



SPECIAL PUBLIC NOTICE

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COMPENSATORY MITIGATION THRESHOLDS UPDATE FOR THE NEW ENGLAND DISTRICT REGULATORY DIVISION

SUBJECT:

This notice informs the public of modifications to the New England District Compensatory Mitigation Standard Operating Procedures (“SOP”) “Appendix O – Thresholds” for losses of aquatic resources associated with Department of the Army (“DA”) permits in New England.

BACKGROUND:

The New England District (“District”) has periodically revised and updated its Compensatory Mitigation SOP. One of the overall goals of the SOP is to ensure consistent compensatory mitigation practices across the New England states and align with national policies. Appendix O – Thresholds, was finalized in the SOP on December 29, 2020. Since then, it has provided stakeholders and project managers guidance on implementing compensatory mitigation requirements. This modification to the SOP will provide transparency across all of District’s area of responsibility to ensure consistent compensatory mitigation threshold requirements.

ACTION:

Enclosed you will find the updated Appendix O – Thresholds, which will be included in the SOP as of the date of this Public Notice. Aquatic resource thresholds have been clarified to ensure that aquatic resource functions are adequately replaced.

The following updates are included for transparency and represent the District’s current practice:

- Adverse impact is defined and is consistent with the national definition in the 2021 Nationwide Permits.
- Wetland adverse impacts greater than 5,000 square feet will require compensatory mitigation.
- Submerged Aquatic Vegetation adverse impacts in tidal waters greater than 25 square feet will require compensatory mitigation.

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- When addressing adverse impacts to multiple aquatic resources, if compensatory mitigation is required for one aquatic resource, then compensatory mitigation will be required for adverse impacts to all aquatic resources.

PURPOSE:

The purpose of providing these thresholds is to provide transparency for stakeholders with predictable and consistent compensatory mitigation requirements, while also ensuring aquatic resource functional losses are adequately replaced. Furthermore, this action will continue to ensure impacts authorized under the District's General Permits remain no more than minimal, both individually and cumulatively. The District will continue to evaluate projects on a case-by-case basis and may, in some cases, require compensatory mitigation below these thresholds.

Thank you for your interested in the USACE Regulatory Program.



Tammy R. Turley
Chief, Regulatory Division

Please contact Ms. Tina Chaisson at bettina.m.chaisson@usace.army.mil or (978) 318-8058 if you would like to be removed from our public notice mailing list.

APPENDIX O - THRESHOLDS

The basic objective of compensatory mitigation in the USACE Regulatory Program is to ensure unavoidable aquatic resource functional losses are adequately replaced.

Compensatory mitigation may be required in the following instances:

- For resource losses that are specifically identifiable, reasonably likely to occur, and of importance to the human or aquatic environment.
- To ensure that the authorized activity is not contrary to the Public Interest.
- To ensure compliance with the Section 404(b)(1) Guidelines.
- To ensure an activity does not have significant effects on the human environment.
- To ensure that the project will not result in more than minimal impacts to the environment.

The intent by establishing these thresholds is to provide transparency for stakeholders with predictable and consistent compensatory mitigation requirements, while also ensuring ongoing losses of the nation's aquatic resources are adequately replaced. This action will also ensure that impacts authorized under the USACE New England District's General Permits remain no more than minimal, both individually and cumulatively. These thresholds will be the starting point for developing appropriate compensatory mitigation. The District will continue to evaluate projects on a case-by-case basis and may in some cases require compensatory mitigation below these thresholds.

Compensatory mitigation will be required when adverse impacts exceed the thresholds listed in the table below. An adverse impact is the loss of an aquatic resource that is permanently adversely affected by filling, flooding, excavation, or drainage because of the regulated activity. Adverse effects include the permanent discharges of dredged or fill material that can change an aquatic area to dry land, increase the bottom elevation of a waterbody, or change the use of a waterbody.

Deviations from the established thresholds will be coordinated with the Division Mitigation Program Manager prior to approval. Compensatory mitigation may be required for impacts that do not exceed the thresholds, e.g., minor impacts that add to a cumulative loss. Additionally, compensatory mitigation is not a substitute for avoidance and minimization.

While the mitigation thresholds can be utilized to determine at what point compensatory mitigation may be required, they are not used to determine the amount of mitigation that may be needed to offset impacts to resources. According to the 2008 Mitigation Rule (33 CFR 332.3(f)(1)), “the amount of required compensatory mitigation must be, to the extent practicable, sufficient to replace lost aquatic resource functions. In cases where appropriate functional or condition assessment methods or other suitable metrics are available, these methods should be used where practicable to determine how much compensatory mitigation is required. If a functional or condition assessment or other suitable metric is **not** used, a minimum one-to-one acreage or linear foot compensation ratios must be used.”

The following activities in waters of the United States associated with the restoration, enhancement, and establishment of tidal and non-tidal wetlands and riparian areas, the restoration and enhancement of non-tidal streams and other non-tidal open waters, and the rehabilitation or enhancement of tidal streams, tidal wetlands, and tidal open waters are not considered a loss of aquatic resource function and are not subject to resource thresholds, **provided those activities result in net increases in aquatic resource functions.**

- The removal of accumulated sediments; releases of sediment from reservoirs to maintain sediment transport continuity to restore downstream habitats.
- The installation, removal, and maintenance of small water control structures, dikes, and berms, as well as discharges of dredged or fill material to restore appropriate stream channel configurations after small water control structures, dikes, and berms are removed.
- The installation of current deflectors; the enhancement, rehabilitation, or reestablishment of riffle and pool stream structure; the placement of in-stream habitat structures; modifications of the stream bed and/or banks to enhance, rehabilitate, or reestablish stream meanders.
- The removal of stream barriers, such as undersized culverts, fords, and grade control structures; the backfilling of artificial channels.
- The removal of existing drainage structures, such as drain tiles, and the filling, blocking, or reshaping of drainage ditches to restore wetland hydrology; the installation of structures or fills necessary to restore or enhance wetland or stream hydrology.
- The construction of small nesting islands; the construction of open water areas; the construction of oyster habitat over unvegetated bottom in tidal waters; shellfish seeding.
- Activities needed to reestablish vegetation, including plowing or discing for seed bed preparation and the planting of appropriate wetland species; reestablishment

of submerged aquatic vegetation in areas where those plant communities previously existed.

- Re-establishment of tidal wetlands in tidal waters where those wetlands previously existed; mechanized land clearing to remove non-native invasive, exotic, or nuisance vegetation; and other related activities.

Impacts to Multiple Aquatic Resources:

When addressing adverse impacts to multiple aquatic resources, if compensatory mitigation is required for one aquatic resource, then compensatory mitigation will be required for adverse impacts to all aquatic resources.

Additional Information:

The thresholds below were developed by analyzing data available from the USACE Districts along the eastern and Gulf of Mexico seaboard and the 2021 Nationwide Permits. The 2021 Nationwide Permits set the thresholds for mitigating wetland impacts to 0.10 acre or 4,356.00 square feet and 0.03 of an acre for streams. In addition, some Districts cited that compensatory mitigation outside of the 2021 Nationwide Permit thresholds will be evaluated on a case-by-case scenario. The intent of this brief study was to identify the USACE coastal Districts that are tasked with similar challenges in an effort to capture consistency throughout USACE programs, and ultimately create consistency throughout the New England District.

For more info on the 2021 Nationwide Permits please visit the below website:

<https://www.usace.army.mil/Missions/Civil-Works/Regulatory-Program-and-Permits/Nationwide-Permits/>

The table below lists the resource types and the threshold square footage.

Resource ¹	Non-Tidal	Tidal
Stream ²	200 Linear Feet	200 Linear Feet
Other Open Waters ³	Project Dependent	Project Dependent
Wetland	5000 Square Feet	500 Square Feet
Vernal Pool ⁴	All	N/A
SAV	Project Dependent	25 Square Feet
Mudflat	N/A	1000 Square Feet
Intertidal ⁵	N/A	1000 Square Feet

¹ Loss of aquatic resource that is permanently adversely affected by filling, flooding, excavation, or drainage caused by the regulated activity. Adverse effects include permanent discharges of dredged or fill material that can change an aquatic area to dry land, increase the bottom elevation of a waterbody, or change the use of a waterbody. For loss of stream function caused by culverting/piping/bridges and/or projects not meeting the USACE New England District Best Management Practices for stream crossings; stream relocation; fill for dam/other structure; any discharge that involves loss or removal of the stream bed and banks.

² Bank stabilization threshold is 500 linear feet for both banks.

³ These waters are classified as Lacustrine (Limnetic and Littoral), and Subtidal (Marine and Estuarine) in the Classification of Wetlands and Deepwater Habitats of the United States, Cowardin *et al.* 1979.

⁴ Assumes USACE has Jurisdiction.

⁵ If permit verification or authorization is or was required prior to work in Waters of the US.