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Committee on Environment
and Public Works

Subcommittee on Fisheries, Water,
and Wildlife

Washington, D.C.

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REVIEWING THE PROPOSED REVISIONS TO THE U.S. FISH AND WILDLIFE
SERVICE MITIGATION POLICY

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The committee met, pursuant to notice, at 2:30 p.m. in room 406, Dirksen Senate Office Building, the Honorable Dan Sullivan [chairman of the subcommittee] presiding.

Present: Senators Sullivan, Whitehouse, Barrasso, Boozman, Wicker, Fischer, Inhofe, Cardin, and Gillibrand.

STATEMENT OF THE HONORABLE DAN SULLIVAN, A UNITED STATES SENATOR
FROM THE STATE OF ALASKA

Senator Sullivan. The Subcommittee on Fisheries, Water, and Wildlife will now come to order.

I first want to apologize to everybody. We are trying to schedule some votes, especially to my colleagues, that we are going to be voting at 2:15, but I guess we are pushing that back. So my apologies.

I want to thank everybody for being here to discuss what I think is an exceptionally important issue, the Fish and Wildlife Service proposed revisions to its mitigation policies and the impacts these could have on projects, economic projects, across the United States, including in my home State of Alaska.

I know some of you have had to come from far away and shuffle competing demands on your schedule on short notice, so I very much appreciate everybody being here at the hearing.

And I want to begin by saying something I think is pretty obvious on this Committee, but it is important to mention at the outset. We all certainly want to protect our wildlife, our environment. In my State, that is something that is near and dear to everybody, and we certainly have a strong record of doing that in Alaska, but we also need to take care of our citizens with economic opportunity.

So this hearing gives us a chance to review the Service's

broad proposal that has the potential to extend the scope of Federal review and consideration of infrastructure, energy, and private development and land use projects throughout the Nation.

The Fish and Wildlife Service proposal, when added to the existing number of procedural and resource reviews for Federal actions and permits for private development, will increase costs, delay or possibly paralyze projects, essentially withdraw lands, and discourage needed investment in many States. In short, broadly crafted and poorly explained policy proposals like the Service's proposed revisions may have significant economic impacts on economic growth and opportunity, while doing little to protect the environment and the species.

This is not some theoretical concern. For example, burdensome regulations and delays have created delay after delay on many large-scale resource and economic development projects in our Country. On average, right now, it takes five to six years to permit a bridge. Just to permit a bridge in the United States. Permitting a highway project can often take twice as long, up to ten years. Again, just for the Federal permits.

More specifically, we had a case of the airport runway expansion at Sea-Tac Airport in Seattle; testimony on the Commerce Committee. Fourteen years to get the Federal permits. In Alaska, it took seven years, \$7 billion to get an oil company to get one permit for an exploration well. Seven years. And we

had a goldmine that took almost 20 years to go through Federal permitting.

A recent report for the American Society of Civil Engineers found that there is an over \$1.4 trillion funding gap for needs of infrastructure spending through 2025 for the United States. That is \$1.4 trillion worth of roads, water, wastewater, basic utility, airport and port repairs, and investments that will be required to meet our Nation's infrastructure needs in the next decade.

We all want to do that. We all need to think through the important ways to do that.

In some places these U.S. investments will rebuild crumbling bridges and roads. But in other places, like my State, there is no infrastructure, no roads, no water and sewer projects in communities; and these infrastructure projects are necessary for lower priced goods, medicine, electricity, and water.

On top of all these investments, our Nation still needs to strategically explore and develop energy resources, all types of energy resources, whether renewables or oil and gas.

Again, when projects like roads or power lines are delayed or not built, it is often the most economically disadvantaged of our citizens who are hurt the most. I see this on a very regular basis in Alaska.

As drafted, the Service's proposed revisions will add more complexity to the dizzying array of regulatory requirements, big and small, that all projects must face. The Fish and Wildlife Service is proposing to potentially veto projects by requiring a "no action" alternative in some cases.

Let me be clear. The Fish and Wildlife Service has no authority under the law to veto an economic development project, period. There is none.

Alaska's unique situation also raises concerns under the Fish and Wildlife Service broad revisions. Alaska was recently recognized by the Supreme Court in the Sturgeon case is different from the rest of the Country in regards to our lands. Eighty-eight percent of Alaska is public lands, with only one percent private sector ownership lands. Large proportions of these lands are undeveloped. Alaska contains more wetlands than the rest of the United States' States combined.

Yet, the proposed revisions are completely silent on the unique differences posed in Alaska or other States that have unique circumstances.

Finally, as noted above, the scope of the authority asserted by the Service in its proposal is exceptionally broad and far from clear. The Service bases its authority to implement its new net gain or no net loss policy on no less than 26 statutes. It is a fundamental principle of administrative

law that agencies must only exercise the authority delegated to them by Congress. It should cause us all concern, all my colleagues, that its own grant of authority from Congress to be implemented for policy revisions is so unclear at this stage of the proposal.

I would like to conclude by just noting after the President's 2015 memo on mitigation, Federal agencies have been piling on additional regulatory requirements and served as so-called guidance and regulatory mandates. Such guidance must be authorized by Congress in Federal statute and it must allow for not delay or prohibit economic opportunity that Americans so desperately need.

I have serious doubts that this guidance meets either of these critical requirements, and look forward to asking questions about these issues. Thank you.

Senator Whitehouse.

[The prepared statement of Senator Sullivan follows:]

STATEMENT OF THE HONORABLE SHELDON WHITEHOUSE, A UNITED STATES
SENATOR FROM THE STATE OF RHODE ISLAND

Senator Whitehouse. Thank you, Chairman.

We are here today to examine the Fish and Wildlife Service's proposed revision to its mitigation policy. The Fish and Wildlife Service is the Federal Government's lead agency for protecting the plants, fish, and wildlife held in trust for the public. The agency has statutory authority to make sure there is a mitigation plan to protect natural resources affected by any development performed or funded by the Federal Government or that requires a Federal permit.

The Fish and Wildlife Service is still operating under a mitigation policy that hasn't been updated since the first year of the Reagan administration.

In the past 35 years, we have made significant advances in the science of endangered species, habitat conservation, and climate change. For one thing, the Service is relying on a document that predates the first intergovernmental panel on climate change report by nine years. We are now at the fifth iteration of that report.

The revisions under review today are needed to bring the Fish and Wildlife Service into the 21st century and ensure that it provides consistent guidance on protecting America's natural spaces and native wildlife from a multitude of dangers,

including those from climate change.

In my home State of Rhode Island, we have already seen winter surface water temperatures increase by around 4 degrees Fahrenheit since the 1960s. Sea level at the Newport Naval Station tide gage is up almost 10 inches since the 1930s. In a State tied so closely to its oceans and coasts -- in 2013, Rhode Island's ocean economy generated \$2.1 billion -- these changes are serious. Rhode Island is not alone in seeing climate change undermine its natural resources, wildlife, and economy.

I appreciate the Service's efforts to better incorporate the latest climate change science into its mitigation policy, and I encourage it to be more specific about accounting for climate change and resiliency in mitigation plans, some of which can cover decades of effort and monitoring.

There is no question as to the Service's authority to promulgate the proposed revisions to its mitigation policy. The Fish and Wildlife Service cites 20 separate laws, 7 executive orders, and a multitude of regulations and administrative guidance documents that support its proposal.

In his presidential memorandum from November 2015, the President set clear expectations for the Department of Interior and other Federal agencies to "avoid and minimize harmful effects to land, water, wildlife, and other ecological resources caused by land- and water-disturbing events, and to ensure that

any remaining harmful effects are effectively addressed consistent with existing missions and legal authorities.”

The memorandum specifically calls for the use of landscape scale planning which coordinates mitigation projects on a larger scale to enhance conservation goals, and of policies to “establish a net benefit goal or, at minimum, a no net loss goal for natural resources.”

With these proposed revisions to its mitigation policy, the Fish and Wildlife Service has set high expectations for its review of mitigation projects. This long-overdue update is necessary to bring the Service’s mitigation policy into the modern era and to provide increased consistency and transparency for non-Federal entities that work with the Fish and Wildlife Service and other Federal agencies.

I thank our witnesses for being here today and look forward to the testimony.

Thank you, Chairman.

[The prepared statement of Senator Whitehouse follows:]

Senator Sullivan. Thank you, Senator Whitehouse.

We do have two distinguished panels here today, and I want to thank, again, the witnesses for being here.

I want to welcome our first witness, Mr. Michael Bean, who is the Principal Deputy Assistant Secretary for the Fish and Wildlife Service and Parks at the Department of Interior.

Mr. Bean, you will have five minutes to deliver an oral statement, and a longer written statement will be included in the record.

STATEMENT OF MICHAEL BEAN, PRINCIPAL DEPUTY ASSISTANT SECRETARY
OF FISH AND WILDLIFE AND PARKS, DEPARTMENT OF INTERIOR

Mr. Bean. Thank you and good afternoon.

Senator Sullivan. Excuse me, Mr. Bean. I apologize, but I think the vote has started, and as opposed to trying to cycle us through, if we can recess for a white 10 minute recess, we will be back to hear your opening statement. Again, I apologize for the delay at the hearing.

Thank you.

[Recess.]

Senator Sullivan. Okay, we will reconvene the Subcommittee on Fisheries, Water, and Wildlife.

Again, thank you for your patience, everybody. Apologize for that recess.

Mr. Bean, the floor is yours for five minutes.

Mr. Bean. Thank you, sir.

Chairman Inhofe, Chairman Sullivan, Ranking Member Whitehouse, members of the Subcommittee, it is a pleasure to have the opportunity to testify before you today regarding the proposed mitigation policies of the U.S. Fish and Wildlife Service. I am Michael Bean, Principal Deputy Assistant Secretary for Fish and Wildlife and Parks at the Department of the Interior.

Mitigation is an important and longstanding means of

reconciling development activities with the conservation of fish and wildlife in their habitat. Mitigation encompasses a wide range of activities, including measures to avoid adverse impacts to wildlife, measures to minimize impacts that cannot practically be avoided, and measures to offset or compensate for those that remain.

The Service generally plays one of two roles with respect to mitigation. In one it recommends to other agencies the mitigation measures that contribute to the achievement of priority conservation goals pursuant to a variety of statutory authorities. Examples are its recommendations pursuant to the Fish and Wildlife Coordination Act or the National Environmental Policy Act, NEPA.

In other cases, the Service functions as a regulatory authority and requires mitigation measures of its permittees under various statutes that it administers. For example, permits issued under Section 10 of the Endangered Species Act fortake of listed species resulting from otherwise lawful development activities require applicants to minimize and mitigate the impacts of their projects to the maximum extent practicable. That is the statutory standard.

Mitigation is not a new responsibility for the Service. The Service has been authorized by Congress to recommend measures to mitigate the impact of water resource development

projects since the Fish and Wildlife Coordination Act of 1934, more than 80 years ago. Decades of experience with mitigation under the Coordination Act, NEPA, and other laws led the Service to formulate a general mitigation policy in 1981.

Recently, the Service has proposed two major policy documents relating to mitigation. The first, published last March, is a comprehensive revision of its 1981 general mitigation policy. The second, published in early September, is a stepdown policy specific to compensatory mitigation under the Endangered Species Act. Both were published in the Federal Register for public review and comment.

With respect to the revised general mitigation policy, the Service is now evaluating comments received. With respect to the ESA compensatory mitigation policy, the comment period will remain open through October 17.

The Service's two recent policy proposals were informed by its own practical experience and the evolution of mitigation science and policy since 1981. The goal of both policy proposals is to make mitigation recommendations and requirements more predictable, consistent, transparent, and effective. Neither policy proposal represents a radical departure from prior practice.

Several key principles guide both proposed policies. They reaffirm the importance of the longstanding mitigation hierarchy

in which practicable measures to avoid impacts are taken first, followed by measures to minimize those impacts that cannot practically be avoided, and finally measures to compensate for remaining impacts, if any.

They emphasize the benefits of compensatory mitigation being done in advance of impacts. The proposed policies urge a broader look at where in the relevant landscape compensatory mitigation can have the greatest benefit to the affected resource, broadening the frame beyond the impact site.

Recognizing that there are a variety of mechanisms for compensatory mitigation, including permittee of responsible mitigation, conservation banks, in-lieu fee programs, and habitat exchanges, the proposed policies make clear that, regardless of the mechanism chosen, equivalent standards must be applied, creating a level playing field where the market-based mechanisms can flourish.

Finally, the proposed policies set a goal of improving or, at a minimum, maintaining the current status of important, scarce, or sensitive resources as allowed by applicable authority and consistent with the responsibilities of action proponents.

It is vitally important that we get the greatest conservation value for each mitigation dollar expended. The proposed policies are intended to improve the effectiveness of

mitigation investments, while at the same time improving the consistency, predictability, and transparency of mitigation decisions, and providing opportunity for market-based mitigation mechanisms to achieve their full potential.

Thank you for this opportunity to testify on the Service's proposed mitigation policies. We especially appreciate the opportunity to hear and discuss your interest in them. I would be glad to answer any questions you may have. Thank you.

[The prepared statement of Mr. Bean follows:]

Senator Sullivan. Thank you, Mr. Bean. I am going to start with some questions just basically on some of the topics that I mentioned in my opening statement, and the one is the issue of delay.

Do you think it is in the interest of the United States to have, it takes, on average, six years to permit a bridge, to get the Federal permitting requirements to permit a bridge?

Mr. Bean. No, sir. I think delay is a genuine problem, and indeed it is a problem that our proposals are intended to address.

Senator Sullivan. I was going to give you a rundown of some of the delays. They're outrageous, right? Fourteen years to permit a runway; 20 years to permit a goldmine; 7 years to get permission to drill one exploration in 100 feet of water. I mean, this is the sound of the economic decline of the Country, in my view.

So I am not going to run through those because you already stated that you don't disagree that that is a problem, so thank you for that.

Let me speak to what the Corps, another Federal agency, has said about your proposed regs, your proposed guidance. This is the Corps of Engineers. Knows a lot about projects; knows a lot about protecting the environment; knows a lot about, unfortunately, projects that take too long. This is their

submitted comments on your proposed regulation: "Our experience is that the Fish and Wildlife staff are extraordinarily busy, to the point where handling existing requirements in a timely manner can be challenging." Just what you got right now.

"Therefore, requiring Fish and Wildlife staff to take the lead," and that is what many people think you are trying to do here, take the lead, "in these types of determinations may only exacerbate the problem."

Again, this is your fellow brother-sister agency essentially saying this is going to create more delays. "We believe that it might be more efficient and effective for Fish and Wildlife staff to simply review materials for acceptability and consistency with the policy recommending any needed changes." So your traditional role.

So other Federal agencies in the Obama Administration are worried that this rule is going to actually require more delays and have you guys take on too much work. What do you say in response to the Corps of Engineers, that knows a lot about these issues?

Mr. Bean. Yes, the Corps does, and we have learned a good deal about mitigation from the Corps' own experience. Our view is that we believe, through our proposals, that we can be more efficient, more effective by being more transparent, more --

Senator Sullivan. So you think having another layer of

Federal permitting requirements is going to make it more efficient to get projects done? The Corps of Engineers doesn't believe that. They are trying to be polite, but it is very clear that they don't believe that.

Mr. Bean. We are not creating another layer of review.

Senator Sullivan. You are not?

Mr. Bean. No, we are not.

Senator Sullivan. Explain how you are not creating another layer of review.

Mr. Bean. Well, when there is an existing requirement for input from the Fish and Wildlife Service to the Corps, for example, under its Clean Water Act authority, Section 404(m), I believe it is, gives the Fish and Wildlife Service the authority and, indeed, the obligation to recommend to the Corps its views with respect to mitigation.

Senator Sullivan. Why do you think the Corps submitted these comments? It is pretty extraordinary, right? They obviously work with you guys closely. They don't seem to be fans of your policy. Why do you think they submitted and know that you are already having a hard time keeping up with permitting projects on a timely basis right now? They are clearly indicating that this is going to make that worse. Why do you think they submitted those comments?

Mr. Bean. Well, our view is that this will not make that

matter worse; it will make it better.

Senator Sullivan. Okay, they disagree.

Mr. Bean. They may disagree, but that is for them to say

Senator Sullivan. So you can you commit to me that this is not going to cause any additional layer of bureaucracy and any additional delay on these critical, critical economic projects that our Country needs so desperately? We are not growing our economy, and a lot of the reason is it takes forever to permit anything. Can you commit to me that that is not going to happen with this new proposed regulation?

Mr. Bean. I believe it will not happen. I know that it is the intent to keep that from happening, and I believe it will be the case that we will be more efficient and more effective with these measures than we are today.

Senator Sullivan. Another issue that I have a lot of concerns about is just the legal authority to where you are going on a number of your policy calls. The first and foremost is in the President's memo, the no net loss net gain policy. That is a pretty big policy call, wouldn't you say?

Mr. Bean. It is an important measure, but I think it has perhaps been misunderstood. I can give you an example from Senator Inhofe's State. Oklahoma and four other States together put together a range-wide conservation strategy for the Lesser Prairie-Chicken, and that is basically a mitigation program, and

as a key part of that program which functions by generating credits from activities that benefit that species, then making those credits available to offset impacts from oil and gas and other activities. What the States creatively have done is to provide that some portion of the credits generated will never be used to offset impacts, and thus, programmatically, they will achieve a net benefit, a net conservation benefit.

Senator Sullivan. Okay, well, I am going to get back to that because that is a big policy call; it is a role for the Congress to make that call. And when I follow up, I want to be respectful to the other members here, but I don't believe that is laid out in any statute, any statute by which you get your authority, and that is a policy call that should be made by the Congress of the United States, not by a Federal agency that doesn't have that authority.

Senator Whitehouse.

Senator Whitehouse. Thanks, Chairman.

Welcome, Director Bean. I appreciate you being here.

Let's pick up on the no net loss policy. That is kind of a baseline to inform your efforts. Tell us in simple terms what it means and tell us, in simple terms, whether it is a novelty under this new guidance.

Mr. Bean. It is not a novelty in general because the no net loss notion was first floated and embraced by President

George H.W. Bush in 1988, who articulated that as his goal for mitigation under the Clean Water Act, and it has become established as the mitigation goal for the Clean Water Act in the ensuing 30 years. The Fish and Wildlife Service, in its 1981 policy, has a similar no net loss goal for important resources.

Senator Whitehouse. That would be 35 years ago in that case.

Mr. Bean. Yes, indeed. So it is not novel. But what is, I think, important is some of the ways in which we can accomplish that goal. I tried to give the example of Lesser Prairie-Chicken as an illustration of how sometimes it is possible to do that relatively creatively and somewhat easily.

Senator Whitehouse. The concern that Senator Sullivan has for unnecessary delays and problems and bureaucracy, I think, is a very legitimate concern and I hope that the Service will take that to heart in the way it implements the new policy or the new guidance.

Mr. Bean. Yes, sir. Let me just say that we were very much aware of the delays of the sort the Chairman described when we set out in this Administration to authorize various wind and solar projects on public lands in the west, and we were able to approve many of those projects relatively quickly, certainly by comparison to the statistics the Chairman gave. We did so in

large measure by early coordination amongst several Federal agencies, Federal State and sometimes local agencies, all of whom have permitting responsibilities of one sort or another, and we found that by coordinating those efforts early on we could achieve some real efficiencies and time-savings.

Senator Whitehouse. For what it is worth, it is in a different context, but we deployed very coordinated permitting in our Federal waters and, as a result, were the first State in the Country to be able to build offshore wind. We shot by both Massachusetts and Delaware and other States because we had done a good job of coordinating the permitting into a much more convenient and singular process, and the private sector folks who invested in and built the offshore wind program are huge fans of that coordinated permitting. Again, it is a different area, but I think the process savings were evident in that as well.

One other point. One of the chemical consequences of amping up the CO2 levels in our atmosphere to 400 parts per million and above has been the chemical reaction of the oceans, which is to acidify. They are measurably acidifying more rapidly than any time in human history that we can find. And that will have considerable effects on ocean creatures of various kinds, whether it is the terrapod that is the base of the food chain in Senator Sullivan's side of the world or the

corals that are so important to Florida's economy, or the clams and oysters that Rhode Island grows so effectively.

Are you looking at the impact of ocean acidification on species as a question worth considering under the Endangered Species Act authorities?

Mr. Bean. Certainly, sir, it is a serious problem, apparently one that is growing in significance. We are looking at it, although I would note that the National Oceanic Atmospheric Administration has primary jurisdiction over marine creatures. The Fish and Wildlife Service has relatively limited authority over marine creatures, so it is primarily NOAA's lead on this issue. But we certainly are aware of the problem and recognize that it is a problem, and when it does affect species or other resources for which we are responsible, we need to take it into account as part of our overall science-based analysis of the problem and its solutions.

Senator Whitehouse. And, in any event, when you are looking at a potentially multi-year plan like the Prairie-Chicken plan, you have to take the known facts of what is happening in that creature's environment from climate change into account as part of the scientific baseline against which you make your determinations, correct?

Mr. Bean. Yes, we do need to do that, and the information to do that varies in quality, but where we have the information

that we can rely upon, we very definitely need to and do use that information.

Senator Whitehouse. Thank you.

Senator Sullivan. Chairman Inhofe.

Senator Inhofe. Thank you.

Both Chairman Sullivan and Ranking Member Whitehouse are very well respected attorneys and I am not a lawyer, so there might be a very simple answer to this, but your mitigation policy adopts a position that mitigation should take place in advance of project construction. Now, in Section 906 of WRDA, that was the 1986 WRDA, Congress authorized the Corps to do mitigation as a project is being built; and then again in 1999, Section 119 of Title 23, that is the Highway Federal Code, the Federal law limits which mitigation can happen in advance of construction, even if the mitigation is voluntary.

So the question I would have is by what authority would you have this mitigation in advance?

Mr. Bean. Well, let me begin by saying that the policy is a policy that does not purport to change statutory authority, so to the extent that there are statutory mandates or authorities that are in conflict with the policy, those prevail. What the policy articulates is where there is discretion as to the timing of mitigation, it is desirable, it is preferred to have it done in advance or contemporaneously with the impacting activities.

It has been our experience over the years that when activities that impact the environment are done first and mitigation comes later, that often leads to problems. The mitigation sometimes fails, for example; and thus there are temporal losses for which you can never fully recover. But the policy is one that is designed to influence where we have the discretion as to the timing, the choice, in favor of early mitigation activities.

Senator Inhofe. And would you say that when it is done in advance that lengthens or shortens the time for ultimate consideration?

Mr. Bean. It actually shortens it quite considerably. A good example of that are the various mitigation banks, of which there are now over 1,000, I believe, under the Clean Water Act, these make it possible for Corps of Engineers permittees to quickly get permits and quickly fulfill their mitigation responsibilities by buying credits from established successful banks.

Senator Inhofe. All right.

Mr. Chairman, I am going to reserve some time because I need a little more time on the second panel.

Senator Sullivan. Okay. Thank you, Mr. Chairman.

Senator Cardin.

Senator Cardin. Well, thank you, Mr. Chairman, for calling

this hearing on the update of the mitigation policies of the Fish and Wildlife.

Was 1981 the last time that we have looked at this? If my math is correct, the amount of developed acres in the lower 48 States since 1981 has increased by about 70 percent since that time, from about 70 million developed acres to about 120 million developed acres. That is a tremendous increase.

Our knowledge of climate change and the impact of climate change has changed so dramatically in the last 35 years. Our expertise on how to deal with the impact of climate change has changed very dramatically over the last 35 years.

I call to my colleagues' attention that on Tuesday we will have the ribbon cutting in Queen Anne's County, Maryland of the living shoreline. It will be the first cobblestone and sand shingle beach project in the United States, and the Maryland Department of Natural Resources worked together with engineers to research and design this innovative shoreline stabilization project which aims to protect the beach from erosion by serving as a natural barrier to currents and tides, and increase the presence of marsh grasses that provide habitat for wildlife.

We didn't know what that was all about 35 years ago. That technology just wasn't even thought to be possible.

We have Smith Island, a habitable island in the Chesapeake Bay that I think 35 years ago they thought there was no way that

we could preserve that land. Today people are still living on Smith Island, and I want to make sure they still have a place to live. And we have contributed to ways in which we can help the environment and help where people live.

So I guess my question is what is the objective here? What are we trying to do by these revisions and plans? We know that diversity of species is critically important to our environment and to our future. We know habitats have been destroyed because of climate change and development. What is the objective that Fish and Wildlife is attempting to do by these revisions?

Mr. Bean. Thank you, Senator. The objective is to have a mitigation program that is more effective, more efficient, more predictable, and more transparent. You are correct that the 1981 policy, since that policy was promulgated, we have learned a good deal. The changes you have cited are real. I think the most important aspect of this policy is its directive to make mitigation decisions in a landscape context, and what I mean by that is the following: in 1981 and for many years thereafter there was an almost reflexive view that mitigation should take place as close to the point of impact being mitigated as possible. Under this policy we are asking people to take a step back and look at where the mitigation can do the most good; and that is a big change because what it will mean is that we won't necessarily be tied to just mitigating at the point of impact if

we can find a better place for the resource to do that mitigation. And I think that is really the most important aspect of this policy change.

Senator Cardin. I was listening to the Chairman and his desire to try to balance our protection of the environment with the need for economic growth. You said something that I think is very, very important that we all should be able to agree on, and that is we need a transparent process and a predictable conclusion so that a developer or government knows what to expect as they try to determine whether they want to make an investment or how they are going to deal with the realities of the challenges that they have.

So I just really want to underscore that point about predictability and an open process. If I understand correctly, you are committed to the end result leading to predictable and understanding of what the requirements of mitigation are all about.

Mr. Bean. Yes, sir, that is the objective. Again, to cite the example of the Lesser Prairie-Chicken, the participants at that program know exactly what it will cost based upon the development activities that they are planning, the acreage they will affect, and whether that acreage is in the highest priority or the middle priority or the lowest priority habitats. They can do a quick calculation of what it will cost and decide

whether they want to proceed. So it is a very predictable scheme and it is the sort of thing that we would like to do more broadly.

Senator Cardin. Thank you.

Thank you, Mr. Chairman.

Senator Sullivan. Senator Boozman.

Senator Boozman. Thank you, Mr. Chairman.

And thank you for being with us today. The draft policy requires the Fish and Wildlife Service to use a valuation species for assessing required mitigation. More so, the draft policy requires the Service to identify habit values to support these evaluation species by designating them as high importance or high value. Habits of high importance are described as irreplaceable or difficult to replace.

Has the Service made everyone aware of what makes a habitat irreplaceable?

Mr. Bean. I think the Service has tried to convey clearly what that concept means. There are certain examples, and I would give you an example from the west, peat habitats, wetland habitats that accumulate peat at a rate of about one foot per 1,000 years. Impacts to those habitats are, for all practical purposes in terms of our lifetimes and our grandchildren's lifetimes, irreplaceable. So that is an example of several that I would try to convey.

Senator Boozman. And I appreciate the example, but have you got in writing someplace the principle of the example?

Mr. Bean. I think so, sir. I think that the proposed policy makes clear that irreplaceable resource are those for which we either lack the means of recreating or restoring them, or the means are so time-consumptive and resource-consumptive as to be impractical.

Senator Boozman. So how do you mitigate something that is irreplaceable?

Mr. Bean. Well, the Fish and Wildlife Service's view is that for an irreplaceable resource, the proper response is avoidance. Now, we recognize that that maybe our recommendation, but the agency to whom we make the recommendation may not take that recommendation, in which case we would then strongly urge that agency to take whatever minimization measures are practical.

Senator Boozman. So once you deem something irreplaceable, it is very difficult, then, to mitigate?

Mr. Bean. Yes, it is very difficult to mitigate, and the Service recommendation would be to avoid impacts.

Senator Boozman. I think it would be good if we knew very clearly since you can't mitigate it, I think it is important that you very clearly state what is deemed irreplaceable.

Mr. Bean. Sure. Let me emphasize one point. Mitigation

is a term that encompasses a range of activities, including avoidance, minimization, and compensatory actions. So when you say something can't be mitigated, I don't want to leave the impression that you can't do things to minimize impacts to it. That, too, is a form of mitigation.

Senator Boozman. Is there a possibility that irreplaceable could arbitrarily apply to other categories, such as minerals?

Mr. Bean. Such as what, sir?

Senator Boozman. Minerals.

Mr. Bean. Not under our policy. The resources to which our policies apply are wildlife and their habitats.

Senator Boozman. Okay. Very good.

Thank you, Mr. Chair.

Senator Sullivan. Thank you, Senator Boozman.

I am going to follow up just with a few questions. I think this topic on the legal authority, which is something that we have discussed a number of times in this Committee, which is a really important issue.

So, Secretary Bean, you agree that the Fish and Wildlife Service does not have just unfettered discretion to make policy calls, right, without the regulatory, statutory authority from the Congress, correct?

Mr. Bean. The Fish and Wildlife Service is required by law and does follow the statutory mandates applicable to it, yes,

sir.

Senator Sullivan. So even when you cited whether it is President Obama's memo or even you cited President George H. W. Bush, the two presidents don't have the ability to make statutory policy calls, do they?

Mr. Bean. Only Congress does that, sir.

Senator Sullivan. So that is clear. Only Congress does. Whether you are citing the 2015 memo or a former president, if they are acting without statutory authority, it doesn't matter what they say, correct, or what their memos say?

Mr. Bean. It doesn't matter, although statutory authority is often granted in rather general terms, leaving them quite a bit of discretion.

Senator Sullivan. Correct. But let me get back to this no net loss or net gain. That is a pretty major statutory policy call, isn't it?

Mr. Bean. It is certainly a major policy call, yes, sir

Senator Sullivan. So what I would like you to do, and if you can't do it here, of the 26 statutes that you cited, I would like to know exactly where that policy is laid out, in which statute. My team has looked and we haven't been able to find it at all, so my concern is, whether it is President Obama's 2015 memo, you are making policy, major, major policy calls that are the realm of the Congress. So right now, for example, even

Section 10 of the ESA, which authorizes incidental take permits, does not require a net gain or no net loss.

Again, we haven't been able to find that anywhere, so can you just tell me where? And don't give me 26 statutes. I want the statute and I want the language in the statute that says it is the policy of the United States to have no net gain or no net loss. I mean, I am sorry, net gain or no net loss.

Mr. Bean. What you will find in all of those statutes, I believe, just as you find in the Endangered Species Act --

Senator Sullivan. Endangered Species Act doesn't have it. The Migratory Bird Act doesn't even talk about mitigation.

Mr. Bean. That is correct. But the Endangered Species Act does, and it requires, in the case of Section 10 permits, that the impacts be mitigated and minimized to the maximum extent practical.

Senator Sullivan. Right. That is not no net gain. That is not no net loss. That is a very different. That is the standard, you are exactly correct.

Mr. Bean. That is the statutory standard.

Senator Sullivan. Correct. So how do you get from there to no net loss or gain? That is a very different standard.

Mr. Bean. If it is practicable, for example, to achieve no net loss, then that is entirely consistent with that goal.

Senator Sullivan. No, but you are saying that the net

policy is -- the President's memo says the new policy is no net loss or, indeed, net gain. And I am saying there is nowhere in any statute that we can find that lays out that policy. So you are making policy, whether it is the President or you. And you have no authority to do that. So what section of what statute gives you that --

Mr. Bean. If you are asking, sir, do those precise words appears in the statute?

Senator Sullivan. Correct.

Mr. Bean. The answer is no. Instead, what we have in all of those statutes, or nearly all of those statutes, is a directive and an authorization to mitigate.

Senator Sullivan. Correct.

Mr. Bean. And the Service --

Senator Sullivan. I don't disagree with that. Mitigate is very different than no net loss or a net gain. It is very different. That is what I am talking about. This is a major policy call that you are usurping the authority of the Congress on this issue.

Mr. Bean. Well, I don't think the Service views it that way, sir. I think the Service views that it has discretion authorized by Congress --

Senator Sullivan. It doesn't have discretion to make new policy when the policy is stated in the law.

Mr. Bean. It has the discretion to interpret what Congress has said, and that is what it has tried to do.

I would add one other thing which is important, which is both the Service policies and the President's memo make clear that they do not override statutory restrictions.

Senator Sullivan. Yes, but you can say that, but in practicality that is exactly what you are doing. You are essentially admitting it here. Mitigation under the ESA is very different. The standard you are citing, which I agree with, in the ESA is very different than a standard, a policy directive of no net loss or net gain. They are apples and oranges. And you are now saying that you have this authority, when we can't find it anywhere in any statute.

Mr. Bean. Well, let me point you to one other provision of the Endangered Species Act, Section 4(d), which authorizes the secretary to have such regulations as are necessary and advisable for the conservation of a threatened species. It is a broadly worded authorization. If the secretary were to find, as she did in the case of the Lesser Prairie-Chicken, that it was necessary and advisable for the conservation of that species to have a regulation that required participation in the State-generated plan which itself requires a net conservation gain, that is fully consistent with the language of the statute.

Senator Sullivan. I would just, and maybe you can do it

again, I don't want to belabor the point, but if you can give us the statutes and the language that lay out the statutory mandates on that policy, I would like to see it, because I don't think it exists.

And let me ask one other one with regard to the veto. You do have a provision in here that allows you to recommend no action. Now, it is very vague and I don't exactly understand what you are trying to do in the new regs, but if you are trying to say somehow that you have authority to veto projects, when you are not even the lead on these projects, that again is way, way beyond your statutory authority.

What are you trying to do with that no action provision in your new policy?

Mr. Bean. Our recommendations are just that, sir, recommendations. We have been very clear in this policy that where we have irreplaceable resources, our recommendation will be to avoid impacts. That is the appropriate thing for the Fish and Wildlife Service to do in light of the responsibility that this Congress has given it, to be vigilant, if you will, in the conservation of wildlife. That is our role.

The agencies to which we make those recommendations are free to make the ultimate decision, but they need to have that decision made based upon input from us as an agency charged by law with understanding in recommending what is best for

wildlife.

Senator Sullivan. Thank you.

Senator Whitehouse.

Senator Whitehouse. Director Bean, I don't, frankly, think you need my help in this exchange, but I do want for the record to say that where the statute says that it is the goal and task conferred by Congress on the Fish and Wildlife Service to see to it that, where there is harm to wildlife or habitat, that that harm shall be mitigated to the extent practicable. That is a pretty clear statement to me, but it is also very general language.

So, to me, for the Service to then say here is a standard that we believe would meet our responsibility to mitigate the harm to the species or habitat to the extent practicable, and that is that there is no net loss; that if you are going to harm it here and you bring back the same amount there, that meets our standard.

I think it is a question of trying to actually provide clarity to the original definition. So just from my perspective, I am completely comfortable that the no net loss standard is legitimate and clear regulatory implementation of a statute well within its terms, which is probably why presidents since President Bush have stood by it.

So I don't mean to belabor this point any further, but, at

least from my point of view, I wanted to have my opinion on this in the record. So thank you.

Senator Sullivan. Thank you, Senator Whitehouse.

Director Bean, thank you for your testimony. Much appreciated.

I am going to ask the second panel to come up to the dais here, and I want to welcome Mr. Joshua Kindred, who is the Environmental Counsel of the Alaska Oil and Gas Association; Mr. Ryan Yates, Chairman of the National Endangered Species Act Reform Coalition; and Mr. Jamison Colburn, Professor of Law at Penn State.

You will each have five minutes to deliver your oral statement, and a longer written statement will be included in the record.

Gentlemen, if you can please join us now. Thank you again for coming here. Sorry again about the delays in the hearing.

Mr. Kindred, I would like to begin with you. You have five minutes to deliver your statement. Thanks again.

STATEMENT OF JOSHUA M. KINDRED, ALASKA OIL & GAS ASSOCIATION

Mr. Kindred. Thank you, and good afternoon, Chairman Sullivan, Ranking Member Whitehouse and members of the Committee. My name is Josh Kindred. I serve as Environmental Counsel for the Alaska Oil and Gas Association, or AOGA. AOGA is a professional trade association whose mission is to foster long-term viability of the oil and gas industry to the benefit of all Alaskans. AOGA's members have a long history of proven environmentally responsible oil and gas exploration development in Alaska, and we appreciate the opportunity to provide testimony today.

In an effort to sort of avoid duplicative testimony, and I don't know if I will succeed in that, I will proceed directly to the substantive issues and concerns that AOGA has, and they fall effectively in three categories: first, as Senator Sullivan pointed out, an inability to reconcile achieving a net benefit or, at minimum, no net loss standard with the statutory sources available for the Service; second, issues and concerns regarding ambiguity and incompatibility; and, finally, how ill-suited the draft policy is for meaningful implementation.

Now, according to the draft policy, under the memorandum, all Federal mitigation policies shall clearly set a net benefit goal or, at minimum, a no net loss goal for natural resources wherever doing so is allowed by existing statutory authority and

is consistent with agency mission and established natural resources objectives. The fundamental problem with the Service's draft policy is that the primary sources of the Service's authority provide no basis for, and are irreconcilable with, the imposition of a net benefit or no net loss mitigation standard.

The fundamental flaw is particular evident when examined in the context of the Endangered Species Act. The ESA provides no authority for the Service to impose mitigation measures upon private applicants that will result in a net benefit or no net loss. For example, in the Section 7 consultation, the Service is charged with ensuring that any federally approved action that may affect listed species is not likely to jeopardize the continued existence of a listed species or destroy or adversely modify their critical habitat.

The Service prepares a biological opinion to explain it in document Section 7 determinations for actions that are not likely to jeopardize listed species or cause adverse modification of critical habitat, but that may, nonetheless, result in incidental take of a listed species and the Service will include an incidental take statement in the biological opinion.

Under these statutory and regulatory provisions, a non-jeopardizing action under ESA Section 7 may have some impact on

listed species and critical habitat, and may result in incidental take of listed species. The Service's authority in this context is simply to recommend measures that minimize the impact of the incidental take. These measures may only result in minor changes to the project. Neither the ESA nor its implementing regulations contain any authorization for the Service to require or recommend measures in a Section 7 consultation to ensure that the federal action results in a net gain or no net loss.

Any action taken by the Service to recommend such measures would exceed the Service's statutory authority under, and therefore violate, Section 7 of the Endangered Species Act.

Similarly, when the Service issues a permit under Section 10 of the ESA, it must ensure that the permit applicant will, to the maximum extent practicable, minimize and mitigate the impacts of the incidental take authorized by the permit. These statutory provisions also give no authority to the Service to impose measures that will result in a net gain or no net loss. Rather, the Service must ensure that the applicant minimizes and mitigates the impact on listed species to the maximum extent practicable.

Nowhere in the draft policy does the Service grapple with the fact that the scope of its authority under Section 7 and 10 of the ESA is irreconcilable with the net benefit or, at

minimum, no net loss standard policy adopted by the draft policy.

The draft policy explains that it is intended to clarify the role of mitigation in dangerous species conservation, but also notes that nothing herein replaces, supersedes, or substitutes for the ESA's implementing regulations.

Respectfully, the Service's acknowledgments of its obligations under the ESA, while correct, does little to address the fact that the draft policy nevertheless purports to apply a standard that is fundamentally incompatible with both the ESA and its implementing regulations. The Service's competing positions that it will both apply a policy to ESA actions that is contrary to the ESA and that it will respect the authority of the ESA when implementing the draft policy cannot be rationalized.

If Congress had intended to require that every impact to listed species be completely offset, it would have written such a requirement into the ESA. If the Service or the President desires such a result, Congress must first act by amending the ESA to provide the authority to the Executive Branch.

The draft policy's incompatibility with statutory authority is not unique to the ESA. Indeed, we are aware of no sources of statutory authority that authorizes the Service to require a net benefit mitigation for federal actions undertaken by citizen

applicants.

For example, under Section 101 of the Marine Mammal Protection Act, private citizens may obtain authorization to take small numbers of marine mammals incidental to lawful activity so long as the take has no more than a negligible impact on the affected marine mammal species or stock, and will not have an unmitigable adverse impact on the availability of such species or stock for taking for subsistence uses.

The Service has no authority under the MMPA to require recipients of incidental take authorizations to take actions to achieve a net benefit or no net loss to the affected marine mammal species or stock.

Similarly, under the National Environmental Policy Act, or NEPA, agencies are required to identify appropriate mitigation measures in the discussion of alternatives and in an environmental impact statement. Such measures are not required to achieve a net benefit or no net loss. Moreover, the Supreme Court has established that NEPA provides no substantive authority to Federal agencies to require mitigation, nor does it impose a substantive duty to develop a complete mitigation plan and an EIS.

Furthermore, one unintended consequence that the Service may not have contemplated is that the draft policy's articulation of a net conservation gain mandate might result in

regulatory takings. The U.S. Supreme Court has held that a regulatory taking occurs when the Government conditions approval of a land use permit on the dedication of property or money to the public unless a nexus or rough proportionality exists between the Government's requirement and the impacts of the proposed land use.

If the draft policy dictates that the Service will condition the approval of a land use permit on a net conservation gain standard, the amount of compensatory mitigation may lack the requisite nexus or rough proportionality to the impacts of the proposed land uses and thus result in a taking.

Finally, the draft ESA policy does not, but should, take into account the fact that the ESA plays a much different role in Alaska than the lower 48 States. In the last 10 years, there have been ESA listings of very abundant, presently healthy, and wide-ranging species in Alaska based on protected habitat conditions at the end of the century.

For example, the Arctic green seal population numbers in the millions and occupies a range far larger than any other listed species. As another example, almost 200,000 square miles of land in offshore waters in Alaska has been designated as polar bear critical habitat.

Much of the resource development in Alaska occurs through a

structured Federal process, while either Boehm or BLM in the oil and gas leasing process, that already take into account the avoidance, minimization, and mitigation of impacts to federally listed species. For example, Boehm has identified and conditioned offshore leases on related permits based in part on the presence of listed species.

In addition, almost every project in Alaska falls under the jurisdiction of the Army Corps of Engineers, which already applies stringent compensatory mitigation measures under the Clean Water Act. Accordingly, aside from being beyond the scope of authority granted by the ESA, additional action by the Service to require or recommend compensatory mitigation through the ESA would unnecessarily complicate and duplicate a Federal project approval system in Alaska that already accounts for and mitigates impacts to listed species and their habitat.

We understand that the President and the Department of Interior are motivated to broadly implement new policies to achieve net gains or no net loss of environmental values. But those policies, however well intended they may be, cannot be implemented without statutory authority. The draft policy is fundamentally flawed because it is entirely premised on achieving a standard that cannot be lawfully implemented by the Service under the Service's existing sources of statutory authority. Because of this overarching flaw, the draft policy

should be withdrawn and rewritten.

Thank you.

[The prepared statement of Mr. Kindred follows:]

Senator Sullivan. Thank you, Mr. Kindred.

Mr. Yates.

STATEMENT OF RYAN YATES, CHAIRMAN, NATIONAL ENDANGERED SPECIES
ACT REFORM COALITION

Mr. Yates. Chairman Sullivan, Ranking Member Whitehouse, members of the Subcommittee, my name is Ryan Yates. I currently serve as Chairman of the National Endangered Species Act Reform Coalition, also known as NESARC. I am pleased to provide testimony today on the Fish and Wildlife Service proposed revisions to its mitigation policy.

NESARC is the Country's oldest broad-based national coalition dedicated solely to achieving improvements to the Endangered Species Act and its implementation. NESARC's members represent a broad section of the American economy, which include agriculture, energy, real estate, forestry, water development, local governments, and other important industries. NESARC and its members are committed to promoting effective and balanced legislative and administrative improvements to the ESA.

The business concerns and activities of NESARC's members frequently require them to seek approval from Federal agencies for permitting and authorization decisions. Our members seek clear and consistent standards that are within the scope of the law and that will guide the implementation of mitigation for a particular permit or authorization.

NESARC's primary concern with the proposed mitigation policy and the Administration's other recent policies addressing

mitigation is that they exceed the scope of applicable statutory authority. While the Service proposed the mitigation policy in response to directives from the President and the Secretary of the Interior, these policies cannot supplant, expand, and allow deviations from the Service's existing authorities and responsibilities and obligations. These responsibilities and obligations are grants from Congress and cannot be created by executive action.

The ESA establishes specific standards and requirements for the scope and nature of any avoidance, minimization, and mitigation measures that may be imposed by the Service. Further, the ESA requires specific analysis and evaluation of impacts to listed species and designated critical habitat. The mitigation policy would impermissibly expand the scope of the ESA to rely upon landscape scale approaches, net conservation gains, and evaluation of species in a manner that is inconsistent with the requirements of ESA Section 7 and Section 10. These statutory requirements cannot be overridden or undermined by the application of a general agency policy.

The central goal of the mitigation policy is to effectuate a net conservation gain or, at minimum, no net loss in the status of affected resources. Under the ESA, there is no mandatory obligation to improve or maintain the current status of affected resources. On the contrary, the statute provides

specific standards in Section 7 and Section 10 regarding what may be required of a project proponent or a permit applicant.

For example, the ESA Section 7 requirements to avoid jeopardy or adverse modification and to minimize the impact of any take of listed species do not equate to the net conservation gain or no net loss standard articulated in the mitigation policy. There is no statutory authority to impose such requirements in the Section 7 consultation context.

A further problem posed by the Service's approach is that the term "conservation gain" is not easily defined and will likely evade consistent application in practice. Further complicating matters, if the Service uses this standard to require mitigation that is not commensurate with impacts to species or habitat, the agency's application of a net conservation gain requirement could result in a regulatory taking.

Lastly, the Service's landscape scale approach is overly expansive and fails to consider the role of States and local jurisdictions in species conservation. The Service cannot incorporate landscape scale mitigation into permitting decisions or authorizations without explicit statutory authority which requires such a broad ecological approach. For example, the Service cannot convert its limited scope of authority under Section 7 and Section 10, which focus on the impact of take of

the species in a particular area, to an authorization to expand the minimization component to a landscape scale.

Further, the agency's new definition of landscape and its reliance on a landscape scale approach are not conducive to consistent application and would undermine the role of States and other local jurisdictions in the management of species and habitat.

While NESARC recognizes that mitigation is a tool which can be required in the application and approval of certain Federal permits, the proposed mitigation policy is overly broad, lacks the requisite statutory authority for implementation. Unless revised and clarified, the mitigation policy will introduce uncertainty into project planning, impose significant additional costs, and delay or prevent the issuance of necessary permits and authorizations, and ultimately reduce incentives for participation in efforts that would conserve species and their habitat.

Senator, thank you again for the opportunity to testify. I am happy to answer any questions you may have.

[The prepared statement of Mr. Yates follows:]

Senator Sullivan. Great. Thank you very much, Mr. Yates.

Professor Colburn.

STATEMENT OF JAMISON COLBURN, PROFESSOR OF LAW, PENN STATE
UNIVERSITY

Mr. Colburn. I would like to thank Chairman Sullivan and Ranking Member Whitehouse, as well as the rest of the Committee, for the opportunity to testify today. It is an honor and a privilege to be here with you. My name is Jamie Colburn. I am a Professor of Law at Penn State. For the last 15 years I have conducted research on policies like this one and their importance and significance in our legal system.

Before I left practice, I went into teaching full-time. I spent two years as assistant regional counsel for U.S. EPA, and I am here today to talk about the breadth of this policy and the challenge created by the many different statutory authorities the Fish and Wildlife Service has to discharge.

I want to highlight a couple general points before I delve into specifics.

First, I think it is important to point out that this is guidance to subordinate agency personnel; it is not binding on anybody outside of the agency. Certainly not binding on the Federal courts, and it is immediately repealable by executive action if a subsequent presidential administration would choose to do so.

I think in citing 11 different Federal statutes at the outset of the policy proposal, the agency tipped its hand, so to

speak, about the scope of its challenge. The Fish and Wildlife Service is often called upon to enforce a very specific statutory standard, which is the case with Endangered Species Act Section 10, maximum extent practicable determinations, but they are also called upon in many contexts to offer recommendations that really don't have any force or effect at all, they are just the recommendation of an expert agency.

And in the 15 years that I have been working on Endangered Species Act NEPA issues, I have seen the scope of this practice of mitigation expand to an extreme degree, and it is my belief that what the agency was trying to do in offering a policy to its subordinates is to bring some coherent predictability and some transparency to mitigation at a broader scale. And, if I may, I would just like to focus on a couple of specifics both from the Endangered Species Act and the NEPA context.

When the agency is offering a specific interpretation of a statutory standard, as, for example, with the Endangered Species Act, it is often in everybody's best interest, certainly with something as complicated as mitigation for purposes of a habitat conservation plan, that agency personnel know all of the factors that they have to balance, and only the factors that they have to balance. And I say that it is in everybody's best interest because of how litigious many of these issues have become.

If agency personnel have to reinvent the wheel every time

they make a necessarily discretionary judgment like this, it is going to compound the delay; it is going to reduce the transparency of those determinations to permittees in particular. And that is just the case with respect to HCP and other determinations that the Service has to make. This compounds itself through Section 7 consultations as well.

A policy of this kind, though, which treats mitigation in full, isn't just aiming at the Fish and Wildlife Service's specific duties to interpret statutory standards and enforce them against individual parties; it also encompasses more passive actions that the Fish and Wildlife Service takes as a recommender of good practices. And that brings me to what mitigation means in the NEPA context.

NEPA Section 102(2)(C) specifically requires action agencies that are preparing its detailed statements to seek the input, really the expertise, of any agency with Federal jurisdiction involved with the action, that might be germane to the action; and Fish and Wildlife Service, having the broad remit that it does, almost more often than any other agency, finds itself called upon to offer its recommendations with regard to fish, wildlife, and plant resources.

And in that context, this is an entirely passive act by the Fish and Wildlife Service. They don't have any regulatory authority at all; what they are attempting to do is offer an

expert opinion. But it has a lot of consequences for the action agency, and oftentimes for the permittee behind that action agency, if the Fish and Wildlife Service doesn't understand the scope, the Fish and Wildlife Service personnel involved in that case don't understand the scope of what mitigation should or ought to entail according to broader agency priorities.

And as I lay out in my written testimony, this is a threshold problem both for whether or not to prepare a detailed statement under Section 102(2)(C) of NEPA, but it is also a problem that arises a little bit further down the road when agencies are preparing what are known as Findings Of No Significant Impact, or FONSI -- environmental lawyers love acronyms -- and the FONSI itself is predicated on the permittee or the action agency taking some kind of mitigating action.

These mitigated FONSI have grown in prevalence and they have also grown in importance, which means that they often wind up in Federal court. They often become the subject of Federal court scrutiny. A policy of this kind, which communicates to other action agencies like the Corps of Engineers, as the Chairman was referencing, and their permittees what the Fish and Wildlife Service's priorities will be when it comes to a mitigation opinion under a Section 102(2)(C) detailed statement or a mitigation opinion in the mitigated FONSI context I think would have the potential actually to speed permitting processes

along. And I think that is why you see Federal courts encouraging agencies to maintain policies like this.

In my view, you have gotten clear signals from our Supreme Court last year, in the Perez case, and from the D.C. Circuit in a variety of cases, where they want to interpret the Administrative Procedure Act really to encourage these kinds of policies in order to increase the transparency and in order to ensure that subordinate agency personnel are responding to broader priorities that the agency has and that the Administration has, and that everybody knows how they will be doing so ahead of time. I think that is something that you can find from a number of lower Federal court opinions, as well as from the Supreme Court.

I see my time is about up, and I welcome any questions you may have. Thank you again.

[The prepared statement of Mr. Colburn follows:]

Senator Sullivan. Great. Well, I again want to thank the panelists. You guys obviously are very knowledgeable on these issues, and you have thought about them, studied them in practice, been involved with them, so I appreciate you coming here and helping enlighten us.

Let me just kind of start with the basics.

We would all agree, and I will just ask each of you, that a permitting delay, and in Alaska, where it is notorious, for years and years and years of delays for important economic projects, but it is also throughout the Country, would each of you agree that that is not in the national interest, nor is it what the statutes envisioned when they were passed, whether it was Endangered Species or any other provision? Would you agree, Mr. Kindred?

Mr. Kindred. I would agree. And it is difficult, and I don't know if it is just the cynic in me, to imagine a scenario where adding another layer of policies is not going to result --

Senator Sullivan. Well, I am going to get to that.

Mr. Yates, would you agree? The statutes weren't designed for eight-year delays on a project, correct?

Mr. Yates. Senator, I agree.

Senator Sullivan. Professor Colburn?

Mr. Colburn. Absolutely, Mr. Chair.

Senator Sullivan. So let me ask, and I am going to get to

the issue. You guys were very, all three of you very articulate on the existing authorities, which, again, I believe are very dubious, and I know at least two of the witnesses also believe that. But we had Mr. Bean here essentially saying, hey, don't worry, this is not an additional level of bureaucracy, this is not going to delay. Do you even remotely think that that is going to be the case? I am not saying he was being deceitful, but is there any conceivable way that a new issuance of this kind of guidance is going to make more efficient and timely the permitting decisions by the Federal agencies?

Mr. Kindred?

Mr. Kindred. I don't see how it could. I mean, just realistically.

Senator Sullivan. Can you give just your experience and examples?

Mr. Kindred. Well, Alaska is unique in the sense that, and Mr. Bean referenced this idea, well, the Corps works well because they have these mitigation banks that afford the opportunity to put some this up front. There are no mitigation banks currently in Alaska. The fact of the matter is that right now there is a great deal of uncertainty just to get Corps-approved mitigation permits. So I find it highly unlikely, given how much of Alaska land is wetlands and critical habitat, how adding this additional layer won't just result in greater

delays and greater uncertainty.

Senator Sullivan. Mr. Yates, do you see this as Mr. Bean testified, that this is not an additional layer of bureaucracy; that this is going to speed things up, it is not going to delay? In your experience, do you think he is correct?

Mr. Yates. I would have to disagree. In my experience, I have yet to find a scenario where additional layers of bureaucracy and requirements from a Federal action agency have increased the efficiency and reduced time and delays and costs related to a project being permitted and authorized.

Senator Sullivan. How about this issue of the Corps of Engineers, which obviously works very closely with Fish and Wildlife, coming out and essentially saying this is going to tax you guys too much; you are already overburdened? I mean, the sister agency is coming out and saying that this is going to delay projects.

Have you ever seen that before? To me, that is relatively remarkable that the Corps is essentially saying you don't need this and it is going to delay things. The Corps of Engineers. This is not a senator; this is a fellow agency. Have you ever seen anything like that in your practice, Mr. Yates, where the Corps has come out and said don't do it, it is a bad idea, or Mr. Kindred?

Mr. Yates. I think it is very telling when you have a

sister agency or a land management agency criticize this type of a policy or rulemaking. I think their expertise and their thoughts should be weighed heavily by the authorizing committee here in Congress through this process of scrutinizing this type of Federal regulatory action.

Senator Sullivan. Mr. Kindred?

Mr. Kindred. I agree. And I think probably another aspect of this is if I was working with the Corps, I would be concerned about increasing the likelihood of litigation.

Senator Sullivan. Yes.

Mr. Kindred. If you have the Corps coming to one conclusion on mitigation and a recommendation from the Fish and Wildlife Service that is adverse to that, how is that reconciled and how does that result in greater litigation?

Senator Sullivan. Professor Colburn, let me ask you. You had some very insightful testimony as well, and I appreciated that. Your two colleagues there on the panel were very dubious, as am I, about the legal authority that the Fish and Wildlife Service has with regard to promulgating this policy when it clearly seems to be expanding what is in the statutory provision. You mentioned that it is just guidance, but, as you know, guidance actually matters; it matters in litigation, it matters in what these Federal agencies are empowered to do. We have had examples, the CD5 case in Alaska that delayed a really

important project for the State and the Country by well over three years where, at the very end, the Corps was going to approve a bridge permit. At the very end, the Fish and Wildlife Service put a letter into the file and it delayed it for three years.

So Mr. Bean was very nice about saying, hey, I am just giving advice, they don't have to listen, but they have power, whether it is guidance, whether it is their objection letters that can delay projects for years. I have seen this.

So can you talk to that a little bit? You ended your testimony with something that is really important. What can we do to make sure that we don't have Federal agencies that are delaying and delaying and delaying projects?

In my experience, most Federal agencies don't want to delay. To be perfectly honest, some do. I think the Secretary of Interior and the rest of the leadership in the Department of Interior wanted to kill that Shell project off the coast of Alaska. That is why it took seven years, \$7 billion to get permission to drill one exploration well in 100 feet of water. Outrageous. They wanted to kill it. They were successful. But I don't think that is the cast most of the time.

What can we do, in your experience, and you have a lot, to help not cut corners, we all want to protect the environment, but not to have a 20-year permitting process for a mine in

Alaska?

Mr. Colburn. Mr. Chairman, I think that is the question here, and I think it is the question that the agency is trying to address; and it is obvious that opinions vary about how they did.

Senator Sullivan. But do you think that the additional guidance is not going to add to the delay, like the two other witnesses?

Mr. Colburn. I think I would answer your question by pointing out that the delays in the examples you cite from Alaska are meeting at a single location, but they are beginning from many different sources, and if I were a general purpose agency like the Corps of Engineers, which under Section 404 of the Clean Water Act is empowered to just make the ultimate determination on a permit, along with EPA, the reason I would take Fish and Wildlife Service's opinions so seriously is because they have the biologists necessary to make the best call, thumbs up or thumbs down, on a lot of the trust resources. And if they ignore what the Fish and Wildlife Service says, they do at their peril because the Clean Water Act is, as you know, Mr. Chairman, is so good at empowering parties outside of the Government to sue in the event they disagree with any permitting decision by the Corps.

So if we were to grease the skid, so to speak, at the early

phases and take mitigation not so seriously, when it is actually a statutory factor that has to be considered and has to be weighed co-equal with the other factors, I think it would be speed that we are borrowing temporarily for a lot of these cases. It would ultimately contribute to legal uncertainty in one form or another.

Now, the other thing that I just wanted to respond to very quickly, what could Congress do to fix this, I think one of the sources of delay within the Fish and Wildlife Service is the fact that they have so many responsibilities and so little personnel to discharge them. And I know you have a thousand people a day asking you for money, but it strikes me that, in my experience with complex permitting problems like the one you referenced, the overwhelming culprit is the fact that there just isn't personnel and there just aren't resources needed to answer some of these really technical questions.

Senator Sullivan. Great. Thank you, that is excellent testimony.

Senator Whitehouse. So, in a nutshell, agency guidance is capable of speeding up the administrative process by making it clearer to the applicants and clearer to the participants what is expected from the get-go.

Mr. Colburn. I agree, Senator Whitehouse. I think that especially for the Fish and Wildlife Service, an agency that is

so often in the business of providing an expert opinion to another agency whose only process delays add to theirs, guidance of this kind, which is, after all, aimed only at subordinate Fish and Wildlife Service personnel, actually has a realistic chance of speeding things up.

Senator Whitehouse. Mr. Kindred, to use a colloquial phrase, Alaska is kind of getting whomped by climate change, compared to more southern locations. Your concern about how climate change gets factored into the Fish and Wildlife policies is that there not be unwarranted reliance on predictive models and that there not be speculation, and that there should be a documented cause and effect relationship based on predictable, reliable data that connects the data that is out there to the problem before the agency. And your concern is that if that is not there, you risk making an error.

Mr. Kindred. That is part of my concern, yes.

Senator Whitehouse. Now, what is the default proposition for you?

Mr. Kindred. I guess I would like a little more clarity in the question.

Senator Whitehouse. Well, you may get it wrong if you look at climate change data and try to use that data to predict exactly what the influence is going to be over time.

Mr. Kindred. Right.

Senator Whitehouse. And that is your concern, that you may get it wrong. But if you ignore climate change data, then you know you are going to be wrong, right? So the problem that I have is if you are concerned that the climate change data isn't secure enough for the agency to make a decision on, to me, that leaves you with the default proposition that you just ignore climate change. And particularly for somebody coming from Alaska, that seems like a really implausible thing to ask the U.S. Fish and Wildlife Service to do based on the science.

So my question is what is the default proposition here? What should be the kind of baseline from which the Fish and Wildlife Service makes these decisions that involve plugging climate change data into their determination?

Mr. Kindred. I think that may be an oversimplification of my position on this, and it is important to distinguish between what NMFS did in their listing of the bearded and ring seals, where they contradicted themselves and went from saying that century-long modeling wasn't reliable to it was with the polar bear. And the polar bear species, I think, is a great example of some of the flaws with Fish and Wildlife Service's approach. I don't think any reasonable person can disagree that although polar bears are currently healthy and abundant, it is difficult to look at climate change modeling, no matter how much weight you want to give it, and not come to the conclusion that sooner

or later the species will be imperiled.

But part of the problem with Fish and Wildlife Service's approach to this is they came out and they, one, acknowledged, even in listing the polar bear species as endangered, they lacked any authority to do anything about the only threat to the species, which is climate change.

More to my point, I guess my concern as an Alaskan is that Fish and Wildlife Service also acknowledges that there is nothing that is happening locally, whether it be industry or --

Senator Whitehouse. Isn't it appropriate for the Fish and Wildlife Service to take into account outside factors that are putting pressure on a particular species and evaluating what additional pressures it can take? I mean, that is a known that they should put into their calculus, which is, based on our information, there is going to be a real wipeout in the polar bear population coming up and, therefore, the population that is likely to remain is what we have to work with, and that is the data that we -- that doesn't seem to be unreasonable at all.

Mr. Kindred. That is not unreasonable, but when you look at what the effect is, the way people are being asked to pay a price for climate change as it relates to polar bear species, our Alaskans, have very little to do about the climate change threat.

Now, if the Fish and Wildlife Service would have come out

and said, you know what, we look at States with high populations like California and we are going to regulate them and make them pay the price because they are actually far more responsible for the threat on polar bears than Alaska, I may come to a --

Senator Whitehouse. But back to the question of climate change, your recommendation to the Fish and Wildlife Service would be get the best data you can, make the most reliable determination you can, not throw up your hands and do something you know is wrong unless there is a level of certainty.

Mr. Kindred. To be perfectly candid, my recommendation to the Fish and Wildlife Service as they were going through this process was to announce that we are going to impose no regulations on Alaska. Not because it is just advantageous to me as an Alaskan, but because it sends the message to people --

Senator Whitehouse. That would make Senator Sullivan so happy.

Mr. Kindred. Well, no, but it sends the --

Senator Whitehouse. I think we could end all these hearings if there could just be an Alaska exemption. He'd come home happy.

Mr. Kindred. But from an environmental standpoint, I think it is more important to announce to the citizens of the United States that simply listing a species, knowing that you can't do anything to protect it, gives people the false sense that it is

being protected. And that was my biggest problem. If they would have come out and said this is a problem for everybody, the citizens of the United States, the citizens of the world, and if they don't take action, then we are going to have problems with the polar bear species. But to give people the false sense of security and not have them acknowledge their culpability in it, to me, is wrong.

Senator Whitehouse. Understood. But to put it simply, it is not your recommendation for the Fish and Wildlife Service to ignore climate change impacts.

Mr. Kindred. It isn't.

Senator Whitehouse. Thank you. My time is over

Senator Sullivan. Chairman Inhofe.

Senator Inhofe. Well, thank you. I am sorry I had to leave. I was kind of hoping this wouldn't devolve into a climate committee, but I suspected it might.

You know, you are oil and gas up in Alaska, right? And we are in my State of Oklahoma. And what I would like to get from you, Mr. Kindred, is how would the new policy impact my State insofar as oil and gas are considered? I have two other areas I will be asking about, too, but thoughts on that?

Mr. Kindred. Well, I apologize in advance; I don't know how intelligently I can speak about how this will affect Oklahoma only given that we have so many unique issues that

cause delays and increase costs and kill projects. I mean, I think to the extent that there are areas that are designated as critical habitat in Oklahoma, I think changing the policy and changing Fish and Wildlife Service's approach from effectively working and creating reasonable mitigation policies to this no net loss or net gain can only result in adverse impacts to industry.

Now, there is a separate question, academically, if that is okay, but from just oil and gas's perspective, it is hard for me to believe that this is going to be anything but increased costs, increased delays, and increased uncertainty.

Senator Inhofe. I agree with that.

Mr. Yates, you are also involved with the Farm Bureau, is that correct?

Mr. Yates. Yes, sir.

Senator Inhofe. And do you know Buchanan in Oklahoma?

Mr. Yates. Yes, sir.

Senator Inhofe. He talks about the things that affect adversely that farmers are concerned about, Tom Buchanan, not just in the State of Oklahoma, but throughout America, that it is the overregulation of the EPA. Then they single out as number one within those regulations, WOTUS. That is the number one concern that he has. And the second thing is some of the endangered species and what is happening there.

Have you already addressed how this would affect farmers in terms of this new mitigation policy?

Mr. Yates. No, but I will try to expand on that. I think generally speaking, from the ag sector's perspective, be it if we are talking from additional regulatory requirements coming from the EPA concern to WOTUS, again, I think we have had a consistent dialogue with this Committee about our concerns about that. But I think, generally speaking, we are trying to evaluate what these regulatory changes mean for ag producers not just in Oklahoma, but across the Country. Generally speaking, farmers are concerned with mitigation requirements which have ultimately led to the elimination of all ag use on these mitigated lands, and I think that is the general concern from the ag sector, is the reduction in use of these private lands for agriculture.

And while this is a problem for agriculture in general, I would say especially a problem that we are seeing impact new beginning and young farmers and ranchers that are trying to get started in the industry.

Lastly, I think the concern about loss of ag infrastructure when mitigation takes land out of production is continuing to provide concern, the lack of certainty for producers. This is what we hear that is keeping people up at night.

So, again, be it from the EPA, be it from proposals like

the mitigation policy, these new requirements that are being created from these Executive Branch agencies are troubling, and I think in my testimony we have had a conversation about this already, but I think the scope in which the Fish and Wildlife Service mitigation policy expands the regulatory reach of that agency as it pertains to landscape level conservation and these new broad authorities that are largely undefined in statute is troubling, and I think that is a role for you, Mr. Chairman, and this Committee.

The Fish and Wildlife Service should have come to you. They should have said, we have a problem, we are seeking, we think that additional mitigation would be helpful for the agency to protect species. And if that is their position, they need to come up with a legislative proposal and work with Congress to make those changes, and not go about it through executive fiat. I think that is the wrong approach and we have a lot of concern with that.

Senator Inhofe. Yes, we understand that. Also, my State has a lot of DOD activity there. We have, of course, highway projects; we have a lot of Corps activities.

But what effect, any one of the three of you, would this have in terms of our Department of Defense facilities? We have five major ones in the State. Any comments, any thoughts about that? Are they mainly exempt from this? And what areas are

they not? Are you conversant with that?

Mr. Yates. Unfortunately, I would be happy to get back to you with that question.

Senator Inhofe. Okay. Thank you.

Senator Sullivan. Well, thank you, Senator Inhofe.

I am going to wrap up with just a few final questions. Again, I want to thank the panelists. You have been outstanding witnesses.

Just so we are clear in terms of your testimony, Mr. Kindred, Mr. Yates, you don't think that the no net loss net benefit policy that has been promulgated in the President's 2015 memo and in these new regs, that that has a statutory basis for them to do that, is that correct?

Mr. Kindred. It does not.

Senator Sullivan. So they are exceeding their authority quite clearly, in your view.

Mr. Kindred. Yes, Senator.

Senator Sullivan. And you agree with that, Mr. Yates?

Mr. Yates. In our opinion, they have gone well beyond their authority.

Senator Sullivan. And, Professor Colburn, you disagree with that or you didn't have an opinion on that?

Mr. Colburn. I disagree, Mr. Chairman. I think that if you were looking for statutory authority, and because you are

dealing with very broad statutory authorities, the programs that they implement and that this policy touches are very broad. I would look at the purposes sections of those statutes.

Senator Sullivan. But you are not troubled that the 26 statutes that they cite, there is nothing like that in the language they cite?

Mr. Colburn. To be honest, Mr. Chairman, I think of NEPA Section 101, where it talks about the authority and the continuing responsibility of all agencies of the Federal Government. I think of the Endangered Species Act Section 7(a)(1) that says utilize the secretary, utilize all of your authorities in pursuit of the purposes of the Act. I think that is where the no net loss impetus is coming from.

Senator Sullivan. Just let just throw a final question. Senator Cardin had mentioned the goals of transparent, more predictable and timeliness in terms of permitting. I agree with that. And Senator Whitehouse talked about the importance of coordinating better among Federal agencies.

Do you think that this policy is going to advance those goals? Mr. Kindred?

I think it would represent the first time that a great deal was added to the regulatory rubric and it resulted in more transparency and more efficiency. It will be the first time it has ever happened, in my experience.

Senator Sullivan. So your answer is no?

Mr. Kindred. No.

Senator Sullivan. Okay.

Mr. Yates?

Mr. Yates. I will keep it simple. No, sir.

Senator Sullivan. Okay.

Professor Colburn?

Mr. Colburn. I think the 1981 policy creates its own uncertainties, so my answer would be I think it has a realistic chance of improving clarity and transparency.

Senator Sullivan. Well, thank you, gentlemen. Outstanding testimony. Very much appreciate you being here.

This hearing is adjourned.

[Whereupon, at 4:24 p.m. the committee was adjourned.]