

Offsite Mitigation Questions and Answers

What is the BLM's authority to require mitigation of impacts and to accept mitigation at another location?

- The BLM's authority to address the mitigation of impacts on public lands associated with a use authorization issued by the BLM derives from the Federal Land Policy and Management Act (FLPMA). Additional authority can be found in the statutes governing specific uses of the public lands such as the Mineral Leasing Act. The congressional declaration of policy for FLPMA states that "the public lands be managed in a manner that will protect the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource and archeological values...." FLPMA §102(a)(8). In addition, the use, occupancy and development of public lands must be regulated by the Secretary through easements, permits, leases, licenses, or other instruments. FLPMA §302(b).
- The BLM may take into account actions that are physically removed or that take place at a different location from the immediate project area, either on or off BLM-managed lands, that could serve to protect or preserve BLM resources and values in deciding whether to approve a specific use on the public lands. In some cases, the applicant's offer to undertake certain mitigating actions may be a significant consideration in the BLM's decision. While the BLM does not have the authority to require an applicant to undertake mitigation offsite, the BLM can enforce the terms of a contract in which the applicant agrees to undertake specific mitigating actions offsite in order to receive the BLM's approval of a particular use on the public lands. The BLM may expressly condition its approval of the permit on the applicant's commitment to take those actions, and the BLM may, if necessary, seek appropriate enforcement action to ensure the terms of the contract are met.

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

- Consideration of offsite mitigation is generally appropriate when it is determined by the authorized officer that a proposed land use authorization cannot be brought into compliance with law, regulation, land use plan decisions, or other important resource objectives through the use of onsite mitigation alone. In this case, it may be appropriate to consider offsite mitigation as a feature of one or more of the alternatives in a NEPA document such as a project-level Environmental Assessment (EA) or Environmental Impact Statement (EIS), or when applicable, a Resource Management Plan/EIS.
- The NEPA document should analyze the proposal with and without offsite mitigation in at least two separate alternatives and in light of the best available science.
- The NEPA document should analyze the need, feasibility, and effectiveness of the proposed offsite mitigation and disclose the impacts of the mitigation and the mitigation measures.

- The NEPA document must be specific regarding how proposed mitigation projects will mitigate the relevant impacts. Long-term project monitoring and maintenance responsibilities should be addressed in the decision document, if applicable, including performance objectives, reporting requirements, and responsible parties.
- The BLM can approve offsite mitigation without a new NEPA document if the need for that mitigation has been identified and evaluated in a previous NEPA document.

When is offsite mitigation appropriate?

- Offsite mitigation is generally appropriate when the authorized officer determines that impacts cannot be mitigated to an acceptable level onsite; and it is expected that the land use authorization as submitted would not be in compliance with law or regulations, or consistent with land use plan decisions or other important resource objectives. When considering the use of offsite mitigation, it is important to weigh the degree to which a resource is affected and the relative importance of the affected resource.
- For example, offsite mitigation may be appropriate based on:
 - The degree of onsite impacts that cannot be mitigated effectively onsite:
 - The degree to which the BLM will be unable to achieve its resource management objectives. For example, the BLM may have identified in the land use plan a priority species and objectives for managing its habitat. Offsite mitigation may be appropriate where a proposed project's impacts are of such a magnitude as to prevent the BLM from meeting its habitat condition objectives in an important part of the species' range.
 - The degree to which small uses or projects are anticipated to have impacts that cumulatively will make it difficult to achieve important resource management objectives. Generally, offsite mitigation would not be appropriate for smaller proposed uses or projects, such as an individual gas well, unless the smaller uses or projects are anticipated to be part of a larger use or project, such as a gas field; or cumulatively have been determined to have an unacceptable impact.
 - The importance of the affected resource:
 - Some resources, ecosystems, and/or areas can be viewed as having higher value than others. This can be based on multiple factors such as:
 - The value placed on the resource in the land use plan. For example, Visual Resource Management Class II has a higher value than Class III; and riparian areas are generally considered to be more valuable than uplands.
 - The rarity, legal status, or state or national policy status. For example, Greater Sage-grouse is identified as a BLM Sensitive Species, and its habitat is considered to be important on a local or regional basis.
 - The resilience in the face of change and impact. For example, some animal species may acclimate fairly well to development, while other species may abandon the area entirely, at least over the short term.

- Offsite mitigation may be appropriate for mitigating impacts from large development projects or closely associated smaller projects that could have undesirable cumulative effects, particularly where onsite mitigation is expected to be insufficient and it is unlikely important resource management objectives can be achieved. This may include large projects areas such as:
 - Oil, gas, or geothermal fields, or individual wells that will make up a large field and associated rights-of-way;
 - Major road, electrical, or pipeline rights-of-way projects;
 - Wind farms or solar arrays;
 - Municipal water reservoirs;
 - Mining operations; and
 - Recreation and Public Purposes Act leases or patents in important habitat.

- Offsite mitigation may not be appropriate when sufficient onsite mitigation is available or when authorizing:
 - Grazing (when degree of new onsite impact is low);
 - Forest product sales (a BLM-initiated action);
 - Events or activities that require Special Recreation Permits (rarely large, substantially displacing, or long-term); or
 - Rights-of-way other than major projects or areas of intensive development (generally small in size, isolated).

- For BLM-initiated actions, the BLM will determine whether offsite mitigation is appropriate and will design the mitigation into the project proposal.

- Offsite mitigation should be designed to directly benefit an important public resource and not other permitted uses or users of that resource. For example, an energy company conducting an activity that removes a large amount of vegetation would not compensate a grazing permit holder for loss of the use of the vegetation. However, the company may partially or fully mitigate for the loss of vegetation onsite by conducting interim and final reclamation of the site. The BLM may also adjust use, grazing in this case, to reflect the loss of vegetation until such time as the vegetation returns to pre-disturbance levels.

- The priority order for mitigating resource impacts onsite or offsite will be:
 1. Onsite Mitigation - Onsite (avoid, minimize, rectify, or reduce in time).
 2. Offsite Mitigation - Local (unless greater resource benefits can be achieved through regional or interstate mitigation).
 3. Offsite Mitigation - Regional (unless greater resource benefits can be achieved through Interstate mitigation).
 4. Offsite Mitigation - Interstate.

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

- In early discussions with the BLM on a land use authorization, the applicant may voluntarily offer to perform mitigation services, purchase conservation easements, or contribute to a mitigation fund. Once the effects of the offered mitigation are analyzed in the NEPA document and approved by the BLM, the mitigation is incorporated into the final permit and becomes a requirement of the approved permit.
- When an applicant's proposed onsite (or offsite) mitigation is expected to be inadequate to satisfactorily address impacts of the authorized use, and the BLM anticipates that offsite mitigation may be appropriate, the BLM will notify the applicant in order to provide the applicant with an opportunity to propose alternative mitigation. For example, to avoid the need for offsite mitigation, the operator may alternatively offer a proposal for reducing surface disturbance or adjusting the pace of development. Applicant notification should occur as early as possible, optimally during the initial project planning, but not later than the formulation of alternatives or effects analysis in the NEPA document. The expectation is that the applicant and the BLM will discuss and seek agreement on appropriate mitigation, offsite or otherwise, prior to the BLM taking final action on a permit application.

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

- If the applicant will not agree to a mitigation strategy that reduces impacts of their proposed action to a level acceptable to the BLM:
 - The applicant may withdraw or amend the project proposal to present an alternative mitigation strategy; or
 - The authorized officer may deny the permit application and return the application to the applicant. The applicant may appeal the denial to the Interior Board of Land Appeals. Before denying a permit application, it is recommended that the BLM consult with the Solicitor's Office in cases where, due to existing contractual or property rights, takings or breach-of-contract claims may be raised.

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

- If operations have not begun, the BLM may revoke the permit or the holder may forfeit the permit. If operations have begun, but mitigation has not been undertaken, the holder would be issued a notice of noncompliance and given a specific time to come into compliance. In appropriate circumstances, the BLM could pursue penalties for violations, including cancellation of the permit. If operations have proceeded too far to prevent unacceptable impacts that the proposed mitigation was expected to mitigate, the BLM would seek an appropriate enforcement remedy to ensure the terms of the permit are met. The BLM may also attach the project or permit bond if one exists.

How long must offsite mitigation remain effective?

- Offsite mitigation should be designed to last as long as the onsite impacts it was designed to mitigate.
- Offsite mitigation should be designed for the long term when onsite resource losses are anticipated to be long-term, such as in the construction of a large water reservoir or wind farm.
- Offsite mitigation projects should be monitored, as appropriate, to evaluate the effectiveness of the mitigation activities and to ensure that they continue to provide adequate mitigation benefits. The BLM's decision should identify whether the BLM or the permit holder is responsible for monitoring the success of offsite mitigation and whether monitoring reports must be filed with the BLM. The applicant shall be held responsible for taking necessary actions to ensure the mitigation is successful.

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

- The BLM may accept an offer of volunteered monies to contribute to larger efforts to mitigate the impact of multiple actions when it is not feasible to require individual applicants to manage specific mitigation efforts. Such monies are only to be used for on-the-ground projects, land purchases, land exchanges, and conservation easements. In order to qualify as offsite mitigation, the funds collected must be identified for specific types of mitigation projects, and either the BLM or other parties should be identified as responsible for implementation of the project(s), depending on its location, whether on or off BLM lands. Before accepting money intended for expenditure off of BLM lands, managers must confirm that they have sufficient authority to expend funds in the proposed manner, such as grant or cooperative agreement authority. Often this authority may be found in FLPMA section 307(c) or in the Wyden Amendment¹. The BLM, however, will not waive or forgo onsite mitigation of impacts through payment of monies. The NEPA analysis and decision document must be specific regarding what types of projects will be funded and how the projects will contribute to the BLM's long-term resource management goals.
- Where the effectiveness of mitigation will depend on speculative future contributions from other applicants, such contributions cannot form the basis for a Finding of No Significant Impact (FONSI) or a conclusion in a NEPA decision document that the

¹ The Wyden Amendment, 16 U.S.C. 1011, provides: "For fiscal year 1997 and each fiscal year thereafter appropriations made for the Bureau of Land Management ... may be used by the Secretary of the Interior for the purpose of entering into cooperative agreements with the heads of other Federal agencies, tribal, State, and local governments, private and nonprofit entities, and landowners for the protection, restoration, and enhancement of fish and wildlife habitat and other resources on public or private land and the reduction of risk from natural disaster where public safety is threatened that benefit these resources on public lands within the watershed."

proposed action complies with a legal limitation on effects, such as those in the Clean Air Act.

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

- Monetary contributions to perform mitigation activities on the BLM lands must be made directly to the BLM in accordance with a formal agreement and with prior approval of the appropriate State Director.
- The BLM may also receive and manage funds for mitigation of certain activities on non-Federal lands under the authority of the Wyden amendment or similar authorities. There must be an agreement reflecting the assent of necessary parties to the proposed mitigation, which must include State or Federal agencies with regulatory responsibility for the affected resource. Before accepting money intended for expenditure off of BLM lands, managers must confirm that they have sufficient authority to expend funds in the proposed manner, such as grant or cooperative agreement authority. Often this authority may be found in FLPMA section 307(c) or in the Wyden amendment.
- The funds must be properly recorded on Form 4120-9 (“Proffer of Monetary Contributions”) and deposited into the appropriate 7100 account (usually 7122) for redistribution for activities on other BLM lands to offset adverse impacts for a particular action or class of actions.
- Accounts for offsite mitigation activities require assignment of specific project codes to track the contributions and subsequent expenditures. State Office budget staff can provide assistance in establishing the project codes.
- Offsite mitigation or financial contribution agreements must address the following items:
 - Authority to enter into an agreement;
 - Disposition of excess funds, if any;
 - Project codes and tracking of funds incoming and outgoing (especially in the case of multiple contributors);
 - Administrative surcharges;
 - Other agency rules and requirements for cooperators; and
 - Adequacy of funds for specific mitigation projects.
 - Agreements may also address:
 - Identification of specific projects or types of projects;
 - Project implementation commitments and timelines; and
 - Project progress reports.
- It is usually appropriate to involve other regulators of the impacted resource (such as State game and fish agencies) and any other directly affected or interested parties in planning and implementing specific offsite mitigation projects. However, the BLM must

retain decisionmaking authority for projects conducted on public lands managed by the BLM. In undertaking cooperative efforts, the Authorized Officer must ensure compliance with the Federal Advisory Committee Act (FACA), if applicable. (For additional information, refer to the Land Use Planning Handbook (H-1601-1) Appendix B.)

- Decisions to accept contributed funds will be made in accordance with the Department's Donations Policy set forth in 374 DM 6 and found at: http://elips.doi.gov/elips/DM_word/3692.doc, as well as BLM's implementing policy, once issued.

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

- It is permissible for non-Federal parties to carry out offsite mitigation on non-Federal lands. In such circumstances, the BLM's role is to consider the proposed mitigation in its permitting decision, as well as to ensure that it is provided information on the progress and/or completion of proposed offsite mitigation.
- Funds for mitigation to be performed on non-Federal lands must be managed by a third party, such as a State agency or a conservation organization. The donor should enter into an agreement with the recipient and the relevant regulatory agency(ies) documenting the purposes for which the funds will be utilized and will include a copy of the agreement with its application for BLM approval of actions for which the mitigation is to be considered.
- The BLM will not assume, by agreement or otherwise, control over the use of such funds. This includes direct control, such as by controlling vote in a decisionmaking group, or constructive control, such as by having the power to veto an expenditure decision. The BLM may participate, however, in decisions as to their use, so long as the BLM does not have ultimate decisionmaking authority. The purpose of this restriction is to ensure that such funds do not inadvertently become Federal funds and thereby subject to Federal rules governing their expenditure.

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

- No. The FLPMA requires the BLM to take action "...to prevent unnecessary or undue degradation of the lands." FLPMA section 302(b). Unnecessary or undue degradation is not allowed on the public lands. A project proposal that will result in unnecessary or undue degradation must be either denied or mitigated onsite to eliminate the potential for causing unnecessary or undue degradation. Offsite mitigation does not directly mitigate impacts onsite and therefore may not be used to compensate for unnecessary or undue degradation of the public lands.