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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 Mitigation Policy, 81 Fed. Reg. 12,380 (Mar. 8, 2016)

Dear Sir or Madam:

The American Petroleum Institute (API) and Independent Petroleum Association of America (IPAA) submit these comments on the U.S. Fish and Wildlife Service's (FWS or "the Service") proposed revisions to its Mitigation Policy ("Draft Policy"), 81 Fed. Reg. 12,380 (Mar. 8, 2016).

API and IPAA represent a range of energy producers. API is a national trade association representing over 650 member companies involved in all aspects of the oil and natural gas industry. API's members include producers, refiners, suppliers, pipeline operators, and marine transporters, as well as service and supply companies that support all segments of the industry. API and its members are dedicated to meeting environmental requirements, while economically developing and supplying energy resources for consumers. IPAA is a national trade association representing the thousands of independent crude oil and natural gas explorers and producers in the United States. It also operates in close cooperation with forty-four unaffiliated independent national, state, and regional associations, which together represent thousands of royalty owners and the companies that provide services and supplies to the domestic industry. IPAA is dedicated to ensuring a strong and viable domestic oil and natural gas industry, recognizing that an adequate and secure supply of energy developed in an environmentally responsible manner is essential to the national economy.

Given the breadth of application of the Draft Policy, API's and IPAA's members will be impacted by any final policy. The Draft Policy cites eleven sources of statutory authority that purportedly give the Service a role in mitigation planning, including the Endangered Species

Act, 16 U.S.C. §§ 1531–1539 (ESA), Bald and Golden Eagle Protection Act, 16 U.S.C. §§ 668–668d (“Eagle Act”), Federal Land and Policy Management Act, 43 U.S.C. §§ 1701–1787 (FLPMA), Marine Mammal Protection Act, 16 U.S.C. §§ 1361–1423h (MMPA), Migratory Bird Treaty Act, 16 U.S.C. §§ 703–712 (MBTA), National Environmental Policy Act, 42 U.S.C. §§ 4321–4347 (NEPA), and the Federal Water Pollution Control Act, 33 U.S.C. §§ 1251–1388 (“Clean Water Act”). 81 Fed. Reg. at 12,383. Members of API and IPAA regularly engage in activities directly or indirectly regulated by these statutes. For example, members may require an incidental take permit under section 10 of the ESA, may require an eagle take permit under the Eagle Act, may engage in exploration and production activities on federal lands managed by land use plans developed under FLPMA, may require authorization of incidental take of marine mammals regulated by the MMPA, may be subject to enforcement actions for take of migratory birds under the MBTA, may require a federal permit or authorization that is subject to NEPA review, or a permit under section 404 of the Clean Water Act.

The Draft Policy’s requirement of compensatory mitigation that reaches a “no net loss” or “net conservation gain” is not authorized by any of the statutes cited by the Service and will likely interfere with valid existing rights. Furthermore, the additional process to evaluate mitigation requirements will introduce uncertainty into project planning, will yield too much discretion to the Service, will delay federal permits and authorizations, and may prevent agencies from issuing such permits. For the reasons summarized below and detailed within this letter, API and IPAA request that the Service withdraw the entire Draft Policy, unless re-proposed with significant revisions making it consistent with the comments and concerns raised. If re-proposed, API and IPAA further request that a revised policy be proposed with a comprehensive package of additional Service policies, if any, that together will describe the larger mitigation strategy the Service is unveiling through various and discrete actions.

I. SUMMARY OF COMMENTS

The Draft Policy improperly expands the Service’s authority beyond that delegated by Congress, and lacks statutory and regulatory justification. Its onerous requirements and ambiguous standards will lead to delays in federal approvals and authorizations, both by the Service and other federal agencies. More specifically, API and IPAA request that the Draft Policy be withdrawn for the following reasons:

➤ The Draft Policy exceeds the Service’s statutory authority and must be withdrawn. By adopting the mitigation goals of “net conservation gain” and “no net loss,” the Service inappropriately attempts to rewrite the statutory standards in sections 7 and 10(a)(1)(B) of the ESA and the MMPA, as well as the regulatory standards implementing section 404 of the Clean Water Act.

➤ The Service cannot impose such an ambiguous and undefined standard as “net conservation gain,” as it proposes in the Draft Policy. No legal basis exists for this standard, and its application may result in a compensable taking under the Fifth Amendment of the U.S. Constitution.

➤ The Draft Policy dramatically and improperly expands the service’s authority over unlisted fish and wildlife. The Service’s asserted authority is defined so broadly that it

effectively would allow the Service to require mitigation of any impacts to the natural environment in the United States. Moreover, the Service's assertion of its authority ignores that much of this authority requires the advancement of multiple use, rather than singularly narrow conservation objectives.

➤ By prioritizing compensatory mitigation, the Draft Policy discounts and thus discourages measures to avoid and minimize impacts to species and their habitats. Often, efforts to avoiding and minimizing impacts to species result in significant costs to land users. The Draft Policy's unwavering focus on mitigating all residual impacts ignores land users' efforts to avoid and minimize impacts.

➤ The Draft Policy is unworkable and ambiguous. It inappropriately expands the Service's oversight of federal actions by allowing the Service to "veto" development projects. The Draft Policy will also delay development by requiring that mitigation be implemented before impacts occur. Moreover, it will lead to compounding and redundant mitigation requirements amongst different regulatory authorities so that the mitigation requirements bear no relationship to the actual impact of a project.

➤ The Service lacks authority to implement the Draft Policy. The Draft Policy imposes a host of burdensome and duplicative requirements on the Service, and leaves significant decisions to the discretion of individual Service employees. Given that the Service is frequently sued for failing to meet its obligations under the ESA, the Service cannot realistically assume responsibility for overseeing mitigation efforts as envisioned in the Draft Policy.

➤ The public has not had a meaningful opportunity to comment on the Service's mitigation strategy. The Draft Policy reflects only one part of a larger mitigation strategy that the Service is unveiling in bits and pieces. The public must have the opportunity to review the entire strategy, assess how the Draft Policy integrates with other elements of the mitigation strategy, and comment on the strategy as a whole.

➤ The Service has not complied with procedural requirements necessary to finalize the Draft Policy. Because the Draft Policy is a substantive rule under the Administrative Procedure Act (APA), the Service must comply with the APA requirement that it disclose the legal authority on which the Draft Policy is based. The Service must also prepare a regulatory flexibility analysis as required by the Regulatory Flexibility Act.

For these reasons, API and IPAA request that the Service withdraw the entire Draft Policy. Alternatively, the Service should revise the Draft Policy, make it consistent with the comments outlined below, and publish the revised policy with a comprehensive package of related Service policies, if any so that the public has a meaningful opportunity to comment on the policy as it relates to the Service's mitigation strategy.

II. THE DRAFT POLICY EXCEEDS THE SERVICE'S STATUTORY AUTHORITY.

The Service's stated goals of "net conservation gain" and "no net loss" are inconsistent with sections 7 and 10(a)(1)(B) of the ESA, the MMPA, and regulations implementing section

404 of the Clean Water Act. In the ESA and MMPA, Congress expressly allowed incidental take of listed species and marine mammals without a showing of “net conservation gain” and “no net loss.” The Service cannot discard Congress’ specific direction in favor of the Service’s own undefined standards set forth in a policy. Moreover, the Service cannot, via an informal policy, override the mitigation standards the U.S. Army Corps of Engineers’ (USACE) has articulated for the program that it, rather than the Service, administers. Because of these inconsistencies, the Service should withdraw the Draft Policy, unless it submits a revised document that identifies with specificity the statutory authority that supports the mitigation goals that the revised document identifies, and that removes discussion of “net conservation gain” and “no net loss” for these reasons and for those reasons set forth in later sections of this comment letter.

A. The Service’s Mitigation Goals are Inconsistent with Section 10(a)(1)(B) of the ESA.

The Service cannot apply the goals of “net conservation gain” and “no net loss” to habitat conservation plans (HCPs) and incidental take permits under section 10(a)(1)(B) of the ESA because they are inconsistent with the statutory standard for obtaining incidental take permits.¹ Section 10(a)(2)(B) requires the Service, when issuing incidental take permits, to find that permit applicants will “minimize and mitigate” the impacts of the proposed taking “to the maximum extent practicable.” 16 U.S.C. § 1539(a)(2)(B)(ii). It does not require that the mitigation or even that the HCP as a whole result in a “net conservation gain” or “no net loss.”

The fact that the Service lacks authority to require mitigation that produces a “net conservation gain” from incidental take permit applicants under section 10(a)(1)(B) is underscored by the ESA’s legislative history. A draft version of the ESA contained a requirement that HCPs yield a benefit for species by “promot[ing] the conservation of listed species or critical habitat.” *See* S. 2309, 97th Cong. § 7(o)(1)(A) (as introduced, Mar. 30, 1982). Congress, however, elected to only require that HCPs “minimize and mitigate” the impacts of a taking “to the maximum extent practicable.” *See* 16 U.S.C. § 1539(a)(2)(A)(ii). Accordingly, the legislative history of the ESA confirms that Congress never intended that the Service could require mitigation that produces a “net conservation gain.” The Draft Policy ignores Congress’ intent and standards it incorporated into the ESA.

Similarly, the Service’s Habitat Conservation Planning Handbook reflects that the Service has interpreted a “net conservation gain” standard as inconsistent with section 10(a)(1)(b). In the handbook, which has been in effect for nearly 20 years, the Service expressly recognizes that “[n]o explicit provision of the ESA or its implementing regulations requires that an HCP must result in a net benefit to affected species.” FWS and National Marine Fisheries, Habitat Conservation Planning Handbook 3-21 (1996). As a result, the Service repeatedly emphasizes that it may only encourage minimization and mitigation measures that yield a “net benefit” but cannot require such measures:

¹ API and IPAA assume the Draft Policy is intended to apply to HCPs and incidental take permits under section 10(a)(1)(B). Appendix A states that the Draft Policy “applies to all actions that may affect ESA-protected resources except for conservation/recovery permits under section 10(a)(1)(A).” 81 Fed. Reg. at 12,396. Because the Draft Policy does not exclude permits under section 10(a)(1)(B) from its coverage, presumably the Service intends the Draft Policy will apply to these permits.

- “Wherever feasible, the FWS and NMFS should encourage HCPs that result in a ‘net benefit’ to the species.” *Id.* at 3-21 (emphasis added).
- “During the HCP development phase, the Services should be prepared to advise section 10 applicants on . . . [p]roject modifications that would minimize take and reduce impacts, or, ideally, and with concurrence of the applicant, would generate an overall measurable net benefit to the affected species.” *Id.* at 3-7 (emphasis added).
- “[A]pplicants should be encouraged to develop HCPs that produce a net positive effect for the species or contribute to recovery plan objectives.” *Id.* at 3-20 (emphasis added).

Therefore, the language of the ESA, its legislative history, and the Service’s interpretations of the Act in the handbook demonstrate that the Service may not require mitigation that yields a “net conservation gain” or “no net loss” from applicants for incidental take permits. The Service cannot ignore Congress’ specific statutory direction when implementing the ESA. Therefore, the Service may not apply the Draft Policy to incidental take permits under section 10(a)(1)(B) and associated HCPs.

B. The Draft Mitigation Policy is Inconsistent with Section 7 of the ESA.

The entire Draft Policy is inconsistent with section 7 of the ESA. As the Service is aware, section 7 of the ESA requires that federal agencies, “in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species” 16 U.S.C. § 1536(a)(2). In the Draft Policy, the Service suggests that mitigation measures that yield a “net conservation gain” or “no net loss” may allow the Service to find that a proposed action is not likely to jeopardize a species or adversely modify designated critical habitat. *See* 81 Fed. Reg. at 12,396 (adoption of mitigation measure consistent with the Draft Policy “may ensure that actions are not likely to jeopardize species or adversely modify designated critical habitat”).

The Draft Policy’s goals of “net conservation gain” or “no net loss,” however, are inconsistent with the section 7 requirement that federal actions not “jeopardize the continued existence” of listed species or “result in the destruction or adverse modification” of critical habitat. The standards in the ESA allow federal actions to have some impact to listed species or their critical habitat, as long as the impact does not jeopardize the continued existence of a listed species or destroy or adversely modify its critical habitat.² *See, e.g., Conservation Cong. v. U.S. Forest Serv.*, 720 F.3d 1048, 1057 (9th Cir. 2013) (“Even completely destroying 22 acres of critical habitat does not necessarily appreciably diminish the value of the larger critical habitat area.”); *Wild Fish Conservancy v. Salazar*, 628 F.3d 513, 523 (9th Cir. 2010) (observing that an

² Indeed, when the ESA was enacted in 1973, section 7 prohibited federal actions that would result in the “destruction or modification” of critical habitat. Pub. L. No. 93-205, § 7, 87 Stat. 884, 892 (1973). Congress added the term “adverse” as part of the 1978 amendments. *See* H.R. Conf. Rep. No. 95-1804, at 3 (1978) (emphasis added). This change reinforces that Congress did not intend to prohibit agencies from taking actions would impact critical habitat, so long as the impact did not rise to the level of destruction or adverse modification.

action can impact the survival or recovery of listed species without jeopardizing the species' continued existence); *Butte Envtl. Council v. U.S. Army Corps of Eng'rs*, 620 F.3d 936, 948 (9th Cir.2010) (concluding that “[a]n area of a species' critical habitat can be destroyed without appreciably diminishing the value of critical habitat for the species' survival or recovery.”); *Pac. Coast Fed'n of Fisherman's Ass'ns v. Gutierrez*, 606 F.Supp.2d 1195, 1208 (E.D. Cal. 2008) (rejecting interpretation of “adverse modification” that “would lead to irrational results, making any agency action that had any effects on a listed species a ‘jeopardizing’ action”). Earlier this year, the Service recognized that impacts to critical habitat may occur without resulting in its “destruction or adverse modification.” See 81 Fed. Reg. 7,214, 7,222 (Feb. 11, 2016).

Because Congress allowed federal agencies to take actions that have some impacts on listed species or their critical habitat, the Service cannot require federal agencies or project proponents to mitigate to a “net conservation gain” or “no net loss” standard in order to reach findings of “no jeopardy” and “no destruction or adverse modification.” Accordingly, the Service's application of the mitigation goals in its Draft Policy is inconsistent with section 7 of the ESA because the Service may not require mitigation that yields a “net conservation gain” or “no net loss” in order to find that a proposed action is not likely to jeopardize a species or adversely modify designated critical habitat.

C. The Service's Mitigation Goals are Inconsistent with the MMPA.

The mitigation goals of “net conservation gain” and “no net loss” are inconsistent with the standards for authorizing incidental take under the MMPA, which allows some impact on marine mammal species or stock. Section 101(a)(5) of the MMPA directs that, upon request, the Secretary allow incidental taking of small numbers of marine mammals of a species or stock during periods as long as five years if certain procedures and requirements are met. These requirements include: 1) a finding by the Secretary that “the total of such taking during each five-year (or less) period concerned will have a negligible impact on such species or stock”; 2) a finding by the Secretary that “the total of such taking during each five-year (or less) period concerned . . . will not have an unmitigable adverse impact on the availability of such species or stock for taking for subsistence uses”; and 3) the Secretary prescribes regulations setting forth “means of effecting the least practicable adverse impact on such species or stock and its habitat,” as well as other requirements. 16 U.S.C. § 1371(a)(5)(A). The Service will issue Letters of Authorization (LOAs) that authorize specific activities upon a determination that the level of taking will be consistent with the findings made for the total allowable taking. 50 C.F.R. § 18.27(f)(2).

Additionally, the MMPA allows the Service to authorize for up to a year the incidental take of small numbers of marine mammals resulting from harassment. 16 U.S.C. § 1371(a)(5)(D). The Secretary must find that the harassment will have a “negligible impact” on species or stock and will not have “an unmitigable adverse impact” on the availability of such species or stock for taking for subsistence uses. *Id.* § 1371(a)(5)(D)(i). The incidental take authorization must prescribe “means of effecting the least practicable impact” on the species or stock, among other requirements. *Id.* § 1371(a)(5)(D)(ii)(I).

The Draft Policy's goals of “net conservation gain” and “no net loss” are inconsistent with the standards for authorizing incidental take under the MMPA. When Congress allowed

incidental taking of marine mammals, it intended that the taking could have some impact on the species or stock, so long as the taking has a “negligible” and did not result in “unmitigable adverse impacts” to subsistence uses. The Service’s regulations interpreting the MMPA confirm Congress’ intention. The Service has defined “negligible impact” as an impact “that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival.” 50 C.F.R. § 18.27(c). Thus, the Service has recognized that incidental take of marine mammals may have some, albeit negligible, net impact to species or stock. Similarly, although the definition of “unmitigable adverse impact” recognizes that the Service may require mitigation, *id.* § 18.27(c), “net conservation gain” and “no net loss” are not the operative standards. *See* 16 U.S.C. § 1371(a)(5)(D)(i). In the preamble to the final rule defining “unmitigable adverse impact,” the Service explained that this standard “does not require the elimination of adverse impacts, only mitigation sufficient to meet subsistence requirements.” 54 Fed. Reg. 40,338, 40,344 (Sept. 29, 1989). Because Congress recognized that the incidental taking of marine mammals could have some albeit minor impacts on species or stock, the goals of “net conservation gain” and “no net loss” are inconsistent with the standards for authorizing incidental take under the MMPA.³

D. The Draft Policy is Inconsistent with Regulations Implementing the Clean Water Act.

The Draft Policy is inconsistent with the USACE regulations implementing section 404 of the Clean Water Act, 33 U.S.C. § 1344. *See* 33 C.F.R. part 332 (2015). These regulations require compensatory mitigation “to offset environmental losses resulting from unavoidable impacts to waters of the United States.” *Id.* § 332.3(a)(1), (2). The regulations impose a ‘no net loss’ standard, requiring that the “amount of required compensatory mitigation must be, to the extent practicable, sufficient to replace lost aquatic resource functions.” *Id.* § 332.3(f). When establishing compensatory mitigation requirements, the USACE uses a “watershed approach” that considers impacts to species and their habitats, among other factors. *Id.* § 332.3(c)(1), (2) (explaining that the watershed approach considers “the habitat requirements of important species” and “habitat loss or conversion trends”).

The Service’s goal of compensatory mitigation that yields a “net conservation gain” is inconsistent and incompatible with the USACE’s requirement of no net loss of wetlands. The Draft Policy both duplicates and adds to the USACE’s mitigation requirements. The Draft Policy duplicates the USACE’s mitigation requirements because, when evaluating compensatory mitigation requirements, the USACE considers species and their habitats. 33 U.S.C. § 332.3(c)(2). Thus, the Draft Policy would require that proponents offer compensatory mitigation to offset impacts that are addressed by the USACE’s required mitigation.

³ In the Draft Policy, the Service suggests that it will recommend but not require mitigation to yield “net conservation gain” or “no net loss,” stating that “[t]he Service shall recommend mitigation for impacts to species covered by the MMPA that are under its jurisdiction consistent with the guidance of this policy” and that “[p]roponents may adopt these recommendations as components of proposed actions.” 81 Fed. Reg. at 12,398 (emphasis added). If the Service intends that mitigation that achieves these standards will be wholly voluntary on the part of proponents due to the Service’s inability to require mitigation that achieves these standards, then the final policy must expressly state this intention. Likewise, the Service must expressly recognize that it may not refuse to authorize incidental take when a proponent declines to adopt mitigation recommendations but otherwise meets the statutory and regulatory criteria for authorized incidental take.

Additionally, the Draft Policy will increase the amount of compensatory mitigation otherwise required by the USACE's regulations to yield a "net conservation gain." Therefore, the Service's goal of "net conservation gain" is inconsistent with the USACE's regulations implementing the Clean Water Act.

E. The Draft Policy Fails to Specifically Identify the Statutory Authority that Supports Its Mitigation Goals.

The Draft Policy states that the goals of "net conservation gain" and "no net loss" should be applied "as allowed by applicable statutory authority and consistent with the responsibilities of action proponents under such authority." *E.g.*, 81 Fed. Reg. at 12,384. API and IPAA agree that these standards may only be applied to the extent allowed by applicable statutory authority and to the extent consistent with the responsibilities of project proponents under such authority. The Draft Policy's general citations to entire congressional acts (such as the entire ESA), however, do not adequately identify the statutory basis to justify the Draft Policy.

In the Draft Policy, the Service generally lists 11 statutes that purportedly provide the Service authority for conservation of fish, wildlife, plants and their habitats and that "give the Service a role in mitigation planning for actions affecting them." 81 Fed. Reg. at 12,383. Additionally, in Appendix A, the Service generally identifies 13 statutes, executive orders, and policies. *Id.* at 12,395-99. Given the relatively few statutes through which the Service will apply the policy, the Service should be able to identify with specificity when application of mitigation standards are and are not "allowed by applicable statutory authority." *See id.* at 12,384. Identifying the statutes that allow and do not allow the Service to impose these mitigation standards would minimize confusion for permit applicants, the public, and other federal agencies trying to understand the Draft Policy and identify the proper scope of the Service's authority when applying the policy. Therefore, the Service must specifically identify the scope of the policy and the explicit statutory authority that allows and prohibits its application.

III. THE SERVICE CANNOT REQUIRE "NET CONSERVATION GAIN."

The Service cannot require mitigation that yields a "net conservation gain" as proposed in the Draft Policy. This standard lacks any legal authority or justification. Additionally, application of this standard can result in a taking of private property rights under the Fifth Amendment of the U.S. Constitution. Furthermore, the Service's failure to define "net conservation gain" will lead to confusion and inconsistent application of this standard. Finally, this standard does not distinguish between different habitat types and qualities. Accordingly, the Service must remove all references to this standard from the Draft Policy.

A. No Legal Authority Justifies a "Net Conservation Gain" Mitigation Standard.

No legal authority or justification supports the Draft Policy's direction that the Service recommend or require compensatory mitigation that achieves a "net conservation gain" standard. In the Draft Policy, the Service cites no statutory or regulatory authority that allows it to require mitigation that achieves this standard. This omission is due to the fact that none of the statutes the Service cites in the Draft Policy contain a "net conservation gain" standard. *See* section II

above and section 0 below. Because this standard has no legal basis, the Service must remove all references to it from the Draft Policy.

B. Application of a “Net Conservation Gain” Standard Can Result in a Regulatory Taking.

The Service may not condition the approval of a land use permit on a “net conservation gain” standard without risking a compensable taking under the Fifth Amendment of the U.S. Constitution. The U.S. Supreme Court has held that a compensable 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 there is a “nexus” and “rough proportionality” between the government’s requirements and the impacts of the proposed land use. *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). The Supreme Court reasoned that “[e]xtortionate demands for property in the land-use permitting context run afoul of the Takings Clause not because they take property but because they impermissibly burden the right not to have property taken without just compensation.” *Koontz*, 133 S. Ct. at 2589-90. A requirement that a project proponent provide mitigation that yields a “net conservation benefit” would result in a compensable taking because it requires a proponent to provide more mitigation than necessary to offset an impact. The amount of mitigation therefore lacks a “rough proportionality” to the impact, leading to a compensable taking. The Service should not adopt a mitigation standard that can lead to compensable takings. *See* Executive Order No. 12630, 53 Fed. Reg. 8859 (Mar. 15, 1988) (directing that agencies “should review their actions carefully to prevent unnecessary takings”). For this reason, the Service should remove the “net conservation gain” standard from the Draft Policy.

C. The Service Failed to Define “Net Conservation Gain.”

Even though the Draft Policy contains a “definitions” section, *see* 81 Fed. Reg. at 12,393–95, the Service did not define “net conservation gain” in the Draft Policy. Without an express definition of “net conservation gain,” the Service risks inconsistent application of this standard by its regional and field offices, as well as other agencies. For example, “net conservation gain” can be interpreted as essentially a “no net loss” standard that includes a conservative margin of error to ensure net impacts do not fall below baseline; alternatively, “net conservation gain” can be interpreted as requiring an improvement above baseline after accounting for a margin of error.⁴ Elsewhere, the Draft Policy suggests that a “net conservation gain” is the enhancement of resources, “i.e., to decrease the gap between the current and desired status of a resource.” 81 Fed. Reg. at 12,386. The Draft Policy also is not clear whether a “net conservation gain” applies to an individual species and its habitat, or multiple species within a habitat. What may harm one species due to an adverse impact to its habitat could benefit another species that occupies the same habitat.

⁴ The statement in the Draft Policy that mitigation design “should take into account the degree of risk and uncertainty associated with both predicted project effects and predicted outcomes of the mitigation measures” suggests that the Service’s intent for the “net conservation gain” goal is not simply a “no net loss” goal that accounts for a margin of error. *See* 81 Fed. Reg. at 12,387.

The lack of an express definition will inevitably lead to confusion with the Service's use of this term and similar terms in other contexts. For example, the Service has defined "net conservation gain" in its Greater Sage-Grouse Range-Wide Mitigation Framework (2014),⁵ and previously defined "net conservation benefit," in its policy on Safe Harbor Agreements,⁶ *see* 64 Fed. Reg. 32,717, 32,722 (June 17, 1999), yet these definitions differ. Under the Greater Sage-Grouse Range-Wide Mitigation Framework, a "net conservation gain" is an improvement over baseline conditions whereas under the Safe Harbor Agreement policy, a "net conservation benefit" must contribute toward the recovery of a listed species. *Compare* Greater Sage-Grouse Range-Wide Mitigation Framework, App. I at 22, *with* 64 Fed. Reg. at 32,722. Most recently, on May 5, 2016, the Service published changes to its regulations governing Candidate Conservation Agreements with Assurances (CCAAs), in which it articulated a "net conservation benefit" standard. 81 Fed. Reg. 26,769 (May 5, 2016). This standard differs from the definitions under the Greater Sage-Grouse Range-Wide Mitigation Framework and Safe Harbor Policy by requiring conservation measures designed to improve the status of the species.⁷

Finally, the lack of an express definition will lead to confusion regarding which impacts require compensatory mitigation. Mitigation necessary to address short-term, temporary disturbances is not the same as the mitigation necessary to address long-term, more permanent effects. The Draft Policy, however, fails to distinguish between these different impacts. Even disturbance and effect to species and their habitats is not irreversible and must be recognized in mitigation planning and implementation. Given the ambiguity and confusion surrounding the term "net conservation gain," the Service must remove references to this term from the Draft Policy.

D. The Draft Policy Suggests "Net Conservation Gain" Means to Improve the Current Status of Affected Resources.

Although the Draft Policy does not expressly define the term "net conservation gain," arguably the Draft Policy defines the term to mean "to improve . . . the current status of affected resources, as allowed by applicable statutory authority and consistent with the responsibilities of action proponents under such authority, primarily for important, scarce, or sensitive resources, or as required or appropriate." *See* 81 Fed. Reg. at 12,384. This possible definition raises several issues. First, the term "improve . . . the current status of affected resources" is problematic because it will be difficult to assess and measure. Because of the inherent uncertainties

⁵ In its Greater Sage-Grouse Range-Wide Mitigation Framework, the Service defined "net conservation gain" as "the actual benefit or gain above baseline conditions, after deductions for impacts, in habitat function or value to species covered by a mitigation program." Greater Sage-Grouse Range-Wide Mitigation Framework, App. I at 22 (2014).

⁶ In the Safe Harbor Policy, the Service and the National Marine Fisheries Service defined "net conservation benefit" as "the cumulative benefits of the management activities identified in a Safe Harbor Agreement that provide for an increase in a species' population and/or the enhancement, restoration, or maintenance of covered species' suitable habitat within the enrolled property, taking into account the length of the Agreement and any off-setting adverse effects attributable to the incidental taking allowed by the enhancement of survival permit. Net conservation benefits must be sufficient to contribute, either directly or indirectly, to the recovery of the covered species." 64 Fed. Reg. 32,717, 32,722 (June 17, 1999).

⁷ In the proposed CCAA regulation, the Service defines "net conservation benefit" as "the cumulative benefits of specific conservation measures designed to improve the status of a covered species by removing or minimizing threats, stabilizing populations, and increasing its numbers and improving its habitat." 81 Fed. Reg. at 26,772.

associated with measuring improvements to resources, measurement is often overly conservative, thus resulting in overcompensation for an impact. Accordingly, the Service should not use the term “improve . . . the current status of affected resources.”

Second, the requirement that “net conservation gain” results in improvement of “affected resources . . . primarily for important, scarce, or sensitive resources” creates confusion as to the resources for which impacts must be compensated. 81 Fed. Reg. at 12,384. More specifically, this language creates confusion as to whether compensation must be provided for all “affected resources” or only for those “important, scarce, or sensitive resources.” Additionally, the inclusion of the term “primarily” further confuses the resources for which impacts must be mitigated. A goal of compensating to yield an improvement of all “affected resources,” however, will be unwieldy to implement and, further, fails to recognize social, ecological, and biological priority of some resources over others.

Finally, the phrase “as required or appropriate” creates uncertainty and ambiguity. Essentially, the phrase suggests that the Service will require “net conservation gain” when allowed by existing statutory authority or, alternatively, “as required or appropriate.” The Service cannot act beyond the authority delegated by Congress and, therefore, cannot apply the standard of “net conservation gain” when not allowed by statutory authority, regardless of whether the Service views application of this standard as “required or appropriate.” Therefore, the Service inappropriately included the phrase “required or appropriate” in the definition of “net conservation gain” in the Draft Policy.

E. The Service Should Consider Adopting Different Mitigation Standards for Different Resources and Habitat Qualities.

The Draft Policy directs the Service to apply “net conservation gain” or “no net loss” to wide variety of affected resources. The Service further explains that the Draft Policy allows the Service to seek mitigation for impacts to: 1) trust resources, which include migratory birds, federally listed endangered and threatened species, certain marine mammals, and interjurisdictional fish; and 2) resources that contribute broadly to ecological functions that sustain species, which include birds, fishes, mammals, all other classes of wild animals, all types of aquatic and land vegetation upon which wildlife is dependent, wetlands and other waters of the United States, the ecosystems upon which listed species depend, and the human environment. *See* 81 Fed. Reg. at 12,383–84. Although the Draft Policy asserts that it applies “primarily” to “important, scarce, or sensitive resources,” *see id.* at 12,384, it does not distinguish between the relative values or importance of affected resources. Thus, for example, the Draft Policy appears to require that impacts to an abundant migratory bird and impacts to a highly imperiled listed species both be mitigated to yield a “net conservation gain” or “no net loss.”

The Draft Policy’s requirement that all impacts to any resource, no matter its importance, scarcity, or sensitivity, be mitigated to the same standard is arbitrary. The Service should have adopted different mitigation goals for different types or values of resources, and to provide a rationale that will explain how resources are prioritized, or characterized as “important, scarce, or sensitive.” Indeed, the Service adopted this approach in its 1981 mitigation policy by identifying mitigation goals that ranged from “no loss of existing habitat value” to “minimize loss of habitat value” for different resource categories. *See* 46 Fed. Reg. at 7,657–7,658. Such

an approach would recognize the relative values of affected resources. Furthermore, it would allow compensatory mitigation to be directed at the species or resources of the highest value or concern. In any future mitigation policy, the Service should narrow the number of resources to which it applies, explain how those resources are prioritized, and identify the alternatives available for mitigation measures to benefit different types or values of resources. The Service should identify the mitigation goals for the different types or values and in doing so involve a public process where local land owners, users, and other stakeholders can provide input into the goals.

IV. THE DRAFT POLICY DRAMATICALLY AND IMPROPERLY EXPANDS THE SERVICE'S AUTHORITY OVER UNLISTED FISH AND WILDLIFE.

In the Draft Policy, the Service attempts to assert jurisdiction effectively over the entire natural environment in the United States. The Service asserts that it may recommend or require mitigation for impacts to a broad variety of species and their habitats, including: 1) trust resources, which include migratory birds, federally listed endangered and threatened species, certain marine mammals, and interjurisdictional fish; and 2) resources that contribute broadly to ecological functions that sustain species, which include birds, fishes, mammals, all other classes of wild animals, all types of aquatic and land vegetation upon which wildlife is dependent, wetlands and other waters of the United States, the ecosystems upon which listed species depend, and the human environment. *See* 81 Fed. Reg. at 12,383–84. This second category captures the entire natural environment in the United States. The Service, however, cannot recommend or require mitigation of impacts to species other than federal trust fish and wildlife resources.

Congress has only charged the Service with management of trust resources under the ESA, MBTA, the Eagle Act and MMPA. *See* 16 U.S.C. §§ 668-668c, 703–712, 1361–1423h, 1531–1539. Although Congress has conferred some authority over non-trust resources under other statutes, this authority is limited to particular roles or projects. For example, although the Fish and Wildlife Coordination Act requires the Service to consult regarding unlisted fish, wildlife, and their habitats, 16 U.S.C. §§ 661-667e, the Service's consultation obligation only relates to water-related projects developed by federal agencies. With this limited directive, Congress could not have intended to confer ongoing management authority over “the human environment.” The Draft Policy tremendously stretches the reach of the Service's statutory authority to include management never envisioned by Congress.

Furthermore, the Service's asserted authority upsets the balance between state and federal management of species. States have “broad trustee and police powers” over wildlife and other natural resources within their jurisdiction and may exercise those powers “in so far as [their] exercise may be not incompatible with, or restrained by, the rights conveyed to the Federal government by the constitution.” *Kleppe v. New Mexico*, 426 U.S. 529, 545 (1976); *Mountain States Legal Found. v. Hodel*, 799 F.2d 1423, 1426 (10th Cir. 1986) (citing *Geer v. Connecticut*, 161 U.S. 519, 528 (1896), *overruled on other grounds*, *Hughes v. Oklahoma*, 441 U.S. 322 (1979)). Unless the federal government exercises one of its enumerated powers to manage wildlife species, the states retain authority to manage wildlife and their habitat. *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 204 (1999) (noting that the states' authority over wildlife “is shared with the Federal Government when the Federal Government exercises one of its enumerated constitutional powers, such as treaty making”) (emphasis added); *see also*

Maine v. Norton, 257 F. Supp. 2d 357, 374 – 75 (D. Me. 2003) (finding listing of salmon under ESA injured state’s sovereign interest in managing its own wildlife resources sufficient to confer constitutional standing). The Department of the Interior has affirmed these limits of its authority over wildlife species in its Fish and Wildlife Policy. See 43 C.F.R. § 24.3(a). Not only do the states possess broad trustee and police powers to manage wildlife within their jurisdictions, state wildlife and conservation agencies generally have the manpower and the experience with species and habitats occurring within their borders to execute these powers responsibly and effectively.

The Draft Policy inappropriately attempts to expand the Service’s authority to a nearly limitless extent. The expansive scope of the Draft Policy is inconsistent with the narrow limits of federal authority over wildlife species. The Service must withdraw the Draft Policy or, at a minimum, revise it to be consistent with the Service’s authority over fish and wildlife species and their habitats.

V. THE DRAFT POLICY PRIORITIZES NARROW CONSERVATION OBJECTIVES OVER BALANCED MULTIPLE USE.

Throughout the Draft Policy, the Service repeatedly cites the need to achieve “conservation objectives” of affected resources. 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. The Draft Policy, however, prioritizes conservation objectives over congressional multiple use mandates. Although the Service cites eleven statutes as providing it with authority to recommend or require compensatory mitigation to fish, wildlife, plants, or their habitats, a number of these statutes do not give the Service authority to prioritize fish, wildlife, plants, and their habitats above all other resources or societal needs and economic development. Although the ESA, MBTA, the Eagle Act, and MMPA impose on the Service a heightened obligation to protect trust resources, many of the other statutes the Service cites as authority for the Draft Policy require that conservation be balanced with other land and resource uses. 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 when Section 7 consultation is not required); 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”). The Draft Policy fails to recognize these statutory directives and does not balance conservation with principles of multiple use.

Furthermore, in the Draft Policy, the Service did not articulate the process by which it will develop “conservation objectives” for a given resource. Although the Service repeatedly refers to “conservation objectives” throughout the Draft Policy, it does not explain how such objectives are defined or by whom. The Service should identify the process for determining conservation objectives that allows for public input and clearly identifies the statutory authority for the objectives. In line with this, and prior to implementation of the proposed policy, the Service should clearly define these objectives prior to implementation of the proposed mitigation policy, to provide transparency to project proponents and to support advanced planning for mitigation.

VI. THE DRAFT POLICY IS AMBIGUOUS AND UNWORKABLE.

A. The Draft Policy Inappropriately Discounts Avoidance and Minimization Efforts.

In the preamble to the Draft Policy, the Service outlines a rigid mitigation hierarchy in which a land use avoids an impact to the extent possible, minimizes any impact, and compensates for the residual impact. *See* 81 Fed. Reg. at 12,381. The Draft Policy does not provide a means to account for voluntary actions creating resource conservation value at higher levels in the mitigation hierarchy from being recognized and used to offset required actions at lower mitigation hierarchy levels. The Draft Policy's specific emphasis on compensating for residual impacts, however, discounts the resource conservation value created and associated cost to a land user for avoiding and minimizing impacts. If a land user voluntarily agrees to forgo planned activities or agrees to stringent minimization measures (such as, for example, timing limitations), the Service must consider the resource conservation value created and cost and burden of these commitments when determining the appropriate amount of compensatory mitigation, if any. For example, if a land user elected to forgo development on a quarter of its project area to protect wildlife, the value of the lost development could be several million dollars. Under the Draft Policy, however, the land user that forgoes development on a portion of his property must nonetheless provide mitigation to compensate for impacts from development in the remainder of the project area. Any mitigation policy must require consideration of the cost to the land user for avoiding and minimizing impacts. Otherwise, the policy will encourage land users to forgo avoidance and minimization measures and provide compensatory mitigation to account for such impacts. If the Service fundamentally places the highest value on avoidance and minimization measures, then its mitigation hierarchy must not discount the cost of these measures to land users. Rather, the mitigation hierarchy should allow the Service to balance the conservation and development uses of the land to yield a compromise that best serves all interests.

B. The Draft Policy Will Inappropriately Allow the Service to "Veto" Development Projects.

The Service improperly proposes to use its mitigation objectives as a "veto" over whether development should proceed. In the Draft Policy, the Service identifies situations in which it will recommend or require avoidance of impacts and specifically recognizes that in these situations it will recommend or require adoption of the "no action" alternative. *See* 81 Fed. Reg. at 12,389, 12,390, 12,392. Specifically, the Service explains that it will recommend "avoiding all impacts to high-value habitats." *Id.* at 12,389. *See also id.* at 12,392 (stating the Service will recommend the "no action" alternative "when appropriate and practicable means of avoiding significant impacts to high-value habitats and associated species are not available"). The Service, however, lacks authority to recommend or require a "no action alternative."⁸ Furthermore, adoption of the "no action" alternative can effectuate a regulatory taking when

⁸ The Service's direction that it may recommend or require adoption of the "no action" alternative must be distinguished with the requirement under NEPA that agencies analyze the environmental impacts of the "no action" alternative. *See* 40 C.F.R. § 1502.14(d). Although NEPA requires that agencies analyze the impacts of a "no action" alternative, it imposes no substantive obligation that agencies adopt this alternative. *See Baltimore Gas & Electric Co. v. Natural Res. Defense Council, Inc.*, 462 U.S. 87, 100 (1983) ("NEPA does not require agencies to adopt any particular internal decisionmaking structure").

private property rights are involved. Indeed, in its 1981 Mitigation Policy, the Service conceded that “the legal authorities for the mitigation policy do not authorize the Service to exercise veto power over land and water development activities.” 46 Fed. Reg. at 7,647 (emphasis added).

The Service lacks authority to veto projects by recommending or requiring the “no action alternative.” The Service’s suggestion that it may recommend or require adoption of the “no action” alternative, such as when high-value habitat cannot be avoided, is inconsistent with section 7 of the ESA. Section 7 of the ESA requires federal agencies to consult with the Service to ensure their actions do not jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat, *see* 16 U.S.C. § 1536(a)(2); further, section 7 details specific procedures for such consultation, *see id.* § 1536(b)–(c). Absent a finding that a proposed action would jeopardize the continued existence of a listed species or result in the destruction or adverse modification of its habitat, the Service lacks authority to recommend or require the “no action alternative.”

Similarly, the Service lacks authority to deny an application for an incidental take permit under section 10(a)(1)(B) of the ESA simply because impacts to species cannot be avoided. The Service has articulated specific criteria that justify denial of an incidental take permit. *See* 50 C.F.R. §§ 13.21, 17.22(b), 17.32(b). Unless the incidental take permit or its applicant fall within the regulatory criteria requiring the Service to deny the permit, the Service lacks authority to deny an incidental take permit because impacts to species or their habitat cannot be avoided. Therefore, the Service cannot recommend or require adoption of the “no action” alternative because of unavoidable impacts may result to species or their habitats.

Furthermore, the Service must recognize that where the proposed action at issue involves an application for a land use permit by a private property owner, the Service could effectuate a regulatory taking if it denied a property owner any beneficial use of his property. *See Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1019 (1992). The Service cannot recommend denial of a land use permit without regard to whether a regulatory taking will occur and the consequences of such a taking. Because the United States must provide just compensation for a taking, Executive Order No. 12630 directs that “governmental actions that may have a significant impact on the use or value of private property should be scrutinized to avoid undue or unplanned burdens on the public fisc.” 53 Fed. Reg. 8,859 (Mar. 15, 1988). Before the Service can recommend or require that it implement the “no action” alternative, it must analyze whether adoption of this alternative would result in a regulatory taking and, if so, analyze the consequences of such taking.

C. The Draft Policy May Lead to Compounding and Redundant Mitigation Requirements.

The Draft Policy may lead to compounding and redundant mitigation requirements when multiple permits are required. This scenario particularly may arise with respect to oil and gas operations in Alaska, where the majority of the lands are wetlands. Conceivably, a project could require an incidental take permit under the ESA and/or an incidental harassment authorization under the MMPA, consultation under section 7 of the ESA, and permits under section 404 of the Clean Water Act. The Draft Policy could be interpreted to allow the Service to recommend or require compensatory mitigation for all three actions. Furthermore, this mitigation would be in

addition to any mitigation required in connection with the 404 permit. The compounding effect of mitigation requirements will result in burdensome and redundant mitigation requirements that yield more mitigation than is necessary to offset the impact. Moreover, the compounding effect of mitigation may significantly delay projects due to inability of agencies and proponents to resolve conflicting measures.

D. The Draft Policy Does Not Explain How the Service Will Identify and Use Conservation and Mitigation Plans.

Throughout the Draft Policy, the Service states it will utilize landscape conservation plans and advance mitigation plans to inform mitigation implementation. 81 Fed. Reg. at 12,385, 12,386, 12,392. The Draft Policy does not, however, adequately explain how the Service will evaluate and decide upon the plans on which it will rely to inform mitigation implementation. Conservation plans and mitigation plans can be adopted by a variety of entities, including state governments, local governments, other federal agencies, and private parties. For example, all states have prepared State Comprehensive Wildlife Conservation Plans (also known as State Wildlife Action Plans) that the Service has approved, as well as other wildlife conservation plans. Similarly, the Bureau of Land Management and Forest Service have prepared land use plans governing their management of lands and minerals within their jurisdiction. Moreover, some counties will prepare plans to conserve wildlife or resources within their jurisdiction, such as a conservation plan for the greater sage-grouse prepared by Garfield County, Colorado. Similarly, private parties or non-profit entities may prepare conservation plans or mitigation plans to guide conservation or mitigation actions.

The Service must utilize landscape conservation plans adopted by state governments, local governments, other federal agencies (such as the Bureau of Land Management), and private parties to inform mitigation decisions. The Service should not duplicate, contradict, or negate existing conservation plans; any changes to existing plans may only be made through the appropriate amendment or revision processes. Furthermore, the Service should utilize conservation plans and mitigation plans developed at the most local level, such as by state and local governments, because these entities often best understand the on-the-ground practicalities of conservation management, and are often in the position to assert that relevant stakeholders have received proper notice and the opportunity to participate. Additionally, the Service must identify the criteria it will use to evaluate the adequacy of a conservation plan to inform mitigation implementation, particularly when multiple, competing plans exist. Such criteria should include whether a plan was subject to public review and comment.⁹

Finally, in the Draft Policy, the Service states that it supports “the planning and implementation of advance mitigation plans.” See 81 Fed. Reg. at 12,386. The Draft Policy does not explain whether it or another agency will draft and make funds available for the development of advance mitigation plans. The public should have the opportunity to review and

⁹ Notably, API and IPAA do not advocate for a requirement that all plans be subject to public notice and comment before the Service may utilize them to inform mitigation implementation. When a private party or nonprofit entity develops a conservation plan and seeks to utilize it to inform mitigation that will offset impacts from its own projects, public notice and comment is not necessary. In contrast, if the Service seeks to rely on a plan developed by one entity to inform mitigation associated with another entity’s development project, the party with the development project should be afforded the opportunity to review and comment on the plan.

comment on any such draft advance mitigation plans funded by the Service, other federal agencies, or state governments.

E. The Service Cannot Require that Compensatory Mitigation be Implemented Before the Impacts of an Action Occur .

The Service lacks authority to require that compensatory mitigation be implemented before the impacts of an action occur. The Draft Policy states that the Service will “recommend or require that compensatory mitigation be implemented before the impacts of an action occur.” 81 Fed. Reg. at 12,385; *see also id.* at 12,391, 12,392. No statutory or regulatory authority, however, allows the Service to delay approval of a permit or action while mitigation is implemented.

Additionally, this requirement is unnecessarily inflexible and could indefinitely delay commencement of development projects. There are a myriad of circumstances that could delay the implementation of compensatory mitigation, ranging from seasonal restrictions on wildlife to the lack of lands available for compensatory mitigation. This requirement essentially prioritizes implementation of compensatory mitigation over the initiation of any federal or private action for which mitigation is necessary, regardless of the circumstance (even an emergency). This requirement also creates a preference for the use of mitigation banks and some in-lieu fee programs because these mitigation mechanisms rely on third parties to secure mitigation independent of a project’s timing. The Service must have the flexibility to balance competing land uses and allow some land uses to proceed ahead of mitigation. Moreover, the Service must have the flexibility to consider the scale of the impact. On one hand, a federal or private action conceivably may be delayed while compensatory mitigation is implemented to offset *de minimis* impacts. On the other hand, a large-scale development project may be delayed while mitigation is secured. In either situation, the delays may be unacceptable.

Furthermore, the Draft Policy’s requirement that compensatory mitigation be “implemented” before impacts occur is ambiguous. “Implemented” could be interpreted as any range of actions, from paying a fee, securing a legal right, securing “credits,” physically initiating a mitigation project, or demonstrating a positive trend from conservation actions. “Implemented” should not, however, be interpreted to require compensatory mitigation project be physically initiated before impacts to occur; for example, if compensatory mitigation consists of habitat restoration, the Service should not require that habitat restoration efforts be physically initiated before impacts may occur.

API and IPAA strenuously disagree with the proposal to require that compensatory mitigation be implemented before the impacts of an action occur. Nonetheless, if the Service decides to retain this requirement in any final policy over API and IPAA’s objections, the Service must at least clarify the requirement and introduce flexibility into it. First, before the Service finalizes the Draft Policy, the Service must disclose what action(s) constitutes the “implementation” of compensatory mitigation so that the public can consider and comment on them. Second, the Service should specify in the policy that it will allow impacts to occur once the necessary funding and any necessary legal rights (such as conservation easements) for compensatory mitigation have been secured. Otherwise, the Services risks unnecessarily delaying land use activities while compensatory mitigation activities are initiated.

F. The Service Lacks the Resources to Implement the Draft Policy.

With the Draft Policy, the Service proposes to assume overwhelming responsibilities that it lacks the resources to implement. From a procedural perspective, the Draft Policy imposes significant new obligations on the Service. The Service must develop advance mitigation plans, 81 Fed. Reg. at 12,386, assess anticipated effects from a proposed action, *id.* at 12,387, assess the expected effectiveness of mitigation measures, *id.*, identify evaluation species for mitigation purpose, *id.* at 12,388, assess the value of affected habitats, *id.*, and communicate final mitigation recommendations in writing, *id.* at 12,393. These obligations are then magnified by the policy's extraordinarily broad scope. *See id.* at 12,383. Finally, these obligations are further magnified by the Draft Policy's ambiguities. With the ambiguous provisions of the Draft Policy, such as mitigation standard of "net conservation gain," and decisions left to the "professional judgment" of staff, the Service will not be able efficiently implement the Draft Policy. Given that the Service currently lacks funds to manage all listed species under the ESA, the Service must address in a revised proposal the resources it will deploy to take on such a burdensome effort without putting at risk its primary statutory duties.

G. The Public Cannot Determine How the Service Will Evaluate Impacts and Net Conservation Gain.

The Draft Policy does not explain how the Service will evaluate impacts to affected resources and measure whether mitigation achieves a "net conservation gain." The Service should avoid overly technical approaches to measuring impacts and improvements, and should avoid pursuing acre-for-acre offsets. When impacts and improvements are measured through highly technical assessments, resources can be over-allocated to these measurements rather than implementing on-the-ground measures that improve species and their habitat. In particular, the Service should discourage highly quantitative measurement of impacts and gains where scientific knowledge about a species is lacking; in such instances, the policy should permit qualitative and semi-qualitative assessments. Furthermore, metrics used to measure impacts and improvements are often overly conservative, particularly when scientific information is lacking. The Service should ensure that impacts and improvements are measured to ensure that mitigation is commensurate with impacts but not punitive.

Furthermore, any final policy should include measures that will enable a project proponent to be given credit for partial avoidance or minimization of impacts as a result of prior project planning and/or design and implementation, as well as to describe as Service policy that mitigation is not required in cases where a project's design achieves complete avoidance of impacts.. For example, the Service should acknowledge and provide credit to a project operator who proposes to drill a new well or wells on an existing pad outside of critical habitat, when the costs of drilling on a new pad in critical habitat might have reduced the costs of drilling the additional well(s).

H. The Service May Utilize "Best Available Science" Under Its Mitigation Policy Only When Consistent with Statutory Authority

In the Draft Policy, the Service states it will use "best available science" to formulate and monitor the long-term effectiveness of its mitigation recommendations and decisions. 81 Fed.

Reg. at 12,385. Additionally, the Service states that it “will rely upon existing conservation plans that are based upon the best available scientific information” *Id.* at 12,386; *see also id.* at 12,391, 12,392.

The standard of “best available science” is a variation on the ESA’s requirement that decisions under this act be based on the “best scientific data and commercial information available,” *e.g.*, 16 U.S.C. §§ 1533(b)(1)(A), 1536(a)(2), and the MMPA’s information standard for decisions under this act, 16 U.S.C. §§ 1362(19)(B), 1373(a). The Department of the Interior, however, has recognized this standard is not appropriately applied under other statutes such as NEPA. *See, e.g.*, 73 Fed. Reg. 61,292, 61,295–96, 61,299 (Oct. 15, 2008) (stating that the Department of the Interior declined to incorporate a “best available data” standard into its NEPA regulations). Furthermore, the Service’s paraphrasing of the ESA and MMPA standard as “best available science” standard ignores the statutory mandates that agencies consider the best available “commercial data” in addition to the best available scientific information. *See* 16 U.S.C. §§ 1362(19)(B), 1373(a), 1533(b)(1)(A), 1536(a)(2). Rather than attempting to fashion a universal information standard for decisions under the Draft Policy, the Service should require that it evaluate information in a manner consistent with applicable statutory standards, the Department of the Interior’s Data Quality Guidelines,¹⁰ and the Service’s Data Quality Guidelines.¹¹ Furthermore, the Service should make all information utilized in making decisions under any mitigation policy available to the public for its review.

I. The Service Should Not Attempt to Address Climate Change Impacts through Mitigation.

The Draft Policy and its preamble make clear that climate change is driving the Service’s revision of the policy and, further, that the Service will consider climate change when implementing any final policy. In the preamble to the Draft Policy, the Service explains it is revising its 1981 mitigation policy in response to the effects of climate change. 81 Fed. Reg. at 12,380, 12,381. The Service asserts that “[t]he conservation of habitats within ecologically functioning landscapes is essential to sustaining fish, wildlife, and plant populations and improving their resilience in the face of climate change impacts, new diseases, invasive species, habitat loss, and other threats.” *Id.* at 12,382.

In the Draft Policy, the Service identifies numerous points at which the Service will consider climate change when implementing the policy. For example, the Service explains that as part of its landscape approach to mitigation, the Service “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.” *Id.* at 12,384–85. Additionally, the Service directs that it should “rely upon existing conservation plans that . . . consider climate-change adaptation” among other factors. *See id.* at 12,386. Moreover, the Service instructs that mitigation efforts should focus on “measures to improve the resilience of resources in the face of climate change or otherwise increase the ability to adapt to climate and other landscape change factors.” *Id.* The Service will also use methodologies that “predict effects over time, including

¹⁰ Available at https://www.doi.gov/ocio/information_management/upload/515Guides.pdf.

¹¹ Available at http://www.fws.gov/informationquality/topics/InformationQualityGuidelinesrevised6_6_12.pdf.

... changes induced by climate change” when assessing effects of actions. *Id.* at 12,388. Finally, the Draft Policy advises that “[c]limate change vulnerability assessments can be a valuable tool for identifying or screening new evaluation species” during the NEPA scoping process. *Id.* at 12,401.

Under the Draft Policy, the Service will be required to engage in significant speculation in order to consider climate change when assessing impacts to species and their habitats resulting from climate change and when assessing the effects of mitigation on species. Specifically, the Service must speculate how species will be affected by climate change and how mitigation efforts will benefit species in the face of climate change into the far future. API and IPAA believe that it is inappropriate to rely on speculative climate change projections over a lengthy time period, without documented cause and effect relationships linking observable or reliably predictable data on climate change to demonstrable effects in specific areas. The science and modeling of climate change impacts do not provide reliable predictions of species’ response to climate change, nor do they provide reliable predictions of how mitigation efforts will benefit species affected by climate change.

These significant limitations have been recognized by the Intergovernmental Panel on Climate Change (“IPCC”) in its most recent evaluation of the state of climate modeling science.¹² Climate models are “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.” IPCC AR5 at 746. Models vary considerably in complexity and application but are, in general, mathematical representations of the climate system, expressed as computer codes, and run on powerful computers. *Id.* at 749. Even the most complex 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. *E.g., id.* at 751–755. As a result of these limitations, models cannot at this time accurately replicate climate over the observable past, *id.* at 755, 767, 769–72, and even if models could replicate past climate, “there is no direct means of translating quantitative measures of past performance into confident statements about fidelity of future climate projections,” *id.* at 745. The Service’s proposal fails to acknowledge the inability of climate change models to support impact projections below a continental or regional scale,¹³ including the localized and highly complex habitat of any particular species.

Given the inherent uncertainties associated with attempting to predict the alleged impacts of climate change on species, the Service should not make the management of species affected by climate change the focus of the Draft Policy. More specifically, the Service should not attempt to tailor mitigation efforts to respond to speculative impacts of climate change on species and should not attempt to speculate as to the effectiveness of mitigation efforts in light of anticipated climate change impacts.

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 *Id.* at 810-17 (describing the flaws and biases present in each methodology for obtaining regional modeling results and noting that downscaling for regional impacts “does not guarantee credible regional climate information”); see also *id.* at 826 (“correlations between local to regional climatological values and projected changes are small except for a few regions”).

VII. THE SERVICE HAS NOT COMPLIED WITH PROCEDURAL REQUIREMENTS APPLICABLE TO THE DRAFT POLICY.

The Service has not complied with procedural requirements applicable to the Draft Policy. The Draft Policy is a substantive rule under the APA; however, the Service has not complied with all procedural requirements that attach to substantive rules. Additionally, because of the numerous ambiguities in the Draft Policy, the Service has not afforded the public a meaningful opportunity to comment on it. Finally, the Service must complete its NEPA analysis before it finalizes the Draft Policy.

A. The Mitigation Policy is a Substantive Rule Requiring Compliance with the Administrative Procedure Act, Regulatory Flexibility Act, and Other Statutes and Executive Orders.

The Draft Policy constitutes a substantive rule under the APA for several reasons. First, the Draft Policy imposes new duties on the Service, other agencies, and the regulated public. Second, the Draft Policy's goals of "net conservation gain" and "no net loss" reflect legislative line-drawing. Finally, the Draft Policy amends the Service's existing regulations governing incidental take permits under the ESA and incidental take authorizations under the MMPA. Because the policy constitutes a legislative rule, the Service cannot finalize the Draft Policy without revising and republishing the Federal Register notice so that it complies with the APA before it finalizes the Draft Policy. Additionally, the Service must comply with other laws and executive orders applicable to substantive rules, including the Regulatory Flexibility Act which requires the Service to prepare a draft regulatory flexibility analysis analyzing the economic impacts of the Draft Policy.

1. The Draft Policy is a Substantive Rule

(a) *The Draft Policy Imposes New Duties on the Service, Other Agencies, and the Regulated Public.*

The APA defines a rule as a "statement of general or particular applicability and future effect" that is "designed to implement, interpret, or prescribe law or policy" that "includes the approval or prescription for the future of . . . valuations, costs, or accounting, or practices bearing on any of the foregoing." 5 U.S.C. § 551(4). The APA imposes notice and comment procedures on substantive rules but not interpretive rules. *See* 5 U.S.C. § 553. To determine whether a rule is substantive or interpretive, courts have examined whether the rule explains an existing requirement or imposes an additional one. Rules that "affect[] individual rights and obligations" are substantive rules. *Coal. for Common Sense in Gov't Procurement v. Sec'y of Veterans Affairs*, 464 F.3d 1306, 1317 (Fed. Cir. 2006); *United States v. Picciotto*, 875 F.2d 345, 347-48 (D.C. Cir. 1989). In contrast, rules that merely explain ambiguous statutory and regulatory terms or restate existing duties are interpretive rules. *Picciotto*, 875 F.2d at 347-48.

Although it is sometimes difficult to distinguish substantive rules from interpretive rules, courts have identified characteristics of substantive rules. Substantive rules grant rights, create new duties, or impose new obligations. *Coal. for Common Sense in Gov't Procurement*, 464 F.3d at 1317; *Picciotto*, 875 F.2d at 347-48. Agencies announce substantive rules when they act

legislatively by establishing limits or drawing lines—in other words, when agencies “make[] reasonable but arbitrary (not in the ‘arbitrary or capricious’ sense) rules that are consistent with the statute or regulation under which the rules are promulgated but not derived from it, because they represent an arbitrary choice among methods of implementation.” *Catholic Health Initiatives v. Sebelius*, 617 F.3d 490, 495 (D.C. Cir. 2010) (quoting *Hocror v. U.S. Dep’t of Agric.*, 82 F.3d 165, 170 (7th Cir. 1996)) (internal quotations omitted). Additionally, a substantive rule “does not genuinely leave the agency free to exercise discretion.” *Am. Mining Cong. v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1111 (D.C. Cir. 1993) (quoting *Alaska v. Dep’t of Transp.*, 868 F.2d 441, 445 (D.C. Cir. 1989)) (internal quotations omitted).

The Draft Policy is a substantive rule because it imposes new obligations on both the FWS and entities outside of the agency. The Draft Policy directs the Service to secure mitigation that achieves a “net conservation gain” or, at a minimum, “no net loss.” 81 Fed. Reg. at 12,384, 12,387, 12,393. The Draft Policy imposes these mitigation obligations on federal agencies consulting with the Service under section 7 of the ESA, *see id.* at 12,386, project proponents seeking incidental take permits from the Service or federal permits from agencies that are required to consult with the Service under section 7, *see id.* at 12,382–83, and entities seeking incidental take authorization under the MMPA, *see id.* at 12,397. When mitigation goals are consistent with the Service’s statutory authority, the Draft Policy does not appear to leave the Service any discretion to depart from the stated mitigation goals. Additionally, the Draft Policy imposes new obligations on the Service when it prepares NEPA analyses. *See id.* at 12,401. The Service must categorically incorporate mitigation goals and conservation objectives into its purpose and need statements. *See id.* The Service must also include mitigation measures to achieve “net conservation gain” or “no net loss” in its decision documents. *Id.* The Draft Policy does not identify any circumstances in which the Service may depart from these requirements in its NEPA analyses. The fact that the Service purports to apply the draft policy only to the extent allowed by applicable statutory authority does not alter the substantive effect of the Draft Policy because the Service identifies few if any circumstances in which statutory authority limits its ability to apply the Draft Policy. Accordingly, the substantive mitigation goals set forth in the Draft Policy constitute substantive rules under the APA.

(b) *The Draft Policy’s Goals of “Net Conservation Gain” and “No Net Loss” Reflect Legislative Line-Drawing.*

Furthermore, the goals of “net conservation gain” and “no net loss” reflect the type of legislative action that Congress intended to vet through public notice and comment. These goals are examples of legislative line-drawing because it represents “an arbitrary choice among methods of implementation.” *See Catholic Health Initiatives v. Sebelius*, 617 F.3d 490, 495 (D.C. Cir. 2010) (quoting *Hocror v. U.S. Dep’t of Agric.*, 82 F.3d 165, 170 (7th Cir. 1996)). The Service could have adopted a variety of other standards—such as “mitigate to the maximum extent practicable,” “mitigate to the maximum extent technologically and economically feasible,” or “net positive impact.” The Service’s decision to adopt goals of “net conservation gain” and “no net loss,” rather than the other available standards, is the type of legislative line-drawing that falls squarely within the definition of a substantive rule under the APA.

(c) *The Draft Policy Amends the Service's Existing Regulations Governing Incidental Take Permits under the ESA and Incidental Take Authorizations under the MMPA.*

Finally, to the extent the Draft Policy requires mitigation amounting to “net conservation gain” and “no net loss” for incidental take permits, the Draft Policy constitutes a substantive rule because it modifies the Service’s requirements for issuance of incidental take permits under the ESA and for take authorization under the MMPA. When agencies seek to change procedures set forth in their regulations, they must amend those regulations through a formal rulemaking process. *City of Idaho Falls v. Fed. Energy Regulatory Comm’n*, 629 F.3d 222, 231 (D.C. Cir. 2011). If an agency action “adopts a new position inconsistent with existing regulations, or otherwise effects a substantive change in existing law or policy,” the action is a legislative rule requiring compliance with the notice and comment procedures at 5 U.S.C. § 553. *Mendoza v. Perez*, 754 F.3d 1002, 1021 (D.C. Cir. 2014).

Here, the Draft Policy directs the Service to recommend or require compensatory mitigation yielding a “net conservation gain” or “no net loss” when issuing incidental take permits under the ESA. *See* 81 Fed. Reg. at 12,396 (“This mitigation policy applies to all actions that may affect ESA-protected resources except for conservation/recovery permits under section 10(a)(1)(A).”). These goals are inconsistent with the Service’s regulations that require an applicant for an incidental take permit to mitigate the impacts of a taking “to the maximum extent practicable.” 50 C.F.R. § 17.22(b)(2)(i)(B). Similarly, the Draft Policy directs the Service to “recommend mitigation for impacts to species covered by the MMPA that are under its jurisdiction consistent with the guidance of this policy.” 81 Fed. Reg. at 12,398. The Service’s regulations implementing the MMPA, however, allow incidental take of marine mammals when a “negligible impact” will occur from the taking. The Service has defined a negligible impact as an impact “that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival.” 50 C.F.R. § 18.27(c). The Draft Policy modifies the standards by which the Service will authorize incidental taking of listed species and marine mammals under the ESA and MMPA, respectively. Therefore, the Draft Policy constitutes a substantive rule under the APA.

2. The Service Has Not Complied with the APA.

The Service has not complied with the procedural requirements applicable to substantive rules. Under the APA, agencies must publish notice of proposed rules and “include a reference to the legal authority under which the rule is proposed.” 5 U.S.C. § 553(c). The APA requires that agencies specify the legal authority for a proposed rule “with particularity” in order “to apprise interested persons of the agency’s legal authority to issue the proposed rule.” *Global Van Lines, Inc. v. Interstate Comm. Comm’n*, 714 F.2d 1290, 1298 (5th Cir. 1983) (quoting H.R.Rep. No. 1980, 79th Cong., 2d Sess. 24 (1946); *U.S. Dep’t of Justice, Attorney General’s Manual on the Administrative Procedure Act* 29 (1947)). The Service’s generalized references to statutory authority are inadequate to satisfy this requirement. Accordingly, the Service cannot finalize the Draft Policy without republishing it with specific citations to the relevant legal authority.

Additionally, the Service has not provided the public with a meaningful opportunity to comment on the Draft Policy. *See* 5 U.S.C. § 553; *Honeywell Int’l, Inc. v. Env’tl. Prot. Agency*, 372 F.3d 441, 445 (D.C. Cir. 2004). This notice must “provide sufficient factual detail and rationale for the rule to permit interested parties to comment meaningfully.” *Honeywell*, 372 F.3d at 445 (quoting *Fla. Power & Light Co. v. United States*, 846 F.2d 765, 771 (D.C. Cir. 1988)). The Draft Policy, however, does not allow for meaningful public comment because it does not adequately inform the public of the standards the Service will apply.

First, the Draft Policy does not expressly define the terms “net conservation gain” or “no net loss,” even though the Draft Policy directs the Service to recommend or require mitigation that achieves this goal. *See* 81 Fed. Reg. at 12,394–95. As detailed in sections II and O herein, the Draft Policy creates significant questions regarding how the Service will implement these goals. Without a clear definition of these terms, the public cannot meaningfully comment on the mitigation the Draft Policy requires. Second, the Draft Policy does not describe when the mitigation goals of “net conservation gain” and “no net loss” can or cannot be applied consistent with statutory authority, as described in section II.E above. The Service has not clearly communicated to the public the circumstances in which it will apply these standards and under which statutory authority it will do so in order for the public to meaningfully comment on the Draft Policy.

Finally, the public cannot meaningfully comment on the Draft Policy because it is intertwined with forthcoming policies the Service is drafting or revising. For example, less than a week before the close of the comment period on the Draft Policy, the Service released proposed revisions to its regulations governing Candidate Conservation Agreements with Assurances (CCAAs) and its CCAA policy. *See* 81 Fed. Reg. 26,817 (May 4, 2016); 81 Fed. Reg. 26,769 (May 4, 2016). These proposed revisions define the term “net conservation benefit” in the context of CCAAs and explain how the Service will evaluate net conservation benefits. *See id.* at 26,772, 26,818. Additionally, the Service is in the process of revising the Habitat Conservation Planning Handbook and its mitigation banking policy, drafting a policy on mitigation for candidate species, and finalizing its draft policy on pre-listing conservation actions. *See* Energy & Climate Change Task Force, *A Strategy for Improving the Mitigation Policies and Practices of the Department of the Interior* 15 (2014); 79 Fed. Reg. 42,525 (July 22, 2014). These forthcoming policies and document all relate to aspects of compensatory mitigation and presumably will implement components of the Draft Policy. The public should have the opportunity to assess how the Draft Policy will be applied to different species and under different statutory authorities. Additionally, the public should have the opportunity to review the Service’s program-specific policies, handbooks, and guidance documents that will implement any final mitigation policy. *See* 81 Fed. Reg. at 12,383. By reviewing and commenting on only pieces of a larger, coordinated strategy, the public cannot meaningfully comment on the Service’s mitigation strategy as a whole. *See Prometheus Radio Project v. Fed. Comm’n Comm’n*, 652 F.3d 431 (3d Cir. 2011) (finding agency failed to solicit comment on “the overall framework under consideration, how potential factors might operate together, or how the new approach might affect” the agency’s other rules). Accordingly, the Service cannot finalize the Draft Policy before it finalizes the Draft policy with the public, provides the public with definitions of “net conservation gain” and “no net loss,” and provides the public with a description of the statutory authority under which the mitigation goals may be applied.

3. The Service Has Not Complied with the Regulatory Flexibility Act and Other Procedural Requirements Applicable to Substantive Rules.

In addition to the procedural requirements of the APA, *see* 5 U.S.C. § 553, substantive rules are subject to a variety of other procedural requirements. The Regulatory Flexibility Act, as amended by the Small Business Regulatory Enforcement Fairness Act, requires agencies to prepare regulatory flexibility analyses of substantive rules under the APA, unless the agency determines the rule would not have a significant economic impact on a substantial number of small entities. 5 U.S.C. §§ 601–612. Additionally, the Unfunded Mandates Reform Act requires agencies to prepare written statements about benefits and costs prior to issuing a proposed rule that includes any Federal mandate that is likely to result in aggregate expenditure by State, local, and tribal governments, or by the private sector, of \$100 million or more in any one year, and prior to issuing any final rule for which a proposed rule was published. 2 U.S.C. § 1532. In addition to these statutes, a variety of executive orders require analysis of proposed rules. *See* Executive Order No. 13175, 65 Fed. Reg. 67,249 (Nov. 9, 2000); Executive Order No. 13132, 64 Fed. Reg. 43,255 (Aug. 10, 1999); Executive Order No. 12988, 61 Fed. Reg. 4,729 (Feb. 7, 1996); Executive Order No. 12866, 58 Fed. Reg. 51,735 (Oct. 4, 1993). The Service cannot finalize the Draft Policy before complying with the requirements of these statutes and executive orders. In particular, the Service must prepare a draft regulatory flexibility analysis of the Draft Policy because its compensatory mitigation requirements will have a significant economic impact on a substantial number of small entities and release it to the public for comment.

B. The Service Must Comply with NEPA Prior to Finalizing the Draft Policy.

API and IPAA agree with the Service’s decision to analyze the impacts of the Draft Policy in a NEPA document. *See* 81 Fed. Reg. at 12,403. The Service, however, should prepare an environmental impact statement (EIS) rather than an environmental assessment (EA) because the Draft Policy will have significant impacts requiring preparation of an EIS. *See* 40 C.F.R. § 1508.27.

In any NEPA analysis, API and IPAA request that the Service analyze the following alternatives and impacts.

- First, the Service must analyze a reasonable range of alternatives to the proposed mitigation goals of “net conservation gain” and “no net loss” beyond simply the “no action” alternative. *See* 40 C.F.R. § 1502.14. For example, the Service should analyze mitigation goals that are consistent with statutory authority, such as goals of mitigating to the “maximum extent practicable” as used in the ESA, 16 U.S.C. § 1533(a)(2)(B)(ii), or “sufficiently” mitigating to “allow subsistence needs to be met” as used in the MMPA, 50 C.F.R. § 18.27(c).

- Second, the NEPA document should analyze the impacts of the mitigation goal and habitat policy on: a) domestic production of oil and natural gas resources; b) production of the federal oil and natural gas estate that the Department of the Interior manages and that is subject to section 7 consultation and NEPA review; and c) socioeconomics, particularly in states where oil and natural gas development contributes significantly to the state’s economic growth.

- Third, the Service must analyze the availability of private lands on which compensatory mitigation projects may be implemented and the willingness of land owners to engage in mitigation projects.
- Finally, API and IPAA request that the Service analyze how its mitigation policy will apply to areas of split-estate lands in which the surface and mineral estates are severed. Mitigation efforts can be challenging to implement on split estate lands where the mineral estate owner or lessee has a right to use a reasonable portion of the surface for development of the mineral estate.

If the Service elects to move forward with an EA, even though, as discussed above, an EA would be inappropriate under these circumstances, it should allow the public to review and comment on a draft EA prior to finalizing it. The CEQ NEPA regulations direct that agencies involve the public in the preparation of EAs “to the extent practicable.” 40 C.F.R. § 1501.4(b). Public review of a draft EA is consistent with the Service’s NEPA Manual, which directs that the Service “should circulate the draft and final EA to the public with the accompanying draft and final project documents, such as the plan, permit, or rule.” 550 FW 1 § 2.5(B)(2). Furthermore, the Service should make any draft finding of no significant impact (FONSI) available for public review because the Service’s adoption of generalized mitigation goals of “net conservation gain” and “no net loss” is “without precedent.” 40 C.F.R. § 1501.4(e)(2)(ii).

C. The Service Should Allow the Public to Comment on All Policies, Handbooks, and Guidance Documents that Implement the Mitigation Policy.

In the preamble to the Draft Policy, the Service states it will adapt program-specific policies, handbooks, and guidance documents to implement any final mitigation policy. 81 Fed. Reg. at 12,383. API and IPAA request that the Service provide the public with the opportunity to review and comment on these draft policies, handbooks, and guidance documents before they are finalized. The public must be afforded the opportunity to review and comment on these draft policies, handbooks, and guidance documents because the Service is likely to treat any final policy and its implementing guidance as binding.

VIII. SECTION-BY-SECTION COMMENTS

A. Preamble

1. The Policy Should Not Require Mitigation when Impacts Will Be Negligible or *de Minimis*.

The Draft Policy inappropriately suggests that compensatory mitigation is necessary even when unavoidable impacts are insignificant or *de minimis*. In the preamble to the Draft Policy, the Service provides an example of departing from the mitigation hierarchy that highlights the need to allow flexibility in the requirement that land users compensate for all residual impacts. The Service explains that “when impacts to a species may occur at a location that is not critical to achieving the conservation objectives for that species, or when current conditions are likely to change substantially due to the effects of a changing climate . . . relying more on compensating for the impacts at another location may more effectively serve the conservation objectives for the

affected resources.” 81 Fed. Reg. at 12,381. Compensatory mitigation is not necessary at all if impacts occur at a location “not critical to achieving the conservation objectives for that species” or “when current conditions are likely to change substantially.” The policy should not be so focused on compensating for all residual impacts that land users must provide compensatory mitigation where no impacts exist or to offset impacts that are, at most, *de minimis* and, in reality, nonexistent. Similarly, the policy cannot assume that any human activities necessarily impact species’ habitat or that any impacts to habitat (such as unoccupied or unsuitable habitat) necessarily result in impacts to species.

2. The Definition of “Adaptive Management” is Inconsistent with Existing Definitions of the Term and Will Not Provide Land Users Certainty in Regulatory Requirements.

The definition of adaptive management set forth in the Draft Policy is inconsistent with other Department of the Interior definitions of this term. In the Draft Policy, the Service defines “adaptive management” as:

[A]n iterative process that involves: (a) Formulating alternative actions to meet measurable objectives; (b) predicting the outcomes of alternatives based on current knowledge; (c) conducting research that tests the assumptions underlying those predictions; (d) implementing alternatives; (e) monitoring the results; and (f) using the research and monitoring results to improve knowledge and adjust actions and objectives accordingly.

81 Fed. Reg. at 12,382. This definition, however, differs from other definitions articulated by the Department of the Interior and the Service. For example, in *Adaptive Management: The U.S. Department of the Interior Technical Guide*, the Department defined “adaptive management” as:

Adaptive management [is a decision process that] promotes flexible decision making that can be adjusted in the face of uncertainties as outcomes from management actions and other events become better understood. Careful monitoring of these outcomes both advances scientific understanding and helps adjust policies or operations as part of an iterative learning process. Adaptive management also recognizes the importance of natural variability in contributing to ecological resilience and productivity. It is not a ‘trial and error’ process, but rather emphasizes learning while doing. Adaptive management does not represent an end in itself, but rather a means to more effective decisions and enhanced benefits. Its true measure is in how well it helps meet environmental, social, and economic goals, increases scientific knowledge, and reduces tensions among stakeholders.

B. K. Williams et al., *Adaptive Management: The U.S. Department of the Interior Technical Guide* v (2009). Additionally, the Service, with NMFS, adopted a different definition in their “five-point policy guidance” addendum to their Habitat Conservation Planning Handbook: “a method for examining alternative strategies for meeting measurable biological goals and objectives, and then, if necessary, adjusting future conservation management actions according to what is learned.” 65 Fed. Reg. 35,242, 35,252 (June 1, 2000). The Service must reconcile

these various definitions of “adaptive management” or at least provide a reason for departing from them in any final policy.

Furthermore, the adaptive management in the Draft Policy fails to impose a high scientific standard that triggers adaptive management changes and does not limit the frequency of adaptive management changes. Adaptive management should not result in ongoing adjustments to a conservation strategy. For example, adaptive management changes should not occur every time a new scientific study is released that contributes to an already well-developed body of scientific literature. Land users such as oil and gas operators require certainty in order to plan future activities, and ongoing adjustments to conservation strategies undermine such certainty. Any final mitigation policy must require high scientific standards that necessitate adaptive management changes and require that adaptive management changes occur with a frequency that accommodates land users’ need for certainty. Adaptive management change processes must also provide for proper input by the affected land user and due process of decision making.

B. Mitigation Policy of the U.S. Fish and Wildlife Service

1. Section 3.3: The Service Appropriately Excluded Completed Actions from the Mitigation Policy.

API and IPAA agree with the exclusions articulated in section 3.3 of the Draft Policy, *see* 81 Fed. Reg. at 12,384, and request that the Service retain these exclusions in any final policy. Additionally, the Service should not apply the policy to federal actions currently under review. Often, a significant amount of time and effort has been devoted to currently pending actions, and application of the policy may undo this past work. Furthermore, application of the policy could delay approval of federal actions currently under review, such as if application of the policy will trigger the need for a supplemental NEPA document. *See* 40 C.F.R. § 1502.9(c)(1)(i). Thus, API and IPAA request that the Service limit application of any final policy to actions that are proposed after its effective date.

2. Section 4: General Policy and Principles

(a) *Section 4.a: The Service Must Define “Sensitive Resources.”*

The Draft Policy states that the Service’s mitigation planning goal is to improve or maintain the status of affected resources “primarily for important, scarce, or sensitive resources.” 81 Fed. Reg. at 12,384. Elsewhere in the Draft Policy, the Service defined “importance” and “scarcity” but did not define “sensitive” resources. *See id.* at 12,394–95. The Service’s failure to define “sensitive” resources contributes to the ambiguities in the Draft Policy and will lead to confusion if the Draft Policy is finalized.

(b) *Section 4.f: The Service Lacks Authority to Recommend or Require Financial Assurances of Project Proponents.*

The Service lacks authority to recommend or require financial assurances of project proponents related to mitigation measures. In section 4.f of the Draft Policy, the Service states

that it “will recommend or require that implementation assurances, including financial, be in place when necessary to assure the development, maintenance, and long-term viability of the mitigation measure.” 81 Fed. Reg. at 12,385. The Service, however, may not even require mitigation under all of the cited statutory authority, as outlined in section II above and section 0 below. By extension, the Service also cannot require financial assurances associated with mitigation projects.

More generally, although the Service has required certain funding assurances from parties operating mitigation banks, the Service should not attempt to similarly require financial assurances from project proponents attempting to secure mitigation offsets. With respect to mitigation banks, the operators of these enterprises seek to manage habitat in perpetuity and sell mitigation credits. Project proponents do not share these same objectives. Financial assurances such as bonds and surety interests will make mitigation more expensive and, conceivably, may burden the transfer of the development projects the mitigation is intended to offset.

Finally, the Service’s statement that it will recommend or require “implementation assurances, including financial,” *see* 81 Fed. Reg. at 12,385, is unclear. Without more information regarding what constitutes “implementation assurances” as well as “financial assurances” for purposes of the Draft Policy, the public cannot meaningfully comment on this proposed element of the Draft Policy.

(c) *Section 4.g: The “Additionality” Requirement Will Deter Conservation Efforts.*

The Service should not “recommend or require that compensatory mitigation be implemented before the impacts of an action occur and be additional to any existing or foreseeably expected conservation efforts planned for the future.” 81 Fed. Reg. at 12,385. For the reasons explained in section VI.E above, the Service should not require that mitigation be implemented before the impacts of an action occur. Furthermore, API and IPAA disagree that mitigation be additional to any existing or foreseeably expected conservation efforts. This “additionality” requirement may deter land users from undertaking voluntary conservation efforts. Additionally, it may have an unintended consequence of making additional regulatory efforts more politically difficult. Conceivably, state and local governments may not be willing to adopt conservation regulations because such regulations will raise the baseline against which compensatory mitigation will be measured. Moreover, the reference to “foreseeably expected” conservation efforts is confusing and will lead to disagreements between the Service and the public regarding what efforts are “foreseeably expected.” Therefore, the Draft Policy improperly includes an “additionality” requirement in section 4.g.

3. Section 5: Mitigation Framework

(a) *The Mitigation Framework is Overly Complex and Unworkable.*

The mitigation framework outlined in section 5 of the Draft Policy is so complex it is unworkable. The complexity of the mitigation framework may render it difficult for the Service and project proponents to apply, thus leading to delays in project approvals. First, the Draft Policy requires that the Service undertake an extremely detailed assessment of anticipated effects

from a proposed action and the expected effectiveness of mitigation measures. *See* 81 Fed. Reg. at 12,387–88. Second, the Draft Policy outlines a detailed set of considerations for the Service to utilize to identify evaluation species. *See id.* at 12,388. Third, the Draft Policy requires the Service to assess the overall value of affected habitats. *See id.* at 12,388–89. Finally, the Draft Policy outlines an exhaustive list of components which the Service must document. *See id.* at 12,393. Given the breadth of regulatory determinations to which the Draft Policy applies, the complex determinations required by the Draft Policy have the potential to tax the Service’s resources and bog down agency decision-making, particularly for relatively small projects. Furthermore, the highly subjective determinations required at each of these phases will result in individual Service employees making case-by-case decisions as projects are proposed. These subjective, case-by-case decisions will lead to inconsistent decision-making within the Service on mitigation.

(b) *Section 5.1: The Requirement of Integrating Mitigation Planning with Conservation Planning is Unworkable and Will Burden Project Proponents.*

The Draft Policy’s direction that the Service “integrate mitigation requirements and recommendations into conservation planning” is unworkable and will burden project proponents. *See* 81 Fed. Reg. at 12,386. First, with respect to existing conservation plans, the Draft Policy does not provide sufficient direction as to how the Service should evaluate and decide upon the plans on which it will rely, for the reasons explained in section VI.D above. Second, the Draft Policy’s direction that the Service “will engage in mitigation planning for actions affecting resources in landscapes for which conservation objectives and strategies to achieve those objectives are not yet available, well developed, or formally adopted” is unworkable. *See* 81 Fed. Reg. at 12,386. As a practical matter, the Service cannot assume that it will have the resources required to provide species-specific mitigation strategies to project proponents when needed. Moreover, manpower constraints and the demands of other work efforts may limit the Service’s ability to provide species-specific mitigation strategies to project proponents when necessary for project approvals. Under such circumstances, the onus of gathering additional data (e.g., habitat distribution/density within the landscape setting; physio-chemical parameters of suitable habitat) to shape those strategies will fall on the project proponent rather than the Service. In effect, the lack of detailed species-specific mitigation strategies will limit predictability in project planning for both the proponent and the Service—which is among the principal benefits of having a standardized policy.

(c) *Section 5.2: The Draft Policy Interferes with State Management of Unlisted Species.*

In the Draft Policy, the Service misstates its authority over fish and wildlife species. The Service states that it “shares responsibility for conserving fish and wildlife with State, local and tribal governments and other Federal agencies and stakeholders.” 81 Fed. Reg. at 12,387. The Service, however, only has management authority over listed fish and wildlife species, certain marine mammals, and migratory birds. *See* 43 C.F.R. § 24.3(c). The Service cannot claim management authority over species for which Congress has not preempted state management. *See id.* § 24.3(a)

The ESA requires the Service to coordinate with states “to the maximum extent practicable” when implementing the ESA. 16 U.S.C. § 1535(a). Similarly, in a recently revised policy, the Service affirmed the role of state agencies in ESA activities. *See* 81 Fed. Reg. 8663 (Feb. 22, 2016). In any final policy, the Service should strengthen the role of state and local government consultation and promote the use of scientific information that states and local governments possess. In particular, the Service should revise the Draft Policy to strengthen its commitment to “consider resources and plans made available by State, local, and tribal governments and other Federal agencies.” 81 Fed. Reg. at 12,387. Rather than simply “consider[ing]” plans developed by states and local governments, the Service must defer to these plans when developing compensatory mitigation recommendations.

The Draft Policy improperly equates coordination with states and other stakeholders to oversight of these stakeholders. Section 5.2 states that “[c]oordination and collaboration with stakeholders allows the Service to confirm that the persons conducting mitigation activities, including contractors and non-Federal persons, have the appropriate experience and training in mitigation best practices, and where appropriate, include measures in employee performance appraisal plans or other personnel or contractor documents, as necessary.” 81 Fed. Reg. at 12,387. The purpose of coordination and collaboration is to share scientific and economic information, communicate values, and gain different perspectives. Congress has recognized the importance of coordination with states, local governments, and the public in the statutes that the Service cites as authority for the Draft Policy. *See, e.g.*, 16 U.S.C. § 1535. The Service cannot diminish the value of coordinating with stakeholders to simply create another opportunity for the Service oversight of non-federal wildlife management.

Finally, API and IPAA agree with the Service’s objective of “seek[ing] to apply compatible approaches and avoid[ing] duplication of efforts with those same entities.” 81 Fed. Reg. at 12,387. Although collaboration and coordination with stakeholders is mandated by the ESA, it nonetheless can delay decision-making. Accordingly, the Service should strive to ensure that coordination and collaboration occurs efficiently and with minimal duplication of efforts.

(d) Section 5.3: Assessment

(i) The Service’s Assessments Should Not Supplant the Requirements of NEPA.

The assessments required by section 5.3 of the Draft Policy duplicate the analysis required under NEPA and, as a result, the assessments will unnecessarily delay both development activities and mitigation projects. The Draft Policy directs that when the Service assesses the “anticipated effects and the expected effectiveness of mitigation measures,” action proponents should “provide reasonable predictions about environmental conditions relevant to the affected area both with and without the action over the course of the planning horizon (i.e., baseline condition).” 81 Fed. Reg. at 12,387. The assessment of predictions with and without the action echo the NEPA requirement that agencies analyze the impacts of both a proposed action and the “no action alternative.” To the extent the impacts of a proposed action or the associated mitigation will be analyzed in a NEPA document, the Service should defer to this analysis rather than conducting its own independent assessment. The Service’s assessment of mitigation measures should not supplant or duplicate the required analysis under NEPA.

Similarly, the Service's assessments under the Draft Policy should not conflict or diverge from the analysis that will occur under NEPA. The Draft Policy offers its own directive relating to the forecast horizon for impacts that differs from NEPA's requirements. Specifically, the Draft Policy directs that the Service will "consider action effects and mitigation outcomes within planning horizons commensurate with the expected duration of the action's impacts. In predicting whether mitigation measures will achieve the mitigation policy goal for the affected resources during the planning horizon, the Service will recognize that predictions about the more-distant future are more uncertain and adjust the mitigation recommendations accordingly." 81 Fed. Reg. at 12,387. To address this very issue, NEPA only requires analysis of "reasonably foreseeable" impacts. 40 C.F.R. §§ 1508.8(b), 1502.22. The Service should not expand the analysis required of federal agencies and, furthermore, should not require speculation about impacts that are not reasonably foreseeable.

Finally, the Draft Policy fails to explain how the Service will adjust mitigation recommendations to account for uncertainty. In the Draft Policy, the Service states: "In predicting whether mitigation measures will achieve the mitigation policy goal for the affected resources during the planning horizon, the Service will recognize that predictions about the more-distant future are more uncertain and adjust the mitigation recommendations accordingly." 81 Fed. Reg. at 12,387 (emphasis added). The Service, however, offers no explanation as to how it will adjust mitigation recommendations. The Service must inform the public as to how it plans to adjust mitigation recommendations to account for uncertainty.

(ii) Metrics Should be Simple and Flexible.

The Draft Policy contemplates that the Service will use "common metrics" to measure adverse and beneficial effects of proposed actions and mitigation efforts. *See* 81 Fed. Reg. at 12,387. The requirement of "common metrics" presents a risk that the methodology will become highly technical and cumbersome, lead to disagreements over scientific interpretation, and delay the development of mitigation. As a result, common metrics must be as simple as possible to reduce the cost of oversight and management and to maximize funds for on-the-ground conservation. Furthermore, common metrics should be subject to public notice and comment.

Additionally, the Draft Policy fails to consider a scenario in which common metrics do not exist to evaluate the impacts of a project and associated mitigation. Whereas large-scale projects may warrant the development of common metrics, small, individual projects do not justify the development of such metrics and, further, should not be delayed while any common metrics are development. Project proponents and the Service should have the flexibility to substitute another form of measurement, such as metrics developed for a like project or a third-party assessment. If common metrics do not exist to evaluate effects of individual projects, the Service or proponents are under no obligation to develop such common metrics but have the flexibility to utilize substitute measures.

(iii) The Draft Policy Should Not Defer to the Judgment of Service Employees.

Section 5.3.4 directs that "[w]here appropriate effects assessment methods or technologies useful in valuation of mitigation are not available, Service will apply best

professional judgment supported by best available science to assess impacts and to develop mitigation recommendations.” 81 Fed. Reg. at 12,388. The Service should not defer to the judgment of individual employees. Most likely, “appropriate effects assessment methods or technologies useful in valuation of mitigation” will not be available for all resources, particularly when the policy is first approved. Leaving these fundamental judgments to Service employees will lead to inconsistent and arbitrary mitigation requirements. To the extent the Draft Policy is intended to encourage consistency in mitigation requirements, science should drive assessments rather than the judgments of individual employees.

(iv) Effect Assessment Methodologies Should be Simple

API and IPAA agree with the directive in the Draft Policy that the Service use “effect assessment methodologies that . . . are practical, cost-effective, and commensurate with the scope and scale of impacts to affected resources.” 81 Fed Reg. at 12,387-88. The Service should retain this directive in any final policy.

(e) *Section 5.4: Evaluation Species*

API and IPAA disagree with the Draft Policy’s directive that the Service identify evaluation species for mitigation purposes. *See* 81 Fed. Reg. at 12,388. The list of characteristics that the Service will use to identify evaluation species will result in a potentially huge pool of indicator species depending on the whereabouts of the mitigation. For example, this list of species could include all species in Alaska’s North Slope, including species that the Service does not manage. Such a broad set of evaluation species could, as a practical matter, mean that mitigation objectives are never attained and, further, that mitigation measures are unnecessary and duplicative. Moreover, the requirement of evaluation species invites challenges to agency authorizations based on whether or not the Service correctly identified evaluation species.

API and IPAA recognize that evaluation species were a component of the Service’s 1981 mitigation policy. *See* 46 Fed. Reg. 7,644, 7,652 (Jan. 23, 1981). The 1981 policy, however, applied to a narrow category of actions and did not apply to threatened or endangered species or Service recommendations related to the enhancement of fish and wildlife resources. *See id.* at 7,656-57. With its narrow application, evaluation species may have been a workable concept for the prior mitigation concept. Given the breadth of activities to which the Draft Policy purports to apply, however, the requirement evaluation species is unworkable and will lead to inconsistent application and litigation. In the context of the use of evaluation species for mitigation purposes in the Lower 48 states, it is important to recognize that the Service has no authority under the ESA to require protection of plants on private lands and the use of an “evaluation” species has the potential to cause problems in the area.

(f) *Section 5.5: Habitat Valuation*

The Draft Policy erroneously assumes that impacts to any habitat, regardless of its quality, necessarily affect the associated species. Specifically, the Draft Policy states, “[t]o maintain landscape capacity to support species, our mitigation policy goal (Section 4) applies to all affected habitats of evaluation species, regardless of their value in a conservation context.”

81 Fed. Reg. at 12,388. This statement is inconsistent with the existing framework established under the ESA and other wildlife statutes. For example, the Service has interpreted section 9 of the ESA to allow the modification of habitat of listed species so long as the modification does not “harm” the species. *See* 16 U.S.C. §§ 1532(1), 1538(a)(1)(A); 50 C.F.R. § 17.3 (definition of “harm”). Likewise, section 7 of the ESA allows modification of critical habitat so long as the modification is not adverse. 16 U.S.C. § 1536(a)(2). Thus, absent species-specific data, the Service cannot assume that impacts to any habitat necessarily translate to impacts to species. *Cf. Ariz. Cattle Growers’ Ass’n v. U.S. Fish & Wildlife Serv.*, 273 F.3d 1229, 1244 (9th Cir. 2001) (observing that absent a critical habitat designation, “there is no evidence that Congress intended to allow the Fish and Wildlife Service to regulate any parcel of land that is merely capable of supporting a protected species”).

API and IPAA disagree with the Service’s statement that “[f]or habitats [it] determine[s] to be of high value, [it] will seek avoidance of all impacts.” *See* 81 Fed. Reg. at 12,389. For the reasons set forth in section VI.B above, the Service cannot seek avoidance of all impacts.

Finally, API and IPAA disagree with the Service’s suggestion that it may require land users to provide compensatory mitigation even when land users have avoided impacts to species. In the Draft Policy, the Service states that “[f]or habitats the Service determines to be of lower value, [it] will consider whether compensation is more effective than other components of the mitigation hierarchy to maintain the current status of evaluation species, and if so, may seek compensation for most or all such impacts.” 81 Fed. Reg. at 12,389. Compensatory mitigation must have a “nexus” and “rough proportionality” to the impact of a land use. *See Koontz*, 133 S. Ct. at 2595. If a land user chooses to avoid impacts, the Service cannot require the land user to provide compensatory mitigation for impacts that do not exist. The Service may only require compensatory mitigation when activities will actually impact species at levels otherwise prohibited by statute and existing regulations.

(g) *Section 5.6: Means and Measures*

(i) *Section 5.6.1: Avoid*

The definition of “unavoidable impacts” set forth in the Draft Policy is ambiguous and imprecise. The Draft Policy explains an impact is unavoidable “when an appropriate and practicable alternative to the proposed action that would not cause the impact is unavailable.” 81 Fed. Reg. at 12,389. Use of a more precise phrase than “appropriate and practicable alternative,” such as “reasonable alternative,” would establish a clearer standard. The phrase “reasonable alternative” derives from NEPA, and Department of the Interior’s NEPA regulations and recognize that a “reasonable alternative” must be “technically and economically practical or feasible and meet the purpose and need of the proposed action.” 43 C.F.R. § 46.420(b). *Accord* Forty Most Asked Questions Concerning CEQ’s National Environmental Policy Act Regulations, 46 Fed. Reg. 18,026, 18,027 (Mar. 23, 1981) (Question 2a) (“Forty Questions”). Further, the Service does not have the technical ability to determine what is technically feasible or economically feasible for a project proponent.

In the Draft Policy, the Service explains that it will examine whether an action avoids both direct and indirect effects to resources. *See* 81 Fed. Reg. at 12,389. When evaluating direct

and indirect effects, the Service must base its evaluations on a well-established body of scientific and commercial information, rather than anecdotal information. If well-established science does not exist or is otherwise not available, the Service must make its determinations based on whatever information is available and allow development to proceed pending availability of science. The Service lacks authority to delay development due to incomplete and insufficient scientific information.

Finally, API and IPAA disagree with the Service's statement that it may recommend or require adoption of a no-action alternative in some circumstances, such as when impacts to high-value habitat cannot be avoided. 81 Fed. Reg. at 12,389, 12,390. API and IPAA reiterate their comments stated in section VI.B above.

(ii) Section 5.6.3: Compensate

The Service may not require that proponents "offset unavoidable resource losses in advance of their actions." 81 Fed. Reg. at 12,390. The Service cannot require that mitigation be implemented prior to impact for the reasons explained in section VI.E above. Furthermore, the Service lacks authority to "ensure the application of equivalent ecological, procedural, and administrative standards for all compensatory mitigation mechanisms." *See id.* at 12,391 (emphasis added). When the Service is only consulting on an action that will be approved by another federal agency, the approving federal agency can manage any compensatory mitigation associated with the federal action. The Draft Policy fails to correctly capture the Service's limited role when it consults on a federal action that will be approved by another federal agency.

The Service must also revise the list of 12 elements that compensatory mitigation mechanisms must incorporate, address, or identify. *See* 81 Fed. Reg. at 12,391. First, despite the Service's assertion that "any" compensatory mitigation mechanism "must" incorporate these elements, *see id.*, the Service lacks authority to require these elements as part of a compensatory mitigation mechanism. These requirements are not based in any statute or regulation. Second, the requirement that compensatory mitigation mechanisms incorporate, address, or identify all of these elements is too cumbersome, particularly for small projects. Although these elements appear to address a large-scale, programmatic mitigation delivery system, they are too burdensome for individual projects with unique impacts to implement; furthermore, they may be too burdensome for a moderately-sized mitigation delivery system. Accordingly, the list of elements in the Draft Policy that compensatory mitigation mechanisms must accurately reflect the limits of the Service's authority and to accommodate a variety of different sized projects.

With respect to the mitigation mechanisms identified in the Draft Policy, API and IPAA support a menu of mitigation mechanisms. Land users should have the flexibility to utilize whichever mitigation mechanism best suits their needs, is cost-efficient, and is readily available. The Service should not promote or discourage a particular mitigation mechanism, nor should the Service impose requirements that make a particular form of mitigation onerous to use.

Mitigation/Conservation Banks – The Service should not require use of a mitigation or conservation bank over other mitigation mechanisms.

Proponent-Responsible Mitigation – The Service should ensure that procedures to develop and implement proponent-responsible mitigation are not overly burdensome so as to discourage land users from implementing their own mitigation. Land users should be afforded flexibility to craft mitigation that suits their individual needs.

In-lieu Fee Programs – The Draft Policy fails to recognize the importance of in-lieu fee programs in providing a cost-effective and accessible form of compensatory mitigation. The Service should encourage the development of in-lieu fee programs, as well as mitigation/conservation banks, which provide more cost-effective and feasible mitigation than proponent-based mitigation. In places such as Alaska’s North Slope, only one in-lieu mechanism exists and it currently is not open to additional participation. Additionally, in-lieu fee programs can provide a sound mitigation mechanism on federal lands. Unlike mitigation efforts that occur on private lands, mitigation that is implemented on federal lands does not require market-based incentives to encourage participation by the federal landowner. Thus, in-lieu fee programs that involve the payment of fees to a third party that implements the conservation efforts can provide a mechanism to expand mitigation opportunities on federal lands.

The Service’s statement that in-lieu fee programs “generally provide compensatory mitigation after impacts have occurred” is not accurate. 81 Fed. Reg. at 12,391. In-lieu fee programs can be structured to initiate mitigation efforts ahead of impacts such as by requiring enrollment fees that will be immediately applied to conservation efforts. For example, the Candidate Conservation Agreement with Assurances for the Lesser Prairie-Chicken and Sand Dune Lizard in New Mexico (2008) implements an in-lieu fee program but requires payment of fees upon enrollment in the agreement so that monies can be applied toward conservation activities before impacts occur. The Service must correctly characterize the nature of in-lieu fee programs.

Research and Education – API and IPAA disagree with the Service’s statement in the Draft Policy that research and education “are not typically considered compensatory mitigation.” 81 Fed. Reg. at 12,391. This limitation is inconsistent with the definition of mitigation under other statutes, such as the National Historic Preservation Act. *See, e.g.*, Advisory Council on Historic Preservation, Section 106 Archeology Guidance (2009).¹⁴ In some instances, where the impacts of an action are not known and it may not be possible to determine suitable mitigation, research efforts may provide a useful form of mitigation. Therefore, any definition of mitigation should include research and education.

(h) *Section 5.7: Recommendations*

API and IPAA reiterate their objection to the preference that compensatory mitigation be implemented prior to development occurring for the reasons explained in section VI.E above. *See* 81 Fed. Reg. at 12,392. Furthermore, the Service should revise the Draft Policy to remove the statement that “[t]he extent of the compensatory measures that are not completed until after action impacts occur will account for the interim loss of resources consistent with the assessment principles (section 5.3).” *Id.* Absent evidence demonstrating an impact to a species, the Service

¹⁴ Available at <http://www.achp.gov/docs/ACHP%20ARCHAEOLOGY%20GUIDANCE.pdf>.

cannot categorically assume that a difference between the timing of compensatory mitigation and impacts results in a loss of resources.

API and IPAA disagree with the statement that “[t]he Service will generally, but not always, recommend compensatory mitigation on lands with the same ownership classification as the lands where the impacts occurred, *e.g.*, impacts to evaluation species on private lands are generally mitigated on private lands and impacts to evaluation species on public lands are generally mitigated on public lands.” 81 Fed. Reg. at 12,392. The Service provides no justification for this preference. A preference for like ownership of impacted lands and mitigation lands will limit the supply of mitigation lands, thus potentially delaying project initiation. Where impacts occur on private or state lands, this preference will result in shifting land uses on private or state lands from resource development to conservation and preservation. In Alaska, for example, this shift can present an environmental justice issue because often the conservation land identified for mitigation is privately land owned by Native Corporations where subsistence activities and development are key to the culture and economic health of the corporations. For these reasons, the Draft Policy should not have adopted the preference for like ownership of impacted lands and mitigation lands.¹⁵

Similarly, the Service should not limit the use of public lands to mitigate impacts occurring on private land to only those situations when “the public land location would provide the best possible conservation outcome.” *See* 81 Fed. Reg. at 12,392. This standard, which the Draft Policy does not define, is ambiguous. Moreover, this standard is unnecessarily limiting because there may be a variety of reasons why public lands are a more suitable place for mitigation. For example, in any given situation, public lands may connect existing habitat, provides more durable mitigation, or allows for better management control. Furthermore, this policy may prohibitively increase the cost of mitigation on private lands if demand for mitigation projects on private lands exceeds supply.

Finally, API and IPAA applaud the service for recognizing the role of project applicants in mitigation assessments and the economic considerations they must evaluate. *See* 81 Fed. Reg. at 12,392. API and IPAA agree with the following language in the Draft Policy: “The Service will develop mitigation recommendations in cooperation with the action proponent . . . considering the cost estimates and other information that the proponent . . . provides about the action and its effects . . .” *Id.*

(i) *Section 5.8: Documentation*

The early planning and effects assessment processes required by the Draft Policy, *see* 81 Fed. Reg. at 12,393, duplicate and are not coordinated with similar NEPA processes. Although the Service’s proposed analysis would focus on impacts to evaluation species, high-value habitats, and the development of a mitigation plan, the analysis is a subset of a larger assessment of impacts and potential mitigation that the authorizing agency performs under NEPA. To efficiently utilize limited agency resources, the Service must coordinate the assessments under the Draft Policy with the NEPA analysis of an authorizing agency. To facilitate efficient and

¹⁵ If the Service elects to retain this preference in any final policy, the Service should justify its basis for this preference and allow the public to comment on this justification before finalizing the policy.

timely coordination, the Service should adopt review timeframes and deadlines for Service action in connection with the authorizing agency's NEPA analysis.

The Draft Policy inappropriately directs that the Service's final mitigation recommendations include a mitigation plan by either the Service or action proponents without any regard to feasibility. 81 Fed. Reg. at 12,393. The Draft Policy should recognize that the Service may lack the resources to prepare a mitigation plan and may lack the authority to require such a plan of a project proponent. For example, the Service cannot require proponents to prepare a mitigation plan when it consults on an action (such as a permit under section 404 of the Clean Water Act or under NEPA). *See* section II.D, *supra*. Furthermore, the Service's regulations do not allow it to require a proponent to submit a mitigation plan with the initiation package the Service will consider under section 7 of the ESA. *See* 50 C.F.R. § 402.14(c). Without resources to prepare its own mitigation plans or the authority to require project proponents to prepare such plans, the Service may not require preparation of a mitigation plan.

4. Section 6: Definitions

Conservation Objective – Although the Draft Policy defines what constitutes a conservation objective, *see* 81 Fed. Reg. at 12,394, the Draft Policy does not identify what entity establishes conservation objectives. Without an explanation of how conservation objectives are identified and established, the Draft Policy will be difficult and confusing to implement. Moreover, all conservation objectives should be subject to public notice and comment.

Importance – The Draft Policy's definition of "importance" is inconsistent with critical habitat:

The relative significance of the affected habitat, compared to other examples of a similar habitat type in the landscape context, to achieving conservation objectives for the evaluation species. 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 (*e.g.*, sustain core habitat areas, linkages, ecological functions). Areas containing habitats of high importance are generally, but not always, identified in conservation plans addressing resources under Service authorities (*e.g.*, in recovery plans) or when appropriate, under authorities of partnering entities (*e.g.*, in State wildlife action plans, Landscape Conservation Cooperative conservation "blueprints," etc.).

81 Fed. Reg. at 12,394. If the Service intends to classify as "important" habitat of a listed species that has not been designated as critical habitat, the ESA does not authorize the Service to make such a classification or impose heightened management of such areas. *See* 16 U.S.C. § 1533(a)(3) (allowing the Service to designate "critical habitat" for listed species). The Service lacks the statutory and regulatory authority to identify habitats of "importance" for species listed as threatened or endangered under the ESA.

C. Appendix A: Authorities and Direction for Service Mitigation Recommendations

1. The Bald and Golden Eagle Protection Act (16 U.S.C. § 668–668d)

The Service errs with its statement in the Draft Policy that “the statute and implementing regulations allow [it] to require habitat preservation and/or enhancement as compensatory mitigation for eagle take.” 81 Fed. Reg. at 12,395. Because Congress has not exercised jurisdiction over the habitats of eagles, the Service lacks authority to require mitigation for impacts to eagle habitats. *See Kleppe v. New Mexico*, 426 U.S. 529, 545 (1976); *see* 16 U.S.C. §§ 668, 703.

2. Clean Water Act (33 U.S.C. 1251–1388)

The Service mischaracterizes sections 404(m) and 404(q) of the Clean Water Act as authorizing it to “secure mitigation for impacts to aquatic resources nationwide.” 81 Fed. Reg. at 12,396. Neither section 404(m) nor section 404(q) authorizes the Service to secure mitigation for impacts resulting from the issuance of permits under Section 404. The authority to issue Section 404 permits rests entirely within the discretion of USACE and the Environmental Protection Agency (EPA). 33 U.S.C. § 1344(a) – (c); *see* Memorandum of Agreement Between the Department of the Interior and the Department of the Army, § I.1 (1992) (“The [USACE] is solely responsible for making final permit decisions pursuant to . . . Section 404(a)”) (MOA). The Service’s role is strictly limited to providing comments on permit applications. 33 U.S.C. § 1344(m). Section 404(m) does not provide the Service with any substantive authority to “secure mitigation.”

Similarly, section 404(q) merely requires the USACE to enter into agreements with the Department of the Interior and other federal agencies to minimize duplication, paperwork, and delays in the permitting process. 33 U.S.C. § 1344(q). To implement this requirement, the USACE entered into the MOA with the Department of the Interior. Among other things, the MOA implements procedures under which the Department of the Interior (through the Service) may provide substantive, project-related information within the Department’s area of expertise and authority on the impacts being evaluated by the USACE and “appropriate and practicable measures to mitigate adverse impacts.” MOA, §§ I.2, II.1–II.9. Although the MOA provides that the USACE will fully consider recommendations appearing in the Service’s comments on proposed 404 permits, *see id.*, § II.3, the final decision of whether to issue a permit and under what conditions rests with the USACE, *id.* § I.5. Further, the MOA expressly contemplates issuing permits over the Service’s objections or without measures the Service recommends. *Id.* § II.8. Even if the Service chooses to elevate a particular permit decision to higher officials as provided in the MOA, the final decision to affirm the USACE’s permit decision rests with the Assistant Secretary of the Army for Civil Works. *Id.* § IV.3(g)–(h). The Draft Policy fails to clearly acknowledge that the Service’s role is limited to commenting upon section 404 permit applications and providing recommendations to the USACE, and that the final decision-making authority rests with the USACE.

Furthermore, the Draft Policy offers no explanation of how its requirements will integrate with mitigation requirements under section 404 of the Clean Water Act, 33 U.S.C. § 1344. First, as explained in detail in section II.D above, the Draft Policy’s goal of “net conservation gain” is

fundamentally inconsistent with the USACE's mitigation regulations, which require "no net loss" of aquatic resources. The Service must reconcile its goal of "net conservation gain" with the requirements of the USACE regulations. Second, the Draft Policy does not explain how the Service will determine the amount of recommended compensatory mitigation under the Draft Policy and, particularly, whether and how the Service will take into account mitigation required by the USACE when recommending mitigation under the Draft Policy. The USACE regulations consider impacts to species and their habitats when assessing the amount of required compensatory mitigation. *See* 33 C.F.R. § 332.3(c)(1), (2) (explaining that the watershed approach to establishing compensatory mitigation requirements considers "the habitat requirements of important species" and "habitat loss or conversion trends"). Therefore, the compensatory mitigation required by the USACE offsets impacts to species and their habitats. The Draft Policy, however, suggests that recommended mitigation must be "additional," *see* 81 Fed. Reg. at 12,394, therefore raising the question of whether any mitigation recommended by the Service must be "additional" to mitigation required by the USACE. The Draft Policy's failure to adequately explain its relationship with the mitigation requirements under section 404 of the Clean Water Act will lead to confusion or disagreement between the agencies if the Service attempts to implement the Draft Policy.

The Service's failure to explain how the Draft Policy would integrate with the permitting process under section 404 of the Clean Water Act is highlighted by the fact that 50 nationwide permits are scheduled to expire in March of 2017.¹⁶ Confusion or disagreement about the Service's application of its mitigation policy when formulating recommendations on these permits may potentially delay the reissuance of these permits. If final rules reissuing the permits are not published before the permits' expiration, all activities under section 404 will require individual permits, which would overwhelm the USACE and significantly delay construction activities across the country. Without an explanation of how the Service anticipates its recommendations will integrate with the section 404 permitting process, implementation of the Draft Policy will lead to unnecessary delays of individual and nationwide permits.

3. Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*)

The Service must clarify how it will apply the mitigation goals articulated in the Draft Policy when evaluating incidental take permits under section 10(a)(1)(B) of the ESA and when consulting with federal agencies on proposed actions under section 7 of the ESA.

(a) *Section 10*

In the Draft Policy, the Service states that the mitigation policy applies to incidental take permits under section 10(a)(1)(B) of the ESA. 81 Fed. Reg. at 12,396. For the reasons explained in section II.A above, the mitigation goals of "net conservation gain" and "no net loss" articulated in the Draft Policy are inconsistent with the standards for issuing incidental take permits. The Service cannot apply the mitigation goals of "net conservation gain" and "no net loss" to applications for incidental take permits.

¹⁶ *See* 2012 *Nationwide Permit Information*, US Army Corps of Eng'rs: Nw. Division, <http://www.nwd.usace.army.mil/Missions/CivilWorks/RegulatoryProgram/Permits.aspx> (last visited April 16, 2016).

(b) Section 7

In the Draft Policy, the Service identifies several roles of mitigation measures in the section 7 consultation process that cannot be reconciled with statutory and regulatory authorities and procedures. *See* 81 Fed. Reg. at 12,396. First, the Service suggests that the adoption of mitigation measures may allow the Service to find that a proposed action is not likely to jeopardize a species or adversely modify designated critical habitat. *See* 81 Fed. Reg. at 12,396 (explaining that adoption of mitigation measure consistent with the Draft Policy “may ensure that actions are not likely to jeopardize species or adversely modify designated critical habitat”). As detailed in section II.B above, however, the Draft Policy’s goals of “net conservation gain” and “no net loss” are inconsistent with the ESA’s prohibition on federal actions that “jeopardize the continued existence” of listed species and result in the “destruction or adverse modification” of their critical habitat.

Second, in the Draft Policy, the Service asserts that it may consider mitigation measures adopted by proponents of federal actions when making “may affect, not likely to affect” determinations and when making determinations of jeopardy and adverse modification. 81 Fed. Reg. at 12,396. Specifically, the Service explains that “[a]ll forms of mitigation are potential conservation measures of a proposed Federal action in the context of section 7 consultation and are factored into Service analyses of effects of the action, including any voluntary mitigation measures proposed by a project proponent that are above and beyond those required by an action agency.” *Id.* The Service further explains that it must consider “any beneficial actions” taken prior to initiation of consultation when formulating a biological opinion, *id.* (citing 50 C.F.R. § 402.14(g)(8)), and for the first time defines “beneficial actions” as including “proposed conservation measures for the affected species within its range but outside of the area of adverse effects (*e.g.*, compensation).” *Id.*

These statements by the Service ignore that it may only consider mitigation actions that are wholly voluntary by the proponent as part of section 7 consultation. Because the mitigation goals of the Draft Policy are inconsistent with the section 7 standards, *see* section II.B above, the Service cannot require a proponent to implement mitigation that yields a “net conservation gain” or “no net loss.” Moreover, although the Service may consider voluntary mitigation adopted by a proponent, the Service cannot require such measures of proponents. In its handbook governing section 7 consultation, the Service expressly states that, when evaluating the potential for jeopardy or adverse modification, it “can evaluate only the Federal action proposed, not the action as the Service[] would like to see that action modified.” U.S. Fish & Wildlife Service and National Marine Fisheries Service, *Endangered Species Consultation Handbook* at 4-33 (1998) (“Joint Consultation Handbook”). The Draft Policy fails to recognize that the Service may only evaluate federal actions as they are proposed under the standards articulated in section 7 and its implementing regulations.

Furthermore, the Service’s position that it may consider mitigation proposed as a beneficial action in making its jeopardy determination is inconsistent is a new one. Earlier this year, the Service explained that “the question of whether beneficial actions can compensate for impacts to critical habitat is complicated and must be evaluated on a case-by-case basis.” Final Rule, *Definition of Destruction or Adverse Modification of Critical Habitat*, 81 Fed. Reg. 7,214, 7,222–23 (Feb. 11, 2016). This statement suggests that in some circumstances, mitigation

proposed as a beneficial action cannot avoid a jeopardy or adverse modification determination. In light of the Service's recent, contradictory statement, the Draft Policy creates confusion regarding how the Service will evaluate compensatory mitigation that a proponent proposes when reaching a jeopardy or adverse modification determination.

Third, the Service explains it may apply "all forms of mitigation" in formulating reasonable and prudent alternatives to an action that would otherwise result in jeopardy or adverse modification. 81 Fed. Reg. at 12,396. API and IPAA support the Service's willingness to consider mitigation measures when formulating reasonable and prudent alternatives to avoid jeopardy or adverse modification. Reasonable and prudent alternatives, however, are only developed upon a finding by the Service that jeopardy or adverse modification would result from a proposed action. 16 U.S.C. § 1536(b)(4)(A); 50 C.F.R. § 402.14(h). The standards for reasonable and prudent alternatives are alternatives necessary to avoid jeopardy or adverse modification, and not whether the alternatives yield "net conservation gain" or "no net loss." See 50 C.F.R. § 402.02; Joint Consultation Handbook at 4-43. Because reasonable and prudent alternatives must be "economically and technologically feasible," see 50 C.F.R. § 402.02, compensatory mitigation that renders a proposed action economically unfeasible does not constitute a reasonable and prudent alternative.

Finally, in the Draft Policy, the Service states that when it reaches a finding of no jeopardy and no adverse modification, it "may provide a statement specifying those reasonable and prudent measures that are necessary or appropriate to minimize the impacts of taking incidental to such actions on the affected listed species." 81 Fed. Reg. at 12,396. This statement implicitly recognizes that "reasonable and prudent measures" do not include mitigation measures. The language of the ESA and its implementing regulations expressly state that "reasonable and prudent" measures must minimize the impacts of a taking. See 16 U.S.C. § 1536(b)(4)(C)(ii); 50 C.F.R. § 402.02. Furthermore, in its Joint Consultation Handbook, the Service recognized that reasonable and prudent measures do not include mitigation measures, stating: "Section 7 requires minimization of the level of take. It is not appropriate to require mitigation." Joint Consultation Handbook at 4-53 (emphasis in original). Accordingly, the Service may not recommend compensatory mitigation as a reasonable and prudent measure.

4. Fish and Wildlife Conservation Act (16 U.S.C. 2901–2912)

The Service erroneously asserts that the Fish and Wildlife Conservation Act, 16 U.S.C. §§ 2901–2912), and specifically Federal Conservation of Migratory Nongame Birds, *id.* § 2912, "implicitly provides" for mitigation of impacts to migratory birds. This statement is not supported by the language of 16 U.S.C. § 2912. This section does not authorize the Service to engage in any management activities associated with migratory birds, particularly over private parties. Rather, this section simply directs the Service to "monitor and assess" population trends and species status of migratory nongame birds, to "identify" a variety of issues including "conservation actions to assure" that migratory nongame birds do not require listing under the ESA, and to report on such findings and activities to Congress. See 16 U.S.C. § 2912. Nothing in the statute provides the Service with additional management authority beyond the authority to manage migratory birds provided by existing statutory directives such as the MBTA. See *id.* Therefore, the Draft Policy incorrectly states that 16 U.S.C. § 2912 "implicitly provides" for mitigation of impacts to migratory birds.

5. Marine Mammal Protection Act of 1972, as amended (16 U.S.C. 1361–1423h)

As explained in section II.C above, the mitigation goals of “net conservation gain” and “no net loss” are inconsistent with the standards for issuing regulations and permits under the MMPA. The Service may not require mitigation that yields a “net conservation gain” or “no net loss” when authorizing incidental take under the MMPA. Furthermore, the Service must recognize it may not refuse to authorize incidental take when a proposal for incidental take authorization meets the statutory and regulatory criteria for authorized incidental take but does not include mitigation that yields a “net conservation gain” or “no net loss.”

6. Migratory Bird Treaty Act (16 U.S.C. 703–712)

The Service errs with its statement that it “has implied authority to permit incidental take of migratory birds” under the MBTA. 81 Fed. Reg. at 12,398. For the reasons detailed in API and IPAA’s comments on the Service’s Notice of Intent to Prepare a Programmatic Environmental Impact Statement, 80 Fed. Reg. 30,032 (May 26, 2015), a number of federal courts have interpreted the MBTA to only prohibit purposeful take of migratory birds. In support of this point, API and IPAA expressly incorporate their comments on the Notice of Intent to Prepare a Programmatic Environmental Impact Statement, Docket No. FWS-HQ-MB-2014-0067, Tracking No. 1jz-8k7r-mn9v (July 27, 2015). Because the MBTA has been interpreted in a number of jurisdictions as not prohibiting incidental take of migratory birds, the Service necessarily lacks express or implied authority to permit their incidental take in these jurisdictions. Accordingly, in these jurisdictions, the Service has no authority to require compensatory mitigation to offset impacts resulting from incidental take of migratory birds.

The Service provides an internally inconsistent explanation of the application of the Draft Policy to its enforcement of the MBTA. In the Draft Policy, the Service recognizes that it “cannot legally require or accept compensatory mitigation for unpermitted, and thus illegal, take of individuals,” but also states that “[i]n all situations, permitted or unpermitted, there is an expectation that take be avoided and minimized to the maximum extent practicable, and voluntary offsets can be employed to this end.” 81 Fed. Reg. at 12,398. The concept that “voluntary offsets” can be used to avoid and minimize take is inconsistent with the Service’s explanation of the mitigation hierarchy. Under this hierarchy, impacts are avoided and, if unavoidable, then minimized. *Id.* at 12,381. Compensation is then provided for remaining impacts by replacing or providing substitute resources. *Id.* The Service’s explanation of “voluntary offsets” under the MBTA, however, suggests that compensatory mitigation can be used as avoidance or minimization measures. *See id.* at 12,398. In any final policy, the Service must correct this statement to ensure consistency with its mitigation hierarchy regarding voluntary offsets under the MBTA.

Additionally, the Service lacks authority to require mitigation to compensate for impacts to the habitats of migratory birds. In the Draft Policy, the Service correctly observes that impacts to migratory bird habitats “are not regulated under MBTA.” 81 Fed. Reg. at 12,398. Nonetheless, the Service states that “action proponents are allowed to use the full mitigation hierarchy to manage impacts to their habitats, regardless of whether or not a permit for take of individuals is in place.” 81 Fed. Reg. at 12,398. This statement does not correctly reflect the

limits of the Service’s regulatory authority. Mitigation of impacts to migratory bird habitat is wholly voluntary by proponents. Furthermore, because the MBTA does not regulate migratory bird habitat, the Service may not condition the approval of a permit, under the MBTA or other statute, on a requirement that a proponent compensate for impacts to migratory bird habitat.

7. National Environmental Policy Act (42 U.S.C. 4321 *et seq.*)

The Service observes that NEPA’s implementing regulations “require that the Service be notified of all major Federal actions affecting fish and wildlife and [its] recommendations solicited.” 81 Fed. Reg. at 12,398. The Service then asserts that “[e]ngaging this process allows [it] to provide comments and recommendations for mitigation of fish and wildlife impacts.” *Id.* The Service, however, fails to recognize the limits of its role when it is providing recommendations on another agency’s NEPA analysis.

(a) *Unless It Is the Action Agency the Service Does Not Make Final Decisions under NEPA*

In the Draft Policy, the Service indicates it will recommend that other agencies incorporate the mitigation goals of the Draft Policy into their NEPA decision-making processes. *See* 81 Fed. Reg. at 12,393. Presumably the Service will make such recommendations through public comments or as a cooperating agency in other agencies’ NEPA actions. *See* 40 C.F.R. § 1501.6. Council on Environmental Quality (CEQ) regulations make clear, however, that agencies need not incorporate recommendations in public comments so long as they supply an adequate response in the record. 40 C.F.R. § 1503.4(a)(5). Similarly, when the Service participates in another agency’s NEPA process as a cooperating agency, the lead agency retains ultimate decision-making authority and is free to decline to implement the Service’s recommendations. *See, e.g., Nat’l Parks & Conservation Ass’n v. Bureau of Land Mgmt.*, 606 F.3d 1058, 1074 – 75 (9th Cir. 2009) (holding plaintiff lacked standing to pursue claims against the National Park Service in an action challenging Bureau of Land Management’s approval of a land exchange because “[e]ven if the Park Service were to rescind its approval of the landfill project, the BLM, as the lead agency, would be free to move forward.”). Although the Service may comment upon another agency’s NEPA document or participate as a cooperating agency in the NEPA process for another agency’s proposed action, the Service’s recommendations are not binding and action agencies retain the discretion to reject the Service’s recommendations.

(b) *Action Agencies Have the Discretion to Determine Which Alternatives to Consider in Detail*

The Draft Policy fails to acknowledge that action agencies are not bound by the Service’s recommendations to analyze alternatives that implement the mitigation goals of the Draft Policy. Action agencies have broad discretion to select alternatives so long as those alternatives are reasonable in light of the agency’s purpose and need for an action. *Theodore Roosevelt Conservation P’ship v. Salazar*, 661 F.3d 66, 73 (D.C. Cir. 2011). Accordingly, action agencies are free to reject from consideration alternatives that are inconsistent with their purpose and need. *Id.* at 74 – 75 (holding Bureau of Land Management is not required to consider a scaled-back development alternative that would not respond to oil and gas operators’ specific proposal). This principle also applies to recommendations made by cooperating agencies because lead

agencies retain ultimate responsibility for determining the content of an EIS. 40 C.F.R. § 1508.16; Forty Questions, 46 Fed. Reg. at 18,030 (Question 14b) (providing that “the ultimate responsibility for the content of an EIS” rests with the lead agency); *see also* Letter from James Connaughton, Chairman, Council on Env'tl. Quality, to Norman Y. Mineta, Sec'y of Transp. (May 12, 2003) (“The lead agency . . . has the authority for and responsibility to define the ‘purpose and need’ for purposes of NEPA analysis.”).¹⁷ When the Service comments on another agency’s NEPA analysis or participates as a cooperating agency, the action agency retains ultimate responsibility for determining which alternatives to analyze in detail and may reject any alternatives recommended by the Service if not consistent with the agency’s stated objectives.

D. Appendix B: Service Mitigation Policy and NEPA

In Appendix B, the Service outlines how it will integrate the Draft Policy into the NEPA decision-making process when the Service is the lead or co-lead for NEPA compliance. This discussion is inconsistent with the regulatory requirements of NEPA.

1. The Service May Not Advance Its Mitigation Goals through the NEPA Process.

Because NEPA is a procedural statute, the Service may not rely on the NEPA process to achieve its substantive mitigation goals set forth in the Draft Policy. In Appendix B, the Service states that all purpose and need statements, 40 C.F.R. § 1502.13, must identify “the need to ensure either a net gain or no-net-loss.” 81 Fed. Reg. at 12,401. Additionally, the Service directs that NEPA decision documents “should clearly identify: [m]easures to achieve outcomes of no net loss or net gain” *Id.* The Service’s direction that its NEPA analyses should incorporate the substantive goals of the Draft Policy, however, is inconsistent with NEPA’s procedural nature.

It is “well settled” that NEPA “does not mandate particular results, but simply prescribes the necessary process.” *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989); *see Theodore Roosevelt Conservation P’ship v. Salazar*, 661 F.3d 66, 68 – 69 (D.C. Cir. 2011); *Wyo. Farm Bureau Fed’n v. Babbitt*, 199 F.3d 1224, 1240 (10th Cir. 2000). NEPA mandates that agencies analyze the environmental consequences of proposed actions, and alternatives to the proposed actions, before making decisions. 40 C.F.R. § 1502.2(g); *Wildwest Inst. v. Bull*, 547 F.3d 1162, 1165 – 66 (9th Cir. 2008). “If the adverse environmental effects of the proposed action are adequately identified and evaluated, the agency is not constrained by NEPA from deciding that other values outweigh the environmental costs.” *Methow Valley*, 490 U.S. at 350. Accordingly, NEPA does not allow agencies to mandate or seek environmentally preferred outcomes.

By requiring that it incorporate mitigation goals into all purpose and need statements and decision documents, the Service turns the procedural steps mandated by NEPA into a vehicle for the Service to implement its own preferred substantive outcomes. For example, by incorporating “net conservation gain” and “no net loss” goals into every project’s purpose and need statement, the Service will limit its ability to approve actions that do not result in a net conservation gain or

¹⁷ Available at http://energy.gov/sites/prod/files/nepapub/nepa_documents/RedDont/G-CEQ-purpose_need.pdf.

no net loss. *Theodore Roosevelt Conservation P'ship*, 661 F.3d at 72 (explaining that the goals set forth in the purpose and need statement define the range of reasonable alternatives an agency must consider). Similarly, by mandating that every NEPA analysis the Service prepares incorporate mitigation requirements consistent with the Draft Policy, the Service will predetermine the substantive outcomes of every decision it makes.

NEPA requires that the Service follow its procedures and only come to a decision after full consideration of all reasonable alternatives, not just those that meet the Service's predetermined, preferred substantive outcomes. *Wildwest Inst.*, 547 F.3d at 1165 – 66. The Draft Policy, however, runs afoul of NEPA's deliberative process by directing the Service to categorically require a "net conservation gain" or "no net loss" in all circumstances. The Service may only recommend mitigation goals developed after full consideration of a project pursuant to the procedural requirements of NEPA.

2. The Service May Not Require that Every Purpose and Need Statement Incorporate the Draft Policy's Standards.

The Draft Policy inappropriately directs the Service to incorporate its mitigation goals of "net conservation gain" and "no net loss" into purpose and need statements for NEPA analyses prepared by the Service as lead or co-lead agency. 81 Fed. Reg. at 12,401. Similarly, the Draft Policy incorrectly directs the Service to incorporate conservation objectives into statements of purpose and need. *Id.*

To ensure a project applicant's proposal receives adequate consideration, federal courts and the Department of the Interior's NEPA regulations recognize that when a private party submits a proposal or application, agencies must consider the needs and goals of the project applicant. 43 C.F.R. § 46.420(a)(2); *Theodore Roosevelt Conservation P'Ship*, 661 F.3d at 72; *Biodiversity Conservation Alliance v. Bureau of Land Mgmt.*, 608 F.3d 709, 715 (10th Cir. 2010). The Service may not require that every purpose and need statement contain substantive mitigation goals or conservation objectives, particularly when these goals and objectives are inconsistent with a project proponent's needs and goals. As the Service is aware, the purpose and need statement in a NEPA document drives the substantive outcome of a project because it defines the range of reasonable alternatives an agency must consider. 43 C.F.R. § 46.420(b); *see Theodore Roosevelt Conservation P'ship v. Salazar*, 661 F.3d 66, 72 (D.C. Cir. 2011). Agencies cannot define their purpose and need so narrowly as to preclude reasonable alternatives. *E.g.*, *League of Wilderness Defenders-Blue Mountains Biodiversity Project v. U.S. Forest Serv.*, 689 F.3d 1060, 1069 (9th Cir. 2012). Moreover, agencies must define their purpose and need in light of statutory authority applicable to the proposed action. *See City of New York v. Dep't of Transp.*, 715 F.2d 732, 743 (2d Cir. 1983).

By requiring that all purpose and need statements contain a mitigation goal of "net conservation gain" or "no net loss" as well as conservation objectives, the Service will foreclose consideration of alternatives that meet a project applicant's needs but do not achieve the goals of the Draft Policy. The Service cannot uniformly adopt these goals in statements of purpose and need without regard to a proponent's own goals and objectives. *See Theodore Roosevelt Conservation P'Ship*, 661 F.3d at 72; *Citizens' Comm. to Save Our Canyons v. U.S. Forest Serv.*, 297 F.3d 1012, 1030 (10th Cir. 2002). Moreover, the Service cannot categorically define its

statements of purpose and need to conform to the Draft Policy to exclude reasonable alternatives. *See League of Wilderness Defenders-Blue Mountains Biodiversity Project*, 689 F.3d at 1069. Therefore, the Service may not require that all purpose and need statements contain a mitigation goal of “net conservation gain” or “no net loss” and conservation objectives.

3. NEPA Does Not Require that Agencies Mitigate Impacts of Proposed Actions.

The Service’s directions in the Draft Policy ignore that NEPA requires agencies to consider measures to mitigate impacts from proposed actions but does not require agencies to adopt such measures. Appendix B requires the Service both to consider and adopt mitigation measures consistent with the mitigation goals of “net conservation gain” and “no net loss.” *See* 81 Fed. Reg. at 12,401. NEPA, however, does not require agencies to formulate specific mitigation plans or require third parties to adopt or carry out particular mitigation programs. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 352 (1989); *Theodore Roosevelt Conservation P’ship v. Salazar*, 616 F.3d 497, 503 (D.C. Cir. 2010). Rather, NEPA only requires agencies to discuss and analyze possible mitigation measures. *Theodore Roosevelt Conservation P’ship*, 616 F.3d at 503 (citing 40 C.F.R. §§ 1508.25(b)(3), 1502.14(f), 1502.16(h), 1505.2(c)). Accordingly, NEPA does not require that the Service adopt mitigation measures in any final decision document.

IX. CONCLUSION

API and IPAA appreciate the Service’s consideration of these comments. API and IPAA request that the Service withdraw the entire Draft Policy, unless re-proposed with significant revisions making it consistent with the comments and concerns raised in this letter. If re-proposed, API and IPAA further request that a revised policy be proposed with a comprehensive package of Service policies that fully describe the larger mitigation strategy the Service is unveiling through various and discrete actions.

Sincerely,



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