

# Subcommittee on Oversight and Investigations

Louie Gohmert, Chairman

Hearing Memorandum

February 22, 2016

To: All Natural Resources Committee Members

From: Majority Committee Staff -- Oversight and Investigations Subcommittee (5-7107)

Hearing: Oversight hearing titled *“The Imposition of New Regulations Through the President’s Memorandum on Mitigation”*

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The Subcommittee on Oversight and Investigations will hold an oversight hearing titled *“The Imposition of New Regulations Through the President’s Memorandum on Mitigation”* on **Wednesday, February 24, 2016 at 2:00pm in room 1334 Longworth House Office Building.**

## **Policy Overview**

- Adding to the close to 200 Presidential Memoranda already issued, last November 3, 2015 President Obama issued another significant Memorandum<sup>1</sup> to the Departments of Agriculture, Defense and Interior, the Environmental Protection Agency (EPA), and the National Oceanic and Atmospheric Administration (NOAA) requiring sweeping changes to their policies regarding mitigation of natural resource impacts from approved projects and activities. Specifically, the new policy requires agencies considering permitting of projects to incorporate a standard of ensuring a “net benefit” or at minimum “no net loss” of important, scarce, or sensitive natural resources before a permit can be issued.
- The Memorandum mandates federal agencies to design policies to require more compensatory mitigation, including advance compensation prior to project approval and mitigation banking methods facilitated by environmental groups and other non-governmental entities that participate in the banking business.
- The Memorandum appears to create sweeping new statutory authority through unilateral executive action, and represents a substantial re-write of public land use and water policy by the Obama Administration. The new “net benefit” standard exceeds statutory standards set in law by Congress, and represents a substantial raising of the threshold that will likely result in the rejection of a host of economic and energy-related projects that would otherwise have been approved under the law, and potentially increase the cost and regulatory burden for those projects that are already permitted.

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<sup>1</sup> Presidential Memorandum: *Mitigating Impacts on Natural Resources from Development and Encouraging Related Private Investment*. November 3, 2015. <https://www.whitehouse.gov/the-press-office/2015/11/03/mitigating-impacts-natural-resources-development-and-encouraging-related>

- The Memorandum could potentially alter the calculus used by agencies to approve permitted projects on federal lands or waters or related “landscape” areas, particularly due to the emphasis on a project needing to demonstrate effective mitigation that meets the standard of “net benefit” or “no net loss” prior to approval.
- Many of the terms used in the Memorandum to describe resources requiring mitigation from projects—including “important,” “scarce,” “sensitive,” and “irreplaceable,” are not found in existing statutes and are largely undefined in the Memorandum. The vague and overbroad terms will likely lead to legal uncertainty for many currently permitted projects.

**Witnesses**

*Mr. Michael Bean*

Principal Deputy Assistant Secretary  
Fish and Wildlife and Parks  
U.S. Department of the Interior

*Mr. Brian Ferebee*

Associate Deputy Chief, National Forest System  
U.S. Forest Service  
U.S. Department of Agriculture

*Ms. Christy Goldfuss*

Managing Director  
Council on Environmental Quality  
The White House

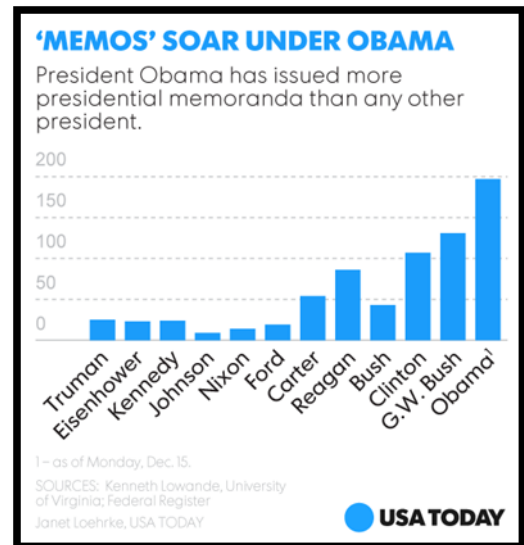


Chart Sources: USA Today, Kenneth Lawande, University of Virginia, Federal Register, December 17, 2014.

**Background**

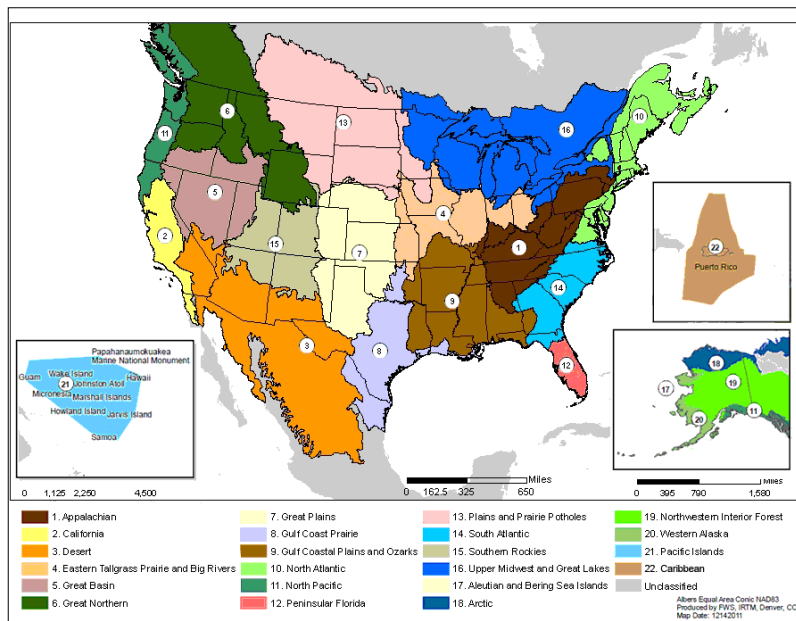
*Provisions of the Memorandum*

The Memorandum requires the agencies to develop policies that will utilize three hierarchical forms of mitigation – avoidance, minimization, and compensation – to address “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.”<sup>2</sup>

Under the Memorandum, the agencies are directed to create mitigation policies that “establish a net benefit goal or, at a minimum, a “no net loss” goal for natural resources the

<sup>2</sup> Ibid

agency manages that are important, scarce, or sensitive.”<sup>3</sup> This standard will not be applicable to just energy or natural resource projects, but will apply uniformly to all activities permitted by the agencies. The Memorandum also instructs agencies to utilize any additional authorities they



National Landscape Conservation Cooperatives  
Source: U.S. Fish and Wildlife Service

have to prevent impacts that projects may have on “irreplaceable” resources.<sup>4</sup> Agencies are directed to utilize large, landscape-scale planning and analysis to determine which areas may be appropriate for development, and which should be restricted from development due to the presence of “irreplaceable” resources. This is a continuation of concepts advocating watershed and landscape-scale mitigation that the Department of the Interior promulgated in a Departmental Manual it released in October 2015.<sup>5</sup> In February 2010, then-

Interior Department Secretary Salazar signed a Secretarial Order<sup>6</sup> establishing 22 Landscape Conservation Cooperatives (LCCs) encompassing the entire U.S., “to better integrate science and management to address climate change and other landscape scale issues.” (see Map at left).

The form of mitigation being altered most by this latest Obama Memorandum is compensation. Compensatory mitigation is employed to offset the land and water impacts that cannot be avoided or minimized. Such mitigation is currently practiced under Section 404 of the Clean Water Act (CWA)<sup>7</sup> to offset impacts to wetlands from projects approved by the EPA and the Army Corps of Engineers.

<sup>3</sup> Ibid

<sup>4</sup> Ibid

<sup>5</sup> Department of the Interior Department Manual: *Implementing Mitigation at the Landscape-scale*. Part 600, Chapter 6. October 23, 2015.

<https://www.doi.gov/sites/doi.gov/files/uploads/TRS%20and%20Chapter%20FINAL.pdf>

<sup>6</sup> [Secretarial Order No. 3289](#), February 22, 2010.

<sup>7</sup> 33 U.S. Code § 1344

The Memorandum directs agencies to “give preference”<sup>8</sup> to compensatory mitigation, especially advance compensation which requires benefits to be achieved before a project begins.<sup>9</sup> The Memorandum also encourages agencies to use mitigation banks – a portion of a landscape or watershed that has been preserved, restored, or enhanced to offset impacts from development – as a means of achieving the “net gain/no net loss” standard. These areas can often be purchased and used by developers as “credits” to mitigate impacts. Compensatory mitigation has been used voluntarily by developers in the past to negate impacts to resources, but the Memorandum seeks to expand the practice, with federal agencies requiring project proponents to include it before obtaining permits.

Finally, the Obama Memorandum sets individual timelines and criteria for agencies to implement policies to comply with the Memorandum. Each agency must develop regulations to implement the directives of the Memorandum within one or two years. Some agencies are required to implement additional, specific policies related to their unique responsibilities.

### *Implications of the Memorandum*

The Obama Memorandum, by unilateral executive action, appears to create new statutory authority for how much risk the agencies will now accept when evaluating and permitting projects. The Memorandum’s standard of “net benefit” or “no net loss” is not found in existing land management statutes. For example, the Federal Lands Policy and Management Act (FLPMA) requires the Bureau of Land Management to manage federal lands for multiple uses while preventing “unnecessary or undue degradation of the [public] lands.”<sup>10</sup> This starkly contrasts the more stringent “net benefit” standard mandated by the Memorandum. Legal analysts believe that as a result of this new standard, projects that would otherwise be appropriate for approval under existing public lands statutes and guidance can now be denied approval if they do not meet the new, ambiguous standard of a “net benefit” or, a minimum, “no net loss.”<sup>11</sup>

While the concept of “no net loss” has been utilized in the past for specific mitigation regulations by the U.S. Army Corps of Engineers relating to wetlands,<sup>12</sup> the Obama Memorandum goes much further by requiring a “net benefit” and by applying these concepts to all federal lands and waters that the agencies have jurisdiction over. The resulting regulatory authority will give agencies broader power to deny projects that would otherwise be permitted,

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<sup>8</sup> Presidential Memorandum: *Mitigating Impacts on Natural Resources from Development and Encouraging Related Private Investment*. November 3, 2015. <https://www.whitehouse.gov/the-press-office/2015/11/03/mitigating-impacts-natural-resources-development-and-encouraging-related>

<sup>9</sup> Ibid

<sup>10</sup> 43 U.S.C. § 1732(b).

<sup>11</sup> Jenson, Thomas; Schreiber, Bailey; Sandra Snodgrass: *The Presidential Memorandum and Interior Department Policy on Mitigation: Their Content and Implications*. Holland & Hart. November 9, 2015. <https://www.hollandhart.com/obama-new-mitigation-policies>.

<sup>12</sup> 33 C.F.R. § 332. 2008.

harming jobs and economies in states with large federal land resources. However, those individuals and entities in the business of mitigation banking will benefit as more developers are compelled to purchase “credits” in attempts to meet the Memorandum’s standards.

The Obama Memorandum also raises potential regulatory uncertainty for pre-existing projects, and how they may be affected. It is unclear whether projects that already have mitigation measures in place or whose impacts are *de minimus* could require additional mitigation to meet the new standard of “net benefit/no net loss” upon changes or renewal of their permits.

In addition, many terms in the Memorandum used to describe resources that may require mitigation from projects – including “important,” “scarce,” “sensitive,” and “irreplaceable” – are not found in FLPMA or other significant federal statutes, and are mostly undefined in the Memorandum. Thus, it is unknown how agencies will interpret and enforce those criteria, and how the definitions of those terms will determine which resources will require compensatory mitigation going forward.

Under this new policy, virtually any resource can be given those classifications and subsequently be subject to mitigation, or be declared irreplaceable and off-limits to development altogether. The ambiguity of the classifications and their lack of established definitions make it difficult to predict or anticipate which resources will be placed in each category. This also hinders the ability of stakeholders to challenge a classification should their project be denied or required to carry out additional mitigation measures due to a resource being placed under one of these categories.

Furthermore, some laws by which many of the relevant agencies are governed – including the incidental take authorizations under Section 7 of the ESA and Section 101 of the Marine Mammal Protection Act – include mitigation but do not specifically provide for *compensatory* mitigation, and those statutes that currently allow for compensation have not been interpreted to require its use. Thus, it remains to be seen how agencies will be able to use those existing authorities to carry out the directives of the Memorandum.<sup>13</sup>

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<sup>13</sup> Steen, Ryan: *Presidential Memo Imparts “Moral Obligation” on Agencies to Mitigate Impacts of Natural Resource Development*. Mineral Law Blog. November 6, 2015. <http://www.minerallawblog.com/mining/presidential-memo-imparts-moral-obligation-on-agencies-to-mitigate-impacts-of-natural-resource-development/>