

Mitigation in the Corps Regulatory Program

Regulatory Program Workshop October 2016

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US Army Corps of Engineers
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Clean Water Act Section 404 Mitigation

- Impacts must be:
 - ▶ Avoided
 - ▶ Minimized
 - ▶ For unavoidable impacts, *compensatory mitigation* is required



Regional Compensatory Mitigation and Monitoring Guidelines

(January 12, 2015)



- Intended to standardize mitigation procedures throughout SPD
- Uses watershed approach
- <http://www.spd.usace.army.mil/Portals/13/docs/regulatory/mitigation/MitMon.pdf>



*Soft

Mitigation Hierarchy

*Soft



- Mitigation Banks
 - In Lieu Fee Programs
 - Permittee Responsible
-
- Divergence is possible
 - Must be justified and explained
 - ▶ Comparability: impact vs mitigation site
 - ▶ Capacity of mitigation to offset losses
 - ▶ Watershed context



Different Functions may be compensated at a single – or multiple – sites

Example:

Impact site resources provide flood attenuation and habitat functions



Single site

- Must be near impact site and provide similar habitat and flood control for same down-slope area

Multiple sites

- Flood attenuation site must be near impact
- Habitat site can be farther away, but should provide similar functions



Mitigation Plan Timing

- **Individual Permits:** Final Mitigation Plan must be approved by Corps prior to permit issuance
- **General Permits:** Approved Final Plan needed before initiating work authorized by the GP



Stages of Mitigation Plan Development

- Mitigation source(s)
- Objectives
- Site selection
- Design
- (Determination of credits)
- Performance Standards
- Monitoring Protocols



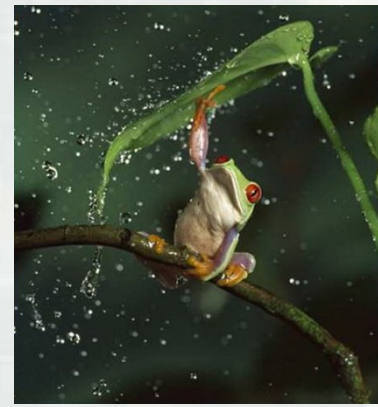
Design Recommendations

- Adequate buffer – subject to minimal or no human disturbance
- Diverse hydrology, geomorphology and biology
- Mimic a local reference site of similar landscape position
- Incorporate species native to area
- Minimize impacts to special status species



Mitigation Design: Wetlands

- Natural, self sustaining hydrology
- Surface water, precipitation, shallow groundwater
- Use of engineered structures (e.g., pumps, diversions) strongly discouraged
- Secure water rights may be an issue



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Mitigation Design: Streams

- Allow for lateral migration
- Ensure appropriate channel geometry for watershed location
- Use native fill material
- Use bioengineering
- Establish/restore riparian areas





Mitigation Plan

- Outline in SPD Guidelines pages 30-37
- Not all outline constituents are always appropriate/ necessary
- Mitigation Plan should be commensurate with proposed impacts
- Key! Mitigation Work Plan: Practical “how to” details needed to take the Plan on paper to “in the ground” implementation



Regional Compensatory Mitigation and Monitoring Guidelines for South Pacific Division
Final January 12, 2015

Mitigation Plan Checklist

Section	Required content	Completed
4.6.1	Title Page	
4.6.2	Contributor Page	
4.6.3	Distribution Page	
4.6.4	Table of Contents	
4.6.5	Brief description of overall project	
4.6.6	Objectives 33 CRF §332.4(c)(2)	
4.6.7	Determination of Credit 33 CRF §332.3(f) and 332.4(c)(6)	
4.6.8	Description of site selection criteria §332.3(d) and 332.74(c)(3)	
4.6.9	Baseline information §332.4(c)(5)	
4.6.10	Mitigation work plan §332.4(c)(7)	
4.6.11	Description of site protection instrument §332.4(c)(4) and 332.7(a)	
4.6.12	Maintenance plan §332.4(c)(8)	
4.6.13	Ecological performance standards §332.4(c)(9) and 332.5	
4.6.14	Monitoring requirements §332.4(c)(4)(10) and 332.6	
4.6.15	Long-term management plan §332.4(c)(11) and 332.7(d)	
4.6.16	Long-term funding (endowments)	
4.6.17	Adaptive management plan §332.4(c)(12) and 332.7(c)	
4.6.18	Financial assurance(s) §332.4(c)(13)	
4.6.19	Other information required by district engineer	

Mitigation Plan Checklist



Performance Standards

- Using Reference sites – Account for changes in performance due to regional phenomena
- Interim standards – Crucial to ensuring performance follows a trajectory to attain final success



Monitoring

- Quantitative sampling
- Permanent photo stations
- Nationally, minimum monitoring period 5 yr
- In SPK/SPD, not always long enough
- Mitigation must meet performance standards for 3 consecutive years with no human intervention



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Appendix D: Mitigation Monitoring Form (Editable Word version: [click here](#))

South Pacific Division - Mitigation Monitoring Report Form
Version date: September 26, 2014

Page 1 of 5

Section A: General Project Information		
1. Project name: Click here to enter text.	2. DA file number(s): Click here to enter text.	3. Project type: Choose an item.
4. Permittee, bank or in-lieu fee sponsor name and work phone number: Click here to enter text.	5. Permittee, bank or in-lieu fee sponsor mailing address: Click here to enter text.	6. Permittee, bank or in-lieu fee sponsor e-mail address: Click here to enter text.
7. Agent name and work phone number: Click here to enter text.	8. Agent mailing address: Click here to enter text.	9. Agent e-mail address: Click here to enter text.
Section B: Notice of Commencement/Completion of Compensatory Mitigation Project		
1. Commencement: Y <input type="checkbox"/> N <input type="checkbox"/> Click here to enter a date.	2. Completion: Y <input type="checkbox"/> N <input type="checkbox"/> Click here to enter a date.	3. Financial assurance remains in place: Y <input type="checkbox"/> N <input type="checkbox"/>
4. Requesting release of a financial assurance? Y <input type="checkbox"/> N <input type="checkbox"/>	5. Name of contractor (if any): Click here to enter text.	6. Phone number of contractor (if any): Click here to enter text.
Please note that your permitted activity is subject to a compliance inspection by a U.S. Army Corps of Engineers representative. If you fail to comply with this permit, you may be subject to permit suspension, modification, or revocation.		
SECTION C: Mitigation Monitoring Status		
1. Final monitoring completed and verification requested? Y <input type="checkbox"/> N <input type="checkbox"/>	2. Date of monitoring reported here: Click here to enter a date.	3. Monitoring report no. Choose an item. of Choose an item.
4. Management and maintenance activities completed (for example: fencing installation/repair or trash removal (include dates): Click here to enter text.		
5. Adaptive management activities completed (include dates): Click here to enter text.		

Mitigation Monitoring Form



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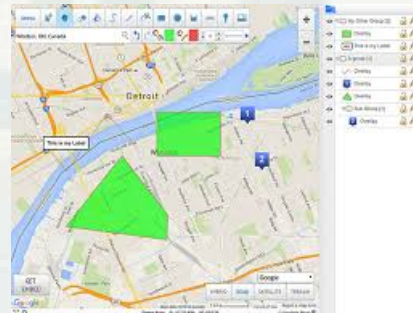
Mitigation Monitoring Form Page 2



Monitoring Reports – Supporting Data



- Vicinity map(s)
- Mitigation site map(s) with photo stations, sampling locations
- Photos of most recent monitoring
- Functional/condition assessments, if required
- Narrative (optional)
- As-built drawing(s), clearly showing changes from authorized design



http://www.iwr.usace.army.mil/Portals/70/docs/iwrreports/Site_Protection_Instrument_Handbook_August_2016.pdf?ver=2016-08-29-082816-237



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IWR

Compensatory Mitigation Site Protection Instrument Handbook for the Corps Regulatory Program

July 2016

Cynthia Wood and Steven Martin

This handbook is intended for use in the Regulatory Program only and is not intended to apply to Corps owned property or to where the Corps is a party to a real estate instrument.



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Site Protection Instruments

- Conservation Easements
- Deed Restrictions (Restrictive Covenants)
- Transfer of Title
- Multi-Party Agreements
- Conservation Land Use Agreements
- Integrated Natural Resources Management Plans (often Federal facilities)



What to Include in Site Protection Instrument

- Statement of Purpose to protect mitigation site
- Reference to DA permit and/or mitigation bank/ILF instrument
- Survey/legal description (show easements to remain)
- Identification of other property rights/interests
- Baseline of resources, incl. listed species, habitat, functions
- Prohibited and Acceptable uses
- Third-party right of enforcement, when appropriate
- Statement that amendment(s) must be pre-approved by Corps
- Provision regarding what happens in a “taking”

Document includes examples of prohibited, acceptable uses; enforcement, amendments and other considerations, such as FAQ and Division/District templates.



Conservation Easements

Advantages:

- Holder can enforce land use restrictions
- Runs with the land
- Corps has third party enforcement rights

Disadvantages:

- Holders have discretion to not enforce terms
- Can be extinguished (e.g., if Holder ceases to exist)
- Can be difficult to find a Holder (esp. for small sites)



Deed Restrictions



Advantages:

- Runs with the land
- Does not require Holder*; restrictions on land itself

Disadvantages:

- More difficult to enforce
- Enforcement burden on landowner or agencies
- Restrictions generally limited to 60 years in CA
- Does not have a Holder*



Transfer of (Fee) Title

Advantages:

- Land Management entity may have greater resources
- Site may become part of a larger protected area

Disadvantages:

- Receiving entity could convert property
- Perpetual set aside for natural resources unsustainable
- Limited funding may lead to incompatible use (e.g., agriculture, licensed hunting)



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Multi-party Agreement

Advantages:

- Greater opportunities to leverage multiple agency resources through shared obligations
- Provides for participants with specialized experience

Disadvantages:

- May be more issues and difficulties reaching consensus
- If one party doesn't fulfill its responsibilities, it jeopardizes success of entire mitigation



Land Management Plans

Advantages:

- Valuable where laws prohibit other mechanisms
- Plans may change over time* (e.g., Federal facility plans may be revised every 5 years)

Disadvantages:

- Generally limited terms (typically 10 years)
- Potential for revision* and removal of mitigation
- Mitigation may be used for other purposes



THE END



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