October 17, 2016

Public Comments Processing, Attn: FWS-HQ-ES-2015-0165
Division of Policy, Performance, and Management Programs
U.S. Fish and Wildlife Service
MS: BPHC
5275 Leesburg Pike
Falls Church, VA 22041-3803

RE: Comments on the U.S. Fish and Wildlife Service's Draft Endangered Species Act Compensatory Mitigation Policy
(FWS-HQ-ES-2015-0165)
81 Fed. Reg. 61.032 (September 2, 2016)

Dear Sir/Madam:

The American Exploration and Production Council (AXPC), American Petroleum Institute (API), Independent Petroleum Association of America (IPAA), International Association of Geophysical Contractors (IAGC), and Western Energy Alliance ("The Alliance") (collectively "the Trades"), submit these comments on the U.S. Fish and Wildlife Service's (FWS or "the Service") Draft Endangered Species Act Compensatory Mitigation Policy ("Draft Compensatory Mitigation Policy" or "Draft Policy").[1] The Trades share the Service's interest in improving the efficacy and efficiency of the conservation programs implemented pursuant to the Endangered Species Act (ESA or "the Act"); however, we are concerned that the Draft Compensatory Mitigation Policy will not bring forth the clarity, predictability, or transparency that the Service anticipates. Indeed, we believe that the Draft Policy, if finalized as proposed, is too complex, would only deter participants from engaging in compensatory mitigation, and would make the Service's approach to mitigation more costly, burdensome, opaque, and unpredictable. The Trades' member companies are proud of the conservation benefits that have been realized through their

[1] 81 Fed. Reg. 61,033 (Sept. 2, 2016).

participation in compensatory mitigation, and strongly wish to see the Service's compensatory mitigation program structured in a way that maintains a focus on conservation and incentivizing participation. As such, we encourage FWS to allow stakeholder to use all the tools in the conservation toolbox and not use the Draft Policy to favor certain specific mitigation instruments.

As detailed throughout these comments, the adverse policy outcomes that would result from this Draft Policy are the unfortunate product of the Service's attempt to exercise authority beyond what Congress has conferred through the ESA or any other statute. The Draft Compensatory Mitigation Policy reaches exceptionally, but falls significantly short of its stated goals. Under the Draft Policy, compensatory mitigation will be required in contexts in which it has never before been used, at unprecedented scales, on impracticable deadlines, for species over which FWS has no jurisdiction, and to achieve goals that FWS is not authorized to require permittees, applicants, and conservation sponsors to achieve.

The Draft Policy's stated goals are undermined by the piecemeal approach through which FWS is attempting to entirely restructure its approach to conservation and mitigation. As discussed further in these and other comments submitted by the Trades, the discrete policies that the Service is promulgating cannot be viewed in isolation—they are artificially isolated components of a larger, more comprehensive, substantive policy shift. The Service's decision to partition a comprehensive policy into multiple separate policies purposely downplays the magnitude of the policy changes, impedes stakeholder engagement, makes it significantly more difficult for stakeholders to fully evaluate and provide meaningful comments on the benefits and the impacts, and leads to an indiscriminant sequencing where, for instance, the justification and support of one draft policy is supplied by one or more policies that also remain in draft form.

The result of this circular justification and statutory overreach is a suite of policies that are substantively unworkable and which will only serve to undermine the effectiveness of conservation programs implemented under the ESA. For instance, the Draft Policy affirmatively dissuades the use of permittee-responsible mitigation, which has traditionally been the most utilized and successful compensatory mitigation mechanism, in favor of conservation banks, which are not widely available, and landscape-scale mitigation requirements, which reduce the incentive to conduct mitigation through added complexity, costs, and delay.

As such, the Trades request that FWS withdraw the Draft Policy and all those similarly drafted pursuant to the November 3, 2015 Presidential Memorandum ("Presidential Memorandum").[2] If FWS wishes to continue with a comprehensive restructuring of the ESA's conservation program, it should proceed within the contours of its statutory authority and through a single rulemaking that complies with the Administrative Procedure Act (APA). Although these various policy revisions are characterized as clarifications and updates to existing policies, the expansive changes should be made through rulemaking, especially since agency staff will treat these policies as regulation.

[2] Mitigating Impacts on Natural Resources from Development and Encouraging Private Investment (80 Fed. Reg. 68,743).

The Trades herein incorporate their comments on the Service's Draft Mitigation Policy,[3] the Service's Proposed Revisions to Regulations for Candidate Conservation Agreements with Assurances (CCAA),[4] and the Service's draft Habitat Conservation Plan Handbook.[5] We further request that FWS treat the present comments as responding to the Draft Compensatory Mitigation Policy, Draft CCAA Revisions, and all other actions proposed by FWS or other agencies drafted pursuant to the Presidential Memorandum.

I. Summary of Comments

The Draft Compensatory Mitigation Policy will not bring forth the clarity, predictability, or transparency that the Service anticipates; instead, it would only make the Service's approach to mitigation more opaque and unpredictable, and undermine the effectiveness of conservation programs implemented under the ESA.

- The Draft Compensatory Mitigation Policy will not fulfill, and will actually undermine, the Service's stated objectives. By shoehorning into a single framework a conservation mechanism used in many distinct contexts, the Draft Policy is rendering a reasonably well-understood and nimble conservation tool unapproachable and indecipherably complex.

- FWS lacks authority to promulgate key elements of the Draft Compensatory Mitigation Policy. The Service does not have authority under the ESA or any other statute to require compensatory mitigation as outlined in the Draft Policy.

- The Draft Compensatory Mitigation Policy violates the ESA. The Service's decision to significantly expand the list of threatened and endangered species does not justify this expansive rewriting of the Service's mitigation framework. The Draft Compensatory Mitigation Policy plainly exceeds the Service's authority under the ESA, and is fundamentally incompatible with the ESA and the Service's regulations thereunder. Key elements of the Draft Policy violate multiple federal statutes and provisions of the ESA in addition to Sections 7 and 10.

- Key elements of the Draft Compensatory Mitigation Policy violate multiple statutes and regulations. The Draft Policy's "no net loss/net gain" requirements, additionality requirements and mitigation ratios, advance mitigation requirements, and definition of "at-risk species" are inconsistent with and violate a number of federal environmental and wildlife statutes and policies.

- The procedures by which FWS is promulgating the Compensatory Mitigation Policy are impermissible. The Draft Policy is impermissible because it cannot be credibly construed as a mere policy statement or simply guidance to Service personnel. It is a proposed rule that, if finalized, would fundamentally change the Service's compensatory mitigation requirements, create substantive new obligations, and expand the jurisdiction of FWS through interpretations of numerous statutes.

[3] 81 Fed. Reg. 12,380 (Mar. 8, 2016).
[4] 81 Fed. Reg. 26,769 (May 4, 2016).
[5] 81 Fed. Reg. 41,986 (June 28, 2016).

- FWS is attempting to entirely restructure its approach to conservation and mitigation through a piecemeal process. The discrete policies that the Service and other agencies are promulgating cannot be viewed in isolation—they are artificially isolated components of a larger, more comprehensive, policy shift. This process downplays the magnitude of the policy changes, impedes stakeholder engagement, and leads to circular justification and support for one draft policy through one or more other draft policies.

For these reasons, the Trades request that FWS withdraw the Draft Policy and all those similarly drafted pursuant to the Presidential Memorandum. If FWS continues with a comprehensive restructuring of the ESA's conservation program, it should proceed within the contours of its statutory authority and through a single rulemaking.

II. The Trades

Each of the Trades represents member companies engaged in the exploration and production of natural gas and crude oil. Collectively, these same member companies are among the foremost participants in federal, state, and private efforts to protect and conserve endangered and threatened species. The oil and gas industry has played a key role in voluntary conservation efforts to protect the dunes sagebrush lizard, lesser prairie-chicken, greater sage-grouse, Graham's and White River beardtongues, and many more species. These member companies have enrolled millions of acres in conservation plans and committed tens of millions of dollars to fund habitat conservation and restoration programs.

AXPC is a national trade association representing 31 of America's largest and most active independent natural gas and crude oil exploration and production companies. AXPC's members are "independent" in that their operations are limited to the exploration for and production of natural gas and crude oil. Moreover, its members operate autonomously, unlike their fully integrated counterparts, which operate in additional segments of the energy industry, such as refining and marketing. AXPC's members are leaders in developing and applying the innovative and advanced technologies necessary to explore for and produce natural gas and crude oil that allows our nation to add reasonably priced domestic energy reserves in environmentally responsible ways.

API is a national trade association representing over 640 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 member companies are leaders of a technology-driven industry that supplies most of America's energy, supports more than 9.8 million jobs and 8 percent of the U.S. economy, and since 2000, has invested nearly $2 trillion in U.S. capital projects to advance all forms of energy, including alternatives.

IPAA is the national association representing the thousands of independent crude oil and natural gas explorer/producers in the United States. It also operates in close cooperation with 44 unaffiliated independent national, state, and regional associations, which together represent thousands of royalty owners and the companies which 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.

IAGC is the international trade association representing companies that provide geophysical services, geophysical data acquisition, seismic data ownership and licensing, geophysical data processing and interpretation, and associated services and products to the oil and gas industry. IAGC is the leader in technical and operations expertise for the geophysical industry and represents more than 150 member companies from all segments of the geophysical industry. IAGC member companies play an integral role in the successful exploration and development of offshore hydrocarbon resources through the acquisition and processing of geophysical data.

The Alliance represents over 300 companies engaged in all aspects of environmentally responsible exploration and production of oil and natural gas in the West. Alliance members are independents, the majority of which are small businesses with an average of fifteen employees.

III. The Draft Compensatory Mitigation Policy Will Not Fulfill, And Will Actually Undermine, the Service's Stated Objectives

Among the Service's stated objectives in undertaking this monumental restructuring of its approach to mitigation is the improvement of the consistency and predictability of compensatory mitigation requirements.[6] The Trades understand the Service's interest in consistency. However, by shoehorning into a single framework a conservation mechanism used in many distinct contexts, the Draft Policy is rendering a reasonably well-understood and nimble conservation tool unapproachable and indecipherably complex. While the Trades share the Service's interest in improving predictability, we believe that the Draft Policy undermines, rather than furthers, the predictability of compensatory mitigation requirements, as set forth specifically below. Indeed, the structure of the Draft Policy strongly suggests that it is being promulgated to constrain public land access and to use the Service's permit and approval authority to leverage fees to fund the Service's conservation mandates.

a. Flaws in Consistency

Compensatory mitigation requirements may vary because the contexts in which compensatory mitigation are recommended or preferable differ. Whether compensatory mitigation should be required, and at what level, stage, or through what mechanism is highly dependent on the impacts to be mitigated and the species potentially affected. It is also dependent on the statutory authority under which the compensatory mitigation is required or prohibited from being required. While the contexts in which compensatory mitigation are used may differ, there is no basis for the Draft Policy's attempt to impose compensatory mitigation as a requirement. Given the impracticability of conducting mitigation outside of conservation banks under the framework proposed by the Draft Policy, requiring compensatory mitigation amounts to a mandatory user fee.

The Draft Compensatory Mitigation Policy and the Service's March 8th Draft Mitigation Policy[7] collectively cite more than a dozen statutes, policies, and departmental guidance under which

[6] 81 Fed. Reg. at 61,033.
[7] 81 Fed. Reg. 12,380.

compensatory mitigation plays a role in conservation or permitting, or where the role of compensatory mitigation is defined or constrained. There is simply not enough commonality between these laws and policies on which to base a single compensatory mitigation framework. Moreover, a single compensatory mitigation policy does not afford the proper flexibility to account for the differing contexts that arise under these laws and policies. The Service has written the Draft Policy in an effort to remain consistent with each of these differing authorities; however, the result is a policy that is confusing or riddled with caveats so pervasive and capacious that there is little chance that the Draft Policy could be implemented in a consistent manner.

What FWS is attempting to solve through the heavily circumscribed Draft Policy is not a problem that requires a solution. A variety of compensatory mitigation mechanisms allows flexibility for species, fact-specific application, and developer preference, which incentivizes conservation and ultimately makes it more effective.

That being said, the Trades do not believe the diverse and varied nature of compensatory mitigation applications entirely deprives FWS of the opportunity to improve consistency. A compensatory mitigation policy could, for instance, identify certain minimal and broadly applicable foundations to which diverse compensatory mitigation requirements could be tailored. That is not what FWS did here. Instead, the Draft Policy takes a top-down approach and attempts to establish the most expansive and aggressive compensatory mitigation requirements possible, complete with 30+ pages of caveats, conditions and carve-outs to account for the many different contexts where compensatory mitigation cannot be used to satisfy the Service's restrictive land-use goals.

If improvement is needed, FWS can bolster the consistency of its mitigation requirements by updating those requirements comprehensively, rather than relying on its current piecemeal approach. As noted above, the Draft Compensatory Mitigation Policy is only one of several interrelated mitigation policies in various stages of development at FWS. Each of these policies is dependent on one another and each policy attempts to further the same goals. Yet, FWS is not providing stakeholders the opportunity to comment on the Service's comprehensive approach. It is unclear why FWS has chosen to segregate these proposals and policies, but it is clearly not for the benefit of, or in furtherance of, consistency.

b. Lack of Predictability

The Trades support the Service's efforts to make compensatory mitigation requirements and recommendations more predictable, but we do not see how the Draft Policy accomplishes this goal. To begin with, and as discussed above, compensatory mitigation requirements will necessarily differ and therefore may remain somewhat unpredictable depending on the context in which they are used. While predictability should be maximized to the extent possible, FWS should not sacrifice flexibility and effectiveness to facilitate a predictable, but also overly formulaic, program. For example, the Service could further predictability by providing the following information:

- Distinct timelines for decisions and implementations of the Draft Policy, such as deadlines for approval of third-party mitigation instruments and the determination of debit and credit for projects;

- Clarification on how FWS intends to implement the Draft Policy along with the other related mitigation policies that are also currently in draft form;

- Clarification on how the Draft Policy should be implemented in states like Alaska, which contain a large amount of public lands and no conservation banks;

- Clarification on the circumstances where FWS would require, rather than recommend, compensatory mitigation;

- A description of how FWS would evaluate the adequacy of compensatory mitigation for a project that potentially impacts multiple species sharing the same habitat;

- Clarification on how FWS will assess compensatory mitigation measures for species with no recovery plans or established metrics for assessing threats or necessary conservation measures;

- A description of how FWS intends to review and approve third-party conservation instruments and how the Service intends to consider public comment on approval of these instruments;

- Clarification on how compensatory mitigation can be used to address concerns about species allegedly threatened by the impacts of climate change. The precise effects of climate change are poorly understood (particularly in the Arctic) and it is difficult, if not impossible, to predict the future response of species or to what regions species may migrate based on climatological impacts that have not yet occurred. Faced with such uncertainty, it is impossible to determine where compensatory mitigation will be required, for which species it will be required, or how a net conservation gain can be demonstrated;

- Clarification on the circumstances under which the Draft Policy could be applied retroactively. The Draft Policy states that it "does not apply retroactively to approved mitigation programs; however, *it does apply to amendments and modifications to existing conservation banks, in-lieu fee programs, and other third-party compensatory mitigation arrangements unless otherwise stated in the mitigation instrument*."[8] Given that the Draft Policy seems to preserve for FWS the discretion to require amendments and modifications to existing compensatory mitigation programs under the auspices of "adaptive management," the retroactive application of the Draft Policy may not be restricted at all. Retroactive application of the Draft Policy would violate the terms of existing conservation agreements and dissuade parties from participating in such programs. The Draft Policy must therefore clarify the narrow circumstances under which it can be applied retroactively;

- Clarification on how FWS will protect confidential business information under the Draft Policy;

[8] 81 Fed. Reg. at 61,036 (emphasis added).

- Clarification on how the Draft Policy's credit/debit methodology will be applied. The Draft Policy would place limitations on the transferability of credits, but does not explain how limits on the transferability of credits would apply in instances where the property or mineral right transfers before the credit is used;

- Clarification on the precise circumstances under which adaptive management would cause FWs to require changes to an existing compensatory mitigation project. Conservation is a dynamic process and recovery is seldom linear. Absent some reasonable guidelines as to what constitutes a change requiring adaptive management, FWS could impose an ever-changing process under which project developers would have no certainty or no ability to establish a budget. Absent some reasonable threshold for triggering a change in conservation management, this uncertainty would surely undermine participation in compensatory mitigation programs; and,

- Clarification on the financial assurance that the Draft Policy will require in order to assure long-term funding. Given the Draft Policy's insistence on the Service's ability to change mitigation requirements at any point in the future, project sponsors have no way of knowing the full scope of their financial obligation. The Trades believe that FWS should address this uncertainty by providing some limits (temporal or otherwise) on the scope of project sponsors' obligations. This uncertainty is not resolved by adding a similarly uncertain obligation to assure financial resources to comply with any change that FWS may once day require.

Additionally, FWS should recognize and address the ways that the Draft Policy makes compensatory mitigation *less predictable*, and therefore *less desirable* to potential sponsors, applicants, and permittees. Consider the Draft Policy's expansion of the compensatory mitigation framework to at-risk species, which are defined as "candidate species and other unlisted species that are declining and are at risk of becoming a candidate for listing under the [ESA]."[9] With this change alone, the Draft Policy expands the applicability of compensatory mitigation requirements from a large but readily identifiable group of threatened and endangered species to a seemingly unlimited universe of species. Notably, FWS does not even limit the definition of "at-risk" species to those at risk of becoming listed as threatened or endangered—it extends the definition to those species *at risk of even being considered* for a potential future listing. FWS should explain how this expansion from a known universe of species to an utterly unknowable universe of species furthers predictability.

Consider also the Draft Compensatory Mitigation Policy's "no net loss/net gain" requirements. While permittees and applicants have previously endured some level of unpredictability over the precise amount of compensatory mitigation that would be required for a proposed action, they could use their knowledge of the potential impacts to the species or habitat as a rough measure of how much compensatory mitigation would be required to offset the potential impacts, to the maximum extent practicable. The Draft Policy, on the other hand, removes the predictability that was inherent in this proportionality approach in favor of "no net loss/net gain" and "additionality" requirements, under which applicants/permittees would be required to compensate not only for

[9] 81 Fed. Reg. at 61,058.

their projects' impacts, but also for some unknown level of impacts posed by broad and unrelated threats like climate change or invasive species that may not be measurable at the project scale. FWS should explain how abandoning the cornerstone mitigation principles of proportionality and comparability provides applicants and permittees more predictability. If applicants and permittees are required to mitigate impacts extraneous to proposed projects, it will be difficult, if not impossible, to predict how much mitigation FWS will require or recommend.

Finally, the Draft Policy's advance mitigation requirements and utilization of performance criteria require compensatory mitigation to be in place before the start of the project. They also ostensibly require a measurable and positive biological response to the mitigation before the project can be initiated.[10] Using performance criteria in conjunction with advance mitigation is unpredictable—and predictability does not increase by requiring permittees and applicants to await positive biological responses that may not be observable or measurable, or which may be delayed or impeded by unrelated factors.

The Draft Policy's use of performance criteria also undermines predictability even when not used in conjunction with the proposed advance mitigation requirements. Under the Draft Policy, many types of mitigation projects will be required to remain in place in perpetuity and the performance criteria for these projects will be requested to remain in perpetuity as well.[11] "Should a mitigation project fail to meet its performance criteria and therefore fail to provide the expected conservation for the species, the responsible party must provide equivalent compensation through other means."[12] Accordingly, a party that undertakes a mitigation project for a species that declines in abundance decades in the future and for reasons unrelated to the mitigation project may then be required to undertake new mitigation efforts to reverse the downtrend. How is a project sponsor's mitigation obligation at all predictable when those obligations can change or increase years into the future for reasons outside of the sponsor's control?

In reality, the Draft Compensatory Mitigation Policy is not credibly intended to increase predictability. It is intended to increase the stringency of compensatory mitigation programs and to shift the government's obligation to manage species and habitat onto those individuals and industries that require access to public lands and other federal authorizations. These are policy goals and they are not tools in furtherance of clarity, consistency, or predictability. Indeed, aspects of this Draft Policy cannot even be construed as furthering conservation goals. Much of what the Draft Policy holds out as conservation tools are in reality, land use restrictions and user fees having nothing to do with compensatory mitigation. As discussed below, because the Draft Policy aims to substantively change the Service's compensatory mitigation requirements in ways that exceed FWS's statutory authority, it is impermissible and should be withdrawn.

IV. FWS Lacks Authority to Promulgate Key Elements of the Draft Compensatory Mitigation Policy

Fundamental to our system of divided government is that Congress crafts the laws that the executive branch, through federal agencies or otherwise, enforces. Stated differently, federal

[10] 81 Fed. Reg. at 61,038.
[11] 81 Fed. Reg. at 61,038.
[12] 81 Fed. Reg. at 61,038.

agencies have no authority to act or restrict actions outside of the authority specifically conveyed to them through a statute that has passed the U.S. House and Senate and been signed into law by the President. The Bureau of Land Management (BLM), for instance, has no independent authority to manage public lands. BLM's authority comes from the Federal Lands Policy & Management Act (FLPMA), the Mineral Leasing Act (MLA), and various other land management statutes. Similarly, the U.S. Environmental Protection Agency (EPA) can regulate air emissions and discharges to waterbodies, but only because Congress conveyed EPA that authority through the Clean Air Act and the Clean Water Act (among other statutes). Agencies can interpret the authority granted through their governing statutes and can promulgate regulations in furtherance of the statutes' objectives, but they cannot wield authority that has not been specifically conveyed to them by Congress or the U.S. Constitution. Nor can the President or other agencies convey to an agency authority which has not first been granted to the executive branch by Congress. To do so is to upset a system of checks and balances essential to our system of government.

With this framework in mind, FWS states that it developed the Draft Compensatory Mitigation Policy pursuant to its authority under the ESA.[13] While the ESA undoubtedly grants FWS authority to facilitate federal wildlife conservation activities, it does not convey to the Service the authority to undertake many of the key elements of the Draft Policy. FWS acknowledged this in stating that "[t]he Service's authority to require compensatory mitigation is limited, and our authority to require a 'net gain' in the status of listed or at-risk species has little or no application under the ESA."[14] Notwithstanding this acknowledgement, FWS nevertheless claimed authority to promulgate the Draft Policy embedded within the advisory role that FWS fulfills in compliance with the ESA and other statutes.[15] These jurisdictional conclusions are plainly wrong.

The Draft Policy's analysis, which consists solely of a list of statutes under which FWS is allowed to make conservation recommendations to other agencies, is not a credible recital of statutory authority. FWS provides no specific citations and no meaningful explanation of the type or scope of authority FWS purports to possess. At base, the Draft Policy's discussion of jurisdiction is not even a recital of the Service's statutory authority—it is a list of statutes that FWS believes do not *prohibit* the Draft Policy. The absence of an explicit prohibition, however, does not amount to a statutory authorization. Further, as discussed in Sections V and VI below, FWS is also incorrect that many of the cited statutes fail to prohibit the key elements of the Draft Policy.

In reality, the Draft Compensatory Mitigation Policy draws its authority, not from a statute, but from a unilateral directive—the Presidential Memorandum.[16] Indeed, FWS stated with no ambiguity that this "draft new policy is needed to implement the recent Executive Office and Department of Interior (DOI) mitigation policies . . ." and that it "adopts the mitigation principles" of the same.[17]

[13] 81 Fed. Reg. at 61,032.
[14] 81 Fed. Reg. at 61,032.
[15] 81 Fed. Reg. at 61,035-36.
[16] "Mitigating Impacts on Natural Resources from Development and Encouraging Related Private Investment," 80 Fed. Reg. 68,743 (Nov. 3, 2015).
[17] 81 Fed. Reg. at 61,032–33.

FWS identified further authority for its actions in a strategy report a FWS task force developed without notice and comment and submitted to FWS and DOI,[18] a departmental landscape-scale mitigation policy that was also developed without notice and comment,[19] and the Service's March 8th, 2016 draft revision of its Mitigation Policy.[20] While the Trades appreciated the opportunity to comment on the March 8th Draft Mitigation Policy, we are concerned that the Service does not intend to consider our comments or deviate substantially from its initial draft.

Despite being in draft form, and despite that FWS should still be considering comments and allowing stakeholder input to help shape the contours of a final mitigation policy, the March 8th Draft Mitigation Policy *already* provides the goals FWS "intends to achieve" with this Draft Compensatory Mitigation Policy.[21] Similarly, this Draft Compensatory Mitigation Policy *already* "adopts" the principles of the March 8th Draft Mitigation Policy and *already* relies on it as support for its hierarchal approach, landscape-scale approach, characterization of lands eligible for compensatory mitigation, identification of conservation objectives, and for several key definitions.[22] The Trades request clarification from the Service regarding how it will implement the March 8th Draft Mitigation Policy alongside the Draft Compensatory Mitigation Policy.

As such, FWS has not only established its own independent, non-statutory authority to promulgate the Draft Compensatory Mitigation Policy (and other related policies), it is doing so with only the appearance of stakeholder engagement. Therefore, as discussed further in these comments, the Draft Compensatory Mitigation Policy violates multiple statutes that circumscribe the Service's jurisdiction, as well as the APA's rulemaking procedures and standards for assessing the rationality of the Service's interpretation of its statutory authority. Therefore, the Draft Policy should be withdrawn.

V. The Draft Compensatory Mitigation Policy Violates the ESA

FWS erroneously identified the ESA as providing both the underlying rationale for and primary statutory authority for the Draft Compensatory Mitigation Policy.[23] The Service's pessimistic view of its ability to manage listed species or fulfill its conservation mandate does not justify this action or allow FWS to summon regulatory authority where none exists. The Draft Policy is fundamentally incompatible with the ESA and its implementing regulations.

a. The Service's Decisions to List More Species as Threatened or Endangered Do Not Justify the Draft Compensatory Mitigation Policy

FWS suggests that the changes contemplated in the Draft Compensatory Mitigation Policy are a necessary response to the steep increase in the number of listed species and the Service's assumption that the number of listed species will continue to outpace the FWS's ability to recover and delist those species.[24] According to FWS, the sheer number of listed species and critical

[18] *Clement et al*. 2014; 81 Fed. Reg. at 61,033.
[19] "Implementing Mitigation at the Landscape-Scale" (600 DM 6); 81 Fed. Reg. at 61,033.
[20] 81 Fed. Reg. 12,380.
[21] 81 Fed. Reg. at 61,033, 35.
[22] 81 Fed. Reg. at 61,033, 36, 42, 43, 57, 58, 59, 60, 61.
[23] 81 Fed. Reg. at 61,034.
[24] 81 Fed. Reg. at 61,034.

habitat designations and the prospect of more listings/designations justify landscape-scale mitigation, advance mitigation, and a need to force permittees and applicants to offset not only the impacts of their project but also potential adverse impacts from climate change, invasive species, and human population growth.[25] Oddly, the large and growing number of listed species also seemingly justifies expanding the Service's authority beyond the thousands of existing and proposed threatened and endangered species that FWS cannot presently manage to potentially thousands more "at-risk" species that are not on the brink of extinction or likely to become so in the foreseeable future. These justifications are improper for many reasons, but most profoundly because FWS is seemingly arguing for the inevitability that more species will be driven to the brink of extinction without any analysis, support, or reasoned explanation for its position. These assumptions are improper and expressly contravened by the ESA.

While FWS is correct that the number of listed species has substantially increased in recent years, that increase was driven by litigation and a long-standing misapplication of the ESA's definitions of endangered and threatened species. The litigation pressure is driven by a handful of groups that have exploited the ESA's citizen suit provisions to compel FWS to subjugate the goal of species conservation to a strategy under which groups petition to list as many species as possible regardless of conservation benefit—in fact, at the price of conservation.[26] According to a law review article published by an Attorney-Advisor at the DOI directly involved with the citizen suit issue:

> The Fish and Wildlife Service's (FWS) program to list species under the Endangered Species Act (ESA) has been mired in litigation and controversy for decades. Much of that litigation has addressed not substantive decisions, but FWS's inability to comply with the ESA's deadlines for taking action. With limited resources, effectively unlimited workload, and strict statutory deadlines, each management or litigation strategy that FWS has used to try to address this conundrum ultimately failed. As a result, court orders and settlement agreements swamped the listing program and FWS lost any ability to prioritize its efforts and get the most bang for the buck in protecting imperiled species. This race-to-the-courthouse environment decreased the program's efficiency and further limited the number of species actually listed and protected by the ESA.[27]

The means by which these groups compelled this shift from a conservation-driven agenda for the most imperiled species to a listing-volume agenda are numerous and beyond the scope of these comments. The result of this shift, however, is clear—more species, subspecies, and distinct population segments are being listed under the ESA, almost all of those listings are directed by

[25] 81 Fed. Reg. at 61,034.

[26] In a settlement executed with the Service's primary litigants (the "2011 Settlement"), FWS agreed to undertake hundreds of listing actions while at the same time refraining from finding, as the ESA allows, that listing some species may be warranted but precluded by higher priority species. *In re Endangered Species Act Section 4 Deadline Litigation*, No. 10-377 [EGS], MDL Docket No. 2165 (D.D.C. May 10, 2011).

[27] Benjamin Jesup, *Endless War or End This War? The History of Deadline Litigation Under Section 4 of the Endangered Species Act and the Multidistrict Litigation Settlements*; Vermont Journal of Environmental Law (Vol. 14, Dec. 2013).

interest groups' litigation, and this litigation pressure has caused the ESA's high standards for listing species to erode.

The ESA's high standard for listing is found within the ESA's definitions of endangered and threatened species. The ESA defines an "endangered" species as one presently in danger of extinction throughout all or a significant portion of its range.[28] A "threatened" species is one that is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.[29]

FWS interprets the phrase "in danger of extinction" as "currently on the brink of extinction," and courts have upheld this interpretation.[30] Accordingly, a "threatened species" is one which is likely to be placed on the brink of extinction within the foreseeable future throughout all or a significant portion of its range. In short, by definition, FWS is statutorily prohibited from listing a species as threatened absent some demonstration that future extinction throughout all or a significant portion of its range is both likely and foreseeable. And courts have universally held that the decision to list a species may not be based on speculation or an intent to err on the side of conservation:

> Under Section 4, the default position for all species is that they are not protected under the ESA. A species receives the protections of the ESA only when it is added to the list of threatened species after an affirmative determination that it is "likely to become endangered within the foreseeable future." Although an agency must still use the best available science to make that determination, *Conner* [*v. Burford*, 848 F.2d 1441 (9th Cir. 1988)] cannot be read to require an agency to "give the benefit of the doubt to the species" under Section 4 if the data is uncertain or inconclusive. Such a reading would require listing a species as threatened if there is any possibility of it becoming endangered in the foreseeable future. This would result in all or nearly all species being listed as threatened.[31]

Unfortunately, FWS has responded to the litigation pressure applied by a handful of groups by listing more species, subspecies, and population segments that are healthy, abundant, and even increasing in population and range based on speculative threats—some of which may occur (or not) decades in the future. But the ESA does not bestow protections based on a finding that species are being harmed, may be harmed in the future, or that certain threats are adversely impacting the

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[28] 16 U.S.C. § 1532(6).

[29] 16 U.S.C. § 1532(20).

[30] *In re Polar Bear Endangered Species Act Listing & 4(d) Litig.*, 794 F. Supp. 2d 65, 89 (D.D.C. 2011), aff'd *sub. nom. In re Polar Bear Endangered Species Act Listing & Section 4(d) Rule Litig. – MDL No. 1993*, 709 F.3d 1 (D.C. Cir. 2013).

[31] *Trout Unlimited v. Lohn*, 645 F. Supp. 2d 929, 947 (D. Or. 2007); *see also Center for Biological Diversity v. Lubchenco*, 758 F. Supp. 2d 945, 955 (N.D. Cal. 2010) (finding the "benefit of the doubt" concept does not apply in the listing context); *Oregon Natural Resources Council v. Daley*, 6 F. Supp. 2d 1139, 1152 (D. Or. 1998) (ESA requires a determination as to the likelihood—rather than the mere prospect—that a species will or will not become endangered in the foreseeable future); *Federation of Fly Fishers v. Daley*, 131 F. Supp. 2d 1158, 1165 (N.D. Cal. 2000) ("The ESA cannot be administered on the basis of speculation or surmise.").

species' abundance. Listing status is bestowed based on the likelihood and foreseeability that the species will cease to exist.

The Service's unwillingness to adhere to this high listing standard in the face of tremendous litigation pressure is causing the increase in ESA listings that the Draft Policy then cites as its primary justification. The complexity inherent in managing the conservation of, and mitigating impacts on over 2,200 listed species is further complicated because FWS is extremely reluctant to delist any species—even those that have met all of their recovery plan goals. Far from justifying a fundamental restructuring of its conservation and mitigation programs, the ever-increasing number of listed species signals a need to restructure the Service's listing program.

The Service's presumption that the number of listed species will only increase is an acknowledgement that FWS has failed to meet the ESA's mandate to conserve and recover species, and that the Service has no expectation of meeting that mandate in the future. Not only does this approach misapply the ESA's listing standards and violate the statute's conservation mandate, it actually impedes conservation and recovery.

As of October 17, 2016, a total of 2,271 plant and animal species were listed as endangered or threatened under the ESA,[32] and only 68 species have been removed.[33] Of those 68 species, roughly half (39) were delisted based on recovery.[34] In most cases, the recovery was widely attributed to factors other than the species' inclusion on the ESA's list of threatened and endangered species.[35] Even attributing each of 39 recovered species to the ESA and the regulatory protections thereunder, those delistings represent a recovery rate of 0.017%—hardly an effective mechanism for recovery.

There are a number of reasons why listing species for protection under the ESA has resulted in recovering species only 0.017% of the time. According to a 2007 study in *Ecological Economics*, listing a species under the ESA without allocating the species significant funding for recovery can actually be injurious to species on private land.[36] The study hypothesized that the ESA's "take" prohibitions under Section 9 can only be effective when matched with a credible threat of enforcement—which is very difficult on private land.[37] Listing can also incentivize some landowners to make their property less suitable as habitat for listed species. Different studies have examined other statutory prohibitions and procedures that come into force when a species is listed under the ESA. Several studies found that the designation of critical habitat confers no

[32] *Summary of Listed Species Listed Populations and Recovery Plans*, U.S. FISH & WILDLIFE SERVICE (Oct. 17, 2016 4:47 PM), http://ecos.fws.gov/tess_public/reports/box-score-report.
[33] *Delisting Report*, U.S. FISH & WILDLIFE SERVICE, https://ecos.fws.gov/tess_public/reports/delisting-report (last visited Oct. 17, 2016).
[34] *Id.*
[35] *See* Jonathan Adler, *The Leaky Ark*, AMERICAN ENTERPRISE INSTITUTE (Oct. 5, 2011), https://www.aei.org/publication/the-leaky-ark/.
[36] Paul J. Ferraro, Craig McIntosh, & Monica Ospina, *The Effectiveness of the U.S. Endangered Species Act: An Econometric Analysis Using Matching Methods*, 54 J. ENVTL. ECON. & MGMT. 245, 246 (2007) ("Our results indicate that success can be achieved when the ESA is combined with substantial species-specific spending, but listing in the absence of funding appears to have adverse consequences for species recovery. This implies that using scarce conservation funding in the contentious process of listing a species may be less effective than using this funding to promote recovery directly").
[37] Ferraro, *supra* note 36, at 256.

conservation benefit on listed species.[38] Notably, the Department of the Interior has reached the same conclusion.[39] Another study identified a modest conservation benefit from the ESA's Section 7 consultation requirements, but deemed it "the best among the weak predictors of recovery."[40]

Critically, in all instances where benefits from listing were identified, those benefits accrued only when the listing of the species was accompanied by funding to develop and implement recovery plans.[41] Unfortunately, the Service has been unable to meet its duty to develop and implement recovery plans for listed species. Of the 2,271 species listed on the ESA, roughly half (1,156) have active Recovery Plans.[42] FWS has also struggled to properly fund those recovery plans: out of 167 taxa with reported species-specific recovery costs, 18 received less than one-tenth of the funding called for in their plans.[43] In FY2014, FWS spent $162,011,371 on species conservation for 1,474 of the 1,523[44] listed species within U.S. jurisdiction.[45] For these 1,474 species, FWS spent, on average, less than $110,000 per species.[46] Not only is this funding level low, it reflects a significant downward trend in conservation spending. The chart below reflects average per-species conservation spending (in 2007 dollars) from 2007 to 2014—the latest year available.

[38] *See, e.g.*, Timothy D. Male & Michael J. Bean, *Measuring Progress in US Endangered Species Conservation*, 8 ECOLOGY LETTERS 986, 988 (2005) ("The designation of critical habitat was not correlated with improved status"); J. Alan Clark et al., *Improving U.S. Endangered Species Act Recovery Plans: Key Findings and Recommendations of the SCB Recovery Plan Project*, 16 CONSERVATION BIOLOGY 1510, 1515 (Dec. 2002) ("the status trends of species with designated critical habitat [are] not significantly different from those for species with no such designation").

[39] News Release, U.S. Department of the Interior, Endangered Species Act "Broken" – Flood of Litigation Over Critical Habitat Hinders Species Conservation (May 28, 2003), *available at* https://www.doi.gov/sites/doi.gov/files/archive/news/archive/03_News_Releases/030528a.htm ("Designating critical habitat for species already on the endangered species list provides little conservation benefit to species").

[40] *See* Katherine E. Gibbs and David J. Currie, *Protecting Endangered Species: Do the Main Legislative Tools Work?*, PLOS ONE (May 2, 2012), *available at* http://journals.plos.org/plosone/article?id=10.1371/journal.pone.0035730.

[41] Madeleine C. Bottrill et al., *Does Recovery Planning Improve the Status of Threatened Species?*, 144 BIOLOGICAL CONSERVATION 1595 (2011).

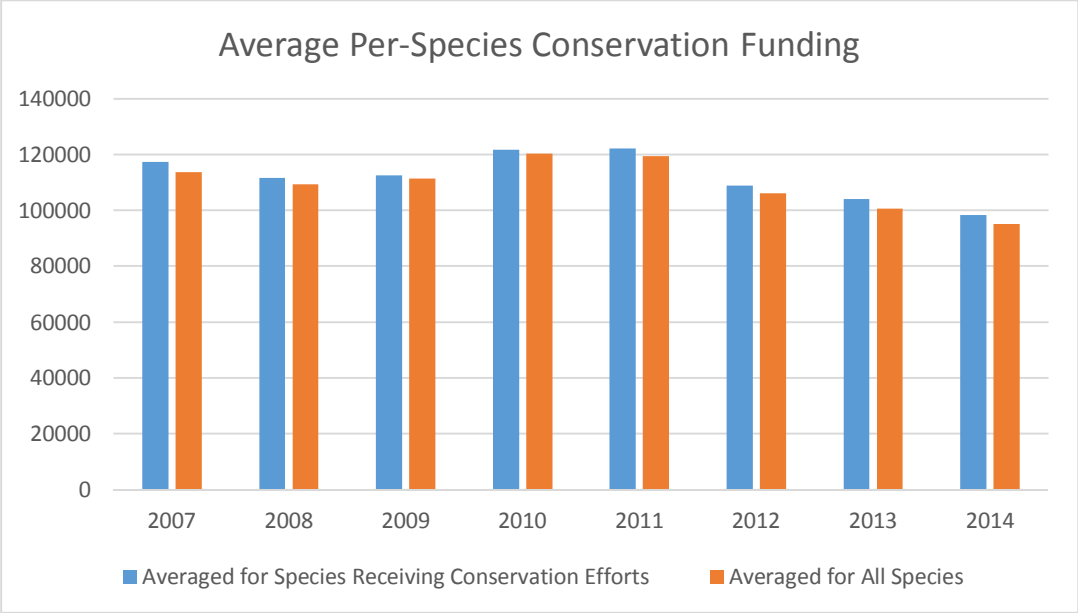
[42] *Summary of Listed Species Listed Populations and Recovery Plans*, *supra* note 32. FWS notes that 19 animal species are counted more than once because of their listing as Distinct Population Segments.

[43] *See* Daniel M. Evans et al., *Species Recovery In the United States: Increasing the Effectiveness of the Endangered Species Act*, 20 ISSUES IN ECOLOGY at 10 (Winter 2016).

[44] Forty-nine species received no funding for conservation efforts at all.

[45] FEDERAL AND STATE ENDANGERED AND THREATENED SPECIES EXPENDITURES: FISCAL YEAR 2014, U.S. FISH & WILDLIFE SERVICE at tbl. 2, *available at* https://www.fws.gov/Endangered/esa-library/pdf/20160302_final_FY14_ExpRpt.pdf [hereinafter ESA EXPENDITURES FY2014].

[46] ESA EXPENDITURES FY2014, *supra* note 45, at tbl. 2.



While somewhat flat appropriations contribute to the downward trend, it is more directly attributable to the number of species being listed. Importantly, these "average" funding levels cloak the true extent of FWS's inability to fund recovery. In 2014, 62% of the listed species in U.S. jurisdiction received $20,000 or less in conservation funding from FWS.[47] Twelve species received only $100 each in conservation funding.[48]

While the best available evidence strongly suggests that funding recovery programs provides the best opportunity for FWS to meet its conservation mandate and move more species toward recovery and delisting, litigation pressure has diverted resources away from recovery planning and implementation. Instead, FWS is increasingly listing species without funding their recovery—and listing without funding is the only action under the ESA shown to harm at-risk species. This is an important problem, and the solution to it rests on adherence to the ESA's high listing standard. The Service's problem with listing more species than it can manage is not solved by scaling up compensatory mitigation requirements far beyond what the ESA, or any other statute, allows. Nor is it acceptable or permissible for FWS to use its statutory overreach in the listing program as a justification for overreaching its authority through the imposition of mitigation requirements.

b. The ESA Does Not Authorize or Allow the Draft Compensatory Mitigation Policy

FWS identifies ESA Sections 7 and 10 as the sources of the Service's authority to require compensatory mitigation as structured and defined by the Draft Policy.[49] While both of these sections contain mechanisms whereby applicants/permittees can use compensatory mitigation to offset impacts of their projects on listed species, Sections 7 and 10 cannot be read to require, or even permit, the use of compensatory mitigation as described in the Draft Policy. In fact, a close read of these sections demonstrates that the Draft Compensatory Mitigation Policy plainly exceeds

[47] ESA EXPENDITURES FY2014, *supra* note 45, at tbl. 1.
[48] ESA EXPENDITURES FY2014, *supra* note 45, at tbl. 1.
[49] 81 Fed. Reg. at 61,039, 61,041.

the Service's authority under the ESA, and that the Draft Policy is fundamentally incompatible with the ESA and the Service's regulations thereunder.

Moreover, the Draft Policy is fundamentally at odds with the very purpose of the ESA. The Draft Policy is not designed to compensate for the potential adverse effects of a project; it requires fees and land use restrictions without any consideration of conservation or biological need, and it dissuades use of the permittee-responsible and short-term mitigation projects that have been most used and most successful. The Draft Policy cites the ESA for the sole purpose of misappropriating its powerful land-use and land-access restrictions, and in doing so, neglects to consider the fundamental conservation purpose for which the ESA required those statutory tools be used.

1. Section 7

There are three provisions within Section 7 of the ESA that FWS relies on to recommend/require compensatory mitigation as outlined in the Draft Policy:

- Section 7(a)(1)
- Section 7(a)(2)
- Section 7(a)(4)

None of these provisions convey FWS the authority suggested in the Draft Policy. In fact, these provisions make it clear that the Draft Compensatory Mitigation Policy exceeds the Service's authority under the ESA and undermines the ESA's conservation purpose.

Section 7(a)(1) – Section 7(a)(1) requires all federal agencies, "in consultation with and with the assistance of [FWS]," to utilize their authorities "for the conservation of endangered species and threatened species . . . ." The Draft Policy states that FWS will use this statutory authority for "[d]evelopment of landscape-scale conservation programs for listed and at-risk species that are designed to achieve a net gain in conservation for the species,"[50] but it is unclear how such an expansive restructuring of the Service's conservation and mitigation programs can be premised on such a narrow provision.

To begin with, while the Draft Policy cites to Section 7(a)(1) as validation for the Service's authority to require compensatory mitigation for "at-risk species," the applicability of Section 7(a)(1) is *expressly* limited to "endangered species and threatened species." "At-risk species" are "candidate species and other unlisted species . . . at risk of becoming a candidate for listing under the [ESA]."[51] FWS cannot credibly interpret a provision expressly limiting the Service's jurisdiction to *listed* species as conferring authority over any species that might someday be considered for listing.

Secondly, the mandate contained in Section 7(a)(1) rests with the agencies conferring with FWS. The Service's role is merely advisory. Further, while these agencies are required to utilize their statutory authorities to help conserve endangered and threatened species, contrary to the Service's implication, Section 7(a)(1) does not force agencies to subordinate the goals of other statutes they

[50] 81 Fed. Reg. at 61,039.
[51] 81 Fed. Reg. at 61,058.

are required to implement to the singular goal of conserving endangered and threatened species. Nor does Section 7(a)(1) provide federal agencies any additional authority to undertake or require conservation activities.[52] Section 7(a)(1) simply confers federal agencies the discretion to incorporate conservation objectives into decisions so long as the agencies utilize that discretion within the bounds of their existing statutory authority.[53]

For instance, the United States Court of Appeals for the Fifth Circuit invalidated EPA's disapproval of Louisiana's National Pollution Discharge Elimination System (NPDES) permitting program because it illegally established conditions to protect endangered or threatened species.[54] The court reasoned that the EPA must manage its NPDES program consistent with the criteria contained in the Clean Water Act (CWA), and that it could not add conditions pursuant to the ESA.[55] This same construct would apply for each of the federal agencies FWS envisions will mandate new compensatory mitigation programs under the Draft Policy. BLM, for instance, must continue to manage land "on the basis of multiple use and sustained yield" pursuant to FLPMA.[56] Section 7(a)(1) does not authorize BLM to abandon its multiple use mandate to manage lands for a single purpose under its jurisdiction through "landscape-scale conservation programs . . . designed to achieve net gain."

Nor does Section 7(a)(1) allow FWS to compel or encourage federal agencies to abandon some of the most well-used and successful mitigation mechanisms in favor of conservation banking, advance mitigation requirements, or mandatory perpetual commitments—each of which is aimed more toward constraint than conservation. Short-term mitigation measures, which the Draft Policy expressly disfavors,[57] have been successful because they can be readily implemented and are appropriate when used to mitigate short-term impacts. Applicants should not be required to purchase advance perpetual conservation credits to mitigate short-term or temporary impacts. The Draft Policy's requirements to do so have no basis in conservation and can be more appropriately characterized as user fees.

In sum, Section 7(a)(1) requires agencies to finds ways to use their statutory authorities to help conserve endangered and threatened species, but it does not provide a means by which FWS can commandeer the various agencies to protect both listed and unlisted species, impose use restrictions across expansive landscapes, and require agency decisions to result in "net conservation gain." Far from authorizing the expansive mitigation program outlined in the Draft Compensatory Mitigation Policy, Section 7(a)(1) closely circumscribes the Service's authority. FWS's suggestions otherwise are arbitrary, capricious, and in clear conflict with the ESA.

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[52] *Platte River Whooping Crane Critical Habitat Maint. Trust v. Fed. Energy Regulatory Comm'n*, 962 F.2d 27, 33 (D.C. Cir 1992); *Seattle Audubon Soc'y v. Lyons*, 871 F. Supp. 1291, 1314 (W.D. WA. 1994).

[53] *Strahan v. Linnon*, 967 F. Supp. 581, 596 (D. Mass. 1997) (the ESA "does not mandate particular actions be taken by federal agencies to implement section 7(a)(1)"); *Hawksbill Sea Turtle v. Federal Emergency Management Agency*, 11 F. Supp. 2d 529 (D. VI 1998) (quoting *Strahan*); *Coalition for Sustainable Res. v. Forest Service*, 45 F. Supp. 2d. 1303 (D. WY 2003) (Discretion "abundant").

[54] *American Forest and Paper Ass'n v. US EPA*, 137 F.3d 291 (5th Cir. 1998).

[55] *American Forest and Paper Ass'n*, 137 F.3d 291.

[56] 43 U.S.C. § 1701(a)(7).

[57] 81 Fed. Reg. at 61,048.

Section 7(a)(2) – Section 7(a)(2) requires that each federal agency "insure that any action authorized, funded, or carried out, by such agency . . . is not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of [critical] habitat."[58] In a Section 7(a)(2) consultation, FWS prepares a biological opinion to explain and document its determination of the potential impact of the federal action on the species or its habitat.

"No Jeopardy/No Adverse Modification" Finding – For actions that are not likely to jeopardize listed species or cause adverse modification of critical habitat, but that may nonetheless result in incidental take of listed species, the Service will include an incidental take statement (ITS) in the biological opinion that specifies: (1) the impact of the incidental taking on species; (2) "reasonable and prudent measures that the Secretary considers necessary or appropriate to minimize such impact;" and (3) measures, if any, necessary to comply with the Marine Mammal Protection Act. (MMPA)[59] The ITS also includes "terms and conditions" to implement the measures.[60]

Reasonable and prudent measures (RPM) are defined as "those actions the Director believes necessary or appropriate to minimize the impacts, i.e., amount or extent, of incidental take."[61] While FWS has some discretion to design the elements of an ITS, they must be commensurate with and proportional to the impacts associated with the action.[62] Additionally, "[r]easonable and prudent measures, along with the terms and conditions that implement them, cannot alter the basic design, location, scope, duration, or timing of the action and may involve only minor changes."[63]

The Draft Policy interprets these statutory and regulatory provisions—requiring *only the minimization* of potential impacts—as allowing FWS to require compensatory mitigation sufficient to *fully offset all* potential impacts of the proposed action *as well as the impacts of threats wholly unrelated to the proposed action.*[64] In doing so, FWS ignores the full purpose of Section 7(a)(2) within the ESA.

Section 7(a)(2) requires FWS to assist agencies in identifying and balancing the needs of listed species with the expectation that the non-jeopardizing action will be permitted to continue. FWS must strike this balance by setting the "price" of the ITS as the cost of undertaking reasonable efforts to reduce potential impacts to listed species. The Draft Policy undermines this balance by failing to recognize that, under Section 7(a)(2) and the Service's implementing regulations, a non-

[58] The ESA Section 7 regulations define "jeopardize the continued existence of" as "to engage in an action that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species." 50 C.F.R. § 402.02 (emphasis added). "Destruction or adverse modification" is defined as "a direct or indirect alteration that appreciably diminishes the value of critical habitat for the conservation of a listed species." 50 C.F.R. § 402.02 (emphasis added). Accordingly, the ESA allows for actions that may "reduce" the likelihood of survival and recovery of a listed species and that may "diminish" critical habitat—it is only when that reduction or diminishment becomes "appreciable" that it rises to the level of jeopardy or adverse modification of critical habitat.
[59] 16 U.S.C. § 1536(b)(4).
[60] 16 U.S.C. § 1536(b)(4).
[61] 50 C.F.R. § 402.02.
[62] 50 C.F.R. § 402.14.
[63] 50 C.F.R. § 402.14(i)(2).
[64] 81 Fed. Reg. at 61,040.

jeopardizing action may have some impact on listed species and critical habitat, and may result in incidental take of listed species. The "price" of the ITS issued under the Draft Policy becomes the *full cost* of all potential impacts from the proposed action, plus additional costs to protect the listed species from threats unrelated to the proposed action.

The Draft Compensatory Mitigation Policy's "no net loss/net gain," additionality, and mitigation ratio requirements fundamentally and impermissibly change the Service's role, and the applicants' burden, under Section 7(a)(2). Any federal project applicants and proponents seeking an ITS could and likely will be required to shoulder a portion of FWS's duty to protect and conserve endangered and threatened species. Under the Draft Policy, the burden assigned to those seeking an ITS under Section 7(a)(2) would no longer be designed to "minimize" impacts and need not be commensurate with or proportionate to the anticipated impact of the project. The Draft Policy would permit FWS broad discretion to require compensatory mitigation at levels completely unmoored to the potential impact of the proposed project and could require any party seeking an ITS to fund conservation efforts unrelated to their proposed action.

In the context of Section 7(a)(2), the Draft Compensatory Mitigation Policy and its requirements for "no net loss/net gain," additionality, landscape-scale mitigation, and advance mitigation essentially mandate conservation banking (that may or may not be available) and establish a clear—and impermissible—new fee structure for ITS:

- To increase the likelihood that FWS will determine a proposed action will not jeopardize a listed species, project applicants will need to have compensatory mitigation in place at least prior to the permitted activity, and even in advance of applying for the permit.[65]

- The compensatory mitigation will be required to extend well beyond the proposed action area because of the Draft Policy's requirements for landscape-scale mitigation, additionality and mitigation that exceeds what is necessary to minimize the potential impact of the proposed action.[66]

- Because the compensatory mitigation will need to occur in advance of the permit/impact, be part of a landscape-scale mitigation program, and provide disproportionately more conservation than necessary to offset the proposed action, purchasing credits from an existing conservation bank is likely to be the only option for most parties seeking an ITS under Section 7(a)(2).

The credits that project applicants will be required to purchase from conservation banks essentially become application fees, the proceeds of which fund conservation efforts unrelated to the proposed action and outside the proposed action area. These fees are not designed to "minimize" impacts, are not commensurate with or proportional to the impacts associated with the action,[67] and are not

[65] 81 Fed. Reg. at 61,041.
[66] 81 Fed. Reg. at 61,041.
[67] 50 C.F.R. § 402.14.

"minor changes"[68] to the scope and design of the proposed action.[69] This misuse of authority is even more conspicuous when applied to situations where permittees are required to provide perpetual protections for projects with, at most, short-term or ephemeral impacts. Because these provisions of the Draft Policy are fundamentally incompatible with, and impermissible under the ESA and the Service's implementing regulations, they must be withdrawn. FWS should be encouraging use of all tools in the conservation tool box, and not any particular mitigation mechanism.

"Jeopardy/Adverse Modification" Finding – When FWS issues a finding of jeopardy or adverse modification of critical habitat under Section 7(a)(2) for a listed species or under Section 7(a)(4), for proposed species/critical habitat the Service includes Reasonable and Prudent Alternatives (RPAs) that avoid jeopardizing the continued existence of the species or destroying/adversely modifying critical habitat.[70] As with Resource Management Plans (RPMs), RPAs cannot alter the basic design, location, scope, duration, or timing of the action and may involve only minor changes.[71] RPAs can also only be applied to avoid or offset the presumed impacts of the proposed action.[72] Agencies can only adopt or require RPAs to the extent the alternatives are consistent with the agencies' existing authorities and are shown to be economically and technologically feasible.[73]

While the Draft Policy correctly states that RPAs can include compensatory mitigation,[74] it errs in suggesting that FWS can mandate compensatory mitigation and further errs in suggesting that RPAs can be used to conscript applicants into mitigating impacts unrelated to the "intended purpose of the action." RPAs are not generalized conservation obligations that can be imposed on all parties' pursuing proposed actions that may jeopardize listed species or destroy/adversely modify critical habitat. RPAs are designed solely to offset the impacts anticipated from the proposed project, and may only be implemented if feasible and if consistent with the federal agency's legal authority. Under Sections 7(a)(2) and 7(a)(4), RPAs can only be required to offset impacts on species that are listed or proposed to be listed or on critical habitat that is designated or proposed to be designated. To the extent that the Draft Compensatory Mitigation Policy suggests otherwise, it is in violation of the ESA and the Service's implementing regulations.

2. Section 10

Section 10(a)(1)(B) of the ESA requires that incidental take permits (ITP) issued by FWS be based on a finding that the permit applicants will "minimize and mitigate" the impacts of the proposed taking "to the maximum extent practicable."[75] No part of this statute gives FWS authority to

[68] 50 C.F.R. § 402.14(i)(2).
[69] Indeed, the Draft Policy could have avoided this *de facto* fee structure by allowing compensatory options that need not be tied to land restrictions. Research and education are important components of conservation and could provide applicants alternatives to conservation banks, but FWS suggests research and education can only be used as compensation in "rare circumstances." 81 Fed. Reg. at 61,049.
[70] 81 Fed. Reg. at 61,040.
[71] 50 C.F.R. § 402.14(i)(2).
[72] 50 C.F.R. § 402.02.
[73] 50 C.F.R. § 402.02.
[74] 81 Fed. Reg. at 61,040.
[75] ESA § 10(a)(1)(B)(ii).

impose measures that will result in a "net gain" or "no net loss." Nor does this provision allow FWS to disfavor short-term mitigation as compensation for short-term impacts. Rather, the Service can only ensure that the applicant minimizes and mitigates the impact on listed species "to the maximum extent practicable."[76]

The absence of authority to require a "net conservation gain" or "additionality" 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 Habitat Conservation Plans (HCPs) yield a benefit for species by "promot[ing] the conservation of listed species or critical habitat."[77] Congress, however, elected to only require that HCPs "minimize and mitigate" the impacts of a taking "to the maximum extent practicable."[78] Congress's clear and documented choice in this respect confirms that it never intended to prohibit all impacts or allow FWS to require mitigation that produces a "net conservation gain." The Draft Policy ignores Congress's intent and the standards Congress incorporated into the ESA.

The Draft Policy not only departs from the Service's statutory mandates, it departs from the Service's existing interpretation of these statutory mandates. The Service's Habitat Conservation Planning Handbook, which has been in effect for nearly 20 years, 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."[79] 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:

- "Wherever feasible, the FWS and NMFS should *encourage* HCPs that result in a 'net benefit' to the species."[80]

- "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, <u>or,</u> *ideally, and with concurrence of the applicant,* would generate an overall measurable net benefit to the affected species."[81]

- "[A]pplicants should be *encouraged* to develop HCPs that produce a net positive effect for the species or contribute to recovery plan objectives."[82]

Therefore, the language of the ESA, its legislative history, and the Service's interpretations of the Act in its Habitat Conservation Planning 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's specific statutory directive when implementing the ESA or abandon without explanation its long-held interpretation of that directive. The Service

[76] ESA § 10(a)(1)(B)(ii).
[77] *See* S. 2309, 97th Cong. § 7(o)(1)(A) (as introduced, Mar. 30, 1982).
[78] *See* 16 U.S.C. § 1539(a)(2)(A)(ii).
[79] FWS and National Marine Fisheries, Habitat Conservation Planning Handbook 3-21 (1996).
[80] FWS and National Marine Fisheries, Habitat Conservation Planning Handbook at 3-21 (emphasis added).
[81] FWS and National Marine Fisheries, Habitat Conservation Planning Handbook at 3-7 (emphasis added).
[82] FWS and National Marine Fisheries, Habitat Conservation Planning Handbook at 3-20 (emphasis added).

may not apply the Draft Policy to incidental take permits under Section 10(a)(1)(B) and associated HCPs. The Draft Policy is impermissible under the Service's authorizing statute, and must be withdrawn.

VI. Key Elements of the Draft Compensatory Mitigation Policy Violate Multiple Statutes and Regulations

The preceding discussion explains how the Draft Policy is fundamentally incompatible with the precise subsections of the ESA under which FWS expects the Draft Policy to be utilized. Sections 7 and 10, however, are not the only statutory limitations on the Service's ability to recommend and require compensatory mitigation as outlined in the Draft Policy. Key elements of the Draft Compensatory Mitigation Policy violate multiple federal statutes and provisions of the ESA other than Sections 7 and 10.

a. No Net Loss/Net Gain

The Draft Policy's "no net loss/net gain" requirements are arguably the most legally suspect element of the revisions proposed by FWS. The Trades understand and share the Service's desire to seek out and incentivize superior levels of conservation benefit/gain. These interests, however, do not relieve FWS of the practical constraints imposed by numerous statutes and regulations.

1. *Marine Mammal Protection Act*

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) regulations setting forth "means of effecting the lease practicable adverse impact on such species or stock and its habitat," as well as other requirements.[83] FWS 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.[84] Thus, through the MMPA, Congress specifically allowed incidental takes of marine mammals, and allowed those incidental takes to result in adverse impacts so long as they were not "unmitigable."

The Service's regulations interpreting the MMPA do not deviate from Congress' clear intent. 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

[83] 16 U.S.C. § 1371(a)(5)(A).
[84] 50 C.F.R. § 18.27(f)(2).

recruitment or survival."[85] Thus, the Service has recognized that incidental take of marine mammals may have some, albeit negligible, net impact to species or stock. Although the Service's definition of "unmitigable adverse impact" recognizes that FWS may require mitigation,[86] "net conservation gain" and "no net loss" are not the operative standards.[87] In the preamble to the final rule defining "unmitigable adverse impact," FWS explained that this standard "does not require the elimination of adverse impacts, only mitigation sufficient to meet subsistence requirements."[88]

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.[89]

2. *Fish and Wildlife Coordination Act*

FWS cites the Fish and Wildlife Coordination Act (FWCA) as providing authority for the Draft Policy and presumably for the "no net loss/net gain" requirements proposed therein.[90] The FWCA, however, cannot be interpreted to require compensatory mitigation of this magnitude. The FWCA expressly requires that wildlife conservation shall receive "*equal consideration* . . . with other features of water-resource development programs . . ."[91] Courts have interpreted the FWCA as requiring agencies to consult with federal and state wildlife agencies prior to authorizing a project impacting water resources,[92] but have never interpreted "equal consideration" as requiring anything more than what the phrase's plain meaning suggests.

Under the FWCA, agencies have authorized, and courts have upheld, projects that adversely impact listed species and their habitat.[93] Because the FWCA allows for authorization of projects adversely impacting species and habitat and because the FWCA does not allow agencies (including FWS) to give unequal weight to conservation considerations, the Draft Policy's "no net loss/net gain" requirements are impermissible under the FWCA.

3. *Clean Water Act*

The Draft Policy's "no net loss/net gain" requirements are inconsistent with the U.S. Army Corps of Engineers (USACE) regulations implementing section 404 of the Clean Water Act.[94] These regulations require compensatory mitigation "to offset environmental losses resulting from

[85] 50 C.F.R. § 18.27(c).
[86] 50 C.F.R. § 18.27(c)
[87] *See* 16 U.S.C. § 1371(a)(5)(D)(i).
[88] 54 Fed. Reg. 40,338, 40,344 (Sept. 29, 1989).
[89] In the Draft Compensatory Mitigation Policy and the March 8, 2016 Draft Mitigation Policy, the Service suggests that it will recommend but not require mitigation to yield "net conservation gain" or "no net loss." As discussed in subsection-VI.b. below, the Service's assertions are undermined by the mandatory nature of the "additionality" and mitigation requirements.
[90] 81 Fed. Reg. at 61,035, 36.
[91] 16 U.S.C. § 661 (emphasis added).
[92] *Confederated Tribes and Bands v. FERC*, 746 F.2d 466 (9th Cir. 1984).
[93] *See Northwest Resource Information Center, Inc. v. Northwest Power & Conservation Council*, 730 F.3d 1008 (9th Cir. 2013).
[94] 33 U.S.C. § 1344. *See* 33 C.F.R. part 332 (2015).

unavoidable impacts to waters of the United States."[95] As such, 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."[96] When establishing compensatory mitigation requirements, the USACE uses a "watershed approach" that considers impacts to species and their habitats, among other factors.[97]

The Service's "net conservation gain" requirement 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.[98] Thus, the Draft Policy would require that proponents offer compensatory mitigation to offset impacts that are addressed by the USACE's required mitigation.

Additionally, the Draft Policy would increase the amount of compensatory mitigation otherwise required by the USACE's regulations to yield a "net conservation gain." This increase places the Draft Policy in direct conflict with the usage regulations. Therefore, the Service's "net conservation gain" goal is inconsistent with, and impermissible under, the USACE's regulations implementing the Clean Water Act.

4. *Various Multiple Use Statutes*

The essential premise of the Draft Policy, and particularly the "no net loss/net gain requirements" is that the Service's conservation mandate allows FWS to disturb the balancing of interests required under various multiple use statutes. This premise is incorrect and impermissible.

Although the ESA, Migratory Bird Treaty Act (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. For instance:

- The Federal Power Act allows the Federal Energy Regulatory Commission to decline to adopt recommendations of the Service;[99]

- The Outer Continental Shelf Lands Act affords the Service only a commenting role on applications for dredge and fill permits when Section 7 consultation is not required;[100] and,

- FLPMA declares national policy that the public lands be managed "on the basis of multiple use and sustained yield."[101]

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[95] 33 C.F.R. § 332.3(a)(1), (2).
[96] *Id.* § 332.3(f).
[97] *Id.* § 332.3(c)(1), (2).
[98] 33 U.S.C. § 332.3(c)(2).
[99] 16 U.S.C. § 803(j).
[100] 33 U.S.C. § 1344(m).
[101] 43 U.S.C. § 1701(a)(7).

The Draft Policy fails to recognize these statutory directives and does not balance conservation with principles of multiple use. In fact, aspects of the Draft Policy like the "no net loss/net gain," additionality, and mitigation ratio requirements may not serve conservation goals at all. Because these provisions impermissibly disrupt the balance mandated by various multiple use statutes, they must be withdrawn.

5. *Council on Environmental Quality (CEQ) Regulations*

The Draft Compensatory Mitigation Policy cites to the Council on Environmental Quality's (CEQ) regulations under the National Environmental Policy Act (NEPA) as providing authority for the policy and several of its key elements.[102] These regulations, however, demonstrate that the compensatory mitigation applicable to NEPA reviews cannot be interpreted to require "net gain/no net loss." Under CEQ's regulations, compensatory mitigation need only compensate "for the impact [of the action] by replacing or providing substitute resources or environments."[103] Compensatory mitigation under the CEQ regulations is further aimed at "repairing, rehabilitating, and restoring the affected environment."[104] In crafting these regulations, CEQ preserved the ordinary meaning of the word "compensatory" as a counterbalance to adverse impacts, and preserved Congress's intent in drafting NEPA to help reduce adverse impacts to the environment.

The Draft Policy's "net gain/no net loss" mandates require far more than compensation, restoration, or rehabilitation of the adverse impacts of a proposed project. These mandates require permittees and applicants to improve the status of species to levels dictated by FWS and without regard to the potential adverse impact of the project. The "net gain/no net loss" mandate cannot be interpreted as a goal of "compensatory mitigation" under NEPA, CEQ's regulations, or any statute referenced above because the "net gain/no net loss" mandate is not designed to compensate for losses and because it bears no relationship to any adverse impact caused by those that FWS would require to/recommend undertake compensatory mitigation. The Draft Policy's "net gain/no net loss" mandate is nothing more than a fee that FWS intends to impose on any entity with a project potentially impacting species. Because FWS has no authority to impose such a fee, and in fact is prohibited from imposing such a fee under many statutes, the Draft Policy's "net gain/no net loss" mandate should be withdrawn.[105]

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[102] 81 Fed. Reg. at 61,033, 61,035, 61,048, 61,058, 61, 059, 61,060.

[103] 40 C.F.R. § 1508.20(d).

[104] 40 C.F.R. § 1508.20(c).

[105] 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 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.*, 570 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 compensatory mitigation policy that can lead to compensable takings. *See* Executive Order No.

b. Additionality and Mitigation Ratios

The Draft Compensatory Mitigation Policy's overall "net gain/no net loss" mandate is implemented through strict "additionality" requirements and mitigation ratios that are weighted to achieve policy objectives quite distinct from conservation and compensation. These policy objectives aim to discontinue use of permittee-responsible mitigation in favor of broad landscape-scale conservation banking regardless of the relative unavailability of conservation banks (or complete unavailability in states like Alaska) and without consideration of whether added costs and complexity decrease the level of participation in compensatory mitigation. Because these are strict and inflexible requirements for compensatory mitigation and because they are not grounded on accepted notions of conservation or compensation, the additionality requirements and mitigation ratio directives are impermissible and must be withdrawn.

1. Additionality

The Draft Policy directs that "[c]ompensatory mitigation must provide benefits beyond what would otherwise have occurred through routine or required practices or actions or obligations required through legal authorities or contractual agreements."[106] The Draft Policy characterizes this requirement as an "additionality" requirement,[107] but it does so in a way that creates an entirely new and impermissible compensatory mitigation requirement.

Current FWS policies and the Draft Compensatory Mitigation Policy define "additionality" as "conservation benefits of a compensatory mitigation measure that improve upon the baseline conditions of the impacted resources and their values, services, and functions in a manner that is demonstrably new and would not have occurred without the compensatory mitigation measure."[108] Under existing FWS policy, the Service need only undertake a *consideration* of additionality in assessing landscape-scale approaches.[109] The Draft Policy, on the other hand, makes additionality a *mandatory component* of compensatory mitigation by requiring that "[c]ompensatory mitigation *must* provide benefit beyond what would otherwise have occurred . . ."[110]

In addition to converting a factor to be examined in compensatory mitigation decisions into a mandatory factor of all compensatory mitigation mechanisms, the Draft Policy shifts the baseline from which "additionality" is measured, and in doing so, severs the concept of additionality from its biological underpinnings. Under the Service's existing policies, "additionality" is the improvement upon the baseline conditions of the species or habitat—it is a measure of biological or ecological improvement. Under the Draft Policy, however, "additionality" is the improvement on baseline regulations or contractual obligations ("benefits beyond what those that would otherwise have occurred through routine or required practices or actions or obligations required through legal authorities or contractual agreements.")[111] The difference between these baselines

12630, 53 Fed. Reg. 8859 (Mar. 15, 1988) (directing that agencies "should review their actions carefully to prevent unnecessary takings").
[106] 81 Fed. Reg. at 61,037.
[107] 81 Fed. Reg. at 61,037.
[108] Departmental Manual 600 DM 6; 81 Fed. Reg. at 61,057.
[109] Departmental Manual 600 DM 6.
[110] 81 Fed. Reg. at 61,037 (emphasis added).
[111] 81 Fed. Reg. at 61,037.

is immensely important because it shows that the Draft Policy's baseline bears no relationship to conservation or compensation.

Consider a circumstance where applicants for temporary use permits are already required to not only remediate the impact area to pre-use conditions, but also reseed the area to propagate plant species beneficial to the target species and/or remove any invasive species encountered. Under the Service's existing policies, the requirements already imposed in this area would qualify as "additionality" because they improve upon the biological or ecological baseline. Under the Draft Policy, however, the existing requirements represent baseline conditions which *must* be improved upon through compensatory mitigation. Indeed, under the Draft Policy, *any* existing protection provided by statute, regulation, contract, or otherwise is *per se* insufficient. Under the Draft Policy, "additionality" means that compensatory mitigation must require something more than what may already fully compensate for the impact of a proposed action or improve the status of the species/habitat. As such, it ceases to be compensatory. And, because the Draft Policy would apply the "additionality" requirement as a formulaic "+1" on existing protections regardless of conservation need, it ceases to further any credible conservation goal, and it violates the ESA's requirement that determinations such as these be based on the best scientific and commercial information available. There is no scientific basis for an "additionality" requirement that must be applied without any consideration of the sufficiency of existing protections or needs of the species.

The Draft Policy's interpretation of additionality also violates FLPMA and other statutes with multiple use mandates because the interpretation does not allow for the balancing of multiple uses. The Draft Policy states that compensatory mitigation must always require more land use constraints and protections regardless of the sufficiency of the status quo and without consideration of the amount of mitigation required to offset the impacts of the proposed action.

Further, the Draft Policy's statement that additionality will be very difficult to demonstrate on public lands indicates that additionality requirements will be used for federal control over private lands.[112] If compensatory mitigation will be required for a proposed action on public land and the compensatory mitigation will require additionality that cannot be demonstrated on public land, then permittees'/applicants' only option is to demonstrate additionality with protections on private land. Regardless of whether these protections take place on the permittee's land or are obtained through the purchase of credits from a conservation bank, the result is the same—FWS is claiming authority to direct private actions on private land.

2. Mitigation Ratios

The Draft Policy's discussion of mitigation ratios also makes clear that its requirements for compensatory mitigation serve goals entirely distinct from conservation objectives. Section 6.6.4 of the Draft Policy states that "[m]itigation ratios can be used as a risk-management tool to address uncertainty, ensure durability, *or implement policy decisions to meet the net gain or no net loss goal.*"[113] As such, the Draft Policy characterizes its "net gain/no net loss" requirements as policy

[112] 81 Fed. Reg. at 61,038.
[113] 81 Fed. Reg. at 61,046.

objectives separate and distinct from the conservation objectives FWS elsewhere claims as justification for this action.[114]

Similarly, the Draft Policy identifies eight biological and conservation-based factors that should be considered in adjusting mitigation ratios.[115] Each of these eight factors attempts to assess the nature and extent of the impacts of the proposed action, and therefore the nature and extent of the mitigation necessary to compensate for impacts of the proposed action.[116] These eight *conservation-based* considerations, however, are followed by two factors that *bear no relationship* to compensatory mitigation and which can only be viewed as putting a thumb on the scale in favor of conservation banking and furthering constraints on access to public lands for reasons unrelated to conservation.[117]

The first policy factor states that:

> Mitigation ratios can be adjusted to achieve conservation goals. For example, mitigation ratios may be adjusted upward to create an incentive for avoidance of impacts in areas of *high conservation concern* (*e.g.*, zoned approach). Or they may be adjusted downward to provide an incentive for project applicants to use conservation banks or in-lieu fee programs that conserve habitat in *high priority conservation areas* rather than permittee-responsible mitigation. . .[118]

While the Draft Policy asserts that this factor is in furtherance of conservation goals, there is little to suggest it has anything to do with conservation. The phrases "high conservation concern" and "high priority conservation areas" are not defined anywhere within the Draft Policy. Absent definitions for these phrases, "high conservation concern" and "high priority conservation areas" could be interpreted by FWS or other agencies to allow the use of heavily weighted compensatory mitigation ratios to extract protections for, and restrict access to, scenic areas, areas of historical significance, or any area a federal agency desires to protect regardless of the presence of listed or proposed species or of designated or proposed critical habitat. It is indeed noteworthy that FWS declined to use the well-known statutory definition of "critical habitat" in favor of two phrases that would allow FWS and agencies broad authority to design mitigation ratios to effectuate land-use or development restrictions. It is not even clear how these particular designations satisfy the Service's conservation goals or how preservation of these areas compensates for impacts.

The second policy factor states that, "[m]itigation ratios may also be adjusted upward to move from a no net loss goal to a net gain goal."[119] In this instance, the Draft Policy makes no attempt to characterize the "net gain goal" as in furtherance of conservation or as a mechanism for compensating for impacts from a proposed action. Instead, the "net gain goal" and the mitigation ratios that would facilitate that goal are designed to control land use and land-use industries—they are not designed to compensate for the impacts of proposed actions. They are federal zoning

[114] Additionally, FWS suggests that it will increase mitigation ratios in response to uncertainty, when in fact adaptive management can and should be used when new peer-reviewed science becomes available.
[115] 81 Fed. Reg. at 61,046.
[116] 81 Fed. Reg. at 61,046.
[117] 81 Fed. Reg. at 61,046.
[118] 81 Fed. Reg. at 61,046 (emphasis added).
[119] 81 Fed. Reg. at 61,046.

requirements which cannot be read in harmony with FLPMA or other statutes with multiple use mandates. These ratios have no scientific basis and pursue no identifiable biological or compensatory goals, and are therefore impermissible under the ESA.

Indeed, because these policy factors (and the biological factors) all appear to address large-scale, programmatic mitigation delivery systems, they are too burdensome for individual projects that represent the lion's share of existing compensatory mitigation projects and the readily available and tangible benefits they provide. This Draft Policy therefore profoundly undermines conservation. Because these interrelated requirements for "no net loss/net gain," additionality, and policy-driven mitigation ratios are the foundation of the Draft Compensatory Mitigation Policy, FWS must withdraw the entire Draft Policy and redraft it consistent with the Service's existing and prescribed authority.

c. Advance Mitigation Requirements and Implementation

The Draft Compensatory Mitigation Policy instructs that compensatory mitigation should be implemented in advance of actions adversely impacting the species or critical habitat.[120] No statutory or regulatory authority, however, allows FWS to delay approval of a permit or action while mitigation is implemented. In attempting to confer to itself the authority to require advance mitigation, FWS is creating a framework that could indefinitely delay commencement of lawful development projects and dissuade use of permittee-responsible mitigation in favor of conservation banks that may or may not be available.

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). And, in doing so, it impermissibly upsets the balancing of multiple uses that is required by FLPMA and other statutes. Additionally, the Draft Policy seeks to require compensatory mitigation to be in place before the start of the project triggering the need to undertake compensatory mitigation, but it may also require a positive biological response to the mitigation to be measured before the project can be initiated.[121] Under Section 6.6.3 of the Draft Policy, FWS may prohibit the release of credits from a compensatory mitigation project until specific performance criteria are met.[122] Performance criteria are "observable or measurable administrative and ecological (physical, chemical, or biological) attributes that are used to determine if a compensatory mitigation project meets the agreed upon conservation objectives."[123]

Using performance criteria as triggers for the release of credits is immensely problematic because the ability to proceed with a proposed action is premised on factors outside of the control of the party seeking the permit. Even a well-executed mitigation project can fail to result in a positive ecological or biological response. Threatened and endangered species are rarely in peril because

[120] 81 Fed. Reg. at 61,038.
[121] 81 Fed. Reg. at 61,038.
[122] 81 Fed. Reg. at 61,045.
[123] 81 Fed. Reg. at 61,060.

of a single threat or a single type of threat, and actions that remove or mitigate a single threat can seldom be expected to result in a positive biological response, much less an immediate response. And, in many cases, positive responses are not observable or measurable. FWS lists numerous species for which habitat modification is a proxy for a threat because it is impossible or impracticable to survey the species or observe population trends.

Performance criteria should be based on what the ESA requires of compensatory mitigation projects and what compensatory mitigation is supposed to accomplish—if the mitigation project mitigates the amount of threat anticipated from the proposed action or is projected to do so, credits should be released.

Further, in most if not all circumstances, these advance mitigation requirements will amount to a de facto requirement to purchase credits from a conservation bank or in-lieu program. Even where conservation banks and in-lieu programs are not rigidly required or available, the Draft Policy suggests that FWS will punish those who cannot or will not agree to advance mitigation by increasing the mitigation ratio that FWS will require for the project.[124] Again, when the Draft Policy's advance mitigation requirements are viewed alongside the "net gain/no net loss" requirements, it becomes clear that Draft Compensatory Mitigation Policy is seeking to impose on those parties required to obtain federal approvals and/or permits a new fee that need not be commensurate or in proportion to the project for which the permit is sought. Under the Draft Policy, permit seekers must be prepared to purchase credits in excess of what is necessary to mitigate, minimize, or offset their project. These permit seekers must, for the first time, fund the Service's conservation obligations simply because they engage in an activity that requires a federal action and/or permit.

These fees are not permitted under the ESA and affirmatively prohibited under FLPMA and other land use statutes. Given the lack of authority for the surcharges that would be imposed by the Draft Policy, it must be withdrawn.

d. <u>At-Risk Species</u>

In the Draft Policy, the Service attempts to assert jurisdiction over nearly any species conceivable by proposing to expand the compensatory mitigation framework to at-risk species, which are defined as "candidate species and other unlisted species that are declining and are at risk of becoming a candidate for listing under the [ESA]."[125] As noted within this definition, the Draft Policy does not even limit the definition of "at-risk" species to those at risk of becoming listed as threatened or endangered—it extends the definition to those species *at risk of even being considered* for a potential future listing. Such a definition provides no limitation on the Service's ability to extend its jurisdiction over any species because there are no standards by which to assess the likelihood that FWS will consider a species for listing. In fact, the Service has unlimited authority to *consider* whether to list species. The ESA provides standards for making listing decisions and responding to petitions, but offers no constraint on the Service's ability to contemplate listing a species. Indeed, even a threadbare and unscientific petition to list a species requires FWS to *consider* listing.

[124] 81 Fed. Reg. at 61,038.
[125] 81 Fed. Reg. at 61,058.

Further, given the Service's heightened concern over broad threats such as climate change, population growth, and natural resource demands,[126] it is not unfathomable that FWS would declare all domestic species or all species within a region or habitat type as at risk of at least being considered for listing. Because FWS may always *consider* listing a species and because there is no standard by which to surmise the risk that FWS may consider a species for listing, the Draft Policy's assertion of jurisdiction over at-risk species amounts to an assertion of jurisdiction over any species the Service desires. This is clearly an impermissible outcome, and one which Congress directed FWS to avoid through numerous statutes.

Congress has only charged the Service with management of trust resources under the ESA, MBTA, the Eagle Act and MMPA.[127] 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 FWCA requires the Service to consult regarding unlisted fish, wildlife, and their habitats, the Service's consultation obligation only relates to water-related projects developed by federal agencies.[128] And, unlike the paradigm proposed by the Draft Policy, the FWCA requires conservation concerns to share an equal footing with development projects.

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."[129] Unless the federal government exercises one of its enumerated powers to manage wildlife species, the states retain authority to manage wildlife and their habitat.[130]

The Service's assertion of jurisdiction over at-risk species causes each aspect of the Draft Policy to extend well beyond the authority conferred by Congress to FWS and the various federal agencies. Absent authority over at-risk species, and in the face of affirmative prohibitions of asserting jurisdiction over at-risk species, the Draft Policy must be withdrawn.

e. Split Estates

The Draft Policy illogically and impermissibly discourages compensatory mitigation on lands where different parties own the surface and the mineral rights.[131] But, as FWS acknowledges, these split estates represent some of the most high-value conservation areas.[132] This conservation value

[126] 81 Fed. Reg. at 61,035.
[127] *See* 16 U.S.C. §§ 668-668c, 703–712, 1361–1423h, 1531–1539.
[128] 16 U.S.C. §§ 661-667e.
[129] *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)).
[130] *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).
[131] 81 Fed. Reg. at 61,043.
[132] 81 Fed. Reg. at 61,043.

has also been recognized by the Internal Revenue Service, which identifies split estates as qualifying for conservation easements and tax benefits. Rather than identifying areas to exclude from its compensatory mitigation program, FWS should be identifying ways to facilitate conservation. For instance, instead of essentially compelling the use of conservation banks, short-term and/or discrete mitigation projects can provide significant conservation benefits regardless of whether ownership and control of the estate is unified or split.

Discouraging the use of compensatory mitigation on split estates only furthers access constraints, increases the scarcity of available mitigation areas, and therefore increases the likely cost of credits sold from conservation banks operating in those areas. The Draft Policy should not artificially facilitate a shortage of mitigation areas in order to create the economic incentive to develop conservation banks to sell credits in those areas.

f. Short-Term Mitigation

Short-term compensatory mitigation is a valuable conservation tool because it can be implemented quickly and efficiently. And because short-term mitigation can be implemented quickly and efficiently, it has been a well-utilized conservation tool. Multiple individual short-term mitigation projects can also be stacked over time to create a comprehensive, long-term conservation benefit.

The Draft Policy's dismissal of short-term mitigation for compensation in favor of larger, more complex mitigation projects would remove this accessible and nimble approach and risk losing the participation of those project proponents that would only engage in compensatory mitigation if it could be implemented quickly and at a cost that is justified by the project for which the mitigation would be undertaken. As such, once again, the Draft Policy's inflexible focus on perpetual landscape-scale mitigation through conservation banking may undermine conservation by effectively eliminating an accessible and well-used mitigation option.

Further, the Draft Policy's dismissal of short-term compensatory mitigation underscores once again that the Draft Policy is not designed to obtain conservation at all—it is designed to facilitate large-scale public set-asides and access fees. Short-term mitigation should be allowed to compensate for projects with short-term impact. When FWS requires long-term or permanent protections for ephemeral disturbances, it ceases to be requiring compensation for a project's potential impacts. It is using the issuance of a permit to exact permanent compensatory mitigation or other longer-term conservation efforts from land users, amounting to charging a fee for obtaining a permit.

While FWS may have some flexibility in crafting its regulations for compensatory mitigation, it cannot wholly eliminate the concept of compensation from its mitigation requirements. Nor can the Service structure its compensatory mitigation program to dissuade the use of the most accessible, most utilized, and therefore most successful type of compensatory mitigation. As such, the Draft Policy's approach to short-term mitigation should be withdrawn and redrafted so that it facilitates greater conservation and reflects its compensatory purpose.

VII. The Procedures by which FWS is Promulgating the Compensatory Mitigation Policy are Impermissible

In addition to claiming jurisdiction in excess of, and inconsistent with, the ESA and numerous other statutes, the Draft Policy is impermissible because it cannot be credibly construed as a mere policy statement or simply guidance to Service personnel. It is a proposed rule that, if finalized, would fundamentally change the Service's compensatory mitigation requirements, create substantive new obligations, and expand the jurisdiction of FWS through interpretations of numerous statutes. Because the Draft Compensatory Mitigation Policy is, in reality, a substantive rule, FWS must promulgate it according to the procedures set forth in the APA and elsewhere. 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, and NEPA, which requires an analysis of the Draft Policy's impacts on the environment.

a. If Finalized, the Draft Policy Would be a Rule

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 revision and republication.

1. *The Draft Policy Imposes New Duties on the Service, Other Agencies, and Regulated Parties*

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."[133] The APA imposes notice and comment procedures on substantive rules but not interpretive rules.[134] 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.[135] In contrast, rules that merely explain ambiguous statutory and regulatory terms or restate existing duties are interpretive rules.[136]

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

[133] 5 U.S.C. § 551(4).
[134] *See* 5 U.S.C. § 553.
[135] *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).
[136] *Picciotto*, 875 F.2d at 347–48.

duties, or impose new obligations.[137] 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."[138] Additionally, a substantive rule "does not genuinely leave the agency free to exercise discretion."[139]

The Draft Policy is a substantive rule because it imposes new obligations on both the FWS and entities outside of the agency. These new obligations include, but are not limited to:

- a new requirement that FWS secure mitigation that achieves a "net conservation gain" or, at a minimum, "no net loss;"[140]

- a new mandate that all compensatory mitigation must include additionality;[141]

- a new requirement that requires applicants to demonstrate financial assurance to fund long-term management of the species, and any changes to management that may be required by FWS in the future;[142]

- a new requirement that FWS and other agencies require compensatory mitigation for proposed actions that may impact any species at risk of being considered for listing; and,[143]

- a new advance mitigation requirement that effectively requires applicants to purchase credits from conservation banks or endure punitive mitigation ratios for projects that are not completed in advance.[144]

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 numerous elements set forth in the Draft Policy constitute substantive rules under the APA.

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[137] *Coal. for Common Sense in Gov't Procurement*, 464 F.3d at 1317; *Picciotto*, 875 F.2d at 347–48.
[138] *Catholic Health Initiatives v. Sebelius*, 617 F.3d 490, 495 (D.C. Cir. 2010) (quoting *Hoctor v. U.S. Dep't of Agric.*, 82 F.3d 165, 170 (7th Cir. 1996)) (internal quotations omitted).
[139] *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).
[140] 81 Fed. Reg. at 61,033, 61,035, 61,036, 61,039, 61,040, 61,041, 61,046.
[141] 81 Fed. Reg. at 61,037.
[142] 81 Fed. Reg. at 61,038.
[143] 81 Fed. Reg. at 61,058.
[144] 81 Fed. Reg. at 61,038.

2. *The Draft Policy Contains Numerous Instances of Legislative Line-Drawing*

Legislative line-drawing is a conspicuous hallmark of a substantive rule, and numerous aspects of the Draft Policy reflect "an arbitrary choice among methods of implementation."[145] A non-exclusive list of examples of legislative line-drawing in the Draft Policy include:

- The "no net loss/net gain" requirement – FWS could have adopted a variety of other standards—such as "mitigate to the maximum extent practicable" or "mitigate to the maximum extent technologically and economically feasible." 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.

- The application of the Draft Policy to "at-risk" species – FWS could have limited (and was in fact required to limit) the scope to proposed and existing threatened and endangered species. In choosing to extend the reach of the policy to "at-risk" species—defined as such for the first time in the various draft policies—FWS engaged in legislative line-drawing.

b. FWS Has Not Complied with the APA's Rulemaking Requirements

The Draft Policy, if finalized, would constitute a rule. As such, FWS is obligated to promulgate it in accordance with the APA. Under the APA, agencies must publish notice of proposed rules and "include a reference to the legal authority under which the rule is proposed."[146] The APA further 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."[147]

The Service's generalized references to statutory authority are inadequate to satisfy this requirement. As explained above, the primary authorities cited by the Draft Policy are other administrative policies and actions—not statutes. While some statutes are identified in the Draft Policy, FWS does not cite to any provisions within these statutes that confer the authority the Draft Policy claims. The only exception to the Draft Policy's lack of citation is the Service's assertion that it will implement the Draft Policy through Sections 7 and 10 of the ESA—and, as discussed above, FWS profoundly misapprehends its authority under these sections. Accordingly, the Service cannot finalize the Draft Policy without republishing it with specific citations to the relevant legal authority.

Further, FWS has not provided the public with a meaningful opportunity to comment on the Draft Policy.[148] In order to provide a meaningful opportunity to comment on an agency action, the agency must "provide sufficient factual detail and rationale for the rule to permit interested parties

[145] *See Catholic Health Initiatives v. Sebelius*, 617 F.3d 490, 495 (D.C. Cir. 2010) (quoting *Hoctor v. U.S. Dep't of Agric.*, 82 F.3d 165, 170 (7th Cir. 1996)).
[146] 5 U.S.C. § 553(c).
[147] *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)).
[148] *See* 5 U.S.C. § 553; *Honeywell Int'l, Inc. v. Envtl. Prot. Agency*, 372 F.3d 441, 445 (D.C. Cir. 2004).

to comment meaningfully."[149] The Draft Policy, however, does not provide factual details or explanations of its rationales sufficient to permit meaningful comment.

Stakeholders simply have no way to meaningfully comment on whether FWS has interpreted its authority consistent with statutory standards because the Draft Policy does not cite to any statutory standards. Nor does FWS impose any standards on itself. The Service's attempts to evade more than a dozen statutes, policies, and departmental guidance (existing and proposed) render the Draft Policy nearly indecipherable. The Draft Policy does not clearly communicate to the public the circumstances in which it will be applied, fundamental aspects of the Draft Policy are premised on goals and frameworks laid out on other draft policies currently under review and subject to revision, and key terms are not defined or defined ambiguously. Indeed, the Draft Policy is so lacking in detail and specificity that it is, at times, indecipherable. As such, it does not provide factual detail and rationale sufficient to allow interested parties to comment.

Additionally, the public cannot meaningfully comment on the Draft Policy because it is but one part of a larger, more comprehensive restructuring of the Service's mitigation program. The Draft Policy is intertwined with, and attempts to derive authority from the March 8th Draft Mitigation Policy, proposed regulations governing Candidate Conservation Agreements with Assurances (CCAAs), and its CCAA Policy.[150] Additionally, the Service is in the process of finalizing the Habitat Conservation Planning Handbook and finalizing its draft policy on pre-listing conservation actions.[151]

These forthcoming policies and regulations are intertwined and all further an administration-wide goal of restricting development and constraining access to public land. There is no credible rationale for separating these regulatory efforts and forcing interested parties to surmise the total impact of the restructuring by cross-referencing several different dockets. 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.[152] In fact, the artificial segregation of these intertwined policies appears designed to cloak the full impact of the overall strategy and stymie stakeholder engagement. Accordingly, should FWS wish to continue with a comprehensive restructuring of its mitigation program, it should proceed within the contours of its statutory authority and through a single rulemaking that complies with the APA.

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[149] *Honeywell*, 372 F.3d at 445 (quoting *Fla. Power & Light Co. v. United States*, 846 F.2d 765, 771 (D.C. Cir. 1988)).
[150] *See* 81 Fed. Reg. 26,817 (May 4, 2016); 81 Fed. Reg. 26,769 (May 4, 2016). The disconnect that is created by segregating a single overarching policy into several individual actions is clear when evaluating CCAAs. Elsewhere, FWS encourages use of CCAAs, while in this Draft Policy undermines their use by suggesting that CCAAs can be converted to credit systems. *See* 81 Fed. Reg. at 61,041.
[151] *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).
[152] *See Prometheus Radio Project v. Fed. Commc'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).

c. FWS Must Fully Comply with NEPA

The Trades agree with the Service's decision to analyze the impacts of the Draft Policy in a NEPA document.[153] 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.[154] FWS itself identifies the Draft Policy as not purely administrative and not subject to any categorical exclusion.[155] And, there is no question that the Draft Policy is a major federal action that significantly affects the human environment. As the Trades have explained throughout these comments, the Draft Policy fundamentally restructures the role of compensatory mitigation in federal decision-making, permitting, and access decisions. If the Draft Policy is finalized, compensatory mitigation will be required in contexts in which it has never before been used, at unprecedented scales, and on impracticable deadlines. It will be used for species over which FWS has no jurisdiction, and to achieve goals that FWS is not authorized to require permittees, applicants, and conservation sponsors to achieve.

The significance of the impact of the Draft Policy is plainly evident based on an examination of the Draft Policy alone, but again, the Draft Policy cannot be viewed in isolation. As significant as the Draft Policy may be, it is merely one part of a much more far-reaching rewrite of the federal government's framework for using compensatory mitigation to constrain access to public lands. As such, FWS must conduct a single NEPA review for all of the various draft and recently finalized policies, guidance, and regulations related to the Service's restructuring of its mitigation policies. These efforts are inextricably intertwined and explicitly acknowledged as such within the Draft Policy. NEPA's requirement that analyses assess the cumulative impacts of related actions prohibits segregation of the forthcoming NEPA reviews and mandates a comprehensive examination of all of the Service's ongoing compensatory mitigation restructuring efforts.[156]

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."[157] 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."[158] 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."[159]

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

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[153] 81 Fed. Reg. at 61,062.
[154] *See* 40 C.F.R. § 1508.27.
[155] 81 Fed. Reg. at 61,062.
[156] 40 C.F.R. § 1508.7.
[157] 40 C.F.R. § 1501.4(b).
[158] 550 FW 1 § 2.5(B)(2).
[159] 40 C.F.R. § 1501.4(e)(2)(ii).

- 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.[160] For example, FWS 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,[161] or "sufficiently" mitigating to "allow subsistence needs to be met" as used in the MMPA.[162]

- Second, the NEPA document should analyze the impacts of the mitigation goal and habitat policy on: (1) domestic production of oil and natural gas resources; (2) 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 (3) socioeconomics, particularly in states where oil and natural gas development contributes significantly to the states' 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, the Trades request that the Service analyze how changes to its mitigation policies 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.

d. Improper Cost Estimates under Multiple Statutes

FWS was required to consider the costs of the Draft Policy under multiple statutes and executive orders. The Service, however, only estimated the anticipated costs of the Draft Policy under the Paperwork Reduction Act of 1995 (PRA),[163] and that analysis was plainly incomplete. The Service's PRA estimates were unrealistic and incomplete because FWS failed to attribute costs to several burdensome aspects of the Draft Policy, underestimated the burdens associated with items the Service did consider, and impermissibly segregated the presumed costs of the Draft Policy from the costs associated with the more comprehensive restructuring of the Service's mitigation framework.

The Service impermissibly erred in its attempt to estimate the costs solely attributable to the Draft Policy. As discussed throughout these comments, the Draft Compensatory Mitigation Policy cannot be viewed in isolation. The Draft Policy is one (albeit important) element of a larger, more comprehensive restructuring of the Service's mitigation framework. The burden and cost required to be estimated under the PRA is the sum total of the costs across all the various policies that will implement this more comprehensive restructuring.

[160] *See* 40 C.F.R. § 1502.14.
[161] 16 U.S.C. § 1533(a)(2)(B)(ii).
[162] 50 C.F.R. § 18.27(c).
[163] 81 Fed. Reg. 61,062.

In addition to improperly isolating the PRA estimate to those costs attributable solely to the Draft Policy, FWS significantly underestimated the hourly and cost burdens associated with the Draft Policy. While it is not possible to determine the burden and cost FWS attributed to specific data collection and reporting requirements, it is plainly evident that the estimates fail to consider the added costs inherent in the more complex and protracted process proposed in the Draft Policy.

The Draft Policy, for instance, would impose new requirements for landscape-scale mitigation, long-term or perpetual protections and monitoring, and complex requirements for assessing baseline conditions. Yet, the information collection costs FWS attributes to the Draft Policy are more closely akin to the costs we would expect from permittee-responsible mitigation and short-term mitigation projects—the precise type of mitigation projects the Draft Policy suggests should not be used. FWS cannot, one the one hand, insist on larger and more complex compensatory mitigation projects and, on the other hand, ignore the additional costs inherent in larger and more complex projects.

Similarly, the Draft Policy seeks to a very detailed and complex set of metrics for generating and redeeming conservation credits.[164] These metrics are further complicated because they are based on an increasingly intricate evaluation of baseline conditions.[165] The analysis that will be required under the Draft Policy's new system for establishing metrics and baseline conditions will come at a significant costs. And, because FWS will not be able to provide this analysis in many cases (*e.g.*, for at-risk species), the cost of additional analysis will fall on project applicants, and will detract from funds available for actual conservation.

In addition to estimating costs under the PRA, the Service is also required to estimate the costs and benefits of its significant regulatory actions under Executive Order 12,866 ("EO 12866")[166] and the Regulatory Flexibility Act (RFA).[167] EO 12,866 requires that agencies conduct cost/benefit analyses for "significant regulatory actions" having an annual effect on the economy of $100 million or more, and requires those same actions to be reviewed by the Office of Management and Budget (OMB).[168] The RFA requires agencies to conduct a regulatory flexibility analysis for proposed actions that will have a "significant economic impact on a substantial number of small entities."[169]

FWS did not conduct either of these required analyses. As discussed throughout these comments, there is no doubt that the Draft Policy, in finalized, would impact a substantial number of small entities. Under the Draft Policy, compensatory mitigation will be required in contexts in which it has never before been used, at unprecedented scales, and on impracticable deadlines. It will be used for species over which FWS has no jurisdiction, and to achieve goals that FWS is not authorized to require permittees, applicants, and conservation sponsors to achieve.

[164] 81 Fed. Reg. at 61,037.
[165] 81 Fed. Reg. at 61,037.
[166] Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (1993).
[167] 44 U.S.C. § 3501 *et seq*.
[168] Exec. Order No. 12,866 at §§ 1, 6(a)(2)(C).
[169] 5 U.S.C. § 603(a).

Additionally, the Trades believe that the full cost of the Draft Policy's requirements alone could well exceed $100 million. The Draft Policy would expand mitigation requirements to an unknown but potentially vast number of unlisted species and areas that are not designated as critical habitat. The Draft Policy's requirements for landscape-scale mitigation, additionality, advance mitigation, and its punitive credit ratios also effectively compel use of, and therefore establish a captive market for, conservation banks. In a captive market where project applicants must essentially chose between abandoning a project and purchasing credits from a conservation bank, the conservation bank can set excessive prices for credits and remain reasonably assured that desperate project applicants will pay the premium.[170]

In addition to the increased costs inherent in a captive market, the Draft Policy will also increase credit costs by artificially creating a scarcity of land that could qualify for compensatory mitigation. The Draft Policy affirmatively disfavors compensatory mitigation on public lands and split-estates, and largely ignores the prospect that research activities could serve a compensatory mitigation role. The Draft Policy also prohibits mitigation projects from being used to compensate for multiple different species and further requires each mitigation project to be perpetual, thereby forever disqualifying and locking away any land that has been improved through a compensatory mitigation project. When this artificial scarcity of qualifying land is combined with a captive market for conservation banking, the cost to purchase mitigation credits will likely be excessive and the prospect that the Draft Policy's requirements will cost more than $100 million becomes quite realistic.

Notwithstanding the significant impact posed by the Draft Policy alone, much like the PRA analysis, the Draft Policy cannot, and should not, be assessed in isolation. The Draft Policy is a component of a larger, more comprehensive restructuring of the Service's mitigation framework. It is the sum total of the costs of each of those components that FWS was required to assess under EO 12,866 and the RFA. FWS, however, not only failed to conduct these analyses for the Draft Policy, but for each of the other recognized elements of the Service's multi-prong policy change.

FWS dismissively concluded that the draft CCAA Policy will have little to no economic impact because it would not change current practice or place any new requirements on non-Federal property owners, nor would it substantially affect small businesses or impose new recordkeeping or reporting costs on governments, individuals, businesses, or organizations.[171] The Service made similar findings for its 2014 draft Policy Regarding Voluntary Prelisting Conservation Actions, determining its effects would be "very limited" and would create reporting requirements only for those that choose to participate.[172] Other key components of this larger restructuring, such as the March 8th Draft Mitigation Policy, the Presidential Memorandum, the FWS task force report,[173] and the departmental landscape-scale mitigation policy[174] contained no cost estimates at all.

[170] The Draft Policy also ignores the cost of potentially having to abandon a project because of the unavailability of credit banks in states like Alaska and elsewhere.
[171] 81 Fed. Reg. at 26,770–71.
[172] 79 Fed. Reg. 42,525, 42, 530 (July 22, 2014).
[173] *Clement et al*. 2014; 81 Fed. Reg. at 61,033.
[174] "Implementing Mitigation at the Landscape-Scale" (600 DM 6); 81 Fed. Reg. at 61,033.

FWS has explicitly acknowledged that these draft policies are all components of a single comprehensive restructuring of the Service's mitigation framework. Offering only an incomplete and disaggregated analysis of the costs of this restructuring undermines the purpose of the PRA, RFA, and EO 12866; deprives FWS of any ability to understand the full economic impact of its actions; deprives OMB of the ability to review the action, and cloaks from stakeholders the true scale and impact of the Service's comprehensive restructuring. FWS's choice to separate these costs out into a number of regulatory actions avoided triggering the threshold values for "significant regulatory actions" under EO 12866[175] and "significant economic impact" under the RFA,[176] which would require the Service to conduct more extensive economic, cost-benefit, and alternatives analyses. FWS cannot evade its obligation to proffer a comprehensive cost estimate for its mitigation restructuring effort by proceeding through multiple policies and guidance documents instead of one. Because the Service has failed to treat the promulgation of the Draft Policy as the rule that it actually constitutes, FWS has violated a number of statutes in advancing the Draft Policy and should therefore withdraw it.

VIII. Conclusion

The Draft Compensatory Mitigation Policy exceeds the Service's statutory authority and relies instead on authority FWS seeks to confer to itself. The Draft Policy undermines the objectives it purports to advance because, in reality, it has been designed to pursue objectives that are completely distinct from conservation. It is intended to increase the stringency of compensatory mitigation programs and to shift the government's obligation to manage species and habitat onto those individuals and industries that require access to public lands and other federal authorizations. These are policy goals and are not tools in furtherance of clarity, consistency, or predictability. Furthermore, the Service's piecemeal approach in separating a comprehensive policy into multiple separate policies purposely downplays the magnitude of the policy changes, obscures the actual statutory authority on which these changes are purportedly based, and impedes stakeholder engagement.

Indeed, aspects of this Draft Policy cannot even be construed as furthering conservation goals. Much of what the Draft Policy holds out as conservation tools are in reality, land use restrictions and user fees having nothing to do with compensatory mitigation. As such, the Trades request that FWS withdraw the Draft Policy and all those policies drafted pursuant to the November 3, 2015 Presidential Memorandum. Should FWS wish to continue with a comprehensive restructuring of the ESA's conservation program, it should encourage use of all the tools in the conservation tool box, proceed within the contours of its statutory authority, and utilize a single rulemaking that complies with the APA.

[175] A "significant regulatory action" has an annual effect on the economy of $100 million or more, and The Service would have to undertake a cost-benefit analysis. Exec. Order No. 12,866 at §§ 1, 6(a)(2)(C).

[176] If a proposed rule will have a "significant economic impact on a substantial number of small entities" (a case-specific standard that varies by industry and effect), FWS must develop an initial regulatory flexibility analysis. 5 U.S.C. § 603(a).

Very truly yours,

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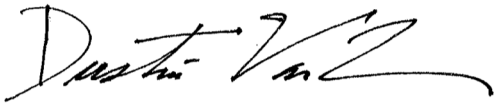

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