



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

# Public Notice

Number: CESWF-12-MITB

Activity: Fort Worth District Mitigation Banks

Date: August 6, 2012

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The purpose of this Public Notice is to inform you of both existing and proposed mitigation banking guidelines described herein.

## **Regulatory Program**

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

## **Section 10**

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

## **Section 404**

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

## **Contact**

Name: Mr. Brent Jasper

Phone Number: (817) 886-1733

## **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 inform the public on additional Guidelines Covering Specific Elements for the Establishment of New Mitigation Banks in the Fort Worth District (Guidelines). The purpose of these Guidelines are twofold, first to clarify and announce procedures that are currently in effect and secondly to solicit comments on a series of additional considerations that would be incorporated into new mitigation banking proposals. These Guidelines have been developed based on input from the Interagency Review Team (IRT). 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:** August 6, 2012

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

**SUMMARY:** As outlined in 33 CFR Part 332, *Compensatory Mitigation for Losses of Aquatic Resources*; Final Rule, dated April 10, 2008, (Federal Register, Vol. 73, No. 70) (Mitigation Rule), the USACE and U.S. Environmental Protection Agency established a flexible hierarchy for compensatory mitigation, and established a preference for mitigation bank credits or in-lieu fee programs. Although these Guidelines may not be completely appropriate for every mitigation banking proposal, it is anticipated that they will provide a framework that will be useful in the vast majority of banking projects. The Guidelines previously announced in Public Notice CESWF-10-MITB, dated June 16, 2011, remain in full effect.

#### **Guidelines Currently in Effect**

1. Consideration of Recently Disturbed Sites. Any sites that have recently undergone human induced alteration, including but not limited to cutting, clearing, logging, burning, brush hogging, application of herbicides, ditching, draining, mining, and dam/berm removal, will not be considered as potential mitigation banks until such time as the site has remained in an unaltered state for a period of five years. Any activities that serve to maintain an artificially low baseline condition of the site, would be considered further alteration activities and would initiate another five year waiting period. The only exceptions would be the application of herbicides solely for the control of exotic invasive species or beneficial management activities that have been performed on the property on a long-term continuous basis. Complete documentation relative to a site's recent land use history will be required in the Prospectus as part of the proposed bank review.

2. Financial assurances. The bank sponsor will be required to provide financial assurances to cover 110% of all costs associated with project construction for short-term financial assurance. The additional 10% would cover any contingencies (i.e. replanting, further manipulation of hydrology). In order to determine the appropriate amount of funds to be established in the short term financial assurance, the bank sponsor shall provide a detailed breakdown of all project related costs, such as those included in the bank's site development plan. These items should include, but are not limited to the following: as-built plans/survey work, costs of land ownership/control, earthwork, permits, erosion control measures, structures, building materials, plant materials, seeding, planting, fencing, control of exotic invasive species, implementation of adaptive management activities, irrigation, monitoring and reporting including monitoring of hydrology, plants, or other elements related to site condition, fence repair and maintenance, administration/legal costs such as associated with establishment of financial assurances endowments and the conservation easement. The incremental release of the short term financial assurance would be evaluated on a case by case basis and would be dependent on factors such as achieving performance standards, risk of failure, expertise of the consultant, and complexity of work.

3. Stream Credits. In order to generate stream mitigation credits, the bank sponsor must own and/or control both sides of a stream and provide documentation of ownership and/or control. An exception would be those situations in which the opposite side of the stream is owned and/or controlled by a federal, state and/or local entity, including a 501(c)3 organization for which the property would be protected in perpetuity through a conservation easement or long-term management plan. In addition, state-owned stream beds would be ineligible for any stream credits. In cases where state-owned stream beds may be present, a determination should be obtained from the State of Texas General Land Office.

4. Design Plans for Stream Mitigation Projects. For stream mitigation projects, 60% stream channel design plans will be required for the draft Mitigation Banking Instrument (MBI) and 95% design plans will be required at the final MBI phase. Additionally, as-built stream channel design plans will be required upon completion of earthwork.

5. Consultant Qualifications and Experience. The bank sponsor shall provide details on the qualifications and experience of their consultants. Particularly for stream mitigation projects, and other projects involving uncertain hydrologic conditions, the qualifications and experience of the consultants will be reviewed. In addition, the sponsor shall submit, for IRT review, examples of past projects similar in nature to those proposed that have been completed by the consultant. In the event that the consultant does not have extensive experience in these areas, the IRT may require a greater degree or amount of monitoring, revision of the credit release schedule, and increased financial assurances.

6. Modifications of Existing MBI's. In most cases, modifications to an existing MBI will require a full re-evaluation and coordination of the MBI, in accordance with the process and timeline outlined in the Mitigation Rule. As part of this process, all revised MBI's must be consistent with the Mitigation Rule and all current Fort Worth District (SWF) guidance. Modifications resulting in the alteration of the number or type of available credits may result in the temporary suspension of credit sales for the duration of the MBI re-evaluation process.

7. Use of Reference Sites. In order to determine the ultimate ecological lift anticipated to be achieved by a mitigation site, the bank sponsor will be required to provide at a minimum an assessment, such as TXRAM, for an appropriate reference site, which exemplifies the ultimate mature ecological condition anticipated to be achieved at the mitigation site at full maturity. All reference sites are to be selected using sound ecological practices. Selected sites shall be similar with regard to a number of factors, including, but not limited to hydrologic regime, watershed, Ecoregion (Level III Ecoregions of Texas, Omernik 2004), soil type, landscape position, and surrounding development patterns. Data sheets, photographs, and other supporting information for the reference and mitigation project sites will be evaluated to determine if the amounts and types of predicted ecological lift are reasonable and achievable in the context of the mitigation work plan.

8. Use of Index of Biotic Integrity (IBI). For in-channel work on perennial streams or intermittent streams with perennial pools, the bank sponsor will be required to use an IBI, or similar biotic assessment model, to provide biological data regarding the effects of restoration on the fish and benthic macroinvertebrate communities. At a minimum, IBI's or equivalent model shall be performed before restoration activities occur to obtain baseline data and performed again after restoration efforts. The IBI and methods for biological monitoring are described in the Texas Commission on Environmental Quality's Surface Water Quality Monitoring Procedures, Volume 2 (RG-416, June 2007). Link to procedures:  
<http://www.tceq.texas.gov/publications/rg/rg-416/index.html>.

9. Performance Based Credit Releases. All performance based credit releases will be determined on percent survival of planted species, diversity, and invasive species criteria in addition to the predicted TXRAM, or equivalent model, scores as calculated based on ecological lift trajectory. The TXRAM score ecological lift trajectory reflects baseline, incremental lift, and ultimate scores at maturity, plotted against time. Specifically, the score to be used as a performance standard would be the score predicted to be achieved at the end of the monitoring period. Additionally, the bank sponsor shall establish interim scores that will correspond to each scheduled credit release. In the event the actual score falls below that predicted by the bank sponsor, the monitoring period and credit release schedule would be adjusted accordingly.

10. RIBITS Credit Ledger. 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.

11. Irrigation and Monitoring. It is the intent of the mitigation program to ensure that all approved mitigation sites are self-sustaining in the long-term. However, on occasion, bank sponsors may choose to provide supplemental water to help ensure survival of newly planted species. In the event bank sponsors choose to irrigate bank sites, the required monitoring period shall be extended such that the first year of monitoring would begin from the time at which irrigation ceases. This requirement will help to ensure that a site's natural hydrologic conditions are sufficient to support the intended habitat type.

12. Abstract / Title Search. As a component of the Prospectus, the bank sponsor shall provide a copy of a residential abstract, including a 50-year title search performed by a title company operating within the state. This information is required to ensure that all properties being considered as potential mitigation banks have been fully researched and full disclosure has been provided relative to all liens and encumbrances.

13. Additional Tables For MBI. All MBI's must contain additional tables indicating the projected functional assessment scores specific to each assessment area within the bank for each credit release. In addition, all MBI's must contain additional tables which show the projected credit distribution for each assessment area within the bank for each credit release.

14. Document Submittal. Upon request by the USACE, proposed bank sponsors will be required to send hard copy documents (draft prospectus, prospectus, draft MBI(s), final MBI, reports, etc.) directly to the IRT. Sponsors will also submit annotated versions of revised documents to clearly demonstrate how all comments have been addressed.

## **Guidelines Currently Under Consideration for Comment**

1. Funding of Long-Term Endowment. In addition to achieving certain activities and/or performance standards, incremental funding of the long-term endowment will be a requirement of credit release. Long term financial assurances would be funded in accordance with the following schedules.

Wetland Mitigation Banks & Stream Mitigation Banks (riparian work only)

<u>Credit Release</u>	<u>Financial Assurance Funding</u>
15%	0
20%.	15%
15%	35%
10%.	50%
10%.	60%
10%	70%
20%	100%

Stream – Complete Channel Restoration – (75% or more of channel needs reconstruction)

<u>Credit Release</u>	<u>Financial Assurance Funding</u>
30%	0%
10%	30%
10%	40%
10%	50%
10%	60%
10%	70%
20%	100%

Stream – Only Partial Channel Restoration with Varying Amounts of Riparian Restoration

<u>Credit Release</u>	<u>Financial Assurance Funding</u>
20%	0%
15%	20%
15%	35%
10%	50%
10%	60%
10%	70%
20%	100%

2. Adjustment of Long-Term Endowment Funds. Until the endowment fund is fully funded, the amount of the applicable endowment principal shall be adjusted annually by a percentage equal to the percentage increase, if any, in the Consumer Price Index (CPI). The adjustment shall be applied to the amount of the applicable endowment principal.

3. Conservation Easement Holder Qualifications and Experience. As a preference the conservation easement should be held by a nationally accredited 501(c)(3) land trust organization. In the event the organization being considered is not nationally accredited, the organization's Board of Directors should have in its corporate resolutions the adoption of the National Land Trust Alliance's Statement of Land Trust Standards and Practices as guiding the practices of the organization. (The Statement is available from LTA ([www.lta.org](http://www.lta.org)) or 202-638-4725). In all cases the bank sponsor will be required to provide details on the organization's qualifications, personnel, and experience relative to the preservation and management of aquatic resources and/or habitat conservation areas.

4. Stream Mitigation Buffers. For those streams subject to lateral migration, stream mitigation buffers must include details on establishment of and preservation of meander belt widths, in an effort to ensure long-term sustainability. The Corps is in the process of updating TXRAM, including the possibility of "add-ons", that would allow additional credit, at a diminishing rate, for buffer widths beyond those currently allowed. In the event the bank sponsor is required to increase buffer width to ensure long-term sustainability, an add-on to TXRAM may allow the bank sponsor to generate additional credits.

5. Preservation Only Mitigation Bank. In an effort toward achieving the goal of no net loss of aquatic resources, preservation only mitigation banks may be evaluated and ultimately approved if they are consistent with the mitigation rule. Authorized impacts to waters of the U. S. utilizing new mitigation banks with preservation credits could only use those credits to meet 20% of their compensatory mitigation requirements. For those impacts associated with short- or long-term temporary impacts, or conversion of forested wetlands that do not result in a loss of waters of the U.S., 100% of the compensatory mitigation requirements could be obtained from any approved bank with appropriate in-kind preservation credits.

SOLICITATION OF COMMENTS: This public notice is being distributed to all known interested persons in order to assist in developing these Guidelines. For accuracy and completeness of the record, all comments and supporting information relating to these Guidelines should be submitted in writing.

CLOSE OF COMMENT PERIOD: All comments pertaining to this Public Notice must reach this office on or before September 20, 2012, which is the close of the comment period. Extensions of the comment period may be granted for valid reasons provided a written request is received by the limiting date. If no comments are received by that date, it will be considered that there are no objections. Comments and requests for additional information should be submitted to 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. Please note that names and addresses of those who submit comments in response to this public notice may be made publicly available.

DISTRICT ENGINEER  
FORT WORTH DISTRICT  
CORPS OF ENGINEERS



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

