

National Oceanic and Atmospheric Administration	NOAA Administrative Order 216-123	
NOAA ADMINISTRATIVE ORDER SERIES	DATE OF ISSUANCE July 22, 2022	EFFECTIVE DATE July 22, 2022
SUBJECT NOAA Mitigation Policy for Trust Resources		

**SECTION 1. PURPOSE AND SCOPE.**

.01 The National Oceanic and Atmospheric Administration (NOAA) is responsible for the conservation and management of coastal, riverine, and marine ecosystems and resources. The stewardship of these resources is conducted in consultation and coordination with our partners and stakeholders. As outlined in this Policy, mitigation is an important component of accomplishing NOAA’s mission. This Policy does not expand or supersede NOAA’s authorities or mission (see section 5). NOAA will conduct all mitigation activities in accordance with our existing authorities, using existing processes as much as possible.

The definition of mitigation used in this Policy is derived from the Council on Environmental Quality (CEQ) National Environmental Policy Act (NEPA) regulations (40 CFR 1508.1(s)). In practice, the five mitigation elements in the CEQ definition<sup>1</sup> are often categorized into three general types: avoidance, minimization, and compensation. This Policy uses these three categories:

- Avoid – avoid the impact altogether by not taking a certain action or parts of an action or by modifying the action to avert impacts.
- Minimize – minimize the impact by limiting the degree or magnitude of the impact, action, or its implementation.
- Compensate – offset or compensate for the impact by replacing or providing equivalent substitute resources or environments.

This is NOAA’s only comprehensive national policy on mitigation. All step-down guidance for specific issues or for specific regions will be written to be consistent with this Policy.

.02 This NOAA Administrative Order establishes NOAA’s policy for mitigation of impacts to NOAA trust resources. NOAA has been engaged in mitigation activities for decades. Many of the statements in this Policy reflect successful approaches currently used by

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<sup>1</sup> The five elements are avoid, minimize, rectify, reduce, and compensate.

NOAA. Additional details on some aspects of mitigation are covered in existing NOAA and interagency guidance. This Policy is compatible with those existing NOAA mitigation documents.

The purpose of this Policy is to outline the principles NOAA will use to guide decisions about mitigation as we implement our programs and assist public agencies, tribes, and project proponents to avoid, minimize, and compensate for adverse impacts to natural resources under NOAA management or jurisdiction.

This Policy:

- Provides a framework for avoiding, minimizing, and compensating for impacts to species and habitats through application of the mitigation sequence;
- Allows for flexibility appropriate to project- and resource-specific circumstances;
- Promotes innovation and incorporates lessons learned from mitigation project successes and failures; and
- Promotes communication and cooperation among Federal, state, and local agencies, tribal governments, project proponents, and other stakeholders.

The goal of this Policy is consistent, effective, and transparent mitigation that helps to achieve the purposes and objectives of our authorities and programs.

Implementation of this policy will allow action agencies and project proponents to anticipate NOAA recommendations or requirements and develop appropriate mitigation measures early in the planning process, thus improving the efficiency and timeliness of the project evaluation and approval process. Implementation of this policy will also help to sustain vibrant coastal communities and economies by aligning mitigation with landscape or seascape conservation objectives and with the strategies for achieving those objectives at ecologically and economically relevant scales.

- .03 This Policy does not alter or substitute for the authorities, standards, and procedures provided by the applicable statutes or the regulations implementing those statutes. This Policy does not expand NOAA's authorities, and all NOAA mitigation activities will be conducted in accordance with existing authorities.
- .04 NOAA has authorities relevant to the conservation of a broad range of fish and wildlife resources. These authorities are codified under multiple statutes that address management and conservation of natural resources, including the effects of land, water, and energy development on fish, wildlife, plants, and their habitats. Listed in section 5 are the statutes that provide NOAA, directly or indirectly through delegation from the Secretary of Commerce, specific authority for conservation of these resources and give NOAA a role in recommending, requiring, or carrying out mitigation when conducted pursuant to those authorities.
- .05 NOAA also has a role in mitigation for activities that NOAA undertakes, such as:

- a. Actions that NOAA carries out, i.e., actions for which NOAA is the project proponent;
  - b. Actions that NOAA funds; and
  - c. Authorizations that NOAA issues under various statutes.
- .06 This Policy applies to NOAA’s trust resources and their habitats, which are: commercial and recreational fishery resources (marine and estuarine fish and shellfish, including diadromous fish species); endangered and threatened marine species (including diadromous fish species) and their designated critical habitats; marine mammals and marine turtles; marshes, mangroves, seagrass beds, coral reefs, and other coastal habitats; areas identified as essential fish habitat (EFH)<sup>2</sup>; marine habitats and resources associated with national marine sanctuaries, marine national monuments, and other protected places; and aquatic habitats and resources associated with the Great Lakes. The types of resources for which NOAA is authorized to recommend, require, or implement mitigation also include those that contribute broadly to ecological functions that sustain species. This definition of “NOAA trust resources” is provided for purposes of this Policy only.<sup>3</sup>

## **SECTION 2. DEFINITIONS.**

The definitions in this section are for use in this Policy and may not be identical to definitions in other documents.

- .01 Action – an activity or program implemented, authorized, or funded by Federal agencies; or a non-Federal activity or program for which NOAA has authority to make mitigation recommendations, specify mitigation requirements, or provide technical assistance for mitigation planning.
- .02 Avoid/Avoidance – not taking a certain action or parts of an action, or modifying the action to avert all impacts.
- .03 Bank – a site or suite of sites that provide ecological functions and services expressed as credits that are used to offset losses or injuries occurring elsewhere.
- .04 Compensate – replacing or providing equivalent substitute resources and/or environments. Providing additional benefit is a requisite of compensation.
- .05 Compensatory Mitigation – a method of offsetting adverse impacts to NOAA trust resources by replacing or providing equivalent substitute resources through the

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<sup>2</sup> Essential Fish Habitat – those waters and substrate necessary to fish for spawning, breeding, feeding, or growth to maturity (Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. 1801 *et seq.*)

<sup>3</sup> The definition of “NOAA trust resources” is not meant to define or interpret the meaning of terms such as “trust,” “trust resources,” or “trustee” as they are used in other contexts, such as under NRDA (the Natural Resource Damage Assessment and Restoration program).

restoration, establishment, enhancement, or preservation of resources with commensurate functions and services. Providing additional benefit is a requisite of compensatory mitigation.

- .06 Conservation – a general term for the collective practices, plans, policies, and science that are used to manage NOAA trust resources.
- .07 Credit – a unit of measure (e.g., a functional or areal measure or other suitable metric) representing the accrual or attainment of ecological functions at a compensatory mitigation site.
- .08 Durability – ability of a mitigation action to persist on the landscape or seascape and provide the desired ecosystem functions and services for as long as required to provide successful mitigation.
- .09 Enhancement – the manipulation of the physical, chemical, or biological characteristics of a natural resource to heighten, intensify, or improve a specific function(s). Enhancement results in the gain of selected natural resource function(s), but may also lead to a decline in other function(s).
- .010 Equivalent – corresponding or virtually identical in effect or function.
- .011 Establishment – the manipulation of the physical, chemical, or biological characteristics present to develop a specific natural resource on a site that did not previously have that resource.
- .012 Impact – a change (usually a decrease but this term can encompass an increase as well) in the quality or quantity of NOAA trust resources.
- .013 Importance – the relative ecological significance of the affected natural resource, compared to other examples of a similar natural resource in the landscape or seascape, to achieving conservation objectives for NOAA trust resources.
- .014 Interim loss – the loss of natural resource functions and services associated with the time lag between T1 (the time at which the natural resource functions and services are lost due to injury or authorized impact) and T2 (the time at which the restored resources or compensatory mitigation have reached a functional level where they are replacing the functions and services lost). Also known as temporal loss.
- .015 Landscape – a land area encompassing an interacting mosaic of ecosystems and human systems that is characterized by common management concerns. Relative to this Policy, such management concerns relate to conserving NOAA trust resources. Landscape is not defined by the size of the area, but rather the interacting elements that are meaningful to the conservation objectives for the resources under consideration.

- .016 Minimize – limiting the degree or magnitude of an impact, action, or the action’s implementation.
- .017 Mitigation – measures taken to avoid, minimize, and compensate for adverse impacts to resources.
- .018 NOAA trust resources – living marine resources and their habitats, which are: commercial and recreational fishery resources (marine and estuarine fish and shellfish, including diadromous fish species); endangered and threatened marine species (including diadromous fish species) and their designated critical habitats; marine mammals and marine turtles; marshes, mangroves, seagrass beds, coral reefs, and other coastal habitats; areas identified as EFH; marine habitats and resources associated with national marine sanctuaries, national marine monuments, and other protected places; and aquatic habitats and resources associated with the Great Lakes.
- .019 Offset – see “compensate.”
- .020 Preservation – the removal of a threat to, or preventing the decline of, natural resources by an action usually in or near those resources. This term includes activities commonly associated with the protection and maintenance of natural resources through the implementation of appropriate legal and physical mechanisms.
- .021 Project proponent – the entity proposing an action, and if applicable, any applicant(s) for agency funding or authorization to implement a proposed action.
- .022 Restoration – the manipulation of the physical, chemical, or biological characteristics of a site with the goal of returning natural/historic functions to a former or degraded resource.
- .023 Scarcity – the relative spatial extent (e.g., rare, common, or abundant) of the habitat type in the relevant context (e.g., landscape or seascape, species range).
- .024 Seascape – a marine, estuarine, tidal freshwater, or Great Lakes area encompassing an interacting mosaic of ecosystems and human systems that is characterized by common management concerns. Relative to this Policy, such management concerns relate to conserving NOAA trust resources. Seascape is not defined by the size of the area, but rather the interacting elements that are meaningful to the conservation objectives for the resources under consideration.
- .025 Suitability – the relative ability of the affected habitat to support one or more elements of the affected resources’ (e.g., species’) life history (e.g., reproduction, rearing, feeding, dispersal, migration, or resting from disturbance) stages compared to other similar habitats in the landscape or seascape context.
- .026 Temporal loss – see “interim loss.”

### **SECTION 3. POLICY.**

The following eight principles will guide NOAA recommendations and decisions about mitigation.

.01 Apply the mitigation sequence appropriately.

NOAA will follow the mitigation sequence by first considering avoidance, then minimization, and then compensatory or offsetting measures. While this sequence indicates NOAA's general order of preference, the selection of appropriate mitigation measures will give considerable weight to the effectiveness of the measure in achieving environmental benefits consistent with applicable authorities.

In applying the mitigation sequence, NOAA will generally recommend or require avoiding adverse impacts to high value habitats. High value habitats include irreplaceable and difficult to replace habitats; habitats that are crucial to achieving conservation objectives for NOAA trust resources; and habitats that provide important ecosystem functions or contribute to ecosystem resiliency.

NOAA will determine if habitats are high value by considering the habitat's: a) scarcity; b) suitability for affected NOAA trust resources; and c) importance to achieving conservation objectives. All three are not required for a habitat to be characterized as high value.

.02 Employ the best scientific information available.

NOAA will use the best scientific information available in recommending, planning, implementing, and monitoring mitigation. Since the state of mitigation-related science is dynamic, continually involving new information and questions, the best scientific information available is not static. Scientific information includes factual input, data, models, analyses, technical information, and scientific assessments. Scientific information also includes data compiled directly from surveys or sampling programs, appropriate local and traditional knowledge, and models that are mathematical representations of reality constructed with primary data. Additionally, scientific information can be gained through implementing mitigation projects and learning from them through monitoring, and in some cases, research.

Consistent 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 for the evaluation of proposed actions and mitigation, or when additional information would facilitate more effective or efficient mitigation recommendations.

.03 Apply a holistic landscape and/or seascape approach.

Mitigation recommendations and decisions should be made using a holistic landscape and/or seascape approach, with a goal of selecting the option that best achieves the conservation objectives for the affected NOAA trust resources. This approach allows for the consideration of a wide range of mitigation options, with a preference for on-site and in-kind for difficult to replace resources, but including off-site and out-of-kind compensation, selecting the option that is most suitable for NOAA's trust resources. This holistic approach can also allow for the development of multi-use mitigation strategies to encourage a broad range of ecological benefits.

NOAA recommends the development of landscape or seascape management plans in collaboration with partners and other stakeholders. These plans should incorporate the best scientific information available and complement existing conservation plans (e.g., recovery plans, habitat conservation plans, watershed plans) relevant to the affected trust resources.

.04 Promote mitigation strategies with high probability of success.

NOAA will seek to ensure mitigation is implemented successfully. NOAA will support mitigation measures that provide a high degree of certainty in their effectiveness and durability while also achieving the best conservation outcome for NOAA's trust resources. In some circumstances, such as when data on a particular natural resource are limited or when atypical conditions exist, achieving mitigation goals may require the use of measures that do not have a high degree of certainty. Under these circumstances, NOAA will support these projects, seeking ways to increase certainty and the likelihood of mitigation success through the use of adaptive management plans.

To increase the certainty of compensatory mitigation outcomes, projects should have measurable ecological performance standards, detailed monitoring requirements, an adaptive management plan, and a long-term management plan. Compensatory mitigation providers should also provide financial assurances to support the development, maintenance, monitoring, and long-term management of the mitigation measures. Compensatory mitigation providers in comparable contexts should be held to consistent standards with respect to assuring the success of compensation.

.05 Consider climate change and climate resilience when evaluating and developing mitigation measures.

In developing and evaluating mitigation measures, NOAA will consider how the effects of climate change (e.g., sea-level rise, changes in species and habitat ranges) may influence the effectiveness and resilience of some mitigation approaches. Mitigation that is durable, adaptable, and resilient under a range of future climate conditions is more likely to maintain its effectiveness in the future than mitigation designed for present conditions that may not persist. NOAA will rely on the specific statutory

requirements under which mitigation is being conducted and the best available science when incorporating climate change into mitigation measures.

- .06 Implement compensatory mitigation that is proportional to impacts to NOAA trust resources and offsets those impacts to the full extent provided by NOAA authorities.

Compensatory mitigation should be proportional in scale to impacts to NOAA trust resources and of a sufficient quantity and quality to offset those impacts, including any interim losses (also known as temporal losses). The level and type of uncertainty associated with the compensatory mitigation project may create the need for an increased amount of compensation to assure that impacts are sufficiently offset. NOAA will rely on the specific requirements of the statutes under which mitigation is being conducted to ensure that the resources, functions, and services provided through compensation will be sufficient.

- .07 Use preservation of intact habitat as compensation appropriately, taking into account the high risk of habitat loss in many coastal and marine landscapes and seascapes.

NOAA supports habitat preservation as compensatory mitigation in certain, limited situations. Preservation may be particularly valuable when the habitat is at risk of loss or degradation and when the long-term conservation benefits of preserving that habitat outweigh the immediate losses requiring compensatory mitigation. However, habitat preservation does not result in new habitat functions and services and thus does not provide an immediate offset for habitat losses. Therefore, when preservation is used as compensation, a combination of restoration and preservation is preferred. When evaluating the appropriateness of preservation as compensatory mitigation, NOAA will consider the characteristics of the area to be preserved, the level of current protection and/or vulnerability of the area to be preserved, and the impact for which the preserved area would compensate.

- .08 Collaborate with partner agencies and stakeholders.

NOAA will work in collaboration and coordination with partner agencies, tribes, project proponents, mitigation providers, communities, and others within the broader array of stakeholders to implement this Policy. NOAA will endeavor to use timely and transparent processes that provide predictability and uniformity. NOAA will seek to engage project proponents, partner agencies, and stakeholders as appropriate, early in the planning and design stage of actions, including planning for mitigation.

When adverse impacts to NOAA trust resources are identified as part of authorizing a project, NOAA will work with action agencies and/or project proponents to identify options for achieving project goals in a manner consistent with this Policy. Those options may include avoiding work in certain areas or during certain time periods, minimizing adverse effects through the use of protective barriers, and compensation through restoration or other measures. Early engagement between NOAA, action



agencies, and project proponents is key to achieving the goals of the project proponents consistent with mitigation mandates.

Whenever appropriate, NOAA will, through Interagency Review Teams or other existing methods of cooperation:

- a. Coordinate with partner agencies and tribes that have responsibilities for fish and wildlife resources when evaluating mitigation for resources of mutual concern;
- b. Seek to develop with partner agencies common mitigation recommendations and compliance approaches across mitigation authorities;
- c. Seek to develop with partner agencies common criteria and standards for mitigation providers to facilitate their use for diverse mitigation needs;
- d. Consider information and plans made available by partner agencies, tribes, and stakeholders in the development of mitigation recommendations and requirements;
- e. Collaborate with partner agencies, tribes, communities, and stakeholders in the formulation of landscape- or seascape-level plans;
- f. Collaborate with underserved communities and stakeholders to, consistent with NOAA authorities, incorporate social equity objectives into mitigation planning; and
- g. Cooperate with partner agencies, tribes, and stakeholders to disseminate data, develop tools, and conduct training in mitigation methodologies and technologies.

#### **SECTION 4. RESPONSIBILITIES.**

- .01 NOAA has many programs that implement mitigation. The following have oversight of programs that will oversee implementation of this Policy: the Director of the Office of Habitat Conservation and regional counterparts, the Director of the Office of Protected Resources and regional counterparts, the Director of the Office of National Marine Sanctuaries, the Director of the Office of Response and Restoration, and the Director the Coral Reef Conservation Program.

#### **SECTION 5. REFERENCES.**

This Policy is subordinate to NOAA's mission and all authorities.

NOAA's mission is: to understand and predict changes in climate, weather, ocean, and coasts, to share that knowledge and information with others, and to conserve and manage coastal and marine ecosystems and resources.

The authorities listed below are the regulatory drivers for this policy.

- .01 Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9601 *et seq.* (or CERCLA)
- .02 Endangered Species Act of 1973, as amended, 16 U.S.C. § 1531 *et seq.* (or ESA)

- .03 Federal Power Act, 16 U.S.C. § 791–828c (or FPA)
- .04 Federal Water Pollution Control Act (Clean Water Act), 33 U.S.C. § 1251 *et seq.* (or CWA)
- .05 Fish and Wildlife Coordination Act, as amended, 16 U.S.C § 661–667(e) (or FWCA)
- .06 Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. § 1801 *et seq.* (or MSA)
- .07 Marine Mammal Protection Act, as amended, 16 U.S.C. § 1361 *et seq.* (or MMPA)
- .08 NEPA, 42 U.S.C. § 4371 *et seq.*
- .09 National Marine Sanctuaries Act, 16 U.S.C. § 1431 *et seq.* (or NMSA)
- .010 Oil Pollution Act, 33 U.S.C. § 2701 *et seq.* (or OPA)

Additional references are provided in the NOAA Procedures on Mitigation for Impacts to Trust Resources, a companion to this Policy.

### **SECTION 6. EFFECTS ON OTHER ISSUANCES.**

This Policy does not have any application to or effect on programs or policies that pertain to hazard mitigation, climate mitigation, or other forms of “mitigation” that are not within the regulatory context of the above authorities..

An electronic copy of this Order will be posted in accordance with Chapter 100 of the NOAA Records Control Schedule on the NOAA Office of the Chief Administrative Officer website under the Administrative Programs’ NOAA Administrative Issuances Section:  
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Under Secretary of Commerce  
for Oceans and Atmosphere

#### **Offices of Primary Interest:**

- Office of Habitat Conservation
- Office of Protected Resources
- Office of National Marine Sanctuaries
- Greater Atlantic Regional Field Office
- Southeast Regional Office
- West Coast Regional Office
- Alaska Regional Office
- Pacific Island Regional Office