

# Compensatory Mitigation Rule



US Army Corps  
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# COMPENSATORY MITIGATION RULE

Each year thousands of property owners undertake projects that affect the nation's aquatic resources, such as wetlands and streams. Before property owners may proceed, a permit from the U.S. Army Corps of Engineers is often required to satisfy the requirements of the Clean Water Act or the Rivers and Harbors Act of 1899. Through its regulatory program, the Corps of Engineers ensures that any environmental impact on aquatic resources from these projects is avoided and minimized as much as possible. In some cases, the Corps may require compensatory mitigation to offset the losses of aquatic resources. The Corps of Engineers authorizes approximately 100,000 projects per year.



Wetland creation—first season.

Wetland creation—second season.

Elizabeth River, Virginia. *Photographer: Steve Martin, U.S. Army Corps of Engineers*

## What is compensatory mitigation?

Compensatory mitigation is the restoration, establishment, enhancement, or preservation of aquatic resources for the purpose of offsetting losses of aquatic resources resulting from activities authorized by Corps of Engineers' permits. Annually, the Corps of Engineers authorizes an average of 22,000 acres of wetland impacts and requires 49,000 acres of compensatory mitigation to offset these impacts.

### Types of compensatory mitigation:

**Restoration** – An activity that returns natural or historic functions to a former or degraded aquatic resource.

**Establishment** – An activity that alters an upland site to develop an aquatic resource at that site.

**Enhancement** – An activity that improves the functioning of an existing aquatic resource.

**Preservation** – An activity that protects and maintains an existing aquatic resource through real estate actions (deed restrictions, conservation easements) or physical actions, such as constructing a fence.

## What are the sources of compensatory mitigation?

There are three ways compensatory mitigation can be provided: mitigation banks, in-lieu fee programs, and permittee-responsible mitigation. Mitigation banks and in-lieu fee programs are generally the preferred options for compensatory mitigation, because they consolidate resources and involve more financial planning and scientific expertise. These factors help reduce the risk of failure of mitigation projects.

### Sources of compensatory mitigation:

**Mitigation bank:** One or more sites where aquatic resources such as wetlands or streams are restored, established, enhanced and/or preserved for the purpose of providing compensatory mitigation in advance of authorized impacts to similar resources.

**In-lieu fee program:** A program that involves the restoration, establishment, enhancement, and/or preservation of aquatic and terrestrial resources through funds paid to a governmental or non-governmental natural resource management organization.

**Permittee-responsible mitigation:** Individual projects constructed by permittees to provide compensatory mitigation for activities authorized by Corps of Engineers' permits.



Wetland mitigation planting project, Florida.

Photographer: Cam Shaw, U.S. Army Corps of Engineers

## **What are the key elements in the rule?**

There are a number of key elements for mitigation bankers, in-lieu fee program sponsors and permittees to consider for compensatory mitigation projects. Some of these include:

- Strategic site selection within the watershed
- Consolidation of financial and technical resources can provide for larger, more successful mitigation banks and in-lieu fee projects
- Use of preservation, riparian areas, and uplands to sustain wetlands and waters
- Being able to obtain approval to transfer mitigation responsibility from permit recipient to mitigation bank or in-lieu fee program

## **Where does compensatory mitigation occur?**

Compensatory mitigation projects may occur on the same site as the permitted project or at an off-site location usually within the same watershed. For some permits, a combination of on-site and off-site compensatory mitigation projects is required. Off-site compensatory mitigation may be provided by mitigation banks and in-lieu fee programs or through permittee-responsible mitigation.

## **Why a compensatory mitigation rule?**

The Corps of Engineers received Congressional authority to issue its compensatory mitigation rule as part of the National Defense Authorization Act of 2004. The goal of the rule is to provide more opportunities for compensatory mitigation as well as provide similar standards and criteria for mitigation projects. Prior to this rule, compensatory mitigation practices varied considerably among Corps of Engineers' district offices, because they relied on non-binding guidance documents. The new rule will promote consistency and predictability, as well as improved ecological success. The Corps of Engineers and U.S. Environmental Protection Agency issued the new rule in the spring of 2008 following months of collaboration with key agency partners and public review.

## **Who oversees compensatory mitigation?**

The Corps of Engineers establishes an Interagency Review Team to review and manage proposed mitigation banks or in-lieu fee programs. The team may consist of the Corps and representatives from the U.S. Environmental Protection Agency, U.S. Fish and Wildlife Service, National Oceanic and Atmospheric Administration Fisheries, the Natural Resources Conservation Service, and other federal agencies, as well as representatives from tribal, state and local regulatory and resource agencies. The Corps of Engineers makes the final decision on whether or not to approve a proposed mitigation bank or in-lieu fee program.

## **What are the benefits of the new compensatory mitigation rule?**

The new rule will improve the ecological success of compensatory mitigation efforts through better site selection, the use of a watershed approach for planning and project design, and use of ecological success criteria to evaluate and measure performance of mitigation projects. Using a watershed approach, mitigation project sites will be selected to offset permitted losses of aquatic resources and to provide ecological benefits to an entire watershed.



**Wetland restoration project, Puerto Rico.**

*Photographer: Jose Rosario-Fabregas, U.S. Army Corps of Engineers*

## Benefits of the mitigation rule:

- Improve predictability, transparency and performance of compensatory mitigation projects
- Flexibility of mitigation options
- All compensatory mitigation procedures in one document
- Possible reduction of permitting time

This rule ensures consistent compensatory mitigation standards and requirements for all jurisdictional waters and wetlands.

The rule also preserves existing mitigation requirements by ensuring that environmental impacts are avoided and minimized wherever possible. The rule does not affect the Corps of Engineers' current regulatory jurisdiction under Section 10 of the Rivers and Harbor Act of 1899 or Section 404 of the Clean Water Act.



Wetland creation—first season.



Wetland creation—second season.

Lafayette River, Virginia. *Photographer: Steve Martin, U.S. Army Corps of Engineers*



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For more information on compensatory mitigation,  
please visit the Army Corps of Engineers' Regulatory web site at  
**<http://www.usace.army.mil/cw/cecwo/reg/>**

April 2008