

Chapter 4

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Federal Mitigation for Project Development

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§ 4.01. Introduction.

All types of energy and other infrastructure projects have some level of environmental impacts. Some of these impacts can be readily avoided or minimized. Others are unavoidable. When, and how, must project developers further conduct compensatory mitigation to offset those remaining impacts? That is a question that developers and the government alike have been wrestling with for decades, with varying results for different projects. Recent developments, however, signal a renewed focus by the government on ensuring successful and meaningful mitigation outcomes, and resulting in more stringent performance obligations being placed on permit applicants. The significance of these developments cannot be understated, and will almost certainly affect environmental reviews and permitting for all types of actions on federal lands and private lands alike. This chapter discusses the underlying legal grounds for mitigation, recent trends in federal agencies' approaches to mitigation, and considerations for optimally approaching this significant step in project permitting.

§ 4.02. Legal Triggers for Mitigation.

Many projects are engineered from the start to avoid and minimize environmental impacts, and incorporate additional measures to mitigate potentially adverse remaining impacts. Some of these improved outcomes are a result of developers' robust planning and ever-increasing sensitivity to environmental and citizen concerns. Yet, there are also many statutory and regulatory requirements driving mitigation efforts for actions with a federal government nexus. An increasing body of agency guidance also exists that, while not binding legally, as a practical matter continues to heighten and tighten mitigation for energy and other projects. This section outlines some of the key causes for mitigation encountered by various energy projects. Under many environmental law requirements, this mitigation mandate may apply on privately owned lands as well as public lands.

[1] — Clean Water Act (33 U.S.C. §§ 1251-1388).

Project developers should consult the Clean Water Act (CWA) early and often when working in or around surface waters or wetlands that may be subject to governmental oversight. Most significantly, CWA Section 404