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Corps Announces New Wetland Mitigation Guidance

ENVIRONMENTAL LAW

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Special to the Legal

In fiscal year 2003, the U.S. Army Corps of Engineers handled over 86,000 permit requests nationwide pursuant to its permitting authority under Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act. During this time period, the corps issued over 80,000 permits, which resulted in approximately 21,000 acres of waters and wetlands being filled or disturbed.

An important component of the permit application process with the Corps of Engineers is the development of compensatory wetland mitigation. Compensatory mitigation is defined as the restoration, enhancement, creation, or in the exceptional circumstances, preservation of wetlands and/or other aquatic resources for the purposes of compensating for unavoidable impacts.

Consistent with the federal government's "no net loss" policy for wetlands, the corps ensures that the functions of the wetlands lost due to regulated activities are replaced with compensatory wetlands created by the permit holder.

On Oct. 12, the Philadelphia District of the Corps published its final *Wetlands Mitigation and Monitoring Guidelines*, which must be considered by applicants seeking permits from the Philadelphia District for unavoidable impacts to aquatic resource requiring a corps permit. This article summarizes the guidelines and their applicability to projects in the Delaware Valley and beyond.



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APPLICABILITY

The guidelines became effective Nov. 1 and are applicable to several types of authorizations issued by the corps, including regional general permits, nationwide permits, state programmatic general permits (Category III activities in Pennsylvania) and individual permit actions. The guidelines will be applied within the Philadelphia District's regulatory boundaries in Pennsylvania, Delaware and New Jersey (which generally includes the Delaware River watershed) and will also be applied for projects located in the rest of Pennsylvania by the Corps of Engineers' district offices in Baltimore and Pittsburgh.

The consistent use of a single set of mitigation guidelines for all projects in Pennsylvania requiring corps authorization, no matter which corps district office has jurisdiction, was the general consensus of the comments received by the corps on the draft of the guidelines.

PURPOSE OF THE GUIDELINES

The guidelines were developed to achieve

three important goals: to improve the overall success of wetland mitigation proposals; to help applicants understand mitigation policies and requirements; and to improve the predictability and consistency among wetland mitigation projects. The guidelines do not address mitigation measures for non-ecological effects from regulated activities, however (e.g., impacts to historic structures). The corps intends to evaluate the guidelines and may modify them over time.

Mitigation options also may include mitigation banking and in-lieu fee arrangements, both of which are not addressed in the guidelines.

MITIGATION CONSIDERATIONS

The guidelines state, consistent with the federal policy of "no net loss" of wetlands, mitigation proposals must have a minimum replacement ratio of one-to-one for the wetland functions lost by implementation of the regulated activity. The guidelines state that this minimum ratio may be increased by the corps for specific projects, depending on such factors as the likelihood of the mitigation project's success, timing, location and the type of mitigation proposed.

Wetland functional assessment techniques are required to be used to evaluate existing conditions and mitigation proposals to ensure that the mitigation proposal achieves a functional replacement of the wetlands lost. The particular functional assessment technique used by the applicant should be pre-approved by the corps. In certain circumstances, acreage or linear feet measurements may be approved for use as a surrogate for a functional assessment.

The level of analysis and documentation regarding the wetlands mitigation proposal submitted to the corps should be commensurate with the level of impact to the aquatic resources to be caused by the proposed activity. Obviously, the mitigation proposal submitted to the Corps of Engineers by the permit applicant must include a higher level of detail for projects that potentially cause greater impacts to waters and wetlands.

Performance standards are an integral element in the development of a successful compensatory mitigation and monitoring program. The guidelines recommend that the corps be involved early in the mitigation planning process to develop measurable performance standards, and notes that these performance standards become legally binding if they are included in the corps' permit or authorization.

THE PROCESS

The guidelines set forth a general process to develop and implement a successful wetland mitigation project. As described above, the permit applicant must first assess the functions of the wetland to be lost by the proposed activity, using an assessment technique approved by the corps. After determining the functions to be lost, the applicant then should prepare a preliminary wetland mitigation plan to replace, at a minimum one-to-one ratio, the functions of the wetland that would be lost

from implementation of the proposed activity. The guidelines recommend that a preliminary wetland mitigation plan be submitted to the corps with the permit application.

In addition to the preliminary wetland mitigation plan, the guidelines contain a "Compensatory Mitigation Plan Checklist," which identifies the types and extent of information needed by the corps to assess the likelihood of success of a mitigation proposal.

In addition to the functional assessment of the wetland to be affected by the proposed project, the types of information requested by the checklist include certain baseline information such as the location, size and classification of the existing wetland, existing soils, hydrology and vegetation of the area, ownership, surrounding land use, and historic and current land use. With respect to the proposed mitigation plan, the checklist specifies that the selection and justification for the mitigation site should be explained, and a description of the financial assurances that the mitigation will be constructed, maintained and monitored be included.

The guidelines also state that compensatory wetland mitigation should generally not use untreated storm water as a hydrology source. Resource agencies typically take the view that you do not "treat water with water," noting that storm water management features that primarily treat storm water to improve water quality should not also be considered as compensatory

wetlands, even though they may exhibit the same features and functions as a compensatory wetland.

Following the corps' initial review of the permit application, which includes the preliminary mitigation plan, the corps generally enters into discussions with the permit applicant in conformance with its regulations and policies to attempt to avoid proposed wetland impacts, and also to minimize those unavoidable wetland impacts. Once the corps agrees that a proposed project has avoided and minimized wetland impacts, the corps will determine whether the preliminary mitigation plan would likely compensate for the remaining unavoidable impacts. If the corps agrees to accept the proposed mitigation, it will request that the applicant prepare a final wetland mitigation plan.

The guidelines state that compensatory mitigation projects should, to the extent practicable, be constructed in advance of or concurrently with the construction of the regulated activity. Further, the guidelines require that the construction of the wetlands mitigation project be completed no later than the first full growing season following the adverse impact to the existing wetland.

In conclusion, the guidelines provide a road map for the preparation of compensatory wetland mitigation proposals, which should assist the regulated community in the preparation of federal wetland permit applications. •