



U.S. DEPARTMENT OF THE INTERIOR

(/) **BUREAU OF
LAND
MANAGEMENT (/)**

COMPENSATORY MITIGATION

IM 2018-093

Instruction Memorandum

United States Department of the Interior
BUREAU OF LAND MANAGEMENT
Office of Law Enforcement and Security
<https://www.blm.gov> (<https://www.blm.gov>)

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EMS TRANSMISSION 7/24/2018
Instruction Memorandum No. 2018-093

To: Assistant Directors and All Field Office Officials
From: Deputy Director for Policy and Programs
Subject: Compensatory Mitigation

Purpose: The policy in this Instruction Memorandum (IM) provides guidance to the Bureau of Land Management (BLM) relating to the imposition of offsite compensatory mitigation, as defined below, under the Federal Land Policy and Management Act of 1976, Pub. L. No. 94-579, 90 Stat. 2743 (codified as amended at 43 U.S.C. §§ 1701-1789) (FLPMA), as a required condition to use the public lands. This policy supersedes all previous policies regarding compensatory mitigation.

Policy/Action: Except where the law specifically requires, the BLM must not require compensatory mitigation from public land users. While the BLM, under limited circumstances, will consider voluntary proposals for compensatory mitigation, the BLM will not accept any monetary payment to mitigate the impacts of a proposed action. In all instances, the BLM must refrain from authorizing any activity that causes unnecessary or undue degradation (UUD), pursuant to FLPMA Section 302(b).

Definitions

Mitigation – Measures or procedures that could reduce or avoid adverse impacts and are not incorporated into the proposed action. **[1]** For NEPA purposes, under Council on Environmental Quality (CEQ) regulations, 40 CFR 1508.20, mitigation may include one or more of the following:

- (a) Avoiding the impact altogether by not taking a certain action or parts of an action;
- (b) Minimizing impacts by limiting the degree or magnitude of the action and its implementation;
- (c) Rectifying the impact by repairing, rehabilitating, or restoring the affected environment;
- (d) Reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action; and

- (e) Compensating for the impact by replacing or providing substitute resources or environments. **[2]**

Compensatory mitigation – A project proponent’s activities, monetary payments, or in-kind contributions to conduct offsite actions that are intended to offset adverse impacts of a proposed action onsite.

Compensatory mitigation is “voluntary” when a project proponent’s activities, payments, or in-kind contributions to conduct offsite actions to minimize the impacts of a proposed action are free of coercion or duress, including the agency’s withholding of authorization for otherwise lawful activity, or the suggestion that a favorable outcome is contingent upon adopting a compensatory mitigation program.

General

- The BLM has an obligation to ensure that actions do not result in UUD. 43 U.S.C. §1732(b).
 - This obligation provides authority to require project proponents to avoid, minimize, rectify, and/or reduce anticipated harms, as necessary and appropriate.
 - Compensatory mitigation cannot prevent what would otherwise constitute UUD. If a proposed use of the public lands would result in UUD, then the BLM cannot authorize that use, even if compensatory mitigation is proposed.
 - Preventing unnecessary or undue degradation does not mean preventing all adverse impacts upon the land. The negative inference of the words “unnecessary” and “undue” is that a certain level of impairment may be necessary and due under a multiple use mandate. **[3]**
- Any compensatory mitigation that a project proponent proposes must be voluntary.
 - Except as described herein, the BLM will not impose, and will not build mechanisms for it to enforce, mandatory compensatory mitigation into its official actions, authorizations to use the public lands, and any associated environmental review documents, including, but not limited to, permits, rights-of-ways, environmental impact statements, environmental assessments, and resource management plans.
 - To ensure compensatory mitigation is voluntary, the BLM must not explicitly or implicitly suggest that project approval is contingent upon proposing a “voluntary” compensatory mitigation component, or that doing so would reverse or avoid an adverse finding.
 - This policy does not affect the ability of any State government or other non-federal party to require and enforce mandatory compensatory mitigation as authorized under state law.
- The BLM may consider voluntary compensatory mitigation proffered by a project proponent, including as a means to reach a Finding of No Significant Impact (FONSI) or as part of a proposed design feature of a project.
 - Where a project proponent has voluntarily proffered compensatory mitigation in an application, including in conjunction with a State requirement or as the result of other Federal law, BLM may incorporate it into and consider it as part of the project analysis. When BLM is considering compensatory mitigation as a component of the project proponent’s submission, BLM’s NEPA analysis should evaluate the need for compensatory mitigation by 1) considering the effectiveness of compensatory mitigation in reducing, resolving, or eliminating impacts of the proposed project(s), and 2) comparatively analyzing the proposal with and without the offsite compensatory mitigation.
 - Any requests to include voluntary offsite compensatory mitigation as a term and condition or condition of a permit or authorization must be evaluated and, where appropriate, authorized solely by the BLM State Director, upon notification to the BLM Director, if the State Director finds that the project proponent has specifically stated a preference to mitigate, through an existing NEPA decision, versus conducting additional NEPA process.
- If requested by the project proponent, the BLM may identify voluntary compensatory mitigation opportunities to address impacts of the project proposal, but unless any such measures are volunteered by

the project proponent, BLM should not carry them forward for detailed analysis in a NEPA document.

- BLM must not deny authorization for a project or activity based upon a project proponent's refusal to adopt a compensatory mitigation proposal that BLM has identified.

Administration and Accountability

- This IM does not affect compensatory mitigation that may be required by Federal laws other than FLPMA.
- State, District, and Field Offices must identify any existing mandatory compensatory mitigation programs, including programmatic agreements, resource management plans, and land use plans, and report them to the Deputy Secretary for appropriate action.
- The appropriate State Director must review all applications for which the applicants are proposing to conduct offsite compensatory mitigation to make certain that the proposed offsite compensatory mitigation is voluntary.
- The BLM Director must prepare and submit to the Deputy Secretary an annual report summarizing all projects incorporating offsite compensatory mitigation. This report must include the location of each project, the estimated cost to the proponent of the proposed compensatory mitigation, and a listing of any Federal and non-federal partners.

Financial Contributions toward Offsite Compensatory Mitigation

In no circumstance may BLM agree to accept a monetary contribution for the implementation of compensatory mitigation.

Where a state has an offsite compensatory mitigation program under state law, BLM may enter into an agreement with the state to obtain information about the amount of compensatory mitigation that the state would require from a project proponent if the proposed activity on Federal lands were taking place on State lands. In addition, BLM may inform the project proponent what the compensatory mitigation would be if the proposed project were on State Lands. The project proponent may then decide if they want to make a voluntary contribution to the state or a third party pursuant to the state program.

Timeframe: This IM is effective upon issuance. For NEPA documents that are near completion for an action (e.g., preliminary Draft Environmental Impact Statement (EIS) is in the final stages of review), implementation of this policy may be modified to fit the specific circumstances so as not to delay publication of the NEPA document and approval of the project(s). Where appropriate, such documents should note whether compensatory mitigation was voluntarily proposed, or is required as a condition of State law or a specifically identified federal statute.

Budget Impact: The BLM may incur costs related to adjustments to project proposals currently being processed or changes made to land use authorizations that are not consistent with the procedures listed in this IM.

Energy Impact: This IM may result in some decreased costs to oil and gas and geothermal lessees, permittees, and operators and energy right-of-way holders. It is unlikely that this policy would have any material adverse impact on energy supply, distribution, or use.

Background: Executive Order 13783, *Promoting Energy Independence and Economic Growth*, (March 28, 2017), rescinded a Presidential Memorandum relating to the mitigation of impacts on natural resources, and directed the Department to review all existing regulations, orders, guidance documents, policies, and any other similar actions that potentially burden the development or utilization of domestically produced energy resources. Secretary's Order (SO) 3349, *American Energy Independence* (March 29, 2017), directed the Department to review guidance documents and policies that potentially burden the development or utilization of domestically produced energy resources. SO 3349 also rescinded SO 3330, *Improving Mitigation Policies and Practices of the Department of the Interior* (Oct. 13, 2013). SO 3360, *Rescinding Authorities Inconsistent with Secretary's Order 3349, "American Energy Independence,"* rescinded BLM Manual Section 1794 – Mitigation (Dec. 22, 2016) and BLM Mitigation Handbook H-1794-1 (Dec. 22, 2016), and directed the BLM to reissue new policy guidance on compensatory mitigation. This IM implements the direction in SO 3360 by establishing parameters on compensatory mitigation.

FLPMA does not explicitly mandate or authorize the BLM to require public land users to implement compensatory

mitigation as a condition of obtaining authorization for the use of the public lands. A 1995 BLM-Wyoming State Office policy cited to and attached legal analysis about the practice that raised serious concerns that compensatory mitigation could “appear[] to be an unauthorized tax or an equally unauthorized attempt to augment BLM’s existing appropriations” that would likely “strike the subjects of the ‘contribution’ as little more than thinly veiled blackmail,” and noted that “the courts tend to find such matters very offensive to fundamental notions of fairness and administrative law.” [4] Over time, BLM gradually allowed the use of mandatory compensatory mitigation in certain circumstances, culminating in a series of policy documents capped off by a now-rescinded Solicitor’s Opinion [5] concluding, among other things, that BLM is authorized to impose mandatory compensatory mitigation to achieve a so-called “net conservation gain.” This opinion was subsequently suspended [6] and ultimately revoked. [7] Upon further reflection, the conclusion that FLPMA authorized BLM to impose mandatory compensatory mitigation to achieve a “net conservation gain” was in error. While FLPMA in some instances may be interpreted to authorize various forms of the mitigation hierarchy, such as avoidance and minimization, it cannot reasonably be read to allow BLM to require mandatory compensatory mitigation for potential temporary or permanent impacts from activities authorized on public lands.

Even if FLPMA *authorizes* the use of compensatory mitigation, it does not require project proponents to implement compensatory mitigation. Further, because by definition, compensatory mitigation does not directly avoid or minimize the potential impacts, its application is particularly ripe for abuse. At times, the nexus between a proposed public land use and compensatory mitigation requirements is far from clear. Nevertheless, project proponents have every economic incentive to go along with these compensatory mitigation plans, if forced upon them, effectively treating them as a cost of doing business that they may willingly accept as long as the overall benefits of the project authorization outweigh the costs. These concerns are particularly acute when coupled with the “net conservation gain” standard, which necessarily goes beyond mitigating actual or anticipated impacts to forcing participants to pay to address impacts they did not cause. To minimize the risk of misuse and ensure compliance with applicable legal authorities, BLM will not mandate compensatory mitigation as a condition of project authorizations, unless required by law.

However, BLM may require the implementation of other forms of mitigation, as appropriate. BLM is committed to meeting its statutory obligations to prevent unnecessary or undue degradation and protecting resources by incorporating onsite mitigation measures into use authorizations prior to approval. In addition, when issuing rights-of-way, BLM is required to include terms and conditions in its grant that will, among other things, “minimize damage to scenic and esthetic values and fish and wildlife habitat and otherwise protect the environment.” 43 U.S.C. 1765(a)(ii). Moreover, project proponents seeking BLM authorizations are free to incorporate compensatory mitigation measures in proposals. BLM typically analyzes these measures, as part of a proposed action, as part of BLM’s compliance with the NEPA. Finally, nothing in this policy abrogates or preempts state government policies that take a different approach in accordance with state law.

Manual/Handbook Sections Affected: This IM augments guidance contained in the BLM’s National Environmental Policy Act Handbook H-1790-1, Section 6.8.4 on Mitigation and Residual Effects.

Coordination: This policy was coordinated among the WO Directorates. The policy was reviewed by the Office of the Solicitor, and by other relevant offices of the U.S. Department of the Interior.

Contact: For additional information, contact WO 210 Division of Decision Support, Planning, and NEPA at 202-912-7221; WO 200, Resources and Planning Directorate at 202-208-4896; and WO 300, Minerals and Realty Management Directorate at 202-208-4201.

Signed by:
Brian C. Steed
Deputy Director for Policy and Programs

Authenticated by:
Catherine Emmett
WO-870, IT Policy and Programs

1 Attachment

[1- Compensatory Mitigation Questions and Answers \(/download/file/fid/26313\)](#)

[1] See BLM, National Environmental Policy Act Handbook H-1790-1 at 133 (2008) (defining “mitigation” as “measures or procedures which could reduce or avoid adverse impacts and have not been incorporated into the proposed action or an alternative. Mitigation can be applied to reduce or avoid adverse effects to biological, physical, or socioeconomic resources.”).

[2] The fact that NEPA provides for considering the compensation of the impact does not mean that BLM must impose such mitigation in any circumstances or even has the authority to do so.

[3] See *Theodore Roosevelt Conservation Partnership v. Salazar*, 661 F.3d 66, 78 (D.C. Cir. 2011) (“FLPMA prohibits only unnecessary or undue degradation, not all degradation.”) (emphasis in the original); see also BLM, Instructional Memorandum No. 92-67 (Dec. 3, 1991) (“‘Unnecessary and undue degradation’ implies that there is also necessary and due degradation. For example, if there is only one route of access possible for development of an existing oil and gas lease, and that route presents the likelihood of some degradation of public lands or resources, such degradation may be considered necessary for the management of the oil and gas resource. . . . As another example, the RMP/EIS or site-specific environmental document may identify mitigation which would result in excessive expenditures of money or unusual technological requirements to achieve compliance. Otherwise there would be some degree of degradation of public lands or resources. If the mitigation would render the proposed operation uneconomic or technologically infeasible so that a prudent operator would not proceed, such degradation may also be considered necessary for the management of the oil and gas resource.”) (emphasis in the original).

[4] Statement of Policy Regarding Compensation Mitigation, BLM-WY IM No. 96-21 (Dec. 14 1995), attachment 1.

[5] The Bureau of Land Management's Authority to Address Impacts of its Land Use Authorizations through Mitigation, M-38039 (Dec. 21, 2016) (rescinded).

[6] See Memorandum from K. Jack Haugrud, Acting Secretary, “Temporary Suspension of Certain Solicitor M-Opinions Pending Review” (Feb. 6, 2017)

[7] See M-37046, “Withdrawal of M-37039, “The Bureau of Land Management’s Authority to Address Impacts of its Land Use Authorizations Through Mitigation.” (June 30, 2017).

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