



U.S. Fish & Wildlife Service Announces Changes to Mitigation Policy

12.08.2016

On November 21, 2016, the U.S. Fish and Wildlife Service (Service) published the final revisions to its Mitigation Policy. The Mitigation Policy, first published in 1981, guides the Service's recommendations and requirements for mitigating adverse impacts of projects on fish, wildlife, plants, and their habitats. The revised Mitigation Policy was issued in response to the *Presidential Memorandum: Mitigating Impacts on Natural Resources from Development and Encouraging Related Private Investment* (Presidential Memorandum), which directed the Service to finalize a mitigation policy to establish principles to guide the Service in its planning and permitting practices and other activities. The Presidential Memorandum issues directives to other federal agencies responsible for the management and protection of natural resources, including the Bureau of Reclamation and the Forest Service.

The Service first announced proposed revisions to the Mitigation Policy in March 2016 to address loss of habitat and ecosystem services, as well as changes in the science of conservation of fish and wildlife and changes to the statutory, regulatory, and policy context governing fish and wildlife conservation. Our coverage of the draft revisions to the Mitigation Policy can be found [here](#).

Consistent with the primary conservation objective of the Presidential Memorandum, the Mitigation Policy provides a framework for applying a landscape-scale approach to mitigation to achieve a net gain in conservation outcomes, or at a minimum, no net loss of resources and their values, services, and functions resulting from proposed actions. Importantly, the Service has expanded the scope of the Mitigation Policy within the Endangered Species Act (ESA) context. Project proponents that need Section 7 biological opinions and incidental take statements and Section 10 incidental take permits are likely to encounter the Service's attempts to reconcile the Service's statutory and regulatory requirements of the ESA with the policy goals and objectives of the new Mitigation Policy.

The Service will apply the Mitigation Policy in two different scenarios. First, the Service will apply the Mitigation Policy when the Service has a statutory or regulatory mandate to require mitigation, such as under the ESA or for actions to restore damage to fish and wildlife resources under the Oil Pollution Act. Second, the Service will apply the Mitigation Policy where the Service provides conservation recommendations, for example, when acting as a responsible agency under the National Environmental Policy Act. Significant changes to the Mitigation Policy that will be of interest to the regulated community, including ESA permit applicants, proponents of projects with a federal nexus, and mitigation providers include:

- The adoption and application in most circumstances of a mitigation hierarchy and sequence with a preference for avoidance of impacts, followed by minimization of impacts, and, finally, offsets or compensation for unavoidable impacts
- The identification of avoidance as the only recommended means of effectively mitigating impacts to high-value habitats, defined as those locations where species are scarce – but not necessarily ESA-listed as threatened or endangered – and the habitat is determined to be both highly suitable and highly important.

Despite the Presidential Memorandum's direction to provide specific, quantifiable measures to achieve the goal of no-net loss/net gain, the Service declined to do, noting that while the Mitigation Policy provides the framework, such measures will be specific to the conservation objectives of the affected resources. The definition of such conservation objectives can result in dramatically different mitigation recommendations and outcomes as illustrated in *Union Neighbors United v. Jewell*, 831 F.3d 564 (D.C. Cir. 2016) (*Union Neighbors*) where the Service adopted a conservation goal defined according to the persistence of a listed bat species. Although the project could further mitigate the impacts to individual bats, the Service determined that because the project fully minimized and mitigated impacts to the species as a whole, no further mitigation, including further avoidance of individual bat deaths, was required. Had the conservation objective for the bat been formulated at the individual animal level or even at an individual population level, the Service presumably would have required additional measures designed to avoid bat deaths.

Recently, the Service has taken the position with respect to the ESA section 10 requirement to minimize and mitigate impacts of the take to the maximum extent practicable that stands in sharp contrast to the mitigation hierarchy adopted in the Mitigation Policy. In *Union Neighbors*, the Service argued that minimize and mitigate function as a single requirement to reduce impacts to species and not two separate requirements to minimize, or reduce, and to mitigate, or offset/compensate for impacts to listed species. Furthermore, the ESA Consultation Handbook (Service and National Marine Fisheries Service, 1998), which guides the Service in implementation of section 7 of the ESA, emphasizes that, Section 7 requires minimization of the level of take. It is not appropriate to require [offsetting or compensatory] mitigation for the impacts of incidental take. Again, the Mitigation Policy's mitigation hierarchy contradicts the Service's stated position that ESA section 7 requires measures to reduce impacts but not measures to offset or compensate for impacts.

While the Mitigation Policy's mitigation hierarchy may meet the Presidential Memorandum's objective to create consistency across federal agencies with regard to mitigation policy – the U.S. Army Corps of Engineers has long used a mitigation hierarchy in Clean Water Act section 404 permitting – it appears to create inconsistency within the Service's interpretation of its statutory mandate under the ESA.

Multiple commenters emphasized that the Service's authority is properly restricted to federally protected species. However, the Service declined to so restrict the applicability of the Mitigation Policy, noting that

some of the authorities that the Service operates under do not restrict the Service's authority solely to these species. This means that, among other things, the Service may make recommendations with respect to mitigation of impacts to resources other than federally protected species for other agencies' approvals and permits, e.g., Clean Water Act section 404 permits. This may thus create conflicts between the Service and another agency's requirements and/or recommendations, complicating the environmental approval and permitting process.

The Mitigation Policy went into effect immediately upon publication and is meant to complement the Service's forthcoming compensatory mitigation policy.