The New Mitigation Rule: 33 CFR 332
Louisville District
Highlights & Frequently Asked Questions
For Use in Evaluating, Documenting, and Compensating for Impacts to Waters of the US[1]
Section 404 of the Clean Water Act and
Sections 9 and 10 of the Rivers and Harbors Act of 1899

Effective June 9, 2008

General

This rule will update the following existing regulations:

1) 33 CFR 325.1(d) includes additional information required for a complete application for an Individual Permit. This information will be included in the Public Notice. The project proponent must review the information required for nationwide and regional general permits in the general conditions of these permits.
2) Section 325.1(d)(7) provides guidance for project proponents when they believe compensatory mitigation may not be required. This section also includes requirements for documenting the mitigation rationale (reason for not requiring mitigation or documenting how impacts will be adequately compensated).
3) The Rule updates parts of 40 CFR 230 (USEPA) that are applicable and addresses how mitigation is handled with respect to the 404(b)(1) Guidelines

This rule will supersede the following documents [33CFR 332.1(f)(1)-(2)]:

1) "Federal Guidance for the Establishment, Use, and Operation of Mitigation Banks" – Nov. 28, 1995
2) "Federal Guidance on the Use of In-Lieu Fee Arrangements for Compensatory Mitigation Under Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act" – Nov. 7, 2000
3) "Regulatory Guidance Letter 02-02, Guidance on Compensatory Mitigation Projects for Aquatic Resource Impacts Under the Corps Regulatory Program Pursuant to Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act of 1899" – Dec. 24, 2002
4) The parts relating to the amount, type, and location of compensatory Mitigation project, and the use of preservation, in the "Memorandum of Agreement between the Department of the Army and the Environmental Protection Agency on the

[1] The purpose of this document is to assist the Louisville District Regulatory project manager in an overall understanding of the new "Mitigation Rule." It is not intended to be complete. This document does not include information relating to the development of Mitigation Bank or In-Lieu Fee instruments; however, this document includes information pertaining to the use of these mitigation resources in the evaluation of applications requiring compensatory mitigation, in addition to permittee responsible compensatory mitigation proposals.

Determination of Mitigation Under the Clean Water Act Section 404(b)(1) Guidelines" – Feb. 6, 1990. All other provisions of the MOA remain in effect.

5) Major portions of the *Louisville District Mitigation Guidelines* should be updated to reflect changes in the Mitigation Rule.

This Rule does not alter the Regulations at 33 CFR 320.4(r) of this title which addresses the general mitigation requirements for DA permits.

This final mitigation rule shall [33 CFR 332.1(a)(1)]:

1) maximize available credits and opportunities for mitigation
2) provide for regional variations in wetland conditions, functions, and values
3) apply equivalent standards and criteria to each type of compensatory mitigation

Organization of the Rule:

Section 332.1 Purpose and general considerations
Section 332.2 Definitions
Section 332.3 General compensatory mitigation requirements
Section 332.4 Planning and documentation
Section 332.5 Ecological performance standards
Section 332.6 Monitoring
Section 332.7 Management
Section 332.8 Mitigation banks and in-lieu fee programs

The rule is generally based on existing practice, with improvements to enhance performance and efficiency. (preamble, FR page 19609)

The rule requires *equivalent standards* (no definition given, but acknowledges differences between types of mitigation), to the maximum extent practicable, for all three compensatory mitigation mechanisms: permittee-responsible mitigation, mitigation banks, and in-lieu fee mitigation. (preamble, FR page 19605)

The term "values" has been replaced by the term "services". This is the term the ecological literature is using to relate the human benefits that ecosystems provide. The rule is focused on protecting "functions" (the physical, chemical, and biological processes that occur in aquatic resources) and "services" (the benefits to humans that result from these functions). (preamble, FR page 19604)

Q1: Which permits does the new mitigation rule apply? (preamble page 19594, 19596, 19602, 19603, 19607)

A1: Both Standard (IP & LOP) and General (Regional & Nationwide) permits.

Q2: Are there exceptions that may apply affecting when the Rule goes into effect?

A2: The final rule will apply to all permit applications received after June 9, 2008, the effective date of this rule, unless the DE determines that the new rules would result in a substantial hardship to the applicant.

Q3: Have in-lieu fee programs been eliminated?
A3: No, and there are new requirements.

Mitigation

The rule does not affect a determination of 'when' mitigation is required [33 CFR 332.1(b)]. Rather, it focuses on 'where' and 'how' the mitigation will be required.

The rule moves towards a greater reliance on function and condition assessments instead of acres and linear feet. (preamble, page 19633)

The new mitigation rule recommends "Restoration" as the first compensatory mitigation option because of an increased likelihood of success over other mitigation options (such as establishment). [33 CFR 332.3(a)(2)]

Compensatory mitigation should not be located where will increase risks to aviation by attracting wildlife to areas where aircraft-wildlife strikes may occur (e.g. near airports). [33 CFR 332.3(b)(1)]

Q4: What must be considered when contemplating requiring compensatory mitigation? [33 CFR 332.3(a)]
A4: The rule states that the mitigation should be practicable and capable of compensating for aquatic resource losses as a result of the permitted activity. The District Engineer (DE) should consider what is **environmentally preferable** (emphasis added) [33 CFR 332.3(a)]. He/she must assess the likelihood for ecological success and sustainability, the location of the compensation site relative to the impact site and its significance within the watershed, and the costs of the project. It is assumed that these items must be discussed, at a minimum, in the Environmental Analysis or the permit rationale.

Q5: What is the compensatory mitigation order [33 CFR 332.3(b)(2)-(6)]?
A5:

1) Mitigation bank credits (purchased from a bank that services the impact area)
2) In-lieu fee program credits
3) Permittee-responsible mitigation (watershed approach)
4) Permittee-responsible mitigation (onsite and in-kind mitigation) – "The DE must also consider the practicability of on-site compensatory mitigation and its compatibility with the proposed project."
5) Permittee-responsible mitigation (off-site and/or out-of-kind)

Q6: Is there any flexibility in following the compensatory mitigation order stated above [33 CFR 332.3(b)(2)-(6), also refer to 33 CFR332.3(a) and preamble]?
A6: Yes. The DE has the discretion to modify the hierarchy in order to approve the **environmentally preferable** (emphasis added) compensatory mitigation option. For example, the rule states a preference for "in-kind" over "out-of-kind" compensatory mitigation; however, when using the watershed approach, the DE may determine that out-of-kind mitigation serves the

aquatic resource needs of the watershed, more so than in-kind (preamble, page 19601). The rationale must be documented in the administrative record.

Q7: What elements are required for a compensatory mitigation plan? [33 CFR 332.4(c)(2)-(14)]

A7: There are 13 elements:

1) Objectives;
2) Site Selection;
3) Site Protection Instruments;
4) Baseline Information;
5) Credit Determination Methodology;
6) Mitigation Work Plan;
7) Maintenance Plan;
8) Ecological Performance Standards;
9) Monitoring Requirements;
10) Long-term Management;
11) Adaptive Management Plan;
12) Financial Assurances; and
13) Other information.

Q8: Do compensatory mitigation projects involving streams (and other open waters) also have to have these same 13 elements?

A8: Yes. And may additionally contain [33 CFR 332.4(c)(7)]:

14) Planform Geometry;
15) Channel Form;
16) Watershed Size;
17) Design Discharge; and
18) Riparian Area Plantings.

Q9: Are there site-selection factors that the DE must consider when approving a compensatory mitigation site?

A9: Yes. The list of factors are located at Section [33 CFR 332.3(d)(1)(i)-(vi)] of the rule.

1) Hydrologic conditions, soil characteristics and other physical and chemical characteristics;
2) Watershed scale features, such as aquatic habitat diversity, habitat connectivity, and other landscape scale functions;
3) The size and location of the compensatory mitigation site relative to hydrologic sources;
4) Compatibility with adjacent land uses and watershed management plans;
5) Reasonably foreseeable effects the compensatory mitigation project will have on ecologically important aquatic and terrestrial resources;
6) Other relevant factors including development trends, anticipated land use changes. Habitat status and trends, relative locations of the impact and mitigation sites in the stream network, local and regional goals for the restoration or protection of particular habitat types or functions, water quality goals, floodplain management goals, and the relative potential for chemical contamination of the aquatic resources.

Q10: What factors must be considered in determining an appropriate mitigation ratio? [33 CFR 332.3(f)(2)]

A10: 1) The method of compensatory mitigation (i.e. restoration, establishment, enhancement, preservation);
2) The likelihood of success;
3) Differences between the functions lost at the impact site and those expected to be produced;
4) Temporal losses of aquatic resource functions;
5) Difficulty in replacing the lost functions; and
6) The distance between the affected aquatic resource and the compensation site.

Q11: What must the compensatory mitigation performance standards be based on?

A11: The performance standards must be based on the best available science that can be measured or assessed in a practicable manner. The standards must be ecologically based and be objective and verifiable. They should not be based on construction tasks or administrative milestones (e.g. "completion of grading activities," "submittal of report," etc.) [33 CFR 332.5(b)]. In the absence of available ecologically based standards, acres may be used [33 CFR 332.5(a)].

Q12: Will we require compensatory mitigation ratios less than one-to-one? [33 CFR 332.3(f)(1)]

A12: Typically no. However, there are some exceptions. Where a functional or condition assessment (e.g. IBI) or other suitable metric is not used, a minimum one-to-one acreage or linear foot compensation ratio must be used (see preamble).

Q13: The project proponent wishes to propose a large compensatory mitigation project. Can I accept the proposal? (preamble FR page 19633)

A14: The DE can only require an amount of compensatory mitigation that is roughly proportional with the permitted impacts, or that it is sufficient to offset those lost aquatic resource functions. However, the DE retains the responsibility for the final decision as to how much mitigation will be required and how it is determined.

Q15: Does the rule affect how we determine compensatory mitigation requirements for projects that will impact "difficult-to-replace resources" (such as bogs, fens, vernal pools, and streams)?

A15: The rule emphasizes avoidance and minimization of impacts for these resources. Additionally, the rule states that, if practicable, compensatory mitigation should be provided through in-kind preservation, rehabilitation, or enhancement. [33 CFR 332.3(e)(3)]

Q16: Does the rule change compensatory mitigation for stream impacts?

A16: The DE will generally require stream restoration, enhancement, or preservation for permitted impacts to streams, unless there are case-specific watershed considerations that warrant out-of-kind mitigation for stream impacts. The appropriateness and practicability of requiring in-kind compensation for permitted losses of ephemeral streams will be determined by the DE on a case-by-case basis. (preamble, FR page 19632)

Q17: Can buffers be considered in a mitigation proposal?
A17: Yes, however, no guidance was provided in the Rule to assist in determining how buffers are to be viewed. Buffers can be used only when the buffer is a critical element in protecting the aquatic resource. [33 CFR 332.3(i)]

Q18: When can preservation be used as compensatory mitigation? [33 CFR 332.3(h)(1)-(2)]
A18: When **all** the following are met:

1) when the resources to be preserved provide important physical, chemical, or biological functions for the watershed
2) when the resources to be preserved contribute significantly to the ecological sustainability of the watershed (must use appropriate quantitative assessment tools, where available)
3) preservation is determined by the DE to be appropriate and practicable
4) when resources are under threat of destruction or adverse modifications
5) when the preserved site is permanently protected through an instrument, and a higher mitigation ratio shall be required.

Q19: Can mitigation be sited on public lands?
A19: Yes. However, the compensatory mitigation project must be compatible with existing use and management of those lands. The credits derived from the compensatory mitigation project must be provided over and above those provided by public programs already planned or in place [preamble, FR page 19632].

Watershed

As with the previous RGL 02-02, which has now been superseded by the new rule, a watershed approach to choosing compensatory mitigation sites is stressed.

Under the watershed approach, the PM can split up the required compensatory mitigation into an on-site and off-site component [33 CFR 332.3(c)(2)(iii)]. For example: requiring on-site mitigation to enhance water quality functions while also requiring off-site mitigation to replace lost habitat functions.

Q20: Are there any watershed plans currently approved by the Louisville District for use by the Regulatory Branch?
A20: No.

Q21: Who is responsible for approving watershed plans for DA permits requiring compensatory mitigation?
A21: The DE. **[33 CFR 332.3(c)(1)]**

Q22: Who will develop these watershed plans?

A22: In general, watershed plans will be developed by other governmental agencies (along with the Corps) and/or non-profit resource planners, in consultation with stake-holders. (preamble, FR page 19610)

Q23: Is a formal watershed plan required before it can be used?

A23: No, the watershed approach may be based on a structured consideration of watershed needs and how wetlands and other types of aquatic resources in specific locations will address those needs. (preamble, FR page 19630)

Q24: Is the applicant required to develop a watershed plan?

A24: No. The DE will determine whether existing watershed plans are appropriate for use in the watershed approach for compensatory mitigation. (preamble, FR page 19631)

Q25: What is the minimal amount of information required to effectively implement the watershed approach? [33 CFR 332.3(c)(3)(i)-(iii)]

A25: There is no set minimum but in general, the PM should consider the following:

1) Analysis of currently available information
2) In-house resources (mapping, T&E sites, aerial photographs, etc.)
3) The scope of analysis should be commensurate with the level of impact

See 33 CFR 332.3(c)(3) of the rule for the specific recommendations.

Q26: Should larger projects involve more investigation when researching the watershed approach?

A26: Yes. The level of review should be commensurate with the level of impact. [33 CFR 332.3(c)(3)(iii)]

Q27: Who determines what watershed scale the Corps uses?

A27: The DE will determine the appropriate scale, which will vary by region (preamble, FR 15523). It should not be larger than is appropriate to ensure that the aquatic resources provided through compensation activities will effectively compensate for the adverse environmental impacts resulting from the activities authorized by DA permits. [33 CFR 332.3(c)(4)]

Permitting

As stated in 33 CFR 332.3(k)(2)(i-iii), for an Individual Permit that requires permittee-responsible mitigation, the Special Conditions must:

a) identify the party responsible for providing the compensatory mitigation
b) incorporate, by reference, the final mitigation plan approved by the DE
c) state the objectives, performance standards, and monitoring required, unless stated in the approved final mitigation plan
d) describe any required financial assurances or long-term management provisions for the compensatory mitigation project, unless they are specified in the approved final mitigation plan.

As stated in 33 CFR 332.3(k)(3), for a General Permit that requires permittee-responsible mitigation, the Special Conditions must:

a) describe the compensatory mitigation proposal (either conceptual or detailed)
b) include a statement that work (in WOUS) cannot commence until the DE approves the final mitigation plan, unless it is not practicable

As stated in 33 CFR 332.3(k)(4) and 332.3(l), if a mitigation bank or in-lieu fee is to be used to address the needs of applications for Individual or General Permits, the special conditions must specify (see also Q29 and Q30):

a) the number of credits to be purchased and verified, and
b) the resource type(s) of credits to be purchased.

The Permit Special Conditions must clearly indicate the party or parties responsible for all aspects of compensatory mitigation. [33 CFR 332.3(l)]

As stated in 33 CFR 332.3(n), the DE shall require financial assurances to ensure a high level of confidence that the compensatory mitigation will be successfully completed in accordance with the required performance standards.

Q28: Under the new Rule, what additional information is required to make both a Standard and General application complete?

A28: For both Standard and General Permits, the Rule modifies 33 CFR 325.1(d) – "Application for Permits" (Page 48 of the Preamble text) by adding a new paragraph requiring a mitigation statement for all Section 404 permit applications. More specifically, the Public Notice must now contain a statement explaining how impacts are to be avoided, minimized, and compensated. However, the Rule states that the notice shall not include information that the DE and the permittee believe should be confidential for business purposes, such as the exact location of a proposed mitigation site that has not yet been secured [33 CFR 332.4(b)(1)].

Q29: Under the new Rule, what compensatory mitigation information needs to be submitted before a DE can issue an IP?

A29: The permittee must prepare a draft mitigation plan and submit it to the DE for review. After addressing any comments provided by the DE, the permittee must prepare a final mitigation plan which must be approved by the DE prior to issuing the IP [33 CFR 332.4(c)(1)(i)]. Depending on the type of mitigation, the following information must be provided in the mitigation plan [33 CFR332.4(c)]:

1) objectives,
2) site selection,
3) site protection instrument,
4) baseline information,
5) determination of credits,
6) mitigation work plan,
7) performance standards,
8) monitoring requirements,
9) long-term management plan,
10) adaptive management plan,

11) financial assurances,
12) other information required by the District Engineer.

Q30: Under the new Rule, what compensatory mitigation information needs to be submitted before a DE can issue an GP?
A30: If compensatory mitigation is required the DE may approve a conceptual or detailed compensatory mitigation plan to meet the required time frames for general permit verifications. But, a final mitigation plan [incorporating elements in 33 CFR 332.4(c)(2-14)] at a level of detail commensurate with the scale and scope of the impacts, must be approved by the DE before the permittee commences work in WOUS [33 CFR 332.4(c)(1)(ii)]. The same plan requirements apply to a GP mitigation plan as in IP mitigation plans.

Q31: Does the new rule change our decision for compliance with 404(b)(1) guidelines?
A31: No, before we consider compensatory mitigation, impacts must first be avoided and then minimized as much as practicable. The rule does not change or weaken existing regulatory requirements to avoid and minimize impacts to wetlands.

Q32: What is the minimum length of time for compensatory mitigation monitoring?
A32: Not less than 5 years; however, the PM can reduce the monitoring period if the success criteria have been met or extend the monitoring period if the success criteria will not be met within the originally prescribed monitoring period. Monitoring requirements for mitigation projects involving resources with slow development rates, such as forested wetlands, can be longer than the typical 5-year period. [33 CFR 332.6(b)]

Q33: Does this new rule change the information we include in a Public Notice?
A33: Yes. Section 33 CFR 325.1(d) has been modified to now require the Corps to include a statement in the PN text, which explains how impacts to waters of the U.S, including wetlands, associated with the proposed activity are to be avoided, minimized, and compensated.

Q34: Is cost the only factor for evaluating whether a proposed compensatory mitigation plan is practicable?
A34: No, there are other important considerations such as ecological success of the compensatory mitigation project and it's effectiveness at offsetting the permitted impacts. [preamble, FR page 19609, 19627-19628; 33 CFR 332.1(b)(2); 33 CFR 332.3(a)]

Q35: Under the new Rule, has the file documentation requirements changed for justifying compensatory mitigation in our administrative record?
A35: Yes, the Corps PM's are required to justify out-of-kind mitigation [33 CFR 332.3(e)(2)] and the rationale for the required replacement ratio must be documented in the administrative record [33 CFR 332.3(f)(2)]. The Mitigation Rule does not change what may be appealed. All mitigation rationales must be documented.

Q36: What does 33 CFR 332.7(a) mean relative to Conservation Easements? Do I require one or not?
A36: The rule requires permanent protection, where practicable. It specifically mentions third party Conservation Easements or other Restrictive Covenants. While the Rule does not explain

what “practicable” means, it does describe a strong preference for third party involvement, unless the property is owned and managed by a governmental or non-profit resource management agency that has the right to enforce protections and will monitor the site protections. The instrument is required to contain a 60-day notification prior to extinguishment.

Q37: How do I know if the mitigation project will be affected by incompatible uses? [33 CFR 332.7(a)(2)]

A37: Since the information is not a required element of the mitigation plan [33 CFR 332.4(c)(4)], you will have to ask the compensatory mitigation project sponsor. Two such examples of incompatible uses given in the preamble and in the Rule include clear cutting or mineral extraction. An additional consideration should be any right or agreement made previous to the execution of the permanent protection instrument. This could include a mortgage or lien, timber contract, oil or gas well rights, or utilities. Other compatible agreements, such as public fishing access easements, may be a compatible use.

Q38: What if the compensatory mitigation does not meet the performance criteria?

A38: Section 33 CFR 332.7(c)(1) requires that the mitigation sponsor notify the DE if the permittee-responsible mitigation or a mitigation bank or a in-lieu fee project cannot be constructed in accordance with the approved plans. The permit or instrument must be modified. Otherwise, minor deviations from the plan must be anticipated in the adaptive management plan and implemented as necessary. The Rule does not allow revisions to the initially approved performance objectives unless they are superior to the original objectives.

Q39: What is the difference between financial assurances [33 CFR 332.3(n)] and funding for long-term management [33 CFR 332.7(d)]?

A39: Financial assurances (in the form of performance bonds or other mechanisms) are intended for assurance of construction and establishment of the mitigation project during the monitoring period. Funding for long-term management is not intended to be phased out over time, since those activities will need to be carried out over long periods of time. If the mitigation project becomes self-sustaining, the mitigation sponsor should contact the DE and request that the long-term funding provisions required be modified to release those obligations.