

Compensatory Mitigation Rule:

Improving, Restoring, and Protecting the Nation's Wetlands and Streams

Questions and Answers *(As of 27 March 2008)*

Q1: What is compensatory mitigation?

A1: The objective of the Clean Water Act (CWA) is “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” Toward achievement of this goal, the CWA prohibits the discharge of dredged or fill material into wetlands, streams, and other waters of the United States unless a permit issued by the U.S. Army Corps of Engineers (Corps) or approved State under CWA Section 404 authorizes such a discharge. When there is a proposed discharge, all appropriate and practicable steps must first be taken to avoid and minimize impacts to aquatic resources. For unavoidable impacts, compensatory mitigation is required to replace the loss of wetland, stream, and/or other aquatic resource functions. The Corps (or approved state authority) is responsible for determining the appropriate form and amount of compensatory mitigation required. Methods of providing compensatory mitigation include aquatic resource restoration, establishment, enhancement, and in certain circumstances, preservation.

Q2: How is compensatory mitigation accomplished?

A2: Compensatory mitigation is typically accomplished through the following three ways:

1. Mitigation Banks: A permit applicant may obtain credits from a mitigation bank. A mitigation bank is a wetland, stream or other aquatic resource area that has been restored, established, enhanced, or preserved. This resource area is then set aside to compensate for future impacts to aquatic resources resulting from permitted activities. The value of a bank is determined by quantifying the aquatic resource functions restored, established, enhanced, and/or preserved in terms of “credits.” Permittees, upon approval of regulatory agencies, can acquire these credits to meet their requirements for compensatory mitigation.
2. In-Lieu Fee Mitigation: A permit applicant may make a payment to an in-lieu fee program that will conduct wetland, stream or other aquatic resource restoration, creation, enhancement, or preservation activities. In-lieu fee programs are generally administered by government agencies or non-profit organizations that have established an agreement with the regulatory agencies to use in-lieu fee payments collected from permit applicants.
3. Permittee-Responsible Mitigation: A permittee may be required to provide compensatory mitigation through an aquatic resource restoration, establishment, enhancement and/or preservation activity. This compensatory mitigation may be provided at or adjacent the impact site (i.e., on-site mitigation) or at another location, usually within the same watershed as the permitted impact (i.e., off-site mitigation). The permittee retains responsibility for the implementation and success of the mitigation project.

Mitigation banks and in-lieu fee mitigation are forms of “third-party” compensation because a third party, the bank or in-lieu fee sponsor, assumes responsibility from the permittee for the implementation and success of the compensatory mitigation.

Q3: What does this final rule do?

A3: The new rule improves and consolidates existing regulations and guidance, to establish equivalent standards for all types of mitigation under the Clean Water Act Section 404 regulatory program. The new rule will also provide one set of regulations for compensatory mitigation, instead of the numerous separate guidance documents that have been in use up to now. This rule uses improved science and results-oriented standards to increase the quality and effectiveness of wetland and stream restoration and conservation practices. The rule does not change when compensatory mitigation is required, but it does change where and how it is required.

The rule establishes equivalent sets of standards that are based on better science, increased public participation, and innovative market-based tools. These equivalent standards take into account the inherent differences among mitigation banks, in-lieu fee programs, and permittee-responsible mitigation, in an effort to maximize the number of ecologically-successful compensatory mitigation projects that project proponents can use to offset their permitted losses of aquatic resources. We believe that this rule will substantially improve compensatory mitigation project performance and accountability.

Q4: What are the most significant changes required by this rule compared to previous mitigation practices.

A4: The most significant change required by the new rule is that compensation projects provided by all three compensation mechanisms (i.e., permittee-responsible compensatory mitigation, mitigation banks, and in-lieu fee mitigation) must have mitigation plans which include the same 12 fundamental components: objectives; site selection criteria; site protection instruments (e.g., conservation easements); baseline information (for impact and compensation sites); credit determination methodology; a mitigation work plan; a maintenance plan; ecological performance standards; monitoring requirements; a long-term management plan; an adaptive management plan; and financial assurances. This important change will dramatically improve the planning, implementation and management of all compensation projects and ensure more effective wetland and stream replacement projects.

Q5: Does the rule provide any criteria for deciding which compensatory mitigation options should be used?

A5: In order to reduce risk and uncertainty and help ensure that the required compensation is provided, the rule establishes a preference hierarchy for mitigation options. The most preferred option is mitigation bank credits, which are usually in place before the activity is permitted. In-lieu fee program credits are second in the preference hierarchy, because they may involve larger, more ecologically valuable compensatory mitigation projects as compared to permittee-responsible mitigation. Permittee-responsible mitigation is the third option, with three possible circumstances: (1) conducted under a watershed approach, (2) on-site and in kind, and (3) off-site/out-of-kind. While on-site/in-kind mitigation approaches will continue to be evaluated, the rule

acknowledges that there are circumstances where off-site or out-of-kind compensatory mitigation may be more beneficial for a watershed.

Q6: What are the goals of the final rule?

A6: The primary goals of this rule are to:

- Implement environmentally effective standards for compensatory mitigation that are based on best available science and incorporate key National Research Council (NRC) recommendations for improving the success of compensatory mitigation;
- Create a “level playing field” among the three compensatory mitigation mechanisms through equivalent standards and greater accountability, so that providers of timely, high-quality mitigation are preferred, because there is greater assurance that the compensatory mitigation will be successful;
- Increase the efficiency and predictability of the process of proposing compensatory mitigation and approving new mitigation banks and in-lieu fee programs; and
- Enhance public participation in compensatory mitigation decision-making.

Q7: Why is this rule being issued?

A7: The 2004 National Defense Authorization Act (PL 108-136) calls for the development of regulations, consistent with Section 404 of the Clean Water Act, that establish equivalent standards and criteria for mitigation banks, in-lieu fee programs and permittee-responsible mitigation.

Q8: Why does this rule encourage mitigation banking and in-lieu fee programs?

A8: Mitigation banks are a “performance-based” form of wetland and stream replacement because, unlike in-lieu fee mitigation and permittee-responsible mitigation, the tradable aquatic resource restoration credits generated by banks are tied to demonstrated achievement of project goals. Thus, the rule establishes an explicit preference for the use of credits from mitigation banks when appropriate credits are available. The new rule encourages the use of mitigation banks and in-lieu fee programs over use of permittee-responsible mitigation because mitigation banks and in-lieu fee programs usually provide consolidated compensatory mitigation projects that have less risk and uncertainty. In its 2001 critique of wetland replacement practices, the NRC highlighted advantages of third-party compensation such as mitigation banks and in-lieu fee programs noting that:

- Mitigation banks and in-lieu fee programs use a multi-resource agency process that brings more expertise and collaboration into the planning, approval, and oversight of wetland restoration and protection projects; and
- Mitigation banks and in-lieu fee programs have less risk than permittee-responsible mitigation projects to achieve desired long-term outcomes and to

provide wetlands, streams, and other aquatic habitats that are protected in perpetuity by organizations dedicated to resource conservation.

Q9: How does this rule treat in-lieu fee mitigation?

A9: The rule revises and improves the requirements for in-lieu fee programs in order to address concerns regarding their past performance and equivalency with the standards imposed on mitigation banks and permittee-responsible mitigation. These reforms are based to a large extent on existing practices of the most successful in-lieu fee programs currently operating. The reforms to improve accountability and performance include:

- 1) An advance planning requirement;
- 2) A cap on the number of advance credits that can be released for sale before an in-lieu fee project site is secured and a mitigation plan is approved;
- 3) Improved financial accounting requirements;
- 4) The same interagency/public review and ecological/administrative requirements as mitigation banks; and
- 5) Limiting in-lieu fee sponsors to government agencies and non-profit organizations.

Q10: How does this rule relate to the national goal of “No Net Loss” of wetlands in the Section 404 permit program?

A10: The rule is specifically designed to improve our ability to ensure no net loss of wetlands by addressing key recommendations associated with compensatory planning, monitoring, and long-term maintenance raised by the NRC in its 2001 report evaluating compensatory mitigation. The NRC report summarized many studies which suggested that compensatory mitigation practices were falling short of providing for “no net loss” of wetland quality and quantity.

Q11: Does the mitigation sequence (i.e., avoid, minimize, and compensate) still apply?

A11: Yes. The mitigation sequence established by the Clean Water Act Section 404(b)(1) Guidelines has been retained in this rule. Proposed impacts must be avoided to the maximum extent practicable; remaining unavoidable impacts must then be minimized, and finally compensated for to the extent appropriate and practicable. The final rule affirms the mitigation sequence and clarifies the criteria for appropriate measures to compensate for unavoidable losses.

Q12: Will applicants have more flexibility in selecting compensatory mitigation options as a result of the new rule?

A12: Yes, the provisions concerning mitigation banking should make banking a more viable mitigation option in many regions where it is not now available. The rule also clarifies the consideration of watershed-scale factors in the selection of appropriate mitigation sites. This clarification may increase the practical viability of mitigation proposals involving off-site or out-of-kind replacement that still provide appropriate aquatic resource replacement in ways that are beneficial to the watershed. Compensatory mitigation options available to permittees include on-site mitigation, off-site mitigation, or a combination of on-site and off-site mitigation within the watershed. Off-site mitigation may be provided by mitigation banks or in-lieu fee programs, or through permittee-responsible mitigation. The Corps is the final decision-maker

regarding whether a proposed compensatory mitigation option provides appropriate compensation for a Department of the Army permit.

Q13: Is mitigation still required to be “on-site” (i.e., located close to the impact) and “in-kind” (i.e., the replacement is of the same ecological type as the impacted resource)?

A13: Since 1990, there has been a general preference that mitigation should occur on-site and in-kind. This rule retains the preference for in-kind mitigation however it replaces the on-site preference with a hierarchy that considers compensation options in the following order 1) use of credits from a mitigation bank, 2) use of credits from an in-lieu fee program, 3) permittee-responsible compensatory mitigation developed using a watershed approach, 4) on-site/in-kind permittee-responsible mitigation, and 5) off-site/out-of-kind permittee-responsible mitigation.

Q14: Does this rule encourage a watershed approach to compensatory mitigation decision-making as recommended by the National Research Council and the National Mitigation Action Plan?

A14: Yes, this rule states that, where appropriate and practicable, compensatory mitigation decisions should be made from a watershed perspective in which the type and location of compensatory mitigation follows from an analytically-based watershed assessment to assure that the proposed compensation furthers watershed goals. This assessment may take the form of a watershed plan, which typically involves an intensive regional planning effort involving many stakeholders. It may also be a less formal “watershed approach,” involving the analysis of data concerning regional environmental issues, efforts to inventory historic trends in aquatic resource condition, and the prioritization of aquatic resource restoration opportunities. Such an approach involves consultation with stakeholders, resource agencies and environmental experts as appropriate.

Q15: When does the new rule go into effect?

A15: The final rule goes into effect 60 days following publication in the Federal Register.

Q16: If I have already submitted a permit application, do I need to change my application or project to comply with the new rule?

A16: There will be a transition period from the current mitigation practices and procedures to those of the new rule. Permit applications received prior to the effective date will be processed in accordance with existing regulations and guidance. Permit applications received after the effective date of this rule will be subject to the new rule, unless the district engineer has made a written determination that applying these new rules to a particular project would result in a substantial hardship to a permit applicant. In such cases, the district engineer will consider whether the applicant can fully demonstrate that substantial resources have been expended or committed in reliance on previous guidance governing compensatory mitigation for DA permits.

Q17: Do existing mitigation banks and in-lieu fee programs need to be changed to satisfy the requirements of the new rule?

A17: Existing mitigation banks that were approved 90 days before publication of the rule in the Federal Register may continue to operate under the terms of their existing instruments. However, if an existing mitigation banking instrument is modified, or if a new mitigation bank is proposed, it must be consistent with the new rule.

Existing in-lieu fee programs that were approved 90 days before publication of the rule in the Federal Register may continue to operate under the terms of their existing instruments for a two-year period, but the Corps may grant an extension for up to three additional years. Any revisions made to the in-lieu-fee program instrument must be consistent with the new rule. An in-lieu fee project constructed under the terms of a previous instrument may continue to operate under the terms of that instrument indefinitely, as long as the Corps determines that the project is providing appropriate compensatory mitigation consistent with the terms of the rule.

Q18: How quickly would proposed mitigation banks and in-lieu fee programs be approved as a result of the new rule?

A18: A significant change is the establishment of specific evaluation and decision-making time frames for proposed new mitigation banks and in-lieu fee programs. The Corps is the final decision-maker for approving proposed mitigation banking or in-lieu fee program instruments, although it will receive input from Interagency Review Teams comprised of other federal, state, tribal, and local agencies. We expect that decisions on most mitigation banks and in-lieu fee programs would be made within 225 days or so of required federal agency review time, unless substantial concerns are raised or there is a need to address other issues, such as endangered species, historic properties, or tribal concerns. In cases where dispute resolution amongst the Corps and the team members is necessary, the review time is expected to take 330 days or so of required federal agency review time. The Corps can suspend or terminate instruments in cases of poor mitigation bank or in-lieu fee program performance.

Q19: Where can I get a copy of the new rule?

A19: You can find the new Compensatory Mitigation Rule in the Federal Register or online at: <http://www.usace.army.mil/cw/cecwo/reg/> or <http://www.epa.gov/wetlandsmitigation> . You can also send a request to David Olson at david.b.olson@usace.army.mil or to U.S. Army Corps of Engineers, 441 G Street NW, Washington, DC 20314; or Palmer Hough at hough.palmer@epa.gov or to U.S. Environmental Protection Agency, Wetlands Division (4502T), 1200 Pennsylvania Avenue, NW, Washington, DC 20460.