

APPENDIX I

Memorandum of Agreement Between The Department of the Army and The Environmental Protection Agency

MEMORANDUM OF AGREEMENT

BETWEEN

The Department of the Army *AND*
The Environmental Protection Agency

CONCERNING

**THE DETERMINATION OF MITIGATION UNDER THE CLEAN WATER
ACT SECTION 404(b)(1) GUIDELINES**

I. PURPOSE

The United States Environmental Protection Agency (EPA) and the United States Department of the Army (Army) hereby articulate the policy and procedures to be used in the determination of the type and level of mitigation necessary to demonstrate compliance with the Clean Water Act (CWA) Section 404(b)(1) Guidelines ("Guidelines"). This Memorandum of Agreement (MOA) expresses the explicit intent of the Army and EPA to implement the objective of the CWA to restore and maintain the chemical, physical and biological integrity of the Nation's waters, including wetlands. This MOA is specifically limited to the Section 404 Regulatory Program and is written to provide guidance for agency field personnel on the type and level of mitigation which demonstrates compliance with requirements in the Guidelines. The policies and procedures discussed herein are consistent with current Section 404 regulatory practices and are provided in response to questions that have been raised about how the Guidelines are implemented. The MOA does not change the substantive requirements of the Guidelines. It is intended to provide guidance regarding the exercise of discretion under the Guidelines. Although the Guidelines are clearly applicable to all discharges of dredged or fill material, including general permits and Corps of Engineers (Corps) civil works projects, this MOA focuses on standard permits (33 CFR325(b)(1)).¹ This focus is intended solely to reflect the unique procedural aspects associated with the review of standard permits, and does not obviate the need for other regulated activities to comply fully with the Guidelines. EPA and Army will seek to develop supplemental guidance for other regulated activities consistent with the policies and principles established in this document.

This MOA provides guidance to Corps and EPA personnel for implementing the Guidelines and must be adhered to when considering mitigation requirements for standard permit applications. The Corps will use this MOA when making its determinations of compliance with the Guidelines with respect to mitigation for standard permit applications. EPA will use this MOA in developing its position on compliance with the Guidelines for proposed discharges and will reflect this MOA when commenting on standard permit applications.

II. POLICY

- A. The Council on Environmental Quality (CEQ) has defined mitigation in its regulations at 40 CFR 1508.20 to include: avoiding impacts, minimizing impacts, rectifying impacts, reducing impacts over time, and compensating for impacts. The Guidelines establish environmental criteria which must be met for activities to be

permitted under Section 404.² The type of mitigation enumerated by CEQ are compatible with the requirements of the Guidelines; however, as a practical matter, they can be combined to form three general types: avoidance, minimization and compensatory mitigation. The remainder of this MOA will speak in terms of these general types of mitigation.

- B. The Clean Water Act and the Guidelines set forth a goal of restoring and maintaining existing aquatic resources. The Corps will strive to avoid adverse impacts and offset unavoidable adverse impacts to existing aquatic resources, and for wetlands, will strive to achieve a goal of no overall net loss of values and functions. In focusing the goal on no overall net loss to wetlands only, EPA and Army have explicitly recognized the special significance of the nation's wetlands resources. This special recognition of wetlands resources does not in any manner diminish the value of other waters of the United States, which are often of high value. All waters of the United States, such as streams, rivers, lakes, etc., will be accorded the full measure of protection under the Guidelines, including the requirements for appropriate and practicable mitigation. The determination of what level of mitigation constitutes "appropriate" mitigation is based solely on the values and functions of the aquatic resource that will be impacted. "Practicable" is defined at Section 230.3(q) of the Guidelines.³ However, the level of mitigation determined to be appropriate and practicable under Section 230.10(d) may lead to individual permit decisions which do not fully meet this goal because the mitigation measures necessary to meet this goal are not feasible, not practicable, or would accomplish only inconsequential reductions in impacts. Consequently, it is recognized that no net loss of wetlands functions and values may not be achieved in each and every permit action. However, it remains a goal of the Section 404 regulatory program to contribute to the national goal of no overall net loss of the nation's remaining wetlands base. EPA and Army are committed to working with others through the Administration's interagency task force and other avenues to help achieve this national goal.
- C. In evaluating standard Section 404 permit applications, as a practical matter, information on all facets of a project, including potential mitigation, is typically gathered and reviewed at the same time. The Corps, except as indicated below, first makes a determination that potential impact have been avoided to the maximum extent practicable; remaining unavoidable impacts will then be mitigated to the extent appropriate and practicable by requiring steps to minimize impacts, and, finally, compensate for aquatic resource values. This sequence is considered satisfied where the proposed mitigation is in accordance with specific provisions of a Corps and EPA approved comprehensive plan that ensures compliance with the compensation requirements of the Section 404(b)(1) Guidelines (examples of such comprehensive plans may include Special Area Management Plans, Advanced Identification areas (Section 230.80) and State Coastal Zone Management Plans). It may be appropriate to deviate from the sequence when EPA and the Corps agree the proposed discharge is necessary to avoid environmental harm (e.g. to protect a natural aquatic community from saltwater intrusion, chemical contamination, or other deleterious physical or chemical impacts), or EPA and the Corps agree that the proposed discharge can reasonably be expected to result in environmental gain or insignificant environmental losses.

In determining "appropriate and practicable" measures to offset unavoidable impact, such measures should be appropriate to the scope and degree of those impacts and practicable in terms of cost, existing technology, and logistics in light of overall project purposes. The Corps will give full consideration to the views of the resource agencies when making this determination.

1. **Avoidance.**⁴ Section 230.10(a) allows permit issuance for only the least environmentally damaging practicable alternative.⁵ The thrust of this section on alternatives is avoidance of impacts. Section 230.10(a) requires that no discharge shall be permitted if there is a practicable alternative to the proposed discharge which would have less adverse impact to the aquatic ecosystem, so long as the alternative does not have other significant adverse environmental consequences. In addition, Section 230.10(a)(3) sets forth rebuttable presumptions that 1) alternatives for non-water dependent activities that do not involve special aquatic sites⁶ are available and 2) alternatives that do not involve special aquatic sites have less adverse impact on the aquatic environment. Compensatory mitigation may not be used as a method to reduce environmental impacts in the evaluation of the least environmentally damaging practicable alternatives for the purposes of requirements under Section 230.10(a).
2. **Minimization.** Section 230.10(d) states that appropriate and practicable steps to minimize the adverse impacts will be required through project modifications and permit conditions. Subpart H of the Guidelines describes several (but not all) means of minimizing impacts of an activity.
3. **Compensatory Mitigation.** Appropriate and practicable compensatory mitigation is required for unavoidable adverse impacts which remain after all appropriate and practicable minimization has been required. Compensatory actions (e.g., restoration of existing degraded wetlands or creation of man-made wetlands) should be undertaken when practicable, in areas adjacent or continuous to the discharge site (on-site compensatory mitigation). If on-site compensatory mitigation is not practicable, off-site compensatory mitigation should be undertaken in the same geographic area if practicable (i.e., in close proximity and, to the extent possible, the same watershed). In determining compensatory mitigation, the functional values lost by the resource to be impacted must be considered. Generally, in-kind compensatory mitigation is preferable to out-of-kind. There is continued uncertainty regarding the success of wetland creation or other habitat development. Therefore, in determining the nature and extent of habitat development of this type, careful consideration should be given to its likelihood of success. Because the likelihood of success is greater and the impacts to potentially valuable uplands are reduced, restoration should be the first option considered.

In the situation where the Corps is evaluating a project where a permit issued by another agency requires compensatory mitigation, the Corps may consider that mitigation as part of the overall application for purposes of public notice, but avoidance and minimization shall still be sought. Mitigation banking may be an acceptable form of compensatory mitigation under specific criteria designed to ensure an environmentally successful bank. Where a mitigation bank has been approved by EPA and the Corps for purposes of providing compensatory mitigation for specific identified projects, use of that mitigation bank for those particular projects is considered as meeting the objective of Section II.C.3 of this MOA, regardless of the practicability of other forms of compensatory mitigation. Additional guidance on mitigation banking will be provided. Simple purchase or "preservation" of existing wetlands resources may in only exceptional

circumstances be accepted as compensatory mitigation. EPA and Army will develop specific guidance for preservation in the context of compensatory mitigation at a later date.

III. OTHER PROCEDURES

- A. Potential applicants for major projects should be encouraged to arrange preapplication meetings with the Corps and appropriate federal, state, or Indian tribal, and local authorities to determine requirements and documentation required for proposed permit evaluations. As a result of such meetings, the applicant often revises a proposal to avoid or minimize adverse impacts after developing an understanding of the Guidelines requirements by which a future Section 404 permit decision will be made, in addition to gaining understanding of other state or tribal, or local requirements. Compliance with other statutes, requirements and reviews, such as NEPA and the Corps public interest review, may not in and of themselves satisfy the requirements prescribed in the Guidelines.
- B. In achieving the goals of the CWA, the Corps will strive to avoid adverse impacts and offset unavoidable adverse impacts to existing aquatic resources. Measures which can accomplish this can be identified only through resource assessments tailored to the site performed by qualified professionals because ecological characteristics of each aquatic site are unique. Functional values should be assessed by applying aquatic site assessment techniques generally recognized by experts in the field and/or the best professional judgement of federal and state agency representatives, provided such assessments fully consider ecological functions included in the Guidelines. The objective of mitigation for unavoidable impacts is to offset environmental losses. Additionally for wetlands, such mitigation should provide, at a minimum, one for one functional replacement (i.e., no net loss of values), with an adequate margin of safety to reflect the expected degree of success associated with the mitigation plan, recognizing that this minimum requirement may not be appropriate and practicable and thus may not be relevant in all cases, as discussed in Section II.B of this MOA.⁷ In the absence of more definitive information on the functions and values of specific wetland sites, a minimum of 1 to 1 acreage replacement may be used as a reasonable surrogate for no net loss of functions and values. However, this ratio may be greater where the functional values of the area being impacted are demonstrably high and the replacement wetlands are of lower functional value or the likelihood of success of the mitigation project is low. Conversely, the ration may be less than 1 to 1 for areas where the functional values associated with the area being impacted are demonstrably low and the likelihood of success associated with the mitigation proposal is high.
- C. The Guidelines are the environmental standards for Section 404 permit issuance under the CWA. Aspects of a proposed project may be affected through a determination of requirements needed to comply with the Guidelines to achieve these CWA environmental goals.
- D. Monitoring is an important aspect of mitigation, especially in areas of scientific uncertainty. Monitoring should be directed toward determining whether permit conditions are complied with and whether the purpose intended to be served by the conditions are actually achieved. Any time it is determined that a permittee is in non-compliance with the mitigation requirements of the permit, the Corps will take action in

accordance with 33 CFR Part 326. Monitoring should not be required for purposes other than these, although information for other uses may accrue from the monitoring requirements. For projects to be permitted involving mitigation with higher levels of scientific uncertainty, such as some forms of compensatory mitigation, long term monitoring, reporting and potential remedial action should be required. This can be required of the applicant through permit conditions.

- E. Mitigation requirements shall be conditions of standard Section 404 permits. Army regulations authorize mitigation requirements to be added as special conditions to an Army permit to satisfy legal requirements (e.g. conditions necessary to satisfy the Guidelines) [33 CFR 325.4(a)]. This ensures legal enforceability of the mitigation conditions and enhances the level of compliance. If the mitigation plan necessary to ensure compliance with the Guidelines is not reasonable implementable or enforceable, the permit shall be denied.
- F. Nothing in this document, is intended to diminish, modify or otherwise affect the statutory or regulatory authorities of the agencies involved. Furthermore, formal policy guidance on or interpretation of this document shall be issued jointly.
- G. This MOA shall take effect on February 8, 1990, and will apply to those completed standard permit applications which are received on or after that date. This MOA may be modified or revoked by agreement of both parties, or revoked by either party alone upon six (6) months written notice.

Robert W. Page /s/

Assistant Secretary of the Army, Civil Works

February 6, 1990

LaJuna S. Wilcher /s/

Assistant Administrator for Water, U.S. Environmental Protection Agency

February 6, 1990

¹ Standard permits are those individual permits which have been processed through application of the Corps public interest review procedures (33 CFR 325) and EPA's Section 404(b)(1) Guidelines, including public notice and receipt of comments. Standard permits do not include letters of permission, regional permits, nationwide permits, or programmatic permits.

²(except where Section 404(b)(2) applies).

³ Section 230.3(q) of the Guidelines reads as follows: " The term practicable means available and capable of being done after taking into consideration *cost, existing technology, and logistics in light of overall project purposes.*" (Emphasis supplied.)

⁴Avoidance as used in Section 404(b)(1) Guidelines and this MOA does not include compensatory mitigation.

⁵It is important to recognize that there are circumstances where the impacts of the project are so significant that even if alternatives are not available, the discharge may not be permitted regardless of the compensatory mitigation proposed (40 CFR 230.10(c)).

⁶Special aquatic sites include sanctuaries and refuges, wetlands, mud flats, vegetated shallows, coral reefs and riffle pool complexes.

⁷ For example, there are certain areas where, due to hydrological conditions, the technology for restoration or creation of wetlands may not be available at present, or may otherwise be impracticable. In addition,

avoidance, minimization, and compensatory mitigation may not be practicable where there is a high proportion of land which is wetlands. EPA and Army, at present, are discussing with representatives of the oil industry, the potential for a program of accelerated rehabilitation of abandoned oil facilities on the North Slope to serve as a vehicle for satisfying necessary compensation requirements.

APPENDIX II

Federal Guidance for the Establishment, Use and Operation of Mitigation Banks

been approved and may be used for reference in future. File is informational in nature and action does not result therefrom.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

10 U.S.C. 8013, Secretary of the Air Force: powers and duties; delegation by and 8074, Commands: Territorial organization.

PURPOSE(S):

Used by Command Awards Branch for reference.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

In addition to those disclosures generally permitted under 5 U.S.C. 552a(b) of the Privacy Act, these records or information contained therein may specifically be disclosed outside the DoD as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows:

The 'Blanket Routine Uses' published at the beginning of the Air Force's compilation of record system notices apply to this system.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Maintained in file folders.

RETRIEVABILITY:

Retrieved by name.

SAFEGUARDS:

Records are accessed by person(s) responsible for servicing the record system in performance of their official duties and by authorized personnel who are properly screened and cleared for need-to-know. Records are stored in locked rooms and cabinets.

RETENTION AND DISPOSAL:

Retained in office files until superseded, obsolete, no longer needed for reference, or on inactivation, then destroyed by tearing into pieces, shredding, pulping, macerating, or burning.

SYSTEM MANAGER(S) AND ADDRESS:

Director of Personnel, Headquarters Air Combat Command, 114 Douglas Street, Suite 214, Langley Air Force Base, VA 23665-2773.

NOTIFICATION PROCEDURE:

Individuals seeking to determine whether this system of records contains information on them should address inquiries to the Director of Personnel, Headquarters Air Combat Command, 114 Douglas Street, Suite 214, Langley Air Force Base, VA 23665-2773.

RECORD ACCESS PROCEDURES:

Individuals seeking to access records about themselves contained in this system should address requests to the Director of Personnel, Headquarters Air Combat Command, 114 Douglas Street, Suite 214, Langley Air Force Base, VA 23665-2773.

CONTESTING RECORD PROCEDURES:

The Air Force rules for accessing records and for contesting contents and appealing initial agency determinations are published in Air Force Instruction 37-132; 32 CFR part 806b, or may be obtained from the system manager.

RECORD SOURCE CATEGORIES:

Information obtained from previous employers and source documents such as reports.

EXEMPTIONS CLAIMED FOR THE SYSTEM:

None.

[FR Doc. 95-29004 Filed 11-27-95; 8:45 am]

BILLING CODE 5000-04-F

Department of the Army

Board of Visitors, United States Military Academy

AGENCY: United States Military Academy, West Point, New York.

ACTION: Notice of Open Meeting.

SUMMARY: In accordance with Section 10(a)(20) of the Federal Advisory Committee Act (P.L. 92-463), announcement is made of the following meeting.

Name of Committee: Board of Visitors, United States Military Academy.

Date of Meeting: 7 December 1995.

Place of Meeting: Russell Senate Office Building, Room 412, Washington, D.C.

Start Time of Meeting: 9:00 a.m.

Proposed Agenda: Preparation of Report to President; Commandant's Assessment of the Corps of Cadets, Report on Enhancing Teaching and Performance at USMA. All proceedings are open.

FOR FURTHER INFORMATION CONTACT:

Lieutenant Colonel John J. Luther, United States Military Academy, West Point, NY 10996-5000, (914) 938-5870.

SUPPLEMENTARY INFORMATION: Please note that the Board of Visitors, United States Military Academy Meeting previously announced for 17 November at West Point, New York, was canceled due to the government shutdown.

Gregory D. Showalter,

Army Federal Register Liaison Officer.

[FR Doc. 95-28950 Filed 11-27-95; 8:45 am]

BILLING CODE 3710-08-M

DEPARTMENT OF DEFENSE

Department of the Army

Corps of Engineers

ENVIRONMENTAL PROTECTION AGENCY

DEPARTMENT OF AGRICULTURE

Natural Resources Conservation Service

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Federal Guidance for the Establishment, Use and Operation of Mitigation Banks

AGENCIES: Corps of Engineers, Department of the Army, DOD; Environmental Protection Agency; Natural Resources Conservation Service, Agriculture; Fish and Wildlife Service, Interior; and National Marine Fisheries Service, National Oceanic and Atmospheric Administration, Commerce.

ACTION: Notice.

SUMMARY: The Army Corps of Engineers (Corps), Environmental Protection Agency (EPA), National Resources Conservation Service (NRCS), Fish and Wildlife Service (FWS) and National Marine Fisheries Service (NMFS) are issuing final policy guidance regarding the establishment, use and operation of mitigation banks for the purpose of providing compensation for adverse impacts to wetlands and other aquatic resources. The purpose of this guidance is to clarify the manner in which mitigation banks may be used to satisfy mitigation requirements of the Clean Water Act (CWA) Section 404 permit program and the wetland conservation provisions of the Food Security Act (FSA) (i.e., "Swampbuster" provisions). Recognizing the potential benefits mitigation banking offers for streamlining the permit evaluation process and providing more effective mitigation for authorized impacts to wetlands, the agencies encourage the establishment and appropriate use of mitigation banks in the Section 404 and "Swampbuster" programs.

DATES: The effective date of this Memorandum to the Field is December 28, 1995.

FOR FURTHER INFORMATION CONTACT: Mr. Jack Chowning (Corps) at (202) 761-

1781; Mr. Thomas Kelsch (EPA) at (202) 260-8795; Ms. Sandra Byrd (NRCS) at (202) 690-3501; Mr. Mark Miller (FWS) at (703) 358-2183; Ms. Susan-Marie Stedman (NMFS) at (301) 713-2325.

SUPPLEMENTARY INFORMATION: Mitigating the environmental impacts of necessary development actions on the Nation's wetlands and other aquatic resources is a central premise of Federal wetlands programs. The CWA Section 404 permit program relies on the use of compensatory mitigation to offset unavoidable damage to wetlands and other aquatic resources through, for example, the restoration or creation of wetlands. Under the "Swampbuster" provisions of the FSA, farmers are required to provide mitigation to offset certain conversions of wetlands for agricultural purposes in order to maintain their program eligibility.

Mitigation banking has been defined as wetland restoration, creation, enhancement, and in exceptional circumstances, preservation undertaken expressly for the purpose of compensating for unavoidable wetland losses in advance of development actions, when such compensation cannot be achieved at the development site or would not be as environmentally beneficial. It typically involves the consolidation of small, fragmented wetland mitigation projects into one large contiguous site. Units of restored, created, enhanced or preserved wetlands are expressed as "credits" which may subsequently be withdrawn to offset "debits" incurred at a project development site.

Ideally, mitigation banks are constructed and functioning in advance of development impacts, and are seen as a way of reducing uncertainty in the CWA Section 404 permit program or the FSA "Swampbuster" program by having established compensatory mitigation credit available to an applicant. By consolidating compensation requirements, banks can more effectively replace lost wetland functions within a watershed, as well as provide economies of scale relating to the planning, implementation, monitoring and management of mitigation projects.

On August 23, 1993, the Clinton Administration released a comprehensive package of improvements to Federal wetlands programs which included support for the use of mitigation banks. At that same time, EPA and the Department of the Army issued interim guidance clarifying the role of mitigation banks in the Section 404 permit program and providing general guidelines for their

establishment and use. In that document it was acknowledged that additional guidance would be developed, as necessary, following completion of the first phase of the Corps Institute for Water Resources national study on mitigation banking.

The Corps, EPA, NRCS, FWS and NMFS provided notice [60 FR 12286; March 6, 1995] of a proposed guidance on the policy of the Federal government regarding the establishment, use and operation of mitigation banks. The proposed guidance was based, in part, on the experiences to date with mitigation banking, as well as other environmental, economic and institutional issues identified through the Corps national study. Over 130 comments were received on the proposed guidance. The final guidance is based on full and thorough consideration of the public comments received.

A majority of the letters received supported the proposed guidance in general, but suggested modifications to one or more parts of the proposal. In response to these comments, several changes have been made to further clarify the provisions and make other modifications, as necessary, to ensure effective establishment and use of mitigation banks. One key issue on which the agencies received numerous comments focused on the timing of credit withdrawal. In order to provide additional clarification of the changes made to the final guidance in response to comments, the agencies wish to emphasize that it is our intent to ensure that decisions to allow credits to be withdrawn from a mitigation bank in advance of bank maturity be made on a case-by-case basis to best reflect the particular ecological and economic circumstances of each bank. The percentage of advance credits permitted for a particular bank may be higher or lower than the 15 percent example included in the proposed guidance. The final guidance is being revised to eliminate the reference to a specific percentage in order to provide needed flexibility. Copies of the comments and the agencies' response to significant comments are available for public review. Interested parties should contact the agency representatives for additional information.

This guidance does not change the substantive requirements of the Section 404 permit program or the FSA "Swampbuster" program. Rather, it interprets and provides internal guidance and procedures to the agency field personnel for the establishment, use and operation of mitigation banks consistent with existing regulations and

policies of each program. The policies set out in this document are not final agency action, but are intended solely as guidance. The guidance is not intended, not can it be relied upon, to create any rights enforceable by any party in litigation with the United States. The guidance does not establish or affect legal rights or obligations, establish a binding norm on any party and it is not finally determinative of the issues addressed. Any regulatory decisions made by the agencies in any particular matter addressed by this guidance will be made by applying the governing law and regulations to the relevant facts. The purpose of the document is to provide policy and technical guidance to encourage the effective use of mitigation banks as a means of compensating for the authorized loss of wetlands and other aquatic resources.

John H. Zirschky,
*Acting Assistant Secretary (Civil Works),
Department of the Army.*

Robert Perciasepe,
*Assistant Administrator for Water,
Environmental Protection Agency.*

James R. Lyons,
*Assistant Secretary, Natural Resources and
Environment, Department of Agriculture.*

George T. Frampton, Jr.,
*Assistant Secretary for Fish and Wildlife and
Parks, Department of the Interior.*

Douglas K. Hall,
*Assistant Secretary for Oceans and
Atmosphere, Department of Commerce.*

Memorandum to the Field

*Subject: Federal Guidance for the
Establishment, Use and Operation of
Mitigation Banks*

I. Introduction

A. Purpose and Scope of Guidance

This document provides policy guidance for the establishment, use and operation of mitigation banks for the purpose of providing compensatory mitigation for authorized adverse impacts to wetlands and other aquatic resources. This guidance is provided expressly to assist Federal personnel, bank sponsors, and others in meeting the requirements of Section 404 of the Clean Water Act (CWA), Section 10 of the Rivers and Harbors Act, the wetland conservation provisions of the Food Security Act (FS) (i.e., "Swampbuster"), and other applicable Federal statutes and regulations. The policies and procedures discussed herein are consistent with current requirements of the Section 10/404 regulatory program and "Swampbuster" provisions and are intended only to clarify the applicability of existing requirements to mitigation banking.

The policies and procedures discussed herein are applicable to the establishment, use and operation of public mitigation banks, as well as privately-sponsored mitigation banks, including third party banks (e.g. entrepreneurial banks).

B. Background

For purposes of this guidance, mitigation banking means the restoration, creation, enhancement and, in exceptional circumstances, preservation of wetlands and/or other aquatic resources expressly for the purpose of providing compensatory mitigation in advance of authorized impacts to similar resources.

The objective of a mitigation bank is to provide for the replacement of the chemical, physical and biological functions of wetlands and other aquatic resources which are lost as a result of authorized impacts. Using appropriate methods, the newly established functions are quantified as mitigation "credits" which are available for use by the bank sponsor or by other parties to compensate for adverse impacts (i.e., "debits"). Consistent with mitigation policies established under the Council on Environmental Quality Implementing Regulations (CEQ regulations) (40 CFR Part 1508.20), and the Section 404(b)(1) Guidelines (Guidelines) (40 CFR Part 230), the use of credits may only be authorized for purposes of complying with Section 10/404 when adverse impacts are unavoidable. In addition, for both the Section 10/404 and "Swampbuster" programs, credits may only be authorized when on-site compensation is either not practicable or use of a mitigation bank is environmentally preferable to on-site compensation. Prospective bank sponsors should not construe or anticipate participation in the establishment of a mitigation bank as ultimate authorization for specific projects, as excepting such projects from any applicable requirements, or as preauthorizing the use of credits from that bank for any particular project.

Mitigation banks provide greater flexibility to applicants needing to comply with mitigation requirements and can have several advantages over individual mitigation projects, some of which are listed below:

1. It may be more advantageous for maintaining the integrity of the aquatic ecosystem to consolidate compensatory mitigation into a single large parcel or contiguous parcels when ecologically appropriate;
2. Establishment of a mitigation bank can bring together financial resources, planning and scientific expertise not

practicable to many project-specific compensatory mitigation proposals. This consolidation of resources can increase the potential for the establishment and long-term management of successful mitigation that maximizes opportunities for contributing to biodiversity and/or watershed function;

3. Use of mitigation banks may reduce permit processing times and provide more cost-effective compensatory mitigation opportunities for projects that qualify;

4. Compensatory mitigation is typically implemented and functioning in advance of project impacts, thereby reducing temporal losses of aquatic functions and uncertainty over whether the mitigation will be successful in offsetting project impacts;

5. Consolidation of compensatory mitigation within a mitigation bank increases the efficiency of limited agency resources in the review and compliance monitoring of mitigation projects, and thus improves the reliability of efforts to restore, create or enhance wetlands for mitigation purposes.

6. The existence of mitigation banks can contribute towards attainment of the goal for no overall net loss of the Nation's wetlands by providing opportunities to compensate for authorized impacts when mitigation might not otherwise be appropriate or practicable.

II. Policy Considerations

The following policy considerations provide general guidance for the establishment, use and operation of mitigation banks. It is the agencies' intent that this guidance be applied to mitigation bank proposals submitted for approval on or after the effective date of this guidance and to those in early stages of planning or development. It is not intended that this policy be retroactive for mitigation banks that have already received agency approval. While it is recognized that individual mitigation banking proposals may vary, it is the intent of this guidance that the fundamental precepts be applicable to future mitigation banks.

For the purposes of Section 10/104, and consistent with the CEQ regulations, the Guidelines, and the Memorandum of Agreement Between the Environmental Protection Agency (EPA) and the Department of the Army Concerning the Determination of Mitigation under the Clean Water Act Section 404(b)(1) Guidelines, mitigation means sequentially avoiding impacts, minimizing impacts, and compensating for remaining unavoidable impacts.

Compensatory mitigation, under Section 10/404, is the restoration, creation, enhancement, or in exceptional circumstances, preservation of wetlands and/or other aquatic resources for the purpose of compensating for unavoidable adverse impacts. A site where wetlands and/or other aquatic resources are restored, created, enhanced, or in exceptional circumstances, preserved expressly for the purpose of providing compensatory mitigation in advance of authorized impacts to similar resources is a mitigation bank.

A. Authorities

This guidance is established in accordance with the following statutes, regulations, and policies. It is intended to clarify provisions within these existing authorities and does to establish any new requirements.

1. Clean Water Act Section 404 (33 U.S.C. 1344).
 2. Rivers and Harbors Act of 1899 Section 10 (33 U.S.C. 403 *et seq.*)
 3. Environmental Protection Agency, Section 404(b)(1) Guidelines (40 CFR Part 230). Guidelines for Specification of Disposal Sites for Dredged or Fill Material.
 4. Department of the Army, Section 404 Permit Regulations (33 CFR Parts 320-330). Policies for evaluating permit applications to discharge dredged or fill material.
 5. Memorandum of Agreement between the Environmental Protection Agency and the Department of the Army Concerning the Determination of Mitigation under the Clean Water Act Section 404(b)(1) Guidelines (February 6, 1990).
 6. Title XII Food Security Act of 1985 as amended by the Food, Agriculture, Conservation and Trade Act of 1990 (16 U.S.C. 3801 *et seq.*).
 7. National Environmental Policy Act (42 U.S.C. 4321 *et seq.*), including the Council on Environmental Quality's implementing regulations (40 CFR Parts 1500-1508).
 8. Fish and Wildlife Coordination Act (16 U.S.C. 661 *et seq.*).
 9. Fish and Wildlife Service Mitigation Policy (46 FR pages 7644-7663, 1981).
 10. Magnuson Fishery Conservation and Management Act (16 U.S.C. 1801 *et seq.*).
 11. National Marine Fisheries Service Habitat Conservation Policy (48 FR pages 53142-53147, 1983).
- The policies set out in this document are not final agency action, but are intended solely as guidance. The guidance is not intended, nor can it be relied upon, to create any rights

enforceable by any party in litigation with the United States. This guidance does not establish or affect legal rights or obligations, establish a binding norm on any party and it is not finally determinative of the issues addressed. Any regulatory decisions made by the agencies in any particular matter addressed by this guidance will be made by applying the governing law and regulations to the relevant facts.

B. Planning Considerations

1. Goal Setting

The overall goal of a mitigation bank is to provide economically efficient and flexible mitigation opportunities, while fully compensating for wetland and other aquatic resource losses in a manner that contributes to the long-term ecological functioning of the watershed within which the bank is to be located. The goal will include the need to replace essential aquatic functions which are anticipated to be lost through authorized activities within the bank's service area. In some cases, banks may also be used to address other resource objectives that have been identified in a watershed management plan or other resource assessment. It is desirable to set the particular objectives for a mitigation bank (i.e., the type and character of wetlands and/or aquatic resources to be established) in advance of site selection. The goal and objectives should be driven by the anticipated mitigation need; the site selected should support achieving the goal and objectives.

2. Site Selection

The agencies will give careful consideration to the ecological suitability of a site for achieving the goal and objectives of a bank, i.e., that it possess the physical, chemical and biological characteristics to support establishment of the desired aquatic resources and functions. Size and location of the site relative to other ecological features, hydrologic sources (including the availability of water rights), and compatibility with adjacent land uses and watershed management plans are important factors for consideration. It also is important that ecologically significant aquatic or upland resources (e.g., shallow sub-tidal habitat, mature forests), cultural sites, or habitat for Federally or State-listed threatened and endangered species are not compromised in the process of establishing a bank. Other significant factors for consideration include, but are not limited to, development trends (i.e., anticipated land use changes), habitat status and trends, local or regional goals

for the restoration or protection of particular habitat types or functions (e.g., re-establishment of habitat corridors or habitat for species of concern), water quality and floodplain management goals, and the relative potential for chemical contamination of the wetlands and/or other aquatic resources.

Banks may be sited on public or private lands. Cooperative arrangements between public and private entities to use public lands for mitigation banks may be acceptable. In some circumstances, it may be appropriate to site banks on Federal, state, tribal or locally-owned resource management areas (e.g., wildlife management areas, national or state forests, public parks, recreation areas). The siting of banks on such lands may be acceptable if the internal policies of the public agency allow use of its land for such purposes, and the public agency grants approval. Mitigation credits generated by banks of this nature should be based solely on those values in the bank that are supplemental to the public program(s) already planned or in place, that is, baseline values represented by existing or already planned public programs, including preservation value, should not be counted toward bank credits.

Similarly, Federally-funded wetland conservation projects undertaken via separate authority and for other purposes, such as the Wetlands Reserve Program, Farmer's Home Administration fee title transfers or conservation easements, and Partners for Wildlife Program, cannot be used for the purpose of generating credits within a mitigation bank. However, mitigation credit may be given for activities undertaken in conjunction with, but supplemental to, such programs in order to maximize the overall ecological benefit of the conservation project.

3. Technical Feasibility

Mitigation banks should be planned and designed to be self-sustaining over time to the extent possible. The techniques for establishing wetlands and/or other aquatic resources must be carefully selected, since this science is constantly evolving. The restoration of historic or substantially-degraded wetlands and/or other aquatic resources (e.g., prior-converted cropland, farmed wetlands) utilizing proven techniques increases the likelihood of success and typically does not result in the loss of other valuable resources. Thus, restoration should be the first option considered when siting a bank. Because of the difficulty in establishing the correct hydrologic conditions associated with many creation projects and the

tradeoff in wetland functions involved with certain enhancement activities, these methods should only be considered where there are adequate assurances to ensure success and that the project will result in an overall environmental benefit.

In general, banks which involve complex hydraulic engineering features and/or questionable water sources (e.g., pumped) are most costly to develop, operate and maintain, and have a higher risk of failure than banks designed to function with little or no human intervention. The former situations should only be considered where there are adequate assurances to ensure success. This guidance recognizes that in some circumstances wetlands must be actively managed to ensure their viability and sustainability. Furthermore, long-term maintenance requirements may be necessary and appropriate in some cases (e.g., to maintain fire-dependent plant communities in the absence of natural fire; to control invasive exotic plant species).

Proposed mitigation techniques should be well-understood and reliable. When uncertainties surrounding the technical feasibility of a proposed mitigation technique exist, appropriate arrangements (e.g., financial assurances, contingency plans, additional monitoring requirements) should be in place to increase the likelihood of success. Such arrangements may be phased-out or reduced once the attainment of prescribed performance standards is demonstrated.

4. Role of Preservation

Credit may be given when existing wetlands and/or other aquatic resources are preserved in conjunction with restoration, creation or enhancement activities, and when it is demonstrated that the preservation will augment the functions of the restored, created or enhanced aquatic resource. Such augmentation may be reflected in the total number of credits available from the bank.

In addition, the preservation of existing wetlands and/or other aquatic resources in perpetuity may be authorized as the sole basis for generating credits in mitigation banks only in exceptional circumstances, consistent with existing regulations, policies and guidance. Under such circumstances, preservation may be accomplished through the implementation of appropriate legal mechanisms (e.g., transfer of deed, deed restrictions, conservation easement) to protect wetlands and/or other aquatic resources, accompanied by

implementation of appropriate changes in land use or other physical changes as necessary (e.g., installation of restrictive fencing).

Determining whether preservation is appropriate as the sole basis for generating credits at a mitigation bank requires careful judgment regarding a number of factors. Consideration must be given to whether wetlands and/or other aquatic resources proposed for preservation (1) perform physical or biological functions, the preservation of which is important to the region in which the aquatic resources are located, and (2) are under demonstrable threat of loss or substantial degradation due to human activities that might not otherwise be expected to be restricted. The existence of a demonstrable threat will be based on clear evidence of destructive land use changes which are consistent with local and regional land use trends and are not the consequence of actions under the control of the bank sponsor. Wetlands and other aquatic resources restored under the Conservation Reserve Program or similar programs requiring only temporary conservation easements may be eligible for banking credit upon termination of the original easement if the wetlands are provided permanent protection and it would otherwise be expected that the resources would be converted upon termination of the easement. The number of mitigation credits available from a bank that is based solely on preservation should be based on the functions that would otherwise be lost or degraded if the aquatic resources were not preserved, and the timing of such loss or degradation. As such, compensation for aquatic resource impacts will typically require a greater number of acres from a preservation bank than from a bank which is based on restoration, creation or enhancement.

5. Inclusion of Upland Areas

Credit may be given for the inclusion of upland areas occurring within a bank only to the degree that such features increase the overall ecological functioning of the bank. If such features are included as part of a bank, it is important that they receive the same protected status as the rest of the bank and be subject to the same operational procedures and requirements. The presence of upland areas may increase the per-unit value of the aquatic habitat in the bank. Alternatively, limited credit may be given to upland areas protected within the bank to reflect the functions inherently provided by such areas (e.g., nutrient and sediment filtration of stormwater runoff, wildlife habitat

diversity) which directly enhance or maintain the integrity of the aquatic ecosystem and that might otherwise be subject to threat of loss or degradation. An appropriate functional assessment methodology should be used to determine the manner and extent to which such features augment the functions of restored, created or enhanced wetlands and/or other aquatic resources.

6. Mitigation Banking and Watershed Planning

Mitigation banks should be planned and developed to address the specific resource needs of a particular watershed. Furthermore, decisions regarding the location, type of wetlands and/or other aquatic resources to be established, and proposed uses of a mitigation bank are most appropriately made within the context of a comprehensive watershed plan. Such watershed planning efforts often identify categories of activities having minimal adverse effects on the aquatic ecosystem and that, therefore, could be authorized under a general permit. In order to reduce the potential cumulative effects of such activities, it may be appropriate to offset these types of impacts through the use of a mitigation bank established in conjunction with a watershed plan.

C. Establishment of Mitigation Banks

1. Prospectus

Prospective bank sponsors should first submit a prospectus to the Army Corps of Engineers (Corps) or Natural Resources Conservation Service (NRCS)¹ to initiate the planning and review process by the appropriate agencies. Prior to submitting a prospectus, bank sponsors are encouraged to discuss their proposal with the appropriate agencies (e.g., pre-application coordination).

It is the intent of the agencies to provide practical comments to the bank sponsors regarding the general need for and technical feasibility of proposed banks. Therefore, bank sponsors are encouraged to include in the prospectus sufficient information concerning the objectives for the bank and how it will be established and operated to allow the agencies to provide such feedback. Formal agency involvement and review is initiated with submittal of a prospectus.

¹ The Corps will typically serve as the lead agency for the establishment of mitigation banks. Bank sponsors proposing establishment of mitigation banks solely for the purpose of complying with the "Swampbuster" provisions of FSA should submit their prospectus to the NRCS.

2. Mitigation Banking Instruments

Information provided in the prospectus will serve as the basis for establishing the mitigation banking instrument. All mitigation banks need to have a banking instrument as documentation of agency concurrence on the objectives and administration of the bank. The banking instrument should describe in detail the physical and legal characteristics of the bank, and how the bank will be established and operated. For regional banking programs sponsored by a single entity (e.g., a state transportation agency), it may be appropriate to establish an "umbrella" instrument for the establishment and operation of multiple bank sites. In such circumstances, the need for supplemental site-specific information (e.g., individual site plans) should be addressed in the banking instrument. The banking instrument will be signed by the bank sponsor and the concurring regulatory and resource agencies represented on the Mitigation Bank Review Team (section II.C.2). The following information should be addressed, as appropriate, within the banking instrument:

- a. Bank goals and objectives;
- b. Ownership of bank lands;
- c. Bank size and classes of wetlands and/or other aquatic resources proposed for inclusion in the bank, including a site plan and specifications;
- d. Description of baseline conditions at the bank site;
- e. Geographic service area;
- f. Wetland classes or other aquatic resource impacts suitable for compensation;
- g. Methods for determining credits and debits;
- h. accounting procedures;
- i. Performance standards for determining credit availability and bank success;
- j. Reporting protocols and monitoring plan;
- k. Contingency and remedial actions and responsibilities;
- l. Financial assurances;
- m. Compensation ratios;
- n. Provisions for long-term management and maintenance.

The terms and conditions of the banking instrument may be amended, in accordance with the procedures used to establish the instrument and subject to agreement by the signatories.

In cases where initial establishment of the mitigation bank involves a discharge into waters of the United States requiring Section 10/404 authorization, the banking instrument will be made part of a Department of the Army permit for that discharge. Submittal of an

individual permit application should be accompanied by a sufficiently-detailed prospectus to allow for concurrent processing of each. Preparation of a banking instrument, however, should not alter the normal permit evaluation process timeframes. A bank sponsor may proceed with activities for the construction of a bank subsequent to receiving the Department of the Army authorization. It should be noted, however, that a bank sponsor who proceeds in the absence of a banking instrument does so at his/her own risk.

In cases where the mitigation bank is established pursuant to the FSA, the banking instrument will be included in the plan developed or approved by NRCS and the Fish and Wildlife Service (FWS).

3. Agency Roles and Coordination

Collectively, the signatory agencies to the banking instrument will comprise the Mitigation Bank Review Team (MBRT). Representatives from the Corps, EPA, FWS, National Marine Fisheries Service (NMFS) and NRCS, as appropriate given the projected use for the bank, should typically comprise the MBRT. In addition, it is appropriate for representatives from state, tribal and local regulatory and resource agencies to participate where an agency has authorities and/or mandates directly affecting or affected by the establishment, use or operation of a bank. No agency is required to sign a banking instrument; however, in signing a banking instrument, an agency agrees to the terms of that instrument.

The Corps will serve as Chair of the MBRT, except in cases where the bank is proposed solely for the purpose of complying with the FSA, in which case NRCS will be the MBRT Chair. In addition, where a bank is proposed to satisfy the requirements of another Federal, state, tribal or local program, it may be appropriate for the administering agency to serve as co-Chair of the MBRT.

The primary role of the MBRT is to facilitate the establishment of mitigation banks through the development of mitigation banking instruments. Because of the different authorities and responsibilities of each agency represented on the MBRT, there is a benefit in achieving agreement on the banking instrument. For this reason, the MBRT will strive to obtain consensus on its actions. The Chair of the MBRT will have the responsibility for making final decisions regarding the terms and conditions of the banking instrument where consensus cannot otherwise be reached within a reasonable timeframe (e.g., 90 days from the date of submittal

of a complete prospectus). The MBRT will review and seek consensus on the banking instrument and final plans for the restoration, creation, enhancement, and/or preservation of wetlands and other aquatic resources.

Consistent with its authorities under Section 10/404, the Corps is responsible for authorizing use of a particular mitigation bank on a project-specific basis and determining the number and availability of credits required to compensate for proposed impacts in accordance with the terms of the banking instrument. Decisions rendered by the Corps must fully consider review agency comments submitted as part of the permit evaluation process. Similarly, the NRCS, in consultation with the FWS, will make the final decision pertaining to the withdrawal of credits from banks as appropriate mitigation pursuant to FSA.

4. Role of the Bank Sponsor

The bank sponsor is responsible for the preparation of the banking instrument in consultation with the MBRT. The bank sponsor should, therefore, have sufficient opportunity to discuss the content of the banking instrument with the MBRT. The bank sponsor is also responsible for the overall operation and management of the bank in accordance with the terms of the banking instrument, including the preparation and distribution of monitoring reports and accounting statements/ledger, as necessary.

5. Public Review and Comment

The public should be notified of and have an opportunity to comment on all bank proposals. For banks which require authorization under an individual Section 10/404 permit or a state, tribal or local program that involves a similar public notice and comment process, this condition will typically be satisfied through such standard procedures. For other proposals, the Corps or NRCS, upon receipt of a complete banking prospectus, should provide notification of the availability of the prospectus for a minimum 21-day public comment period. Notification procedures will be similar to those used by the Corps in the standard permit review process. Copies of all public comments received will be distributed to the other members of the MBRT and the bank sponsor for full consideration in the development of the final banking instrument.

6. Dispute Resolution Procedure

The MBRT will work to reach consensus on its actions in accordance with this guidance. It is anticipated that

all issues will be resolved by the MBRT in this manner.

a. Development of the Banking Instrument

During the development of the banking instrument, if any agency representative considers that a particular decision raises concern regarding the application of existing policy or procedures, an agency may request, through written notification, that the issue be reviewed by the Corps District Engineer, or NRCS State Conservationist, as appropriate. Said notification will describe the issue in sufficient detail and provide recommendations for resolution. Within 20 days, the District Engineer or State Conservationist (as appropriate) will consult with the notifying agency(ies) and will resolve the issue. The resolution will be forwarded to the other MBRT member agencies. The bank sponsor may also request the District Engineer or State Conservationist review actions taken to develop the banking instrument if the sponsor believes that inadequate progress has been made on the instrument by the MBRT.

b. Application of the Banking Instrument

As previously stated, the Corps and NRCS are responsible for making final decisions on a project-specific basis regarding the use of a mitigation bank for purposes of Section 10/404 and FSA, respectively. In the event an agency on the MBRT is concerned that a proposed use may be inconsistent with the terms of the banking instrument, that agency may raise the issue to the attention of the Corps or NRCS through the permit evaluation process. In order to facilitate timely and effective consideration of agency comments, the Corps or NRCS, as appropriate, will advise the MBRT agencies of a proposed use of a bank. The Corps will fully consider comments provided by the review agencies regarding mitigation as part of the permit evaluation process. The NRCS will consult with FWA is making its decisions pertaining to mitigation.

If, in the view of an agency on the MBRT, an issued permit or series of permits reflects a pattern of concern regarding the application of the terms of the banking instrument, that agency may initiate review of the concern by the full MBRT through written notification to the MBRT Chair. The MBRT Chair will convene a meeting of the MBRT, or initiate another appropriate forum for communication, typically within 20 days of receipt of notification, to resolve concerns. Any such effort to address concerns

regarding the application of a banking instrument will not delay any decision pending before the authorizing agency (e.g., Corps or NRCS).

D. Criteria for Use of a Mitigation Bank

1. Project Applicability

All activities regulated under Section 10/404 may be eligible to use a mitigation bank as compensation for unavoidable impacts to wetlands and/or other aquatic resources. Mitigation banks established for FSA purposes may be debited only in accordance with the mitigation and replacement provisions of 7 CFR Part 12.

Credits from mitigation banks may also be used to compensate for environmental impacts authorized under other programs (e.g., state or local wetland regulatory programs, NPDES program, Corps civil works projects, Superfund removal and remedial actions). In no case may the same credits be used to compensate for more than one activity; however, the same credits may be used to compensate for an activity which requires authorization under more than one program.

2. Relationship to Mitigation Requirements

Under the existing requirements of Section 10/404, all appropriate and practicable steps must be undertaken by the applicant to first avoid and then minimize adverse impacts to aquatic resources, prior to authorization to use a particular mitigation bank. Remaining unavoidable impacts must be compensated to the extent appropriate and practicable. For both the Section 10/404 and "Swampbuster" programs, requirements for compensatory mitigation may be satisfied through the use of mitigation banks when either on-site compensation is not practicable or use of the mitigation bank is environmentally preferable to on-site compensation.

It is important to emphasize that applicants should not expect that establishment of, or purchasing credits from, a mitigation bank will necessarily lead to a determination of compliance with applicable mitigation requirements (i.e., Section 404(b)(1) Guidelines or FSA Manual), or as excepting projects from any applicable requirements.

3. Geographic Limits of Applicability

The service area of a mitigation bank is the area (e.g., watershed, county) wherein a bank can reasonably be expected to provide appropriate compensation for impacts to wetlands and/or other aquatic resources. This area should be designated in the

banking instrument. Designation of the service area should be based on consideration of hydrologic and biotic criteria, and be stipulated in the banking instrument. Use of a mitigation bank to compensate for impacts beyond the designated service area may be authorized, on a case-by-case basis, where it is determined to be practicable and environmentally desirable.

The geographic extent of a service area should, to the extent environmentally desirable, be guided by the cataloging unit of the "Hydrologic Unit map of the United States" (USGS, 1980) and the ecoregion of the "Ecoregions of the United States" (James M. Omernik, EPA, 1986) or section of the "Descriptions of the Ecoregions of the United States" (Robert G. Bailey, USDA, 1980). It may be appropriate to use other classification systems developed at the state or regional level for the purpose of specifying bank service areas, when such systems compare favorably in their objectives and level of detail. In the interest of the integrating banks with other resource management objectives, bank service areas may encompass larger watershed areas if the designation of such areas is supported by local or regional management plans (e.g., Special Area Management Plans, Advance Identification), State Wetland Conservation Plans or other Federally sponsored or recognized resource management plans. Furthermore, designation of a more inclusive service area may be appropriate for mitigation banks whose primary purpose is to compensate for linear projects that typically involve numerous small impacts in several different watersheds.

4. Use of a Mitigation Bank vs. On-Site Mitigation

The agencies' preference for on-site mitigation, indicated in the 1990 Memorandum of Agreement on mitigation between the EPA and the Department of the Army, should not preclude the use of a mitigation bank when there is no practicable opportunity for on-site compensation, or when use of a bank is environmentally preferable to on-site compensation. On-site mitigation may be preferable where there is a practicable opportunity to compensate for important local functions including local flood control functions, habitat for a species or population with a very limited geographic range or narrow environmental requirements, or where local water quality concerns dominate.

In choosing between on-site mitigation and use of a mitigation bank, careful consideration should be given to

the likelihood for successfully establishing the desired habitat type, the compatibility of the mitigation project with adjacent land uses, and the practicability of long-term monitoring and maintenance to determine whether the effort will be ecologically sustainable, as well as the relative cost of mitigation alternatives. In general, use of a mitigation bank to compensate for minor aquatic resource impacts (e.g., numerous, small impacts associated with linear projects; impacts authorized under nationwide permits) is preferable to on-site mitigation. With respect to larger aquatic resource impacts, use of a bank may be appropriate if it is capable of replacing essential physical and/or biological functions of the aquatic resources which are expected to be lost or degraded. Finally, there may be circumstances warranting a combination of on-site and off-site mitigation to compensate for losses.

5. In-kind vs. Out-of-kind Mitigation Determinations

In the interest of achieving functional replacement, in-kind compensation of aquatic resource impacts should generally be required. Out-of-kind compensation may be acceptable if it is determined to be practicable and environmentally preferable to in-kind compensation (e.g., of greater ecological value to a particular region). However, non-tidal wetlands should typically not be used to compensate for the loss or degradation of tidal wetlands. Decisions regarding out-of-kind mitigation are typically made on a case-by-case basis during the permit evaluation process. The banking instrument may identify circumstances in which it is environmentally desirable to allow out-of-kind compensation within the context of a particular mitigation bank (e.g., for banks restoring a complex of associated wetland types). Mitigation banks developed as part of an area-wide management plan to address a specific resource objective (e.g., restoration of a particularly vulnerable or valuable wetland habitat type) may be such an example.

6. Timing of Credit Withdrawal

The number of credits available for withdrawal (i.e., debiting) should generally be commensurate with the level of aquatic functions attained at a bank at the time of debiting. The level of function may be determined through the application of performance standards tailored to the specific restoration, creation or enhancement activity at the bank site or through the use of an appropriate functional assessment methodology.

The success of a mitigation bank with regard to its capacity to establish a healthy and fully functional aquatic system relates directly to both the ecological and financial stability of the bank. Since financial considerations are particularly critical in early stages of bank development, it is generally appropriate, in cases where there is adequate financial assurance and where the likelihood of the success of the bank is high, to allow limited debiting of a percentage of the total credits projected for the bank at maturity. Such determinations should take into consideration the initial capital costs needed to establish the bank, and the likelihood of its success. However, it is the intent of this policy to ensure that those actions necessary for the long-term viability of a mitigation bank be accomplished prior to any debiting of the bank. In this regard, the following minimum requirements should be satisfied prior to debiting: (1) banking instrument and mitigation plans have been approved; (2) bank site has been secured; and (3) appropriate financial assurances have been established. In addition, initial physical and biological improvements should be completed no later than the first full growing season following initial debiting of a bank. The temporal loss of functions associated with the debiting of projected credits may justify the need for requiring higher compensation ratios in such cases. For mitigation banks which propose multiple-phased construction, similar conditions should be established for each phase.

Credits attributed to the preservation of existing aquatic resources may become available for debiting immediately upon implementation of appropriate legal protection accompanied by appropriate changes in land use or other physical changes, as necessary.

7. Crediting/Debiting/Accounting Procedures

Credits and debits are the terms used to designate the units of trade (i.e., currency) in mitigation banking. Credits represent the accrual or attainment of aquatic functions at a bank; debits represent the loss of aquatic functions at an impact or project site. Credits are debited from a bank when they are used to offset aquatic resource impacts (e.g., for the purpose of satisfying Section 10/404 permit or FSA requirements).

An appropriate functional assessment methodology (e.g., Habitat Evaluation Procedures, hydrogeomorphic approach to wetlands functional assessment, other regional assessment methodology) acceptable to all signatories should be

used to assess wetland and/or other aquatic resource restoration, creation and enhancement activities within a mitigation bank, and to quantify the amount of available credits. The range of functions to be assessed will depend upon the assessment methodology identified in the banking instrument. The same methodology should be used to assess both credits and debits. If an appropriate functional assessment methodology is impractical to employ, acreage may be used as a surrogate for measuring function. Regardless of the method employed, the number of credits should reflect the difference between site conditions under the with- and without-bank scenarios.

The bank sponsor should be responsible for assessing the development of the bank and submitting appropriate documentation of such assessments to the authorizing agency(ies), who will distribute the documents to the other members of the MBRT for review. Members of the MBRT are encouraged to conduct regular (e.g., annual) on-site inspections, as appropriate, to monitor bank performance. Alternatively, functional assessments may be conducted by a team representing involved resources and regularly agencies and other appropriate parties. The number of available credits in a mitigation bank may need to be adjusted to reflect actual conditions.

The banking instrument should require that bank sponsors establish and maintain an accounting system (i.e., ledger) which documents the activity of all mitigation bank accounts. Each time an approved debit/credit transaction occurs at a given bank, the bank sponsor should submit a statement to the authorizing agency(ies). The bank sponsor should also generate an annual ledger report for all mitigation bank accounts to be submitted to the MBRT Chair for distribution to each member of the MBRT.

Credits may be sold to third parties. The cost of mitigation credits to a third party is determined by the bank sponsor.

Party Responsible for Bank Success

The bank sponsor is responsible for assuring the success of the debited restoration, creation, enhancement and preservation activities at the mitigation bank, and it is therefore extremely important that an enforceable mechanism be adopted establishing the responsibility of the bank sponsor to develop and operate the bank properly. Where authorization under Section 10/404 and/or FSA is necessary to establish the bank, the Department of the Army

permit or NRCS plan should be conditioned to ensure that provisions of the banking instrument are enforceable by the appropriate agency(ies). In circumstances where establishment of a bank does not require such authorization, the details of the bank sponsor's responsibilities should be delineated by the relevant authorizing agency (e.g., the Corps in the case of Section 10/404 permits) in any permit in which the permittee's mitigation obligations are met through use of the bank. In addition, the bank sponsor should sign such permits for the limited purpose of meeting those mitigation responsibilities, thus confirming that those responsibilities are enforceable against the bank sponsor if necessary.

E. Long-Term Management, Monitoring and Remediation

1. Bank Operational Life

The operational life of a bank refers to the period during which the terms and conditions of the banking instrument are in effect. With the exception of arrangements for the long-term management and protection in perpetuity of the wetlands and/or other aquatic resources, the operational life of a mitigation bank terminates at the point when (1) Compensatory mitigation credits have been exhausted or banking activity is voluntarily terminated with written notice by the bank sponsor provided to the Corps or NRCS and other members of the MBRT, and (2) it has been determined that the debited bank is functionally mature and/or self-sustaining to the degree specified in the banking instrument.

2. Long-term Management and Protection

The wetlands and/or other aquatic resources in a mitigation bank should be protected in perpetuity with appropriate real estate arrangements (e.g., conservation easements, transfer of title to Federal or State resource agency or non-profit conservation organization). Such arrangements should effectively restrict harmful activities (i.e., incompatible uses²) that might otherwise jeopardize the purpose of the bank. In exceptional circumstances, real estate arrangements may be approved which dictate finite protection for a bank (e.g., for coastal protection projects which prolong the ecological viability of

²For example, certain silvicultural practices (e.g. clear cutting and/or harvests on short-term rotations) may be incompatible with the objectives of a mitigation bank. In contrast, silvicultural practices such as long-term rotations, selective cutting, maintenance of vegetation diversity, and undisturbed buffers are more likely to be considered a compatible use.

the aquatic system). However, in no case should finite protection extend for a lesser time than the duration of project impacts for which the bank is being used to provide compensation.

The bank sponsor is responsible for securing adequate funds for the operation and maintenance of the bank during its operational life, as well as for the long-term management of the wetlands and/or other aquatic resources, as necessary. The banking instrument should identify the entity responsible for the ownership and long-term management of the wetlands and/or other aquatic resources. Where needed, the acquisition and protection of water rights should be secured by the bank sponsor and documented in the banking instrument.

3. Monitoring Requirements

The bank sponsor is responsible for monitoring the mitigation bank in accordance with monitoring provisions identified in the banking instrument to determine the level of success and identify problems requiring remedial action. Monitoring provisions should be set forth in the banking instrument and based on scientifically sound performance standards prescribed for the bank. Monitoring should be conducted at time intervals appropriate for the particular project type and until such time that the authorizing agency(ies), in consultation with the MBRT, are confident that success is being achieved (i.e., performance standards are attained). The period for monitoring will typically be five years; however, it may be necessary to extend this period for projects requiring more time to reach a stable condition (e.g., forested wetlands) or where remedial activities were undertaken. Annual monitoring reports should be submitted to the authorizing agency(ies), who is responsible for distribution to the other members of the MBRT, in accordance with the terms specified in the banking instrument.

4. Remedial Action

The banking instrument should stipulate the general procedures for identifying and implementing remedial measures at a bank, or any portion thereof. Remedial measures should be based on information contained in the monitoring reports (i.e., the attainment of prescribed performance standards), as well as agency site inspections. The need for remediation will be determined by the authorizing agency(ies) in consultation with the MBRT and bank sponsor.

5. Financial Assurances

The bank sponsor is responsible for securing sufficient funds or other financial assurances to cover contingency actions in the event of bank default or failure. Accordingly, banks posing a greater risk of failure and where credits have been debited, should have comparatively higher financial sureties in place, than those where the likelihood of success is more certain. In addition, the bank sponsor is responsible for securing adequate funding to monitor and maintain the bank throughout its operational life, as well as beyond the operational life if not self-sustaining. Total funding requirements should reflect realistic cost estimates for monitoring, long-term maintenance, contingency and remedial actions.

Financial assurances may be in the form of performance bonds, irrevocable trusts, escrow accounts, casualty insurance, letters of credit, legislatively-enacted dedicated funds for government operate banks or other approved instruments. Such assurances may be phased-out or reduced, once it has been demonstrated that the bank is functionally mature and/or self-sustaining (in accordance with performance standards).

F. Other Considerations

1. In-lieu-fee Mitigation Arrangements

For purposes of this guidance, in-lieu-fee, fee mitigation, or other similar arrangements, wherein funds are paid to a natural resource management entity for implementation of either specific or general wetland or other aquatic resource development projects, are not considered to meet the definition of mitigation banking because they do not typically provide compensatory mitigation in advance of project impacts. Moreover, such arrangements do not typically provide a clear timetable for the initiation of mitigation efforts. The Corps, in consultation with the other agencies, may find there are circumstances where such arrangements are appropriate so long as they meet the requirements that would otherwise apply to an offsite, prospective mitigation effort and provides adequate assurances of success and timely implementation. In such cases, a formal agreement between the sponsor and the agencies, similar to a banking instrument, is necessary to define the conditions under which its use is considered appropriate.

2. Special Considerations for "Swampbuster"

Current FSA legislation limits the extent to which mitigation banking can be used for FSA purposes. Therefore, if a mitigation bank is to be used for FSA purposes, it must meet the requirements of FSA.

III. Definitions

For the purposes of this guidance document the following terms are defined:

A. *Authorizing agency.* Any Federal, state, tribal or local agency that has authorized a particular use of a mitigation bank as compensation for an authorized activity; the authorizing agency will typically have the enforcement authority to ensure that the terms and conditions of the banking instrument are satisfied.

B. *Bank sponsor.* Any public or private entity responsible for establishing and, in most circumstances, operating a mitigation bank.

C. *Compensatory mitigation.* For purposes of Section 10/404, compensatory mitigation is the restoration, creation, enhancement, or in exceptional circumstances, preservation of wetlands and/or other aquatic resources for the purpose of compensating for unavoidable adverse impacts which remain after all appropriate and practicable avoidance and minimization has been achieved.

D. *Consensus.* The term consensus, as defined herein, is a process by which a group synthesizes its concerns and ideas to form a common collaborative agreement acceptable to all members. While the primary goal of consensus is to reach agreement on an issue by all parties, unanimity may not always be possible.

E. *Creation.* The establishment of a wetland or other aquatic resource where one did not formerly exist.

F. *Credit.* A unit of measure representing the accrual or attainment of aquatic functions at a mitigation bank; the measure of function is typically indexed to the number of wetland acres restored, created, enhanced or preserved.

G. *Debit.* A unit of measure representing the loss of aquatic functions at an impact or project site.

H. *Enhancement.* Activities conducted in existing wetlands or other aquatic resources which increase one or more aquatic functions.

I. *Mitigation.* For purposes of Section 10/404 and consistent with the Council on Environmental Quality regulations, the Section 404(b)(1) Guidelines and the Memorandum of Agreement Between

the Environmental Protection Agency and the Department of the Army Concerning the Determination of Mitigation under the Clean Water Act Section 404(b)(1) Guidelines, mitigation means sequentially avoiding impacts, minimizing impacts, and compensating for remaining unavoidable impacts.

J. *Mitigation bank.* A mitigation bank is a site where wetlands and/or other aquatic resources are restored, created, enhanced, or in exceptional circumstances, preserved expressly for the purpose of providing compensatory mitigation in advance of authorized impacts to similar resources. For purposes of Section 10/404, use of a mitigation bank may only be authorized when impacts are unavoidable.

K. *Mitigation Bank Review Team (MBRT).* An interagency group of Federal, state, tribal and/or local regulatory and resource agency representatives which are signatory to a banking instrument and oversee the establishment, use and operation of a mitigation bank.

L. *Practicable.* Available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes.

M. *Preservation.* The protection of ecologically important wetlands or other aquatic resources in perpetuity through the implementation of appropriate legal and physical mechanisms. Preservation may include protection of upland areas adjacent to wetlands as necessary to ensure protection and/or enhancement of the aquatic ecosystem.

N. *Restoration.* Re-establishment of wetland and/or other aquatic resource characteristics and function(s) at a site where they have ceased to exist, or exist in a substantially degraded state.

O. *Service area.* The service area of a mitigation bank is the designated area (e.g., watershed, county) wherein a bank can reasonably be expected to provide appropriate compensation for impacts to wetlands and/or other aquatic resources.

John H. Zirschky,

*Acting Assistant Secretary (Civil Works),
Department of the Army.*

Robert Perciasepe,

*Assistant Administrator for Water,
Environmental Protection Agency.*

Thomas R. Hebert,

*Acting Undersecretary for Natural Resources
and Environment, Department of Agriculture.*

Robert P. Davison,

*Acting Assistant Secretary for Fish and
Wildlife and Parks, Department of the
Interior.*

Douglas K. Hall,

*Assistant Secretary for Oceans and
Atmosphere, Department of Commerce.*

[FR Doc. 95-28907 Filed 11-27-95; 8:45 am]

BILLING CODE 3710-92-M

DEPARTMENT OF ENERGY

Environmental Management Site-Specific Advisory Board, Hanford Site

AGENCY: Department of Energy.

ACTION: Notice of open meeting.

SUMMARY: Pursuant to the provisions of the Federal Advisory Committee Act (Public Law 92-463, 86 Stat. 770) notice is hereby given of the following Advisory Committee meeting: Environmental Management Site-Specific Advisory Board (EM SSAB), Hanford Site.

DATES:

Thursday, December 7, 1995: 9:00 a.m.–4:30 p.m.

Friday, December 8, 1995: 8:30 a.m.–3:00 p.m.

ADDRESSES: Columbia River Red Lion, Portland, Oregon.

FOR FURTHER INFORMATION CONTACT: Jon Yerxa, Public Participation Coordinator, Department of Energy Richland Operations Office, P.O. Box 550, Richland, WA, 99352.

SUPPLEMENTARY INFORMATION:

Purpose of the Board

The purpose of the Board is to make recommendations to DOE and its regulators in the areas of environmental restoration, waste management, and related activities.

Tentative Agenda

December Meeting Topics

The Hanford Advisory Board will receive information on and discuss issues related to: Update on Congressional Budget Action, the Waste Management Programmatic Environmental Impact Statement, Status of Tri-Party Agreement Milestone, M-33, and the Strategic Planning Process. The Committee will also receive updates from various Subcommittees, including reports on: the Plutonium Disposition Final Report, the Quarterly Progress Report from DOE, and EPA's

Budget and Reorganization in Region 10.

Public Participation

The meeting is open to the public. Written statements may be filed with the Committee either before or after the meeting. Individuals who wish to make oral statements pertaining to agenda items should contact Jon Yerxa's office at the address or telephone number listed above. Requests must be received 5 days prior to the meeting and reasonable provision will be made to include the presentation in the agenda. The Designated Federal Official is empowered to conduct the meeting in a fashion that will facilitate the orderly conduct of business. Each individual wishing to make public comment will be provided a maximum of 5 minutes to present their comments. This notice is being published less than 15 days before the date of the meeting due to programmatic issues that had to be resolved prior to publication.

Minutes

The minutes of this meeting will be available for public review and copying at the Freedom of Information Public Reading Room, 1E-190, Forrestal Building, 1000 Independence Avenue, SW, Washington, DC 20585 between 9:00 a.m. and 4 p.m., Monday-Friday, except Federal holidays. Minutes will also be available by writing to Jon Yerxa, Department of Energy Richland Operations Office, P.O. Box 550, Richland, WA 99352, or by calling him at (509)-376-9628.

Issued at Washington, DC on November 21, 1995.

Gail Cephas,

*Acting Advisory Committee Management
Officer.*

[FR Doc. 95-29023 Filed 11-27-95; 8:45 am]

BILLING CODE 6450-01-P

Environmental Management Site-Specific Advisory Board, Oak Ridge Reservation

AGENCY: Department of Energy.

ACTION: Notice of open meeting.

SUMMARY: Pursuant to the provisions of the Federal Advisory Committee Act (Public Law 92-463, 86 Stat. 770) notice is hereby given of the following Advisory Committee meeting:

APPENDIX III

Examples of State Regulations of Wetland Banking

Florida

Florida's mitigation banking regulations were developed in 1993 in response to a legislative mandate (§ 373.4135, Florida Statutes), prior to the publication of the Federal Guidance. The Department of Environmental Protection and its sister agencies, the five regional water management districts, jointly developed and adopted rules on mitigation banking (Chapter 62-342, Florida Administrative Code). The regulations apply to all waters in the state, fresh and salt, contiguous and isolated. Under Florida law mitigation bankers may be private or public entities. Some advance credits may be available for use when the site must be preserved in perpetuity and the implementation and long term management trust funds are in place. Subsequent credit releases are made based on demonstrated increases in function at the site. Some credits must be withheld until success is demonstrated. Service areas are based on watersheds, but may be modified based on other ecological or hydrological factors. Restoration of native, pre-existing habitats in a landscape context is preferred. Credits assessments are made using a functional assessment methodology. Perpetual management is required and must be endowed prior to the sale of credits. A 1998 resolution of the Board of Trustees of the Internal Improvement Trust Fund prohibits the use of state lands for mitigation banks.

Hackensack Meadowlands District, New Jersey

The Hackensack Meadowlands District operates under the Interagency Compensatory Wetland Mitigation Agreement which is governed by the Corps, EPA, New Jersey DEP, Hackensack Meadowlands Commission, NMFS and FWS. There are goals of immediate no net loss and long term net gain of wetland functions and values. Mitigation bankers may be private or public entities. It is possible for bank sponsors to obtain an umbrella agreement for the establishment and operation of multiple bank sites. Some advance use of credits may be approved once the site has been secured and the financial assurances are in place. preservation credits become available once the site has been preserved. The service area is the Hackensack Meadowlands District. Wetland restoration, creation or enhancement may be used. Uplands within the bank site may be assigned credit to the extent that they augment the ecological functioning of the site. Compensation amounts for the offset of impacts is decided on a case by case basis. Endowed perpetual management is required. Public or private lands may be used.

Louisiana

Louisiana's mitigation banking regulations (Title 43, Subchapter C, § 724.F) only apply within the state's coastal zone. Mitigation bankers may be private or public entities. Preservation and financial assurances are required when the banker wishes to receive advance credits. Under state law, preservation is for 20 years for marshes and 50 years for forested wetlands. The service areas are not defined in the state rules. Wetland restoration, creation, enhancement and protection may be used. Uplands are not mentioned in the law. Credits needed for the offset of impacts are assessed using a functional assessment procedure. Compensation amounts for the offset of impacts is decided on a case by case basis. Public or private lands may be used.

Maryland

Mitigation banks in Maryland's nontidal wetlands are governed by Title 26, Subtitle 23, Code of Maryland Regulations (COMAR 26.23.04.06). These regulations were promulgated in 1993 in response to the Nontidal Wetlands Mitigation Banking Act (§ 5-910, Maryland Statutes, Liebesman, 1993) prior to the publication of the Federal Guidance. There is a goal of net wetland gain under this law. Under Maryland law mitigation bankers may be private or public entities. Up to 50% of the credits may be available for use in the first two years after construction when the site has been preserved in perpetuity, construction is completed and the bonding requirements (private banks only) are met. Subsequent credit releases are made based on demonstrated increases in function at the site. Service areas are limited to 20 watersheds defined by regulation. Wetland restoration, creation or enhancement may be used. No mention is made of the inclusion of uplands within the bank site. Compensation amounts for the offset of impacts are based on ratios with a 50% increase in the ratio currently required of the mitigation uses a wetlands bank. Ratios vary by Cowardin Classification and wetlands location. State lands may be used for mitigation banks.

In tidal wetlands, under COMAR 26.24.05.01.B(9) the Department of the Environment can approve mitigation bank sites in consultation with local, state and federal agencies. However, there are no specific regulations on mitigation banks in tidal wetlands.

North Carolina

Mitigation banks in North Carolina are governed pursuant to G.S.143.214 (North Carolina statutes) by Subchapter 2R, § .0300 of the North Carolina Code, which became effective in August 1998. This law specifically requires that banks be processed be consistent with the Federal Guidance and that it be consistent with the appropriate Basinwide Restoration Plan (BRP). The state provides its assent for by signing the Mitigation Banking Instrument. The state enacted a Wetland Restoration Fund at the Department of Environment, Health and Natural Resources in 1997 that provides mitigation via in payment to a trust fund for those permit applicants requiring a 401 water quality certification, with the goal of potentially providing mitigation to all Section 404 permit applicants. This program also oversees private mitigation banks to ensure their compatibility with the BRP's. Because of the manner in which the in lieu fee program is set up, mitigation banks will be implemented by private entities, the law does not contemplate public entities as bankers. The mitigation banking-specific regulations are within the Federal Guidance, so there are no specific state provisions governing credit release, perpetual management, financial assurances, service areas, or credit assessments for impacts. The state regulations do require that "adequate, dedicated financial surety" exists for the perpetual land management. Public or private lands may be used and the site must be consistent with the BRP's

Virginia

The Commonwealth of Virginia does not specifically regulate wetlands banking. However, in 1996 (amended in 1999) the Code of Virginia (§§ 28.2-1308, 33.1-223.2:1, and 62.1-44.15:5) was modified to allow wetlands impacts to be mitigated by the purchase or use of

credits from a wetlands bank that has been approved and is operating in accordance with applicable federal and state guidance, laws, or regulations for the establishment, use and operation of mitigation banks as long as: (1) the bank is in the same U.S.G.S. cataloging unit, as defined by the Hydrologic Unit Map of the United States (U.S.G.S. 1980), or an adjacent cataloging unit within the same river watershed, as the impacted site, or it meets certain conditions [which govern conditions for when credits can be used outside this service area for linear transit projects], (2) the bank is ecologically preferable to practicable on-site and off-site individual mitigation options, as defined by federal wetland regulations; and (3) the banking instrument, if approved after July 1, 1996, has been approved by a process that included public review and comment. The Department of Environmental Quality (DEQ) is the agency which authorizes permits to use non-tidal wetlands banks.

Specific policy and Guidance for the Establishment and use of Tidal Wetlands Mitigation Banks in Virginia has been developed by the Virginia Marine Resource Center (VMRC) and Virginia Institute of Marine Science (VIMS); where as no such document has been completed by DEQ for non-tidal banks.

Washington

The Washington legislature enacted a new chapter as Title 90.84 RCW regarding mitigation banking in 1998. This law specifically requires that interpretation of it and rules promulgated under it be consistent with the Federal Guidance. The state rules are expected by December 1999. Mitigation banks may be publicly or privately operated. Use of credits prior to meeting all of the performance standards are met is allowed. Wetland restoration, creation, enhancement and preservation may be used, though restoration is preferred. Neither preservation of the bank site nor uplands are mentioned in the law. Long term management and financial assurances are required. The state Department of Ecology and local governments will be signatories to the banking instruments.

APPENDIX IV

Model Mitigation Banking Instrument

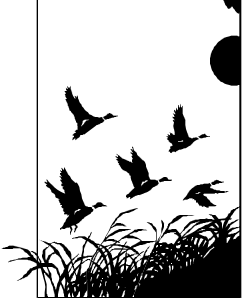
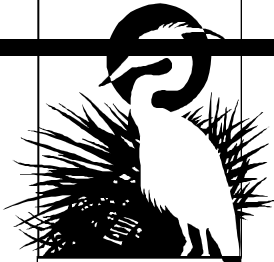


DRAFT

NATIONAL WETLAND MITIGATION

BANKING STUDY

Model Banking Instrument



Institute for Water Resources

Water Resources Support Center

U.S. Army Corps of Engineers

Alexandria, Virginia 22315

ACKNOWLEDGMENTS

This model banking instrument was prepared as part of the U.S. Army Corps of Engineers (Corps) Institute for Water Resources (IWR) National Wetland Mitigation Banking Study (NWMBS) and in support to the Council of Environmental Quality Interagency Wetlands Working Group for Federal Wetlands Policy in the development of Federal Mitigation Banking Guidance.

The NWMBS is being conducted within the IWR Policy and Special Studies Division, whose Chief is Eugene Stakhiv. The study manager is Robert Brumbaugh.

The document was prepared under the direction of Robert Brumbaugh. Fari Tabatabai (Corps, Los Angeles District) prepared the initial drafts of the model banking instrument while on developmental assignment to IWR. The model instrument benefited from the substantial and invaluable comments from Tom Kelsch (U.S. Environmental Protection Agency Wetlands Division) and Jack Chowning (Corps Headquarters Regulatory Branch), co-chairs of the interagency staff-level mitigation banking working group that prepared the Federal Mitigation Banking Guidance (issued in the Federal Register on 28 November 1995). Mark Miller (U.S. Fish and Wildlife Service), Susan-Marie Stedman (National Marine Fisheries Service) , and John Gleason (Corps, Los Angeles District) also provided comments. Finally, this document benefited greatly from the very critical review of Jim Monroe (Corps, Sacramento District).

BANKING INSTRUMENT
[NAME OF THE MITIGATION BANK]

This Banking Instrument regarding the establishment, use, operation, and maintenance of *[name of the wetland mitigation bank]* (hereinafter, the Bank) is made and entered into by and among *[name of the wetland mitigation bank sponsor]* (hereinafter, Sponsor), the U.S. Army Corps of Engineers (Corps), the U.S. Environmental Protection Agency (EPA), the U.S. Fish and Wildlife Service (FWS), National Marine Fisheries (NMFS) *[if applicable]*, Natural Resources Conservation Service (NRCS) *[if applicable]*, *[list other Federal, State, tribal and/or local agencies, who are signatory to the instrument]*, with reference to the following:

Federal
Policy
Documen
Referenc

Sec. II.C.:

I. PREAMBLE

A. Purpose: The purpose of this Banking Instrument is to establish guidelines and responsibilities for the establishment, use, operation, and maintenance of the Bank. The Bank will be used for compensatory mitigation for unavoidable impacts to waters of the United States including wetlands which result from activities authorized under Section 404 of the Clean Water Act, *[list other applicable programs for which credits from the bank are expected to be used, e.g., Section 10 of the Rivers and Harbors Act, the Swampbuster provisions of the Food Security Act, State or local wetland regulatory programs, other Federal programs]* provided such use has met all applicable requirements and is authorized by the appropriate authority.

B. Location and Ownership of Parcel: Whereas, *[ownership of bank lands]* owns ___ acres of land at *[provide address of the parcel, including County and State]*, (Exhibit A), and the Sponsor has developed a mitigation plan to establish and/or maintain ___ acres of ___ *[type of habitat]*. *[Also include owner of water rights for the property, if applicable.]*

Sec. II.C.

C. Project Description: Whereas, under this Banking Instrument, the Sponsor will establish and/or maintain ___ acres of aquatic habitat in accordance with the provisions of this Banking Instrument and the Bank Development Plan (Exhibit B), and shall then maintain the Bank in such condition for ___ years in accordance with the bank closure procedures or until all credits are sold, whichever is later. The Bank area shall consist of a total of ___ acres and include *[provide detailed description of wetland type(s) to be established and/or maintained, including size, expected hydrologic conditions and vegetation community. Use the Classification of Wetlands and Deepwater Habitats of the United States, Cowardin, et al., 1979; the Hydrogeomorphic Classification For Wetlands, Brinson, 1993, or other similar classification system, as appropriate]*.

Sec. II.C.

D. Baseline Conditions: Whereas, the Bank area is currently *[provide detailed description of current conditions of site, including assessment of any existing aquatic functions that the site currently provides]*.

Sec. II.C.

E. Establishment and Use of Credits: Whereas, in accordance with the provisions of this Banking Instrument and upon satisfaction of the success criteria contained herein, a total of ___ credits will be available to be used as mitigation in accordance with all applicable requirements. *[May include other information, as appropriate, regarding the general use of credits, e.g., whether credits will be used by bank sponsor or sold to third parties]*

F. Whereas, the Mitigation Banking Review Team (MBRT) consists of:

1. U.S. Army Corps of Engineers, ___ District (Corps), Chair.
2. U.S. Environmental Protection Agency, Region __ (EPA).
3. U.S. Fish and Wildlife Service, ___ Field Office (FWS).
4. National Marine Fisheries Service , ___ Field Office (NMFS) *[if applicable]*.
5. Natural Resources Conservation Service, ___ District (NRCS) *[if applicable]*.

Sec. II.C.

[List other signatory agencies who are responsible for review and approval of the bank proposal].

G. Disclaimer: Whereas, this Banking Instrument does not in any manner affect statutory authorities and responsibilities of the signatory parties.

H. Exhibits: Whereas, the following Exhibits are incorporated as appendices to this Banking Instrument:

1. “Exhibit A”, Bank location and service area *[include, as appropriate U.S. Geological Survey location map showing location of the Bank (include latitude and longitude information for GIS purposes), topographic map of the Bank showing existing conditions, and Figures of the service area of bank]*
2. “Exhibit B”, Bank Development Plan *[list and provide description of the specific activities to be undertaken by the Sponsor, e.g., activities to restore hydrology, detailed planting plans, removal of invasive non-native species; include all plans and specifications, as necessary, to document the proposed work]*
3. “Exhibit C”, Crediting and Debiting Procedure for the Bank
4. “Exhibit D”, Delineation Report
5. “Exhibit E”, Watershed Plan *[if applicable]*
6. “Exhibit F”, Real-Estate Provisions *[attach conservation easement, deed restriction or other real estate provisions, as appropriate upon completion]*
7. “Exhibit G”, Financial Assurance *[attach appropriate documentation pertaining to the financial assurance arrangements upon completion]*
8. “Exhibit H”, Bank Closure Plan *[include description of specific requirements and procedures to be followed by Bank Sponsor to conclude operational phase of bank. Alternatively, these provisions may be included in the Bank Development Plan.]*
and *[Include other Exhibits as appropriate]*.

II. AUTHORITIES

The establishment, use, operation and maintenance of the Bank is carried out in accordance with the following authorities:

A. Federal:

1. Clean Water Act (33 USC 1251 et seq.)
2. Rivers and Harbors Act (33 USC 403)
3. Fish and Wildlife Coordination Act (16 USC 661 et seq.)
4. Regulatory Programs of the Corps of Engineers, Final Rule (33 CFR Parts 320-330)
5. Guidelines for Specification of Disposal Sites for Dredged and Fill Material (40 CFR Part 230)
6. Memorandum of Agreement between the Environmental Protection Agency and the Department of the Army concerning the Determination of Mitigation Under the Clean Water Act, Section 404 (b)(1) Guidelines (February 6, 1990)
7. Federal Guidance for the Establishment, Use, Operation of Mitigation Banks (60 F.R. 58605 et seq.)

[Include other State, tribal, and/or local authorities, as appropriate.]

NOW, THEREFORE, the parties agree to the following:

III. ESTABLISHMENT OF THE BANK

A. The Sponsor agrees to perform all necessary work, in accordance with the provisions of this Banking Instrument, to establish and/or maintain ___ acres of aquatic habitat, as shown in Exhibit B, until it is demonstrated to the satisfaction of the agencies represented on the MBRT (acting through the Chair) that the project complies with all conditions contained herein, or until all credits are sold, whichever is later. Work shall include implementing the Bank Development Plan (Exhibit B).

Sec. II.C.

B. The Sponsor will obtain all appropriate environmental documentation, permits or other authorizations needed to establish and maintain the Bank. This Banking Instrument does not fulfill or substitute for such authorization.

C. Establishment of the Bank will be performed in [*indicate whether work is to be conducted in a phased manner or its entirety*] as described in the Bank Development Plan (Exhibit B), and the credits will become available in accordance with the schedule specified in Part IV, Sections D through G of this Banking Instrument. In the event the Sponsor determines that modifications must be made in the Bank Development Plan to ensure successful establishment of habitat within the Bank, the Sponsor shall submit a written request for such modification to the MBRT, through the Chair, for approval. Documentation of implemented modifications shall be made consistent with Part III, Section F *infra*.

D. Financial Assurance Requirements: The Sponsor agrees to provide the following financial assurances for the work described in this Banking Instrument. *[Include information about the specific financial assurance (e.g., performance bond, letter of credit, escrow account) to be provided by the Sponsor. For example, “The Sponsor shall deposit in the following manner:* Sec. II.E.

1. ___ in *[identify the financial assurance mechanism, e.g., letter of credit, interest bearing escrow account, etc.] to be termed Contingency Funds and to be used by the Sponsor or a third party to be designated by the Corps in the event the Sponsor fails to comply with the terms of this Banking Instrument to rectify any unforeseen events as determined by the MBRT. In the event that the Contingency Funds are not used, [at the end of the X Year] the funds shall be returned to the Sponsor.*

2. ___ in *[identify the financial assurance mechanism (e.g., an interest bearing trust account)] to be transferred to [identify the long-term management entity] on [identify the starting date of the maintenance period]. These funds referred to as the Long-Term Management Funds shall only be used by [long-term management entity] for managing and maintaining the Bank in perpetuity. (The cost of long-term management of the bank may be adjusted based on actual annual cost of maintenance that will be provided by the Sponsor in the monitoring reports.)”]*
[Note: Many self-maintenance banks may not require long-term management funds.]

E. Real Estate Provisions: The Sponsor shall *[specify the type of real estate provisions, e.g., conservation easements and/or title transfers. An example is as follows:* Sec. II.E.
“The Sponsor shall record a conservation easement on the Bank land prior to certification of any credits in favor of [identify the appropriate party] or its successor. The conservation easement shall preserve the Bank land as wetlands and wildlife habitat in perpetuity. The draft conservation easement documents shall be provided to Corps for approval prior to its recording and copies of recorded documents shall be provided to the Corps”].

F. The Sponsor agrees to submit an as-built report for *[each phase of]* the Bank ___ days following completion of the establishment of the *[that phase of]* bank. The as-built report will describe in detail any deviation from that described in the mitigation plan (Exhibit B), and a plan showing finish grades, and surface and groundwater elevations, as appropriate.

IV. OPERATION OF THE BANK

A. Service Area: The bank is established to provide mitigation to compensate for impacts to the Waters of the United States including wetlands within *[indicate the service area of the bank]* as shown in Exhibit A. Decisions authorizing use of credits from the Bank will be made by the appropriate authority on a case-by-case basis in accordance with applicable requirements. Sec. II.D.3

B. The Sponsor will allow, or otherwise provide for, access to the site by all signatory parties, as necessary, for the purpose of inspection and compliance monitoring consistent with the terms and conditions of this Banking Instrument. Inspecting parties shall provide reasonable notice, of not less than 24 hours, to the Sponsor, prior to inspection of Bank.

C. Projects Eligible to Use the Bank. For projects requiring authorization under Section 404 and Section 10, the Corps, in consultation with the other regulatory and resource agencies, will determine the eligibility of projects to use the bank on a case-by-case basis. *[To the extent that the Bank may be authorized for use under other Federal, State, tribal, or local programs, it may be appropriate to include a similar clarifying statement.]* *[It may be appropriate, however, to list examples of the types of activities for which the bank is expected to be used. For example, "In general, it is agreed that the following activities shall typically be eligible to use the bank (provide list of activities, e.g., activities associated with specific projects, activities authorized under certain general permits, activities impacting specific wetland classes)].*

Sec. II.D.

D. Assessment Methodology: Credits and debits will be assessed using *[identify the method for determining credits, and debits, e.g., specific functional assessment methodology, wetland acreage, or other appropriate method]*.

Sec. II.D.

E. Success Criteria: The following criteria will be used to assess project success: *[List appropriate measures of success, e.g., attainment of appropriate wetland hydrology, % coverage (by strata) of vegetation, % species composition/diversity.]*

Sec. II.D.

F. Schedule of Credit Availability: Upon submittal of all appropriate documentation by the Sponsor, and subsequent approval by the Corps *[identify any other authorizing agency(s)]*, in consultation with the other members of the MBRT, it is agreed that credits will become available for use by the Sponsor or for transfer to a third party in accordance with the following schedule: *[Indicate conditions that must be met before credits may become available for debiting, For example: Credits will be available for debiting upon satisfaction of the success criteria; or ___ percentage of total anticipated credits will be available for debiting upon approval of this Banking Instrument, maintenance of adequate funds [indicate amount, beneficiary, and the type of financial assurance, e.g., escrow account, letter of credits, or performance bond] for construction, operation, and long-term maintenance, and real estate assurance [indicate type and beneficiary; or ___ percentages of total anticipated credits may be withdrawn immediately after the construction and an initial planting phase has been completed for any given phase of the Bank, provided adequate funds are maintained in [indicate amount, beneficiary, and type of financial assurance] for long-term maintenance of any portion of debited credits; or ___ percentage of total credits will be available for debiting following successful demonstration of attainment of hydrologic criteria as described in Section ___ [see hydrologic success criteria], and provided adequate funds are maintained in [indicate amount, beneficiary, and type of financial assurance] for long-term maintenance of any portion of debited credits.]*

G. Conditions on Debiting: *[Include any specific conditions on debiting of credits. The following scenarios are examples: Any credits debited before achieving the success criteria, shall require posting sufficient financial assurance to cover contingency actions in the event of partial or total failure (i.e., \$ X/acre). The form and amount of the assurances shall be approved by the Corps [identify any other authorizing agency(s)], in consultation with the other members of the MBRT, prior to posting. Upon meeting the success criteria as determined by the MBRT, the bond shall be released to the Sponsor.]*

H. Provisions For Uses of the Mitigation Bank Area: The Sponsor shall **NOT** :

1. Grant additional easements, right of way, or any other property interest in or to the project areas without the written consent of the Corps, in consultation with the MBRT.
2. Use or authorize the areas within the Bank for any purpose which interferes with its conservation purposes other than those specified below *[specify any compatible uses. Alternatively, it may be appropriate to include this information in the Bank Development Plan.]*.

V. MAINTENANCE AND MONITORING OF THE BANK

A. Maintenance Provisions: The Sponsor agrees to perform all necessary work to maintain the Bank consistent with the maintenance criteria established in the Bank Development Plan *[the Bank Development Plan should include provisions describing particular maintenance activities, e.g., removal of invasive species, prescribed burning]*. The Sponsor shall continue with such maintenance activities until closure of *[a particular phase of]* the bank. Upon closure of the Bank, the Sponsor shall implement the management requirements established in Part V, Section F *[and as described in the Bank Closure Plan, where applicable]*. Deviation from the approved Bank Development Plan is subject to review and written approval by MBRT, (acting through the Chair).

B. Monitoring Provisions: The Sponsor agrees to perform all necessary work to monitor the Bank to demonstrate compliance with the success criteria established in this Banking Instrument. Work will include *[state frequency, methods, and period of monitoring needed to demonstrate compliance with success criteria. For example:*

1. *Vegetation Survey,*
2. *Wildlife Survey,*
3. *Hydrologic monitoring,*
4. *Other activities]*

C. Reports: The Sponsor shall submit to the Corps, for distribution to the other members of the MBRT, a report describing the conditions of Bank and relating those conditions to the success criteria. Reports will be submitted by the [*annual date of report submittal*] of each calendar year and contain the following:

[*Examples of monitoring report provisions:*

1. A U.S. Geological Survey map showing location of the Bank,,
2. A detailed narrative summarizing the condition of the Bank and all regular maintenance activities,
3. Appropriate topographic maps (e.g., 1-2 foot-contour intervals) showing location of sampling plots, permanent photo points, location of transects, etc.
4. Results of hydrology survey including hydroperiod, extent of inundation and depth, groundwater monitoring data, precipitation, etc.
5. Results of vegetation survey including visual estimates of % overall cover and % cover by each vegetation layer, species diversity, % exotic vegetation in each vegetation layer, total % “facultative” and “upland” species in each vegetation layer, survival rate of planted vegetation, an estimate of natural revegetation, and plant vigor as measured by evidence of reproduction.
6. Results of other surveys such as bird, macroinvertebrate, fish surveys, etc.)]

D. Accounting Procedure: The Sponsor shall submit a statement to the Corps [*identify any other authorizing agency(s)*] each time credits are debited or additional credits are approved. If requested, the Corps will distribute the statement to other members of the MBRT. At a minimum, the Sponsor shall submit an annual ledger to the Corps for distribution to all members of the MBRT, showing all transactions at the bank for the previous year.

E. Contingency Plans/Remedial Actions: In the event the Bank [*or a specific phase of the Bank*] fails to achieve the success criteria specified in Part IV, Section E of this Banking Instrument, the Sponsor shall develop necessary contingency plans and implement appropriate remedial actions for the Bank [*or that phase*] in coordination with the MBRT. In the event the Sponsor fails to implement necessary remedial actions within ____ calendar days after notification by the Corps [*identify any other authorizing agency(s)*] of necessary remedial action to address any failure in meeting the success criteria , the MBRT (acting through the Chair) will notify the Sponsor and the appropriate authorizing agency(ies) and recommend appropriate remedial actions.

Sec. II.E.

If the authorizing agency(ies) determines that the Bank is operating at a deficit, debiting of credits will immediately cease, and the authorizing agency(ies), in consultation with the MBRT and the Sponsor, will determine what remedial actions are necessary to correct the situation. As determined by the Chair in coordination with the MBRT and the Sponsor, if conditions at the bank site do not improve or continue to deteriorate within a reasonable time frame from the date that the need for remediation was first identified in

writing to the Sponsor by the Chair of the MBRT, the Contingency Funds and the long-term management funds shall be transferred to [*identify the entity*] to undertake corrective measures.

At the request of the Sponsor, the MBRT will perform a final compliance visit to determine whether all success criteria have been satisfied. Upon satisfaction of the success criteria, any remaining contingency funds will be released to the Sponsor.

F. Long-Term Management: *[Specify the responsible entity and source of funds (if required) for long-term management. An example is as follows: “At the end of the active monitoring period, the Sponsor shall transfer the entire long-term management funds and the title to the Bank land to [identify entity responsible for long-term management]. At that time, the [long-term management entity] shall be responsible to manage the Bank in perpetuity in accordance with the terms of the long-term management plans and real estate provisions. Upon signing of this Banking Instrument the long-term management entity concurs and it shall use the long-term management funds specified in Part III, Section D.2 to be used for this purpose only.” (Alternatively, if there is a Bank Closure, incorporate it here by reference.)]*

Sec. II.E.

VI. RESPONSIBILITIES OF THE MBRT

A. The agencies represented on the MBRT agree to provide appropriate oversight in carrying out provisions of this Banking Instrument.

B. The agencies represented on the MBRT agree to review and provide comments on all project plans, *[regular or annual]* monitoring reports, credit review reports, contingency plans, and necessary permits for the Bank in a timely manner. Comments on the monitoring reports and credit review reports will be reviewed within ___ calendar days from the date of complete submittal, except for good cause.

C. The agencies represented on the MBRT agree to review and confirm reports on evaluation of success criteria prior to approving credits within *[each phase of]* the bank.

D. The agencies represented on the MBRT shall conduct compliance inspections, as necessary, as determined by the Corps in consultation with the Sponsor, to verify credits available in the mitigation bank, recommend corrective measures (if any), until the terms and conditions of the Bank Development Plan have been determined to be fully satisfied or until all credits have been sold, whichever is later.

E. *[Include other provisions which specify arrangements agreed upon between the Sponsor and the agencies on the MBRT (e.g., agency monitoring of the bank)].*

VII. OTHER PROVISIONS

A. Force Majeure: The sponsor will not be responsible for bank failure that is attributed to natural catastrophes such as flood, drought, disease, regional pest infestation, etc., that the MBRT, acting through the Chair, determine is beyond the control of the Sponsor to prevent or mitigate [*may include the detailed description of provisions and responsibilities as appropriate*].

B. Dispute Resolution: Resolution of disputes about application of this Banking Instrument shall be in accordance with those stated in the Federal Guidance for the Establishment, Use and Operation of Mitigation Banks (60 F.R. 58605 et seq., November 28, 1995).

Sec. II.C.

C. Validity, Modification, and Termination of the Banking Instrument: This Banking Instrument will become valid on the date of the last signatory's signature. This Banking Instrument may be amended or modified with the written approval of all signatory parties. Any of the MBRT members may terminate their participation upon written notification to all signatory parties. Participation of the MBRT members will terminate ____ days after written notification.

Sec. II.C.

D. Specific Language of Banking Instrument Shall Be Controlling: To the extent that specific language in this document changes, modifies, or deletes terms and conditions contained in those documents that are incorporated into the Banking Instrument by reference, and that are not legally binding, the specific language within the Banking Instrument shall be controlling.

[For banks not requiring a Section 10/404 permit to be established, it may be appropriate to include a provision which indicates that the Sponsor is responsible for signing on as an ancillary permittee for all permit actions mitigated at the Bank.]

VI. DEFINITIONS.

[Optional - May include as necessary.]

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