

SUMMARY OF NEW MITIGATION REGULATIONS

EFFECTIVE DATES

- Released March 31, 2008,
- Effective 90 days after publication in Federal Register (likely this Friday), so effective date is likely July 4, 2008

KEY PROVISIONS

1. *Watershed Planning*

- a. New definition of "watershed" and "watershed approach"
- b. Rule does not require a watershed plan
 - i. Allows use of government or NGO watershed plans
- c. Discretion in District Engineer

2. *Did Not Phase out In Lieu Fees (ILFs)*

- a. Maintained ILFs with revised approval and use criteria
- b. Established clear hierarchy of preference among types of mitigation
 - i. Mitigation Banks – clear preference
 - ii. Revised In Lieu Fees
 - iii. Permittee Mitigation

3. *Revised and Uniform Standards for All Mitigation Planning*

- a. Similar to proposal
 - i. Wetland mitigation
 - ii. Stream mitigation
- b. All mitigation must meet same twelve general performance and administrative requirements, including
 - i. Site identification
 - ii. Mitigation plans
 - iii. Performance standards
 - iv. Financial assurances
- c. Permittee mitigation
 - i. Requires final mitigation plan with permit approval
 - ii. Some flexibility on level of detail

4. *Revised Process for Mitigation Bank Approval*

- a. Interagency Review Team (IRT), similar to prior MBRT process
- b. Deadlines for IRT decisions
- c. Thirty (30) day public notice and comment on prospectus
- d. IRT dispute resolution process

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5. Distinctions Between Mitigation Banks and In Lieu Fees

- a. Same IRT system for approval as banks
- b. Distinctions
 - i. ILFs must have more detailed watershed plan as basis for ILF proposal; additional planning step distinct from banks
 - ii. Caps and ratios
 - 1. Limits on advanced credit sales
 - 2. DE authority to impose higher ratios
 - iii. ILFs limited to governments and not for profits
 - iv. New requirements for segregating funds and oversight of ILF fund expenditures
- c. Credit release, advance credits
 - i. No set limit on advanced credits for either banks or ILFs
 - ii. Banks must be in construction within one (1) year of first credit sales
 - iii. ILFs may have up to three (3) years after initial credit sales

6. Distinctions for Permit Applicant Mitigation

- a. Recognizes mitigation may occur after impacts
- b. Identifies "ad hoc" offsite payments as permittee mitigation, similar to contracted mitigation services with no liability transfer

7. Rejects On-Site Preference

- a. Maintains preference for in-kind

8. Phase-in Periods

- a. Existing mitigation banks
 - i. Approved prior to effective date, no change needed
 - ii. Modifications to existing banks must meet new rules
- b. New mitigation banks
 - i. Approved after effective date
- c. Existing In Lieu Fees
 - i. Two year grandfather to meet new rules
 - ii. Extension up to one additional year
- d. New In Lieu Fees
 - i. Approved after effective date

9. Some Important Issues

- a. Degree of discretion retained by Corps on case by case basis
- b. Specificity of terms, provisions, requirements
- c. Resources for agencies to implement