

December 3, 2021

U.S. Fish and Wildlife Service  
5275 Leesburg Pike  
Falls Church, VA 22041-3803

RE: Docket No. FWS-HQ-MB-2021-0105

Dear U.S. Fish and Wildlife Service:

The undersigned hunting, fishing and conservation organizations are writing in response to the U.S. Fish and Wildlife Service (Service) Advance Notice of Proposed Rulemaking on the Migratory Bird Treaty Act (MBTA). We support the Service in restoring critical bird protections to migratory birds and adopting a permitting program for incidental take under the MBTA that utilizes the full mitigation hierarchy, including establishment of a compensatory mitigation program.

By way of this letter, we are sharing with the Service standards and best practices that we believe should guide the agency's approach to mitigation, including compensatory mitigation, under any future MBTA rulemaking. The attached guidelines are informed by the decades of experience at many of our organizations in providing mitigation solutions on-the-ground. If adopted, policies guided by these best practices will yield a balanced, durable approach to mitigation that advances conservation outcomes for migratory birds.

In addition, we offer the following comments for the Service's consideration in development of a "conservation fee structure" and "compensatory mitigation approach."

*Clarify that "conservation fees" do not count toward mitigation obligations.* The Service should clarify that voluntary donations to conservation, including research and monitoring, should be considered separate from any mitigation measures and should not allow permittees to "buy down" mitigation obligations. While we support such contributions for their conservation benefits, including the concept in a future rulemaking would only sow confusion and risk undermining full utilization of the mitigation hierarchy to support the conservation of species. Below we outline several of the reasons why we believe that including discussion of a "conservation fee" in any MBTA rulemaking would be problematic.

Contributions to conservation can be of any type, including research, education, and monitoring, while mitigation measures must be tailored specifically to measures that avoid, minimize, or offset impacts to target species. If, for example, the Service determines that research and monitoring are not appropriate mitigation measures, permittees that have voluntarily contributed to such activities should not be allowed to use the contribution to lessen their obligation to avoid impacts through proper siting, minimize impacts through activities that deter mortality, or offset impacts through the conservation and restoration of replacement migratory bird habitat.

In addition, the amount of compensation that may be required to meet conservation goals should be based on a compensation accounting methodology designed to ensure that impacts and offsets are roughly proportional and support conservation outcomes. Voluntary contributions to conservation, on the other hand, need not meet this standard. Translating such contributions to an offset accounting system would be challenging and confusing.

Mitigation measures are not charitable donations and are thus not subject to charitable deductions. Voluntary conservation measures, on the other hand, can and should be treated as charitable contributions.

For all these reasons, we strongly recommend that the Service treat conservation contributions independently and outside the framework of a permitting program that relies upon mitigation – avoidance, minimization, and offset measures – so that voluntary conservation contributions are not used to pressure the Service to circumvent appropriate mitigation measures that support conservation of the species and to avoid sowing confusion among permittees and Service field offices.

*Apply the full mitigation hierarchy.* As part of any general or individual permitting program, the Service should apply the full mitigation hierarchy of avoidance, minimization, and compensatory mitigation. The hierarchy provides a structured framework for balancing the permitted take of species with the conservation of species covered under the Act and related Treaties. Avoidance and minimization measures should be considered before any compensatory measures are contemplated or agreed upon. Offsets can be successful but are not without risk. Avoidance of bird mortality, on the other hand, is the surest way to support the Service’s obligations under the MBTA.

*Establish a mitigation program that aligns with forthcoming Service mitigation regulations and guidance.* The 2021 National Defense Authorization Act (NDAA) directs the Service to issue regulations governing mitigation banks for endangered, threatened, and candidate species. We have encouraged the Service to utilize this rulemaking to apply consistent standards to all forms of compensatory mitigation, including banks, in-lieu fee programs, and permittee responsible mitigation, and to clarify that the regulation 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), including MBTA. We have also encouraged the Service to update its 1981 Service-wide mitigation policy.

We strongly urge the Service to take advantage of the significant opportunity to coordinate the mitigation approach outlined in any MBTA rulemaking with any Service-wide policy and the forthcoming compensatory mitigation rulemaking, thereby creating a consistent approach to mitigation, including compensatory mitigation, across the agency’s authorities. Doing so will encourage private sector investment in mitigation solutions, harness the expertise of the nation’s leading private and non-profit conservation practitioners, and allow permit applicants to make use of existing, approved mitigation bank credits, conservation bank credits, and in-lieu fee programs that provide conservation outcomes for migratory birds. Additionally, we recommend that any MBTA compensatory mitigation program provide permittees with flexibility in how they meet their compensatory mitigation obligations rather than dictating a specific mechanism or predetermined fee.

This approach will support a ready-made path to compliance under any MBTA permitting program. When compensatory mitigation programs allow permittees to use banks and in-lieu fee programs to satisfy their compensatory mitigation obligations, permitting times can be cut in half. The good news for a potential MBTA permitting program is that there are currently over 1,025 mitigation banks and in-lieu fee programs in the country totaling 476,000 acres that can reasonably be demonstrated to provide habitat benefits to migratory birds. If deemed appropriate by the Service, these credits could be certified by the Service as suitable for migratory bird credits.

Of course, if used to meet MBTA compliance obligations, these credits would need to be deducted from the banks and programs to avoid “double dipping.” Use of existing species in-lieu fee species programs

for MBTA compliance would also need to be tracked separately and utilize service areas appropriate to migratory bird conservation.

*Ensure additionality of any migratory bird take mitigation offsets and consistency with other Service mitigation policies.* Any MBTA compensatory mitigation rulemaking should provide implementation direction to ensure that offsets are truly providing conservation benefits that would not have been achieved otherwise. This is a challenging subject, particularly given the existing federal conservation programs designed to support conservation of migratory birds. Through its Endangered Species Act and other conservation programs, the Service has developed ample guidance on the issue, including the relationship between federal award programs and matching requirements. We recommend that the Service seek to maximize consistency between how these issues are treated across the agency's authorities.

*Clarify that research and monitoring are not appropriate compensatory mitigation measures except under limited circumstances.* Compensatory mitigation should provide tangible conservation benefits to migratory birds. Research and education should only be included in a mitigation package in limited circumstances. This is a well-established principle of mitigation and one that the Service has outlined in mitigation policies over the years. We urge the Service to apply a consistent approach under any MBTA regulation with existing Service-wide mitigation policies and other regulations under development.

Thank you for the opportunity to provide our perspectives on this important topic. As noted in the Advanced Notice, the total population of North American birds has declined significantly over the past 50 years, as too have birds protected under the MBTA. Some of the human caused impacts can be managed through balanced use of the mitigation hierarchy. We now have an opportunity to utilize this long-established practice to support the conservation of species that the Service is charged with protecting under the Act. Please contact Madeleine West ([mwest@trcp.org](mailto:mwest@trcp.org)) or Jessica Wilkinson ([jwilkinson@tnc.org](mailto:jwilkinson@tnc.org)) if you have questions.

Sincerely,

Backcountry Hunters and Anglers  
National Deer Association  
North American Grouse Partnership  
The Conservation Fund  
The Nature Conservancy  
The Theodore Roosevelt Conservation Partnership

## 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 impacts beyond the project area should be expected to be avoided, minimized, or offset. 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, this section could specify in what instances 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 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.

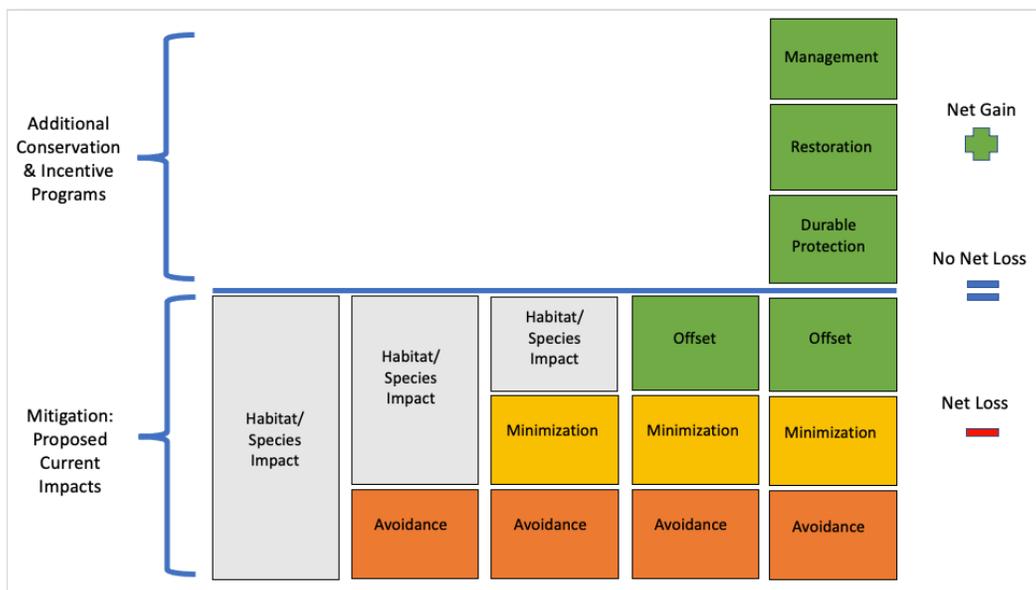


Figure 1: Relationship Between No Net Loss and Net Gain

## Compensatory Mitigation Program Best Practices

The Mitigation Policy Standards 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.
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.