

Greater Sage-Grouse

Pre-Listing Mitigation Program Review USFWS Standard Operating Procedure

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V 0.999
August 2015*



Greater Sage-Grouse Mitigation Program Review, USFWS Standard Operating Procedure

Table of Contents

PURPOSE and PROCESS 2

 Purpose 2

 Administration..... 2

 Review Process..... 2

SIDEBOARDS for MITIGATION REVIEW 3

 Narrowing the Sideboards 3

 Goals and Governance 3

 Mitigation Standards 6

PRELISTING MITIGATION AGREEMENTS..... 10

 Background on Prelisting Mitigation 10

 Agreement Recommendations 12

 CCAs/CCAAs and Prelisting Mitigation Agreements 13



PURPOSE and PROCESS

Purpose

The purpose of this standard operating procedure (SOP) is to establish a uniform process for the U.S. Fish and Wildlife Service (Service) to review local, state and federal mitigation agreements and programs for the Greater sage-grouse (*Centrocercus urophasianus*), including those where the Service may enter into pre-listing mitigation agreements. Mitigation agreements may come in the form of conservation bank agreements or bank-like agreements, habitat or credit exchange agreements, in lieu fee programs, or other mechanisms.

This document provides Service staff with tools to translate the standards outlined in the 2014 *Greater sage-grouse Range-wide Mitigation Framework* (Framework) to more specific program review criteria. Refer to the Framework for definitions and background on mitigation concepts.



Administration

This SOP identifies a process and outline for Service staff from the field and regional offices to review and approve local mitigation programs. Designated SharePoint sites have been established for working drafts and official documents so they are accurately captured as part of the administrative record.

Working and Final

Documents: <https://fishnet.fws.doi.net/projects/home/NSGC/Mitigation/Forms/AllItems.aspx>

Official and Final Documents:

<https://portal.doi.net/usfws/SG/SitePages/Home.aspx>

Review Process

Service staff may have already been involved in the development of a local mitigation program, or may be seeing a near-complete program for the first time. An official request for review should include enough documentation to adequately assess the following:

- The mitigation program's structure, including specific documentation on program governance
- How compensation will be assessed and quantified
- Roles of relevant parties, including the state, BLM, and the Service where appropriate

The proponent should also submit answers to the Framework Questions Guide.

[regional review, range-wide consistency, etc.? to the Field Office]

SIDEBOARDS for MITIGATION REVIEW

Narrowing the Sideboards

The Framework provides broad guidance for sage-grouse mitigation program developers to follow. The Framework calls attention to the role of the full mitigation hierarchy (including avoidance and minimization), a net conservation gain as the overall mitigation goal, and the importance of program governance. Five mitigation principles and six mitigation standards are provided as guideposts that, if followed, should demonstrate how compensatory mitigation can achieve the best outcomes for conservation.

The tables that follow provide Service staff reviewing sage-grouse mitigation programs additional internal guidance to further narrow the sideboards of the Framework's principles and standards. Unless otherwise noted, each component is a requirement for the Service to provide endorsement of a mitigation program and/or enter into a prelisting mitigation agreement. The column "Framework Questions" refers to the specific question number in the Framework's Questions Guide appendix and can be used to cross-reference proponent's answers.

Goals and Governance

A.	Avoidance, Minimization, and Rectification Preferably, documents submitted by a proponent for review will address how projects arrive at compensatory mitigation, i.e. how avoidance and minimization is first addressed. Third party mitigation providers may not have direct control over this, however. The Service should exercise caution in providing regulatory predictability through prelisting mitigation agreements if there is uncertainty that projects acquiring credits did not go through an adequate avoidance and minimization filter. At a minimum, the BLM standards for avoidance and minimization may be used as reference.	Framework Question(s)
a.1	To obtain regulatory certainty from the Service and ensure conservation of sage-grouse, avoidance and minimization of impacts should be ensured prior to transfer of credits from a mitigation program. Methods to ensure adequate application of the mitigation hierarchy (in order of strength): <ul style="list-style-type: none">• Mitigation program is integrated into regulatory mechanism(s) that have avoidance and minimization requirements (e.g. Oregon mitigation program)• Regulatory mechanisms provide adequate avoidance and minimization requirements (e.g. BLM; Wyoming core area strategy)• Regulatory agencies are party to the mitigation agreement which contains language requiring avoidance and minimization before credit transfer• Language in program operational documents clarifies that only projects providing proof that avoidance and minimization were employed are accepted (this should be in any program)	I.1 IV.A-B

a.2	<p>If the program will offer term (i.e. not permanently protected) credits, the Service should have confidence that impacts those credits compensate for will be fully rectified by the end of their identified term. Preference is always for use of permanent credits (perhaps at a discount) to offset term impacts.</p> <p>Methods to ensure adequate rectification of term impacts:</p> <ul style="list-style-type: none"> Regulating agency issues a term (i.e. defined length of time) permit which requires complete rectification and verification of the site to pre-project levels within the permit timeframe Permits are not definitive in length but can be renewed, however the regulatory agency can assess potential new impacts and can require additional mitigation <p>Additional (untested and less preferable) methods to consider:</p> <ul style="list-style-type: none"> Mitigation program administrator has legal ability to confirm rectification has occurred and request additional compensation if necessary Bond [CHE example? – I think CHE will have more of a funding pool] 	<p>II.6 IV.C</p>
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B.	<p>Mitigation Goal</p> <p>After avoiding and minimizing project impacts to the maximum extent practicable, compensatory mitigation should provide a net conservation gain or benefit. The overall program design, and specifically the metrics (see 6) and application of risk management tools (see 4), should provide the Service confidence that a net conservation benefit can be achieved.</p>	Framework Question(s)
b.1	<p>The mitigation program can demonstrate how net conservation benefit will be measured at three potential levels:</p> <ul style="list-style-type: none"> Project level (while no net loss is the minimum required at this level net benefit is preferable) Regional or service area level Mitigation program level 	<p>I.1 IV.D.c.2</p>

b.2	<p>To ensure the mitigation goal can be tracked and is attainable, the following components, at minimum, should be part of the mitigation program:</p> <ul style="list-style-type: none"> • Adaptive program management plan (see c.6) • Transparent tracking system (see 6.6) • Reporting requirements (see c.8) • One or more of the following mechanisms:* – A retirement account, separate from any risk management credit reserve account, that consists of credits never be used to offset debits; – Applying a mitigation ratio (e.g. need credits equaling 1.5x the number of debits to offset); – A high enough project level reserve account contribution ensures the reserve account will never be completely exhausted; – A credit reserve pool with built-in thresholds to ensure reserve credits never fall below a certain amount (dropping below a certain threshold could be grounds for the Service to suspend an agreement); – Use of adjustment factors tied to qualitative habitat features that make it relatively easier to generate debits and harder to generate credits; – Requirement for credits to have a longer duration than the impacts they offset (e.g. 20-year credit project to offset 10-years of disturbance). 	<p>III.8 III.10 III.11</p>
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*Note: All mechanisms assume credits and debits are equivalent, robust, and any uncertainties are mitigated through risk management tools.

C.	Governance The success of any compensatory mitigation program is dependent on how the program is managed. In most cases, the Service will not be directly involved in governance of a mitigation program so understanding the checks and balances of a governance structure is key to providing certainty a program will be successful.	Framework Question(s)
c.1	A mechanism (agreement, legislation, etc.) identifies responsible parties for managing the program.	III.3
c.2	The agency responsible for managing the species has adequate authority or input in the program, especially in the processes for valuation and prioritization of habitat. If the agency does not have direct authority, participation on a program's scientific and oversight committees may be acceptable.	III.2
c.3	Roles of the parties are clearly defined, including any role of the Service. At least one party should be linked to landscape-level planning processes for sage-grouse.	III.1 III.12 III.2 III.13 III.4 III.14
c.4	The program administrator has the authority and resources needed to enforce compliance.	III.2 III.3
c.5	The program identifies at least two transparent financial systems with two separate accounts: one for program operations and one for mitigation funds collected or dispersed. Monies for long-term stewardship, such as endowments, should reside with a third party and not the mitigation program.	III.5 III.7

c.6	The program includes an adaptive management plan identifying specific thresholds which trigger program review or modification of program components and a process for review and adoption of modifications. Where appropriate, thresholds should be tied to biological triggers (related to sage-grouse population and habitat monitoring) either directly through program monitoring or in conjunction with state monitoring efforts.	III.8 IV.D.c.6 IV.D.d.24
c.7	A dispute resolution process is identified in any agreement and in program operational documents.	III.4
c.8	The program includes reporting requirements for who receives what information and at what frequency. If the Service is party to the agreement, the Service should receive at least annual reports. Parties should be able to evaluate the effectiveness of mitigation in relation to the species and the program. Reports should clearly demonstrate how the mitigation goal is being met. [list minimum components for reports? Yes. E.g. ratio of debits to credits for each seasonal habitat type.]	III.1 III.9 III.10 III.11 IV.D.d.23

Mitigation Standards

1.	Siting The mitigation sequencing hierarchy should be applied in the context of conservation objectives derived by a landscape-scale approach. Compensatory mitigation actions should be sited in locations that have been identified in conservation plans to most likely successfully and fully compensate losses to sage-grouse.	Framework Question(s)
1.1	Program integrates landscape level plan(s) such as a county or state conservation plan or BLM regional mitigation strategy. <i>or, in the absence or inadequacy of such plans,</i> Program includes planning or decision support tools to facilitate smart siting of development and conservation actions.	III.4 IV.A.2 IV.A.5 IV.D.c.8 IV.D.c.10 IV.D.d.1 IV.D.d.2
1.2	Program incentivizes conservation of and discourages development in areas designated by a conservation strategy or other planning tool as important for sage-grouse. Provisions for when, if ever, on-site mitigation is appropriate are included.	IV.D.d.1 IV.D.d.6 IV.D.d.16
1.3	Service area(s) are defined and are based primarily on biological factors (e.g. PACs, populations). Jurisdictional factors (e.g. political boundaries) are justified if they are used.	IV.D.c.8
1.4	Program addresses trading of credit outside service area or jurisdictional boundaries (e.g. across state lines). <i>or</i> Program provides for adjustment of service areas through an adaptive management process.	IV.D.c.9 IV.D.c.10

1.5	Scale-appropriate factors, including habitat proximity, importance, and limited/rare habitat are included in impact assessment and mitigation siting decisions.	IV.D.a.2,4,5 IV.D.b.2 IV.D.c.5 IV.D.d.1
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2.	Duration Compensatory mitigation actions should achieve targeted biological conditions in a timeframe commensurate and proportional with the biological impacts to be offset.	Framework Question(s)
2.1	Credit project duration must meet or exceed duration of the impact, accounting for any time lags, uncertainty, and remediation.	IV.C IV.D.a.3 IV.D.b.3 IV.D.b.4 IV.D.c.3 IV.D.c.4 IV.D.d.7
2.2	Term credits are limited to no less than 10 years.* <i>For example:</i> a “5 year” impact is offset using a 10 year or more term credit.	
2.3	Dynamic credits (credits purchased in sequence over time to offset a longer-term impact) are limited to no less than 30 years and in 30 year increments.* <i>For example:</i> a “50 year” impact would be offset using two 30 year dynamic (sequential) credits (or a ≥50 year credit). If the program restricts the use of dynamic credits (see 2.4) then the 30 year increment requirement may be reconsidered.	
2.4	[Preference] Dynamic credits are programmatically restricted.* <i>For example:</i> Only 25% or less of program funds or credits in a given year may be used for dynamic credits.	

*Note: The limits to term and dynamic credits are based on the slow nature of a disturbed sagebrush ecosystem to respond to restoration and management efforts. Use of term and dynamic credit types is relatively untested for species and until proven successful, these limits will provide more confidence that impacts will be adequately offset in a sustainable, long term manner.

3.	Additionality Actions proposed as compensatory mitigation should provide benefits beyond those that would be achieved if the mitigation actions had not taken place and should exceed what is otherwise required by federal, state, and local regulations.	Framework Question(s)
3.1	Eligibility - program outlines minimum eligibility criteria for credit sites which include the potential for sage-grouse use, the landowner’s ability/authorization to implement conservation actions, and minimum habitat functionality that should exist before accruing credit.	IV.D.d.1-3 IV.D.d.5 IV.D.d.10

3.2	Baseline – program uses the same baseline for calculating credits and debits both pre- and post-project and baselines provide certainty of ecological benefit. If different baselines are used, a biologically-based justification is given.	IV.D.a.4 IV.D.b.2
3.3	Credit Types – program balances use of preservation and enhancement/restoration projects based on threats and local needs of sage-grouse (ideally as determined by a conservation plan).	IV.D.d.12
3.4	Regulatory Requirements – the program ensures that eligible sites must exceed existing regulatory or policy obligations, including designation as conservation lands.	IV.D.d.10
3.5	Public Funds – program describes how ecological outcomes achieved using public funds in active contracts will be separate and excluded from credit calculations.	IV.D.d.17
3.6	CCAAs [<i>if program may overlap with CCAAs</i>] - program explains if or when it is appropriate to have mitigation agreements on lands covered under a CCAA. If deemed appropriate, the program provides clear direction on how conservation measures in CCAAs and mitigation site-level agreements will be separately tracked and reported.	IV.D.d.5
3.7	Credit Stacking [<i>if credit stacking may apply</i>] - program addresses any possible credit stacking of other resources and clarifies how to account for sage-grouse credit to ensure additionality.	II.4 IV.D.d.18

4.	Effectiveness (and Managing Risk) Compensatory mitigation actions should be proven to be reasonably likely to deliver expected conservation benefits, target those actions that will provide the greatest benefit to sage-grouse, be measurable, and be commensurate with the degree of risk and uncertainty associated with predicted effects.	Framework Question(s)
4.1	The program requires credits are verified and available before impacts occur. <i>or</i> The program is structured to account for time lags between impacts and offsets through metrics and/or transfer of additional credits, reserve accounts, or other risk management tools. <i>For example:</i> An in lieu fee mitigation program typically does not have credits available before an impact but is structured to account for time lags in credit availability.	IV.D.a.6 IV.D.b.5 IV.D.c.3 IV.D.c.4 IV.D.d.14
4.2	Conservation measures/actions are supported by science and time lags in restoration actions are appropriately considered.	IV.D.b.3 IV.D.d.12
4.3	Credit for preservation is proportionate to the magnitude and likelihood of existing and future threats to the habitat and/or the value of the site to conservation of the species (ideally as recommended in a plan - see also 3.3).	IV.D.b.2 IV.D.d.9
4.4	The program requires monitoring of specific performance standards to ensure continued compliance of credit sites. [Preference for a priori identification of site specific performance standards].	IV.D.d.13 IV.D.d.20-22 IV.D.d.24

4.5	The program outlines a monitoring plan for credit sites based on performance standards, proportional to the type of credit projects (e.g. preservation projects may require less monitoring than restoration projects). Monitoring should tie into program adaptive management triggers (see also 6.5).	III.11 IV.D.d.21 IV.D.d.23
4.6	A credit release schedule is identified that limits release of credits to only when specific administrative and ecological performance criteria are achieved. <ul style="list-style-type: none"> Minimum administrative criteria for the first credit release should include: site agreement and management plan approved, real estate instrument secured, and establishment of financial assurances. Additional credit releases occur from meeting ecological milestones (determined through monitoring of performance standards - see 4.4) and/or for meeting financial milestones (see 5.3). 	IV.D.d.4 IV.D.d.13 IV.D.d.15
4.7	Research and education are not used as compensatory mitigation. Research is encouraged on mitigation sites and additional fees may be collected for these purposes, but only after full compensation for impacts is ensured.	IV.D.d.12

5.	Durability Actions or plans proposed as compensatory mitigation must be accompanied by management, legal, and financial assurances that ensure the action or plan will be in place and effective for the intended duration. Assurances should address unintentional and intentional losses of compensatory mitigation actions.	Framework Question(s)
5.1	Site Agreement – program requires a binding agreement between administrator and participants that ties in assurances, management, and reporting.	IV.D.d.11 IV.D.d.15 IV.D.d.19
5.2	Real Estate – the program will require site protection instruments for participating lands, including federal lands and lands with split estates, for the full duration of the project's life. Mechanisms should ensure durability on public land is commensurate to those of private land.	IV.D.d.11 IV.D.d.19
5.3	Financial – the mitigation program requires sufficient financial assurances connected to each project to ensure mitigation will be successfully completed in accordance with performance standards and for the full duration of the project's life.	IV.D.d.19 IV.D.d.20
5.4	Management Plan – the program requires each site to have a customized management plan that prescribes the management, monitoring, and reporting activities to be conducted and provides for the continued adaptive management of a site.	IV.D.d.11 IV.D.d.15 IV.D.d.19
5.5	A plan or structure is in place to replace any potential reversals in credit projects from natural or anthropogenic disturbances. <i>For example:</i> One programmatic tool for reversals is a reserve credit account. Each site sets aside a percentage of credits based on the amount of risk (e.g. from fire or split estate issues) to potential reversals. This pool of credits is never to be used for mitigation.	IV.D.d.22

6.	Metrics Determinations of the expected impacts of actions and the measures necessary to avoid, minimize, or compensate for those impacts should be based on biological conditions and upon reliable, repeatable, and quantitative science-based methods.	Framework Question(s)
6.1	Metrics are developed from a science-based and transparent process and result in reliable, consistent, and repeatable methods to determine debits and credits. [Preference] The quantitative, science-based metric/accounting system is peer reviewed.	IV.D.a IV.D.b IV.D.c.1
6.2	The metrics take into consideration both direct and indirect effects for all of the potential covered impact activities.	IV.D.a.5 IV.D.b IV.D.c.1
6.3	The metrics consider habitat quality, quantity, and scale. The three major sage-grouse habitat categories (breeding, summer/foraging, and wintering habitat) are included and (preferably) tracked.	IV.D.a IV.D.b IV.D.c.1 IV.D.d.16
6.4	A verification process is identified that will confirm program rules are followed and that credits are ecologically available to be released for use on a given site.	IV.D.a.6 IV.D.b.5 IV.D.d.14 IV.D.d.15
6.5	The program establishes clear thresholds to trigger future adjustments to metrics. Criteria and processes for making adjustments in a way that will not undermine existing credits or mitigation agreements are identified.	IV.D.c.6 IV.D.c.7
6.6	A robust accounting system to track credits (and debits, if applicable) is defined. The accounting system should foster transparency, accountability, and creditability; be accessible to parties to the agreement; and information from the system should be included in monitoring reports.* [include specifics?]	III.10 IV.D.d.14 IV.D.d.15

*Note: The Service is exploring the use of the Regulatory In-Lieu Fee and Bank Information Tracking System (RIBITS), used to track conservation banks and ILF programs for listed species, to track these types of non-listed species mitigation programs. If feasible, tracking prelisting mitigation programs in RIBITS may become a requirement for Service participation in prelisting mitigation agreements.

PRELISTING MITIGATION AGREEMENTS

Background on Prelisting Mitigation

Prelisting mitigation refers to explicit recognition from the Service that actions or credits developed or acquired both in advance of impacts, and in advance of a listing decision, will be considered as a conservation action in a status review and may be used as compensatory mitigation through ESA consultations should the species be listed. Additionally, suppliers of compensatory mitigation may be able to attain regulatory predictability that, should the species become federally listed, the management to which they agreed will not change and/or incidental take coverage will be provided for these management actions. In order to obtain

these types of regulatory predictability, a prelisting mitigation agreement with the Service is required.

The Service does not currently provide guidance on the specific language or structure of these agreements. However, it is generally recognized that they may fall into three broad categories: conservation bank or bank-like agreements, Endangered Species Act (ESA) section 7(a)(4) consultations, and CCAAs.

1. Conservation Bank or “Bank-Like” Agreements

Traditionally, conservation bank agreements are a regulatory instrument that provides both bank sponsors and entities buying credits from conservation banks certainty that credits are fungible, valid, and meet regulatory requirements under sections 7 or 10 of the ESA. While it is plausible to have a conservation bank for non-listed species, conservation bank agreements only apply to permanently protected lands, require a signed agreement with the Service, and only consider the crediting side of the equation. However, their familiar structure can be used to develop similar agreements for prelisting programs which may cover debiting, not include the Service in a regulatory oversight role, and offer term credits. Through these types of agreements the Service is best positioned to offer at least the following: 1) that prelisting actions will be credited if those actions meet the conditions specified in the agreement, and 2) that valid credits can be used in the manner described in the agreement.

2. Section 7(a)(4) Consultation

Where there is clearer understanding of potential impacts, the Service can complete a section 7(a)(4) conference that covers both beneficial and adverse actions for a prelisting mitigation program. For federal agencies, the Service can issue a draft section 7 incidental take statement through a conference opinion. For nonfederal entities, the Service can provide a conference opinion through an intra-Service consultation. If the species is listed and if there are no significant changes, the conference opinion may be converted to a biological opinion. Conferencing may occur in conjunction with any of the prelisting mitigation agreement mechanisms listed in this section.

3. CCAAs

For nonfederal entities, and assuming details about potential impacts are known, the Service can conference on both beneficial prelisting mitigation actions (credits) and proposed adverse impacts (debits) and issue a 10(a)(1)(A) enhancement of survival permit, essentially a CCAA. There is general debate about using this tool for mitigation and it is also unclear what level of impacts can be authorized through CCAAs. This mechanism would only be appropriate if enough detailed information about future impacts were available in order to adequately evaluate the effects on the species to meet the CCAA standard.

Agreement Recommendations

The Service recommends, for maximum regulatory and legal predictability, that prelisting mitigation agreements of any variety are vetted through an inter- or intra-Service section 7 conference process which assesses, to the extent possible, beneficial and adverse actions of the program.

For any agreement the Service should require a net conservation benefit standard and should include language expressing the need for avoidance and minimization to occur prior to entry into any compensatory mitigation program. The standards outlined in this SOP should be met in order to deliver the fullest amount of regulatory predictability; however, the Service may offer conditional or partial predictability if some standards are not fully addressed.

To provide certainty that credits may be recognized in a post-listing environment, modification of the following language from existing sage-grouse prelisting mitigation agreements may be useful:

Colorado Habitat Exchange Agreement – 2015

[insert final language from regulatory predictability section]

Barrick Gold Bank Enabling Agreement - 2015

If the sage-grouse is listed or proposed for listing as threatened or endangered under the ESA, FWS agrees that Barrick may incorporate Credits that have been or will be Released to Barrick pursuant to an approved Project Plan under this BEA prior to the conclusion of Section 7 consultation or conference into a proposed action to approve a future proposed Plan of Operations or amendment in the Service Area. If Barrick elects to incorporate Credits to offset the Debits associated with such proposed action, FWS agrees, when conducting Section 7 consultation or conference with BLM, to assess the impacts to the sage-grouse of such proposed action based on the calculation of Credits and Debits generated by the TNC Methodology set forth in Appendix 1, Exhibit C, or other methodology mutually agreed upon pursuant to Section IV.A.1. In accordance with Sections I and IV of this BEA, if FWS determines that these Credits are sufficient to achieve a Net Conservation Gain to offset the adverse effects of habitat loss or modification (i.e., Debits) of such Plan of Operations or amendment upon the sage-grouse, no additional requirements related to sources of adverse effects that are addressed in the TNC Methodology will be included in the reasonable and prudent measures to the extent that use of the TNC Methodology is consistent with applicable law and regulations.

If the lands within the Service Area are not in federal ownership at the time that Barrick proposes activities on those lands, and Barrick chooses to apply for an incidental take permit under ESA Section 10 for those activities, and minimizes the impacts of those activities on the sage-grouse to the maximum extent practicable, and includes sufficient Credits that have been Released to Barrick under this BEA in its habitat conservation plan to show a Net Conservation Gain, FWS agrees to accept those Credits as satisfaction of Barrick's obligation to mitigate impacts to the sage-grouse to the maximum extent practicable and in accordance with Section I of this BEA.

CCAs/CCAAs and Prelisting Mitigation Agreements

Informed by national policy discussion and consistent with the Framework, landowners enrolled in CCAs/CCAAs can provide compensatory mitigation if the actions related to mitigation are additional to the minimum conservation measures required by the CCA/CCAA.

Ideally, participants will retire a CCA/CCAA when entering into a mitigation program that provides regulatory predictability. However, when regulatory certainty through a mitigation program is not available and where CCA/CCAAs and mitigation agreements may cover the same lands, the following measures should be considered to ensure both CCA/CCAA and mitigation program standards are retained:

1. Baselines are measured using the same metric and at the same time (within 2 years) – OR - baseline measures are reconciled in a transparent, scientific way approved by the Service.
 - a. If land has been under a CCA/CCAA for > 5 years or is within 2 years of its termination date, this provision need not apply.
 - b. If the CCA/CCAA is surrendered and the original CCA/CCAA baseline metrics meet this provision it may be used as the mitigation baseline.
2. At least 15% additional uplift from measureable activities is available for mitigation – OR – for preservation situations, the financial and real estate provisions under the mitigation agreement provide protection for at least the duration of the CCA/CCAA and such protections demonstrate avoided loss.
3. In order to track conservation actions and ensure additionality, a process is identified for communication and reporting of conservation measures for each program.

