A New Era of Compensatory Mitigation for Impacts on Natural Resources

The National Agricultural Law Center
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Kerry L. McGrath

What Is Compensatory Mitigation?

- Gains in resources to offset losses of aquatic and/or species resources caused by permitted activities
  - Gains – “credits”
  - Losses – “impacts” or “debts”
- Wetlands/Streams
  - Restoration, enhancement, establishment, and/or preservation of aquatic resources to offset losses of jurisdictional waters and wetlands
  - Credits = acres of wetlands, linear feet of stream
- Species
  - Large areas of preserved and/or restored species habitat formally approved to compensate for impacts to similar species habitat
  - Credits = acres/miles of surface area, number of individuals or mating pairs of species, habitat function.

Previous Approaches to Mitigation

- Focus on on-site mitigation, but often surrounded by development

Shift to Landscape-Scale Mitigation

- Obama Administration emphasizing need to do landscape-scale conservation and mitigation
  - Across all Federal agencies
  - Selecting land based on ecological and watershed suitability and not just price and availability

New Mitigation Policies

Compensatory Mitigation Webinar

- What is compensatory mitigation?
- Previous approaches v. current trends
- New mitigation policies
- Implications for Ag
- Mitigation banks and other sources of compensation
- Litigation risks
2015 Presidential Memo

- Presidential Memorandum: Mitigating Impacts on Natural Resources from Development (Nov. 2015)
  - Establishes federal principles
    - Net benefit goal
    - Landscape-scale
    - Advance compensation
    - Long-term financial assurances
    - Avoidance of impacts to “irreplaceable” resources
  - Would essentially require other agencies to adopt mitigation framework similar to Corps
  - Requires BLM, USFS, and FWS to establish new mitigation policies
- Legal authority?

Proposed FWS Policy

- Amends 1981 FWS Policy
- Implements Presidential Memo
  - Extends to ESA species
  - “Net conservation benefit” (or at a minimum, no net loss)
  - Advance compensation
  - No impacts on “high value” habitat areas
- Would give Service significant discretion to impose mitigation requirements
- Services would implement through § 7 consultation, § 10 Incidental Take Permits, NEPA processes
- Legal authority?

Draft ESA-Specific Mitigation Policy

- Service taking comment until October 17, 2016
- Adopts the FWS mitigation principles proposed in March
  - Shift from project-by-project to landscape-scale approach
  - Encourages use of consolidated mitigation mechanisms (conservation banks; in-lieu fee; habitat credit exchange)
  - Emphasis on advance (or concurrent) mitigation
  - Goal of net gain (or at minimum, no net loss)
- Sets standards and minimum criteria for mitigation providers and permittees

Draft ESA-Specific Mitigation Policy - Potential Areas for Comment

- Service acknowledges it has limited statutory authority to require mitigation
- Mitigation principles presented as “goals” but concern that they could be treated as binding requirements
  - e.g., FWS can hold up projects until applicants agree to certain mitigation
- Lack of established metrics for credits
- Interruption of projects currently under review
  - Staff may apply final policy to actions currently under review

USDA Wetland Mitigation Banking Program

- $9 million available through nationwide competitive process.
- Maximum grant award is $1 million.
- Incentivizes 3rd parties to develop mitigation banks specifically for agricultural producers subject to Wetland Conservation Compliance provisions of the 1985 Farm Bill.
- Avoids competition for mitigation credits with other large developers

Broad Regulatory Expansion

- More expansive regulations with more agency discretion
  - WOTUS Rule
  - Critical Habitat Rules
- Broad expansion in regulatory requirements means more permitting
- Drives demand for mitigation
Implications for Agriculture

- Increased permitting requirements for Ag
  - Impacting more federally protected resources
- Rise in mitigation banks
  - More farmland to be taken out of ag use for mitigation purposes
  - Can be business opportunities in this area
  - But can also be high risk
    - High transaction costs, doesn’t allow for flexibility
- Question about compatible uses
  - E.g., can you still have cattle grazing on mitigation lands?
    - Different answers from different Corps Districts

Compensatory Mitigation Mechanisms

<table>
<thead>
<tr>
<th>Compensatory Mitigation Mechanism</th>
<th>Credits</th>
<th>Description</th>
<th>Transferable</th>
</tr>
</thead>
<tbody>
<tr>
<td>Permittee-Responsible</td>
<td>No</td>
<td>Permittee or contractor does compensatory mitigation project</td>
<td>No</td>
</tr>
<tr>
<td>Mitigation/Conservation Bank</td>
<td>Yes</td>
<td>One or more sites where resources are restored, established, enhanced, and/or preserved for purpose of offsetting permitted impacts. Sells compensatory mitigation credits to permittees</td>
<td>Yes</td>
</tr>
<tr>
<td>In-lieu Fee Program Site</td>
<td>Yes</td>
<td>Sponsored by government or non-profit natural resource management entities. Collects fees from permittees to do larger compensatory mitigation projects</td>
<td>Yes</td>
</tr>
<tr>
<td>Habitat Credit Exchange Site</td>
<td>Yes</td>
<td>Environmental market that operates as a clearinghouse for credit transactions between mitigation providers and permittees. Indirect transactions</td>
<td>Yes</td>
</tr>
<tr>
<td>Other 3rd-party Mitigation Site</td>
<td>No</td>
<td>Established by third party to compensate for impacts for a single action taken by permittee</td>
<td>Yes</td>
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</table>

What is a Mitigation Bank?

- Sells compensatory mitigation credits to permittees whose obligation to provide compensatory mitigation is then transferred to the mitigation bank sponsor
- Operation and use governed by mitigation bank instrument
- Market-oriented approach
- Advantages of third party compensation
  - Watershed/landscape scale
  - Responsibilities are clear
  - Severance of liability
  - Reduce time to permit
- Highly regulated

Mitigation Mechanisms

Different Compensation Sources

U.S. Army Corps of Engineers: 2008 Mitigation Rule Retrospective

- Increasing reliance on mitigation bank and in-lieu fee program credits

Increase in Mitigation Banks

Figure 13. Number of all authorizations (individual permits and general permits) requiring compensatory mitigation, by mitigation source, during the period of 2010-2014

Figure 17. Increase in Mitigation Banks Through 2015

- 1384 banks
  - 1331 wetlands
  - 311 stream
  - Ratio June 2008
  - Guidance 1998
  - Banks w/Wetland Credits
  - Banks w/Stream Credits
  - ~ 1.9 per week approved in recent years

March (WRO) Update 2015 March 2015
Wetlands Mitigation Bank

- Site where wetlands resources restored, established, enhanced, and/or preserved for purpose of offsetting losses of jurisdictional wetlands
- Wetlands banking is most established
  - As of 2015, at least 600,000 acres approved for banking
  - Average of 10,000 acres of permitted wetland impacts requiring mitigation annually
- Annual wetland mitigation market size - $1.2 billion

Banks Providing Wetland Credits

- Locations of approved mitigation bank sites providing wetland credits as of 2014

Wetlands Credit Pricing


Stream Mitigation Bank

- Increased regulatory focus on stream mitigation since 2008 Mitigation Rule
- Number of banks providing stream mitigation credits has more than doubled since 2008
- Annual Stream Mitigation Market Size – $2.2 billion

Banks Providing Stream Credits

- Locations of approved mitigation bank sites providing stream credits as of 2014

Conservation Banks

- Large areas of preserved and/or restored species habitat formally approved to compensate for impacts to similar species habitat
- No regulations with specific requirements/instructions or performance criteria
  - (FWS draft ESA policy contains some guidance)
- Less than 200 conservation banks have been approved

Source: http://www.cityofchesapeake.net/
Approved Conservation Banks

- 141 Approved Conservation Banks (8 NMFS)
- >170,000 acres (1992-2016)
- >70 listed species

Wetlands/Stream v. Species Banks

<table>
<thead>
<tr>
<th>Wetlands/Streams</th>
<th>Species</th>
</tr>
</thead>
<tbody>
<tr>
<td>CWA requires mitigation</td>
<td>No ESA mitigation reqs</td>
</tr>
<tr>
<td>Clear requirements and performance standards from Corps 2008 Mitigation Rule</td>
<td>FWS policy under development (public comment period open)</td>
</tr>
<tr>
<td>&quot;No net loss&quot;</td>
<td>Net gain (or at a minimum, no net loss)</td>
</tr>
<tr>
<td>Service areas tied to watersheds</td>
<td>Service areas tied to species range/habitat</td>
</tr>
</tbody>
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Litigation Risks

- Potential challenges to new mitigation policies
  - Does FWS have statutory authority to require net gains through mitigation?
- Mitigation bank challenges
  - Challenges to mitigation bank approvals
    - Sierra Club v. St. Johns River Water Management District - failure to do NEPA review
  - Challenges on Corps requiring permittee to obtain credits from one bank v. another
    - Walther & Pioneer Reserve v. United States - breach of contract claim

Kerry L. McGrath
Hunton & Williams LLP
2200 Pennsylvania Avenue, NW
Washington, DC 20037
(202) 955-1519
kmcgrath@hunton.com