

ERBA WRDA 2022 Requests:

Improve Compliance, Efficiencies, & Environmental Outcomes of Corps Civil Works' Mitigation

The Ecological Restoration Business Association (ERBA) has advocated for several years to improve the compliance, efficiency, and environmental outcomes of U.S. Army Corps of Engineers' (Corps) mitigation, as required under the Clean Water Act, for Corps Civil Works' project impacts. Specifically, ERBA has promoted the Corps' use of competitive procurement approaches, e.g., "pay-for-performance," to improve the Corps' mitigation delivery. The Corps HQ's P3 Team has been evaluating the pay-for-performance and other innovative procurement approaches for a potential pilot project for identified mitigation needs in the Corps' Sacramento District. However, in pursuing this pilot, Corps' Civil Works has identified multiple issues, based on current WRDA statute and guidance, that could be interpreted as constraints on these desired procurement approaches.

To eliminate these constraints, ERBA recommends the following proposed amendment to 33 U.S.C. 2283, with the two primary purposes of: i) clearly providing the Corps with authority to contract with mitigation providers for their mitigation needs, either through contracting for current or forthcoming mitigation bank credits, or under a competitive full delivery contract, and ii) aligning Corps Civil Works mitigation procedures and methodologies to match those of Corps' Regulatory and be consistent with the 2008 Compensatory Mitigation Rule at 33 CFR 332. These changes would ensure that the Corps can pursue pay-for-performance and other innovative procurement approaches through public-private partnerships for their Civil Works mitigation needs.

Proposed legislative text to amend 33 U.S.C. 2283:

(Note: will ensure it is drafted properly; this redline version is to show the proposed amendments).

(d)(3)(B) (iv) for projects where mitigation will be carried out through a third-party mitigation arrangement in accordance with subsection (i)—

(I) a description of the third-party mitigation instrument *or Contract* to be used; and

(II) the basis for a determination that the mitigation instrument *or Contract* can meet the mitigation requirements for the project;

(i) Third-party mitigation arrangements

(1) Eligible activities

In accordance with all applicable Federal laws (including regulations), mitigation efforts carried out under this section may include—

(A) participation in mitigation banking or other third-party mitigation arrangements, such as—

(i) the purchase of credits from commercial or State, regional, or local agency-sponsored mitigation banks, *for immediate or future delivery*; ~~and~~

(ii) the purchase of credits from in-lieu fee mitigation programs; and

“(iii) the use of a Contract for the full-delivery, including monitoring and long-term monitoring (operations and maintenance) of the mitigation plans required under subsection (b).

(B) contributions to statewide and regional efforts to conserve, restore, enhance, and create natural habitats and wetlands if the Secretary determines that the contributions will ensure that the mitigation requirements of this section and the goals of section 2317(a)(1) of this title will be met.

(2) Inclusion of other activities

The banks, programs, and efforts described in paragraph (1) include any banks, programs, and efforts developed in accordance with applicable law (including regulations).

(3) Terms and conditions

In carrying out natural habitat and wetlands mitigation efforts under this section, *the Secretary shall ensure* contributions to the mitigation effort ~~may~~—

(A) are consistent with the approved Corps of Engineers compensatory mitigation procedures utilized by the District’s Regulatory program in which the project or activity is located;

~~(A)~~ *(B) take place concurrent with, or in advance of, the commitment of funding to a project, or portion of a project; and*

~~(B)~~ *(C) occur in advance of project construction only if the efforts are consistent with all applicable requirements of Federal law (including regulations) and water resources development planning processes.*

“(l) In carrying out this section, the Secretary shall be consistent with the Final Rule, Compensatory Mitigation for Losses of Aquatic Resources issued by the U.S. Army Corps of Engineers and U.S. Environmental Protection Agency, dated April 10, 2008, or any subsequently promulgated rule.”

“(m) Definitions.—

(1) “Contract” means “an agreement between the Secretary and a mitigation provider that – (A) utilizes regionally accepted mitigation implementation practices, including but not limited to:

(i) site selection, acquisition of land or interest in land, and site protection

(ii) restoration plan development and approval

(iii) credit generation;

(iv) implementation of restoration plan

(v) monitoring, management, and long-term stewardship (i.e., operations and maintenance); and

(vi) project success determination.

(B) provides for the full delivery of mitigation from one or more sources, the responsibility for the successful completion of which is imposed upon selected mitigation provider, including but not limited to:

(i) stand-alone mitigation projects;

(ii) purchase of credits from in-lieu fee programs or mitigation banks; or

(iii) the acquisition of credits utilizing mitigation standards and policies adopted by the regulatory program of the Corps of Engineers District in which the project or activity is located.”

Again, ERBA has long advocated for the Corps to utilize a competitive, outcome-based procurement approach, i.e., pay-for-performance, to improve delivery of Corps' mitigation for Civil Works projects. If the needed changes are made to 33 U.S.C. 2283 as recommended above, then the Corps can readily adopt these contracting approaches. Based on the recent news of the Corps' P3 Team analysis in the Sacramento District, and our ongoing discussions at Corps HQ, we understand that the Corps is open to these innovative approaches if Congressional direction and their statutory authority are clear. To encourage the Corps to use competitive processes for their mitigation needs, and take advantage of the increased efficiencies, reduced costs, and timeliness of outcome-based contracting, ERBA recommends that the Corps pursue a pay-for-performance pilot program for the mitigation needs of authorized Civil Works projects with funds appropriated for construction. Specifically, ERBA proposes the following language:

Proposed legislative text to encourage use of Pay for Performance Contracting

SEC. xxx. PERFORMANCE BASED CONTRACTING PILOT PROGRAM.

(a) IN GENERAL.—Not later than 90 days after enactment of this Act, the Secretary shall establish a pilot program utilizing performance based contracts for the mitigation requirements of authorized Army Corps of Engineers Civil Works projects.

(b) PURPOSES.— to evaluate the technical, financial, and resource benefits of allowing a non-Federal mitigation provider to carry out and manage the design and construction of one or more mitigation projects using a performance based contract. Performance-based contracting will enable creative financing to timely address compensatory mitigation needs for the Civil Works program; control and minimize risk to the Corps by shifting the design and implementation risks of mitigation projects to third-parties better able to execute and handle the risk; and improve overall mitigation results, performance, and timeliness while reducing costs.

(c) ADMINISTRATION.—In carrying out the pilot program established under subsection (a), the Secretary shall—

(1) identify for inclusion in the program at least 15 Army Corps of Engineers Civil Works projects with unmet mitigation requirements that have been authorized and received appropriations for construction;

(2) issue a request for proposals to pilot mitigation providers to meet the mitigation needs of projects identified under paragraph (1) through the use of a performance based contract;

(3) in issuing a request for proposals, the Secretary shall clearly define the desired mitigation outcome to be achieved by the pilot mitigation provider;

(4) when selecting a pilot mitigation provider project pursuant to paragraph (3), the Secretary shall use transparent, publicly available evaluation criteria during the selection process, which criteria shall:

(i) give first preference to pilot mitigation providers that propose mitigation largely delivered in advance of a project's impacts, including through provision of mitigation bank credits; and then

(ii) give preference to pilot mitigation providers that propose mitigation delivered concurrent to a project's impacts; and

(iii) require a sufficiency determination of a pilot mitigation providers proposed financial assurances to ensure a high level of confidence that the proposed mitigation will be successfully completed; and (iv) if the Secretary shall prioritize pilot mitigation providers

that propose mitigation projects that address priorities identified in state or other federal agency developed comprehensive mitigation, coastal and/or flood master plans;

(5) after selecting a pilot mitigation provider, enter into a performance based contract with the pilot mitigation provider under which the pilot provider is provided full project management control for the site identification, acquisition, financing, design, or construction (or any combination thereof) of the project;

(6) notify the Committees in writing of each project identified under paragraph (1);

(7) following the completion of a mitigation project under paragraph (3), certify that work was completed in accordance with the performance based contract in paragraph (5); and

(8) issue payment in accordance with the performance based contract to the relevant pilot mitigation provider;

(d) DETAILED PROJECT SCHEDULE.—Not later than 180 days after entering into a project partnership agreement under subsection (c)(5), a non-Federal pilot provider, to the maximum extent practicable, shall submit to the Secretary a detailed project schedule for the relevant project, based on estimated funding levels, that specifies deadlines for each milestone with respect to the project.

(e) TECHNICAL ASSISTANCE.—At the request of a pilot mitigation provider participating in the pilot mitigation program established under subsection (a), the Secretary may provide to the pilot mitigation provider technical assistance with respect to—

(1) a study, engineering activity, or design activity related to a project carried out by the pilot mitigation provider under the program; and

(2) obtaining permits necessary for such a project.

(f) IDENTIFICATION OF IMPEDIMENTS.—

(1) IN GENERAL.— Within 90 days of completion of the program established in subsection (a), the Secretary shall—

(A) except as provided in paragraph (2), identify any procedural requirements under the authority of the Secretary that impede use of performance based contracts for development and completion of required mitigation elements of Army Corps of Engineers Civil Works projects that have been authorized for construction and have received construction appropriations;

(B) develop and implement programmatic procedures and approaches that—

(i) address such impediments; and

(ii) protect the public interest and any public investment in water resources development projects that involve performance based contracts in water resources development projects; and (C) not later than 1 year after the date of enactment of this section, issue guidance to carry out the procedures and approaches developed under subparagraph (B).

(2) RULE OF CONSTRUCTION.—Nothing in this section allows the Secretary to waive any requirement under—

(A) sections 3141 through 3148 and sections 3701

through 3708 of title 40, United States Code;

(B) the National Environmental Policy Act of 1969

(42 U.S.C. 4321 et seq.);

(C) section 2283 of title 33, United States Code; or

(D) any other provision of Federal law (including regulations).

(g) **NON-FEDERAL FUNDING.**—The pilot mitigation provider may finance the non-Federal share of a project carried out under the pilot program established under subsection (a).

(i) **COST SHARE.**—Nothing in this section affects a cost-sharing requirement under Federal law that is applicable to a project carried out under the pilot program established under subsection (a).

(h) **REPORT.**—Not later than 3 years after the date of enactment of this Act, the Secretary shall submit to the Committees and make publicly available a report describing the results of the pilot mitigation program established under subsection (a), including any recommendations of the Secretary concerning whether the program or any component of the program should be implemented on a national basis.

(h) **NON-FEDERAL PILOT APPLICANT DEFINED.**—In this section, the term “pilot mitigation provider means—

(1) the non-Federal entity that is the performance based contract project provider;

(j) **COMMITTEES DEFINED.** – In this section, the term “Committees” means –

(1) the Committee on Environment and Public Works of the Senate and the Committee on Transportation and Infrastructure of the House of Representatives

(k) **PERFORMANCE BASED CONTRACT DEFINED** – In this section, the term “performance based contract means –

(1) a procurement mechanism by which the Army Corps of Engineers contracts with a pilot mitigation provider for a specific mitigation outcome requirement, with payment to the pilot mitigation providers linked to delivery of verifiable and successful mitigation performance.

GAO Study on Mitigation Mechanisms Compliance with the 2008 Rule Requirements:

To inform potential improvements to the Clean Water Act Section 404 mitigation program and support the availability of mitigation options to facilitate water infrastructure projects, the Government Accountability Office (GAO) is directed to evaluate the performance of mitigation mechanisms since promulgation of the 2008 Compensatory Mitigation Rule at 33 CFR 332 et seq. and deliver a report back to Congress not later than 180 days after the date of enactment of this Act. Specifically, GAO shall evaluate the following key performance metrics for mitigation banks, In-Lieu Fee (ILF) programs, and Permittee-Responsible Mitigation (PRM): (i) Timeliness of mitigation (i.e. the time gap between when the impact occurs and construction completion), (ii) Operations and Monitoring Compliance (i.e. was annual monitoring completed), (iii) Ecological Performance (i.e. did the mitigation project perform as anticipated, were corrective actions performed if needed), and (iv) Long-Term Protection and Funding (i.e. are the mitigation sites still protected as intended, including the establishment of long-term funding mechanism).

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