

GAO

Report to the Ranking Democratic
Member, Committee on Transportation
and Infrastructure, House of
Representatives

September 2005

WETLANDS PROTECTION

Corps of Engineers
Does Not Have an
Effective Oversight
Approach to Ensure
That Compensatory
Mitigation Is
Occurring



G A O

Accountability ★ Integrity ★ Reliability



Highlights of [GAO-05-898](#), a report to the Ranking Democratic Member, Committee on Transportation and Infrastructure, House of Representatives

Why GAO Did This Study

Because wetlands provide valuable functions, the administration set a national goal of no net loss of wetlands in 1989. Section 404 of the Clean Water Act generally prohibits the discharge of dredged or fill material into waters of the United States, which include certain wetlands, without a permit from the U.S. Army Corps of Engineers (Corps). To help achieve the goal of no net loss, the Corps can require compensatory mitigation, such as restoring a former wetland, as a condition of a permit when the loss of wetlands is unavoidable. Permittees can perform the mitigation or pay a third party—a mitigation bank or an in-lieu-fee arrangement—to perform the mitigation. GAO was asked to review the (1) guidance the Corps has issued for overseeing compensatory mitigation, (2) extent to which the Corps oversees compensatory mitigation, and (3) enforcement actions the Corps can take if required mitigation is not performed and the extent to which it takes these actions.

What GAO Recommends

GAO recommends that the Secretary of the Army direct the Corps to establish an effective oversight approach that will ensure that permittees and third parties are performing required compensatory mitigation. In commenting on our report, the Department of Defense generally agreed with GAO's recommendations.

www.gao.gov/cgi-bin/getrpt?GAO-05-898.

To view the full product, including the scope and methodology, click on the link above. For more information, contact Anu K. Mittal at (202) 512-3841 or mittala@gao.gov.

WETLANDS PROTECTION

Corps of Engineers Does Not Have an Effective Oversight Approach to Ensure That Compensatory Mitigation Is Occurring

What GAO Found

The Corps has developed guidance that establishes two primary oversight activities for compensatory mitigation: requiring the parties performing mitigation to periodically submit monitoring reports to the Corps and conducting compliance inspections of the mitigation. However, parts of the guidance are vague or internally inconsistent. For example, the guidance suggests that the Corps place a high priority on requiring and reviewing monitoring reports when “substantial mitigation” is required, but it does not define substantial mitigation. Furthermore, one section of the guidance directs district officials to conduct compliance inspections of a relatively high percentage of compensatory mitigation sites, while another section designates these inspections as a low priority, leading to confusion by Corps officials.

Overall, the seven Corps districts GAO visited performed limited oversight to determine the status of compensatory mitigation. The Corps required monitoring reports for 89 of the 152 permit files reviewed where the permittee was required to perform compensatory mitigation. However, only 21 of these files contained evidence that the Corps received these reports. Moreover, only 15 percent of the 152 permit files contained evidence that the Corps had conducted a compliance inspection. The Corps districts provided somewhat more oversight for mitigation performed by the 85 mitigation banks and 12 in-lieu-fee arrangements that GAO reviewed. For the 60 mitigation banks that were required to submit monitoring reports, 70 percent of the files contained evidence that the Corps had received at least one monitoring report. However, only 36 percent of the mitigation bank files that GAO reviewed contained evidence that the Corps conducted an inspection. For the 6 in-lieu-fee arrangements that were required to submit monitoring reports to the Corps, 5 had submitted at least one report. In addition, the Corps had conducted inspections of 5 of the 12 arrangements.

The Corps can take a variety of enforcement actions if required compensatory mitigation is not performed. These actions include issuing compliance orders, assessing administrative penalties of up to \$27,500, requiring the permittee to forfeit a bond, suspending or revoking a permit, implementing the enforcement provisions of agreements with third parties, and recommending legal actions. District officials rarely use these actions and rely primarily on negotiation to resolve any violations. In some cases, GAO found district officials may not be able to use enforcement actions after detecting instances of noncompliance because they have limited their enforcement capabilities. For example, because they did not always specify the requirements of compensatory mitigation in the permits, they had no legal recourse for noncompliance.

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Abbreviations

Corps	U.S. Army Corps of Engineers
EPA	Environmental Protection Agency

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United States Government Accountability Office
Washington, D.C. 20548

September 8, 2005

The Honorable James L. Oberstar
Ranking Democratic Member
Committee on Transportation and Infrastructure
House of Representatives

Dear Mr. Oberstar:

Wetlands such as bogs, swamps, and marshes support a number of valuable functions—controlling floods, improving water quality, and providing wildlife habitat, among other things. Given the value of these functions, the administration set a national goal in 1989 of balancing the losses and gains of wetlands to achieve no net loss of wetlands. Each subsequent President has reaffirmed and expanded this goal to achieve net gains of wetlands in the long term. The U.S. Army Corps of Engineers (Corps) is responsible for processing permit applications from individuals and businesses seeking to build driveways, houses, golf courses, or commercial buildings or perform other activities that could degrade or destroy wetlands on their property, and each year the Corps approves thousands of these permit applications. The Corps' decisions are to reflect the national concern for both the protection and utilization of important resources.

Under section 404 of the Clean Water Act, the Corps and the Environmental Protection Agency (EPA) regulate activities affecting wetlands. Under related regulations and guidance issued by these agencies, a permittee is expected to avoid deliberate discharge of fill materials into wetlands or other federally regulated waters and then to minimize discharges that cannot be avoided. If such discharges are unavoidable, the Corps can require mitigation to compensate for the loss and/or degradation of wetlands from permitted activities as a condition of issuing the permit. Such compensatory mitigation could involve (1) creating a new wetland, (2) restoring a former wetland, (3) enhancing a degraded wetland, or (4) preserving an existing wetland. Since 1993, the Corps has required such mitigation on more than 40,000 acres of land per year. Permittees may perform their own compensatory mitigation, often on or near the project site, or they may pay another entity to perform mitigation, usually at a location away from the project site, but generally within the same watershed. This kind of mitigation, known as third-party mitigation, is typically performed by mitigation banks or sponsors of in-lieu-fee arrangements. Mitigation banks are often private for-profit entities with land in areas where they believe that they can successfully establish

wetlands.¹ These areas include those that have the potential to become wetlands, previously filled wetlands, wetlands that have been degraded by invasive plant species,² or wetlands that are threatened by development. After the mitigation banks improve these areas as wetlands, permittees required to perform compensatory mitigation pay fees to the mitigation bank to fulfill their mitigation requirements. In contrast to mitigation banks, in-lieu-fee arrangements are often sponsored by public or nonprofit entities. Under agreements with the Corps, in-lieu-fee sponsors receive payments from multiple permittees required to perform compensatory mitigation. Then, at a later date, the sponsors use these funds to establish wetlands.

The Corps is responsible for ensuring that permittees, mitigation banks, and in-lieu-fee sponsors perform required compensatory mitigation. However, the Corps historically has not emphasized oversight of such mitigation activities. In 1988, we reported that the Corps placed a high priority on issuing permits and did not routinely inspect project sites to ensure that permittees were in compliance with their permit conditions, which include any compensatory mitigation that the permittee was required to perform.³ More recently, the National Research Council, environmental groups, and others have raised concerns that the Corps may not spend sufficient time on oversight to ensure that permittees or third parties are performing the required compensatory mitigation.

In this context, you asked us to review the (1) guidance the Corps has established for overseeing compensatory mitigation, (2) extent to which the Corps oversees compensatory mitigation, and (3) enforcement actions the Corps can take if it determines that compensatory mitigation requirements are not being met and the extent to which it takes such actions.

¹According to the Environmental Law Institute, in the early 1990s, most banks were sponsored by public entities, such as state highway agencies, but now most mitigation banks are sponsored by private entities.

²Invasive species are nonnative plants, animals, and microorganisms that are found throughout the United States and that have a devastating effect on natural areas, where they can take over wetland habitats and strangle native flora.

³GAO, *Wetlands: The Corps of Engineers' Administration of the Section 404 Program*, [GAO/RCED-88-110](#) (Washington, D.C.: July 28, 1988).

In conducting our work, we selected 7 of the 38 Corps districts that implement the section 404 program—Charleston, South Carolina; Galveston, Texas; Jacksonville, Florida; New Orleans, Louisiana; St. Paul, Minnesota; Seattle, Washington; and Wilmington, North Carolina. We selected these districts because they represent different geographic areas of the United States and collectively accounted for over two-thirds of the compensatory mitigation required by individual permits issued in fiscal year 2003.⁴ To identify the guidance the Corps has established for overseeing compensatory mitigation, we examined Corps documents and interviewed officials from Corps headquarters, as well as from Corps' district offices.

To determine the extent to which the Corps oversees compensatory mitigation, we reviewed a total of 249 files. We reviewed 152 permit files issued in fiscal year 2000 where the permittee was responsible for the mitigation. We selected this time frame because most of the permits we reviewed were valid for 5 years or less, and sufficient time would have passed for the permittee to begin work on the permitted project and for the Corps to have received a monitoring report or conducted a compliance inspection. We also reviewed files for 85 mitigation banks and 12 in-lieu-fee arrangements.⁵ The mitigation bank and in-lieu-fee arrangement files we reviewed usually provided data on the mitigation activities for multiple permittees, and the mitigation conducted can encompass thousands of acres. While our results cannot be generalized to all 38 Corps districts, according to a Corps official responsible for managing the program nationally, our findings would most likely represent program

⁴Individual permits are typically issued for projects that may have substantial environmental impacts. For smaller impacts, Corps officials generally issue either letters of permission, which are used when the proposed work is minor and is not expected to receive appreciable opposition, or general permits, which cover activities that have been identified as being substantially similar in nature, such as stabilizing stream banks. The Charleston, Galveston, Jacksonville, New Orleans, St. Paul, and Wilmington districts were the top six districts nationwide in terms of mitigation required by individual permits. Seattle was among the top districts in the western part of the United States.

⁵In those districts where it was not feasible to review all files, we selected a random sample of files from the district's database for review. We reviewed a random sample of permit files in the Jacksonville district and a random sample of mitigation bank files in the Jacksonville, New Orleans, and St. Paul districts. Because the New Orleans district was not able to identify permits requiring the permittee to perform mitigation from their database, we asked district officials to select these permits, and we reviewed all of them.

implementation by other Corps districts. We also interviewed district officials to obtain additional information on how they oversee compensatory mitigation.

To identify enforcement actions the Corps can take if it determines that compensatory mitigation requirements are not being met and the extent to which it takes these actions, we examined agency regulations and documents that outline available enforcement actions, reviewed agency data on noncompliance cases, and discussed levels of noncompliance and actions taken with district officials. In addition, we interviewed several sponsors of mitigation banks and a sponsor of an in-lieu-fee arrangement to obtain their perspectives on the Corps' mitigation program. A more detailed description of the scope and methodology of our review is presented in appendix I. We performed our work between June 2004 and September 2005 in accordance with generally accepted government auditing standards.

Results in Brief

The Corps has developed guidance that establishes two primary oversight activities for compensatory mitigation. First, the Corps guidance directs district officials to require the parties performing mitigation to periodically submit monitoring reports to the Corps on the status of compensatory mitigation. Second, the guidance calls for district officials to conduct compliance inspections of the mitigation. However, we found that parts of the guidance are vague or internally inconsistent, thus limiting their usefulness. For example, the guidance suggests that requiring and reviewing monitoring reports is a high-priority activity for the Corps when "substantial mitigation" is required, but it does not define substantial mitigation. Furthermore, the guidance does not indicate what actions Corps officials should take if permittees or third parties do not submit required monitoring reports. The guidance is also internally inconsistent because, in one section of the guidance, district officials are directed to conduct compliance inspections on a relatively high percentage of compensatory mitigation sites to ensure that permit conditions have been met, while another section designates these inspections as a low-priority activity, to be conducted only if the goals for other higher priority work, such as issuing permits, have been achieved. As a result, district officials told us that they are unsure of how many resources to allocate to compliance inspections. The Corps is currently developing new guidance, which it expects to issue by fall of 2005.

Overall, the Corps districts we visited have performed limited oversight to determine the status of required compensatory mitigation. For the 152 permit files that we reviewed where the individual permittee was required to perform compensatory mitigation, we found little evidence that required monitoring reports were submitted or that the Corps conducted compliance inspections. The Corps required monitoring reports for 89 of the files that we reviewed, but only 24 percent, or 21 permit files, contained evidence that the Corps had actually received the report. Only 15 percent of the files contained evidence that the Corps had conducted a compliance inspection. Although Corps districts provided somewhat more oversight for mitigation conducted by the 85 mitigation banks and 12 in-lieu-fee arrangements that we reviewed, even in these cases oversight was still limited. For the 60 mitigation banks that were required to submit monitoring reports, 70 percent of the files showed that the Corps had received at least one monitoring report. The percentage of the mitigation bank files with evidence that the Corps conducted an inspection ranged from a low of 13 percent to a high of 78 percent in the seven districts. For the 6 in-lieu-fee arrangements that were required to submit monitoring reports to the Corps, 5 had submitted at least one report. In addition, the Corps had conducted a compliance inspection for 5 of the 12 arrangements. District officials told us that the Corps' conflicting guidance, which notes that compliance inspections are crucial yet makes them a low priority, as well as limited resources contribute to their low level of oversight of compensatory mitigation. However, because many projects that we reviewed did not receive oversight, the districts cannot definitively assess whether compensatory mitigation has been performed on thousands of acres. Without this information, it is unclear how the Corps is assessing the effectiveness of its mitigation program or assessing whether this program is contributing to the national goal of no net loss of wetlands.

The Corps can take a variety of enforcement actions if required compensatory mitigation is not performed. These actions include issuing compliance orders, assessing administrative penalties up to \$27,500, suspending or revoking a permit, implementing the enforcement provisions of agreements with third parties, and recommending legal actions.⁶ According to fiscal year 2003 data provided by the Corps, the seven districts did not take any enforcement actions to obtain compliance with

⁶Under Corps' regulations, the Corps may refer appropriate cases to the local U.S. attorney to file a criminal or civil action. Appropriate cases include, but are not limited to, violations that are willful, repeated, or of substantial impact. 33 C.F.R. § 326.5.

issued permits. Instead, district officials rely primarily on negotiation with permittees and third parties, a first step in the enforcement process, rather than enforcement actions to resolve any violations. According to district officials, when they find that required compensatory mitigation has not been performed, they usually first contact the responsible parties to discuss options and time frames for bringing the permittee or third-party sponsor into compliance. District officials told us that typically no further action is necessary because the desired action is subsequently taken. If district officials are not able to resolve the noncompliance through negotiation, they told us that they then notify the responsible party in writing of the noncompliance and lay out potential enforcement actions and time frames. District officials told us that they generally resort to enforcement actions only after negotiation fails because taking enforcement actions is usually more time-consuming and does not necessarily result in the required mitigation being completed. For instance, according to Corps district officials, while monetary penalties are an effective tool that draws attention to compliance and enforcement, the funds collected from assessing these penalties are required by law to go into the general fund of the federal Treasury. We found that, sometimes, district officials wanting to pursue enforcement actions after detecting instances of noncompliance may be unable to do so because they have limited their enforcement capabilities by not specifying the requirements for compensatory mitigation in permits and by not establishing agreements with third parties. For example, the Corps does not always specify what mitigation activity should be performed or the time frame for completing the mitigation in individual permits. Similarly, some districts have not established agreements called for in federal guidance with mitigation bank or in-lieu-fee sponsors. Without such agreements, the Corps and the third-party sponsors have not formally agreed to the penalties that may be imposed and/or corrective actions that may be required if the mitigation efforts are not performed. Therefore, the Corps does not have sufficient legal recourse if third parties do not perform required compensatory mitigation.

To address the concerns we have identified, we are recommending that the Secretary of the Army direct the Corps of Engineers to establish an effective oversight approach that will ensure that permittees and third parties are performing required compensatory mitigation. In commenting on our report, the Department of Defense generally agreed with our recommendations.

Background

Wetlands include swamps, marshes, bogs, and similar areas. They are characterized by three factors: (1) frequent or prolonged presence of water at or near the soil surface, (2) hydric soils that form under flooded or saturated conditions, and (3) plants that are adapted to live in these types of soils. Wetlands are found throughout the United States. They may differ greatly in their physical characteristics; for example, water may not be present on the wetland for part of the year or it may be present year-round. Figures 1 and 2 show two different types of wetlands—a marsh and a bayou.

Figure 1: Marsh in Michigan



Source: U.S. Fish and Wildlife Service.

Figure 2: Bayou in Louisiana



Source: U.S. Fish and Wildlife Service.

Wetlands provide many important functions for the environment and for society. For example, wetlands

- improve water quality by removing excess nutrients from sources such as fertilizer applied to agricultural land and municipal sewage and by trapping other pollutants in soil particles;
- reduce the harmful effects of weather events by storing flood waters and buffering roads and houses from the storm surges caused by hurricanes; and
- provide important habitat for plants and wildlife—more than one-third of threatened and endangered species, such as the whooping crane and Florida panther, live in wetlands.

Over half of the estimated 220 million acres of wetlands in the contiguous United States during colonial times have disappeared, and many of the remaining wetlands have been degraded. This loss in wetlands was primarily caused by agricultural activities and development; significant wetland loss continued through the mid-1970s. While the economic pressure to develop wetlands continues today, according to the U.S. Fish and Wildlife Service, the rate of wetland loss has decreased significantly over the past 30 years.⁷

The decrease in the rate of wetlands loss stems from executive actions and legislation, prompted by an increased recognition of the benefits of wetlands. In 1977, the first executive order for the protection of wetlands directed federal agencies to take action to minimize the destruction of wetlands and to preserve and enhance wetlands' benefits when carrying out responsibilities such as managing federal lands and facilities or providing federally financed construction.⁸ Subsequently, in 1989, the administration set a national goal of no net loss of wetlands to ensure that these valuable resources are protected.

The Clean Water Act provides the primary legislative authority for federal efforts to regulate wetlands and other waters of the United States.⁹ The act's objective is to restore and maintain the chemical, physical, and biological integrity of the nation's waters. The section 404 program under the Clean Water Act is the principal federal program that provides regulatory protection for wetlands. Section 404 generally prohibits the discharge of dredged or fill material in waters of the United States, which

⁷The Emergency Wetlands Resources Act of 1986, as amended, requires the Fish and Wildlife Service to, among other things, assess the status of wetlands in the United States and trends in wetland gains or losses and to report the results to Congress each decade. 16 U.S.C. § 3931.

⁸Exec. Order No. 11990 (May 24, 1977).

⁹Other federal laws and programs regulating activities in wetlands include the Swampbuster Provision of the Food Security Act of 1985, as amended, which denies benefits to farmers who drain wetlands on their property; the Wetlands Reserve Program, which offers payments to farmers to restore and protect wetlands on their property; and the Coastal Wetlands Planning, Protection and Restoration Act, which authorized spending for coastal wetlands conservation and restoration projects and created a task force to develop a comprehensive approach for protecting and restoring coastal wetlands in Louisiana.

include certain wetlands, without a permit from the Corps.¹⁰ Responsibility for issuing these permits is delegated to 38 Corps district offices. The Corps requires the permittee to first avoid discharges of dredged or fill materials into wetlands and then to minimize discharges that cannot be avoided. To replace lost wetland functions, the Corps can require compensatory mitigation as a condition of issuing a permit when damage or degradation of wetlands is unavoidable.

Compensatory mitigation can consist of creating a new wetland, restoring a former wetland, enhancing a degraded wetland, or preserving an existing wetland. According to Corps guidance, compensatory mitigation should generally provide, at a minimum, one-to-one functional replacement for a lost wetland.¹¹ When determining the type, size, and nature of compensatory mitigation to be performed, district officials may consider factors such as the wetland's location, the rarity of the ecosystem, water levels, vegetation, wildlife usage, and the presence of endangered species. In some cases, the loss of the functions of a certain wetland area may be offset by either a larger or a smaller wetland area. For example, on an acreage basis, the ratio should be greater than one-to-one when the lost wetland functions are high and the replacement wetlands provide lower functions.

In the absence of information about the functions of a certain site, acreage may be used instead to determine the amount of compensatory mitigation to help achieve the national goal of no net loss. Figure 3 shows land before and after a wetland restoration project.

¹⁰These discharges result from activities such as construction or mining and may include soil, rock, sand, or other materials. Section 404(g) of the Clean Water Act authorizes EPA-approved states to assume responsibility for issuing section 404 permits in certain waters under their jurisdiction (other than waters used to transport interstate or foreign commerce); only Michigan and New Jersey have assumed this responsibility.

¹¹Even an acre for acre replacement of lost wetlands may not translate into maintaining equal functionality. Questions remain about whether created wetlands function as effectively as natural wetlands.

Figure 3: Wetlands Restoration Project in Washington, D.C. (Before and After)



Source: U.S. Geological Survey.

Before



Source: U.S. Geological Survey.

After

Compensatory mitigation may be performed by permittees or third parties. Third-party mitigation is typically performed by mitigation banks, which are generally private for-profit entities that establish wetlands under agreements with the Corps, or under in-lieu-fee arrangements, which are often sponsored by public or nonprofit entities. Under mitigation banking guidance issued in 1995 and in-lieu-fee guidance issued in 2000, mitigation bank and in-lieu-fee sponsors should have formal, written agreements with the Corps, developed in consultation with EPA and other resource agencies such as the U.S. Fish and Wildlife Service, to provide frameworks for how the mitigation bank or in-lieu-fee arrangement will operate. According to Corps guidance, these written agreements should include information on

- *the mitigation site*, including the types of wetlands to be developed, the conditions of any existing wetlands, and the geographic area; and
- *site management*, such as
 - monitoring plans and reporting protocols on the progress of the mitigation,
 - remedial actions and the parties responsible for performing them if the mitigation is not successful,
 - accounting procedures for tracking payments received from permittees,

-
- performance standards for determining ecological success of the site, and
 - provisions for long-term management and maintenance.

The Corps and EPA, which have joint enforcement authorities for the section 404 program, established a memorandum of agreement allocating enforcement responsibilities between the two agencies. According to this agreement, the Corps is the lead enforcement agency for all violations of Corps-issued permits, while EPA is the lead enforcement agency when unpermitted activities occur in wetlands.¹² Historically, the Corps has not emphasized enforcement activities. In 1988, we reported that many Corps permits were not monitored for compliance with permit conditions, the Corps districts we visited at that time did not place a high priority on detecting unauthorized impacts to wetlands, and the frequent lack of monitoring could result in the loss of valuable wetland resources. Subsequently, in 1993, we reported that the Corps continued to emphasize permit processing over compliance and enforcement and that funding and staffing shortfalls had inhibited the Corps' and EPA's compliance and enforcement activities.¹³ More recently, the National Research Council, environmental groups, and others have noted the same lack of emphasis on monitoring and enforcement.

Corps Guidance for Oversight of Compensatory Mitigation Is Sometimes Vague or Internally Inconsistent

The Corps has developed guidance that establishes two primary activities for oversight of compensatory mitigation performed by permittees or third parties. The guidance directs Corps districts to require that permittees performing compensatory mitigation periodically submit monitoring reports that provide information on the status of their mitigation efforts. For mitigation banks and in-lieu-fee arrangements, the guidance directs Corps districts to require sponsors to submit annual monitoring reports. The guidance also suggests that district staff conduct annual on-site inspections of mitigation bank activities but does not specify a frequency for inspections of mitigation activities performed by permittees and in-lieu-

¹²The Corps refers to its actions in response to activities not in compliance with issued permits as "compliance actions," as distinct from EPA's "enforcement actions" in response to unauthorized activities performed without required permits.

¹³GAO, *Wetlands Protection: The Scope of the Section 404 Program Remains Uncertain*, GAO/RCED-93-26 (Washington, D.C.: Apr. 6, 1993).

fee sponsors. However, we found that parts of the guidance are vague or internally inconsistent, thus limiting their usefulness.

Corps Guidance Establishes Two Primary Oversight Activities for Compensatory Mitigation

The Corps has three primary guidance documents that establish requirements for overseeing compensatory mitigation performed by permittees, mitigation banks, or in-lieu-fee arrangements: (1) *The 1999 Army Corps of Engineers Standard Operating Procedures for the Regulatory Program*; (2) *The Federal Guidance for the Establishment, Use and Operation of Mitigation Banks*; and (3) *The Federal Guidance on the Use of In-Lieu-Fee Arrangements for Compensatory Mitigation Under Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act*. The two primary oversight activities these guidance documents establish are (1) Corps review of monitoring reports submitted by permittees or third parties and (2) the conduct of compliance inspections (field visits) that provide firsthand knowledge of the status of the mitigation.¹⁴ The guidance documents lay out the following requirements:

- *1999 Standard Operating Procedures for the Regulatory Program*. This document, which highlights current Corps policies and procedures and provides guidance to the districts for setting priorities for their regulatory program activities, calls for Corps districts to require permittees to submit periodic monitoring reports and states that the districts should review all monitoring reports. It also states that compliance inspections are essential to ensure that compensatory mitigation is performed and directs Corps districts to inspect a relatively high percentage of compensatory mitigation performed by permittees to ensure compliance with permit conditions. Districts are to inspect all mitigation banks to ensure compliance with the banking agreement.
- *Federal Guidance for the Establishment, Use and Operation of Mitigation Banks*. Developed to provide guidance for establishing, using, and operating mitigation banks, this federal guidance directs the Corps to require that mitigation bank sponsors submit annual monitoring reports to the Corps and other authorizing agencies, which can include the EPA and the U.S. Fish and Wildlife Service, among others. Typically, mitigation banks are to be monitored for 5 years;

¹⁴See appendix II for a summary of these guidance documents.

however, according to the guidance, it may be necessary to extend this period for mitigation banks that require more time to reach a stable condition or that have undertaken remedial activities. In addition, the guidance encourages members of the mitigation banking review team, which the Corps chairs, to conduct regular (e.g., annual) on-site inspections, as appropriate, to monitor bank performance.¹⁵

- *Federal Guidance on the Use of In-Lieu-Fee Arrangements for Compensatory Mitigation Under Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act.* This federal guidance was developed to ensure that in-lieu-fee arrangements can serve as an effective and useful mitigation approach. The guidance specifies that there should be appropriate schedules established for regular (e.g., annual) monitoring reports to document funds received, impacts permitted, funds disbursed, types of projects funded, and the success of projects conducted. Furthermore, the guidance calls for the Corps in conjunction with other federal and state agencies to evaluate these reports and conduct regular reviews to ensure that the arrangement is operating effectively and is consistent with agency policy and the specific agreement.

Corps Guidance Is Sometimes Vague or Internally Inconsistent

Although Corps guidance documents establish monitoring reports and compliance inspections as the two primary oversight activities for compensatory mitigation, these guidance documents are sometimes vague or internally inconsistent. Specifically, the guidance is vague on the following key points:

- *The circumstances under which monitoring reports should be required.* Although the Corps' standard operating procedures call for district officials to require and review monitoring reports for mitigation banks and "other substantial mitigation," it does not define substantial mitigation. We found that Corps districts differed in how they defined "substantial mitigation." For example, two districts require mitigation reports when the mitigation involves restoring, enhancing, or creating a wetland but not when the mitigation involves preserving a wetland.

¹⁵A mitigation banking review team is an interagency group of federal, state, tribal, and/or local regulatory and resource agency representatives which are signatories to the mitigation banking agreement and oversee the establishment, use, and operation of the mitigation bank.

Another district interpreted “substantial” mitigation to include mitigation projects that generally involved more than one-half acre.

- *The actions district officials should take if reports are not submitted as required.* Corps guidance does not address the issue of noncompliance if monitoring reports are not submitted for review. For the files that we reviewed, we found that monitoring reports were provided for 44 percent, or 68 of the 155 cases in which these reports were required. District officials told us that, because of budget constraints, little time is spent on compliance activities, including following up on the submission of monitoring reports. While three districts that we visited have established a process for tracking due dates for monitoring reports from either permittees or third parties, none of the districts had a system for tracking reports from both.¹⁶ Without such tracking systems, a district official told us that Corps officials may not realize when monitoring reports are due or that the reports were not submitted as required.
- *The information that should be included in a monitoring report.* The guidance does not specify what information should be included in monitoring reports submitted by permittees and mitigation banks, despite the importance of these reports as a primary means of overseeing compliance with mitigation requirements. We found that some monitoring reports were only a few pages in length and provided limited information about the site, while other reports were over 50 pages in length, were more comprehensive, and included data on the water levels at the mitigation site, the plants growing at the site, methods for monitoring both the water levels and plant growth, documentation of animals present at the site, and photographs of the site. The Chief of the Regulatory Branch acknowledged that the information submitted in monitoring reports varies significantly and may not always provide the details needed to assess the status of the compensatory mitigation.

¹⁶The Jacksonville district office has a tracking system for permits and is modifying the system to include mitigation banks. The New Orleans district only has a system for tracking reports for mitigation banks. The Seattle district has a system for tracking reports from permittees, and officials stated that it does not currently need such a system for mitigation banks because it has not had a problem with receiving the reports since there are only two banks currently approved by the district.

Furthermore, the guidance is internally inconsistent about the emphasis districts should place on compliance inspections. The Corps' standard operating procedures state that compliance inspections are essential, and districts should inspect a relatively high percentage of compensatory mitigation sites to ensure compliance with permit conditions, although they do not define what high means. The mitigation banking guidance states that districts should inspect all mitigation performed by banks annually to ensure compliance with the banking agreement.¹⁷ The in-lieu-fee guidance does not specify how often compliance inspections should be conducted. However, the standard operating procedures also designate all compliance inspections as a low-priority activity, to be performed only if the goals for other higher-priority work, such as issuing permits, have been achieved. Furthermore, the guidance states that the degree to which districts perform lower priority work would affect whether districts received additional resources. District officials told us that in the past they were instructed that if they spent too many resources on low-priority activities, their budget would be reduced. Consequently, a number of district officials told us that they are unsure of how much time to spend on compliance inspections. According to officials in one district we visited, for instance, the number of sites they were inspecting was based on a target set in the 1991 guidance because the current guidance is not as specific.¹⁸ Other districts do not have a specific goal for the number of inspections that district officials will conduct for mitigation activities. The Corps is revising its standard operating procedures to include specific performance goals for compliance inspections. Corps officials told us they expect to finalize the revised standard operating procedures by fall of 2005.

¹⁷This agreement is referred to as the mitigation banking instrument in the federal mitigation banking guidance.

¹⁸In 1991, the Corps' numerical inspection goal was equivalent to 25 percent of the individual permits issued in the prior year. Permits with required mitigation, including general permits if applicable, were a high priority to inspect.

Corps Districts Perform Limited Oversight of Compensatory Mitigation

Overall, the Corps districts we visited have performed only limited oversight of compensatory mitigation undertaken by permittees and third parties. For the 152 individual permit files that we reviewed, we frequently found little evidence that the required monitoring reports were submitted or that the Corps conducted compliance inspections. Although Corps districts provided somewhat more oversight for mitigation performed by the 85 mitigation banks and 12 in-lieu-fee arrangements that we reviewed, we found that oversight was still limited even in these cases. Detailed results of our file review by district are presented in appendix III.

Corps Districts Provide Little Oversight of Mitigation Performed by Permittees

According to our review of 152 permit files where the permittee was responsible for performing the compensatory mitigation, the Corps districts generally provided little oversight either through a monitoring report or a compliance inspection.¹⁹ The Corps required permittees to submit monitoring reports for 89 of the 152 permit files that we reviewed. This ranged from a low of zero in Charleston to a high of 100 percent in Seattle. However, we found only 21 files contained evidence that the Corps actually received these required reports, ranging from a low of zero in two districts to a high of 69 percent in Jacksonville.²⁰ Furthermore, only 15 percent, or 23 of the 152 permit files, showed that the Corps had conducted a compliance inspection. The actual proportion of permits receiving oversight may be less because several districts could not locate some of the permit files that we requested for review.

The following cases illustrate situations in which the Corps required compensatory mitigation as a condition of permit issuance, but the files contained no evidence that the Corps had conducted oversight:

- In November 1999, the Corps issued a permit authorizing a permittee to install two boat slips and dredge approximately 5,270 feet of a canal in Louisiana, which would affect marsh and other wetland areas. As a

¹⁹The permit files in the Wilmington district contained evidence that district officials had more consistently conducted oversight of mitigation performed by permittees. There was evidence that district officials had either received a monitoring report or conducted a compliance inspection for 14 of 21 permit files, or 67 percent, that we reviewed. See appendix III.

²⁰Four permit files contained evidence that the Corps received monitoring reports although the Corps did not require submission of these reports.

condition of issuing this permit, the Corps required the permittee to use the dredge material and establish wetland plants to create a 710-acre intertidal marsh. The Corps also required the permittee to submit annual monitoring reports for 5 years. The file contained no evidence that the Corps had received any monitoring reports or conducted compliance inspections to determine the status of the required mitigation.

- In May 2000, the Corps issued a permit authorizing a developer to fill over 430 acres of wetlands to build a residential golf community in Florida. As a condition of issuing this permit, the Corps required the permittee to enhance over 1,000 acres of wetlands and to create 13 acres of wetlands. The Corps also required the permittee to submit annual monitoring reports for 5 years. The file contained no evidence that the Corps had conducted any compliance inspections or received any monitoring reports to determine the status of the required mitigation.
- In May 2000, the Corps issued a permit authorizing a permittee to fill 77 acres for a landfill in Texas. As a condition of issuing this permit, the Corps required the permittee to create 122 acres of prairie wetlands and to preserve 58 acres of wetlands on-site. The preservation area also included lakes and uplands that were to be managed for wildlife habitat. The Corps required the permittee to submit monitoring reports after 6 months and annually for 5 years. The file contained no evidence that the Corps had conducted any compliance inspections or received any monitoring reports to determine the status of the required mitigation.

Moreover, even when Corps officials conducted oversight, they did not always perform suggested follow-up. For example, in one permit file we reviewed, the Corps issued a permit in December 1999 that authorized the excavation of an approximately 15-acre sand and gravel mining project in a wetland area. The Corps required the permittee to restore the mining area to a wetland plant community as the excavation occurred and to submit annual monitoring reports on the progress of this restoration effort. The permittee submitted one report to the Corps in March 2000, which stated that the work authorized by the permit had begun but that compensatory mitigation activities could not be completed until excavation was completed. No other monitoring reports were in the file, and the file did not contain any evidence that Corps officials had followed up to determine if the compensatory mitigation was performed. Another file indicated that, in December 2000, a Corps official had inspected a project site to assess the status of the required compensatory mitigation for a permit issued in August 2000. This permit authorized filling about 6 acres of wetlands to

build a retail facility. The official's inspection indicated that construction was almost finished, but the mitigation to enhance 4 acres of wetlands was still under way. The official recommended that the site be revisited at a later date. However, the file contained no evidence that the Corps conducted a follow-up compliance inspection or contacted the permittee to determine the status of the mitigation.

Corps Districts Perform Somewhat Greater Oversight of Mitigation Performed by Mitigation Banks and In-Lieu-Fee Sponsors

Corps districts provided somewhat more oversight for mitigation conducted by third parties, although even in these cases oversight was limited. Of the 85 mitigation banks that we reviewed, the Corps required that 71 percent, or 60 of the 85 mitigation bank sponsors, submit monitoring reports and 70 percent, or 42 mitigation bank files, contained evidence that at least one monitoring report had been received.²¹ However, only 31 of the 85 mitigation bank files contained evidence that the Corps conducted a compliance inspection.²² This ranged from a low of 13 percent in the St. Paul district to a high of 78 percent in the Wilmington district. The following cases illustrate situations where files contained no evidence that the Corps had conducted oversight of the mitigation bank:

- In February 1999, the Corps approved a mitigation bank in Texas that preserved and protected about 540 acres of swamp. The agreement between the Corps and the mitigation bank sponsor included a requirement that the sponsor submit an annual report on the mitigation bank's status of operation and maintenance. The file contained no evidence of any monitoring reports submitted by the sponsor or compliance inspections conducted by the Corps.
- In August 1999, the Corps approved an approximately 360-acre mitigation bank in Louisiana to reestablish a productive, coastal, forested wetland ecosystem on previously converted agricultural lands. The agreement between the Corps and the mitigation bank sponsor included a requirement that the sponsor provide the Corps with annual

²¹Only one district did not conduct oversight for a majority of the mitigation banks that we reviewed. We reviewed an additional 10 mitigation bank files for banks approved during calendar year 2004. We did not include these banks in our overall totals because monitoring reports are typically required on a yearly basis and not enough time had elapsed during our review to determine if the banks submitted monitoring reports.

²²One mitigation bank file contained evidence that the Corps received a monitoring report even though the Corps did not require the sponsor to submit monitoring reports.

monitoring reports for at least 5 years and then reports once every 5 years. The file contained no evidence of any monitoring reports submitted by the sponsor or compliance inspections conducted by the Corps.

- In December 2001, the Corps approved a 2,100-acre mitigation bank in Florida to restore native tree species and enhance the site's hydrology. The agreement between the Corps and the mitigation bank sponsor required the sponsor to submit annual monitoring reports to the Corps for 4 years. The file contained no evidence of any monitoring reports submitted by the sponsor or compliance inspections conducted by the Corps.

For in-lieu-fee arrangements, the Corps required the sponsors of 6 of the 12 in-lieu-fee arrangements that we reviewed to submit monitoring reports. We found that five of the six files contained evidence that the sponsor had submitted at least one report. We also found that the Corps had received monitoring reports from one in-lieu-fee sponsor who was not required to submit a report. In addition, the files contained evidence that the Corps had conducted at least one compliance inspection for 5 of the 12 arrangements.

Conflicting Guidance and Limited Resources Contribute to the Corps' Low Level of Oversight of Compensatory Mitigation

District officials told us that the Corps' conflicting guidance, which notes that compliance inspections are crucial but makes them a low priority, as well as limited resources contribute to their low level of oversight of compensatory mitigation activities. According to the Chief of the Regulatory Branch, historically, districts were to issue permits within specified time frames. If those time frames were not met, work in other areas, including compliance, was not to be performed. In addition, funds were allocated primarily for permit processing, with little remaining for other activities. However, Corps headquarters and district officials recognize the importance of oversight. They stated that without a comprehensive oversight program the Corps cannot ensure that compensatory mitigation will occur. In the absence of additional national guidance and resources, some of the districts we visited have decided to take their own steps to improve oversight. For example, Jacksonville district officials increased their compliance inspections of compensatory mitigation performed by permittees; the number of inspections more than tripled from 2003 to 2004 after several years of decline. In addition, New Orleans district officials told us that, in 2003, they began tracking monitoring reports and compliance inspections for mitigation banks, more aggressively followed up to ensure that the mitigation banks submit

required monitoring reports, and increased the number of compliance inspections of the mitigation banks.

Corps Districts Can Take a Variety of Enforcement Actions to Resolve Violations but Rely Primarily on Negotiation

The Corps can take a variety of enforcement actions if required compensatory mitigation is not performed.²³ Possible enforcement actions include issuing compliance orders and assessing administrative penalties, requiring the permittee to forfeit a bond, suspending or revoking a permit, and implementing the enforcement provisions of agreements with third parties to perform mitigation on permittees' behalf. In addition, the Corps may refer a case to the Department of Justice to bring legal action in federal district court. However, district officials rarely use these enforcement actions, relying primarily on negotiation with permittees or third parties as a first step in the enforcement process to resolve any noncompliance cases they detect. In some cases, district officials want to pursue enforcement actions after detecting instances of noncompliance, but they may not be able to do so because they have limited their enforcement capabilities by not including specific requirements in the permits or third-party agreements.

A Variety of Enforcement Actions Are Available to Corps Districts

When the Corps determines that required compensatory mitigation has not been performed, the type of enforcement action taken would depend on, among other things, whether mitigation is to be carried out by the permittee or by a third party.

In cases where the permittee was to perform the mitigation, the Corps may issue a compliance order, assess administrative penalties, require the permittee to forfeit a bond, suspend or revoke a permit, and/or refer the case to the Department of Justice for legal action. Under section 404 of the Clean Water Act and Corps regulations, the Corps may take the following actions:

- *Issue compliance orders to permittees who violate any condition of their permits.* Each order must specify the nature of the violation,

²³The Corps refers to its actions in response to noncompliance as "compliance actions," as distinct from EPA's "enforcement actions" in response to unauthorized activities performed without required permits.

which could include failure to implement mitigation requirements, and specify a time by which the permittee must come into compliance.²⁴

- *Assess administrative penalties, in an amount of up to \$27,500.*²⁵
- *Require the permittee to forfeit a bond, if such a bond was a condition of the permit.* The Corps has the authority to require permittees to post a financial bond to assure that they will fulfill all obligations required by the permit, which could include compensatory mitigation.²⁶
- *Suspend a permit for, among other things, a permittee's failure to comply with the terms and conditions of the permit.*²⁷ A suspension requires the permittee to stop the activities previously authorized by the suspended permit. Following the suspension, the Corps may take action to reinstate, modify, or revoke the permit.²⁸
- *Refer the case to the Department of Justice to bring an action in federal district court seeking an injunction and civil penalties.*²⁹ Cases that are appropriate for judicial actions include violations that are willful, repeated, flagrant, or of substantial impact.³⁰ Civil penalties may be awarded by the court in an amount of up to \$25,000 per day for each violation.³¹

²⁴33 U.S.C. § 1344(s); 33 C.F.R. § 326.4(d).

²⁵The Corps has authority to assess Class I administrative penalties in an amount of up to \$11,000 per violation, not to exceed \$27,500. 33 U.S.C. § 1319(g) and 33 C.F.R. § 326.6(a)(1). The current penalty amounts were effective July 26, 2004. 69 *Fed. Reg.* 35518 (June 25, 2004). However, under the Corps' policy, once the Corps decides to proceed with an administrative penalty, it cannot subsequently refer the case to the Department of Justice for legal action. 33 C.F.R. § 326.6(a)(2).

²⁶33 C.F.R. § 325.4(d).

²⁷33 C.F.R. § 325.7(c).

²⁸33 C.F.R. § 325.7(d).

²⁹33 U.S.C. § 1344(s); 33 C.F.R. § 326.5.

³⁰33 C.F.R. § 326.5(a).

³¹33 U.S.C. § 1344(s)(4).

The enforcement actions available to the Corps for a mitigation bank or in-lieu-fee sponsor's failure to carry out mitigation would depend on the provisions that are incorporated into each permit (if applicable) and mitigation bank agreement or in-lieu-fee agreement and would be governed by the terms of the agreement with the Corps. For example, once the Corps has agreed that a permittee's mitigation requirements will be satisfied by a mitigation bank or in-lieu-fee arrangement, the permittee satisfies these mitigation requirements by submitting the required payment to the third-party sponsor. Federal guidance for mitigation banks states, "it is extremely important that an enforceable mechanism be adopted establishing the responsibility of the bank sponsor to develop and operate the bank properly."³² The guidance states that the bank sponsor is responsible for securing sufficient funds or other financial assurances in the form of, among other things, performance bonds, irrevocable trusts, escrow accounts, and letters of credit. In addition, "the banking agreement should stipulate the general procedures for identifying and implementing remedial measures at a bank." Similarly, federal guidance states that an in-lieu-fee agreement should contain, among other things, "financial, technical and legal provisions for remedial actions and responsibilities (*e.g.*, contingency fund)"; "financial, technical and legal provisions for long-term management and maintenance (*e.g.*, trust)"; and a "provision that clearly states that the legal responsibility for ensuring mitigation terms are fully satisfied rests with the organization accepting the fee."³³

Corps Districts Rely Primarily on Negotiation

While the Corps may take a variety of enforcement actions, the seven districts did not take any enforcement actions in fiscal year 2003, the latest year for which data is available.³⁴ Instead, district officials primarily rely on negotiation, a first step in the Corps' enforcement process, to resolve noncompliance issues. In keeping with Corps regulations, district officials told us that, when they find that required compensatory mitigation has not been performed, they first notify the responsible party and gather relevant information to better understand the noncompliance case. They then

³²60 *Fed. Reg.* 58605 (Nov. 28, 1995).

³³65 *Fed. Reg.* 66914 (Nov. 7, 2000).

³⁴The fiscal year 2003 data provided by the Corps includes information about litigation and penalties but does not provide information on permit suspensions or revocations. According to a headquarters senior project manager, the Corps rarely uses these actions to obtain compliance.

attempt to negotiate by discussing with the permittees or third parties available corrective actions and time frames for voluntarily bringing the work into compliance. For example, at one district, officials told us that corrective actions by responsible parties could include working with an environmental organization such as The Nature Conservancy to improve wetlands or developing a traveling exhibit for local schools to educate children about the value of protecting wetlands. According to Corps officials, no additional action is needed generally because responsible parties are willing to work with the Corps to get back into compliance.

If district officials do not succeed in voluntarily bringing the responsible party into compliance, they notify the responsible party in writing, laying out potential enforcement actions available to the Corps and time frames for the party to respond to the letter—the next step toward achieving compliance. District officials told us they generally resort to such actions to achieve compliance only after negotiation has failed because such actions usually take more time to implement. For example, one district official estimated that when the Corps refers a noncompliance case to the Department of Justice, district officials may be occupied for several months. Similarly, according to Corps officials, developers prefer to negotiate with the Corps because it is less time-consuming than pursuing legal solutions. In addition, use of enforcement actions does not always ensure that the required compensatory mitigation will be completed. For instance, Corps district officials told us, while monetary penalties are an effective tool that draws attention to compliance and enforcement, the funds collected from assessing these penalties are required by law to go into the general fund of the federal Treasury.³⁵

Corps Sometimes Limits Its Own Enforcement Ability

On occasion, district officials wanting to pursue enforcement actions after detecting instances of noncompliance may not be able to do so because they have limited their enforcement capabilities; that is, they have not specified the requirements for compensatory mitigation in permits and failed to establish agreements with third parties. In our file review, we identified several permits that lacked this crucial information about

³⁵31 U.S.C. § 3302(b), known as the miscellaneous receipts statute, requires that, unless otherwise provided, a government agency must deposit any funds received from sources other than appropriations into the general fund of the Treasury.

required mitigation.³⁶ Both the Chief of the Regulatory Branch and district officials stress the importance of including specific mitigation information in permits so that the Corps can take actions necessary to ensure required compensatory mitigation occurs. However, some of the districts we visited acknowledged that the lack of enforceable conditions included within a permit has been a problem and they have efforts under way, such as permit reviews and standardized permit conditions, to ensure that future permits are issued with the conditions needed to ensure enforceability. Although a review process for permit conditions may be a good idea, we found that, even when a review process was in place in some of the districts we visited, they still had issued permits with unenforceable conditions.

In addition, we found that three districts had not established formal agreements with third parties to document the objectives and implementation of mitigation banks or in-lieu-fee arrangements, as called for in federal guidance. Of the 85 mitigation bank files we reviewed, 21 did not have agreements with the Corps. These mitigation banks were all located in Minnesota, one of two states with mitigation banks that fall under the jurisdiction of the St. Paul District Office. According to district officials, Minnesota had developed state mitigation banking guidelines before the federal guidelines. Many of the banks in Minnesota were approved by the state program and partially developed before requesting Corps approval. Corps officials told us they had decided not to take additional steps to develop agreements with these mitigation banks. Currently, district officials issue a letter approving all or a portion of the state bank for use in the Corps compensatory mitigation program but do not develop a banking agreement with the bank sponsor. At the time of our review, district officials realized that the lack of mitigation banking agreements limited their enforcement ability and, therefore, were developing banking guidelines to provide more structure for the establishment of mitigation banks in Minnesota. However, they had not yet begun to consistently develop such agreements.

For the in-lieu-fee arrangements we reviewed, the Galveston and New Orleans districts have not established formal agreements with in-lieu-fee sponsors. Without such agreements, district officials may not know how

³⁶A National Research Council report also has noted that it is important for permit requirements to contain clear and comprehensive information about compensatory mitigation and that without such information Corps officials may not be able to ensure that mitigation replaces the functions and values of lost wetlands.

many permittees are using these arrangements to fulfill their compensatory mitigation requirements. For example, for the arrangements that he was responsible for monitoring, a Galveston district official could not provide us with information about the number of permittees using the arrangement to perform compensatory mitigation, the total amount of payments the in-lieu-fee sponsor had received, or any oversight activities conducted by the Corps to ensure that the sponsor was performing the required compensatory mitigation. Before our visit, Galveston district officials were unaware that their four in-lieu-fee arrangements were not in compliance with federal guidance and are now attempting to restructure these arrangements. In addition, a Galveston district official told us the district will develop such agreements with the sponsors of future arrangements. With regard to the in-lieu-fee arrangement in New Orleans that did not have an agreement, officials told us that resource constraints and other priorities had prevented them from establishing a formal agreement with the in-lieu-fee sponsor. This arrangement has collected approximately \$1 million since its inception in 1994, but district officials could provide no other information regarding oversight of the arrangement.³⁷

Until the districts establish formal agreements with third-party sponsors, the Corps does not have sufficient legal recourse if third parties do not perform required compensatory mitigation because the sponsors have not reached agreement with the Corps on what penalties and/or corrective actions will be required to address any problems if the mitigation efforts are not performed. The Corps' Chief of the Regulatory Branch noted that he would encourage the districts to cease using these in-lieu-fee arrangements to provide compensatory mitigation until such agreements are established.

Conclusions

The Corps' section 404 program is crucial to the nation's efforts to protect wetlands and achieve the national goal of no net loss. Although Corps officials acknowledge that compensatory mitigation is a key component of this program, the Corps has consistently neglected to ensure that the mitigation it has required as a condition of obtaining a permit has been completed. The Corps' priority has been and continues to be processing permit applications. In 1988 and 1993, we reported that the Corps was placing little emphasis on its compliance efforts, including compensatory

³⁷According to a New Orleans official, although the majority of the total is the result of compensatory mitigation requirements, some of the monies were collected as a result of penalty assessments from the state's coastal program.

mitigation, and little has changed. The Corps continues to provide limited oversight of compensatory mitigation, largely relying on the good faith of permittees to comply with compensatory mitigation requirements. The Corps' oversight efforts have been further hampered by vague and inconsistent guidance that does not (1) define key terms, (2) specify the actions Corps staff should take if required monitoring reports are not received, or (3) set clear expectations for oversight of compensatory mitigation. Furthermore, district officials have failed to establish agreements with third-party sponsors that would ensure the agency has legal recourse if compensatory mitigation is not performed. Until the Corps takes its oversight responsibilities more seriously, it will not know if thousands of acres of compensatory mitigation have been performed and will be unable to ensure that the section 404 program is contributing to the national goal of no net loss of wetlands.

Recommendations for Executive Action

Given the importance of compensatory mitigation to the section 404 program and its contribution to achieving the national goal of no net loss of wetlands, we recommend that the Secretary of the Army direct the Corps of Engineers to establish an oversight approach that ensures required mitigation is being performed throughout the nation. As part of this oversight approach, the Corps should

- develop more specific guidance for overseeing compensatory mitigation performed by permittees, mitigation banks, and in-lieu-fee sponsors; in particular, the guidance should define key terms such as “substantial mitigation” and specify the actions Corps officials should take if required monitoring reports are not received;
- clarify expectations for oversight of mitigation, including establishing goals for the number of monitoring reports that should be reviewed and the number of compliance inspections that should be conducted; and
- review existing mitigation banks and in-lieu-fee arrangements to ensure that the sponsor has an approved agreement with the Corps, as called for in federal guidance; if such agreements are not in place, they should be developed and the Corps should ensure that future mitigation banks and in-lieu-fee arrangements have these approved agreements.

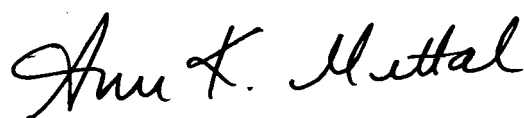
Agency Comments and Our Evaluation

We provided a draft of this report to the Secretary of the Department of Defense for review and comment. The Department of Defense concurred with the report's findings and recommendations. In its written comments, the Department of Defense stated that the Corps is currently revising its standard operating procedures. According to the department, the revised guidance will provide details on mitigation requirements as well as compliance and enforcement procedures. The department also indicated that the Corps will issue a Regulatory Guidance Letter that will clarify monitoring requirements for compensatory mitigation and include an outline for standardized monitoring reports. In addition, the Department of Defense provided technical comments and clarifications that we incorporated, as appropriate. The Department of Defense's written comments are presented in appendix IV.

As agreed with your office, unless you publicly announce the contents of this report earlier, we plan no further distribution until 30 days from the report date. At that time, we will send copies of this report to interested congressional committees and Members of Congress; the Secretary of Defense; the Secretary of the U.S. Army; and the Chief of Engineers and Commander, U.S. Army Corps of Engineers. We also will make copies available to others upon request. In addition, the report will be available at no charge on the GAO Web site at <http://www.gao.gov>.

If you have any questions about this report, please contact me at (202) 512-3841 or mittala@gao.gov. Contact points for our Offices of Congressional Relations and of Public Affairs may be found on the last page of this report. GAO staff who made major contributions to this report are listed in appendix V.

Sincerely yours,



Anu K. Mittal
Director, Natural Resources
and Environment

Scope and Methodology

Our review focused on the compensatory mitigation activities at 7 of the U.S. Army Corps of Engineers' (Corps) 38 districts that implement the section 404 program: Charleston, South Carolina; Galveston, Texas; Jacksonville, Florida; New Orleans, Louisiana; St. Paul, Minnesota; Seattle, Washington; and Wilmington, North Carolina. We selected these districts because they represent different geographic areas of the United States, and they comprised over two-thirds of the compensatory mitigation required by individual permits issued in fiscal year 2003.¹ The Charleston, Galveston, Jacksonville, New Orleans, St. Paul, and Wilmington districts were the top districts nationwide in terms of mitigation required by individual permits. While the Seattle district is not one of the top 7 districts nationwide, it is one of the top districts in the western region in terms of required individual permit mitigation, and we included it to provide geographic coverage. To determine how much compensatory mitigation was required by permits issued by each of the 38 districts, we used the Quarterly Permit Data System data, which we examined and determined to be suitably reliable for selecting the districts to be included in our review.

To identify the guidance the Corps has established for overseeing compensatory mitigation, we examined legislation, federal guidance on mitigation banks and in-lieu-fee arrangements, Corps regulations, Corps guidance, and supplemental guidance developed by the districts. We also met with responsible Corps headquarters and district officials to discuss the Corps' guidance on oversight of compensatory mitigation.

To determine the extent to which the Corps oversees compensatory mitigation, we reviewed a total of 249 files. We reviewed 152 permit files issued in fiscal year 2000 where the permittee was responsible for the mitigation. We selected this time frame because sufficient time would have passed for the permittee to begin work on the permitted project, as most of the permits we reviewed were valid for 5 years or less, and for the Corps to have received a monitoring report or conducted a compliance inspection. We also reviewed files for 95 mitigation banks (including 10 mitigation banks approved in 2004), and 12 in-lieu-fee arrangements. The mitigation banks we reviewed had been approved since the mitigation banking guidance was established on November 28, 1995. For in-lieu-fee

¹Individual permits are typically issued for projects that may have substantial environmental impacts. For smaller impacts, Corps officials generally issue either letters of permission, which are used when the proposed work is minor and is not expected to receive appreciable opposition, or general permits, which cover activities that have been identified as being substantially similar in nature, such as stabilizing stream banks.

arrangements, we reviewed the arrangements currently operating at the seven districts at the time of our site visit. These mitigation bank and in-lieu-fee arrangement files usually provided data on the mitigation activities for multiple permittees, and the mitigation conducted can encompass thousands of acres. Owing to the large number of permits and mitigation banks at some of the districts, we selected a random sample of permit files at Jacksonville and of mitigation banks at the Jacksonville, New Orleans, and St. Paul districts. These samples were drawn so that the estimates from the samples would have a precision margin of about plus or minus 15 percentage points at the 95 percent confidence level. However, we decided not to project our estimates to the population of permits in the seven districts because some districts were unable to find information for our sampled units, and another district was unable to provide a list of permits within the scope of our sample. Since we had no information on the missing permits, we are only presenting estimates for the permits and banks that we reviewed.

While our results are not representative of the activities of the 38 district offices nationwide, the Corps' Chief of the Regulatory Branch told us that our findings would likely indicate program implementation at the other districts not included in the scope of our review. Tables 1 through 3 detail the permit files, mitigation banks, and in-lieu-fee arrangements reviewed at each of the districts.

Table 1: Permit Files Reviewed at the Seven Districts, Fiscal Year 2000

District	Number of permits reviewed
Charleston	25
Galveston	18
Jacksonville	24
New Orleans	26
St. Paul	31
Seattle	7
Wilmington	21
Total	152

Source: GAO analysis of Corps data.

As listed in table 1, we reviewed all permits that met our criteria (individual permits where the permittee was responsible for performing mitigation issued in fiscal year 2000) with the following exceptions:

- *Charleston.* The district could not locate three permit files.
- *Jacksonville.* We selected a random sample of 55 the 167 individual permits identified by Jacksonville officials. The district could not locate complete permit files for 13 of the permits we requested. In addition, 18 of the permits we requested did not meet our criteria; for example, some permits were modified in fiscal year 2000 but were not issued in that year.
- *New Orleans.* District officials could not identify the permits that met our criteria from the district database. Therefore, we asked district officials to select the permits issued in fiscal year 2000 where the permittee was responsible for performing compensatory mitigation and reviewed all of the permits they identified.
- *St. Paul.* The district could not locate one permit file.

Table 2: Mitigation Banks Reviewed at the Seven Districts, November 28, 1995, through December 2004

District	Number of banks reviewed
Charleston	10
Galveston	4
Jacksonville ^a	19
New Orleans ^{a, b}	23
St. Paul ^a	28
Seattle	2
Wilmington	9
Total	95^c

Source: GAO analysis of Corps data.

^aWe randomly selected mitigation bank files for review at this district.

^bNew Orleans could not locate files for two of the mitigation banks that we requested for review.

^cThis total includes the 10 mitigation bank agreements that were approved during 2004: Jacksonville - 4, New Orleans - 1, and St. Paul - 5.

Table 3: In-Lieu-Fee Arrangements Reviewed at the Seven Districts

District	Number of arrangements
Charleston	2
Galveston	4
Jacksonville	4
New Orleans	1
St. Paul	0
Seattle	0
Wilmington	1
Total	12

Source: GAO analysis of Corps data.

Note: At the Galveston and New Orleans districts, we asked for documentation of the in-lieu-fee arrangements. Because neither of these districts has formal agreements for its arrangements, as called for by federal guidance, the districts did not provide any documentation for us to review. Therefore, any information about these districts' in-lieu-fee arrangements was obtained through interviews with district officials.

In addition to the file reviews, we spoke with district officials and reviewed relevant documentation to gain a better understanding of the districts' oversight programs and to gather any information that may not have been available during our file reviews.

To identify the enforcement actions the Corps can take if it determines that compensatory mitigation requirements are not being met and the extent to which it takes these actions, we analyzed Corps data on how the district offices resolved instances of noncompliance during fiscal year 2003. In addition, we reviewed relevant regulations and documentation obtained either from Corps officials or identified during our file reviews. We also discussed with headquarters and district officials the enforcement actions available to the Corps and the frequency with which the districts used these actions.

In addition, we met with several sponsors of mitigation banks and in-lieu-fee arrangements, as well as subject area experts, such as members of the National Research Council, to gain their views on the Corps' mitigation program. We conducted our review from June 2004 through September 2005 in accordance with generally accepted government auditing standards.

Corps of Engineers Federal Guidance for Oversight of Compensatory Mitigation

As noted earlier, the Corps has three primary guidance documents for overseeing compensatory mitigation performed by permittees, mitigation banks, and in-lieu-fee arrangements: (1) *The 1999 Army Corps of Engineers Standard Operating Procedures for the Regulatory Program* (Parts I and II); (2) *The Federal Guidance for the Establishment, Use and Operation of Mitigation Banks*; and (3) *The Federal Guidance on the Use of In-Lieu-Fee Arrangements for Compensatory Mitigation Under Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act*. These documents provide guidance for overseeing compensatory mitigation as described in this appendix.

Standard Operating Procedures for the Regulatory Program (Parts I and II)

The Corps' 1999 Standard Operating Procedures for the Regulatory Program (Part I) highlights critical policies and procedures that are major factors in administering a consistent program nationwide. It specifies the following:

- *For all compensatory mitigation,*
 - Compliance inspections are essential.
- *For individual permittees,*
 - Districts will inspect a relatively high percentage of compensatory mitigation to ensure compliance with permit conditions. This is important because many of the Corps permit decisions require compensatory mitigation to offset project impacts.
 - To minimize field visits and the associated expenditures of resources, permits with compensatory mitigation requirements should require applicants to provide periodic monitoring reports and certify that the mitigation is in accordance with permit conditions. Districts should review all monitoring reports.
 - Districts will require all permittees to submit a self-certification statement of compliance. Districts should not be expending funds on surveillance as a discrete activity. Surveillance should be performed in conjunction with other activities such as permit or enforcement actions.
- *For mitigation banks,*

- Districts will inspect all mitigation banks to ensure compliance with the banking agreement.
- *For in-lieu-fee arrangements,*
 - These are not mentioned in Part I of the standard operating procedures.

The Corps' Standard Operating Procedures for the Regulatory Program (Part II) lists the work that should be prioritized. Part II states that it is not intended to dissuade districts from doing lower priority work; however, all districts should perform the high priority work before expending resources on the lower priority work. Part II specifies the following for mitigation:

- *High priority work consists of:*
 - requiring and reviewing monitoring reports on mitigation banks and other substantial mitigation, including in-lieu-fee approaches to assure success; and
- *Low priority work consists of:*
 - compliance inspections for all mitigation and multiple site visits to a mitigation site.

Federal Guidance for the Establishment, Use and Operation of Mitigation Banks

The Federal Guidance for the Establishment, Use and Operation of Mitigation Banks, issued in November 1995, provides policy guidance for the establishment, use, and operation of mitigation banks for the purpose of providing compensatory mitigation. Oversight guidance in this document is as follows:

- Members of the mitigation banking review team, which the Corps chairs, are encouraged to conduct regular (e.g., annual) on-site inspections, as appropriate, to monitor bank performance.
- Annual monitoring reports should be submitted to the authorizing agencies, which include the Corps. The period for monitoring will typically be 5 years; however, it may be necessary to extend this period for projects requiring more time to reach a stable condition or where remedial activities were undertaken.

Federal Guidance on the
Use of In-Lieu-Fee
Arrangements for
Compensatory Mitigation
Under Section 404 of the
Clean Water Act and Section
10 of the Rivers and Harbors
Act

The Federal Guidance on the Use of In-Lieu-Fee Arrangements for Compensatory Mitigation Under Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act, issued in November 2000, clarifies the manner in which in-lieu-fee mitigation may serve as an effective and useful approach to satisfy compensatory mitigation requirements and meet the administration goal of no net loss of wetlands. Related to oversight, it specifies the following:

- There should be appropriate schedules for regular (e.g., annual) monitoring reports to document funds received, impacts permitted, how funds were disbursed, types of projects funded, and the success of projects conducted, among other aspects of the arrangement.
- The Corps should evaluate the reports and conduct regular reviews to ensure that the arrangement is operating effectively and is consistent with agency policy and the specific agreement.

File Review Results by Corps District

This appendix presents the results of our file review at seven Corps districts—Charleston, South Carolina; Galveston, Texas; Jacksonville, Florida; New Orleans, Louisiana; St. Paul, Minnesota; Seattle, Washington; and Wilmington, North Carolina. Results of our review for individual permits issued in fiscal year 2000 where permittees were responsible for the mitigation are presented in table 4. Results for mitigation banks approved between the date of the mitigation bank federal guidance (November 28, 1995) and December 31, 2003, are in table 5 and in-lieu-fee arrangements currently operating at the districts at the time of our site visits are in table 6.

Table 4: Results of Review of Corps Oversight of Individual Permits Issued in Fiscal Year 2000 Where Permittees Are Responsible for Compensatory Mitigation

	Charleston	Galveston	Jacksonville	New Orleans	St. Paul	Seattle	Wilmington
Number of permit files reviewed	25	18	24	26	31	7	21
Permits requiring monitoring reports	0	11	16	19	19	7	17
Permit files with evidence of at least one monitoring report	1 ^a	1 ^a	11	0	2	2	8 ^b
Permit files with evidence of at least one compliance inspection	3	3	4	0	1	2	10
Permit files with evidence of either monitoring reports or compliance inspections	4	3	13	0	3	2	14

Source: GAO analysis of Corps data.

^aMonitoring report was received, but the Corps did not require the permittee to submit it.

^bOf the eight permit files with evidence of at least one monitoring report in Wilmington, two of the permits did not require these reports.

Appendix III
File Review Results by Corps District

Table 5: Results of Review of Corps Oversight of Mitigation Banks Approved from November 1995 through December 2003

	Charleston	Galveston	Jacksonville ^a	New Orleans ^a	St. Paul ^a	Seattle	Wilmington
Number of mitigation bank files reviewed	10	4	15 ^b	22 ^c	23 ^d	2	9
Mitigation banking agreements requiring monitoring reports	5	4	14	22	4	2	9
Mitigation bank files with evidence of at least one monitoring report	4	3	7 ^e	16	2	2	9
Mitigation bank files with evidence of at least one compliance inspection	5	1	5	9	3	1	7
Mitigation bank files with evidence of either monitoring reports or compliance inspections	7	3	8	18	5	2	9

Source: GAO analysis of Corps data.

^aGAO reviewed a random sample of mitigation bank files at this district.

^bFour additional banks were approved in 2004. All of the banking agreements require the sponsor to provide monitoring reports to the Corps.

^cOne additional bank was approved in 2004. The banking agreement requires the sponsor to provide monitoring reports to the Corps.

^dFive additional banks were approved in 2004. Of these, one of the banking agreements required the sponsor to provide monitoring reports to the Corps.

^eFor one bank, a monitoring report was received, but the Corps did not require the bank to submit it.

Table 6: Results of Review of Corps Oversight of In-Lieu-Fee Arrangements Currently in Operation at the Time of Our Site Visit

	Charleston	Galveston ^a	Jacksonville	New Orleans ^a	St. Paul	Seattle	Wilmington
Number of in-lieu-fee arrangements reviewed	2	4	4	1	0	0	1
Arrangements with agreements requiring monitoring reports	2	0	3	0	N/A	N/A	1
Arrangements with evidence of at least one monitoring report	1	0	4 ^b	0	N/A	N/A	1
Arrangements with evidence of at least one compliance inspection	0	0	4	0	N/A	N/A	1
Arrangements with evidence of either monitoring reports or compliance inspections	1	0	4	0	N/A	N/A	1

Source: GAO analysis of Corps data.

^aThe Galveston and New Orleans districts do not have any formal agreements or documentation regarding oversight for their in-lieu-fee arrangements. As a result, district officials did not have any monitoring requirements or provide files for us to review.

Appendix III
File Review Results by Corps District

^bFor one arrangement, a monitoring report was received, but the Corps did not require the arrangement to submit it.

Comments from the Department of Defense



DEPARTMENT OF THE ARMY
OFFICE OF THE ASSISTANT SECRETARY
CIVIL WORKS
108 ARMY PENTAGON
WASHINGTON DC 20310-0108

26 AUG 2005

Ms. Anu Mittal
Director
Natural Resource and Environment
U.S. General Accounting Office
441 G Street, N.W.
Washington, D.C. 20548-1000

Dear Ms. Mittal:

This is the Department of Defense (DoD) response to the GAO draft report, 'WETLANDS PROTECTION: Corps of Engineers Is Not Providing the Oversight Needed to Ensure That Compensatory Mitigation Is Occurring,' dated August 12, 2005, (GAO Code 360490/GAO-05-898).

The GAO report was prepared to examine the: (1) guidance the Corps has issued for overseeing compensatory mitigation; (2) extent to which the Corps oversees compensatory mitigation; and (3) enforcement actions the Corps can take if required mitigation is not performed and the extent to which it takes these actions. The report acknowledges that the Corps has existing guidance that establishes two primary oversight activities for compensatory mitigation: requiring monitoring reports be submitted by permittees and conducting compliance inspections of the mitigation sites. In general, the report concludes that better oversight of compensatory mitigation is completed for third-party mitigation than for permittee-responsible mitigation. In addition, the report indicates that the Corps prefers to negotiate with permittees over using enforcement actions to bring them into compliance with permit conditions, and for those infrequent circumstances where permittees believe that enforcement actions have been overly severe they may request review by the appropriate Division Commander. As a consequence of this investigation, the GAO recommends that the Secretary of the Army direct the Corps to establish an effective oversight approach to ensure that permittees and third parties are accomplishing all required compensatory mitigation as specified in their authorizations. On behalf of the Department of Defense, I have enclosed specific comments on the recommendations of the GAO.

Very truly yours,

A handwritten signature in cursive script that reads "John Paul Woodley, Jr." is positioned above the printed name.

John Paul Woodley, Jr.
Assistant Secretary of the Army
(Civil Works)

Enclosure

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**GAO DRAFT REPORT - DATED AUGUST 12, 2005
GAO CODE 360490/GAO-05-898**

**"WETLANDS PROTECTION: Corps of Engineers is Not Providing the Oversight
Needed to Ensure That Compensatory Mitigation Is Occurring"**

**DEPARTMENT OF DEFENSE COMMENTS
TO THE RECOMMENDATIONS**

RECOMMENDATION 1: The GAO recommends that the Secretary of the Army direct the Corps of Engineers to develop more specific guidance for overseeing compensatory mitigation performed by permittees, mitigation banks, and in-lieu-fee sponsors. In particular, the guidance should define key terms, such as "substantial mitigation"; and specify the actions Corps officials should take if required monitoring reports are not received. (p. 28/GAO Draft Report)

DOD RESPONSE: We concur with this recommendation. The Standard Operation Procedures (SOP) procedures issued in 1999 do not adequately address mitigation nor compliance and enforcement. The Corps recognized this shortcoming prior to the GAO initiating this investigation and has been working on a revised SOP to clarify existing discrepancies and lack of specific guidance. The revised SOP will provide details on mitigation requirements as well as compliance and enforcement procedures in relation to all permit conditions, including compensatory mitigation requirements. A revised draft SOP will be circulated in October 2005 for review and comment by the Corps Divisions and Districts.

RECOMMENDATION 2: The GAO recommends that the Secretary of the Army direct the Corps of Engineers to clarify expectations for oversight of mitigation, including establishing goals for the number of monitoring reports that should be reviewed and the number of compliance inspections that should be conducted. (p. 28/GAO Draft Report)

DOD RESPONSE: We concur. The Corps will issue a Regulatory Guidance Letter (RGL) clarifying monitoring requirements for compensatory mitigation projects. The RGL will state what is required to be monitored and provide an outline for standardized monitoring reports. This outline will ensure Corps resources are used to provide oversight of the projects themselves rather than reports. In addition to the RGL, the Corps has established performance measures (issued in 2003 and will be tracked in 2006) that provide clear guidance to Corps districts on the level of oversight that is expected for compensatory mitigation projects. These performance measures were coordinated with the Office of Management and Budget through the Program Assessment and Rating Tool process (PART). Through a combination of the RGL and tracking of the performance measures, the Corps will insure better oversight of existing and future compensatory mitigation so that the Administration's goal of no overall net loss of wetlands is achieved within our Regulatory program. Additionally, the RGL will

-2-

communicate to the public, mitigation bankers, ILF providers, and the Federal and State agencies what is expected of permittees who are required to perform compensatory mitigation.

RECOMMENDATION 3: The GAO recommends that the Secretary of the Army direct the Corps of Engineers to review existing mitigation banks and in-lieu-fee arrangements to ensure that they have approved agreements with the Corps, as called for in federal guidance. If such agreements are not in place, they should be developed. Additionally, the Corps should ensure that future mitigation banks and in-lieu-fee arrangements have these approved agreements. (p. 29/GAO Draft Report)

DOD RESPONSE: We concur. In response to independent critiques of the effectiveness of wetland compensatory mitigation projects, the Army Corps of Engineers, the Environmental Protection Agency, and the Departments of Agriculture, Commerce, Interior, and Transportation released the National Wetlands Mitigation Action Plan (MAP) on December 26, 2002. The MAP includes tasks that will lead to improved ecological performance and results of compensatory mitigation. On May 7, 2004, the Corps issued guidance entitled "Mitigation for Impacts to Aquatic Resources from Surface Coal Mining" to supplement existing guidance so as to facilitate uniform implementation of compensatory mitigation requirements and the implementation of successful compensatory mitigation projects. In addition, Section 314 of the National Defense Authorization Act for Fiscal Year 2004 directed the Corps to issue regulations "establishing performance standards and criteria for the use, consistent with section 404 of the Federal Water Pollution Control Act (33 U.S.C. 1344), of on-site, off-site, and in-lieu fee mitigation and mitigation banking as compensation for lost wetlands functions in permits issued by the Secretary of the Army under such section." The Corps has prepared a draft mitigation rule that establishes standards and requirements for all forms of compensatory mitigation projects, including wetland and stream projects. The Corps will implement this new comprehensive mitigation rule in accordance with the interagency vetting, coordination, and comment procedures stipulated by the Administrative Procedures Act. The Corps will ensure district offices follow these new requirements and procedures in concert with additional follow-on supplemental guidance developed through the MAP process.

GAO Contact and Staff Acknowledgments

GAO Contact

Anu K. Mittal (202) 512-3841 (mittala@gao.gov)

Staff Acknowledgments

In addition to the individual named above, Sherry McDonald, Assistant Director; Diane Caves; Jonathan Dent; Doreen Feldman; Janet Frisch; Natalie Herzog; Cynthia Norris; Karen O’Conor; Anne Rhodes-Kline; Jerry Sandau; Carol Herrnsstadt Shulman; Lisa Vojta; and Daniel Wade Zeno made key contributions to this report.

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