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Federal Government Adopts Significant, New Rule for Mitigating Impacts to Nation's Waters

On March 31, the U.S. EPA and the Army Corps of Engineers released for public comment the final compensatory mitigation rule which applies to the Section 404 regulatory program. The final rule, which is over 230 pages long including the preamble, will be published in the Federal Register soon and will become effective 60 days thereafter. The rule is a significant development and establishes greater accountability and new standards against which all future compensatory mitigation projects will be measured. <http://www.epa.gov/wetlandsmitigation>.

According to EPA's Assistant Administrator for Water, Benjamin Grumbles, "the new standards will accelerate our wetlands conservation efforts under the Clean Water Act by establishing more effective, more consistent, and more innovative mitigation practices."

The Clean Water Act prohibits the discharge of dredge and fill materials to waters of the United States without a federal permit. Projects that result in unavoidable impacts to aquatic resources, such as wetlands and streams, will generally be required to offset such impacts through compensatory mitigation. While environmental groups have criticized the rule for encouraging the destruction of wetlands by making mitigation easier, the rule adopts many of the 2001 recom-

mendations by the National Research Council for ways to improve the planning, implementation, and management of wetland mitigation projects. The rule does a number of important things, including:

- retains and affirms the mitigation sequencing of avoidance, minimization, and mitigation;
- applies to impacts for both individual and general permits;
- adopts a watershed-based approach to locating mitigation projects;
- establishes a hierarchy of mitigation options, promoting the use of approved wetland mitigation banks over other options, such as in-lieu fee and permit-tee-responsible mitigation;
- requires monitoring, adaptive management, and ecological performance standards to ensure ultimate success;
- provides certain flexibility for multi-phased and linear projects, such as pipelines, transportation, and utility infrastructure;
- applies to streams, although mitigation is limited to in-kind rehabilitation, enhancement or preservation;
- clarifies the use of riparian buffers for mitigation credits;

- requires public notice for standard permits of how impacts will be avoided, minimized and compensated for; and
- requires mitigation to replace the lost aquatic resource functions, with a minimum of one-to-one replacement ratio.

The rule is long and complex, and the applicability and scope of its

requirements to projects will be highly site-specific. The rule also promotes the development of other ecologically-based services, including the sale of credits for other purposes such as water quality trading to offset regulatory requirements under Section 402 of the CWA. However, to assess the viability of mitigation-related credits for non-404 regulatory programs will require greater

planning and coordination with the regulatory agencies.

Hunton & Williams' Environmental practice professionals have extensive experience providing guidance to clients regarding all aspects of the federal Clean Water Act. If you have questions about the US Army Corps of Engineers' and the US EPA's new rule, or any other environmental issues, please contact us.

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