

NORFOLK DISTRICT INTERNAL MITIGATION BANK ESTABLISHMENT SOP

October 2009

This SOP is intended to assist Norfolk District staff to process mitigation bank proposals consistently and in accordance with Corps mitigation regulations at 33 CFR 332.8. The focus of this SOP is on development of mitigation bank instruments (MBI) and associated aspects of mitigation bank proposals.

Virginia Department of Environmental Quality's Office of Wetlands and Water Protection operates an independent regulatory program to protect water quality and aquatic resources. DEQ acts as a Co-Chair on the IRT. DEQ's approval is essential to establishing an economically viable bank; therefore, it is in the interest of both IRT Chairs and the sponsor to work collaboratively throughout the approval process.

A. PRIOR TO PROSPECTUS SUBMITTAL

- 1) Encourage the sponsor to review the following information related to bank establishment on Norfolk's RIBITS webpage:

Virginia Off-site Mitigation Location Guidelines
Mitigation Bank Dos and Don'ts
Corps-DEQ Wetland Mitigation Guidelines (2004)
Unified Stream Methodology (for proposed stream banks)

Norfolk's RIBITS page can be found at the following web address:

<http://216.83.232.125:443/pls/htmldb/f?p=101>

- 2) Provide the sponsor with a copy of the Norfolk District Prospectus Checklist. This checklist outlines the information required for a COMPLETE prospectus.
- 3) Encourage the sponsor to contact DEQ Central Office (Bettina Rayfield).

B. DRAFT PROSPECTUS

- 1) Upon receipt of the DRAFT prospectus, determine if it is complete. It must contain the following information:
 - a) Contact information (name, address, telephone number, email address, etc.) for the Sponsor, the land owner, and the agent.
 - b) An indication whether the sponsor owns the land or is acquiring an interest in the proposed bank (fee simple acquisition, easement, etc.).
 - c) Project location to include a vicinity map & USGS map or equivalent with the limits of the bank site identified.
 - d) Basic description of the project to include types of mitigation proposed (wetland creation/restoration, stream restoration/enhancement, preservation, etc.) estimated acreage/linear footage of each compensation type, how the mitigation will be accomplished, etc.

- e) Brief description of current site conditions (forested, row-cropped, pasture, ditched and drained wetland, previously channelized streams, etc.)
Pictures (aerials or ground images) are very helpful. If known, include information on rare or T/E spp., historic properties, impaired waters (303(d) streams), etc.
- f) Proposed service area (localities and 8 digit HUCs served). **Virginia state law limits the service area of wetland mitigation banks to the same or adjacent 8 digit HUCs in the same river basin. The same criterion is typically applied to stream banks.**
- g) General objectives & benefits to be provided by the bank (water quality improvement, flood storage, wildlife habitat, etc.).

2) If the DRAFT prospectus is complete:

- a) Contact the Corps IRT representative (currently Steve Martin and Jeanne Richardson) to be placed on the IRT monthly meeting agenda.
- b) Forward copies of the DRAFT prospectus to the DEQ Co-chair and the other IRT members for their review. The DRAFT prospectus should be sent to the IRT a minimum of 15 days prior to the appropriate IRT meeting. The DEQ Co-Chair and most members of the IRT have requested electronic submittals (Word or PDF document) of the prospectus.

3) IRT Meeting and Initial IRT Review Stage:

- a) The proposed bank should be included on an IRT meeting agenda at the DRAFT prospectus stage. The Corps PM must be present at the IRT meeting or make arrangements to have another Corps representative available to provide comments and take notes.
- b) IRT meetings consist of a presentation of the DRAFT prospectus by the sponsor or consultant and a discussion with the IRT regarding the viability of the proposed mitigation bank and any potential problems or special considerations.
- c) Make note of the comments/recommendations from the IRT on whether the bank sponsor should proceed with the development of the COMPLETE prospectus, as proposed or with changes, or if the bank sponsor should not proceed at all with the proposed bank. **The IRT can make those recommendations, but our regulations make it clear that a sponsor can submit a complete prospectus at any time. If it is complete, we are required to public notice it.**
- d) Schedule an onsite inspection with the IRT, if appropriate. The onsite inspection should be scheduled so that all members of the IRT that wish to

attend the meeting can. The Corps PM and DEQ Co-Chair must be present at this meeting.

- e) Within 15 days of the IRT meeting, follow up with an email to the bank sponsor, copying the IRT, recapping the IRT comments and providing the bank sponsor with guidance on next steps (listed below). **Coordination with the IRT on written comments in advance of the 15-day deadline is encouraged. If not conducted, indicate in your email that the DEQ Co-Chair may have additional comments.**
- f) If the onsite inspection occurs prior to the public notice of the COMPLETE prospectus, then within 15 days of the IRT onsite inspection, follow up with an email to the bank sponsor, copying the IRT, recapping the IRT comments and providing the sponsor with guidance on next steps (listed below).
- g) If the onsite inspection occurs during the public notice period of the COMPLETE prospectus, include a recap of the comments made by the IRT as part of the comments received in response to the public notice.

Note: The procedures described above are recommended and encouraged by the regulations at 33 CFR 332.8(d)(3). The IRT prefers to review and comment on a DRAFT prospectus prior to submittal of a COMPLETE prospectus. However, if the Sponsor chooses to submit a COMPLETE prospectus, a notice for the prospectus should be issued (see 33 CFR 332.8(d)(4)).

C. COMPLETE PROSPECTUS

- 1) To be considered COMPLETE, a prospectus must, at a minimum, contain all of the information described on the Norfolk District Prospectus Checklist (attached).
- 2) Within 30 days of receipt of the prospectus, the Corps PM must determine whether it is complete:
 - a) If the prospectus is incomplete, provide written guidance to the bank sponsor regarding the deficiencies.
 - b) If the prospectus is complete, public notice the prospectus, in accordance with the public notice procedures at 33 CFR 325.3.
- 3) While the prospectus is on public notice, brief the Chiefs with a summary of the prospectus. The summary should include the information in B.1. (above) and identification of any potential policy issues or problems associated with the proposed bank.

- 4) Within 15 days from the closing date of the public notice, provide electronic copies of all comments received to the IRT. Copy the bank sponsor.
- 5) Within 30 days from the closing date of the public notice, provide an initial evaluation letter to the bank sponsor (copy the IRT. It is recommended that the IRT be given 5 days to review and comment on the draft initial evaluation letter prior to sending it to the sponsor. The initial evaluation letter should indicate that:
 - a) The Corps in consultation with the IRT has determined that the proposed mitigation bank has the potential for providing appropriate compensatory mitigation for activities authorized by DA permits and the bank sponsor should proceed with preparation of the DRAFT mitigation banking instrument (MBI), OR
 - b) The Corps in consultation with the IRT has determined that the proposed mitigation bank does not have the potential for providing appropriate compensatory mitigation for activities authorized by DA permits.
 - i. If modifications can be made to make it a viable proposal, the initial evaluation letter should identify the modifications necessary for the bank sponsor to proceed with the preparation of the DRAFT MBI.
 - ii. Subsequently, if the Sponsor submits a revised prospectus, it should be public noticed within 30 days of the receipt of a revised prospectus and a determination that it is complete.

Note: If DEQ does not provide comments on the draft initial evaluation letter or provide a separate evaluation letter, the Corps initial evaluation letter should include a statement that the DEQ, as Co-Chair of the IRT will provide comments separately regarding the acceptance of the bank proposal for providing compensatory mitigation for activities authorized by VWPP permits.

D. DRAFT MITIGATION BANKING INSTRUMENT (MBI)

- 1) A complete MBI must contain the following information:
 - a) Description of the proposed service area(s). Service areas may be based on watershed, physiographic province, and/or other geographic area in which the bank is authorized to provide compensatory mitigation. The service area must be consistent with state law and with other approved mitigation banks located in the same 8 digit HUC and physiographic province
 - b) Accounting procedures
 - c) Provision stating that legal responsibility for providing mitigation lies with the sponsor once a permittee secures credits from the sponsor
 - d) Default and closure provisions
 - e) Reporting protocols
 - f) Objectives

- g) Site selection factors considered
 - h) Site protection instrument (conservation easement, declaration of restrictions, title transfer, etc.)
 - i) Baseline information-description of ecological characteristics of the proposed mitigation bank site
 - j) Description of number of credits to be provided
 - k) Mitigation work plan-detailed written specification and work descriptions for the mitigation bank site
 - l) Maintenance plan-description and schedule of maintenance requirements
 - m) Performance Standards-ecologically-based standards used to determine whether the project is achieving its objectives
 - n) Monitoring requirements
 - o) Long-term management plan-description of mitigation site management after meeting all performance standards to ensure long-term sustainability of the site
 - p) Adaptive management plan-a management strategy to address unforeseen changes in site conditions or other aspects of the project. It guides decisions for addressing circumstances that adversely affect the mitigation project.
 - q) Financial assurances-a description of any financial assurances that will be provided to ensure that the mitigation project will be completed in accordance with its performance standards
 - r) A credit release schedule tied to achievement of specific milestones
 - s) Any other information deemed necessary by the district engineer
- 2) In order to facilitate review and revision of the DRAFT MBI by the IRT, Corps PM, and the DEQ Co-Chair, the DRAFT MBI should be submitted to the Corps PM as a Word document. The sponsor may submit associated maps, tables, and drawings either as pdf files or as hard copies. Upon receipt, the DRAFT MBI shall be electronically distributed to the IRT for a 30 day comment period. The 30 day comment period begins 5 days after the date the DRAFT MBI was distributed. Identify the deadline date in your email. The bank sponsor can also provide 8 hard copies for distribution to the IRT if the sponsor chooses.
 - 3) Within 30 days of receipt of a complete DRAFT MBI, submit a notification of completeness to the bank sponsor.
 - 4) Upon receipt of comments from the IRT, discuss and attempt to resolve any outstanding issues.
 - 5) Within 90 days of receipt of a complete DRAFT MBI, notify the bank sponsor of the status of the IRT review. This notification should:
 - a) Indicate if the DRAFT MBI is generally acceptable and what changes, if any, are needed. In order to facilitate revision of the MBI, the changes should be identified in redlined format on the DRAFT MBI (using the "Track Changes" command in Word).

- b) Indicate if there are significant unresolved concerns that may lead to a formal objection from one or more of the IRT members.
- 6) After the Sponsor has incorporated the revisions recommended by the Corps PM and the IRT, the DRAFT MBI should be forwarded to Office of Counsel for review. The Corps PM is encouraged to ensure that comments from the DEQ Co-Chair have been addressed.
- 7) The Sponsor prepares a FINAL DRAFT MBI that incorporates comments provided by the Corps PM, DEQ Co-Chair, IRT, and Office of Counsel. Substantive changes to the MBI suggested by the Office of Counsel should be discussed with the DEQ Co-Chair before the sponsor is advised to provide a FINAL MBI.
- 8) The bank sponsor should submit the FINAL MBI for approval. This FINAL MBI should include supporting documentation that explains how the FINAL MBI addresses the comments provided by the IRT and Office of Counsel. Sponsor should provide 8 hard copies and a WORD or pdf document for distribution to the IRT.

E. FINAL MITIGATION BANKING INSTRUMENT

- 1) Upon receipt of a FINAL MBI, forward electronic documents to the IRT. Advise the IRT that they have 45 days from the date on which you sent them the FINAL MBI to object to the approval of the FINAL MBI or initiate the dispute resolution process. Identify the due date in your email.
- 2) Upon receipt of a FINAL MBI, brief the Chiefs with a summary of the MBI. The summary should include who the sponsor is, the size of the bank, the bank location, type of mitigation (wetland restoration, stream restoration, enhancement, etc.), an indication whether there are any ESA/106 issues still outstanding, whether the IRT agencies support the bank, whether the sponsor has satisfied IRT concerns, and if there are any unique or policy issues that were brought up by this project. **Note: The Sponsor will have to make any changes to the MBI recommended by the Chiefs.**
- 3) Within 30 days of receipt of a FINAL MBI, notify the IRT members whether the Corps intends to approve the MBI. The MBI may not be approved/signed until the IRT has been notified first and given a minimum of 15 days to review the final MBI & to initiate the formal dispute resolution process if necessary.
- 4) Within 45 days of receipt of a FINAL MBI, notify the bank sponsor of the final decision, and if the MBI is approved, arrange for the MBI to be signed by the appropriate IRT members. The easiest way to arrange for signature of the MBI is to have the Chief of the Regulatory Office sign the MBI and then send a PDF of the signature page to the IRT members. **Note: The DEQ Co-Chair will obtain signature from the Water Division Director. Once the MBI is signed, the**

DEQ Co-Chair will send a PDF of the signature page to the Corps PM, the IRT, and the bank sponsor.

- 5) Provide a PDF of the final signed MBI (including all exhibits) to the IRT members and the District RIBITS administrator (Currently Steve Martin and Kim Baggett) for posting on RIBITS.

G. GENERAL NOTES:

- 1) The Corps project manager is the Chair and is the final decision making authority for the federal agencies.
- 2) The DEQ project manager is the Co-Chair and is the final decision making authority for the state agencies.
- 3) Consensus does not have to be a unanimous decision by the IRT. Typically, the final signatory agencies (Corps and DEQ) are the only agencies that need to agree.
- 4) Coordination of correspondence with the IRT, at all phases of prospectus development, MBI development, credit release, modification of bank instruments, monitoring, etc. is required under the regulations at 33 CFR 332.8 in order to ensure the IRT is aware of the developments with each bank.

The Corps Chair is to give full consideration to any timely comments and advice provided by the IRT, including the DEQ Co-Chair. **Note: The DEQ Co-Chair will provide any comments directed at the sponsor to the sponsor directly, copying the Corps Chair and IRT.**

- 5) The use of the consensus-based approach does not alter the responsibility of the Corps Chair to make a final determination regarding the draft MBI within the specified timeframes.
- 6) No MBI can be approved without resolution of any 106 and ESA issues.
- 7) There is no default approval provision in the regulations. Failure to meet the timelines for approval specified in the regulations will not result in instrument approval.
- 8) The decision by the Corps not to approve an instrument or site plan is not subject to appeal.
- 9) Any controversial concerns or policy related issues regarding the development of an MBI should be coordinated with the Corps PM, DEQ Co-Chair, and the appropriate Section Chief immediately upon identification of a problem.