DEPARTMENT OF THE ARMY
U.S. ARMY CORPS OF ENGINEERS
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CECW-P

MEMORANDUM FOR COMMANDERS, MAJOR SUBORNIDATE COMMANDS

SUBJECT: Implementation Guidance for the Water Resources Development Act of 2007 – Section 2036(c) Wetlands Mitigation

1. Section 2036(c) directs the Secretary, where appropriate, to first consider the use of a mitigation bank to compensate for wetland impacts that occur within the service area of an existing, approved mitigation bank. The mitigation bank must be approved in accordance reference 2a. A copy of Section 2036(c) is enclosed.

2. References:

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

b. ER 1105-2-100 (issued April 22, 2000).

c. Policy Guidance Letter (PGL) No. 46, Use of Mitigation Banks for U.S. Army Corps of Engineers Civil Works Projects (issued 22 April 1998).

3. Purpose: This memorandum provides guidance on the use of mitigation banks for wetlands mitigation as described in Section 2036(c) of the Water Resources Development Act of 2007. Information on mitigation banking can be found in reference 2a. and information on compensatory mitigation planning for environmental impacts of Civil Works projects is located in reference 2b. This memorandum rescinds reference 2c.

4. Policy:

a. Use of Mitigation Banks in Civil Works Projects. The purchase of credits from mitigation banks established by others shall be considered first, where appropriate, when providing compensatory mitigation for environmental impacts to wetlands resulting from construction of a Corps Civil Works project. The service area of a mitigation bank, to the maximum extent practicable, shall be in the same watershed as the habitat impacted by the Civil Works project. If the mitigation credits are not available in the same watershed or there are compelling reasons to provide mitigation in a different watershed, the documentation of the analysis and of the rationale for that decision should be included in the project decision document.

1) The use of credits from a mitigation bank to meet the compensatory mitigation requirements for a Civil Works project must be evaluated in accordance with the guidance for mitigation measures as described in reference 2.b. in Appendix C, parts C-3(d) and (e), especially the use of functional assessment or habitat-based methodologies to evaluate mitigation needs and measures. Credits available from mitigation banks should be included as part of the incremental cost analysis.

2) Credits from a mitigation bank are a service which is acquired to meet the compensatory mitigation requirements of a Civil Works projects. This service includes acquisition of required lands, easements and rights-of-way; construction and management activities to produce credits; and operation and maintenance of the bank. 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 will be classified as a one-time construction cost of the Civil Works project for which the mitigation is being provided. The costs for acquisition of credits will be shared in accordance with the cost sharing applicable to construction cost for that project purpose.

3) The primary purpose of mitigation banks is to create, restore, or enhance wetland habitat. However, some mitigation banks also create, restore or enhance streams, riparian zones and upland resources. Credits for upland resources within a mitigation bank may be available on a limited basis, and may be used to compensate for upland impacts of Corps Civil Works projects, if determined to be appropriate and the rationale is documented by the District Engineer.

4) The purchase of credits from a mitigation bank for a water resources project relieves the Secretary from responsibility for monitoring the mitigation measure, and demonstrating that the mitigation measure is successful as long as the Secretary determines that monitoring is being conducted by the owner or operator of the mitigation bank.

5) 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.

b. General. The Corps ecosystem restoration authorities under Section 1135 of the Water Resources Development Act of 1986 (WRDA 1986), as amended; Section 206 of WRDA 96, as amended; and, Section 204 of WRDA 1992, as amended, will not be used for the establishment of compensatory mitigation banks. Similarly, Federal appropriations will not be requested to initiate Federal feasibility or other planning studies for the establishment

of mitigation banks. The Corps can participate in joint water resources projects that include both ecosystem restoration and mitigation banking elements as long as the Corps financial participation in the project is limited to the ecosystem restoration element.

5. Permanent Guidance. The guidance in this memorandum will be incorporated into the permanent guidance of ER 1105-2-100 as the ER is updated.

FOR THE COMMANDER:

STEVEN L. STOCKTON, P. E.
Director of Civil Works

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