

September 26, 2022

Mr. Craig Aubrey  
Chief, Division of Environmental Review  
U.S. Fish and Wildlife Service  
5275 Leesburg Pike  
Falls Church, VA 22041–3803

Re: Docket No. FWS–HQ–ES–2021–0137

**Submitted electronically at [www.regulations.gov](http://www.regulations.gov)**

Dear Mr. Aubrey:

The undersigned hunting, fishing, conservation, professional society, and landowner organizations write in response to the U.S. Fish and Wildlife Service (Service) Advance Notice of Proposed Rulemaking (ANPR) regarding Compensatory Mitigation Mechanisms. We support the Service’s efforts to develop regulations that ensure consistency, transparency, and predictability for project proponents and mitigation providers across all habitat-based compensatory mitigation mechanisms.

Many of our organizations have decades of experience providing on-the-ground mitigation solutions. It is our strong belief that clear, transparent mitigation policies are critical to the Service’s success in meeting its mandates and trust responsibilities. When fairly designed and effectively implemented, mitigation policies can reduce conflict between conservation and land use activities, enhance project success, and support responsible land stewardship. We also encourage the agency to move expeditiously to adopt a Service-wide mitigation policy that sets 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).

The ANPR states that, “The Service intends to apply equivalent standards to all habitat-based compensatory mitigation mechanisms (including conservation banks, in-lieu fee programs, and permittee-responsible mitigation) for covered species.” We believe the 2021 National Defense Authorization Act (NDAA) provides the Service with ample opportunity to use this rulemaking to establish equivalent standards for all compensatory mitigation mechanisms and to maximize compensatory mitigation compliance solutions not just under the Endangered Species Act (ESA), but other Service authorities).

While the NDAA requires the Service to set standards for conservation banking, the Service derives its authority to require, incentivize and set standards for compensatory mitigation from the ESA itself. For example, Section 10 of the ESA authorizes the Service to issue an incidental take permit (ITP) so long as the applicant submits a habitat conservation plan (HCP) that assures the agency it will take measures to “minimize and mitigate” impacts to a species.<sup>1</sup> This could include compensatory mitigation.<sup>2</sup> The ESA also authorizes the Service to extend “take” provisions to threatened species and to issue regulations “necessary and advisable” to conserve such species.<sup>3</sup> Relying on this provision, the Service requires ITPs

---

<sup>1</sup> 16 U.S.C. § 1539.

<sup>2</sup> U.S. Department of the Interior,

<sup>3</sup> 16 U.S.C. § 1533(d).

for many threatened species as well as HCPs to address mitigation.<sup>4</sup> Section 7 of the ESA contemplates mitigation as well. The Service can identify conservation measures as part of the consultation process, which could include compensatory mitigation as a means of minimizing impacts to a listed species.<sup>5</sup>

The ESA does not specify what form mitigation can or must take nor does the NDAA limit the Service's authority under the ESA. While the Service has for decades relied on conservation banking as its primary tool to achieve compensatory mitigation, it is not statutorily limited from expanding mitigation to include other mechanisms. Indeed, because different mechanisms may better serve different contexts, we urge the Service to issue standards that contemplate a number of tools to achieve compensatory mitigation and would apply consistently to all of those tools.

Thank you for the opportunity to provide the following detailed comments with respect to the ANPR:

**Question 1: Level of detail to ensure equivalent standards, including equivalence in cost on public and private lands**

We believe that the Service's 2016 Compensatory Mitigation Policy (CMP) included the right level of detail on compensatory mitigation standards and criteria for compensatory mitigation mechanisms and should serve as a guide for this rulemaking. That policy included standards for sustainable siting, equivalence (in-kind for species), reliable and consistent metrics, additionality, timing and duration, and effective conservation outcomes and accountability. We note that the Service issued Interim Guidance on Implementing the Final Endangered Species Act Compensatory Mitigation Policy in 2017, which provided additional detail to support effective and efficient implementation of the CMP in the field. We believe this was an appropriate approach and recommend that the Service use this rulemaking to set and define uniform standards for all compensatory mitigation that are widely supported and understood, and issue more detailed implementation guidance at a later date.

We also strongly recommend that the Service use this rulemaking as an opportunity to define the elements that must be included in all mitigation bank and in-lieu fee instruments, as well as the components that must be included in mitigation plans associated with banks, in-lieu fee, or permittee responsible projects. Establishing these uniform requirements is essential to supporting equivalence, transparency, and predictability for project proponents and mitigation providers alike.

Additional specificity on standards that we believe are important to guide site selection, equivalency (i.e., in-kind), and metrics are listed below. Recommendations on durability and additionality are provided subsequently in response to question #2.

- **Site selection and scale-appropriate decision making:** The rule should include criteria for selecting appropriate offset sites and any requirements for identifying offset areas based on relevant scale-appropriate conservation information. We recommend distance from the impact site be discussed in implementation guidance.
- **Equivalence:** The rule should define specific conservation actions that are appropriate to ensure that offsets are equivalent to impacts (e.g., restoration, preservation, enhancement, creation) and the types of habitat that are appropriate for offsets (e.g., in-kind habitat types).
- **Metrics:** The rule should state that all compensatory mitigation projects should quantify offsets based on a loss/gain methodology that is science-based, quantifiable, consistent, repeatable, and related to the conservation goals for the species. These metrics should be species- or

---

<sup>4</sup> 50 C.F.R. § 17.32(b)(1).

<sup>5</sup> 16 U.S.C. § 1536(a), (b)(3)(A), (b)(4).

habitat-based and should, to the maximum extent possible, be based on a measure of functional capacity of areas lost and offset. In addition, the regulations should specify that these measures need not be overly precise, but rather should strive to yield a *roughly equivalent* amount and type of replacement resources. Importantly, these methodologies must account for *both* direct (i.e., habitat lost directly from development of project infrastructure) and indirect (i.e., habitat rendered unsuitable from behavioral avoidance/modification to disturbance) impacts. We believe this level of specificity is appropriate to include in the proposed regulation. Additional specificity on how to develop such metrics should be provided in stand-alone guidance from Service headquarters. Service regions and field offices should be charged with developing species- or habitat-specific implementation guidelines that include metrics.

Finally, we recognize that there are some concerns about the establishment of compensatory mitigation projects on public lands and the potential cost differentials between doing so on public versus private lands. We believe the Service's role is to support compensatory solutions that it believes will provide the maximum conservation benefit for the affected resources, while ensuring additionality particularly if mitigation is proposed for public lands while the impact is to private lands (this concept is discussed further in question #2 and #6). We believe it is appropriate for the Service to assert that it will *generally*, recommend compensatory mitigation on lands with the same ownership classification as the lands where impacts occurred but that it should retain the discretion to decide otherwise if doing so best supports conservation outcomes for the resources under consideration. Additional recommendations on compensation projects on public lands are provided in response to question #6.

**Question 2: Level of detail regarding durability and additionality to ensure equivalence**

As noted above, we believe this rulemaking should provide high-level definitions and parameters on meeting durability and additionality standards, but that additional detail is best provided in implementing guidance. Below we provide additional specificity on the level of detail we think is appropriate for this rulemaking.

- **Durability criteria:** Durability means the assurance that the conservation benefits provided by a compensatory mitigation measure will be secured and effective over the full timeframe (duration) for which they compensate. 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 should be included in the rule. Specificity on how to achieve these standards are best provided in guidance outside of this rulemaking.
- **Additionality:** A key principle of compensatory mitigation is that compensatory mitigation measures must provide conservation benefits that are truly "additional" to what would have occurred in the absence of the compensatory mitigation measure. Mitigation is "additional" when it provides resource benefits that are demonstrably new and that would not have occurred without the compensatory mitigation measure. The rule should reflect the requirement to ensure any offsets are above and beyond the conservation benefits that would have otherwise occurred. We recognize that assessing additionality is perhaps the most challenging aspect of compensatory mitigation implementation. We recommend that additional specificity, along with program-specific parameters (e.g., appropriate use of mitigation funds in conjunction with federal awards and settlement funding) and examples are best provided in accompanying guidance.

**Question 3: Monitoring, Financial Assurances, and Mitigation Tracking**

As noted above and in further responses to question #5, all compensatory mitigation projects regardless of the mechanism, should be held to equivalent standards for monitoring and financial assurances. We believe broad parameters on these topics are appropriate to outline in compensatory mitigation regulations, but as with metrics, additional specificity on how to develop appropriate monitoring protocols should be provided in future implementation guidance issued by Service headquarters. In addition, we believe that Service regions and field offices should be charged with developing species- or habitat-specific implementation guidelines that include monitoring protocols.

To the maximum extent possible, we strongly encourage the Service to utilize the existing compensatory mitigation tracking platform, RIBITS, to provide the public with information on compensatory mitigation projects. However, we also believe any such tracking system should include information not just on banks, but in-lieu fee programs/projects, and permittee-responsible projects as well. Such tracking systems are essential for instilling public confidence that conservation values are truly being replaced if adverse impacts from authorized development occur.

#### **Question 4: Hurdles to Species Bank Establishment**

The U.S. Department of the Interior's Office of Policy Analysis has characterized the obstacles to further accelerating the establishment of species banks and offered suggestions on how to address identified issues.<sup>6</sup> While many of the solutions identified cannot be solved through this rulemaking, we encourage the Service to revisit that analysis, provide direction to field offices to develop species- and habitat-specific mitigation guidance documents that outline metrics, monitoring, and success criteria, and provide ample training opportunities to field staff to support development of such guidance.

#### **Question 5: Alignment with 2008 Rule**

We believe the Service should consider alignment with the 2008 U.S. Army Corps/Environmental Protection Agency Compensatory Mitigation Rule where possible and appropriate. For instance, there are provisions in the 2008 Rule that will be instructive as the Service is preparing this rule, such as the use of standard definitions and required elements for establishment of mitigation instruments and mitigation project plans. However, we believe the Service's rule should recognize the many differences between the best methods for mitigating for impacts to species and their habitat and the best methods for mitigating for impacts to aquatic resources, as well as the need for more flexibility in approach given the multitude of species and habitats that can be impacted.

#### **Question 6: Bank projects on Federal and Tribal lands**

One of the significant challenges to compensatory mitigation on public lands is establishment of reasonably appropriate durability and additionality provisions. We suggest that securing durability for compensatory mitigation on public lands can be achieved through three important mechanisms: designation by the public land management agency, development of management plans, and provision of funding for carrying out long-term management obligations allocated to non-federal stewardship organizations.

We recognize that additionality is a particularly challenging issue to address in the public lands context. We recommend that the Service set a standard for achieving a "high level of confidence" that the compensatory mitigation measures will be additional over time. We believe this can be accomplished by establishing a baseline for funding, through tracking requirements, through stipulations in the

---

<sup>6</sup> U.S. Department of the Interior, Office of Policy Analysis. 2016. "Results from a Survey of Conservation Banking Sponsors and Managers."

crediting methodologies used, and through requiring elevation of approval for replacing baseline funding. We believe that it would be appropriate to provide additional specificity on the issue of public lands additionality in future guidance to the field.

Regarding sovereign tribal nations, we urge the Service to engage in meaningful tribal consultation and dialogue regarding compensatory mitigation on tribal lands and the appropriate mechanisms, objectives, standards, and criteria to be used in such a context. The Service should do so consistent with letter and spirit of its statutory mandates and authority, and recently issued Secretarial and Service policies—including Secretarial Order No. 3403 on tribal engagement and Director’s Order No. 227 on fulfilling the Service’s trust responsibility to tribes. Any compensatory mitigation on tribal lands should only take place with informed tribal consent.

**Additional comments on risk and uncertainty**

There are several risks associated with delivering sustainable and ecologically successful compensatory mitigation solutions. Well-designed compensatory mitigation programs manage risk and uncertainty through a variety of alternatives including through metrics (i.e., adjustment factors for projects with a high degree of risk and uncertainty), financial assurances, reasonable adaptive management provisions, and, when appropriate, ecologically based credit release schedules. We believe that this combination of risk management tools is sufficient to provide the Service and the public with a high degree of confidence that compensatory mitigation projects will deliver sustainable and ecologically successful outcomes.

Thank you for your consideration of our comments. We look forward to continuing to work with the Service as this important rule is developed.

Sincerely,

American Sportfishing Association  
Backcountry Hunters and Anglers  
Boone and Crockett Club  
Fly Fishers International  
National Deer Association  
National Wildlife Federation  
North American Grouse Partnership  
The Conservation Fund  
The Nature Conservancy  
The Wildlife Society  
Theodore Roosevelt Conservation Partnership  
Western Landowners Alliance