

OVERVIEW OF MITIGATION BANKING TEMPLATE

Mark G. McIntosh,
Regulatory Specialist, Technical Services Branch
Regulatory Division
U.S. Army Corps of Engineers
19 April 2017

“The views, opinions and findings contained in this report are those of the authors(s) and should not be construed as an official Department of the Army position, policy or decision, unless so designated by other official documentation.”



**US Army Corps
of Engineers.**



PURPOSE OF MITIGATION TEMPLATE DOCUMENT

- To insure the proposed project meets all requirements contained within the 2008 Mitigation Rule
- Facilitate consistent review of proposed mitigation banks
- Provide predictability for mitigation bank sponsors
- Reduce mitigation bank development time
- Reduce IRT review time



OVERVIEW OF MITIGATION TEMPLATE DOCUMENT

- Document consists of 10 Sections and Exhibits A - I
- All italicized **BLUE** text should be replaced with project specific information.
- Any changes to standard language should be submitted in red highlights, and will be subject to additional IRT Review.

DRAFT DELIBERATIVE – Information Contained in this Draft Document is Subject to Change

Note: Do not change or remove parts of the template, any changes to standard language should be submitted in red highlights. All blue text should be replaced with project specific information.

MITIGATION BANKING INSTRUMENT

[BANK NAME] MITIGATION BANK

This Mitigation Banking Instrument (“MBI”), dated this ___ day of _____, 20____, is made by and among [Bank Sponsor’s full legal name(s)] (“Bank Sponsor”), [Property Owner’s full legal name(s)] (“Property Owner”), and [*delete name(s) of any of the following agencies that is not a party: the Nashville District of the U.S. Army Corps of Engineers (“USACE”), Louisville District of the U.S. Army Corps of Engineers (“USACE”), Memphis District of the U.S. Army Corps of Engineers (“USACE”), Region 4 of the U.S. Environmental Protection Agency (“USEPA”), the U.S. Fish and Wildlife Service (“USFWS”), the Natural Resources Conservation Service (“NRCS”), the Tennessee Valley Authority (“TVA”), the Tennessee Department of Environment and Conservation (“TDEC”), the Tennessee Wildlife Resources Agency (“TWRA”), Kentucky Department of Fish and Wildlife Resources (“KDFWR”), Kentucky Division of Water (“KDOW”), the Alabama Department of Environmental Management (“ADEM”), and the Alabama Department of Conservation and Natural Resources (“ADCNR”).*] These agencies comprise and are referred to jointly as the Interagency Review Team (“IRT”). The Bank Sponsor, Property Owner, and the IRT are hereinafter referred to jointly as the “Parties.” This MBI sets forth the agreement of the Parties regarding the establishment, use, operation and maintenance of the [Bank name] Mitigation Bank (the “Bank”).

USACE approval of this Instrument constitutes the regulatory approval required for the 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.

RECITALS

- The Bank Sponsor is responsible for establishing, operating, and maintaining the Bank according to this MBI.
- The Property Owner is the owner of real property containing approximately _____ acres (the “Property”), located at _____ [*insert coordinates in decimal degrees, address and county*], State of (*Alabama, Tennessee, or Kentucky*), designated Assessor’s Parcel

[Bank Name] Mitigation Bank [Version Date]

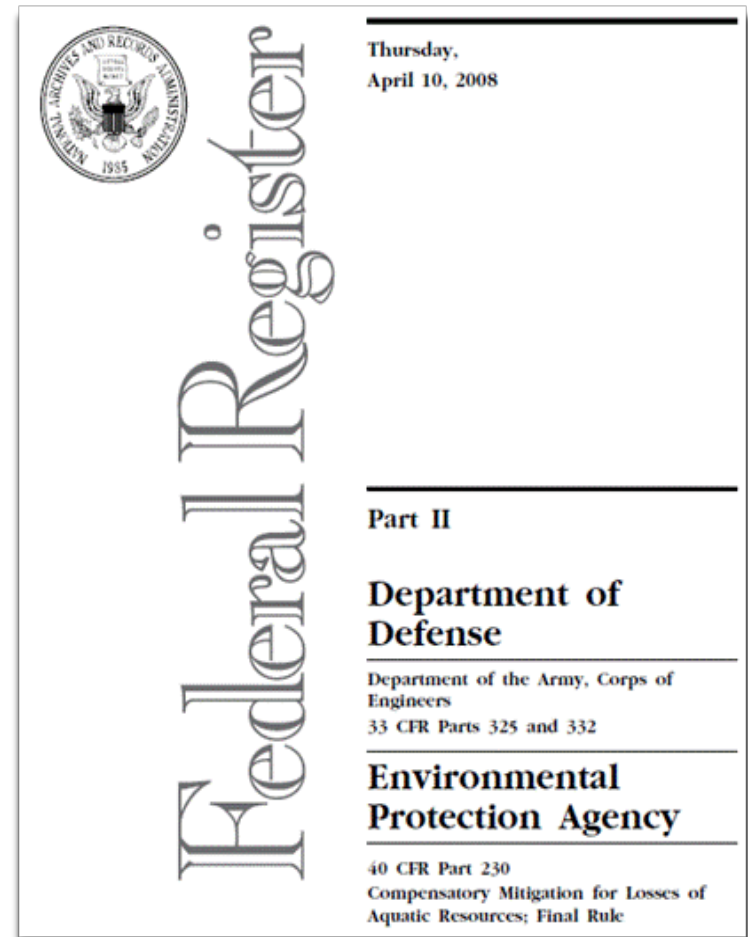
DEFINITIONS

- As-Built Plan
 - Construction Phase
 - Construction Financial Assurance Analysis & Schedule
 - Monitoring & Adaptive Management Phase
 - Monitoring & Adaptive Management Financial Assurance Analysis & Schedule
 - Long Term Management Phase
 - Long Term Management Financial Assurance Analysis & Schedule
- Key mitigation banking instrument terms have been defined to provide clarity and consistency in interpreting specific sections of the Template MBI



12 COMPONENTS OF A MITIGATION PLAN REQUIRED FOR ALL MITIGATION PROJECTS IN ACCORDANCE WITH THE 2008 MITIGATION RULE (33 CFR 332.4(C))

1. Objectives
2. Site Selection Factors
3. Site Protection Instrument
4. Baseline Information
5. Work Plan
6. Maintenance Plan
7. Performance Standards
8. Monitoring Requirements
9. Financial Assurances
10. Credit Determination
11. Long-Term Management Plan
12. Adaptive Management Plan



US Army Corps
of Engineers.



SITE PROTECTION INSTRUMENT

- Title Report
- Title Insurance
- Plat Map(s)
- Real Estate Protection Instrument



NOTICE OF LAND USE RESTRICTIONS ("[Add Property Name"])

Notice is hereby given that pursuant to their respective authorities found at Tennessee Code Annotated (T.C.A.) Section 68-212-225 and 33 Code of Federal Regulations (CFR) Section 332.7(a), the Commissioner of the Tennessee Department of Environment and Conservation ("TDEC") and the Nashville District Engineer of the United States Corps of Engineers ("USACE") have determined that land use restrictions are an appropriate remedial action at the below-described property. Pursuant to T.C.A. Section 68-212-225(d) the register of deeds shall record this Notice and index it in the grantor index under the names of the owners of the property.

WITNESSETH:

WHEREAS, _____ (Grantor), is the owner of approximately _____ acres of real property described in a Deed of record with the _____ County Tennessee Register of Deeds, Book _____, Page _____, herein after referred to as the "Property"; and,

WHEREAS, the Property is shown on a survey drawn by _____ dated _____, attached hereto as Exhibit A and incorporated herein by reference; and,

WHEREAS, the Property possesses natural resources with significant aquatic, ecological and habitat values ("Conservation Values"). These natural resources are of aesthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people. These values include Waters of the U.S., as defined in 40 C.F.R. § 122.2 (Oct. 1, 2009), including streams, wetlands and the adjacent uplands, and other native vegetation and wildlife. These natural resources are of great importance to both TDEC, the Grantor, and the United States Army Corps of Engineers ("USACE");

WHEREAS, the Property has been approved by USACE for use as mitigation pursuant to and as defined in 33 C.F.R. Part 332 (April 10, 2008);

WHEREAS, the Property has been identified as being occupied by, or as being potential habitat for species of native plants and wildlife which Grantor desires to establish, preserve, protect, restore and enhance;

WHEREAS, on or about _____, the Commissioner of the Department of Environment and Conservation (TDEC) issued Aquatic Resource Alteration Permit (ARAP) Number _____ to Grantor; and,

ARAP Number _____; CWA Number _____

Page 1



**US Army Corps
of Engineers.**



CREDIT RELEASE SCHEDULE

- Example stream and wetland credit release schedules are provided in the document
- Credit releases occur when mitigation banks meet specific milestones, and/or ecologically based performance standards
- Alternative credit release schedules may be proposed by mitigation bank sponsors, and evaluated by the IRT on a case-by-case basis



FINANCIAL ASSURANCES (FA)

- Establishes and defines the following financial assurances
 - Construction FA
 - Monitoring & Adaptive Management FA
 - Long Term Management Fund
- Lays out the procedures for the establishment, funding, and release of financial assurances



LONG TERM MANAGEMENT PLAN

- MBI Template provides guidance on Long-Term Management cost analysis, funding amounts, funding procedures, and related topics.
- *Long-Term Management Fund Analysis and Schedule (Ex. Property Analysis Record (PAR) (Center for Natural Lands Management), Long-Term Stewardship Calculator (The Nature Conservancy)*

Table 1. Estimated Long-Term Management Costs

Task	Expenditure	Labor/Source	Specification	Unit	Number of Units		Item	Cost/Item	Total Cost	Recurrence Interval (per)	Annual Cost	Total Annual Cost	
					Project (\$38/hr.)	Biologist (\$30/hr)							
Inspect boundary lines	annual	staff	Boundary line inspection and maintenance	L hours		8	0.00	\$30.00	\$240.00	2	\$480.00		
Repaint boundary lines	annual	staff	Paint and mark boundary lines	L hours		8	0.00	\$30.00	\$240.00	1	\$240.00		
Replace signs	annual	staff	Replace signs	L hours		8	0.00	\$30.00	\$240.00	1	\$240.00		
Undesirable vegetation control	annual	contr	Exotic and invasive vegetation control	Acres			5.00	\$250.00	\$1250.00	1	\$1250.00		
Annual Monitoring Report	annual	staff	Prepare annual monitoring report for IRT	L hours	8		0.00	\$38.00	\$304.00	1	\$304.00		
Project Management	annual	staff	Project Management	L hours	8		0.00	\$38.00	\$304.00	2	\$3648.00		
Monthly General Inspections	annual	staff	General Inspections	L hours		8	0.00	\$30.00	\$240.00	2	\$2880.00		
Beaver Control	annual	staff	Monitor and control adverse beaver activity	L hours		8	0.00	\$30.00	\$240.00	6	\$1440.00		
Road Maintenance	annual	contr	clipping side of roads, repair erosion, etc.	Miles			3.00	\$500.00	\$1500.00	1	\$1500.00		
												Annual Maintenance Cost	\$11982.00
												10% Administration Fee	
												22% Contingency Fee	\$2,636.04
												Total Annual Cost	\$14,618.04
												Endowment starting Principle	\$625,456.48
Total Fund Deposit	\$625,456.48												
Contingency Fee	22%												
Net Interest Rate*	3.0%												
*Net interest is interest less inflation													
<p>Note: Property tax is not calculated in the formula because XXXXX does not pay property tax as a non-profit.</p>													

OTHER PROVISIONS

- Provides common standardized banking provisions including: Force Majeure, Default, Modification and Termination of the Instrument, Availability of Funds, etc.



B. Bank Sponsor's Responsibilities for Bank Development	24
C. Approvals	24
D. Subsequent Phases	25
E. Modification of the Mitigation Plan	25
Section IV: Bank Establishment Date	25
Section V: Operation of the Bank	25
A. Service Area	25
B. Transfer and Use of Credits	25
C. Bank Closure Plan	26
Section VI: Responsibilities of the Bank Sponsor and/or Property Owner	27
Section VII: Responsibilities of the IRT	29
A. IRT Oversight	29
B. Compliance Inspections	29
Section VIII: Other Provisions	29
A. Force Majeure	29
B. Dispute Resolution	30
C. Conveyance of Bank or Bank Property or Other Interests	31
D. Modification and Termination of the MBI	32
E. Default	33
F. Controlling Language	35
G. Entire Agreement	35
H. Reasonableness and Good Faith	35
I. Successors and Assigns	36
J. Partial Invalidation	36
K. Notices	36
L. Counterparts	38
M. No Third Party Beneficiaries	38
N. Availability of Funds	38
O. No Partnerships	38
P. Applicable Laws	38
Q. No Federal Contract or Monetary Damages	38
Section IX: Reporting	38
A. Annual Report	39
i. Bank Development	39
ii. Transfer of Credits	39
iii. Credit Transfer Reporting	39
iv. Reporting Compliance Measures	39
B. Adaptive Management and Long-Term Management	40
Section X: Execution	40



QUESTIONS



US Army Corps
of Engineers.

