

**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:

1 **SEC. ____ . FISH AND WILDLIFE MITIGATION.**

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

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

7 (2) in subsection (i)—

8 (A) in paragraph (1)—

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

12 (ii) by adding at the end the fol-
13 lowing:

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

17 (B) in paragraph (3)—

18 (i) by redesignating subparagraph (B)
19 as subparagraph (C); and

1 (ii) in the matter preceding subpara-
2 graph (A), by striking “contributions to
3 the” and all that follows through “commit-
4 ment of funding to a project; and” and in-
5 serting the following: “the Secretary shall
6 ensure that contributions to the mitigation
7 effort—

8 “(A) are consistent with the approved
9 Corps of Engineers compensatory mitigation
10 procedures used by the regulatory program of
11 the Corps of Engineers district in which the
12 project or mitigation activity is located;

13 “(B) take place concurrent with, or in ad-
14 vance of, the commitment of funding to a
15 project, or portion of a project; and”;

16 (C) by adding at the end the following:

17 “(1) COMPLIANCE WITH REGULATIONS.—In carrying
18 out this section, the Secretary shall comply with the final
19 rule issued by the Department of the Army and the Envi-
20 ronmental Protection Agency on April 10, 2008, entitled
21 ‘Compensatory Mitigation for Losses of Aquatic Resources
22 issued by the U.S. Army Corps of Engineers and U.S. En-
23 vironmental Protection Agency’, or any subsequently pro-
24 mulgated rule.

1 “(m) DEFINITION OF CONTRACT.—In this section,
2 the term ‘contract’ means an agreement between the Sec-
3 retary and a mitigation provider that—

4 “(1) uses regionally accepted mitigation imple-
5 mentation practices, including—

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

8 “(B) restoration plan development and ap-
9 proval;

10 “(C) credit generation;

11 “(D) implementation of restoration plan;

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

15 “(F) project success determination; and

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

20 “(A) stand-alone mitigation projects;

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

23 “(C) the acquisition of credits using miti-
24 gation standards and policies adopted by the
25 regulatory program of the Corps of Engineers

1 district in which the project or activity is lo-
2 cated.”.

3 **SEC. ____ . PERFORMANCE BASED CONTRACTING PILOT**
4 **PROGRAM.**

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

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

12 (1) evaluate the technical, financial, and re-
13 source benefits of allowing a pilot mitigation pro-
14 vider to carry out and manage the design and con-
15 struction of one or more mitigation projects using a
16 performance based contract;

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

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

24 (4) improve overall mitigation results, perform-
25 ance, and timeliness while reducing costs.

1 (c) ADMINISTRATION.—In carrying out the pilot pro-
2 gram established under subsection (a), the Secretary
3 shall—

4 (1) identify for inclusion in the program at
5 least 15 Corps of Engineers Civil Works projects
6 with unmet mitigation requirements that have been
7 authorized and received appropriations for construc-
8 tion;

9 (2) issue a request for proposals to pilot mitiga-
10 tion providers to meet the mitigation needs of
11 projects identified under paragraph (1) through the
12 use of a performance based contract;

13 (3) in issuing a request for proposals, the Sec-
14 retary shall clearly define the desired mitigation out-
15 come to be achieved by the pilot mitigation provider;

16 (4) use transparent, publicly available evalua-
17 tion criteria to select a pilot mitigation provider the
18 selection process, which criteria shall—

19 (A) give first preference to pilot mitigation
20 providers that propose mitigation largely deliv-
21 ered in advance of a project's impacts, includ-
22 ing through provision of mitigation bank cred-
23 its;

1 (B) give preference to pilot mitigation pro-
2 viders that propose mitigation delivered concu-
3 rent to a project's impacts;

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

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

14 (5) after selecting a pilot mitigation provider,
15 enter into a performance based contract with the
16 pilot mitigation provider under which the pilot pro-
17 vider is provided full project management control for
18 the site identification, acquisition, financing, design,
19 or construction (or any combination thereof) of the
20 project;

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

23 (7) following the completion of a mitigation
24 project, certify that work was completed in accord-

1 ance with the performance based contract entered
2 into under paragraph (5); and

3 (8) issue payment in accordance with the per-
4 formance based contract to the relevant pilot mitiga-
5 tion provider;

6 (d) DETAILED PROJECT SCHEDULE.—Not later than
7 180 days after entering into a performance based contract
8 under subsection (c)(5), a pilot mitigation provider, to the
9 maximum extent practicable, shall submit to the Secretary
10 a detailed project schedule for the relevant project, based
11 on estimated funding levels, that specifies deadlines for
12 each milestone with respect to the project.

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

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

21 (2) obtaining permits necessary for such a
22 project.

23 (f) IDENTIFICATION OF IMPEDIMENTS.—

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

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

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

14 (i) address such impediments; and

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

20 (C) not later than 1 year after the date of
21 enactment of this section, issue guidance to
22 carry out the procedures and approaches devel-
23 oped under subparagraph (B).

1 (2) RULE OF CONSTRUCTION.—Nothing in this
2 section may be construed to allow the Secretary to
3 waive any requirement under—

4 (A) sections 3141 through 3148 and sec-
5 tions 3701 through 3708 of title 40, United
6 States Code;

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

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

11 (D) any other provision of Federal law (in-
12 cluding regulations).

13 (g) NON-FEDERAL FUNDING.—The pilot mitigation
14 provider may finance the non-Federal share of a project
15 carried out under the pilot program established under sub-
16 section (a).

17 (i) COST SHARE.—Nothing in this section affects a
18 cost-sharing requirement under Federal law that is appli-
19 cable to a project carried out under the pilot program es-
20 tablished under subsection (a).

21 (h) REPORT.—Not later than 3 years after the date
22 of enactment of this Act, the Secretary shall submit to
23 the Committees and make publicly available a report de-
24 scribing the results of the pilot program established under
25 subsection (a), including any recommendations of the Sec-

1 retary concerning whether the program or any component
2 of the program should be implemented on a national basis.

3 (h) DEFINITIONS.—In this section:

4 (1) COMMITTEES.—The term “Committees”
5 means the Committee on Environment and Public
6 Works of the Senate and the Committee on Trans-
7 portation and Infrastructure of the House of Rep-
8 resentatives.

9 (2) PERFORMANCE BASED CONTRACT.—The
10 term “performance based contract” means a pro-
11 curement mechanism by which the Corps of Engi-
12 neers contracts with a pilot mitigation provider for
13 a specific mitigation outcome requirement, with pay-
14 ment to the pilot mitigation providers linked to de-
15 livery of verifiable and successful mitigation per-
16 formance.

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

