New Mitigation Rule
Avoidance-Minimization Requirements
Individual Permit Applications
What Must an Application Include?

- Rule requires a statement describing how impacts to waters of the US are to be avoided and minimized.
- Practically speaking, a 404(b)(1) alternatives analysis is required.
Individual Permits

Processing Steps (120 days)

1. Application with 404(b)(1) alternatives analysis
2. Public Notice
3. 30-day comment period
4. Agency coordination
5. 404(b)(1) Evaluation & Public Interest Review
6. Permit decision
1990 Memorandum of Agreement
Between
USACE and USEPA
Provides Guidance Regarding
Exercise of Discretion
Under the Guidelines
Exercise of Discretion

Use a Common Sense Approach for Project Development and Permit Application Preparation
Basic Project Purpose

- Project purpose drives the alternatives analysis process
- Applicant provides Corps with need and purpose statement
  - Maximizing profits for commercial/residential developments is not an acceptable project purpose
- With applicant input, the Corps determines basic project purpose
- Practicable alternative must meet the basic project purpose
404 (b)(1) Guidelines

Sequential Steps

- Determine water dependency
- Consider off-site alternatives
- Avoid unnecessary impacts
- Minimize unavoidable impacts
- Compensatory mitigation
Water Dependency

- A marina is water dependant
- Houses, golf courses, malls and lakes are not water dependant
- Don’t waste time with this step
For a non-water dependent project, an alternative site that would involve less adverse impact on the aquatic environment is presumed to exist.
The geographic location of a project site can have a bearing on the intensity of the off-site alternatives analysis required.
**Off Site Alternatives**

**Geographic Location – Coastal Plain**

- Many Lower Coastal Plain sites are at least 1/3 wetland (2/3 upland)
- An intensive off-site alternatives analysis may not be required for a Coastal Plain site that is 1/3 wetland or less
- The amount of wetlands on Upper Coastal Plain sites will vary considerably and this guidance may not be applicable
Off-Site Alternatives

Geographic Location – Piedmont

- Most Piedmont sites are < 10% wetland
- The amount of wetland on a Piedmont site will not have much of an affect on the intensity of the off-site alternatives analysis required
- Piedmont sites are dominated by perennial and intermittent streams
- The off-site alternatives analysis required for a Piedmont site with few streams may not be as intensive
Urban vs. Rural

- In urban areas, remaining undeveloped properties are generally surrounded and dominated by degraded aquatic systems.
- Aquatic functions provided by the wetlands and streams that remain in urban areas are extremely important.
- Projects in urban areas will require a more intensive off-site alternatives analysis.
**Urban vs. Rural**

- The aquatic systems in rural areas are generally more intact and functional.
- Impacts associated with rural projects do not typically result in a major degradation of aquatic functions for the system.
- The alternatives analysis required for a rural project may not be as intensive.
Off-Site Alternatives

Scale of Aquatic Impacts

- The larger the aquatic impact relative to the size of the project area, the more rigorous the requirement to conduct an intensive analysis of off-site alternatives.

- One acre impact on a two acre site would require a very intensive off-site analysis.

- One acre impact on a 100-acre site would require a much less intensive analysis.
Off-Site Alternatives

Do I Really Have To Do One?

- Geographic location, aquatic impacts and size of project will influence the intensity of the off-site alternatives analysis
- But the answer is **YES**, an off-site alternatives analysis is required with every individual permit application
- Must provide 3 sites → Preferred and 2 alternates
Once the Preferred Project Site is Selected, Unnecessary Impacts to the Aquatic Environment Must be Avoided to the Maximum Extent Practicable
Avoidance

Common Mistakes

- Wholesale filling of aquatic resources for the creation of developable lots in a residential subdivision will not pass the avoidance step.
- Very difficult to demonstrate avoidance for a recreational amenity lake in a residential subdivision.
Avoidance

**Simple Rules**

- If total avoidance is impossible, propose aquatic impacts as the last resort!
- Roads should cross aquatic systems at narrowest points
- Do not run utilities through aquatic systems
- Avoid impacts to high quality aquatic systems and impact only low quality or degraded resources
  - For example, construct a bridge over a high quality perennial stream and place a culverts in degraded intermittent steams
Unavoidable Impacts to the Aquatic Environment Must be Minimized to the Maximum Extent Practicable
Minimization

Simple Rules

- Install bottomless culverts to allow free movement of aquatic organisms
- Reduce fill slope from 4:1 to 3:1 or 2:1
- Utilize state-of-the-art erosion and sedimentation control techniques on exposed soils and fill areas
- Re-vegetate utility right-of-ways in wetlands with native plant species
- Directionally bore utilities under high quality perennial streams
Compensatory Mitigation

Only After Demonstrating that Impacts to the Aquatic Environment Have Been Avoided and Minimized to the Maximum Extent Practicable Will Compensatory Mitigation be Considered
The US Army Corps of Engineers can only issue a permit for the least environmentally damaging practicable alternative that meets the basic project purpose.

The only reason Savannah District has denied an individual permit is failure to comply with the 404 (b)(1) Guidelines.