



U.S. Army Corps  
of Engineers  
Alaska District

## Alaska District Regulatory Guidance Letter

RGL ID No. 09-01

CEPOA-RD

2009

**SUBJECT:** Alaska District implementation of the Federal Rule on Compensatory Mitigation: Compensatory Mitigation for Losses of Aquatic Resources; Final Rule (33 CFR Parts 325 and 332), dated April 10, 2008.

**BACKGROUND:** The Corps and EPA published a new rule to clarify how to provide compensatory mitigation for unavoidable impacts to the nation's wetlands and streams resulting from authorized activities. The rule is intended to enable the agencies to promote greater consistency, predictability, and ecological success of mitigation projects under the Clean Water Act.

The rule preserves the requirement for applicants to first avoid and/or minimize impacts to aquatic resources before proposing compensatory mitigation to offset project impacts. The rule establishes performance standards, sets timeframes for decision making, and to the extent possible, establishes equivalent requirements and standards for the three sources of compensatory mitigation: mitigation banks, in-lieu-fee (ILF) programs, and permittee-responsible mitigation.

**PURPOSE:** The purpose of this Regulatory Guidance Letter (RGL) is to define the Alaska District's review procedure for compensatory mitigation with respect to the requirements of the rule. This RGL outlines the steps necessary to implement the rule when evaluating project proposals, and identifies the necessary documentation to be included in the administrative record for a permit decision.

**APPLICABILITY:** This guidance applies to all permit applications submitted for approval.

**IMPACTS, COMPENSATION AND WATERSHEDS:** Regulations require appropriate and practicable compensatory mitigation to replace functional losses to aquatic resources. The Alaska District will determine what level of mitigation is "appropriate" based upon the functions lost or adversely affected by permitted activities. When determining "practicability", the District will consider the availability of suitable locations, constructability, overall costs, technical requirements, and logistics.

The rule includes flexibility concerning regional variations in aquatic resources, determination of watershed size and limits, in-lieu-fee and mitigation bank service areas, and the types of wetland projects. For reference, Table 1 provides cited portions from the rule that are particularly relevant to aquatic resource impacts and compensatory mitigation in Alaska.

**PROCEDURES:** The following are flow chart procedures for evaluating mitigation proposals that accompany permit requests.

### **A. Receipt of Application**

#### **1. Review permit request (applies to all permit requests)**

- a. The application does not contain any information pertaining to mitigation sequencing and compensation for impacts (incomplete application or Pre-Construction Notification). Request this information from the applicant.

**OR**

- b. The application contains the required mitigation statement, documents mitigation sequencing (avoidance, minimization, then compensation), and has a conceptual mitigation plan, if necessary. Proceed to Section B.

## **B. Determination of Mitigation Requirements for all Permit Requests**

*Mitigation requirements are determined by following 33 CFR 320.4(r). It is critical to document your evaluation process, whether you require compensatory mitigation or not, by following the sequencing outlined in the regulations above and taking into consideration the nation's "no net loss" goal (see Executive Order 11990 and the February 6, 1990, Memorandum of Agreement between the Department of the Army and the Environmental Protection Agency). See Table 2 for examples of projects that will require compensatory mitigation and may or may not require compensatory mitigation.*

1. The proposed project does not require compensatory mitigation beyond avoidance and minimization:
  - a. The applicant must document avoidance and minimization measures;
  - b. The applicant must provide rationale as to why they are not proposing compensatory mitigation for their proposed project; and
  - c. In the decision document (i.e., memorandum for record (MFR), combined decision document, etc.), regulator must document acceptance of avoidance and minimization measures and rationale for not requiring compensatory mitigation.

**OR**

2. The proposed project requires compensatory mitigation, but the applicant does not think so, nor propose any:
  - a. The applicant must document avoidance and minimization measures; and
  - b. The Public Notice (PN) or General Permit Agency Coordination (GPAC) mitigation statement will state that no compensatory mitigation has been proposed and the applicant's rationale for not proposing any. Items the regulator should discuss with the applicant during the review period would be: Is there opportunity on-site for compensatory mitigation? If so, is it ecologically preferable and practicable (e.g. will it be self-sustaining, low risk, temporal losses, etc.). Is the proposed project within a service area for an established bank or ILF program? Are there compensatory mitigation opportunities within the impacting project's watershed/ecoregion, which might be applicable and/or of which the applicant is unaware?
  - c. Proceed to Section C.

**OR**

3. The proposed project is submitted with a compensatory mitigation plan:
  - a. The applicant must document avoidance and minimization measures;
  - b. Review the plan for adequacy, as outlined in Section C;
  - c. If inadequate, work with the applicant to get the plan refined until it is adequate; and
  - d. Proceed to Section C.

## **C. Reviewing Compensatory Mitigation Plans and General Considerations**

*If compensatory mitigation is required for general permits (regional or nationwide permits), you may approve a conceptual or detailed compensatory mitigation plan to meet required time frames for general permit verifications, but a final mitigation plan (as described in Section D) must be approved before work commences in waters of the U.S. Alternatively, components of a mitigation plan may be addressed through permit conditions (see 33 CFR § 332.4(c)(ii)). Do not forget to ensure project is in compliance with NWP general condition 20, if applicable.*

1. Is the mitigation site located on private or public lands? Credits for compensatory mitigation projects on public land must be based solely on aquatic resource functions provided by the compensatory mitigation project, over and above those provided by public programs already planned or in place.
2. Is mitigation proposed in-kind or out-of-kind? On-site or off-site? The decision document needs to include ecological rationale for out-of-kind. Very rarely can you justify a marine impact being compensated at a fresh-

water site but the opposite may be able to easily justify. If off-site, can all impacted functions be mitigated at an off-site location? If not, how is the applicant addressing water quality and quantity functions on-site?

3. What option has the applicant determined would be environmentally preferable and why (e.g. in-kind, out-of-kind, temporal concerns, etc.)?
  - a. If mitigation bank credits – go to item (i) below
  - b. If ILF program credits – go to item (ii) below
  - c. If permittee-responsible mitigation – go to item (iii) below
    - i. Mitigation bank credits
      - 1) The applicant must provide a rationale for using a mitigation bank (why the bank is an environmentally preferable compensation choice);
      - 2) Confirm that the impact occurs in the service area of the mitigation bank and that credits are available;
      - 3) Baseline information and determination of credits as described in D. 4. and D. 5. below; and
      - 4) In the decision document (i.e., MFR, combined decision document, etc.), Regulator must document acceptance of avoidance and minimization measures and rationale for compensatory mitigation requirements.
    - ii. In-lieu fee program credits
      - 1) The applicant must provide a rationale for using an in-lieu fee (why the in-lieu fee is an environmentally preferable compensation choice);
      - 2) Confirm that the impact occurs in the Service Area of the in-lieu fee sponsor's program;
      - 3) Baseline Information and Determination of Credits as described in D. 4. and D. 5. below; and
      - 4) In decision document (i.e., MFR, Combined Decision Document, etc.), the regulator must document acceptance of avoidance and minimization measures and rationale for compensatory mitigation requirements.
    - iii. Permittee-responsible mitigation
      - 1) Type of compensatory mitigation
        - a) Preservation only (go to Section E)
        - b) Restoration, establishment, enhancement (go to Section D)
        - c) Stream compensatory mitigation projects (go to Section D)
      - 2) Was a functional assessment provided for the impacted area, and was it related to the proposed compensatory mitigation? See Appendix A (Wetland Functions Information and Tools)
      - 3) Was the functional assessment an approved methodology or is it based upon best professional judgment? See item 4.
      - 4) Does the functional assessment adequately describe the impacts to all wetland functions – water quantity; water quality; habitat? Do you agree with the conclusions of the assessment?
      - 5) Overall, is the wetland being impacted of high, medium, or low functions and services (Category I – IV – see Appendix A)?
      - 6) Has the applicant or consultant included wetland and upland buffer impacts?
      - 7) Are there indirect and/or secondary adverse affects from the project?
      - 8) The regulator must document findings and rationale of items 2-7 above to support their conclusions.

**D. Final Mitigation Plan Requirements for Permittee-Responsible Mitigation (33 CFR 332.4(c)(2) through (c)(14))**

1. Objectives:
  - a. method of compensation (restoration, establishment, enhancement and/or preservation);
  - b. description of resource types (i.e., U.S. Fish and Wildlife Service Cowardin Class – PFO, PSS, PEM, riverine, lacustrine, etc. and/or Hydrogeomorphic (HGM) Class: Depressional, Riverine, Slope, or Flats) provided by plan (see Appendix A);

- c. the amount of each resource type provided by plan; and
  - d. does the compensation project address the needs of the watershed, ecoregion, or other geographic area of interest?
2. Site Selection:
- a. will the compensation project be self-sustaining;
  - b. did the applicant consider on-site alternatives where practicable; and
  - c. were watershed needs considered by applicant?

3. Site Protection Instrument:
- a. what legal arrangements and instrument is the applicant proposing to ensure long-term protection of the mitigation site:
    - i. Conservation Easement
    - ii. Restrictive Covenant/Deed Restriction – See examples in O:\RD\Private\Library\Mitigation

4. Baseline Information:

*For applicants planning on securing credits from an ILF program or mitigation bank, baseline information only needs to be submitted for the impact site, not the ILF or mitigation bank project site.*

Baseline information includes the following for both the impact site and the mitigation project site (if applicable). The list may not be inclusive of other information that may be needed on a case-by-case basis.

- a. descriptions of historic and existing plant communities and hydrology (including any monitoring well data);
  - b. soil conditions (including any soil boring data);
  - c. a map showing the locations of the impact and mitigation site(s) or the geographic coordinates; and
  - d. delineation of waters of the U.S. (in accordance with the 1987 wetland delineation manual and the 2007 Alaska Regional Supplement) for both the impact and mitigation project site
5. Determination of Credits (See Appendix B):

A description of the number of credits to be provided, including a brief explanation of the rationale for this determination. (See Section 332.3(f).)

- a. For permittee-responsible mitigation, this should include an explanation of how the compensatory mitigation project will provide the required compensation for unavoidable impacts to aquatic resources resulting from the permitted activity; and
- b. For permittees intending to secure credits from an approved mitigation bank or in-lieu fee program, it should include the number and resource type of credits to be secured and how these were determined.

*Example – DO NOT USE MONETARY CONVERSIONS – that is between the ILF or bank sponsor and the applicant!!! Using Appendix B: If the impact is 5 acres of moderate functioning wetland (Category II or III) and the applicant proposes preservation (either as an ILF or Mitigation Bank) as their compensatory mitigation type, then according to the ratio table, the applicant would need to compensate at a 2:1 ratio, which would translate to 10 credits (or acres) of preservation. The price for purchasing 10 credits from an ILF or bank sponsor will be determined by the sponsor, NOT by the Corps.*

6. Mitigation Work Plan:

The applicant needs to include the following details (using all available information, but not limited to):

*For Wetland Projects*

- a. geographic boundaries of the project;
- b. construction methods, timing, and sequence;
- c. source(s) of water, including connections to existing waters and uplands;
- d. methods for establishing the desired plant community (including plant species, number of individuals and spacing – e.g. trees will be planted 10-foot on center);
- e. plans to control invasive plant species; proposed grading plan, including elevations and slopes of substrate;
- f. soil management; and
- g. erosion control measures

*For Stream Projects* - includes the above list, plus:

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- h. planform geometry;
  - i. channel form (e.g. typical channel cross-sections);
  - j. watershed size;
  - k. design discharge; and
  - l. riparian area planting plan (including species, number of individuals, and spacing)
7. Maintenance Plan:
- a. description and schedule of maintenance requirements once initial construction is completed
8. Performance Standards (See Appendix C for examples):
- a. used to determine whether the project is achieving objectives – must be meaningful, measurable and achievable, as well as enforceable;
  - b. must be objective and verifiable;
  - c. may be based on variables or measures of functional capacity described in functional assessment methodologies, measurements of hydrology or other aquatic resource characteristics, and/or comparisons to reference aquatic resources of similar type and landscape position.
9. Monitoring Requirements:
- a. applicant should submit a description of parameters to be monitored in order to determine if the mitigation project is on track to meet performance standards and if adaptive management is needed – includes parameters to be monitored, the length of the monitoring period, party responsible for monitoring and submittal of reports, the frequency for submittal of reports; and
  - b. content and detail is commensurate with scale and scope of mitigation project
10. Long-term Management Plan:
- a. how will mitigation project be managed to ensure long-term sustainability of the resource;
  - b. party responsible for ownership and all long-term management of the mitigation project;
  - c. long-term management responsibilities can be transferred to another entity, such as a public agency, non-governmental organization, or private land manager (District Engineer (DE) must approve);
  - d. should include description of long-term management needs, annual cost estimates for these needs, and funding mechanism that will be used to meet those needs;
  - e. financing mechanisms include: non-wasting endowments, trusts, contractual arrangements with future responsible parties and other appropriate financial instruments; and
  - f. public authority or government agency responsible for long-term management, must include plan for long-term financing of the mitigation site
11. Adaptive Management Plan:
- a. includes a strategy to address unforeseen changes in site conditions or other components of the mitigation project;
  - b. must include party responsible for implementing adaptive management measures;
  - c. adaptive management measures may include: site modification, design changes, revisions to maintenance requirements, and revised monitoring requirements
12. Financial Assurances:
- a. need to assess whether financial assurance is required;
  - b. government agencies or public authorities with a formal documented commitment do not need to post financial assurances;
  - c. is another regulatory entity requiring financial assurances;
  - d. amount is based on the size and complexity of the mitigation project, likelihood of success, past performance of project sponsor, the degree of completion of the project at the time of project approval
  - e. financial assurances may be in the form of performance bonds, escrow accounts, casualty insurance, letters of credit, legislative appropriations for government sponsored projects, or other appropriate instruments
  - f. rationale for determining the amount of the required financial assurances, or not requiring any, must be documented in the administrative record

**E. Required Criteria for using ONLY Preservation as Compensatory Mitigation (33 CFR 332.3(h))**

- 1. The resources to be preserved provide important physical, chemical, or biological functions for the watershed;

2. The resources to be preserved contribute significantly to the ecological sustainability of the watershed. In determining the contribution of those resources to the ecological sustainability of the watershed, the district engineer must use appropriate tools, where available;
3. Preservation is determined by the DE to be appropriate and practicable;
4. The resources are under threat of destruction or adverse modifications; and
5. The preserved site will be permanently protected through an appropriate real estate or other legal instrument (e.g., easement, title transfer to state resource agency or land trust).

#### **F. Tables and Appendices**

*The tables and appendices were compiled using multiple resources and are to be utilized as tools and resources to assist in the regulator's evaluation. The regulator may choose to use the functional assessment tools together, separately, or not at all. Every project needs to be evaluated based on its own merit, and the tools are generalizations that may need adjusting or further analysis, which should be determined by the regulator on a case-by-case basis.*

**Table 1: Citations from the new rule (preamble and the regulations) that are of particular value to Alaska**

**Table 2: Examples of projects that will require compensatory mitigation and examples of projects that may or may not require compensatory mitigation**

**Appendix A: Functional Assessment Information and Tools**

**Appendix B: Sample Ratios for Compensatory Mitigation**

**Appendix C: Performance Standards**

**Appendix D: Glossary**

2/25/09

Date

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Chief, Regulatory Division

**Table 1. Citations from the new rule (preamble and the regulations) that are of particular value to Alaska**

<p>Page 19617 (332.3(a) - Flexibility in Mitigation Requirements): Flexibility in compensatory mitigation requirements is needed to account for regional variations in aquatic resources, as well as state and local laws and regulations. There also needs to be flexibility regarding the requirements for permittee-responsible mitigation. Practicability is an important consideration when determining compensatory mitigation requirements.</p>
<p>Page 19625-19626 (332.2 - Definitions for Watershed and Service Area): District engineers will determine appropriate watershed scales for compensatory mitigation projects, including services areas for mitigation banks and in-lieu fee programs.... In general, compensatory mitigation projects should be located in the same watershed as the permitted impacts, at a scale determined to be appropriate by the district engineer based on the factors specified in the rule.</p>
<p>Page 19627 (332.3(a) - Mitigation Options &amp; Practicability): If a particular compensatory mitigation project is cost-prohibitive, then an alternative compensation project that is more practicable should be required. District engineers will also consider impacts to the public interest, including potential losses of aquatic resource functions and services, when evaluating permit applications and compensatory mitigation proposals, and determining appropriate and practicable compensatory mitigation requirements.</p>
<p>Page 19627 (332.3(a) – Environmentally Preferable Mitigation): [The regs] provide flexibility for district engineers to make compensatory mitigation decisions based on what is environmentally preferable and is most likely to successfully provide the required compensatory mitigation.</p>
<p>Page 19627 (332.3(c) - Watershed Approach &amp; DE Flexibility): [The regs] provide flexibility for district engineers to use innovative approaches or strategies for determining more effective compensatory mitigation requirements that provide greater benefits for the aquatic environment.</p>
<p>Page 19632 (332.3(b)(6) - Out-of-kind Mitigation): District engineers can require the use of out-of-kind compensatory mitigation when he or she determines that it will serve the aquatic resource needs of the watershed.</p>
<p>Page 19635 (332.3(h) - Preservation as Compensatory Mitigation): Preservation will be provided in conjunction with aquatic resource restoration, establishment, and/or enhancement activities, unless the district engineer waives this requirement in a situation where preservation has been identified as a high priority using a watershed approach. If the district engineer makes such a waiver, a higher compensation ratio shall be required.</p>
<p>Page 19654 (332.8(d)(6)(ii)(A) - Bank Service Area): The district engineer, in consultation with the IRT, will determine the appropriate service area(s) for mitigation banks and in-lieu fee programs.</p>
<p>Page 19660 (332.8(o)(6) - Credits Provided by Preservation): Preservation may also be used as the only form of compensatory mitigation, at the discretion of the district engineer, but this should only be allowed where preservation of specific resources has been identified as a high priority using a watershed approach...</p>

**Table 2. Examples of projects that will require compensatory mitigation and examples of projects that may or may not require compensatory mitigation**

*Notes:*

1. *These are examples. Every project must be reviewed on a case-by-case basis and compensatory mitigation requirements must be determined through the permit review process for each project.*
2. *This table assumes that avoidance and minimization has occurred for the project to the PM/RS's satisfaction, and been documented. The decision whether to require compensatory mitigation must also be well documented in the administrative record.*
3. *This table does not mean that impacts considered small for purposes of ILF or Mitigation Bank credit would never require another form of compensatory mitigation.*

<b>WILL REQUIRE</b>
The project occurs in degraded, rare, difficult to replace, or threatened wetlands, areas of critical habitat, 303(d) waters, etc.
The project, even if minimally impacting, occurs in a watershed where cumulative impacts are a concern (i.e., urban areas, transportation corridors, etc.)
Fill placed in intertidal waters associated with special aquatic sites, streams, rivers, lakes and/or riparian areas.
Fill placed in anadromous fish streams and wetlands adjacent to anadromous fish streams.
The project is federally funded, so compensatory mitigation is required under Executive Order 11990 (no net loss of wetlands).
<b>MAY OR MAY NOT REQUIRE</b>
The impacting project requires an IP or permanently impacts more than ½ acre of wetlands and/or other waters of the U.S.
The impacts from the project are so small (e.g. loss of 1/2 acre of forested wetlands in a remote, relatively undisturbed watershed) that they cannot be effectively compensated
There is no opportunity within the watershed for compensatory mitigation AND the impacts are so small that an ILF or Bank Sponsor could not sell a credit that would be worth the money to process (cost/benefit analysis does not add up)
The project impacts are minimal or in a watershed with large expanses of wetlands that are not at risk of being cumulatively degraded.

