

**“Hearing to receive testimony reviewing the proposed revisions to
the U.S. Fish and Wildlife Service Mitigation Policy”**

**U.S. Senate Committee on Environment and Public Works
Fisheries, Water, and Wildlife Subcommittee**

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Good Afternoon Chairman Sullivan, Ranking Member Whitehouse, and members of the committee.

My name is Joshua Kindred, and I serve as Environmental Counsel for the Alaska Oil & Gas Association. 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 members have a long history of prudent and environmentally responsible oil and gas exploration and development in Alaska. We appreciate the opportunity to provide testimony today.

In an effort to avoid duplicative testimony, I will proceed directly into the substantive issues and concerns regarding the USFWS proposed revisions to Mitigation Policy, which fall into three categories: (i) an inability to reconcile achieving a “net benefit or, at a minimum, no net loss” standard 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 meaningful implementation.

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). 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 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. 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 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 net 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.

To amplify the problems described above, the Draft Policy requires the Service to use “evaluation species” as the touchstone 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.

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).

Furthermore, 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. The U.S. Supreme Court has held that a regulatory taking occurs 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. 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, and, thus, result in a “taking”.

In addition, the Draft ESA Policy does not, but should, take into account the fact that the ESA plays a much different role in Alaska than in the Lower 48 states. In the last 10 years, there have been ESA listings of very abundant, presently healthy, and wide-ranging species in Alaska (and offshore Alaska) based on projected habitat conditions at the end of the century. For example, the Arctic ringed seal population numbers in the millions and occupies a range far larger than any other listed species. As another example, almost 200,000 square miles of land and offshore waters in Alaska has been designated as polar bear critical habitat. Much of the resource development in Alaska occurs through structured federal processes -- such as the BOEM (offshore) and BLM (onshore) oil and gas leasing processes -- that already take into account the avoidance, minimization, and mitigation of impacts to federally listed species. For example, BOEM has identified and conditioned offshore leases or related permits based, in part, on the presence of listed species. In addition, almost every project in Alaska falls under the jurisdiction of the Army Corps of Engineers, which already applies stringent compensatory mitigation measures under the Clean Water Act. Accordingly, aside from being beyond the scope of authority granted by the ESA, additional action by the Service to require or recommend compensatory mitigation through the ESA would unnecessarily complicate and duplicate a federal project approval system in Alaska that already accounts for, and mitigates, impacts to listed species and their habitat.

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 must be withdrawn and rewritten.