



DEPARTMENT OF THE ARMY
OFFICE OF THE ASSISTANT SECRETARY
CIVIL WORKS
108 ARMY PENTAGON
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MEMORANDUM FOR THE COMMANDING GENERAL OF THE U.S. ARMY CORPS
OF ENGINEERS

SUBJECT: Implementation Guidance for Section 1163 of the Water Resources
Development Act of 2016 (WRDA 2016), Wetlands Mitigation

1. References.

a. Section 1163 of the Water Resources Development Act of 2016 (WRDA 2016).

b. Section 1162 of the WRDA 2016.

c. Compensatory Mitigation for Losses of Aquatic Resources; Final Rule;
Federal Register, Volume 73, No. 70, 10 April 2008.

d. ER 1105-2-100 dated 22 April 2000, Planning Guidance Notebook.

e. CECW-P Memorandum, Subject: Implementation Guidance for WRDA
2007 – Section 2036(c) Wetlands Mitigation, 6 November 2008.

f. EC 1105-2-412 Assuring Quality of Planning Models, 31 March 2011.

2. Section 1163 of WRDA 2016 amends Section 2036(c) of WRDA 2007 by replacing the full text of the original provision and providing for consideration of the entire amount of potential in-kind credits available at mitigation banks and in-lieu fee programs when conducting water resources development feasibility studies. Section 2036(c) of WRDA 2007, as amended by Section 1163 of WRDA 2016, is enclosed.

3. This memorandum provides guidance on the use of mitigation banks and in-lieu fee programs for mitigation as described in Section 2036(c) of WRDA 2007, as amended. Information on mitigation banking and in-lieu fee programs can be found in reference 1.c, and information on compensatory mitigation planning for environmental impacts of water resources development projects is located in reference 1.d. This implementation guidance rescinds implementation guidance issued in November 2008 for Section 2036(c) (reference 1.e).

4. Policy for Use of Mitigation Banks and In-Lieu Fee Programs:

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a. The Corps shall consider available and potential in-kind credits from mitigation banks and in-lieu fee programs established by others, where appropriate, when planning compensatory mitigation for unavoidable impacts to wetlands and other habitats resulting from construction of a proposed water resources development project. The Corps shall consider all available credits and all potential credits from mitigation banks and in-lieu fee programs in a manner consistent with the guidance provided below. Potential credits will need to be released (available) in order for the Corps to purchase the credits. Purchasing those credits would occur prior to the award of a construction contract for the water resource development project or a separable element of the project. Corps policy provides that consideration of compensatory mitigation, whether it is constructed by the Corps or purchased from a mitigation bank or in-lieu fee program, is only appropriate after all practicable steps have been taken to avoid and minimize adverse impacts to waters of the United States. (References 1.c. (33 CFR 332.1(c)(2)) and 1d. (paragraphs C-3.b.(13), C-3.d.(1)(a), C-3.d.(3)(l-m).)) Consideration of mitigation banks and in-lieu fee programs will be accomplished as part of the incremental cost analysis consistent with paragraph 4.g.

b. Definitions. For the purposes of this guidance, the following definitions apply:

i. "Available credits" are those that have been released for sale or transfer as determined by the District Engineer consistent with the definition of "release of credits" in reference 1.c. (33 CFR 332.2).

ii. "Potential credits" is defined separately for mitigation banks and for in-lieu fee programs. For a mitigation bank, "potential credits" is the number of credits that is identified in the credit release schedule portion of an approved instrument (see reference 1.c. (33 CFR 332.8(d)(6)(iii)(B))), less any credits that have already been sold or transferred. For an in-lieu fee program, "potential credits" is the total number of credits expected to be produced by an approved in-lieu fee project (see reference 1.c. (33 CFR 332.8(j)(1))), minus any released credits that must be used for the fulfillment of in-lieu fee program advance credit sales (see reference 1.c.(33 CFR 332.2 and 332.8(n)(3))).

iii. "In-kind" and "instrument" have the same definitions as provided in reference 1.c (33 CFR 332.2).

(a) "In-kind" means a resource of a similar structural and functional type to the impacted resource (33 CFR 332.2).

(b) "Instrument" means a mitigation banking instrument or in-lieu fee program instrument (33 CFR 332.2).

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(c) "In-lieu fee program instrument" means the legal document for the establishment, operation, and use of an in-lieu fee program (33 CFR 332.2).

(d) "Mitigation banking instrument" means the legal document for the establishment, operation, and use of a mitigation bank (33 CFR 332.2).

iv. "Service area" means the geographic area within which impacts can be mitigated at a specific mitigation bank or an in-lieu fee program, as designated in its instrument. (33 CFR 332.2)

c. Mitigation Banks. Mitigation banks will be considered a reasonable mitigation alternative for planning purposes if all the following criteria are met:

i. The mitigation bank was approved by the Secretary or his/her designee, as demonstrated by a mitigation banking instrument approved pursuant to the process set forth in reference 1.c;

ii. The mitigation bank provides in-kind mitigation credit for the water resources development project, and the project impacts are located in the service area of the mitigation bank; and

iii. A functional analysis of the potential credits has been completed using a Corps certified habitat assessment model that conforms with reference 1.f (or successor guidance), which specifies how models are approved or certified, and is consistent with the model used to determine project impacts. The Corps will collaboratively determine conformance with these requirements. The requirement to apply a functional analysis under this provision only applies when a mitigation bank is considered for use to mitigate impacts resulting from a water resources development project and does not alter the Corps Regulatory Program's oversight of the establishment and operation of the mitigation banks it approves.

d. In-Lieu Fee Programs. In order to ensure that an in-lieu fee program provides a reasonable assurance that mitigation requirements for a water resources development project are met and to have a meaningful way to evaluate the amount of potential credits at an in-lieu fee program, in-lieu fee programs will be considered a reasonable mitigation alternative for planning purposes if all the following criteria are met:

i. The in-lieu fee program was approved by the Secretary or his/her designee, as demonstrated by an in-lieu fee program instrument approved pursuant to the process set forth in reference 1.b;

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ii. The in-lieu fee program provides in-kind mitigation for the water resources development project and the project impacts are located in the service area of the approved in-lieu fee program;

iii. A functional analysis of the potential credits has been completed using a Corps certified habitat assessment model that conforms with reference 1.f (or successor guidance), which specifies how models are approved or certified, and is consistent with the model used to determine project impacts. The Corps will collaboratively determine conformance with these requirements. The requirement to apply a functional analysis under this provision only applies when an in-lieu fee program is considered for use to mitigate impacts resulting from a water resources development project and does not alter the Corps Regulatory Program's oversight of the establishment and operation of the in-lieu fee programs it approves.

e. All potential mitigation bank and in-lieu fee credits that meet the criteria in 4.c or 4.d shall be considered a reasonable alternative for planning purposes if the Secretary determines that the use of the mitigation bank or in-lieu fee program provides a reasonable assurance that the statutory and regulatory mitigation requirements for a water resources development project are met, including monitoring and the demonstration of ecological success. Mitigation banks and in-lieu fee programs that do not meet the criteria as described in 4.c and 4.d, may be determined to be reasonable alternatives during the planning process if the Corps conducts an analysis of the mitigation bank or in-lieu fee program to confirm the alternative would meet Corps technical and policy requirements and regulations.

f. The consideration of available credits and potential credits from mitigation banks and in-lieu fee programs to meet compensatory mitigation requirements for water resources development projects must be evaluated in accordance with the guidance for mitigation measures described in ER 1105-2-100, Appendix C. This includes the use of functional assessments or habitat-based methodologies to evaluate mitigation needs and measures. That evaluation should be undertaken with the understanding that the number of potential credits identified at the time of the evaluation may be subject to change as the mitigation bank site or in-lieu fee project develops or matures. The instrument or approved mitigation plan governing each mitigation bank site or in-lieu fee program is required to specify the credit release schedule as well as the monitoring required to determine whether applicable milestones in the credit release schedule have been met. The results of that monitoring may result in a reduction in the number of credits that are ultimately released as determined in accordance with reference 1.c, and the instrument for the approved mitigation bank site or the approved mitigation plan for the in-lieu fee program. The District Engineer of the Corps district that administers the mitigation bank or an in-lieu-fee program should evaluate the potential impacts that the

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proposed use of the mitigation bank credits or in-lieu-fee program credits for a water resources development project could have on the Corps Regulatory program.

g. Potential in-kind credits from mitigation banks and in-lieu fee projects will be included as part of the incremental cost analysis if considered a reasonable alternative for meeting compensatory mitigation requirements in accordance with 3.c and/or 3.d, above.

h. Section 1163 of WRDA 2016 amended Section 2036(c) of WRDA 2007 to require consideration of potential in-kind credits in addition to available in-kind credits, as determined in accordance with reference 1.c. If available credits are included in the mitigation plan developed during the feasibility phase, there is risk associated with whether these credits will still be available when the water resources development project receives authorization and funding to begin project construction and implementation of the mitigation plan. There is also risk if potential credits identified in the final mitigation plan do not become released credits by the time the Corps is required to implement compensatory mitigation because those potential credits did not meet the applicable milestones to become released (available) credits. In such circumstances, prior to initiation of project construction the district engineer will evaluate the status of the potential credits included in the mitigation plan. If there is a foreseeable problem with successful implementation of the mitigation bank or in-lieu fee project and availability of credits, then re-evaluation of the mitigation plan and credit release schedule may be warranted.

i. In-kind credits from a mitigation bank or in-lieu fee program are a service which is acquired to meet the compensatory mitigation requirements of a water resources development project. This service includes acquisition of required lands; easements and rights-of-ways; construction and management activities to produce credits; and operation and maintenance of the mitigation bank or in-lieu fee project. However, there will be no division of costs for credits into its components for cost sharing purposes. All costs associated with the acquisition of credits from a mitigation bank or in-lieu fee program will be classified as a one-time construction cost of the water resources development project for which the mitigation is being provided. The costs associated with acquisition of credits will be shared in accordance with the cost sharing applicable to construction cost for that project purpose.

j. The purpose of mitigation banks and in-lieu fee programs is to preserve, establish, restore, or enhance habitat. Mitigation banks and in-lieu fee projects may preserve, restore, or enhance wetlands, streams, riparian zones and upland resources and may be evaluated for their potential to provide compensatory mitigation if they have appropriate habitats related to mitigation needs of a water resources development project.

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k. The purchase of in-kind credits from a mitigation bank and/or in-lieu fee program for a water resources development project relieves the Secretary from responsibility for monitoring the mitigation measure, and demonstrating that the mitigation measure is successful, as long as the Secretary or designee determines that the mitigation bank or in-lieu fee program is in compliance with the instrument used to establish the bank or in-lieu fee program.

l. The purchase of mitigation credits must comply with any applicable Federal procurement laws and regulations such as the Federal Acquisition Regulation (FAR) codified at 48 C.F.R.

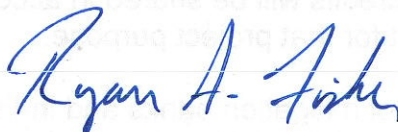
5. The Corps' ecosystem restoration authorities, including Section 1135 of WRDA 1986, as amended; Section 206 of WRDA 1996, as amended; and, Section 204 of WRDA 1992, as amended, will not be used for the establishment of mitigation banks or in-lieu fee programs. Similarly, federal appropriations will not be requested to initiate federal feasibility or other planning studies for the establishment of mitigation banks or in-lieu fee programs. The Corps can participate in joint water resource development projects that include both ecosystem restoration and mitigation banking or in-lieu fee project elements as long as the Corps' financial participation in the project is limited to the ecosystem restoration element.

6. Nothing in Section 2036(c) of WRDA 2007, as amended by Section 1163 of WRDA 2016, modifies or alters any requirement for a water resources development project to comply with applicable laws and regulations, including Section 906 of WRDA 1986, as amended. Nor shall this provision be construed as to limit mitigation alternatives or require the use of mitigation banks or in-lieu fee programs.

7. The guidance will be incorporated in ER 1105-2-100.

8. Questions regarding this implementation guidance should be directed to Mark Matusiak, Office of Water and Policy Review, Planning and Policy Division, at (202) 761-4700 or Mark.Matusiak@usace.army.mil.

Encl



Ryan A. Fisher
Acting Assistant Secretary of the Army
(Civil Works)

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Section 2036(c) of WRDA 2007, as amended by Section 1163 of WRDA 2016.

(c) MITIGATION BANKS AND IN-LIEU FEE ARRANGEMENTS.—

(1) IN GENERAL.—Not later than 180 days after the date of enactment of the Water Resources Development Act of 2016, the Secretary shall issue implementation guidance that provides for the consideration in water resources development feasibility studies of the entire amount of potential in-kind credits available at mitigation banks approved by the Secretary and in-lieu fee programs with an approved service area that includes the location of the projected impacts of the water resources development project.

(2) REQUIREMENTS.—All potential mitigation bank and in-lieu fee credits that meet the criteria under paragraph (1) shall be considered a reasonable alternative for planning purposes if—

(A) the applicable mitigation bank—

(i) has an approved mitigation banking instrument; and

(ii) has completed a functional analysis of the potential credits using the approved Corps of Engineers certified habitat assessment model specific to the region; and

(B) the Secretary determines that the use of such banks or in-lieu fee programs provide reasonable assurance that the statutory (and regulatory) mitigation requirements for a water resources development project are met, including monitoring or demonstrating mitigation success.

(3) EFFECT.—Nothing in this subsection—

(A) modifies or alters any requirement for a water resources development project to comply with applicable laws or regulations, including section 906 of the Water Resources Development Act of 1986 (33 U.S.C. 2283); or

(B) shall be construed as to limit mitigation alternatives or require the use of mitigation banks or in-lieu fee programs.