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The Presidential Memorandum on Mitigation

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Insights

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Compensatory mitigation—the practice of offsetting harm caused to natural resources at one location by restoring, enhancing, creating, or preserving similar resources at another location—has been the lubricant of natural resources permitting programs for over four decades. Indeed, it is difficult to envision how regimes such as the Clean Water Act's (CWA) Section 404 program for permitting development in jurisdictional wetlands, or the Endangered Species Act's (ESA) Section 10 program for permitting habitat impacts causing incidental take of protected species, could operate without the option of compensatory mitigation.

Yet, although compensatory mitigation is often referred to as simply "mitigation," the mitigation concept encompasses three distinct forms of harm-reduction measures, usually applied in a hierarchy of preference. Consider a proposal for a development that will affect protected resources and thus requires a permit from a resource agency. The most preferred form of mitigation in the hierarchy is *avoidance*, which could involve revising the project design to reduce its footprint in the protected areas. Next in the hierarchy is *minimization*, which could involve taking measures in construction and operation of the project to reduce the magnitude of harmful impacts that cannot be avoided, such as by reducing sediment runoff into the protected areas. In theory, *compensation* is the last resort, which might require the project applicant to restore a degraded area of similar resources in another location to offset harms to the protected areas that could not practicably be further avoided or minimized. *See*, e.g., 40 C.F.R. § 1508.20 (defining mitigation).

This so-called avoid-minimize-compensate "sequencing" approach has evolved over time and has been controversial every step of the way, with compensatory mitigation at the center of its development and conflicts. For example, wetland mitigation banking, introduced in the 1990s to allow large-scale restoration projects to sell compensatory mitigation "credits" to multiple development projects needing to satisfy permit conditions, radically transformed how mitigation is practiced under CWA § 404. *See* Jessica Wilkinson and Jared Thompson, 2005 Status Report on Compensatory Mitigation in the United States (ELI 2006), *available at* www.eli.org/sites/default/files/eli-pubs/d16_03.pdf. But from the program's earliest days, some raised concerns that "if mitigation banking flourishes, pressure will grow to use it before avoidance or minimization measures are fully considered, resulting in even more wetland destruction." *See* Jeffrey Zinn, CRS Report for Congress 97-849, Wetland Mitigation Banking Status and Prospects 15–16 (Sept. 12, 1997), *available at* http://congressionalresearch.com/97-849/document.php?study=Wetland+Mitigation+Banking+Status+and+Prospects.

There has never been a coherent federal policy to guide the evolution of mitigation and respond to these and other of its controversial aspects. Different federal and state agencies have designed and managed their own mitigation programs.

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The Council on Environmental Quality, for example, has grappled for decades with how to integrate project mitigation into the decision under the National Environmental Policy Act of whether to require a full-blown environmental impact statement. *See* Final Guidance for Federal Departments and Agencies on the Appropriate Use of Mitigation and Monitoring and Clarifying the Appropriate Use of Mitigated Findings of No Significant Impact, 76 Fed. Reg. 3843 (Jan. 21, 2011). The Army Corps of Engineers (Corps) and Environmental Protection Agency (EPA) essentially invented mitigation banking in the mid-1990s to facilitate implementation of CWA § 404, but until 2008 had no comprehensive regulatory approach for compensatory mitigation. *See* Compensatory Mitigation for Losses of Aquatic Resources, 70 Fed. Reg. 19594 (Apr. 10, 2008). And the Fish and Wildlife Service (FWS), which geared up its ESA incidental take permit program in the early 1990s, did not develop its own guidance on habitat conservation banking until 2003. *See* Guidance for the Establishment, Use, and Operation of Conservation Banks, 68 Fed. Reg. 24753 (May 8, 2003). This decentralized, ad hoc approach to agencies' mitigation policies may have seen its last days at the federal level.

On November 3, 2015, President Obama issued a Presidential Memorandum aimed at unifying the mitigation practice and policy for activities carried out and approved by the Departments of Defense, Interior, and Agriculture, the EPA, and the National Oceanic and Atmospheric Administration. *See* Mitigating Impacts on Natural Resources from Development and Encouraging Related Private Investment, 80 Fed. Reg. 68743 (Nov. 6, 2015). The broad policy goal of the Memorandum is to ensure that the agencies' mitigation policies "are clear, work similarly across agencies, and are implemented consistently within agencies." *Id.* at 68743. The Memorandum also emphasizes the need for transparency, measurable performance standards, and clear policies regarding who is responsible for what. *Id.* at 687465. The Memorandum develops four key themes working toward those goals.

First, the Memorandum unambiguously adopts the sequencing approach. Mitigation is defined as using "avoidance, minimization, and compensation. These three actions are generally applied sequentially." *Id.* at 68745. The Memorandum further explains that it shall be the agencies' policy "to avoid and then minimize harmful effects to land, water, wildlife, and other ecological resources (natural resources) caused by land- or water-disturbing activities, and to ensure that any remaining harmful effects are effectively addressed" through compensatory mitigation where appropriate. *Id.* at 68743. In short, unless a statutory program imposes another approach, the agencies must adopt the sequencing approach and, in some cases, may be required to demand that projects emphasize avoidance. But the Memorandum does not provide standards—such as feasibility, practicability, or cost-effectiveness—for determining when a project may move from avoidance to minimization to compensation. Also, it defines "irreplaceable resources" as those which existing legal authorities recognize as "requiring particular protection" and thus "because of their high value or function and unique character, cannot be restored or replaced," *id.*, but leaves unclear what an agency must do where an avoidance-only approach is not technologically or economically feasible.

The second major theme goes to the question of net outcome. The Memorandum requires that agency mitigation policies "should establish a net benefit goal or, at a minimum, a no net loss goal for natural resources the agency manages." *Id.* at 68745. This ambitious goal is tempered with the qualifications that it applies only to resources that are "important, scarce, or sensitive, or wherever doing so is consistent with agency mission and established natural resources objectives." *Id.* Those key terms, however, are not defined.

In its third major theme, the Memorandum directs agencies to "encourage advance compensation, including mitigation bank-based approaches, in order to provide resource gains before harmful impacts occur." *Id.* at 68744. In a specific directive to FWS, the Memorandum requires the agency to develop a policy to provide clarity regarding actions landowners take to conserve species in advance of potential listing under the ESA and to "provide a mechanism to recognize and credit such action as avoidance, minimization, and compensatory mitigation." *Id.* at 68746. This suggests a broad meaning for programs designed to promote conservation measures before regulatory restrictions attach to an activity.

The fourth major theme of the Memorandum incorporates the directives into the front end of agency land management planning. The Memorandum explains that agencies' "large-scale plans and analysis should inform the identification of areas where development may be most appropriate, where high natural resource values result in the best locations for protection and restoration, or where natural resource values are irreplaceable." *Id.* at 68744. Large-scale planning is defined broadly, but clearly has in mind the planning required of the federal public land management agencies. *Id.* at 68744. If, pursuant to this directive, agencies designate up-front which areas are off limits and which are open for resource development, that would reduce the need for mitigation at the back end of specific land permitting and approval decisions, such as timber harvesting or grazing. Whether that has any practical impact on the allocation of uses versus the existing planning practices of agencies remains to be seen.

One implementation challenge the Memorandum faces is that the statutes under which federal agencies have established mitigation practices vary widely in their incorporation of mitigation into the planning or permitting program, if at all. It is not clear how the sequencing and net outcome directives mesh with statutes that do not mention avoidance, much less impose sequencing, in connection with "mitigation," and do not require a no-net loss or net benefit outcome for issuance of a permit. For example, the ESA § 10 incidental-take permit program requires issuance of a permit so long as the project "will, to the maximum extent practicable, minimize and mitigate the impacts of such taking" and any remaining impacts do "not appreciably reduce the likelihood of the survival and recovery of the species in the wild." 16 U.S.C. 1539(a)(1)(B)(ii) and (iv). Exactly what "minimize and mitigate" requires has been hotly contested, *see Union Neighbors United, Inc. v. Jewell*, 83 F. Supp. 3d 280 (D.D.C. 2015) (strict sequencing is not required), and the "not appreciably reduce" standard cannot plausibly be equated with a no net loss or net benefit mandate. Indeed, it is likely for these reasons that the Memorandum directs FWS to develop a special policy "that applies to compensatory mitigation associated with its responsibilities under the [ESA]." Memorandum, 80 Fed. Reg. at 68746.

Other programs are far more open-ended about mitigation. The operative text of CWA § 404 does not so much as

mention the concept, though Congress broadly endorsed *compensatory* mitigation in the statute that required the Corps and EPA to develop rules implementing CWA § 404. *See* Pub. L. No. 108-136, §314(b) (2003). If agencies working under such statutes begin to implement the full sequencing and net outcome directives of the Memorandum to their fullest meaning, they likely will face challenges from developers as to the extent of their statutory authority.

Similarly, the advance compensation directive, which builds on the banking concept, is likely to be controversial. Most banking programs arise in the context of an extant regulatory regime. It will be far trickier to design an advance compensation program that awards credits to conservation actions put in place before regulatory controls are imposed, such as habitat protection measures established prior to listing of a species under the ESA. In its initial proposal for such a program, FWS sought input regarding how to structure advance crediting. *See* Policy Regarding Voluntary Prelisting Conservation Actions, 79 Fed. Reg. 42525 (July 22, 2014). As of this writing, FWS has not returned with a final policy.

Notwithstanding these challenges, agencies have begun to implement the Memorandum directives. Their efforts thus far range from exploratory to far along in developing proposals. For example, the Forest Service issued a white paper in March 2016 announcing its intention to publish a policy implementing the Memorandum in late 2017 and requesting input on over a dozen implementation questions. *See* U.S. Forest Service, *Seeking Recommendations in Formulating Agency Policy on Mitigating Adverse Impacts on National Forests and Grasslands* (Mar. 2016), *available at* http://www.fs.fed.us/emc/nepa/FSMitigationPolicy.htm. By contrast, the FWS issued an extensive set of proposed revisions to its mitigation policies, including for ESA § 10 permitting, which closely track and expand upon the Memorandum directives. *See* Proposed Revisions to the U.S. Fish and Wildlife Service Mitigation Policy, 81 Fed. Reg. 12380 (Mar. 8, 2016). Nor has the Memorandum escaped the attention of Congress, as the House Committee on Natural Resources held hearings on what it described as the "Obama Administration's new environmental mitigation regulations." *See* House Committee on Natural Resources, Press Release (Feb. 24, 2016), *available at* http://naturalresources.house.gov/newsroom/documentsingle.aspx?DocumentID=400005.

The Memorandum clearly represents a milestone in federal natural resources mitigation policy. If agencies maximize implementation of the sequencing, net outcome, advance compensation, and large-scale planning directives, and do so consistently, transparently, and with measurable performance standards, mitigation in the United States would look considerably different from its present practice.

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The Supreme Court's Platonic Energy Policy

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With more than a decade having passed since *New York v. FERC*, 535 U.S. 1 (2002), the U.S. Supreme Court recently returned to the boundaries of federal and state authority over national energy policy. Across three factually unrelated cases, decisions for which issued during a 12-month span bridging the 2014 and 2015 terms, the Court considered and determined the extent to which state action (in two cases) and federal action (in the other) constituted permissible or impermissible exercise of power under the provisions of the closely related Federal Power Act (FPA) and Natural Gas Act (NGA). And while it might be tempting to conclude that federal authority took the prize, a collective analysis of the three decisions supports the view that the states made out well for themselves. In what is arguably to the states' benefit, the bright line between federal and state authority that many wanted is not going to be drawn by the Court any time soon.

Of the three governmental actions reviewed, the Court found only one unlawful: a Maryland electric generator subsidy program conditioned on participation in, and the outcome of, a wholesale capacity auction regulated by the Federal Energy Regulatory Commission (FERC). *See Hughes v. Talen Energy Mktg.*, 136 S. Ct. 1288 (April 2016) (*Hughes*). *Hughes*, however, was the closest to a bright-line exercise. In an almost unanimous opinion (Justice Thomas joined the opinion only as it relied on the FPA, not implied preemption; also, this case was decided after Justice Scalia's death), Justice Ginsburg wrote that the Maryland program "invades FERC's regulatory turf." *Hughes*, 136 S. Ct. at 1297. The program in question sought to incentivize the construction of new electric generation in Maryland by ensuring that the new generators would be guaranteed some assurance of cost recovery (through a separate contract between the generator and a load-serving entity (LSE)). Maryland structured the subsidy, however, around the generator's participation in the FERC-regulated capacity auction process used by its regional transmission organization (RTO) and, importantly, the clearing price awarded to capacity through the auction. If the auction clearing price fell below a certain threshold set forth in the contract, the LSE paid the generator the difference. If the auction clearing price was above the threshold, then the generator paid the LSE the difference. *Id.* at 1294–95. In short, the Maryland program "adjust[ed] an interstate wholesale rate." *Id.* at 1297. Doing so put the situation squarely in line with prior precedent, thus making the Court's decision to strike the law ostensibly an easy one.