

## **NAB Regulatory Advance Permittee-Responsible Mitigation (APRM) Procedures**

August 16, 2022

This document is intended to help applicants seeking approval from the Baltimore District to establish Advance Permittee-Responsible Mitigation (APRM) 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. In addition, these procedures identify what information is needed when proposing and using an APRM site.

APRM is a form of permittee-responsible mitigation (PRM) constructed in advance of unavoidable authorized impacts to aquatic resources. All APRM sites must comply with the standards and requirements of the 2008 Mitigation Rule. The Mitigation Rule identifies that implementation of compensatory mitigation project shall be, to the maximum extent practicable, in advance of, or concurrent with, the activity causing the authorized impacts (33 CFR § 332.3(m)). The expectation is that APRM proposals would involve larger sites selected using a watershed approach, be developed using scientific and technical expertise, and be completed in advance of permitted impacts. Evaluating APRM proposals in advance of a permit decision allows the Corps to evaluate the proposal without causing delays in application review. Furthermore, implementation of APRM prior to commencement of authorized impacts would be expected to reduce risks and temporal losses of aquatic resource functions compared to other forms of PRM.

An APRM site may be designed to provide compensatory mitigation for future expected impacts. Alternatively, APRM can also be combined with concurrent PRM required by a Corps permit, where the concurrent mitigation site provides additional area/credits beyond the immediate mitigation requirements. The excess PRM credit generated at the site would be established in advance of expected future impacts to aquatic resources, with the intent of using the excess mitigation credit to fulfill required compensatory mitigation requirements. The Corps may approve the use of APRM for projects not initially identified on a case-by-case basis.

The Corps must verify the baseline conditions and approve the APRM plan in advance of APRM project implementation. An APRM site must be initially designed, approved, and established with the purpose of providing compensatory mitigation for impacts to aquatic resources. Previously constructed aquatic resources that were established, restored, or enhanced for purposes other than compensatory mitigation would not be considered appropriate APRM sites.

Applicants may need to continue to budget mitigation funding prior to and during the permit application process even though the intent is to use an APRM site. Establishing the APRM site in advance of future impacts does not create any guarantee or presumption that future impacts will be authorized or that the APRM site will be approved to offset those identified future project impacts. Once a credit is approved for use and debited from the ledger for the APRM site, that same credit cannot be used for any other permitted activity.

### **A. Considerations for Establishing APRM:**

1. Use by one entity. The APRM site may only be used to meet compensatory mitigation requirements of the one entity (single applicant/permittee) that received prior Corps approval for construction of the APRM site.

2. APRM site development approved before or during permit application review. The development of an APRM site can be approved before or during the permit application review for the impacts requiring compensatory mitigation. There is no presumption or guarantee that the Corps or other agency will authorize a proposed project, or that the applicant can apply APRM credit to a future authorized project.

Following a project-specific evaluation, the Corps may determine that the APRM is not environmentally preferable to compensate for the proposed impacts associated with the proposed project requiring a DA permit. For example, if the impact site is within the service area of an approved mitigation bank that has the appropriate number and type of released credits, the bank may be environmentally preferable to use because the bank has been successfully performing for a longer period of time and the risk and temporal loss has been decreased/eliminated.

3. Determined appropriate by the Corps. As part of the evaluation, the Corps will consider whether the APRM site has achieved the performance standards identified in the approved final mitigation plan and whether the APRM provides the appropriate type and amount of mitigation required to compensate for a project's proposed impacts.
4. No guarantee of use. The permittee bears the risk of the possible inability to utilize all the credits generated at the APRM site. Developing an APRM site does not guarantee that the applicant can apply APRM credit to a future permit. The approval to use the APRM site to compensate for unavoidable impacts is determined by the Corps at the permitting stage. When proposing to use APRM in a service area where an approved mitigation bank or ILF program has been approved, the applicant must demonstrate why the APRM site is ecologically preferable to other forms of mitigation.
5. No transfer of mitigation responsibility. Unlike 3<sup>rd</sup> party compensatory mitigation, the permittee retains liability for the APRM and remains responsible for funding and implementation of the site protection mechanism, achievement of all performance standards, monitoring and adaptive management, and funding and execution of any required long term management and maintenance.
6. Compliance with applicable laws. APRM must still comply with applicable law, including mitigation sequencing (33 CFR 332.3(b)), NEPA, Section 404(b)(1), and public interest review requirements (33 CFR § 320.4(a)).

#### **B. Information required for establishing an APRM site:**

1. The permittee name and contact information proposing to establish and use the APRM site. This permittee retains full responsibility for ensuring that required compensation is completed and successful.
2. A mitigation plan in accordance with 33 CFR § 332.4(c) for agency review and Corps approval with disclosure that the proposal is to develop an APRM site.

3. Information demonstrating APRM proposed ecological lift beyond the baseline conditions, where appropriate. Documentation of baseline conditions must be sufficient to determine future ecological lift and assess potential advance credits.
4. Written justification demonstrating why the use of APRM is environmentally preferable to a mitigation bank or in-lieu fee (ILF) project if within the service area of an approved bank or ILF program.
5. The boundary and the basis for the proposed geographic service area within which the APRM site is authorized to provide compensatory mitigation required by DA permits. A proposed service area would not be necessary when the APRM site is proposed entirely to offset impacts for a known specific project.
6. The proposed accounting and reporting procedures. A proposed ledger to track potential and available credits by credit type, permitted impacts and project number using the APRM site's credits, the amount of credits being used at the APRM, the date of use, and all changes in credit availability should be included with this information.
7. The proposed close-out procedures, including disposition of unused and unneeded advance credits generated at the APRM site.
8. Identification of the proposed project(s) (current and future) intending to use the APRM site and their expected compensatory mitigation needs. It is highly recommended to have an idea of future anticipated projects and associated impacts that are expected to use the APRM; however, knowing all future projects and their impacts is not required. When projects and associated impacts are known, the APRM site should be designed to replace the anticipated aquatic resource impacts.
9. Proposed credit generating schedule or framework demonstrating how the credits will increase over time as the site matures and successfully reaches performance standards. This schedule shall show how the advance credit may be generated over time as the site matures from construction (when concurrent mitigation ratios/amounts will apply) through full performance phase, including how the site would achieve required performance standards as credits are generated. Required compensatory mitigation for future impacts may be reduced as temporal losses are reduced and the APRM site achieves its proposed, expected future (e.g., post-construction) environmental lift and potential credit (similar to a mitigation bank).
10. Any other information deemed necessary by the Corps.

**C. Use of an APRM site on project-specific basis:** The information below shall be provided at the time that APRM is proposed for use as compensatory mitigation for a specific project.

1. A reference to the specific Corps-approved APRM site name and Corps' tracking number that is proposed to be used for project-specific compensatory mitigation.

2. Written justification demonstrating why the use of APRM is environmentally preferable to a mitigation bank or ILF program if within the service area of an approved bank or ILF program.
3. Summary of compliance with Corps-approved performance standards and all monitoring report results for the APRM completed by the time of submittal of the DA application.
4. Describe the impacts to aquatic resources requiring compensatory mitigation. Include type and acreage of aquatic resources affected, functions lost, fish and wildlife species affected, and how impacts have been avoided and minimized.
5. Describe how the APRM adequately compensates for the unavoidable impacts to aquatic resources associated with the proposed project.
6. Proposed amount of APRM credit the applicant believes is necessary to offset the unavoidable losses to be authorized by the specific DA permit. This should be based on the credit generating schedule established at the APRM site approval.
7. Information demonstrating the previous Corps-approved APRM site protection instrument has been executed or include information on what site protection mechanism is being proposed for approval. The approved APRM site protection instrument must be approved and recorded prior to the use of the site as mitigation.
8. Information on short-term financial assurances and long-term management mechanisms and funding that were established and approved during APRM plan approval or is being proposed for approval. Financial assurances and long-term management mechanisms and funding must be implemented prior to the use of the site as mitigation.
9. Information on the amount of APRM credits proposed to be debited from the site for the proposed project impacts. Within 30 days of Corps approval to use APRM credit, the permittee will send a copy of an updated ledger to the Corps' APRM project manager.

#### **D. Tracking APRM Development in ORM2:**

ORM2 has an action to capture the process associated with developing APRM sites. The action is identified as "Develop APRM site". The APRM action will identify the approved aquatic resource(s), credit type, credit unit, and quantity of available credit. The current 2021 ORM2 SOP includes these procedures for tracking APRM beginning on page 39 of the document. Tracking procedures are similar to mitigation banking. In ORM2, the APRM is established (action finalized and closure method = procedure complete) with a unique name and the total approved compensatory mitigation area and credits (if used). Thereafter, each project proposing to use the APRM site will be assigned a new ORM tracking number, and a project-specific mitigation entry would be created using the Impact/Mitigation Screen for the project by adding a new mitigation entry and selecting APRM as the mitigation type from the drop-down list. On the mitigation screen, the specific APRM site is selected and the type and number of credits to be used by that particular project are entered by the project manager.