President Trump's March 28th Executive Order on Promoting Energy Independence and Economic Growth has understandably received a great deal of attention from the environmental community. Commentators, including those on Legal Planet, have examined the order's efforts to roll back the climate change initiatives of the Obama administration. Another aspect of the order, though, has been entirely overlooked and could have serious implications for market-based natural resources law and policy.

Lost amidst the carnage of climate reports, guidance documents, and presidential memoranda that were obliterated by the Executive Order, Section 3 also revoked the Presidential Memorandum on Mitigating Impacts on Natural Resources from Development and Encouraging Related Private Investment. The Memorandum had been signed on November 3, 2015, and generally welcomed by both the environmental and mitigation banking community.

To understand the reasons for the Memorandum, we need to go back to 1988. As a presidential candidate, George H.W. Bush had made a campaign pledge of "no net loss" for wetlands. President Clinton reiterated this commitment in his campaign four years later. President George W. Bush's administration stated its commitment to no net loss of wetlands, as did President Obama.

Pledging not to lose any wetlands was all well and good, but the challenge was how to achieve this since wetlands continued being lost to development. The solution developed by the EPA and Army Corps of Engineers was a strategy known as wetlands mitigation banking (WMB). In WMB, a "bank" of wetlands habitat is created, restored, or preserved and then made available to developers of wetlands habitat who must "buy" habitat mitigation as a condition of government approval for development (generally under a Clean Water Act 404 permit). As wetlands are converted, new mitigated wetlands are created to offset the loss. If all goes well, there are actually more acres of wetland created than destroyed.

JB Ruhl and I, among others, have highlighted concerns over WMB, particularly in terms of whether it actually conserves the value of ecosystem services, but mitigation banking has thrived and WMB now resembles a commodity market, with freewheeling, entrepreneurial wetlands banks offering for sale (and profit) finished offsite wetlands as "credits" to anyone who is in need of mitigation for their 404 permits. This market mechanism has also provided a model for endangered species protection.

President Obama's Memorandum was far-reaching, directing the Departments of Defense, Interior, Agriculture, NOAA and EPA to follow a hierarchy for activities with harmful effects on land, water and wildlife – first avoidance, then minimization, and then compensatory mitigation to offset impacts to public lands. Agencies' mitigation goals were set as "a net benefit goal or, at a minimum, a no net loss goal for natural resources the agency manages that are important, scarce, or sensitive, or wherever doing so is consistent with agency mission and established natural resource objectives."

Agencies were given short implementation timelines — 180 days for the U.S. Forest Service to implement guidance policies and two years for mitigation regulation, one year for BLM and the Fish & Wildlife Service to finalize mitigation policies, and one year for the Department of the Interior to develop program guidance for the use of mitigation projects and measures on Interior lands.

Given the range of views on mitigation policies within the government’s land and wildlife agencies, this Memorandum was significant in sending a clear message endorsing the use of mitigation mechanisms in resource management, in many cases potentially mitigation banking. The National Agricultural Law Center hailed it as the dawn of “A New Era of Compensatory Mitigation for Impacts on Natural Resources.” Given the recent Executive Order, the cheering was obviously premature.

So given all the excitement over the Memorandum by the private sector mitigation banking community, why was it one of the very first Obama environmental policies thrown under the bus? The answer isn’t obvious. The Memorandum could eventually have had some impacts on energy projects, but it’s hardly a cornerstone of the Obama administration’s climate strategy. The most likely explanation (and this is pure speculation) is that resource development interests opposed the Memorandum because of its calls for ensuring not just no net loss but a “net benefit goal” following harm to public lands. What constitutes a net benefit was not defined and may have been feared as an expensive threat for resource-based extractive interests. It may be that someone with West Wing influence was able to slip the Memorandum onto the list of climate change policies in the crosshairs of the Executive Order.

Even so, the policies had not yet been implemented and they could have injected a good deal of private capital into resource restoration projects. It seems an odd step for an administration with an avowed affinity for business to destroy in one of its very first acts arguably the most pro-market environmental initiative of the Obama administration.