

# LAND USE & NATURAL RESOURCES

CLIENT ALERT

MARCH 1, 2012

## THE ARMY CORPS OF ENGINEERS ISSUES NEW PROCEDURES FOR DETERMINING WETLAND FILL PERMIT MITIGATION RATIOS

The U.S. Army Corps of Engineers recently established a new set of procedures for determining and documenting mitigation ratios for wetland fill permits. Because of the costs and other obligations associated with mitigating impacts to wetlands, these new procedures are likely to affect development of projects that impact jurisdictional wetlands. The new procedures will be applied to determine compensatory mitigation requirements for all permit applications received after April 20, 2011 for projects in the Corps' Sacramento, Los Angeles, and San Francisco Districts. The procedures are intended to increase consistency in mitigation determinations, reflect current scientific understanding of mitigation, and provide documentation of the Corps' compensatory mitigation decisions. The Corps' expectation is that these new procedures will give the regulated community, including developers, more certainty regarding compensatory mitigation ratios imposed upon a project.

In general, the new procedures require Corps regulatory project managers to complete a mitigation ratio checklist using the applicant's compensatory mitigation proposal. Project managers will use the checklist to evaluate the applicant's proposed mitigation for each impact site or type. The checklist requires consideration of several factors. These include:

1. Qualitative Factors: If no Corps-approved functional/condition assessment has been obtained, the project manager must complete a qualitative assessment of functional loss at the impact site relative to functional gain at the mitigation site.
2. Quantitative Factors: If a Corps-approved functional/condition assessment has been obtained, the project manager must use a Before-After-Mitigation-Impact spreadsheet to determine the appropriate mitigation ratio adjustment. Project managers must consider quantitative or qualitative factors, but will not consider both.
3. Mitigation Site Location: This factor directs project managers to require a higher mitigation ratio when mitigation sites are located outside of the impacted watershed.
4. Net Loss of Aquatic Resource Surface Area: If the proposed mitigation consists of rehabilitation, enhancement, or preservation, then mitigation ratios will be increased.
5. Type Conversion: This factor generally directs project managers to require a higher mitigation ratio in most situations where out-of-kind mitigation is proposed. However, out-of-kind mitigation that results in conversion of a common habitat type to a highly valuable or rare habitat type may warrant implementation of a lower mitigation ratio.

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6. Uncertainty: This factor requires mitigation ratios to reflect the uncertainty in mitigation by increasing mitigation ratios depending on the degree of uncertainty inherent in the applicant's proposed mitigation.
7. Temporal Loss: Project managers are required to increase mitigation ratios as appropriate to reflect delays between impact and full replacement of habitat function resulting from mitigation.

Each of these factors will result in a mitigation ratio adjustment. To determine the final mitigation ratio, project managers must add together these adjustments and consider whether indirect impacts or cumulative impacts require mitigation. This final mitigation ratio will be used to determine whether the applicant's proposed mitigation is adequate and, if necessary, how it must be altered to fully mitigate impacts to jurisdictional waters.

Whether or not these factors and the Corps' new procedures will actually lead to more certainty for the regulated community will remain to be seen. Even the detailed spreadsheets accompanying the new procedures do not eliminate the need for judgment calls and speculation. Nonetheless, the new procedures are a step in the right direction because they require the Corps to provide developers a better explanation for mitigation ratios attached to a permit.

*If you have any questions regarding this alert, please contact:*

R. Clark Morrison at 415.262.5113 or [rmorrison@coxcastle.com](mailto:rmorrison@coxcastle.com)

Scott B. Birkey at 415.262.5162 or [sbirkey@coxcastle.com](mailto:sbirkey@coxcastle.com)

Rachel R. Jones at 415.262.5144 or [rjones@coxcastle.com](mailto:rjones@coxcastle.com)