



Federal Guidance on the Use of Off-Site and Out-of-Kind Compensatory Mitigation Under Section 404 of the Clean Water Act



Site/Kind Guidance

- Context
 - Existing preference for on-site and in-kind compensation (1990 Mitigation MOA)
 - NAS study finding that automatic preference contradicts a watershed approach
 - Watershed approach not yet widely available
- Purpose
 - Guide mitigation decisions until watershed approach can be widely applied



Background Information

- Interagency workgroup developed first draft in March of 2003
- Draft presented at 2003 Stakeholder Meeting in Portland
- Recommendations from stakeholders were to make it more structured and specific



Background Information

- Second draft put out for public comment April 2004
- Roughly 3 dozen comment letters from environmental groups, regulated community, and state or Federal regulators



Public Comment

- 200 individual comments
- About half made specific suggestions for changing language
- The other half were either general comments about the document or comments on topics not directly related to the draft guidance



Environmental Community Comments

- the guidance exceeds the intent of the NAS report by allowing off-site and out-of-kind compensation without a watershed plan
- prefer that we not issue the guidance, and not allow off-site or out-of-kind compensation without a watershed plan



Response

- the use of off-site and out-of-kind compensation already occurs under existing Corps regulations
- we believe the guidance is needed to clarify the context in which those decision should be made.
- we have made some changes to the guidance to make it clear that the goal is to implement the environmentally preferable option.



Regulated Community Comment

- most approve of the guidance as is.
 - Response - The final guidance is substantially the same as the draft. Any changes that were made were for clarification.
- a few believe that the guidance does not go far enough in that all references to on-site and in-kind preference should be deleted.
 - Response - there are good reasons for maintaining a preference for on-site and in-kind when no other option is environmentally preferable (i.e., all other things being equal).



Site/Kind Guidance

- Reiterates deference to watershed plan

“The best tool for determining whether on-site, off-site, in-kind, or out-of-kind compensatory mitigation is environmentally preferable is a holistic watershed plan incorporating mitigation or restoration priorities.”



Site/Kind Guidance

- And the watershed approach

“In the absence of a holistic watershed plan, a watershed-based approach to mitigation decisions is the most appropriate way to address the appropriateness of on-site, off-site, in-kind, or out-of kind mitigation.”



Site/Kind Guidance

- Emphasis is on environmentally preferable mitigation
- “If an off-site mitigation option is identified as **environmentally preferable** to on-site mitigation in a holistic watershed plan, then it is considered acceptable..”



Site/Kind Guidance

Condensed background, moved actual guidance forward

Included on-site and in-kind in text discussing environmentally preferable

Removed language related to difficult restoration and invasive species



Site/Kind Guidance

- Separate sections for out-of-kind and off-site
- Addresses combined mitigation
 - “Decisions on whether to propose or authorize in-kind, out-of-kind, on-site, or off-site compensatory mitigation need not be either/or decisions.”



Site/Kind Guidance

AND NOW?

- Currently in the clearance/signature process at the MAP agencies