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New DOI Strategy for Mitigation Offers Some Promise and Many Unanswered Questions

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On April 10, 2014, Secretary of the Interior Sally Jewell released the Department of the Interior's (DOI's) new strategy to implement mitigation policies and practices that will more effectively encourage infrastructure development while protecting natural and cultural resources: ***A Strategy for Improving the Mitigation Policies and Practices of the Department of the Interior*** (DOI Report). DOI's overarching goal is to identify high-value resources and conservation priorities on a regional basis so that developers can plan projects more effectively from the outset (so as to avoid and minimize impacts to such resources), and to help developers more readily identify high value compensatory mitigation opportunities (if necessary to compensate for unavoidable resource impacts).

In theory, this will help to streamline the environmental review and permitting process, especially for large, complex projects (such as roads, railways, transmission lines, pipelines, and mines). In practice, the numerous policies and guidelines that DOI will be preparing over the next few years to implement this Strategy could result in greater burdens on development projects, as DOI appears poised to impose new mitigation obligations without a clear legal basis for doing so. In addition, regionally-based, landscape-scale planning and selection of compensatory mitigation will need to be reconciled with current laws, regulations, and policies governing compensatory mitigation, which often favor mitigating in close proximity to a project's impacts. Of course, effectively integrating compensatory mitigation for small projects into a more landscape-scale strategy may raise practical implications as well.

For clients working with the species protection and land management programs administered by the Department of the Interior – such as the U.S. Fish and Wildlife Service (FWS), Bureau of Land Management (BLM), or Bureau of Reclamation – tracking and coping with the implementation of this Strategy will be an important part of project planning for the coming months and years. Depending upon the project and its governing laws, this Strategy may present a "moving target" for mitigation for some time to come.

I. Background

By Executive Order on March 22, 2012, President Obama urged agencies to streamline the environmental review process and to "significantly reduce the aggregate time required to make decisions in the permitting and review of infrastructure projects by the Federal Government, while improving environmental and community outcomes." This order led to a series of inter-agency and stakeholder workshops in 2013, such as a June 2013 DOI workshop on improving mitigation, which ultimately led to the DOI Report issued last week.

Venable environmental attorneys were among a small group of legal counsel invited to participate in the various agency workshops. In those meetings, the Venable team conferred with decision-makers and had the opportunity to participate, along with industry members and agency personnel, in crafting the Strategy to improve environmental review of infrastructure projects. In October 2013, the Secretary of DOI issued an order directing the evaluation of DOI mitigation policies and practices, which led to this Report.

The Strategy was developed because DOI felt that there were gaps in mitigation planning historically, and sought to provide a more holistic umbrella for future mitigation considerations. The Strategy was developed with input from other federal agencies, and also addresses the need for federal agencies to work with their state and local counterparts.

II. DOI Strategy Summarized

The DOI Report lays out 10 guiding principles that foster landscape-scale mitigation and lead, it is hoped, to a more collaborative process:

- use of landscape-scale approaches to all facets of development and conservation planning and mitigation;
- use of full-mitigation hierarchy in project planning and review;
- establishment of protocols to simplify the planning and project review process, while simultaneously improving operational certainty for project developers;
- use of advance mitigation planning that will incorporate mitigation and landscape objectives into the design and development of projects that are more likely to affect natural or cultural resources;
- development of scientific information and tools necessary to identify the most effective and efficient means of mitigating the effects of development;
- fostering of resilience by identifying and promoting mitigation efforts that improve the resilience of natural and cultural resources;
- ensuring that mitigation measures are durable;
- promoting transparency and consistency;
- coordinating with other federal and state agencies, tribes, and stakeholders; and
- monitoring and evaluating the results of mitigation over time.

DOI plans to achieve these goals by following a four-step process toward landscape-scale mitigation, which includes:

- identifying key landscape-scale attributes and the characteristics (including conditions, trends, and baselines) that characterize these attributes;
- developing landscape-scale goals and strategies;
- developing efficient and effective compensatory mitigation programs for impacts that ultimately cannot be avoided; and
- monitoring progress to ensure that mitigation is effective in the long term.

The Report also spells out additional steps that DOI intends to take throughout 2014-2015 to improve its mitigation guidance and policies for purposes of NEPA review, BLM projects, and FWS review.

III. Cautions for Clients

As with many government “strategies” (issued by way of guidance vs. rulemaking), this Strategy does not change any regulatory or legal requirements. For example, while the Strategy seems to assume standards for mitigation that have never before been applied outside of the Clean Water Act (CWA) – such as tiering of avoidance, minimization and compensatory mitigation – it ignores the fact that other environmental laws, like the Endangered Species Act (ESA), allow for minimization but do not authorize compensatory mitigation at all. Despite DOI’s objective of streamlining project review, this potential mismatch of regulatory requirements and the new strategy could add delay, complications and risk.

The specific milestones for implementing DOI’s Strategy (as spelled out in the “Near-Term Policy Deliverables” in Chapter 5 of the Report) seem to suggest that DOI intends to extend full-mitigation tiering beyond projects on BLM lands; DOI’s “to do” list includes things like revising FWS mitigation policies and initiating mitigation guidance under Section 106 of the National Historic Preservation Act (NHPA) to comport with principles laid out in the DOI Report. It is not yet clear whether DOI intends to subject such policies and guidance to public notice and comment. Until the regulations are modified, the bottom-line regulatory requirements should govern; however, we expect that there will be efforts to implement the strategy before any such changes.

Thus, members of the regulated community should consider reaching out to DOI to encourage an open process that allows for their input. Given Venable’s involvement in previous stakeholder workshops, we are in a good position to assist with such efforts. In addition, we will be following implementation of this Strategy closely, to advise clients who find themselves in a changing landscape for regulatory compliance.

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Numerous members of **Venable’s Environmental Law Group** have significant experience and expertise in NEPA review of resource impacts, as well as resource avoidance, minimization, and compensatory mitigation required for environmental permitting of large, complex infrastructure projects.