make mitigation recommendations or to specify mitigation requirements during the review of actions based on numerous authorities related to specific plant and animal species, habitats, and broader ecological functions. Our authorities to engage actions that may affect these resources extends to all U.S. States and territories, on public and on private property. This unique standing necessitates that we clarify our integrated interests and expectations when seeking mitigation for impacts to fish, wildlife, plants, and their habitats.

This Policy serves as overarching Service guidance applicable to all actions for which the Service has specific authority to recommend or require the mitigation of impacts to fish, wildlife, plants, and their habitats. In most cases, applications of this Policy are advisory. Service recommendations provided under the guidance of this Policy are intended to help action proponents incorporate appropriate means and measures into their actions that will most effectively conserve resources affected by those actions. As necessary and as budgetary resources permit, we intend to adapt or develop Service program-specific policies, handbooks, and guidance documents, consistent with the applicable statutes, to integrate the spirit and intent of this Policy.

New Threats and New Science

Since the publication of the Service's 1981 Policy, land use changes in the United States have reduced the habitats available to fish and wildlife. By 1982, approximately 72 million acres of the lower 48 States had already been developed. Between 1982 and 2012, the American people developed an additional 44 million acres for a total of 114 million acres developed. Of all historic land development in the United States, excluding Alaska, over 37 percent has occurred since 1982. Much of this newly developed land had been existing habitats, including 17 million acres converted from forests.

A projection that the U.S. population will increase from 310 million to 439 million between 2010 and 2050 suggests that land conversion trends like these will continue. In that period, development in the residential housing sector alone may add 52 million (42 percent more) units, plus 37 million replacement units. By 2060, a loss of up to 38 million acres (an area the size of Florida) of forest habitats alone is possible. Attendant pressures on remaining habitats will also increase fragmentation, isolation, and degradation through myriad indirect effects. The loss of ecological function will radiate beyond the extent of direct habitat losses. Given these projections, the near-future challenges for conserving species and habitats are daunting. As more lands and waters are developed for human uses, it is incumbent on the Service to help project proponents successfully and strategically mitigate impacts to fish and wildlife and prevent systemic losses of ecological function.

Accelerating climate change is resulting in impacts that pose a significant challenge to conserving species, habitat, and ecosystem functions. Climatic changes can have direct and indirect effects on species abundance and distribution, and may exacerbate the effects of other stressors, such as habitat fragmentation and diseases. The conservation of habitats within ecologically functioning landscapes is essential to sustaining fish, wildlife, and plant populations and improving their resilience in the face of climate change impacts, new diseases, invasive species, habitat loss, and other threats. Therefore, this Policy emphasizes the integration of mitigation planning with a landscape approach to conservation.

Over the past 30 years, the concepts of adaptive management (resource management decisionmaking when outcomes are uncertain) have gained general acceptance as the preferred science-based approach to conservation. Adaptive management is an iterative process that involves: (a) Formulating alternative actions to meet measurable objectives; (b) predicting the outcomes of alternatives based on current knowledge; (c) conducting research that tests the assumptions underlying those predictions; (d) implementing alternatives; (e) monitoring the results; and (f) using the research and monitoring results to improve knowledge and adjust actions and objectives accordingly. Adaptive management further serves the need of most natural resources managers and policy makers to provide accountability for the outcomes of their efforts, *i.e.*, progress toward achieving defensible and transparent objectives.

Working with many partners, the Service is increasingly applying the principles of adaptive management in a landscape approach to conservation. Mitigating the impacts of actions for which the Service has advisory or regulatory authorities continues to play a significant role in accomplishing our conservation mission under this approach. Our aim with this Policy is to align mitigation with conservation strategies at appropriate landscape scales so that mitigation most effectively contributes to achieving the conservation objectives we are pursuing with our partners, and to align mitigation recommendations and requirements with Secretarial Order 3330 and 600 DM.

A Focus on Habitat Conservation

Although many Service authorities pertain to specific taxa or groups of species, most specifically recognize that these resources rely on functional ecosystems to survive and persist for the continuing benefit of the American people. Mitigation is a powerful tool for sustaining species and the habitats upon which they depend; therefore, the Service's Mitigation Policy must effectively deal with impacts to the ecosystem functions, properties, and components that sustain fish, wildlife, plants, and their habitats. The 1981 Policy focused on habitat: ''the area which provides direct support for a given species, population, or community.'' It defined criteria for assigning the habitats of project-specific evaluation species to one of four resource categories, using a two-factor framework based on the relative scarcity of the affected habitat type and its suitability for the evaluation species, with mitigation guidelines for each category. We maintain a focus on habitats in this Policy by using evaluation species and a valuation framework for their affected habitats, because habitat conservation is still generally the best means of achieving conservation objectives for species. However, our revisions of the evaluation species and habitat valuation concepts are intended to address more explicitly the landscape context of species and habitat conservation to improve mitigation effectiveness and efficiency. In addition, we recognize that some situations warrant measures that are not habitat based to address certain species-specific impacts.

Applicability to the Endangered Species Act

The 1981 Policy did not apply to the conservation of species listed as threatened or endangered under the ESA. Excluding listed species from the 1981 Policy was based on: (a) A recognition that all Federal actions that could affect listed species and designated critical habitats must comply with the consultation provisions of section 7 of the ESA; and (b) a position that ''the traditional concept of mitigation'' did not apply to such actions. This Policy supersedes this exclusion for the Service. Mitigation, which we define in this Policy as measures to avoid, minimize, and compensate for impacts, is an essential means of achieving the overarching purpose of the ESA, which is to conserve listed species and the ecosystems upon which they depend.

Effective mitigation prevents or reduces further declines in populations and/or habitat resources that would otherwise slow or impede recovery of listed species. It is fully consistent with the purposes of the ESA for the Service to identify measures that mitigate the impacts of proposed actions to listed species and designated critical habitat. Although this Policy is intended, in part, to clarify the role of mitigation in endangered species conservation, nothing herein replaces, supersedes, or substitutes for the ESA or its implementing regulations.

Under ESA section 7, the Service has consistently recognized or applied mitigation in the form of:

(a) Measures that are voluntarily included as part of a proposed Federal action that avoid, minimize, rectify, reduce over time, or compensate for unavoidable (also known as residual) impacts to a listed species;

(b) components of reasonable and prudent alternatives (RPAs) to avoid jeopardizing the continued existence of listed species or destroying or adversely modifying designated critical habitat; and

(c) reasonable and prudent measures (RPMs) within an incidental take statement to minimize the impacts of anticipated incidental taking on the affected listed species.

As another example, the 1982 amendments to the ESA created incidental take permitting provisions (section 10(a)(1)(B)) with specific requirements (sections 10(a)(2)(A)(ii) and 10(a)(2)(B)(ii)) for applicants to minimize and mitigate impacts to listed species to the maximum extent practicable.

Summary of Comments and Responses

The March 8, 2016, notice announcing our proposed revisions to the U.S. Fish and Wildlife Service (Service) Mitigation Policy (Policy) (81 FR 12380) requested written comments, information, and recommendations from governmental agencies, tribes, the scientific community, industry groups, environmental interest groups, and any other interested members of the public.

That notice established a 60-day comment period ending May 9, 2016. Several commenters requested an extension of time to provide their comments, asked the Service to revise and recirculate the Policy for comment, or asked the Service to withdraw the Policy to allow interested parties additional time to comment. We subsequently published a notice on May 12, 2016 (81 FR 29574), reopening the comment period for an additional 30 days, through June 13, 2016.

During the comment period, we received approximately 189 comments from Federal, State, and local government entities, industry, trade associations, conservation organizations, nongovernmental organizations, private citizens, and others. The range of comments varied from those that provided general statements of support or opposition to the draft Policy, to those that provided extensive comments and information supporting or opposing the draft Policy or specific aspects thereof. The majority of comments submitted included detailed suggestions for revisions addressing major concepts as well as editorial suggestions for specific wording or line edits.

All comments submitted during the comment period have been fully considered in preparing the final Policy. All substantive information provided has been incorporated, where appropriate, directly into this final Policy or is addressed below. The comments we received were grouped into general issues specifically relating to the draft Policy, and are presented below along with the Service's responses to these substantive comments.

A. Clarify How the Policy Guides Formulation of Service Mitigation Recommendations vs. Requirements

Comment (1): Many commenters indicated that the proposed Policy was unclear regarding the Service's authorities to require mitigation, and requested clarification to distinguish between requirements and recommendations. Several of these commenters noted that various authorities cited for the Policy, such as the ESA, Fish and Wildlife Coordination Act (FWCA), and NEPA, do not require actions to maintain or improve the status of affected resources, or to apply a landscape approach to their conservation, which are features of the Policy.

Response: We agree with comments that the proposed Policy provided an unclear distinction between circumstances under which the Policy would guide the Service's formulation of: (a) Mitigation requirements, *i.e.*, measures that the Service may impose upon an action proponent as conditions of Service funding, approval, or regulatory decision; vs. (b) mitigation recommendations, *i.e.,* measures that we advise an action proponent to adopt for conservation purposes. We used the phrase ''recommend or require'' because the Service has authority to require mitigation in some contexts, but not in others, and our aim with this Policy is to provide a common framework for the Service to implement across the full range of our authorities. However, we recognize the need to clearly distinguish these two general contexts, and have revised the final Policy accordingly.

Circumstances under which the Service currently has specific authority to *require,* consistent with applicable laws and regulations, one or more forms of mitigation for impacts to fish and wildlife resources include the following:

1. Actions that the Service carries out, *i.e.,* the Service is the action proponent;
2. Actions that the Service funds;
3. Actions to restore damages to fish and wildlife resources caused by oil spills and other hazardous substance releases, under the Oil Pollution Act (OPA) and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA);
4. Actions of other Federal agencies that require an incidental take statement under section 7 of the ESA (measures to minimize the impacts of incidental taking on the species);
5. Actions that require an incidental take permit under section 10 of the ESA (measures to minimize and mitigate the impacts of the taking on the species to the maximum extent practicable);
6. Fishway prescriptions under section 18 of the Federal Power Act (FPA), which minimize, rectify, or reduce over time through management, the impacts of non-Federal hydropower facilities on fish passage;
7. License conditions under section 4(e) of the FPA for non-Federal hydropower facilities affecting Service properties (*e.g.,* a National Wildlife Refuge) for the protection and

utilization of the Federal reservation consistent with the purpose for which such reservation was created or acquired;

8. Actions that require a Letter of Authorization or Incidental Harassment Authorization under the Marine Mammal Protection Act (MMPA); and

9. Actions that require a permit for non-purposeful (incidental) take of eagles under the Bald and Golden Eagle Protection Act (BGEPA).

The circumstances cited above under which the Service currently has specific authority to *require*, consistent with applicable laws and regulations, one or more forms of mitigation for impacts to fish and wildlife resources are further clarified in subsequent responses to comments, the Policy, and its appendices.

In all other circumstances not listed above, the Policy will guide the Service's formulation of recommendations, not requirements, to proponents of actions that cause impacts to fish and wildlife resources and which are within the defined scope (section 3) of the Policy.

B. Policy Is Based on Existing Authority

Comment (2): Several commenters stated that the draft Policy attempted to inappropriately create new authority for the Service to engage in mitigation processes, circumventing appropriate legislative or rulemaking processes. They stated that the Policy could not be used to expand Service authority to take actions beyond those authorized by Congress, noting that the Policy itself is not an independent grant of authority and the imposition of any mitigation measures advocated by it would be constrained by authority provided by the applicable statute. The commenters requested we clarify that the Policy does not expand existing Service authorities.

Response: The commenters are correct that the Policy cannot create or assume new authority for making mitigation recommendations. This Policy does not exceed existing statutory or regulatory authority to engage in mitigation processes for the purpose of making mitigation recommendations, and in limited cases, specifying mitigation requirements. Processes established by applicable statutes and regulations remain in effect and are not superseded by this Policy. In implementing this Policy and carrying out our broader mission, the Service recognizes these authorities and processes, and their limitations.

C. Scope of the Policy

Comment (3): One commenter stated their concerns that the scope of the Policy appeared to limit the discretion of an action agency, potentially holding the action agency or applicant responsible for mitigation beyond an action agency's own authority, mission, and responsibilities.

Response: The Service recognizes that the authorities and processes of different agencies may limit or provide discretion regarding the level of mitigation for a project. This Policy is not controlling upon other agencies. There may be limitations (*e.g.*, agency-specific authorities and 600 DM 6) on the implementation of measures that would achieve the Policy's goal of net conservation gain or a minimum of no net loss, when the costs of such mitigation are reimbursable by project beneficiaries under laws and regulations controlling agencies' activities (*e.g.*, Bureau of Reclamation).

Comment (4): Two commenters stated their belief that the Policy inappropriately expands Service authority to lands beyond National Wildlife Refuges or other Service-managed lands, and beyond the authorities of the ESA.

Several commenters wanted the Policy to contain explicit guidance on the function of the Service's mitigation authorities under each statute and on implementation of the new Policy in relation to those authorities. Two commenters were concerned about the way the Service will coordinate its responsibilities with similar duties carried out by other agencies and how the Policy applies in situations when more than one statute applies to a particular action.

Response: The Service's authorities to recommend mitigation are described in section 2 and in Appendix A. The Policy's overall coverage is described in the Scope, section 3. The commenters are correct that the Policy's coverage is dictated by the underlying statutory authorities. If a relevant statute provides the Service with authority to make mitigation recommendations, the Service may provide recommendations that cover the resources that are described in that statute. The Policy cannot create or assume new authority for making mitigation recommendations or exceed existing statutory or regulatory authority, and it does not extend the geographic or taxonomic extent of coverage beyond existing Service practice. Authorities for making mitigation recommendations may be applicable, regardless of the location of the action, and whether the action has an effect on a species listed under the ESA. For example, the Service routinely reviews projects to provide mitigation recommendations for inter-jurisdictional fish under NEPA, FWCA, FPA, and the Clean Water Act (CWA) for projects that are planned on lands and waters not owned or managed by the Service.

This Policy covers engagement under all of the Service's mitigation authorities, and does not replace interagency procedure established in another document. The Policy was developed in accordance with the Presidential Memorandum on Mitigating Impacts on Natural Resources from Development and Encouraging Related Private Investment (November 3, 2015), and the Secretary of the Interior's Order 3330 entitled ''Improving Mitigation Policies and Practices of the Department of the Interior'' (October 31, 2013). Having multiple agency mitigation policies using common principles, terms, and approaches provides greater consistency and predictability for the public.

Comment (5): Two commenters stated that the Service cannot prioritize fish, wildlife, plants, and their habitats above all other resources. One said that the Policy must incorporate the Mining and Minerals Policy Act of 1970 (30 U.S.C. 21a) that states that it is the policy of the Federal Government in the national interest to foster and encourage private enterprise in the development of economically sound and stable domestic mining, minerals, metal and mineral reclamation industries, and to promote the orderly and economic development of domestic mineral resources and reserves. They also stated the Policy must incorporate the National Materials and Minerals Policy, Research and Development Act, (30 U.S.C. 1601 *et seq.*), which states it is the continuing policy of the United States to promote an adequate and stable supply of materials necessary to maintain national security, economic well-being, and industrial production, with appropriate attention to a long-term balance between resource production, energy use, a healthy environment, natural resources conservation, and social needs. The commenter noted that the Service ignored these statutes and proposed requirements that restrict and discourage mineral development in violation of these laws. They added that any mitigation must be balanced against Congress' policy of encouraging mineral development.

Response: The Service recognizes the national importance of resource development referenced by the commenter, along with many other types of economic development and activities. Statutes that encourage such development are not modified by this Policy. By enacting the various statutes

that provide for natural resource mitigation authority across multiple Federal agencies, Congress has recognized that fish and wildlife resources provide commercial, recreational, social, and ecological value to the American people. These statutes providing mitigation authority do not supersede statutes encouraging economic development. Conversely, statutes encouraging economic development do not supersede those providing mitigation authorities. Mitigation is a process by which agencies, proponents, and partners can facilitate sustainable development while simultaneously addressing the long-term conservation of native plants, animals, and ecosystems.

Comment (6): One commenter stated there were constitutional limits on requiring mitigation, referencing the *Koontz* v. *St. Johns River Water Management District* case decided by the U.S. Supreme Court 570 US 2588 (2013). This commenter noted that any compensatory mitigation measures must have an essential nexus with the proposed impacts and be roughly proportional, or have a reasonable relationship between the permit conditions required and the impacts of the proposed development being addressed by those permit conditions.

Response: Like all agencies, the Service has responsibility to implement its authorities consistent with any applicable case law. The Service will implement the Policy in a manner that is consistent with the *Koontz* case and any other relevant court decisions. We have included the following language in the Policy in section 5.6, Means and Measures: All appropriate mitigation measures have a clear connection with the anticipated effects of the action and are commensurate with the scale and nature of those effects.

D. Trust Resources

Comment (7): Several commenters addressed the concept of Federal trust fish and wildlife resources. They noted that in section 3.2, the Policy states that it applies to Service trust resources, but gives Service staff discretion to engage in mitigation processes on an expanded basis under appropriate authorities. They were unclear what authorities were being referenced and recommended that they be clarified, especially if they were expanding the Service's efforts. They asked that we clarify what the term ''expanded basis'' means.

Commenters stated that the Service's authority is limited to migratory birds, threatened or endangered species, eagles, and certain marine mammals. They said that States have authority for all other species. They also requested acknowledgement that States have sole authority for resource management and that the Service should restrict the Policy to only federally protected species.

Response: This Policy applies to all resources listed or described within the Service's various mitigation authorities. The language used within those authorities to describe the covered resources determines the scope of Service recommendations made under each authority. Some authorities apply to resources defined very broadly. The types of resources for which the Service is authorized to recommend mitigation include those that contribute broadly to ecological functions that sustain species. For example, the definitions of the terms ''wildlife'' and ''wildlife resources'' in the Fish and Wildlife Coordination Act include birds, fishes, mammals, and all other classes of wild animals, and all types of aquatic and land vegetation upon which wildlife is dependent. The purpose of the National Environmental Policy Act (NEPA) also establishes an expansive focus in promoting efforts that will prevent or eliminate damage to the environment, including fish and wildlife resources, while stimulating human health and welfare. In NEPA, Congress recognized the profound impact of human activity on the natural environment, particularly through population growth, urbanization, industrial expansion, resource exploitation, and new technologies. NEPA further recognized the critical importance of restoring and maintaining environmental quality, and declared a Federal policy of using all practicable means and measures to create and maintain conditions under which humans and nature can exist in productive harmony. These statutes address systemic concerns and provide authority for protecting habitats and landscapes.

In this Policy, we note that the Service has traditionally described its trust resources as migratory birds, federally listed endangered and threatened species, certain marine mammals, and inter-jurisdictional fish. Our engagement in mitigation processes is likely to focus on those trust resources, but under certain authorities, the Service's recommendations are not strictly limited to covering only trust resources. This Policy does not establish new authority. We respect the role of States and State authorities. We have revised section 3.2 to replace the term ''expanded basis'' to avoid the perception that the Policy is expanding authorities.

E. Applicability to Endangered and Threatened Species

Comment (8): Several commenters recommended excluding species that are listed as endangered or threatened under the ESA as resources to which the Policy would apply, and several others supported such applicability. Reasons cited by the commenters for excluding listed species included: (a) The Service does not explain the circumstances that have changed and warrant reversing the listed-species exclusion of the 1981 Policy; (b) the Policy cannot substitute for ESA-specific requirements; (c) the ESA does not provide authority to require mitigation; and (d) Policy concepts such as ''net conservation gain,'' ''high-value habitat,'' and a ''landscape approach'' to conservation are inconsistent with ESA statutory authority and regulatory requirements.

Response: The Policy addresses all fish and wildlife resources for which the Service has authority to recommend or require mitigation, including ESA-listed species, because of our need to more strategically provide such recommendations. The primary purpose of the ESA is to provide a means for conserving the ecosystems upon which listed species depend. Avoiding, minimizing, and compensating for impacts is as important, if not more so, to the conservation of listed species as it is to any other resource of conservation concern (*e.g.,* wetlands), because listed species are in danger of extinction or are likely to become so in the foreseeable future. The Service can and should advise others about how they may help conserve listed species when their proposed actions would cause impacts to their populations, because conserving listed species is part of our agency's mission. Identifying those means and measures that would, at minimum, result in no net loss to the status of affected listed species will inform action proponents about what they can do, consistent with their authorities and abilities, to prevent further status declines or contribute to their recovery. As mentioned earlier, the 1982 amendments to the ESA are another example of the changed circumstances since the 1981 Policy, and changes in knowledge, conservation, and management of listed species support this Policy's concepts.

Comment (9): In ESA section 7(a)(2) consultations, several commenters noted that reasonable and prudent alternatives (RPAs) to actions that jeopardize listed species or destroy or adversely modify designated critical habitat are not required to meet the no-net-loss or net gain goal of the Policy.

Response: When an agency has proposed an action that the Service has determined in a biological opinion is likely to jeopardize listed species or destroy or adversely modify designated critical habitat, we agree that RPA(s) to that action are not required to meet the no-net loss/net gain goal of the Policy. The definition of RPAs at 50 CFR 402.02 applies to the formulation of RPAs, not this Policy. In discussions with both the action agency and any applicant involved, the Service is required to suggest RPAs, if available, to the action agency and to rely on the expertise of both in identifying RPAs.

The ESA does not prohibit impacts to critical habitat, but section 7(a)(2) does prohibit Federal actions from destroying or adversely modifying critical habitat, without special exemption under section 7(h). We do not anticipate conflicts between the advisory recommendations under this Policy provided in advance of the initiation of consultation and subsequent review of actions under section 7(a)(2) relative to critical habitat. However, we have added language in the Policy that specifically cautions Service personnel about providing compensation recommendations in the context of actions that may affect designated critical habitat. Recommendations for measures that mitigate impacts (all five types) to the listed species *within* critical habitat will receive preference over compensation *outside* critical habitat to avoid the possibility that adverse effects to the physical and biological features of critical habitat could appreciably diminish its conservation value.

Comment (10): In ESA section 7(a)(2) consultations, several commenters requested that the Service clarify whether the reasonable and prudent measures (RPMs) and the accompanying nondiscretionary terms and conditions that the Service includes in incidental take statements may require compensating for the impacts of take on the species. Most stated that RPMs are limited to actions that minimize take, and may not include requirements to compensate for taking impacts. In support of such comments, some quoted the Services' 1998 Consultation Handbook language at page 4–50, which states in a section about RPMs: ''Section 7 requires minimization of the level of take. It is not appropriate to require mitigation for the impacts of incidental take.''

Response: The Service's authority to require or recommend mitigation, including all forms of mitigation covered by the CEQ's definition of mitigation, are governed by the ESA and the regulations addressing consultations at 50 CFR part 402. While this Policy addresses ESA compensatory mitigation to a limited extent, further detail regarding the role of compensatory mitigation in implementing the ESA will be provided through authority-specific step-down policy (see proposed Endangered Species Act—Compensatory Mitigation Policy at 81 FR 61032–61065, September 2, 2016).

Comment (11): Two commenters asked that we clarify this sentence in the Discussion material on Applicability to the Endangered Species Act: ''This Policy encourages the Service to utilize a broader definition of mitigation where allowed by law.''

Response: We removed the sentence from the Discussion material in this final Policy.

F. Policy Addresses Multiple Authorities

Comment (12): Several commenters addressed aspects of the Service's authority under the Bald and Golden Eagle Protection Act (BGEPA). One commenter supported the acknowledgement that compensatory mitigation for bald and golden eagles may include preservation of those species' habitats and enhancing their prey base. They noted that existing regulations establishing a permit program for the non-purposeful take of bald and golden eagles recognize these options but that these options have not been used. One commenter stated the Service was incorrect in stating in the proposed Policy: ''the statute and implementing regulations allow the Service to require habitat preservation and/or enhancement as compensatory mitigation for eagle take.'' They said that Congress has not exercised jurisdiction over the habitats of eagles, meaning the Service lacks authority to require mitigation for impacts to eagle habitats. One commenter suggested the Policy should articulate whether compensatory mitigation would be in addition to current requirements of a 1-for-1 take offset.

Response: The Service has revised the BGEPA material in Appendix A section (A)(1) to address the concepts raised by the commenters. Although BGEPA does not directly protect eagle habitat beyond nest structures, nothing in the statute precludes the use of habitat restoration, enhancement, and protection as compensatory mitigation. Because golden eagle populations are currently constrained by a high level of unauthorized human-caused mortality rather than habitat loss, permits for golden eagle take require mitigation to be in the form of a reduction to a human-caused source of mortality. However, habitat restoration and enhancement could potentially offset permitted take in some situations, once standards and metrics are developed to ensure the habitat-based mitigation provided will adequately compensate for the detrimental impacts of the permit.

As we developed this Policy, the Service is simultaneously in the process of developing revised regulations that will establish the specific mitigation ratio (prior to being adjusted to account for uncertainties and risks in the mitigation method) for eagle permits.

Comment (13): Three commenters stated that section 404(m) of the CWA does not provide the Service with any substantive authority to ''secure mitigation'' as stated in Appendix A (A)(2). They suggested the Service's role is limited to commenting upon section 404 permits and providing recommendations to the U.S. Army Corps of Engineers (Corps) and that final decisionmaking rests with that agency.

Response: We have edited Appendix A to remove the word ''secure,'' replacing it with ''recommend.'' This change better reflects the Service's authority, provided in the CWA, to provide mitigation recommendations during permitting processes. The Service makes such recommendations with the intention that they be considered and adopted by the Corps as their permit conditions or requirements, but the commenters are correct that the Service's recommendations themselves are advisory.

Comment (14): Two commenters were concerned that the language in the Policy provides an inappropriate method of requiring mitigation measures on projects permitted under CWA section 404 where the Service could not do so under its own authority, by asking the Corps to impose them.

Response: The language regarding the CWA in Appendix A (A)(2) does not introduce any new authority or process. It describes the existing means by which the Service, under statutory authority in the CWA, provides recommendations to the Corps. The Service uses those recommendations to advise the Corps on the effects of proposed permitting actions on aquatic habitats and wildlife and how to mitigate those effects. The Corps then decides whether to adopt the Service's advice in making their CWA permitting decision.

Comment (15): One commenter was concerned that the Policy could be applied to activities authorized under CWA section 404 Nationwide Permits (NWP) that have only minimal environmental impacts. They said that the Service should expressly exclude

activities authorized by NWPs from the Policy because such activities have only minimal environmental impacts and any current mitigation requirements are unwarranted.

Response: Mitigation does apply to the NWP program. The Corps addresses mitigation for NWP-authorized activities in General Condition 23 (77 FR 10285, February 21, 2012). Activities authorized by NWPs are not excluded from this Policy. Also see the agency coordination provisions of General Condition 31, Pre-construction Notification, in the NWPs issued by the Corps on February 21, 2012 (77 FR 10286). For the listed NWPs and in the circumstances described in General Condition 31, the Service is afforded a review opportunity, after which the U.S. Army Corps District Engineer will consider any comments from Federal and State agencies concerning the proposed activity's compliance with the terms and conditions of the NWPs and the need for mitigation to reduce the project's adverse environmental effects to a minimal level.

Comment (16): One commenter suggested clarifying the application of the Policy to the Service's role in CWA section 404 permits and mitigation by adding the following sentence to Section 3.4, Applicability to Service Actions: This Policy applies to the Service's review of all CWA permits, both in coordination and consultation roles.

Response: We agree with the commenter that the Policy applies to the Service's review of CWA section 404 permits. We did not add the suggested sentence but address the Service's application of our statutory authority to make recommendations that mitigate the impacts of these permitted actions on aquatic environments in Appendix A (A)(2).

Comment (17): Two commenters addressed the Service's authority under the Fish and Wildlife Coordination Act. One commenter said the Policy should acknowledge that the FWCA is advisory in nature. Another commenter said that the Policy should acknowledge that the FWCA provides a basis for recommending mitigation of impacts to ecological functions.

Response: Mitigation recommendations the Service makes under the FWCA to Federal agencies planning water resource development projects are advisory. Section 2(a) of the FWCA requires agencies to consult with the Service whenever the waters of any stream or other body of water are proposed or authorized to be impounded, diverted, channelized, controlled, or modified for any purpose whatever, with a view to the conservation and development of fish and wildlife resources. Section 2(b) of the FWCA requires that Service reports and recommendations be given full consideration and included in project reports to Congress or to any other relevant agency or person for authorization or approval. These aspects of FWCA compliance are required. Adoption of Service recommendations by the Federal water resource construction agency is not required.

The FWCA applies to those resources described in section 8 of the statute, where the terms ''wildlife'' and ''wildlife resources'' are defined to include birds, fishes, mammals, and all other classes of wild animals, and all types of aquatic and land vegetation upon which wildlife is dependent. In practice, Service recommendations made under FWCA are likely to focus on linkages of effects to trust resources, as prioritized by Service field and regional offices, but recommendations can cover resources as the statute defines. Because of the breadth of this coverage, we agree with the commenter that Service recommendations under the FWCA can include measures intended to address systemic ecological functions and agree that the purposes of the statute envision this application.

Comment (18): Several commenters addressed the Service's authority under the Migratory Bird Treaty Act (MBTA). One commenter said the Service was incorrect in describing implied authority to permit incidental take of migratory birds under the MBTA and noted that the Service has no authority to require compensatory mitigation for incidental take of migratory birds. Several commenters said that mitigation for migratory birds exceeds MBTA authority and that the Policy should exclude potential incidental impacts to migratory birds under the MBTA until the Service establishes statutory or regulatory authority to require landowners to obtain incidental take authorization prior to undertaking otherwise lawful activities. They added that the MBTA does not directly address mitigation or habitat impacts.

One commenter said the Service was incorrect in writing that the Fish and Wildlife Conservation Act implicitly provided for mitigation of impacts to migratory birds. They said that the language does not authorize the Service to engage in any management activities associated with migratory birds, particularly over private parties, only directing the Service to monitor and assess population trends and species status of migratory nongame birds.

Response: The Service has consistently interpreted the MBTA to apply to the incidental take of migratory birds. Currently, there is no express authority to permit the incidental take of migratory birds under the MBTA. Thus, the Service uses an enforcement discretion approach whereby the Service provides technical assistance to project proponents with strategies to avoid or minimize project-related take of migratory birds that is not the purpose of the otherwise legal action. Under this approach, the Service recommends voluntary measures that can mitigate the direct take of migratory birds and works with project proponents to address impacts to migratory bird habitat, including voluntary compensation for loss of migratory bird habitat. In May 2015, the Service published a notice of intent to conduct a National Environmental Policy Act review of a proposed rule that would establish the authority to permit incidental take as provided by the Act itself. An environmental impact statement will evaluate multiple alternatives for authorizing the incidental take of migratory birds. Subsequently, the Service will develop a regulation that provides the clear authority to permit incidental take and require mitigation measures to avoid and minimize incidental take, and compensation for unavoidable take. Until the regulation is finalized, the Service will continue working with project proponents and industries to manage impacts to migratory birds and their habitats.

The Service does not have specific statutory authority pursuant to the MBTA to *require* Federal action agencies and/or their permittees to provide compensatory mitigation for unavoidable impacts to (loss of) migratory bird habitat resulting from federally conducted or approved, authorized, or funded projects or activities. However, many Federal agency-specific authorities, as well as procedural authorities such as NEPA and the FWCA, require consultation with the Service, State natural resource agencies, and others, and evaluation of environmental effects of proposed actions, which may include considering impacts to migratory bird habitat. Through these authorities, the Service may recommend compensatory mitigation for unavoidable impacts to migratory bird habitat. Federal action agencies may include terms and conditions in permits, licenses, and certificates that mitigate a full range of adverse environmental effects, such as recommendations to compensate for

unavoidable impacts to migratory bird habitat, if they determine they have authority, consistent with their statutes and regulations, to require such compensatory mitigation.

In addition, Executive Order (E.O.) 13186 directs Federal agencies ''taking actions that have, or are likely to have, a measurable negative effect on migratory bird populations'' to sign a Memorandum of Understanding (MOU) with the Service ''that shall promote the conservation of migratory bird populations.''

In Appendix A, we have modified the text of section (A)(7) to clarify the requirements of the Fish and Wildlife Conservation Act and have made minor clarifying edits to the MBTA text of section (A)(10).

Comment (19): Four commenters addressed the Marine Mammal Protection Act (MMPA) discussion in Appendix A (A)(9). One commenter suggested that the Service provide more clarification on existing authorities under the MMPA. These included specifying that this section of Appendix A only discusses incidental take authorizations for non-commercial fishing activities; clarifying requirements as they apply to military readiness activities; providing additional information on other means of affecting the least practicable adverse impact; and clarifying that the permissible methods of taking and the mitigation and reporting are required measures as provided under Incidental Take Regulations (ITRs) and Incidental Harassment Authorizations (IHAs).

Response: Although the MMPA section of Appendix A was intended to provide a general overview for part of this Act, we agree that Appendix A of the Mitigation Policy could benefit from these additional clarifications. We have revised Appendix A to address these points as appropriate.

Comment (20): Commenters stated that the Policy is incompatible with the MMPA in that it adopts a new position inconsistent with the existing regulations or otherwise effects a substantive change in the MMPA.

Response: This Policy does not alter or amend any existing regulation, law, or policy other than the 1981 Policy itself. Instead, where mitigation measures are compatible with the standards of other statutes, *e.g.,* the MMPA, the Service would recommend their use. On the other hand, there are mitigation measures that may be required under statutes besides the MMPA regardless of this Mitigation Policy, *e.g.,* mitigation measures to ensure the least practicable adverse impact on a marine mammal species or stock and its habitat, and on their availability for subsistence use.

Comment (21): Commenters stated that the draft mitigation Policy is incompatible with the MMPA in that it indicates that recipients of incidental take authorizations would be required to take actions to achieve a net conservation gain or no net loss to the affected marine mammal species or stock. They commented that the Service does not have such authority under the MMPA.

Response: The MMPA states that species and population stocks should not be permitted to diminish beyond the point at which they cease to be a significant functioning element in the ecosystem of which they are a part, and, consistent with this major objective, they should not be permitted to diminish below their optimum sustainable population. In this manner, the mitigation Policy is compatible with the MMPA in that it implies there should be no conservation loss. However, the Service agrees that the MMPA does not require recipients to achieve a net conservation gain or no net loss to marine mammals. It was not the intent of this Policy to make such a requirement. Instead, should the Service make the required findings under section 101(a)(5) of the MMPA and authorize incidental take, it would prescribe the permissible methods of taking and other means of ensuring the least practicable adverse impact on the marine mammal species or stock and its habitat, and on the availability for subsistence use as a part of that authorization. We have revised Appendix A of the Policy to clarify this point.

Comment (22): One commenter suggested that the Policy should include language to ensure that review and consultation under Section 106 of the National Historic Preservation Act of 1996 (NHPA) (16 U.S.C 470 *et seq.*), as amended in 1992, takes place at the early planning stage of the action and not wait until mitigation is being considered.

Response: We have revised section 3.4 of the Policy to state that the Service's responsibilities begin ''during early planning for design of the action.'' In addition, we have added the following language: ''Consistent with the NEPA, and the NEPA and NHPA Section 106 Handbook, these reviews will be integrated into the decisionmaking process at the earliest possible point in planning for the action rather than wait until mitigation is considered.''

Comment (23): One commenter said that in Appendix B, to help meet its overarching Tribal Trust Doctrine responsibilities under the NHPA, the Service should initiate Section 106 consultation with Indian tribes early within the time of mitigation planning for the FWS proposed action (instead of after the preferred mitigation approach is selected).

Response: We have revised Appendix B accordingly. The Service will initiate Section 106 consultation with Indian tribes during early planning for Service-proposed actions, to ensure their rights and concerns are incorporated into project design. Consultation will continue throughout all stages of the process, including during consideration of mitigation, and will follow the Service's Tribal Consultation Handbook and the Service's Native American Policy.

Comment (24): One commenter specifically questioned the treatment of Natural Resource Damage Assessment actions conducted under CERCLA, OPA, and the CWA, stating that the Presidential Memorandum on Mitigating Impacts on Natural Resources from Development and Encouraging Related Private Investment, dated November 3, 2015, requires that separate guidance be developed for when restoration banking or advance restoration would be appropriate.

Response: When a release of hazardous materials or an oil spill injures natural resources under the jurisdiction of State, tribal, or Federal agencies, the type of restoration conducted depends on the resources injured by the release and, by nature of the action, must happen after impacts occur. Thus, this Policy's preference for compensatory mitigation measures that are implemented and earn credits in advance of project impacts cannot apply. However, pending promulgation of further DOI guidance, the tools provided in section 5 maintain flexibility useful in implementing restoration to restore injured resources under the jurisdiction of multiple governments, by providing support for weighing or modifying project elements to reach Service goals. Therefore, in agreement with the commenter, we have made edits to section 5.6 and to Appendix A to clarify the relationship of this Policy with Natural Resource Damage Assessment and the Presidential Memorandum on Mitigation.

Comment (25): Two commenters said that combining the fish and wildlife resources provisions of the Stream Protection Rule under the Surface Mining Control and Reclamation Act (SMCRA) with the language of the proposed Mitigation Policy could result in the Service inserting mitigation

requirements not otherwise called for in a SMCRA permit.

Response: At the time this Policy was completed, the proposed Stream Protection Rule, published July 27, 2015 (80 FR 44436), was not yet finalized. The statutory language of SMCRA and its implementing regulations, including the Stream Protection Rule when finalized, will determine the scope of resources covered by Service recommendations under that statute. This Policy does not exceed existing statutory or regulatory authority to engage in mitigation processes for the purpose of making mitigation recommendations, and in limited cases, specifying mitigation requirements. Processes established by applicable statutes and regulations are not superseded by this Policy.

G. Exemptions

Comment (26): Several commenters provided observations regarding exemptions from the Policy. One commenter said that the Policy should further identify those activities and projects that are exempt, adding that the Policy should make clear that any new procedural or other requirements apply only to new project applications or proposals. Several commenters said that the Policy should not apply to actions for which a complete application is already submitted. They stated that the Policy should apply neither to actions already under review nor to actions where coordination was initiated prior to publication of the final Policy.

Response: In section 3.3, Exclusions, we describe the circumstances when the Policy does not apply, but we do not specifically exempt any category of action. The Policy applies when one or more of our authorities apply to the review of a particular action for purposes of making mitigation recommendations. It is the language of those authorities that specifies their coverage of particular actions and resources. In section 3.3, we establish that the Policy does not apply when the Service has already agreed to a mitigation plan for pending actions, except in the specified circumstances. Complete applications that are submitted prior to the finalization of this Policy, but that are not yet under review, do not satisfy those circumstances. If an action is under active review as of the date of final publication of this Policy, Service personnel may elect to apply this Policy to that action. For actions where coordination was initiated prior to the final Policy, Service personnel would determine whether that coordination constitutes active review.

Comment (27): Two commenters said the Policy should exempt landowners who have participated or are currently participating in voluntary programs designed to conserve endangered species.

Response: We do not specifically exempt any category of action in section 3.3. This Policy, as an umbrella policy, integrates all of the Service's authorities for engaging in mitigation. We cannot legally exempt the landowners referenced by the commenters on the basis of their status pursuant to an agreement entered into under a single authority, because their future actions may trigger applicability of one or more other authorities. The Policy does not, however, override or modify any such agreements or substitute for the regulations governing those agreements.

Comment (28): Four commenters stated that the Policy should explicitly exempt activities with *de minimus* impacts. They said that projects with small and/or temporary impacts should not be burdened by mitigation measures.

Response: We do not specifically exempt any category of action and do not exempt actions on the basis of the size of activities planned or on the size of their impacts. The Policy provides a framework to guide Service personnel in their review of actions, including their application of the mitigation hierarchy and their recommendations for mitigation. Application of this guidance will assist Service personnel in determining whether to engage actions in mitigation planning and then in the formulation of mitigation recommendations. Application of this guidance could result, in appropriate circumstances, in a decision not to engage in mitigation planning for actions with *de minimus* impacts, but we do not specifically exempt actions based on the scale of anticipated impacts.

Comment (29): One commenter stated the Policy should include an exemption for conservation projects sponsored by local, State, or Federal resource agencies that seek beneficial restoration and implement conservation objectives.

Response: We do not specifically exempt any category of action and do not exempt actions on the basis of their primary purpose. We acknowledge that actions designed to restore or create habitats are generally less likely to require, for example, compensatory mitigation, and support their role in fulfilling the Service's larger mission. The Policy does not establish new or increased scrutiny of conservation or restoration actions than under existing statutes and regulations. The Service may apply this Policy in review of a conservation action that is intended to benefit one resource, but may adversely affect others for which the Service is authorized to provide mitigation recommendations and/or mitigation requirements.

Comment (30): Two commenters stated that this Policy should not apply to military testing, training, or readiness activities. They stated that such an exclusion is necessary to be consistent with the Presidential Memorandum on Mitigating Impacts on Natural Resources from Development and Encouraging Related Private Investment (November 3, 2015).

Response: The Service interprets the Presidential Memorandum, which instructs agencies to develop or update their mitigation policies, to exempt agencies that conduct military testing, training, and readiness activities from the requirement to update or create policies for those activities. The Presidential Memorandum cannot exempt any particular activity from the applicability of existing statutory authority that provides for mitigation.

Comment (31): One commenter stated the Policy should define or describe ''habitat'' and recommended that the Service exclude dredge material placement sites, and other such manmade areas, from mitigation planning processes.

Response: Habitat develops on sites with a history of human manipulation, including levees, reclaimed mine sites, timber harvest sites, agricultural areas, and dredged material placement sites. The commenter does not reference a particular timeframe over which their proposed exemption would be valid. We note that sites with a history of human manipulation may have been disturbed or modified hundreds of years prior, with multiple episodes of habitat recovery and re-disturbance in the intervening years. The Policy does not exclude areas solely because they are manmade or disturbed habitats. Mitigation requirements and recommendations will be informed by the framework established in this Policy, including section 5.5, Valuation.

H. Net Conservation Gain/No Net Loss

Comment (32): Many commenters addressed the Policy's mitigation planning goal to improve (*i.e.,* a net gain) or, at minimum, to maintain (*i.e.,* no net loss) the current status of affected resources. A number of commenters supported the goal while a number of commenters opposed the inclusion of a net conservation gain. Many commenters stated that the Service lacks the statutory authority to implement the

net gain goal for mitigation planning. Several commenters suggested that a net gain goal imposes a new standard for mitigation and that mitigation requirements should be commensurate with the level of impacts. Others expressed concern about the costs associated with achieving a net gain.

Response: The Policy applies to those resources identified in statutes and regulations that provide the Service with the authority to make mitigation recommendations or specify mitigation requirements and are described in section 2 and in Appendix A. The purpose of the net conservation goal in mitigation planning is to improve conservation outcomes to affected resources, but the Policy does not require project proponents to achieve those outcomes. The Policy provides a framework for Service recommendations to conserve fish, wildlife, plants, and their habitats that are negatively affected by proposed actions. The identification of those means and measures that would result in a net conservation gain to the affected resources will not only help prevent further declines but contribute to a net improvement in the status of affected species and their habitats. The Service will seek a net gain in conservation outcomes in developing mitigation measures consistent with our mission to identify and promote opportunities to decrease the gap between the current and desired status of a resource.

Comment (33): Several commenters questioned the ability to achieve the net conservation gain and how it would be measured. Other commenters stated that the Policy should provide the methodology to assess or measure the net conservation gain.

Response: It is beyond the scope of the Policy to provide specific quantifiable measures to achieve the net conservation gain goal. The Service's mitigation goal is to achieve a net conservation gain or, at a minimum, no net loss of the affected resources. The Policy provides the framework for assessing the effects of an action and formulating mitigation measures (sections 5.1 through 5.9) to achieve this goal, which will be specific to the conservation objectives of the affected resources.

Comment (34): Several commenters stated that neither no net loss, nor net conservation gain, are compatible with the standards of the ESA sections 7 and 10. One commenter asked that we clarify that the net conservation gain goal does not modify or expand proponents' obligations under ESA sections 7 or 10 permitting programs. One commenter stated that the Policy's goal would have limited relevance to section 10 decisions other than serving as an aspiration or goal for negotiating conservation measures. One commenter asked that we specify how the Policy's goal will be applied to processing incidental take permit applications under section 10(a)(2)(B)(ii), especially for projects predicted to directly kill listed species. This commenter added that neither no net loss nor net gain is an appropriate goal under section 10 if the goal implies that impacts at the individual level will not be minimized to the maximum extent practicable.

Response: This Policy is intended to guide mitigation for impacts to listed species. It does not expand the Service's authorities for recommending or requiring mitigation under the ESA. As an administrator of the ESA, the Service has an obligation to work with others to recover listed species and preclude the need to list species, including guiding compensatory mitigation to offset the adverse impacts of actions to threatened and endangered species. The Service anticipates further defining the mitigation goal in relation to compensatory mitigation for impacts to listed species and designated critical habitat in the forthcoming Endangered Species Act Compensatory Mitigation Policy.

Comment (35): One commenter recommended the use of regional conservation goals and objectives in developing landscape-scale mitigation where the conservation goals and objectives are clear, explicit, and defensible. The commenter recommended that the Policy define a conservation goal as a ''formal statement describing the future status of a species or habitat.''

Response: We acknowledge that there may be variability in conservation plans developed by different entities, and agree that the commenter's descriptions are among the possibilities. This Policy describes an overall goal of a net conservation gain. The Service's mitigation planning goal is to improve (*i.e.,* a net gain) or, at minimum, to maintain (*i.e.,* no net loss) the current status of affected resources, as allowed by applicable statutory authority and consistent with the responsibilities of action proponents under such authority, primarily for important, scarce, or sensitive resources, or as required or appropriate. Service mitigation recommendations or requirements will specify the means and measures that achieve this goal, as informed by established conservation objectives and strategies. This Policy defines conservation objectives as a measurable expression of a desired outcome for a species or its habitat resources. Population objectives are expressed in terms of abundance, trend, vital rates, or other measurable indices of population status. Habitat objectives are expressed in terms of the quantity, quality, and spatial distribution of habitats required to attain population objectives, as informed by knowledge and assumptions about factors influencing the ability of the landscape to sustain species.

I. Landscape-Scale Approach

Comment (36): Two commenters stated the Policy should include nearshore, estuarine, and marine habitats in describing landscapes. They asked that we clarify that the concept is inclusive of ecologically connected areas of the aquatic environment, such as watersheds.

Response: We concur with the commenters that the definition of and concept of landscape and a landscape approach must include aquatic environments. The concept does include ecologically connected areas of the aquatic environment such as watersheds. The existing definition of landscape in section 6 accommodates this inclusion.

Comment (37): Three commenters suggested providing more clarity regarding what it means to take a landscape approach to mitigation in the absence of an existing conservation plan. They said that a landscape approach in the absence of an appropriate plan will necessitate an analytical process and the Policy should identify the information that should be used in such a process. They suggested adopting language from the rule on Compensatory Mitigation for Losses of Aquatic Resources, 33 CFR parts 325 and 332 (Corps) and 40 CFR part 230 (Environmental Protection Agency (EPA)), 33 U.S.C. 1344, that describes the Corps and EPA watershed approach in the absence of appropriate plans.

Response: The availability of plans will be variable, and the Policy's instruction to Service staff to take a landscape approach when conservation plans are not available is sound. The diversity in the habitats, species, project impacts, and mitigation in the implementation of the Service's suite of mitigation authorities make detailed specification of landscape approach instructions beyond the scope of this umbrella policy. In concurrence with the commenters, we have added text to the end of section 5.1, Integrating Mitigation with Conservation Planning.

Comment (38): Multiple commenters expressed concerns regarding how the landscape approach will be

implemented, suggesting that clarity be provided through specific criteria, guidance on process, and how data will be used or appropriateness of data, for consistent application.

Response: The Service has written the national Policy in a manner that facilitates further clarification on a regional scale. As with many of the decisions made in impact analysis, determination of appropriate assessment methodologies including landscape scale must occur on a project-by-project basis, under the authority at hand, with information most appropriate for the site or region of impact. Section 5.3.3 allows the Service flexibility in methodology to meet this need by allowing use of any methodology that allows comparison of present to predicted conditions, measures beneficial and adverse impacts by a common metric, and predicts effects over time. We look forward to using existing means of engagement at the local and State level, when working with the States, tribes, and other partners through existing authorities while developing programs and additional guidance to seek mutual goals and avoid inconsistency.

J. Advance Mitigation Planning at Larger Scales

Comment (39): Two commenters stated that the term ''Advance Mitigation Planning at Larger Scales'' in section 5.1, Integrating Mitigation with Conservation Planning, might be confused with the Policy's preference for Advance Mitigation in section 5.7.1, Preferences.

Response: We agree and have changed the term within section 5.1 to read ''Proactive Mitigation Planning at Larger Scales.''

K. Climate Change

Comment (40): Many commenters addressed the Policy's inclusion of climate change in assessing the effects of a proposed action and mitigation. One commenter stated the Policy should make it a requirement that climate change be assessed, while others urged the Service to refrain from using climate change projections to govern mitigation efforts. Several commenters stated that climate change predictions and the effects to species and their habitats are uncertain and that the current state of climate projections are not of a scale sufficient to assess project-related impacts or mitigation. Several commenters suggested the Policy include guidance on how the effects of climate change should be determined. One commenter stated the Service should ensure that the temporal scope of the analyses is well defined and supported by data and that the impacts to species and their habitats can be assessed with reliable predictability.

Response: Consistent with the Departmental Manual Chapter (600 DM 6), this Policy recommends that climate change be considered when evaluating the effects of an action and developing appropriate mitigation measures. The Service recognizes that the science of climate change is advancing and assessment methodologies are continually being refined to address the effects of climate change to specific resources and at differing scales. Because of the broad scope of resources covered by this Policy and the evolving state of climate change science and assessment methodologies, including specific information on these topics is beyond the scope of the Policy. Therefore, the Policy is written with language to ensure that it does not become quickly outdated as methodologies evolve. As stated in section 5.3, Assessment, the Service will use the best available information and methodologies when considering the effects of climate change to the resources covered by this Policy and in designing mitigation measures.

Comment (41): One commenter provided an in-depth discussion of the broad-scale consequences of greenhouse gas emissions, climate change, and carbon sequestration.

Response: The Service shares the commenter's emphasis of the importance of climate change as a systemic challenge that must be a focus of integrated natural resource management. That is why it is written in the Policy to inform the scale, nature, and location of mitigation measures when employing the Policy's fundamental principle of using the landscape approach (section 4.c). It is not possible to provide exhaustive details for addressing climate change in this umbrella policy. Our mitigation authorities give us ability to recommend mitigation for impacts to species and habitats, but we do not have explicit authorities to recommend offsets for carbon emissions. In the course of integrating mitigation with conservation planning (section 5.1), assessing project impacts and formulating mitigation measures (section 5.3), and recommending siting of compensatory mitigation (section 5.7.1), this Policy directs Service staff to integrate consideration of climate change.

L. Collaboration and Coordination

Comment (42): Several commenters supported the Policy's clear desire for collaboration and coordination with stakeholders. However, other commenters were concerned with the lack of detail in regard to coordination with State, tribal, or other local conservation partners during various steps in the process, and the extent to which data, analyses, and expertise of these entities will be used, and conflict with existing planning efforts avoided. Multiple comments indicated the importance of early coordination with State, tribal, and Federal organizations, local conservation partners, and private landowners, especially to avoid delay in the process. Some commenters requested minimum standards for plans or data, and indicated multiple types of plans or data that would be useful (*e.g.*, ESA Recovery Plans, State Wildlife Action Plans, watershed plans, State natural heritage data, and plans associated with State or metropolitan transportation planning processes). One commenter in particular pointed to the importance of collaborating to avoid conflicts and ''negative externalities'' for Alaska and its citizens. Multiple commenters requested we specifically list State and local entities in section 5.2.

Response: State and local conservation partners often have data or planning documents important to project mitigation scenarios. Thus, we acknowledge the benefits of collaboration and coordination in the early planning and design of mitigation in section 5.2. We look forward to using existing means of engagement at the local and State level, when working with the States, tribes, and other partners through existing authorities while developing programs to seek mutual goals and avoid inconsistency. Therefore, we revised the text in sections 4(c) and 5.2(a) and (d) to better reference local government entities.

Comment (43): One commenter requested reaffirmation that States can, with guidance and participation of the Service, develop and implement mitigation programs to achieve Service mitigation goals, while aligning with local conservation plans and multiple use objectives. Several commenters requested identification of specific Service representatives to engage in these planning efforts, and clarification on process, especially to avoid disputes related to inconsistency. One commenter requested the Service require State concurrence with recommendations when related to resources under State authority; others were specifically concerned with the Policy's interface with current mitigation systems.

Response: We agree that alignment with local mitigation efforts mutually

benefits conservation agencies, and this Policy formally recognizes the shared responsibility with State, local, and tribal governments, and other Federal agencies and stakeholders. We look forward to using existing means of engagement at the local and State level, when working with the States, tribes, and other partners through existing authorities while developing programs to seek common goals and avoid inconsistency.

Comment (44): Several commenters requested more information specifically on how conflicts between agencies or regulations, plans, or mitigation or permitting requirements would be handled.

Response: Conflicts between agencies are handled through direct engagement and through existing mechanisms that will be unchanged by this Policy. For example, in NEPA, regulations at 40 CFR part 1504 establish procedures for referring Federal interagency disagreements concerning proposed major Federal actions that might cause unsatisfactory environmental effects to the Council on Environmental Quality. The same regulations provide means for early resolution of such disagreements. In CWA permitting processes, disagreements over issuance of specific permits or on policy issues between the Service and Corps or between EPA and the Corps are resolved following procedures established at section 404(q) of that act and detailed within a Memorandum of Agreement between the agencies. The Corps/EPA joint 2008 Compensatory Mitigation Rule also features a dispute resolution process for agencies to resolve disagreements concerning the approval of mitigation banks or in-lieu-fee programs. We will continue to use existing processes.

Comment (45): One commenter requested that the Service include requirements that all mitigation data, including data associated with amount and type of mitigation, ecological outcomes, landscape scale and conservation plans used in mitigation planning, and monitoring be made public in an easily accessible manner, such as being submitted electronically to publicly available databases.

Response: We agree that data should be made broadly available to facilitate future conservation at a landscape level, dependent on the relevant regulations under which the mitigation is required. If there is the potential for disclosure of personal, private, or proprietary information, there are limitations on the Service's or other agencies' ability to require public availability. While most of the Service's mitigation authorities allow for recommendations, the ability to disclose monitoring data may be at the discretion of another agency. A blanket requirement to post all monitoring data to public databases would, therefore, be beyond the scope of this Policy.

M. Assessment

Comment (46): One commenter stated that indirect effects from some actions are greater than the direct effects and should, therefore, be made more prominent in the Policy.

Response: We added indirect and cumulative impacts to section 5.3 of the Policy.

Comment (47): Several commenters expressed concern regarding the use of best professional judgment during and as subjective predictions of impact, as described in section 5.3.4. Some commenters seemed particularly concerned about coincidental changes in magnitude of probable impacts caused by indirect sources, or those falling outside Service jurisdiction, such as climate change.

Response: The Service, in section 5.3, allows use of ''best professional judgment'' using information described in the remainder of that section (recognition of and adjustment for uncertainty, use of information provided by the action proponent, and best available methodologies to predict impact). Thus, even where predictions may be uncertain, the Service will support decisions on the best available scientific information. As with many of the decisions made in impact analysis, prediction of impacts through time must occur on a project-by-project basis, under the authority at hand, with information most appropriate for the site or region of impact. We look forward to using existing means of engagement at the local and State level, when working with the States, tribes, and other partners through existing authorities while developing programs and additional guidance to seek mutual goals and avoid inconsistency.

Comment (48): Multiple commenters stated that assessment methodologies should be designed to ensure predictable mitigation credits, measure both beneficial and adverse effects, and be based on biological and/or habitat conditions that are accurate, sensitive, repeatable, and transparent. Two commenters were concerned that the Service should provide additional guidance to Federal and State agencies to avoid inefficiencies, and provide clarification in methodologies.

Response: As with many of the decisions made in impact analysis, determination of appropriate assessment methodologies must occur on a project-by-project basis, under the authority at hand, with information most appropriate for the site or region of impact. Section 5.3.3 allows the Service flexibility in methodology to meet this need by allowing use of any methodology that compares present to predicted conditions, measures beneficial and adverse impacts by a common metric, and predicts effects over time. We look forward to using existing means of engagement with the States, tribes, and other partners through existing authorities while developing programs and additional guidance to seek mutual goals and avoid inconsistency.

Comment (49): One commenter suggested that ''key ecological attributes'' (KEA) be used as a landscape-scale mitigation framework to guide impact assessment and ensure ''like for like'' benefits. The commenter categorized KEAs as: (1) Size (measure of a resource's area of occurrence or population abundance); (2) condition (measure of the biological composition, structure, and biotic interactions that characterize the space in which the resource occurs); and (3) landscape context (assessment of the resource's environment including the ecological processes and regimes that maintain it, and connectivity that allows species to access habitats and resources or allows them to respond to environmental change through dispersal or migration).

Response: While use of the assessment approach involving application of KEAs would be consistent with the assessment principles and attributes of the best available effect assessment methodologies that we describe in section 5.3, we do not specify use of specific methodologies because the Policy's breadth of geographical, ecological, and authority coverage warrant flexibility.

Comment (50): One commenter stated the Policy should provide science quality standards while another commenter stated that science provided by a project proponent to support a mitigation action should be evaluated fairly.

Response: As stated in the Policy, the Service will use the best available science in formulating and monitoring the long-term effectiveness of its mitigation recommendations and decisions, consistent with all applicable Service science policy. This will include an objective evaluation of science-based information provided by the project proponent.

N. Evaluation Species

Comment (51): Numerous commenters expressed opinions and concerns on how the evaluation species should be selected. Suggestions focused on coordination with States and other parties and on selecting species identified in local government plans that have met appropriate standards or in State Wildlife Action Plans.

Response: The Policy is not meant to be exhaustive in identifying the resources or characteristics of evaluation species. The Service recognizes that there may be existing plans (*e.g.*, local government plans, State Wildlife Action plans) other than those identified in the Policy as well as other characteristics that may be useful in mitigation planning depending on the specific action and the affected resources. We agree that the use of existing plans such as State Wildlife Action plans or other sources that have established species conservation objectives will be useful in selecting evaluation species within the affected area. The Service will work with project proponents and other stakeholders in reviewing existing plans and identifying evaluation species for a specific action following the guidance outlined in section 5.4, Evaluation Species.

Comment (52): One commenter stated that section 5.4, Evaluation Species should be expanded to focus beyond evaluation species to species and their habitats for use in impact assessments and mitigation planning.

Response: Section 5.4 in the Policy adequately addresses the identification and characteristics of evaluation species, and does not need to be expanded. The purpose of selecting evaluation species is part of the Policy's framework to evaluate affected habitats and make mitigation recommendations based on their scarcity, suitability, and importance to achieving conservation objectives as discussed in section 5.5, Habitat Valuation.

Comment (53): A number of commenters suggested that the Policy's approach to evaluation species will expand the Service's jurisdiction to all wildlife and that mitigation will be required for species (and habitats) for which there is no direct statutory or regulatory obligation.

Response: Evaluation species are a utility used by agencies in mitigation planning. The Service defines them as the fish, wildlife, and plant resources in the affected area that are selected for effects analysis and mitigation planning. We need evaluation species because we cannot exhaustively assess all impacts and formulate mitigation for all resources affected by a proposed action. The purpose of Service mitigation planning is to develop a set of recommendations that, if implemented with the proposed action as a package, would achieve conservation objectives for the affected resources. Accordingly, the Service would select evaluation species for which conservation objectives have the greatest overlap with the effects of a proposed action. The Service will select others to represent the suite of fish and wildlife impacts caused by an action. The Policy provides guidance for selecting evaluation species and is not a means of expanding our jurisdiction. Evaluation species are, in effect, a planning tool and were a major feature of the 1981 Policy.

Comment (54): A number of commenters addressed the selection of evaluation species in those instances identified in the Policy where an evaluation species does not need to occur within the affected habitat: Species identified in an approved plan that includes the affected area, or the species is likely to occur in the affected area during the reasonably foreseeable future with or without the proposed action due to natural species succession. One commenter stated that the Policy places clear and defined limits on what constitutes both the ''reasonably foreseeable future'' and ''natural species succession'' when selecting evaluation species so mitigation actions are not overly expansive. Some commenters questioned the Service's authority to expand the scope of analysis to species that do not occur in the affected area but could occur at some point in the foreseeable future due to natural species succession.

Response: The selection of evaluation species that is not currently present in the affected area was a component of the Service's 1981 Policy. Under this Policy, the Service retains the ability to consider such selections, as authorities permit. Such selections will be subject to the conditions described in section 5.4 and are not a means of expanding the Service's authorities.

Comment (55): A few commenters stated that there is no basis for evaluating other non-listed species when assessing actions under the ESA, while another commenter expressed concern that the consultation and permitting for specific species will be complicated by the addition of evaluation species resulting in additional analysis and costs.

Response: Nothing in this Policy supersedes statutes and regulations governing treatment of federally listed species. Section 5.4, Evaluation Species, provides guidance on the selection of evaluation species that the Service will recommend in the assessment of affected resources and mitigation planning. The Service will recommend the smallest set of evaluation species necessary to relate the effects of an action to the full suite of affected resources. In instances where the Service is required to issue a biological opinion, permit, or regulatory determination for a specific species, that species will be, at a minimum, identified as an evaluation species. The recommendation to use additional evaluation species will depend on the specific project and affected resources. Use of evaluation species beyond federally listed species will improve conservation outcomes for other resources affected by an action, but the Policy does not require such usage.

Comment (56): One commenter stated that the Policy creates a new category of species by using evaluation species.

Response: Evaluation species is not a new term and has been brought forth from the Service's 1981 Policy. Section 5.4, of the Policy, Evaluation Species, provides additional guidance on the selection and use of evaluation species to assess impacts and develop mitigation strategies.

O. Habitat Valuation

Comment (57): Several commenters requested the Service provide additional details on habitat valuation in section 5.5 of the Policy. To avoid the potential for ''lengthy disputes'' between the Service and other stakeholders in mitigation planning, some recommended including measurable/repeatable metrics in the Policy for quantifying habitat scarcity, suitability, and importance. Others wanted a very clear standard for identifying ''habitats of high-value,'' for which the Policy guidance is to avoid all impacts.

Response: The scope of the Policy covers all authorities that give the Service a role in mitigating the impacts of actions to fish and wildlife resources, which encompasses a broad range of action types and species. The types and quality of available information vary widely across this range; therefore, highly prescriptive methods of habitat valuation are not advisable. Scarcity, suitability, and importance are the characteristics most relevant to our purpose for habitat valuation, which is to inform the relative emphasis we place on avoiding, minimizing, and compensating for impacts to the conservation of evaluation species. Our definitions of these parameters are sufficiently clear to provide useful guidance to Service personnel in

formulating mitigation recommendations to action proponents. However, we have revised the Policy to clarify that ''habitats of high-value'' are those that are rare and both highly suitable for, and important to, the conservation of the evaluation species.

Our authority to require specific mitigation actions of action proponents is limited, and is governed by the regulations of the statute that confers such authority, not this Policy. Our goal with this Policy is to provide a common framework for the Service to apply when identifying mitigation measures across the full range of our authorities to promote better conservation outcomes for species. Service personnel are obligated to explain mitigation recommendations, including our valuation of the affected habitats. Action proponents may adopt or reject Service recommendations about how they may maintain or improve the status of species as part of their proposed actions. Therefore, we do not anticipate ''lengthy disputes'' between the Service and action proponents over habitat valuations.

Comment (58): Several commenters recommended that the Service use habitat valuation as the basis for variable mitigation standards or goals, similar to the 1981 Policy.

Response: This Policy adopts a minimum goal of no-net-loss for mitigating impacts to evaluation species, regardless of the value of the affected habitat, which is a fundamental change relative to the 1981 Policy. Instead of determining variable objectives that apply to affected habitats, variable habitat value informs the priority we assign to avoid, minimize, and compensate for impacts to evaluation species. Our rationale for this change is that all occupied habitats contribute to the current status of an evaluation species. Discounting the contribution of lower value habitat would increase the difficulty of achieving conservation objectives for evaluation species. However, we recognize that to maintain or improve a species' status, it is more efficient to avoid and minimize impacts to higher value habitats, and to minimize and strategically compensate for impacts to lower value habitats. The Service will engage action proponents in mitigation planning only when we have authority to do so and when an action may adversely affect resources of conservation interest to a degree that warrants application of the Policy.

Comment (59): Two commenters recommended the Service retain the four Resource Categories of the 1981 Policy.

Response: In the 1981 Policy, the Resource Categories established variable mitigation objectives based on habitat value, which was a function of scarcity and suitability. Under this Policy, the objective is a minimum of no net loss, regardless of habitat value. Instead, habitat value informs the priority we assign to avoid, minimize, and compensate for impacts. By adding habitat ''importance'' to the scarcity and suitability parameters of the 1981 Policy, the revised Policy more explicitly integrates mitigation recommendations with conservation strategies applicable to the evaluation species. Our valuation considers all three parameters, and we will seek to avoid and minimize impacts to habitats of higher value, and to minimize and compensate for impacts to habitats of lower value. We considered prescribing a prioritization of mitigation types through a revised resource category system but determined that it added little practical value beyond stating that we should recommend avoiding impacts to rare habitats that are of both high suitability and importance (the equivalent of Resource Category 1 in the 1981 Policy) and give greater emphasis to compensating for impacts to low-value habitats.

Comment (60): Three commenters expressed specific concerns about the three habitat-valuation parameters, each recommending possible revisions/substitutions. One stated that our definition of importance was mostly a function of scarcity and/or suitability, and suggested substituting ''irreplaceability'' and ''landscape position'' as more independent parameters. Another suggested that ''unique and irreplaceable'' was the criterion for recommending avoiding all impacts to a habitat, as opposed to high-value assessed by all three valuation parameters. The third urged the Service to use ''vulnerability'' as an additional parameter.

Response: Our definitions of the three habitat-valuation parameters are distinct and do not overlap, but we recognize potential correlations between the parameters (*e.g.,* rare habitats of high suitability are very likely also of high importance). Our definition of importance captures the significance of a location in the conservation of a species, regardless of its scarcity or suitability, and we disagree that importance is mostly a function of scarcity and suitability. The definition of importance refers to both the ability to replace the affected habitat and its role in the conservation of the evaluation species as a core habitat, a linkage between habitats, or its provision of a species-relevant ecological function. Therefore, ''irreplaceability'' and ''landscape position'' are already considered in the importance parameter.

A ''unique'' habitat is the rarest valuation possible on the scarcity parameter, and an ''irreplaceable'' habitat rates high on the importance parameter. The third parameter, suitability, is defined as ''the relative ability of the affected habitat to support one or more elements of the evaluation species' life history compared to other similar habitats in the landscape context.'' A unique habitat would have no other similar habitats in the relevant landscape context for comparative purposes; therefore, its suitability is not assessable. In practice, if a unique and irreplaceable habitat is supporting an evaluation species, we will consider it as a ''high-value'' habitat under this Policy.

Our view of ''vulnerability'' as a habitat-valuation parameter is that it is difficult to define and assess consistently. A workable definition would likely overlap substantially with the scarcity parameter, which is more readily evaluated given data about the spatial distribution of a habitat type in the relevant landscape context, and also with the replicability concept under the importance parameter. Regardless whether a non-overlapping definition is possible, adding vulnerability as a fourth habitat-valuation parameter would then dilute the influence of the other three. Scarcity and suitability, which were features of the 1981 Policy, and importance, which is applicable to interpreting how conservation plans describe the significance of particular areas, are each amenable to reasonably consistent assessment by Service personnel. These three parameters sufficiently serve the purpose of habitat valuation under this Policy, which is to prioritize the type of mitigation we recommend.

Comment (61): One commenter suggested that when more than one evaluation species uses an affected habitat, some situations may warrant not using the highest valuation to govern the Service's mitigation recommendations, contrary to the Policy's guidance in section 5.6.3. The commenter offered the following example of such a situation. An affected habitat is used by two evaluation species; but regulatory requirements (*e.g.,* ESA compliance) apply to the species associated with the lower habitat valuation, and conservation bank credits are available to compensate for impacts to this species. Two other commenters requested clarification of

the Service's methodology for valuation of a habitat used by multiple evaluation species.

Response: Because the goal of the Policy is to improve, or at minimum, maintain the current status of evaluation species, the Policy's guidance to assign the highest valuation among evaluation species associated with an affected habitat most efficiently achieves this goal for all evaluation species. Avoiding or minimizing impacts to the higher value habitat reduces the level of compensation necessary to achieve the Policy goal for both species. The availability of conservation bank credits, while advantageous, should not dictate Service recommendations for achieving the Policy goal.

Although species to which regulatory requirements apply, such as species listed under the ESA, are automatic evaluation species under the Policy, the Policy does not assign priorities among evaluation species. Accordingly, our habitat-valuation methodology is the same whether one or multiple evaluation species use an affected habitat. The scarcity parameter is not species-specific; however, the suitability and importance parameters are. A particular affected habitat is not necessarily of the same suitability for and importance to different evaluation species and may, therefore, receive different valuations. The highest valuation informs the relative priority for avoiding, minimizing, and compensating for impacts.

P. Mitigation Hierarchy

Comment (62): We received comments from many entities related to our use of the mitigation hierarchy concept in the Policy. Most expressed support for strict adherence to the avoid-minimize-compensate sequence of the hierarchy and concern that the Policy's recognition of circumstances warranting a departure from this preferred sequence provides Service personnel an inappropriate amount of discretion. Others supported such departures and requested greater specificity in defining the circumstances that would justify greater emphasis on compensation.

Response: The first three general principles listed in section 4 will guide the Service's application of the mitigation hierarchy: (a) The goal is to improve or, at minimum, to maintain the current status of affected resources; (b) observe an appropriate mitigation sequence; and (c) integrate mitigation into a broader ecological context with applicable landscape-level conservation plans. Action- and resource-specific application of these principles under the framework of section 5 will determine the relative emphasis that Service mitigation recommendations afford to measures that avoid, minimize, and compensate for impacts.

We are clarifying Service determinations of ''high-value habitat,'' for which the Service recommendation is to avoid all impacts. Consistent with our commitment to the mitigation hierarchy under Principle ''b'' of section 4, the Service will not recommend compensation as the sole means of mitigating impacts when practicable options for avoiding or minimizing impacts are available. However, to achieve the Policy's goal of maintaining or improving the status of evaluation species, all Service mitigation recommendations will necessarily include some degree of compensation, unless it is the rare circumstance where it is possible to avoid all impacts while still accomplishing the purpose of the action or we are compelled to recommend the no-action alternative. Our habitat-valuation guidance (section 5.5) informs the relative emphasis we place on the mitigation types in the hierarchy. Higher valued habitats warrant primarily avoidance and minimization measures, in that order, to the maximum extent practicable. Compensation is likely, but not necessarily, a more effective means of maintaining or improving the status of species affected in lower valued habitats. Applicable conservation plans for the evaluation species (Principle ''c'' of section 4) will inform Service personnel whether compensation should receive greater emphasis. Service personnel are obligated to explain recommendations per the guidance of section 5.8, Documentation.

Comment (63): One commenter stated the Policy should include a mechanism to credit a project proponent for implementing avoidance or minimization measures.

Response: Avoidance and minimization are components of the mitigation hierarchy. Impacts that are avoided will negate the need for further mitigation measures. Impacts that are minimized will lessen the need to reduce, rectify, and compensate for residual impacts.

Comment (64): One commenter requested the Policy clarify how mitigation credits will be calculated at banking sites and that the Policy should provide for the ability to ''stack'' credits. Another commenter suggested the Policy include the definition of the term ''credit.''

Response: This is not a compensatory mitigation policy. It is beyond the scope of this Policy to provide detailed procedural or operational information. Based on the applicable authority, such implementation detail for compensatory mitigation processes is provided in other regulatory or policy documents. For example, details for CWA processes is provided through regulation (Compensatory Mitigation for Losses of Aquatic Resources, 33 CFR parts 325 and 332 (USACE) and 40 CFR part 230 (EPA), 33 U.S.C. 1344). For ESA processes, the Service expects to finalize such guidance through policy (see proposed ESA Compensatory Mitigation Policy at (81 FR 61032–61065, September 2, 2016)).

Q. Avoidance

Comment (65): Several commenters strongly supported the Policy's statements on avoidance, or said the Policy should increase the emphasis on avoidance generally, and especially with respect to the most highly valued resources. They suggested the Policy more strongly acknowledge that some habitats are unique and irreplaceable, making the ''no action'' alternative the only way of achieving conservation goals for species that depend on those habitats. They added that ensuring the long-term protection of high-value habitat is especially critical for imperiled species.

Some commenters said the Policy should not require avoidance of all impacts to high-value habitats, as strict adherence to this measure has the potential to stop crucial infrastructure projects. They said requiring avoidance of high-value habitats and imposing limitations on timing, location, and operation of the project will result in added project costs. They proposed that avoidance recommendations be made or implemented on a case-by-case basis. Some commenters suggested the Policy clarify the Service's authority for recommending a ''no action'' alternative. One commenter said the Service cannot recommend avoidance of all impacts when such a position would deny a property owner any beneficial use of their property. Otherwise, a regulatory taking would result. Commenters said that because the Service has no basis to deny an action, the Policy should expressly state it does not allow for the Service to veto proposed projects on which it consults.

Response: We agree the proposed Policy's existing statements regarding recommendation of avoidance of impacts to high-value habitats are important themes, as they were in the 1981 Policy. For clarity, we have edited section 4, General Policy and Principles, to add a principle highlighting the

Service's policy of recommending avoidance of high-value habitats.

This Policy provides a common framework for identifying mitigation measures. It does not create authorities for requiring mitigation measures to be implemented. The authorities for reviewing projects and providing mitigation recommendations or requirements derive from the underlying statutes and regulations. On a case-by-case basis, as noted in the Policy at section 5.7, Recommendations, we may recommend the ''no action'' alternative when appropriate and practicable means of avoiding significant impacts to high-value habitats and associated species are not available. These recommendations will be linked to avoiding impacts to high-value habitats. Depending on the spatial configuration and location of habitats relative to project elements, recommending avoidance of all impacts to high-value habitats will not always equate to recommending no action.

Also, we note that the Policy does not indicate avoidance of all high-value habitats is required. The Policy provides guidance to Service staff for making a recommendation to avoid all high-value habitats or to adopt a ''no action'' alternative in certain circumstances. If we provide such materials to an action agency for consideration in their authorization process, a regulatory taking would not result from making recommendations. This Policy will not effectively compel a property owner to suffer a physical invasion of property and will not deny all economically beneficial or productive use of the land or aquatic resources. This Policy provides a common framework for the Service to apply when identifying mitigation measures across the full range of our authorities, including those for which we may require mitigation. This broad program direction for the Service's application of its various authorities does not itself result in any particular action concerning a specific property. In addition, this Policy substantially advances a legitimate government interest (conservation of species and their habitat) and does not present a barrier to all reasonable and expected beneficial use of private property.

Comment (66): Three commenters said identifying and requiring avoidance of all high-value habitat conflicts with the statutory and regulatory requirements of the ESA. They pointed out that regulations at 50 CFR 402.14(i)(2) state reasonable and prudent measures cannot alter basic design, location, scope, duration, or timing of an action. They said the Service would prohibit any activity impacting areas determined to be high-value habitat and that no such parallel requiring complete avoidance exists under the ESA. They said the Service has no authority to mandate the complete avoidance of designated critical habitat or require all impacts to critical habitat be offset with mitigation measures that achieve a net gain or no net loss.

Response: The Policy does not prohibit any activity impacting areas determined to be high-value habitat. The Policy provides guidance to Service staff for making a recommendation to avoid all high-value habitats or to adopt a ''no action'' alternative in certain circumstances. Through the Policy, we are neither requiring nor mandating the complete avoidance of designated critical habitat. Regulations and procedures that implement the ESA are not superseded. The Policy does apply to all species and their habitats for which the Service has authorities to recommend mitigation on a particular action, including listed species and critical habitat. Although the Policy is intended, in part, to clarify the role of mitigation in endangered species conservation, nothing in it replaces, supersedes, or substitutes for the ESA implementing regulations. In early stages of interagency consultation under the ESA, we routinely provide advice to action agencies on avoiding impacts to listed species and designated critical habitats that may be reflected in subsequent project descriptions or in action agency permits or authorizations. The provision of that advice is consistent with the Policy's guidance to Service staff on recommending avoidance of all high-value habitats.

Comment (67): One commenter said requiring onsite avoidance can lead to piecemeal mitigation and undermines the goal of supporting regional mitigation planning. They suggested removing the preference for onsite avoidance over compensatory mitigation to better support regional mitigation planning goals.

Response: The Service agrees that defaulting to avoidance can, in some cases, result in a less desirable outcome than pursuing compensatory mitigation elsewhere that better serves broader landscape-level conservation goals. However, in the Policy, we note that those cases involve impacts to lower value habitats. Even then, the Service will consider avoidance, consistent with the mitigation hierarchy. For the most highly valued habitats, the Policy guides Service staff to recommend avoidance. If adopted, recommendations to avoid impacts to high-value habitats directly support regional mitigation planning by ensuring the scarcest, most suitable, and most important habitats within a landscape remain unaltered.

Comment (68): Three commenters discussed whether avoidance of all impacts to high-value habitats is always necessary or desirable. They asked what the Service's response would be when an action is likely to be implemented despite recommendations to avoid high-value habitats. They suggested the Policy recognize that avoidance of all impacts to high-value habitats is not always necessary or practicable, and that unavoidable impacts to those resources will sometimes be authorized.

Response: Through this Policy, we provide guidance to Service staff that recommendations should seek to avoid all impacts to habitats they determine to be of high-value. Therefore, our policy is that it is always desirable to avoid impacts to high-value habitats. We recognize circumstances will vary, and in section 5.7, Recommendations, we note that when appropriate and practicable means of avoiding significant impacts to high-value habitats and associated species are not available, the Service may recommend the ''no action'' alternative. We further recognize that our recommendations, either to avoid all impacts to high-value habitats or to adopt the no action alternative if necessary, will not be adopted or implemented by action agencies in all cases.

R. Compensatory Mitigation

Comment (69): Several commenters said they strongly supported application of equivalent standards for compensatory mitigation mechanisms as advocated by the Policy. One commenter said that, without equivalency, mitigation programs with lower standards will have competitive pricing advantages that create a ''race to the bottom'' as developers seek the lowest cost compliance option, producing lower conservation outcomes and undermining chances of species recovery. Several said the Policy should give greater emphasis to the sentence: ''The Service will ensure the application of equivalent ecological, procedural, and administrative standards for all compensatory mitigation mechanisms.'' These commenters felt that, while the Policy's intent to support equivalent standards is clear, the statement is not easily located within a paragraph in section 5.6.3. They suggested creating a new paragraph with this sentence as the lead, or creating a new subsection titled ''Equivalent Standards'' under the existing section 5.6. Two commenters said equivalent standards should be

required by the Policy. One commenter said a monitoring and verification process should be required of all mitigation.

Response: We agree with the commenters that equivalent standards must be applied to ensure compensatory mitigation is successfully implemented regardless of the mechanism used to provide the mitigation. A level playing field allows for more transparency, fairness, and a greater likelihood of successful mitigation. In this Policy, we do not state that equivalent standards are required because of the breadth of authorities and processes it covers. In many cases, our authority is advisory, with the permitting authority resting with another agency. In such cases, requiring equivalent standards is another agency's provision to implement or enforce. This Policy covers multiple authorities, so it would be inaccurate to state that it can require equivalent standards in all cases. However, the Policy's statement of support for application of equivalent standards is accurate in all cases. Similarly, we support the monitoring and verification processes suggested by one commenter, but cannot provide a blanket requirement for such processes through this Policy. We agree with the commenters who suggested that our support for equivalent standards is not well highlighted or located within the Policy. We have now placed the information under a header for a new section 5.6.3.1, Equivalent Standards.

Comment (70): One commenter supported the Policy's definition of ''additionality,'' while two commenters expressed concern for the use of the term ''baseline'' in defining additionality and suggested the Policy distinguish between baseline and pre-project or pre-existing conditions.

Response: For purposes of the Policy, the baseline is the existing condition that will be used as the starting point by which to compare the adverse or beneficial effects of an action. In assessing compensatory mitigation, the Service will evaluate if the proposed mitigation measures are demonstrably new and would not have occurred without the compensatory mitigation measure and if they provide a conservation benefit above the baseline condition (*i.e.,* additionality). We have included the definition of baseline in section 6.

Comment (71): Several commenters requested the Service recognize in the Policy the ability of proponents to transfer responsibility for compensatory mitigation actions they initiate to a third party.

Response: We have revised the Policy to recognize that third parties may assume responsibility for implementing proponent-responsible compensation. This Policy advocates equivalent ecological, procedural, and administrative performance standards among all compensatory mitigation mechanisms. Therefore, conversion of a proponent-responsible plan to one administered by a third party is inconsequential relative to the Policy's goals. The third party accepting responsibility for the compensatory actions would assume all of the proponent's obligations to ensure success and durability.

Comment (72): One commenter suggested the Policy indicate that Service-approved conservation banks for aquatic and aquatic-dependent species may also serve the purpose of compensating for impacts to waters regulated under the CWA, but that the Corps has discretion to use a conservation bank for those purposes.

Response: We agree that a wetland protected and managed as a conservation bank to compensate for impacts to species may also serve as a wetland mitigation bank, provided the Corps has approved the bank for that purpose. Because the Policy addresses mitigation for impacts to fish and wildlife species and not impacts to regulated wetlands, per se, the comment exceeds the scope of this Policy and does not warrant a specific revision. However, we intend to address operational considerations for compensatory mitigation mechanisms in step-down policies, such as the proposed ESA Compensatory Mitigation Policy (81 FR 61032–61065, September 2, 2016).

Comment (73): One commenter questioned whether measures that are considered ''onsite compensation'' in the context of permitting processes under the CWA (*i.e.,* restoring, enhancing, and/or preserving wetlands on or adjacent to the impact site) are considered a form of minimization under the Policy. The commenter noted section 5.6.3 indicates that compensation occurs ''generally in an area outside the action's affected area,'' but also refers to compensation sites that are either ''within or adjacent to the impact site.''

Response: The Policy adopts the five mitigation types defined in the NEPA regulations. We include ''rectifying the impact by repairing, rehabilitating, or restoring the affected environment'' (rectify) and ''reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action'' (reduce) under the ''minimizing'' label, but have not discarded these definitions, which have specific utility for species conservation. Our purpose for consolidating the five NEPA mitigation types into three was to align the general language of this Policy with that of the existing three-tiered DOI and CWA mitigation policies (avoid, minimize, and compensate). We group ''rectify'' and ''reduce'' with ''minimization'' to recognize the priority of these types of measures over compensation in the mitigation hierarchy, because such measures are, by definition, onsite measures focused specifically on the action-affected resources. We recognize that, unlike proactive minimization measures, measures to rectify and reduce impacts over time occur after impacts and are, therefore, more similar to compensation measures. Compensation replaces, or provides substitute resources or environments for, the affected resources, not necessarily within the affected area. Replacing or providing an onsite substitute for an affected resource meets the definition of rectify, but in the three-tier scheme of mitigation under CWA processes, is typically called onsite compensation. Because this Policy addresses species and not waters of the United States, some differences in terminology with mitigation under the CWA are unavoidable.

Under this Policy, which has not discarded the definition of rectify, ''onsite compensation'' has a narrower meaning. Onsite compensation involves provision of a habitat resource within the action area that was *not* adversely affected by the action, but would effectively address the action's effect on the conservation of the evaluation species. For example, an action reduces food resources for an evaluation species, but water availability in dry years is a more limiting factor to the species' status in the affected area. Increasing the reliability of water resources onsite may represent a practicable measure that will more effectively maintain or improve the species' status over some degree of rectifying the loss of food resources alone, even though the action did not affect water availability. This Policy would identify measures to restore food resources as rectification and measures to increase water availability as onsite compensation.

Comment (74): Five commenters addressed the Policy's reference to habitat credit exchanges among available compensatory mitigation mechanisms. Two commenters expressed support for the inclusion of habitat credit exchanges, but one commenter said that they should be excluded because there are no existing

examples that demonstrate the viability of the concept. Three commenters said the Policy should emphasize that equivalent standards apply to habitat credit exchanges as well as all other compensatory mitigation mechanisms. Two commenters said the Policy should further define habitat credit exchanges.

Response: We agree with the majority of the commenters that defining and clarifying the role of habitat credit exchanges as a potential compensatory mechanism is prudent. In section 6, we have added the definition of habitat credit exchange. We confirm that all compensatory mitigation mechanisms, including habitat credit exchanges, must meet equivalent standards. Habitat credit exchanges in concept are not new. They are the species equivalent to the environmental market mechanisms established for carbon and water quality trading. Exchanges are emerging where wide-ranging species cross multiple natural and geo-political boundaries and a mechanism to engage vast numbers of participants is desired. At its core, a habitat credit exchange is a trading platform and, therefore, may encompass other compensatory mitigation mechanisms such as conservation banks.

Comment (75): One commenter expressed concern that ''performance standards'' are included among the 12 considerations for compensatory mitigation mechanisms in section 5.6.3, but are not mentioned in section 5.8 about documenting final Service recommendations. The commenter recommended the Service require performance standards in mitigation plans that address the full range of measures adopted (avoidance, minimization, and compensation), not just compensatory measures.

Response: We agree mitigation plans should include performance standards that address the effectiveness (degree to which objectives are achieved) of any mitigation means and measures (avoid, minimize, compensate) for which the outcome is relatively uncertain. Although such uncertainty is generally greatest for compensatory measures involving future habitat improvements to offset unavoidable impacts, the success of planned avoidance and minimization measures is not always assured and may require monitoring. To handle uncertainty, section 5.8 indicates that Service-recommended/approved mitigation plans should specify measurable objectives, associated effectiveness monitoring, and additional adaptive management (*i.e.,* corrective) actions as indicated by monitoring results. These final plans address the full range of mitigation means and measures that are reasonable and appropriate to ensure the proposed action improves or, at minimum, maintains the current status of affected species and their habitats. We did not use the phrase ''performance standards'' in section 5.8 as we did in section 5.6.3, and it is not necessary to do so. A compensatory mitigation plan that is prepared independently of a general mitigation plan for an impact-causing action (*e.g.,* the instrument for operating a conservation bank or in-lieu fee program) will serve the compensation needs of one or more such actions, and both types of plans require objectives and appropriate effectiveness monitoring (*i.e.,* performance standards).

Comment (76): One commenter recommended the Policy explicitly require an equivalent assessment of impacts and offsets (*i.e.,* the amount of compensation necessary to, at minimum, maintain the current status of the affected species after applying avoidance and minimization measures).

Response: Section 5.3, Assessment, provides general guidance for estimating impacts and benefits. This guidance applies to assessing the effects of actions both with and without mitigation options. Section 5.3 directs Service staff to use best available effects-assessment methodologies that meet various criteria, including the ability to estimate adverse and beneficial effects using ''common'' (*i.e.,* shared or equivalent) metrics. We have revised this language to clarify that ''common'' means ''equivalent,'' and have added an example to illustrate the concept. The example involves assessing effects to a species' food resource. The metric is the density or spatial extent of the food resource. Predicted decreases and increases in this metric represent adverse and beneficial effects, respectively.

Comment (77): One commenter stated that the Service should not require the use of a mitigation or conservation bank over other mitigation mechanisms, and that the Service lacks authority to require financial assurances of action proponents.

Response: We are clarifying the circumstances under which the Service may require the implementation of mitigation under the guidance of this Policy. Such circumstances are limited, and we expect our application of the Policy will most often occur in an advisory capacity to action proponents. The Policy expresses a preference for compensatory mitigation in advance of impacts, but the use of conservation banks or other compensation in advance of impacts is not a firm requirement, even when the Service is funding, approving, or carrying out the proposed action. To the same extent that the Service cannot require mitigation under all of the authorities that apply to a particular action, the Service cannot require financial assurances of action proponents in all cases (*e.g.,* outside the ESA Habitat Conservation Plan context). Nevertheless, we are retaining the reference to financial assurances throughout the Policy as a prudent component of mitigation plans. Such assurances are a reasonable and practicable underpinning for reducing the uncertainty about achieving the objectives associated with mitigation plans, especially with compensatory activities intended to secure future benefits to the affected species.

Comment (78): One commenter believed the Policy preference to compensate for impacts in advance of actions causing impacts would discourage voluntary actions to conserve species in order to avoid the need to list them as endangered or threatened under the ESA. The commenter suggested Service listing decisions would discount any habitat improvements that are identified, or could serve as advance compensation, presumably because the proponents of future actions causing impacts to the species would seek to claim such improvements as compensatory offsets. Over time, advance compensation improves the status of the species only to the extent that its benefits exceed the impacts of those future actions relying upon it; therefore, advance compensation does not necessarily preclude the need to list a species.

Response: This Policy does not address listing decisions under the ESA. This comment addresses the purposes of the Service's proposed ''Policy Regarding Voluntary Prelisting Conservation Actions'' (79 FR 42525–42532, July 22, 2014), which is not yet finalized. The proposed Voluntary Prelisting Conservation Actions policy describes the Service's proposal to give credit to such actions in the event of a subsequent listing of the species. In the context of both section 7 and section 10 of the ESA, the Service proposes to recognize a proponent's previous conservation actions as offsets to the adverse effects of a proposed action within the framework of an established conservation plan for the species in States that participate in the prelisting conservation program. Regardless how the Service finalizes the Voluntary Prelisting Conservation Actions policy, this Policy expresses Service support for compensation in advance of impacts to species, and the Service will account for

advance compensation actions in its formulation of mitigation recommendations.

Comment (79): Several commenters recommended the Policy address preferences for ''in-kind'' vs. ''out-of-kind'' compensatory measures. Some urged the Service to explicitly endorse out-of-kind measures, while others advised us to express a strong preference for in-kind measures as in the 2008 Mitigation Policy for CWA section 404 permitting.

Response: We do not use the terminology of ''in-kind'' vs. ''out-of-kind'' compensation in this Policy. Unlike the Mitigation Policy for CWA section 404 permitting, where the subject resources are waters of the United States, the subject resources of this Policy are species. All compensatory mitigation recommended by the Service under this Policy is ''in-kind'' for the affected evaluation species (*i.e.,* it must offset an action's unavoidable impacts to the same species). We do not express a preference for implementing compensatory measures in the same type of habitat(s) affected by the action. Based on a species' conservation needs and applicable plans/strategies to address those needs, Service personnel will determine whether in-kind or out-of-kind habitat compensation will provide the most practicable means of ensuring a proposed action improves or, at minimum, maintains the current status of the affected evaluation species.

Comment (80): Two commenters recommended that the Policy recognize an action proponent's authorities/abilities to implement all mitigation measures onsite only, or to implement compensatory measures only within a particular jurisdiction.

Response: The Service should not provide recommendations that others have no discretion to consider, and this Policy does not direct Service personnel to do so. Measures that avoid and minimize impacts apply within the area affected by the action, and proponents should generally have sufficient discretion to adopt and implement all such measures. The Service will respect the jurisdictional limitations of proponents to implement compensatory measures outside the affected area.

Comment (81): A few commenters expressed concern that early or voluntary mitigation actions would not be recognized or given the appropriate crediting.

Response: The Service supports early and voluntary mitigation actions and is committed to collaborating and coordinating with project proponents to assess the accrual of additional conservation benefits from such actions.

Comment (82): A number of commenters addressed the concept of duration in relation to the durability of mitigation measures. Several commenters questioned the standard to maintain the intended purpose of the mitigation measure ''for as long as the impacts of the action persist on the landscape.'' These commenters suggested the duration of the mitigation site be correlated to the monitoring and maintenance period after which the mitigation sites should be allowed to evolve through natural successional processes rather than be required to maintain a specific condition. Another commenter recommended more objective or established timeframes such as length of the ''planning horizon'' or ''in perpetuity'' to characterize the duration of the mitigation. One commenter suggested the burden of proof be on the project proponent to demonstrate that impacts of a temporary duration have been removed before being released from a mitigation obligation.

Response: The Service will recommend or require that mitigation measures be durable, and at minimum, maintain their intended purpose for as long as impacts of the action persist on the landscape. The Service acknowledges site-specific conditions may need to evolve through natural processes. For example, we expect riverine systems to scour and revegetate in cycles, causing species composition to vary at any one point in time but supporting targeted resources in the long term. In other circumstances, active management (*e.g.,* controlled burning, grazing) may be needed to retain the intended purpose of the mitigation site for affected resources. Mitigation measures for permanent impacts will rely on permanent mitigation. When it can be demonstrated that impacts to affected resources are temporary, durability accounts for the time the effects of the action persist.

Comment (83): One commenter noted the definition of ''durability'' only includes the concept of duration and not the implementation assurances needed to ensure the mitigation is durable, while another commenter suggested that reference be made to the elements ''a. thru i.'' as set forth in 81 FR 12380 at 12391 (March 8, 2016) as essential to the definition.

Response: Durability is one of the fundamental principles that will guide Service mitigation recommendations to ensure mitigation measures maintain their intended purpose for affected resources for as long as impacts persist on the landscape. We agree with the commenters that implementation assurances are needed to ensure mitigation is durable. Section 5.6.3 identifies those elements intended to ensure successful implementation and durability of compensatory mitigation measures, including site-protection mechanisms, performance standards, monitoring, long-term and adaptive management, and provisions for financial assurances.

Comment (84): Several commenters supported the approach described in the Policy regarding the limits on use of research or education as compensatory mitigation. Three commenters suggested that use of research/education as compensatory mitigation should be expanded. One commenter suggested we add additional implementation detail. For clarity, one commenter suggested moving the research/education material under a new header or section.

Response: We agree with the commenters who said compensatory mitigation should provide tangible benefits and that research/education should be included in a mitigation package only in those limited circumstances described in the Policy. Exhaustive implementation detail on this topic is beyond the scope of this umbrella policy, which covers all Service mitigation authorities wherever they are carried out. Such detail may be contained in future step-down guidance or will be determined on a case-by-case basis by Service staff. We have reorganized the material into a new section 5.6.3.2.

S. Adaptive Management

Comment (85): In general, commenters appeared to agree with the concept of adaptive management, as discussed in the Background section and other areas of the Policy. Several commenters suggested refinements to the Policy to increase certainty for project proponents. One commenter was concerned with regard to adaptive management's nexus with protections for federally listed species.

Response: We agree the iterative process used during adaptive management serves to facilitate progress toward achieving defensible and transparent objectives. As this Policy is meant to guide the overall approach to mitigation planning while allowing the greatest flexibility for Service program needs, we expect further guidance will document specific requirements on specific elements included in documentation, including those related to adaptive management. Nothing in this Policy supersedes statutes and

regulations governing treatment of federally listed species.

T. Documentation

Comment (86): Commenters asked that final recommendations include, in writing, all steps and clearly identify party responsibilities regarding implementation and performance of mitigation measures. One commenter requested more consistency between the 12 elements identified in section 5.6.3 and the section on final recommendations. Another commenter requested clarification of whether information provided by the Service through the Policy is a requirement or considered technical assistance.

Response: The Policy indicates that documentation should be commensurate in scope and level of detail with the significance of the potential impacts to resources, in addition to providing an explanation of the basis for Service recommendations. As this Policy is meant to guide the overall approach to mitigation planning while allowing the greatest flexibility for Service program needs, we expect further guidance will document specific requirements on specific elements included in documentation. Section 5.6.3 describes the use of compensatory mitigation, one of the five general types of impact mitigation described under section 5.6, Means and Measures. Section 5.6.3 includes several measures meant to ensure successful implementation and durability, specific to instances where compensatory mitigation is employed. The text in section 5.8, Documentation, has been modified to include the phrase: ''Where compensation is used to address impacts, additional information outlined in section 5.6.3 may be necessary.''

U. Monitoring

Comment (87): Many commenters were concerned how this Policy would add predictability, efficiency, and timeliness. Some were particularly concerned about potentially variable interpretation among Service field offices. One recommended actual Policy implementation elements be separated due to complexity and provided as guidance, while two others stated the Policy was not specific enough to evaluate and ensure consistency. Several commenters requested a standardized process or system, with clear guidelines and methods for implementation, be established to determine effectiveness, monitor durability, and track performance to ensure compliance and deliver conservation benefits. One commenter was concerned that wildlife and habitat assessments envisioned by the Policy could entail complex analyses, while others said mitigation should be based on biological conditions and reliable, repeatable, and quantitative science-based methods to measure benefits and outcomes and inform adaptive management. Others suggested use of key ecological attributes (KEAs) to measure outcomes. Some were concerned that there was no requirement for monitoring, while others supported standardized self-reporting. One commenter noted the monitoring requirement may conflict within the Policy itself (Appendix B, section C) with regard to the responsibility of the Service to monitor compliance.

Response: The Service, being national in scope of operations, has written the proposed Policy in a manner that allows for further clarification on a regional scale. Regarding the request that a ''standardized process'' or ''system'' be established, where such (a) system(s) would be of benefit, it would be more practicable to establish it at a regional or programmatic scale, and would be handled through step-down guidance. The principle articulated in paragraph (f) of section 4 specifically states: ''The Service will use the best available science in formulating and monitoring the long-term effectiveness of its mitigation recommendations and decisions, consistent with all applicable Service science policy.'' The principle articulated in paragraph (f) states ''The Service will recommend or require that mitigation measures are durable, and at a minimum, maintain their intended purpose for as long as impacts of the action persist on the landscape.'' Thus, where appropriate, a process using KEAs may be applied. Regarding requirements for monitoring, the Policy states the Service's final mitigation recommendations should communicate in writing ''c. effectiveness monitoring; d. additional adaptive management actions as may be indicated by monitoring results; and e. reporting requirements.'' Regarding the statement indicating the need or inability to ''require'' monitoring, this Policy serves as an overarching guidance applicable to all actions for which the Service has specific authority to recommend or require the mitigation of impacts to fish, wildlife, plants, and their habitats. The text in the Policy was modified to clarify its intent with regard to monitoring compliance. This includes Appendix B, which now clarifies Service responsibilities for applying the Policy when formulating our own proposed actions under the NEPA decisionmaking process, versus being used as guidance for providing mitigation recommendations when reviewing the proposed actions of other Federal agencies under NEPA.

V. Recommendations and Preferences

Comment (88): One commenter was concerned that certain language in the Policy appeared to devalue proponent-responsible compensatory mitigation and cautioned against conflating preferences with standards. This commenter pointed to the Department of the Interior's Departmental Manual Chapter (600 DM 6) on Implementing Mitigation at the Landscape-scale (October 23, 2015), that lists the high and equivalent standards to which all mechanisms for compensatory mitigation should be held in section 6.7. They noted preferences are not included in that list, so while the ideas of ''equivalent standards'' and a policy's ''preferences'' are both principles, a preference is not an equivalent standard. They said each mitigation measure does not need to adhere to each preference, only to each equivalent standard. They suggested that the following statement be removed from section 5.6.3 of the Policy, as it seemingly asserts all mitigation measures must achieve the preferences: ''As outlined by DM 6.6 C, this means that compensatory mitigation measures will. . .implement and earn credits in advance of impacts . . . .''

Response: We do not intend to devalue proponent-responsible mitigation, and we recognize it is a vital compensatory-mitigation mechanism, whether implemented by private project developers, agencies, or third-party mitigation implementers. We acknowledge flexibility is warranted in recommendations for the compensatory mitigation measures and mechanisms most likely to achieve the Policy's goal, and we established a preference for advance mitigation because it is the compensatory mitigation timing most likely to achieve that goal. We recognize either concurrent mitigation or mitigation occurring after impacts may be necessary in some cases, and may represent the best ecological outcome in others. The Policy does not establish an explicit preference for conservation or mitigation banks or other compensatory mitigation mechanisms. Conservation or mitigation banks do typically secure resource benefits before impacts occur, and may be more likely to satisfy this preference, but any other compensatory mitigation mechanism that does so is also consistent with the Service's preference. We agree with the

suggestion to remove reference of our preference for advance mitigation from the language that precedes the list of equivalent standards, located in the new section 5.6.3.1, Equivalent Standards, and have made that targeted edit to avoid further confusion between preferences and equivalent standards.

Comment (89): One commenter asked for clarification of the following statement on advance compensatory mitigation within section 5.7.1, Preferences: The extent of the compensatory measures that are not completed until after action impacts occur will account for the interim loss of resources consistent with the assessment principles (section 5.3).

Response: The sentence the commenter mentions addresses temporal loss. Temporal loss is the delay between the loss of resource functions caused by an impact and the replacement of resource functions at a compensatory mitigation site. Additional compensatory mitigation may be required to compensate for temporal loss. When the compensatory mitigation project is initiated prior to, or concurrent with, the impacts, additional compensation for temporal loss may not be necessary, unless the resource has a long development time. We have added an additional sentence to clarify the statement.

Comment (90): One commenter said the Policy should use a priority and preference, similar to the Corps' and EPA's joint rule on Compensatory Mitigation for Losses of Aquatic Resources, 33 CFR parts 325 and 332, and 40 CFR part 230 (EPA), 33 U.S.C. 1344. In that regulation, the agencies establish an explicit preference for mitigation banking, followed by in-lieu fee programs, and finally, proponent-responsible mitigation.

Response: This Policy is an umbrella policy that integrates all of the Service's authorities for engaging in mitigation processes. One reason we have not pursued an outright preference for banks or other mechanisms is that our authorities to recommend mitigation extend beyond the current track record for banks, which is limited to aquatic habitats and listed species. Instead of following the regulatory model from the CWA practice of stating an explicit, hierarchical preference that begins with banks, we establish a preference for advanced mitigation. While conservation or mitigation banks do typically secure resource benefits before impacts occur, and may be more likely to satisfy this preference, any compensatory mitigation mechanism that secures resource benefits before impacts occur may also be consistent with the Service's preference.

We expect additional detail regarding compensatory mitigation mechanisms will be included in future step-down policies that are specific to compensatory mitigation. In this Policy, we use terminology that supports and accommodates future Service policies rather than pre-determines their content. For example, we do not yet know what compensatory mitigation mechanisms will be preferred in future Bald and Golden Eagle Protection Act regulations, so it would be inappropriate to state firm preferences here.

Comment (91): One commenter suggested we revise section 5.7, Recommendations, to indicate that compensatory mitigation should encourage more sustainable contributions of the goods and services provided to the public. This commenter said mitigation can have larger public benefits and services and that the Service should encourage mitigation actions that have additional natural, cultural, historical, or recreational values and benefits.

Response: We agree mitigation actions can provide the benefits the commenter describes. In section 5.1, we describe our support of the development of mitigation plans that identify high-priority resources prior to specific proposed actions. The most effective early mitigation planning is integrated with conservation planning and planning for human infrastructure, including transportation; water and energy development; as well as working lands, recreation, and cultural values. Although such integration is not a requirement of a process under any particular mitigation authority, the Service recognizes the potential power of plans that simultaneously addresses multiple ecological and human needs from broad stakeholder perspectives.

W. Advance Mitigation

Comment (92): Several commenters addressed the Policy's inclusion of a preference for advance mitigation. Several said they strongly endorsed statements throughout the Policy that recognize the value of compensatory mitigation completed in advance of impacts. Others said the preference should be removed or altered, but their reasoning differed. Some opposed a categorical requirement that mitigation be implemented prior to impacts, while others suggested the Policy go further than a preference and make advance mitigation a requirement. Some commenters said a preference was appropriate, but suggested the Policy use consistent language in referring to a preference.

Response: Section 5.7.1 describes a preference for advance mitigation. It is not a requirement. As policy, we prefer that compensatory mitigation be implemented before the impacts of an action occur, making affected resources less vulnerable to temporal impacts and a net loss. Advance mitigation reduces risk and uncertainty. Demonstrating that mitigation is successfully implemented in advance of impacts provides ecological and regulatory certainty that is rarely matched by a proposal of mitigation to be accomplished concurrent with, or following, the impacts of an action. Most of the Service's mitigation authorities provide the ability to specify mitigation recommendations rather than requirements, and the Service would not be able to create a requirement for advance mitigation through policy. Accordingly, when providing mitigation recommendations to another action agency for consideration in their permitting or project decision, this Policy's guidance to Service staff is that they indicate their preference for advance mitigation. We have made minor edits to more consistently refer to this preference.

Comment (93): Several commenters said the Policy's preference for advance mitigation is incompatible with project-planning realities, is not feasible or appropriate for some projects, and is not always possible. They suggested we revise the Policy to allow mitigation to occur concurrent with, and in some circumstances following, impacts to be consistent with the Corps' mitigation framework. Some commenters suggested simultaneous construction of the project and mitigation remain an option.

Other commenters expressed the need for flexibility regarding the preference for conservation reasons. One commenter said overemphasizing the timing of mitigation could limit the Policy's goal of net conservation gain. They suggested the Policy de-emphasize mitigation timing in favor of tailored mitigation that addresses the needs of unique species and habitats. They were also concerned that a preference for advance mitigation would give priority to for-profit conservation/mitigation banks, and may not adequately tailor mitigation for the impacted resources. Another commenter noted that some initial flexibility may be necessary as new mitigation programs are created at the State and local levels.

Response: Because advance mitigation is the Service's preference and not a requirement, the Policy is compatible with circumstances where

compensatory mitigation is concurrent with or after project impacts. It is our preference that compensatory mitigation be implemented prior to project impacts, but we recognize that authorities and project planning circumstances might prevent implementation of advance mitigation in some cases. While concurrent mitigation is an option when circumstances allow, proponents may expect advance mitigation to remain the Service's preference in most cases.

We agree that flexibility is necessary in recommendations for compensatory mitigation measures and mechanisms that are most likely to successfully secure resources. Advance mitigation is the Service's preference, as it is the compensatory mitigation timing that is most likely to achieve success in regard to procuring funding. We recognize that concurrent mitigation or mitigation occurring after impacts may be necessary in some cases or may represent the best ecological outcome in others. The Policy does not establish an explicit preference for conservation or mitigation banking or other compensatory mitigation mechanisms. Conservation or mitigation banking typically secures resources before impacts occur, but any compensatory mitigation mechanism that does so may also be considered consistent with the Service's preference.

Comment (94): One commenter wrote that it is possible for in-lieu fee programs to implement advanced mitigation, although they have not done so historically. This commenter also said a preference for advanced mitigation applied to in-lieu fee programs would increase their likelihood of success.

Response: The Policy's preference for advance mitigation applies to all compensatory mitigation mechanisms. Although conservation or mitigation banking secures resources before impacts occur, any compensatory mitigation mechanism implemented before impacts occur may also satisfy this preference. In-lieu fee programs can implement a ''jump-start'' that establishes and maintains a supply of credits that offer mitigation in advance of impacts.

X. Public and Private Lands

Comment (95): Several commenters focused on the way the Policy addresses siting of compensatory mitigation relative to land ownership status in section 5.7.2, Recommendations for Locating Mitigation on Public or Private Lands. Several expressed support for the Policy's statement that mitigation will generally be required on lands with the same ownership classification as those where impacts occur. Some commenters believe the Policy should establish even stronger controls on public land mitigation, saying that impacts on private lands should not be mitigated on public lands. These commenters reasoned that mitigation on public lands has limited value and should not be allowed. One commenter said the Policy should recognize that when any compensatory mitigation is sited on Federal lands, unless a full-cost compensation is made for the fair market value (at a minimum) of the land utilized, then the public is subsidizing the development that caused the resource impacts. One commenter said no policy should create unfair competition with private industry, or create a disincentive to private investment in compensatory mitigation. They felt this could occur if there were no restrictions on siting compensatory mitigation for private-land impacts on public land locations. One commenter noted that some land managers would like to use compensatory mitigation funds to resolve preexisting problems on public lands, usually unrelated to the action and resources under active analysis. The commenter said this view is understandable but contrary to the mitigation hierarchy.

Several commenters suggested fewer barriers or checks on mitigating private-land impacts on public lands, and the removal of the statement that compensatory mitigation should generally occur on lands with the same ownership classification as at the location of impacts. These commenters said requiring mitigation on lands with the same ownership classification is unnecessarily restrictive, adding that, when implemented, the standards for compensatory mitigation will force a positive result regardless of land ownership. One commenter said public land managers do not and will not have the funding necessary to stabilize and recover some resources, and it is, therefore, imperative that private conservation investments, including mitigation for adverse activities, be applied on public lands if it will provide maximum conservation benefit for the affected resource.

Response: Compensatory mitigation can occur on public lands, and in some cases, such siting may lead to the best ecological outcome. Compensatory mitigation for impacts on public lands can be sited on both public and private lands. Also, compensatory mitigation for impacts on private lands can be located on public lands, but it is that combination, or that particular change in ownership classification, where Service staff should be attentive to additional considerations before confidently making such a recommendation. Section 5.7.2 describes factors Service staff should consider. This cautious approach is warranted within the Policy's instruction to Service staff, for the reasons described below.

We recognize that funds to properly manage or restore public lands are often insufficiently available today, absent infusion of mitigation dollars. This argument may have merit in some cases, but we remain concerned about consequences. It is possible that funding availability is reduced and opportunities to restore or protect at-risk habitats on private lands are precluded when compensatory mitigation is sited on public lands. If passed, those opportunities on private lands are often permanently gone. Given the irregular footprint of public lands across much of the United States, we are also concerned about strategic conservation of wildlife if the aggregation of mitigation onto public lands is further streamlined without articulating at least some test or application of criteria prior to making such recommendations. If we remove all checks on locating compensatory mitigation for private land impacts on public lands, we may risk making the ''export'' of habitats from private to public lands a routine practice, as it may often be the lower cost option. This outcome would counter the Service's intent that the Policy be applied using a landscape-level approach.

We agree with the commenters who said there is potential for the public to subsidize the development that causes resource impacts if access to public lands for compensatory mitigation is streamlined to an inappropriate extent. This could potentially facilitate impacts or de-incentivize avoidance on private lands by artificially reducing the costs of compensatory mitigation for project proponents.

We are also concerned about the unintended consequence of reducing private conservation investment. Streamlined access to public lands for proponents needing to provide mitigation for impacts on private lands could undermine private conservation investment and banking opportunities, or weaken the economic conditions necessary for bank establishment by artificially reducing proponents' mitigation costs (*e.g.,* land acquisition costs might not be fully incorporated).

Comment (96): Several commenters discussed conditions or means for ensuring compensatory mitigation on public lands is durable and held to the

same standards as when conducted on private lands.

One commenter said the Policy should require the public land agency include the compensatory mitigation requirements as specific conditions in the special use permit or other required authorizations. This commenter also said a long-term management plan should be included in the use authorization, permit, or other legally binding document. They said that in order to ensure long-term management plans are binding, they should be established through a contractual agreement between the public land management agency and a third party with a conservation mission.

One commenter said compensatory mitigation on Federal lands for impacts on private lands must include full-cost compensation for the use of public lands, either through monetary compensation or implementation of additional projects to further the purposes of the Federal lands.

One commenter said land managers must demonstrate that actions taken in already-protected areas meet mitigation objectives and are not used solely for the benefit of existing protected area management goals. They added that when compensatory mitigation is sited within protected areas, land managers must uphold accountability by maintaining a ledger of mitigation actions undertaken and completed in addition to existing conservation obligations.

One commenter said the Policy, at minimum, should give preference to private lands with high conservation potential yet currently lacking conservation assurances (*i.e.,* legal and financial assurances in place to achieve protection in perpetuity) before considering the use of public lands for mitigation.

Two commenters said the Policy should require public land managers commit to long-term protection and management, and that they implement and fully fund alternative compensatory mitigation in the event of a change in law that allows incompatible uses to occur on mitigation lands. They said this would provide better certainty to project proponents when mitigating on public lands.

Response: We agree that the identification of mechanisms for ensuring the durability and additionality of compensatory mitigation on public lands is both important and challenging. As an umbrella policy, this Policy integrates all of the Service's authorities for engaging in all aspects of mitigation, and is not specifically a compensatory mitigation policy. It is beyond the scope of the Policy to provide detailed procedural information for all compensatory mitigation scenarios. Also, as many of our mitigation authorities are advisory, it would be inappropriate to present detailed compensatory mitigation procedures in this Policy for such advisory authorities, when that information may already be presented in the existing regulations or guidance of other agencies. We agree that compensatory mitigation on Federal lands for impacts occurring on private lands must incorporate accounting for the difference between the cost of using public lands compared to private lands. Otherwise, agencies will not be able to maintain a level playing field for both public and private lands and for all types of compensatory mitigation mechanisms. Detailed specification of measures to ensure such accounting is beyond the scope of this Policy.

Public lands that are proposed for siting compensatory mitigation may include Federal, State, county, and municipal lands. The existence and nature of mechanisms to ensure durability and additionality varies widely across land management agencies. Given this variation, it is prudent for this Policy to provide general guidelines for Service staff to examine before recommending mitigation of private land impacts on public lands. As described in section 5.7.2, these include additionality, durability, legal consistency, and whether the proposal would lead to the best possible conservation outcome.

Comment (97): One commenter addressed the Service's Final Policy on the National Wildlife Refuge System and Compensatory Mitigation under the Section 10/404 Program (64 FR 49229–49234, September 10, 1999). They said siting compensatory mitigation for impacts permitted under the CWA on National Wildlife Refuge System lands is not appropriate and that those lands were not established for fulfilling private wetland impact mitigation requirements. They added that the Service must fulfill its responsibility for fully functioning Federal lands and should in no instances lower its standards when contemplating compensatory mitigation; to do otherwise would subsidize private mitigation. This commenter was concerned that section 5.7.2 undermined the 1999 Policy.

Response: We appreciate the commenter's observations and share their concerns regarding compensatory wetland mitigation on National Wildlife Refuge System lands. Those concerns led to, and were addressed by the 1999 Policy. Section 5.7.2 does not undermine the 1999 Policy. Regardless of the content of section 5.7.2, when the public land proposed for siting compensatory mitigation for permitted impacts under the CWA is a National Wildlife Refuge, that proposal is specifically covered by, and must comply with, the 1999 Policy. Our revisions of the 1981 Policy do not modify or supersede the 1999 Policy.

Y. Implementation

Comment (98): One commenter recommended an economic analysis because they believed there would be additional burdens and cost of implementing the Policy.

Response: We understand that confusion regarding whether the Service's comments are requirements or merely recommendations may have led some to believe the scope of the Policy has been substantially expanded. The burdens and costs associated with this Policy will remain largely the same as under the 1981 Policy and under existing agency practice.

Comment (99): Commenters requested the Service articulate a clear timeline in which the Policy will be implemented across the agency. A 2-year timeline was recommended, as it would allow enough time to sufficiently (a) adopt the Policy, (b) train and educate staff, and (c) apply the Policy in the field. Others questioned the undue burden to staff and availability of funding to implement the Policy. Similarly, commenters requested information on how the Service plans to implement the Policy, given staffing and budget constraints.

Response: The Service, being national in scope of operations, has written the proposed Policy in a manner that allows for further clarification on a regional scale. Regarding the request that a ''standardized process'' or ''system'' be established, where such a system(s) would be of benefit, it would be more practicable to establish it at a regional or programmatic scale, and would be handled through step-down guidance. During development of such guidance, the Service will facilitate discussions and training with staff to ensure consistency and reduce workload.

Comment (100): Many expressed concern with how the Policy may be inconsistent or conflict with regulations or policies from States, and other Federal agencies responding to the Presidential Memorandum on Mitigation (National Marine Fisheries Service, Corps, National Atmospheric and Oceanic Administration, Federal Energy Regulatory Commission, etc.), given the need to promulgate joint regulations. Some urged the Service to

coordinate this Policy internally, particularly with policies promulgated under the Endangered Species Act and CERCLA, OPA, and the CWA during natural resource damage assessment. One commenter requested clarity where more than one statute applies, others suggested the Service provide training internally and externally to other agencies, and some recommended examples and templates be constructed.

Response: The Policy is consistent with the Presidential Memorandum on Mitigation. The guidance development referenced in the Presidential Memorandum on Mitigation is under consideration within the Department of Interior at the time this Policy is being finalized and the Service will continue to seek consistency in future guidance. We have made edits to Appendix A to clarify the relationship of this Policy with natural resource damage assessment and the Presidential Memorandum on Mitigation.

Comment (101): One commenter questioned the use of ''reasonably foreseeable,'' requesting clarification of what impacts would be considered such and what criteria would be applied to make that determination.

Response: The Service will implement use of the phrase ''reasonably foreseeable,'' similar to that used in NEPA. Under this scenario, actions that are likely to occur or are probable, rather than those that are merely possible, would be considered reasonably foreseeable. See CEQ guidance at 46 FR 18026 (March 23, 1981).

Comment (102): Several commenters were concerned that the Policy lacks clear mitigation protocol, resulting in moving targets for land users interested in developing and executing projects in good faith. Some commenters stated that the Policy will substantially increase uncertainty, without providing additional environmental benefits, especially given the broad range of regulatory protections already in place.

Response: The Service, being national in scope of operations, has written the proposed Policy in a manner that allows for further clarification on a regional scale. Thus, site differences could be considered during impact evaluation, for example, circumstances such as differences in productivity of habitat prior to the project, expected duration and severity of impact, or other local conditions. A less flexible policy could cause rigid adherence to a protocol, which may be more suitable in one region than another.

Comment (103): One commenter suggested the Service did not comply with procedural requirements to finalize the Policy, in particular the Administrative Procedure Act (APA) and the Regulatory Flexibility Act (RFA).

Response: The Service complied with all necessary regulatory requirements in publishing the final Policy. The Policy does not require compliance with the APA or the RFA because it is not regulatory. The Policy simply revises and replaces the 1981 Policy that guided the Service's mitigation recommendations for 35 years. This Policy is advisory in nature and outlines the Service's recommended approach to addressing accelerating loss of habitats, effects of climate change, and a strategic approach to conservation at appropriate landscape scales. It addresses all resources for which the Service has legal authorities to recommend mitigation for impacts to resources and provides an updated framework for mitigation measures that will maximize their effectiveness at multiple geographic scales.

Comment (104): Several commenters suggested we allow the public to comment on a complete portfolio of policies, handbooks, and guidance documents that implement the Policy at one time.

Response: Many of the Service's guidance products are completed, while others are either in development or have yet to be drafted, making it logistically impossible to complete such a filing. This Policy is intended to be an umbrella policy under which more detailed policies or guidance documents covering specific activities may be developed in the future.

Z. Editorial and Organizational Comments

Comment (105): Many commenters provided specific technical, editorial, and organizational suggestions or corrections, including suggestions for new or modified definitions.

Response: We have addressed technical, editorial, and organizational suggestions and corrections as appropriate throughout the document.

Comment (106): Many commenters questioned the specifics of multiple definitions, requested clarification or refinement, or mentioned the need for additional or narrowed definitions (*e.g.*, baseline, additionality, equivalent standards, preferences and credits, emerging mechanisms, conservation objective, net conservation gain, impacts or effects, landscape, ecologically relevant scales, broad ecological functions, ecologically functioning landscapes).

Response: With regard to refining the definitions, the Service is consistent with the Departmental Manual and Presidential Memorandum. As with many of the decisions made during analyses of impacts, definitions of many terms may take on the nuances of the project and/or authority under which the mitigation is being discussed. We have preserved the flexibility and look forward to using existing means of engagement at the local and State level, when working with the States, tribes, and other partners through existing authorities while developing programs and additional guidance to seek mutual goals and avoid inconsistency, including newly emerging mechanisms for analyses, mitigation, and monitoring.

Comment (107): One commenter was concerned the definition of ''compensatory mitigation'' insinuates there will always be ''remaining unavoidable impacts'' that must be compensated, and suggests revisions. The same commenter states that the definition of mitigation hierarchy should include where departure from the sequential approach may achieve a better conservation income.

Response: If there are no residual impacts after ''all appropriate and practicable avoidance and minimization measures have been applied,'' no compensatory mitigation would be required. Departure from the mitigation hierarchy is detailed in section 5.5, where we describe how relative emphasis will be given to mitigation types within the mitigation hierarchy depending on the landscape context and action-specific circumstances that influence the effectiveness of available mitigation. No change was made to these definitions.

AA. Appendix C. Compensatory Mitigation in Financial Assistance Awards Approved or Administered by the U.S. Fish and Wildlife Service

Comment (108): Five commenters suggested or requested clarifications regarding Appendix C, which addresses the limited role that specific types of mitigation can play in financial assistance programs. Two commenters said they supported limiting the use of public conservation funds to meet regulatory mitigation requirements, as the use of such funding to also generate credits undermines the effectiveness of both conservation and mitigation programs. They said that funding from any public entity that is specifically dedicated to conservation should not be used to generate credits, and suggested those funds be used to achieve baseline conditions. They suggested the Policy clarify that public conservation funds can be used to meet baseline.

Response: The commenters propose that, if funds from a public entity are specifically dedicated to conservation, they could be used to achieve baseline conditions, which they define as ''the level of resource function above which mitigation credits may be sold.'' However, even if baseline were defined as recommended, the achievement of baseline would still be an essential part of the process leading to the generation of mitigation credits.

This Policy prohibits the use of the Federal share or the required minimum match of a financial assistance project to satisfy Federal mitigation requirements, except in exceptional situations described in the Policy. This prohibition is consistent with the basic principles of the regulations implementing the compensatory mitigation requirements of the CWA, which is the authority for most funds spent on mitigation. The regulations were published in the **Federal Register** on April 10, 2008 (73 FR 19594), by: (a) The Department of Defense, resulting in regulations at 33 CFR parts 325 and 332; and (b) the EPA, resulting in regulations at 40 CFR part 230. Sections 332.3(j)(2) and 230.93(j)(2) state that, except for projects undertaken by Federal agencies, or where Federal funding is specifically authorized to provide compensatory mitigation, federally funded aquatic resource restoration or conservation projects undertaken for purposes other than compensatory mitigation, such as the Wetlands Reserve Program, Conservation Reserve Program, and Partners for Wildlife Program activities, *cannot be used for the purpose of generating compensatory mitigation credits* for activities authorized by [Department of the Army] permits. *However, compensatory mitigation credits may be generated by activities undertaken in conjunction with, but supplemental to, such programs* in order to maximize the overall ecological benefits of the restoration or conservation project. [*Emphasis added.*]

The preamble of the final rule for these regulations clarifies the intent of §§ 230.93(j)(2) and 332.3(j)(2) by stating that, for example, if a Federal program has a 50 percent landowner match requirement, neither the federally funded portion of the project, nor the landowner's 50 percent match, which is part of the requirements for obtaining Federal funding, may be used for compensatory mitigation credits. However, if the landowner provides a greater than 50 percent match, any improvements provided by the landowner over and above those required for Federal funding could be used as compensatory mitigation credits.

The Policy acknowledges these regulations for mitigation required by the CWA (Dept. of the Army permits). It also adopts the underlying principles of these regulations as the foundation of the Policy for mitigation required by authorities other than the CWA. Restricting the role of financial assistance funds for mitigation purposes is a reasonable requirement to avoid the equivalent of a Federal subsidy to those who are legally obligated to compensate for the environmental impacts of their proposed projects.

Comment (109): Two commenters said limiting the use of funds counted as matching funds toward Federal grants as mitigation is inconsistent with several existing State and Federal policy statements. They noted that in 2008, seven agencies including the Service, other Federal agencies, and several Oregon State agencies issued joint recommendations limiting the use of public conservation dollars to generate credits for mitigation. The recommendations state, ''The agencies believe that funds from programs identified as Public Resource Protection and Restoration Programs should not be used to finance mitigation projects undertaken to satisfy regulatory requirements. To do so would be inconsistent with the mandated and/or intended purposes and limitations of these programs.'' The recommendations further state ''. . . multisource funded projects should include accounting that is detailed and transparent enough to accurately measure the relative habitat and conservation values derived through each funding source.'' They also stated that Metropolitan Regional Governments and other sources of public conservation funds have consistently limited the use of pubic conservation funds to support mitigation, but allow mitigation funds to be used as match.

Response: The Policy allows matching funds to be used to generate credits only if: (a) The match used for the credits is over and above the required minimum; (b) funding for the award has been statutorily authorized and/or appropriated for use as compensatory mitigation for specific projects or categories of projects; or (c) the project funded by the Federal financial assistance award requires mitigation as a condition of a permit. These restrictions are based on the premise that neither Federal funds nor any required contribution for obtaining Federal funds should subsidize those who are legally obligated to compensate for the environmental impacts of the projects they propose. This was an underlying principle in the regulations that implement the compensatory mitigation requirements of the CWA, which is the authority for most funds spent on compensatory mitigation.

The regulations on compensatory mitigation under the CWA were published jointly in the **Federal Register** on April 10, 2008 (73 FR 19594), by: (a) The Department of Defense, resulting in regulations at 33 CFR parts 325 and 332; and (b) the Environmental Protection Agency, resulting in regulations at 40 CFR part 230. For excerpts from these regulations that are relevant to this comment, please see our response to comment #108 above.

Consistent with the DOD and EPA regulations, the Appendix C, section (C)(1)(a) of the Policy allows the match in a Federal financially assisted project to be used to generate mitigation credits if: The mitigation credits are solely the result of any match over and above the required minimum. This surplus match must supplement what will be accomplished by the Federal funds and the required minimum match to maximize the overall ecological benefits of the restoration or conservation project.

Comment (110): Five commenters said they want to encourage collective action to achieve conservation outcomes, and leveraging multiple funding sources will lead to bigger projects with greater environmental benefits. They said the Policy seems to support a scenario where the EPA could fund $1 million of a project, a city could fund $2 million, but the city could not take any mitigation credits if it claimed those funds as match for the Federal grant. The commenters said this scenario could limit opportunities to create greater conservation or environmental benefit at a landscape scale.

Response: Under the commenters' scenario, if a city provided match above the required minimum, the Policy would not present a barrier for this ''surplus'' match to generate mitigation credits as long as the program's establishing authority(ies) or regulations do not prohibit it. However, if a program requires a minimum match, that required minimum has effectively already been dedicated to conservation by the rules of the program. In those programs where a minimum match is required, the Federal funds and the minimum match are essential components of the financial assistance. The award would not be possible without that minimum match, so the Policy does not allow either of these

essential components to generate mitigation credits.

This was a basic principle in the regulations that implement the compensatory mitigation requirements of the CWA, which is the authority for most funds spent on compensatory mitigation. The Service's revised Policy is based on the same principle. If we were to allow the match required as a prerequisite for an award to generate mitigation credits, it would effectively subsidize those who are legally obligated to compensate for the environmental impacts of their proposed projects.

Comment (111): Two commenters suggested the following text to reflect the importance of leveraging multiple funding sources in achieving landscape-scale outcomes: Public conservation funds cannot be used to meet regulatory compliance obligations. Where multiple sources of funding are used in conjunction with credit-generating activities, it is the permittee's responsibility to demonstrate compliance with this requirement. Public conservation funds can be used to meet baseline conditions.

Response: The Policy authorizes the use of specific funding sources that are, or could be interpreted as ''public conservation funds.'' The references to such funding in the Policy are:

(a) Federal funding statutorily authorized and/or appropriated for use as compensatory mitigation for specific projects or categories of projects (Appendix C, section E(1)(b)).

(b) Federal funds needed to mitigate environmental damage caused by a federally funded project (Appendix C, section E(1)(c)).

(c) Revenue from a Natural Resource Damage Assessment and Restoration Fund settlement as long as the financial assistance program does not prohibit its use (Appendix C, section F).

The Policy also affirms that States, tribes, and local governments are free to use Federal financial assistance (*i.e.*, public conservation funds) to satisfy the mitigation requirements of State laws or regulations as long as that use is not contrary to any law, regulation, or policy of the State, tribal, or local government (Appendix C, section G(2)).

We did not accept the commenter's recommended language because it could lead to incorrect interpretations of the Policy.

The commenter also recommended ''public conservation funds'' be used to meet baseline conditions under the commenter's definition of ''baseline.'' We addressed this issue in a previous response.

Comment (112): One commenter said it is not workable to prohibit a site that has received Federal funds to generate credits. They suggested the Policy encourage the pooling of resources and the investment of mitigation dollars in the most valuable sites regardless of whether Federal funds have been invested on the site, especially for those uses not directly related to restoring greater sage-grouse habitat. The commenter said they believe thoughtful discussions and pertinent accounting will ensure Federal funds are not used to generate credits to offset the impacts of the private sector or create a conflict with the rules of additionality.

Response: The authority for most funds spent on mitigation is the CWA. The regulations that implement the CWA's compensatory mitigation requirements were published jointly in the **Federal Register** on April 10, 2008 (73 FR 19594), by: (a) The Department of Defense, resulting in regulations at 33 CFR parts 325 and 332; and (b) the Environmental Protection Agency, resulting in regulations at 40 CFR part 230. Sections 332.3(a)(3) and 230.93(a)(3) indicate that compensatory mitigation projects may be sited on public or private lands. Credits for compensatory mitigation projects on public land must be based solely on aquatic resource functions provided by the compensatory mitigation project, *over and above* those provided by public programs already in place. [*Emphasis added.*]

Sections 332.3(j)(2) and 230.93(j)(2) of 40 CFR part 230 state that, except for projects undertaken by Federal agencies, or where Federal funding is specifically authorized to provide compensatory mitigation, federally funded aquatic resource restoration or conservation projects undertaken for purposes other than compensatory mitigation, such as the Wetlands Reserve Program, Conservation Reserve Program, and Partners for Wildlife Program activities, cannot be used for the purpose of generating compensatory mitigation credits for activities authorized by [Department of the Army] permits. However, compensatory mitigation credits may be generated by activities undertaken in conjunction with, *but supplemental to,* such programs in order to maximize the overall ecological benefits of the restoration or conservation project. [*Emphasis added.]*

The CWA may have a limited effect on the habitat of the greater sage-grouse, but the underlying principles of its regulations are reasonable and appropriate for applicability to other statutory authorities for mitigation. Limiting any credits from projects on public lands to those based on resource functions provided *over and above* those already in place, avoids a government subsidy to those already legally obligated to compensate for impacts of their projects. The Policy adopts the basic principles of the CWA's compensatory mitigation regulations as the foundation for all sources of compensatory mitigation.

Comment (113): One commenter noted Appendix C includes information on the use of Service funds relative to the need to obtain permits from the Corps' regulatory program. To avoid confusing these requirements with the Corps' Civil Works requirements, they suggested adding a statement that Appendix C does not affect policies on cost-sharing or non-Federal contributions for the Corps' Civil Works Program.

Response: The Policy directly affects only those Federal financial assistance programs and awards in which the Service has the authority to approve or disapprove applications. It also affects real property or equipment either acquired or improved with a Service-administered financial assistance award where the recipient must continue to manage the real property or equipment for its originally authorized purpose as long as it is needed for that purpose. The Policy has no effect on other Federal agencies' policies on match or cost share as long as those policies do not affect: (a) Restrictions in this Policy on the use of Service-administered financial assistance awards for generating compensatory mitigation credits, and (b) the Service's responsibilities as identified in Federal statutes or their implementing regulations. The Policy does not take precedence over the requirements of any Federal statute or regulation, whether that statute or regulation applies to a Service program or a program of another Federal agency. We added a new section I to Appendix C to clarify these issues.

Comment (114): One commenter said the Service's proposed revised Policy is inconsistent on in-lieu fee mitigation in the context of financial assistance programs. They sought further explanation of the rationale of allowing Federal funds to satisfy mitigation requirements of State, tribal, or local governments.

Response: The revised Policy prohibits the use of proceeds from the purchase of credits in an in-lieu fee program as match unless both of the following apply:

(a) The proceeds are over and above the required minimum match. This surplus match must supplement what will be accomplished by the Federal

funds and the required minimum match to maximize the overall ecological benefits of the project.

(b) The statutory authority(ies) for the financial-assistance program and program-specific regulations (if any) do not prohibit the use of match or program funds for mitigation.

This prohibition is consistent with the underlying principles of the regulations implementing the compensatory mitigation requirements of the CWA, which is the authority for most funds spent on mitigation. Please see relevant excerpts from the regulations published jointly by The Department of Defense and the EPA within our response to comment #108 above.

The Service's revised Policy defers to these regulations for mitigation required by the CWA (Dept. of the Army permits). It also adopts the underlying principles of these regulations as the foundation for mitigation required by authorities other than the CWA. Restricting the ability of financial assistance programs to generate compensatory mitigation credits is a reasonable requirement to avoid the equivalent of a Federal subsidy to those who are legally obligated to compensate for the environmental impacts of their proposed projects.

The rationale of allowing the use of Federal funds to satisfy mitigation requirements of State, tribal, or local governments is based on 33 CFR 332.3(j)(1) and 40 CFR 230.93(j)(1), which have the force and effect of law only for the compensatory mitigation requirements of the CWA. However, the basic approach of these regulations is reasonable and appropriate for use as the foundation of a Service policy on mitigation in the context of financial assistance when the authority for mitigation is in a statute other than the CWA.

The regulations at 33 CFR 332.3(j)(1) and 40 CFR 230.93(j)(1) read:

(j) *Relationship to other Federal, State, tribal, and local programs.* (1) Compensatory mitigation projects for DA [Department of the Army] permits may also be used to satisfy the environmental requirements of other programs, such as State, tribal, or local wetlands regulatory programs, other Federal programs such as the Surface Mining Control and Reclamation Act, Corps civil works projects, and Department of Defense military construction projects, consistent with the terms and requirements of these programs and subject to the following considerations: (i) The compensatory mitigation project must include appropriate compensation required by the DA permit for unavoidable impacts to aquatic resources authorized by that permit. (ii) Under no circumstances may the same credits be used to provide mitigation for more than one permitted activity. However, where appropriate, compensatory mitigation projects including mitigation banks and in-lieu fee projects, may be designed to holistically address requirements under multiple programs and authorities for the same activity.

The wording of Appendix C, section G may have led the commenter to incorrectly conclude that Service-administered financial assistance may be awarded explicitly for the purpose of satisfying the mitigation requirements of a State, tribal, or local government. We changed the wording of section G to avoid any misunderstanding on this issue.

Comment (115): One commenter asked what, if any, impacts might be considered for administration of the Service's Wildlife and Sport Fish Restoration Program (WSFR) and State fish and wildlife agency obligations related to that program. They requested potential programmatic impacts be noted in the Policy, and the existing Joint Federal/State Task Force on Federal Assistance Policy (JTF) be engaged. This commenter appreciated the Policy's emphasis on collaboration and coordination, but suggested we also cite 43 CFR part 24, *Department of the Interior Fish and Wildlife Policy: State-Federal Relationships*. They also said the Service should consult with the States and other affected governments before selecting plans to guide mitigation, and that great deference should be given to State-prepared plans.

Response: It is difficult to assess the impact of the Policy on WSFR because the Service has never had any comprehensive national policy on the role of mitigation in its financial assistance programs. The CWA is the authority for most funds spent on mitigation, and it is the only Federal statutory authority for mitigation that addresses mitigation in the context of financial assistance. The Policy does not (and cannot) change the CWA regulations on compensatory mitigation, which have been in effect since 2008. The Policy will give grants managers in the Service and in recipient agencies a better awareness and understanding of these regulations.

In addition to the 2008 CWA regulations, an element of continuity in this Policy is its treatment of the Natural Resource Damage Assessment and Restoration Fund. This Policy incorporates the findings of a 1999 Solicitor's Opinion determining that revenue from this fund was eligible as match.

As for the commenter's recommendation that we consult with the States and other affected governments before selecting plans to guide mitigation, on March 8, 2016, we published the proposed revised Policy in the **Federal Register**, and invited all interested parties to comment during a 60-day comment period. On May 12, 2016, we extended the comment period for an additional 30 days. We are pleased to have received the recommendations of the Association of Fish and Wildlife Agencies, which represents State fish and wildlife agencies.

As for the comment that we engage the Joint Federal/State Task Force on Federal Assistance Policy on the potential impacts to the WSFR program, we welcome any JTF engagement on the implementation of Appendix C. We are also open to future input that: (a) Clearly improves implementation of Appendix C; (b) fully complies with existing statutes and regulations; (c) carries out the general policy and principles stated in section 4 of the Policy, with special attention to the goal of a net conservation gain; (d) maintains a consistent approach in satisfying the requirements of all statutory authorities for mitigation to the extent possible; (e) ensures *additionality* (see section 6) for any proposed change in locating compensatory mitigation on public or private lands already designated for the conservation of natural resources; and (f) does not subsidize those who are legally obligated to compensate for the environmental impacts of their proposed projects.

Section G of Appendix C of the revised Policy may be of special interest to the Association of Fish and Wildlife Agencies, as it affirms the rights of States, tribes, and local governments to structure the mitigation requirements of their own laws and regulations however they choose. The Service's revised Policy does not affect mitigation required by State, tribal, or local law.

We added the 43 CFR part 24 reference to Appendix A, section C per the comment.

To address the comment that we give great deference to State-prepared plans that guide mitigation, we will convert the existing section H in Appendix C to section I, and add the following to the new section H: When evaluating existing plans under sections H.2.a or b, the Service must defer to State and tribal plans to determine which additional benefits to count toward achieving the mitigation planning goal

as long as the plans are consistent with Federal law, regulation, and this Policy.

Comment (116): One commenter noted that the way financial assistance programs addressed in Appendix A are described in section 3.5 may become outdated. The number of financial assistance programs recently increased to 61. Instead of using a number that will change frequently, they suggested revising the first sentence to read:

The Service has more than 60 financial assistance programs, which collectively disburse. . . .

Response: We made the suggested revision.

Comment (117): One commenter addressed the interaction between the Service's financial assistance programs described in Appendix C with section 4, General Policy and Principles. The commenter was concerned that the following concept in paragraph (g) would be applied inconsistently unless additional guidance was provided: ''The Service will recommend or require that compensatory mitigation be . . . additional to any *existing or foreseeably expected* conservation efforts planned for the future.'' The commenter said the following scenarios need clarification:

(1) A master plan for a land-management unit has an objective that calls for a specific conservation action to be accomplished in the next 15 years. If funding has not yet been appropriated or allocated to accomplish the conservation action, would the master-plan objective qualify as a ''foreseeably expected'' conservation effort planned for the future?

(2) The establishing statutory authority of a land-management agency makes that agency responsible for specific management actions, but the agency does not have enough funds to carry out these management actions? Would those management actions for which the agency is statutorily responsible qualify as an ''existing or foreseeably expected'' conservation effort?

(3) The partners in a grant-funded land-acquisition project have committed to use non-Federal and non-match funds to complete specific types of restoration or enhancement on the project area. These commitments contributed to the project being recommended for funding by the grant program's ranking panel. Would these commitments qualify as an ''existing or foreseeably expected'' conservation effort?

Response: The regulations implementing the compensatory mitigation requirements of the CWA at 33 CFR 332.7(a) and 40 CFR 230.97(a) state that:

Long-term protection may be provided through real estate instruments such as conservation easements held by entities such as Federal, State, tribal, or local resource agencies, nonprofit conservation organizations, or private land manager; the transfer of title to such entities; or by restrictive covenants. For government property, long-term protection may be provided through Federal facility management plans or integrated natural resources management plans.

These regulations regard facility-management plans and integrated natural-resources management plans as providing long-term protection. We used this as part of the basis for clarifying what would qualify as ''existing or foreseeably expected conservation efforts planned for the future.'' We addressed the issues and scenarios raised by the commenter in Appendix C, section H.

Comment (118): One commenter addressed the interaction between the Service's financial assistance programs described in Appendix C and provisions of section 5.7.2, Recommendations for Locating Mitigation on Public or Private Lands. They asked for clarification on whether the following would be considered public land:

(a) Real property owned by ''instrumentalities'' of government, such as a regional water management district?

(b) An interest in real property that is less than full fee title, such as a conservation easement or a leasehold estate?

(c) Real property owned by tribal governments?

(d) Real property held by nongovernmental entities, but acquired with Federal financial assistance. In such cases, the Federal awarding agency does not have an ownership interest in the property, but it does have the following legal rights defined in regulation:

(1) Approving encumbrances to the title,

(2) Approving or giving instructions for disposition of real property no longer needed for its originally authorized purpose, and

(3) Receiving a share of the proceeds resulting from disposition of real property when the Federal awarding agency authorizes sale on the open market or transfer to the grant recipient.

Response: Examples (a), (b), and (c) would be public land for purposes of the Policy. However, if the government or public agency owns a fee with exceptions to title as in example (b), the Policy applies only to the interest owned by a government or public agency. It has no effect on interests not owned by a government or public agency. Example (d) would be considered public land only if the interest in real property is owned by the Federal Government; a State, tribal, or local government; or an agency or instrumentality of one of these governments. We have provided clarification in Appendix C, section H.

Comment (119): One commenter said terms in section 5.7.2, Recommendations for Locating Mitigation on Public or Private Lands, had implications for the material in Appendix C and were unclear. Specifically, they asked for an explanation of the difference between the proposed language of this Policy in section 5.7.2: ''measures the public agency is foreseeably expected to implement absent the mitigation'' and the language of the regulations jointly issued by the EPA at 40 CFR 230.93(a)(3) and the Corps at 33 CFR 332.3(a)(3): ''Credits for compensatory mitigation projects on *public* land must be based solely on aquatic resource functions provided by the compensatory mitigation project, over and above *those provided by public programs already planned or in place.*''

Response: The language in section 5.7.2 and in the EPA/Corps regulation has different purposes, but both are applications of the principle of *additionality*, which this Policy defines as: A compensatory mitigation measure is additional when the benefits of a compensatory mitigation measure improve upon the baseline conditions of the impacted resources and their values, services, and functions in a manner that is demonstrably new and would not have occurred without the compensatory mitigation measure.

The measures described in section 5.7.2 are effectively those described in the regulatory language as: Those provided by public programs already planned.

Appendix C, section H explains how to determine what qualifies as ''baseline conditions . . . that a public land management agency is foreseeably expected to implement absent the mitigation.''

Comment (120): One commenter addressed Appendix C, section H, Can a mitigation proposal be located on land acquired under a Federal financial assistance award? They said despite this section title, section 5.7.2, Recommendations for Locating Mitigation on Public or Private Lands, seems to apply to everything covered by the Policy, including financial assistance awards. They suggested that if section 5.7.2 applies to financial

assistance awards, we clarify that Appendix C, section H supplements section 5.7.2.

Response: Most lands acquired under Service-approved or administered financial assistance awards are dedicated to conservation, but not all are public land. We have revised section H to acknowledge the applicability of section 5.7.2 to land already designated for conservation.

Comment (121): One commenter said the Authorities and Direction for Service Mitigation Recommendations listed in Appendix A needed additional references related to the financial assistance programs described in Appendix C. They suggested the following authorities for the two Service grant programs that have an authorizing statute or regulation prohibiting the use mitigation in the program be added to Appendix A:

North American Wetlands Conservation Act, 16 U.S.C. 4401 *et seq.*

National Coastal Wetlands Conservation Grants, 16 U.S.C. 3954, 50 CFR part 84.

Response: We added the North American Wetlands Conservation Act, 16 U.S.C. 4401 *et seq.* to Appendix A, section B, Additional Legislative Authorities. We added the National Coastal Wetlands Conservation Grants, 16 U.S.C. 3954, 50 CFR part 84 to Appendix A, section C, Implementing Regulations.

Comment (122): One commenter addressed the ineligibility of the use of mitigation in the National Coastal Wetlands Conservation program. They suggested that inserting the following as the ninth sentence in the introductory paragraph would avoid any potential misunderstandings: Consistent with the Service's Mitigation Policy, the regulations at 50 CFR part 84 authorize the use of Natural Resource Damage Assessment funds as match in the National Coastal Wetlands Conservation Program.

Response: We added the sentence as recommended.

Comment (123): For further clarity, one commenter recommended editing in Appendix C, section B, Where do most mitigation issues occur in financial assistance? Specifically, they suggested the first sentence in the answer to Question B be replaced with: Most mitigation issues in financial assistance relate to: (a) The proposed use of mitigation funds on land acquired with Federal financial assistance, and (b) the use as match of mitigation funds and in-kind contributions derived from mitigation funds.

Response: We replaced the first sentence as recommended by the commenter.

Comment (124): One commenter noted that in a recent mitigation project proposed for siting on land acquired with Federal financial assistance, the landowner asserted that the mitigation project should be acceptable to the Service because it was acceptable to the Corps. To address such implementation questions, the commenter suggested adding a new section that examines the responsibilities of the Corps and the Service for approving specific decisions related to the limited role of mitigation in financial assistance programs. They said, where appropriate, the new section would give the legal basis of their respective roles.

Response: The District Engineer of the Corps has the authority to impose conditions on a Department of the Army (DA) permit under the CWA, including conditions on the type and location of compensatory mitigation. However, no mitigation project, whether it is under the authority of the CWA or any other Federal statute, can interfere with the purposes of a financially assisted project. If the conditions in a DA permit will affect a financially assisted project for which the Service is responsible, those conditions must be acceptable to the Service before the permitted activity is initiated.

Even if a mitigation project under the CWA will not affect one of its financially assisted projects, the Service may be a member of the Interagency Review Team that reviews documentation for the establishment of mitigation banks and in-lieu fee programs. The respective roles of the Corps and the Service in carrying out the compensatory mitigation requirements of the CWA are described in more detail in 33 CFR parts 325 and 332, and 40 CFR part 230.

For mitigation projects that will affect a financially assisted project in a program where it approves or administers awards, the Service is responsible for the following decisions:

(a) Can real property and equipment acquired under a Service-administered financial assistance award be used for purposes of compensatory mitigation?

The Service makes this decision based on 2 CFR 200.311(b) and 2 CFR 200.313(a–c), which addresses real property and equipment (respectively), with special reference to the Service's authority to approve encumbrances and its right to receive a share of proceeds from a disposition when property is no longer needed for the purposes of the original award. 50 CFR 80.132–135 also apply to real property acquired under the Wildlife Restoration program, Sport Fish Restoration program, and Enhanced Hunter Education and Safety programs, and will guide mitigation in financial assistance programs.

(b) Can real property that includes a capital improvement funded by a Service-administered financial assistance award be used for purposes of compensatory mitigation during the useful life of the capital improvement?

The Service makes this decision based on 2 CFR 200.311(b). Regulations at 50 CFR 80.132–135 may also be applicable to a capital improvement funded by an award from the Wildlife Restoration program, Sport Fish Restoration program, and Enhanced Hunter Education and Safety programs. ''Capital improvement'' means (a) a structure that costs at least $25,000 to build; or (b) the alteration, renovation, or repair of a structure that increases the structure's useful life by at least 10 years or its market value by at least $25,000. A financial assistance program may have its own definitions of capital improvement for purposes of compensatory mitigation as long as it includes all capital improvements as defined here.

(c) Can real property managed, maintained, or operated with funding from a Service-administered financial assistance award be used for purposes of compensatory mitigation?

The Service makes this decision based on 2 CFR 200.300.311(a) and (b). Regulations at 50 CFR 80.134 also apply to real property managed, maintained, or operated by an award from the Wildlife Restoration program, Sport Fish Restoration program, and Enhanced Hunter Education and Safety programs.

(d) Are funds or in-kind contributions that have been used or will be used to satisfy compensatory-mitigation requirements eligible as match in a Service-administered financial assistance program?

The Service makes this decision based on 2 CFR 200.300; 2 CFR 200.403(a); and 2 CFR 200.404(a), (b), and (d). For compensatory mitigation required by the CWA, the Service makes this decision in compliance with 33 CFR 332.3(j)(2) and 40 CFR 230.93(j)(2). The final rule for these regulations was published in the **Federal Register** on April 10, 2008 (73 FR 19594). Its preamble clarifies the intent of §§ 332.3(j)(2) and 230.93(j)(2) in the following example: . . . if a Federal program has a 50 percent landowner match requirement, neither the federally funded portion of the project, nor the landowner's 50 percent match, which is part of the requirements for obtaining

Federal funding, may be used for compensatory mitigation credits. However, if the landowner provides a greater than 50 percent match, any improvements provided by the landowner over and above those required for federal funding could be used as compensatory mitigation credits.

National Environmental Policy Act (NEPA)

We have analyzed this Policy in accordance with the criteria of the National Environmental Policy Act, as amended (NEPA) (42 U.S.C. 4332(c)), the Council on Environmental Quality's Regulations for Implementing the Procedural Provisions of NEPA (40 CFR parts 1500–1508), and the Department of the Interior's NEPA procedures (516 DM 2 and 8; 43 CFR part 46). Issuance of policies, directives, regulations, and guidelines are actions that may generally be categorically excluded under NEPA (43 CFR 46.210(i)). Based on comments received, we determined that a categorical exclusion can apply to this Policy, but nevertheless, the Service chose to prepare an environmental assessment (EA) to inform decision makers and the public regarding the possible effects of the policy revisions. We announced our intent to prepare an EA pursuant to NEPA when we published the proposed revised policy. We requested comments on the scope of the NEPA review, information regarding important environmental issues that should be addressed, the alternatives to be analyzed, and issues that should be addressed at the programmatic stage in order to inform the site-specific stage during the comment period on the proposed revised policy. Comments from the public were considered in the drafting of the final EA. The final EA is available on the Internet at *http://www.regulations.gov* at Docket Number FWS–HQ–ES–2015–0126.

Authority

The multiple authorities for this action include the: Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*); Fish and Wildlife Coordination Act, as amended, (16 U.S.C. 661–667(e)); National Environmental Policy Act (42 U.S.C. 4371 *et seq.*); and others identified in section 2 and Appendix A of this Policy.

Mitigation Policy of the U.S. Fish and Wildlife Service

1. Purpose

This Policy applies to all actions for which the U.S. Fish and Wildlife Service (Service) has specific authority to either recommend or to require the mitigation of impacts to fish, wildlife, plants, and their habitats. Most applications of this Policy are advisory. The purpose of this Policy is to provide guidance to Service personnel in formulating and delivering recommendations and requirements to action agencies and project proponents so that they may avoid, minimize, and compensate for action-caused impacts to species and their habitats.

The guidance of this Policy:

- Provides a framework for formulating measures to maintain or improve the status of affected species through an application of the mitigation hierarchy informed by a valuation of their affected habitats;
- will help align Service-recommended mitigation with conservation objectives for affected resources and the strategies for achieving those objectives at ecologically relevant scales;
- will allow action agencies and proponents to anticipate Service recommendations and plan for mitigation measures early, thus avoiding delays and assuring equal consideration of fish and wildlife conservation with other action purposes; and
- allows for variations appropriate to action- and resource-specific circumstances.

This Policy supersedes the Fish and Wildlife Service Mitigation Policy (46 FR 7644–7663) published in the **Federal Register** on January 23, 1981. Definitions for terms used throughout this Policy are provided in section 6.

2. Authority

The Service has jurisdiction over a broad range of fish and wildlife resources. Service authorities are codified under multiple statutes that address management and conservation of natural resources from many perspectives, including, but not limited to, the effects of land, water, and energy development on fish, wildlife, plants, and their habitats. We list below the statutes that provide the Service, directly or indirectly through delegation from the Secretary of the Interior, specific authority for conservation of these resources and that give the Service a role in mitigation planning for actions affecting them. We further discuss the Service's mitigation planning role under each statute and list additional authorities in Appendix A.

- Bald and Golden Eagle Protection Act, 16 U.S.C. 668 *et seq.* (Eagle Act)
- Endangered Species Act of 1973, as amended, 16 U.S.C. 1531 *et seq.* (ESA)
- Federal Land and Policy Management Act, 43 U.S.C. 1701 *et seq.* (FLPMA)
- Federal Power Act, 16 U.S.C. 791–828c (FPA)
- Federal Water Pollution Control Act (Clean Water Act), 33 U.S.C. 1251 *et seq.* (CWA)
- Fish and Wildlife Conservation Act, 16 U.S.C. 2901–2912
- Fish and Wildlife Coordination Act, as amended, 16 U.S.C 661–667(e) (FWCA)
- Marine Mammal Protection Act of 1972, as amended, 16 U.S.C. 1361 *et seq.* (MMPA)
- Migratory Bird Treaty Act, 16 U.S.C. 703–712 (MBTA)
- National Environmental Policy Act, 42 U.S.C. 4371 *et seq.* (NEPA)
- National Wildlife Refuge System Administration Act, 16 U.S.C. 668dd *et seq.*

While all of the statutes listed above give the Service an advisory role in fish and wildlife mitigation, not all of them give the Service authority to require others to implement the mitigation measures we identify. Circumstances under which the Service has specific authority to require, consistent with applicable laws and regulations, one or more forms of mitigation for impacts to fish and wildlife resources include:

- Actions that the Service carries out, *i.e.,* the Service is the action proponent;
- actions that the Service funds;
- actions to restore damages to fish and wildlife resources caused by spills of oil and other hazardous materials under the Oil Pollution Act and the Comprehensive Environmental Response, Compensation, and Liability Act;
- actions of other Federal agencies that require an incidental take statement under section 7 of the ESA (measures to minimize the impact of the incidental taking on the species);
- actions of non-Federal entities that require an incidental take permit under section 10 of the ESA (measures to minimize and mitigate the impacts of the taking on the species to the maximum extent practicable);
- fishway prescriptions under section 18 of the FPA, which minimize, rectify, or reduce over time through management, the impacts of non-Federal hydropower facilities on fish passage;
- license conditions under section 4(e) of the FPA for non-Federal hydropower facilities affecting Service properties (*e.g.,* a National Wildlife Refuge) for the protection and utilization of the Federal reservation consistent with the purpose for which such reservation was created or acquired;
- actions that require a ''Letter of Authorization'' or ''Incidental

Harassment Authorization'' under the MMPA; and

• actions that require a permit for non-purposeful (incidental) take of eagles under the Eagle Act.

Our aim with this Policy is to provide a common framework for Service discretion across the full range of our authorities, including those listed above for which the Service may require mitigation, but the Policy does not alter or substitute for the regulations implementing any of these authorities.

3. Scope

3.1. Actions

This Policy applies to all Service activities related to evaluating the effects of proposed actions and subsequent recommendations or requirements to mitigate impacts to resources, defined in section 3.2. For purposes of this Policy, actions include: (a) Activities conducted, authorized, licensed, or funded by Federal agencies (including Service-proposed activities); (b) non-Federal activities to which one or more of the Service's statutory authorities apply to make mitigation recommendations or specify mitigation requirements; and (c) the Service's provision of technical assistance to partners in collaborative mitigation planning processes that occur outside of individual action review.

3.2. Resources

This Policy may apply to specific resources based on any Federal authority or combination of authorities, such as treaties, statutes, regulations, or Executive Orders, that empower the Federal Government to manage, control, or protect fish, wildlife, plants, and their habitats that are affected by proposed actions. Such Federal authority need not be exclusive, comprehensive, or primary, and in many cases, may overlap with that of States or tribes or both.

This Policy applies to those resources identified in statute or implementing regulations that provide the Service authority to make mitigation recommendations or specify mitigation requirements for the actions described in section 3.1. The scope of resources addressed by this Policy is inclusive of, but not limited to, the Federal trust fish and wildlife resources concept.

The Service has traditionally described its trust resources as migratory birds, federally listed endangered and threatened species, certain marine mammals, and inter-jurisdictional fish. Some authorities narrowly define or specifically identify covered taxa, such as threatened and endangered species, marine mammals, or the species protected by the Migratory Bird Treaty Act. This Policy applies to trust resources; however, Service Regions and field stations retain discretion to recommend mitigation for other resources under appropriate authorities.

The types of resources for which the Service is authorized to recommend mitigation also include those that contribute broadly to ecological functions that sustain species. The definitions of the terms ''wildlife'' and ''wildlife resources'' in the Fish and Wildlife Coordination Act include birds, fishes, mammals, and all other classes of wild animals, and all types of aquatic and land vegetation upon which wildlife is dependent. Section 404 of the Clean Water Act (33 CFR 320.4) codifies the significance of wetlands and other waters of the United States as important public resources for their habitat value, among other functions.

The Endangered Species Act envisions a broad consideration when describing its purposes as providing a means whereby the ecosystems upon which endangered and threatened species depend may be conserved and when directing Federal agencies at section 7(a)(1) to utilize their authorities in furtherance of the purposes of the ESA by carrying out programs for the conservation of listed species. The purpose of the National Environmental Policy Act (NEPA) also establishes an expansive focus in promoting efforts that will prevent or eliminate damage to the environment while stimulating human health and welfare. In NEPA, Congress recognized the profound impact of human activity on the natural environment, particularly through population growth, urbanization, industrial expansion, resource exploitation, and new technologies. NEPA further recognized the critical importance of restoring and maintaining environmental quality, and declared a Federal policy of using all practicable means and measures to create and maintain conditions under which humans and nature can exist in productive harmony. These statutes address systemic concerns and provide authority for protecting habitats and landscapes.

3.3. Exclusions

This Policy does not apply retroactively to completed actions or to actions specifically exempted under statute from Service review. It does not apply where the Service has already agreed to a mitigation plan for pending actions, except where: (a) New activities or changes in current activities would result in new impacts; (b) a law enforcement action occurs after the Service agrees to a mitigation plan; (c) an after-the-fact permit is issued; or (d) where new authorities or failure to implement agreed-upon recommendations, warrant new mitigation planning. Service personnel may elect to apply this Policy to actions that are under review as of the date of its final publication.

3.4. Applicability to Service Actions

This Policy applies to actions that the Service proposes, including those for which the Service is the lead or co-lead Federal agency for compliance with NEPA. However, it applies only to the mitigation of impacts to fish, wildlife, plants, and their habitats that are reasonably foreseeable from such proposed actions. When it is the Service that proposes an action, the Service acknowledges its responsibility, during early planning for design of the action, to consult with Tribes, and to consider the effects to, and mitigation for, impacts to resources besides fish, wildlife, plants, and their habitats (*e.g.*, cultural and historic resources, traditional practices, environmental justice, public health, recreation, other socio-economic resources, etc.). Consistent with NEPA (42 U.S.C. 4332(A)) (40 CFR 1500.2 and 1501.2) and the CEQ and the Advisory Council on Historic Preservation (ACHP), *NEPA NHPA Section 106 Handbook*, these reviews will be integrated into the decisionmaking process at the earliest possible point in planning for the action. This Policy neither provides guidance nor supersedes existing guidance for mitigating impacts to resources besides those defined in section 3.2, Resources.

NEPA requires the action agency to evaluate the environmental effects of alternative proposals for agency action, including the environmental effects of proposed mitigation (*e.g.*, effects on historic properties resulting from habitat restoration). Considering impacts to resources besides fish and wildlife requires the Service to coordinate with entities having jurisdiction by law, special expertise, or other applicable authority. Appendix B further discusses the Service's consultation responsibilities with tribes related to fish and wildlife impact mitigation, *e.g.*, statutes that commonly compel the Service to address the possible environmental impacts of mitigation activities for fish and wildlife resources. It also supplements existing Service NEPA guidance by describing how this Policy integrates with the Service's decisionmaking process under NEPA.

3.5. Financial Assistance Programs and Mitigation

The Service has more than 60 financial assistance programs, which collectively disburse more than $1 billion annually to non-Federal recipients through grants and cooperative agreements. Most programs leverage Federal funds by requiring or encouraging the commitment of matching cash or in-kind contributions. Recipients have acquired approximately 10 million acres in fee title, conservation easements, or leases through these programs. To foster consistent application of financial assistance programs with respect to mitigation processes, Appendix C addresses the limited role that specific types of mitigation can play in financial assistance programs.

4. General Policy and Principles

The mission of the Service is working with others to conserve, protect, and enhance fish, wildlife, plants, and their habitats for the continuing benefit of the American people. In furtherance of this mission, the Service has a responsibility to ensure that impacts to fish, wildlife, plants, and their habitats in the United States, its territories, and possessions are considered when actions are planned, and that such impacts are mitigated so that these resources may provide a continuing benefit to the American people. Consistent with Congressional direction through the statutes listed in the ''Authority'' section of this Policy, the Service will provide timely and effective recommendations to conserve, protect, and enhance fish, wildlife, plants, and their habitats when proposed actions may reduce the benefits thereof to the public.

Fish and wildlife and their habitats are resources that provide commercial, recreational, social, and ecological value to the Nation. For Tribal Nations, specific fish and wildlife resources and associated landscapes have traditional cultural and religious significance. Fish and wildlife are conserved and managed for the people by State, Federal, and tribal governments. If reasonably foreseeable impacts of proposed actions are likely to reduce or eliminate the public benefits that are provided by such resources, these governments have shared responsibility or interest in recommending means and measures to mitigate such losses. Accordingly, in the interest of serving the public, it is the policy of the U.S. Fish and Wildlife Service to seek to mitigate losses of fish, wildlife, plants, their habitats, and uses thereof resulting from proposed actions.

The following fundamental principles will guide Service-recommended mitigation, as defined in this Policy, across all Service programs.

a. *The goal is a net conservation gain.* The Service's mitigation planning goal is to improve (*i.e.,* a net gain) or, at minimum, to maintain (*i.e.,* no net loss) the current status of affected resources, as allowed by applicable statutory authority and consistent with the responsibilities of action proponents under such authority. As informed by established conservation objectives and strategies, Service mitigation recommendations will focus primarily on important, scarce, or sensitive resources, and will specify the means and measures that achieve the planning goal.

b. *Observe an appropriate mitigation sequence.* The Service recognizes it is generally preferable to take all appropriate and practicable measures to avoid and minimize adverse effects to resources, in that order, before compensating for remaining impacts. However, to achieve the best possible conservation outcomes, the Service recognizes that some limited circumstances may warrant a departure from this preferred sequence. The Service will prioritize the applicable mitigation types based on a valuation of the affected resources as described in this Policy in a landscape conservation context.

c. *Avoid high-value habitats.* The Service will seek avoidance of all impacts to high-value habitats. High-value habitats make an exceptional contribution to the conservation of species. Preventing impacts to these habitats is the most effective means of maintaining the current status of a species, which is the minimum goal of this Policy.

d. *A landscape approach will inform mitigation.* The Service will integrate mitigation into a broader ecological context with applicable landscape-level conservation plans, where available, when developing, approving, and implementing plans, and by steering mitigation efforts in a manner that will best contribute to achieving conservation objectives. The Service will consider climate change and other stressors that may affect ecosystem integrity and the resilience of fish and wildlife populations, which will inform the scale, nature, and location of mitigation measures necessary to achieve the best possible conservation outcome. The Service will foster partnerships with Federal and State partners, tribes, local governments, and other stakeholders to design mitigation strategies that will prevent fragmented landscapes and restore core areas and connectivity necessary to sustain species.

e. *Ensure consistency and transparency.* The Service will use timely and transparent processes that provide predictability and uniformity through the consistent application of standards and protocols as may be developed to achieve effective mitigation.

f. *Science-based mitigation.* The Service will use the best available science in formulating and monitoring the long-term effectiveness of its mitigation recommendations and decisions, consistent with all applicable Service science policy.

g. *Durability.* The Service will recommend or require that mitigation measures are durable, and at a minimum, maintain their intended purpose for as long as impacts of the action persist on the landscape. The Service will recommend or require that action proponents provide assurances of durability, including financial assurances, to support the development, maintenance, and long-term effectiveness of the mitigation measures.

h. *Effective compensatory mitigation.* The Service will recommend implementing compensatory mitigation before the impacts of an action occur. The Service will recommend compensatory mitigation that provides benefits to the affected species that are additional to the benefits of existing conservation efforts or those planned for the reasonably foreseeable future. To ensure consistent implementation of compensatory mitigation, the Service will support the application of equivalent standards, regardless of the mechanism used to provide compensatory mitigation.

5. Mitigation Framework

This section of the Policy provides the conceptual framework and guidance for implementing the general policy and principles declared in section 4 in an action- and landscape-specific mitigation context. Implementation of the general policy and principles as well as the direction provided in 600 DM 6 occurs by integrating landscape scale decisionmaking within the Service's existing process for assessing effects of an action and formulating mitigation measures. The key terms used in describing this framework are defined in section 6, Definitions.

The Service recommends or requires mitigation under one or more Federal authorities (section 2) when necessary and appropriate to avoid, minimize, and/or compensate for impacts to resources (section 3.2) resulting from

proposed actions (section 3.1). Our goal for mitigation is to achieve a net conservation gain or, at minimum, no net loss of the affected resources (section 4). Sections 5.1 through 5.9, summarized below, provide an overview of the mitigation framework and describe how the Service will engage actions as part of its process of assessing the effects of an action and formulating mitigation measures that would achieve this goal. Variations appropriate to action-specific circumstances are permitted; however, the Service will provide action proponents with the reasons for such variations.

Synopsis of the Service Mitigation Framework

5.1. Integrating Mitigation Planning with Conservation Planning. The Service will utilize landscape-scale approaches and landscape conservation planning to inform mitigation, including identifying areas for mitigation that are most important for avoiding and minimizing impacts, improving habitat suitability, and compensating for unavoidable impacts to species. Proactive mitigation plans can achieve efficiencies for attaining conservation objectives while streamlining the planning and regulatory processes for specific landscapes and/or classes of actions within a landscape.

5.2. Collaboration and Coordination. At both the action and landscape scales, the Service will collaborate and coordinate with action proponents and with our State, Federal, and tribal conservation partners in mitigation.

5.3. Assessment. Assessing the effects of proposed actions and proposed mitigation measures is the basis for formulating a plan to meet the mitigation policy goal. This Policy does not endorse specific methodologies, but does describe several principles of effects assessment and general characteristics of methodologies that the Service will use in implementing this Policy.

5.4. Evaluation Species. The Service will identify the species evaluated for mitigation purposes. The Service should select the smallest set of evaluation species necessary, but include all species for which the Service is required to issue biological opinions, permits, or regulatory determinations. When actions would affect multiple resources of conservation interest, evaluation species should serve to best represent other affected species or aspects of the environment. This section describes characteristics of evaluation species that are useful in planning mitigation.

5.5. Habitat Valuation. The Service will assess the value of affected habitats to evaluation species based on their scarcity, suitability, and importance to achieving conservation objectives. This valuation will determine the relative emphasis the Service will place on avoiding, minimizing, and compensating for impacts to habitats of evaluation species.

5.6. Means and Measures. The means and measures that the Service recommends for achieving the mitigation policy goal are action- and resource-specific applications of the three general types of impact mitigation (avoid, minimize, and compensate). This section provides an expanded definition of each type, explains its place in this Policy, and lists generalized examples of its intended use in Service mitigation recommendations and requirements.

5.7. Recommendations. This section describes general standards for Service recommendations, and declares specific preferences for various characteristics of compensatory mitigation measures, *e.g.*, timing, location.

5.8. Documentation. Service involvement in planning and implementing mitigation requires documentation that is commensurate in scope and level of detail with the significance of the potential impacts to resources. This section provides an outline of documentation elements that are applicable at three different stages of the mitigation planning process: Early planning, effects assessment, and final recommendations.

5.9. Followup. Determining whether Service mitigation recommendations were adopted and effective requires monitoring, and when necessary, corrective action.

5.1. Integrating Mitigation With Conservation Planning

The Service's mitigation goal is to improve or, at minimum, maintain the current status of affected resources, as allowed by applicable statutory authority and consistent with the responsibilities of action proponents under such authority (see section 4). This Policy provides a framework for formulating mitigation means and measures (see section 5.6) intended to efficiently achieve the mitigation planning goal based upon best available science. This framework seeks to integrate mitigation recommendations and requirements into conservation planning to better protect or enhance populations and those features on a landscape that are necessary for the long-term persistence of biodiversity and ecological functions. Functional ecosystems enhance the resilience of fish and wildlife populations challenged by the widespread stressors of climate change, invasive species, and the continuing degradation and loss of habitat through human alteration of the landscape. Achieving the mitigation goal of this Policy involves:

- Avoiding and minimizing those impacts that most seriously compromise resource sustainability;
- rectifying and reducing over time those impacts where restoring or maintaining conditions in the affected area most efficiently contributes to resource sustainability; and
- strategically compensating for impacts so that actions result in an improvement in the affected resources, or at a minimum, result in a no net loss of those resources.

The Service recognizes that we will engage in mitigation planning for actions affecting resources in landscapes for which conservation objectives and strategies to achieve those objectives are not yet available, well developed, or formally adopted. The landscape-level approach to resource decisionmaking described in this Policy and in the Departmental Manual (600 DM 6.6D) applies in contexts with or without established conservation plans, but it will achieve its greatest effectiveness when integrated with such planning.

When appropriate, the Service will seek a net gain in the conservation outcome of actions we engage for purposes of this Policy. It is consistent with the Service's mission to identify and promote opportunities for resource enhancement during action planning, *i.e.*, to decrease the gap between the current and desired status of a resource. Mitigation planning often presents practicable opportunities to implement mitigation measures in a manner that outweighs impacts to affected resources. When resource enhancement is also consistent with the mission, authorities, and/or responsibilities of action proponents, the Service will encourage proponents to develop measures that result in a net gain toward achieving conservation objectives for the resources affected by their actions. Such proponents include, but are not limited to, Federal agencies when responsibilities such as the following apply to their actions:

- Carry out programs for the conservation of endangered and threatened species (Endangered Species Act, section 7(a)(1));
- consult with the Service regarding both mitigation and enhancement in water resources development (Fish and Wildlife Coordination Act, section 2);

• enhance the quality of renewable resources (National Environmental Policy Act, section 101(b)(6)); and/or
• restore and enhance bird habitat (Executive Order 13186, section 3(e)(2)).

To serve the public interest in fish and wildlife resources, the Service works under various authorities (see section 2) with partners to establish conservation objectives for species, and to develop and implement plans for achieving such objectives in various landscapes. We define a landscape as an area encompassing an interacting mosaic of ecosystems and human systems that is characterized by common management concerns (see section 6, Definitions). Relative to this Policy, such management concerns relate to conserving species. The geographic scale of a landscape is variable, depending on the interacting elements that are meaningful to particular conservation objectives and may range in size from large regions to a single watershed or habitat type. When proposed actions may affect species in a landscape addressed in one or more established conservation plans, such plans will provide the basis for Service recommendations to avoid and minimize particular impacts, rectify and reduce over time others, and compensate for others. The criteria in this Policy for selecting evaluation species (section 5.4) and assessing the value of their affected habitats (section 5.5) are designed to place mitigation planning in a landscape conservation context by applying the various types of mitigation where they are most effective at achieving the mitigation policy goal.

The Service recognizes the inefficiency of automatically applying under all circumstances each mitigation type in the traditional mitigation sequence. As DM 6 also recognizes, in limited situations, specific circumstances may exist that warrant an alternative from this sequence, such as when seeking to achieve the maximum benefit to affected resources and their values, services, and functions. For example, the cost and effort involved in avoiding impacts to a habitat that is likely to become isolated or otherwise unsuitable for evaluation species in the foreseeable future may result in less conservation when compared to actions that achieve a greater conservation benefit if used to implement offsite compensatory mitigation in area(s) that are more important in the long term to achieving conservation objectives for the affected resource(s). Conversely, onsite avoidance is the priority where impacts would substantially impair progress toward achieving conservation objectives.

The Service will rely upon existing conservation plans that are based upon the best available scientific information, consider climate-change adaptation, and contain specific objectives aimed at the biological needs of the affected resources. Where existing conservation plans are not available that incorporate all of these elements or are not updated with the best available scientific information, Service personnel will otherwise incorporate the best available science into mitigation decisions and recommendations and continually seek better information in areas of greatest uncertainty. Service personnel will use a landscape approach based on analysis of information regarding resource needs, including priorities for impact avoidance and potential compensatory mitigation sites. Such information includes development trends and projected habitat loss or conversion, cumulative impacts of past development activities, the presence and needs of species, and restoration potential. Service personnel may access this information in existing mapping products, survey data, reports, studies, or other sources.

Proactive Mitigation Planning at Larger Scales

The Service supports the planning and implementation of proactive mitigation plans in a landscape conservation context, *i.e.,* mitigation developed before actions are proposed, particularly in areas where multiple similar actions are expected to adversely affect a similar suite of species.

Proactive mitigation plans should complement or tier from existing conservation plans relevant to the affected resources (*e.g.,* recovery plans, habitat conservation plans, or nongovernmental plans). Effective and efficient proactive mitigation identifies high-priority resources and areas on a regional or landscape scale, prior to and without regard to specific proposed actions, in which to focus: (a) Resource protection for avoiding impacts; (b) resource enhancement or protection for compensating unavoidable impacts; and (c) measures to improve the resilience of resources in the face of climate change or otherwise increase the ability to adapt to climate and other landscape change factors. In many cases, the Service can take advantage of available Federal, State, tribal, local, or nongovernmental plans that identify such priorities.

Developing proactive mitigation should involve stakeholders in a transparent process for defining objectives and the means to achieving those objectives. Planning for proactive mitigation should establish standards for determining the appropriate scale, type, and location of mitigation for impacts to specific resources within a specified area. Adopted plans that incorporate these features are likely to substantially shorten the time needed for regulatory review and approval as actions are subsequently proposed. Proactive mitigation plans, not limited to those developed under a programmatic NEPA decisionmaking process or a Habitat Conservation Plan process, will provide efficiencies for project-level Federal actions and will also better address potential cumulative impacts.

Procedurally, proactive mitigation should draw upon existing land-use plans and databases associated with human infrastructure, including transportation, and water and energy development, as well as ecological data and conservation plans for floodplains, water quality, high-value habitats, and key species. Stakeholders and Service personnel process these inputs to design a conservation network that considers needed community infrastructure and clearly prioritizes the role of mitigation in conserving natural features that are necessary for long-term maintenance of ecological functions on the landscape. As development actions are proposed, an effective proactive regional mitigation plan will provide a transparent process for identifying appropriate mitigation opportunities within the regional framework and selecting the mitigation projects with the greatest aggregated conservation benefits.

5.2. Collaboration and Coordination

The Service shares responsibility for conserving fish and wildlife with State, local, and tribal governments and other Federal agencies and stakeholders. Our role in mitigation may involve Service biological opinions, permits, or other regulatory determinations as well as providing technical assistance. The Service must work in collaboration and coordination with other governments, agencies, organizations, and action proponents to implement this Policy. Whenever appropriate, the Service will:

a. Coordinate activities with the appropriate Federal, State, tribal, and local agencies and other stakeholders who have responsibilities for fish and wildlife resources when developing mitigation recommendations for resources of concern to those entities;

b. consider resources and plans made available by State, local, and tribal governments and other Federal agencies;

c. seek to apply compatible approaches and avoid duplication of efforts with those same entities;

d. collaborate with Federal and State agencies, tribes, local agencies and other stakeholders in the formulation of landscape-level mitigation plans; and

e. cooperate with partners to develop, maintain, and disseminate tools and conduct training in mitigation methodologies and technologies.

The Service should engage agencies and applicants during the early planning and design stage of actions. The Service is encouraged to engage in early coordination during the NEPA Federal decisionmaking process to resolve issues in a timely manner (516 DM 8.3). Coordination during early planning, including participation as a cooperating agency or on interdisciplinary teams, can lead to better conservation outcomes. For example, the Federal Highway Administration (FHWA) is most likely to adopt alternatives that avoid or minimize impacts when the Service provides early comments under section 4(f) of the Transportation Act of 1966 relative to impacts to refuges or other Service-supported properties. When we identify potential impacts to tribal interests, the Service, in coordination with affected tribes, may recommend mitigation measures to address those impacts. Recommendations will carry more weight when the Service and tribe have overlapping authority for the resources in question and when coordinated through government-to-government consultation.

Coordination and collaboration with stakeholders allows the Service to confirm that the persons conducting mitigation activities, including contractors and other non-Federal persons, have the appropriate experience and training in mitigation best practices, and where appropriate, include measures in employee performance appraisal plans or other personnel or contract documents, as necessary. Similarly, this allows for the development of rigorous, clear, and consistent guidance, suitable for field staff to implement mitigation or to deny authorizations when impacts to resources and their values, services, and functions are not acceptable. Collaboratively working across Department of the Interior bureaus and offices allows the Service to conduct periodic reviews of the execution of mitigation activities to confirm consistent implementation of the principles of this Policy.

When collaborating with stakeholders, Service staff should utilize the principles and recommendations set forth in the Council on Environmental Quality handbook, *Collaboration in NEPA—a Handbook for NEPA Practitioners* (2007).

5.3. Assessment

Effects are changes in environmental conditions caused by an action that are relevant to the resources (fish, wildlife, plants, and their habitats) covered by this Policy. This Policy addresses mitigation for impacts to these resources. We define impacts as adverse effects relative to the affected resources. Impacts may be direct, indirect, or cumulative. Indirect effects are often major drivers in ecological systems. Because indirect impacts from an action occur later in time or farther removed in distance, they may have landscape-scale implications. Mitigation is the general label for all measures implemented to avoid, minimize, and/or compensate for its predicted impacts.

The Service should design mitigation measures to achieve the mitigation goal, when appropriate, of net gain, or a minimum of no net loss for affected resources. This design should take into account the degree of risk and uncertainty associated with both predicted project effects and predicted outcomes of the mitigation measures. The following principles shall guide the Service's assessment of anticipated effects and the expected effectiveness of mitigation measures.

1. The Service will consider action effects and mitigation outcomes within planning horizons commensurate with the expected duration of the action's impacts. In predicting whether mitigation measures will achieve the mitigation policy goal for the affected resources during the planning horizon, the Service will recognize that predictions about the more-distant future are more uncertain and adjust the mitigation recommendations accordingly.

2. Action proponents should provide reasonable predictions about environmental conditions relevant to the affected area both with and without the action over the course of the planning horizon (*i.e.,* baseline condition). If such predictions are not provided, the Service will assess the effects of a proposed action over the planning horizon considering: (a) The full spatial and temporal extent of resource-relevant direct and indirect effects caused by the action, including resource losses that will occur during the period between implementation of the action and the mitigation measures; and (b) any cumulative effects to the affected resources resulting from existing concurrent or reasonably foreseeable future activities in the landscape context. When assessing the affected area without the action, the Service will also evaluate: (a) Expected natural species succession; (b) implementation of approved restoration/improvement plans; and (c) reasonably foreseeable conditions resulting directly or indirectly from any other factors that may affect the evaluation of the project including, but not limited to, climate change.

3. The Service will use the best available effect assessment methodologies that:

a. Display assessment results in a manner that allows decisionmakers, action proponents, and the public to compare present and predicted future conditions for affected resources;

b. measure adverse and beneficial effects using equivalent metrics to determine mitigation measures necessary to achieve the mitigation policy goal for the affected resources (*e.g.,* measure both adverse and beneficial effects to a species' food resources via changes to the density or spatial extent of the food resource);

c. predict effects over time, including changes to affected resources that would occur with and without the action, changes induced by climate change, and changes resulting from reasonably foreseeable actions;

d. are practical, cost-effective, and commensurate with the scope and scale of impacts to affected resources;

e. are sufficiently sensitive to estimate the type and relative magnitude of effects across the full spectrum of anticipated beneficial and adverse effects;

f. may integrate predicted effects with data from other disciplines such as cost or socioeconomic analysis; and

g. allow for incorporation of new data or knowledge as action planning progresses.

4. Where appropriate effects assessment methods or technologies useful in valuation of mitigation are not available, Service employees will apply best professional judgment supported by best available science to assess impacts and to develop mitigation recommendations.

5.4. Evaluation Species

Section 3.2 identifies the resources to which this Policy applies. Depending on the authorities under which the Service is engaging an action for mitigation purposes, these resources may include: Particular species; fish, wildlife, and plants more generally; and their habitats, including those contributing to ecological functions that sustain species. However, one or more species

of conservation interest to the Service is always necessary to initiate mitigation planning, and under this Policy, the Service will explicitly identify evaluation species for mitigation purposes. In instances where the Service is required to issue a biological opinion, permit, or regulatory determination for specific species, the Service will identify such species, at minimum, as evaluation species.

Selecting evaluation species in addition to those for which the Service must provide a regulatory determination varies according to action-specific circumstances. In practice, an initial examination of the habitats affected and review of typically associated species of conservation interest are usually the first steps in identifying evaluation species. The purpose of Service mitigation planning is to develop a set of recommendations that would improve or, at minimum, maintain the current status of the affected resources. When available, conservation planning objectives (*i.e.,* the desired status of the affected resources) will inform mitigation planning (see section 5.1). Therefore, following those species for which we must provide a regulatory determination, species for which action effects would cause the greatest increase in the gap between their current and desired status are the principal choices for selection as evaluation species.

An evaluation species must occur within the affected area for at least one stage of its life history, but as other authorities permit, the Service may consider evaluation species that are not currently present in the affected area if the species is:

a. Identified in approved State or Federal fish and wildlife conservation, restoration, or improvement plans that include the affected area; or

b. likely to occur in the affected area during the reasonably foreseeable future with or without the proposed action due to natural species succession.

Evaluation species may or may not occupy the affected area year-round or when direct effects of the action would occur.

The Service should select the smallest set of evaluation species necessary to relate the effects of an action to the full suite of affected resources and applicable authorities, including all species for which the Service is required to issue opinions, permits, or regulatory determinations. When an action affects multiple resources, evaluation species should represent other affected species or aspects of the environment so that the mitigation measures formulated for the evaluation species will mitigate impacts to other similarly affected resources to the greatest extent possible. Characteristics of evaluation species that are useful in mitigation planning may include, but are not limited to, the following:

a. Species that are addressed in conservation plans relevant to the affected area and for which habitat objectives are articulated;

b. species strongly associated with an affected habitat type;

c. species for which habitat limiting factors are well understood;

d. species that perform a key role in ecological processes (*e.g.,* nutrient cycling, pollination, seed dispersal, predator-prey relations), which may, therefore, serve as indicators of ecosystem health;

e. species that require large areas of contiguous habitat, connectivity between disjunct habitats, or a distribution of suitable habitats along migration/movement corridors, which may, therefore, serve as indicators of ecosystem functions;

f. species that belong to a group of species (a guild) that uses a common environmental resource;

g. species for which sensitivity to one or more anticipated effects of the proposed action is documented;

h. species with special status (*e.g.,* species of concern in E.O. 13186, Birds of Conservation Concern);

i. species of cultural or religious significance to tribes;

j. species that provide monetary and non-monetary benefits to people from consumptive and non-consumptive uses including, but not limited to, fishing, hunting, bird watching, and educational, aesthetic, scientific, or subsistence uses;

k. species with characteristics such as those above that are also easily monitored to evaluate the effectiveness of mitigation actions; and/or

l. species that would be subject to direct mortality as a result of an action (*e.g.,* wind turbine).

5.5. Habitat Valuation

Species conservation relies on functional ecosystems, and habitat conservation is generally the best means of achieving species population objectives. Section 5.4 provides the guidance for selecting evaluation species to represent these habitat resources. The value of specific habitats to evaluation species varies widely, such that the loss or degradation of higher value habitats has a greater impact on achieving conservation objectives than the loss or degradation of an equivalent area of lower value habitats. To maintain landscape capacity to support species, our mitigation policy goal (Section 4) applies to all affected habitats of evaluation species, regardless of their value in a conservation context. However, the Service will recognize variable habitat value in formulating appropriate means and measures to mitigate the impacts of proposed actions, as described in this section. The primary purpose of habitat valuation is to determine the relative emphasis the Service will place on avoiding, minimizing, and compensating for impacts to habitats of evaluation species.

The Service will assess the overall value of affected habitats by considering their: (a) Scarcity; (b) suitability for evaluation species; and (c) importance to the conservation of evaluation species.

- *Scarcity* is the relative spatial extent (*e.g.,* rare, common, or abundant) of the habitat type in the landscape context.
- *Suitability* is the relative ability of the affected habitat to support one or more elements of the evaluation species' life history (reproduction, rearing, feeding, dispersal, migration, hibernation, or resting protected from disturbance, etc.) compared to other similar habitats in the landscape context. A habitat's ability to support an evaluation species may vary over time.
- *Importance* is the relative significance of the affected habitat, compared to other similar habitats in the landscape context, to achieving conservation objectives for the evaluation species. Habitats of high importance are irreplaceable or difficult to replace, or are critical to evaluation species by virtue of their role in achieving conservation objectives within the landscape (*e.g.,* sustain core habitat areas, linkages, ecological functions). Areas containing habitats of high importance are generally, but not always, identified in conservation plans addressing resources under Service authorities (*e.g.,* in recovery plans) or when appropriate, under authorities of partnering entities (*e.g.,* in State wildlife action plans, Landscape Conservation Cooperative conservation ''blueprints,'' etc.).

The Service has flexibility in applying appropriate methodologies and best available science when assessing the overall value of affected habitats, but also has a responsibility to communicate the rationale applied, as described in section 5.8 (Documentation Standards). These three parameters are the considerations that will inform Service determinations of the relative value of an affected habitat that will then be used to guide application of the mitigation hierarchy under this Policy.

For all habitats, the Service will apply appropriate and practicable measures to avoid and minimize impacts over time, generally in that order, before applying compensation as mitigation for remaining impacts. For habitats we determine to be of high-value (*i.e.,* scarce and of high suitability and high importance) however, the Service will seek avoidance of all impacts. For habitats the Service determines to be of lower value, we will consider whether compensation is more effective than other components of the mitigation hierarchy to maintain the current status of evaluation species, and if so, may seek compensation for most or all such impacts.

The relative emphasis given to mitigation types within the mitigation hierarchy depends on the landscape context and action-specific circumstances that influence the efficacy and efficiency of available mitigation means and measures. For example, it is generally more effective and efficient to achieve the mitigation policy goal by maximizing avoidance and minimization of impacts to habitats that are either rare, of high suitability, or of high importance, than to rely on other measures, because these qualities are typically not easily repaired, enhanced through onsite management, or replaced through compensatory actions. Similarly, compensatory measures may receive greater emphasis when strategic application of such measures (*i.e.,* to further the objectives of relevant conservation plans) would more effectively and efficiently achieve the policy goal for mitigating impacts to habitats that are either abundant, of low suitability, or of low importance.

When more than one evaluation species uses an affected habitat, the highest valuation will govern the Service's mitigation recommendations or requirements. Regardless of the habitat valuation, Service mitigation recommendations or requirements will represent our best judgment as to the most practicable means of ensuring that a proposed action improves or, at minimum, maintains the current status of the affected resources.

5.6. Means and Measures

The means and measures that the Service recommends for achieving the goal of this Policy (see section 4) are action- and resource-specific applications of the five general types of impact mitigation: Avoid, minimize, rectify, reduce over time, and compensate. The third and fourth mitigation types, rectify and reduce over time, are combined under the minimization label (*e.g.,* in mitigation planning for permitting actions under the Clean Water Act, in the Presidential Memorandum on Mitigating Impacts on Natural Resources from Development and Encouraging Related Private Investment, and in 600 DM 6.4), which we adopt for this Policy and for the structure of this section, while also providing specific examples for rectify and reduce. When carrying out its responsibilities under NEPA, the Service will apply the mitigation meanings and sequence in the NEPA regulations (40 CFR 1508.20). In particular, the Service will retain the ability to distinguish, as needed, between minimizing, rectifying, and reducing or eliminating the impact over time, as described in Appendix B: Service Mitigation Policy and NEPA.

The emphasis that the Service gives to each mitigation type depends on the evaluation species selected (section 5.4) and the value of their affected habitats (section 5.5). Habitat valuation aligns mitigation with conservation planning for the evaluation species by identifying where it is critical to avoid habitat impacts altogether and where compensation measures may more effectively advance conservation objectives. All appropriate mitigation measures have a clear connection with the anticipated effects of the action and are commensurate with the scale and nature of those effects.

Nothing in this Policy supersedes the statutes and regulations governing prohibited ''take'' of wildlife (*e.g.,* ESA-listed species, migratory birds, eagles); however, the Policy applies to mitigating the impacts to habitats and ecological functions that support populations of evaluation species, including federally protected species. Attaining the goal of improving or, at a minimum, maintaining the current status of evaluation species will often involve applying a combination of mitigation types. For each of the mitigation types, the following subsections begin with a quote of the regulatory language at 40 CFR 1508.20, then provides an expanded definition, explains its place in this Policy, and lists generalized examples of its intended use in Service mitigation recommendations. Ensuring that Service-recommended mitigation measures are implemented and effective is addressed in sections 5.8, Documentation, and 5.9, Followup.

5.6.1. Avoid—Avoid the impact altogether by not taking a certain action or parts of an action.

Avoiding impacts is the first tier of the mitigation hierarchy. Avoidance ensures that an action or a portion of the action has no direct or indirect effects during the planning horizon on fish, wildlife, plants, and their habitats. Actions may avoid direct effects to a resource (*e.g.,* by shifting the location of the construction footprint), but unless the action also avoids indirect effects caused by the action (*e.g.,* loss of habitat suitability through isolation from other habitats, accelerated invasive species colonization, degraded water quality, etc.), the Service will not consider that impacts to a resource are fully avoided. In some cases, indirect effects may cumulatively result in population and habitat losses that negate any conservation benefit from avoiding direct effects. An impact is unavoidable when an appropriate and practicable alternative to the proposed action that would not cause the impact is unavailable. The Service will recommend avoiding all impacts to high-value habitats. Generalized examples follow:

a. Design the timing, location, and/or operations of the action so that specific resource impacts would not occur.

b. Add structural features to the action, where such action is sustainable (*e.g.,* fish and wildlife passage structures, water treatment facilities, erosion control measures) that would eliminate specific losses to affected resources.

c. Adopt a non-structural alternative to the action that is sustainable and that would not cause resource losses (*e.g.,* stream channel restoration with appropriate grading and vegetation in lieu of rip-rap).

d. Adopt the no-action alternative.

5.6.2. Minimize (includes Rectify and Reduce Over Time)—Minimize the impact by limiting the degree or magnitude of the action and its implementation.

Minimizing impacts, together with rectifying and reducing over time, is the second tier of the mitigation hierarchy. Minimizing is reducing the intensity of the impact (*e.g.,* population loss, habitat loss, reduced habitat suitability, reduced habitat connectivity, etc.) to the maximum extent appropriate and practicable. Generalized examples of types of measures to minimize impacts follow:

a. Reduce the overall spatial extent and/or duration of the action.

b. Adjust the daily or seasonal timing of the action.

c. Retain key habitat features within the affected area that would continue to support life-history processes for the evaluation species.

d. Adjust the spatial configuration of the action to retain corridors for species movement between functional habitats.

e. Apply best management practices to reduce water quality degradation.

f. Adjust the magnitude, timing, frequency, duration, and/or rate-of-change of water flow diversions and flow releases to minimize the alteration of flow regime features that support life-history processes of evaluation species.

g. Install screens and other measures necessary to reduce aquatic life entrainment/impingement at water intake structures.

h. Install fences, signs, markers, and other measures necessary to protect resources from impacts (*e.g.,* fencing riparian areas to exclude livestock, marking a heavy-equipment exclusion zone around burrows, nest trees, and other sensitive areas).

Rectify — This subset of the second tier of the mitigation hierarchy involves ''repairing, rehabilitating, or restoring the affected environment.''

Rectifying impacts may possibly improve, relative to no-action conditions, a loss in habitat availability and/or suitability for evaluation species within the affected area and contribute to a net conservation gain. Rectifying impacts may also involve directly restoring a loss in populations through stocking. Generalized examples follow:

a. Repair physical alterations of the affected areas to restore pre-action conditions or improve habitat suitability for the evaluation species (*e.g.,* re-grade staging areas to appropriate contours, loosen compacted soils, restore altered stream channels to stable dimensions).

b. Plant and ensure the survival of appropriate vegetation where necessary in the affected areas to restore or improve habitat conditions (quantity and suitability) for the evaluation species and to stabilize soils and stream channels.

c. Provide for fish and wildlife passage through or around action-imposed barriers to movement.

d. Consistent with all applicable laws, regulations, policies, and conservation plans, stock species that experienced losses in affected areas when habitat conditions are able to support them in affected areas.

Reduce Over Time—This subset of the second tier of the mitigation hierarchy is to ''reduce or eliminate the impact over time by preservation and maintenance operations during the life of the action.''

Reducing impacts over time is preserving, enhancing, and maintaining the populations, habitats, and ecological functions that remain in an affected area following the impacts of the action, including areas that are successfully restored or improved through rectifying mitigation measures. Preservation, enhancement, and maintenance operations may improve upon conditions that would occur without the action and contribute to a net conservation gain (*e.g.,* when such operations would prevent habitat degradation expected through lack of management needed for an evaluation species). Reducing impacts over time is an appropriate means to achieving the mitigation goal after applying all appropriate and practicable avoidance, minimization, and rectification measures. Generalized examples follow:

a. Control land uses and limit disturbances to portions of the affected area that may continue to support the evaluation species.

b. Control invasive species in the affected areas.

c. Manage fire-adapted habitats in the affected areas with an appropriate timing and frequency of prescribed fire, consistent with applicable laws, regulations, policies, and conservation plans.

d. Maintain or replace equipment and structures in affected areas to prevent losses of fish and wildlife resources due to equipment failure (*e.g.,* cleaning and replacing trash racks and water intake screens, maintaining fences that limit access to environmentally sensitive areas).

e. Ensure proper training of personnel in operations necessary to preserve existing or restored fish and wildlife resources in the affected area.

5.6.3. Compensate—Compensate for the impact by replacing or providing substitute resources or environments.

Compensating for impacts is the third and final tier of the mitigation hierarchy. Compensation is protecting, maintaining, enhancing, and/or restoring habitats and ecological functions for an evaluation species, generally in an area outside the action's affected area. Mitigating some percentage of unavoidable impacts through measures that minimize, rectify, and reduce losses over time is often appropriate and practicable, but the costs or difficulties of mitigation may rise rapidly thereafter to achieve the mitigation planning goal entirely within the action's affected area. In such cases, a lesser or equivalent effort applied in another area may achieve greater benefits for the evaluation species. Likewise, the effort necessary to mitigate the impacts to a habitat of low suitability and low importance of a type that is relatively abundant in the landscape context (low-value habitat) will more likely achieve sustainable benefits for an evaluation species if invested in enhancing a habitat of moderate suitability and high importance. This Policy is designed to apply the various types of mitigation where they may achieve the greatest efficiency toward accomplishing the mitigation planning goal.

Onsite restoration of an affected resource meets the definition of rectify and is not considered compensation under this Policy. Although compensation is usually accomplished outside the affected area, onsite compensation under the definitions of this Policy involves provision of a habitat resource within the affected area that was not adversely affected by the action, but that would effectively address the action's effect on the conservation of the evaluation species. For example, an action reduces food resources for an evaluation species, but in dry years, water availability is a more limiting factor to the species' status in the affected area. Increasing the reliability of water resources onsite may represent a practicable measure that will more effectively maintain or improve the species' status than some degree of rectifying the loss of food resources alone, even though the action did not affect water availability. In this example, measures to restore food resources are rectification, and measures to increase water availability are onsite compensation.

Multiple mechanisms may accomplish compensatory mitigation, including habitat credit exchanges and other emerging mechanisms. Proponent-responsible mitigation, mitigation/conservation banks, and in-lieu fee funds are the three most common mechanisms. Descriptions of their general characteristics follow:

a. *Proponent-Responsible Mitigation.* A proponent-responsible mitigation site provides ecological functions and services in accordance with Service-defined or approved standards to offset the habitat impacts of a proposed action on particular species. As its name implies, the action proponent is solely responsible for ensuring that the compensatory mitigation activities are completed and successful. Proponent-responsible mitigation may occur onsite or offsite relative to action impacts. Like all compensatory mitigation measures, proponent-responsible mitigation should: (a) Maximize the benefit to impacted resources and their values, services, and functions; (b) implement and earn credits in advance of project impacts; and (c) reduce risk to achieving effectiveness.

b. *Mitigation/Conservation Banks.* A conservation bank is a site or suite of sites that provides ecological functions and services expressed as credits that are conserved and managed in

perpetuity for particular species and are used expressly to offset impacts occurring elsewhere to the same species. A mitigation bank is established to offset impacts to wetland habitats under section 404 of the Clean Water Act. Some mitigation banks may also serve the species-specific purposes of a conservation bank. Mitigation and conservation banks are typically for-profit enterprises that apply habitat restoration, creation, enhancement, and/or preservation techniques to generate credits on their banking properties. The establishment, operation, and use of a conservation bank requires a conservation bank agreement between the Service and the bank sponsor, and aquatic resource mitigation banks require a banking instrument approved by the U.S. Army Corps of Engineers. Responsibility for ensuring that compensatory mitigation activities are successfully completed is transferred from the action proponent to the bank sponsor at the time of the sale/transfer of credits. Mitigation and conservation banks generally provide mitigation in advance of impacts.

c. *In-Lieu Fee.* An in-lieu fee site provides ecological functions and services expressed as credits that are conserved and managed for particular species or habitats, and are used expressly to offset impacts occurring elsewhere to the same species or habitats. In-lieu fee programs are sponsored by governmental or nonprofit entities that collect funds used to establish in-lieu fee sites. In-lieu fee program operators apply habitat restoration, creation, enhancement, and/or preservation techniques to generate credits on in-lieu fee sites. The establishment, operation, and use of an in-lieu fee program may require an agreement between regulatory agencies of applicable authority, including the Service, and the in-lieu fee program operator. Responsibility for ensuring that compensatory mitigation activities are successfully completed is transferred from the action proponent to the in-lieu fee program operator at the time of sale/transfer of credits. Unlike mitigation or conservation banks, in-lieu fee programs generally provide compensatory mitigation after impacts have occurred. See section 5.7.1 for discussion of the Service's preference for compensatory mitigation that occurs prior to impacts.

The Service's preference is that proponents offset unavoidable resource losses in advance of their actions. Further, the Service considers the banking of habitat value for the express purpose of compensating for future unavoidable losses to be a legitimate form of mitigation, provided that withdrawals from a mitigation/conservation bank are commensurate with losses of habitat value (considering suitability and importance) for the evaluation species and not based solely upon the affected habitat acreage or the cost of land purchase and management. Resource losses compensated through purchase of conservation or mitigation bank credits may include, but are not limited to, habitat impacts to species covered by one or more Service authorities.

5.6.3.1 Equivalent Standards

The mechanisms for delivering compensatory mitigation differ according to: (1) Who is ultimately responsible for the success of the mitigation (the action proponent or a third party); (2) whether the mitigation site is within or adjacent to the impact site (onsite) or at another location that provides either equivalent or additional resource value (offsite); and (3) when resource benefits are secured (before or after resource impacts occur).

Regardless of the delivery mechanism, species conservation strategies and other landscape-level conservation plans that are based on the best scientific information available are expected to provide the basis for establishing and operating compensatory mitigation sites and programs. Such strategies and plans should also inform the assessment of species-specific impacts and benefits within a defined geography.

Service recommendations or requirements will apply equivalent ecological, procedural, and administrative standards for all compensatory mitigation mechanisms. Departmental guidance at DM 6.6 C declares a preference for compensatory mitigation measures that will maximize the benefit to affected resources, reduce risk to achieving effectiveness, and use transparent methodologies. Mitigation that the Service recommends or approves through any compensatory mitigation mechanism should incorporate, address, or identify the following that are intended to ensure successful implementation and durability:

a. Type of resource(s) and/or its value(s), service(s), and function(s), and amount(s) of such resources to be provided (usually expressed in acres or some other physical measure), the method of compensation (restoration, establishment, preservation, etc.), and the manner in which a landscape-scale approach has been considered;

b. factors considered during the site selection process;

c. site protection instruments to ensure the durability of the measure;

d. baseline information;

e. the mitigation value of such resources (usually expressed as a number of credits or other units of value), including a rationale for such a determination;

f. a mitigation work plan including the geographic boundaries of the measure, construction methods, timing, and other considerations;

g. a maintenance plan;

h. performance standards to determine whether the measure has achieved its intended outcome;

i. monitoring requirements;

j. long-term management commitments;

k. adaptive management commitments; and

l. financial assurance provisions that are sufficient to ensure, with a high degree of confidence, that the measure will achieve and maintain its intended outcome, in accordance with the measure's performance standards.

Third parties may assume the responsibilities for implementing proponent-responsible compensation. The third party accepting responsibility for the compensatory actions would assume all of the proponent's obligations for ensuring their success and durability.

5.6.3.2 Research and Education

Research and education, although important to the conservation of many resources, are not typically considered compensatory mitigation, because they do not directly offset adverse effects to species or their habitats. In rare circumstances, research or education that is directly linked to reducing threats, or that provides a quantifiable benefit to the species, may be included as part of a mitigation package. These circumstances may exist when: (a) The major threat to a resource is something other than habitat loss; (b) the Service can reasonably expect the outcome of research or education to more than offset the impacts; (c) the proponent commits to using the results/recommendations of the research to mitigate action impacts; or (d) no other reasonable options for mitigation are available.

5.7. Recommendations

Consistent with applicable authorities, the Policy's fundamental principles, and the mitigation planning principles described herein, the Service will provide recommendations to mitigate the impacts of proposed actions at the earliest practicable stage of planning to ensure maximum

consideration. The Service will develop mitigation recommendations in cooperation with the action proponent and/or the applicable authorizing agency, considering the cost estimates and other information that the proponent/agency provides about the action and its effects, and relying on the best scientific information available. Service recommendations will represent our best judgment as to the most practicable means of ensuring that a proposed action improves or, at minimum maintains, the current status of the affected resources. The Service will provide mitigation recommendations under an explicit expectation that the action proponent or the applicable authorizing agency is fully responsible for implementing or enforcing the recommendations.

The Service will strive to provide mitigation recommendations, including reasonable alternatives to the proposed action, which, if fully and properly implemented, would achieve the best possible outcome for affected resources while also achieving the stated purpose of the proposed action. However, on a case-by-case basis, the Service may recommend the ''no action'' alternative. For example, when appropriate and practicable means of avoiding significant impacts to high-value habitats and associated species are not available, the Service may recommend the ''no action'' alternative.

5.7.1. Preferences for Compensatory Mitigation

Unless action-specific circumstances warrant otherwise, the Service will observe the following preferences in providing compensatory mitigation recommendations:

Advance compensatory mitigation. When compensatory mitigation is necessary, the Service prefers compensatory mitigation measures that are implemented and earn credits in advance of project impacts. Even though compensatory mitigation may be initiated in advance of project impacts, there may still be temporal losses that need to be addressed. The extent of the compensatory measures that are not completed until after action impacts occur will account for the interim loss of resources consistent with the assessment principles (section 5.3).

Compensatory mitigation in relation to landscape strategies and plans. The preferred location for Service-recommended or required compensatory mitigation measures is within the boundaries of an existing strategically planned, interconnected conservation network that serves the conservation objectives for the affected resources in the relevant landscape context. Compensatory measures should enhance habitat connectivity or contiguity, or strategically improve targeted ecological functions important to the affected resources (*e.g.*, enhance the resilience of fish and wildlife populations challenged by the widespread stressors of climate change).

Similarly, Service-recommended or required mitigation should emphasize avoiding impacts to habitats located within a planned conservation network, consistent with the Habitat Valuation guidance (section 5.5).

Where existing conservation networks or landscape conservation plans are not available for the affected resources, Service personnel should develop mitigation recommendations based on best available scientific information and professional judgment that would maximize the effectiveness of the mitigation measures for the affected resources, consistent with this Policy's guidance on Integrating Mitigation Planning with Conservation Planning (section 5.1).

5.7.2. Recommendations for Locating Compensatory Mitigation on Public or Private Lands

When appropriate as specified in this Policy, the Service may recommend establishing compensatory mitigation at locations on private, public, or tribal lands that provide the maximum conservation benefit for the affected resources. The Service will generally, but not always, recommend compensatory mitigation on lands with the same ownership classification as the lands where impacts occurred, *e.g.*, impacts to evaluation species on private lands are generally mitigated on private lands and impacts to evaluation species on public lands are generally mitigated on public lands. However, most private lands are not permanently dedicated to conservation purposes, and are generally the most vulnerable to impacts resulting from land and water resources development actions; therefore, mitigating impacts to any type of land ownership on private lands is usually acceptable as long as they are durable. Locating compensatory mitigation on public lands for impacts to evaluation species on private lands is also possible, and in some circumstances may best serve the conservation objectives for evaluation species. Such compensatory mitigation options require careful consideration and justification relative to the Service's mitigation planning goal, as described below.

The Service generally only supports locating compensatory mitigation on (public or private) lands that are already designated for the conservation of natural resources if additionality (see section 6, Definitions) is clearly demonstrated and is legally attainable. In particular, the Service usually does not support offsetting impacts to private lands by locating compensatory mitigation on public lands designated for conservation purposes because this practice risks a long-term net loss in landscape capacity to sustain species by relying increasingly on public lands to serve conservation purposes. However, the Service acknowledges that public ownership does not automatically confer long-term protection and/or management for evaluation species in all cases, which may justify locating compensatory mitigation measures on public lands, including compensation for impacts to evaluation species on public or private lands. The Service may recommend compensating for private-land impacts to evaluation species on public lands (whether designated for conservation of natural resources or not) when:

a. Compensation is an appropriate means of achieving the mitigation planning goal, as specified in this Policy;

b. the compensatory mitigation would provide additional conservation benefits above and beyond measures the public agency is foreseeably expected to implement absent the mitigation (only such additional benefits are counted towards achieving the mitigation planning goal);

c. the additional conservation benefits are durable, *i.e.*, lasting as long as the impacts that prompted the compensatory mitigation;

d. consistent with and not otherwise prohibited by all relevant statutes, regulations, and policies; and

e. the public land location would provide the best possible conservation outcome, such as when private lands suitable for compensatory mitigation are unavailable or are available but do not provide an equivalent or greater contribution towards offsetting the impacts to meet the mitigation planning goal for the evaluation species.

Ensuring the durability of compensatory mitigation on public lands may require multiple tools beyond land use plan designations, including right-of-way grants, withdrawals, disposal or lease of land for conservation, conservation easements, cooperative agreements, and agreements with third parties. Mechanisms to ensure durability of land protection for compensatory mitigation on public and private lands vary among agencies, but should preclude conflicting uses and ensure that protection and management

of the mitigation land is commensurate with the magnitude and duration of impacts.

When the public lands under consideration for use as compensatory mitigation for impacts on private lands are National Wildlife Refuge System (NWRS) lands, additional considerations covered in the Service's Final Policy on the NWRS and Compensatory Mitigation Under the Section 10/404 Program (64 FR 49229–49234, September 10, 1999) may apply. Under that policy, the Regional Director will recommend the mitigation plan proposing to site compensatory mitigation on NWRS lands to the Director for approval.

5.7.3. Recommendations Related to Recreation

Mitigation for impacts to recreational uses of wildlife and habitat. The Service will generally not recommend measures intended to increase recreational value as mitigation for habitat losses. The Service may address impacts to recreational uses that are not otherwise addressed through habitat mitigation, but will do so with separate and distinct recreational use mitigation recommendations.

Recreational use of mitigation lands. Consistent with applicable statutes, the Service supports those recreational uses on mitigation lands that are compatible with the conservation goals of those mitigation lands. If certain uses are incompatible with the conservation goals for the mitigation lands, for example, off-road vehicle use in an area conserved for wildlife intolerant to disturbance, the Service will recommend against such uses.

5.8. Documentation

The Service should advise action proponents and decisionmaking agencies at timely stages of the planning process. To ensure effective consideration of Service recommendations, it is generally possible to communicate key concerns that will inform our recommendations early in the mitigation planning process, communicate additional components during and following an initial assessment of effects, and provide final written recommendations toward the end of the process, but in advance of a final decision for the action. The following outline lists the components applicable to these three planning stages. Because actions vary substantially in scope and complexity, these stages may extend over a period of years or occur almost simultaneously, which may necessitate consolidating some of the components listed below. For all actions, the level of the Service's analysis and documentation should be commensurate with the scope and severity of the potential impacts to resources. Where compensation is used to address impacts, additional information outlined in section 5.6.3 may be necessary.

A. Early Planning

1. Inform the proponent of the Service's goal to improve or, at minimum, maintain the status of affected resources, and that the Service will identify opportunities for a net conservation gain if appropriate.

2. Coordinate key data collection and planning decisions with the proponent, relevant tribes, and Federal and State resource agencies; including, but not limited to:

a. Delineate the affected area;

b. define the planning horizon;

c. identify species that may occur in the affected area that the Service is likely to consider as evaluation species for mitigation planning;

d. identify landscape-scale strategies and conservation plans and objectives that pertain to these species and the affected area;

e. define surveys, studies, and preferred methods necessary to inform effects analyses; and

f. as necessary, identify reasonable alternatives to the proposed action that may achieve the proponent's purpose and the Service's no-net-loss goal for resources.

3. As early as possible, inform the proponent of the presence of probable high-value habitats in the affected area (see section 5.5), and advise the proponent of Service policy to avoid all impacts to such habitats.

B. Effects Assessment

1. Coordinate selection of evaluation species with relevant tribes, Federal and State resource agencies, and action proponents.

2. Communicate the Service's assessment of the value of affected habitats to evaluation species.

3. If high-value habitats are affected, advise the proponent of the Service's policy to avoid all impacts to such habitats.

4. Assess action effects to evaluation species and their habitats.

5. Formulate mitigation options that would achieve the mitigation policy goal (an appropriate net conservation gain or, at minimum, no net loss) in coordination with the proponent and relevant tribes, and Federal and State resource agencies.

C. Final Recommendations

The Service's final mitigation recommendations should communicate in writing the following:

1. The authorities under which the Service is providing the mitigation recommendations consistent with this Policy.

2. A description of all mitigation measures that are reasonable and appropriate to ensure that the proposed action improves or, at minimum, maintains the current status of affected fish, wildlife, plants, and their habitats.

3. The following elements should be specified within a mitigation plan or equivalent by either the Service, action proponents, or in collaboration:

a. Measurable objectives;

b. implementation assurances, including financial, as applicable;

c. effectiveness monitoring;

d. additional adaptive management actions as may be indicated by monitoring results; and

e. reporting requirements.

4. An explanation of the basis for the Service recommendations, including, but not limited to:

a. Evaluation species used for mitigation planning;

b. the assessed value of affected habitats to evaluation species;

c. predicted adverse and beneficial effects of the proposed action;

d. predicted adverse and beneficial effects of the recommended mitigation measures; and

e. the rationale for our determination that the proposed action, if implemented with Service recommendations, would achieve the mitigation policy goal.

5. The Service's expectations of the proponent's responsibility to implement the recommendations.

5.9. Followup

The Service encourages, supports, and will initiate, whenever practicable and within our authority, post-action monitoring studies and evaluations to determine the effectiveness of recommendations in achieving the mitigation planning goal. In those instances where Service personnel determine that action proponents have not carried out those agreed-upon mitigation means and measures, the Service will request that the parties responsible for regulating the action initiate corrective measures, or will initiate access to available assurance measures. These provisions also apply when the Service is the action proponent.

6. Definitions

Definitions in this section apply to the implementation of this Policy and were developed to provide clarity and consistency within the policy itself, and to ensure broad, general applicability to all mitigation processes in which the Service engages. Some Service authorities define some of the terms in this section differently or more specifically, and the definitions herein do not substitute for statutory or regulatory definitions in the exercise of those authorities.

Action. An activity or program implemented, authorized, or funded by Federal agencies; or a non-Federal activity or program for which one or more of the Service's authorities apply to make mitigation recommendations, specify mitigation requirements, or provide technical assistance for mitigation planning.

Additionality. A compensatory mitigation measure is additional when the benefits of a compensatory mitigation measure improve upon the baseline conditions of the impacted resources and their values, services, and functions in a manner that is demonstrably new and would not have occurred without the compensatory mitigation measure.

Affected area. The spatial extent of all effects, direct and indirect, of a proposed action to fish, wildlife, plants, and their habitats.

Affected resources. Those resources, as defined by this Policy, that are subject to the adverse effects of an action.

Baseline. Current and future environmental conditions (relevant to the resources covered by this Policy) that are expected without implementation of the proposed action under review. Predictions about future environmental conditions without the action should account for natural species succession, implementation of approved land and resource management plans, and any other reasonably foreseeable factors that influence these conditions.

Compensatory mitigation. Compensatory mitigation means to compensate for remaining unavoidable impacts after all appropriate and practicable avoidance and minimization measures have been applied, by replacing or providing substitute resources or environments (see 40 CFR 1508.20.) through the restoration, establishment, enhancement, or preservation of resources and their values, services, and functions. Impacts are authorized pursuant to a regulatory or resource management program that issues permits, licenses, or otherwise approves activities. In this Policy, ''mitigation'' is a deliberate expression of the full mitigation hierarchy, and ''compensatory mitigation'' describes only the last phase of that sequence.

Conservation. In the context of this Policy, the noun ''conservation'' is a general label for the collective practices, plans, policies, and science that are used to protect and manage species and their habitats to achieve desired outcomes.

Conservation objective. A measurable expression of a desired outcome for a species or its habitat resources. Population objectives are expressed in terms of abundance, trend, vital rates, or other measurable indices of population status. Habitat objectives are expressed in terms of the quantity, quality, and spatial distribution of habitats required to attain population objectives, as informed by knowledge and assumptions about factors influencing the ability of the landscape to sustain species.

Conservation planning. The identification of strategies for achieving conservation objectives. Conservation plans include, but are not limited to, recovery plans, habitat conservation plans, watershed plans, green infrastructure plans, and others developed by Federal, State, tribal or local government agencies or non-governmental organizations. This Policy emphasizes the use of landscape-scale approaches to conservation planning.

Durability. A mitigation measure is durable when the effectiveness of the measure is sustained for the duration of the associated impacts of the action, including direct and indirect impacts.

Effects. Changes in environmental conditions that are relevant to the resources covered by this Policy.

Direct effects are caused by the action and occur at the same time and place.

Indirect effects are caused by the action, but occur at a later time and/or another place.

Cumulative effects are caused by other actions and processes, but may refer also to the collective effects on a resource, including direct and indirect effects of the action. The causal agents and spatial/temporal extent for considering cumulative effects varies according to the authority(ies) under which the Service is engaged in mitigation planning (*e.g.,* refer to the definitions of cumulative effects and cumulative impacts in ESA regulations and NEPA, respectively), and the Service will apply statute-specific definitions in the application of this Policy.

Evaluation species. Fish, wildlife, and plant resources in the affected area that are selected for effects analysis and mitigation planning.

Habitat. An area with spatially identifiable physical, chemical, and biological attributes that supports one or more life-history processes for evaluation species. Mitigation planning should delineate habitat types in the affected area using a classification system that is applicable to both the region(s) of the affected area and the selected evaluation species in order to facilitate determinations of habitat scarcity, suitability, and importance.

Habitat Credit Exchange. An environmental market that operates as a clearinghouse in which an exchange administrator, operating as a mitigation sponsor, manages credit transactions between compensatory mitigation providers and project permittees. This is in contrast to the direct transactions between compensatory mitigation providers and permittees that generally occur through conservation banking and in-lieu fee programs. Exchanges provide ecological functions and services expressed as credits that are permanently conserved and managed for specified species and are used to compensate for adverse impacts occurring elsewhere to the same species.

Habitat value. An assessment of an affected habitat with respect to an evaluation species based on three attributes—scarcity, suitability, and importance—which define its conservation value to the evaluation species in the context of this Policy. The three parameters are assessed independently but are sometimes correlated. For example, rare or unique habitat types of high suitability for evaluation species are also very likely of high importance in achieving conservation objectives.

Impacts. In the context of this Policy, impacts are adverse effects relative to the affected resources.

Importance. The relative significance of the affected habitat, compared to other examples of a similar habitat type in the landscape context, to achieving conservation objectives for the evaluation species. Habitats of high importance are irreplaceable or difficult to replace, or are critical to evaluation species by virtue of their role in achieving conservation objectives within the landscape (*e.g.,* sustain core habitat areas, linkages, ecological functions). Areas containing habitats of high importance are generally, but not always, identified in conservation plans addressing resources under Service authorities (*e.g.,* in recovery plans) or when appropriate, under authorities of

partnering entities (*e.g.,* in State wildlife action plans, Landscape Conservation Cooperative conservation ''blueprints,'' etc.).

Landscape. An area encompassing an interacting mosaic of ecosystems and human systems that is characterized by a set of common management concerns. The most relevant concerns to the Service and this Policy are those associated with the conservation of species and their habitats. The landscape is not defined by the size of the area, but rather the interacting elements that are meaningful to the conservation objectives for the resources under consideration.

Landscape-scale approach. For the purposes of this Policy, the landscape-scale approach applies the mitigation hierarchy for impacts to resources and their values, services, and functions at the relevant scale, however narrow or broad, necessary to sustain, or otherwise achieve, established goals for those resources and their values, services, and functions. A landscape-scale approach should be used when developing and approving strategies or plans, reviewing projects, or issuing permits. The approach identifies the needs and baseline conditions of targeted resources and their values, services, and functions, reasonably foreseeable impacts, cumulative impacts of past and likely projected disturbance to those resources, and future disturbance trends. The approach then uses such information to identify priorities for avoidance, minimization, and compensatory mitigation measures across that relevant area to provide the maximum benefit to the impacted resources and their values, services, and functions, with full consideration of the conditions of additionality and durability.

Landscape-scale strategies and plans. For the purposes of this Policy, landscape-scale strategies and plans identify clear management objectives for targeted resources and their values, services, and functions at landscape-scales, as necessary, including across administrative boundaries, and employ the landscape-scale approach to identify, evaluate, and communicate how mitigation can best achieve those management objectives. Strategies serve to assist project applicants, stakeholders, and land managers in pre-planning as well as to inform NEPA analysis and decisionmaking, including decisions to develop and approve plans, review projects, and issue permits. Land use planning processes provide opportunities for identifying, evaluating, and communicating mitigation in advance of anticipated land use activities. Consistent with their statutory authorities, land management agencies may develop landscape-scale strategies through the land use planning process, or incorporate relevant aspects of applicable and existing landscape-scale strategies into land use plans through the land use planning process.

Mitigation. In the context of this Policy, the noun ''mitigation'' is a label for all types of measures (see Mitigation Types) that a proponent would implement toward achieving the Service's mitigation goal.

Mitigation hierarchy. The elements of mitigation, summarized as avoidance, minimization, and compensation, provide a sequenced approach to addressing the foreseeable impacts to resources and their values, services, and functions. First, impacts should be avoided by altering project design and/or location or declining to authorize the project; then minimized through project modifications and permit conditions; and, generally, only then compensated for remaining unavoidable impacts after all appropriate and practicable avoidance and minimization measures have been applied.

Mitigation planning. The process of assessing the effects of an action and formulating mitigation measures that would achieve the mitigation planning goal.

Mitigation goal. The Service's goal for mitigation is to improve or, at minimum, maintain the current status of affected resources, as allowed by applicable statutory authority and consistent with the responsibilities of action proponents under such authority.

Mitigation types. General classes of methods for mitigating the impacts of an action (Council on Environmental Quality, 40 CFR 1508.20(a–e)), including:

(a) Avoid the impact altogether by not taking the action or parts of the action;

(b) minimize the impact by limiting the degree or magnitude of the action and its implementation;

(c) rectify the impact by repairing, rehabilitating, or restoring the affected environment;

(d) reduce or eliminate the impact over time by preservation and maintenance operations during the life of the action; and

(e) compensate for the impact by replacing or providing substitute resources or environments.

These five mitigation types, as enumerated by CEQ, are compatible with this Policy; however, as a practical matter, the mitigation elements are categorized into three general types that form a sequence: Avoidance, minimization, and compensation for remaining unavoidable (also known as residual) impacts. Section 5.6 (Mitigation Means and Measures) of this Policy provides expanded definitions and examples for each of the mitigation types.

Practicable. Available and capable of being done after taking into consideration existing technology, logistics, and cost in light of a mitigation measure's beneficial value and a land use activity's overall purpose, scope, and scale.

Proponent. The agency(ies) proposing an action, and if applicable, any applicant(s) for agency funding or authorization to implement a proposed action.

Resources. Fish, wildlife, plants, and their habitats for which the Service has authority to recommend or require the mitigation of impacts resulting from proposed actions.

Scarcity. The relative spatial extent (*e.g.,* rare, common, or abundant) of the habitat type in the landscape context.

Suitability. The relative ability of the affected habitat to support one or more elements of the evaluation species' life history (reproduction, rearing, feeding, dispersal, migration, hibernation, or resting protected from disturbance, etc.) compared to other similar habitats in the landscape context. A habitat's ability to support an evaluation species may vary over time.

Unavoidable. An impact is unavoidable when an appropriate and practicable alternative to the proposed action that would not cause the impact is not available.

Appendix A. Authorities and Direction for Service Mitigation Recommendations

A. Relationship of Service Mitigation Policy to Other Policies, Regulations

This section is intended to describe the interaction of existing policies and regulations with this Policy in agency processes. Descriptions regarding the application of mitigation concepts generally, and elements of this Policy specifically, for each of the listed authorities follow:

1. The Bald and Golden Eagle Protection Act (16 U.S.C. 668–668d) (Eagle Act)

The Eagle Act prohibits take of bald eagles and golden eagles except pursuant to Federal regulations. The Eagle Act regulations at title 50, part 22 of the Code of Federal Regulations (CFR), define the ''take'' of an eagle to include the following actions: ''pursue, shoot, shoot at, poison, wound, kill, capture, trap, collect, destroy, molest, or disturb'' (§ 22.3).

Except for protecting eagle nests, the Eagle Act does not directly protect eagle habitat. However, because disturbing eagles is a violation of the Act, some activities within

eagle habitat, including some habitat modification, can result in illegal take in the form of disturbance. ''Disturb'' is defined as ''to agitate or bother a bald or golden eagle to a degree that causes, or is likely to cause, based on the best scientific information available, (1) injury to an eagle, (2) a decrease in its productivity, by substantially interfering with normal breeding, feeding, or sheltering behavior, or (3) nest abandonment, by substantially interfering with normal breeding, feeding, or sheltering behavior.''

The Eagle Act allows the Secretary of the Interior to authorize certain otherwise prohibited activities through regulations. The Service is authorized to prescribe regulations permitting the taking, possession, and transportation of bald and golden eagles provided such permits are ''compatible with the preservation of the bald eagle or the golden eagle'' (16 U.S.C. 668a). Permits are issued for scientific and exhibition purposes; religious purposes of Native American tribes; falconry (golden eagles only); depredation; protection of health and safety; golden eagle nest take for resource development and recovery; nonpurposeful (incidental) take; and removal or destruction of eagle nests.

The Eagle Act provides for mitigation in the form of avoidance and minimization by restricting permitted take to circumstances where take is ''necessary.'' While not expressly addressed, compensatory mitigation can also be used as a tool for ensuring that authorized take is consistent with the preservation standard of the Eagle Act. The regulations for eagle nest take permits and eagle non-purposeful incidental take permits explicitly provide for compensatory mitigation. Although eagle habitat (beyond nest structures) is not directly protected by the Eagle Act, the statute and implementing regulations do not preclude the use of habitat restoration, enhancement, and protection as compensatory mitigation.

At the time of development of this Appendix A, the threshold for authorized take of golden eagles is set at zero throughout the United States because golden eagle populations appear to be stable and potentially declining, and may not be able to absorb additional take while still maintaining current numbers of breeding pairs over time. Accordingly, all permits for golden eagle take must incorporate compensatory mitigation. Because golden eagle populations are currently primarily constrained by a high level of unauthorized human-caused mortality, rather than habitat loss, permits for golden eagle take require mitigation to be in the form of a reduction of a source of mortality; however, habitat restoration and enhancement could potentially offset permitted take in some situations, once reliable standards and metrics are developed to support the application of habitat-based mitigation to offset permitted take.

2. Clean Water Act (33 U.S.C. 1251 *et seq.*)

Several locations within the statute under section 404 describe the responsibilities and roles of the Service. The authority at section 404(m) is most directly relevant to the Service's engagement of Clean Water Act permitting processes to recommend mitigation for impacts to aquatic resources nationwide and is routinely used by Ecological Services Field Offices. At section 404(m), the Secretary of the Army is required to notify the Secretary of the Interior, through the Service Director, that an individual permit application has been received or that the Secretary proposes to issue a general permit. The Service will submit any comments in writing to the Secretary of the Army (Corps of Engineers) within 90 days. The Service has the opportunity to engage several thousand Corps permit actions affecting aquatic habitats and wildlife annually and to assist the Corps of Engineers in developing permit terms that avoid, minimize, or compensate for permitted impacts. The Department of the Army has also entered into a Memorandum of Agreement with the Department of the Interior under section 404(q) of the Clean Water Act. The current Memorandum of Agreement, signed in 1992, provides procedures for elevating national or regional issues relating to resources, policy, procedures, or regulation interpretation.

3. Endangered Species Act of 1973, as Amended (16 U.S.C. 1531 *et seq.*)

A primary purpose of the Endangered Species Act (ESA) of 1973 as amended (16 U.S.C. 1531 *et seq.*) is to conserve the ecosystems upon which species listed as endangered and threatened depend. Conserving listed species involves the use of all methods and procedures that are necessary for their recovery, which includes mitigating the impacts of actions to listed species and their habitats. All actions must comply with the applicable prohibitions against taking endangered animal species under ESA section 9 and taking threatened animal species under regulations promulgated through ESA section 4(d). Under ESA section 7(a)(2), Federal agencies must consult with the Service(s) to ensure that any actions they fund, authorize, or carry out are not likely to jeopardize the continued existence of listed species or adversely modify designated critical habitat. Federal agencies, and any permit or license applicants, may be exempted from the prohibitions against incidental taking for actions that are not likely to jeopardize the continued existence of the species or result in the destruction or adverse modification of designated critical habitat, if the terms and conditions of the incidental take statement are implemented.

The Service may permit incidental taking resulting from a non-Federal action under ESA section 10(a)(1)(B) after approving the proponent's habitat conservation plan (HCP) under section 10(a)(2)(A). The HCP must specify the steps the permit applicant will take to minimize and mitigate such impacts, and the funding that will be available to implement such steps. The basis for issuing a section 10 permit includes a finding that the applicant will, to the maximum extent practicable, minimize and mitigate the impacts of incidental taking, and a finding that the taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild.

This Policy applies to all actions that may affect ESA-protected resources except for conservation/recovery permits under section 10(a)(1)(A). The Service will recommend mitigation for impacts to listed species, designated critical habitat, and other species for which the Service has authorized mitigation responsibilities consistent with the guidance of this Policy, which proponents may adopt as conservation measures to be added to the project descriptions of proposed actions. Such adoption may ensure that actions are not likely to jeopardize species or adversely modify designated critical habitat; however, such adoption alone does not constitute compliance with the ESA. Federal agencies must complete consultation per the requirements of section 7 to receive Service concurrence with ''may affect, not likely to adversely affect'' determinations, biological opinions for ''likely to adversely affect'' determinations, and incidental take statement terms and conditions. Proponents of actions that do not require Federal authorization or funding must complete the requirements under section 10(a)(2) to receive an incidental take permit. Mitigation planning under this Policy applies to all species and their habitats for which the Service has authorities to recommend mitigation on a particular action, including listed species and critical habitat. Although this Policy is intended, in part, to clarify the role of mitigation in endangered species conservation, nothing herein replaces, supersedes, or substitutes for the ESA implementing regulations.

All forms of mitigation are potential conservation measures of a proposed Federal action in the context of section 7 consultation and are factored into Service analyses of the effects of the action, including any voluntary mitigation measures proposed by a project proponent that are above and beyond those required by an action agency. Service regulations at 50 CFR 402.14(g)(8) affirm the need to consider ''any beneficial actions'' in formulating a biological opinion, including those ''taken prior to the initiation of consultation.'' Because jeopardy and adverse modification analyses weigh effects in the action area relative to the status of the species throughout its listed range and to the status of all designated critical habitat units, respectively, ''beneficial actions'' may also include proposed conservation measures for the affected species within its range but outside of the area of adverse effects (*e.g.*, compensation).

Mitigation measures included in proposed actions that avoid and minimize the likelihood of adverse effects and incidental take are also relevant to the Service's concurrence with ''may affect, not likely to adversely affect'' determinations through informal consultation. All mitigation measures included in proposed actions that benefit listed species and/or designated critical habitat, including compensatory measures, are relevant to jeopardy and adverse modification conclusions in Service biological opinions.

Likewise, the Service may apply all forms of mitigation, consistent with the guidance of this Policy, in formulating a reasonable and prudent alternative that would avoid jeopardy/adverse modification, provided that it is also consistent with the regulatory

definition of a reasonable and prudent alternative at 50 CFR 402.02. It is preferable to avoid or minimize impacts to listed species or critical habitat before rectifying, reducing over time, or compensating for such impacts. Under some limited circumstances, however, the latter forms of mitigation may provide all or part of the means to achieving the best possible conservation outcome for listed species consistent with the purpose, authority, and feasibility requirements of a reasonable and prudent alternative.

For Federal actions that are not likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of habitat, the Service may provide a statement specifying those reasonable and prudent measures that are necessary or appropriate to minimize the impacts of taking incidental to such actions on the affected listed species. That incidental take statement must comply with all applicable regulations. No proposed mitigation measures relieve an action proponent of the obligation to obtain incidental take exemption through an incidental take statement (Federal actions) or authorization through an incidental take permit (non-Federal actions), as appropriate, for unavoidable incidental take that may result from a proposed action.

4. Executive Order 13186 (E.O. 13186), Responsibilities of Federal Agencies To Protect Migratory Birds

E.O. 13186 directs Federal departments and agencies to avoid or minimize adverse impacts on ''migratory bird resources,'' defined as ''migratory birds and the habitats upon which they depend.'' These acts of avian protection and conservation are implemented under the auspices of the MBTA, the Eagle Act, the Fish and Wildlife Coordination Act (16 U.S.C. 661–666c), the ESA, the National Environmental Policy Act, and ''other established environmental review process'' (section 3(e)(6)). Additionally, E.O. 13186 directs Federal agencies whose activities will likely result in measurable negative effects on migratory bird populations to collaboratively develop and implement an MOU with the Service that promotes the conservation of migratory bird populations. These MOUs can clarify how an agency can mitigate the effects of impacts and monitor implemented conservation measures. MOUs can also define how appropriate corrective measures can be implemented when needed, as well as what proactive conservation actions or partnerships can be formed to advance bird conservation, given the agency's existing mission and mandate.

The Service policy regarding its responsibility to E.O. 13186 (720 FW 2) states ''all Service employees should: A. Implement their mission-related activities and responsibilities in a way that furthers the conservation of migratory birds and minimizes and avoids the potential adverse effects of migratory bird take, with the goal of eliminating take'' (2.2 A). The policy also stipulates that the Service will support the conservation intent of the migratory bird conventions by integrating migratory bird conservation measures into our activities, including measures to avoid or minimize adverse impacts on migratory bird resources; restoring and enhancing the habitat of migratory birds; and preventing or abating the pollution or detrimental alteration of the environment for the benefit of migratory birds.

5. Executive Order 13653 (E.O. 13653), Preparing the United States for the Impacts of Climate Change

E.O. 13653 directs Federal agencies to improve the Nation's preparedness and resilience to climate change impacts. The agencies are to promote: (1) Engaged and strong partnerships and information sharing at all levels of government; (2) risk-informed decisionmaking and the tools to facilitate it; (3) adaptive learning, in which experiences serve as opportunities to inform and adjust future actions; and (4) preparedness planning.

Among the provisions under section 3, *Managing Lands and Waters for Climate Preparedness and Resilience*, is this: ''agencies shall, where possible, focus on program and policy adjustments that promote the dual goals of greater climate resilience and carbon sequestration, or other reductions to the sources of climate change . . . [a]gencies shall build on efforts already completed or underway . . . as well as recent interagency climate adaptation strategies.'' Section 5 specifies that agencies shall develop or continue to develop, implement, and update comprehensive plans that integrate consideration of climate change into agency operations and overall mission objectives.

The *Priority Agenda: Enhancing The Climate Resilience of America's Natural Resources* (October 2014), called for in E.O. 13653, includes provisions to develop and provide decision support tools for ''climate-smart natural resource management'' that will improve the ability of agencies and landowners to manage for resilience to climate change impacts.

The Service policy on climate change adaptation (056 FW 1) states that the Service will ''effectively and efficiently incorporate and implement climate change adaptation measures into the Service's mission, programs, and operations.'' This includes using the best available science to coordinate an appropriate adaptive response to impacts on fish, wildlife, plants, and their habitats. The policy also specifically calls for delivering landscape conservation actions that build resilience or support the ability of fish, wildlife, and plants to adapt to climate change.

6. Federal Power Act (16 U.S.C. 791–828c) (FPA)

The Federal Energy Regulatory Commission (FERC) authorizes non-Federal hydropower projects pursuant to the FPA. The Service's roles in hydropower project review are primarily defined by the FPA, as amended in 1986 by the Electric Consumers Protection Act, which explicitly ascribes those roles to the Service. The Service has mandatory conditioning authority for projects on National Wildlife Refuge System lands under section 4(e) and to prescribe fish passage to enhance and protect native fish runs under section 18. Under section 10(j), FERC is required to include license conditions that are based on recommendations made pursuant to the Fish and Wildlife Coordination Act by States, NOAA, and the Service for the adequate and equitable protection, mitigation, and enhancement of fish, wildlife, and their habitats.

7. Fish and Wildlife Conservation Act (16 U.S.C. 2901–2912)

Specifically, Federal Conservation of Migratory Nongame Birds (16 U.S.C. 2912) requires the Service to ''identify the effects of environmental changes and human activities on species, subspecies, and populations of all migratory nongame birds'' (section 2912(2)); ''identify conservation actions to assure that species, subspecies, and populations of migratory nongame birds . . . do not reach the point at which the measures provided pursuant to the Endangered Species Act of 1973, as amended (16 U.S.C. 1531–1543), become necessary'' (section 2912(4)); and ''identify lands and waters in the United States and other nations in the Western Hemisphere whose protection, management, or acquisition will foster the conservation of species, subspecies, and populations of migratory nongame birds. . . .'' (section 2912(5)).

8. Fish and Wildlife Coordination Act (16 U.S.C. 661–667e) (FWCA)

The FWCA requires Federal agencies developing water-related projects to consult with the Service, NOAA, and the States regarding fish and wildlife impacts. The FWCA establishes fish and wildlife conservation as a coequal objective of all federally funded, permitted, or licensed water-related development projects. Federal action agencies are to include justifiable means and measures for fish and wildlife, and the Service's mitigation and enhancement recommendations are to be given full and equal consideration with other project purposes. The Service's mitigation recommendations may include measures addressing a broad set of habitats beyond the aquatic impacts triggering the FWCA and taxa beyond those covered by other resource laws. Action agencies are not bound by the FWCA to implement Service conservation recommendations in their entirety.

9. Marine Mammal Protection Act of 1972, as Amended (16 U.S.C. 1361 *et seq.*) (MMPA)

The MMPA prohibits the take (*i.e.*, hunting, killing, capture, and/or harassment) of marine mammals and enacts a moratorium on the import, export, and sale of marine mammal parts and products. There are exemptions and exceptions to the prohibitions. For example, under section 101(b), Alaskan Natives may hunt marine mammals for subsistence purposes and may possess, transport, and sell marine mammal parts and products. However, this section focuses on incidental take authorizations for non-commercial fishing activities.

Section 101(a)(5) allows for the authorization of incidental, but not intentional, take of small numbers of marine mammals by U.S. citizens while engaged in a specified activity (other than commercial fishing) within a specified geographical

region, provided certain findings are made. Specifically, the Service must make a finding that the total of such taking will have a negligible impact on the marine mammal species and will not have an unmitigable adverse impact on the availability of these species for subsistence uses. Negligible impact is defined at 50 CFR 18.27(c) as ''an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival.'' Unmitigable adverse impact, which is also defined at 50 CFR 18.27(c), means ''an impact resulting from the specified activity that is likely to reduce the availability of the species to a level insufficient for a harvest to meet subsistence needs by (i) causing the marine mammals to abandon or avoid hunting areas, (ii) directly displacing subsistence users, or (iii) placing physical barriers between the marine mammals and the subsistence hunters; and (2) cannot be sufficiently mitigated by other measures to increase the availability of marine mammals to allow subsistence needs to be met.''

Section 101(a)(5)(A) of the MMPA provides for the promulgation of Incidental Take Regulations (ITRs), which can be issued for a period of up to 5 years. The ITRs set forth permissible methods of taking pursuant to the activity and other means of effecting the least practicable adverse impact on the species or stock and its habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance, and on the availability of such species or stock for subsistence uses. In addition, ITRs include requirements pertaining to the monitoring and reporting of such takings.

Under the ITRs, a U.S. citizen may request a Letter of Authorization (LOA) for activities proposed in accordance with the ITRs. The Service evaluates each LOA request based on the specific activity and geographic location, and determines whether the level of taking is consistent with the findings made for the total taking allowable under the applicable ITRs. If so, the Service may issue an LOA for the project and will specify the period of validity and any additional terms and conditions appropriate to the request, including mitigation measures designed to minimize interactions with, and impacts to, marine mammals. The LOA will also specify monitoring and reporting requirements to evaluate the level and impact of any taking. Depending on the nature, location, and timing of a proposed activity, the Service may require applicants to consult with potentially affected subsistence communities in Alaska and develop additional mitigation measures to address potential impacts to subsistence users. Regulations specific to LOAs are codified at 50 CFR 18.27(f).

Section 101(a)(5)(D) established an expedited process to request authorization for the incidental, but not intentional, take of small numbers of marine mammals for a period of not more than one year if the taking will be limited to harassment, *i.e.,* Incidental Harassment Authorizations (IHAs). Harassment is defined in section 3 of the MMPA (16 U.S.C. 1362). For activities other than military readiness activities or scientific research conducted by or on behalf of the Federal Government, harassment means ''any act of pursuit, torment, or annoyance which (i) has the potential to injure a marine mammal or marine mammal stock in the wild'' (the MMPA calls this Level A harassment) ''or (ii) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to migration, breathing, nursing, breeding, feeding, or sheltering'' (the MMPA calls this Level B harassment). There is a separate definition of harassment applied in the case of a military readiness activity or a scientific research activity conducted by or on behalf of the Federal Government. In addition, ''small numbers'' and ''specified geographical region'' requirements do not apply to military readiness activities.

The IHA prescribes permissible methods of taking by harassment and includes other means of effecting the least practicable impact on marine mammal species or stocks and their habitats, paying particular attention to rookeries, mating grounds, and areas of similar significance. In addition, as appropriate, the IHA will include measures that are necessary to ensure no unmitigable adverse impact on the availability of the species or stock for subsistence purposes in Alaska. IHAs also specify monitoring and reporting requirements pertaining to the taking by harassment.

ITRs and IHAs can provide considerable conservation and management benefits to covered marine mammals. The Service shall recommend mitigation for impacts to species covered by the MMPA that are under its jurisdiction consistent with the guidance of this Policy and to the extent compatible with the authorities of the MMPA. Proponents may adopt these recommendations as components of proposed actions. However, such adoption itself does not constitute compliance with the MMPA. In addition, IHAs or LOAs issued under ITRs specify the permissible methods of taking and other means of effecting the least practicable adverse impact on the species or stock and its habitat, and on the availability for subsistence purposes. Those authorizations also outline required monitoring and reporting of takes.

10. Migratory Bird Treaty Act (16 U.S.C. 703–712) (MBTA)

The MBTA does not allow the take of migratory birds without a permit or other regulatory authorization (*e.g.,* rule, depredation order). The Service has express authority to issue permits for purposeful take and currently issues several types of permits for purposeful take of individuals (*e.g.,* hunting, depredation, scientific collection). Hunting permits do not require the mitigation hierarchy be enacted; rather, the Service sets annual regulations that limit harvest to ensure levels harvested do not diminish waterfowl breeding populations. For purposeful take permits that are not covered in these annual regulations (*e.g.,* depredation, scientific collection), there is an expectation that take be avoided and minimized to the maximum extent practicable as a condition of the take authorization process. Compensation and offsets are not required under these purposeful take permits, but can be accepted.

The Service has implied authority to permit incidental take of migratory birds, though incidental take has only been authorized in limited situations (*e.g.,* Department of Defense Readiness Rule and the NOAA Fisheries Special Purpose Permit). In all situations, permitted or unpermitted, there is an expectation that take be avoided and minimized to the maximum extent practicable, and voluntary offsets can be employed to this end. However, the Service cannot legally require or accept compensatory mitigation for unpermitted, and thus illegal, take of individuals. While action proponents are expected to reduce impacts to migratory bird habitat, such impacts are not regulated under the MBTA. As a result, action proponents are allowed to use the full mitigation hierarchy to manage impacts to their habitats, regardless of whether or not a permit for take of individuals is in place. Assessments of action effects should examine direct, indirect, and cumulative impacts to migratory bird habitats, as habitat losses have been identified as a critical factor in the decline of many migratory bird species.

11. National Environmental Policy Act (42 U.S.C. 4321 *et seq.*) (NEPA)

NEPA requires Federal agencies to integrate environmental values into decisionmaking processes by considering impacts of their proposed actions and reasonable alternatives. Agencies disclose findings through an environmental assessment or a detailed environmental impact statement and are required to identify and include all relevant and reasonable mitigation measures that could improve the action. The Council on Environmental Quality's implementing regulations under NEPA define mitigation as a sequence, where mitigation begins with avoidance of impacts; followed by minimization of the degree or magnitude of impacts; rectification of impacts through repair, restoration, or rehabilitation; reducing impacts over time during the life of the action; and lastly, compensation for impacts by providing replacement resources. Effective mitigation through this ordered approach starts at the beginning of the NEPA process, not at the end. Implementing regulations require that the Service be notified of all major Federal actions affecting fish and wildlife and our recommendations solicited. Engaging this process allows the Service to provide comments and recommendations for mitigation of fish and wildlife impacts.

12. National Wildlife Refuge Mitigation Policy (64 FR 49229–49234, September 10, 1999) (Refuge Mitigation Policy)

The Service's Final Policy on the National Wildlife Refuge System and Compensatory Mitigation under the section 10/404 Program establishes guidelines for the use of Refuge lands for siting compensatory mitigation for impacts permitted through section 404 of the Clean Water Act (CWA) and section 10 of the Rivers and Harbors Act (RHA). The Refuge Mitigation Policy clarifies that siting mitigation for off-Refuge impacts on Refuge lands is appropriate only in limited and

exceptional circumstances. Mitigation banks may not be sited on Refuge lands, but the Service may add closed banks to the Refuge system if specific criteria are met. The Refuge Mitigation Policy, which explicitly addresses only compensatory mitigation under the CWA and RHA, remains in effect and is unaltered by this Policy. However, the Service will evaluate all proposals for using Refuge lands as sites for other compensatory mitigation purposes using the criteria and procedures established for aquatic resources in the Refuge Mitigation Policy (*e.g.,* to locate compensatory mitigation on Refuge property for off-Refuge impacts to endangered or threatened species).

13. Natural Resource Damage Assessment and Restoration (NRDAR)

Under the Oil Pollution Act (33 U.S.C. 2701 *et seq.*) (OPA) and the Comprehensive Environmental Response, Compensation and Liability Act (42 U.S.C. 9601) (CERCLA), as amended by Public Law 99–499, when a release of hazardous materials or an oil spill injures natural resources under the jurisdiction of State, tribal, and Federal agencies, these governments quantify injuries to determine appropriate restoration necessary to compensate the public for losses of those resources or their services. Nothing in this Policy supersedes the statutes and regulations governing the natural resource damage provisions of CERCLA, OPA, and the CWA.

The Service is often a participating bureau, supporting the Department of the Interior, during NRDAR. A restoration settlement, in the form of damages provided through a settlement document, is usually determined by quantifying the type and amount of restoration necessary to offset the injury caused by the spill or release. The type of restoration conducted depends on the resources injured by the release (*e.g.,* marine habitats, ground water, or biological resources (fish, birds)).

In the *Presidential Memorandum on Mitigating Impacts on Natural Resources from Development and Encouraging Related Private Investment* (November 3, 2015), DOI is charged with developing guidance describing considerations for evaluating whether, where, and when tools and techniques used in mitigation—including restoration banking or advance restoration projects—would be appropriate as components of a restoration plan resolving natural resource damage claims. Pending promulgation of that guidance, the tools provided in section 5 maintain the flexibility to implement the appropriate restoration to restore injured resources under the jurisdiction of multiple governments, by providing support for weighing or modifying project elements to reach Service goals.

B. Additional Legislative Authorities

1. Clean Air Act; 42 U.S.C. 7401 *et seq.,* as amended (See *http://www.fws.gov/refuges/airquality/permits.html*)
2. Marine Protection, Research, and Sanctuaries Act; 16 U.S.C. 1431 *et seq.* and 33 U.S.C. 1401 *et seq.*
3. Resource Conservation and Recovery Act; 42 U.S.C. 6901 *et seq.*
4. Shore Protection Act; 33 U.S.C. 2601 *et seq.*
5. Coastal Zone Management Act; 16 U.S.C. 1451 *et seq.*
6. Coastal Barrier Resources Act; 16 U.S.C. 3501
7. Surface Mining Control and Reclamation Act; 30 U.S.C. 1201 *et seq.*
8. National Wildlife Refuge System Administration Act; 16 U.S.C. 668dd, as amended
9. National Historic Preservation Act; 16 U.S.C. 470f
10. North American Wetlands Conservation Act, 16 U.S.C. 4401 *et seq.*
11. Pittman-Roberts Wildlife Restoration Act; 16. U.S.C. 669–669k
12. Dingell-Johnson Sport Fish Restoration Act; 16 U.S.C. 777–777n, except 777e–1 and g–1
13. Federal Land and Policy Management Act, 43 U.S.C. 1701 *et seq.*

C. Implementing Regulations

1. National Environmental Policy Act (NEPA), 40 CFR part 1508, 42 U.S.C. 55
2. Marine Mammal Protection Act (MMPA), 50 CFR part 18, 16 U.S.C. 1361 *et seq.*
3. Migratory Bird Treaty Act (MBTA), 50 CFR part 21, 16 U.S.C. 703 *et seq.*
4. Bald and Golden Eagle Protection Act (Eagle Act), 50 CFR part 22, 16 U.S.C. 668 *et seq.*
5. Guidelines for Wetlands Protection, 33 CFR parts 320 and 332, 40 CFR part 230
6. Compensatory Mitigation for Losses of Aquatic Resources, 33 CFR parts 325 and 332 (USACE) and 40 CFR part 230 (EPA), 33 U.S.C. 1344
7. National Coastal Wetlands Conservation Grants, 16 U.S.C. 3954, 50 CFR part 84
8. Natural Resource Damage Assessments (OPA), 15 CFR part 990, 33 U.S.C. 2701 *et seq.*
9. Natural Resource Damage Assessments (CERCLA), 43 CFR part 11, 42 U.S.C. 9601
10. Endangered Species Act of 1973, as amended; 50 CFR parts 13, 17 (specifically §§ 17.22, 17.32, 17.50), part 402; 16 U.S.C. 1531 *et seq.*
11. Powers of the Secretary (43 U.S.C. 1201), 43 CFR part 24

D. Executive Orders

1. Executive Order 13186, Responsibilities of Federal Agencies to Protect Migratory Birds, January 10, 2001
2. Executive Order 12114, Environmental Effects Abroad of Major Federal Actions, January 4, 1979
3. Executive Order 11988, Floodplain Management, May 24, 1977
4. Executive Order 11990, Protection of Wetlands, May 24, 1977
5. Executive Order 12898, Federal Actions To Address Environmental Justice in Minority and Low-Income Populations, February 11, 1994
6. Executive Order 13514, Federal Leadership in Environmental, Energy, and Economic Performance, October 5, 2009
7. Executive Order 13604, Improving Performance of Federal Permitting and Review of Infrastructure Projects, March 22, 2012

E. Council on Environmental Quality (CEQ) Policy and Guidance

1. Guidance Regarding NEPA Regulations (48 FR 34236, July 28, 1983)
2. Designation of Non-Federal Agencies to be Cooperating Agencies in Implementing the Procedural Requirements of the National Environmental Policy Act (40 CFR 1508.5, July 28, 1999)
3. Cooperating Agencies in Implementing the Procedural Requirements of the National Environmental Policy Act (January 30, 2002)
4. Collaboration in NEPA, a Handbook for NEPA Practitioners (October 2007)
5. Memorandum, ''Appropriate Use of Mitigation and Monitoring and Clarifying the Appropriate Use of Mitigated Findings of No Significant Impact'' (January 14, 2011)
6. ''Memorandum on Environmental Collaboration and Conflict Resolution'' (September 6, 2012)
7. NEPA and NHPA, a Handbook for Integrating NEPA and Section 106 (March 2013)
8. Memorandum for Heads of Federal Departments and Agencies, ''Effective Use of Programmatic NEPA Reviews'' (December 18, 2014)
9. Memorandum: ''Final Guidance for Federal Departments and Agencies on Consideration of Greenhouse Gas Emissions and the Effects of Climate Change in National Environmental Policy Act Reviews'' (August 1, 2016)

F. Department of the Interior Policy and Guidance

1. Department of the Interior National Environmental Policy Act Procedures, 516 DM 1–7
2. Secretarial Order 3330, Improving Mitigation Policies and Practices of the Department of the Interior (October 31, 2013)
3. Secretarial Order 3206, American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act (June 5, 1997)
4. Department of the Interior Climate Change Adaptation Policy, 523 DM 1

G. U.S. Fish and Wildlife Service (USFWS) Policy and Guidance:

1. Service Responsibilities to Protect Migratory Birds, 720 FW 2
2. Final Policy on the National Wildlife Refuge System and Compensatory Mitigation under the Section 10/404 Program, 64 FR 49229–49234, September 10, 1999
3. Habitat Conservation Planning and Incidental Take Permit Processing Handbook, 61 FR 63854, 1996
4. USFWS National Environmental Policy Act Reference Handbook, 505 FW 1.7 and 550 FW 1
5. Endangered Species Act Habitat Conservation Planning Handbook (with NMFS), 1996
6. Endangered Species Act Consultation Handbook (with NMFS), 1998
7. Inter-agency Memorandum of Agreement Regarding Oil Spill Planning and Response Activities Under the Federal

Water Pollution Control Act's National Oil and Hazardous Substances Pollution Contingency Plan and the Endangered Species Act, 2002
8. Guidance for the Establishment, Use, and Operation of Conservation Banking, 2003
9. Endangered and Threatened Wildlife and Plants; Recovery Crediting Guidance, 2008
10. USFWS Tribal Consultation Handbook, 2011
11. Service Climate Change Adaptation Policy, 056 FW 1
12. USFWS Native American Policy, 510 FW 1

H. Other Agency Policy, Guidance, and Actions Relevant to Service Activities

1. Memorandum of Agreement Between the Department of the Army and the Environmental Protection Agency, The Determination of Mitigation Under the Clean Water Act Section 404(b)(1) Guidelines, 1990
2. Federal Highway Administration, Consideration of Wetlands in the Planning of Federal Aid Highways, 1990
3. Clean Water Act Section 404(q) Memorandum of Agreement Between the Department of the Interior and the Department of the Army, 1992
4. Interagency Agreement between the National Park Service, Fish and Wildlife Service, Bureau of Land Management, and the Federal Aviation Administration Regarding Low-Level Flying Aircraft Over Natural Resource Areas, 1993
5. USFWS Memorandum from Acting Director to Regional Directors, Regarding ''Partners for Fish and Wildlife Program and NEPA Compliance,'' 2002
6. Agreement between the U.S. Fish and Wildlife Service and the U.S. Army Corps of Engineers for Conducting Fish and Wildlife Coordination Act Activities, 2003
7. Memorandum of Agreement Between the U.S. Fish and Wildlife Service and the U.S. Army Corps of Engineers, 2003
8. Partnership Agreement between the U.S. Army Corps of Engineers and the U.S. Fish and Wildlife Service for Water Resources and Fish and Wildlife, 2003
9. Memoranda of understanding with nine Federal agencies, under E.O. 13186, Responsibilities of Federal Agencies to Protect Migratory Birds (*http://www.fws.gov/migratorybirds/PartnershipsAndIniatives.html*)

Appendix B. Service Mitigation Policy and NEPA

This appendix addresses Service responsibilities for applying this Policy when we are formulating our own proposed actions under the NEPA decision making process. Service personnel may also use this appendix as guidance for providing mitigation recommendations when reviewing the proposed actions of other Federal agencies under NEPA. However, comments that we provide are advisory to other Federal agencies in the NEPA context as an agency with special expertise regarding mitigating impacts to fish and wildlife resources. Consistent with their authorities, action agencies choose whether to adopt, in whole or in part, mitigation recommendations received from other agencies and the public, including the Service. Any requirements of other Federal agencies to mitigate impacts to fish and wildlife resources are governed by applicable statutes and regulations.

A. Mitigation in Environmental Review Processes

NEPA was enacted to promote efforts to prevent or eliminate damage to the environment and biosphere (42 U.S.C. 4321). The NEPA process is intended to help officials make decisions based on an understanding of environmental consequences and take actions that protect, restore, and enhance the environment (40 CFR part 1501). At the earliest stage possible in the planning process, and prior to making any detailed environmental review, the Service will ''consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved.'' (42 U.S.C. 4332(C)) Early coordination avoids delays, reduces potential conflicts, and helps ensure compliance with other statutes and regulations. When scoping the issues for the review, the Service will ''invite the participation of affected Federal, State, and local agencies, any affected Indian tribe, the proponent of the action, and other interested persons (including those who might not be in accord with the action on environmental grounds).'' (40 CFR 1501.7(a)(1))

NEPA requires consideration of the impacts from connected, cumulative, and similar actions, and their relationship to the maintenance and enhancement of long-term productivity (42 U.S.C. 4332). Mitigation measures should be developed that effectively and efficiently address the predicted and actual impacts, relative to the ability to maintain and enhance long-term productivity. The consideration of mitigation (type, timing, degree, etc.) should be consistent with and based upon the evaluation of direct, indirect, and cumulative impacts. The Service should also consider and encourage public involvement in development of mitigation planning, including components such as compliance and effectiveness monitoring, and adaptive management processes.

Consistent with the January 14, 2011, CEQ Memorandum: Appropriate Use of Mitigation and Monitoring and Clarifying the Appropriate Use of Mitigated Findings of No Significant Impacts, Service-proposed actions should incorporate measures to avoid, minimize, rectify, reduce, and compensate for impacts into initial proposal designs and described as part of the action. Measures to achieve net gain or no-net-loss outcomes have the greatest potential to achieve environmentally preferred outcomes that are encouraged by the memorandum, and measures to achieve net gain outcomes have the greatest potential to enhance long-term productivity. We should analyze mitigation measures considered, but not incorporated into the proposed action, as one or more alternatives. For illustrative purposes, our NEPA documents may address mitigation alternatives or consider mitigation measures that the Service does not have legal authority to implement. However, the Service should not commit to mitigation alternatives or measures considered or analyzed without sufficient legal authorities or sufficient resources to perform or ensure the effectiveness of the mitigation (CEQ 2011). The Service should monitor the compliance and effectiveness of our mitigation commitments. For applicant-driven actions, some or most of the responsibility for mitigation monitoring may lie with the applicant; however, the Service retains the ultimate responsibility to ensure that monitoring is occurring when needed and that the results of monitoring are properly considered in an adaptive management framework.

When carrying out its responsibilities under NEPA, the Service will apply the mitigation meanings and sequence in the NEPA regulations (40 CFR 1508.20). In particular, the Service will retain the ability to distinguish between:

- Minimizing impacts by limiting the degree or magnitude of the action and its implementation;
- rectifying the impact by repairing, rehabilitating, or restoring the affected environment; and
- reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action.

Minimizing impacts under NEPA is commonly applied at the planning design stage, prior to the action (and impacts) occurring. Rectification and reduction over time are measures applied after the action is implemented (even though they may be included in the plan). Therefore, under NEPA, there are often very different temporal scopes between minimization measures and those for rectification and reduction over time. These temporal differences can be important for developing and evaluating alternatives, analyzing indirect and cumulative impacts, and for designing and implementing effectiveness and compliance monitoring. Therefore, the Service will retain the ability to distinguish between these three mitigation types when doing so will improve the ability to take the requisite NEPA ''hard look'' at potential environmental impacts and reasonable alternatives to proposed actions.

Other statutes besides NEPA that compel the Service to address the possible environmental impacts of mitigation activities for fish and wildlife resources commonly include the National Historic Preservation Act of 1996 (NHPA) (16 U.S.C 470 *et seq.*), as amended in 1992, the Federal Water Pollution Control Act (Clean Water Act) (33 U.S.C. 1251–1376), Fish and Wildlife Coordination Act (16 U.S.C 661–667(e)), as amended (FWCA), and the Clean Air Act (42 U.S.C. 7401–7661). Service mitigation decisions should also comply with all applicable Executive Orders, including E.O. 13514, Federal Leadership in Environmental, Energy, and Economic Performance (October 5, 2009); E.O. 13653, Preparing the United States for the Impacts of Climate Change (November 1, 2013); and E.O. 12898, Federal Actions To Address Environmental Justice in Minority

Populations and Low-Income Populations. DOI Environmental Compliance Memorandum (ECM) 95–3 provides additional direction regarding responsibilities for addressing environmental justice under NEPA, including the equity of benefits and risks distribution.

B. Efficient Mitigation Planning

The CEQ Regulations Implementing NEPA include provisions to reduce paperwork (§ 1500.4), delay (§ 1505.5), and duplication with State and local procedures (§ 1506.2) and combine documents in compliance with NEPA. A key component of the provisions to reduce paperwork directs Federal agencies to use environmental impact statements for programs, policies, or plans, and to tier from statements of broad scope to those of narrower scope, in order to eliminate repetitive discussions of the same issues (§§ 1501.1(i), 1502.4, and 1502.20). To the fullest extent possible, the Service should coordinate with State, tribal, local, and other Federal entities to conduct joint mitigation planning, research, and environmental review processes. Mitigation planning can also provide efficiencies when it is used to reduce the impacts of a proposed project to the degree it eliminates significant impacts and avoids the need for an environmental impact statement. When using this approach, employing a mitigated Finding of No Significant Impact (FONSI), the Service should ensure consistency with the aforementioned January 14, 2011, CEQ memorandum.

Use of this Policy will help focus our NEPA discussion on issues for fish, wildlife, plants, and their habitats, and will avoid unnecessarily lengthy background information. When appropriate, the Service should use the process for establishing evaluation species and resource categories to concentrate our environmental analyses on relevant and significant issues.

Programmatic NEPA reviews can establish standards for consideration and implementation of mitigation, and can more effectively address cumulative impacts. The programmatic NEPA reviews can facilitate decisions on agency actions that precede site- or project-specific decisions and actions, such as mitigation alternatives or commitments for subsequent actions, or narrowing of future alternatives. To ensure that landscape-scale mitigation planning is effectively implemented and meets conservation goals, as appropriate, the Service should seek and consider collaborative opportunities to conduct programmatic NEPA decisionmaking processes on Service actions that are similar in timing, impacts, alternatives, resources, and mitigation. The Service should consider developing standard mitigation protocols or objectives in a programmatic NEPA review in order to provide a framework and scope for the subsequent tiered analysis of environmental impacts. Existing landscape-scale conservation and mitigation plans that have already undergone a NEPA process will provide efficiencies for Federal actions taken on a project-specific basis and will also better address potential cumulative impacts. However, the Service may incorporate plans or components of plans by reference (40 CFR 1502.21), while addressing impacts from plans or components within the NEPA process on the Service action. When considering programmatic NEPA reviews, the Service should adopt approaches consistent with the December 18, 2014, CEQ Memorandum: Effective Use of Programmatic NEPA Reviews.

Appropriate treatment of climate change in NEPA reviews is essential to development of meaningful mitigation. The Service approach should be consistent with the August 1, 2016, CEQ Memorandum: Final Guidance for Federal Departments and Agencies on Consideration of Greenhouse Gas Emissions and the Effects of Climate Change in National Environmental Policy Act Reviews, which guides the consideration of reasonable alternatives and recommends agencies consider the short- and long-term effects and benefits in the alternatives and mitigation analysis.

C. Collaboration

Collaboration is an important component of mitigation planning, especially at the landscape or programmatic level. A collaborative NEPA process can offer the Service many benefits regarding development and implementation of mitigation, including, but not limited to: Better information regarding mitigation options by accessing relevant scientific and technical expertise and knowledge relating to local resources; a fairer process by involving most or all interests involved in determining mitigation; conflict prevention by dealing with issues related to mitigation as they arise; and easier implementation because all the stakeholders feel vested in the implementation of mitigation. Therefore, when considering and engaging in collaboration, the Service should, to the extent applicable, utilize the principles and recommendations set forth in the Office of Management and Budget and CEQ Memorandum on Environmental Collaboration and Conflict Resolution (2012) and the CEQ handbook, *Collaboration in NEPA–a Handbook for NEPA Practitioners* (2007).

D. NEPA and Tribal Trust Responsibilities

NEPA also provides a process through which all Tribal Trust responsibilities can be addressed simultaneous to consultation, but care should be taken to ensure that culturally sensitive information is not disclosed. Resources that may be impacted by Service actions or mitigation measures include culturally significant or sacred landscapes, species associated with those landscapes, or species that are separately considered culturally significant or sacred. The Service should coordinate or consult with affected tribes to develop methods for evaluating impacts, significance criteria, and meaningful mitigation to sacred or culturally significant species and their locales. Because climate change has been identified as an Environmental Justice (EJ) issue for tribes, adverse climate change-related effects to culturally significant or sacred landscapes or species may be cumulatively greater, and may indicate the need for a separate EJ analysis. Affected tribes can be those for which the locale of the action or landscape mitigation planning lies within traditional homelands and can include traditional migration areas. The final determination of whether a tribe is affected is made by the tribe, and should be ascertained during consultation or a coordination process. When government-to-government consultation takes place, the consultation process will be guided by the Service Tribal Consultation Handbook.

The Service has overarching Tribal Trust Doctrine responsibilities under the Eagle Act, the National Historic Preservation Act (NHPA), the American Indian Religious Freedom Act (AIRFA) (42 U.S.C. 1996), Religious Freedom Restoration Act of 1993 (RFRA) (42 U.S.C. 2000bb *et seq.*), Secretarial Order 3206, American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, the Endangered Species Act (June 5, 1997), Executive Order 13007, Indian Sacred Sites (61 FR 26771, May 29, 1996), and the USFWS Native American Policy. Government-wide statutes with requirements to consult with tribes include the Archeological Resources Protection Act of 1979 (ARPA) (16 U.S.C. 470aa–mm), the Native American Graves Protection and Repatriation Act (NAGPRA) (25 U.S.C. 3001 *et. seq.*), and AIRFA. Regulations with requirements to consult include NAGPRA, NHPA, and NEPA. As required, the Service will initiate Section 106 consultation with Indian tribes during early planning for FWS proposed actions, to ensure their rights and concerns are incorporated into project design. Consultation will continue throughout all stages of the process, including during consideration of mitigation.

E. Integrating the Mitigation Policy Into the NEPA Process

When the Service is the lead or co-lead Federal agency for NEPA compliance, this Policy may inform several components of the NEPA process and make it more effective and more efficient in conserving the affected Federal trust resources. This section discusses the role of this Policy in Service decisionmaking under NEPA.

Scoping

The Service should use internal and external scoping to help identify appropriate evaluation species, obtain information about the relative scarcity, suitability, and importance of affected habitats for resource category assignments, identify issues associated with these species and habitats, and identify issues associated with other affected resources. Climate change vulnerability assessments can be a valuable tool for identifying or screening new evaluation species. The Service should coordinate external scoping with agencies having special expertise or jurisdiction by law for the affected resources.

Purpose and Need

The purpose and need statement of the NEPA document should incorporate relevant conservation objectives for evaluation species and their habitats, and the need to ensure either a net gain or no-net-loss. Because the statement of purpose and need frames the development of the proposed action and

alternatives, including conservation objectives from the beginning, it steers action proposals away from impacts that may otherwise necessitate mitigation. Addressing conservation objectives in the purpose statement initiates a planning process in which the proposed action and all reasonable alternatives evaluated necessarily include appropriate conservation measures, differing in type or degree, and avoids presenting decisionmakers with a choice between a ''conservation alternative'' and a ''no conservation alternative.''

Alternatives

The alternatives should include, as appropriate, an alternative that includes design components or mitigation measures to achieve a net benefit for affected resources and an alternative that includes design components or mitigation measures to achieve no-net-loss of affected resources. Alternatives that include provisions for mitigation based upon different climate change projections will help guide the development of appropriate responses, and will facilitate the ability to change mitigation responses more quickly to ones already analyzed but not previously adopted.

Affected Environment

The affected environment discussion should focus on significant environmental issues associated with evaluation species and their habitats and highlight resource vulnerabilities that may require mitigation features in the project design. This section should document the relative scarcity, suitability, and importance of affected habitats, along with the sensitivity and status of the species and habitats. It should identify relevant temporal and spatial scales for each resource and the appropriate indicators of effects and units of measurement for evaluating mitigation features. This section should also identify habitats for evaluation species that are currently degraded but have a moderate to high potential for restoration or improvement.

Significance Criteria

Explicit significance criteria provide the benchmarks or standards for evaluating effects under NEPA. Potentially significant impacts to resources require decisionmaking supported by an environmental impact statement. Determining significance considers both the context and intensity of effects. For resources covered by this Policy, the sensitivity and status of affected species, and the relative scarcity, suitability, and importance of affected habitats, provide the context component of significance criteria. Measures of the severity of effects (degree, duration, spatial extent, etc.) provide the intensity component of significance criteria. Significance criteria may help identify appropriate levels and types of mitigation; however, the Service should consider mitigation for impacts that do not exceed thresholds for significance as well as those that do.

Analysis of Environmental Consequences

The analysis of environmental consequences should address the relationship of effects to the maintenance and enhancement of long-term productivity (40 CFR 1502.16), and include the timing and duration of direct, indirect, and cumulative effects to resources, short-term versus long-term effects (adverse and beneficial), and how the timing and duration of mitigation would influence net effects over time. The Service's net gain goal for fish and wildlife resources under this Policy applies to the full planning horizon of a proposed action. Guidance under section V.B.3 (Assessment Principles) of this Policy supplements existing Service, Department, and government-wide guidance for the Service's environmental consequences analyses for affected fish and wildlife resources under NEPA.

Cumulative Effects Analyses

The long-term benefits of mitigation measures, whether onsite or offsite relative to the proposed action, often depend on their placement in the landscape relative to other environmental resources and stressors. Therefore, cumulative effects analyses, including the effects of climate change, are especially important to consider in designing mitigation measures for fish and wildlife resources. Cumulative effects analyses should include consideration of direct and indirect effects of climate change and should incorporate mitigation measures to address altered conditions. Cumulative effects are doubly important in actions affecting species in decline, such as ESA-listed or candidate species, marine mammals, and Birds of Conservation Concern, for which the Service should design mitigation that will improve upon existing conditions and offset as much as practicable reasonably foreseeable adverse cumulative effects. Also, to the extent practicable, cumulative effects analyses should address the synergistic effects of multiple foreseeable resource stressors. For example, in parts of some western States, the combination of climate change, invasive grasses, and nitrogen deposition may substantially increase fire frequency and intensity, adversely affecting some resources to a greater degree than the sum of these stressors considered independently.

Analysis of Climate Change

The analyses of climate change effects should address effects to and changes for the evaluation species, resource categories, mitigation measures, and the potential for changes in the effects of mitigation measures. Anticipated changes may result in the need to choose different or additional evaluation species and habitat, at different points in time.

Decision Documents

Mitigation measures should be included as commitments within a Record of Decision (ROD) for an EIS, and within a mitigated FONSI. The decision documents should clearly identify: (a) Measures to achieve outcomes of no net loss or net gain; (b) the types of mitigation measures adopted for each evaluation species or suite of species; (c) the spatial and temporal application and duration of the measures; (d) compliance and effectiveness monitoring; (e) criteria for remedial action; and (f) unmitigable residual effects.

Appendix C. Compensatory Mitigation in Financial Assistance Awards Approved or Administered by the U.S. Fish and Wildlife Service

The basic authority for Federal financial assistance is in the Federal Grant and Cooperative Agreement Act of 1977 (31 U.S.C. 6301 *et seq.*). It distinguishes financial assistance from procurement, and explains when to use a grant or a cooperative agreement as an instrument of financial assistance. Regulations at 2 CFR part 200 provide Government-wide rules for managing financial assistance awards. Each of the Service's financial assistance programs has at least one statutory authority, which are listed in the Catalog of Federal Domestic Assistance at *http://www.cfda.gov/*. These statutory authorities and their program-specific regulations may supplement or create exceptions to the Government-wide regulations. The authorities and regulations for the vast majority of financial assistance programs do not address mitigation, but there are at least two exceptions. The statutory authority for the North American Wetlands Conservation Fund program (16 U.S.C. 4401 *et seq.*) prohibits the use of program funds for specific types of mitigation. Regulations implementing the National Coastal Wetlands Conservation Grant program (50 CFR part 84) include among the activities ineligible for funding the acquisition, restoration, enhancement, or management of lands to mitigate recent or pending habitat losses. Consistent with this Policy, the regulations at 50 CFR part 84 authorize the use of Natural Resource Damage Assessment funds as match in the National Coastal Wetlands Conservation Program. To foster consistent application of financial assistance programs with respect to mitigation processes, the following provisions describe appropriate circumstances as well as prohibitions for use of financial assistance in developing compensatory mitigation.

A. What is Federal financial assistance?

Federal financial assistance is the transfer of cash or anything of value from a Federal agency to a non-Federal entity to carry out a public purpose authorized by a U.S. law. If the Federal Government will be substantially involved in carrying out the project, the instrument for transfer must be a cooperative agreement. Otherwise, it must be a grant agreement. We use the term *award* interchangeably for a grant or cooperative agreement. This Policy applies only to awards approved or administered by the Service in one of its financial assistance programs. If the Service shares responsibility for approving or administering an award with another entity, this Policy applies only to those decisions that the Service has the authority to make under the terms of the shared responsibility.

B. Where do most mitigation issues occur in financial assistance?

Most mitigation issues in financial assistance relate to: (a) The proposed use of mitigation funds on land acquired with Federal financial assistance, and (b) using either mitigation funds or in-kind

contributions derived from mitigation, as match. Match is the share of project costs not paid by Federal funds, unless otherwise authorized by Federal statute. Most Service-approved or -administered financial assistance programs require or encourage applicants to provide match to leverage the Federal funds.

C. Can the Federal or matching share in a financially assisted project be used to generate mitigation credits for activities authorized by Department of the Army (DA) permits?

1. Neither the Federal nor matching share in financially assisted aquatic-resource-restoration projects or aquatic resource conservation projects can be used to generate mitigation credits for DA-authorized activities except as authorized by 33 CFR 332.3(j)(2) and 40 CFR 230.93(j)(2). These exceptional situations are any of the following:

a. The mitigation credits are solely the result of any match over and above the required minimum. This surplus match must supplement what will be accomplished by the Federal funds and the required-minimum match to maximize the overall ecological benefits of the restoration or conservation project.

b. The Federal funding for the award is statutorily authorized and/or appropriated for the purpose of mitigation.

c. The work funded by the financial assistance award is subject to a DA permit that requires mitigation as a condition of the permit. An example is an award that funds a boat ramp that will adversely affect adjacent wetlands and the impact must be mitigated. The recipient may pay the cost of the mitigation with either the Federal funds or the non-Federal match.

2. Match cannot be used to generate mitigation credits under the exceptional situations described in section C(1)(a–c) if the financial assistance program's statutory authority or program-specific regulations prohibit the use of match or program funds for compensatory mitigation.

D. Can the Service approve a proposal to use the proceeds from the purchase of credits in an in-lieu-fee program or a mitigation bank as match?

1. In-lieu-fee programs and mitigation banks are mechanisms authorized in 33 CFR part 332 and 40 CFR part 230 to provide mitigation for activities authorized by a DA permit. The Service must not approve a proposal to use proceeds from the purchase of credits in an in-lieu-fee program or mitigation bank as match unless both of the following apply:

a. The proceeds are over and above the required minimum match. This surplus match must supplement what will be accomplished by the Federal funds and the required-minimum match to maximize the overall ecological benefits of the project.

b. The statutory authority for the financial assistance program and program-specific regulations (if any) do not prohibit the use of match or program funds for mitigation.

2. The reasons that the Service cannot approve a proposal to use proceeds from the purchase of credits in an in-lieu-fee program or mitigation bank as match except as described in section D(1)(a–b) are:

a. Proceeds from the purchase of credits are legally required compensation for resources or resource functions impacted elsewhere. The sponsor of the in-lieu-fee program or mitigation bank uses these proceeds for the restoration, establishment, enhancement, and/or preservation of the resources impacted. The purchase price of the credits is based on the full cost of providing the compensatory mitigation.

b. When credits are purchased from an in-lieu-fee program sponsor or a mitigation bank to compensate for impacts authorized by a DA permit, the responsibility for providing the compensatory mitigation transfers to the sponsor of the in-lieu-fee program or mitigation bank. The process is not complete until the sponsor provides the compensatory mitigation according to the terms of the in-lieu-fee program instrument or mitigation-banking instrument approved by the District Engineer of the U.S. Army Corps of Engineers.

E. Can the Federal share or matching share in a financially assisted project be used to satisfy a mitigation requirement of a permit or legal authority other than a DA permit?

The limitations on the use of mitigation in a Federal financially assisted project are generally the same regardless of the source of the mitigation requirement, but only the limitations regarding mitigation required by a DA permit are currently established in regulation. Limitations for a permit or authority other than a DA permit are established in this Policy. They are:

1. Neither the Federal nor matching share in a financially assisted project can be used to satisfy Federal mitigation requirements except in any of the following situations:

a. The mitigation credits are solely the result of any match over and above the required minimum. This surplus match must supplement what will be accomplished by the Federal funds and the required minimum match to maximize the overall ecological benefits of the project.

b. The Federal funding for the award is statutorily authorized and/or appropriated for use as compensatory mitigation for specific projects or categories of projects.

c. The project funded by the Federal financial assistance award is subject to a permit or authority that requires mitigation as a condition of the permit. An example is an award that funds a boat ramp that will adversely affect adjacent wetlands and the impact must be mitigated. The recipient may pay the cost of the mitigation with either the Federal funds or the non-Federal match.

2. Match cannot be used to satisfy Federal mitigation requirements under the exceptional situations described in section E(1)(a–c) if the financial assistance program's statutory authority or program-specific regulations prohibit the use of match or program funds for mitigation.

3. If any regulations govern the specific type of mitigation, and if these regulations address the role of mitigation in a Federal financially assisted project, the regulations will prevail in any conflict between those regulations and section E of Appendix C.

F. Can the Service approve a proposal to use revenue from a Natural Resource Damage Assessment and Restoration (NRDAR) Fund settlement as match in a financial assistance award?

1. The Service can approve such a proposal as long as the financial assistance program does not prohibit the use of match or program funds for compensatory mitigation. In certain cases, this revenue qualifies as match because:

a. Federal and non-Federal entities jointly recover the fees, fines, and/or penalties and deposit the fees, fines, and/or penalties as joint and indivisible recoveries into a fiduciary fund for this purpose.

b. The governing body of the NRDAR Fund may include Federal and non-Federal trustees, who must unanimously approve the transfer to a non-Federal trustee for use as non-Federal match.

c. The project is consistent with a negotiated settlement agreement and will carry out the provisions of the Comprehensive Environmental Response Compensation and Liability Act, as amended, Federal Water Pollution Control Act of 1972, and the Oil Pollution Act of 1990 for damage assessment activities.

d. The use of the funds by the non-Federal trustee is subject to binding controls.

G. Can the Service approve financial assistance to satisfy mitigation requirements of State, tribal, or local governments?

1. The Service may approve an award that satisfies a compensatory mitigation requirement of a State, tribal, or local government, if satisfying the mitigation requirement is incidental to a project purpose consistent with the purposes(s) of the program. It is solely the responsibility of the State, tribal, or local government to determine that its mitigation requirement has been satisfied and to submit any required certifications to that effect.

2. Satisfying a State, tribal, or local government mitigation requirement with Federal financial assistance or contributing match originating from such a requirement to a Federal award must not be contrary to any law, regulation, or policy of the State, tribal, or local government, as applicable.

H. Can a project on land already designated for the conservation of natural resources generate credits for compensatory mitigation?

1. A project on public, private, or federally recognized tribal lands already designated for conservation of natural resources can generate credits for compensatory mitigation if it meets the requirements of section 5.7.2. One of these requirements is that the benefits of the mitigation measures must be additional. If the authority for the compensatory mitigation is the Clean Water Act and if public land is proposed as the site of the project, it must also comply with 33 CFR 332.3(a)(3) and 40 CFR 230.93(a)(3), both of which read:

. . . Credits for compensatory mitigation projects on public land must be based solely on aquatic resource functions provided by the compensatory mitigation project, over and above those provided by public programs already planned or in place. . . .

Public land includes only those real property interests owned or held by Federal, State, and local governments, and instrumentalities of any of these governments.

To be either ''additional'' or ''over and above,'' the benefits must improve upon the baseline conditions of the impacted resources and their values, services, and functions in a manner that is demonstrably new and would not have occurred without the compensatory mitigation measure. Baseline conditions are: (a) Those that exist, and (b) those that a public land-management agency is foreseeably expected to implement absent the mitigation.

2. Examples of baseline conditions that a land-management agency or organization is foreseeably expected to implement are:

a. Management outcomes or environmental benefits required for a land-management unit by a statute, regulation, covenant in a deed, facility-management plan, or an integrated natural resources management plan, *e.g.,* (a) huntable populations of big game, (b) Class A wild trout populations at Class A densities, and (c) habitat diversity. When evaluating existing plans under sections H.2.a or b, the Service must defer to State and tribal plans to determine which additional benefits to count toward achieving the mitigation planning goal as long as the plans are consistent with Federal law and regulation and this Policy.

b. Management responsibilities assigned to an agency by statute, regulation, facility management plan, or integrated natural resources management plan, *e.g.,* (a) resource protection, (b) habitat management, and (c) fire management.

c. Commitments made under a financial-assistance award by the recipient, a subrecipient, or a partner to achieve certain management outcomes or environmental benefits for a land-management unit. The source of the funding to carry out these commitments may be the awarding agency, a match provider, and/or other contributors.

3. Projects that are not part of annual operations and maintenance are not baseline conditions if they are unfunded and have little prospect of funding, even if these projects are authorized in a statute or called for in a plan. Examples of projects that may be authorized in a statute or called for in a plan, but may have little prospect for funding are: (a) Construction of a high-volume pump station, (b) demolition of a dam, (c) reforestation of 1,000 acres of former agricultural land, and (d) acquisition of real property.

4. If it is unclear whether the proposed mitigation would provide additional conservation benefits after considering the above guidance, financial assistance managers must use judgment in making a decision. The overarching principles in making this decision should be: (a) Consistency with regulations, and (b) avoidance of an unauthorized subsidy to anyone who has a legal obligation to compensate for the environmental impacts of a project.

5. Service staff must be involved in the decision to locate mitigation on real property acquired under a Service-approved or administered financial assistance award for one or both of the following reasons:

a. The Service has a responsibility to ensure that real property acquired under one of its financial assistance awards is used for its authorized purpose as long as it is needed for that purpose.

b. If the proposed legal arrangements or the site-protection instrument to use the land for mitigation would encumber the title, the recipient of the award that funded the acquisition of the real property must obtain the Service's approval. If the proposed legal arrangements would dispose of any real-property rights, the recipient must request disposition instructions from the Service.

I. Does the Service's Mitigation Policy affect financial assistance programs and awards managed by other Federal entities?

1. This Policy affects only those Federal financial assistance programs and awards in which the Service has the authority to approve or disapprove applications for financial assistance or changes in the terms and conditions of an award. It also affects real property or equipment acquired or improved with a Service-administered financial assistance award where the recipient must continue to manage the real property or equipment for its originally authorized purpose as long as it is needed for those purposes.

2. The Policy has no effect on other Federal agencies' policies on match or cost share as long as those policies do not affect:

a. Restrictions in the Policy on the use of Service-approved or administered financial assistance awards for generating compensatory mitigation credits, and

b. the Service's responsibilities as identified in Federal statutes or their implementing regulations.

3. This Policy does not take precedence over the requirements of any Federal statute or regulation whether that statute or regulation applies to a Service program or a program of another Federal agency.

Dated: November 9, 2016.

Daniel M. Ashe,

Director, U.S. Fish and Wildlife Service.

[FR Doc. 2016–27751 Filed 11–18–16; 8:45 am]

BILLING CODE 4333–15–P

Agriculture & Environmental Law Update Session

June 9th, 2017

Table of Contents

March 12, 2014

The 2014 Farm Bill (Agricultural Act of 2014, P.L. 113-79)

What Is the Farm Bill?

The farm bill is an omnibus, multi-year piece of authorizing legislation that governs an array of agricultural and food programs. Although agricultural policies sometimes are created and changed by freestanding legislation or as part of other major laws, the farm bill provides a predictable opportunity for policymakers to comprehensively and periodically address agricultural and food issues.

The farm bill is typically renewed about every five years. Seventeen farm bills have been enacted since the 1930s (2014, 2008, 2002, 1996, 1990, 1985, 1981, 1977, 1973, 1970, 1965, 1956, 1954, 1949, 1948, 1938, and 1933). Farm bills traditionally have focused on farm commodity program support for a handful of staple commodities—corn, soybeans, wheat, cotton, rice, dairy, and sugar. Yet farm bills have become increasingly expansive in nature since 1973, with the inclusion of a nutrition title. Other prominent additions have been conservation, horticulture, and bioenergy programs.

The omnibus nature of the farm bill can create broad coalitions of support among sometimes conflicting interests for policies that individually might not survive the legislative process. This can stir fierce competition for funds. In recent years, more parties have become involved in the debate, including national farm groups, commodity associations, state organizations, and nutrition and public health officials, as well as advocacy groups representing conservation, recreation, rural development, faith-based interests, local food systems, and organic production.

> The farm bill provides an opportunity for Congress to comprehensively and periodically address agricultural and food issues, and is renewed about every five years.

The Agricultural Act of 2014 (P.L. 113-79, H.Rept. 113-333), referred to here as the "2014 farm bill," is the most recent omnibus farm bill. It was enacted in February 2014 and succeeded the Food, Conservation, and Energy Act of 2008 (P.L. 110-246, "2008 farm bill"). The 2014 farm bill contains 12 titles encompassing commodity price and income supports, farm credit, trade, agricultural conservation, research, rural development, energy, and foreign and domestic food programs, among others.

Provisions in the 2014 farm bill reshape the structure of farm commodity support, expand crop insurance coverage, consolidate conservation programs, reauthorize and revise nutrition assistance, and extend authority to appropriate funds for many U.S. Department of Agriculture (USDA) discretionary programs through FY2018. USDA reports that implementing the 2014 farm bill over the next few years will require about 150 rulemaking actions, and more than 40 studies and reports.

The 2014 Farm Bill (P.L. 113-79), by Title

- **Title I, Commodity Programs:** Provides support for major commodity crops, including wheat, corn, soybeans, peanuts, rice, dairy, and sugar, as well as disaster assistance.
- **Title II, Conservation:** Encourages environmental stewardship of farmlands and improved management through land retirement and/or working lands programs.
- **Title III, Trade:** Provides support for U.S. agricultural export programs and international food assistance programs.
- **Title IV, Nutrition:** Provides nutrition assistance for low-income households through programs including the Supplemental Nutrition Assistance Program (SNAP).
- **Title V, Credit:** Supports federal direct and guaranteed loans to farmers and ranchers.
- **Title VI, Rural Development:** Supports business and community programs and coordination activities with other local, state, and federal programs.
- **Title VII, Research, Extension, and Related Matters:** Supports agricultural research and extension programs.
- **Title VIII, Forestry:** Supports forestry management programs run by USDA's Forest Service.
- **Title IX, Energy:** Supports the development of farm and community renewable energy systems through various programs, including grants and loan guarantees.
- **Title X, Horticulture:** Supports the production of specialty crops—fruits, vegetables, tree nuts, and floriculture and ornamental products—through a range of initiatives.
- **Title XI, Crop Insurance:** Enhances coverage of the permanently authorized federal crop insurance program.
- **Title XII, Miscellaneous:** Other types of programs and assistance not covered in other bill titles, including provisions affecting livestock and poultry production.

Without a new farm bill or an extension, the authority for some farm programs would expire and some would cease to operate altogether unless reauthorized. Also, new activities under some old programs might not be initiated, for lack of either program authority or available funding. Nutrition assistance programs require periodic reauthorization if they are to continue. The farm commodity programs not only expire, but would revert to permanent law dating back to the 1940s. Many discretionary programs would not have statutory authority to receive appropriations in future years. Other programs have permanent authority and do not need to be reauthorized (e.g., crop insurance), but might be included to make changes for policy or budgetary goals.

What Is the Estimated Cost?

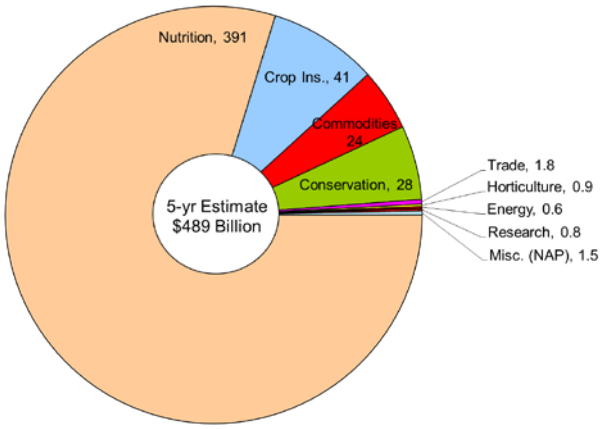
The farm bill authorizes programs in two spending categories: mandatory and discretionary. Mandatory programs generally operate as entitlements; the farm bill pays for them using multi-year budget estimates when the law is enacted. Discretionary programs are authorized for their scope, but are not funded in the farm bill; they are subject to appropriations. While both types of programs are important, mandatory programs often dominate the farm bill debate.

At enactment of the 2014 farm bill, the Congressional Budget Office (CBO) estimated that the total cost of mandatory programs (**Table 1**) would be $489 billion over the next five years (FY2014-FY2018).

The overwhelming share (99%) of estimated total net outlays is anticipated for four farm bill titles: nutrition, crop insurance, conservation, and farm commodity support (**Figure 1**). Of the projected net outlays, about 80% is for the Supplemental Nutrition Assistance Program (SNAP). Farm commodity support and crop insurance are expected to account for 13% of mandatory program costs, with another 6% of costs in USDA conservation programs. Programs in all other farm bill titles are expected to account for about 1% of all mandatory expenditures.

> CBO estimated that the total cost of mandatory programs in the 2014 farm bill would be $489 billion over the next five years (FY2014-FY2018).

Figure 1. Share of Projected Outlays, 2014 Farm Bill
(billions of dollars, FY2014-FY2018)



Source: CRS, using CBO's 2014 farm bill cost estimates (http://www.cbo.gov/publication/45049). Shows five-year projected mandatory outlays, FY2014-FY2018, in billions of dollars by title.

Of the total estimated mandatory outlays, $391 billion is for nutrition assistance and $98 billion is mostly geared toward agriculture production (**Table 1**). Within the agriculture portion, crop insurance outlays are projected to be $41 billion over the next five years, conservation $28 billion, and farm commodity programs $24 billion. The trade title is projected to spend $1.8 billion over the next five years, horticulture $0.9 billion, research $0.8 billion, and bioenergy $0.6 billion.

If the 2008 farm bill had continued, CBO estimated that mandatory outlays would have been $494 billion for the five-year period FY2014-FY2018. Including changes in revenues, the five-year net impact of the 2014 farm bill on the deficit is an estimated change of -$5.3 billion (-1.1%) over five years. (On a ten-year basis, the score is -$16.6 billion, with ten-year projected outlays of $956.4 billion.)

The net reduction in expected outlays is the result of some titles receiving more funding, while other titles provide offsets. The titles for farm commodity subsidies, nutrition, and conservation provide budgetary savings. The titles for crop insurance, research, bioenergy, horticulture, rural development, trade, forestry, and miscellaneous items receive additional funding.

Table 1. 2014 Farm Bill Budget, by Title (P.L. 113-79)
(millions of dollars, FY2014-FY2018)

	2014 Farm Bill Titles	CBO baseline FY2014-FY2018	CBO Score (chg. to baseline)	Projected Outlays (Baseline + Score)	Share
I	Commodities	29,888	-6,332	23,556	4.8%
II	Conservation	28,373	-208	28,165	5.8%
III	Trade	1,718	+64	1,782	0.4%
IV	Nutrition	393,930	-3,280	390,650	79.9%
V	Credit	-1,011	+0	-1,011	-0.2%
VI	Rural Dev.	13	+205	218	0.04%
VII	Research	111	+689	800	0.2%
VIII	Forestry	3	+5	8	<0.1%
IX	Energy	84	+541	625	0.1%
X	Horticulture	536	+338	874	0.2%
XI	Crop Ins.	39,592	+1,828	41,420	8.5%
XII	Misc. (NAP)	705	+839	1,544	0.3%
Total, Direct Spending		**493,941**	**-5,310**	**488,631**	**100%**

Source: CRS, using the CBO baseline and 2014 farm bill cost estimates (http://www.cbo.gov/publication/45049); CBO, "May 2013 Baseline for the 2008 Farm Bill Programs and Provisions, by Title," unpublished, May 2013; and "Updated Budget Projections: Fiscal Years 2013 to 2023," May 14, 2013 (http://cbo.gov/publication/44172). Reflects mandatory outlays in millions of dollars (FY2014-FY2018).

For more information, see CRS Report R43076, *The 2014 Farm Bill (P.L. 113-79): Summary and Side-by-Side*; CRS Report R22131, *What Is the Farm Bill?*; and CRS Report R42484, *Budget Issues Shaping the 2014 Farm Bill*. Additional CRS reports include CRS Report R41433, *Expiring Farm Bill Programs Without a Budget Baseline*; and CRS Report R42442, *Expiration and Extension of the 2008 Farm Bill*.

Renée Johnson, rjohnson@crs.loc.gov, 7-9588; and
Jim Monke, jmonke@crs.loc.gov, 7-9664.

IF00014

Congressional Research Service
Informing the legislative debate since 1914

Farm Safety Net Programs: Background and Issues

Dennis A. Shields
Specialist in Agricultural Policy

August 21, 2015

Congressional Research Service
7-5700
www.crs.gov
R43758

CRS REPORT
Prepared for Members and
Committees of Congress

Summary

The U.S. Department of Agriculture (USDA) operates several programs that supplement the income of farmers and ranchers in times of low farm prices and natural disasters. Federal crop insurance, farm programs, and disaster assistance are collectively called the farm safety net.

Federal crop insurance is often referred to as the centerpiece of the farm safety net because of its cost and broad scope for addressing natural disasters. The program is permanently authorized and makes available subsidized insurance for more than 130 commodities (ranging from apples to wheat) to help farmers manage risks associated with a loss in yield or revenue. Program cost is projected by the Congressional Budget Office to total $8.8 billion per year over the next decade. Producers pay a portion of the premium which increases as the level of coverage rises. The federal government pays the rest of the premium—62%, on average, in 2014—and covers the cost of selling and servicing the policies.

Farm commodity programs historically represented the heart of U.S. farm policy by virtue of their long history (dating back to the 1930s). Price and income support is based primarily on statutorily fixed prices and not market prices (as in crop insurance), which can be quite low in some years. For crop years 2014-2018, the Agricultural Act of 2014 (2014 farm bill, P.L. 113-79) established minimum prices via the marketing loan program for approximately two dozen commodities, including corn, soybeans, wheat, rice, and peanuts. In addition, producers with production histories for covered crops have a one-time choice between *Price Loss Coverage (PLC) payments* and *Agriculture Risk Coverage (ARC) payments*. Costs were projected in March 2015 at about $4 billion per year over the next decade. Programs are free for producers.

Agricultural disaster assistance is permanently authorized for livestock and orchards. Under the 2014 farm bill, nearly all parts of the U.S. farm sector are now covered by either a disaster program or federal crop insurance, which is expected to reduce calls for ad hoc assistance. As of May 2015, producer payments had totaled more than $5 billion for losses in FY2012-FY2015.

Compared with the previous farm bill, the 2014 farm bill was enacted with more crop insurance options and higher reference prices designed to trigger payments more often than under previous law. Funding was accomplished by eliminating direct payments that had been made annually since 1996 but played no role in managing farm risk because they did not vary with farm prices.

Several facets of the current farm safety net might be of interest to the 114th Congress. An initial focus could be on USDA's implementation of the farm safety net provisions. Issues could include the delayed payment schedule, which could expose cashflow problems, and the pending "actively engaged" rule that could affect program eligibility for some producers.

With ongoing concern for budget deficits and federal spending, Congress also might be interested in reviewing the effectiveness of the revised safety net and actual costs, which are expected to be higher than earlier projections due to lower farm prices. Farm safety net proponents say the current suite of programs has been designed for such situations and is needed to adequately protect producers and the overall agriculture sector. Critics believe that a simplified approach might be more effective and less expensive, with funds used instead for broad societal gains, such as investment in agricultural research or transportation infrastructure. The Administration has proposed trimming crop insurance subsidies, arguing that the safety net could remain effective.

Contents

Figures

Tables

Appendixes

Contacts

Overview

Congress has devised a variety of programs operated by the U.S. Department of Agriculture (USDA) to support farm income and help farmers and ranchers manage production or price risk. The programs essentially supplement farm incomes in times of low farm prices and natural disasters, and they are collectively called the farm safety net. The three main components are (1) permanently authorized federal crop insurance, (2) farm commodity price and income support programs for crop years 2014-2018, and (3) permanently authorized agricultural disaster programs. Additional support is provided through emergency loans and USDA discretionary assistance. The suite of programs is designed to allow for maximum farmer choice and flexibility.

Most farmers and ranchers are eligible for at least one of these federal programs. Some commodities are supported by only one method; others receive support through a combination of program tools. Within the farm safety net, federal crop insurance is most extensive, as policies are available for much of U.S. agriculture, including grains, fruits and vegetables, pasture, nursery crops, and livestock gross margins. About two dozen of these crops (e.g., corn, soybeans, wheat) are eligible for both crop insurance and farm commodity programs, including minimum statutory prices. Sugar and dairy have their own programs, while disaster programs support livestock producers. The federal cost for the farm safety net was projected in March 2015 to average about $13.5 billion per year for FY2015-FY2024 (**Table 1**).

Table 1. Farm Support by Commodity

Commodity	Federal Crop Insurance	Farm Commodity Programs	Disaster Assistance
Feed grains (corn, sorghum, barley, oats), peanut, pulses (dry peas, lentils, chickpeas), rice, soybeans, other oilseeds, wheat	Yield or revenue guarantees based on historical yields and *same-year market* prices, plus county yield or revenue guarantee for some crops (Suppl. Coverage Option—SCO)	Price Loss Coverage (PLC) and Ag. Risk Coverage (ARC) - price or revenue guarantee based on historical yields and *minimum prices* (or 5-year *historical* prices); nonrecourse loans with *min. prices*	—
Upland cotton	Same as above, plus county revenue guarantee (Stacked Income Protection Plan—STAX)	Transition payments in 2014 (and 2015 if STAX is not available); nonrecourse loans with *minimum prices*	—
Sugar	Yield guarantees based on same-year market prices	Import quotas, nonrecourse loans with *minimum prices*, and marketing allotments	—
Fruits, vegetables, & nursery	Yield or revenue guarantees, & other products, incl. whole farm	—	Payment for loss of fruit trees and vines (assets)
Livestock & poultry	Insurance for livestock prices, gross margins, & pasture/forage	—	Payment for loss of animals, forage, & feed
Dairy	Insurance for livestock prices, gross margins, & pasture/forage	Margin Protection Program (milk price minus feed costs)	Payment for loss of animals, forage, & feed
Projected ave. annual cost	$8.8 billion	$4.2 billion	$0.5 billion

Source: CRS Report IF00025, Overview of Farm Safety Net Programs (In Focus); costs from CBO.

Notes: Nonrecourse loans (for cash flow and low-price protection) also are available for extra-long staple cotton, wool, mohair, and honey. Emergency loans in disaster-declared counties are not commodity-specific. Uses CBO estimates for FY2015-FY2024 as of March 2015; projections are sensitive to market changes.

Federal Crop Insurance[1]

Federal crop insurance often is referred to as the centerpiece of the farm safety net because of its broad scope and cost. The program makes available subsidized insurance for more than 130 commodities to help farmers manage financial risks associated with a loss in yield or crop revenue. Insurable causes of loss include adverse weather such as drought and excess rain. A distinguishing feature is that guarantees are based on market prices and not on statutory minimums, as provided in farm commodity programs. Program cost was projected by the Congressional Budget Office (CBO) in March 2015 to total $8.8 billion per year during FY2015-FY2024, about twice the level of farm commodity programs.

Insurable commodities include major field crops such as wheat, corn, soybeans, cotton, peanuts, and rice, as well as many specialty crops (including fruit, tree nut, vegetable, and nursery crops), pasture, rangeland, forage crops, and livestock (prices and operating margins). Policies cover more than 250 million acres nationwide. For major crops, three-fourths or more of U.S. planted acreage is insured under the federal crop insurance program. Producers who grow a crop not covered by crop insurance can purchase coverage through the Noninsured Crop Disaster Assistance Program (NAP).

The program is permanently authorized by the Federal Crop Insurance Act, as amended (7 U.S.C. §1501 et seq.). The Federal Crop Insurance Corporation (FCIC) was created as a wholly owned government corporation in 1938 to carry out the program. The program is a partnership between U.S. Department of Agriculture's Risk Management Agency (RMA) and private industry. RMA approves and supports products, develops and approves the premium rates, administers premium subsidies, reimburses private companies for their administrative and operating costs (i.e., delivery costs for selling and servicing the policies), and reinsures company losses. Producer premium subsidies account for three-fourths of total federal crop insurance costs.

Farmers annually purchase about 1.2 million policies, with many producers purchasing multiple policies depending on the number of crops grown and other factors. Policies protect against individual farm losses in yield, crop revenue, or whole farm revenue. Area-wide policies are available for some crops, whereby an indemnity is paid when there is an overall loss over a broad geographic area (e.g., county). For some policies, the revenue guarantee can increase if the harvest price is higher than the expected price calculated in the springtime prior to planting, thereby increasing the point at which indemnities are triggered.

In practice, the producer selects a coverage level and absorbs the initial loss through the deductible. For example, a coverage level of 70% has a 30% deductible (for a total equal to 100% of the expected value prior to planting the crop); in this case an indemnity is made for losses exceeding 30%. The producer pays a portion of the premium, and the federal government pays the rest of the premium—62%, on average, in 2014—plus covers the cost of selling and servicing the policies. This differs from farm commodity programs (see "Farm Commodity Programs," below), which require no participation fees. Also unlike farm commodity programs, crop insurance has no subsidy limits, and participants can be eligible regardless of income levels.

[1] For more information, see CRS Report R40532, *Federal Crop Insurance: Background,* and CRS Report R43494, *Crop Insurance Provisions in the 2014 Farm Bill (P.L. 113-79).*

Farm Commodity Programs[2]

USDA farm commodity programs historically represented the heart of U.S. farm policy, by virtue of their long history (dating back to the 1930s) and because price and income support is based primarily on statutorily fixed prices and not market prices (as in crop insurance), which can be quite low in some years. Program costs were projected in March 2015 by CBO at about $4.2 billion per year over FY2015-FY2024. Funding is provided through the Commodity Credit Corporation (CCC), USDA's program financing mechanism. USDA's Farm Service Agency (FSA) delivers CCC-funded commodity program benefits through a network of local ("county") offices overseen by committees of elected farmers.

The statutory authority underpinning USDA-CCC programs is provided mainly by three permanent laws: the Agricultural Adjustment Act of 1938 (P.L. 75-430), the Agricultural Act of 1949 (P.L. 81-439), and the CCC Charter Act of 1948 (P.L. 80-806). Congress frequently alters or suspends provisions of these laws through omnibus, multi-year farm bills. The most recent omnibus farm law is the Agricultural Act of 2014 (P.L. 113-79). This law is effective for the 2014-2018 crop years. To reduce the deficit and pay for changes to federal crop insurance and farm commodity programs, Congress eliminated fixed decoupled or "direct" payments that had been in place since the 1996 farm bill and were not triggered by declining prices or a farm loss.

The 2014 farm bill requires USDA to offer farm commodity support, including minimum prices, for wheat, feed grains (corn, sorghum, barley, oats), cotton (upland and extra-long staple—ELS), rice, soybeans, other oilseeds (sunflower seed, rapeseed, canola, safflower, flaxseed, mustard seed, crambe, and sesame seed), peanuts, refined beet and raw cane sugar, wool, mohair, honey, dry peas, lentils, and chickpeas. The mix of supported crops reflects historical policy goals and compromises. The most recent additions were pulse crops (dry peas, lentils, chickpeas) in 2002.

Covered Commodities: Wheat, Feed Grains, Rice, Peanuts, Soybeans, Other Oilseeds, Dry Peas, Lentils, and Chickpeas. For each "covered commodity" in the 2014 farm bill, eligible producers (those with past production histories for these crops) had a one-time choice in early 2015 between *Price Loss Coverage (PLC) payments* and *Agriculture Risk Coverage (ARC) payments*, depending on their preference for protection against a decline in either (a) crop prices or (b) crop revenue.[3] PLC payments make up the difference between the crop's average market price and its statutory "reference price" (see **Table 2**), while ARC payments make up the difference between a county revenue guarantee (based on five-year average crop prices or statutory minimums) and actual crop revenue. Payments to a producer are paid on 85% of the farm's acreage history (i.e., "base"). Rather than selecting between PLC and the county ARC guarantee for each covered commodity, a farmer can select a farm-level "individual" ARC guarantee, which combines all covered crops into a single, whole-farm revenue guarantee. Payment is based on 65% of acreage history. In response to a trade dispute with Brazil, upland cotton is no longer a covered commodity, with support now provided by a new crop insurance policy called the Stacked Income Protection Plan (STAX) in addition to marketing assistance loans (see below).

[2] For more information, see CRS Report R43448, *Farm Commodity Provisions in the 2014 Farm Bill (P.L. 113-79).*

[3] 7 C.F.R. §1412; Commodity Credit Corporation and USDA Farm Service Agency, "Agriculture Risk Coverage and Price," 79 *Federal Register* 57703-57721, September 26, 2014. For program purposes, producers/landowners could reallocate base acres and update yields between September 29, 2014, and February 27, 2015. They could make the PLC/ARC program choice between November 17, 2014, and March 31, 2015.

Table 2. Reference Prices and Loan Rates in the 2014 Farm Bill

Crop	Reference Price	Loan Rate	Crop	Reference Price	Loan Rate
Wheat, $/bu	5.50	2.94	Peanuts, $/ton	535	355
Corn, $/bu	3.70	1.95	Peas, dry, $/cwt	11.00	5.40
Sorghum, $/bu	3.95	1.95	Lentils, $/cwt	19.97	11.28
Barley, $/bu	4.95	1.95	Sm.chickpeas, $/cwt	19.04	7.43
Oats, $/bu	2.40	1.39	Lg.chickpeas, $/cwt	21.54	11.28
Upland Cotton, $/lb	n.a.	0.45 to 0.52	Wool, graded, $/lb	n.a.	1.15
ELS Cotton, $/lb	n.a.	0.7977	Wool, nongraded	n.a.	0.40
Rice, long grain $/cwt	14.00	6.50	Mohair $/lb	n.a.	4.20
Rice, med. grain $/cwt	14.00; 16.10 for temperate *japonica*	6.50	Honey, $/lb	n.a.	0.69
Soybeans, $/bu	8.40	5.00	Sugar, raw cane, $/lb	n.a.	0.1875
Minor oilseeds, $/lb	0.2015	0.1009	Sugar, refined beet, $/lb	n.a.	0.2409

Source: CRS from 2014 farm bill (P.L. 113-79).

Notes: n.a. = not applicable. Crops with reference prices are called "covered commodities." Minor oilseeds include sunflower seed, rapeseed, canola, safflower, flaxseed, mustard seed, crambe, and sesame seed.

Unlike federal crop insurance, producers do not pay to participate in these programs. Payment recipients can plant any combination of crops on their land, but conservation rules must be followed. The **Appendix** contains graphical illustrations and numeric examples of PLC and ARC.

Producers, regardless of whether they receive the above payments, also are eligible for *nonrecourse marketing assistance loans* and *loan deficiency payments*, which provide cash flow and additional price protection at statutory minimum prices. (See **Table 2** for loan rates.) To qualify, a farmer pledges the stored crop as collateral. Nonrecourse loans generally must be repaid with interest within nine months or else the producer forfeits the pledged commodity to the government, which has "no recourse" other than to accept it in lieu of money. However, two features are intended to help avert forfeitures and subsequent buildup of CCC-owned surpluses. First, the "marketing loan" feature enables the farmer to repay the loan at a USDA-calculated rate approximating market prices. If that repayment rate is below the loan rate, the farmer captures the difference as a subsidy (marketing loan gain). Loan deficiency payments (equal to marketing loan gains) also are available to eligible producers who choose not to take out a crop loan.

Upland Cotton, ELS Cotton, Wool, Mohair, Honey. These commodities are not eligible for PLC/ARC payments, but producers can receive nonrecourse marketing assistance loans and (except for ELS cotton) loan deficiency payments.

Payment Limits and Adjusted Gross Income Eligibility. Farm commodity program benefits (except for "gains" from loan forfeitures) are subject to a combined payment limit of $125,000 per person, with an additional separate limit of $125,000 for peanuts. Also, the income limit per person for program eligibility is $900,000 of adjusted gross income (three-year average). The dollar amounts double for a married couple. Finally, persons must be "actively engaged" in farming. With benefits from forfeited loans not counted against the payment limit, potential payments for PLC/ARC have generated concerns that loans for peanuts and other crops could be forfeited, resulting in government stock build-up, if producers approach the $125,000 limit.

Sugar. A combination of import quotas, nonrecourse loans, and marketing allotments (to limit sales by processors) is intended to support prices at 18.75¢/lb. (raw cane) and 24.09¢/lb. (refined beet), and at no net cost to the government. A sugar-to-ethanol (feedstock flexibility) backstop is available if allotments and import quotas fail to keep market prices above guaranteed levels.[4]

Milk. Dairy producers are eligible for the Margin Protection Program (MPP), which makes payments when the national margin (average farm price of milk minus an average feed cost ration) falls below a producer-selected margin ranging from $4.00 per hundredweight (cwt.) to $8.00/cwt. Participating producers pay premiums for margin coverage above $4.00/cwt. To assist small farms, lower premiums are charged for the first 4 million pounds of annual output (approximately 170 cows), while higher premiums are charged on amounts above 4 million lbs. A 25% discount on premiums is available for 2015 on coverages below $8.00/cwt.[5]

Agricultural Disaster Assistance[6]

The 2014 farm bill permanently authorized three disaster programs for livestock and one for orchards and vineyards. Nearly all parts of the U.S. farm sector now are covered by either a disaster program or federal crop insurance, which is expected to reduce calls for ad hoc federal assistance. CBO estimates annual outlays at about $500 million per year for FY2015-FY2024. The programs are retroactive, and producer payments as of May 2015 totaled more than $5 billion for losses in FY2012-FY2015. The programs are:

1. **Livestock Indemnity Program (LIP)**, which provides payments to eligible livestock owners and contract growers at a rate of 75% of market value for livestock deaths in excess of normal mortality caused by adverse weather;
2. **Livestock Forage Disaster Program (LFP)**, which makes payments to eligible livestock producers who have suffered grazing losses on drought-affected pasture or grazing land, or on rangeland managed by a federal agency due to fire;
3. **Emergency Assistance for Livestock, Honey Bees, and Farm-Raised Fish Program (ELAP)**, which provides payments (capped at $20 million per year) to producers of livestock, honey bees, and farm-raised fish as compensation for losses due to disease, adverse weather, and feed or water shortages; and
4. **Tree Assistance Program (TAP)**, which makes payments to orchardists/nursery tree growers for losses in excess of 15% to replant trees, bushes, and vines damaged by natural disasters.

The programs do not require a disaster declaration, and producers do not pay a fee to participate. For individual producers, combined payments under all programs except TAP may not exceed $125,000 per year. For TAP, a separate limit of $125,000 per year applies. Also, to be eligible for a payment, a producer's total adjusted gross income cannot exceed $900,000. Separately, for all types of farms and ranches, when a county has been declared a disaster area by either the President or the Secretary of Agriculture, producers in that county may become eligible for low-interest emergency disaster (EM) loans. USDA also has several programs that help producers repair damaged land following natural disasters.

[4] CRS Report R42535, *Sugar Program: The Basics.*

[5] CRS Report R43465, *Dairy Provisions in the 2014 Farm Bill (P.L. 113-79)*.

[6] CRS Report RS21212, *Agricultural Disaster Assistance*; and CRS Report R42854, *Emergency Assistance for Agricultural Land Rehabilitation.*

USDA Discretionary Support

In addition to the explicitly required assistance described above, federal law has long given USDA the discretion to offer support for virtually any farm commodity. For example, USDA made direct payments to hog producers in 1999 during a period of historically low prices, and to fruit, vegetable, and nursery plant growers affected by Florida hurricanes in 2004 and 2005. The most recent emergency farm assistance extended under discretionary authority was in 2010, when USDA made farm payments for weather-related and other losses to producers of upland cotton, rice, soybeans, poultry, and aquaculture. Authority and funding for these various activities can come from CCC (under the CCC Charter Act) and Section 32 (of P.L. 74-320, a 1935 law).

Section 32 permanently appropriates the equivalent of 30% of annual customs receipts to support the farm sector through a variety of activities. Most of this appropriation (now about $8 billion per year) is transferred directly to USDA's child nutrition account to fund school feeding and other programs. Much of the remainder provides USDA with a source of discretionary funds, which in addition to the direct payments above also pays for "emergency removals" of surplus agricultural commodities, disaster relief, or other unanticipated needs. USDA annually purchases hundreds of millions of dollars in meats, poultry, fruits, and vegetables under Section 32. Importantly, in annual appropriations acts since FY2012, Congress has restricted some of USDA's authority by prohibiting the use of appropriated funds to pay for salaries and expenses needed to operate a farm disaster program under either funding source.[7]

Historical Policy Discussion

When commodity programs and the federal crop insurance program were first authorized in the 1930s, most of the country's then 6.8 million farms were diversified and small (by today's standards). There was a perceived need to address the severe economic problems faced by this large segment of rural-based society, where about 25% of the U.S. population resided. Moreover, it was argued, stabilizing the agricultural sector—through guaranteed minimum farm prices, income payments to producers, and/or various supply management techniques—would help to ensure an abundant supply of food and fiber at reasonable prices in the future.

Over the last half century, while farm size and incomes have increased, the perennial challenge of price and income variability has remained, especially as increased globalization exposed U.S. agricultural markets to international events. As a result, policy makers have focused increasingly on risk management rather than traditional price support and supply control. Both Congress and the Administration sought, for many decades, to steer price and income support programs onto a more "market-oriented" course, so that the private market rather than the government would provide economic rewards for production agriculture. And since 1980, to reduce the potential for ad hoc disaster assistance and provide producers with risk management tools, the federal crop insurance program has been enhanced for producers multiple times by increasing subsidy rates and broadening coverage.

Most recently, Congress passed the 2014 farm bill with additional crop insurance options and higher farm program guarantees (reference prices) designed to trigger payments more often than under previous law. Funding was accomplished by eliminating direct payments that had been made annually to eligible producers and farmland owners since 1996 but played no role in managing farm risk because they did not vary with farm prices. Also, as part of the trend toward

[7] For more information, see CRS Report RL34081, *Farm and Food Support Under USDA's Section 32 Program*.

risk management, the 2014 farm bill's new dairy program and Agriculture Risk Coverage have insurance-like features that reimburse farmers when a loss is triggered.

Supporters of the farm safety net contend that the authorized programs protect against price and market volatility, and provide needed support and/or stability to farmers who otherwise would see plunging incomes and land values due to unfavorable and unpredictable yields. Critics have long argued that U.S. commodity-based policies are outdated and transfer too much risk from private businesses (farms) to the federal government, waste taxpayers' money, and may be detrimental to society in general, particularly if policies encourage farming on environmentally sensitive land.

Prospective Issues

Several facets of the current farm safety net might be of interest to the 114th Congress, including USDA's implementation of the farm safety net provisions of the 2014 farm bill. Also, potential efforts to find budgetary savings could direct attention to government expenditures on commodity programs and subsidy levels for federal crop insurance. Finally, as programs are activated through the five-year life of the 2014 farm bill, Congress might have interest in the overall design of the farm safety net, including the appropriate level of federal farm support and how to best deliver it.

Implementation

After enactment of the 2014 farm bill in February 2014, USDA immediately began implementing the farm safety net provisions. In April 2014, the disaster programs were some of the first 2014 farm bill programs to be implemented. USDA began issuing disaster payments for 2012 and 2013 losses shortly thereafter. Later in 2014, regulations were published for new commodity programs and crop insurance changes.[8]

The farm program signup involved a series of decisions for farmers in early 2015. The first was the decision for base and program yields. Owners of farms had a one-time opportunity to (1) maintain the farm's 2013 base acres of covered commodities through 2018 or (2) reallocate base acres among those covered commodities planted on the farm at any time during the 2009-2012 crop years. In addition, participants could update their program payment yields (equal to 90% of the 2008-2012 average yield for the farm). The second decision was for the program choice, whereby farm owners and operators had a one-time opportunity to select between PLC, ARC-County Coverage, and ARC-Individual. The final step was for producers to enroll their farms by signing a contract (summer 2015).

In late 2014 and early 2015, USDA's Farm Service Agency and the Cooperative Extension System (including land grant universities), had provided farmers with information for making farm program decisions.[9] Farmers could use decisions tools (developed with funding from the 2014 farm bill) to sift through the program choices, which required collection of farm data and analysis including projections for farm prices through 2018. Farmers considered their options based on maximizing potential government payments and/or protecting again low revenue or prices over the five-year period covered by the farm bill. With a choice of several options (farmers could pick PLC for one crop and ARC-County for another crop, or ARC-Individual for a

[8] The department summarizes activities related to 2014 farm bill implementation at http://www.usda.gov/wps/portal/usda/usdahome?contentid=progress-2014-farm-bill.html.

[9] For more information, see USDA/Farm Service Agency, http://www.fsa.usda.gov/FSA/webapp?area=home&subject=arpl&topic=landing.

guarantee that combines all crops), producers were able to tailor the program to their individual farms. However, upfront decisions were required, and some farmers may not be happy with their choice in the future if their program does not activate during difficult financial times and the alternative does.

Nationwide, ARC-County Coverage was elected by 96% of soybean farms, 91% of corn farms, and 66% of wheat farms. Over 90% of rice and peanut farms elected PLC. Few farms, regardless of the commodity mix, elected ARC-Individual.[10]

Timing of Farm Program Payments

Under the 2014 farm bill, farm program payments are delivered about one year (or more) after farmers harvest the crop. For example, any payments associated with corn planted in spring of 2014 and harvested in fall 2014 are not made until October 2015 at the earliest (i.e., FY2016). The delay in payments helped reduce the "budget score" of the farm bill by shifting one year of payments outside the 10-year budget scoring window.

This timing of program payments is significantly later than under the 2008 farm bill when partial payments were made available prior to planting (except for winter wheat), with the remainder delivered shortly after harvest. The old schedule helped farmers with cashflow needs, including paying for their production costs (e.g., seed, fertilizer). Some policy observers and lenders are concerned that farmers might have a cashflow during low-price years. Bankers may need to fill the gaps with additional loans and cropping decisions might be affected (e.g., farmers shift to crops with lower input costs). As an alternative, farmers might make greater use of the marketing assistance loan program, which was reauthorized by the 2014 farm bill and is designed to help with farm cashflow by using crops as collateral for a loan.

"Actively Engaged" Rule

To be eligible for payments, persons must be "actively engaged" in farming. Actively engaged, in general, is defined as making a significant contribution of (i) capital, equipment or land, and (ii) personal labor or active personal management. Also, profits are to be commensurate with the level of contributions, and contributions must be at risk. Legal entities can be actively engaged if members collectively contribute personal labor or active personal management. Special classes allow landowners to be considered actively engaged if they receive income based on the farm's operating results, without providing labor or management. Both spouses are considered actively engaged if only one meets the qualification, allowing payment limits to be doubled.

The 2014 farm bill instructs USDA to write regulations that define "significant contribution of active personal management" to more clearly and objectively implement existing law. The regulation is to apply beginning with the 2015 crop year, and entities made solely of family members are to be exempt from the new regulation. This enacted provision differs from earlier Senate-passed and House-passed versions of the 2014 farm bill, which would have deleted "active personal management" and effectively required personal labor in the farming operation. Under the 2014 farm bill, USDA is required to consider different limits for varying types of farming operations, based on considerations of size, nature, and management requirements of different farming types; changes in the nature of active personal management due to advancements in farming practices; and the impact of this regulation on the long-term viability of farming operations.

[10] For more information, see http://www.fsa.usda.gov/programs-and-services/arcplc_program/index.

USDA issued a proposed rule in March 2015, and the comment period ended May 26, 2015. The proposed rule limits farm payments to individuals who may be designated as farm managers but are not actively engaged in farm management. Under the proposed rule, non-family joint ventures and general partnerships must document that their managers are making significant contributions to the farming operation, defined as 500 hours of substantial management work per year, or 25% of the critical management time necessary for the success of the farming operation. Issuance of the final rule is pending.[11]

Implementing SCO and STAX for Upland Cotton

For a typical federal crop insurance policy, an indemnity is triggered when the farm yield (or revenue) is below the policy guarantee, and the size of the indemnity is determined in part by the amount of coverage purchased by the producer. As provided under the 2014 farm bill, and to help cover the deductible (out-of-pocket or "shallow" loss) absorbed by the farmer on the underlying policy, farmers can now purchase a second policy on the same acreage, called Supplemental Coverage Option (SCO). The SCO indemnity is triggered when there is a county-level loss in yield or revenue (not an individual farm loss). A similar policy was made available for upland cotton called Stacked Income Protection (STAX), which is a revenue-based, area-wide crop insurance policy that may be purchased as a stand-alone policy for primary coverage or purchased in tandem with an underlying policy.[12] Premiums are subsidized at 65% for SCO and 80% for STAX.

Beginning with the 2015 crop year, SCO is available in select counties for spring barley, corn, soybeans, wheat, sorghum, cotton, and rice.[13] Beginning with the 2016 crop year, USDA expects to make greater use of crop insurance data to expand SCO coverage into select counties for alfalfa seed, canola, cultivated wild rice, dry peas, forage production, grass seed, mint, oats, onions, and rye. SCO is also expected to be available in 2016 for almonds, apples, blueberries, grapes, peaches, potatoes, prunes, safflower, tomatoes, and walnuts. USDA plans to extend coverage in the 2017 crop year to grapefruit, lemons, mandarins/tangerines, oranges, and tangelos.

Farmers who normally purchase relatively low levels of coverage (which are more affordable) might be most attracted to SCO, as it could help cover a larger portion of the farmer's out-of-pocket loss (deductible). Proponents argue that these farmers are usually in the higher risk areas and need additional assistance through SCO to deal with the additional risk. Critics argue that these policies provide an excessive amount of support for crops in risky areas or can indemnify producers when there is no farm loss. Separately, a concern for some farm policy makers is that because the policies are triggered by area-wide losses and not farm losses, farmers may not be adequately covered if they suffer a loss on their farm but there was not a sufficient loss at the county level to trigger an indemnity. These issues might capture the attention of policy makers after producers have some experience with these policies.

[11] For more information, see http://www.fsa.usda.gov/programs-and-services/payment-eligibility/actively_engaged/index.

[12] STAX was sought by U.S. cotton producers in an attempt to resolve a long-running trade dispute with Brazil that requires changing the U.S. cotton support program so it does not distort international markets.

[13] USDA, Risk Management Agency, *Supplemental Coverage Option for Federal Crop Insurance*, October 2014, http://www.rma.usda.gov/news/currentissues/farmbill/2014NationalSupplementalCoverageOption.pdf. See also CRS Report R43494, *Crop Insurance Provisions in the 2014 Farm Bill (P.L. 113-79).*

Actual Production History (APH) for Crop Insurance

In recent years, a particular crop insurance concern of producers affected by prolonged drought in the Southern Plains has been the inclusion of poor yields used to establish an individual's insurance guarantee, which is based on 4 to 10 years of historical farm yields and called actual production history (APH). To address this, the 2014 farm bill allows a producer to exclude years with low yields from his or her APH calculation when the average county yield is less than 50% of the 10-year county average. The farm bill manager's report directed USDA to implement the provision for 2015 crops. Given program complexity and significant data requirements, USDA first indicated that it would not do so until 2016, prompting some Members to press for an earlier rollout. On October 21, 2014, USDA announced it would implement the provision for crops planted in spring 2015 (but not wheat planted in fall 2014). Some Members had pushed for extending benefits retroactively to wheat planted in fall 2014, which USDA declined to do.

Additional Crop Insurance Provisions

The 2014 farm bill enacted several provisions to address specific concerns for fruit and vegetable producers, including whole farm insurance. In November 2014, USDA announced the availability of a revised Whole-Farm Revenue Protection plan of insurance, which offers higher levels of coverage and other features designed to enhance the safety net for fruit and vegetable producers and others with limited availability of traditional federal crop insurance products. The 114th Congress is expected to monitor the experiences of these producers during 2015.

Members also will likely await the results of number of studies required by the farm bill to explore potential products for additional commodities. The 2014 farm bill directs FCIC to study a variety of topics that could lead to additional insurance policies for animal agriculture. FCIC is required to enter into contracts to conduct research and development on policies for the margin between the market value of catfish and input costs and poultry business interruption insurance for poultry growers, including losses due to bankruptcy of an integrator (owner-processor). FCIC also is required to contract for separate studies on insuring swine producers and poultry producers for a catastrophic event.

More information on other provisions in the 2014 farm bill is available in CRS Report R43494, *Crop Insurance Provisions in the 2014 Farm Bill (P.L. 113-79).*

Agricultural Disaster Payments

Given significant drought conditions in parts of the Great Plains in recent years, the Livestock Forage Program (LFP), as modified in the 2014 farm bill to provide retroactive payments for losses back to FY2012, has delivered to date the largest amount of farm safety net payments. Program payments totaled $3.0 billion in FY2014 and are projected by CBO to total $2.5 billion in FY2015. There is no program cap on LFP payments. Smaller amounts have been delivered to other disaster programs: the Livestock Indemnity Program ($55 million in FY2015) and Tree Assistance Program ($8 million in FY2015). For the Emergency Assistance for Livestock, Honey Bees, and Farm-Raised Fish Program (ELAP), annual payments are capped at $20 million, and individual farm payments for both FY2012 and FY2013 were adjusted downward in order for the total to fit under the cap. At the time of farm bill enactment, the CBO score for total disaster payments expected in FY2014 and FY2015 was $1.3 billion.

With relatively large LFP outlays under the 2014 farm bill, Congress might be interested in the payment process for LFP. USDA's Office of Inspector General (OIG) reviewed the program under the 2008 farm bill, and in December 2014 found that the Farm Service Agency (FSA) had made

administrative errors when processing certain LFP applications, resulting in improper payments for some applications.[14] The OIG identified areas needing attention, including improved guidance for local FSA offices when calculating and making payments and improved internal reviews for producer eligibility and payment accuracy.

Government Outlays and Policy Issues

With ongoing congressional concern for budget deficits and federal spending, the combined cost of farm programs, crop insurance, and disaster programs is expected to garner the attention of policy makers who want to reduce federal spending in the 114th Congress. Several additional aspects of the farm safety net might be examined, including "generic" base acres and crop insurance subsidies.

Potential for Higher Farm Program Outlays

Record corn and soybean yields in 2014 have put downward pressure on farm prices, pushing government outlays for the farm commodity programs for 2014 crops above earlier expectations. In March 2015, CBO estimated the cost of PLC/ARC for FY2016 (associated with crops harvested in 2014) at $4.0 billion, up from $3.8 billion that was calculated in January 2014 based on stronger market assumptions. USDA expects even higher FY2016 outlays, estimated at $7.3 billion. The five-year program costs could rise substantially as well, if the price of corn remains below $4 per bushel through 2018. Corn generates the greatest outlays among program crops, and its price correlates with other crop prices. To offset the projected higher farm program costs, the Administration proposed in its FY2016 budget a reduction in crop insurance subsidies (see "Crop Insurance Subsidies" below).

Lower expected farm prices are significant for program outlays because the 2014 farm bill increased program payment triggers (reference prices) for covered commodities (see list in **Table 2**). The additional price protection will trigger payments (generating outlays) more quickly than under the 2008 farm bill, but farm programs were designed to provide financial cover for producers until crop prices rebound and incomes rise. Proponents of farm spending also point out that weak prices likely will have the opposite effect for federal crop insurance (i.e., reducing prospective outlays) because policy premiums (and the premium subsidy) typically decline in tandem with falling farm prices (lower prices means lower liability and premiums).

A broader policy concern is that prospective payments could help maintain overall crop production when low prices would otherwise discourage farmers from planting or applying additional inputs. Larger supplies could intensify the price pressure and further increase government costs. Several program features, however, are designed to minimize any adverse production effect. The first is that farm payments are made only on historical base acreage and not current year plantings (except for generic base—see below). In other words, farmers would receive the payment, if triggered by low prices or revenue, regardless of how much acreage is planted. Moreover, payment is made only on a portion of base (85% in the case of PLC and ARC-County and 65% for ARC-Individual). Finally, the ARC formula limits the potential production effects if farm prices were to remain low for several years. That is, the ARC guarantee declines as older, higher prices (from recent years) fall out of the five-year moving average guarantee, at least

[14] USDA Office of Inspector General, *Farm Service Agency Livestock Forage Program*, Audit Report 03702-0001-32, December 2014, http://www.usda.gov/oig/webdocs/03702-0001-32.pdf.

until farm prices decline to the reference price, which serves as the minimum price in the ARC guarantee. In contrast, the PLC guarantee is the reference price, which remains fixed in statute.

The fixed nature of the reference prices has potential to lock in farm payments for an extended period of time if, for particular crops, the average farm price remains below the reference price. For example, the average farm price for peanuts is projected by CBO to average between $0.2039 per pound and $0.2150 per pound for crop years 2014-2018, compared with a reference price of $0.2675 per pound. Farm program outlays for peanuts are expected to be triggered each year of the farm bill, with outlays projected by CBO to exceed $200 million per year. USDA expects significantly higher peanut outlays.

"Generic" Base Acres

As mentioned above, to reduce the potential for excess production and subsequent market distortions, the 2014 farm bill continues to "decouple" farm payments from actual plantings by instead making PLC/ARC payments on a farm's historical "base acres." Each farm has crop-specific bases equal to historical planted acreage on that farm. Also, as part of a package to address a long-term trade dispute, the 2014 farm bill excluded upland cotton from PLC/ARC and renamed upland cotton base (totaling 17.5 million acres) as "generic" base. Generic base becomes eligible for program payments if a covered crop is planted on the farm. Thus, generic base is an exception to the broad decoupling of plantings and farm program payments. (The precursor to ARC, called "ACRE," also tied government payments to same-year plantings.)

The domestic and trade policy concern is that farmers with generic base might pursue potential farm program payments by planting certain covered crops in low-price years (see "WTO Trade Concerns" below). For example, producers with generic base might have an economic incentive to plant additional peanuts if the combination of expected payments and market returns is greater for peanuts than for alternative crops. For a discussion of potential planting incentives on generic base acres and associated government costs, see CRS Report R44156, *U.S. Peanut Program and Issues*. **Table A-3** contains an example of Price Loss Coverage (PLC) payments for peanuts, with generic base attributed to peanuts.

Crop Insurance Subsidies

To offset higher farm program outlays given lower expected farm prices, the Administration's FY2016 budget proposed two changes to the federal crop insurance program, which would reduce outlays by a combined $16 billion over 10 years.[15] The first proposal would reduce premium subsidies by 10 percentage points for policies providing revenue protection with "harvest price coverage" (crops include wheat, corn, soybeans and others with guarantees set by USDA using the futures market). The current subsidy ranges between 38% and 80%, depending upon the coverage (deductible) purchased by the producer. The guarantee for this type of coverage increases if harvest-time price is higher than the initial guarantee established prior to planting. The Administration and others argue that such "up-side" price protection does not need to be subsidized by the government. The second proposal would change "prevented planting coverage," which indemnifies producers when crops cannot be planted for weather reasons. The changes include adjusted payment rates and lower yield guarantees.

[15] USDA, *FY2016 Budget Summary and Annual Performance Plan*, February 2015, http://www.obpa.usda.gov/budsum/fy16budsum.pdf.

Leaders of the House and Senate Agriculture Committees criticized the Administration's proposal. House Agriculture Committee Chairman Mike Conaway said the cuts "would jeopardize the ability of producers to insure their crops in a climate of collapsing crop prices, major crop losses, and falling farm income."[16] Senate Agriculture Committee Chairman Pat Roberts said the proposal "ignores the concerns of the nation's farmers and ranchers."[17]

For more information, see CRS Report R43951, *Proposals to Reduce Premium Subsidies for Federal Crop Insurance*.

WTO Trade Concerns

The enacted 2014 farm bill (P.L. 113-79) could result in potential compliance issues for U.S. farm policy with the rules and spending limits for domestic support programs that the United States agreed to as part of the World Trade Organization's (WTO's) Uruguay Round Agreement on Agriculture. In general, the act's new farm safety net shifts support away from classification under the WTO's green/amber boxes and toward the blue/amber boxes, indicating a potentially more market-distorting U.S. farm policy regime. The most notable safety net change is the elimination of the $5-billion-per-year direct payment program, which was decoupled from producer planting decisions and was notified as a minimally trade-distorting green box outlay. Direct payments were replaced by programs that are partially coupled (PLC and ARC) or fully coupled (SCO and STAX), meaning that they could potentially have a significant impact on producer planting decisions, depending on market conditions. Because the United States plays such a prominent role in most international markets for agricultural products, any distortion resulting from U.S. policy would be both visible and vulnerable to challenge under WTO rules. For more, see CRS Report R43817, *2014 Farm Bill Provisions and WTO Compliance.*

Design of Overall Farm Safety Net

Challenges for farm policy makers over the years have included the complexity of the farm safety net, the development of programs with similar but not identical objectives and payment mechanisms, and the potential for different programs to make payments for the same loss.[18] For example, the current farm safety net for "covered" commodities has several variations of "counter-cyclical-style" payments, including marketing loan benefits, traditional price payments (PLC), and revenue payments (ARC-County Coverage). All three focus to some extent on price declines. Farmers can also add "revenue protection" crop insurance for individual farm yield (and revenue) risk, but without minimum prices used in farm programs. (See **Figure A-3** for the interaction of crop insurance and farm programs.) Proponents say the options are necessary because "one program doesn't fit all producers and regions," while others believe that a simplified approach might be more effective and less expensive, with savings used for purposes that generate broad societal gains, such as agricultural research or transportation infrastructure.

[16] Mike Conaway, "Chairman Conaway Responds to President Obama's FY2016 Budget Proposal," press release, February 2, 2015, http://agriculture.house.gov/press-release/chairman-conaway-responds-president-obama%E2%80%99s-FY2016-budget-proposal.

[17] Senator Pat Roberts, "Senate Ag Committee Chairman Roberts Responds to President's Budget Proposal," press release, February 2, 2015, http://www.ag.senate.gov/newsroom/press/release/senate-ag-committee-chairman-roberts-responds-to-presidents-budget-proposal.

[18] For background and analysis on program overlap, see Erik J. O'Donoghue et al., *Identifying Overlap in the Farm Safety Net*, USDA Economic Research Service, Economic Information Bulletin Number 87, November 2011, http://www.ers.usda.gov/media/149262/eib87_1_.pdf.

Appendix. Farm Commodity Program Examples

The 2014 farm bill (P.L. 113-79) established commodity programs that make farm payments when either annual crop prices or revenues are below statutory reference prices or historical revenue guarantees. Producers have a one-time choice:

- For each covered crop on each farm,
  - Price Loss Coverage (PLC), or
  - Agriculture Risk Coverage-County (ARC-CO)
- Or, for all covered crops on each farm,
  - Agriculture Risk Coverage-Individual (ARC-Individual)

PLC is illustrated in **Figure A-1** and ARC-CO is illustrated in **Figure A-2**.

Hypothetical numeric examples in the following tables illustrate several types of farms and how farm commodity programs might trigger payments given 2014 farm bill parameters.

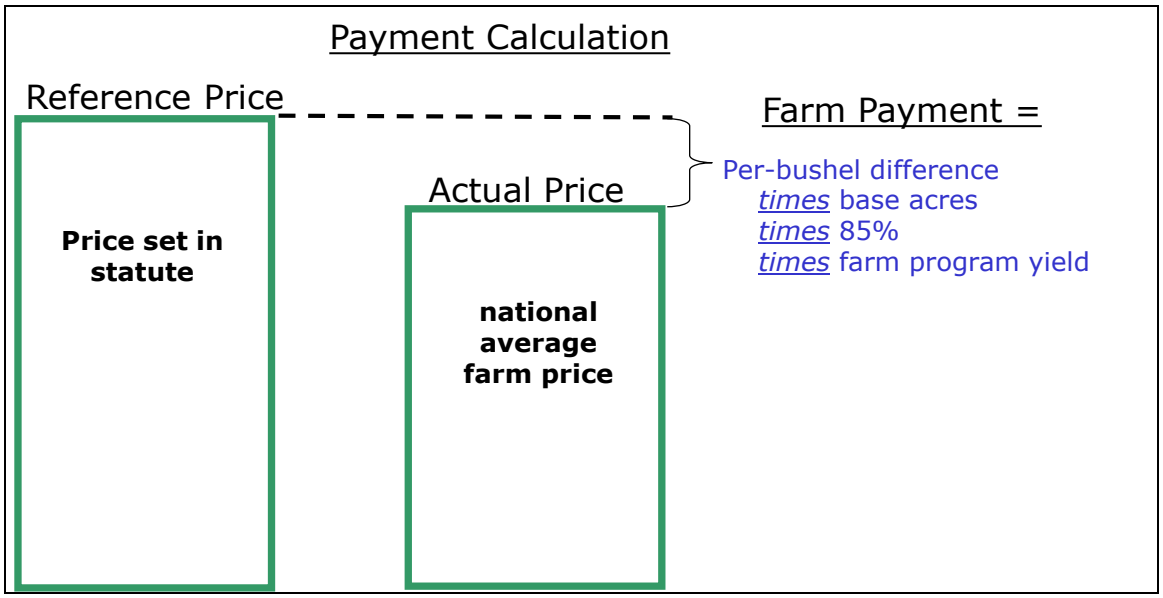
- **Table A-1**: Corn/Soybean farmer selects PLC for corn and ARC for soybeans
- **Table A-2**: Wheat/Lentil farmer selects ARC-Individual for the entire farm
- **Table A-3**: Peanut/Cotton farmer selects PLC for peanuts, with generic base (formerly upland cotton base) attributed to same-year peanut planted acreage

In addition to farm commodity programs, producers who purchase federally subsidized crop insurance may also be eligible for an indemnity if price and yield conditions specified in the policy are triggered. The 2014 farm bill made available a second federal crop insurance policy called the Supplemental Coverage Option (SCO) to cover part of the deductible on the underlying policy. (Note: SCO cannot be purchased for commodities enrolled in ARC.) For farm examples of crop insurance, see CRS Report R40532, *Federal Crop Insurance: Background.*

Figure A-3 illustrates the interaction between crop insurance and farm programs. The bar on the left depicts the expected revenue (prior to planting) under a typical crop insurance revenue policy with a 30% deductible (the farmer absorbs the first 30% of the loss). If the farmer selects PLC, an SCO policy can be purchased to cover part of the deductible (see PLC column). If a farm loss occurs, an initial indemnity is triggered under the farmer's individual crop insurance policy (depicted by the green box). A second indemnity from SCO would be paid (blue box) if there is also a loss at the county level. Overall, the farmer incurs a loss of approximately 14% (white box at top). A *separate PLC payment* (not shown) is made if the farm price is below the reference price. In contrast, if ARC is selected rather than PLC (see ARC column), the farm is not eligible for SCO and only an ARC payment (red box) and insurance indemnity (green box) would be made if triggered.

Figure A-1. Price Loss Coverage (PLC)

(makes payment when national average farm price drops below the reference price)

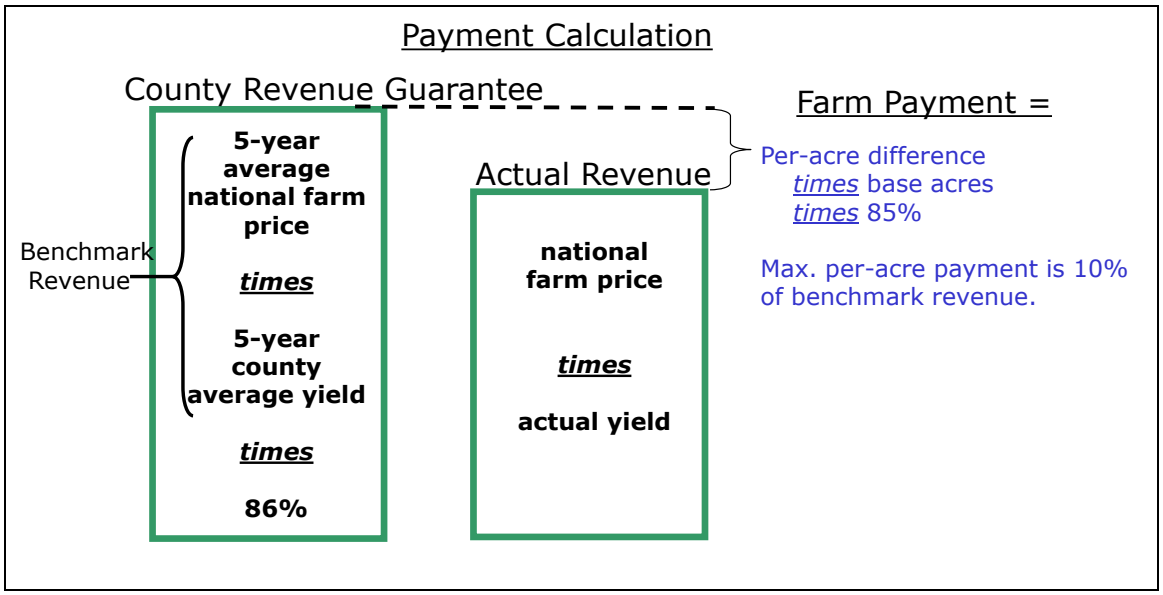


Source: CRS.

Notes: In a declining market, the per-bushel payment rate increases until the farm price drops below the loan rate. At this point, benefits under the Marketing Assistance Loan Program may become available.

Figure A-2. Agriculture Risk Coverage (ARC)–County Coverage

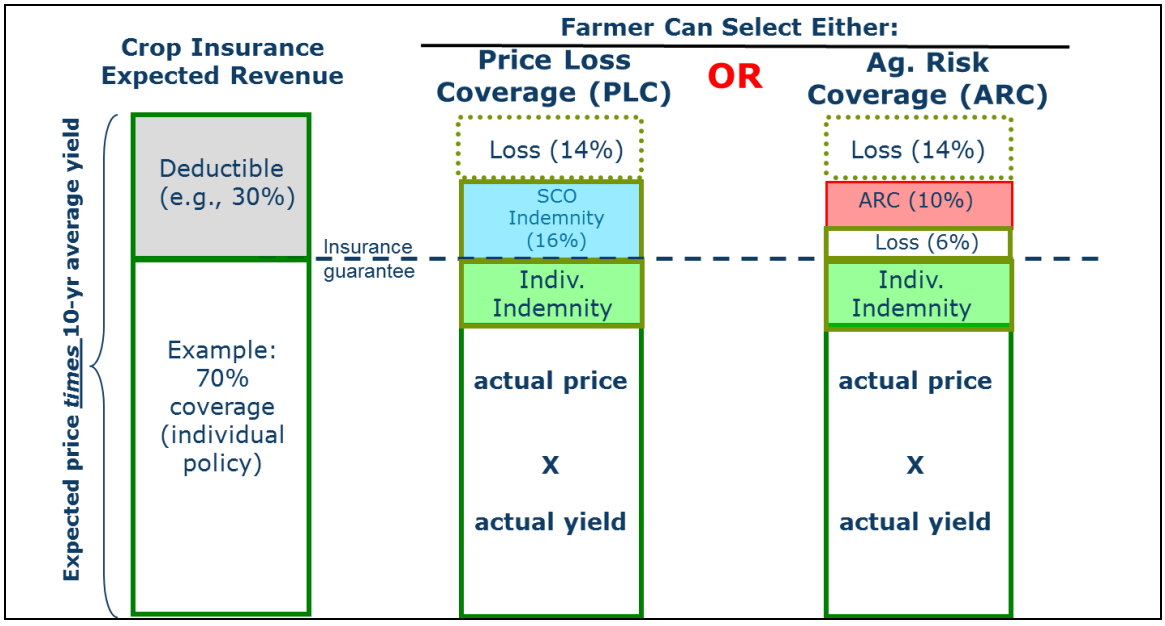
(payment when actual county-wide revenue drops below 86% of historical revenue ["shallow loss"])



Source: CRS.

Notes: Five-year averages exclude high and low years. Instead of an ARC county guarantee on a crop-by-crop basis, farmers can select a farm-level guarantee for all covered crops on a farm. Payment acreage is reduced to 65% of base acres, and a single, whole farm guarantee (and payment) is calculated as a weighted average for all crops (i.e., not on a crop-by-crop basis).

Figure A-3. Crop Insurance and Farm Commodity Programs



Source: CRS.

Notes: Does not show PLC payment, which is made when the average farm price is less than the reference prices set in the farm bill. Program selection deadline: March 31, 2015.

Table A-1. Hypothetical Corn/Soybean Farm in 2014

(farmer selects Price Loss Coverage (PLC) for corn and Ag. Risk Coverage (ARC) for soybeans)

Step 1.	Step 2.	Step 3.	Step 4.
Data	**Payment Formula**	**Calculation**	**Payment**
Price Loss Coverage (PLC) for corn: *payment occurs when actual farm price ($3.40/bu.) is below reference price ($3.70/bu.)*			
Corn Reference Price = $3.70/bu. 2014 Actual Price = $3.40/bu. Farm Base = 500 acres Farm Program Yield = 100 bu./acre	**Payment =** (Reference Price - Actual Price) x Base Acres x 85% acreage factor x Program Yield	**Payment =** ($3.70/bu. - $3.40/bu.) x 500 acres x 85% x 100 bushels/acre = $12,750	**Corn payment =** $12,750
Agriculture Risk Coverage – County (ARC) for soybeans: *payment occurs when actual county revenue ($/acre) is below guarantee*			
Soybeans **County yield** bu./acre / **Nat'l price** per bu. 2009 *36* *$9.59* 2010 38 $11.30 2011 40 $12.50 2012 42 *$14.40* 2013 *44* $13.00 Data in *italics* are not used in calculation.	**Benchmark Revenue =** 5-year "Olympic" average county yield x 5-year "Olympic" average national price The "Olympic" averages exclude the high and the low years (in *italics* at left).	**Average yield and price calculations** Average yield = (38 + 40 + 42) / 3 = 40 bu./acre Average price = ($11.30 + $12.50 +$13.00) / 3 = $12.27/bu. **Benchmark Revenue =** $40 bu./acre x $12.27/bu. = $491/acre	
	Revenue Guarantee = Benchmark Revenue x 86% guarantee factor	**Revenue Guarantee =** $491/acre x 86% = **$422**/acre	
2014 county yield = 40 bu./ac 2014 nat'l price = $10.00 /bu.	**2014 Actual Revenue =** county yield x national price	**2014 Actual Revenue =** 40 bu./acre x $10.00/bu. = **$400**/acre	
Farm Base (soybeans) = 500 acres	**Payment =** (Revenue Guarantee - Actual Revenue) x Base Acres x 85% acreage factor	**Payment =** (**$422**/acre - **$400**/acre) x 500 acres x 85% = $9,350	**Soybean payment =** $9,350
Total farm payment = PLC for corn + ARC for soybeans			$22,100

Source: CRS, based on statutory provisions of P.L. 113-79, hypothetical data (county yields, farm program yields, and farm bases), and USDA crop prices (2014 "actual" prices are forecast as of October 10, 2014).

Notes: Statutory parameters include the reference price, the payment acreage factor (85%), and the guarantee factor for "shallow losses" (86%). Payments do not depend which crop is actually planted and are scheduled to be made in October 2015 after final 2014-crop price and yield data become available. In ARC, reference prices serve as minimums; maximum payment is 10% of the benchmark revenue. In both PLC and ARC, the loan rate is used if higher than actual price. Higher prices or yields might not trigger a farm payment for 2014 crops.

Table A-2. Hypothetical Wheat/Lentil Farm in 2014

(farmer selects *Agriculture Risk Coverage-Individual* for entire farm—wheat and lentils)

Step 1. Data	Step 2. Payment Formula	Step 3. Calculation	Step 4. Payment
Agriculture Risk Coverage – Individual (ARC): *payment occurs when actual whole-farm revenue ($/acre) is below whole-farm guarantee*			
2014 total plantings = 600 acres Wheat = 500 acres Lentils = 100 acres	**2014 Planting Shares:** **Wheat:** (2014 **wheat** plantings / 2014 total plantings) **Lentils:** (2014 **lentil** plantings / 2014 total plantings)	**2014 Planting Shares:** **Wheat:** 500 ac. / (500 ac. + 100 ac.) = 83% **Lentils:** 100 ac. / (500 ac. + 100 ac.) = 17%	
Wheat Farm yield bu./acre x Nat'l price per bu. = Rev. $/ac. 2009 36 x $5.50* = *$198* 2010 38 x $5.70 = $217 2011 40 x $7.24 = $290 2012 42 x $7.77 = *$326* 2013 44 x $6.87 = $302	**Average Revenue Calculations:** The "Olympic" averages exclude the high and the low revenue years (in *italics* at left)	**Average Revenue Calculations:** **Wheat:** ($217/ac. + $290/ac. + $302/ac.) / 3 = $270/ac. **Lentils:** ($334/ac. + $275/ac. + $312/ac.) / 3 = $307/ac.	
Lentils Farm yield cwt./acre x Nat'l price per cwt. = Rev. $/ac. 2009 14 x $26.80 = *$375* 2010 13 x $25.70 = $334 2011 11 x $25.00 = $275 2012 12 x $20.70 = *$248* 2013 15 x $20.80 = $312 Data in *italics* are not used in calculation; *reference price of $5.50 serves as a minimum price for wheat.	**Benchmark Revenue =** 5-year "Olympic" average revenue for **wheat** x wheat 2014 planting share + 5-year "Olympic" average revenue for **lentils** x lentil 2014 planting share	**Benchmark Revenue =** **Wheat:** $270/ac. x 83% = $224/ac. **Lentils:** $307/ac. x 17% = $52/ac. **Total Benchmark revenue =** $224/ac. + $52/ac.= $276/ac.	
	Revenue Guarantee = Benchmark Revenue x 86% guarantee factor	**Revenue Guarantee =** $276 / acre x 86% = **$ 237 / acre**	
2014 Actual Crop Revenue Data Farm prod. x Nat'l price = Revenue Wheat:18,000 bu. x $5.90 = $106,200 Lentils: 1,400 cwt. x $19.00 = $26,600	**2014 Actual Revenue =** Sum of crop revenues divided by total 2014 planted area	**2014 Actual Revenue =** ($106,200 + $26,600) / 600 acres = **$221**/ac.	
Total Farm Base = 600 acres In this case, base acres = total planted acres	**Payment =** (Revenue Guar. - Actual Revenue) x Base Acres x 65% acreage factor	**Payment =** (**$237**/acre - **$221**/acre) x 600 acres x 65% = $6,240	**Farm payment =** $6,240
Total farm payment			$6,240

Source: CRS, based on statutory provisions of P.L. 113-79, hypothetical data (acreage and yields), and USDA crop prices (2014 "actual" prices are forecast as of October 10, 2014).

Notes: Statutory parameters include the reference price, the guarantee ("shallow loss") factor (86%), and the payment acreage factor (65%). Payments are scheduled to be made in October 2015 after final 2014-crop price and yield data become available. Reference prices serve as minimums; maximum payment is 10% of benchmark revenue. Higher actual prices or yields might not trigger farm payment for 2014 crops.

Table A-3. Hypothetical Peanut/Cotton Farm in 2014

(farmer selects *Price Loss Coverage (PLC)* for peanuts, with *Generic Base* attributed to peanuts)

Step 1.	Step 2.	Step 3.	Step 4.
Data	**Payment Formula**	**Calculation**	**Payment**
Price Loss Coverage (PLC) for peanuts: *payment occurs when actual farm price ($400/ton) is below reference price ($535/ton)*			
Reference Price = $535/ton 2014 Actual Price = $400/ton Peanut Base = 200 acres Farm Program Yield = 1.5 tons/acre 2014 Total Plantings = 300 acres of peanuts Note: payments do not depend on same-year plantings.	**Payment =** (Reference Price – Actual Price) x Base Acres x 85% acreage factor x Program Yield	**Peanut Payment =** ($535/ton - $400/ton) x 200 acres x 85% x 1.5 ton/acre = $34,425	**Peanut payment =** $34,425
Generic Base = 100 acres (formerly Upland Cotton Base) Note: payments on Generic Base depend on same-year plantings of covered crops.	For plantings on Generic Base: Payment = same formula as above but Generic Base acres are attributed to a particular covered commodity in proportion to actual plantings for that crop year. In this case, all Generic Base (100 acres) are attributed to peanuts because no other covered commodity was planted in 2014.	Payment on Generic Base = ($535/ton - $400/ton) x 100 acres x 85% x 1.5 ton/acre = $17,213	**Payment on Generic Base =** $17,213
Total farm payment = PLC for peanuts + PLC for Generic Base (planted/attributed to peanuts)			$51,638

Source: CRS, based on statutory provisions of P.L. 113-79, hypothetical data (acreage and yields), and USDA crop prices (2014 "actual" prices are forecast as of October 10, 2014).

Notes: Statutory parameters include the reference price and the payment acreage factor (85%). For each crop year, generic base acres are attributed to (i.e., temporarily designated as) base acres to a particular covered commodity base in proportion to that covered crop's share of total plantings of all covered commodities in that year. The loan rate is used in the payment calculation if it is higher than the actual price.

Upland cotton is no longer a covered commodity and not eligible for PLC/ARC payments (marketing assistance loans remain available). Instead it is eligible for a new crop insurance policy called Stacked Income Protection or STAX (see CRS Report R43494, *Crop Insurance Provisions in the 2014 Farm Bill (P.L. 113-79)*). Transition payments are made for upland cotton for the 2014 crop year, and for 2015 if STAX is not available.

Author Contact Information

Dennis A. Shields
Specialist in Agricultural Policy
dshields@crs.loc.gov, 7-9051

853 F.3d 527
United States Court of Appeals,
District of Columbia Circuit.

WATERKEEPER ALLIANCE, et al., Petitioners
v.
ENVIRONMENTAL PROTECTION AGENCY, Respondent
U.S. Poultry and Egg Association, et al., Intervenors

No. 09-1017
|
Consolidated with 09-1104
|
Argued December 12, 2016
|
Decided April 11, 2017

Synopsis

Background: Environmental and agricultural organizations petitioned for review of Environmental Protection Agency's (EPA) rule generally exempting farms from Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) and Emergency Planning and Community Right-to-Know Act (EPCRA) notification requirements for air releases of hazardous substances from animal wastes. Association of poultry producers intervened as respondents.

Holdings: The Court of Appeals, No. 09-1017, Williams, Senior Circuit Judge, held that:

[1] environmental organizations sufficiently alleged injury in fact required for informational standing;

[2] CERCLA and EPCRA were not ambiguous as to whether EPA could create new exemptions to notification requirements for release of hazardous substances; and

[3] EPA could not use de minimis power to create exemption to CERCLA and EPCRA notification requirements.

Petition granted.

Brown, Circuit Judge, filed concurring opinion.

West Headnotes (16)

[1] Administrative Law and Procedure
Implied powers

Agencies have implied de minimis authority to create certain categorical exceptions to a statute when the burdens of regulation yield a gain of trivial or no value.

Cases that cite this headnote

[2] Administrative Law and Procedure
Jurisdiction

Absent a specific statutory provision assigning review to the Court of Appeals, a challenge to agency action must go first to district court.

Cases that cite this headnote

[3] Environmental Law
Notice and reporting requirements; listing

Challenges under Emergency Planning and Community Right-to-Know Act (EPCRA) must ordinarily be brought in district court. 42 U.S.C.A. § 11004.

Cases that cite this headnote

[4] Administrative Law and Procedure
Jurisdiction

Where a single agency action relies on multiple statutory bases, Court of Appeals commonly examines the entire agency action in a comprehensive and coherent fashion so long as at least one of the statutes provides for Court of Appeals' direct review.

Cases that cite this headnote

[5] Administrative Law and Procedure

Persons aggrieved or affected

A plaintiff suffers an injury in fact as required to establish standing when agency action cuts him off from information which must be publicly disclosed pursuant to a statute.

Cases that cite this headnote

[6] Federal Civil Procedure

In general;injury or interest

For standing purposes, a federal court assumes the merits in favor of the plaintiff.

Cases that cite this headnote

[7] Administrative Law and Procedure

Persons aggrieved or affected

To establish injury in fact based on agency action that cuts a plaintiff off from information which must be publicly disclosed pursuant to a statute, as required to have informational standing to challenge the agency action, a plaintiff must assert a view of the law under which the defendant or an entity it regulates is obligated to disclose certain information that the plaintiff has a right to obtain.

Cases that cite this headnote

[8] Environmental Law

Organizations, associations, and other groups

Environmental organization sufficiently alleged injury in fact as required to have informational standing to challenge Environmental Protection Agency (EPA) rule generally exempting farms from notification requirements for air releases of hazardous substances from animal wastes under CERCLA and Emergency Planning and Community Right-to-Know Act (EPCRA), based on agency action cutting organization off from information which must be publicly disclosed, even though CERCLA did not require public disclosure; organization alleged that EPA's unlawful CERCLA exemption reduced information that was required to be publicly disclosed under EPCRA, and that, as result, organization and others who sought that information no longer had statutory right to access it. Comprehensive Environmental Response, Compensation, and Liability Act of 1980 § 103, 42 U.S.C.A. § 9603; 42 U.S.C.A. § 11004.

Cases that cite this headnote

[9] Administrative Law and Procedure

Deference to agency in general

Court of Appeals reviews an agency's final rule for reasonableness under *Chevron*, under which a reasonable agency interpretation of a statute prevails.

Cases that cite this headnote

[10] Administrative Law and Procedure

Erroneous construction;conflict with statute

If Congress has directly spoken to an issue then any agency interpretation of a statute contradicting what Congress has said is unreasonable.

Cases that cite this headnote

[11] Administrative Law and Procedure

Environment and health

Environmental Law

Notice and reporting requirements; listing

Existence of provisions setting forth exemptions to CERCLA disclosure requirements, and provisions giving the Environmental Protection Agency (EPA) authority to set reportable quantities, did not create ambiguity as to whether EPA

could create new exemptions to CERCLA and Emergency Planning and Community Right-to-Know Act (EPCRA) notification requirements for release of hazardous substances, as would support finding that EPA's rule creating exemption for air releases of hazardous substances from animal waste for farms was reasonable interpretation of CERCLA and EPCRA; statutory exemptions were paired with sweeping reporting mandates requiring notification of any release of a hazardous substance in quantities greater than the reportable quantities authorized under the statutes, and statutes did not contain any language of delegation. Comprehensive Environmental Response, Compensation, and Liability Act of 1980 § 103, 42 U.S.C.A. § 9603(a); 42 U.S.C.A. § 11044(a).

Cases that cite this headnote

[12] Administrative Law and Procedure
Construction

The canon of expressio unius est exclusio alterius is an especially feeble helper in an administrative setting, where Congress is presumed to have left to reasonable agency discretion questions that it has not directly resolved.

Cases that cite this headnote

[13] Administrative Law and Procedure
Statutory basis and limitation

Agencies are bound not only by the ultimate purposes Congress has selected, but by the means it has deemed appropriate, and prescribed, for the pursuit of those purposes.

Cases that cite this headnote

[14] Statutes
Relation to plain, literal, or clear meaning;ambiguity

The de minimis doctrine is an expression of courts' reluctance to apply the literal terms of a statute to mandate pointless expenditures of effort, and is thus a cousin of the doctrine permitting courts to avoid absurd results in the face of a statute's seemingly plain meaning.

Cases that cite this headnote

[15] Administrative Law and Procedure
Statutory basis and limitation

An agency cannot use de minimis doctrine to create an exception to a statutory requirement where application of the literal terms of the statute would provide benefits in the sense of furthering the regulatory objectives but the agency concludes that the acknowledged benefits are exceeded by the costs.

Cases that cite this headnote

[16] Environmental Law
Notice and reporting requirements; listing

Environmental Protection Agency (EPA) could not use de minimis power to create exemption to CERCLA and Emergency Planning and Community Right-to-Know Act (EPCRA) notification requirements for release of hazardous substances, which exempted farms from disclosure requirements for air releases of hazardous substances from animal wastes; application of literal terms of the statutes, which required notification of releases of hazardous substances, provided benefits that furthered regulatory objectives. Comprehensive Environmental Response, Compensation, and Liability Act of 1980 § 103, 42 U.S.C.A. § 9603(a); 42 U.S.C.A. § 11044(a).

Cases that cite this headnote

***529** On Petitions for Review of Final Regulation Issued by the U.S. Environmental Protection Agency

Attorneys and Law Firms

Jonathan J. Smith, Marietta, GA, argued the cause for petitioners Waterkeeper Alliance, et al. With him on the briefs was Eve C. Gartner, New York, NY.

David Y. Chung argued the cause for petitioner National Pork Producers Council. With him on the briefs were Richard E. Schwartz, Washington, DC, and Sherrie A. Armstrong. Ellen Steen entered an appearance.

Daniel H. Lutz, Orrville, OH, and Hope M. Babcock were on the brief for amici curiae American Lung Association and American Thoracic Society in support of petitioners Waterkeeper Alliance, et al.

Jonathan Skinner-Thompson and Erica M. Zilioli, Attorneys, U.S. Department of Justice, argued the causes for respondent. With them on the brief was John C. Cruden, Assistant Attorney General. Sue S. Chen and Cynthia J. Morris, Attorneys, U.S. Department of Justice, entered appearances.

Eve C. Gartner and Jonathan J. Smith were on the brief for intervenors-respondents Waterkeeper Alliance, et al.

Richard E. Schwartz and David Y. Chung, Washington, DC, were on the brief for intervenor-respondent U.S. Poultry and Egg Association. Sherrie A. Armstrong and James T. Banks, Washington, DC, entered appearances.

Before: Brown and Srinivasan, Circuit Judges, and Williams, Senior Circuit Judge.

Opinion

Concurring opinion filed by Circuit Judge Brown.

Williams, Senior Circuit Judge:

Anyone with a pet knows firsthand that raising animals means dealing with animal waste. But many of us may not realize that as the waste breaks down, it emits serious pollutants—most notably ammonia and hydrogen ***530** sulfide. While those emissions are miniscule for pet owners, they can be quite substantial for farms that have hundreds or thousands of animals.

Two provisions of federal law—sections of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA") and the Emergency Planning and Community Right-to-Know Act of 1986 ("EPCRA")—require parties to notify authorities when large quantities of hazardous materials (such as ammonia or hydrogen sulfide) are released into the environment. See 42 U.S.C. § 9603 (CERCLA); *id.* § 11004 (EPCRA). On learning of such a release, the EPA has broad powers to take remedial actions or order further monitoring or investigation of the situation. See *id.* § 9604.

In 2008 the EPA issued a final rule that generally exempts farms from CERCLA and EPCRA reporting requirements for air releases from animal waste. ("Air releases" refer only to emissions made into the air, rather than into water or soil.) The EPA reasoned that those "reports are unnecessary because, in most cases, a federal response is impractical and unlikely." CERCLA/EPCRA Administrative Reporting Exemption for Air Releases of Hazardous Substances from Animal Waste at Farms, 73 Fed. Reg. 76,948, 76,956/1 (Dec. 18, 2008) ("*Final Rule*"). In a change from the proposed rule, the EPA somewhat limited the exemption. Commenters had expressed a "desire to receive information regarding releases from large concentrated animal feeding operations," known as "CAFOs," which generally house thousands or even tens of thousands of animals. In response, the EPA retained the reporting requirement for CAFOs under EPCRA, which, as we'll see in more detail later, has a public-disclosure requirement that's missing from the relevant CERCLA provisions. See *id.* at 76,950/2; see also *id.* at 76,952/1-2, 76,953/3; (CAFO thresholds).

[1] A number of environmental groups objected, claiming that the *Final Rule* ran afoul of the underlying statutes (and was therefore outside the EPA's delegated authority). The dispute brings into play our longtime recognition that agencies have "implied *de minimis* authority to create even certain categorical exceptions to a statute 'when the burdens of regulation yield a gain of trivial or no value.' " *Public Citizen v. FTC*, 869 F.2d 1541, 1556 (D.C. Cir. 1989) (quoting *Alabama Power v. Costle*, 636 F.2d 323, 360-61 (D.C. Cir. 1979)). Although the EPA never

explicitly invokes the *de minimis* exception, its analysis tracks the exception's logic. And intervenor U.S. Poultry and Egg Association specifically pointed to the agency's *de minimis* power as a reason to uphold the *Final Rule*. It thus poses the question whether the record adequately supports the EPA's conclusion that these animal-waste reports are truly "unnecessary." 73 Fed. Reg. at 76,956/1. By contrast, the environmental petitioners' argument, when framed in the language of *Alabama Power*, is essentially that the reports "provide benefits, in the sense of furthering the regulatory objectives." 636 F.2d at 361. In light of the record, we find that those reports aren't nearly as useless as the EPA makes them out to be. (We do not address the potential questions of whether the reports' costs outweigh their benefits and whether the exact statutory language (discussed below) authorizes an exception for measures failing a cost/benefit analysis; the EPA makes no claim for such a reading of the statute.) We therefore grant Waterkeeper's petition and vacate the *Final Rule*.

* * *

Congress has long sought to ensure that federal, state, and local authorities can adequately respond when hazardous chemicals ***531** threaten public safety or the environment. CERCLA gives federal authorities (generally the EPA) broad power to investigate and respond to actual or threatened releases of hazardous substances. See 42 U.S.C. § 9604. And since the EPA can't respond to releases it doesn't know about, § 103 of CERCLA requires parties to immediately notify the National Response Center ("NRC") of any release of a hazardous substance over a threshold set by the EPA—known in regulatory speak as the "reportable quantity." See *id.* § 9603; *Fertilizer Institute v. EPA*, 935 F.2d 1303, 1306 (D.C. Cir. 1991). The NRC, which is staffed by the U.S. Coast Guard and "acts as the single [federal] point of contact for all pollution incident reporting," 40 C.F.R. § 300.125(a), must "convey the notification expeditiously to all appropriate Government agencies, including the Governor of any affected State," 42 U.S.C. § 9603(a). After receiving a report from the NRC, the EPA determines if a response is appropriate. See 40 C.F.R. § 300.130(c).

EPCRA has a parallel reporting mandate, except that it requires the relevant parties to notify state and local (rather than federal) authorities whenever covered pollutants (which it refers to as "extremely hazardous substances") are released into the environment. See 42 U.S.C. § 11004; see also *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 86, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998).

The parties here focus on two of the hazardous substances emitted by animal waste as it decomposes—ammonia and hydrogen sulfide. (There are other such substances (e.g., nitrous oxide, methane, volatile organic compounds), see 73 Fed. Reg. at 76,950/2-3; see also NATIONAL RESEARCH COUNCIL OF THE NATIONAL ACADEMIES, AIR EMISSIONS FROM ANIMAL FEEDING OPERATIONS: CURRENT KNOWLEDGE, FUTURE NEEDS 50-56 (2003) ("National Research Council Report"), but we need not address them.) The EPA has classified ammonia and hydrogen sulfide as both CERCLA "hazardous substances" and EPCRA "extremely hazardous substances"; the EPA set the reportable quantity for each at 100 pounds per day. See 40 C.F.R. § 302.4(a) (CERCLA); *id.* pt. 355 App. A (EPCRA). None of the parties contends that the daily emissions of commercial farms fall below that threshold.

There appears to have been no clear resolution of the best way to measure these releases, which after all do not come conveniently out of a smokestack. See National Research Council Report at 2, 99-101; *Draft Air Emissions Estimating Methodologies for Animal Feeding Operations*, EPA, https://www.epa.gov/afos-air/draft-air-emissions-estimating-methodologies-animal-feeding-operations (last visited Mar. 24, 2017). The statute accommodates the problem a bit by providing for annual notice of so-called "continuous release[s]," 42 U.S.C. § 9603(f)(2), i.e., releases that are "continuous and stable in quantity and rate," 40 C.F.R. § 302.8(a), subject to a requirement of special notification for a "statistically significant increase in the quantity ... above that previously reported," 42 U.S.C. § 9603(f)(2), which the EPA has defined as an increase "above the upper bound of the reported normal range," 40 C.F.R. § 302.8(b).

In December 2007, the EPA proposed exempting farms from CERCLA and EPCRA reporting of air releases from animal waste. See CERCLA/EPRCRA Administrative

Reporting Exemption for Air Releases of Hazardous Substances from Animal Waste, 72 Fed. Reg. 73,700 (proposed Dec. 28, 2007) ("*Proposed Rule* "). The EPA noted that it had never taken response action based on notifications of air releases from animal waste. *Id.* at 73,704/2. ***532** Nor could the Agency "foresee a situation where [it] would take any future response action as a result of such notification[s] ... because in all instances the source (animal waste) and nature (to the air over a broad area) are such that on-going releases makes an emergency response unnecessary, impractical and unlikely." *Id.* The EPA specifically requested comments "on whether there might be a situation where a response would be triggered by such a notification of the release of hazardous substances to the air from animal waste at farms, and if so, what an appropriate response would be." *Id.* at 73,704/3-73,705/1.

The EPA finalized that proposed exemption on December 18, 2008. 73 Fed. Reg. at 76,948. So far as CERCLA authority is concerned, the *Final Rule* (like the *Proposed Rule*) exempts all farms from reporting air releases from animal waste. None of the public comments changed the EPA's view that those reports "are unnecessary because, in most cases, a federal response is impractical and unlikely (*i.e.*, [the EPA] would not respond to them since there is no reasonable approach for the response)." *Id.* at 76,956/1. But public comments seeking information about emissions from the largest farms (so-called CAFOs), led the EPA to carve CAFOs out of its EPCRA exemption. *Id.* at 76,952/3-76,953/1. (A CAFO is a farm that "stables or confines" more than a certain (relatively large) number of animals—for example, more than 1,000 cattle, 10,000 sheep, or 55,000 turkeys. *Id.* at 76,959-60.) The *Final Rule* thus requires CAFOs to continue reporting air emissions under EPCRA, but not under CERCLA; other farms are exempt from both.

Environmental and agricultural groups challenged the *Final Rule*. The environmentalists—the Waterkeeper Alliance, the Sierra Club, the Humane Society of the United States, the Environmental Integrity Project, and the Center for Food Safety (for ease of reference we'll call them "Waterkeeper")—principally argue that CERCLA and EPCRA don't permit the EPA to grant reporting exemptions, but instead require reports of any and all releases over the reportable quantity. The *Final Rule* is, in Waterkeeper's view, arbitrary to boot because it treats air releases from animal waste at farms more favorably than those from other sources (like a leaky ammonia tank) or other locations (like animal waste at zoos, circuses or slaughterhouses). The National Pork Producers Council, on the other hand, argues that the *Final Rule*'s CAFO carve-out can't stand because it was based on a factor, the public's desire for information, which the Council argues is irrelevant to the statutory purpose of facilitating emergency response. See, e.g., *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983).

* * *

[2] We start with a jurisdictional issue posed by the two statutes' unusual relationship. Absent a specific statutory provision assigning review to the court of appeals, a challenge to agency action must go first to district court. See *Int'l Brotherhood of Teamsters v. Peña*, 17 F.3d 1478, 1481 (D.C. Cir. 1994). But in CERCLA Congress gave this court direct (and exclusive) jurisdiction over CERCLA rules. See 42 U.S.C. § 9613(a). Thus the congressional allocation of jurisdiction is no bar to our hearing the CERCLA-based challenges to the *Final Rule*.

[3] **[4]** The *Final Rule*, however, wasn't limited to CERCLA; it relied on EPCRA too. EPCRA has no judicial review provision and therefore challenges under it must ordinarily be brought in district court. See ***533** *Barrick Goldstrike Mines, Inc. v. Browner*, 215 F.3d 45, 47 (D.C. Cir. 2000). But where, as here, a single agency action relies on multiple statutory bases, it would be a wasteful exaltation of form over substance to require piecemeal challenges in various courts. We thus commonly examine the entire agency action in a "comprehensive and coherent fashion" so long as at least one of the statutes provides for our direct review. *Shell Oil Co. v. FERC*, 47 F.3d 1186, 1195 (D.C. Cir. 1995); contra *Loan Syndications & Trading Ass'n v. SEC*, 818 F.3d 716, 723 (D.C. Cir. 2016) (finding we lacked jurisdiction where the statute providing essential authority, as acknowledged by the parties, did not provide for direct appellate review). Since CERCLA does precisely that, jurisdiction doesn't seem a problem.

Hold your horses, responds the EPA. It argues that while of course we *could* hear a consolidated CERCLA/EPCRA challenge, Waterkeeper lacks standing to challenge the

CERCLA portions of the *Final Rule* because while both statutes require reporting, CERCLA (unlike EPCRA) has no requirement of *disclosure*. Thus, in the EPA's view, the CERCLA portion of the rule inflicts no informational injury on Waterkeeper. We disagree.

[5] **[6]** **[7]** A plaintiff suffers an "injury in fact" when agency action cuts him off from "information which must be publicly disclosed pursuant to a statute." *FEC v. Akins*, 524 U.S. 11, 21, 118 S.Ct. 1777, 141 L.Ed.2d 10 (1998). Given the longstanding rule that for standing purposes we assume the merits in favor of the plaintiff, *Parker v. District of Columbia*, 478 F.3d 370, 377 (D.C. Cir. 2007), the upshot of *Akins* is that the plaintiff must assert "a view of the law under which the defendant (or an entity it regulates) is obligated to disclose certain information that the plaintiff has a right to obtain," *Am. Soc. for Prevention of Cruelty to Animals v. Feld Entertainment, Inc.*, 659 F.3d 13, 22-23 (D.C. Cir. 2011). On this line of analysis, the question is whether a reporting mandate under CERCLA triggers a requirement of public disclosure. If so, exempting a release from the mandate extinguishes the corresponding disclosure.

[8] Because CERCLA itself doesn't require disclosure, the EPA argues there can't be an injury. But due to the complex interplay between CERCLA and EPCRA, the EPA's allegedly unlawful CERCLA exemption reduces the information that must be publicly disclosed under EPCRA. As a result Waterkeeper (and others) who previously sought that information no longer have a statutory right to access it. For the purpose of standing, that's injury enough.

In drafting the EPCRA reporting requirements, Congress expressly tied them to CERCLA's. Repeatedly referring back to CERCLA, Congress set two of the three notification provisions in its new state-targeted measure (EPCRA) to require reports whenever the "release [also] requires a notification under section 103(a) of CERCLA," 42 U.S.C. §§ 11004(a)(1), (a)(3). In other words, a release that triggers the CERCLA duty also automatically trips the EPCRA reporting requirements in subsections (1) and (3) of § 11004(a). And under subsection (2), the remaining notice provision, even a release that "is not subject to the notification requirements under section 103(a) of CERCLA" requires EPCRA reporting when it "occurs in a manner which would require notification under section 103(a) of CERCLA." *Id.* § 11004(a)(2). Thus all of EPCRA's reporting mandates are piggybacked on the CERCLA mandates in one form or another. And once EPCRA reporting is required, EPCRA goes on to mandate that the information from those reports be disclosed to the general public. See 42 U.S.C. § 11044(a); see also ***534** *Ctr. for Biological Diversity, Inc. v. BP Am. Production Co.*, 704 F.3d 413, 429 (5th Cir. 2013). (Of course § 11044(a) only requires disclosure of EPCRA "followup emergency notice[s]," but that's a meaningless technicality since § 11004(c) requires those "followup emergency notice[s]" to "set[ ] forth" the information from the initial notices that preceded them.) Though slightly roundabout, a CERCLA reporting mandate does, in fact, trigger a public disclosure requirement.

The *Final Rule*, by cutting back on CERCLA reporting requirements, had the automatic effect of cutting back on EPCRA reporting and disclosure requirements. It thus deprives Waterkeeper of information, the public disclosure of which would otherwise be required by EPCRA. Because we find informational standing exists on this basis, we need not reach Waterkeeper's remaining theories of injury and instead proceed to the merits.

* * *

[9] **[10]** We review the *Final Rule* for reasonableness under the familiar standard of *Chevron, USA, Inc. v. NRDC, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984), "which ... means (within its domain) that a 'reasonable agency interpretation prevails.' " *Northern Natural Gas Co. v. FERC*, 700 F.3d 11, 14 (D.C. Cir. 2012) (quoting *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 218 n. 4, 129 S.Ct. 1498, 173 L.Ed.2d 369 (2009)). Of course, "if Congress has directly spoken to an issue then any agency interpretation contradicting what Congress has said would be unreasonable." *Entergy*, 556 U.S. at 218 n.4, 129 S.Ct. 1498.

[11] Rather than identifying particular text that's ambiguous, the EPA points to provisions setting forth *unrelated* exemptions and ones giving the EPA authority to set reportable quantities. It says that these "collectively create ambiguity" as to whether the EPA can create *new* exemptions like those in the *Final Rule*. Resp't

Br. at 34. That conclusion doesn't follow from the premise. Consider the statutory exemptions that the EPA relies upon. No report is required for releases of engine exhaust, certain nuclear material, the normal application of fertilizer, or those that expose persons *solely* within a workplace (i.e., those that don't escape into the broader environment). 42 U.S.C. § 9601(22). CERCLA similarly exempts from reporting the application of federally-registered pesticides, releases authorized under a federal environmental statute or ones that are already reported to the NRC under the Solid Waste Disposal Act. *Id.* §§ 9603(a), (e), (f)(1). And as we saw earlier it adjusts the reporting requirements for so-called "continuous release [s]," *id.* § 9603(f)(2), i.e., those releases that are "continuous and stable in quantity and rate," 40 C.F.R. § 302.8(a).

[12] To be sure, the fact that Congress thought to write certain exceptions into the statutes doesn't necessarily mean it meant to bar all others. The canon of *expressio unius est exclusio alterius* is "an especially feeble helper in an administrative setting, where Congress is presumed to have left to reasonable agency discretion questions that it has not directly resolved." *Cheney R. Co. v. ICC*, 902 F.2d 66, 69 (D.C. Cir. 1990). Had Congress done nothing more than place certain exemptions in these statutes we might have reasonably concluded that the EPA had discretion to fashion other exemptions consistent with the statutory purposes. Indeed we did precisely that in *Texas Rural Legal Aid, Inc. v. Legal Services Corp.*, where we held that statutory provisions barring an agency from supporting certain types of litigation (school desegregation and abortion) didn't preclude the agency from creating an additional bar precluding ***535** redistricting litigation. 940 F.2d 685, 694 (D.C. Cir. 1991). But here Congress paired those specific exemptions with a sweeping reporting mandate. It made clear that the statutes require notification of "*any* release ... of a hazardous substance ... in quantities equal to or greater than" the reportable quantities authorized under § 9602. 42 U.S.C. § 9603(a) (emphasis added) (CERCLA); see also *id.* §§ 11004(a)(1), (a)(3) (EPCRA report required when release requires notice under CERCLA). Read together those statutory provisions set forth a straightforward reporting requirement for any non-exempt release (over the reportable quantity). See *New York v. EPA*, 443 F.3d 880, 885 (D.C. Cir. 2006). Conspicuously missing is any language of delegation, such as that reports be "as appropriate," "effective," "economical," or made "under circumstances to be determined by the EPA."

That brings us to the next set of provisions—permitting the EPA to set reportable quantities and adopt necessary regulations. Admittedly Congress gave the EPA broad authority to designate *additional* hazardous substances and establish reportable quantities. See 42 U.S.C. § 9602(a) (CERCLA); see also *id.* § 11002(a) (similar authority under EPCRA). And both statutes provide the EPA with general rulemaking authority "to promulgate any regulations necessary to carry out the[ir] provisions." *Id.* § 9615 (CERCLA); see also *id.* § 11048 (EPCRA). But those general grants of rulemaking authority don't tell us much about whether the specific rule in question passes muster.

[13] While none of those provisions even hints at the type of reporting exemption the EPA adopted in the *Final Rule*, the EPA extracts from them a notion that Congress meant to "avoid[ ] duplication of effort ... and minimiz[e] the burden on both regulated entities and government response agencies." Resp't Br. at 33. Perhaps. But as we've long made clear, "[a]gencies are ... 'bound, not only by the ultimate purposes Congress has selected, but by the means it has deemed appropriate, and prescribed, for the pursuit of those purposes.' " *Colorado River Indian Tribes v. Nat'l Indian Gaming Comm'n*, 466 F.3d 134, 139-40 (D.C. Cir. 2006) (quoting *MCI Telecomms. Corp. v. AT&T*, 512 U.S. 218, 231 n.4, 114 S.Ct. 2223, 129 L.Ed.2d 182 (1994)). We have no doubt that a desire for efficiency motivated some of the exceptions Congress provided, but those concerns don't give the agency carte blanche to ignore the statute whenever it decides the reporting requirements aren't worth the trouble. See *Util. Air Regulatory Grp. v. EPA*, —— U.S. ——, 134 S.Ct. 2427, 2446, 189 L.Ed.2d 372 (2014) ("[A]n agency may not rewrite clear statutory terms to suit its own sense of how the statute should operate.").

[14] **[15]** Agencies are not, however, "helpless slaves to literalism." *Public Citizen v. Young*, 831 F.2d 1108, 1112 (D.C. Cir. 1987). The *de minimis* doctrine is an expression of courts' reluctance "to apply the literal terms of a statute to mandate pointless expenditures of effort," and is thus a "cousin" of the doctrine permitting courts to avoid absurd

results in the face of a statute's seemingly plain meaning. *Alabama Power*, 636 F.2d at 360 & n.89. But that *de minimis* power is strictly limited; an agency can't use it to create an exception where application of the literal terms would "provide benefits, in the sense of furthering the regulatory objectives, but the agency concludes that the acknowledged benefits are exceeded by the costs." *Id.* at 360-61.

[16] The EPA purported to find an absence of regulatory benefit. It asserted that the animal-waste "reports are unnecessary because, *in most cases*, a federal ***536** response is impractical and unlikely." 73 Fed. Reg. at 76.956/1 (emphasis added). The qualification suggests that at least some circumstances would call for a response. Other portions of the *Final Rule*, however, seem to reject that notion and instead state simply that the EPA could "not foresee a situation where the Agency would initiate a response action as a result of such notification." *Id.* at 76,953/2.

But commenters in the rulemaking claimed to foresee just such situations. They put before the EPA a good deal of information, not refuted by the EPA, suggesting scenarios where the reports could be quite helpful in fulfilling the statutes' goals. Specifically, commenters explained that "when [manure] pits are agitated for pumping," hydrogen sulfide, methane, and ammonia "are rapidly released from the manure and may reach toxic levels or displace oxygen, increasing the risk to humans and livestock." 73 Fed. Reg. at 76,957/2; see also *Manure Gas Dangers*, FARM SAFETY ASS'N, http://nasdonline.org/static_content/documents/48/d001616.pdf (last visited Mar. 24, 2017). That risk isn't just theoretical; people have become seriously ill and even died as a result of pit agitation. See K.J. Donham, *Community & Occupational Health Concerns in Pork Production: A Review*, 88 J. ANIM. SCI. 102, 107 (2010), available at https://www.animalsciencepublications.org/publications/jas/pdfs/88/13/E102 (cited by Amici Br. at 12 & n.55). (One might reasonably then ask why bother agitating at all. The answer—at least according to the EPA—is that it's necessary to maintain storage in liquid manure storage systems. See *NPDES Permit Writers' Manual for Concentrated Animal Feeding Operations* 5-15, EPA (Feb. 2012), https://www.epa.gov/sites/production/files/201510/documents/cafo_permitmanual_entire.pdf.) The EPA didn't dispute that "various pit pumping techniques may cause emissions to exceed reportable quantities" (truly an understatement), but dismissed the comments by simply noting "it is unclear what response the commenter had in mind." Joint App'x at 626. The *Final Rule* added that "based on the EPA's experience, the Agency would *rarely* respond to such scenarios." 73 Fed. Reg. at 76,957/3 (emphasis added). Although we (like the EPA) don't know what particular response the commenter had in mind, the EPA suggested at oral argument that one option might be requiring "some sort of change in the farm's ... waste management system [to] eliminate the risk." Oral Arg. Tr. at 32:13-14. That hardly sounds "impractical." And as we'll see in a minute, such responses appear to be within the EPA's remedial powers.

Commenters also pointed to the role of information in enabling responses by local officials. The National Association of Clean Air Agencies ("Clean Air Agencies") (which represents hundreds of air pollution control agencies) submitted Congressional testimony from an Iowa regulator saying that the *Final Rule* "prevent[s] local, state and federal emergency responders from having critical information about potentially dangerous releases" and limits the ability of federal or state authorities to take action through "investigations or clean-up[s]" or "issuing abatement orders." *Human Health, Water Quality, and Other Impacts of the Confined Animal Feeding Operation Industry: Hearing Before the S. Env't & Pub. Works Comm.*, 110th Cong. 1 (2007) (statement of Catharine Fitzsimmons, Chief of the Air Quality Bureau of the Iowa Dep't of Natural Resources). Likewise, the National Association of SARA Title III Program Officials ("SARA Title III Officials") (which is made up of members of local and state emergency planning commissions) discussed how emergency commissions could use those ***537** reports when responding to citizen complaints or genuine emergencies. It explained:

> The 911 call that comes in from a member of the public in the dark of night reporting a foul or chemical odor rarely contains information on the source. The responders are forced to guess at that source as they ga[u]ge

> their response. "Immediate" release reporting by facilities under EPCRA provides crucial information to those responders. Without such information responders are forced to blindly drive through an area not knowing what they are looking for —is it a vehicle accident, a facility release or something worse will be the question in their minds.

Comment Letter from Timothy R. Gablehouse, Pres., Nat'l Ass'n of SARA Title III Program Officials, to Superfund Docket, U.S. EPA at 2 (Mar. 27, 2008). Then-Oklahoma Attorney General Drew Edmondson also invoked the benefits of alerting local agencies. Comment Letter from W.A. Drew Edmondson, Okla. Att'y Gen., to Superfund Docket, U.S. EPA at 3 (Mar. 27, 2008).

Whatever the EPA's past experience in responding to mandated information may have been, it plainly has broad authority to respond. CERCLA authorizes both removal and remedial actions. See 42 U.S.C. § 9604(a)(1); see also *Montrose Chem. Corp. of California v. EPA*, 132 F.3d 90, 92 n.3 (D.C. Cir. 1998). "Removal" includes both cleanup of hazardous substances from the environment and broad authority to institute monitoring, investigative and preventative activities designed to evaluate and minimize the impact of possible releases. See 42 U.S.C. §§ 9601(23), 9604(b)(1) (authorizing "investigations, monitoring, surveys, testing, and other information gathering"). "Remedial actions" are ones designed to permanently prevent or minimize the risk of a release. See *id.* § 9601(24). They can range from enormously invasive measures (like permanently relocating residents) to relatively minor ones (like digging protective trenches or requiring covers). See *id.*

Thus the comments undermine the EPA's primary justification for the *Final Rule*—namely, that notifications of animal-waste-related releases serve no regulatory purpose because it would be "impractical or unlikely" to respond to such a release. 73 Fed. Reg. at 76,950/1. It's not at all clear why it would be impractical for the EPA to investigate or issue abatement orders (as suggested by the Clean Air Agencies) in cases where pumping techniques or other actions lead to toxic levels of hazardous substances such as hydrogen sulfide. And the SARA Title III Officials provide at least one way that local or state authorities might use the CERCLA release reports —to narrow an investigation when they get a phone call reporting a suspicious smell or similarly vague news of possibly hazardous leaks.

The record therefore suggests the potentiality of some real benefits. Of course it's possible that these are outweighed by the costs, which the EPA estimates as substantial. See 73 Fed. Reg. at 76,958/1 (estimating that, over ten years, the *Final Rule* would save farms more than a million hours and more than $60 million in compliance costs and cut out roughly 160,000 hours and $8 million in government costs related to those reports). But as we have noted, such facts (assuming their correctness) are not enough to support application of the *de minimis* exception.

* * *

Because the EPA's action here can't be justified either as a reasonable interpretation of any statutory ambiguity or implementation of a *de minimis* exception, we grant Waterkeeper's petition and vacate ***538** the *Final Rule*. That necessarily moots Pork Producers' challenge to the CAFO carve-out; we therefore dismiss their petition.

So ordered.

Brown, Circuit Judge, concurring:
I join in the Panel Opinion because "the *Final Rule* ran afoul of the underlying statutes (and was therefore outside the EPA's delegated authority)." Op. 530. To reach this result, the court dances around the familiar *Chevron* two-step with the following formulation: "Of course, 'if Congress has directly spoken to an issue then any agency interpretation contradicting what Congress has said would be unreasonable.' " Op. 534 (quoting *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 218 n.4, 129 S.Ct. 1498, 173 L.Ed.2d 369 (2009)). I assume this reasoning casts no aspersions on the first step of *Chevron*. *But see United States v. Home Concrete & Supply, LLC*, 566 U.S. 478, 132 S.Ct. 1836, 1846 n.1, 182 L.Ed.2d 746 (2012) (Scalia, J., concurring in part and concurring in the judgment).

Entergy Corp. merely establishes an agency's *un*reasonable statutory interpretation is outside the scope of any statutory ambiguity. The decision does *not* comment on the situation in which a court might find an agency's interpretation reasonable *without* satisfying *Chevron* Step One, *i.e.*, without a *judicial* determination that the "traditional tools" of interpretation identify a statutory ambiguity that, in turn, authorizes agency action on the "precise question at issue." *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842, 843 n.9, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984).

This case extends no further than what *Entergy Corp.* established. As the Panel acknowledges, EPA set forth *no* statutory ambiguity authorizing its *Final Rule*. Op. 534. Under Step One, this ends the matter. *See, e.g.*, *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374, 106 S.Ct. 1890, 90 L.Ed.2d 369 (1986) (holding "an agency literally has no power to act ... unless and until Congress confers power upon it"). Step One would decompose if EPA's premise here were accepted: An agency can take "unrelated" statutory provisions that, in its view, "collectively create ambiguity," and command deference because a court finds the agency's interpretation "reasonable" at Step Two. *See* Op. 534.

Chevron's "reasonableness" inquiry could (and should) be governed by statutory text, but Step Two jurisprudence reveals statutory text need not play much of a role at all—let alone a dispositive one. *See, e.g.*, Stephen G. Breyer, et al., ADMINISTRATIVE LAW AND REGULATORY POLICY: PROBLEMS, TEXT, AND CASES 359 (7th ed. 2011) ("The weight of scholarly opinion endorses an equation of step two with arbitrary and capricious review." Such review is "not an inquiry into congressional instructions, but an assessment of whether the agency's decision is reasonable on the merits and not, in the [Supreme] Court's words, arbitrary or capricious in substance."). This is why Step One is so critical. For all its potential for manipulation, it is *Chevron* Step One where "[t]he court's task is to fix the boundaries of delegated authority, an inquiry that includes defining the range of permissible criteria.... [T]he judicial role is to specify what the statute cannot mean, and some of what it must mean, but not all that it does mean." Henry P. Monaghan, Marbury *and the Administrative State*, 83 COLUM. L. REV. 1, 27–28 (1983); *see also* Gerald L. Neuman, *Law Review Articles that Backfire*, 21 U. MICH. J.L. REFORM 697, 711–12 (1988) ("Monaghan's thesis reappeared, without citation, as the core of Justice Stevens's new approach ***539** to statutory interpretation in [*Chevron*].").

Truncating the *Chevron* two-step into a one-step "reasonableness" inquiry lets the judiciary leave its statutory escort to blow on an agency's dice. "It isn't fair. It isn't nice." FRANK SINATRA, *Luck Be A Lady*, *on* SINATRA '65: THE SINGER TODAY (Reprise Records 1965). In fact, some advocates of a one-step reasonableness approach appeal to the judiciary's fear of commitment—promising that courts can avoid "ascertain[ing] whether the statute has a single, clear meaning before deciding whether the agency's interpretation is reasonable." *See* Matthew C. Stephenson & Adrian Vermeule, Chevron *Has Only One Step*, 95 VA. L. REV. 597, 605 (2009). Congress is out of the picture altogether. When all that matters is aligning judicial and administrative views of reasonableness, and reasonableness at Step Two need not be primarily or solely determined by the "traditional tools" of statutory interpretation, there is no incentive to petition the legislature for statutory clarity. Agencies are free to experiment with various interpretations, and courts are free to avoid determining the meaning of statutes. *See* Kenneth A. Bamberger & Peter L. Strauss, Chevron*'s Two Steps*, 95 VA. L. REV. 611, 618–19 (2009).

An Article III renaissance is emerging against the judicial abdication performed in *Chevron*'s name. If a court could purport fealty to *Chevron* while subjugating statutory clarity to agency "reasonableness," textualism will be trivialized. "For whatever the *agency* may be doing under *Chevron*, the problem remains that *courts* are not fulfilling their duty to interpret the law." *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1152–53 (10th Cir. 2016) (Gorsuch, J., concurring).

I join in the Panel Opinion because it does not extend to the situation in which an agency's statutory interpretation is found to be "reasonable" without a court first determining the statutory bounds of agency authority. But if *Chevron*'s two-step inquiry can be collapsed into one "reasonableness" inquiry no different than current Step

Two jurisprudence, there is yet another reason to question *Chevron*'s consistency with "the judicial department['s]" "emphatic[ ]" "province and duty ... to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177, 2 L.Ed. 60 (1803).

All Citations

853 F.3d 527

United States Senate
WASHINGTON, DC 20510

May 25, 2017

The Honorable Scott Pruitt
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Dear Administrator Pruitt:

In light of the recent D.C. Circuit decision in *Waterkeeper v. EPA*, the EPA should take immediate action to prevent the waste of federal, state, and local resources designated for emergency response programs. Therefore, we urge you to challenge the D.C. Circuit decision and to provide America's farmers and ranchers with regulatory relief through agency directive and rulemaking.

As you know, the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) was enacted in 1980 in response to serious environmental and health risks posed by industrial pollution. CERCLA has two primary objectives: to give the federal government the tools necessary for prompt response to problems resulting from hazardous waste disposal and to hold polluters financially responsible for cleanup. The Emergency Planning and Community Right-to-Know Act of 1986 (EPCRA) was enacted to ensure proper notice to relevant authorities in cases of accidental spills, chemical plant explosions, and release of hazardous chemicals from sinking ships or train derailments. Congress never imagined the normal odors and emissions (including low-level concentrations of ammonia and hydrogen sulfide) of livestock, poultry, and egg production would somehow be captured.

In 2008, EPA finalized a rule to clarify the exemption of farms from CERCLA and EPCRA reporting requirements. This rule provided that all Animal Feeding Operations (AFOs) and Concentrated Animal Feeding Operations (CAFOs) were exempt from CERCLA, and only large CAFOs were required to report under EPCRA. However, in its April ruling, the Court of Appeals for the D.C. Circuit found that exemption to be inconsistent with statutory requirements, thereby requiring submission of these senseless reports from agricultural operations. We implore you to continue fighting for American agriculture, by challenging the panel decision by the D.C. Circuit.

Left unchecked, when expanded reporting requirements go into effect on June 2, 2017, up to 100,000 farms and ranches across the country will face enormous uncertainty and potential liability if they do not submit an emissions report. These reports have the potential to significantly overburden the National Response Center (NRC), which received a mere 24,193 reports in 2016. And unlike the reports received last year, which averaged about 66 per day, the National Response Center would potentially receive tens of thousands of reports within a matter of a few days. Not only will these unnecessary agricultural reports shut down and congest a necessarily fast-moving response process, but they will actually prevent the NRC and local first

responders from efficiently addressing real emergencies. Required reporting from agricultural operations directly impedes the purpose of the statute.

In addition, we strongly support any action you take to protect both the integrity of the NRC and local emergency planning units, while also protecting the wellbeing of America's farmers and ranchers. This includes clarifying the applicability of the agricultural exemptions contained within both CERCLA and EPCRA, as well as tailoring reportable quantities to an appropriate level for livestock and poultry operations. If the EPA cannot address this problem in the courts or on its own, we encourage you to come to Congress to find a solution.

Sincerely,

JOHN CORNYN
United States Senator

JOHN BARRASSO, M.D.
United States Senator

ROY BLUNT
United States Senator

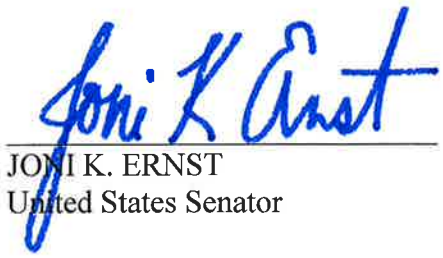
JOHN BOOZMAN
United States Senator

TOM COTTON
United States Senator

MIKE CRAPO
United States Senator

TED CRUZ
United States Senator

MIKE ENZI
United States Senator



JONI K. ERNST
United States Senator

DEB FISCHER
United States Senator

CORY GARDNER
United States Senator

CHARLES E. GRASSLEY
United States Senator

ORRIN G. HATCH
United States Senator

JOHNNY ISAKSON
United States Senator

JERRY MORAN
United States Senator

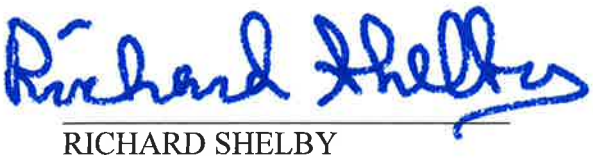
RAND PAUL
United States Senator

ROB PORTMAN
United States Senator

PAT ROBERTS
United States Senator

M. MICHAEL ROUNDS
United States Senator

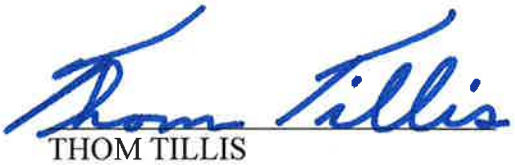
BEN SASSE
United States Senator



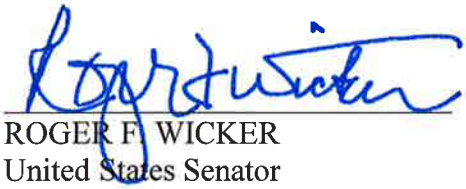
RICHARD SHELBY
United States Senator

LUTHER STRANGE
United States Senator

JOHN THUNE
United States Senator



THOM TILLIS
United States Senator



ROGER F. WICKER
United States Senator

TODD YOUNG
United States Senator

MIKE LEE
United States Senator

JAMES E. RISCH
United States Senator

CERCLA/EPCRA Administrative Reporting Exemption for Air Releases of Hazardous Substances from Animal Waste at Farms

Final Rule

Please note:
This regulation *does not* create any new regulatory requirements or reporting deadlines.

The final rule, "CERCLA/EPCRA Administrative Reporting Exemption for Air Releases of Hazardous Substances from Animal Waste at Farms," is an *exemption* from the existing notification requirements in the 1984 final rule on the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) notification requirements. The exemption became effective on January 20, 2009. The final rule *exempts* all farms that release hazardous substances from animal waste to the air that meet or exceed their reportable quantity (RQ) from reporting under CERCLA section 103. The final rule also *exempts* farms that release hazardous substances from animal waste to the air that meet or exceed their RQ from reporting under the Emergency Planning and Community Right to Know Act (EPCRA) section 304 if they stable or confine *fewer* than the following number of animal species:

1. 700 mature dairy cows, whether milked or dry
2. 1,000 veal calves
3. 1,000 cattle other than mature dairy cows or veal calves. Cattle includes but is not limited to heifers, steers, bulls and cow/calf pairs
4. 2,500 swine each weighing 55 pounds or more
5. 10,000 swine each weighing less than 55 pounds
6. 500 horses
7. 10,000 sheep or lambs
8. 55,000 turkeys
9. 30,000 laying hens or broilers, if the farm uses a liquid manure handling system
10. 125,000 chickens (other than laying hens), if the farm uses other than liquid manure handling system
11. 82,000 laying hens, if the farm uses other than a liquid manure handling system
12. 30,000 ducks (if the farm uses other than a liquid manure handling system)
13. 5,000 ducks (if the farm uses a liquid manure handling system)

For purposes of this rule:

Animal Waste means manure (feces, urine, and other excrement produced by livestock), digestive emissions, and urea. The definition includes animal waste when mixed or commingled with bedding, compost, feed, soil and other typical materials found with animal waste.

Farm means a facility on a tract of land devoted to the production of crops or raising of animals, including fish, which produced and sold, or normally would have produced and sold, $1,000 or more of agricultural products during a year.

Note: For the purposes of this rule, EPA considers animals that reside primarily outside of an enclosed structure (i.e., a barn or a feed lot) and graze on pastures, not to be stabled or confined.

Those farms that stable or confine greater than the number of animal species identified above are still required to submit the appropriate reports to State and local officials pursuant to EPCRA section 304 if they release hazardous substances to the air that meet or exceed their RQ. That is, the reporting requirement under EPCRA section 304 in this rule does not create a new regulatory requirement.

Farms that *are required* to report their air releases of hazardous substances from animal waste under EPCRA should follow the requirements at 40 CFR 355.32, "Which emergency release notification requirements apply to continuous releases?" For these notifications you are *not* required to call the National Response Center. Your initial telephone notification should be directed to the community emergency coordinator for the Local Emergency Planning Committee (LEPC) for any area likely to be affected by the release and to the State Emergency Response Commission (SERC) of any State likely to be affected by the release. You will then submit the written notification to those LEPCs and SERCs as appropriate.

Finally, the exemption created by the rule does not impact EPA's authority to respond to citizen complaints or requests for assistance from State or local government agencies to investigate and respond to those releases of hazardous substances from farms. Nor does this rule limit any of the Agency's other authorities under CERCLA (e.g., liability) or EPCRA.

Background

CERCLA section 103 notification requirements call for immediate notification to the National Response Center (NRC) when the person in charge of a facility has knowledge of a release of a hazardous substance equal to or greater than the RQ established by EPA for that substance.

EPCRA section 304 emergency notification requirements call for notification to be given to the community emergency coordinator for each LEPC for any area likely to be affected by the release, and the SERC of any State likely to be affected by the release. Through this notification, State and local officials can assess whether a response action to the release is appropriate. EPCRA section 304 notification requirements apply only to releases that have the potential for off-site exposure and that are from facilities that produce, use, or store a "hazardous chemical," as defined by regulations promulgated under the Occupational Safety and Health Act of 1970 (OSHA) (29 CFR 1910.1200(c)) and by section 311 of EPCRA.

You Are Not Required to Report If:

- You have reported continuous releases in the past and your continuous release report is up to date and on file with the appropriate SERC and LEPC; or
- Your releases are less than the RQ.

Moreover, EPA does not expect farms participating in the Agency's Animal Feeding Operation Air Compliance Agreement (70 *Fed. Reg.* 4958), and that are in compliance with the terms of the Agreement, to report at this time.

For continuous release reporting, to establish the continuity and stability of the release, you may use:

- Prior release data;
- Knowledge of operating procedures; or
- Best professional judgment.

Look for Updates

As the Agency receives additional questions that are generally applicable to a wide audience, we will update this fact sheet on the web with those questions and answers.

EPA is working on developing emission estimating methodologies based in part on the data collected in the National Air Emissions Monitoring Study, which is scheduled for completion at the end of 2009 with the final report to be complete in 2011. For more information on the Air Compliance Agreement and the Air Emissions Monitoring Study, please visit: http://www.epa.gov/compliance/resources/agreements/caa/cafo-agr.html.

Code of Federal Regulations
Title 40. Protection of Environment
Chapter I. Environmental Protection Agency (Refs & Annos)
Subchapter J. Superfund, Emergency Planning, and Community Right–to–Know Programs
Part 302. Designation, Reportable Quantities, and Notification (Refs & Annos)

40 C.F.R. § 302.8

§ 302.8 Continuous releases.

Currentness

(a) Except as provided in paragraph (c) of this section, no notification is required for any release of a hazardous substance that is, pursuant to the definitions in paragraph (b) of this section, continuous and stable in quantity and rate.

(b) Definitions. The following definitions apply to notification of continuous releases:

Continuous. A continuous release is a release that occurs without interruption or abatement or that is routine, anticipated, and intermittent and incidental to normal operations or treatment processes.

Normal range. The normal range of a release is all releases (in pounds or kilograms) of a hazardous substance reported or occurring over any 24–hour period under normal operating conditions during the preceding year. Only releases that are both continuous and stable in quantity and rate may be included in the normal range.

Routine. A routine release is a release that occurs during normal operating procedures or processes.

Stable in quantity and rate. A release that is stable in quantity and rate is a release that is predictable and regular in amount and rate of emission.

Statistically significant increase. A statistically significant increase in a release is an increase in the quantity of the hazardous substance released above the upper bound of the reported normal range of the release.

(c) Notification. The following notifications shall be given for any release qualifying for reduced reporting under this section:

(1) Initial telephone notification;

(2) Initial written notification within 30 days of the initial telephone notification;

(3) Follow-up notification within 30 days of the first anniversary date of the initial written notification;

(4) Notification of a change in the composition or source(s) of the release or in the other information submitted in the initial written notification of the release under paragraph (c)(2) of this section or the follow-up notification under paragraph (c)(3) of this section; and

(5) Notification at such times as an increase in the quantity of the hazardous substance being released during any 24–hour period represents a statistically significant increase as defined in paragraph (b) of this section.

(d) Initial telephone notification. Prior to making an initial telephone notification of a continuous release, the person in charge of a facility or vessel must establish a sound basis for qualifying the release for reporting under CERCLA section 103(f)(2) by:

(1) Using release data, engineering estimates, knowledge of operating procedures, or best professional judgment to establish the continuity and stability of the release;

(2) Reporting the release to the National Response Center for a period sufficient to establish the continuity and stability of the release; or

(3) When a person in charge of the facility or vessel believes that a basis has been established to qualify the release for reduced reporting under this section, initial notification to the National Response Center shall be made by telephone. The person in charge must identify the notification as an initial continuous release notification report and provide the following information:

(i) The name and location of the facility or vessel; and

(ii) The name(s) and identity(ies) of the hazardous substance(s) being released.

(e) Initial written notification. Initial written notification of a continuous release shall be made to the appropriate EPA Regional Office for the geographical area where the releasing facility or vessel is located. (Note: In addition to the requirements of this part, releases of CERCLA hazardous substances are also subject to the provisions of SARA title III section 304, and EPA's implementing regulations codified at 40 CFR part 355, which require initial telephone and written notifications of continuous releases to be submitted to the appropriate State emergency response commission and local emergency planning committee.)

(1) Initial written notification to the appropriate EPA Regional Office shall occur within 30 days of the initial telephone notification to the National Response Center, and shall include, for each release for which reduced reporting as a continuous release is claimed, the following information:

(i) The name of the facility or vessel; the location, including the latitude and longitude; the case number assigned by the National Response Center or the Environmental Protection Agency; the Dun and Bradstreet number of the

facility, if available; the port of registration of the vessel; the name and telephone number of the person in charge of the facility or vessel.

(ii) The population density within a one-mile radius of the facility or vessel, described in terms of the following ranges: 0–50 persons, 51–100 persons, 101–500 persons, 501–1,000 persons, more than 1,000 persons.

(iii) The identity and location of sensitive populations and ecosystems within a one-mile radius of the facility or vessel (e.g., elementary schools, hospitals, retirement communities, or wetlands).

(iv) For each hazardous substance release claimed to qualify for reporting under CERCLA section 103(f)(2), the following information must be supplied:

(A) The name/identity of the hazardous substance; the Chemical Abstracts Service Registry Number for the substance (if available); and if the substance being released is a mixture, the components of the mixture and their approximate concentrations and quantities, by weight.

(B) The upper and lower bounds of the normal range of the release (in pounds or kilograms) over the previous year.

(C) The source(s) of the release (e.g., valves, pump seals, storage tank vents, stacks). If the release is from a stack, the stack height (in feet or meters).

(D) The frequency of the release and the fraction of the release from each release source and the specific period over which it occurs.

(E) A brief statement describing the basis for stating that the release is continuous and stable in quantity and rate.

(F) An estimate of the total annual amount that was released in the previous year (in pounds or kilograms).

(G) The environmental medium(a) affected by the release:

(1) If surface water, the name of the surface water body;

(2) If a stream, the stream order or average flowrate (in cubic feet/second) and designated use;

(3) If a lake, the surface area (in acres) and average depth (in feet or meters);

(4) If on or under ground, the location of public water supply wells within two miles.

(H) A signed statement that the hazardous substance release(s) described is (are) continuous and stable in quantity and rate under the definitions in paragraph (b) of this section and that all reported information is accurate and current to the best knowledge of the person in charge.

(f) Follow-up notification. Within 30 days of the first anniversary date of the initial written notification, the person in charge of the facility or vessel shall evaluate each hazardous substance release reported to verify and update the information submitted in the initial written notification. The follow-up notification shall include the following information:

(1) The name of the facility or vessel; the location, including the latitude and longitude; the case number assigned by the National Response Center or the Environmental Protection Agency; the Dun and Bradstreet number of the facility, if available; the port of registration of the vessel; the name and telephone number of the person in charge of the facility or vessel.

(2) The population density within a one-mile radius of the facility or vessel, described in terms of the following ranges: 0–50 persons, 51–100 persons, 101–500 persons, 501–1,000 persons, more than 1,000 persons.

(3) The identity and location of sensitive populations and ecosystems within a one-mile radius of the facility or vessel (e.g., elementary schools, hospitals, retirement communities, or wetlands).

(4) For each hazardous substance release claimed to qualify for reporting under CERCLA section 103(f)(2), the following information shall be supplied:

(i) The name/identity of the hazardous substance; the Chemical Abstracts Service Registry Number for the substance (if available); and if the substance being released is a mixture, the components of the mixture and their approximate concentrations and quantities, by weight.

(ii) The upper and lower bounds of the normal range of the release (in pounds or kilograms) over the previous year.

(iii) The source(s) of the release (e.g., valves, pump seals, storage tank vents, stacks). If the release is from a stack, the stack height (in feet or meters).

(iv) The frequency of the release and the fraction of the release from each release source and the specific period over which it occurs.

(v) A brief statement describing the basis for stating that the release is continuous and stable in quantity and rate.

(vi) An estimate of the total annual amount that was released in the previous year (in pounds or kilograms).

(vii) The environmental medium(a) affected by the release:

(A) If surface water, the name of the surface water body;

(B) If a stream, the stream order or average flowrate (in cubic feet/second) and designated use;

(C) If a lake, the surface area (in acres) and average depth (in feet or meters);

(D) If on or under ground, the location of public water supply wells within two miles.

(viii) A signed statement that the hazardous substance release(s) is (are) continuous and stable in quantity and rate under the definitions in paragraph (b) of this section and that all reported information is accurate and current to the best knowledge of the person in charge.

(g) Notification of changes in the release. If there is a change in the release, notification of the change, not otherwise reported, shall be provided in the following manner:

(1) Change in source or composition. If there is any change in the composition or source(s) of the release, the release is a new release and must be qualified for reporting under this section by the submission of initial telephone notification and initial written notification in accordance with paragraphs (c)(1) and (2) of this section as soon as there is a sufficient basis for asserting that the release is continuous and stable in quantity and rate;

(2) Change in the normal range. If there is a change in the release such that the quantity of the release exceeds the upper bound of the reported normal range, the release must be reported as a statistically significant increase in the release. If a change will result in a number of releases that exceed the upper bound of the normal range, the person in charge of a facility or vessel may modify the normal range by:

(i) Reporting at least one statistically significant increase report as required under paragraph (c)(7) of this section and, at the same time, informing the National Response Center of the change in the normal range; and

(ii) Submitting, within 30 days of the telephone notification, written notification to the appropriate EPA Regional Office describing the new normal range, the reason for the change, and the basis for stating that the release in the increased amount is continuous and stable in quantity and rate under the definitions in paragraph (b) of this section.

(3) Changes in other reported information. If there is a change in any information submitted in the initial written notification or the followup notification other than a change in the source, composition, or quantity of the release, the person in charge of the facility or vessel shall provide written notification of the change to the EPA Region for the geographical area where the facility or vessel is located, within 30 days of determining that the information submitted previously is no longer valid. Notification shall include the reason for the change, and the basis for stating that the release is continuous and stable under the changed conditions.

(4) Notification of changes shall include the case number assigned by the National Response Center or the Environmental Protection Agency and also the signed certification statement required at (c)(2)(xi) of this section.

(h) Notification of a statistically significant increase in a release. Notification of a statistically significant increase in a release shall be made to the National Response Center as soon as the person in charge of the facility or vessel has knowledge of the increase. The release must be identified as a statistically significant increase in a continuous release. A determination of whether an increase is a "statistically significant increase" shall be made based upon calculations or estimation procedures that will identify releases that exceed the upper bound of the reported normal range.

(i) Annual evaluation of releases. Each hazardous substance release shall be evaluated annually to determine if changes have occurred in the information submitted in the initial written notification, the followup notification, and/or in a previous change notification.

(j) Use of the SARA Title III section 313 form. In lieu of an initial written report or a followup report, owners or operators of facilities subject to the requirements of SARA title III section 313 may submit to the appropriate EPA Regional Office for the geographical area where the facility is located, a copy of the Toxic Release Inventory form submitted under SARA Title III section 313 the previous July 1, provided that the following information is added:

(1) The population density within a one-mile radius of the facility or vessel, described in terms of the following ranges: 0–50 persons, 51–100 persons, 101–500 persons, 501–1,000 persons, more than 1,000 persons.

(2) The identity and location of sensitive populations and ecosystems within a one-mile radius of the facility or vessel (e.g., elementary schools, hospitals, retirement communities, or wetlands).

(3) For each hazardous substance release claimed to qualify for reporting under CERCLA section 103(f)(2), the following information must be supplied:

(i) The upper and lower bounds of the normal range of the release (in pounds or kilograms) over the previous year.

(ii) The frequency of the release and the fraction of the release from each release source and the specific period over which it occurs.

(iii) A brief statement describing the basis for stating that the release is continuous and stable in quantity and rate.

(iv) A signed statement that the hazardous substance release(s) is(are) continuous and stable in quantity and rate under the definitions in paragraph (b) of this section and that all reported information is accurate and current to the best knowledge of the person in charge.

(k) Documentation supporting notification. Where necessary to satisfy the requirements of this section, the person in charge may rely on recent release data, engineering estimates, the operating history of the facility or vessel, or other relevant information to support notification. All supporting documents, materials, and other information shall be kept on file at the facility, or in the case of a vessel, at an office within the United States in either a port of call, a place of regular berthing, or the headquarters of the business operating the vessel. Supporting materials shall be kept on file for a period of one year and shall substantiate the reported normal range of releases, the basis for stating that the release is continuous and stable in quantity and rate, and the other information in the initial written report, the followup report, and the annual evaluations required under paragraphs (e), (f), and (i), respectively. Such information shall be made available to EPA upon request as necessary to enforce the requirements of this section.

(l) Multiple concurrent releases. Multiple concurrent releases of the same substance occurring at various locations with respect to contiguous plants or installations upon contiguous grounds that are under common ownership or control may be considered separately or added together in determining whether such releases constitute a continuous release or a statistically significant increase under the definitions in paragraph (b) of this section; whichever approach is elected for purposes of determining whether a release is continuous also must be used to determine a statistically significant increase in the release.

(m) Penalties for failure to comply. The reduced reporting requirements provided for under this section shall apply only so long as the person in charge complies fully with all requirements of paragraph (c) of this section. Failure to comply with respect to any release from the facility or vessel shall subject the person in charge to all of the reporting requirements of § 302.6 for each such release, to the penalties under § 302.7, and to any other applicable penalties provided for by law.

Credits
[55 FR 30185, July 24, 1990; 67 FR 45357, July 9, 2002]

SOURCE: 50 FR 13474, April 4, 1985; 54 FR 33425, 33448, Aug. 14, 1989; 54 FR 53062, Dec. 27, 1989; 55 FR 30185, July 24, 1990; 80 FR 37123, June 29, 2015, unless otherwise noted.

AUTHORITY: 33 U.S.C. 1251 et seq.

Current through May 11, 2017; 82 FR 21951.

United States Code Annotated
Title 42. The Public Health and Welfare
Chapter 103. Comprehensive Environmental Response, Compensation, and Liability (Refs & Annos)
Subchapter I. Hazardous Substances Releases, Liability, Compensation (Refs & Annos)

42 U.S.C.A. § 9603

§ 9603. Notification requirements respecting released substances

Currentness

(a) Notice to National Response Center upon release from vessel or offshore or onshore facility by person in charge; conveyance of notice by Center

Any person in charge of a vessel or an offshore or an onshore facility shall, as soon as he has knowledge of any release (other than a federally permitted release) of a hazardous substance from such vessel or facility in quantities equal to or greater than those determined pursuant to section 9602 of this title, immediately notify the National Response Center established under the Clean Water Act [33 U.S.C.A. § 1251 et seq.] of such release. The National Response Center shall convey the notification expeditiously to all appropriate Government agencies, including the Governor of any affected State.

(b) Penalties for failure to notify; use of notice or information pursuant to notice in criminal case

Any person--

(1) in charge of a vessel from which a hazardous substance is released, other than a federally permitted release, into or upon the navigable waters of the United States, adjoining shorelines, or into or upon the waters of the contiguous zone, or

(2) in charge of a vessel from which a hazardous substance is released, other than a federally permitted release, which may affect natural resources belonging to, appertaining to, or under the exclusive management authority of the United States (including resources under the Magnuson-Stevens Fishery Conservation and Management Act [16 U.S.C.A. § 1801 et seq.]), and who is otherwise subject to the jurisdiction of the United States at the time of the release, or

(3) in charge of a facility from which a hazardous substance is released, other than a federally permitted release,

in a quantity equal to or greater than that determined pursuant to section 9602 of this title who fails to notify immediately the appropriate agency of the United States Government as soon as he has knowledge of such release or who submits in such a notification any information which he knows to be false or misleading shall, upon conviction, be fined in accordance with the applicable provisions of Title 18 or imprisoned for not more than 3 years (or not more than 5 years in the case of a second or subsequent conviction), or both. Notification received pursuant to this subsection or information obtained by the exploitation of such notification shall not be used against any such person in any criminal case, except a prosecution for perjury or for giving a false statement.

(c) Notice to Administrator of EPA of existence of storage, etc., facility by owner or operator; exception; time, manner, and form of notice; penalties for failure to notify; use of notice or information pursuant to notice in criminal case

Within one hundred and eighty days after December 11, 1980, any person who owns or operates or who at the time of disposal owned or operated, or who accepted hazardous substances for transport and selected, a facility at which hazardous substances (as defined in section 9601(14)(C) of this title) are or have been stored, treated, or disposed of shall, unless such facility has a permit issued under, or has been accorded interim status under, subtitle C of the Solid Waste Disposal Act [42 U.S.C.A. § 6921 et seq.], notify the Administrator of the Environmental Protection Agency of the existence of such facility, specifying the amount and type of any hazardous substance to be found there, and any known, suspected, or likely releases of such substances from such facility. The Administrator may prescribe in greater detail the manner and form of the notice and the information included. The Administrator shall notify the affected State agency, or any department designated by the Governor to receive such notice, of the existence of such facility. Any person who knowingly fails to notify the Administrator of the existence of any such facility shall, upon conviction, be fined not more than $10,000, or imprisoned for not more than one year, or both. In addition, any such person who knowingly fails to provide the notice required by this subsection shall not be entitled to any limitation of liability or to any defenses to liability set out in section 9607 of this title: *Provided, however*, That notification under this subsection is not required for any facility which would be reportable hereunder solely as a result of any stoppage in transit which is temporary, incidental to the transportation movement, or at the ordinary operating convenience of a common or contract carrier, and such stoppage shall be considered as a continuity of movement and not as the storage of a hazardous substance. Notification received pursuant to this subsection or information obtained by the exploitation of such notification shall not be used against any such person in any criminal case, except a prosecution for perjury or for giving a false statement.

(d) Recordkeeping requirements; promulgation of rules and regulations by Administrator of EPA; penalties for violations; waiver of retention requirements

(1) The Administrator of the Environmental Protection Agency is authorized to promulgate rules and regulations specifying, with respect to--

(A) the location, title, or condition of a facility, and

(B) the identity, characteristics, quantity, origin, or condition (including containerization and previous treatment) of any hazardous substances contained or deposited in a facility;

the records which shall be retained by any person required to provide the notification of a facility set out in subsection (c) of this section. Such specification shall be in accordance with the provisions of this subsection.

(2) Beginning with December 11, 1980, for fifty years thereafter or for fifty years after the date of establishment of a record (whichever is later), or at any such earlier time as a waiver if obtained under paragraph (3) of this subsection, it shall be unlawful for any such person knowingly to destroy, mutilate, erase, dispose of, conceal, or otherwise render unavailable or unreadable or falsify any records identified in paragraph (1) of this subsection. Any person who violates

this paragraph shall, upon conviction, be fined in accordance with the applicable provisions of Title 18 or imprisoned for not more than 3 years (or not more than 5 years in the case of a second or subsequent conviction), or both.

(3) At any time prior to the date which occurs fifty years after December 11, 1980, any person identified under paragraph (1) of this subsection may apply to the Administrator of the Environmental Protection Agency for a waiver of the provisions of the first sentence of paragraph (2) of this subsection. The Administrator is authorized to grant such waiver if, in his discretion, such waiver would not unreasonably interfere with the attainment of the purposes and provisions of this chapter. The Administrator shall promulgate rules and regulations regarding such a waiver so as to inform parties of the proper application procedure and conditions for approval of such a waiver.

(4) Notwithstanding the provisions of this subsection, the Administrator of the Environmental Protection Agency may in his discretion require any such person to retain any record identified pursuant to paragraph (1) of this subsection for such a time period in excess of the period specified in paragraph (2) of this subsection as the Administrator determines to be necessary to protect the public health or welfare.

(e) Applicability to registered pesticide product

This section shall not apply to the application of a pesticide product registered under the Federal Insecticide, Fungicide, and Rodenticide Act [7 U.S.C.A. § 136 et seq.] or to the handling and storage of such a pesticide product by an agricultural producer.

(f) Exemptions from notice and penalty provisions for substances reported under other Federal law or is in continuous release, etc.

No notification shall be required under subsection (a) or (b) of this section for any release of a hazardous substance--

(1) which is required to be reported (or specifically exempted from a requirement for reporting) under subtitle C of the Solid Waste Disposal Act [42 U.S.C.A. § 6921 et seq.] or regulations thereunder and which has been reported to the National Response Center, or

(2) which is a continuous release, stable in quantity and rate, and is--

(A) from a facility for which notification has been given under subsection (c) of this section, or

(B) a release of which notification has been given under subsections (a) and (b) of this section for a period sufficient to establish the continuity, quantity, and regularity of such release:

Provided, That notification in accordance with subsections (a) and (b) of this paragraph shall be given for releases subject to this paragraph annually, or at such time as there is any statistically significant increase in the quantity of any hazardous substance or constituent thereof released, above that previously reported or occurring.

CREDIT(S)

(Pub.L. 96-510, Title I, § 103, Dec. 11, 1980, 94 Stat. 2772; Pub.L. 96-561, Title II, § 238(b), Dec. 22, 1980, 94 Stat. 3300; Pub.L. 99-499, Title I, §§ 103, 109(a)(1), (2), Oct. 17, 1986, 100 Stat. 1617, 1632, 1633; Pub.L. 104-208, Title I, § 101(a) [Title II, § 211(b)], Sept. 30, 1996, 110 Stat. 3009-41.)

42 U.S.C.A. § 9603, 42 USCA § 9603
Current through P.L. 115-30. Title 26 current through 115-32

State of Arkansas *As Engrossed: H3/3/17 S3/14/17*
91st General Assembly **A Bill**
Regular Session, 2017 HOUSE BILL 1665

By: Representatives Vaught, Ballinger, Bentley, Boyd, Brown, Cavenaugh, Coleman, Davis, C. Douglas, Drown, Eubanks, Fortner, Gates, M. Gray, G. Hodges, Hollowell, Lundstrum, Maddox, McNair, Pilkington, Richmond, Rye, B. Smith, Sullivan
By: Senator G. Stubblefield

For An Act To Be Entitled

AN ACT TO CREATE A CAUSE OF ACTION FOR UNAUTHORIZED ACCESS TO ANOTHER PERSON'S PROPERTY; AND FOR OTHER PURPOSES.

Subtitle

TO CREATE A CAUSE OF ACTION FOR UNAUTHORIZED ACCESS TO ANOTHER PERSON'S PROPERTY.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF ARKANSAS:

SECTION 1. Arkansas Code Title 16, Chapter 118, is amended to add an additional section to read as follows:

16-118-113. Civil cause of action for unauthorized access to property.

(a) As used in this section:

(1) "Commercial property" means:

(A) A business property;

(B) Agricultural or timber production operations, including buildings and all outdoor areas that are not open to the public; and

(C) Residential property used for business purposes; and

(2) "Nonpublic area" means an area not accessible to or not intended to be accessed by the general public.

(b) A person who knowingly gains access to a nonpublic area of a

commercial property and engages in an act that exceeds the person's authority to enter the nonpublic area is liable to the owner or operator of the commercial property for any damages sustained by the owner or operator.

(c) An act that exceeds a person's authority to enter a nonpublic area of commercial property includes an employee who knowingly enters a nonpublic area of commercial property for a reason other than a bona fide intent of seeking or holding employment or doing business with the employer and without authorization subsequently:

(1) Captures or removes the employer's data, paper, records, or any other documents and uses the information contained on or in the employer's data, paper, records, or any other documents in a manner that damages the employer;

(2) Records images or sound occurring within an employer's commercial property and uses the recording in a manner that damages the employer;

(3) Places on the commercial property an unattended camera or electronic surveillance device and uses the unattended camera or electronic surveillance device to record images or data for an unlawful purpose;

(4) Conspires in an organized theft of items belonging to the employer; or

(5) Commits an act that substantially interferes with the ownership or possession of the commercial property.

(d) A person who knowingly directs or assists another person to violate this section is jointly liable.

(e) A court may award to a prevailing party in an action brought under this section one (1) or more of the following remedies:

(1) Equitable relief;

(2) Compensatory damages;

(3) Costs and fees, including reasonable attorney's fees; and

(4) In a case where compensatory damages cannot be quantified, a court may award additional damages as otherwise allowed by state or federal law in an amount not to exceed five thousand dollars ($5,000) for each day, or a portion of a day, that a defendant has acted in violation of subsection (b) of this section, and that in the court's discretion are commensurate with the harm caused to the plaintiff by the defendant's conduct in violation of this section.

(f) This section does not:

(1) Diminish the protections provided to employees under state or federal law; or

(2) Limit any other remedy available at common law or provided by law.

(g) This section does not apply to a state agency, a state-funded institution of higher education, a law enforcement officer engaged in a lawful investigation of commercial property or of the owner or operator of the commercial property, or a healthcare provider or medical services provider.

/s/Vaught

Shale Gas in the Spotlight: EPA Releases its Final Report on Impacts from the Hydraulic Fracturing Water Cycle on Drinking Water Resources in the United States

Written by Chloe J. Marie & Ross H. Pifer, Penn State Center for Agricultural and Shale Law
(www.pennstateshalelaw.com)

December 22, 2016

After years of study, on December 13, 2016, the U.S. Environmental Protection Agency (EPA) finally released its final report on Impacts from the Hydraulic Fracturing Water Cycle on Drinking Water Resources in the United States. Despite much attention on the changes to some of the specific language used, this long-awaited final report largely conforms with the preliminary findings set out in the EPA's draft assessment, dated June 2015, that hydraulic fracturing activities have some potential to impact drinking water resources, but that impacts to date have been relatively isolated rather than pervasive.

Changes have been made in the final report, in comparison with the draft assessment, including providing further clarification relating to the major findings, adding other chemicals to the chemicals listed in the draft assessment, and better identifying gaps in data and uncertainties in scientific knowledge. Notably, EPA also reconsidered the language of its conclusion in the draft assessment that the agency "did not find evidence that these mechanisms have led to widespread, systemic impacts on drinking water resources in the United States."[1] EPA excluded this sentence in its final report explaining that "contrary to what the sentence implied, uncertainties prevent EPA from estimating the national frequency of impacts on drinking water resources from activities in the hydraulic fracturing water cycle."[2]

The final report is structured in a similar manner to the draft assessment, focusing on five stages in the hydraulic fracturing water cycle: i) water acquisition; ii) chemical mixing; iii) well injection; iv) produced water handling; and v) wastewater disposal and reuse. For each stage, EPA evaluated the potential for impacts on drinking water resources and factors that affect the frequency or severity of impacts. In addition, EPA stated that only relevant scientific literature, available data and public comments were used in assessing the relationship between hydraulic fracturing and drinking water resources.

Concerning the stage of water acquisition, EPA found that groundwater withdrawals may have a considerable impact on the quality of drinking water resources, especially in regions with low water availability due to high water demand and/or changing seasonal and annual weather patterns. EPA explained that groundwater generally recharges quite slowly; thus any impacts on water resources could last decades.

For the chemical mixing stage, although the concentration of additives used in hydraulic fracturing is deemed small, EPA pointed out that the delivered quantities of fracturing fluid at the well site are generally large; as a consequence, fracturing fluid management can present a problem if not handled well. EPA concluded that spills are mainly caused by equipment failure, human error or storage facility impairment. In addition to specifying that the potential for impacts on water resources largely depends on

[1] U.S. ENVT'L PROT. AGENCY, ASSESSMENT OF THE POTENTIAL IMPACTS OF HYDRAULIC FRACTURING FOR OIL AND GAS ON DRINKING WATER RESOURCES 32 (2015).
[2] *Why Did EPA Remove 'No Evidence of Widespread, Systemic Impacts' from the Assessment?*, U.S. ENVT'L PROT. AGENCY, https://www.epa.gov/hfstudy/questions-and-answers-about-epas-hydraulic-fracturing-drinking-water-assessment#widespread (last visited Mar. 22, 2017).

the hydraulic fracturing-related spill characteristics, transport methods and spill response operations, EPA noted the lack of site-specific studies to identify the factors establishing frequency and severity of impacts from the chemical mixing stage of the hydraulic fracturing water cycle. EPA, however, determined that "impacts on groundwater resources have the potential to be more severe than impacts on surface water resources because it takes longer to naturally reduce the concentration of chemicals in groundwater and because it is generally difficult to remove chemicals from groundwater resources."[3]

As for the well injection stage, EPA sets out the mechanical integrity of wells as a significant factor influencing the frequency and severity of impacts on drinking water resources and, more specifically refers to inadequate well casing and cementing as well as improper well plugging and abandonment. According to the report, another important factor concerns the underground injection of fracturing fluids creating fractures that could establish a pathway to aquifers. Interestingly, mostly due to poor data availability, EPA declared it was "unable to determine with certainty whether fractures created during hydraulic fracturing have reached underground drinking water resources."[4] EPA, however, determined that experience has shown it is unlikely that "hydraulic fracturing fluids would reach an overlying drinking water resource if . . . the vertical separation distance between the targeted rock formation and the drinking water resource is large and . . . there are no open pathways."[5]

With regard to produced water handling, EPA explained that produced water spills have great potential to impact drinking water sources. Based on available site-specific studies, EPA found that local geology, fluid flow path and chemical composition of produced water are factors affecting the frequency and severity of impacts. Furthermore, EPA added that "large volume spills are more likely to travel further from the site of the spill, potentially to groundwater or surface water resources . . . leading to long-term groundwater contamination."[6]

Wastewater disposal and reuse is considered the last stage of the hydraulic fracturing water cycle. According to EPA, wastewater from hydraulic fracturing operations is usually injected into Class II wells[7] but also could be managed through evaporation ponds and percolating pits depending upon the geographic region where the wastewater is generated. EPA underscored that wastewater disposal has the potential to create impacts on water resources because fracturing fluids can end up either in surface or groundwater. EPA, however, mentioned that the risk of contamination is higher for underground aquifers because of the slow groundwater flow speed but noted that soil and sediment properties are also factors to consider. [8]

EPA dedicated a whole section of its report to explain the data gaps and uncertainties during the course of its assessment. EPA admitted lacking important information on data regarding the location of drinking water resources, water withdrawals, hydraulically fractured oil and gas production wells, and hydraulic

[3] U.S. ENVT'L PROT. AGENCY, EXECUTIVE SUMMARY, HYDRAULIC FRACTURING FOR OIL AND GAS: IMPACTS FROM THE HYDRAULIC FRACTURING WATER CYCLE ON DRINKING WATER RESOURCES IN THE UNITED STATES 22 (2016).
[4] *Id.* at 27.
[5] *Id.*
[6] *Id.* at 33.
[7] *See Underground Injection Control*, U.S. ENVT'L PROT. AGENCY (stating "Class II wells are used only to inject fluids associated with oil and natural gas production."), https://www.epa.gov/uic/class-ii-oil-and-gas-related-injection-wells (last visited Mar. 22, 2017).
[8] U.S. ENVT'L PROT. AGENCY, EXECUTIVE SUMMARY, HYDRAULIC FRACTURING FOR OIL AND GAS: IMPACTS FROM THE HYDRAULIC FRACTURING WATER CYCLE ON DRINKING WATER RESOURCES IN THE UNITED STATES 37 (2016).

fracturing wastewater management practices as well as information on chemicals in the hydraulic fracturing water cycle. As a result, EPA emphasized the need for further research highlighting the fact that "the uncertainties and data gaps identified throughout this report can be used to identify future efforts to further [the] understanding of the potential for activities in the hydraulic fracturing water cycle to impact drinking water resources and the factors that affect the frequency and severity of those impacts."[9]

In its concluding observations, EPA commented that "evaluating the potential for activities in the hydraulic fracturing water cycle to impact drinking water resources will need to keep pace with emerging technologies and new scientific studies." The agency finally contended that "this report provides a foundation for these efforts, while helping to reduce current vulnerabilities to drinking water resources."[10]

[9] *Id.* at 41.
[10] *Id.* at 42.

NATIONAL BIOENGINEERED FOOD DISCLOSURE STANDARD

Public Law 114–216
114th Congress

An Act

July 29, 2016
[S. 764]

To reauthorize and amend the National Sea Grant College Program Act, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. NATIONAL BIOENGINEERED FOOD DISCLOSURE STANDARD.

The Agricultural Marketing Act of 1946 (7 U.S.C. 1621 et seq.) is amended by adding at the end the following:

''Subtitle E—National Bioengineered Food Disclosure Standard

7 USC 1639.

''SEC. 291. DEFINITIONS.

''In this subtitle:

''(1) BIOENGINEERING.—The term 'bioengineering', and any similar term, as determined by the Secretary, with respect to a food, refers to a food—

''(A) that contains genetic material that has been modified through in vitro recombinant deoxyribonucleic acid (DNA) techniques; and

''(B) for which the modification could not otherwise be obtained through conventional breeding or found in nature.

''(2) FOOD.—The term 'food' means a food (as defined in section 201 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 321)) that is intended for human consumption.

''(3) SECRETARY.—The term 'Secretary' means the Secretary of Agriculture.

7 USC 1639a.

''SEC. 292. APPLICABILITY.

''(a) IN GENERAL.—This subtitle shall apply to any claim in a disclosure that a food bears that indicates that the food is a bioengineered food.

''(b) APPLICATION OF DEFINITION.—The definition of the term 'bioengineering' under section 291 shall not affect any other definition, program, rule, or regulation of the Federal Government.

''(c) APPLICATION TO FOODS.—This subtitle shall apply only to a food subject to—

''(1) the labeling requirements under the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 301 et seq.); or

''(2) the labeling requirements under the Federal Meat Inspection Act (21 U.S.C. 601 et seq.), the Poultry Products

Inspection Act (21 U.S.C. 451 et seq.), or the Egg Products Inspection Act (21 U.S.C. 1031 et seq.) only if—

''(A) the most predominant ingredient of the food would independently be subject to the labeling requirements under the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 301 et seq.); or

''(B)(i) the most predominant ingredient of the food is broth, stock, water, or a similar solution; and

''(ii) the second-most predominant ingredient of the food would independently be subject to the labeling requirements under the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 301 et seq.).

''SEC. 293. ESTABLISHMENT OF NATIONAL BIOENGINEERED FOOD DISCLOSURE STANDARD. 7 USC 1639b.

''(a) ESTABLISHMENT OF MANDATORY STANDARD.—Not later than 2 years after the date of enactment of this subtitle, the Secretary shall— Deadline.

''(1) establish a national mandatory bioengineered food disclosure standard with respect to any bioengineered food and any food that may be bioengineered; and

''(2) establish such requirements and procedures as the Secretary determines necessary to carry out the standard. Requirements. Procedures.

''(b) REGULATIONS.—

''(1) IN GENERAL.—A food may bear a disclosure that the food is bioengineered only in accordance with regulations promulgated by the Secretary in accordance with this subtitle.

''(2) REQUIREMENTS.—A regulation promulgated by the Secretary in carrying out this subtitle shall—

''(A) prohibit a food derived from an animal to be considered a bioengineered food solely because the animal consumed feed produced from, containing, or consisting of a bioengineered substance;

''(B) determine the amounts of a bioengineered substance that may be present in food, as appropriate, in order for the food to be a bioengineered food; Determination.

''(C) establish a process for requesting and granting a determination by the Secretary regarding other factors and conditions under which a food is considered a bioengineered food;

''(D) in accordance with subsection (d), require that the form of a food disclosure under this section be a text, symbol, or electronic or digital link, but excluding Internet website Uniform Resource Locators not embedded in the link, with the disclosure option to be selected by the food manufacturer;

''(E) provide alternative reasonable disclosure options for food contained in small or very small packages;

''(F) in the case of small food manufacturers, provide—

''(i) an implementation date that is not earlier than 1 year after the implementation date for regulations promulgated in accordance with this section; and Implementation date. Time period.

''(ii) on-package disclosure options, in addition to those available under subparagraph (D), to be selected by the small food manufacturer, that consist of—

''(I) a telephone number accompanied by appropriate language to indicate that the phone

number provides access to additional information; and

Web site.

''(II) an Internet website maintained by the small food manufacturer in a manner consistent with subsection (d), as appropriate; and

''(G) exclude—

''(i) food served in a restaurant or similar retail food establishment; and

''(ii) very small food manufacturers.

''(3) SAFETY.—For the purpose of regulations promulgated and food disclosures made pursuant to paragraph (2), a bioengineered food that has successfully completed the pre-market Federal regulatory review process shall not be treated as safer than, or not as safe as, a non-bioengineered counterpart of the food solely because the food is bioengineered or produced or developed with the use of bioengineering.

''(c) STUDY OF ELECTRONIC OR DIGITAL LINK DISCLOSURE.—

Deadline.

''(1) IN GENERAL.—Not later than 1 year after the date of enactment of this subtitle, the Secretary shall conduct a study to identify potential technological challenges that may impact whether consumers would have access to the bioengineering disclosure through electronic or digital disclosure methods.

''(2) PUBLIC COMMENTS.—In conducting the study under paragraph (1), the Secretary shall solicit and consider comments from the public.

''(3) FACTORS.—The study conducted under paragraph (1) shall consider whether consumer access to the bioengineering disclosure through electronic or digital disclosure methods under this subtitle would be affected by the following factors:

''(A) The availability of wireless Internet or cellular networks.

''(B) The availability of landline telephones in stores.

''(C) Challenges facing small retailers and rural retailers.

''(D) The efforts that retailers and other entities have taken to address potential technology and infrastructure challenges.

''(E) The costs and benefits of installing in retail stores electronic or digital link scanners or other evolving technology that provide bioengineering disclosure information.

Determination.
Consultation.

''(4) ADDITIONAL DISCLOSURE OPTIONS.—If the Secretary determines in the study conducted under paragraph (1) that consumers, while shopping, would not have sufficient access to the bioengineering disclosure through electronic or digital disclosure methods, the Secretary, after consultation with food retailers and manufacturers, shall provide additional and comparable options to access the bioengineering disclosure.

''(d) DISCLOSURE.—In promulgating regulations under this section, the Secretary shall ensure that—

''(1) on-package language accompanies—

''(A) the electronic or digital link disclosure, indicating that the electronic or digital link will provide access to an Internet website or other landing page by stating only 'Scan here for more food information', or equivalent language that only reflects technological changes; or

Inspection Act (21 U.S.C. 451 et seq.), or the Egg Products the telephone number will provide access to additional information by stating only 'Call for more food information.';

''(2) the electronic or digital link will provide access to the bioengineering disclosure located, in a consistent and conspicuous manner, on the first product information page that appears for the product on a mobile device, Internet website, or other landing page, which shall exclude marketing and promotional information;

''(3)(A) the electronic or digital link disclosure may not collect, analyze, or sell any personally identifiable information about consumers or the devices of consumers; but

''(B) if information described in subparagraph (A) must be collected to carry out the purposes of this subtitle, that information shall be deleted immediately and not used for any other purpose;

''(4) the electronic or digital link disclosure also includes a telephone number that provides access to the bioengineering disclosure; and

''(5) the electronic or digital link disclosure is of sufficient size to be easily and effectively scanned or read by a digital device.

''(e) STATE FOOD LABELING STANDARDS.—Notwithstanding section 295, no State or political subdivision of a State may directly or indirectly establish under any authority or continue in effect as to any food in interstate commerce any requirement relating to the labeling or disclosure of whether a food is bioengineered or was developed or produced using bioengineering for a food that is the subject of the national bioengineered food disclosure standard under this section that is not identical to the mandatory disclosure requirement under that standard.

''(f) CONSISTENCY WITH CERTAIN LAWS.—The Secretary shall consider establishing consistency between—

''(1) the national bioengineered food disclosure standard established under this section; and

''(2) the Organic Foods Production Act of 1990 (7 U.S.C. 6501 et seq.) and any rules or regulations implementing that Act.

''(g) ENFORCEMENT.—

''(1) PROHIBITED ACT.—It shall be a prohibited act for a person to knowingly fail to make a disclosure as required under this section.

''(2) RECORDKEEPING.—Each person subject to the mandatory disclosure requirement under this section shall maintain, and make available to the Secretary, on request, such records as the Secretary determines to be customary or reasonable in the food industry, by regulation, to establish compliance with this section.

''(3) EXAMINATION AND AUDIT.—

''(A) IN GENERAL.—The Secretary may conduct an examination, audit, or similar activity with respect to any records required under paragraph (2).

''(B) NOTICE AND HEARING.—A person subject to an examination, audit, or similar activity under subparagraph (A) shall be provided notice and opportunity for a hearing on the results of any examination, audit, or similar activity.

''(C) AUDIT RESULTS.—After the notice and opportunity for a hearing under subparagraph (B), the Secretary shall make public the summary of any examination, audit, or similar activity under subparagraph (A).

''(4) RECALL AUTHORITY.—The Secretary shall have no authority to recall any food subject to this subtitle on the basis of whether the food bears a disclosure that the food is bioengineered.

7 USC 1639c.

''SEC. 294. SAVINGS PROVISIONS.

Applicability.

''(a) TRADE.—This subtitle shall be applied in a manner consistent with United States obligations under international agreements.

''(b) OTHER AUTHORITIES.—Nothing in this subtitle—

''(1) affects the authority of the Secretary of Health and Human Services or creates any rights or obligations for any person under the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 301 et seq.); or

''(2) affects the authority of the Secretary of the Treasury or creates any rights or obligations for any person under the Federal Alcohol Administration Act (27 U.S.C. 201 et seq.).

''(c) OTHER.—A food may not be considered to be 'not bioengineered', 'non-GMO', or any other similar claim describing the absence of bioengineering in the food solely because the food is not required to bear a disclosure that the food is bioengineered under this subtitle.

''Subtitle F—Labeling of Certain Food

7 USC 1639i.

''SEC. 295. FEDERAL PREEMPTION.

''(a) DEFINITION OF FOOD.—In this subtitle, the term 'food' has the meaning given the term in section 201 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 321).

''(b) FEDERAL PREEMPTION.—No State or a political subdivision of a State may directly or indirectly establish under any authority or continue in effect as to any food or seed in interstate commerce any requirement relating to the labeling of whether a food (including food served in a restaurant or similar establishment) or seed is genetically engineered (which shall include such other similar terms as determined by the Secretary of Agriculture) or was developed or produced using genetic engineering, including any requirement for claims that a food or seed is or contains an ingredient that was developed or produced using genetic engineering.

7 USC 1639j.

''SEC. 296. EXCLUSION FROM FEDERAL PREEMPTION.

''Nothing in this subtitle, subtitle E, or any regulation, rule, or requirement promulgated in accordance with this subtitle or subtitle E shall be construed to preempt any remedy created by a State or Federal statutory or common law right.''.

Claims.
7 USC 6524.

SEC. 2. ORGANICALLY PRODUCED FOOD.

In the case of a food certified under the national organic program established under the Organic Foods Production Act of 1990 (7 U.S.C. 6501 et seq.), the certification shall be considered sufficient to make a claim regarding the absence of bioengineering in the

food, such as ''not bioengineered'', ''non-GMO'', or another similar claim.

Approved July 29, 2016.

LEGISLATIVE HISTORY—S. 764:

SENATE REPORTS: No. 114–90 (Comm. on Commerce, Science, and Transportation).

CONGRESSIONAL RECORD:
Vol. 161 (2015): July 28, considered and passed Senate.
Sept. 18, considered and passed House, amended, pursuant to H. Res. 421.
Vol. 162 (2016): Mar. 14–16, June 29, July 6, 7, Senate considered and concurred in House amendment with an amendment.
July 14, House concurred in Senate amendment.

Æ

Selected Recent Industrial Hemp / Cannabis Developments (May 26, 2017)

Written by Ross H. Pifer, Penn State Center for Agricultural and Shale Law www.pennstateaglaw.com

Colorado Law Protects Hemp Farmers Who Use Federal Water

On May 22, 2017, *The Journal* reported that Colorado Governor John Hickenlooper has "sign[ed] a bill protecting hemp farmers who use water stored in federal reservoirs." According to the report, "Colorado legalized growing hemp in 2014, but it is still banned at the federal level, creating complications when water from a federal project is used to water it." As a result, Colorado law makers passed SB 117, entitled *Recognize Industrial Hemp Agricultural Product for Agricultural Water Right*, which permits Colorado water right holders the right to use the water "on hemp if the person is registered by the state to grow hemp for commercial, or research purposes."

South Carolina Legalizes Industrial Hemp

On May 20, 2017, *The State* reported that South Carolina has passed legislation legalizing the growing of industrial hemp. According to the report, "Soon, perhaps this summer, the S.C. Department of Agriculture and the State Law Enforcement Division will issue 20 licenses to grow crops on up to 20 acres as a pilot program." The report stated that to receive a license, a grower must: (1) pass a State Law Enforcement Division background check; (2) work with an in-state research university to develop and market the products; and (3) have a contracted buyer for the hemp.

First Medical Marijuana Cultivation License Awarded in Maryland

On May 18, 2017, *Marijuana Business Daily* reported that "[t]he Maryland Medical Cannabis Commission gave final approval to the first company to win a cultivation license under the state's MMJ program." According to the report, "[t]he announcement…comes nine months after the state revealed 15 preliminary license winners, underscoring the slow rollout of Maryland's medical cannabis program." The report stated that the other 14 preliminary license "winners are still undergoing background checks, completing facility buildouts, and obtaining local zoning approval, according to a news release from the commission."

Washington State Governor Signs Organic Marijuana and Industrial Hemp Legislation

On May 17, 2017, *Reuters* reported that Washington Governor Jay Inslee has "signed a bill that paves the way for the state to create what is believed to be the first system in the United States to certify marijuana as organic." According to the report, the new legislation "creates a voluntary program for the certification and regulation of organic marijuana products" which is "to be administered by the Washington agriculture department." Additionally, the report stated that "[w]hile it is legal for adults to smoke marijuana in Washington, it is not legal to grow industrial hemp." As a result, the new legislation will now provide "for the study of a method to allow hemp to be grown and used for industrial purposes."

California Court Orders Return of Funds Seized from Marijuana Business

On May 8, 2017, the Institute for Justice announced that a San Diego County Superior Court has ordered the San Diego District Attorney (DA) to return funds seized from family members' bank accounts following a raid on a legal marijuana business. According to the announcement, "[a]lthough no one has been charged with any crime, the DA used civil forfeiture laws to seize more than $55,000 from James [Slatic's] personal bank account, more than $34,000 from his wife, Annette, and more than $5,600 each from their teenage daughters Lily and Penny, who had saved the money for college." The announcement stated that the court "ruled that the District Attorney had no grounds to hold the funds since it had not pursued any criminal charges or forfeiture for more than 12 months."

West Virginia Governor Signs Medical Cannabis and Industrial Hemp Legislation

Recently, West Virginia Governor Jim Justice signed into law separate legislation regarding Medical Cannabis and Industrial Hemp. On April 19, 2017, Governor Justice signed the Medical Cannabis Act which provides seriously ill patients access to medical cannabis (Senate Bill 386). According to a press release from Governor Justice, as a result of the legislation, "West Virginia is now the 29th state to allow the medical use of cannabis." On April 25, 2017, Governor Justice signed House Bill 2453 which amended West Virginia's Industrial Hemp Development Act. Accordingly, the new legislation expands "the list of persons the Commissioner of Agriculture may license to grow or cultivate industrial hemp."

Industrial Hemp: Pennsylvania Authorizes 16 Research Projects

On March 16, 2017, the Pennsylvania Department of Agriculture (PDA) announced the approval of "16 research proposals that seek to demonstrate the value and viability of industrial hemp cultivation in the state." According to PDA, "[t]he projects were approved under the new Industrial Hemp Research Pilot Program, which the department launched in December after Governor Tom Wolf and the General Assembly enacted Act 92 of 2016." Included among the approved projects was Penn State University's proposal "to compare six varieties under different growing conditions (planting dates, seed densities, tillage regimens and nitrogen levels); track plant height, yield, disease and insect impact to develop draft production recommendations for PA."

Medical Marijuana: PDH Publishes Amendments to Temporary Regulations

On January 14, 2017, the Pennsylvania Department of Health (PDH) published notice in the Pennsylvania Bulletin regarding amendments to the temporary regulations under the Medical Marijuana Act relating to general provisions; and growers/processors (47 Pa.B. 199). According to PDH, "Interested persons are invited to submit written comments, suggestions or objections regarding the amendments to the temporary regulations to John J. Collins, Office of Medical Marijuana, Department of Health, Room 628, Health and Welfare Building, 625 Forster Street, Harrisburg, PA 17120, (717) 787-4366, RA-DHMedMarijuana@pa.gov."

PA Announces Application Dates for Medical Marijuana Program

On December 21, 2016, Pennsylvania Department of Health (PDH) issued a press release announcing the Medical Marijuana Program permit application dates for growers, processors, and dispensaries. According to PDH, permit applications will be made available beginning January 17, 2017, and will be accepted from February 20, 2017 until March 20, 2017. PDH stated that there will 12 permits issued for growers/processors and 27 permits issued for dispensaries.

Industrial Hemp: PA Opens Application Process for Pilot Research Projects

On December 1, 2016, the Pennsylvania Department of Agriculture (PDA) announced the release of the application and guidelines for persons and institutions of higher learning interested in conducting industrial hemp pilot research projects. According to PDA, a maximum of 30 projects will be selected for the 2017 growing season and the deadline for application is January 6, 2017. PDA stated that only "products or uses that would use hemp fiber or seed for industrial purposes" will be approved.

Industrial Hemp: Notice Published for Federal Statement of Principles

On August 12, 2016, the United States Department of Agriculture (USDA), the United States Drug Enforcement Administration (DEA), and the United States Food and Drug Administration (FDA) published notice in the Federal Register that the three agencies have "developed a Statement of Principles on Industrial Hemp to inform the public how Federal law applies to activities associated with industrial hemp that is grown and cultivated in accordance with Section 7606 of the Agricultural Act of 2014" (81FR 53395). According to the Federal Register notice, because the "Statement of Principles does not establish any binding legal requirements…[i]t is, therefore, exempt from notice and comment rulemaking requirements under the Administrative Procedure Act pursuant to 5 U.S.C. 553(b)."

Shale Law in the Spotlight: Use of the Congressional Review Act to Alter Energy and Environmental Policy in the Early Days of the Trump Administration

Written by Chloe J. Marie & Ross H. Pifer, Penn State Center for Agricultural and Shale Law (www.pennstateshalelaw.com)

February 23, 2017

During his presidential campaign and since taking office, President Donald Trump has repeatedly expressed concern about the "burdensome regulations on [the U.S.] energy industry."[1] He has vowed to "eliminat[e] harmful and unnecessary policies," which are inconsistent with his energy agenda.[2] Working with Congress, President Trump already has used the Congressional Review Act as a method to alter existing energy and environmental policies since he assumed office.

Congress has within its general powers the ability to overturn federal agency rules in conformity with the 1996 Congressional Review Act (CRA).[3] Under the CRA, Members of Congress have sixty "days of continuous session" to introduce a joint resolution of disapproval from the date the rule is received by Congress and published in the Federal Register. If both the House of Representatives and the Senate pass the joint resolution, the President may sign or veto the disapproval joint resolution. Prior to the recent change in Presidential administrations, only one regulation ever had been struck down using the CRA. In March of 2001, President George W. Bush signed into law the repeal of workplace ergonomic rules promulgated by the Clinton Administration's Occupational Safety and Health Administration in the Department of Labor.

In an interesting report released in November 2016, the Congressional Research Service explained that "perhaps the most widely cited reason why the CRA has been used to overturn only one rule is that a President is generally expected to veto a joint resolution of disapproval attempting to overturn a rule proposed by his own Administration."[4] As an illustration of this point, President Obama vetoed a total of five joint resolutions during his time in office. The authors of the CRS report go on to state that "[d]uring a transition following the inauguration of a new President, however, the CRA is more likely to be used successfully."[5]

In this context, on February 16, 2017, President Trump signed into law a joint resolution — H.J. Res. 38 — disapproving the Stream Protection Rule promulgated by the Interior Department's Office of Surface Mining Reclamation and Enforcement and published in the Federal Register on December 20, 2016.[6] This joint resolution was introduced by U.S. Congressman Bill Johnson, on January 30, 2017, in the U.S. House of Representatives. In justifying such nullification, the Trump administration explained that the Stream Protection Rule "would establish onerous requirements for coal mining operations, and impose significant compliance burdens on America's coal production."[7] In addition, the administration posited that the rule "also duplicates existing protections in the Clean Water Act and is unnecessary given the other Federal and State Regulations already in place."[8]

---

[1] *An America First Energy Plan*, WHITEHOUSE.GOV, https://www.whitehouse.gov/america-first-energy (last visited Mar. 22, 2017).
[2] *Id.*
[3] 5 U.S.C. § 801.
[4] CONG. RESEARCH SERV., R43992, THE CONGRESSIONAL REVIEW ACT: FREQUENTLY ASKED QUESTIONS 4 (2016).
[5] *Id.* at 5.
[6] Stream Protection Rule, 81 Fed. Reg. 93,066 (Dec. 20, 2016).
[7] Statement of Administration Policy, H.J. Res. 38, (Feb. 1, 2017).
[8] *Id.*

The Stream Protection Rule was to become effective on January 19, 2017, and its stated purpose was to "better protect water supplies, surface water and groundwater quality, streams, fish, wildlife, and related environmental values from the adverse impacts of surface coal mining operations and provide mine operators with a regulatory framework to avoid water pollution and the long-term costs associated with water treatment."[9]

In addition, on February 14, 2017, President Trump signed another joint resolution of disapproval into law — H.J. Res. 41 — disapproving the Securities and Exchange Commission's rule on "disclosure of payments by resource extraction issuers." This rule imposed upon resource extraction issuers to report annually any payment made to a foreign government or the Federal Government for the purpose of the commercial development of oil, natural gas, or minerals. The Commission's rule was published in the Federal Register in July 2016 and took effect on September 26, 2016. In disapproving the rule, the Trump administration pointed out that it "would impose unreasonable compliance costs on American energy companies that are not justified by quantifiable benefits."[10] Moreover, its administration underlined the fact that "American businesses could face a competitive disadvantage in cases where their foreign competitors are not subject to similar rules."

H.J. Res. 38 and 41 could be the first of many joint resolutions of disapproval to come in the early days of the Trump administration in matters of energy and the environment. On January 30, 2017, another joint resolution — H.J. Res. 36 — was introduced, seeking to disapprove the "Waste Prevention, Production Subject to Royalties, and Resource Conservation" rule that was published in the Federal Register by the Interior Department's Bureau of Land Management (BLM) on November 18, 2016. The U.S. House of Representatives passed this joint resolution on February 3, 2017, and it is awaiting action in the Senate. The BLM rule was scheduled to become effective on January 17, 2017.

Significant federal regulatory activity took place during the final months of the Obama administration — actions including those related to the Climate Action Plan, Waters of the United States Rule, BLM Hydraulic Fracturing Rule, Clean Power Plan, and the Venting and Flaring Rule among others. Stay tuned to see if Congress and the Trump Administration take action, including through the use of the CRA, to roll-back any of these regulatory activities related to energy and the environment.

[9] Stream Protection Rule, 81 Fed. Reg. 93,066 (Dec. 20, 2016).
[10] Statement of Administration Policy, H.J. Res. 41, (Feb. 1, 2017).

Who Should be in Charge?: The Ongoing Saga of Catfish Inspections

Alexandra Chase

Catfish is ubiquitous in southern cuisine. It's a rare restaurant in the South that doesn't offer Southern fried catfish, served up with hush puppies, fries, and coleslaw. Traditionally, this Southern staple came from farms in only a few Southern states. Catfish devotees, however, may be surprised to learn that the majority of catfish consumed in the United States today is imported from Asia. This influx of imported catfish has lowered prices and negatively impacted the profitability of domestic producers.

As imports of catfish have increased, so have concerns over contamination risks. In 2008, in response to growing pressure from the U.S. catfish industry and consumer safety groups, Congress passed legislation transferring catfish inspection duties from the Food and Drug Administration (FDA) to the U.S. Department of Agriculture's (USDA) Food Safety and Inspection Service (FSIS).

Background

Catfish is almost exclusively a farm-raised product. Catfish farming represents 57% of aquaculture production in the United States.[i] Commercial catfish farming started to grow in the 1960s when profit margins for cotton, rice, and soybeans decreased and southern farmers began replacing income from staple crops with catfish ponds. Even though foreign competition has resulted in a decline of the domestic catfish industry in the last few decades, catfish still remains a valuable agricultural product. The sales of domestic catfish growers, predominately located in Alabama, Arkansas, Mississippi, and Texas, exceeded $380 million in 2016.[ii]

Domestic catfish production, however, faces stiff competition from foreign imports which have steadily increased in recent decades. In the early 2000s, the United States and Vietnam resumed formal trade relations, and Vietnam increased the exportation of several native species of catfish from the family *Pangasiidae* known as *basa*, *swai*, and *tra*. Between 2003 and 2012, U.S. catfish imports increased from 5.5 million pounds to over 238 million pounds.[iii] The lower prices of imported catfish fillets gave Asian catfish farmers a competitive advantage over domestic producers. For instance, in 2012 the market price of frozen catfish fillets imported from Vietnam was around $1.50 a pound and U.S. produced frozen fillets were over $3.50 a pound, while U.S. catfish farmers received less than a dollar per pound. By 2012, 78% of all frozen catfish fillets sold in the U.S. were imported.[iv]

Many countries exporting catfish to the U.S. lack the environmental, animal welfare, and public health protections present in the United States. Fish farms in China, Vietnam, and other countries are often located in areas where water supplies are at risk of contamination from pesticides, human and animal sewage, and industrial waste. Crowded conditions in ponds contribute to the spread of disease. Many of the chemicals and antibiotics used by fish farmers to treat ponds and sick animals are banned for use in the United States on animals produced for human consumption.

In 1995, the FDA adopted regulations requiring processors of fish and fishery products to adhere to Hazard Analysis Critical Control Point (HACCP) principles.[v] Importers must take steps to verify that the imported fish or fishery products are

processed under conditions equivalent to those required of domestic producers.[vi] According to FDA regulations, imported products lacking the required assurances regarding processing conditions are considered adulterated and will be denied entry into the United States.[vii]

To ensure the safety of imported seafood products, the FDA conducts inspection of foreign seafood processors, domestic importers, and collects samples upon entry.[viii] Given the incredible volume of imported food coming into the United States, it would be impossible for the FDA or any other agency to inspect and test every shipment. That said, the FDA physically inspects and samples a very small percentage of imported seafood products. In 2009, the FDA sampled only 1% of imported seafood products for drug residue.[ix] Critics cited this low inspection rate as one of the major reasons for the transfer of catfish inspections duties to the USDA.

USDA Inspections

As a result of the 2008 and 2014 Farm Bills, the FSIS now inspects fish from the order *Siluriformes* under the Federal Meat Inspection Act.[x] The catfish inspection program became effective on March 1, 2016, with implementation phased in over an 18-month transition period. Full program implementation is expected by September 1, 2017.

The regulations establish both a domestic and foreign inspection program. Foreign countries seeking catfish importation must prove that their "laws, regulatory administration, evaluation system, and standards are equivalent" to USDA standards, subject to FSIS onsite visits.[xi] To date, ten countries have started the equivalency process – Bangladesh, China, Dominican Republic, El Salvador, Guyana, India, Jamaica, Nigeria, Thailand, and Vietnam.[xii]

Rejections and Recalls

Since FSIS took over inspections on April 15, 2016, the number of catfish imports that have been rejected, rerouted, or recalled has increased. While several rejections were for paperwork anomalies, the majority of rejected imported catfish or catfish products were for serious food safety violations. Serious catfish food safety violations that occurred were "problems with the product's labels … fail[ed] physical inspection for defects and adulteration or laboratory analysis for chemical/drug residues or pathogens."[xiii]

In the past year, FSIS has issued two domestic recalls for illegal chemical contaminants and one recall for an imported catfish product that bypassed inspection procedures. On July 14, 2016, FSIS issued a product recall of 21,521 pounds of catfish products from a Louisiana facility for illegal chemical contaminants and 1,650 pounds of imported products that bypassed inspection procedures in California.[xiv] On March 24, 2017, FSIS issued a product recall of 1,695 pounds of catfish products from a Mississippi facility because the catfish products contained illegal chemical contaminants.[xv]

Conclusion

Although the USDA program has had marked success in stopping contaminated catfish from reaching consumers, the program's future is uncertain. In May of 2016, the Senate passed a resolution to return catfish inspections to the FDA. Senators John McCain, Jeanne Shaheen, and Kelly Ayotte argued that the USDA program is expensive and an example of duplicative regulation.[xvi] New data may allay the Senate's concerns as the

USDA catfish inspection program costs relatively little by federal standards, just $1.1 million annually.[xvii] The FDA has also completed the transfer of program authority to the USDA. Transferring the authority back would also be expensive and potentially waste agency resources. The House of Representatives has not scheduled a vote on the Senate's resolution.

Alexandra Chase is the Ocean and Coastal Law Fellow with the National Sea Grant Law Center at the University of Mississippi School of Law.

Endnotes

[i] ANDRE F. MILLER AND HAROLD F. UPTON, CONG. RESEARCH SERV., R44177, U.S. CATFISH INDUSTRY AND FOREIGN TRADE: A FACT SHEET 1 (2015).
[ii] National Agricultural Statistics Service, U.S. Department of Agriculture, Catfish Production (Feb. 3, 2017), available at http://usda.mannlib.cornell.edu/usda/current/CatfProd/CatfProd-02-03-2017.pdf
[iii] Miller at 3.
[iv] Terry Hanson and Dave Sites, 2012 U.S. Catfish Database (Mar. 2013). http://www.aces.edu/dept/fisheries/aquaculture/catfish-database/2012-catfish/2012-catfish-database1.pdf
[v] U.S. Food and Drug Administration, Procedures for the Safe and Sanitary Processing and Importing of Fish and Fishery Products, Final Rule, 60 FED. REG. 65096 (Dec. 18, 1995) (codified at 21 C.F.R. Parts 124 and 1240).
[vi] 21 C.F.R. § 123.12(a).
[vii] *Id.* § 123.12(d).
[viii] U.S. FDA, Enhanced Aquaculture and Seafood Inspection – Report to Congress, Nov. 20, 2008, available at
[ix] Dianne Feinstein, et al., United States Senator, to Gene L. Dodaro, Comptroller General (April 25, 2017) (on file with Senator Dianne Feinstein).
[x] P.L. 113-79, §12106.
Agricultural Act of 2014, 21 U.S.C. §§ 601(w), 606, 625 (2014).
[xi] Martin at 14.
[xii] FSIS Equivalence Status Chart https://www.fsis.usda.gov/wps/wcm/connect/2514b05f-82b2-4c1a-a7f2-fdf4610d4d8e/Equivalence-Status-Chart.pdf?MOD=AJPERES (last visited May 12, 2017).
[xiii] USDA Rejections of Imported Meat, Poultry, Egg Products and Catfish (August 2016), https://www.foodandwaterwatch.org/sites/default/files/fsis_import_rejections_summary.pdf (last visited May 12, 2017).
[xiv] USDA, NEWS RELEASE 06016, HARING CATFISH, INC. RECALLS SILURIFORMES FISH PRODUCTS DUE TO POSSIBLE ADULTERATION (July 14, 2016).
[xv] USDA, NEWS RELEASE 032-2017, LAKES FARM RAISED CATFISH, INC. RECALLS SILURIFORMES FISH PRODUCTS DUE TO POSSIBLE ADULTERATION (Mar. 24, 2017).
[xvi] Press Release, Senator John McCain (May 25, 2016) (available at https://www.mccain.senate.gov/public/index.cfm/2016/5/senate-passes-mccain-shaheen-ayotte-resolution-disapproving-wasteful-catfish-inspection-program).
[xvii] Rick Crawford, et al., Member of Congress, to Paul D. Ryan & Nancy Pelosi, H.R. Speaker & Minority Leader (May 26, 2016) (on file with Congressman Rick Crawford).

Mississippi v. Tennessee

C. Janasie

Mississippi v. Tennessee

Although the U.S. Supreme Court has developed a common law framework for resolving disputes over interstate water resources, the Court has never resolved a dispute over groundwater resources. Mississippi v. Tennessee, a case over the use of groundwater by the City of Memphis near the MS- TN border, is the first case of its kind.

The states of Mississippi and Tennessee have very different theories for the case. Tennessee is claiming the water is an interstate resource, and thus, the Court needs to determine how much water each state is entitled to use. Mississippi is treating the water in the aquifer as Mississippi property, not as an interstate resource, and is asking for damages for the water Tennessee has taken.

An initial issue is whether the aquifer will be treated as an interstate resource, and there will be a hearing on this issue later this year.

Equitable Apportionment

Disputes over interstate water bodies are treated differently under water law. When two or more states disagree on how to share water resources between them, federal rules apply. Interstate water disputes are common, and sometimes states can negotiate agreements as to how to share water resources that cross state borders, such as the Great Lakes Compact. But when states can't reach an agreement among themselves, the disputes can only be resolved by the Court, as the Court has original jurisdiction in all cases in which a state is a party.

The Court has developed common law to resolve disputes over the allocation and pollution of interstate rivers through the doctrine of equitable apportionment. When apportioning water, the Court is not bound by the laws of the individual states.

The Court has stated that equitable apportionment is a flexible doctrine, and it will consider all relevant factors of a case so that a just result is reached. The doctrine's basis is that each state is entitled to "equality of right," not equal amounts of water. In previous cases, the Court has given factors that will inform its decision. A major factor the Court has considered is the benefit to one state versus the present harm to the other one. Also, many of these factors deal with characteristics of surface water, not groundwater, so the question remains how these factors would apply to groundwater.

In suits between states, the Court serves as a trial court and appoints a Special Master (often not an expert in water law) to run a trial-like process. The Special Master hears the parties' initial motions and evaluates the evidence. The Special Master then makes findings of fact, conclusions of law, and recommends a decision for the Court. The Court then decides whether or not to follow the Special Master's recommendation. The Special Master process can take years to complete.

The Lawsuit

In the current lawsuit, Mississippi is concerned with the City of Memphis pumping groundwater close to the MS-TN border. When you pump large amounts of groundwater, it creates what is known as a cone of depression. The pumping changes the flow of water, causing more water to flow your way and lowering the water table of your neighbor, forcing them to need a deeper well. Mississippi claims the City's pumping has taken billions of gallons of water out of Mississippi, and that the water belongs to Mississippi.

Mississippi has challenged this use before by suing the City of Memphis for monetary damages. In 2009, the 5th Circuit Court of Appeals dismissed Mississippi's lawsuit ruling that Mississippi had framed its case incorrectly. The court determined that the aquifer was an interstate resource, so Tennessee, which was not named in the suit, was a necessary party and exclusive jurisdiction belonged to the Supreme Court. The Court denied cert in that case, citing an equitable apportionment case in doing so.

Despite denying to hear the previous case, the Court allowed Mississippi to file this new lawsuit. In the case, the states have widely varying arguments. Tennessee argues that the framework the Court has developed for surface water should apply to the underground aquifer that both states use. Under that doctrine, neither state has any right to the water until the Court apportions the water.

Mississippi argues that the water is state property, claiming it owns the groundwater within the state and Tennessee needs to pay for the water it has taken. Thus, Mississippi has not asked for the water to be apportioned, but rather, has asked for monetary damages (not less than $615 million).

The Special Master for the lawsuit is the Hon. Eugene E. Siler of the Court of Appeals for the 6th Circuit. The initial issue in the case is whether the Special Master determines that this should treated as an interstate water dispute (which could potentially dismiss the lawsuit, with no apportionment).

After considering each state's initial filings in the case, the Special Master issued a Memorandum of Decision in August 2016 that ordered an initial hearing on whether the aquifer was an interstate resource. In the Memorandum, the Special Master noted that he did not think that Mississippi had made its case in its initial pleadings. In an October 2016 Case Management Order, the Special Master set July 30, 2017 as the deadline for discovery for the hearing, and the parties need to submit a plan for the hearing by August 31, 2017.

The docket sheet for the Special Master can be found at: http://www.ca6.uscourts.gov/special-master. The docket for the case has not been updated since the October 2016 Case Management Order.