

Client Alert

Tort & Environmental Practice Group

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Presidential Directive Establishes New Compensatory Mitigation Policy, Expanding Future Costs and Obligations for Federally Authorized Activities

On November 3, 2015, President Obama directed key federal agencies to adopt new or more extensive compensatory mitigation policies over the next six to twenty-four months. Once implemented, these policies could block development of certain sensitive areas and substantially increase the cost of mitigation required to obtain federal permits and approvals.

The new policy, entitled “Mitigating Impacts on Natural Resources from Development and Encouraging Private Investment,” applies to federal land management agencies, as well as those with permitting and regulatory jurisdiction.¹ These include the Department of Agriculture (US Forest Service), the Department of Interior (Bureau of Land Management, US Fish & Wildlife Service, Bureau of Ocean Energy Management), the Environmental Protection Agency, the Department of Defense (US Army Corps of Engineers), and the National Oceanic and Atmospheric Administration (National Marine Fisheries Service).

Expanded mitigation requirements will impact sectors across the economy that depend on federal permits and authorizations. Examples of affected industries include both traditional and renewable energy development, particularly on federal lands; timber sales and related forestry activities; mining and mineral extraction; and activities affecting species protected under the Endangered Species Act. Any project affecting wetlands covered under the newly expanded “Waters of the United States” Clean Water Act rule could also be impacted.

Reciting a “moral obligation . . . to leave America’s natural resources in better condition than when we inherited them,” the new Presidential policy expands mitigation requirements in three important ways:

- *First*, it adopts a new “net benefit goal” for the mitigation of natural resource impacts. This appears to go well beyond simply avoiding, minimizing, or offsetting impacts associated with activities permitted or approved by federal agencies, instead imposing an affirmative obligation on the regulated community to improve the condition of affected natural systems.

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- *Second*, it directs federal agencies to use “large-scale plans and analysis” to identify areas “more appropriate” for development and those where development should be prohibited. This mirrors and expands on a “landscape-scale” mitigation policy adopted by the Department of Interior just one week earlier, and could be used to support regional mitigation strategies for large-scale developments. However, it also suggests that areas could be placed off-limits to certain activities based on agencies’ assessment of the “resource’s value.”
- *Third*, it instructs federal agencies to “give preference to advance compensation mechanisms” that achieve the agency’s environmental objectives “prior to the harmful impacts of a project.” While the mechanism for this “advance compensation” is unclear, and it could enhance the use of off-site mitigation bank approaches, this appears to expand on the problematic practice—already employed by some districts within the Corps of Engineers—of requiring costly, upfront mitigation of impacts from all phases of a multi-phase development, even when the ultimate impacts are highly uncertain or when upfront mitigation is not financially feasible until initial phases of the project have been completed.

Agencies must issue their new mitigation policies within six months to two years. It is not clear whether or to what extent the agencies will seek public comment on their various mitigation policies. However, there are strong arguments that requiring a “net benefit goal” would exceed certain agencies’ statutory authority. Members of the regulated community should be prepared to provide substantive comments regarding mitigation policies that may affect them. They also should vigilantly guard against overreaching as any final policies are applied by agency staff.

King & Spalding has significant experience with the permitting and development of projects occurring on federal lands or that require federal permits and approvals. If you have any questions about how this new policy may affect you and your business, please contact Lewis Jones, Cynthia Stroman, or John Fortuna.

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¹ The memorandum is available at <https://www.whitehouse.gov/the-press-office/2015/11/03/mitigating-impacts-natural-resources-development-and-encouraging-related>.