



Mitigating the Impacts of the Obama Administration Mitigation Policy: U.S. Fish & Wildlife Service Seeks Comments on 2016 Policy

By: [Michael Cross](#)

On November 6, 2017, the United States Fish & Wildlife Service (FWS) published a [policy review](#) in the Federal Register, seeking public comment on highly criticized portions of the existing [Mitigation Policy](#) and the [Endangered Species Act Compensatory Mitigation Policy](#) which ran contrary to existing lease rights and regulations. Specifically, FWS is seeking comments on whether to retain or remove references to “net conservation gain” as a mitigation planning goal.

In November 2015, President Obama issued a [Presidential Memorandum](#) entitled Mitigating Impacts on Resources from Development and Encouraging Related Private Investment. Ultimately, the Presidential Memorandum sought to encourage private investment in resource restoration efforts such as conservation banks. However, in support of that goal, the Administration ordered agencies to revise existing mitigation policies to “establish a net benefit goal, or at a minimum, a no net loss goal for natural resources.”

In response to President Obama’s directive, FWS published revisions to its Mitigation Policy and Endangered Species Act Compensatory Mitigation Policy in late 2016. In these revised policies, FWS stated that mitigation is a measure taken to “avoid, minimize, and compensate for” impacts. Accordingly, FWS stated that the agency’s mitigation planning goal is a net conservation gain—improve or at minimum, maintain the current status of affected resources.

Many comments to this revised policy expressed concern that FWS lacked the statutory authority to implement a net conservation gain goal for mitigation planning, to which the agency responded that “the Policy does not require project proponents to achieve those outcomes.” Despite the acknowledgement that a net conservation gain outcome was not required, agencies have relied upon the Mitigation Policy to require net conservation gain as a condition of approval for projects across the West. In support of this requirement, former Solicitor of the United States Department of the Interior, Hilary Tompkins, issued a Memorandum Opinion concerning the authority of the Bureau of Land Management (BLM) to require public land users to “leave the public lands in better condition than they found them.”

Despite the push for a net conservation gain, BLM regulations only require that measures be taken “to *minimize* adverse impacts to other resource values.” 43 C.F.R. § 3101.1-2. The Council on Environmental Quality’s definition of mitigation also does not require improvement

of the land. *See* 40 C.F.R. § 1508.20. Indeed, no regulations require more than minimizing impacts, let alone improving upon the condition of the land.

Furthermore, net conservation gain is contrary to BLM's oil and gas lease terms. The stipulations in BLM's oil and gas lease form require that lessees "conduct operations in a manner that *minimizes* adverse impacts to the land, air, and water, to cultural, biological, visual, and other resources, and to other land uses or users." BLM Form 3100-11, Lease Terms § 6. Requiring a net benefit or no net loss to resources violates the terms of those leases.

The net conservation gain standard adopted in the Mitigation Policy poses additional concerns. First, net conservation gain is contrary to the Endangered Species Act (ESA). The ESA requires that agency actions not jeopardize or adversely modify habitat; there is no obligation to improve or maintain the current status of a species. Additionally, improving baseline conditions under this more stringent standard ultimately results in significantly higher compensatory mitigation costs for operators.

Moreover, under the Mitigation Policy, compensatory mitigation is required for future environmental conditions as well as existing conditions. Consequently, operators are forced to mitigate for impacts from climate change and other indirect effects.

Because of these inconsistencies, the Mitigation Policy has encountered roadblocks. Solicitor Tompkins's Memorandum Opinion was suspended in February 2017. However, FWS's Mitigation Policy is still in place, resulting in regulatory uncertainty and inconsistent application in field offices across the West. On March 28, 2017, President Trump issued [Executive Order 13783](#): Promoting Energy Independence and Economic Growth (EO 13783). Amongst other directives, EO 13783 rescinded the Obama Presidential Memorandum. On March 29, 2017, [Secretarial Order 3349](#) also rescinded Obama-era orders on which the Mitigation Policy was based.

Given these mounting rescissions and regulatory issues, FWS has decided to evaluate whether to revise its Mitigation Policy. Comments on this policy review will be accepted until January 5, 2018.

For more information or updates on the FWS Mitigation Policy, please contact [Michael Cross](#).