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BLM reverses position on "compensatory mitigation"

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On 24 July, 2018, the Bureau of Land Management (BLM) instructed its personnel that the agency lacks authority to require monetary payments and other forms of compensatory mitigation as a condition of obtaining authorization for the use of public lands. This new direction, which is set forth in an instructional memorandum, reverses the prior administration's determination that the BLM had the authority under the Federal Land Management and Policy Act (FLPMA) to require offsite compensatory mitigation for entry onto public lands for energy development and other projects. The BLM's new instruction manual responds to Executive Order 13783, "Promoting Energy Independence and Economic Growth," (28 March, 2017); Secretary's Order (SO) 3349, "American Energy Independence" (29 March, 2017); and Secretary's Order 3360, "Rescinding Authorities Inconsistent" with Secretary's Order 3349, "American Energy Independence." SO 3360 rescinded BLM Manual Section 1794 – Mitigation (22 December, 2016) and BLM Mitigation Handbook H-1794-1 (22 December, 2016), and directed the BLM to provide new policy guidance on compensatory mitigation.

What is compensatory mitigation?

Under current National Environmental Policy Act (NEPA) regulations, mitigation of environmental impact can take various forms, including avoiding or minimizing impacts from development projects or compensating offsite for an onsite impact by replacing or providing substitute resources or environments (40 C.F.R. §1508.20). Compensatory mitigation does not necessarily involve monetary payments, but can include activities or in-kind contributions which serve to offset adverse impacts of the proposed action.

Compensatory mitigation falls out of favor

The BLM's new policy expressly states that compensatory mitigation may be proffered only voluntarily by project proponents and that the BLM cannot require mandatory compensatory mitigation in authorizing the use of public land unless otherwise required by law – presumably legal mandates could include Clean Water Act (CWA) wetland permits or Endangered Species Act (ESA) Incidental Take Statements (ITS).

While recognizing that FLPMA may authorize "various forms of the mitigation hierarchy, such as avoidance and minimization," the BLM's new instruction manual expressly states that under no circumstances can the BLM accept monetary contributions for implementation of compensatory mitigation, in the belief that FLPMA does not authorize such payments. This blanket prohibition, however, does not pertain to requirements of other federal statutes, as noted, or when compensatory mitigation is sanctioned by state law.

What about "unnecessary and undue degradation?"

Another notable change in the BLM's policy is a finding that compensatory mitigation cannot be used to counteract "unnecessary and undue degradation" (UUD). That is to say, if a project results in UUD, then it may not be approved regardless of reliance on compensatory mitigation to offset UUD. However, the current administration's interpretation of UUD is much narrower than before in that energy projects may be approved, even when some "necessary" and "due" degradation can be expected. Thus, these impacts may be tolerated, and the need for mitigation is further reduced.

The BLM's FLPMA authority not as broad as some thought

At the core of the BLM's aversion to its former policy, in which a requirement of compensatory mitigation was allowed, is an apparent concern that the BLM would appear to be imposing an unauthorized tax or unlawful increase to its appropriations. In addition, the BLM now appears to object to an absence of a nexus between proposed land use and compensatory mitigation, especially when mitigation is imposed to achieve a "net conservation gain."

What does the BLM's new policy mean for stakeholders?

The BLM's new policy suggests that a developer will have the option to either offer offsite mitigation without being required to do so by the BLM or to modify its onsite plans so as to achieve avoidance or minimization of impacts. In no case will the project proponent have an opportunity to offer monetary payments as compensatory mitigation. These restrictions could make it more difficult for project proponents to obtain a "finding of no significant impact" if onsite measures are not sufficient to address impacts identified under environmental review statutes such as the NEPA.

It is not yet clear that the BLM's new policy will conform to regulatory reforms that are now under consideration by the Council on Environmental Quality (CEQ). Under direction of the president, CEQ has undertaken a NEPA regulatory reform effort where compensatory mitigation is likely to be embraced to affect streamlining permitting approvals. Where avoidance, minimization, and rehabilitation are not viable, compensatory mitigation may provide the only defensible path to permit approval. Since many elements of the former policy have been tested and refined by litigation, it can be assumed that the revised policy will be reviewed for consistency with those opinions. Finally, while the BLM now foresees reduced reliance on well-established policies of compensatory mitigation in its management of the public lands, it can be assumed that proponents of the former policy will seek redress in the courts.

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