

Mitigation Principles

Predictability: Oil and gas companies incorporate many types of mitigation measures into project planning and seek a stable, predictable regulatory environment that recognizes and incentivizes those efforts. Mitigation plays a key role in the development of oil and natural gas resources on all lands where activity takes place and is elemental in adhering to multiple-use principles on our nation's lands.

Hierarchy: Federal agencies must better emphasize the role the full mitigation hierarchy – avoid, minimize, rectify, reduce, and compensate, as defined in 40 CFR 1508.20 – plays in the planning process and recognize that mitigation comes in many forms. Companies often perform mitigation by avoiding or minimizing impacts in important habitat areas through pre-siting and screening prior to submitting an application for permit to drill, but they are seldom credited for those actions. Mitigation policies and guidance should acknowledge these pre-siting practices so that additional avoidance or minimization requirements are not subsequently imposed on the operator at the permitting stage.

Proportionality: Compensatory mitigation is utilized to compensate for the direct effects of unavoidable adverse impacts which remain after all other appropriate and practical mitigation has been required. Compensatory mitigation should never be an automatic requirement. Compensatory mitigation is most appropriate when there is a measured, unacceptable residual impact after the mitigation hierarchy is followed. Unacceptable impacts are those that exceed an agency's statutory or regulatory standards and therefore would prevent an agency from approving a project. Any compensatory mitigation should be quantifiable, defensible, and proportional to and not exceed the direct project impacts. A "no net loss" or "net conservation gain" standard exceeds existing statutory authority and cannot be required.

Optionality: Project proponents should be able to choose from a variety of mitigation options. BLM Instruction Memorandum 2008-204 outlines the available options for off-site mitigation as In-Kind, Out-of-Kind, and In-Lieu-Fee, which represents a reasonable range of options for oil and natural gas companies. Under 40 CFR 230.93, mitigation can also occur through the use of conservation banks, exchanges, or restoration and enhancement projects. Because there are a number of options available, preservation and conservation easements should not be the de-facto requirement.

Flexibility: Mitigation should be implemented in line with the schedule of the project. The timing of mitigation actions should be flexible and not required in advance of project approval; such a requirement would discourage mitigation measures including voluntary conservation efforts and restoration actions that cannot show demonstrable effects until much later in the project lifespan. Often, the mitigation mechanism (i.e. bank or exchange) is not fully operational at the start of the project, so it is impossible to utilize in advance and should therefore not be required as a front-end mitigation measure.

Availability: Mitigation should be available and encouraged to occur on public lands and NEPA analysis should be streamlined to promote such efforts. When a mitigation action serves to benefit the health of public lands, for instance by suppressing fire risks or reducing the spread of invasive species, categorical exclusions should be utilized to avoid an unnecessarily lengthy NEPA analysis.

Adaptability: Mitigation policies should promote adaptability for operators to appropriately scope, scale, and site mitigation within, near, or outside a general project area. Mitigation should not be disconnected from the project impacts, but should be allowed to occur in locations that provide commensurate ecological value.

Non-Additionality: Policies need to account for the legacy landscape in a manner that does not impose additional mitigation requirements designed to address or mitigate pre-existing impacts.