

Public Land and Resources Committee Newsletter

Vol. 13 No. 1

February 2016

LANDSCAPE-SCALE MANAGEMENT AND MITIGATION AT THE DEPARTMENT OF THE INTERIOR

Joel Clement and Tomer Hasson

The Department of the Interior (“DOI” or “department”) manages 500 million acres of land and water, primarily located in western states. With further authority over 1.7 billion acres on the Outer Continental Shelf, the department is a steward to 20 percent of the nation’s land—the largest single manager of this country’s natural and geologic resources. According to 2014 numbers, production and activities on DOI lands are associated with approximately \$200 billion in value added, \$360 billion in economic output, supporting an estimated two million jobs. *See U.S. Department of the Interior, Economic Report Fiscal Year 2014* (July 23, 2015).

This is a complex management responsibility; the lands and waters of this country, from the Arctic tundra to the Florida everglades, represent an extreme diversity of resources and systems that are a host to diverse public uses and perspectives. Working within the constraints and authorities of key natural resource laws, the department seeks to find an appropriate balance between conservation, grazing, recreation, resource extraction, development, and other requirements of a broad set of interested parties, stakeholders, and legal public users.

To help find that balance, and to integrate 21st-century science, technology, and management

innovations into policies and permit processes, Secretary Jewell issued Secretarial Order 3330, “Improving Mitigation Policies and Practices of the Department of the Interior” in October 2013 (“order”). This order tasked the department with developing a framework for making these improvements. This report, “A Strategy for Improving the Mitigation Policies and Practices of the Department of the Interior,” was delivered to the secretary in April 2014.

The report highlights the challenges and opportunities associated with developing and implementing effective mitigation policies and describes the key principles and actions necessary to successfully shift from project-by-project management to consistent, landscape-scale, science-based management of the lands and resources for which the department is responsible. To implement this vision the department has already undergone substantial changes in the policies and practices that govern the application of mitigation, while additional changes are in the works.

Revisions to departmental and bureau policies are intended to ensure that modern mitigation principles and goals are considered when developing and approving strategies and plans, reviewing projects, and issuing permits, and are

Continued on page 3.

Public Land and Resources
Committee Newsletter
Vol. 13, No. 1, February 2016
Raya Treiser, Editor

In this issue:

Landscape-scale Management and Mitigation at the Department of the Interior
Joel Clement and Tomer Hasson 1

Making Ecological Restoration Investable: Policy Solutions To Align Incentives
Adam Davis 5

The Third Wave: Mitigation as a Mechanism for Supporting Public Land Management Decision-Making
Jessica Wilkinson 8

Assessing Compensatory Mitigation Options for Greater Sage-Grouse Conservation
Olivia Pearman..... 13

Tracking Federal Policy on Mitigating Impacts to Natural Resources Just Got Even More Complicated
Margaret "Peggy" Strand, Gregory Braker, Kathryn Floyd, and Laura Boorman 18

Copyright © 2016. American Bar Association. All rights reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted in any form or by any means, electronic, mechanical, photocopying, recording, or otherwise, without the prior written permission of the publisher. Send requests to Manager, Copyrights and Licensing, at the ABA, by way of www.americanbar.org/reprint.

Any opinions expressed are those of the contributors and shall not be construed to represent the policies of the American Bar Association or the Section of Environment, Energy, and Resources.

**AMERICAN BAR ASSOCIATION
SECTION OF ENVIRONMENT,
ENERGY, AND RESOURCES**

CALENDAR OF SECTION EVENTS

March 16, 2016
Using Private/Public Partnerships for Water Development
CLE Webinar

March 29-30, 2016
34th Water Law Conference
Austin, TX

March 30- April 1, 2016
45th Spring Conference
Austin, TX

March 30, 2016
Meet the SEER - Boulder, CO
Sandra Day O'Connor College of Law

April 13, 2016
EPA's Financial Assurance Rules for the Mining Industry and Why Every Industry Should Take Note
CLE Webinar

April 14-15, 2016
ABA Petroleum Marketing Attorneys' Meeting
Washington, DC

June 14, 2016
Key Environmental Issues in U.S. EPA Region 5 Conference
Chicago, IL

June 14-15, 2016
Superfund Master Class: Today's Issues and Tomorrow's Reforms
Chicago, IL

**For full details, please visit
www.ambar.org/EnvironCalendar**

Continued from page 1.

implemented consistently within and across the department's bureaus. Such principles include, but are not limited to:

- Application of a consistent landscape approach to inform mitigation planning and implementation when developing and approving strategies and plans, reviewing projects, and issuing permits;
- Adherence to the mitigation hierarchy of first avoiding, and then minimizing impacts, followed by requiring compensatory mitigation for residual impacts that warrant such mitigation;
- Identification of mitigation requirements and opportunities in advance of project impacts (pre-planning) to engage stakeholders and project proponents and communicate permit requirements more efficiently and effectively;
- Development of management goals for resources prior to any allowance of impacts, such that mitigation requirements are tied to achieving such goals;
- Mitigation decisions based on best available science and tools—development of new tools when necessary to improve effectiveness of mitigation;
- Mitigation decisions that improve the resilience of America's natural resources to a rapidly changing climate; and
- Mitigation measures that are at least as durable as the impacts being mitigated.

This year, the department expects the Bureau of Land Management (BLM) to finalize a regional mitigation policy that will provide the foundation for a new approach for the BLM to mitigate impacts from development—with the goal of being more strategic, effective, and consistent in its mitigation requirements. The BLM's new mitigation policy moves the BLM toward pre-planning for mitigation—through development of mitigation strategies or plans rather than

addressing mitigation only during individual permit reviews (where options for effective mitigation are generally more limited and often are not concerned with larger landscape effects of impacts).

The new BLM mitigation policy will be joined by two new proposed Fish and Wildlife Service (FWS) mitigation policies: a revision of its 1981 mitigation policy and the development of a new Endangered Species Act (ESA) compensatory mitigation policy to replace the 2003 conservation banking guidance and 2008 recovery crediting guidance. The revised FWS mitigation policy is intended to be an overarching policy under which other relevant FWS mitigation policies would nest. It will reinforce and expand upon departmental principles to help guide mitigation recommendations by FWS, including using a landscape-level approach and focusing on long-term benefits to species and habitats that are impacted. The ESA compensatory mitigation policy will provide procedural detail specific to carrying out the compensatory mitigation for impacts to listed species and their habitats, clarifying the use of mitigation under the ESA.

Per the secretarial order, these policies are intended to create permit reviews that will better address the direct, indirect, and cumulative impacts to all pertinent resources, including their values, services, and functions; consider mitigation in the context of the conditions and trends of the appropriate landscape and apply mitigation consistently across that landscape; ensure mitigation requirements are durable and have clearly defined outcomes; and finally, ensure that mitigation measures are adequately monitored to ensure progress toward those outcomes.

While these policies are still being drafted, the department is already using more modern, landscape-scale practices to implement mitigation. For example, the department's approach to permitting renewable energy in the desert Southwest provides a new business model for energy permitting on public lands through the early identification and establishment of "solar

energy zones” where this particular use is identified as appropriate and prioritized. Similarly, this landscape-scale approach was central to the conservation strategy identified in the records of decision for the greater sage grouse (GSG) land use plan amendments that provided, in part, the basis for the FWS determination that the GSG was “not warranted for listing under the Endangered Species Act.” The foundation for the “not warranted” decision was, in large part, due to the commitment in land management plans to mitigate impacts in identified priority habitat management areas (and some parts of general habitat management areas) across the 11 affected western states upon which the GSG rely. While the overall framework for GSG mitigation has been identified, the BLM and FWS, along with other federal, state, and local communities and citizen groups, will continue to use the principles identified in the secretarial order and forthcoming bureau policies to develop the mitigation structure, standards, approaches, metrics, preferences, and administrative procedures associated with this critical landscape mitigation approach.

The department’s approach to the GSG and renewable energy development represents a marked change from decades of prior resource management practices that strictly responded to permit inquiries and managed resources within political and administrative boundaries and units. Reducing the effect of these silos, and the project-by-project approach to decision making, will require many years of organizational adjustment, but these efforts signal an important institutional eagerness to address modern management challenges with modern tools and approaches. Going forward, the department will continue to expand landscape-scale mitigation pilots and the institutionalization of this approach to benefit project proponents and the public resources the department is tasked to conserve and manage.

Joel Clement is the Director of the U.S. Department of the Interior’s Office of Policy Analysis, which provides cross-cutting analysis, planning, and coordination to support decision making and policy development at Interior. He is deeply

engaged in mitigation issues, landscape-scale approaches to managing public resources, and the many policy and planning challenges that Interior faces regarding climate change resilience, rapid change in the Arctic, clean energy, and invasive species.

Tomer Hasson works in the Department of the Interior’s Office of Policy Analysis as the department’s Science Coordinator. In that capacity he focuses on coordinating science programs and processes across the department’s bureaus and offices to best achieve secretarial goals. His expertise has been particularly utilized in establishing a departmental mitigation policy, and in advancing the inclusion of ecosystem services and greenhouse gas considerations into federal decision making.



Twitter:

@ABAEnvLaw (Use #EnvLaw for industry related tweets!)



ABA SEER LinkedIn group:

bit.ly/ABAEnvLaw



Facebook:

Facebook.com/ABAEnvLaw



Instagram:

www.instagram.com/abaenvlaw

MAKING ECOLOGICAL RESTORATION INVESTABLE: POLICY SOLUTIONS TO ALIGN INCENTIVES

Adam Davis

Over the past 20 years, a remarkable environmental success story has unfolded in the United States. The Clean Water Act mitigation banking program has enabled the restoration and permanent protection of 883,000 acres of wetlands and streams by harnessing private investment on private land. *See generally* U.S. Army Corps of Engineers, *Regulatory In Lieu Fee and Bank Information Tracking System Reports Data* (Sept. 2015). The fundamental innovation that allows investment to occur—the recognition that third-party action can provide legitimate compliance with laws that require compensatory action—has the potential to expand far beyond section 404 of the Clean Water Act to address a wider range of environmental problems and align the interest of investors with the public good.

The latest chapter in this remarkable story was the release on November 3, 2015, of the Presidential Memorandum on Mitigating Impacts on Natural Resources from Development and Encouraging Related Private Investment. By establishing goals and mandates for all of the federal agencies that oversee and regulate land and water, the memorandum establishes for the first time:

- A government-wide goal of no net loss—and in some instances an actual “net gain” goal—for a wide range of environmental features on land and water. Previously, only the Clean Water Act had explicit requirements for no net loss.
- A clear preference for restoration completed in advance of any permitted impacts over plans or promises to do restoration in the future.
- A mandate that mitigation policies work similarly across all federal agencies, are implemented consistently within those agencies, and that federal agencies hold all compensatory mitigation mechanisms to equivalent standards.

The memorandum provides great encouragement for agencies to build on the success of the Clean Water Act section 404 program to put these conditions into place. There are, after all, many laws and regulations that require ecological restoration other than section 404 of the Clean Water Act, and all of them have the potential to become investable if the same principles that inform mitigation banking are applied. These laws include natural resource damage provisions under the Oil Pollution Act, the Comprehensive Environmental Response, Compensation, and Liability Act, sections 7 and 10 of the Endangered Species Act, and elements of section 401 of the Clean Water Act.

The notion of “outsourced compliance” was not part of the original language of the 1972 Clean Water Act and projects that had unavoidable impacts to aquatic resources. Following the adoption of the “no net loss” policy by the George H. W. Bush administration in 1989, compensatory mitigation was explicitly required, but a preference was established for restoration on-site; that is, at the same location as the impact. Following a 2001 National Academy of Sciences report on compensating for wetland losses, the agencies responsible for regulatory implementation, the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (“Corps”) issued guidance that emphasized ecological function within a given watershed but continued to prioritize on-site mitigation.

As the undesirable outcomes of on-site restoration became more apparent, however (e.g., having wetlands directly adjacent to a highway, thus attracting wildlife to the highway), agencies increasingly recognized the benefit of having larger restoration projects in locations that maximize hydrologic and habitat benefits to the overall watershed. Consequently, in 2008, EPA and the Corps promulgated the 2008 mitigation banking rule (“2008 rule”), which formalized the agencies’ evolution in thinking about compensatory restoration, and for the first time established a preference for mitigation banks versus on-site mitigation projects.

In a parallel regulatory development, the 2008 rule also recognized the benefit of restoration completed in advance of impacts over plans or promises to do mitigation later. Up until this time, so called in-lieu fees (ILFs) were often collected by permitting authorities that enabled impacts, but were often not effectively disbursed to restoration projects. These ILFs also provided a questionable source of competition for mitigation banks, because they could set prices that allowed impacts before they knew what the actual cost of compensatory restoration would be.

These improvements in the regulatory environment, along with additional changes that improved predictability and certainty for private investment in restoration projects, have led to a dramatic increase in the pace of mitigation banking activity. For example, in 1993, there were 46 banks in the United States, and ten years later in 2003 there were 219. As of today, there are a total of 1306 mitigation banks (172 of which have sold out of credits). *See generally* U.S. Army Corps of Engineers, *Regulatory In Lieu Fee and Bank Information Tracking System Reports Data* (Sept. 2015).

These banks are not only providing demonstrably higher quality compensatory restoration than the other forms of compliance available, but in so doing they are providing a cost-effective regulatory option to help offset certain unavoidable impacts associated with natural resource extraction, infrastructure, and other forms of development activity. Under the Clean Water Act, projects are still designed so as to avoid and minimize impacts to the maximum extent practicable; but to the extent impacts are unavoidable, securing permits, which relies on mitigation banking programs rather than individual compensatory restoration plans, will be faster and, on average, take half the time to obtain as compared to those for projects that include mitigation under an independent compensatory program.

Today, transportation projects are the single largest source of demand for compensatory

mitigation, followed by commercial/residential/industrial development projects, and then mining and drilling. *See generally* U.S. Army Corps of Engineers, Operations and Maintenance Business Information Database for Fiscal Years 2010–2014. The time savings in obtaining permits for these projects are significant: from approximately 240 days for permittee-responsible projects done off-site to approximately 120 days for those projects that purchase mitigation bank credits. In addition, permittee-responsible projects retain responsibility for the long-term ecological performance of restoration, while the purchase of a mitigation bank credit extinguishes legal liability for the project proponent. Together, these time and liability considerations have made mitigation banks the preferred form of compliance for customers, with 51 percent of Clean Water Act section 404 permits now purchasing credits, up from just 31 percent in 2010. *See* Institute for Water Resources, *The Mitigation Rule Retrospective: A Review of the 2008 Regulations Governing Compensatory Mitigation for Losses of Aquatic Resources* (Oct. 2015).

As a result of the policy requiring no net loss of a specified natural feature, there is a move toward favoring restoration that is completed in advance rather than mitigation that requires long-term monitoring and maintenance (including permanent conservation easements and financial assurance mechanisms). For this reason among others, investment in ecological restoration is rapidly expanding.

To give just one example, Ecosystem Investment Partners (EIP) has developed a private equity fund management strategy that provides a familiar platform for institutional investors like pension funds, educational and foundation endowments, and high net worth individuals to put capital to work in ecological restoration. Following a “proof of concept” investment of \$27 million in three projects, EIP closed a \$181 million fund in 2012, which is now invested in a portfolio of 10 major restoration projects around the United States that are all fully entitled and selling credits.

By providing cost-effective compliance options to projects that have the added benefit of providing jobs and economic development, while also improving the standards of environmental performance, mitigation banking is becoming a meaningful asset class that is earning consideration from institutional investors. The amount of capital aimed at social and environmental good (“impact investing”) was estimated by J.P. Morgan to exceed \$50 billion in 2010, but this is only a fraction of the \$210 trillion in global financial markets. To the extent that policy innovation properly aligns real environmental performance with a predictable set of conditions that make risk-adjusted market-rate return on investment possible, ecological restoration can become a recognized and significant investment category.

Progress is being made by regulatory agencies on all of these laws, with demonstration and proof-of-concept restoration projects already in place that are enabling private investment to proceed.

The success story of government innovation in finding an appropriate division of labor between the public sector in setting goals and standards and the private sector in providing capital and entrepreneurial innovation does not end with compliance programs, however. Federal, state, and regional governments now spend billions of dollars on restoration in a manner that does not yet have the same accountability or track record of success as the restoration required by the section 404 mitigation banking program. Examples of large expenditures with highly variable results include regional efforts like the CalFed program in the California Bay Delta, the Puget Sound Partnership in Washington State, and a variety of Chesapeake Bay and Gulf Coast programs.

There is no reason that the restoration standards applicable to mitigation banks could not be applied to contracts that would procure actual ecological results from completed projects, rather than the kind of contracts used today which put performance risk on government, require up-front government financing, and typically lack long-term monitoring and maintenance requirements.

While most of the public discussion about the environment continues to focus on problems and worries, a powerful model that demonstrates both current success and the possibility of significant expansion has been quietly developed. The “restoration economy” in the United States now creates some 220,000 jobs and \$25 billion in economic activity every year. *See Todd BenDor et al., Estimating the Size and Impact of the Ecological Restoration Economy, PLOS One (June 17, 2015).* Further policy innovation that aligns return on investment with achieving public goals for ecological restoration will address unavoidable impacts from infrastructure, resource extraction, and development more quickly and to a higher standard while leveraging private investment and creativity.

Adam Davis is a partner and Director of Research, Policy & New Markets for Ecosystem Investment Partners, a private equity fund manager that acquires and manages high-priority conservation properties across the United States.



Trends and The Year in Review are all-electronic publications.

Natural Resources & Environment and committee newsletters are also available on the Section website.

**Visit
www.americanbar.org/Environ**

THE THIRD WAVE: MITIGATION AS A MECHANISM FOR SUPPORTING PUBLIC LAND MANAGEMENT DECISION MAKING

Jessica Wilkinson

U.S. mitigation policy and practice can be categorized into three types—procedural mitigation, mitigation that is required as a condition of a permit, and application of the mitigation hierarchy to support public land management decision making. Note that throughout this article, the term “mitigation” is taken to mean avoidance, minimization, and compensatory mitigation—the full mitigation hierarchy.

Mitigation as a Procedural Requirement

In the first mitigation “bucket” are those authorities that are procedural in nature and require only consideration of anticipated impacts to the environment and how such impacts can be mitigated. This category of mitigation policy is best typified by the forefather of all U.S. mitigation policy: the National Environmental Policy Act (NEPA). NEPA is a procedural statute that requires agencies undertaking federal actions to analyze anticipated environmental impacts and identify mitigation measures. See 40 C.F.R. § 1508.20. Since its enactment in 1970, NEPA has not been interpreted to require by itself the adoption and implementation of mitigation measures. Rather it relies upon other underlying statutes to establish substantive mitigation commitments. See Jessica B. Wilkinson et al., *The Next Generation of Mitigation: Linking Current and Future Mitigation Programs with State Wildlife Action Plans and Other State and Regional Plans* (Aug. 4, 2009). NEPA does, of course, create substantive mitigation requirements when mitigation measures are utilized to secure a finding of no significant impact. See Council on Environmental Quality, *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. 5666 (Jan. 21, 2011).

Mitigation as a Condition for Undertaking an Activity

In the second category of mitigation policy and practice are those programs that require mitigation as a *condition* for receiving a permit or otherwise being authorized to undertake an action that causes harm to the environment. The best examples of these policies are the Clean Water Act (CWA) section 404 and the Endangered Species Act (ESA) section 10. For example, CWA section 404 requires that before the U.S. Army Corps of Engineers issues a permit for actions that affect wetlands and other aquatic resources, the agency must ensure that impacts are avoided to the “maximum extent practicable” and remaining unavoidable impacts are then minimized “to the extent appropriate and practicable.” U.S. Environmental Protection Agency and the Department of the Army, *Memorandum of Agreement Between the Department of the Army and the Environmental Protection Agency: The Determination of Mitigation Under the Clean Water Act Section 404(b)(1) Guidelines at § II(C)* (Feb. 6, 1990) (hereinafter “Mitigation MOU”). Compensatory mitigation is then required for all remaining unavoidable impacts. See *Mitigation MOU at § II(C)(3)*. In the cases of CWA section 404 and ESA section 10, mitigation—avoidance, minimization, and in some cases, compensation—is required as a condition for impacting wetlands or harming species or habitat protected under the statute.

These conditional mitigation programs result in significant financial contributions to conservation and habitat restoration efforts in the United States. It is estimated that together they contribute over \$3.73 billion in terrestrial and aquatic resource restoration and protection every year and support a “restoration economy” in the United States that employs over 126,000 workers and generates \$9.5 billion in economic output annually. See Jay Austin et al., *Mitigation of Impacts to Fish and Wildlife Habitat: Estimating Costs and Identifying Opportunities* (Oct. 2007); see also Todd BenDor et al., *Estimating the Size and Impact of the Ecological Restoration Economy*, PLOS One (June 17, 2015).

The Third Wave: Mitigation as a Public Land Management Tool

The last category of mitigation—mitigation as a means to support decision making in exercising public land management agencies’ responsibilities to manage federal lands and waters—represents a new understanding of mitigation. Although still in development as of this writing, the most significant public land management agencies are undergoing policy changes that will employ the use of mitigation *beyond that required by the other categories of mitigation* to sustain and improve the ecological health of over 440 million acres of public lands. See Ross W. Gorte et al., *Federal Land Ownership: Overview and Data*, Congressional Research Service, R42346 (Feb. 8, 2010). These emerging policies hold great promise for supporting more efficient and timely project reviews and improved environmental outcomes.

The Role of Mitigation in Public Land Management

Congress established multi-purpose missions for the nation’s two largest public landowners—the Bureau of Land Management (BLM) and the U.S. Forest Service (USFS). The BLM administers 247.9 million acres, more public land acreage than any other agency. See Gorte et al., *supra*. The USFS administers 192.9 million acres, second only to BLM. *Id.* Both agencies are subject to a multiple-use mandate.

In the case of the BLM, the Federal Land Policy and Management Act of 1976 (FLPMA) directs the agency (through the secretary) to manage the public lands “on the basis of multiple use and sustained yield.” 43 U.S.C. § 1701(a)(7). Yet it is also directed to manage its lands in a manner that “will protect the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archeological values,” “will preserve and protect certain public lands in their natural condition,” “will provide food and habitat for fish and wildlife and domestic animals,” and “will provide for outdoor recreation

and human occupancy and use.” *Id.* § 1701(a)(8). Under the Organic Act, the USFS is also directed to both “improve and protect the forest” while also providing “a continuous supply of timber for the use” of the public. 16 U.S.C. § 475.

Both agencies, however, recognize that their multiple-use mandates do not mean that every acre is available for every use and there are limits on the extent of acceptable impacts. See Statement of Robert Abbey, Director of Bureau of Land Management, Department of the Interior, before the House Natural Resources Committee: Wild Lands Policy (Mar. 1, 2011); see also John B. Loomis, *Integrated Public Lands Management: Principles and Applications to National Forests, Parks, Wildlife Refuges, and BLM Lands* (2002). FLPMA, for example, requires the BLM to “take any action necessary to prevent unnecessary or undue degradation of the lands.” 43 U.S.C. § 1732(b). Similarly, the multiple-use mandates set limits on the extent of the lands and waters that can be managed primarily to sustain and improve the ecological health of the managed resources.

How can these public land management agencies best satisfy their mandates to allow for economic and recreational uses, while also complying with their obligation to conserve, maintain, and improve ecological quality and avoidance of undue degradation? Application of the mitigation hierarchy with a goal of meeting, at a minimum, no net loss of resources is one such way. Indeed, one can argue that such a balance cannot be reached *without* the use of mitigation.

The Department of the Interior, the BLM, and the USFS have come to view mitigation—all three categories—as a valuable tool to support their decision making. In June 2013, the BLM released an interim policy on regional mitigation and a final version of the policy is expected for release in the coming months. In June 2015, the USFS issued a “Chief’s letter” to the field setting forth a “Forest Service Mitigation Framework.” See Bureau of Land Management, Interim Policy, Draft–Regional Mitigation Manual Section–1794 (June 13, 2013);

U.S. Forest Service, Finalizing and Implementing a Forest Service National Landscape-Scale Mitigation Framework (June 9, 2015). Most recently in November 2015, the Department of the Interior adopted a new chapter of its departmental manual, titled “Landscape-Scale Mitigation Policy.” This chapter appears in the manual’s public land policy section and establishes that it is the policy of the department to apply the full mitigation hierarchy on a landscape-scale “when carrying out its legal and regulatory responsibilities and in the management of Federal lands, waters, air quality, and other resources and infrastructure under its jurisdiction.” Department of the Interior, *Chapter 6: Implementing Mitigation at the Landscape-Scale*, Departmental Manual, pt. 600.

These policy developments come on top of significant efforts by the White House and the Department of the Interior to establish high standards for mitigation policy and consistent application of the mitigation hierarchy. See Joel Clement and Tomer Hasson, *Landscape-scale Management and Mitigation at the Department of the Interior*, published in this newsletter. In November 2015, for example, the White House issued a presidential memorandum on mitigation, which lays out a set of principles to which all mitigation policies should be held. The White House, Presidential Memorandum: Mitigating Impacts on Natural Resources from Development and Encouraging Related Private Investment (Nov. 3, 2015).

Key Elements of Success

Ultimately, the legacy of public land mitigation policy will be determined by success on the ground in the coming years. And that success will be measured by the degree to which such policies meet the demands of economic and recreational users, improve permitting efficiencies, provide the regulated public with predictability, improve environmental and other outcomes, and earn the public’s confidence in public land decision making. Below are several additional critical elements that will be keys to that success. See Bruce McKenney

& Jessica Wilkinson, *Advancing Conservation and Development: 10 Principles for Applying the Mitigation Hierarchy*, the Nature Conservancy (Apr. 2014).

Landscape level and informed by science.

Mitigation programs on lands under the administrative jurisdiction of the federal land management agencies should be carried out on a landscape level and should be informed by science and relevant and reasonably available data. Landscape-level planning supports mitigation decisions that are informed by an understanding of conservation priorities and potential direct, indirect, and cumulative impacts across an ecologically meaningful geography. Such plans can link to existing conservation and management plans developed by the agencies or by other appropriate entities. Particularly when the planning is carried out in advance of project proposals, it provides greater predictability and transparency. Landscape-level mitigation planning can also help ensure that impacts to resources are appropriately and adequately avoided, minimized, and, if unavoidable, compensation is directed to areas that maximize conservation outcomes, have a high likelihood of success, and support applicable regulatory *and* management objectives.

Clarity, practicality, and consistency. Application of mitigation to support federal land management decision making is a new approach for many field staff. Federal land management agencies should invest in training, technical support, and the establishment of a community of practice to support this new direction. Field staff should be encouraged and supported to develop locally tailored, stepped-down guidance, standard operating procedures, and templates that can be followed to operationalize mitigation in the field. Such guidance ensures that federal policies are applied consistently across field offices. Clear guidance should also be provided to project proponents. Such guidance should encourage project proponents to include mitigation measures adequate to meet all three categories of mitigation in their initial project and permit proposals. If such

mitigation measures are consistent with existing agency guidelines, project review should be more efficient and outcomes for project proponents more predictable.

Another important area of consistency is the standard to which compensatory mitigation mechanisms are held. When agencies allow for compensatory mitigation requirements to be satisfied with a variety of mechanisms (e.g., banks, in-lieu fee programs, permittee-responsible mitigation), they should ensure that the standards for all compensatory mitigation mechanisms—crediting methodologies, standards for the duration of the offsets, financial assurances, and other administrative requirements—are consistent.

Durability. Durability relates to the expectation that the intended ecological functions of the compensatory mitigation investment will endure over time and at least as long as the impacts for which the compensation is being carried out. Therefore, because many impacts to public and private land are permanent or effectively permanent, these impacts should be offset by mitigation measures that are similarly also permanent.

The mechanisms used to establish the durability of the conservation investments should provide a high level of confidence that the project will endure for the intended time period. There are three essential components of durability for compensatory investments on public lands—designation, management, and funding. Although several of these concepts are not unique to the public land context, third parties can play an important role in establishing appropriate safeguards for two of these—management and funding.

Federal land management agencies have yet to clearly affirm a set of appropriate designation tools that can be used to secure the protection of compensatory mitigation investments on public lands. Agency leadership should provide clear guidance to field offices on appropriate tools for ensuring that mitigation measures are appropriately durable.

Additionality. Additionality refers to the degree to which the compensatory mitigation represents a genuinely new and additional benefit to the resource or value being impacted. If the impacted resource or value on land considered for application of the compensatory mitigation is already under adequate protection, simply layering new protective designations would likely not meet the adequate additionality criteria. Similarly, compensatory investments on public lands should also be in addition to and not replace existing conservation, management, and investment commitments already in place.

It may be appropriate for compensatory mitigation funds to be allocated to activities such as law enforcement or land management and restoration activities, but for these actions to be additional they must be tied to the needs of the resources being offset, and the actions must be directed to the compensatory sites. The additionality of compensatory investments should also be measured against a reasonable estimate of the baseline funding for the existing management unit. In other words, the funds must be a new contribution to conservation actions in that area and should not displace funds that have already been allocated to the site.

Federal land management agencies should provide their field offices with technical support and tools to evaluate additionality. In particular, local staff would benefit from guidance on how to establish baselines for funding against which to evaluate the additionality of new mitigation investments and track funding to ensure that funding is not reduced to offset funds from compensation in the future.

Transparency. Federal land management agencies should also ensure that mitigation programs provide the maximum amount of transparency. This should include information on the location and extent of impacts, minimization measures, the location, extent, and type of compensatory mitigation, and the compensatory mitigation's effectiveness. Additionally, transparency assists project proponents in their own planning, permit

applications, and project proposals. It also builds public support for mitigation measures, supports private investments in compensatory mitigation, and can bring public and private resources to bear on evaluating the ecological effectiveness of mitigation programs.

Conclusion

Federal land management agencies have made remarkable progress in a few short years in setting forth a new paradigm for public land use decision making, a paradigm that holds promise for supporting a rational, consistent approach to balancing their dual mandates for the lands and waters they manage and the sustainability of which they are responsible for. See, e.g., David J. Hayes, *Addressing the Environmental Impacts of Large Infrastructure Projects: Making “Mitigation” Matter*, 44 ENVTL. L. REP. 10016 (2014). Several new policies have been announced that offer a

compelling vision for agency project review and landscape-level conservation outcomes. The coming years will tell whether these policies are successful when we see their actual implementation and success at the local level where they are being implemented. DOI and the USFS can, however, set their agencies up for success by providing field staff with technical support and training, and by providing guidance to both field staff and project proponents in several critical areas including landscape-level planning, durability, and additionality.

Jessica Wilkinson is Senior Policy Advisor for Mitigation in The Nature Conservancy's (TNC) External Affairs Department. Before joining TNC, Wilkinson was a Senior Policy Analyst and Director of the Wetlands Program at the Environmental Law Institute in Washington, D.C. The author would like to give special thanks to Lynn Scarlett, Bob Barnes, and Bruce McKenney for their review and input.

Save the Date

The 2016 Fall Conference crowns the Section's 2016-17 program year, with in-person discussions of environmental, energy, and resources law that you can only find at Section of Environment, Energy, and Resources conferences.

This conference is for you, whatever your practice setting: law firm, corporate counsel, public interest, or academia. This is an important opportunity for you to engage with other leading lawyers in CLE sessions on topics relevant to your practice as well as to network.

The Fall Conference is a key reason why our members recognize the Section as “the premier forum for environmental, energy, and resources lawyers.”

Don't miss the Fall Conference! Mark your calendar for October 5-8, 2016 at the Westin in Denver.



ASSESSING COMPENSATORY MITIGATION OPTIONS FOR GREATER SAGE-GROUSE CONSERVATION

Olivia Pearman

Research completed earlier this year by two candidates for master in the Yale School of Forestry and Environmental Studies (“Yale Research”) indicates that the development of compensatory mitigation programs for the greater sage grouse (GSG) will benefit greatly from the collaboration of government, industry, and conservationists. Additionally, the integration of a mix of programs to address needs for compensatory mitigation will result in a more comprehensible and effective approach to sage-grouse conservation in the western United States. *See Assessing Compensatory Mitigation Options for Greater Sage-Grouse Conservation: A Report Prepared by Olivia Pearman (candidate for Master of Environmental Management 2016) and Rachel Plawecki (Master of Environmental Management, graduated 2015) under the supervision and guidance of Jessica Wilkinson and Len Barson of the Nature Conservancy (2015). This article provides an overview of this research and its key findings.*

The GSG was declared a candidate species for listing under the Endangered Species Act (ESA) in 2010. In September 2015, the U.S. Fish and Wildlife Service (FWS) found that listing the GSG under the ESA was not warranted. The Bureau of Land Management (BLM) and the U.S. Forest Service (USFS) have finalized resource management plans that require compensatory mitigation for impact to GSG habitat on BLM and USFS lands. Compensatory mitigation is the last resort in the mitigation hierarchy after avoidance and minimization of impacts. *See FWS, Greater Sage-Grouse Range-Wide Mitigation Framework (2014). Compensatory mitigation refers to the practice of compensating for impacts caused to habitat through development and industry actions. Compensatory mitigation can include providing for the protection, restoration, creation, or enhancement of habitat. These actions may (1) be completed by the project*

proponent; (2) the project proponent may fulfill this requirement by paying an in-lieu fee to a program that will perform the required mitigation; (3) a project proponent may buy appropriate credits generated by a mitigation bank to fulfill its requirements; or (4) a project proponent may buy appropriate credits generated through a habitat credit exchange program.

The research goals in this study included characterizing the demand by industry for compensatory mitigation options for GSG habitat. The research also assessed the advantages and disadvantages of compensatory mitigation program components as perceived by three broad groups including federal government officials, conservation professionals, and industry representatives. Over the course of three months, the researchers performed a total of 27 interviews with 28 participants, including oil and gas representatives, federal and state government representatives (primarily FWS, the BLM, and state natural resource departments), and nongovernmental conservation organizations, including the Nature Conservancy and the Environmental Defense Fund. Finally, because GSG populations occur across 11 western states, the study included participants representing this broader spectrum rather than limiting itself to one particular state. The researchers also analyzed specific compensatory mitigation programs and general program guidelines to assess how they compare to defined criteria.

The research took place before FWS’s decision to not list the GSG under the ESA and before the finalization of the BLM’s resource management plan amendments. *See BLM’s Sage Grouse website, available at <http://www.blm.gov/wo/st/en/prog/more/sagegrouse.html>. The amendments require compensatory mitigation for impacts to GSG habitat. A significant portion of the GSG range occurs on land owned by the BLM. *See Bureau of Land Management, Sage Grouse Frequently Asked Questions. During the course of the research FWS granted approval to the Barrick Nevada Sage-Grouse Bank Enabling Agreement and the**

Sweetwater River Conservancy Conservation Bank in Wyoming. See Department of the Interior, Bureau of Land Management, U.S. Fish and Wildlife Service, and Barrick Gold of North America, Barrick Nevada Sage-Grouse Bank Enabling Agreement (Mar. 25, 2015); see also FWS, *State of Wyoming, Sweetwater River Conservancy Launch Nation's First Greater Sage-Grouse Conservation Bank*.

Compensatory Mitigation Programs—How They Compare

The first stage of the project was to define criteria and create a scoring system to assess compensatory mitigation programs. The criteria were based on the FWS Greater Sage-Grouse Range-Wide Mitigation Framework (2014) in addition to elements of a program that are important but not explicit in the standards outlined by the framework. Criteria included (1) the ability to provide additionality (actions are more than what would have occurred otherwise), (2) durability (benefits last at least as long as the impacts), (3) sensible and priority-directed siting, (4) scientifically defensible action with measurable benefits, (5) rigorous metrics and methodology, (6) stakeholder participation, and (7) adaptability to risk factors. The criteria were designed to evaluate a program's capacity to effectively provide and measure lasting benefits to the GSG across its range, including the program's ability to manage risks such as climate change and engage relevant stakeholders in productive conversation. Two themes crosscut these criteria: transparency and certainty. Programs that publicly document their adherence to standards received higher scores. Programs that have proven results also scored higher while newer programs, such as habitat credit exchanges, ranked lower.

Permittee-responsible, in-lieu fee programs, mitigation banks, and habitat credit exchanges were the four broad categories of programs that were included in the assessment. Publicly available documentation about particular and general programs was used in evaluating the programs against the criteria. *Permittee-responsible* means

that the permittee creating the impacts must develop and implement a project that is negotiated with and approved by the relevant government agency. The permittee remains liable for maintenance and proof of benefit for the duration of the project. *In-lieu fee*, *mitigation banks*, and *habitat credit exchanges* transfer liability from the permittee to the entity administering the program. *In-lieu fee programs* may be administered by the state or by other organizations that manage the funds and perform the projects. The permittee pays a fee and the administrator chooses a site and then develops and implements a project to compensate for the impacts. A *mitigation bank* is established on one piece of property, generates various types of credits, and then permittees can buy them in order to fulfill their requirements. A *habitat credit exchange* allows private landowners to develop credits on their property through defined management actions. These credits are then sold on the market to permittees.

Permittee-responsible compensatory mitigation scored lowest overall primarily due to the inability of these types of arrangements to consistently provide lasting benefits and the lack of stakeholder involvement. One aspect considered in the scoring is that permittees have little to no incentive to seek out the most suitable habitat for performing compensatory mitigation and are more likely to choose a site close to the impacted area whether or not it is likely to be a high priority area of benefit to the species.

Habitat credit exchanges and in-lieu fees scored higher than permittee-responsible compensatory mitigation. The most influential factor in scoring the habitat credit exchange program type was uncertainty. Based on the principles of these types of programs, the researchers contend that there is great potential for a habitat credit exchange to be able to direct mitigation to priority areas, adapt to changes in the landscape, and engage stakeholders. In-lieu fees have been shown to have great variability in their effectiveness. In-lieu fees also have the potential to target priority habitat and adapt to changes. This program type lost points,

however, because implementation does not occur until after the impacts to habitat occur and because administration and oversight of these programs are often poor.

Mitigation banks scored highest out of the four program types. Their ranking reflects the fact that they are rigorously monitored and have every incentive to produce and maintain quality credits. They also have the scientific expertise to efficiently develop and implement compensatory mitigation projects. While they have limited flexibility due to their physical location, they also have the incentive and ability to plan for the long term and adapt to changes. However, mitigation banking programs also have some drawbacks. Because these programs are private businesses, they lack transparency and do not necessarily engage surrounding landowners or other relevant stakeholders in any part of their projects.

Scope of Demand by Industry

At the time of this research it was determined that demand for compensatory mitigation credits was quite low. This was determined through the researchers' interviews with industry representatives and non-industry participants. Industry representatives were asked to characterize their company's demand and non-industry participants were asked to share their perception of industry demand. Most of the responses from all interview respondents indicated that industry was very interested in the development of compensatory mitigation programs but were not, at the time, seeking to buy any credits. In other words, industry demand for credits was low and being fulfilled by current options, but they were also anticipating the potential need for credits in the future and were interested in having many options available.

The main barrier to industry demand for securing compensatory mitigation credits was the lack of regulatory requirements for compensatory mitigation. As previously noted, at the time of this research, the BLM had not yet finalized its resource management plan amendments that include

requirements for compensatory mitigation, and FWS had not yet made a listing decision. States also did not require compensatory mitigation for impacts to sage-grouse habitat but some states have been developing their own policies as well. The lack of regulatory requirements and uncertainty about the listing decision meant that industry was unsure of what compensatory mitigation actions, credits, or programs would be accepted by FWS if a listing of sage grouse did occur. Industry representatives stated the need for assurances that actions taken or credits bought before a listing would be acceptable to FWS in the case of a listing. This indicated that, generally, industry would wait to buy credits until given clear direction in the form of regulation.

Two clear examples of the existence of a demand were the creation of the Sweetwater Bank in Wyoming and the Barrick Agreement in Nevada. The researchers contend that because of low demand, demand for credits was being met by the few options that were available. It is important to note that both programs had to be approved by FWS in order to become viable options for industry. It is likely that as more regulations become solidified, demand for securing credits will increase. It is also likely that some portion of the industry will wait until a listing decision is made before participating in any compensatory mitigation programs.

Finding the Right Mix of Programs

An appropriate mix of compensatory mitigation programs will provide the best chance for effectively providing benefits to the GSG. The researchers suggest that mitigation banks should constitute the bulk of compensatory mitigation programs while in-lieu fee and habitat credit exchanges fill in gaps when and where mitigation banks are not appropriate.

Federal government representatives interviewed by the research team emphasized mitigation banks as the best option in the context of the GSG. The perceived benefits of mitigation banking programs included their permanence, rigorous methodology for their crediting systems, and their accountability.

Conservation NGO representatives were also favorable to mitigation banks. They also favored habitat credit exchanges because they allowed for greater participation, more flexibility, and a broader scope than banks. The researchers' own analysis also suggests that mitigation banking has the highest potential for achieving effective mitigation for the GSG. Industry representatives, however, considered mitigation banks to be expensive and complicated to participate in because of the time and money required to determine what kinds of credits are needed for which kinds of impacts. By contrast, an in-lieu fee program establishes set fees for each type of impact. It is less expensive and easier for companies to participate in.

Industry representatives unanimously indicated they would be more likely to pursue in-lieu fee mitigation programs rather than mitigation banking. The perceived advantages of the in-lieu fee programs include the certainty of costs (i.e., fees are set for various types of impacts so permittee knows exactly how much it will cost to offset project impacts) and ease of participating in the program. NGOs, however, consistently identified concerns with in-lieu fee programs and indicated that in-lieu fee programs do not meet high standards for compensatory mitigation (i.e., do not meet FWS standards provided in the framework and do not provide sufficient habitat benefits).

Overlapping Preferences for Program Components

The research found that the most important criterion for a compensatory mitigation program is the actual component and design rather than the specific type of program. For example, any program has the potential to be attractive to industry and effective for mitigating impacts to GSG habitat depending on specific features of the mitigation program. For instance, programs that provide cost assurances, specify detailed actions, include ongoing protections against future regulatory changes, and allow for input when plan changes are required are considered favorable by the industry groups. Conservation NGOs tended to prefer

the FWS framework for mitigation programs, emphasizing the importance of achieving (and proving) net gain for the sage grouse and involvement of all relevant stakeholders in the design and implementation of mitigation programs.

The researchers found important areas of overlap in desired program components although government officials, conservation NGO professionals, and industry representatives differed in their main priorities. The main areas of overlap included consistent, transparent, and simple crediting methodology, identification and action in the highest priority habitat, and the inclusion of a process that engages all stakeholders in meaningful dialogue. These common themes suggest that there are opportunities for all of these diverse parties to collaborate on the creation and implementation of effective compensatory mitigation programs.

Conclusion

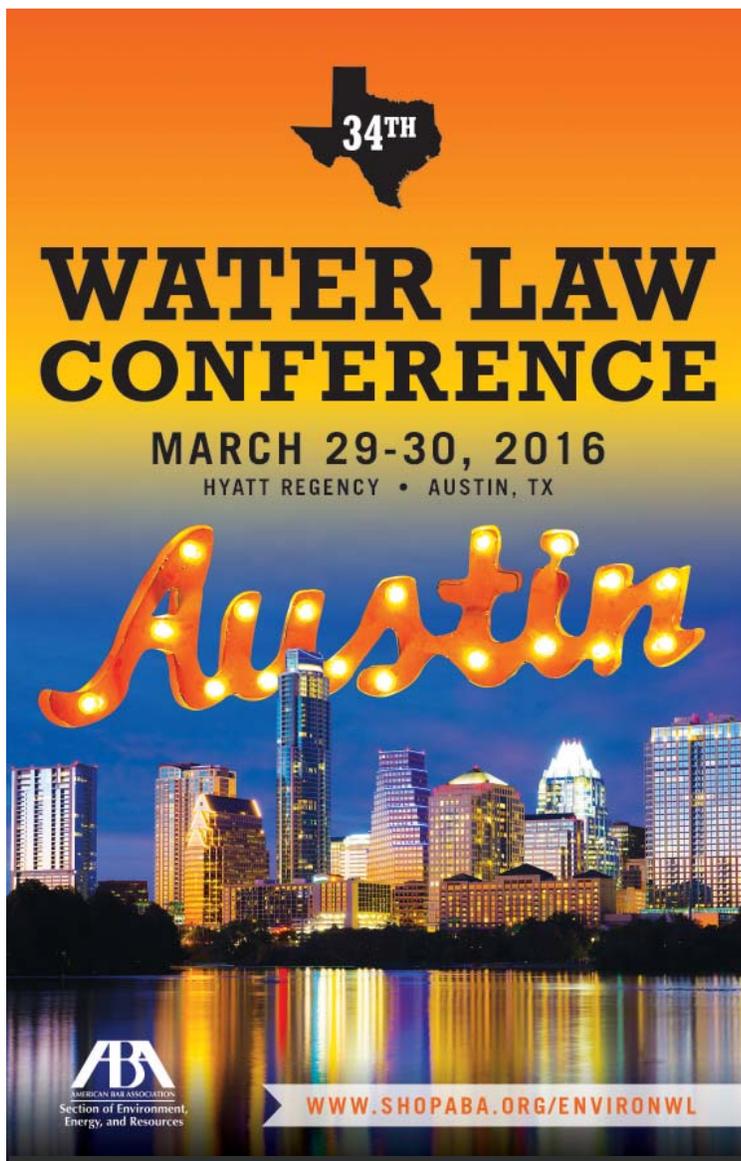
Continuing the conversation about compensatory mitigation options for the GSG is key to developing programs that are both effective for the sage grouse and attractive for users. Industry has a desire to be included in the conversation, and regulators and others are interested in communicating the science behind standards. There is significant interest in having a variety of compensatory mitigation options available, and there are real benefits that options besides banks can provide. FWS should work toward setting standards that can be applied to programs in addition to mitigation banks. Regulatory drivers are key to getting industry interested in these programs, and clarity in regulations and requirements is key to driving demand for credits. Focusing on the components and design of programs rather than program types will allow for more productive conversation between industry, regulators, and conservation NGOs.

A mix of compensatory mitigation programs will be necessary to fulfill the demand for credits and to achieve benefits to the sage grouse. Preferences for specific program types should not eclipse

the potential for a program to meet the needs of the grouse and the needs of industry. Banks can be more attractive to industry users by simplifying their crediting process and making it more understandable and transparent. In-lieu fee programs can be improved by designing the fee structure such that fees can only be paid for mitigation that has already happened and such that prices do not undermine the credit market. They can also be made to have more transparent and accessible pricing methodology and be made more accountable to regulators. These are a few of the suggestions that are not meant to be definitive answers but rather indicative of the myriad

possibilities that should be explored in designing compensatory mitigation programs for greater sage grouse.

Olivia Pearman is a candidate for Master of Environmental Management degree (class of 2016) at Yale School of Forestry and Environmental Studies in New Haven, Conn. Ms. Pearman co-authored a report assessing compensatory mitigation options for greater sage grouse conservation as part of a project for a class with Jim Lyons (Department of the Interior). Ms. Pearman studies conservation and other complex environmental issues. She has on-the-ground experience in ecosystem restoration and wetland mitigation.



The poster features a black silhouette of the state of Texas with "34TH" written inside. Below this, the text "WATER LAW CONFERENCE" is written in large, bold, black letters. Underneath, "MARCH 29-30, 2016" and "HYATT REGENCY • AUSTIN, TX" are displayed. The word "Austin" is written in a large, orange, cursive font with glowing lights. The background shows a night view of the Austin skyline with buildings lit up and reflected in water. At the bottom left is the logo for the American Bar Association, Section of Environment, Energy, and Resources. At the bottom right is the website address "WWW.SHOPABA.ORG/ENVIRONWL".

REGISTRATION OPEN

The **34th Water Law Conference** will bring together the very best water lawyers from across the country to address practical topics and new legal developments that impact your practice.

The conference provides a great opportunity for lawyers and other water professionals to hear from and network with speakers from private practice, government, in-house counsel, and academia. As water resource and quality issues become more complicated, this conference will explore innovative solutions to dealing with the challenge of scarcity, the impact of shortages on long-term water supply planning, and the impact of water resources on different sectors of the economy.

Programming will also include panel discussions and debate on recent changes in the law, hot topics, water quality issues, and much more.

The live music, restaurants, and shopping that surrounds the downtown Austin conference location provides a setting for an unparalleled learning and networking experience.

TRACKING FEDERAL POLICY ON MITIGATING IMPACTS TO NATURAL RESOURCES JUST GOT EVEN MORE COMPLICATED

Margaret “Peggy” Strand, Gregory Braker, Kathryn Floyd, Laura Boorman

On November 3, 2015, the administration released a presidential memorandum entitled “Mitigating Impacts on Natural Resources from Development and Encouraging Related Private Investment.” *Mitigating Impacts on Natural Resources from Development and Encouraging Related Private Investment* (Nov. 3, 2015) (hereinafter “presidential memorandum”). The publication outlines new steps that various federal agencies—including the U.S. Environmental Protection Agency (EPA), Army Corps of Engineers (“Corps”), Bureau of Land Management (BLM), Department of Interior (“DOI” or “agency”), and the U.S. Fish and Wildlife Service (FWS)—must take with respect to conservation and restoration measures. While the ultimate goal of the presidential memorandum is to simplify things by ensuring that federal agencies protect high quality resources and encourage successful compensatory mitigation via applying consistent principles of mitigation across the agencies, the directive is broad and open-ended and overlaps to some degree with an ongoing DOI effort to improve federal mitigation practices that have already fallen behind schedule.

On April 10, 2014, Secretary of the Interior Sally Jewell released “A Strategy for Improving the Mitigation Policies and Practices of the Department of the Interior,” DOI’s new strategy for implementing regional mitigation policies with emphasis on landscape-level planning and resource considerations. *A Strategy for Improving the Mitigation Policies and Practices of the Department of the Interior* (Apr. 2014) (hereinafter “DOI guidance”). The DOI guidance set lofty policy goals and numerous detailed implementation steps for achieving those goals. Of the many specific anticipated changes described in 2014, relatively few final regulations or policies have been issued.

For clients working with any of these agencies on projects that have the potential for noteworthy resource impacts, tracking and complying with the constantly evolving implementation of the presidential memorandum and DOI guidance will be an important consideration in project planning that may present a “moving target” for some time to come.

This article provides a status report on implementation of the DOI guidance, and a brief overview of the objectives and milestones established by the presidential memorandum.

Progress on DOI Guidance to Date

When DOI announced its new mitigation strategy, its expressed goal was to identify high-value resources and conservation priorities on a regional basis so developers could plan projects more effectively from the outset, avoid and minimize impacts to such resources, and more readily identify high-value compensatory mitigation opportunities (if necessary to compensate for unavoidable resource impacts). The idea was that the agency, applicants, and the public would have better resources across multiple programs to select quality mitigation.

In addition to the overarching policy goals, the DOI guidance also specifically enumerated 15 near-term deliverables to be accomplished in the months following the DOI guidance release. Fifteen months since its publication, some of the near-term deliverables in the guidance have been accomplished. However, many of the target dates have come and gone.

Notably, even though many of the deliverables are not final, the principles of the DOI guidance are currently being considered in mitigation decisions. For that reason, stakeholders should be aware of the general direction as well as the final policies in this arena. The following scorecard examines what progress has been made over the last 15 months and discusses prospects for DOI’s future implementation of landscape-scale mitigation policies.

DOI Goals Achieved

Goal: Develop landscape-scale mitigation framework for greater sage-grouse conservation in collaboration with states, tribes, local governments, industry, and other stakeholders.

Greater sage-grouse protection has been highly controversial, and FWS announced on September 22, 2015, that the joint conservation efforts of state, local, and federal entities supported the determination to not list this species under the Endangered Species Act (ESA). *See* DOI, Historic Conservation Campaign Protects Greater Sage-Grouse (Sept. 22, 2015). This was presaged in the September 3, 2014, DOI greater sage-grouse mitigation plan, a 30-page range-wide mitigation framework for the species. Greater Sage-Grouse Range-Wide Mitigation Framework (Sept. 3, 2014). DOI stated that it would take compliance with this guidance into account when FWS made its final listing decision.

Goal: Convene workshop of partners and experts to identify and evaluate existing landscape analysis data and tools and issue guidance for use in mitigation decision support.

According to the U.S. DOI 2015/2016 Annual Performance Plan and 2014 Report, the U.S. Geological Survey (USGS) has been working to develop landscape-level management and planning tools and has updated the geospatial platform that provides data and topographic maps intended to assist with landscape-level management. *See* U.S. Department of the Interior 2015/2016 Annual Performance Plan & 2014 Report (APP&R) (Feb. 2, 2015). Though it does not appear that guidance has been issued, the agency seems committed to working to improve data collection and tools for data analysis.

Goal: The BLM will conduct stakeholder workshops to discuss lessons learned from the Dry Lake Solar Energy Zone Regional Mitigation Pilot Strategy and develop technical reference document for developing future regional mitigation strategies for solar development.

In 2012, the BLM established a new solar energy program through the Final Programmatic Environmental Impact Statement for Solar Energy Development in Six Southwestern States (“final solar PEIS”), and the subsequent record of decision (“solar PEIS ROD”). The solar PEIS ROD identified specific locations that are well suited for utility-scale solar production and have minimal environmental or cultural resource conflicts. The BLM has stated it will prioritize and incentivize solar energy development in these solar energy zones (SEZs).

The DOI guidance stated that the BLM would conduct stakeholder workshops to discuss lessons learned from the final solar PEIS process—and from the Dry Lake SEZ pilot program in particular—and develop a technical reference document for developing future regional mitigation strategies for solar development. According to the BLM, four such workshops were held in Las Vegas, Nevada, and several webinars were hosted to discuss future regional mitigation strategies for solar development. A workshop was also held in Denver, Colorado, in July 2014. That same month, the BLM released a draft Procedural Guidance for Developing Solar Regional Mitigation Strategies, intended to help BLM managers craft mitigation strategies for SEZs. *See* Draft Procedural Guidance for Developing Solar Regional Mitigation Strategies (July 2014). The July 2014 guidance was informed by the March 2014 Regional Mitigation Strategy for the Dry Lake Solar Energy Zone (pilot program). At this time, it is unclear whether this guidance has been finalized.

Goal: FWS will formally propose revisions to the 2003 “Guidance for Establishment, Use, and Operation of Conservation Banks.”

While it does not appear that FWS has actually proposed revisions to the 2003 “Guidance for Establishment, Use, and Operation of Conservation Banks,” FWS and DOI’s Office of Policy Analysis have conducted analyses to identify potential institutional or other impediments to the habitat conservation banking program and

to develop possible options for encouraging expanded use of the program. The agency plans to survey conservation bank sponsors and managers to identify constraints in the current conservation banking program and will provide recommendations for further possible expansion and changes to the program. See Information Collection Request Sent to the Office of Management and Budget (OMB) for Approval; Survey of U.S. Fish and Wildlife Service Habitat Conservation Bank Sponsors and Managers, 80 Fed. Reg. 44,147 (July 24, 2015).

In a press release announcing FWS's and the National Oceanic and Atmospheric Administration's new initiatives and "additional suite of actions . . . to improve the effectiveness of the [ESA]," the agencies stated that in the coming year, they would be unveiling additional proposals to achieve four broad goals, one of which was "incentivizing voluntary conservation efforts." U.S. Fish and Wildlife Service, NOAA Propose Actions to Build on Successes of Endangered Species Act (May 18, 2015). Thus, it appears that this deliverable is a work in progress that may give FWS a head start on meeting its one-year deadline for revising its mitigation policy to recognize and credit action to conserve species of potential ESA listing as avoidance, minimization, and compensatory mitigation.

Goal: DOI will work with the Steering Committee on Federal Infrastructure Permitting and related working groups to execute the Implementation Plan for the Presidential Memorandum on Modernizing Infrastructure Permitting, including the provision to "Expand Innovative Mitigation Approaches."

In May 2014, the Steering Committee on Federal Infrastructure Permitting and Review Process Improvement—of which DOI was a member—issued this implementation plan. See Implementation Plan for the Presidential Memorandum on Modernizing Infrastructure Permitting (May 2014). The implementation plan sets forth four strategies, 15 reforms, and

96 near-term and long-term milestones that will be implemented to further institutionalize best practices. The implementation plan is also intended to help modernize federal regulations, policies, procedures, and guidance for the review and permitting of major infrastructure projects in accordance with Executive Order 13563, *Improving Regulation and Regulatory Review* and Executive Order 13604, *Improving Performance of Federal Permitting and Review of Infrastructure Projects*. In theory, developers of large, complex projects will utilize this implementation plan and related guidance to streamline the environmental review and permitting processes for such projects. However, when put into action, these procedures could instead result in significant burdens or obstacles to development projects.

Goal: Office of Policy Analysis will develop guidance, in the form of a new chapter to the Department Manual, for implementing the principles and procedures outlined in the strategy on a departmental scale.

On October 23, 2015, the Office of Policy Analysis at DOI released the "Landscape-Scale Mitigation Policy," a new chapter in the departmental manual that describes the agency's policy for implementation of landscape-scale mitigation. The ten-page document also sets forth and "reaffirms the Department's authority to require and determine the scope of compensatory mitigation; establishes a goal for the conservation outcomes of mitigation investments; enumerates standards when implementing landscape-scale mitigation approaches, and; outlines responsibilities of bureaus and offices in fulfilling the goals established in SO 3330 [the Secretary's Order 3330, *Improving Mitigation Policies and Practices of the Department of the Interior*]."

DOI Goals Still in Progress

For many of the near-term goals, stakeholder outreach was planned before certain manuals, guidance, or policies would be changed and finalized. We can report the following deliverables

have not been finalized, but internal agency progress may have been made:

- The Office of Environmental Policy and Compliance will convene a working group of Department National Environmental Policy Act (NEPA) specialists to develop departmental guidance based on the Council on Environmental Quality's (CEQ) 2011 guidance, the "Appropriate Use of Mitigation and Monitoring and Clarifying the Appropriate Use of Mitigated Findings of No Significant Impact." The guidance will reflect CEQ guidance on integrating compliance with NEPA and section 106 of the National Historic Preservation Act (NHPA) (*Goal: Q3 2014*). No new NEPA guidance appears to have been made public yet.
- The BLM will finalize its "Interim Draft Regional Mitigation Manual Section 1794." According to DOI, this policy will include a commitment to avoid, minimize, and compensate for residual impacts to appropriate resources, including conservation areas within and outside jurisdiction of the bureau in collaboration with relevant land managers (National Park Service, FWS, U.S. Forest Service, etc.) (*Goal: Q3 2014*). The interim draft, which was published on June 13, 2013, has not yet been publicly released as a final version. Notably, the 2015 presidential memorandum requires the BLM to finalize its mitigation policy by November 3, 2016.
- The BLM will initiate development of a handbook for implementing regional mitigation policy and work to incorporate mitigation principles into relevant programmatic handbooks and manuals. The BLM will also develop training modules for field staff (*Goal: Q1 2015*). This handbook does not appear to be final or publicly available.
- An interagency team will conduct regional workshops on implementation of policies, programs, and guidance for landscape-level

mitigation. USGS will provide training and technical assistance (*Goal: Q1 2015 and ongoing*). While such regional workshops and training may have been conducted, those events have not been made public.

- The BLM will convene a policy forum to share methods for identifying potential landscape-scale conservation and development priorities and to discuss how those methods may be better integrated into BLM resource management plans and USFS plans (*Goal: Q4 2014*). It appears this goal has not yet been met.
- FWS will formally propose revisions to its 1981 mitigation policy consistent with the principles outlined in the DOI guidance (*Goal: Q4 2014*). Proposed changes have not yet been noticed for comment. Notably, the 2015 presidential memorandum requires FWS to finalize its revised mitigation policy by November 3, 2016.
- The National Park Service (NPS) will convene a work group to initiate guidance for landscape scale mitigation under section 106 of NHPA (*Goal: Q1 2015*). While the NPS may have convened such a working group, guidance for landscape scale mitigation under section 106 of NHPA does not seem to have been made publicly available.
- The NPS will convene a work group and initiate guidance for landscape-level mitigation for shared scenic resources and values (*Goal: Q1 2015*). While the NPS may have convened such a work group, guidance for landscape-level mitigation for shared scenic resources and values does not appear to have been made publicly available.

2015 Presidential Memorandum on Mitigation Policy

The presidential memorandum, released on November 3, 2015, is directed toward five federal agencies and is aimed at streamlining regulations for offsetting environmental harm and promoting

independent mitigation efforts at the early stage of development projects. Notably, the memorandum establishes a “net benefit goal” for natural resource use, calling for no net loss of land, water, wildlife, or other ecological resources from federal actions or permitting. In support of the general principles identified in the presidential memorandum, several specific deadlines and actions were identified:

- By May 1, 2016 (within 180 days of the date of the memorandum), the USFS must develop and implement additional manual and handbook guidance addressing its approach to avoidance, minimization, and compensation to impacts within the national forest system. A mitigation regulation must also be finalized by November 3, 2017.
- By November 3, 2016:
 - The BLM must finalize 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.”
 - FWS should (1) finalize its revised mitigation policy applying to all FWS authority and trust responsibilities; (2) finalize an additional policy that applies to compensatory mitigation associated with ESA responsibilities; and (3) finalize a policy that provides clarity to and predictability for those that take action to conserve species in advance of potential future listing under the ESA.
 - Each of the agencies should develop guidance for its trustee representatives. The guidance should describe the considerations for evaluating whether, where, and when restoration banking or advance restoration projects would be appropriate as components of a restoration plan.
 - DOI must develop program guidance “regarding the use of mitigation projects and measures on lands administered by bureaus or offices of

the Department through a land-use authorization, cooperative agreement, or other appropriate mechanism that would authorize a project proponent to conduct actions, or otherwise secure conservation benefits, for the purpose of mitigating impacts elsewhere.”

As mentioned above, the goals in the presidential memorandum overlap to some degree with those goals and strategies outlined in the DOI guidance.

Conclusion

The DOI guidance set multiple and lofty goals for the agency and its bureaus. The targets (deadlines) were probably overambitious, and it is not surprising that implementation is requiring additional time. The staggered development of these many deliverables, and now the new deadlines and goals set forth in the 2015 presidential memorandum that overlap and set goals to reform mitigation policy for additional agencies, make it difficult for project planners to know which guidance is current. This state of flux is likely to continue for quite some time.

Margaret “Peggy” Strand, Gregory Braker, and Kathryn Floyd are partners in the Environmental Practice Group of Venable LLP’s Washington, D.C., office. Strand, Braker, and Floyd were part of a small group of legal counsel invited to participate in various DOI stakeholder workshops on improving mitigation and developing the agency’s strategy to improve environmental review of infrastructure projects.

Laura Boorman is an associate in the Environmental Practice Group of Venable LLP’s Washington, D.C., office.

The authors regularly provide environmental support to large development projects that involve the mitigation policies discussed in this article.