

## Mitigation Guidance or Mitigation Myth?

*The U.S. Army Corps of Engineers and the Environmental Protection Agency released their new regulatory guidance letter on mitigation in December. Yet the guidance merely reaffirms the unsuccessful mitigation policies of the past, according to a wetland policy specialist for a national environmental organization.*

by Julie M. Sibbing

**F**ew were surprised when the National Academy of Sciences' Committee on Mitigating Wetland Losses reported in 2001 that it was "not convinced that the goal of no net loss for permitted wetlands is being met for wetland functions," and that insufficient data existed to determine if the goal was even being met even for wetland area.<sup>1</sup> Many were surprised, however, at the extent of the problem, as documented in an analysis by three of the committee's members. The analysis estimated that "...the section 404 permitting program has been fostering an 80 percent net loss of wetlands."<sup>2</sup> Considering the stunning magnitude of the failure of wetland mitigation suggested by these studies, it would seem that the time was ripe for a re-examination of the policies under which such failure has occurred. Yet the Bush Administration responded to the growing body of evidence documenting the failure of mitigation policies by issuing new mitigation guidance that reaffirms the very policies that have proven unsuccessful in the past and by creating new accounting schemes that will mask future failures.

On December 24, 2002, a new Regulatory Guidance Letter (No. 02-2) was issued regarding compensatory mitigation for impacts under section 404 of the Clean Water Act and section 10 of the Rivers and Harbors Act.<sup>3</sup> This new Regulatory Guidance Letter was issued to replace an RGL issued by the U.S. Army Corps of Engineers on October 31, 2001—a policy that was developed and issued by the Corps with no input from other federal agencies. Given the criticism this "Halloween RGL" received from other federal agencies and the public, it was widely expected that the "Christmas RGL," developed in consultation with other federal agencies, would set out progressive new policies to remedy past failures. However, despite repeated endorsement of the no net loss of

wetlands goal, the guidance letter failed to implement the changes needed to even begin to achieve this goal.

### Net Loss Mitigation

While the success rate of efforts to restore former wetlands or to build new wetlands in upland areas is disturbingly low, these are the only two types of mitigation that can replace lost wetland acreage. Yet the Christmas RGL, like the Halloween RGL before it, continues to allow mitigation credit for simply preserving existing wetlands, riparian areas, other aquatic habitats, and even uplands—even where such activities are the only mitigation required. Such "preservation" need not even involve a permanent legal mechanism to ensure a "preserved" property is not developed in the future. The new guidance letter also allows mitigation credit for buffer areas surrounding wetlands, despite the fact that in most cases such buffers probably add no net function, given that buffers around the developed wetland would also have been lost along with the wetland that was destroyed (and those lost buffer areas were not included in the metric for compensatory mitigation).

The new RGL also allows other historically undependable forms of mitigation, including enhancement and rehabilitation of existing wetlands. Under new definitions put forth in the RGL, "enhancement" may involve manipulation of a wetland to increase some functions while decreasing others (e.g., deepening a wetland to increase its recreational value, while simultaneously decreasing its biodiversity value). "Rehabilitation" under the guidance letter is defined as having the goal of "repairing natural or historic functions of a degraded wetland." Such efforts can result in replacement of some functions of a wetland destroyed for development, but neither enhancement nor rehabilitation can replace lost wetland acreage. In addition, such enhancements are in some cases only temporary—such as removal of exotic species that may re-colonize within a few years. Additionally, it is extremely difficult to predict or measure the functional "lift" that will occur with implementation of an enhancement or rehabilitation plan.

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## Attempting “Functional Accounting”

Further undermining the possibility that the RGL will enable the Corps to achieve the no-net-loss goal is the rejection of a Clinton Administration policy included in the March 2000 Nationwide Permits. The policy required a minimum replacement ratio of one

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acre of new wetland for each acre destroyed. Given the dismal success record of mitigation projects, this acre-for-acre requirement seemed quite modest. Instead, the RGL loosened even that basic requirement and now allows districts to attempt functional trade-offs that could, for example, result in the

destruction of a large wetland and replacement with a smaller “higher function” wetland. While an increased emphasis on replacing wetland functions is desirable, in practice there is no reliable way to account for such functional tradeoffs, and they will always contribute to a net loss of wetland area.

While the guidance letter calls for wetlands targeted for development to be evaluated and their functions measured (in some cases using no more than “best professional judgement”), there is no call for mitigation wetlands to be likewise evaluated. Moreover, the only information available regarding the functions of replacement wetlands is a proposed mitigation plan—which frequently paints an unreasonably rosy outlook for success. Unless mitigation wetlands are built in advance such that they too can be evaluated (using the same assessment methodology) and their functions measured, regulators can only rely on their best guesses regarding whether a mitigation site will become functional and what functions it will eventually provide. This approach has not worked in the past—the many currently failing mitigation sites were all first approved by these same regulators. It would therefore seem that prediction powers alone are insufficient to determine if a functioning wetland will develop at all, let alone to determine what functions that wetland will provide.

Developing a functional accounting system for wetlands is a daunting—if not impossible—task (especially when functions to be replaced through mitigation are only theoretical until a project is fully mature). Currently the Corps’ database misleadingly inflates mitigation acreage by counting preserved wetlands and uplands, and in some cases, even wetlands avoided by development (e.g., when a developer destroys 5 acres of a 10-

acre wetland, the Corps may count this as a 5-acre gain for mitigation). Because of this meaningless accounting of wetland acreage, both the NAS Committee on Mitigating Wetlands Losses and the U.S. General Accounting Office agreed that it was impossible to determine if the no-net-loss goal had been achieved.<sup>4</sup>

The regulatory guidance letter steps away from historic requirements that have generally dictated that wetlands to be replaced by the same type of wetland as was lost. Instead, the new RGL relies on “functional” replacement of a wetland. While functional replacement is extremely important in mitigation, its use as the only metric leaves rare and hard to replicate wetlands vulnerable to loss, unless their rarity is considered a “function” (such as for wildlife habitat or species biodiversity). Without a specific requirement for in-kind replacement, few mitigation providers will risk building difficult to replicate wetlands, thus further reducing the acreage of these wetland types. In fact, this shift in wetland types is already evident across the country, as mitigators perfect construction of open water marshlands and struggle to replicate systems such as forested swamps, fens, and vernal pools. Under the new guidance letter, we can therefore expect to see a further increase in acreage of easily replicated wetland types at the expense of rare wetland types.

## A Watershed Approach or Anything Goes?

The RGL pays lip service to the NAS recommendation that mitigation projects be designed and located according to a watershed approach. But the RGL merely treats the watershed approach as almost “anything goes.” In reality, implementation of a true watershed approach in most areas will take the collection of much more additional information and development of a comprehensive restoration plan. Using such a plan, the Corps would need to ensure that each project fit the plan with regard to type and design of wetland and location. Conversely, ad hoc consideration of watershed needs based only on best professional judgement does not amount to a watershed approach.

The guidance letter further states that consolidated mitigation, such as mitigation banks and in-lieu-fee programs, “...facilitates a watershed approach to mitigating impacts to waters of the United States.” Yet a recent study by the Environmental Law Institute, “Banks and Fees: the Status of Off-site Wetland Mitigation in the United States,” found that “...less than one percent of all banking instruments specifically reference consistency with a watershed management plan,” and “few in-lieu-fee programs are guided by a formal watershed plan.”<sup>5</sup>

## Genuine Progress

Several provisions of the RGL do represent progress, including a requirement for compensatory mitigation projects involving streams to replace stream functions. Despite the fact that streams containing pool and riffle complexes qualify as “special aquatic

sites” under Clean Water Act regulations (just as wetlands do) in many areas of the country, mitigation is seldom required for impacts to these systems. Taking a step in the wrong direction, the Halloween RGL allowed wetland mitigation to make up for damages caused to stream systems in a watershed. The Christmas RGL improves matters by including a stream mitigation requirement, and it’s a major first step towards ensuring some compensation for impacts to high quality stream systems.

Another positive aspect to the new guidance letter could result in improved accountability for mitigation projects—both successes and failures. The RGL requires every permit that contains a mitigation requirement to include special conditions that identify “the party(s) responsible for meeting any or all components of compensatory mitigation requirements.” To date, the lack of such a requirement has frequently been cited as a factor that complicates enforcement of permit conditions.

The RGL also highlights sequencing requirements of the section 404 (b)(1) guidelines, emphasizing that mitigation plans should not be discussed in detail until it has been established that impacts to aquatic sites are unavoidable. Given the depressing lack of success of mitigation projects, a renewed emphasis on sequencing is wholly appropriate.

At the same time that the Corps, EPA, and other cooperating agencies issued the Christmas RGL, these agencies also issued details of a “Mitigation Action Plan.” According to the agencies, this 17-item work plan “...will enable the agencies and the public to make better decisions regarding where and how to restore, enhance, and protect wetlands; improve their ability to measure and evaluate the success of mitigation efforts; and expand the public’s access to information on these wetland restoration activities.”<sup>6</sup> The Mitigation Action Plan will address several of the issues identified by the NAS Committee on Mitigating Wetland Losses, and it may lead to progressive policies for improving mitigation success. However, the administration’s decision to lock in place currently failing policies in the interim does not bode well for a future that will see the significant changes in policy that are needed to truly achieve the stated goal of no overall net loss of the nation’s wetlands.

### The Mitigation Myth Continues

Ever since the no net loss of wetlands goal was first articulated by President George H.W. Bush in 1989, federal, state, and local agencies, scientists, developers and many of the general public have expressed confidence that wetlands being destroyed by development activities were being fully replaced by mitigation efforts. Under this assumption, many people wondered why we should rigorously apply avoidance requirements when a new wetland would be built to take the place of the one destroyed? Recent evidence, however, has exposed the mitigation “exchange” as a myth, and we have found that we

simply have not superseded what we destroyed.

In the face of mounting evidence that these replacement efforts frequently fall far short of their promise, new myths were created to assuage critics. Mitigation banking was introduced and touted as foolproof, because wetlands would be restored in advance and proven successful prior to serving as compensation for the loss of natural wetlands. The idea of directing mitigation fees to conservation organizations, land trusts, and government entities also rang with promise. Yet the recent Environmental Law Institute report documented that “as many as 92 percent of the nation’s banks allow credits to be withdrawn...in advance of bank maturity.”<sup>7</sup> Furthermore, the General Accounting Office report found that only seven Corps districts had taken any steps to determine whether in-lieu-fee mitigation efforts have been ecologically successful.

In the end, fundamental changes, not simple tweaks to current policies are needed if the goal of no overall net loss of wetlands is ever to be achieved within the regulatory program. Current efforts to give preferential treatment to mitigation banks or any other mitigation provider will not solve the basic deficiencies in mitigation policy that are allowing for ecological failure and net loss of both acreage and function. Only through a renewed commitment to avoidance of impacts where practicable, a concentration on true mitigation for unavoidable losses, better design and siting of projects, and implementation of strong, ecological success criteria (that are accompanied by close monitoring and strong enforcement), will mitigation ever begin to “compensate” for the loss of natural wetlands. ■

### References

- <sup>1</sup> Committee on Mitigating Wetland Losses, “Compensating for Wetland Losses Under the Clean Water Act,” National Research Council (National Academy Press, Washington, D.C., 2001), p. 3.
- <sup>2</sup> R.E. Turner, A.E. Redmond, and J.B. Zedler. 2001. “Count it by Acre or Function—Mitigation Adds up to Net Loss of Wetlands,” *National Wetlands Newsletter* 23 (6): 5.
- <sup>3</sup> A copy of the Regulatory Guidance Letter 2-02 is available at <http://www.usace.army.mil/inet/functions/cw/cecwo/reg/RGL2-02.pdf>.
- <sup>4</sup> U.S. General Accounting Office, “Assessments Needed to Determine the Effectiveness of In-Lieu-Fee Mitigation,” GAO report, GAO-01-325, May 2001. Available online at <http://www.gao.gov/new.items/d01325.pdf>.
- <sup>5</sup> Environmental Law Institute, “Banks and Fees: the Status of Off-site Wetlands Mitigation in the United States,” research report (Environmental Law Institute, Washington, D.C., 2002), p. 119.
- <sup>6</sup> A copy of the Mitigation Action Plan is available at <http://www.epa.gov/owow/wetlands/guidance/map1226withsign.pdf>
- <sup>7</sup> Environmental Law Institute, pp. 123–124.