U.S. Senate Committee on Energy & Natural Resources
Hearing to Examine the Presidential Memorandum on Mitigation

March 15, 2016

Testimony by Lynn Scarlett
Managing Director, Public Policy
The Nature Conservancy

Madam Chairwoman Murkowski, Ranking Member Cantwell, and Members of the Committee;

Thank you for providing me with this opportunity to testify at this hearing on the Presidential Memorandum on Mitigation. I have had the opportunity to meet with many of you during my nearly eight-year tenure at the Department of the Interior in the G.W. Bush Administration, including over three years as Deputy Secretary and Chief Operating Officer of the Department.

During my time at the Interior Department, I became familiar with the mitigation policies of its bureaus and offices and the ways in which effective application of policies to avoid, minimize, and offset impacts can support efficient, predictable agency decision-making. I now serve as the global Managing Director of Public Policy at The Nature Conservancy, an organization with over 60 years of experience in pioneering conservation in coordination and cooperation with private landowners, businesses, and federal, state, local, and tribal governments across the nation.

The Nature Conservancy is the world's largest conservation organization with over one million members. We impact conservation efforts on the ground in 69 countries around the world with the mission to conserve the lands and waters upon which all life depends. We strive for conservation approaches that benefit both people and nature.

With a rapidly growing world population and accompanying economic growth, the footprint of energy, mining, and infrastructure development is projected to impact 20 percent of the world's remaining natural lands by 2050, affecting the well-being of both communities and nature.[1] In the context of this development activity and economic use of land, our focus is on how to prevent impacts to the **most** critical lands and waters in a predictable manner, and, when impacts cannot be avoided or minimized, offset impacted resources to sustain biodiversity and the benefits that natural systems help provide, such as water purification, coastal resilience, and air quality.

[1] Oakleaf JR, Kennedy CM, Baruch-Mordo S, West PC, Gerber JS, et al. (2015) A World at Risk: Aggregating Development Trends to Forecast Global Habitat Conversion. PLoS ONE 10(10): e0138334.

This is mitigation done right – smart planning, efficient government decision-making, and predictability for project proponents – and it can result in positive outcomes for businesses, communities, and the environment. We believe that the November 2015 Presidential Memorandum on mitigation helps to support such an approach.

The Role of Mitigation in Supporting Structured Decision-Making

Mitigation – the avoidance and minimization of impacts, and then offsetting or compensating for remaining impacts – is not a new concept in the U.S. policy arena. The National Environmental Policy Act (NEPA), passed by this body in 1969, is a *procedural* statute that requires agencies undertaking federal actions to analyze anticipated environmental impacts and identify mitigation measures. NEPA regulations define mitigation as a five-step process: Avoidance, minimization, rectification, reducing or eliminating the impact over time, and compensation by replacing or providing substitute resources or environments.

Mitigation policy evolved through its application under the Clean Water Act and the Endangered Species Act. These authorities require mitigation as a *condition* for receiving authorization to impact the environment as a means to meet statutorily defined goals. Through these provisions, a whole new private restoration market was born. These conditional mitigation programs support significant contributions to conservation and habitat restoration in the U.S.

Although these and other mitigation policies are intended to support thoughtful consideration of environmental impacts and economic activity, their track record for efficient project review and robust environmental outcomes has been lacking. In addition, the mechanisms for delivering compensatory mitigation have operated under different agency rule sets, which stymied private sector investment in restoration.

Recognizing these shortcomings, in 2008, the George W. Bush administration clarified a set of rules to which **all** wetland compensatory mitigation mechanisms would be held. The enhanced clarity and predictability provided by these rules have further invigorated the private restoration economy and serve as a hallmark for smart mitigation policy.

Support for Better Outcomes for Business, Communities and the Environment

Mitigation policies exist in some form or fashion across a wide variety of agency authorities and practices. However, it has long been understood that the approximately $3.8 billion dollars directed annually to conservation through existing programs fall short of their potential to support significant conservation outcomes. In 2001, the National Academy of Sciences looked at the track record of wetland mitigation and found that 50% to 53% of the implemented mitigation projects did not meet permit requirements.[2] The Committee concluded that poor site selection and planning,

[2] National Research Council. 2001. *Compensating for Wetland Losses Under the Clean Water Act*. National Academy Press.

noncompliance with permit conditions, and a lack of adequate performance standards all contributed to the failure of compensatory mitigation projects to offset wetland losses. Their solutions included the use of a watershed approach to guide site selection and holding compensation projects to meeting measurable performance standards.

These recommendations were incorporated into the wetland mitigation rules in 2008 and this set of rules has, as discussed above, become the benchmark for sound mitigation policy. The Presidential Memorandum is an acknowledgement of these advances in mitigation policy and seeks to see them applied uniformly across the array of existing agency mitigation policies. For this reason, the Presidential Memorandum directs agencies to utilize watershed- or landscape-scale plans to guide mitigation decisions and set measurable performance standards for projects and programs to access mitigation effectiveness.

In addition to past shortcomings with environmental outcomes, the disparities among different agencies' mitigation policies also caused significant project delays, increased project costs, and created an unpredictable environment for developers. A transportation project that, for example, will bisect wetlands, impact threatened or endangered species, and fragment migratory bird habitat, may face a protracted permitting process and encounter a variety of mitigation requirements that operate under vastly different rules. Such confusing rules are neither good for the environment nor for businesses and the economy.

As a result, The Nature Conservancy has long believed that our national mitigation policy was in need of some common sense updates. Such updates – based on our on-the-ground experiences across all 50 states – can support more efficient project review and better outcomes for communities, businesses, and the environment. Although it is important to get the overall framework for mitigation right, ensuring that **all** mitigation policies operate under a clearly stated and predictable set of principles is an essential condition for success.

Consistent Standards for Mitigation

The Nature Conservancy has articulated a core set of principles to which we believe all mitigation policies and projects should adhere. These principles, laid out in *Achieving Conservation and Development: 10 Principles for Applying the Mitigation Hierarchy*, are not new.[3] They are well established in the peer-reviewed science and policy literature, domestically and abroad.

Among these principles is the principle that the mitigation hierarchy (avoidance, minimization, and mitigation) should be applied in a **landscape context** and, when possible, should be guided by **early planning**. Potential conflicts between conservation

[3] McKenney, Bruce and Jessica Wilkinson. April 2014. *Achieving Conservation and Development: 10 Principles for Applying the Mitigation Hierarchy*. The Nature Conservancy.

and development are reduced when developers know in advance what areas should be avoided or prioritized, and project review is more efficient when project proponents and agencies have already laid out clear expectations for mitigation.

One particularly successful example is the Western Solar Plan. Approved by the Department of the Interior in October 2012, the Plan provides a single blueprint for utility-scale solar energy permitting on Bureau of Land Management (BLM)-administered lands across six southwestern states. The plan represents an unprecedented effort to use proactive landscape-scale planning to guide the development of solar energy on public lands to low conflict areas, support efficient project review, and create clear expectations for mitigation in advance. In 2014, BLM held an auction for the solar sites, which resulted in $5.8 million in bids from energy developers to develop six parcels covering 3,083 acres. In June 2015, BLM approved three large-scale projects on those parcels. This approach reduced the project permitting time **by more than half**.

In Southern California, the San Diego Association of Governments, which is made up of 18 cities and county governments, has demonstrated that early planning for mitigation yields tremendous cost savings. The organization's Environmental Mitigation Program undertakes early planning for its transportation-related mitigation needs rather than addressing mitigation on a project-by-project basis. They estimated that while a project-by-project approach would cost close to $850 million, their early mitigation approach would save them $200 million.[4] In 2013, the program reported that the approach led to the agency paying roughly **half** the estimated costs for meeting its mitigation needs.[5]

The Presidential Memorandum seeks to build on and institutionalize these types of successes. It does so by encouraging agencies to utilize existing landscape-scale plans to identify "areas where development may be most appropriate" and where high natural resource values should be best avoided. And it directs agencies to "give preference to advance compensation mechanisms that are likely to achieve clearly defined environmental performance standards." These are measures of good mitigation practice that have demonstrated cost savings for governments and industry, greater predictability for project proponents, and because critical resources are avoided, better results for the environment and people.

The Conservancy also believes that mitigation policies should be guided by a clear **goal** that drives accountability in applying a mitigation approach of avoiding, minimizing, and offsetting impacts. The 2001 National Academy of Sciences study concluded that better mitigation performance would be achieved if mitigation goals were clear.

---

[4] San Diego Association of Governments. February 2015. "TransNet: Environmental Mitigation Program." Fact Sheet.

[5] San Diego Association of Governments. "TransNet: Environmental Mitigation Program – 2013 Status Report."

In keeping with good mitigation practice, the Presidential Memorandum directs agencies to establish a clear goal for mitigation – net benefit or, at a minimum, no net loss, to the extent permitted by each agency's existing legal authorities. The terms "no net loss" and "net benefit" are common standards used in mitigation policies. The "no net loss" goal was first articulated by George H. W. Bush in the wetlands context and the U.S. Fish and Wildlife Service used the net benefit goal in its 2008 Recovery Crediting Guidance. These goals are important because they are clear and they drive accountability in applying the mitigation hierarchy.

Without such a goal, compensatory mitigation requirements are unpredictable and default to protracted, negotiated settlements that may seem arbitrary or unlinked to specific outcomes that offset impacts. With such a goal, mitigation policies support a structured, rational, and transparent framework for ensuring that compensatory mitigation requirements are proportional to impacts.

We believe that when mitigation policies are held to a common set of principles they provide greater predictability for project proponents and the private restoration industry. The Presidential Memorandum articulates a clear set of principles to which all mitigation policies and projects should be held. If implemented, it could yield significant project review efficiencies and reduced administrative effort, greater predictability and certainty for project proponents and the private mitigation market, co-location of project infrastructure to avoid unnecessary and inefficient expansion of areas of impact, and scientifically sound and economically fair offsets for residual impacts, all leading to better outcomes for the environment and communities.