



## **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**

### **I. Purpose**

Compensatory mitigation projects are designed to replace aquatic resource functions and values that are adversely impacted under the Clean Water Act Section 404 and Rivers and Harbors Act Section 10 regulatory programs. These mitigation objectives are stated in regulation, the 1990 Memorandum of Agreement on mitigation between Environmental Protection Agency (EPA) and the Department of the Army, the November 28, 1995, Federal Guidance on the Establishment, Use and Operation of Mitigation Banks (“Banking Guidance”), and other relevant policy. The advent of in\_lieu\_fee approaches to mitigation has highlighted the importance of several fundamental objectives that the agencies established for determining what constitutes appropriate compensatory mitigation. The purpose of this memorandum is to clarify the manner in which in\_lieu\_fee mitigation may serve as an effective and useful approach to satisfy compensatory mitigation requirements and meet the Administration’s goal of no overall net loss of wetlands. This in-lieu-fee guidance elaborates on the discussion of in\_lieu\_fee mitigation arrangements in the Banking Guidance by outlining the circumstances where in\_lieu\_fee mitigation may be used, consistent with existing regulations and policy.

### **II. Background**

A. “In-lieu-fee” mitigation occurs in circumstances where a permittee provides funds to an in-lieu-fee sponsor instead of either completing project-specific mitigation or purchasing credits from a mitigation bank approved under the Banking Guidance.

B. A fundamental precept of the Section 404(b)(1) Guidelines is that no discharge of dredged or fill material in waters of the U.S. may be permitted unless appropriate and practicable steps have been taken to minimize all adverse impacts associated with the discharge. (40 CFR 230.10(d)) Specifically, the Section 404(b)(1) Guidelines establish a mitigation sequence, under which compensatory mitigation is required to offset wetland losses after all appropriate and practicable steps have been taken to first avoid and then minimize wetland impacts. Compliance with these mitigation sequencing requirements is an essential environmental safeguard to ensure

that CWA objectives for the protection of wetlands are achieved. The Section 404 permit program relies on the use of compensatory mitigation to offset unavoidable wetlands impacts by replacing lost wetland functions and values.

C. The agencies further clarified their mitigation policies in a Memorandum of Agreement (MOA) between the EPA and the Department of the Army Concerning the Determination of Mitigation under the Clean Water Act Section 404(b)(1) Guidelines (February 6, 1990). That document reiterates that “the Clean Water Act and the Guidelines set forth a goal of restoring and maintaining existing aquatic resources. The Corps will strive to avoid adverse impacts and offset unavoidable adverse impacts to existing aquatic resources, and for wetlands, will strive to achieve a goal of no overall net loss of values and functions.” Moreover, the MOA clarifies that mitigation “should be undertaken, when practicable, in areas adjacent or contiguous to the discharge site,” and that “if on\_site compensatory mitigation is not practicable, off\_site compensatory mitigation should be undertaken in the same geographic area if practicable (i.e., in close proximity and, to the extent possible, the same watershed).” As outlined in the MOA, the agencies have also agreed that “generally, in\_kind compensatory mitigation is preferable to out\_of\_kind.” The MOA further states that mitigation banking may be an acceptable form of compensatory mitigation. The agencies recognize the general preference for restoration over other forms of mitigation, given the increased chance for ecological success.

D. Pursuant to these standards, project\_specific mitigation for authorized impacts has been used by permittees to offset unavoidable impacts. Project\_specific mitigation generally consists of restoration, creation, or enhancement of aquatic resources that are similar to the aquatic resources of the impacted area, and is often located on the project site or adjacent to the impact area. Permittees providing project specific mitigation have a U.S. Army Corps of Engineers (Corps) approved mitigation plan detailing the site, source of hydrology, types of aquatic resource to be restored, success criteria, contingency measures, and an annual reporting requirement. The mitigation and monitoring plan becomes part of the Section 404 authorization in the form of a special condition. The permittee is responsible for complying with all terms and conditions of the authorization and would be in violation of their authorization if the mitigation did not comply with the approved plan.

E. In 1995, the agencies issued the Banking Guidance. Consistent with that guidance, permittees may purchase mitigation credits from an approved bank. Mitigation banks will generally be functioning in advance of project impacts and thereby reduce the temporal losses of aquatic functions and values and reduce uncertainty over the ecological success of the mitigation. Mitigation banking instruments are reviewed and approved by an interagency Mitigation Banking Review Team (MBRT). The MBRT ensures that the banking instrument appropriately addresses the physical and legal characteristics of the bank and how the bank will be established and operated (e.g., classes of wetlands and/or other aquatic resources proposed for inclusion in the bank, geographic service area where credits may be sold, wetland classes or other aquatic resource impacts suitable for compensation, methods for determining credits and debits). The bank sponsor is responsible for the operation and maintenance of the bank during its operational life, as well as the long\_term management and ecological success of the wetlands and/or other aquatic resources, and must provide financial assurances.

F. The Banking Guidance describes in-lieu-fee mitigation as follows: “...in-lieu-fee, fee mitigation, or other similar arrangements, wherein funds are paid to a natural resource management entity for implementation of either specific or general wetland or other aquatic resource development project, are not considered to meet the definition of mitigation banking because they do not typically provide compensatory mitigation in advance of project impacts. Moreover, such arrangements do not typically provide a clear timetable for the initiation of mitigation efforts. The Corps, in consultation with the other agencies, may find circumstances where such arrangements are appropriate so long as they meet the requirements that would otherwise apply to an offsite, prospective mitigation effort and provides adequate assurances of success and timely implementation. In such cases, a formal agreement between the sponsor and the agencies, similar to a banking instrument, is necessary to define the conditions under which its use is considered appropriate.”

### **III. Use of In\_Lieu\_fee Mitigation in the Regulatory Program**

In light of the above considerations and in order to ensure that decisions regarding the use of in\_lieu\_fee mitigation are made more consistently with existing provisions of agency regulations and permit policies, the following clarification is provided. It is organized in a tiered manner to reflect and incorporate the agencies’ broader mitigation policies, and is based on relative assurances of ecological success.

A. Impacts Authorized Under Individual Permit: In-lieu-fee agreements may be used to compensate for impacts authorized by individual permit if the in-lieu-fee arrangement is developed (or revised, if an existing agreement), reviewed, and approved using the process established for mitigation banks in the Banking Guidance. MBRTs should review applications from such in-lieu-fee sponsors to ensure that such agreements are consistent with the Banking Guidance.

B. Impacts Authorized Under General Permit: As a general matter, in\_lieu\_fee mitigation should only be used to compensate for impacts to waters of the U.S. authorized by a Section 404 general permit, as described below:

1. Where “On-site” Mitigation Is Available and Practicable: As a general matter, compensatory mitigation that is completed on or adjacent to the site of the impacts it is designed to offset (i.e., project\_specific mitigation done by permittees consistent with Corps approved mitigation plans) is preferable to mitigation conducted off-site (i.e., mitigation bank or in-lieu-fee mitigation). The agencies' preference for on\_site mitigation, indicated in the 1990 Memorandum of Agreement on mitigation between the EPA and the Department of the Army, should not preclude the use of a mitigation bank or in-lieu-fee mitigation when there is no practicable opportunity for on\_site compensation, or when use of a bank or in-lieu-fee mitigation is environmentally preferable to on\_site compensation, consistent with the provisions in paragraph 2 below.

2. Where “On site” Mitigation Is Not Available or Practicable: Except as noted below in a. or b., where on-site mitigation is not available, practicable, or determined to be less environmentally desirable, use of a mitigation bank is preferable to in\_lieu\_fee mitigation where permitted impacts are within the service area of a mitigation bank approved to sell mitigation credits, and those credits are available. Use of a mitigation bank is also preferable over in\_lieu\_fee mitigation where both the available in\_lieu\_fee arrangement and the service area of an approved mitigation bank are outside of the watershed of the permitted project impacts, unless the mitigation bank is determined on a case by case basis to not be practicable and environmentally desirable.

a. Where Mitigation Bank Does Not Provide “In-kind” Mitigation: In those circumstances where wetlands impacts proposed for general permit authorization are within the service area of an approved mitigation bank with available credits, but the impacted wetland type is not identified by the Mitigation Banking Instrument for compensation within such bank, then the authorized impact may be compensated through an in\_lieu\_fee arrangement, subject to the considerations described in Section IV below, if the in-lieu-fee arrangement would provide in-kind restoration as mitigation.

b. Where Mitigation Bank Does Not Provide Restoration, Creation, or Enhancement Mitigation: In those circumstances where wetlands impacts proposed for general permit authorization are within the service area of an approved mitigation bank, but the only available credits are through preservation, then the authorized impact may be compensated through an in\_lieu\_fee arrangement subject to the considerations described in Section IV below, if the in-lieu-fee arrangement would provide in kind restoration as mitigation.

#### **IV. Planning, Establishment, and Use of In-lieu-fee Mitigation Arrangements**

This section describes the basic considerations that should be addressed for any proposed use of in-lieu-fee mitigation to offset unavoidable impacts associated with a discharge authorized under a general permit described in Section III above.

##### **A. Planning considerations:**

1. Qualified Organizations: Given the goal to ensure long\_term mitigation success, the Corps, in consultation with the other Federal agencies, should carefully evaluate the demonstrated performance of natural resource management organizations (e.g., governmental organizations, land trusts) prior to approving

them to manage in\_lieu\_fee arrangements. In fact, given the unique strengths and specialties of such organizations, it may be useful for the Corps, in consultation with other Federal resource agencies, to establish formal arrangements with several natural resource management organizations to ensure there are sufficient options to effectively replace lost functions and values. In any event, in-lieu-fee arrangements and subsequent modifications should be made in consultation with the other Federal agencies and only after an opportunity for public notice and comment has been afforded.

2. Operational Information: Those organizations considered qualified to implement formal in\_lieu\_fee arrangements should work in advance with the Corps to ensure that authorized impacts will be offset fully on a project\_by\_project basis consistent with Section 10/404 permit requirements. As detailed in the paragraphs that follow, organizations should supply the Corps with information in advance on (1) potential sites where specific restoration projects or types of restoration projects are planned, (2) the schedule for implementation, (3) the type of mitigation that is most ecologically appropriate on a particular parcel, and (4) the financial, technical, and legal mechanisms to ensure long\_term mitigation success. The Corps should ensure that the formal in\_lieu\_fee arrangements and project authorizations contain distinct provisions that clearly state that the legal responsibility for ensuring mitigation terms are satisfied fully rests with the organization accepting the in\_lieu\_fee. In-lieu-fee sponsors should be able to demonstrate approval of all necessary State and local permits and authorizations. In\_lieu\_fee sponsors (e.g., State) should notify the Corps and MBRT if the service area of any mitigation bank overlaps the jurisdiction in which their in\_lieu\_fees may be spent.

3. Watershed Planning: Local watershed planning efforts, as a general matter, identify wetlands and other aquatic resources that have been degraded and usually have established a prioritization list of restoration needs. In-lieu-fee mitigation projects should be planned and developed to address the specific resource needs of a particular watershed.

4. Site Selection: The Federal agencies and in-lieu-fee sponsor should give careful consideration to the ecological suitability of a site for achieving the goal and objectives of compensatory mitigation (e.g., possess the physical, chemical and biological characteristics to support the desired aquatic resources and functions, preferably in-kind restoration or creation of impacted aquatic resources). The location of the site relative to other ecological features, hydrologic sources, and compatibility with adjacent land uses and watershed management plans shall be considered by the Federal agencies during the evaluation process.

5. Technical Feasibility: In-lieu-fee mitigation should be planned and designed to be self-sustaining over time to the extent possible. The techniques for

establishing aquatic resources must be carefully selected. The restoration of historic or substantially degraded aquatic resources (e.g., prior-converted cropland, farmed wetlands) utilizing proven techniques increases the likelihood of success and typically does not result in the loss of other valuable resources. Thus, restoration should be the first option considered for siting in-lieu-fee mitigation. This guidance recognizes that in some circumstances aquatic resources must be actively managed to ensure their sustainability. Furthermore, long-term maintenance requirements may be necessary and appropriate in some cases (e.g., to maintain fire dependent habitat communities in the absence of natural fire, to control invasive exotic plant species). Proposed mitigation techniques should be well-understood and reliable. When uncertainties surrounding the technical feasibility of a proposed mitigation technique exist, appropriate arrangements may be phased-out or reduced once the attainment of prescribed performance standards is demonstrated. In any event, a plan detailing specific performance standards should be submitted to ensure the technical success of the project can be evaluated.

6. Role of Preservation: As described in the Banking Guidance, simple purchase or “preservation” of existing wetlands may be accepted as compensatory mitigation only in exceptional circumstances. Mitigation credit may be given when existing wetlands and/or other aquatic resources are preserved in conjunction with restoration, creation or enhancement activities, and when it is demonstrated that the preservation will augment the functions of the restored, created or enhanced aquatic resource.

7. Collection of Funds: Funds collected under any in\_lieu\_fee arrangement should be used for replacing wetlands functions and values and not to finance non\_mitigation programs and priorities (e.g., education projects, research). Funds collected should be based upon a reasonable cost estimate of all funds needed to compensate for the impacts to wetlands or other waters that each permit is authorized to offset. Funds collected should ensure a minimum of one-for-one acreage replacement, consistent with existing regulation and permit conditions. Land acquisition and initial physical and biological improvements should be completed by the first full growing season following collection of the initial funds. However, because site improvements associated with in-lieu-fee mitigation may take longer to initiate, initial physical and biological improvements may be completed no later than the second full growing season where 1) initiation by the first full growing season is not practicable, 2) mitigation ratios are raised to account for increased temporal losses of aquatic resource functions and values, and 3) the delay is approved in advance by the Corps.

8. Monitoring and Management: The in-lieu-fee sponsor is responsible for securing adequate funds for the operation and maintenance of the mitigation sites. The wetlands and/or other aquatic resources in the mitigation site should be protected in perpetuity with appropriate real estate arrangements (e.g.,

conservation easements, transfer of title to Federal or State resource agency or non-profit conservation agency). Such arrangements should effectively restrict harmful activities (e.g., incompatible uses) that might otherwise jeopardize the purpose of the compensatory mitigation. In addition, there should be appropriate schedules for regular (e.g., annual) monitoring reports to document funds received, impacts permitted, how funds were disbursed, types of projects funded, and the success of projects conducted under the in\_lieu\_fee arrangement. The Corps, in conjunction with other Federal and State agencies, should evaluate the reports and conduct regular reviews to ensure that the arrangement is operating effectively and consistent with agency policy and the specific agreement. The Corps will track all uses of in\_lieu\_fee arrangements and report those figures by public notice on an annual basis.

#### B. Establishment of In-Lieu-Fee Agreements:

A formal in-lieu-fee agreement, consistent with the planning provisions above, should be established by the sponsor with the Corps, in consultation with the other agencies. It may be appropriate to establish an “umbrella” arrangement for the establishment and operation of multiple sites. In such circumstances, the need for supplemental information (e.g., site specific plans) should be addressed in specific in-lieu-fee agreements. The in-lieu-fee agreement should contain:

1. a description of the sponsor’s experience and qualifications with respect to providing compensatory mitigation;
2. potential site locations, baseline conditions at the sites, and general plans that indicate what kind of wetland compensation can be provided (e.g., wetland type, restoration or other activity, proposed time line, etc.);
3. geographic service area;
4. accounting procedures;
5. methods for determining fees and credits;
6. a schedule for conducting the activities that will provide compensatory mitigation or a requirement that projects will be started within a specified time after impacts occur;
7. performance standards for determining ecological success of mitigation sites;
8. reporting protocols and monitoring plans;
9. financial, technical and legal provisions for remedial actions and responsibilities (e.g., contingency fund);
10. financial, technical and legal provisions for long-term management and maintenance (e.g., trust); and
11. provision that clearly states that the legal responsibility for ensuring mitigation terms are fully satisfied rests with the organization accepting the fee.

In cases where initial establishment of in-lieu-fee compensatory mitigation involves a discharge into waters of the United States requiring Section 10/404 authorization, submittal of a Section 10/404 application should be accompanied by the in-lieu-fee agreement.

## V. General

A. Effect of Guidance. This guidance does not change the substantive requirements of the Section 10/404 regulatory program. Rather, it interprets and provides guidance and procedures for the use of in-lieu fee mitigation consistent with existing regulations. The policies set out in this document are not final agency action, but are intended solely as guidance. The guidance is not intended, nor can it be relied upon, to create any rights enforceable by any party in litigation with the United States. This guidance does not establish or affect legal rights or obligations, establish a binding norm on any party and it is not finally determinative of the issues addressed. Any regulatory decisions made by the agencies in any particular matter addressed by this guidance will be made by applying the governing law and regulations to the relevant facts.

B. Definitions. Unless otherwise noted, the terms used in this guidance have the same definitions as those terms in the Banking Guidance. Note that as part of the Administration's Clean Water Action Plan, the Federal agencies have proposed a tracking system to more accurately account for wetland losses and gains that includes definitions of terms such as restoration used in wetland programs. Future notice will be given when these definitions will be applied to Section 10/404 regulatory program.

C. Effective Date. This guidance is effective immediately on the date of the last signature below. Therefore, existing in-lieu-fee arrangements or agreements should be reviewed and modified as necessary in light of the above.

D. Conversion to Banks: If requested by the in-lieu-fee sponsor, the Corps, in conjunction with the other Federal agencies, will provide assistance and recommendations on the steps necessary to convert individual in-lieu-fee arrangements to mitigation banks, consistent with the Banking Guidance.

E. Future Revisions. The agencies are supporting a comprehensive, independent evaluation of the effectiveness of compensatory mitigation by the National Academy of Sciences. The technical results of this evaluation are expected to be used by the public to improve the quality of wetlands and aquatic resource restoration, creation, and enhancement. The agencies will take note of the results of this evaluation and other relevant information to make any necessary revisions to guidance on compensatory mitigation, to ensure the greatest opportunity for ecological success of restored, created, and enhanced wetlands and other aquatic resources. At a minimum, a review of the use of this guidance will be initiated no later than 12 months after the effective date.

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