AMENDMENT TO THE AMENDMENT IN THE
NATURE OF A SUBSTITUTE TO H.R. 7776
OFFERED BY MR. GARAMENDI OF CALIFORNIA

Add at the end of title I the following:

SEC. ___ . FISH AND WILDLIFE MITIGATION.

Section 906 of the Water Resources Development Act of 1986 (33 U.S.C. 2283) is amended—

(1) in subsection (d)(3)(B)(iv), by inserting “or contract” after “mitigation instrument” each place it appears; and

(2) in subsection (i)—

(A) in paragraph (1)—

(i) in clause (i), by striking “; and” at the end and inserting “, for immediate or future delivery;”; and

(ii) by adding at the end the following:

“(iii) the use of a contract for the full delivery of the mitigation plans required under subsection (d); and”;

(B) in paragraph (3)—

(i) by redesignating subparagraph (B) as subparagraph (C); and
(ii) in the matter preceding subpara-
paragraph (A), by striking “contributions to
the” and all that follows through “commit-
ment of funding to a project; and” and in-
serting the following: “the Secretary shall
ensure that contributions to the mitigation
effort—
“(A) are consistent with the approved
Corps of Engineers compensatory mitigation
procedures used by the regulatory program of
the Corps of Engineers district in which the
project or mitigation activity is located;
“(B) take place concurrent with, or in ad-
advance of, the commitment of funding to a
project, or portion of a project; and”; and
(C) by adding at the end the following:
“(l) COMPLIANCE WITH REGULATIONS.—In carrying
out this section, the Secretary shall comply with the final
rule issued by the Department of the Army and the Envi-
ronmental Protection Agency on April 10, 2008, entitled
‘Compensatory Mitigation for Losses of Aquatic Resources
issued by the U.S. Army Corps of Engineers and U.S. En-
vironmental Protection Agency’, or any subsequently pro-
mulgated rule.
“(m) DEFINITION OF CONTRACT.—In this section, the term ‘contract’ means an agreement between the Secretary and a mitigation provider that—

“(1) uses regionally accepted mitigation implementation practices, including—

“(A) site selection, acquisition of land or interest in land, and site protection;

“(B) restoration plan development and approval;

“(C) credit generation;

“(D) implementation of restoration plan;

“(E) monitoring, management, and long-term stewardship (including operations and maintenance); and

“(F) project success determination; and

“(2) provides for the full delivery of mitigation from one or more sources, the responsibility for the successful completion of which is imposed upon the mitigation provider, including—

“(A) stand-alone mitigation projects;

“(B) purchase of credits from in-lieu fee programs or mitigation banks; or

“(C) the acquisition of credits using mitigation standards and policies adopted by the regulatory program of the Corps of Engineers
district in which the project or activity is located.”.

SEC. ___. PERFORMANCE BASED CONTRACTING PILOT PROGRAM.

(a) In General.—Not later than 90 days after the date of enactment of this Act, the Secretary shall establish a pilot program using performance based contracts for the mitigation requirements of authorized Corps of Engineers civil works projects.

(b) Purposes.—The purpose of the pilot program established under subsection (a) is to—

(1) evaluate the technical, financial, and resource benefits of allowing a pilot mitigation provider to carry out and manage the design and construction of one or more mitigation projects using a performance based contract;

(2) enable creative financing to timely address compensatory mitigation needs for the civil works program;

(3) control and minimize risk to the Corps of Engineers by shifting the design and implementation risks of mitigation projects to third parties better able to execute and handle the risk; and

(4) improve overall mitigation results, performance, and timeliness while reducing costs.
(c) ADMINISTRATION.—In carrying out the pilot program established under subsection (a), the Secretary shall—

(1) identify for inclusion in the program at least 15 Corps of Engineers Civil Works projects with unmet mitigation requirements that have been authorized and received appropriations for construction;

(2) issue a request for proposals to pilot mitigation providers to meet the mitigation needs of projects identified under paragraph (1) through the use of a performance based contract;

(3) in issuing a request for proposals, the Secretary shall clearly define the desired mitigation outcome to be achieved by the pilot mitigation provider;

(4) use transparent, publicly available evaluation criteria to select a pilot mitigation provider the selection process, which criteria shall—

(A) give first preference to pilot mitigation providers that propose mitigation largely delivered in advance of a project’s impacts, including through provision of mitigation bank credits;
(B) give preference to pilot mitigation providers that propose mitigation delivered concurrent to a project’s impacts;

(C) require a sufficiency determination of a pilot mitigation providers proposed financial assurances to ensure a high level of confidence that the proposed mitigation will be successfully completed; and

(D) prioritize pilot mitigation providers that propose mitigation projects that address priorities identified in state or other federal agency developed comprehensive mitigation, coastal and/or flood master plans;

(5) after selecting a pilot mitigation provider, enter into a performance based contract with the pilot mitigation provider under which the pilot provider is provided full project management control for the site identification, acquisition, financing, design, or construction (or any combination thereof) of the project;

(6) notify the Committees in writing of each project identified under paragraph (1);

(7) following the completion of a mitigation project, certify that work was completed in accord-
ance with the performance based contract entered
into under paragraph (5); and

(8) issue payment in accordance with the per-
formance based contract to the relevant pilot mitigat-
ion provider;

(d) DETAILED PROJECT SCHEDULE.—Not later than
180 days after entering into a performance based contract
under subsection (c)(5), a pilot mitigation provider, to the
maximum extent practicable, shall submit to the Secretary
a detailed project schedule for the relevant project, based
on estimated funding levels, that specifies deadlines for
each milestone with respect to the project.

(e) TECHNICAL ASSISTANCE.—At the request of a
pilot mitigation provider participating in the pilot mitiga-
tion program established under subsection (a), the Sec-
etary may provide to the pilot mitigation provider tech-
nical assistance with respect to—

(1) a study, engineering activity, or design ac-
tivity related to a project carried out by the pilot
mitigation provider under the program; and

(2) obtaining permits necessary for such a
project.

(f) IDENTIFICATION OF IMPEDIMENTS.—
(1) IN GENERAL.—Not later than 90 days after
the completion of the pilot program carried out
under this section, the Secretary shall—

(A) identify any procedural requirements
under the authority of the Secretary that im-
pede use of performance based contracts for de-
velopment and completion of required mitiga-
tion elements of Corps of Engineers civil works
projects that have been authorized for construc-
tion and have received construction appropri-
tions;

(B) develop and implement programmatic
procedures and approaches that—

(i) address such impediments; and

(ii) protect the public interest and any
public investment in water resources devel-
opment projects that involve performance
based contracts in water resources develop-
ment projects; and

(C) not later than 1 year after the date of
enactment of this section, issue guidance to
carry out the procedures and approaches devel-
oped under subparagraph (B).
(2) Rule of Construction.—Nothing in this section may be construed to allow the Secretary to waive any requirement under—

(A) sections 3141 through 3148 and sections 3701 through 3708 of title 40, United States Code;

(B) the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.);

(C) section 906 of the Water Resources Development Act of 1986 (33 U.S.C. 2283); or

(D) any other provision of Federal law (including regulations).

(g) Non-Federal Funding.—The pilot mitigation provider may finance the non-Federal share of a project carried out under the pilot program established under subsection (a).

(i) Cost Share.—Nothing in this section affects a cost-sharing requirement under Federal law that is applicable to a project carried out under the pilot program established under subsection (a).

(h) Report.—Not later than 3 years after the date of enactment of this Act, the Secretary shall submit to the Committees and make publicly available a report describing the results of the pilot program established under subsection (a), including any recommendations of the Sec-
retary concerning whether the program or any component of the program should be implemented on a national basis.

(h) DEFINITIONS.—In this section:

(1) COMMITTEES.—The term “Committees” means the Committee on Environment and Public Works of the Senate and the Committee on Transportation and Infrastructure of the House of Representatives.

(2) PERFORMANCE BASED CONTRACT.—The term “performance based contract” means a procurement mechanism by which the Corps of Engineers contracts with a pilot mitigation provider for a specific mitigation outcome requirement, with payment to the pilot mitigation providers linked to delivery of verifiable and successful mitigation performance.

(3) PILOT MITIGATION PROVIDER.—The term “pilot mitigation provider” means the non-Federal entity carrying out a mitigation project through a performance based contract under this section.