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Public Comments Processing
Attn: Docket No. FWS-HQ-ES-2015-0126
Division of Policy, Performance and Management
U.S. Fish and Wildlife Service
5275 Leesburg Pike, ABHC-PPM
Falls Church, VA 22041-3803

Re: Proposed Revisions to the U.S. Fish and Wildlife Service's Mitigation Policy

To Whom It May Concern:

The Alaska Oil and Gas Association ("AOGA") appreciates this opportunity to provide the following comments on the U.S. Fish and Wildlife Service's (the "Service") proposed revisions to its Mitigation Policy ("Draft Policy"). *See* 81 Fed. Reg. 12,380 (March 8, 2016). AOGA is a professional trade association whose mission is to foster the long-term viability of the oil and gas industry for the benefit of all Alaskans. AOGA's membership includes 10 companies representing the industry in Alaska, which have state and federal interests, both onshore and offshore. AOGA's members have a long history of prudent and environmentally responsible oil and gas exploration and development in Alaska.

All of AOGA's members operate in areas that implicate the Service's jurisdiction, such as areas that may be occupied by species listed under the Endangered Species Act ("ESA"). In addition, AOGA and its members have a long history of applying for, and obtaining, incidental take regulations and authorizations under the Marine Mammal Protection Act ("MMPA") from the Service. In so doing AOGA's members have also implemented, in coordination with the Service, polar bear management programs under the MMPA for decades. These MMPA regulatory actions have been recognized by the Service as extraordinarily successful and form the key basis for one of the provisions in the ESA Section 4(d) rule for the polar bear. *See* 73 Fed. Reg. 28,212, 28,289 (May 15, 2008) ("[T]he actual history of oil and gas activities in the Beaufort and Chukchi Seas demonstrate that operations have been done safely and with a negligible effect on wildlife

and the environment."). For these and other reasons, AOGA and its members have a direct and keen interest in the proposed changes set forth in the Draft Policy.

As an initial matter, before providing substantive commentary, AOGA notes its ongoing support of the Service's proposal to continue to retain the Council for Environmental Quality's definition of mitigation at 40 CFR 1508.20[1]. This is also consistent with the familiar Clean Water Act Section 404(b)(1) "avoid, minimize, and compensate" approach to mitigation. This framework is well-known to both regulators and the regulated community; it has been implemented for decades and, while not perfect, has generally been effective. AOGA also agrees with the Service's observation that "the concepts of adaptive management (resource decision-making under uncertainty) have gained general acceptance as the preferred science-based approach to conservation." 81 Fed. Reg. at 12,382. The mitigation of environmental impacts is far more efficient and effective when it is applied through a framework that allows for adaptation as new information is gained, particularly for continuing actions or actions that are implemented over a number of years. Finally, although, as addressed below, we disagree with the Service's presumed authority to implement certain aspects of "advance" mitigation planning, we agree that it is essential that early engagement and planning must "involve stakeholders in a transparent process for defining objectives." 81 Fed. Reg. at 12,386. In sum, AOGA is generally supportive of mitigation programs that (i) are consistent with the above well-established approaches, (ii) allow for adaptive management, and (iii) meaningfully involve the regulated community in the planning and implementation processes.

However, as addressed below, AOGA has numerous concerns related to the Draft Policy regarding: (i) an inability to reconcile achieving a "net benefit or, at a minimum, no net loss" with the statutory sources of the Service's authority; (ii) issues and concerns regarding ambiguity and incompatibility; and (iii) how ill-suited the Draft Policy is for

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[1] **Sec. 1508.20 Mitigation.**

"Mitigation" includes:

(a) Avoiding the impact altogether by not taking a certain action or parts of an action.

(b) Minimizing impacts by limiting the degree or magnitude of the action and its implementation.

(c) Rectifying the impact by repairing, rehabilitating, or restoring the affected environment.

(d) Reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action.

(e) Compensating for the impact by replacing or providing substitute resources or environments.

meaningful implementation in Alaska. AOGA's comments attempt to address those concerns separately, first focusing on the legal implications and following with articulating concerns regardless of legality. Given the fatal issues with the proposed policy, AOGA recommends that the USFWS withdraw and rewrite the Draft Policy.

I. The Draft Policy Violates Applicable Law

The Draft Policy suffers from fundamental legal flaws that derive from the Service's proposal to implement an overarching "net benefit or, at a minimum, no net loss" standard for mitigating impacts. This standard directly conflicts with numerous existing statutes, such as the ESA, and cannot lawfully be implemented by the Service under these sources of statutory authority. Below, we address some of the most apparent flaws with the Draft Policy, which are not intended to be exclusive.

A. The Draft Policy's "Net Benefit" or "No Net Loss" Standard is Incompatible With Key Provisions of the ESA

The Draft Policy adopts the mitigation goals stated in the Presidential Memorandum on Mitigating Impacts on Natural Resources from Development and Encouraging Related Private Investment (November 3, 2015). According to the Draft Policy, "[u]nder 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." 81 Fed. Reg. at 12,380. The fundamental problem with the Service's Draft Policy is that the primary sources of the Service's authority provide no bases for, and are irreconcilable with, the imposition of a "net benefit" or "no net loss" mitigation standard. In other words, several aspects of the Draft Policy are not "allowed by existing statutory authority."

This fundamental flaw is particularly evident when examined in the context of the ESA. The ESA provides no authority for the Service to impose mitigation measures upon private applicants that will result in a net benefit or no net loss. For example, in a Section 7(a)(2) consultation, the Service is charged with ensuring that any federally approved action that may affect listed species is not likely to jeopardize the continued existence of listed species or destroy or adversely modify their critical habitat. *See* 16 U.S.C. § 1536(a)(2).[2] The Service prepares a biological opinion to explain and document its

[2] The ESA Section 7 regulations define "jeopardize the continued existence of" as "to engage in an action that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species." 50 C.F.R. § 402.02 (emphasis added). "Destruction or adverse modification" is defined as "a direct or indirect

Section 7(a)(2) determinations. For actions that are not likely to jeopardize listed species or cause adverse modification of critical habitat, but that may nonetheless result in incidental take of listed species, the Service will include an incidental take statement ("ITS") in the biological opinion that specifies (i) the impact of the incidental taking on species, (ii) "reasonable and prudent measures that the Secretary considers necessary or appropriate to minimize such impact," and (iii) measures, if any, necessary to comply with the MMPA. 16 U.S.C. § 1536(b)(4). The ITS also includes "terms and conditions" to implement the measures. *Id.* Reasonable and prudent measures are "those actions the Director believes necessary or appropriate to minimize the impacts, *i.e.*, amount or extent, of incidental take." 50 C.F.R. § 402.02. Additionally, "[r]easonable and prudent measures, along with the terms and conditions that implement them, cannot alter the basic design, location, scope, duration, or timing of the action and may involve only minor changes." 50 C.F.R. § 402.14(i)(2).

Under these statutory and regulatory provisions, a non-jeopardizing action under ESA Section 7(a)(2) may have some impact on listed species and critical habitat, and may result in incidental take of listed species. The Service's authority in this context is simply to recommend measures that "minimize" the impact of the incidental take. These measures may only result in "minor changes" to the project.[3] Neither the ESA nor its implementing regulations contain any authorization for the Service to require or recommend measures in a Section 7(a)(2) consultation to ensure that the federal action results in a "net gain" or "no net loss." Any action taken by the Service to recommend such measures would exceed the Service's statutory authority under, and therefore violate, Section 7(a)(2) of the ESA and its implementing regulations.

Similarly, when the Service issues a permit under Section 10(a)(1)(B) of the ESA, it must ensure that the permit applicant will "to the maximum extent practicable, minimize and mitigate the impacts of" the incidental take authorized by the permit. 16 U.S.C. § 1539(a)(2)(B). These statutory provisions also give no authority to the Service to impose measures that will result in a "net gain" or "no net loss." Rather, the Service must ensure that the applicant minimizes and mitigates the impact on listed species "to the maximum

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alteration that appreciably diminishes the value of critical habitat for the conservation of a listed species." *Id.* (emphasis added). Accordingly, the ESA allows for actions that may "reduce" the likelihood of survival and recovery of a listed species and that may "diminish" critical habitat—it is only when that reduction or diminishment becomes "appreciable" that it rises to the level of jeopardy or adverse modification of critical habitat.

[3] Some of the minimization measures described in the Draft Policy are more than "minor" and would unlawfully "alter the basic design, location, scope, duration, or timing of the action." *See* 81 Fed. Reg. at 12,390.

extent practicable." *Id.* Nowhere in the Draft Policy does the Service grapple with the fact that the scope of its authority under Sections 7(a)(2) and 10(a)(1)(B) of the ESA is irreconcilable with the "net benefit or, at a minimum, no let loss" standard adopted by the Draft Policy.

The Draft Policy explains that it is intended to "clarify the role of mitigation in endangered species conservation" but notes that "nothing herein replaces, supersedes or substitutes for the ESA implementing regulations." 81 Fed. Reg. at 12,396. Respectfully, the Service's acknowledgment of its obligations under the ESA, while correct, does little to address the fact that the Draft Policy nevertheless purports to apply a standard (net gain or no net loss) that is fundamentally incompatible with both the ESA and its implementing regulations. The Service's competing positions that it will both apply a policy to ESA actions that is contrary to the ESA and that it will respect the authority of the ESA when implementing the Draft Policy cannot be rationalized. If Congress had intended to require that every impact to listed species be completely offset (or result in a net gain), it would have written such a requirement into the ESA. If the Service or the President desires such a result, Congress must first act by amending the ESA to provide that authority to the Executive Branch.

B. The Draft Policy's Treatment of "High Value" Habitat Conflicts With the ESA Standards Applicable to Critical Habitat

To amplify the problems described above, the Draft Policy requires the Service to use "evaluation species" as the touchtone for assessing required mitigation, and, under the Draft Policy, ESA-listed species always qualify as "evaluation species." *See* 81 Fed. Reg. at 12,388. The Draft Policy further requires the Service to identify habitat values to support evaluation species and encourages the Service to assess those values in advance at the landscape level, designating certain habitats as "high importance" or "high value." "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, however, the Service will seek avoidance of *all* impacts." 81 Fed. Reg. at 12,389 (emphases added). The Draft Policy indicates that designated critical habitat for ESA-listed species is "high value." *See, e.g., id.* at 12,394 ("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.").

Under the ESA, some impacts to habitat are permitted and need not be entirely "avoided" or completely offset by mitigation. In a Section 7(a)(2) consultation, the Service is required to determine whether an action will cause "a direct or indirect alteration that appreciably diminishes the value of critical habitat for the conservation of a listed

species." *Id.* (emphasis added). An action that causes habitat impacts below this standard will result in an a "no adverse modification" conclusion, and the Service will include reasonable and prudent measures in the biological opinion that cause only "minor changes" to the action and that "cannot alter the basic design, location, scope, duration, or timing of the action." 50 C.F.R. § 402.14(i)(2). In contrast, the Draft Policy would require the Service to seek "avoidance" of *all* impacts to critical "high value" habitat and, assuming the policy allowed for any such impacts to "high value" habitat, it would require the Service to mitigate for those impacts to achieve a "net gain" or "at a minimum, no net loss." Again, the Draft Policy is fundamentally contrary to the well-established requirements of the ESA. The Service has no authority to mandate the complete avoidance of designated critical habitat or to require that all impacts to critical habitat be offset with mitigation measures that achieve a net gain or no net loss.

C. The Draft Policy Conflicts With Other Statutory Sources of the Service's Authority

The Draft Policy's incompatibility with statutory authority is not unique to the ESA. Indeed, we are aware of no sources of statutory authority that authorize the Service to require "net benefit" mitigation for federal actions undertaken by citizen applicants. For example, under Sections 101(a)(5)(A) and (D) of the MMPA, private citizens may obtain authorization to take "small numbers" of marine mammals incidental to lawful activity so long as the take has no more than a "negligible impact" on the affected marine mammal species or stock and will not have "an unmitigable adverse impact on the availability of such species or stock for taking for subsistence uses." 16 U.S.C. § 1371(a)(5)(A) and (D). The Service may require mitigation and monitoring measures to achieve "the least practicable adverse impact" on the species or stock. *Id.* (emphasis added). However, the Service has no authority under the MMPA to require recipients of incidental take authorizations to take actions to achieve a "net benefit" or "no net loss" to the affected marine mammal species or stock.

Similarly, under the National Environmental Policy Act ("NEPA"), agencies are required to identify "appropriate" mitigation measures in the discussion of alternatives in an environmental impact statement ("EIS"). *See* 40 C.F.R. § 1502.14(f); 42 USC § 4332. Such measures are not required to achieve a "net benefit" or "no net loss." Moreover, the Supreme Court has established that NEPA provides no substantive authority to federal agencies to require mitigation nor does it impose a substantive duty to develop a complete mitigation plan in an EIS. *See Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 351-53 (1989).

II. General Recommendations and Concerns Regarding Draft Policy

A. The Draft Policy Should Encourage and Allow for Balanced Multiple Use.

The Service consistently reiterates, throughout the Draft Policy, a desire to achieve "conservation objectives" of affected resources.[4] However, that approach lacks the flexibility necessary to ensure that the Service can provide for an appropriate and prudent strategy that endeavors to yield a more balanced approach -- considering the need to promote economic and social development, rather than exclusively considering conservation objectives. Economic and social development are legitimate ends and a balanced multiple use is more consistent with the statutes governing the Service. AOGA would caution the Service that the same statutes that may serve to provide it with the authority to recommend or require mitigation to fish, wildlife, plants, or their habitats, fail to afford the Service authority to prioritize fish, wildlife, plants, and their habitats above all other resources. As discussed previously, AOGA believes that the Service must approach its Draft Policy with full recognition of statutory guardrails in order to ensure that irreconcilable conflict is not created between mitigation policy and the Service's actual authority.[5] In that vein, AOGA recommends that the Draft Policy must balance conservation with other land uses, and not consider conservation of both listed and unlisted fish, wildlife, plants, and their habitats as the singular and paramount objective.

AOGA also encourages the Service to articulate the process by which it will develop "conservation objectives" for a given resource. AOGA notes that although the Service repeatedly references "conservation objectives" in the Draft Policy, it fails to provide any description of the manner in which such objectives will be defined. Ultimately, the Service must revise the Draft Policy in order to provide greater detail to its conservation objectives, and so through a public and transparent process.

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[4] *See* 81 Fed. Reg. at 12,381, 12,382, 12,383, 12,384, 12,385, 12,386, 12,388, 12,389, 12,392, 12,394, 12,401, 12,403.

[5] *See* 16 U.S.C. § 803(j) (allowing the Federal Energy Regulatory Commission to decline to adopt recommendations of the Service); 33 U.S.C. § 1344(m) (affording the Service only a commenting role on applications for dredge and fill permits); 42 U.S.C. § 4331(a) (declaring a national policy to "to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans"); 43 U.S.C. § 1701(a)(7) (declaring national policy that the public lands be managed "on the basis of multiple use and sustained yield").

B. Draft Policy Must Clarify the Use of Conservation and Mitigation Plans.

The Service contemplates utilizing landscape conservation plans and advance mitigation plans to inform mitigation implementation.[6] However, in doing so, the Service fails to provide sufficient detail or clarity as to the manner by which it will evaluate and make subsequent determinations regarding plans it will rely upon to inform mitigation implementation. Currently, state and local governments, as well as other federal agencies and private parties adopt conservation and mitigation plans. Similarly, private parties or non-profit entities may prepare conservation plans or mitigation plans to guide conservation or mitigation actions. Taking this into account, AOGA urges the Service to revise the Draft Policy to provide that it may utilize landscape conservation plans adopted by state governments, local governments, other federal agencies, and private parties. In doing so, it would be prudent for the Service to identify reasonable criteria it will use to evaluate the adequacy of existing plans to inform mitigation implementation, particularly when multiple, competing plans exist. Ultimately, the Service would be well served to utilize conservation plans and mitigation plans developed by state and local governments, given that such entities best understand the unique aspects and needs of their respective locals.

AOGA also encourages the Service to provide greater clarity as to explain how landscape conservation plans and advance mitigation plans will inform mitigation implementation. For example, it is not clear to AOGA whether mitigation efforts under the Draft Policy must conform to previously developed plans, or if the Service will simply consult these plans when formulating mitigation efforts.

C. Increase Flexibility Regarding Compensatory Mitigation to be Implemented Before the Impacts of an Action Occur

AOGA has substantial concerns regarding the Service "recommend[ing] or require[ing] that compensatory mitigation be implemented before the impacts of any action occur."[7] This mandate is unreasonably inflexible and will likely result in indefinite delays to proposed development projects. Essentially, this requirement prioritizes the implementation of compensatory mitigation over the initiation of any federal or private action for which mitigation is necessary, regardless of circumstance. AOGA believes the Service should embrace greater flexibility in its approach to mitigation, which will afford an opportunity to balance competing land uses and allow some land uses to move forward ahead of anticipated impacts. Additionally, an approach that mandates the

[6] 81 Fed. Reg. at 12,385, 12,386, 12,392.
[7] 81 Fed. Reg. at 12,385; *see also id.* at 12,391, 12,392.

implementation of compensatory mitigation before the impacts of any proposed action occurs fails to account for the scale of the impact. AOGA recommends that the Service revise the Draft Policy to allow for the waiver or modification of pre-impact mitigation requirement when circumstances exist that support initiation of the proposed action prior to compensatory mitigation implementation.

It is also unclear what statutory authority the Service has to implement broad new compensatory mitigation measures in addition to those required by Clean Water Act Section 404(b)(1) regulations, and how consistent the Service's proposals are with the procedures and standards of this existing program. At minimum, the Service should clarify what it believes to be the statutory scope of its authority in this area and how its policy would be implemented in conjunction with wetlands compensatory mitigation.

D. The "Net Conservation Gain" Standard Might Result in a Regulatory Taking.

AOGA believes that one unintended consequence that the Service may not have contemplated is that the Draft Policy's articulation of a "net conservation gain" mandate might result in regulatory takings. More to the point, if the Service requires compensatory mitigation that will result in a positive impact, after accounting for a margin of error, it risks a regulatory taking. The U.S. Supreme Court has held that a regulatory taking occurs under the Fifth Amendment to the U.S. Constitution when the government conditions approval of a land use permit on the dedication of property or money to the public unless a "nexus" and "rough proportionality" exists between the government's requirements and the impacts of the proposed land use.[8] Thus, if the Draft Policy dictates that the Service will condition the approval of a land use permit on a "net conservation gain" standard, the amount of compensatory mitigation may lack the requisite "nexus" and "rough proportionality" to the impacts of the proposed land use. AOGA strongly encourages the Service to consider modifying the Draft Policy to avoid creating a compensatory mitigation approach that may result in a regulatory taking.

III. Specific Issues regarding Implementation of Draft Policy in Alaska

Although AOGA recognizes that the Services is tasked with creating a policy that has broad applicability, it should consider the unique nature of implementing mitigation policies in Alaska. The Service need look no further than the difficulties the Army Corps of Engineers has faced in creating a workable and reasonable mitigation approach for Alaska. Alaska has a unique environment, illustrated by the great disparity between

[8] *Koontz v. St. Johns River Water Mgmt. Dist.*, __ U.S. __, 133 S. Ct. 2586, 2595 (2013); *Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 837 (1987).

lands where development has or is anticipated to occur versus those lands that remain untouched by significant human activity or are already part of an extremely broad system of federal conservation units. Furthermore, Alaska is unique due to the relatively small area of privately held land, which substantially limits meaningful additional conservation opportunities.[9] Given the realities of land status and ownership, the Draft Policy, as currently constructed, will result in placing more Alaskan lands into conservation than are necessary for protection of endangered wildlife and their habitat. This, in turn, will lead to broad and serious negative externalities for Alaska and its citizens. The Service's policy at a minimum should recognize the unique circumstances of Alaska and allow for flexibility in its implementation in this State.

A. The Services Should Be Cautious About Reliance on Long Term Predictive Models to Address Future Species and Habitat Mitigation through the Draft Policy

The Draft Policy mentions several circumstances that will result in the Service considering climate change factors in the implementation of mitigation policy. For example, the Service explains that it "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" as part of its landscape approach to mitigation.[10] Perhaps more importantly, the Draft Policy dictates mitigation efforts to be focused on "measures to improve the resilience of resources in the face of climate change or otherwise increase the ability to adapt to climate change and other landscape change factors", and utilize methodologies that "predict effects over time, including . . . changes induced by climate change" when assessing effects of actions. [11]

To illustrate the problematic nature of the Draft Policy approach, AOGA encourages the Service to consider the Intergovernmental Panel on Climate Change ("IPCC") recent evaluation of the inherent limitations regarding the state of climate modeling science.[12] Specifically, the IPCC noted the significant limitations of "the primary tools available for investigating the response of the climate system to various forcings, for making climate predictions on seasonal to decadal time scales and for making projections of future climate over the coming century and beyond."[13] Recognizing that even the most complex

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[9] Approximately one percent of Alaska lands, or less than 3 million acres are privately owned, compared to approximately 60 million acres that fall within the boundaries of the National Park System Units in Alaska.
[10] *Id.* at 12,384–85.
[11] *Id.*
[12] IPCC, Climate Change 2013: The Physical Science Basis, Working Group I Contribution to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change (2013) ("IPCC AR5"), available at http://www.ipcc.ch/report/ar5/index.shtml.
[13] IPCC AR5 at 746.

models have limitations and no model accurately simulates all climate-related processes, the IPCC describes in detail the many limitations and uncertainties that characterize current models.[14] Intuitively, the limitations of current modeling cannot "translat[e] quantitative measures of past performance into confident statements about fidelity of future climate predictions."[15]

The Draft Policy's incorporation of climate change considerations in species and habitat impact assessments not only risks unwarranted reliance on predictive models. It also potentially requires a great deal of speculation about not only the manner in which climate change may impact species into the distant future, but also how mitigation efforts might benefit species in presumed future circumstances. AOGA does not believe that it is reasonable for the Service to rely on speculative climate change projections over lengthy periods of time absent documented cause and effect relationships linking observable or reliably predictable data on climate change to demonstrable effects in specific areas and upon specific species. The science and modeling of climate change impacts fails both to provide reliable predictions of how a particular species may respond to climate change, or reliable predictions of how mitigation efforts might benefit species affected by climate change.

As a result of the inherent and unavoidable uncertainties associated with speculating as to the impacts of climate change on species, AOGA urges the Service to avoid making the management of species affected by climate change a focus of the Draft Policy. More importantly, AOGA recommends that the Service refrain from mandating the use of speculative climate change projections to govern mitigation policy and efforts.

B. Mitigation Limitations in Alaska

As the Army Corps of Engineers is well aware, Alaska has historically and is currently facing substantial issues related to mitigation. AOGA asks the Service to account for the fact that no approved conservation banks exist in Alaska, and implementation of the Draft Policy will result increased application review times and costs incurred due to the corresponding project delays. Candidly stated, the Draft Policy will substantially increase uncertainty in Alaska without providing any additional environmental benefits given the broad regulatory protections that already govern oil and gas activities in Alaska. The Service states that the Draft Policy is intended to improve permitting process and provide project developers with added predictability (81 Fed Reg 12.381) For example, given the nature and location of development, avoidance is not a practicable mitigation option for industry in Alaska. As discussed above, given the finite amount of land

[14] *E.g., id.* at 751–755.
[15] *Id.* at 745.

available in Alaska coupled with the limited areas prime for resource development, there are unlikely to be scenarios where avoidance is a realistic policy goal. AOGA's members have and will continue to pursue technological advances and innovative techniques to minimize any potential impacts to the landscapes. However, the Service lacks the technical understanding of oil and gas development to effectively determine whether a project has sufficiently incorporated avoidance and minimization measures its design.

IV. Conclusion

We understand that the President and the Department of Interior are motivated to broadly implement new policies to achieve net gains or no net loss of environmental values. But, those policies, however well-intended they may be, cannot be implemented without statutory authority. The Draft Policy is fundamentally flawed because it is entirely premised on achieving a standard that cannot be lawfully implemented by the Service under the Service's existing sources of statutory authority. Because of this overarching flaw, the Draft Policy should be withdrawn and rewritten. If a "net gain or, at a minimum, no net loss" goal is retained, then a revised Draft Policy must expressly restrict that goal to only those extremely limited areas (if any) in which the Service may have authority to implement it. *See supra* note 1. Changes to the Service authority to implement such changes as outlined in the Draft Policy can only be granted through Congressional action.

If you have any questions regarding these comments, please feel free to contact me at 907-272-1481 or kindred@aoga.org.

Sincerely,

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