

Appendix III
SWG IRT - Draft Mitigation Banking Instrument Template

DO NOT include this page when submitting MBI.

INSTRUCTIONS: 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. All mitigation banks must comply with 33CFR332.8 to be used to provide compensatory mitigation for a Department of the Army (DA) permits.

This template is provided as a standard by the Galveston District Interagency Review Team (IRT) to aid in the timely development of a Mitigation Banking Instrument (MBI) for your mitigation bank. It is intended to provide the preferred document format and structure that already contains common language required for mitigation banks pursuant to 33 CFR 332.8. Submittals in accordance with this template will result in more timely review, and potential approval of, a Sponsor's proposal. The document still requires the insertion of project-specific information and evaluation by the IRT. This document may be periodically revised by the USACE based on new information, scientific research or advances in the application of compensatory mitigation, and/or changes in the Regulatory Program.

- ✓ *(Underlined) text within parentheses in this template specifies information that will be replaced by bank-specific information in the draft MBI. For example, (Permit Number) in the template would be replaced with "SWG-2019-00999" in the draft MBI document submitted.*
- ✓ ***Bold text in this template is standard required language to be included in all MBIs and should not be modified.***
- ✓ *All text insertions, deletions, or other revisions, including any alterations of standard language from the template, made by the sponsor must be clearly indicated (e.g., Microsoft Word track changes) within the document and submitted to the USACE/IRT in both electronic (i.e., Microsoft Word) and hardcopy formats.*

✓ *All information within text boxes are instructions/explanatory and should be removed from the submitted document.*

- ✓ *Insert all project specific information as required to disclose and support a concise and thorough discussion of the bank proposal.*
- ✓ *Insert all required attachments 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 and Mitigation Design/Work Plan) in Attachment A. The mitigation plan (or site development 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 draft Conservation Easement in Attachment I (ref. SWG CE Template). 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 subsequent Attachments and include the respective title for this information.*

**Draft MBI
Template**

MITIGATION BANKING INSTRUMENT
(NAME) MITIGATION BANK
(NAME) COUNTY, TEXAS
(PERMIT NUMBER)



(Insert Optional Photo)

(Insert Optional Prepared By:)

SUBMITTED FOR APPROVAL TO:
U.S. ARMY CORPS OF ENGINEERS
GALVESTON DISTRICT
AND
INTERAGENCY REVIEW TEAM

(DATE SUBMITTED)

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- B. **Imagery** (contemporary and historical aerial photography/imagery)
- C. **Environmental Baseline Report** (Jurisdictional Delineation & Functional Assessment)
- D. **Survey Plat and Legal Description**
- E. **Invasive Species Management Plan**
- F. **Title Abstract** (w/ opinion of title from prospectus)
- G. **Minerals Management Plan** (or Land Use Plan)
- H. **Draft Conservation Easement** (with Survey Plat and Legal Description)
- I. **Financial Assurance & Long-term Funding Agreements** (with Draft Documents)
- J. **Water Rights Documentation** (from prospectus)
- K. **(Other)**

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I. INTRODUCTION

A. BANK PURPOSE:

All mitigation banks require a banking instrument. The Mitigation Banking Instrument (MBI) is the legal document 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 U.S. Army Corps of Engineers (USACE). All mitigation banks must comply with 33 CFR Part 332 if they are to be used to provide compensatory mitigation for Department of the Army (DA) permits. The Sponsor is responsible for developing, operating, and maintaining the bank subject to the requirements of this MBI; and the Sponsor agrees to satisfy and assume the legal responsibility for the mitigation requirements assigned to a respective permit by USACE.

The (Name) Mitigation Bank is a bank sited on (public or private) *(choose either and remove the unused choice from the final document)* lands. Credits for compensatory mitigation projects on public land must be based solely on aquatic resource functions provided by the compensatory mitigation project, over and above those provided by public programs already planned or in place. Bank credits for DA permits may also be used to satisfy the requirements of other programs (e.g. tribal, state, or local wetlands regulatory programs, USACE civil works projects, and Department of Defense military construction projects, Endangered Species Act), consistent with the requirements of the programs, if the appropriate credits required by a DA permit is supplemental to such programs. Under no circumstances may the same credits be used to provide mitigation for more than one permitted activity.

This MBI serves to ensure compliance with Section 404 of the Clean Water Act 33 USC 1344 et seq, Section 10 of the Rivers and Harbors Act 33 USC 401 et seq and the implementing regulations found at 33 CFR 320-332, which are controlling in any conflict between the MBI and those laws and regulations. The Corps role is regulatory only; the MBI should not be construed as a contract with the Government enforceable at law by the applicant or any third party. The sponsor agrees to the extent allowed by the laws of the State of Texas to defend, indemnify and hold the United States harmless in any action where any party, including the sponsor, the beneficiary or any third party brings a claim, monetary or otherwise, against the United States that relates in any way to the Corps execution of mitigation banking documents for the establishment of this mitigation bank.

Explain/Discuss as necessary

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B. BANK CONTACT INFORMATION:

Mitigation Bank Name: (ABC) Mitigation Bank

Name of Sponsor:
Mailing Address:
Phone Number:
Email Address:
Point of Contact (POC):

Name of Long-term Steward:
Mailing Address:
Phone Number:
Email Address:
POC:

Name of Sponsor's Agent(s):
Mailing Address:
Phone Number:
Email Address:
POC:

Name of Endowment Fund Managing Entity:
Mailing Address:
Phone Number:
Email Address:
POC:

Name of Property Owner(s):
Mailing Address:
Phone Number:
Email Address:
POC:

(Name of Other:
Mailing Address:
Phone Number:
Email Address:
POC☺

Name of Mineral Owner(s):
Mailing Address:
Phone Number:
Email Address:
POC:

Name of Conservation Easement Holder:
Mailing Address:
Phone Number:
Email Address:
POC:

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C. REGULATORY AUTHORITIES:

The establishment, use, and operation of the (Name) Mitigation Bank will be carried out in accordance with the following authorities:

- Clean Water Act (33 USC 1251 et seq.)
- Rivers and Harbors Act (33 USC 403)
- Fish and Wildlife Coordination Act (16 USC 661 et seq.)
- Regulatory Programs of the U.S. Army Corps of Engineers, Final Rule (33 CFR 320-332)
- Guidelines for Specification of Disposal Sites for Dredged and Fill Material (40 CFR 230)
- 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)
- 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)
- Water Resources Development Act of 2007-Section 2036: Mitigation for Fish and Wildlife and Wetlands Losses
- Section 7 of the Endangered Species Act
- Section 106 of the National Historic Preservation Act”
- Food Security Act of 1985, as amended

Option A: For mitigation banks within the State of Texas:

- Texas State Water Quality Certification [30 Tex. Admin. Code §279.12 (2001)]
- Texas State Water Quality Standards [30 Tex. Admin. Code § 307 (2000)]
- Texas Parks and Wildlife Code Chapter 14 Powers and Duties Concerning Wetlands

Option B: For mitigation banks within the State of Louisiana:

- Louisiana State Water Quality Certification (LAC 33:IX Chapter 15 (2007))
- Louisiana State Water Quality Standards (LAC 33:IX Chapter 11 (2007))
- (Others)

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D. INTERAGENCY REVIEW TEAM:

The Interagency Review Team (IRT) for the (Name) Mitigation Bank is composed of the individuals representing the agencies listed below:

US Army Corps of Engineers

SWG-RD-P Fax: 409-766-3931
2000 Fort Point Road
Galveston, TX 77553
IRT Chair: Sam J. Watson – Sam.Watson@usace.army.mil Phone: 409 766-3946
Dwayne Johnson – Dwayne.A.Johnson@usace.army.mil 409 766-6353

US Fish & Wildlife Service

17629 El Camino Real, Suite 211 Phone: 281 286-8282
Houston, TX 77058 Fax: 281 488-5882
Jeff Hill - Jeffrey_Hill@fws.gov

EPA, Region 6

Wetlands Section (6WQ-EM) - Houston Lab Phone: 214-665-7459
10625 Fallstone Road Fax: 281-983-2124
Houston TX 77099
Paul Kaspar - Kaspar.Paul@epa.gov

Texas Parks & Wildlife Department

TPWD-Dickinson Marine Lab Phone: 281 534-0146
1502 East FM517 Fax: 281 534-0122
Dickinson, Texas 77539
Mike Morgan - Mike.Morgan@tpwd.texas.gov

Texas General Land Office

Coastal Coordination Council Phone: 512 463-5055
1700 North Congress Avenue Fax: 512 475-0680
Austin, TX 78701-1495
Carla Kartman – Carla.Kartman@glo.tx.gov

Texas Commission on Environmental Quality

Water Planning & Assessment Division Phone: 512 239-4583
P.O. Box 13087, Mail Code 150 Fax: 512 239-4420
Austin, TX 78711-3087
Brittany Lee - Brittany.Lee@tceq.texas.gov

Natural Resources Conservation Service

USDA-NRCS Texas Phone: 254-742-9833
101 South Main Street
Temple, TX 76501
Dan Keesee – Dan.Keesee@tx.usda.gov

National Marine Fisheries Service

4700 Avenue U Phone: 409 766-3699
Galveston, TX 77550 Fax: 409 766-3575
Rusty Swafford - Rusty.Swafford@noaa.gov

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E. LEGAL RESPONSIBILITY STATEMENT:

The Sponsor assumes all legal responsibility for satisfying all mitigation requirements of Department of the Army (DA) permits for which the bank has been utilized, or fees have been accepted (i.e. the implementation, performance, and long-term management of the compensatory mitigation project approved under this agreement). The transfer of liability from permittee to the Sponsor is established by the following: 1) the approval of this MBI by the Sponsor and District Engineer (DE), 2) receipt of a credit transaction report by the DE that is signed and dated by the Sponsor and the Permittee, and 3) the transfer of fees required from the Permittee to the Sponsor.

The responsibility for financial success and risk to the investment initiated by the Bank Sponsor rests solely with the Bank Sponsor. The IRT agencies administer their regulatory programs to best protect and serve the public's interest, and not to guarantee the financial success of banks, specific individuals, or entities. Accordingly, there is no guarantee of profitability for any individual mitigation bank. Bank sponsors should not construe the MBI as a guarantee in any way that the IRT agencies will ensure sale of credits or that the IRT agencies will forgo other mitigation options that may also serve the public interest. Since the IRT agencies do not control the number of banks proposed or the resulting market impacts upon success or failure of individual banks, in depth market studies of the potential and future demand for bank credits are the sole responsibility of the Sponsor.

USACE approval of this Instrument constitutes the regulatory approval required for the (NAME) Mitigation Bank to be used to provide compensatory mitigation for Department of the Army permits pursuant to 33 C.F.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.

F. OWNERSHIP DOCUMENTATION

Neither this MBI nor any Department of the Army (DA) permit convey any property rights, either in real estate or material, or any exclusive privileges. Furthermore, this MBI or DA permit does not authorize any injury to property, or invasion of rights or any infringement of Federal, state or local laws or regulations. The Sponsor's signature on the MBI is an affirmation that the Sponsor possesses or will possess the requisite property interest to undertake all activities discussed and required in the MBI (33CFR320.4(g)6).

Sponsor agrees that there are no encumbrances on the property that have not been identified and fully disclosed to USACE and the IRT.

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The (Name) Mitigation Bank shall protect (number) acres in the required ecological condition in perpetuity which is to be guaranteed by the execution of a legally binding conservation easement. There are no liens, mortgages, or security interests on the property. To ensure that the conservation easement is conveyed without encumbrances that would affect the viability of the bank, Sponsor has provided the following:

- ✓ (A title abstract, including a 60-year title search with an attorney's Opinion of Title and a Survey with legal description of the Bank showing all existing easements and encumbrances, if any, as identified in the title document. This information will be submitted in recordable form.
- ✓ Any liens, mortgages, or security interests of any type on the property must be subordinated to the conservation easement, and subordination agreements provided by the bank sponsor to verify that any liens, mortgages and security interests of any type on the property are subject to and bound by the conservation easement established for the property.
- ✓ A copy of the filed publicly recorded executed conservation easement.)

Abstract / Title Search. As a component of the Prospectus, the bank sponsor shall provide a copy of a title abstract, including a 60-year title search performed by a title company operating within the state. The submittal shall also include a legal survey of the proposed mitigation bank site. The Bank Sponsor shall submit an attorney's Opinion of Title prepared in accordance with federal title standards, addressing each scheduled exception to the title and either clear said exception or explain its permissible use in the project. The Title Opinion may be structured in a manner similar to that used in standard American Land Title Association Title Commitment Form. 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.

Draft MBI Template

II. MITIGATION PLAN

A. OBJECTIVES:

Describe the goals and objectives of the mitigation bank. Goals should clearly define the intended result of the proposed compensatory mitigation in terms of aquatic ecosystem functions and hydrologic conditions within a watershed context. Objectives should be a list of specific, measurable outcomes of the compensatory mitigation that can be used to demonstrate whether or not the goals of the mitigation plan have been achieved. Objectives must include the following: 1) A description of the resource type(s) and amount(s) that will be provided, expressed as linear feet for streams and as acres for wetlands and other aquatic resources, and 2) the method of compensation (i.e., restoration, establishment, enhancement, and/or preservation). This section must also describe how the bank's mitigation plan addresses the needs of the watershed and/or ecoregion.

B. SITE SELECTION:

Description of current site ownership and factors considered during site selection, the compatibility with adjacent land uses, and the practicability of an ecologically self-sustaining aquatic resource restoration, establishment, enhancement and/or preservation project on this site. State the availability of a published watershed plan and assess its consistency to the watershed approach. May describe the ecosystem and why the bank may support a unique watershed important to the region ("watershed approach"). A demonstration of the threat to proposed preservation areas is included in this section. (should include/ID surface owner and mineral owner)

C. SERVICE AREA:

Describe how the service area was determined using a "watershed approach" and the basis for a mapped boundary representing the service area(s) of the mitigation bank. The MBI must contain a single service area map. A primary service area shall be the 8-digit HUC in which the bank property is located. Smaller primary areas may be required in certain circumstances (e.g., coastal areas). As determined appropriate by the IRT consistent with the watershed approach, a secondary Service Area may be authorized. A secondary service area shall be no larger than the adjacent 8-digit HUC watersheds that have the same first six digits and are within the same EPA Level III Ecoregion as the bank. The secondary service area may be associated with a multiplier (e.g., 1.5x). Approval of a service area occurs after detailed evaluation by the IRT and therefore is site-specific (determined on a case-by-case basis). An umbrella mitigation banking instrument may have multiple service areas governed by its MBI (e.g., each watershed within a region may be a separate service area); however, all impacts and compensatory mitigation must be accounted for by service area.

The service area is the watershed, ecoregion, physiographic province, and/or other geographic areas within which the mitigation bank is authorized to provide compensatory mitigation required by DA permits. Service areas must be appropriately sized for each credit type to ensure that the aquatic resources provided will effectively compensate for adverse environmental impacts across the entire service area respectively.

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The primary service area for the (name of bank) is identified as the (name of HUC) USGS 8-digit Hydrologic Unit Code (HUC) (insert 8digit number). The primary service area includes portions of (list County(s)) Counties. Impacts occurring within the primary service area shall be debited on a 1 : 1 basis.

The secondary service area for the (name of bank) is identified as the (name of HUC) USGS 8-digit HUC (insert 8digit number). The secondary service area includes portions of (list County(s)) Counties. Impacts occurring within the secondary service area shall be debited on a 1.5 : 1 basis (see map attached as Fig (X)).

D. SITE PROTECTION INSTRUMENT:

To provide sufficient site protection, a conservation easement shall establish in a third party approved by USACE, in coordination with IRT, the right to enforce site protections and provide the third party the resources necessary to monitor and enforce these site protections. An appropriate third party must be a government resource management agency or a non-profit conservation organization. A non-profit conservation organization must be a current land trust member of the Texas Land Trust Council and/or a currently accredited land trust by the Land Trust Accreditation Commission. ~ See SWG CE Template

*(*For Texas banks):*

The Sponsor shall record a conservation easement with the (NAME) County Clerk that has been approved by USACE, in coordination with the IRT, and provide a copy of the recorded conservation easement to the USACE Galveston District.

*(*For Louisiana banks):*

Sponsor shall record a covenant servitude with the (NAME) Parish Clerk of Court that has been approved by USACE in coordination with the IRT and provide a copy of the recorded covenant to the USACE Galveston District.

**(Choose appropriate option and remove the unused choice from the final document)*

Subsurface mineral exploration and extraction activities have the potential to adversely impact restored, enhanced, and created aquatic resources. No new leases, sales, or other contracts of mineral rights (those owned by the surface owner, if any) should occur during the mitigation bank evaluation period. Bank sponsors should provide a minerals assessment report (i.e., remoteness opinion) which assesses the minerals present on and under the land to determine the potential for future development. A Mineral Management Plan (MMP) should be developed and provided as part of the draft MBI review. The MMP should specifically identify potential areas for subsurface mineral exploration and development activities (e.g., access roads, well pads, directional drill sites, etc.) based on the minerals assessment report. To avoid and minimize adverse impacts to aquatic resources, activities associated with subsurface mineral exploration and extraction should be limited to only those identified areas and these areas would be excluded from creditable acreage within the Conservation Easement. In some cases the bank sponsor may need to consult an experienced oil and gas attorney to draft a Surface Use Agreement (SUA) for the potential of any subsurface holder(s) to conduct exploration or extraction activities in those areas. The SUA should be provided to the IRT for review and once approved should be attached as an exhibit to the Conservation Easement. It should be noted that sand, gravel, and timber resources are considered surface resources.

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E. BASELINE INFORMATION:

MBI must provide the baseline description of the ecological characteristics of the site. This must generally include an approved jurisdictional delineation of all waters of the United States according to the 1987 Corps of Engineers Wetland Delineation Manual (Manual) and any appropriate regional supplement to the Manual. The baseline information must also include a verified functional assessment (e.g., iHGM) or conditional assessment (e.g., SWG Stream SOP), as applicable, for the determination and establishment of credits to provide the required compensatory mitigation and the baseline assessment of the functions of all existing aquatic resources on the site. The following additional items should also be included: site location map; site photographs (including historic aerials); historic land use; descriptions of historic and existing hydrology; plant communities; soil description; Routine Analysis Soil Profile Test results (from accredited NELAC laboratory (e.g. Texas A&M AgriLife Extension - <http://soiltesting.tamu.edu/>); and, Sponsor's written statement as to whether or not any party or parties to the proposed bank are or have been USDA or other Federal (e.g., Wetlands Reserve Program, Conservation Reserve Program, Partners for Fish and Wildlife Program) or State Program participants.(see Baseline Report(s) Attachment C)

F. Determination of Credits:

The Sponsor should provide a description of the functional assessment method (e.g., iHGM) for the determination and establishment of credits and how the credits will be traded respectively. Clarify specific models and respective currency (i.e., refer to HGM Regional Guidebooks and iHGM which include # of function scores, SWG Stream Method). In the cases of restoration, enhancement and establishment, document the amount of credit by substantiating the difference in functional score between baseline scores and respective yearly projected functional scores. A table should be included that shows calculations, type, and amounts of credits generated. Sponsor should substantiate any proposal for initial debiting. Credits must be traded as a suite of functions. If one of the functional categories of FCUs is sold out, no further transactions may be conducted until the sponsor has all respective functional categories available for that type of currency or credit type.

G. Mitigation Work Plan:

Sponsor must provide a detailed plan specifying the geographic boundaries of the project; construction methods, timing, and sequence; source(s) of water, including connections to existing waters and uplands; methods for establishing the desired plant community; the proposed grading plan, including elevations and slopes of the substrate; soil management; and erosion control measures. For those projects impacting existing aquatic resources, either natural or man-made, the source and effect of that impact shall be clearly documented, (e.g., design, effect on hydrology, effect on hydrology relative to property boundaries, volumes of material and their disposition, etc.).

Sponsor must provide plans to control/manage invasive plant and animal species, as applicable.

For stream compensatory mitigation projects, the mitigation work plan shall include other relevant information, such as planform geometry, channel form (e.g., typical channel cross-sections), watershed size, design discharge, and riparian area plantings. This includes the construction methods, timing, sequence and source of materials to meet the desired objective(s). It should justify how a stream will be improved.

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H. Maintenance Plan

A description and schedule of the general maintenance required to sustain and ensure continued viability of the aquatic resource function once construction is completed and credits are released. This should include a detailed description and schedule of abatement of non-target flora and fauna.

I. Performance Standards

Sponsor shall establish ecologically-based standards (i.e., specific success-failure criteria) that will be used to determine when objectives are met and to release credits. Credit releases may be accounted for by subsequent functional assessments (e.g. iHGM), however additional ecological standards not dependent on functional assessment metrics (e.g. hydrologic recorders, plant species lists with minimum density/survival, etc.) are required to assure success and facilitate adaptive management decisions. These must include control of invasive plant species (<5%). Performance Standards will be reflected with other MBI requirements as Special Conditions of the DA Permit.

At a minimum, in order for a Bank to be considered acceptable for mitigating wetland impacts associated with DA permits, the vegetation, soils, and hydrology within the Bank must meet the wetlands criteria described in the Regional Supplement to the Corps of Engineers Wetland Delineation Manual: Atlantic and Gulf Coastal Plain Region, Version 2.0 (Nov 2010) (Supplement). Credits will be established as Functional Capacity Units (FCUs) and released to the Bank once the USACE verifies the increase of FCUs from either the initial baseline assessment, or a subsequent credit release amount. FCUs will be added or if necessary, subtracted from the ledger accordingly. Wetland Assessment Areas (WAAs) which score lower in FCUs, or that do not meet minimum requirement to be classified as wetlands will result in a reduction of credits/FCUs from the ledger respectively.

- **The Sponsor shall record a conservation easement with the (Name) County Clerk that has been approved by the USACE in coordination with the IRT and provide a copy of the recorded conservation easement to the USACE SWG Regulatory Division Chief, prior to initial credit release.**
- **The Sponsor shall establish and execute financial assurances, approved by the USACE in coordination with the IRT, and provide copies of the respective executed documentation to the USACE SWG Regulatory Division Chief prior to initial credit release.**
- **The Sponsor shall establish and execute the long-term management fund prior to initial credit release and shall fully fund the long-term management endowment within (number) years of the date the MBI is signed by the USACE.**
- **Within (number) calendar years of the date the MBI is signed by the USACE, the Sponsor must provide the USACE and IRT an as-built report with plan drawings (to scale) that include elevations and horizontal distances, and a signed statement demonstrating that construction and planting is complete and compliant with the MBI.**
- **(Site specific species of concern, if any) All noxious and invasive species currently listed by the Texas Department of Agriculture (TDA 2007) (Texas Register. Volume 32,**

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Number 23. June 8, 2007. Pages 3077-3422) must comprise no more than five percent (5%) actual cover of the herbaceous or other strata.

- Sponsor shall submit all monitoring, transaction, and other reports on time in accordance with the requirements of this MBI.
- The Sponsor shall conduct the hydrologic improvements in accordance with the specifications of the MBI. To assess hydrologic improvements, the Sponsor will install, maintain, and monitor continuous water level recorders at locations indicated in the MBI. Hydrographs produced from data collected will be correlated to the field indicators sampled and be provided in all monitoring and credit release reports. This will include documentation of precipitation conditions (normal, wet, dry) during annual monitoring periods using a National Food Security Act Manual WETS analysis, the Palmer Drought Severity Index, or other suitable metric.
- (Additional as appropriate)

J. Monitoring Requirements

Sponsor shall give a description of the parameters to be monitored when scheduled reports are submitted to USACESWG-IRT. Establishing static sample plots representative of wetland assessment areas is recommended along with the use of water-recorders to measure hydrologic parameters with field indicators observed.

Monitoring and reporting requirements are to be in accordance with USACE Regulatory Guidance Letter (RGL) 08-03 “Minimum Monitoring Requirements for Compensatory Mitigation Projects Involving the Restoration, Establishment, and/or Enhancement of Aquatic Resources”. Reports presenting documentation of monitoring findings will be submitted to the USACE by (date) of each year, for the first (15) years following signature of the MBI by the Sponsor and the USACE, or until all Performance Standards are met, whichever is later.

Draft MBI Template

L. Long-term Management & Funding Plan

Provide details on long-term management responsibilities including planned transfer to named 3rd party responsible. Discuss contingencies and funding. Long-term financial assurances will need to be reconciled with costs of this plan. The MBI must clearly indicate the party or parties responsible for the implementation, performance, and long-term management of the compensatory mitigation project(s). The instrument must also contain a provision expressing the sponsor's agreement to assume responsibility for a permittee's compensatory mitigation requirements, once that permittee has secured the appropriate number and resource type of credits from the sponsor and the district engineer has received the documentation. If use of this Bank is approved by the USACE to provide part or all of the required compensatory mitigation for a DA permit, the permittee retains responsibility for providing the compensatory mitigation until the appropriate number and resource type of credits have been secured from the Sponsor and the USACE has received documentation that confirms that the Sponsor has accepted the responsibility for providing the required compensatory mitigation. If the Sponsor fails to provide the required compensatory mitigation, the USACE may pursue measures against the Sponsor to ensure compliance.

In order to ensure that funds are available to provide a source of funding for the perpetual maintenance of the Bank, the Sponsor shall establish an investment (e.g. escrow, endowment) account for long-term management funds. This financial assurance must be sufficient to provide for perpetual maintenance and operation of the bank's activities, including but not limited to site protection, management, monitoring, reporting, and remedial actions that might be necessary. The long-term management fund investment account must be established and executed prior to initial credit release and must be fully funded within 5 years of MBI approval. A cost estimate created using Property Analysis Record (PAR3) software, and draft language for the investment account agreement is presented in Appendix (X). The Sponsor calculated the long-term funding amount by estimating the labor, materials, and equipment costs for those items necessary to comply with the successful long-term maintenance of the Bank. The Sponsor adjusted maintenance costs based on a (2%) annual inflation rate and used a (3%) capitalization (cap) rate. The account will be capitalized through annual deposits and funded in the amount of \$ XX.00 within 5 years of MBI approval. This requirement is not contingent on credit sales. The Sponsor included investment returns in its planning, and based on past experience and estimated future performance, assumed a (5%) percent annual return. The Sponsor will invest the funds into a (XX) managed by (XX). The fund is expected to return an average annual rate of approximately (5%) under current market conditions, projected to produce a balance of \$xxx.00 when long-term management begins, and is designed to be non-wasting (Appendix X). Notwithstanding economic indicators, projections, or future performance, the Sponsor remains legally and financially responsible for maintaining the Bank pursuant to the DA Permit Conditions including this MBI.

Any accrued interest shall be used in the operation, maintenance, or other purpose that directly benefits the Bank. Only accumulated interest may be withdrawn for this purpose. The principal shall not be used and shall remain as part of the Bank's assets to ensure that sufficient funds are available should USACE approve a future request to transfer perpetual maintenance responsibilities to a third party. The Sponsor or a USACE approved Long-Term Steward may withdraw the accumulated interest after approval from the USACE. The Sponsor is responsible for ensuring that the funding of the Long-Term Maintenance and Protection account is sufficient. In the event capitalization of the account proves insufficient to meet the long-term management needs of the Bank, the Sponsor, or USACE approved long-term steward, remains liable for such costs. Prior to approving a request to transfer liability to a 3rd party long-term steward, the USACE in coordination with the IRT, will determine whether any additional funding by the Sponsor is necessary and if so, in what amount. The USACE may not approve a transfer of liability until the long-term maintenance account is sufficiently funded. In the event the financial assurance or long-term funding mechanism is due to expire, or the sponsor proposes to replace the respective mechanism with another type, the sponsor shall notify the USACE at least 120 days prior to the expiration or replacement to allow for USACE review and approval. If a USACE approved funding mechanism has not been established, mitigation bank credits will be suspended until such time financial assurances are approved. Failure to maintain adequate long-term funding shall constitute good cause for suspending or terminating operation of the Bank.

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L. Adaptive Management Plan

The Galveston District IRT does not view adaptive management as an initial mechanism to address non-compliance. The Sponsor should not assume that adaptive management would be determined to be the appropriate response to non-compliance. The Corps, in coordination with the IRT, will determine whether it necessary to approve an adaptive management proposal. This will not result in a lowering of performance standards. Sponsor must explain its adaptive management plan consistent with performance standards, monitoring and maintenance, and financial assurances.

Adaptive management necessitates stated management objectives to guide decisions about what to try and explicit assumptions about expected outcomes to compare against actual outcomes. The linkages among management objectives, learning about the system, and adjusting direction based on what is learned distinguish adaptive management from a simple trial and error process. Therefore, success in adaptive management ultimately depends on effectively linking monitoring and assessment to objective-driven decision making. During the operational phase of the bank. Prior to and during long-term management, adaptive management is not a short-term fix, an assumed resolution to non-compliance or failure to meet a performance standard(s), or responding to single events or short-term problems caused by weather, normal cyclical fluctuations in plant and animal populations, or human interruptions. Accordingly, the conditions and components of adaptive management will be a product of analyzing whether the Bank is currently progressing toward desired outcomes; whether new or improved methods are available to prescribe; and predicting the expected effects of the plan.

M. 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.

Sponsor shall provide a detailed description of the financial assurances (FA) and their sufficiency to ensure a high level of confidence that the project will be successfully completed. Financial assurances may be in the form of performance bonds, escrow accounts, casualty insurance, letters of credit, or other appropriate instruments, subject to approval by USACE in coordination with the IRT.

Financial assurances may be phased out once the compensatory mitigation project has been determined by USACE to be successful in accordance with its performance standards. The MBI must clearly specify the

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conditions under which the financial assurances are to be released to the sponsor, and/or other financial assurance provider, including, as appropriate, linkage to achievement of performance standards, adaptive management, or compliance with special conditions. A financial assurance must be in a form that ensures that the district engineer will receive notification at least 120 days in advance of any termination or revocation. For 3rd party assurance providers, this may take the form of a contractual requirement for the assurance provider to notify the district engineer at least 120 days before the assurance is revoked or terminated. Financial assurances shall be payable at the direction of the district engineer to an approved designee or to a standby trust agreement. When a standby trust is used (e.g., with performance bonds or letters of credit) all amounts paid by the financial assurance provider shall be deposited directly into the standby trust fund for distribution by the trustee in accordance with the district engineer's approval.

Per 33CFR332, the Sponsor must provide sufficient financial assurances to ensure a high level of confidence that the compensatory mitigation project will be successfully completed and maintained in accordance with applicable performance standards. The Sponsor will secure sufficient financial resources, taking into account inflation, to ensure compliance with the requirements of the MBI in the event that the Sponsor is no longer able or willing to operate the bank in compliance with the MBI. This financial assurance should be sufficient to provide for maintenance and operation of the bank's activities, monitoring, reporting, and any remedial actions that might be necessary. Site-specific considerations, such as the position of the bank within the watershed, normal hydrology, soils, type and extent of site development activities proposed, and expected relative ease or difficulty of achieving the performance standards, may affect the size of the financial assurance. Failure to maintain an adequate financial assurance shall constitute good cause for suspending or terminating operation of the bank.

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PART IV: BANK OPERATIONS

A. ACCOUNTING PROCEDURES

Sponsor must describe, in detail, the provisions that 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. Each ledger submitted must be dated. This should also address the process the sponsor intends to use regarding "reserved" credits, including the reporting of such credits.(example ledger should be included)

The sponsor shall also use this section to describe 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 by functional category and permitted impacts for each credit type (e.g., stream), 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).

Sponsor will establish and maintain a system for tracking the production of credits, credit transactions, and financial transactions between Sponsor and permittee. Credit production, credit transactions, and financial transactions must be tracked on a bank basis and separately for each individual permit. Credits will be debited from the ledger once a financial transaction has occurred. The Sponsor will notify the USACE of each transaction and provide the USACE a copy of the ledger entry within 15 days of each transaction. Sponsor will inform the IRT of the status of credits reserved on an independent submittal.

Each ledger entry will include the following information: Date of submittal. USACE-permit applicant's name, address, and telephone number,

- **USACE-permit and/or other identification number,**
- **Brief description of the location and type of the authorized work (8-dHUC),**
- **Brief description of the nature and extent of adverse project impacts,**
- **Sponsor assumes legal responsibility for the mitigation requirements,**
- **Account balance before transaction,**
- **Date of transaction,**
- **Number of credits currently available,**
- **Number of credits debited from the credit availability account, and**
- **Account balance after transaction.**

The Sponsor shall also provide an annual statement of the account to USACE by (date) of each year until all credits have been withdrawn and bank closed."

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

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current and compliant. RIBITS mandatory information fields include the following:

1. Jurisdiction Type
2. Transaction Date
3. Credits Debited
4. USACE Permit Number (Format: SWG/Yr/Permit # (e.g.SWG-2000-00150))
5. Name of Permittee
6. Credit Classification (if applicable, with functional assessment subcategories identified; (e.g. iHGM identify amounts within each functional category TSSW/RSEC/MPAC, etc.)

Compliance with RIBITS reporting does not supersede the requirement of the sponsor to submit individual transaction reports.

B. REPORTING PROTOCOLS

Sponsor should ensure that all requirements identified in Regulatory Guidance Letter (RGL) 08-03 will be met. The Sponsor shall provide a financial assurance statement to USACE by (date) of each year in which financial assurances and/or Long-Term funding reports are required. In the financial assurance statement, the Sponsor shall discuss the status of the fund/assurance and propose any reduction or increase that the Sponsor deems appropriate in light of the requirements of the MBI. USACE will evaluate the proposal and, after coordination with the IRT, provide the Sponsor a decision. Along with the report, the sponsor must include a signed statement that their account is (or is not) in compliance.

C. CREDIT RELEASE SCHEDULE

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

Release of credits must be tied to performance-based milestones (e.g., specified number of functional units). This should include a detailed explanation substantiating when credits are generated and released. No credits will be released until a conservation easement is recorded on the bank. Credit release should in most cases be based on subsequent iHGM/HGM scores substantiating the lift earned, with some exceptions given for bank viability. In any case, any initial credit will be required to have sufficient financial assurances to be considered. No credits can be sold until they are officially released by USACE (in writing).

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D. 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 notify the USACE immediately, and 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 ecological success criteria, the IRT (acting through USACE), 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.

E. APPROVED CREDIT QUANTITIES

Example: Upon signature of the document, the USACE, in consultation with the IRT, grants the sponsor the proposed quantities of wetland/ stream credits, as described in Part XX 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 ecological performance standards are not met or adjusted upward if the ecological performance standards are significantly exceeded.

F. FORCE MAJEURE

Any delay or failure of the Sponsor to comply with the terms of the MBI shall not constitute a default if and to the extent that such delay or failure is primarily caused by any force majeure event, as determined by the USACE, resulting in conditions beyond the Sponsor's reasonable control and significantly adversely affects its ability to perform its obligations hereunder. The Sponsor shall give written notice to the USACE and IRT if affected by any such event within 60 days in order to restore compliance. Following a force majeure event the Sponsor should not expect the bank to be in compliance with the MBI, therefore, the bank may be suspended, terminated or closed. Because of a force majeure event, the bank may not be in compliance or meet performance standards. If the Corps agrees that a force majeure event, the bank will be suspended until remedial actions and remaining mitigation obligations are approved. In the event that the bank is not in compliance, not meeting performance standards, and ultimately if the result of the force majeure event is that the bank is suspended, terminated or closed, the Sponsor remains liable for fulfilling all remaining mitigation obligations including maintenance, monitoring, reporting, and long-term management requirements.

G. VALIDITY, MODIFICATION, OR TERMINATION OF THE MITIGATION BANK

This MBI will become valid upon signature by the U.S. Army Corps of Engineers and bank sponsor. This MBI may be amended, altered, released, or revoked only by written approval by USACE to the parties hereto or their heirs, assigns or successors-in-interest. The amendment must follow the appropriate procedures listed in 33 CFR 332.8 unless the district engineer

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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.

H. CONTROLLING LANGUAGE

Corps permit # and MBI documents referenced should include:

To the extent that specific language in this document or appendices 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 Department of the Army Permit ([Permit #](#)) and MBI shall be controlling.

I. DEFAULT/CLOSURE PROVISIONS

If the USACE/IRT determines that the Sponsor has failed to provide the required compensatory mitigation performance standards, submit monitoring reports on time, establish and maintain ledgers and reports in accordance with the provisions in Sections xx, and/or otherwise comply with the terms of the MBI, the USACE will take appropriate action to enforce compliance with the terms of the MBI. Such actions may include suspending credits sales, decreasing available credits, requiring adaptive management measures, utilizing financial assurances or contingency funds, terminating the MBI, or referring the non-compliance with the terms of the instrument to the Department of Justice. The Sponsor shall remain responsible for fulfilling these obligations until such time as the long-term financial obligations have been met and the long-term liability of all mitigation has been transferred to a party approved by USACE, in coordination with the IRT.

Bank closure shall be the first date that all of the following have occurred:

- 1) all performance standards have been achieved and verified by USACE,
- 2) all monitoring requirements have been met and verified by USACE,
- 3) all financial responsibilities have been met, including 100% of long-term management funding in place for not less than one year, and
- 4) USACE approval, in coordination with the IRT, of either the sponsor's written request for bank closure or otherwise determined closed by discretion of the District Engineer.

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ADDITIONAL INFORMATION

This section should be used for any additional specific information that the USACE directs the sponsor to incorporate in the MBI including, but not limited to:

Appendices and/or associated documents e.g. legal description of the Property that includes a reference to a Plat; (also mineral owners)

Sponsor must obtain all appropriate permits or other authorizations needed to construct and maintain the bank. The MBI does not fulfill or substitute for such authorization.

Document Submittal. Sponsors will be required to send hard copy documents (draft prospectus, prospectus, draft MBI(s), final MBI, reports, etc.) directly to the IRT (both hard and e-copy). In addition to response to comments etc. Sponsors will also submit annotated versions of revised documents (i.e. MS Word tracked changes) to clearly demonstrate how all comments have been addressed.

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Signature Pages:

Upon approval of the final instrument by the Sponsor and USACE (same page).
USACE will coordinate for IRT signatures (separate pages) by the appropriate parties.

SPONSOR: (Name of Sponsor e.g. MITIGATION BANKING INC.)

(Name of Signatory/Representative)
(w/proof of authority to sign)

Date

U.S. ARMY CORPS OF ENGINEERS, GALVESTON DISTRICT

Kimberly S. Older
Chief, Regulatory Division

Date

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Provide each IRT Agency Signatory on separate signature page

Signature Page:

U.S. ENVIRONMENTAL PROTECTION AGENCY, REGION 6

William K. Honker, P.E.
Director, Water Quality Protection Division

Date

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Signature Page:

U.S. FISH AND WILDLIFE SERVICE

Edith Erfling
Field Supervisor, Clear Lake Field Office

Date

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Signature Page:

USDA-NATURAL RESOURCES CONSERVATION SERVICE

Salvador Salinas
State Conservationist

Date

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Signature Page:

TEXAS PARKS AND WILDLIFE DEPARTMENT

Carter Smith
Executive Director

Date

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Signature Page:

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Charles Maguire
Director, Water Quality Division

Date

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Signature Page:

TEXAS GENERAL LAND OFFICE

George Bush
Land Commissioner

Date

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ATTACHMENTS

Include all referenced attachments. Examples may include the following:

- A. Figures*
- B. Mitigation Plan*
- C. Approved Jurisdictional Delineation of Waters of the U.S., Including Wetlands*
- D. Site Photos*
- E. Approved/Verified Functional/Conditional Assessment*
- F. Credit Evaluation*
- G. Final Draft of Site Protection Instrument (conservation easement)*
- H. Long-term Management Plan & Funding Agreements*
- I. Letter of Agreement Identifying the Long-term Steward*
- J. Financial Assurances Documents (e.g. final draft of escrow agreement, bond, etc.)*
- K. Assurance of Water Rights (e.g. water rights permit)*
- L. Other*