

Presidential Memorandum: Mitigating Impacts on Natural Resources from Development and Encouraging Related Private Investment

MEMORANDUM FOR THE SECRETARY OF DEFENSE
THE SECRETARY OF THE INTERIOR
THE SECRETARY OF AGRICULTURE
THE ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY
THE ADMINISTRATOR OF THE NATIONAL OCEANIC AND ATMOSPHERIC
ADMINISTRATION

We all have a moral obligation to the next generation to leave America's natural resources in better condition than when we inherited them. It is this same obligation that contributes to the strength of our economy and quality of life today. American ingenuity has provided the tools that we need to avoid damage to the most special places in our Nation and to find new ways to restore areas that have been degraded.

Federal agencies implement statutes and regulations that seek simultaneously to advance our economic development, infrastructure, and national security goals along with environmental goals. As efforts across the country have demonstrated, it is possible to achieve strong environmental outcomes while encouraging development and providing services to the American people. This occurs through policies that direct the planning necessary to address harmful impacts on natural resources by avoiding and minimizing impacts, then compensating for impacts that do occur. Moreover, when opportunities to offset foreseeable harmful impacts to natural resources are available in advance, agencies and project proponents have more options to achieve positive environmental outcomes and potentially reduce permitting timelines.

Federal agencies can, however, face barriers that hinder their ability to use Federal resources for restoration in advance of regulatory approval of development and other

activities (e.g., it may not be possible to fund restoration before the exact location and scope of a project have been approved; or there may be limitations in designing large-scale management plans when future development is uncertain). This memorandum will encourage private investment in restoration and public-private partnerships, and help foster opportunities for businesses or non-profit organizations with relevant expertise to successfully achieve restoration and conservation objectives.

One way to increase private investment in natural resource restoration is to ensure that Federal policies are clear, work similarly across agencies, and are implemented consistently within agencies. By encouraging agencies to share and adopt a common set of their best practices to mitigate for harmful impacts to natural resources, the Federal Government can create a regulatory environment that allows us to build the economy while protecting healthy ecosystems that benefit this and future generations. Similarly, in non-regulatory circumstances, private investment can play an expanded role in achieving public natural resource restoration goals. For example, performance contracts and other Pay for Success approaches offer innovative ways to finance the procurement of measurable environmental benefits that meet high government standards by paying only for demonstrated outcomes.

Therefore, by the authority vested in me as President by the Constitution and the laws of the United States of America, and to protect the health of our economy and environment, I hereby direct the following:

Section 1. Policy. It shall be the policy of the Departments of Defense, the Interior, and Agriculture; the Environmental Protection Agency; and the National Oceanic and Atmospheric Administration; and all bureaus or agencies within them (agencies); to avoid and then minimize harmful effects to land, water, wildlife, and other ecological resources (natural resources) caused by land- or water-disturbing activities, and to ensure that any remaining harmful effects are effectively addressed, consistent with existing mission and legal authorities. Agencies shall each adopt a clear and consistent approach for avoidance and minimization of, and compensatory mitigation for, the impacts of their activities and the projects they approve. That approach should also recognize that existing legal authorities contain additional protections for some resources that are of such irreplaceable character that minimization and compensation measures, while potentially practicable, may not be adequate or appropriate, and therefore agencies should design policies to promote avoidance of impacts to these resources.

Large-scale plans and analysis should inform the identification of areas where development may be most appropriate, where high natural resource values result in the best locations for protection and restoration, or where natural resource values are irreplaceable. Furthermore, because doing so lowers long-term risks to our environment and reduces timelines of development and other projects, agency policies should seek to encourage advance compensation, including mitigation bank-based approaches, in order to provide resource gains before harmful impacts occur. The design and implementation of those policies should be crafted to result in predictability sufficient to provide incentives for the private and non-governmental investments often needed to produce successful advance compensation. Wherever possible, policies should operate similarly across agencies and be implemented consistently within them.

To the extent allowed by an agency's authorities, agencies are encouraged to pay particular attention to opportunities to promote investment by the non-profit and private sectors in restoration or enhancement of natural resources to deliver measurable environmental outcomes related to an established natural resource goal, including, if appropriate, as part of a restoration plan for natural resource damages or for authorized investments made on public lands.

Sec. 2. Definitions. For the purposes of this memorandum:

(a) "Agencies" refers to the Department of Defense, Department of the Interior, Department of Agriculture, Environmental Protection Agency, and National Oceanic and Atmospheric Administration, and any of their respective bureaus or agencies.

(b) "Advance compensation" means a form of compensatory mitigation for which measurable environmental benefits (defined by performance standards) are achieved before a given project's harmful impacts to natural resources occur.

(c) "Durability" refers to a state in which the measurable environmental benefits of mitigation will be sustained, at minimum, for as long as the associated harmful impacts of the authorized activity continue. The "durability" of a mitigation measure is influenced by: (1) the level of protection or type of designation provided; and (2) financial and long-term management commitments.

(d) "Irreplaceable natural resources" refers to resources recognized through existing legal authorities as requiring particular protection from impacts and that because of their high value or function and unique character, cannot be restored or replaced.

(e) "Large-scale plan" means any landscape- or watershed-scale planning document that addresses natural resource conditions and trends in an appropriate planning area, conservation objectives for those natural resources, or multiple stakeholder interests and land uses, or that identifies priority sites for resource restoration and protection, including irreplaceable natural resources.

(f) "Mitigation" means avoiding, minimizing, rectifying, reducing over time, and compensating for impacts on natural resources. As a practical matter, all of these actions are captured in the terms avoidance, minimization, and compensation. These three actions are generally applied sequentially, and therefore compensatory measures should normally not be considered until after all appropriate and practicable avoidance and minimization measures have been considered.

Sec. 3. Establishing Federal Principles for Mitigation. To the extent permitted by each agency's legal authorities, in addition to any principles that are specific to the mission or authorities of individual agencies, the following principles shall be applied consistently across agencies to the extent appropriate and practicable.

(a) Agencies should take advantage of available Federal, State, tribal, local, or non-governmental large-scale plans and analysis to assist in identifying how proposed projects potentially impact natural resources and to guide better decision-making for mitigation, including avoidance of irreplaceable natural resources. 4

(b) Agencies' mitigation policies should establish a net benefit goal or, at a minimum, a no net loss goal for natural resources the agency manages that are important, scarce, or sensitive, or wherever doing so is consistent with agency mission and established natural resource objectives. When a resource's value is determined to be irreplaceable, the preferred means of achieving either of these goals is through avoidance, consistent with applicable legal authorities. Agencies should explicitly consider the extent to which the beneficial environmental outcomes that will be achieved are demonstrably new and would not have occurred in the absence of mitigation (i.e. additionality) when determining whether those measures adequately address impacts to natural resources.

(c) With respect to projects and decisions other than in natural resource damage cases, agencies should give preference to advance compensation mechanisms that are likely to achieve clearly defined environmental performance standards prior to the harmful impacts of a project. Agencies should look for and use, to the extent appropriate and practicable, available advance compensation that has achieved its intended environmental outcomes. Where advance compensation options are not appropriate or not available, agencies should give preference to other compensatory mitigation practices that are likely to succeed in achieving environmental outcomes.

(d) With respect to natural resource damage restoration plans, natural resource trustee agencies should evaluate criteria for whether, where, and when consideration of restoration banking or advance restoration projects would be appropriate in their guidance developed pursuant to section 4(d) of this memorandum. Consideration under established regulations of restoration banking or advance restoration strategies can contribute to the success of restoration goals by delivering early, measurable environmental outcomes.

(e) Agencies should take action to increase public transparency in the implementation of their mitigation policies and guidance. Agencies should set measurable performance standards at the project and program level to assess whether mitigation is effective and should clearly identify the party responsible for all aspects of required mitigation measures. Agencies should develop and use appropriate tools to measure, monitor, and evaluate effectiveness of avoidance, minimization, and compensation policies to better understand and explain to the public how they can be improved over time.

(f) When evaluating proposed mitigation measures, agencies should consider the extent to which those measures will address anticipated harm over the long term. To that end, agencies should address the durability of compensation measures, financial assurances, and the resilience of the measures' benefits to potential future environmental change, as well as ecological relevance to adversely affected resources.

(g) Each agency should ensure consistent implementation of its policies and standards across the Nation and hold all compensatory mitigation mechanisms to equivalent and effective standards when implementing their policies.

(h) To improve the implementation of effective and durable mitigation projects on Federal land, agencies should identify, and make public, locations on Federal land of authorized impacts and their associated mitigation projects, including their type, extent, efficacy of compliance, and success in achieving performance measures. When compensatory actions take place on Federal lands and waters that could be open to future multiple uses, agencies should describe measures taken to ensure that the compensatory actions are durable.

Sec. 4. Federal Action to Strengthen Mitigation Policies and Support Private Investment in Restoration. In support of the policy and principles outlined above, agencies identified below shall take the following specific actions.

(a) Within 180 days of the date of this memorandum, the Department of Agriculture, through the U.S. Forest Service, shall develop and implement additional manual and handbook guidance that addresses the agency's approach to avoidance, minimization, and compensation for impacts to natural resources within the National Forest System. The U.S. Forest Service shall finalize a mitigation regulation within 2 years of the date of this memorandum.

(b) Within 1 year of the date of this memorandum, the Department of the Interior, through the Bureau of Land Management, shall finalize a mitigation policy that will bring consistency to the consideration and application of avoidance, minimization, and compensatory actions or development activities and projects impacting public lands and resources.

(c) Within 1 year of the date of this memorandum, the Department of the Interior, through the U.S. Fish and Wildlife Service, shall finalize a revised mitigation policy that applies to all of the U.S. Fish and Wildlife Service's authorities and trust responsibilities. The U.S. Fish and Wildlife Service shall also finalize an additional policy that applies to compensatory mitigation associated with its responsibilities under the Endangered Species Act of 1973. Further, the U.S. Fish and Wildlife Service shall finalize a policy that provides clarity to and predictability for agencies and State governments, private landowners, tribes, and others that take action to conserve species in advance of potential future listing under the Endangered Species Act. This policy will provide a mechanism to recognize and credit such action as avoidance, minimization, and compensatory mitigation.

(d) Within 1 year of the date of this memorandum, each Federal natural resource trustee agency will develop guidance for its agency's trustee representatives describing the considerations for evaluating whether, where, and when restoration banking or advance restoration projects would be appropriate as components of a restoration plan adopted by trustees. Agencies developing such guidance will coordinate for consistency.

(e) Within 1 year of the date of this memorandum, the Department of the Interior will develop program guidance regarding the use of mitigation projects and measures on lands administered by bureaus or offices of the Department through a land-use authorization, cooperative agreement, or other appropriate mechanism that would authorize a project proponent to conduct actions, or otherwise secure conservation benefits, for the purpose of mitigating impacts elsewhere. 6

Sec. 5. General Provisions. (a) This memorandum complements and is not intended to supersede existing laws and policies.

(b) This memorandum shall be implemented consistent with applicable law, and subject to the availability of appropriations.

(c) This memorandum is intended for the internal guidance of the executive branch and is inapplicable to the litigation or settlement of natural resource damage claims. The provisions of section 3 this memorandum encouraging restoration banking and advance restoration projects also do not apply to the selection or implementation of natural resource restoration plans, except to the extent determined appropriate in Federal trustee guidance developed pursuant to section 4(d) of this memorandum.

(d) The provisions of this memorandum shall not apply to military testing, training, and readiness activities.

(e) Nothing in this memorandum shall be construed to impair or otherwise affect:

(i) the authority granted by law to an executive department, agency, or the head thereof; or

(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(f) This memorandum is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

(g) The Secretary of the Interior is hereby authorized and directed to publish this memorandum in the *Federal Register*.

BARACK OBAMA

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