

## Department of Defense Rules “A New Day For Mitigation”

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## Department of Defense Rules Presentation Outline

- Background/History
- Environmental Assessment
- Summary of Rules
- Timelines for Mitigation Bank Review
- Issues/Concerns

## History/Background of DoD Rules

- Federal Mitigation Bank Guidelines 1995
- HR 1330 (Congressman Walter Jones-NC)
- Findings of National Research Council Report of Mitigation (NAS, 2001)
- Mitigation Action Plan (EPA, Corps, NOAA, FWS, NRCS)
- GAO Report on In-Lieu Fees (2001)

## DoD Rules: HR 1588, 2003: Sec. 2649 (a)(b) Text

- (a): Authorize Army to use mitigation banks as a preference to on-site, creation on federal property;
- (b): “To ensure opportunities for Federal agencies participation in mitigation banking, the Secretary of the Army” ... “shall issue regulations establishing performance standards and criteria for the use ... of on-site, off-site, and in-lieu fee mitigation and mitigation banking”

## DoD Rules: HR 1588: Sec. 2649 (a)(b) Text: cont.

- (b), cont.: “To maximum extend practicable, the regulatory standards shall maximize available credits and opportunities for mitigation, provide flexibility for regional variations in wetland conditions”
- “apply equivalent standards and criteria for each type of compensatory mitigation”
- “Final regulations shall be issued not later than two years after the date of the enactment of this Act.”

## Environmental Assessment Data

- “Finding of No Significant Impact”
- Corps District Offices mitigation data (99-04):
  - approx. 21,000 acres of wetland impacts
  - approx. 45,000 acres of mitigation required
  - 51% IP’s, 19% IP’s, 22% All, require mitigation
  - 55% on-site PR, 18% off-site, 27% combined

## EA Mitigation Banking Data

- Types of Mitigation:
  - 60% Permittee Responsible
  - 33% Mitigation Banks
  - 7% In-Lieu Fees
- Performance Standards (1987 Manual Criteria): 95% Banks, 62% PR, 63% ILF
- Number of Banks: 305 Permitted, 149 Proposed, 59 Sold Out

## Summary of Mitigation Regulations (33 C.F.R. Part 332, March 28, 06)

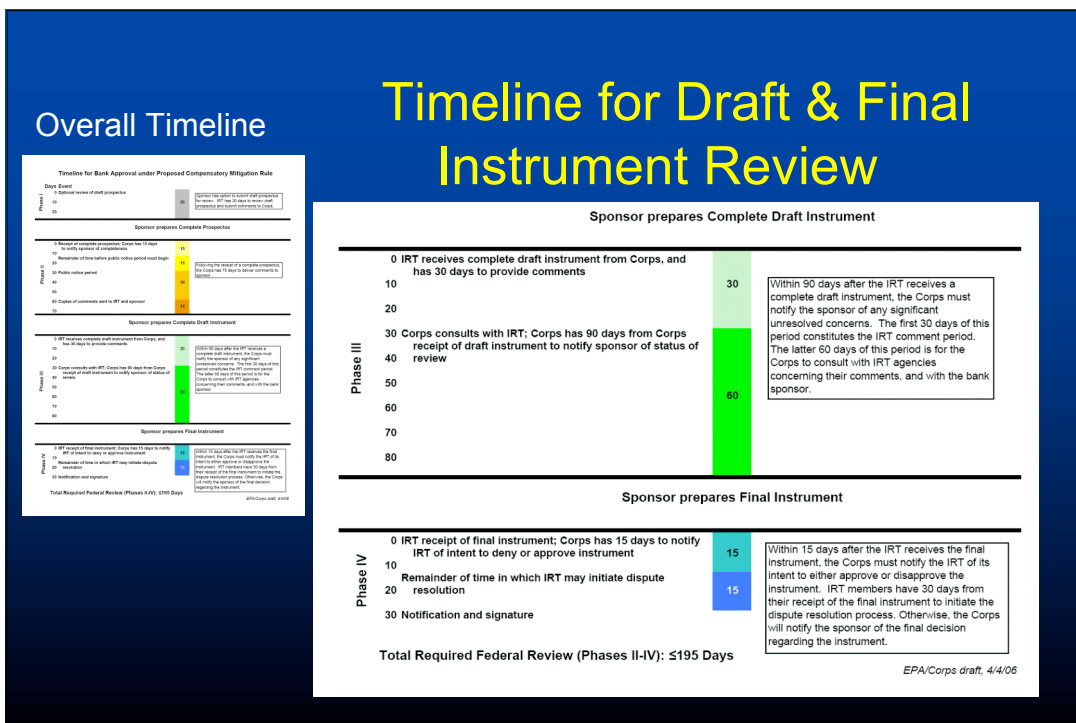
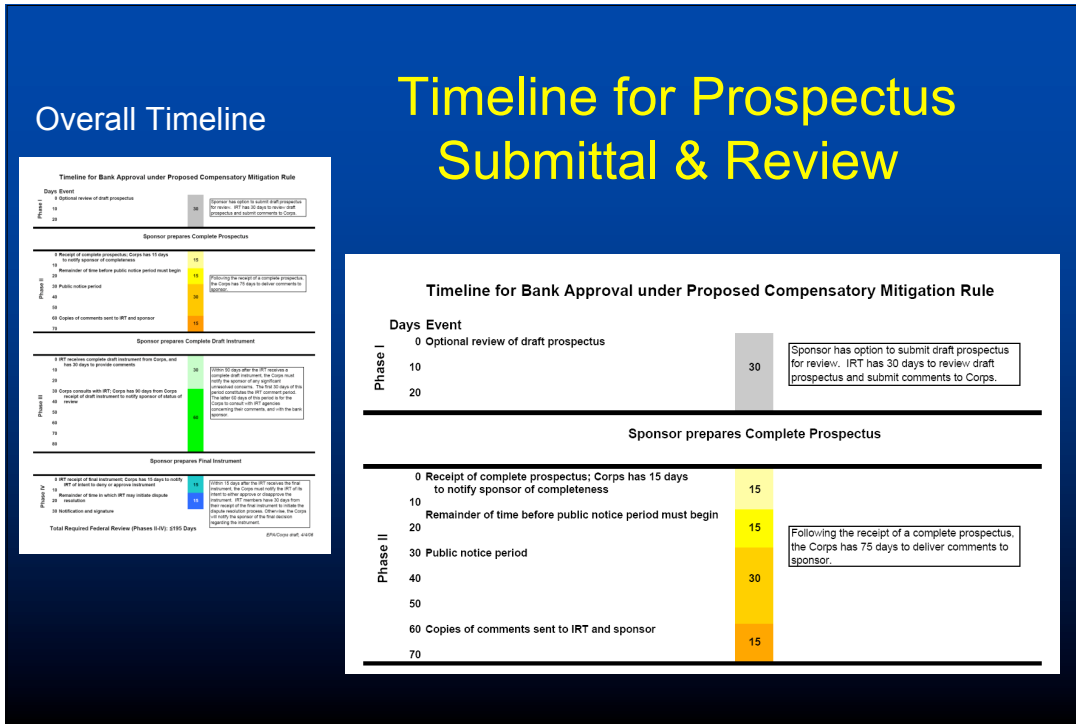
- General Provisions:
  - Watershed Approach: mitigation must be considered in a watershed context
  - Corps retain discretion for out-of-kind, vegetated buffers
  - No strict “on-site” preference [332.3(b)(4)]

## Summary of Regulations: cont.

- Standards Applicable for All Forms of Mitigation:
  - designate duties and enforceable relationship b/n Corps and mitigation provider
  - timing of mitigation (within first growing season)
  - specific mitigation plans with site, design, etc.
  - All plans must have performance standards, financial and legal assurances, monitoring and management

## Summary of Regulations: cont.

- Standards for Mitigation Bank:
  - Banks allowable on public and private lands
  - MBRT changes to “Interagency Review Team” (IRT)
  - Corps lead agency for bank review and approval
  - Timelines for bank review and dispute resolution mechanism
- In-Lieu Fees:
  - ILF phased out as of 90 days of final rule; or
  - Grandfathering of existing ILF if they meet banking and new mitigation requirements (e.g., site ID)



## Dispute Resolution Timeline

150 days total

Days	Event	
-20	Receipt of Final Instrument; District Engineer has 15 days to notify IRT of Intent to approve or deny	15
0	IRT member notifies District Engineer of objection	15
10	District Engineer response to IRT objection	30
20		
30		
40	IRT member elevates issue to IRT Agency Headquarters	15
50		
60	IRT Agency Headquarters requests Army Civil Works Headquarters for further review	20
70		
80	Army Civil Works HQ advises Corps District on final action, immediately notifying other IRT Agencies' HQ	30
90		
100		
110	Remainder of time allotted for District Engineer action	≥25
120		
130		

## Issues/Concerns

- Potential opposition from business/ environmental groups (e.g., ILF providers)
- Will rules lead to lower ratio's and more efficient permitting as promised?
- Will Corps really be able to enforce the Rules and new standards?
- Can banks demonstrate their superior ecological benefits and will there be enough credits available?
- Will the Corps be given sufficient resources to implement the Rules?
- How will the different Corps offices implement the Rules?

## Information Sources

- Copy of Rules:
  - [www.epa.gov](http://www.epa.gov);
  - [www.usace.army.mil](http://www.usace.army.mil)
- Comments (Due within 60 days of 3/28/06):
  - [www.regulations.gov](http://www.regulations.gov) (follow instructions)
  - [ow-docket@epamail.epa.gov](mailto:ow-docket@epamail.epa.gov)
- Experts:
  - David Olson, (202) 761-4922 [david.b.olson@usace.army.mil](mailto:david.b.olson@usace.army.mil)
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