

Reference: RGL 85-08

Subject: MITIGATION

Title: IMPLEMENTATION OF FISH & WILDLIFE MITIGATION IN THE CORPS OF ENGINEERS REGULATORY PROGRAM

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Originator: DAEN-CWO-N

**Description: PROVIDES POLICY FOR FULL CONSIDERATION OF USFWS
MITIGATION RECOMMENDATIONS.**

1. Purpose: This document clarifies existing statutory and regulatory standards in the Corps of Engineers (Corps) regulatory program and clarifies the role of the Department of the Interior, acting through the Fish and Wildlife Service (Service), in establishing fish and wildlife mitigation for projects proposed to be authorized by permit. The document brings together existing guidance for implementation of fish and wildlife mitigation within the program. The objective is to improve interagency and intra-agency understanding of administration of the present program regarding mitigation.

2. Definitions:

Mitigation: Mitigation is defined in the Council on Environmental Quality's REGULATIONS FOR IMPLEMENTING THE PROCEDURAL PROVISIONS OF THE NATIONAL ENVIRONMENTAL POLICY ACT (40 CFR 1508.20). These regulations describe five elements which may be considered to develop justifiable measures to avoid, minimize, rectify, reduce, and compensate for project-induced losses.

3. Policy:

a. The Service's comments and fish and wildlife mitigation recommendations on projects proposed to be authorized by permit are to be given full consideration, as appropriate throughout the permit application process, and in making public interest review determinations (16 U.S.C. 661(b)).

b. The five elements of mitigation (see paragraph 2) are to be considered by the district engineer as described in section 4 of this document in determining fish and wildlife mitigation necessary for his public interest review determinations.

c. The district engineer is required to give full consideration to the Service-recommended mitigation measures. If he does not, it constitutes insufficient coordination at the district

level and may result in a request for elevation by the Department of the Interior. To minimize the potential for elevation, the district engineer will work cooperatively with the Service field supervisor to ensure that mitigation is considered in a timely and efficient manner.

4. Clarification of Mitigation Process

a. Fish and Wildlife Mitigation: Within the public interest review determination, it is necessary to consider justifiable fish and wildlife mitigation, as recommended by the Service, under the Fish and Wildlife Coordination Act. The comments of the Service are to be fully considered in developing a description of fish and wildlife resource losses. The district engineer is to coordinate with the Service's field office supervisor when questions arise so that the intended flexibility of the mitigation determination process is not compromised. In the public interest determination and in applying 33 CFR 325.4, the district engineer will be guided by the following measures in deciding mitigation requirements.

(1) Measures which would avoid losses to fish and wildlife resources. The permit should be conditioned to include such justifiable loss avoidance measures.

(2) Measures to minimize impacts by limiting the degree or magnitude of the action and its implementation. In such instances, the permit should be conditioned to include such justifiable measures.

(3) Measures which rectify the impacts to fish and wildlife by repairing, rehabilitating, or restoring the affected environment. In such instances, the permit should be conditioned to include such justifiable measures.

(4) Measures which may reduce or eliminate impacts of fish and wildlife resources by preservation and maintenance operations during the life of the action. In such instances, the permit should be conditioned to include such justifiable measures.

(5) Measures to compensate for fish and wildlife losses which remain when the measures outlined above have been applied. In developing justifiable compensation measures, the district engineer shall:

(a) Determine the quality and quantity of the environment impacted;

(b) Consider appropriate on- and off-site areas for mitigation activities;

(c) Mitigation with appropriate States and Federal Wildlife agencies, ??how much of that habitat, if any, should be acquired, improved, and/or managed; and

(d) condition the permit with appropriate justifiable compensation.

b. If the district engineer determines that the mitigation is necessary to insure the proposal will not be contrary to the public interest, but such mitigation would not be reasonably implement-able or enforceable, he will deny the permit (33 CPR 325.4(c)).

c. District engineer decision regarding mitigation requirements should be documented in the Statement of Findings or Record of Decision as follows:

(1) To the maximum extent practicable, the district engineer should describe how any mitigation measures he has required are expected to reduce adverse project impacts and/or compensate for damaged or lost resources.

(2) The district engineer may decide--after giving full consideration to the resource agency views--that he will require less or different mitigation than that recommended by the resource agency. In such cases, he will document the basis for this decision. This documentation will include:

(a) Relevant supporting data.

(b) Discussion of how the favorable public interest determination has been made with less or different mitigation than that recommended by the resource agency.

(c) A description of how the selected mitigation measures would reduce adverse project impacts or compensate for resource damage.

(3) To the maximum extent practicable, the district engineer shall use and incorporate, by reference, existing documentation prepared for compliance with NEPA, 404(h)(1) guidelines, and/or the public interest review.

5. Expiration:

FOR THE CHIEF OF ENGINEERS: