

Compensatory Mitigation Standard Operating Procedures

I. PURPOSE.

This document establishes standard operating procedures (SOP) under which the U.S. Army Corps of Engineers (Corps), New Orleans District, Regulatory Branch (CEMVN) will determine the need, appropriateness and quantity of compensatory mitigation and assure that the required compensatory mitigation is consistent with the policies set forth in 33 CFR 320.4(r), 325 and 332 (REGS), the Council for Environmental Quality's (CEQ) implementing regulations for the National Environmental Policy Act (NEPA), and the February 6, 1990, Memorandum of Agreement between the Corps of Engineers and the Environmental Protection Agency (MOA). However, CEMVN may deviate from procedures, as described above, at its discretion on a case-by-case basis where a different approach may be either more practicable and/or environmentally preferable, depending on the circumstances involved.

Department of the Army Permits for the discharge of dredged or fill material within jurisdictional waters require mitigative sequencing for which project related impacts must first be avoided to the maximum extent practicable, remaining impacts must then be minimized, and finally unavoidable impacts must be appropriately compensated through an approved mitigation plan that replaces lost aquatic resource functions and values. The Corps is responsible for determining the appropriate form and amount of compensatory mitigation required. This SOP will clarify CEMVN's criteria for determining and implementing compensatory mitigation.

II. COMPENSATORY MITIGATION FOR UNAVOIDABLE IMPACTS TO AQUATIC RESOURCES

A. Objective of Compensation

The fundamental objective of compensatory mitigation is to offset unavoidable impacts to waters of the United States authorized by DA permits. Army regulations state that mitigation shall be required for resource losses which are specifically identifiable, reasonably likely to occur, and of importance to the human or aquatic environment. This includes both direct and any foreseeable secondary impacts to aquatic resources resulting from individual and/or cumulative actions. Direct impacts are those that happen in direct response to the permitted activity, i.e. functional wetland losses within the footprint of the permitted activity (e.g., the loss of habitat in the footprint of a dam). Secondary impacts are those removed in time and/or distance in relation to the permitted activity (e.g., the secondary impact of dam construction is the inundation of the area behind the dam or impacts to habitat and/or fisheries downstream of the dam associated with the hydroperiod changes). Secondary impacts beyond the action area that would have occurred regardless of the permit decision (e.g., increases in traffic and noise could be judged as these types of impacts) are not considered in regulatory decision-making.

The regulations require appropriate and practicable compensatory mitigation to replace functional losses to aquatic resources, including wetlands. CEMVN strives to achieve a goal of no overall net loss of wetland functions by offsetting unavoidable adverse impacts to existing aquatic resources associated with permit actions.

B. When to Begin Development of a Compensatory Mitigation Plan

In reference to 33 CFR 325.1(d)(7) and 335.1(d) the applicant is required to submit a statement explaining how impacts to the waters of the United States are to be avoided, minimized, and compensated. CEMVN follows the sequencing established in the MOA for all permit applications. Sequencing first determines that potential impacts to jurisdictional waters have been avoided to the maximum extent practicable, then determines if all appropriate and practicable steps have been taken to minimize project site impacts and finally requires compensation for all remaining unavoidable adverse impacts. Generally, CEMVN does not encourage a formal mitigation plan be developed until we have determined that avoidance is not practicable and that the applicant has done everything practicable to minimize project impacts to aquatic resources.

CEMVN encourages applicants to develop a tentative mitigation plan for submittal with the Department of the Army permit application. The primary purpose for early development of a mitigation plan is to allow an opportunity for review by the resource agencies and the interested public through the Corps' public notice advertisement process. The early receipt of the applicant's mitigation plan should assist in reaching a timely permit decision. The tentative mitigation plan may be as simple as stating that an appropriate offsite mitigation bank would be used. This is adequate since established mitigation banks have been reviewed and approved by the resource agencies. **However, the amount of required compensatory mitigation cannot be determined by CEMVN until all appropriate and practicable avoidance and minimization steps have been satisfied and an appropriate assessment of the project site wetlands has been completed.**

C. Compensatory Mitigation Types

1. **Mitigation Banks**: A permit applicant may obtain credits from a mitigation bank. A mitigation bank is a wetland, stream or other aquatic resource area that has been restored, established, enhanced, or preserved. This resource area is then set aside to compensate for future impacts to aquatic resources resulting from permitted activities. The value of a bank is determined by quantifying the aquatic resource restored, established, enhanced, and/or preserved in terms of "credits". Permittees upon Corps approval can acquire these credits to meet their requirements for compensatory mitigation.

2. **In-Lieu Fee Mitigation**: A permit applicant may make a payment to an in-lieu fee program that will conduct wetland, stream or other aquatic resource restoration, creation, enhancement, or preservation activities. In-lieu fee programs are generally administered by government agencies or non-profit organizations that have established an agreement with the regulatory agencies to use in-lieu fee payments collected from permit applicants.

3. **Permittee-Responsible Mitigation**: A permittee may be required to provide compensatory mitigation through an aquatic resource restoration, enhancement, or preservation activity. This compensatory mitigation is usually within the same watershed and preferably on

the same site as the permitted impact. The permittee retains responsibility of the implementation and success of the mitigation project.

Under all circumstances, CEMVN makes the final determination as to the type and amount of compensatory mitigation. Third party agreements or the purchase of wetland acreage/credits prior to formal notification by CEMVN of compensatory mitigation requirements does not necessitate designation of that bank and/or amount of acreage/credits as appropriate compensatory mitigation.

D. Appropriate Compensatory Mitigation

The determination of what level of compensatory mitigation constitutes “appropriate” mitigation is based solely on the values and functions of the aquatic resource that will be impacted. The term “practicable” which is defined at 40 CFR 230.3(q) means “available and capable of being done after taking into consideration cost, existing technology and logistics in light of overall project purposes”.

CEMVN is responsible for determining the kind and amount of compensatory mitigation required. The applicant is responsible for the preparation of a compensatory mitigation plan to fully compensate for unavoidable impacts. This compensatory mitigation plan may be to purchase credits from a mitigation bank or in-lieu fee program or to implement a permittee-responsible mitigation plan or a combination of these options. However when permitted impacts are in the service area of an approved mitigation bank and the bank has the appropriate number and resource type of credits available the permittee’s compensatory mitigation requirements may be met by securing those credits from the sponsor of the mitigation bank.

In general the required compensatory mitigation should be located within the same watershed as the impact site and should be located where it is most likely to successfully replace lost functions and values, taking into account such watershed scale features as aquatic habitat diversity, habitat connectivity, relationships to hydrologic sources (including the availability of water rights), trends in land use, ecological benefits, and compatibility with adjacent land uses.

CEMVN will consider compensatory mitigation types, using a watershed approach, in the following preferential hierarchy as established in 33 CFR 332.3(b): Mitigation bank credits, in-lieu fee program credits, and then permittee-responsible mitigation.

E. Developing a Mitigation Plan

After determining what compensatory mitigation will be required, CEMVN will request a plan from the applicant that fully compensates for project related adverse impacts on the aquatic environment. CEMVN, with input from the resource agencies, will assist the applicant in developing a mitigation plan. CEMVN will evaluate the appropriateness of the proposed plan utilizing an acceptable assessment method.

For activities authorized by general permits or letters of permission, if compensatory mitigation is required, CEMVN may approve a conceptual or detailed compensatory mitigation

plan to meet required time frames for general permit verifications, but a final compensatory mitigation plan (incorporating the elements found in 33 CFR 332.4(c)(2) through 332.4(c)(14) and discussed below) must be approved by CEMVN. The final compensatory mitigation plan must contain a level of detail that is commensurate with the scale and scope of the impacts. If the permittee intends to fulfill their compensatory mitigation obligations by securing credits from approved mitigation banks or in-lieu fee programs, their mitigation plan needs to include only the items described in 332.4(c)(5) and (c)(6), with a statement providing the name of the specific mitigation bank or in-lieu fee program to be used or a statement indicating that a mitigation bank or in-lieu fee program will be used contingent upon approval from CEMVN.

For individual permits, if the permittee intends to fulfill their compensatory mitigation obligations by securing credits from an approved mitigation bank or in-lieu fee program, their mitigation plan need to include only the items described in 332.4(c)(5) and (c)(6), with a statement providing the name of the specific mitigation bank or in-lieu fee program to be used or a statement indicating that a mitigation bank or in-lieu fee program will be used contingent upon approval from CEMVN. However if the permittee does not intend to fulfill their obligations by securing credits from approved mitigation bank or in-lieu fee program, the permittee must prepare a draft mitigation plan and submit it to CEMVN for review. After addressing any comments/concerns identified by CEMVN the permittee must prepare a final mitigation plan which must be approved by CEMVN prior to issuing the permit. The final mitigation plan must include the items described in 33 CFR 332.4(c)(2) through (c)(14) and outlined below.

1. **Objectives:** §332.4 (c)(2) A description of the resource type(s) and amount(s) that will be provided, the method of compensation (i.e., restoration, establishment, enhancement, and/or preservation). Also the manner in which the resource functions of the compensatory mitigation project will benefit the watershed, ecoregion, physiographic province, or other geographic area of interest.

2. **Site selection.** §332.4 (c)(3) A description of the factors considered during the site selection process. This should include watershed needs, on-site alternatives where applicable, and the practicability of accomplishing ecologically self-sustaining aquatic resource restoration, establishment, enhancement, and/or preservation at the chosen site. (See §332.3(d)).

3. **Site protection instrument.** §332.4 (c)(4) A description of the legal arrangements and instrument, including site ownership, that will be used to ensure the long-term protection of the compensatory mitigation project site (see §332.7(a)).

4. **Baseline information.** §332.4 (c)(5) A description of the ecological characteristics of the proposed compensatory mitigation project site and, in the case of an application for a DA permit, the impact site. This may include descriptions of historic and existing plant communities, historic and existing hydrology, soil conditions, a map showing the locations of the impact and mitigation site(s) or the geographic coordinates for those site(s), and other site characteristics appropriate to the type of resource proposed as compensation. The baseline information should also include a delineation of jurisdictional waters/wetlands on the proposed compensatory mitigation site. A prospective permittee planning to secure credits from an approved mitigation

bank or in-lieu fee program only needs to provide baseline information about the impact site, not the mitigation bank or in-lieu fee site.

5. **Determination of credits.** §332.4 (c)(6) A description of the number of credits to be provided, including a brief explanation of the rationale for this determination. (See §332.3(f).)

(i) For permittee-responsible mitigation, this should include an explanation of how the compensatory mitigation project will provide the required compensation to offset unavoidable impacts to aquatic resources resulting from the permitted activity.

(ii) For permittees intending to secure credits from an approved mitigation bank or in-lieu fee program, it should include the number and resource type of credits to be secured and how these were determined.

6. **Mitigation work plan.** §332.4 (c)(7) Detailed written specifications and work descriptions for the compensatory mitigation project, including, but not limited to, the geographic boundaries; construction methods (to include the proposed grading plan including surface elevations and slopes), timing, and sequence; source(s) of water, including connections to existing waters and uplands; methods for establishing the desired plant community; plans to control invasive plant species;; soil management; and erosion control measures.

7. **Maintenance plan.** §332.4 (c)(8) A description and schedule of maintenance activities required to ensure the continued viability of the resource once initial construction is completed.

8. **Performance standards.** §332.4 (c)(9) Ecologically-based standards that will be used to determine whether the compensatory mitigation project is achieving its objectives. (See §332.5.)

9. **Monitoring requirements** §332.4 (c)(10) A description of parameters to be monitored for success in meeting document performance standards and if adaptive management is needed. A schedule for monitoring and reporting on monitoring results to the CEMVN must be included. (See §332.6.)

10. **Long-term management plan** §332.4 (c)(11) A description of how the compensatory mitigation project will be managed after performance standards have been achieved to ensure the long-term sustainability of the resource, including long-term financing mechanisms and the party responsible for long-term management. (See §332.7(d).)

11. **Adaptive management plan** §332.4 (c)(12) A management strategy to address unforeseen changes in site conditions or other components of the compensatory mitigation project, including the party or parties responsible for implementing adaptive management measures. The adaptive management plan will guide decisions for revising compensatory mitigation plans and implementing measures to address both foreseeable and unforeseen circumstances that adversely affect compensatory mitigation success. (See §332.7(c).)

12. **Financial assurances** §332.4 (c)(13) A description of the type and amount of financial assurances to be provided as necessary to ensure a high level of confidence that the compensatory mitigation project will be successfully completed, in accordance with its performance standards (see §332.3(n)).

13. **Other information** §332.4 (c)(13) CEMVN may require additional information as necessary to determine the appropriateness, feasibility, practicability, and success of the compensatory mitigation project.

Since an activity that requires a standard DA permit pursuant to section 404 of the Clean Water Act, requires a public notice for the proposed activity which must contain a statement explaining how impacts associated with the proposed activity are to be avoided, minimized and compensated for the applicant must clearly identify any information being claimed as confidential in the mitigation statement when submitted.

III. MITIGATION BANKS AND IN-LIUE FEE PROGRAMS

Mitigation banks and in-lieu fee programs must prepare a mitigation plan including the items in paragraphs 33 CFR 332.4(c)(2) through (c)(14) for each separate compensatory mitigation project site. For mitigation banks and in-lieu fee programs, the preparation and approval process for mitigation plans is described in §332.8.