COMPENSATORY MITIGATION AND THE MITIGATION RULE

USACE, Jacksonville District
What is Mitigation?

- Sequential process of avoidance, then minimization of wetland impacts, and lastly compensatory mitigation

- Permit applicants are responsible for proposing compensatory mitigation to offset unavoidable wetland impacts
Compensatory Mitigation Attributes

- Appropriate for the type, scope, and degree of project impacts
- Conducted in advance of or concurrent with the activity causing the impact
- Designed to include an offset for temporal loss of wetland function
- Enforceable through permit special conditions
Why is Compensatory Mitigation Required?

- Compliance with the 404(b)(1) Guidelines
- To ensure permitted activity is not contrary to the public interest
- Contribute to *national* goal of “no overall net loss” of wetland acreage and function
National Research Council 2001 Report

- Requested by USEPA and USACE
- Evaluated mitigation for projects approved under the Clean Water Act
- Recommended improvements to mitigation practices:
  - Base site selection for mitigation on watershed approach
  - Incorporate hydrological variability into wetland mitigation design and evaluation
  - Plan and measure mitigation projects by broader set of wetland functions
  - Incorporate monitoring and adaptive management into mitigation plans
  - Third-party mitigation (mitigation bank or in-lieu fee program) offers advantages over permittee-responsible mitigation
2008 Mitigation Rule Development

- **1999** – USEPA/USACE seek National Research Council (NRC) study
- **2001** – NRC study published
- **11/2003** – Congressional directive (NDAA 2004)
- **3/28/2006** – Proposal in Federal Register
- **4/10/2008** – Final Rule in Federal Register (Revisions to 33 CFR Parts 325 and 332)
- **6/09/2008** – Effective date of rule
2008 Mitigation Rule Overview

- Applies to compensatory mitigation for USACE permits
- Provides performance standards and requirements for compensatory mitigation
- Includes where and how compensatory mitigation is to be done
- Supersedes most previous mitigation guidance
Types of Mitigation

- Restoration
  - Re-establishment (Increases function and area)
  - Rehabilitation (Increases function only)

- Establishment (Increases function and area)

- Enhancement (Increases function only)

- Preservation (May increase function)
Mitigation Rule
Watershed Approach

- Provides a general framework for better decision-making and consistency for compensatory mitigation

- Goal: “Maintain and improve the quality and quantity of aquatic resources within watersheds through strategic selection of compensatory mitigation sites”

- Watershed approach should be used to the extent appropriate and practicable
Preference Hierarchy for Mitigation

- Mitigation bank credits
- In-lieu fee program credits
- Permittee-responsible mitigation under a watershed approach
- Permittee-responsible mitigation through on-site and in-kind mitigation
- Permittee-responsible mitigation through off-site and/or out-of-kind mitigation

(33 CFR 332.3(b))
Mitigation Banks and ILF

- Are approved by the Corps in advance
- Available credits have already met the performance standards
- Address resource needs on a watershed scale
- Responsibility for the compensatory mitigation is transferred from the permittee to the sponsor
Mitigation Plans
Level of Detail

- Commensurate with scale and scope of the impacts

- Influenced by
  - Degree of risk and uncertainty
  - Mitigation type
  - Mitigation hierarchy
Mitigation Plan Components

1. Objectives
2. Site Selection
3. Site Protection Instrument
4. Baseline Information
5. Determination of Credits
6. Mitigation Work Plan
7. Maintenance Plan
8. Performance Standards
9. Monitoring Requirements
10. Long-term Management Plan
11. Adaptive Management Plan
12. Financial Assurances
1. Objectives

- Provide a description of the resource type(s) and amount(s) that will be provided

- Describe method of compensation (i.e., restoration, enhancement, establishment, and/or preservation)

- Describe how mitigation proposal will support needs of the watershed
2. Site Selection
(Location, Location, Location!)

Factors to address include:

- Landscape position
- Ecological suitability for providing aquatic resource functions
- Watershed needs
- Hydrological conditions
- Compatibility with adjacent land
3. Site Protection Instrument

- Describes legal arrangements and proposed instrument, including site ownership, that will be used to ensure long-term protection of the mitigation site.

- Long-term protection may be provided through real estate instruments such as conservation easements.
4. Baseline Information

Description of impact and mitigation sites:

- Historic and existing ecological conditions
- Historic and existing hydrology
- Historic and existing plant communities
- Soil conditions
- Vicinity map(s)
- Jurisdictional delineation

* If using mitigation bank/in-lieu fee, only need information for impact site
5. Determination of Credits

Describe the number of credits (functional lift) to be provided and rationale:

- If using mitigation bank/in-lieu fee, identify the number and type of credits needed, and how determined (e.g., UMAM, WRAP)

- For permittee-responsible mitigation, provide an explanation, based on functional assessment, of how the mitigation project will compensate for impacts
6. Mitigation Work Plan

- Construction methods and timing
- Sources of water
- Method for establishing desired plant community
- Invasive plants control
- Soil management, grading, erosion control (best management practices)
7. Maintenance Plan

Describe maintenance activities needed to meet performance standards:

- Prescribed fire management
- Irrigation
- Weed/invasive species control
- Trash pick-up
- Fencing
8. Performance Standards

- Should include ecologically-based standards that will be used to determine if the mitigation project is achieving objectives

- Should be objective, verifiable and based on best available science

- May entail use of reference aquatic resource sites and/or functional assessments
8. Performance Standards (cont’d)

- **Hydrology** - Duration, periodicity
- **Soils** - Hydric soil indicators
- **Vegetation** - Density, community structure, species diversity
- **Stream** - Sinuosity, sediment particle size, cross section, bank stabilization
9. Monitoring Requirements

Mitigation plan must address monitoring requirements:

- Parameters to be monitored
- Length of monitoring
- Parties responsible for monitoring
- Report submittal frequency
9. Monitoring Requirements (cont’d)

- Content and detail of monitoring reports is commensurate with scale and scope of mitigation
- Minimum of five years
  - Longer if slow development rates (forested)
  - Reduce/waive remaining if standards achieved
  - Extend if standards not met
- Monitoring report includes: as-built plans, maps, photographs, functional assessment results
9. Monitoring Requirements (cont’d)

- Regulatory Guidance Letter 08-03
- 33 CFR Part 332
10. Long-Term Management (Sustainability)

- Describes how compensatory mitigation project will be managed after performance standards have been met
- Identifies annual cost estimates
- Identifies long-term financing mechanisms
- Identifies qualified responsible party (permittee by default)
10. Long-Term Management (cont’d)

Describe funding mechanisms:

- Non-wasting endowments, trusts, contractual arrangements with future responsible parties
- Address inflation & other contingencies
10. Long Term Management Activities (cont’d)

- Fencing, signage
- Prescribed fire management
- Water-control structures maintenance
- Resource inventories
- Inspections
- Species management
- Encroachment, vandalism protection
11. Adaptive Management Plan

- Addresses under- or non-performing mitigation/unforeseen changes
- Identifies who is responsible
- Guides decisions on revising plans
- Examples: floods, droughts, herbivory, unexpected site conditions
12. Financial Assurances

- Financial mechanism to ensure that:
  - Project is completed
  - Resources are available to correct projects that don’t meet performance standards, or replace unsuccessful projects

- Long-term management funding is separate matter
Implementation Financial Assurances vs. Long-Term Financial Assurances

- Implementation assurances help guarantee
  - Project is constructed
  - Project meets performance standards

- Long-term assurances
  - Provide resources for management AFTER performance standards are met
  - Help ensure project is sustainable
Amount of Financial Assurances

- Based on full cost of providing mitigation
- Could include costs for:
  - Land
  - Planning, design and engineering
  - Construction and planting
  - Monitoring and maintenance
  - Reasonably foreseeable remedial work
  - Contingencies
  - Legal and administrative
Allowable Forms of Assurances

- Letter of credit
- Escrow account
- Performance bond
- Casualty insurance
- Other appropriate instruments, subject to agency approval
Financial Assurances Summary

- A number of options available for establishing financial assurances
- Mitigation provider is responsible for proposing assurance mechanism
- Assurances limit but CANNOT eliminate risk of failure
- USACE cannot be the beneficiary of assurances, but approves plan
- Work on financial assurances should begin before permit issuance
Permit Requirements for Mitigation Plan

- Individual permits (Standard Permits and Letters of Permission)
  - Final mitigation plan must be approved prior to permit issuance

- Minor permits (General Permits, Nationwide Permits)
  - Permit conditions may supplement mitigation plan
  - Final mitigation plan must be approved prior to initiating work

- If using mitigation bank or in-lieu fee program, provide only:
  - Baseline (impact) information
  - Determination of credits
  - Statement of credit availability
Compensatory Mitigation Summary

Mitigation is a sequential process:
- Avoid
- Minimize
- Provide for compensatory mitigation for unavoidable impacts to wetlands

Mitigation Rule:
- “Levels the playing field” by requiring 12 mitigation plan components for all types of compensatory mitigation (mitigation banks, in-lieu fee, and permittee-responsible)
- Establishes a watershed-based preference hierarchy for compensatory mitigation
- Requires financial assurances for both mitigation project implementation and long-term management
Compensatory Mitigation Reporting

Permitees are responsible for:

- Monitoring mitigation annually for a period of 5 years or more.

- Reports that are:
  - Accurate and concise,
  - Provide overview of site conditions and functions, and
  - Provide information on how the site is meeting performance standards.

- Reporting actions taken using adaptive management.

- Submitting monitoring reports until released by the Corps.
Mitigation Compliance

Permitees are responsible for:

- Complying with all of the permit terms and conditions.
- Maintaining permittee-responsible mitigation in perpetuity beyond the monitoring period.
Tools & Contacts

- Federal ledgers are online:
  - RIBITS - Regulatory In lieu fee and Bank Information Tracking System

- Monitoring Reports can be sent to:
  - SAJ-RD-enforcement@usace.army.mil
Questions?

Photo provided by: Tim Douma