

(2) Coordination

In carrying out this subsection, the Secretary shall—

(A) coordinate the review with the Engineer Research and Development Center, other Federal and State agencies, and other relevant entities; and

(B) to the maximum extent practicable and where appropriate, utilize data provided to the Secretary by such agencies.

(b) Assessment of benefits from addressing sea level rise and inland flooding resiliency in feasibility reports**(1) In general**

Upon the request of a non-Federal interest, in carrying out a feasibility study for a project for flood risk mitigation, hurricane and storm damage risk reduction, or ecosystem restoration under section 2282 of this title, the Secretary shall consider whether the need for the project is predicated upon or exacerbated by conditions related to sea level rise or inland flooding.

(2) Addressing sea level rise and inland flooding resiliency benefits

To the maximum extent practicable, in carrying out a study pursuant to paragraph (1), the Secretary shall document the potential effects of sea level rise or inland flooding on the project, and the expected benefits of the project relating to sea level rise or inland flooding, during the 50-year period after the date of completion of the project.

(Pub. L. 116–260, div. AA, title I, §113, Dec. 27, 2020, 134 Stat. 2626.)

Editorial Notes**CODIFICATION**

Section was enacted as part of the Water Resources Development Act of 2020, and not as part of the Water Resources Development Act of 1986 which comprises this chapter.

Statutory Notes and Related Subsidiaries**“SECRETARY” DEFINED**

Secretary means the Secretary of the Army, see section 2 of div. AA of Pub. L. 116–260, set out as a note under section 2201 of this title.

§ 2283. Fish and wildlife mitigation**(a) Steps to be taken prior to or concurrently with construction**

(1) In the case of any water resources project which is authorized to be constructed by the Secretary before, on, or after November 17, 1986, construction of which has not commenced as of November 17, 1986, and which necessitates the mitigation of fish and wildlife losses, including the acquisition of lands or interests in lands to mitigate losses to fish and wildlife, as a result of such project, such mitigation, including acquisition of the lands or interests—

(A) shall be undertaken or acquired before any construction of the project (other than such acquisition) commences, or

(B) shall be undertaken or acquired concurrently with lands and interests in lands for

project purposes (other than mitigation of fish and wildlife losses),

whichever the Secretary determines is appropriate, except that any physical construction required for the purposes of mitigation may be undertaken concurrently with the physical construction of such project.

(2) For the purposes of this subsection, any project authorized before November 17, 1986, on which more than 50 percent of the land needed for the project, exclusive of mitigation lands, has been acquired shall be deemed to have commenced construction under this subsection.

(b) Acquisition of lands or interests in lands for mitigation

(1) After consultation with appropriate Federal and non-Federal agencies, the Secretary is authorized to mitigate damages to fish and wildlife resulting from any water resources project under his jurisdiction, whether completed, under construction, or to be constructed. Such mitigation may include the acquisition of lands, or interests therein, except that—

(A) acquisition under this paragraph shall not be by condemnation in the case of projects completed as of November 17, 1986, or on which at least 10 percent of the physical construction on the project has been completed as of November 17, 1986; and

(B) acquisition of water, or interests therein, under this paragraph, shall not be by condemnation.

The Secretary, shall, under the terms of this paragraph, obligate no more than \$30,000,000 in any fiscal year. With respect to any water resources project, the authority under this subsection shall not apply to measures that cost more than \$7,500,000 or 10 percent of the cost of the project, whichever is greater.

(2) Whenever, after his review, the Secretary determines that such mitigation features under this subsection are likely to require condemnation under subparagraph (A) or (B) of paragraph (1) of this subsection, the Secretary shall transmit to Congress a report on such proposed modification, together with his recommendations.

(c) Allocation of mitigation costs

Costs incurred after November 17, 1986, including lands, easements, rights-of-way, and relocations, for implementation and operation, maintenance, and rehabilitation to mitigate damages to fish and wildlife shall be allocated among authorized project purposes in accordance with applicable cost allocation procedures, and shall be subject to cost sharing or reimbursement to the same extent as such other project costs are shared or reimbursed, except that when such costs are covered by contracts entered into prior to November 17, 1986, such costs shall not be recovered without the consent of the non-Federal interests or until such contracts are complied with or renegotiated.

(d) Mitigation plans as part of project proposals**(1) In general**

After November 17, 1986, the Secretary shall not submit any proposal for the authorization of any water resources project to Congress in any report, and shall not select a project al-

ternative in any report, unless such report contains (A) a recommendation with a specific plan to mitigate for damages to ecological resources, including terrestrial and aquatic resources, and fish and wildlife losses created by such project, or (B) a determination by the Secretary that such project will have negligible adverse impact on ecological resources and fish and wildlife without the implementation of mitigation measures. Specific mitigation plans shall ensure that impacts to bottomland hardwood forests are mitigated in-kind, and other habitat types are mitigated to not less than in-kind conditions, to the extent possible. If the Secretary determines that mitigation to in-kind conditions is not possible, the Secretary shall identify in the report the basis for that determination and the mitigation measures that will be implemented to meet the requirements of this section and the goals of section 2317(a)(1) of this title. In carrying out this subsection, the Secretary shall consult with appropriate Federal and non-Federal agencies.

(2) Selection and design of mitigation projects

The Secretary shall select and design mitigation projects using a watershed approach to reflect contemporary understanding of the science of mitigating the adverse environmental impacts of water resources projects.

(3) Mitigation requirements

(A) In general

To mitigate losses to flood damage reduction capabilities and fish and wildlife resulting from a water resources project, the Secretary shall ensure that the mitigation plan for each water resources project complies with, at a minimum, the mitigation standards and policies established pursuant to the regulatory programs administered by the Secretary.

(B) Inclusions

A specific mitigation plan for a water resources project under paragraph (1) shall include, at a minimum—

(i) a plan for monitoring the implementation and ecological success of each mitigation measure, including the cost and duration of any monitoring, and, to the extent practicable, a designation of the entities that will be responsible for the monitoring;

(ii) the criteria for ecological success by which the mitigation will be evaluated and determined to be successful based on replacement of lost functions and values of the habitat, including hydrologic and vegetative characteristics;

(iii) for projects where mitigation will be carried out by the Secretary—

(I) a description of the land and interest in land to be acquired for the mitigation plan;

(II) the basis for a determination that the land and interests are available for acquisition; and

(III) a determination that the proposed interest sought does not exceed the minimum interest in land necessary to meet

the mitigation requirements for the project;

(iv) for projects where mitigation will be carried out through a third party mitigation arrangement in accordance with subsection (i)—

(I) a description of the third party mitigation instrument to be used; and

(II) the basis for a determination that the mitigation instrument can meet the mitigation requirements for the project;

(v) a description of—

(I) the types and amount of restoration activities to be conducted;

(II) the physical action to be undertaken to achieve the mitigation objectives within the watershed in which such losses occur and, in any case in which the mitigation will occur outside the watershed, a detailed explanation for undertaking the mitigation outside the watershed; and

(III) the functions and values that will result from the mitigation plan; and

(vi) a contingency plan for taking corrective actions in cases in which monitoring demonstrates that mitigation measures are not achieving ecological success in accordance with criteria under clause (ii).

(C) Responsibility for monitoring

In any case in which it is not practicable to identify in a mitigation plan for a water resources project the entity responsible for monitoring at the time of a final report of the Chief of Engineers or other final decision document for the project, such entity shall be identified in the partnership agreement entered into with the non-Federal interest under section 1962d-5b of title 42.

(4) Determination of success

(A) In general

A mitigation plan under this subsection shall be considered to be successful at the time at which the criteria under paragraph (3)(B)(ii) are achieved under the plan, as determined by monitoring under paragraph (3)(B)(i).

(B) Consultation

In determining whether a mitigation plan is successful under subparagraph (A), the Secretary shall consult annually with appropriate Federal agencies and each State in which the applicable project is located on at least the following:

(i) The ecological success of the mitigation as of the date on which the report is submitted.

(ii) The likelihood that the mitigation will achieve ecological success, as defined in the mitigation plan.

(iii) The projected timeline for achieving that success.

(iv) Any recommendations for improving the likelihood of success.

(5) Monitoring

Mitigation monitoring shall continue until it has been demonstrated that the mitigation has met the ecological success criteria.

(e) First enhancement costs as Federal costs

In those cases when the Secretary, as part of any report to Congress, recommends activities to enhance fish and wildlife resources, the first costs of such enhancement shall be a Federal cost when—

(1) such enhancement provides benefits that are determined to be national, including benefits to species that are identified by the National Marine Fisheries Service as of national economic importance, species that are subject to treaties or international convention to which the United States is a party, and anadromous fish;

(2) such enhancement is designed to benefit species that have been listed as threatened or endangered by the Secretary of the Interior under the terms of the Endangered Species Act, as amended (16 U.S.C. 1531, et seq.), or

(3) such activities are located on lands managed as a national wildlife refuge.

When benefits of enhancement do not qualify under the preceding sentence, 25 percent of such first costs of enhancement shall be provided by non-Federal interests under a schedule of reimbursement determined by the Secretary. Not more than 80 percent of the non-Federal share of such first costs may be satisfied through in-kind contributions, including facilities, supplies, and services that are necessary to carry out the enhancement project. The non-Federal share of operation, maintenance, and rehabilitation of activities to enhance fish and wildlife resources shall be 25 percent.

(f) National benefits from enhancement measures for Atchafalaya Floodway System and Mississippi Delta Region projects

Fish and wildlife enhancement measures carried out as part of the project for Atchafalaya Floodway System, Louisiana, authorized by Public Law 99-88, and the project for Mississippi Delta Region, Louisiana, authorized by the Flood Control Act of 1965, shall be considered to provide benefits that are national for purposes of this section.

(g) Fish and Wildlife Coordination Act supplementation

The provisions of subsections (a), (b), and (d) shall be deemed to supplement the responsibility and authority of the Secretary pursuant to the Fish and Wildlife Coordination Act [16 U.S.C. 661 et seq.], and nothing in this section is intended to affect that Act.

(h) Programmatic mitigation plans**(1) In general**

The Secretary may develop programmatic mitigation plans to address the potential impacts to ecological resources, fish, and wildlife associated with existing or future Federal water resources development projects.

(2) Use of mitigation plans

The Secretary shall, to the maximum extent practicable, use programmatic mitigation plans developed in accordance with this subsection to guide the development of a mitigation plan under subsection (d).

(3) Non-Federal plans

The Secretary shall, to the maximum extent practicable and subject to all conditions of

this subsection, use programmatic environmental plans developed by a State, a body politic of the State, which derives its powers from a State constitution, a government entity created by State legislation, or a local government, that meet the requirements of this subsection to address the potential environmental impacts of existing or future water resources development projects.

(4) Scope

A programmatic mitigation plan developed by the Secretary or an entity described in paragraph (3) to address potential impacts of existing or future water resources development projects shall, to the maximum extent practicable—

(A) be developed on a regional, ecosystem, watershed, or statewide scale;

(B) include specific goals for aquatic resource and fish and wildlife habitat restoration, establishment, enhancement, or preservation;

(C) identify priority areas for aquatic resource and fish and wildlife habitat protection or restoration;

(D) include measures to protect or restore habitat connectivity;

(E) encompass multiple environmental resources within a defined geographical area or focus on a specific resource, such as aquatic resources or wildlife habitat; and

(F) address impacts from all projects in a defined geographical area or focus on a specific type of project.

(5) Consultation

The scope of the plan shall be determined by the Secretary or an entity described in paragraph (3), as appropriate, in consultation with the agency with jurisdiction over the resources being addressed in the environmental mitigation plan.

(6) Contents

A programmatic environmental mitigation plan may include—

(A) an assessment of the condition of environmental resources in the geographical area covered by the plan, including an assessment of recent trends and any potential threats to those resources;

(B) an assessment of potential opportunities to improve the overall quality of environmental resources in the geographical area covered by the plan through strategic mitigation for impacts of water resources development projects;

(C) standard measures for mitigating certain types of impacts, including impacts to habitat connectivity;

(D) parameters for determining appropriate mitigation for certain types of impacts, such as mitigation ratios or criteria for determining appropriate mitigation sites;

(E) adaptive management procedures, such as protocols that involve monitoring predicted impacts over time and adjusting mitigation measures in response to information gathered through the monitoring;

(F) acknowledgment of specific statutory or regulatory requirements that must be

satisfied when determining appropriate mitigation for certain types of resources; and

(G) any offsetting benefits of self-mitigating projects, such as ecosystem or resource restoration and protection.

(7) Process

Before adopting a programmatic environmental mitigation plan for use under this subsection, the Secretary shall—

(A) for a plan developed by the Secretary—

(i) make a draft of the plan available for review and comment by applicable environmental resource agencies and the public; and

(ii) consider any comments received from those agencies and the public on the draft plan; and

(B) for a plan developed under paragraph (3), determine, not later than 180 days after receiving the plan, whether the plan meets the requirements of paragraphs (4) through (6) and was made available for public comment.

(8) Integration with other plans

A programmatic environmental mitigation plan may be integrated with other plans, including watershed plans, ecosystem plans, species recovery plans, growth management plans, and land use plans.

(9) Consideration in project development and permitting

If a programmatic environmental mitigation plan has been developed under this subsection, any Federal agency responsible for environmental reviews, permits, or approvals for a water resources development project may use the recommendations in that programmatic environmental mitigation plan when carrying out the responsibilities of the agency under the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.).

(10) Preservation of existing authorities

Nothing in this subsection limits the use of programmatic approaches to reviews under the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.).

(11) Effect

Nothing in this subsection—

(A) requires the Secretary to undertake additional mitigation for existing projects for which mitigation has already been initiated, including the addition of fish passage to an existing water resources development project; or

(B) affects the mitigation responsibilities of the Secretary under any other provision of law.

(i) Third-party mitigation arrangements

(1) Eligible activities

In accordance with all applicable Federal laws (including regulations), mitigation efforts carried out under this section may include—

(A) participation in mitigation banking or other third-party mitigation arrangements, such as—

(i) the purchase of credits from commercial or State, regional, or local agency-sponsored mitigation banks; and

(ii) the purchase of credits from in-lieu fee mitigation programs; and

(B) contributions to statewide and regional efforts to conserve, restore, enhance, and create natural habitats and wetlands if the Secretary determines that the contributions will ensure that the mitigation requirements of this section and the goals of section 2317(a)(1) of this title will be met.

(2) Inclusion of other activities

The banks, programs, and efforts described in paragraph (1) include any banks, programs, and efforts developed in accordance with applicable law (including regulations).

(3) Terms and conditions

In carrying out natural habitat and wetlands mitigation efforts under this section, contributions to the mitigation effort may—

(A) take place concurrent with, or in advance of, the commitment of funding to a project; and

(B) occur in advance of project construction only if the efforts are consistent with all applicable requirements of Federal law (including regulations) and water resources development planning processes.

(4) Preference

At the request of the non-Federal project sponsor, preference may be given, to the maximum extent practicable, to mitigating an environmental impact through the use of a mitigation bank, in-lieu fee, or other third-party mitigation arrangement, if the use of credits from the mitigation bank or in-lieu fee, or the other third-party mitigation arrangement for the project has been approved by the applicable Federal agency.

(j) Use of funds

(1) In general

The Secretary, with the consent of the applicable non-Federal interest, may use funds made available for preconstruction engineering and design after authorization of project construction to satisfy mitigation requirements through third-party arrangements or to acquire interests in land necessary for meeting mitigation requirements under this section.

(2) Notification

Prior to the expenditure of any funds for a project pursuant to paragraph (1), the Secretary shall notify the Committee on Appropriations and the Committee on Transportation and Infrastructure of the House of Representatives and the Committee on Appropriations and the Committee on Environment and Public Works of the Senate.

(k) Measures

The Secretary shall consult with interested members of the public, the Director of the United States Fish and Wildlife Service, the Assistant Administrator for Fisheries of the National Oceanic and Atmospheric Administration,

States, including State fish and game departments, and interested local governments to identify standard measures under subsection (h)(6)(C) that reflect the best available scientific information for evaluating habitat connectivity.

(Pub. L. 99-662, title IX, § 906, Nov. 17, 1986, 100 Stat. 4186; Pub. L. 102-580, title III, § 333(a), Oct. 31, 1992, 106 Stat. 4852; Pub. L. 106-53, title II, § 221, Aug. 17, 1999, 113 Stat. 295; Pub. L. 106-541, title II, § 224(a), Dec. 11, 2000, 114 Stat. 2597; Pub. L. 110-114, title II, § 2036(a), Nov. 8, 2007, 121 Stat. 1092; Pub. L. 113-121, title I, § 1040(a), June 10, 2014, 128 Stat. 1239; Pub. L. 114-322, title I, § 1162, Dec. 16, 2016, 130 Stat. 1668.)

Editorial Notes

REFERENCES IN TEXT

The Endangered Species Act, as amended, referred to in subsec. (e)(2), probably means the Endangered Species Act of 1973, Pub. L. 93-205, Dec. 28, 1973, 87 Stat. 884, as amended, which is classified generally to chapter 35 (§1531 et seq.) of Title 16, Conservation. For complete classification of this Act to the Code, see Short Title note set out under section 1531 of Title 16 and Tables.

Public Law 99-88, referred to in subsec. (f), is Pub. L. 99-88, Aug. 15, 1985, 99 Stat. 293, known as the Supplemental Appropriations Act, 1985. Provisions of Pub. L. 99-88 authorizing the project for the Atchafalaya Floodway System, Louisiana, are not classified to the Code. For complete classification of this Act to the Code, see Tables.

The Flood Control Act of 1965, referred to in subsec. (f), is title II of Pub. L. 89-298, Oct. 27, 1965, 79 Stat. 1073. Provisions of that Act authorizing the project for Mississippi Delta Region, Louisiana, are not classified to the Code. For complete classification of this Act to the Code, see Tables.

The Fish and Wildlife Coordination Act, referred to in subsec. (g), is act Mar. 10, 1934, ch. 55, 48 Stat. 401, which is classified generally to sections 661 to 666c-1 of Title 16, Conservation. For complete classification of this Act to the Code, see section 661(a) of Title 16, Short Title note set out under section 661 of Title 16, and Tables.

The National Environmental Policy Act of 1969, referred to in subsec. (h)(9), (10), is Pub. L. 91-190, Jan. 1, 1970, 83 Stat. 852, which is classified generally to chapter 55 (§ 4321 et seq.) of Title 42, The Public Health and Welfare. For complete classification of this Act to the Code, see Short Title note set out under section 4321 of Title 42 and Tables.

AMENDMENTS

2016—Subsec. (h)(4)(D) to (F). Pub. L. 114-322, § 1162(1)(A), added subpar. (D) and redesignated former subpars. (D) and (E) as (E) and (F), respectively.

Subsec. (h)(6)(C). Pub. L. 114-322, § 1162(1)(B), substituted “impacts, including impacts to habitat connectivity” for “impacts”.

Subsec. (h)(11). Pub. L. 114-322, § 1162(1)(C), added par. (11) and struck out former par. (11). Prior to amendment, text read as follows: “Nothing in this subsection requires the Secretary to undertake additional mitigation for existing projects for which mitigation has already been initiated.”

Subsecs. (j), (k). Pub. L. 114-322, § 1162(2), added subsecs. (j) and (k).

2014—Subsec. (d)(1). Pub. L. 113-121, § 1040(a)(1)(A), inserted “for damages to ecological resources, including terrestrial and aquatic resources, and” after “mitigate”, “ecological resources and” after “impact on”, “without the implementation of mitigation measures” before period at end of first sentence, and “If the Secretary determines that mitigation to in-kind conditions is not possible, the Secretary shall identify in the report the basis for that determination and the mitiga-

tion measures that will be implemented to meet the requirements of this section and the goals of section 2317(a)(1) of this title.” after “to the extent possible.”

Subsec. (d)(2). Pub. L. 113-121, § 1040(a)(1)(B)(iii), which directed insertion of “using a watershed approach” after “projects” was executed by making the insertion after “projects” the first place appearing to reflect the probable intent of Congress.

Pub. L. 113-121, § 1040(a)(1)(B)(i), (ii), substituted “Selection and design” for “Design” in heading and inserted “select and” before “design” in text.

Subsec. (d)(3)(A). Pub. L. 113-121, § 1040(a)(1)(C)(i), inserted “, at a minimum,” after “complies with”.

Subsec. (d)(3)(B)(iii) to (vi). Pub. L. 113-121, § 1040(a)(1)(C)(ii), added cls. (iii) and (iv), redesignated former cls. (iv) and (v) as (v) and (vi), respectively, and struck out former cl. (iii) which read as follows: “a description of the land and interests in land to be acquired for the mitigation plan and the basis for a determination that the land and interests are available for acquisition;”.

Subsecs. (h), (i). Pub. L. 113-121, § 1040(a)(2), added subsecs. (h) and (i).

2007—Subsec. (d)(1). Pub. L. 110-114, § 2036(a)(1), (2), substituted “to Congress in any report, and shall not select a project alternative in any report,” for “to the Congress” and inserted “, and other habitat types are mitigated to not less than in-kind conditions” after “mitigated in-kind”.

Subsec. (d)(3) to (5). Pub. L. 110-114, § 2036(a)(3), added pars. (3) to (5).

2000—Subsec. (d). Pub. L. 106-541 inserted subsec. heading, designated existing provisions as par. (1), inserted par. heading, realigned margins, substituted “November 17, 1986” for “the date of enactment of this Act”, redesignated former cls. (1) and (2) as (A) and (B), respectively, and added par. (2).

1999—Subsec. (e). Pub. L. 106-53 inserted after second sentence “Not more than 80 percent of the non-Federal share of such first costs may be satisfied through in-kind contributions, including facilities, supplies, and services that are necessary to carry out the enhancement project.”

1992—Subsec. (c). Pub. L. 102-580 inserted “, including lands, easements, rights-of-way, and relocations,” before “for implementation and operation”.

Statutory Notes and Related Subsidiaries

APPLICABILITY

Pub. L. 113-121, title I, § 1040(b), June 10, 2014, 128 Stat. 1243, provided that: “The amendments made by subsection (a) [amending this section] shall not apply to a project for which a mitigation plan has been completed as of the date of enactment of this Act [June 10, 2014].”

CONCURRENT MITIGATION

Pub. L. 106-541, title II, § 224(b), Dec. 11, 2000, 114 Stat. 2598, required the Comptroller General to conduct an investigation of the effectiveness of the concurrent mitigation requirements of this section and to transmit to Congress a report on the results of the investigation not later than 1 year after Dec. 11, 2000.

§ 2283a. Status report

(1) In general

Concurrent with the President’s submission to Congress of the President’s request for appropriations for the Civil Works Program for a fiscal year, the Secretary shall submit to the Committee on Transportation and Infrastructure of the House of Representatives and the Committee on Environment and Public Works of the Senate a report on the status of construction of projects that require mitigation under section 2283 of this title, the status of such mitigation, and the results of the consultation under subsection (d)(4)(B) of such section.