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WETLAND MITIGATION – THE PRICE OF A CORPS PERMIT GOES UP AND THE LINE GETS LONGER

By: [Stanley A. Millan](#)

The U.S. Army Corps of Engineers and Environmental Protection Agency issued a 100+ page joint mitigation rule on April 10, 2008 (73 F.R. 19594) that replaces most of their prior administrative guidance between 1990 and 2002, and that makes mitigation a three-ring circus among mitigation banks, in-lieu fee arrangements, and permittee's responsibility. 33 C.F.R. 332; 40 C.F.R. 230, Part J. The rule will come into effect on June 9, 2008.

Many feel that the new rules will encourage mitigation banking (perhaps making mitigation cheaper in the long run) as well as more off-site mitigation. Consultants say the agencies have informally been following the new rule as guidance for some time; however, the new rules will add more red tape to the permit equation. Some highlights follow:

- Mitigation sequencing of avoiding wetlands (upland alternatives) and minimizing (smaller wetland projects) continue to take priority over compensation (wetland replacement efforts).
- In-lieu fee programs, smaller mitigation projects than banks, that are generally closer to the permit sites but which usually obtain financing after agency approval, remain an option to the agencies.
- Compensatory mitigation through permit conditions still includes site restoration, establishment (creation), and enhancement (over a baseline), as well as preservation in some cases (at increased mitigation ratios for acres in mitigation versus wetland acreage being permitted).
- Mitigation sponsors assume the permittee's mitigation responsibilities, except where their approved service areas are too far away and permittee-responsible mitigation is the only permit option available. This means the risk of mitigation failure (i.e., acquiring further mitigation sites) is on the permittee in such cases.
- A watershed approach and approved watershed planning is favored by the agencies, where the landscape and aquatic resources in a given land area that drain into a common waterway are established, enhanced, and preserved. Compensatory mitigation should be in the same watershed as the permit site. Otherwise, where watershed planning is not available, the permittee or mitigation sponsor must furnish the agencies with pertinent information.

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- The objective of compensatory mitigation is to offset environmental losses (including values and an entire suite of natural functions), such as habitat losses.
- On-site (same area) and in-kind (same habitat or wetland type) compensatory mitigation is favored.
- The agencies have discretion to determine mitigation ratios (wetland acres permitted versus mitigation acres required), and a minimum one-to-one acre or linear foot compensation is to be used.
- Appropriate financial assurances, planning, work plans, monitoring, reporting, and long-term and adaptive management planning (length of sustainability and responsiveness to unforeseen circumstances) are required for the mitigation site.
- Interagency review team approval, prospectus approval, public notice and comment, mitigation credit release approvals, conservation easements, and formal memoranda of agreement with the agencies are required of mitigation banks and in-lieu fee arrangements. The market price of mitigation credits will reflect this effort.
- Permittees must engage in new tasks of pre-application mitigation meetings, prepare a mitigation statement for the public notice, and prepare a mitigation plan for agency approval, as well as be subject to the aforesaid efforts of a mitigation banker or in-lieu fee arranger if the permit site lies within their service area.

Before this rule, mitigation was a rather simple process at the tail-end of the permit. Now mitigation becomes an enlarged process within the permit process itself.

Perhaps the new rule will enhance Corps of Engineers decision-making, in the face of unfavorable decisions like *O'Reilly v. Corps of Engineers*, 477 F.3d 393 (5th Cir. 2007). However, the new rule still do not address the other issues raised in the *O'Reilly* opinion about not assessing NEPA cumulative impacts, unreasonably distant mitigation (many miles), and inexplicable fragmentation of Louisiana's wetlands.

For more information about wetland mitigation, contact [Stan Millan](#), [Mike Chernenkoff](#), or [Boyd Bryan](#).

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Remember that these legal principles may change and vary widely in their application to specific factual circumstances. You should consult with counsel about your individual circumstances. For further information regarding these issues, contact:

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