



*New Mitigation Rule Requirements
Individual Permit Applications*



General Principles

Savannah District

- ◆ **Final rule provides substantial flexibility**
- ◆ **Mitigation sequence unchanged:**
 - ❖ **Avoidance, minimization, compensation**
 - ❖ **404(b)(1) Guidelines provisions concerning avoidance, minimization haven't been changed**
 - ❖ **Rule's focus is on compensation for unavoidable impacts**
- ◆ **Final rule focuses on the where and how of compensatory mitigation**



Transition to New Rule

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- ◆ **Final rule applies to permit applications received after the effective date (June 9, 2008)**
- ◆ **However, district engineer can make written determination (e.g., memo to file) that a hardship situation exists for a permit applicant**
 - ❖ **Applicant committed or expended substantial resources in reliance on previous compensatory mitigation guidance**
 - ❖ **Examples: final engineering design work, contractual commitments for construction, purchase or long-term leasing of property**



How does this Rule affect Existing Guidance?

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- ◆ **The final rule replaces:**
 - ❖ **1995 mitigation banking guidance**
 - ❖ **2000 in-lieu fee guidance**
 - ❖ **Regulatory Guidance Letter 02-02**
 - ❖ **Certain provisions of the 1990 Mitigation Memorandum of Agreement between Army and EPA**
 - **Amount, type, and location of compensatory mitigation projects (including the on-site preference)**
 - **Use of preservation**
 - **Other provisions of the 1990 Mitigation MOA remain in effect**



What hasn't changed

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- ◆ **Doesn't change when compensatory mitigation is required**
 - ❖ **Regulatory's general mitigation policy [33 CFR 320.4(r)] and nationwide permit mitigation [33 CFR 330.1(e)(3)] have not been changed by this rule**
- ◆ **Compensation requirements still must be commensurate with the amount and type of impact to be permitted (i.e., the “rough proportionality” test)**
- ◆ **Application of the 404(b)(1) Guidelines for avoidance and minimization**



Preference Hierarchy for Compensatory Mitigation

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1. **Mitigation bank credits**
 2. **In-lieu fee program credits**
 3. **Permittee-responsible mitigation under a watershed approach**
 4. **On-site and/or in-kind permittee-responsible mitigation**
 5. **Off-site and/or out-of-kind permittee-responsible mitigation**
- ◆ **Bottom Line: Consider what is “environmentally preferable” compensation and document your decision**



Watershed Approach

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- ◆ **Strategic site selection to improve or maintain watershed functions**
- ◆ **Consider likelihood for ecological success and sustainability, location in watershed, and practicability**
- ◆ **Use available watershed planning information**
 - ❖ **If it is appropriate for compensatory mitigation decision-making**
- ◆ **Level of information and analysis commensurate with the scope of permitted activity**
- ◆ **May use more than one site to provide compensatory mitigation for a permitted activity**
 - ❖ **On-site mitigation measures for water quality and quantity**
 - ❖ **Off-site mitigation that provides the desired aquatic resource type (habitat and other functions)**
- ◆ **Use of preservation, riparian areas, uplands**



New Requirement for Permit Application Process

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- ◆ **Mitigation statement required for complete permit application (new §325.1(d)(7))**
 - ❖ **Individual permits only**
 - ❖ **Need to get ENG 4345 re-approved**
- ◆ **For §404 standard permits, public notice must describe proposed avoidance and minimization, as well as any proposed compensation**
- ◆ **Mitigation plan not required, but applicant can submit one voluntarily**



Mitigation Statement for IPs

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- 1. How do you plan to mitigate!!!*
- 2. Mitigation Bank – Which One & How many Credits*
- 3. ILF – Georgia Land Trust – Provide Conversion as found in the NW Regional Conditions (SOP wetland credits x 0.875 = in-lieu-fee wetland acres; and (b) SOP stream credits x 0.0046 = in-lieu-fee stream acres).*
- 4. Other – Watershed Approach, On-site, or Off-site...to include credit generation to offset impacts*



Planning and Documentation

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◆ Individual permits

- ❖ Final compensatory mitigation plan must be approved prior to issuance of permit
- ❖ If using mitigation bank or in-lieu fee program, permit must identify specific bank or ILF program



On-site & Off-site Mitigation Plan

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Do You Really Want to go Here??

- 1. Objectives - Resource Types, Amount, method of compensation (rehabilitation, establishment, restoration, preservation)**
- 2. Site Selection - Must be ecologically suitable**
- 3. Site Protection Instrument - Real estate based**
- 4. Baseline Data - soil conditions, ecological, historic plant/hydrology**
- 5. Determination of Credits - SOP**
- 6. Mitigation Work Plan - What exactly you plan to do**
- 7. Maintenance Plan - Description & Schedule of maintenance requirements to ensure the continued viability after construction.**
- 8. Performance Standards - Ecologically based per objectives**
- 9. Monitoring Requirements - Parameters to be monitored to see if the mitigation project is on track to meet performance standards**



Is That All? Maybe Not

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◆ **Financial assurances**

- ❖ **When needed to ensure high level of confidence of successful completion**
- ❖ **E.g.. Performance Bond, Escrow Account, etc...**

◆ **Long-term management**

- ❖ **May be more appropriate for larger compensatory mitigation projects**



Ecological Performance Standards

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- ◆ **Objective and verifiable**
- ◆ **Based on best available science assessed in a practicable manner**
- ◆ **Use performance standards that can be achieved during the desired monitoring period**
 - ❖ **Focus on early stages of ecosystem development**
 - ❖ **Provides early identification of potential problems`**



Monitoring

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- ◆ **To determine if project is meeting performance standards**
- ◆ **Content of monitoring reports determined by DE**
- ◆ **Length of monitoring period can vary**
 - ❖ **Generally 5 years as minimum**
 - ❖ **Can have longer monitoring periods for aquatic resources with slow development rates (e.g., forested wetlands)**
 - ❖ **Can end monitoring requirement earlier, if performance standards have been achieved (but must have 2 consecutive monitoring reports demonstrating success in meeting performance standards)**



Management

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- ◆ **Site protection**
- ◆ **Should be self-sustaining**
- ◆ **Adaptive Management**
 - ❖ **Measures to address deficiencies/unforeseen events**
- ◆ **Long-term Management**
 - ❖ **Permit or third-party instrument must identify party responsible for long-term management (if required)**
 - ❖ **If long-term management is required, funding arrangements must be described**



Special Conditions of an Issued IP

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- 1. Identify the party responsible for providing the compensatory mitigation**
- 2. Incorporate, by reference, the Final Mitigation Plan**
- 3. Describe any Financial Assurances or any long Term Management Provisions for the compensatory mitigation project.**
- 4. If a Mitigation Bank or In-Lieu Program is used, the condition must state the Bank/Program Name, & the number and resource type credits.**



Questions?

Savannah District

<http://www.usace.army.mil/cw/cecwo/reg/>