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B-316445

May 16, 2008

The Honorable Barbara Boxer  
Chairman  
The Honorable James M. Inhofe  
Ranking Minority Member  
Committee on Environment and Public Works  
United States Senate

The Honorable Nick J. Rahall II  
Chairman  
The Honorable Don Young  
Ranking Minority Member  
Committee on Natural Resources  
House of Representatives

Subject: *Department of Defense, Department of the Army, Corps of Engineers, and Environmental Protection Agency: Compensatory Mitigation for Losses of Aquatic Resources*

Pursuant to section 801(a)(2)(A) of title 5, United States Code, this is our report on a major rule promulgated by the Department of Defense, Department of the Army, Corps of Engineers, and Environmental Protection Agency, entitled "Compensatory Mitigation for Losses of Aquatic Resources" (RIN: 0710-AA55). We received the rule on May 5, 2008. It was published in the *Federal Register* as a final rule on April 10, 2008. 73 Fed. Reg. 19,594. The rule has a stated effective date of June 9, 2008.

The final rule establishes performance standards and criteria for compensatory mitigation, mitigation banks, and in-lieu programs to improve the quantity and success of compensatory mitigation projects. Compensatory mitigation involves actions taken to offset unavoidable adverse impacts to wetlands, streams, and other aquatic resources. The rule is meant to improve the planning, implementation, and management of projects by emphasizing a watershed approach.

Enclosed is our assessment of the agencies' compliance with the procedural steps required by section 801(a)(1)(B)(i) through (iv) of title 5 with respect to the rule. Our review indicates that, except for compliance with the 60-day review provision, the agencies complied with the applicable requirements. Under the provisions of 5 U.S.C. § 801(a)(3), a major rule shall take effect 60 days after the latest date on

which Congress receives the rule or the rule is published in the *Federal Register*. Although this rule was published on April 10, 2008, 60 days prior to its effective date, it was not received in our office until May 5, 2008.

If you have any questions about this report or wish to contact GAO officials responsible for the evaluation work relating to the subject matter of the rule, please contact Michael R. Volpe, Assistant General Counsel, at (202) 512-8236.

signed

Robert J. Cramer  
Associate General Counsel

Enclosure

cc: David B. Olson  
U.S. Army Corps of Engineers  
Department of Defense

REPORT UNDER 5 U.S.C. § 801(a)(2)(A) ON A MAJOR RULE  
ISSUED BY THE  
DEPARTMENT OF DEFENSE, DEPARTMENT OF THE ARMY,  
CORPS OF ENGINEERS, AND  
ENVIRONMENTAL PROTECTION AGENCY  
ENTITLED  
"COMPENSATORY MITIGATION FOR LOSSES OF AQUATIC RESOURCES"  
(RIN: 0710-AA55)

(i) Cost-benefit analysis

The United States Army Corps of Engineers (USACE) and the Environmental Protection Agency (EPA) conducted a regulatory analysis of this final rule. The agencies determined that it was not possible to quantify the costs of the rule. Instead, they used a qualitative evaluation approach to describe potential incremental social costs of the rule and concluded that the added flexibility for permit applicants introduced by the rule should ensure that aggregate applicant mitigation costs are no higher than necessary to fulfill compensatory mitigation requirements.

(ii) Agency actions relevant to the Regulatory Flexibility Act, 5 U.S.C. §§ 603–605, 607, and 609

USACE and EPA determined that this rule will not have a significant impact on a substantial number of small entities.

(iii) Agency actions relevant to sections 202–205 of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. §§ 1532–1535

USACE and EPA determined that this rule does not contain a federal mandate that may result in expenditures of \$100 million or more for state, local, and tribal governments, or the private sector.

(iv) Other relevant information or requirements under acts and executive orders

Administrative Procedure Act, 5 U.S.C. §§ 551 et seq.

USACE and EPA promulgated this final rule using the notice and comment procedures found in the Administrative Procedure Act. 5 U.S.C. § 553. On March 28, 2006, USACE and EPA published a proposed rule. 71 Fed. Reg. 15,520. USACE and EPA received over 12,000 comments, including 850 distinct comments (and 11,150 substantially identical e-mails or letters), to the proposed rule. The agencies address these comments in this final rule. 73 Fed. Reg. 19,595–67.

Paperwork Reduction Act, 44 U.S.C. §§ 3501–3520

This rule will impose new information collection burdens which USACE and EPA will submit to the Office of Management and Budget (OMB) for review under the Act. The agencies will be modifying the existing standard permit application form in light of the new information collections. Applicants will be required to submit statements explaining how environmental impacts are to be minimized or avoided. Also, in-lieu fee program sponsors will be required to provide additional information on their applications. Finally, in-lieu fee programs and mitigation banks will be subject to annual reporting on monitoring requirements.

Statutory authorization for the rule

USACE and EPA promulgated this final rule under the authority of sections 404(b) and 501(a) of the Clean Water Act of 1977 (33 U.S.C. §§ 1344(b), 1361(a)).

Executive Order No. 12,866

USACE and EPA determined that this rule is significant, although not economically significant, under the Order and prepared the economic analysis required by the Order.

Executive Order No. 13,132 (Federalism)

USACE and EPA determined that this rule will not have a significant impact on a substantial number of small entities.