COMMENTS OF THE AMERICAN GAS ASSOCIATION ON THE NOTICE OF PROPOSED REVISIONS TO THE U.S. FISH AND WILDLIFE SERVICE MITIGATION POLICY

The American Gas Association, founded in 1918, represents more than 200 local energy companies that deliver clean natural gas throughout the United States. There are more than 72 million residential, commercial and industrial natural gas customers in the U.S., of which 95% – just under 69 million customers – receive their gas from AGA members. AGA is an advocate for natural gas utility companies and their customers and provides a broad range of programs and services for member natural gas pipelines, marketers, gatherers, international natural gas companies and industry associates. Today, natural gas meets more than one-fourth of the United States’ energy needs.

AGA appreciates the opportunity to submit comments on the notice of proposed revisions to the U.S. Fish and Wildlife Service (“FWS” or “Service”) Mitigation Policy as published in the Federal Register on March 8, 2016 (the “Proposed Policy”).1 In the course of owning and operating natural gas pipelines and facilities, AGA members undertake projects that may require FWS consultation or review. Because these actions may potentially trigger mitigation measures under the expanded scope of FWS’s Proposed Policy, AGA is providing FWS with comments highlighting AGA’s concerns related to the goals, scope, and implementation of the Proposed Policy.

1. The FWS Should Reinstate Its Position That The Mitigation Policy Does Not Apply to the Endangered Species Act or Should More Fully Explain How the Service Will Address Inconsistencies Between the Proposed Policy and the Act

AGA is concerned with the Service’s application of the Proposed Policy to the Endangered Species Act (“ESA”) with minimal explanation of how the Proposed Policy will be integrated and applied to the ESA. If the Service intends to publish a subsequent policy that will specifically address compensatory mitigation under the ESA,2 there will be unnecessary redundancy and the potential to burden the regulated community with inconsistent polices. In addition, because the National Marine Fisheries Service is not adopting the Mitigation Policy, the Service is creating an inconsistent ESA framework with differing requirements. For these reasons, AGA encourages the Service to reinstate its position that the Mitigation Policy does not apply to the ESA.

If the Mitigation Policy is to apply to ESA actions, than FWS must clarify how the Proposed Policy will be applied under the ESA and address any inconsistencies between the Proposed Policy and the statutory requirements of the ESA. For example, although the goal of the Proposed Policy is a “net conservation gain,” this goal exceeds the ESA Section 7 consultation standard of “no jeopardy” or “adverse modification.” In addition, the Proposed Policy would rely upon a landscape-scale approach, which appears to be broader than the “action area” where effects are determined during ESA Section 7 consultation. AGA strongly encourages the Service to revisit its

1 81 Fed. Reg. 12380.
2 Id. at 12383.
decision to apply the Mitigation Policy to the ESA, and if it continues with this course, to fully explain how inconsistent priorities and requirements will be addressed and reconciled.

2. The FWS Should Exclude Actions Taken Pursuant to Nationwide Permits Issued Under the Clean Water Act From the Mitigation Requirements Under the Proposed Policy

AGA members often rely on nationwide permits (NWPs) issued under the Clean Water Act for activities relating to the construction, maintenance, repair and removal of natural gas pipelines. As required by the Clean Water Act, activities taken pursuant to an NWP have only minimal individual and cumulative environmental impacts.\(^3\) As such, activities authorized pursuant to NWPs have historically not required mitigation under the FWS Mitigation Policy. The existing FWS Mitigation Policy (the “1981 Policy”) does not apply to threatened or endangered species under the Endangered Species Act.\(^4\) Because the Proposed Policy would remove the ESA exclusion, AGA is concerned that the Proposed Policy could be applied to activities authorized under NWPs that have only minimal environmental impacts. The Service should expressly exclude activities taken pursuant to NWPs from the mitigation requirements in its Proposed Policy because such activities have only minimal environmental impacts.

Under Army Corps regulations, no activity is authorized by any NWP if it is likely to jeopardize the continued existence of a threatened or endangered species as listed or proposed for listing under the ESA, or to destroy or adversely modify the critical habitat of such species.\(^5\) Therefore, the actions being authorized by an NWP have no adverse effect on listed species.

Under the general conditions prospective permittees must comply with to qualify for NWP authorization, permittees are required to give pre-construction notification to the Army Corps if any listed species or designated critical habitat might be affected or is in the vicinity of the project.\(^6\) Permittees must then await notification from the Army Corps that ESA compliance has been assured. This requirement may result in Section 7 consultation under the ESA between the Army Corps and the FWS, which could potentially trigger mitigation under the Proposed Policy. However, because an activity ultimately cannot be authorized by an NWP unless it has minimal impacts, any mitigation requirements are unwarranted.

The Service recently issued regulations that revise the criteria used for designating critical habitat.\(^7\) The new rules expand the reach of the ESA by (1) expanding the Service’s ability to designate lands as critical habitat, and (2) once designated, find that more activities result in adverse destruction of that habitat. Under the new regulations, the definition of critical habitat includes “areas outside the geographical area occupied by a species at the time it is listed upon a determination by the Secretary that such areas are essential for the conservation of the species.”\(^8\)

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\(^3\) 33 U.S.C. § 1344(e)(1).
\(^5\) 33 C.F.R. 330.4(f).
\(^6\) NWP General Condition 18.
\(^7\) See 81 Fed. Reg. 7414 (Feb. 11, 2016).
\(^8\) 50 C.F.R. § 424.02(d).
This arguably allows the Service to designate areas that are not yet occupied by a listed species, but may one day be occupied. The new rules also amend the definition of “destruction or adverse modification” to include any direct or indirect alteration that appreciably diminishes the value of critical habitat. According, it is conceivable that a project in the vicinity of critical habitat may be subject to mitigation under the Proposed Policy if it indirectly alters an area that may one day be suitable as habitat for a listed species.

Requiring extensive mitigation for such indirect, speculative impacts would subvert the purpose of the NWP program. The NWP program is intended to streamline the permitting process for activities that have minimal environmental impacts. Thus, AGA urges the Service to provide predictability to NWP permittees by excluding NWP activities that have minimal environmental impacts from the mitigation requirements in the Proposed Policy.

3. AGA Opposes the “Net Gain” Mitigation Goal In the Proposed Policy Because It Is Insufficiently Defined And Potentially Places An Undue Burden On Project Proponents

AGA is concerned about the “net gain” mitigation goal because the Proposed Policy does not specify when “net gain” will be required or the amount of gain that is sufficient to satisfy the standard. The current standard in the FWS’s 1981 Policy is to provide “no net loss.” The Proposed Policy requires a net gain in conservation outcomes, or at a minimum, no net loss. It also states that the Service will seek a net gain in conservation outcomes whenever required or appropriate. However, it does not specify what circumstances will trigger a net gain outcome. This is troublesome because it provides no predictability for project proponents on what level of mitigation is required and could be subjectively and inconsistently applied. The “net gain” standard in the Proposed Policy is vague and could result in the inconsistent application of mitigation requirements.

Under the Department of the Interior Departmental Manual, which provides the FWS with guidance in implementing mitigation, the Service may “decline authorization of projects if applicants cannot adequately mitigate impacts to levels required to achieve established goals.” AGA is concerned that a “net gain” goal expands the Service’s authority to reject, delay, or require extensive mitigation for projects in an arbitrary manner.

AGA supports the current “no net loss” standard because it provides a clear standard that can be applied in a predictable and consistent manner. A standard that requires an applicant to mitigate for impacts beyond those associated with its proposed project is inconsistent with the concept of mitigation and would place an undue burden on applicants to mitigate for impacts that go beyond the scope of their project. AGA recommends that the Service maintain its current “no net loss” mitigation goal.

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9 Id. at § 402.02.
12 600 DM 6.
4. **AGA Is Concerned About Incorporating Climate Change Considerations Into Mitigation Measures**

The Proposed Policy instructs the Service to consider climate change effects in making mitigation recommendations and decisions. Such climate change considerations are to inform the scale, nature, and location of mitigation measures.\(^\text{13}\)

AGA is concerned about the uncertainty in defining effects of climate change as well as the scale of mitigation that could potentially be required if project proponents are required to mitigate for direct and indirect cumulative effects of climate change. For example, if a utility is seeking a permit to construct a new pipeline to transport and deliver natural gas, the potential impact of greenhouse gas emissions resulting from the combustion of the transported natural gas could be considered an indirect effect of the pipeline project. However, it would be inappropriate, not to mention nearly impossible, to speculate on the potential net effects of climate change linked to the ultimate use of natural gas transported through the pipeline – often in place of other higher emitting fossil fuels. Natural gas is used as a feedstock for a wide variety of products as well as for generating electric power, heating homes and hospitals, heating water and fueling cars and trucks. If a project proponent were to be required to mitigate for such widely varying and complicated indirect net effects, the scale of analysis as well as mitigation that could be required would be unlimited. The unending analysis alone would delay needed pipeline safety projects indefinitely. As such, requiring mitigation for indirect effects of climate change is impractical, speculative, places an undue burden on applicants, and jeopardizes public safety and energy security by blocking projects needed for the safe and reliable delivery of natural gas to homes, hospitals and businesses. This would violate the President’s Executive Order 13604 calling on federal agencies to expedite permits for infrastructure that moves people, products and energy.\(^\text{14}\)

5. **AGA Supports Flexibility In The Choice Of Compensatory Mitigation Mechanisms**

Under the Proposed Policy, multiple mechanisms may be used to provide compensatory mitigation, including Proponent-Responsible Mitigation, Mitigation/Conservation Banks, and In-Lieu Fee Funds.\(^\text{15}\) AGA appreciates the flexibility provided by the variety of compensatory mitigation mechanisms authorized by the Proposed Policy. AGA encourages the FWS to allow a project proponent to choose its preferred mechanism of compensatory mitigation, that is, when compensation is appropriate under the mitigation hierarchy detailed in the Proposed Policy. By providing proponents with a choice in their compensatory mitigation mechanism, conservation objectives will be achieved most efficiently and effectively.

\(^\text{13}\) 81 Fed. Reg. 12384-85.


\(^\text{15}\) 81 Fed. Reg. at 12391.
The Proposed Policy expresses a preference for advance mitigation when compensatory mitigation is necessary. AGA recognizes that advance mitigation is a strategy that can work for some projects and can be useful as a tool to streamline the permitting process. However, AGA believes that a requirement to implement advance mitigation is overly broad and fails to recognize that advance mitigation is not possible for all projects. Requiring advance mitigation for all projects could significantly delay a project if a proponent is required to construct mitigation in advance of a project. AGA encourages the Service to recognize that although in some instances, advance mitigation is an option, it should not be a requirement. Additionally, the Proposed Policy appears to prefer mitigation banking over in-lieu fee programs, which generally provide mitigation after impacts have occurred. Allowing a project proponent the discretion to rely upon an in-lieu fee program allows the project proponent to contract with a provider that has the knowledge, skills and resources to promote the conservation of natural resources. The Proposed Policy should equally allow mitigation banking and in-lieu fee programs and not express a preference between the two options.

5. **AGA Encourages the Service to Recognize that Proponent Liabilities Associated With Proponent-Responsible Mitigation Can Be Transferred to Third Parties While Retaining the Integrity of the Mitigation Project**

The proposed policy recognizes “proponent-responsible mitigation site” as a valid mechanism to provide compensatory mitigation. AGA encourages the Service to recognize that with such a site, all liabilities associated with proponent-responsible mitigation cease for the project proponent when transferred to a third party with the specific goal of monitoring and completing the mitigation actions. When this transfer occurs, many times both the state and the FWS are named as third party beneficiaries that can step in to enforce mitigation strategies when mitigation actions by the third party manager are not completed or are not successful. Once transferred, proponent-responsible mitigation lands often are protected in perpetuity through a conservation easement or other deed restrictions. Applicants like natural gas utilities typically transfer the fee title of a mitigation parcel to a third-party non-profit group (with an approved endowment and management plan) relieving the action proponent of further liability.

6. **The Service Should Provide Flexibility for Small and/or Temporary Impacts**

For many natural gas utility projects, the potential impact will be small and/or temporary. The Service should encourage expedient mitigation alternatives for these small and/or temporary impacts, including mitigation on public lands.

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16 *Id.*

17 *Id.*
AGA appreciates the opportunity to comment on the Proposed Policy.

Respectfully Submitted,

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