

MEMO

DATE: November 25, 2025

FROM: Joseph B. Gibbs, PE, Board Member, Missouri Levee & Drainage District Assoc. (MLDDA)

TO: Flood Plain Landowners and Levee and Drainage District Boards of Supervisors

SUBJECT: Compensatory Wetlands Program of the Clean Water Act

To avoid direct clean up and/or restoration of an affected disturbed area, a political entity like a levee district may opt for what is known as "compensatory mitigation through an in-lieu of fee program". The U.S. Army Corps of Engineers (USACE) which is responsible for issuing the 404/401 permits, defines this as "the restoration, establishment, enhancement, and/or preservation of wet-lands through funds paid to a governmental or nongovernmental natural resource management organization." The organization may restore the area affected by construction or restore other areas to balance the loss of wetlands elsewhere. What this means is that someone else has restored wetlands somewhere else to balance the initial loss of wetlands.

Three Distinct Mechanisms for Compensatory Mitigation

- Compensatory mitigation for unavoidable wetland impacts may be accomplished through three distinct mechanisms. With permittee-responsible mitigation, the permittee maintains liability for the construction and long-term success of the site. Mitigation banking and in-lieu fee mitigation are forms of "third party" compensation, where the liability for project success is transferred to the mitigation bank or in-lieu fee sponsor.
- Permittee-Responsible Mitigation: Restoration, establishment, enhancement or preservation of wetlands undertaken by a permittee in order to compensate for wetland impacts resulting from a specific project. The permittee performs the mitigation after the permit is issued and is ultimately responsible for implementation and success of the mitigation. Permittee-responsible mitigation may occur at the site of the permitted impacts or at an off-site location within the same watershed.

- **Mitigation Banking:** A wetlands mitigation bank is a wetland area that has been restored, established, enhanced or preserved, which is then set aside to compensate for future conversions of wetlands for development activities. Permittees, upon approval of regulatory agencies, can purchase credits from a mitigation bank to meet their requirements for compensatory mitigation. The value of these "credits" is determined by quantifying the wetland functions or acres restored or created. The bank sponsor is ultimately responsible for the success of the project. Mitigation banking is performed "off-site," meaning it is at a location not on or immediately adjacent to the site of impacts, but within the same watershed. Federal regulations establish a flexible preference for using credits from a mitigation bank over the other compensation mechanisms.
- **In-Lieu Fee Mitigation:** Mitigation that occurs when a permittee provides funds to an in-lieu-fee sponsor (a public agency or non-profit organization). Usually, the sponsor collects funds from multiple permittees in order to pool the financial resources necessary to build and maintain the mitigation site. The in-lieu fee sponsor is responsible for the success of the mitigation. Like banking, in-lieu fee mitigation is also "off-site," but unlike mitigation banking, it typically occurs after the permitted impacts.

The restored wetlands are protected forever and will continue to be managed. The acreage of these areas essentially works as a credit program for projects that might take away existing acres wetlands. This may be a way for a levee district to engage critical flood control and drainage projects and still meet wetland preservation requirements.

Sources: 40 CFR Part 230 Subpart J and 33 CFR Part 332;
<https://www.epa.gov/compensatory-mitigation-factsheet>