Flexibility and Clarifications Provided in the Preamble to the Mitigation Rule (33 CFR Part 332)

I. General Provisions:

Discretionary Language. District engineers need to take…into account…variations in state and local requirements that affect the implementation and long-term management of compensatory mitigation projects. For example, laws and regulations governing real estate instrument and financial assurances vary from state to state. In addition, practices for restoring, establishing, and enhancing aquatic resources vary by resource type and by region. For these reasons, discretionary language is used where appropriate to promote both regulatory efficiency and project success, and to ensure that required mitigation is practicable. *(Page 19598)*

Watershed Approach. The primary objective of the watershed approach included in today's rule is to maintain and improve the quantity and quality of wetlands and other aquatic resources in watersheds through strategic selection of compensatory mitigation project sites. The watershed approach accomplishes this objective by expanding the informational and analytic basis of mitigation project site selection decisions and ensuring that both authorized impacts and mitigation are considered on a watershed scale rather than only project by project. This requires a degree of flexibility so that district engineers can authorize mitigation projects that most effectively address the case-specific circumstances and needs of the watershed, while remaining practicable for the permittee. In response to the concern about additional burden on permittees, the agencies recognize that the level of data and analysis appropriate for implementing the watershed approach must be commensurate with the scale of the project, and that there will be situations, particularly for projects with small impacts, where it would not be cost-effective to utilize a watershed approach. *(Page 19598)*

We recognize that there are many different types of watershed plans that have been developed for purposes other than aquatic resource restoration, establishment, enhancement, and/or preservation activities and that such plans may be of limited use in making compensatory mitigation decisions. For example, some watershed plans are conceived to guide development activities or the placement of storm water infrastructure. [T]he district engineer will determine whether a given watershed plan is appropriate for use in the watershed approach for compensatory mitigation. *(Pages 19598 and 19599)*

[C]onsistent with the 2001 NRC Report, the watershed approach described in this final rule does not require a formal watershed plan. Although it would always be preferable to have an appropriate watershed plan, we believe that implementing a watershed approach to the degree practicable, even without a watershed plan, can improve compensatory mitigation site selection and project implementation. For example, the use of appropriately sited mitigation banks can support a watershed approach without using watershed plans. In the absence of an appropriate watershed plan, the watershed approach should be based on a structured consideration of watershed needs and how wetlands and other types of aquatic resources in specific locations will address those needs. The

appropriate watershed scale to use for the watershed approach will vary by geographic region, as well as by the particular aquatic resources under consideration. [A] watershed approach may include on-site compensatory mitigation, off-site compensatory mitigation, or a combination of on-site and off-site compensatory mitigation. *(Page 19599)*

Functional Replacement. [A]ll compensatory mitigation projects should provide a high level of functional capacity, even when compensating for degraded or low-quality resources. Replacement ratios may be used to adjust for the relative quality of impact sites and mitigation projects, where appropriate. With this rule, we are moving towards greater reliance on functional and condition assessments to quantify credits and debits, instead of surrogates such as acres and linear feet. *(Page 19601)*

Mitigation Requirement. The rule does not affect the determination as to when compensatory mitigation is required, only the requirements for conducting such mitigation once the district engineer determines that it is necessary. [I]nstead it focuses on where and how compensatory mitigation will be provided. *(Page 19602)*

Ecosystem Services. The concept of ecosystem services provides a more objective measure than "values" of the importance of the functions performed by the ecosystem to human populations. Ecosystem services is a useful concept for assessing the public interest, an important consideration in the Corps Regulatory Program. Consideration of "services" provided by aquatic resources is usually qualitative, and can be accomplished through evaluations of compensatory mitigation options, including siting those projects near human populations. The term "values" is more subjective, since a particular ecosystem service may be perceived to be valuable by some individuals but not others. The term "values" can also be read to imply monetary valuation, which is difficult for most aquatic resource functions and is not generally practical for most decisions. *(Page 19604)*

State/Local Mitigation Requirements. If permittee-responsible mitigation is required by a state or local government with regulatory authorities that are similar to the Corps under section 404 of the Clean Water Act or sections 9 or 10 of the Rivers and Harbors Act of 1899, and the mitigation project will appropriately offset the permitted impacts, then the district engineer may determine that the permittee-responsible mitigation is acceptable for the purposes of the DA permit. We encourage coordination among federal, state, and local governments to avoid duplicate or conflicting compensatory mitigation requirements, as long as those requirements are consistent with federal requirements. *(Page 19607)*

Implementation of Regulations to current permit applications and substantial reliance. This final rule will apply to permit applications received after the effective date of this rule, unless the district engineer has made a written determination that applying these new rules to a particular project would result in a substantial hardship to a permit applicant. In such cases, the district engineer will consider whether the applicant can fully demonstrate that substantial resources have been expended or committed in reliance on previous guidance governing compensatory mitigation for DA permits. Final engineering

design work, contractual commitments for construction, or purchase or long-term leasing of property will, in most cases, be considered a substantial commitment of resources. Permit applications received prior to the effective date will be processed in accordance with the previous compensatory mitigation guidance. *(Page 19608)*

Non-Jurisdictional Waters, Rapanos-Carabell, and Mitigation. Non-jurisdictional waters can be used to provide compensatory mitigation for activities authorized by DA permits, if the rehabilitation, enhancement, and/or preservation of those waters is determined to be appropriate compensation for authorized impacts. The Rapanos decision is limited to the question of Clean Water Act jurisdiction, not decision-making for compensatory mitigation. *(Page 19618)*

Circumstances under which mitigation is required – Alaska: This rule does not change the circumstances under which compensatory mitigation is required for DA permits. Therefore, it does not change the May 13, 1994, Alaska mitigation statement… *(Page 19619)*

II. Preamble for Specific Sections of the Rule:

§ 325.1(d)(7) - Mitigation Statement. This should be a brief statement because this occurs in the early stages of the evaluation process, and the evaluation of mitigation options is an iterative process. As district engineers conduct their evaluations in accordance with applicable Corps regulations, the 404(b)(1) Guidelines, and regulations governing other applicable laws (e.g., section 7 of the Endangered Species Act), additional avoidance and minimization may be required, and compensatory mitigation requirements will be determined in greater detail to offset the permitted impacts to the extent appropriate and practicable. *(Page 19641)*

§ 332.1(a) - Equivalent Standards. Where it is not practicable to impose identical requirements, the rule adopts comparable alternative requirements to help ensure the ecological success of all types of compensatory mitigation. *(Page 19605)*

§ 332.2 – Definitions. *ad hoc* mitigation is considered to be a form of permittee responsible mitigation… Permittee-responsible mitigation also includes any *ad hoc* payments made to governmental or nongovernmental organizations that are not in accordance with the terms of an approved in-lieu fee program instrument. When a governmental or non-governmental organization accepts an *ad hoc* payment from a permittee, that organization is in essence acting as a contractor to provide the compensatory mitigation for that permittee, and the permittee retains responsibility for any long-term protection and/or management of the compensatory mitigation project. *(Page 19601)*

§ 332.2 - Enhancement as mitigation. Enhancement differs from restoration, rehabilitation, and re-establishment because the objective of enhancement is usually to improve one or two functions, which may result in a decrease in the performance of other functions. Increasing those particular functions does not change the amount of area

occupied by the aquatic resource. In contrast, re-establishment and rehabilitation (which are forms of restoration) are intended to return most, if not all, natural and/or historic functions to a former or degraded aquatic resource. *(Page 19621)*

While enhancement does not result in a gain in aquatic resource area for purposes of tracking ‘‘not net loss’’ of wetlands, this does not mean that it cannot be used to compensate for a loss in resource area at the impact site. The district engineer will determine on a case-by-case basis the appropriate type and amount of mitigation to compensate for permitted impacts. *(Page 19622)*

§ 332.2 In-kind mitigation. [I]n-kind mitigation should provide similar types of structure and functions as the impacted resource, while accommodating high quality compensatory mitigation projects. In-kind mitigation projects should result in resource structure and functional capacity that are comparable to reference aquatic resources. In other words, in-kind mitigation should not consist of replacing a degraded aquatic resource with a degraded compensation resource. An in-kind compensatory mitigation project should result in a high quality aquatic resource. Thus, a mitigation project that was the same class of wetlands as the impacted resource, but with greater species diversity and habitat quality, would be considered appropriate in-kind mitigation. *(Page 19622)*

§ 332.2 – Preservation. As part of an overall compensatory mitigation project, uplands such as non-wetland riparian areas may be included with preserved aquatic resources, if they help protect or sustain those aquatic resources. Although preservation helps sustain the functions and services provided by the preserved aquatic resources, by preventing direct impacts through land use changes, there is no gain in acreage. There may be a “passive” gain in functions and services over the long-term, if the preservation activity serves to remove or reduce stressors on the resource, however the main purpose of preservation is to prevent a future loss of resources, not to provide a gain. For this reason, higher compensation ratios are generally required. *(Page 19624)*

§ 332.2 – Rehabilitation differs from enhancement in that rehabilitation is intended to result in a general improvement in the suite of the functions performed by a degraded aquatic resource. *(Page 19624)*

§ 332.3(a) - Flexibility in Mitigation requirements. Flexibility in compensatory mitigation requirements is needed to account for regional variations in aquatic resources, as well as state and local laws and regulations. There also needs to be flexibility regarding the requirements for permittee-responsible mitigation. Practicability is an important consideration when determining compensatory mitigation requirements. *(Page 19617)*

A district engineer can require water quality management measures as part of the overall compensatory mitigation package required for a particular DA permit. Even though this rule is focused on a watershed approach, it provides flexibility for district engineers to use innovative approaches or strategies for determining more effective compensatory

mitigation requirements that provide greater benefits for the aquatic environment. *(Page 19627)*

§ 332.3(a) – Environmentally Preferable Mitigation. [The regulations] have provided flexibility for district engineers to make compensatory mitigation decisions based on what is environmentally preferable and is most likely to successfully provide the required compensatory mitigation. *(Page 19627)*

§ 332.3(a) – Mitigation options and practicability. If a particular compensatory mitigation project is cost-prohibitive, then an alternative compensation project that is more practicable should be required. District engineers will also consider impacts to the public interest, including potential losses of aquatic resource functions and services, when evaluating permit applications and compensatory mitigation proposals, and determining appropriate and practicable compensatory mitigation requirements. *(Page 19627)*

Economic costs are an important consideration when determining the practicability of a proposed compensatory mitigation project. In addition to economic costs, existing technology and logistics must also be considered. If a particular compensatory mitigation project is cost-prohibitive, then an alternative compensation project that is more practicable should be required. *(Page 19627)*

§ 332.3(b) Type and location of mitigation.

On-site compensatory mitigation activities, especially wetland restoration or establishment, are particularly sensitive to land use changes. Land use changes often alter local hydrology. Establishing appropriate hydrology patterns (i.e., duration and frequency) to support the desired aquatic habitat type is a key factor in successfully restoring or establishing those habitats. In many cases, there are circumstances in which on-site mitigation is neither practicable nor environmentally preferable. Under the watershed approach, it may be desirable to require some on-site mitigation measures to address water quality and quantify functions, and to require off-site mitigation to compensate for habitat functions. *(Page 19601)*

Flexibility in compensatory mitigation requirements is needed to account for regional variations in aquatic resources, as well as state and local laws and regulations. There also needs to be flexibility regarding the requirements for permittee-responsible mitigation. Practicability is an important consideration when determining compensatory mitigation requirements…The focus should be on ecological success of compensatory mitigation projects, not the source of the compensatory mitigation. *(Page 19617)*

Compensatory mitigation required by district engineers will be located in areas where it is appropriate and practicable to conduct successful aquatic resource restoration, establishment, and enhancement activities. In some cases, this will result in compensatory mitigation for impacts in urban areas to be conducted in more remote locations; in other cases, it may be appropriate to replace certain aquatic resources in urban areas. *(Page*

19629)

In general, compensatory mitigation projects should be located in the same watershed as the permitted impacts, at a scale determined to be appropriate by the district engineer based on the factors specified in the rule. *(Pages 19625 and 19626)*

[R]estoration should be the first option considered since the likelihood of success is greater. Restoration also helps reduce impacts to ecologically important uplands, such as mature forests, where compensatory mitigation activities may be proposed because of land availability. *(Page 19627)*

§ 332.3(b)(2)-(6) – Mitigation hierarchy. District engineers have the discretion to modify the hierarchy in order to approve the use of the environmentally preferable compensatory mitigation. Another example is when a permittee with a proven track record and access to appropriate scientific expertise proposes a high-value mitigation project, even though credits from an approved in-lieu fee program or mitigation bank are available. *(Page 19614)*

§ 332.3(b) – Permittee Responsible Mitigation. If a mitigation bank or in-lieu fee program does not have the appropriate number and resource type of credits available, then permittee responsible mitigation should be determined using the watershed approach. *(Page 19627)*

§ 332.3(b) – Linear Projects. For linear projects, such as roads and utility lines, district engineers may determine that consolidated compensatory mitigation projects provide appropriate compensation for the authorized impacts, and are environmentally preferable to requiring numerous small permittee-responsible compensatory mitigation projects along the linear project corridor. *(Page 19605)*

District engineers also have flexibility under this rule to allow compensation for linear projects to be conducted on one or multiple sites, based on environmentally preferable and practicable compensatory mitigation options. *(Page 19629)*

§ 332.3(b)(1) – Mitigation Site Selection and Airports. Locating compensatory mitigation projects (including mitigation banks) near airports is likely to attract wildlife species and pose hazards to aviation. This does not mean that no compensatory mitigation projects can be located near any airport; it means that compatibility with existing facilities must be considered. *(Page 19632)*

§ 332.3(b)(2)-(6) – Mitigation hierarchy. This is a preference hierarchy that does not override a district engineer's judgment as to what constitutes the most appropriate and practicable compensatory mitigation based on consideration of case-specific circumstances. *(Page 19628)*

District engineers can apply these considerations to other sources of compensatory mitigation to override the preference for mitigation bank credits. For example, the district

engineer may authorize the use of released credits from an in-lieu fee program since the requirements for release of these credits are comparable to the requirements for release of credits from an approved mitigation bank. Where the permittee has proposed to restore an outstanding resource, and has provided sufficient scientific and technical analysis to demonstrate that such a project will be successful, the district engineer may authorize the use of that compensatory mitigation project instead of mitigation bank credits. *(Page 19628)*

§ 332.3(b)(6) – Out-of-kind mitigation. District engineers can require the use of out-of-kind compensatory mitigation when he or she determines that it will serve the aquatic resource needs of the watershed. *(Page 19632)*

§ 332.3(c) – Watershed Approach and District Engineer Flexibility. It provides flexibility for district engineers to use innovative approaches or strategies for determining more effective compensatory mitigation requirements that provide greater benefits for the aquatic environment. *(Page 19627)*

§ 332.3(c) – Watershed Approach and Mitigation Decisions. Compensatory mitigation decisions will be based on what is environmentally preferable, which, in a particular situation, might be on-site compensation. *(Page 19629)*

Compensatory mitigation requirements should be guided by ecological and practicability considerations, to help ensure that the required compensation successfully fulfills its objective, to offset aquatic resource functions lost as a result of the permitted impacts. *(Page 19629)*

District engineers also have flexibility under this rule to allow compensation for linear projects to be conducted on one or multiple sites, based on environmentally preferable and practicable compensatory mitigation options. *(Page 19629)*

§ 332.3(c)(3) – Watershed Approach Information requirements. … there is no bright line for the minimum amount of information needed to support a watershed approach… *(Page 19631)*

§ 332.3(e) Mitigation Type. In-kind mitigation does not mean compensating for impacts to degraded aquatic resources by providing degraded compensatory mitigation projects. A compensatory mitigation project should result in high quality aquatic resources that provide optimum functions within its landscape context, taking into account unavoidable constraints. *(Page 19632)*

Although out-of-kind mitigation may not offset all aquatic resource functions and services provided by the aquatic resource being affected by the permitted activity, out-of-kind mitigation may be important for restoring or improving watersheds, especially in cases where certain aquatic resource types have been disproportionately lost from a watershed (see the 2001 NRC Report). *(Page 19632)*

§ 332.3 (f) – Mitigation Ratios. Replacement ratios may be used to adjust for the relative quality of impact sites and mitigation projects, where appropriate. *(Page 19601)*

District engineers can only require an amount of compensatory mitigation that is roughly proportional with the permitted impacts, so that it is sufficient to offset those lost aquatic resource functions. *(Page 19633)*

We recognize that, in some cases, it may not be appropriate and practicable to require full replacement of aquatic resource functions. *(Page 19633)*

§ 332.3(g) – Use of Mitigation Banks and In-Lieu Fee Programs. The Corps does not have the authority to require supplemental environmental projects to resolve Clean Water Act violations. EPA has a Supplemental Environmental Projects (SEP) Policy ... Mitigation banks and in-lieu fee programs can qualify as these types of projects if they meet the basic requirements of the Agency's SEP Policy. *(Page 19634)*

§ 332.3(h) – Preservation as Mitigation. Preservation will be provided in conjunction with aquatic resource restoration, establishment, and/or enhancement activities, unless the district engineer waives this requirement in a situation where preservation has been identified as a high priority using a watershed approach. If the district engineer makes such a waiver, a higher compensation ratio shall be required. *(Page 19635)*

The 2001 NRC Report stated that wetland preservation is an important tool for maintaining wetland diversity in a watershed, and achieving the goals of the Clean Water Act in that watershed. Preservation is particularly valuable for protecting unique, rare, or difficult-to-replace aquatic resources, such as bogs, fens, and streams, and may be the most appropriate form of compensatory mitigation for those resources. We recognize that wetland preservation does not, in the short term, result in new wetland resources and thus contribute to the "no overall net loss" goal, but over longer time periods preservation helps reduce wetland losses by removing the protected wetlands from the pool of wetlands that may be subject to future development activities that require DA permits. *(Page 19635)*

§ 332.3(i) – Buffers. It is not feasible to require buffers for all compensatory mitigation projects; such decisions need to be made by district engineers on a case-by-case basis. *(Page 19635)*

To qualify as providing compensatory mitigation credit, adjacent upland habitat must contribute to the long-term viability of the adjoining aquatic resources. *(Page 19635)*

§ 332.3(j)(1) – Relationships to Other Programs. In cases where tribal, state, or local governments regulate similar activities to those regulated by the Corps, compensatory mitigation projects may be designed to fulfill all applicable compensation requirements. For example, a surface coal mining activity that requires authorization under section 404 of the Clean Water Act and the Surface Mining Control and Reclamation Act (SMCRA)

may offset environmental losses through a compensatory mitigation project that is designed to satisfy the requirements of both statutes. *(Page 19636)*

§ 332.3(j)(2) – Federal Funding for Wetland Conservation. In cases where a landowner has taken advantage of financial incentives to restore or enhance wetlands on their property, that landowner can also produce compensatory mitigation credits that can be used for DA permits, as long as those credits are the result of supplemental ecological improvements. In other words, the ecological improvements that result from the financial incentives provided to the landowner cannot be used to satisfy compensatory mitigation requirements of DA permits, but additional ecological improvements involving aquatic resource restoration, establishment, enhancement, and/or preservation may be used as compensatory mitigation for DA permits, provided these additional improvements were not part of the requirements for obtaining the financial incentives. *(Page 19636)*

If a federal program has a 50% landowner match requirement, neither the federally funded portion of the project, nor the landowner's 50% match, which is part of the requirements for obtaining federal funding, may be used for compensatory mitigation credits. However, if the landowner provides a greater than 50% match, any improvements provided by the landowner over and above those required for federal funding could be used as compensatory mitigation credits. *(Page 19636)*

§ 332.3(k) and (l) – Timing of Mitigation Plan Approval. Examples of situations where the district engineer may waive the requirement to approve a final mitigation plan before the permittee commences work in waters of the United States include after-the-fact permits and cases where the authorized work must be completed immediately (e.g., emergency situations). *(Page 19637)*

For general permit verifications, the special conditions must specify either the mitigation bank or in-lieu fee program that will be used, or state that the use of a mitigation bank or in-lieu fee program will be identified at a later time, once the permittee has negotiated the terms of securing the appropriate number and resource type of credits from the sponsor, and the district engineer has approved the use of those credits. *(Page 19637)*

The approved mitigation plans must be linked to the individual permit or to the general permit verification through special conditions, so that the Corps has a legal basis for ensuring compliance with the terms and conditions of its permits… Approval of a final mitigation plan prior to issuance of an individual permit is necessary to ensure that the approved compensatory mitigation project provides appropriate compensation for the permitted impacts. *(Page 19637)*

The Corps has the authority to impose conditions on a DA permit that specify which mitigation bank or in-lieu fee program will be used to provide the required compensatory mitigation. Permittees are free to negotiate with mitigation banks or in-lieu fee programs before the permit is issued. Once they have made arrangements to purchase the appropriate number of credits, the name of the third-party provider and the number and resource type of credits must be approved by the district engineer, and in the case of an

individual permit, included as a special condition in the permit. If the permittee later finds an alternative source of third party mitigation, then he or she can request a permit modification to change the special conditions to use that alternative compensatory mitigation, contingent upon approval by the district engineer. The district engineer will determine whether the modified compensatory mitigation proposal is sufficient for offsetting the permitted losses of aquatic resources. *(Page 19637)*

§ 332.3(m) – Timing of Mitigation Implementation. It is usually not feasible to require full functionality of a compensatory mitigation project to be achieved before the permitted impacts occur. *(Page 19638)*

As an incentive for timely mitigation, district engineers may determine that additional compensation for temporal losses is not necessary if the mitigation project is initiated prior to or concurrent with the permitted impacts, except in the case of resources with long development times (e.g., forested wetlands). *(Page 19638)*

For linear transportation projects, district engineers will consider the practicability of requiring advance or concurrent compensatory mitigation. *(Page 19638)*

Depending on the specific circumstances surrounding a phased development project, compensatory mitigation may be required up-front as the first phase of the development project is constructed. Or there could be separate compensatory mitigation projects required for each phase. The appropriate approach for phased construction projects is at the discretion of the district engineer. *(Page 19638)*

§ 332.3(n) – Financial Assurances: There may be cases where financial assurances are not necessary because 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). Consideration of the sponsor's past performance in providing ecologically successful mitigation projects would also influence the district engineer's determination regarding the level of financial assurances necessary to ensure a high level of confidence in successful project completion—this is true for banks as well as in-lieu fee programs. *(Page 19612)*

Decisions regarding the appropriate type and amount of financial assurances should not be based solely on the size of the compensatory mitigation project, or whether it is a mitigation bank. The risk and uncertainty associated with a specific compensatory mitigation project should be considered. For small losses of waters of the United States authorized by nationwide permits and regional general permits, it may not be practicable to require financial assurances, and permit conditions may be all that is necessary to provide a high level of confidence that the required compensatory mitigation is provided. *(Page 19639)*

District engineers can consider whether financial assurances required for compensatory mitigation projects under state or local laws are sufficient for the purposes of achieving

compliance with compensatory mitigation requirements for DA permits. State or local requirements for financial assurances may be adequate in cases where the same compensatory mitigation project will be used to satisfy the requirements of the Corps Regulatory Program, as well as similar state or local regulatory programs. *(Page 19639)*

Financial assurances should not be phased out until the district engineer decides that the compensatory mitigation project has met its performance standards. Phasing out financial assurances in increments before compliance with performance standards has been achieved would increase the risk that insufficient financial assurances would be available if the compensatory mitigation project were to fail at a later date. *(Page 19639)*

District engineers have the authority to condition the approval of a permit to require the posting and execution of financial assurances by a third-party mitigation sponsor or a permittee, as long as the Corps is not positioned to accept directly, retain, or draw upon those funds in the event of a default. Financial assurances should be executed with the signatures of an additional governmental or nongovernmental environmental management entity or entities as a bond ''surety'' or ''sureties,'' who agree to ensure performance if the Corps should determine that the sponsor or permittee, as the bond ''principal,'' has defaulted on any of his or her responsibilities. The third-party instrument or permit conditions should also specify that the Corps stands as a third-party ''obligee'' to the principal and surety(ies) of the bond, possessing the full and final authority to determine the penal sum amount, and to determine whether the principal and the surety(ies) have specifically performed some or all of the obligations, covenants, terms, conditions, and agreements of the financial assurance. Finally, the financial assurance should specify that if both the principal and the surety(ies) default in their responsibilities, the Corps retains the full and final discretionary authority to identify new parties as additional surety(ies) to the bond. *(Page 19640)*

§ 332.4(b) Public Review and Comment. [C]ertain information may be kept confidential for business purposes. For example, permittees may not want to reveal the exact parcel of land that they are considering for a compensatory mitigation project if they have not yet secured the site, since revealing this information may adversely affect their ability to do so. The district engineer must agree that any information withheld is legitimately confidential for business purposes, and must ensure that adequate information is included in the public notice to enable the public to provide meaningful comment. *(Page 19641)*

§ 332.4(c) – Mitigation Plan. The level of detail should be commensurate with the scope and scale of the impacts. This is up to the district engineer to determine. *(Page 19642)*

Flexibility in the level of detail required for mitigation plans is necessary to account for differences in compensatory mitigation projects. It would be impractical to require the same level of detail for all mitigation plans developed for individual permits, general permits, and third-party mitigation. Rather, projects with significant impacts will necessarily need to devote more effort and resources to mitigation planning than projects with minor impacts. *(Page 19642)*

§ 332.4(c)(1) – Mitigation Plan. Paragraph (c)(1)(i) does not require the prospective permittee to provide contract-ready mitigation plans. However, the mitigation plans need to be sufficiently detailed to demonstrate that the items listed in paragraphs (c)(2) through (c)(14) have been appropriately addressed. District engineers must also ensure that the final mitigation plans have the appropriate level of detail necessary for compliance under the Corps regulatory authorities. *(Page 19641)*

§ 332.4(c)(4) – Site Protection Instruments vs MBIs. Federal facility management plans, integrated natural resource management plans, and similar documents are more appropriately considered as site protection instruments, not mitigation banking instruments. *(Page 19623)*

§ 332.4(c)(4) – Site Protection. While the goal of the rule is to ensure permanent protection of all compensatory mitigation project sites, we recognize that the degree of long-term protection afforded by real estate instruments varies from state to state. *(Page 19642)*

§ 332.5 – Performance Standards. Functional or condition assessments should be used where appropriate and practicable to better describe how compensatory mitigation projects offset losses of aquatic resource functions. *(Page 19644)*

[This] rule does not proscribe a one-size-fits-all set of ecological performance standards to evaluate the success of all compensation projects. Instead, the rule recognizes that ecological performance standards will vary depending upon aquatic resource type, geographic region, and compensation method but requires that they be based the best available science that can be measured or assessed in a practicable manner. *(Page 19616)*

Functional standards are necessary to demonstrate that compensatory mitigation projects offset losses of aquatic resource functions resulting from activities authorized by DA permits. Area-based performance standards tied to functions can also be used, to determine the functional capacity of a compensatory mitigation project. However, area or linear measures alone would not constitute ecological performance standards. Functional or condition assessments should be used where appropriate and practicable to better describe how compensatory mitigation projects offset losses of aquatic resource functions. *(Page 19644)*

District engineers are responsible for developing ecological performance standards that are objective and verifiable. Such performance standards must be clearly written, so that independent parties can assess whether compensatory mitigation projects are meeting their performance standards. Ecological performance standards may be based on specific wetland characteristics. [R]eference aquatic resources can be used to establish performance standards that are reasonably achievable, by reflecting the range of variability exhibited by the regional class of aquatic resources. *(Page 19644)*

§ 332.6 – Monitoring. The rule also allows the district engineer to reduce or waive remaining monitoring requirements upon a determination that the compensatory mitigation project has achieved its performance standards. To reduce or waive the remaining monitoring requirements before the five year period ends, there should be at least two consecutive monitoring reports issued where the success criteria are met. This will help account for variability in environmental conditions, to ensure that the compensatory mitigation project is truly meeting its performance standards. Performance standards should be designed, to the extent practicable, to account for the ecological characteristics of early developmental stages of aquatic ecosystems, so that a determination of ecological success can be made within five years. *(Page 19645)*

The information to be included in a monitoring report is at the discretion of the district engineer, who should take into account the characteristics of the compensatory mitigation project when determining those requirements. The content of monitoring reports will also depend on the ecological performance standards for the compensatory mitigation project, since the purpose of the monitoring report is to demonstrate how the project is progressing towards achieving those standards. If the performance standards require the use of functional assessments to assess the performance of the compensatory mitigation project, then the results of those assessments should be provided in the monitoring reports. *(Page 19645)*

We do not believe it is appropriate to require monitoring reports to include scientific comparisons of wetland functions between mitigation and impact sites, because the tools necessary to conduct such comparisons are not available in many areas, or they may not be practicable for certain types of projects, such as small compensatory mitigation projects provided for activities authorized by general permits. *(Page 19645)*

§ 332.7(a) – Site Protection. The goal of the rule is to ensure permanent protection of all compensatory mitigation project sites… However, we recognize that the terms of real estate or legal instruments used to protect compensatory mitigation project sites will differ, because of the variability in real estate laws among states and local jurisdictions. For example, in some states perpetual protection cannot be required, because the real estate or legal instruments may be in effect for a limited number of years. Therefore, we cannot require specific terms for real estate instruments in this rule. The terms for conservation easements, restrictive covenants, and other mechanisms are more appropriately addressed by district engineers on a case-by-case basis. *(Page 19646)*

For stream compensatory mitigation projects, appropriate means of site protection will be determined by district engineers, after considering the characteristics of the compensation activities and the real estate interests of the project proponent. For example, in-stream rehabilitation measures may not warrant long-term protection. Specific requirements for site protection are at the discretion of the district engineer. *(Page 19646)*

There are other examples of situations where it may not be feasible to require site protection through real estate or legal instruments for compensatory mitigation projects. One potential situation is the construction of oyster habitat or the restoration of sea grass

beds in state-owned tidal waters, where the project proponent does not have a real estate interest, but may obtain authorization to conduct those environmentally beneficial activities. Another example may be the restoration of tidal marshes or other coastal resources, since the long-term sustainability of those projects in the dynamic coastal environment cannot be assured because of the natural littoral processes that occur in those areas. *(Page 19646)*

§ 332.7(a)(2) – Site Protection and Incompatible Uses. To the extent appropriate and practicable, incompatible uses that might jeopardize the objectives of the compensatory mitigation project will be prohibited. District engineers will determine which uses are compatible and incompatible on a case-by-case basis. *(Page 19646)*

§ 332.7(a) – Corps as easement holder. The Corps, however, does not have authority to hold easements for compensatory mitigation projects. *(Page 19646)*

§ 332.7(b) – Sustainability. In general, compensatory mitigation should not require active engineering features such as pumps, but should be appropriately sited to ensure that natural hydrology and landscape position will support long-term sustainability. If this is not possible in some areas, district engineers may decide that active engineering features or active management may be necessary for a compensatory mitigation project to meet its objectives. *(Page 19647)*

§ 332.7(c) – Adaptive management. The focus of adaptive management should be on taking measures to achieve performance and satisfy the objectives of the compensatory mitigation project. Extending the monitoring period may not be an appropriate adaptive management approach to achieve the desired performance, however, if the district engineer determines that the project is progressing towards meeting performance standards and that more time is all that is needed, he may determine that extension of the monitoring period is an appropriate adaptive management response. *(Page 19647)*

A certain amount of responsiveness to conditions on the ground may be built in to the mitigation plan itself. In such cases, as long as the project sponsor is operating in accordance with the approved mitigation plan, no special notification or additional approval is required, although monitoring reports should include appropriate information to allow the district engineer to assess how the project is progressing. *(Page 19647)*

Alternative compensatory mitigation may be required to offset a shortfall in aquatic resource functions. District engineers will also consider whether the compensatory mitigation project is providing ecological benefits that are comparable or superior to the approved compensatory mitigation project. *(Page 19648)*

If a natural disaster causes deficiencies in a compensatory mitigation project, the district engineer will evaluate the circumstances and determine whether it would be appropriate and practicable to require measures to address those deficiencies. Additional monitoring may be required to assess how a compensatory mitigation project is responding to a natural disaster. District engineers will determine on a case-by-case basis whether flood

events warrant taking action to repair compensatory mitigation projects. In cases where diseased plant stock may have been used at a compensatory mitigation project site, it may be appropriate either to require replanting, or to allow natural revegetation. It is appropriate for adaptive management plans to consider potential natural disasters that may occur, to the extent that they can be reasonably foreseen. Financial assurances may be used to provide alternative compensatory mitigation if the compensatory mitigation project fails as a result of a natural disaster that occurs before the monitoring period has ended. *(Page 19648)*

§ 332.7(d) – Long-term management. Although compensatory mitigation projects should, to the extent it is practicable to do so, be self-sustaining, active long-term management and maintenance are often necessary for a compensatory mitigation project to fulfill its objectives. In such cases, provisions for long-term management need to be provided as permit conditions or as stipulations in a mitigation banking or in-lieu fee program instrument. *(Page 19648)*

§ 332.7(d) – Long-term management funding. Funding for financial assurances is handled differently than funding for long-term management. *(Pages 19648)*

The final rule clearly differentiates between financial assurances for construction and establishment of compensatory mitigation projects and funding mechanisms for long-term management of those projects. In general, funding for long-term management should not be phased out over time, since those activities usually need to be conducted for substantial periods of time. There may be occasions where long-term management is no longer necessary because a compensatory mitigation project has developed to the point where active management measures are no longer needed to fulfill the objectives of that project. In such cases, the responsible party should contact the district engineer and request that the long-term management provisions be modified to release those obligations. *(Pages 19648 and 19649)*

In cases where compensatory mitigation project sites are owned by public entities, it may not be necessary to include provisions for the financing of any required long-term management if, for example, a formal, documented commitment from a government agency is provided (i.e., stewardship commitment). For public agencies, identifying adequate financing at the time of permit issuance may be problematic since agency funding can vary from year-to-year with budget cycles, thus underscoring the need for a formal, documented commitment. *(Page 19649)*

In cases where long-term financing for long-term management of compensatory mitigation projects is necessary, district engineers should consider the need to make inflationary adjustments and certain financial assumptions. For example, district engineers may consider total return assumptions and capitalization rates in the case of endowments, or Consumer Price Index adjustments in the case of annual payments. *(Page 19649)*

Mitigation Banks and In-lieu Fee Programs.

§ 332.8 – Permitting and Bank or ILF Project Establishment. District engineers have the discretion to determine that use of programmatic general permits may not be appropriate for authorizing the construction of mitigation banks, to ensure adequate coordination of instrument approval and any required DA authorization. District engineers are also free to enter into MOAs with state agencies administering programmatic general permits to perform some or all of the review functions associated with mitigation bank and in-lieu fee program approval; however, the district engineer retains the final responsibility and authority for ensuring that the requirements of the CWA and this part are met. *(Page 19651)*

§ 332.8(a) – General Considerations. There must be a mitigation banking or in-lieu fee program instrument approved by the district engineer in accordance with the procedures in this final rule. Any other compensatory mitigation arrangements are considered to be permittee-responsible mitigation where the permittee retains responsibility for providing the required compensatory mitigation... *(Page 19601)*

§ 332.8(a) – Bank site selection. The selection of mitigation bank sites should, to the extent practicable, follow a watershed approach. *(Page 19650)*

§ 332.8(a)(1) – *Ad hoc* mitigation. So called ''ad hoc'' third-party mitigation providers cannot operate as banks or in-lieu fee programs without an approved instrument. While a permittee-responsible mitigation project is free to use a third party to provide some or all of the design, construction and management services required for project implementation, liability for project success cannot be transferred to a third party except where there is an approved instrument. *(Page 19650)*

§ 332.8(b) – Interagency Review Team. District engineers have the flexibility to establish standing IRTs in their geographic areas of responsibility, or to establish a new IRT for each proposed mitigation bank or in-lieu fee program. *(Page 19650)*

Representatives of the U.S. EPA, National Marine Fisheries Service, and U.S. Fish and Wildlife Service will automatically be included on the IRT if they choose to participate. Beyond this, the district engineer determines the composition of the IRT. [T]he district engineer will seek to include in the IRT all public agencies with a substantive interest in the establishment of a mitigation bank or in-lieu fee program. *(Page 19650)*

[T]he district engineer retains the final authority for approving mitigation banking instruments or in-lieu fee program instruments, since these third-party mitigation sources will be used to satisfy compensatory mitigation requirements for DA permits. If there is a co-chair, that co-chair will decide whether the proposed mitigation bank or in-lieu fee program can be used to provide compensatory mitigation under the other federal, tribal, state, or local program. [T]he district engineer may approve an instrument regardless of whether or not other IRT member agencies sign it. *(Pages 19650 and 19651)*

§ 332.8(c) – In-Lieu Fee Program Compensation Planning Framework. The level of detail necessary for the compensation planning framework is at the discretion of the district engineer, and will take into account the characteristics of the service area(s) and the scope of the in-lieu fee program. Once the planning framework is approved as part of the in-lieu fee program instrument, all specific mitigation projects developed by the in-lieu fee program to provide compensation for DA permits must be consistent with it. *(Page 19651)*

Any modification to the framework must be approved as a significant modification to the instrument by the district engineer, after consultation with the IRT. *(Page 19651)*

§ 332.8(d)(1) – Permitting third party mitigation. District engineers have the discretion to determine that use of programmatic general permits may not be appropriate for authorizing the construction of mitigation banks, to ensure adequate coordination of instrument approval and any required DA authorization. District engineers are also free to enter into MOAs with state agencies administering programmatic general permits to perform some or all of the review functions associated with mitigation bank and in-lieu fee program approval; however, the district engineer retains the final responsibility and authority for ensuring that the requirements of the CWA and this part are met. *(Page 19652)*

§ 332.8(d)(4) – Public review and comment. We do not believe it is necessary to subject draft mitigation banking instruments to a public notice and comment process, because these documents are essentially contractual in nature. The principle aspects of a proposed mitigation bank or in-lieu fee program that would benefit from the public notice and comment process are covered by the prospectus. *(Page 19653)*

District engineers may announce the approval of a mitigation banking instrument or an in-lieu fee program instrument by issuing a public notice. Approved third-party mitigation instruments are public information that will be provided to interested parties upon request. *(Page 19653)*

If a permit is required to construct a mitigation bank or in-lieu fee project, and an alternatives analysis was required to issue that permit, then the documentation of the alternatives analysis would be in the administrative record for the permit action. *(Page 19653)*

§ 332.8(d)(5) – Initial Evaluation. The initial evaluation process does not apply to modifications of previously approved instruments. *(Page 19653)*

§ 332.8(d)(6)(ii)(A)) – Service areas for third-party mitigation. Mitigation banks and in-lieu fee programs must be sited in such a way as to effectively replace lost aquatic resource functions and services and address key watershed needs within their service areas. However, consideration of economic factors is also important in determining the service area, to make it possible for third-party mitigation sponsors to develop and implement these projects. If service areas are too small to support economically viable

mitigation banks or in-lieu fee programs, then we would have to rely on permittee-responsible mitigation. [T]o ensure the benefits of third-party mitigation, economic factors should not supersede ecological considerations in the final service area determination. *(Page 19606)*

District engineers can take into account the sponsor's needs and capabilities (as well as relevant statutory or regulatory authorities if the sponsor is a government agency) when determining service areas for a third party mitigation operation. *(Page 19654)*

§ 332.8(d)(6)(ii) – Bank Service Area and Watershed Plans. We do not believe it is practical to require watershed plans prior to establishing service areas for mitigation banks…The Corps believes that ecologically-suitable service area sizes can be established through the review processes required for mitigation banks even in the absence of a formal watershed plan, though district engineers must use a watershed approach in making this determination to the extent practicable. *(Page 19654)*

§ 332.8(d)(6)(ii)(A) – Bank Service Area. The district engineer, in consultation with the IRT, will determine the appropriate service area(s) for mitigation banks and in-lieu fee programs. *(Page 19654)*

§ 332.8(d)(6)(ii)(A) and §332.3(c) – Watershed Scale and Service Area. District engineers will determine appropriate watershed scales for compensatory mitigation projects, including services areas for mitigation banks and in-lieu fee programs…. In general, compensatory mitigation projects should be located in the same watershed as the permitted impacts, at a scale determined to be appropriate by the district engineer based on the factors specified in the rule. *(Pages 19625 and 19626)*

§ 332.8(d)(6)(ii)(D) – Closure Provisions. Specific closure procedures for mitigation banks are at the discretion of the district engineer. *(Page 19655)*

§ 332.8(d)(7) – IRT Review of Draft Instrument. The district engineer will give full consideration to any timely comments and advice provided by the IRT, but the district engineer alone retains final authority for approval of instruments for mitigation banks or in-lieu fee programs used to provide compensatory mitigation for DA permits. *(Page 19655)*

Use of a consensus-based approach does not alter the responsibility of the district engineer to make a final determination regarding the draft instrument within the specified time frames. *(Page 19655)*

§ 332.8(d)(8) – Final Instrument. This final rule does not include a default approval provision. *(Page 19655)*

If a proposed mitigation bank or in-lieu fee program is not approved, a prospective sponsor can modify that proposal to correct these deficiencies and resubmit it for consideration. *(Page 19655)*

§ 332.8(e) – Dispute Resolution Process. This process is intended to resolve disputes that are within the purview of the Corps to address. If there is a co-chair involved in the approval process, and there is an IRT objection that is solely under the authority of the tribal, state, or local co-chair to address, then the co-chair should address those objections. The co-chair also has the option of not approving the instrument. *(Page 19656)*

District engineers should try to address state objections to proposed mitigation banks and in-lieu fee programs, but final decisions must be based on federal interests, including applicable federal laws, regulations, and executive orders. *(Page 19656)*

§ 332.8(g) – Instrument Modification. What constitutes appropriate documentation for an instrument modification is at the discretion of the district engineer, and is dependent on the type of modification. *(Page 19653)*

§ 332.8(g)(2) – Streamlined Modification of Instruments. District engineers have the discretion to determine what changes that are not listed in § 332.8(g) warrant use of the streamlined review process. Examples might include minor changes to a mitigation project plan that do not substantively change the character of the project or its ability to provide appropriate mitigation for DA permits. *(Page 19656)*

§ 332.8(i) – In-lieu Fee Program Account. The purpose of the program account is to ensure that the funds collected from permittees by the in-lieu fee program sponsor are used within a reasonable time period to provide compensatory mitigation for DA permits, instead of other activities. Requiring the sponsor to establish the account with a member of the FDIC is intended to protect those funds from being lost through default. The interest and other earnings accruing to the account must remain in the account, to fund in-lieu fee projects. The funds placed into the in-lieu fee program account may only be used for the selection, design, acquisition, implementation, and management of in-lieu fee projects, with a small percentage being allowed for administrative costs. The percentage that can be used for administrative costs will be determined by the district engineer, in consultation with the IRT. If the sponsor conducts activities, such as educational programs, in addition to aquatic resource restoration, establishment, enhancement, and/or preservation activities that are used to provide compensatory mitigation for DA permits, the in-lieu fee program account must be separate from the accounts that fund those supplemental activities. *(Page 19657)*

The district engineer does not need to authorize each individual disbursement from the account, but must provide written approval for the project, based on a review of the project mitigation plan, which will include a description of activities and projected costs. Once the project is authorized, funds disbursed from the account must be spent for the project in a manner consistent with the approved project mitigation plan. The terms of the in-lieu fee program account must specify that the district engineer has the authority to direct those funds to alternative compensatory mitigation projects if the sponsor does not provide the compensatory mitigation in accordance with required time frames. As with

financial assurances, the Corps lacks statutory authority to accept directly, retain, and draw upon funds that are in the in-lieu fee program account, because of the requirements of the Miscellaneous Receipts Statute (31 U.S.C. 3302(b)). Therefore, the terms of the in-lieu fee program instrument must be carefully crafted to ensure that the district engineer can direct the funds deposited in the in-lieu fee program account to be used for providing compensatory mitigation for DA permits, without the Corps directly accepting or disbursing the funds. *(Page 19657)*

§ 332.8(j) – In-Lieu Fee Project Approval. In-lieu fee projects may be conducted by other parties on behalf of the in-lieu fee program sponsor, but the project must still be approved by the district engineer and the sponsor remains responsible for compliance with the terms of the instrument and the approved mitigation plan. *(Page 19657)*

§ 332.8(m) – Credit Withdrawal from Mitigation Banks. We do not believe it would be appropriate to place a limit on the percentage of credits that can be produced through aquatic resource establishment activities. Such decisions should be made on a case by case basis by the district engineer, after consulting with the IRT. *(Page 19658)*

§ 332.8(m) and § 332.8(o)(9) – Release of Credits from Third Party Mitigation. A proportion of projected credits for a specific mitigation bank or in-lieu fee project may be released upon approval of the mitigation plan. *(Page 19624)*

§ 332.8(n) – Advance Credits for ILF Programs. If the in-lieu fee program instrument covers more than one service area, the advance credit limit will be specified for each service area. *(Page 19613)*

The goal of the requirements in this paragraph is not to place an arbitrary limit on the availability of advance credits within a service area, but rather to ensure that in-lieu fee programs do not sell more advance credits than they can reasonably deliver in the time frame, generally 3 years. This does not mean that the number of advance credits will necessarily be small… District engineers will determine the number of advance credits allowed per service area, after consulting with the IRT in accordance with the procedures in § 332.8(d)… For example, in service areas with larger numbers of permitted impacts, and where a sponsor with demonstrated past successes is likely to produce a substantial amount of compensatory mitigation within the time frame specified in § 332.8(n)(4), district engineers can authorize a higher number of advance credits. As another example, if an in lieu fee program is being established by a sponsor that does not have a history of successfully implementing aquatic resource restoration, establishment, enhancement, and/or preservation projects, the district engineer may authorize a smaller number of advance credits to address potential risks. *(Page 19658)*

District engineers have the discretion to allow more time to plan and initiate in-lieu fee projects. An example of where this discretion may be appropriate would be a service area where credit demand is lower than expected, and the in-lieu fee program has not been able to collect enough funds to secure an in-lieu fee project site and plan and implement the compensatory mitigation project within the three growing season time period. The

district engineer also has the discretion to direct the sponsor to use the funds in the in-lieu fee program account to provide alternative compensatory mitigation to fulfill the obligations created through the sale or transfer of advance credits. *(Pages 19658 and 19659)*

The amount of available advance credits will be based on an evaluation of the compensation planning framework, the size of the service area(s), the resources available to the program (e.g., an independent funding stream for government sponsored in-lieu fee programs) and other considerations identified by the district engineer during consultation with the IRT. If the in-lieu fee program instrument covers more than one service area, the advance credit limit will be specified for each service area. *(Page 19613)*

§ 332.8(n) – ILF, Advance Credits, and Service Areas. In rare circumstances, the district engineer may allow an in-lieu fee program to fulfill advance credits sold in one service area with released credits from a different service area. This should only occur in situations where the number of unfulfilled advance credits is small, the prospects for collecting more fees in the service area are poor, and the district engineer determines that fulfilling the advance credits in another service area will provide adequate compensation for the previously authorized impacts represented by the advance credits. This may happen in the case of state-wide in lieu fee programs that have some remote service areas with very small numbers of authorized impacts. *(Page 19613 and 19659)*

In certain limited cases, such as when there is insufficient permitted activity in a given service area to support a viable mitigation project within a reasonable time frame, the district engineer may authorize the use of released credits from a different service area to fulfill advance credits sales… In such cases, the district engineer should ensure that the approved mitigation compensates for the lost resources to the extent feasible, even though it may be some distance away, or in a different watershed. *(Page 19613)*

§ 332.8(o)(2) – Assessments. We do not agree that functional assessment methods should be standardized within watershed, districts, or states. Functional assessment methods will vary among resource type, and sometimes by regional categories, such as ecoregion or physiographic region. *(Page 19659)*

In many areas of the country, and for certain types of wetlands, there may not be functional or condition assessment methods available, so other measures such as acres, may need to be used to quantify credits and debits. *(Page 19659)*

§ 332.8(o)(5) – ILF Credit Costs. We do not believe it is appropriate for district engineers to determine credit costs for in-lieu fee programs, but they will review the fees set by sponsors to determine whether they comply with the requirement for full cost accounting to ensure that the required compensatory mitigation is provided and maintained. *(Page 19615)*

The Corps will not determine the price of compensatory mitigation credits. *(Page 19609)*

The cost per unit credit must also reflect resources needed for long-term management and protection of the in-lieu fee project site, as well as any financial assurances that may be necessary to ensure successful completion of those projects. District engineers can evaluate the fee structure of an in-lieu fee program to determine whether the sponsor is complying with this provision. *(Page 19660)*

§ 332.8(o)(6) – Credits Provided by Preservation. Preservation may also be used as the only form of compensatory mitigation, at the discretion of the district engineer, but this should only be allowed where preservation of specific resources has been identified as a high priority using a watershed approach… *(Page 19660)*

When using a watershed approach, the district engineer may determine that preservation of out-of-kind aquatic resources is an appropriate means of providing compensatory mitigation. *(Page 19660)*

If there are existing aquatic resources on a mitigation bank site or an in-lieu fee project site, and those aquatic resources will not be enhanced or rehabilitated to produce enhancement or restoration credits, then the district engineer may determine that there are preservation credits being provided, once the appropriate site protection mechanisms are implemented. *(Page 19660)*

§ 332.8(o)(7) – Credits provided by riparian areas, buffers, and uplands. In general, third-party mitigation credits provided by riparian areas, buffers, and uplands will supplement the credits produced through aquatic resource restoration, establishment, enhancement, and/or preservation activities, to provide a compensatory mitigation package that is appropriate for offsetting the permitted losses of aquatic resource functions. [N]on-aquatic resources can only be used for compensatory mitigation when they are essential for maintaining the ecological viability of adjoining aquatic resources. *(Page 19661)*

Riparian areas are critical components of stream ecosystems, as well as other open waters. Riparian areas provide important ecological functions, and directly influence the functions of streams, especially in terms of habitat quality and water quality. Therefore, it is important for mitigation banks and in-lieu fee projects containing streams and other open waters to include riparian areas as part of the overall compensatory mitigation project. In such cases, compensatory mitigation credits should also be awarded to those riparian areas. *(Page 19661)*

Buffers next to wetlands, and uplands that provide habitat connectivity and other ecological functions, may also generate compensatory mitigation credits because of their contribution to the ecological functions of the overall mitigation bank or in-lieu fee project site. *(Page 19661)*

Although the definition of ‘‘credit’’ refers to the accrual or attainment of aquatic functions at a compensatory mitigation site, riparian areas, buffers, and uplands are often critical for maintaining the integrity and sustainability of aquatic resource functions.

Therefore, compensatory mitigation credits can be produced through the restoration, establishment, enhancement, and/or preservation of riparian areas, buffers, and uplands that support aquatic resources. *(Page 19661)*

District engineers will determine on a case-by-case basis when buffers are essential to maintaining the ecological viability of adjoining aquatic resources, and thus eligible to produce compensatory mitigation credits. *(Page 19661)*

§ 332.8(o)(8)(i) – Credit Release Schedule. The final rule states that the credit release schedule should reserve a significant share of the total credits for release only after full achievement of ecological performance standards. What constitutes a significant share is at the discretion of the district engineer, after consulting with the IRT and may vary depending on the nature of the mitigation compensatory project and the risks and uncertainty associated with successful completion of that mitigation project. ‘‘Significant share’’ does not necessarily mean a majority. Rather, for the purposes of this paragraph, the term ‘‘significant share’’ refers to a proportion of projected credits that will provide the sponsor with a significant incentive to complete a mitigation bank or in-lieu fee project and ensure that all performance standards are achieved. *(Page 19662)*

§ 332.8(o)(9) – Credit Release Approval and Site Visits. The need to conduct site visits to evaluate requests for credit releases is at the discretion of the district engineer. The rule allows a total of 45 days for the district engineer to make a decision after distributing documentation to the IRT, or after the site visit, whichever is later. We believe this is a reasonable time frame that appropriately balances the need of the project sponsor for timely credit releases with the need to ensure that performance based milestones have indeed been met before credits are released. *(Page 19662)*

§ 332.8(q)(1) – Ledger Report. If a permittee secures third-party credits from a sponsor, but decides not to proceed with the authorized work, he or she should notify the district engineer. It is at the sponsor’s discretion whether to buy back any unused credits. Any such transactions should be documented in the ledger reports. *(Page 19664)*