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October 17, 2016

Mr. Craig Aubrey
U.S. Fish and Wildlife Service
5275 Leesburg Pike
Falls Church, VA 22041

Re: AGA's Comments on Draft Endangered Species Act Compensatory Mitigation Policy

Dear Mr. Aubrey:

The American Gas Association (AGA) appreciates the opportunity to comment on the U.S. Fish and Wildlife Service's (FWS or Service) draft Endangered Species Act Compensatory Mitigation Policy.[1]

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 percent – 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.

I. The Service's Compensatory Mitigation Policy Should Support the Efficient and Timely Permitting of Natural Gas Utility Maintenance and Infrastructure Projects

Natural gas is a clean, domestic, abundant, efficient and affordable resource, making it the perfect foundation fuel to help strengthen America's economic recovery, meet our environmental challenges, and improve our overall national security by reducing our dependence on foreign energy sources. Natural gas distribution utilities work to maintain the safe, efficient and reliable operation of their systems. In addition to maintenance projects, infrastructure development will need to be

[1] 81 Fed. Reg. 61032 (Sep. 2, 2016).

addressed to meet increased demand. The increased reliance by power generation on the use of natural gas may need to be accompanied by an appropriate expansion or development of new natural gas infrastructure to meet the needs of gas-fired generation, while preserving reliability for all of the customers on the gas system. This Administration repeatedly has recognized the need for and encouraged the timely construction of natural-gas infrastructure and related projects.[2]

Natural gas utilities take steps to avoid endangered species habitat when implementing these projects. However, when avoidance cannot be accomplished, in part due to the growing swath of lands designated as habitat for endangered species, natural gas utility projects usually will have minimal and temporary impacts on species and their habitat. Pipeline segments can often be completed within a few days, and the narrow linear footprint of the project further minimizes impacts. Natural gas utilities implement best management practices to minimize impacts, and are subject to a myriad of other federal, state and local regulations. The end result is that natural gas utility projects often have minimal and temporary environmental impacts, including impacts on endangered species or habitat.

The need for natural gas utility maintenance and infrastructure projects is well-documented and their impacts minimal. AGA believes that compensatory mitigation programs such as conservation banking, in-lieu fee programs, and similar mitigation programs that consolidate mitigation on larger landscapes can serve as an important tool in improving the efficiency of permitting for this infrastructure. These programs can expand mitigation options for project proponents and reduce administrative burdens for all parties. AGA encourages the Service to consider the comments below and ensure that any final Compensatory Mitigation Policy does not serve as an impediment to these projects, but actually serves to improve the efficiency of permitting such projects.

II. The Draft Compensatory Mitigation Policy Cannot Be Used to Circumvent Limitations on the FWS's Authority Under the ESA

AGA has significant concerns that the Draft Policy encourages FWS personnel to act inconsistent with and outside the bounds of their statutory authority. The Endangered Species Act ("ESA") establishes specific standards and requirements for the scope and nature of any mitigation measures that may be imposed by FWS. Further, the ESA requires specific analysis and evaluation of impacts to listed species and designated critical habitat. These statutory requirements cannot be overridden or undermined by the application of a policy or recommendation by Service personnel. Any Compensatory Mitigation Policy enacted by the Service is limited to that authority conferred by the ESA.

A. The Service's Advisory Role Does Not Provide Them Authority to *Require* Compensatory Mitigation

The Service itself recognizes that its "authority to *require* mitigation is limited," but purports to derive its authority to implement the goals of the Draft Policy through its more expansive authority

[2] Executive Order 13604 (2012) – Improving Performance of Federal Permitting and Review of Infrastructure Projects; Executive Order 13605 (2012): Supporting Safe and Responsible Development of Unconventional Domestic Natural Gas Resources and Associated Infrastructure.

to "recommend" compensatory mitigation under the ESA as well as other statutes.[3] AGA disagrees that the Service has such broad authority under the ESA or under the other named statutes. To the extent that the Service has the authority to recommend compensatory mitigation, the substance of those recommendations must still fall within the statutes conferring authority.

The FWS points to two sections under the ESA as conferring the Service authority to require compensatory mitigation: Section 7—Interagency Cooperation and Section 10—Conservation Plans and Agreements. Although both sections would permit the use of compensatory mitigation to offset impacts of projects to listed species, neither section provides the Service with the authority to require compensatory mitigation, or even recommend compensatory mitigation as envisioned by the Draft Policy.

Under Section 7 of the ESA, the Service's role is to consult with Federal agencies to ensure that Federal programs are carried out in a manner consistent with the ESA, and that Federal agency actions are not "likely to jeopardize the continued existence of listed species or destroy or adversely modify critical habitat."[4] The Service cannot directly or indirectly require applicants to adopt compensatory mitigation in project proposals. In these situations, the Service primarily plays an advisory role. The mandates contained in Section 7 rest with the Federal agencies conferring with the Service. This relationship is confirmed by longstanding FWS policy[5] as well as the Service's own regulations that provide for the consideration of "any beneficial actions taken by the Federal agency or applicant," but do not provide FWS with the authority to require beneficial actions in the form of compensatory mitigation.[6]

Under Section 10 of the ESA, an applicant for an incidental take permit must submit a habitat conservation plan to the Service that addresses several criteria, including the impacts resulting from the take of the species, and the steps that will be taken to minimize and mitigate such impacts.[7] Compensatory mitigation may well be a part of the habitat conservation plan, but the Service lacks any authority to require or recommend compensatory mitigation as envisioned by the Draft Policy.

Neither do other statutes provide the Service with authority for recommending compensatory mitigation as envisioned under the Draft Policy. The FWS includes a list of statutes that it asserts provide the Service with authority for recommending compensatory mitigation for actions affecting fish, wildlife, plants and their habitats.[8] The Service provides no specific citations or explanation of the type or scope of authority purportedly conferred.

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[3] 81 Fed. Reg. 61035-36 (emphasis added).

[4] 16 U.S.C. § 1536(a)(2).

[5] U.S. Fish and Wildlife Service and National Marine Fisheries Service, Endangered Species Consultation Handbook at 4-33 (March 1998) ("The Services can evaluate only the Federal action proposed, not the action as the Services would like to see that action modified.").

[6] 50 C.F.R. § 402.14(g)(8).

[7] 16 U.S.C. § 1539(a)(2)(A).

[8] 81 Fed. Reg. 61035.

Finally, the Service points to the November 2015 Presidential Memorandum relating to mitigation of impacts to natural resources stemming from federal agency activities as the impetus for the Draft Policy.[9] However, even this directive acknowledges that Federal agencies are limited to implementing policies that are "consistent with existing mission and legal authorities."[10]

B. The Draft Policy Sets Conservation Standards That Are Inconsistent with the ESA

The FWS' authority to establish and apply compensatory mitigation standards under the ESA is limited to the specific standards established within the ESA. Despite this, the Service proposes to implement a mitigation goal to "improve (i.e., a net gain) or, at a minimum, to maintain (i.e., no net loss) the current status of affected resources," a standard which the Service itself admits has "little or no application under the ESA."[11] In addition, the Service states that the Draft Policy encourages adverse impacts from proposed actions to be "fully compensated."[12] The Service has no legal basis for imposing these standards.

Sections 7 and 10 of the ESA provide specific standards regarding what may be required of a non-federal party or project proponent. Under ESA Section 7, FWS must evaluate whether a federal action is likely to jeopardize the continued existence of any listed species or result in the destruction or adverse modification of critical habitat.[13] The ESA Section 7 requirements to avoid jeopardy or adverse modification and to minimize the impact of any take of listed species do not equate to the "no net loss" or "net gain" standards articulated in the Draft Policy, and there is no statutory authority to impose such requirements in the consultation context. Under Section 10, the Service may only issue an incidental take permit if the Service finds in part, that the applicant "will, to the maximum extent practicable, minimize and mitigate the impacts of such taking," and the survival and recovery of the species will not be appreciably reduced.[14]

The conservation standards set forth in the ESA are specific in what is required of the FWS and project proponents alike. The Service lacks the authority to require or recommend compensatory mitigation that would exceed these standards, as would be the result under the Service's net gain and fully mitigate requirements.

C. The Service Lacks Authority to Recommend Compensatory Mitigation for non-ESA Species, including "At-Risk" Species

Throughout the Draft Policy, the Service states that it may recommend compensatory mitigation for adverse effects to "at-risk" species, defined as "candidate species and other unlisted

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[9] *Id*. at 61032-33.

[10] Presidential Memorandum: Mitigating Impacts on Natural Resources from Development and Encouraging Related Private Investment, Section 1 (Nov. 3, 2015).

[11] 81 Fed. Reg. 61035-36.

[12] *Id*. at 61033.

[13] 16 U.S.C. § 1536(a)(2).

[14] *Id*. § 1539(a)(2)(B).

species that are declining and are at risk of becoming a candidate for listing."[15] AGA is concerned that by including "at-risk" species in the Draft Policy, the FWS is improperly suggesting that it has authority to require or even recommend mitigation for these species. To the contrary, there is no requirement to mandate mitigation for at-risk species under ESA Sections 7 or 10.

Consultations under Section 7 are limited to species that are listed as threatened or endangered.[16] For candidate species or proposed critical habitat, a federal action agency must "confer" with FWS regarding a proposed action is likely to jeopardize a species proposed for listing or destroy or adversely modify proposed critical habitat.[17] However, any measures that are identified are not binding unless the species is listed or critical habitat is designated.[18] With respect to actions under Section 10, the Service is authorized to issue an incidental take permit covering listed species if the applicant submits a HCP that satisfies the issuance criteria.[19] Inclusion of unlisted species is voluntary and at the discretion of the applicant.

Not only is inclusion of at-risk species contrary to the ESA, but their inclusion under the Draft Policy could improperly suggest to Federal agencies carrying out the agency action that compensatory mitigation for these species is required or should be expected. This is not the case and would be inconsistent with the requirements of the ESA.

D. The Service Cannot Circumvent its Authority By Recommending Mitigation Goals that Exceed the Service's Authority

The Service's Compensatory Mitigation Policy should establish goals that fall squarely within the Service's authority under the ESA. Regardless of whether these goals are furthered through recommendations or requirements, a policy with goals that exceed the Service's authority will only encourage abuse of discretion in the permitting context, and result in mitigation recommendations that exceed the requirements of the ESA.

As noted above, in many circumstances, the Service is acting in a consultative capacity when recommending compensatory mitigation associated with a project impact. That is, it is not the Service that makes the ultimate decision on whether to grant a permit or what conditions to premise the grant on. This ultimate decision is often with another Federal agency, such as the U.S. Army Corps of Engineers or the Bureau of Land Management. When the Service makes recommendations that exceed its authority under the ESA, whether by recommending compensatory mitigation when no mitigation is required, or recommending mitigation to effectuate a "net gain" in the status of a listed species, the Service is acting inconsistent with its authority under the ESA. The Service lacks any authority to offer these recommendations and is not fulfilling its consultative obligation under the

[15] 81 Fed. Reg. 61058.

[16] 16 U.S.C. § 1536(a)(2).

[17] *Id.* § 1536(a)(4); 50 C.F.R. § 402.10.

[18] 50 C.F.R. § 402.10(c).

[19] 16 U.S.C. § 1539(a).

ESA. Suggesting that another Federal agency condition grant of a permit on these recommendations is an improper end run on the ESA.

Not only would these recommendations be improper under the ESA, they would also serve to increase uncertainty for the regulated community and cause delays and inefficiencies to the permitting process. Federal agencies receiving recommendations that exceed the bounds of the ESA would be placed in the position of parsing through the recommendations to evaluate what they could and could not require of a project proponent. Project proponents faced with such permit conditions would be forced to accept these unlawful requirements in the interest of moving their project forward, or oppose the conditions and accept the inevitable delays. The overall result is a lose-lose situation for all parties involved.

AGA strongly encourages the Service to reevaluate its authority to implement the Draft Policy and revise to ensure it is consistent with the FWS' authority under the ESA.

III. General Comments on the Scope and Applicability of the Draft Policy

AGA is supportive of innovative policies that encourage market-based approaches to mitigation, offer project proponents additional mitigation tools, and serve to improve permitting efficiency. AGA encourages the Service to work with other Federal agencies to develop these compensatory mitigation programs, within the bounds of the ESA, so that robust consolidated compensatory mitigation programs are available for all types of impacts. AGA offers the Service with the following general comments on the Draft Policy.

A. The Draft Policy Should Ensure that Mitigation Requirements/Recommendations are Commensurate to the Impact

Historically, the Service's conservation goal has been "no net loss." With its recent proposal to revise its Mitigation Policy, the Service intends to expand this goal "to improve (i.e., a net gain) or, at minimum, to maintain (i.e., no net loss) the current status of affected resources, as allowed by applicable statutory authority and consistent with the responsibilities of action proponents under such authority, primarily for important, scarce, or sensitive resources, or as required or appropriate."[20] As noted above, AGA has reservations about the Service's authority to implement such a goal. Moreover, in the context of the Draft Compensatory Mitigation Policy, AGA is concerned that the Draft Policy fails to acknowledge that any mitigation should be commensurate to the impact of the action. This concept is missing from the Draft Policy and is especially problematic for those actions with *de minimis* or temporary impacts.

The Draft Policy defines impact to include any adverse effect on a species or its habitat.[21] This definition is consistent with the definition proposed in the Service's Mitigation Policy, but elaborates that under the Draft Policy, impacts include "adverse effects on the species or its habitat

[20] 81 Fed. Reg. 12380, 12384 (March 8, 2016).

[21] 81 Fed. Reg. 61059 (proposed definition of "Impact(s) (of an action)").

anticipated in a proposed action or resulting from an authorized permitted action."[22] AGA supports the proposed definition to the extent that it recognizes that only adverse effects need to be mitigated.

AGA is concerned with the applicability of the Draft Policy for all adverse effects, even *de minimis* effects. When a proposed action is anticipated to have a reasonably foreseeable *de minimis* adverse effect, application of the Draft Policy to this impact would be unworkable and result in mitigation recommendations that are disproportionate to any potential impact. The Draft Policy suggests taking a "landscape-level" approach to mitigation.[23] Consistent with this approach, the Service's proposed Compensatory Mitigation Standards are drafted to ensure that large-scale mitigation compensatory mitigation programs are robust and durable. The principles and standards found in the Draft Policy do not properly address *de minimis* adverse effects. In fact, the two concepts could be viewed as inconsistent with each other. Applying these principles to mitigation intended to compensate for *de minimis* adverse effects would result in recommended mitigation that would far exceed any potential adverse effect. AGA encourages the Service to recognize the disconnect and exempt *de minimis* adverse effects from strict application of the policy.

Of similar concern is the application of the Draft Policy to mitigation for temporary impacts. As noted above, impacts associated with natural gas utility projects are often temporary in nature – once the project is completed, the environment can be restored. Despite the fact that the environment can and often is restored, the burden associated with mitigation for temporary impacts is many times no different from mitigation for permanent impacts. On the administrative side, the burden associated with identifying and implementing mitigation for temporary and permanent impacts is generally indistinguishable. But of greater concern is that the actual mitigation requirements, that is the conservation efforts, generally are no different when dealing with temporary or permanent impacts. By failing to adequately acknowledge and distinguish between the two types of impacts, there is minimal incentive from a permitting perspective for permit applicants to design projects that have temporary instead of permanent impacts.

The Service appears to acknowledge that there is a difference between temporary and permanent impacts with its description of "short term compensatory mitigation."[24] However, AGA believes that the Service's proposal and statement that opportunities for short-term compensatory mitigation are very limited take too narrow of a view of temporary impacts and fail to recognize the benefit of compensating for these impacts in a different manner. By providing incentives for a broader range of temporary impacts, the Service would be encouraging project proponents to fully mitigate their impact as well as alleviating the administrative challenges associated with continuously permitting these actions.

One solution may be for the Service to expressly encourage in-lieu fee programs specifically for temporary impacts. Natural gas utilities are required to conduct maintenance at specific intervals along pipelines. At each location, these projects are short-term and have only temporary impacts, yet there is a continual need to permit for these projects as the maintenance project continues to the next

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[22] *Id*.

[23] *Id*. at 61034.

[24] *Id*. at 61048.

location. Project proponents are forced to start from scratch with identifying suitable compensatory mitigation options at each location, an administrative challenge for both the project proponent and the regulatory agencies. An in-lieu fee program that recognized the temporary yet recurring nature of these types of projects would reduce the administrative burden for all parties, while ensuring that adequate compensatory mitigation was occurring.

Finally, in order for the suggested compensatory mitigation to be commensurate with project impacts, there is a need for objectivity in offset ratios. AGA recognizes that there is inherent subjectivity in evaluating the impact of a project on a species or critical habitat. However, in order for companies to forecast theoretical project cost, and move forward with conceptual planning and budgeting, there is a need to estimate the required mitigation, including the cost of such mitigation.

B. Adopting a Compensatory Mitigation Policy that Implements the Service's Draft Mitigation Policy Is Premature

On March 8, 2016, the Service published its proposed revisions to the Service's "Mitigation Policy."[25] The Policy had not been updated since 1981, and the Service solicited public comment on proposed revisions that were intended to respond to changes in conservation challenges and practices since 1981. Numerous commenters, including AGA, provided the Service with extensive feedback and input on the proposed revisions. Many of the comments noted that the Service exceeded its authority in the proposed revisions, and that many of the proposed revisions were unworkable.

The FWS has not yet finalized its proposed revisions to the Mitigation Policy. Nonetheless, the Service states that the draft Compensatory Mitigation Policy is intended to "implement" the not-yet finalized Mitigation Policy.[26] Proposing a policy that would "implement" another proposed policy is premature and effectively forecloses any meaningful public comment on either document. By moving forward with policies to implement the proposed revisions to the Mitigation Policy, the Service is effectively stating that it is not considering comments that the FWS exceeded its authority or proposed unworkable conservation principles – comments that would require extensive reconsidering and revision to the proposed revisions to the Mitigation Policy. Furthermore, by stating that the Draft Compensatory Mitigation Policy is intended to implement not yet finalized policy goals, stakeholders are hamstrung to provide meaningful comment on conservation strategies to implement these evolving goals.

For these reasons, AGA strongly encourages the Service to postpone seeking comment on the Draft Compensatory Mitigation Policy until the Mitigation Policy is finalized. Once the Mitigation Policy is finalized, the Service should make any necessary conforming revisions to the Draft Compensatory Mitigation Policy and re-propose it for public comment.

[25] 81 Fed. Reg. 12380.

[26] 81 Fed. Reg. 61036.

C. The Service Should Limit the Scope of its Policy to Actions and Mitigation Programs that are Initiated after the Policy Goes into Effect

Although the Service states that the policy would not apply retroactively, there are several situations where the Service states that the Policy would apply retroactively.[27] Such retroactive application is inappropriate and outside the scope of the Service's authority. AGA strongly suggests that the Service recognize the limits of its authority and apply any final policy on mitigation actions and programs that are initiated after the policy goes into effect.

For approved mitigation programs, the Service states that the policy would 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."[28] Initially, it is unlikely that a mitigation instrument for a previously approved program would state that a yet-to-be developed compensatory mitigation policy would apply. As such, AGA interprets this statement broadly such that any "no surprise" or similar clause found in a mitigation instrument would preclude application. Even where there is no such clause found in an instrument, AGA believes it inappropriate to apply the Policy to existing mitigation programs. These mitigation programs were developed under the guidance and regulations existing at that time. Although they may be functional and successful, they may not be compatible with all aspects of the Draft Policy. Retroactively holding successful mitigation programs to a new standard will only cause administrative challenges and decrease the already small inventory of mitigation programs from which projects applicants can choose. Any subsequent review of an existing mitigation program should be in accordance with the terms set out by the parties when the program was developed and originally approved.

For actions permitted or otherwise authorized prior to issuance of the policy, the Service states that the policy will apply under circumstances that are incredibly broad and will subject permitted actions to a continuous reopening and review. These circumstances include when new information becomes available that reveals effects of the action to listed species or critical habitat not previously considered; as well as when a new species is listed or critical habitat is designated that may be affected by the actions. The Service lacks the authority to re-evaluate a previously approved action in either of these situations.

Finally, AGA encourages the Service to apply the policy to pending actions, only where there has been no agreement reached by the parties on mitigation measures. As drafted, the policy would apply to pending actions unless the Service has already agreed in writing to mitigation measures. Generally during these consultations and reviews, the Service agreeing to mitigation measures in writing is one of the last steps of the process, even though all parties have reached agreement and the parties have taken actions relying on these agreements. Requiring that Service personnel apply the policy to pending actions could negate significant work by the parties to reach an agreement.

[27] *Id.*

[28] *Id.*

D. Use of Habitat Area in Defining Mitigation Recommendations

The Service states that its mitigation goal is not necessarily based on habitat area, but on numbers of individuals, size and distribution of populations, the quality and carrying capacity of habitat, or the capacity of the landscape to support stable or increasing populations of the affected species after the action (including all proposed conservation measures) is implemented.[29] To the extent that this statement offers permit applicants flexibility in implementing appropriate compensatory mitigation intended to address any project impacts, AGA supports this statement. However, AGA is concerned that this approach will be difficult for the Service to implement, and is inconsistent with how the Service currently bases its mitigation recommendations, which generally is in habitat area.

IV. AGA's Comments on the Service's Proposed Compensatory Mitigation Standards

The Service has proposed several "compensatory mitigation standards" that compensatory mitigation programs, projects, and measures are to be consistent with. AGA offers the FWS the following specific concerns with the proposed compensatory mitigation standards, as detailed below.

A. Timing and Duration

The Draft Policy suggests that compensatory mitigation projects should be implemented in advance of the action that adversely impacts the species or critical habitat. When advance mitigation is not possible, temporal losses must be compensated.[30] Although 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, the Draft Policy fails to appropriately recognize that advance mitigation is not possible or appropriate for all projects.

The implementation of advance mitigation requires a project applicant to estimate the potential impact of a project. Many permit applicants will make a conservative estimate of this impact, and include potential impacts as broadly as possible to ensure that they do not underestimate the impact of the project. However, during construction it is often the case that many of these impacts are able to be avoided and do not come to fruition. For one AGA member, although a project was permitted for over 12 acres of impacts, the actual impact was less than 1 acre. Had advance mitigation been required, the company would have been forced to implement significantly more mitigation than what was actually required, and would not have the incentive to avoid these impacts.

Acquiring mitigation for some species may be difficult and take significant time to coordinate. The availability of compensatory mitigation programs and suitable habitat will have a direct impact on the timing of mitigation. In addition, a permit applicant often has no control over the time it takes to navigate the permitting process. Applicants should not be penalized for complying with the administrative burdens associated with identifying mitigation options and receiving the necessary

[29] *Id*. at 61033.

[30] *Id*. at 61038.

approval. AGA encourages the Service to revise the Draft Policy such that advance mitigation is merely a preference and not the standard.

In regard to temporal losses, as noted above, a fundamental concern that AGA has with the Draft Policy is a failure to ensure that compensatory mitigation is commensurate with the impact. This concept applies equally to the timing and duration inquiry. In regard to temporal losses associated with mitigation that is implemented after the impact has occurred, when the impact is temporary, AGA believes that this loss would be accounted for in any evaluation of the intended impacts of the project and would not increase the size or scope of associated compensatory mitigation. For a project with a temporary impact, the timing of the intended compensatory mitigation in no way impacts the duration of the project's impacts. Therefore, when evaluating appropriate compensatory mitigation for temporary impacts, whether the mitigation occurs in advance of the project or after the project should have no bearing.

B. Judicious Use of Additionality

AGA recognizes that the concept of "additionality" is necessary to ensure actual compensation of impacts.[31] However, AGA encourages the Service to recognize that where multiple mitigation obligations arise from the same project, compensatory mitigation that addresses all of these obligations is permissible and satisfies the concept of additionality. The situation would most often arise when a single project impacts one acre of wetland that also happens to be habitat for an endangered species. In this situation, a single compensatory mitigation project that addresses the wetland and the species aspects is satisfactory.

C. Effective Conservation Outcomes and Accountability through Monitoring, Adaptive Management, and Compliance

The Service suggests that where the Service relies on third-party evaluators as part of the Service's oversight authority, the cost associated with the evaluators must be built into and covered by the mitigation project.[32] AGA does not believe such a cost arrangement is feasible or appropriate.

AGA recognizes that the Service may have the authority to conduct oversight of compensatory mitigation programs in some situations. Where the Service has this authority, it is the Service's responsibility to conduct this oversight. Included in this responsibility is the obligation to fund such oversight. The applicant should not be responsible for covering the cost of any third-party evaluator. The applicant ensures that costs associated with the mitigation project are covered through an endowment that goes directly to the compensatory mitigation manager – not agency staff or the agency's third party evaluator.

D. Maintain Transparency and Predictability

The Draft Policy states that mitigation instruments and other similar documents must be made publicly available, either through the Regulatory In-lieu fee and Bank Information Tracking System

[31] *Id*. at 61037.

[32] *Id*. at 61038.

or another publicly accessible online system.[33] AGA believes there would be minimal benefit associated with making these documents publicly available. These documents are legal and contractual instruments. They are not drafted to provide guidance to the public on the mitigation actions taken. Contrary to the Service's suggestion, posting these documents online will not help ensure consistent implementation of the Compensatory Mitigation Policy. Instead, differences in drafting preferences of these highly technical contract documents would likely give rise to more questions regarding the consistency of application of the policy. Given the minimal likelihood of any benefit, the burden to project applicants for maintaining these documents in an online system is not warranted.

V. AGA's Comments on the Service's Proposed General Considerations

AGA provides the following comments on the Service's proposed General Consideration.

A. Preference for Consolidated Compensatory Mitigation

The Service states that mitigation mechanisms that consolidate compensatory mitigation on the landscape are generally preferred to small, disjunct compensatory mitigation sites spread across the landscape.[34] Although AGA recognizes that in many situations consolidated compensatory mitigation programs are more effective, there is still a role for permittee-responsible mitigation.

There are limited consolidated mitigation options available to permit applicants. AGA can only assume that the Service intends this Draft Policy to encourage the development of more programs. AGA hopes that will be the case and looks forward to working with the Service to encourage this result. Whether or not that intention is realized, the Service needs to recognize that these consolidated mitigation programs are not available now and may not be available in the future. Furthermore, whenever the Service lists a new species or designates new critical habitat, there will always be a lag time between when mitigation options are needed and when compensatory mitigation programs are up and running.

Where consolidated mitigation options are available, they may not always be appropriate. If there is not a robust market for a specific type of compensatory mitigation, for example for a specific species, market influences may not have had an opportunity to ensure that the price point for the mitigation is appropriate, and may make consolidated compensatory mitigation cost-prohibitive. In addition, when impacts are temporary or minimal, there may not be a consolidated mitigation option that provides for mitigation of temporary impacts, meaning that a permit applicant would need to fund mitigation that was disproportionate to the impact.

Despite these situations where permittee-responsible mitigation could be the only available mitigation option, the Service has proposed guidance that is unworkable for this type of mitigation and could effectively foreclose its use. AGA encourages the Service to recognize that situations exist

[33] *Id*. at 61039.

[34] *Id*. at 61042.

where permittee-responsible mitigation is the preferred mitigation approach and develop a Compensatory Mitigation Policy that supports the use of permittee-responsible mitigation.

Finally, the Service states that "expedited regulatory compliance processes" are an advantage of using consolidated compensatory mitigation.[35] Expedited processes benefit not only the applicant, but the Service as less resources need to be devoted to the application. The Service should ensure that use of a consolidated compensatory mitigation site results in such expedited processes.

B. Mitigation Ratios

The Service notes that Mitigation 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.[36] The Service goes on to state that mitigation ratios 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. AGA fully supports this concept. As noted above, AGA has concerns regarding the availability or appropriateness of consolidated compensatory mitigation. Using mitigation ratios to encourage the use of consolidated mitigation is consistent with the market-based approach that the Service has proposed and could provide incentives for the development of more consolidated compensatory mitigation options.

VI. Establishment and Operation of Compensatory Mitigation Programs and Projects

The Service has proposed minimum criteria for compensatory mitigation programs and projects. According to the Service, FWS and other Federal and/or State regulatory agencies will use these criteria in authorizing compensatory mitigation programs.[37] As noted above, the Service has limited authority to require or even recommend compensatory mitigation. These limitations extend to the Service's authority to define criteria for compensatory mitigation programs, as well as the approval of such programs. AGA also questions the Service's authority to set criteria for other Federal and State agencies to use as they exercise their independent authority.

In addition, AGA is concerned with the Service's propose that Mitigation Review Teams ("MRT") or Interagency Review Teams ("IRT") review permittee-responsible mitigation projects.[38] There are inherent differences between consolidated compensatory mitigation projects and permittee-responsible mitigation projects that make it unnecessary for MRTs/IRTs to review permittee-responsible mitigation. Permittee-responsible mitigation is often on a much smaller-scale and is a one-off project. Requiring such review would add significant delay to projects, for no or minimal benefit. Furthermore, the Service should not rely on MRT/IRT review to ensure consistent application with the Compensatory Mitigation Policy. The Service should be responsible for training FWS personnel so that there is consistent application of the Policy.

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[35] *Id.*

[36] *Id.* at 61046.

[37] *Id.* at 61049.

[38] *Id.*

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AGA appreciates the opportunity to comment. If you have any questions, please contact Pamela Lacey at (202) 824-7340 or Christine Wyman at (202) 824-7120.

Respectfully submitted,

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