



PRELIMINARY DRAFT

State Wetland Definition and Procedures for Discharges of Dredged or Fill Materials to Waters of the State

[Proposed for Inclusion in the Water Quality Control Plans for Inland Surface Waters and Enclosed Bays and Estuaries and Ocean Waters of California]

STATE WATER RESOURCES CONTROL BOARD

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Procedures for Discharges of Dredged or Fill Materials into Waters of the State

I. Introduction

The mission of the State Water Resources Control Board and the ~~regional water quality control boards~~Regional Water Quality Control Boards (Water Boards) includes the preservation, enhancement, and restoration of the quality of California's water resources for the protection of the environment and all beneficial uses for the benefit of present and future generations. In accordance with the Porter-Cologne Water Quality Control Act (Water Code, § 13000 et seq.), the Water Boards are authorized to regulate discharges of waste that may affect the quality of waters of the state. As described below, waters of the state include some, but not all, features that are defined as wetlands, as well as other features, including the ocean, lakes, and rivers. These wetlands provide environmental and economic benefits to the people of this state, including flood and storm water control, surface and ground water supply, fish and wildlife habitat, erosion control, pollution treatment, nutrient cycling, and public enjoyment. Wetlands ameliorate the effects of global climate change by providing floodwater storage, sequestering carbon, and maintaining vulnerable plant and animal communities. Many of these invaluable areas statewide have been lost to fill and development. Presently, wetlands are threatened by impacts from increasing population growth, land development, sea level rise, and climate change. These Procedures for the Discharges of Dredged or Fill Materials to Waters of the State (Procedures) conform to Executive Order W-59-93, commonly referred to as California's "no net loss" policy for wetlands. In accordance with Executive Order W-59-93, the ~~Policy ensures~~Procedures ensure that the Water Boards' regulation of dredged or fill activities will be conducted in a manner "to ensure no overall net loss and long-term net gain in the quantity, quality, and permanence of wetlands acreage and values..." The Water Boards are committed to increasing the quantity, quality, and diversity of wetlands that qualify as waters of the state.

These Procedures contain a wetland definition in section II and wetland delineation procedures in section III, both of which apply to all Water Board programs. The wetland definition encompasses the full range of wetland types commonly recognized in California, including some features not protected under federal law, and reflects current scientific understanding of the formation and functioning of wetlands. ~~The wetland definition is not intended to be jurisdictional — not all features that qualify as wetlands are waters of the state.~~ These Procedures also include procedures for the review and approval of activities that could result in the discharge of dredged or fill material to any waters of the state in section IV. The ~~dredged or fill procedures~~Procedures include elements of the Clean Water Act Section 404(b)(1) Guidelines, thereby bringing uniformity to Water Boards' regulation of discharges of dredged or fill material to all waters of the state.

II. Wetland Definition

~~The following definition of wetlands is intended to inform the public about the types of features that qualify as wetlands, and therefore may also warrant protection as waters of the state. It is important to note that the definition of wetlands includes some features that may not be protected as waters of the state. The Water Code defines "waters of the state" broadly to include "any surface water or groundwater, including saline waters, within the boundaries of the state." All features that are protected as "waters of the United States" under federal law are necessarily also waters of the state, but the Water Boards have not developed a complete list or categorical descriptions of all other features that qualify as waters of the state. Therefore, in some cases, the Water Boards must determine whether a particular feature is a water of the state on a case-by-case basis. The Water Boards will continue to determine, on a case-by-case basis, whether a particular feature that meets the definition of wetlands also qualifies as a water of the state. The definition of wetland does not modify or expand the jurisdiction or otherwise affect the statutory or regulatory authorities of the Water Boards. The Water Boards define an area as wetland as follows:~~

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45 *An area is wetland if, under normal circumstances, (1) the area has continuous or recurrent saturation of*
46 *the upper substrate caused by groundwater, or shallow surface water, or both; (2) the duration of such*
47 *saturation is sufficient to cause anaerobic conditions in the upper substrate; and (3) the area's vegetation*
48 *is dominated by hydrophytes or the area lacks vegetation.*

49 The Water Boards may consider a wetland, as defined above, to be a water of the state on a
50 case-by-case basis. If uncertain whether a wetland as defined above is a water of the state, project
51 proponents are strongly encouraged to contact the Water Boards for assistance prior to submitting an
52 application for dredged or fill projects. Code defines "waters of the state" broadly to include "any surface
53 water or groundwater, including saline waters, within the boundaries of the state." The following wetlands
54 are waters of the state:

- 55 1. Natural wetlands.
- 56 2. Wetlands created by modification of a water of the state.¹
- 57 3. Wetlands that meet current or historic definitions of "waters of the United States,"² and
- 58 4. Artificial wetlands³ that meet any of the following criteria:
 - 59 a. Approved by an agency as mitigation for impacts to other waters of the state, except where
60 the approving agency explicitly identifies the mitigation as being of limited duration;
 - 61 b. Specifically identified in a water quality control plan as a wetland or other water of the state;
 - 62 c. Resulted from historic human activity and has become a relatively permanent part of the
63 natural landscape;
 - 64 d. Greater than or equal to one acre in size, unless the artificial wetland was constructed and is
65 currently used and maintained primarily for one or more of the following purposes (i.e., the
66 following artificial wetlands are not waters of the state unless they also satisfy another one of
67 the above criteria):
 - 68 i. Industrial or municipal wastewater treatment or disposal.
 - 69 ii. Settling of sediment.
 - 70 iii. Storm water detention, infiltration, or treatment.
 - 71 iv. Agricultural crop irrigation or stock watering.

¹ "Created by modification of a water of the state" means that the wetland that is being evaluated must have been directly converted from a water of the state, and does not include a situation where the water of the state was completely eliminated.

² This includes features that have been determined by the U.S. Environmental Protection Agency or the U.S. Army Corps of Engineers to be "waters of the U.S." in an approved jurisdictional determination; "waters of the U.S." identified in a preliminary jurisdictional determination upon which a permitting decision was based; and features that are consistent with any current or historic final judicial interpretation of "waters of the U.S." or any current or historic federal regulation defining "waters of the U.S."

³ Artificial wetlands are wetlands that result from human activity.

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v. Fire suppression.

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vi. Cooling water.

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vii. Active surface mining – even if the site is managed for interim wetlands functions and values, or

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viii. Log storage.

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If an aquatic feature meets the wetland definition, the burden is on the applicant to demonstrate that the wetland is not a water of the state.

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III. Wetland Delineation

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The permitting authority shall rely on any wetland area delineation ~~approved from a final aquatic resource report, with a preliminary or approved jurisdictional determination issued~~ by the United States Army Corps of Engineers (Corps) for the purposes of determining the extent of wetland waters of the U.S. A delineation of non-federal wetland areas potentially impacted by the project shall be performed using the methods described in the three federal documents listed below (collectively referred to as “1987 Manual and Supplements”) to determine whether the area meets the state definition of a wetland as defined above. As described in the 1987 Manual and Supplements, an area “lacks vegetation” if it has less than 5 percent areal coverage of plants at the peak of the growing season. The methods shall be modified only to allow for the fact that the lack of vegetation does not preclude the determination of such an area that meets the definition of wetland. Terms as defined in these Procedures shall be used if there is conflict with terms in the 1987 Manual and Supplements.

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- Environmental Laboratory. 1987. U.S. Army Corps of Engineers Wetlands Delineation Manual. Technical Report Y-87-1. U.S. Army Engineer Waterways Experiment Station, Vicksburg, MS.

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- U.S. Army Corps of Engineers. 2008. Regional Supplement to the Corps of Engineers Wetland Delineation Manual: Arid West Region (Version 2.0). ed. J. S. Wakeley, R. W. Lichvar, and C. V. Noble. ERDC/EL TR-08-28. Vicksburg, MS: U.S. Army Engineer Research and Development Center.

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- U.S. Army Corps of Engineers. 2010. Regional Supplement to the Corps of Engineers Wetland Delineation Manual: Western Mountains, Valleys, and Coast Region (Version 2.0). ed. J. S. Wakeley, R. W. Lichvar, and C. V. Noble. ERDC/EL TR-10-3. Vicksburg, MS: U.S. Army Engineer Research and Development Center.

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IV. Procedures for Regulation of Discharges of Dredged or Fill Material to Waters of the State

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The purpose of this section is to establish application procedures for discharges of dredged or fill material to waters of the state, which includes both waters of the U.S. and non-federal waters of the state. This section supplements existing state requirements for discharges of dredged or fill material to waters of the U.S.⁴⁴ These Procedures include Appendix A, which contains relevant portions of the U.S. EPA's

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⁴⁴ California Code of Regulations, title 23, sections 3830-3869 (state's Clean Water Act (CWA) section 401 (33 USC § 1341) water quality certification program)

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107 Section 404(b)(1) “Guidelines for Specification of Disposal Sites for Dredge or Fill Material”²⁵
108 (Guidelines), 1980, with minor modifications to make them applicable to the state dredged or fill program
109 (hereafter State Supplemental Dredged or Fill Guidelines).³⁶ This section applies to all
110 applications for discharges of dredged or fill material to waters of the state submitted after [insert the
111 effective date of the Plan Amendment].

112 Project Application Submittal for Individual Orders

113 Applicants Unless excluded by Section IV.D, applicants must file an application to the Water Boards for
114 any activity that could result in the discharge of dredged or fill material to waters of the state in
115 accordance with California Code of Regulations, title 23, section 3855.⁷ The applicant may consult with
116 the Water Boards to determine whether a project could result in impacts to waters of the state and/or
117 discuss submittals that would meet the application requirements listed below.⁴

118 A. Project Application Submittal

119 Applicants must submit the items listed in subsection 1 to the permitting authority. In addition, applicants
120 shall consult with the permitting authority about the items listed in subsection 2. Within 30 days of
121 receiving the items listed in subsection 1, the permitting authority may require the applicant to submit one
122 or more of the items in subsection 2 for a complete application. Within 30 days of receiving all of the
123 required items, the permitting authority shall determine whether the application is complete and notify the
124 applicant accordingly. If the applicant’s federal license or permit application includes any of the
125 information required in subsections 1 or 2 below, the applicant may submit the federal application
126 materials to satisfy the corresponding state application information. If federal application materials are
127 submitted as part of the state application, the applicant shall indicate where the corresponding state
128 application information can be found in the federal application materials.

129 1. Items Required for a Complete Application

- 130 a. All items listed in California Code of Regulations, title 23, section 3856 “Contents of a Complete
131 Application.”⁵⁸
- 132 b. If wetlands that are waters of the U.S. are present, a final aquatic resource delineation report, with
133 a preliminary or approved jurisdictional determination issued by the Corps.

²⁵ 40 C.F.R. § 230.

³⁶ The State Supplemental Dredge and Fill Guidelines are included as Appendix A. Because Appendix A is derived directly from the 404(b)(1) guidelines, it uses slightly different terms than terms used in sections I through V of these Procedures. Appendix A will be applied in a manner consistent with sections I through V of these Procedures.

⁷ Note that California Code of Regulations, title 23, section 3855 applies only to individual water quality certifications, but these Procedures extend the application of section 3855 to individual waste discharge requirements for discharges of dredged or fill material to waters of the state.

⁴ Note that California Code of Regulations, title 23, section 3855 applies only to individual water quality certifications, but these Procedures extend the application of section 3855 to individual waste discharge requirements for discharges of dredged and fill material to waters of the state.

⁵⁸ Note that California Code of Regulations, title 23, section 3856 applies only to individual water quality certifications, but these Procedures extend the application of section 3856 to individual waste discharge requirements for discharges of dredged and/or fill material to waters of the state.

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- 134 c. ~~If waters of the state outside of federal jurisdiction are present, a delineation of those waters,~~
135 ~~including wetlands delineated as described in section III. In addition, if waters of the U.S. are~~
136 ~~present, any preliminary or final wetland delineation report that was submitted to the Corps.~~
- 137 d. ~~e.~~ The date or dates upon which the overall project activity will begin and end; and, if known, the
138 ~~date or date(s)~~ upon which the discharge(s) will take place.
- 139 e. ~~d.~~ Map(s) with a scale of at least 1:24000 (1" = 2000') and of sufficient detail to accurately show
140 (1) the boundaries of the lands owned or to be utilized by the applicant in carrying out the
141 proposed activity, including the grading limits, proposed land uses, and the location, dimensions
142 and type of any structures erected (if known) or to be erected ~~on the plotted lands for use in~~
143 ~~connection with the activity and the location,~~ and (2) all aquatic resources that may qualify as
144 waters of the state, within the boundaries of the project, and all aquatic resources that may qualify
145 as waters of the state outside of the boundary of the project that could be affected by the project.
146 A map submitted for a Corps' preliminary jurisdictional determination may satisfy this requirement
147 if it includes all potential waters of the state. The ~~Permitting Authority~~ permitting authority may
148 require that the map(s) be submitted in electronic format (e.g., GIS shapefiles).
- 149 f. ~~e.~~ A description of the waters proposed to receive a discharge of dredged or fill material, including
150 the beneficial uses as listed in the applicable water quality control plan. The description should
151 also include: a description of discharge at each individual impact location; quantity of impact at
152 each location ~~in~~ rounded to the nearest ~~tenth~~ one-thousandth (0.001) of an acre, nearest linear
153 foot, and nearest cubic yard (as applicable); assessment of potential direct and indirect impacts
154 to listed beneficial uses and potential mitigation measures for those potential impacts to beneficial
155 uses, identification of existing water quality impairment(s); the source of water quality
156 impairment(s), if known; and the presence of rare, threatened or endangered ~~aquatic species~~
157 ~~resource~~ habitat.
- 158 g. An alternatives analysis,⁹ unless any of the following exemptions apply.
- 159 i. The project includes discharges to waters of the state outside of federal jurisdiction, but the
160 project would meet the terms and conditions of one or more Water Board certified Corps'
161 General Permits, if all discharges were to waters of the U.S. The permitting authority will
162 verify that the project would meet the terms and conditions of the Corps' General Permit(s) if
163 all discharges were to waters of the U.S. based on information supplied by the applicant.
- 164 ii. The project would be conducted in accordance with a watershed plan that has been
165 approved by the permitting authority and analyzed in an environmental document that
166 includes a sufficient alternatives analysis, monitoring provisions, and guidance on
167 compensatory mitigation opportunities.

⁹ "Alternatives analysis" as used in these Procedures refer to the analysis required by Section IV.A.(h) and Appendix A, State Supplement Dredged or Fill Guidelines, section 230.10(a). An alternatives analysis also may be required in order to comply with other statutory or regulatory requirements, such as CEQA. The exemptions and the tiers set forth below do not affect any alternatives analysis conducted pursuant to another statutory or regulatory requirement. To the extent that the permitting authority is acting as the lead agency under CEQA, it may be necessary for the permitting authority to conduct further analysis to comply with CEQA.

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- 168 iii. The project is an Ecological Restoration and Enhancement Project.
- 169 iv. The project has no permanent impacts to aquatic resources and no impacts to any bog, fen,
- 170 playa, seep wetland, vernal pool, headwater creek, eelgrass bed, anadromous fish habitat,
- 171 or habitat for rare, threatened or endangered species, and all implementation actions in the
- 172 restoration plan can reasonably be concluded within one year.
- 173 h. If none of the above exemptions apply, the applicant must submit an alternatives analysis
- 174 consistent with the requirements of 230.10 of the State Supplemental Dredge or Fill Guidelines
- 175 that allows the permitting authority to determine whether the proposed project is the Least
- 176 Environmentally Damaging Practicable Alternative (LEDPA). If the applicant submitted a draft
- 177 alternatives analysis to the Corps, the applicant shall provide a copy to the permitting authority.
- 178 Such alternatives analyses may satisfy some or all of the following requirements in accordance
- 179 with Section IV.B.3. Alternatives analyses shall be completed in accordance with the following
- 180 tiers, unless the permitting authority determines that a lesser level of analysis is appropriate. The
- 181 level of effort required for an alternatives analysis within each tier shall be commensurate with the
- 182 significance of the project's potential threats to water quality and beneficial uses¹⁰.
- 183 i. Tier 3 projects include any project that directly impacts more than two-tenths (0.2) of an acre
- 184 or 300 linear feet of waters of the state, or directly impacts a bog, fen, playa, seep wetland,
- 185 vernal pool, headwater creek, eelgrass bed, anadromous fish habitat, or habitat for rare,
- 186 threatened or endangered species; and is not a project that inherently cannot be located at
- 187 an alternate location. Tier 3 projects shall provide an analysis of off-site and on-site
- 188 alternatives.
- 189 ii. Tier 2 projects include any project that directly impacts more than one tenth (0.1) and less
- 190 than or equal to two tenths (0.2) of an acre or more than 100 and less than or equal to 300
- 191 linear feet of waters of the state, or any project that inherently cannot be located at an
- 192 alternate location (unless it meets the size requirements set forth in Tier 1). Tier 2 projects
- 193 shall provide an analysis of only on-site alternatives.
- 194 iii. Tier 1 projects include any project that directly impacts less than or equal to one tenth (0.1)
- 195 of an acre or less than or equal to 100 linear feet of waters of the state, unless it is a Tier 3
- 196 project because it impacts a specified habitat type. Tier 1 projects shall provide a description
- 197 of any steps that have been or will be taken to avoid and minimize loss of, or significant
- 198 adverse impacts to, beneficial uses of waters of the state.
- 199 2. Additional Information Required for a Complete Application
- 200 a. If required by the permitting authority on a case-by-case basis, if the wetland area delineations
- 201 were conducted in the dry season, supplemental field data from the wet season to substantiate
- 202 dry season delineations.

¹⁰ As used below, "impacts" include both permanent and temporary impacts.

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- 203 b. If required by the permitting authority on a case-by-case basis, an assessment of the potential
204 impacts associated with climate change related to the proposed project and any proposed
205 ~~compensation~~compensatory mitigation, and any measures to avoid or minimize those potential
206 impacts.
- 207 ~~c. If required by the permitting authority on a case-by-case basis, if no exemptions apply, an~~
208 ~~alternatives analysis in accordance with section IV.B.3 and, any supporting documentation.~~
- 209 c. ~~d.~~ If compensatory mitigation is required by the permitting authority on a case-by-case basis, an
210 assessment of the overall condition of aquatic resources proposed to receive a discharge of
211 dredged or fill material and their likely stressors, using an assessment method approved by the
212 permitting authority and a draft compensatory mitigation plan developed using a watershed
213 approach containing the items below. Compensatory mitigation plans are not required for
214 Ecological Restoration and Enhancement Projects. For permittees who intend to fulfill their
215 compensatory mitigation obligations by securing credits from approved mitigation banks or in-lieu
216 fee programs, their mitigation plans need include only the items i and ii, as described below, as
217 well as information required in Appendix A, section 230.94 (c)(5) and (c)(6), and the name of the
218 specific mitigation bank or in-lieu fee program proposed to be used.
- 219 Draft compensatory mitigation plans shall comport with the State Supplemental ~~Dredged~~Dredge
220 or Fill Guidelines, Subpart J, and include the elements listed below.
- 221 i. A watershed profile for the project evaluation area for both the proposed dredged or fill
222 project and the proposed compensatory mitigation project. ~~The scope and detail of the~~
223 ~~watershed profile shall be commensurate with the magnitude of impact associated with the~~
224 ~~proposed project, and shall describe the overall abundance, diversity, and condition of~~
225 ~~aquatic resources in the project evaluation area. The watershed profile shall include a map~~
226 ~~and report characterizing the location, abundance, and diversity of aquatic resources in the~~
227 ~~project evaluation area, and a report characterizing the condition of aquatic resources in the~~
228 ~~project evaluation area and the environmental stress factors affecting condition. In some~~
229 ~~cases, field data may need to be collected in the project evaluation area to confirm the~~
230 ~~reported condition. Some or all of the information may be obtained from a watershed plan.~~
- 231 ii. A description of how the project impacts and compensatory mitigation plan, ~~whether located~~
232 ~~inside or outside the project watershed area, does~~would not cause a net loss of the overall
233 abundance, diversity, and condition of aquatic resources, based on the watershed profile. If
234 the compensatory mitigation is located in the same watershed as the project, no net loss will
235 be determined on a watershed basis. If the compensatory mitigation and project impacts are
236 located in multiple watersheds, no net loss will be determined considering all affected
237 watersheds. The level of detail in the plan shall be sufficient to accurately evaluate whether
238 compensatory mitigation offsets the adverse impacts attributed to a project.
- 239 iii. Preliminary information about ecological performance standards, monitoring, and long-term
240 protection and management, as described in State Supplemental ~~Dredged~~Dredge or Fill
241 Guidelines.
- 242 iv. A timetable for implementing the compensatory mitigation plan.

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- 243 v. If the compensatory mitigation plan includes buffers, design criteria and monitoring
244 requirements for those buffers.
- 245 vi. If the compensatory mitigation involves restoration or establishment as the form of
246 mitigation, applicants shall ~~consult with~~notify state and federal land management agencies,
247 airport land use commission, fire control districts, flood control districts, local
248 mosquito-vector control district(s), and any other interested local entities prior to initial site
249 selection. ~~Appropriate mosquito and vector control measures, including maintenance~~
250 ~~specifications, shall be developed in coordination with local mosquito vector control~~
251 ~~district(s) or other responsible public agency(ies) during the initial compensatory mitigation~~
252 ~~project design stage.~~ vii. ~~_____ If the compensatory mitigation involves restoration or~~
253 ~~establishment on a site(s) within five miles of any airport, applicants shall consult the~~
254 ~~applicable airport land use commission or other appropriate responsible public agency to~~
255 ~~determine whether the proposed compensatory mitigation project may pose a danger to air~~
256 ~~traffic safety, and submit proof of consultation. These entities should be consulted~~These
257 entities should be notified as early as possible during the initial compensatory mitigation
258 project design stage.
- 259 d. ~~e.~~ If required by the permitting authority on a case-by-case basis, if project activities include
260 in-water work or water diversions, a proposed water quality monitoring plan to monitor compliance
261 with water quality objectives of the applicable water quality control plan. At a minimum, the plan
262 should include type and frequency of sampling for each applicable parameter.
- 263 e. ~~f.~~ In all cases where temporary impacts are proposed, a draft restoration plan that outlines design,
264 implementation, assessment, and maintenance for restoring areas of temporary impact to
265 pre-project conditions ~~including, at a minimum, the following:~~ The design components shall
266 include the objectives of the restoration plan; ~~a work schedule; plans for grading plan~~ of disturbed
267 areas to pre-project contours; a planting palette with plant species native to the area; seed
268 collection locations; and an invasive species management plan; The implementation component
269 shall include all proposed actions to implement the plan (e.g., re-contouring, initial planting, site
270 stabilization, removal of temporary structures) and a schedule for completing those actions. The
271 maintenance and assessment components shall include a description of performance standards
272 used to evaluate attainment of objectives ; the timeframe for determining attainment of
273 performance standards; and maintenance requirements (e.g., watering, weeding, ~~and replanting~~);
274 and invasive species control). The level of detail in the restoration plan shall be sufficient to
275 accurately evaluate whether the restoration offsets the adverse impacts attributed to a project.
- 276 Prior to issuance of the Order, the applicant shall submit a final restoration plan that describes the
277 restoration of all temporarily disturbed areas to pre-project conditions.
- 278 f. ~~g.~~ For all Ecological Restoration and Enhancement Projects, a draft monitoring assessment plan
279 including, ~~at a minimum,~~ the following: project objectives; description of performance standards
280 used to evaluate attainment of objectives; protocols for monitoring and data condition
281 assessment; the timeframe and responsible party for ~~determining attainment of performance~~
282 ~~standards; and monitoring schedule.~~ For Ecological Restoration and Enhancement projects,
283 monitoring shall consist of performing condition assessment; and assessment schedule. A draft
284 assessment plan shall provide for at least one assessment of the overall condition of aquatic
285 resources and their likely stressors, using an appropriate assessment method ~~subject to the~~
286 ~~approval of~~ approved by the permitting authority, prior to restoration and/or enhancement and two

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287 years following restoration and/or enhancement to determine success of the restoration and/or
288 enhancement.

289 **B. Permitting Authority Review and Approval of Applications for Individual Orders**

- 290 1. The permitting authority will evaluate the potential impacts on the aquatic environment from the
291 proposed project and determine whether the proposed project complies with these Procedures. The
292 permitting authority has the discretion to approve a project only if the applicant has demonstrated the
293 following:
- 294 a. A sequence of actions has been taken to first avoid, then to minimize, and lastly compensate for
295 adverse impacts to waters of the state;
- 296 b. The potential impacts will not contribute to a net loss of the overall abundance, diversity, and
297 condition of aquatic resources in a watershed;
- 298 c. The discharge of dredged or fill material will not violate water quality standards and will be
299 consistent with all applicable water quality control plans and policies for water quality control; and
- 300 d. The discharge of dredged or fill material will not cause or contribute to significant degradation of
301 the waters of the state.
- 302 2. The permitting authority shall rely on any ~~Corps-approved wetland area delineation within the final~~
303 aquatic resource report, with a preliminary or approved jurisdictional determination issued by the
304 Corps to determine boundaries of waters of the U.S. For all other wetland area delineations, the
305 permitting authority shall review and approve delineations that are performed using the methods
306 described in Section III.
- 307 3. ~~Alternatives Analysis Submission and Review Requirements:~~
- 308 a. The purpose of the alternatives analysis is to identify the ~~least environmentally damaging~~
309 ~~practicable alternative (LEDPA)~~ LEDPA. The permitting authority will be responsible for
310 determining the sufficiency of an alternatives analysis except as described in 3(b) below. In all
311 cases, the alternatives analysis must establish that the proposed project alternative is the LEDPA
312 in light of all potential direct, secondary (indirect), and cumulative impacts on the physical,
313 chemical, and biological elements of the aquatic ecosystem.
- 314 b. Discharges to waters of the U.S.
- 315 In reviewing and approving the alternatives analysis for discharges of dredged or fill material that
316 impact waters of the U.S., the permitting authority shall defer to the Corps and EPA'
317 determinations on the adequacy of the alternatives analysis, or rely on a draft alternatives
318 analysis if no final determination has been made, unless the Executive Officer or Executive
319 Director determines that (1) the permitting authority was not provided an adequate opportunity to
320 ~~consult during~~ collaborate in the development of the Corps' alternatives analysis, (2) the Corps'
321 alternatives analysis does not adequately address issues identified by the permitting authority
322 during consultation, (3) additional analysis is required to comply with CEQA, water quality
323 standards, or other requirements or (4) in writing by the Executive Officer or Executive Director to
324 the Corps during the development of the alternatives analysis, or (3) the proposed project and all
325 of the identified alternatives would not comply with water quality standards.
- 326 If the project also includes discharges to waters of the state outside of federal jurisdiction, the
327 permitting authority ~~may~~ shall require the applicant to supplement the alternatives analysis to

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328 include waters of the state outside of federal jurisdiction. If an alternatives analysis is not required
329 by the Corps for waters of the U.S. impacted by the discharge of dredged or fill material, the
330 permitting authority ~~may~~shall require an alternatives analysis for the entire project in accordance
331 with the State Supplemental Dredged ~~Dredge~~ or Fill Guidelines, unless the project is exempt
332 under ~~subsection (d)~~Section IV.A.1.(g) below.

333 e. ~~Discharges solely to waters of the state outside of federal jurisdiction~~

334 The permitting authority ~~may~~ require an alternatives analysis in accordance with the State
335 Supplemental Dredged or Fill Guidelines, unless the project is exempt under subsection (d)
336 below.

337 d. ~~Exemptions from Alternatives Analysis~~

338 Unless the permitting authority is required to analyze alternatives to a proposed project in order to
339 comply with CEQA, water quality standards, or other requirements the permitting authority shall
340 not require an alternatives analysis if any of the following exemptions apply.

341 i. ~~The project includes discharges to waters of U.S. only, and the project meets the terms and~~
342 ~~conditions of one or more Corps' General Permits that has been previously certified by the~~
343 ~~Water Boards. The permitting authority will verify that the project meets the terms and~~
344 ~~conditions of the Corps' General Permit based on information supplied by the applicant.~~

345 ii. ~~The project includes discharges to waters of the state outside of federal jurisdiction, and the~~
346 ~~project would meet the terms and conditions of one or more Corps' General Permits that has~~
347 ~~been previously certified by the Water Boards, if all the discharges were to waters of the U.S.~~
348 ~~The permitting authority will verify that the project would meet the terms and conditions of the~~
349 ~~Corps' General Permit(s) if all discharges were to waters of the U.S. based on information~~
350 ~~supplied by the applicant.~~

351 iii. ~~The project inherently cannot be located in an alternate location (e.g., bank stabilization~~
352 ~~projects). The permitting authority may, however, require an analysis of on-site alternatives~~
353 ~~that would minimize impacts to waters of the state.~~

354 iv. ~~The project would be conducted in accordance with a watershed plan that has been~~
355 ~~approved by the permitting authority and analyzed in an environmental document that~~
356 ~~includes a sufficient alternatives analysis, monitoring provisions, and guidance on~~
357 ~~compensatory mitigation opportunities.~~

358 v. ~~The project is an Ecological Restoration and Enhancement Project.~~

359 e. ~~The permitting authority will be responsible for determining the sufficiency of an alternatives~~
360 ~~analysis that is required under their discretion (see 3b, 3.c and 3.d above). The alternatives~~
361 ~~analysis must establish that the proposed project alternative is the LEDPA in light of all potential~~
362 ~~direct, secondary (indirect), and cumulative adverse impacts on the physical, chemical, and~~
363 ~~biological elements of the aquatic ecosystem.~~

364 f. ~~If an alternatives analysis is required by these Procedures, the final alternatives analysis shall be~~
365 ~~submitted prior to the issuance of the Order.~~

366 4. Prior to issuance of the Order, the permitting authority will review and approve the final restoration
367 plan for temporary impacts.

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368 5. Compensatory Mitigation

- 369 a. Compensatory mitigation, in accordance with the State Supplemental ~~Dredged~~Dredge or Fill
370 Guidelines, Subpart J, may be required to ensure that an activity complies with these Procedures.
- 371 b. Where feasible, the permitting authority will consult and coordinate with any other public agencies
372 that have concurrent mitigation requirements in order to achieve multiple environmental benefits
373 with a single mitigation project, thereby reducing the cost of compliance to the applicant.
- 374 c. Amount: The amount of compensatory mitigation will be determined on a project-by-project basis
375 in accordance with State Supplemental ~~Dredged~~Dredge or Fill Guidelines, section 230.93(f). The
376 permitting authority may take into account recent anthropogenic degradation to the aquatic
377 resource and the potential and existing functions and conditions of the aquatic resource. A
378 minimum of one-to-one acreage or length of stream reach replacement is necessary to
379 compensate for wetland or stream losses unless an appropriate function or condition assessment
380 method clearly demonstrates, on an exceptional basis, that a lesser amount is sufficient. A
381 reduction in the mitigation ratio for compensatory mitigation will be considered by the permitting
382 authority if buffer areas adjacent to the compensatory mitigation are also required to be
383 maintained as part of the compensatory mitigation management plan. The amount of
384 compensatory mitigation required by the permitting authority will vary depending on which of the
385 following strategies the applicant uses to locate the mitigation site within a watershed.

386 Strategy 1: Applicant locates compensatory mitigation using a watershed approach based on a
387 watershed profile developed from a watershed plan that has been approved by the permitting
388 authority and analyzed in an environmental document, includes monitoring provisions, and
389 includes guidance on compensatory mitigation opportunities;

390 Strategy 2: Applicant locates compensatory mitigation using a watershed approach based on a
391 watershed profile developed for a project evaluation area, and demonstrates that the mitigation
392 project will contribute to the sustainability of watershed functions and the overall health of the
393 watershed area's aquatic resources.

394 Generally, the amount of compensatory mitigation required under Strategy 1 will be less than the
395 amount of compensatory mitigation required under Strategy 2 since the level of certainty that a
396 compensatory mitigation project will meet its performance standards increases if the
397 compensatory mitigation project complies with a watershed plan as described above. Certainty
398 increases when there is a corresponding increase in understanding of watershed conditions,
399 which is increased when using a watershed plan as described above to determine compensatory
400 mitigation requirements.

- 401 d. Type and Location: The permitting authority will evaluate the applicant's proposed mitigation type
402 and location based on the applicant's use of a watershed approach based on a watershed profile.
403 ¶ The permitting authority will determine the appropriate type and location of compensatory
404 mitigation based on watershed conditions, impact size, location and spacing, aquatic resource
405 values, relevant watershed plans, and other considerations.

406 In general, the required compensatory mitigation should be located within the same watershed as
407 the impact site, but the permitting authority may approve compensatory mitigation in a different
408 watershed. For example, if a proposed project may affect more than one watershed, then the
409 permitting authority may determine that locating all required project mitigation in one area is
410 ecologically preferable to requiring mitigation within each watershed, based on watershed

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411 conditions, impact size, location and spacing, aquatic resource values, relevant watershed plans
412 and other considerations.

413 e. Final Compensatory Mitigation Plan: The permitting authority will review and approve the final
414 compensatory mitigation plan submitted by the applicant to ensure mitigation comports with the
415 State Supplemental ~~Dredged~~Dredge or Fill Guidelines, Water Code requirements, applicable
416 water quality standards, and other appropriate requirements of state law. The level of detail in the
417 final plan shall be sufficient to accurately evaluate whether compensatory mitigation offsets the
418 adverse impacts attributed to a project considering the overall size and scope of impact. The
419 compensatory mitigation plan shall be sufficient to provide the permitting authority with a
420 reasonable assurance that replacement of the full range of lost aquatic resource(s) and/or
421 functions will be provided in perpetuity.

422 The permitting authority may include as a condition of an Order that the applicant receive
423 approval of a final mitigation plan prior to discharging dredged or fill materials to waters of the
424 state. In this case, the permitting authority will approve the final mitigation plan by amending the
425 Order.

426 f. Financial Security: Where deemed necessary by the permitting authority, provision of a financial
427 security (e.g., letter of credit or performance bond) shall be a condition of the Order. In this case,
428 the permitting authority will approve the financial security to ensure compliance with
429 compensatory mitigation plan requirements.

430 g. Term of Mitigation Obligation: The permitting authority may specify in the Order the conditions
431 that must be met in order for the permitting authority to release the permittee from the mitigation
432 obligation, including compensatory mitigation performance standards and long term
433 management funding obligations.

434 6. The permitting authority shall provide public notice in accordance with Water Code section 13167.5
435 for waste discharge requirements. The permitting authority shall provide public notice of an
436 application for water quality certification in accordance with California Code of Regulations, title 23,
437 section 3858. If the permitting authority receives comments on the application or there is substantial
438 public interest in the project, the permitting authority shall also provide public notice of the draft Order,
439 or draft amendment of the Order, unless circumstances warrant a shorter notice period.

440 7. The permitting authority will review and approve the final monitoring and reporting requirements for all
441 projects. Monitoring and reporting may be required to demonstrate compliance with the terms of the
442 Order.

443 C. General Orders

444 The permitting authority may issue general orders for specific classes of dredged or fill discharge
445 activities that are similar; involve the same or similar types of discharges and possible adverse impacts
446 requiring the same or similar conditions or limitations in order to alleviate potential adverse impacts to
447 water quality; and are determined by the permitting authority to more appropriately be regulated under a
448 general order rather than under an individual Order.

449 General orders shall be reviewed, noticed, and issued in accordance with the applicable requirements of
450 division 7 of the Water Code and the California Code of Regulations, division 3 of title 23.

451 Applicants applying to enroll under a general order shall ~~file a Notice of Intent with the permitting authority~~
452 in accordance with the instructions specified in the general order for obtaining coverage.

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453 **D. Activities and Areas Excluded from the Application Procedures for Regulation of**
454 **Discharges of Dredged or Fill Material to Waters of the State**

455 The application procedures specified in sections IV.A and IV.B do not apply to proposed discharges of
456 dredged or fill material to waters of the state from the following activities or to the following areas. These
457 exclusions do not, however, affect the Water Board’s authority to issue or waive waste discharge
458 requirements (WDRs) or take other actions for the following activities or areas to the extent authorized by
459 the Water Code.

- 460 1. Activities excluded from application procedures in sections IV.A and IV.B:
- 461 a. Activities that are exempt under CWA section 404(f) (33 USC § 1344(f)). The following federal
462 regulations (Table 1), guidance letters (Table 2), and memoranda (Table 3), that have been
463 adopted pursuant to CWA section 404(f) or that are used to interpret or implement section 404(f)
464 shall be used when determining whether certain activities are excluded from these procedures.
465 These documents are hereby incorporated by reference and shall apply to all waters of the state.
466 Consistent with CWA section 404(f)(2) and 40 CFR section 232.3, any discharge of dredged or fill
467 material to a water of the state incidental to any of these activities is not exempt under CWA
468 section 404(f) and shall be subject to the application procedures sections IV.A and IV.B, if (1) the
469 purpose of the activity is bringing a water of the state into a use to which it was not previously
470 subject, where the flow or circulation of water of the state may be impaired or the reach of such
471 waters be reduced, or (2) the discharge contains any toxic pollutant listed in CWA section 307.

472
473 **b. Table 1: CFR References⁶¹¹**

Title	Section	Name
33 CFR	323.4	Discharges not requiring permits (1986)
40 CFR	232.3	Activities not requiring permits (1988)

474 **Table 2: Applicable U.S. Army Corps of Engineers (Corps) Regulatory Guidance Letters**
475 **(RGLs)⁷¹²**

RGL	Title
82-03	Irrigation Exemption in Section 404(F)(1)(C) of the Clean Water Act
84-01	Regulatory Jurisdiction Over Vegetative Operations
84-05	Fifth Circuit Decision in <i>Avoyelles vs. Marsh</i>

⁶¹¹ The documents in Table 1 are available at the U.S. Government Printing Office, Code of Federal Regulations webpage:
<http://www.gpo.gov/fdsys/browse/collectionCfr.action?collectionCode=C.F.R.>

⁷¹² The documents in Table 2 are available at the U.S. Army Corps of Engineers, Regulatory Program and Permits, Related Resources,
Regulatory Guidance Letters webpage: <http://www.usace.army.mil/Missions/CivilWorks/RegulatoryProgramandPermits/GuidanceLetters.aspx>

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85-04	Agricultural Conversion
86-01	Exemptions to Clean Water Act - Plowing
86-03	Exemption of Farm and Forest Roads
87-07	Exemption for Drainage Ditch Maintenance
87-09	Exemption for Construction or Maintenance of Farm or Stock Ponds
92-02	Water Dependency and Cranberry Production
93-03	Rescission of RGL's 90-5 and 90-8
96-02	Applicability of Exemptions under Section 404(f) to "Deep Ripping" Activities in Wetlands
07-02	Exemptions for Construction or Maintenance of Irrigation Ditches and Maintenance of Drainage Ditches Under Section 404 of Clean Water Act

476

477

Table 3: Memoranda⁸¹³

Memorandum for the Field: Clean Water Act Section 404 Regulatory Program and Agricultural Activities (1990)

478

479

c. ~~b.~~ Suction dredge mining activities for mineral recovery regulated under CWA section 402.

480

2. Areas excluded from application procedures in sections IV.A and IV.B:

481

a. Discharges of dredged or fill material that occur within wetland areas that have been certified as prior converted cropland (PCC) by the Natural Resources Conservation Service. The PCC exclusion will no longer apply if: (1) the PCC changes to a non-agricultural use, or (2) the PCC is abandoned, meaning it is not planted to an agricultural commodity for more than five consecutive years and wetland characteristics return, and the land was not left idle in accordance with a USDA program.

487

i. For purposes of D.2.(a), agricultural commodity means any crop planted and produced by annual tilling of the soil, including tiling by one-trip planters, or sugarcane.⁹¹⁴

488

489

ii. For purposes of D.2.(a), agricultural use means open land planted to an agricultural crop, used for the production of (1) food or fiber, (2) used for haying or grazing, (3) left idle per a USDA program, or (4) diverted from crop production to an approved cultural practice by

490

491

⁸¹³ These documents are available at the U.S. Army Corps of Engineers Regulatory Program and Permits, Related Resources, Memoranda of Understanding/Agreement webpage: <http://www.usace.army.mil/Missions/CivilWorks/RegulatoryProgramandPermits/MOUMOAs.aspx>

⁹¹⁴ Joint Guidance from the Natural Resources Conservation Service and the Army Corps of Engineers Concerning Wetland Determinations for the Clean Water Act and the Food Security Act of 1985, February 25, 2005.

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492 NRCS that prevents erosion or other degradation.⁴⁰¹⁵ ~~b. Discharges of dredged or fill~~
493 ~~material for the purpose of creating or maintaining constructed treatment wetlands, as long~~
494 ~~as the constructed treatment wetland is located in an area that did not historically support~~
495 ~~wetland areas or other aquatic resources, and the treatment wetlands were not constructed~~
496 ~~as mitigation for discharges of dredged or fill material to other wetlands.~~

497 b. ~~e.~~ Discharges of dredged or fill material that are associated with routine maintenance of storm
498 water facilities regulated under another Water Board Order, such as sedimentation/storm water
499 detention basins.

500 For activities associated with (1) an appropriation of water subject to Part 2 (commencing with section
501 1200) of Division 2 of the Water Code, (2) a hydroelectric facility where the proposed activity requires a
502 Federal Energy Regulatory Commission (FERC) license or amendment to a FERC license, or (3) any
503 other diversion of water for beneficial use, the Division of Water Rights will inform the applicant whether
504 the application procedures in sections IV.A and IV.B will apply to the application.

505 V. Definitions

506 The following definitions apply to these Procedures, including the State Supplemental ~~Dredged~~Dredge or
507 Fill Guidelines. Unless otherwise indicated, any term that is not defined in these Procedures shall have
508 the same meaning as defined in Water Code section 13050, and title 23, section 3831 of the California
509 Code of Regulations.

510 **Abundance** means an estimate of the amount of aquatic resources by type in a watershed area, and
511 what types of aquatic resources are most and least prevalent.

512 **Alternatives Analysis** is the process of analyzing project alternatives, including the proposed project, to
513 determine the alternative that is both practicable and the least environmentally damaging.

514 **Application** means a written request, including a report of waste discharge or request for water quality
515 certification, for authorization of any activity that may result in the discharge of dredged or fill material and
516 is subject to ~~this Policy~~ these Procedures.

517 **Wetland Delineation** means the application of a technical and procedural method to identify the
518 boundary of a wetland area within a specified study site by identifying the presence or absence of wetland
519 indicators at multiple points at the site and by establishing boundaries that group together sets of points
520 that share the same status as wetland versus non-wetland.

521 **Discharge of Dredged Material** means addition of dredged material, material that is excavated or
522 dredged from waters of the state, including redeposit of dredged material other than incidental fallback
523 within, to the waters of state.

524 **Diversity** means the relative proportion of aquatic resource types, classification, connectivity, and spatial
525 distribution in a watershed area.

⁴⁰¹⁵ Joint Guidance from the Natural Resources Conservation Service and the Army Corps of Engineers Concerning Wetland Determinations for the Clean Water Act and the Food Security Act of 1985, February 25, 2005

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526 **Discharge of Fill Material** means the addition of fill material where the material has the effect of
527 replacing any portion of a water of the state with dry land or changing the bottom elevation of any portion
528 of a water of the state.

529 **Ecological Restoration and Enhancement Project** means ~~projects~~the project is voluntarily undertaken
530 for the ~~sole~~ purpose of assisting or controlling the recovery of an aquatic ecosystem that has been
531 degraded, damaged or destroyed to restore some measure of its natural condition and to enhance the
532 beneficial uses ~~of, including~~ potential beneficial uses of water. Such projects are undertaken ~~voluntarily;~~
533 1) in accordance with the terms and conditions of a binding stream or wetland enhancement or
534 restoration agreement, or a wetland establishment agreement, between the landowner and the U.S. Fish
535 and Wildlife Service, Natural Resources Conservation Service, Farm Service Agency, National Marine
536 Fisheries Service, National Oceanic and Atmospheric Administration, U.S. Forest Service, U.S. Bureau
537 of Land Management, California Department of Fish and Wildlife, California Wildlife Conservation Board,
538 California Coastal Conservancy, or other federal or state resource agency or non-governmental
539 conservation organization; or 2) by a state or federal agency. These projects do not include the
540 conversion of a stream or natural wetland to ~~another aquatic habitat type or uplands; or~~ stream
541 channelization; ~~or relocation of tidal waters or the conversion of tidal waters, including tidal wetlands, to~~
542 ~~other aquatic uses, such as the conversion of tidal wetlands into open water impoundments.~~ It is
543 recognized that ecological restoration and enhancement projects may require filling gullied stream
544 channels and similar rehabilitative activities to re-establish stream and meadow hydrology. Changes in
545 wetland plant communities that occur when wetland hydrology is more fully restored during rehabilitation
546 activities are not considered a conversion to another aquatic habitat type. These projects also do not
547 include actions required under a Water Board order (e.g., WDRs, waivers of WDRs, or water quality
548 certification) for mitigation, actions to service required mitigation, or actions undertaken for the primary
549 purpose of land development, ~~agricultural production, property protection, or flood management.~~

550 **Environmental Document** means a document prepared for compliance with the California
551 Environmental Quality Act or the National Environmental Policy Act.

552 **Hydrophyte** means any macrophyte that grows in water or on a substrate that is at least periodically
553 deficient in oxygen as a result of excessive water content; plants typically found in wet habitats.

554 **LEDPA** means the least environmentally damaging practicable alternative. The determination of
555 practicable alternatives shall be consistent with the State Supplemental Guidelines, section 230.10(a).

556 **Normal Circumstances** is the soil and hydrologic conditions that are normally present, without regard to
557 whether the vegetation has been removed. The determination of whether normal circumstances exist in
558 a disturbed area involves an evaluation of the extent and relative permanence of the physical alteration of
559 wetlands hydrology and hydrophytic vegetation and consideration of the purpose and cause of the
560 physical alterations to hydrology and vegetation.

561 **Order** means Waste Discharge Requirements, waivers of Waste Discharge Requirements, or water
562 quality certification.

563 **Permitting Authority** means the entity or person issuing the Order (i.e., the applicable Water Board,
564 Executive Director or Executive Officer, or his or her designee).

565 **Project Evaluation Area** means an area that includes the project impact site, and/or the compensatory
566 mitigation site, and is sufficiently large to evaluate the effects of the project and/or the compensatory
567 mitigation on the abundance, diversity, and condition of aquatic resources in an ecologically meaningful

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568 unit of the watershed. The size and location of the ecologically meaningful unit shall be based on a
569 reasonable rationale.

570 **Water Boards** mean any of the nine Regional Water Quality Control Boards, the State Water Resources
571 Control Board, or all of them collectively.

572 **Watershed** means a land area that drains to a common waterway, such as a stream, lake, estuary,
573 wetland, or ultimately the ocean.

574 **Watershed Approach** means an analytical process for evaluating the environmental effects of a
575 proposed project and making decisions that support the sustainability or improvement of aquatic
576 resources in a watershed. The watershed approach recognizes that the abundance, diversity, and
577 condition of aquatic resources in a watershed support beneficial uses. Diversity of aquatic resources
578 includes both the types of aquatic resources and the locations of those aquatic resources in a watershed.
579 Consideration is also given to understanding historic and potential aquatic resource conditions, past and
580 projected aquatic resource impacts in the watershed, and terrestrial connections between aquatic
581 resources. The watershed approach can be used to evaluate avoidance and minimization of direct,
582 indirect, secondary, and cumulative project impacts. It also can be used in determining compensatory
583 mitigation requirements.

584 **Watershed Plan** means a document that provides assessment and management information for a
585 geographically defined watershed, including the analyses, actions, participants, and resources related to
586 development and implementation of the plan. developed in consultation with relevant stakeholders, for
587 the specific goal of aquatic resource restoration, establishment, enhancement, and preservation within a
588 watershed. A watershed plan addresses aquatic resource conditions in the watershed, multiple
589 stakeholder interests, and land uses. Watershed plans should include information about implementing
590 the watershed plan. Watershed plans may also identify priority sites for aquatic resource restoration and
591 protection. Examples of watershed plans include special area management plans, advance identification
592 programs, and wetland management plans. The permitting authority may approve the use of HCPs and
593 NCCPs as watershed plans.

594 **Watershed Profile** means a compilation of data or information on the abundance, ~~types~~diversity, and
595 condition of aquatic resources in a project evaluation area ~~sufficient to provide~~. The watershed profile
596 shall include a map and a report characterizing the location, abundance and diversity of aquatic
597 resources in the project evaluation area, assessing the condition of aquatic resources in the project
598 evaluation area, and describing the environmental stress factors affecting that condition.

599 The watershed profile shall include information sufficient to evaluate direct, secondary, and cumulative
600 impacts of project and factors that may favor or hinder the success of compensatory mitigation
601 alternatives projects, and to help define watershed goals. It may include such things as current trends in
602 habitat loss or conservation, cumulative impacts of past development activities, current development
603 trends, the presence and need of sensitive species, and chronic environmental problems or site
604 conditions such as flooding or poor water quality.

605 The scope and detail of the watershed profile shall be commensurate with the magnitude of impact
606 associated with the proposed project. Information sources include online searches, maps, watershed
607 plans, and possibly some fieldwork if necessary. In some cases, field data may need to be collected in
608 the project evaluation area to confirm the reported condition. Some or all of the information may be

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609 obtained from a watershed plan. Watershed profiles for subsequent projects in a watershed can be used
610 to track the cumulative effectiveness of the permitting authority's decisions.

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612

613 **Appendix A: State Supplemental ~~Dredged~~Dredge or Fill Guidelines**

614 It is the intent of the Water Boards to be consistent with the ~~Corps~~EPA's 404(b)(1) Guidelines where
615 feasible. Due to jurisdictional and procedural differences, some modifications to the ~~Corps~~EPA's
616 Guidelines were necessary. Generally, these changes or deletions were made to reduce redundancy
617 (especially where sufficiently described elsewhere in these Procedures) and to account for other state
618 requirements. Note that the numbering scheme of the ~~Corps~~EPA's 404(b)(1) Guidelines has been
619 retained in these State Supplemental ~~Dredged~~Dredge or Fill Guidelines for the benefit of practitioners
620 who are familiar with the ~~Corps'~~federal Guidelines. The State Supplemental ~~Dredged~~Dredge or Fill
621 Guidelines describe how the Water Boards will implement the 404(b)(1) Guidelines, ~~40 CFR~~ under these
622 Procedures. ~~In cases of conflict, Parts I through V take precedence over these~~ The definitions contained
623 herein apply to these Procedures, including the State Supplemental ~~Dredged~~Dredge or Fill Guidelines.

624 **Subpart A – General**⁴⁴¹⁶

625 § 230.3 Definitions.

626 For purposes of these Procedures, the following terms shall have the meanings indicated:

627 (c) The terms aquatic environment and aquatic ecosystem mean waters of the state, including
628 wetlands, that serve as habitat for interrelated and interacting communities and populations of plants
629 and animals.

630 (h) The term discharge point means the point within the disposal site at which the dredged or fill
631 material is released.

632 (i) The term disposal site means that portion of the “waters of the state” where the discharge of
633 dredged or fill material is permitted and involves a bottom surface area and any overlying volume of
634 water. In the case of wetlands or ephemeral streams on which surface water is not present, the
635 disposal site consists of the wetland or ephemeral stream surface area.

636 (k) The term extraction site means the place from which the dredged or fill material proposed for
637 discharge is to be removed.

638 (n) The term permitting authority means as defined above in the main text of ~~this Policy~~ these
639 Procedures.

640 (q) The term practicable means available and capable of being done after taking into consideration
641 cost, existing technology, and logistics in light of overall project purposes.

642 (q1) Special aquatic sites are geographic areas, large or small, possessing special ecological
643 characteristics of productivity, habitat, wildlife protection, or other important and easily disrupted
644 ecological values. These areas are generally recognized as significantly influencing or positively

⁴⁴¹⁶ Note that the numbering scheme of the Corps' 404(b)(1) Guidelines has been retained for the benefit of practitioners who are familiar with the Corps' 404(b)(1) Guidelines.

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645 contributing to the general overall environmental health or vitality of the entire ecosystem of a region.
646 (See § 230.10 (a)(3))

647 § 230.6 Adaptability⁴²¹⁷

648 (a) The manner in which these Guidelines are used depends on the physical, biological, and chemical
649 nature of the proposed extraction site, the material to be discharged, and the candidate disposal site,
650 including any other important components of the ecosystem being evaluated. Documentation to
651 demonstrate knowledge about the extraction site, materials to be extracted, and the candidate
652 disposal site is an essential component of guideline application. These Guidelines allow evaluation
653 and documentation for a variety of activities, ranging from those with large, complex impacts on the
654 aquatic environment to those for which the impact is likely to be innocuous. It is unlikely that the
655 Guidelines will apply in their entirety to any one activity, no matter how complex. It is anticipated that
656 substantial numbers of ~~permit~~ applications will be for minor, routine activities that have little, if any,
657 potential for significant degradation of the aquatic environment. It generally is not intended or
658 expected that extensive testing, evaluation or analysis will be needed to make findings of compliance
659 in such routine cases.

660 ~~Where the conditions for General permits are met, and where numerous applications for similar~~
661 ~~activities are likely, the use of General permits will eliminate repetitive evaluation and documentation~~
662 ~~for individual discharges.~~(b) The Guidelines user, including the agency or agencies responsible for
663 implementing the Guidelines, must recognize the different levels of effort that should be associated
664 with varying degrees of impact and require or prepare commensurate documentation. The level of
665 documentation should reflect the significance and complexity of the discharge activity.

666 (c) An essential part of the evaluation process involves making determinations as to the relevance of
667 any portion(s) of the Guidelines and conducting further evaluation only as needed. However, where
668 portions of the Guidelines review procedure are “short form” evaluations, there still must be sufficient
669 information (including consideration of both individual and cumulative impacts) to support the
670 decision of whether to specify the site for disposal of dredged or fill material and to support the
671 decision to curtail or abbreviate the evaluation process. The presumption against the discharge in [§](#)
672 [230.1](#) applies to this decision-making.

673 ~~(d) In the case of activities covered by General permits for dredge and fill activities issued by the~~
674 ~~permitting authority, the analysis and documentation required by the Guidelines will be performed at~~
675 ~~the time of General permit for dredge and fill activities issuance by the permitting authority and will not~~
676 ~~be repeated when activities are conducted under a General permit for dredge and fill activities issued~~
677 ~~by the permitting authority. These Guidelines do not require reporting or formal written~~
678 ~~communication at the time individual activities are initiated under a General permit for dredge and fill~~
679 ~~activities issued by the permitting authority. However, a particular General permit for dredge and fill~~
680 ~~activities issued by the permitting authority may require appropriate reporting.~~

681 **Subpart B – Compliance with Guidelines**¹³¹⁸

⁴²¹⁷ Note that the numbering scheme of the Corps' 404(b)(1) Guidelines has been retained for the benefit of practitioners who are familiar with the Corps' 404(b)(1) Guidelines.

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682 § 230.10 Restrictions on Discharge

683 (a) No discharge of dredged or fill material shall be permitted if there is a practicable alternative to the
684 proposed discharge which would have less adverse impact on the aquatic ecosystem, so long as the
685 alternative does not have other significant adverse environmental consequences.

686 (1) For the purpose of this requirement, practicable alternatives include, but are not limited to:

687 (i) Activities which do not involve a discharge of dredged or fill material to waters of the state or
688 ocean waters;

689 (ii) Discharges of dredged or fill material at other locations in waters of the state or ocean
690 waters;

691 (2) An alternative is practicable if it is available and capable of being done after taking into
692 consideration cost, existing technology, and logistics in light of overall project purposes. If it is
693 otherwise a practicable alternative, an area ~~not~~ presently owned by the applicant which could
694 reasonably be obtained, utilized, expanded or managed in order to fulfill the basic purpose of the
695 proposed activity may be considered.

696 (3) Where activity associated with a discharge which is proposed for a special aquatic site (as
697 defined in subpart E) does not require access or proximity to or ~~sittings~~siting within the special
698 aquatic site in question to fulfill its basic purpose (i.e., ~~is~~ not “water dependent”), practicable
699 alternatives that do not involve special aquatic sites are presumed to be available, unless clearly
700 demonstrated otherwise. In addition, where a discharge is proposed for a special aquatic site, all
701 practicable alternatives to the proposed discharge which do not involve a discharge into a special
702 aquatic site are presumed to have less adverse impact on the aquatic ecosystem, unless clearly
703 demonstrated otherwise.

704 (b) No discharge of dredged or fill material shall be permitted if it:

705 (1) Causes or contributes, after consideration of disposal site dilution and dispersion, to violations
706 of any applicable State water quality standard;

707 (2) Violates any applicable toxic effluent standard or prohibition under section 307 of the Clean
708 Water Act;

709 (c) No discharge of dredged or fill material shall be permitted which will cause or contribute to
710 significant degradation of the waters of the state. Under these Guidelines, effects contributing to
711 significant degradation considered individually or collectively, include:

712 (1) Significantly adverse effects of the discharge of pollutants on human health or welfare,
713 including but not limited to effects on municipal water supplies, plankton, fish, shellfish, wildlife,
714 and special aquatic sites;

715 (2) Significantly adverse effects of the discharge of pollutants on life stages of aquatic life and
716 other wildlife dependent on aquatic ecosystems, including the transfer, concentration, and spread

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717 of pollutants or their byproducts outside of the disposal site through biological, physical, and
718 chemical processes.

719 (3) Significantly adverse effects of the discharge of pollutants on aquatic ecosystem diversity,
720 productivity, and stability. Such effects may include, but are not limited to, loss of fish and wildlife
721 habitat or loss of the capacity of a wetland to assimilate nutrients, purify water, or reduce wave
722 energy; or

723 (4) Significantly adverse effects of the discharge of pollutants on recreational, aesthetic, and
724 economic values.

725 (d) No discharge of dredged or fill material shall be permitted unless appropriate and practicable
726 steps have been taken which will minimize potential adverse impacts of the discharge on the aquatic
727 ecosystem. Subpart H identifies such possible steps.

728 **Subpart E- – Potential Impacts on Special Aquatic Sites**

729 § 230.40 Sanctuaries and refuges⁴⁴¹⁹

730 (a) Sanctuaries and refuges consist of areas designated under State and Federal laws or local
731 ordinances to be managed principally for the preservation and use of fish and wildlife resources.

732 § 230.41 Wetlands.

733 ~~(a)(1) Wetlands consist of areas that are inundated or saturated by surface or groundwater at a frequency~~
734 ~~and duration sufficient to support, and under normal circumstances do support, a prevalence of~~
735 ~~vegetation typically adapted for life in saturated soil conditions. are as defined above in the main text of~~
736 ~~these Procedures.~~

737 § 230.42 Mud Flats.

738 (a) Mud flats are broad flat areas along the sea coast and in coastal rivers to the head of tidal influence
739 and inland lakes, ponds, and riverine systems. When mud flats are inundated, wind and wave action may
740 resuspend bottom sediments. Coastal mud flats are exposed at extremely low tides and inundated at
741 high tides with the water table at or near the surface of the substrate. The substrate of mud flats contains
742 organic material and particles smaller in size than sand. They are either unvegetated or vegetated only
743 by algal mats.

744 § 230.43 Vegetated shallows.

745 (a) Vegetated shallows are permanently inundated areas that under normal circumstances support
746 communities of rooted aquatic vegetation, such as turtle grass and eel grass in estuarine or marine
747 systems as well as a number of freshwater species in rivers and lakes.

748 § 230.45 Riffle and Pool Complexes.

749 (a) Steep gradient sections of streams are ~~sometimes~~sometimes characterized by ~~rigger~~riffle and pool
750 complexes. Such stream sections are recognizable by their hydraulic characteristics. The rapid
751 movement of water over a coarse substrate in riffles results in a rough flow, a turbulent surface, and high

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752 dissolved oxygen levels in the water. Pools are deeper areas associated with riffles. Pools are
753 characterized by a slower stream velocity, a streaming flow, a smooth surface, and a finer substrate.
754 Riffle and pool complexes are particularly valuable habitat for fish and wildlife.

755 **Subpart H – Actions to Minimize Adverse Effects**

756 Note: There are many actions which can be undertaken in response to 230.10(d) to minimize the
757 adverse effects of discharges of dredged or fill material. Some of these, grouped by type of activity, are
758 listed in this subpart. Additional criteria for compensation measures are provided in subpart J of this
759 Policy. these procedures.

760 § 230.70 Actions concerning the location of the discharge.

761 The effects of the discharge can be minimized by the choice of the disposal site. Some of the ways to
762 accomplish this are by:

- 763 (a) Locating and confining the discharge to minimize smothering of organisms;
- 764 (b) Designing the discharge to avoid a disruption of periodic water inundation patterns;
- 765 (c) Selecting a disposal site that has been used previously for dredged material discharge;
- 766 (d) Selecting a disposal site at which the substrate is composed of material similar to that being
767 discharged, such as discharging sand on sand or mud on mud;
- 768 (e) Selecting a disposal site, the discharge point, and the method of discharge to minimize the extent
769 of any plume;
- 770 (f) Designing the discharge of dredged or fill material to minimize or prevent the creation of standing
771 bodies of water in areas of normally fluctuating water levels, and minimize or prevent the drainage of
772 areas subject to such fluctuations.

773 § 230.71 Actions concerning the material to be discharged⁴⁵²⁰

774 The effects of a discharge can be minimized by treatment of, or limitations on the material itself, such
775 as:

- 776 (a) Disposal of dredged material in such a manner that physiochemical conditions are maintained and
777 the potency and availability of pollutants are reduced.
- 778 (b) Limiting the solid, liquid, and gaseous components of material to be discharged at a particular site;
- 779 (c) Adding treatment substances to the discharge material;
- 780 (d) Utilizing chemical flocculants to enhance the deposition of suspended particulates in diked
781 disposal areas.

782 § 230.72 Actions controlling the material after discharge.

783 The effects of the dredged or fill material after discharge may be controlled by:

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- 784 (a) Selecting discharge methods and disposal sites where the potential for erosion, slumping or
785 leaching of materials into the surrounding aquatic ecosystem will be reduced. These sites or methods
786 include, but are not limited to:
- 787 (1) Using containment levees, sediment basins, and cover crops to reduce erosions:
- 788 (2) Using lined containment areas to reduce leaching where leaching of chemical constituents
789 from the discharged material is expected to be a problem;
- 790 (b) Capping in-place contaminated material with clean material or selectively discharging the most
791 contaminated material first to be capped with the remaining material;
- 792 (c) Maintaining and containing discharged material properly to prevent point and nonpoint sources of
793 pollution;
- 794 (d) Timing the discharge to minimize impact, for instance during periods of unusual high water flows,
795 wind, wave, and tidal actions.

796 § 230.73 Actions affecting the method of dispersion.

797 The effects of a discharge can be minimized by the manner in which it is dispersed, such as:

- 798 (a) Where environmentally desirable, distributing the dredged material widely in a thin layer at the
799 disposal site maintain natural substrate contours and elevation;
- 800 (b) Orienting a dredged or fill material mound to minimize undesirable obstruction to the water current
801 or circulation pattern, and utilizing natural bottom contours to minimize the size of the mound;
- 802 (c) Using silt screens or other appropriate methods to confine suspended particulate/turbidity to a
803 small area where settling or removal can occur;
- 804 (d) Making use of currents and circulation patterns to mix, disperse and dilute the discharge;
- 805 (e) Minimizing water column turbidity by using a submerged diffuser system. A similar effect can be
806 accomplished by submerging pipeline discharges or otherwise releasing materials near the bottom;
- 807 (f) Selecting sites or managing discharges to confine and minimize the release of suspended
808 particulates to give decreased turbidity levels and to maintain light penetration for organisms;
- 809 (g) Setting limitations on the amount of material to be discharged per unit of time or volume of
810 receiving water.

811 § 230.74 Actions related to technology.

812 Discharge technology should be adapted to the needs of each site. In determining whether the
813 discharge operation sufficiently minimizes adverse environmental impacts, the applicant should
814 consider:

- 815 (a) Using appropriate equipment or machinery, including protective devices, and the use of such
816 equipment or machinery in activities related to the discharge ~~or of~~ dredged or fill material;
- 817 (b) Employing appropriate maintenance and operation on equipment or machinery, including
818 adequate training, staffing, and working procedures;
- 819 (c) Using machinery and techniques that are especially designed to reduce damage to wetlands. This
820 may include machines equipped with devices that scatter rather than mound excavated materials,

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- 821 machines with specially designed wheels or tracks, and the use of mats under heavy machines to
822 reduce wetland surface compaction and rutting;
- 823 (d) Designing access roads and channels spanning structures using culverts, open channels, and
824 diversions that will pass both low and high water flows, accommodate fluctuating water levels, and
825 maintain circulation and faunal movement;
- 826 (e) Employing appropriate machinery and methods of transport of the material for discharge.
- 827 § 230.75 Actions affecting plant and animal populations.⁴⁶²¹
- 828 Minimization of adverse effects on populations of plant and animals can be achieved by:
- 829 (a) Avoiding changes in water current and circulation patterns which would interfere with the
830 movement of animals;
- 831 (b) Selecting sites or managing discharges to prevent or avoid creating habitat conducive to the
832 development of undesirable predators or species which have a competitive edge ecologically over
833 indigenous plants or animals;
- 834 (c) Avoiding sites having unique habitat or other value, including habitat of threatened or endangered
835 species;
- 836 (d) Using planning and construction practices to institute habitat development and restoration to
837 produce a new or modified environmental state of higher ecological value by displacement of some or
838 all of the existing environmental characteristics. Habitat development and restoration techniques can
839 be used to minimize adverse impacts and to compensate for destroyed habitat. Additional criteria for
840 compensation measures are provided in subpart J of this part. Use techniques that have been
841 demonstrated to be effective in circumstances similar to those under consideration wherever
842 possible. Where proposed development and restoration techniques have not yet advanced to the
843 pilot demonstration stage, initiate their use on a small scale to allow corrective action if unanticipated
844 adverse impacts occur;
- 845 (e) Timing discharge to avoid spawning or migration seasons and other biologically critical time
846 periods;
- 847 (f) Avoiding the destruction of remnant natural sites within areas already affected by development.
- 848 § 230.76 Actions affecting human use.
- 849 Minimization of adverse effects on human use potential may be achieved by:
- 850 (a) Selecting discharge sites and following discharge procedures to prevent or minimize any potential
851 damage to the aesthetically pleasing features of the aquatic site (e.g. viewscales), particularly with
852 respect to water quality;
- 853 (b) Selecting disposal sites which are not valuable as natural aquatic areas;
- 854 (c) Timing the discharge to avoid the seasons or periods when human recreational activity associated
855 with the aquatic site is most important;

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- 856 (d) Following discharge procedures which avoid or minimize the disturbance of aesthetic features on
857 an aquatic site or ecosystem;
- 858 (e) Selecting sites that will not be detrimental or increase incompatible human activity, or require the
859 need for frequent dredge or fill maintenance activity in remote fish and wildlife areas;
- 860 (f) Locating the disposal site outside of the vicinity of a public water supply intake.
- 861 § 230.77 Other actions.
- 862 (a) In the case of fills, controlling runoff and other discharges from activities to be conducted on the fill;
- 863 (b) In the case of dams, designing water releases to accommodate the needs ~~of~~ fish and wildlife;
- 864 (c) In dredging projects funded by Federal agencies other than the Corps of Engineers, maintain
865 desired water quality of the return discharge through agreement with the Federal funding authority on
866 scientifically defensible pollutant concentration levels in addition to any applicable water quality
867 standards;
- 868 (d) When a significant ecological change in the aquatic environment is proposed by the discharge ~~of~~
869 dredged or fill material, the permitting authority should consider the ecosystem that will be lost as well
870 as the environmental benefits of the new system.

871 **Subpart J – Compensatory Mitigation for Losses of Aquatic Resources**⁴⁷²²

872 § 230.91 Purpose and general considerations.

873 (a) Purpose.

874 (1) The purpose of this subpart is to establish standards and criteria for the use of all types of
875 compensatory mitigation, including on-site and off-site permittee-responsible mitigation,
876 mitigation banks, and in-lieu fee mitigation to offset unavoidable impacts to waters of the state
877 authorized through the issuance of ~~permits~~Orders.

878 (d) Accounting for regional variations. Where appropriate, the permitting authority shall account for
879 regional characteristics of aquatic resource types, functions and services when determining
880 performance standards and monitoring requirements for compensatory mitigation projects.

881 § 230.92 Definitions.⁴⁸²³

882 For the purposes of this subpart, the following terms are defined:

883 Adaptive management means the development of a management strategy that anticipates likely
884 challenges associated with compensatory mitigation projects and provides for the implementation of
885 actions to address those challenges, as well as unforeseen changes to those projects. It requires
886 consideration of the risk, uncertainty, and dynamic nature of compensatory mitigation projects and

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- 887 guides modification of those projects to optimize performance. It includes the selection of appropriate
888 measures that will ensure that the aquatic resource functions are provided and involves analysis of
889 monitoring results to identify potential problems of a compensatory mitigation project and the
890 identification and implementation of measures to rectify those problems.
- 891 Buffer means an upland, wetland, and/or riparian area that protects and/or enhances aquatic resource
892 functions associated with waters of the state from disturbances associated with adjacent land uses.
- 893 Compensatory mitigation means the restoration (re-establishment or rehabilitation), establishment
894 (creation), enhancement, and/or in certain circumstances preservation of aquatic resources for the
895 purposes of offsetting unavoidable adverse impacts which remain after all appropriate and practicable
896 avoidance and minimization has been achieved.
- 897 Compensatory mitigation project means compensatory mitigation implemented by the permittee as a
898 requirement of a permit Order (i.e., permittee-responsible mitigation), or by a mitigation bank or an
899 in-lieu fee program.
- 900 Condition means the relative ability of an aquatic resource to support and maintain a community of
901 organisms having a species composition, diversity, and functional organization comparable to
902 reference aquatic resources in the region.
- 903 Credit means a unit of measure (e.g., a functional or areal measure or other suitable metric)
904 representing the accrual or attainment of aquatic functions at a compensatory mitigation site. The
905 measure of aquatic functions is based on the resources restored, established, enhanced, or preserved.
- 906 Days means calendar days.
- 907 Debit means a unit of measure (e.g., a functional or areal measure or other suitable metric)
908 representing the loss of aquatic functions at an impact or project site. The measure of aquatic functions
909 is based on the resources impacted by the authorized activity.
- 910 Enhancement means the manipulation of the physical, chemical, or biological characteristics of an
911 aquatic resource to heighten, intensify, or improve a specific aquatic resource function(s).
912 Enhancement results in the gain of selected aquatic resource function(s), but may also lead to a decline
913 in other aquatic resource function(s). Enhancement does not result in a gain in aquatic resource
914 area.⁴⁹²⁴
- 915 Establishment (creation) means the manipulation of the physical, chemical, or biological characteristics
916 present to develop an aquatic resource that did not previously exist at an upland site. Establishment
917 results in a gain in aquatic resource area and functions.
- 918 Functional capacity means the degree to which an area of aquatic resource performs a specific
919 function.
- 920 Functions means the physical, chemical, and biological processes that occur in ecosystems.
- 921 Impact means adverse effect.
- 922 In-kind means a resource of a similar structural and functional type to the impacted resource.

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923 In-lieu fee program means a program involving the restoration, establishment, enhancement, and/or
924 preservation of aquatic resources through funds paid to a governmental or non-profit natural resources
925 management entity to satisfy compensatory mitigation requirements for ~~permits~~Orders. Similar to a
926 mitigation bank, an in-lieu fee program sells compensatory mitigation credits to permittees whose
927 obligation to provide compensatory mitigation is then transferred to the in-lieu program sponsor.
928 However, the rules governing the operation and use of in-lieu fee programs are somewhat different
929 from the rules governing operation and use of mitigation banks. The operation and use of an in-lieu fee
930 program are governed by an in-lieu fee program instrument.

931 In-lieu fee program instrument means the legal document for the establishment, operation, and use of
932 an in-lieu fee program.

933 Instrument means mitigation banking instrument or in-lieu fee program instrument.

934 Mitigation bank means a site, or suite of sites, where resources (e.g., wetlands, streams, riparian areas)
935 are restored, established, enhanced, and/or preserved for the purpose of providing compensatory
936 mitigation for impacts authorized by ~~permits~~Orders. In general, a mitigation bank sells compensatory
937 mitigation credits to permittees whose obligation to provide compensatory mitigation is then transferred
938 to the mitigation bank sponsor. The operation and use of a mitigation bank are governed by a
939 mitigation banking instrument.

940 Mitigation banking instrument means the legal document for the establishment, operation, and use of
941 an in-lieu fee program.

942 Off-site means an area that is neither located on the same parcel of land as the impact site, nor on a
943 parcel of land contiguous to the parcel containing the impact site.

944 On-site means an area located on the same parcel of land as the impact site, or on a parcel of land
945 contiguous to the impact site.

946 Out-of-kind means a resource of a different structural and functional type from the impacted resource.

947 Performance standards are observable or measurable physical (including hydrological), chemical
948 and/or biological attributes that are used to determine if a compensatory mitigation project meets its
949 objectives.²⁰²⁵

950 Permittee-responsible mitigation means an aquatic resource restoration, establishment, enhancement,
951 and/or preservation activity undertaken by the permittee (or an authorized agent or contractor) to
952 provide compensatory mitigation for which the permittee retains full responsibility.

953 Preservation means the removal of a threat to, or preventing the decline of, aquatic resources by an
954 action in or near those aquatic resources. This term includes activities commonly associated with the
955 protection and maintenance of aquatic resources through the implementation of appropriate legal and
956 physical mechanisms. Preservation does not result in a gain of aquatic resource area or functions.

957 Re-establishment means the manipulation of the physical, chemical, or biological characteristics of a
958 site with the goal of returning natural/historic functions to a former aquatic resource. Re-establishment

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- 959 results in rebuilding a former aquatic resource and results in a gain in aquatic resource area and
960 functions.
- 961 Reference aquatic resources are a set of aquatic resources that represent the full range of variability
962 exhibited by a regional class of aquatic resources as a result of natural processes and anthropogenic
963 disturbances.
- 964 Rehabilitation means the manipulation of the physical, chemical, or biological characteristics of a site
965 with the goal of repairing natural/historic functions to a degraded aquatic resource. Rehabilitation
966 results in a gain in aquatic resource function, but does not result in a gain in aquatic resource area.
- 967 Restoration means the manipulation of the physical, chemical, or biological characteristics of a site with
968 the goal of returning natural/historic functions to a former or degraded aquatic resource. For the
969 purpose of tracking net gains in aquatic resource area, restoration is divided into two categories:
970 re-establishment and rehabilitation.
- 971 Riparian areas are lands adjacent to waters of the state. Riparian areas provide a variety of ecological
972 functions and services and help improve or maintain local water quality.
- 973 Service area means the geographic area within which impacts can be mitigated at a specific mitigation
974 bank or an in-lieu fee program, as designated in its instrument.
- 975 Services mean the benefits that human populations receive from functions that occur in ecosystems.
- 976 Sponsor means any public or private entity responsible for establishing, and in most circumstances,
977 operating a mitigation bank or in-lieu fee program.
- 978 Temporal loss is the time lag between the loss of aquatic resource functions caused by the permitted
979 impacts and the replacement of aquatic resource functions at the compensatory mitigation site. Higher
980 compensation ratios may be required to compensate for temporal loss. When the compensatory
981 mitigation project is initiated prior to, or concurrent with, the permitted impacts, the permitting authority
982 may determine that compensation for temporal loss is not necessary, unless the resource has a long
983 development time.
- 984 Watershed means a land area that drains to a common waterway, such as a stream, lake, estuary,
985 wetland, or ultimately the ocean.²⁴²⁶
- 986 Watershed approach is defined above in the main text of the Policy these Procedures.
- 987 ~~Watershed plan means a plan developed by federal, tribal, state, and/or local government agencies or~~
988 ~~appropriate non-governmental organizations, in consultation with relevant stakeholders, for the specific~~
989 ~~goal of aquatic resource restoration, establishment, enhancement, and preservation. A watershed plan~~
990 ~~addresses aquatic resource conditions in the watershed, multiple stakeholder interests, and land uses.~~
991 ~~Watershed plans may also identify priority sites for aquatic resource restoration and protection.~~
992 ~~Examples of watershed plans include special area management plans, advance identification~~
993 ~~programs, and wetland management plans. is defined above in the main text of these Procedures.~~
- 994 § 230.93 General compensatory mitigation requirements.

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995 (a) General Considerations.

996 (1) The fundamental objective of compensatory mitigation is to offset environmental losses
997 resulting from unavoidable impacts to waters of the state authorized by ~~permits~~Orders. The
998 permitting authority must determine the compensatory mitigation to be required in a ~~permit~~an
999 Order, based on what would be environmentally preferable. In making this determination, the
000 permitting authority must assess the likelihood for ecological success and sustainability, and the
001 location of the compensation site relative to the impact site and their significance within the
002 watershed, and the costs of the compensatory mitigation project. In many cases, the
003 environmentally preferable compensatory mitigation may be provided through mitigation banks or
004 in-lieu fee programs because they usually involve consolidating compensatory mitigation projects
005 where ecologically appropriate, consolidating resources, providing financial planning and
006 scientific expertise (which often is not practical for permittee-responsible compensatory mitigation
007 projects), reducing temporal losses of functions, and reducing uncertainty over project success.
008 Compensatory mitigation requirements must be commensurate with the amount and type of
009 impact that is associated with a particular ~~permit~~Order. ~~Permit applicants~~ Applicants are
010 responsible for proposing an appropriate compensatory mitigation option to offset unavoidable
011 impacts.

012 (2) Compensatory mitigation may be performed using methods or restoration, enhancement,
013 establishment, and in certain circumstances preservation. Restoration should generally be the
014 first option considered because the likelihood of success is greater and the impacts to potentially
015 ecologically important uplands are reduced compared to establishment, and the potential gains in
016 terms of aquatic resource functions are greater, compared to enhancement and preservation.

017 (3) Compensatory mitigation projects may be sited on public or private lands. Credits for
018 compensatory mitigation projects on public land must be based solely on aquatic resource
019 functions provided by the compensatory mitigation project, over and above those provided by
020 public programs already planned or in place. All compensatory mitigation projects must comply
021 with the standards in section IV of ~~this Policy~~these Procedures, if they are to be used to provide
022 compensatory mitigation for activities authorized by ~~permits~~Orders, regardless of whether they
023 are sited on public or private lands and whether the sponsor is a governmental or private entity.

024 (b) Type and location of compensatory mitigation.²²²⁷

025 (1) In general, the required compensatory mitigation should be located within the same watershed
026 as the impact site, and should be located where it is most likely to successfully replace lost
027 functions and services, taking into account such watershed scale features as aquatic habitat
028 diversity, habitat connectivity, relationships to hydrologic sources (including the availability of
029 water rights), trends in land use, ecological benefits, and compatibility with adjacent land uses.
030 When compensating for impacts to marine resources, the location of the compensatory mitigation

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031 site should be chosen to replace lost functions and services within the same marine ecological
032 system (e.g., reef complex, littoral drift cell). Compensation for impacts to aquatic resources in
033 coastal watersheds (watersheds that include a tidal water body) should also be located in a
034 coastal watershed where practicable. Compensatory mitigation projects should not be located
035 where they will increase risks to aviation by attracting wildlife to areas where aircraft-wildlife
036 strikes may occur (e.g., near airports).

037 (2) Mitigation bank credits. When permitted impacts are located within the service area of an
038 approved mitigation bank, and the bank has the appropriate number and resource type of credits
039 available, the permittee's compensatory mitigation requirements may be met by securing those
040 credits from the sponsor. Since an approved instrument (including an approved mitigation plan
041 and appropriate real estate and financial assurances) for a mitigation bank is required to be in
042 place before its credits can begin to be used to compensate for authorized impacts, use of a
043 mitigation bank can help reduce risk and uncertainty, as well as temporal loss of resource
044 functions and services. Mitigation bank credits are not released for debiting until specific
045 milestones associated with the mitigation bank site's protection and development are achieved,
046 thus use of mitigation bank credits can also help reduce risk that mitigation will not be fully
047 successful. Mitigation banks typically involve larger, more ecologically valuable parcels, and
048 more rigorous scientific and technical analysis, planning and implementation than
049 permittee-responsible mitigation. Also, development of a mitigation bank requires site
050 identification in advance, project-specific planning, and significant investment of financial
051 resources that is often not practicable for many in-lieu fee programs. For these reasons, the
052 permitting authority should give preference to the use of mitigation bank credits when these
053 considerations are applicable. However, these same considerations may also be used to
054 override this preference, where appropriate, as, for example, where an in-lieu fee program has
055 released credits available from a specific approved in-lieu fee project, or a permittee-responsible
056 project will restore an outstanding resource based on rigorous scientific and technical analysis.

057 (3) In-lieu fee program credits. Where permitted impacts are located within the service area of an
058 approved in-lieu fee program, and the sponsor has the appropriate number and resource type of
059 credits available, the permittee's compensatory mitigation requirements may be met by securing
060 those credits from the sponsor. Where permitted impacts are not located in the service area of an
061 approved mitigation bank, or the approved mitigation bank does not have the appropriate number
062 and resource type of credits available to offset those impacts, in-lieu fee mitigation, if available, is
063 generally preferable to permittee-responsible mitigation. In-lieu fee projects typically involve
064 larger, more ecologically valuable parcels, and more rigorous scientific and technical analysis,
065 planning and implementation than permittee-responsible mitigation. They also devote significant
066 resources to identifying and addressing high-priority resource needs on a watershed scale, as
067 reflected in their compensation planning framework. For these reasons, the permitting authority
068 should give preference to in-lieu fee program credits over permittee-responsible mitigation, where
069 these considerations are applicable. However, as with the preference for mitigation bank credits,
070 these same considerations may be used to override this preference where appropriate.
071 Additionally, in cases where permittee-responsible mitigation is likely to successfully meet
072 performance standards before advance credits secured from an in-lieu fee program are fulfilled,
073 the permitting authority should also give consideration to this factor in deciding between in-lieu fee
074 mitigation and permittee-responsible mitigation.

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075 (4) Permittee-responsible mitigation under a watershed approach. Where permitted impacts are
076 not in the service area of an approved mitigation bank or in-lieu fee program that has the
077 appropriate number and resource type of credits available, permittee-responsible mitigation is the
078 only option. Where practicable and likely to be successful and sustainable, the resource type and
079 location for the required permittee-responsible compensatory mitigation should be determined
080 using the principles of a watershed approach as outlined in paragraph (c) of this section.

081 (5) Permittee-responsible mitigation through on-site and in-kind mitigation. In cases where a
082 watershed approach is not practicable, the permitting authority should consider opportunities to
083 offset anticipated aquatic resource impacts by requiring on-site and in-kind compensatory
084 mitigation. The permitting authority must also consider the practicability of on-site compensatory
085 mitigation and its compatibility with the proposed project.

086 (6) Permittee-responsible mitigation through off-site and/or out-of-kind mitigation. If, after
087 considering opportunities for on-site, in-kind compensatory mitigation as provided in paragraph
088 (b)(5) of this section, the permitting authority determines that these compensatory mitigation
089 opportunities are not practicable, are unlikely to compensate for the permitted impacts, or will be
090 incompatible with the proposed project, and an alternative, practicable off-site and/or out-of-kind
091 mitigation opportunity is identified that has a greater likelihood of offsetting the permitted impacts
092 or is environmentally preferable to on-site or in-kind mitigation, the permitting authority should
093 require that this alternative compensatory mitigation be provided.

094 (c) Watershed approach to compensatory mitigation.²³²⁸

095 (1) The permitting authority must use a watershed approach to establish compensatory mitigation
096 requirements in ~~permits~~Orders as described in the main text of the ~~Policy~~Procedures. Where a
097 watershed plan is available, the permitting authority will determine whether the plan meets the
098 definition of watershed plan in the ~~Policy~~Procedures and therefore is appropriate for use in the
099 watershed approach for compensatory mitigation. In cases where the permitting authority
100 determines that an appropriate watershed plan is available, the watershed approach should be
101 based on that plan. Where no such plan is available, the watershed approach should be based on
102 information provided by the project sponsor or available from other sources. The ultimate goal of
103 a watershed approach is to maintain and improve the abundance, diversity, and condition of
104 aquatic resources within watersheds through strategic selection of compensatory mitigation sites.

105 (2) Considerations.

106 (i) A watershed approach to compensatory mitigation considers the importance of condition,
107 landscape position and resource type of compensatory mitigation projects for the sustainability
108 of aquatic resource functions within the watershed. Such an approach considers how the
109 condition, types, and locations of compensatory mitigation projects will provide the desired

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110 aquatic resource functions, and will continue to function over time in a changing landscape. It
111 also considers the habitat requirements of important species, habitat loss or conversion trends,
112 sources of watershed impairment, and current development trends, as well as the
113 requirements of other regulatory and non-regulatory programs that affect the watershed, such
114 as storm water management or habitat conservation programs. It includes the protection and
115 maintenance of terrestrial resources, such as non-wetland riparian areas and uplands, when
116 those resources contribute to or improve the overall ecological functioning of aquatic resources
117 in the watershed. Compensatory mitigation requirements determined through the watershed
118 approach should not focus exclusively on specific functions (e.g., water quality or habitat for
119 certain species), but should provide, where practicable, the suite of functions typically provided
120 by the affected aquatic resource.

121 (ii) Locational factors (e.g., hydrology, surrounding land use) are important to the success of
122 compensatory mitigation for impacted habitat functions and may lead to siting of such
123 mitigation away from the project area. However, consideration should also be given to
124 functions and services (e.g., water quality, flood control, shoreline protection) that will likely
125 need to be addressed at or near the areas impacted by the permitted impacts.²⁴²⁹

126 (iii) A watershed approach may include on-site compensatory mitigation, off-site compensatory
127 mitigation (including mitigation banks or in-lieu fee programs), or a combination of on-site and
128 off-site compensatory mitigation.

129 (iv) A watershed approach to compensatory mitigation should include, to the extent
130 practicable, inventories of historic and existing aquatic resources, including identification of
131 degraded aquatic resources, and identification of immediate and long-term aquatic resource
132 needs within watersheds that can be met through permittee-responsible mitigation projects,
133 mitigation banks, or in-lieu fee programs. Planning efforts should identify and prioritize aquatic
134 resource restoration, establishment, and enhancement activities, and preservation of existing
135 aquatic resources that are important for maintaining or improving ecological functions of the
136 watershed. The identification and prioritization of resource needs should be as specific as
137 possible, to enhance the usefulness of the approach in determining compensatory mitigation
138 requirements.

139 (v) A watershed approach is not appropriate in areas where watershed boundaries do not exist,
140 such as marine areas. In such cases, an appropriate spatial scale should be used to replace
141 lost functions and services within the same ecological system (e.g., reef complex, littoral drift
142 cell).

143 (3) Information Needs.

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144 (i) In the absence of a watershed plan determined by the permitting authority under paragraph
145 (c)(1) of this section to be appropriate for use in the watershed approach, the permitting
146 authority will use a watershed approach based on analysis of ~~abundance, diversity, and~~
147 ~~condition of aquatic resources in a watershed,~~ and information regarding watershed conditions
148 (as identified in the watershed profile) and needs, including potential sites for aquatic resource
149 restoration activities and priorities for aquatic resource restoration and preservation. Such
150 information includes: Current trends in habitat loss or conversion; cumulative impacts of past
151 development activities, current development trends, the presence and needs of sensitive
152 species; site conditions that favor or hinder the success of compensatory mitigation projects;
153 and chronic environmental problems such as flooding or poor water quality.

154 (ii) This information may be available from sources such as wetland maps; soil surveys; U.S.
155 Geological Survey topographic and hydrologic maps; aerial photographs; information on rare,
156 endangered and threatened species and critical habitat; local ecological reports or studies; and
157 other information sources that could be used to identify locations for suitable compensatory
158 mitigation projects in the watershed.

159 (iii) The level of information and analysis needed to support a watershed approach must be
160 commensurate with the scope and scale of the proposed impacts requiring a permit Order,
161 as well as the functions lost as a result of those impacts.

162 (4) Watershed Scale. The size of watershed addressed using a watershed approach should not
163 be larger than is appropriate to ensure that the aquatic resources provided through compensation
164 activities will effectively compensate for adverse environmental impacts resulting from activities
165 authorized by permits Orders. The permitting authority should consider relevant environmental
166 factors and appropriate locally-developed standards and criteria when determining the
167 appropriate watershed scale in guiding compensation activities.

168 (d) Site selection.²⁵³⁰

169 (1) The compensatory mitigation project site must be ecologically suitable for providing the
170 desired aquatic resource functions. In determining the ecological suitability of the compensatory
171 mitigation project site, the permitting authority must consider, to the extent practicable, the
172 following factors:

173 (i) Hydrological conditions, soil characteristics, and other physical and chemical
174 characteristics;

175 (ii) Watershed-scale features, such as aquatic habitat diversity, habitat connectivity, and other
176 landscape scale functions;

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- 177 (iii) The size and location of the compensatory mitigation site relative to hydrologic sources
178 (including the availability of water rights) and other ecological features;
- 179 (iv) Compatibility with adjacent land uses and watershed management plans;
- 180 (v) Reasonably foreseeable effects the compensatory mitigation project will have on
181 ecologically important aquatic or terrestrial resources (e.g., shallow sub-tidal habitat, mature
182 forests), cultural sites, or habitat for federally- or state-listed threatened and endangered
183 species; and
- 184 (vi) Other relevant factors including, but not limited to, development trends, anticipated land
185 use changes, habitat status and trends, the relative locations of the impact and mitigation sites
186 in the stream network, local or regional goals for the restoration or protection of particular
187 habitat types or functions (e.g., re-establishment of habitat corridors or habitat for species of
188 concern), water quality goals, floodplain management goals, and the relative potential for
189 chemical contamination of the aquatic resources.
- 190 (2) Permitting authorities may require on-site, off-site, or a combination of on-site and off-site
191 compensatory mitigation to replace permitted losses of aquatic resource functions and services.
- 192 (3) Applicants should propose compensation sites adjacent to existing aquatic resources or
193 where aquatic resources previously existed.
- 194 (e) Mitigation type.
- 195 (1) In general, in-kind mitigation is preferable to out-of-kind mitigation because it is most likely to
196 compensate for the functions and services lost at the impact site. For example, tidal wetland
197 compensatory mitigation projects are most likely to compensate for unavoidable impacts to tidal
198 wetlands, while perennial stream compensatory mitigation projects are most likely to compensate
199 for unavoidable impacts to perennial streams. Thus, except as provided in paragraph (e)(2) of
200 this section, the required compensatory mitigation shall be of a similar type to the affected aquatic
201 resource.
- 202 (2) If the permitting authority determines, using the watershed approach in accordance with
203 paragraph (c) of this section that out-of-kind compensatory mitigation will serve the aquatic
204 resource needs of the watershed, the permitting authority may authorize the use of such
205 out-of-kind compensatory mitigation. The basis for authorization of out-of-kind compensatory
206 mitigation must be documented in the administrative record for the permitOrder action.
- 207 (3) For difficult-to-replace resources (e.g., bogs, fens, springs, streams, vegetated seasonal
208 wetlands, slope and seep wetlands, vernal pools, and wet meadows) if further avoidance and
209 minimization is not practicable, the required compensation should be provided, if practicable,
210 through in-kind rehabilitation, enhancement, or preservation since there is greater certainty that
211 these methods of compensation will successfully offset permitted impacts.

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212 (f) Amount of compensatory mitigation.

213 (1) If the permitting authority determines that compensatory mitigation is necessary to offset
214 unavoidable impacts to aquatic resources, the amount of required compensatory mitigation must
215 be, to the extent practicable, sufficient to replace lost aquatic resource functions. In cases where
216 appropriate functional or condition assessment methods or other suitable metrics are available,
217 these methods should be used where practicable to determine how much compensatory
218 mitigation is required. If a functional or condition assessment or other suitable metric is not used,
219 a minimum one-to-one acreage or linear foot compensation ratio must be used.

220 (2) The permitting authority must require a mitigation ratio greater than one-to-one where
221 necessary to account for the method of compensatory mitigation (e.g., preservation), the
222 likelihood of success, differences between the functions lost at the impact site and the functions
223 expected to be produced by the compensatory mitigation project, temporal losses of aquatic
224 resource functions, the difficulty of restoring or establishing the desired aquatic resource type and
225 functions, and/or the distance between the affected aquatic resource and the compensation site.
226 The rationale for the required replacement ratio must be documented in the administrative record
227 for the ~~permit~~Order action.

228 (3) If an in-lieu fee program will be used to provide the required compensatory mitigation, and the
229 appropriate number and resource type of released credits are not available, the permitting
230 authority must require sufficient compensation to account for the risk and uncertainty associated
231 with in-lieu fee projects that have not been implemented before the permitted impacts have
232 occurred.

233 (g) Use of mitigation banks and in-lieu fee programs. Mitigation banks and in-lieu fee programs may
234 be used to compensate for impacts to aquatic resources authorized by general ~~permits~~Orders and
235 individual ~~permits~~Orders in accordance with the preference hierarchy in paragraph (b) of this section.
236 Mitigation banks and in-lieu fee programs may also be used to satisfy requirements arising out of an
237 enforcement action, such as supplemental environmental projects.

238 (h) Preservation.²⁶³¹

239 (1) Preservation may be used to provide compensatory mitigation for activities authorized by
240 ~~permits~~Orders when all the following criteria are met:

241 (i) The resources to be preserved provide important physical, chemical, or biological functions
242 for the watershed;

243 (ii) The resources to be preserved contribute significantly to the ecological sustainability of the
244 watershed. In determining the contribution of those resources to the ecological sustainability of

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- 245 the watershed, the permitting authority must use appropriate quantitative assessment tools
246 where available;
- 247 (iii) Preservation is determined by the permitting authority to be appropriate and practicable;
- 248 (iv) The resources are under threat of destruction or adverse modifications; and
- 249 (v) The preserved site will be permanently protected through an appropriate real estate or other
250 legal instrument (e.g., easement, title transfer to state resource agency or land trust).
- 251 (2) Where preservation is used to provide compensatory mitigation, to the extent appropriate and
252 practicable the preservation shall be done in conjunction with aquatic resource restoration,
253 establishment, and/or enhancement activities. This requirement may be waived by the permitting
254 authority where preservation has been identified as a high priority using a watershed approach
255 described in paragraph (c) of this section, but compensation ratios shall be higher.
- 256 (i) Buffers. The permitting authority may require the restoration, establishment, enhancement,
257 and preservation, as well as the maintenance, of riparian areas and/or buffers around aquatic
258 resources where necessary to ensure the long-term viability of those resources. Buffers may
259 also provide habitat or corridors necessary for the ecological functioning of aquatic resources.
260 If buffers are required by the permitting authority as part of the compensatory mitigation
261 project, compensatory mitigation credit will be provided for those buffers, as provided in section
262 IV B.75 (a**c**).
- 263 (j) Relationship to other federal, tribal, state, and local programs.
- 264 (1) Compensatory mitigation projects for ~~permits~~Orders may also be used to satisfy the
265 environmental requirements of other programs, such as tribal, state, or local wetlands regulatory
266 programs, other federal programs such as the Surface Mining Control and Reclamation Act,
267 Corps civil works projects, and Department of Defense military construction projects, consistent
268 with the terms and requirements of these programs and subject to the following considerations:
- 269 (i) The compensatory mitigation project must include appropriate compensation required by
270 the ~~permit~~Order for unavoidable impacts to aquatic resources authorized by that ~~permit~~Order.
- 271 (ii) Under no circumstances may the same credits be used to provide mitigation for more than
272 one permitted activity. However, where appropriate, compensatory mitigation projects,
273 including mitigation banks and in-lieu fee projects, may be designed to holistically address
274 requirements under multiple programs and authorities for the same activity.
- 275 (2) Except for projects undertaken by federal agencies, or where federal funding is specifically
276 authorized to provide compensatory mitigation, federally-funded aquatic resource restoration or
277 conservation projects undertaken for purposes other than compensatory mitigation, such as the
278 Wetlands Reserve Program, Conservation Reserve Program, and Partners for Wildlife Program
279 activities, cannot be used for the purpose of generating compensatory mitigation credits for

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280 activities authorized by ~~permits~~Orders. However, compensatory mitigation credits may be
281 generated by activities undertaken in conjunction with, but supplemental to, such programs in
282 order to maximize the overall ecological benefits of the restoration or conservation project.

283 (3) Compensatory mitigation projects may also be used to provide compensatory mitigation under
284 the federal and state Endangered Species Act or for Natural Community Conservation Plans and
285 Habitat Conservation Plans, as long as they comply with the requirements of paragraph (j)(1) of
286 this section.

287 (k) ~~Permit~~Order conditions.

288 (1) The compensatory mitigation requirements for a ~~permit~~an Order, including the amount and
289 type of compensatory mitigation, must be clearly stated in the special conditions of the individual
290 ~~permit~~Order or authorization to use the general ~~permit~~Order. The special conditions must be
291 enforceable.²⁷³²

292 (2) For a ~~permit~~an Order that requires permittee-responsible mitigation, the special conditions
293 must:

294 (i) Identify the party responsible for providing the compensatory mitigation;

295 (ii) Incorporate, by reference, the final or draft mitigation plan approved by the permitting
296 authority;

297 (iii) State the objectives, performance standards, and monitoring required for the
298 compensatory mitigation project, unless they are provided in the approved final mitigation plan;
299 and

300 (iv) Describe any required financial assurances or long-term management provisions for the
301 compensatory mitigation project, unless they are specified in the approved final mitigation plan.

302 (4) If a mitigation bank or in-lieu fee program is used to provide the required compensatory
303 mitigation, the special conditions must indicate whether a mitigation bank or in-lieu fee program
304 will be used, and specify the number and resource type of credits the permittee is required to
305 secure. In the case of an individual ~~permit~~Order, the special condition must also identify the
306 specific mitigation bank or in-lieu fee program that will be used. For authorizations to use a
307 general ~~permit~~Order, the special conditions may either identify the specific mitigation bank or
308 in-lieu fee program, or state that the specific mitigation bank or in-lieu fee program used to provide
309 the required compensatory mitigation must be approved by the permitting authority before the
310 credits are secured.

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311 (l) Party responsible for compensatory mitigation.

312 (1) For permittee-responsible mitigation, the special conditions of the permitOrder must clearly
313 indicate the party or parties responsible for the implementation, performance, and long-term
314 management of the compensatory mitigation project.

315 ~~(2) For mitigation banks and in-lieu fee programs, the instrument must clearly indicate the party or~~
316 ~~parties responsible for the implementation, performance, and long-term management of the~~
317 ~~compensatory mitigation project(s). The instrument must also contain a provision expressing the~~
318 ~~sponsor's agreement to assume responsibility for a permittee's compensatory mitigation~~
319 ~~requirements, once that permittee has secured the appropriate number and resource type of~~
320 ~~credits from the sponsor and the permitting authority has received the documentation described in~~
321 ~~paragraph (1)(3) of this section.~~

322 (3) If use of a mitigation bank or in-lieu fee program is approved by the permitting authority to
323 provide part or all of the required compensatory mitigation for a permitan Order, the permittee
324 retains responsibility for providing the compensatory mitigation until the appropriate number and
325 resource type of credits have been secured from a sponsor and the permitting authority has
326 received documentation that confirms that the sponsor has accepted the responsibility for
327 providing the required compensatory mitigation. This documentation may consist of a letter or
328 form signed by the sponsor, with the permitOrder number and a statement indicating the number
329 and resource type of credits that have been secured from the sponsor. Copies of this
330 documentation will be retained in the administrative records for both the permitOrder and the
331 instrument. If the sponsor fails to provide the required compensatory mitigation, the permitting
332 authority may pursue measures against the sponsor to ensure compliance.²⁸³³

333 (m) Timing. Implementation of the compensatory mitigation project shall be, to the maximum extent
334 practicable, in advance of or concurrent with the activity causing the authorized impacts. The
335 permitting authority shall require, to the extent appropriate and practicable, additional compensatory
336 mitigation to offset temporal losses of aquatic functions that will result from the permitted activity.

337 (n) Financial assurances.

338 (1) The permitting authority shall require sufficient financial assurances to ensure a high level of
339 confidence that the compensatory mitigation project will be successfully completed, in
340 accordance with applicable performance standards. In cases where an alternate mechanism is
341 available to ensure a high level of confidence that the compensatory mitigation will be provided
342 and maintained (e.g., a formal, documented commitment from a government agency or public
343 authority) the permitting authority may determine that financial assurances are not necessary for
344 that compensatory mitigation project.

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345 (2) The amount of the required financial assurances must be determined by the permitting
346 authority, in consultation with the project sponsor, and must be based on the size and complexity
347 of the compensatory mitigation project, the degree of completion of the project at the time of
348 project approval, the likelihood of success, the past performance of the project sponsor, and any
349 other factors the permitting authority deems appropriate. Financial assurances may be in the
350 form of performance bonds, escrow accounts, casualty insurance, letters of credit, legislative
351 appropriations for government sponsored projects, or other appropriate instruments, subject to
352 the approval of the permitting authority. The rationale for determining the amount of the required
353 financial assurances must be documented in the administrative record for either the permitOrder
354 or the instrument. In determining the assurance amount, the permitting authority shall consider
355 the cost of providing replacement mitigation, including costs for land acquisition, planning and
356 engineering, legal fees, mobilization, construction, and monitoring.

357 (3) If financial assurances are required, the permitOrder must include a special condition requiring
358 the financial assurances to be in place prior to commencing the permitted activity.²⁹³⁴

359 (4) Financial assurances shall be phased out once the compensatory mitigation project has been
360 determined by the permitting authority to be successful in accordance with its performance
361 standards. The permitOrder or instrument must clearly specify the conditions under which the
362 financial assurances are to be released to the permittee, sponsor, and/or other financial
363 assurance provider, including, as appropriate, linkage to achievement of performance standards,
364 adaptive management, or compliance with special conditions.

365 (5) A financial assurance must be in a form that ensures that the permitting authority will receive
366 notification at least 120 days in advance of any termination or revocation. For third-party
367 assurance providers, this may take the form of a contractual requirement for the assurance
368 provider to notify the permitting authority at least 120 days before the assurance is revoked or
369 terminated.

370 (6) Financial assurances shall be payable at the direction of the permitting authority to his
371 designee or to a standby trust agreement. When a standby trust is used (e.g., with performance
372 bonds or letters of credit) all amounts paid by the financial assurance provider shall be deposited
373 directly into the standby trust fund for distribution by the trustee in accordance with the permitting
374 authority's instructions.

375 (o) Compliance with applicable law. The compensatory mitigation project must comply with all
376 applicable federal, state, and local laws. The permitOrder, mitigation banking instrument, or in-lieu
377 fee program instrument must not require participation by the permitting authority in project
378 management, including receipt or management of financial assurances or long-term financing
379 mechanisms, except as determined by the permitting authority to be consistent with its statutory
380 authority, mission, and priorities.

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381 § 230.94 Planning and documentation.

382 (a) Pre-application consultations. Potential applicants for permitsOrders are encouraged to
383 participate in pre-application meetings with the permitting authority and appropriate agencies to
384 discuss potential mitigation requirements and information needs.

385 (c) Mitigation plan.

386 (1) Preparation and Approval.

387 (i) For individual permitsOrders, the permittee must prepare a draft mitigation plan and submit
388 it to the permitting authority for review prior to certification. After addressing any comments
389 provided by the permitting authority, the permittee must prepare a final mitigation plan, which
390 must be approved by the permitting authority prior to commencing work in waters of the state.
391 The approved final mitigation plan must be incorporated into the individual permitOrder either
392 as an attachment or by reference. The final mitigation plan must include the items described in
393 paragraphs (c)(2) through (c)(14) of this section, but the level of detail of the mitigation plan
394 should be commensurate with the scale and scope of the impacts. As an alternative, the
395 permitting authority may determine that it would be more appropriate to address any of the
396 items described in paragraphs (c)(2) through (c)(14) of this section as permitOrder conditions,
397 instead of components of a compensatory mitigation plan. For permittees who intend to fulfill
398 their compensatory mitigation obligations by securing credits from approved mitigation banks
399 or in-lieu fee programs, their mitigation plans need include only the items described in
400 paragraphs (c)(5) and (c)(6) of this section, and the name of the specific mitigation bank or
401 in-lieu fee program to be used.³⁰³⁵

402 (ii) For general permitsOrders, if compensatory mitigation is required, the permitting authority
403 may approve a conceptual or detailed compensatory mitigation plan to meet required time
404 frames for general permitOrder enrollments, but a final mitigation plan incorporating the
405 elements in paragraphs (c)(2) through (c)(14) of this section, at a level of detail commensurate
406 with the scale and scope of the impacts, must be approved by the permitting authority before
407 the permittee commences work in waters of the state. As an alternative, the permitting
408 authority may determine that it would be more appropriate to address any of the items
409 described in paragraphs (c)(2) through (c)(14) of this section as permitOrder conditions,
410 instead of components of a compensatory mitigation plan. For permittees who intend to fulfill
411 their compensatory mitigation obligations by securing credits from approved mitigation banks
412 or in-lieu fee programs, their mitigation plans need include only the items described in
413 paragraphs (c)(5) and (c)(6) of this section, and either the name of the specific mitigation bank
414 or in-lieu fee program to be used or a statement indicating that a mitigation bank or in-lieu fee
415 program will be used (contingent upon approval by the permitting authority).

416 (2) Objectives. A description of the resource type(s) and amount(s) that will be provided, the
417 method of compensation (i.e., restoration, establishment, enhancement, and/or preservation),
418 and the manner in which the resource functions of the compensatory mitigation project will

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- 419 address the needs of the watershed, ecoregion, physiographic province, or other geographic area
420 of interest.
- 421 (3) Site selection. A description of the factors considered during the site selection process. This
422 should include consideration of watershed needs, on-site alternatives where applicable, and the
423 practicability of accomplishing ecologically self-sustaining aquatic resource restoration,
424 establishment, enhancement, and/or preservation at the compensatory mitigation project site.
425 (See [§ 230.93\(d\)](#).)
- 426 (4) Site protection instrument. A description of the legal arrangements and instrument, including
427 site ownership, that will be used to ensure the long-term protection of the compensatory mitigation
428 project site (see [§ 230.97\(a\)](#)).³⁴³⁶
- 429 (5) Baseline information. A description of the ecological characteristics of the proposed
430 compensatory mitigation project site and, in the case of an application for a ~~permit~~ Order, the
431 impact site. This may include descriptions of historic and existing plant communities, historic and
432 existing hydrology, soil conditions, a map showing the locations of the impact and mitigation
433 site(s) or the geographic coordinates for those site(s), and other site characteristics appropriate to
434 the type of resource proposed as compensation. The baseline information should also include a
435 delineation of waters of the state on the proposed compensatory mitigation project site. A
436 prospective permittee planning to secure credits from an approved mitigation bank or in-lieu fee
437 program only needs to provide baseline information about the impact site, not the mitigation bank
438 or in-lieu fee project site.
- 439 (6) Determination of credits. A description of the number of credits to be provided, including a
440 brief explanation of the rationale for this determination. (See [§ 230.93\(f\)](#).)
- 441 (i) For permittee-responsible mitigation, this should include an explanation of how the
442 compensatory mitigation project will provide the required compensation for unavoidable
443 impacts to aquatic resources resulting from the permitted activity.
- 444 (ii) For permittees intending to secure credits from an approved mitigation bank or in-lieu fee
445 program, it should include the number and resource type of credits to be secured and how
446 these were determined.
- 447 (7) Mitigation work plan. Detailed written specifications and work descriptions for the
448 compensatory mitigation project, including, but not limited to, the geographic boundaries of the
449 project; construction methods, timing, and sequence; source(s) of water, including connections to
450 existing waters and uplands; methods for establishing the desired plant community; plans to
451 control invasive plant species; the proposed grading plan, including elevations and slopes of the
452 substrate; soil management; and erosion control measures. For stream compensatory mitigation
453 projects, the mitigation work plan may also include other relevant information, such as planform
454 geometry, channel form (e.g., typical channel cross-sections), watershed size, design discharge,
455 and riparian area plantings.

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- 456 (8) Maintenance plan. A description and schedule of maintenance requirements to ensure the
457 continued viability of the resource once initial construction is completed.
- 458 (9) Performance standards. Ecologically-based standards that will be used to determine whether
459 the compensatory mitigation project is achieving its objectives. (See [§ 230.95](#).)
- 460 (10) Monitoring requirements. A description of parameters to be monitored in order to determine
461 if the compensatory mitigation project is on track to meet performance standards and if adaptive
462 management is needed. A schedule for monitoring and reporting on monitoring results to the
463 permitting authority must be included. (See [§ 230.96](#).)³²³⁷
- 464 (11) Long-term management plan. A description of how the compensatory mitigation project will
465 be managed after performance standards have been achieved to ensure the long-term
466 sustainability of the resource, including long-term financing mechanisms and the party
467 responsible for long-term management. (See [§ 230.97\(d\)](#).)
- 468 (12) Adaptive management plan. A management strategy to address unforeseen changes in site
469 conditions or other components of the compensatory mitigation project, including the party or
470 parties responsible for implementing adaptive management measures. The adaptive
471 management plan will guide decisions for revising compensatory mitigation plans and
472 implementing measures to address both foreseeable and unforeseen circumstances that
473 adversely affect compensatory mitigation success. (See [§ 230.97\(c\)](#).)
- 474 (13) Financial assurances. A description of financial assurances that will be provided and how
475 they are sufficient to ensure a high level of confidence that the compensatory mitigation project
476 will be successfully completed, in accordance with its performance standards (see [§ 230.93\(n\)](#)).
- 477 (14) Other information. The permitting authority may require additional information as necessary
478 to determine the appropriateness, feasibility, and practicability of the compensatory mitigation
479 project.

480 § 230.95 Ecological performance standards.

481 (a) The approved mitigation plan must contain performance standards that will be used to assess
482 whether the project is achieving its objectives. Performance standards should relate to the objectives
483 of the compensatory mitigation project, so that the project can be objectively evaluated to determine if
484 it is developing into the desired resource type, providing the expected condition or functions, and
485 attaining any other applicable metrics (e.g., acres).

486 (b) Performance standards must be based on attributes that are objective and verifiable. Ecological
487 performance standards must be based on the best available science that can be measured or
488 assessed in a practicable manner. Performance standards may be based on variables or measures
489 of functional capacity or condition as described in assessment methodologies, measurements of
490 hydrology or other aquatic resource characteristics, and/or comparisons to reference aquatic
491 resources of similar type and landscape position. The use of reference aquatic resources to establish
492 performance standards will help ensure that those performance standards are reasonably

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493 achievable, by reflecting the range of variability exhibited by the regional class of aquatic resources
494 as a result of natural processes and anthropogenic disturbances. Performance standards based on
495 measurements of hydrology should take into consideration the hydrologic variability exhibited by
496 reference aquatic resources, especially wetlands. Where practicable, performance standards should
497 take into account the expected stages of the aquatic resource development process, in order to allow
498 early identification of potential problems and appropriate adaptive management.

499 § 230.96 Monitoring.³³³⁸

500 (a) General.

501 (1) Monitoring the compensatory mitigation project site is necessary to determine if the project is
502 meeting its performance standards, and to determine if measures are necessary to ensure that
503 the compensatory mitigation project is accomplishing its objectives. The submission of
504 monitoring reports to assess the development and condition of the compensatory mitigation
505 project is required, but the content and level of detail for those monitoring reports must be
506 commensurate with the scale and scope of the compensatory mitigation project, as well as the
507 compensatory mitigation project type. The mitigation plan must address the monitoring
508 requirements for the compensatory mitigation project, including the parameters to be monitored,
509 the length of the monitoring period, the party responsible for conducting the monitoring, the
510 frequency for submitting monitoring reports to the permitting authority, and the party responsible
511 for submitting those monitoring reports to the permitting authority.

512 (2) The permitting authority may conduct site inspections on a regular basis (e.g., annually) during
513 the monitoring period to evaluate mitigation site performance.

514 (b) Monitoring period. The mitigation plan must provide for a monitoring period that is sufficient to
515 demonstrate that the compensatory mitigation project has met performance standards, but not less
516 than five years. A longer monitoring period must be required for aquatic resources with slow
517 development rates (e.g., forested wetlands, bogs). Following project implementation, the permitting
518 authority may reduce or waive the remaining monitoring requirements upon a determination that the
519 compensatory mitigation project has achieved its performance standards. Conversely the permitting
520 authority may extend the original monitoring period upon a determination that performance standards
521 have not been met or the compensatory mitigation project is not on track to meet them. The
522 permitting authority may also revise monitoring requirements when remediation and/or adaptive
523 management is required.

524 (c) Monitoring reports.

525 (1) The permitting authority must determine the information to be included in monitoring reports.
526 This information must be sufficient for the permitting authority to determine how the compensatory
527 mitigation project is progressing towards meeting its performance standards, and may include
528 plans (such as as-built plans), maps, and photographs to illustrate site conditions. Monitoring
529 reports may also include the results of functional, condition, or other assessments used to provide

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- 530 quantitative or qualitative measures of the functions provided by the compensatory mitigation
531 project site.
- 532 (2) The permittee or sponsor is responsible for submitting monitoring reports in accordance with
533 the special conditions of the ~~permit~~Order or the terms of the instrument. Failure to submit
534 monitoring reports in a timely manner may result in compliance action by the permitting authority.
- 535 (3) Monitoring reports must be provided by the permitting authority to interested federal, tribal,
536 state, and local resource agencies, and the public, upon request.
- 537 § 230.97 Management.³⁴³⁹
- 538 (a) Site protection.
- 539 (1) The aquatic habitats, riparian areas, buffers, and uplands that comprise the overall
540 compensatory mitigation project must be provided long-term protection through real estate
541 instruments or other available mechanisms, as appropriate. Long-term protection may be
542 provided through real estate instruments such as conservation easements held by entities such
543 as federal, tribal, state, or local resource agencies, non-profit conservation organizations, or
544 private land managers; the transfer of title to such entities; or by restrictive covenants. For
545 government property, long-term protection may be provided through state or federal facility
546 management plans or integrated natural resources management plans. When approving a
547 method for long-term protection of non-government property other than transfer of title, the
548 permitting authority shall consider relevant legal constraints on the use of conservation
549 easements and/or restrictive covenants in determining whether such mechanisms provide
550 sufficient site protection. To provide sufficient site protection, a conservation easement or
551 restrictive covenant should, where practicable, establish in an appropriate third party (e.g.,
552 governmental or non-profit resource management agency) the right to enforce site protections
553 and provide the third party the resources necessary to monitor and enforce these site protections.
- 554 (2) The real estate instrument, management plan, or other mechanism providing long-term
555 protection of the compensatory mitigation site must, to the extent appropriate and practicable,
556 prohibit incompatible uses (e.g., clear cutting or mineral extraction) that might otherwise
557 jeopardize the objectives of the compensatory mitigation project. Where appropriate, multiple
558 instruments recognizing compatible uses (e.g., fishing or grazing rights) may be used.
- 559 (3) The real estate instrument, management plan, or other long-term protection mechanism must
560 contain a provision requiring 60-day advance notification to the permitting authority before any
561 action is taken to void or modify the instrument, management plan, or long-term protection
562 mechanism, including transfer of title to, or establishment of any other legal claims over, the
563 compensatory mitigation site.
- 564 (4) For compensatory mitigation projects on public lands, where state or Federal facility
565 management plans or integrated natural resources management plans are used to provide
566 long-term protection, and changes in statute, regulation, or agency needs or mission results in an
567 incompatible use on public lands originally set aside for compensatory mitigation, the public

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568 agency authorizing the incompatible use is responsible for providing alternative compensatory
569 mitigation that is acceptable to the permitting authority for any loss in functions resulting from the
570 incompatible use.³⁶⁴⁰

571 (5) A real estate instrument, management plan, or other long-term protection mechanism used for
572 site protection of permittee-responsible mitigation must be approved by the permitting authority in
573 advance of, or concurrent with, the activity causing the authorized impacts.

574 (b) Sustainability. Compensatory mitigation projects shall be designed, to the maximum extent
575 practicable, to be self-sustaining once performance standards have been achieved. This includes
576 minimization of active engineering features (e.g., pumps) and appropriate siting to ensure that natural
577 hydrology and landscape context will support long-term sustainability. Where active long-term
578 management and maintenance are necessary to ensure long-term sustainability (e.g., prescribed
579 burning, invasive species control, maintenance of water control structures, easement enforcement),
580 the responsible party must provide for such management and maintenance. This includes the
581 provision of long-term financing mechanisms where necessary. Where needed, the acquisition and
582 protection of water rights must be secured and documented in the ~~permit~~Order conditions or
583 instrument.

584 (c) Adaptive management.

585 (1) If the compensatory mitigation project cannot be constructed in accordance with the approved
586 mitigation plans, the permittee or sponsor must notify the permitting authority. A significant
587 modification of the compensatory mitigation project requires approval from the permitting
588 authority.

589 (2) If monitoring or other information indicates that the compensatory mitigation project is not
590 progressing towards meeting its performance standards as anticipated, the responsible party
591 must notify the permitting authority as soon as possible. The permitting authority will evaluate and
592 pursue measures to address deficiencies in the compensatory mitigation project. The permitting
593 authority will consider whether the compensatory mitigation project is providing ecological
594 benefits comparable to the original objectives of the compensatory mitigation project.

595 (3) The permitting authority, in consultation with the responsible party (and other federal, tribal,
596 state, and local agencies, as appropriate), will determine the appropriate measures. The
597 measures may include site modifications, design changes, revisions to maintenance
598 requirements, and revised monitoring requirements. The measures must be designed to ensure
599 that the modified compensatory mitigation project provides aquatic resource functions
600 comparable to those described in the mitigation plan objectives.³⁶⁴¹

601 (4) Performance standards may be revised in accordance with adaptive management to account
602 for measures taken to address deficiencies in the compensatory mitigation project. Performance
603 standards may also be revised to reflect changes in management strategies and objectives if the

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604 new standards provide for ecological benefits that are comparable or superior to the approved
605 compensatory mitigation project. No other revisions to performance standards will be allowed
606 except in the case of natural disasters.

607 (d) Long-term management.

608 (1) The permitOrder conditions or instrument must identify the party responsible for ownership
609 and all long-term management of the compensatory mitigation project. The permitOrder
610 conditions or instrument may contain provisions allowing the permittee or sponsor to transfer the
611 long-term management responsibilities of the compensatory mitigation project site to a land
612 stewardship entity, such as a public agency, non-governmental organization, or private land
613 manager, after review and approval by the permitting authority. The land stewardship entity need
614 not be identified in the original permitOrder or instrument, as long as the future transfer of
615 long-term management responsibility is approved by the permitting authority.

616 (2) A long-term management plan should include a description of long-term management needs,
617 annual cost estimates for these needs, and identify the funding mechanism that will be used to
618 meet those needs.

619 (3) Any provisions necessary for long-term financing must be addressed in the original
620 permitOrder or instrument. The permitting authority may require provisions to address inflationary
621 adjustments and other contingencies, as appropriate. Appropriate long-term financing
622 mechanisms include non-wasting endowments, trusts, contractual arrangements with future
623 responsible parties, and other appropriate financial instruments. In cases where the long-term
624 management entity is a public authority or government agency, that entity must provide a plan for
625 the long-term financing of the site.

626 (4) For permittee-responsible mitigation, any long-term financing mechanisms must be approved
627 in advance of the activity causing the authorized impacts.

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