

TEN THINGS TO KNOW ABOUT THE PROPOSED REVISIONS TO THE U.S. FISH AND WILDLIFE SERVICE'S MITIGATION POLICY



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The U.S. Fish and Wildlife Service (Service) is proposing to revise its 36-year-old policy on mitigation for the adverse impacts of land and water development activities on fish, wildlife, plants, and their habitats. The [proposed revisions](#), published on March 8th, comprise 25 Federal Register pages of nuanced policy, definitions, and cross-references. **Comments are due no later than May 9, 2016.** The Service intends to prepare an Environmental Assessment (EA) on the proposed policy. Any party considering submission of comments on the draft policy should also consider including comments on the proper scope and content of the upcoming EA.

As Holland & Hart's clients and other friends consider how to respond to the Service's proposal, we offer the following discussion of ten key items of particular importance.

But before the details, some context. In our view, the Service is doing two things with this proposal. First, it is moving to recast mitigation from being a reaction or response to a development proposal to being, instead, a relatively well defined, predictable feature of the regulatory and policy landscape that will be "knowable" to the proponent of a development action prior to proposing the development. Second, the Service is moving to elevate consideration of ecosystem functions and values above individual animals or plants when applying the three steps of mitigation – avoidance, minimization, and compensation.

The first objective reflects the Administration's overall drive to reshape federal permitting processes to be more efficient and predictable. (For background, see Holland & Hart's recent [article](#) on infrastructure permit streamlining). The second objective can best be understood by reading some of the perspective that the Service offers:

Since the publication of the Service's 1981 Policy, land use changes in the United States have reduced the habitats available to fish and wildlife. By 1982, approximately 71 million acres of the lower 48 States had already been developed. Between 1982 and 2012, the American people developed an

additional 44 million acres for a total of 114 million acres developed. Of all historic land development in the United States, excluding Alaska, over 37 percent has occurred since 1982. Much of this newly developed land had been existing habitats, including 17 million acres converted from forests.

A projection that the U.S. population will increase from 310 million to 439 million between 2010 and 2050 suggests that land conversion trends like these will continue. In that period, development in the residential housing sector alone may add 52 million (42% more) units, plus 37 million replacement units. By 2060, a loss of up to 38 million acres (an area the size of Florida) of forest habitats alone is possible. Attendant pressures on remaining habitats will also increase fragmentation, isolation, and degradation through myriad indirect effects. The loss of ecological function will radiate beyond the extent of direct habitat losses. Given these projections, the near-future challenges for conserving species and habitats are daunting. As more lands and waters are developed for human uses, it is incumbent on the Service to help project proponents successfully and strategically mitigate impacts to fish and wildlife and prevent systemic losses of ecological function.

Accelerating climate change is resulting in impacts that pose a significant challenge to conserving species, habitat, and ecosystem functions. Climatic changes can have direct and indirect effects on species abundance and distribution, and may exacerbate the effects of other stressors, such as habitat fragmentation and diseases. The conservation of habitats within ecologically functioning landscapes is essential to sustaining fish, wildlife, and plant populations and improving their resilience in the face of climate change impacts, new diseases, invasive species, habitat loss, and other threats. Therefore, this policy

emphasizes the integration of mitigation planning with a landscape approach to conservation.

The individual elements highlighted below are most usefully analyzed in relation to the mindset propelling the proposed new policy. The Service seems to have come to view its fundamental mission as prevention of ecological collapse. Later, if and when the policy is finalized, the most successful development strategy for any project or activity that includes interaction with the Service will fully comprehend and internalize the policy context described by the Service.

With that background, here are 10 key aspects of the proposal that merit particular attention:

1. The proposal follows from and is intended to implement the November [2015 Presidential Memorandum](#) and Interior Secretary's [policy](#) on mitigation. Many of the concepts in the draft policy are the same as the provisions of those previous documents. In a prior [Holland & Hart article](#), we highlighted a number of important questions about those initiatives, particularly the uncertainty surrounding key mitigation benchmarks, such as achievement of a "net conservation gain" or assurance of "no net loss," and the potential application of the new directives to the greenhouse gas emissions associated with some developmental activities.
2. The proposal applies only to the work of the Service, but it covers all of the agency's program areas and all the resources for which the Service has authorities to recommend or require mitigation for impacts, not just the Endangered Species Act (ESA). The potential scope of the policy (and universe of parties who may be affected) is illustrated by the list of statutes cited by the Service as giving the Service "a role in mitigation planning for actions affecting" fish, wildlife, plants and their habitats:
 - Bald and Golden Eagle Protection Act
 - Endangered Species Act
 - Federal Land Policy and Management Act
 - Federal Power Act
 - Federal Water Pollution Control Act (Clean Water Act)
 - Fish and Wildlife Conservation Act
 - Fish and Wildlife Coordination Act
 - Marine Mammal Protection Act
 - Migratory Bird Treaty Act
 - National Environmental Policy Act (NEPA)
 - National Wildlife Refuge System Administration Act
3. The proposal reemphasizes a focus on habitat, not just quantities of acreage or individuals of specific species. This means that mitigation requirements will include consideration of impacts to ecosystem functions, properties, and components that sustain fish, wildlife, and plants—and their habitats. "The types of resources for which the Service is authorized to recommend or require mitigation also include those that contribute broadly to ecological functions that sustain species."
4. The proposal specifically includes the ESA, whereas the 1981 policy that it is replacing specifically excluded the ESA (due to a lack of statutory authority to issue incidental take permits or incidental take statements at that time). This change is intended to bring the policy in line with actual practice as it has evolved since Congress authorized incidental take in 1982.
5. There will be more guidance to come. The draft policy provides the specific example of future guidance regarding compensatory mitigation under the ESA. The additional increments of policy direction likely will play a vital role in guiding the Service's activities, but can be challenging to track and understand because the text tends to become more technical and arcane, and there often is limited or no opportunity for public comment on such lower-level policy documents.
6. The proposal calls for mitigation planning to be an integral part of "planning and regulatory processes for specific landscapes and/or classes of actions within a landscape." The principle—integrating mitigation planning into other

conservation planning—seems simple, but the draft policy is not clear in defining the universe of “planning and regulatory processes” to which the principle applies. Does it, for example, apply to the resource management plans of the Bureau of Land Management (BLM) or the equivalent planning processes of the U.S. Forest Service? How would this apply in relation to Farm Bill conservation programs? The policy’s enhanced focus on landscape-scale mitigation planning appears consistent with and supportive of the BLM and Forest Service’s recent approach in revising western land use plans to implement broad-scale conservation planning and species mitigation, but it is not clear whether those efforts are the same as what is intended under the new policy.

7. The proposal introduces a new concept of “evaluation species,” which appears to include species beyond those that trigger the Service’s regulatory involvement in the first place. It appears that the Service intends to use evaluation species as proxies for the full range of species in a landscape area potentially impacted by proposed development. Among other concerns, one can imagine that the best-studied resources in a particular landscape will become the defining reference points for all mitigation-related decision-making for that area simply because they are relatively well understood, irrespective of their relevance to the impacts of a potential project. For instance, sage-grouse, though not listed, have been heavily studied and the large and growing body of science on the species makes it a likely proxy for considering sagebrush ecosystem health and mitigation planning for other listed and candidate species that rely on the same or similar habitat functions.
8. The proposal is vague in drawing distinctions between those circumstances where the Service has the authority to require compensatory mitigation and those where the Service has authority only to recommend it. Appendix A of the draft policy describes the relationship of the proposal to other policies and regulations, and Appendix B discusses the intersection of the proposal and NEPA. But nowhere is there a clear description of the different levels or types of authority held by the Service, an omission that seems likely to generate confusion and unnecessary controversy.

9. The proposal provides guidance on valuing habitat for determining the amount of mitigation required. The value of affected habitat to evaluation species will be “based on their scarcity, suitability, and importance to achieving conservation objectives.” These terms are not self-defining and, absent further clarification, have the potential to create considerable concern and dispute.
10. The proposal provides guidance regarding locating compensatory mitigation on public and private lands. The Service’s usual approach will be to recommend compensatory mitigation on lands with the same ownership classification as the lands where impacts occurred; i.e., impacts on private lands should usually be mitigated on private lands and impacts on public lands should usually be mitigated on public lands. The proposal recognizes there are situations where departure from this typical approach may be warranted. The proposal does not resolve the long-standing uncertainty over the process that a private party would need to follow to secure “credit” for mitigation investments on public land.

The points highlighted above suggest that public-resource users, governments, and other parties should give the proposal careful review. As with all new policies on complicated and sometimes controversial areas of law, there is considerable potential for confusion. The nation’s approach to mitigation for development impacts is occurring in a rapidly changing policy and physical environment, where many risk factors are not yet fully understood. Stakeholder comments are particularly valuable in this setting because policymakers are at a relatively early point in the process of understanding the implications of their proposals and choices.

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