

**A TRAINING COURSE FOR
MITIGATION BANKING AND IN-LIEU FEE PROGRAM
INTERAGENCY REVIEW TEAMS**



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).
- <https://www.epa.gov/cwa-404/compensatory-mitigation>

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.
- http://www.faa.gov/documentLibrary/media/advisory_circular/150-5200-33B/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.
- http://www.usace.army.mil/Portals/2/docs/civilworks/RGLS/rgl08_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.
- http://www.usace.army.mil/Portals/2/docs/civilworks/RGLS/rgl05_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.
- <https://www.epa.gov/cwa-404/model-mitigation-plan-checklist>

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.
- <https://www.epa.gov/cwa-404/memorandum-field-adaptation-national-research-council-compensatory-mitigation-guidelines>

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.
<https://www.epa.gov/cwa-404/federal-aviation-administration-memorandum-agreement-address-aircraft-wildlife-strikes>

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 21st Century (TEA-21) to compensatory mitigation requirements under §404.
- <https://www.epa.gov/cwa-404/transportation-equity-act-21st-century-tea-21-guidance-federal-highway-administration>

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.
- <http://www.fws.gov/habitatconservation/Refuge%20Mitigation%20Policy%201999FR.pdf>

2009 Implementation Guidance for WRDA 2036(a) of the Water Resources Development Act of 2007 – Mitigation for Fish and Wildlife and Wetland Losses

- Memorandum to the Field to ensure Civil Works projects providing guidance on elements within compensatory mitigation plans.
- <http://planning.usace.army.mil/toolbox/library/WRDA/wrda07sec2036a.pdf>

2008 Implementation Guidance for the Water Resources Development Act of 2007 – Section 2036(c) Wetlands Mitigation

- Directs Corps to first consider use of mitigation banks to offset wetland losses associated with civil works projects.
- <http://planning.usace.army.mil/toolbox/library/WRDA/wrda07sec2036c.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.
- <https://www.epa.gov/cwa-404/memorandum-agreement>

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.
- <https://www.epa.gov/cwa-404/section-404b1-guidelines-40-cfr-230>

OTHER REFERENCES:

2015 The Mitigation Rule Retrospective: A Review of the 2008 Regulations Governing Compensatory Mitigation for Losses of Aquatic Resources.

- <https://www.epa.gov/cwa-404/mitigation-rule-retrospective-review-2008-regulations-governing-compensatory-mitigation>

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.
- http://www.eli.org/sites/default/files/docs/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.
- http://water.epa.gov/lawsregs/guidance/wetlands/upload/2006_06_01_wetlands_ELIMitigation2005.pdf

2006 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.
- http://www.epa.gov/owow/wetlands/pdf/ELI_ILF_Study06.pdf

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.
- http://water.epa.gov/lawsregs/guidance/wetlands/upload/2005_10_11_wetlands_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.
- <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.
- <http://www.iwr.usace.army.mil/Portals/70/docs/iwrreports/WMB-TP-2.pdf>

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)
- ❖ CE: Conservation Easement
- ❖ Corps or USACE: U.S. Army Corps of Engineers
- ❖ CPF: Compensation Planning Framework
- ❖ CWA: Clean Water Act
- ❖ DoR: Declaration of Restrictions

- ❖ ELI: Environmental Law Institute
- ❖ EPA: U.S. Environmental Protection Agency
- ❖ FAA: U.S. Department of Transportation, Federal Aviation Administration
- ❖ FWS: U.S. Fish and Wildlife Service
- ❖ GSA: Geographic Service Area
- ❖ HUC: U.S. Geological Survey hydrologic unit code
- ❖ ILF: In-lieu fee mitigation
- ❖ IRT: Interagency Review Team
- ❖ LLC: Limited Liability Corporation
- ❖ LOC: Letter of Credit
- ❖ LTM: Long-Term Management
- ❖ LTMP: Long-Term Management Plan
- ❖ 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 Corps-EPA compensatory mitigation rule for losses of aquatic resources
- ❖ Mitigation MOA: The 1990 Memorandum of Agreement between EPA and the Corps
- ❖ MOU: Memorandum of Understanding
- ❖ NMFS: National Marine Fisheries Service
- ❖ NRC: National Research Council
- ❖ NRCS: Natural Resources Conservation Service
- ❖ RGL: Pronounced “ree-gul,” a Regulatory Guidance Letter issued by the Corps
- ❖ RIBITS: Regulatory In-lieu fee and Bank Information Tracking System
- ❖ TCF: The Conservation Fund
- ❖ TEA-21: The Transportation Equity Act for the 21st Century (federal transportation legislation)
- ❖ TNC: The Nature Conservancy
- ❖ USDA: U.S. Department of Agriculture

