

New Wetland Mitigation Rules

Where Can I find the actual regulations?

<http://www.epa.gov/fedrgstr/EPA-WATER/2006/March/Day-28/w2969.htm>

Summary

Following is the summary excerpted from the US EPA Federal Register Environmental Documents “Compensatory Mitigation for Losses of Aquatic Resources”, March 28, 2006. For the complete record, visit the link listed above.

SUMMARY: The U.S. Army Corps of Engineers (the Corps) and the Environmental Protection Agency (EPA) are proposing to revise regulations governing compensatory mitigation for activities authorized by permits issued by the Department of the Army. The proposed regulations are intended to establish performance standards and criteria for the use of permittee-responsible compensatory mitigation and mitigation banks, and to improve the quality and success of compensatory mitigation projects for activities authorized by Department of the Army permits. The proposed regulations are also intended to account for regional variations in aquatic resource types, functions, and values, and apply equivalent standards to each type of compensatory mitigation to the maximum extent practicable. The proposed rule includes a watershed approach to improve the quality and success of compensatory mitigation projects in replacing losses of aquatic resource functions, services, and values resulting from activities authorized by Department of the Army permits. We are proposing to require in-lieu fee programs, after a five-year transition period, to meet the same standards as mitigation banks.

The following article was printed in the EBX Spring 2006 Newsletter:

Wetland Rules Set to Change

“Good things come in three’s.” Do they still? In wetlands mitigation, the rule of threes was fairly straightforward. If you needed to mitigate for wetlands impact, you had three clear choices: do the mitigation yourself, pay a fee “in lieu of” mitigation, or use the services of private mitigation banking specialists.

Because private banks had stricter rules governing their construction and maintenance, many opted to select what was on the surface an easier or more affordable option, doing it on their own. And in many areas, paying a fee was a less expensive option than buying credits from an approved mitigation bank.

All of that will now change. Two years ago the US Government directed the US Army Corps of Engineers to “issue regulations establishing performance standards and criteria for use of on-site, off-site, and in-lieu fee mitigation and mitigation banking,” according to Ecosystem Marketplace. While much followed that seemingly simply stated goal, the real objective was more straightforward—the Government wanted the Corps to ensure a

higher level of performance for the restoration efforts being performed by bringing all options for mitigation up to the standards currently in place for mitigation banks.

What does this mean for organizations in need? The new regulation recently posted for public comment on the Federal Register, Compensatory Mitigation for Loss of Aquatic Resources, appears to make the “do it yourself” and “fees in lieu” more complicated and hence more expensive. Certainly, they will still be available, only with higher risks, a requirement for more advanced and technical capability, and perhaps the potential for increased long-term liability. Changes include a higher level of procedural and technical standards relating to project specific mitigation equivalent to what is in place for mitigation banks today. Also, the proposed changes will promote landscape-scale projects through the preference for larger scale mitigation banks and watershed-based mitigation planning.

At Environmental Banc and Exchange, we are prepared for the changes and ready to handle them for our clients. We already have the in-house talent, the financial wherewithal to undertake projects and meet performance standards, a proven track record with thousands of acres of wetlands and over 130,000 linear feet of streams constructed and under management, and a deep knowledge of the legal, financial, and regulatory issues that can no impact and in the future will no doubt affect the efficient use of wetlands mitigation. As developments occur, we will be happy to provide you with up-to-date information, as well as advise you on how these new rules might impact your business.

EPA Supplemental Information

Following is the supplemental information excerpted from the US EPA Federal Register Environmental Documents “Compensatory Mitigation for Losses of Aquatic Resources”, March 28, 2006. For the complete record, visit the link <http://www.epa.gov/fedrgstr/EPA-WATER/2006/March/Day-28/w2969.htm>

SUPPLEMENTARY INFORMATION:

I. Background

Section 314 of the National Defense Authorization Act for Fiscal Year 2004 (Pub. L. 108-136) requires the Secretary of the Army, acting through the Chief of Engineers, to issue regulations “establishing performance standards and criteria for the use, consistent with section 404 of the Federal Water Pollution Control Act (33 U.S.C. 1344), of on-site, off-site, and in-lieu fee mitigation and mitigation banking as compensation for lost wetlands functions in permits issued by the Secretary of the Army under such section.”

The statute states that the regulation should address wetlands compensatory mitigation. However, we believe that this regulation should apply to compensatory mitigation for all types of aquatic resources that can be impacted by activities authorized by Department of the Army permits, including streams and other open waters. We also believe that this regulation should apply to compensatory mitigation required for activities in navigable waters of the United States that are subject to regulatory jurisdiction under Sections 9 and 10 of the Rivers and Harbors Act

of 1899. We believe this approach does not conflict with the intent of the statute, and will provide the regulated public with clear national standards and requirements for all aquatic resource compensatory mitigation required by Department of the Army permits, while allowing district engineers flexibility to address permit-specific situations. We also believe this approach will enhance regulatory efficiency and improve protection of the aquatic environment.

The statute states that the regulation should be developed by the Department of the Army, with the provision that the standards and criteria developed be consistent with Section 404 of the Clean Water Act. We believe that the goals of the Clean Water Act and the Defense Authorization Act will be more effectively met if this proposed rule is issued jointly by the Corps and EPA. A jointly-issued proposed rule reflects the important roles played by both agencies in the Section 404 program, in which the permit program is administered by the Corps, while the responsibility for developing the regulations providing the environmental criteria for permit issuance is given to EPA. Since the proposed rule is in part a clarification of EPA regulations concerning Section 404 mitigation, a joint rule helps to ensure maximum consistency in the implementation of the section 404 regulatory program. Furthermore, CWA Section 501(a) authorizes EPA to conduct any rulemaking necessary to carry out EPA's functions under the Clean Water Act.

Joint issuance also provides basic regulatory consistency. Environmental criteria for the selection of disposal sites for discharges of dredged or fill material are set by EPA regulations at 40 CFR part 230, and referenced by Corps regulations at 33 CFR part 320. Since the proposed rule is in part a clarification of EPA's regulations at 40 CFR part 230, EPA must add the proposed rule text to its existing regulations in order to maintain consistency between the two linked Parts of the CFR. Making the two agencies' additions concurrent will avoid any confusion on the part of the regulated community and the public. Moreover, the history of a joint EPA/Corps relationship on mitigation issues is long. All national guidance on compensatory mitigation has been developed and issued jointly by the Corps and EPA, including Regulatory Guidance Letter 02-02 (issued on December 24, 2002); the "Federal Guidance for the Establishment, Use, and Operation of Mitigation Banks" (as published in the November 27, 1995, issue of the Federal Register, [60 FR 58605](#)); the "Federal Guidance on the Use of In-Lieu Fee Arrangements for Compensatory Mitigation Under Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act" (as published in the November 7, 2000, issue of the Federal Register, [65 FR 66914](#)); and the "Memorandum of Agreement Between the Environmental Protection Agency and the Department of the Army Concerning the Determination of Mitigation Under the Clean Water Act Section 404(b)(1) Guidelines" (issued on February 6, 1990). We also believe the proposed rule establishes, to an extent that is feasible and practical, equivalent standards for all forms of compensatory mitigation, given the basic differences between the current mechanisms for providing compensatory mitigation (i.e., permittee-responsible mitigation, mitigation banks, and in-lieu fee programs). In many cases, it is not practical to impose all the same requirements on permittee-responsible mitigation projects as on mitigation banks, so some differences in the requirements for these types of mitigation remain. However, we are proposing to require in-lieu fee program sponsors to modify their programs within five years to comply with the same standards and requirements as mitigation banks, to provide greater assurances that compensatory mitigation projects undertaken by in-lieu fee programs will successfully replace lost aquatic resource functions and services. We are also seeking comment on alternative approaches that would retain in-lieu fee programs as a separate category of mitigation with somewhat different requirements. These alternatives are explained in further detail in Section VI of this preamble.

By establishing, to the maximum extent practicable, equivalent standards for all forms of compensatory mitigation, we believe success rates of compensatory mitigation projects will improve, and entrepreneurs and others will be encouraged to develop mitigation banks.

Improving the processes applicable to the development and approval of mitigation banks is expected to result in more mitigation banking proposals, which would provide more compensatory mitigation in advance of authorized impacts to waters of the United States. The proposed rule does not apply to compensatory mitigation that may be required for impacts other than to aquatic resources resulting from activities authorized by DA permits, such as impacts to historic properties. Under appropriate circumstances, a DA permit may require compensatory mitigation measures to ensure compliance with the Endangered Species Act or the National Historic Preservation Act, or to address some other public interest requirement. Those compensatory mitigation requirements are addressed through other regulations and authorities.

In preparing the proposed rule, we considered the findings and recommendations in the National Research Council's report issued in 2001 entitled "Compensating for Wetland Losses Under the Clean Water Act" (NRC Report). We also contemplated other studies and documents cited in the draft Environmental Assessment/Regulatory Analysis that was prepared by the Corps for this proposed rule. The Environmental Assessment/Regulatory Analysis is available at the Corps Headquarters Regulatory Home page at <http://www.usace.army.mil/inet/functions/cw/cecwo/reg/citizen.htm>.

The proposed rule incorporates many of the recommendations suggested in the NRC Report to improve the ecological success and sustainability of wetland compensatory mitigation projects. Through the standards and requirements in this proposed rule, we intend to improve the quality and success of aquatic resource restoration, establishment, enhancement, and preservation activities used to provide compensatory mitigation for DA permits, and to help maintain and improve the aquatic environment within watersheds.

In the NRC Report, the committee concluded that a watershed approach would improve permit decision making, and stated that wetland functions must be understood from a watershed perspective to fulfill the objectives of the Clean Water Act. The committee noted that an automatic preference for in-kind and on-site compensatory mitigation is inconsistent with a watershed approach since there are circumstances in which on-site or in-kind mitigation is neither practicable nor environmentally preferable. In addition, the committee suggested using an analytical process for assessing wetland needs within a watershed and the potential for compensatory mitigation projects to persist over time.

In the proposed rule, we revise compensatory mitigation policies and procedures to conform with current principles of ecological restoration and landscape ecology. The proposed rule also aims to reduce regulatory burdens on mitigation bank sponsors by making the mitigation bank approval process more efficient through changes in the review and approval process.

The proposed rule also complements the Corps' and EPA's ongoing efforts to implement the National Wetlands Mitigation Action Plan (NWMAP). In response to the NRC report and other independent critiques of the effectiveness of compensatory mitigation for authorized losses of wetlands and other aquatic resources under Section 404 of the Clean Water Act, the Corps, EPA, and the Departments of Agriculture, Commerce, Interior, and Transportation released the NWMAP on December 26, 2002. The NWMAP includes 17 tasks designed to improve the ecological performance and results of compensatory mitigation. Thus far, eight of the tasks called for in the NWMAP have been completed and work continues on efforts to improve wetland impact and mitigation data collection and tracking. However, work on the remaining guidance documents called for in the NWMAP awaits finalization of this proposed rule.

The proposed rule is consistent with Executive Order 13352, Facilitation of Cooperative Conservation. The proposed rule includes collaborative approaches to decision-making for compensatory mitigation required by DA permits consistent with the definition of cooperative conservation in the Order. The provisions of the rule will ensure that determinations regarding compensatory mitigation requirements take into account the interests of landowners and other legally recognized interests in land and other natural resources, and accommodate agency and local participation in federal decision-making.

II. General Principles in the Proposed Rule

For the purposes of the Corps Regulatory Program, compensatory mitigation is used to replace aquatic resource functions, services, and values that are lost to permitted impacts. Compensatory mitigation for losses of aquatic resources can help sustain or improve watershed functioning, and support the objective of the Clean Water Act, which is to “restore and maintain the chemical, physical, and biological integrity of the Nation's waters” (33 U.S.C. 1251(a)). One intent of the proposed rule is to improve the quality of compensatory mitigation for DA permits, to satisfy the objective of the Clean Water Act by improving the performance of compensatory mitigation projects in replacing aquatic resource functions, services, and values. Another intent of the proposed rule is to improve regulatory efficiency, especially for the review, approval, and implementation of mitigation banks. Finally, the proposed rule fulfills the mandate to ensure opportunities for federal agency participation in mitigation banking. In addition to supporting the objective of the Clean Water Act, the proposed rule will support the “no overall net loss” goal for wetland acreage and functions, through appropriate site selection for wetlands compensatory mitigation projects. Locating compensatory mitigation projects where they will provide the desired habitat type and functions to appropriately offset impacts will support the “no overall net Loss” goal for wetland acreage and function. The proposed rule does not alter Corps regulations which address the general mitigation requirements for DA permits. In particular, it does not alter the circumstances under which compensatory mitigation is required. Also, the proposed rule does not alter Corps or EPA enforcement authorities for the section 404 program, as specified in sections 301(a), 308, 309, 404(n), and 404(s) of the Clean Water Act.

Site selection is a critical planning step for compensatory mitigation projects, and the watershed approach in the proposed rule is intended to focus on choosing appropriate locations for compensatory mitigation activities. Restoring or establishing a specific aquatic habitat type, such as a wetland, requires careful site selection for two primary reasons. First, development activities may alter the interaction between hydrology, soils, and organisms within a landscape, affecting the type of habitat that can be supported by the project site. For example, forested wetlands require narrow hydrologic regimes because many tree species cannot tolerate long periods of inundation. Development activities may change local hydrology, resulting in new patterns of inundation and saturation that cannot support forested wetlands. Therefore, it is important to find a compensatory mitigation project site that will support the appropriate hydrology for the desired type of wetland habitat. Second, even if the desired habitat type can be restored or established at that site, surrounding development may result in an isolated or fragmented habitat that is less capable of supporting viable populations of species of import. Motile species require corridors to move between different habitats in the landscape, and if the surrounding area is occupied by roads and buildings, the ability of many species to move between habitats and interact with each other is restricted. Therefore, compensatory mitigation projects, especially those that are intended to replace wetland habitat, need to be planned within larger landscape contexts, such as watersheds. In its report on wetland compensatory mitigation, the NRC stated that “[l]andscape position, hydrologic variability, species richness, biological dynamics, and hydrologic regime are all important factors that affect wetland restoration.”

For activities authorized by DA permits in coastal and urban areas, compensatory mitigation required by district engineers will be located in areas where it is appropriate and practicable to conduct aquatic resource restoration, establishment, and enhancement activities. It is important that coastal and other urban areas do not become devoid of aquatic resources simply because it is more difficult to successfully restore or establish aquatic habitat in developing areas. In some cases, however, preservation may be the most appropriate form of compensatory mitigation in coastal and urban areas. In addition to providing important ecological functions, wetlands and other aquatic resources also perform important services, such as wildlife viewing and education, that can only be accomplished when people have opportunities to interact with those aquatic resources. The functions and services that aquatic resources perform in turn provide the basis for the values that society derives from them. These include use values, such as recreation, and non-use values such as biodiversity and stewardship for future generations. Aquatic resource functions, services, and values should be considered when evaluating sites in developed areas as options for providing compensatory mitigation. Mitigation projects for impacts authorized by DA permits should compensate for lost functions and services. While values are also considered as part of the public interest review, it is not always possible to fully compensate for lost values, as these are often dependent on proximity to population centers. Replacing aquatic resources at more remote locations may enhance some values (e.g., preservation of species) while decreasing others (e.g., recreational enjoyment).

Within a watershed context, it may be more appropriate to replace certain aquatic resource functions on-site, whereas it may be more appropriate to replace other functions off-site. For example, it may be environmentally preferable, to replace hydrologic and water quality functions at the impact site with a mitigation project that performs these functions, and to replace habitat functions at an off-site location, such as a mitigation bank or a compensatory mitigation project site near a park or nature reserve.

Through the watershed approach in the proposed rule, we intend to improve environmental outcomes of compensatory mitigation required for DA permits, including the effectiveness of compensatory mitigation in replacing impacted aquatic resource functions. The watershed approach uses a landscape perspective that places primary emphasis on site selection, through consideration of landscape attributes that will help provide the desired aquatic resource types and ensure they are self-sustaining. The watershed approach also considers how other landscape elements (e.g., other natural resources and developments) interact with compensatory mitigation project sites and affect the functions they are intended to provide.

In the proposed rule, the district engineer determines whether the compensatory mitigation option or proposal submitted by the permit applicant is adequate to offset unavoidable impacts, based on what is practicable and what will appropriately compensate for the aquatic resource functions and services that will be impacted as a result of the permitted activity. In pre-application consultation, the Corps may also provide information on existing watershed plans or watershed needs.

The proposed rule also establishes that the district engineer makes decisions regarding the approval of mitigation banking instruments, after coordinating a review of the prospectus for the proposed mitigation bank and the draft mitigation banking instrument with an Interagency Review Team (IRT). We are proposing to establish clearly defined time frames for this review and a dispute resolution process whereby members of the IRT can expeditiously elevate issues associated with proposed mitigation banks for higher level review where necessary.

III. Watershed Approach

In the NRC Report, the committee recommended that the Corps adopt a watershed-based approach to compensatory mitigation. The committee stated that the ecological functions of a restored or established wetland are dependent on its design and its setting or context within a watershed. The committee also said that the types and locations of wetlands in the landscape are important for providing desired functions.

Ideally, the watershed approach is based on a formal watershed plan, developed by Federal, state, and/or local environmental managers in consultation with affected stakeholders. Currently, there are many areas where no watershed plan exists. The Corps and EPA are committed to working with our counterparts at other levels of government to develop watershed plans, especially for areas facing significant development pressure. In the meantime, the watershed approach described in the NRC Report does not require a formal watershed plan. Instead, the watershed approach may be based on a structured consideration of watershed needs and how wetland types in specific locations can fulfill those needs.

The use of a watershed approach is based on analysis of information regarding watershed conditions and needs. Where an applicable watershed plan exists, such information will generally already have been considered in the development of the plan. Where no such plan exists, project sponsors may propose compensatory mitigation based on the watershed approach using appropriate information from other sources. Such information includes: Current trends in habitat loss or conversion, cumulative impacts of past development activities, current development trends, the presence and needs of sensitive species, site conditions that favor or hinder the success of mitigation projects, chronic environmental problems such as flooding or poor water quality, and local watershed goals and priorities. Project sponsors should make a reasonable effort, commensurate with the scope and scale of the project and impacts, to obtain as much of this information as possible as they design the compensatory mitigation projects. Project sponsors may consult with the Corps to see if such information has been developed in the past in association with other projects in the watershed. For smaller projects requiring DA authorization, all of the types of information listed above may not be available, but that information should generally be available (or developed) for larger projects.

The agencies request comment on whether the rule should specify minimal information requirements for use of the watershed approach. Commenters should bear in mind that specifying minimum information requirements will likely limit the areas where a watershed approach can be used, at least in the medium term, as much of the above information is currently not available for many areas. This problem was recognized by the NRC, which recommended that in such situations watershed based decision-making should rely on the scientific expertise of wetlands program staff (i.e., Corps permit writers and other Federal agency review staff) and broad-based stakeholder participation. As discussed below, the proposed rule includes a requirement that information on how a prospective permittee plans to address avoidance, minimization, and compensatory mitigation requirements be included in the permit application and published by the Corps in the public notice for the permit application. This requirement is intended to promote the kind of broad-based stakeholder involvement in watershed based mitigation decisions envisioned by the NRC Report.

A watershed approach to compensatory mitigation involves a regional or landscape perspective, and should involve consideration of Federal, Tribal, state, community, and private interests, including the requirements of other programs and objectives, such as habitat

conservation, storm water management, flood control, pollution prevention, and economic development when determining compensatory mitigation requirements for DA permits.

The agencies note that the term "watershed approach" is now used by a variety of Federal, State, and local agencies, as well as by private parties, but a consensus definition of this term has not yet emerged. The watershed approach presented in this proposed rule is a framework being proposed for use in determining compensatory mitigation requirements for DA permits. The watershed approach described in the proposed rule does not supersede or replace other uses of the term "watershed approach" in natural resource management programs conducted by other government agencies. We are soliciting comments on whether, and if so, how, the watershed approach in the proposed rule differs from the watershed approaches used in other natural resource management programs, and how any such differences may affect implementation of the watershed approach for determining compensatory mitigation requirements for DA permits.

The watershed approach in the proposed rule will be implemented by district engineers with available information to determine the types and locations of compensatory mitigation activities that would best serve the watershed. Available information used by district engineers includes current trends in habitat loss or conversion, cumulative impacts of past development activities, current development trends, the presence and needs of sensitive species, site conditions that favor or hinder the success of mitigation projects, chronic environmental problems such as flooding or poor water quality, local watershed goals and priorities, assessments of watershed conditions, best professional judgment, and site conditions, as well as other relevant data.

The watershed approach in the proposed rule will help support the objective of Clean Water Act, and is intended to result in more effective replacement of aquatic resource functions impacted by activities authorized by DA permits. The level of detail used in the watershed approach for a specific activity is dependent on the availability of information and on the scope and scale of that activity.