



Public Notice

U.S. Army Corps
of Engineers
Baltimore District

Date June 24, 2008

Special Public Notice # 08-41

Subject: Final Compensatory Mitigation Rule

On April 10, 2008 the U.S. Army Corps of Engineers and the U.S. Environmental Protection Agency published a Final Rule on Compensatory Mitigation for the Losses of Aquatic Resources (33 CFR 325 and 332 and 40 CFR 230). The effective date of this rule is June 9, 2008. Although this final rule does not change when compensatory mitigation is required, it does modify the procedures for where the compensation will be located and how the compensation will be organized and completed. The rule replaces the following:

- 1995 mitigation banking guidance issued November 28, 1995
- 2000 in-lieu fee guidance issued November 7, 2000
- Regulatory Guidance Letter 02-02 issued December 24, 2002, and
- Certain provisions of the 1990 Mitigation MOA issued February 6, 1990

The Baltimore District encourages all applicants to read the full text of the Final Mitigation Rule which can be obtained at:

http://www.usace.army.mil/cw/cecwo/reg/news/final_mitig_rule.pdf

The new rule directly impacts Individual Department of the Army permit applications submitted after the effective date of the rule. The purpose of this notice is to draw the attention of applicants to several key changes that will affect the application and review process for Individual Department of the Army permits.

1. In accordance with 33 CFR 325.1(d)(7), all applications for Individual Department of the Army permits must include a brief statement by the applicant:
 - a. Explaining how avoidance, minimization and compensation shall be accomplished for the project, or
 - b. Explaining why compensation for aquatic resource loss should not be required. Submission of a proposed compensatory mitigation plan is not required with an application but may be offered voluntarily by the applicant.
2. A final compensatory mitigation plan must be approved PRIOR to the issuance of any Individual Department of the Army permit.
3. For General Permits, including Nationwide Permits and State Programmatic General Permits, a final plan must be approved before commencing work in waters of the U.S.
4. Approval of final compensatory mitigation plans may include a requirement for the applicant to provide sufficient financial assurances to ensure a high level of confidence that the compensatory mitigation will be successfully completed. If sureties are required, there must be a

provision that requires a minimum of a 120 day advance notification to the District Commander prior to termination or revocation of any such surety.

5. All compensatory mitigation sites shall require long-term protection through real estate instruments or other appropriate mechanisms (e.g., management plan for government property). A minimum 60-day advance notice to the District Commander shall be required for real estate instruments, management plans or other long-term protection instrument before voiding or modifying the instrument.

6. A watershed approach shall be used to establish compensatory mitigation requirements in Department of the Army permits to the extent appropriate and practicable. The ultimate goal of a watershed approach is to maintain and improve the quality and quantity of aquatic resources within watersheds through strategic selection of compensatory mitigation sites.

As previously noted, the purpose of this notice is to alert applicants to several major changes that will affect the application and review process for federal permits; this notice is not an exhaustive or complete summary of the new Mitigation Rule. All applicants should read the full text of the rule and are required to comply with all applicable sections of the complete rule.

Additional information on the Final Mitigation Rule and any questions concerning the above points should be directed to Ms. Beth E. Bachur at (410) 962-4336 or by email at beth.bachur@usace.army.mil.