The Biden administration has made bold commitments to conserve land and transition to renewable energy, including multiple executive orders committing the US to a carbon-free power sector by 2035, a net-zero economy by 2050, and building $1–$2 trillion in new infrastructure.¹

These goals will be difficult to accomplish—or substantially delayed—without stronger policies to pre-identify irreplaceable natural resources that must be avoided, incentivize investment in expanded supplies of offsets, and create more efficient review processes to approve balanced use of those beneficial offsets to permitted harms.

Many federal agencies built offset policies and other mitigation approaches from 1988 through 2016 with a particular emphasis between 2015 and 2016 on enhanced policies for infrastructure permitting and consistency across agencies and laws. Unfortunately, much of this progress was reversed between 2017 and 2020.

Those policies are needed again. And more.

In this paper, we offer detailed recommendations for how the Biden administration can rebuild earlier mitigation policies while creating both better permitting for applicants and stronger ecological outcomes. Beyond those policies, we also offer recommendations that support America the Beautiful, offshore and onshore renewables permitting, and the administration’s other infrastructure initiatives.

¹ White House. (2021, January 27). Fact Sheet: President Biden Takes Executive Actions to Tackle the Climate Crisis at Home and Abroad, Create Jobs, and Restore Scientific Integrity Across Federal Government.
We recommend:

- Quickly restoring specific policies related to mitigation (where they existed) that were rescinded between 2017 and 2020.

- Developing additional agency-wide mitigation policies and implementing them through step-down guidance and other measures. In many cases, we recommend complementing this effort by dedicating new staff to mitigation teams and conducting more federal staff training on mitigation.

- Supporting initiatives and funding that create advance offset supplies such that, when offset needs arise, the private sector or others already have a ready supply of relevant offsets to deploy.

- Putting administrative procedures in place to improve the permitting timeline for important infrastructure programs that dramatically speed up the permitting timelines for ecological restoration and climate resilience projects.

Recognizing the range of existing mitigation programs, rules, and policies, this paper makes over fifty statute- and agency-specific recommendations for improvements to existing programs, as well as new rules and programs. EPIC interviewed over thirty-five mitigation experts to inform our recommendations, including federal agency staff, environmental groups, tribal representatives, and regulated industry. We selected these interviewees based on their deep expertise in how mitigation policies were developed and how mitigation is practiced under different environmental laws and in different regions of the country. Each interviewee informed the contents of the report sections that matched their expertise. Through careful consideration, EPIC selected the recommendations that we believe have the most potential to improve mitigation. (This report is not intended to reflect the views of our interviewees or their organizations.)

The following is a selection of the top recommendations from each section:

**Clean Water Act**

The assistant secretary of the Army (Civil Works) should act to ensure that Army Corps districts consistently implement the preference hierarchy in the 2008 Rule. This should include guidance on ways to standardize various types of mitigation paperwork, like standard easement language, credit release schedules, and roles of interagency review teams in bank, in-lieu fee, and permittee responsible project review.

**Endangered Species Act**

Restoring the two 2016 mitigation policies is a crucial step toward creating a workable ESA mitigation program that can support the Biden administration’s infrastructure, climate change, and conservation goals. Although the policies are not perfect, they offer a framework that the administration can use as a starting point for more detailed guidance that facilitates individual permitting or general permitting processes for specific species or types of species.

**National Environmental Policy Act**

Reissue the 2015 Presidential Memorandum directing federal agencies to develop consistent mitigation policies that incorporate compensatory mitigation into planning and permitting processes and to clearly set outcome-related goals for natural resources (e.g., net zero policies).
In the interim, before a permit system can be developed, commit in writing to prosecutorial discretion standards that make clear that no enforcement action will be taken against projects that adopt best practices spelled out in guidance.

Invest in a rapid build-up and training of mitigation staff in the BLM to oversee mitigation policy, the inclusion of mitigation in land use plans and EISs, and the establishment of mitigation banks and in-lieu fee programs that can be used to offset public land-based impacts.

Agency leadership should reissue the 2015 USFS mitigation principles and priority actions, using them as a starting point to continue pursuing an agency-wide mitigation policy. A dedicated national-level effort is needed to survey national forest staff to identify how the agency has implemented mitigation thus far, formalize when and where to require mitigation for special use authorizations, and establish equivalency analyses to standardize offset requirements across national forests and types of ecosystems.

The Secretary of the Interior should issue a secretarial order that supports tribal leadership on restoration projects carried out on tribal lands that can serve as mitigation offsets. In addition, an order should also include directives to build DOI field staff’s awareness of requirements for how to engage and consult with tribes—as sovereign states—on avoidance of and offsets for impacts to tribal trust resources.

Steps in the right direction include the Bureau of Land Management’s recent reissuance of a mitigation Instructional Memorandum and Handbook chapter, EPA and the Army Corps progress on Waters of the US, and Congress’ direction to the US Fish and Wildlife Service to issue first-ever regulations covering species conservation banking. The US Fish and Wildlife Service has also initiated public comment on ways to better address and mitigate impacts to bald and golden eagles.

We believe the following principles, many of which echo standards set in President Obama’s 2015 Presidential Memorandum on Mitigation and Private Investment, should be more broadly and systematically applied across federal agencies. For example, following the principle of additionality requires that one should have to prove or document that a resource’s condition is better off than it would be, but for the action. The beauty of having a presidential directive from 2015 to 2017 that elaborated on these cross-agency standards was that it made those principles clear, especially to agencies that operate in their own silos and might not be aware of patterns that have emerged in other areas of law, science, and regulation. These principles can already be found in some federal, or state, mitigation policies, and they make sense in almost all contexts:
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<th>Table 1: Mitigation principles</th>
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| **Irreplaceable natural resources** | • Require land management plans to identify irreplaceable resources.  
• Define (i.e., map) irreplaceable resources where only avoidance is appropriate. |
| **Clear goalposts for how much is enough** | • Done right, no net loss, net benefit, and net zero are all examples of goals that allow both an agency and a potential permittee to understand and reach an agreement around “how much mitigation is enough.” If an agency’s mitigation policies are not seeking to achieve no net loss, net zero, or net benefit for a finite and rare resource, then by definition, those policies are facilitating the resource becoming increasingly rare. If subsequent permits contribute to that rarity, it’s by agency design and not the permittees’ fault or a fault of development writ large. |
| **Additionality** | • Additionality analysis should be required by all federal agencies to make sure that preservation, restoration, and management actions truly offset new damage to resources. |
| **Advance compensation preference** | • A policy preference for advance compensatory actions will almost always produce better results for natural resources. |
| **Durability** | • Durability means that environmental benefits of offsetting actions are expected to endure for at least as long as the harm they are compensating continues. |
| **Clarity on how to measure or model the condition of the resource being mitigated** | • Require quantitative ecological performance standards on measures that can actually be delivered.  
• Require a balance of long-term financial assurances, insurance, or other mechanisms to mitigate risks to durability. |
| **Equal standards for different types of compensatory mitigation** | • Documentation standards, insurance standards, and performance requirements should be similar regardless of whether a private entity or public agency provides compensatory offsets. |

An additional principle—a limitation on compensatory mitigation—deserves more attention than it receives today. Allowing compensation funding to flow to federal agencies or restoration of federal lands to offset non-federal land development, is generally an extremely bad idea. Some federal agencies, including the National Park Service (for wetlands) and US Forest Service (for streams), currently operate under such arrangements. It is a tragic mistake to hook an agency on financial rewards for approving or supporting projects that permanently damage resources that agencies are charged to protect, and for which they are funded—even if inadequately—to do so.

Federal land-based mitigation for private land impacts incentivizes legislators to give agencies fewer resources to manage those lands since another source of funding is available. It generally facilitates net loss outcomes where resources decline on non-federal lands and any gains that occur on federal lands do not fully compensate for that...
loss. Especially in the context of the Clean Water Act, where a vibrant, evolving, and improving private and nonprofit supply of compensatory offsets continues to expand, allowing the use of discounted federal lands to offset private land impacts directly undermines a proven policy tool, likely destroys local jobs, and subsidizes the price of development using taxpayer resources that aren’t used when offsets are provided privately. We encourage the Biden administration to avoid any policy actions that encourage additional private-to-federal compensatory mitigation arrangements without extensive constraints and oversight on how this approach is used.

**Establishing A Year Zero**

Lastly, one big new idea: The White House Council on Environmental Quality—through NEPA or other authorities—should establish the concept of “A Year Zero” for natural resource conditions.

A Year Zero is a point in time after which any improvement in a natural resource condition that can be quantified can be related to its similarly quantifiable condition in Year Zero. Those improvements—for example, the growth of trees planted by a forest landowner or the storage of carbon by a farmer—should be eligible for future programs that seek to buy those outcomes. Those improvements should be eligible for future purchase or use as a mitigation offset even if the future program wasn’t developed at the time of the actions that led to the improvement. We believe this new approach could incentivize a diversity of private and entrepreneurial initiatives to store carbon, restore nature, or enhance water quality, and that it’s also a just approach because it rewards instead of punishes landowners and others who act before the government tells them how to do so.

For full report and recommendations, go to: [https://www.policyinnovation.org/publications/Mitigation-Policy-Recommendations](https://www.policyinnovation.org/publications/Mitigation-Policy-Recommendations)

Full report:
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