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**EPA AND U.S. ARMY CORPS OF ENGINEERS JOINTLY PROPOSE
REVISIONS TO WETLAND MITIGATION REGULATIONS**



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The U. S. Army Corps of Engineer (Corps) has long required mitigation to compensate for wetlands losses resulting from activities authorized under Corps permits. In 2004, Congress required the Corps to issue regulations establishing performance standards and criteria for the use, consistent with the Clean Water Act (CWA), of on-site, off-site, and in-lieu fee mitigation and mitigation banking as compensation such losses.

On March 28, 2006, the Corps and EPA jointly proposed to revise the federal regulations governing mitigation. *See* 71 Fed. Reg. 15520 (March 28, 2006). The proposed regulations would affect not only to wetlands mitigation, but also to compensatory mitigation for all types of aquatic resources — including streams and other open waters — that may be impacted by permitted activities. They would also apply to mitigation required for activities in waters subject to regulatory jurisdiction under Sections 9 and 10 of the Rivers and Harbors Act, not only jurisdictional waters under the CWA.

The proposed regulations have several purposes. First, as directed by Congress, they establish performance standards and criteria for permittee-responsible compensatory mitigation and mitigation banks, with the intent to improve the quality and success of mitigation projects. A key requirement is that a watershed approach be employed in evaluating mitigation proposals to account for regional variations in aquatic resource types, functions, and values. The watershed approach places primary emphasis on site selection, through consideration of landscape attributes that will provide the desired aquatic resource types and ensure they are self-sustaining. The proposed regulations require that information on how the permittee plans to address avoidance, minimization, and compensatory mitigation requirements be included in the permit application and published by the Corps in the public notice for the permit application, to promote broad-based stakeholder involvement in watershed-based mitigation decisions.

The proposed regulations also aim to improve regulatory efficiency, especially for the review, approval, and implementation of mitigation banks. Streamlining this process is intended to encourage entrepreneurs and others to develop mitigation banks.

Further, the regulations propose to phase out in-lieu fee programs, wherein the permittee provides funds to an in-lieu-fee sponsor instead of either completing the project-specific mitigation or purchasing credits from an approved mitigation bank. In-lieu-fee programs are generally administered by state governments, local governments, or non-profit non-governmental organizations, while mitigation banks usually (though not always) are operated for profit by private entities. EPA is concerned that there is often a substantial lag time between the permitted wetland impacts and mitigation under in-lieu-fee programs, because mitigation under such programs is delayed until after fees are collected, whereas mitigation banks must achieve certain mitigation milestones before they can sell credits. Also, in-lieu-fee programs are not generally required to provide the same financial assurances as mitigation banks. Under the proposed rule, new in-lieu-fee programs would not be approved, and existing in-lieu-fee programs may continue to operate under the terms of their approved instrument for up to five years after the effective date of the rule.

[Click here](#) to review a complete copy of the proposed regulations and preamble. EPA will consider public comments received within sixty days of the March 28, 2006 publication of the notice of the proposed regulations. For more information, contact **[Boyd Bryan](#)**.