



U S Army Corps
of Engineers
Huntington District

Public Notice

SPECIAL PUBLIC NOTICE

FINAL MITIGATION RULE

Please address all comments and inquiries to:

U.S. Army Corps of Engineers, Huntington District

ATTN: CELRH-OR-F Public Notice No. (*reference above*)

502 Eighth Street

Huntington, West Virginia 25701-2070

Phone: (304) 399-5210

On April 10, 2008, the United States Army Corps of Engineers and the United States Environmental Protection Agency Published a Final Rule on Compensatory Mitigation for the Losses of Aquatic Resources. **The effective date of this rule was June 9, 2008.**

The Huntington District encourages all applicants to read the full text of the Final Mitigation Rule, which can be obtained at:

http://www.usace.army.mil/cw/cecwo/reg/news/final_mitig_rule.pdf

The new rule applies to all Department of the Army (DA) permit applications and DA permits issued under Section 404 of the Clean Water Act and Sections 9 and 10 of the Rivers and Harbors Act. The new rule establishes performance standards, sets timeframes for decision making, and to the extent possible, establishes equivalent requirements and standards for the three sources of compensatory mitigation: permittee responsible mitigation, mitigation banks, and in-lieu fee programs. The purpose of this notice is to draw the attention of applicants to several key changes that will affect the application and review process for DA permits.

The new rule applies to compensatory mitigation projects for all types of aquatic resources that can be impacted by activities authorized by DA permits, including streams, wetlands, and other open waters. The rule applies to compensatory mitigation required by all DA permits, including individual and general permits.

The final rule does not change when compensatory mitigation is required or the extent of the required mitigation. However, it does modify the procedures for where compensatory mitigation will be located and how the compensatory mitigation will be organized and completed. The rule preserves the requirement for applicants to avoid or minimize impacts to aquatic resources before proposing compensatory mitigation projects to offset permitted impacts.

Individual Permits:

Individual Permit Applications: For activities involving discharges of dredged or fill material into waters of the United States, any application for an Individual Permit **must** include a statement describing how impacts to waters of the United States are to be avoided and

minimized. The application **must** also include either a statement describing how impacts to waters of the United States are to be compensated for or a statement explaining why compensatory mitigation should not be required for the proposed impacts.

Public Notice: Any Public Notice issued for an Individual Permit application received after the effective date of the new rule will include a mitigation statement based on the information submitted with the application.

Individual Permit Conditions: A final compensatory mitigation plan must be approved prior to issuance of any Individual DA permit. The new mitigation rule establishes mandatory special conditions for inclusion in any DA permit involving compensatory mitigation.

Nationwide Permits (NWP):

Pre-Construction Notification (PCN): The new rule does not change the requirements for a complete PCN as described by NWP General Condition 27(b). NWP General Condition 27(b)(5) states, when compensatory mitigation is required, the PCN must include a mitigation statement describing how the mitigation requirement will be satisfied. As an alternative, this condition states the prospective permittee may submit a conceptual or detailed mitigation plan.

General Condition 20. Mitigation: The new rule does not change the requirements described in this NWP General Condition.

Nationwide Permit Verifications: If compensatory mitigation is required for an activity authorized by a nationwide permit, the District Engineer may approve a conceptual or detailed mitigation plan to meet required timeframes for general permit verifications. However, the permittee cannot begin the work in waters of the US authorized by the general permit until a final mitigation plan has been approved.

Mitigation Plans:

Compensatory mitigation provided by all three compensation mechanisms (permittee responsible mitigation, mitigation banks, and in lieu fee programs) must have mitigation plans that include the same 12 fundamental components: objectives, site selection criteria, site protection instruments, baseline information, credit determination methodology, a mitigation work plan, a maintenance plan, ecological performance standards, monitoring requirements, a long-term management plan, an adaptive management plan, and financial assurances.

Relationship to Previous Mitigation Guidance:

The new rule replaces the following:

- the “Federal Guidance for the Establishment, Use, and Operation of Mitigation Banks,” which was issued on November 28, 1995.
- the “Federal Guidance on the Use of In-Lieu Fee Arrangements for Compensatory Mitigation Under Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act,” which was issued on November 7, 2000, and
- Regulatory Guidance Letter 02–02, “Guidance on Compensatory Mitigation Projects for Aquatic Resource Impacts Under the Corps Regulatory Program Pursuant to Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act of 1899” which was issued on December 24, 2002.

The new rule also applies instead of the provisions relating to the amount, type, and location of compensatory projects, including the use of preservation in the February 6, 1990 Memorandum of Agreement (MOA) between the Department of the Army and the Environmental Protection Agency on the Determination of Mitigation Under the Clean Water Act Section 404(b)(1) Guidelines. All other provisions of this MOA remain in effect.

Effective Date: Permit application and/or general permit verification requests received prior to the June 9, 2008 effective date of the new rule will be processed in accordance with the regulations and guidance that were in effect at the time the information was submitted. Permit applications and/or general permit verification requests received after the June 8, 2008 will be subject to the new rule, unless the district engineer has made a written determination that applying the new rule will result in substantial hardship to a permit applicant.

As noted above, the purpose of this notice is to alert applications to several major changes that will affect the application and review process for DA permits. This notice is not an exhaustive or complete summary of the new Mitigation Rule. All applicants should read the full text of the rule and are required to comply with all applicable sections of the complete rule.

If you have any questions concerning this public notice, please call the Huntington District at the following numbers or by writing to this office at the following address.

for projects in Ohio, please call (304) 399-5210

for projects in West Virginia, please call (304) 399-5710

mailing address: U.S. Army Corps of Engineers, Huntington District

Attn: Regulatory Branch

502 8th Street

Huntington, West Virginia 25701-2070


for Ginger Mullins
Chief, Regulatory Branch

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