Compensatory Mitigation Regulation

- Section 314 of Public Law 108-136
- Ensure opportunities for Federal agency participation in mitigation banking
- Establish performance standards and criteria for the use of on-site, off-site, in-lieu fee mitigation, and mitigation banking as compensation for lost wetland functions in DA permits

• Standards and criteria shall:
  – Maximize available credits and opportunities for mitigation
  – Provide flexibility for regional variation in wetland conditions, functions, and values
  – To the maximum extent practicable, apply equivalent standards to each type of compensatory mitigation
Rule Development

• Main sources for principles in the rule:
  – National Research Council report on compensatory mitigation in §404 permit program (2001)
  – Regulatory Guidance Letter 02-02
  – 1995 Mitigation Banking Guidance
  – 2000 In-lieu fee Guidance
  – 1990 Mitigation Memorandum of Agreement

• Proposed rule published in Federal Register on March 28, 2006 (75 day comment period)
Comment Summary

• Approximately 12,000 comments received
• Many comments expressing general support for the rule, with recommendations for improving rule language
• Many said that the final rule should be limited to wetlands mitigation
• Final rule needs to be flexible, to allow continued use of effective local practices
• Many states concerned about how a final rule would affect their programs
Comment Summary

• 22% of commenters discussed proposed phase-out of in-lieu fee programs:
  – 17% supported retaining in-lieu fee programs
  – 5% supported their elimination
• Many commenters suggested requirements and standards for in-lieu fee programs
• 29 states supported retaining in-lieu fee programs
• Large number of commenters stated that mitigation banks cannot satisfy all the compensation needs in the Corps regulatory program
What isn’t changing?

- Proposed rule doesn’t change *when* compensatory mitigation is required
- General mitigation policy [33 CFR 320.4(r)] and nationwide permit mitigation [33 CFR 330.1(e)(3)] are not being changed
- Proposed rule focuses on the *where* and *how* of compensatory mitigation
- Does not affect on Corps regulatory jurisdiction under §10 and §404
General Principles

- Focus on compensatory mitigation planning and performance to get self-sustaining aquatic resources that provide desired functions
- Watershed approach
  - Consider likelihood for ecological success and sustainability, location in watershed, and practicability
  - May use more than one site to provide compensatory mitigation for a permitted activity (e.g., on-site for water quality and quantity, off-site for habitat type)
  - Use of preservation, riparian areas, uplands
- Clear standards, more accountability, better performance
General Principles

• Mitigation sequence unchanged:
  – Avoid, minimize, compensate
  – Rule’s focus is on compensation for unavoidable impacts
• Permit applicants are responsible for proposing an appropriate compensatory mitigation option
• Corps determines compensatory mitigation requirements for DA permits
• Compensatory mitigation requirements must be commensurate with amount and type of impact
General Principles

- If mitigation bank or in-lieu fee program used, responsibility to provide compensatory mitigation is transferred to the sponsor when permittee secures credits
Planning and Documentation

• For §404 standard permits, public notice must describe proposed avoidance, minimization, compensation
• Rule outlines requirements for mitigation plans
• Requirements and level of detail of mitigation plan is to be commensurate with scope and scale of project
• Individual permits – Final compensatory mitigation plan must be approved prior to issuance of permit
• General permits – Follow requirements and procedures in those permits
Other Provisions

- Permit conditions relating to mitigation
- Ecological performance standards
- Monitoring requirements (generally 5 years)
- Provide long-term protection through appropriate mechanisms (e.g., transfer of title, conservation easements, management plans)
- Adaptive management – take measures to achieve objectives by correcting deficiencies
- Long-term management may be transferred to a land stewardship entity
Mitigation Banks and In-Lieu Fees

- Final rule will contain standards and requirements for mitigation banks and in-lieu fee programs
  - Commercial banks, single-user banks, umbrella banks
  - In-lieu fee programs
- Must have an approved instrument signed by the district engineer and sponsor
- Rule provisions intended to make the instrument approval process more efficient
- Timeline with milestones to provide predictability and accountability in the instrument approval process
Mitigation Banks and In-Lieu Fees

- Mitigation banks
  - Prospectus
  - Public notice and comment process
  - IRT review, with dispute resolution process
  - Approved instrument required

- In-lieu fee programs
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  - Public notice and comment process
  - IRT review, with dispute resolution process
  - Approved instrument required
Mitigation Banks and In-Lieu Fees

- **Mitigation banks**
  - Approved mitigation plans
  - Ledgers for all credit transactions
  - DE approval required to release credits
  - Suspension and/or termination of instrument if poor performance

- **In-lieu fee programs**
  - Approved mitigation plans
  - Ledgers for all credit transactions
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Next Steps

• On December 14, 2007, submitted draft final rule to the Office of Management and Budget, Regulatory Affairs, for final review
  – Executive Order 12866, Regulatory Review
  – Agency Headquarters may provide comments
• OMB’s review can take up to 90 days
• After OMB clears the final rule, publish in the *Federal Register*
• Effective date likely to be 60 days after publication