

**Testimony before the U.S. Senate  
Committee on Energy and Natural Resources**

**Hearing to Examine the Presidential Memorandum on Mitigation**

March 15, 2016

Submitted by:  
Sara Longan, Executive Director  
Office of Project Management & Permitting  
Alaska Department of Natural Resources

Testimony on behalf of:  
The State of Alaska

**I. Introduction**

Chairwoman Murkowski, Ranking Member Cantwell, and honorable members of the Senate Committee on Energy and Natural Resources – My name is Sara Longan and I am the Executive Director of the Office of Project Management & Permitting within the Alaska Department of Natural Resources (AK DNR). On behalf of Governor Bill Walker, thank you for this opportunity to testify on the important topic of federal mitigation.

**II. Overview of Testimony**

The focus of today’s testimony is to identify a number of mutual mitigation interests the State of Alaska shares with the federal agencies participating in the recently issued Presidential Memorandum on Mitigation (the “Memo”). At the same time, we have significant concerns with regard to the implementation of the Memo and the resulting policies that may unnecessarily duplicate and excessively burden resource development opportunities in Alaska. I hope to address specific challenges and encourage our federal partners to think creatively and within their respective and existing authorities to improve the current mechanisms in place to avoid, minimize, and mitigate unavoidable impacts to resources. Collaboration among the agencies and open dialog with the public and suite of stakeholders is a must and should help foster a coordinated regulatory process that can be flexible and allow for responsible resource development, while creating more effective modes of mitigation.

1 – Statement of Joseph Nukapigak, Kuupik Corporation. Testimony given to Senate Committee on Energy and Natural Resources, et al, August 17, 2015  
2 – Status of Alaska Wetlands (Hall et. al., 1994) <http://www.fws.gov/wetlands/Documents/Status-of-Alaska-Wetlands.pdf>  
3 - Alaska Wetlands Initiative [http://water.epa.gov/grants\\_funding/wetlands/facts/upload/alaska.pdf](http://water.epa.gov/grants_funding/wetlands/facts/upload/alaska.pdf)  
4 – Governor Bill Walker letter to Secretary Jewell, December 22, 2014  
5 - National Petroleum Reserve-Alaska (NPR-A) Impact Grant Program <https://www.commerce.alaska.gov/web/dcra/GrantsSection/NPR-AlaskaImpactMitigationGrant.aspx>

### **III. Regulatory Mitigation Challenges Already Exist in Alaska**

It is concerning that the Memo is calling upon the federal agencies to achieve new mitigation goals when existing mitigation requirements already impose significant challenges to both regulators and developers in Alaska. The Clean Water Act section 404 mitigation program administered by the Army Corps of Engineers (the “Corps) and the Environmental Protection Agency has repeatedly been cited for its inefficient and sometimes impractical implementation in Alaska.

During a recent joint Senate field hearing held in Alaska, one Alaska Native Corporation representative referred to the 404 wetlands mitigation program as a “significant barrier” to Native Corporation projects where “six times the amount of mitigation” has been required to offset unavoidable project impacts, interestingly enough, from a proposed mitigation project.<sup>1</sup> The specific project cited was a spur road requested by the local community to be used to gain access to subsistence areas and local jobs. In this scenario, mitigation projects trigger additional mitigation requirements, propelling community developers into a seemingly endless convoluted regulatory process and significantly increasing mitigation costs. Furthermore, mitigation was accomplished by placing conservation easements on significant acres of native corporation lands; thereby, locking up those same acres for future regional and community development needs.<sup>1</sup>

Other resource development project applicants in Alaska have experienced challenges and delays in acquiring the 404 permit due to Clean Water Act mitigation requirements.

It has been long recognized that the “no net loss” policy is a particular concern in Alaska where 63% of the nation’s wetlands are found.<sup>2</sup> Alaska’s wetlands are predominantly pristine, which offers a tremendously small inventory of “threatened” or “previously disturbed” wetlands that would be eligible for mitigation as is currently required. In 1994, the Army Corps and EPA produced the “Alaska Wetlands Initiative Report” specifically noting Alaska’s unique challenges. The report concluded that a “practicable” and “flexible” regulatory program was essential in Alaska.<sup>3</sup> This report is referenced in the 2008 Mitigation Rule; however, there is room for improvement to show how the federal regulators are implementing their own advice by effectively making the 404 program in Alaska more practicable and flexible.

### **IV. The GMT-1 Experience: Existing Mitigation Provided by Industry**

Another emerging federal regulatory concern is taking many Alaskans by surprise. The Bureau of Land Management’s (BLM’s) evolving mitigation requirements to offset unavoidable impacts from development within the *National Petroleum Reserve-Alaska (NPR-A)* has been cited by Governor Bill Walker as being a “multi-layered bargaining regime”, which ultimately required mitigation fees in the sum of \$8 million dollars from Conoco Phillips Alaska, Inc. (“Conoco Phillips”) for the Greater Moose’s Tooth-1 (GMT-1) project.<sup>4</sup> For the past decade and longer, the

1 – Statement of Joseph Nukapigak, Kuupik Corporation. Testimony given to Senate Committee on Energy and Natural Resources, et al, August 17, 2015

2 – Status of Alaska Wetlands (Hall et. al., 1994) <http://www.fws.gov/wetlands/Documents/Status-of-Alaska-Wetlands.pdf>

3 - Alaska Wetlands Initiative [http://water.epa.gov/grants\\_funding/wetlands/facts/upload/alaska.pdf](http://water.epa.gov/grants_funding/wetlands/facts/upload/alaska.pdf)

4 – Governor Bill Walker letter to Secretary Jewell, December 22, 2014

5 - National Petroleum Reserve-Alaska (NPR-A) Impact Grant Program <https://www.commerce.alaska.gov/web/dcra/GrantsSection/NPR-AlaskaImpactMitigationGrant.aspx>

GMT-1 project area has been subject to multiple National Environmental Policy Act (NEPA) analyses and Integrated Activity Planning activities, resulting in numerous stipulations and lease mitigation measures. However, these federal restrictions are seemingly unrecognized by BLM as they implement additional mitigation requirements and attempt to require more compensatory funds from developers.

Conoco Phillips Alaska voluntarily provides significant mitigation support and payments to communities impacted by GMT-1. One significant contribution includes the supply of natural gas to the village of Nuiqsut, which is a much cleaner and cheaper alternative option to diesel-burning to generate heat and power. Multiple subsistence support programs, education and workforce development programs, emergency response assistance programs are funded by Conoco Phillips in order to fulfill the company's efforts in being a "good neighbor." A comprehensive list of community support programs and funding provided by Conoco to help mitigate impacts from GMT-1 and adjacent satellite development will be provided to the Committee and for the record.

It is imperative that new compensatory mitigation fees required by BLM or other federal agencies seeking to get into the business of "compensation" will not compete with the existing sources of voluntary monetary support offered to impacted Alaskan communities.

## **V. Avoid Duplication and Competition of Existing Funding Sources**

It appears the Memo provides no direction on how to avoid duplicating government funding already in place to help compensate for unavoidable impacts. The Memo fails to recognize the millions of dollars the oil & gas industry already provides to help mitigate social impacts. The oil & gas industry through the NPR-A Grant Program required by federal law has administered over \$150 million dollars to North Slope villages as a result from the NPR-A leasing activities that took place in 1999.<sup>5</sup>

Other industry funding sources exist and the federal agencies should fully understand any potential unintended consequences in the context of issuing the Memo, now requiring new and additional mitigation payments.

Industry representatives in Alaska are growing increasingly concerned with the exceeding cost associated with existing compensatory mitigation requirements. DNR shares this concern and now realize that with the advent of the Memo, new mitigation requirements have the potential to drive costs even higher running the serious risk of making once commercially feasible projects no longer economically viable.

1 – Statement of Joseph Nukapigak, Kuupik Corporation. Testimony given to Senate Committee on Energy and Natural Resources, et al, August 17, 2015

2 – Status of Alaska Wetlands (Hall et. al., 1994) <http://www.fws.gov/wetlands/Documents/Status-of-Alaska-Wetlands.pdf>

3 - Alaska Wetlands Initiative [http://water.epa.gov/grants\\_funding/wetlands/facts/upload/alaska.pdf](http://water.epa.gov/grants_funding/wetlands/facts/upload/alaska.pdf)

4 – Governor Bill Walker letter to Secretary Jewell, December 22, 2014

5 - National Petroleum Reserve-Alaska (NPR-A) Impact Grant Program <https://www.commerce.alaska.gov/web/dcra/GrantsSection/NPR-AlaskaImpactMitigationGrant.aspx>

## **VI. Transparency, Agency Collaboration and Public Involvement is a Must**

We want to recognize BLM AK Region's efforts to improve transparency as it relates to their policy setting and mitigation requirements for the GMT-1 project. Likewise, we have appreciated the Army Corps AK Region's leadership in working to collaborate more effectively with federal and state agencies and increase transparency while trying to make improvements to the Clean Water Act mitigation program. However, the State of Alaska is concerned that the Memo will now further complicate our efforts in Alaska to improve compensatory mitigation actions, which we view as being broken and in need of repair.

Due to the history of regulatory challenges surrounding existing federal mitigation requirements briefly summarized here, we view the Presidential Memo as a step in the wrong direction. We question the level of consultation the federal government undertook prior to its issuance. The same troubling regulatory terms, such as "no net loss" are memorialized in the Memo and new, equally troubling undefined and ambiguous terms, such as "harmful impacts" or "irreplaceable character" are included and left to the potentially conflicting interpretation of multiple federal agencies to determine what these terms actually mean and how to implement policies in order to achieve the ambiguous and far-reaching goals.

## **VII. Recommendations**

The participating federal agencies should:

Conduct a NEPA review in order to fully understand the cumulative social and environmental impacts resulting from the multiple federal agencies taking a major federal action while developing additional requirements for compensatory mitigation.

Conduct a regulatory cost analysis to understand and report the additional cost burden to developers now required to pay additional fees for compensatory mitigation.

Undergo a formal rulemaking process to develop new or modify existing regulations to help clarify which regulatory process will be followed, under which federal authority, defining when (and how) compensatory mitigation will be required. Without developing and following a regulatory mechanism, for example what is already in place under the Clean Water Act, no parameters are in place to methodically determine how much compensatory mitigation may be required placing undue burden on regulators to arbitrarily develop compensatory cost estimates. Without following a formal rulemaking process, transparency is marginalized and the public has very little, to no say in how these new mitigation goals might be achieved.

1 – Statement of Joseph Nukapigak, Kuupik Corporation. Testimony given to Senate Committee on Energy and Natural Resources, et al, August 17, 2015

2 – Status of Alaska Wetlands (Hall et. al., 1994) <http://www.fws.gov/wetlands/Documents/Status-of-Alaska-Wetlands.pdf>

3 - Alaska Wetlands Initiative [http://water.epa.gov/grants\\_funding/wetlands/facts/upload/alaska.pdf](http://water.epa.gov/grants_funding/wetlands/facts/upload/alaska.pdf)

4 – Governor Bill Walker letter to Secretary Jewell, December 22, 2014

5 - National Petroleum Reserve-Alaska (NPR-A) Impact Grant Program <https://www.commerce.alaska.gov/web/dcra/GrantsSection/NPR-AlaskaImpactMitigationGrant.aspx>

Make expressly clear how new federal mitigation policies might impact non-federal lands. The Memo and resulting dialog has provided few assurances that new federal actions will not impose new federal mitigation policies affecting state, private, Native Corporation, or tribal lands.

Revise the Memo or provide clarifying guidelines to incorporate the Alaska Native Settlement Claims Act (ANSCA) and Alaska National Interest Lands Conservation Act (ANILCA). Finding no mention of these two major federal laws in the Memo is concerning considering these laws must be followed during the implementation of the Memo in order to balance national conservation interests with the economic and social needs of the State and its citizens.

Consult state and local agencies to gain mitigation knowledge and lessons learned while implementing the mitigation goals and directives provided in the Memo. The state agencies in Alaska have utilized existing state authorities to effectively mitigate unavoidable impacts from development for decades.

- 1 – Statement of Joseph Nukapigak, Kuupik Corporation. Testimony given to Senate Committee on Energy and Natural Resources, et al, August 17, 2015
- 2 – Status of Alaska Wetlands (Hall et. al., 1994) <http://www.fws.gov/wetlands/Documents/Status-of-Alaska-Wetlands.pdf>
- 3 - Alaska Wetlands Initiative [http://water.epa.gov/grants\\_funding/wetlands/facts/upload/alaska.pdf](http://water.epa.gov/grants_funding/wetlands/facts/upload/alaska.pdf)
- 4 – Governor Bill Walker letter to Secretary Jewell, December 22, 2014
- 5 - National Petroleum Reserve-Alaska (NPR-A) Impact Grant Program <https://www.commerce.alaska.gov/web/dcra/GrantsSection/NPR-AlaskaImpactMitigationGrant.aspx>