



## A TRAINING COURSE FOR MITIGATION BANKING INTERAGENCY REVIEW TEAMS



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### Reference Document: Overview of Federal Mitigation Banking Policy and Regulations

#### A. Summary of Key Federal Compensatory Mitigation Regulations, Policy and Other References

##### Federal Regulations, Guidance, and Plans

###### 2008 Compensatory Mitigation for Losses of Aquatic Resources

- Final regulations governing compensatory mitigation for authorized impacts to wetlands, streams, and other waters of the U.S. under §404 and §10.
- The rule replaces provisions of the 1990 MOA that relate to the amount, type, and location of compensatory mitigation, and the use of preservation as a mitigation component. All other provisions of the 1990 MOA remain in effect.
- The rule replaces the entirety of the 1995 Mitigation Banking Guidance, the 2000 In-Lieu Fee Mitigation Guidance, and the 2002 Compensatory Mitigation Regulatory Guidance Letter (RGL 02-2).
- Department of Defense and Environmental Protection Agency. April 10, 2008. *Compensatory Mitigation for Losses of Aquatic Resources*. Final rule. Federal Register. Vol. 73, No. 70: pp. 19594-19705.
- <http://www.epa.gov/wetlandsmitigation/>

###### 2007 Federal Aviation Administration Advisory Circular

- Guidance issued by the Federal Aviation Administration on locating land uses, including wetland compensatory mitigation sites, which have the potential to attract hazardous wildlife to or in the vicinity of public-use airports.
- U.S. Department of Transportation, Federal Aviation Administration. August 28, 2007. *Advisory Circular: Hazardous Wildlife Attractants On or Near Airports*. AC No: 150/5200-33B.
- [http://wildlife-mitigation.tc.faa.gov/wildlife/downloads/150\\_5200\\_33b.pdf](http://wildlife-mitigation.tc.faa.gov/wildlife/downloads/150_5200_33b.pdf)

### **2008 Minimum Monitoring Requirements Regulatory Guidance Letter 08-03**

- Guidance issued by the Corps to the Districts and the regulatory community on minimum monitoring requirements for compensatory mitigation projects, as well as the required content of monitoring reports.
- U.S. Army Corps of Engineers. October 10, 2008. *Minimum Monitoring Requirements for Compensatory Mitigation Projects Involving the Creation, Restoration, and/or Enhancement of Aquatic Resources*. Regulatory Guidance Letter No. 08-03.
- [http://www.usace.army.mil/CECW/Documents/cecwo/reg/rqls/rql08\\_03.pdf](http://www.usace.army.mil/CECW/Documents/cecwo/reg/rqls/rql08_03.pdf)

### **2005 Financial Assurances Regulatory Guidance Letter Guidance 05-01**

- Guidance issued by the Corps on the use of financial assurances, and suggested language for special conditions for Department of the Army permits requiring performance bonds.
- U.S. Army Corps of Engineers. *Guidance on the Use of Financial Assurances, and Suggested Language for Special Conditions for Department of the Army Permits Requiring Performance Bonds*. Regulatory Guidance Letter No. 05-01.
- [http://www.usace.army.mil/CECW/Documents/cecwo/reg/rqls/rql05\\_01.pdf](http://www.usace.army.mil/CECW/Documents/cecwo/reg/rqls/rql05_01.pdf)

### **2003 Model Compensatory Mitigation Plan Checklist**

- Memorandum to the field issued by EPA and the Corps that includes a model compensatory mitigation plan checklist and supplemental materials to guide permit applicants preparing compensatory mitigation plans.
- U.S. Army Corps of Engineers and U.S. Environmental Protection Agency. November 7, 2003. *Model Compensatory Mitigation Plan Checklist for Aquatic Resource Impacts Under the Corps Regulatory Program Pursuant to Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act*. Memorandum to the Field.
- [http://water.epa.gov/lawsregs/guidance/wetlands/upload/2003\\_11\\_10\\_wetlands\\_modelmitigationchecklist.pdf](http://water.epa.gov/lawsregs/guidance/wetlands/upload/2003_11_10_wetlands_modelmitigationchecklist.pdf)

### **2003 Operational Guidelines for Creating or Restoring Self-Sustaining Wetlands**

- Memorandum to the field issued by the Corps that identifies basic requirements for planning and siting successful mitigation projects.
- U.S. Army Corps of Engineers. October 29, 2003. *Model "Operational Guidelines for Creating or Restoring Wetlands that are Ecologically Self-Sustaining" for Aquatic Resource Impacts Under the Corps Regulatory Program Pursuant to Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act*. Memorandum to the Field.
- [http://water.epa.gov/lawsregs/guidance/wetlands/upload/2004\\_01\\_28\\_wetlands\\_nas404program.pdf](http://water.epa.gov/lawsregs/guidance/wetlands/upload/2004_01_28_wetlands_nas404program.pdf)

### **2003 Interagency Memorandum of Agreement on Protecting Aviation from Wildlife Hazards**

- A Memorandum of Agreement signed by the Federal Aviation Administration, U.S. Air Force, Department of the Army, EPA, U.S. Fish and Wildlife Service, and U.S. Department of Agriculture establishing procedures to coordinate efforts to minimize wildlife risks to aviation and human safety, while protecting natural resources.
- Federal Aviation Administration, U.S. Air Force, Department of the Army, U.S. Environmental Protection Agency, U.S. Fish and Wildlife Service, and U.S. Department of Agriculture. July 2003. *Memorandum of Agreement Between the Federal Aviation Administration, the U.S. Air Force, the U.S. Army, the U.S. Environmental Protection Agency, the U.S. Fish and Wildlife Service, and the U.S. Department of Agriculture to Address Aircraft-Wildlife Strikes.*
- [http://www.usace.army.mil/CECW/Documents/cecwo/reg/mou/wildlife\\_hazard\\_mou\\_2003.pdf](http://www.usace.army.mil/CECW/Documents/cecwo/reg/mou/wildlife_hazard_mou_2003.pdf)

### **2003 Guidance on the Use of the TEA-21 Preference for Mitigation Banking**

- Guidance issued by EPA, Department of the Army, and Federal Highway Administration on applying the preference for wetlands mitigation banking mandated in the Transportation Equity Act for the 21<sup>st</sup> Century (TEA-21) to compensatory mitigation requirements under §404.
- Department of the Army, Federal Highway Administration, and U.S. Environmental Protection Agency. July 11, 2003. *Federal Guidance on the Use of the TEA-21 Preference for Mitigation Banking to Fulfill Mitigation Requirements Under Section 404 of the Clean Water Act.*
- <http://www.epa.gov/owow/wetlands/pdf/TEA-21Guidance.pdf>

### **1999 Fish and Wildlife Service Policy on Wildlife Refuges and Compensatory Mitigation**

- Guidelines issued by the Fish and Wildlife Service regarding siting compensatory mitigation projects conducted under §404 on lands in the National Wildlife Refuge System.
- U.S. Fish and Wildlife Service. September 10, 1999. *Final Policy on the National Wildlife Refuge System and Compensatory Mitigation Under the Section 10/404 Program.* Federal Register. Vol. 64, No. 175: 49229-49234.
- <http://www.fws.gov/habitatconservation/Refuge%20Mitigation%20Policy%201999FR.pdf>

### **1998 Corps Guidance on the Use of Mitigation Banks in Civil Works Projects**

- Implementation guidance issued by the Corps on the use of mitigation banks in Corps Civil Works projects.
- U.S. Army Corps of Engineers. April 22, 1998. *Use of Mitigation Banks for U.S. Army Corps of Engineers Civil Works Projects.* Policy Guidance Letter (PGL) No. 46.

- <http://www.usace.army.mil/CECW/Documents/cecwp/pgls/pgl46b.pdf>

### **1990 Memorandum of Agreement**

- Agreement between EPA and the Corps outlining the policy and procedures to be used in determining the type and level of mitigation necessary to demonstrate compliance with the §404(b)(1) Guidelines. The 2008 compensatory mitigation rule replaced the provisions of the 1990 MOA that relate to the amount, type, and location of compensatory mitigation, and the use of preservation as a mitigation component.
- U.S. Environmental Protection Agency and U.S. Department of the Army. February 6, 1990. *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.*
- <http://www.epa.gov/owow/wetlands/regs/mitigate.html>

### **1980 §404(b)(1) Guidelines**

- Regulations issued by EPA that constitute the substantive environmental criteria used by the Corps in evaluating activities regulated under §404 of the Clean Water Act.
- U.S. Environmental Protection Agency. 1980. *Guidelines for Specification of Disposal Sites for Dredged or Fill Material.* Federal Register. Vol. 45, No. 249: 85336-85357.
- <http://www.epa.gov/owow/wetlands/pdf/40cfrPart230.pdf>

## **Other References**

### **2005 Corps Compensatory Mitigation Practices Working Paper**

- Issued by the Corps' Institute for Water Resources in March 2006, summarizes the current practice and status of compensatory mitigation authorized by the Corps' regulatory program.
- Martin, Steven, Robert Brumbaugh, Paul Scodari, and David Olson. March 2006. *Compensatory Mitigation Practices in the U.S. Army Corps of Engineers.* U.S. Army Corps of Engineers Working Paper.
- [http://www2.eli.org/pdf/mitigation\\_forum\\_2006/Mitigation\\_Status\\_2005.pdf](http://www2.eli.org/pdf/mitigation_forum_2006/Mitigation_Status_2005.pdf)

### **2005 Status Report on Compensatory Mitigation in the United States**

- Issued by the Environmental Law Institute in April 2006, summarizes the findings of a survey of all 38 Corps districts; characterizes compensatory mitigation and provides an updated list of approved wetland mitigation banks, umbrella banking programs, and in-lieu fee mitigation programs.
- Wilkinson, Jessica and Jared Thompson. April 2006. *2005 Status Report on Compensatory Mitigation in the United States.* Washington, DC: Environmental Law Institute.
- [http://www.elistore.org/reports\\_detail.asp?ID=11137](http://www.elistore.org/reports_detail.asp?ID=11137)

### **2005 Study on In-Lieu Fee Mitigation**

- Issued by the Environmental Law Institute, a report providing a comprehensive profile of the nation's active wetland and stream in-lieu fee mitigation programs.
- Wilkinson, Jessica, Roxanne Thomas and Jared Thompson. June 2006. *The Status and Character of In-Lieu Fee Mitigation in the United States*. Washington, DC: Environmental Law Institute.
- [http://www.elistore.org/reports\\_detail.asp?ID=11151](http://www.elistore.org/reports_detail.asp?ID=11151)

### **2005 GAO report: Corps of Engineers Does Not Have an Effective Oversight Approach to Ensure That Compensatory Mitigation Is Occurring**

- A Government Accountability Office report released in September 2005, summarizing the Corps' oversight of compensatory mitigation projects.
- Government Accountability Office. September 2005. *Wetlands Protection: Corps of Engineers Does Not Have an Effective Oversight Approach to Ensure That Compensatory Mitigation Is Occurring*. Washington, DC: GAO. GAO-05-898.
- <http://www.epa.gov/owow/wetlands/pdf/GAO05898.pdf>

### **2001 NRC Report: Compensating for Wetland Losses under the Clean Water Act**

- Published in 2001 by National Academies of Sciences' National Research Council, investigates the adequacy of currently available science and technology for replacing wetland functions and evaluates the effectiveness of the federal compensatory mitigation program in accomplishing the 'no net loss' goal for wetlands.
- National Research Council. 2001. *Compensating for Wetland Losses Under the Clean Water Act*. National Academy Press.
- <http://www.nap.edu/books/0309074320/html>

### **1995 IWR Technical Paper: Technical and Procedural Support to Mitigation Banking Guidance**

- Published as part of the Institute for Water Resource's National Wetland Mitigation Banking Study, the report elaborates on specific sections of the Federal Mitigation Banking Guidance, including bank planning, success criteria and monitoring, determination of credits and debits, accounting procedures and formats, and financial and legal assurances.
- U.S. Army Corps of Engineers, Institute for Water Resources. December 1995. "National Wetland Mitigation Banking Study: Technical and Procedural Support to Mitigation Banking Guidance." IWR Technical Paper WMB-TP-2. See Chapter Five: "Financial and Legal Assurances."
- <http://www.iwr.usace.army.mil/docs/iwrreports/WMB-TP-2.pdf>



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#### B. Acronyms & Shorthand References

404: Section 404 of the Clean Water Act

404(b)(1): The 1980 §404(b)(1) Guidelines

BEI: Bank Enabling Instrument (also known as MBI)

Corps or USACE: U.S. Army Corps of Engineers

CWA: Clean Water Act

EPA: U.S. Environmental Protection Agency

FAA: U.S. Department of Transportation, Federal Aviation Administration

FWS: U.S. Fish and Wildlife Service

HUC: U.S. Geological Survey hydrologic unit code

ILF: In-lieu fee mitigation

IRT: Interagency Review Team

IWR: U.S. Army Corps of Engineers, Institute for Water Resources

MAP: The Interagency Mitigation Action Plan Workgroup

MBI: Mitigation Bank Instrument

MBRT: Mitigation Bank Review Team, now referred to as the Interagency Review Team

Mitigation Rule: The 2008 compensatory mitigation rule for losses of aquatic resources

MOA: The 1990 Memorandum of Agreement between EPA and the Corps

NRC: National Research Council

NRCS: Natural Resources Conservation Service

RGL: Pronounced “ree-gul,” a Regulatory Guidance Letter issued by the Corps

TEA-21: The Transportation Equity Act for the 21<sup>st</sup> Century (federal transportation legislation)

USDA: U.S. Department of Agriculture