

U.S. Army Corps of Engineers (USACE) Fort Worth District



Mitigation Banking Instrument Template

This template integrates requirements for a mitigation banking instrument as required by 33 CFR 332.8 for a single mitigation bank project. This template is not to be used for an umbrella mitigation bank.

Contents

- **Description of a Mitigation Banking Instrument**
 - Draft Mitigation Banking Instrument Review Process
 - Final Mitigation Banking Instrument
- **Instructions**
- **Part I: Bank Information**
 - Contact Information
 - Service Area
- **Part II: Authorities**
 - Purpose
 - Regulatory Authorities
 - Interagency Review Team
 - Force Majeure
 - Dispute Resolution
 - Validity, Modification, and Termination of the Mitigation Bank
 - Controlling Language
- **Part III: Mitigation Plan**
- **Part IV: Bank Operations**
 - Accounting Procedures
 - Credit Release Schedule
 - Contingency Plan/Remedial Action
 - Provisions Covering the Use of the Land
 - Approved Credit Quantities
- **Part V: Additional Information**
 - Financial Assurances
- **Signature Page**
- **Attachments**

DESCRIPTION OF A MITIGATION BANKING INSTRUMENT

All mitigation banks require a banking instrument as documentation of agency concurrence on the objectives and administration of the bank. The purpose of the Mitigation Banking Instrument (MBI) is to establish guidelines and responsibilities for the establishment, use, operation, and maintenance of the proposed mitigation bank. The proposed mitigation bank will be used for compensatory mitigation for unavoidable impacts to waters of the United States, including wetlands, that result from activities authorized under Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act, provided such activities have met all applicable requirements and are authorized by the USACE. Information provided in the prospectus will serve as the basis for establishing the MBI.

All mitigation banks must comply with 33 CFR Part 332.8 if they are to be used to provide compensatory mitigation for a Department of the Army (DA) permits.

Draft Mitigation Banking Instrument Review Process: The Fort Worth District Interagency Review Team (IRT) does not have a mechanism to accept electronic submittals. Therefore, all documents are to be submitted hard copy to each IRT member. In addition, to expedite record keeping, the USACE requests that all documents are saved to a disc to be included in each hard copy submittal. Upon receipt of a complete draft instrument, the

District Engineer (DE) will provide copies of the draft instrument to the Interagency Review Team (IRT). The 30 day comment period begins 5 days after the DE distributes the copies of the draft instrument. Within 90 days of receipt of the complete draft instrument the DE must notify the sponsor of the status of the draft instrument. Notification must indicate to the sponsor if the draft instrument is generally acceptable and what changes, if any, are needed.

As documents are revised to address comments, the IRT strongly recommends that revised documents be clearly annotated to address how concerns were addressed and to identify the location within the document where revisions were made. Submittal of such annotated documents will aid in expediting project evaluations.

Final Mitigation Banking Instrument: The sponsor must submit a final instrument to the DE for approval, with supporting documentation that explains how the final instrument addresses the comments provided by the IRT concerning the draft instrument. Within 30 days of receipt of the final instrument, the DE will notify the IRT members whether or not he/she intends to approve the instrument. If no IRT member objects, by initiating the dispute resolution process in 33 CFR 332.8 (e) within 45 days of receipt of the final instrument, the DE will notify the sponsor of his final decision and, if the instrument is approved, arrange for it to be signed by the appropriate parties.

Instructions: [Please do not include pages i-ii when submitting the template]

All information within the text boxes is explanatory and should be removed from the final document. All other information is standard language for use in the MBI.

- 1) Provide specific project information in Part I.
- 2) Complete the necessary regulatory authorities and IRT members' information in Part II.
- 3) Attach or integrate the USACE Fort Worth District (SWF) Recommended Template for Basic Mitigation Plans into Part III of the template. The SWF Recommended Template for Basic Mitigation Plans can be found at the USACE Fort Worth District website.
- 4) Complete all sections of Part IV of the template with the required information in the space provided after the text boxes.
- 5) Attachments: Check the boxes for those attachments that are included, and place a cover sheet or tab with each attachment behind the last page of the template. Include any figures required for the MBI (e.g., Project Location, Proposed Service Area, Existing Conditions, Proposed Conditions, Mitigation Design/Work Plan) in Attachment A. The mitigation plan may be included as Attachment B, or supplemental information for the mitigation plan (if included in Part III) may be included as Attachments C to H. Also include a Letter of Agreement between the bank sponsor and the long-term steward of the site in Attachment I. Include any and all financial assurance documents relative to the mitigation bank in Attachment J. For Attachment K, if applicable, describe the methods that will be implemented to ensure sufficient water rights to support the long-term sustainability of the mitigation bank. Information about water rights permitting within the State of Texas may be found on the Texas Commission on Environmental Quality's website. Place additional information (e.g., engineering studies, supporting materials, etc.) in Attachment L and include a title for this information.

Mitigation Banking Instrument

Part I: Bank Information

1. Contact Information

Mitigation Bank Name:

Name of Sponsor:

Mailing Address:

Phone Number:

Fax Number:

Email Address:

Name of Owner:

Mailing Address:

Phone Number:

Fax Number:

Email Address:

2. Service Area

Describe the proposed primary, secondary, and tertiary service areas and the basis for selecting the service area of the mitigation bank. Include a figure showing the service areas in relation to the location of the mitigation bank in the attachments to the MBI. 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.

Part II: Authorities

1. Purpose

The purpose of this MBI is to establish guidelines and responsibilities for the establishment, use, operation, and maintenance of the bank. The bank will be used with the intent to sell credits commercially 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 and/or Section 10 of the Rivers and Harbors Act of 1899, provided such use has met all applicable requirements and is authorized by the USACE.

2. Regulatory Authorities

The establishment, use, and operation of the (*insert bank name here*) Mitigation Bank is carried out in accordance with the following authorities:

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 U.S. Army Corps of Engineers, Final Rule (33 CFR 320-330)
5. Guidelines for Specification of Disposal Sites for Dredged and Fill Material (40 CFR 230)
6. Memorandum of Agreement between the Environmental Protection Agency and the Department of the Army concerning Determination of Mitigation Under the Clean Water Act, Section 404(b)1 Guidelines (February 6, 1990)
7. Final Rule for the Compensatory Mitigation for Losses of Aquatic Resources issued by the U.S. Army Corps of Engineers and the Environmental Protection Agency (April 10, 2008)
8. Section 7 of the Endangered Species Act
9. Section 106 of the National Historic Preservation Act

Also list in this section any and all applicable state authorities and regulations

For mitigation banks within the State of Texas:

1. Texas State Water Quality Certification [30 Tex. Admin. Code §279.12 (2001)]
2. Texas State Water Quality Standards [30 Tex. Admin. Code § 301 (2000)]
3. Texas Parks and Wildlife Code Chapter 14 Powers and Duties Concerning Wetlands
4. Others

For mitigation banks within the State of Louisiana:

1. Louisiana State Water Quality Certification (LAC 33:IX Chapter 15 (2007))
2. Louisiana State Water Quality Standards (LAC 33:IX Chapter 11 (2007))
3. Others

3. Interagency Review Team (IRT)

The IRT member agencies and representatives may change on a case by case basis. The IRT member information will be provided to the sponsor by the district engineer.

The IRT is composed of the individuals representing the agencies listed below;

Agency	Representative	Phone Number	Email Address

4. Force Majeure

The sponsor should insert language in this section to address majeure events as related to bank operations and sponsor obligations. The language in this section is subject to USACE review.

5. Validity, Modification, and Termination of the Mitigation Bank

This MBI will become valid upon signature by the U.S. Army Corps of Engineers and bank sponsor. The initial credit release is typically authorized following the recordation of the conservation easement, execution of the financial assurances requirements, and any other requirements specified in the MBI. This MBI may be amended, altered, released, or revoked only by written agreement among the parties hereto or their heirs, assigns or successors-in-interest, the amendment must follow the appropriate procedures listed in 33 CFR 332.8 (d), unless the district engineer determines that the streamlined review process described in 33 CFR 332.8 (g) (2) is warranted. Any of the IRT members may terminate their participation upon written notification to all signatory parties. Participation of IRT members will terminate 30 days after written notification.

6. Controlling Language

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 MBI by reference, and are not legally binding, the specific language within the MBI shall be controlling.

The following provision must be included in any instrument for a new mitigation bank, in lieu fee program, or any modification of a previously approved mitigation bank or in-lieu fee program instrument:

USACE approval of this Instrument constitutes the regulatory approval required for the [INSERT NAME OF THE MITIGATION BANK OR IN-LIEU FEE PROGRAM] to be used to provide compensatory mitigation for Department of the Army permits pursuant to 33 C.P.R. 332.8(a)(1). This Instrument is not a contract between the Sponsor or Property Owner and USACE or any other agency of the federal government. Any dispute arising under this Instrument will not give rise to any claim by the Sponsor or Property Owner for monetary damages. This provision is controlling notwithstanding any other provision or statement in the Instrument to the contrary.

Part III: Mitigation Plan

The sponsor should insert or attach a complete SWF Recommended Template for Basic Mitigation Plans for this section including all applicable items listed in 33 CFR 332.4 (c).

Part IV: Bank Operations

1. Accounting Procedures and Reporting

This section must describe, in detail, the provisions the sponsor will implement to establish and maintain a ledger to account for all credit transactions. Each time an approved credit transaction occurs, the sponsor must notify the USACE and provide an updated bank ledger.

Use this section to also describe the how the sponsor will develop an annual ledger report. The annual ledger report is used to show the beginning and ending balance of available credits and permitted impacts for each resource type, all additions and subtractions of credits, and any other changes in credit availability for the life of the bank (e.g., additional credits released, credit sales suspended).

RIBITS

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

1. Jurisdiction
 2. Transaction Date
 3. Credits Debited
 4. USACE Permit Number
Format: SWF/Year/Permit Number *must be 5-digits long (example: SWF-2000-00150)
 5. Name of Permittee
 6. Credit Classification (if applicable, with functional assessment subcategories identified; i.e. if HGMi identify amounts within each subcategory TSSW/RSEC/MPAC, etc.)
 7. Specific Area(s) Within Bank That Credits Are To Be Debited (example: Enhancement Area 1, Upland Buffer, Ephemeral Stream, Intermittent Stream, Etc., based on how total potentially available credits are distributed throughout different areas in the bank and where they have been released)
- Compliance with RIBITS reporting does not supersede the requirement of the sponsor to submit individual transaction reports.

2. Credit Release Schedule

Describe the credit release schedule that will be implemented for the mitigation bank project. The credit release schedule should be developed in coordination with the IRT and based on the schedule proposed in the mitigation banking prospectus. Credit releases may only take place after coordination with and approval from the USACE.

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.

Release of credits must be tied to performance-based milestones (e.g., construction, planting, establishment of specified plant and animal communities, and achieving established assessment scores or functional units). The credit release schedule should reserve a significant share of the total credits for release only after full achievement of ecological performance standards. When determining the credit release schedule, factors to be considered may include, but are not limited to:

- The method of providing compensatory mitigation credits (e.g., restoration, establishment, enhancement)
- The likelihood of success
- The nature and amount of work needed to generate the credits
- The aquatic resource type(s) and function(s) to be provided by the mitigation bank

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 - 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.

3. Contingency Plans/Remedial Actions

In the event the mitigation bank or a specific phase of the bank fails to achieve success criteria as specified in this MBI, the sponsor shall develop necessary contingency plans to implement appropriate remedial actions for the bank or that phase in coordination with the IRT. In the event the sponsor fails to implement necessary remedial actions within one growing season after notification by the USACE of the necessary remedial action to address any failure in meeting the success criteria, the IRT (acting through Chair), will notify the appropriate authorizing agencies and recommend appropriate remedial actions.

If the authorizing agencies determine that the bank is operating at a deficit, debiting by the sponsor of deposited credits shall immediately cease, and the authorizing agencies, in consultation with the IRT and the sponsor, will determine what remedial actions are necessary to correct the situation. As determined by the Chair in coordination with the IRT and the sponsor, if conditions at the bank site do not improve or continue to deteriorate within one growing season from the date that the need for remediation was first identified in writing to the sponsor by the USACE through the Chair of the IRT, the agent responsible for the financial assurances shall be directed by the USACE to transfer the amount necessary to correct the deficiency to a party acceptable to the IRT, to undertake corrective measures.

4. Provisions Covering the Use of the Land

This section should be used to describe the acceptable compatible uses for the mitigation bank. Use of the land will be restricted as detailed in the site protection instrument and described in the mitigation plan (Part III or Attachment B). However, uses compatible with the purpose of the bank may be deemed acceptable only if specifically authorized by district engineer through coordination with the IRT. Examples of such uses might include performing academic research or establishing hunting leases, provided these activities do not have the potential to reduce the ecological condition or function of the site, nor give rise to a condition counter to that intended in the MBI.

5. Approved Credit Quantities

Upon signature of this document, the USACE, in consultation with the IRT, grants the sponsor the proposed quantities of wetland and stream credits, as described in Part III or the attached mitigation plan. The release of these credits shall follow the schedule described in Part IV. In accordance with the Final Rule for the Compensatory Mitigation for Losses of Aquatic Resources issued by the USACE and the EPA, dated April 10, 2008, these quantities can be adjusted downward if performance standards are not met or adjusted upward if the performance standards are significantly exceeded.

Part V: Additional Information

1. Financial Assurances

All mitigation banks must have a USACE approved financial assurance mechanism (performance bond, letter of credit, cash escrow, casualty insurance) for the duration of the bank establishment and monitoring period. In the event the financial assurance mechanism is due to expire, or the sponsor elects to replace the financial assurance mechanism with another form, the sponsor shall notify the USACE at least 120 days prior to the expiration or replacement to allow for USACE review and approval. If an approved financial assurance mechanism has not been established, mitigation bank credits may be suspended until such time financial assurances are approved.

<p>This section should be used for any additional specific information that the USACE directs the sponsor to include in the MBI.</p>
--

SIGNATURE PAGE

The Final MBI shall also include the following statement. "By signing this Final MBI, the Bank Sponsor hereby reaffirms the fact that the status of the project site relative to liens, encumbrances, or other conditions described in the submittals for this project remain unaltered".

The district engineer will provide the sponsor with the information necessary to populate the table with the relevant organization information and identify the name and title of all of the needed signatories. Upon approval of the final instrument by the USACE and the IRT, the USACE will arrange for signatures by the appropriate parties.

Organization	Name and Title	Signature	Date
U.S. Army Corps of Engineers Fort Worth District			
Sponsor	Manager		

Attachments

	Included
A. Figures	<input type="checkbox"/>
B. Mitigation Plan	<input type="checkbox"/>
C. Delineation of Waters of the U.S., Including Wetlands	<input type="checkbox"/>
D. Site Photos	<input type="checkbox"/>
E. Functional/Conditional Assessment	<input type="checkbox"/>
F. Credit Evaluation	<input type="checkbox"/>
G. Draft Site Protection Instrument	<input type="checkbox"/>
H. Long-term Management Plan	<input type="checkbox"/>
I. Letter of Agreement Identifying the Long-term Steward	<input type="checkbox"/>
J. Financial Assurances Documents, Short-term and Long-term (non-wasting)	<input type="checkbox"/>
K. Assurance of Water Rights	<input type="checkbox"/>
L. Other:	<input type="checkbox"/>

End of Template
