S. HRG. 114–73

FEDERAL MITIGATION REQUIREMENTS AND INTER-AGENCY COORDINATION RELATED TO THE ECONOMIC DEVELOPMENT ON FEDERAL, STATE, AND PRIVATE LANDS

JOINT FIELD HEARING

BEFORE THE

COMMITTEE ON ENERGY AND NATURAL RESOURCES UNITED STATES SENATE

AND THE

Subcommittee on Fisheries, Water, and Wildlife

OF THE

COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS UNITED STATES SENATE

ONE HUNDRED FOURTEENTH CONGRESS

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FEDERAL MITIGATION REQUIREMENTS AND INTERAGENCY COORDINATION RELATED TO ECONOMIC DEVELOPMENT ON FEDERAL, STATE, AND PRIVATE LANDS

Monday, August 17, 2015

COMMITTEE ON ENERGY AND NATURAL RESOURCES,
COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS,
U.S. SENATE SUBCOMMITTEE ON FISHERIES,
WATER AND WILDLIFE,
Wasilla, AK

The Committees met, pursuant to notice, at 2:30 p.m. at the Curtis D. Menard Memorial Sports Complex, 1001 South Mack Drive, Wasilla, Alaska, Hon. Lisa Murkowski, Presiding.

OPENING STATEMENT OF HON. LISA MURKOWSKI, U.S. SENATOR FROM ALASKA

The CHAIRMAN. I call to order the meeting of the Energy and Natural Resources Committee and Environment and Public Works Subcommittee hearing on BLM and U.S. Army Corps of Engineers mitigation.

I would like to welcome everybody. I want to start off this afternoon by thanking Senator Sullivan for working with me to arrange what is probably a pretty unprecedented hearing.

Senator SULLIVAN. Yes.

The CHAIRMAN. To have a joint hearing between the Energy and Natural Resources Committee and the Environment and Public Works Committee.

I would also like to thank Wasilla for hosting us this afternoon. I want to welcome and thank our witnesses for joining us and participating in an important dialogue for Alaskans.

We have brought our committees to Alaska to examine the regulatory practices that impact and often delay or prevent development in our state. Specifically, our focus today will be on the Bureau of Land Management's (BLM) policies for mitigation and land use and the Army Corps of Engineers and EPA's regulation of water and wetlands and related mitigation issues.

We here in Alaska are keenly aware of the challenges that current regulatory practices impose. We have heard the statistics before, and you will hear them a lot today. Approximately 43 percent of our state is categorized as wetlands. That does not include the lakes and the streams and the rivers and the adjacent waters to them. The BLM also manages 72 million acres of Alaska's land and in many ways, given the reach of its regulations and its ownership

of lands in our state, the Federal Government, is sort of a gatekeeper and a landlord here in Alaska.

So how the Federal Government chooses to approach those rules has a big impact on our daily lives and our ability to grow as a state. Right now there is a lot to be desired. In some instances we are being held back by ill-designed, ill-fitted or ill-applied policies.

It is estimated that the acreage of wetlands in the lower 48 has halved over the last 200 years while here in Alaska, over the same period of time, we have lost only one tenth of one percent of our wetland acreage. So it is really a different comparison set when you are talking State of Alaska verses the rest of the country.

Despite this strong record, our state is still pigeonholed into the same regulations as the limited fill of wetlands in drier climates like Arizona or in more heavily populated regions like California or New York. The BLM employs many land management regulations including national and regional policies and those concerning mitigation. These are not well-suited for Alaska which has some unique history, geography, remoteness and work force needs. We all know our considerations should simply be different from those in the lower 48, yet Alaska is again categorically analyzed through the lens of national and regional portfolios.

Like many Alaskans, my concern about Federal overreach has grown dramatically over the years. As I go around the state, and I know Senator Sullivan hears the same, if there is one unifying theme amongst Alaskans, whether you are down on Prince of Wales Island, up in the Interior of the Fortymile region or up on the North Slope, a concern consistently is we see ongoing, rapidly developing, encroachment, overreach and overregulation that is stifling us.

The regulatory scheme within the Department of the Interior has significantly departed from the fundamental principle of multiple use as defined in and required by law. Instead it is tilted toward conservation, more conservation, and is followed by what appears to be mere lip service toward other uses protected under law.

Though the Department of the Interior's authorities are rooted in very different principles from that of the EPA's Clean Water Act, Interior has decided to adopt its regulatory principles on mitigation anyway. Secretary Jewell published an order highlighting Interior's mitigation priorities, and it mirrors the language from the Section 404 sequence of mitigation.

There is something fundamentally flawed about an agency that borrows theories and regulations which are born from wholly different laws and adopting them as its own when its authorizing language is so markedly different, and that is what we are seeing here.

Then we come to the Corps of Engineers and the EPA. We have seen time and time again in Alaska instances where individuals and companies have pre-coordinated desired projects, redesigned those projects based on the Corps recommendations and paid millions and millions of dollars toward mitigation only to learn, at the very end, that the agency wants additional conditions. This moving of the regulatory goalpost has a serious, chilling effect on project development and it limits the growth of our economy. It hurts the

livelihoods of the Alaskan people, and it cripples our ability to fulfill promises of our statehood.

I think, in fairness, that the Corps really does try to get to yes. I wish that I could say the same for EPA, but its perogative often seems to be finding a way to get to, or to perhaps stay at, no.

We have reached a point where Federal agencies are unreasonably binding the hands of well-intentioned, environmentally-principled, hard-working Alaskans. And whether it is the layering on of new regulations like the recent waters of the United States rule, reasonable litigation ratios or something else, we have reached a point where it often looks like the goal in Alaska is to stop new development in its tracks rather than helping it to reasonably and responsibly advance. So the question then is what do we do about it? What do you do about it?

Well, it begins with oversight. I hope that the desire would be a constructive and an open conversation amongst us all here today. We will renew our demands that the agencies faithfully apply the law, thoughtfully analyze each and every permit sought in this state, and work with us, not against us, but with us as Alaskans. If that is not enough, we will turn to the legislative and appropriations process to secure the fair treatment that we deserve.

Again, I want to welcome our witnesses. I am going to turn to Senator Sullivan for his opening comments, and then for those of us gathered here today, we will kind of, blow out the program here this afternoon in terms of what you can expect for the timing.

It is a delight and a privilege to be here with my colleague, Senator Sullivan. I appreciate his leadership for Alaska on the Environment and Public Works Committee. It is key and it is so important to so many of the issues that we are working on in the Senate.

Thank you, Senator Sullivan.

STATEMENT OF HON. DAN SULLIVAN, U.S. SENATOR FROM ALASKA

Senator SULLIVAN. Thank you.

Well, thank you, Madam Chair, and I want to thank everybody for attending.

You know, these issues that we are discussing today, I think, sometimes can be viewed as rather technical. These regulatory issues sometimes are viewed as only impacting large companies.

Well, I thank you for the turn out here of many state legislators. Certainly I want to thank Representatives Gattis and Keller and Hughes, but there are others in the audience today—I really want to thank you, for everybody coming. I have seen so many Alaskans from so many different parts of the state come out today and show that you are interested in this topic because it is a huge topic for all of us.

I want to thank the witnesses. I know we have an outstanding panel both in terms of the first panel and the second panel. And I do want to thank Senator Murkowski, the Chairman of the Energy and Natural Resources Committee in the U.S. Senate.

This is, I think, a rather new approach. This is a combination of the Energy and Natural Resources and the Environment and Public Works Committees. I chair the Subcommittee on Fisheries

Waters and Wildlife. So this is an official U.S. Senate hearing, and to have Senator Murkowski's leadership on this is critical.

As I mentioned, I think that there's a tendency on some of these issues that we dismiss them or say this is kind of technical. It doesn't really impact us or it just impacts large companies which certainly impact us, but how does this affect the lives of our citizens throughout the state?

Well, I think that you are going to see today in testimony that these kinds of regulations do hugely impact all of us. And whether it's small placer miners or other examples that we hear about constantly, this really matters to Alaska. Let me provide just a couple of examples.

Recently the Alaska Association of Realtors shared with us a story about a land transaction that fell through because the Army Corps acknowledged that the land may include wetlands. After disclosing this information to perspective buyers and even after lowering the sale price by a significant amount, the mere suggestion that property could include wetlands in our state made an important real estate transaction fall through.

A few months ago, a Fairbanks company wrote to my office and explained that they previously had a 404 permit to fill a portion of their land. A few years later, their permit expired. After reapplying for another permit they were told that it would only be issued after placing a permanent, non-development deed restriction on one fifth of their property. This was all after paying an undefined sum to a mitigation bank in-lieu of fee program. The power to require payment and other concessions on what occurs on private and state lands effectively grants Federal agencies the ability to zone the whole state, and that should concern all of us.

Finally, at an EPW Subcommittee hearing earlier this year in Alaska, Mayor Charlotte Brower testified that the North Slope Borough paid over $1 million in mitigation fees for simply trying to expand their landfill on the North Slope. In testimony before an EPW Committee she stated, "That's $1 million less to pay for teachers, health aides, police officers and many other services we need on the North Slope." It is important to remember every dollar spent on mitigation is a dollar not spent building Alaska.

I want to conclude by mentioning one other thing that I think is very important. In many ways, I think we're going to see compensatory mitigation often appears arbitrary and even punitive to those of us trying to navigate this complex process.

One critical issue that I certainly want to discuss today is the legal authority, the statutory authority for Federal agencies to undertake these actions. All Federal agencies, all Federal actions, whether an action or a regulation, has to be based on a Federal statute or the Constitution. That is a fact.

Unfortunately, I think many agencies forget or downright ignore this bedrock principle of the rule of law, that they have to have statutory authority to do what they do. And when they do this, when they ignore that, it's what we in Alaska refer to, and Chairman Murkowski has already mentioned this, as Federal overreach.

It is not just us talking about it. It's not just us claiming it. In the last two terms of the U.S. Supreme Court, in two different cases, the U.S. Supreme Court has found that the EPA has violated

either statutes or the Constitution of the United States, zero for two, on two different cases. So this is a concern for all of us, and it should be.

I want to thank everybody who is here again. I want to thank the witnesses. I look forward to an informative hearing so that we can take additional action to address what is a huge concern for our state and, I think, a concern for most of you.

Again, I want to thank everybody for coming out today.

Thank you.

The CHAIRMAN. Thank you, Senator Sullivan.

With that we will now hear testimony from two panels.

The first panel is the six Alaskans that you have in front of you today. I will introduce them in just a moment, and we will hear their comments.

Let me just outline to you the process that we will use and follow today which is a little bit different than what you would see if you were attending a hearing in Juneau. In the Senate we have hearings set up so that the witnesses will each provide five minutes of oral testimony. Their full statements will be included as part of the record. But hopefully this will be an opportunity for you to basically outline the issues that you have been dealing with, not only to inform those who are here in the room, but to inform the Senate Committee records, the Committee records for both the Energy Committee and the EPW Committee. We will hear comments from each of the witnesses, and then Senator Sullivan and I will pose questions to each of them after the six have presented. When they have concluded that Q and A exchange we will excuse the first panel and we will turn to the second panel, which is comprised of three representatives from our agencies.

Senator Sullivan and I agreed coming in that typically back in Washington we see the agency people are on the first panel. And no disrespect to the gentlemen and lady that make up that first panel, but we thought it was very important to hear the actual stories, the issues on the ground that these Alaskans have been dealing with so that it would better help form your comments and responses when we get to that panel. So we do appreciate the deference that you have shown us, no disrespect to the titles, but we are just making sure that you all are fully informed as to where they are coming from as well.

There will not be an opportunity for you, as audience, to then come up and also present testimony. As much as we would like to be able to do that, that is not a format that we typically use. Perhaps at a Town Hall we might be able to look at that as one alternative.

If you would like to submit written commentary for the public record, we are going to be holding the Committee record open for an additional two weeks. If you or your companies would like to provide a written statement, it is welcome.

I also want to acknowledge and thank the representatives who are here today. Senator Sullivan has mentioned Representatives Gattis, Keller and Hughes. I do believe that I saw Senator Stoltze walk into the room a minute ago, and we appreciate him being here as well. And a former colleague of mine, former Senator Scott

Ogan, is also with us. So thank you for not only being here today but the good work that you are doing working with us in Juneau.

With that, unless, Senator Sullivan, you think we need to add anything more in process, I think we are ready to go to our first panel.

Senator SULLIVAN. I think we are good to go.

You should know though, we do read the submissions for the record. I think some of us will be staying around after the hearing so we can hear from you then. We want to hear from everybody.

But if you are not able to make comments or we don't hear the comments today, we certainly want to encourage you, particularly if you have your own stories on how this has impacted you, we certainly want to hear that because that becomes part of the official record of this hearing. I think it can have a good impact in terms of legislative actions that we want to take to address some of these challenges.

The CHAIRMAN. Good.

We will turn to our panel to receive testimony on the implications of the regulatory actions that are taken by Federal agencies to which these witnesses will speak. We anticipate they will discuss the affects of regulatory actions on project proponents and the State of Alaska Attorney General, if not—on Federal, State and private lands.

I will go ahead and introduce each of the panelists, and then we will begin with Mr. Fogels.

At the end here is Mr. Ed Fogels, who is Deputy Commissioner of the Department of Natural Resources for the State of Alaska. He is here to talk about the development challenges he experiences in his role both as Deputy Commissioner of the Department of Natural Resources and as a conduit for project proponents who are seeking assistance from the State of Alaska to navigate the maze of Federal regulations. We are pleased that Mr. Fogels is here.

Next to Mr. Fogels is Mr. Randy Brand. He is the Vice President of Great Northwest, and he will speak about his experiences in the construction industry in Fairbanks and the evolution of increasingly complex and costly mitigation and permitting requirements that his business has encountered. I think it is almost legend in Fairbanks what Great Northwest has had to go through, so we look forward to your testimony.

Next to Mr. Brand is Deantha Crockett, the Executive Director of the Alaska Miners Association, representing miners both large and small across our state. She will discuss the challenges they face with a complex and unclear regulatory scheme required by the BLM and also speak to miner's experiences with 404 mitigation.

We also have Mr. Joe Nukapigak, the Vice President of Kuukpik. He is here to highlight permitting challenges that we experienced on the Spur Road, what might be expected for proposed roads in the Colville Delta, and what the community would like to see on GMT1 mitigation funds.

Next to Joe we have Theresa Clark, the Vice President of Lands and Shareholder Services at Olgoonik. She is here to talk about the challenges the villages face when they try to marry mitigation and regulatory requirements for growing villages.

Rounding out the panel we have Phil Shephard of the Great Land Trust. We greatly appreciate you being here, Phil, to present the interests and the perspectives of the Great Land Trust.

So thank you all for being here. We will lead off with Mr. Fogels.

Again, if you can try to limit your comments to about five minutes, your full statements will be incorporated as part of the official hearing record.

I will note that we have the hearing room until five o'clock, so we are going to try to keep moving on this.

Mr. Fogels, welcome to the Committees.

STATEMENT OF ED FOGELS, DEPUTY COMMISSIONER, ALASKA DEPARTMENT OF NATURAL RESOURCES

Mr. FOGELS. Thank you, Chairwoman Murkowski, Chairman Sullivan.

My name is Ed Fogels. I'm Deputy Commissioner at the Alaska Department of Natural Resources, and on behalf of Governor Bill Walker, I thank you for this opportunity to testify.

The focus of my testimony today is to first discuss permit coordination process employed by the State of Alaska and second is to discuss some concerns we have with current mitigation requirements. I'll focus primarily on some BLM mitigation requirements that we are afraid might start duplicating and confusing the mitigation requirements required under the Clean Water Act.

The state has established a sophisticated coordination office for large projects within my department. This office, the Office of Project Management and Permitting, coordinates the environmental review and permitting process for major development projects. The state has found this leads to real permitting efficiencies for several reasons.

First, public processes are integrated across different agency timelines, which prevents repetitive and confusing public notices. It gives the public an accessible source of information about projects in one place.

The state processes are synched with corresponding Federal processes to minimize duplication of effort, permit collaboration and avoid duplication. The state can speak with a highly coordinated and well-informed voice in the Federal and local permitting process and in National Environmental Policy Act reviews.

Our services are unique in that they are voluntary for project proponents. If a project proponent wants to pursue the efficiency of coordination they must enter into a memorandum of understanding with the state which also requires reimbursement of state expenses. The state has long advocated that the Federal Government establish a similar coordination process for large and complex projects based on the same principles and structures.

Next let me speak to our concerns about the Bureau of Land Management's draft regional mitigation strategy manual, which is a guidance document that will direct Federal staff on how to require mitigation for impacts to Federal lands that occurs as a consequence for permitted activities. The manual mentions different types of mitigation and how they may be applied, but we feel there is little to no discussion of what impacted resources would require

mitigation or how those impacts will be calculated in order to determine what mitigation requirements would be required.

We are also very concerned about duplication with the compensatory mitigation requirements for permits issued under Section 404 of the Clean Water Act.

We're also concerned the manual has not been developed through a public process. As it has been formulated as a guidance document, the manual has not gone through a formal rulemaking process.

Next I would like to briefly discuss one example which we believe illustrates where the process could be improved, the Greater Mooses Tooth well or GMT1 in the National Petroleum Reserve.

First, let me start by emphasizing, however, how grateful we are to BLM and all the Federal agencies for permitting this project. GMT1 is anticipated to add about 30,000 barrels per day in the Trans-Alaska Pipeline system, making it a critical priority for the State of Alaska and furtherance of the national strategic interest; however, the state has some concerns about the process, and we believe they should be addressed for future projects.

The EIS and BLM's record of decision layered additional mitigation measures on the project. These mitigation measures are in addition to numerous requirements already required by other BLM EIS' and lease stipulations.

Cooperating agencies including the state were surprisingly excluded from the development of the mitigation measures. BLM required a number of oil spill-related measures for the project despite the fact that this authority falls mainly under the Alaska Department of Environmental Conservation. Consultation with the cooperating agencies would have prevented this duplication.

Next let me touch briefly on an issue of these new Areas of Critical Environmental Concern. This is, I'm sorry, another concerning area on the BLM planning and regulatory activities have a proposal to designate multiple Areas of Critical Environmental Concern, or ACECs.

BLM is increasingly proposing excessively restrictive ACECs across Alaska. If designated as proposed, these ACECs will create uncertainty for development projects of critical public and economic importance such as the natural gas pipeline for the North Slope and the Donlin Gold project's proposed natural gas pipeline. Specifically, two ACECs in the Eastern Interior RMP, Resource Management Plan, would close approximately 713,000 acres from mineral location and leasing, providing blanket closures on restrictions for off-highway vehicles, including snow machines.

We're also concerned that these ACECs could potentially hamper the state's ability to fulfill its statehood land entitlement as most of these ACECs are layered on top of existing withdrawals.

In closing, I would like to say that regardless of these issues that I've brought before these Committees, we do have an excellent working relationship with our Federal agency partners, especially the Alaska staff, and we continue to work to make that relationship better.

Our intent here is to highlight the areas where we must improve. The state needs to be viewed as an equal partner by the Federal Government. Additionally, the Federal Government should draw

from the success of the state permitting coordination model to improve its own process.

We at the state applaud the efforts of the oversight of your Committees to drive Federal improvements in these areas.

Thank you.

[The prepared statement of Mr. Fogels follows:]

Testimony before the U.S. Senate Committee on Energy and Natural Resources and The U.S. Senate Committee on Environment and Public Works' Subcommittee on Fisheries, Water and Wildlife

Federal Mitigation Requirements by the Bureau of Land Management and the U.S. Army Corps of Engineers and interagency coordination related to economic development on federal, state, and private lands

August 17, 2015

Submitted by:
Ed Fogels, Deputy Commissioner
Alaska Department of Natural Resources

Testimony on behalf of:
The State of Alaska

I. Introduction

Chairwoman Murkowski, Ranking Member Cantwell, and honorable members of the Senate Committee on Energy and Natural Resources; as well as Chairman Sullivan, Ranking Member Whitehouse, and honorable members of the Subcommittee on Fisheries, Water and Wildlife – My name is Ed Fogels and I am Deputy Commissioner of the Alaska Department of Natural Resources (DNR). On behalf of Governor Bill Walker, thank you for this opportunity to testify on the important topic of federal mitigation requirements for natural resource development projects and the need for increased federal interagency coordination. We at the State applaud the efforts and oversight of your Committees to drive federal improvements in these areas.

I have spent almost 30 years working at the Department of Natural Resources working to develop mines, public land use, and other activity on State land. Whether in my work coordinating permitting for large mine projects, doing state land and resource planning, or today serving as the State's liaison to the federal Inter-Agency Working Group on Alaska Energy, I have seen the complexities of federal project review and the need to increase its transparency and efficiency.

II. Overview of Testimony

The focus of my testimony today is to outline a number of issues, concerns, and uncertainties that projects in Alaska face from unduly complex and ambiguous federal mitigation requirements for resource development and public works projects. Particularly, I will discuss the efficient and comprehensive permit coordination process employed by the State of Alaska, the concerns we have

with current guidance documents proposed by the Bureau of Land Management (BLM), the difficulties that occurred during permitting for a recent project on federal land, and issues associated with current federal land planning processes.

III. The Successful State Example of Permitting Coordination

Alaska's social and economic livelihood is dependent on responsible resource development. In turn, a thorough, efficient and timely state permitting process is critical to allow this development to occur while protecting and conserving Alaska's natural resources. To support the permitting process and foster sustainable development, the State has established a sophisticated coordinating office for large projects at DNR's executive leadership level. This office, the Office of Project Management and Permitting (OPMP), is staffed by employees with substantial experience in environmental permitting, land management, and state and federal regulatory law who report directly to the DNR Commissioner's Office.

OPMP's central role is to coordinate the environmental review and permitting process for major development projects. This includes directing applicants to all of the appropriate state agencies that may need to review their project and facilitating communication between the state agencies so permitting timelines and data collection can be done efficiently and effectively.

The state has found that this leads to real permitting efficiencies for several reasons:

- State agency staff have an established venue and forum for communication throughout the review of a project;
- Public processes are integrated across different agency timelines – which prevents repetitive and confusing public notices;
- The public has an accessible source of information about projects in one place, which improves public understanding and engagement;
- State processes are synced with corresponding federal processes to minimize duplication of effort, promote collaboration and avoid delays;
- Efficient use of staff time and resources are maximized by interagency coordination of data and research needs; and,
- Coordination allows the State to speak with a single, highly coordinated and well-informed voice in the federal and local permitting processes For example, OPMP will gather comments on federal permits from multiple state agencies and provide them in a consolidated format to the federal agency. When necessary, OPMP will also participate as a cooperating agency in National Environmental Policy Act (NEPA) reviews.

Current projects coordinated through OPMP include mineral exploration and development, oil and gas research, transportation corridors and other public works projects. OPMP services are unique in that they are voluntary for project proponents. If a project wants to pursue the efficiency of coordination through OPMP, it must enter into a memorandum of understanding with the State, as well as a reimbursable services agreement to allow the recoupment of many state expenses related to both coordination and permitting. This cost recovery is a major boon for the State, especially in the

current state budget environment, and is seen as a major asset and a "win-win-win" for project proponents, state regulators, and the public.

The State has long advocated that the federal executive branch or the leadership of key federal permitting agencies establish a similar coordination process for large, complex projects based on the same principles and structure. Many of the benefits that have been realized through OPMP at the state level are sorely needed at the federal level, which suffers from limited interagency communication, budget and staffing issues, duplicative processes, and poorly coordinated timelines. Furthermore, there is an established venue for such coordination in the NEPA process that almost all large projects must go through, but the commitment to building a structure for a federal coordinating office at the executive leadership level needs to be made.

IV. Concerns about the Department of the Interior, Bureau of Land Management's Current "Mitigation Strategy" Document

The BLM's "*Draft – Regional Mitigation Strategy, Manual Section 1794*" (MS 1794) purports to be a guidance document that will direct federal planners and adjudicators on how to require mitigation for impacts to federal lands that occur as a consequence of permitted activities. Essentially, this document discusses an ambiguous region-based approach to mitigation that BLM proposes to adopt for future project reviews.

The background for MS 1794 is a complex administrative and bureaucratic web, but it seems to be the BLM-specific implementation of a Department of the Interior (DOI) "*Landscape Scale Mitigation Strategy*" (LSMS), which, in turn, was expressed in Secretarial Order 3330 and in the April 2014 report to the Secretary from the Energy and Climate Change Task Force titled "*A Strategy for Improving the Mitigation Policies and Practices of the Department of the Interior*" (Mitigation Strategy Report).

Both BLM's MS 1794 and the DOI-wide LSMS call for a mitigation approach that reaches beyond federally managed lands into private, state and tribal lands. Thus, a project proponent might be required to conduct mitigation, restoration, or conservation projects outside of the federal land actually affected by the permitted activities.

This is analogous to the compensatory mitigation requirements for "unavoidable adverse impacts to aquatic resources" authorized via permits issued under §404 of the Clean Water Act (CWA) administered by the U.S. Army Corps of Engineers (USACE) and the Environmental Protection Agency (EPA). The LSMS even references "Mitigation Banks", one of the preferred mitigation approaches for §404 permits, and suggests they would be appropriate means for addressing mitigation in BLM permits.

This obvious similarity is concerning because CWA §404 permitting is a complex regulatory program, with specific statutory direction and an expansive reach, intended to protect a particular public resource. Federal public land managed by the BLM, however, is meant to be multiple-use and is not guided by the same statutory authorities, intents, and sidebars.

Because of the CWA's statutory direction, the compensatory mitigation requirements, preferences, methodologies and mechanisms for §404 permits, as well as agency roles and responsibilities, are extensively detailed in the 2008 Mitigation Rule (2008 Rule) (33 CFR Parts 325 and 332; 40 CFR Part 230). This rule was built on the results of a National Research Council report on §404 mitigation and extensive and lengthy public consultation and comment, including review under the National Environmental Policy Act (NEPA) and the rulemaking procedures under the Administrative Procedure Act (APA).

Conversely, MS 1794, and its purely administrative forbearers and counterparts have not been developed through any such process. Defining major BLM processes without public engagement and review under the APA has led to serious state and public concerns about the clarity, transparency, and efficiency of MS 1794 and BLM's mitigation reviews generally.

The lack of process and transparency on BLM's mitigation policy and guidance has led to confusion with many stakeholders. As just one example, BLM has not been clear how its mitigation strategy interfaces with the established §404 program it aspires to imitate. Critically, it is unclear how BLM has coordinated with USACE, if it has at all, to assure that federal agencies are not requiring duplicative mitigation on identical impacts/footprints.

Without this coordination, project applicants, the public, and even the federal permitting agencies themselves will be mired in confusion as they try to navigate these circular processes. There even seems to be confusion among senior federal staff when discussing BLM "compensatory mitigation" or "mitigation measures" in comparison to CWA §404 "compensatory mitigation" and how and where the two may differ or overlap.

Stated briefly, the state has two major concerns about MS 1794 at this point:

Lack of Public Process

Because it has been formulated as a 'guidance' document, MS 1794 has not gone through a formal APA rulemaking process and BLM has also claimed that NEPA does not apply to the development of this policy. Furthermore, this draft guidance is being *implemented* before it and other related draft planning and policy documents have even been *finalized*.

Guidance documents are more properly employed when explaining how broad-based statutory or regulatory provisions will be employed for particular circumstances. For example, regional guidance would be helpful in applying regional specificity to the provisions of a nationwide rule, which has gone through a formal rulemaking process, to an area with specific or unique characteristics that are not directly addressed in the rule.

Instead, BLM is attempting to make key policy and regulatory decisions through guidance, independently and without the public insights and comments which lead to practical and defensible decision making. These decisions could even instruct applicants to take action on, or mitigate impacts on, state, tribal, and private lands. Further, those decisions have meaningful consequences

for the permitted public, including potentially disparate treatment, untenable financial obligations, and even violations.

Lack of Transparency and Rigor

Although MS 1794 mimics aspects of the established CWA §404 compensatory mitigation concepts and approaches, it lacks the comprehensive detail of the 2008 Rule. This lack of detail provides no direction to the agency and consequently creates permitting uncertainty for applicants and transparency concerns for the public.

MS 1794 mentions different types of mitigation and how they might be applied, but there is little to no discussion of what impacted resources or values would require mitigation or how those impacts would be calculated in order to determine what mitigation requirements would be. Instead, virtually everything is left to the discretion of BLM State Directors and their responsible officers.

For example, section 17(b) of MS 1794 says

> *When the BLM expects that an applicant's initial proposal for mitigation will be inadequate to satisfactorily address impacts of the authorized use, and the BLM anticipates that mitigation outside the area of impact may be appropriate, the BLM will notify the applicant in order to provide the applicant with an opportunity to propose alternative mitigation.*

No guidelines or direction of what would be judged "acceptable" are provided. In short, MS 1794 directs applicants to make a mitigation proposal with the hope that BLM does not "expect" it to be inadequate. In the event that it is rejected, they will be granted an "opportunity" to supplement it, presumably with even more extensive, expensive, and far-reaching mitigation projects in other areas. This ill-defined approach leaves project applicants in the dark and potentially subject to conflicting and varying interpretations and opinions of different BLM officials.

The potential chilling impact of MS 1794 on the permitted public is significant. While flexibility in implementation can be helpful for an agency, especially in a region as diverse and challenging as Alaska, this much discretion without measures of accountability is practically unlimited. Further, the ambiguity of MS 1794 leaves it open to misapplication by the BLM, such as providing an accessible funding source for mitigation projects and purposes that have only marginal connections, if any, to impacts from the permitted project.

BLM has said that these details are to be addressed during the NEPA review of project proposals, but that does not provide any functional direction regarding what mitigation applicants should include when fabricating their project proposals. In practical terms, this causes a murky and inefficient process during the critical step of project design and prior to beginning formal NEPA review. This flaw can only be cured by having a comprehensively detailed and legally sound mitigation policy presented to the public for vetting in an open process prior to finalization and implementation.

V. A Case Study: the Challenges of Permitting Greater Moose's Tooth (GMT-1) in the *National Petroleum Reserve – Alaska.*

Concerns with the General Process

The State recently witnessed some of the challenges of uncoordinated and inefficient federal permitting during permitting of the Greater Moose's Tooth One (GMT-1) project within the National Petroleum Reserve-Alaska (NPR-A). Despite its statutory designation as a petroleum reserve, this project is the first oilfield development project within the NPR-A. GMT-1 is anticipated to add about 30,000 barrels per day into the Trans-Alaska Pipeline System (TAPS), making it a critical priority for the State of Alaska and a furtherance of the national strategic interest.

In his December 22, 2014 letter to Secretary Jewell, Alaska Governor Bill Walker expressed his concerns about the federal permitting of GMT-1 in no uncertain terms:

> *It appears that rather than a clearly-defined regulatory path, a multi-layered bargaining regime has been put in front of the applicant; the purpose of which appears to be either to extract value from the project or to so negatively affect the economic outcome as to effectively stop project development.*

The State of Alaska is pleased the process resulted in Records of Decision (ROD) from the BLM and USACE authorizing the development of GMT-1. Nevertheless, the State maintains these procedural objections and has additional concerns related to findings in the Final Supplemental Environmental Impact Statement (SEIS) and supplemental provisions in the decision documents. For example, the SEIS and the BLM's ROD layered additional mitigation measures and Best Management Practices (BMP) on the project. These mitigation measures are *in addition to* numerous requirements already contained in:

- The lease stipulations;
- The project design;
- The 2004 Alaska Satellite Development Plan EIS;
- The 2008 Northeast NPR-A EIS; *and,*
- The 2013 NPR-A Integrated Activity Plan EIS.

Also, as discussed above, under the new *draft* regional mitigation guidance, the BLM will also be requiring ambiguous and as-yet undefined "compensatory mitigation designed to further avoid, reduce or compensate for impacts from the proposed action."

Collectively, the package of federal authorizations, BMPs and Mitigation Measures for GMT-1 are complex and duplicative to the point of being inscrutable. The State found it surprising that new measures and issues were being discovered on the fourth "comprehensive" review of the project area in a decade, and that the significant number of existing, vetted, and well understood mitigation strategies and measures required supplementation in the final stages.

Concerns with the "Environmental Justice" Section of the SEIS

The SEIS concluded that the project would have "disproportionately high and adverse effects" on "Environmental Justice," but any analytical methodology used to make this conclusive determination was not provided. To arrive at this conclusion, the BLM appears to have underweighted the social, economic, royalty, and tax benefits of the project to Alaskans, effectively dismissing the benefits from past, current, or future development. This was a surprising and unexplained reversal of conclusions in the BLM's 2013 EIS, a matter the State, the Arctic Slope Regional Corporation (ASRC), and the North Slope Borough (NSB) emphasized in an April 22, 2014 letter to BLM, which is yet to receive an adequate response.

General Concerns with Mitigation Measures in the EIS

- Arctic Alaska developments present unique environmental issues relative to the rest of the nation, but Alaskan regulators are able to address these risks and impacts under existing law and policy. BLM's national leadership must work cooperatively to understand and support these existing processes without duplicating and contradicting them with excessive mitigation requirements.

- The GMT-1 SEIS cooperating agencies, including the State, were surprisingly excluded from the development of mitigation measures before the BLM published them in the final SEIS. The BLM apparently worked from "suggestions from cooperating agencies" without vetting them with all involved parties to ensure that they were appropriate or necessary. This was demonstrated by the proposal of new mitigation measures by certain stakeholders outside of the SEIS process, which were incorporated without input from the cooperating agencies who would have identified overlaps and duplication of existing authority.

- BLM has spent several years, millions of taxpayer dollars, and thousands of staff hours developing the NPR-A Integrated Activity Plan to manage and mitigate oil and gas exploration and development in the NPR-A. However, the GMT-1 decision documents require project proponent ConocoPhillips to "contribute" $1 million to the BLM for the "development and implementation of a landscape-level Regional Mitigation Strategy for the Northeastern NPR-A region." This requirement is in addition to the $7 million ConocoPhillips is required to pay into a compensatory mitigation fund for the impacts purportedly associated with its project. As noted above, there have been four comprehensive planning documents developed for the NPR-A area since 2004, and now BLM is requiring project applicants fund yet another layer of duplicative analysis and strategy documents.

- It should also be noted that, despite the congressional reservation of the highly prospective NPR-A lands for oil and gas exploration and development, previous BLM planning efforts have blocked development on more than 45% of the NPR-A. In the context of preventing activity in half of the NPR-A, the BLM is now requiring compensatory mitigation for projects within the remaining half at multiples of the disturbed acreage.

- BLM required a number of oil spill-related BMPs for the project, despite the fact this authority falls mainly under ADEC. Additionally, these requirements only administratively burden the applicant, since Alaska's statutes and regulations regarding spills and spill response are largely more stringent than the BLM's BMPs. Consultation with the cooperating agencies in the SEIS would have prevented this duplication had it been properly vetted through the standard process.

VI. The Unwarranted Designation of "Areas of Critical Environmental Concern"

Another concerning area of BLM planning and regulatory activity is the proposals to designate multiple Areas of Critical Environmental Concern (ACEC) within several planning areas across Alaska. ACECs are a land management tool referenced in the Federal Land Policy and Management Act which, when designated in a planning document, call for elevated review and mitigation for permits issued in the area. These restrictions can include mineral leasing and entry withdrawals, general access restrictions, and other deviations from the "multiple-use" mandate for federal lands.

BLM is increasingly proposing excessively restrictive ACEC's, both in number and in size, across Alaska, even though other tools and authorities exist that would better enable the BLM to fulfill its traditional role as a multiple-use land manager. If designated as proposed, these ACECs will create uncertainty for development projects of critical public and economic importance, such as a natural gas pipeline from the North Slope, the Donlin Gold Project's proposed natural gas pipeline, and infrastructure and mineral development in the Fortymile mining district.

The three BLM "Resource Management Plans" (RMPs) currently underway in Alaska (Eastern Interior RMP, Bering Sea-Western Interior RMP, and Central Yukon RMP) are on track to designate multiple new ACECs, totaling millions of restricted acres. These planning areas contain a patchwork of land ownership, and unduly restrictive federal management prevents access and utilization of adjacent State, Alaska Native, and privately owned parcels.

Specifically, two ACEC's in the Eastern Interior RMP, for the Fortymile and Mosquito Flats areas, would close approximately 713,000 acres to mineral location and leasing and provide blanket closures or restrictions for off-highway vehicles, including snow machines. These kinds of land use restrictions on multiple-use lands should be very carefully evaluated and justified prior to moving forward, but are occurring in a cumbersome and expansive federal planning process that seems pre-disposed to restrictive management.

In the Bering Sea-Western Interior RMP, the BLM has spent months soliciting nominations for restrictive ACECs, including considering layering ACECs over areas that were withdrawn by Public Land Orders (PLOs) to support Alaska Native Claims Settlement Act (ANCSA) selections by Alaska Native Corporations. With these selections by ANCSA corporations complete, many of these areas will be eligible for transfer to the State under its statehood entitlement once DOI fulfills its

responsibility to lift the PLOs. Instead, under BLM's proposed new designations, the transfer of these statehood entitlement lands will be further restricted and delayed.

VII. Conclusion

As discussed, federal regulators, especially the BLM, need to increase coordination and transparency in permitting. This is especially important in the area of mitigation for the impacts of permitted projects, where overlapping federal authorities are burdening applicants and delaying progress on critical state and private projects. The State will continue to participate in the public process on all of these issues, but needs to be viewed as an equal partner by the federal government and have some acknowledgment and consideration of its expert perspective in implementation. Additionally, the federal government should draw from the success of the state permitting coordination model to improve its own processes.

The CHAIRMAN. Thank you.
Mr. Brand, welcome.

STATEMENT OF RANDY BRAND, VICE PRESIDENT, GREAT NORTHWEST, INC.

Mr. BRAND. Thank you.

If you visit the EPA website, you're bombarded with why we need the clean water rule to protect our streams and wetlands. Ironically, EPA workers accidentally caused a toxic wastewater release in Colorado. If this had happened to any of us in the industry, we would soon be out of business and in handcuffs.

For the past 22 years my firm has either had a controlling interest or outright ownership of 300 acres of heavy industrial-zoned land in Fairbanks. We have developed this property to serve the construction needs of the greater Fairbanks area. Originally all that was required for a wetland permit was to submit a written development plan to show the purpose and need. Over the years, things became gradually more difficult.

The first change was the requirement that any plan for pit development had to include a restoration plan to include littoral zones. Restricting development of a 20-foot wide zone around an old pit may not sound like much, but it adds up quickly. A 20-foot strip around a five acre pond equals about 0.85 acres. A geometric calculation of this set-aside equals a volume of 206,000 cubic yards with a potential value of over $600,000. Requirements gradually worsened to the point we are at today with the requirement of compensatory mitigation.

In 2006, my firm needed to update our existing wetlands permit. The U.S. Army Corps of Engineers required that we contribute $55,000 to The Conservation Fund to provide for offsite mitigation of 16 acres of lost wetlands. We were also required to permanently set aside an additional 10.64 acres of our land to be protected wetlands in perpetuity.

As we were aware of two U.S. Supreme Court rulings that might affect our determination, we held off executing the permit. After those rulings were published, we requested on July 12th, 2006 the Corps revisit the jurisdictional determination for our property. This remained unanswered until March 28th, 2007 when the Corps offered a proffered permit which included a condition that the in-lieu fee for compensatory mitigation would be held in escrow until a new jurisdictional determination was issued under the new guidance.

On July 28th, 2008 the Corps determined that this property was jurisdictional wetlands. With the help of the Pacific Legal Foundation, we fought this determination on our property all the way to the 9th Circuit Court and won at a cost of $89,000. The new rulemaking by the EPA will reverse that determination, potentially forcing us to re-enter the permitting process for our ongoing development. To hopefully protect ourselves from that situation, we have cleared and disked much of this land at a cost of $73,000 to convert it to uplands beyond the EPA's reach.

In other private cost impacts, a business associate of mine with a development on North Slope Borough leased land in Deadhorse was required to pay $90,000 in fees to develop seven and a half

acres in 2011. Three years later he applied to develop an adjoining seven and a half acre parcel. The price doubled to $180,000 without any explanation. That's about $24,000 per acre.

This impact is not limited to private landowners. Our ability to improve public infrastructure is also impacted by these rules. Mayor Brower has previously testified that the Barrow landfill project had to pay $1 million in compensatory mitigation.

I would like to add that Northern region transportation projects paid $3.4 million in mitigation payments in 2014 and $1.3 million in mitigation payments in 2015 to date. During 2014 the credit cost increased from $2,200 per credit to as much as $33,000 per credit.

[Audio problems.]

Mr. BRAND. So last but not least is an agreement reached in December 2007 whereby the Juneau Airport project paid $5.3 million to the Southeast Alaska Land Trust as compensatory mitigation for impacts to 73 acres of wetlands. That's about $73,000 per acre.

Another interesting note is the government's failure to recognize court rulings. Several of us individually own property upstream of the Great Northwest property that was deemed non-jurisdictional wetlands. The government claimed jurisdiction over my property last week, just as they had done to other property owners in the same neighborhood.

To further complicate matters, the EPA has shut down The Conservation Fund until they do an audit of the expenditures. Permits cannot now be obtained as there is no organization to receive the required funds. Progress for future paying projects is now at risk.

These payments are impacting our ability to deliver worthwhile infrastructure improvements, predominately within long dedicated rights-of-way. Additionally, these payments are re-directing taxpayer dollars to NGO's with their own self-serving interests, salaries, and expenses. One could even argue these payments constitute extortion due to the fact you will not get a permit to fill your wetlands without making the appropriate payment.

These new regulations will take large tracts of land not currently under the authority of the Clean Water Act and redefine them as waters of the U.S. This egregious Federal overreach has more to do with the largest land grab in history than with expanding protection under the Clean Water Act. The net result will be changing the Clean Water Act into a Wetlands Protection Act.

If there is a need for a Wetlands Protection Act, Congress should enact one and leave public rights-of-way and privately held properties out of it. If the public wants to set these areas aside then the public should purchase the land outright at fair market value.

Thank you.

[The prepared statement of Mr. Brand follows:]

If you visit the EPA website you are bombarded with why we need the clean water rule to protect our streams and wetlands. Ironically on August 4 EPA workers accidentally caused a toxic wastewater release in Colorado. When they finally did report it over a day later, they grossly underestimated the volume of the release. And these are the folks that regulate our actions! If this had happened to any of us in the industry we would soon be out of business and in handcuffs.

For the past 22 years my firm has either had a controlling interest or outright ownership of 300 acres of heavy industrial zoned land in Fairbanks. We have developed this property to serve the construction needs of the greater Fairbanks area. Originally, all that was required for a wetland permit was to submit a written development plan to show the purpose and need. Over the years things became gradually more difficult. The first change was the requirement that any plan for pit development had to include a restoration plan to include littoral zones. Restricting development of a 20' wide zone around an old pit may not sound like much, but it adds up quick. A 20' strip around a 5 acre pond amounts to about 0.85 acres! A geometric calculation of this set-aside equals a volume of 205,700 cubic yards with a potential value of over $615,000!

Requirements gradually worsened to the point we are at today with the requirement of compensatory mitigation. In 2006 my firm needed to update our existing wetlands permit. The U.S. Army Corps of Engineers required that we contribute $55,000 to The Conservation Fund to provide for offsite mitigation of 16 acres of lost wetlands. We were also required to permanently set aside an additional 10.64 acres of our land to be protected wetlands in perpetuity. As we were aware of two U.S. Supreme Court rulings that might affect our determination (Rapanos & Carabell) we held off executing the permit. After those rulings were published we requested on July 12, 2006 the Corps revisit the jurisdictional determination for our property. This remained unanswered until March 28, 2007 when the Corps offered a proffered permit which included a condition that the in-lieu fee for compensatory mitigation would be held in escrow until a new jurisdictional determination was issued under the new guidance. On July 28, 2008 the Corps determined that this property was jurisdictional wetlands. With the help of the Pacific Legal Foundation we fought this determination on our property all the way to the 9th Circuit Court and won at a cost of $89,205. The new rulemaking by the EPA will reverse that determination potentially forcing us to re-enter the permitting process for our ongoing development. To hopefully protect ourselves from that situation, we have cleared and disked much of this land at a cost of $73,000 to convert it to uplands beyond the EPA's reach.

In other private cost impacts a business associate of mine with a development on North Slope Borough leased land in Deadhorse was required to pay $90,000 in fees to develop 7.5 acres in 2011. Three years later he applied to develop an adjoining 7.5 acre parcel. The price doubled to $180,000 without any explanation ($24,000 per acre).

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This impact is not limited to private landowners. Our ability to improve public infrastructure is also impacted by these rules. Mayor Brower has previously testified that the Barrow landfill project had to pay $1 million compensatory mitigation. I would like to add that Northern region transportation projects have paid $3.4M mitigation payments in 2014 and $1.3M mitigation payments in 2015 to date. During 2014 the credit cost increased from $2,200 per credit to as much as $33,000 per credit. Last but not least is an agreement reached in December 2007 whereby the Juneau Airport project paid $5.3M to the Southeast Alaska Land Trust as compensatory mitigation for impacts to 72.84 acres of wetlands ($72,826 per acre).

Another interesting note is the government's failure to recognize court rulings. Several of us individually own property upstream of the Great Northwest property that was deemed non-jurisdictional wetlands. The Government claimed jurisdiction over my property last week, just as they have done to other property owners in the same neighborhood.

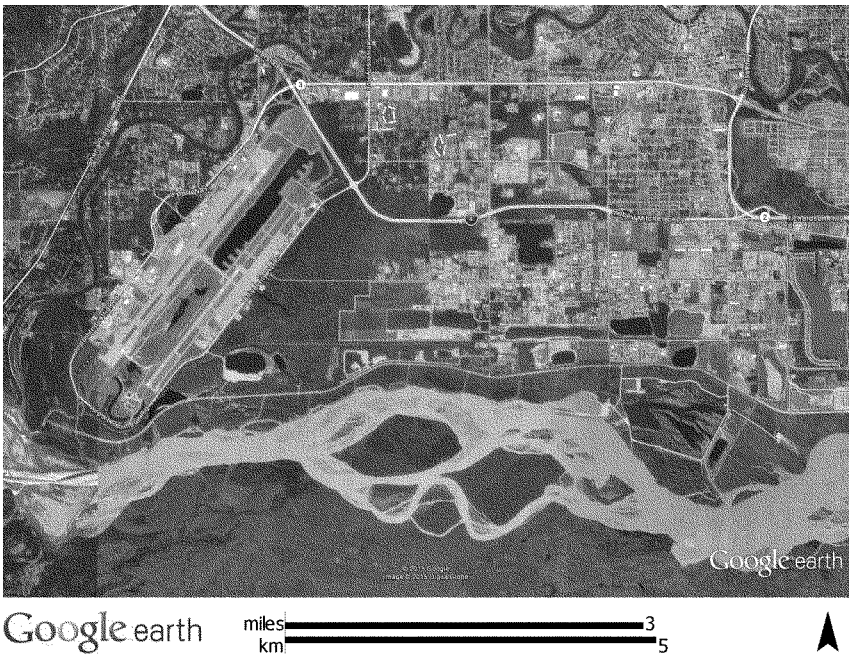
To further complicate matters the EPA has shut down The Conservation Fund until they do an audit of the expenditures. Permits cannot now be obtained as there is no organization to receive the required funds. Progress for future projects is now at risk.

These payments are impacting our ability to deliver worthwhile infrastructure improvements, predominately within long dedicated rights of way. Additionally, these payments are re-directing taxpayer dollars to N.G.O.'s with their own self-serving interests, salaries and expenses. One could even argue these payments constitute extortion due to the fact you will not get a permit to fill your wetlands without making the appropriate payment.

Alaska is in a bit of a unique position here. Wetland mitigation rules and permits should not apply to the State of Alaska. Over 43% of Alaska's surface area is considered wetlands. In the lower 48, wetlands occupy 5.2% of the surface area. Over 88% of Alaska's wetlands are already under public management which includes vast tracts of land in our park and refuge system. Wetlands contained within public transportation facilities, as well as wetlands in private ownership should be exempted. We already have regulations to control pollution, and the designer of any project is ultimately responsible for a functioning product. In the case of public projects, these rules constitute extortion. In the case of private projects they also take land for public benefit without any compensation to the landowner, or in many cases, force the landowner to pay compensatory mitigation to obtain permits to fill private wetlands at values that are multiples of the value of the property being filled. After all, what are the land trusts and conservation funds doing but using public funds to purchase private lands thus shrinking the 10.9% of Alaska currently available land for private development thereby reducing our local governments' tax rolls.

These new regulations will take large tracts of land not currently under the authority of the Clean Water Act and redefine them as waters of the U.S. This egregious Federal overreach has more to do with the largest land grab in history than with expanding protection under the Clean Water Act. The net result will be changing the Clean Water Act into a Wetlands Protection Act. If there is a need for a Wetlands Protection Act, then Congress should enact one, and leave public rights of way and privately held properties out of it. If the public wants to set these areas aside then the public should purchase the land outright at fair market value.

Respectfully,
Randy Brand



Great Northwest, Inc. Fairbanks gravel pit

Randy Brand

From: Miller, David J (DOT) <david.miller@alaska.gov>
Sent: Monday, August 10, 2015 1:05 PM
To: Randy Brand
Subject: FW: NR Wetland mitigation payments 2014 - updated to 2015

Let me know if you need anything else.

From: Nelson, Brett D (DOT)
Sent: Monday, August 10, 2015 12:44 PM
To: Miller, David J (DOT)
Cc: Anderson, Ryan (DOT); Hill, Jason J (DOT); Woster, Timothy J (DOT); Hooper, Barry L (DOT); Bailey, Meadow P (DOT)
Subject: NR Wetland mitigation payments 2014 - updated to 2015

Dave,

Here is the updated wetland mitigation payment information, now including 2015 payments. Please let me know if you have any questions.

Thanks,
Brett

Brett Nelson
Northern Region Environmental Manager
Alaska Dept. of Transportation & Public Facilities
Office (907)451-2238
Fax (907)451-5126

2014 NR Wetland Mitigation ILF Payments

Project Name	Project No.	Mitigation Cost	Date Paid	Credits	Credit Cost	Funding Source
Parks Hwy MP 194-195 RR Overpass	61277	$12,430	7/2/2014	1.13*	$11,000	FHWA
Parks Hwy MP 163-305 Passing Lanes - Stage II	63515	$12,375	4/28/2014	1.125*	$11,000	FHWA
Richardson Hwy New Weigh Station	60552	$33,000	7/2/2014	3.0*	$11,000	FHWA
Nome Airport RSA	61413	$1,417,350	5/8/2014	128.85*	$11,000	FAA
St. Mary's-Mountain Village Road	60240	$262,350	6/23/2014	22.35*	$11,000	FHWA
Goldstream Road - permit mod	63513	$6,390	6/23/2014	0.63*	$11,000	FHWA
Deadhorse Airport ARFF	61447	$77,550	12/1/2014	3.525*	$22,000	FAA
Dalton MP 401-414 - road only	61366	$579,150	11/17/2014	52.65*	$11,000	FHWA
Ambler Airport Rehab	61303	$533,060	10/20/2014	48.46*	$11,000	FAA
Elliott Hwy MP 107.7-120.5	62227	$147,070	9/25/2014	13.13*	$11,201	FHWA
Parks Hwy Passing Lanes - Stage III	63515	$4,620	8/5/2014	0.42*	$11,000	FHWA
Plack Rd Bike Path	77248	$26,400	7/29/2014	2.4*	$11,000	FHWA
Elliott Hwy MP 97.7-106.6	M&O	$104,500	8/6/2014	9.5*	$11,000	State
Dalton MP 274-289 - permit mod	67018	$40,260	8/5/2014	3.66*	$11,000	FHWA
Road to Tanana	61759	$118,140	4/8/2014	53.7*	$2,200	State
		$3,374,645				

2015 NR Wetland Mitigation ILF Payments

Project Name	Project No.	Mitigation Cost	Date Paid	Credits	Credit Cost	Funding Source
Parks Hwy Rest Areas	61074	$8,250	2/11/2015	0.75*	$11,000	FHWA
Coldfoot Airport	60851	$24,750	5/4/2015	2.25*	$11,000	FAA
Yankovich Miller Hill Bike Path	76707	$52,800	4/27/2015	3.0*	$17,600	State
Dalton MP 401-414 - mod & material sites	61366	$1,252,250	8/10/2015	114.75*	$11,000	FHWA
		$1,338,050				

*credits calculated from acres x wetland category ratio

The CHAIRMAN. Randy, thank you, we appreciate your testimony. I think sometimes those costs that are associated are just astounding.

Deantha Crockett, welcome.

STATEMENT OF DEANTHA CROCKETT, EXECUTIVE DIRECTOR, ALASKA MINERS ASSOCIATION

Ms. CROCKETT. Thank you, Senators.

For the record my name is Deantha Crockett, and I'm the Executive Director of the Alaska Miners Association (AMA).

I know that you two are quite aware of what AMA is. But for the record, we are the statewide membership-funded trade association that represents all aspects of the mining industry. You described the vast affect of the areas of the state that these polices have an effect on our membership spans. We've got branches in Nome and we have a branch in Ketchikan, Prince of Wales and six in between. Members really do operate in every corner of our state.

I represent six large operating mines, but around 400 permitted placer operations. A vast majority of my job on a day-to-day basis is advocating and helping placer miners to sum up Federal policies in five minutes. I think I heard Mr. Fogels use this word as well, and I'm sorry to say that the word I've got to use is uncertainty.

Right now I have the large operations that I referenced evaluating what source of investments they'll make of those big projects, but I've got the vast majority of my placer miners evaluating whether or not they'll still have a livelihood.

I do have one of my members, someone I've become great friends with, in the third row, Bronk Jorgensen. He is here from the Fortymile Mining District and watches that every single day in terms of how Federal management policies affect placer mining on Federal land in Alaska.

I will begin with the BLM. I think we're seeing multiple policies come from multiple field offices throughout different levels of management in the agency whether it's land planning, regulatory enforcement or how permitting is conducted. But a lot of times policies are introduced in draft form to which the industry scrambles to digest multiple volumes, I'm not exaggerating, about this high, of different plans and policy changes that come out. Sometimes the polices come to fruition, sometimes they don't, and sometimes in the meantime we see them used by the agency as legitimate land management tools.

To be specific, BLM recently reevaluated its implementation of the regulations in which mineral activity is permitted and managed in Alaska, which is essentially new regulation that doesn't add any additional environmental protection. It doesn't fix any problems, and it burdens the miners with increasing costs and delays.

For many years placer mining operations have applied for permits and been regulated under the Annual Placer Mining Application, the APMA process, which is managed by three State of Alaska agencies and BLM. For a long time these agencies got together and made sure that the APMA was a good program that placer miners could effectively manage permitting for but still establish the objectives of all the agencies involved.

That certainly changed into a different animal, and now BLM has proposed seven new supplemental documents for the APMA. There is also a requirement to gather new data and a possible Reclamation cost estimate to determine the cost of reclaiming an operation that doesn't have any non-compliance issues in the first place.

So outside of the permitting, the agency has also released a number of land management plans as part of an overarching landscape level process. The RMPs cover really large acreages and often contain management prescriptions that guide polices of the land users in the area outside of what is current land regulation and statute.

Deputy Commissioner Fogels did a phenomenal job of explaining the ACECs, so I was able to cross out a little of my testimony here.

Recently we've seen two, a newly proposed and then an expanded one, that was in existence in the Fortymile region, and it really has that district very concerned. It's hundreds of thousands of acres that are being proposed for closure to mineral entry, an area that's known to be highly mineralized.

There is an additional component within the land managing process called rapid ecological assessment. And I have to be honest with you, I'm still not totally sure what it does or what it doesn't do. But these are all examples of, frankly, what is a puzzle and us trying to understand BLM's land management philosophy and how it applies to placer mining on Federal lands in Alaska.

When the National Director, Neil Kornze, visited Chicken earlier this year, which we profusely thank you for your help on, I had the opportunity to talk to him. I told him that I think there are really good, intelligent and hard working staff within the BLM Alaska offices here. I firmly believe that. They're all sitting in this row right here. They are wonderful about communicating with me. They're asking for different ways to provide outreach to miners.

And what I told Director Kornze is that they've got a lot of good ideas on how placer mining can be regulated and the agency's objectives can still be established. I hope that the communication between the Alaska staff and the national staff is a two way street, and they're being allowed to implement ideas. I think they are the best ones to understand placer mining in Alaska.

So switching to wetlands mitigation, we certainly do have our struggles with jurisdiction over Section 404. But one thing I can say at this time is kudos to that agency for its recent internal review of how wetlands jurisdiction and regulation is conducted in Alaska. I know that they are evaluating the 1994 Alaska Wetlands Initiative, and is it a tool that is there for the agency to manage projects specific to mining in Alaska.

I know that the agency has committed to reviewing whether the entire suite of tools is being utilized to regulate operations and wetlands in Alaska. We saw these words put into action with the recently released general permit for placer mining that the agency went through. They extended the existing permit because they readily admitted we're not done. This is not a forum with which we're happy and ended up striking out the compensatory mitigation for certain small placer mining projects.

So they really did put their money where their money is, so to speak, and ended up taking multiple stages of revisions from placer

miners into that final product. And it's one that there are some things we don't like about it. There's a lot of things we like about it, and I think they did a great job of meeting us in the middle, if you will, on that one.

So I think I've exceeded my time allotment. For that, I apologize. But I thank you again for the opportunity to testify for placer miners today.

[The prepared statement of Ms. Crockett follows:]

ALASKA MINERS
ASSOCIATION

121 W. Fireweed Suite 120 | Anchorage, Alaska | 99503 | 907.563.9229 | alaskaminers.org

Testimony of Deantha Crockett, Executive Director
Alaska Miners Association
April 17, 2015 Field Hearing
Senate Committee on Energy and Natural Resources and the
Senate Committee on Environment and Public Works; Subcommittee of Fisheries, Water, and Wildlife
"Federal Mitigation Requirements by BLM and USACE"

Thank you for the opportunity to testify at this field hearing on federal mitigation requirements by the Bureau of Land Management (BLM) and the U.S. Army Corps of Engineers (Corps), and interagency coordination related to economic development on federal, state, and private lands.

AMA is a non-profit membership organization established in 1939 to represent the mining industry in Alaska. We are composed of more than 1,800 individuals and companies that come from seven geographically diverse statewide branches: Anchorage, Denali, Fairbanks, Juneau, Kenai, Ketchikan/Prince of Wales, and Nome. Our members include individual prospectors, geologists, engineers, vendors, suction dredge miners, small family mines, junior mining companies, and major mining companies. AMA works closely with the Federal and State agencies in Alaska to assure that the resources of Alaska can be developed in an economic and environmentally manner. We look for and produce gold, silver, platinum, molybdenum, lead, zinc, copper, coal, limestone, sand and gravel, crushed stone, armor rock, and other materials. These members are engaged in mineral development critical to the economies of local Alaskan communities, the State of Alaska, the United States of America, and the world.

To sum up federal policies, in the eyes of Alaska's miners, I'm sorry to say the word I must choose is uncertainty.

I will begin with the BLM. We are seeing multiple policies coming from multiple field offices through multiple levels of management: land planning, regulatory enforcement, permitting, and otherwise. These policies are introduced in draft form, to which the mining industry scrambles to digest the multiple volumes of thousands of pages of new policies governing our operations. Many times these policies do not come to fruition, or are not finalized, yet are used by the agency as legitimate land management tools.

To be specific, BLM recently reevaluated its implementation of the regulations (43 CFR 3809) in which mineral activity is permitted and managed. This policy change is essentially new regulation – regulation that does not add any additional environmental protection - that burdens Alaska's miners with increasing costs and delays, especially small placer mining operations. For many years, placer operations have applied for permits and been regulated under the Annual Placer Mining Application (APMA) process, managed by three State of Alaska agencies and BLM. Under the APMA program, placer mining in Alaska has garnered National BLM Reclamation Awards and no operation has ever drawn from the bonding pool. Despite resounding successes, BLM has proposed seven new supplemental documents, a requirement to gather new data, and a possible reclamation cost estimate to determine the cost of reclaiming an operation holding no past noncompliance issues and a proven track record of successful reclamation.

In addition to permitting, the agency has also released a number of land management plans as part of an overarching "landscape-level" planning process. These Resource Management Plans cover very large acreages of Alaska and often contain management prescriptions that guide policies of the land users in the area outside of regulation and/or statute. The RMPs contain provisions in which Areas of Critical Environmental Concern, or ACECs, can be nominated for special management protection, including two we saw recently which proposed closing over 700,000 acres of BLM land known to be highly mineralized to mineral entry, which we believe is a violation of the Alaska National Interest Lands Conservation Act (ANILCA). An additional component is a Rapid Ecological Assessment, or REA, in which BLM seeks to understand existing conditions and any factors

that may change a landscape. Frankly, I do not know what a REA does, or does not do. But they are just one more piece of what is a puzzle in trying to understand BLM's land management philosophy, and adds further confusion when mining on federally-owned land in Alaska.

When National BLM Director Neil Kornze visited Chicken, Alaska, earlier this month (which we profusely thank Senator Murkowski for helping to arrange), I had the opportunity to provide comments to him. I told him that I firmly believe there are good, intelligent, and hard-working staff within the BLM Alaska offices, and that they genuinely care about Alaskans in all sectors. I must commend them, before this committee today, for their outreach to AMA to foster a good working relationship and ensure two-way communication. I urged Director Kornze to provide the State Office with the resources and leeway it needs to continue what has been many years of successful mining operations that maintain the livelihood of hundreds of Alaskan families while still meeting the BLM mission to manage Alaska's federal lands for all users. Policies from BLM need to be reasonable and reflect the reality of Alaska's environment. Agency staff here on the ground are well-equipped to manage the land and enhance the industry simultaneously, if they are given the freedom to do so.

In terms of wetlands mitigation, Alaska's miners certainly have struggles with the U.S. Army Corps of Engineers' jurisdiction over the Clean Water Act Section 404 wetlands regulation. The reality is, a vast acreage of Alaska is wetlands, so developing nearly anywhere in the State will require a project to obtain some level of USACOE permitting. One thing that can be said at this time, is "kudos" to the agency for its recent internal review of how wetlands jurisdiction and regulation are conducted in Alaska, and how the 1994 Alaska Wetlands Initiative is being reevaluated as a tool for the agency to manage projects. The Alaska Division of USACOE has committed to reviewing whether its entire suite of tools is being utilized to regulate economic development in Alaska's wetlands. These words have been put into action, proven with the recently released General Permit for Placer Mining. The General Permit went through multiple stages of public involvement, revision, and adaptation to ensure it accomplishes the objectives of the Department while allowing for practical placer mining regulation. We commend this agency for its outreach to AMA as well, and are hopeful this approach can be extended for other types of resource development activity as well.

I'm hopeful that I haven't exceeded my time allotment today in attempting to summarize federal policies affecting Alaska's miners. We at AMA thank you for the opportunity to testify before this committee today.

The CHAIRMAN. Thank you, Deantha.
Joe, welcome.

STATEMENT OF JOSEPH NUKAPIGAK, VICE PRESIDENT, KUUKPIK CORPORATION

Mr. NUKAPIGAK. Thank you.

Thank you, Senator Murkowski and Senator Sullivan and the Committees for allowing me the opportunity to provide testimony on Federal mitigation requirements. I hope to add local content and offer some suggestions for the committees to consider.

Kuukpik Corporation is the Alaska Native Land Settlement Act Village Corporation for Nuiqsut, which is an almost entirely Native community on the North Slope of Alaska. Approximately 90 percent of our residents of Nuiqsut are shareholders in Kuukpik Corporation or are married to Kuukpik Corporation shareholders or descendants of Kuukpik shareholders.

Kuukpik is one of the largest private landowners in the National Petroleum Reserve-Alaska, having received title to approximately 74,000 acres of ANCSA lands surface estate. The balance of Kuukpik's lands, totaling about 69,000 acres, are just east of the NPR-A in and around the Colville River Delta.

Nuiqsut is the community most affected by oil development on the North Slope to date. Alpine is only eight miles away from the village and can be seen from the village, day and night. Nuiqsut is a traditionally Inupiat community where over 70 percent of households get more than half their food from subsistence hunting.

The oil industry has been active on the eastern side of Nuiqsut's traditional subsistence lands at Prudhoe Bay and Kuparuk for over 50 years, but construction of the Alpine field in 1998 put the oil field and Nuiqsut in close daily contact. Three new satellite oil fields have been built around Nuiqsut since Alpine and at least two more are planned. Impacts to subsistence activities and resources are continuing and persistent issues.

Our challenge as a community and a corporation was to realize the economic benefit of ANCSA land ownership through oil development, while protecting our Native culture. Our leadership has consistently worked to protect subsistence and our natural surroundings.

As oil development occupied more and more subsistence lands to the east and north, Kuukpik decided that better access to subsistence land to the west was the one part of dealing with oil development impact, while the other part was better access to jobs and training at Alpine oil field.

Our solution was to build a Spur road from the village to the industrial CD–5 road. The road has three purposes. One is to open up more area for subsistence to the west. Two is to allow Nuiqsut residents and shareholders to drive to training and employment opportunities at home. Three expanded health, life, and safety options.

Projects such as the Spur Road are a key part of ANCSA's purpose, to protect Native land and culture while promoting economic development of Native land, jobs, and training for Alaska Natives. Yet the Federal permitting process has created substantial barriers to the project.

The Permit Process. In January 2013, Kuukpik submitted an application to the U.S. Army Corps of Engineers. The proposed road was 5.8 miles long and called for placing gravel on 51 acres of our land that we own. Over several months Kuukpik submitted information to improve our application. In August 2013, the EPA commented on our application. Like many 404 applicants, they sent Kuukpik a letter stating that they reserved the right to elevate our ANCSA project if their concerns are not addressed, or could not be addressed.

Specifically, the EPA argued that mitigation for Kuukpik's 51-acre road required that we set aside an additional 294.2 acres in permanent conservation status. Under the EPA calculation, the 51-acre footprint of our community road would actually impact a minimum of 343.2 acres of Kuukpik-owned property. The proposed mitigation acreage would be almost six times the actual footprint.

Kuukpik continued to meet with the Corps of Engineers and the EPA throughout the fall of 2013. We repeatedly argued that the size of parcel needed as an offset for the project was smaller than required by the EPA and that the purpose of the road is an extension of our right as a landowner under ANCSA and served to mitigate oil development impacts.

Our negotiations lead Kuukpik to the conclusion that despite the inherent conflict between ANCSA and the Clean Water Act, we needed the 404 permit. We eventually agreed to set aside a 127-acre parcel in the area known as Fish Creek, so that the Spur Road's 51-acre footprint impacts 178 acres of Kuukpik land. The mitigation acreage is more than twice as much as the actual footprint even though the mitigation acreage is made up of higher value wetland than those occupied by the project footprint.

Kuukpik is still in the process of finalizing the easement. One of the many byzantine requirements of the Clean Water Act is that a qualified third-party entity hold the easement, and that an entitlement be set up to fund future costs of managing that easement.

We are in the process of identifying a qualified and willing third-party that can harmonize our need to continue our lifestyle with the demands of the Clean Water Act.

Kuukpik supports continuing to use all the mitigation-related tools available under the existing rule, including wetland mitigation banks, in-lieu fee programs and permittee responsible mitigation; however, Kuukpik also supports expansion of the options available to Alaska Native Corporations including recent legislation introduced by our Congressman calling for preservation leasing for tribal organizations, including Alaska Native Corporations. That legislation could more closely tie mitigation acreage to the actual life of project-related impacts.

Finally, we think that Alaska Native Corporations should be exempt from Clean Water Act requirements where the applicant is an Alaska Native Corporation and the project is on Alaska Native land.

BLM Region Mitigation Strategy. The Department of the Interior has now stepped into the compensatory mitigation equation. BLM negotiated an $8 million mitigation payment to offset impacts created by GMT1. Decisions regarding the disposition of the funds should be made by the NPR-A Working Group.

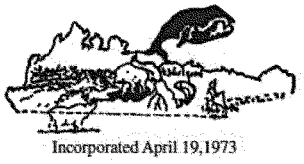
The NPR–A Working Group was created as part of the Integrated Activity Plan for the NPR-A. The purpose of the Working Group is to guide the Federal Government's decision making process within the NPR-A. The group has broad representation including tribal, local government, and corporate groups. It makes perfect sense to allow that group to determine the use of the funds.

Second, we recommend that funding community mitigation be the highest priority for the funds.

We will continue to work with our families and our neighbors including the City of Nuiqsut, Native Village of Nuiqsut, and the BLM on plans for utilizing the funds.

Thank you for your time.

[The prepared statement of Mr. Nukapigak follows:]



KUUKPIK corporation

STATEMENT OF JOSEPH NUKAPIGAK
VICE PRESIDENT
KUUKPIK CORPORATION

COMMITTEE ON ENERGY AND NATURAL RESOURCES
COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS
SUBCOMMITTEE ON FISHERIES, WATER, AND WILDLIFE
UNITED STATES SENATE
AUGUST 17, 2015

Thank you Senator Murkowski and Senator Sullivan and the Committees for allowing me the opportunity to provide testimony on federal mitigation requirements. I hope to add local content and offer some suggestions for the Committees to consider.

Introduction

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Kuukpik is one of the largest private landowners in the National Petroleum Reserve-Alaska, having received title to approximately 74,000 acres of ANCSA surface estate. The balance of Kuukpik's lands, totaling about 69,000 acres are just east of the NPR-A in and around the Colville River Delta.

Nuiqsut is the community most affected by oil development on the North Slope to date. Alpine is only 8 miles from the village and can be seen from the village, night and day.

Increasing Impacts and the Nuiqsut Spur Road Project

Nuiqsut is a traditional Inupiat community where over 70 percent of households get more than half their food from subsistence.

The oil industry has been active on the eastern side of Nuiqsut's traditional subsistence lands at Prudhoe Bay and Kuparuk for over 50 years, but construction of the Alpine field in 1998 put the oil fields and Nuiqsut in close daily contact. Three new satellite oil fields have been built around Nuiqsut since Alpine and at least two more are planned. Impacts to subsistence activities and resources are a continuing and persistent issue.

Our challenge as a community and a Corporation was to realize the economic benefits of ANCSA land ownership through oil development, while protecting our Native culture. Our leadership has consistently worked to protect subsistence and our natural surroundings.

As oil development occupied more and more subsistence lands to the east and north, Kuukpik decided that better access to subsistence lands to the west was one part of dealing with oil development impacts, while the other part was better access to jobs and training at Alpine.

Our solution was to build a Spur road from the village to the industrial, CD-5 road.

The road had two purpose: (1) to open up more areas for subsistence to the west; and (2) to allow Nuiqsut residents and shareholders to drive to training and employment opportunities at Alpine.

Projects such as the Spur Road are a key part of ANCSA's purpose: to protect Native lands and culture while promoting economic development of Native lands and jobs and training for Alaska Natives. Yet the federal permitting process has created substantial barriers to the project.

The Permit Process

In January of 2013 Kuukpik submitted an application to the U.S. Army Corp of Engineers. The proposed road was 5.8-mile long road and called for placing gravel on 51 acres of land that we own. Over several months Kuukpik submitted information to improve our application. In August of

2013 the EPA commented on our application. Like many 404 applicants they sent Kuukpik a letter stating that they reserved the right to elevate our ANCSA project if their concerns could not be addressed.

Specifically the EPA argued that mitigation for Kuukpik's 51-acre road required that we set aside an additional 292.2 acres in permanent conservation status. Under the EPA's calculation, the 51 acre footprint of our community road would actually impact a minimum of 343.2 acres of Kuukpik owned property. The proposed mitigation acreage would be almost six times the actual footprint.

Kuukpik continued to meet with the Corps of Engineers and the EPA throughout the fall of 2013. We repeatedly argued that the size of parcel needed as an offset for the project was smaller than required by the EPA and that the purposes of the road were an extension of our right as a landowner under ANCSA and served to mitigate oil development impacts.

Our negotiations lead Kuukpik to the conclusion that despite the inherent conflict between ANCSA and the Clean Water Act we needed the 404 permit. We eventually agreed to set aside a 127-acre parcel in the area known as Fish Creek, so the Spur Road's 51-acre footprint impacts 178 acres of Kuukpik land. The mitigation acreage is more than twice as much as the actual footprint.

Kuukpik is still in the process of finalizing the easement. One of the many byzantine requirements of the Clean Water Act is that a qualified third-party entity hold the easement and that an endowment be set up to fund future costs of managing that easement.

We are in the process of identifying a qualified and willing third party that can harmonize our need to continue our lifestyle with the demands of the Clean Water Act.

The Future

Kuukpik supports continuing to use all the mitigation-related tools available under the existing rule, including wetland mitigation banks, in-lieu fee programs and permittee responsible mitigation.

However, Kuukpik also supports expansion of the options available to Alaska Native Corporations including the recent legislation introduced by our Congressman calling for preservation leasing for tribal organizations including ANC's. That legislation would more closely tie mitigation acreage to the actual life of project-related impacts.

Finally we think that ANC's should be exempted from Clean Water Act requirements where the applicant is an Alaska Native Corporation and the project is on ANC land.

BLM Region Mitigation Strategy

DOI has now stepped into the compensatory mitigation equation. BLM negotiated an $8 million dollar mitigation payment to offset impacts created by GMT1. Decisions regarding the disposition of the funds should be made by the NPR-A Working Group. The NPR-A Working Group was created as part of the Integrated Activity Plan for the NPR-A. The purpose of the Working Group is to guide the federal government's decision-making process within the NPR-A. The group has broad representation including tribal, local government and corporate groups. It is the actual representatives of the impacts communities. It makes perfect sense to allow that group to determine the use of the funds. Second, we recommend that funding community mitigation be the highest priority for the funds.

We will continue to work with our families and neighbors including the City of Nuiqsut and the Native Village of Nuiqsut and the BLM on plans for utilizing the funds.

Thank you for your time.

The CHAIRMAN. Thank you, and thank you for representing Kuukpik.

Ms. Clark, welcome.

STATEMENT OF THERESA CLARK, VICE PRESIDENT OF LANDS AND SHAREHOLDER SERVICE, OLGOONIK CORPORATION

Ms. CLARK. Good afternoon. My name is Theresa Clark. I am the Vice President of Lands and Shareholder Services for Olgoonik Corporation.

Thank you, Senator Murkowski and Senator Sullivan and members of the Committees for providing Olgoonik the opportunity to testify today. I thank you for conducting this public hearing here in Alaska on this very important issue of Federal wetlands, Federal mitigation requirements, and the proposed legislation to address wetlands mitigation.

Olgoonik Corporation is the ANCSA village corporation for Wainwright. Olgoonik privately owns 175,000 acres of surface estate, all of which are within the NPRA, so we are one of the closest communities to offshore development in the Chukchi Sea. Offshore exploration, development, and production will require onshore-based support services which we are planning to deliver.

We received our full entitlement to our ANCSA lands. It took BLM over 20 years to patent our lands to us. The Clean Water Act was amended to address wetlands mitigation just as we were receiving the balance of our full entitlement, which subjected our lands to new and additional Federal requirements.

Wainwright residents and Olgoonik Corporation will be highly impacted by oil exploration and industry development in both a positive and negative manner. We are trying to minimize the adverse impacts that development brings to our community, especially those affecting our subsistence way of life. The positive impacts will be business and job opportunities, and a financial future for generations.

To minimize impacts and to capture benefits we are planning and developing Olgoonik lands on the outskirts of Wainwright. This will make development of Olgoonik lands subject to wetlands mitigation rules.

We have our own land management plan to develop lands and protect certain sensitive areas. Our strategy is to keep development of our lands to a minimum by compacting the development into a reasonably small footprint.

We are currently in the process of purchasing lands formally utilized by the Air Force as the Early Defense Warning System, DEW lines. With your introduction of an amendment to the 2015 NDAA and its passage, Senator Murkowski, thank you, we are now in the process of purchasing those lands. This property is within our ANCSA lands. Our plans for this property is to build infrastructure upon the plans already existing to provide essential support to oil and gas industries. This will further minimize development on wetlands within our ANCSA lands.

Full mitigation to protect wetlands is good and needed. We recognize that fact. We are also mindful that this impacts our ANCSA lands or purchased lands, the DEW line.

For example, there is a social deed in our community to build new homes. We are subdividing lands for that purpose. Roads will be needed for access. To build roads, we'll have to comply with the Federal regulations. This will drive up the price of development as the current method we are leaning toward is paying an in-lieu fee.

The current wetlands inventory data for Alaska's North Slope is limited and out-of-date. The Arctic Coastal Plain is comprised of approximately 80 percent wetlands. This was determined by the State of Alaska in 1994. This places the burden of more detailed delineation of our lands on us as a developer. Currently the average cost per acre to develop is approximately $12,000 per acre.

Using this data, a majority, if not all, of our land is considered wetlands. The in-lieu fee program is not available or able to presell additional credits at this time. Permittee responsibility is challenging in that we are required to triple the size of the impacted area when one adds together the project with a conservation easement.

We are certainly watching for and hoping that the Arctic Slope Regional Corporation's bank will be certified. In short, we feel that having multiple mitigation options is important from a permitting standpoint but also a financial standpoint.

Finally, we do not desire to lock up any of our lands in perpetuity to mitigate as we cannot predict the future. Decisions made today in regards to our lands may not be applicable 20 years down the road. As time passes, corporate leaders change, additional development will be needed to take place, and we need to keep the options open for our future generations to determine.

Therefore, with these purposes in mind, we support the proposed legislation to one, provide ANCs exemption from the Clean Water Act requirements where an applicant in an ANC and the proposed projects are on ANC lands. And two, to have the ability to enter into a preservation easement as a mitigation option.

I thank you for the opportunity to be heard, Senator Murkowski and Senator Sullivan and members of the Committees. I request your support on this proposed legislation.

[The prepared statement of Ms. Clark follows:]

Olgoonik Corporation

STATEMENT OF THERESA CLARK, VICE PRESIDENT OF LANDS AND SHAREHOLDER SERVICE
OLGOONIK CORPORATION

SUBCOMMITTEE ON FISHERIES, WATER, AND WILDLIFE
COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS
AND
COMMITTEE ON ENERGY AND NATURAL RESOURCES
UNITED STATES SENATE
AUGUST 17, 2015

Good afternoon, my name is Theresa Clark. I am Vice President of Lands and Shareholder Services for Olgoonik Corporation. Thank you Senator Murkowski, Senator Sullivan and members of the Committees for providing Olgoonik the opportunity to testify today. I thank you for conducting this public hearing here in Alaska on the very important issue of federal mitigation requirements and proposed legislation to address this issue.

Introduction

Olgoonik Corporation is the ANCSA village corporation for Wainwright Alaska. Olgoonik privately owns 175,000 acres of surface estate; all of which are within the National Petroleum Reserve of Alaska (NPRA). A vast majority of the subsurface estate is owned by the regional corporation Arctic Slope Regional Corporation. Approximately 12,000 acres subsurface estate remains in United States ownership which could be subject to leasing.

We are one of the closest communities to offshore development in the Chukchi Sea. Offshore exploration, development and production will require onshore based support services which we are planning for.

We have received our full entitlement to our ANCSA lands. It took BLM over twenty years to patent our lands to us. Clean Water Act was amended to address wetland mitigation just as we were receiving the balance of our full entitlement subjecting our lands to new and additional federal requirements.

Impacts to Wainwright

Wainwright residents and Olgoonik Corporation will be highly impacted by oil exploration and industry development in both a positive and negative manner. We are trying to minimize the adverse impacts that development brings to our community; the biggest affect being to our

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subsistence way of life. The positive impacts will be business and job opportunities and a financial future for generations.

To minimize impacts and to capture the benefits we are planning and developing Olgoonik lands on the outskirts of Wainwright. This will make development of Olgoonik lands subject to wetland mitigation rules.

We have our own land management plan to develop areas and protect certain sensitive areas. Our strategy is to keep development of our lands to a minimum by compacting the development into a reasonably small footprint.

We are currently in the process of purchasing lands formally utilized by the United States Air Force as Defense Early Warning system. With your introduction of an amendment to the 2015 National Defense Authorization Act and passage, Senator Murkowski (Thank you again), we are now in the process of purchasing these lands. This property is within our ANCSA lands. Our plan for this property is to build infrastructure upon the pads already existing to provide industry support to oil and gas industries. This will further minimize development on wetlands on our ANCSA land.

Full mitigation to protect wetlands is good and needed; we mindful of that fact and need. We are also mindful that the impacts we are talking about are either on ANCSA land or purchased lands. Regardless, mitigation requirements will impact our plans for development. For example, there is a need for our community to build new homes as Wainwright expands. We are subdividing lands for that purpose. Roads will be needed for access. We will have to comply federal regulations to address wetland mitigation in building roads on our *entitled* lands to address this social need. This will drive up the price of developing our land for this much needed community need as the current method we leaning towards using is paying an in-lieu fee.

Permitting

The current national wetlands lands inventory data for Alaska's North Slope is limited and out of date. The arctic coastal plain is comprised of approximately 80% wetlands *(Hall, Frayer, and Wilen; State of Alaska Wetlands, 1994)*. This places the burden of more detailed delineation of our land on us as a developer. Currently, the average cost per acre to develop is approximately $12,000.

Using this data, a majority, if not all of our land is considered wetland. The in-lieu fee program is not able to pre-sell additional credits at this time; and permittee responsible is challenging in that we are required to triple the size of the "impacted" area when one adds together the project with a conservation easement. We are certainly watching and hoping that the Arctic Slope Regional Corporation's bank will be certified. In short we feel that having multiple mitigation options is important from a permitting standpoint but also a financial standpoint.

Looking Forward

Finally, we do not desire to lock up any of our lands in perpetuity in wetland mitigation as we cannot predict future. Decisions made in current time in regards to our lands may not be applicable twenty years down the road and as time changes, corporate leaders change; development growth will need to take place, we need to keep those options open for our future generations to determine.

Therefore, with these purposes in mind, we support the proposed legislation that provide ANCs exemption from Clean Water Act requirements where the applicant is an ANC and proposed projects are on ANC lands and have the ability to enter into a preservation lease as an option for mitigation.

I thank you for the opportunity to be heard by yourselves, Senator Murkowski and Senator Sullivan, committee members and request your support of the proposed legislation.

The CHAIRMAN. Thank you, Theresa.

And finally we will wrap up with Mr. Phil Shephard, welcome to the Committees.

STATEMENT OF PHIL SHEPHARD, EXECUTIVE DIRECTOR, GREAT LAND TRUST

Mr. SHEPHARD. Thank you.

Thank you, Senator Murkowski and Senator Sullivan.

My name is Phil Shephard. I'm the Executive Director of Great Land Trust. We're a private, non-profit land trust that operates here in Alaska. We're based in Alaska. We have an all-Alaskan board.

We were founded in 1995, so 20 years ago. We work with willing landowners, agencies, communities, local governments and other partners to conserve south central Alaska's special lands and waterways. We have our service area, the area that we work is in south central, so from Denali, down to Kodiak, Prince William Sound. Primarily we've worked in Anchorage and Mat-Su, and we were asked in 1998 by the municipality of Anchorage, the State of Alaska, and various regulatory agencies to consider starting an in-lieu fee program in Anchorage.

So there's been discussion today about different mitigation options. We happen to operate one that's called an in-lieu fee program. There are other options.

But so what I'm going to talk about today is this public/private partnership that we happen to run as a land trust to do some of the mitigation. I'm not going to weigh in on why mitigation happens because that's not our purview. We don't do advocacy work. What we do is the mitigation after the fact.

So when the Army Corps has made the decision that okay, here's a permit, you can't fill this wetland, then that permittee, whether it's a private developer or an agency, it's DOT or some agency that's filling a wetland, they decide that the mitigation is formed and the mitigation options and the fee. Then that payment is made to us, and we aggregate those funds and then we turn around and we purchase those purchase properties to permanently protect those wetlands.

What we have to do in order to do that, in order to operate this is in the fee program, is we spend a great deal of time using the current data on wetlands in Anchorage and the Mat-Su to know, okay, well where are the best wetlands to mitigate? And so what we've done to date is partner with dozens of private landowners and agencies. We've created seven new parks, we've built a number of trails, we've conserved about 45 miles of salmon habitat here in Upper Kuukpik arm, we've provided six access points to public lands, and we've worked in eight different estuaries.

One of the things that we've focused on is if there's a wetland and it's privately owned and if we only work with willing landowners and the landowners that have these wetlands, and for whatever reason they decided they, you know, they don't want them anymore, we purchase those and then oftentimes they are adjacent to say, a state game refuge or a state park, and then we add those to the park. And then that way that property provides access to these public lands.

So we are blessed with a lot of public lands in Alaska. In some cases, especially around Anchorage, access is very limited. Actually right near here we just purchased property near Machetanz Elementary School and added it to Palmer Hayflats State Game Refuge and are building a boardwalk for the kids at Machetanz who are helping us. That's an example of a project, a type of project, that we do.

When we try to figure out where to do the mitigation we spend, I already said, a great deal of time with maps and GIS to figure out the best possible mitigation to do. We work closely with the boroughs, the municipal governments, state agencies, to find the best property. When we get frequent feedback from these agencies and resident experts that choose these properties we're really proud of all of the projects we've done.

One of our—several of our main partners have been Native Corporations. We've got—we've conserved almost 7,000 acres of Native Corporation lands in Upper Turnagain Arm that were mitigation from various projects around Anchorage.

Obviously there's way more impacts to wetlands around Anchorage and the Mat-Su just because there's more people here. And so I can't speak to the North Slope and these areas in the interior. We only operate or are in the fee program in Mat-Su and Anchorage.

In closing, I'd like to thank the Senators, both Senators Murkowski and Sullivan, for coming here and having this hearing. I'm sure everyone appreciates the ability to understand this issue more fully. I would just like to close with we're a, you know, small, private nonprofit in a partnership between a private nonprofit and these Federal agencies and the public I think has resulted in some really sound, high quality mitigation that has been for the good citizens of this area.

[The prepared statement of Mr. Shephard follows:]

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Senate Committee on Environment and Public Works subcommittee on Fisheries, Water and Wildlife: Great Land Trust Field Hearing Testimony August 17, 2015

INTRODUCTION TO GREAT LAND TRUST

Great Land Trust was founded in 1995 by Alaskans to work with willing landowners, agencies, communities, local governments, and other partners to conserve Southcentral Alaska's special lands and waterways. GLT is a private, nonpartisan non-profit organization dedicated to conserving lands and waters essential to the quality of life and the economic health of our communities. GLT seeks to conserve wetlands, salmon habitat, farmlands, and places of cultural, historical and recreational value. GLT works throughout Southcentral Alaska with a focus on the Municipality of Anchorage, the Mat-Su Borough, Prince William Sound and Kodiak.

GLT has played a critical role in wetland mitigation and economic development projects in Alaska since 1998.

RECOGNIZING A NEED FOR COMPENSATORY MITIGATION

The Municipality of Anchorage recognized the need for mitigation following a report in 1993 that concluded that between 1950 and 1990, approximately 10,000 acres of wetlands in the Anchorage Bowl had been filled or altered (Anchorage Wetlands Management Plan, April 8, 2013). There was a need to conserve wetlands to maintain wetland functions critical to the health of the community. Cumulative impacts to wetlands had resulted in:

- A reduction in anadromous fish populations
- Impaired water quality
- An increase in flood hazards

GREAT LAND TRUST'S ROLE IN COMPENSATORY MITIGATION

In 1998, GLT signed an agreement with the Alaska District of the U.S. Army Corps of Engineers to establish an In Lieu Fee compensatory mitigation program. This program allows GLT to accept funds from permittees to purchase high-value wetlands from willing landowners to compensate for the loss of other developed wetlands. GLT plays no role in the Corps' decision to approve or deny a development permit, or in decisions regarding the type of mitigation necessary. In 2011, Great Land Trust updated its agreement with the Corps as required by the Corps' 2008 Mitigation Rule. GLT's agreement with the Corps allows permittees a streamlined way to fulfill their mitigation requirements that benefits the communities within the Municipality of Anchorage and the Mat-Su Borough, where we operate our program.

GLT provides economic opportunities for wetland landowners. As an example, GLT's wetland mitigation program has enabled Alaska Native corporations to

capitalize on corporation-owned wetlands. GLT uses mitigation dollars to purchase conservation easements on high-value, corporation-owned wetlands, keeping the land in native ownership and available to shareholders for subsistence use. To date, GLT has conserved over 7,000 acres of lands owned by Alaska Native corporations.

GREAT LAND TRUST'S APPROACH TO COMPENSATORY MITIGATION

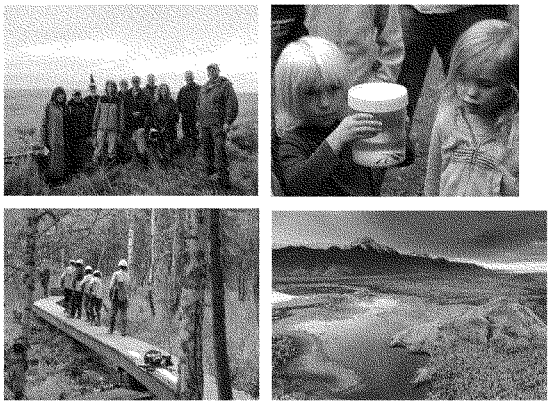
To select wetland projects, GLT gathers data including wetland type and function, fish and wildlife habitat, land status, and threat of conversion, and then maps priority areas. Working with local, state, and federal agency staff, regional biologists and GIS professionals, GLT ranked nearly 100,000 land parcels for wetland conservation within the Municipality of Anchorage and over 105,000 parcels in the Mat-Su Borough.

Once GLT has identified a parcel using the methods described above, it works with the Corps to evaluate whether it is the right fit for the compensatory mitigation program. The Corps enlists the assistance of its Interagency Review Team (IRT), a group of agency experts assembled by the Corps to evaluate compensatory mitigation projects. The IRT gives feedback to GLT and provides the Corps with expert opinion as part of its decision-making.

PROPERTIES CONSERVED THROUGH THE PROGRAM

GLT's work under this program has resulted in the protection of over 8,000 acres of wetlands to date, including wetlands visited by thousands of residents, school groups and tourists every year at sites such as Fish Creek Estuary in downtown Anchorage, Bowman Elementary School, and Campbell Creek Estuary. Through this program GLT has provided our community:

- 45 miles of conserved salmon stream habitat
- 5 public trails and boardwalks
- 6 new access points to public lands
- 8 conserved estuaries
- 7 city parks



The CHAIRMAN. Thank you.

Thank you, Mr. Shephard, and thank you to each of you for not only your testimony here this afternoon but the work that you do within your respective communities, your region, and the state.

I think if I have heard a common theme here it is the uncertainty that comes about with any level of requested development whether it is housing, as you were talking about in Wainwright, Ms. Clark, or whether it is mining activities out in the Fortymile region. When you do not have clear and consistent policies, it is difficult to make that business judgment decision as to how to move forward.

I have to say to friends here at home I feel like I have to apologize sometimes for the alphabet soup. I was listening to Mr. Fogels and Ms. Crockett. We have APMAs, we have ACECs, we have RMPs, we have REAs, and that's just in the little BLM area. It kind of boggles your mind. Unfortunately it just seems like that this is the acronym of the day, what is coming next? I don't know and I am not sure that our regulators know, and it adds to the confusion and complexity of what we are dealing with.

I am concerned as we look at the impact to our opportunities to develop. Mr. Fogels, you mentioned some of the big ticket items that we think about whether it is the ability for Donlin Gold to bring affordable energy to a project out there being limited by an ACEC; whether it is our Trans-Alaska Pipeline; whether it is further build out and repair of our Dalton Highway after the washout; whether it is what we are trying to accomplish in GMT1 and recognizing that we are still trying to get things moving within the NPRA. It really causes you to wonder how we have had the level of progress that we have had to date.

Let me ask, specifically, about these areas of critical environmental concern, these ACECs. In 1986, my understanding is we had 16 across the state and it encompassed about 2.7 million acres. Now, well in 2014, we had 52 ACECs overlaid across the state accounting for approximately 8.7 million acres of additional management. I do not go anywhere without my map of things that rile me up. Where is my rile me up map? [Laughter.]

I got so riled up that I put it in another file. Where is my colored maps? Those, you have them.

For those who do not have the areas of withdrawals of Alaskan lands, it is not just things like ACECs and the withdrawals within each of our public lands. It is what we also see withdrawn off of our coastline, with critical habitat designations. At the end of the day, Senator Sullivan has seen this chart through videos, but it is a colored patchwork that just, kind of, reinforces the situation that we are in and trying to access what we are dealing with here in this state. We are seeing this growth in ACECs. We are seeing this growth, this expansion, if you will.

I am going to ask you, Mr. Fogels. You have been with the Department of Natural Resources for some time. Are these regulatory measures increasing the health and the welfare to Alaskans? Is it helping us in terms of management? Are we gaining any benefit by these additional designations?

Mr. FOGELS. Senator Murkowski, I think, in my professional opinion, these most recent proposals that we have seen do not add to the health and welfare of the Alaskan people.

We, I should say that these are all, the ones out in the Eastern Interior Management Plan that totals up about 713,000 acres. And then there's another large one that we're watching. We're very concerned about the Donnelly project with many hundreds of thousands of acres. Those are all still in draft. I know those have been finalized. All of those plans are still in their planning process. So we're strongly commenting on these, on all of these ACECs, and we do not believe they're warranted. They're way too big. They don't have the justification.

In addition, we believe that the BLM already has the ability to manage those resources properly with their existing tools. They don't need to create these Areas of Critical Environmental Concern. I think it's——

The CHAIRMAN. Let me interrupt and ask you, though, even if it has not been finalized, what is the impact of this proposed designation? What does that do to any potential development?

Mr. FOGELS. Well, Senator, that's a good question. That's one that we see in a number of different venues in Alaska when an agency typically is studying something, let's say, for wilderness, then they're apt to treat it and manage it like a wilderness while they're studying it. So, while we do not have direct experience with that in these instances, I would imagine that's a significant concern on these Areas of Critical Environmental Concern.

The BLM is doing a good job with their planning process. I've got high hopes that reason will prevail and the public will comment on these things. Until that happens, I don't know.

The CHAIRMAN. But until such time as there is a final designation, it is managed as de facto withdrawal effectively?

Mr. FOGELS. Well, Senator, I think you might, I think in your next panel you might have BLM folks. You might ask them about that.

It's important to note that wherever these ACECs are proposed now, as we understand it, there are already withdrawals under those ACECs. And that's one of the things that concerns us is that those existing withdrawals, many of those, were put in place for a purpose that is no longer valid. And so with the layering of the ACEC on top of that, we argue that that's essentially repurposing that original withdrawal that underlies it.

That would be contrary to provisions in ANILCA which prohibits the designation, the withdrawal of more than 5,000 acres without Congressional approval.

The CHAIRMAN. Let me ask you, Ms. Crockett. Representing the miners in the Fortymile area and Mosquito Flats, Fortymile is the area where over 700, what did you say? Seven hundred and ?

Ms. CROCKETT. Eighteen.

The CHAIRMAN. Eighteen thousand acres will be put under this designation. Even though it has not been finalized, what impact is that having on a small placer miner out there?

When was the last time we saw a new mine permitted out there in the Fortymile region or really anywhere in the state?

Ms. CROCKETT. Senator Murkowski, that's an interesting question. I actually don't know the answer to when the last time a placer mine was permitted in the Fortymile Mining District.

The CHAIRMAN. But it has been long enough that you cannot remember. [Laughter.]

Ms. CROCKETT. I should be a little fair admitting I've only been there for three years. So I will research that and get back to you.

The CHAIRMAN. Okay.

Ms. CROCKETT. Maybe the BLM folks have an answer to that; I have not had one brought to my attention in the last three years. So I will find that out.

Ms. CROCKETT. You also asked me about the impact, and I think it has made a lot of them very scared.

And looking in terms of how did we get here? If you talked about the number of ACECs that are in place or proposed now, how many more there are. The number is certainly alarming, but I think what's more alarming for me is learning about the ACEC nomination process and how exactly it works.

So the two that are within the Fortymile region in one meeting with BLM, it was explained there were individuals that nominated these, that proposed these ACECs. So any member of the public can nominate for an ACEC. And when they were put into the Eastern Interior Resource Management Plan there was an ACEC nomination process so that individuals could then forward that generally had hunting and fishing interests, and foreclose that as needed caribou habitat or moose having habitat, etcetera.

When the proposal came out with public comment there was no information whatsoever about the mineral potential of the area. It was a lot of information about ecological aspects and wildlife aspects. We brought that to their attention and they said, bring it to us. So we did. We said, okay, we'd like to provide you with some information. Here is a known, very large deposit here in a number of areas where placer mining activity could really increase and diversify and strengthen. And that was generally not available to the general public that may have been interested in commenting on this.

So I think that process of how they're brought to the public, those of us that are trying to just understand this better, and information they don't include, is more alarming to me than anything. And I hope that kind of answers your question.

The CHAIRMAN. Well, it does.

I know that Senator Sullivan will go to the issue of specific authorization under the law, and I think what we would question is whether or not much of this can move forward without congressional authority under the parameters of ANILCA.

Ms. CROCKETT. Yes, absolutely.

And the proposals, as they stand now, do designate closure to mineral entries. So no mining activity would occur if these become effective.

The CHAIRMAN. Again, contrary to ANILCA.

Ms. CROCKETT. Yes.

The CHAIRMAN. Senator Sullivan?

Senator SULLIVAN. Thank you, Madam Chair.

Mr. Fogels, I wanted to follow-up on a couple questions.

You talk about OPMP. I agree with you, the state has done a good job of coordinating on large projects. There was an Executive Order by the Obama Administration a few years ago that tried to replicate that, but from my perspective, it did not seem to go anywhere.

How is the coordination at the federal level and is there a need, do you think, from the Federal legislative standpoint to mandate that kind of coordination?

Because right now whether it is the Shell project, whether it is a different Alaska natural gas AK LNG project, it seems like Federal agencies come in with all kinds of different requirements, completely uncoordinated. What do you think needs to happen there and is that Executive Order doing enough?

Mr. FOGELS. Senator Sullivan, I would have to say that, in my opinion, I see where the coordination can, on the Federal level, have flashes of where it actually starts working. But it's pretty inconsistent. We've seen places where we tried, at a local level, to improve that coordination. We have excellent regular meetings with EPA and the Army Corps to discuss large projects around the state, trying to avoid blow outs like we have with CD5 to head those off at the pass. So that's working.

I think on a broader scale with President Obama's interagency working group, our frustration there was that, as you know, we were never invited to sit at that table.

Senator SULLIVAN. Yes.

Mr. FOGELS. That was purely a Federal table.

Much to our pleasant surprise, the local Federal leaders decided to build their own mirror group of that and they invited us to sit at the table here in Alaska.

Senator SULLIVAN. Let me ask you, let me follow-up on that in terms of those invited to the table.

In the Clean Water Act, you agree the Clean Water Act, we are supposed to be a co-regulator, on an equal basis with the Federal Government. That is the way the Clean Water Act was set up.

Yet on compensatory mitigation are we at all involved in the process in terms of laying out these random and, I think, arbitrary numbers and amounts and the dollar figures? Are we at all a part of that process even though that is under the Clean Water Act?

Mr. FOGELS. Senator, in my experience we are really not involved in that process at all.

Senator SULLIVAN. So you think that clearly goes against the spirit if not the actual rule of the law of the Clean Water Act?

Mr. FOGELS. Well certainly the spirit, Senator.

I think in years past we've also tried to evaluate whether the state should seek primacy for the 404 process. And almost every state in the Nation has primacy over the 404–2 discharge program. But only two have primacy over the 404 program. And when you read the Clean Water Act and even early EPA guidance documents, it clearly says the states should be ultimately getting primacy and they should take the lead. And that has not happened.

Senator SULLIVAN. Let me ask another, kind of, related question with regard to mitigation.

I actually spent a lot of the day yesterday at the Chena Hot Springs Alternative Energy Fair, which was a great event. I had

a lot of time to talk to Governor Walker about a number of these issues, and told him we had this hearing coming up.

We were discussing, both of us were wondering to what degree the Federal Government can require mitigation with regard to the state. So coequal sovereign under our Constitution, and I did not think the Federal Government could require if the State of Alaska is building the road, do we have to mitigate that under the Federal rules?

So I took a look at this. I think the answer is not only yes, but heck, yes. Almost $3.4 million in 2014 we had to pay to the Federal Government for mitigation to build roads in Alaska. I think that violates the tenth amendment or any other aspect of the Clean Water Act. It certainly seems to me kind of an outrageous example of the Federal Government claiming way too much authority.

What is your thought on that?

Mr. FOGELS. My thought?

Well, I would think a former Attorney General would kind of know more about that than I probably do. [Laughter.]

Senator SULLIVAN. So Madam Chair, I have a number of more questions.

The CHAIRMAN. We will go back and forth.

Because the question, I think most Alaskans would be stunned——

Senator SULLIVAN. Stunned.

The CHAIRMAN. To know that, for instance, on the rebuild of the Dalton Highway after the substantial flooding, what we need to do is we need to elevate that road. We are going to have to do something a little bit different than what we had before or we will have a repeat. In order for us to move forward with that, a level of mitigation is required. I am not sure what the dollar amount is, but we do know that the state is basically going to be paying the Federal Government for those mitigation costs.

Then it speaks also to the issues that Mr. Nukapigak and Ms. Clark have spoken to whether it is coming from Wainwright or Nuiqsut. The fact that these are your ANCSA lands that were conveyed to you as part of a settlement, and for you to access these lands whether it is a road that will allow for additional subsistence opportunities for you or whether it is for the folk, the people, in Wainwright to be able to access additional area for housing that is necessary. That they also will be paying the Federal Government, and whether it is six times the amount or whether it is negotiated down to just twice the amount of the footprint, I think most would be very shocked to find that from your native lands that were conveyed upon settlement that you, as tribal entities, have a requirement now to pay the Federal Government.

I was in Craig on Prince of Wales last week, and they too are looking to build additional housing. The compensation that they have to then pay, again, to access their lands and what I was told was that the issue of where these mitigation dollars go to is of great concern.

Mr. Fogels, you mentioned that there is an issue right now with the availability of mitigation banks that can accept these dollars to move forward. I understand that up north there was an effort to expand, or build out, a hangar in the area. They are all ready to

move on the project, and there is nobody that can take the mitigation dollars because of this audit that you acknowledged.

What do you do then? You need to build the hangar. You need to repair the road. You need to build housing or a connector road.

Mr. Shephard has mentioned the in-lieu system, but he also mentioned that is just down here.

Are we to believe that we are not able to move on anything up in the North Slope because we do not have a place to even bank it if we can agree that a two-to-one mitigation ratio is reasonable and not extortion?

Mr. FOGELS. Well, Senator Murkowski, yes, as we understand it, there's a situation that's developed that one of the main mitigation banks in the in-lieu fee programs is no longer accepting money to further the program. I think it's a fairly recent development. I think, I know, that is a huge concern to us.

What we're doing right now is, even with the tight budget situation the state has right now, we received a small legislative appropriation this year to start investigating forming a state in-lieu fee program or possibly even a mitigation bank.

So that's something that, I think, the state can have a bigger role in this whole process. That's one place we're really looking at trying to put some energy and hopefully help.

The issue is if for every acre we develop now we have to go and protect ten or five or whatever it is. That is just an untenable situation. It's just, I mean anyone can see that's just not workable.

So we'd like to use that money as much as possible to do environmentally good things, right? I mean, it's kind of ironic when Point Thompson thought it was being permitted. Exxon wrote some huge multimillion dollar check that's probably going to go and protect a block of land somewhere.

At that same time, when we're talking about how do we cleanup these legacy wells, you know, which all have wetlands in house. Wouldn't it be nice if we could have just used that money to clean up a legacy well? I know that's kind of a reach for the Clean Water Act, but I mean, that's what we need to do. We need to reach, we need to think outside of the box and figure out how to use these dollars to fix real environmental problems.

The CHAIRMAN. Mr. Fogels, can you explain what happens there then if, for instance, in Wainwright the mitigation dollars, the concerns you are under, which are the organization is that it is not able to accept funds now? Is there any requirement that these mitigation dollars be used to help either in the regions of the North Slope Borough or even within the State of Alaska?

The mitigation dollars the Great Northwest paid, are they required to be directed somewhere in the region that is impacted or even the state that is impacted?

Mr. FOGELS. Well, Senator, you know, our understanding is that those dollars should be used to be as close as possible in areas related as possible to the area of the impact.

I think you might have some folks coming in the next panel that you may actually get a more clear answer of what the latitude is to move those dollars around to other parts of the state. I'm not sure I would have been the best person to answer that with very much precision.

The CHAIRMAN. Well, know that for the next panel that is something that I would like to drill down on because it is my understanding that while it is recommended that that happen, there is no certainty to that. In fact, these dollars go places that you and I may have never heard of.

I think what Great Land Trust has done to make it be very localized is the model that we would like to pursue and recognize. You can see that benefit going there. But I am afraid that the system that we currently have does not allow for an assurance that we are seeking.

Senator Sullivan?

Senator SULLIVAN. Mr. Nukapigak, I thought your testimony was very powerful in a couple of ways. You talked about some broader themes, kind of the clash of ANCSA and the Clean Water Act, which I think is a really important issue.

But could you unpack that a little bit more? Essentially what you are saying is under the Alaska Native Claims Settlement Act, regional and village corporations receive the allotments of land they own in fee simple, to develop with their shareholders. Yet when you are trying to develop these for your shareholders, you have to actually give up more land. You literally have to give land back, and it is not one for one.

What I am interested in is when you talked about the EPA and you said it wanted a 300-acre easement to make it 50 acres. Then they came back and said, ah, maybe we'll do a little bit less here, a little bit more. Were they giving you any kind of sense of where they were coming up with these numbers? You mentioned six to one initially then it came down to two to one. What was the basis of these negotiations?

That is one question. But the broader question is do you think that what is going on here undermines the spirit and again, the letter of the law, what the Federal Government is trying to do in regard to ANCSA? The more you develop your land, the more you are going to lose your land. I do not think that was part of the deal.

Mr. NUKAPIGAK. Well, Senator Sullivan, there are times that my corporation had to contend with some of those issues. You see the Tenement Act allowed us to select land to then determine what then the population of the village. And so when we finally, when Alpine was finally discovered some years ago, there was two ways that we had to set aside or come up with $1.4 million, which is hard earned money.

Senator SULLIVAN. One million four hundred thousand dollars?

Mr. NUKAPIGAK. One million four hundred thousand dollars of our hard earned money or set aside a certain piece of land that the EPA wanted us to. You know, that's kind of contradictive of what the purpose of ANSCA was for.

And you know, what can we do? I don't know, here we're trying to make a pact for the betterment for our people to make our life easier by having access to the Alpine for jobs. And so, it's only eight miles away and some of our locals and without that, we've got no roads.

I don't think the men of our villages would be willing to spend three weeks at a time at eight miles away unless they'd be able to come home every night and spend the night with the family.

You know, these are the environments that we strive to make better.

Senator SULLIVAN. When they came to you initially with this six to one proposal, did they give you a sense of why they chose six to one?

Mr. NUKAPIGAK. Well, they, I don't know how that number came up but they gave to us some sort of a calculation that, I don't like, maybe, of course, somebody might be able to answer that——

But how they calculated that is something that I don't know, probably I think it would be, might be easier, might even be able to answer that might be a person in this room.

Senator SULLIVAN. Okay, well we can, I mean, maybe we can take that for the record and if you guys could get back to us on it on answering that question, that would be very helpful.

Ms. Clark, I was going to ask you, you kind of watched that whole episode. I would imagine that that also sends a bit of a concern. It is kind of random, right, six-to-one and then down to two-to-one and then all over the map?

You guys, as you mentioned, are looking at a whole number of important issues with regard to the potential developments in your community. I wanted to ask you a question. The mitigation rule that we are talking about here encourages permittees to first avoid and then minimize impacts on wetlands but when that cannot be done you have to mitigate. Is it geographically possible to avoid wetlands in your region?

Ms. CLARK. No, no. What we're doing right now because the 1994 delineation, you know, if you go to the outlet you go to probably the Corps of Engineers website. You'll see that the wetlands are delineated there in our area. They're not delineated. And so we're having to have a consultant come in and delineate what is wetlands and what isn't wetlands because if we don't do that, then they'll all have to be considered wetlands, which would either cost us more dollar wise or more land wise. So we're trying to save some money and some land by getting our land delineated and determining what is wetlands and what isn't wetlands near our community.

Senator SULLIVAN. But right now it is looking like pretty much?

Ms. CLARK. Wetlands.

Senator SULLIVAN. Everything.

Ms. CLARK. Right.

Senator SULLIVAN. So you are, again, stuck with a conundrum that as you want to develop, you lose land.

Ms. CLARK. Yes, that's correct.

Senator SULLIVAN. Again, I am not sure of the Federal law, whether it is the Clean Water Act or the ANCSA, that should create such a black and white choice. It seems to me that that is completely at odds with both the goals of both of those statutes.

So I made a reference to Mayor Brower's comments about essentially the tradeoffs. They expanded their land bill, had to pay over $1 million. Are your communities struggling with similar payoffs? You are having to contemplate right now whether it's payment of $1.4 million or the loss of lands that, in essence, is making you make a very difficult decision how you are going to do this because you really have no choice whether it is the wetlands or whether it

is payment that could cost millions that takes away from all your potential effective use of that kind of money.

Ms. CLARK. We're struggling with that right now.

Senator SULLIVAN. What do you think would be an answer to address that?

Mr. NUKAPIGAK. What was the question again, sir?

Senator SULLIVAN. With regard to the tradeoff, not only in terms of money for the ability to develop but also lands like we were talking about, that if you are developing your land, you are losing your land because all your land is wetlands. The exemption you talked about in terms of your testimony.

Mr. NUKAPIGAK. Well, um, I don't know what the purpose of this ANCSA was supposed to be was to keep land for the ancient land that we have taken from the path.

But mitigation may not mean mitigation. Things like that is, here, you wanted to hold up one. Your own land but, you know, when your hands are tied by EPA or somebody, what can you do it to come up with money more or lose that land that is highly valued such as ancient land? But how you value, in terms of money, monetarily or how you compensate for it is another manner.

Senator SULLIVAN. Yes.

Mr. Brand, I wanted to ask you a question. First, I commend you for your company's willingness to actually challenge this because that takes a lot of guts, a lot of money, a lot of time, and a lot of uncertainty. You won in the 9th Circuit, of all places, which is kind of a miracle. [Laughter.]

Well done, from my perspective.

You are an example of a small business, not one of the large companies that has had to not only litigate but seen the different increases in these regulatory and permitting requirements. Can you give us a sense of how that has grown? Your testimony touched on it. You said several years ago, hey, you only had to do one thing. Now it looks like it is layer upon layer upon layer. Can you give us a little bit of sense of that in addition to the kind of litigation that you undertook?

Mr. BRAND. I'll try.

As I mentioned in my testimony, it used to be 25 years ago or so all you had to do was submit a written plan along with purpose and need, and you were granted the permit. And then the littoral zone came in. Anybody that doesn't know what littoral zone is, it's a shallow area if you're digging relative to the water. They instituted a plan where we needed to create a littoral zone for fish and bird habitat, I believe, that for the first 20 feet from the shoreline you couldn't get much more than like three feet deep.

So that created a bit of a restriction where we were only able to mine a portion of our property rather than the entire property because we had to set aside a littoral zone. And if you take it, at best, at a full 150 feet, it's $700,000 worth of gravel that you have to leave in the ground to comply with this new restriction.

Then, we've all been talking about the compensatory mitigation as well as the time factor. It's a huge amount of time to submit and go through the process to get your wetlands permit, if you can. And right now in Fairbanks because of The Conservation Fund debacle, we couldn't even do that.

Senator SULLIVAN. And you mentioned in your testimony that you just found out that other land that you own, private land, was recently found to be Clean Water jurisdictional by the Corps of Engineers. How did that happen and then what are the implications for any plans you had for that private land that you own?

Mr. BRAND. That's a very good question. I don't know how that happened.

But a little bit of history on our situation. The Great Northwest property was deemed to be the closest water was the Tanana River. And we were successful on our argument because they cannot claim wetlands that are adjacent to adjacent wetlands, and in our situation that's I think from the—decision that you can't, you know, keep on going forever out through the water calm. You have to stop at wherever there's a barrier.

And our property was separated by two barriers from the Tanana River. The first was the flood control dike built by the Corps of Engineers many, many years ago. And then the second barrier was the railroad embankment, for the railroad spur that runs out to the Fairbanks International Airport. So those two embankments separated our property from the Tanana River, and that was the whole argument in court. Therefore our wetlands were adjacent, and they couldn't be considered jurisdictional wetlands. They are or were wetlands, but they're no longer jurisdictional wetlands until this new rulemaking becomes effective.

And the properties that I and others own personally are further removed from the Tanana River upstream, if you will, from The Great Northwest project. So with The Great Northwest property non-jurisdictional wetlands because of these barriers, anything further removed from it should also be non-jurisdictional wetlands. But the Government has ignored that and continues to assert jurisdiction over the wetlands.

The CHAIRMAN. Why don't you go ahead?

Senator SULLIVAN. So, Ms. Crockett, I had a question and I know that you are very familiar with the state of the amount of wetlands in Alaska which is about 40 percent of the state that I think comes to about 60 percent or over 60 percent of all the wetlands in the United States. These statistics are why this is such an important issue for us.

But if you add state lands, you remove Alaska Native lands, and we are only left with, 60 percent of Alaska, Federal land. If you look at that whole menu of lands, we are only left with about one percent of Alaska's land base that is in private hands. So when we look at mitigation requirements, where is industry supposed to find private land mitigation?

Isn't that part of the huge conundrum that a one-size-does-not-fit-all for Alaska when it comes to the Clean Water Act as we are literally so different from every other state and country?

Ms. CROCKETT. Senator Sullivan, yes.

I'd answer that question I have no idea. It's just something that we're grappling with every single day. And I think Deputy Commissioner Fogels touched on this a bit earlier, but we even struggle with that purpose whatsoever.

And it's not as though the people I represent and companies I represent are being forced to just write a check to be able to do

something. We are being forced to write a check to go close up land that could, I mean, we are literally denying our future generations or maybe not that far away, the potential to develop something in the future. We could, hypothetically, be blocking up the next Red Dog or access to the next Red Dog for no significant purpose.

And, you know, I don't know how we got that way, down that road, instead of doing things that are actually good for the environment, that are actually, you know, why isn't like you said with the Exxon example, why isn't the company, if you do want to talk about the disturbance that's going into wetlands and access a dollar amount then do something good with it. Don't just lock up land. Do something good, you know, enhancement is something that we talk about all the time and really do think outside the box. And I don't think this is a naive statement.

I know there are liability issues and there are things that agencies disagree with, but we should find a way to get around that. And we should find a way to say, okay, company x, you'd like to develop this project. We would like to figure out a fair reasonable amount to assess you. We want you to bring a project to us, propose to us something good you can do to enhance the environment or enhance someplace that's in the State of Alaska and do something for the greater good verses denying us future opportunities.

Senator SULLIVAN. Right.

Thank you, Madam Chair. I think we have gotten a lot of good ideas from this panel.

The CHAIRMAN. There really are, and we could stick to this panel all afternoon. Believe me, I have got a lot more questions, but I do think in the interest of getting to the next panel we will wrap up.

I want to ask, though, Mr. Fogels, has the state taken a position on the proposal that has been introduced, at least in the House by Congressman Young, for the preservation easements for tribes and Native Corporations?

Mr. FOGELS. Senator Murkowski, I do not know. I'm not familiar enough with that legislation. I haven't been involved in it, so I don't think I can answer that question right now at this time. I can look into it to see if I can get you a response.

The CHAIRMAN. I would appreciate it because it is something that as we listen to some of the on-the-ground examples of what we are dealing with, whether it is Wainwright or Nuiqsut or out in Craig. These are very real, very immediate issues. It is something that I would like to look at, perhaps dealing with legislation in the Senate following Congressman Young on this. I would appreciate knowing where the state is on it as well.

The exemption allowing our even exemption for Clean Water Act on ANC lands is perhaps another matter to, again, consider. But I think that these are very direct and immediate issues that we can look to as we are trying to figure out a path forward here.

The CHAIRMAN. So again, I thank you all for what you have provided to us today by way of not only your input here but that there is follow-up to your comments that you have made today that you would like to have presented as part of the record.

Again, we will keep this record open for another couple weeks and would welcome them. So thank you. Thank you for being here and thank you for making the trip to be here. We appreciate it.

Next we will go to the second panel. We have a diverse group of Administration panelists before us this afternoon. We appreciate them being here and providing their comments and their input to us.

The panel will be led off by Mr. Ted Murphy. Mr. Murphy is the Alaska Associate State Director of BLM. He is here to give us a perspective on BLM's regulatory process, internal practices such as how it is determined whether guidance and policy should receive public comment, and then talk a little bit about the evolution of the regulatory framework. Mr. Murphy, we welcome you.

Next to Mr. Murphy is David Hobbie, the Chief of Alaska's District Regulatory Division of the Army Corps of Engineers. He is here to inform us about what tools are available to the Corps, and how he intends to employ those tools going forward in his new role as the Chief here.

We also have Dr. Mary Anne Thiesing, the Regional Wetland Ecologist and Wetlands Coordinator in the Office of Ecosystems, Tribal and Public Affairs for EPA. She is here to speak to the interagency cooperation and coordination of EPA and the Corps as well as engagement of EPA with individual project stakeholders.

Again, thank you for being here, and thank you for the courtesy that you have given in allowing the first panel to proceed and offer specific cases of the concerns. My hope is that that will better frame your opening comments or certainly your responses to questions that Senator Sullivan and I will have.

So we thank you for being here.

Mr. Murphy, if you would like to lead off with about five minutes or so? Again, your full statements will be included as part of the official hearing record.

Thank you.

STATEMENT OF TED MURPHY, ASSOCIATE STATE DIRECTOR, BUREAU OF LAND MANAGEMENT, U.S. DEPARTMENT OF THE INTERIOR

Mr. MURPHY. Thank you.

Chairman Murkowski and Chairman Sullivan, thank you for the opportunity to discuss the Bureau of Land Management's efforts to facilitate responsible economic development of public lands while protecting the natural and cultural resources that Americans cherish. I'm Ted Murphy, the BLM Associate State Director for Alaska, and I look forward to discussing these issues with—from the BLM experience here in Alaska.

Mitigation is central to the BLM's successfully carrying out our multiple use and sustained yield mission. It is something we have done for decades and its legal basis comes straight from our governmental authorities under FLPMA.

When you think about mitigation at the BLM you think about what is a three step process: avoidance, minimization and compensation. Through this process accounts are first divided through careful siting that will minimize by using innovative design features and best management practices. And then sometimes they are compensated for their corresponding offsets elsewhere.

Mitigation programs have been used to solve some of our most significant resource challenges and partnerships with states, tribes and other Federal entities have been central to their success.

For example, in the early 2000's the BLM faced a major challenge with permitting large scale oil and gas projects in Wyoming. In response to concerns about impacts to state managed game species, the BLM, the State of Wyoming and the oil and gas companies came together to develop innovative solutions that worked for the companies and helped mitigate impacts to those state managed species. This approach was championed by the previous Administration as a breakthrough for balancing the development and conservation and it has served as a model for our agency.

While recently in Nevada BLM issued mitigation to speed the approval of a solar project through Western Solar Plan. The plan avoided sensitive areas by establishing focused areas for development. They identified key design features and called for regional mitigation strategies to direct compensatory investments. By identifying mitigation responsibilities up front BLM was able to provide certainty to private developers and increase the efficiency of its environmental review. Innovative mitigation approaches are helping the BLM conserve greater safeguards to habitat and support system while economic development on portions of public land in ten states across the West.

A recent landmark agreement among the U.S. Fish and Wildlife Service, the BLM and Barrick Gold of North America established a conservation bank that gives fair certainty for the company's planned future mine expansion on public lands. Other states are leading efforts to develop similar systems and the BLM is working hard to support these efforts.

Chairman Murkowski and Chairman Sullivan, I know you both are familiar with the Greater Mooses Tooth Project in Alaska. As you know this project is the first oil and gas development project on Federal lands in the National Petroleum Reserve in Alaska. As part of our public review of the project the BLM identified significant impact to the subsistence resource provided by—of ANCSA. In the final project approval the BLM included a suite of best management practices approved by the company to avoid or minimize project impacts as well as an $8 million fund to directly address the subsistence impacts. As part of the planning for that project BLM is also moving forward with regional mitigation strategies for Mooses Tooth with—development units that will provide certainty to developers coming into these areas in the future. We believe this sort of up-front planning is good for subsistence resources and good for developers.

With all of these promising efforts underway on public lands, the BLM is recognizing the need to set common standards and consistent expectations for mitigation across our lands and program areas. Since 2005 BLM has developed a series of increasingly detailed policies to assist BLM staff in their mitigation work. The latest of these was released in 2013. We released this policy on an interim basis which has allowed us to gather important lessons as we continue to execute these programs on the ground with states and companies. We anticipate issuing a final policy in the coming months.

Chairman Murkowski and Chairman Sullivan, thank you again for the opportunity to present this testimony, and I would be glad to answer questions you may have.

[The prepared statement of Mr. Murphy follows:]

Statement of
Ted Murphy
Associate State Director
Bureau of Land Management, U.S. Department of the Interior
Senate Committee on Energy and Natural Resources
Senate Committee on Environment and Public Works
Subcommittee on Fisheries, Water and Wildlife

"Federal Mitigation Requirements and Interagency Coordination Related to Economic Development on Federal, State, and Private Lands"

August 17, 2015

Thank you for the opportunity to discuss the Bureau of Land Management's (BLM) efforts to facilitate responsible economic development on public lands while protecting the natural and cultural resources that Americans cherish. For decades, the BLM has sought to achieve responsible, balanced development through application of mitigation – seeking first to avoid or minimize the impacts through careful siting and innovative design features, and then to compensate for residual impacts to important resources through corresponding offsets. In partnership with sister agencies and states, the BLM has deployed innovative mitigation programs to solve some of our most significant resource challenges, including large-scale oil and gas development, solar energy generation, and conservation of the greater sage-grouse. The BLM has issued interim policy to ensure that mitigation efforts follow consistent principles and standards throughout our programs and across our lands consistent with Departmental policy and guidance so that we can better support responsible economic development on public lands in compliance with our multiple use and sustained yield mandate.

Background

Nationally, the BLM manages nearly 250 million acres of land and 700 million acres of subsurface estate, which is more than 10 percent of the Nation's surface area and almost one third of its mineral estate. In Alaska, BLM manages approximately 72 million acres of public lands. The BLM manages this vast portfolio on behalf of the American people under the dual framework of multiple use and sustained yield. This means the BLM manages public lands for a broad range of uses, including renewable and conventional energy development, livestock grazing, timber production, watershed protection, hunting, fishing, recreation, wildlife, and natural, scenic, cultural, and historic values for the long term. In so doing, public lands support the production of goods and services that create jobs and promote economic development in communities across all 50 states. In fact, resource production and outdoor recreation activities on lands managed by the Department of the Interior contributed $358 billion to the U.S. economy in 2014, supporting more than two million jobs across the country. The BLM balances these various resources and uses while providing for extensive public input and cooperation with partners, industry, and local communities.

As expressed in the Federal Land Policy and Management Act (FLPMA) of 1976, the BLM has a responsibility to provide for reasonable mitigation for impacts to public lands that are caused by development. In FLPMA, Congress declared it to be the policy of the United States that "the

public lands be managed in a manner that will protect the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archeological values."[1] In defining multiple use and sustained yield, Congress called for "harmonious and coordinated management of the various resources without permanent impairment of the productivity of the land and the quality of the environment" and for "achievement and maintenance in perpetuity of a high-level annual or regular periodic output of the various renewable resources of the public lands consistent with multiple use."[2]

The BLM works with project proponents and the public to identify and mitigate impacts to the broad range of resources found on public lands. Where Congress has issued explicit direction for the protection of certain resources, including wetlands, endangered species, cultural resources, national parks, and air quality, the BLM works closely with partner agencies to ensure that appropriate mitigation is identified and carried out. For example, because much of the lands in Alaska contain wetlands under the jurisdiction of the Clean Water Act (CWA), the BLM works closely with the U.S. Army Corps of Engineers to ensure mitigation requirements are consistent with CWA permitting. For other resources – such as key subsistence use areas on the North Slope of Alaska – the BLM identifies appropriate mitigation actions during project design based on Departmental and agency policy, Resource Management Plans, Regional Mitigation Strategies, and through public review and engagement with state and tribal governments.

When assessing appropriate mitigation options, the BLM relies upon the mitigation hierarchy – first seeking to avoid impacts, then minimizing them, and then compensating for unavoidable impacts that could impair the productivity of the land and the values it sustains. The BLM works proactively with project proponents to assist them in designing and siting projects so that proposed projects can have fewer adverse impacts to resources of concern. For example, for broad-scale siting, BLM's Rapid Ecoregional Assessments provide a means to identify areas, at a landscape scale, with little to no resource conflicts and resulting in fewer potential impacts. By avoiding adverse impacts in the first place, there is no need to take further action to minimize or compensate for such impacts. Frequently, however, it is not practical or possible to avoid adverse impacts altogether. In these cases, the BLM works with project proponents to minimize impacts by altering design features and implementing best management practices. Finally, the BLM may consider implementing compensatory mitigation to benefit resources of concern when adverse impacts are expected to remain. Together, proactive work with the applicant and the implementation of the mitigation hierarchy can lead to successful development projects with improved outcomes for local communities, the project proponent, and the environment.

Deploying Effective Mitigation

The BLM has for decades used mitigation to allow responsible development to proceed while minimizing damage to important resources. In the 2000s, for example, the BLM worked with oil and gas developers in Wyoming to maximize recovery of natural gas while minimizing impacts to other important natural resources. In permitting development plans for the Jonah gas field, the BLM in 2006 entered into an innovative partnership with the state of Wyoming and developers

[1] Federal Land Policy and Management Act of 1976, Section 102(8).
[2] Ibid., Section 103.

to minimize surface infrastructure, reclaim roads and pads on a rolling basis, and fund compensatory mitigation in nearby high-quality habitat. In New Mexico and Alaska, the BLM has worked with the oil and gas industry to carefully plan for directionally-drilled wells to greatly reduce the number of well pads needed, minimizing surface disturbance while boosting operational efficiencies. Developers in New Mexico also contribute to a cooperative fund for landscape restoration, an effort widely touted by industry, sportsmen, and local governments.

The BLM has also mitigated project impacts by responsibly siting solar development through the Western Solar Plan, which established focused areas for development, identified key design features, and called for regional mitigation strategies to direct compensatory investments. In March 2014, the BLM released the first of these regional mitigation strategies for the Dry Lake Solar Energy Zone in Nevada. This strategy supported the BLM's first ever competitive offer of public lands for solar energy development, a sale that brought in $5.8 million in high bids from project developers. By identifying mitigation responsibilities upfront, the BLM provided certainty to project developers and increased the efficiency of its public review of these projects. Just recently, the Bureau completed this review and approved the three projects within 10 months, less than half the amount of time approval took under the previous project-by-project system.

Innovative mitigation approaches are also helping the BLM conserve greater sage-grouse habitat and support sustainable economic development on portions of public lands in 10 states across the west. This past May, the BLM released final environmental impact statements for proposed land use plans that outlined a framework for sage-grouse conservation, including the commitment to collaboratively develop mitigation strategies with states and partner agencies. These collaborative strategies will identify and direct mitigation investments to protect and restore sage-grouse habitat in areas of highest value. A similar cooperative partnership in Wyoming has led to the approval of the first greater sage-grouse mitigation bank earlier this year.

Similarly, a recent landmark agreement among the U.S. Fish and Wildlife Service, the BLM, and Barrick Gold of North America in Nevada established a conservation bank that allows the mining company to accumulate credits for successful mitigation projects that protect and enhance greater sage-grouse habitat on the company's private ranch lands. As a result, Barrick gained certainty that the credits can be used to offset impacts to habitat from the company's planned future mine expansion on public lands. The Barrick agreement sets an important precedent for public-private mitigation partnerships and a model for the development of advance mitigation strategies at the federal and state levels. Moreover, the agreement is particularly noteworthy because it uses a transparent and repeatable methodology to measure both project impacts and the benefits of compensatory actions to offset them.

In Alaska, the BLM earlier this year issued a Record of Decision for the Greater Mooses Tooth 1 project, the first oil and gas development project on Federal lands in the National Petroleum Reserve in Alaska. The decision issued by the BLM provided for up to 33 development and injection wells on a single well pad and incorporated a responsible package of mitigation measures, including a suite of best management practices to avoid or minimize project impacts and a voluntary $8 million contribution from the project proponent into a compensatory mitigation fund. Inclusion of this mitigation package helped to solve significant resource issues,

including ensuring that the permitted project minimized impacts to the subsistence use in the project vicinity for local communities. The compensatory mitigation fund provides an important opportunity to help bolster subsistence resources across the landscape. Following approval of the project, the BLM continues to work with local Native communities, industry, state and Federal agencies, and the public to develop a regional mitigation strategy that will increase predictability and certainty for future development while ensuring ongoing protection of important resources in the northeast corner of the 23-million acre reserve.

Ensuring Consistent & Predictable Mitigation Standards

The BLM has worked for the past several years to establish policy to make mitigation for resources across the Bureau more consistent and predictable. The BLM first developed an interim compensatory mitigation policy in February 2005 and released a more comprehensive revised interim policy in September 2008. The 2005 policy focused on the BLM's approach to onsite and compensatory mitigation for the BLM's oil and gas, geothermal, and energy right-of-way programs. The 2008 revision broadened the scope of the 2005 interim policy by including other BLM program areas and further defining the circumstances and methods for considering compensatory mitigation.

The BLM issued a new interim mitigation policy in June 2013. This interim policy provided procedures and instructions for taking a landscape approach to mitigation, which means considering broad trends when analyzing project impacts, determining mitigation standards, and targeting mitigation investments. The policy also provided guidance for developing regional mitigation strategies to solve resource challenges in particular geographic areas and for applying consideration of the full mitigation hierarchy to land-use authorizations. By releasing this policy on a trial basis, the BLM has been able to gather important lessons learned and seek additional input before finalizing a comprehensive manual and handbook.

In the fall of 2013, Secretary Jewell released Secretarial Order 3330, *Improving Mitigation Policies and Practices of the Department of the Interior*. Secretary Jewell directed the Department and each of its bureaus to follow a common set of principles for its mitigation programs while using a landscape-scale approach building on and expanding concepts pioneered in the BLM's 2013 interim mitigation policy. Consistent with Secretarial Order 3330 and incorporating key lessons learned since release of the interim mitigation policy, the BLM is working to revise and finalize our mitigation policy to ensure it is responsive to emerging best practices and compatible with similar policies being developed by sister agencies and states.

Conclusion

Mitigation is important to effective management under the BLM's multiple use and sustained yield mandate. The BLM has a proven track record of applying mitigation to support responsible development while conserving important resources, and we are moving forward with efforts to make mitigation more consistent, predictable, and effective. Thank you for the opportunity to present this testimony, and I would be glad to answer any questions you may have.

The CHAIRMAN. Thank you, Mr. Murphy.
Mr. Hobbie, welcome to the Committees.

STATEMENT OF DAVID HOBBIE, CHIEF, REGULATORY DIVISION, ALASKA DISTRICT, U.S. ARMY CORPS OF ENGINEERS

Mr. HOBBIE. Thank you. Thank you.

Good afternoon, Chairman Murkowski, Chairman Sullivan. Thank you for the opportunity to testify today. My name is David Hobbie. I am the Chief of the Regulatory Division of Alaska's District U.S. Army Corps of Engineers.

I've served at the Corps for approximately 25 years, have worked around the globe, predominantly in the Regulatory Program, and I am very happy to be back in Alaska. In my career with the Corps and its Regulatory Program, I have witnessed many changes over the past quarter century, while gaining an understanding and appreciation for the complexity of this mission.

There are some special challenges that come with applying the Regulatory Program in a state as varied and as unique as Alaska, including identifying and implementing compensatory mitigation requirements. Natural resources in Alaska are abundant and include a huge percentage of wetlands. Alaska is also an extremely large landmass with a low population base and a large percentage of the land are publicly held.

I have been back in Alaska for approximately seven months as the Chief of the Regulatory Division. One of the first issues I was asked about following my arrival was compensatory mitigation. Compensatory mitigation is a key component of the Regulatory Program, and reviewing these practices in the state has been one of my top priorities.

The fundamental objective of compensatory mitigation is to offset environmental losses resulting from unavoidable impacts to waters of the United States caused by activities authorized by Clean Water Act permits. Compensatory mitigation enters the analysis only after the proposed project has incorporated all appropriate and in implementing compensatory mitigation requirements. The Alaska Regulatory Program has sought opportunities to be more flexible when possible while at the same time protecting aquatic resources to the maximum extent practicable. One example involves the Alaska Department of Transportation replacing culverts fully to increase fish passage and assist with fish resources.

Additionally, we are looking at ways to improve communication and collaboration, not only with agency partners at the state and Federal level, but also with the public in order to better understand their issues. These efforts have involved meetings with leadership from the Department of Natural Resources, the U.S. Environmental Protection Agency, Bureau of Land Management, National Marine Fisheries, Alaska Oil and Gas, and CIRI which is an Alaskan Native Corporation, just to mention a few. During these meetings we discuss mitigation and the opportunities that exist for the Federal family and our non-Federal loan partners to work more closely together.

Compensatory mitigation is a complex issue. Our goal, which is a national goal within Corps, is to ensure no net loss of wetlands functions and values while remaining as flexible as possible to

allow reasonable and sustainable development. It is also our goal to be transparent, as transparent as possible, in our decision-making process.

Every project is unique. No two projects are exactly identical. Although the structures may look the same, the areas and types of impacts associated with individual projects are nearly always different. Therefore, the quantity and type of compensatory mitigation required will vary depending on the site specific nature of each project.

Before I close, I would like to offer a little general information about the Regulatory Program in Alaska. So far in Fiscal Year 2015, which starts on October 1st of 2014, the Alaska District has authorized 431 projects under the Nationwide/Regional General Permit Program. General permits streamline the process of meeting the requirements of the Clean Water Act for projects with no more than minimal environmental impacts.

Of the 431 projects authorized, 17 required compensatory mitigation, approximately four percent. We have completed 75 Standard Permits/Letters of Permission for larger, more complex projects where the impacts were determined to be more than minimal, of which 12 required compensatory mitigation, approximately 16 percent. I believe the number reflects the Corps' ability to work closely with the applicant and partner agencies to avoid and minimize impacts so that compensatory mitigation is not always a requirement for the authorization of a project. At the same time, the Corps remains flexible, so that when compensatory mitigation is required, we are able to work with the applicant and other agencies to achieve a successful outcome.

Thank you again for the opportunity to speak here today. I look forward to questions.

[The prepared statement of Mr. Hobbie follows:]

DEPARTMENT OF THE ARMY

COMPLETE STATEMENT

OF

DAVID S. HOBBIE

CHIEF, REGULATORY DIVISION
ALASKA DISTRICT

U.S. ARMY CORPS OF ENGINEERS

BEFORE

THE COMMITTEE ON ENERGY AND NATURAL RESOURCES

and

THE COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS
SUBCOMMITTEE ON FISHERIES, WATER, AND WILDLIFE

UNITED STATES SENATE

ON

Federal Mitigation Requirements and Interagency Coordination related to Economic Development on Federal, State and Private Lands

August 17, 2015

Good afternoon Chairman Sullivan, Chairman Murkowski and other Members of the Committees. Thank you for the opportunity to testify today. My name is David Hobbie and I am the Chief of the Regulatory Division for the Alaska District, U.S. Army Corps of Engineers (Corps). I have served with the Corps for approximately 25 years and have worked around the globe, predominately in the Regulatory Program, and I am very happy to be back in Alaska. In my career with the Corps and its Regulatory Program, I have witnessed many changes over the past quarter century, while gaining an understanding and appreciation for the complexity of this mission.

There are some special challenges that come with applying the Regulatory Program in a state as varied and unique as Alaska, including identifying and implementing compensatory mitigation requirements. Natural resources in Alaska are abundant and include a high percentage of wetlands. Alaska is also an extremely large landmass with a low population base, and a large percentage of lands are publicly held.

I have been back in Alaska for approximately six months as the Chief of the Regulatory Division. One of the first issues I was asked about following my arrival was compensatory mitigation. Compensatory mitigation is a key component of the Regulatory Program, and reviewing these practices in the State has been one of my top priorities. The fundamental objective of compensatory mitigation is to offset environmental losses resulting from unavoidable impacts to waters of the United States caused by activities authorized by Clean Water Act permits. Compensatory mitigation enters the analysis only after a proposed project has incorporated all appropriate and practicable means to avoid and minimize adverse impacts to aquatic resources. In implementing compensatory mitigation requirements, the Alaska Regulatory Program has sought opportunities to be more flexible when possible, while at the same time protecting aquatic resources to the maximum extent practicable. (One example involves the Alaska Department of Transportation replacing culverts to allow for better fish passage, as a form of compensatory mitigation).

Additionally, we are looking at ways to improve communication and collaboration – not only with agency partners at the state and Federal level, but also with the public in order to better understand their issues. These efforts have involved meetings with leadership from the Department of Natural Resources, the U.S. Environmental Protection Agency, the National Marine Fisheries Service, Alaska Oil and Gas and CIRI (an Alaskan Native Corporation), just to mention a few. During these meetings we discuss mitigation and the opportunities that exist for the Federal family and our non-Federal local partners to work more closely together.

Compensatory mitigation is a complex issue. Our goal, which is a national goal within Corps, is to ensure no net loss of wetlands functions and values, while remaining as flexible as possible to allow reasonable and sustainable development. It is also our goal to be as transparent as possible in our decision-making process. Every project is unique; no two projects are exactly identical: although the structures may look the same, the areas and types of impacts associated with individual projects are nearly

always different. Therefore, the quantity and type of compensatory mitigation required will vary depending on the site-specific nature of each project.

Before I close, I would like to offer a little general information about the Regulatory Program in Alaska. So far in Fiscal Year 2015, the Alaska District has authorized 431 projects under the Nationwide/Regional General Permit Program. General permits streamline the process of meeting the requirements of the Clean Water Act for projects with no more than minimal environmental impacts. Of the 431 projects authorized, 17 required compensatory mitigation (approximately 4 percent). We have completed 75 Standard Permits/Letters of Permission for larger, more complex projects where the impacts were determined to be more than minimal, of which 12 required compensatory mitigation (approximately 16 percent). I believe this number reflects the Corps' ability to work closely with the applicant and partner agencies to avoid and minimize impacts so that compensatory mitigation is not always a requirement for the authorization of a project. At the same time, the Corps remains flexible, so that when compensatory mitigation is required, we are able to work with the applicant and other agencies to achieve a successful outcome.

Thank you again for the opportunity to be here today and I look forward to any questions you or other Members of the Committees may have.

The CHAIRMAN. Thank you, Mr. Hobbie. Welcome to Alaska, or welcome back.

Mr. HOBBIE. Thank you.

The CHAIRMAN. Dr. Thiesing.

STATEMENT OF DR. MARY ANNE THIESING, WETLANDS COORDINATOR FOR THE OFFICE OF ECOSYSTEMS, TRIBAL AND PUBLIC AFFAIRS IN REGION 10, U.S. ENVIRONMENTAL PROTECTION AGENCY

Dr. THIESING. Good afternoon, Chairman Murkowski and Chairman Sullivan. I'm Mary Anne Thiesing, Wetland Coordinator for the Office of Ecosystems, Tribal and Public Affairs in Region Ten, EPA. I'm pleased to be here to discuss the Clean Water Act, Section 404 Mitigation program, compensatory mitigation banking and EPA's coordination with the Corps.

As you know the Clean Water Act was promulgated in 1972 to restore and maintain the physical, chemical and biological integrity of the waters of the U.S. The Act established the Section 404 permit program which authorizes the discharges of dredged and fill material to waters in the U.S. discharge that can degrade or even destroy those waters.

The Corps is given responsibility under the Act to issue the Section 404 permits. In Alaska permits often are associated with activities such as road construction or energy development.

To offset the impacts from permitted activities, the 404 program is built on the concept that when impacts to waters, including their loss, are unavoidable, they shall be compensated by establishing, restoring or preserving waters at the impact site or at another location, generally within the same watershed as the impacts. Consideration of mitigation occurs throughout the permit application process and includes avoidance and minimization. However, there may still be unavoidable impacts to waters. Those require compensatory mitigation but it is only considered after a proposed project has first looked to trying to avoid and minimize adverse impacts.

Individual permits that are associated with activities with more than minimal adverse effects to the aquatic environment may include special conditions that require compensatory mitigation. And that's to offset degradation or loss of waters of the U.S. when avoidance or minimization is not practicable.

There are basically three mechanisms that will allow permittees to offset the aquatic impacts resulting from their projects. They can purchase credits from a mitigation bank, they can purchase credits from an in-lieu fee program, or they can conduct a compensatory mitigation project on their own.

A mitigation bank is a site that has restored, established, enhanced and/or preserved aquatic resources and the Corps, in consultation with an Interagency Review Team, approves for the use of compensating the losses from future permitted activities. The bank approval process establishes the number of credits and the bank sponsor is responsible for the success.

With in-lieu fee mitigation, a permittee provides funds to an in-lieu fee program. Those are sponsored by either a government or a nonprofit entity or a tribe that conducts compensatory mitigation projects consistent, again with an agreement, with the Corps in

consultation with an interagency review team. Typically the in-lieu fee mitigation projects are started only after they pool the funds from multiple permittees. And the in-lieu fee program sponsor is the one who is responsible for the success of the sites.

The third option, permittee responsible, is basically the responsibility of the permittee to conduct and ensure the success of mitigation. It's usually, it can occur either at the project site or in a different one, preferable within the same watershed.

EPA works closely with the Corps and the Interagency Review Team that oversees the review, approval and management of mitigation banks and in-lieu fee programs. For proposed permittee responsible mitigation, the EPA provides comments to the Corps in the review process.

Congress directed in 2004 that the Corps and EPA publish regulations, and they did so in 2008 to revise and clarify compensatory mitigation requirements. It ensures a level playing field among providers of compensation because it holds all the providers to the same standard regardless of whether it's a bank, an in-lieu fee program or by the permit applicant. It also increased consistency and predictability in compensatory mitigation requirements through a number of timing of the contents of mitigation plans and also the timelines for review. It did not change when compensation is required but rather focuses on how and where mitigation is planned, implemented and managed to improve its ecological success and sustainability.

Although careful attention is given to compensatory mitigation requirements when they are necessary, most of the 404 authorizations don't require mitigation. Permitting data from 2010 through 2014 shows the Corps nationally issued approximately 56,400 written authorizations per year under its permit authorities, about ten percent required compensatory mitigation. This reflects a number of factors, the Corps' ability to successfully work with the applicants and also with the agencies to try and avoid or minimize any impacts. Most of those authorizations occurred under the general permit process and they have no more than the minimal adverse impacts.

Compensatory mitigation is a basic component of the Section 404 permit program. It is consistent with the act's goals of trying to restore and maintain the chemical, physical and biological integrity of the nation's waters. We work together to ensure that this provision is applied consistently, predictably and effectively so that the applicants can proceed with projects to achieve their needs while at the same time protecting public health and water quality.

Thank you very much for the opportunity to be here. I will be happy to answer any questions you may have.

[The prepared statement of Dr. Thiesing follows:]

TESTIMONY OF
MARY ANNE THIESING
U.S. ENVIRONMENTAL PROTECTION AGENCY

JOINT HEARING BEFORE THE
COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS
AND THE
COMMITTEE ON ENERGY AND NATURAL RESOURCES
UNITED STATES SENATE

August 17, 2015

Good morning Chairman Sullivan and Chairman Murkowski. I am Mary Anne Thiesing, Wetlands Coordinator in the Office of Ecosystems, Tribal and Public Affairs in Region 10 of the U.S. Environmental Protection Agency. I am pleased to be here today to discuss the Clean Water Act section 404 mitigation program, compensatory mitigation banking, and the EPA's coordination with the U.S. Army Corps of Engineers.

The Clean Water Act was promulgated in 1972 to "restore and maintain the chemical, physical, and biological integrity of the nation's waters." The Act established the section 404 permit program, which involves the authorization of discharges of dredged or fill material to waters of the United States, discharges that can degrade or even destroy these waters.

The U.S. Army Corps of Engineers is given responsibility under the Act to issue section 404 permits. In Alaska, these discharges are often associated with activities such as road construction and energy development.

To offset impacts from permitted activities, the section 404 program is built on the concept that when impacts to waters, including their loss, are unavoidable, they shall be compensated by

establishing, restoring, or preserving waters at the impact site or at another location, generally within the same watershed as the impacts. Consideration of mitigation occurs throughout the permit application process and includes avoidance and mitigation measures. However, there may still be unavoidable impacts to waters. Compensatory mitigation is only considered after a proposed project has first looked at how to avoid and minimize adverse impacts.

Section 404 permits, particularly individual permits that are associated with activities with more than minimal adverse effects to the aquatic environment, may include special conditions for conducting compensatory mitigation to offset degradation and loss of waters of the United States when avoidance or minimization of the impacts is not practicable.

There are three basic mechanisms that permittees may use to offset the aquatic impacts that will result from their proposed projects. A permit applicant can propose to purchase credits from a mitigation bank, purchase credits from an in-lieu fee program, or conduct a compensatory mitigation project on its own.

1. A mitigation bank is a site with restored, established, enhanced, and/or preserved aquatic resources that the Corps, in consultation with an Interagency Review Team composed of federal and state natural resource and regulatory agency representatives, has approved for use to compensate for losses from future permitted activities. The bank approval process establishes the number of available compensation credits, which permittees may purchase upon Corps approval of the bank. The bank sponsor is responsible for the success of these mitigation bank sites.

2. With in-lieu fee mitigation, a permittee provides funds to an in-lieu fee program sponsored by a government or nonprofit entity that conducts compensatory mitigation projects consistent with an agreement approved by the Corps, in consultation with an Interagency Review Team. Typically, specific compensatory mitigation projects are started only after pooling funds from multiple permittees. The in-lieu fee program sponsor is responsible for the success of these in-lieu fee mitigation sites.
3. With permittee-responsible mitigation, the permittee undertakes and bears full responsibility for the implementation and success of the required compensation. Compensation may occur either at the site where the regulated activity caused the loss of aquatic resources or at a different location, preferably within the same watershed.

The EPA works closely with the Corps as part of the Interagency Review Teams that oversee the review, approval, and management of mitigation banks and in-lieu fee programs. For proposed permittee-responsible mitigation, the EPA typically provides comments to the Corps during the permit review process.

As called for in the National Defense Authorization Act for Fiscal Year 2004, the Corps and the EPA published regulations in 2008 that revise and clarify compensatory mitigation requirements. The 2008 Mitigation Rule ensures a level playing field among providers of compensation by holding all forms of compensatory mitigation to equivalent standards regardless of whether the compensation is provided by a mitigation bank, an in-lieu fee program, or by the permit applicant. The 2008 Mitigation Rule also increased consistency and predictability in compensatory mitigation requirements by clarifying the contents of mitigation plans and the

timelines for review. The 2008 Rule did not change when compensation is required but rather focuses on how and where compensatory mitigation is planned, implemented, and managed to improve its ecological success and sustainability.

Section 404 permitting requirements for compensatory mitigation are based on what is practicable and capable of compensating for the aquatic resource functions that will be lost as a result of the permitted activity. In determining what type of compensatory mitigation will be environmentally preferable, the Corps must assess the likelihood for ecological success and sustainability, the location of the compensation site relative to the impact site and their significance within the watershed, and the costs of the compensatory mitigation project. Furthermore, compensatory mitigation requirements must be commensurate with the amount and type of impact associated with a particular section 404 permit. Determinations of the appropriate amount and type of compensatory mitigation are made using methodologies that are tailored to address regional variations in wetland and stream resources and their associated functions and services.

Although careful attention is given to compensatory mitigation requirements when they are necessary, the majority of section 404 authorizations do not require any compensatory mitigation. According to a recent analysis of permitting data from 2010 through 2014, the Corps issued approximately 56,400 written authorizations nationally per year under its permit authorities, approximately 10 percent of which required compensatory mitigation. This percentage reflects a number of factors, including the Corps's ability to successfully engage with other federal and state resource agencies and permit applicants during the permit review process

to identify ways to avoid and minimize adverse impacts to the nation's waters. The majority of those authorizations were done under the general permit program which have no more than minimal adverse effects to aquatic resources. Compensatory mitigation is required when necessary to offset unavoidable yet significant impacts to wetlands and streams only after a project includes all means necessary to avoid or minimize impacts.

Compensatory mitigation is a basic component of the section 404 permit program and is consistent with the Act's goals of restoring and maintaining the chemical, physical, and biological integrity of the nation's waters. The agencies work to ensure this provision is applied consistently, predictably, and effectively so that permit applicants can proceed with projects that achieve their needs while protecting public health and water quality.

Thank you for the opportunity to be here today. I will be happy to answer any questions.

The CHAIRMAN. Thank you, Doctor, and I apologize that I mispronounced your last name.

You wrapped up your statement by saying that the goal here is a level of consistency, predictability and effectiveness. I think what you heard with the panel just before you is that this process, when it comes to compensatory mitigation, is anything but consistent, predictable and in many cases, effective.

I want to ask you a question. You mentioned that nationally that with the 404C permits issued, only about ten percent are required to be mitigated. Is that correct?

Dr. THIESING. Yes, about ten percent of them are, correct.

The CHAIRMAN. How does that compare then, here in Alaska? Those are national figures. We recognize that things are just entirely different down there. When you are up in the North Slope and 90 percent of the area around you is determined to be wetlands, what percentage here in Alaska of those 404Cs require a compensatory mitigation?

Dr. THIESING. Not 404Cs, 404 permits, Ma'am? I believe Mr. Hobbie actually answered that in his testimony.

Mr. HOBBIE. Yes, Ma'am.

If you look at our numbers as a total I wrote my pertinent individual permit information and information GPs because the small ones would be less. If you combined our new totals we issued 431 nationwide GPs and 71 IPs. If you combine those two totals about six percent of the time we require mitigation in the State of Alaska.

The CHAIRMAN. Does that hold true then for the North Slope?

Mr. HOBBIE. I do not break the numbers down that way and I'd have to get back to you. I can't tell you things I don't know about the North Slope.

The CHAIRMAN. Well it is something that, I think, would be interesting to drill down on because when you have an area that is effectively almost all wetlands and the extent of the wetlands I would be curious to know exactly what we are talking about here.

Mr. HOBBIE. What I would say is most likely the percentage is almost always going to be greater. The reason is, percentage wise, because of course we, the North Slope is not the area of our most predominate permitting. It's typically the Anchorage Borough area and Juneau, Wasilla so many of the permits also the impacts in the North Slope tend to be much greater.

A lot of oil and gas, it probably has too many, hundreds of acres in size where a lot of the projects within the municipality of Anchorage, Wasilla, Juneau are sometimes tens of acres, half acres or an acre. So the impacts are much larger on the North Slope, typically speaking, therefore, it would drive more compensatory mitigation while other areas may not.

The CHAIRMAN. I look forward to that break down.

Mr. HOBBIE. Will do.

The CHAIRMAN. I want to bring up with you an issue that was just presented to me this morning. I had an opportunity to meet with the Mayor of the Mat-Su Borough, the Palmer Mayor and the Mayor here in Wasilla. They alerted me to what they are entitling here the "Wetland Mitigation Bank Concern."

They apparently received some information that was disclosed just as a result of a FOIA request regarding some changes in policies that relate to compensatory mitigation. The fact that the guidance letter was developed and implemented without public input which is something that I think we are going to have a little bit longer conversation about here and the concern that we have that so much of what we're seeing coming out is not with full public comment.

The concern they have raised, and I will read from their document here they provided, "The Corps new policy requires ownership of wetland banks, requires ownership of the surface, subsurface rights or an agreement with subsurface right owners to not impact the surface even in those cases where the possibility of mineral exploration or extraction is remote. Municipal entitlements for boroughs and municipalities from the state only convey the surface estate to municipalities."

This is an issue here in the Mat-Su. It is also an issue out in the Ketchikan Gateway Borough. I was asked to bring this to your attention.

I am going to not only provide this to you, Mr. Hobbie, but it will become part of the record.

[The information referred to follows:]

Matanuska-Susitna Borough

Wetland Mitigation Bank Concern

Background

The Matanuska-Susitna Borough (Borough) received surface estate title to thousands of acres of wetlands as part of our Municipal Entitlement. In 2004, we began the process to preserve approximately 12,000 acres of Borough wetlands. The purpose was to create a mitigation bank as a way of preserving high value wetland complexes that the Borough owns. In addition, the bank would help to provide and/or sell credits for compensatory mitigation pursuant to the Clean Water Act (CWA) in an affordable manner to the Borough and others. The sale of mitigation credits to third parties would generate a revenue stream to the Borough while keeping mitigation credit costs low. The "Wetland Bank" was certified in 2009 and operated under the CWA 2008 Rule and USACE Alaska District regulatory guidance letter RGL ID No.09-01 issued in 2009.

The Borough recently received information (disclosed only as a result of a FOIA request) regarding USACE Alaska District (Corps) changes in policy (effective the 9th of July 2014) that have significant adverse economic and environmental impact to the Borough.

Issues:

1. Recent changes in requirements for compensatory mitigation were developed and implemented through the Corps' Regulatory Guidance Letter without public, Borough, EPA, or the State Interagency Review Team (IRT) input. Essentially the Alaska District Corps is working in complete isolation, with a total lack of transparency or communication with those stakeholders affected.

Possible Solutions:

We propose that the Senator or staff talk directly with the head of the Corps in Alaska, and request transparency related to this past Guidance Letter and any and all future considerations or actions impacting the Borough and the Wetland Bank. We propose in addition that the issue be raised with superiors of the Alaska Corps in Corps regional and national headquarters. While we can only guess at the motivation for these recent and contrary actions, they seem to be contrary to both the spirit and the letter of the Clean Water Act, its regulations, and the desires of citizens of the State of Alaska to preserve their environment in a way that marries private enterprise and regulation.

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2. Using the 2014 regulatory guidance letter, the Corps recently permitted the filling of 7.38 acres of waters of the U.S., including wetlands without requiring compensatory mitigation. The Borough as a whole is ranked by the National Fish Habitat Partnership (NFHP) as a "high" risk of habitat degradation and specifically called out Wasilla Creek as one of the 10 "Waters to Watch". Waters to Watch are a collection of rivers, streams, estuaries, watershed systems and lakes from across the country that will benefit from strategic conservation efforts to protect, restore or enhance their current condition. Notwithstanding the NFHP designations the Corps determined compensatory mitigation was not required. The public notice for this permit indicated compensatory mitigation was being offered by the applicant; but when the permit was finally issued, it was not required. This would seem to be a change significant enough to warrant that a new Public Notice be provided prior to issuance of the permit.

3. The Corps decision not to require compensatory mitigation for this permit alone adversely impacts the Borough's potential revenue by approximately $160,000.00 from the loss of potential wetland mitigation credit sales.

The Borough could potentially lose millions of dollars in wetland mitigation credit sales from credits already released and available for sale if this policy of permitting the filling of waters of the U.S. without requiring compensatory mitigation continues to be allowed by the Corps. This is a special problem since the Borough and its strategic partners have spent 13 years and a significant amount of staff time and public and private funds to establish the Wetland Bank in reliance on laws, rules and regulations now in place but that we believe are being contravened by the Corps staff.

Possible Solutions for items 2-3:

We propose that the Senator or staff talk directly with the head of the Corps in Alaska and have high-level authorities, perhaps the Engineer Inspector General or others from outside the State of Alaska, examine these matters to make an internal investigation as to whether local Corps staff have exceeded their discretion to the detriment of the environment, Wasilla Creek and the Borough.

4. The Corps recently made another policy change that could effectively limit the life and the value of our Wetland Bank. This issue surfaced with recent attempts to certify the Ketchikan Gateway Borough mitigation bank. Our Wetland Bank was informed that this would be an issue for us as well. The Corps' new policy requires ownership of the surface/subsurface rights or an agreement with sub-surface rights owner(s) to not impact the surface even in those cases in which the possibility of mineral exploration or extraction is "remote" or where other mitigation arrangements are made. Municipal Entitlements for Borough's and Municipalities from the State of Alaska only convey the surface estate to municipalities and boroughs.

Other members of the IRT have voiced opposition to this requirement but to no avail. The Final Rule promulgated under the Clean Water Act does not call for requirement of owning sub-surface rights or easement restricting sub-surface rights owner from accessing via surface. Surface rights owners can

develop improvements on the surface, develop roads, power plants and the like, but we have been told that all Boroughs in the State can no longer utilize lands for preservation banking.

The Borough could potentially lose tens of millions of dollars in potential wetland mitigation credit sales. We have already classified over 10,000 acres of land beginning back in 2004 and now the Corps has changed the policy without transparency, communication to stakeholders or basis for decision.

Possible Solutions:

We propose that the Senator or staff talk directly with the head of the Corps in Alaska and have high-level authorities, perhaps the Engineer Inspector General or others from outside the State of Alaska, examine these matters to make an internal investigation as to whether local Corps staff have exceeded their discretion to the detriment of the environment and the Borough.

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The CHAIRMAN. The Borough is essentially laying out that they could potentially lose millions of dollars in wetland mitigation credit. This is something that was new to me this morning, and I am still learning more about it. But I would like you to be able to respond to not only the people here in the Mat-Su Borough but Ketchikan Borough because I understand that they have a similar concern, an issue, as it relates to the mitigation bank.

Mr. HOBBIE. Okay, Senator.

I'm not familiar with that particular letter; however, we are struggling right now. And when I say we, Alaska District, and it's nationwide typically when a mitigation bank is established the land is reserved into perpetuity or any other sort of mitigation. Typically that requires some surface rights.

The rationale behind that is locking up the surface may be fine, but that doesn't exclude people coming in individually and mining the area because in most states, the subsurface rights are not bound by any restrictions. So therefore the easement really doesn't mean much.

The CHAIRMAN. Understood, but if you do not have the subsurface rights?

Mr. HOBBIE. Totally understand.

The CHAIRMAN. Yes.

Mr. HOBBIE. What we're trying to do is make sure the policy has some kind of consistency across the nation. Alaska is sure where it's not the only state that has some sort of issues, so we want to make sure we're trying to be as consistent as possible across the nation.

I'm not saying that that means that will never happen; however, it's something we're investigating to try to ensure that we are applying the rules as fairly as we can.

The CHAIRMAN. I am going to turn to Senator Sullivan, but one thing that I think is important to keep in mind here in this state is we are unique. We have some laws here, Federal laws, that apply to our lands that do not apply in other states. ANILCA is applicable only in Alaska, and I want to talk about ANILCA when we do our next round.

Senator Sullivan?

Senator SULLIVAN. Thank you, Madam Chair.

I want to thank the witnesses here. I really appreciate some of you flying in from out of town.

But also what Ms. Crockett mentioned in her earlier testimony is it has been my experience, as Attorney General in Alaska, and as the DNR Commissioner, is closer to the Federal officials are to Alaska, when they live here, when they work here, they see our issues. I think the working relationship is oftentimes a lot stronger because you get it.

The problem is when Washington, DC dictates certain policies with, kind of, a one-size-fits-all mentality, and then they try to apply it here. So I just appreciate you being here. I know that you guys are working hard on these issues.

But as you did see and as Senator Murkowski mentioned, we also appreciate you letting the Alaskan panel go first, because I think it was good for all of us to see what the issues are. Clearly there is a lot of frustration. That is a sampling of what is going

on in the state, but that was not some kind of handpicked group. That is very representative of the sense in Alaska whether you are a small, private landowner or a big company in terms of what is going on with mitigation.

A lot of it is the sense of, you talked about transparency and predictability, it almost seems like it is the opposite where it is random. So I want to get into some of those kind of questions.

I also, if you can and if you cannot do it here, one of the things I mentioned in my opening statement, authority, authority, authority, authority. If you are a Federal agency and you are taking action or issuing a regulation, do you agree that you have to have a basis either in Federal statute or the U.S. Constitution? Do you agree with that? Do you?

The answer is yes, if you are wondering. [Laughter.]

It is not even a close question.

Just for the record, it should be yes. If you take an action as a Federal agency, your action or your reg has to be based in statute or the U.S. Constitution. Just for the record, do you agree with that?

Mr. HOBBIE. Yes, sir.

Senator SULLIVAN. Okay.

Mr. MURPHY. Yes.

Dr. THIESING. Of course, of course it does.

Senator SULLIVAN. Okay.

Dr. THIESING. We take the same oath that you do, sir.

Senator SULLIVAN. Oh, I know. I am just checking because, as I mentioned, now this is a really important issue because there are a lot of things where, on the actions you are taking, I know you have some discretion and the Corps allow some discretion.

But as I mentioned in my opening statement, in the last two terms of the U.S. Supreme Court, they have found that the EPA has not done that. And one of those cases actually started here, the Utility Air Regulator Case verses EPA. It wound its way to the U.S. Supreme Court. Two years in a row the U.S. Supreme Court has stated that you have not abided by the statute or the Constitution. So your record on this is not terribly good. I think it is an area that, in terms of Congressional oversight, that is important.

The Deputy Commissioner, Mr. Fogels, raised a really good issue. As you guys know, when you look at the structure of the Clean Water Act, just like the Clean Air Act, it is supposed to be a co-regulator relationship between the states and the feds. It is in the, actually, preamble of the law.

So why is it that in terms of mitigation which has such a big impact here which we have so many concerns about, that you guys do not invite the State of Alaska in with regard to your mitigation decisions? We asked Commissioner Fogels whether you do that. His answer was no. So why don't you do that?

Mr. HOBBIE. Well, sir, I would say two things.

One, through our permitting process, you know, we do invite responses, information, from all agencies, State and Federal, you know. The state does have an opportunity. When it comes to the Interagency Review Team for mitigation, the Department of the Environmental Conservation which is a state agency, does sit on

that Interagency Review Team with regards to mitigation banks and such.

Senator SULLIVAN. So you think that Deputy Commissioner Fogels' response was incorrect that the state does actually have a co-regulator role with regard to the mitigation decisions?

Mr. HOBBIE. Senator, what I'm stating is the DEC does sit on the Interagency Review Team, and I'm stating that it's a practice they do come into our projects, a good majority of them with regards to mitigation.

Senator SULLIVAN. Okay.

Dr. THIESING. Senator, if I might add to that?

I believe that the commissioners of all the state agencies were signators to the State Interagency Review Team document. They're not?

Senator SULLIVAN. Okay. But I think, for example, I was very involved with regard to the Corps and the permitting on Point Thompson, right? At the end of that permitting process, wham, there was a huge dollar figure that you put with regard to the permittees in terms of compensation that we had no idea, right?

So I know from personal experience that we are not that involved because we were the lead agency doing that project but we did not have a clue.

I think if you say you are doing it, you need to do a much, much better job of doing it because you have a Deputy Commissioner who just talked about it and also my experience. We are getting blindsided by this. I think it is important to go back and look at the statute. We are the co-regulator. We are the co-sovereign here. I think that is a really important issue, and it is a part of the frustration.

Let me ask another question that came up. Do you see this tension that became very apparent in the previous panel between ANCSA and what is required in terms of the Clean Water Act mitigation? And if so, how do you address it? Again, I will just summarize it.

If our Alaska Native Corporations, regional corporations, village corporations want to develop the land that they were given by the Federal Government and the State to develop to take care of their shareholders, their people they are responsible for, to do that they have to give up land. They actually have to give up land in a way that is more than one for one. The EPA wanted six for one which I have a question for on that too. But do you see the tension there? How do we solve that? What is your recommendation to solve that? To develop land you have got to lose land.

Mr. HOBBIE. Senator, there are a couple ways to respond to that.

First of all with regards to compensatory mitigation, again, I do believe there's a low percentage of times where we do require it. When we do though——

Senator SULLIVAN. Not on the North Slope, though. We will be very curious about your numbers on the North Slope. I think we see it on almost everything, roads, developments and that is a lot, in many ways the heart and soul of our economy. So I would like to see those numbers.

Mr. HOBBIE. We'll provide those, sir, to the Committees.

[The information referred to was not provided as of the date of printing.]

Mr. HOBBIE. The other thing is the mitigation banks or in-lieu fee programs have become a way to allow applicants an easier access to mitigation. There's nothing that precludes them from not tying up land.

Mr. Fogels talked about legacy wells and stuff. When I met with the different agencies those were some of the things we were trying to do, trying to be flexible.

Are there other areas in the state that can actually be cleaned up or rehabbed versus just setting aside land?

Senator SULLIVAN. What if you are a corporation like Kuukpik that said they do not have $1.4 million for just an eight mile road? One million four hundred thousand dollars. They did not have that money. You heard it, their only option was to give up their land. You heard the testimony. They are in a conundrum. Develop the land. Give up the land. It seems to me it is squarely undermining the intent of ANCSA. How do you respond to that?

Mr. HOBBIE. Again, sir, they may have chosen that route, but again, I'm not for sure——

Senator SULLIVAN. But I do not think they are choosing.

Mr. HOBBIE. Um, well——

Senator SULLIVAN. If you do not have the money, what is the opposite?

Mr. HOBBIE. If the determination was the impacts were more than minimal, mitigation is required by statute. That's a requirement. You know, I can't change that.

The cost of that, the Corps of Engineers nor EPA, that I'm aware of, apologize if I speak for you, regulates the amount of fees that the in-lieu banks with mitigation banks charge and in-lieu programs charge.

Senator SULLIVAN. Let me ask a question where you have more flexibility than you think you might have.

On May 13th, 1994, the Army Corps and the EPA jointly issued a memorandum entitled, "Statements on the Mitigation Sequence and No Net Loss of Wetlands in Alaska." What this states, and it is still a memo that is good to go according to your guy's website, it states there are areas of the State of Alaska because of a high proportion of wetlands in a watershed or region opportunities for compensatory action may not be available. I think they are clearly referring to places like the North Slope.

In addition, there are situations in this state where the technology for restoration enhancement or creation of wetlands is not available or are otherwise impracticable where compensatory mitigation is not practicable it is not required of Section 404 permit applicants.

So isn't the North Slope a perfect example of what this memorandum is talking about? Have there been situations where the Corps and the EPA under this authority that you guys have, that you stated, have said, look, it's not going to work. You pick, we get it. You don't have $1.4 million and you should not be required to give up land to develop lands so we are not going to require anything. Have you ever used the authority given to you by this memorandum between the EPA and the Corps?

Ms. THIESING. Sir, the memorandum was dated 1994. We have since come out with a rulemaking which applies something over or a different set of standards which are clearer intended to try and make, put everything on an even playing field.

Kuukpik was the one that offered an area of preservation as compensation for the impacts that they had. And when a conservation easement was written or identified in the Corps' permit and the permit that was ultimately granted to Kuukpik there are a number of uses of that land that remain theirs.

They are, they can use it for subsistence purposes. There are a whole bunch of other things that are listed as part of the conservation easement which is not ordinarily something that is done. But——

Senator SULLIVAN. Alright Ms. Thiesing, for the record, in the preamble to your 2008 compensatory mitigation rule it references the 1994 memorandum. And it says, therefore it does not, the new rule, change the May 13th, 1994 statements on mitigation sequencing no net loss of wetlands in Alaska. So to say that the 2008 rule overrode the 1994 memo, giving you way more flexibility than you are utilizing is not correct.

Ms. THIESING. But I believe what the preamble is addressing itself to is the no net loss. We understand that there will be loss of wetlands in Alaska.

Senator SULLIVAN. Again, to say Kuukpik had an option. I think that is stretching the situation that you just heard from them. They didn't really have an option to build a road because they did not have the $1.4 million. You see, I think that what you need to do is look at a lot more flexibility for the state, and I think you have that. You are just not using it.

Madam Chair, I am sorry I kind of went a lot over.

The CHAIRMAN. No, this is the line of inquiry that I think most of us here in Alaska are interested in, because I do not think that we have received satisfactory responses from the agencies.

Pretty tough words are used when we hear whether it is from Wainwright or Nuiqsut or Craig or the folks at Great Northwest. But the word is extortion. Now that is pretty tough.

I think we can understand why it is important to allow for mitigation, why those regulations are in place, but I think there also is an expectation, and this goes back to your words, that there be a level of predictability, that it be fair and reliable. This is where the concern is because it is almost as if there is a bargaining that goes on and we will figure out what it is that we can settle on. Instead of a six-to-one ratio you settle on a two-to-one because that was what people finally agreed to.

It is not really an option when you have no other alternative, and yet you want to be able to provide for the health and safety of the people in your village. You want to be able to get to work which is effectively what they are looking for there at Kuukpik and you want a road open for subsistence.

So I do not mean to be not asking a question, but I think you need to put yourself into the shoes of those that are working really very, very hard to try to provide for a level of access, a limited level of development and a willingness to do so and work within the laws. But we want to know that you are working within the laws

and not sometimes making it up as you go, and sometimes that's how it feels. Again, these are pretty harsh words for you, but that's how it feels.

Mr. Murphy, I don't want you to get off the hook. [Laughter.]

The CHAIRMAN. The compensatory mitigation is certainly one thing within our Corps, but we do have other issues within our BLM lands. The Federal Land Policy Management Act, FLPMA as it is lovingly called. Throughout FLPMA we have the principles of multiple use defined, pretty consistently, pretty clearly. I think you, in your comments, referred to the fundamental authorities that come from FLPMA to BLM.

Secretary Jewell in her Secretarial Order stated that, "Through the development of comprehensive mitigation strategy we can ensure that our national wildlife refuges, national parks, other Federal lands and waters are managed for conservation purposes with sound stewardship and a commitment to conserve habitat and fish in wildlife mitigation corridors."

She goes on to lay out the following mitigation priorities, and this is what she says in her Secretarial Order. She says, "To avoid potential environmental impacts where impacts cannot be avoided require projects to minimize impacts to the extent practicable and where impacts cannot be avoided, DOI should seek offset or compensation." She is effectively taking this language, borrowing this language, if you will, from the Clean Water Act. And regarding the avoiding, the minimizing and the compensating, do we really have authority within FLPMA that gives to BLM the authority to borrow this language, if you will or these priorities, that the Secretary has included within this order? How do we get to this level of authority? It goes to Senator Sullivan's earlier question. Do we have that authority within FLPMA because that is your fundamental authority? It seems to me that what you are doing is you are taking language from another authority and utilizing it to expand yours. That is my question.

Mr. MURPHY. Well, as I pointed out in my comments looking through our handbook and manual—it's, well mitigation in general. And we do have a long history of arguing with proponents at development all over the United States and that's built upon the challenges and we realized in the lower 48 over time development that have impacts we couldn't sustain there. And as we moved into Alaska and we started to see opportunities for development, particularly in the National Petroleum Reserve, we didn't want to think of going down that same road, fragmenting habitat and precluding multiple use—resource economically and sustaining the resources, the natural resources that are on land.

So, yes, we feel that our authority emanates from FLPMA. But within the National Petroleum Reserve we also have the National Petroleum Reserve Protection Act which also reinforces that level of mitigation necessary to sustain ourselves and the public land.

The CHAIRMAN. So let me ask you about this draft guidance, this manual. It is my understanding that it was Secretary Hayes that began the process for this draft Regional Mitigation Manual, and that was when Secretary Salazar was in office so it was about five years ago, and that draft manual has not even been something issued. It has not been rescinded. So we are sitting here with a sit-

uation where BLM is effectively drafting guidance and then before it has been finally issued, before it has been vetted, you are implementing it. It goes to the comment that I made earlier about the lack of public comment afforded through BLM.

You heard the concerns. We have had conversations about it in the past, and yet it still seems to me we are in the same situation where you are moving forward with draft provisions that have not been vetted, have not received the public comment, and yet you're moving forward to implement them.

Even though they are not yet fully in place, you heard Ms. Crockett's comments about the impact that this proposed guidance and these designations have on the ability to invest, the ability to permit, the ability to really do anything in any area. So at the end of the day, you may get your desired effect if the desired effect is to limit further development in the area because everybody is put on hold. How are we at that place where we are allowing these draft, unvetted guidance documents to be controlling without public comment?

Mr. MURPHY. The—of that draft, I believe is 2013, and that draft mitigation policy was vetted with the public. And yes, we are implementing portions of that as we move forward.

The CHAIRMAN. Even though it is still in draft?

Mr. MURPHY. Even though it's still in draft, in close coordination, we're developing with FOIA, with the states and to be sure that we're not overlapping each other, if you will, as well as making sure that we're on program as we move forward.

And again, it all emanates from, you've heard it time and time again, the transparency aspect that we're trying to achieve that we can provide some assurances to those developers as we move forward and as they move forward to develop other lands in Alaska.

The CHAIRMAN. One of the things that we did hear from Mr. Fogels though is a concern that you have overlapping, duplicative mitigation requirements. So if, in fact, you are working with the state to ensure that that is not the case, it seems to me we need to be doing a little bit better coordination.

Let me go to Senator Sullivan.

Senator SULLIVAN. Madam Chair, I am going to spend my comments or a couple more questions on authority because I think it goes to the fact, again, to this critical question so many of us are concerned about. It is clearly an oversight role of the Energy and Natural Resource Committee and the EPW Committee on pinning down where you have authority to take the actions that you do.

Mr. Murphy, I know you are not driving this policy and this is actually driven by Secretary Jewell, but I still think your answers to this with regard to mitigation are not sufficient. I would request that, for the record, you get the Department of the Interior General Counsel's Office to give detailed answers, citing specific statutes on where you get the authority to require $8 million in mitigation on GMT1. It is not sufficient to say the Secretary has a draft letter that provides us that authority. That is worthless. The authority has to derive from the Congress. You have to be able to point to a statute.

We have heard rumors that there was at one point officials from DOI saying hey, they can afford it, so we are going to require mitigation.

Last time I checked that was not a proper authority to require that kind of level of mitigation. We heard, once again, it started at a real high number, again, not sure why, and then started to come down throughout this negotiation, and then what are you are actually going to do with the funds? Who made that decision? What are you going to do with those funds? You are just randomly coming up with the idea that now we have $8 million and we are going to use it for whatever purpose we want without any direction from the Congress of the United States?

I don't think you are answering these questions. I would respectfully request that the headquarters back at the Department of the Interior come back with detailed, detailed, legal authority on what gives you the authority for the GMT1 mitigation and the spending of that money on whatever you feel like? I don't think that is a proper answer.

[The information referred to was not provided as of the date of printing.]

Senator SULLIVAN. I would like to ask a question that came up, and this could be for all three of you. In terms of mitigation required by the state, so the State of Alaska wants to build a road. We were required, I guess, last year to pay almost $3.5 million in mitigation. Do you have a statutory provision that you can provide us that allows Federal agencies to require compensatory mitigation of a co-equal sovereign to pay mitigation? I was very surprised by that. I actually did not know the answer until this morning.

Mr. HOBBIE. I'll take the first stab at it, Senator.

As far, I mean, under the Clean Water Act of course, there's regulations that have been promulgated. Part of that is, of course, the 2002 rule.

Senator SULLIVAN. But remember, we are a co-equal regulator under the Clean Water Act, so you are charging us compensatory mitigation.

Mr. HOBBIE. We didn't charge the state a dime. The state chose to pay that in a third party, in-lieu fee holder. Again, like replacing the fish culvert.

Senator SULLIVAN. So we could have just not done anything?

Mr. HOBBIE. You would not have got a permit, sir. [Laughter.]

Sir, if the state was exempt——

Senator SULLIVAN. Come on there, Mr. Hobbie.

Mr. HOBBIE. If the state was exempt——

Senator SULLIVAN. You are playing with the words. So we had to do it. No equal regulator under the Clean Water Act became the subservient sovereign.

Mr. HOBBIE. Yes, sir, just like the Federal agencies have to mitigate also.

Senator SULLIVAN. Okay, can you do the same thing? Provide the statutory authority detail on where that authority rests?

Mr. HOBBIE. Yes, sir.

[The information referred to was not provided as of the date of printing.]

Senator SULLIVAN. Okay, thank you.

Ms. Thiesing, I wanted to ask you a question. This is a little more detailed, but again it goes to authority issues. It is my understanding that the lands that are set aside in compensatory mitigation are supposed to be under an imminent threat of development.

Dr. THIESING. That's correct.

Senator SULLIVAN. Why is this a requirement? Where do you derive your authority for that? For example, the EPA initially dismissed, when Kuukpik was working with you, the location of their initial easement that they wanted to provide as inadequate because that land was not under the imminent threat of development. I just do not even understand that. That is not just taking acreage, the six-to-one or two-to-one or whatever, but you are actually making sure it is acreage that is really, really valuable for them. Again, where do you get the authority in the statute to say that the acreage that you want has to be extra valuable to them? Do you see how it is extra valuable?

Dr. THIESING. Senator, I think you're not correctly characterizing what the rule says. The authority for requiring measures to evaluate a permit comes from Section 404B of the statute, the 1972 Federal Water Pollution Control Act also known as the Clean Water Act. Section 404B, Section 404A authorizes the Corps to, the Secretary of the Army acting through the Chief of Engineers or his designee, to authorize discharges to fill, dredged of full material to waters of the West. Section 404B authorizes the Administrator to develop guidelines, the substantive criteria, by which the Corps will evaluate its authorizations for against the criteria that the Administrator develops. Okay? So, in other words, EPA has responsibility to develop the guidelines while the Corps evaluates all of its permits applications because——

Senator SULLIVAN. You are not really answering my question.

Dr. THIESING. No, sir.

Senator SULLIVAN. Why is this a requirement? Why is the compensatory land that you are seeking——

Dr. THIESING. I'm getting to that.

Senator SULLIVAN. Have to be under the imminent threat of development?

Dr. THIESING. Okay, that's where the authority comes from.

Now the rule which is part, the 2008 final mitigation rule, is part of the, has become part of the 404B guidelines, and in laying out criteria for using preservation as a means of offsetting unavoidable losses, okay?

If you preserve an area you're still incurring a loss of function and services that that area provides to the environment and to the human population. However, if an area is particularly valuable ecologically or provides important services and it is under threat of destruction or degradation then preserving that area provides an important—it provides, it preserves those important functions and services to the environment and to the human population using it.

Senator SULLIVAN. Actually I think you can make the opposite argument. If you talked to the Kuukpik members who were here earlier that is very important to that population because of the fact that you are putting up, you are focusing on it in a way that actually is going after even more high value land for them. Again, I just

do not understand why this is a requirement and where you have the authority to make it a requirement.

Dr. THIESING. It is a criteria by which, it's a criteria laid out in a rule by which the Corps can consider a net loss of wetlands if an important area, an area that's ecologically important and performs important functions, is preserved.

Senator SULLIVAN. Okay, if you can, again if you can take the opportunity to provide more detailed comments with the general counsel from the EPA on the statutory basis for this requirement, if there is any. I'm doubtful there is. It would be very useful, I think, to be respectful here, as a follow-up to this hearing.

Dr. THIESING. I can, sir.

[The information referred to was not provided as of the date of printing.]

Dr. THIESING. But the important thing is that valuable is, you know, in terms of when we look at preservation, our analysis of its value is how important is this to the area in terms of providing ecologically important services.

Senator SULLIVAN. How about how important it is to the people of the area?

Dr. THIESING. Well, but that's the thing. One of the reasons the Kuukpik proposed this area for preservation was that it was very important to them for subsistence and for other uses for hunting, for fishing——

Senator SULLIVAN. But you initially dismissed Kuukpik's——

Dr. THIESING. No, what we said in our comment letter was that we did not see the basis for them preserving. There was no information provided in the public notice that identified what the values of this parcel were. I mean, it did not have information available either from the public notice or from our discussions with the Corps as to what the basis for this parcel's ecological value was.

Senator SULLIVAN. Okay.

Well Madam Chair, I am sorry, but just to wrap up. I do think, again, even on that it would be very useful. This is something I have asked the Administrator a number of times in hearings, in Washington, about getting back to the Committees of oversight with detailed statutory reasoning on how you have the ability to take these kind of actions. If you don't you can admit that as well, but she has not been very good about getting back to us. I think it is something that we need to start instilling as part of the agency oversight.

Where are you getting your authority? And you need to show us, you need to show the American people, the people of Alaska and the Congress. I think that if you can do that, provide that for additional follow-up to some of these questions, I think it would be very useful and we would really appreciate that.

Thank you, Madam Chair.

The CHAIRMAN. Thank you, Senator Sullivan.

I think the whole discussion about where the authority stems from and some of the comments that have been made by this panel are important, again, in the context of where we are because we are not in Iowa. We are in Alaska.

We have some provisions, some Federal laws, ANILCA most specifically, ANCSA certainly, but certainly ANILCA that recognizes that our Federal land managers who work all over the country and manage all kinds of Federal land all over the country that we all have existing Federal statutes but within Alaska ANILCA provides that there is a difference that in order to accommodate a viable social and economic future that respects Alaskan needs, Alaskan traditions, participation within the state. This is laid out in Federal statute that is unique to Alaska.

Yet it seems that that is just yet one more Federal law that we can overlook in an effort to say, well where we are working on all of these other land management policies for BLM across the country, and so we will just lump Alaska in but for ANILCA.

I have questioned you, Mr. Murphy, on where the authority rests to allow for an ACEC in the Fortymile area that would encompass over 700,000 acres when within ANILCA it specifically limits, specifically limits, to 5,000 acres any withdrawal or deferral without Congressional authority. We can talk about whether it is EPA compensatory mitigation or BLM, the issues that you are dealing with in terms of some of these proposals and land designations and within the Corps, but I think it is imperative to understand where you are operating.

I would assume that Mr. Murphy and Mr. Hobbie, you have had ANILCA training and that you require ANILCA training of all of your staffs here in Alaska. I would hope that that is the case. If it is not, we need to make sure that that is the case.

Mr. MURPHY. It's the case.

The CHAIRMAN. But further to that that anybody who is sitting back in Washington, DC working out these regulations and reading through the records and the comments, that they too have an understanding and an appreciation of ANILCA because there is something that is clearly missing. I think part of it is bypassing some of the fundamental Federal statutes that relate specifically to the State of Alaska.

We are well over our time, and I apologize to those of you that have been very patient with us as we have tried to gain more information. I appreciate not only the testimony provided today, but what you will be able to provide us with follow-up.

As we have additional comments that may be presented by the public for the record, know that we will keep this Committee hearing record open for an additional two weeks.

I think this has been very important for Alaskans to be able to understand some of what we are dealing with and perhaps some of the more constructive paths forward.

It is probably the bigger part of our jobs representing Alaska back in Washington, DC to try to lend some air of predictability or certainty within the Federal regulations. This is one area where, I think, you can see we are not able to give that certainty because we do not have that at this point in time. So the request for greater cooperation, greater collaboration is an imperative and hopefully we will be making some progress moving forward.

Senator Sullivan, thank you for——

Senator SULLIVAN. Thank you, Madam Chair.

The CHAIRMAN. Your leadership on these issues within EPW. It is really important that we are working together as a team.

For those of you who gathered here today, thank you for your interest and your concerns as well.

With that, the Committees stand adjourned.

[Whereupon, at 5:30 p.m. the hearing was adjourned.]

APPENDIX MATERIAL SUBMITTED

Questions for the Record - before the U.S. Senate Committee on Energy and Natural Resources and The U.S. Senate Committee on Environment and Public Works' Subcommittee on Fisheries, Water and Wildlife

Federal Mitigation Requirements by the Bureau of Land Management and the U.S. Army Corps of Engineers and interagency coordination related to economic development on federal, state, and private lands

September 14, 2015

Submitted by:
Ed Fogels, Deputy Commissioner
Alaska Department of Natural Resources

Response submitted on behalf of:
The State of Alaska

Question: Mr. Fogels, you mentioned in your testimony possible mitigation duplication required by the Corps of Engineers for Section 404 wetlands permitting. Could you please give us your views on wetlands mitigation and any ways that the federal agencies could help make wetlands mitigation more reasonable and effective?

Answer: The U.S. Army Corps of Engineers' (USACE) wetlands compensatory mitigation under Section 404 of the Clean Water Act should be a transparent regulatory process where unavoidable adverse impacts to wetlands and aquatic resources are mitigated. However, other federal agencies are developing their own ambiguous 'mitigation' requirements for land use through policies and strategies outside of the regulatory process. If these mitigation plans are not coordinated among these different regulatory agencies, duplicative mitigation requirements may result. For example, the State is concerned that the Bureau of Land Management's plans and polices in the National Petroleum Reserve-Alaska (NPR-A) are duplicating USACE requirements, which was repeatedly seen during the federal permitting review of the Greater Moose's Tooth-1 project.

Duplicative mitigation requirements may also occur when state, federal, or local regulatory agency authorities are imposed without recognition of mitigation requirements and practices that are already in place. First and foremost, federal agencies should work to avoid duplicative permitting and mitigation requirements.

The implementation of the 2008 Mitigation Rule has proven to be challenging in Alaska. When the federal "no net loss" of wetlands policy was being developed, federal regulators recognized that Alaska's wetlands were ubiquitous and were not rapidly declining as was the case with wetlands in the Lower 48 states. In 1994, federal regulators proposed the "Alaska Wetlands Initiative" describing the unique nature of Alaska's wetlands and concluding a flexible regulatory framework was necessary, emphasizing the "practicability" and "flexibility" of the regulatory program to reflect circumstances in Alaska.

Secondly, federal agencies should study the "Alaska Wetlands Initiative" materials to incorporate its longstanding principles and ideas to address the unique nature of Alaska's wetlands and increase the efficacy of compensatory mitigation in Alaska. There is an existing collaborative group that provides a venue for these discussions – the State Interagency Review Team (SIRT). This team is led by the USACE, and features the U.S. Environmental Protection Agency, Fish and Wildlife Service, National Marine Fisheries Service, and the Resources Conservation Service, along with the State of Alaska's Department of Environmental Conservation, Department of Fish and Game, and Department of Natural Resources.

The SIRT advises the USACE on the best way to manage compensatory mitigation in the State. The team has pushed for the USACE to develop a more transparent process with guidance documents, checklists, and templates to help inform stakeholders, lay out expectations, and limit subjective implementation of the rule. This has been received well by USACE and several guidance documents are currently being created. Historically it appears this team has not been overly effective, but with new team members from the State and USACE it appears to be taking steps in the right direction, which is encouraging.

Federal agencies should work on a continued and strengthened stakeholder outreach effort while maintaining an on-going dialog among regulators, industry, and community stakeholders to develop a statewide mitigation strategy. That outreach should include guidance detailing BLM's process for mitigation and a description of how they will calculate BLM costs for "mitigation" on projects where USACE will also be requiring "compensatory mitigation"..

The State of Alaska Department of Natural Resources is currently pursuing the development of a statewide compensatory mitigation program to help provide additional opportunities for project applicants to utilize mitigation credits from a state-managed mitigation program. In turn, previously impacted wetlands and aquatic resources on state lands could effectively be mitigated and restored to a higher functional value, a goal shared by multiple state resources agencies in Alaska. The Department is currently working with stakeholders and the USACE to consider the most practical options for developing a suitable mitigation program to provide additional mitigation opportunities in Alaska where there are limited private lands available for private mitigation banking. Support and result-oriented flexibility from federal agencies are critical as the State goes through this process.

Joint Field Hearing before the
U.S. Senate Committee on Energy and Natural Resources and the Committee on Environment and Public Works' Subcommittee on Fisheries, Water and Wildlife
August 17, 2015: Federal Mitigation Requirements

Questions for the Record
Submitted by Chairman Lisa Murkowski
to Mr. Joseph Nukapigak

Question 1: The Greater Moose's Tooth 1 permit calls for a mitigation fund to be set up. How would the community like to see those funds used?

Answer:

Residents of the community of Nuiqsut are represented by Kuukpik Corporation, the City of Nuiqsut, and the Native Village of Nuiqsut. In some cases residents are members of all three organizations. Kuukpik Corporation has actively engaged in the planning and permitting of industrial activity in and around the village to ensure that the village's concerns are heard and heeded. GMT1 requires payment by the applicant of $8M in mitigation funds. Kuukpik has two requests. First, that the mitigation funds be used on community of Nuiqsut-related projects including community buildings, infrastructure, or additional subsistence access roads in and around Nuiqsut. Second, the disposition of the funds should be as directed by the community and not by outside interests.

Question 2: Rural communities are usually trying to improve transportation and access to subsistence activities. This is especially true in rural Alaska. You talked a lot about the Nuiqsut Spur Road as an important link for subsistence hunters.

a. Do the agencies look at the Spur Road as mitigation for subsistence?

Answer:

Kuukpik Corporation explained to several federal agencies on multiple occasions over the past several years the value of the Nuiqsut Spur Road for accessing additional subsistence areas and jobs and training and offsetting the impacts of oil development. We are unaware, however, of any credit provided by the federal agencies (in the 404 process or otherwise) for the fact that community members will be able to access greater subsistence opportunities as a result of the construction of the Nuqsut Spur Road. It is our opinion that the system for identifying and establishing mitigation does not allow for roads to be considered as mitigation in these types of situations. Prospectively, the government agencies should look at roads as mitigation where the road system provides greater access to subsistence.

b. Have you been able to finalize all the Spur Road permits? If not, why not?

Answer:

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We have not finalized the Spur Road permits. The 404 permit requires that a third party hold the conservation easement and serve as custodian of the funds needed to manage the easement. We have not been able to complete the necessary agreements to perfect this part of the permit. We continue to seek a qualified and agreeable partner that we can work with on these two final steps of the process.

c. Though the Spur Road isn't complete, does it provide additional subsistence access?

Answer:

Yes. Although it is not officially open yet, some residents have started using the road for limited subsistence activity. The gravel used to construct the Road is still being worked and turned in order to allow its high ice content to melt and the gravel to compact. Some caribou hunting has occurred using the road for access. Berry picking has also occurred along the road. Finally, I have personally benefitted as my subsistence fishing nets are set near the Niglig Channel bridge and it has already improved my access.

Question 3: When one looks at the Colville River Delta there seems to be a wealth of subsistence opportunities. There is also a lot of mineral wealth. This means that we need to work to ensure that the community, the mineral owners and developers are together.

a. Can subsistence be protected at the same time that we continue to develop the subsurface area?

Answer:

Some impacts are unavoidable, which is why mitigation such as that provided by the Spur Road is so important. Kuukpik has worked exceptionally hard with public agencies and with the oil industry to ensure that project designs are refined to have the least possible impact on subsistence and on our traditional lands. Kuukpik has always taken a balanced position with respect to Nuiqsut's subsistence needs when contrasted against continued development in the Colville River Delta.

b. How can all the projects that include gravel be mitigated in the area of your village?

Answer:

We believe that mitigation banks, in-lieu fee programs and permittee responsible options should continue to be available to applicants. However, Kuukpik also thinks that there is a strong need to expand the options available to meet the demands of industry and the communities. We support the certification of Arctic Slope Regional Corporation's umbrella mitigation bank and

will work with the certified in-lieu fee program (The Conservation Fund) where possible. Both options are important and we share the same goal of fully mitigating projects, particularly within the same watershed and within the critical Colville River Delta.

There are unquestionably problems with the current 404 mitigation structure and process. To fix those problems, Kuukpik strongly believes that additional statutory options need to be made available for 404 mitigation and for the BLM mitigation program that seems to be developing, including preservation leasing and an exemption for Native projects built on Native lands.

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August 17, 2015: Federal Mitigation Requirements

Questions for the Record
Submitted by Chairman Lisa Murkowski
to Mr. Ted Murphy

Question 1: What interagency coordination occurs between the Bureau of Land Management (BLM) and the U.S. Army Corps of Engineers (USACE or the Corps), and USACE and the Environmental Protection Agency (EPA)? Are there ways to improve that coordination?

Answer: The U.S. Army Corps of Engineers and the Environmental Protection Agency are just two of the many agencies the BLM works with in considering the development of projects on public lands. During the permitting process, proposals with site-specific wetland criteria trigger the initiation of Section 404 with the USACE and EPA. In addition to its role in wetlands, the EPA contributes to the management of water disposal and injection wells. The EPA is also a central cooperator when conducting air and water analysis and modeling in large programmatic NEPA documents. The BLM and the USACE have taken steps to improve coordination on permitting oil and gas projects in the National Petroleum Reserve-Alaska (NPR-A). The USACE and the BLM have had several meetings to explore ways to improve communication during consideration of future projects.

Question 2: The Federal Lands Policy Management Act, or as many call it – FLPMA – requires in Title II a "systematic interdisciplinary approach to achieve integrated consideration of physical, biological, economic, and other sciences;" and requires the BLM to "consider the relative scarcity of the values…and realization of those values." Do you consider current policies in the Department of Interior (DOI) and BLM to equally value those integrated resources?

Answer: As part of the BLM's land use planning process, the BLM considers each of those values, legal considerations, and the long-term public interest when determining how to manage the public lands. Based on these factors, the BLM identifies a balance of appropriate uses of the public lands to meet its multiple use and sustained yield mission.

Question 3: In your testimony, you indicated that FLPMA does provide the BLM/DOI with the authority to borrow principles and regulatory framework from the Clean Water Act regarding the following mitigation priorities laid out in Secretary Jewell's Secretarial Order 3330: avoid potential environmental impacts; where impacts cannot be avoided, require projects to minimize impacts to the extent practicable; where projects cannot be avoided, DOI should seek offset or compensation. Please provide a legal opinion, which explains the legal premise for borrowing these regulations and principles.

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Answer: The mitigation hierarchy as described in your question is a concept that is fundamental to nearly all mitigation of natural resource impacts, whether conducted by the USACE, DOI, or other agencies. The hierarchy has been identified by the White House Council on Environmental Quality as expressed in National Environmental Policy Act regulations[1] and has long been considered a best practice among mitigation practitioners. The mitigation hierarchy identifies a general preference to first avoid and minimize those resource impacts that are capable of being avoided and minimized in order to reduce the need to rely on compensatory mitigation. The BLM has ample discretion to apply mitigation through its authorities in FLPMA – most broadly through FLPMA's fundamental direction to manage public lands for multiple use and sustained yield. The BLM anticipates publishing final guidance on the use of mitigation under FLPMA early in calendar year 2016. In the case of the NPR-A, the Naval Petroleum Reserves Production Act also provides authority, as does Title VIII of the Alaska National Interest Lands Conservation Act (ANILCA), and section 28 of the Mineral Leasing Act. These authorities are discussed in some detail in Appendix D to the Record of Decision for the Greater Mooses Tooth 1 project.[2]

<u>Question 4</u>: You noted in your testimony that the program folks responsible for draft plans, guidance and policy as well as those with the authority to sign off on those plans, guidance and policy have taken Alaska National Interests Lands Conservation Act (ANILCA) training. In light of the testimony we received about ANILCA requiring Areas of Critical Environmental Concern (ACECs) larger than 5,000 acres to first get Congressional authority:

a) Can you please explain why the State of Alaska repeatedly spends an inordinate amount of time providing BLM with the exact same ANILCA-related/driven comments in public comment period after public comment period?

Answer: The BLM receives many comments during the public comment process on any proposed plan or amendment. While the State of Alaska has raised concerns with the agency's compliance with certain provisions of ANICLA, the BLM maintains that our land use planning process in Alaska is compliant with all applicable laws, including ANILCA.

b) Would you commit to request that Bud Cribley send all of his field managers and those drafting large plans or policies in the state (even those without authority to implement/sign off on the plans) to the ANILCA training, and request the same of relevant Washington, DC folks?

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[1] 40 CFR 1508.20

[2] https://eplanning.blm.gov/epl-front-office/projects/nepa/37035/54639/59351/MASTER_GMT1ROD.Ver17_signed__2.13.15.pdf

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Answer: At this time, all personnel assigned to BLM Alaska are encouraged to attend ANILCA training within two years of reporting to Alaska. It is also encouraged for relevant National BLM office personnel. We are interested in working with your office on expanding opportunities for ANILCA training, including the possibility of holding a training here in Washington DC.

Question 5: Regarding Greater Mooses Tooth 1 (GMT1):

a) Why did the mitigation plan take so long to develop, and how exactly was the $8,000,000 payment developed?

Answer: The GMT1 project EIS was the first authorization of oil and gas production on Federal land within the NPR-A and as a result, required time and effort to determine the most responsible path forward for allowing development to occur while also fulfilling our obligations to protect subsistence and other resources as directed by FLPMA, the National Petroleum Reserve Production Act (NPRPA), ANILCA, and other laws. The BLM worked closely with the State of Alaska, local Alaska Native villages and corporations, Federal partners such as the USACE, and other stakeholders through a public process to determine potential impacts to subsistence and other resources as part of this project authorization. To offset identified impacts that could not be fully mitigated by avoidance and minimization measures, ConocoPhillips agreed to contribute $8 million dollars to BLM to establish a compensatory mitigation fund to provide for the development and implementation of a landscape-level regional mitigation strategy (RMS) and to finance mitigation projects as identified by that strategy. The final GMT1 approval also requires a public stakeholder process to develop the RMS that will determine how to best allocate these funds and set clear expectations for future projects. This upfront analysis will speed the consideration of future development projects in the NPR-A.

b) We understand that BLM intends to use part of the $8,000,000 to develop its landscape-level Regional Mitigation Strategy.

i. Do you think it is appropriate for a private party to bear the burden of paying for BLM to develop this strategy? If yes, why?

Answer: The Regional Mitigation Strategy will determine how best to allocate compensatory mitigation funds to address the impacts to subsistence and other resources that will be impacted by the GMT1 project. The impacts that the BLM seeks to mitigate are the direct result of the economic pursuits of a private party, and the BLM believes that it is reasonable to assign these costs to the private developer rather than to the American taxpayer. By developing a Regional Mitigation Strategy to assess impacts and mitigation opportunities through a stakeholder driven process, the BLM will also be able

to better and more rapidly respond to future permit applications from those private parties and at the same time reduce the risk of litigation.

ii. Your testimony notes that the interim mitigation policy prescribes procedures for a landscape approach to mitigation, and that the policy has been released "on a trial basis."

- **Is this $8M being spent in part on the "trial run" of a program, which has not been subjected to a robust public comment period?**

Answer: The BLM has decades of experience implementing mitigation to offset impacts from development as part of the public environmental review for a given development project, as was the case for GMT1. However, the BLM has lacked uniform and consistent guidance regarding how to best determine and apply mitigation to projects, which is the focus of the interim policy you identify. The BLM decided to release that policy in interim form in order to allow for input from our field offices and from the public. The BLM is in the last stages of finalizing that policy. In terms of public comment on the interim policy, please see the responses to Questions 6 and 7 below.

- **Your testimony also notes that the Secretarial Order 3330 "builds on and expands" concepts from the interim policy. Does this mean that the project proponents for GMT1 should expect in a matter of months or a year, the BLM will require additional mitigation measures or monies to be taken as you continue building on and expanding your mitigation policy?**

Answer: Secretarial Order 3330 and the BLM's interim mitigation policy address concepts that broadly apply to mitigation—including principles of additionality, durability, and transparency —without prescribing the amount of mitigation that might be required for any given project. In general, the BLM will continue to identify appropriate mitigation measures by evaluating the specific impacts of each project proposal, in consideration of applicable BLM land use plans and in compliance with NEPA.

With the approval of the GMT1 project on February 13, 2015, the BLM's NEPA analysis and decision-making for that project is complete. Accordingly, no additional mitigation measures will be required for impacts addressed in that decision.

Question 6: You indicated in your testimony that the Draft Regional Mitigation Manual did receive public comment. Please clarify exactly what that public comment was

comprised of, and note whether a formal Administrative Procedure Act rulemaking public comment and consultation process occurred.

Answer: While a public review and comment process is not required for the development of agency guidance such as the BLM mitigation policy, the BLM took the extraordinary step of publishing the interim draft policy and making it available on our public website. As a result, the BLM received feedback from a variety of stakeholders, including both industry and environmental groups. That feedback is being carefully considered as the BLM writes its final policy.

a) **A number of individuals sent a letter directed to Secretary Jewell and Director Kornze outlining major legal, jurisdictional, policy, and implementation concerns related to the draft mitigation manual in March of 2014. Do [you] expect concerns raised by the public regarding this important draft manual will be responded to by the Director, the Secretary or their delegees?**

Answer: The BLM has received extensive public feedback on our interim policy. Each concern raised to us in letters sent to DOI and BLM is being thoroughly considered and in some cases may result in changes that will be reflected in our final policy.

Question 7: Given that public comment, coordination and collaboration are so fundamental to FLPMA, what is the BLM's process for determining whether policy or guidance rises to the level of requiring formal public comment and coordination under rulemaking regulations verses administrative, unilateral formulation of instructions or guidance, etc.?

Answer: In determining whether notice and comment rulemaking procedures are necessary for a given policy, the BLM, with counsel from the Department of the Interior's Office of the Solicitor, carefully considers the requirements of section 553 of the Administrative Procedure Act (APA). Further guidance can be found in the Final Bulletin for Agency Good Guidance Practices which establishes policies and procedures for the development, issuance, and use of "significant guidance documents" by Executive Branch departments and agencies, including the requirements for providing an opportunity for public comment.

Joint Field Hearing before the
U.S. Senate Committee on Energy and Natural Resources and the Committee on Environment and Public Works' Subcommittee on Fisheries, Water and Wildlife
August 17, 2015: Federal Mitigation Requirements

Questions for the Record
Submitted by Chairman Lisa Murkowski
to Mr. Dave Hobbie

Question 1: What interagency coordination occurs between the Bureau of Land Management (BLM) and the U.S. Army Corps of Engineers (USACE or the Corps), and USACE and the Environmental Protection Agency (EPA)? Are there ways to improve that coordination?

Answer: The Alaska District Regulatory Division of Corps (Alaska District) currently coordinates with the BLM and EPA through several venues, including:

a. The Alaska Region - Interagency Working Group (AK-IWG), hosted by Department of Interior and established by Executive Order 13580, to address both long-term and current issues primarily on coordination of domestic energy development and permitting in Alaska, including compensatory mitigation requirements, as needed.
b. Large project review teleconferences, hosted by the Alaska Department of Natural Resources (DNR). Projects in the energy, transportation, mining, and Federal realm are addressed; potential issues are discussed and coordination occurs.
c. The State Interagency Review Team (SIRT), chaired by the Corps, addresses policies and procedures regarding third-party mitigation.
d. Senior Leaders from the Corps Alaska District, BLM, and EPA meet on a regular basis and will continue to meet on major issues, as needed.
e. Corps regulatory project managers communicate often and meet with BLM and EPA staff when necessary to discuss comments received in response to Alaska District public notices for individual permit actions. Staff coordination may also occur during the review of general permit applications, if applicable.
f. All of the State and Federal agencies are allowed the opportunity to comment on all public notices issued by the Alaska District.

The Alaska District is always striving to improve coordination with these agencies to promote shared understanding of regulatory requirements to enable more efficient and effective permit decisions and to remain as transparent as possible throughout our decision-making process.

Question 2: I was recently in a small town in Alaska and heard from the community that the local tribal council was trying to build some affordable housing. This small, roughly 2 acre project incurred some $40,000 in mitigation costs, thereby driving up the

ultimate cost of housing. Do you see this as a problem and what options are available to minimize impacts of mitigation costs?

Answer: Compensatory mitigation must be appropriate (i.e., commensurate with the impacts) and practicable. Practicable, as stated in 33 CFR 332.1(c)(2), means available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes. When examining the cost, the Corps may review whether the compensatory mitigation cost is reasonable and expected given the type and location of compensatory mitigation required.

As always, the Corps works with applicants within the parameters of the existing laws and regulations to be as flexible as possible and to work towards finding sustainable solutions that meets the needs of the applicant, the Corps, and the aquatic resources.

Question 3: Regarding your Section 404 permitting, what are the largest issues you see affecting miners, and what resolutions do you think can be realistically implemented?

Answer: The largest issue affecting the mining industry is the necessity to align multiple federal and state permitting processes. Clean Water Act Section 404 requirements only represent a subset of regulations with which a miner is required to comply. The State and the BLM also have mine permitting programs which include mining reclamation requirements and associated performance standards. The challenge facing the miner is understanding and meeting all of the necessary requirements.

The Alaska District has addressed this issue by working cooperatively with State and Federal agencies (BLM in particular) along with the mining community to reach a shared understanding of each program's requirements to ensure that duplicative and/or contradictory requirements are not imposed on the mining industry. An example of this effort is the recent renewal of the Placer Mining General Permit which involved extensive coordination with agencies and industry. As a result of these coordination efforts, the Corps and BLM were able to establish a protocol by which miners performing work on BLM land are no longer required to contact the Corps prior to beginning work. The Corps, along with Federal and State partners, and representatives from the mining industry will continue to work together to reach a shared understanding of requirements and develop a coordinated application process to reach this goal.

Question 4: We understand the Arctic Slope Regional Corporation's (ASRC) attempt to operate a wetlands mitigation bank on the North Slope has been under review for almost 4.5 years versus being a process that one would expect to be closer to 18 months.

a. Why has this taken the Corps so long?

Answer: The ASRC submitted a prospectus on February 3, 2012. The Corps provided a notice of approval for ASRC to proceed in drafting a mitigation banking instrument on October 5, 2012. The ASRC submitted a draft mitigation banking instrument on October 6, 2014. The Corps coordinated an interagency review team (IRT) consideration of the draft on November 18, 2014. The Corps communicated the comments from the IRT to ASRC on January 30, 2015 and also met with representatives of ASRC to discuss comments on the draft instrument. The ASRC submitted a revised draft mitigation banking instrument on June 3, 2015. The Corps corresponded with ASRC via e-mail and telephonically to discuss unresolved issues in the revised draft instrument. On August 20, 2015 the Corps sent ASRC a formal letter identifying outstanding issues that needed to be addressed to ensure compliance with the 2008 Mitigation Rule (33 CFR 332).

b. What is the Corps doing to streamline this process for ASRC and others that may want to establish a mitigation bank in the State?

Answer: The Corps is working directly with ASRC as well as all proposed bank and in-lieu fee sponsors to facilitate development of a mitigation banking instrument compliant with the 2008 Mitigation Rule. In addition, the Corps is developing templates for mitigation bank and in-lieu fee sponsors to use throughout the planning and development process. These templates are being coordinated with Federal and State partners as well as potential sponsors.

Question 5: You noted in your testimony that 17 of the 431 projects authorized required compensatory mitigation. What specifically is the authority in the Clean Water Act to authorize the "requirement" for compensatory mitigation?

Answer: The Corps authority to require compensatory mitigation under its permit program, when appropriate , is derived from statutory authorities. These include Section 404 of the Clean Water Act (33 USC 1344), Sections 9 and 10 of the Rivers and Harbors Act of 1899 (33 USC 401, 403), and Section 103 of the Marine Protection, Research and Sanctuaries Act of 1972 (33 USC 1413). In order to comply with the statutory mandates, to administer a permit program, the Corps promulgated implementing regulations. These regulations include the provisions at 33 CFR 320.4(r), which set forth policy on the consideration of mitigation measures and the sequence of avoidance, minimization, and compensatory mitigation.

Furthermore, in section 314(b) of the 2004 National Defense Authorization Act (P.L. 108-136), Congress required the Corps to "... issue regulations establishing performance standards and criteria for the use, consistent with section 404 of the [Clean Water Act], of on-site, off-site, and in-lieu fee mitigation and mitigation banking as compensation for lost wetlands functions in permits issued by the Secretary of the Army under such section...." Those regulations are at 33 CFR Part 332.

Question 6: I understand through a number of USACE colleagues that the availability of a detail to Alaska is not uncommon. In your experience, are those that come to Alaska for a six to twelve month assignment, for example, adequately knowledgeable of the unique qualities of Alaska to make thoughtful and pragmatic analysis such that the end result is both timely and practical?

Answer: The Corps provides developmental opportunities for individuals from across the nation. This is done for many reasons: Assisting employees in gaining national perspectives, career development, and broadening employees' skill sets, among other reasons. The Alaska District also participates in and encourages these types of developmental opportunities. This practice allows employees to experience the program in other parts of the country, and to interact with a wide range of backgrounds and perspectives within the confines of the Corps regulations. Individuals on developmental assignment from outside districts provide meaningful input to regulatory processes. However, these individuals are not regulatory decision makers within the Alaska District. The individual on developmental assignment works directly under the supervision of a Branch Chief and/or the Division Chief who has the delegated authority to make permitting decisions.

Question 7: Given that there has been much litigation over Section 404 permitting to include plurality opinions in the Supreme Court, there exist a few undefined terms within the law to include a definition for waters and wetlands, and the regulations afford some judgement and analysis on the part of the Corps and the EPA to make good legal and policy calls when it comes to 404 permitting, do you think it is fair to say that there is some subjectivity when it comes to analyzing the facts of a particular project's impact? If so, when you initially advise a proponent that you have concerns about anticipated impacts from their projects, is there active engagement by the Corps and EPA to reach out to the project proponent to get their project to a workable design?

Answer: Corps regulatory project managers routinely have pre-application meetings with applicants to identify potential issues regarding proposed projects. In some instances, these are joint agency pre-application meetings where the Corps hosts a

meeting with the BLM, USFWS, EPA, State agencies and the applicant. This allows each agency to represent concerns regarding its respective authorities directly to an applicant. In addition, the Corps solicits comments from the public as well as federal and state agencies on each proposed individual permit. All substantive comments, agency or public, are shared with the applicant. The Corps then works with the applicant toward resolution of all substantive comments.

During the hearing, there were many comments concerning consistency in the program. The Corps strives to have a consistent process both within the Alaska District and nationally. However, every project is evaluated on its own merits (type of impact, amount of impact, ability of the applicant to provide data, and financial ability of the applicant, among other considerations). The Corps works with applicants to the maximum extent practicable to permit reasonable and sustainable projects through fair, flexible, and balanced permit decisions.

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August 17, 2015: Federal Mitigation Requirements

[No Responses to Questions for the Record have been received from Dr. Thiesing as of the time of print.]

Questions for the Record
Submitted by Chairman Lisa Murkowski
to Dr. Mary Anne Thiesing

Question 1: What interagency coordination occurs between the Bureau of Land Management (BLM) and the U.S. Army Corps of Engineers (USACE or the Corps), and USACE and the Environmental Protection Agency (EPA)? Are there ways to improve that coordination?

Question 2: Given that there has been much litigation over Section 404 permitting to include plurality opinions in the Supreme Court, there exist a few undefined terms within the law to include a definition for waters and wetlands, and the regulations afford some judgement and analysis on the part of the Corps and the EPA to make good legal and policy calls when it comes to 404 permitting, do you think it is fair to say that there is some subjectivity when it comes to analyzing the facts of a particular project's impact? If so, when you initially advise a proponent that you have concerns about anticipated impacts from their projects, is there active engagement by the Corps and EPA to reach out to the project proponent to get their project to a workable design?

Question 3: I have been advised of a number of letters issued by the EPA that say something to the effect "there may be impacts – further investigation is required."

a. How does a project proponent help effect a timely further investigation in pursuit of a timely permit issuance?

b. Is there communication about what specifically may create a problematic impact?

c. Are there timelines that the agency is bound by in regulation in terms of response time to a project proponent?

Question 4: In your testimony, you indicated that Kuukpik "offered" the easements voluntarily. Given Mr. Hobbie's remark that a permit is not issued where activities/mitigation measures do not occur, please explain this concept of "voluntary" provision of land or money.

Question 5: I understand from Mr. Brand's testimony that the EPA has shut down the Conservation Fund until the fund is able to be audited, and that permits cannot now be obtained as there is no organization to receive the required funds.

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a. Is this true?

b. If yes, can you tell me when this will be remedied or how project proponents can expeditiously operate in the interim?

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arctic slope regional corporation

Mat-Su Field Hearing on
Federal Land Management Practices and Mitigation Requirements

Written Testimony
of
Richard K. Glenn
Executive Vice President for Lands and Natural Resources
Arctic Slope Regional Corporation

August 17, 2015

Before the
United States Senate's

Committee on Energy and Natural Resources
and
Committee on Environment and Public Works'
Subcommittee on Fisheries, Water and Wildlife

Chairwoman Murkowski, Chairman Inhofe, Ranking Members Cantwell and Boxer, and Members of the Subcommittee:

My name is Richard Glenn and I serve as Executive Vice President for Lands and Natural Resources of Arctic Slope Regional Corporation (ASRC).

ABOUT ASRC

ASRC is an Alaska Native regional corporation (ANC) created at the direction of Congress under the terms of the Alaska Native Claims Settlement Act of 1971 (ANCSA). As the Native corporation for the North Slope region of Alaska, our region encompasses 55 million acres and includes the villages of Point Hope, Point Lay, Wainwright, Atqasuk, Barrow, Nuiqsut, Kaktovik, and Anaktuvuk Pass. ASRC pursues resource development on the North Slope to benefit our growing shareholder population of approximately 12,000 Iñupiat people.

Under ANCSA, Congress directed Native corporations, including ASRC, "to provide benefits to its shareholders who are Natives or descendants of Natives or to its shareholders' immediate family members who are Natives or descendants of Natives to promote the health, education or welfare of such shareholders or family members." Consistent with this unique mandate, ASRC operates as a for-profit business that is

committed both to providing sound financial returns to our shareholders and to preserving our Iñupiat way of life, culture and traditions. Accordingly, a portion of our revenues is invested into supporting initiatives that aim to promote healthy communities and sustainable economies.

ASRC lands are located in areas that either have known resources or are highly prospective for oil, gas, coal, and minerals. In carrying out our congressionally-mandated mission, ASRC and its subsidiary companies are active participants in North Slope oil exploration, development, and production, and have been so for decades. The oil and gas industry provides many jobs for ASRC's Iñupiat shareholders and is the source of many contracting opportunities for the ASRC family of companies. This includes work our subsidiaries perform as contractors in oil field developments, engineering, pipeline maintenance, and property leasing for exploration and development. The development of oil and gas resources in our region has fostered a stable local tax base that provides local education and community improvements that would otherwise be lacking or furnished at great expense by the federal government and other agencies.

Often, the activities in which ASRC and its shareholders undertake require engagement with federal agencies to perform mitigation to offset project impacts. These projects are subject to (among other things) the U.S. Army Corps of Engineers' (Army Corps) authority under section 404 of the Clean Water Act (CWA) and the Bureau of Land Management's (BLM) land use and planning mitigation programs. ASRC supports an interagency coordination effort related to economic development on federal, state, and private lands.

Our perspective is based on the dual realities that our Iñupiat culture and communities depend upon a healthy ecosystem and the subsistence resources it provides and upon present and future oil and gas development as the foundation of a sustained North Slope economy.

COMPENSATORY MITIGATION ISSUES UNDER THE CLEAN WATER ACT

Under the CWA, when an ANC or tribe develops a project on its lands that impacts "waters of the United States," the Native landowner is required to obtain a CWA section 404 permit from the Army Corps. Section 404 permits authorize the discharge of dredged or fill material into "waters of the United States," which is defined to include wetlands. To obtain a section 404 permit, the Army Corps often requires, among other things, compensatory mitigation to offset project impacts on the wetland and other water resources.

Generally, there are four methods of providing compensatory mitigation in the context of a CWA section 404 permit: (1) the establishment of a new aquatic site; (2) the restoration of a previously-existing aquatic site; (3) the enhancement of an existing aquatic site's functions; or (4) the preservation of an existing aquatic site – typically

through acquisition. The Army Corps typically prefers restoration mitigation because "it has the greatest potential for replacing both lost aquatic resource functions and area." For mitigation through preservation, ANCs and tribes may under some circumstances set aside certain of their lands not impacted by the development project to offset project impacts on wetland and water resources.

Once Native lands have been set aside for preservation, the land is permanently unusable for development purposes of any kind. This is the case even though the project may have a predetermined lifecycle, such that impacted wetlands will be restored after a period of time and, under ideal circumstances, there is no further ecological need to compensate for their loss. In short, if a project has a lifecycle of 20 years, the preservation status of lands set aside for mitigation does not expire with the project; instead, that status remains in perpetuity.

Three mechanisms for fulfilling compensatory mitigation requirements are currently sanctioned by the Army Corps and the Environmental Protection Agency: (1) permittee-responsible mitigation; (2) mitigation banking; and (3) in-lieu fee mitigation. Under permittee-responsible mitigation, the permittee remains responsible for ensuring that required compensation activities are completed and successful. Permittee-responsible mitigation can be located at or adjacent to the impact site (i.e., on-site compensatory mitigation) or at another location generally within the same watershed as the impact site (i.e., off-site compensatory mitigation). Mitigation banks and in-lieu fee mitigation both involve off-site compensation activities generally conducted by a third party. When a permittee's compensatory mitigation requirements are satisfied by a mitigation bank or in-lieu fee program, responsibility for ensuring that the required mitigation is successful moves from the permittee to the bank or in-lieu fee sponsor. Mitigation banks and in-lieu fee programs both conduct consolidated aquatic resource restoration, enhancement, establishment, and preservation projects.

ANCs and tribes face unique challenges to developing our resources under the existing compensatory mitigation regime. In Alaska, the majority of Native lands are wetlands. For example, one hundred percent of one ANC's lands (conveyed pursuant to ANCSA) have been deemed wetlands by the Army Corps. That means one hundred percent of the ANC's land is subject to compensatory mitigation requirements should the ANC wish to develop any of its land. Additionally, the ANC's land is surrounded by oil development projects. In order to minimize the impacts to the ANC's village residents from oil development, the ANC plans to build a 5.6-mile long road that will impact approximately 51 acres of land (wetlands). The road will enable residents to access subsistence resources (e.g. caribou) whose movement and activities may be affected by the presence of development. Yet, the federal government is requiring the ANC to place 127 acres of their land in permanent conservation status in order to build the road.

ASRC'S STALLED ATTEMPT TO CREATE A WETLANDS MITIGATION BANK

In 2010, the Army Corps approached ASRC and asked if we would be willing to consider creating a wetlands mitigation bank that will cover the North Slope of Alaska and the Northwest Arctic. Leaders within ASRC determined this was a positive opportunity for our shareholders and an effective way to utilize portions of our land that were otherwise not being used. We were told that the process to create a wetlands mitigation bank would take approximately 18-months. This estimate was consistent with the Army Corps' regulations and the amount of time it takes to set up a mitigation bank in the lower 48 states. Despite our best efforts, ASRC's mitigation bank is still not operational. We believe this is due in large part to the lack of continuity and internal consistency within the Army Corps' operations in Alaska. We have found the process to be burdensome, terribly time consuming, and completely lacking strategic direction from the Army Corps. This appears to be a problem unique to setting up a mitigation bank in Alaska.

Mitigation banks are not only an important business opportunity for Alaskan entities; they also provide a much needed mechanism to comply with federal compensatory mitigation requirements. ASRC's mitigation bank would also allow mitigation to occur on the North Slope – where projects are impacting our land. Converse to this local mitigation approach is BLM's recent compensatory mitigation scheme, discussed further below, which required a project developer to pay fees to develop a "Regional Mitigation Strategy" that has nothing to do with purchasing land to mitigate project impacts. Regardless, there is an increased need for interagency coordination and new compensatory mitigation options for ANCs and tribes.

COMPETING COMPENSATORY MITIGATION REQUIRED BY BLM

In 2013, BLM released a draft "Regional Mitigation Strategy" to "establish policies, procedures, and instruction for the use of mitigation" on BLM lands. Again, there does not appear to be any internal agency consistency related to what types of compensatory mitigation BLM should (or can) require or how the Regional Mitigation Strategy should be implemented. Moreover, project developers working on BLM land impacting wetlands now face a dual compensatory mitigation regime. This layering effect of multiple agencies trying to extract compensatory mitigation requirements has a huge chilling effect on economic development in Alaska.

An example of this competing compensatory mitigation regime involves the Greater Mooses Tooth Unit One project (GMT1), which was approved by the BLM earlier this year. The GMT1 project will be the first production of oil and gas from the federally managed National Petroleum Reserve in Alaska (NPR-A). In BLM's Record of Decision (ROD) for GMT1, ConocoPhillips, Alaska, Inc., the project proponent, was required to pay $8 million in compensatory mitigation. According to the ROD, BLM plans to use a substantial portion of this "fee" to implement its Regional Mitigation Strategy. In our opinion, this is a completely inappropriate use of compensatory mitigation fees – the money should go towards mitigating impacts from the GMT1 project, i.e., purchasing additional wetlands to preserve and should not be used to develop duplicative

compensatory mitigation requirements. It is important to remember that under this dual federal compensatory mitigation regime, in addition to paying $8 million to fund BLM's strategy, ConocoPhillips will also be required to comply with the Army Corps' compensatory mitigation requirements. These additional costs to a project developer operating on our land will impact ASRC.

NEED FOR COMPENSATORY MITIGATION REFORM

ASRC encourages the Committees to re-examine and reform the existing compensatory mitigation requirements, particularly as they relate to projects on Native lands. The complex layering of compensatory mitigation requirements and piecemeal and arbitrary behavior by multiple federal agencies is unduly burdensome for Alaska project developers, ANCs, and tribes. ASRC supports federal legislation, described below, that would create an exemption from compensatory mitigation requirements for project development on Tribal and ANC lands. ASRC also supports federal legislation that would establish a new compensatory mitigation mechanism that permits the utilization of life-of-the-project preservation leasing for projects that impact Tribal and ANC lands. This legislation that ASRC supports is not in conflict with our desire to establish a mitigation bank and is in fact complementary to it.

TRIBAL/ANC EXEMPTION FROM COMPENSATORY MITIGATION

As exemplified by the road-building example above, current CWA requirements for compensatory mitigation force ANCs to permanently set aside large parcels of land to offset project impacts even when the ANC is developing land conveyed to it in settlement of their indigenous land claims (i.e., pursuant to ANCSA).

Legislation recently introduced by Representative Don Young (R-AK) would amend the CWA to exempt ANCs and tribes from compensatory mitigation requirements for some section 404 dredge and fill activities. Under the proposed legislation, any ANC receiving a 404 permit would be exempted from any compensatory mitigation requirements. In addition and as a safeguard, the bill, as proposed, would subject the exempted ANC to potential restoration or rehabilitation requirements established by the Army Corps, if the ANC ceased or abandoned work under the 404 permit.

ASRC strongly supports the legislation introduced by Representative Young to provide ANCs and tribes with relief from CWA compensatory mitigation requirements and encourages your Committees to works towards passing this legislation.

CREATION OF PRESERVATION LEASING ON ANC LANDS

As discussed above, there are currently three types of mechanisms now available to provide compensatory mitigation: (1) permittee-responsible mitigation; (2) mitigation banking; and (3) in-lieu fee mitigation. Mitigation banks are increasingly the most common mechanism used for compensatory mitigation throughout the country.

Mitigation banks are the only viable compensatory mitigation option available to project developers in Alaska. There are only a handful of operational mitigation banks in Alaska and ASRC's attempt to create a mitigation bank has turned what is an 18-month process in the lower 48 to a near 4.5 year process in Alaska. For projects developed on Native lands or that impact Native lands, ASRC believes there should be a fourth mechanism available to fulfill compensatory mitigation requirements: life-of-the-project preservation leasing.

Preservation leasing is a tool that would allow ANCs to mitigate projects that impact their land and support resource development projects by providing compensatory mitigation for projects in a manner that respects Native land ownership. Under the proposed preservation leasing option, a project developer conducting a project on Native lands or that may impact Native lands would be able to fulfill section 404 compensatory mitigation requirements by entering into a negotiated agreement with the Native landowner to lease Native lands for preservation for a predetermined amount of time. As the project ages and impacts to the surrounding wetlands lessen, so would the footprint of the preservation activities. At the conclusion of the project, after impacted lands have been restored, all rights to the land would revert back to the Native landowner. Thus, impacts will be mitigated throughout the life of the project, and Native landowners can reclaim the land for their use and enjoyment in the future without committing future generations to the permanent set aside of their lands.

Representative Young has recently introduced legislation (separate from the legislation described above) that would amend the CWA to allow preservation leasing as a mechanism for compensatory mitigation for 404 permitted activities for ANCs and tribes. Under the proposed bill, a preservation lease is defined as "an agreement under which a permittee pays an ANC a monthly or annual fee to preserve ANC land in an undisturbed condition during the term of the lease to mitigate for a permitted activity." Similar to a mitigation bank, whereby a permittee pays a fee to buy mitigation "credits," under the preservation leasing option, a permittee would pay a fee to lease ANC land to satisfy their compensatory mitigation requirements.

Compliance with section 404 of the CWA has significant financial implications on any Native-owned projects and projects on Native lands that benefit Native shareholders and communities. ASRC strongly supports Representative Young's proposed legislation to provide preservation leasing as a fourth option for compensatory mitigation. It is ASRC's goal to develop options to provide relief to projects on Native lands. The preservation leasing option will provide Native landowners whose lands are impacted by a project with financial incentives to benefit from that project through negotiated lease terms that are non-permanent.

As a Native corporation, we are committed to reinvesting in our communities and encouraging safe and sustainable development of our resources. We are grateful that your Committees are committed to streamlining federal land management practices and mitigation requirements and ASRC urges Congress to consider the two legislative

options described above to protect Native landowners while maintaining important CWA protections. We also urge Congress to require federal agencies to develop coordinated efforts to streamline the compensatory mitigation process so that project developers are not caught in a fragmented regime of federal policies. Thank you.

○

Members of the Senate Energy and Natural Resources Committee and Senate Environment and Public Works Subcommittee on Fisheries, Water and Wildlife

My name is Mike Coons, as an Alaskan, I and so many other Alaskans have disdain for the Dept Of Interior and BLM, specifically Izenbeck, predatory management differences between the Interior and Alaska, as well as Federal overreach throughout our State. However, the main purpose for this testimony is to the EPA.

The EPA, in general, since it's inception has been inept and over bearing. It has kowtowed to the environmentalist groups and dismissed 100's of years of sound conservation practices. That is bad enough! Now we have an administration that by executive order and total disregard for the 10th Amendment of the United States of America has made those issues, practices and problems pale in comparison!

The EPA is bought and paid from by the environmentalist groups, pure and simple! The practice of the environmentalist filing suit against a State or company, then behind closed doors, that group working out exactly what they wanted with the EPA as a so call "settlement" is not well known by most, but is known to have and still happening. We know that there are Judges who legislate from the bench, but this is even easier, get the settlement, then have that leftist Judge sign off on it, all without the expense by the environmentalist of going to trial!

EPA has decided to shut down Peeble Mine, this was from the get-go without any real science or information from outside the environmentalist community. I attended and spoke in support Peeble Mine last year in Anchorage. It was obvious that the EPA had zero intention to hear from our side in any positive manner what-so-ever! I saw the EPA members staring off into space, body language that was not interested and I do believe doodling instead of listening, writing down arguments or giving all sides a fair and impartial hearing. Yet with the environmentalist spoke the body language was "all ears"! All that hearing did was spend more of my taxpayer dollars for some high priced EPA people to hold meetings with the outcome already decided!

Now we have the EPA dumping water from an old gold mine into Colorado waters, impacting multiple States, the people along those rivers, the animals that drink from those rivers and the fish and other species in those rivers. Yet, the main reason that Peeble was denied was the "danger" from the heavy metals that would be stored in the holding lakes and the fear that the dams would burst and pollute the fisheries downstream. I will rebuke both issues

First off the mine that the EPA messed with has been there from 1887-1922. According to news stories the EPA removed a plug that had "possible leak". From and article in http://www.independentsentinel.com/gold-king-mine-owner-epa-incompetents-forced-their-way-on-to-his-property/ *"The EPA not only caused a massive toxic spill that poured from an abandoned mine into the Animas River, they did it against basic common sense, working stupidly on the private property the mine is on, after threatening the owner who did not want to give them access. The EPA has not acknowledged or disavowed this claim as of yet.*

The owner of the Gold King mine, Todd Hennis, told CBS Denver that the EPA forced him to give them access to the mine to investigate a discharge which they plugged up last year.

After the EPA was done and they removed the plug, the mine leaked more than 3 million gallons of toxic metals into the Animas and San Juan Rivers over the last two weeks.

Four years ago the EPA threatened the owner with a $35,000 a day fine if he didn't let them on to work on his property. He said that when you're the little guy you quickly put up the white flag."

Those dams were from technology that can't hold a candle to the engineering of today, as to safety. The "fear" is of an earthquake at Peeble, the engineering and technology of today and when the holding areas are built are and will be far above any before. Unless EPA were to come in and mess with it and cause a spill in the future! Sadly the EPA has no regard for private property, at Gold King Mine or Peeble or anywhere else since they have been in existence! Another excellent example of mining history and impact on fisheries is the Kennecott Mine that was on the Copper River and that produces some of the finest and expensive King, Red and Silver Salmon fisheries in the world!

The main "stated reason" for denying Peeble was the concern that any of the heavy metals were to go into the Bristol Bay rivers would kill off all the salmon and other species. That the toxic nature of arsenic, mercury, lead etc was lethal to wildlife fish and of course humans. Yet almost immediately after the Gold King Mine catastrophe the people down river were told all is safe, no need for alarm, water is safe to drink, nothing here, move on to the next story media! This from a mine with at best 1922 technology? So which is it? The real answer is that the EPA, President Obama want to shut down any and all use of the land to further their environmentalist agenda. An agenda that is based on false science that has been shown to be fraudulent across the board! I could go on for many, many more pages, but I do hope that the members get the drift by now.

Bottom line Senators, the State of Alaska is our land, period! We the People of the State of Alaska live here, work here, recreate here and we love and take care of our land far better than any Federal agency could begin to imagine doing! EPA must be held responsible for Gold King Mine stupidity, the rulings by the Courts and EPA stopping Peeble Mine, again, on **private lands**, must be overturned! The State of Alaska DEC and DNR will take due diligence in seeing that any permitting process follows sound science, engineering and any other mining and construction practices needed to ensure a safe operation for the next several hundreds of years! Additionally, any future funding in the Federal Budget must be reduced by billions of dollars. The past ability of EPA deciding and implementing rules and regulations must be stopped! The rights of the People under the 9th Amendment and the rights of the States under the 10th Amendment must be upheld!

Michael C. Coons
5200 N Dorothy Drive
Palmer, AK 99645

August 17, 2015

U.S. Senator Maria Cantwell
Marshall House
1313 Officers Row
Vancouver, WA 98661

RE: Joint Field Hearing in Alaska for Committee on Energy and Natural Resources

Dear Senator Cantwell:

Thank you for the opportunity to provide this written comment for the above-referenced committee hearing taking place today in Wasilla, Alaska. My firm, Ecological Land Services, Inc. is working to establish wetland and aquatic resource mitigation banks in Alaska. One bank is near Juneau for Waterman Mitigation Partners involving clean-up and habitat restoration at a historic mine site. The other is for Columbia River Carbonates (based in Woodland, Washington) who owns a 1,200 acre parcel on Prince of Wales Island, where a substantial and robust wetland mitigation bank is being proposed. Substantial work and investment has occurred on both of these proposed mitigation banks to date, and should be approved as certified banks within the next several months. Any effort to exempt outright all wetland mitigation in Alaska would certainly gut our client's attempts to make wetland mitigation banking viable. We know wetland mitigation in Alaska is challenging in terms of finding suitable sites for restoration, however I can assure you there are opportunities that are certainly viable, and these two proposed wetland mitigation bank sites are case in point. We are very supportive of the mining and resource extraction industry in Alaska, and are members of the Alaska Miners Association. We agree that for smaller scale projects, mitigation should be commensurate with the scale of the impact and the ability of the miner or operator to afford such mitigation. This can be worked out administratively and scientifically, taking into consideration economic constraints of the operator. Obviously a "middle-ground approach" is necessary and appropriate; however we firmly do not support exempting all projects from wetland mitigation in Alaska. This will result in losses to wetland and aquatic resources, and economically harm the investments to date in establishing viable permitted wetland mitigation banks in Alaska. Thank you for the opportunity to provide this comment.

Respectfully,

Francis Naglich, President
Ecological Land Services, Inc.

1157 · 3rd Avenue Suite 220 • Longview, Washington 98632 • Tel (360) 578-1371 • Fax (360) 414-9305

Fortymile Mining District
P.O. BOX 4
Chicken, AK 99732

August 26, 2015

Honorable Senator Lisa Murkowski,
Honorable Senator Dan Sullivan,

This letter is the testimony of the Fortymile Mining District to be given as record for the Committee on Energy and Natural Resources and the Committee on Environment and Public Works Subcommittee on Fisheries, Water and Wildlife. The District would like to thank you for hard work and continued support of family placer mines in the Fortymile and all of Alaska.

The family placer mines that make up the Fortymile Mining District are currently facing an unprecedented obstacle in dealing with the Department of Interior's Bureau of Land Management (BLM). The BLM is presently trying to replace the Fortymile River Management Plan and is instituting multiple Instructional Memoranda's upon the miners of the Fortymile Mining District. A number of miners live with their families in the Fortymile and these actions, the lack of communication with BLM and the introduction of the instructional Memoranda's, are driving miners out of business and out of the Fortymile.

The Fortymile Mining District was established on the Fortymile Bar of the Fortymile River on March 25th, 1898 under the 1866 Mining Act (H.R.365) and the General Mining Act of 1872 (H.R. 1016). The Fortymile Mining District is the oldest and longest standing Mining District in the State of Alaska. Since 1898, the District has been actively engaged with Governmental agencies to promote family placer mines and create a healthy and vibrant environment for all user groups of the Fortymile River, its tributaries and watershed.

Currently the US Department of Interior's Bureau of Land Management is applying pressure from every angle to try and limit family placer mining and slowly shut down all mining in the Fortymile. This is being achieved by over regulation, de-funding and improper staffing in addition to burdensome expenses attached to mining activities.

The following is a list of how BLM is attacking family placer mining:

- Replacing the Fortymile River Management plan.
- Issuing and enforcing three "Instructional Memoranda's".
- Creating an unrealistic stream reclamation project.
- Improperly funding and staffing the 3809 Mining Program.
- Denying the Fortymile Mining District coordination status.

Replacing the Fortymile Rivers Management Plan

In February of 2008 the BLM starting a scoping process to replace individual Resource Management Plans (RMPs) for the Fortymile River, White Mountains and the Steese National Conservation Area. The BLM claims they are amending, consolidating and updating these Resource Management Plans for each area. This is incorrect. The BLM is replacing these Resource Management Plans with the proposed Eastern Interior Resource Management Plan.

The current Fortymile Management Framework Plan (1980) and the Fortymile River Management Plan (1983) were required by ANILCA and approved by Congress in 1983. The BLM does have the authority to update the plan but cannot replace it as is stated on the BLM's website for the Eastern Interior Resource Management Plan and Environmental Impact Statement.

> "*When completed and approved, the Eastern Interior RMP will replace three existing BLM land use plans: the White Mountains National Recreation Area RMP (1986), the Steese National Conservation Area RMP (1986), and the Fortymile Management Framework Plan (1980).*"
> www.blm.gov/epl-front-office/eplanning/planAndProjectSite.do?methodName=renderDefaultPlanOrProjectSite&projectId=1100 .

This planned replacement is contrary to and violates ANICLA under Administrative Provisions Sec. 605. (d)

> *"(d) The Secretary of the Interior shall take such action as is provided for under section 3 (b) of the Wild and Scenic Rivers Act to establish detailed boundaries and formulate detailed development and management plans within three years after the date of enactment of this title..."*

The proposed new RMP is not a "detailed development and management plan". This new plan encompasses three current Conservation System Units and adds the Black River area in a document over eight inches thick. In comparison the current plan for the Fortymile area is less than one inch thick.

When the Fortymile Management Framework Plan was put together the BLM coordinated with multiple user groups including local hunters, fishermen, individual miners, the Fortymile Mining District and other impacted groups to develop the Fortymile Framework Plan. The users were actively engaged and involved and were told that this Framework and approved plan was a "contract" between the BLM and stakeholders within the Fortymile. The plan spelled out the conditions in which we would operate under ANICLA. However, this new plan violates this agreement and the intent of ANILCA. Senate Report No. 96-413, Alaska National Interest Lands Report of the Committee on Energy and Natural Resources United States Senate, Page 136, Title I-Purposes, Definitions and Maps. States:

> *"The provisions contained in this bill are the result of thorough congressional analysis and the weighing of many competing factors regarding particular tracts of land, and the management system appropriate to each tract....In our opinion such an analysis will lead to the conclusion that the delicate balance between competing interests which is struck in the present bill should not be upset in any significant way."*

The replacement of the original plan and framework is wrong. Within the original framework there are numerous items that BLM was to do as part of the plan and contract with the users of

the area. The users and people of the area that were here before are still here but all of the federal managers and regulators have left. ANILCA was meant to protect the people but the BLM has failed to do their part. For example, here are a few items outlined in the Fortymile Management Framework Plan BLM agreed to but has yet to follow through with:

- Sand and gravel on public lands will be made available for construction projects...and community pits will be established at Chicken and Eagle. Firewood will also be made available for local use (Page 4).
- Historic trails will be rehabilitated (Page 4).
- Lands Objective 1: Make lands available for intensive use and public purposes (Page 4).
- Lands Objective 4: Provide lands for transportation systems (Page 4).
- Lands 1.6: Identify and provide suitable sites for waste disposal near Eagle, Chicken and Boundary by 1983 (Page 5).
- Minerals Objective 3: By 1990, all land which is public land or reverts to public land, and is closed to mineral entry by unnecessary withdrawals, should be reopened to mineral entry (Page 7).
- Minerals Objective 4: All public land should be inventoried for its mineral potential before any action is taken which will prohibit entry (Page 7).
- Decisions. Minerals 1.2: The Chicken Creek area should remain open to coal exploration and development (Page 7).
- Decisions. M 2.1: A five acre community pit should be established in the community of Chicken (Page 7).
- Decisions. M 3.1: By 1985, all public land, which has been withdrawn by PLO 5250, and has not been recommended to Congress, should be restored to public land, open to mineral entry. The major lands affected are those within the Fortymile River drainage basin (Page 7).

It is imperative that the original management plan be kept. It has been approved by Congress and was created under the guidelines of ANILCA. The new proposed plan, the Eastern Interior Resource Management Plan, violates the rules and intentions of ANILCA and does not take into account multiple user input.

Issuing and Enforcing Three Instructional Memoranda's

On November 10th, November 13th, and December 23rd, 2014 the Bureau of Land Management issued three separate Instruction Memoranda's, No. 2015-001, No. 2015-002 and No. 2015-004. These Instructional Memoranda's are in regards to reclamation standards and performance guarantees.

BLM has departed from the normal compliance exams, conducted by a qualified Compliance Officer, by proposing the use of college students and BLM employees with little or no mining experience. This practice is contrary to 3809 regulations and has caused conflict that has led to BLM not signing off on reclamation work. The 3809 regulations state that 3809 Compliance Officers will be "intimately knowledgeable in mining methods and techniques" per 3809 regulations.

This change in compliance officer personnel started much sooner than December of 2014. Since the summer of 2013, family placer operations in the Fortymile have requested to have completed reclamation work signed off. All mining operations have federal limits on how many acres can be disturbed at one time to continue to operate lawfully under their BLM approved Plan of Operations. However, BLM has refused to sign off on ground that has been reclaimed in accordance to the laws and regulations as defined by 43 CFR 3809.420 which states specifically that ground is to be "contoured and stabilized" as to prevent "undue and unnecessary degradation".

The BLM Surface Management Handbook (p. 6-42) references 43 CFR 3809.592 which says that even after the BLM approves reclamation and returns the bond, it remains the mine owners' responsibility should the reclamation fail. So, as long as a reclamation meets the requirements of the statute at the time of examination by the BLM (stable, conforming and susceptible to regrowth), there is absolutely no valid reason for the BLM to refuse to accept it, sign off and return the bond. The fact that the BLM refuses to accept any reclamation is contrary to the law, which says that once the operator has notified the BLM that reclamation has been completed, the BLM will (a term which means they have no choice but to do this) verify the reclamation according to the reclamation schedule in the Notice or Plan of Operations, or will take corrective action if the reclamation work is not adequate (BLM Handbook, p.5-15). If the reclamation is somehow incomplete, the BLM must tell the operator the corrective action which needs to be taken in order to complete the reclamation. In addition, this section also says that the operator is held to the reclamation standards in the Notice, or Plan of Operation. Accordingly, the BLM cannot hold the operator to any other standards, whether they be the subject of IM's, or future restrictions being contemplated by the BLM.

The BLM's refusal to accept any reclamation work in the 40 Mile is contrary to law. The BLM must be held to a reasonable time period in which to either accept reclamation and return the bond, or explain to the operator what needs to be done in order to complete the reclamation, so the operator can comply. Anything short of this can only be interpreted as a deliberate violation of the law by the BLM.

With the application of the Instructional Memoranda's the BLM is now requiring Baseline Data be collected and all reclamation must be visited by and approved by an interdisciplinary team (IDT) of federal employees. At this time the team consists of a botanist, habit biologist, fisheries biologist, wildlife biologist, hydrologist and the 3809 compliance officer. All six of these teams must then agree on the reclamation. Currently, it appears that within the BLM they cannot agree on what needs to be done and the disciplines contradict each other often resulting in delayed progress for the miner.

In the past the 3809 Compliance Officer would inspect reclamation and either sign off on the reclamation so those acres can be released and the operator is able to move forward or let the miner know what needs to be done to achieve proper reclamation. At this point, about all that is being told to the miner is that the ground will have to meet standards that amount to waiting for at least three years, but possibly ten years or more, until sufficient vegetative cover is achieved to satisfy the BLM. It is now obvious that the BLM intentionally delayed and denied signing off on operator's reclamation from the summer of 2013 until the BLM Director released his

"Instructional Memoranda's". These "Instructional Memoranda's" have now taken the effect of Law with BLM.

According to BLM's website:

> *"Instruction Memoranda (IMs) are temporary policy directives issued by the BLM, Washington and State Offices. IMs transmit new policies, procedures and directions. Often IMs transmit urgent information to BLM employees. IMs expire at the end of the fiscal year following the year they were created. If they are still valid after that time period, the expiration date can be extended for one year. If the message in the IM is still valid after the one year extension, the IM needs to be reissued as permanent directive (BLM Manual Supplement) or as another temporary directive."*
> http://www.blm.gov/wo/st/en/prog/more/Abandoned_Mine_Lands/AML_Publications/instruction_memoranda.html

What BLM has done with these "Instructional Memoranda's" will force most family placer mines on federal land to use up their allotted acres and then sit idle waiting for willows to grow large enough to satisfy the BLM. Only then will they be able to move forward with their mining operation. During this time most families will have no income; their livelihood depends on the BLM and when they agree to release a few more acres allowing the miner to proceed.

The Fortymile Mining District has met with BLM on multiple occasions regarding this issue and has proposed a solution. Once the miner has reclaimed the site the ground is no longer considered disturbed, it is reclaimed by definition and should be released so the miner can move forward. This ground would however, remain bonded until the BLM signs off on it. Although the Fortymile Mining District has tried to propose an alternative and work with the BLM, the BLM will not move forward with our proposal and refuses to alter their own.

Instructional Memoranda No. 2015-001 is BLM's new policy concerning bonding and reclamation. BLM is attempting to require a detailed Reclamation Cost Estimate (RCE) for certain mines BEFORE they will be allowed to use the State Bond pool. If a mine exceeds 33% of the solvency of the bond pool the operator would be required to self-bond through the BLM. This memorandum would increase bonding cost for operators by over *four times the current cost*.

As mentioned above, these 'certain' mines include the following:

- All new plans or notices.
- All mines mining within 100' of a waterway.
- Any mine working a slope greater than 33 degrees.
- Mines at a site where demobilization can only be done by air, or during winter months.
- Mines that have a history of non-compliance.

According to BLM these restrictions are in place now. The Fortymile Mining District is strongly opposed to most of these restrictions. These restrictions will affect most mines in our District that operate on Federal land. This means that until the detailed Reclamation Cost Estimate is completed a miner may not use the State Bond Pool. No bond means no mining and we would all be shut down until the REC is completed, reviewed and approved by BLM. Another concern

is the time in which the BLM would approve the Reclamation Cost Estimate. Not much is approved in a timely manner by the BLM.

After much discussion BLM's State director, Bud Cribley, said that it was not his intention (to shut down mines). The District asked him to pull back this policy immediately. Mr. Cribley stated he would do a thorough review of the policy and make adjustments as required. At this time we have not received, or heard back, from the BLM in regards to the modification of this position.

Creating an Unrealistic Stream Reclamation Project

BLM is moving forward with spending hundreds of thousands of dollars of tax payer money to organize and complete the "Jack Wade Stream Reclamation Project". While the Fortymile Mining District embraces the concept of a reclamation project for the Jack Wade area, we oppose the project as proposed for the following reasons.

The BLM purports one of the purposes of this project will be the "creation of an outdoor classroom for miners". The placer miners of the Fortymile District have been working in an "outdoor classroom" for over thirty years satisfying reclamation standards and refining reclamation techniques suited to individual sites, yet not one member of the mining community was involved in the development of this exemplified reclamation project.

43 CFR 3809.420 Performance Standards, sets the miners' reclamation requirements. It states reclamation will be performed "at the earliest feasible time" and that reclamation shall include "reshaping the area disturbed, application of topsoil and re-vegetation of disturbed areas where reasonably practicable". It is the Districts' opinion that any reclamation project should be confined to the existing standards, using equipment and tools currently being used by placer miners within the Fortymile Mining District.

In the Proposed Action section of the Environmental Impact Statement associated with the Jack Wade Reclamation Project, BLM calls for up to five (5) acres of riparian vegetation be transplanted to the project area and that "excavated areas used would be fertilized and seeded to promote recovery". The District strongly opposes any use of fertilization and reseeding in a reclamation project and any form of vegetation that is not natural and adjacent to the immediate reclamation area.

Under Purpose and Need for Action the following is stated, "Proposed project will utilize natural stream bank stabilization techniques". What defines natural to the BLM? Then we go on to read, "Trees and large rock would be harvested from areas near the project area". What defines near? A reclamation project that is to be a "classroom" for miners must use existing available materials, not those trucked in from miles away! Having the option to truck in materials is not available to most miners and is an unrealistic approach to replicating a realistic reclamation.

In the Transplant Source Areas section it is stated that additional sources of transplant material may be located farther south of the project, or from commercial vendors. Once again, the

District strongly opposes any reclamation project that does not use local vegetation from the immediate area and certainly any form of a vegetative mat supplied by a commercial vendor.

In the Mitigation Measures section, a proposed action calls for the following: "Avoid leaving any developed pull-outs off the Taylor Hwy beyond 200' of centerline to encourage compliance of the camping restrictions". The area of the reclamation project encompasses the Jack Wade Recreational Panning Area. This is one of the very few accessible areas that people can recreationally pan on for free. The Jack Wade Recreational Panning Area draws tourists, journalists, metal detectorists and miners from near and far. The District feels the BLM should be encouraging developed pull-outs in this area, for the benefit and safety of the recreational users.

The Fortymile Mining District adamantly opposes the concept that the Jack Wade Reclamation Project is in any form a realistic "classroom for miners" in the Fortymile. This project has little basis for actually benefiting the average placer miner in the District. Any project, to be realistic, would need to more closely mimic the actual finances, available equipment and time a real life family placer miner has.

We feel the project should be abandoned and replaced with the BLM embracing a more realistic approach to helping individual placer miners solve site specific reclamation.

Improperly Funding and Staffing the 3809 Mining Program

As stated early, the regulations require that the 3809 Compliance Officer be intimately knowledgeable in mining methods and techniques. These officers are required by law to do two inspections per year of an active operation.
Generally, the Fortymile District has two permanent 3809 compliance officers. For the last five years, or so, there has been no consistency with the BLM 3809 compliance officer staffing. Most operators have seen a new compliance officer every year because of, apparently, internal BLM issues. It has come to the point that long time Fortymile miners have seen up to 15 different compliance examination staff over the years. Some of these personnel are knowledgeable and others have little to no mining experience.

Compliance officers who lack sufficient knowledge on mining put a huge burden on operators who are then forced to educate each new compliance officer every year. Due to the lack of consistency, the new 3809 staff is then unfamiliar with the operator, the operation and the site history. In many instances the new officer arrives on site completely cold turkey, not even having one site visit with the previous inspector. This scenario takes away from the focus of the examination, significantly increases the time a compliance exam should take and puts undo and unnecessary strain on the operator.

For the summer of 2015, BLM is informing the operators in the Fortymile that there will only be one 3809 Compliance Officer in the District accompanied by two college interns. The Mining District has a major concern with college interns inspecting, interpreting regulations and then making decisions that have a direct financial and long term consequences on the individual family placer mines. This is unacceptable! BLM has the ability to staff and fund

interdisciplinary teams that fly around in helicopters, they spend hundreds of thousands of dollars on field classroom projects but yet they *will not* provide the required 3809 Compliance Officers as mandated by their own regulations.

Denying the Fortymile Mining District Coordination Status

On February 12th, 2015 the Fortymile Mining District formally asked BLM for coordination status. This was done because the BLM continues to tell the Mining District we are an important stakeholder, they value our comments and they want the District involved in the process.

Federal agencies, such as the BLM, are required to recognize Coordination Status for local government in accordance with the National Environmental Policy Act (NEPA), 42 U.S.C. §4331, and Federal Land Policy Management Act (FLPMA), 43 U.S.C. § 1712 requirements. In order to enter into Coordination with the BLM, a local government's mission must be affected by the management of the surrounding, adjacent or nearby federal lands. The Fortymile Mining District has asked for a seat at the table and a chance to be involved in a meaningful way for years. Federal land management policies and actions directly, and often profoundly, impact stakeholders within the Fortymile Mining District. It is past time that the BLM follow NEPA and FLPMA requirements, and begin the process of achieving consistency with the Fortymile Mining District's local land use and coordination plan.

The Fortymile Mining District has represented all mines and miners within our District since 1898. The Fortymile Mining District is an organized major user group in Eastern Alaska that represents over 100 stakeholders. We are a non-profit IRS 501(c)(4) organization with a stated goal of enhancing the betterment of the community.

Page six (6) of the BLM Land Use Planning Handbook states:
"Section 202(c)(9) of FLPMA also requires, to the extent practical, that BLM keep itself informed of other Federal agency and state and local land use plans, assure that consideration is given to those plans that are germane to the development of BLM land use plan decisions, and assist in resolving inconsistencies between Federal and non-Federal plans. The key is ongoing, long-term relationships where information is continually shared and updated."

United States Code 43 CFR 1601, subpart 1610 - Resource Management Planning, §1602.2 – Public Participation states:

> *a) "The public shall be provided opportunities to meaningfully participate in and comment on the preparation of plans, amendments and related guidance and be given early notice of planning activities".*

The Fortymile Mining District has the responsibility to protect the prosperity, property, title, livelihood, economic security and welfare of any miner, of the public mineral estate trust, society at large over the geographical area encompassed by the District and all miners located within the Fortymile Mining District as to their individual case. It is because of this, and the obligation of certain federal departments and agencies to coordinate with local government that the Fortymile Mining District has requested the BLM coordinate with us in any and all planning that may affect the District.

Part of the Mining District board drove to Anchorage for a meeting with the State Director, Mr. Cribley, and staff on December 19th, 2014 in regards to the two Instructional Memoranda's that were already issued. During this meeting we wanted to know why BLM had not notified the Mining District about many of the issues in the Instructional Memoranda's and were told that they had presented and notified the Alaska Mining Association. The District was very disappointed that during this meeting we were not told that in four days the BLM would be reissuing yet another Instructional Memoranda, No. 2015-004, on December 23rd, 2014 that would have direct consequences on the Mining District. We were also told that we would have a response to our meeting in thirty days, but it took almost two months. After making our request for coordination, we were promptly denied in less than one month! The District was also informed that in addition to being denied coordination status we were also denied cooperating agency status. The BLM did let us know that the Mining District is an "important stakeholder" and as such BLM will, "continue to ascertain the views of the District, as it would for other specialized user groups and will alert you of opportunities to make contributions to our process."

From past actions it is our belief that this is just an afterthought. The BLM seems to only let the Mining District know about things after they have been decided on by BLM. At that point there is no change or reasoning to happen. Had the BLM recognized the District's coordination status, so much of this could have been avoided. The District needs a meaningful seat at the table. We need more than to participate in public comment that the BLM can disregard.

The Fortymile Mining District and its users face an extraordinary challenge. We are confronted with an uncooperative federal agency, the BLM. Several tremendously important issues are on the table currently: the replacement of the Fortymile Rivers Management Plan, the issuance of three unacceptable Instructional Memoranda's, the creation of an unrealistic stream reclamation project, the improper funding and staffing of the 3809 mining program and the blatant avoidance of coordination with the Fortymile Mining District.

In years past, the District and its members have participated in a positive manner with the BLM. It is obvious that not only is BLM violating their contract with the Fortymile Area Users, but the BLM is blatantly going against the spirit and intent of ANILCA. The Fortymile Mining District hopes that with your support we can achieve some constructive change from BLM so we can progress in a positive manner for all parties involved.

Respectfully,

Dick Hammond – President
Fortymile Mining District

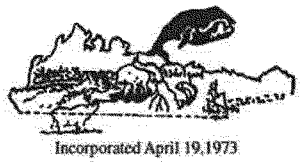
David Likins – Vice President
Fortymile Mining District
Chairman Federal Oversight Committee

Bronk Jorgensen – Treasurer

Fortymile Mining District
Board of Trustees

Joell Stine – Secretary
Fortymile Mining District
Board of Trustees

Dan Jacobson
Fortymile Mining District
Board of Trustees



KUUKPIK
corporation
Incorporated April 19,1973

SUPPLEMENTAL STATEMENT
OF
MR. JOSEPH NUKAPIGAK
VICE PRESIDENT OF KUUKPIK CORPORATION

JOINT FIELD HEARING BEFORE THE US SENATE COMMITTEE ON ENERGY AND NATURAL RESOURCES AND COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS' SUBCOMMITTEE ON FISHERIES, WATER AND WILDLIFE

FEDERAL MITIGATION REQUIREMENTS

AUGUST 17, 2015

Kuukpik Corporation submitted oral testimony at the Mitigation Requirement Field Hearing in Wasilla, Alaska on August 17, 2015. Several questions were asked by Senators Murkowski and Sullivan to help clarify Kuukpik's position and experience in obtaining a 404 permit for the Nuiqsut Spur Road. Kuukpik provides the following testimony in response to those questions and to supplement its testimony:

Kuukpik Corporation (Kuukpik) first met with the Corps of Engineers (COE) about the Nuiqsut Spur Road in December, 2012 in a pre-application meeting. The COE stated that compensatory mitigation would be required for a project of this size and in the particular location. Kuukpik's response was that the Nuiqsut Spur Road was mitigation. Specifically we argued that the Nuiqsut Spur Road was being constructed to provide (and was, in fact) mitigation to be balanced against the impacts of the CD-5 road development. Kuukpik made this argument on behalf of all of the members of the Native community of Nuiqsut.

On January 31, 2013, Kuukpik submitted its application to the COE for the Nuiqsut Spur Road and Storage Pad. Kuukpik provided the COE with Kuukpik's "Applicant Proposed Mitigation Statements" along with other information (e.g. application form, project description, map, etc.).

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Kuukpik's position continued to be that the Nuiqsut Spur Road project was mitigation for impacts associated with the development of CD-5. (See, Attachment A, pg. 5). The COE, however, suggested that it did not have authority to consider the Nuiqsut Spur Road as mitigation. After reanalyzing its position Kuukpik proposed paying in-lieu fees with a request that the funds be deployed on the North Slope. Kuukpik also suggested that use the Arctic Slope Regional Corporation mitigation bank would be appropriate. (See, Attachment A, pg. 5). The fee proposed was $1.596 million. (See, Attachment A, pg. 5).

After reconsidering its mitigation options again, Kuukpik determined that permittee-responsible mitigation, particularly a conservation easement, would better suit Kuukpik's needs. On April 11, 2013, Kuukpik proposed creation of a 17-acre conservation easement in the Fish Creek area. A copy of this proposal is attached. (See, Attachment B, pg. 3). In making its proposal, Kuukpik's theory was that it would get a better result by offering high quality wetlands for preservation when compared to the lower quality wetlands being impacted by the project.

EPA testimony at the August 17 Field Hearing was that Kuukpik "offered" a 127 acre easement. Attachments A and B, when read together, should set the record straight. Kuukpik's initial position was that the Nuiqsut Spur Road project mitigated impacts created by the CD-5 road. Kuukpik's fallback position was that, if required to do so, Kuukpik would set aside 17 acres of high quality wetlands in an easement.

After submission of the 17 acre proposal the COE informed Kuukpik that the 17-acre easement was a "non-starter." The COE then pointed Kuukpik to a COE regional guidance letter on mitigation (See, Attachment C).

Based on the COE guidance letter and the COE's refusal to accept the 17-acre proposal, Kuukpik revised its mitigation proposal in late April, 2013 to create a 76.5 acre conservation easement. A copy of this revised proposal is attached. (See, Attachment D). The 76.5 acre amount was determined based on the guidance document and uses a ratio of 1.5:1 (1.5 acres of mitigation wetlands for every 1 acre of wetlands to be filled by the

permittee). Kuukpik maintained that the wetlands offered as mitigation in the Fish Creek Delta area were of extremely high value when compared to the ordinary wetlands upon which the Nuiqsut Spur Road are built. This is still Kuukpik's position today.

Kuukpik stuck with the 76.5-acre parcel until very late in the permitting process, when it became clear that it was still not acceptable to the EPA. On August 22, 2013, the EPA provided written comments on the project and demanded over 292 acres of mitigation to offset project impacts.

In mid-February, 2014, the COE informed Kuukpik that it would need to provide 116.3 acres for the conservation easement. Kuukpik objected but eventually agreed to the creation of a 127-acre easement. The EPA eventually agreed to the 127-acre easement. Finalization of the implementing permanent conservation easement is still not complete.

The Nuiqsut Spur Road is largely constructed and should be finished within the next 45 days. Villagers are starting to enjoy the benefits of the additional area available for subsistence.

Attachment A

Attachment to U.S. Army Corps of Engineers Permit Application
Kuukpik Corporation Nuiqsut Spur Road and Storage Pad Project

Applicant Proposed Mitigation Statements

Background:

The U.S. Army Corps of Engineers (Corps) and the Environmental Protection Agency issued regulations that govern national compensatory mitigation policy for activities in waters of the U.S., including wetlands, authorized by Corps permits. The final mitigation rule was published in the federal register on April 10, 2008, and became effective on June 9, 2008. The final rule establishes standards and criteria for the use of appropriate and practicable compensatory mitigation for unavoidable functional losses of aquatic resources authorized by Corps permits (33 CFR Part 332). Additionally, the rule requires new information to be included in Corps permit applications and public notices to enable meaningful comments on applicant proposed mitigation. In accordance with 33 CFR Part 325.1(d)(7), "For activities involving discharges of dredged or fill material into waters of the U.S., the application must include a statement describing how impacts to waters of the United States are to be avoided and minimized. The application must also include either a statement describing how impacts to waters of the United States are to be compensated for or a statement explaining why compensatory mitigation should not be required for the proposed impacts." For additional information, the final mitigation rule can be viewed at:

http://www.usace.army.mil/cw/cecwo/reg/news/final_mitig_rule.pdf

Mitigation is a sequential process of avoidance, minimization, and compensation. Compensatory mitigation is not considered until after all appropriate and practicable steps have been taken to first avoid and then minimize adverse impacts to the aquatic ecosystem. Please provide your proposed avoidance, minimization, and compensatory mitigation below:

Applicant's Proposed Mitigation (attach additional sheets as necessary):

1. Avoidance of impacts to waters of the U.S., including wetlands:

Please describe how, in your project planning process, you avoided impacts to waters of the U.S., including wetlands, to the maximum extent practicable. Examples of avoidance measures include site selection, routes, design configurations, etc...

The planning process for the Kuukpik Corporation's (Kuukpik's) proposed Nuiqsut spur road and storage pad project resulted in a number of measures that avoid impacts to the waters of the U.S. including wetlands. These measures are described further below:

Routing - Although the entire project is located in wetlands, the project routing was selected by using habitat mapping data to identify a road route that avoids more valuable habitat types to the greatest extent practicable. Avian study data was also utilized in the routing process to avoid areas where threatened and/or endangered bird species were found nesting in the summer of 2012. Additionally, polar bear denning information from 2012 was reviewed to determine that no polar bears are presently using Kuukpik project lands for denning activities.

Design Configuration - The plan to widen the existing Nuiqsut dump road as an access point from Nuiqsut avoids the impacts that would occur from use of a totally new route from Nuiqsut to connect with the proposed Nuiqsut spur road. The majority of the Nuiqsut spur road is proposed to be constructed at a width of 24 feet instead of the typical North Slope industrial standard of 30 to 32 feet wide (or more). Additional information regarding the rationale for the selected road width is provided in the minimization of avoidable impacts section of this document. Use of the Nuiqsut dump road as a takeoff point from Nuiqsut also resulted in a slightly shorter route than what was analyzed by the Corps in its CD 5 Record of Decision and Permit Evaluation. The Corps analysis of the Nuiqsut spur road was based on a road length of 8 miles. The proposed routing will result in 5.8 miles of new gravel road plus about 0.8 miles of an upgrade to an existing road, yielding a total distance of about 6.6 miles.

The project has been designed to prevent the creation of new standing water bodies and maintain the existing drainage patters and water flows. The addition of a culvert battery in the road at the crossing of a small unnamed stream and placement of culverts in selected locations along the Nuiqsut spur road will minimize the possibility of creating new water bodies. These culverts are designed to allow water flows during the seasonal break-up time frame when overland flows may occur. Additionally, the general route of the proposed spur road (i.e. generally in a north-south direction) is consistent with general water flows during breakup.

The project has been designed to minimize interference with fish movement. The sole stream along the proposed road route will have a culvert battery that will provide a means for fish passage between nearby lakes and provide for fish and water movement into Cody Creek, which connects to the Nechelik channel of the Colville River.

Construction - Kuukpik proposes to perform a portion of the Nuiqsut dump road upgrade and construction of the Nuiqsut spur road during winter months. Ice roads and ice pads will be utilized. Ice roads and pads are only constructed after the tundra is sufficiently frozen to support the heavy equipment utilized for gravel road construction. Winter tundra travel is regulated by the North Slope Borough in the entire project area. The Alaska Department of Natural Resources and the Bureau of Land Management regulate winter tundra travel activities on adjoining State and Federal lands, respectively. The bulk of the proposed storage pad will also likely be built in winter months although Kuukpik is requesting approval to be able to expand this pad (and, possibly, the spur road itself) during "summer" (i.e. non-winter) months after at least a portion of the road activities are completed and in useable condition. These activities would utilize gravel

stockpiled in Nuiqsut and the gravel road from Nuiqsut to access the storage pad location, eliminating the need for ice roads. By performing the major construction activities in winter, it will avoid potential impacts to subsistence hunting activities and avian nesting. Also, any summer construction work will be coordinated with Nuiqsut residents to minimize potential impacts to subsistence hunting and fishing activities that occur during the thawed months on the North Slope. Such "summer" construction activities would be also performed in a fashion to minimize disturbance to nesting birds (e.g. conduction of avian surveys and adhering to setback distances established by the U.S. Fish and Wildlife Service for nesting threatened and/or endangered avian species.

Storage Pad Use – The storage pad is initially slated for use by Nanuq, Inc. (a Kuukpik subsidiary) for its own equipment and material storage. Nanuq, Inc. expects to perform construction activities for CPAI for CD 5 development and for other future exploration and development activities by CPAI or others. However, on a year to year basis, storage space for others may become available for the oil and gas industry. This measure will provide oil and gas industrial users with a means to perform selected exploration and development activities in the National Petroleum Reserve – Alaska (NPR-A) by placing materials and equipment placed closer to the desired operational area. Such action is expected to lessen the environmental and human impacts associated with the construction and operation of CD 5 and future satellites than what would occur without the storage pad. Any extra space on the storage pad not utilized by Nanuq, Inc. or other Kuukpik subsidiaries will be available for use on commercial terms by other entities performing oil exploration activities (e.g. seismic activities, exploration drilling operations, etc.) in the NPR-A in the future, eliminating potential impacts that may occur from overland equipment transport from other areas such as Deadhorse or other oilfield centers.

2. Minimization of unavoidable impacts to waters of the U.S., including wetlands:

Please describe how your project design incorporates measures that minimize the unavoidable impacts to waters of the U.S., including wetlands, by limiting fill discharges to the minimum amount/size necessary to achieve the project purpose.

As noted previously, the road width for the majority of the spur road portion of the proposed project has been reduced to 24 feet between Nuiqsut and the storage pad location instead of the typical industrial road width on the North Slope, which is 30 to 32 feet (or greater). The width of the spur road between the storage pad and the junction of the spur road and the CD 5 access road is planned for a width of 32 feet to accommodate drilling rig movement and storage. This width was selected after a review of the needs of Nuiqsut residents, the needs of Kuukpik subsidiary companies, and the needs of industrial users, such as ConocoPhillips Alaska, Inc. (CPAI), which operates the Alpine oilfield and will operate CD 5 when constructed. This action limits the fill discharges to the minimum necessary to have a safe transportation route to the CD 5 road and the Alpine oilfield for all of the types of vehicles expected to utilize the road.

A single lane road with pullouts was considered by Kuukpik but eliminated due to the fact that many of the larger pieces of equipment that may be utilized in Nuiqsut (e.g. large cranes, bulldozers, etc.) are transported on 17 feet wide trailers. Such units need additional road width beyond the actual trailer width to be able to safely navigate the roadway and minimize the potential for road bank collapse on the edges during movement. Also, a single lane road with pullouts would pose greater personnel safety issues since, during low visibility conditions, it would likely be necessary for vehicles to back up to the nearest pullout. Additionally, although the vehicle traffic levels on this road are expected to be minimal to moderate at times, there will be many occasions where multiple vehicles will be transiting this road in both directions, reducing the viability of the single lane option due to the length of the road.

The proposed road has been located on higher ground which will minimize the need for additional fill material beyond what is necessary to protect the underlying tundra. Most road areas will only require a 5 feet thick roadway to achieve this purpose.

Kuukpik plans to install a culvert battery at the location where the Nuiqsut spur road crosses an unnamed stream south of the CD 5 access road. Additional culverts will be placed in selected areas along this roadway to assist in cross drainage flow at break-up. We believe these mitigation measures will help minimize the unavoidable impacts to the adjoining wetlands.

Kuukpik and CPAI will be coordinating construction activities for this project and CPAI's CD 5 project. CPAI will be permitting and constructing all of the ice roads necessary for this project in the winter of 2013-2014. The ice roads will be shared wherever necessary, avoiding duplicative activities and minimizing the impacts to wetlands from construction. Similarly, CPAI and Kuukpik will be utilizing the same gravel source (i.e. the ASRC Gravel Mine Site adjacent to the main channel of the Colville River), which will minimize potential impacts from gravel mining and transport activities to only the minimum necessary to achieve the purposes of both projects. Discharge material (i.e. gravel) will be loaded in a fashion to minimize the potential impacts from gravel spillage during transport.

3. Compensation for unavoidable impacts to waters of the U.S., including wetlands:

Please describe your proposed compensatory mitigation to offset unavoidable impacts to waters of the U.S., or, alternatively, why compensatory mitigation is not appropriate or practicable for your project. Compensatory mitigation involves actions taken to offset unavoidable adverse impacts to waters of the U.S., including wetlands, streams and other aquatic resources (aquatic sites) authorized by Corps permits. Compensatory mitigation may involve the restoration, enhancement, establishment (creation), and/or the preservation of aquatic sites. The three mechanisms for providing compensatory mitigation are mitigation banks, in-lieu fee of mitigation, and permittee-responsible mitigation. Please see the attached definitions for additional information.

Although Kuukpik views the Nuiqsut spur road and Nuiqsut dump road expansion as mitigation measures designed to mitigate the impacts associated with CD 5 development and avoid impacts from future satellite development, Kuukpik proposes payment of in-lieu fees as a means of compensatory mitigation for this project. Kuukpik proposes to compensate for the unavoidable impacts to wetlands at a 2:1 ratio, which is a lesser ratio than the Corps determined was appropriate for CPAI CD 5 development project components outside of the Colville River Delta. Kuukpik believes that the 2:1 ratio (or even a lesser ratio) is appropriate for a community related project such as this one. Kuukpik proposes an additional payment at a 1:1 ratio for dust shadow effects for the spur road only. At the Corps direction, Kuukpik contacted the Conservation Fund to obtain an estimate of the appropriate in-lieu fee compensation associated with this project. Kuukpik was informed that the current mitigation fee is $10,000.00/acre and that the Corps determines the appropriate ratio to use for the value of the wetlands being impacted. The Conservation Fund then adds a 10% transaction and stewardship fee to the total calculated amount. The Conservation Fund estimated an in-lieu fee of $1,596,100 for this project and was based on 145.1 acres total to be mitigated. The estimate was based on the proposed 52.9 acre footprint of all components of the project using a 2:1 mitigation ratio for acreage covered at a fee of $10,000.00/acre. This estimate also included mitigation for dust shadowing based on the actual new footprint of the spur road only (i.e. 39.3 acres) at a 1:1 ratio at a fee of $10,000.00/acre. It also includes transaction and long term stewardship costs. No dust shadow component was included for the dump road upgrade since the actual driving area of this road will be less than the existing area when upgrades are completed. Also, no dust shadow component was included for the storage pad.

Kuukpik would prefer in-lieu fees paid for this project to be used for activities on the North Slope. Kuukpik understands that the Arctic Slope Regional Corporation (ASRC) is in the process of establishing an umbrella mitigation bank with the Corps that could possibly be used, after approval, for projects such as the Kuukpik project. Kuukpik proposes to work with the Corps to find a suitable mechanism to allow any in-lieu fees required to be paid by Kuukpik to be set aside until such time that the ASRC umbrella mitigation bank is approved or another suitable North Slope mitigation project becomes available.

Kuukpik does not believe any additional study programs are necessary for compensation for the unavoidable impacts to wetlands resulting from the proposed Kuukpik project. Some of the study activities being performed by CPAI as part of mitigation for the CD 5 project or for ongoing Alpine development activities will also yield environmental information about the Kuukpik project. For example, the habitat monitoring program to be performed in the vicinity of the CD 5 road would also include the northern end of the Nuiqsut spur road and, likely, the storage pad proposed by Kuukpik due to their location. Also, the aerial photography work that Aerometrix (a firm specializing in aerial photography for various applications) currently collects bi-annually (and makes available for sale) as part of their ongoing North Slope data collection efforts includes the entire Kuukpik project area. This data can be used to assess shifts

in vegetation and/or indications of thermokarst formation in the Kuukpik project area on a macroscopic scale. Additionally, the avian surveys conducted annually by CPAI will also include large swaths of the proposed Kuukpik project area.

Definitions:

Enhancement: the manipulation of the physical, chemical, or biological characteristics of an aquatic resource to heighten, intensify, or improve a specific aquatic resource function(s). Enhancement results in the gain of selected aquatic resource function(s), but may also lead to a decline in other aquatic resource function(s). Enhancement does not result in a gain in aquatic resource area.

Establishment (creation): the manipulation of the physical, chemical, or biological characteristics present to develop an aquatic resource that did not previously exist at an upland site. Establishment results in a gain in aquatic resource area and functions.

In-lieu fee program: a program involving the restoration, establishment, enhancement, and/or preservation of aquatic resources through funds paid to a governmental or nonprofit natural resources management entity to satisfy compensatory mitigation requirements for DA permits. Similar to a mitigation bank, an in-lieu fee program sells compensatory mitigation credits to permittees whose obligation to provide compensatory mitigation is then transferred to the in-lieu program sponsor. However, the rules governing the operation and use of in-lieu fee programs are somewhat different from the rules governing operation and use of mitigation banks. The operation and use of an in-lieu fee program are governed by an in-lieu fee program instrument.

Mitigation bank: a site, or suite of sites, where resources (e.g., wetlands, streams, riparian areas) are restored, established, enhanced, and/or preserved for the purpose of providing compensatory mitigation for impacts authorized by DA permits. In general, a mitigation bank sells compensatory mitigation credits to permittees whose obligation to provide compensatory mitigation is then transferred to the mitigation bank sponsor. The operation and use of a mitigation bank are governed by a mitigation banking instrument.

Permittee-responsible mitigation: an aquatic resource restoration, establishment, enhancement, and/or preservation activity undertaken by the permittee (or an authorized agent or contractor) to provide compensatory mitigation for which the permittee retains full responsibility.

Practicable: available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes.

Preservation: the removal of a threat to, or preventing the decline of, aquatic resources by an action in or near those aquatic resources. This term includes activities commonly associated with the protection and maintenance of aquatic resources through the implementation of appropriate legal and physical mechanisms. Preservation does not result in a gain of aquatic resource area or functions.

Restoration: the manipulation of the physical, chemical, or biological characteristics of a site with the goal of returning natural/historic functions to a former or degraded aquatic

resource. For the purpose of tracking net gains in aquatic resource area, restoration is divided into two categories: re-establishment and rehabilitation.

Attachment B

KUUKPIK
corporation

April 11, 2013

Ms. Mary Leykom
U.S. Army Corps of Engineers (USACE)
Alaska District
Regulatory Division
P. O. Box 6898
JBER, Alaska 99506-0898

Subject: Alternative Mitigation Proposal
Kuukpik Corporation Nuiqsut Spur Road and Storage Pad Project

Dear Ms. Leykom:

The Kuukpik Corporation ("Kuukpik") hereby proposes alternative mitigation for wetlands losses associated with the subject project. Kuukpik is now proposing permittee-responsible mitigation for this project via creation of a conservation easement on lands owned by Kuukpik. Enclosed with this transmittal letter is a document that provides specific information regarding this alternative mitigation proposal. Also enclosed is a map showing the general area where creation of a conservation easement would be performed.

If, after your review of the enclosed material, you have any questions or need additional information, please contact me by phone at 541-826-4195 or by e-mail at majorinor@live.com at your earliest convenience. Thank you for your assistance on this matter.

Sincerely,

Mark Major
Permitting Agent for Kuukpik

Enclosures

KUUKPIK CORPORATION (KUUKPIK)
NUIQSUT SPUR ROAD AND STORAGE PAD PROJECT
ALTERNATIVE ACTION FOR COMPENSATORY MITIGATION

Background:

Kuukpik is in the process of permitting the subject project with the U.S. Army Corps of Engineers (Corps) and other applicable regulatory agencies. The project has 3 components, which are: 1) Upgrade ~ 0.8 miles of the existing Nuiqsut dump road; 2) Construct a 5.8 mile long spur road from the take-off point on the Nuiqsut dump road that will connect Nuiqsut to the ConocoPhillips Alaska, Inc. (CPAI) CD 5 access road; and 3) Construct a 10 acre storage pad at the junction of the spur road and the CPAI CD 5 access road. The project involves placement of 455,000 cubic yards of gravel fill into 51.0 acres of wetlands.

In its January 31, 2013 application documents, Kuukpik originally proposed payment of in-lieu fees as compensation for the unavoidable loss of wetlands associated with this project. At that time, Kuukpik expressed a preference for any in-lieu fees paid for this project to go towards activities on the North Slope of Alaska. Kuukpik understands that Arctic Slope Regional Corporation (ASRC) is in the process of establishing an umbrella mitigation bank with the Corps that may be suitable for compensatory mitigation for the Kuukpik project. However, the timing of approval of this mitigation bank appears to be uncertain. Kuukpik also understands that the Corps is willing to designate mitigation credits for the Kuukpik project that are provided to the Conservation Fund to be held in escrow until the ASRC umbrella mitigation bank is approved, and then transferred to that entity. However, Kuukpik believes this escrow approach would likely result in increased transfer and stewardship costs and lesser amounts available for actual preservation purposes. This situation has led Kuukpik to explore alternatives for the compensatory mitigation that will be required by the Corps for the loss of wetlands associated with this project, if approved.

Summary of Proposed Mitigation for Kuukpik Project:

In view of the lack of currently available approved alternatives for mitigation projects on the North Slope of Alaska, Kuukpik now proposes permittee-responsible mitigation for the unavoidable losses of wetlands associated with its project. Kuukpik proposed to create a conservation easement on wetlands owned by Kuukpik as compensation for the wetlands that would be lost by construction of the Kuukpik project.

Details of Proposed Permittee-Responsible Mitigation:

Kuukpik proposes creation of a conservation easement on wetlands currently owned by the Kuukpik Corporation on the North Slope of Alaska. The area where Kuukpik proposes to create

a conservation easement is located about 14 miles north-northwest of Nuiqsut and is northwest of the mouth of Fish Creek. A map showing the general area proposed for a conservation easement is enclosed.

Kuukpik proposes creation of a 17 acre conservation easement in this Fish Creek area. Kuukpik believes the wetland areas planned for the conservation easement have a much higher environmental value that the wetlands that would be lost from construction of the Kuukpik project, which is the reason Kuukpik is proposing a 3:1 ratio for wetlands impacted to wetlands preserved (i.e. 51 acres of wetlands impacted at a 3:1 ratio for wetland value equals 17 acres of wetlands to be preserved). The wetlands that would be lost from the Kuukpik project are generally characterized as "inland plain". The wetlands proposed for preservation are "coastal plain" and serve a number of valuable environmental functions. These proposed preservation wetlands serve as insect relief areas for caribou in the summer months, are located in a higher density bird nesting area when compared to the planned construction area, and have a greater biodiversity of plant life than the planned construction area. This proposed preservation area also has a higher density of ephemeral puddles and small water bodies than the wetlands in the planned construction area.

Kuukpik would create this conservation easement by having surveyors place survey markers or monuments that would delineate the exact area slated for preservation. This delineated area would then be deemed as a conservation easement where surface development by Kuukpik, the surface owner, as well as its successors and assigns, would be prohibited in perpetuity. Kuukpik proposes to dedicate or otherwise turn over responsibility for this conservation easement to a third party, such as the North Slope Borough, for custodianship and stewardship purposes. Kuukpik will be discussing this stewardship role situation with the NSB. In the event that the NSB declines to provide a stewardship role for this conservation easement, Kuukpik will approach entities such as The Nature Conservancy to perform this stewardship function.

Since Kuukpik does not own the subsurface estate for this area, Kuukpik will be working with ASRC to obtain their agreement to prohibit shallow subsurface development activities (e.g. sand and gravel resource development; etc.) underneath the conservation easement. Any future exploration or development of deeper subsurface resources such as oil and/or gas would be allowed but would have to be performed by using directional drilling from areas outside of the conservation easement to evaluate or develop such resources.

Activities that would be permitted in the conservation easement include subsistence activities (e.g. hunting, fishing, trapping, hiking, camping, berry picking, etc.), winter snowmobiling, and other similar non-invasive, non-destructive activities by North Slope residents. The steward of this conservation easement would be responsible for determining the other types of activities that would be permitted to occur in the preserved area and when such activities would be permitted. Such other activities may include planned snow trails and/or ice roads where no practicable alternatives exist for re-routing of such trails and/or ice roads, planned seismic data acquisition in the preserved area in winter months, and other similar activities that would be expected to have no significant surface impact. Also, the steward of this conservation easement would be responsible for authorizing non-destructive scientific studies (e.g. bird nesting studies, etc.) in the preserved area. No permanent structures would be allowed to be constructed on the preserved

areas. Additionally, no commercial recreational activities would be allowed on the preserved tract.

Future Kuukpik Actions:

Kuukpik will provide the Corps with a map of the area proposed for creation of a conservation easement after survey data is obtained and processed, which expected to be in the summer of 2013. Kuukpik will also provide the Corps with additional environmental information concerning the tract selected for creation of a conservation easement. Additionally, Kuukpik will provide the Corps with copies of agreements reached with ASRC and the NSB on their roles in this matter when such documents become available.

Shoreline Northwest of Fish Creek
Image © 2013 DigitalGlobe
Image IBCAO
Image © 2013 TerraMetrics
70 23 12.42" N 151 18 38.82" W elev -20 ft
Eye alt 1617
Date 8/11/2012
2010

Attachment C

DEPARTMENT OF THE ARMY
U.S. ARMY ENGINEER DISTRICT, ALASKA
REGULATORY DIVISION
P.O. BOX 6898
JBER, ALASKA 99506-0898

REPLY TO
ATTENTION OF:

CEPOA-RD-P

3 March 2011

MEMORANDUM FOR Regulatory Division

SUBJECT: Mitigation Team Guidance on Compensatory Mitigation

1. The attached guidance provides the Mitigation Team's recommendations regarding when compensatory mitigation is likely to be required in Alaska.

2. The Mitigation Team recommendations supplement the 25 February 2009, Alaska District Regulatory Guidance Letter RGL 09-01.

3. Every project must be reviewed on a case-by-case basis and compensatory mitigation requirements are determined during the permit evaluation process for each project. In all cases, avoidance and minimization to the extent practicable will occur prior to compensatory mitigation.

Encl

GLEN E. JUSTIS
Chief, Policy and Administration Branch

AK DISTRICT MITIGATION TEAM RECOMMENDATIONS REGARDING COMPENSATORY MITIGATION

Compensatory mitigation will likely be required when:

1) The project occurs in, rare, difficult to replace, or threatened wetlands, areas of critical habitat, etc.

2) The project permanently impacts more than 1/10 of an acre of wetlands and/or other waters of the U.S. and the watershed condition is such that compensatory mitigation is necessary to offset the project's unavoidable adverse effects. Situations that can indicate degradation of the watershed's aquatic environment can include, but is not limited to, more than 5% of impervious surface[1] in the watershed, waters listed as impaired or CWA Section 303(d) listed waterbodies[2], etc.

3) Fill placed in intertidal waters associated with special aquatic sites[3].

4) Fill placed in fish bearing waters and jurisdictional wetlands within 500' of such waters when impacts are determined more than minimal.

5) The project is federally funded, so compensatory mitigation is required under Executive Order 11990 and meets the National policy goal of no net loss of wetlands.

6) Large scale projects with significant aquatic resource impacts (ex. mining development; highway, airport, pipeline, and railroad construction projects). [33 CFR 320.4(r)(2)]

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[1] Impervious surface is defined as areas of the earth that have been covered by any material that impedes the infiltration of water into the soil. Areas of land covered by pavement or buildings are impervious to rain water. Concrete, asphalt, rooftops and even severely compacted areas of soil are considered impervious.

[2] Alaska Dept. of Environmental Conservation - Alaska's List of Impaired or 303(d) Listed Waterbodies
http://dec.alaska.gov/water/wqsar/waterbody/integratedreport.htm

[3] 40 CFR 230 Subpart E, Special aquatic sites include sanctuaries and refuges, wetlands, mud flats, vegetated shallows, coral reefs and riffle pool complexes
http://water.epa.gov/lawsregs/rulesregs/cwa/upload/CWA_Section404b1_Guidelines_40CFR230_July2010.pdf

U.S. Army Corps
of Engineers
Alaska District

Alaska District Regulatory Guidance Letter

RGL ID No. 09-01

CEPOA-RD **2009**

SUBJECT: Alaska District implementation of the Federal Rule on Compensatory Mitigation: Compensatory Mitigation for Losses of Aquatic Resources; Final Rule (33 CFR Parts 325 and 332), dated April 10, 2008.

BACKGROUND: The Corps and EPA published a new rule to clarify how to provide compensatory mitigation for unavoidable impacts to the nation's wetlands and streams resulting from authorized activities. The rule is intended to enable the agencies to promote greater consistency, predictability, and ecological success of mitigation projects under the Clean Water Act.

The rule preserves the requirement for applicants to first avoid and/or minimize impacts to aquatic resources before proposing compensatory mitigation to offset project impacts. The rule establishes performance standards, sets timeframes for decision making, and to the extent possible, establishes equivalent requirements and standards for the three sources of compensatory mitigation: mitigation banks, in-lieu-fee (ILF) programs, and permittee-responsible mitigation.

PURPOSE: The purpose of this Regulatory Guidance Letter (RGL) is to define the Alaska District's review procedure for compensatory mitigation with respect to the requirements of the rule. This RGL outlines the steps necessary to implement the rule when evaluating project proposals, and identifies the necessary documentation to be included in the administrative record for a permit decision.

APPLICABILITY: This guidance applies to all permit applications submitted for approval.

IMPACTS, COMPENSATION AND WATERSHEDS: Regulations require appropriate and practicable compensatory mitigation to replace functional losses to aquatic resources. The Alaska District will determine what level of mitigation is "appropriate" based upon the functions lost or adversely affected by permitted activities. When determining "practicability", the District will consider the availability of suitable locations, constructability, overall costs, technical requirements, and logistics.

The rule includes flexibility concerning regional variations in aquatic resources, determination of watershed size and limits, in-lieu-fee and mitigation bank service areas, and the types of wetland projects. For reference, Table 1 provides cited portions from the rule that are particularly relevant to aquatic resource impacts and compensatory mitigation in Alaska.

PROCEDURES: The following are flow chart procedures for evaluating mitigation proposals that accompany permit requests.

A. Receipt of Application

1. Review permit request (applies to all permit requests)

   a. The application does not contain any information pertaining to mitigation sequencing and compensation for impacts (incomplete application or Pre-Construction Notification). Request this information from the applicant.

   OR

b. The application contains the required mitigation statement, documents mitigation sequencing (avoidance, minimization, then compensation), and has a conceptual mitigation plan, if necessary. Proceed to Section B.

B. Determination of Mitigation Requirements for all Permit Requests

Mitigation requirements are determined by following 33 CFR 320.4(r). It is critical to document your evaluation process, whether you require compensatory mitigation or not, by following the sequencing outlined in the regulations above and taking into consideration the nation's "no net loss" goal (see Executive Order 11990 and the February 6, 1990, Memorandum of Agreement between the Department of the Army and the Environmental Protection Agency). See Table 2 for examples of projects that ***will*** *require compensatory mitigation and* ***may*** *or* ***may not*** *require compensatory mitigation.*

1. The proposed project does not require compensatory mitigation beyond avoidance and minimization:

   a. The applicant must document avoidance and minimization measures;
   b. The applicant must provide rationale as to why they are not proposing compensatory mitigation for their proposed project; and
   c. In the decision document (i.e., memorandum for record (MFR), combined decision document, etc.), regulator must document acceptance of avoidance and minimization measures and rationale for not requiring compensatory mitigation.

OR

2. The proposed project requires compensatory mitigation, but the applicant does not think so, nor propose any:

   a. The applicant must document avoidance and minimization measures; and
   b. The Public Notice (PN) or General Permit Agency Coordination (GPAC) mitigation statement will state that no compensatory mitigation has been proposed and the applicant's rationale for not proposing any. Items the regulator should discuss with the applicant during the review period would be: Is there opportunity on-site for compensatory mitigation? If so, is it ecologically preferable and practicable (e.g. will it be self-sustaining, low risk, temporal losses, etc.). Is the proposed project within a service area for an established bank or ILF program? Are there compensatory mitigation opportunities within the impacting project's watershed/ecoregion, which might be applicable and/or of which the applicant is unaware?
   c. Proceed to Section C.

OR

3. The proposed project is submitted with a compensatory mitigation plan:

   a. The applicant must document avoidance and minimization measures;
   b. Review the plan for adequacy, as outlined in Section C;
   c. If inadequate, work with the applicant to get the plan refined until it is adequate; and
   d. Proceed to Section C.

C. Reviewing Compensatory Mitigation Plans and General Considerations

If compensatory mitigation is required for general permits (regional or nationwide permits), you may approve a conceptual or detailed compensatory mitigation plan to meet required time frames for general permit verifications, but a final mitigation plan (as described in Section D) must be approved before work commences in waters of the U.S. Alternatively, components of a mitigation plan may be addressed through permit conditions (see 33 CFR § 332.4(c)(ii)). Do not forget to ensure project is in compliance with NWP general condition 20, if applicable.

1. Is the mitigation site located on private or public lands? Credits for compensatory mitigation projects on public land must be based solely on aquatic resource functions provided by the compensatory mitigation project, over and above those provided by public programs already planned or in place.

2. Is mitigation proposed in-kind or out-of-kind? On-site or off-site? The decision document needs to include ecological rationale for out-of-kind. Very rarely can you justify a marine impact being compensated at a fresh-

water site but the opposite may be able to easily justify. If off-site, can all impacted functions be mitigated at an off-site location? If not, how is the applicant addressing water quality and quantity functions on-site?

3. What option has the applicant determined would be environmentally preferable and why (e.g. in-kind, out-of kind, temporal concerns, etc.)?

   a. If mitigation bank credits – go to item (i) below
   b. If ILF program credits – go to item (ii) below
   c. If permittee-responsible mitigation – go to item (iii) below

      i. Mitigation bank credits
         1) The applicant must provide a rationale for using a mitigation bank (why the bank is an environmentally preferable compensation choice);
         2) Confirm that the impact occurs in the service area of the mitigation bank and that credits are available;
         3) Baseline information and determination of credits as described in D. 4. and D. 5. below; and
         4) In the decision document (i.e., MFR, combined decision document, etc.), Regulator must document acceptance of avoidance and minimization measures and rationale for compensatory mitigation requirements.

      ii. In-lieu fee program credits
         1) The applicant must provide a rationale for using an in-lieu fee (why the in-lieu fee is an environmentally preferable compensation choice);
         2) Confirm that the impact occurs in the Service Area of the in-lieu fee sponsor's program;
         3) Baseline Information and Determination of Credits as described in D. 4. and D. 5. below; and
         4) In decision document (i.e., MFR, Combined Decision Document, etc.), the regulator must document acceptance of avoidance and minimization measures and rationale for compensatory mitigation requirements.

      iii. Permittee-responsible mitigation
         1) Type of compensatory mitigation
            a) Preservation only (go to Section E)
            b) Restoration, establishment, enhancement (go to Section D)
            c) Stream compensatory mitigation projects (go to Section D)
         2) Was a functional assessment provided for the impacted area, and was it related to the proposed compensatory mitigation? See Appendix A (Wetland Functions Information and Tools)
         3) Was the functional assessment an approved methodology or is it based upon best professional judgment? See item 4.
         4) Does the functional assessment adequately describe the impacts to all wetland functions – water quantity; water quality; habitat? Do you agree with the conclusions of the assessment?
         5) Overall, is the wetland being impacted of high, medium, or low functions and services (Category I – IV – see Appendix A)?
         6) Has the applicant or consultant included wetland and upland buffer impacts?
         7) Are there indirect and/or secondary adverse affects from the project?
         8) The regulator must document findings and rationale of items 2-7 above to support their conclusions.

D. Final Mitigation Plan Requirements for Permittee-Responsible Mitigation (33 CFR 332.4(c)(2) through (c)(14))

1. Objectives:
   a. method of compensation (restoration, establishment, enhancement and/or preservation);
   b. description of resource types (i.e., U.S. Fish and Wildlife Service Cowardin Class – PFO, PSS, PEM, riverine, lacustrine, etc. and/or Hydrogeomorphic (HGM) Class: Depressional, Riverine, Slope, or Flats) provided by plan (see Appendix A);

c. the amount of each resource type provided by plan; and
d. does the compensation project address the needs of the watershed, ecoregion, or other geographic area of interest?

2. Site Selection:
   a. will the compensation project be self-sustaining;
   b. did the applicant consider on-site alternatives where practicable; and
   c. were watershed needs considered by applicant?

3. Site Protection Instrument:
   a. what legal arrangements and instrument is the applicant proposing to ensure long-term protection of the mitigation site:
      i. Conservation Easement
      ii. Restrictive Covenant/Deed Restriction – See examples in O:\RD\Private\Library\Mitigation

4. Baseline Information:
For applicants planning on securing credits from an ILF program or mitigation bank, baseline information only needs to be submitted for the impact site, not the ILF or mitigation bank project site.

Baseline information includes the following for both the impact site and the mitigation project site (if applicable). The list may not be inclusive of other information that may be needed on a case-by-case basis.

   a. descriptions of historic and existing plant communities and hydrology (including any monitoring well data);
   b. soil conditions (including any soil boring data);
   c. a map showing the locations of the impact and mitigation site(s) or the geographic coordinates; and
   d. delineation of waters of the U.S. (in accordance with the 1987 wetland delineation manual and the 2007 Alaska Regional Supplement) for both the impact and mitigation project site

5. Determination of Credits (See Appendix B):

A description of the number of credits to be provided, including a brief explanation of the rationale for this determination. (See Section 332.3(f).)

   a. For permittee-responsible mitigation, this should include an explanation of how the compensatory mitigation project will provide the required compensation for unavoidable impacts to aquatic resources resulting from the permitted activity; and
   b. For permittees intending to secure credits from an approved mitigation bank or in-lieu fee program, it should include the number and resource type of credits to be secured and how these were determined.

Example – DO NOT USE MONETARY CONVERSIONS – that is between the ILF or bank sponsor and the applicant!!! Using Appendix B: If the impact is 5 acres of moderate functioning wetland (Category II or III) and the applicant proposes preservation (either as an ILF or Mitigation Bank) as their compensatory mitigation type, then according to the ratio table, the applicant would need to compensate at a 2:1 ratio, which would translate to 10 credits (or acres) of preservation. The price for purchasing 10 credits from an ILF or bank sponsor will be determined by the sponsor, NOT by the Corps.

6. Mitigation Work Plan:
The applicant needs to include the following details (using all available information, but not limited to):

For Wetland Projects
   a. geographic boundaries of the project;
   b. construction methods, timing, and sequence;
   c. source(s) of water, including connections to existing waters and uplands;
   d. methods for establishing the desired plant community (including plant species, number of individuals and spacing – e.g. trees will be planted 10-foot on center);
   e. plans to control invasive plant species; proposed grading plan, including elevations and slopes of substrate;
   f. soil management; and
   g. erosion control measures

For Stream Projects - includes the above list, plus:

h. planform geometry;
i. channel form (e.g. typical channel cross-sections);
j. watershed size;
k. design discharge; and
l. riparian area planting plan (including species, number of individuals, and spacing)

7. Maintenance Plan:
   a. description and schedule of maintenance requirements once initial construction is completed

8. Performance Standards (See Appendix C for examples):
   a. used to determine whether the project is achieving objectives – must be meaningful, measurable and achievable, as well as enforceable;
   b. must be objective and verifiable;
   c. may be based on variables or measures of functional capacity described in functional assessment methodologies, measurements of hydrology or other aquatic resource characteristics, and/or comparisons to reference aquatic resources of similar type and landscape position.

9. Monitoring Requirements:
   a. applicant should submit a description of parameters to be monitored in order to determine if the mitigation project is on track to meet performance standards and if adaptive management is needed – includes parameters to be monitored, the length of the monitoring period, party responsible for monitoring and submittal of reports, the frequency for submittal of reports; and
   b. content and detail is commensurate with scale and scope of mitigation project

10. Long-term Management Plan:
   a. how will mitigation project be managed to ensure long-term sustainability of the resource;
   b. party responsible for ownership and all long-term management of the mitigation project;
   c. long-term management responsibilities can be transferred to another entity, such as a public agency, non-governmental organization, or private land manager (District Engineer (DE) must approve);
   d. should include description of long-term management needs, annual cost estimates for these needs, and funding mechanism that will be used to meet those needs;
   e. financing mechanisms include: non-wasting endowments, trusts, contractual arrangements with future responsible parties and other appropriate financial instruments; and
   f. public authority or government agency responsible for long-term management, must include plan for long-term financing of the mitigation site

11. Adaptive Management Plan:
   a. includes a strategy to address unforeseen changes in site conditions or other components of the mitigation project;
   b. must include party responsible for implementing adaptive management measures;
   c. adaptive management measures may include: site modification, design changes, revisions to maintenance requirements, and revised monitoring requirements

12. Financial Assurances:
   a. need to assess whether financial assurance is required;
   b. government agencies or public authorities with a formal documented commitment do not need to post financial assurances;
   c. is another regulatory entity requiring financial assurances;
   d. amount is based on the size and complexity of the mitigation project, likelihood of success, past performance of project sponsor, the degree of completion of the project at the time of project approval
   e. financial assurances may be in the form of performance bonds, escrow accounts, casualty insurance, letters of credit, legislative appropriations for government sponsored projects, or other appropriate instruments
   f. rationale for determining the amount of the required financial assurances, or not requiring any, must be documented in the administrative record

E. Required Criteria for using ONLY Preservation as Compensatory Mitigation (33 CFR 332.3(h))
If proposed preservation meets the following criteria, proceed to Section D. for final mitigation plan requirements

1. The resources to be preserved provide important physical, chemical, or biological functions for the watershed;

2. The resources to be preserved contribute significantly to the ecological sustainability of the watershed. In determining the contribution of those resources to the ecological sustainability of the watershed, the district engineer must use appropriate tools, where available;
3. Preservation is determined by the DE to be appropriate and practicable;
4. The resources are under threat of destruction or adverse modifications; and
5. The preserved site will be permanently protected through an appropriate real estate or other legal instrument (e.g., easement, title transfer to state resource agency or land trust).

F. Tables and Appendices

The tables and appendices were compiled using multiple resources and are to be utilized as tools and resources to assist in the regulator's evaluation. The regulator may choose to use the functional assessment tools together, separately, or not at all. Every project needs to be evaluated based on its own merit, and the tools are generalizations that may need adjusting or further analysis, which should be determined by the regulator on a case-by-case basis.

Table 1: Citations from the new rule (preamble and the regulations) that are of particular value to Alaska
Table 2: Examples of projects that will require compensatory mitigation and examples of projects that may or may not require compensatory mitigation

Appendix A: Functional Assessment Information and Tools
Appendix B: Sample Ratios for Compensatory Mitigation
Appendix C: Performance Standards
Appendix D: Glossary

2/25/09
Date

Michael Rahle
Chief, Regulatory Division

Table 1. Citations from the new rule (preamble and the regulations) that are of particular value to Alaska

Page 19617 (332.3(a) - Flexibility in Mitigation Requirements): Flexibility in compensatory mitigation requirements is needed to account for regional variations in aquatic resources, as well as state and local laws and regulations. There also needs to be flexibility regarding the requirements for permittee-responsible mitigation. Practicability is an important consideration when determining compensatory mitigation requirements.
Page 19625-19626 (332.2 - Definitions for Watershed and Service Area): District engineers will determine appropriate watershed scales for compensatory mitigation projects, including services areas for mitigation banks and in-lieu fee programs.... In general, compensatory mitigation projects should be located in the same watershed as the permitted impacts, at a scale determined to be appropriate by the district engineer based on the factors specified in the rule.
Page 19627 (332.3(a) - Mitigation Options & Practicability): If a particular compensatory mitigation project is cost-prohibitive, then an alternative compensation project that is more practicable should be required. District engineers will also consider impacts to the public interest, including potential losses of aquatic resource functions and services, when evaluating permit applications and compensatory mitigation proposals, and determining appropriate and practicable compensatory mitigation requirements.
Page 19627 (332.3(a) – Environmentally Preferable Mitigation): [The regs] provide flexibility for district engineers to make compensatory mitigation decisions based on what is environmentally preferable and is most likely to successfully provide the required compensatory mitigation.
Page 19627 (332.3(c) - Watershed Approach & DE Flexibility): [The regs] provide flexibility for district engineers to use innovative approaches or strategies for determining more effective compensatory mitigation requirements that provide greater benefits for the aquatic environment.
Page 19632 (332.3(b)(6) - Out-of-kind Mitigation): District engineers can require the use of out-of-kind compensatory mitigation when he or she determines that it will serve the aquatic resource needs of the watershed.
Page 19635 (332.3(h) - Preservation as Compensatory Mitigation): Preservation will be provided in conjunction with aquatic resource restoration, establishment, and/or enhancement activities, unless the district engineer waives this requirement in a situation where preservation has been identified as a high priority using a watershed approach. If the district engineer makes such a waiver, a higher compensation ratio shall be required.
Page 19654 (332.8(d)(6)(ii)(A) - Bank Service Area): The district engineer, in consultation with the IRT, will determine the appropriate service area(s) for mitigation banks and in-lieu fee programs.
Page 19660 (332.8(o)(6) - Credits Provided by Preservation): Preservation may also be used as the only form of compensatory mitigation, at the discretion of the district engineer, but this should only be allowed where preservation of specific resources has been identified as a high priority using a watershed approach...

Table 2. Examples of projects that <u>will</u> require compensatory mitigation and examples of projects that <u>may</u> or <u>may not</u> require compensatory mitigation

Notes:
1. These are examples. Every project must be reviewed on a case-by-case basis and compensatory mitigation requirements must be determined through the permit review process for each project.
2. This table assumes that avoidance and minimization has occurred for the project to the PM/RS's satisfaction, and been documented. The decision whether to require compensatory mitigation must also be well documented in the administrative record.
3. This table does not mean that impacts considered small for purposes of ILF or Mitigation Bank credit would never require another form of compensatory mitigation.

WILL REQUIRE
The project occurs in degraded, rare, difficult to replace, or threatened wetlands, areas of critical habitat, 303(d) waters, etc.
The project, even if minimally impacting, occurs in a watershed where cumulative impacts are a concern (i.e., urban areas, transportation corridors, etc.)
Fill placed in intertidal waters associated with special aquatic sites, streams, rivers, lakes and/or riparian areas.
Fill placed in anadromous fish streams and wetlands adjacent to anadromous fish streams.
The project is federally funded, so compensatory mitigation is required under Executive Order 11990 (no net loss of wetlands).
MAY OR MAY NOT REQUIRE
The impacting project requires an IP or permanently impacts more than ½ acre of wetlands and/or other waters of the U.S.
The impacts from the project are so small (e.g. loss of 1/2 acre of forested wetlands in a remote, relatively undisturbed watershed) that they cannot be effectively compensated
There is no opportunity within the watershed for compensatory mitigation AND the impacts are so small that an ILF or Bank Sponsor could not sell a credit that would be worth the money to process (cost/benefit analysis does not add up)
The project impacts are minimal or in a watershed with large expanses of wetlands that are not at risk of being cumulatively degraded.

Appendix A

WETLAND FUNCTIONS AND SERVICES FORM

*****This is an example. Best professional judgment should be used on each specific site*****

Helpful when evaluating permittee-responsible mitigation to determine which functions are being lost; therefore, these functions should be replaced in the applicant's mitigation proposal

File #:_____ Assessed by:_____

Cowardin Class:_____ Wetland Size:_____ Date:_____

Function/Service	Occurrence Y	Occurrence N	Rationale	Comments
Flood Flow Alteration				
Sediment Removal				
Nutrient & Toxicant Removal				
Erosion Control & Shoreline Stabilization				
Production of Organic Matter and its Export				
General Habitat Suitability				
General Fish Habitat				
Native Plant Richness				
Educational or Scientific Value				
Uniqueness and Heritage				

NOTE: The function/services that are to be lost with the project are the functions/services that should be replaced.

Appendix A

SUMMARY OF POTENTIAL FUNCTIONS FOR HGM CLASS WETLANDS

*****This is an example. Best professional judgment should be used on each specific site*****

Common definitions of HGM Classification Types:

Riverine - Riverine wetlands occur in floodplains and riparian corridors in association with stream or river channels. They lie in the active floodplain and have important hydrologic links to the water dynamics of the river or stream. The distinguishing characteristic of Riverine wetlands is that they are frequently flooded by overbank flow from the stream or river. Flood waters are a major factor that structures the ecosystem in these wetlands. Wetlands that lie in floodplains but are **not** frequently flooded are not classified as Riverine.

Depressional - Depressional wetlands occur in topographic depressions. Dominant water sources are precipitation, groundwater discharge, and interflow from adjacent uplands. The direction of flow is normally from the surrounding uplands toward the center of the depression. Elevation contours are closed, thus allowing the accumulation of surface water. Depressional wetlands may have any combination of inlets and outlets or may lack them completely. Dominat hydrodynamics are vertical fluctuations, primarily seasonal. Depressional wetlands may lose water through intermittent or perennial drainage from an outlet and by evapotranspiration and, if they are not receiving groundwater discharge, may slowly contribute to groundwater.

Lacustrine Fringe - Lacustrine fringe wetlands are adjacent to lakes where the water elevation of the lake maintains the water table in the wetland. In some cases, these wetlands consist of a floating mat attached to land. Additional sources of water are precipitation and groundwater discharge, the latter dominating where lacustrine fringe wetlands intergrade with uplands or slope wetlands. Surface water flow is bidirectional, usually controlled by water-level fluctuations such as seiches in the adjoining lake.Lacustrine fringe wetlands are indistinguishable from depressional wetlands where the size of the lake becomes so small relative to fringe wetlands that the lake is incapable of stabilizing water tables. Lacustrine wetlands lose water by flow returning to the lake after flooding, by saturation surface flow, and by evapotranspiration.

Tidal Fringe - Tidal Estuarine wetlands occur along coasts and estuaries and are under the influence of the sea level. They intergrade landward with riverine wetlands where tidal current diminishes and river flow becomes the dominant water source. Additional water sources may be groundwater discharge and precipitation. The interface between the tidal fringe and riverine classes is where bidirectional flows from tides dominate over unidirectional ones controlled by floodplain slope of riverine wetlands. Because tidal fringe wetlands frequently flood and water table elevations are controlled mainly by sea surface elevation, tidal fringe wetlands seldom dry for significant periods. Tidal fringe wetlands lose water by tidal exchange, by saturated overland flow to tidal creek channels, and by evapotranspiration.

Slope - Slope Wetlands normally are found where there is a discharge of groundwater to the land surface. They normally occur on sloping land; elevation gradients may range from steep hillsides to slight slopes. Slope wetlands are usually incapable of depressional storage because they lack the necessary closed contours. Principal water sources are usually groundwater return flow and interflow from surrounding uplands as well as precipitation. Hydrodynamics are dominated by downslope unidirectional water flow. Slope wetlands can occur in nearly flat landscapes if groundwater discharge is a dominant source to the wetland surface. Slope wetlands lose water primarily by saturation subsurface and surface flows, and by evapotranspiration. Slope wetlands may develop channels, but the channels serve only to convey water away from the slope wetland.

Flats - Flats wetlands occur in topographically flat areas that are hydrologically isolated from surrounding ground or surface water. The main source of water in these wetlands is precipitation. They receive virtually no groundwater discharge. This characteristic distinguishes them from Depressional and Slope wetlands.

Appendix A

Description of Wetland Categories Based on Functions

*****This is an example. Best professional judgment should be used on each specific site*****

Category I – High functioning wetlands
These wetlands are the "cream of the crop." Generally, these wetlands are less common. These are wetlands that: 1) provide a life support function for threatened or endangered species that has been documented; 2) represent a high quality example of a rare wetland type; 3) are rare within a given region; or, 4) are undisturbed and contain ecological attributes that are impossible or difficult to replace within a human lifetime, if at all. Examples of the latter are mature forested wetlands that may take a century to develop, and certain bogs and fens with their special plant populations that have taken centuries to develop. The position of the wetland in the landscape plays an integral role in overall watershed health.

Category II – High to Moderate functioning wetlands
These wetlands are those that: 1) provide habitat for very sensitive or important wildlife or plants; 2) are either difficult to replace (such as bogs); or 3) provide very high functions, particularly for wildlife habitat. These wetlands may occur more commonly than Category I wetlands, but still need a high level of protection.

Category III – Moderate to low functioning wetlands
These wetlands can provide important functions and values. They can be important for a variety of wildlife species and can provide watershed protection functions depending on where they are located. Generally these wetlands will be smaller and/or less diverse in the landscape than Category II wetlands. These wetlands usually have experienced some form of degradation, but to a lesser degree than Category IV wetlands.

Category IV – Degraded and low functioning wetlands
These wetlands are the smallest, most isolated, have the least diverse vegetation, may contain invasive species, and have been degraded by humankind. These are wetlands that we should be able to replace and, in some cases, be able to improve from a habitat standpoint. These wetlands can provide important functions and values, and should to some degree be protected depending on where they are located in the watershed and the condition of that watershed (urban vs. rural). In some areas, these wetlands may be providing groundwater recharge and water pollution prevention functions and, therefore, may be more important from a local point of view. Thus, regional differences may call for a more narrow definition of this category.

Appendix A

Wetland Functions Data Form-Alaska Regulatory Best Professional Judgment Characterization
*****This is an example. Best professional judgment should be used on each specific site*****

File #:_____ Date:_____

Wetland Name:_____ PM/RS:_____

A. Flood Flow Alteration (Storage and Desynchronization)	Likely or not likely to Provide (Y or N)
1. Wetland occurs in the upper portion of its watershed. 2. Wetland is relatively flat area and is capable of retaining higher volumes of water during storm events, than under normal rainfall conditions. 3. Wetland is a closed (depressional) system. 4. If flowthrough, wetland has constricted outlet with signs of fluctuating water levels, algal mats, and/or lodged debris. 5. Wetland has dense woody vegetation 6. Wetland receives floodwater from an adjacent water course 7. Floodwaters come as sheet flow rather than channel flow.	1. 2. 3. 4. 5. 6. 7. 5 – 7 (Y) – High Function 1 – 4 (Y) – Moderate Function None - Low Function
B. Sediment Removal	Likely or not likely to Provide (Y or N)
1. Sources of excess sediment (from tillage, mining or construction) are present upgradient of the wetland. 2. Slow-moving water and/or a deepwater habitat are present in the wetland. 3. Dense herbaceous vegetation is present. 4. Interspersion of vegetation and water is high in wetland. 5. Ponding of water occurs in the wetland. 6. Sediment deposits are present in wetland (observation or noted in application materials).	1. 2. 3. 4. 5. 6. 4 – 6 (Y) – High Function 1 - 3 (Y) – Moderate Function None – Low Function

Note: e.g., for Flood Flow Alteration, answering yes to at least 3 out of 7 attributes would rate the wetlands as high functioning; answering yes to 1, 2, 3, or 4 out of the 7 attributes would rate the wetland as moderate; and not answering yes to any of the 7 attributes would rate the wetland low for Flood Flow Alteration function.

Appendix A

C. Nutrient and Toxicant Removal (important with high adjacent land use/industrial areas) 1. Sources of excess nutrients (fertilizers) and toxicants (pesticides and heavy metals) are present upgradient of the wetland. 2. Wetland is inundated or has indicators that flooding is a seasonal event during the growing season. 3. Wetland provides long duration for water detention. 4. Wetland has at least 30% aerial cover of live dense herbaceous vegetation. 5. Fine grained mineral or organic materials are present for the wetland (in wetland report).	Likely or not likely to Provide (Y or N) 1. 2. 3. 4. 5. 3 – 5 (Y) – High Function 1 - 2 (Y) – Moderate Function None – Low Function
D. Erosion Control and Shoreline Stabilization *If associated with watercourse or shoreline* 1. Wetland has dense, energy absorbing vegetation bordering the water course and no evidence of erosion. 2. A herbaceous layer is part of this dense vegetation. 3. Trees and shrubs able to withstand erosive flood events are also part of this dense vegetation.	Likely or not likely to Provide (Y or N) 1. 2. 3. 1-3 (Y) – High Function None – Low Function
E. Production of Organic Matter and its Export 1. Wetland has at least 30% aerial cover of dense herbaceous vegetation. 2. Woody plants in wetland are mostly deciduous. 3. High degree of plant community structure, vegetation density, and species richness present. 4. Interspersion of vegetation and water is high in wetland. 5. Wetland is inundated or has indicators that flooding is a seasonal event during the growing season. 6. Wetland has outlet from which organic matter is flushed.**	Likely or not likely to Provide (Y or N) 1. 2. 3. 4. 5. 6. 4 – 6 (Y) – High Function 1 - 3 (Y) – Moderate Function None – Low Function **If 6 is N, then automatically low function
F. General Habitat Suitability 1. Wetland is not fragmented by development. 2. Upland surrounding wetland is undeveloped. 3. Wetland has connectivity with other habitat types. 4. Diversity of plant species is high. 5. Wetland has more than one Cowardin Class (i.e., PFO, PSS, PEM, POW, etc.) 6. Has high degree of Cowardin Class interspersion. 7. Evidence of wildlife use, e.g., tracks, scat, gnawed stumps, etc., is present.	Likely or not likely to Provide (Y or N) 1. 2. 3. 4. 5. 6. 7. 5 – 7 (Y) – High Function 1 – 4 (Y) – Moderate Function None - Low Function

Appendix A

G. General Fish Habitat *Must be associated with a fish-bearing water* 1. Wetland has perennial or intermittent surface-water connection to a fish-bearing water body. 2. Wetland has sufficient size and depth of open water so as not to freeze completely during winter. 3. Observation of fish. 4. Herbaceous and/or woody vegetation is present in wetland and/or buffer to provide cover, shade, and/or detrital matter. 5. Spawning areas are present (aquatic vegetation and/or gravel beds.) 6. Juvenile rest areas	Likely or not likely to Provide (Y or N) 1. 2. 3. 4. 5. 6. 4 – 5 (Y) – High Function 1 - 3 (Y) – Moderate Function None – Low Function
H. Native Plant Richness 1. Dominant and codominant plants are native. 2. Wetland contains two or more Cowardin Classes. 3. Wetland has three or more strata of vegetation. 4. Wetland has mature trees.	Likely or not likely to Provide (Y or N) 1. 2. 3. 4. 3 - 4 (Y) – High Function 1 - 2 (Y) – Moderate Function None – Low Function
I. Educational or Scientific Value 1. Site has documented scientific or educational use. 2. Wetland is in public ownership. 3. Accessible trails available.	Likely or not likely to Provide (Y or N) 1. 2. 3. 2 - 3 (Y) – High Function 1 (Y) – Moderate Function None – Low Function
J. Uniqueness and Heritage 1. Wetland contains documented occurrence of a state or federally listed threatened or endangered species. 2. Wetland contains documented critical habitat, high quality ecosystems, or priority species respectively designated by the U.S. Fish and Wildlife Service 3. Wetland has biological, geological, or other features that are determined rare 4. Wetland has been determined significant because it provides functions scarce for the area. 5. Wetland is part of: an estuary, bog, or a mature forest.	Likely or not likely to Provide (Y or N) 1. 2. 3. 4. 5. 3 – 5 (Y) – High Function 1 – 2 (Y) – Moderate Function None – Low Function

APPENDIX B

SAMPLE RATIOS FOR COMPENSATORY MITIGATION

Note: The ratios provided below are guidance and represent what a permit applicant should expect as a compensation requirement, thereby providing some predictability. However, a Corps regulator may deviate from this guidance. Corps regulators must make an individual determination on the compensatory mitigation ratios required for specific aquatic resource impacts to ensure that the compensation is proportionate to the proposed loss or degradation of an aquatic resource area and/or its functions.

	TYPE OF COMPENSATORY MITIGATION	
Impacted Wetland or Other Waters of the U.S.	Preservation	Restoration and/or Enhancement
LOW Category III or IV	1.5:1	1:1
MODERATE Category II or III	2:1	1:1
HIGH Category I or II	3:1	2:1

Assumptions and/or considerations when determining ratios:

- Impacts to ponds, lakes, rivers and streams, should be mitigated for in the HIGH category, due to their inherent high level of functions and services. Compensatory mitigation for tidal and intertidal waters can generally be parsed out by habitat type; where unvegetated (inter)tidal habitat would be compensated for in the MODERATE category, while those (inter)tidal waters associated with special aquatic sites would be compensated for in the HIGH category. Deviations from this should be well reasoned and documented (e.g., document existing site degradation and lack of specific functions/services).
- Watershed position – the compensatory mitigation site should be located in areas where the compensation can contribute to ecosystem functioning at a large scale (e.g., part of river corridors and green belt space)
- Most ratios will be greater than 1:1 because there is a risk of failure associated with many forms of compensation, there is usually a temporal loss (it may take years for a compensation site to develop wetland functions and/or structure

equivalent to the impacted wetland), and preservation and enhancement activities result in net loss of wetland acreage and/or function

- Ratios shown represent a compensatory project that is constructed or protected in perpetuity concurrent with aquatic resource impacts. If there is a time delay in constructing or securing a preservation site the ratios will increase due to temporal loss
- Preservation sites selected for compensatory mitigation will be moderate to high functioning systems that meet the criteria in 33 CFR 332.3(h)
- If using a mitigation bank, rules and ratios applicable to the individual bank should be used
- Consider indirect and/or secondary impacts. For example, impacting a small portion of the wetland (<25% on the edge) is less impact then bisecting a wetland in the middle or impacting >70% of a wetland

Example for using ratio:
An applicant proposes to impact 5 acres of moderate value wetlands and it is determined compensatory mitigation is required. The applicant wants to use an ILF for preservation. The applicant would be required to provide mitigation at a 2:1 ratio using the above table, which would result in 10 credits (acres) in preservation through the ILF sponsor.

Appendix C

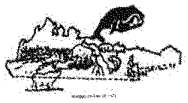
Examples of performance standards that should NOT be used, rationale, and a suggested standard

Standards NOT to use	Rationale	Suggested Standard
By the end of the fifth year, there will be X-X% coverage.	This standard does not specify what type of coverage (cumulative, aerial, or relative), or what should be providing the cover (it could be non-native species). Also missing from the standard is the location (where the cover should be.)	An alternate standard would be: After 5 years, native wetland (FAC or wetter) species will provide X% aerial cover in the wetland.
X-X acres will be dominated by native forested wetland vegetation in the XXX community types.	This standard provides a range for acreage, which is good. However, specifying the exact plants that need to dominate these areas could be setting this site up for failure by not allowing natural colonization and site conditions to influence plant community composition. Also missing from this standard is a time frame, an exact location, and a clear description of the action. Multiple interpretations of the word "dominated" are possible.	Several standards may be needed. For example: 1) A minimum of X (number of) species of native shrubs or trees will be present in the wetland by the end of the monitoring period. 2) A minimum of X (number of) native, herbaceous species will be present in the wetland by the end of the monitoring period. 3) X species (same as X above)[i.e., scrub shrub, forested] will each provide at least X% aerial cover in the compensatory mitigation wetland site by the end of the X-year monitoring period.
Within 5 years vegetation will provide adequate food and habitat to support populations of species found in natural areas of compatible size.	This standard is not useful for regulatory purposes. It is not measurable. It does not identify an attribute of vegetation that would be measured, nor does it provide a quantity/status that should be reached. Also missing from the standard is a location. The time frame and action are ambiguous.	Several standards may be needed. For example: 1) By year 5 there will be X-X acres of native, palustrine emergent wetland (PEM, as defined by Cowardin et al. 1979) at the wetland mitigation site. 2) By year 5 there will be X-X acres of native, palustrine scrub-shrub wetland (PSS, as defined by Cowardin et al. 1979) at the wetland mitigation site.
In the first year of monitoring, X% of the planted species or appropriate volunteers must be present and viable.	This standard is confusing and may be hard to measure or enforce. Words like "viable" have multiple interpretations. The words "appropriate volunteers" may be subject to interpretation, also.	An alternate standard would be: Native woody species (planted or volunteer) will maintain an average stem density of X in the scrub-shrub wetland in all monitoring years.

Performance Standard	Rationale	Alternate Standard
In year 3, survival of planted vegetation will be X%.	This is ambiguous, immeasurable, and unachievable. Standards should distinguish between woody and herbaceous plantings. The survival rate of planted herbaceous species is difficult to measure (dead herbaceous planting can disappear quickly and living individuals are difficult to distinguish for many plants). For woody plantings, measuring survival at year 3 can also be difficult and does not provide a good depiction of what is on-site: natural recruitment of woody species may have occurred. It would be better to measure stem density and then aerial cover in later years.	Alternate standards for the establishment of woody vegetation could be: In year 1, survival of planted woody vegetation at the mitigation site will be 100%. Of all dead plantings are replaced, the standard will be considered met. In year 3, woody vegetation at the mitigation site will have a stem density of at least X stems/acre. In year 10, woody vegetation at the mitigation site will achieve at least X% aerial cover.
The wetland will be saturated during the growing season.	This is ambiguous, immeasurable, and unachievable.	An alternate standard could be: The compensatory mitigation site will have X-X% area that is seasonally inundated (surface water present for > 1 month, but no more than 6 months) each year of monitoring.

Attachment D

KUUKPIK
corporation



April 25, 2013

Ms. Mary Leykom
U.S. Army Corps of Engineers (USACE)
Alaska District
Regulatory Division
P. O. Box 6898
JBER, Alaska 99506-0898

Subject: Revised Alternative Mitigation Proposal
Kuukpik Corporation Nuiqsut Spur Road and Storage Pad Project

Dear Ms. Leykom:

In response to our recent discussions and a review of additional information associated with preservation mitigation, the Kuukpik Corporation ("Kuukpik") hereby revises its alternative mitigation for wetlands losses associated with the subject project submitted to the USACE on April 11, 2013. Kuukpik is now proposing permittee-responsible mitigation via land preservation at a ratio of 1.5:1 for this project. In other words, Kuukpik is now proposing creation of a conservation easement of 76.5 acres of wetlands as mitigation for the 51.0 acres of wetlands that will be utilized for construction of the Kuukpik project. The general area of the proposed conservation easement remains the same as previously stated (i.e. northwest of the mouth of Fish Creek). Kuukpik will proceed with creation of this conservation easement as previously outlined in our April 11, 2013 correspondence.

If you have any questions or need additional information, please contact me by phone at 541-826-4195 or by e-mail at majorinor@live.com at your earliest convenience. Thank you for your assistance on this matter.

Sincerely,

Mark Major
Permitting Agent for Kuukpik