Federal Mitigation Policies Revoked: What Will It Mean to Developers?

Sandra Snodgrass

Partner
303.295.8326
Denver
ssnodgrass@hollandhart.com

Murray Feldman

Partner
208.383.3921
Boise
mfeldman@hollandhart.com

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We closely tracked the various Obama Administration moves to elevate and standardize federal policy on natural-resource mitigation.[1] For eight years, we and our energy and infrastructure clients navigated a nearly continuous outpouring of reports, interagency memoranda, departmental policy changes, and presidential orders that were in some way changing mitigation policy – the federal rules and practices associated with avoiding, minimizing, and compensating for adverse environmental impacts from federally regulated development activities. Now that the Trump Administration has begun dismantling those policies, it's timely to consider what that new direction means for developers.[2]

One's first impression of the outcome of the Trump Administration's actions to nullify the prior Administration's directives is that mitigation policy will largely revert to the *status quo ante*. Mitigation requirements will be defined by relevant statutory regimes and the transactional dynamics of any individual permit or project, what was sometimes referred to as the “Let's Make A Deal” approach, a structure perhaps befitting a President known as a dealmaker.

This regulatory environment is by no means free of mitigation-related obligations, but the requirements are diffused across different statutory regimes, lack normative and quantitative clarity, and have historically been applied in an *ad hoc* manner. Developers will confront the “non-impairment” standard that pertains to National Park Service lands, the “unnecessary or undue degradation” standard of the Federal Land Policy and Management Act, the “consistency” and “compatibility” standards of the National Wildlife Refuge System Act, the requirement to “minimize and mitigate the impacts of [a permitted] taking” under the Endangered Species Act “to the maximum extent practicable,” and so on.

So, that which is old is new again. Those parties who saw the Obama Administration policies offering value in the form of greater uniformity and predictability may be frustrated by the Trump Administration's actions. Those who found the Obama Administration policies objectionable as unduly rigid or overreaching in setting substantive benchmarks for mitigation (e.g., “net conservation benefit”), may be relieved.

Losers and Winners

Among the losers in the new regime, the most aggrieved may be the private investors in for-profit conservation banking. The mitigation banking

business will remain largely confined to the market for wetland and streambank offset credits without federal policies specifically encouraging compensatory mitigation for other categories of habitat, at-risk species, or other natural-resource variables. Perhaps it is unlikely that the Trump Administration intended to crimp an emerging market that had begun to draw significant interest from the real estate investment sector, but this is, at best, cold comfort to those who placed large bets on conservation banking.

Development-sector losers, in this context, are probably those whose projects involve multiple agencies, jurisdictions, and officials and cause impacts that lend themselves to compensatory mitigation. Linear infrastructure developments, such as interstate pipelines or electric transmission projects, may have lost some procedural or substantive benefits intended by the now-revoked policies. Here, the potential adverse impacts of the disaggregated and ill-defined mitigation policies stand the greatest chance of impeding even the most socially desirable development.

Among the winners, the most relieved are likely to be those whose development activities cause impacts that are difficult or impossible to offset fully. Many fossil-fuel and mining interests had viewed the Obama Administration policies as a subterfuge to choke-off new oil, gas, coal, and other mineral extraction from federal lands. Other public-land users believed that the mitigation rules would impose economically crippling burdens on forestry, grazing, vehicle-based recreation, and other uses.

Winners are most likely to be those whose projects involve depletable resources and are sited in locations where permitting involves a small number of agencies, jurisdictions, and officials. Perhaps the best example would be natural-gas development on a single management unit of land administered by the Bureau of Land Management or U.S. Forest Service. Whatever the potential shortcomings of the pre- and post-Obama mitigation regulatory environment may be, they are likely to have the least effect in that type of setting. And, to borrow an expression from the tech world, some resource developers experience the shortcomings as features of the regulatory system, not bugs.

The new Administration's natural-resource-related policies are pitched to deemphasize environmental constraints in favor of aggressive moves to develop energy resources. This is the dominant feature of the new policy environment and explicit rationale for reversal of the Obama mitigation polices. The Trump Administration may promulgate additional policy directives that amplify the pro-development impact achieved by the recent elimination of the Obama mitigation policies. Congress may ultimately legislate in ways that support the Administration's push, perhaps by enacting major changes in natural-resource laws, including the Endangered Species Act, National Environmental Policy Act, Clean Water Act, and others. Outside the realm of natural-resource policy, many things reflected in daily headlines may also influence or entirely control the pace and direction of Washington-based policymaking.

While waiting for those other shoes to drop, we think it is time well spent to

test the question whether reversal of the prior Administration's mitigation policies represents a straightforward return to the pre-Obama (i.e., Bush Administration) situation. Does reversal, combined with the new Administration's pro-development orientation, actually achieve a relaxation of the mitigation-related *status quo* pre-Obama? Or, despite the erasures and development policy shift, have enough important things changed over the last eight years that some aspects of the Obama policies will remain to affect development activity?

Questions for Consideration

The following questions are intended to help project developers consider the potential impact of the Trump Administration's revocation of the Obama Administration mitigation policies:

- What will it mean in the regulatory environment and in litigation that hundreds of career officials across the executive branch invested considerable time and effort under the prior Administration to define and document problems with federal mitigation policy?
- Hundreds of natural-resource mitigation agreements, most small, but some quite large, were executed in recent years between developers and the U.S. Fish and Wildlife Service and other federal resource managers. How secure are the agreements now? How secure are the conservation benefits (i.e., the quo for regulatory quid) if current and future projects affecting the same resources are permitted without similar mitigation requirements? Digging a little deeper: Will the “mutuality” required of a contract fail for some reason? Will private sector parties unilaterally terminate, assuming that they face little risk? Will agencies conclude that they lack authority to enforce agreements? Will new Trump-era natural resource policies translate into on-the-ground impacts that fundamentally change key assumptions about habitat, populations, management options, NEPA tiering, inter-agency collaboration, and so on?
- Will regulators and courts treat the concepts reflected in the now-revoked policies as *de facto* benchmarks for compliance with various resource-related laws?
- Will the reversal of the Obama Administration mitigation policies make it simpler for project opponents to persuade a court that agency approvals have been granted without adequate consideration of impacts because the mitigation achieves less than “no net loss” or no “net benefit”?
- Testing again the question of litigation risk, but from a different angle: Did courts defer to Obama-era natural-resource decisions despite their adverse environmental impacts because of some generalized sense within the judiciary that the Administration was taking reasonable account of environmental and other considerations? If so, will the courts maintain the same degree of deference now? Along the same lines, does the current push by some policymakers[3] (and arguably some Supreme Court justices)[4] to eliminate or reduce *Chevron* deference invite a potential shift in

jurisprudence that will stunt the pro-development ambitions of the new policies?

- Will some developers hew to the Obama-era principles because of transactional convenience or business-reputation considerations, and thereby raise the bar for mitigation within or across industries?
- Many infrastructure and other projects, even those launched today, may not complete the permitting process under the current Administration or Congressional majority. How will industry executives and counsel weigh permitting strategy against the variables associated with upcoming elections or other potentially relevant developments in Washington?
- Will California or other states react to the Trump Administration's reversals of Obama's mitigation policies by adopting laws or policies that leverage mitigation standards onto out-of-state infrastructure developments in much the same way that California has leveraged western energy development to fit the state's greenhouse-gas-reduction policies?
- If President Trump follows through on his recent statements that appear to indicate his intention to seek cooperation from Senate and House Democrats to pass major infrastructure legislation,[5] is it prudent to expect Democrats to extract concessions on various environmental and natural-resource matters, including perhaps mitigation and climate policy?

Conclusion

It would be premature to posit reliable answers to all of the questions above. We expect to have many discussions with our clients and colleagues in the coming months to assess whether the new Administration's seemingly consequential policy moves translate into actual changes in financial markets, regulatory practice, litigation risk, or state and local law and policy. The reader can infer from our questions that we anticipate some confusion and surprises. Experience indicates that whatever comes from the new federal policies, many of the traditional elements of infrastructure development, including strategic planning, consistency and durability in leadership, credible stakeholder engagement, and alacrity in addressing externalities will remain the features that define successful projects.

We will continue to share news and our thoughts on this important topic over the coming months and, as always, invite your feedback.

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[1]Holland & Hart's recent publications tracking Obama Administration mitigation policy developments are posted online here:

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

[2]Holland & Hart's overview of President Trump's recent executive order revoking Obama environmental policies, including mitigation, is available online at: Trumping Obama-Era Environmental Policy—What's Next?

[3]For example, see the Regulatory Accountability Act of 2017 passed by the U.S. House of Representatives on January 11, 2017, which would do away with *Chevron* deference.

[4]*See Michigan v. EPA*, 135 S. Ct. 2699 (2015) (finding that the "EPA strayed far beyond [the] bounds" of reasonable interpretation required under *Chevron*); *King v. Burwell*, 135 S. Ct. 2480 (2015) (refusing to give *Chevron* deference to the IRS's interpretation of the Affordable Care Act); *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J., concurring) (describing *Chevron* deference as "the elephant in the room with us today").

[5]Abby Phillip, Ashley Parker & David Weigel, Trump now says he wants to work with Democrats – but it may already be too late, WASHINGTON POST, Mar. 28, 2017; Zeke J. Miller, President Trump Changes Tone on Democrats After Health Care Failure, TIME, Mar. 27, 2017; Melanie Zanona, Report: Trump wants to move tax reform, infrastructure together, THE HILL, Mar. 27, 2017.
