

GUIDELINES FOR PREPARATION OF ADVANCE PERMITTEE-RESPONSIBLE MITIGATION PROPOSALS



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U.S. ARMY CORPS OF ENGINEERS

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Purpose

This guidance intends to assist applicants seeking approval from the Sacramento District to establish advance permittee-responsible mitigation (Advance PRM) prior to initiation of permitted impacts authorized by Section 404 of the Clean Water Act and/or Section 10 of the Rivers and Harbors Act. Nothing in this guidance either diminishes or expands the U.S. Army Corps of Engineers' (Corps) regulatory authorities.

What is Advance PRM?

In the context of this guidance, Advance PRM is a form of permittee-responsible compensatory mitigation¹ constructed in advance of permitted impacts to waters of the U.S. The Advance PRM approach provides a mechanism to implement Corps' Regulatory Program regulations promulgated in 33 C.F.R. part 320-332 and 40 C.F.R. part 230. The Advance PRM approach described in this guidance is consistent with Corps regulations 33 C.F.R. part 332 and 40 C.F.R. part 230), the *South Pacific Division (SPD) Final Regional Compensatory Mitigation and Monitoring Guidelines* (SPD MMGS), and the *2015 Red Book Synchronizing Environmental Reviews for Transportation and Other Infrastructure Projects* (2015 Red Book).

The Corps' regulations at 33 C.F.R. part 332, intend to promote greater consistency, predictability, and ecological success of all forms of compensatory mitigation. Pursuant to 33 C.F.R. § 332.3(m), implementation of the compensatory mitigation project shall be, to the maximum extent practicable, in advance of, or concurrent with, the activity causing the authorized impacts. Thus, implementation of Advance PRM is expected to reduce temporal losses of aquatic resource functions and services as compared to other forms of compensatory mitigation. Specifically, those implemented concurrent with or, in rare circumstances, after impacts to waters of the U.S. In addition, evaluating Advance PRM proposals in advance of a permit allows the Corps to evaluate the proposal without causing delays in permit review. Further, we expect that Advance PRM proposals will be similar to mitigation bank and In-Lieu Fee (ILF) proposals; meaning they will consist of consolidated compensatory mitigation projects and resources, involve larger sites selected using a watershed approach, be developed using appropriate scientific and technical expertise, and completed in advance of permitted impacts.

¹ Compensatory mitigation is defined by 33 C.F.R. § 332.2 as the restoration (re-establishment or rehabilitation), establishment (creation), enhancement, and/or in certain circumstances preservation of aquatic resources for the purpose of offsetting unavoidable adverse impacts which remain after all appropriate and practicable avoidance and minimization has been achieved.

Considerations for an Advance PRM Proposal

Individuals/organizations interested in seeking approval from the Sacramento District for an Advance PRM site should consider the following prior to submittal of a proposal:

1. Advance PRM will generally be used by one entity. Advance PRM can be proposed by any applicant/permittee, but in general, the Advance PRM generated at an individual site can only be used by that same entity. Proposals that intend to combine Advance PRM for multiple individuals or agencies must be disclosed in the initial mitigation proposal. Proposals intended for use by multiple entities must include a specific proposal for mitigation and monitoring tracking and reporting.
2. Advance PRM can be approved before or during the permit application review. The Sacramento District can review and conditionally approve an Advance PRM proposal in advance of a permit application or during the permit evaluation process. This approval will provide the applicant a conditional decision on the potential type and amount of Advance PRM generated. This conditional approval may reference the proposed type and amount (acres or linear feet) of compensatory mitigation that may be available at the site if all required performance standards, as identified in the mitigation plan and approved by the Corps, are achieved. It is important to note that even if an Advance PRM proposal is approved, the approval does not create any presumption or guarantee that the Corps or any other agency will authorize a proposed project, or that the Advance PRM will be considered adequate to offset unavoidable losses of waters of the U.S. for that project (see paragraph 6).
3. Using Advance PRM. As a part of the permit evaluation process, the Corps will also consider whether the Advance PRM project has achieved the performance standards identified in the Corps-approved mitigation plan and if the proposal provides the appropriate type and amount of mitigation necessary to compensate for a project's proposed impacts. If the Corps determines the Advance PRM project has met required performance standards, where applicable, and is in compliance with all of the information required herein and is appropriate to compensate for the unavoidable loss of waters of the U.S., the Corps will determine the appropriate amount of compensatory mitigation required to fully compensate for the impacts using the *SPD Standard Operating Procedure for the Determination of Mitigation Ratios*, or current Corps guidance.
4. No guarantee of use. Establishing an Advance PRM site provides no entitlement to, or guarantee of, use of that Advance PRM as compensation for any particular project causing impacts to aquatic resources. Following a case-specific evaluation of a proposed activity, the Corps may determine that the Advance PRM is not appropriate to compensate for the loss of waters of the U.S. associated with the proposed project requiring a DA permit. Advance PRM will not be officially approved by the Corps until it is proposed for use as compensatory mitigation in a specific request for a DA individual permit or General permit verification, and until the Corps completes its permit decision. The Corps cannot determine the

appropriateness of the use of any Advance PRM until such time it is proposed for use as compensatory mitigation for a specific project.

5. Permittee retains liability. The permittee, or transferee, remains responsible for funding and implementation of the site protection mechanism and any long-term management and maintenance required for the Advance PRM site.

6. Compliance with Applicable Laws. Advance PRM does not affect the requirement to demonstrate mitigation sequencing as identified in 33 C.F.R § 332.3(b) or compliance with the National Environmental Policy Act, the Section 404(b)(1) guidelines, and public interest review (see 33 CFR § 320.4(a)).

Advance PRM Submittal Requirements

The following information should be submitted to the Sacramento District by any individual/entity requesting approval of an Advance PRM site:

1. A mitigation and monitoring plan for Corps review and approval. The plan must be prepared in accordance with 33 CFR § 332.4(c), and Section 4.8 of the SPD MMGs and any subsequent or updated guidance. All maps and graphics must be prepared in accordance with the *Updated Map and Drawing Standards for the South Pacific Division*, dated February 10, 2016 and any updates, as applicable. One electronic copy with editable documents (i.e. MS Word) and one hard copy must be provided to the Corps to facilitate our review. The plan shall also contain:
 - a. Disclosure that the proposal is for an Advance PRM project.
 - b. Information demonstrating the Advance PRM's proposed ecological lift beyond the baseline conditions, where appropriate.
 - c. Written justification demonstrating why the use of the Advance PRM mitigation site is environmentally preferable to a mitigation bank or ILF Program if the proposed impact site is within the service area of a Corps-approved mitigation bank or ILF Program and the mitigation bank and ILF Program has the appropriate number and type of released credits available (33 C.F.R. § 332.3(b)).
 - d. A written justification demonstrating how the proposed Advance PRM project was selected using a watershed approach (see 33 C.F.R. § 332.3(c) and (d), 332.4(c)(3), and SPD MMG Sections 4.3 and 4.8.7).
 - e. A proposed ledger to account for all transactions related to the debiting of Advance PRM. The ledger must include: Corps permit number, Cowardin classification of impacted aquatic resources, amount and type of Advance PRM allocated to a particular Corps permit, and the specific aquatic resources debited from the Advance PRM site. All Advance PRM acreage debited for a Corps permit must be tied to specific aquatic resource created, enhanced, re-established, rehabilitated, or preserved on an Advance PRM site. Proposals

intended for use by multiple entities must include a specific proposal for mitigation and monitoring tracking and reporting.

f. Draft conservation easement language using the most current Corps-approved template. Any modifications to the Corps template must be provided in track changes and justified in writing. If an alternative site protection mechanism is proposed justification as to why a conservation easement is not practicable must be provided. A copy of the Corps-approved conservation easement template is available upon request.

(1) The conservation easement must identify the proposed Corps-approved grantee and the proposal must propose a Corps-approved endowment holder (if different than the proposed grantee). Grantees that are accredited by the Land Trust Alliance will be automatically accepted by the Corps. For grantees that are not accredited by the Land Trust Alliance information on the qualifications of the proposed entity must be submitted with the proposal to facilitate the Corps' review. A list of required information for conservation easement grantees and endowment holders will be provided upon request.

g. Proposed amount of long-term financial assurance and proposed holder to be approved in writing by the Corps. Estimated long-term management costs using The Nature Conservancy's Long-term Stewardship Calculator, Center for Natural Lands Management's (CNLM) Property Analysis Record (PAR) software, or an equivalent cost analysis.

h. Proposed amount and type of short-term financial assurance (e.g. performance security) and a draft schedule for funding a performance security and a proposed release schedule.

i. Entity proposing Advance PRM must identify the project or projects that could use the Advance PRM to offset unavoidable losses of waters of the U.S. The Corps may approve the use of Advance PRM for projects not initially identified on a case-by-case basis.

Use of an Advance PRM Site: At the time that the Advance PRM is proposed for use as compensatory mitigation, the applicant must provide a compensatory mitigation proposal to the Corps² as part of the DA application. The proposal must include the following information:

a. Written justification demonstrating why the use of the Advance PRM mitigation site is environmentally preferable to a mitigation bank or ILF Program if the proposed impact site is within the service area of a Corps-approved mitigation bank or ILF Program and the mitigation bank and ILF Program has the appropriate number and type of released credits available (33 C.F.R. § 332.3(b)).

b. A reference to a Corps-approved plan including the Corps' permit number.

c. A summary of compliance with Corps-approved performance standards and all monitoring report results for the Advance PRM site completed by the time of submittal of the DA application.

² See 33 CFR 332.4(c) for mitigation plan approval requirements for Individual and General permits.

- d. Describe how the Advance PRM mitigation adequately compensates for the unavoidable impacts to waters of the U.S. associated with the proposed project.
- e. Proposed amount of Advance PRM the applicant believes is necessary to offset unavoidable losses of waters of the U.S. The Corps retains the final decision on the type and amount of compensatory mitigation required for a specific DA permit.
- f. Information demonstrating the Corps-approved Advance PRM site protection instrument has been executed.
- g. A proposal for short- and long-term financial assurances. Specifically, a construction and performance security if the site has not been established or if the performance standards identified in the Corps' approved advance PRM plan have not been met. If the long-term stewardship fund has not been established, proposals must include information on the amount of the proposed long-term stewardship fund and the proposed holder, if different than conservation easement grantee. The form of financial assurance must be consistent with the requirements at 33 C.F.R. 332.3(n). Draft financial assurances, including a long-term stewardship funding estimate and agreement, must be provided to the Corps for review and approval.
- h. Information on the cumulative Advance PRM acreage debited from the site including the proposed project.
- i. A map identifying the aquatic resources on the Advance PRM site proposed to be used as compensatory mitigation. Areas already dedicated as compensatory mitigation must be depicted on relevant figures and tied to specific aquatic resources. The areas debited must be identified on a map depicting established, re-established, restored, or preserved aquatic resources present on the Advance PRM site and must include the Corps' permit number.