



DEPARTMENT OF THE ARMY
OFFICE OF THE ASSISTANT SECRETARY
CIVIL WORKS
108 ARMY PENTAGON
WASHINGTON, DC 20310-0108

SACW

16 September 2024

MEMORANDUM FOR COMMANDING GENERAL, U.S. ARMY CORPS OF
ENGINEERS

SUBJECT: Improving U.S. Army Corps of Engineers Timeline Compliance with the 2008
Compensatory Mitigation Rule

1. Purpose and applicability:

a. Purpose – On April 10, 2008, the U.S. Army Corps of Engineers (Corps) and the U.S. Environmental Protection Agency (EPA) published a final rule in the Federal Register (73 Fed Reg 19594) regarding compensatory mitigation for losses of aquatic resources (hereafter the 2008 Mitigation Rule or mitigation rule). Among other aspects, the 2008 Mitigation Rule lays out a timeline for review of proposed mitigation banks and in-lieu fee (ILF) programs by the district engineer. The 2008 Mitigation Rule stipulates a review timeline of no longer than 225 days for the Corps' steps in the review process. Recent analysis of Corps data has shown that this timeline is not, on average, being met. This memorandum provides clarification on certain aspects of the 2008 Mitigation Rule to improve compliance with the mitigation bank and ILF program review timeline and thus support rapid investment in, and timely production of conserved and restored aquatic resources. The availability of mitigation banks and ILF programs provides benefits not only to permittees, but also projects implemented through the Corps' Civil Works Program. Ultimately, taking the actions delineated in paragraph four of this memorandum is consistent with the Administration's priorities of improving the permitting process and expanding the tools available to preserve, restore, enhance, and establish critical aquatic resources.

b. Applicability – This memorandum applies to the Corps' role in reviewing, approving, and evaluating mitigation banks and ILF programs and projects under 33 CFR Part 332. This memorandum is based on regulations that contain legally binding requirements. This memorandum is not a substitute for those regulations, does not create legally binding requirements, and is not a regulation itself. It does not impose legally binding requirements on the Corps, mitigation providers, or permittees, and may not apply to every situation. The Corps retains the discretion to adopt approaches on a regional or case-by-case basis that differ from those provided in this memorandum as appropriate and consistent with statutory and regulatory requirements.

SACW

SUBJECT: Improving U.S. Army Corps of Engineers Timeline Compliance with the 2008 Compensatory Mitigation Rule

2. References:

a. Compensatory Mitigation for Losses of Aquatic Resources; Final Rule (73 Fed Reg 19594) (33 CFR Part 332) (2008 Mitigation Rule).

b. Regulatory Guidance Letter 08-03, Minimum Monitoring Requirements for Compensatory Mitigation Projects Involving the Restoration, Establishment, and/or Enhancement of Aquatic Resources, October 10, 2008.

c. Regulatory Guidance Letter 19-01, Mitigation Bank Credit Release Schedules and Equivalency in Mitigation Banks and In-Lieu Fee Program Service Areas, February 22, 2019.

d. The Mitigation Rule Retrospective: A Review of the 2008 Regulations Governing Compensatory Mitigation for Losses of Aquatic Resources, U.S. Army Corps of Engineers Institute for Water Resources Report 2015-R-03, 2015.

e. Improving Compensatory Mitigation Project Review, R. Kihlslinger, J.J. McElfish and D. Scicchitano, Environmental Law Institute, 2020.

f. The Time it Takes for Restoration: An Analysis of Mitigation Bank Instrument Timelines, S. Martin and B. Madsen, Environmental Policy Innovation Center (EPIC) and Ecological Restoration Business Association, 2023.

g. Civil Works Actions to Sustain and Advance the Nation's Waters and Wetlands After the Sackett Decision, Assistant Secretary of the Army (Civil Works) Memo for Commanding General, USACE, dated March 22, 2024.

3. Background:

a. Several positive trends have been documented since the issuance of the 2008 Mitigation Rule. In the ten years following issuance of the mitigation rule, the number of mitigation banks doubled, and, as of 2018, all or part of 46 states were covered by the geographic service areas of approved mitigation banks and/or ILF programs. Additionally, the percentage of permits using mitigation bank credits or ILF program credits doubled between 2010 and 2017. The use of mitigation banks and ILF programs have improved the Corps' permit processing times, which are approximately 50% faster when mitigation bank or ILF program credits are used when compared to using permittee-responsible mitigation.

b. Challenges with compensatory mitigation timelines – The 2008 Mitigation Rule stipulates that mitigation bank and ILF program proposals should be reviewed over a series of steps, each with specific timeframes for completion (e.g., 30 days). The total

amount of time allotted for the Corps to decide whether to approve or not approve an instrument is 225 days (details provided in the Appendix). Section 332.8(f) of the mitigation rule gives the district engineer discretion to extend the review timeline (i.e., discretionary and non-discretionary delays). Previous studies conducted by a range of investigators have documented that the Corps' mean processing times exceed 225 days; most recently, one study found the Corps' nationwide average processing time was 336 days for the portion of the timeline that the Corps itself is responsible for, which is 49% greater than the 2008 Mitigation Rule timeline.

c. Sources of delays – There are several factors likely contributing to delayed processing times including the sponsor's time for producing documentation and information; sponsors submitting incomplete information; competing priorities for Corps staff time; discretionary delays by the district engineer during the Interagency Review Team (IRT) review process (e.g., negotiations with IRT members); requests for additional information; time extension requests; review processes that are inconsistent with the 2008 mitigation rule; extensive focus on and review of plans rather than outcomes; and lack of, or not using, tools to standardize and streamline review processes. Existing data do not allow quantifying the delay associated with each potential source of delay. That said, the Corps should take actions to address sources of mitigation rule timeline delays that are within its purview, in particular, by exercising more effective project management of the review process and through better managing and leading of the IRT review process. This policy memorandum thus focuses on additional actions that the Corps can take to improve compliance with the mitigation rule timeline specifically related to the review process.

4. Improving Compliance with Timelines in the 2008 Mitigation Rule:

a. Clarifying the Role of District Engineer and the IRT –Under the regulations, there are two review processes for proposed mitigation banks and ILF programs: a public notice and comment process, and an IRT process.

During the public notice and comment process (see Phase II in the Appendix), the key timeline feature for the Corps is that the district engineer must provide the sponsor an Initial Evaluation Letter (IEL) within 30 days of the close of the public notice comment period on the prospectus. This IEL indicates the potential of the proposed mitigation bank or in-lieu fee program to provide compensatory mitigation for activities authorized by Department of the Army (DA) permits (See 33 CFR §332.8(d)(5)). If the district engineer determines that the proposed mitigation bank or ILF program does not have potential for providing appropriate compensatory mitigation for DA permits, the initial evaluation letter must discuss the reasons for that determination, and this IEL must be provided to the sponsor within that 30-day, post public comment period.

SACW

SUBJECT: Improving U.S. Army Corps of Engineers Timeline Compliance with the 2008 Compensatory Mitigation Rule

The IRT process in the 2008 Mitigation Rule was not prescribed by any statute, nor was it prescribed by any regulation prior to the promulgation of the mitigation rule. Under 33 CFR §332.8(b), the IRT consists of a group of federal, Tribal, state, and/or local regulatory and resource agency representatives that review documentation for, and advises the district engineer on, the establishment and management of a mitigation bank or an ILF program. The IRT is led by the Corps, and usually includes representatives from the EPA, U.S. Fish and Wildlife Service, National Marine Fisheries Service, and the Natural Resources Conservation Service. Other federal agencies, as well as representatives from Tribal, state, and local regulatory and resource agencies, may also participate on the IRT.

The IRT works together to review and provide comments on mitigation bank and ILF program proposals; the IRT can also advise on developing templates, assessment methods, Standard Operating Procedures (SOPs), and other tools for implementation of third-party mitigation project review and oversight. In addition, securing the agreement of IRT agencies on initial approval of a mitigation bank or ILF program can help ensure that these agencies will not object to future use of credits for offsetting impacts authorized by DA permits. However, the only two signatures required for the approval of a mitigation banking instrument or ILF program instrument are the Corps' and the sponsor's (33 CFR §332.8(a)(1)); members of the IRT serve an advisory role and have the option to sign the mitigation banking instrument or the ILF program instrument to indicate their agreement with the terms of the instrument, but their signatures are not required (33 CFR §332.8(b)(3)). In the case of multi-purpose banks, signatures would be required from other federal, Tribal, state, or local agencies that have relevant regulatory authority for programs they administer (i.e., other approving agencies that are co-chairs of the IRT).

Despite the benefits of IRT agency collaboration, to meet the 2008 Mitigation Rule timeline, the Corps must act in its capacity as chair of the IRT and lead the review process by managing the review process in accordance with the stipulated timeframes and other provisions in Section 332.8. Importantly, unanimity of the IRT members is not required, and reaching unanimity may often be impossible; thus, the district engineer should seek to gain general consensus rather than unanimity amongst the IRT. As stated in 33 CFR §332.8(d)(7), "the district engineer will seek to resolve issues using a consensus-based approach, to the extent practicable, while still meeting the decision-making time frames specified in this section." While achieving consensus is not a requirement of the 2008 Mitigation Rule, the district engineer should use a consensus-based approach so long as that approach does not conflict with the time frames in 33 CFR §332.8. As discussed above, it is the district engineer who has the decision-making authority for instruments for mitigation banks and ILF programs.

SACW

SUBJECT: Improving U.S. Army Corps of Engineers Timeline Compliance with the 2008 Compensatory Mitigation Rule

Therefore, as chair of the IRT, the district engineer should strive to achieve consensus with IRT members within the mitigation rule timeline; if consensus is not readily possible, the district engineer will move the review process forward so as to meet the 2008 Mitigation Rule timeline.

b. Complying with Stipulated 2008 Mitigation Rule Timeline - Under 33 CFR §332.8(d), the timeline specified in the 2008 Mitigation Rule for IRT and Corps review during the three required phases of mitigation bank and ILF proposal development is 225 days (i.e., prospectus – 90 days, draft instrument – 90 days, and final instrument – 45 days). The regulations also include a dispute resolution process that enables other federal regulatory agencies to elevate disputes remaining at the time the district engineer notifies the IRT of the Corps' intent to approve the final instrument (or amendment). The dispute resolution timeline does not exceed 150 days.

(1) Multiple Drafts and Timeline Extensions: The requests for multiple versions and iterations of draft instruments, including draft mitigation plans, along with IRT-related timeline extensions, are a cause of delay that the Corps can address through more effective management of the review process. The current review process, as it is often implemented with multiple reviews of draft instruments, mitigation plans, and other documents, may be a significant cause of delays. The 2008 Mitigation Rule (at 33 CFR §332.8(d)(6) and §332.8(d)(7)) requires a complete "draft instrument," and the review of the complete draft instrument should not exceed 90 days from its distribution to the IRT. If a sponsor requests review of one or more components of an incomplete draft instrument, doing so is at the discretion of the Corps and should not be considered initiation of the draft instrument review. The Corps is afforded up to 30 days to determine completeness of a draft instrument; if complete, distribute the draft to the IRT for review; 30 days for IRT review; and the remaining time for the district engineer to seek to resolve any remaining issues with the sponsor and the IRT. Within 90 days of the IRT receiving a complete draft instrument, the district engineer must indicate to the sponsor if the draft instrument is generally acceptable and what changes, if any, are needed. The district engineer must also state at this time if there are significant unresolved concerns that may lead to formal objections by IRT members, recognizing that the final decision remains that of the district engineer. Multiple draft instruments (including mitigation plans) and multiple reviews of those draft instruments have become common, and generally result in prolonged review times that further delay decision-making. IRT concerns with the draft instrument and mitigation plan should be identified and addressed during the 60-day review period for this stage of the review process, with a focus on revising specific sections of the draft instrument to attempt to resolve IRT concerns about those sections.

The district engineer should, to all extents practicable, minimize the number of review iterations of complete draft instruments. If a draft instrument is not complete, it should be returned with the missing components identified. If specific provision(s) of a complete

SACW

SUBJECT: Improving U.S. Army Corps of Engineers Timeline Compliance with the 2008 Compensatory Mitigation Rule

draft instrument have been identified as substantive area(s) of concern by IRT members, the district engineer should work with the IRT members and sponsor to address those specific concerns within the constraints of the mitigation rule timeline. Extending the mitigation rule timeline should be limited to the scenarios cited in 33 CFR §332.8(f).

(2) Timeline for Credit Release Requests: The 2008 Mitigation Rule *requires* that upon receipt of a request for credit releases from mitigation banks or ILF projects, IRT members have 15 days to provide comments to the district engineer on suitability of the requested release (e.g., whether the applicable milestones have been achieved or partially achieved to warrant a full or partial credit release). After the IRT's 15-day comment period, the district engineer then has 30 days to decide on the credit release request; (33 CFR §332.8(o)(9)); i.e., the 2008 Mitigation Rule's cumulative timeline for credit release requests is 45 days. The mitigation rule does not provide for delays or timeline extensions for credit release requests, except in cases where site visits are necessary for evaluation of milestone achievement. While site visits may be necessary in some circumstances, they are not required in the 2008 Mitigation Rule for every credit release. Credit release decisions can often be made after reviewing the appropriate documentation, such as monitoring reports.

The district engineer should comply with the 2008 Mitigation Rule timeline for credit release decisions of 45 days.

Site visits may not be necessary for every credit release but should be used when documentation provided by the sponsor does not sufficiently inform a decision by the district engineer; when the district engineer determines that a site visit is necessary, the district engineer should immediately notify the sponsor.

Notification and scheduling of a site visit related to a credit release request should occur within the mitigation rule timeline for credit release requests of 45-days. The district engineer and sponsor's availability should determine when the site visit occurs, which may be outside the 45-day period. IRT members should be invited to participate in the scheduled site visit, but the availability of individual IRT member(s) should not drive the scheduling of, nor delay the site visit.

c. Tools and Practices in Support of Timeline Compliance – Corps Headquarters, along with district engineers, are encouraged to develop tools to facilitate compensatory mitigation decision-making and provide transparency. These tools can streamline the review process and thus reduce the amount of time to reach decisions. Nationwide templates, particularly for key elements of mitigation bank and ILF program instruments not specific to regional considerations, can facilitate greater consistency across districts.

(1) Templates: Templates for mitigation banking and ILF program instruments, prospectuses, credit release schedules, site protection instruments, and financial assurances are tools that can better enable the district engineer to comply with mitigation rule timelines. Some templates are appropriate at the nationwide level, such as the general elements of mitigation banking and ILF program instruments and financial assurances. In contrast, templates for site protection instruments, credit release schedules, and service area determinations should be developed at the district or division level. While templates can improve mitigation rule timeline compliance, timeline delays can occur if template language is changed during the review process for a proposed mitigation bank or ILF program.

Headquarters should develop nationwide templates for the general elements that should be included in any mitigation bank or ILF program instruments for use where there are no locally developed templates. In addition, Headquarters should seek input from federal (e.g., federal IRT members), Tribal, and state partners as well as the public and private sectors (including mitigation bank sponsors and in-lieu fee program sponsors) and/or NGO partners to develop national templates for specific types of financial assurances. Finally, the district engineer should develop, in collaboration with the IRT, templates for site protection instruments, credit release schedules, and service area determinations.

(2) Standard Operating Procedures and Rapid Assessment Methods: Greater use of tools for quantifying debits and credits (impacts and offsets) will improve consistency and transparency, while supporting compliance with the 2008 Mitigation Rule timeline. SOPs may include impact/compensation calculators that are not rapid assessment methods (RAMs) but provide regional standardized approaches to assessing project impacts and determining compensatory mitigation requirements for DA permits. Impact or compensation calculators may have descriptive narratives and/or scoring procedures to assist users in producing consistent, repeatable results. SOPs can be used for permittee-responsible mitigation, mitigation banks, and ILF programs. For mitigation banks and ILF projects, SOPs for compensation calculators can be used to determine credit quantities.

RAMs include functional and condition assessment methods that estimate the level of functions performed by wetlands, streams, and other aquatic resources or the ecological condition of those ecosystems. RAMs are an effective approach to estimate the degree to which an authorized impact results in the loss of aquatic resource functions or a change in ecological condition. For mitigation banks and ILF projects, RAMs can be used to determine credit values. The 2008 Mitigation Rule establishes a preference for RAMs over SOPs. IRT members including state agencies and EPA (among others) have led or funded the development of SOPs and RAMs in some areas, reducing the burden on Corps staff.

SACW

SUBJECT: Improving U.S. Army Corps of Engineers Timeline Compliance with the 2008 Compensatory Mitigation Rule

The district engineer should, in collaboration with the IRT, develop and regularly update RAMs for quantifying impact and offset actions, while using SOPs until such RAMs are available. As part of this effort, the district engineer should issue a public notice on draft rapid assessment procedures and SOPs to allow the regulated public and other interested members of the public (including third-party mitigation sponsors) to provide comments on these tools.

5. Identifying Sources of Delays:

While the 2008 Mitigation Rule timeline is not being consistently met, the causes likely differ across districts. A limited number of studies have investigated timeline details, and even fewer have investigated the causes of those delays. This Policy Memo provides some actions that the district engineer can take within the context of current practices. However, adaptively managing the compensatory mitigation program in the future to meet ecological goals and stipulated timelines will require a better understanding of the causes of delays and what mechanisms could be introduced to address such delays.

Headquarters should take steps to better document the causes of delays in the mitigation rule timeline and credit release timeline, including adapting existing databases and record-keeping (e.g., ORM data fields). Additionally, the Corps should seek input from federal (e.g., EPA or other federal IRT members), Tribal, and state partners as well as the private sector and/or NGO partners to better identify the sources of delay and potential solutions.

6. Point of Contact. Questions regarding this matter may be directed to Elliott Carman, Water Resources Regulation and Policy Advisor, Office of the Assistant Secretary of the Army (Civil Works), at (703) 300-2899 or elliott.n.carman.civ@army.mil.

//signed//

MICHAEL L. CONNOR
Assistant Secretary of the Army
(Civil Works)

SACW

SUBJECT: Improving U.S. Army Corps of Engineers Timeline Compliance with the 2008 Compensatory Mitigation Rule

Compensatory Mitigation Rule Timeline for Bank or ILF Instrument Approval*

		Event	# of Days**		
Phase I		Optional Preliminary Review of Draft Prospectus	30		DE provides copies of draft prospectus to IRT and will provide comments back to the sponsor within 30 days.
		Sponsor Prepares and Submits Prospectus ~DE must notify sponsor of completeness w/in 30 days of submission~			
Phase II	Day 1**	Complete Prospectus Received by DE			
	Day 30	Public notice must be provided within 30 days of receipt of a complete prospectus	30		
	Day 60	30-Day Public Comment Period	30		
	Day 90	DE must provide the sponsor with an initial evaluation letter within 30 days of the end of the public comment period.	30	15	DE distributes comments to IRT members and sponsor within 15 days of the close of the public comment period.
Sponsor Considers Comments, Prepares and Submits Draft Instrument ~DE must notify sponsor of completeness w/in 30 days of submission~					
Phase III	Day 1	Complete Draft Instrument Received by IRT Members			
		30-day IRT comment period begins 5 days after DE distributes draft instrument to IRT members	30		
		DE discusses comments with IRT and seeks to resolve issues ~ # of days variable~	60	90	
	Day 90				Within 90 days of the receipt of a complete draft instrument by IRT members, the DE must notify the sponsor of the status of the IRT review.
Sponsor Prepares Final Instrument ~Sponsor provides copies to DE and all IRT members~					
Phase IV	Day 1	Final Instrument Received by DE & IRT			
	Day 30	DE must notify IRT members of intent to approve/not approve instrument within 30 days of receipt.	30	45	
		Remainder of time for initiation of dispute resolution process by IRT members	15		IRT members have 45 days from submission of final instrument to object to approval of the instrument and initiate the dispute resolution process.
	Day 45	INSTRUMENT APPROVED/NOT APPROVED, or DISPUTE RESOLUTION PROCESS INITIATED			

EPA/Corps draft 4/02/08

Total Required Federal Review (Phases II-IV): ≤225 Days

*Timeline also applies to amendments

**The timeline in this column uses the maximum number of days allowed for each phase.

Appendix.