

CORPS SHIFTS TOWARD A FUNCTIONAL APPROACH TO WETLANDS MITIGATION

On December 27, 2002, the U.S. Army Corps of Engineers released Regulatory Guidance Letter (“RGL”) No. 02-2, entitled “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.” The RGL applies to all compensatory mitigation proposals in connection with permit applications filed after December 27, 2002 and supersedes RGL 01-1 issued October 31, 2001. The stated purpose of the RGL is to support the national policy of “no overall net loss” of wetlands and to reinforce the Corps commitment to protecting wetlands by requiring permittees to provide appropriate and practicable mitigation for authorized impacts to aquatic resources.

The most important change effected by the RGL is its shift in the Corps’ mitigation policy from requiring strict acreage replacement to an increased reliance on replacing wetlands functions. The RGL acknowledges the possibility that a net loss in wetlands acreage may be allowed if compensatory mitigation would be impracticable or would only achieve inconsequential reductions in impacts. As a result, the “no overall net loss of wetlands” goal may not be achieved for each and every permit decision, but the Corps intends to achieve this goal on a cumulative basis.

Where there is an absence of definitive information on the functions of a wetland, the Corps will still use acres as the standard measure for determining wetlands impacts and required mitigation. However, the RGL instructs Districts wherever possible to use a “functional assessment method.” Given the unique ecological characteristics of each aquatic site, the RGL states that focusing on replacement of the functions provided by a wetland, rather than simply the acreage lost, will more effectively enhance environmental performance. Under this approach, Districts will assign scores to particular functions using assessment techniques generally accepted by experts in the field, the best professional judgment of federal, tribal and state agency representatives, and the Section 404(b)(1) Guidelines. Fortunately, the RGL requires that the District make its chosen assessment method available to applicants.

The Corps’ mitigation objective under the RGL is to provide, at a minimum, one-to-one functional replacement, or “no net loss of functions.” This may be achieved in some cases by replacing a wetland with a smaller wetland, where the replacement wetland is of higher function.

As mitigation alternatives, applicants may propose the use of mitigation banks, in-lieu fee arrangements, or activity-specific projects. The four types of wetland projects available under the RGL are familiar: creation of a new wetland; restoration of a former wetland or a degraded wetland; enhancement of specific functions; or preservation by the removal of a threat to, or preventing the decline of, wetland conditions. As part of specific wetland

projects, Districts may require on-site or off-site mitigation; in-kind or out-of-kind mitigation; or buffers.

The Corps will be making mitigation plans for individual permits available for public review and comment. As always, pre-application consultation is recommended to discuss compensatory mitigation proposals with the Corps prior to filing. Since compensation is the last step in the Corps' sequencing guidelines, the RGL states that Districts should not require detailed compensatory mitigation plans until they have established "the unavoidable impact"; or, to put it more bluntly, reducing your impacts may reduce your mitigation.

A compensatory mitigation plan must contain the following components: baseline information concerning the impacted resources, goals and objectives for the mitigation plan, the factors considered in site selection, written specifications and work descriptions, performance standards, the parties responsible for compliance, description of the legal means for protecting mitigation areas, contingency plans for unanticipated site conditions or changes, monitoring and long-term reporting plans, and financial assurances and contingency funds set aside for remedial measures. The level of information provided in a mitigation plan "should be commensurate with the potential impact to aquatic resources."

While it may never be possible to determine whether the Corps has achieved its goal of no net loss of wetlands functions, most interested parties should be encouraged that their government will now be evaluating wetland mitigation proposals based upon scientific factors rather than a mere bean-counting of acres. Of course, from the applicant perspective, whether this new approach will add further expense and delay to an already cumbersome process remains to be seen.

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