

# Compensatory Mitigation Questions and Answers

## July 24, 2018

### *What is compensatory mitigation?*

- For the purposes of this Instructional Memorandum (IM), compensatory mitigation is a project proponents' activities, monetary payments, or in-kind contributions to conduct offsite actions that are intended to offset adverse impacts of a proposed action onsite.

### *How is offsite compensatory mitigation analyzed in a National Environmental Policy Act (NEPA) document?*

- Offsite compensatory mitigation may be considered as a feature of one or more alternatives in a NEPA document, such as a project-level Environmental Assessment (EA) or Environmental Impact Statement (EIS) **only** when it is voluntarily proffered by a project proponent or required by a third party (**not** BLM), such as a State government.
- When BLM is considering voluntary 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 compensatory mitigation.
- Any requests to include voluntary 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 versus, through an existing NEPA decision, conducting additional NEPA process.

### *When is offsite compensatory mitigation appropriate?*

- When it is voluntarily offered by a project proponent, and/or when it is legally required by a third party, such as a State government.
- If asked by the project proponent, the BLM may identify voluntary compensatory mitigation opportunities to address impacts of the project proposal.
- It is **not** appropriate for the BLM to 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.

***What is the process for negotiating a commitment to perform offsite compensatory mitigation?***

- Offsite compensatory mitigation should not be a focus of negotiation for the BLM.
- As described above, offsite compensatory mitigation is appropriate to include as a project feature when it is voluntarily proposed by a project proponent and/or required by a third party, such as a State government.
- If asked by the project proponent, the BLM may identify voluntary compensatory mitigation opportunities to address impacts of the project proposal, however, the BLM may not explicitly or implicitly suggest that project approval is contingent upon accepting the BLM suggestion.
- Any requests to include voluntary 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.

***What happens if the applicant decides not to proceed with an offsite compensatory mitigation strategy for the impacts of the proposed action prior to the BLM issuing a decision?***

- Offsite compensatory mitigation is voluntary. Prior to the BLM issuing a decision, the decision to propose or proceed with offsite compensatory mitigation rests with the project proponent.
- Should the project proponent change their mind prior to BLM issuing a decision, that is their prerogative. The BLM should analyze the project proposal based on the facts before the Bureau, and should not include the contemplated mitigation.
- In analyzing a proposal without offsite compensatory mitigation, the BLM should bear in mind that FLPMA's unnecessary or undue degradation standard inherently allows some impacts that are necessary and due; it does **not** require that project proponents mitigate for **all** adverse impacts.

***May the BLM include compensatory mitigation in stipulations, conditions of approval, or other terms and conditions in land use authorizations and NEPA decisions?***

- Only voluntary, project proponent-recommended compensatory mitigation may be included in stipulations, conditions of approval, or other terms and conditions in BLM land use authorizations or NEPA decisions.

***What happens if the permit holder fails to perform offsite compensatory mitigation included in the approved permit?***

- For mitigation proposals adopted pursuant to this policy, the BLM has a number of options. In appropriate circumstances, the BLM could pursue penalties for violations, including cancellation of the permit, attaching the project or permit bond, and/or other enforcement remedies to ensure that the terms of the permit are met.

***How long must offsite compensatory mitigation remain effective?***

- Once incorporated into a permit or other authorization, offsite compensatory mitigation must remain effective for as long as the project proponent represented that it would.

***When can offsite compensatory mitigation take the form of monetary contributions toward conservation projects?***

- Going forward, in no circumstance may BLM agree to accept a monetary contribution for the implementation of offsite compensatory mitigation.
- Offsite compensatory mitigation can take the form of monetary contributions to other entities when voluntarily proposed by project proponents or required by third parties, such as State governments.
- The likelihood of monetary contributions to third parties to have the desired conservation benefits, as well as the amount of money proposed to be held by a third party for administrative and other non-programmatic expenses, should be considered as part of the analysis of the likely effectiveness of the proposed offsite compensatory mitigation.

***How are financial contributions for mitigation on Federal lands or in carrying out the Wyden Amendment received and managed?***

- They are not, at least in the context of financial contributions that are part of an offsite compensatory mitigation plan. In no circumstance may BLM accept a monetary contribution for the implementation of offsite compensatory mitigation.

***How do we address mitigation on non-Federal lands to be managed by non-Federal partners?***

- Offsite compensatory mitigation on non-Federal lands to be managed by non-Federal partners may be voluntarily proposed by project proponents or mandated by third parties, such as State governments.
- Funds for mitigation to be performed on non-Federal lands must be managed by a third party, such as a State agency.
- The BLM will not assume, by agreement or otherwise, control over the use of such funds. This includes direct control, such as a controlling vote in a decision making group, or

constructive control, such as by having the power to veto an expenditure decision. The BLM may offer advice and recommendations, when requested, as to the funds use, provided that the BLM does not have decision making authority. In no circumstance may BLM accept a monetary contribution for the implementation of offsite compensatory mitigation.

***Can offsite compensatory mitigation be used to compensate for unnecessary or undue degradation onsite?***

- No.
- Unnecessary or undue degradation is not allowed on Federal lands. Offsite compensatory mitigation does not directly mitigate impacts onsite and therefore may not be used to compensate for unnecessary or undue degradation. A project proposal that will result in unnecessary or undue degradation must either be modified, denied, or mitigated onsite to eliminate the potential for causing unnecessary or undue degradation.
- Note, 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. This means for activities that take place under Federal Land Policy and Management Act, Congress anticipated that impacts or degradation may be due and necessary for the management of a variety of natural resources. Many, if not most, federally authorized activities will have some impact on the land.