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The Administration's End-of-Summer Push on Compensatory Mitigation Policy

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The final week of August saw several important developments in what is proving to be a very consequential year for federal environmental mitigation policy. The U.S. Fish and Wildlife Service (Service) released a new proposed policy on compensatory mitigation for species protected under the Endangered Species Act (ESA) that would replace long-standing policy on mitigation banking and recovery crediting. The White House issued a strategy document explaining the Administration's overall policy to attract private investment in mitigation and related conservation actions. And President Obama, in remarks delivered at Lake Tahoe, specifically tied conservation policy to climate policy, declaring that: "A changing climate threatens even the best conservation efforts. . . . And, because climate and conservation are challenges that go hand in hand, our conservation mission is more urgent than ever." This alert will highlight key features or implications of each new development.

The pre-Labor Day burst of activity is the latest in a series of steps the current Administration has taken to change federal mitigation policy. For readers seeking background, please see Holland & Hart's recent publications tracking these developments, including:

- The Presidential Memorandum and Interior Department Policy on Mitigation: Their Content and Implications
- Ten Things to Know About the Proposed Revisions to the U.S. Fish and Wildlife Service's Mitigation Policy
- Infrastructure Permit Streamlining Under The FAST Act

Proposed Service Policy on ESA-Related Compensatory Mitigation

The Service's new proposed policy for ESA-related compensatory mitigation is consistent with and follows from the draft policy on mitigation released by the Service in March 2016 and President Obama's directive on mitigation issued in November 2015. These polices each call for landscape-level conservation planning and mitigation and the application of mitigation as a three-step process beginning with avoidance, then minimization, and, finally, compensation for remaining unavoidable impacts, though there appears to be some flexibility in this hierarchy in limited circumstances.

The President's directive and Service policies also emphasize application of mitigation to achieve a "net gain" or, at a minimum, "no net loss" of protected resources. We note that these benchmarks for success have

drawn significant criticism from some industries and congressional offices, along with support from conservation investors and organizations. Examples of these diverse reactions are reflected in testimony during a March 2016 oversight hearing on the Presidential directive by the U.S. Senate Committee on Energy and Natural Resources.

The proposed policy on compensatory mitigation is nominally focused on species protected under the ESA, but the Service appears to be taking a broad view of the policy's scope, stating that it will be applied to "achieve the best conservation outcomes for listed, proposed, and at-risk species through effective management of the risks associated with compensatory mitigation." The proposed policy would apply to every form of compensatory mitigation, including permittee-responsible mitigation, conservation banking, in-lieu fee programs, habitat credit exchanges, and other third-party mitigation arrangements. It establishes generally applicable compensatory mitigation standards (e.g., siting, use of metrics, additionality, timing and duration, durability, and use of performance standards), explains the applicability of compensatory mitigation under the ESA, provides guidance on and identifies preferences for general mitigation processes, describes the forms of compensatory mitigation, outlines how compensatory mitigation programs and projects should be established and operated, establishes criteria for use of third-party mitigation, and provides guidelines for compliance tracking.

For practitioners in this area of law and developers considering ways to optimize mitigation expenditures, a threshold question is likely to be whether the Service has proposed a policy that achieves substantive and procedural equivalency across the various approaches to compensatory mitigation or, instead, is proposing explicit or implicit biases toward different forms or providers of compensatory mitigation. The challenge facing the Service and stakeholders with respect to "equivalency" among compensatory mitigation approaches is illustrated by the situation surrounding compensatory mitigation for impacts to the lesser prairie-chicken. In that case, the Service found itself holding private conservation banks to much more exacting conservation standards than the Service applied to a state-administered compensatory mitigation program. The disparity has created a significant disincentive to private conservation investment and rewarded relatively short-term and low-quality conservation expenditures by state wildlife officials.

The Service will receive public comment on the proposed policy until October 17, 2016. This policy will, when implemented, likely affect all parties involved with any form of development potentially impacting at-risk or listed species and merits a careful review by, among others, infrastructure developers, natural resource users, and conservation investors.

White House Strategy to Leverage Private Investment in Conservation

The White House released a 12-page document on August 31 entitled "Leveraging Innovation to Boost Private Investment in America's Natural Resources." The document calls for strategic innovations in the federal

government's approach to policy, finance, and technology to stimulate private and philanthropic investments in conservation. The strategy envisions creation of a $10 billion annual market for private sector investment within 10 years. The policy document is explanatory, not a binding order, but nevertheless deserves attention for the vision it offers regarding the current Administration's policy choices and the direction it may chart for future policy-makers.

The White House strategy relies on:

- Greater development of regulatory and incentive-driven policies to facilitate investments in conservation, reward outcomes and flexibility over rigidity, and create predictability for investors;
- Financial innovations that promote novel combinations of private, philanthropic, and public capital that, at scale, would serve as new investment platforms tied to improved environmental performance; and
- Technological investments to lower the cost and increase the reliability of tools for measurement, monitoring, and verification of conservation investments; enable better targeting of investments; and foster greater collaboration.

With an element of irony that is probably not intentional, but also not entirely coincidental, the document makes its case using language reminiscent of the urgings employed by nineteenth century proponents of federal spending to make up for shortfalls in the private capital required to bring "civilization" to the western frontier. Replace a few nouns and the 2016 White House paper's rhetoric could have been taken from a 1902 speech by Senator Newlands promoting the federal reclamation program or any one of scores of other contemporary calls for public investment in railroads, electricity generation and transmission, or other then-innovative visions of national progress:

> Increased private sector investment can help close the deficit of conservation investment needed to maintain healthy ecosystems and the services that they provide. Leadership across all sectors and levels of government to unleash private capital for conservation are driving new resources to meet our growing conservation needs. However, significant capital, with investors ready and willing to invest remains frozen on the sidelines. Rapid progress in developing new conservation business opportunities has the potential to expand private investment to craft solutions that generate appropriate risk and return profiles for investors and demonstrate measurable conservation outcomes.

The strategy draws analogies from numerous other federal programs aimed at using market mechanisms to stimulate private investment in outcomes serving public or governmental purposes, such as the pollutant trading systems used for Clean Air Act compliance, the wetland banking and nutrient trading mechanisms used under the Clean Water Act, and the Department of Agriculture's programs under the 2008 Farm Bill to develop

uniform guidelines for quantifying environmental benefits from voluntary conservation and land-management activities. The conservation strategy envisions using financial incentives heretofore largely associated with promotion of renewable energy technologies, such as grants to create and explore new markets, direct grants and tax credits to subsidize equity returns, direct loans, loan guarantees, price guarantees, and subsidized insurance.

It is interesting to speculate whether the private sector would respond to financial incentives for conservation investments with the same alacrity seen in the movement of private capital to renewable energy investments. How would development interests react to federal tax and other policies promoting private investment in restoration or expansion of habitats for at-risk species?

As for technology, the document focuses on promoting the use of rapidly diversifying remote sensing, data sharing, and analytical tools. The paper cites numerous examples of innovation, including the Chesapeake Conservancy's cooperative program with the Environmental Protection Agency and Department of the Interior to produce high-resolution land-cover datasets to improve the targeting of conservation efforts, and NASA Ames Research Center's use of a quantum computer to count each tree in California.

The President's Linkage of Climate and Conservation Policy

President Obama's commentary at Lake Tahoe linking climate and conservation policies merits attention principally for what it emphasizes, alongside the week's other policy developments, about the shifting configuration of governance related to—pick your term—environment, energy, natural resources, climate, conservation, or infrastructure. The President's comments focused on climate change, but used examples drawn from almost every major federal "environmental," "energy," "infrastructure," and "conservation" program to articulate the contours of Administration climate policy. Federal environmental and natural resource laws are not changing, but the conceptual and normative silos dividing categories of environmental and natural resource policy and regulation are dissolving. The developer of a new transmission line that crosses public lands with protected species can expect a siting process in which a landscape-level conservation and mitigation program sets the terms for permitting success or failure, while Clean Air Act regulatory policy and related state-led climate initiatives define the market for energy generation and transmission investment and pricing of electricity as a commodity.

For a significant portion of the regulated community, this change means that it will be increasingly difficult to discern and reliably navigate the boundaries between one compliance regime and another. Business leaders and advisors who have grown accustomed to relying on more commoditized approaches to siting and permitting of infrastructure or other development activities may be surprised by changes in the way agency officials conceptualize project scope or impacts and associated mitigation responsibilities. For other private sector stakeholders, new investment opportunities are emerging from the haze. For agency officials with a

tolerance for risk and an appetite for expansion in reach, there is a chance for innovation. Agency officials fearful of risk or erosion of jurisdiction are likely to find reasons to hunker down and resist acting. A good portion of the evidence of these changes will emerge in the environmental reviews and records of decision prepared by agencies under the National Environmental Policy Act (NEPA). Successful NEPA compliance will likely come to demand an even greater ability by agencies and regulated parties to synthesize information across categories and approach "compliance" from a strategic, not mechanical perspective.

The Executive Branch is remaking conservation policy largely unaffected by the Legislative Branch. Laws passed decades ago when the world was quite different are being interpreted and applied in ways that lawmakers never could have foreseen accurately. The Administration's move to change conservation policy to attract private capital to protect or restore natural resources from the impacts of development and climate change is a transformation of governance that, in prior times, would have occurred with involvement from the Congress. It is not unreasonable to think that something this big would have been accompanied by new law. The public and private sectors likely would have had time to consider, influence, and adapt to the changes. Attention would have been paid. There was a time, perhaps, when a serious policy debate in Congress about all the changes embodied in the Administration's mitigation policies might have resulted in a new, one-stop-shopping law that allowed multiple permits and approvals to be consolidated into a coordinated permit founded on adherence to the mitigation hierarchy and certain types or quantities of privately funded compensatory mitigation.

We are in a different time. For the moment, at least, Congress is largely a bystander to conservation policy-making (though the environmental review reforms enacted in Title XVI of last year's FAST Act are a notable exception). It is tempting to think that, in a not-too-distant future, Congress might find a bipartisan, bi-cameral opportunity to engage on the question of the use of market mechanisms for public resource conservation. Whatever happens on Capitol Hill, it is far from settled whether agencies such as the Environmental Protection Agency and Department of the Interior—large institutions with widely divergent missions, cultures, and traditional constituencies—will successfully embrace the more unitary concepts reflected in the Administration's mitigation policy, but that is the direction in which they are being steered now. Some regulated parties will bear the consequence of fragmentary or less-than-fully-evaluated policy changes, but others will enjoy the potential advantages gained from investment and compliance decisions that anticipate the trajectory and destination of federal policy-making. The Administration's pre-Labor Day push, and the earlier steps on which the recent moves were based, offer as good a sign as any of where the risks and opportunities related to natural resource conservation will be found in the years ahead.

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