

**TRANSPORTATION RESEARCH BOARD COMMITTEE ON ENVIRONMENTAL
ISSUES IN TRANSPORTATION LAW (AL050)**

THE NATURAL LAWYER

Volume 24

January, 2017

Number 2

Richard A. Christopher, Editor

HDR Engineering, Chicago

richard.christopher@hdrinc.com

This newsletter is available by e-mail free of charge. Anyone who wishes to be added to the circulation list or would like to change an address should send a message to the Editor at the address listed above. This newsletter is an unedited committee product that has not been subjected to peer review. The opinions and comments in these articles do not represent the views of the Transportation Research Board.

U.S. FISH & WILDLIFE SERVICE ISSUES

COMPREHENSIVE MITIGATION GUIDANCE

Submitted By

Sue Meyer, Nossaman LLP,
and Stephanie N. Clark, Nossaman LLP

smeyer@nossaman.com

In the last two months of 2016, the U.S. Fish and Wildlife Service (Service) published two policy documents that will guide the agency's future mitigation recommendations and requirements. First, on November 21, 2016, the Service finalized its first revision to the Mitigation Policy since the policy was enacted in 1981. The Mitigation Policy is a far-reaching policy that addresses all types of mitigation – avoidance, minimization, and compensatory or offsetting – as it pertains to mitigating the adverse impacts of projects on fish, wildlife, plants and their habitats. Second, on December 27, 2016, the Service published the Compensatory Mitigation Policy – the first Service policy that comprehensively addresses compensatory mitigation under the ESA. The Compensatory Mitigation Policy steps down the Mitigation Policy and provides guidance on the types of, recommendation and approval mechanisms for, and implementation of compensatory mitigation under the ESA.

In 2015, President Obama issued a memorandum, *Mitigating Impacts on Natural Resources from Development and Encouraging Related Private Investment*

(Presidential Memorandum), to multiple agencies, including the Service (through the Secretary of the Interior), directing all of the affected agencies to develop and implement policies to achieve a net conservation gain or, at a minimum, no net loss of scarce resources. The Service developed the new policies in response to the Presidential Memorandum's direction to revise the Service's 1981 mitigation policy and to develop a compensatory mitigation policy consistent with the overarching "net gain/no net loss" conservation goal.

The Mitigation Policy will guide all types of mitigation applicable to all Service-recommended or required mitigation related to projects' adverse impacts to plants, wildlife, fish, and their habitats. As more generalized policy guidance, the Mitigation Policy applies in all contexts where the Service can require or recommend mitigation measures, including recommendations not associated with the ESA. Specifically, the Service will apply the Mitigation Policy in two different scenarios: (1) when the Service has a statutory or regulatory mandate to require mitigation, such as under the ESA, or for action to restore damage to fish and wildlife resources under the Oil Pollution Act; and (2) when the Service provides conservation recommendations, for example, when acting as a responsible agency under the National Environmental Policy Act.

The Compensatory Mitigation Policy steps down the Mitigation Policy with regard to one component of the Mitigation Policy: compensatory mitigation under the ESA.

Drawing from the Presidential Memorandum, both the Mitigation Policy and the Compensatory Mitigation Policy utilize a landscape-level approach to conservation, and emphasize the Presidential Memorandum's directive to implement a net-gain/no net loss goal for conservation. Among the advantages of landscape-level approaches to mitigation is that they can achieve greater conservation benefits by encouraging private investment in mitigation, thus leveraging economies of scale and incentivizing advance mitigation.

The policies' emphasis on landscape-level conservation strategies also allows the Service to maximize the effectiveness of mitigation at multiple geographic scales as appropriate for the target resources. As the Service notes, the geographic scale of a "landscape" can vary widely, from landscapes that encompass a single watershed to an entire habitat type. The policies afford the Service discretion to require or recommend mitigation across a wide range of geographic scales to achieve conservation objectives. The flip side of this flexibility is that the Service can choose the geographic scale at which to apply mitigation within the context of a given project. This means, for example, that the Service could choose to require mitigation that includes nesting habitat for a project affecting only a species' foraging habitat.

The Mitigation Policy

The Mitigation Policy was revised in light of changes since 1981, which include the following: (1) the acceleration of habitat loss and subsequent loss of ecosystem function in the intervening years since the policy's initial publication in 1981; (2) threats, such as climate change, spread of invasive species, and outbreaks of epizootic diseases, that were not evident in 1981; (3) substantial advancements made in the science of fish and wildlife conservation since 1981; and (4) substantial changes to the federal statutory, regulatory, and policy context of conservation since the policy's initial publication.

Importantly, per the direction in the Presidential Memorandum the Service has expanded the scope of the Mitigation Policy to include the ESA. Project proponents that need Section 7 biological opinions and incidental take statements and/or Section 10 incidental take permits are likely to encounter the Service's attempts to reconcile the statutory and regulatory requirements of the ESA with the policy goals and objectives of the new Mitigation Policy.

Despite the Presidential Memorandum's mandate to provide specific, quantifiable measures to achieve the goal of no-net loss/net gain, the Service declined to do so, noting that, such measures "will be specific to the conservation objectives of the affected resources." Exactly how the Service specifies conservation objectives can result in dramatically different mitigation recommendations and outcomes, and implemented at varying geographic scales. In *Union Neighbors United v. Jewell*, 831 F.3d 564 (D.C. Cir. 2016) (*Union Neighbors*), the Service defined a conservation objective in terms of the persistence of a listed bat species and found that although the project could further mitigate the impacts to individual bats, no further mitigation, including avoidance of individual bat deaths, was required. The Service reasoned – and the court agreed – that because the project fully minimized and mitigated impacts to the species as a whole, there were no residual unavoidable impacts to the species' persistence to be mitigated. 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.

In *Union Neighbors*, the Service took 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 its 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. While the Mitigation Policy's mitigation hierarchy may meet the Presidential Memorandum's objective to create consistency across federal agencies

with regard to mitigation policies and implementation — for example, 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 own statutory mandate under ESA Section 10 permitting.

Other 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.

The Compensatory Mitigation Policy

The Compensatory Mitigation Policy applies to all forms of compensatory mitigation involving ESA compliance required or recommended by the Service, including conservation banks, in-lieu fee programs, permittee-responsible mitigation, and other third-party mitigation mechanisms. Many commenters noted that the Compensatory Mitigation Policy’s mitigation goal of “net gain/no net loss” (per the Presidential Memorandum) in the status of species’ conservation is not required under either section 7 or 10 of the ESA. However, nothing in the ESA precludes the Service from adopting such “enhanced” mitigation goals and recommending mitigation plans accordingly. Project proponents who implement compensatory mitigation developed to achieve the Service’s enhanced mitigation standard are expected to enjoy such benefits as greater future regulatory certainty and expedited permit processes.

The Compensatory Mitigation Policy encourages market-based approaches to mitigation -- with a preference for conservation banking -- that consolidates compensatory mitigation on larger landscapes. According to the Service, the benefits of a comprehensive landscape-level, market-based approach to compensatory mitigation include standardization and greater consistency and transparency in implementation in the ESA, as well as regulatory flexibility and predictability for the regulated community.

Conclusion

As noted above, under the Mitigation Policy 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.

Both policies became final upon their publication, and will guide the Service as it considers approval and permitting requirements under ESA sections 7 and 10, as well as mitigation and conservation recommendations under a wide variety of environmental statutes and regulatory programs. 81 FR 83440, 11/21/16. 81 FR 95316, 12/27/16

CASE SUMMARIES

Submitted by

Richard A. Christopher

Richard.christopher@hdrinc.com

Albuquerque Bus Rapid Transit Project Does Not Violate NEPA or 106

When Albuquerque, NM proposed to construct a Bus Rapid Transit project on Central Avenue (old Route 66), a group of businesses claimed that impacts on businesses and historic districts were not properly considered. The Tenth Circuit of Appeals upheld the use of a categorical exclusion by FTA based in part on the fact that the impacts were not on the natural environment but instead were socioeconomic impacts. The Court also found that the impacts on the adjacent historic districts were adequately considered by the New Mexico SHPO and the FTA. *Coalition of Concerned Citizens to Make Art Smart v. FTA*, 10th Circuit No. 16-2192, December 13, 2016.

North Carolina Highway Project No Longer Viable So Appeal Dismissed as Moot

Two conservation groups filed suit to invalidate the environmental analysis performed for the Gaston East-West Connector. The District Court granted the groups' motion for summary judgment. Before the District Court ruled, the North Carolina General Assembly took away funding for the project and repealed the statute that made the project eligible for funding. After the District Court ruled, state and local authorities removed the project from the relevant planning documents. At oral argument, NCDOT argued that the appeal should be dismissed as moot since the project was dead. The Fourth Circuit agreed. *Catawba Riverkeeper Foundation v. NCDOT*, 4th Circuit No. 15-2285, December 13, 2016.

NEXT DEADLINE IS MARCH 15, 2017

The next deadline for submission of articles for this newsletter is March 15, 2017. Anyone who wishes to submit an article should send it to Richard.christopher@hdrinc.com and use Microsoft Word.