

Compensatory Mitigation Regulation

What isn't changed by the final rule?

- It doesn't change when compensatory mitigation is required
- The final rule focuses on the where and how of compensatory mitigation

§325.1(d) – Mitigation statement

- New requirement for complete permit application
- For individual §404 permits, applicant must provide statement explaining how avoidance, minimization, and compensation are accomplished
- Applicant can also explain why compensatory mitigation shouldn't be required
- Statement should be brief
 - It might change during our evaluation process
- Mitigation plan not required, but applicant can submit one voluntarily

§332.1 – Purpose and general considerations

- Reaffirms avoidance and minimization requirements of the 404(b)(1) Guidelines
- Compensatory mitigation may be required to ensure an activity is not contrary to the public interest
- Account for regional variations when establishing performance standards and monitoring requirements
- Rule replaces:
 - 1995 mitigation banking guidance
 - 2000 in-lieu fee guidance
 - Regulatory Guidance Letter 02-02
 - Certain provisions of 1990 Mitigation MOA

§332.2 – Definitions

- New definitions:
 - Advance credits (for in-lieu fee programs)
 - Condition
 - Ability of aquatic resource to support a community of organisms
 - e.g., index of biological integrity
 - Fulfillment of advance credits
 - In-lieu fee program
 - Release of credits
 - Temporal loss
 - Watershed
 - Watershed approach

§332.3 – General compensatory mitigation requirements

- General considerations
 - Assess likelihood for ecological success and sustainability
 - Consider location of impact site to compensation site
 - Costs (practicability)
 - Consider what is “environmentally preferable”
- First consider restoration
 - Higher likelihood of success
 - Reduce impacts to ecologically important uplands
- Compensatory mitigation projects may be sited on public or private lands
 - If public land, credits for DA permits only for work over and above what is done by the public program

§332.3 – General compensatory mitigation requirements

- Preference hierarchy for mitigation options:
 - Mitigation bank credits
 - In-lieu fee program credits
 - Permittee-responsible mitigation under a watershed approach
 - On-site and/or in-kind permittee-responsible mitigation
 - Off-site and/or out-of-kind permittee-responsible mitigation
- This is a “soft” preference
- Document your decisions

§332.3 – General compensatory mitigation requirements

■ Watershed approach

- Use to the extent appropriate and practicable
- An existing watershed plan may be used, if district engineer determines that it is an appropriate aid for making compensatory mitigation decisions
- Consider the importance of landscape position and sustainability
- Provide the suite of functions (don't focus on specific functions)
- May use a combination of on-site and off-site mitigation
- Watershed approach may not be appropriate in areas where watershed boundaries do not exist (e.g., marine areas)

§332.3 – General compensatory mitigation requirements

- Watershed approach (con't)
 - If appropriate watershed plan not available, use information on watershed condition and needs, including potential sites for restoration, etc.
 - Level of information and analysis commensurate with scope and scale of the proposed impacts
 - Appropriate watershed scale is at district engineer's discretion
- Site selection
 - Ecological suitability for providing the desired aquatic resource functions

§332.3 – General compensatory mitigation requirements

■ Mitigation type

- General preference for in-kind
- Under watershed approach, may determine that out-of-kind is more appropriate
- For difficult to replace resources (e.g., bogs, streams), should do in-kind rehabilitation, enhancement or preservation of those resources

■ Amount of compensation

- Sufficient to replace lost aquatic resource functions
- Require a ratio greater than 1:1 where necessary
- If an in-lieu fee program is used, may require additional compensatory mitigation to account for risk and uncertainty

§332.3 – General compensatory mitigation requirements

■ Preservation

- Consider resources' contribution to the ecological sustainability of the watershed
- Permanent protection required
- Where practicable, should be done in conjunction with aquatic resource restoration, establishment and enhancement

■ Permit conditions

- Enforceable conditions
- Address various components of the compensatory mitigation project (e.g., performance standards, monitoring, financial assurances, long-term management)

§332.3 – General compensatory mitigation requirements

- Party responsible for compensatory mitigation
 - For permittee-responsible mitigation, special conditions indicate responsible party
 - If third-party mitigation, instrument must contain a provision where sponsor assumes responsibility once a permittee has secured credits
 - If third-party mitigation, documentation required to transfer responsibility from permittee to sponsor
 - Letter or form signed by sponsor
 - Documentation retained in administrative record
- Timing
 - Strive for advance or concurrent compensation, when it is practicable to do so

§332.3 – General compensatory mitigation requirements

■ Financial assurances

- Require sufficient financial assurances to ensure a high level of confidence that the compensatory mitigation will be successfully completed
 - If high level of confidence without financial assurances, then don't need to require them
- Alternative mechanisms can be used (e.g., formal commitment from government agency)
- Amount to be determined by district engineer
- Requires at least 120 day advance notification to district engineer prior to termination or revocation

§332.4 – Planning and documentation

- Pre-application consultations encouraged
- Public notice
 - For applications for individual §404 permits, public notice needs to explain proposed avoidance, minimization, and compensation
 - Mitigation statement from permit application
 - May exclude confidential business information from public notice

§332.4 – Planning and documentation

- Mitigation plans
 - For individual permits, final mitigation plan must be approved before permit is issued
 - For general permits, may use conceptual or detailed mitigation plan to issue verification letter
 - Work in waters of the U.S. cannot start until mitigation plan is approved
 - Can address mitigation plan components through permit conditions, instead of the plan itself
 - If using a mitigation bank or in-lieu fee program, need only to provide:
 - Baseline information
 - Determination of credits

§332.4 – Planning and documentation

- Mitigation plan components
 - Objective(s) of the compensatory mitigation project
 - Site selection information
 - Site protection instrument to be used
 - Baseline information (impact and compensation site)
 - Number of credits to be provided
 - Mitigation work plan
 - Maintenance plan
 - Ecological performance standards
 - Monitoring requirements
 - Long-term management plan
 - Adaptive management plan
 - Financial assurances
- Level of detail → scope and scale as the permitted impacts

§332.5 – Ecological performance standards

- Used to assess whether the compensatory mitigation project is meeting its objectives
- Based on attributes that are objective and verifiable
- Based on the best available science that can be measured or assessed in a practicable manner
- Reflect the range of variability exhibited by regional classes of aquatic resources due to natural processes and man-made disturbances
- Focus on early stages of ecosystem development
 - Match up with monitoring period
 - Early identification of potential problems

§332.6 – Monitoring

- Determine if the project is meeting performance standards, and if fixes are necessary to meet objectives
- Minimum of five years
 - Longer monitoring periods if slow development rates (e.g., forested wetlands)
 - May reduce or waive remaining monitoring if performance standards have been achieved
 - May extend monitoring requirement if performance standards are not met
- Content of monitoring reports determined by district engineer

§332.7 – Management

■ Site protection

- Provide long-term protection through real estate instruments or other appropriate mechanisms (e.g., management plan for government property)
- May establish 3rd party to enforce site protection
- 60-day advance notice to district engineer required for real estate instruments, management plans or other long-term protection instrument before voiding the instrument

■ Sustainability

- Projects should be self-sustaining
- Projects may require active long-term management

§332.7 – Management

- Adaptive management
 - District engineer may require measures to address deficiencies in the compensatory mitigation project
 - Performance measures may be revised to:
 - Address deficiencies
 - Reflect changes in management strategies and objectives
 - Address natural disasters
- Long-term management
 - Permit conditions or third-party instrument must identify party responsible for long-term management
 - May also address financing of long-term management measures

§332.8 – Mitigation banks and in-lieu fee programs

- General considerations
 - All mitigation banks and in-lieu fee programs must have an approved instrument
 - Ad hoc mitigation is considered to be permittee-responsible mitigation (no approved instrument)
- Corps is the decision-maker

§332.8 – Mitigation banks and in-lieu fee programs

- Interagency review team
 - Reviews documentation for establishment and management of mitigation bank and in-lieu fee program
 - Corps is chair
 - Other agencies may participate
 - Corps determines membership
 - Seek to resolve issues via consensus, but IRT members must adhere to time frames in the rule
- MOAs may be executed with other agencies to perform certain IRT review functions
 - Corps remains sole authority for final approval of instruments and other documentation

§332.8 – Mitigation banks and in-lieu fee programs

- Compensation planning framework for in-lieu fee programs
 - Part of the prospectus
 - Will be part of the instrument
 - Used to select, secure, and implement aquatic resource mitigation projects
 - Must support a watershed approach
 - In-lieu fee projects must be consistent with the framework approved in the instrument
 - May be modified by Corps after consulting with the IRT

§332.8 – Mitigation banks and in-lieu fee programs

- Components of the compensation planning framework for in-lieu fee programs
 - Service area (watershed-based)
 - Description of threats to aquatic resources
 - How the in-lieu fee program will address those threats
 - Statement of aquatic resource goals and objectives
 - Prioritization strategy for in-lieu fee projects
 - How preservation will be used
 - Description of public and private stakeholder involvement
 - Long-term protection and management strategies
 - Strategy for periodic evaluation and reporting for achieving goals and objectives
 - Any other information determined to be necessary
- Level of detail is at discretion of the district engineer

§332.8 – Mitigation banks and in-lieu fee programs

■ Prospectus

- Objectives of the proposed mitigation bank or in-lieu fee program
- Proposed service area(s)
- General need and technical feasibility
- Proposed ownership and long-term management strategy
- Sponsor qualifications to successfully implement mitigation projects
- For mitigation banks:
 - Ecological suitability of the proposed bank site
 - Assurance of sufficient water rights
- For in-lieu fee programs:
 - Compensation planning framework
 - Description of the proposed in-lieu fee program account (for holding funds)

§332.8 – Mitigation banks and in-lieu fee programs

- Public review and comment
 - Public notice for all proposed mitigation banks and in-lieu fee programs
 - Public notice requirement for significant instrument modifications
 - 30 day comment period (generally)
 - Copies of comments to be provided to IRT
 - If mitigation bank or in-lieu fee project requires a standard permit, that public notice may satisfy PN requirement

§332.8 – Mitigation banks and in-lieu fee programs

■ Initial evaluation

- Written determination of potential suitability of proposed mitigation bank or in-lieu fee program to provide compensatory mitigation for DA permits
- If suitable, district engineer informs sponsor to begin preparing draft instrument
- If not suitable, district engineer informs sponsor of reasons for making that determination
 - Sponsor may revise prospectus to address those deficiencies, and resubmit

§332.8 – Mitigation banks and in-lieu fee programs

■ Service areas

- Can be based on watershed, ecoregion, physiographic province, or other suitable geographic area
- Ensure that mitigation bank or in-lieu fee project will provide effective compensatory mitigation
- 8-digit HUC or a number of contiguous 8-digit HUCs may form the basis of an appropriate service area
- May also consider the economic viability of the mitigation bank or in-lieu fee program
- Basis for determining the service area must be documented in the instrument
- Can have multiple service areas for in-lieu fee programs or umbrella mitigation banks

§332.8 – Mitigation banks and in-lieu fee programs

■ Draft instruments

- Service area(s)
- Accounting procedures
- Provision where sponsor agrees to assume responsibility for providing compensatory mitigation when permittee secures credits
- Default and closure provisions
- Reporting protocols
- Other information determined to necessary by district engineer

§332.8 – Mitigation banks and in-lieu fee programs

- Draft instruments (con't)
 - For mitigation banks:
 - Mitigation plans
 - Credit release schedule, tied to achievement of specific milestones
 - For in-lieu fee programs:
 - Compensation planning framework
 - The amount of advance credits, by service area
 - Draft fee schedule, by service area
 - Method for determining project-specific fees and credits
 - Description of the in-lieu fee program account

§332.8 – Mitigation banks and in-lieu fee programs

- Final instrument
 - Contains same types of information as draft instrument
- Dispute resolution process
 - Agency headquarters process limited to EPA, U.S. FWS, and NOAA/NMFS
 - Other senior agency officials with representation on the IRT can raise concerns
 - Concerns must be in writing
 - Time frames and processes to be followed

§332.8 – Mitigation banks and in-lieu fee programs

- Extension of deadlines
 - Section 7 consultation under the Endangered Species Act
 - Section 106 consultation for the National Historic Preservation Act
 - Government-to-government consultation with Indian tribes
 - Sponsor has not submitted necessary information in a timely manner
 - Information necessary for the district engineer to make a decision cannot be provided within the timeframes

§332.8 – Mitigation banks and in-lieu fee programs

- Modification of approved instruments
 - Includes the addition of umbrella mitigation bank sites and in-lieu fee project sites
 - Public notice and comment process, unless the district engineer determines that a streamlined process is warranted
 - Streamlined review process
 - Changes based on adaptive management
 - Credit releases
 - Changes in credit release schedules and credit releases
 - Non-significant changes (as determined by the district engineer)
 - Dispute resolution process can be re-initiated

§332.8 – Mitigation banks and in-lieu fee programs

- Umbrella mitigation banking instruments
 - Add sites as instrument modifications
- In-lieu fee program account
 - Sponsor must establish account before accepting fees
 - Fees accepted from others (not permittees) must be in a separate account
 - Must be at an FDIC institution
 - Interest must be retained into the account
 - Account funds may only be used for selection, design, acquisition, implementation, and management of in-lieu fee projects
 - Small percentage allowed to be used for administrative costs (as specified in the instrument)

§332.8 – Mitigation banks and in-lieu fee programs

- In-lieu fee program account (con't)
 - Sponsor must submit proposed in-lieu fee projects to district engineer for funding approval
 - District engineer may direct sponsor to use funds to provide alternative compensatory mitigation if not in-lieu fee projects not implemented by required time frames
 - Sponsor must provide annual reports to the district engineer and IRT
 - Fees collected, funds expended
 - List of permits using the in-lieu fee program
 - Credit balances, by service area
 - District engineer may audit in-lieu fee program account

§332.8 – Mitigation banks and in-lieu fee programs

- In-lieu fee project approval
 - Sponsor must submit mitigation plans for each in-lieu fee project
 - Mitigation plans must also include credit release schedule
 - These are instrument modifications
- Credit withdrawal from mitigation banks
 - Initial credit release based on approved instrument and mitigation plan, securing the bank site, establishing appropriate financial assurances, and other requirements
 - Implement approved mitigation plan within first growing season after first credit transaction

§332.8 – Mitigation banks and in-lieu fee programs

- Advance credits for in-lieu fee programs
 - Limited number of credits available when instrument approved
 - Number of allowable advance credits based on:
 - Compensation planning framework
 - Sponsor's past performance on mitigation projects
 - Projected financing necessary to initiate mitigation projects
 - As released credits are produced by in-lieu fee projects, more advance credits become available
 - Released credits must be used to fulfill the obligations incurred by selling or transferring advance credits

§332.8 – Mitigation banks and in-lieu fee programs

- Advance credits for in-lieu fee programs (con't)
 - Land acquisition and initial physical and biological improvements for in-lieu fee projects must be initiated by the third full growing season after the first advance credit is secured by a permittee
 - District engineer may allow more time
 - If sponsor is not complying with the terms of the instrument, district engineer may take appropriate action, including suspending credit sales
 - Permittees who secured credits are not held responsible

§332.8 – Mitigation banks and in-lieu fee programs

■ Credit costs

- To be determined by the sponsor
- For in-lieu fee programs, cost per unit credit must be based on:
 - Expected costs associated with aquatic resource restoration, establishment, enhancement, and/or preservation in that service area
 - Based on full cost accounting, including any appropriate contingency costs that may be needed (taking into account risk and uncertainty)

§332.8 – Mitigation banks and in-lieu fee programs

■ Credit release schedule

- Must be tied to achievement of performance-based milestones
- Reserve a significant share for release only after full achievement of ecological performance standards
- District engineer determines the credit release schedule, including the amount of the “significant share”
- For single-site mitigation banks, the credit release schedule is in the instrument
- For in-lieu fee programs and umbrella bank sites, the credit release schedule is in the approved mitigation plan

§332.8 – Mitigation banks and in-lieu fee programs

- Credit release approval
 - For mitigation banks and in-lieu fee projects, credit releases must be approved by the district engineer
 - Sponsor submits documentation demonstrating achievement of the appropriate milestones for credit release
 - District engineer consults the IRT
 - Site visits may be scheduled

§332.8 – Mitigation banks and in-lieu fee programs

- Non-compliance with an instrument
 - District engineer will take action if the mitigation bank or in-lieu fee program is not meeting performance standards or complying with the terms of the instrument
 - Actions may include:
 - Suspending credit sales
 - Adaptive management
 - Decreasing available credits
 - Utilizing financial assurances
 - Terminating the instrument

§332.8 – Mitigation banks and in-lieu fee programs

- Accounting procedures
 - Mitigation banks – Ledgers to account for all credit transactions
 - In-lieu fee programs – Annual report ledger for overall program, plus individual ledgers to track credit releases for each in-lieu fee project
- Reporting requirements
 - Ledger accounts
 - Monitoring reports
 - Financial assurance and long-term management funding report

§332.8 – Mitigation banks and in-lieu fee programs

- IRT concern with use of credits
 - IRT can raise concerns to district engineer
 - Resolution is at the discretion of the district engineer
- Site protection
- Long-term management
 - Responsible party must be documented in instrument or approved mitigation plans
 - If long-term management is required, funding arrangements must also be described

§332.8 – Mitigation banks and in-lieu fee programs

- Grandfathering of existing mitigation banking instruments
 - All mitigation banks approved 90 days after publication of the final rule must comply with that rule
 - Mitigation banks approved prior to that date may continue to operate under their current instruments
 - Any modification of current instruments 90 days after publication must be consistent with the new rule

§332.8 – Mitigation banks and in-lieu fee programs

- Grandfathering of existing in-lieu fee program instruments
 - All in-lieu fee programs approved 90 days after publication of the final rule must comply with that rule
 - In-lieu fee programs approved prior to that date may continue to operate under their current instruments for two years, unless the district engineer grants an extension (up to three additional years) after consulting with the IRT
 - Any modification of current instruments 90 days after publication must be consistent with the new rule
 - Any approved in-lieu fee project may continue to operate indefinitely, if it is providing appropriate compensatory mitigation