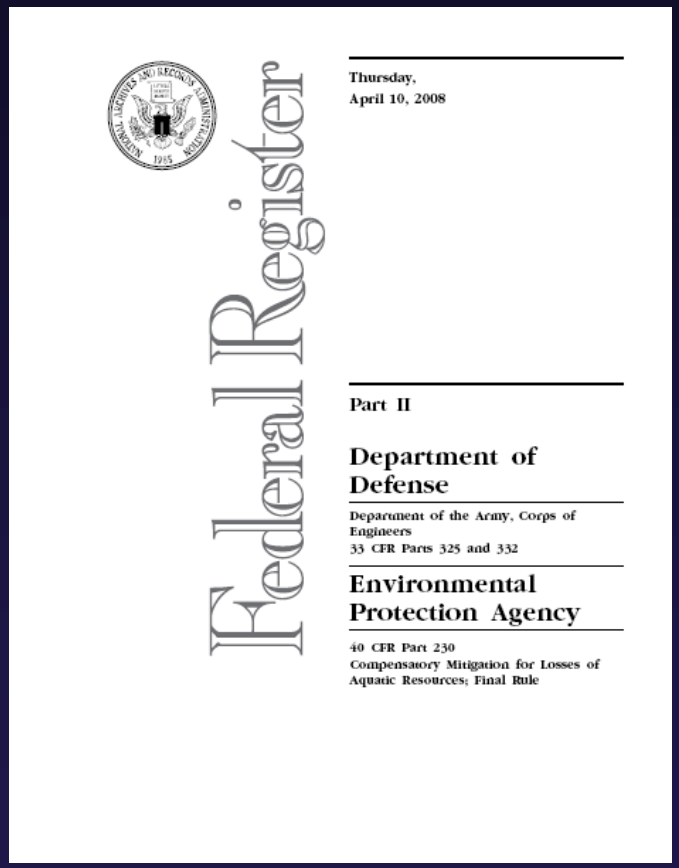
Joint Army–EPA:

Compensatory Mitigation Rule



Federal Register

Thursday,
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Part II

Department of Defense

Department of the Army, Corps of Engineers
33 CFR Parts 325 and 332

Environmental Protection Agency

40 CFR Part 230
Compensatory Mitigation for Losses of Aquatic Resources; Final Rule

Mitigation Rule

- **Authority** – National Defense Authorization Act FY04
- **References** – NRC Report and aspects of current regulations & guidance
- **Goal** – level playing field (permittee, Mitigation Banks, ILFs) to the maximum extent practicable
- **Performance Standards** – ecologically-driven, equivalent/effective standards, best available science
- **Compliance** – increase compliance visits, establish enforceable success criteria, prescribed monitoring reports
- **Mitigation Sequence Preserved** – avoid, minimize, compensate for unavoidable impacts and lost aquatic functions
- Does not change *when* mitigation is required
- Does change *where* and *how*

Benefits of the Mitigation Rule

- Greater predictability, transparency
- Improved mitigation planning and site selection
- Improved performance of compensatory mitigation projects
- Strongly encourages watershed approach
- Flexibility of mitigation options
- Possible reduction in permitting time
- Increased public participation

Clarified Watershed Approach

- Added new definitions:
  - Watershed
  - Watershed plan
  - Watershed approach
- Addresses appropriateness of existing plans
- Outlines information required to utilize a watershed approach

All Mitigation Plans
(12 fundamental elements)

1. Project objectives
2. Site selection factors
3. Site protection instrument
4. Baseline information (at impact site and compensation site)
5. Credit determination methodology
6. Work plan
7. Maintenance plan
8. Performance standards
9. Monitoring requirements
10. Long-term management plan
11. Adaptive management plan
12. Financial assurances

ILF Reforms for Equivalency

- The rule retains ILF mitigation but with significant reforms:
  - Advance planning requirement
  - Cap on “advance” credits
  - Financial accounting requirements
  - Same review process as banks
  - Only non-profits or governments
  - Transfer liability to ILF up front and enforceable

Requirements for Permittee-Responsible Mitigation

- 12 fundamental elements of a mitigation plan
- Timing:
  - Individual permits – final mitigation plan approved prior to permit issuance
  - General permit – final mitigation plan approved prior to initiating work
- New public notice requirements

Principles in Final Rule

- Ecological performance standards required
- Must be verifiable
- Based on the *best available science* that can be measured or assessed in a practicable manner
- Accommodate variability of regional classes of aquatic resources
- Manage adaptively to rectify performance problems or unanticipated performance
- District Engineer is decision-maker

Banking Preference

- Initiated in advance of permitted impacts:
  - Increase likelihood of success
  - Reduce temporal losses
- Involve larger, ecologically valuable parcels
- Greater up-front planning and investment

Compensation Hierarchy

1. Credits from a mitigation bank
2. Credits from an in-lieu fee program
3. PRM using a watershed approach
4. PRM on-site
5. PRM off-site

*In-kind preference maintained

Timely Bank Review

- All proposed banks receive public notice and comment
- Disciplined IRT/public review
- 3 required phases totaling ≤225 days
- Dispute resolution process completed ≤150 days after receipt of final instrument

Use of Preservation

- In order to use preservation as compensation, the resources to be preserved must:
  - Provide important physical, chemical or biological functions for the watershed;
  - Contribute significantly to the ecological sustainability of the watershed (the DE must use appropriate quantitative tools to determine this);
  - Be under threat of destruction; and
  - Be provided permanent protection

Existing Regulations and Guidance

- No change to Section 404(b)(1) Guidelines
- Replace entirety of:
  - 1995 Banking Guidance
  - 2000 ILF Guidance
  - 2002 Compensatory Mitigation RGL
- Replace portions of the 1990 Army/EPA Mitigation MOA

Transition

- Rule goes into effect on June 9, 2008
- Mitigation banks
  - Existing banks and those approved by July 9, 2008, are grandfathered
  - Instrument modification will trigger compliance with new requirements
- In-lieu Fee mitigation
  - Existing ILFs and those approved by July 9, 2008: 2-yr transition period
  - Additional 3 years possible if *"good cause"*

Implementation

- *"It could be the best of all worlds…or it could be the same old same old…It's all in the implementation."*
  - Dr. Joy Zedler, Chair 2001 NRC Wetlands Mitigation Study Committee – EM.com, 4-27-08

Next Steps

- Outreach/Training
  - Corps/EPA Joint National Meeting – May/08
  - ASWM Workshop May/08
  - Federal/State IRT Training– June/08
  - Training Courses – Fall ’08
- Implementing Guidance

Questions?

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  - Compensatory Mitigation Website:
    - http://www.epa.gov/wetlandsmitigation/
  - Rule posted on the Corps HQ Website:
    - http://www.usace.army.mil/cw/cecwo/reg/