



Joint Corps-EPA Mitigation Rule

On June 9, 2008, new regulations affecting mitigation on development projects were enacted jointly by the U.S. Army Corps of Engineers (Corps) and the U.S. Environmental Protection Agency (EPA). The “new rule” changes their position regarding *how* and *where* mitigation requirements can be met when wetlands and streams are impacted, but does not change *when* mitigation is required. As always, the basic part of Section 404(b)(1) of the Clean Water Act requires avoidance and minimization before mitigation can be considered.

The new rule presents a hierarchy for mitigation options:

- Mitigation Bank Credits
- In-lieu fee program credits
- Watershed approach based mitigation by the permittee
- On-site mitigation/in-kind mitigation by the permittee
- Off-site mitigation/out-of-kind mitigation by the permittee

The goal is to create larger, watershed-based projects that protect large expanses of wetlands and streams in perpetuity as opposed to the current system, which allows the creation of small stream segments or wetland pockets that may not be related to other ecological components.

Mitigation plans must now:

- Detail how the project will mitigate for lost functions and values,
- Provide baseline information for both the impact area and the mitigation site,
- Indicate the ecologically-based performance standards that will be used to monitor the site,
- Include an adaptive management plan to address unforeseen changes, and
- Provide assurances to guarantee successful implementation.

The rule also changed the operation of in-lieu fee (ILF) fund programs into a system similar to the functioning of mitigation banks. Only a limited amount of advance credits can be sold for ILF projects before the project has to be constructed and future credits will only be released after meeting the set performance criteria. While banks can be owned by individual entities and established for profit, ILF projects can only be established by governments or non-profit groups, using a small percentage of the compensation for overhead. DEQ is currently working on guidance to mesh their mitigation sequencing requirements with the federal rule so that the regulated community will only have one mitigation requirement for the vast majority of projects.

More information about mitigation changes can be found online from the Corps and EPA at <http://www.usace.army.mil/cw/cecwo/reg/citizen.htm> and <http://www.epa.gov/wetlandmitigation>. If you have any questions about how the new regulations affect your project, please contact your WEG project manager at any of our offices: Williamsburg, VA (757) 220-6869, Richmond, VA (804) 267-3474, Herndon, VA (703) 437-3096, Fredericksburg, VA (540) 785-5544, or Lakeland, FL (863) 686-1718.