US Army Corps of Engineers ®
Seattle District

Special Public Notice

Regulatory Branch
Post Office Box 3755
Seattle, Washington 98124-3755
Telephone (206) 764-3495

Public Notice Date: May 19, 2016

ANNOUNCEMENT: Clarification of the U.S. Army Corps of Engineers Regulatory Program Mitigation Requirements

BACKGROUND: In an effort to clarify for the regulated public, consultants, and agents, we are publishing this Special Public Notice to provide an overview of the mitigation program of the Seattle District, U.S. Army Corps of Engineers, Regulatory Branch (Corps). We are not changing our mitigation processes or regulations with this Special Public Notice. We are simply summarizing and consolidating mitigation information from various regulations and documents into a single concise resource.

MITIGATION SEQUENCING: Mitigation sequencing[1] is the first step which must occur for all projects proposing impacts to waters of the U.S. Mitigation sequencing refers to a series of steps permit applicants must follow to eliminate or decrease the negative environmental effects of a proposed action to a water of the U.S. Waters of the U.S. include (but are not limited to) wetlands, streams, rivers, lakes, mud flats, and tidal waters. Mitigation sequencing is composed of the following steps:

1. Avoiding impacts to waters of the U.S.
2. Minimizing permanent and/or temporary impacts by limiting the degree or magnitude of the action to avoid or reduce impacts.
3. Repairing, rehabilitating, or restoring unavoidable temporary impacts to the affected environment.
4. Compensating for the unavoidable impact by replacing, enhancing, or providing substitute resources.

COMPENSATORY MITIGATION: The Federal Rule on Compensatory Mitigation[2] (Federal Rule) outlines the requirements for providing compensatory mitigation for adverse impacts to the aquatic environment. The purpose of the Federal Rule is to establish standards and criteria for the use of all types of compensatory mitigation, including on-site and off-site permittee-responsible mitigation, mitigation banks, and in-lieu fee mitigation to offset unavoidable impacts to waters of the U.S., authorized through the issuance of Department of the Army permits pursuant to Section 404 of the Clean Water Act and/or Sections 9 or 10 of the Rivers and Harbors Act.

[1] 1990 Memorandum of Agreement between the EPA and the Corps defines the mitigation sequence under the Clean Water Act Section 404(b)(1) Guidelines (40 CFR part 230)

[2] 33 CFR Parts 325 and 332; Compensatory Mitigation for Losses of Aquatic Resources

COMPENSATORY MITIGATION - PREFERENCE HIERARCHY: The Federal Rule establishes a preference hierarchy[3] for the different types of compensatory mitigation available to an applicant. The order of preference outlined in the Federal Rule is as follows:

1. Mitigation Banks
2. In-lieu fee (ILF) Programs
3. Permittee-responsible mitigation under a watershed approach
4. Permittee-responsible mitigation that is on-site and in-kind
5. Permittee-responsible mitigation that is off-site and/or out-of-kind.

The Federal Rule provides a comprehensive rationale why Corps-approved Mitigation Banks and ILF Programs are preferred over permittee-responsible mitigation. If a proposed project is located within the Service Area of a Corps-approved Mitigation Bank or ILF Program, the applicant must first consider use of them as compensatory mitigation. However, the Federal Rule also states this preference can be overridden when the permittee-responsible mitigation will restore an outstanding resource based on rigorous scientific and technical analysis.

Banks are the preferred compensatory mitigation option for a variety of reasons[4]. Use of a mitigation bank can help reduce risk and uncertainty of mitigation success, and reduce the temporal loss of resource functions and services. Mitigation banks typically involve larger, more ecologically valuable parcels, and more rigorous scientific and technical analysis, planning and implementation than permittee-responsible mitigation.

ILF Programs also typically involve larger, more ecologically valuable parcels, and more rigorous scientific and technical analysis, planning and implementation than permittee-responsible mitigation[5]. ILF Programs also devote significant resources to identifying and addressing high-priority resource needs on a watershed scale, as reflected in their comprehensive compensation planning framework.

There was much analysis and consideration given to the preference hierarchy as established in the Federal Rule. In addition, the Seattle District also considers the benefits of banks and ILF programs from a variety of perspectives:

Benefits to the applicant and the public by using a Bank or ILF:

- Reduces permitting time
- Transfers all responsibility for implementation and success of the compensatory mitigation from the permit applicant to the Bank or ILF Sponsor
- Generally speaking, permittee-responsible mitigation may have lower upfront costs but it does require: long-term involvement; permanent encumbrance of mitigation site or property (e.g., deed restriction, conservation easement, etc.); maintenance of the mitigation site in perpetuity (e.g., long-term management plan); financial assurances; contingency measures; and the associated, potentially significant, costs accrued through the life of the mitigation project
- Provides fairly simple and predictable compensatory mitigation alternatives
- Reduces the risk of failure, particularly of small mitigation sites, and reduces associated costs of re-implementing mitigation and additional compensation for temporal losses due to failure of the site

[3] Federal Rule 33 CFR 332.3(b)
[4] Federal Rule 33 CFR 332.3(b)(2)
[5] Federal Rule 33 CFR 332.3(b)(3)

Additional benefits to the environment by using Banks and ILF Programs:

- Typically, mitigation sites for Banks and ILF Programs include more contiguous acreage than permittee-responsible mitigation sites.
- Banks and ILF Programs target their selection of these larger sites to protect and preserve multiple, diverse, and complex ecological systems and functions at a landscape scale, thus allowing synergistic interactions that provide ecological lift and functions beyond the boundaries of Bank and ILF mitigation sites. This landscape scale synergy is difficult to achieve at small on-site permittee-responsible mitigation projects.
- Individual Bank and ILF Program mitigation sites generally include larger tracts of ecologically important upland habitats within their protected boundaries than small on-site permittee-responsible mitigation projects. These upland habitats provide additional ecological diversity and functions for the watershed.
- While it may be ecologically effective to compensate for some critical functions on-site through permittee-responsible mitigation, some functions (such as habitat functions) can be more effectively and successfully compensated through the use of Banks and ILF programs at different location(s) in the same watershed.

For the Corps to override the preference hierarchy (i.e., choose to authorize permittee responsible mitigation instead of using a Bank or ILF Program) as established in the Federal Rule, the following items must be addressed by the applicant:

- The applicant must provide a sound and thorough ecological rationale to the Corps. The Federal Rule[6] states the preference hierarchy may be overridden if there is a high-quality permittee-responsible mitigation project where the permittee-responsible mitigation plan meets all of the standards outlined in the Federal Rule, and when the permittee-responsible mitigation will restore an outstanding resource based on rigorous scientific and technical analysis.
- A permittee-responsible mitigation plan is not considered complete unless it contains this ecological rationale, including a site selection rationale using a watershed approach. The permittee-responsible mitigation must demonstrate it will be self-sustainable, have low risk of failure and a high likelihood of success, and fully compensate for all aquatic resource functions and services impacted by the proposed project, including permanent, direct, indirect, temporary, and temporal impacts.
- Costs may be a consideration but cannot be the main reason to not use a Bank or ILF Program. Cost is just one of *many* considerations the Corps evaluates that may override the Federal Rule preference for Banks and ILF Programs.

    If an applicant proposes to use cost as one of the factors to override the preference hierarchy, a detailed and comprehensive cost analysis must be submitted for evaluation, including: land costs; consultant fees for designing, implementing, maintaining, and monitoring (inclusive of preparing monitoring reports in Years 1, 3, 5, 7 and 10) for a minimum of 10 years; contingency actions (typically 20% of construction costs); financial assurances; site protection costs; and, Long-Term Management Plan development, management, and monitoring. Depending on the specifics of the permittee responsible mitigation site, long-term management and monitoring requirements will likely be in perpetuity (e.g., particularly relevant for sites with weirs or other water control structures which require maintenance).

[6] Preamble of the Federal Rule

PERMITTEE RESPONSIBLE COMPENSATORY MITIGATION PLAN: If a permittee-responsible mitigation plan is submitted, before a permit decision can be made, the applicant must submit a final mitigation plan fully addressing all requirements of the Federal Rule[7]. The easiest way to meet this requirement is for the applicant to meet the requirements as outlined in the Joint Agency Guidance: Wetland Mitigation in Washington State Part 1: Agency Policies and Guidance and Part 2: Developing Mitigation Plans (Ecology 2006)[8]. A *Checklist of Key Elements of the Federal Rule and the Joint Agency Guidance* can be found on our webpage at www.nws.usace.army.mil, under Forms. Based on the Corps' review of many permittee-responsible compensatory mitigation plans, we have found many of the required elements are often omitted or not fully discussed. To help ensure you have a complete mitigation plan, make sure the plan includes the key elements described above, in particular, include:

- Per the Preference Hierarchy, when considering permittee-responsible mitigation, you must first consider using a watershed approach for site selection; this watershed analysis must be a component of the mitigation plan
- Sufficient baseline information of the mitigation site, especially hydrologic data
- Functioning buffers of adequate width to protect the mitigation site
- Understandable, measurable, and enforceable performance standards that are practicable and ecologically meaningful
- Appropriate performance standards for invasive species
- A long term management plan
- A site protection instrument
- Financial assurance information
- Contingency measures

CONCLUSION: This Special Public Notice provides an overview of the mitigation program of the Seattle District, U.S. Army Corps of Engineers, Regulatory Branch. Our hope is you will use this single concise resource as a starting point when you are developing a project which impacts waters of the U.S. Compliance with all of the processes in the order described in this document will help to expedite the Corps' review of your permit application and ensure impacts to aquatic resources are minimized. These mitigation processes apply to all permit application types: Nationwide Permits, Regional General Permits, Letters of Permission, and Standard Individual Permits. Please visit our website www.nws.usace.army.mil, select Permit Guidebook, Chapter V Mitigation for more information on mitigation.

[7] 33 CFR 332.4(c)(2) – (14)

[8] https://fortress.wa.gov/ecy/publications/publications/0606011b.pdf