

Compensatory Mitigation Rule:

Corps/EPA Notice of Proposed Rulemaking

Regulatory Branch
U.S. Army Corps of Engineers

Office of Water
U.S. Environmental Protection Agency

May 10, 2006



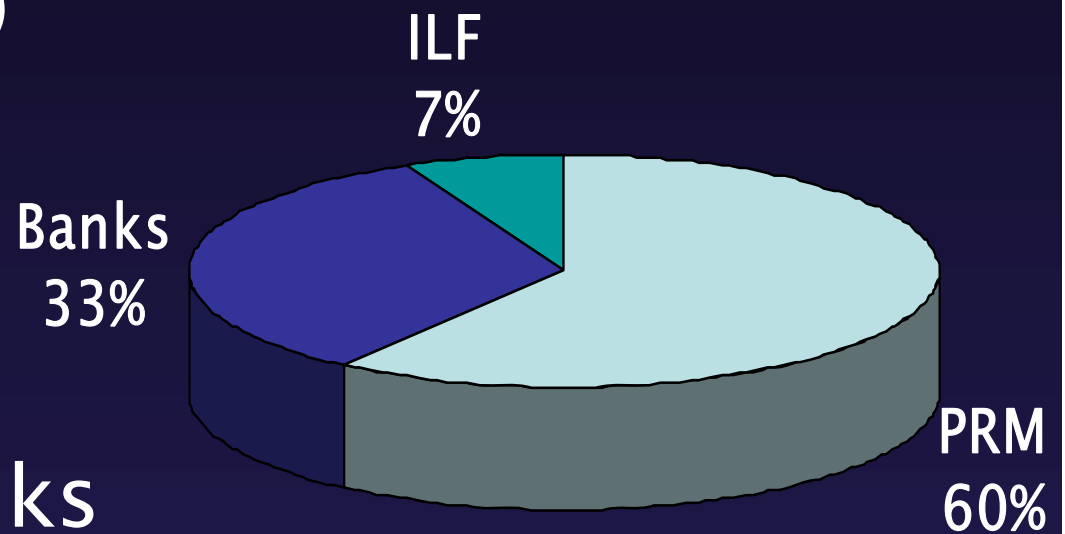
Overview

- Background
- Timeline
- Supporting materials
- Major themes
- Outline
- Highlights by section
- Next steps



Type of Compensation

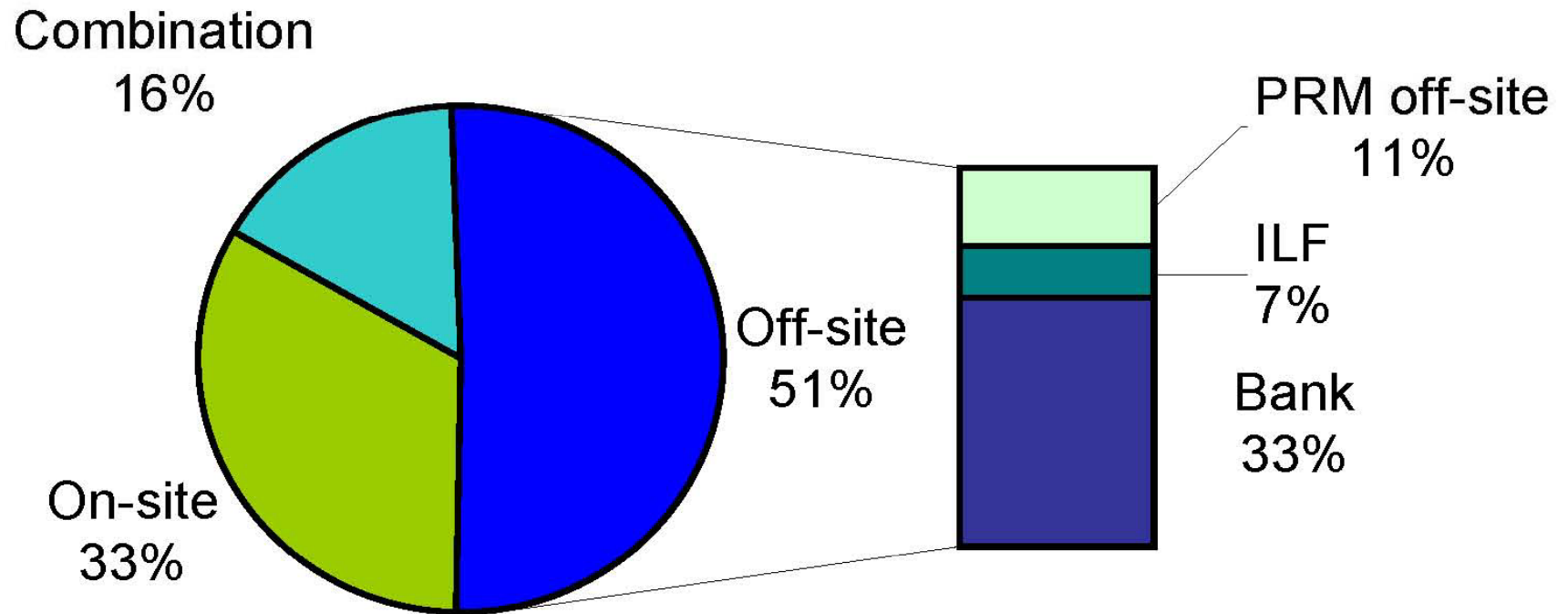
- Permittee-responsible mitigation (PRM)
- Third-party mitigation
 - Mitigation Banks
 - In-lieu fee (ILF)



(USACOE, 2005)



Location of Compensation



Source: US Army Corps of Engineers, 2005

3rd Party Mitigation Trends

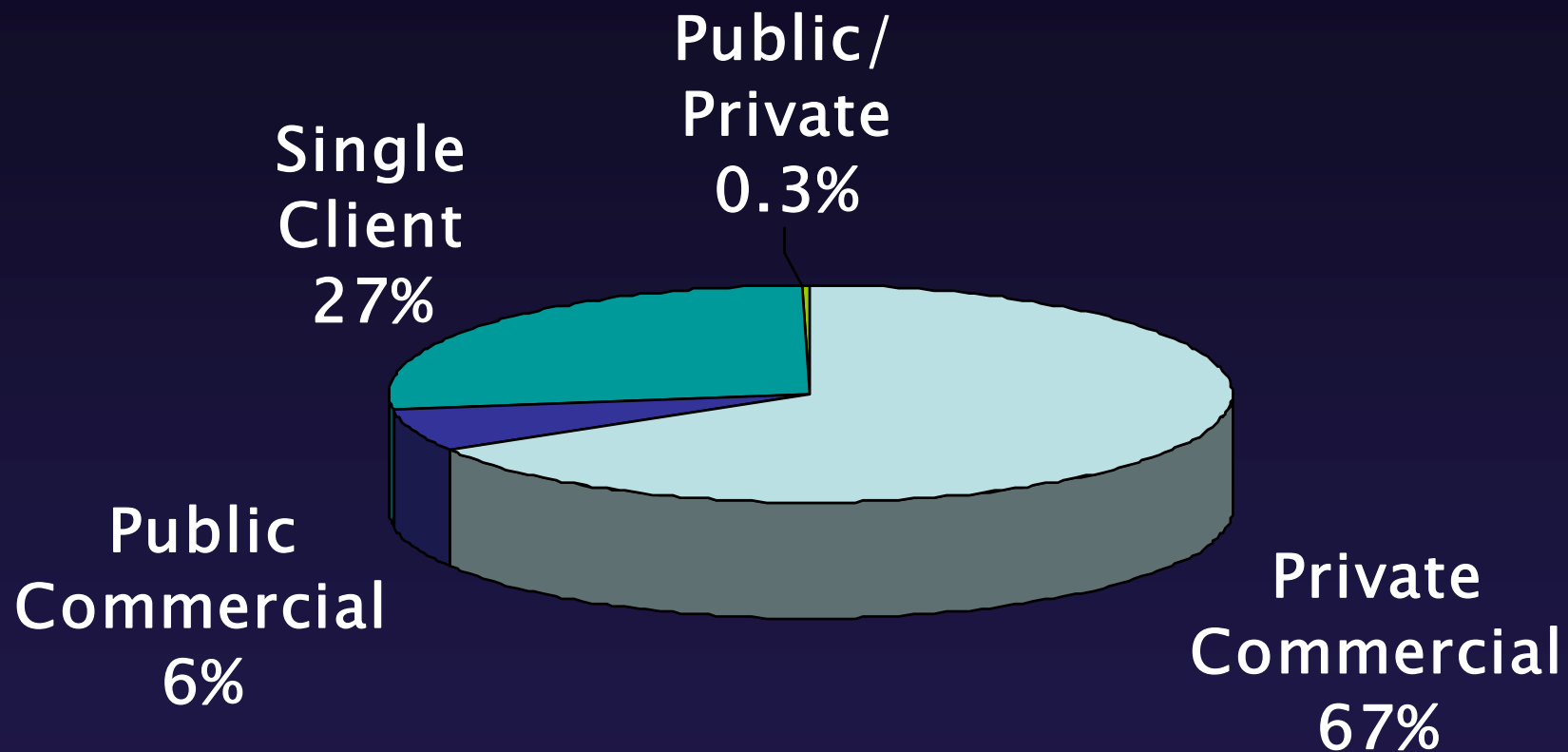
Third-Party Type	1992	1995	2001	2005	Proposed (as of 2005)
Single-user Banks	43	--	76	86	49
Commercial Banks	--	13	176	305*	149
ILF Programs	--	8	87	58**	7

*This number does not include the 59 commercial banks that had sold out as of 2005

**An additional 52 ILF programs were identified as discontinued

(USACOE, 2005)

Type of Bank



(ELI, 2006)



Rule Timeline

- 1 / 05 – 12 / 05 – Corps / EPA coordination
- 12 / 5 / 05 – 3 / 10 / 06 – OMB review
- 3 / 13 / 06 – Army signed NPRM
- 3 / 23 / 06 – EPA signed NPRM
- 3 / 28 / 06 – Federal Register
- 5 / 30 / 06 – Comment deadline



Supporting Materials

- Primary sources used in drafting:
 - 2002 Mitigation RGL
 - 2000 ILF Guidance
 - 1995 Banking Guidance
 - 1990 Army/EPA Mitigation MOA
 - 2001 NRC Study, others
 - 2003/2004 MAP work–productions and stakeholder input



Major Themes

- Implementing effective, equivalent standards:
 - “Raising the bar for compensatory mitigation”
- Emphasizing best available science
 - Watershed approach
- Ensuring predictability and efficiency
 - Mitigation proposals/banks
- Expanding public participation



Rule Highlights

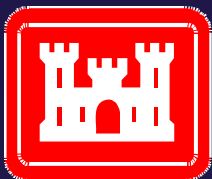
- General considerations and requirements
 - Sections 1–3
- Administrative requirements and performance standards
 - Sections 4–7
- Third-party compensation
 - Sections 8–9



General Considerations and Requirements

§332.1–2(Corps)/§230.91–2(EPA)

- Purpose
 - Establish standards and criteria for the use of all three types of compensation
 - Reference to 2004 DAA
- Affirms “mitigation sequence”
 - Avoid, minimize, compensate
- New Definitions



General Considerations and Requirements

§332.3 / 230.93 – General Requirements

- Watershed approach
 - Consistent with plan or principles
 - Considerations and information needs
- Absence of watershed plan / approach
 - On-site / in-kind
 - Off-site / out-of-kind
 - “near”



General Considerations and Requirements

- Site selection – five factors
- Mitigation type – “in-kind”
- Amount of compensation
 - 1:1 minimum
- Use of banks
- Preservation: “certain circumstances,”
five factors
- Buffers



General Considerations and Requirements

- Other F/S/T/L programs
 - Must fully offset 404 impacts – over and above what is required by other programs to address other impacts
 - No “double dipping”
- Federally funded projects may not generate compensation credits
 - “Supplemental” projects



General Considerations and Requirements

- Permit conditions
 - Amount and type, party responsible, approved plans, performance standards, monitoring requirements, financial assurances and management provisions
- Timing – concurrent
- Financial assurances – “high level of confidence”



Administrative Requirements and Performance Standards

§332.4/230.94 – Planning and
documentation

- Pre-application consultations
- Public review and comment:
 - *“...the public notice for the proposed activity must explain how impacts associated with the proposed activity are to be avoided, minimized, and compensated for.”*



Mitigation Plans

1. **Project objectives**
2. Site selection factors
3. Site protection instrument
4. **Baseline information (at impact site and compensation site)**
5. **Credit determination methodology**
6. Work plan
7. Maintenance plan
8. Performance standards
9. Monitoring requirements
10. Long-term management plan
11. Adaptive management plan
12. Financial assurances

Administrative Requirements and Performance Standards

§332.5/230.95 – Ecological performance standards

- Assess whether project is achieving objectives
- Objective, verifiable, and measurable

§332.6/230.96 – Monitoring

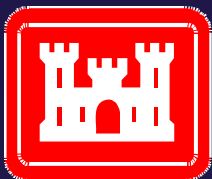
- General requirements
- Five-year minimum monitoring period



Administrative Requirements and Performance Standards

§332.7/230.97 – Management

- Site protection
- Sustainability
- Adaptive management
- Long-term management
 - Party responsible
 - Provisions for long-term financing



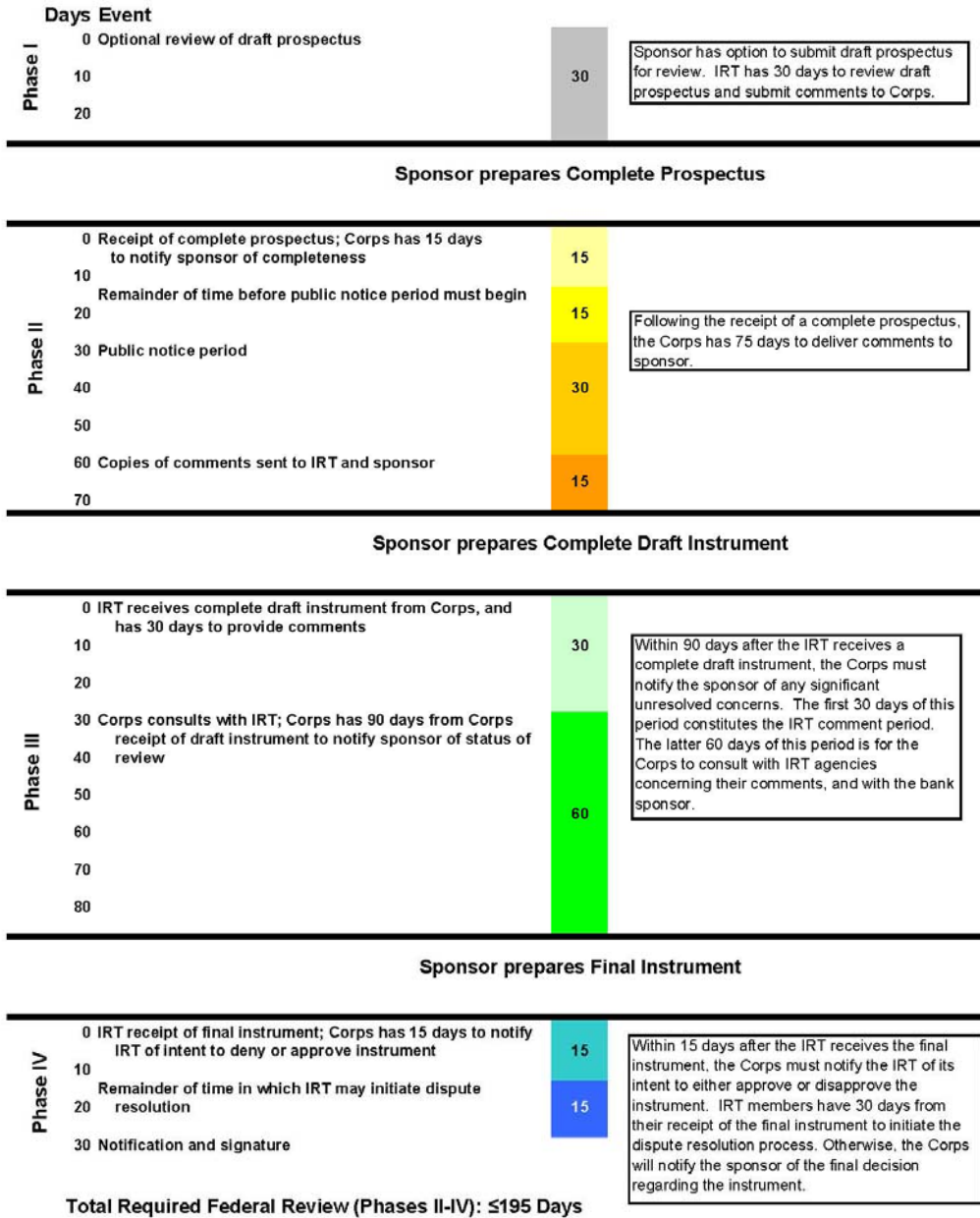
Third-Party Compensation

§332.8/230.98 – Mitigation banks

- Siting banks – public vs. private lands
- Interagency review team (IRT)
 - Bank establishment and oversight
- Bank review process – public and IRT
 - Disciplined timelines for federal review



Timeline for Bank Approval under Proposed Compensatory Mitigation Rule

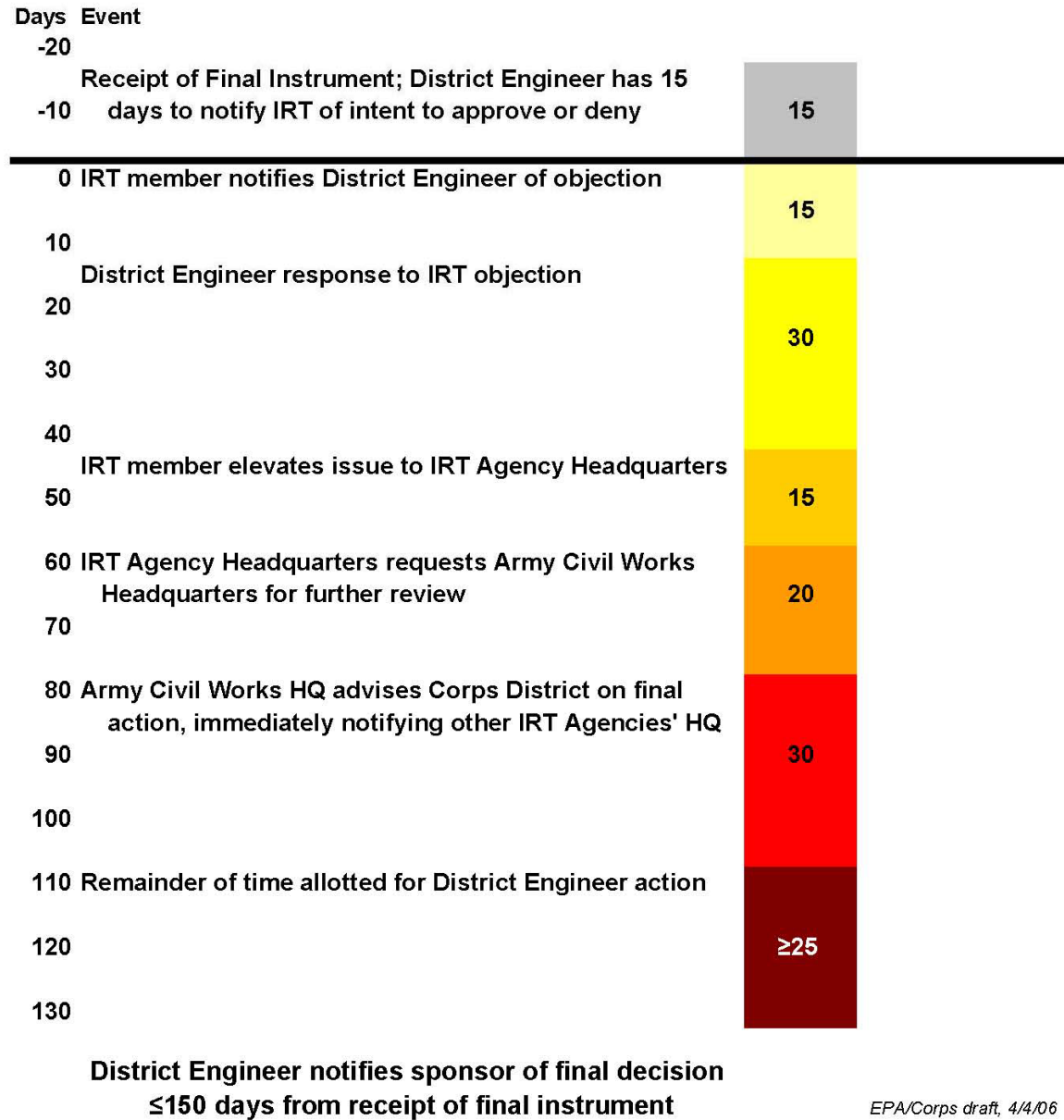


Third-Party Compensation

- Prospectus and draft/final instruments
 - Contents of mitigation plan (slide 16)
 - Service area
 - Credit release schedule
 - Accounting procedures
 - Transfer of liability for site success, and
 - Default and closure provisions
- Dispute resolution process



Timeline for Bank Instrument Dispute Resolution under Proposed Compensatory Mitigation Rule



Third-Party Compensation

- Credit withdrawal – a % of total bank credits may be released for debiting:
 1. Instrument and plan are approved
 2. Bank site has been secured
 3. Financial assurances established
- Grandfathers existing banks
 - Instrument modification will trigger compliance with new requirements



Third-Party Compensation

§332.9/230.99 – In-lieu fee programs

- Suspension of future authorizations
 - 90 days after final rule published
- Transition period for existing ILF programs
 - 5 years and 90 days to comply with new standards for banks or close



Next Steps

- NPRM public comment deadline
 - May 30, 2006
- Spring '06 – outreach
- Summer '06 – analyze public comment
 - Draft comment response
- Implementation
 - MBRT/IRT Academy



Rule and the MAP

- Rule complements MAP
 - “unanticipated opportunity”
- 8 of 17 MAP tasks complete
- Work continues on impact/mitigation data collection efforts (ORM)
- Work on remaining MAP guidance documents awaits rule finalization



Remaining MAP Guidance

1. Off-site/out-of-kind – draft
2. Preservation – draft
3. Buffers – draft
4. Difficult to replace – draft
5. Performance standards – outline
6. Watershed approach – internal draft



Questions

- Compensatory Mitigation Website:
 - <http://www.epa.gov/wetlandsmitigation/>
- Palmer Hough – EPA HQ
 - Hough.palmer@epa.gov
- David Olson – Corps HQ
 - David.B.Olson@HQ02.USACE.ARMY.MIL

