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New Regulations to Improve Wetland and Stream Compensatory Mitigation

BY PALMER HOUGH AND MARK SUDOL

On March 31, 2008, EPA and the Corps issued revised regulations governing compensatory mitigation for authorized impacts to wetlands, streams, and other waters of the United States under Section 404 of the Clean Water Act. Highlights of the new rule are examined below.

This past spring, the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers issued a new rule establishing equivalent and effective standards for compensatory mitigation of unavoidable impacts to the Nation's wetlands and streams. We believe the science-based and results-oriented standards set forth in the new rule make it the most important step in U.S. wetlands policy since the national goal of "no net loss" was established in 1989.

Compensation for permitted impacts to wetlands, streams, and other aquatic resources is accomplished by restoring, enhancing, establishing, and, in certain circumstances, preserving other wetland and stream resources. This compensation is provided through three mechanisms: permittee-responsible compensatory mitigation (PRM); mitigation banks; and in-lieu-fee mitigation (ILF).

The requirement to provide compensatory mitigation is essential in helping the Clean Water Act Section 404 program meet its longstanding "no net loss" goal. For many years, however, concerns were raised regarding the effectiveness of compensatory mitigation at offsetting permitted losses. Whether each of the three mechanisms for providing compensation were held to the same set of standards was another concern. Mitigation bankers have argued (and rightly so) that they

are consistently held to higher administrative and ecological standards than the other two forms of compensation—PRM and ILF—thereby creating an unlevel and unfair playing field among competing compensation providers.

Prompted by these concerns, EPA and the Corps asked the National Research Council (NRC) to evaluate the effectiveness of compensatory mitigation. The final report, published in 2001, served as an important resource in developing the new

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Box 1. Compensatory Mitigation Rule Timeline

1999: EPA and the Corps ask the NRC to evaluate the effectiveness of compensatory mitigation.

2001: NRC publishes the landmark study, *Compensating for Wetlands Losses Under the Clean Water Act*, and concludes that, despite progress in the past 20 years, compensatory mitigation is not replacing lost wetland functions.

2003: Congress calls for the development of equivalent standards for the use of all three compensation mechanisms through language in the National Defense Authorization Act for 2004.

2006: The Corps and EPA publish a proposed rule in the *Federal Register* on March 28. Over 12,000 comment letters are received and most of the substantive letters acknowledge the general need for such a rule.

2008: After carefully considering public and agency comments and making necessary revisions, the Corps and EPA publish a final rule in the *Federal Register* on April 10. The rule becomes effective on June 9 for new permit applications, and applies to new banks and ILF programs on July 9.

rule, and the final compensatory mitigation rule addresses *all applicable* recommendations from the NRC study.¹ A timeline of the agencies' actions is in Box 1.

Most of the provisions in the new rule can be classified under four important themes:

1. Creation of equivalent, effective standards for all three mechanisms of compensatory mitigation;
2. Use of the best available science in making compensatory mitigation decisions;
3. Predictability and efficiency in mitigation project review; and
4. Expansion of public participation.

Equivalent Standards

While some mitigation providers have historically included all necessary components in their mitigation plans, the NRC and others have noted that many projects lacked one or more key elements. Components commonly omitted from mitigation plans include real estate instruments to protect sites, detailed work plans, performance standards and monitoring requirements to evaluate progress, financial assurances to ensure project construction and

1. Of the 29 recommendations included in the NRC's 2001 critique of wetlands compensatory mitigation practices, the rule directly addresses 17 and indirectly addresses an additional 7, for a total of 24 out of 29. Two of the remaining five recommendations deal with improving data collection and tracking. EPA and the Corps are addressing these through significant investments in new data management systems. The remaining three recommendations involve funding for research and training programs that are being pursued outside the scope of this rulemaking.

Box 2. Key Components of a Mitigation Plan

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

implementation, and long-term site stewardship plans.

The final rule ensures that all compensatory mitigation projects address 12 critical elements in a detailed mitigation plan (see Box 2). For individual permits, the mitigation plan must be approved by the District Engineer prior to permit issuance. For general permits, a final mitigation plan must be approved prior to initiation of work in waters of the United States.

Even though all mitigation plans are now required to include the same key components, specific differences still remain among the three compensation mechanisms. For example, mitigation banking is the most reliable form of compensation because it is the only one that must be initiated prior to being used to offset permitted losses of aquatic resources. It is for this reason that the rule establishes a risk-based *compensation hierarchy* that directs the district engineer to first consider credits from a mitigation bank before other options (see Box 3).

Use of credits from an ILF project is the second most preferable form of compensation. The new rule includes a package of reforms designed to improve the performance of ILF mitigation, including: (1) an advance planning requirement similar to a watershed plan; (2) detailed financial accounting requirements; and (3) the same interagency and public review process as mitigation banks. With these reforms to ILF, we believe that it will be more likely to provide effective compensation than PRM. PRM projects

Box 3. Compensation Hierarchy

Mechanisms for offsetting permitted losses through compensatory mitigation must be considered in the following order of preference:

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

utilizing a watershed-approach are the third most preferred mechanism for compensatory mitigation followed by PRM on-site and PRM off-site compensation.

Using the Best Available Science: Impact Avoidance, Ecological Performance Standards, and the Watershed Approach

“The district engineer will issue an individual section 404 permit only upon a determination that the proposed discharge complies with applicable provisions of 40 CFR part 230, including those which require the permit applicant to take all appropriate and practicable steps to avoid and minimize adverse impacts to waters of the United States.”

—Compensatory Mitigation for Losses of Aquatic Resources; Final Rule

The new rule does nothing to alter the avoidance and minimization requirements set forth in the Section 404(b)(1) Guidelines. In fact, the rule underscores these critical provisions. Emphasis on avoidance and minimization of impacts recognizes that despite progress over the last two decades there are still large gaps in the science of restoration ecology. The NRC and others in the scientific community have stressed that, in light of continued uncertainty associated with the successful replacement of many types of wetlands, the first step should always be to avoid impacting these important aquatic resources if possible.

“Performance expectations in Section 404 permits have often been unclear”

—NRC Report, 2001

The NRC raised numerous concerns regarding the absence or inadequacy of compensatory mitigation project performance standards. To remedy this, the rule requires that all mitigation projects include performance standards that are objective, enforceable, and based on the best available science that can be measured or assessed in a practicable manner. To track progress in meeting performance standards, the rule outlines mitigation site monitoring requirements including the contents of monitoring plans. The rule also establishes a minimum monitoring period of five years but requires longer monitoring periods for aquatic resources with slow development rates (e.g., forested wetlands, bogs).

“A watershed approach would improve permit decision making”

—NRC Report, 2001

The NRC also strongly recommended taking a watershed approach in the selection and design of compensatory mitigation projects. A watershed approach considers watershed needs in a structured way and considers how wetland and stream types in specific locations can fulfill those needs.

The new rule recognizes that the best tool to support taking a watershed approach is a well-crafted watershed plan. When such plans are available and appropriate for use in the Section 404 context, the rule requires the Corps to use them to guide decisions on

compensation project location and design. When plans are not available or existing plans are not appropriate, the rule describes the types of information that need to be evaluated and where such information can be found. This information includes: current trends in habitat loss or conversion; cumulative impacts of past development activities; current development trends; the presence and needs of sensitive species; site conditions that favor or hinder the success of compensatory mitigation projects; and chronic environmental problems such as flooding or poor water quality.

Predictability and Efficiency: Standardized Timelines for Project Review and Improved Administrative Requirements

The NRC highlighted an important positive aspect of mitigation banks in its 2001 report—the consensus-based, interagency review process performed by Mitigation Bank Review Teams (MBRTs). These collaborative teams brought together the skills and expertise of staff from relevant state and federal resource agencies to assist with the review and oversight of mitigation banks. The new rule codifies this process and expands its application to ILF programs as well through “Interagency Review Teams,” or “IRTs.”

The new rule establishes a clear, four-step process for the review of bank and ILF projects by IRTs with disciplined timeframes for agency review. Under the new rule, the total amount of required federal review time is 225 days. If disputes remain after review, unresolved issues can be elevated to headquarters for resolution. An additional 150 days is allowed if this dispute resolution process is triggered.

The final rule also establishes sound and enforceable administrative requirements for all three compensation mechanisms. Because a goal of the rule is the permanent protection of mitigation sites, binding real estate instruments (such as conservation easements) are required to protect sites. Financial assurances are also required to ensure that construction and implementation take place. According to the rule, the Corps must require sufficient financial assurances, such as performance bonds or letters of credit, to ensure a high level of confidence that the project will meet its performance standards. Additionally, the rule requires that long-term management plans be developed and that adequate funding (e.g., non-wasting stewardship endowment) be provided to cover necessary long-term stewardship tasks.

Enhanced Public Participation

Finally, the new rule significantly expands and strengthens opportunities for public participation in compensatory mitigation decisions. Most importantly, the new rule requires that all permit applications and all public notices for standard permits include information regarding how impacts are to be avoided, minimized, and compensated for. This should greatly improve the ability of the public and resource agencies to provide meaningful and timely comments to the Corps regarding proposed impacts and their mitigation. The rule also requires that all proposed bank and ILF projects be subject to public notice and review. Additionally, all

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mitigation project monitoring reports will be available for public review and our goal is to make these available via the web by the end of the year.

The Way Forward

The new rule will be the impetus for many important and necessary changes for regulators, permit applicants, mitigation providers, and others. Proper training and outreach on the rule will be critical for ensuring that these improved standards result in more effective compensation on the ground. To that end, the Corps and EPA have already conducted a number of critical outreach and training efforts throughout the country, and will continue to do so for the remainder of 2008. For a copy of the new rule, supporting materials, and other compensatory mitigation resources, go to <http://www.epa.gov/wetlandsmitigation/>. ■

Palmer Hough is an environmental scientist in the U.S. Environmental Protection Agency Wetlands Division. Mark Sudol is chief of the U.S. Army Corps of Engineers Regulatory Branch.

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