



DEPARTMENT OF THE ARMY
GALVESTON DISTRICT, CORPS OF ENGINEERS
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CE-SWG-RD

MEMORANDUM FOR: All SWG Regulatory Personnel.

SUBJECT: Standard Operating Procedure for Mitigation Bank / In-Lieu-Fee Proposals

1. Purpose: The purpose of the Standard Operating Procedure (SOP) is to disseminate established standards, and implement preferential criteria for streamlining the submission of mitigation bank (MB) and in-lieu fee program (ILF) prospectus and instruments to the U.S. Army Corps of Engineers (Corps), Galveston District (SWG) and the SWG Inter-agency Review Team (IRT).

2. Location: These Procedures will be applicable to all MB/ILF proposals within the Regulatory boundaries of the USACE, Galveston District.

3. References:

- 33 CFR 332 and Compensatory Mitigation for Losses of Aquatic Resources (73 Fed. Reg. 19594, 10 April 2008) (Federal Register, Vol. 73, No. 70).
- Regulatory Guidance Letter No. 08-03 (10OCT2008).
- CECW-CO-R Memorandum Mandatory Provision to Include in All Mitigation Banking Instruments and In-Lieu Fee Program Instruments (9JUL2014)
- Regulatory Information Memorandum No. SWD-2015-1 (20OCT2015).

4. Introduction: This SOP, pursuant to RIM-SWD-2015-1 (above), was developed based on comparable documents published by other Corps districts, as well as input from IRT member agencies. The SOP, along with the use of the SWG Draft Prospectus Checklist, SWG Prospectus Template, and SWG Draft Mitigation Banking Instrument Template, will serve to increase consistency, predictability and transparency for MB/ILF activities, in addition to expediting the review process.

5. Required MB/ILF Documents: The sponsor is responsible for preparing and submitting all documentation required by 33CFR332.8 to establish a MB or ILF, including: 1) a draft prospectus (optional); 2) the complete prospectus; 3) the draft mitigation banking instrument (MBI); 4) the final MBI, with all associated documents (e.g. mitigation plan, long-term management plan, conservation easement, financial agreements, etc.). The standards and criteria that follow specify the level of documentation for each required submittal (above), and are implemented to expedite the review process for MB/ILF proposals in SWG respectively. It is the SWG approved final MBI that provides the authorization necessary for a MB or ILF to sell credits to be used as compensatory mitigation for DA permits (ref: 33CFR332.8 (d)). A SWG Draft MBI Template, is being made available (Appendix III), to highlight additional detail on information and implemented preferential criteria required for MBI document submittals. Sponsors are required to submit both hard copies and electronic copies (e.g. pdf) of each respective document to the SWG Regulatory Division for review and approval.

5.1. Draft Prospectus: The purpose of a draft prospectus is to allow a sponsor to propose a bank site and/or site development plan to the IRT and receive preliminary comments prior to committing a large amount of resources of either the sponsor or the IRT. This preliminary review is optional but is strongly recommended and encouraged. Once received, SWG will provide copies of the draft prospectus to the IRT for review & comment and will provide all IRT comments back to the sponsor within 45 days. Details on the specific information required for a draft prospectus are provided in Appendix I.

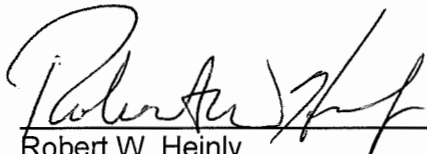
5.2. Complete Prospectus: The formal review process begins when the sponsor submits a complete prospectus to SWG. The prospectus must provide the basic overview of the proposed MB or ILF at a sufficient level of detail to support an informed public and IRT review and comment. Since the fundamental objective of compensatory mitigation is to offset aquatic resource functions lost as a result of unavoidable impacts to Waters of the United States (WOTUS), ascertaining a mitigation site's potential to support and sustain aquatic resource functions, including existing WOTUS, is critical. After receiving preliminary comments afforded by the draft prospectus, an approved jurisdictional delineation and verified functional assessment of the site is generally warranted to facilitate informed public and IRT comments and should be submitted as part of a complete prospectus. SWG will notify the sponsor within 30 days of receipt, whether or not a prospectus is complete. Within 30 days of receipt of a complete prospectus, SWG will publish a public notice of the proposed MB or ILF, in accordance with the public notice procedures at 33 CFR 325.3. The comment period for public notice will be 30 days, unless SWG determines that a longer comment period is appropriate. After the end of the comment period, SWG will review the comments received in response to the public notice, and make a written initial evaluation as to the potential of the proposed MB or ILF to provide compensatory mitigation for activities authorized by DA permits. This initial evaluation letter will be provided to the sponsor within 30 days of the end of the public notice comment period. If SWG determines that the proposed MB or ILF has potential for providing appropriate compensatory mitigation for activities authorized by DA permits, the initial evaluation letter will inform the sponsor that he/she may proceed with preparation of the draft MBI. SWG will transmit copies of all consolidated comments received in response to the public notice as an attachment to the evaluation letter. Copies will be distributed to the other IRT members and to the sponsor. Details on specific information required for a complete prospectus is provided in Appendix II.

5.3. Draft MBI: After considering comments from SWG, the IRT, and the public, if the sponsor chooses to proceed with establishment of the MB or ILF, the sponsor must prepare a draft MBI and submit both a hard copy and electronic copy (e.g. pdf) of the draft instrument to the SWG Regulatory Division. SWG will notify the sponsor within 30 days of receipt, whether the draft MBI or amendment is complete. If complete, SWG will request that the sponsor distribute both a hard copy and electronic copy of the draft instrument to each of the SWG IRT members. SWG will coordinate to solicit IRT review of the draft instrument for a 30-day comment period. Following the comment period, SWG will coordinate the consolidated comments with the sponsor and IRT agencies and request a response to comments document from the sponsor. SWG will continue to work with the sponsor and IRT to resolve issues using a consensus based approach. Within 90-100 days of receipt of the complete draft MBI by the IRT members, SWG will notify the sponsor of the status of the IRT review. Specifically, SWG will indicate to the sponsor if the draft MBI is generally acceptable and what changes, if any, are needed. If there are significant unresolved concerns that may lead to a formal objection from one or more IRT members to the final MBI, SWG will indicate the nature of those concerns. The following provision must be included in any instrument for a

MB or ILF, or any modification of a previously approved MB or ILF instrument: "USACE approval of this Instrument constitutes the regulatory approval required for the [INSERT NAME OF MB or ILF] to be used to provide compensatory mitigation for Department of the Army permits pursuant to 33 CFR 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". Additional detail on the specific information required for a complete DMBI is provided in Appendix III.

5.4. Final MBI: The sponsor must submit a complete hard copy and electronic copy of the final MBI to SWG RD for approval, with supporting documentation that explains how the final instrument addresses all of the comments provided by the IRT. For modifications of approved instruments, the sponsor must submit a final amended MBI for approval, with supporting documentation that explains how the final amendment addresses the comments provided by the IRT. All copies of the final MBI or final amended MBI must be provided directly by the sponsor to SWG and all members of the IRT.

6. Conclusion: By following the above guidelines for providing the level of documentation for each submittal required by 33CFR332.8 to the SWG IRT; and by including the requested information in the Appendices; sponsors will benefit from a streamlined and comprehensive review by the Corps and the IRT within a predictable timeframe. These Guidelines along with use of the SWG Checklist and Templates (found at: <https://www.swg.usace.army.mil/Business-With-Us/Regulatory/>) will serve to increase predictability and transparency for mitigation banking activities, in addition to expediting the MB/ILF review process.



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FOR COLONEL LARS N. ZETTERSTROM

9/13/18
Date

Enclosures - Appendix I, II, and III