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), Natural Resources Conservation Service (NRCS), Fish and Wildlife Service (FWS) and National Marine Fisheries Service (NMFS) are proposing guidance regarding the establishment, use and operation of mitigation banks for the purpose of providing compensatory mitigation 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 associated with 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: Written comments must be submitted on or before April 20, 1995.

ADDRESSES: All comments concerning this proposed document should be submitted in writing to: Mitigation Banking Docket, Wetlands Division, Mail Code (4502F), U.S. Environmental Protection Agency, 401 M Street, SW., Washington, DC 20460.

FOR FURTHER INFORMATION CONTACT: Mr. Jack Chowning (Corps) at (202) 272–1725; Ms. Julie Metz (Corps) at (703) 355–3065; Mr. Thomas Kelsch (EPA) at (202) 260–8795; Ms. Sandra Byrd (NRCS) at (202) 690–3501; Mr. Michael Long (FWS) at (703) 358–2183; Ms. Susan-Marie Stedman (NMFS) at (301) 713–2325.

SUPPLEMENTARY INFORMATION: Mitigating the harmful effects 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 a sequential approach to mitigating these harmful effects by first avoiding unnecessary impacts, then minimizing environmental harm, and, finally, compensating for remaining 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 mitigating unavoidable adverse wetland losses in advance of development actions, when compensatory mitigation cannot be achieved at the development site or is not as environmentally beneficial. It typically involves the consolidation of 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 within environmentally sound limits as a means for compensating for authorized wetland impacts. 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.

This notice responds to a need identified in the Corps national study for more detailed guidance on the policy of the Federal government regarding the establishment, use and operation of mitigation banks. The proposed guidance is 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. The agencies are specifically soliciting public comment on the proposed guidance and will consider all comments submitted by the public in developing final guidance. A copy of the proposed guidance is published with this notice.

John H. Zirschky,

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

Robert Perciasepe,

Assistant Administrator for Water, Environmental Protection Agency.

James R. Lyons,

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George T. Frampton, Jr.,

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Douglas K. Hall,

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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 purpose and goals 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 (FSA) (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 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 or as excepting such projects from any applicable requirements.

Mitigation banks 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 for projects that qualify and provide more cost-effective compensatory mitigation opportunities;

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

II. Policy Considerations

The following policy considerations provide general guidance for the establishment, use and operation of mitigation banks. This policy applies to all 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, the fundamental precepts of this guidance should apply to all future mitigation banks.

For the purposes of Section 10/404, 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 expressly 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 not establish any new requirements.

1. Clean Water Act Section 404 (33 USC 1344).

2. Rivers and Harbors Act of 1899 Section 10 (33 USC 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 USC 3801 *et seq.*).

7. National Environmental Policy Act (42 USC 4321 *et seq.*), including the Council on Environmental Quality's implementing regulations (40 CFR parts 1500–1508).

8. Fish and Wildlife Coordination Act (16 USC 661 *et seq.*).

9. Fish and Wildlife Service Mitigation Policy (46 FR 7644–7663, 1981).

10. Magnuson Fishery Conservation and Management Act (16 USC 1801 *et seq.*).

11. National Marine Fisheries Service Habitat Conservation Policy (48 FR 53142–53147, 1983).

B. Planning Considerations

1. Prospectus

Prospective bank sponsors are encouraged to 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 (e.g., pre-application coordination). The purpose of the prospectus is to provide information to the agencies regarding the general need for and technical feasibility of a bank, as well as its potential for providing compensatory mitigation within a particular watershed or other designated geographic area (i.e., bank service area). Formal agency involvement and review is initiated with submittal of a prospectus. The submittal of a prospectus and establishment of an approved mitigation bank in no way guarantees use of a bank to satisfy compensatory mitigation requirements of any authorized activity.

2. Goal Setting

The overall goal of a mitigation bank should be the establishment or reestablishment of a self-sustaining, functioning aquatic system, which replaces the functions and acreage of wetlands and other aquatic resources anticipated to be adversely affected within a watershed or other designated geographic area. It is desirable to set the particular objectives (i.e., determining the type and character of compensatory mitigation to be developed) for a mitigation bank in advance of site selection. The goal and objectives should be driven by the anticipated mitigation need; the site selection should support achieving the goal and objectives.

3. Site Selection

Consideration should be given 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 upland resources (e.g., mature forests) or cultural sites, or threatened and endangered species habitat are not compromised in the process of establishing a bank. Other factors for consideration include development trends (i.e., land use changes), habitat status and trends, local or regional goals for the restoration or protection of particular habitat types or functions (e.g., reestablishment of habitat corridors), water quality and floodplain management goals, and establishment of habitat for species of concern.

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 must 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, may not be counted toward bank credits.

Federally funded wetland conservation projects undertaken via separate authority and for other purposes, such as the Wetlands Reserve Program, Farmers 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.

4. Technical Feasibility

Mitigation banks should be planned and designed to be self-sustaining over time to the extent possible and pose little risk of failure. The techniques for restoring and creating wetlands and/or other aquatic resources must be carefully selected, since restoration/creation science is constantly evolving. The restoration of historic or substantially degraded wetlands and/or other aquatic resources utilizing proven techniques increases the likelihood of mitigation success and lessens the loss of valuable uplands due to wetland creation. Thus, restoration should be the first option considered when siting a bank.

In general, banks which involve complex hydraulic engineering features and/or questionable water sources (e.g., pumped) are more 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 be avoided to the extent possible. 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).

Mitigation techniques should be sufficiently well understood and reliable to allow the development of detailed construction plans and specifications for review and approval. 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.

5. 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.

Consistent with existing regulations, policies and guidance, 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 under exceptional circumstances. 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

[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.

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 (e.g., by Section 10/404 or the FSA ''Swampbuster'' provisions). The existence of a demonstrable threat must 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. 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 generally require a greater number of acres from a preservation bank than from a bank which is based on restoration, creation or enhancement.

6. 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. 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. The presence of upland areas may increase the per-unit value of the aquatic habitat in the bank, but upland areas are not directly counted as mitigation credits.

7. Mitigation Banking and Watershed Planning

Mitigation banks should be planned and developed to address resource needs within a particular watershed. Moreover, decisions regarding the location and uses of a mitigation bank, as well as the type of wetlands and/or other aquatic resources to be restored, created, enhanced or preserved may often be made within the context of ecological objectives set for the watershed. Watershed planning efforts often identify categories of activities having minimal adverse effects on the aquatic ecosystem which could be authorized under a general permit. In order to reduce 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. Mitigation Banking Instruments

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. 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:

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;
d. Description of baseline conditions;
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.

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 the Department of the Army (DA) permit. The permit application to establish a bank will be evaluated by the Corps on its own merits pursuant to Section 10/404 policies and procedures. As such, preparation of a banking instrument 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 DA authorization. It should be noted, however, that a bank sponsor who proceeds in the absence of a banking instrument does so as 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).

2. 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 comply with the terms of that instrument.

The Chair of the MBRT will be the Corps, 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. Either agency may delegate that responsibility to another Federal, state, tribal or local agency, as appropriate.

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 up front. For this reason, the MBRT will strive to obtain consensus [2] on its actions. The MBRT will review and reach consensus on the banking instrument and final plans for the restoration, creation, enhancement, and/or preservation of wetlands and other aquatic resources. Once the banking instrument has been signed, the MBRT will not typically be involved in the operation of a bank on a project-specific basis. Periodically, the MBRT will review monitoring and accounting reports. In the event a bank

[2] 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. Under consensus, agreements or decisions are made without voting. An agreement is reached through a process of gathering information and viewpoints, discussion, analysis, persuasion, a combination or synthesis of the proposals and/or development of totally new solutions that are acceptable to the group. The goal of consensus is to reach an agreement or decision with which everyone can agree, but not necessarily unanimity. A consensus agreement is a recognition by a group that it has reached the best achievable solution for the parties involved.

sponsor proposes remedial actions, or an agency on the MBRT considers remedial actions to be necessary, the MBRT will review and reach consensus on the specific remedial measures to be implemented at a bank.

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.

3. 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 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.

4. 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 the agency representatives on the MBRT cannot reach consensus on the content of the banking instrument within a reasonable timeframe, or if an agency representative considers that a particular decision raises concern regarding the application of existing policy or procedures, an agency may request the issue be reviewed by a higher level within each agency. If resolution is still not achieved, any agency(ies) may initiate interagency review through written notification to, as appropriate, the Corps District Engineer, EPA Regional Wetlands Division Director, FWS Field Supervisor, NMFS Habitat Coordinator, NRCS State Conservationist and corresponding management levels within other agencies represented on the MBRT. 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), or an appropriate designee, will lead necessary discussions to achieve interagency concurrence on the issue of concern, and forward documentation of the resolution to the MBRT Chair for distribution 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 not comply 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 and initiate discussion as necessary. 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 FWS in 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 10 days upon receipt of notification, to resolve concerns. If resolution is not reached, an agency may request that the issue be reviewed by higher levels within each agency consistent with the procedures described in the preceding paragraph. Invoking this dispute resolution procedure to address concerns regarding the application of a banking instrument will not delay any permit decision pending before the authorizing agency (i.e., Corps or NRCS).

This guidance does not affect in any way the Corps statutory authorities and responsibilities under Section 404 of the Clean Water Act or Section 10 of the Rivers and Harbors Act. The ability of an agency to elevate a particular permit or policy issue in accordance with the Section 404(q) Memoranda of Agreement between the Department of the Army and the Federal advisory agencies will not be limited in any way by this guidance. Similarly, EPA's authority to deny or restrict authorization of a CWA permit in accordance with Section 404(c) will not be limited in any way by this guidance.

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 in so far as the use complies with the terms of the banking instrument. Mitigation banks established for FSA purposes may be debited only in accordance with the mitigation and replacement provisions of 7 CFR part 12.

Mitigation banks may also be used to compensate for adverse impacts to wetlands and/or other aquatic resources authorized under other resource protection programs such as state regulatory programs. 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

For purposes 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 participation in, a mitigation bank will ultimately 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 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. Designation of the service area should be based on consideration of hydrologic, edaphic and biotic criteria, and be stipulated in the banking instrument.

The geographic extent of a service area should be guided by the cataloging unit of the ''Hydrologic Unit Map of the United States'' (USGS, 1980) and 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 hydrologic and biotic classification and mapping 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 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 watershed management plans.

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

As indicated in 1990 Memorandum of Agreement on mitigation between the EPA and DA, compensatory mitigation should be undertaken in areas adjacent or contiguous to the site of the aquatic resource impacts when practicable and environmentally preferable. This preference for on-site mitigation is established because on-site mitigation often has greater potential for compensating for particular aquatic functions. For example, on-site mitigation may be the most appropriate option for compensating for 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.

The preference for on-site mitigation, however, 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. In making the latter determination, careful consideration must be given to wetland functions, landscape position, affected species populations at the impact and mitigation bank sites, and potential on-site compensation areas. In general, it may be desirable to provide compensation for minor aquatic resource impacts through consolidation in a well-managed bank. There may also be circumstances warranting a combination of on-site and off-site (i.e., bank) mitigation to compensate for losses.

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 and is environmentally preferable to on-site compensatory mitigation. Moreover, for projects that might otherwise cause or contribute to significant degradation (40 CFR part 230.10(c)), a bank may only be used when it is demonstrated that use of the bank will prevent or replace the lost functions that give rise to the significant degradation finding, and where a reasonable assurance of success is provided.

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, nor vice-versa. 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. 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 may be appropriate to allow limited debiting based upon a projected level of aquatic functions at a bank (e.g. 15% of the total credits projected for the bank at maturity). 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 requirements should be satisfied prior to debiting: (1) Banking instrument and final 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 within the first full growing season following initial debiting of a bank. The temporal loss of functions associated with the debiting of projected credits may require higher compensation ratios. Further debiting of the bank should not occur until the allocated projected credits have accrued and additional credits have accrued to match proposed debiting.

Credits based solely on 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) acceptable to all signatories should be used to assess wetland and/or other aquatic resource restoration, creation

and enhancement efforts 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, credits and debits can be based on simple indices (e.g. acres) of various classes of wetlands and/or other aquatic resources (e.g., Cowardin et al, 1979, as modified for National Wetland Inventory mapping conventions). Regardless of the method employed, credits should be based on 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) and members of the MBRT for review. Alternatively, functional assessments may be conducted by a team representing involved resource and regulatory agencies and other appropriate parties.

Bank sponsors will 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 will submit a statement to each member agency of the MBRT. The bank sponsor will also generate an annual ledger report for all mitigation bank accounts for similar distribution.

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

8. Party Responsible for Bank Success

The bank sponsor is responsible for assuring the success of the restoration, creation, enhancement and preservation activities at the mitigation bank. This responsibility must be clearly documented in the banking instrument and in any authorization approving the use of the bank as compensatory mitigation. Where authorization under Section 10/404 and/or FSA is necessary to establish the bank, the DA permit or NRCS plan should be conditioned accordingly to ensure that provisions of the banking instrument are enforceable. In circumstances where establishment of a bank does not require such authorization, adequate mechanisms (i.e., legal and financial assurances) need to be in place to ensure that provisions of the banking instrument are enforceable.

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 applicable, and signatories of the instrument are responsible for carrying out its provisions. With the exception of arrangements for the long-term management and protection in perpetuity of the bank, 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

Mitigation banks should be protected in perpetuity with appropriate real estate arrangements. In exceptional circumstances, real estate arrangements may be approved which dictate finite protection for a bank. 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.

All banks must be protected by legal instruments which effectively prevent harmful activities (i.e., incompatible uses [3]) that would jeopardize their continued conservation purpose. Acceptable instruments are deed restrictions, conservation easements or other enforceable legal mechanisms.

Banking instruments should identify the entity responsible for the management of the bank beyond its operational life as a means to assure the conservation purpose of the bank. 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 management of the bank beyond its operational life, as necessary. 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 need to 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). Annual monitoring reports should be submitted to the authorizing agency(ies) and members of the MBRT.

4. Remedial Action

The banking instrument should stipulate the 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 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 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, 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-

[3] For 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.

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 leaving the potential for project impacts to go unmitigated for a significant time period. The Corps, in consultation with the other agencies, may find there are some exceptional circumstances where such arrangements are appropriate. In such cases, a formal agreement between the sponsor and the agencies, similar to a banking instrument, is necessary to define the limited circumstances and conditions under which its use is considered appropriate.

2. Special Considerations for ''Swampbuster''

Note to readers: Current FSA legislation limits the extent to which mitigation banking can be used for FSA purposes. FSA requires that mitigation be conducted on prior-converted cropland as opposed to farmed wetlands or other degraded wetland systems. If this legislation is not modified to be consistent with the mitigation provisions commonly used by other wetland regulatory programs, including the Section 10/404 program, then the final mitigation banking guidance will be appropriately annotated to identify the FSA constraints.

III. Definitions

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

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

B. 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 expressly for the purpose of compensating for unavoidable adverse impacts which remain after all appropriate and practicable avoidable and minimization has been achieved.

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

D. Credit. A unit of measure representing the accrual or attainment of aquatic functions at a mitigation bank.

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

F. Enhancement. Activities conducted in existing wetlands or other aquatic resources to achieve specific management objectives or provide conditions which previously did not exist, and which increase one or more aquatic functions. Enhancement may involve trade-offs between aquatic resource structure, functions, and values; a positive change in one function may result in negative effects to other functions.

G. 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.

H. 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.

I. 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.

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

K. 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.

L. Restoration. Re-establishment of previously existing wetland or other aquatic resource character and function(s) at a site where they have ceased to exist, or exist only in a substantially degraded state.

M. 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.

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