

Recent GAO Study on Compensatory Mitigation

Questions and Answers

GAO Study

1. Dennis Durbin, FHA: (To McDonald) The GAO report didn't look at the ecological performance of the mitigation sites; instead focusing on whether the Corps is following their requirements (e.g. monitoring reports, compliance checks)?
 - Sherry McDonald, GAO: Looked at what is the Corps is required to do to determine if the mitigation that they have required is being conducted. Very strictly, what is the Corps doing.
 - Bob Brumbaugh, Corps: The Corps and other agencies are cuing off the NRC report, and trying to develop written performance standards that are enforceable and that mean something ecologically. MAP is also part of this; one MAP action item is to develop guidance on performance standards. The Corps effort started before MAP to gather the same information and the other agencies have been helpful.

2. George Howard, Restoration Systems: Concern with the GAO data is that the banking industry may be misinterpreted by the inclusion of the outlier banks in the report that are not reflective of the industry (e.g. St. Paul and New Orleans districts).
 - Bob Brumbaugh, Corps: Many of the banks in MN are overseen by local governmental units as part of a simplification agreement between the Corps and MN.
 - Doug Norris, MN DNR: There are a few locally run banks, but they are probably 100 commercial banks in MN.
 - Jessica Wilkinson, ELI: Minnesota has a state umbrella program, and these banks are treated a little differently.
 - Doug Norris, MN DNR: The Corps relied heavily on the state certification and review of those banks.
 - Bob Brumbaugh, Corps: Basically overseen by the local governments.
 - George Howard, Restoration Systems: Did these throw the numbers off in the GAO study, because in MN only 4 of 23 required monitoring reports.
 - Sherry McDonald, GAO: That is why they also did the individual statistics for each district to see where things are coming from. But, these are mitigation banks and are subject to the same requirements.
 - Bob Brumbaugh, Corps: The corps is responsible for these by allowing mitigation on those sites.
 - George Howard, Restoration Systems: But in the future there should be another category in these reports for private, for profit, professionally managed mitigation banks so they don't throw the numbers off.
 - Bob Brumbaugh, Corps: New studies now lump these outlier banks under umbrella banks. It is good to identify the type of bank because there is a lot of variation out there.

- Jessica Wilkinson, ELI: In ELI's new mitigation program the old mitigation sites that were previously classified as ILFs in 2000 are now classified as something else in 2005.
- Kelly Burks-Copes, Corps: One of the first focus sites for RIBITS is St. Paul and the banking issues so may have a better handle on this in one year.

Compliance Site Visits

3. Peggy Strand, Venable LLP: (To McDonald) When GAO talks about compliance site visits does this mean something specific (i.e. is there something in particular that you are characterizing as a compliance site visit as opposed to something else)?
 - Sherry McDonald, GAO: GAO was looking at field visits; for example where the Corps was going out to see if mitigation that was occurring was complying with what was required under the permit/banking instrument/ILF agreement.
 - Strand Response: (To Brumbaugh) Will there be a template (or something) for a compliance site visit in the new regulations.
 - Bob Brumbaugh, Corps: Some districts probably have something like that.
 - Steve Martin, Corps: In the Norfolk district tracking system there is a data point for compliance site visit (mitigation good/mitigation not good), which may be very general but it is a tracker.
 - Bob Brumbaugh, Corps: RAMS does track this now (but it is not very useful). The new database will track this information.
 - Strand Response: There is a concern that these compliance site visits may duplicate other site visits. For example, under the proposed rule if there is a request for credit release it is sent to other agencies for a 15 data review and the possibility of a site visit. But, concern that there will be duplicate requirements for site visits that might not dovetail (e.g. visits associated with credit releases and visits associated with compliance).
 - Bob Brumbaugh, Corps: Should be something in ORM that indicates how the mitigation has been taken care of, so if the mitigation was done at a bank, then there should be an indication that responsibility has been transferred to the bank.
 - Kelly Burks-Copes, Corps: Also, in RIBITS there is a credit release schedule which indicates whether or not the credits released and if not why, and will also include all documentation associated with credit release. And this information will be linked to the other databases (ORM). ORM will handle off-site mitigation, which is not handled by RIBITS, probably in much the same way.

4. Dan Spethmann, Temple-Inland: Will this new responsibility for site compliance be included in the project managers' performance reviews?
 - Steve Martin, Corps: It has been included in individual performance standards. Corps districts are now held accountable for review,

- compliance inspections of certain numbers of banks, individual permits, and mitigation sites. This started in FY06 in the Norfolk district.
- Dennis Durbin, FHA: Some districts have own enforcement branch dedicated to compliance and enforcement issues.
 - Sherry McDonald, GAO: Depends on the district.
5. Dan Spethmann, Temple-Inland: Do you anticipate there will be increased funding associated with increase workload?
- Bob Brumbaugh, Corps: In discussion with OMB, they have tied the work load to the level of funding they will receive based on different targets.
 - Sherry McDonald, GAO: GAO also found that some districts on own were taking actions to improve compliance. For example, Jacksonville had almost tripled the number of compliance inspections since 2003.
6. Dan Spethmann, Temple-Inland: Can we talk to congress about requiring funding to go along with the rule.
- Bob Brumbaugh, Corps: In the EA that is associated with the rule, the cost analysis say that in the short term this will require lots of funds, but in the long term there are efficiencies and time spent will come down especially as more banks take over and there are fewer compliances.

Compliance Site Visit Targets

7. Dennis Durbin, FHA: (To Brumbaugh) How do you determine what you will base the 20% review on? Where do you start (what year etc)?
- Bob Brumbaugh, Corps: These considerations are being weighed in, in terms of the reality and the context for these sites.
8. Bob Brumbaugh, Corps (to Steve Martin, response to Durbin question): In your district, what are the bases, time periods, constraints, assumptions used to select sites for compliance inspection?
- Steve Martin, Corps: The decisions are subjective in nature and vary with staff person, but generally look at large, high visibility sites, sites that have low probability of success, (e.g. creations sites, sites that are difficult to restore or create, sites with a focus on difficult to restore or difficult to create systems)
 - Ellen Gilinsky, VA DEQ: Again, need to factor in states that have their own permit programs because also have state permits on the same properties. So try to coordinate inspections to increase the coverage. In VA tries to inspect sites at least once during construction to make sure they haven't exceeded impacts, and also inspect mitigation sites, and also look at all banks on a rotating basis. So it is a good idea to coordinate state and federal efforts.
 - Bob Brumbaugh, Corps: In the past, the Corps has interacted well with other agencies (e.g. state agencies or feds (NRCS, FWS)) has

- been a lot of teamwork for site visits (especially in areas that are difficult to get to).
- Dennis Durbin, FHA: Could also do a compliance inspection with no site visit, just by sending a letter if a required document is not submitted.
 - Ellen Gilinsky, VA DEQ: VA does that at the state level.
 - Sherry McDonald, GAO: The problem is that many of the districts don't have tracking system to let them know when monitoring reports are due.
9. Jeanne Hanson, NMFS: In Alaska, compliance issues are constrained by a huge geographical area and a short growing season, so funding is a huge issue. Suggest that there should be some sort of formalized way for different agencies who are going out to sites to work together.
10. Jan Goldman-Carter, NWF/CWN Wetlands Group: The performance measures that will require compliance inspections are they just on the ground in Norfolk or are they on the ground nationwide.
- Bob Brumbaugh, Corps: All districts will have the same targets, but how they will be implemented in terms of deciding which sites to inspect will vary with districts. HQ will work with the districts
 - Jan Goldman-Carter, NWF/CWN Wetlands Group: Does this performance measures piece put it above the line in terms of hierarchy of work, will the line be changed?
 - Sherry McDonald, GAO: They are moving the line.
 - Bob Brumbaugh, Corps: yes, this is paramount concern.
11. Royal Gardner, Stetson University: Under the Clean Water Act section 402 program, if there is a violation of a permit condition a citizen suit can be brought. There is no similar program in 404, so what role do individuals/citizens play in this process (i.e. could individuals at least identify mitigation sites of concern)?
- Bob Brumbaugh, Corps: The public will have access to the information associated with mitigation online, including monitoring reports etc.
 - Steve Martin, Corps: On a district basis they rely on information from public. Most of their reports of unauthorized activities or noncompliance come from the public. So that is a role, although it may not be formalized, they rely on it.
 - Bob Brumbaugh, Corps: The same is true for mitigation and mitigation bank sites.
 - Sherry McDonald, GAO: The compliance officers in the districts that the GAO looked at echo Steve Martin's point; the public provides many of their leads.
 - Gardner Response: So for the 25% of sites that will be visited for compliance, will this type of public input influence which of sites are visited?
 - Bob Brumbaugh, Corps: That is possible. The intent is to statistically cover so many sites over a give time period, but the way that these are

targeted can be changed. One problem with reviewing permits is file management. Often times, for some permits project managers have information in their head or it is not all in one place, which makes it hard to do file review. The new database will have all the electronic information in one place, especially monitoring reports, and allow the files to be managed.

Enforcement

12. Mike Rolband, Wetlands Studies and Solutions, Inc.: (To sherry) Did you indicate that negotiating a violation of a permit condition is not as preferable as enforcement action?
 - Sherry McDonald, GAO: NO, but, in their study she found that the while the Corps has a number of enforcement options available, they typically use negotiation first, which works really well and seems to resolve most of the violations. The GAO was not making any judgments on this tactic; instead the intent was to show what the Corps is doing.
 - Rolband response: Concern that in some areas enforcement looks better to some agencies, but in his experience it costs more energy and time.
 - Sherry McDonald, GAO: Yes, project managers say that enforcement actions often take more time and effort, and so they use negotiation first and then move forward with enforcement if need be.

13. Jan Goldman-Carter, NWF/CWN Wetlands Group: Monitoring reports are crucial to enforcement, and given the constraints on enforcement, wouldn't it make sense to have monitoring reports be a condition of the permit, and require that immediate notice goes out upon non-compliance which includes a reflexive penalty. This wouldn't require a lot of enforcement resources.
 - Steve Martin, Corps: Typically a requirement of a monitoring report is associated with a permit associated with permittee responsible mitigation. It is either specified in permit or by referencing the approved mitigation plan.
 - Goldman-Carter Response: But this requirement it seems gets ignored a lot.
 - Jessica Wilkinson, ELI: Doesn't the rule require monitoring reports as a special condition of a permit?
 - Bob Brumbaugh, Corps: Yes, but it doesn't give the process and no penalty for violation.
 - Joanne Barry, Corps: A lot of this will be addressed in the new database, which will give automatic flags to mitigation that is coming up on monitoring due date.
 - Bob Brumbaugh, Corps: A number of ways to get at this problem, including transparency of data which will yield force from without in addition to pressure from within.
 - Goldman-Carter Response: Should emphasizing the monitoring reports (not the inspections), should be some way to make sure reports are in.

- Bob Brumbaugh, Corps: (to Barry) How do you deal with reports when they are late?
 - Joanne Barry, Corps: This is a huge issue. The corps will send letters to those not in compliance, but it gets to be huge work issue (used students in the summertime, administrative help). Adding permit compliance inspections, in addition to the fact that project managers have to do so many numbers of inspections and reviews with in a certain time period. This should be hopefully addressed by new data tracking system, because when you don't have good data management things are very difficult.
14. Jeanne Hanson, NMFS: When there is a notice of violation a mitigation provider may rely on the fact that there may not be enough funding for a compliance visit and may not be the funds for second visit to see if modifications were made, and then might just wait for another notice of violation. Suggest that there needs to be something in between an expense and time consuming enforcement case and just a letter of non-compliance. There should be some sort of penalty that the Corps can enforce.
15. Ann Redmond, WilsonMiller, Inc.: Suggest that enforcement attorneys be involved in the process of writing permit conditions for performance and monitoring so that judges can understand what they are supposed to enforce.
16. Jennifer McCarthy, USDA NRCS: Mitigation rule is separate from the set of existing enforcement regulations (326). Not really supposed to be looking at enforcement as part of the proposed rule. There are tools for dealing with non-compliance with permit conditions. What some districts are using administrative penalties, which maybe aren't used as effectively as they could, but they are possibilities for enforcement.

MBRT/IRT Academy

17. Dan Spethmann, Temple-Inland: Is the concept of an academy beyond the conceptual stage? Will that be a reality?
- Palmer Hough, EPA: EPA has a conceptual proposal from NOAA, FWS, ELI, The Conservation Fund, and others on what it would cost to develop design and implement a pilot, 1-week MBRT academy. Looking at ways to fund that pilot and if it works there will be seats for federal and state regulators.
 - Dan Spethmann, Temple-Inland: super idea