

US EPA ARCHIVE DOCUMENT

CWA §404 Mitigation Rule and CWA §401 Water Quality Certification

EPA Clean Water Act Tribal Workshop
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Mitigation Rule Outline

- Background
- Types of Mitigation
- Mitigation Considerations
- Mitigation Plan Requirements



Mitigation Rule Background

- Published in Federal Register 4/10/08
 - §332.1-9(Corps)/§230.91-99(EPA)
- It doesn't change mitigation sequence: avoid, minimize, compensate
- Replaces previous 404 mitigation guidance

Mitigation Rule Background

- Watershed focus
- Establishes minimum requirements for all mitigation plans
- Mitigation “statement” required for issuance of Corps Public Notice

Compensatory Mitigation

Action taken to replace aquatic resources lost to authorized and unavoidable impacts

“No Net Loss”



Mitigation Activities

Establishment:

creation of new a
new aquatic
resource

Restoration:

returning natural
functions to a
degraded aquatic
resource



Santa Monica Mountains Conservancy native plant restoration along riparian corridors

Mitigation Activities

Enhancement:

improvement of a specific aquatic resource function

Preservation:

protection and maintenance of an existing aquatic resource



Santa Ana River Mitigation Bank

Types of Mitigation

Permittee Responsible (PRM)

Third Party

- Mitigation Banks
- In-Lieu Fee (ILF)



Third Party Mitigation

Mitigation Banks:

- Initiated in advance of impacts
 - Credit release tied to performance
- Most sponsored by entrepreneurs

In-Lieu Fee programs:

- Initiated after impacts
- Most sponsored by government or non-profits

Compensation Hierarchy

1. Credits from a mitigation bank
2. Credits from an in-lieu fee program
3. PRM using a watershed approach
4. PRM on-site
5. PRM off-site

Mitigation Considerations

- Preference for in kind
- Watershed approach: with or without formal watershed plan
- Minimum 1:1 compensation
- Preservation: under certain circumstances
- Upland Buffers

Mitigation Plans

1. Project objectives
2. Site selection factors
3. Site protection instrument
4. Baseline information (at impact site and compensation site)
5. Credit determination methodology
6. Work plan
7. Maintenance plan
8. Performance standards
9. Monitoring requirements
10. Long-term management plan
11. Adaptive management plan
12. Financial assurances

Mitigation Rule Review

- Doesn't change when compensatory mitigation is required, addresses the where and how
- Focus on Watershed Approach
- Establishes a preference for banks & ILF
- Sets required information for all mitigation plans

CWA 401 Outline

- What is a 401 cert and when is it required
- Basic 401 Process
- EPA Application requirements
- Evaluation Process
- 401 certs and 404 permits



401 Certification

Clean Water Act (CWA) § 401 says:

- No federal permit or license can be issued that may result in a discharge to waters of the United States

Unless

- The EPA/Tribe/State certifies that the discharge is consistent with standards and other water quality goals, or waives certification

- No 401 cert or waiver means no federal permit or license

401 Certification: Protecting Water Quality

- Provides for the protection of the physical, chemical, and biological integrity of waters
- Allows EPA/Tribes/States to address impacts to water quality from federal permits
- Helps insure that federal actions will not violate Tribe/State water quality standards

Who Issues 401 Certs?

- EPA regional offices on behalf of tribes not yet authorized
- Indian tribes authorized to administer the Water Quality Standards (WQS) program
- All States where the discharge originates

Authorized Tribes in Region 9

- EPA, Region 9 issues the 401 cert on behalf of other tribes in AZ, CA, and NV

Arizona:

- Navajo Nation, Hualapai Nation, Hopi Tribe, and White Mountain Apache Tribe

California:

- Hoopa Valley Tribe, Bishop Paiute Tribe, Big Pine Paiute Tribe, Twenty-Nine Palms Band

Basic 401 Process

- Applicant applies to the EPA/Tribe/State for certification
- EPA/Tribe/State reviews
 - Public Notice
 - Public Hearing possible
- Applicant provides 401 cert to federal permit/licensing agency

What does EPA require in a 401 application?

- Contact information
- Tribal contact information (for non-tribal applicants)
- Description of proposed activity
- List of other permits needed
- Purpose and need statement
- Location of watercourse
- Vicinity Maps

What does EPA require in a 401 application?

- Scale plan-view and cross section diagrams of the pre-project and pos-project conditions
- Estimated acreage of impacted waters
- Source and quantity of fill material
- Description of impacts
- Any proposed mitigation
- 404 (b)(1) Alternatives Analysis for 404 related cert applications

Timeframes for Review

- EPA:
 - CWA provides up to one year
 - Usually complete within 60 days
 - For 404 permits Corps assumes waiver if no action after 60 days

- Tribes/States may have different timeframes

What Must Be Determined?

EPA/Tribe/State must conclude that the permitted activity will be consistent with:

- Effluent limitations for pollutants
- Water quality standards
- Toxic pollutant limitations

PLUS

- Any more stringent tribal/state requirements
(e.g. effects on cultural laws or non-federal waters)

What can the EPA/Tribe/State do under a 401 cert?

- Grant Certification
- Grant Certification with Conditions
- Deny Certification
- Waive Certification

Typical Conditions

- Construction stormwater management
- Post-construction stormwater treatment
- Vegetated buffers around waters
- Erosion control measures
- Seasonal constraints
- Restoration of disturbed areas
- Mitigation of permanent impacts

404 Permits

Most 401 certs are tied to a 404 permit

- Individual 404 Permits
 - Follow application process outlined above
- 404 Nationwide Permits
 - EPA, Region 9 has programmatically certified the NWPs for tribal lands.
 - Need to contact the Tribe for the 7 authorized tribes

401 Certification: Review

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401 Certification: Review

- No 401 cert or waiver means no federal permit or license
- If you do not meet the conditions of the 401 cert, then you are not in compliance with the permit

Send 401 Applications To:

USEPA, Region 9
Wetlands Office (WTR-8)
75 Hawthorne St
San Francisco, CA 94105

* For authorized tribes, contact the tribe directly



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