

Wyoming Administrative Rules

**Lands and Investments, Office of**

Land Commissioners, Board of

Chapter 29: Sage Grouse Mitigation Credits

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## Chapter 29 Sage Grouse Mitigation Credits

**Section 1. Authority.** This chapter is promulgated pursuant to Wyoming Statute § 9-19-203(b).

**Section 2. Definitions.**

(a) “Avoidance” means avoiding an impact completely by not taking a certain action or part of an action. Preferred development plans avoid negative impacts in Core Population Areas and other Executive Order delineated habitat used by Greater sage-grouse through compliance with Executive Order thresholds and stipulations for development.

(b) “Minimization” means minimizing the impact to habitat and populations by limiting the degree of an action and its implementation. When development occurs within Core Population Areas and other Executive Order delineated habitat used by Greater sage-grouse, all reasonable options should be pursued to minimize impacting additional suitable habitat to the greatest extent practicable. This may result in new disturbance within Executive Order delineated habitats, but the disturbance is managed to result in minimal discernable impacts at the population level.

(c) Suitable Habitat. Greater sage-grouse habitat within the delineated range of Greater sage-grouse, and are:

(i) Existing habitats with 5% or greater sagebrush canopy cover as measured by the point intercept method. “Sagebrush” includes all species and sub-species of the genus *Artemisia* except the mat-forming sub-shrub species: *frigida* (fringed) and *pedatifida* (birdfoot); or

(ii) Riparian, wet meadow (native or introduced) or areas of alfalfa or other suitable forbs (brood rearing habitat) within 275 meters of sagebrush habitat with 5% or greater sagebrush canopy cover (for roosting/loafing). Areas further than 275 meters from sagebrush may be considered suitable where pellet counts, documented sightings or other defensible proof of sage-grouse use can be provided; or

(iii) Reclaimed or restored habitat containing 5% or greater sagebrush canopy cover, with site-appropriate desirable grass and forb cover and frequency; or

(iv) Natural and manmade wetlands and historically (pre-2008) irrigated areas, excluding row crops, in stream and river valleys further than 275 meters from sagebrush habitat. These areas are considered “suitable” habitat for Density/Disturbance Calculation Tool (DDCT) purposes. These areas may also be considered suitable habitat for credit calculation purposes where pellet counts, documented sightings, or other defensible proof of sage-grouse use can be provided.

(d) Disturbed Habitat. Land that has been converted from formerly suitable habitat to grasslands, croplands, energy development, mining, or other disturbance resulting in less than 5% sagebrush canopy cover. These areas may provide habitat at some time in the future through succession, reclamation, or restoration. The following items are guidelines for determining disturbed habitat for the DDCT process:

(i) Long-term removal occurs when habitat is physically removed through activities that replace suitable habitat with long-term occupancy of unsuitable habitat such as a road, well pad or active mine.

(ii) Short-term removal occurs when vegetation is removed in small areas, but restored to suitable habitat within 5-10 years, such as a successfully reclaimed pipeline, or successfully reclaimed pit.

(iii) Suitable habitat between three or more short- or long-term disturbances may be considered disturbed due to proximity. Disturbances less than 1.2 miles apart (0.6 miles from each activity) will be consolidated and reflected in the DDCT as industrialized areas. Exceptions may be provided on a site-by-site basis.

(iv) Lands in Northeastern Wyoming are ecologically limited in terms of sagebrush production and the ability to sustain dense stands of sagebrush (canopy cover rarely exceeds 15% as measured by Line Intercept). Lands in northeastern Wyoming where sagebrush was removed prior to 1994 for the purpose of grassland agriculture which still do not have 5% or greater sagebrush cover may be exempt from counting as “disturbed” for DDCT purposes. Lands that were converted after 1994 that still do not have 5% or greater sagebrush canopy cover will be counted as “disturbed” in DDCT. Determinations will be based on orthophoto interpretation.

(e) Transitional Habitat. Land that has been previously disturbed or burned resulting in less than 5% sagebrush cover but is actively managed to provide functional habitat within 10 years. Lands managed to meet or move towards “suitable” definition for reclaimed or restored habitat (5% sagebrush canopy, appropriate grass and forb cover and frequency), including reclamation, may be considered “transitional” when valid, reliable, and repeatable trend data show vegetation is moving towards the definition of “suitable” and a management plan is developed. Trend is established by a minimum of five years of data. On potential “transitional” sites, the Wyoming Game and Fish Department (WGFD) and other relevant partners will be included in management plan development and a technical team may be needed. Habitats that are classified as “transitional” will not count as disturbance in DDCT calculations of Executive Order 5% threshold. However, “transitional” sites that do not meet the definition of “suitable” within 10 years will be considered “disturbed.”

(f) Unsuitable Habitat. Land within the historic range of Greater sage-grouse that did not, does not, and will not provide Greater sage-grouse habitat due to natural ecological conditions (e.g., badlands, canyons or forests). This also includes those permanent disturbances such as existing reservoirs and municipal boundaries. This may also be referred to as “non-habitat.”

(g) Density Disturbance Calculation Tool (DDCT). A spatially based tool that calculates both the average density of disruptive activities and total surface disturbance within the area affected by the project, also known as the DDCT assessment area.

(h) Modified Density Disturbance (MDD). A spatial analysis used to determine whether an area designated for credits is consistent with the tolerances of Executive Order 2019-3 (for example, surface disturbance less than 5%, one oil and gas or mining activity per 640 acres on average, collector or arterial roads greater than 1.9 miles from the perimeter of a lek, no surface occupancy within 0.6 miles from the perimeter of a lek).

### **Section 3. Geographic Area for Providing Mitigation Credits.**

(a) In order for a land parcel to be considered for conservation credits, the land must meet the following biological requirements:

(i) The lands within a proposed mitigation bank or other mitigation measure shall be considered the geographic area designated for credits. .

(ii) The geographic area designated for credits must include the habitat attributes identified in Section 7 as essential for perpetuation of greater sage-grouse and must have evidence of use by greater sage-grouse.

(iii) The geographic area designated for credits must have active breeding areas (leks) within the landscape. (Generally, the credits should be located within 5.3 miles of an active lek.).

(b) Mitigation credits must reflect science-based criteria including provisions that consider additionality, durability, replacement, direct and indirect effects, habitat assurance, habitat vulnerability, evidence of use, access to seasonal habitat and other landscape and habitat needs for greater sage-grouse.

### **Section 4. Compensatory Mitigation Oversight Group.**

(a) The compensatory mitigation oversight group shall consist of representatives of the department of agriculture, the game and fish department, the Wyoming wildlife and natural resource trust account board, and the Office, which will serve as chair of the group.

(b) The compensatory mitigation group should include representation from federal partners, including the U.S. Fish and Wildlife Service, Bureau of Land Management, U.S. Forest Service and Natural Resource Conservation Service, as appropriate, and should request assistance from any other state, local, and federal agencies, as appropriate, to review credit provider applications and other proposed mitigation measures.

(c) The compensatory mitigation oversight group shall evaluate and provide technical review using the criteria established under Section 7 of this chapter and, where appropriate, recommend certification of any mitigation credit provider seeking approval.

**Section 5. Service Area for Use of Compensatory Mitigation Credits.**

(a) The service area for the use of compensatory mitigation credits is the state of Wyoming. Credit purchasers should consider proximity to the impact when offering compensatory mitigation.

**Section 6. Length of Credits.**

(a) The length of credits to be used and sold shall be not less than five years, provided that any term credit shall be adequate to meet the period of the impact and shall remain in place until biological impact to greater sage-grouse habitat is restored and evidence of use by greater sage-grouse can be shown.

(b) If term credits will expire before restoration of the impacted location, the credit holder shall be required to purchase additional credits or negotiate a credit contract extension. Funds for this purpose may be placed in an escrow or reserve account held by the Board and must be deposited at the time of the credit purchase.

**Section 7. Criteria for Use and Sale of Compensatory Mitigation Conservation Credits.**

(a) Credit Requirements:

Category	Credit Condition	Credit Requirements
Evidence of Use	Mandatory	There is evidence that greater sage-grouse use the area.
Disturbance	Mandatory	Disturbance within the area to be considered for credits must be below 10% and 1 per 640 as measured by a modified Density Disturbance Calculation Tool (DDCT) process.
Disturbance	Potential Credit Adjustment	Disturbance within the area to be considered for credits is below 5% and 1 per 640 as measured by a modified DDCT process. <ul style="list-style-type: none"> <li>If disturbance is between 5.01% and 9.99% as measured by the DDCT Process, the credit will be discounted by 10%.</li> </ul>
Durability	Mandatory	The credit exists for the life of the biological impact.
Durability	Potential Credit Adjustment	The credit has permanent protection. For state and federal lands, this would require a conservation credit lease term of not less than fifty (50) years, with a renewal option at the end of the term. The credit does not have permanent protection =

		deduction in an amount determined by actuarial analysis that reflects the comparative value of credits for different durations
Financial Assurances/Replacement	Mandatory	Credits include the financial assurances or replacement credits, as appropriate, to guarantee the implementation and effectiveness of compensatory mitigation measures and to cover their administration, durability, monitoring, and reporting.
Habitat Suitability	Mandatory	Habitat suitability must be functional for greater sage-grouse as verified by an ecological site potential assessment and habitat assessment through the Habitat Assessment Framework, or other suitable habitat analysis.
Habitat Suitability	Mandatory	Habitat suitability is greater than 5% sagebrush cover.
Additionality	Mandatory	Credits will not be allowed where habitat conservation is otherwise required by law, regulation, permit, or other condition.
Landscape Support	Potential Credit Adjustment	The area proposed for credit must be within a landscape that provides access to all seasonal habitats where potential threats have been ameliorated or removed. Private lands that meet these criteria would receive a landscape context credit increase not to exceed 15%. Any areas not adequately conserved discounted from the total increase. Any landscape credit adjustment must be approved by the credit-certifying entity and should be figured in a manner that reflects specific habitat values (for example, the number of leks, the lek population, enhanced credit value based on credit location in relation to protecting a lek, quality of habitat, removal of multiple threats).
Risk Reduction	Mandatory	The credit includes the following: <ul style="list-style-type: none"> <li>a. The outcomes of compensatory mitigation measures and the performance standards to be met for the duration of the credit life. Credit descriptions should include the types and amounts of resources that will be restored, established, enhanced, and/or preserved, and how these outcomes will address species' conservation needs at the landscape scale.</li> <li>b. The baseline condition prior to disturbance and future disturbance threats affecting the compensatory mitigation credits (for example, are there 4 seasonal habitats located within 4 miles, what are the existing thresholds, what is the</li> </ul>

		<p>potential for future development?).</p> <ul style="list-style-type: none"> <li>c. The durability (for example, offset for life of disturbance) of the compensatory mitigation measures and how the credit sites will be maintained.</li> <li>d. The monitoring and reporting program that will be used to report credit conditions and trends of resources at all relevant scales, to assess the effectiveness of compensatory mitigation measures, and to identify any need for adaptive management.</li> <li>e. The triggers for adapting management, if necessary, in order to achieve the outcomes of the compensatory mitigation measures.</li> <li>f. The implementation plan for the enhancement, restoration or funding of compensatory mitigation measure(s) that includes: <ul style="list-style-type: none"> <li>1. Specifications for implementing the compensatory mitigation measures ( for example, timing, method, source materials, specific geographic area).</li> <li>2. The schedule and plan to maintain compensatory mitigation measures for the duration of the impacts.</li> </ul> </li> <li>g. The accounting process for tracking measures/funds/credits.</li> </ul>
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(b) Debit Requirements:

(i) The following table identifies how the replacement, indirect effect, habitat assurance and habitat vulnerability debit factors are calculated for activities in Core Population Areas.

<b>Activity in Core Population Areas</b>	<b>Debits</b>
New disturbance in compliance with Executive Order thresholds	0 debits.
New disturbance exceeding the 5% disturbance threshold and occurring more than 0.6 miles from an occupied lek	5 debits per acre
Any new disturbance within 0.6 miles from an occupied lek and new collector or arterial roads within 1.9 miles from an occupied lek.	10 debits per acre
Greater than 1 activity per 640 acres	10 debits total per activity.
Short-term impact	10 debits per activity, per year

(seasonal stipulation relief)	
Habitat vulnerability (discretionary)	Potential 5 debits per acre of vulnerable habitat

(ii) Compensatory Mitigation in Non-core Population Areas.

(A) For surface occupancy within (<) .25 miles from an occupied lek, compensatory mitigation will be calculated on an acre-to-acre basis (based on the footprint of the activity in suitable habitat within the .25 mile buffer) with a factor of 2:1.

(B) The compensatory mitigation requirement for short-term impacts applies to Non-Core Population Areas.

(C) The following table demonstrates how debits are calculated for activity in Non-Core Population Areas:

<b>Activity in Core Population Areas</b>	<b>Debits</b>
New disturbance in compliance with Executive Order 2015-4 thresholds	0 debits.
Within .25 miles from an occupied lek	2 debits per acre of suitable habitat
Short-term impact (seasonal stipulation relief).	10 debits per activity, per year

(iii) Considerations relative to debits, including durability, additionality, timeliness, and other factors are adequately addressed in the calculation of credits and should not be applied to both debits and credits.

**Section 8. Criteria for Other Forms of Mitigation.**

(a) Compensatory mitigation may be achieved through actions that maintain, improve or restore existing landscapes, or areas within landscapes, from a condition that does not currently support greater sage-grouse, or does not meet the needs of species reflected through Habitat



Assessment Framework assessments, or other defensible habitat assessments, which are consistent with the ecological potential for the site.

(b) Restoration credits would be awarded when the proponent can show that site conditions have been changed to a condition that is stable, functional, and trending toward the normal range of variability for the appropriate ecological site description, or where otherwise verified by acceptable scientific protocols, and where greater sage-grouse occupy the site. Restoration credit providers shall document the changes in ecological conditions as a result of their actions in manner that can be monitored over time.

(c) Credits will be awarded when a disturbed site conforms to the appropriate ecological site description and is maintained in a stable state and trend toward optimal greater sage-grouse habitat for a period of five (5) years.

(d) Restoration credits must adhere to the quality parameters outlined for conservation credits in Section 7(a), but need not meet the requirements in the Habitat Suitability categories. Restoration credits must adhere to the quality parameters outlined for conservation credits.

(e) Improvement will be measured as a functional change in the landscape, and generally will be in the form of credit generation as outlined in Section 7.

(f) Proponents will be required to annually submit data to show that the credit is not regressing.

(g) Any action that is required by law, permitting and reclamation agreements, contracts, or other requirements is not eligible for credits.

#### **Section 9. Approval by the Board.**

(a) The compensatory mitigation oversight group shall submit recommendations to the Board for its approval at a public meeting when the compensatory mitigation oversight group determines that the credit provider meets the requirements of statute and rule.

#### **Section 10. Maintenance Requirements.**

(a) The Board shall maintain records concerning ecological function and greater sage-grouse habitat losses and credit and debit accounts for each mitigation credit.

#### **Section 11. Requirements for Long-Term Monitoring, Management, and Maintenance**

(a) Compensatory mitigation credits authorized under this credit system shall be subject to long-term monitoring, management, and maintenance. Potential credit providers shall submit a plan that shows a schedule and methods for monitoring, management and maintenance, including adequate endowment funds to meet the obligations outlined in the plan.

(b) Endowment funds to cover the costs of long-term monitoring, maintenance and management shall be provided at the time of any sale of compensatory mitigation credits and shall include the State of Wyoming as a beneficiary of the funds, and may be included in the endowment account authorized under Section 14 of these rules.

(c) Data collected by monitoring should be in a form that can be standardized and analyzed to assess the relationship between sage-grouse population trends and conservation actions undertaken as a part of the credit provider.

#### **Section 12. Financial and Performance Audits.**

(a) Periodic financial and performance audits shall be required on each mitigation credit provider authorized to offer credits under the compensatory mitigation credit system. Audits shall be conducted only to ensure that the mitigation credit provider is in compliance with the Wyoming Greater Sage-Grouse Compensatory Mitigation Act and any rules promulgated thereunder.

(b) The cost of performance audits shall be borne by the credit provider.

#### **Section 13. Eligibility Criteria for Mitigation Credit Providers.**

(a) A mitigation credit provider shall be a resident of or authorized to conduct business in Wyoming.

(b) Any credit provider authorized under these rules shall meet the requirements found in Section 7 of these rules

(c) A credit provider shall pay an annual registration fee of \$250.00 to remain in good standing. If the credit provider operates under section 18 of these rules, the annual fee may be deducted from the account as provided.

#### **Section 14. Financial Assurances.**

(a) Each credit provider shall provide financial assurances that are satisfactory to meet the requirements in Section 7 of these rules, and are sufficient to address the following:

(i) Any corrective measures that a mitigation credit provider or their successor in interest is required to take to ameliorate any material injury or adverse impacts to the land or habitat used for compensatory mitigation for which credits are offered that materially impairs the conservation objectives of that land or habitat;

(ii) Natural disasters that occur on or at mitigation sites used to offer credits;

(iii) The bankruptcy or financial failure of a mitigation credit provider authorized to offer credits under the compensatory mitigation credit system; and

- (iv) Maintenance, monitoring, and management costs.

### **Section 15. Conservation Easement**

(a) Every conservation easement or other instrument used to serve as a credit shall bind the parties to an agreement that provides a third-party beneficiary to the easement solely with the contingent right to enter onto the land subject to the easement for inspection and to enforce the terms of the easement or other instrument if the grantee fails to enforce any of the terms of the easement.

(b) The Office shall have the right to access a mitigation credit provider's financial assurances in order to address any of the occurrences in W.S. 9-19-203(b)(xii).

### **Section 16. Purchase/Transfer of Mitigation Credit**

(a) Upon the purchase of a credit from a mitigation credit provider, the purchaser's obligation for mitigation represented by that credit shall be transferred to the mitigation credit provider for the term of the credit.

### **Section 17. Certification of Habitat Conservation Banks**

(a) The Board shall certify any habitat conservation bank that has been certified and approved by the United States fish and wildlife service as meeting or exceeding the requirements of this act until the earlier of:

- (i) The federally approved habitat conservation bank is approved; or
- (ii) July 1, 2023.

### **Section 18. Account and Fees**

(a) The Board may accept and manage the expenditure of endowment funds deposited as part of the financial assurances required under these rules provided that:

(i) Endowment funds deposited pursuant to this section shall be invested by the state treasurer as authorized under W.S. 9-4-715 (a), (d), and (e).

(ii) The Board shall collect an endowment setup fee of \$1,500. The setup fee shall be deposited into an account determined by the Board.

(b) Any endowment fund established pursuant to this section shall be subject to an annual fee of one percent (1%) of the fund's balance for the annual administration, operation, reporting, and accounting of the fund. The Board shall assess and collect the annual fee on the anniversary date of the approved credit provider during each year in which the account is in existence. The Board shall collect the annual fee by deducting it from the balance of the

endowment fund.

(c) The Board shall assess and collect an annual registration fee of \$250.00 as provided for in Section 13 during each year in which the credit provider is in existence. The Board may deduct the annual fee from the balance of the account.