

MEMORANDUM FOR COMMANDERS, MAJOR SUBORDINATE COMMANDS

SUBJECT: Policy Guidance Letter (PGL) No. 46, Use of Mitigation Banks for U.S. Army Corps of Engineers Civil Works Projects

1. References.

a. Federal Guidance for the Establishment, Use and Operation of Mitigation Banks; Federal Register, Volume 60, No. 228, November 28, 1995.

b. ER 1105-2-100, Planning Guidance.

2. Purpose. This PGL provides implementation guidance on the use of mitigation banks in U. S. Army Corps of Engineers Civil Works projects. In the context of Federal activities and in accordance with reference 1.a., mitigation banking means the restoration, creation, enhancement and, in exceptional circumstances, preservation of wetlands and/or other aquatic resources expressly for the purpose of providing compensatory mitigation in advance of authorized impact to similar resources. "Authorized impacts" refers to impacts resulting from federally regulated activities or impacts resulting from Federal projects or programs. To date, there is no established Federal policy on the establishment, use and operation of mitigation banks to compensate for impacts on upland resources. Therefore, mitigation banks will not be used to compensate for upland impacts of Corps Civil Works projects.

3. Policy.

a. General. As defined in reference 1.a., the objective of a mitigation bank is to provide for the replacement of the chemical, physical and biological functions of wetlands and other aquatic resources which are lost as a result of authorized impacts. Conceptually, there is no net gain in ecological value as a result of the creation and operation of a mitigation bank. Therefore, the Corps permanent ecosystem restoration authorities under Section 1135 of the Water Resources Development Act of 1986 (WRDA 86) , as amended; Section 1103 of WRDA 86; Section 204 of the Water Resources Development Act of 1992, as amended; and Section 206 of WRDA 96 will not be used for the creation of mitigation banks. Similarly, funding will not be requested to initiate feasibility studies solely for the creation of mitigation banks, but may be considered for joint ecosystem restoration and mitigation banking projects as discussed below.

b. Exceptions to General Policy. The Corps can participate in implementing joint projects that include both ecosystem restoration and mitigation banking elements as long as the Corps

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financial participation in the project is limited to the ecosystem restoration element. An exception to the general policy of not budgeting for the creation of mitigation banks will also be considered where a mitigation bank is being established primarily to mitigate for Corps Civil Works projects. For example, a central mitigation bank could be proposed for Corps implementation to provide credits for compensatory mitigation for multiple projects in the same geographic area or for a large project that is built in stages. Corps implementation of a mitigation bank could also be considered to compensate for the impacts of operation and maintenance activities. These exceptions will be considered on a case-by-case basis. Any Corps bank must be established in accordance with the Federal guidance (reference 1.a.).

c. Use of Mitigation Banks in Civil Works Projects. While, as a general policy, Corps Civil Works funds will not be used to finance the creation of mitigation banks, as provided in reference 1.a., credits from mitigation banks established by others may be used to compensate for environmental impacts from construction or operation and maintenance of Corps Civil Works projects. The following policies apply to use of credits from mitigation banks.

(1) Mitigation banks that can be considered for meeting the mitigation requirements for Civil Works projects include public and privately sponsored banks. To be eligible for consideration, a bank must have been established and approved in accordance with the guidance in reference 1.a. The guidance in reference 1.a. provides for a Corps led interagency process for review and approval of mitigation banks which addresses all relevant issues including accounting procedures, the banking instrument, management, monitoring and contingencies actions in the event of bank failure and default. Where a mitigation bank was established prior to the Federal guidelines, the bank can be considered if it meets the standards established by the Federal guidance.

(2) 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 guidance for mitigation planning and recommendation in paragraph 7-35 of reference 1.b.

(3) Credits from a mitigation bank are a service which is acquired to meet the compensatory mitigation requirements of a Civil Works project. 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 acquisition of credits from a mitigation bank will be classified as a 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 costs for that project purpose.

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(4) 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.

4. Permanent Guidance. The guidance in this PGL will be incorporated into permanent guidance as it is updated.

FOR THE COMMANDER:

/s/

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Acting Director of Civil Works