



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

# Public Notice

Number: CESWF-10-MITB

Activity: Fort Worth District Mitigation Banks

Date: June 16, 2011

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

## **Regulatory Program**

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

## **Section 10**

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

## **Section 404**

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

## **Contact**

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## **PUBLIC NOTICE**

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

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

**DATE ISSUED:** June 16, 2011

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

**SUMMARY:** As outlined in 33 CFR Part 332, *Compensatory Mitigation for Losses of Aquatic Resources*; Final Rule, dated April 10, 2008, (Federal Register, Vol. 73, No. 70) (Mitigation Rule), the USACE and U.S. Environmental Protection Agency established a flexible hierarchy for compensatory mitigation, and establishes a preference for mitigation bank credits or in lieu fee programs. As a result of this rule, the Fort Worth District received a large number of new mitigation banking proposals. These proposals included a variety of approaches for identifying service area, schedule for credit release and other banking elements. As indicated above, the use of the Guidelines will serve to increase predictability and transparency for mitigation banking activities, in addition to expediting the mitigation banking process. Although these Guidelines may not be completely appropriate for every mitigation banking proposal, it is anticipated that they will provide a framework that will be useful in the vast majority of banking projects.

On December 2, 2010, a 30-day public notice was issued to solicit comments to assist in developing these Guidelines. Comments were received from the IRT, mitigation banking community, and interested parties. All comments were fully considered in developing the Guidelines. The Guidelines for the specific elements of the Fort Worth District Mitigation Banking program are as follows.

#### **Preservation:**

In certain cases, the preservation of threatened, high quality aquatic resources may be preferable to the potential loss of the resources due to anticipated impacts. The inclusion of preservation within the program may be appropriate when all criteria are met as specified in Part

332.3(h)(1)(i)-(v). In particular, in determining whether requirement 332.3(h)(1)(ii) is sufficiently met, the bank sponsor must demonstrate that the resources to be preserved significantly contribute to the ecological sustainability of the watershed. In making this determination, several resource characteristics may be considered, including the extent to which an aquatic resource is unique, rare, threatened, or hard to replace.

When determining potential credits for a preservation component of a bank, the use of a functional/conditional assessment can be problematic in determining functional lift. The primary ecological benefit from preservation is the long-term protection of the site and not the lift. Most assessment models do not accurately capture this element. Therefore, preservation credits would be determined on an acre basis (i.e. one acre of preservation = one preservation credit). However, an assessment model can be used to calculate the baseline conditions and quality of the site to determine if the site is suitable for preservation.

Preservation credits will be released with the initial credit release, provided all elements for initial release have been met, including the signing and recording of the site protection instrument (conservation easement), and full funding of the long-term endowment. All preservation credits will be recorded on a separate credit ledger.

Since an assessment model will not be used in determining potential bank preservation credits, it would not be appropriate to use a model to determine credit requirements for aquatic resource impacts. Therefore, a ratio would be developed for determining preservation credit requirements. Initial proposed ratio for impacts to in-kind aquatic resources would be 15:1. Further discussion could be had for reducing ratios for impacts to lower quality aquatic resources.

As previously stated, the primary ecological benefit from preservation is the elimination of the threat and the long-term protection of the site. Therefore, particular importance would be placed on the site protection instrument and the long-term endowment. The use of a conservation easement held by a third-party would provide the most secure method to ensure the perpetual protection of the site. Requiring the long-term endowment to be fully funded prior to release of the preservation credits, would also ensure that funds are available should unforeseen management/maintenance issues arise.

### **Monitoring Requirements:**

Historically, mitigation banks in the district established 5 year monitoring periods, and in some circumstances, required a 7-10 year monitoring period based on the mitigation plan and associated activities. The monitoring and release of credits were tied to performance metrics.

A monitoring plan will be developed to address the specific reporting needs of each bank and may depend on a number of factors, including, the magnitude of earth work proposed, a mitigation bank sponsor's prior history of successful projects, and risk of failure. Most typically, monitoring will occur on an annual basis for wetland, stream, and preservation banks until bank closure. Annual monitoring will be general and typically would not require a

functional/conditional assessment. A jurisdictional determination and functional/conditional assessment will only be needed when tied to a credit release. All credit releases will be tied to the functional/conditional assessment which would determine the length of monitoring. If the functional lift is not obtained, credits will not be released and the bank will continue to be monitored until the ecological performance and lift for final credit release is obtained.

A monitoring report and credit ledger shall be submitted annually. Separate ledgers shall be maintained based on service area and aquatic resource type.

### **Long-term Hydrology:**

For projects involving wetland enhancement or preservation, the sponsor shall address the adequacy and source of current hydrology and demonstrate the site currently possess adequate hydrology to sustain the site as a wetland. If wetland restoration is prescribed, and hydrology is the limiting factor, then the sponsor must also address where and how they will obtain adequate hydrology for the site.

As part of determining hydrology, the sponsor shall also review/investigate any activities upstream (or downstream) that may have potential future impacts on this hydrology. This investigation will include, but is not limited to, a review of the Texas Water Development Board's current State Water Plan to identify any proposed reservoirs that could influence hydrology. In addition, the sponsor shall evaluate any proposed residential, commercial, or industrial development within the watershed that could affect the site's hydrology. The sponsor should also review any recent USACE 404 permit actions, or any actions currently under review, that could indicate potential hydrologic impacts to the bank site. Existing water rights and the proximity of the bank site to potential urban expansion shall also be reviewed. In most cases, the acquisition of water rights for the purpose of assuring adequate long-term hydrology of the site will not be practicable.

On a case-by-case basis, the USACE may require a water budget to be developed when long-term sustainable hydrology may be an issue.

**Credit Release Schedule:** Credits are the currency of Mitigation Banks. The USACE approves the number of mitigation credits that would be available for sale dependent on the specifics of each bank, including considerations such as baseline condition and ecological lift. Credits become available for use or sale only at such time as certain requirements are met. The following credit release schedules based on further analysis of a particular proposal, will be considered reasonable by the IRT. However, further analysis may be required for unique sites or situations.

#### Wetland Mitigation Banks & Stream Mitigation Banks-Riparian work only

- 15% - Initial release (Compliance with all initial success criteria)
- 20% - Post planting, construction, and demonstration of hydrology (Including success criteria)
- 15% - After two full growing seasons (Including success criteria)
- 10% - Interim release based on functional/conditional assessment - Minimum of 3 years after planting
- 10% - Interim release based on functional/conditional assessment - Minimum of 5 years after planting
- 10% - Interim release based on functional/conditional assessment - Minimum of 7 years after planting
- 20% - Final release based on functional/conditional assessment. A long-term management non-wasting endowment or other approved financial mechanism must be fully funded prior to final credit release.

#### Stream Mitigation Banks

##### Stream - Complete channel restoration – 75% or more of channel needs reconstruction

- 30% - Initial release (Compliance with all initial success criteria)
- 10% - Post planting/construction
- 10% - Project survival of two bank full events at least one year apart (Bank full events may occur anytime after construction is completed. At least one bank full event must occur before the 1st assessment. Five percent released for each bank full event.)
- 10% - Interim release based on functional/conditional assessment at a minimum of 2 years
- 10% - Interim release based on functional/conditional assessment at a minimum of 3 years
- 10% - Interim release based on functional/conditional assessment at a minimum of 5 years
- 20% - Final release based on functional/conditional assessment (The second bank full event must occur and the long-term management non-wasting endowment must be funded prior to final release.)

##### Stream - Only partial channel restoration with varying amounts of riparian restoration

- 20% - Initial release (Compliance with all initial success criteria)
- 15% - Post planting/construction
- 15% - After two full growing seasons if success criteria are achieved and project survival of two bank full events at least one year apart (Bank full events may occur anytime after construction is completed. At least one bank full event must occur before the 1st assessment. Five percent released for each bank full event.)
- 10% - Interim release based on functional/conditional assessment at a minimum of 2 years
- 10% - Interim release based on functional/conditional assessment at a minimum of 3 years
- 10% - Interim release based on functional/conditional assessment at a minimum of 5 years
- 20% - Final release based on functional/conditional assessment (The second bank full event must occur and the long-term management non-wasting endowment must be funded prior to final release.)

As identified in the Mitigation Rule, streams are a “difficult-to-replace resource”. Stream mitigation banks shall identify the type of stream as ephemeral, intermittent, or perennial. Credit withdrawals shall be in-kind between the impact and bank.

Preservation

100% - Released only after the conservation easement is finalized and the long-term management financial mechanism is fully funded.

**Service Area:** The primary, secondary, and tertiary service areas for proposed wetland and stream mitigation banks will be determined utilizing watersheds based on the 8-digit Hydrologic Unit Code (HUC) and the Level III Ecoregions of Texas (Omernik 2004).

The primary service area is defined as the entire 8-digit HUC within which the mitigation bank is located (regardless of Ecoregion). The secondary service area is defined as any 8-digit HUC (or portion thereof) adjacent to the primary service area, and located within the same Level III Ecoregion as the mitigation bank. The tertiary service area is defined as any 8-digit HUC (or portion thereof) adjacent to the primary service area, but located outside of the same Level III Ecoregion as the mitigation bank. All secondary and tertiary service area must be located within the same major river basin as the primary service area (Sulphur/Cypress, Sabine, Neches, Trinity, Brazos, Colorado, etc.) Tertiary service areas may not extend beyond the limits of the adjacent Ecoregion as that of the mitigation bank. Ratios for service areas will generally be as follows: Primary Service Area 1 : 1, Secondary Service Area 1.5 : 1, and Tertiary Service Area 3 : 1.

Specific service areas may be developed for individual banks on a case by case basis. However, use of the above guidelines will serve to expedite the evaluation of proposed mitigation banks and will likely be appropriate for most banks proposing to operate within the Fort Worth District.

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

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

