(Preamble and Final Rule Excerpts contained below relate to the hierarchy of preference for using mitigation banks as a "first option." Preamble excerpts contain responses to comments received by the Corps and EPA relating to the hierarchy, and the rationale used by the Corps and EPA in developing the hierarchy in final rule language).

General Compensatory Mitigation Requirements:
33 CFR 332(b)(2)--(6) [§ 230.93(b)(2)--(6)]

PREAMABLE (excerpt)

(b) Type and location of compensatory mitigation. Several commenters stated that the established order of preference in the proposed rule (i.e., mitigation bank credits; permitteeresponsiblemitigation in accordance with a watershed plan or watershed approach; on-site, in-kind permitteeresponsible mitigation; and lastly, offsite, out-of-kind permittee-responsible mitigation) is too limiting and creates inefficiency. Many commenters stated that the proposed rule establishes a preference for mitigation banks, and some of these commenters argued that the preference for mitigation banks over in-lieu fee programs cannot be justified. One commenter suggested that this rule stipulate that mitigation banks should not necessarily represent a ''first resort'' to fulfilling mitigation requirements if there are on-site opportunities that are likely to provide greater ecological benefits. However, another commenter said that section 314 warrants a stronger preference for using approved mitigation banks. We have substantially revised and reorganized this section of the final rule, and have provided flexibility for district engineers to make compensatory mitigation decisions based on what is environmentally preferable and is most likely to successfully provide the required compensatory mitigation.

Sections 332.3(b)(2)–(6) [§ 230.93(b)(2)–(6)] present a preference hierarchy, which was developed through careful consideration of comments received in response to the proposed rule, as well as various studies on the different approaches for providing compensatory mitigation. The hierarchy is based on administrative and environmental considerations, to reduce risk and uncertainty associated with compensatory mitigation projects, as well as temporal losses of aquatic resource functions and services. Reduction of risk and uncertainty associated with compensatory mitigation projects is achieved by favoring compensatory mitigation that is further along in the planning and approval process or will better support a watershed approach. Since there are time lags associated with all sources of compensatory mitigation (see the 2001NRC Report), our focus is on reducing temporal losses to the extent practicable. Administrative considerations include the regulations governing mitigation banks, in-lieu fee programs, as well as the timing of actions required and permittee-responsible mitigation that are provided in this rule, for those sources of compensatory mitigation. Environmental considerations include the expected ecological benefits of third-party compensatory mitigation as well as independent studies that have shown that the ecological success of pemitteeresponsible mitigation is uneven. There have been few independent studies of the ecological success of mitigation banks and in-lieu fee programs, so we have no basis for establishing a preference based solely on third-party mitigation success.

Section 332.3(b)(1) [§ 230.93(b)(1)] discusses general principles for determining the appropriate type and location for compensatory mitigation projects. Some of these principles were taken from § 332.3(b)(4) [§ 230.93(b)(4)] of the proposed rule, which discussed the use of off-site and out-of-kind compensation. Since these basic principles should be applied earlier in the selection process, we have moved those provisions to § 332.3(a)(1) [§ 230.93(a)(1)] of the final rule. Paragraph (b)(1) of this section also states that the compensatory mitigation options provided in paragraphs (b)(2) through (b)(6) should be applied in the order they are given, to make it clear that this is a hierarchy from highest to lowest preference. It is

important to understand that this is a preference hierarchy that does not override a district engineer's judgment as to what constitutes the most appropriate and practicable compensatory mitigation based on consideration of case-specific circumstances. In this paragraph, we have added a provision to address compensating for impacts to marine resources. This provision states that compensatory mitigation project sites for marine resources should be located in the same marine ecological system as the impact site, citing reef complexes and littoral drift cells as examples of marine ecological systems. We have also added provisions indicating that compensation for impacts to aquatic resources in coastal watersheds should be located in a coastal watershed where practicable, and that mitigation projects should not be located where they will increase risks to aviation by attracting wildlife to areas where aircraft-wildlife strikes may occur (e.g., near airports).

Section 332.3(b)(2) [§ 230.93(b)(2)] establishes a preference for the use of mitigation bank credits if the mitigation bank has the appropriate number and resource type of credits available. This preference is based on the requirements in this rule: before credits can be sold or transferred to permittees the sponsor must have an approved instrument, as well as an approved mitigation plan and other assurances in place. Those other assurances are specified in the mitigation banking instrument and usually include securing the mitigation bank site, establishing financial assurances, and finalizing the appropriate site protection mechanisms. Because of these requirements for mitigation banks, there is generally less risk and uncertainty (and less temporal loss) than there is with in-lieu fee programs and permittee-responsibility. Because of the credit release schedule required for mitigation banks, there is some degree of demonstrated success in providing the compensatory mitigation. In addition, the planning and resources involved in developing and implementing a mitigation bank help provide greater assurance that the compensatory mitigation project will provide environmental benefits. However, district engineers can apply these considerations to other sources of compensatory mitigation to override the preference for mitigation bank credits. For example, the district engineer may authorize the use of released credits from an in-lieu fee program since the requirements for release of these credits are comparable to the requirements for release of credits from an approved mitigation bank. In a situation where the permittee has proposed to restore an outstanding resource, and has provided sufficient scientific and technical analysis to demonstrate that such a project will be successful, the district engineer may authorize the use of that compensatory mitigation project instead of mitigation bank credits. If the permitted impacts are not in the service area of an approved mitigation bank, or are in the service area of an approved mitigation bank, but that mitigation bank does not have the appropriate number and resource type of credits available, and an approved inlieu fee program does not have appropriate released credits available,

§ 332.3(b)(3) [§ 230.93(b)(3)] establishes a preference for in-lieu fee program credits. In-lieu fee programs fall into the next level of the hierarchy because of the levels of planning and review they are required to perform as a result of this rule. In-lieu fee programs are required to develop a compensation planning framework that supports a watershed approach (see § 332.8(c) [§ 230.98(c)]). In-lieu fee programs can also bring substantial expertise to aquatic resource restoration and protection activities, and many in-lieu fee program sponsors are conservation organizations with an interest in longterm management of aquatic resources. This preference may be overridden by a high quality permittee-responsible mitigation project or one that is likely to meet performance standards before the in-lieu fee program sponsor fulfills his or her obligation for advance credits.

If an approved mitigation bank or inlieu fee program cannot be used to provide the required compensatory mitigation, § 332.3(b)(4) establishes a preference for permittee-responsible mitigation conducted under a watershed approach.

In cases where a watershed approach is not practicable for permittee-responsible mitigation, under § 332.3(b)(5) [§230.93(b)(5)] the district engineer should consider options for onsite and/or in-kind compensation to fulfill the compensatory mitigation requirements.

The last option under the preference hierarchy is for permitteeresponsible mitigation through off-site and/or out-of-kind compensatory mitigation (see § 332.3(b)(6)[§ 230.93(b)(6)]).

One commenter said the proposed rule seems excessively rigid, and the limited funds available to public agencies should be used to implement mitigation where it will be most cost effective. One commenter said that wetland establishment should not be an acceptable form of wetland compensation, as it is too uncertain and has a bad track record. One commenter recommended that this section be reorganized to explain how the watershed approach should be applied to each mitigation location option. Cost considerations may be used to evaluate whether the proposed compensatory mitigation requirement for a DA permit is practicable. However, the ecological success of the compensatory mitigation project and its effectiveness at offsetting the permitted impacts are also important.

FINAL RULE LANGUAGE: (excerpt)
33 CFR § 332.3(b)(2) – (6), [§ 230.93(b)(2) - (6)]

(b) *Type and location of compensatory mitigation.* (1) When considering options for successfully providing the required compensatory mitigation, the district engineer shall consider the type and location options in the order presented in paragraphs (b)(2) through (b)(6) of this section. In general, the required compensatory mitigation should be located within the same watershed as the impact site, and should be located where it is most likely to successfully replace lost functions and services, taking into account such watershed scale features as aquatic habitat diversity, habitat connectivity, relationships to hydrologic sources (including the availability of water rights), trends in land use, ecological benefits, and compatibility with adjacent land uses. When compensating for impacts to marine resources, the location of the compensatory mitigation site should be chosen to replace lost functions and services within the same marine ecological system (e.g., reef complex, littoral drift cell). Compensation for impacts to aquatic resources in coastal watersheds (watersheds that include a tidal water body) should also be located in a coastal watershed where practicable. Compensatory mitigation projects should not be located where they will increase risks to aviation by attracting wildlife to areas where aircraft-wildlife strikes may occur (e.g., near airports).

(2) *Mitigation bank credits.* When permitted impacts are located within the service area of an approved mitigation bank, and the bank has the appropriate number and resource type of credits available, the permittee's compensatory mitigation requirements may be met by securing those credits from the sponsor. Since an approved instrument (including an approved mitigation plan and appropriate real estate and financial assurances) for a mitigation bank is required to be in place before its credits can begin to be used to compensate for authorized impacts, use of a mitigation bank can help reduce risk and uncertainty, as well as temporal loss of resource functions and services. Mitigation bank credits are not released for debiting until specific milestones associated with the mitigation bank site's protection and development are achieved, thus use of mitigation bank credits can also help reduce risk that mitigation will not be fully successful. Mitigation banks typically involve larger, more ecologically valuable parcels, and more rigorous scientific and technical analysis, planning and implementation than permittee-responsible mitigation. Also, development of a mitigation bank requires site identification in advance, project-specific planning, and significant investment of financial resources that is often not practicable for many in-lieu

fee programs. For these reasons, the district engineer should give preference to the use of mitigation bank credits when these considerations are applicable. However, these same considerations may also be used to override this preference, where appropriate, as, for example, where an in-lieu fee program has released credits available from a specific approved inlieu fee project, or a permitteeresponisble project will restore an outstanding resource based on rigorous scientific and technical analysis.

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

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

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

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