

August 13, 2021

Shannon Estenoz
Assistant Secretary for Fish and Wildlife and Parks
Department of the Interior
1849 C Street, N.W.
Washington, DC 20240

Martha Williams
Principal Deputy Director, Fish and Wildlife Service
Department of the Interior
1849 C Street, N.W.
Washington, DC 20240

Dear Ms. Estenoz and Ms. Williams:

The undersigned hunting, fishing, conservation, professional society, outdoor-industry, and landowner organizations are writing to encourage the U.S. Fish and Wildlife Service (Service) to adopt and implement balanced, durable mitigation policies. Many of our organizations have decades of experience providing mitigation solutions on-the-ground. It is our strong belief that such policies are critical to the Service's success in meeting its mandates and trust responsibilities. When fairly designed and effectively implemented, such mitigation policies can reduce conflict between conservation and land use activities, ensure project success, and support private land stewardship.

Mitigation "done right" involves smart planning that fully considers the interests of the proposed project and land management priorities and applies the mitigation hierarchy—avoidance, minimization, and compensation for remaining unavoidable impacts—to ensure land use activities limit impacts to irreplaceable fish and wildlife habitat.

In its March 10, 2021 letter to the then acting secretary of the Department of the Interior, several of the undersigned organizations recommended that the Department prioritize the following actions:

- Adopt a Service-wide mitigation policy that applies high and consistent standards across all the Service's authorities (e.g., Endangered Species Act, Migratory Bird Treaty Act, Fish and Wildlife Coordination Act, and the Water Resources Development Act).
- Utilize the mandate of the 2021 National Defense Authorization Act (NDAA), which directs the Service to issue regulations governing mitigation banks for endangered, threatened, and candidate species, to address all forms of compensatory mitigation.

These recommendations remain unchanged. We believe it is appropriate for the Service to reissue its Service-wide mitigation policy in the short term to clarify its position on mitigation to its field offices, partners, and the regulated public. When developing the compensatory mitigation regulations pursuant to Section 329 of the 2021 NDAA, we request that the Service develop a rule that accomplishes the following:

- Applies to all compensatory mitigation mechanisms, including banks, in-lieu fee programs, and permittee-responsible projects;

- Provides the Service with the flexibility to support compensatory mitigation solutions that best support the needs of species and habitats on a project-specific basis rather than adopt a rigid preference for any specific mechanism; and
- To the extent appropriate, serves as a framework for satisfying recommended or required compensatory mitigation of resources managed by the Service beyond those under the Endangered Species Act (ESA).

In the attached appendix, we provide additional recommendations on the principles that we believe all mitigation programs should adhere, as well as key components of successful compensatory mitigation programs.

Finally, we urge the agency to strike a balanced approach that will yield enduring mitigation policies to guide development and conservation. We believe this can best be accomplished by considering input from the full range of stakeholders, including organizations such as ours that share the Service's conservation mission. As such, our groups would appreciate meeting with you and your staff to discuss mitigation policy further as you advance policy directives. Please contact us if you have questions and to coordinate a future conversation (Ed Arnett, earnett@trcp.org or Jessica Wilkinson, jwilkinson@tnc.org).

Sincerely,

Angler Action Foundation
American Sportfishing Association
Archery Trade Association
Backcountry Hunters and Anglers
Bass Anglers Sportsman Society (B.A.S.S.)
California Waterfowl
Ducks Unlimited
Fly Fishers International
Isaak Walton League of America
Land Trust Alliance
Mule Deer Foundation
National Bobwhite Conservation Initiative
National Deer Association
National Wildlife Federation
National Wild Turkey Federation
North American Falconers Association
North American Grouse Partnership
Orion: The Hunter's Institute
Pope & Young Club
The Conservation Fund
The Nature Conservancy
The Trust for Public Land
The Wildlife Society
Theodore Roosevelt Conservation Partnership
Western Landowner Alliance
Wildlife Management Institute

Mitigation Policy Standards

Mitigation (avoidance, minimization, and compensation) is an essential tool for advancing fish, wildlife and natural resources conservation and management.

Mitigation can be applied to prevent impacts to the most critical lands and waters in a predictable manner and, when impacts cannot be avoided or minimized, balance impacts with conservation and restoration efforts elsewhere. Appropriate and effective mitigation involves smart planning, efficient and effective decision-making, and predictability for project proponents as well as a multitude of other stakeholder interests. Done right, it can result in positive outcomes for all – the public, communities, businesses, and the environment.

We believe any future U.S. Fish and Wildlife Service (Service) mitigation policies should, at minimum establish the following standards and elements:

Adhere to the mitigation sequence: The mitigation sequence is a well understood concept that has its origins in National Environmental Policy Act regulations and has been embedded in a wide range of existing, successful mitigation programs. Where supported by the Service's existing authorities, it should apply the full mitigation sequence (avoid, minimize, offset) and do so sequentially. While it may be appropriate to apply flexibility when determining what constitutes appropriate and practicable mitigation at each step in the sequence, following the steps in sequence provides a predictable framework and helps the Service avoid claims that mitigation is a "pay to play" scheme or any one project proponent or type of development receives different treatment.

Establish a mitigation goal: Sound mitigation policies are guided by a clear goal statement. Such goals provide a driver for the avoidance and minimization of impacts and clarity to agencies on the appropriate type and quantity of compensatory mitigation that should be recommend or required. This clarity supports efficient project review and approval and helps ensure that mitigation measures are not arbitrary but rather follow from a structured, predictable decision-making process.

We recognize that any goal needs to derive from the underlying authorities to which it is applied. We recommend that the Service state that the goal of its Service-wide Mitigation Policy is to achieve a no net loss of the resources relevant to the specific authority being implemented. We recognize that there may be contexts in which it is appropriate to apply a higher goal, such as under the Fish and Wildlife Coordination Act and the Water Resources Development Act, when the Service is relying upon mitigation to preclude a listing, or under Endangered Species Action §7(a)(1). Under other authorities it is appropriate and fair for the Service to apply a no net loss standard and utilize other conservation and incentive programs that are designed to protect, restore, and manage fish and wildlife resources to achieve a net gain (see Figure 1).

Scale-appropriate decision-making: Application of the mitigation hierarchy should be informed by an understanding of the needs of the target species or habitats at the appropriate scale. This does not mean that the project proponent should be expected to offset impacts beyond the project area. Rather when the Service makes decisions about appropriate amounts, types, and locations for avoidance, minimization, and offset measures, to the maximum extent practicable, these decisions should be based on scale-appropriate considerations and make use of existing, relevant conservation plans and rely on early planning and coordination.

Affirm that the Service has the authority to require or recommend mitigation (avoidance, minimization, and compensation): The Service should affirm that it has the authority to require mitigation measures in some circumstances. We support the Service's analysis of where this authority exists, as expressed in §2 of the 2016 Mitigation Policy. In other circumstances, the Service has the

authority to recommend mitigation measures through its advisory and other roles. While we concur with its interpretation of where these authorities exist in this same section, we believe a fuller discussion of these authorities is warranted. In addition, the Service should specify in future policy the instances in which the Service has the authority to require specific steps in the mitigation sequence – when, for example, it has the authority to require avoidance and minimization measures and where it has the authority to also require compensatory mitigation. Finally, we strongly recommend that the policy retain language that makes clear that compensatory mitigation can be used under §7(a)(2) to avoid a jeopardy or adverse modification finding.

Mitigation measure design: Mitigation measures should be clear, science-based, measurable, and designed to track compliance, effectiveness, and inform any needed adjustments for improvement. They should clearly specify the conservation outcomes (impacts minimized, functional units of offsets delivered) that are expected. A financial payment or commitment by a project proponent may be used to meet a mitigation obligation if the basis for calculating the payment or financial commitment is transparent, consistent for the species across its range, grounded in science, and tied to expected conservation outcomes. This supports innovation in delivering conservation outcomes and averts negotiated mitigation measures that may be viewed as arbitrary.

Minimization and offset actions should be required to meet ecological performance standards and adhere to provisions for adaptive management, monitoring, and enforcement measures to ensure long-term and sustainable outcomes for conservation. Mitigation measures should not be merely conceptual; they should be a condition of a permit or other authorization.

The amount and type of mitigation measures recommended or required should be *reasonably proportional* to the impacts and account for habitat function (not just acre-for-acre replacement), time lag, and risk. These measures should also result in conservation actions that eliminate or ameliorate threats to a species, group of species, habitat or ecosystem function.

Emphasize principles of durability, duration, additionality, and equivalency.

Durability: All mitigation measures should be designed to be durable. Durability of offsets should be secured through designation mechanisms, management, and funding. We recognize that there are challenges with securing directly equivalent standards on public lands. This should not preclude the option. Rather, the mechanisms used to establish the durability of the conservation investments on private lands should provide *a high level of confidence* that the compensatory mitigation measures will endure over time.

Duration: All mitigation measures should be designed to be durable and in place at least as long as the duration of the direct and indirect impacts.

Additionality: Offsets should provide a new contribution to conservation, additional to what would have occurred without the offset. Offset actions that restore, enhance, manage, and/or protect values and functions should be a genuinely new contribution to conservation with a strong probability of success. The amount of and types of offsets required should be measured against project impacts to assess progress toward the mitigation policy goal. Where appropriate, the Service should provide clear guidance on the use of mitigation funds in conjunction with Federal grants and other state and federal programs.

Equivalence: Decisions about the compensatory mitigation measures (amount and type) should strive to deliver offsets that are “in kind” in terms of habitat type, functions, values, and other attributes.

Provide for certainty and transparency to regulators, developers and the public: The Service should support more consistent implementation across the agency and predictability for project proponents, participating agencies, mitigation providers, and other stakeholders by directing field offices to adopt local guidance for implementing the Mitigation Policy and by providing additional direction on the type of information that should be included in such guidance.

The Service should also invest in improved mitigation tracking systems to provide the public with more information on the amounts and type of compensatory mitigation that are being carried out across the country. Not only is this good practice, but it also can stimulate investment in mitigation solutions, help learn what measures do and don’t deliver, and build public confidence in mitigation.

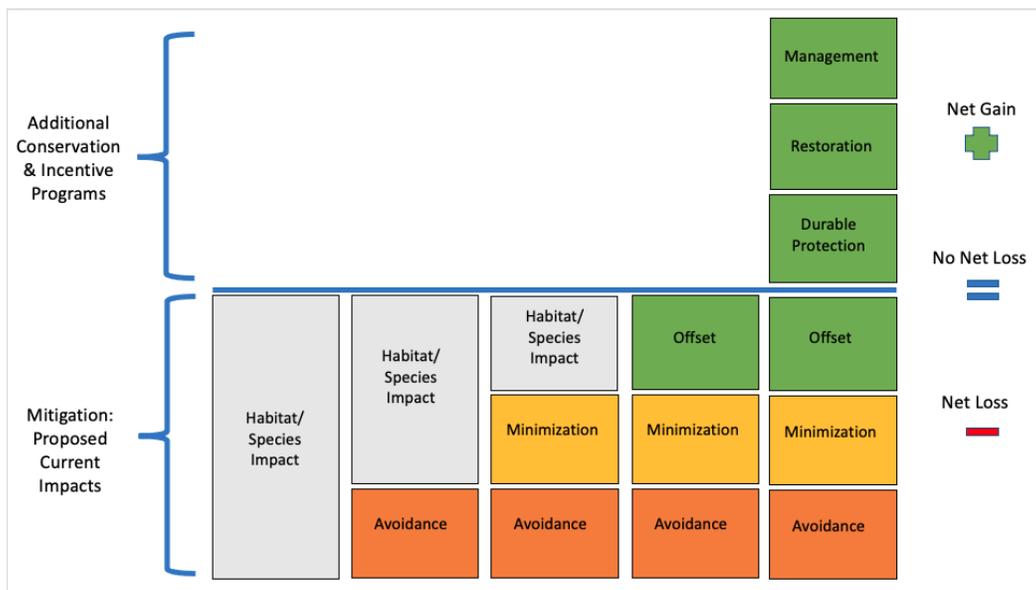


Figure 1: Relationship Between No Net Loss and Net Gain

Compensatory Mitigation Program Best Practices

The Mitigation Policy Standards outlined above are key to a successful program that seeks to avoid, minimize, and offset impacts from development and operation of infrastructure. Compensatory mitigation programs – the offsets that happen after impacts have been avoided and minimized – can be designed to operate smoothly and predictably. They can also easily become overly complicated, lack sufficient guardrails, or fail to strike the right balance between fairness and precaution.

Our deep experience with compensatory mitigation programs around the world and across a variety of programs in the U.S. has proven that successful offset programs have an established set of guidelines and defined rules. Key components of a successful offset program are summarized below.

1. **Loss/gain methodology:** Direction to develop loss/gain methodologies to quantify impacts and offsets. These methodologies should ideally be based on a measure of functional capacity of areas lost and offset. These measures need not be overly precise, but rather should strive to yield a *roughly equivalent* amount and type of replacement resources. Risk, uncertainty, and time lag can be addressed through the inclusion of appropriate adjustment factors.
2. **Site selection and scale-appropriate decision making:** Criteria for selecting appropriate offset sites, including distance from impact site, and any requirements for identifying offset areas based on relevant scale-appropriate conservation information.
3. **Service area:** Boundary within which impacts may be offset.
4. **Appropriate actions and habitat types:** Specific actions that may be used to provide offsets (e.g., restoration, preservation, enhancement, creation) and types of habitat that are appropriate (e.g., equivalent habitat types).
5. **Duration of offset:** Direction on how long offsets should be in place with a strong preference for permanence if the impacts are of a duration that are *in effect* permanent.
6. **Durability criteria:** Parameters for protecting the offset site for the intended duration, including any requirements for long-term site management, long-term funding for management activities, and appropriate mechanisms for ensuring against incompatible uses.
7. **Defined mechanisms and rules for mechanisms:** Approved mechanisms that can be used to deliver offsets, such as permittee-responsible offsets or a mechanism that allows liability for offsets to transfer to a third party (e.g., in lieu fee, conservation banks); rules outlining when each mechanism can be used, liability for compliance, and the process for the offset project to be approved.
8. **Offset plan elements:** Components of an offset plan, such as standards by which success will be measured, how the site will be protected, and monitoring and reporting requirements.
9. **Oversight parameters:** Expectations for when developer receives permit and commits to offset plan; defined roles for all parties (approving entity, project proponent, offset provider); when and how oversight agency will review ecological and administrative compliance; expectations for enforcement of and consequences for non-compliance with mitigation plans.
10. **Offset tracking system:** Transparent and publicly available system for tracking offset obligations, credit/debits, and project performance.