

Wetlands Compensatory Mitigation Rule

On March 31, 2008, the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (the Corps) announced innovative new standards to promote no net loss of wetlands by improving wetland restoration and protection policies, increasing the effective use of wetland mitigation banks and strengthening the requirements for the use of in-lieu fee mitigation. These new wetlands compensatory mitigation standards emphasize best available science, promote innovation and focus on results. This rule follows the recommendations of the National Research Council by establishing equivalent, effective standards for all forms of wetland replacement projects under the Clean Water Act.



Emphasize Best Available Science

The new standards clearly affirm the requirement to adhere to the “mitigation sequence” of “avoid, minimize and compensate”: anyone wishing to obtain a permit to impact a wetland or other aquatic resource must first *avoid* and *minimize* impacts, and then *compensate* for unavoidable impacts. The rule’s emphasis on avoiding impacts to wetlands and other water resources recognizes that despite progress over the last two decades there are still large gaps in the science of restoration ecology. The National Research Council (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. For unavoidable impacts, the rule incorporates key NRC recommendations associated with improving the planning, implementation and management of wetland replacement projects provided in the NRC’s 2001 assessment of wetland replacement practices. Specifically, the rule:

- Emphasizes that the process of selecting a location for compensation sites should be driven by assessments of watershed needs and how specific wetland restoration and protection projects can best address those needs;
- Requires measurable and enforceable ecological performance standards for all types of compensation so that project success can be evaluated;
- Requires regular monitoring to document that compensation sites achieve ecological performance standards;
- Clearly specifies the components of a complete compensation plan based on the principles of aquatic ecosystem science; and
- Emphasizes the use of science-based assessment procedures to evaluate the extent of potential water resource impacts and the success of compensation measures.



Wildlands, Inc.

Black-necked stilts in a restored seasonal wetland at the Plummer Creek Mitigation Bank in Newark, California

What is a Wetland Mitigation Bank?

A wetland mitigation bank is a wetland area that has been restored and protected to provide compensation for impacts to wetlands. A mitigation bank may be created when a government agency, corporation, nonprofit organization or other potential bank sponsor undertakes wetland restoration and protection activities under a formal agreement with the Corps. This formal agreement describes the wetland area’s restoration plan and establishes the number of environmental credits the restoration work can potentially generate. Although most mitigation banks are designed to compensate only for impacts to various wetland types, in recent years banks have been developed to compensate specifically for impacts to streams.

Promote Innovation

The new standards encourage the expansion of mitigation banking, a reliable and verifiable market-based method of wetland and water resource replacement. The standards accomplish this by:

- Creating a flexible preference for the use of mitigation bank credits to satisfy requirements for wetlands compensatory mitigation, since banks can help reduce many of the risks and uncertainties associated with compensatory mitigation;
- Simplifying the process for using existing mitigation banks by clearly stating that approved banks are able to compensate for all permitted impacts; and
- Making the process of establishing a mitigation bank more predictable by establishing disciplined timelines for the review of bank proposals.

The new standards' emphasis on the use of watershed assessments to identify priority wetland restoration and protection projects will encourage federal, state, tribal and local planning efforts. This, in turn, will result in faster and more effective compensation within the context of local or regional watershed needs.

Focus on Results

In order to ensure successful resource replacement projects, the standards establish sound and enforceable administrative requirements for all types of compensation projects concerning:

- Real estate instruments that protect the site;
- Financial assurances for near- and long-term site stewardship;
- Monitoring and contingency planning; and
- Identification of parties responsible for project tasks.

The new standards also expand and strengthen public participation in decisions regarding resource restoration and protection efforts. They require the inclusion of information in public notices describing how impacts will be avoided, minimized and compensated for. Furthermore, all proposed mitigation banks and in-lieu fee programs will receive public notice and comment. The new standards will improve accountability for replacement projects conducted by the regulated community by encouraging "performance-based" forms of wetland replacement such as mitigation banking. Unlike traditional forms of wetland replacement, the wetland restoration credits generated by banks are tied to demonstrated achievement of project goals. Most importantly, the new rule will hold all mitigation providers to the same effective standards so that providers of high-quality wetland replacement projects are not at a competitive disadvantage to others being held to lower standards.

Background

Wetlands and other aquatic resources play an important role in the environmental landscape. Those who intend to dredge or deposit fill in wetlands or other waters of the U.S. must apply for a permit from the Corps (or EPA-approved State) under the Clean Water Act. Consistent with the wetland program's goal of "no net loss of wetlands," these permits often require compensatory mitigation – typically, the restoration of former (historically degraded) wetlands to mitigate the effects of wetland loss.

Wetlands provide numerous beneficial functions including protecting and improving water quality, providing fish and wildlife habitat, storing floodwaters, reducing damages associated with storm surges such as those caused by hurricanes and recharging underground sources of drinking water.

Selected References

For more information regarding compensatory mitigation and to download a copy of the new standards, see <http://www.epa.gov/wetlandsmitigation>

Corps Regulatory Program: <http://www.usace.army.mil/inet/functions/cw/cecwo/reg>

National Academy of Sciences. Compensating for Wetland Losses Under the Clean Water Act. 2001. National Academy Press. Washington, D.C. Available at <http://www.nap.edu/>