
GAO Report on the Corps of Engineers' Oversight of Compensatory Mitigation

Objectives of the Review

- At the request of the Ranking Democratic Member of the House Committee on Transportation and Infrastructure, GAO initiated a review of the Corps of Engineers' efforts to ensure that required compensatory mitigation has occurred. GAO was asked to review the
 - guidance the Corps has issued for overseeing compensatory mitigation,
 - extent to which the Corps oversees compensatory mitigation, and
 - enforcement actions the Corps can take if required mitigation is not performed and the extent to which it takes these actions.

Background on the Compensatory Mitigation

- Compensatory mitigation can consist of creating a new wetland, restoring a former wetland, enhancing a degraded wetland, or preserving an existing wetland.
 - To help achieve the national goal of no net loss, the Corps can require compensatory mitigation as a condition of issuing the permit when discharges of dredged or fill material into wetlands is unavoidable.
 - Permittees can perform the mitigation or pay a third party—a mitigation bank or sponsor of an in-lieu-fee arrangement.
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Scope and Methodology

- We visited 7 of the 38 Corps districts that implement the section 404 program.
 - Charleston, South Carolina
 - Galveston, TX
 - Jacksonville, FL
 - New Orleans, LA
 - St. Paul, MN
 - Seattle, WA
 - Wilmington, NC
- We selected these districts because they represent different geographic areas of the US and collectively accounted for more than two-thirds of the compensatory mitigation required by individual permits in fiscal year 2003.

Scope and Methodology

- We reviewed a total of 249 files:
 - 152 individual permit files,
 - 85 mitigation bank files, and
 - 12 in-lieu-fee arrangements
 - We also examined agency regulations and documents to identify the guidance provided for conducting oversight of compensatory mitigation and the enforcement options available to the Corps.
 - We interviewed officials from Corps headquarters and the district offices as well as several mitigation bank and in-lieu-fee sponsors.
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Objective 1: What guidance has the Corps issued for overseeing compensatory mitigation?

- Three guidance documents establish the Corps' requirements for overseeing compensatory mitigation:
 - *1999 Standard Operating Procedures for the Regulatory Program,*
 - *Federal Guidance for the Establishment, Use and Operation of Mitigation Banks, and*
 - *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.*
- These documents establish two primary activities for overseeing compensatory mitigation
 - Corps review of monitoring reports submitted by permittees or third parties, and
 - compliance inspections conducted by Corps staff.

Objective 1: What guidance has the Corps issued for overseeing compensatory mitigation?

- However, parts of the guidance documents are vague.
- Corps guidance calls for Corps staff to require and review monitoring reports for mitigation banks and other “substantial” mitigation. But the guidance does not define “substantial mitigation”.
- In addition, despite the importance of monitoring reports to the Corps’ efforts, Corps guidance does not
 - specify what information should be included in monitoring reports, or
 - address the issue of noncompliance if monitoring reports are not submitted for review.
- Furthermore, the guidance is inconsistent about the emphasis that should be placed on compliance inspections. One section of the guidance instructs staff to place a high priority on compliance inspections while another section designates these inspections as a low priority.

Objective 2: To what extent is the Corps overseeing compensatory mitigation?

- Overall, the Corps districts that we visited have performed only limited oversight of compensatory mitigation.
 - Permittee-performed mitigation:
 - The Corps required the monitoring reports for 89 of the 152 permits that we reviewed. However, only 21 of these permit files contained evidence that the Corps had received these reports.
 - Only 23 (15 percent) of the 152 permit files indicated that the Corps had conducted a compliance inspection.
 - In addition, we found that even when the Corps conducted oversight, they did not perform suggested follow-up.

Objective 2: To what extent is the Corps overseeing compensatory mitigation?

- Mitigation banks:
 - The Corps required 60 of the 85 mitigation banks we reviewed to submit monitoring reports and 42 of the mitigation bank files contained evidence that the Corps had received monitoring reports.
 - Only 31 (36 percent) of the mitigation bank files indicated that the Corps had conducted a compliance inspection.
- In-Lieu Fee Arrangements:
 - The Corps required 6 of the 12 in-lieu-fee arrangement to submit monitoring reports and 5 had submitted at least one monitoring report.
 - 5 in-lieu-fee files contained evidence that the Corps had conducted compliance inspections.

Objective 3: What enforcement actions can the Corps take if required mitigation is not performed and to what extent does it take these actions?

- The Corps can take a variety of enforcement actions if required compensatory mitigation is not performed.
 - If the permittee was required to perform the mitigation, the Corps can
 - issue compliance orders,
 - assess administrative penalties up to \$27,500,
 - require the forfeiture of a bond, if a bond was required as a condition of the permit,
 - suspend the permit, and
 - refer the case to the Department of Justice for legal action.
 - For mitigation banks and in-lieu-fee arrangements, the actions that the Corps can take depend upon the provisions that are incorporated into each agreement.

Objective 3: What enforcement actions can the Corps take if required mitigation is not performed and to what extent does it take these actions?

- Although the Corps can take a variety of enforcement actions, Corps staff primarily rely on negotiation to resolve noncompliance issues.
 - If discussions with the permittee or third-party sponsors about the corrective actions needed and the time-frames for completing these actions are not successful, Corps staff notify the responsible party in writing and lay out the potential enforcement actions that may be taken.
 - However, the Corps sometimes limits its enforcement ability by
 - not specifying the requirements for compensatory mitigation in permits, and
 - failing to establish formal agreements with third-party sponsors that specify the penalties and/or corrective actions that will be required if mitigation efforts are not performed.
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Conclusions

- The section 404 program is crucial to the nation's efforts to protect wetlands and achieve the national goal of no net loss.
 - Compensatory mitigation is a key component of this program.
 - However, historically, the Corps has failed to place an emphasis on compliance and we found that little has changed. The Corps continues to provide limited oversight to ensure that mitigation it has required as a condition of obtaining a permit has been completed.
 - As a result, the Corps does not know if thousands of acres of compensatory mitigation has been performed and cannot ensure that the section 404 program is contributing to the national goal of no net loss.
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Conclusions

- The Corps' efforts have been further hampered by vague and inconsistent guidance that does not
 - Define key terms,
 - Specify the actions that Corps staff should taken if required monitoring reports are not received, and
 - Set clear expectations for oversight of compensatory mitigation.
 - In addition, the Corps has failed to establish agreements with third-party sponsors that would ensure the agency has legal recourse if compensatory mitigation is not performed.
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Conclusions

- The GAO report made 3 recommendations to improve the Corps' efforts to establish an effective oversight program
 - develop more specific guidance for overseeing compensatory mitigation;
 - clarify expectations for oversight of compensatory mitigation; and
 - review existing third-party arrangements to ensure that formal agreements, as called for in federal guidance, are in place.
 - The Department of Defense concurred with our findings and recommendations and is taking actions to implement our recommendations.
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