

## **Federal Guidance on the Use of Preservation as Compensatory Mitigation Under Section 404 of the Clean Water Act**

### **I. Purpose**

This document provides guidance on the use of preservation as compensatory mitigation undertaken to meet permit requirements under Section 404 of the Clean Water Act and/or Section 10 of the Rivers and Harbors Act of 1899. The permit program requires appropriate and practicable compensatory mitigation to offset unavoidable impacts to aquatic resources by replacing aquatic resource functions lost as a result of activities authorized by the U.S. Army Corps of Engineers (Corps).

For the purposes of this document the relevant terms are identified below, as defined in Corps Regulatory Guidance Letter 02-2:

Protection/Maintenance (Preservation): The removal of a threat to, or preventing the decline of, wetland conditions by an action in or near a wetland. This term includes the purchase of land or easements, deed restrictions, repairing water control structures or fences, or structural protection such as repairing a barrier island. This term also includes activities commonly associated with the term preservation.

Demonstrable threat: Clear evidence of destructive land use changes that are consistent with local and regional land use trends, and that are not the consequence of actions under the permit applicant's control.

### **II. Existing Policy and Guidance**

The following documents provide guidance concerning the use of preservation as compensatory mitigation:

1. The 1995 Federal Guidance for the Establishment, Use and Operation of Mitigation Banks (Banking Guidance)<sup>1</sup>
2. The 2002 Corps Regulatory Guidance Letter 02-2, Guidance on Compensatory Mitigation Projects for Aquatic Resource Impacts Under the Corps Regulatory Program Pursuant to Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act of 1899 (RGL 02-2)

Both the 1995 Banking Guidance and RGL 02-2 state that preservation of wetlands or other aquatic resources may be acceptable as compensatory mitigation when they are preserved in conjunction with, and augment the functions of, newly established, restored, or enhanced aquatic resources. These documents also state that there are exceptional circumstances in which preservation may be accepted as the sole basis of compensatory mitigation. Evaluation of these exceptional circumstances should consider whether the wetlands or other aquatic resources: 1) perform important physical, chemical or biological functions, the protection and maintenance of which is important to the region where those aquatic resources are located; and 2) are under demonstrable threat of loss or substantial degradation due to human activities that might not otherwise be expected to be restricted.

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<sup>1</sup> Federal Register, November 28, 1995, Volume 60, Number 28, Pages 58605 – 58614.

### **III. Additional Recommendations**

This section clarifies the appropriate use of preservation when used to augment other mitigation components and the exceptional circumstances when preservation may be appropriate as the sole form of compensation. The information below is not a complete list of all examples and circumstances encountered. Rather, it is general guidance to assist agency staff in reviewing compensatory mitigation proposals that involve preservation. Practicable restoration, enhancement, and establishment opportunities should be exhausted before preservation is considered. The following information can be further expanded to create regionally specific guidance as appropriate.

#### **A. Preservation as a Component of a Mitigation Plan**

Preservation should generally only be considered as a compensatory mitigation component when the preserved resources will demonstrably augment or be integral in sustaining the functions of newly established, restored, or enhanced aquatic resources. Preserved lands may enhance the components of a mitigation project in many ways, including protecting uplands and aquatic resources within or adjacent to the mitigation site from adverse land use activities. Preserved lands may also protect and maintain hydrological and biological connectivity between the mitigation site and other wetlands, refuges, wildlife corridors, listed species habitat, or other environmentally sensitive lands. In some cases, preserved lands that are not contiguous with a mitigation plan's restoration, enhancement, and establishment components may serve to augment the function of these components through protection of associated functions within the appropriate region. The benefits provided by preserved lands should be evaluated on a case-by-case basis to determine the applicability to the overall project.

#### **B. Preservation as the Sole Method of Compensation**

As stated in RGL 02-2, there are exceptional circumstances in which preservation may be authorized as the only compensation required for impacts to aquatic resources:

- 1) When the lands perform regionally important physical, chemical and/or biological functions; **and**
- 2) When the lands are under demonstrable threat of loss or substantial degradation.

These circumstances are further described below.

**1) Regionally important physical, chemical, or biological functions:** Examples of aquatic resources that perform vital, regionally important functions may include but are not limited to:

- Aquatic resources that are adjacent to or connect regionally important publicly held lands, such as: National Marine Sanctuaries, National Seashores, National and State Parks, Forests, Refuges and Wildlife Management Areas.
- Aquatic resources that have been identified as: Wetlands of International Importance, Wild and Scenic Rivers, Designated Shellfish Grounds, Outstanding Resource Waters, Essential Fish Habitat, Anadromous Fish Spawning Waters, Critical Watershed Areas, or State Priority Lands.

- Aquatic resources that contain old growth climax communities that have unique habitat structural complexity likely to support rare native plant or animal communities.
- Aquatic resources that provide habitat important to species that are listed under the Endangered Species Act, or have some other special designation.
- Aquatic resources identified as Source Water Protection Areas under the Safe Drinking Water Act.

**2) Demonstrable threat of degradation or loss:** As described in RGL 02-2, demonstrable threat is based on clear evidence of destructive land use changes that are not the consequence of actions under the permit applicant's control. The following factors should be considered to determine if a demonstrable threat is applicable for the preservation parcel:

- The extent to which the land to be preserved would be adversely impacted or lost if it were not protected.
- The source of the threat and its seriousness. This can include environmental pressures, such as nuisance and exotic species invasion, erosion, etc., and anthropogenic factors that are consistent with local and regional land use trends, such as land development and agricultural and silvicultural practices. The threat and its seriousness should be clearly documented.
- Whether the aquatic resources are protected by current rules and regulations, including the Clean Water Act, and would benefit from preservation because of their importance in providing or augmenting aquatic resource functions.

In all cases, the preservation proposal should include provisions for monitoring to ensure the viability of the preservation site.

### **C. General Guidelines for Selecting an Area for Preservation**

The following general guidelines should be considered when selecting an area for preservation as either a component of compensatory mitigation or as the sole method of compensation.

- The preserved component should be selected after consideration of watershed objectives, as well as current and future watershed activity.
- Where possible, preservation efforts should also target lands that coincide with governmental or non-profit land acquisition and conservation programs.
- Where possible, preservation projects should attempt to protect lands in or adjacent to areas of national, state, or regional ecological significance in order to build on large contiguous land areas.
- Where possible, preserved lands should provide connectivity to other systems and take advantage of refuges, buffers, green spaces, and other preserved elements of the landscape.
- Preservation may provide a suitable mitigation option when the lands to be preserved are considered to be difficult to acquire parcels and would not likely be preserved by federal, state or local acquisition programs. An example of a difficult to acquire parcel may include coastal wetlands or other parcels in rapidly developing areas where the price of the land may inhibit future acquisition.
- Preservation parcels should be permanently protected with appropriate real estate instruments (e.g., conservation easements, deed restrictions, transfers of title to Federal or state resource

agencies or non-profit conservation organizations) and include assurances that the supporting hydrology will also be protected in perpetuity.

#### **D. Credit for Preservation**

Compensatory mitigation credit may be granted for preservation activities that are consistent with the recommendations described in this guidance. Preservation differs from the other types of mitigation in that it does not directly replace aquatic resource area or functions lost to permitted activities. Therefore, the amount of compensatory mitigation credit given for preservation activities may be less than other forms of compensatory mitigation. For example, if acreage ratios are used, they will likely be significantly higher for preservation than for other forms of compensation like restoration and enhancement. Factors that should be considered when determining mitigation credit include, but are not limited to, the following:

- The extent to which the land to be preserved would be adversely impacted if it were not preserved.
- The value of ecological and hydrological relationships between wetlands, other surface waters, and uplands to be preserved.
- The proximity of the area to be preserved to areas of national, state, or regional ecological significance, and the ability of the preserved lands to provide biological and hydrological connectivity to these areas.
- The ability of the preserved site to meet watershed objectives.

#### **IV. Relationship of This Guidance to Other Mitigation Guidance under Development**

The best tool for planning compensatory mitigation is a holistic watershed plan<sup>2</sup> incorporating mitigation or restoration priorities. Without such a plan, there may be many diverging opinions about what is "best" for a watershed. In the absence of a holistic watershed plan, a watershed-based approach to mitigation should be used to develop mitigation proposals. Such an approach takes into account a wide range of factors such as: site conditions that favor or hinder success; the needs of sensitive species; chronic environmental problems such as flooding or poor water quality; current trends in habitat loss or conversion; current development trends; and the long-term benefits of available options. As part of the Mitigation Action Plan released in December of 2002, the agencies<sup>3</sup> plan to publish guidance regarding making compensatory mitigation decisions in a watershed context in 2005. The Watershed Context Guidance will likely incorporate the recommendations contained in this Preservation Guidance as well as other guidance documents that have been or will be developed.

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<sup>2</sup> Holistic watershed plans are those that: 1) have been reviewed and approved by Federal and State agencies; 2) consider multiple stakeholder interests and competing land uses; and, 3) address issues of habitat, water quality, hydrology, cumulative impacts, and restoration priorities for a watershed. Holistic watershed plans could include, for example, a Special Area Management Plan, the "comprehensive conservation and management plans" created as part of the National Estuary Program, a comprehensive state planning effort such as the Louisiana Coast 2050 plan or a basin plan such as the Water Resources Plan being developed for the Delaware River Basin.

<sup>3</sup> The Corps, U.S. Environmental Protection Agency and the Departments of Agriculture, Commerce, Interior and Transportation.

## **V. General**

A. Current Food Security Act (FSA) legislation (also known as “Swampbuster”) limits the extent to which preservation can be used for FSA purposes. Notwithstanding anything in this guidance, if a mitigation proposal is to be used for FSA purposes, it must meet the requirements of FSA.

This guidance does not alter or modify requirements of any Federal law or regulation, or modify any prior guidance. The signatory agencies will employ this guidance in concert with the 1990 MOA between the EPA and the Army, the 1995 Federal Guidance on Mitigation Banking, the 2000 Federal Guidance on In-Lieu-Fee Arrangements, and the 2002 Corps RGL on Compensatory Mitigation Projects.

B. The statutory provisions and regulations mentioned in this document contain legally binding requirements. However, this guidance does not substitute for those provisions or regulations, nor is it a regulation itself. This guidance does not impose legally binding requirements on the signatory agencies or any other party, and may not apply to a particular situation in certain circumstances. The signatory agencies retain the discretion to adopt approaches on a case-by-case basis that differ from this guidance when they determine that it is appropriate to do so. Such decisions will be based on the facts of a particular project and applicable legal requirements. Therefore, interested parties are free to raise questions and objections about the substance of this guidance and the appropriateness of its application to a particular situation.

C. This guidance does not and is not intended to alter any provisions of applicable state law or regulations. It is the responsibility of the applicant to comply with all applicable federal, state, and local laws and regulations.

D. As of the date of the last signature below, the agencies will take this guidance into account in their evaluation of compensatory mitigation proposals.

E. This guidance is based on evolving information and may be revised periodically without public notice. This document may be altered with the consent of all signatories. The signatory agencies welcome public comments on this guidance at any time and will consider those comments in any future revision of this guidance.

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