



**US Army Corps
of Engineers**®

Compensatory Mitigation

New Orleans District

I. Introduction

The Corps of Engineers permit regulations, at 33 CFR 325.4, stipulate that special conditions may be added to permits in order to satisfy public interest concerns and/or legal requirements, such as compliance with the Clean Water Act 404(b)(1) Guidelines. If a proposed permit action would result in impacts to wetlands, these special conditions often include provisions requiring the permittee to compensate for the expected impact. This compensation is commonly referred to as compensatory mitigation. It may also be referred to simply as mitigation, although strictly speaking, it is only one of three forms of mitigation. The first two forms, avoidance and minimization are typically addressed through alternative siting and/or modifications to the project design. For most standard permits (i.e., those that require issuance of a public notice), and in particular those subject to regulation under the Clean Water Act, avoidance and minimization of impacts to aquatic resources, including wetlands, must be addressed prior to considering compensatory mitigation. Compensatory mitigation, therefore, is only utilized to offset impacts which are otherwise unavoidable. The process of incorporating all appropriate and practicable measures to avoid, minimize and, finally, compensate for impacts to aquatic resources caused by permit actions is referred to as sequencing.

II. Policy

The Corps of Engineers' mitigation policy relative to projects authorized under Section 404 of the Clean Water Act is explained in a Memorandum of Agreement between the Environmental Protection Agency and the Department of the Army, which was signed on February 6, 1990. The memorandum establishes that: "The Corps will strive to avoid adverse impacts and offset unavoidable adverse impacts to existing aquatic resources, and for wetlands, will strive to achieve a goal of no overall net loss of values and functions." Compensatory mitigation for wetland impacts may be accomplished in several ways. The most common forms of mitigation are projects which result in the restoration, enhancement or creation of wetlands. In exceptional circumstances, compensatory mitigation may also be accomplished through the preservation of unique and valuable wetlands which are under demonstrable threat of destruction. In general, the memorandum establishes a preference for onsite mitigation at or in the immediate vicinity of the wetland impact site and for in-kind replacement using wetlands which are similar to those which would be impacted. These preferences may be overridden, however, if onsite and in-kind mitigation is not available, not practicable or if another mitigation option is environmentally preferable. Compensatory mitigation for wetland impacts should, to the extent practicable, result in a minimum of one-to-one functional replacement, or one-to-one acreage replacement if adequate functional assessment techniques are not available.

III. Compensatory Mitigation Approaches

Two general approaches may be used to restore, enhance or create wetlands for mitigation purposes. The New Orleans District classifies these approaches as follows:

A. Project-specific mitigation - Restoration, creation, enhancement and, in exceptional circumstances, preservation of wetlands undertaken by a permittee in order to compensate for wetland impacts resulting from his specific project. The permittee performs the mitigation after his permit is issued and is ultimately responsible for implementation and success of the mitigation.

B. Consolidated mitigation - A single, typically large, mitigation project serving to compensate for impacts resulting from multiple projects. Consolidated mitigation includes:

1. Mitigation Bank - Wetland restoration, creation, enhancement, and in exceptional circumstances, preservation undertaken expressly for the purpose of compensating for unavoidable wetland losses in advance of development actions. Mitigation banks are established through a formal agreement or "banking instrument" signed by the Corps, interested resource agencies and a sponsor. Once a mitigation bank is approved, the sponsor generally performs the wetland restoration, creation or enhancement activities and subsequently uses (in the case of single-entity banks) or sells (in the case of commercial banks) "credits" which are generated by these activities. When determined by the Corps to be appropriate, a permittee may, therefore, fulfill mitigation requirements specified in his permit by purchasing credits from an approved mitigation bank. The sponsor, rather than the permittee, is ultimately responsible for implementation, maintenance and success of the mitigation. Mitigation banks are currently evaluated and approved in accordance with the Federal Guidance for the Establishment, Use and Operation of Mitigation Banks, dated November 28, 1995.

2. Mitigation Area - An arrangement in which a site and a specific wetland mitigation plan are approved through an "agreement" between the Corps, interested resource agencies and a sponsor. Wetland mitigation areas are similar, in most respects, to mitigation banks; however, wetland restoration, creation or enhancement is not necessarily performed in advance of the wetland impact. Instead, it is generally performed on an "as-needed" basis by the sponsor. Once a mitigation area is approved, the Corps may, in appropriate circumstances, allow permit recipients to fulfill their mitigation requirements by contracting with a sponsor who, in turn, performs the mitigation at his approved site on behalf of the permittees. The sponsor performs the mitigation using funds provided by the permittees. Although previously established through an informal arrangement, mitigation areas are now evaluated and approved using the same formalized procedures used for mitigation banks. As with mitigation banks, for all mitigation areas approved under a formal agreement, the sponsor is responsible for implementation, maintenance and success of the mitigation. Mitigation areas are currently evaluated and approved in accordance with the Federal Guidance for the Establishment, Use and Operation of Mitigation Banks, dated November 28, 1995 . Both consolidated mitigation and project-specific mitigation may be accomplished on lands belonging to individuals other than the permit recipient. For project-specific mitigation proposals, the permittee is normally responsible for making the necessary arrangements with the landowner on whose property the mitigation will be performed. Both the landowner and the permittee must agree to the mitigation provisions specified in the permit; however, the permittee retains accountability for the implementation and success of the mitigation under the terms of his permit. For mitigation banks and areas, the sponsor, who is usually the landowner, agrees in advance to perform the mitigation in a specified manner and to accept the responsibility for the implementation, management, maintenance, protection and monitoring of the mitigation on behalf of all permittees who elect to use the sponsor's site. The sponsor's acceptance of these provisions is demonstrated by his signature on the banking instrument , or interagency agreement, which establishes his mitigation bank or area. In addition, for those mitigation banks and areas which require a Department of the Army Permit, the permit conditions will establish this accountability.