

New Regulatory Guidance for Mitigation Banks: U.S. Army Corps of Engineers Issues Regulatory Guidance Letter 19-01



Walter Wright, Jr.
wwright@mwlaw.com
(501) 688.8839

03/08/2019

The United States Army Corps of Engineers (“Corps”) Headquarters issued a new Regulatory Guidance Letter (“RGL”) addressing wetland mitigation banks.

RGL 19-01 is titled:

Mitigation Bank Credit Release Schedules and Equivalency in Mitigation Bank and In-Lieu Fee Program Service Areas (“RGL 19-01”)

Section 404 of the Clean Water Act requires a permit be obtained from the Corps for certain activities in jurisdictional waters. A frequent condition of such permits is mitigation of environmental impacts to rivers, streams, or wetlands. The Corps may require that a party proposing the project purchase credits from a mitigation bank or an in-lieu fee program in the same area to compensate for such impacts.

The mitigation bank is generally a wetland, stream, or other aquatic resource area that has been restored, established, enhanced, or (in certain circumstances) preserved for the purpose of providing compensation for unavoidable impacts to aquatic resources permitted under Section 404 of the Clean Water Act. The value of a bank is defined in compensation mitigation credits.

The bank’s instrument identifies the number of credits available for sale and an assessment is typically undertaken to certify that the credits provide the required ecological functions. Some banks operate as commercial enterprises selling their credits to permit applicants needing to provide required mitigation.

The Corps states that *RGL 19-01* was developed in collaboration with the United States Environmental Protection Agency and provides guidance to District Commanders on two issues relating to that authority:

- Credit release schedules for mitigation banks
- Consistency in establishing service areas for mitigation banks and in-lieu fee programs

An analysis is stated to have been undertaken of the implementation of a 2008 rule that had been promulgated addressing wetland mitigation banks. The Corps states that the analysis compared processing times for Corps permits between the use mitigation banks or in-lieu fee credits and permittee-responsible mitigation. It states that permit processing timeframes were reduced by approximately 50 percent with the use of mitigation bank or in-lieu credit.

The Corps states that it believes that *RGL 19-01* will:

- Facilitate the release of more credits available for sale to permittees shortly after successful construction of a mitigation bank
- Allow for additional credits for sale resulting in mitigation credits to be sold at a more competitive, fair and comparable price

As to service areas, RGL 19-01 is stated to clarify that:

. . . with each District, the Corps should ensure that the same criteria are used to establish similar service areas for mitigation banks and in-lieu fee programs.

A link to the news release can be found [here](#) and to RGL 19-01 [here](#).