PRESIDENTIAL MEMORANDUM PROMOTES PRE-PROJECT MITIGATION AND RESTORATION BANKING: IMPLICATIONS FOR ENERGY PROJECTS AND RELATED DEVELOPMENT

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Environmental, Land and Natural Resources Alert

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On November 3, 2015, U.S. President Barack Obama issued a Presidential Memorandum (Memorandum) that potentially opens the door to agency attempts to expand mitigation obligations beyond what is required under law while also having the potential to have significant and positive net benefits for the development of energy projects. The Memorandum encourages advance (*i.e.*, pre-project) restoration measures, including mitigation banking, by both public and private entities.[1] It directs federal agencies to adopt a clear and consistent approach, such as guidance and regulations, to further this goal. Agencies affected include the United States Forest Service (USFS), the United States Fish & Wildlife Service (USFWS), the Bureau of Land Management (BLM) and the Department of Interior (DOI) -- projects involving review by these agencies, including energy and other types of proposed development, may be affected. These agencies will be expected to draft handbooks, guidelines, policies and regulations to implement advance mitigation measures.

The Memorandum creates no new legal authority. Rather it requires the agencies to implement new regulatory guidance and rules under existing statutes requiring mitigation. The potential exists for project developers to benefit from these regulations if they clarify and provide clear standards as directed by the Memorandum. The Memorandum, in calling for the identification of areas for "protection and restoration" and the implementation of a "net benefit goal," however, may also encourage agencies to test the statutory limits for mitigation requirements.

Mitigation is defined broadly by the Memorandum, to include avoiding, minimizing, rectifying, reducing and/or compensating for environmental impacts associated with project development. At its core, mitigation is designed to offset a project's impacts on natural resources. Mitigation can be achieved at the outset of a project, during project construction, or after completion of a project. A classic example of mitigation is under the Clean Water Act (CWA) where a developer may be required to mitigate for impacts to wetlands by designing the project to avoid those impacts or by constructing compensatory off-site mitigation.[2]

Mitigation can be time-consuming and expensive for developers of energy infrastructure. As an example, a site for a proposed energy facility, such as a liquefied natural gas (LNG) facility, may contain areas of critical habitat or species protected by the Endangered Species Act (ESA). To offset adverse impacts to critical habitat or take of a listed species associated with development of such a facility, the project proponent often spends significant resources to mitigate those impacts through avoidance or investigation of areas with similar habitat to restore and/or preserve. In an effort to make the permitting and mitigation processes less time-consuming and more

streamlined, predictable and efficient, it has become increasingly common for private entities to establish mitigation banks.

A mitigation bank is a wetland, stream, environmental resource or habitat conservation area that has been preserved, enhanced, restored or created to offset or compensate for environmental impacts associated with development activity, including facility operations and infrastructure. Developers can go directly to mitigation banks rather than expend resources at the early stages of a project to identify natural areas to restore and/or preserve.

The benefits of mitigation banking are not limited to ecological and biological sustainability. By providing a preexisting and established marketplace of restored and/or preserved natural resources, mitigation banks can help provide certainty to project developers by conserving commercial resources, including time and capital. Mitigation banks can also achieve economic efficiencies by tapping economies of scale, since a mitigation bank can more efficiently deliver environmental benefits in a centralized way -- offering a potential win-win for both the environment and development. This is where the Memorandum may have its greatest impact on the growing mitigation banking sector, as it appears to be consistent with and support that growth. The key takeaways from the Memorandum are as follows:

- **Advance Compensation, Avoidance and Restoration.** The Memorandum focuses on avoiding and minimizing damages, or what it calls "advance compensation," to natural resources and the restoration of contaminated or damaged natural habitats through, among other things, mitigation or restoration banking.
- **Private Investment.** The Memorandum encourages private investment and public-private partnerships to achieve restoration and conservation goals.
- **Best Practices and Mitigation Standards.** The Memorandum directs federal agencies to create a common set of clear and consistent best practices and performance standards for mitigating impacts on natural resources.
- **Identification of Development and Restoration Areas.** The Memorandum encourages identification of appropriate areas for development, areas where development may not be appropriate, and "the best locations for protection and restoration" of natural resources.
- **Implementation.** The Memorandum directs the USFS, BLM, USFWS, DOI and federal natural resource trustees to draft handbooks, guidelines, policies and regulations to implement advance mitigation measures.

    - *USFS.* Must "develop and implement additional manual and handbook guidance" for mitigating impacts to natural resources within 180 days of the Memorandum. Within two years, USFS must finalize mitigation regulations.
    - *BLM.* Has one year from the date of the Memorandum to finalize a mitigation policy for the consideration and application of mitigation measures to projects impacting public lands and resources.

- *USFWS.* Has one year to finalize revised mitigation policies that apply to its responsibilities as trustee of certain natural resources, to its mitigation responsibilities under the ESA, and to conservation actions taken pursuant to the ESA.
- *DOI.* Within one year of the Memorandum, DOI must issue guidance for developing mitigation projects, such as restoration banks, to offset impacts elsewhere.
- *Federal Trustees.* Within one year, natural resource trustees must develop guidance for determining whether mitigation or restoration banking can be used as part of an approved restoration plan.

As the federal agencies implement President Obama's Memorandum, the potential benefits and hurdles to project development will become clearer. At the outset there is the potential for significant gains in the mitigation banking sector and associated benefits to developers. Indeed, mitigation or restoration banks established pursuant to the regulations and guidance called for by the Memorandum could provide project developers a streamlined and cost-effective market for compensating for project impacts. There is also, however, the potential for agencies to implement regulatory requirements testing the limits of their statutory authority, such as designating off-limits restoration areas and requiring developers to show net benefits from pre-project mitigation.

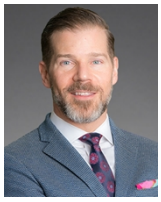
It will be important to monitor implementation of the Memorandum to ensure that the agencies stay within their statutory lanes and that the benefits associated with mitigation banks are maximized. While the Memorandum does not purport to create new legal authority, and pays heed to existing legal authorities, it will inform how agencies interpret their existing practices and how new guidance and regulations are designed. The interaction between the Memorandum and agency authority under the CWA; the ESA; the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA); and the National Environmental Policy Act (NEPA), for instance, will be developed over time, and significant questions remain as to the extent of the agencies' authority to impose net-positive mitigation under existing law. It will be instructive to see how agencies interpret the concept of advance mitigation and whether they seek to impose advance mitigation processes that go beyond familiar mitigation banking models. Nonetheless, the environmental and economic benefits from mitigation banking could be significant, and the Memorandum has the potential to streamline the mitigation process for project proponents. The future of mitigation banking and its potential to alleviate uncertainty and shorten timelines for energy project permitting and development may be in the balance.

Notes:

[1] Mitigating Impacts on Natural Resources from Development and Encouraging Related Private Investment, *available at* https://www.whitehouse.gov/the-press-office/2015/11/03/mitigating-impacts-natural-resources-development-and-encouraging-related (last visited Dec. 1, 2015).

[2] In 2008, the Environmental Protection Agency (EPA) adopted rules applicable to compensatory mitigation, including the use of mitigation banks, to offset impacts to waters of the United States pursuant to permits issued under the CWA. The rules, codified at 40 C.F.R. §§ 230.91 - 230.98, could serve as models for the regulations and guidelines promulgated by the USFS, BLM, USFWS, DOI and federal trustees pursuant to President Obama's Memorandum. Further information on EPA's mitigation rules is available at http://www2.epa.gov/cwa-404/compensatory-mitigation#regulations (last visited Dec. 1, 2015).

KEY CONTACTS



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