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U.S. Fish and Wildlife Service
Division of Policy, Performance, and Management Programs
5275 Leesburg Pike
MS: BPHC
Falls Church, VA 22041-3803

RE: Comments on Draft Endangered Species Act Compensatory Mitigation Policy Docket No. FWS-HQ-ES-2015-0165

To Whom It May Concern:

The Alaska Oil and Gas Association ("AOGA") provides the following comments on the U.S. Fish and Wildlife Service's ("Service") draft Endangered Species Act ("ESA") Compensatory Mitigation Policy ("Draft Policy"). *See* 81 Fed. Reg. 61,031 (Sept. 2, 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 12 companies representing the industry in Alaska that have state and federal interests, both onshore and offshore. AOGA's members have a well-established 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 ESA-listed species. 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 mitigation program set forth in the Draft Policy.

As an initial matter, AOGA notes its ongoing support of the Service's proposal to use the Council for Environmental Quality's ("CEQ") definition of mitigation. *See* 40 C.F.R. § 1508.20.[1] This is also consistent with the "avoid, minimize, and compensate" approach to mitigation used under Section 404 of the Clean Water Act ("CWA"). 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 recognition of the importance of adaptive management in conservation-based actions. 81 Fed. Reg. at 61,045. 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 and predictable process. *Id.* at 61,039. In sum, AOGA is generally supportive of mitigation programs that support conservation planning and programs that effectively off set, to the extent practicable, impacts to documented threatened or endangered species and habitat as contemplated under the MMPA and ESA.

We also, however, have significant concerns with the Draft Policy, the first and foremost of which is the fact that the standards on which the Draft Policy is premised are entirely inapplicable to implementation of the ESA. We address this concern in detail below, along with additional specific concerns regarding the implementation of, and authority for, the Draft Policy. We genuinely intend for these comments to be constructive, and appreciate the opportunity to participate in this process.

I. The Draft Policy is Fundamentally Incompatible with the ESA.

According to the Service, the Draft Policy is the "first comprehensive treatment of compensatory mitigation under authority of the ESA to be issued by the Service" and is intended to "achieve

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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.

greater consistency, predictability, and transparency in implementation of the ESA." *Id.* at 61,033. The Service further states that the Draft Policy is intended to address the "mitigation goal to improve (*i.e.*, net gain) or, at a 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." *Id.* at 61,033 (emphases added). However, as addressed below, the Service has no authority under the ESA to require compensatory mitigation, and the "net benefit" and "no net loss" standards of the Draft Policy are incompatible with well-established ESA standards. Project applicants may voluntarily propose compensatory mitigation under the ESA, but the burdensome standards of the Draft Policy will likely discourage such voluntary efforts.

The Draft Policy acknowledges that "the Service's authority to require compensatory mitigation under the ESA is limited and differs under Sections 7 and 10" and that the Service's "authority to require a 'net gain' in the status of listed or at-risk species has little or no application under the ESA." *Id.* at 61,034-35. However, despite these recognitions, the Draft Policy goes on to set forth a prescriptive framework for the imposition of "net gain" or "no net loss" compensatory mitigation under the ESA. Indeed, the terms "net gain," "net benefit," "no net loss," and "fully compensate" appear repeatedly throughout the Draft Policy. On one hand, the Service recognizes its lack of authority to require "net gain" or "no net loss" mitigation, yet, on the other hand, the Service proceeds to present a mitigation program entirely premised upon those very standards. This central contradiction blurs the Service's intent for how the Draft Policy will be implemented and suggests that the Service will unlawfully require "net gain" or "no net loss" compensatory mitigation of project applicants.

The ESA provides no authority for the Service to impose compensatory mitigation measures that are intended to result in a net benefit or no net loss. Under Section 7(a)(2), 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 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

[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 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.

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 (emphasis added). 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) (emphasis added).

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 legal obligation in this context is simply to recommend measures that "minimize" the impact of the incidental take and result in only "minor changes" to the proposed project. Indeed, the Service's *ESA Section 7 Consultation Handbook* ("Handbook") states that "the objective of incidental take analysis under section 7 is minimization, *not* mitigation." Handbook at 4-19 (emphases added). Notwithstanding these authorities, the Service suggests that it is using the term "compensation" in a "broad sense" to include "any measure that would rectify, reduce, or compensate" and that it is similarly using the term "minimize" to include "any conservation measure, including compensation." 81 Fed. Reg. at 61,035. Respectfully, this "broad" interpretation directly contradicts the CEQ's structured framework for "mitigation" (which the Draft Policy expressly adopts), the ESA and its implementing regulations, and the manner in which the Service has applied the term "minimize" under the ESA for decades. *Cf.* 40 C.F.R. § 1508.20; 50 C.F.R. § 402.02; Handbook at 4-19.

In addition, the Service has no authority to require "net gain" or "no net loss" compensatory mitigation when a proposed action is likely to cause jeopardy or adverse modification of critical habitat. In that circumstance, the Service must identify "reasonable and prudent alternatives" ("RPAs") that the Service believes will avoid jeopardy. 16 U.S.C. § 1536(b)(3)(A). RPAs must be "implemented in a manner consistent with the intended purpose of the action," "consistent with the scope of the Federal agency's legal authority and jurisdiction," and "economically and technologically feasible," and they must avoid the likelihood of jeopardy or adverse modification of critical habitat. *See* 50 C.F.R. § 402.02. These requirements provide no authority to the Service to alter a proposed action to include "net benefit" or "no net loss" compensatory mitigation. ESA Section 7 requires only that an action (whether originally proposed or in the form of an RPA[3]) avoid the likelihood of jeopardy or adverse modification of critical habitat,

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[3] Applicants have participatory rights in the development of RPAs, and the Service has the responsibility during formal consultation to discuss with the action agency and the applicant the basis for any finding in the biological opinion and the availability of RPAs. 50 C.F.R. § 402.14(g)(5); Handbook at 4-6.

which is a fundamentally different, and lesser, standard than either "net benefit" or "no net loss."[4]

In sum, neither the ESA nor its implementing regulations provide any authority for the Service to require or recommend compensatory mitigation measures in a Section 7 consultation. Compensatory mitigation under Section 7 may occur only when it is voluntarily proposed by an applicant as part of the proposed action or as part of an RPA. Even if compensatory mitigation is not "required" of ESA applicants, AOGA remains very concerned that the Draft Policy may be informally used to pressure project applicants into agreeing to compensatory mitigation that is not otherwise legally required under the ESA. Applicants may view themselves as having no choice but to agree to mitigation "recommendations" in order to ensure that the regulatory approvals for their projects are not substantially delayed or effectively denied if compensatory mitigation is not included as part of the proposal.

For these reasons, the Draft Policy must be substantially revised to clarify that compensatory mitigation by applicants under the ESA may only be voluntary and to apply the correct ESA standards. 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, the only solution is for Congress to amend the ESA to provide that authority to the Executive Branch.

II. The Draft Policy Conflicts with Other Federal Laws.

The Draft Policy explains that the Service will "work with Federal agencies and applicants" to "recommend or require" the inclusion of compensatory mitigation through other statutory schemes. 81 Fed. Reg. at 61,034. For example, the Draft Policy states that "[t]he Service shall recommend mitigation for impacts to species covered by the MMPA that are under our jurisdiction consistent with the guidance of this policy." *Id.* at 61,061 (emphases added). Such a recommendation would violate the MMPA and exceed the Service's authority.

Under Section 101(a)(5) 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

[4] Similarly, when the Service issues a permit under Section 10(a)(l)(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 provisions 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 extent practicable." *Id.*

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. Accordingly, there is no statutory basis for the Service to require or recommend such mitigation in the context of the MMPA.

The Service also suggests it will "require or recommend" compensatory mitigation through the National Environmental Policy Act ("NEPA") review process consistent with the standards of the Draft Policy. 81 Fed. Reg. at 61,034. However, under NEPA, agencies are simply 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 U.S.C. § 4332. Such measures are not required to achieve a "net benefit" or "no net loss." Moreover, the U.S. 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). Again, the Service's apparent intent to require or recommend "net gain" or "no net loss" compensatory mitigation through the NEPA process has no statutory basis and exceeds the Service's authority.

III. It Is Not Reasonable or Feasible to Compensate for Impacts Before the Impacts Occur Through the ESA Regulatory Process.

The Draft Policy gives a strong priority to compensatory mitigation that occurs in advance of impacts. *See* 81 Fed. Reg. at 61,038, 61,042. This may work for long-term, programmatic habitat conservation plans under ESA Section 10. However, in all other circumstances, an applicant cannot feasibly implement compensatory mitigation in advance of incidental take authorization or development of the proposed project. Attempting to do so would result in indefinite delays to proposed projects and would arbitrarily prioritize the implementation of compensatory mitigation over the initiation of any federal or private action for which mitigation is necessary. The Service should embrace greater flexibility in its approach to mitigation and recognize that almost all actions for which ESA consultation is required cannot feasibly or reasonably mitigate anticipated impacts before those impacts occur.

IV. The Draft Policy Should Clarify That Mitigation Credits May Be Used For Multiple Purposes.

In the Draft Policy, the Service properly recognizes that "[c]ompensatory mitigation projects may be designed to holistically address requirements under multiple programs and authorities for the same action. . . ." *Id.* at 61,055. However, the Draft Policy also states that compensatory mitigation "must provide benefits beyond those that would otherwise have occurred through routine or required practices or actions or obligations required through legal authorities . . . ." *Id.* at 61,037. The Service must reconcile these competing statements. Specifically, the Service should clarify that applicants who voluntarily undertake compensatory mitigation will have flexibility under the policy to use mitigation credits for multiple purposes under different laws and regulatory programs.

For example, under the CWA Section 404 wetlands mitigation program, project proponents may pay compensatory fees for impacts that occur to wetlands that also provide habitat for ESA-listed species. In fact, on Alaska's North Slope, which is predominantly composed of wetlands, most project impacts addressed in the context of the ESA will also be addressed under the CWA Section 404 program. *See* 33 C.F.R. § 332.3(c)(2) (comprehensive approach to Section 404 mitigation). The Service should revise the Draft Policy to clearly state that applicants may undertake compensatory mitigation that is both (i) used to satisfy statutorily required mitigation (such as under CWA Section 404) and (ii) credited as voluntary mitigation for ESA purposes.

V. The Draft Policy Must Recognize and Address Alaska-Specific Issues.

Alaska presents issues that do not exist in any other state. Alaska has a unique environment, illustrated by the great disparity between 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. Alaska is also exceptional due to the relatively small area of privately held land, which substantially limits meaningful additional conservation opportunities. No approved conservation banks exist in Alaska. Perhaps more troubling, the US Army Corps of Engineers (USACE) has been unable, as of yet, to establish and implement a compensatory mitigation program for the North Slope of Alaska. Unsurprisingly, that has led to greater uncertainty for stakeholders in Alaska, which can only be exacerbated with the introduction of additional mitigation programs. AOGA advocates that the Service not require mitigation in areas that do not currently have approved Conservation Plans, or approved mitigation instruments. It would be unreasonable for the Service to create mitigation mandates that cannot not be satisfied for reasons entirely out of the control of interested stakeholders.

As a result of these circumstances, implementation of the Draft Policy will cause increased application review times and costs incurred due to the corresponding project delays. In addition, given the finite amount of land available in Alaska coupled with the limited areas prime for resource development, there are unlikely to be scenarios in which avoidance is a realistic 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 into its design. Complicating matters further, Alaskan arctic species have been listed due to climate change projections, rather than any threats posed by local activities. The inability for local actors to directly confront the threats posed by climate change, coupled with the Service inability to address climate change, suggest that the Service's proposed approach with be problematic in Alaska.

Given the realities of land ownership and project development in Alaska, the Draft Policy, as currently constructed, will result in placing more Alaskan lands into conservation than are necessary for protection of ESA-listed species 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. Moreover, these unique issues highlight the importance of the fact that mitigation may only occur under the ESA if it is voluntarily undertaken by an applicant. In such circumstances, it will be the applicant's responsibility to navigate the potentially difficult mitigation scenarios presented in Alaska. The final policy should provide the flexibility necessary to make it feasible for such applicants to do so.

VI. The Service Should Be Cautious About Relying on Long-Term Predictive Models to Address Future Species and Habitat Mitigation.

The Draft Policy relies on climate change projections in numerous instances. For example, the Draft Policy states that climate change projections "should be considered when selecting sites for compensatory mitigation." 81 Fed. Reg. at 61,037. It also explains that "it may be preferable to compensate for the loss of an occupied site that will be difficult to maintain based on projected future . . . climate change impacts." *Id.* at 61,040. And, the Draft Policy provides that mitigation ratios will be informed, in part, by "[p]rojected change[s] in physical parameters affecting habitat condition as a result of processes such as climate change." *Id.* at 61,046.

AOGA encourages the Service to consider the Intergovernmental Panel on Climate Change's ("IPCC") recent evaluation of the inherent limitations regarding the state of climate modeling science.[5] 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." *Id.* at 746. Recognizing that even the most complex models have limitations and that no model accurately simulates all climate-related processes, the IPCC describes in detail the many limitations and uncertainties that characterize current models. *See id.* at 751-55. Intuitively, the limitations of current modeling cannot "translat[e] quantitative measures of past performance into confident statements about fidelity of future climate predictions." *Id.* at 745.

The Draft Policy's reliance on climate change projections unreasonably risks unwarranted reliance on models that cannot meaningfully predict how climate change will impact species and habitat in specific areas and how mitigation may result in specific benefits in those areas. It is not 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 climate change data to demonstrable effects in specific areas and upon specific species. The current state of the science and modeling of climate change impacts cannot provide reliable predictions of how a particular species may respond to climate change and how mitigation efforts might benefit species affected by climate change. Accordingly, AOGA

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[5] 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"), http://www.ipcc.ch/report/ar5/wg1/.

recommends that the Service revise the Draft Policy to minimize the reliance on speculative climate change projections in the development of mitigation efforts.

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

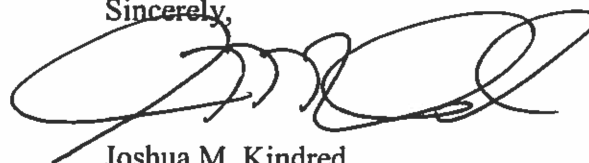
If the Service elects to mandate compensatory mitigation under the ESA (to which we object), one unintended consequence is that the application of a "net gain" standard may result in regulatory takings. The U.S. Supreme Court has held that a regulatory taking occurs under the Fifth Amendment to the U.S. 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.[6] Thus, if the Service's final policy mandates that the Service will condition the approval of a necessary ESA authorization on an applicant's satisfaction of a "net gain" standard, without statutory authority to impose such a requirement, the amount of compensatory mitigation may lack the requisite "nexus" and "rough proportionality" to the actual impacts of the proposed project.

VIII. 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 lawfully be implemented by the Service under the ESA (or any other statute). Because of this overarching flaw, the Draft Policy should be withdrawn and substantially revised as recommended in the above comments. At a minimum, the Draft Policy should be revised to focus expressly on voluntary compensatory mitigation efforts that are intended to satisfy applicable ESA standards.

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

Sincerely,



Joshua M. Kindred
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[6] *See Koontz v. St. Johns River Water Mgmt. Dist.*, 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).