

COMPENSATORY MITIGATION AT A GLANCE

Krystel Bell

Senior Project Manager, Office of the Chief

22 February 2016



US Army Corps of Engineers
BUILDING STRONG®



Overview

- Mitigation is avoiding, minimizing, rectifying, reducing, or compensating for aquatic resource losses
- Permit applicants are responsible for proposing an appropriate compensatory mitigation option
- The Corps determines appropriate and practicable mitigation for its permit decisions



What is mitigation?

- Avoiding, minimizing, rectifying, reducing, or compensating for resource losses
- Compensatory mitigation:
 - ▶ Restore, establish, enhance, and/or preserve aquatic resources to offset unavoidable loss of waters and wetlands authorized by DA permits
- Applicant must first avoid and minimize to maximum extent practicable
- Permit applicants are responsible for proposing appropriate compensatory mitigation option
- Corps is decision-maker
 - ▶ Compensatory mitigation may not required for all permit actions



Why is mitigation required?

- To ensure permitted activity is not contrary to the public interest
- Compliance with the 404(b)(1) Guidelines
- National Environmental Policy Act
 - ▶ Identification of mitigation measures to avoid, minimize, rectify, reduce and compensate for impacts
- Individual permits
 - ▶ Required to offset significant resource losses
- For general permits, ensure minimal adverse effects
- Contribute to national goal of “no overall net loss” of wetlands



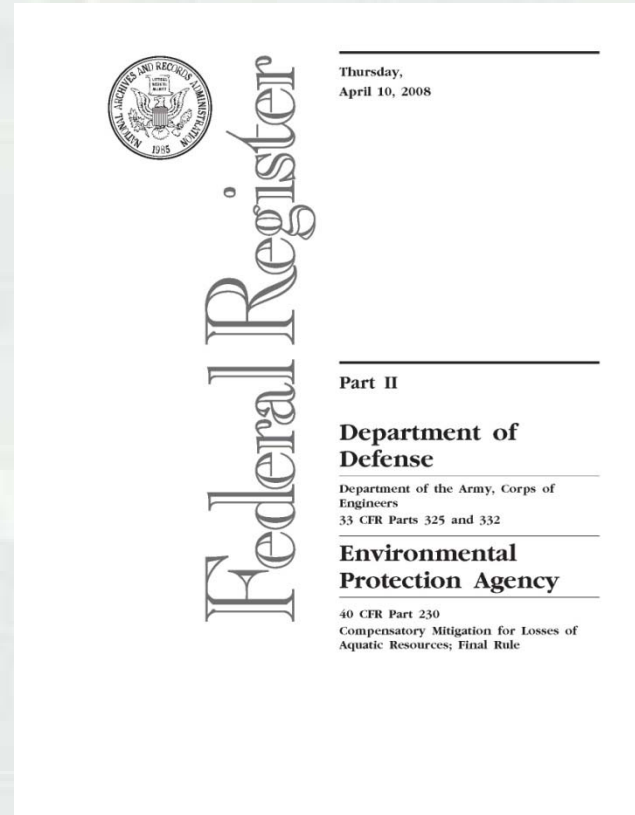
General Mitigation Policy

- All compensatory mitigation will be for:
 - ▶ Significant resource losses which are specifically identifiable
 - ▶ Reasonably likely to occur and
 - ▶ Of importance to the human or aquatic environment
- All mitigation will be:
 - ▶ Related to the impacts of the proposal (e.g. direct and indirect)
 - ▶ Appropriate to the scope and degree of those impacts
 - ▶ Reasonably enforceable
- Use permit conditions to establish binding, enforceable mitigation requirements



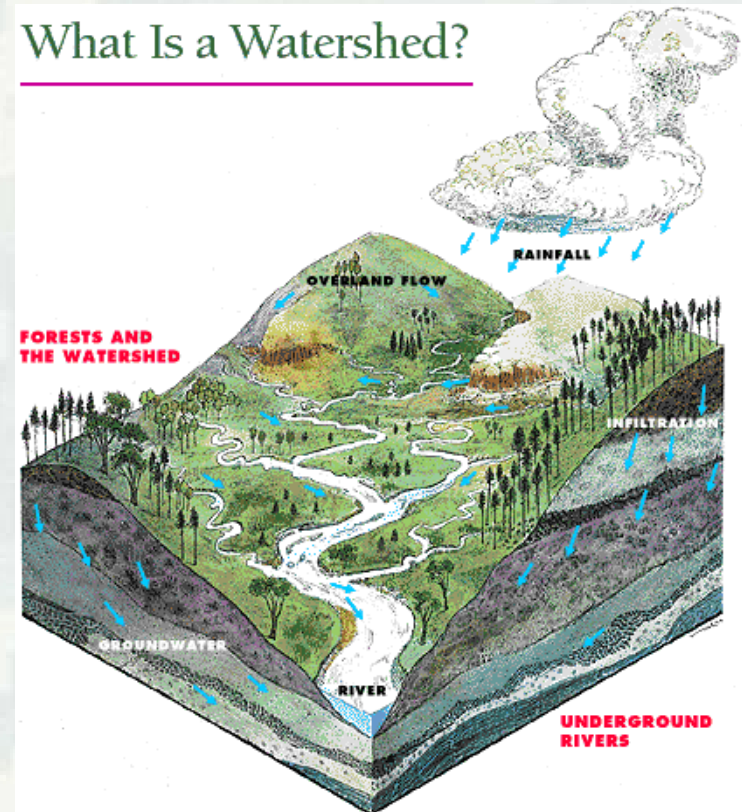
2008 Mitigation Rule

- Compensatory mitigation for impacts to aquatic resources
- Detailed standards and requirements for compensatory mitigation
- Addresses where and how compensatory mitigation is to be done
- Three sources:
 - ▶ Mitigation banks
 - ▶ In-lieu fee programs
 - ▶ Permittee-responsible mitigation



Why a watershed approach?

- National Research Council (2001)
 - ▶ “Wetland [and stream] functions must be understood within a watershed framework in order to secure the purposes of the Clean Water Act.”
 - ▶ “Site selection for wetland conservation and mitigation should be conducted on a watershed scale”
 - ▶ watershed approach is to be used to the extent appropriate and practicable (332.3(c)(1))
 - ▶ the level of information and analysis must be commensurate with the scope and scale of the authorized impacts and functions lost (332.3(c)(3)(iii))



General Considerations

- Permit applicants are responsible for proposing an appropriate compensatory mitigation option
- Corps is decision-maker
 - ▶ Compensatory mitigation requirements for DA permits
 - ▶ Approval of mitigation banking or in-lieu fee program instruments
- If mitigation bank or in-lieu fee program used, responsibility to provide compensatory mitigation is transferred to the sponsor when permittee secures credits



Compensatory Mitigation Sources and Preference Hierarchy 332.3(b)

- Mitigation banks

- ▶ One or more sites where resources (e.g., wetlands, streams) are restored, established, enhanced, and/or preserved for the purpose of providing compensatory mitigation for impacts authorized by DA permits
- ▶ Sells compensatory mitigation credits to permittees
- ▶ Commercial bank or single client bank
- ▶ Responsibility transferred to bank sponsor



Compensatory Mitigation Sources and Preference Hierarchy 332.3(b)

- In-lieu fee programs
 - ▶ Limited to government or non-profit natural resource management entities
 - ▶ Collects fees from permittees to do larger compensatory mitigation projects
 - ▶ Responsibility transferred to in-lieu fee program sponsor
- Permittee-responsible mitigation (on- or off-site)
 - ▶ Permittee or contractor does compensatory mitigation project
 - ▶ Permittee retains responsibility



Mitigation Banks and In-Lieu Fee Programs

- Prospectus
- Public notice and comment process
- Interagency review, with dispute resolution process, if needed
- Approved instrument
- Approved mitigation plans with credit release schedules
- Ledgers for all credit transactions
- Corps approval required to release credits
- Suspension and/or termination of instrument if poor performance



RIBITS

Regulatory In-lieu Fee and Bank Information Tracking System

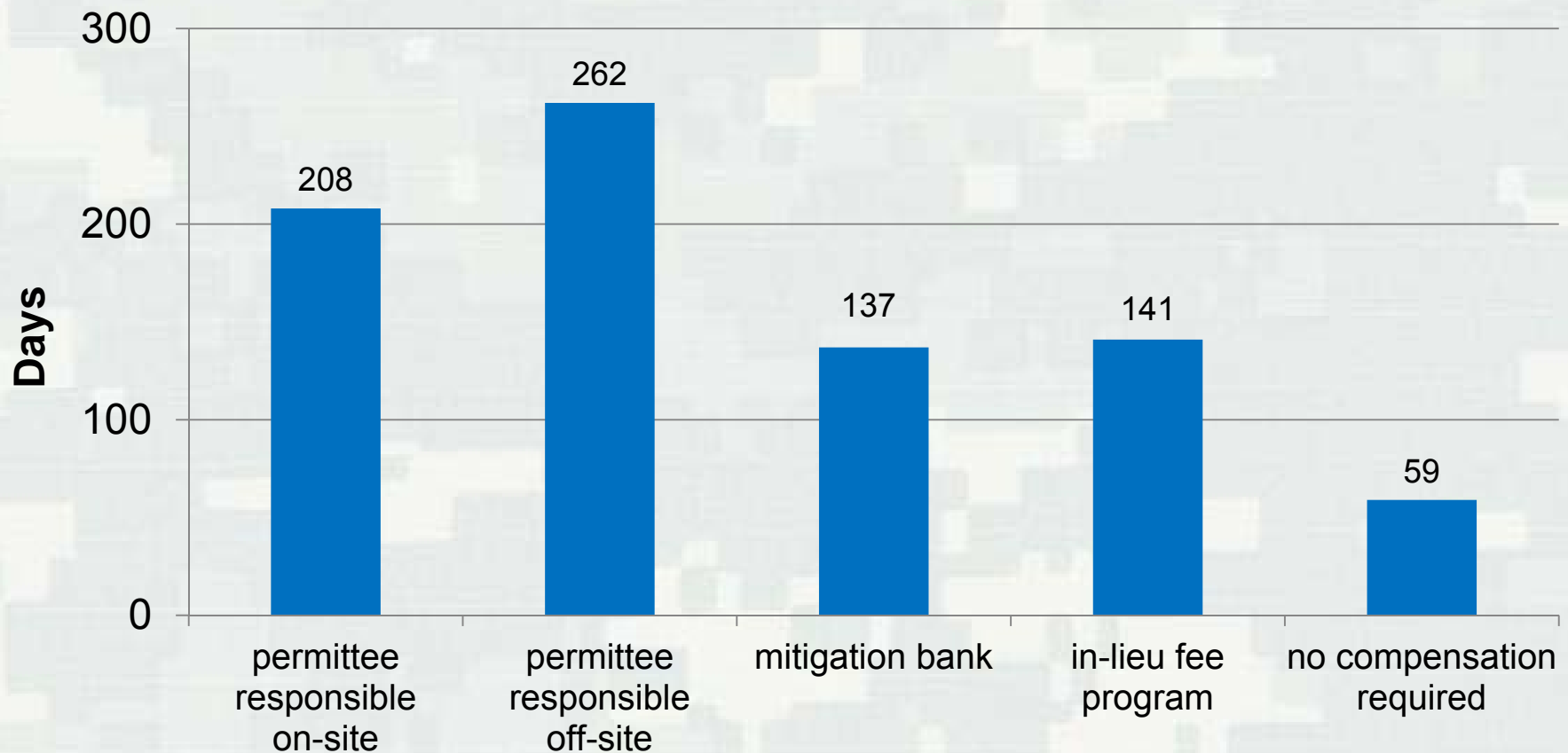


Benefits of mitigation banks and in-lieu fee programs

- Consolidated aquatic resource restoration, establishment, enhancement, and/or preservation projects
- Provide higher level of planning and scientific expertise
- Helps lessen risks and uncertainty for compensatory mitigation project success
- Allows more efficient compliance efforts
 - ▶ One large mitigation site vs. many small, scattered sites
- Helps streamline permit process
 - ▶ Reduces need to evaluate and approve individual permittee-responsible mitigation plans
 - ▶ District only needs to approve use of credits



Days to Corps permit decision, by compensatory mitigation source (2014)



Source: Mitigation Rule Retrospective, IWR, 2015



Corps' responsibilities

- Evaluate applicant's compensatory mitigation proposal
 - Sufficiency for offsetting lost functions
- Fully consider agency comments
- Determine appropriate compensatory mitigation option
 - Manage risk and uncertainty
 - Likelihood of success?
 - Preference for restoration (higher likelihood of success)
 - Environmental preferability
 - What would be beneficial to the watershed?
- Essential to document decisions



General Considerations

33 CFR 332.3(a)

- Objectives
 - ▶ Offset impacts
 - ▶ Practicable
 - ▶ Environmentally preferable
- Commensurate with impacts
- Methods
 - ▶ Restoration
 - ▶ Enhancement
 - ▶ Establishment
 - ▶ Preservation*



General Considerations Cont'd

33 CFR 332.3(h)

Preservation - Requirements:

1. Provides important functions
2. Contributes to watershed sustainability
3. Appropriate & practicable
4. Permanently protected
5. Under threat of destruction or adverse modification

Where practicable, should be done in conjunction with aquatic resource restoration, establishment and enhancement



General Considerations Cont'd

(33 CFR 332.3(j))

- Mitigation may be sited on public or private lands
- Other Federal/State/Tribal/Local programs
 - ▶ Must fully offset 404 impacts
 - ▶ No “double dipping”
- Federally funded projects (e.g., WRP, Partners for Wildlife) may not generate compensation credits
 - ▶ “Supplemental” projects in addition to the Federally funded projects may be used for mitigation



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 of a minimum of 1:1 where unless F/CAM
 - ▶ If an in-lieu fee program is used, may require additional compensatory mitigation to account for risk and uncertainty



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
 - ▶ Reduced impacts to potentially 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



Mitigation statement

33 CFR 325.1(d)

- Mitigation statement for DA application: how avoidance, minimization, & compensation will be accomplished.
- Applicant can also explain why compensatory mitigation shouldn't be required
- Statement should be a brief conceptual proposal
 - ▶ It might change during our evaluation process
- Mitigation plan not required for a complete application, but applicants may submit one voluntarily



Focus on Watershed Approach

- Strategic site selection to improve or maintain watershed functions
- Consider likelihood for ecological success and sustainability, location in watershed, and practicability
- Use available watershed planning information
 - ▶ If it is appropriate for compensatory mitigation decision-making
- Level of information and analysis commensurate with the scope of permitted activity
- May use more than one site to provide compensatory mitigation for a permitted activity
 - ▶ On-site mitigation measures for water quality and quantity
 - ▶ Off-site mitigation that provides the desired aquatic resource type (habitat and other functions)



Planning and documentation

33 CFR 332.4

- 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



Local Resources

- Final Regional Compensatory Mitigation and Monitoring Guidelines (South Pacific Division, December 2014)
- Updated Map and Drawing Standards (SPD, February 2016)
- Standard Operating Procedure for Determination of Mitigation Ratios (SPK, July 2013)
- Regulatory Program Uniform Performance Standards for Compensatory Mitigation Requirements (SPD, August 2012)



SPD Mitigation Monitoring Guidelines

- Guidelines intended to supplement and inform implementation of 2008 Mitigation Rule
- Organized similarly to the rule (33 C.F.R. § 332.1 through 332.8).
- Provide guidance for the regulated public in selecting appropriate compensatory mitigation sites and in preparing mitigation plans to compensate for unavoidable impacts to waters of the United States for authorized activities.



SPD Mitigation Monitoring Guidelines Cont'd

- Intended to
 - ▶ standardize compensatory mitigation procedures throughout SPD
 - ▶ assist the regulated public in preparing mitigation plans and in implementing successful compensatory mitigation projects using a watershed-based approach
- Unless otherwise noted, each part of the Guidelines applies to mitigation banks, in-lieu fee programs, and permittee-responsible mitigation.



SPD Mitigation Monitoring Guidelines Cont'd

- Overall, the process of developing a mitigation plan can be described as having the following stages:
 - ▶ Determination of compensatory mitigation source(s)
 - ▶ Determination of objectives
 - ▶ Site selection
 - ▶ Design
 - ▶ Determination of credits
 - ▶ Other considerations (including development of performance standards and monitoring protocols) and
 - ▶ Completion
- Flowchart and checklist included in Guidelines



Take Home Messages

- Mitigation is avoiding, minimizing, rectifying, reducing, or compensating for aquatic resource losses
- Permit applicants are responsible for proposing an appropriate compensatory mitigation option
- The Corps determines appropriate and practicable mitigation for its permit decisions



Questions?

Krystel Bell

916-557-7745

Krystel.I.bell@usace.army.mil

