



June 13, 2016

Dan Ashe, Director
United States Fish & Wildlife Service
5275 Leesburg Pike
Falls Church, VA 22041

RE: National Hydropower Association Comments on *Proposed Revisions to the U.S. Fish and Wildlife Service Mitigation Policy*, Docket No. FWS-HQ-ES-2015-0126

Mr. Ashe:

On March 8, in response to the President's Memorandum on *Mitigating Impacts on Natural Resources from Development and Encouraging Related Private Investment* (November 3, 2015) (Presidential Memorandum), and other Fish and Wildlife Service (Service) Orders and Departmental Manuals, the Service proposed revisions to its 1981 Mitigation Policy (Proposal). The National Hydropower Association (NHA)¹ appreciates the opportunity to submit comments for your consideration.

The Proposal outlines a mitigation framework "for applying a landscape-scale approach to achieve... 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." Further, the Proposal is intended to serve as over-arching 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, including the Service's authority under the Federal Power Act (FPA) and Endangered Species Act (ESA).

I. The Benefits of Hydropower

Hydropower is the largest source of renewable energy in the United States and has been generating renewable, carbon-free, energy for over a century. This generation helps the U.S. avoid nearly 200 million metric tons of CO₂ every year – the equivalent of over 42 million passenger cars. Further, hydropower is the most flexible and adaptable renewable energy resource available. It provides baseload and peaking power, 98 percent of the U.S.'s grid scale energy storage, and a solution to the challenges of integrating large amounts of intermittent generation, like wind and solar, thus enabling their widespread deployment.

¹ NHA is a national non-profit association dedicated to advancing the interests of the North American hydropower industry, including conventional, pumped storage, and new marine and hydrokinetic technologies. NHA's membership consists of over 220 organizations, including consumer-owned utilities, investor-owned utilities, independent power producers, project developers, equipment manufacturers, environmental and engineering consultants, and attorneys.

In terms of addressing the challenges of climate change, no other renewable energy resource has done more. In addition to hydropower's clean and renewable energy attributes, and the grid stability it provides, hydropower and its associated infrastructure is playing a crucial role in building resilience to climate change through irrigation, flood control, and water storage, which mitigates the impact of droughts on fisheries, and other adverse effects.

These are important benefits that the President is equally concerned about, demonstrated through the President's Climate Action Plan² and a recent Presidential Memorandum entitled *Building National Capabilities for Long-Term Drought Resilience*,³ and accompanying federal action plan on drought.⁴ As such, NHA recommends the Service incorporate a broader lens when finalizing its Proposal, one that recognizes hydropower's many climate and environmental benefits.

II. Hydropower Licensing under the Federal Power Act and the Service's Mitigation Responsibilities

The FPA provides a well-established framework for the mitigation of impacts of hydropower projects upon the Service's resources. Any Service policies on mitigation must recognize and be consistent with this existing framework and FPA mandates. While the development of an over-arching mitigation process may be an appropriate goal, a one-size-fits-all approach is not appropriate for hydropower projects, which are necessarily site specific and subject to a comprehensive and challenging regulatory scheme that requires consultation with federal and state resource agencies and a broad array of stakeholder interests. Further, the principle to establish a "no net loss" or "net benefit" mitigation standard is fundamentally inconsistent with the FPA, which, in essence, requires a balancing of project benefits and impacts, and often conflicting federal, state, and stakeholder resource goals, making a "no net loss" or "net benefit" goal unworkable.

For hydroelectric projects subject to licensing by the Federal Energy Regulatory Commission (FERC), the FPA provides statutory standards and guidelines for mitigating environmental impacts. Section 10(a) of the FPA requires FERC to condition licenses so that the project "will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit" of a variety of uses, including power development, the adequate protection, mitigation, and enhancement of fish and wildlife, irrigation, flood control, water supply, and recreational and other purposes. FPA section 10(j) requires FERC to give

² Available at: <https://www.whitehouse.gov/the-press-office/2013/06/25/fact-sheet-president-obama-s-climate-action-plan>

³ Available at: <https://www.whitehouse.gov/the-press-office/2016/03/21/presidential-memorandum-building-national-capabilities-long-term-drought>

⁴ Available at: https://www.whitehouse.gov/sites/default/files/docs/drought_resilience_action_plan_2016_final.pdf

deference to fish and wildlife protection, mitigation and enhancement measures recommended by federal and state fish and wildlife agencies, including the Service.

Under section 18 of the FPA, FERC must require such fishways as may be prescribed by the Service. Thus, the Service's fishway prescriptions become mandatory on the license. Under FPA section 33(b), a license applicant may propose an alternative fishway prescription which costs less or results in improved power production, but the Service is obligated to accept that alternative only if the alternative is no less protective than the Service's original prescription.

The FPA further specifies the criteria the Service must weigh in setting section 18 prescriptions. Section 33(b) requires the Service to give "equal consideration to the effects of the prescription adopted and alternatives not accepted on energy supply, distribution, cost, and use; flood control; navigation; water supply; and air quality (in addition to the preservation of other aspects of environmental quality)." Thus, similar to FERC's mandate to balance a range of power and non-power considerations in setting license conditions under section 10(a), the Service must similarly balance these factors in setting section 18 prescriptions.

The Presidential Memorandum directs federal agencies, including the Service, to apply a number of mitigation principles "to the extent appropriate and practicable." Among those principles is: "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." The Presidential Memorandum also states that it "complements and is not intended to supersede existing laws and policies."

NHA agrees that the policies promoted in the Presidential Memorandum must be applied consistently with the Service's statutory mandates. As to hydroelectric projects subject to FERC licensing, this means in particular the statutory standards and criteria of the FPA must govern. As explained above, the FPA requires FERC to impose appropriate conditions for the protection of fish, wildlife and other environmental resources based, in part, on the Service's recommendations, and provides the Service with mandatory authority to impose fishway prescriptions. However, the FPA does not impose a "no net loss" or "net benefit" standard for environmental protection – and indeed, such a standard would not be consistent with the requirement in FPA section 33(b) that the Service give equal consideration to energy supply, flood control, water supply, air quality, and similar factors when setting section 18 prescriptions. The FPA does

not require that every environmental impact of a project be mitigated or avoided – but rather, the environmental impacts must be balanced against the benefits of hydroelectric development, such as clean, renewable, emissions-free electric power.

Considering the FPA’s requirements, NHA believes the existing framework provides the appropriate mechanisms to mitigate the impacts of hydroelectric projects upon Service resources.

III. Additional Mitigation Policy Proposal Concerns

a. Endangered Species Act

NHA agrees with and endorses the concerns of Public Utility District No. 1 of Chelan County, Washington in its May 6, 2016 comment letter regarding applicability of the Proposal to the ESA. NHA agrees with the comment letter that neither the ESA nor its implementing regulations authorize the Service to impose a “no net loss” or “net benefit” standard on activities covered by the ESA.

b. Landscape-Scale Approach to Mitigation

In concept, NHA is not opposed to landscape-scale or basin-scale approaches to mitigating impacts of a proposed action. But the practicality of implementing this concept must be viewed within the licensing framework. FERC hydroelectric licensees are required to mitigate for the impacts of their projects under the standards set forth in the FPA and thus required mitigation plans tend to be site specific and within the boundaries of the project. FERC does not favor off-site mitigation, but license applicants have entered into agreements for off-site mitigation where such mitigation provided greater environmental benefits at a lesser cost than onsite mitigation.

Where FERC is licensing multiple projects in a river basin at the same time, opportunities may arise for addressing resources in a coordinated fashion on a landscape or watershed scale. However, when projects within a river basin are licensed on different timetables, agreeing to mitigation outside of a project boundary strains the regulatory framework. As such, approaching mitigation on a landscape-scale or basin-scale must be coordinated and strategic.

IV. Conclusion

NHA appreciates the opportunity to provide comments on the Service's Proposal. We also look forward to the opportunity to participate in the development of any subsequent policies or guidance documents that further implement the Proposal or focus on specific activities. It is NHA's goal that through the development of new mitigation policies the regulated community will be provided with more consistent, effective, and timely approaches to hydroelectric licensing among the Service's regions.

Respectfully submitted,

A handwritten signature in cursive script that reads "Linda Church Ciocci".

Linda Church Ciocci, Executive Director