



**US Army Corps
of Engineers** ®
Fort Worth District

Public Notice

Number: CESWF-12-MITB

Activity: Fort Worth District Mitigation Banks

Date: June 27, 2016

Purpose

The purpose of this Public Notice is to inform you of mitigation banking guidelines being adopted by the U.S. Army Corps of Engineers, Ft. Worth District.

Regulatory Program

Since its early history, the U.S. Army Corps of Engineers has played an important role in the development of the nation's water resources. Originally, this involved construction of harbor fortifications and coastal defenses. Later duties included the improvement of waterways to provide avenues of commerce. An important part of our mission today is the protection of the nation's waterways through the administration of the U.S. Army Corps of Engineers Regulatory Program.

Section 10

The U.S. Army Corps of Engineers is directed by Congress under Section 10 of the Rivers and Harbors Act of 1899 (33 USC 403) to regulate *all work or structures in or affecting the course, condition or capacity of navigable waters of the United States*. The intent of this law is to protect the navigable capacity of waters important to interstate commerce.

Section 404

The U.S. Army Corps of Engineers is directed by Congress under Section 404 of the Clean Water Act (33 USC 1344) to regulate the *discharge of dredged and fill material into all waters of the United States, including wetlands*. The intent of the law is to protect the nation's waters from the indiscriminate discharge of material capable of causing pollution and to restore and maintain their chemical, physical and biological integrity.

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PUBLIC NOTICE

U.S. ARMY CORPS OF ENGINEERS, FORT WORTH DISTRICT

SUBJECT: The U.S. Army Corps of Engineers, Fort Worth District (USACE) is releasing this Public Notice to publish additional Guidelines Covering Specific Elements for the Establishment of New Mitigation Banks in the Fort Worth District (Guidelines). These guidelines have been developed based on input from the Interagency Review Team (IRT), as well as the mitigation banking community, including mitigation bank sponsors and consultants. The purpose of these Guidelines is to establish a series of considerations that may be incorporated into new mitigation banking proposals as well as bank expansions. These Guidelines along with the USACE mitigation banking templates (found at <http://www.swf.usace.army.mil/pubdata/environ/regulatory/permitting/mitigationtemplates/index.asp>) will serve to increase predictability and transparency for mitigation banking activities, in addition to expediting the mitigation banking process.

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LOCATION: These Guidelines are applicable to all mitigation banking proposals located within the regulatory boundaries of the USACE, Fort Worth District within the State of Texas (refer to Figure 1). Further, these Guidelines would apply to all mitigation bank proposals received after the date of this Public Notice or to those projects that are within the Bank Review Prospectus Phase, as of the date of this Public Notice.

SUMMARY: As outlined in 33 CFR Part 332, *Compensatory Mitigation for Losses of Aquatic Resources*; Final Rule, dated April 10, 2008, (Federal Register, Vol. 73, No. 70) (Mitigation Rule), the USACE and U.S. Environmental Protection Agency established a flexible hierarchy for compensatory mitigation, and established a preference for mitigation bank credits or in-lieu fee programs. In order to fully implement the 2008, Mitigation Rule, the Fort Worth District identified a need to develop a series of Guidelines. The first set of Guidelines were finalized in a Public Notice, dated June 16, 2011. On August 6, 2012, a 45-day public notice was issued to solicit comments to assist in developing a second set of Guidelines. Comments were received from the IRT, mitigation banking community, and interested parties. All comments were fully considered in developing the Guidelines. The subject Public Notice will serve to finalize the Guidelines initially proposed in August 2012. Although these Guidelines may not be completely appropriate for every mitigation banking proposal, it is anticipated that they will provide a framework that will be useful in the vast majority of banking projects. The mitigation banking guidelines previously announced in Public Notice CESWF-10-MITB, dated June 16, 2011, remain in full effect. The additional Guidelines for these specific elements of the Fort Worth District Mitigation Banking program are as follows.

Consideration of Recently Disturbed Sites:

Any sites that have recently undergone human induced alteration which would artificially create low baseline conditions will generally not be considered as potential mitigation banks until such time as the site has remained in an unaltered state for a period of five years. These activities include, but are not limited to cutting, clearing, logging, burning, mowing, application of herbicides, ditching, draining, mining, and dam/berm removal. Any activities that serve to maintain an artificially low baseline condition of the site, would be considered further alteration activities and would initiate another five year waiting period. Typical exceptions to this waiting period would include the application of herbicides solely for the control of exotic invasive species or beneficial management activities that have been performed on the property on a long-term continuous basis. Consideration will be given to the historical land use of a site. A complete documentation relative to a site's recent land use history will be required in the Prospectus as part of the proposed bank review.

Financial Assurances:

The bank sponsor will be required to provide financial assurances, in accordance with the 2008 Mitigation Rule. These financial Assurances would typically cover 110% of all costs associated with project construction for short-term financial assurance. The additional 10% would cover any contingencies (i.e. replanting, further manipulation of hydrology). In order to determine the appropriate amount of funds to be established in the short term financial assurance, the bank sponsor shall provide a detailed breakdown of all project related costs, such as those included in the bank's site development plan. These items should include, but are not limited to the following: as-built plans/survey work, costs of land ownership/control, earthwork, permits, erosion control measures, structures, building materials, plant materials, seeding, planting, fencing, control of exotic invasive species, implementation of adaptive management activities, , monitoring and reporting including monitoring of hydrology, plants, or other elements related to site condition, fence repair and maintenance, administration/legal costs such as associated with establishment of financial assurances endowments and the conservation easement.

Stream Credits:

In order to generate in-channel and riparian buffer credits (as defined in the Fort Worth District Stream Mitigation Method, Public Notice CESWF-13-MIT-1, dated October 2, 2013), the bank sponsor must own and/or control both banks of a stream including the full required buffer on both sides of the stream, and provide documentation of ownership and/or control. The only exception would be those situations in which the opposite side of the stream is owned and/or controlled by a federal, state and/or local entity, including a 501(c) (3) organization for which the property would be protected in perpetuity through a conservation easement or long-term management plan. In addition, stream beds (channel bottom from toe-of-bank to toe-of-bank) not owned and/or controlled by the sponsor would be ineligible for any in-channel credits. However, riparian buffer credits could be generated adjacent to stream beds not owned by the sponsor. In

order to make an official determination relative to potential state-owned stream beds, a determination should be obtained from the State of Texas General Land Office.

Design Plans for Mitigation Projects:

As part of the IRT review process for in-stream work associated with mitigation projects, Bank Sponsors would include 60% stream channel design plans, as a component of the draft Mitigation Banking Instrument (MBI), with 95% design plans submitted at the final MBI phase. Additionally, as-built stream channel design plans would be submitted upon completion of earthwork. As-built plans showing wetland activities would be submitted for wetland-only banks or stream mitigation banks incorporating wetlands as a part of the bank. As-built plans would depict all other activities located outside of streams and/or wetlands which have been incorporated into the project, including, but not limited to: grading, water control structures, erosion control, etc. In order for the IRT to understand potential differences between the as-built condition, as compared to the approved MBI plans, the sponsor would provide a detailed, itemized description of the differences between the as-built plans and the plans depicted in the approved MBI, and provide a credit adjustment breakdown to account for any changes in crediting that are required. These plans would be reviewed by the IRT prior to making any credit adjustments.

Consultant Qualifications and Experience:

The bank sponsor shall provide details on the qualifications and experience of their consultants. Particularly for stream mitigation projects, and other projects involving uncertain hydrologic conditions, the qualifications and experience of the consultants will be reviewed. In addition, the sponsor shall submit, for IRT review, examples of past projects similar in nature to those proposed that have been completed by the consultant. In the event that the consultant does not have extensive experience in these areas, the IRT may require a greater degree or amount of monitoring, revision of the credit release schedule, and increased financial assurances.

Modifications of Existing MBI's:

In most cases, modifications to an existing MBI will require a full re-evaluation and coordination of the MBI, in accordance with the process and timeline outlined in the Mitigation Rule. As part of this process, all revised MBI's must be consistent with the Mitigation Rule and will be examined for compliance with all current Fort Worth District (SWF) guidance current at the time of the modification request. Modifications resulting in the alteration of the number or type of available credits may result in the temporary suspension of credit sales for the duration of the MBI re-evaluation process.

Use of Reference Sites:

In order to evaluate the appropriateness of proposed stream and wetland restoration/enhancement designs, and to calculate the projected ecological lift anticipated to be achieved by a mitigation site, the bank sponsor should identify potential reference sites for IRT review. The sponsor should provide, at a minimum, a TXRAM (2.0) assessment for each appropriate reference site. These reference sites should exemplify the ecological condition anticipated to be achieved at full maturity. All reference sites are to be selected using sound ecological practices. Selected sites should be similar with regard to a number of factors, including, but not limited to hydrologic regime, watershed, Ecoregion (Level III Ecoregions of Texas, Omernik 2004), soil type, landscape position, and surrounding development patterns. Data sheets, photographs, and other supporting information for the reference and mitigation project sites will be evaluated to determine if the amounts and types of predicted ecological lift are reasonable and achievable in the context of the mitigation work plan. Once approved, these sites would be used to determine the projected ecological lift of the mitigation site.

Use of Index of Biotic Integrity (IBI):

For in-channel work on perennial streams or intermittent streams with perennial pools, the bank sponsor will be required to use an IBI, or similar biotic assessment model, to provide biological data regarding the effects of restoration on the fish and benthic macroinvertebrate communities. At a minimum, IBI's or equivalent model shall be performed before restoration activities occur to obtain baseline data and performed again after restoration efforts. The IBI and methods for biological monitoring are described in the Texas Commission on Environmental Quality's Surface Water Quality Monitoring Procedures, Volume 2 (RG-416, June 2007). Link to procedures: <http://www.tceq.texas.gov/publications/rg/rg-416/index.html>.

Performance Based Credit Releases:

All performance based credit releases will be determined on percent survival of planted species, diversity, and invasive species criteria in addition to the predicted TXRAM (2.0), or equivalent model, scores as calculated based on ecological lift trajectory. The TXRAM (2.0) score ecological lift trajectory reflects baseline, incremental lift, and ultimate scores at maturity, plotted against time. Specifically, the score to be used as a performance standard would be the score predicted to be achieved at the end of the monitoring period. Additionally, the bank sponsor shall establish interim scores that will correspond to each scheduled credit release. In the event the actual score falls below that predicted by the bank sponsor, the monitoring period and credit release schedule would be adjusted accordingly, unless adequate justification to the contrary is provided.

RIBITS Credit Ledger:

All MBI's shall have a RIBITS reporting section as follows:

The Sponsor shall be responsible for maintaining the bank's credit ledger in the Regulatory In-lieu Fee and Bank Information Tracking System (RIBITS). All credit transactions should be entered into the database no later than seven calendar days after the transaction has occurred or the USACE reserves the right to suspend credit sales until sales transactions are deemed current and compliant. RIBITS mandatory information fields include the following:

1. Jurisdiction
2. Transaction Date
3. Credits Debited
4. USACE Permit Number
Format: SWF/Year/Permit Number *must be 5-digits long (example: SWF-2000-00150)
5. Name of Permittee
6. Credit Classification (if applicable, with functional assessment subcategories identified; i.e. if HGMI identify amounts within each subcategory TSSW/RSEC/MPAC, etc.)
7. Specific Area(s) Within Bank That Credits Are To Be Debited (example: Enhancement Area 1, Upland Buffer, Ephemeral Stream, Intermittent Stream, Etc., based on how total potentially available credits are distributed throughout different areas in the bank and where they have been released)

Compliance with RIBITS reporting does not supersede the requirement of the sponsor to submit individual transaction reports.

Irrigation and Monitoring:

It is the intent of the mitigation program to ensure that all approved mitigation sites are self-sustaining in the long-term. However, on occasion, bank sponsors may choose to provide supplemental water to help ensure survival of newly planted species. Establishment irrigation performed during the first growing season after planting may be done so without the need to extend the approved monitoring period. In the event bank sponsors choose to irrigate bank sites after the first growing season, the required monitoring period shall be extended such that the first year of monitoring would begin from the time at which irrigation ceases. This requirement will help to ensure that a site's natural hydrologic conditions are sufficient to support the intended habitat type.

Abstract / Title Search:

As a component of the Prospectus, the bank sponsor would provide a copy of a residential abstract, including a 60-year title search performed by a title company operating within the subject state and an attorney’s opinion of title relative to potential effects of any and all activities associated with subject liens and encumbrances. This information is necessary to comply with the 2008 Mitigation Rule to ensure that all properties being considered as potential mitigation banks have been fully researched and full disclosure has been provided relative to all liens and encumbrances.

Additional Tables for MBI:

Appropriate accounting is an important aspect of the Mitigation Bank development process. To ensure clarity with the process of accounting and monitoring, all MBI's should contain additional tables indicating the projected functional assessment scores specific to each assessment area within the bank for each credit release. In addition, all MBI's should contain additional tables which show the projected credit distribution for each assessment area within the bank for each credit release.

Document Submittal:

Upon request by the USACE, proposed bank sponsors would be required to send hard copy documents (draft prospectus, prospectus, draft MBI(s), final MBI, reports, etc.) directly to the IRT. In an effort to expedite IRT review, Sponsors should also submit annotated versions of revised documents to clearly demonstrate how all comments have been addressed.

Funding of Long-Term Endowment:

In addition to achieving certain activities and/or performance standards, incremental funding of the long-term endowment would be a requirement of credit release. Long term financial assurances would be funded in accordance with the following schedules.

Wetland Mitigation Banks & Stream Mitigation Banks (riparian work only)

Credit Release	Financial Assurance Funding
15%	0%
20%	15%
15%	35%
10%	50%
10%	60%
10%	70%
20%	100%

Stream – Complete Channel Restoration – (75% or more of channel needs reconstruction)

Credit Release	Financial Assurance Funding
30%	0%
10%	30%
10%	40%
10%	50%
10%	60%
10%	70%
20%	100%

Stream – Only Partial Channel Restoration with Varying Amounts of Riparian Restoration

Credit Release	Financial Assurance Funding
20%	0%
15%	20%
15%	35%
10%	50%
10%	60%
10%	70%
20%	100%

Adjustment of Long-Term Endowment Funds:

Until the endowment fund is fully funded, the amount of the applicable endowment principal would be adjusted annually by a percentage equal to the percentage increase, if any, in the Consumer Price Index (CPI). The adjustment shall be applied to the amount of the applicable endowment principal.

Conservation Easement Holder Qualifications and Experience:

As a preference the conservation easement should be held by a nationally accredited 501(c)(3) land trust organization. In the event the organization being considered is not nationally accredited, the organization's Board of Directors should have in its corporate resolutions the adoption of the National Land Trust Alliance's Statement of Land Trust Standards and Practices as guiding the practices of the organization. (The Statement is available from LTA (www.lta.org or 202-638-4725). In all cases the bank sponsor will be required to provide details on the organization's qualifications, personnel, and experience relative to the preservation and management of aquatic resources and/or habitat conservation areas.

Stream Mitigation Buffers:

In an effort to ensure long-term sustainability, streams subject to lateral migration must include details on establishment and preservation of meander belt widths including the required buffer width. In the event the bank sponsor is required to increase buffer width to ensure long-term sustainability of the stream and associated riparian buffers, TXRAM (2.0) would allow the bank sponsor to generate additional credits.

The point of contact for these guidelines is Mr. Brent Jasper; Regulatory Division, CESWF-DE-R; U. S. Army Corps of Engineers; Post Office Box 17300; Fort Worth, Texas 76102-0300. You may visit the Regulatory Division in Room 3A37 of the Federal Building at 819 Taylor Street in Fort Worth between 8:00 A.M. and 3:30 P.M., Monday through Friday. Telephone inquiries should be directed to (817) 886-1733.

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