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Office of Habitat Conservation
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Submitted via email, to mitigationpolicy.comments@noaa.gov.

Re: Comments on NOAA's Draft Mitigation Policy for Trust Resources

Defenders of Wildlife ("Defenders") is a 501(c)(3) non-profit organization dedicated to the protection of all native animals and plants in their natural communities. With more than 2.2 million members and activists, Defenders of Wildlife is a leading advocate for innovative solutions to safeguard our wildlife heritage for generations to come. Defenders appreciates the opportunity to offer comments on the National Oceanographic and Atmospheric Administration's ("NOAA's") Draft Mitigation Policy for Trust Resources ("Draft Mitigation Policy").

Human-caused habitat destruction being the most significant driver of the biodiversity and extinction crises, it is critically important to offset human impacts on our natural environment. We recognize NOAA's goal of implementing a mitigation policy as the first step in compensating for the impacts of human activities on trust resources, including but not limited to threatened and endangered species, and protected areas like National Marine Monuments. We appreciate NOAA's recognition that compensatory mitigation should be invoked only after avoidance and minimization.

NOAA's Draft Mitigation Policy can be strengthened to better meet the current and urgent mitigation needs of wildlife and their habitats, and set mitigation goals consistent with the severity of the biodiversity, extinction, and climate crises they face. The final policy should also offer greater details and guidance on implementing mitigation actions.

We provide the following recommendations, focusing particularly (but not exclusively) on the compensatory mitigation prong of the Draft Mitigation Policy.

I. NOAA Should Set a Net Gain Goal for Mitigation and a No Net Loss Minimum Requirement

Given the extent and scope of the biodiversity and extinction crises, it is not enough for federal agencies like NOAA to simply aim at stemming losses of species and habitats. NOAA has an

ongoing obligation to restore and recover trust resources under Executive Order 14,008¹, the Endangered Species Act, the National Marine Sanctuaries Act, and similar provisions of relevant law. Section 7(a)(1) of the Endangered Species Act is particularly relevant here, as it requires all agencies, including NOAA, to use their authorities to recover species listed as threatened or endangered under the ESA. Therefore, we strongly recommend that NOAA’s mitigation policy set an explicit goal of achieving net gain, with a no net loss goal as the required minimum threshold, or “the floor.”

There is no constitutional or statutory bar to setting a net gain *goal* under the policy, and *recommending* measures that reach net gain even if such recommendations cannot, in every situation, be required by NOAA of private entities. In some cases, NOAA or action agencies can require private stakeholders mitigate to no net loss – and then federal entities can enhance those mitigation measures to reach net gain. Furthermore, individual project-level mitigation that avoid, minimize, and offset project impacts to a no net loss standard can be coordinated at the agency level to result in net gain when aggregated together.

To begin, we define net gain as: “The long-term benefit to trust resources from conservation measures implemented under a project that, either alone or in coordination with other projects, exceed the adverse impacts resulting from the project or projects.” Net gain goals may be met through project-level decisions and, with careful planning, through program-level frameworks in which individual projects may only meet no net loss.

An example of how a net gain goal could look can be seen in President Obama’s Presidential Memorandum of November 3, 2015,² and the U.S. Fish and Wildlife Service’s mitigation policies building upon that order.³ The Trump administration withdrew existing mitigation policies as part of a broader anti-conservation agenda. But now NOAA could and should include a goal in its own mitigation policy.⁴ This would also ensure that its policy is consistent with any future executive action from President Biden reinstating a net gain requirement for agencies.

As we note above, this does not mean to say that net gain mitigation is possible in every case, and requiring net gain might be inconsistent under some statutory provisions. Requiring private entities to mitigate beyond the proportional impacts of their activities on trust resources in some cases may also implicate constitutional prohibitions.⁵ Federal agencies have the discretion to further the nation’s biodiversity goals by taking actions that not only offset any negative impacts of their projects/activities, but leaving the environment better than they found it at the beginning of the project or activity. In some cases, there is a mandate: federal agencies must not just ensure their

¹ “*See, e.g.*, Part II, Section 201 of the Order: “It is the policy of my Administration to organize and deploy the full capacity of its agencies to . . . conserve[] our lands, waters, and biodiversity. . . .”

² “Mitigating Impacts on Natural Resources from Development and Encouraging Related Private Investment,” <https://obamawhitehouse.archives.gov/the-press-office/2015/11/03/mitigating-impacts-natural-resources-development-and-encouraging-related>

³ 81 F.R. 224 (Nov. 21, 2016) (general USFWS mitigation policy); 81 F.R. 95316 (USFWS ESA-focused mitigation policy).

⁴ While we will not address them in detail, the Trump administration’s rationale for removing existing mitigation guidance and policies were legally unsound, largely misrepresented and distorted controlling law (and the Obama-era mitigation guidance itself).

⁵ The Supreme Court has held that mitigation requirements placed on private individuals must have a “nexus” to and be “roughly proportional” to the adverse impacts caused by a project. *See, e.g., Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595 (2013).

activities do not drive listed species (which are important NOAA trust resources) to extinction but must actively recover such species, as *required* by section 7(a)(1) of the Endangered Species Act.

II. The Mitigation Policy Should Require a Precautionary Approach and Err on the Side of Certainty of Outcomes

Given the significant uncertainties inherent in developing plans to offset human-caused impacts to the environment, it is important that conservative assumptions are built into mitigation decisions to avoid the risk of under-mitigation. Climate change poses the additional threat of potentially unforeseen impacts that could reduce the efficacy of mitigation efforts and increasing the risks of under-mitigation. Section 4.05 of the Draft Policy recognizes the importance of “Mitigation that is durable, adaptable, and resilient under a range of climate change conditions,” but there are significant challenges and uncertainties in achieving such a standard in practice. We thus strongly recommend that NOAA adopt a policy that includes preference for mitigation that is higher in certainty of outcomes for trust resources over mitigation with lower certainty.

For example, in regard to compensatory mitigation, habitat restoration may in some cases sufficiently offset project damage. But the biological and physical dynamics of habitats are complex, and planned restoration may frequently fall short of restoration goals. Section 4.0 of the Draft Mitigation Policy recognizes that “[i]n some circumstances, achieving mitigation goals may require the use of measures that do not have a high degree of certainty.” While the Draft Mitigation Policy appropriately calls for measures to reduce uncertainties and the use of adaptive management, it should also recognize that where uncertainties exist it is better to risk over mitigation rather than under mitigation. The policy should take an expressly precautionary approach and recognize that compensatory mitigation measures should be selected and implemented in a way to ensure that underperformance of mitigation measures does not risk net loss. When required by statute or caselaw, for example by the Endangered Species Act’s requirement to give species “the benefit of the doubt” in the face of uncertainty, any final mitigation policy must take an expressly precautionary approach.⁶

The final policy should also prioritize advance compensatory mitigation and state that when offsets are used, they should be implemented and their outcomes or benefits to the trust resources confirmed before adverse environmental impacts are allowed to occur to the maximum extent practicable. This would be consistent with the Draft Mitigation Policy’s existing preference for conservation banking approaches over in-lieu fee programs and permittee-responsible mitigation, which by design have temporal lags that can lead to unnecessary environmental degradation, and which have an oftentimes poor history of implementation in the United States.⁷ As one recent report by the Nicholas Institute for Environmental Policy Solutions at Duke University concluded, the temporal lag alone means in-lieu fee mitigation programs “should be a last resort as a mechanism for

⁶ As the Supreme Court articulated in *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 194 (1979), “Congress has spoken in the plainest of words, making it abundantly clear that the balance has been struck in favor of affording endangered species the highest of priorities, thereby adopting a policy which it described as ‘institutionalized caution.’”; *see also Sierra Club v. Marsh*, 816 F.2d 1376, 1386 (9th Cir. 1987) (in considering effects the “benefit of the doubt” must go to endangered species).

⁷ *See, e.g.*, Government Accountability Office. 2005. *Corps of Engineers Does Not Have an Effective Oversight Approach to Ensure That Compensatory Mitigation is Occurring*; Morgan, J.A. & Hough, P. Compensatory mitigation performance: The state of the science. National Wetlands Newsletter 37(6):5-13.

compensatory mitigation.”⁸ Permittee-responsible mitigation can suffer from similar temporal lag when mitigation is carried out after the project’s impact. And without adequate oversight and monitoring, mitigation as an activity is more likely to fail.

III. The Mitigation Policy Should Provide More Detailed Guidance on Selecting Appropriate Mitigation Measures and Evaluating Their Effectiveness

Though the Draft Mitigation Policy defines the general types of mitigation, and emphasizes the application of the mitigation hierarchy of avoidance, minimization, and compensatory mitigation, there is a significant lack of detail on how mitigation measures are to be selected. We are particularly concerned that the lack of specificity concerning compensatory mitigation could lead to offset strategies that are ineffective or redundant. Section 4.04 of the Draft Mitigation Policy states that NOAA will “[p]romote mitigation strategies with high probability of success,” it does not offer a framework or guidance for evaluating mitigation success. We recommend that NOAA revise the draft policy to specify how success will be measured before adopting the final policy.

The final policy should first describe a framework for evaluating the likelihood of mitigation effectiveness. One possible system for evaluating likelihood of mitigation effectiveness can be found in the Business and Biodiversity Offsets Programme (BBOP) report, *Limits to What Can Be Offset*.⁹ The BBOP system considers factors including the irreplaceability of affected resources and vulnerability, and offers process that is structured and transparent approach to determine whether impacts are offsettable or not.¹⁰

Secondly, the final policy should use this likelihood evaluation to determine how much avoidance and minimization is required for specific projects. Where mitigation has only a low likelihood of effectiveness, NOAA should emphasize avoidance and minimization measures in mitigation planning. Though the mitigation hierarchy sequence should be followed generally in all situations, if compensatory mitigation has been demonstrated to work well in a given situation, more flexibility may be allowed with avoidance and minimization measures.

One critically important criterion for selecting and evaluating mitigation strategies generally, and one that should be expressly included in the final policy, is the assurance of additionality of mitigation measures. Any compensatory mitigation must result in habitat being restored or protected that would otherwise remain degraded or be subject to likely development or degradation. Permit holders or action agencies must not offset damage to trust resources by nominally protecting areas that were in no significant risk of degradation or development anyway. Furthermore, given this additionality need, the policy must also emphasize that compensatory mitigation should never use public lands to offset impacts, given the government’s wide discretion in designating protections on federal lands outside mitigation decisions.

⁸ Doyle, Martin W. 2019. *The Financial and Environmental Risks of In Lieu Fee Programs for Compensatory Mitigation*. NI Report 19- 01. Durham, NC: Duke University, <http://nicholasinstitute.duke.edu/publications>.

⁹ <https://www.forest-trends.org/publications/resource-paper-limits-to-what-can-be-offset/>

¹⁰ The Environmental Policy Innovation Center has offered several proposals to FWS to improve ESA mitigation specifically; many of their suggestions could be effectively incorporated into NOAA’s mitigation policy, including the development of a system to track implementation and effectiveness of mitigation techniques. Li, Ya-Wei & Male, Tim. 2021. *Improving Mitigation Under the Endangered Species Act*. <http://policyinnovation.org/wp-content/uploads/ESA-mitigation-report.pdf>

Furthermore, it is important for any final policy to recognize that certain trust resources are irreplaceable and impacts to them cannot be offset through compensatory mitigation. The Draft Mitigation Policy states that “NOAA will generally recommend avoiding impacts to high value habitats,” and defines high value habitats to “include irreplaceable . . . habitats” We recommend that stricter language be used – NOAA should prohibit impact to “irreplaceable” habitats to the maximum extent possible.

IV. The Mitigation Policy Must Include Monitoring and Evaluation Standards

Monitoring of mitigation compliance and efficacy is critically important in ensuring that conservation actions are meeting their objectives. Lack of such monitoring has led to significant problems in existing mitigation programs across the federal government.¹¹ Absence of monitoring of threatened and endangered species and the impacts of mitigation on such species can be especially destructive, potentially leading to extinction and the permanent loss of such trust resources.¹² NOAA must have adequate data to practice adaptive management of its trust resources, including for mitigation efforts and outcomes. We therefore strongly recommend that you use the mitigation policy to create a monitoring and evaluation framework that is consistent across projects and programs to ensure long-term success.

The Draft Mitigation Policy does not expressly require monitoring of mitigation efforts or set standards or criteria for how such monitoring should be done. The sole references to monitoring are found in Section 4.02, which simply states that any monitoring should be based on the best available scientific information. Any final policy must include an independent section on monitoring requirements that would apply to all compensatory mitigation decisions. Such requirements must be tailored to the type of mitigation used, the length of the project and its impacts on trust resources. Mitigation monitoring programs should also be connected to adaptive management provisions to ensure that mitigation failures can be remedied quickly and effectively through the life of the impacts to be offset.

V. The Mitigation Policy Should Encourage, Not Just Allow, Scientific Research and Data Collection to Address Gaps

Section 4.02 of the mitigation policy states that “NOAA will use the best scientific information available in mitigation planning, implementation, and monitoring.” While the best science must be used for mitigation under some statutes, where scientific data is lacking or is uncertain, we recommend NOAA expressly call for the collection of relevant data in this policy.

Though the Draft Mitigation Policy states that “[c]onsistent with existing authorities, NOAA may request the collection of information about NOAA trust resources through surveys and other data collection efforts when existing information is not sufficient,” we suggest stronger language is

¹¹ See, e.g., Gov’t Accountability Office. 2005. *Wetlands Protection: Corps of Engineers Does Not Have an Effective Oversight Approach to Ensure That Compensatory Mitigation is Occurring*, <https://www.gao.gov/products/gao-05-898>; Van den Bosch, K. & Matthews, J.W. 2016. An assessment of long-term compliance with performance standards in compensatory mitigation wetlands, *Environmental Management* 59:546-556; Owley, J. 2015, Keeping track of conservation, 42 *Ecology* L.Q. 79.

¹² Evansen, M., Carter, A., & Malcom, J. 2021. *A Monitoring Policy Framework for the United States Endangered Species Act*, *Environ. Res. Lett.* 16 031001, <https://iopscience.iop.org/article/10.1088/1748-9326/abe0ea>

warranted to ensure NOAA staff making mitigation decisions consider data collection a priority. We suggest “may request” be changed to “where necessary, and to the maximum extent practicable” in the section quoted above to, among other things, promote data collection that can not only inform individual project decisions, but improve scientific information across mitigation programs, and improve monitoring and evaluation activities.

In cases where scientific research is proposed as a mitigation measure, the policy should specify that such research may only be considered “mitigation” when it is designed to fill gaps or reduce uncertainty in a way that is expected to measurably improve conservation measures relating to the project or activity specifically.

VI. The Mitigation Policy Must Ensure Transparency and Public Availability of Mitigation Documents

The Draft Mitigation Policy states in its Preamble that mitigation work is “conducted in consultation and coordination with . . . the public” and states in section 5 that “[t]he goal of this Policy is to implement NOAA mitigation authorities in a consistent, effective, and transparent manner.” With these goals in mind, any final policy must contain more explicit direction to NOAA staff that mitigation documents be made available to the public. Such requirements would be consistent with the OPEN Government Data Act.¹³

Thank you for the opportunity to comment on the Draft Mitigation Policy. If you have any questions about our comments, please feel free to contact us at acarter@defenders.org or (202)772-3260.



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¹³ 132 Stat. 5534 (2019).