US Army Corps of Engineers

Proposed Compensatory Mitigation Rule:
Improving, Restoring, and Protecting the Nation's Wetlands

Questions and Answers

Q1: What is compensatory mitigation?

A: 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 (the 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 and area. The Army Corps of Engineers (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 (creation), enhancement, and, in certain circumstances, preservation.

Q2: How is compensatory mitigation accomplished?

A: Compensatory mitigation is typically accomplished through the following three mechanisms:

1. Permittee-Responsible Mitigation: A permit applicant may implement compensatory measures at 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.
2. Mitigation Banks: A permit applicant may purchase credits from a mitigation bank. A mitigation bank is a wetland, stream or other aquatic resource area that has been restored, created, enhanced, or, in certain circumstances, preserved. This resource area is then set aside to compensate for future conversions of aquatic resources for development activities. The value of a bank is determined by quantifying the aquatic resource functions restored or created in terms of "credits." Permittees, upon approval of regulatory agencies, can acquire these credits to meet their requirements for compensatory mitigation.
3. In-Lieu Fee Mitigation: A permit applicant may make a payment to an in-lieu fee program. In-lieu fee programs are generally administered by public agencies or non-

profit organizations who have established an agreement with regulatory agencies to use in-lieu fee payments collected from permit applicants to conduct wetland, stream or other aquatic resource restoration, creation, enhancement or preservation activities.

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 proposed rule do?

A: Each of the three mechanisms for compensatory mitigation is currently subject to different standards and criteria, producing variable ecological outcomes and regulatory effectiveness. The rule establishes a single set of standards which all forms of compensation must satisfy that is based on better science, increased public participation, and innovative market-based tools.

Q4: What are the goals of the proposed rule?

A: The primary goals of this proposed 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 by raising the bar, so that providers of high-quality mitigation are not disadvantaged by others being held to lower performance standards;
- Increase the efficiency and predictability of the process of proposing compensatory mitigation and approving new mitigation banks; and
- Enhance public participation in compensatory mitigation decision-making.

Q5: Why is this rule being proposed now?

A: The 2004 National Defense Authorization Act (PL 108-136) calls for the development of regulations, consistent with Section 404 of the Clean Water Act, establishing equivalent standards and criteria for all forms of compensatory mitigation by November 2005.

Q6: Why does this rule encourage mitigation banking?

A: The proposed standards encourage the expansion of mitigation banking because it is a reliable and verifiable method of wetland replacement. Mitigation banks are a **"performance-based"** form of wetland replacement because, unlike traditional forms of wetland replacement, the tradable wetland restoration credits generated by banks are tied to demonstrated achievement of project goals. In its 2001 critique of wetland replacement practices, the NRC highlighted advantages of third-party compensation such as mitigation banks noting that:

- Banks use a multi-resource agency process that brings more expertise and collaboration into the planning, approval, and oversight of banked wetland restoration and protection projects;[1] and
- Banks are more likely than traditional wetland replacement projects to achieve desired long-term outcomes and to create wetland sites that are protected in perpetuity by organizations dedicated to resource conservation.[2]

Q7: How does this rule propose to treat in-lieu fee mitigation?

A: We are proposing to require existing in-lieu fee programs to conform with the rule's standards for mitigation banks within five years of finalization of this rule, ensuring that all forms of third-party compensation are held to the same standards. We believe this measure is necessary to ensure effective replacement of permitted wetland losses and to comply with the 2004 Defense Authorization Act's directive to *"apply equivalent standards and criteria to each type of compensatory mitigation."*

Unlike mitigation banks, in-lieu fee programs generally provide mitigation only after collecting fees, and there is often a substantial time lag between permitted impacts and implementation of in-lieu fee compensation projects. In-lieu fee programs are also not generally required to provide the same financial assurances as mitigation banks. Another concern with in-lieu fee mitigation is the sale price of credits. Because credits are often sold before the details (or even the location) of a specific compensatory mitigation project have been determined, it may be difficult for the in-lieu fee project sponsor to determine the price that will fully fund the future compensation project. For these reasons and others described in more detail in the preamble, there is a high level of uncertainty associated with in-lieu fee programs regarding the final mitigation they produce and its adequacy to compensate for lost functions and services.

Q8: How does this rule relate to the national goal of "No Net Loss" of wetland and other aquatic resources in the Section 404 permit program?

A: The proposed rule was specifically designed to improve our ability to ensure no net loss of wetlands and other aquatic resources by addressing key recommendations associated with compensatory planning, monitoring, and long-term maintenance raised by the NRC in its 2001 report evaluating compensatory mitigation.[3] The NRC report summarized many studies which suggested that compensatory mitigation practices were falling short of providing for "no net loss" of wetland functions and area.

Q9: Does the mitigation sequence (i.e., avoid, minimize, and compensate) still apply?

A: Yes. The Clean Water Act Section 404(b)(1) Guidelines established a three-step mitigation sequence to be followed in the review of proposed impacts to wetlands, streams,

[1] National Research Council, 2001. "Compensating for Wetland Losses Under the Clean Water Act," National Academy Press, Washington, D.C., pp. 82, 160-4
[2] NRC, 2001, p. 163
[3] NRC, 2001.

and other aquatic resources. 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 proposed rule affirms the mitigation sequence and clarifies the criteria for appropriate measures to compensate for unavoidable losses.

Q10: With this rule, will applicants have more flexibility in selecting compensatory mitigation options?

A: Yes, the provisions concerning mitigation banking should make banking a more viable mitigation option in many regions in which it is not now available. The flexibility to consider off-site and out-of-kind mitigation alternatives already exists. However, the rule 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.

Q11: 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)?

A: Since 1990, there has been a general and flexible *preference* that mitigation should occur on-site and in-kind. This rule retains this flexible preference, but also recognizes that departure from this preference can be environmentally preferable where replacement wetlands, streams, and other aquatic resources are designed and situated to address specific regional environmental issues, and to bring the maximum ecological benefit to the watershed. This rule also notes that use of an approved mitigation bank consistent with the terms of its instrument (e.g., the permitted activity is located within the approved service area, credits are available for an appropriate resource type) will generally satisfy the requirement to consider on-site, in-kind compensation options.

Q12: How does this rule relate to the National Mitigation Action Plan[4]?

A: In December 2002, EPA, the Corps, and the Departments of Agriculture, Commerce, Interior, and Transportation released the National Wetlands Mitigation Action Plan. The Plan includes a number of tasks that the agencies are implementing to improve the ecological performance and results of compensatory mitigation. By further clarifying the administrative requirements and ecological performance standards applicable to compensatory mitigation, this proposed rule is complementary to the ongoing interagency efforts to improve compensatory mitigation associated with the National Mitigation Action Plan.

Q13: Does this proposed rule encourage a watershed approach to compensatory mitigation decision-making as recommended by the National Research Council and the National Mitigation Action Plan?

A: Yes, this rule states that, where appropriate and practicable, compensatory mitigation

[4] National Mitigation Action Plan interagency website < http://www.mitigationactionplan.gov/ >

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 available 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.

Q14: Where can I get a copy of this proposed rule?

A: You can find the proposed rule published in the Federal Register or on-line at: **http://www.epa.gov/wetlandsmitigation** . You can also send a request to Mr. David Olson, U.S. Army Corps of Engineers, 441 G Street NW, Washington, DC 20314 or Mr. Palmer Hough, U.S. Environmental Protection Agency, Wetlands Division (4502T), 1200 Pennsylvania Avenue, NW, Washington, DC 20460.