

Corps /EPA Compensatory Mitigation Rule 3rd Party Mitigation: Instrument Development



Regulatory Branch
U.S. Army Corps of Engineers

Office of Wetlands, Oceans and Watersheds
U.S. Environmental Protection Agency

January 2009



Third-Party Compensation

§332.8/230.98 – Mitigation Banks/ILF

- Banks/ILFs must have instrument signed by DE
- Designed to be self-sustaining



Interagency Review Team (IRT) Replaces MBRT

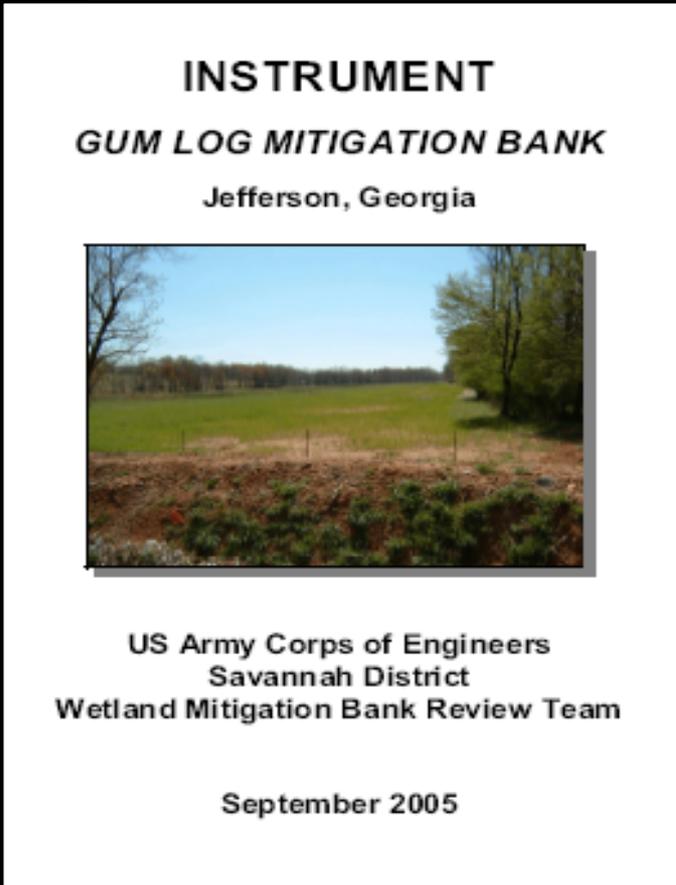
- Reviews establishment & operation of all 3rd party mitigation
- F/S/L/T resource agencies
- Consensus
- Corps makes final decision
- MOA's with F/S/L resource agencies



Overview

- Draft Prospectus
- Prospectus
- Draft Instrument
- Final Instrument

<i>TABLE OF CONTENTS</i>	
INSTRUMENT	iv
GUM LOG MITIGATION BANK	vii
Jefferson, Georgia	ix
	x
	1
	2
	2
	3
	3
	4
	4
	5
	6
	6
	6
	6
	7
	8
	9
	9
	11
	11
	11
	11
	12
	12
	14
	14
	15
	17
	17
	17
	#



Compensatory Mitigation Rule Timeline for Bank or ILF Instrument Approval*

		Event	# of Days**			
Phase I		Optional Preliminary Review of Draft Prospectus	30		DE provides copies of draft prospectus to IRT and will provide comments back to the sponsor within 30 days.	
	Sponsor Prepares and Submits Prospectus ~DE must notify sponsor of completeness w/in 30 days of submission~					
		Day 1**	Complete Prospectus Received by DE			
Phase II	Day 30	Public notice must be provided within 30 days of receipt of a complete prospectus	30			
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	Day 90	DE must provide the sponsor with an initial evaluation letter within 30 days of the end of the public comment period.	30	15		DE distributes comments to IRT members and sponsor within 15 days of the close of the public comment period.
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		Remainder of time for initiation of dispute resolution process by IRT members	15			
Day 45	INSTRUMENT APPROVED/NOT APPROVED, or DISPUTE RESOLUTION PROCESS INITIATED					

EPA/Corps draft 4/02/08

Total Required Federal Review (Phases II-IV): ≤225 Days

*Timeline also applies to amendments

**The timeline in this column uses the maximum number of days allowed for each phase.

Phase 1: Draft Prospectus

- Preliminary review of draft prospectus
- Optional
 - “...**strongly recommended**...intended to identify potential issues early so that the sponsor may attempt to address those issues prior to the start of the formal review process.”
- IRT has opportunity to review
- DE will provide comments to sponsor within 30 days



Example: Mobile District

- Initial Plan Review Checklist
- Outlines 3–Step Process
 - **Step 1**: If info in 14 areas is provided to IRT 14 days before it meets, IRT will give concept an up or down vote.
 - **Step 2**: If thumbs up – set up Site Visit and provide additional info in 6 areas
 - **Step 3**: Provide Prospectus recommendation



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Phase 2: Prospectus

- Contents (§332.8(d)(2)) Bank and ILF:
 1. Objectives
 2. How the Bank or ILF program will be established and operated
 3. Proposed service area
 4. Need and technical feasibility
 5. Ownership arrangements
 6. Qualifications



Prospectus Contents (cont'd)

- Banks must also include:
 7. Ecological suitability
 8. Assurance of sufficient water rights
- ILFs must also include:
 7. Compensation planning framework
 8. Description of ILF program account



Public Review and Comment

- Public Notice Required
 - Prospectus
 - Most modifications of approved instruments
- Copies of comments provided to IRT & sponsor



Prospectus Checklist Example

- All Fed/State IRT agencies in CA
- 8 elements required by rule
- 12 additional elements
- 404/ESA

**Prospectus Checklist
For Mitigation Banks**

Revised May 2008

Please refer to the "Mitigation Banking Information Cover Sheet, September 2007" for information and instructions related to the submission requirements for a mitigation bank proposal.¹ Please provide the following information and checklist with the submittal of a Prospectus:

- Proposed Bank Name - Use a short name based on a geographic feature if possible and include "Mitigation Bank" in the name;
- Bank contacts - Include the name, address, phone, fax, email, and role in project for: Bank Applicant, Land Owner, Consultants, etc.;
- The qualifications of the sponsor to successfully complete the type(s) of mitigation project(s) proposed, including information describing any past such activities by the sponsor;
- General location map and address of the proposed bank property;
- Accurate current map of the proposed bank property on a 7.5 minute USGS map showing boundaries of the bank;
- Aerial photo of the bank and surrounding properties;
- Map of the proposed bank service area;
- The objectives of the proposed mitigation bank;
- How the mitigation bank will be established and operated;
- The general need for and technical feasibility of the proposed mitigation bank;
- The proposed ownership arrangements and long-term management strategy for the mitigation bank site;
- Site conditions description. This must describe the ecological suitability of the site to achieve the objectives of the proposed mitigation bank, including the physical, chemical, and biological characteristics of the bank site and how that site will support the planned types of aquatic resources and functions and should include: site conditions and habitats, photos of the site, description of wetlands and waters present on site, hydrology description, number of acres of existing wetlands and waters and what is proposed for creation, enhancement, etc., site history including past land uses, surrounding land uses and zoning along with the anticipated future development in the area;
- Assurance of sufficient water rights to support the long-term sustainability of the mitigation bank;
- Proposed number and kind of credits (and acres) on the property;
- Proposed credit release schedule;
- Biological resource survey report - if species credit are proposed or species will be impacted, include this report;
- Corps-verified map of on-site jurisdictional wetlands and waters;²
- Preliminary Title Report indicating any easements or other encumbrances. Note, any liens and easements on the property that may affect a bank's viability will need to be resolved before a bank can be approved. Provide a written assessment of all easements and encumbrances describing the easement and how it may affect bank operation or habitat values;
- Any other restrictions on the property; and
- An affirmative statement that a conservation easement covering the property or fee title transfer of the property will occur as part of bank establishment. Include number of acres of



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Initial evaluation of the Prospectus provided to Sponsor

- Based on comments from public and IRT
- Written determination of potential suitability of proposed Mitigation Bank or In-Lieu Fee program to provide compensatory mitigation for DA permits
- If suitable, District Engineer informs sponsor to begin preparing draft Instrument
- If not suitable, District Engineer informs sponsor of reasons for making that determination
 - Sponsor may revise prospectus to address those deficiencies and resubmit



Phase 3 – Draft Instrument

- Contents (§332.8(d)(6)) Banks and ILF:
 1. Service area
 2. Accounting procedures
 3. Provision stating legal liability
 4. Default and closure provisions
 5. Reporting protocols



Draft Instrument Content (cont'd)

- Banks must also include:
 - Mitigation plans (12 items)
 - Credit release schedule
- ILFs must also include:
 - Compensation planning framework
 - Advance credits
 - Fee schedule
 - Method for determining fees and credits
 - Description of in-lieu fee program account



Draft Instrument Content Comparison

Bank & ILF

- Service Area
- Accounting procedures
- Assumption of mitigation responsibility/liability
- Default and closure provisions
- Reporting protocols
- Other information deemed necessary by District Engineer

Bank only

- Mitigation plans addressing the 12 required elements (§332.4(c)(2) through (14))
- Credit release schedule

ILF only

- Compensation planning framework
- Advance credits
- Fee schedule
- Method for determining fees and credits
- Description of in-lieu fee program account



Template Bank Instruments

Example: California

"Exhibit F" - B...

"Exhibit G" - P...

"Exhibit H" - B...

"Exhibit I" - Ve...

"Exhibit J" - C...

"Exhibit K" - O...

Draft Bank Enabling Instrument Requirements For Mitigation Banks

Revised May 2008

Please refer to the "Mitigation Banking Information Cover Sheet, September 2007" for information and instructions related to the submission requirements for a mitigation bank proposal. The following are the submission requirements for a draft Bank Enabling Instrument Proposal.

Any proposed modifications to the BEI template shall be identified using tracked changes or other electronic comparison and explained in a memorandum. The draft BEI should be in a 3 ring binder containing all the following information and documents. The submittal should also include an electronic, editable format of the BEI, the Conservation Easement, and other applicable template-derived documents. The electronic format need not include the large format (greater than 11"x 17") figures or maps. The draft BEI Proposal binder should include the most recent banking templates and the other necessary exhibits listed below:

- BEI
- Exhibit A" - Bank Location Maps
 - A-1 General Vicinity Map
 - A-2 Bank Property Map
- "Exhibit B" - Service Area Map(s) and Description(s)
- "Exhibit C" - Development Plan
 - C-1 Development Plan
 - C-2 Construction Security Analysis and Schedule
 - C-3 Performance Security Analysis and Schedule
- "Exhibit D" - Bank Management and Operation Plans
 - D-1 Interim Management Security Analysis and Schedule
 - D-2 Endowment Fund Analysis and Schedule
 - D-3 Instructions and Forms for Submission or Disbursement of Funds
 - D-4 Interim Management Plan
 - D-5 Long-Term Management Plan
 - D-6 Bank Closure Plan
- "Exhibit E" - Real Estate Records and Assurances
 - E-1 Preliminary Title Report, Legal Description, and Parcel Map(s)
 - E-2 Property Assessment and Warranty
 - E-3 Plat Maps
 - E-4 Approved-as-to-form Conservation Easement Deed or Grant Deed
 - E-5 Title Insurance Policy

- May 2008
- All Fed/State IRT agencies in CA
- 1.5 page BEI checklist
- 43 page BEI template
- 13 sections/11 appendices
- 404/ESA



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Phase 4: Final Instrument

- Contents
 - Core elements
 - 18 for final bank instruments (includes 12 elements for mitigation plans)
 - 10 for final ILF instruments
 - Supporting documentation addressing IRT comments
 - DE decides whether instrument should be approved



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Day 90		15	DE distributes comments to IRT members and sponsor within 15 days of the close of the public comment period.
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Concerns with Dispute Resolution under 1995 Banking Guidance

- IRT member concerns
 - 1995 Banking Guidance DR process
 - “Refusing to sign instrument” – poor negotiation tool
 - Districts willing to move forward w/out other agencies
 - Eliminates non-signing agency from future involvement in bank
- Corps concerns
 - IRT members failing to provide timely comments
 - “Non-constructive” IRT participants
- New Regs intended to “fix” these problems



Compensatory Mitigation Rule Timeline for Bank or ILF Instrument Dispute Resolution*

		# of days**			
Day 1**	Final Instrument Received by DE and IRT				
Day 30	DE must notify IRT members of intent to approve instrument within 30 days of receipt.	30	150	45	IRT members have 45 days from submission of final instrument to object to approval of the instrument and initiate the dispute resolution process.
Day 45	IRT members then have 15 days to notify DE and other IRT members of their objection by letter	15			
Day 75	If an objection is received, the DE must respond within 30 days	30		The DE's response must be sent to all IRT members, and may either indicate an intent to disapprove the instrument as a result of the objection, or provide a modified instrument that attempts to address the objection.	
Day 90	If not satisfied, IRT member may forward the issue to IRT Agency HQ*** for review****	15		IRT member must object within 15 days of the notification of intent from the DE. The DE must hold in abeyance the final action.	
Day 110	Within 20 days, IRT Agency HQ may request further review by the Assistant Secretary of the Army, Civil Works	20		The requesting IRT Agency HQ must also notify the ASA(CW) if further review will not be requested.	
Day 140	ASA(CW) has 30 days to review the draft instrument and advise the DE on how to proceed with the final action	30		The ASA(CW) must immediately notify requesting Agency HQ of the final decision.	
Day 150	Remainder of time for notification of the sponsor of the final decision	10		The DE must notify the sponsor of the final decision within 150 days of receipt of the final instrument.	

Questions?

