sustaining (in accordance with performance standards).

F. Other Considerations

1. In-Lieu-Fee Mitigation Arrangements

For purposes of this guidance, in-lieufee, fee mitigation, or other similar arrangements, wherein funds are paid to a natural resource management entity for implementation of either specific or general wetland or other aquatic resource development projects, are not considered to meet the definition of mitigation banking because they do not typically provide compensatory mitigation in advance of project impacts. Moreover, such arrangements do not typically provide a clear timetable for the initiation of mitigation efforts leaving the potential for project impacts to go unmitigated for a significant time period. The Corps, in consultation with the other agencies, may find there are some exceptional circumstances where such arrangements are appropriate. In such cases, a formal agreement between the sponsor and the agencies, similar to a banking instrument, is necessary to define the limited circumstances and conditions under which its use is considered appropriate.

2. Special Considerations for "Swampbuster"

Note to readers: Current FSA legislation limits the extent to which mitigation banking can be used for FSA purposes. FSA requires that mitigation be conducted on priorconverted cropland as opposed to farmed wetlands or other degraded wetland systems. If this legislation is not modified to be consistent with the mitigation provisions commonly used by other wetland regulatory programs, including the Section 10/404 program, then the final mitigation banking guidance will be appropriately annotated to identify the FSA constraints.

III. Definitions

For the purposes of this guidance document the following terms are defined:

A. Bank sponsor. Any public or private entity responsible for establishing and, in most circumstances, operating a mitigation bank.

B. Compensatory mitigation. For purposes of Section 10/404, compensatory mitigation is the restoration, creation, enhancement, or in exceptional circumstances, preservation of wetlands and/or other aquatic resources expressly for the purpose of compensating for unavoidable adverse impacts which remain after all appropriate and practicable avoidable and minimization has been achieved.

C. Creation. The establishment of a wetland or other aquatic resource where one did not formerly exist.

D. Credit. A unit of measure representing the accrual or attainment of aquatic functions at a mitigation bank.

E. Debit. A unit of measure representing the loss of aquatic functions at an impact or project site.

F. Enhancement. Activities conducted in existing wetlands or other aquatic resources to achieve specific management objectives or provide conditions which previously did not exist, and which increase one or more aquatic functions. Enhancement may involve trade-offs between aquatic resource structure, functions, and values; a positive change in one function may result in negative effects to other functions.

G. Mitigation. For purposes of Section 10/404 and consistent with the Council on Environmental Quality regulations, the Section 404(b)(1) Guidelines and the Memorandum of Agreement Between the Environmental Protection Agency and the Department of the Army Concerning the Determination of Mitigation under the Clean Water Act Section 404(b)(1) Guidelines, mitigation means sequentially avoiding impacts, minimizing impacts, and compensating for remaining unavoidable impacts.

H. Mitigation bank. A mitigation bank is a site where wetlands and/or other aquatic resources are restored, created, enhanced, or in exceptional circumstances, preserved expressly for the purpose of providing compensatory mitigation in advance of authorized impacts to similar resources. For purposes of Section 10/404, use of a mitigation bank may only be authorized when impacts are unavoidable.

I. Mitigation Bank Review Team (MBRT). An interagency group of Federal, state, tribal, and/or local regulatory and resource agency representatives which are signatory to a banking instrument and oversee the establishment, use and operation of a mitigation bank.

J. Practicable. Available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes.

K. Preservation. The protection of ecologically important wetlands or other aquatic resources in perpetuity through the implementation of appropriate legal and physical mechanisms. Preservation may include protection of upland areas adjacent to wetlands as necessary to ensure protection and/or enhancement of the aquatic ecosystem.

L. Restoration. Re-establishment of previously existing wetland or other aquatic resource character and function(s) at a site where they have ceased to exist, or exist only in a substantially degraded state.

M. Service area. The service area of a mitigation bank is the designated area (e.g., watershed, county) wherein a bank can reasonably be expected to provide appropriate compensation for impacts to wetlands and/or other aquatic resources.

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