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Mr. Calvin Alvarez
US Army Corps of Engineers
Alaska District - Anchorage
Regulatory Division (1145)
CEPOA-RD
Post Office Box 6898
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Submitted electronically to Calvin.L.Alvarez@usace.army.mil

Re: Methodology for Assessing Functional Gains and Losses for Permittee Responsible Compensatory Mitigation and Calculating Compensatory Mitigation Credits and Debits for Third Party Mitigation Providers in the Alaska District

Dear Mr. Alvarez:

The Alaska Oil and Gas Association (“AOGA”) appreciates this opportunity to provide the following comments on the U.S. Army Corps of Engineers (the “Corps”) proposed methodology for assessing functional gains and losses for permittee responsible compensatory mitigation and calculating compensatory mitigation credits and debits for third party mitigation providers (“proposed methodology” or “proposal”). 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.

Recognizing the long-standing challenges regarding wetlands mitigation in Alaska, AOGA shares the Corps' endeavor to create a prudent, workable, and consistent approach to assessing credits for impacted wetlands and mitigation sites. AOGA believes that it is essential for the Corps, the State, other federal agencies, and stakeholders to engage in a collaborative effort to improve the functionality of the compensatory mitigation system in Alaska, and meet the collective goal of increasing the availability of practicable mitigation instruments and opportunities for industry projects in this State.

Although AOGA is attempting to provide substantive and constructive comments, given the complexity of the proposed methodology, it would be far more productive for the Corps to participate in a workshop or meeting to allow for interested stakeholders to garner a better understanding of how the proposed methodology might be implemented and the manner in which the Corps will apply such methodology to a specific project requiring mitigation.¹ Unfortunately, without greater context or a full appreciation of the Corps' vision, AOGA's initial impression of the proposal is that it would introduce unnecessary complexity and confusion into current processes for valuation of credits and likely diminish the extremely limited opportunities existing for practicable mitigation in Alaska. More specific comments and questions about the proposal are set forth below.

I. Background

AOGA believes that, before addressing the proposal, it is essential to consider the current status of compensatory mitigation options in Alaska. As the Corps is well aware, such options are extremely limited in the areas where oil and gas development occurs. Currently, only one approved instrument exists for compensatory mitigation and this instrument is not currently providing credits in a reliable manner. Further there is little availability of mitigation instruments in the State to accommodate large development projects. Experience in Alaska has demonstrated that approval of both mitigation instruments and proposed permittee responsible mitigation under the 2008 regulations is challenging, not practicable, and time consuming. Opportunities for mitigation given preference under the regulations, such as the various forms of rehabilitation, are exceedingly limited within individual water sheds/service areas. These issues are due in large part to the increasing restrictions on the use of wetlands preservation, formerly a key component of mitigation in Alaska. The current regulations disfavor permittee responsible mitigation and this option cannot be considered practicable for large projects for many reasons. These include the unavailability of mitigation opportunities and the increased

¹ In order to help facilitate such a meeting, AOGA is willing to host a workshop with the Corps and interested stakeholders.

uncertainty, cost, and risk of delay associated with planning, permitting, and managing what would essentially be a second project. As a result, there is currently no reason to believe that any practicable mitigation is available for industry projects in Alaska. Such a reality cannot be reconciled with Congressional intent and the mandated promulgation of the 2008 regulations. As relevant here, the Congressional legislation directed that “[t]o the maximum extent practicable, the regulatory standards and criteria shall maximize available credits and opportunities for mitigation...”²

In addition to the critical issues regarding the absence of mitigation availability, the costs associated with mitigation in Alaska are potentially extraordinary, particularly as it relates to large projects. Costs are driven not only by many factors which make any project in Alaska expensive (such as limited availability of private land and the very high expense of any operations in remote areas), but by the regulatory system as well. Increasing regulatory mandates for project mitigation will result in dramatically increasing costs, burdening industry investment in Alaska, and, moving forward, raising fundamental issues of practicability and fairness.

Given our ongoing discourse, AOGA understands that the Corps appreciates the difficulties and issues surrounding wetlands mitigation in Alaska. To truly find a reasonable and prudent path forward to achieve a functional mitigation program in Alaska, AOGA encourages that the conversation continues and further opportunities be made available for the Corps to engage with the State and other stakeholders. AOGA recognizes and supports the need to develop opportunities for additional third party providers and types of mitigation sufficient to address industry mitigation needs, including for large projects. We encourage the Corps to focus effort on this front in addition to efforts to develop a new mitigation methodology. AOGA appreciates that the Corps, the State and other stakeholders are exploring such opportunities. However, AOGA believes that realizing this goal will require both time and a concerted effort by all concerned to identify opportunities and to make them available as approved credits from third party providers.

²In 2004, Congress in Section 314 of the National Defense Authorization Act directed promulgation of new wetlands compensatory mitigation regulations. The statute stated:

To the maximum extent practicable, the regulatory standards and criteria shall maximize available credits and opportunities for mitigation, provide flexibility for regional variations in wetland conditions, functions and values, and apply equivalent standards and criteria to each type of compensatory mitigation.

Until a meaningful and substantive solution can be reached, AOGA encourages the District Engineer to exercise his discretion under the regulations to maximize the availability of mitigation, especially for larger projects, in any practicable way as soon as possible. Since the District Engineer possesses discretion to determine whether mitigation is required and what mitigation is practicable, and Congress required use of flexibility to account for regional variations in wetland conditions, there is ample authority to do so. This might include, for example, expanding the approved use of preservation, allowing mitigation to be provided in different service areas than a project site when necessary, and expediting the approval process for proposed providers.

II. The Mitigation Debit/ Credit Methodology Proposal

Although AOGA has substantial reservations regarding the proposed methodology, it recognizes the Corps' goal to promote consistency in the determination for debits/credits and gains/losses for mitigation. As previously mentioned, AOGA requests the opportunity to meet with the Corps to better understand how the Corps will implement and internally apply the proposed methodology and work through actual Alaska applications (such as pad expansions on the North Slope). Due to our questions and concerns regarding the basis of the different criteria in the proposed methodology, it is difficult to provide more constructive suggestions. Subject to further discussion with the Corps and fuller appreciation of the proposed methodology, AOGA offers the following specific comments and concerns.

A. Availability and Cost of Mitigation.

AOGA recognizes that the proposal does not seek to address availability or cost of mitigation. However, considering the proposal from the perspective of the present lack of availability of mitigation in Alaska, AOGA is concerned that the proposed formula would not only increase the acre to credit ratio (historically at or close to 1:1) for most projects and therefore the costs to achieve mitigation, it will do so at such an extent to stymie development. Given uncertainty regarding the availability of these options to begin with, the unintended consequence of the proposed methodology might be to make all such options unavailable or impracticable, particularly when considering the scope of industry-scale projects.

Further, the proposed methodology does not take into account the actual practicality and realities of realizing mitigation opportunities in Alaska as addressed in the 1994 Alaska Wetland Initiative Summary Report and subsequent Statements on the Mitigation Sequence and No Net Loss of Wetlands in Alaska (May 1994). These documents

acknowledge that Alaska has vast area of undeveloped wetlands, that only a minor portion of these areas are used for development and that compensatory mitigation is in many cases not practicable nor feasible in Alaska. The Statements by EPA and the Department of the Army on the application of mitigation in Alaska, which specifically remain in effect under the 2008 regulations,³ specifically address the importance of considerations of “flexibility” and “practicability”⁴ for mitigation in the unique circumstances of Alaska. For example, the agencies concluded:

The Clean Water Act Section 404 regulatory program provides a significant degree of flexibility in making permit decisions to reflect circumstances throughout the Nation, including Alaska. Where it is not practicable to avoid wetlands, or to restore or create wetlands, such measures are not required under the Section 404 program...

Statement on the Mitigation Sequence, Attachment 1, Alaska Wetlands Initiative Summary Report. And:

[B]ecause compensatory mitigation may not be appropriate and practicable in all cases, no overall net loss of wetlands may not be achieved for each individual permitted loss of wetlands.

Due to physiographic conditions in Alaska, there are circumstances in the State where it is not practicable to restore or create wetlands. There are areas of the State where because of a high proportion of wetlands in a watershed or region, opportunities for compensatory mitigation may not be

³*Compensatory Mitigation for Losses of Aquatic Resources* [Final Rule], 73 Federal Register (FR) 19619 (April 10, 2008).

⁴ The first Statement provided in part as follows:

Concerns have been raised in Alaska about how “practicability” and “flexibility” considerations involved in implementing the alternatives analysis and compensatory mitigation requirements of the Clean Water Act Section 404 regulatory program are affected by circumstances in Alaska. This statement responds to those concerns by clarifying existing National policy regarding regulatory flexibility, and describing how this flexibility is applied to reflect circumstances in Alaska. Specifically, this statement recognizes that:

Avoiding wetlands may not be practicable where there is a high proportion of land in a watershed or region which is wetlands; and

Restoring, enhancing, or creating wetlands through compensatory mitigation may not be practicable due to limited availability of sites or technical/logistical limitations.

available. In addition, there are situations in the State where the technology for restoration, enhancement, or creation of wetlands is not available or is otherwise impracticable...

Applying the No Overall Net Loss of Wetlands Goal in Alaska, Attachment 2, Alaska Wetlands Initiative Summary Report.

AOGA's specific concerns on the proposed methodology are straightforward. The proposed formula appears to optimize the quantified values for restoration/rehabilitation of wetlands—a means of mitigation with very limited availability in Alaska—while subjecting other forms of mitigation to additional factors such as risk, time lag, and threat.

Application of these factors would certainly lower the predicted mitigation “gain” values and therefore increase the credits and costs required for the types of mitigation actually available in Alaska. In other words, rather than increasing the availability of mitigation options in Alaska, the proposed methodology appears to merely increase the costs associated with the few options that currently exist. Although AOGA recognizes that the use of preservation-only mitigation projects to satisfy compensatory obligations is less favored under the regulations than mitigation projects that include some form of enhancement, restoration, or establishment, there are legitimate questions regarding whether it is appropriate to further burden the existing alternatives—and the applicant—in light of the absence of any other options. More importantly, AOGA believes that any regulatory action which makes it more difficult to utilize such options will simply further undermine the functionality of the compensatory mitigation system in Alaska.

Additionally, the proposal appears to be intended to operate through the voluntary “opt-in” of interested permittees. AOGA would appreciate the Corps confirming that this is, in fact, the case and is applicable with respect to all potential types of mitigation, including permittee-responsible mitigation.

B. Quantification as a tool.

The proposed methodology represents an effort to normalize and quantify a large number of underlying variables to determine credits. While AOGA recognizes that this approach aims to promote consistency, it is unclear whether the necessary underlying determinations to quantify various factors can be done with sufficient certainty to support consistent outcomes or the level of apparent precision. For example, one fundamental variable is functional assessment methodology, but there is no generally accepted methodology for such assessments in Alaska. Until there is a consistent methodology (or more than one as

needed to account for regional differences), the valuation of credits will always substantively reflect the output of a particular assessment and will not be comparable across different project assessments. Therefore, an improvement in quantification of some variables and consistency in determination of credits will remain incomplete until an overall functional assessment methodology has been agreed upon. Of course, AOGA recognizes this would be a significant undertaking, but the example serves to highlight that the proposed methodology will fail to create truly consistent outcomes.

Any consistency born from the proposed methodology would be limited to the use of the same functional assessment to compare a project site and a proposed mitigation site. However, AOGA has reservations about even this limited applicability. Such assessments typically evaluate discrete group of functions, using 0.0 to 1.0 scale. It is not clear to AOGA how functional losses at one site (which may be total for areas of gravel fill) can be directly compared to incremental functional gains at a different site, or accurately quantified, except by an assumed correspondence. Furthermore, AOGA has legitimate questions as to whether a forward looking determination of anticipated future improvements to wetlands at a mitigation site can be quantified by any existing method with any reasonable degree of accuracy.

Similarly, quantification of other factors in the proposed methodology demand the assessment of multiple complex variables. For example, consideration of “threat” to a preservation site involves a series of variables concerning prospective land use⁵ which cannot be easily or objectively quantified.⁶ “Risk” similarly requires assessment not only

⁵ For example:

(0.3) Demonstrated land use trend within the boundaries of an incorporated city, town, or borough. (Example: Platted land zoned for development). Demonstrated threat of mining activities through extensive prospecting, which indicates there are economically recoverable reserves/commodities Demonstrated threat of oil/gas activities through exploration activities, which indicate there are economically recoverable reserves.

(0.2) Demonstrated land use trend locally or regionally resulting in destruction or alteration of aquatic resources outside of incorporated areas. Demonstrated threat of mining activities through sampling, i.e. sampling of water quality constituents, which indicate there are economically recoverable reserves/commodities.

AOGA notes that consideration of many of these factors, in particular “(0.4) Documented evidence of an authorization to adversely impact the aquatic resources within the mitigation site (Example: existing land use permit, 404 permit),” would come too late to preserve a site. Once a legal authorization such as a lease, mining claim or permit has been granted, there is no clear basis to acquire an adverse interest for a different purpose.

⁶ AOGA has concerns with the quantification methodology with respect to preservation.

of multiple prospective land use factors but of the “vulnerability” of an in lieu fee program.⁷ These are very complicated assessments requiring comprehensive research concerning land uses and restrictions and forwarding looking assessments of trends. AOGA is concerned that determination of these and other factors in the proposed methodology require subjective judgments on many levels or assessments which cannot be objectively quantified. Given the likelihood that significant portions of the proposed methodology is conditional on subjective judgments, AOGA believes that the extent to which a quantified approach adds value is uncertain. If discretionary judgments are ultimately required, then arguably those assessments could be better made directly in an overview of proposed mitigation, rather than as a series of underlying determinations made with respect to quantification of variables in a formulaic approach. AOGA believes such an approach is both preferable and more consistent with the regulations which ultimately require the District Engineer to exercise informed discretion to determine mitigation requirements.

First, this approach does not account for the fact that preservation may provide a high intrinsic value whether or not resulting in functional “gain.” By regulatory definition, preservation is not intended to and does not result in a gain of functions. Please see the definition of “preservation” in 33 CFR 332.2, which provides in part that “Preservation does not result in a gain of aquatic resource area or functions.” The draft methodology however sets a value for preservation credits based on the difference or delta between “with preservation” and “without preservation.” This by mathematical definition requires an increase in the value of preserved wetlands which is directly contrary to the 2008 regulatory definition. It is also unclear how, as a practical matter, a “gain” with preservation could be quantified to avoid zeroing out the “preservation adjustment factor” formula at the outset.

Second, the proposed methodology assumes that threats to preservation can be identified and quantified on a one to one basis for a particular mitigation site. However, it is not possible to consistently predict in advance where specific development might occur. The information developed to support such investment determinations is typically closely held and proprietary. But even if specific threats to sites could be identified it would likely be too late to acquire the land for a different purpose. Once a legal authorization such as a lease, land use or permit has been granted, there are likely pre-existing rights already in place. Nor would it likely be practicable to outbid a proposed economically viable use for a specific site. There is therefore no clear basis to quantify a specific threat as required by the methodology.

⁷ For example:

(e) Secondary Impacts: The vulnerability of the mitigation to secondary impacts due to its location, considering potential land use changes in surrounding area, existing protection provided to surrounding areas by easements, restrictive covenants, or federal, state, or local regulations, and the extent to which these factors influence the long term viability of functions provided by the mitigation site; and

(f) Direct Impacts: The vulnerability of the mitigation to direct impacts, considering its location and existing and proposed protection provided to the mitigation site by easements, restrictive covenants, or federal, state, or local regulations, and the extent to which these measures influence the long term viability of the mitigation site.

III. Process

AOGA is particularly interested in how the actual process the Corps will undertake in employing the proposed methodology. The proposal does not address: (i) what procedures the Corps will follow to implement the proposed quantifications and formulas; (ii) who would be tasked with responsibility for implementation; (iii) when in the permitting process implantation of the proposed methodology will take place; and (iv) what recourse an applicant might to dispute questionable outcomes. Given the unavoidable complexity surrounding the existing process to secure a permit and mitigation, or for a third party provider to secure approval to operate, these are significant questions. AOGA would appreciate the opportunity to informally meet with the Corps to better understand what process is intended. AOGA would also appreciate understanding further how the proposed methodology could be implemented consistently with existing regulations and practices. These include the use of existing authority such as performance standards, monitoring, adaptive management, and financial assurances in permit conditions to manage risk of mitigation, as well as the overall discretion of the District Engineer to ensure that mitigation opportunities are maximized and mitigation requirements and costs remain practicable.

The proposal also appears to be very demanding of agency and applicant and/or provider resources. Completion of two functional assessments—one for an impacted site and another for a proposed mitigation area—substantially increases the amount of information and effort required and will likely result in greater inconsistency in the process. So, too, would development of information to support the various “factors” in the methodology.⁸ In addition, for example, the proposal provides that, for a determination of potential preservation as an option, “[t]he evaluation must be based on currently available information, such as aerial photographs, topographic maps, geographic information system data and maps, site visits, scientific articles, journals, other professional reports, and reasonable scientific judgment.” Each of these factors would require a very significant effort. A great deal of effort would likely be required to acquire and assess such information. At the same time, it would appear to be very intensive with respect to agency time and resources to consider, assess, and quantify the information presented. AOGA believes that such demands should be considered in terms of the length and difficulty of the process which might be required to implement the proposed methodology.

⁸ Please see notes 2 and 3 above with respect to information needed to assess preservation and risk factors.

IV. Conclusion

Ultimately, the Corps like AOGA appear to recognize a need to improve the approach to wetlands mitigation in Alaska and AOGA is eager to assist in our collective endeavor. AOGA appreciates the opportunity to provide substantive and constructive comments, and hopes to provide additional context and information in person. If you have any questions regarding these comments, or if the Corps has any interest in having AOGA host a subsequent workshop with interested stakeholders, please feel free to contact me at 907-272-1481 or kindred@aoga.org.

Sincerely,



Joshua M. Kindred
Environmental Counsel