

# Successes **in** Stewardship

<http://www.environment.fhwa.dot.gov/strmlng/es4newsltrs.asp>

June 2009

## Minimizing Negative Impacts on Wetlands through the New Final Joint Compensatory Mitigation Rule

The present standard for required infrastructure projects is that there be "no net loss" of wetland resources or function. Since this standard was established, policymakers have strived to uphold it and at the same time have tried to identify mitigation options that can be successfully implemented. The U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (USACE) jointly implement the Final Rule on Compensatory Mitigation for Losses of Aquatic Resources, as both have some jurisdiction over waters of the United States.

On March 31, 2008, EPA and USACE issued the Final Rule on Compensatory Mitigation for Losses of Aquatic Resources,, which comprises revised regulations governing compensatory mitigation to offset negative impacts to wetlands, streams, and other waters of the United States that are protected under Section 404 of the Clean Water Act. These revised regulations are meant to improve the effectiveness of compensatory mitigation in replacing lost aquatic-resource functions. The new rule consolidates existing regulations and guidance to establish equivalent standards for all types of mitigation that fall under Section 404.

Section 314 of the National Defense Authorization Act for Fiscal Year 2004 obligated the Secretary of the Army, acting through the USACE Chief of Engineers, to establish equivalent criteria for the performance of mitigation sites, which produced the new rule. In the past, different types of compensatory mitigation required different processing procedures and incurred different costs. Project-by-project mitigation projects received a full-credit release after a mitigation plan was approved, while mitigation banks were required to receive prior approval in order to begin operations and credit release was staggered on the basis of ecological-performance achievements. Through the new mitigation rule, USACE hopes to improve the success of all mitigation projects.

### Three Types of Compensatory Mitigation

The rule establishes three acceptable mechanisms for compensatory mitigation. The rule presents a hierarchy that aims to reduce risk and uncertainty, ensuring that the required mitigation is provided. Under the new rule, there are three allowable mechanisms for compensatory mitigation: mitigation banking, in-lieu fee, and permittee-responsible mitigation.

- **Mitigation banking.** A wetlands mitigation bank is an existing site that has been restored, preserved, established, or enhanced in some way. The bank is set aside as a compensation site for future development projects that impact wetlands within the same watershed. Permittees can purchase credits from a mitigation bank to fulfill their mitigation requirements. The amount and quality of the impacts to the aquatic resource determines the number of credits that a permittee needs to purchase. Mitigation banking is always performed offsite but within the same watershed as the proposed project.

Because mitigation banks are fully permitted prior to their association with specific infrastructure projects, using them as a mechanism for compensatory mitigation reduces the time and resources required by the permitting process. In addition, mitigation banks are generally restored created or enhanced wetlands that are protected

### What Is a Jurisdictional Determination?

To use and interpret the Compensatory Mitigation Rule, it is important to understand the difference between a wetland delineation and jurisdictional determination

**Wetland delineation** is the process of determining if an area is technically considered a wetland and, if so, of establishing the boundary between wetlands and uplands. This decision is made using one of two delineation procedures. Both procedures can be found in the 1987 [Corps of Engineers Wetlands Delineation Manual](#).

**Jurisdictional determination** is the process of identifying and locating "jurisdictional waters of the United States" that are regulated by USACE under Section 404 of the Clean Water Act. Not all aquatic resources, including wetlands, are jurisdictional. The procedure for determining whether an aquatic resource is jurisdictional is given in the USACE's new guidance pursuant to the Rapanos Supreme Court decision. (More information can be found on the [USACE](#) website.)

through the banking instrument. A larger mitigation site has greater potential for ecological success than do several smaller, scattered sites. The bank sponsor is responsible for the mitigation success and for all maintenance and management issues. Once a permittee has purchased the appropriate credits, they are relieved of further responsibility for the mitigation.

- *In-lieu fee mitigation.* With this mechanism, permittees pay a fee to an “in-lieu” sponsor—either a government agency or a nonprofit organization—to complete measures for wetland mitigation. The sponsor collects funds from one or more permittees, amassing the resources needed to build and maintain a mitigation site or various sites within the watershed. The sponsor is then responsible for the mitigation site, which can be located onsite but is more frequently offsite. This type of mitigation can be performed before or after impacts have occurred.
- *Permittee-responsible mitigation.* With this mechanism, permittees that need to perform mitigation for a proposed project undertake the compensatory mitigation project by themselves. The permittee must receive USACE approval of a devised mitigation plan. Permittee-responsible mitigation can be performed onsite or at an offsite location within the same watershed. The permittee is responsible for the ecological performance, monitoring and long-term management of the mitigation site.

## The Transition

The primary difference between the new mitigation rule and previous guidelines is the new rule’s preference for mitigation banking over other mechanisms. There is still flexibility for areas where banking is not an option. In some areas of the country where banks have not yet been established, project managers may pursue the next-most-preferred option that fits their situation. It is important to note that the mechanism preferences are aimed at encouraging successful mitigation projects and simplifying the permitting process. Therefore, all mitigation mechanisms continue to be acceptable.

All new permits issued after June 8, 2008 must comply with the new mitigation rule.

## Additional Resources

The changes put forward in this rule on compensatory mitigation should simplify and streamline the compensatory mitigation permitting process. For additional information about the new rule and mitigation banking, please visit the following resources:

[EPA Compensatory Mitigation Page](#)

[USACE Final Compensatory Mitigation Rule Page](#)

[National Mitigation Banking Association \(NMBA\)](#)



Washoe Lake wetland mitigation site, between Carson City and Reno, Nevada. (Photo courtesy of FHWA)

## Contact Information

### Dennis Durbin

Federal Highway Administration  
Office of Project Development and  
Environmental Review  
(202) 366-2066  
Dennis.Durbin@dot.gov

## Look What's New!

- Read about the [findings from the third FHWA audit of the California Department of Transportation \(Caltrans\)](#) under the Surface Transportation Project Delivery Pilot Program
- On April 21, 2009 the FHWA Texas Division, in conjunction with the TxDOT Environmental Affairs Division, successfully executed an interagency agreement with the U.S. EPA Region 6 and the Office of the Governor to provide for technical assistance and training regarding the GIS Screening Tool (GIS-ST) and NEPAssist web-based environmental mapping tools. To learn more, about GIS-ST, and NEPAssist, visit the [U.S. EPA Region 6 website](#).
- The Planning and Environment Linkages (PEL) Program, a joint effort of FHWA's Office of Planning and Office of Project Development and Environmental Review, is offering a training webcast titled "PEL 101: The Tools for Adopting and Implementing a PEL Approach". The purpose of the training is to help transportation professionals and resource agency practitioners to better understand, coordinate and integrate planning and environmental linkages.
  - The webcast is being offered on the following three dates:
  - Tuesday, June 23 - 10am to 12pm EDT ([Register Here](#))
  - Monday, July 27 - 3pm to 5pm EDT ([Register Here](#))
  - Thursday, August 20 - 1pm to 3pm EDT ([Register Here](#))

Registration for each session is limited.

*Successes in Stewardship* is a Federal Highway Administration newsletter highlighting current environmental streamlining and stewardship practices from around the country. To subscribe, visit [http://environment.fhwa.dot.gov/sis\\_registration/Register.aspx](http://environment.fhwa.dot.gov/sis_registration/Register.aspx) or call 617-494-3259.