



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

Public Notice

Number: CESWF-18-MITB

Activity: Fort Worth District Mitigation Banks

Date: January 24, 2019

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.

Contact

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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.

DATE ISSUED: January 24, 2019

LOCATION: These Guidelines are applicable to all new mitigation banking actions within the regulatory boundaries of the USACE, Fort Worth District within the State of Texas (refer to Figure 1).

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. 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 Notices CESWF-10-MITB, dated June 16, 2011, and CESWF-12-MITB, dated July 5, 2016, remain in full effect.

On January 9, 2018, a 30-day public notice was issued to solicit comments to assist in developing these additional Guidelines. The USACE received a request for an extension to the comment period. In light of this request, the USACE granted a 30-day extension to the comment period with comments due on or before March 12, 2018. Comments were received from the IRT, mitigation banking community, and additional interested parties. All comments were fully considered in developing the Guidelines. The additional Guidelines for these specific elements of the Fort Worth District Mitigation Banking program are as follows:

1. Phase I Environmental. All mitigation bank sites would require a Phase I Environmental Assessment in accordance with ASTM Practice E-1527-13, or most up to date practice, at the Prospectus Phase. This information would be submitted in addition to other relevant criteria to ensure appropriate site selection.

2. Invasive Species. Exotic invasive species composition should be limited to 0% in the overstory and mid-story, and 1% in the herbaceous layer. However, for specific problematic species, justification may be considered for different requirements. Exotic invasive species composition requirements will only apply to creditable acreage within the mitigation bank. Upon identification and subsequent treatment of exotic invasive species, additional monitoring will be conducted to ensure successful control. If an invasive species is discovered and subsequently successfully treated to reduce coverage back to 0%, the bank would be considered to be in compliance with this guideline. The list to be used to identify invasive species can be found on the Texas Invasives website at:

http://texasinvasives.org/plant_database/. In any case, exotic plant species, whether invasive or not, discovered within creditable acreage of the mitigation bank will be treated, with the goal of complete removal.

3. Forest Restoration Performance Standards. At release of monitoring, the site should support a minimum of 250 stems per acre of trees that have been planted and rooted in the ground for a minimum of five years. Eighty percent of planted tree species shall be present in year 5 (Present means each species should constitute at least 5% of the total planted stems.) Volunteer stems of approved native species may be counted toward total stem counts. No one species, either planted or volunteer, will account for more than 30% of the total surviving canopy species stems. A similar performance standard for diversity should be developed for understory species. Note that interim and final credit releases must meet stems per acre, diversity, and invasive species requirements in addition to Texas Rapid Assessment Method scores. Variations from this standard may be evaluated on a case-by-case basis and will be based on an appropriate stream reference reach, or reference wetland data commensurate to the specific ecoregion and major river basin, with other considerations including landscape position, hydrologic regime, sediment dynamics, and substrate present on-site. Additional consideration will be given to scientific literature citations supporting this approach.

4. Baseline Data. All baseline data, including Jurisdictional Determination, Texas Rapid Assessment Method, and other relevant data should not have been collected more than five years prior to submission of the draft mitigation banking instrument. Notable changes within the watershed or site conditions during this time period may require re-evaluation of the baseline data.

5. Stream Migration Buffer. Streams subject to lateral migration may require additional buffer widths in order to ensure long-term viability of both the stream channel and its associated Texas Rapid Assessment Method buffer. Bank sponsors may propose credits appropriate to account for expanded buffers. Credits should be based on a calculated area difference between meander buffer width and expanded buffer width not to exceed 5% of awardable riparian buffer credits.

6. Reduction of Short-term Financial Assurances. Due to the increased risk of failure associated with stream restoration and enhancement activities, short-term financial assurances should be fully retained until such time as the bank has achieved full performance standards as specified in the mitigation banking instrument.

7. Stream Reference Reach. Proposed reference reaches should be submitted to and approved by the Interagency Review Team prior to scoring the Texas Rapid Assessment Method and other relevant protocols. Bank sponsors are encouraged to submit stream reference data early in the draft mitigation banking instrument phase and prior to substantial investment in the stream design. This will help ensure the reference reach data is appropriately reflected in the stream design. Bank sponsors should provide an ecological basis for reference reach selection that demonstrates the reference reach shares ecological characteristics similar to the mitigation site. Reference reach information to be considered should include, at a minimum, channel geometry, depth, width, gradient, sinuosity, meander belt width, and meander belt heterogeneity, in addition to the extent to which the reference reach reflects variability in these characteristics. Other characteristics to be considered should include soil, slope, land use, substrate, sediment transport, floodplain dynamics, and condition of the riparian buffer.

8. Flash Grazing. Flash grazing involves short duration grazing with an appropriate number of livestock specifically implemented as an adaptive management tool to control invasive species. As part of the draft mitigation banking instrument, the bank sponsor may submit a Flash Grazing Plan. If approved and implemented, the bank sponsor would be required to submit a separate request for each flash grazing event. Grazing would be permitted to occur in buffers and wetland areas as deemed appropriate, however grazing would be excluded from all stream channels.

9. Stream Stability. When riparian planting is the only activity proposed, the bank sponsor must sufficiently demonstrate short-term and long-term channel stability. Performance standards for channel geometry and stability will be required in addition to those associated with buffer metrics.

10. On-Site Supervision. As part of the mitigation banking instrument, the bank sponsor shall submit for IRT approval an on-site supervision plan that ensures qualified/experienced personnel will be on-site during stream construction.

11. Title Abstract. As a component of the Prospectus, the bank sponsor shall provide a copy of a title abstract, including a 100-year title search of the proposed mitigation bank property performed by a title company operating within the state. The bank sponsor shall submit an attorney's Opinion of Title prepared in accordance with Federal Title Standards, addressing each scheduled exception to the title and either clear said exception, or explain its permissible use in relation to the proposed project. The Opinion of Title may be structured in a manner similar to that used in a standard American Land Title Association Title Commitment Form. Dependent upon the location of the proposed mitigation bank site and potential for mineral extraction on properties adjacent to the proposed site, a title abstract, including a 100-year title search may be required on adjacent properties. This information may be required on a case-by-case basis to identify and evaluate the likelihood and extent to which existing or proposed land use activities located on adjacent lands could adversely affect the ecological condition of the proposed bank site.

12. Subsurface Mineral Exploration. Subsurface mineral exploration and extraction activities have the potential to adversely impact restored, enhanced, and created aquatic resources. No new leases, sales, or other contracts of mineral rights (those owned by the surface owner, if any) should occur during the mitigation bank evaluation period. Bank sponsors should provide a minerals assessment report (i.e., remoteness opinion) which assesses the minerals present on and under the land to determine the potential for future development. For any subsurface mineral rights owned by the landowner, the bank sponsor should fully and permanently retire all subsurface minerals (oil, gas, and other hydrocarbon) rights in perpetuity, or alternatively, the sponsor would commit to accessing owned resources without performing work that would affect the bank site (i.e., directional drilling). For subsurface mineral rights held by other parties, the bank sponsor should make reasonable efforts to purchase or retrieve all subsurface mineral rights. If 100% of all subsurface mineral rights cannot be acquired and otherwise retired by the bank's sponsor a Mineral Management Plan (MMP) should be developed and provided to the Interagency Review Team as part of the draft mitigation banking instrument review. The MMP should specifically identify potential areas for subsurface mineral exploration and development activities (e.g., access roads, well pads, directional drill sites, etc.) based on the minerals assessment report. To avoid and minimize adverse impacts to aquatic resources, activities associated with subsurface mineral exploration and extraction should be limited to only those identified areas, and these areas would be excluded from creditable acreage and the Conservation Easement. For any areas associated with the MMP that cannot be excluded from the Conservation Easement, the bank sponsor should consult an experienced oil and gas attorney to draft a Surface Use Agreement (SUA) for the potential of any subsurface holder(s) to conduct exploration or extraction activities in those areas. The SUA should be provided to the Interagency Review Team for review, and once approved should be attached as an exhibit to the Conservation Easement. It should be noted that sand, gravel, and timber resources are considered surface resources which should also be retired.

13. Templates. The use of the Fort Worth District templates, including templates for Prospectus, Mitigation Banking Instrument, Conservation Easement, and Sample Tables for short and long-term financial assurance is encouraged. These templates can be found on the Fort Worth District Regulatory Home Page at <http://www.swf.usace.army.mil/Missions/Regulatory/> .

14. Monitoring Phase Jurisdictional Determination. A Jurisdictional Determination identifying waters of the U.S. will be required for the first credit release including a functional/conditional assessment and the final credit release for all schedules, including wetlands and streams.

15. Initial Credit Release for Stream and Wetland Creation. Due to the high risk of failure associated with stream and wetland creation, initial credit releases will generally not be approved for those areas that are not waters of the U.S. at the time baseline surveys are performed. Upon determination by the USACE that the new normal conditions exist on the project site, the initial credit release will be approved upon identification of the extent, limits, and type of waters of the U.S. as verified by the USACE, in addition to other performance standards specified in the mitigation banking instrument.

16. Initiation of Mitigation Activities. The bank sponsor should initiate the mitigation activities specified in the mitigation banking instrument within one year of the initial credit release. These mitigation activities are in addition to the activities specified for the initial credit release. The bank sponsor may request an extension to the one-year initiation date.

17. Force Majeure. Any delay or failure of the bank sponsor shall not constitute a default hereunder if and to the extent that such delay or failure is primarily caused by any act, event, or conditions beyond the bank sponsor's reasonable control and significantly adversely affects their ability to perform their obligations hereunder, including: (i) acts of god, lightning, earthquake, fire, landslide, or interference by third parties; (ii) condemnation or other taking by any governmental body; (iii) change in applicable law, regulation, rule, ordinance or permit condition, or the interpretation or enforcement thereof; (iv) any order, judgment, action, or determination of any federal, state, or local court, administrative agency, or government body; or (v) the suspension or interruption of any permit, license, consent, authorization, or approval. If the performance of the bank sponsor is affected by any such event, bank sponsor shall give written notice thereof to the Interagency Review Team as soon as is reasonably practicable. If such event occurs before the last sale of credits and bank closure, the bank sponsor shall take remedial action to restore the property to its condition prior to such event, in a manner sufficient to provide adequate mitigation to cover credits that were sold prior to such delay or failure to compensate for impacts to waters, including wetlands, authorized by Department of the Army permits. Such remedial action shall be taken by the bank sponsor only to the extent necessary and appropriate, as determined by the Interagency Review Team.

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.

DISTRICT ENGINEER
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U.S. Army Corps of Engineers Districts within the State of Texas

