DEPARTMENT OF THE ARMY
JACKSONVILLE DISTRICT CORPS OF ENGINEERS
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REPLY TO
ATTENTION OF

Regulatory Division

SEP 26 2006

# PUBLIC NOTICE

Minimum Monitoring Requirements for Compensatory Mitigation Projects Involving the Creation, Restoration, and/or Enhancement of Aquatic Resources

**TO WHOM IT MAY CONCERN:** The attached Regulatory Guidance Letter (RGL) 06-03, provides guidance on mitigation monitoring requirements for compensatory mitigation projects including the content for monitoring reports. Specifically, this RGL requires that mitigation sites typically be monitored for a minimum of five years and annual monitoring reports total no more than 10 pages in length. By incorporating this length requirement, we are ensuring that only the pertinent information is submitted for review pending our analysis if a site visit is warranted to insure mitigation compliance with specified permit conditions. Moving away from the large bulky monitoring reports is encouraged by the paperwork reduction act and allows us to implement procedures that strongly encourage electronic submittals. This RGL was formulated to compliment and be consistent with the "Compensatory Mitigation For Losses of Aquatic Resources: Proposed Rule" (FR 71 FR 15520, issued March 28, 2006) and may be revised if this guidance is not consistent with the Final Rule.

Any questions or comments regarding this RGL should be directed to either Ron Silver, Regulatory Program Manager at 904-232-2502 or Eric Summa, Chief, Enforcement Section, at 904-232-1665.

Margaret E. Gaffney-Smith
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Chief, Regulatory Division

US Army Corps of Engineers®

# REGULATORY GUIDANCE LETTER

**No. 06-03** **Date: August 3, 2006**

SUBJECT: Minimum Monitoring Requirements for Compensatory Mitigation Projects Involving the Creation, Restoration, and/or Enhancement of Aquatic Resources.

## 1. Purpose and Applicability

**a. Purpose.** To provide the Districts and regulated public guidance on minimum monitoring requirements for compensatory mitigation projects including the required content for monitoring reports.

**b. Applicability.** The District Engineer (DE) must require the submission of monitoring reports to assess the development and condition of compensatory mitigation projects, unless the DE determines that monitoring is not practicable for that compensatory mitigation project. This guidance applies to all Department of the Army (DA) permit authorizations under Section 404 of the Clean Water Act and Sections 9 and 10 of the Rivers and Harbors Act, including Nationwide Permit (NWP) verifications, which require monitoring of compensatory mitigation involving the creation, restoration, and/or enhancement of aquatic resources as a special condition.

## 2. Background

Recent studies by the Government Accountability Office (GAO) and National Research Council (NRC) indicated that the U.S. Army Corps of Engineers (Corps) was not providing adequate oversight to ensure that compensatory mitigation projects were successfully replacing the aquatic resource functions and services lost as a result of permitted activities. For example, the GAO study determined that many project files requiring mitigation lacked monitoring reports despite the fact that such reports were required as a condition of the permit. Similarly, the NRC study documented that a lack of clearly stated objectives and performance standards in approved compensatory mitigation proposals made it difficult to ascertain whether the goal of no net loss of wetland resources was achieved.

On March 28, 2006, the Corps and Environmental Protection Agency published a proposed rule (Mitigation Rule) to revise regulations governing compensatory mitigation for activities authorized by permits issued by the Department of the Army (33 CFR Parts 325 and 332). This Regulatory Guidance Letter (RGL) was formulated to compliment and be consistent with the proposed Mitigation Rule. Subsequently, this RGL may be revised if the guidance stated herein is not consistent with the final Mitigation Rule.

## 3. Discussion

Inconsistent approaches to monitoring compensatory mitigation projects are one of many factors that have affected the ability of project managers (PM) to adequately enforce the required performance standards of Corps approved mitigation plans. Standardizing monitoring requirements will aid PMs when evaluating compensatory mitigation sites, thereby allowing DEs to effectively assess the status and success of compensatory mitigation projects.

This RGL addresses the reports and requirements associated with monitoring mitigation projects and for determining the information necessary to conduct compensatory mitigation site assessments. Monitoring requirements are typically based on the performance standards for a particular project and may vary from one compensatory mitigation project to another.

Monitoring reports are documents intended to provide the DE with information to determine if a compensatory mitigation project site is successfully meeting its performance standards. Remedial actions for correcting deficiencies in mitigation outcomes must be based on information provided in the monitoring reports and subsequent site inspections.

## 4. Guidance

### a. Monitoring guidelines for compensatory mitigation.

**i. Performance Standards.** Performance standards, as defined in 33 CFR 332.2, must be consistent with the objectives of the compensatory mitigation project. The goal of these standards is to ensure that the project can be objectively evaluated to determine if it is developing into the desired resource type and providing the expected functions. Mitigation projects compensating for wetland impacts must include special conditions that clearly state that all wetlands within the mitigation site which are counted towards compensation must meet performance standards for and be monitored for the three parameters defined in the 1987 Corps of Engineers Wetland Delineation Manual and any associated guidance (i.e., hydrophytic vegetation, hydric soils, and the appropriate hydrology). Additional performance standards based on functional assessment methods and/or criteria may be incorporated into the special conditions as a basis for determining if the site is achieving the desired functional capacity. Compensatory mitigation projects also are conducted to offset impacts to other aquatic resources, such as riverine and estuarine habitats. Special conditions of the DA permits must clearly state performance standards specific to the type and function of the ecosystem in relation to the objectives of the compensatory mitigation project. Alternatively, the special conditions can refer to the performance standards documented in the Corps approved mitigation plan.

**ii. Monitoring Timeframe.** The monitoring period must be sufficient to demonstrate that the compensatory mitigation project has met performance standards, but not less than five years. Special conditions of the permit must support the five-year monitoring requirement and include deadlines for submittal of reports. Increased monitoring timeframes are usually needed for mitigation sites that take longer to develop and reach a level of stability. For example, a site at which a forested wetland is being restored may take longer than five years to develop into a fully functioning wetland. Certain compensatory mitigation projects may require

monitoring more often than annually during the early stages of development. This additional monitoring will allow project managers to quickly address problems and/or concerns associated with the mitigation site. Annual monitoring can resume once the site has stabilized and begun to develop in accordance with the approved performance standards. Monitoring may be conducted on a less frequent timeframe (such as every other year) in cases where monitoring is required for longer than five years. Yearly monitoring must occur for the first few years, however, to ensure the area is becoming established as a successful mitigation site. Off-year monitoring must include some form of assessment such as driving by the mitigation site, telephone conversations regarding condition of the mitigation site, etc. The special conditions of the DA permit (or the mitigation plan as referenced in the special conditions) must specify the length of monitoring required. Onsite conditions, the complexity of the approved mitigation plan, and unforeseen circumstances will ultimately determine whether the length and amount of mitigation monitoring required should be extended beyond the five-year time frame for a particular project. Complex and/or ecologically significant compensatory mitigation projects should have higher priority for site visits.

The DE may waive any remaining monitoring requirements upon a determination that the compensatory mitigation project has achieved its performance standards. For example, restoring open water habitat that was temporarily drained may not require a five-year monitoring period. Conversely, the DE may extend the original monitoring period upon a determination that performance standards have not been met or the compensatory mitigation project is not on track to meet them (e.g., high mortality rate of vegetation). The DE may also revise monitoring requirements when remediation is required.

**iii. Monitoring Reports**. Monitoring reports are required for all compensatory mitigation projects unless the DE determines that monitoring is not practicable for that compensatory mitigation project. The content of the monitoring reports must be specified in the special conditions of the DA permit so that the requirements are clearly identified for the permittee. In addition, the monitoring reports must comply with the timeframes specified in the special conditions of the DA permit. Monitoring reports should not be used as a substitute for onsite compliance inspections. Rather, monitoring reports must provide the PM with sufficient information to assess progress towards meeting the specified performance standards and to prioritize site inspections based on the findings documented in the report. The standard monitoring report format presented here is designed to provide the PM with sufficient information on the permitted work, the mitigation site, and whether a compliance visit is warranted. This new format will allow the permittee to electronically submit the reports and photos for review. Electronic submittals should be strongly encouraged by the Corps districts. Site visits to mitigation sites should be documented in the administrative record and will count toward district performance goals. DEs should consider taking enforcement action if the responsible party fails to submit complete and timely monitoring reports.

**b. Contents of Monitoring Reports**. Monitoring reports provide the PM with a convenient mechanism for assessing the status of required compensatory mitigation projects. They also allow the PM to prioritize inspections of compensatory mitigation projects so that the Corps can ensure effective use of limited resources and maximize replacement of the most valuable impacted aquatic resources within an ecosystem. The PM should schedule a site visit

and determine potential remedial actions if problems with the compensatory mitigation project are identified in a monitoring report.

DEs should discourage the submittal of large bulky reports that provide general information. While often helpful as background, reiteration of the mitigation and monitoring plan content, lengthy discussions of site progress, and extensive paraphrasing of quantified data are unnecessary. Monitoring reports must be concise and effectively provide the information necessary to assess the status of the compensatory mitigation project. Reports must provide information necessary to describe the site conditions and whether the compensatory mitigation project is meeting the performance standards.

Annual monitoring reports must follow a 10-page maximum report format for assessing mitigation sites, as follows:

**i. Project Overview (1 page)**

(1) Corps Permit Number
(2) Name and contact information of permittee and consultant
(3) Name of party responsible for conducting the monitoring and the date(s) the inspection was conducted.
(4) A summary paragraph defining the purpose of the approved project, acreage and type of aquatic resources impacted, and mitigation acreage and type of aquatic resources authorized to compensate for the aquatic impacts.
(5) Written description on the location and any identifiable landmarks of the compensatory mitigation project including information to locate the site perimeter(s).
(6) Directions to the mitigation site
(7) Dates compensatory mitigation commenced and/or was completed.
(8) Short statement on whether the performance standards are being met
(9) Dates of any recent corrective or maintenance activities conducted since the previous report submission.
(10) Specific recommendations for any additional corrective or remedial actions.

**ii. Requirements (1 page)**

List the monitoring requirements and performance standards, as specified in the approved mitigation plan and special conditions of the permit, and evaluate whether the compensatory mitigation project site is successfully achieving the approved performance standards or trending towards success. A table is one option for comparing the performance standards to the conditions and status of the developing mitigation site.

**iii. Summary Data (maximum of 4 pages)**

Summary data must be provided to substantiate the success and/or potential challenges associated with the compensatory mitigation project. Photo documentation may be provided to support the findings and recommendations referenced in the monitoring report and to assist the PM in assessing whether the compensatory mitigation project is successful for the monitoring period. Submitted photos must fit on a standard 8 ½ X 11" piece of paper, dated, and clearly labeled with the direction from which the photo was taken. The photo sites must also be identified on the appropriate maps.

**iv. Maps (maximum of 3 pages)**

Maps must be provided to show the location of the compensatory mitigation site relative to other landscape features, habitat types, locations of photographic reference points, transects, sampling data points, and/or other features pertinent to the mitigation plan. In addition, the submitted maps must clearly delineate the mitigation site perimeter(s), which will assist PMs in locating the mitigation area(s) during subsequent site inspections. Each map or diagram must fit on a standard 8 ½ X 11" piece of paper and include a legend and the location of any photos submitted for review.

**v. Conclusions (1 page)**

A general statement must be included describing the conditions of the compensatory mitigation project. If performance standards are not being met, a brief explanation of the difficulties and potential remedial actions proposed by the permittee, including a timetable, must be provided. The DE will ultimately determine if the mitigation site is successful for a given monitoring period.

**c. Completion of Compensatory Mitigation Requirements**. Compensatory mitigation requirements will not be considered fulfilled until the permittee has received written concurrence from the DE that the compensatory mitigation project has met its objectives and no additional monitoring reports are required. PMs will review the final monitoring reports to make this determination. A final field visit should be conducted to verify that onsite conditions are consistent with information documented in the mitigation reports.

**d. Special Condition**. The following condition must be added to all DA permits that require compensatory mitigation:

*Your responsibility to complete the required compensatory mitigation as set forth in Special Condition X will not be considered fulfilled until you have demonstrated mitigation success and have received written verification from the U.S. Army Corps of Engineers.*

**5. Duration**

This guidance remains in effect unless revised or rescinded.

DON T. RILEY
Major General, US Army
Director of Civil Works