THE PRESIDENTIAL MEMORANDUM AND INTERIOR DEPARTMENT POLICY ON MITIGATION: THEIR CONTENT AND IMPLICATIONS

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On November 3, President Obama issued a memorandum (Presidential Memorandum) relating to mitigation of impacts to natural resources stemming from the activities, including issuance of permits or approvals, by the Department of Defense, the Department of the Interior (DOI), the Department of Agriculture, the Environmental Protection Agency (EPA), and the National Oceanic and Atmospheric Administration. On the heels of the President's action, the Department of the Interior issued a new Departmental Manual section (DOI Policy) on the implementation of landscape-scale mitigation, which directs agency officials to use compensatory mitigation to offset impacts to public lands and to tailor mitigation actions to anticipate and address the impacts of climate change.

The directives issued by the Obama Administration last week build on earlier efforts to improve mitigation planning and implementation, particularly Secretary Jewell's 2013 Order 3330 and the 2014 Interior Department report entitled *A Strategy for Improving the Mitigation Policies and Practices of The Department of the Interior*. But the Presidential and Secretarial directives carry mitigation policy significantly forward by providing additional principles and policies to be followed by agencies when managing public resources and lands and setting specific actions that must be taken in coming months and years to develop guidance and regulations. This article first describes the content of these two directives, then provides our take on their potential implications.

The Directive: Summary of Contents

The Presidential Memorandum. The President's directive, entitled *Presidential Memorandum: Mitigating Impacts on Natural Resources from Development and Encouraging Related Private Investment*, establishes principles for mitigation to guide the above-referenced federal agencies in their planning and permitting practices and other activities. The scope of the Presidential Memorandum is not limited to impacts to natural resources on federal lands; it applies broadly to agency activities and projects approved by agencies, to the extent consistent with existing mission and legal authorities.

In undertaking activities or issuing approvals, the Presidential Memorandum requires the agencies set a "net benefit goal or, at a minimum, a no net loss goal" for natural resources that are "important, scarce or sensitive, or wherever doing so is consistent with agency mission and established natural resource objectives."[1] If a particular resource is irreplaceable, impacts should be avoided altogether.[2]

More generally, agencies are instructed to adhere to the entire mitigation hierarchy — avoidance, then minimization, then compensation — and to ensure that mitigation is durable and additional.[3] Mitigation is durable when it lasts at least as long as the impacts it was designed to offset; it is additional when its outcomes are above and beyond what would have occurred in its absence.[4] The Presidential Memorandum emphasizes that durability is especially important when compensatory mitigation takes place on federal lands open to multiple uses.[5] In addition to these specific mitigation criteria, the President has directed the agencies to encourage advance compensation—including mitigation bank-based approaches—in order to provide resource gains before harmful impacts occur and to provide incentives for and otherwise promote investment by the private and non-governmental sector to deliver measurable environmental outcomes and produce successful advance compensation.[6]

The Presidential Memorandum calls for the agencies to develop policies and standards that are consistent across all of agencies and that are implemented transparently. Agencies are directed to "set measurable performance standards at the project and program level to assess whether mitigation is effective" and to "clearly identify the party responsible for all aspects of required mitigation measures."[7] The Presidential Memorandum cites a clear preference for compensatory mitigation mechanisms that "are likely to achieve clearly defined environmental performance standards prior to the harmful impacts of a project."[8]

The President's directive also prescribes specific actions for agencies to accomplish along with deadlines by which these

actions must be taken, including the following:

- The U.S. Forest Service must develop and issue new mitigation guidance within 180 days and related regulations within two years.[9]
- Within one year, the Bureau of Land Management (BLM) must promulgate a mitigation policy that "will bring consistency to the consideration and application of avoidance, minimization, and compensatory actions or development activities and projects impacting public lands and resources."[10]
- The U.S. Fish and Wildlife Service (USFWS) must finalize a mitigation policy within one year and must issue additional policy related to the use of compensatory mitigation to fulfill statutory obligations under the Endangered Species Act (ESA). This additional policy must address how efforts to conserve species in anticipation of listing decisions can be recognized and credited as mitigation.[11]
- Within one year, each federal natural resource trustee agency must also issue consistent guidance describing how to evaluate whether, where, and when restoration banking or advance restoration projects would be appropriate as components of a restoration plan adopted by trustees.[12]
- DOI must issue guidance within one year that covers how mitigation projects will be administered on federal lands managed by the Department's bureaus and offices to offset impacts elsewhere.[13]

The DOI Policy. On the same day President Obama issued his memorandum, DOI released Departmental Manual 600 DM 6, *Implementing Mitigation at the Landscape-scale*, on the implementation of mitigation policy. The DOI Policy parallels the Presidential Memorandum policy in most respects and adds additional instructions to DOI's bureaus and offices relating to landscape-scale approaches to mitigation and mitigation in the context of a changing climate.

The DOI Policy recognizes the importance of offsetting impacts to public resources, but it does not prioritize net benefits as the Presidential Memorandum does. The DOI Policy calls for no net loss to "resources and their values, services, and functions that are considered by the Department as important, scarce, sensitive, or otherwise suitable to achieve established goals, or have a protective legal mandate" or, if "required or appropriate, a net benefit in outcomes."[14]

The DOI Policy sets principles to be followed, largely repeating policies contained in the Presidential Memorandum. The DOI Policy affirms its commitment to the full three-part mitigation hierarchy.[15] It also requires that mitigation projects be additional and durable and that the bureaus and offices create predictable and transparent means of evaluating and processing mitigation projects.[16]

The DOI Policy reaches beyond the President's directive in a few respects. First, it elaborates on earlier Department policy relating to landscape-scale mitigation, providing clarification of what a landscape-scale approach entails. A landscape is described as "an area encompassing an interacting mosaic of ecosystems and human systems characterized by a set of common management concerns" and should be defined by the "interacting elements that are relevant and meaningful in a management context."[17] The DOI Policy requires the agency's bureaus and offices to use a landscape-scale approach that considers impacts and prioritizes mitigation objectives across the landscape whenever possible, and to coordinate with other federal entities and states, tribes, and stakeholders in doing so.[18]

Additionally, the DOI Policy addresses ways in which DOI's bureaus and offices should consider climate change when managing public resources and directs these entities to "[i]dentify and promote mitigation measures that help address the effects of climate change and improve the resilience of our Nation's resources and their values, services and functions."[19] It also requires the Department's bureaus and offices to consider greenhouse gas emissions from projects and activities, changing wildlife behaviors, and ways to protect resources that store carbon, among other things.[20] Whereas the Presidential Memorandum does not include air in the definition of "natural resources" or otherwise mention air quality, the DOI Policy specifically includes management of and mitigation related to air quality.[21]

Finally, the DOI Policy expands on the use and implementation of compensatory mitigation measures, noting that compensatory mitigation should only be considered when avoidance and mitigation cannot fully offset impacts.[22] Compensatory mitigation measures should be taken in advance of impacts, should "maximize the benefit to impacted resources and their values, services and functions," and should prioritize effective mitigation. Impacts and benefits should be measured and monitored transparently and consistently, and those responsible for mitigation should be clearly identified.[23] The DOI Policy also provides that compensatory mitigation measures should be set forth in binding agreements that include: the type and location of resources to be compensated; mitigation, monitoring and maintenance plans; and means by which projects will be funded. It emphasizes that all compensatory mechanism (conservation banks, in-lieu fee, and permittee-responsible mitigation) be held to high and equivalent standards.[24]

There are ambiguities in the Presidential Memorandum and in the DOI Policy. For example, the Presidential Memorandum provides for the mitigation of impacts to "natural resources," which includes "land, water, wildlife, and other ecological resources."[25] There will likely be disagreement among agencies and stakeholders over the extent to which the Presidential directive applies to these natural resources, and what actually qualifies as a natural resource. Disagreements may also arise regarding the DOI Policy's definition of "landscape" and what is appropriate under a "landscape-scale approach." There will also likely be questions regarding implementation of these two directives. What criteria will be used to determine where mitigation will occur? How will ecological impacts and benefits be measured? What are "irreplaceable resources?" Additionally, the DOI Policy, while committed to following the mitigation hierarchy, recognizes that in "limited situations, specific circumstances may exist that warrant an alternative from this sequence."[26] But there will likely be conflict over which circumstances and situations provide for this deviation. These ambiguities and others will likely surface as these new directives are implemented among and across agencies.

Implications of the Directives

The directives issued last week by the President and DOI memorialize an important shift in and coalescence of federal natural resource management policy and practice. For decades, federal resource agencies seemed comfortable with mitigation only in the sense of measures to avoid and minimize adverse impacts. The notion that mitigation could rightly encompass measures to offset or compensate for harm was treated as anathema to sound management, an appeasement that was unworthy of the public trust. That limited perspective began to broaden with the maturation and improved quality of the wetlands banking program set up by the Army Corps of Engineers and EPA to implement the first President Bush's "no net loss of wetlands" goal. Over time, the USFWS lent further legitimacy to compensatory mitigation through its approval of ESA incidental take permits supported by habitat conservation plans that included compensatory mitigation components. And the Natural Resource Damage Assessment (NRDA) program promoted various creative efforts to restore and re-create a range of environmental resources in widely varying locations and conditions to serve as compensation for pollution-caused damages to ecosystems.

Still, most federal resource managers continued to look on compensatory mitigation as cheating somehow, an inappropriately permissive response to poorly conceived projects. Even after the President's Council on Environmental Quality issued guidance in 2011 encouraging use of all forms of mitigation to reduce impacts below the level of "significance" that would otherwise trigger the requirement of the National Environmental Policy Act (NEPA) for preparation of an environmental impact statement, many agency officials were unsure what discretion they had to treat compensatory mitigation as a justification to grant a permit or approval. In a single agency, even a single office of an agency, one could find widely divergent opinions.

Last week's directives should greatly reduce any remaining confusion. As of now, all key federal resource management agencies are directed to use their authorities, in the language of the President's directive, to establish "a net benefit goal or, at a minimum, a no net loss goal for natural resources the agency manages that are important, scarce, or sensitive,

or wherever doing so is consistent with agency mission and established natural resource objectives." And the path to a net gain (or at least no net loss) involves adherence to the three-part concept of mitigation - relying on avoidance, minimization, and compensation (at a ratio of 1:1 or greater) - for impacts that cannot be avoided entirely. The President and DOI have brought compensatory mitigation out of the shadows; it is no longer a disreputable indulgence, it is now affirmative national policy.

These directives deserve considerable attention from those active in the natural resource law and policy arenas. There are new rules of the road for resource agency decisions subject to NEPA review, and they may significantly influence implementation of ESA and other resource protection laws. Federal resource planning efforts will likely change to include substantial consideration of "net gain/no net loss" benchmarks. Most fundamentally, the new directives seem likely to change the transactional environment facing developers seeking federal approvals for: infrastructure projects; energy, water, and mineral development; or other activities potentially impacting federal natural resources.

Agencies' permitting and compliance decisions involve significant elements of subjectivity and uncertainty. The permitting process is often defined by bargaining over the allocation of risk between an agency wary of potentially unforeseen resource impacts and a developer or resource user wary of potentially unforeseen costs or delays. The Presidential and DOI directives can be seen as ratifying and calling for even greater effort by resource agencies to minimize or eliminate the risk of unforeseen impacts on natural resources. In effect, the agencies are being told to bargain harder, demand greater assurances, and accept little or no risk of adverse impacts when rendering decisions potentially affecting natural resources.

The directives raise the bar, but are not entirely one-sided. They encourage agencies to promote conservation banking, stewardship contracts, and other financial-incentive-based tools that generate "credits" that developers can use to offset adverse impacts of proposed projects. The internal logic of the directives appears to be that the new, higher standards for resource mitigation—net gain, or at least no net loss—are realistically achievable because any project's unavoidable adverse impacts can be offset with conservation credits.

The agencies' mandate to bargain harder will create difficulties for almost all resource users. To begin with, baseline resource information often lacks the empirical certainty that would make it obvious how to get to a net gain or no net loss. And what is a "net gain"? How big must that be? More challenging, the directives call for "durability" in mitigation, meaning that the quantitative and qualitative relationship of impact to compensation should endure so long as the impact continues. But natural resources change over time. Even resources that once seemed static are now recognized to be mobile as temperature, precipitation, fire, and other variables change across the landscape. The new directives will particularly frustrate those resource users who are not inclined to anticipate nor internalize within their project planning and business judgments the agencies' resource management goals. Whatever the agencies were bargaining for yesterday, they'll soon be bargaining for more.

There is something encouraging here for those resource users who approach the regulatory environment with a transactional mindset. The directives' embrace of compensatory mitigation means that, once the directives have had time to be incorporated into agency procedures, there should be a predictable regulatory "solution" for a project potentially posing the risk of adverse resource impacts. In theory, the ultimate decision about whether - and on what terms - to approve a permit or other authorization should be somewhat less vulnerable to an agency official's reluctance to countenance unavoidable adverse resource impacts. This is particularly so if the agencies do, in fact, embrace the use of mitigation banks and other credit-generating tools.

The sage-grouse mitigation bank established in Nevada earlier this year by Barrick Gold with BLM and USFWS suggests just how strategic the transactional opportunity may prove to be. Barrick's most important Nevada mining project is now, for all practical purposes, insulated from legal and other battles over sage-grouse, and the agencies (and bird) stand to benefit from significant conservation investments well in advance of any new mining activities. As another example, the mitigation fund negotiated by electric utilities PPL and PSEG with the National

Park Service in 2012 to compensate for impacts on park resources from expansion of a major transmission line crossing the Delaware Water Gap National Recreation Area and two other National Park Service units shows how transactional negotiations relying on compensatory mitigation can lead to favorable permitting decisions (and, not insignificantly, avoid Office of Management and Budget rules related to payments of compensation directly to federal agencies).

The other potential winners from the directives will be private investors in mitigation banks and similar financial structures that produce resource "credits" to exchange for impacts. The first real test will come in the sage-grouse context, where BLM and Forest Service land use plans, recently revised to forestall the need to list the bird under the ESA, all anticipate use of compensatory mitigation practices, with details to be worked out over the coming months and years. Though sage-grouse mitigation will draw most of the early market attention, it is the case that the directives would appear to have the potential to create markets for compensatory mitigation offsets or credits associated with any category of natural resource. The range of possible new markets is wide, well beyond at-risk species or wetlands. It should also be of interest to potential investors that the two directives seem to have been written with a view toward reducing problems encountered by certain pioneering private conservation banks competing with state governments to create "credits" to offset impacts to the lesser prairie-chicken. In that circumstance, the USFWS discovered after the fact that agency staff had held the private banks to much more demanding qualitative and procedural standards than agency leaders had applied to the states managing the regional conservation plan for the bird, unintentionally granting the states a *de facto* monopoly (built around low-quality offsets) in what was supposed to be a competitive compensatory mitigation market (built around high-quality offsets). On the surface, at least, the directives call for a level playing field between private- and public-sector banking efforts.

With impacts and compensation now formally tied together in federal resource management policy, the relatively small and insular universe of mitigation bankers appears headed toward major disruption as new players enter the field. It seems highly likely that some resource users will opt to integrate compensatory mitigation into their traditional resource-impacting businesses. Will certain industries, e.g., utilities and dredging/construction companies, be inclined to leverage their balance sheets, equipment, and infrastructure development expertise into ancillary lines of business? Will large landowning businesses, such as mining and mineral interests, convert some of their lands into mitigation banks? Will those resource-impacting companies already invested in mitigation banking for endangered species (such as Vulcan Material's mitigation bank for the Delhi Sands Flower-loving Fly) expand their investments to other categories of resources? Will the relatively small wetland mitigation banking businesses be able to compete against larger players emerging from among the resource-impacting industries? Will civil engineering firms, now well entrenched in the NEPA environmental-review document-production business, begin offering mitigation services to offset the adverse impacts identified in the environmental analyses that they prepare in connection with agency decision-making they are hired to inform? Will private equity investors recognize the many structural analogies between compensatory mitigation and more familiar investments such as commodities, real estate, agriculture, silviculture, and ranching? These and similar questions might best be abstracted to: Who will be most efficient at producing the natural resource goods needed most by those whose federally regulated activities have unavoidable adverse impacts?

It also seems only a matter of time before compensatory mitigation and greenhouse gas policy converge. The Presidential directive applies to "natural resources" and defines the term as "land, water, wildlife, and other ecological resources…." Although "air" is not listed as a natural resource, there is nothing in the directives that distinguishes atmospheric chemistry from the suite of ecological resources to be potentially protected through mitigation. In theory, the principle of net gain/no net loss can readily be applied to CO_2 or methane emissions associated with a given project. How long can it be before an agency takes the step of issuing a permit on the condition that the regulated activity be greenhouse gas neutral or negative?

The agencies covered by the directives will encounter fundamental challenges at the very threshold of their implementation efforts. The language of the President's directive invites uncertainty and disagreement within agencies

and between agencies and the regulated community over the scope of the directive. Which resources and programs are covered? The language does not limit the applicability of the directive to natural resources on federal lands. Nor does the directive answer the complicated question of which existing agency authorities might plausibly be interpreted to be consistent with the directive's net gain/no net loss mandate. One area sure to be tested will be the relationship between the new directives and the NRDA programs, where billions of dollars of environmental restoration activities are underway or planned as "compensation" for natural resource harms.

EPA's various regulatory programs offer good examples of the scope problem. Does the Clean Water Act's section 316(b) regulatory program fall inside or outside the scope of the directive? Section 316(b) requires EPA to issue regulations on the design and operation of cooling water intake structures in order to minimize adverse impacts. Cooling water intake structures can cause adverse environmental impacts by pulling large numbers of fish and shellfish or their eggs into a power plant's or factory's cooling system. Will the net gain/no net loss principle take root in this highly consequential regulatory scheme, with permits reconfigured to require avoidance and minimization of adverse impacts and compensatory mitigation to reach a net gain in the condition of the resources impacted by the permitted facility? Another EPA example: How will pesticide regulation be affected?

An array of smaller but still important questions will present themselves. For example, the directives may create favorable conditions for compensatory mitigation markets as a matter of federal policy, but property rights law—as in the law that will largely govern the assets used as credits—is mostly state law. In the current political climate surrounding natural resource policy, it does not take much imagination to envision a state attorney general or state legislature opting to interpret or revise state law to influence federal crediting systems. How will trans-border crediting work, not just in the sense of credits moving across state lines, but also over the United States' international boundaries? Crediting agreements may include credits tied to species on the brink of extinction or other highly vulnerable resources. Scarcity of a marketable resource can lead to higher prices. Will market forces encourage some to create "market shortages" in order to drive up the market value of certain credits?

More questions arise: How will traditional NEPA compliance practices change as application of the net gain/no net loss principle decreases the number of decisions posing the potential for impacts that rise to the level of "significance" recognized under NEPA law? When a proposed project may impact more than one type of natural resource, will the process of offsetting those impacts allow for arbitrage among the categories to produce an economically or environmentally optimal "net gain," or will each category of resource need to be treated in isolation? What practices, if any, will migrate from the agencies covered by the directives to those - like the Department of Transportation and Department of Energy - that are not specifically covered? Given their historic reluctance to acknowledge the overlap between their missions in the context of natural resources, will the EPA and DOI approach implementation of the Presidential directive in compatible ways?

We have entered a new regime in federal natural resource management, one that brings to mind Aldo Leopold's observation that "Conservation . . . is a positive exercise of skill and insight, not merely a negative exercise of abstinence or caution." In time, we will have a better sense of what the new regime will mean in practical terms. For now, the natural resource community will want to focus on the various agencies' efforts to implement the directives. Across the federal government, for months to come, new rules and policies will be under development with implications for an enormous range of decisions affecting natural resources "that are important, scarce, or sensitive, or wherever doing so is consistent with agency mission and established natural resource objectives."

Endnotes

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1 Presidential Memorandum § 3(b).
2 *Id.*
3 *Id.* §§ 2(f), 3(b), 3(f).
4 *Id.* §§ 2(c), 3(b).
5 *Id.* § 3(h).
6 *Id.* § 1.
7 *Id.* § 3(e).
8 *Id.* § 3(c).
9 *Id.* § 4(a).
10 *Id.* § 4(b).
11 *Id.* § 4(c).
12 *Id.* § 4(d).
13 *Id.* § 4(e).
14 DOI Policy, 600 DM 6.5.
15 *Id.* § 6.4.B.
16 *Id.* §§ 6.4.G, 6.4.H, 6.6.G.
17 *Id.* § 6.4.D
18 *Id.* §§ 6.5.D, 6.5.E.
19 *Id.* § 6.4.F.
20 *Id.*
21 *Id.* §§ 6.2, 6.5, 6.8.G.
22 *Id.* § 6.5.C.
23 *Id.* § 6.5.C(1).
24 *Id.* §§ 6.6.C, 6.7.
25 Presidential Memorandum § 1.
26 DOI Policy, 600 DM 6.4.B.

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