

The State of Compensatory Mitigation



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Clean Water Act § 404 (b) (1)

- **Avoid, Minimize & Mitigate 404 (b) (1) Guidelines**
 - applicant must first show that steps have been taken to avoid impacts to waters of the United States (WOTUS);
 - that potential impacts have been minimized;
 - and that compensation will be provided for all remaining unavoidable impacts.
- **1989 President George H. W. Bush established the policy of “no-net loss of wetlands” – programmatic goal**
- **Agency interpretation expanded to “requirement” in every permit**

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2008 Compensatory Mitigation Rule (33 CFR PART 332)

- 2008, EPA and the U.S. Army Corps of Engineers expanded the 404(b)(1) Guidelines to include more comprehensive standards for compensatory mitigation
- Established new mitigation hierarchy
 - Off-site mitigation bank preference
 - In-lieu fee
 - On-site with some restrictions
- Shift from (1:1) quantified ratios to qualitative, replacing function and value in watershed

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Obama Administration Directives

Memorandum on Mitigating Impacts on Natural Resources From Development and Encouraging Related Private Investment, 80 Fed. Reg. 68743 (Nov. 3, 2015).

- Required all federal agencies to strengthen mitigation policies and support private investment in restoration. The goals included:
 - At a minimum, create a no net loss of land, water, wildlife and other ecological resources from federal actions or permitting
 - If a resource is irreplaceable, impacts should be avoided altogether
- Expanded “avoid, minimize, mitigate” – CWA concepts to land and species
- Created potential for significant expansion of “mitigation industry”
 - Credits
 - Banks
 - Trading

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Trump Administration and New Congress Signal Change

- Obama mitigation guidance revisited:
 - In February 2017, the House Committee on Natural Resources introduced H.R. Res. 60 to block USFW's compensatory mitigation policy
 - Trump March 28, 2017 EO "Promoting Energy Independence and Economic Growth" revoked Obama Mitigation Order
- March 29, 2017 Secretary Zinke signed Order 3349 "American Energy Independence" directing reexamination of the Department of the Interior's mitigation policies and practices

Trump Administration and New Congress Signal Change

- Extent of federal jurisdiction revisited:
 - Trump EO, Feb. 28, 2017, Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the “Waters of the United States” Rule
 - EPA and Corps announced intent to review and rescind the Clean Water Rule. 82 Fed. Reg. 12532 (Feb. 28, 2017)
 - Administrator Pruitt directs Scalia approach
- Administrator Pruitt encourages state-level regulation
 - NACEPT 2017 Report Assumable Waters

Questions?

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