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CESAJ-RD

Standard Operating Procedure – Assessing a Proximity Factor for Compensatory Mitigation Required to Offset Unavoidable Impacts to Waters of the United States

INTRODUCTION AND OVERVIEW: A proximity factor will be assessed for any compensatory mitigation proposed outside of approved mitigation bank and in-lieu fee (ILF) Program/Site service areas or outside the impact 8-digit Hydrologic Unit Code (HUC) for permittee responsible mitigation (PRM). The proximity factor is based on ratio multipliers for multiple variables. The resulting proximity factor is then multiplied by the number of credits required by the Corps to compensate for unavoidable adverse effects to aquatic resources (e.g., via application of an approved functional assessment such as the Uniform Mitigation Assessment Method).

The standards and criteria for the use of all types of compensatory mitigation, including on-site and off-site PRM, mitigation banks, and ILF mitigation to offset unavoidable impacts to waters of the United States authorized through issuance of Department of the Army (DA) permits pursuant to Section 404 of the Clean Water Act and/or Sections 9 or 10 of the Rivers and Harbors Act of 1899 are established in the Code of Federal Regulations (CFR) at 33 CFR Part 332. The regulations were published in the Federal Register under the title of Compensatory Mitigation for Losses of Aquatic Resources: Final Rule, 75 Fed. Reg. 19594 (Apr. 10, 2008), herein referred to as the Rule.

The Rule identifies general compensatory mitigation requirements at 33 CFR 332.3. Per 33 CFR 332.3(a)(1), the Corps must determine the compensatory mitigation to be required in a DA permit, based on what is practicable and capable of compensating for the aquatic resource functions that will be lost as a result of the permitted activity. When considering options for successfully providing the required compensatory mitigation, the district engineer must consider the type and location options in the order presented in 33 CFR 332.3(b)(2) through (b)(6). This section is commonly referred to as the mitigation preference hierarchy.

When evaluating compensatory mitigation options, the district engineer will consider what would be environmentally preferable. In making this determination, the district engineer must assess the likelihood for ecological success and sustainability, the location of the compensation site relative to the impact site and their significance within the watershed, and the costs of the compensatory mitigation project (33 CFR 332.3(a)(1)). If the district engineer determines that compensatory mitigation is necessary to offset unavoidable impacts to aquatic resources, the amount of required compensatory mitigation must be, to the extent practicable, sufficient to replace lost aquatic resource functions (33 CFR 332.3(f)(1)). Per 33 CFR

332.3(f)(2), the district engineer must require a mitigation ratio greater than one-to-one where necessary to account for the method of compensatory mitigation (e.g., preservation), the likelihood of success, differences between the functions lost at the impact site and the functions expected to be produced by the compensatory mitigation project, temporal losses of aquatic resource functions, the difficulty of restoring or establishing the desired aquatic resource type and functions, and/or the distance between the affected aquatic resource and the compensation site. This tool is intended to provide a more consistent, predictable, and efficient approach to complying with the requirements at 33 CFR 332.3(a)(1) and (f)(2).

PROXIMITY FACTOR APPLICABILITY: The Corps Jacksonville District recognizes that the ability -of a compensatory mitigation project to effectively compensate for the lost functions and values in a watershed is diminished as the locations of the compensatory mitigation project site and impact site become further removed. The relative importance of the suite of functions provided by the impacted aquatic resources and those at the compensatory mitigation project site, and regional variations, must also be evaluated. 33 C.F.R. 332.3(c)(2)(i). To incorporate said factors into our decision-making process, the Jacksonville District has developed a proximity factor tool to provide a more consistent, predictable, and efficient approach to evaluating the location of proposed compensatory mitigation sites. This proximity factor tool is applicable to compensatory mitigation proposed outside approved mitigation bank and ILF Program/Site service areas or outside impact 8-digit HUC watersheds for PRM.

This tool is consistent with the Rule's requirement for application of equivalent standards to all types of compensatory mitigation, including PRM, to the maximum extent practicable. 33 C.F.R. 332.1(a)(1). This tool, when used in accordance with the Rule, may provide expanded compensatory mitigation options and markets for permittees and sponsors while also incentivizing compensatory mitigation to occur closer to the impacted aquatic resources (e.g., within the same watershed).

A description of the geographic service area is a required component of mitigation bank and ILF program instruments. The service area is the watershed, ecoregion, physiographic province, and/or other geographic area within which the mitigation bank or in-lieu fee program is authorized to provide compensatory mitigation required by DA permits (33 CFR 332.8(d)(6)(ii)(A)). Use of the proximity factor tool must be consistent with the specific terms and conditions of each mitigation bank or ILF program instrument. For example, some instruments may explicitly prohibit outside-of-service-area sales. The proximity factor tool would not supersede this prohibition. In addition, service areas may include considerations for ecoregions, so it would not be appropriate to apply an ecoregion variable when an impact occurs within an approved service area, consistent with the instrument's terms and conditions. Finally, mitigation bank or ILF program instruments may include specific

procedures for determining the number of credits required when the mitigation bank or ILF program is utilized as compensatory mitigation. The proximity factor tool would not supersede these procedures.

The proximity factor tool is based on regulations that contain legally binding requirements. This tool is not a substitute for those regulations, does not create legally binding requirements, and is not a regulation itself. It does not impose legally binding requirements on the Corps, other resource agencies, mitigation providers, or permittees, and may not apply to every situation. The Corps retains the discretion to adopt approaches that differ from those provided in this tool as appropriate and consistent with statutory and regulatory requirements.

DESCRIPTION OF PROXIMITY FACTOR TOOL: A proximity factor will be assessed for any compensatory mitigation proposed outside of approved mitigation bank and ILF Program/Site service areas or outside the impact 8-digit HUC for PRM. The proximity factor is based on ratio multipliers for multiple variables. The resulting proximity factor is then multiplied by the number of credits required by the Corps to compensate for unavoidable adverse effects to aquatic resources (e.g., via application of an approved functional assessment such as the Uniform Mitigation Assessment Method).

This tool should only be applied when the Corps has determined that mitigation outside of the approved mitigation bank and ILF Program/Site service area or outside the impact 8-digit HUC for PRM is the most environmentally preferable mitigation option in accordance with the required considerations listed at 33 CFR 332.

After considering all mitigation options in the order presented in 33 CFR 332.3(b)(2) through (b)(6), assess the location of the of the impact site relevant to the proposed compensatory mitigation options following the step-by-step process depicted below:

a) 8-digit HUCs relative to the impact and compensatory mitigation sites:

If the impact site is outside of a mitigation bank/ILF service area boundary, but within the same 8-digit HUC that contains the mitigation bank location/ILF service area boundary, enter 0 (i.e., to ensure a 1:1 multiplier). For PRM, if the impact site is located within the same 8-digit HUC that contains the PRM site, enter 0 (i.e., to ensure a 1:1 multiplier).

If the impact site is outside of a mitigation bank/ILF service area boundary and one 8-digit HUC away from the mitigation bank location/ILF service area boundary, enter 1.5. For PRM, if the impact site is located one 8-digit HUC away from the proposed PRM site, enter 1.5.

For each additional 8-digit HUC away from the mitigation bank location, ILF service area boundary, or PRM site, add 0.25.

b) In-kind vs. out-of-kind replacement:

If the compensatory mitigation entails in-kind replacement, enter 0.

If the compensatory mitigation entails out-of-kind replacement, enter 0.75.

c) EPA Level IV Ecoregions:

If the mitigation occurs within the same EPA Level IV Ecoregion, enter 0.

If the mitigation occurs within a different EPA Level IV Ecoregion, enter 0.25.

Once evaluations of the three variables have been completed, the sum of all applicable variables will provide the proximity factor. The resulting proximity factor is then multiplied by the number of credits required by the Corps to compensate for unavoidable adverse effects to aquatic resources (e.g., via application of an approved functional assessment such as the Uniform Mitigation Assessment Method).

PROXIMTY FACTOR EXAMPLE TABLE:

The proximity factor table below contains inputted values as an example of how it could be applied to a scenario where the PRM site is located two (2) 8-digit HUCs away from the impact site and in a different EPA Level IV Ecoregion from the impact site.

Proximity Factor Calculation Table	Variables
If the impact site is outside of a mitigation bank/ILF service area boundary, but within the same 8-digit HUC that contains the mitigation bank location/ILF service area boundary, enter 0. For PRM, if the impact site is located within the same 8-digit HUC that contains the PRM site, enter 0. If the impact site is located outside the 8-digit HUC that contains the mitigation bank/ILF service area boundary or PRM site, proceed to the next row.	0
If the impact site is outside of a mitigation bank/ILF service area boundary and one 8-digit HUC away from the mitigation bank location/ILF service area boundary, enter 1.5. For PRM, if the impact site is located one 8-digit HUC away from the proposed PRM site, enter 1.5.	1.50

For each additional 8-digit HUC away from the mitigation bank	
If the mitigation entails in-kind replacement of impacted WOTUS, enter 0. For out-of-kind replacement of impacted WOTUS, enter 0.75.	0
If the mitigation occurs within the same EPA Level IV Ecoregion, enter 0. If the mitigation occurs within a different EPA Level IV Ecoregion, enter 0.25.	0.25
2.0	

GENERAL CONSIDERATIONS: The following considerations are applicable to utilization of the proximity factor:

1. This proximity factor tool does not supersede the Corps' considerations of compensatory mitigation options in the order presented in 33 CFR 332.3(b)(2) through (b)(6).
2. The Corps reserves its discretion to determine the most environmentally preferable mitigation option in accordance with the required considerations listed at 33 CFR 332.
3. This proximity factor tool is applicable to all types of compensatory mitigation, including PRM.
4. This proximity factor tool is applicable for DA permits and will be considered at the discretion of the district engineer on a case-by-case basis.
5. Mitigation Banks: When assessing the location of the mitigation site relative to the impact site, the calculation will start at the 8-digit HUC that contains the mitigation bank site.
6. ILF Program Service Area: When an ILF Program has available advanced credits, impacts that occur outside of an ILF Program service area is calculated starting at the 8-digit HUC that contains the impact site to the most distant 8-digit HUC in the ILF program service area. This is because the location of future ILF projects is not known at the time of impact.
7. ILF Sites: When an ILF site has released credits available, assessing the location of the mitigation site relative to the impact site will be calculated starting at the 8-digit HUC that contains the ILF site.

8. PRM: The distance from the impact site to the PRM site will be assessed based on the number of 8-digit HUC units the impact and PRM sites are separated by.
9. Sum the proximity factor variables to determine the proximity factor. The resulting proximity factor is multiplied by the number of credits required by the Corps to compensate for unavoidable adverse effects to aquatic resources (e.g., via application of an approved functional assessment such as the Uniform Mitigation Assessment Method).
10. Compensatory mitigation should be performed within the same 6-digit HUC where practicable.
11. According to 33 CFR 332.3(b)(1), when compensating for impacts to marine resources, the location of the compensatory mitigation site should be chosen to replace lost functions and services within the same marine ecological system (e.g., reef complex, littoral drift cell). Compensation for impacts to aquatic resources in coastal watersheds (watersheds that include a tidal water body) should also be located in a coastal watershed where practicable. In addition, according to 33 CFR 332.3(c)(2)(v), a watershed approach is not appropriate in areas where watershed boundaries do not exist, such as marine areas. In such cases, an appropriate spatial scale should be used to replace lost functions and services within the same ecological system (e.g., reef complex, littoral drift cell).
12. When determining in-kind versus out-of-kind mitigation, factors such as the type of aquatic resources and credits, aquatic resource functions, landscape position, and species habitat at the mitigation site should be considered. Note, compensatory mitigation requirements determined through the watershed approach should not focus exclusively on specific functions (e.g., water quality or habitat for certain species), but should provide, where practicable, the suite of functions typically provided by the affected aquatic resource (33 CFR 332.3(c)(2)(i)).
13. This proximity factor tool does not supersede the terms and conditions of an approved mitigation bank or ILF Program instrument. Sponsors may formally propose to modify service area descriptions in their approved mitigation bank or ILF Program instrument to take advantage of this tool. These proposed revisions will be evaluated in accordance with the required procedures prescribed in 33 CFR 332.8(g).
14. This proximity factor tool does not authorize or guarantee the use of credits from, or release of credits to, any mitigation bank or ILF Program/Site.

15. This proximity factor tool is not limited to the State of Florida; however, if used in Puerto Rico or the U.S. Virgin Islands, adaptations/revisions may be required.

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