
U.S. Fish and Wildlife Service Proposes New Mitigation Policy

By Karen C. Bennett / Sep 14, 2016

The United States Fish and Wildlife Service ("USFWS") announced the availability of a new draft policy on compensatory mitigation associated with implementation of the Endangered Species Act ("ESA") (81 Fed. Reg. 61032-61065, September 2, 2016). Comments on the proposed policy are due **October 16, 2016**. Agriculture, building and road construction, forest and paper production, mining, natural resource and renewable energy development are among the industries that should consider filing comments on the proposal.

The policy promotes use of a landscape-scale approach to mitigation planning and encourages the creation of compensatory mitigation credits for all unavoidable adverse impacts to listed, proposed, and at-risk species and their habitat that would result from proposed actions. The final policy will apply to all USFWS decisions under the ESA, including conservation banks, in-lieu fee programs, habitat credit exchanges, and permittee-responsible mitigation. It is intended to replace previous guidance on the establishment, use, and operation of conservation banks (68 Fed. Reg. 24753, May 8, 2003) and recovery credit guidance (73 Fed. Reg. 44761, July 31, 2008). *Id.* at 61033.

Background

The proposal is in response to a 2015 Presidential Memorandum that required all federal agencies to strengthen mitigation policies and support private investment in restoration. The President's primary objective is to create a net benefit goal, or at a minimum, a no net loss goal, for all federally managed land and resources. The memo extends the goal to include species preservation and establishes a preference for obtaining advance compensation through mitigation projects that are completed prior to causing adverse impacts; it requires resource management agencies to finalize mitigation policies consistent with the memo. Shortly after the memo's publication, the Department of the Interior, Bureau of Land Management, issued a new Landscape-Scale Mitigation Policy and the U.S. Forest Service requested public input on a draft national mitigation policy. We anticipate other Natural Resource Damage trustees may produce similar guidance in the future.

USFWS Proposal

The USFWS's authority to require compensatory mitigation to offset adverse impacts to species and their habitat under the ESA is limited. However, the agency intends to use the mitigation policy as a basis for the Service's involvement in federal agency decisions by recommending, or requiring, the inclusion of compensatory mitigation for all unavoidable adverse impacts to listed, proposed, and at-risk species and their habitat that would result from proposed actions (81 FR 61032, 61035). The policy sets forth five mitigation options and minimum requirements: 1) Permittee-Responsible; 2) Conservation Bank; 3) In-lieu Fee; 4) Habitat Credit Exchange; and, 5) Other Third-Party Compensatory Mitigation. *Id.* at 61047. All compensatory mitigation must provide site protection assurances, a management plan, and financial assurances and requires USFWS approval at each stage of the process. *Id.* at 61049.

Conclusion

As written, the policy is extremely prescriptive and may limit private-sector, voluntary involvement in developing compensatory mitigation plans. Interested parties should consider filing comments focused on clarifying the limits of USFWS's authority and explaining the market-based opportunities that may voluntarily be pursued by interested project proponents given the right flexibility and incentives.

Clark Hill has partnered with Exponent to develop a portfolio of strategic options for assessing and utilizing the ecological assets of properties to offset environmental liabilities, complete early restoration projects, and optimize property value. The Clark Hill-Exponent team offers expertise on the technical, transactional, and legal aspects of the valuation and prioritization process for eco assets. With either a single property or multiple parcels, we develop strategies for long-land management aimed at maximizing market and nonmarket natural capital value. We would be happy to arrange a time to discuss how these new strategies can be incorporated into your next project.

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