

Recent Developments in Federal Mitigation Regulations and Policy

Questions and Answers

Procedures

1. Suzanne Klimek, NC EEP: What are the procedures for finalizing the proposed rule?
 - Palmer Hough, EPA: When the comment period closes, the Corps and EPA will organize the comments into a database, analyze the comments (as to which stakeholder groups are responding to which issues), and incorporate them into a huge response document. The agencies will respond to every comment. In developing the comment response the Corps and EPA will figure out and identify what changes to the rule might be needed and why. Once this is done, the new preamble (comment response document), the new rule and the new environmental assessment will go back to OMB (OMB, CEQ took three months to vet proposed rule) and out to district federal agencies (to give them another opportunity to comment on the rule), and then published as FINAL rule. There will be no further opportunity for public comment after the publication of the final rule. For last proposed rule – 130,000 comments were received which took a long time– at least 3 months at OMB. So possible time table may be late fall early next year for publication of final rule.

Watershed Approach

2. Rich Mogensen, EarthMark’s Mid-Atlantic Mitigation, LLC: Is the goal of the watershed approach described in the proposed rule more to identify the location for mitigation sites or to identify strategies and goals for what mitigation should be?
 - Palmer Hough, EPA: The criticism in past was that preferences for mitigation were fixed (e.g. assumed that on-site, in-kind were preferable to anything else). The NRC report said on-site and in-kind preferences may work, but it is better to base decisions on thorough evaluation of watershed needs. So should use watershed approach to get at both where mitigation sites should be and what type of mitigation should be done. If a watershed plan that highlights sites and prioritizes types is available should rely on that instead of fixed strategies. The rule had to recognize that that information is not always there, and sometimes there is also no data let alone a watershed plan. So in those cases can fall back on traditional preferences (e.g. on-site, in-kind).
 - George Howard, Restoration Systems: Can a private entity sponsor a plan?
 - Palmer Hough, EPA: Yes, but the proposed rule has a definition of a watershed plan, and given that watershed plans may range in quality the Corps and other agencies have discretion over which plans may be used in the context of making compensatory mitigation decisions.

3. Ken Murin, Penn DEQ: It was indicated that the Corps district engineer has responsibility to approve a watershed plan, but in Pennsylvania there are four Corps districts. Is there opportunity for one Corps district to take lead on watershed plans in areas where Corps districts overlap, to help to have some consistency among decisions?
 - Palmer Hough, EPA: Mark Sudol (Corps) has emphasized that Corps regulators need to be more involved in watershed planning efforts because this will inform decisions on whether or not impacts should be permitted and where the compensation will be located. Corps is spending resources to build the right data management systems so that project managers will have the ability to access that data and use it in making impact and mitigation decisions. And ORM will help to allow regulators to be involved in the planning process and to have the technology to pull in the data layers.
 - Joanne Barry, Corps: For the past few years, the Corps has been working on a lead district initiative so that there will be one designated district, but they are still dealing with political realities.
4. Rob Shreeve, MD State highway: What is the level of support that the regulatory and resource agencies are going to give in developing watershed plans?
 - Palmer Hough, EPA: This rulemaking doesn't have a lot of funding for watershed planning. But, watershed plans are being done through EPA's other programs (e.g. Non-point source program, Targeted Watershed Grants, National Estuary Program). Other agencies, both federal and state are doing watershed planning. They hope to have more collaboration with the programs and have a role for compensatory mitigation in these plans.
 - Response Shreeve: Does this generate a push for the other agency programs to target their efforts towards watershed planning.
 - Palmer Hough, EPA: Yes, this is the first rule to talk about watershed planning. Should encourage other programs that are doing watershed planning to be more balanced.

Mitigation method

5. Robin Mann, Sierra Club: How much of the inequity that exists between the three forms of compensatory mitigation (Banks, Permittee Responsible, ILF) is structural and how much is due to the way agencies enforce regulations? This will help to identify where structural changes may need to be made to these types of mitigation in the proposed rule.
 - Palmer Hough, EPA: Right now, the three different forms of compensation are evaluated using three guidance documents, written at three different times, that are not uniform (e.g. definitions). In addition, to other guidance documents (e.g. 2002 RGL). The regulators currently have to look in three or four places for guidance. One of the goals of the proposed rule was to put all of the regulations in one document with clear a set of administrative regulations and ecological standards. In addition,

the requirements for banks laid out in 1995 banking guidance were a lot more detailed and asked for a lot more than for permittee responsible or ILF (e.g. banks were required to do a lot more upfront planning, to put up a lot financial assurances for long and short-term management, and a lot of emphasis was put on making sure that banks had the proper real estate instruments) and equal weight was not given to the other forms of compensatory mitigation. Also, there are some real structural differences between banks and ILF that the proposed rule is attempting to address. For banks the regulators risk is minimized because the bank already has a site and there are phased credit release, but with ILF liability is being transferred to a third party, but there is no upfront site, and no notion of phase credit so increases risk associated with transfer of liability for regulating agencies. The ability to transfer liability from a permittee to a bank would not be able to happen with out phased credit release.

- Response Mann: Does the rule also address the inconsistency in how the agencies enforce the guidance?
 - Palmer Hough, EPA: Yes
 - Bob Brumbaugh, Corps: The proposed rule is a rule, which makes it different from guidance. The proposed rule has very few shoulds instead there are requirements. This is why congress was interested in have a rule to get away from the shoulds.

- 6. Sherry Lewin, Mitigation Marketing, LLC: Is it the Corps and EPA's intention that this rule will address that any 'innovative solutions' that appear in future, that were discussed in your talk, will be held to these standards? If so, will that be addressed in the rule?
 - Palmer Hough, EPA: Yes, these regulations require that any future innovative solutions will be held to the same standards. For example, there is an example of an innovative solution called credit resale programs, or in North Carolina EEP, which is proving to be a superior way to approach compensation from a comprehensive standpoint. The agencies did not want to write a set of regulations that would stifle those types of innovative solutions with this rule. And, will look into modifying the rule to better accommodate these programs.
 - Response Lewin: Concern of banking industry is that new guidance will be written as new types of solutions come up.
 - Palmer Hough, EPA: Rules are amended all the time. If in the future a new program needs to be addressed more formally, then there will be a new rulemaking.

- 7. John Ryan, Land and Water Resources Inc.: In light of the discussion on 'innovative solutions', it would be helpful to define ILF in the rule, so that it is clear what is being phased out.

MBRT process

8. Mike Rolband, Wetlands Studies and Solutions, Inc.: If an agency joins an MBRT, are they allowed to participate even if they have not intention of signing the document?
 - Palmer Hough, EPA: The rule says the Corps chairs the MBRT, unless there is a state program that has state regulations (then the state is the co-chair). If federal agencies (EPA, NRCS, NOAA, FWS) want to participate, they can. Then the Corps has discretion whether to allow non-federal agencies (other than the state permitting agency) to participate, and how big the MBRT/IRT will be. Rule makes it clear that participating MBRT/IRT agency does not have to sign the document/instrument. It is encouraged that all agencies will sign the document.
9. John Ryan, Land and Water Resources Inc.: Are other members of the MBRT/IRT that are not federal agencies held to timelines for bank approval?
 - Palmer Hough, EPA: The proposed rule can only impose requirements on federal agencies, did not feel it was appropriate to imposed requirement on states. States permitting agencies will be co-chair to federal IRT process so the idea is that state and federal agency timelines would run concurrently. If there is a state agency on the IRT that doesn't have a role in state law they may not have much authority in the process.

Language in the rule

10. George Kelly, Environmental Bank and Exchange, Is the economic cost factor in determining compensatory mitigation new in the proposed regulations?
 - Palmer Hough, EPA: No, this language is not new. There was very similar language in 2002 regulations. In the larger context, economics is always a factor because all decisions about appropriate impacts and appropriate compensation are made in light of what is appropriate and practicable and a component of practicable is cost.