

# NATIONAL MITIGATION BANKERS ASSOCIATION

## Comments on Proposal to Reissue and Modify Nationwide Permits (NWP) Notice Dated August 9, 2001 (66 Federal Register 42069)

### INTRODUCTION

The National Mitigation Bankers Association (“NMBA”) represents individuals and companies in the wetlands and habitat mitigation banking business. NMBA members have obtained state and federal authorization to operate mitigation banks across the country, from California to Florida and Illinois to Alabama. The members’ mitigation banks range from those fully completed and sold to those still in the various stages of planning and construction.

NMBA is concerned that the Army Corps of Engineers (“the Corps”) is using the proposed changes to the nationwide permits (“NWPs”) to establish new policies for compensatory mitigation. The policy statements that appear throughout this Federal Register Notice (“Notice”) are inconsistent with federal law and regulations, and lack supporting facts and data.

The Corps should restate clearly that mitigation banks are the preferred form of compensatory mitigation for NWPs, as opposed to in-lieu fees and other *ad hoc* forms of compensatory mitigation. This is consistent with longstanding federal policy, including the recently issued *Federal Guidance on the Use of In-Lieu-Fee Arrangements for Compensatory Mitigation under Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act*, 65 Fed.Reg. 66913 (November 7, 2000) (“In-Lieu-Fee Guidance”) and the *Federal Guidance for the Establishment, Use and Operation of Mitigation Banks*, 60 Fed.Reg. 58605 (November 28, 1995) (“Mitigation Banking Guidance”).

In addition, the Corps should delay its proposal to authorize the waiver of mandatory “wetlands for wetlands” compensation, which would allow district engineers unfettered discretion in substituting vegetated buffers (and potentially other forms of “ecological compensation”) as compensatory mitigation for impacted wetlands. Such a radical change in policy is unwarranted without (1) adequate scientific study of its environmental effects, and (2) detailed guidelines governing the implementation of waivers (if scientific study supports their use).

NMBA raised similar concerns in its comments on the Corps’ July 21, 1999 proposal to reissue and modify certain NWPs; a copy of these prior comments is attached and incorporated by reference (“Attachment 1”). NMBA is also concerned with similar deficiencies in the Programmatic Environmental Impact Statement (PEIS), prepared for purposes of assessing the Corps’ August 9, 2001 Notice to reissue and modify NWPs. NMBA will be filing comments on the PEIS.

Repeatedly throughout the August 9, 2001 Notice, the Corps makes two fundamental errors with regard to compensatory mitigation. First, the Notice treats in-lieu-fee arrangements as equivalent to mitigation banks, a conclusion without foundation in law or fact. Mitigation banks are subject to stringent federal regulation and approval to assure long-term ecological and economic success. Federal mitigation bank charters establish environmental success criteria, set service areas, require financial assurances, and insure long-term stewardship, all in advance of authorizing use of the mitigation bank for compensatory mitigation. In contrast, in-lieu-fee programs usually lack the same degree of safeguards for insuring success and long-term stewardship, and are implemented well after wetland losses occur. In-lieu-fee programs are financed only by payments made by wetland impactors. For the most part, such programs do not even start mitigation projects until sufficient wetland impacts have occurred to fund a compensatory mitigation project, and all payments have been received. By contrast, wetland banks are required to succeed environmentally (and provide financial assurance of continued success) prior to accepting payments from any wetland impactors. Thus, the Corps' own guidance on in-lieu-fees and mitigation banks favors mitigation banks in the context of general permits (with minor exceptions). *See* In-Lieu-Fee Guidance (65 Fed.Reg. at 66915) and Mitigation Banking Guidance (60 Fed.Reg. at 58613).

The second fundamental problem is that the August 9, 2001 Notice establishes a policy of "ecological trading" in compensatory mitigation, by allowing the offsetting of impacts to wetlands with compensation through nonwetland environmental improvements. The Notice specifically states that a waiver of "wetlands for wetlands" compensation may be applied at the discretion of the Corps' district engineers. Thus, the Corps emphasizes the value of vegetated buffers to protect aquatic areas, and asserts that establishment of vegetated buffers is an appropriate form of compensatory mitigation. Furthermore, the Corps repeatedly states throughout the Notice that wetland losses from NWP authorizations can be compensated in a variety of ways, many of which do not involve replacement of wetland functions, values, or acreage.

The net result of these policy shifts is that the Corps will unilaterally allow – and even encourage – "trading" of environmental resources in compensation for permitted wetland impacts under NWPs. Trading of environmental functions and values by compensating for wetland loss with upland buffers constitutes a major federal policy shift. Trading programs in other environmental media, such as air pollution credits and water pollutant balancing, have been developed only after thorough and public study. In contrast, the Corps' Notice and its accompanying PEIS offer no scientific information or criteria for implementing this trading program. The law imposes strict ecological criteria on wetland mitigation banks to assure that the "exchange" of adverse impacts is offset by ecological benefits close in location (the bank's service area) and kind. The Corps has no justification to now propose to compensate for NWP impacts with an unstructured mixture of "ecological trading" programs.

These shifts in policy are unwarranted and inconsistent with federal policy concerning wetlands mitigation and mitigation banking. The Corps has not expressed a

rational basis in law or fact supporting these newly stated policies and, thus, this Notice bears all the markings of arbitrary and capricious action:

Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely fails to consider an important aspect of the problem, offered an explanation that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983).

It is axiomatic that an agency may not “depart radically from its own prior long-standing policy” without compliance with the law. *Hospital Therapy Service of Georgia, Inc. v. Shalala*, 1997 WL 1068207 (N.D.Ga. August 14, 1997). An agency “changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored, and if an agency glosses over or swerves from prior precedents without discussion, it may cross the line from tolerably terse to the intolerably mute.” *Greater Boston Television Corporation v. F.C.C.*, 444 F.2d 841, 852 (D.C. Cir 1970).

As addressed above and illustrated below, the Corps is acting arbitrarily and capriciously in its August 9, 2001 Notice (and its accompanying PEIS). More specifically, NMBA’s comments on this Notice fall into two categories:

- (1) Inaccurate and Inadequate Information about Compensatory Wetland Mitigation: The Notice fails to recognize long-standing federal policy favoring mitigation banks – even though the Corps’ own written guidance expressly states a preference for mitigation banks in the context of general permitting. In addition, the Notice fails to mention, much less discuss, several recent studies of in-lieu-fee arrangements (*see* Section I.B. below) that illustrate the continued shortcomings of such non-banking alternatives.
- (2) Insufficient Information about Vegetated Buffers: The Notice does not provide information sufficient to support changing (*i.e.*, waiving) the “wetlands for wetlands” compensation requirement in favor of permitting the use of vegetated buffers to compensate for wetlands losses. Furthermore, even assuming that science were to support such a waiver, the Notice does nothing to address the inherent danger in failing to provide any guidelines whatsoever to help Corps district engineers determine when a waiver is appropriate or what types of compensation measures are adequate substitutes. Such an unguided approach directly contradicts recent studies suggesting that effective watershed management requires interagency decisionmaking.

## **I. Inaccurate and Inadequate Information about Compensatory Wetland Mitigation**

**A. Federal Policy Favoring Mitigation Banks.** Nowhere does the Notice account for the fact that the federal government has long supported mitigation banking and its safeguards as the compensatory mitigation method of choice. The history of federal wetland mitigation policy consistently reflects this preference

In 1990, the Corps and EPA signed a *Memorandum of Agreement Between the Environmental Protection Agency and the Department of Army Concerning the Determination of Mitigation under the Clean Water Act Section 404(b)(1) Guidelines* (“Mitigation MOA”). The Mitigation MOA defines criteria for acceptable compensatory mitigation. It specifically provides that mitigation banking is an acceptable form of compensatory mitigation:

Where a mitigation bank has been approved by EPA and the Corps for purposes of providing compensatory mitigation for specific identified projects, use of that mitigation bank is considered as meeting the objectives of Section II.C.3 of this MOA, regardless of the practicability of other forms of compensatory mitigation.

The federal government continued its clear support for mitigation banking through the 1990s. In 1993, the White House Office of Environmental Policy issued its policy, *Protecting America’s Wetlands: A Fair, Flexible, and Effective Approach* (August 24, 1993) (“President’s Wetland Policy”), which states as follows:

To increase the predictability and environmental effectiveness of the Clean Water Act regulatory program and to help attain the no overall net loss goal, the Administration endorses the use of mitigation banks.

The President’s Wetland Policy clearly explains why the Administration endorses mitigation banking:

[M]itigation banking, with appropriate environmental safeguards, offers numerous advantages. Banking provides for greater certainty of successful compensatory mitigation in the permit process by requiring mitigation to be established before permits are issued. Banks are often ecologically advantageous because they can consolidate fragmented wetland mitigation projects into one large contiguous parcel that can more effectively replace the lost wetland functions within the watershed. Mitigation banks also provide a framework for financial resources, planning, and technical expertise to be brought together in a fashion often not possible with smaller mitigation projects.

In November 1995, the federal government revised and reissued the final interagency Mitigation Banking Guidance. The notice recited the history of federal government support for mitigation banking, and the advantages of mitigation banks over other types of compensatory mitigation. The guidance established standards for mitigation banks, which now have an excellent record under the guidance. This Corps-

approved Mitigation Banking Guidance specifies that, among other things, in-lieu-fee arrangements

do not typically provide compensatory mitigation in advance of project impacts. Moreover, such arrangements do not typically provide a clear timetable for the initiation of mitigation efforts. 60 Fed.Reg. at 58613.

In short, the guidance recognized that in-lieu-fee arrangements do not meet the same requirements that are imposed on mitigation banks, and thus do not provide similar compensatory mitigation.

In-Lieu-Fee Guidance was later released in November of 2000 in an effort to impose some requirements for implementing in-lieu-fee arrangements. Yet, even this Guidance, affirmatively supports the longstanding policy favoring mitigation banking where general permits are concerned, expressly stating:

[T]he use of mitigation banking is preferable to in-lieu-fee mitigation where permitted impacts are within the service area of a mitigation bank approved to sell mitigation credits, and those credits are available. 65 Fed.Reg. at 66915.

The guidance further specifies that, for impacts authorized under a general permit, in-lieu-fee arrangements are an acceptable substitute for mitigation banking only where the mitigation bank (1) does not provide “in-kind” mitigation, or (2) offers only credits through “preservation.” In brief, the In-Lieu-Fee Guidance allows routine use of fee programs only for individual permits and not for general or nationwide permits.

Besides the long-standing support for mitigation banking demonstrated by the Corps, EPA, and other federal agencies, Congress has recognized that mitigation banking is a preferable form of compensatory mitigation. The Transportation Equity Act for the 21<sup>st</sup> Century (“TEA 21”) established a preference for the use of mitigation banks to offset authorized wetland impacts arising from transportation projects. *See* 23 U.S.C. §§ 103(b)(6)(M) and 133(b)(11). Federal Highway Administration regulations implementing this provision state this preference as follows:

Mitigation Banks. In accordance with all applicable Federal law (including regulations), with respect to participation in compensatory mitigation related to a project funded under Title 23, U.S. Code, that has an impact on wetlands or natural habitat occurring within the service area of a mitigation bank, preference shall be given, to the maximum extent practicable, to the use of the mitigation bank, if the bank contains sufficient available credits to offset the impact and the bank is approved in accordance with the Federal [Mitigation Banking Guidance], or other agreement between appropriate agencies. 65 Fed.Reg 82913, 82925 (December 29, 2000).

**B. Recent Studies Concerning the Deficiencies of In-Lieu-Fee Arrangements.**

Not only does the August 9, 2001 Notice fail to account for longstanding federal policy favoring mitigation banks over other forms of compensatory mitigation, it fails to recognize (much less discuss) recent studies of compensatory mitigation and in-lieu-fee arrangements that continue to identify the shortcomings of in-lieu-fee arrangements.

*1. The Corps Study.* The Corps' own study of in-lieu-fees, *Review and Analysis of In Lieu Fee Mitigation in the CWA Section 404 Permit Program* (November 2000) ("Corps Study"), designed to assess and debunk the standard fare of criticisms levied against in-lieu-fee arrangements, ultimately admits:

The review of the studied programs appears to justify some concern about a lack of specificity regarding program assurances [*i.e.*, mechanisms to ensure construction and ecological success] and accountability [*i.e.*, mechanisms to allocate legal and financial responsibility]. The program operating agreements and written policies do not always speak directly to these issues. And while the sufficiency of assurances for mitigation success largely depends on the adequacy of the fee rates charged, the cost accounting and fee setting process used by the studied programs were less than transparent. Corps Study at 16.

Similarly, the Corps Study underlines concerns that fee rates charged by in-lieu-fee programs may not be sufficient to cover the full costs of implementing required compensatory mitigation:

Full-cost fees would accurately reflect all program costs, both financial costs and opportunity costs, of implementing and ensuring the long-term success of required mitigation. Relevant costs include land values and costs of securing sites, mitigation planning and construction costs, maintenance and monitoring costs, long-term site management costs, assurance funding for possible remedial action and other contingencies, and administrative costs (including management time) . . .

. . . Administrators and Corps regulators for the studied ILF programs contend that all program costs are reflected in the fee rates charged. Nevertheless, it is unclear how systematically program costs are accounted for and how well they are estimated. Program operating agreements and policies generally do not speak to the specifics of cost accounting and fee setting. *Id.* at 17.

Thus, the Corps Study concludes that improvements are necessary in, among other things, cost accounting for setting fees and in clarifying accountability for ensuring the success of in-lieu-fee mitigation. *Id.* at 23-24.

**2. The GAO Study.** The U.S. General Accounting Office (“GAO”) recently completed its study, entitled *Wetlands Protection: Assessments Needed to Determine Effectiveness of In-Lieu-Fee Mitigation* (May 4, 2001 / GAO-01-325) (“GAO Study”). Like the Corps Study, the GAO Study offered a less-than-glowing recommendation where in-lieu-fee arrangements are concerned:

The extent to which the in-lieu-fee option has achieved its purpose of mitigating adverse impacts to wetlands is uncertain. Although Corps officials in 11 of 17 districts with the in-lieu-fee option told us that the number of wetland acres restored, enhanced, created, or preserved by in-lieu-fee organizations equaled or exceeded the number of wetland acres adversely affected, data submitted by more than half of those districts did not support these claims. Also, while officials in 9 of 17 districts said that the ecological functions and associated values (*i.e.*, economic and social benefits) lost from the adversely affected wetlands were replaced at the same level or better through in-lieu-fee mitigation, officials in over half of those districts acknowledged that they have not tried to assess whether mitigation efforts have been ecologically successful. Further, lacking criteria for ecological success, some districts use acreage as a measure for success, and some assume success as soon as the developer pays a fee to an in-lieu-fee organization even if no mitigation has been performed. As a result, the Corps lacks assurances that in-lieu-fee mitigation has been effective. GAO Study at 3-4.

**3. The NAS Study.** Finally, the report of the National Academy of Sciences, *Compensating for Wetlands Losses under the Clean Water Act* (Pre-Publication Copy / September 2001) (“NAS Study”), specifically refrains from favoring any particular compensatory mitigation mechanism because “a compensatory mitigation mechanism may not fit neatly into one of the listed categories (*e.g.*, mitigation banking *v.* in-lieu fee *v.* cash donation).” NAS Study at 8. However, the NAS Study does specifically articulate the characteristics or attributes requisite to successful compensatory mitigation, identifying “who is legally responsible, the timing of the mitigation, whether MBRT process is used, and whether stewardship requirements are in place.” *Id.* Mitigation banking is the only form of compensatory mitigation that achieves all of these characteristics and attributes.

## **II. Insufficient Information about Vegetated Buffers**

The Corps provides in this Notice that district engineers will be permitted to waive the “wetlands for wetlands” mandate for compensatory mitigation in favor of allowing compensatory mitigation involving non-wetland aquatic resources, such as vegetated buffers. Apparently to support this, the Corps at various points suggests that no net loss of wetlands is not the only goal for the NWP program, arguing that improvement of aquatic environment with vegetated buffers can help overall water and wetland health. Based on this, the Corps plans to allow “trading” of ecological impacts, where wetland impacts are mitigated with some other kind of compensatory mitigation.

**A. Lack of Scientific Basis Supporting a Waiver of the “Wetlands for Wetlands” Mandate.** The Notice, and even its accompanying PEIS, provide no scientific or environmental basis from which to evaluate the environmental consequences of using vegetated buffers (or other aquatic resources) as compensatory mitigation for wetland losses. At a minimum, the Notice (and PEIS) must provide information on vegetated buffers sufficient to support the proposed NWP modifications and reissuance.

The Notice simply lists ten different functions provided by vegetated buffers in conclusory fashion. Nowhere is there any discussion of the bases for these assertions, the value of vegetated buffers relative to wetlands, or circumstances when it might be appropriate to substitute vegetated buffers for wetlands. Similarly, the PEIS does not even mention vegetated buffers, much less evaluate the environmental impact of permitting their use as compensatory mitigation for wetland losses.<sup>1</sup> Absent such information, there is no record to support the policy the Corps has expressed in the proposed reissuance and modification of NWPs.

Before establishing environmental trading programs in other environmental media (such as air pollution), the government conducted careful analysis and rulemakings to allow assessment of information by the regulators, the regulated, and the public. This Notice not only fails to provide a thoroughgoing and reliable analysis of vegetated buffers, it fails to provide **any** analysis whatsoever on that issue.

**B. Lack of Guidelines for Implementing a Waiver of the “Wetlands for Wetlands” Mandate.** NMBA has previously commented (see Attachment 1) and continues to be concerned that the Corps has no standards or criteria for its proposed ecological trading, which simply dumps all of the difficult decisions, critical to the success of compensatory mitigation, into the laps of district engineers without giving them any guidance.

If nothing else, the GAO Study illustrates the dangers inherent in permitting individual district engineers to determine – entirely within their own discretion – whether waiver of “wetlands for wetlands” mitigation is appropriate in favor of compensating

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<sup>1</sup> Several sections of the PEIS require a detailed analysis of the facts and data supporting the Corps’ conclusion that “ecological trading” is an appropriate alternative to “wetlands for wetlands” mitigation. For example, Chapter 4 discusses the “service value” that mitigation provides to the aquatic ecosystem. PEIS 4-27 to 4-30. Yet, Chapter 4 never mentions vegetated buffers, much less explains why they might be a better alternative to wetland restoration in some instances.

Similarly, Chapter 5 discusses the “environmental consequences” of compensatory mitigation under the NWPs proposed for reissuance and modification. PEIS at 5-21 to 5-26. Yet, Chapter 5 never mentions vegetated buffers, much less provides the requisite analysis to support the Corps’ radical proposal for a change in policy.

In addition, Appendix C discusses numerous studies concerning the “methodology for creating, restoring, and enhancing wetlands.” None of these studies addresses the critical issue of vegetated buffers.

wetlands losses with vegetative buffers. This study reflects significant inconsistencies between Corps officials' perception of the success of in-lieu-fee programs and the actual measured success (or failure). GAO Study at 3.

Furthermore, the Corps Study emphasizes the need for interagency involvement in making complex "watershed based" decisions:

"[B]est professional judgment is used by . . . Corps district offices to ascertain whether a particular restoration or preservation expenditure best serves the watershed. If best professional judgment is to be relied upon, then expanding the number of professional experts involved in expenditure decisions could contribute to the success of a watershed-oriented program. Accordingly, [such] programs should include identifiable roles for other interested federal and state agencies in determining watershed priorities". . . *Id.* at viii.

Without appropriate criteria and interagency involvement, individual district engineers will be left to make and implement complex decisions critical to the success or failure of the mitigation effort with little or no guidance and oversight.

### CONCLUSION

The Corps cannot support changing its mitigation policy, as proposed in this Notice, to (1) place in-lieu fee arrangements on equal footing with mitigation banks and (2) allow use of vegetated buffers as compensatory mitigation for wetlands losses. These changes in mitigation policy directly contradict longstanding federal policy, have been introduced summarily with little or no rationale for the sudden change, and, as a result, are "arbitrary and capricious" in nature.

Based on these comments, NMBA recommends the following:

1. The Corps revise its proposal to reissue and modify NWP's to include accurate and complete information about existing mitigation law and policy and available scientific studies of compensatory mitigation, both of which strongly support a preference for mitigation banks over in-lieu-fee arrangements and other *ad hoc* forms of compensatory mitigation.
2. The Corps delay implementation of its proposed waiver of the "wetlands for wetlands" mandate until further scientific study can be done on this issue. In the alternative, and at a minimum, the Corps must provide (i) the scientific facts and data supporting its conclusion that vegetated buffers provide compensatory function and value equivalent to wetlands, and (ii) guidelines for implementing waivers of the "wetlands for wetlands" mandate. Such guidelines should help district engineers select appropriate alternative forms of compensation and perhaps even set limits

on the amount of alternative forms of compensation that may be used (e.g., up to 10% of the overall compensation).

3. If the results of thorough, scientific study on vegetated buffers show that that they benefit wetlands, yet do not provide compensatory function and value equivalent to wetlands, the Corps should require installation of vegetated buffers around all remaining wetlands on the impacted site in addition to one-for-one replacement of wetlands (whether on site or elsewhere).

NMBA submits these comments and recommendations in the interest of improving the Corps proposed changes to and reissuance of NWP's and as required by applicable regulatory policies. NMBA has serious concerns that the Notice, as drafted, is arbitrary and capricious in its approach to compensatory mitigation. NMBA requests that the Corps include these comments in its administrative record and make changes to its final reissuance and modification of NWP's accordingly.

**ADDITIONAL SPECIFIC COMMENTS (BY FEDERAL REGISTER PAGE)**

<b><u>Page</u></b>	<b><u>Comment</u></b>
<b>42070</b>	The Corps notes that it is preparing a “voluntary” PEIS for which it invites public comment. Because the proposal to modify and reissue NWP's is a “major federal action,” the PEIS is in fact <u>mandatory</u> , not voluntary.
<b>42071</b>	The Corps states that “General Condition 19, ‘Mitigation,’ describes how District Engineers will require compensatory mitigation with other aquatic resources or vegetated buffers in order to offset the authorized impacts to the extent necessary to ensure minimal adverse effects on the aquatic environment.” This sentence illustrates a significant change in mitigation policy (see general comments above). Wetland mitigation should focus on replacement of wetland functions and value. Wetland mitigation is not the ecological arena best suited for unplanned and unstructured “ecological trading” programs.
<b>42071</b>	The Corps references “mitigation banks, in lieu fee programs, or other consolidated mitigation efforts” as equivalents. Contrary to this implication, federal policy expressly favors mitigation banks, and recent studies support this preference (see general comments above).

<u>Page</u>	<u>Comment</u>
42071	In its discussion of vegetated buffers, the Corps summararily claims that vegetated buffers are “[a]n important component of compensatory mitigation” and that “[v]egetated buffers next to streams and other open waters provide many of the same functions that wetlands provide.” See general comments above regarding the Corps’ failure to discuss relevant facts and data supporting these conclusions.
42071	The Corps concludes that its brief discussion of vegetated buffers supports its decision to allow a waiver of the one-for-one wetlands mitigation requirement “in cases where the Corps determines that some other form of mitigation, such as establishment of vegetated buffers, is more appropriate.” See general comments above regarding the Corps’ failure to discuss relevant facts and data supporting this substantial shift in policy. The Corps compounds this problem by implying that vegetated buffers are only <u>one type</u> of mitigation substitute for one-for-one wetlands mitigation, leaving the door open for an unstructured mix of “ecological trading.”
42071	In its general discussion of NEPA compliance, the Corps notes that it is “continuing to improve data collection and monitoring efforts associated with the NWP Program . . . [which] include accumulating information on the verified uses of the NWPs, acreage impacts, affected resource types, the geographic location of the activities, and the type of mitigation provided.” Based upon recent studies of wetlands mitigation (discussed in general comments above), improved data collection is <u>critical</u> for purposes of accurately assessing the success or failure of mitigation methods. Given this fact, the Corps should emphasize the importance of accurate assessments, and expressly indicate whether it has taken into account new data on mitigation methods ( <i>e.g.</i> , the GAO and NAS studies).
42080	In discussing proposed changes to Condition 19 (Mitigation), the Corps proposes to “allow a case-by-case waiver of the requirement of one-for-one mitigation of adverse impacts to wetlands . . . [because] the Corps believes the one-for-one acreage requirement as currently written is too restrictive in that it does not allow the Corps to mitigate aquatic impacts to streams and other non-wetland aquatic resources.” See general comments above regarding the Corps’ failure to discuss relevant facts and data supporting this shift in policy. Wetland mitigation should focus on replacement of wetland functions and value. Wetland mitigation is not the ecological arena best suited for unplanned and unstructured ecological trading programs. Furthermore, even assuming that the one-for-one mitigation requirement is too restrictive, the solution should not be to simply provide a waiver mechanism without any guidelines for its proper use and implementation.

<u>Page</u>	<u>Comment</u>
42080	The Corps proposes to retain its preference for restoration of wetlands over preservation when one-for-one mitigation of wetland losses is required, but requests comment on whether this preference should be eliminated. Simply put, if the Corps decides to place preservation on equal footing with restoration of wetlands, it will assure an overall net loss of wetlands. However, if the Corps ultimately does decide to eliminate the preference for restoration, it should clearly indicate that it intends to do so for <b>all</b> types of compensatory mitigation in <b>all</b> permitting contexts (not just NWPs). Because the Mitigation Banking Guidance (1995) currently imposes upon all mitigation banks a preference for restoration (over preservation), failure by the Corps to expressly override this guidance would place mitigation banks at a severe disadvantage.
42097	The Corps proposes to modify Condition 19 (Mitigation) to allow project-specific waiver of the one-for-one wetland compensation requirement if “some other form” of mitigation would be more environmentally appropriate. See general comments above regarding the Corps’ failure to discuss relevant facts and data supporting this shift in policy. Even assuming that such a waiver is appropriate, the Corps must provide much more specific guidance concerning (1) the circumstances under which it is appropriate, and (2) how it should be implemented. Absent such guidance, the Corps is opening the door to an unstructured mix of “ecological trading.”
42097	Subsection (e) of Condition 19 (Mitigation) lists as an example of appropriate mitigation, “establishing and maintaining wetland or upland vegetated buffers to protect open waters such as streams; and replacing losses of aquatic resource functions and values by creating, restoring, enhancing, or preserving similar functions and values, preferably in the same watershed.” See previous comment.
42097	Subsection (f) of Condition 19 (Mitigation) states that, “[i]n many cases, vegetated buffers will be the only compensatory mitigation.” See previous comment. Unless further research on vegetated buffers proves otherwise, the Corps should, at a minimum, state a preference for one-for-one wetlands compensation and establish a maximum percentage of overall compensation that “alternative forms” of compensation (such as vegetated buffers) may comprise (e.g., 10%).

<u>Page</u>	<u>Comment</u>
42097	Condition 14 (Compliance Certification) continues to state that permittees must provide a signed certification that all required mitigation has been completed in accordance with the Corps permit conditions. In light of the Corps' apparent willingness to now accept various forms of compensatory mitigation, it should add an additional element to Condition 14 requiring that any third parties used to satisfy compensatory mitigation requirements must provide a similar certification statement to the permittees for submission to the Corps. The Mitigation Banking Guidance (1995) already requires mitigation banks to provide any number of assurances that its work has been done properly and will succeed. At a minimum, alternative forms of compensatory mitigation (in-lieu-fee programs and the like) should be required to certify that their work has been completed properly, particularly since the work of non-bank entities may not be performed until well after the wetlands impacts for which they compensate have occurred.
42097	Subsection (h) of Condition 19 (Mitigation) states that “[p]ermittees may propose the use of mitigation banks, in-lieu fee arrangements, or separate activity-specific mitigation.” Because federal policy expressly favors mitigation banks in the context of general permitting, and recent studies support this preference – see general comments above concerning federal policy and recent studies – subsection (h) should expressly state the preference for mitigation banks, as stated in the guidance for use of in-lieu-fees.
42100	The Corps own definition of “vegetated buffer” seems to contradict the notion that “vegetated buffers” may be used as the sole means of compensatory mitigation: “maintenance of vegetated buffers is a method of compensatory mitigation that can be used <b>in conjunction with</b> the restoration, creation, enhancement or preservation of aquatic habitats” (emphasis added). Assuming that further scientific study were to support the use of vegetative buffers as a form of compensatory mitigation, the Corps should make subsection (f) of Condition 19 consistent with this definition of “vegetated buffer” by clarifying that alternative mitigation may only be used “in conjunction with” wetland for wetland mitigation. Furthermore, the Corps should establish a maximum percentage of overall compensation that “alternative forms” of compensation (such as vegetated buffers) may comprise (e.g., 10%).