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

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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.