

**DEPARTMENT OF DEFENSE****Department of the Army, Corps of Engineers****33 CFR Parts 325 and 332****ENVIRONMENTAL PROTECTION AGENCY****40 CFR Part 230****[EPA-HQ-OW-2006-0020]****RIN 0710-AA55****Compensatory Mitigation for Losses of Aquatic Resources****AGENCIES:** U.S. Army Corps of Engineers, DoD; and Environmental Protection Agency.**ACTION:** Proposed rule.

**SUMMARY:** The U.S. Army Corps of Engineers (the Corps) and the Environmental Protection Agency (EPA) are proposing to revise regulations governing compensatory mitigation for activities authorized by permits issued by the Department of the Army. The proposed regulations are intended to establish performance standards and criteria for the use of permittee-responsible compensatory mitigation and mitigation banks, and to improve the quality and success of compensatory mitigation projects for activities authorized by Department of the Army permits. The proposed regulations are also intended to account for regional variations in aquatic resource types, functions, and values, and apply equivalent standards to each type of compensatory mitigation to the maximum extent practicable. The proposed rule includes a watershed approach to improve the quality and success of compensatory mitigation projects in replacing losses of aquatic resource functions, services, and values resulting from activities authorized by Department of the Army permits. We are proposing to require in-lieu fee programs, after a five-year transition period, to meet the same standards as mitigation banks.

**DATES:** Submit comments on or before May 30, 2006.

**ADDRESSES:** You may submit comments, identified by docket number EPA-HQ-OW-2006-0020 and/or RIN 0710-AA55, by any of the following methods:

- Federal eRulemaking Portal (recommended method of comment submission): <http://www.regulations.gov>. Follow the on-line instructions for submitting comments.
- E-mail: [ow-docket@epamail.epa.gov](mailto:ow-docket@epamail.epa.gov). Include the

docket number, EPA-HQ-OW-2006-0020, and/or the RIN number, 0710-AA55, in the subject line of the message.

- Mail: USEPA Docket Center, Attention Docket Number EPA-HQ-OW-2006-0020, 1200 Pennsylvania Ave., NW., Washington, DC 20460.
- Hand Delivery: USEPA Docket Center, Room B102, EPA West, Attention Docket Number EPA-HQ-OW-2006-0020, 1301 Constitution Ave., NW., Washington, DC 20460. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

**Instructions:** Direct your comments to docket number EPA-HQ-OW-2006-0020 and/or RIN 0710-AA55. All comments received will be included in the public docket without change and may be made available on-line at <http://www.regulations.gov>, including any personal information provided, unless the commenter indicates that the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI, or otherwise protected, through [www.regulations.gov](http://www.regulations.gov) or e-mail. The [www.regulations.gov](http://www.regulations.gov) Web site is an anonymous access system, which means we will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail directly to EPA without going through [www.regulations.gov](http://www.regulations.gov), your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, we recommend that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If we cannot read your comment because of technical difficulties and cannot contact you for clarification, we may not be able to consider your comment. Electronic comments should avoid the use of any special characters, any form of encryption, and be free of any defects or viruses. For additional information about EPA's public docket visit the EPA Docket Center homepage at <http://www.epa.gov/epahome/dockets.htm>.

**Docket:** For access to the docket to read background documents or comments received, go to [www.regulations.gov](http://www.regulations.gov). All documents in the docket are listed. Although listed in the index, some information is not publicly available, such as CBI or other information whose disclosure is restricted by statute. Certain other

material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically in [www.regulations.gov](http://www.regulations.gov) or in hard copy at the Water Docket, EPA/DC, EPA West, Room B102, 1301 Constitution Ave., NW., Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566-1744, and the telephone number for the Water Docket is (202) 566-2426.

Consideration will be given to all comments received within 60 days of the date of publication of this notice.

**FOR FURTHER INFORMATION CONTACT:** Mr. David Olson at 202-761-4922 or by e-mail at [david.b.olson@usace.army.mil](mailto:david.b.olson@usace.army.mil), or Mr. Palmer Hough at 202-566-8323 or by e-mail at [mitigationrule@epa.gov](mailto:mitigationrule@epa.gov). Information can also be found at the EPA compensatory mitigation webpage at: <http://www.epa.gov/wetlandsmitigation>.

**SUPPLEMENTARY INFORMATION:****I. Background**

Section 314 of the National Defense Authorization Act for Fiscal Year 2004 (Pub. L. 108-136) requires the Secretary of the Army, acting through the Chief of Engineers, 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 statute states that the regulation should address wetlands compensatory mitigation. However, we believe that this regulation should apply to compensatory mitigation for all types of aquatic resources that can be impacted by activities authorized by Department of the Army permits, including streams and other open waters. We also believe that this regulation should apply to compensatory mitigation required for activities in navigable waters of the United States that are subject to regulatory jurisdiction under Sections 9 and 10 of the Rivers and Harbors Act of 1899. We believe this approach does not conflict with the intent of the statute, and will provide the regulated public with clear national standards and requirements for all aquatic resource compensatory mitigation required by Department of the Army permits, while

allowing district engineers flexibility to address permit-specific situations. We also believe this approach will enhance regulatory efficiency and improve protection of the aquatic environment.

The statute states that the regulation should be developed by the Department of the Army, with the provision that the standards and criteria developed be consistent with Section 404 of the Clean Water Act. We believe that the goals of the Clean Water Act and the Defense Authorization Act will be more effectively met if this proposed rule is issued jointly by the Corps and EPA. A jointly-issued proposed rule reflects the important roles played by both agencies in the Section 404 program, in which the permit program is administered by the Corps, while the responsibility for developing the regulations providing the environmental criteria for permit issuance is given to EPA. Since the proposed rule is in part a clarification of EPA regulations concerning Section 404 mitigation, a joint rule helps to ensure maximum consistency in the implementation of the section 404 regulatory program. Furthermore, CWA Section 501(a) authorizes EPA to conduct any rulemaking necessary to carry out EPA's functions under the Clean Water Act.

Joint issuance also provides basic regulatory consistency. Environmental criteria for the selection of disposal sites for discharges of dredged or fill material are set by EPA regulations at 40 CFR part 230, and referenced by Corps regulations at 33 CFR part 320. Since the proposed rule is in part a clarification of EPA's regulations at 40 CFR part 230, EPA must add the proposed rule text to its existing regulations in order to maintain consistency between the two linked Parts of the CFR. Making the two agencies' additions concurrent will avoid any confusion on the part of the regulated community and the public. Moreover, the history of a joint EPA/Corps relationship on mitigation issues is long. All national guidance on compensatory mitigation has been developed and issued jointly by the Corps and EPA, including Regulatory Guidance Letter 02-02 (issued on December 24, 2002); the "Federal Guidance for the Establishment, Use, and Operation of Mitigation Banks" (as published in the November 27, 1995, issue of the **Federal Register**, 60 FR 58605); 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" (as published in the November 7, 2000, issue of the **Federal Register**, 65 FR

66914); and the "Memorandum of Agreement Between the Environmental Protection Agency and the Department of the Army Concerning the Determination of Mitigation Under the Clean Water Act Section 404(b)(1) Guidelines" (issued on February 6, 1990).

We also believe the proposed rule establishes, to an extent that is feasible and practical, equivalent standards for all forms of compensatory mitigation, given the basic differences between the current mechanisms for providing compensatory mitigation (i.e., permittee-responsible mitigation, mitigation banks, and in-lieu fee programs). In many cases, it is not practical to impose all the same requirements on permittee-responsible mitigation projects as on mitigation banks, so some differences in the requirements for these types of mitigation remain. However, we are proposing to require in-lieu fee program sponsors to modify their programs within five years to comply with the same standards and requirements as mitigation banks, to provide greater assurances that compensatory mitigation projects undertaken by in-lieu fee programs will successfully replace lost aquatic resource functions and services. We are also seeking comment on alternative approaches that would retain in-lieu fee programs as a separate category of mitigation with somewhat different requirements. These alternatives are explained in further detail in Section VI of this preamble.

By establishing, to the maximum extent practicable, equivalent standards for all forms of compensatory mitigation, we believe success rates of compensatory mitigation projects will improve, and entrepreneurs and others will be encouraged to develop mitigation banks. Improving the processes applicable to the development and approval of mitigation banks is expected to result in more mitigation banking proposals, which would provide more compensatory mitigation in advance of authorized impacts to waters of the United States.

The proposed rule does not apply to compensatory mitigation that may be required for impacts other than to aquatic resources resulting from activities authorized by DA permits, such as impacts to historic properties. Under appropriate circumstances, a DA permit may require compensatory mitigation measures to ensure compliance with the Endangered Species Act or the National Historic Preservation Act, or to address some other public interest requirement. Those compensatory mitigation requirements

are addressed through other regulations and authorities.

During the development of the proposed rule, we considered the following compensatory mitigation guidance documents and lessons learned from their implementation: Regulatory Guidance Letter 02-02 (issued on December 24, 2002); the "Federal Guidance for the Establishment, Use, and Operation of Mitigation Banks" (as published in the November 27, 1995, issue of the **Federal Register**, 60 FR 58605); 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" (as published in the November 7, 2000, issue of the **Federal Register**, 65 FR 66914); and the "Memorandum of Agreement Between the Environmental Protection Agency and the Department of the Army Concerning the Determination of Mitigation Under the Clean Water Act Section 404(b)(1) Guidelines" (issued on February 6, 1990).

In preparing the proposed rule, we considered the findings and recommendations in the National Research Council's report issued in 2001 entitled "Compensating for Wetland Losses Under the Clean Water Act" (NRC Report). We also contemplated other studies and documents cited in the draft Environmental Assessment/Regulatory Analysis that was prepared by the Corps for this proposed rule. The Environmental Assessment/Regulatory Analysis is available at the Corps Headquarters Regulatory Home page at: <http://www.usace.army.mil/inet/functions/cw/cecwo/reg/citizen.htm>. Hard copies of this document can be obtained by contacting Corps Headquarters at the phone number provided in the **FOR FURTHER INFORMATION CONTACT** section, above.

The proposed rule incorporates many of the recommendations suggested in the NRC Report to improve the ecological success and sustainability of wetland compensatory mitigation projects. Through the standards and requirements in this proposed rule, we intend to improve the quality and success of aquatic resource restoration, establishment, enhancement, and preservation activities used to provide compensatory mitigation for DA permits, and to help maintain and improve the aquatic environment within watersheds.

In the NRC Report, the committee concluded that a watershed approach would improve permit decision making, and stated that wetland functions must

be understood from a watershed perspective to fulfill the objectives of the Clean Water Act. The committee noted that an automatic preference for in-kind and on-site compensatory mitigation is inconsistent with a watershed approach since there are circumstances in which on-site or in-kind mitigation is neither practicable nor environmentally preferable. In addition, the committee suggested using an analytical process for assessing wetland needs within a watershed and the potential for compensatory mitigation projects to persist over time.

In the proposed rule, we revise compensatory mitigation policies and procedures to conform with current principles of ecological restoration and landscape ecology. The proposed rule also aims to reduce regulatory burdens on mitigation bank sponsors by making the mitigation bank approval process more efficient through changes in the review and approval process.

The proposed rule also complements the Corps' and EPA's ongoing efforts to implement the National Wetlands Mitigation Action Plan (NWMAP). In response to the NRC report and other independent critiques of the effectiveness of compensatory mitigation for authorized losses of wetlands and other aquatic resources under Section 404 of the Clean Water Act, the Corps, EPA, and the Departments of Agriculture, Commerce, Interior, and Transportation released the NWMAP on December 26, 2002. The NWMAP includes 17 tasks designed to improve the ecological performance and results of compensatory mitigation. Thus far, eight of the tasks called for in the NWMAP have been completed and work continues on efforts to improve wetland impact and mitigation data collection and tracking. However, work on the remaining guidance documents called for in the NWMAP awaits finalization of this proposed rule.

The proposed rule is consistent with Executive Order 13352, Facilitation of Cooperative Conservation. The proposed rule includes collaborative approaches to decision-making for compensatory mitigation required by DA permits consistent with the definition of cooperative conservation in the Order. The provisions of the rule will ensure that determinations regarding compensatory mitigation requirements take into account the interests of landowners and other legally recognized interests in land and other natural resources, and accommodate agency and local participation in federal decision-making.

## II. General Principles in the Proposed Rule

For the purposes of the Corps Regulatory Program, compensatory mitigation is used to replace aquatic resource functions, services, and values that are lost to permitted impacts. Compensatory mitigation for losses of aquatic resources can help sustain or improve watershed functioning, and support the objective of the Clean Water Act, which is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters" (33 U.S.C. 1251(a)). One intent of the proposed rule is to improve the quality of compensatory mitigation for DA permits, to satisfy the objective of the Clean Water Act by improving the performance of compensatory mitigation projects in replacing aquatic resource functions, services, and values. Another intent of the proposed rule is to improve regulatory efficiency, especially for the review, approval, and implementation of mitigation banks. Finally, the proposed rule fulfills the mandate to ensure opportunities for federal agency participation in mitigation banking.

In addition to supporting the objective of the Clean Water Act, the proposed rule will support the "no overall net loss" goal for wetland acreage and functions, through appropriate site selection for wetlands compensatory mitigation projects. Locating compensatory mitigation projects where they will provide the desired habitat type and functions to appropriately offset impacts will support the "no overall net loss" goal for wetland acreage and function.

The proposed rule does not alter Corps regulations which address the general mitigation requirements for DA permits. In particular, it does not alter the circumstances under which compensatory mitigation is required. Also, the proposed rule does not alter Corps or EPA enforcement authorities for the section 404 program, as specified in sections 301(a), 308, 309, 404(n), and 404(s) of the Clean Water Act.

Site selection is a critical planning step for compensatory mitigation projects, and the watershed approach in the proposed rule is intended to focus on choosing appropriate locations for compensatory mitigation activities. Restoring or establishing a specific aquatic habitat type, such as a wetland, requires careful site selection for two primary reasons. First, development activities may alter the interaction between hydrology, soils, and organisms within a landscape, affecting the type of habitat that can be supported by the project site. For example, forested

wetlands require narrow hydrologic regimes because many tree species cannot tolerate long periods of inundation. Development activities may change local hydrology, resulting in new patterns of inundation and saturation that cannot support forested wetlands. Therefore, it is important to find a compensatory mitigation project site that will support the appropriate hydrology for the desired type of wetland habitat. Second, even if the desired habitat type can be restored or established at that site, surrounding development may result in an isolated or fragmented habitat that is less capable of supporting viable populations of species of import. Motile species require corridors to move between different habitats in the landscape, and if the surrounding area is occupied by roads and buildings, the ability of many species to move between habitats and interact with each other is restricted. Therefore, compensatory mitigation projects, especially those that are intended to replace wetland habitat, need to be planned within larger landscape contexts, such as watersheds. In its report on wetland compensatory mitigation, the NRC stated that "[l]andscape position, hydrologic variability, species richness, biological dynamics, and hydrologic regime are all important factors that affect wetland restoration."

For activities authorized by DA permits in coastal and urban areas, compensatory mitigation required by district engineers will be located in areas where it is appropriate and practicable to conduct aquatic resource restoration, establishment, and enhancement activities. It is important that coastal and other urban areas do not become devoid of aquatic resources simply because it is more difficult to successfully restore or establish aquatic habitat in developing areas. In some cases, however, preservation may be the most appropriate form of compensatory mitigation in coastal and urban areas. In addition to providing important ecological functions, wetlands and other aquatic resources also perform important services, such as wildlife viewing and education, that can only be accomplished when people have opportunities to interact with those aquatic resources. The functions and services that aquatic resources perform in turn provide the basis for the values that society derives from them. These include use values, such as recreation, and non-use values such as biodiversity and stewardship for future generations. Aquatic resource functions, services, and values should be considered when

evaluating sites in developed areas as options for providing compensatory mitigation. Mitigation projects for impacts authorized by DA permits should compensate for lost functions and services. While values are also considered as part of the public interest review, it is not always possible to fully compensate for lost values, as these are often dependent on proximity to population centers. Replacing aquatic resources at more remote locations may enhance some values (e.g., preservation of species) while decreasing others (e.g., recreational enjoyment).

Within a watershed context, it may be more appropriate to replace certain aquatic resource functions on-site, whereas it may be more appropriate to replace other functions off-site. For example, it may be environmentally preferable, to replace hydrologic and water quality functions at the impact site with a mitigation project that performs these functions, and to replace habitat functions at an off-site location, such as a mitigation bank or a compensatory mitigation project site near a park or nature reserve.

Through the watershed approach in the proposed rule, we intend to improve environmental outcomes of compensatory mitigation required for DA permits, including the effectiveness of compensatory mitigation in replacing impacted aquatic resource functions. The watershed approach uses a landscape perspective that places primary emphasis on site selection, through consideration of landscape attributes that will help provide the desired aquatic resource types and ensure they are self-sustaining. The watershed approach also considers how other landscape elements (e.g., other natural resources and developments) interact with compensatory mitigation project sites and affect the functions they are intended to provide.

In the proposed rule, the district engineer determines whether the compensatory mitigation option or proposal submitted by the permit applicant is adequate to offset unavoidable impacts, based on what is practicable and what will appropriately compensate for the aquatic resource functions and services that will be impacted as a result of the permitted activity. In pre-application consultation, the Corps may also provide information on existing watershed plans or watershed needs.

The proposed rule also establishes that the district engineer makes decisions regarding the approval of mitigation banking instruments, after coordinating a review of the prospectus for the proposed mitigation bank and

the draft mitigation banking instrument with an Interagency Review Team (IRT). We are proposing to establish clearly defined time frames for this review and a dispute resolution process whereby members of the IRT can expeditiously elevate issues associated with proposed mitigation banks for higher level review where necessary.

### III. Watershed Approach

In the NRC Report, the committee recommended that the Corps adopt a watershed-based approach to compensatory mitigation. The committee stated that the ecological functions of a restored or established wetland are dependent on its design and its setting or context within a watershed. The committee also said that the types and locations of wetlands in the landscape are important for providing desired functions.

Ideally, the watershed approach is based on a formal watershed plan, developed by Federal, state, and/or local environmental managers in consultation with affected stakeholders. Currently, there are many areas where no watershed plan exists. The Corps and EPA are committed to working with our counterparts at other levels of government to develop watershed plans, especially for areas facing significant development pressure. In the meantime, the watershed approach described in the NRC Report does not require a formal watershed plan. Instead, the watershed approach may be based on a structured consideration of watershed needs and how wetland types in specific locations can fulfill those needs.

The use of a watershed approach is based on analysis of information regarding watershed conditions and needs. Where an applicable watershed plan exists, such information will generally already have been considered in the development of the plan. Where no such plan exists, project sponsors may propose compensatory mitigation based on the watershed approach using appropriate information from other sources. Such information includes: Current trends in habitat loss or conversion, cumulative impacts of past development activities, current development trends, the presence and needs of sensitive species, site conditions that favor or hinder the success of mitigation projects, chronic environmental problems such as flooding or poor water quality, and local watershed goals and priorities. Project sponsors should make a reasonable effort, commensurate with the scope and scale of the project and impacts, to obtain as much of this information as possible as they design the

compensatory mitigation projects. Project sponsors may consult with the Corps to see if such information has been developed in the past in association with other projects in the watershed. For smaller projects requiring DA authorization, all of the types of information listed above may not be available, but that information should generally be available (or developed) for larger projects.

The agencies request comment on whether the rule should specify minimal information requirements for use of the watershed approach. Commenters should bear in mind that specifying minimum information requirements will likely limit the areas where a watershed approach can be used, at least in the medium term, as much of the above information is currently not available for many areas. This problem was recognized by the NRC, which recommended that in such situations watershed based decision-making should rely on the scientific expertise of wetlands program staff (i.e., Corps permit writers and other Federal agency review staff) and broad-based stakeholder participation. As discussed below, the proposed rule includes a requirement that information on how a prospective permittee plans to address avoidance, minimization, and compensatory mitigation requirements be included in the permit application and published by the Corps in the public notice for the permit application. This requirement is intended to promote the kind of broad-based stakeholder involvement in watershed based mitigation decisions envisioned by the NRC Report.

A watershed approach to compensatory mitigation involves a regional or landscape perspective, and should involve consideration of Federal, Tribal, state, community, and private interests, including the requirements of other programs and objectives, such as habitat conservation, storm water management, flood control, pollution prevention, and economic development when determining compensatory mitigation requirements for DA permits.

The agencies note that the term "watershed approach" is now used by a variety of Federal, State, and local agencies, as well as by private parties, but a consensus definition of this term has not yet emerged. The watershed approach presented in this proposed rule is a framework being proposed for use in determining compensatory mitigation requirements for DA permits. The watershed approach described in the proposed rule does not supersede or replace other uses of the term "watershed approach" in natural

resource management programs conducted by other government agencies. We are soliciting comments on whether, and if so, how, the watershed approach in the proposed rule differs from the watershed approaches used in other natural resource management programs, and how any such differences may affect implementation of the watershed approach for determining compensatory mitigation requirements for DA permits.

The watershed approach in the proposed rule will be implemented by district engineers with available information to determine the types and locations of compensatory mitigation activities that would best serve the watershed. Available information used by district engineers includes current trends in habitat loss or conversion, cumulative impacts of past development activities, current development trends, the presence and needs of sensitive species, site conditions that favor or hinder the success of mitigation projects, chronic environmental problems such as flooding or poor water quality, local watershed goals and priorities, assessments of watershed conditions, best professional judgment, and site conditions, as well as other relevant data.

The watershed approach in the proposed rule will help support the objective of Clean Water Act, and is intended to result in more effective replacement of aquatic resource functions impacted by activities authorized by DA permits. The level of detail used in the watershed approach for a specific activity is dependent on the availability of information and on the scope and scale of that activity.

#### IV. Organization of the Proposed Rule

The proposed compensatory mitigation regulation in 33 CFR part 332 [40 CFR part 230], is organized into the following sections:

Section 332.1 [230.91], *Purpose and general considerations*, describes the basic purpose of the proposed rule and general principles concerning compensatory mitigation.

Section 332.2 [230.92], *Definitions*, provides definitions of important terms relating to compensatory mitigation and the Corps Regulatory Program.

Section 332.3 [230.93], *General compensatory mitigation requirements*, describes general compensatory mitigation requirements for DA permits, including permit conditions and financial assurances. This section also describes the watershed approach to compensatory mitigation.

Section 332.4 [230.94], *Planning and documentation*, describes the review of

proposed compensatory mitigation activities, as well as requirements for mitigation plans.

Section 332.5 [230.95], *Ecological performance standards*, describes principles for establishing ecological performance standards for compensatory mitigation projects.

Section 332.6 [230.96], *Monitoring*, describes general requirements for monitoring compensatory mitigation projects.

Section 332.7 [230.97], *Management*, describes general requirements for site protection, sustainability, adaptive management, and long-term management of compensatory mitigation projects.

Section 332.8 [230.98], *Mitigation banks*, provides requirements and standards that are applicable to mitigation banks.

Section 332.9 [230.99], *In-lieu fee programs*, establishes deadlines for existing in-lieu fee programs to modify their current agreements to comply with the requirements of this rule.

It is important to note that §§ 332.1 to 332.7 apply to all new compensatory mitigation projects, including mitigation banks, while §§ 332.8 and 332.9 contain special provisions for new mitigation banks and existing in-lieu fee programs, respectively. Existing mitigation banks may continue operating under the terms of their approved instruments, but any modifications to such instruments, including the addition of new sites for umbrella instruments, would be subject to the requirements in this rule. New in-lieu-fee programs would not be approved once the rule goes into effect. Existing in-lieu-fee programs may continue to operate under the terms of their approved instrument for up to five years after the effective date of the rule.

#### V. Discussion of Specific Sections of the Proposed Rule

The proposed rule is presented in two parallel sections: changes to Corps regulation in 33 CFR and changes to EPA regulation in 40 CFR. The two sections are almost entirely the same, with minor exceptions. These include: (1) Corps changes to permit application requirements at 33 CFR 325.1; (2) Conforming changes to EPA's existing mitigation regulations at 40 CFR part 230, making appropriate citations for the addition of new §§ 230.91 through 230.99; and (3) References to the Rivers and Harbors Act of 1899, in which the EPA does not have a regulatory role, have been omitted from the text in part 230.

#### 33 CFR 325.1 Application for Permits

Since § 332.4(b)(1) of the proposed rule requires applicants for standard section 404 permits to submit a statement explaining how impacts to waters of the United States are to be avoided, minimized, and compensated, we are also proposing to modify § 325.1(d) by adding a new paragraph (paragraph (d)(7)). This new paragraph would further clarify the information required for a complete standard permit application for activities that involve discharges of dredged or fill material into waters of the United States, so that we can describe the proposed avoidance, minimization, and compensation in the public notice. The remaining paragraphs in this section would be renumbered, but the text of those paragraphs would remain the same.

#### 40 CFR 230.12 Findings of Compliance or Non-Compliance With the Restrictions on Discharge

Section 230.12(a)(2) specifies that permits may only be issued if certain conditions are met that avoid, minimize, and compensate for impacts to aquatic resources. The proposed change would indicate that requirements for compensation for impacts can be found in Subpart J as well as Subpart H.

#### 40 CFR Part 230 Subpart H—Actions To Minimize Adverse Effects

We propose to add a sentence to the introductory "Note" of Subpart H indicating that Subpart J also contains requirements regarding compensating for impacts to aquatic resources. At § 230.75(d), we propose to add a similar reference to Subpart J following the second sentence of the paragraph.

Other than the inclusion of the citations described above noting the addition of Subpart J, we are not seeking comment on the existing text or provisions in Subparts B or H.

#### 33 CFR 332.1 and 40 CFR 230.91 Purpose and General Considerations

The proposed rule will not alter the circumstances under which the district engineers require compensatory mitigation. In other words, the threshold for determining when compensatory mitigation is required for a particular activity that needs a DA permit is unchanged by the proposed rule. For example, district engineers will continue to use the criteria at 33 CFR 320.4(r) and 33 CFR 330.1(e)(3) to determine when compensatory mitigation should be required. The proposed rule will not increase compensatory mitigation requirements, but it focuses instead on where and how

compensatory mitigation will be provided.

The proposed rule also does not affect regulatory jurisdiction under Section 404 of the Clean Water Act or Sections 9 and 10 of the Rivers and Harbors Act of 1899. However, areas not subject to regulatory jurisdiction under these statutes may be used as compensatory mitigation, if the creation, restoration, enhancement, or preservation of aquatic resources in those areas will compensate for ecosystem functions lost at the impact site.

### *33 CFR 332.2 and 40 CFR 230.92 Definitions*

The definitions provided in this section of the draft rule are intended to provide clarity to the regulated public, and promote consistency in the implementation of this rule. The definitions were adapted from several sources, including the Federal guidance documents listed in the "Background" section in this preamble.

We are proposing a definition of the term "adaptive management" as follows. *Adaptive management* means the development of a management strategy that anticipates the challenges associated with likely future impacts to the aquatic resource functions of the mitigation site. It acknowledges the risk and uncertainty of compensatory mitigation projects and allows modification of those projects to optimize performance. The process will provide guidance on the selection of appropriate remedial measures that will ensure the continued adequate provision of aquatic resource function and involves analysis of monitoring results to identify potential problems of a compensatory project and identification of measures to rectify those problems.

In the September 2003 report of the National Environmental Policy Act (NEPA) Task Force, which is entitled "Modernizing NEPA Implementation," the NEPA Task Force recommended that the NEPA workgroup consider establishing a definition of adaptive management that would be promulgated in the NEPA regulations at 40 CFR part 1508. If a definition of "adaptive management" is promulgated by the Council on Environmental Quality (CEQ), we will evaluate our proposed definition of this term to determine if any changes are necessary to conform with CEQ's final definition. If such changes are necessary, we will propose those changes in a future **Federal Register** notice.

In the proposed definitions of "on-site," we are proposing to add the phrase "or near" after the phrase

"parcel of land contiguous to" to include lands near the impact site as "on-site" lands. We are also proposing a corresponding change to the definition of "off-site" so that these definitions are parallel to each other.

We are also proposing definitions of the terms "functions", "services", and "values." All three of these terms have been used by various documents in the past to describe the attributes of aquatic resources that are being replaced through compensatory mitigation. The agencies believe it is important to articulate the differences among these terms and the appropriate role of each within the Section 404 Program.

We are proposing the following definition of "functions." Functions means the physical, chemical, and biological processes that occur in aquatic resources and other ecosystems. The primary purpose of compensatory mitigation is to replace lost aquatic resource functions at the impact site. The agencies have a long standing policy of achieving no overall net loss for wetland acreage and functions. Services means the benefits that human populations receive from functions that occur in aquatic resources and other ecosystems. For example, providing habitat for birds is a biological function of some aquatic habitat types, which in turn provides bird watching services to humans. In general, compensatory mitigation projects, in replacing lost functions at the impact site, should also replace the lost services associated with these functions.

Values means the utility or satisfaction that humans derive from aquatic resource services. Values can be described in monetary terms or in qualitative terms, although many of the values associated with aquatic resources cannot be easily monetized. Values can be either use values (e.g., recreational enjoyment) or non-use values (e.g., stewardship ethic). Values are considered by the District Engineer as part of the public interest review of a proposed project. However, the values associated with compensatory mitigation projects may not fully mirror those lost at the impact site. For example, replacing a resource in a more remote area may reduce use values (because the area is less accessible) while enhancing non-use values (because people may value resources on stewardship grounds more when they are in more pristine areas). We are seeking comment on the definitions in this proposed rule, including the proposed definitions of "on-site", "off-site", "functions", "services" and "values."

### *33 CFR 332.3 and 40 CFR 230.93 General Compensatory Mitigation Requirements*

This section of the proposed rule establishes criteria for determining the location and type of compensatory mitigation and describes the watershed approach to compensatory mitigation for losses of aquatic resources. When project impacts are located in the service area of an approved mitigation bank, and the mitigation bank has credits available for the type of resource impacted, the project's mitigation requirements may be met by the purchase of an appropriate number of credits from the mitigation bank. The use of a watershed plan is the most preferable option when evaluating permittee-responsible compensatory mitigation proposals and draft mitigation banking instruments. If a watershed plan is not available, the watershed approach described in § 332.3(c) should be used. If it is not practicable to use a watershed approach, then the district engineer will consider the practicability of on-site compensatory mitigation, as well as the compatibility of on-site mitigation with the proposed project. The watershed approach will identify resource types and locations for compensatory mitigation projects within the watershed. It is important to understand that a watershed approach may include on-site compensatory mitigation, off-site compensatory mitigation (including mitigation banks), or a combination of on-site and off-site mitigation. Also, the identified compensatory mitigation projects may be in-kind, out-of-kind, or a mixture of in-kind and out-of-kind compensatory mitigation.

The information used to conduct a watershed approach is listed in § 332.3(c)(3). Where a watershed plan exists, all or most of this information will have been considered in the development of that plan. Where no formal watershed plan exists, project sponsors should make a reasonable effort, commensurate with the scope and scale of the project, to obtain as much of this information as possible as they design the compensatory mitigation projects. Project sponsors may consult with the Corps to see if such information has been developed in the past in association with other projects in the watershed. For smaller projects requiring DA authorization, all of the types of information listed in this paragraph may not be available, but that information should generally be available (or developed) for larger projects.

We are seeking comment on the watershed approach proposed in this rule, as well as the proposed criteria regarding the location of compensatory mitigation projects.

The amount of required compensatory mitigation is dependent upon the functions (or area when functions cannot be readily assessed) lost as a result of the impacts authorized by the DA permit and the functions (or area) provided by the compensatory mitigation project. In some cases, replacing the functions provided by the impacted aquatic resource may be achieved by a compensatory mitigation project smaller in area than the impact site. In other cases, a larger compensatory mitigation project may be needed to replace the functions provided by the impacted aquatic resource.

To determine the amount of compensatory mitigation required for a specific activity, acres or similar units of measure are likely to be the principal units for determining credits and debits. However, in cases where functional assessment methods are available, appropriate, and practical to use, district engineers should use those functional assessment methods to determine how much compensatory mitigation should be required. For activities authorized by general permits, it may not be practical to conduct functional assessments for each general permit activity. For certain types of aquatic resources, such as streams, it may be more appropriate to quantify credits and debits by using linear feet. The value of a credit or debit is dependent upon the amount of aquatic resource functions provided per acre (or linear foot).

In the proposed rule, site selection is a primary consideration for compensatory mitigation projects. The watershed approach provides an analytical approach similar to the approach recommended by the NRC committee. A watershed approach to compensatory mitigation considers the importance of landscape position and resource type for the ecological functions and sustainability of aquatic resources within the watershed. A watershed approach also considers the services provided by aquatic resources, as well as the values derived from aquatic resource functions and services. Such an approach considers how the types and locations of compensatory mitigation projects will provide the desired aquatic resource functions, and will continue to function over time in a changing landscape. It also considers the habitat requirements of important species, habitat loss or conversion

trends, sources of watershed impairment, and current development trends, as well as the requirements of other regulatory and non-regulatory programs that affect the watershed, such as storm water management or habitat conservation programs.

Another site selection factor is the compatibility of compensatory mitigation projects with proposed or existing facilities or projects. For example, it is not appropriate to locate compensatory mitigation projects designed to attract wildlife species that are known to be hazardous to aviation near airports. The Federal Aviation Administration issued Advisory Circular 150/5200-33, "Hazardous Wildlife Attractants on or Near Airports," In addition, the "Memorandum of Agreement Between the Federal Aviation Administration, U.S. Air Force, U.S. Army, U.S. Environmental Protection Agency, and U.S. Department of Agriculture to Address Aircraft Wildlife Strikes, which became effective in July 2003, also addresses this particular issue. District engineers need to consider these types of issues when determining compensatory mitigation requirements for DA permits (see § 332.3(b) of the proposed rule).

If the district engineer determines that all of the aquatic resource functions cannot be effectively replaced at a single site, then more than one site may be used to provide the desired aquatic resource functions. Therefore, to maintain aquatic resource functions in a watershed, the district engineer may require a combination of on-site and off-site compensatory mitigation. For example, on-site compensation may be required to provide water quality, water storage, and flood protection functions and services, while off-site compensation may be required for losses of habitat functions. In general, the proposed rule requires off-site compensatory mitigation to be located in the same watershed as the impact site.

The proposed rule generally requires wetland compensatory mitigation for wetland losses, and stream compensatory mitigation for stream losses. However, the proposed rule provides flexibility for district engineers to require compensatory mitigation that is best for the watershed. For example, out-of-kind compensatory mitigation may involve the restoration or establishment of an aquatic habitat type that is now rare, because of disproportionate impacts to that habitat type in the past. Restoring or establishing rare habitat types may help restore valuable ecological functions

and services to the watershed. In the watershed approach in the proposed rule, district engineers will first consider in-kind compensatory mitigation, but if the watershed approach determines that out-of-kind compensatory mitigation would result in greater benefits to the aquatic environment within the watershed, then out-of-kind compensation may be authorized.

The NRC Report stated that the preservation of wetlands is appropriate in a watershed approach to compensatory mitigation, because it helps support the objective of the Clean Water Act. Preservation of aquatic resources helps secure desired wetland types in a watershed and maintain wetland diversity in that watershed. The preservation of aquatic resources through appropriate real estate and legal instruments helps provide long-term maintenance of the aquatic environment in watersheds.

Both wetland and non-wetland riparian areas are also important for maintaining the aquatic resource functions and services of watersheds. Riparian areas are important for stream restoration activities, as well as the restoration of other open waters. Riparian areas are important to streams and other open waters, and help augment aquatic resource functions by moderating temperature changes, removing excess nutrients and pollutants, providing a source of detritus for aquatic food webs, providing aquatic habitat heterogeneity, storing flood waters, stabilizing sediments, and providing habitat for a variety of aquatic and terrestrial species.

Restoration or establishment of non-aquatic riparian areas normally would be used in conjunction with aquatic resource restoration, establishment, enhancement, and/or preservation activities, as part of an overall compensatory mitigation project to offset losses of aquatic resources. With the watershed approach, we are looking at combinations of different habitats as components of a functioning landscape, instead of habitat units in isolation from one another.

The NRC Report also acknowledged the importance of upland areas as part of the watershed approach to compensatory mitigation. The proposed rule also requires consideration of the establishment and maintenance of upland buffers around the restored, established, enhanced, or protected aquatic habitats to ensure the sustainability of those habitats. Buffers may augment aquatic resource functions, and help increase the overall ecological functions of the



compensatory mitigation project site. Under limited circumstances, the district engineer may grant compensatory mitigation credit for upland areas within a compensatory mitigation project, if those uplands increase the overall ecological functioning of the compensatory mitigation site or other aquatic resources in the watershed or ecoregion. For example, uplands may provide connections between aquatic habitats that are essential for the preservation of certain species, such as amphibians. When determining the amount of compensatory mitigation credit provided by uplands, the district engineer must consider whether the uplands perform ecological functions that are important to the watershed and are under threat of loss or substantial degradation.

The proposed rule requires that mitigation providers secure sufficient financial assurances to assure completion of the compensatory mitigation project consistent with an approved mitigation plan. Government agencies may use other mechanisms to provide reasonable assurances that compensatory mitigation projects will be completed, such as partnerships established in accordance with the Economy Act. In cases where alternative mechanisms are used to provide reasonable assurances that compensatory mitigation projects will be completed, financial assurances may not be necessary or appropriate. The district engineer will determine appropriate financial assurances on a case-by-case basis. Financial assurances may take a number of forms including letters of credit, performance bonds, or other sureties. In some circumstances in the past, mitigation providers have allowed their financial assurance arrangements to lapse before the mitigation project was completed leaving the Corps without the necessary funds to ensure completion of the mitigation project should the mitigation provider default. The proposed rule does not specifically address this issue. We are soliciting comment on whether to include a regulatory provision to require that the providers of these financial assurances obtain permission from, or alternatively, notify the district engineer prior to canceling them or allowing them to lapse. We are also soliciting comment on the appropriate time frame (e.g., 120 days) for any such advance notification.

If failure of a compensatory mitigation project is due to natural catastrophes, such as floods, droughts, diseases, or pest infestations, that occur during the monitoring period, the district engineer

normally would require the responsible party to implement appropriate remedial measures, unless the compensatory mitigation project is expected to respond to the event in a similar manner as comparable types of aquatic resources in the watershed. After the monitoring period has ended, the district engineer would normally not require remediation if he determines that the failure is due to a natural catastrophe that was beyond the control of the responsible party to prevent or mitigate. In such cases, the provisions of the conservation easement (or other legal mechanism for long-term protection of the site) will remain in effect so that the compensatory mitigation project site will be allowed to continue to evolve through natural ecosystem development processes. This approach to addressing natural catastrophes acknowledges the dynamic nature of the environment.

We are seeking comment on the provisions in this section.

#### *33 CFR 332.4 and 40 CFR 230.94 Planning and Documentation*

In paragraph (b) of this section, we are proposing to require applicants for standard permits involving discharges of dredged or fill material into waters of the United States to submit a statement explaining how impacts to waters of the United States will be avoided, minimized, and compensated. Information from that statement will be provided in the public notice for the proposed permit. This requirement will necessitate changing the standard permit application form (ENG Form 4345), and compliance with the requirements of the Paperwork Reduction Act of 1995. Compliance with the Paperwork Reduction Act is discussed in more detail in Section VII, Administrative Requirements, below.

The agencies recognize that government agencies sponsoring projects that require National Environmental Policy Act (NEPA) compliance generally try to coordinate their NEPA review with their DA permit review. This may mean submitting a permit application while the draft Environmental Impact Statement (EIS), including analysis of compensatory mitigation options, is still undergoing public review and comment. We believe that the requirements of paragraph (b) of this section are fully consistent with such efforts. In such cases, the information provided with the permit application should provide a conceptual discussion of the proposed compensatory mitigation, and reference the more detailed description of options in the draft EIS. This should further

facilitate public participation in both the permit application and NEPA review process. The purpose of the new permit application requirements is to inform the public of the sponsor's compensatory mitigation plans, as of the time the application is filed, and most importantly, to solicit informed public comment on those plans, in whatever stage of development they may be. It is not necessary for the final compensatory mitigation option to have been selected prior to submitting a DA permit application.

Paragraph (c) of this section of the proposed rule requires permittees or mitigation bank sponsors to submit draft and final mitigation plans to district engineers. In the proposed rule, there is a requirement for the district engineer to approve the final mitigation plan prior to issuing the DA permit or approving the mitigation banking instrument.

This section also lists the types of information to be provided in draft and final mitigation plans. Permittees proposing to use a mitigation bank to provide required compensatory mitigation would be required to submit only information concerning the mitigation bank they plan to use, project baseline information, and credit determinations.

We are seeking comment on the provisions in this section.

#### *33 CFR 332.5 and 40 CFR 230.95 Ecological Performance Standards*

This section discusses, in general terms, ecological performance standards that will be used to assess whether compensatory mitigation projects, including mitigation banks, are achieving their objectives. Since ecological performance standards usually vary by aquatic type and geographic region, this section provides only general considerations for establishing those standards.

We are seeking comment on the provisions in this section.

#### *33 CFR 332.6 and 40 CFR 230.96 Monitoring*

This proposed rule provides general standards for monitoring compensatory mitigation projects, including mitigation banks. Monitoring reports are used for assessing how well the compensatory mitigation project is satisfying its objectives. We are proposing a minimum required monitoring period of five years, with flexibility for district engineers to stop requiring monitoring reports if compensatory mitigation projects, such as those involving the establishment of open water habitats, meet their performance standards in a shorter period of time. Longer



monitoring periods may be required for compensatory mitigation activities, such as the establishment of forested wetlands, that develop slowly, or that require remediation.

We are seeking comment on the provisions in this section. We are also requesting comment on examples of specific types of compensatory mitigation projects (e.g., specific habitat types) where monitoring periods of less than five years may be appropriate.

### *33 CFR 332.7 and 40 CFR 230.97 Management*

This section of the proposed rule establishes criteria and standards for the management of compensatory mitigation projects, including mitigation banks. Some compensatory mitigation projects may require active management and maintenance, as well as adaptive management. For some aquatic resources, such as fringe wetlands in coastal areas, long-term management may not be feasible or desirable because of the dynamic nature of the environment.

The various real estate or legal instruments that can be used to protect compensatory mitigation project sites may differ from state to state, or among other government jurisdictions. Therefore, we are not proposing detailed requirements for real estate instruments used for long-term protection of compensatory mitigation project sites. We believe those instruments are best addressed by district engineers on a case-by-case basis.

For compensatory mitigation projects on public lands, other long-term protection mechanisms may be more appropriate, such as Federal facility management plans or integrated natural resources management plans. Therefore, this section of the proposed rule has flexibility for district engineers to determine requirements for site protection on a case-by-case basis. The agencies recognize that changes in statute, regulation or agency needs or mission may sometimes necessitate authorization of an incompatible use on public lands originally set aside for compensatory mitigation. In such cases, the public agency authorizing the incompatible use would be responsible for providing alternative compensatory mitigation for any loss in functions resulting from the incompatible use.

Paragraph (c) of this section discusses remediation requirements if a compensatory mitigation project is not progressing towards meeting its performance standards. In addition to consulting with the responsible party to determine appropriate remediation requirements, the district engineer

should also consult with any other Federal, Tribal, state, or local agency "where appropriate." In general, such consultation would be appropriate if the other agency was involved earlier in the review of the compensatory mitigation requirements in the DA permit.

The proposed rule requires that the permit conditions or mitigation banking instrument identify the party responsible for the ownership and long-term management of the compensatory mitigation project. The permittee or mitigation bank sponsor must provide long-term financing as necessary to ensure that funds are available for the long-term management of the project site once the monitoring period is over. This can be accomplished in a number of ways, but in the past problems have arisen when arrangements for the capitalization of long-term management funds have not taken place in a timely fashion. Although the rule text does not address this deficiency, we are soliciting comments on the inclusion of a provision that would require that the arrangements for the adequate capitalization of long-term management funds be finalized prior to permit issuance.

If the entity responsible for long-term management is a government agency or public authority, and that entity is willing to accept the stewardship responsibilities for the compensatory mitigation project site, the district engineer may accept the stewardship commitment by the government agency or public authority in lieu of imposing long-term financing requirements in the DA permit or mitigation banking instrument. Such acceptance of stewardship responsibilities will generally involve a formal transaction of some type (e.g., transfer of title, designation as a protected area, etc). We are aware of situations where government agencies have accepted stewardship responsibilities without adequately considering long-term financial needs for the management of a site, and strongly encourage agencies to plan for such needs before accepting stewardship responsibilities. Such planning may include requiring a financial commitment from the original responsible party as a condition of accepting long-term stewardship responsibilities.

We are seeking comment on the provisions in this section.

### *33 CFR 332.8 and 40 CFR 230.98 Mitigation Banks*

The proposed rule establishes criteria and standards for mitigation banks, including requirements and processes for the review, approval, and oversight

of those banks. We are seeking comment on all provisions of this section, especially the timeframes and milestones for mitigation bank review and approval.

The proposed rule contains explicit requirements for the mitigation bank prospectus, and requires the district engineer to notify the sponsor within 15 days if the prospectus is incomplete. The proposed rule also has requirements for the content of mitigation banking instruments.

The district engineer is responsible for the review and approval of mitigation banks that are intended to be used to provide compensatory mitigation for DA permits, after seeking comment from the Interagency Review Team (IRT) and the public. The role of the IRT is to advise the district engineer on the establishment and management of mitigation banks. Representatives of the U.S Environmental Protection Agency, National Marine Fisheries Service, and U.S. Fish and Wildlife Service hold ex officio positions on the IRT. Beyond this, the district engineer determines the composition of the IRT. The IRT in the proposed rule replaces the Mitigation Bank Review Team (MBRT) in the 1995 mitigation banking guidance.

Each proposed mitigation bank will be subject to a public notice and comment process, regardless of whether a DA permit is required to construct or establish the mitigation bank. In the proposed rule, we are specifying formal procedures and timeframes for establishing mitigation banks, to provide more predictability and efficiency to the mitigation bank review and approval process.

In general, the timelines provided in this section of the proposed rule should result in a decision on the proposed mitigation bank within one year of receipt of a complete prospectus. However, there may be exceptional circumstances associated with a particular proposed mitigation bank that may result in a longer review period.

The district engineer, in consultation with the IRT and using a watershed approach to the extent practicable, will determine the service area of an approved mitigation bank. The service area of a mitigation bank is to be described in the mitigation banking instrument. The service area should be large enough to support an economically viable mitigation bank, but must not be larger than is appropriate to ensure that the aquatic resources provided by the mitigation bank will effectively compensate for adverse environmental impacts across the entire service area. In

§ 332.8(c)(5)(ii), we provide some guidelines for service areas based on the hydrologic unit codes designated by the U.S. Geological Survey. The service areas suggested in the text of this section may not be appropriate for some mitigation banks, such as single-user mitigation banks sponsored by state departments of transportation. For these sponsors, it may be infeasible to have relatively small service areas for their mitigation banks, such as those based on 8-digit hydrologic unit codes, because they incur a relatively small amount of debits per year. Also, having relatively small service areas for some single user mitigation banks may discourage the establishment of large mitigation banks that provide substantial amounts of habitat and other aquatic resource functions and services. On the other hand, in areas with significant development, service areas even smaller than an 8-digit hydrologic unit code may be appropriate.

We are proposing a dispute resolution process to resolve agency concerns about proposed mitigation banks. The dispute resolution process involves higher levels of review, up to the respective agency headquarters. We are seeking comment on the milestones and timeframes in the proposed dispute resolution process. It is intended as a last resort for significant issues that cannot be resolved in a timely manner within the IRT. The agencies anticipate that it will be used infrequently.

In cases where initial establishment of the mitigation bank requires authorization through a DA permit, it is important that the permit be fully consistent with the provisions of the mitigation banking instrument. Issuing the permit before all relevant provisions of the mitigation banking instrument have been substantively determined may lead to inconsistencies between the permit and the instrument and/or may constrain the district engineer's ability to address substantive concerns that arise through the IRT review process. Where issues potentially affecting permit conditions are still unresolved within the IRT, the district engineer should delay permit issuance until the final terms of the mitigation banking instrument have been determined.

We are proposing to establish a process for modifying mitigation banking instruments. For example, a mitigation banking instrument may be modified if the mitigation bank develops aquatic resource functions that are substantially greater than expected, to allow the sponsor to sell those extra credits after achieving all performance standards specified in the bank's instrument. The full IRT review process

would be used for major modifications to the mitigation banking instrument, such as expanding the mitigation bank by conducting more aquatic resource restoration, establishment, enhancement, and/or preservation at the bank site. Certain types of minor modifications to instruments, such as changes in credit release schedules, may be accomplished through a streamlined modification process.

Umbrella mitigation banking instruments, which have been used to establish mitigation banks on multiple sites, are provided for in the proposed rule with additional sites treated as modifications of the original mitigation banking instruments. In the proposed rule, a mitigation banking instrument would have to be approved for the initial mitigation bank site, and subsequent mitigation bank sites under the "umbrella" instrument would be added to that instrument as major modifications.

The proposed rule also establishes criteria for credit release from mitigation banks. A limited proportion of projected credits may be released when the mitigation banking instrument and mitigation plan have been approved, the bank site secured, and required financial assurances have been established. The proposed rule also requires a substantial proportion of credits to be released only after performance standards are achieved. Criteria for determining the credit release schedule are provided in the text of the proposed rule. District engineers must also approve credit releases.

Existing mitigation banks may continue operating under the terms of their approved instruments. However, modifications to the instrument, including the addition of new sites for umbrella instruments, must be made in accordance with the requirements of Part 332. We are also seeking comment on the appropriate legal mechanism for transferring the responsibility for providing compensatory mitigation from the permittee to a mitigation bank. One option would be through parallel provisions in DA permit special conditions and mitigation banking instruments. Therefore, we are seeking comment on the following language for a special condition for a DA permit to transfer responsibility for providing compensatory mitigation in cases where credits are secured from a mitigation bank:

"You have agreed to provide compensatory mitigation for the permitted impacts by purchasing credits at [INSERT NAME OF MITIGATION BANK]. As compensation for impacting [INSERT NUMBER] acres [OR OTHER UNIT OF MEASURE] of [INSERT

AQUATIC RESOURCE TYPE], a total of [INSERT NUMBER] credits must be acquired from the [INSERT NAME OF MITIGATION BANK]. Upon the mitigation bank sponsor's acceptance of payment for those credits, that compensatory mitigation requirement will be considered fulfilled, and your responsibility for providing that compensatory mitigation will be transferred to the [INSERT NAME OF MITIGATION BANK]. Proof of securing these compensatory mitigation credits must be provided to this office prior to initiating any work in waters of the United States on the project site, unless the district engineer waives this requirement. If you cannot obtain the required amount and type of credits from [INSERT NAME OF MITIGATION BANK], you must submit a revised compensatory mitigation proposal to this office, and receive approval of the revised compensatory mitigation plan, prior to initiating any work in waters of the United States."

We are also seeking comment on the following language for a mitigation banking instrument, whereby the mitigation bank would then accept responsibility for providing compensatory mitigation for a DA permit in cases where the permittee secures credits from that mitigation bank sponsor:

"For projects in the service area of this Mitigation Bank that require Department of the Army authorization pursuant to Section 404 of the Clean Water Act and/or Section 10 of the Rivers and Harbors Act of 1899, and if such authorizations require compensatory mitigation, credits from this Mitigation Bank may be used to satisfy those compensatory mitigation requirements, subject to Corps approval on a case-by-case basis.

In accordance with the terms of this Instrument, the sponsor agrees that upon Corps approval of a proposal by the Permittee to secure mitigation bank credits through a contract with this Mitigation Bank, a fully executed contract between the Sponsor and the Permittee shall act to transfer to this Mitigation Bank all responsibility for the compensatory mitigation required by the permittee's DA permit."

We are also seeking comment on other possible mechanisms for transferring legal responsibility for providing compensatory mitigation from the permittee to a mitigation bank. One potential mechanism may be co-permitting, where the mitigation bank sponsor would sign the DA permit and assume responsibility for providing compensatory mitigation credits, once the permittee has secured those credits from the mitigation bank. The compensatory mitigation provisions of the permit (and those provisions only) would then be directly enforceable against the mitigation bank sponsor using normal Clean Water Act enforcement authorities. The agencies seek comment on these and other mechanisms for transferring legal responsibility for providing

compensatory mitigation from the permittee to the mitigation bank sponsor.

In addition to the Corps, other Federal agencies (as well as some state agencies) have, in the past, signed mitigation banking instruments to indicate their agreement with the terms of those instruments. Since district engineers are responsible for approving instruments for mitigation banks, as well as for approving the use of credits from those banks as compensatory mitigation for specific DA permits, we are seeking comment on whether the provisions in § 332.8(b)(3) relating to other IRT members signing mitigation banking instruments are appropriate. In particular, do, or should, the signatures of other agencies have any legal effect in the implementation and enforcement of the banking instrument?

### *33 CFR 332.9 and 40 CFR 230.99 In-Lieu Fee Programs*

Since we are proposing to require in-lieu fee programs after five years to comply with the same criteria, requirements, and standards as mitigation banks, we believe there is a need for a grandfathering provision for current in-lieu fee programs. We are seeking comments on this section, in particular the proposed time frames. Section VI below explains our rationale for phasing out in-lieu fee programs and discusses possible alternative approaches.

## **VI. In-Lieu Fee Programs/Arrangements**

Under the proposed rule, existing in-lieu fee programs would have to be modified within five years to meet the requirements for mitigation banks in 33 CFR 332.8 and 40 CFR 230.98 in order to continue to provide compensatory mitigation credits for DA permits. In other words, after five years, in-lieu fee programs would cease to exist as a separate mechanism for providing compensatory mitigation. As of the effective date of the rule, new programs would have to meet the requirements in 33 CFR 332.8 and 40 CFR 230.98 in order to sell credits. Current in-lieu fee programs with multiple sites could develop umbrella mitigation banking instruments (see 33 CFR 332.8(g) and 40 CFR 230.98(g) of the proposed rule).

Under current practice, there are several important differences between in-lieu fee programs and mitigation banks. First, in-lieu fee programs are generally administered by state governments, local governments, or non-profit non-governmental organizations while mitigation banks are usually (though not always) operated for profit by private entities, at least those

that are third-party mitigation providers. Second, in-lieu fee programs rely on collected fees from permittees to initiate compensatory mitigation projects while mitigation banks usually rely on private investment for initial financing. Most importantly, mitigation banks must achieve certain milestones, including site selection, plan approval, and financial assurances, before they can sell credits, and generally sell a majority of their credits only after the mitigation has been provided. In contrast, in-lieu fee programs generally provide mitigation only after collecting fees, and there is often a substantial time lag between permitted impacts and implementation of compensatory mitigation projects. In-lieu fee programs are also not generally required to provide the same financial assurances as mitigation banks. For all of these reasons, in some cases there may be greater uncertainty associated with in-lieu fee programs regarding the final mitigation and its adequacy to compensate for lost functions and services. On the other hand, some in-lieu fee programs have been able to protect high quality aquatic resources under threat of imminent impact, to employ a conservation strategy that is consistent with the watershed approach discussed in § 332.3(c) of the proposed rule, and to partner with government agencies and non-profit non-governmental organizations to maximize protection of those at-risk resources. In-lieu fee programs may also be able to provide effective compensatory mitigation in certain areas, such as coastal areas, where options for economically viable mitigation banks are limited.

The 2004 National Defense Authorization Act directs that, “To the maximum extent practicable, the regulatory standards and criteria shall maximize available credits and opportunities for mitigation \* \* \* and apply equivalent standards and criteria to each type of compensatory mitigation.” The agencies carefully considered this directive in developing the proposed rule. Based on this consideration, the agencies believe that the proposed requirements for mitigation banks are necessary and sufficient to ensure that third-party compensatory mitigation is actually completed, while also balancing the need to make mitigation banking economically viable and thus “maximize available credits.” The agencies are concerned that providing less stringent oversight or up-front requirements for in-lieu fee programs may not ensure that compensatory

mitigation is actually performed, or satisfy the statutory directive to apply equivalent standards and criteria to each type of mitigation to the maximum extent practicable. The agencies recognize that the proposed requirements for permittee-responsible mitigation are not exactly the same as those for mitigation banks, though we have tried to harmonize them to the extent practicable. But there are certain requirements, such as formal review by an IRT, that are not practicable for permittee-responsible projects, particularly smaller ones. However, for in-lieu fee programs, which as third-party mitigation providers sell credits to permittees and take on responsibility for providing required compensatory mitigation in the same way that mitigation banks do, we have not found strong grounds for concluding that meeting the same requirements as mitigation banks is not appropriate and practicable.

Another concern with in-lieu fee programs is the sale price of credits. Because credits are often sold before the details (or even the location) of a specific compensatory mitigation project have been determined, it may be difficult for the project sponsor to determine a price that will fully fund the future compensatory mitigation project. Because the market pressure of needing to provide a sufficient return to investors is missing, in-lieu fee sponsors may underestimate the credit price, and perhaps undercut a mitigation bank doing business in the same service area. Furthermore, it is difficult for the Corps to determine what an adequate price might be in the absence of definitive information about the location and type of mitigation project to be provided.

The agencies realize that phasing out in-lieu fee programs entails some challenges. In some areas, there are no mitigation banks and in-lieu fee programs provide the only option for third-party mitigation. However, the agencies are concerned that this may to some extent reflect the less stringent requirements under which in-lieu-fee programs currently operate. The agencies believe that if in-lieu fee programs are required to meet the same requirements as banks, this will provide a level playing field that will allow mitigation banks to compete in areas where this may not be currently possible. We also recognize that in areas with a “thin” market (e.g., areas where there is a low density of dredge and fill projects requiring compensatory mitigation) it may not be economically viable to obtain the level of up-front financing that is necessary to start a mitigation bank. This concern can be at

least partially addressed through the size of the mitigation bank's service area. Proposed § 332.8(5)(ii) provides that the service area "should be large enough to support an economically viable mitigation bank, but must not be larger than is appropriate to ensure that the aquatic resources provided by the mitigation bank will effectively compensate for adverse environmental impacts across the entire service area."

The agencies recognize that phasing out in-lieu fee programs would represent a substantial departure from current practice. We are aware that there are a number of successful in-lieu fee programs that are providing effective compensatory mitigation. We therefore request comment on the challenges associated with transforming these projects into mitigation banks over a five-year period. We also request comment on retaining in-lieu fee programs as a distinct regulatory entity. Under this approach, in-lieu fee programs would have equally specific, but somewhat different, requirements from mitigation banks. Areas in which in-lieu fee programs might be different include: (1) The degree of up-front planning required before credits could be sold (e.g., in-lieu fee programs might not be required to identify and secure a site and provide detailed site plans for the compensatory mitigation project); (2) the level of financial assurances that would be required, although we note that under the proposed rule district engineers retain substantial discretion in determining appropriate financial assurances for banks, and may consider factors such as the type of sponsoring entity (e.g., government, private, non-profit); (3) the types of projects for which they could be used (e.g., in-lieu fee programs might be limited to providing compensatory mitigation only for nationwide permits and other general permits, or for projects below a specified acreage cutoff, such as 1 acre); (4) the required compensation ratios (e.g., these could be higher for in-lieu fee programs than for mitigation banks); (5) the credit release schedule (e.g., in-lieu fee programs might be permitted to sell more credits at an earlier point in the planning process); (6) limiting the establishment and use of in-lieu fee programs to specific types of aquatic resources (e.g., tidal wetlands) or specific geographic regions, such as coastal areas; and (7) the types of permitted sponsoring entities (i.e., in-lieu fee programs might be limited to government agencies and/or non-profit land stewardship entities with proven track records). Commenters may suggest other ways in which the requirements

for in-lieu fee programs might be different from those for mitigation banks.

Another option would be to retain in-lieu fee programs but provide a "preference" for in-place compensatory mitigation (e.g., compensatory mitigation sites such as mitigation banks established in advance of permitted impacts) over compensatory mitigation that would be established after permitted impacts are authorized (e.g., many in-lieu fee programs) because of their greater certainty of successfully providing compensatory mitigation credits. Under this approach, if the permitted project was in the service area of both an established mitigation bank and an in-lieu fee project that had not been constructed, the permittee would first have to consider purchasing credits from the mitigation bank, and could only use the in-lieu fee program if purchasing credits from the mitigation bank was not practicable.

Comments will be most helpful if they provide specific information. Current in-lieu fee program sponsors should explain exactly what difficulties they would experience in transitioning to a mitigation bank. Commenters who support retaining in-lieu fee programs as a distinct regulatory entity should explain exactly what requirements would be different from those for mitigation banks, and what would be the basis for establishing these different requirements in light of the statutory directive noted above. The agencies believe that the detailed discussion of issues and options in this preamble provides sufficient notice and opportunity for informed public comment, such that we may choose to finalize a rule that retains a separate in-lieu fee option along the lines discussed here without issuing a new proposed rule.

## VII. Administrative Requirements

### *Plain Language*

In compliance with the principles in the President's Memorandum of June 1, 1998, (63 FR 31855) regarding plain language, this preamble is written using plain language. The use of "we" in this notice refers to the Corps and EPA. We have also used the active voice, short sentences, and common everyday terms except for necessary technical terms.

### *Paperwork Reduction Act*

This proposed action will impose a new information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*). Applicants for Clean Water Act section 404 permits will be required, under 33

CFR 332.4(b)(1) and 40 CFR 230.93(b)(1) of the proposed rule, to submit a statement explaining how impacts associated with the proposed activity are to be avoided, minimized, and compensated for. This statement must also include a description of any proposed compensatory mitigation, or the intention to use an approved mitigation bank.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid Office of Management and Budget (OMB) control number. For the Corps Regulatory Program under Section 10 of the Rivers and Harbors Act of 1899, section 404 of the Clean Water Act, and section 103 of the Marine Protection, Research and Sanctuaries Act of 1972, the current OMB approval number for information collection requirements is maintained by the Corps of Engineers (OMB approval number 0710-0003, which expires on April 30, 2008). As a result of the new information collection requirement in the proposed rule, we are proposing to modify our standard permit application form in accordance with the requirements of the Paperwork Reduction Act.

*Title, Form, and OMB Number:* Application for a Department of Army Permit; Eng Form 4345; OMB Control Number 0710-0003.

*Type of Request:* Revision.

*Number of Respondents:* 85,500.

*Responses Per Respondent:* 1.

*Annual Responses:* 85,500.

*Average Burden Per Response:* 11 hours.

*Annual Burden Hours:* 374,000.

*Needs and Uses:* Information collected is used to evaluate, as required by law, proposed construction or filing in waters of the United States that result in impacts to the aquatic environment and nearby properties, and to determine if issuance of a permit is in the public interest. Respondents are private landowners, businesses, non-profit organizations, and government agencies.

*Affected Public:* Individuals or households; business or other for-profit; not-for-profit institutions; farms; Federal government; State, local or tribal government.

*Frequency:* On occasion.

*Respondents Obligation:* Mandatory.

*OMB Desk Officer:* Jim Laity.

Written comments and recommendations on the proposed information collection should be sent to Jim Laity at the Office of Management and Budget, Desk Officer for USACE, Room 10202, New Executive Office Building, Washington, DC 20503.

*Executive Order 12866*

Under Executive Order 12866 (58 FR 51735, October 4, 1993), we must determine whether the regulatory action is “significant” and therefore subject to review by OMB and the requirements of the Executive Order. The Executive Order defines “significant regulatory action” as one that is likely to result in a rule that may:

(1) Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or Tribal governments or communities;

(2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

(4) Raise novel legal or policy issues arising out of legal mandates, the President’s priorities, or the principles set forth in the Executive Order.

Pursuant to the terms of Executive Order 12866, we have determined that the proposed rule is a “significant regulatory action” and the draft was submitted to OMB for review.

The regulatory analysis required by E.O. 12866 has been prepared for this proposed rule. The regulatory analysis is available on the Internet at: <http://www.usace.army.mil/inet/functions/cw/cecwo/reg/citizen.htm>. It is also available by contacting Headquarters, U.S. Army Corps of Engineers, Operations and Regulatory Community of Practice, 441 G Street, NW., Washington, DC 20314–1000.

*Executive Order 13132*

Executive Order 13132, entitled “Federalism” (64 FR 43255, August 10, 1999), requires the Corps to develop an accountable process to ensure “meaningful and timely input by State and local officials in the development of regulatory policies that have Federalism implications.” The proposed rule does not have Federalism implications. We do not believe that the proposed rule will have substantial direct effects on the States, on the relationship between the Federal government and the States, or on the distribution of power and responsibilities among the various levels of government. The proposed rule does not impose new substantive requirements. In addition, the proposed rule will not impose any additional substantive obligations on State or local governments. State and local

governments that administer in-lieu fee programs to provide compensatory mitigation for impacts to wetlands and other aquatic resources can modify their in-lieu fee programs to conform with the requirements of this proposed rule. Therefore, Executive Order 13132 does not apply to this proposed rule. However, in the spirit of Executive Order 13132, we specifically request comment from state and local officials on the proposed rule.

*Regulatory Flexibility Act, as Amended by the Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. 601 et seq.*

The Regulatory Flexibility Act generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice-and-comment rulemaking requirements under the Administrative Procedure Act or any other statute unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations and small governmental jurisdictions.

For purposes of assessing the impacts of this proposed rule on small entities, a small entity is defined as: (1) A small business based on Small Business Administration size standards; (2) a small governmental jurisdiction that is a government of a city, county, town, school district, or special district with a population of less than 50,000; or (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

The statutory basis for the proposed rule is Section 314 of the National Defense Authorization Act for Fiscal Year 2004 (Pub. L. 108–136), which is discussed above. After considering the economic impacts of the proposed rule on small entities, we certify that this action will not have a significant impact on a substantial number of small entities. Small entities subject to the proposed rule include those small entities that need to obtain DA permits pursuant to Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act of 1899.

This rulemaking will not change compensatory mitigation requirements, or change the number of permitted activities that require compensatory mitigation. This rule further clarifies mitigation requirements established by Corps and EPA, and is generally consistent with current agency practices. Some provisions of the rule may result in increases in compliance costs, other provisions may result in

decreases in compliance costs, but most of the provisions in the rule are expected to result in no changes in compliance costs. To the extent that it promotes mitigation banking, the rule may lower compensatory mitigation costs for small projects by making credits more widely available. Overall, we believe the proposed rule will result in no net change in compliance costs for permittees, including small entities that need to obtain DA permits. For a more detailed analysis of potential economic impacts of this rule, please see the regulatory analysis in the Environmental Assessment prepared for the proposed rule. We are interested in the potential impacts of the proposed rule on small entities and welcome comments on issues related to such impacts.

*Unfunded Mandates Reform Act*

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104–4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and Tribal governments and the private sector. Under Section 202 of the UMRA, the agencies generally must prepare a written statement, including a cost-benefit analysis, for proposed and final rules with “Federal mandates” that may result in expenditures to State, local, and Tribal governments, in the aggregate, or to the private sector, of \$100 million or more in any one year. Before promulgating a rule for which a written statement is needed, Section 205 of the UMRA generally requires the agencies to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, most cost-effective, or least burdensome alternative that achieves the objectives of the rule. The provisions of section 205 do not apply when they are inconsistent with applicable law. Moreover, section 205 allows an agency to adopt an alternative other than the least costly, most cost-effective, or least burdensome alternative if the agency publishes with the final rule an explanation why that alternative was not adopted. Before an agency establishes any regulatory requirements that may significantly or uniquely affect small governments, including Tribal governments, it must have developed, under Section 203 of the UMRA, a small government agency plan. The plan must provide for notifying potentially affected small governments, enabling officials of affected small governments to have meaningful and timely input in the development of regulatory proposals with significant Federal intergovernmental mandates, and

informing, educating, and advising small governments on compliance with the regulatory requirements.

We have determined that the proposed rule does not contain a Federal mandate that may result in expenditures of \$100 million or more for State, local, and Tribal governments, in the aggregate, or the private sector in any one year. The proposed rule is generally consistent with current agency practice and therefore does not contain a Federal mandate that may result in expenditures of \$100 million or more for State, local, and Tribal governments, in the aggregate, or the private sector in any one year. Therefore, the proposed rule is not subject to the requirements of Sections 202 and 205 of the UMRA. For the same reasons, we have determined that the proposed rule contains no regulatory requirements that might significantly or uniquely affect small governments. Therefore, the proposed rule is not subject to the requirements of Section 203 of UMRA.

#### *Executive Order 13045*

Executive Order 13045, "Protection of Children from Environmental Health Risks and Safety Risks" (62 FR 19885, April 23, 1997), applies to any rule that: (1) Is determined to be "economically significant" as defined under Executive Order 12866, and (2) concerns an environmental health or safety risk that we have reason to believe may have a disproportionate effect on children. If the regulatory action meets both criteria, we must evaluate the environmental health or safety effects of the proposed rule on children, and explain why the regulation is preferable to other potentially effective and reasonably feasible alternatives.

The proposed rule is not subject to this Executive Order because it is not economically significant as defined in Executive Order 12866. In addition, it does not concern an environmental or safety risk that we have reason to believe may have a disproportionate effect on children.

#### *Executive Order 13175*

Executive Order 13175, entitled "Consultation and Coordination with Indian Tribal Governments" (65 FR 67249, November 6, 2000), requires agencies to develop an accountable process to ensure "meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications." The phrase "policies that have tribal implications" is defined in the Executive Order to include regulations that have "substantial direct effects on one or more Indian tribes, on the relationship

between the Federal government and the Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes."

The proposed rule does not have tribal implications. It is generally consistent with current agency practice and will not have substantial direct effects on tribal governments, on the relationship between the Federal government and the Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes. Therefore, Executive Order 13175 does not apply to this proposed rule. However, in the spirit of Executive Order 13175, we specifically request comment from Tribal officials on the proposed rule.

#### *Environmental Documentation*

The Corps has prepared a draft Environmental Assessment (EA) and Finding of No Significant Impact (FONSI) for the proposed rule. The draft EA and FONSI are available at: <http://www.usace.army.mil/inet/functions/cw/cecwo/reg/citizen.htm>. It is also available by contacting Headquarters, U.S. Army Corps of Engineers, Operations and Regulatory Community of Practice, 441 G Street, NW., Washington, DC 20314-1000.

#### *Congressional Review Act*

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. We will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. The proposed rule is not a "major rule" as defined by 5 U.S.C. 804(2).

#### *Executive Order 12898*

Executive Order 12898 requires that, to the greatest extent practicable and permitted by law, each Federal agency must make achieving environmental justice part of its mission. Executive Order 12898 provides that each Federal agency conduct its programs, policies, and activities that substantially affect human health or the environment in a manner that ensures that such programs, policies, and activities do not have the

effect of excluding persons (including populations) from participation in, denying persons (including populations) the benefits of, or subjecting persons (including populations) to discrimination under such programs, policies, and activities because of their race, color, or national origin.

The proposed rule is not expected to negatively impact any community, and therefore is not expected to cause any disproportionately high and adverse impacts to minority or low-income communities.

#### *Executive Order 13211*

The proposed rule is not a "significant energy action" as defined in Executive Order 13211, "Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use" (66 FR 28355, May 22, 2001) because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy.

#### *National Technology Transfer and Advancement Act*

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (NTTAA), Public Law 104-113, section 12(d), (15 U.S.C. 272 note), directs us to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., materials specifications, test methods, sampling procedures, business practices) that are developed or adopted by voluntary consensus standards bodies. The NTTAA directs us to provide Congress, through the Office of Management and Budget (OMB), explanations when we decide not to use available and applicable voluntary consensus standards.

This action does not involve technical standards. Therefore, the Corps and EPA did not consider the use of any new voluntary consensus standards.

#### **List of Subjects**

##### *33 CFR Part 325*

Administrative practice and procedure, Intergovernmental relations, Environmental protection, Navigation, Water pollution control, Waterways.

##### *33 CFR Part 332*

Administrative practice and procedure, Intergovernmental relations, Navigation (water), Water pollution control, Water resources, Watersheds, Waterways.

#### 40 CFR Part 230

Environmental protection, Water pollution control.

#### Corps of Engineers

#### 33 CFR Chapter II

For the reasons stated in the preamble, the Corps proposes to amend 33 CFR chapter II as set forth below:

### PART 325—PROCESSING OF DEPARTMENT OF THE ARMY PERMITS

1. The authority citation for part 325 continues to read as follows:

**Authority:** 33 U.S.C. 401 *et seq.*; 33 U.S.C. 1344; 33 U.S.C. 1413.

2. Amend § 325.1 by redesignating paragraphs (d)(7), (d)(8), and (d)(9) as paragraphs (d)(8), (d)(9), and (d)(10), respectively, and adding new paragraph (d)(7) as follows:

#### § 325.1 Applications for permits.

\* \* \* \* \*

(d) \* \* \*

(7) For activities involving discharges of dredged or fill material into waters of the United States, the application must include a statement describing how impacts to waters of the United States are to be avoided, minimized, and compensated (see § 332.4(b)(1)).

\* \* \* \* \*

### PART 332—COMPENSATORY MITIGATION FOR LOSSES OF AQUATIC RESOURCES

3. Add part 332 to read as follows:

### PART 332—COMPENSATORY MITIGATION FOR LOSSES OF AQUATIC RESOURCES

Sec.

- 332.1 Purpose and general considerations.
- 332.2 Definitions.
- 332.3 General compensatory mitigation requirements.
- 332.4 Planning and documentation.
- 332.5 Ecological performance standards.
- 332.6 Monitoring.
- 332.7 Management.
- 332.8 Mitigation banks.
- 332.9 In-lieu fee programs.

**Authority:** 33 U.S.C. 401 *et seq.*; 33 U.S.C. 1344; and Pub. L. 108–136.

#### § 332.1 Purpose and general considerations.

(a) *Purpose.* (1) The purpose of this part is to establish standards and criteria for the use of all types of compensatory mitigation, including on-site and off-site permittee-responsible mitigation, mitigation banks, and in-lieu fee mitigation to offset unavoidable impacts to waters of the United States

authorized through the issuance of Department of the Army (DA) permits pursuant to Section 404 of the Clean Water Act (33 U.S.C. 1344) and/or Sections 9 or 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. 401, 403). This part implements Section 314(b) of the 2004 National Defense Authorization Act (Pub. L. 108–136), which directs that the standards and criteria shall, to the maximum extent practicable, maximize available credits and opportunities for mitigation, provide for regional variations in wetland conditions, functions, and values, and apply equivalent standards and criteria to each type of compensatory mitigation. This part is intended to further clarify mitigation requirements established under U.S. Army Corps of Engineers (Corps) and U.S. Environmental Protection Agency regulations at 33 CFR part 320 and 40 CFR part 230, respectively.

(2) These rules have been jointly developed by the Secretary of the Army, acting through the Chief of Engineers, and the Administrator of the Environmental Protection Agency. From time to time guidance on interpreting and implementing these rules may be prepared jointly by EPA and the U.S. Army Corps of Engineers at the national or regional level. No modifications to the basic application, meaning, or intent of these rules will be made without further joint rulemaking by the Secretary of the Army, acting through the Chief of Engineers and the Administrator of the Environmental Protection Agency pursuant to the Administrative Procedure Act (5 U.S.C. 551 *et seq.*).

(b) *Applicability.* This part does not alter the regulations at § 320.4(r) of this title, which address the general mitigation requirements for DA permits. In particular, it does not alter the circumstances under which compensatory mitigation is required or the definitions of “waters of the United States” or “navigable waters of the United States,” which are provided at parts 328 and 329 of this title, respectively. Use of resources as compensatory mitigation that are not otherwise subject to regulation under Section 404 of the Clean Water Act and/or Sections 9 or 10 of the Rivers and Harbors Act of 1899 does not in and of itself make them subject to such regulation.

(c) *Sequencing.* Pursuant to these requirements, the district engineer will issue a section 404 permit only upon a determination that the permit applicant has taken all appropriate and practicable steps to avoid and minimize adverse impacts to waters of the United

States. Practicable means available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes. Compensatory mitigation for unavoidable impacts may be required to ensure that a section 404 activity complies with the Section 404(b)(1) Guidelines. Compensatory mitigation may also be required to ensure that an activity requiring authorization under Section 404 of the Clean Water Act and/or Sections 9 or 10 of the Rivers and Harbors Act of 1899 is not contrary to the public interest.

(d) *Accounting for regional variations.* Where appropriate, district engineers shall account for regional characteristics of aquatic resource types, functions, services, and values when determining performance standards and monitoring requirements for compensatory mitigation projects.

#### § 332.2 Definitions.

For the purposes of this part, the following terms are defined:

*Adaptive management* means the development of a management strategy that anticipates the challenges associated with likely future impacts to the aquatic resource functions of the mitigation site. It acknowledges the risk and uncertainty of compensatory mitigation projects and allows modification of those projects to optimize performance. The process will provide guidance on the selection of appropriate remedial measures that will ensure the continued adequate provision of aquatic resource function and involves analysis of monitoring results to identify potential problems of a compensatory project and identification of measures to rectify those problems.

*Buffer* means an upland and/or riparian area that protects and/or enhances aquatic resource functions associated with wetlands, rivers, streams, lakes, marine, and estuarine systems from disturbances associated with adjacent land uses.

*Compensatory mitigation* means the restoration (re-establishment or rehabilitation), establishment (creation), enhancement, and/or in certain circumstances preservation of aquatic resources for the purposes of compensating for unavoidable adverse impacts which remain after all appropriate and practicable avoidance and minimization has been achieved.

*Compensatory mitigation project* means a restoration, establishment, enhancement, and/or preservation activity implemented by the permittee as a requirement of a DA permit (i.e.,



permittee-responsible mitigation), or by a third party (e.g., a mitigation bank).

*Credit* means a unit of measure (e.g., a functional or area measure) representing the accrual or attainment of aquatic functions at a compensatory mitigation site. The measure of function is based on the aquatic resources restored, established, enhanced, or preserved.

*DA* means Department of the Army.

*Days* means calendar days.

*Debit* means a unit of measure (e.g., a functional or area measure) representing the loss of aquatic functions at an impact or project site. The measure of function is based on the aquatic resources impacted by the authorized activity.

*Enhancement* means the manipulation of the physical, chemical, or biological characteristics of an aquatic resource to heighten, intensify, or improve a specific aquatic resource function(s). Enhancement results in the gain of selected aquatic resource function(s), but may also lead to a decline in other aquatic resource function(s). Enhancement does not result in a gain in aquatic resource area.

*Establishment* (creation) means the manipulation of the physical, chemical, or biological characteristics present to develop an aquatic resource that did not previously exist at an upland or deepwater site. Establishment results in a gain in aquatic resource area.

*Functional capacity* means the degree to which an area of aquatic resource performs a specific function.

*Functions* means the physical, chemical, and biological processes that occur in aquatic resources and other ecosystems.

*Impact* means adverse effect.

*In-kind* means a resource type that is structurally and/or functionally similar to the impacted resource type.

*Interagency Review Team (IRT)* means an interagency group of Federal, Tribal, State, and/or local regulatory and resource agency representatives that reviews documentation for, and advises the district engineer on, the establishment and management of a mitigation bank.

*Mitigation bank* means a site, or suite of sites, where aquatic resources such as wetlands or streams are restored, established, enhanced, and/or preserved for the purpose of providing compensatory mitigation for authorized impacts to similar resources. Third-party mitigation banks generally sell compensatory mitigation credits to permittees whose obligation to provide mitigation is then transferred to the mitigation bank sponsor. The operation and use of a mitigation bank are

governed by a mitigation banking instrument.

*Mitigation banking instrument* means the legal document for the establishment, operation, and use of a mitigation bank.

*Off-site* means an area that is neither located on the same parcel of land as the impact site, nor on a parcel of land contiguous to or near the parcel containing the impact site.

*On-site* means an area located on the same parcel of land as the impact site, or on a parcel of land contiguous to or near the impact site.

*Out-of-kind* means a resource type that is structurally and/or functionally different than the impacted resource type.

*Performance standards* are observable or measurable attributes that are used to determine if a compensatory mitigation project meets its objectives.

*Permittee-responsible mitigation* means an aquatic resource restoration, establishment, enhancement, and/or preservation activity undertaken by the permittee (or an authorized agent or contractor) to provide compensatory mitigation for which the permittee retains full responsibility.

*Preservation* means the removal of a threat to, or preventing the decline of, aquatic resources by an action in or near those aquatic resources. This term includes activities commonly associated with the protection and maintenance of aquatic resources through the implementation of appropriate legal and physical mechanisms. Preservation does not result in a gain of aquatic resource area or functions.

*Re-establishment* means the manipulation of the physical, chemical, or biological characteristics of a site with the goal of returning natural/historic functions to a former aquatic resource. Re-establishment results in rebuilding a former aquatic resource and results in a gain in aquatic resource area.

*Reference aquatic resources* are aquatic resources that represent the range of variability exhibited by a regional class of aquatic resources as a result of natural processes and anthropogenic disturbances.

*Rehabilitation* means the manipulation of the physical, chemical, or biological characteristics of a site with the goal of repairing natural/historic functions to a degraded aquatic resource. Rehabilitation results in a gain in aquatic resource function, but does not result in a gain in aquatic resource area.

*Restoration* means the manipulation of the physical, chemical, or biological characteristics of a site with the goal of

returning natural/historic functions to a former or degraded aquatic resource. For the purpose of tracking net gains in aquatic resource area, restoration is divided into two categories: re-establishment and rehabilitation.

*Riparian areas* are lands adjacent to a waterbody. Riparian areas are transitional between terrestrial and aquatic ecosystems, through which surface and subsurface hydrology connects waterbodies with their adjacent uplands. Riparian areas are adjacent to streams, lakes, and estuarine-marine shorelines and provide a variety of ecological functions and services and help improve or maintain local water quality.

*Service area* means the geographic area within which impacts can be mitigated at a particular mitigation bank, as designated in its instrument.

*Services* means the benefits that human populations receive from functions that occur in aquatic resources and other ecosystems.

*Sponsor* means any public or private entity responsible for establishing and, in most circumstances, operating a mitigation bank.

*Standard permit* means a standard, individual permit issued under the authority of Section 404 of the Clean Water Act and/or Sections 9 or 10 of the Rivers and Harbors Act of 1899.

*Values* means the utility or satisfaction that humans derive from aquatic resource services. Values can be described in monetary terms or in qualitative terms, although many of the values associated with aquatic resources cannot be easily monetized. Values can be either use values (e.g., recreational enjoyment) or non-use values (e.g., stewardship, biodiversity).

*Watershed plan* means a plan developed by federal, tribal, state, and/or local government agencies, in consultation with relevant stakeholders. A watershed plan addresses ecological conditions in the watershed, multiple stakeholder interests, and land uses. Watershed plans may also identify priority sites for aquatic resource restoration and protection. Examples of watershed plans include special area management plans, advance identification programs, and watershed management plans.

### § 332.3 General compensatory mitigation requirements.

(a) *General considerations.* The fundamental objective of compensatory mitigation is to offset environmental losses resulting from unavoidable impacts to waters of the United States authorized by DA permits. The district engineer must determine the

compensatory mitigation to be required in a DA permit, based on what is available, practicable, and capable of compensating for the aquatic resource functions that will be lost as a result of the permitted activity. In making this determination, the district engineer must assess the likelihood for ecological success and sustainability, the location of the compensation site relative to the impact site and their significance within the watershed, and the economic costs of the compensatory mitigation.

Compensatory mitigation requirements must be commensurate with the amount and type of impact that is associated with a particular DA permit. Permit applicants are responsible for proposing an appropriate compensatory mitigation option to offset unavoidable impacts.

(b) *Location and type of compensatory mitigation.* (1) Where project impacts are located within the service area of an approved mitigation bank, and the mitigation bank has credits available for the type of resource impacted, the project's compensatory mitigation requirements may be met by the purchase of an appropriate number of credits from the mitigation bank.

(2) Where practicable and appropriate, the district engineer will require that the location and aquatic resource type of permittee-responsible compensatory mitigation necessary to offset anticipated impacts be consistent with an established watershed plan or be determined using the principles of a watershed approach as outlined in paragraph (c) of this section. The district engineer and the IRT should also use a watershed approach to the extent practicable in reviewing mitigation banking instruments.

(3) Where reliance on a watershed plan or approach is not practicable, the district engineer will consider opportunities to offset anticipated aquatic resource impacts by requiring on-site and in-kind compensatory mitigation. The district engineer must also consider the practicability of on-site compensatory mitigation and its compatibility with the proposed project.

(4) If, after considering opportunities for on-site, in-kind compensatory mitigation as provided in paragraph (b)(3) of this section, the district engineer determines that these compensatory mitigation opportunities are not practicable, are unlikely to compensate for the permitted activity, or will be incompatible with the proposed project, and an alternative, practicable off-site and/or out-of-kind mitigation opportunity is identified that has a greater likelihood of offsetting the permitted activity, the district engineer shall require that this alternative

compensatory mitigation be provided. In general, 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, services, 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), and compatibility with adjacent land uses.

(c) *Watershed approach to compensatory mitigation.* (1) The district engineer must use a watershed approach to establish compensatory mitigation requirements in DA permits to the extent appropriate and practicable. Where an applicable watershed plan is available, the watershed approach should be based on the existing plan. Where no such plan is available, the watershed approach should be based on information provided by the project sponsor or available from other sources. The ultimate goal of a watershed approach is to maintain and improve the quality and quantity of aquatic resources within watersheds through strategic selection of compensatory mitigation sites.

(2) *Considerations.* (i) A watershed approach to compensatory mitigation considers the importance of landscape position and resource type of compensatory mitigation projects for the ecological functions and sustainability of aquatic resources within the watershed. Such an approach considers how the types and locations of compensatory mitigation projects will provide the desired aquatic resource functions, and will continue to function over time in a changing landscape. It also considers the habitat requirements of important species, habitat loss or conversion trends, sources of watershed impairment, and current development trends, as well as the requirements of other regulatory and non-regulatory programs that affect the watershed, such as storm water management or habitat conservation programs. It includes the protection and maintenance of terrestrial resources, such as non-wetland riparian areas and uplands, when those resources contribute to or improve the overall ecological functioning of aquatic resources in the watershed.

(ii) Locational factors (e.g., hydrology, surrounding land use) are important to the success of compensatory mitigation for impacted habitat functions and values and may lead to siting of such mitigation away from the project area. However, consideration should also be given to functions, services, and values

(e.g., water quality, flood control, shoreline protection) that will likely need to be addressed at or near the areas impacted by the permitted project.

(iii) A watershed approach to compensatory mitigation may involve planning efforts to inventory historic and existing aquatic resources, including identification of degraded aquatic resources, and planning efforts to identify immediate and long-term aquatic resource needs within watersheds that can be met through permittee-responsible mitigation projects or mitigation banks. Watershed planning efforts may identify and/or prioritize aquatic resources that are important for maintaining and restoring ecological functions of the watershed.

(3) *Information Needs.* The use of a watershed approach is based on analysis of information regarding watershed conditions and needs. Such information includes: Current trends in habitat loss or conversion, cumulative impacts of past development activities, current development trends, the presence and needs of sensitive species, site conditions that favor or hinder the success of mitigation projects, chronic environmental problems such as flooding or poor water quality, and local watershed goals and priorities. This information may be contained in an existing watershed plan or may be available from other sources. The level of information and analysis needed to support a watershed approach must be commensurate with the scope and scale of the proposed project requiring a DA permit, as well as the functions lost as a result of that project.

(d) *Site selection.* The compensatory mitigation project site must be ecologically suitable for providing the desired aquatic resource functions. In determining the ecological suitability of the compensatory mitigation project site, the district engineer must consider the following factors:

(1) Hydrological conditions, soil characteristics, and other physical and chemical characteristics;

(2) Watershed-scale features, such as aquatic habitat diversity, habitat connectivity, and other landscape scale functions;

(3) The size and location of the compensatory mitigation site relative to hydrologic sources (including the availability of water rights) and other ecological features;

(4) Compatibility with adjacent land uses and watershed management plans;

(5) Reasonably foreseeable effects the compensatory mitigation project will have on ecologically important aquatic or terrestrial resources (e.g., shallow sub-tidal habitat, mature forests),

cultural sites, or habitat for Federally- or State-listed threatened and endangered species; and

(6) Other relevant factors including, but not limited to, development trends, anticipated land use changes, habitat status and trends, local or regional goals for the restoration or protection of particular habitat types or functions (e.g., re-establishment of habitat corridors or habitat for species of concern), water quality goals, floodplain management goals, and the relative potential for chemical contamination of the aquatic resources.

(e) *Mitigation type.* (1) In general, in-kind mitigation is preferable to out-of-kind mitigation because it is most likely to compensate for the functions, services, and values lost at the impact site. For example, restoration of wetlands is most likely to compensate for unavoidable impacts to wetlands, while restoration of streams is most likely to compensate for unavoidable impacts to streams. Thus, except as provided in paragraph (e)(2) of this section, the district engineer should require that compensatory mitigation be of a similar type to the impacted aquatic resource.

(2) If the district engineer determines through the decision framework in paragraph (b) of this section that out-of-kind compensatory mitigation will serve the aquatic resource needs of the watershed, the district engineer may authorize the use of such out-of-kind compensatory mitigation. Factors that should be considered in making this determination include historic loss of habitat types within the watershed, the needs of sensitive species, appropriate mixes of habitat to maintain ecosystem viability, the relative likelihood of success in establishing different habitat types, needs for ecosystem services, and local watershed goals and priorities. The basis for authorization of out-of-kind compensatory mitigation must be documented in the administrative record for the permit action.

(f) *Amount of compensatory mitigation.* The district engineer must require an amount of compensatory mitigation for unavoidable impacts to aquatic resources sufficient to replace lost aquatic resource functions. In cases where functional assessment methods are available, appropriate, and practical to use, district engineers should use those functional assessment methods to determine how much compensatory mitigation should be required. If a functional assessment is not used, a minimum one-to-one acreage or linear foot replacement ratio should be used as a surrogate for functional replacement. The district engineer must require a

mitigation ratio greater than one-to-one where necessary to account for the method of compensatory mitigation (e.g., preservation), differences between the functions lost at the impact site and the functions expected to be produced by the compensatory mitigation project, temporal losses of aquatic resource functions, and/or the difficulty of restoring or establishing the desired aquatic resource type and functions. The rationale for the required replacement ratio must be documented in the administrative record for the permit action.

(g) *Use of mitigation banks.* Mitigation banks may be used to compensate for impacts to aquatic resources authorized by general permits and individual permits, including after-the-fact permits.

(h) *Preservation.* (1) Preservation may be used to provide compensatory mitigation for activities authorized by DA permits where:

(i) The resources provide important physical, chemical, or biological functions for the watershed;

(ii) The resources contribute to the ecological sustainability of the watershed;

(iii) Preservation is determined by the district engineer to be appropriate and practicable;

(iv) The resources are under threat of destruction or adverse modifications; and

(v) The preserved site will be permanently protected through an appropriate real estate or other legal instrument (e.g., easement, title transfer to state resource agency or land trust).

(2) Where preservation is used to provide compensatory mitigation, to the extent appropriate and practicable the preservation shall be done in conjunction with aquatic resource restoration, establishment, and/or enhancement activities. This requirement may be waived by the district engineer where preservation has been identified as a high priority using a watershed approach, as described in paragraph (c) of this section, but compensation ratios should be higher.

(i) *Buffers.* District engineers may require that compensatory mitigation project sites include, and may provide compensatory mitigation credit for, the establishment and maintenance of riparian areas and/or upland buffers around the restored, established, enhanced, or preserved aquatic resources where necessary to ensure the long-term viability of those resources.

(j) *Relationship to other Federal, Tribal, State, and local programs.* Compensatory mitigation projects for DA permits may also be used to compensate for environmental impacts

authorized under other programs, such as Tribal, State, or local wetlands regulatory programs, the National Pollutant Discharge Elimination System Permit Program, Corps civil works projects, and Superfund removal and remedial actions, consistent with the terms and requirements of these programs and subject to the following considerations. The project must include appropriate compensatory mitigation for unavoidable impacts to aquatic resources authorized by the DA permit, over and above what would be required under other programs to address other impacts. Under no circumstances may the same credits be used to provide mitigation for more than one activity. However, where appropriate, compensatory mitigation projects, including mitigation banks, may be designed to holistically address requirements under multiple programs and authorities for the same activity. Except for projects undertaken by Federal agencies, or where Federal funding is specifically authorized to provide compensatory mitigation, Federally-funded wetland conservation projects undertaken for purposes other than compensatory mitigation, such as the Wetlands Reserve Program and the Partners for Wildlife Program activities, cannot be used for the purpose of generating compensatory mitigation credits for activities authorized by DA permits. However, compensatory mitigation credits may be generated by activities undertaken in conjunction with, but supplemental to, such programs in order to maximize the overall ecological benefits of the conservation project.

(k) *Permit conditions.* The compensatory mitigation requirements for a DA permit, including the amount and type of compensatory mitigation, must be clearly stated in the special conditions of the individual permit or general permit verification (see 33 CFR 325.4 and 330.6(a)). The special conditions must be enforceable and describe the objectives of the compensatory mitigation project. The special conditions must also identify the party responsible for providing the compensatory mitigation. The special conditions must incorporate, by reference, compensatory mitigation plans approved by the district engineer. The performance standards and monitoring required for the compensatory mitigation project must also be clearly stated in the special conditions or the approved compensatory mitigation plan. The special conditions must also describe any required financial assurances or

long-term management provisions for the compensatory mitigation project. If a mitigation bank is used to provide the required compensatory mitigation, the special conditions must indicate which mitigation bank will be used, and specify the required number and type of credits the permittee is required to purchase.

(l) *Party responsible for compensatory mitigation.* (1) The special conditions of the DA permit must clearly indicate the party or parties responsible for the implementation, performance, and long-term management of the compensatory mitigation project.

(2) For mitigation banks, the mitigation banking instrument must clearly indicate the party or parties responsible for the implementation, performance, and long-term management of the compensatory mitigation project.

(3) If a mitigation bank is approved by the district engineer to provide required compensatory mitigation for a DA permit, the special conditions of that DA permit must indicate which mitigation bank will be used to provide that compensatory mitigation. In such cases, the mitigation bank assumes responsibility for providing the required compensatory mitigation after the permittee has secured those credits from the sponsor.

(m) *Timing.* Implementation of the compensatory mitigation project shall be, to the maximum extent practicable, in advance of or concurrent with the activity causing the authorized impacts. Where it is not practicable to complete the initial physical and biological improvements required by the approved mitigation plan by the first full growing season following the impacts resulting from the permitted activity, the district engineer may require additional compensatory mitigation to offset temporal losses of aquatic functions that will result from the permitted activity.

(n) *Financial assurances.* (1) The district engineer shall require sufficient financial assurances to ensure a high level of confidence that the compensatory mitigation project will be successfully completed, in accordance with applicable performance standards. In cases where an alternate mechanism is available to ensure a high level of confidence that the compensatory mitigation will be provided and maintained (e.g., a formal, documented commitment from a government agency or public authority) the district engineer may determine that financial assurances are not necessary for that compensatory mitigation project.

(2) The amount of the required financial assurances must be

determined by the district engineer, in consultation with the project sponsor, and must be based on the size and complexity of the compensatory mitigation project, the degree of completion of the project at the time of project approval, the likelihood of success, the past performance of the project sponsor, and any other factors the district engineer deems appropriate. Financial assurances may be in the form of performance bonds, escrow accounts, casualty insurance, letters of credit, legislative appropriations for government sponsored projects, or other appropriate instruments, subject to the approval of the district engineer. The rationale for determining the amount of the required financial assurances must be documented in the administrative record for the DA permit.

(3) Financial assurances shall be phased out once the compensatory mitigation project has been determined by the district engineer to be successful in accordance with its performance standards. The DA permit or mitigation banking instrument must clearly specify the conditions under which the financial assurances are to be released to the permittee, sponsor, and/or other financial assurance provider, including, as appropriate, linkage to achievement of performance standards, adaptive management, or compliance with special conditions.

(o) *Compliance with applicable law.* The compensatory mitigation project must comply with all applicable Federal, state, and local laws. The DA permit or mitigation banking instrument must not require participation by the Corps or any other Federal agency in project management, including receipt or management of financial assurances or long-term financing mechanisms, except as determined by the Corps or other agency to be consistent with its statutory authority, mission, and priorities.

#### **§ 332.4 Planning and documentation.**

(a) *Pre-application consultations.* Potential applicants for standard permits are encouraged to participate in pre-application meetings with the Corps and appropriate agencies to discuss potential compensatory mitigation requirements and information needs.

(b) *Public review and comment.* (1) For an activity that requires a standard DA permit pursuant to Section 404 of the Clean Water Act, the public notice for the proposed activity must explain how impacts associated with the proposed activity are to be avoided, minimized, and compensated for. This explanation shall address the amount, type, and location of any proposed

compensatory mitigation, including any out-of-kind mitigation, or indicate an intention to use an approved mitigation bank. The level of detail provided in the public notice must be commensurate with the scope and scale of the project.

(2) For activities authorized by general permits, review of compensatory mitigation plans must be conducted in accordance with the terms and conditions of those general permits and applicable regulations.

(c) *Mitigation plan.* (1) The permittee or mitigation bank sponsor must prepare a draft mitigation plan and submit it to the district engineer for review. After addressing any comments provided by the district engineer, the permittee or sponsor must prepare a final mitigation plan, which must be approved by the district engineer prior to issuing the DA permit or approving the mitigation banking instrument. The approved mitigation plan must be incorporated into the DA permit or mitigation banking instrument by reference. The mitigation plan must include the items described in paragraphs (c)(2) through (c)(14) of this section, except that the district engineer may waive specific items if he determines that they are not applicable to a particular project. Permittees who plan to fulfill their compensatory mitigation obligations by purchasing credits from an approved mitigation bank need only include the name of the mitigation bank and the items described in paragraphs (c)(5) and (c)(6) of this section in their mitigation plan. The level of detail of the mitigation plan should be commensurate with the scale and scope of the project.

(2) *Objectives.* A description of the aquatic resource type(s) and amount(s) that will be provided, the method of compensation (i.e., restoration, establishment, enhancement, and/or preservation), and the manner in which the aquatic resource functions of the compensatory mitigation project will address the needs of the watershed, ecoregion, or other geographic area of interest.

(3) *Site selection.* A description of the factors considered during the site selection process. This should include consideration of 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 compensatory mitigation project site.

(4) *Site protection instrument.* 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.

(5) *Baseline information.* 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, and other site characteristics. A prospective permittee planning to purchase credits from an approved mitigation bank only needs to provide baseline information about the impact site, not the mitigation bank site.

(6) *Determination of credits.* A description of the number of credits to be provided, including a brief explanation of the rationale for this determination. For permittee-responsible mitigation, this should include an explanation of how the compensatory mitigation project compensates for unavoidable impacts to aquatic resources resulting from the permitted activity. For mitigation banks, it should include a description of resource types for which the mitigation bank may be used as compensatory mitigation and the number of credits to be provided for each resource type. This may include provisions for adjusting credits in the future, both downward (if performance standards are not met) or upward (if performance standards are significantly exceeded). For permittees intending to purchase credits from an approved mitigation bank, it should include the number and type of credits to be purchased and how these were determined.

(7) *Mitigation work plan.* Detailed written specifications and work descriptions for the compensatory mitigation project, including, but not limited to, the geographic boundaries of the project; construction methods, timing, and sequence; source(s) of water, including connections to existing waters and uplands; plant species to be planted at the site; the use of natural regeneration or seed banks to provide the desired plant community at the site; plans to control invasive plant species; the proposed grading plan, including elevations and slopes of the substrate; erosion control measures; and proposed stream geomorphology, if applicable.

(8) *Maintenance plan.* A description and schedule of maintenance requirements to ensure the continued viability of the resource once initial construction is completed.

(9) *Performance standards.* Ecologically-based standards that will be used to determine whether the

compensatory mitigation project is achieving its objectives.

(10) *Monitoring requirements.* A description of parameters to be monitored in order to determine if the compensatory mitigation project is on track to meet performance standards and if adaptive management is needed. A schedule for monitoring and reporting on monitoring results to the district engineer must be included.

(11) *Long-term management plan.* 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 the party responsible for long-term management and long-term financing mechanisms.

(12) *Adaptive management plan.* A description of procedures to address potential 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 conducting remediation to provide aquatic resource functions.

(13) *Financial assurances.* A description of financial assurances that will be provided and how they are sufficient to ensure a high level of confidence that the compensatory mitigation project will be successfully completed, in accordance with its performance standards.

(14) *Other information.* The district engineer may require additional information as necessary to determine the appropriateness, feasibility, and practicability of the compensatory mitigation project.

#### **§ 332.5 Ecological performance standards.**

The mitigation plan must contain performance standards that will be used to assess whether the project is achieving its objectives. Performance standards should relate to the objectives of the compensatory mitigation project, so that the project can be objectively evaluated to determine if it is developing into the desired resource type and providing the expected functions. Performance standards should be based on attributes that are objective, verifiable, and can be measured with a reasonable amount of effort. Performance standards may be based on variables or measures of functional capacity described in functional assessment methodologies, measurements of hydrology or other aquatic resource characteristics, and/or comparisons to reference aquatic

resources of similar type and landscape position. Performance standards based on measurements of hydrology should take into consideration the hydrologic variability exhibited by reference aquatic resources, especially wetlands. Where practicable, performance standards should take into account the expected stages of the aquatic resource development process, in order to allow early identification of potential problems and appropriate adaptive management.

#### **§ 332.6 Monitoring.**

(a) *General.* Monitoring the compensatory mitigation project site is necessary to determine if the project is meeting its performance standards, and to determine if remediation is necessary to ensure that the compensatory mitigation project is accomplishing its objectives. The district engineer must require the submission of monitoring reports to assess the development and condition of the compensatory mitigation project, unless he determines that monitoring is not practicable for that compensatory mitigation project. The mitigation plan must address the monitoring requirements for the compensatory mitigation project, including the parameters to be monitored, the length of the monitoring period, the party responsible for conducting the monitoring, the frequency for submitting monitoring reports to the district engineer, and the party responsible for submitting those monitoring reports to the district engineer.

(b) *Monitoring period.* The mitigation plan must provide for a monitoring period that is sufficient to demonstrate that the compensatory mitigation project has met performance standards, but not less than five years. A longer monitoring period must be required for aquatic resources with slow development rates (e.g., forested wetlands, bogs). Following project implementation, the district engineer may waive the remaining monitoring requirements upon a determination that the compensatory mitigation project has achieved its performance standards. Conversely the district engineer may extend the original monitoring period upon a determination that performance standards have not been met or the compensatory mitigation project is not on track to meet them. The district engineer may also revise monitoring requirements when remediation is required.

(c) *Monitoring reports.* (1) The district engineer must determine the information to be included in monitoring reports. This information

should be sufficient for the district engineer to determine how the compensatory mitigation project is progressing towards meeting its performance standards, and may include plans, maps, and photographs to illustrate site conditions. Monitoring reports may also include the results of functional assessments used to provide quantitative or qualitative measures of the functions provided by the compensatory mitigation project site.

(2) Monitoring reports should be provided by the district engineer to interested Federal, Tribal, State, and local resource agencies. The district engineer and representatives of Federal, Tribal, State, and/or local resource agencies may conduct regular (e.g., annual) on-site inspections, as appropriate, to monitor performance of the mitigation site. Monitoring reports must be made available to the public upon request.

#### **§ 332.7 Management.**

(a) *Site protection.* The aquatic habitats, riparian areas, buffers, and uplands that comprise the overall compensatory mitigation project should be provided long-term protection, through appropriate real estate instruments such as conservation easements held by, or transfer of title to, entities such as Federal, Tribal, State, or local resource agencies, non-profit conservation organizations, or private land managers, or other acceptable means for government property, such as Federal facility management plans or integrated natural resources management plans. The real estate instrument for the long-term protection of the compensatory mitigation site should restrict or prohibit incompatible uses (e.g., clear cutting) that might otherwise jeopardize the objectives of the compensatory mitigation project. Where appropriate, multiple instruments recognizing compatible uses (e.g., fishing or grazing rights) may be used.

(b) *Sustainability.* Compensatory mitigation projects should be designed, to the maximum extent practicable, to be self-sustaining once performance standards have been achieved. This includes minimization of active engineering features (e.g., pumps) and appropriate siting to ensure that natural hydrology and landscape context will support long-term sustainability. Where active long-term management and maintenance are necessary to ensure long-term sustainability (e.g., prescribed burning, invasive species control, maintenance of water control structures, easement enforcement), the responsible party must provide for such

management and maintenance. This includes the provision of long-term financing mechanisms where necessary.

(c) *Adaptive management.* (1) If monitoring or other information indicates that the compensatory mitigation project is not progressing towards meeting its performance standards as anticipated, the responsible party must notify the district engineer. The district engineer must require remediation to correct the deficiencies in the project to the extent appropriate and practicable. In determining appropriate and practicable remediation, the district engineer will consider whether the compensatory mitigation project is providing ecological benefits comparable to the original objectives of the compensatory mitigation project.

(2) The district engineer, in consultation with the responsible party (and other Federal, Tribal, state, and local agencies, as appropriate), will determine the appropriate remediation requirements. The required remediation may include site modifications, design changes, revisions to maintenance requirements, and revised monitoring requirements. The remediation must be designed to ensure that the modified compensatory mitigation project provides aquatic resource functions comparable to those described in the mitigation plan objectives.

(3) The performance standards must be revised where necessary to assess the success of remediation efforts and/or the realization of comparable ecological benefits that were considered in determining remediation requirements.

(d) *Long-term management.* (1) The permit conditions or mitigation banking instrument must identify the party responsible for the ownership and long-term management of the compensatory mitigation project, once performance standards have been achieved. The permit conditions or mitigation banking instrument may contain provisions allowing the permittee or sponsor to transfer the long-term management responsibilities of the compensatory mitigation project site to a land stewardship entity, such as a public agency, non-governmental organization, or private land manager, after review and approval by the district engineer. The land stewardship entity need not be identified in the original permit or mitigation banking instrument, as long as the future transfer of long-term management responsibility is approved by the district engineer.

(2) Provisions necessary for long-term financing must be included in the original permit or mitigation banking instrument. Appropriate long-term

financing mechanisms include endowments, trusts, contractual arrangements with future responsible parties, and other appropriate financial instruments. In cases where the long-term management entity is a public authority or government agency, a formal commitment to accept stewardship responsibilities for the project is acceptable in lieu of specific financial arrangements.

#### **§ 332.8 Mitigation banks.**

(a) *General considerations.* (1) All mitigation banks must have an approved instrument signed by the sponsor and the district engineer prior to being used to provide compensatory mitigation for DA permits. To the maximum extent practicable, mitigation banks must be planned and designed to be self-sustaining over time, but some active management and maintenance may be required to ensure their long-term viability and sustainability. Examples of acceptable management activities include maintaining fire dependent habitat communities in the absence of natural fire and controlling invasive exotic plant species.

(2) Mitigation banks may be sited on public or private lands. Siting on public land is only permitted when done in accordance with the mission and policies of the land management agency and with its written approval. Credits for mitigation banks on public land must be based solely on aquatic resource functions provided by the mitigation bank, over and above those provided by public programs already planned or in place.

(3) All mitigation banks must comply with the standards in this part, if they are to be used to provide compensatory mitigation for activities authorized by DA permits, regardless of whether they are sited on public or private lands and whether the sponsor is a governmental or private entity.

(b) *Interagency Review Team.* (1) The district engineer will establish an Interagency Review Team (IRT) to review documentation for the establishment and management of the mitigation bank. The district engineer or his designated representative serves as Chair of the IRT. In cases where a mitigation bank is proposed to satisfy the requirements of another Federal, Tribal, State, or local program, in addition to compensatory mitigation requirements of DA permits, the district engineer may designate an appropriate official of the responsible agency as co-Chair of the IRT.

(2) In addition to the Corps, representatives from the U.S. Environmental Protection Agency, U.S.

Fish and Wildlife Service, NOAA Fisheries, the Natural Resources Conservation Service, and other Federal agencies, as appropriate, may participate in the IRT. The IRT may also include representatives from Tribal, State, and local regulatory and resource agencies, where such agencies have authorities and/or mandates directly affecting, or affected by, the establishment, operation, or use of the mitigation bank. The district engineer will seek to include all public agencies with a substantive interest in the establishment of the mitigation bank on the IRT, but retains final authority over its composition.

(3) The primary role of the IRT is to facilitate the establishment of mitigation banks through the development of mitigation banking instruments. The IRT will review the prospectus, mitigation plan, and mitigation banking instrument and provide comments to the district engineer. Members of the IRT may also sign the mitigation banking instrument, if they so choose. By signing the mitigation banking instrument, the IRT members indicate their agreement with the terms of the instrument. The IRT will also advise the district engineer in assessing monitoring reports, recommending remedial measures, approving credit release, and approving modifications to a mitigation banking instrument.

(4) The district engineer will give full consideration to the comments and advice of the IRT. However, the district engineer alone retains final authority for approval of the mitigation banking instrument. However, in cases where the mitigation bank is also intended to satisfy the requirements of another agency, that agency must also approve the mitigation banking instrument before it can be used to satisfy such requirements.

(c) *Review process.* (1) The sponsor is responsible for preparing all documentation associated with establishment of the mitigation bank, including the prospectus, mitigation plan, and mitigation banking instrument. The prospectus provides an overview of the mitigation bank project and serves as the basis for public and initial IRT comment. The mitigation plan, as described in § 332.4(c), provides detailed plans and specifications for the mitigation bank. The mitigation banking instrument provides the authorization for the mitigation bank to provide credits to be used as compensatory mitigation for DA permits. The mitigation banking instrument must also incorporate the mitigation plan by reference.

(2) *Prospectus.* The prospectus must provide a summary of the information that will be included in the mitigation plan, at a sufficient level of detail to support informed public and IRT comment. In particular, it must describe the objectives of the proposed mitigation bank, how the mitigation bank will be established and operated, the proposed service area, and the general need for, and technical feasibility of, the proposed mitigation bank. The prospectus must discuss the ecological suitability of the site to achieve the objectives of the proposed mitigation bank. This includes the physical, chemical, and biological characteristics of the site and how that site will support the planned types of aquatic resources and functions. It should also discuss the proposed ownership arrangements and long-term management of the mitigation bank. The review process begins when the sponsor submits a complete prospectus to the district engineer. The district engineer will notify the sponsor within 15 days whether or not a submitted prospectus is complete.

(3) *Preliminary review of prospectus.* Prior to submitting a prospectus, the sponsor may elect to submit a draft prospectus to the district engineer for comment and consultation. The district engineer will provide copies of the draft prospectus to the IRT, and provide comments back to the sponsor within 30 days. Any comments from IRT members will also be forwarded to the sponsor. This preliminary review is optional but is strongly recommended. It is intended to identify potential issues early so that the sponsor may attempt to address those issues prior to the start of the formal review process.

(4) *Public review and comment.* Within 30 days of receipt of a complete prospectus, the district engineer will provide public notice of the proposed mitigation bank, in accordance with the public notice procedures at 33 CFR 325.3. The public notice must include a summary of the prospectus and indicate that the full prospectus is available to the public for review upon request. The comment period for public notice will generally be 30 days, unless the district engineer determines that a longer or shorter comment period is appropriate. The district engineer will notify the sponsor if the comment period is extended beyond 30 days, including an explanation of why the longer comment period is necessary. Copies of all comments received in response to the public notice must be distributed to the other IRT members and to the sponsor within 15 days of the close of the public comment period. The district engineer

and IRT members may also provide comments to the sponsor at this time, and copies of any such comments will also be distributed to all IRT members. If the construction of a mitigation bank requires DA authorization through the standard permit process, the public notice requirement may be satisfied through the public notice provisions of the standard permit processing procedures, provided all of the relevant information is provided.

(5) *Draft mitigation banking instrument.* After considering comments from the district engineer, the IRT, and the public, if the sponsor chooses to proceed with establishment of the mitigation bank, he must prepare a draft mitigation banking instrument and submit it to the district engineer. The draft mitigation banking instrument should be based on the prospectus and must describe in detail the physical and legal characteristics of the mitigation bank and how it will be established and operated. The draft mitigation banking instrument must include the following information:

(i) *Mitigation plan*, including all applicable items listed in § 332.4(c)(2) through (14);

(ii) *Geographic service area of the mitigation bank.* The service area is the watershed or other geographic area within which a mitigation bank is authorized to provide compensation for unavoidable impacts authorized by DA permits. The service area should be large enough to support an economically viable mitigation bank, but must not be larger than is appropriate to ensure that the aquatic resources provided by the mitigation bank will effectively compensate for adverse environmental impacts across the entire service area. The district engineer must consider relevant environmental and economic factors when approving the service area. The district engineer may also consider locally-developed standards and criteria. In urban areas, a U.S. Geological Survey 8-digit hydrologic unit code (HUC) watershed or a smaller watershed may be an appropriate service area. In rural areas, several contiguous 8-digit HUCs or a 6-digit HUC watershed may be an appropriate service area for the mitigation bank. The basis for determining the service area must be documented in writing and referenced in the mitigation banking instrument;

(iii) *Credit release schedule.* Credit release must be tied to achievement of specific milestones. If the mitigation bank does not achieve appropriate milestones (e.g., performance standards) as anticipated, the district engineer may



modify the credit release schedule, including reducing the number of available credits or suspending credit sales altogether;

(iv) Accounting procedures;

(v) A provision stating that legal responsibility for providing the compensatory mitigation lies with the sponsor;

(vi) Default and closure provisions; and

(vii) Any other information deemed necessary by the district engineer.

(6) *IRT review.* Upon receiving a draft mitigation banking instrument, the district engineer must provide copies of the draft instrument to the IRT members for a 30-day comment period. Following the comment period, the district engineer will discuss any comments with the appropriate agencies and with the sponsor. The district engineer will seek to resolve any issues using a consensus-based approach. Within 90 days of receipt of the complete draft mitigation banking instrument, the district engineer must notify the sponsor of the status of the IRT review.

Specifically, the district engineer must indicate to the sponsor if the draft mitigation banking instrument is generally acceptable and what changes, if any, are needed. If there are significant unresolved concerns that may lead to a formal objection from one or more IRT members to the final mitigation banking instrument, the district engineer will indicate the nature of those concerns.

(7) *Final mitigation banking instrument.* If the sponsor still wishes to proceed with establishment of the mitigation bank, he must submit a final mitigation banking instrument to the district engineer for approval. The final mitigation banking instrument should address any comments provided as a result of the IRT review process. The final mitigation banking instrument must be provided directly by the sponsor to all members of the IRT. Within 15 days of receipt of the final mitigation banking instrument, the district engineer will notify the IRT members whether or not he intends to approve the mitigation banking instrument. If no IRT member objects, by initiating the dispute resolution process in paragraph (d) of this section within 30 days of receipt of the final mitigation banking instrument, the district engineer will notify the sponsor of his final decision and, if the mitigation banking instrument is approved, arrange for it to be signed by the appropriate parties. If any IRT member initiates the dispute resolution process, the district engineer will notify the sponsor. Following conclusion of

the dispute resolution process, the district engineer will notify the sponsor of his final decision, and if the mitigation banking instrument is approved, arrange for it to be signed by the appropriate parties. The final mitigation banking instrument must contain the types of information items listed in paragraphs (c)(5)(i) through (vii) of this section.

(d) *Dispute resolution process.* (1) Within 15 days of receipt of the district engineer's notification of intent to approve a mitigation banking instrument, the Regional Administrator of the U.S. EPA, the Regional Director of the U.S. Fish and Wildlife Service, the Regional Director of the National Marine Fisheries Service, and/or other senior officials of agencies represented on the IRT may notify the district engineer and other IRT members by letter if they object to the approval of the proposed final mitigation banking instrument. This letter must include an explanation of the basis for the objection and, where feasible, offer recommendations for resolving the objections. If the district engineer does not receive any objections within this time period, he may proceed to final action on the mitigation banking instrument.

(2) The district engineer must respond to the objection within 30 days of receipt of the letter. The district engineer's response may indicate an intent to disapprove the mitigation banking instrument as a result of the objection, an intent to approve the mitigation banking instrument despite the objection, or may provide a modified mitigation banking instrument that attempts to address the objection. The district engineer's response must be provided to all IRT members.

(3) Within 15 days of receipt of the district engineer's response, if the Regional Administrator or Regional Director is not satisfied with the response he may forward the issue to the Assistant Administrator, Office of Water of the U.S. EPA, the Assistant Secretary for Fish and Wildlife and Parks of the U.S. FWS, or the Undersecretary for Oceans and Atmosphere of NOAA, as appropriate, for review and must notify the district engineer by faxed letter (with copies to all IRT members) that the issue has been forwarded for Headquarters review. This step is available only to the IRT members representing these three Federal agencies, however other IRT members who do not agree with the district engineer's final decision do not have to sign the mitigation banking instrument or recognize the mitigation bank for purposes of their own programs

and authorities. If an IRT member other than the one filing the original objection has a new objection based on the district engineer's response, he may use the first step in this procedure (paragraph (d)(1) of this section) to provide that objection to the district engineer.

(4) If the issue has not been forwarded to the objecting agency's Headquarters, then the district engineer may proceed with final action on the mitigation banking instrument. If the issue has been forwarded to the objecting agency's Headquarters, the district engineer must hold in abeyance the final action on the mitigation banking instrument, pending Headquarters level review described below.

(5) Within 20 days from the date of the letter requesting Headquarters level review, the Assistant Administrator, Office of Water, the Assistant Secretary for Fish and Wildlife and Parks, or the Undersecretary for Oceans and Atmosphere must either notify the Assistant Secretary of the Army (Civil Works) (ASA(CW)) that further review will not be requested, or request that the ASA(CW) review the draft mitigation banking instrument.

(6) Within 30 days of receipt of the letter from the objecting agency's Headquarters request for ASA(CW)'s review of the draft mitigation banking instrument, the ASA(CW), through the Director of Civil Works, must review the draft mitigation banking instrument and advise the district engineer on how to proceed with final action on that instrument. The ASA(CW) must immediately notify the Assistant Administrator, Office of Water, the Assistant Secretary for Fish and Wildlife and Parks, and/or the Undersecretary for Oceans and Atmosphere of the final decision.

(7) In cases where the dispute resolution procedure is used, the district engineer must notify the sponsor of his final decision within 150 days of receipt of the final mitigation banking instrument.

(e) *Extension of deadlines.* (1) The deadlines in paragraphs (c) and (d) of this section may be extended by the district engineer at his sole discretion in cases where:

(i) Compliance with other applicable laws, such as Endangered Species Act Section 7 consultation, is required;

(ii) Timely submittal of information necessary for the review of the proposed mitigation bank is not accomplished by the sponsor; or

(iii) Information that is essential to the district engineer's response cannot be reasonably obtained within the specified time frame.

(2) In such cases, the district engineer must promptly notify the sponsor in writing of the extension and the reason for it. Such extensions shall be for the minimum time necessary to resolve the issue necessitating the extension.

(f) *Modification of mitigation banking instruments.* (1) In general, modification of an approved mitigation banking instrument must follow the procedures in paragraph (c) of this section, unless the district engineer determines that the streamlined review process described in paragraph (f)(2) of this section is warranted. The streamlined review process may be used for changes reflecting adaptive management of the mitigation bank, changes in credit release schedules, and changes that the district engineer determines are non-significant.

(2) If the district engineer determines that the streamlined review process is warranted, he must notify the IRT members and the sponsor of this determination and provide them with copies of the proposed modification. IRT members and the sponsor have 30 days to notify the district engineer if they have concerns with the proposed modification. If IRT members or the sponsor notify the district engineer of such concerns, the district engineer shall attempt to resolve those concerns. Within 60 days of providing the proposed modification to the IRT, the district engineer must notify the IRT members of his intent to approve or disapprove the proposed modification. If no IRT member objects, by initiating the dispute resolution process in paragraph (d) of this section, within 15 days of receipt of this notification, the district engineer will notify the sponsor of his final decision and, if the modification is approved, arrange for it to be signed by the appropriate parties. If any IRT member initiates the dispute resolution process, the district engineer will so notify the sponsor. Following conclusion of the dispute resolution process, the district engineer will notify the sponsor of his final decision, and if the modification is approved, arrange for it to be signed by the appropriate parties.

(g) *Umbrella mitigation banking instruments.* A single mitigation banking instrument may provide for future authorization of additional mitigation bank sites. As additional sites are selected, they must be included in the mitigation banking instrument as modifications, using the procedures in paragraph (c) of this section.

(h) *Coordination of mitigation banking instrument and DA permit issuance.* In cases where initial establishment of the mitigation bank

involves activities requiring DA authorization, the permit should not be issued until all relevant provisions of the mitigation banking instrument have been substantively determined. This is to ensure that the DA permit accurately reflects all relevant provisions of the final mitigation banking instrument.

(i) *Project implementation.* Authorization to sell credits to satisfy compensatory mitigation requirements in DA permits is contingent on compliance with all of the terms of the mitigation banking instrument. This includes constructing a mitigation bank in accordance with the mitigation plan as approved by the district engineer and incorporated by reference in the mitigation banking instrument. If the aquatic resource restoration, establishment, enhancement, and/or preservation activities cannot be implemented in accordance with the approved mitigation plan, the district engineer must consult with the sponsor and the IRT to consider modifications to the mitigation banking instrument, including adaptive management, revisions to the credit release schedule, and alternatives for providing compensatory mitigation to satisfy any credits that have already been sold.

(j) *Credit withdrawal from mitigation banks.* The mitigation banking instrument may allow for initial debiting of a percentage of the total credits projected at mitigation bank maturity provided the following conditions are satisfied: the mitigation banking instrument and mitigation plan have been approved, the mitigation bank site has been secured, appropriate financial assurances have been established, and any other requirements determined to be necessary by the district engineer have been fulfilled. The mitigation banking instrument must provide a schedule for additional credit releases as appropriate milestones are achieved (see paragraph (k)(7) of this section).

(k) *Determining credits.* (1) *Units of measure.* For mitigation banks, the principal units for credits and debits are acres or linear feet or functional assessment units of particular resource types. Functional assessment units may be linked to acres or linear feet.

(2) *Functional assessment.* Where practicable, an appropriate functional assessment method (e.g., hydrogeomorphic approach to wetlands functional assessment) must be used to assess and describe the aquatic resource types that will be restored, established, enhanced and/or preserved by the mitigation bank.

(3) *Credit production.* The number of credits must reflect the difference

between pre- and post-mitigation bank site conditions. If an existing resource is being enhanced, the number of credits should reflect only the enhancements produced by construction of the mitigation bank. This may be reflected in a discounted number of credits relative to the total acres or linear feet encompassed by the mitigation bank.

(4) *Credit value.* Once a credit is debited, its value cannot change.

(5) *Credits provided by preservation.* These credits should be specified as acres or linear feet of preservation of a particular resource types. In determining the compensatory mitigation requirements for DA permits using the mitigation bank, the district engineer should apply a higher mitigation ratio if the requirements are to be met through the use of preservation credits. In determining this higher ratio, the district engineer must consider the relative importance of both the impacted and the preserved aquatic resources in sustaining watershed functions as described in § 332.3(c).

(6) *Credits provided by riparian areas, buffers, and uplands.* These credits should be specified as acres or linear feet of riparian area, buffer, and uplands respectively. Non-aquatic resources can only be used as compensatory mitigation for impacts to aquatic resources authorized by DA permits when those resources are essential to maintaining the ecological viability of adjoining aquatic resources. In determining the compensatory mitigation requirements for DA permits using the mitigation bank, the district engineer may authorize the use of riparian area, buffer and/or upland credits if he determines that these areas are essential to sustaining watershed functions as described in § 332.3(c) and are the most appropriate compensation for the authorized impacts.

(7) *Credit release schedule.* The terms of the credit release schedule must be specified in the mitigation banking instrument. The credit release schedule may provide for release of a limited portion of projected credits once the mitigation banking instrument, including the mitigation plan, has been approved, the site secured, and appropriate financial assurances established. Release of the remaining credits must be tied to performance based milestones (e.g., construction, planting, establishment of specified plant and animal communities). The credit release schedule should reserve a significant share of the total credits for release only after full achievement of ecological performance standards. When determining the credit release schedule, factors to be considered may include,

but are not limited to: The method of providing compensatory mitigation credits (e.g., restoration), the likelihood of success, the nature and amount of work needed to generate the mitigation bank credits, the aquatic resource type(s) and function(s) to be provided by the mitigation bank, and the initial capital costs needed to establish the mitigation bank. Once released, credits may only be used to satisfy compensatory mitigation requirements in a DA permit if they have been specifically approved by the district engineer as part of the permit review process.

(8) *Release of credits.* Credit releases must be approved by the district engineer. The sponsor must submit documentation to the district engineer demonstrating that the appropriate milestones for a release of credits have been achieved and requesting the release. The district engineer will provide copies of this documentation to the IRT members for review. IRT members must provide any comments to the district engineer within 15 days of receiving this documentation. However, if the district engineer determines that a site visit is necessary, IRT members must provide any comments to the district engineer within 30 days of receipt of this documentation. After full consideration of any comments received, the district engineer will determine whether the milestones have been achieved and the credits can be released.

(9) *Adjustments to credit totals and release schedules.* (i) If, after achieving all performance standards as specified in the mitigation banking instrument, the sponsor finds that the mitigation bank has developed aquatic resource functions substantially in excess of those upon which the original credit totals and release schedule were based, he may request that the mitigation banking instrument be amended in accordance with the procedures in paragraph (f) of this section. This request must include detailed documentation of the aquatic resource functions provided by the mitigation bank site, an explanation of how those aquatic resource functions substantially exceed the functions upon which the original credit totals were based, an explanation of the basis for calculating the additional credits, and any other information deemed necessary by the district engineer.

(ii) If the district engineer determines that the mitigation bank is not meeting performance standards, he may reduce the number of available credits or suspend credit sales. The district engineer may also require adaptive

management and/or direct the use of financial assurances for remediation.

(l) *Reporting.* (1) *Ledger account.* The mitigation banking instrument must contain a provision requiring the sponsor to establish and maintain a ledger to account for all credit transactions for the mitigation bank. Each time an approved credit transaction occurs, the sponsor must notify the district engineer. The sponsor must compile an annual ledger report showing the beginning and ending balance of available credits of each resource type, all additions and subtractions of credits, and any other changes in credit availability (e.g., additional credits released, credit sales suspended). The ledger report must be submitted to the district engineer, who will distribute copies to the IRT members. The ledger report is part of the administrative record for the mitigation bank. The district engineer will make the ledger report available to the public upon request.

(2) *Monitoring reports.* The sponsor is responsible for monitoring the mitigation bank site in accordance with the approved monitoring requirements to determine the level of success and identify problems requiring remedial action. Monitoring must be conducted in accordance with the requirements in § 332.6, and at time intervals appropriate for the particular project type and until such time that the district engineer, in consultation with the IRT, has determined that the performance standards have been attained. The mitigation banking instrument must include requirements for periodic monitoring reports to be submitted to the district engineer, who will provide copies to other IRT members.

(m) *Use of credits.* All activities authorized by DA permits are eligible, at the discretion of the district engineer, to use a mitigation bank to compensate for unavoidable impacts to aquatic resources, such as streams and wetlands. The district engineer will determine the number and type(s) of credits required to compensate for the authorized impacts. Permit applicants may propose to use a particular mitigation bank to provide the required compensatory mitigation. The banker must provide the permit applicant with a statement of credit availability. The district engineer must review the permit applicant's compensatory mitigation proposal, and notify the applicant of his determination regarding the acceptability of using that mitigation bank. In making this determination, the district engineer must fully consider agency and public comments submitted as part of the permit review process. Use

of an approved mitigation bank consistent with the terms of its instrument (e.g., the permitted activity is located within the approved service area, credits are available for an appropriate resource type) will generally satisfy the requirement to use a watershed approach to determine compensatory mitigation requirements where feasible and considering opportunities for on-site, in-kind mitigation, as described in § 332.3(b).

(n) *IRT concerns with use of credits.* If, in the view of a member of the IRT, an issued permit or series of issued permits raises concerns about how credits from a particular mitigation bank are being used to satisfy compensatory mitigation requirements (including concerns about whether credit use is consistent with the terms of the mitigation banking instrument), the IRT member may notify the district engineer in writing of the concern and request an IRT consultation. The district engineer shall promptly consult with the IRT to address the concern. Final resolution of the concern is at the discretion of the district engineer, consistent with applicable statutes, regulations, and policies regarding compensatory mitigation requirements for DA permits.

(o) *Long-term management.* The legal mechanisms and the party responsible for the long-term management of the mitigation bank and the protection of the site must be documented in the mitigation banking instrument. The sponsor must make adequate provisions for the operation, maintenance, and long-term management of the mitigation bank site. The mitigation banking instrument may contain provisions for the sponsor to transfer long-term management responsibilities to a land stewardship entity, such as a public agency, non-governmental organization, or private land manager. Where needed, the acquisition and protection of water rights must be secured by the sponsor and documented in the mitigation banking instrument.

(p) *Grandfathering of existing mitigation banking instruments.* All mitigation banking instruments approved after [date 90 days after publication of final rule] must meet the requirements of this part. Mitigation banks approved prior to [date 90 days after publication of final rule] may continue to operate under the terms of their existing instruments. However, any modification to such a mitigation banking instrument after [date 90 days after publication of final rule], including authorization of additional sites under an umbrella mitigation banking instrument, must be consistent with the terms of this part.

**§ 332.9 In-lieu fee programs.**

(a) *Suspension of future authorizations.* As of [date 90 days after publication of final rule] district engineers will not authorize new in-lieu fee programs to provide compensatory mitigation for DA permits.

(b) *Transition period for existing in-lieu fee programs.* (1) In-lieu fee programs with an approved instrument in effect as of [date 90 days after publication of final rule] may continue to sell credits consistent with the terms of that instrument until [date 5 years and 90 days after publication of final rule]. Credits that have already been sold by the in-lieu fee program on or before this date (or the date resulting from an extended deadline, as provided in paragraph (b)(2) of this section) continue to be subject to the terms and conditions of the instrument for that in-lieu fee program.

(2) In-lieu fee programs that wish to continue operating beyond this date must reconstitute themselves as a mitigation bank, consistent with the requirements of this part. If an in-lieu fee program has submitted a prospectus satisfying the requirements of § 332.8(c)(2) by [date 4 years and 90 days after publication of final rule] and is making a good faith effort to complete the process of obtaining an approved mitigation banking instrument that satisfies the requirements of this part, the district engineer may extend the deadline for final approval of this instrument beyond [date 5 years and 90 days after publication of final rule] as necessary.

(3) If the district engineer determines that the substantive requirements of this part pertaining to mitigation banks are already satisfied by the existing in-lieu fee program instrument, any changes necessary to reconstitute the in-lieu fee program as a mitigation bank may be accomplished using the streamlined review process in § 332.8(f)(2), otherwise a new mitigation banking instrument must be developed using the procedure in § 332.8(c).

(4) Any in-lieu fee program that has not reconstituted itself as a mitigation bank by the applicable deadline in paragraphs (b)(1) or (b)(2) of this section must cease selling credits as of that date. However, any such in-lieu fee program is still responsible for providing all credits already sold, consistent with the terms of its instrument.

Dated: March 13, 2006.

**John Paul Woodley, Jr.,**

*Assistant Secretary of the Army (Civil Works),  
Department of the Army.*

**Environmental Protection Agency****40 CFR Chapter I**

For the reasons stated in the preamble, the Environmental Protection Agency proposes to amend 40 CFR part 230 as set forth below:

**PART 230—SECTION 404(b)(1)  
GUIDELINES FOR SPECIFICATION OF  
DISPOSAL SITES FOR DREDGED OR  
FILL MATERIAL**

1. The authority citation for part 230 continues to read as follows:

**Authority:** Secs. 404(b) and 501(a) of the Clean Water Act of 1977 (33 U.S.C. 1344(b) and 1361(a)).

**§ 230.12 [Amended]**

2. In § 230.12(a)(2) revise the reference “subpart H” to read “subparts H and J”.

**Subpart H—[Amended]**

3. In subpart H the Note following the subpart heading is amended by adding a sentence to the end to read as follows:

**Note:** \* \* \* Additional criteria for compensation measures are provided in Subpart J.

4. In § 230.75 add a new sentence after the second sentence in paragraph (d) to read as follows:

**§ 230.75 Actions affecting plant and animal populations**

\* \* \* \* \*

(d) \* \* \* Additional criteria for compensation measures are provided in Subpart J. \* \* \*

\* \* \* \* \*

5. Add Subpart J to part 230 to read as follows:

**Subpart J—Compensatory Mitigation for Losses of Aquatic Resources**

Sec.

230.91 Purpose and general considerations.

230.92 Definitions.

230.93 General compensatory mitigation requirements.

230.94 Planning and documentation.

230.95 Ecological performance standards.

230.96 Monitoring.

230.97 Management.

230.98 Mitigation banks.

230.99 In-lieu fee programs.

**Subpart J—Compensatory Mitigation for Losses of Aquatic Resources**

**§ 230.91 Purpose and general considerations.**

(a) *Purpose.* (1) The purpose of this subpart is to establish standards and

criteria for the use of all types of compensatory mitigation, including on-site and off-site permittee-responsible mitigation, mitigation banks, and in-lieu fee mitigation to offset unavoidable impacts to waters of the United States authorized through the issuance of permits by the U.S. Army Corps of Engineers (Corps) pursuant to Section 404 of the Clean Water Act (33 U.S.C. 1344). This subpart implements Section 314(b) of the 2004 National Defense Authorization Act (Pub. L. 108–136), which directs that the standards and criteria shall, to the maximum extent practicable, maximize available credits and opportunities for mitigation, provide for regional variations in wetland conditions, functions, and values, and apply equivalent standards and criteria to each type of compensatory mitigation. This subpart is intended to further clarify mitigation requirements established under Corps and EPA regulations at 33 CFR part 320 and this part, respectively.

(2) These rules have been jointly developed by the Secretary of the Army, acting through the Chief of Engineers, and the Administrator of the Environmental Protection Agency. From time to time guidance on interpreting and implementing these rules may be prepared jointly by EPA and the U.S. Army Corps of Engineers at the national or regional level. No modifications to the basic application, meaning, or intent of these rules will be made without further joint rulemaking by the Secretary of the Army, acting through the Chief of Engineers and the Administrator of the Environmental Protection Agency pursuant to the Administrative Procedure Act (5 U.S.C. 551 *et seq.*).

(b) *Applicability.* This subpart does not alter the circumstances under which compensatory mitigation is required or the definition of “waters of the United States,” which is provided at § 230.3(s). Use of resources as compensatory mitigation that are not otherwise subject to regulation under Section 404 of the Clean Water Act does not in and of itself make them subject to such regulation.

(c) *Sequencing.* Pursuant to these requirements, the district engineer will issue a section 404 permit only upon a determination that the permit applicant has taken all appropriate and practicable steps to avoid and minimize adverse impacts to waters of the United States. Practicable means available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes. Compensatory mitigation for unavoidable impacts may be required to ensure that a section 404 activity

complies with this part of the Section 404(b)(1) Guidelines.

(d) *Accounting for regional variations.* Where appropriate, district engineers shall account for regional characteristics of aquatic resource types, functions, services, and values when determining performance standards and monitoring requirements for compensatory mitigation projects.

#### **§ 230.92 Definitions.**

For the purposes of this subpart, the following terms are defined:

*Adaptive management* means the development of a management strategy that anticipates the challenges associated with likely future impacts to the aquatic resource functions of the mitigation site. It acknowledges the risk and uncertainty of compensatory mitigation projects and allows modification of those projects to optimize performance. The process will provide guidance on the selection of appropriate remedial measures that will ensure the continued adequate provision of aquatic resource function and involves analysis of monitoring results to identify potential problems of a compensatory project and identification of measures to rectify those problems.

*Buffer* means an upland and/or riparian area that protects and/or enhances aquatic resource functions associated with wetlands, rivers, streams, lakes, marine, and estuarine systems from disturbances associated with adjacent land uses.

*Compensatory mitigation* means the restoration (re-establishment or rehabilitation), establishment (creation), enhancement, and/or in certain circumstances preservation of aquatic resources for the purposes of compensating for unavoidable adverse impacts which remain after all appropriate and practicable avoidance and minimization has been achieved.

*Compensatory mitigation project* means a restoration, establishment, enhancement, and/or preservation activity implemented by the permittee as a requirement of a DA permit (i.e., permittee-responsible mitigation), or by a third party (e.g., a mitigation bank).

*Credit* means a unit of measure (e.g., a functional or area measure) representing the accrual or attainment of aquatic functions at a compensatory mitigation site. The measure of function is based on the aquatic resources restored, established, enhanced, or preserved.

*DA* means Department of the Army.

*Days* means calendar days.

*Debit* means a unit of measure (e.g., a functional or area measure) representing

the loss of aquatic functions at an impact or project site. The measure of function is based on the aquatic resources impacted by the authorized activity.

*Enhancement* means the manipulation of the physical, chemical, or biological characteristics of an aquatic resource to heighten, intensify, or improve a specific aquatic resource function(s). Enhancement results in the gain of selected aquatic resource function(s), but may also lead to a decline in other aquatic resource function(s). Enhancement does not result in a gain in aquatic resource area.

*Establishment* (creation) means the manipulation of the physical, chemical, or biological characteristics present to develop an aquatic resource that did not previously exist at an upland or deepwater site. Establishment results in a gain in aquatic resource area.

*Functional capacity* means the degree to which an area of aquatic resource performs a specific function.

*Functions* means the physical, chemical, and biological processes that occur in aquatic resources and other ecosystems.

*Impact* means adverse effect.

*In-kind* means a resource type that is structurally and/or functionally similar to the impacted resource type.

*Interagency Review Team (IRT)* means an interagency group of Federal, Tribal, State, and/or local regulatory and resource agency representatives that reviews documentation for, and advises the district engineer on, the establishment and management of a mitigation bank.

*Mitigation bank* means a site, or suite of sites, where aquatic resources such as wetlands or streams are restored, established, enhanced, and/or preserved for the purpose of providing compensatory mitigation for authorized impacts to similar resources. Third-party mitigation banks generally sell compensatory mitigation credits to permittees whose obligation to provide mitigation is then transferred to the mitigation bank sponsor. The operation and use of a mitigation bank are governed by a mitigation banking instrument.

*Mitigation banking instrument* means the legal document for the establishment, operation, and use of a mitigation bank.

*Off-site* means an area that is neither located on the same parcel of land as the impact site, nor on a parcel of land contiguous to or near the parcel containing the impact site.

*On-site* means an area located on the same parcel of land as the impact site,

or on a parcel of land contiguous to or near the impact site.

*Out-of-kind* means a resource type that is structurally and/or functionally different than the impacted resource type.

*Performance standards* are observable or measurable attributes that are used to determine if a compensatory mitigation project meets its objectives.

*Permittee-responsible mitigation* means an aquatic resource restoration, establishment, enhancement, and/or preservation activity undertaken by the permittee (or an authorized agent or contractor) to provide compensatory mitigation for which the permittee retains full responsibility.

*Preservation* means the removal of a threat to, or preventing the decline of, aquatic resources by an action in or near those aquatic resources. This term includes activities commonly associated with the protection and maintenance of aquatic resources through the implementation of appropriate legal and physical mechanisms. Preservation does not result in a gain of aquatic resource area or functions.

*Re-establishment* means the manipulation of the physical, chemical, or biological characteristics of a site with the goal of returning natural/historic functions to a former aquatic resource. Re-establishment results in rebuilding a former aquatic resource and results in a gain in aquatic resource area.

*Reference aquatic resources* are aquatic resources that represent the range of variability exhibited by a regional class of aquatic resources as a result of natural processes and anthropogenic disturbances.

*Rehabilitation* means the manipulation of the physical, chemical, or biological characteristics of a site with the goal of repairing natural/historic functions to a degraded aquatic resource. Rehabilitation results in a gain in aquatic resource function, but does not result in a gain in aquatic resource area.

*Restoration* means the manipulation of the physical, chemical, or biological characteristics of a site with the goal of returning natural/historic functions to a former or degraded aquatic resource. For the purpose of tracking net gains in aquatic resource area, restoration is divided into two categories: re-establishment and rehabilitation.

*Riparian areas* are lands adjacent to a waterbody. Riparian areas are transitional between terrestrial and aquatic ecosystems, through which surface and subsurface hydrology connects waterbodies with their adjacent uplands. Riparian areas are

adjacent to streams, lakes, and estuarine-marine shorelines and provide a variety of ecological functions and services and help improve or maintain local water quality.

*Service area* means the geographic area within which impacts can be mitigated at a particular mitigation bank, as designated in its instrument.

*Services* means the benefits that human populations receive from functions that occur in aquatic resources and other ecosystems.

*Sponsor* means any public or private entity responsible for establishing and, in most circumstances, operating a mitigation bank.

*Standard permit* means a standard, individual permit issued under the authority of Section 404 of the Clean Water Act.

*Values* means the utility or satisfaction that humans derive from aquatic resource services. Values can be described in monetary terms or in qualitative terms, although many of the values associated with aquatic resources cannot be easily monetized. Values can be either use values (e.g., recreational enjoyment) or non-use values (e.g., stewardship, biodiversity).

*Watershed plan* means a plan developed by federal, tribal, state, and/or local government agencies, in consultation with relevant stakeholders. A watershed plan addresses ecological conditions in the watershed, multiple stakeholder interests, and land uses. Watershed plans may also identify priority sites for aquatic resource restoration and protection. Examples of watershed plans include special area management plans, advance identification programs, and watershed management plans.

### **§ 230.93 General compensatory mitigation requirements.**

(a) *General considerations.* The fundamental objective of compensatory mitigation is to offset environmental losses resulting from unavoidable impacts to waters of the United States authorized by DA permits. The district engineer must determine the compensatory mitigation to be required in a DA permit, based on what is available, practicable, and capable of compensating for the aquatic resource functions that will be lost as a result of the permitted activity. In making this determination, the district engineer must assess the likelihood for ecological success and sustainability, the location of the compensation site relative to the impact site and their significance within the watershed, and the economic costs of the compensatory mitigation. Compensatory mitigation requirements

must be commensurate with the amount and type of impact that is associated with a particular DA permit. Permit applicants are responsible for proposing an appropriate compensatory mitigation option to offset unavoidable impacts.

(b) *Location and type of compensatory mitigation.* (1) Where project impacts are located within the service area of an approved mitigation bank, and the mitigation bank has credits available for the type of resource impacted, the project's compensatory mitigation requirements may be met by the purchase of an appropriate number of credits from the mitigation bank.

(2) Where practicable and appropriate, the district engineer will require that the location and aquatic resource type of permittee-responsible compensatory mitigation necessary to offset anticipated impacts be consistent with an established watershed plan or be determined using the principles of a watershed approach as outlined in paragraph (c) of this section. The district engineer and the IRT should also use a watershed approach to the extent practicable in reviewing mitigation banking instruments.

(3) Where reliance on a watershed plan or approach is not practicable, the district engineer will consider opportunities to offset anticipated aquatic resource impacts by requiring on-site and in-kind compensatory mitigation. The district engineer must also consider the practicability of on-site compensatory mitigation and its compatibility with the proposed project.

(4) If, after considering opportunities for on-site, in-kind compensatory mitigation as provided in paragraph (b)(3) of this section, the district engineer determines that these compensatory mitigation opportunities are not practicable, are unlikely to compensate for the permitted activity, or will be incompatible with the proposed project, and an alternative, practicable off-site and/or out-of-kind mitigation opportunity is identified that has a greater likelihood of offsetting the permitted activity, the district engineer shall require that this alternative compensatory mitigation be provided. In general, 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, services, 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), and compatibility with adjacent land uses.

(c) *Watershed approach to compensatory mitigation.* (1) The district engineer must use a watershed approach to establish compensatory mitigation requirements in DA permits to the extent appropriate and practicable. Where an applicable watershed plan is available, the watershed approach should be based on the existing plan. Where no such plan is available, the watershed approach should be based on information provided by the project sponsor or available from other sources. The ultimate goal of a watershed approach is to maintain and improve the quality and quantity of aquatic resources within watersheds through strategic selection of compensatory mitigation sites.

(2) *Considerations.* (i) A watershed approach to compensatory mitigation considers the importance of landscape position and resource type of compensatory mitigation projects for the ecological functions and sustainability of aquatic resources within the watershed. Such an approach considers how the types and locations of compensatory mitigation projects will provide the desired aquatic resource functions, and will continue to function over time in a changing landscape. It also considers the habitat requirements of important species, habitat loss or conversion trends, sources of watershed impairment, and current development trends, as well as the requirements of other regulatory and non-regulatory programs that affect the watershed, such as storm water management or habitat conservation programs. It includes the protection and maintenance of terrestrial resources, such as non-wetland riparian areas and uplands, when those resources contribute to or improve the overall ecological functioning of aquatic resources in the watershed.

(ii) Locational factors (e.g., hydrology, surrounding land use) are important to the success of compensatory mitigation for impacted habitat functions and values and may lead to siting of such mitigation away from the project area. However, consideration should also be given to functions, services, and values (e.g., water quality, flood control, shoreline protection) that will likely need to be addressed at or near the areas impacted by the permitted project.

(iii) A watershed approach to compensatory mitigation may involve planning efforts to inventory historic and existing aquatic resources, including identification of degraded aquatic resources, and planning efforts to identify immediate and long-term aquatic resource needs within watersheds that can be met through

permittee-responsible mitigation projects or mitigation banks. Watershed planning efforts may identify and/or prioritize aquatic resources that are important for maintaining and restoring ecological functions of the watershed.

(3) *Information Needs.* The use of a watershed approach is based on analysis of information regarding watershed conditions and needs. Such information includes: Current trends in habitat loss or conversion, cumulative impacts of past development activities, current development trends, the presence and needs of sensitive species, site conditions that favor or hinder the success of mitigation projects, chronic environmental problems such as flooding or poor water quality, and local watershed goals and priorities. This information may be contained in an existing watershed plan or may be available from other sources. The level of information and analysis needed to support a watershed approach must be commensurate with the scope and scale of the proposed project requiring a DA permit, as well as the functions lost as a result of that project.

(d) *Site selection.* The compensatory mitigation project site must be ecologically suitable for providing the desired aquatic resource functions. In determining the ecological suitability of the compensatory mitigation project site, the district engineer must consider the following factors:

(1) Hydrological conditions, soil characteristics, and other physical and chemical characteristics;

(2) Watershed-scale features, such as aquatic habitat diversity, habitat connectivity, and other landscape scale functions;

(3) The size and location of the compensatory mitigation site relative to hydrologic sources (including the availability of water rights) and other ecological features;

(4) Compatibility with adjacent land uses and watershed management plans;

(5) Reasonably foreseeable effects the compensatory mitigation project will have on ecologically important aquatic or terrestrial resources (e.g., shallow sub-tidal habitat, mature forests), cultural sites, or habitat for Federally-or State-listed threatened and endangered species; and

(6) Other relevant factors including, but not limited to, development trends, anticipated land use changes, habitat status and trends, local or regional goals for the restoration or protection of particular habitat types or functions (e.g., re-establishment of habitat corridors or habitat for species of concern), water quality goals, floodplain management goals, and the relative

potential for chemical contamination of the aquatic resources.

(e) *Mitigation type.* (1) In general, in-kind mitigation is preferable to out-of-kind mitigation because it is most likely to compensate for the functions, services, and values lost at the impact site. For example, restoration of wetlands is most likely to compensate for unavoidable impacts to wetlands, while restoration of streams is most likely to compensate for unavoidable impacts to streams. Thus, except as provided in paragraph (e)(2) of this section, the district engineer should require that compensatory mitigation be of a similar type to the impacted aquatic resource.

(2) If the district engineer determines through the decision framework in paragraph (b) of this section that out-of-kind compensatory mitigation will serve the aquatic resource needs of the watershed, the district engineer may authorize the use of such out-of-kind compensatory mitigation. Factors that should be considered in making this determination include historic loss of habitat types within the watershed, the needs of sensitive species, appropriate mixes of habitat to maintain ecosystem viability, the relative likelihood of success in establishing different habitat types, needs for ecosystem services, and local watershed goals and priorities. The basis for authorization of out-of-kind compensatory mitigation must be documented in the administrative record for the permit action.

(f) *Amount of compensatory mitigation.* The district engineer must require an amount of compensatory mitigation for unavoidable impacts to aquatic resources sufficient to replace lost aquatic resource functions. In cases where functional assessment methods are available, appropriate, and practical to use, district engineers should use those functional assessment methods to determine how much compensatory mitigation should be required. If a functional assessment is not used, a minimum one-to-one acreage or linear foot replacement ratio should be used as a surrogate for functional replacement. The district engineer must require a mitigation ratio greater than one-to-one where necessary to account for the method of compensatory mitigation (e.g., preservation), differences between the functions lost at the impact site and the functions expected to be produced by the compensatory mitigation project, temporal losses of aquatic resource functions, and/or the difficulty of restoring or establishing the desired aquatic resource type and functions. The rationale for the required replacement ratio must be documented

in the administrative record for the permit action.

(g) *Use of mitigation banks.* Mitigation banks may be used to compensate for impacts to aquatic resources authorized by general permits and individual permits, including after-the-fact permits. Mitigation banks may also be used to satisfy requirements arising out of an enforcement action, such as supplemental environmental projects.

(h) *Preservation.* (1) Preservation may be used to provide compensatory mitigation for activities authorized by DA permits where:

(i) The resources provide important physical, chemical, or biological functions for the watershed;

(ii) The resources contribute to the ecological sustainability of the watershed;

(iii) Preservation is determined by the district engineer to be appropriate and practicable;

(iv) The resources are under threat of destruction or adverse modifications; and

(v) The preserved site will be permanently protected through an appropriate real estate or other legal instrument (e.g., easement, title transfer to state resource agency or land trust).

(2) Where preservation is used to provide compensatory mitigation, to the extent appropriate and practicable the preservation shall be done in conjunction with aquatic resource restoration, establishment, and/or enhancement activities. This requirement may be waived by the district engineer where preservation has been identified as a high priority using a watershed approach, as described in paragraph (c) of this section, but compensation ratios should be higher.

(i) *Buffers.* District engineers may require that compensatory mitigation project sites include, and may provide compensatory mitigation credit for, the establishment and maintenance of riparian areas and/or upland buffers around the restored, established, enhanced, or preserved aquatic resources where necessary to ensure the long-term viability of those resources.

(j) *Relationship to other Federal, Tribal, State, and local programs.* Compensatory mitigation projects for DA permits may also be used to compensate for environmental impacts authorized under other programs, such as Tribal, State, or local wetlands regulatory programs, the National Pollutant Discharge Elimination System Permit Program, Corps civil works projects, and Superfund removal and remedial actions, consistent with the terms and requirements of these programs and subject to the following



considerations. The project must include appropriate compensatory mitigation for unavoidable impacts to aquatic resources authorized by the DA permit, over and above what would be required under other programs to address other impacts. Under no circumstances may the same credits be used to provide mitigation for more than one activity. However, where appropriate, compensatory mitigation projects, including mitigation banks, may be designed to holistically address requirements under multiple programs and authorities for the same activity. Except for projects undertaken by Federal agencies, or where Federal funding is specifically authorized to provide compensatory mitigation, Federally-funded wetland conservation projects undertaken for purposes other than compensatory mitigation, such as the Wetlands Reserve Program and the Partners for Wildlife Program activities, cannot be used for the purpose of generating compensatory mitigation credits for activities authorized by DA permits. However, compensatory mitigation credits may be generated by activities undertaken in conjunction with, but supplemental to, such programs in order to maximize the overall ecological benefits of the conservation project.

(k) *Permit conditions.* The compensatory mitigation requirements for a DA permit, including the amount and type of compensatory mitigation, must be clearly stated in the special conditions of the individual permit or general permit verification (see 33 CFR 325.4 and 330.6(a)). The special conditions must be enforceable and describe the objectives of the compensatory mitigation project. The special conditions must also identify the party responsible for providing the compensatory mitigation. The special conditions must incorporate, by reference, compensatory mitigation plans approved by the district engineer. The performance standards and monitoring required for the compensatory mitigation project must also be clearly stated in the special conditions or the approved compensatory mitigation plan. The special conditions must also describe any required financial assurances or long-term management provisions for the compensatory mitigation project. If a mitigation bank is used to provide the required compensatory mitigation, the special conditions must indicate which mitigation bank will be used, and specify the required number and type of credits the permittee is required to purchase.

(l) *Party responsible for compensatory mitigation.* (1) The special conditions of the DA permit must clearly indicate the party or parties responsible for the implementation, performance, and long-term management of the compensatory mitigation project.

(2) For mitigation banks, the mitigation banking instrument must clearly indicate the party or parties responsible for the implementation, performance, and long-term management of the compensatory mitigation project.

(3) If a mitigation bank is approved by the district engineer to provide required compensatory mitigation for a DA permit, the special conditions of that DA permit must indicate which mitigation bank will be used to provide that compensatory mitigation. In such cases, the mitigation bank assumes responsibility for providing the required compensatory mitigation after the permittee has secured those credits from the sponsor.

(m) *Timing.* Implementation of the compensatory mitigation project shall be, to the maximum extent practicable, in advance of or concurrent with the activity causing the authorized impacts. Where it is not practicable to complete the initial physical and biological improvements required by the approved mitigation plan by the first full growing season following the impacts resulting from the permitted activity, the district engineer may require additional compensatory mitigation to offset temporal losses of aquatic functions that will result from the permitted activity.

(n) *Financial assurances.* (1) The district engineer shall require sufficient financial assurances to ensure a high level of confidence that the compensatory mitigation project will be successfully completed, in accordance with applicable performance standards. In cases where an alternate mechanism is available to ensure a high level of confidence that the compensatory mitigation will be provided and maintained (e.g., a formal, documented commitment from a government agency or public authority) the district engineer may determine that financial assurances are not necessary for that compensatory mitigation project.

(2) The amount of the required financial assurances must be determined by the district engineer, in consultation with the project sponsor, and must be based on the size and complexity of the compensatory mitigation project, the degree of completion of the project at the time of project approval, the likelihood of success, the past performance of the project sponsor, and any other factors

the district engineer deems appropriate. Financial assurances may be in the form of performance bonds, escrow accounts, casualty insurance, letters of credit, legislative appropriations for government sponsored projects, or other appropriate instruments, subject to the approval of the district engineer. The rationale for determining the amount of the required financial assurances must be documented in the administrative record for the DA permit.

(3) Financial assurances shall be phased out once the compensatory mitigation project has been determined by the district engineer to be successful in accordance with its performance standards. The DA permit or mitigation banking instrument must clearly specify the conditions under which the financial assurances are to be released to the permittee, sponsor, and/or other financial assurance provider, including, as appropriate, linkage to achievement of performance standards, adaptive management, or compliance with special conditions.

(o) *Compliance with applicable law.* The compensatory mitigation project must comply with all applicable Federal, state, and local laws. The DA permit or mitigation banking instrument must not require participation by the Corps or any other Federal agency in project management, including receipt or management of financial assurances or long-term financing mechanisms, except as determined by the Corps or other agency to be consistent with its statutory authority, mission, and priorities.

#### **§ 230.94 Planning and documentation.**

(a) *Pre-application consultations.* Potential applicants for standard permits are encouraged to participate in pre-application meetings with the Corps and appropriate agencies to discuss potential compensatory mitigation requirements and information needs.

(b) *Public review and comment.* (1) For an activity that requires a standard DA permit pursuant to Section 404 of the Clean Water Act, the public notice for the proposed activity must explain how impacts associated with the proposed activity are to be avoided, minimized, and compensated for. This explanation shall address the amount, type, and location of any proposed compensatory mitigation, including any out-of-kind mitigation, or indicate an intention to use an approved mitigation bank. The level of detail provided in the public notice must be commensurate with the scope and scale of the project.

(2) For activities authorized by general permits, review of compensatory mitigation plans must be conducted in

accordance with the terms and conditions of those general permits and applicable regulations.

(c) *Mitigation plan.* (1) The permittee or mitigation bank sponsor must prepare a draft mitigation plan and submit it to the district engineer for review. After addressing any comments provided by the district engineer, the permittee or sponsor must prepare a final mitigation plan, which must be approved by the district engineer prior to issuing the DA permit or approving the mitigation banking instrument. The approved mitigation plan must be incorporated into the DA permit or mitigation banking instrument by reference. The mitigation plan must include the items described in paragraphs (c)(2) through (c)(14) of this section, except that the district engineer may waive specific items if he determines that they are not applicable to a particular project. Permittees who plan to fulfill their compensatory mitigation obligations by purchasing credits from an approved mitigation bank need only include the name of the mitigation bank and the items described in paragraphs (c)(5) and (c)(6) of this section in their mitigation plan. The level of detail of the mitigation plan should be commensurate with the scale and scope of the project.

(2) *Objectives.* A description of the aquatic resource type(s) and amount(s) that will be provided, the method of compensation (i.e., restoration, establishment, enhancement, and/or preservation), and the manner in which the aquatic resource functions of the compensatory mitigation project will address the needs of the watershed, ecoregion, or other geographic area of interest.

(3) *Site selection.* A description of the factors considered during the site selection process. This should include consideration of 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 compensatory mitigation project site.

(4) *Site protection instrument.* 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.

(5) *Baseline information.* 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, and other site characteristics. A prospective permittee planning to purchase credits from an approved mitigation bank only needs to provide baseline information about the impact site, not the mitigation bank site.

(6) *Determination of credits.* A description of the number of credits to be provided, including a brief explanation of the rationale for this determination. For permittee-responsible mitigation, this should include an explanation of how the compensatory mitigation project compensates for unavoidable impacts to aquatic resources resulting from the permitted activity. For mitigation banks, it should include a description of resource types for which the mitigation bank may be used as compensatory mitigation and the number of credits to be provided for each resource type. This may include provisions for adjusting credits in the future, both downward (if performance standards are not met) or upward (if performance standards are significantly exceeded). For permittees intending to purchase credits from an approved mitigation bank, it should include the number and type of credits to be purchased and how these were determined.

(7) *Mitigation work plan.* Detailed written specifications and work descriptions for the compensatory mitigation project, including, but not limited to, the geographic boundaries of the project; construction methods, timing, and sequence; source(s) of water, including connections to existing waters and uplands; plant species to be planted at the site; the use of natural regeneration or seed banks to provide the desired plant community at the site; plans to control invasive plant species; the proposed grading plan, including elevations and slopes of the substrate; erosion control measures; and proposed stream geomorphology, if applicable.

(8) *Maintenance plan.* A description and schedule of maintenance requirements to ensure the continued viability of the resource once initial construction is completed.

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

(10) *Monitoring requirements.* A description of parameters to be monitored in order to determine if the compensatory mitigation project is on track to meet performance standards and if adaptive management is needed. A schedule for monitoring and reporting on monitoring results to the district engineer must be included.

(11) *Long-term management plan.* 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 the party responsible for long-term management and long-term financing mechanisms.

(12) *Adaptive management plan.* A description of procedures to address potential 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 conducting remediation to provide aquatic resource functions.

(13) *Financial assurances.* A description of financial assurances that will be provided and how they are sufficient to ensure a high level of confidence that the compensatory mitigation project will be successfully completed, in accordance with its performance standards.

(14) *Other information.* The district engineer may require additional information as necessary to determine the appropriateness, feasibility, and practicability of the compensatory mitigation project.

#### **§ 230.95 Ecological performance standards.**

The mitigation plan must contain performance standards that will be used to assess whether the project is achieving its objectives. Performance standards should relate to the objectives of the compensatory mitigation project, so that the project can be objectively evaluated to determine if it is developing into the desired resource type and providing the expected functions. Performance standards should be based on attributes that are objective, verifiable, and can be measured with a reasonable amount of effort. Performance standards may be based on variables or measures of functional capacity described in functional assessment methodologies, measurements of hydrology or other aquatic resource characteristics, and/or comparisons to reference aquatic resources of similar type and landscape position. Performance standards based on measurements of hydrology should take into consideration the hydrologic variability exhibited by reference aquatic resources, especially wetlands. Where practicable, performance standards should take into account the expected stages of the aquatic resource development process, in order to allow

early identification of potential problems and appropriate adaptive management.

#### **§ 230.96 Monitoring.**

(a) *General.* Monitoring the compensatory mitigation project site is necessary to determine if the project is meeting its performance standards, and to determine if remediation is necessary to ensure that the compensatory mitigation project is accomplishing its objectives. The district engineer must require the submission of monitoring reports to assess the development and condition of the compensatory mitigation project, unless he determines that monitoring is not practicable for that compensatory mitigation project. The mitigation plan must address the monitoring requirements for the compensatory mitigation project, including the parameters to be monitored, the length of the monitoring period, the party responsible for conducting the monitoring, the frequency for submitting monitoring reports to the district engineer, and the party responsible for submitting those monitoring reports to the district engineer.

(b) *Monitoring period.* The mitigation plan must provide for a monitoring period that is sufficient to demonstrate that the compensatory mitigation project has met performance standards, but not less than five years. A longer monitoring period must be required for aquatic resources with slow development rates (e.g., forested wetlands, bogs). Following project implementation, the district engineer may waive the remaining monitoring requirements upon a determination that the compensatory mitigation project has achieved its performance standards. Conversely the district engineer may extend the original monitoring period upon a determination that performance standards have not been met or the compensatory mitigation project is not on track to meet them. The district engineer may also revise monitoring requirements when remediation is required.

(c) *Monitoring reports.* (1) The district engineer must determine the information to be included in monitoring reports. This information should be sufficient for the district engineer to determine how the compensatory mitigation project is progressing towards meeting its performance standards, and may include plans, maps, and photographs to illustrate site conditions. Monitoring reports may also include the results of functional assessments used to provide quantitative or qualitative measures of

the functions provided by the compensatory mitigation project site.

(2) Monitoring reports should be provided by the district engineer to interested Federal, Tribal, State, and local resource agencies. The district engineer and representatives of Federal, Tribal, State, and/or local resource agencies may conduct regular (e.g., annual) on-site inspections, as appropriate, to monitor performance of the mitigation site. Monitoring reports must be made available to the public upon request.

#### **§ 230.97 Management.**

(a) *Site protection.* The aquatic habitats, riparian areas, buffers, and uplands that comprise the overall compensatory mitigation project should be provided long-term protection, through appropriate real estate instruments such as conservation easements held by, or transfer of title to, entities such as Federal, Tribal, State, or local resource agencies, non-profit conservation organizations, or private land managers, or other acceptable means for government property, such as Federal facility management plans or integrated natural resources management plans. The real estate instrument for the long-term protection of the compensatory mitigation site should restrict or prohibit incompatible uses (e.g., clear cutting) that might otherwise jeopardize the objectives of the compensatory mitigation project. Where appropriate, multiple instruments recognizing compatible uses (e.g., fishing or grazing rights) may be used.

(b) *Sustainability.* Compensatory mitigation projects should be designed, to the maximum extent practicable, to be self-sustaining once performance standards have been achieved. This includes minimization of active engineering features (e.g., pumps) and appropriate siting to ensure that natural hydrology and landscape context will support long-term sustainability. Where active long-term management and maintenance are necessary to ensure long-term sustainability (e.g., prescribed burning, invasive species control, maintenance of water control structures, easement enforcement), the responsible party must provide for such management and maintenance. This includes the provision of long-term financing mechanisms where necessary.

(c) *Adaptive management.* (1) If monitoring or other information indicates that the compensatory mitigation project is not progressing towards meeting its performance standards as anticipated, the responsible party must notify the district engineer.

The district engineer must require remediation to correct the deficiencies in the project to the extent appropriate and practicable. In determining appropriate and practicable remediation, the district engineer will consider whether the compensatory mitigation project is providing ecological benefits comparable to the original objectives of the compensatory mitigation project.

(2) The district engineer, in consultation with the responsible party (and other Federal, Tribal, state, and local agencies, as appropriate), will determine the appropriate remediation requirements. The required remediation may include site modifications, design changes, revisions to maintenance requirements, and revised monitoring requirements. The remediation must be designed to ensure that the modified compensatory mitigation project provides aquatic resource functions comparable to those described in the mitigation plan objectives.

(3) The performance standards must be revised where necessary to assess the success of remediation efforts and/or the realization of comparable ecological benefits that were considered in determining remediation requirements.

(d) *Long-term management.* (1) The permit conditions or mitigation banking instrument must identify the party responsible for the ownership and long-term management of the compensatory mitigation project, once performance standards have been achieved. The permit conditions or mitigation banking instrument may contain provisions allowing the permittee or sponsor to transfer the long-term management responsibilities of the compensatory mitigation project site to a land stewardship entity, such as a public agency, non-governmental organization, or private land manager, after review and approval by the district engineer. The land stewardship entity need not be identified in the original permit or mitigation banking instrument, as long as the future transfer of long-term management responsibility is approved by the district engineer.

(2) Provisions necessary for long-term financing must be included in the original permit or mitigation banking instrument. Appropriate long-term financing mechanisms include endowments, trusts, contractual arrangements with future responsible parties, and other appropriate financial instruments. In cases where the long-term management entity is a public authority or government agency, a formal commitment to accept stewardship responsibilities for the

project is acceptable in lieu of specific financial arrangements.

**§ 230.98 Mitigation banks.**

(a) *General considerations.* (1) All mitigation banks must have an approved instrument signed by the sponsor and the district engineer prior to being used to provide compensatory mitigation for DA permits. To the maximum extent practicable, mitigation banks must be planned and designed to be self-sustaining over time, but some active management and maintenance may be required to ensure their long-term viability and sustainability. Examples of acceptable management activities include maintaining fire dependent habitat communities in the absence of natural fire and controlling invasive exotic plant species.

(2) Mitigation banks may be sited on public or private lands. Siting on public land is only permitted when done in accordance with the mission and policies of the land management agency and with its written approval. Credits for mitigation banks on public land must be based solely on aquatic resource functions provided by the mitigation bank, over and above those provided by public programs already planned or in place.

(3) All mitigation banks must comply with the standards in this part, if they are to be used to provide compensatory mitigation for activities authorized by DA permits, regardless of whether they are sited on public or private lands and whether the sponsor is a governmental or private entity.

(b) *Interagency Review Team.* (1) The district engineer will establish an Interagency Review Team (IRT) to review documentation for the establishment and management of the mitigation bank. The district engineer or his designated representative serves as Chair of the IRT. In cases where a mitigation bank is proposed to satisfy the requirements of another Federal, Tribal, State, or local program, in addition to compensatory mitigation requirements of DA permits, the district engineer may designate an appropriate official of the responsible agency as co-Chair of the IRT.

(2) In addition to the Corps, representatives from the U.S. Environmental Protection Agency, U.S. Fish and Wildlife Service, NOAA Fisheries, the Natural Resources Conservation Service, and other Federal agencies, as appropriate, may participate in the IRT. The IRT may also include representatives from Tribal, State, and local regulatory and resource agencies, where such agencies have authorities and/or mandates directly

affecting, or affected by, the establishment, operation, or use of the mitigation bank. The district engineer will seek to include all public agencies with a substantive interest in the establishment of the mitigation bank on the IRT, but retains final authority over its composition.

(3) The primary role of the IRT is to facilitate the establishment of mitigation banks through the development of mitigation banking instruments. The IRT will review the prospectus, mitigation plan, and mitigation banking instrument and provide comments to the district engineer. Members of the IRT may also sign the mitigation banking instrument, if they so choose. By signing the mitigation banking instrument, the IRT members indicate their agreement with the terms of the instrument. The IRT will also advise the district engineer in assessing monitoring reports, recommending remedial measures, approving credit release, and approving modifications to a mitigation banking instrument.

(4) The district engineer will give full consideration to the comments and advice of the IRT. However, the district engineer alone retains final authority for approval of the mitigation banking instrument. However, in cases where the mitigation bank is also intended to satisfy the requirements of another agency, that agency must also approve the mitigation banking instrument before it can be used to satisfy such requirements.

(c) *Review process.* (1) The sponsor is responsible for preparing all documentation associated with establishment of the mitigation bank, including the prospectus, mitigation plan, and mitigation banking instrument. The prospectus provides an overview of the mitigation bank project and serves as the basis for public and initial IRT comment. The mitigation plan, as described in § 230.94(c), provides detailed plans and specifications for the mitigation bank. The mitigation banking instrument provides the authorization for the mitigation bank to provide credits to be used as compensatory mitigation for DA permits. The mitigation banking instrument must also incorporate the mitigation plan by reference.

(2) *Prospectus.* The prospectus must provide a summary of the information that will be included in the mitigation plan, at a sufficient level of detail to support informed public and IRT comment. In particular, it must describe the objectives of the proposed mitigation bank, how the mitigation bank will be established and operated, the proposed service area, and the

general need for, and technical feasibility of, the proposed mitigation bank. The prospectus must discuss the ecological suitability of the site to achieve the objectives of the proposed mitigation bank. This includes the physical, chemical, and biological characteristics of the site and how that site will support the planned types of aquatic resources and functions. It should also discuss the proposed ownership arrangements and long-term management of the mitigation bank. The review process begins when the sponsor submits a complete prospectus to the district engineer. The district engineer will notify the sponsor within 15 days whether or not a submitted prospectus is complete.

(3) *Preliminary review of prospectus.* Prior to submitting a prospectus, the sponsor may elect to submit a draft prospectus to the district engineer for comment and consultation. The district engineer will provide copies of the draft prospectus to the IRT, and provide comments back to the sponsor within 30 days. Any comments from IRT members will also be forwarded to the sponsor. This preliminary review is optional but is strongly recommended. It is intended to identify potential issues early so that the sponsor may attempt to address those issues prior to the start of the formal review process.

(4) *Public review and comment.* Within 30 days of receipt of a complete prospectus, the district engineer will provide public notice of the proposed mitigation bank, in accordance with the public notice procedures at 33 CFR 325.3. The public notice must include a summary of the prospectus and indicate that the full prospectus is available to the public for review upon request. The comment period for public notice will generally be 30 days, unless the district engineer determines that a longer or shorter comment period is appropriate. The district engineer will notify the sponsor if the comment period is extended beyond 30 days, including an explanation of why the longer comment period is necessary. Copies of all comments received in response to the public notice must be distributed to the other IRT members and to the sponsor within 15 days of the close of the public comment period. The district engineer and IRT members may also provide comments to the sponsor at this time, and copies of any such comments will also be distributed to all IRT members. If the construction of a mitigation bank requires DA authorization through the standard permit process, the public notice requirement may be satisfied through the public notice provisions of the standard permit processing

procedures, provided all of the relevant information is provided.

(5) *Draft mitigation banking instrument.* After considering comments from the district engineer, the IRT, and the public, if the sponsor chooses to proceed with establishment of the mitigation bank, he must prepare a draft mitigation banking instrument and submit it to the district engineer. The draft mitigation banking instrument should be based on the prospectus and must describe in detail the physical and legal characteristics of the mitigation bank and how it will be established and operated. The draft mitigation banking instrument must include the following information:

(i) *Mitigation plan*, including all applicable items listed in § 230.94(c)(2) through (14);

(ii) *Geographic service area of the mitigation bank.* The service area is the watershed or other geographic area within which a mitigation bank is authorized to provide compensation for unavoidable impacts authorized by DA permits. The service area should be large enough to support an economically viable mitigation bank, but must not be larger than is appropriate to ensure that the aquatic resources provided by the mitigation bank will effectively compensate for adverse environmental impacts across the entire service area. The district engineer must consider relevant environmental and economic factors when approving the service area. The district engineer may also consider locally-developed standards and criteria. In urban areas, a U.S. Geological Survey 8-digit hydrologic unit code (HUC) watershed or a smaller watershed may be an appropriate service area. In rural areas, several contiguous 8-digit HUCs or a 6-digit HUC watershed may be an appropriate service area for the mitigation bank. The basis for determining the service area must be documented in writing and referenced in the mitigation banking instrument;

(iii) *Credit release schedule.* Credit release must be tied to achievement of specific milestones. If the mitigation bank does not achieve appropriate milestones (e.g., performance standards) as anticipated, the district engineer may modify the credit release schedule, including reducing the number of available credits or suspending credit sales altogether;

(iv) Accounting procedures;

(v) A provision stating that legal responsibility for providing the compensatory mitigation lies with the sponsor;

(vi) Default and closure provisions; and

(vii) Any other information deemed necessary by the district engineer.

(6) *IRT review.* Upon receiving a draft mitigation banking instrument, the district engineer must provide copies of the draft instrument to the IRT members for a 30 day comment period. Following the comment period, the district engineer will discuss any comments with the appropriate agencies and with the sponsor. The district engineer will seek to resolve any issues using a consensus-based approach. Within 90 days of receipt of the complete draft mitigation banking instrument, the district engineer must notify the sponsor of the status of the IRT review. Specifically, the district engineer must indicate to the sponsor if the draft mitigation banking instrument is generally acceptable and what changes, if any, are needed. If there are significant unresolved concerns that may lead to a formal objection from one or more IRT members to the final mitigation banking instrument, the district engineer will indicate the nature of those concerns.

(7) *Final mitigation banking instrument.* If the sponsor still wishes to proceed with establishment of the mitigation bank, he must submit a final mitigation banking instrument to the district engineer for approval. The final mitigation banking instrument should address any comments provided as a result of the IRT review process. The final mitigation banking instrument must be provided directly by the sponsor to all members of the IRT. Within 15 days of receipt of the final mitigation banking instrument, the district engineer will notify the IRT members whether or not he intends to approve the mitigation banking instrument. If no IRT member objects, by initiating the dispute resolution process in paragraph (d) of this section within 30 days of receipt of the final mitigation banking instrument, the district engineer will notify the sponsor of his final decision and, if the mitigation banking instrument is approved, arrange for it to be signed by the appropriate parties. If any IRT member initiates the dispute resolution process, the district engineer will notify the sponsor. Following conclusion of the dispute resolution process, the district engineer will notify the sponsor of his final decision, and if the mitigation banking instrument is approved, arrange for it to be signed by the appropriate parties. The final mitigation banking instrument must contain the types of information items

listed in paragraphs (c)(5)(i) through (vii) of this section.

(d) *Dispute resolution process.* (1) Within 15 days of receipt of the district engineer's notification of intent to approve a mitigation banking instrument, the Regional Administrator of the U.S. EPA, the Regional Director of the U.S. Fish and Wildlife Service, the Regional Director of the National Marine Fisheries Service, and/or other senior officials of agencies represented on the IRT may notify the district engineer and other IRT members by letter if they object to the approval of the proposed final mitigation banking instrument. This letter must include an explanation of the basis for the objection and, where feasible, offer recommendations for resolving the objections. If the district engineer does not receive any objections within this time period, he may proceed to final action on the mitigation banking instrument.

(2) The district engineer must respond to the objection within 30 days of receipt of the letter. The district engineer's response may indicate an intent to disapprove the mitigation banking instrument as a result of the objection, an intent to approve the mitigation banking instrument despite the objection, or may provide a modified mitigation banking instrument that attempts to address the objection. The district engineer's response must be provided to all IRT members.

(3) Within 15 days of receipt of the district engineer's response, if the Regional Administrator or Regional Director is not satisfied with the response he may forward the issue to the Assistant Administrator, Office of Water of the U.S. EPA, the Assistant Secretary for Fish and Wildlife and Parks of the U.S. FWS, or the Undersecretary for Oceans and Atmosphere of NOAA, as appropriate, for review and must notify the district engineer by faxed letter (with copies to all IRT members) that the issue has been forwarded for Headquarters review. This step is available only to the IRT members representing these three Federal agencies, however other IRT members who do not agree with the district engineer's final decision do not have to sign the mitigation banking instrument or recognize the mitigation bank for purposes of their own programs and authorities. If an IRT member other than the one filing the original objection has a new objection based on the district engineer's response, he may use the first step in this procedure (paragraph (d)(1) of this section) to provide that objection to the district engineer.

(4) If the issue has not been forwarded to the objecting agency's Headquarters, then the district engineer may proceed with final action on the mitigation banking instrument. If the issue has been forwarded to the objecting agency's Headquarters, the district engineer must hold in abeyance the final action on the mitigation banking instrument, pending Headquarters level review described below.

(5) Within 20 days from the date of the letter requesting Headquarters level review, the Assistant Administrator, Office of Water, the Assistant Secretary for Fish and Wildlife and Parks, or the Undersecretary for Oceans and Atmosphere must either notify the Assistant Secretary of the Army (Civil Works) (ASA(CW)) that further review will not be requested, or request that the ASA(CW) review the draft mitigation banking instrument.

(6) Within 30 days of receipt of the letter from the objecting agency's Headquarters request for ASA(CW)'s review of the draft mitigation banking instrument, the ASA(CW), through the Director of Civil Works, must review the draft mitigation banking instrument and advise the district engineer on how to proceed with final action on that instrument. The ASA(CW) must immediately notify the Assistant Administrator, Office of Water, the Assistant Secretary for Fish and Wildlife and Parks, and/or the Undersecretary for Oceans and Atmosphere of the final decision.

(7) In cases where the dispute resolution procedure is used, the district engineer must notify the sponsor of his final decision within 150 days of receipt of the final mitigation banking instrument.

(e) *Extension of deadlines.* (1) The deadlines in paragraphs (c) and (d) of this section may be extended by the district engineer at his sole discretion in cases where:

(i) Compliance with other applicable laws, such as Endangered Species Act Section 7 consultation, is required;

(ii) Timely submittal of information necessary for the review of the proposed mitigation bank is not accomplished by the sponsor; or

(iii) Information that is essential to the district engineer's response cannot be reasonably obtained within the specified time frame.

(2) In such cases, the district engineer must promptly notify the sponsor in writing of the extension and the reason for it. Such extensions shall be for the minimum time necessary to resolve the issue necessitating the extension.

(f) *Modification of mitigation banking instruments.* (1) In general, modification

of an approved mitigation banking instrument must follow the procedures in paragraph (c) of this section, unless the district engineer determines that the streamlined review process described in paragraph (f)(2) of this section is warranted. The streamlined review process may be used for changes reflecting adaptive management of the mitigation bank, changes in credit release schedules, and changes that the district engineer determines are non-significant.

(2) If the district engineer determines that the streamlined review process is warranted, he must notify the IRT members and the sponsor of this determination and provide them with copies of the proposed modification. IRT members and the sponsor have 30 days to notify the district engineer if they have concerns with the proposed modification. If IRT members or the sponsor notify the district engineer of such concerns, the district engineer shall attempt to resolve those concerns. Within 60 days of providing the proposed modification to the IRT, the district engineer must notify the IRT members of his intent to approve or disapprove the proposed modification. If no IRT member objects, by initiating the dispute resolution process in paragraph (d) of this section, within 15 days of receipt of this notification, the district engineer will notify the sponsor of his final decision and, if the modification is approved, arrange for it to be signed by the appropriate parties. If any IRT member initiates the dispute resolution process, the district engineer will so notify the sponsor. Following conclusion of the dispute resolution process, the district engineer will notify the sponsor of his final decision, and if the modification is approved, arrange for it to be signed by the appropriate parties.

(g) *Umbrella mitigation banking instruments.* A single mitigation banking instrument may provide for future authorization of additional mitigation bank sites. As additional sites are selected, they must be included in the mitigation banking instrument as modifications, using the procedures in paragraph (c) of this section.

(h) *Coordination of mitigation banking instrument and DA permit issuance.* In cases where initial establishment of the mitigation bank involves activities requiring DA authorization, the permit should not be issued until all relevant provisions of the mitigation banking instrument have been substantively determined. This is to ensure that the DA permit accurately reflects all relevant provisions of the final mitigation banking instrument.

(i) *Project implementation.*

Authorization to sell credits to satisfy compensatory mitigation requirements in DA permits is contingent on compliance with all of the terms of the mitigation banking instrument. This includes constructing a mitigation bank in accordance with the mitigation plan as approved by the district engineer and incorporated by reference in the mitigation banking instrument. If the aquatic resource restoration, establishment, enhancement, and/or preservation activities cannot be implemented in accordance with the approved mitigation plan, the district engineer must consult with the sponsor and the IRT to consider modifications to the mitigation banking instrument, including adaptive management, revisions to the credit release schedule, and alternatives for providing compensatory mitigation to satisfy any credits that have already been sold.

(j) *Credit withdrawal from mitigation banks.* The mitigation banking instrument may allow for initial debiting of a percentage of the total credits projected at mitigation bank maturity provided the following conditions are satisfied: the mitigation banking instrument and mitigation plan have been approved, the mitigation bank site has been secured, appropriate financial assurances have been established, and any other requirements determined to be necessary by the district engineer have been fulfilled. The mitigation banking instrument must provide a schedule for additional credit releases as appropriate milestones are achieved (see paragraph (k)(7) of this section).

(k) *Determining credits.* (1) *Units of measure.* For mitigation banks, the principal units for credits and debits are acres or linear feet or functional assessment units of particular resource types. Functional assessment units may be linked to acres or linear feet.

(2) *Functional assessment.* Where practicable, an appropriate functional assessment method (e.g., hydrogeomorphic approach to wetlands functional assessment) must be used to assess and describe the aquatic resource types that will be restored, established, enhanced and/or preserved by the mitigation bank.

(3) *Credit production.* The number of credits must reflect the difference between pre- and post-mitigation bank site conditions. If an existing resource is being enhanced, the number of credits should reflect only the enhancements produced by construction of the mitigation bank. This may be reflected in a discounted number of credits

relative to the total acres or linear feet encompassed by the mitigation bank.

(4) *Credit value.* Once a credit is debited, its value cannot change.

(5) *Credits provided by preservation.* These credits should be specified as acres or linear feet of preservation of a particular resource types. In determining the compensatory mitigation requirements for DA permits using the mitigation bank, the district engineer should apply a higher mitigation ratio if the requirements are to be met through the use of preservation credits. In determining this higher ratio, the district engineer must consider the relative importance of both the impacted and the preserved aquatic resources in sustaining watershed functions as described in § 230.93(c).

(6) *Credits provided by riparian areas, buffers, and uplands.* These credits should be specified as acres or linear feet of riparian area, buffer, and uplands respectively. Non-aquatic resources can only be used as compensatory mitigation for impacts to aquatic resources authorized by DA permits when those resources are essential to maintaining the ecological viability of adjoining aquatic resources. In determining the compensatory mitigation requirements for DA permits using the mitigation bank, the district engineer may authorize the use of riparian area, buffer and/or upland credits if he determines that these areas are essential to sustaining watershed functions as described in § 230.93(c) and are the most appropriate compensation for the authorized impacts.

(7) *Credit release schedule.* The terms of the credit release schedule must be specified in the mitigation banking instrument. The credit release schedule may provide for release of a limited portion of projected credits once the mitigation banking instrument, including the mitigation plan, has been approved, the site secured, and appropriate financial assurances established. Release of the remaining credits must be tied to performance based milestones (e.g., construction, planting, establishment of specified plant and animal communities). The credit release schedule should reserve a significant share of the total credits for release only after full achievement of ecological performance standards. When determining the credit release schedule, factors to be considered may include, but are not limited to: the method of providing compensatory mitigation credits (e.g., restoration), the likelihood of success, the nature and amount of work needed to generate the mitigation bank credits, the aquatic resource

type(s) and function(s) to be provided by the mitigation bank, and the initial capital costs needed to establish the mitigation bank. Once released, credits may only be used to satisfy compensatory mitigation requirements in a DA permit if they have been specifically approved by the district engineer as part of the permit review process.

(8) *Release of credits.* Credit releases must be approved by the district engineer. The sponsor must submit documentation to the district engineer demonstrating that the appropriate milestones for a release of credits have been achieved and requesting the release. The district engineer will provide copies of this documentation to the IRT members for review. IRT members must provide any comments to the district engineer within 15 days of receiving this documentation. However, if the district engineer determines that a site visit is necessary, IRT members must provide any comments to the district engineer within 30 days of receipt of this documentation. After full consideration of any comments received, the district engineer will determine whether the milestones have been achieved and the credits can be released.

(9) *Adjustments to credit totals and release schedules.* (i) If, after achieving all performance standards as specified in the mitigation banking instrument, the sponsor finds that the mitigation bank has developed aquatic resource functions substantially in excess of those upon which the original credit totals and release schedule were based, he may request that the mitigation banking instrument be amended in accordance with the procedures in paragraph (f) of this section. This request must include detailed documentation of the aquatic resource functions provided by the mitigation bank site, an explanation of how those aquatic resource functions substantially exceed the functions upon which the original credit totals were based, an explanation of the basis for calculating the additional credits, and any other information deemed necessary by the district engineer.

(ii) If the district engineer determines that the mitigation bank is not meeting performance standards, he may reduce the number of available credits or suspend credit sales. The district engineer may also require adaptive management and/or direct the use of financial assurances for remediation.

(l) *Reporting.* (1) *Ledger account.* The mitigation banking instrument must contain a provision requiring the sponsor to establish and maintain a

ledger to account for all credit transactions for the mitigation bank. Each time an approved credit transaction occurs, the sponsor must notify the district engineer. The sponsor must compile an annual ledger report showing the beginning and ending balance of available credits of each resource type, all additions and subtractions of credits, and any other changes in credit availability (e.g., additional credits released, credit sales suspended). The ledger report must be submitted to the district engineer, who will distribute copies to the IRT members. The ledger report is part of the administrative record for the mitigation bank. The district engineer will make the ledger report available to the public upon request.

(2) *Monitoring reports.* The sponsor is responsible for monitoring the mitigation bank site in accordance with the approved monitoring requirements to determine the level of success and identify problems requiring remedial action. Monitoring must be conducted in accordance with the requirements in § 230.96, and at time intervals appropriate for the particular project type and until such time that the district engineer, in consultation with the IRT, has determined that the performance standards have been attained. The mitigation banking instrument must include requirements for periodic monitoring reports to be submitted to the district engineer, who will provide copies to other IRT members.

(m) *Use of credits.* All activities authorized by DA permits are eligible, at the discretion of the district engineer, to use a mitigation bank to compensate for unavoidable impacts to aquatic resources, such as streams and wetlands. The district engineer will determine the number and type(s) of credits required to compensate for the authorized impacts. Permit applicants may propose to use a particular mitigation bank to provide the required compensatory mitigation. The banker must provide the permit applicant with a statement of credit availability. The district engineer must review the permit applicant's compensatory mitigation proposal, and notify the applicant of his determination regarding the acceptability of using that mitigation bank. In making this determination, the district engineer must fully consider agency and public comments submitted as part of the permit review process. Use of an approved mitigation bank consistent with the terms of its instrument (e.g., the permitted activity is located within the approved service area, credits are available for an appropriate resource type) will



generally satisfy the requirement to use a watershed approach to determine compensatory mitigation requirements where feasible and considering opportunities for on-site, in-kind mitigation, as described in § 332.3(b).

(n) *IRT concerns with use of credits.* If, in the view of a member of the IRT, an issued permit or series of issued permits raises concerns about how credits from a particular mitigation bank are being used to satisfy compensatory mitigation requirements (including concerns about whether credit use is consistent with the terms of the mitigation banking instrument), the IRT member may notify the district engineer in writing of the concern and request an IRT consultation. The district engineer shall promptly consult with the IRT to address the concern. Final resolution of the concern is at the discretion of the district engineer, consistent with applicable statutes, regulations, and policies regarding compensatory mitigation requirements for DA permits.

(o) *Long-term management.* The legal mechanisms and the party responsible for the long-term management of the mitigation bank and the protection of the site must be documented in the mitigation banking instrument. The sponsor must make adequate provisions for the operation, maintenance, and long-term management of the mitigation bank site. The mitigation banking instrument may contain provisions for the sponsor to transfer long-term management responsibilities to a land stewardship entity, such as a public agency, non-governmental organization, or private land manager. Where needed, the acquisition and protection of water rights must be secured by the sponsor

and documented in the mitigation banking instrument.

(p) *Grandfathering of existing mitigation banking instruments.* All mitigation banking instruments approved after [date 90 days after publication of final rule] must meet the requirements of this part. Mitigation banks approved prior to [date 90 days after publication of final rule] may continue to operate under the terms of their existing instruments. However, any modification to such a mitigation banking instrument after [date 90 days after publication of final rule], including authorization of additional sites under an umbrella mitigation banking instrument, must be consistent with the terms of this part.

#### **§ 230.99 In-lieu fee programs.**

(a) *Suspension of future authorizations.* As of [date 90 days after publication of final rule] district engineers will not authorize new in-lieu fee programs to provide compensatory mitigation for DA permits.

(b) *Transition period for existing in-lieu fee programs.* (1) In-lieu fee programs with an approved instrument in effect as of [date 90 days after publication of final rule] may continue to sell credits consistent with the terms of that instrument until [date 5 years and 90 days after publication of final rule]. Credits that have already been sold by the in-lieu fee program on or before this date (or the date resulting from an extended deadline, as provided in paragraph (b)(2) of this section) continue to be subject to the terms and conditions of the instrument for that in-lieu fee program.

(2) In-lieu fee programs that wish to continue operating beyond this date

must reconstitute themselves as a mitigation bank, consistent with the requirements of this subpart. If an in-lieu fee program has submitted a prospectus satisfying the requirements of § 230.98(c)(2) by [date 4 years and 90 days after publication of final rule] and is making a good faith effort to complete the process of obtaining an approved mitigation banking instrument that satisfies the requirements of this subpart, the district engineer may extend the deadline for final approval of this instrument beyond [date 5 years and 90 days after publication of final rule] as necessary.

(3) If the district engineer determines that the substantive requirements of this subpart pertaining to mitigation banks are already satisfied by the existing in-lieu fee program instrument, any changes necessary to reconstitute the in-lieu fee program as a mitigation bank may be accomplished using the streamlined review process in § 230.98(f)(2), otherwise a new mitigation banking instrument must be developed using the procedure in § 230.98(c).

(4) Any in-lieu fee program that has not reconstituted itself as a mitigation bank by the applicable deadline in paragraphs (b)(1) or (b)(2) of this section must cease selling credits as of that date. However, any such in-lieu fee program is still responsible for providing all credits already sold, consistent with the terms of its instrument.

Dated: March 23, 2006.

**Stephen L. Johnson,**

*Administrator, U.S. Environmental Protection Agency.*

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