

A Public Notice was available from 15 December 2003 through 12 February 2004 on the Guidance for Compensatory Mitigation and Mitigation Banking in the Omaha District for the public to review.

Several comments received were in regards to the use of language within the document and were corrected but not addressed below. Aggregated comments below were designed to aid in clarification of the guidance document.

GENERAL COMMENTS

There were several comments regarding the number of years between possible revisions and how that might effect agencies such as DORs that need to purchase Right-of-Way (ROW) areas and how interested parties can keep up with the changes. *The Corps will revise the review process and change the update period to every 2-3 years. Please keep in mind that especially in the case of a DOR and advanced purchases such as a ROW these would apply to the version that the project took place and would not be expected to have to adapt to new policy. To the best of our ability we will try to keep all interested parties involved by placing notification of any changes on the Internet site. Current site address is: <http://www.nwo.usace.army.mil/html/od-r/mitbnk.htm>*

Establishing an upland vegetative buffer adjacent to wetlands and streams enhances the functions of these aquatic systems. However, if establishing an upland buffer is credited for wetland mitigation, then the loss of a buffer due to construction should be mitigated. The HGM considers the presence or absence of a buffer in rating the functions of wetlands at both the construction and mitigation sites. In contrast, the use of mitigation ratios has typically given credit for the establishment of buffers at a mitigation site, but has not considered mitigation for the destruction of a buffer at the construction site. *If the intent of this comment is as understood, the Corps does not have authority to regulate upland buffer areas of wetlands unless the wetland is directly impacted. [UPDATE] Establishment of buffers at a mitigation site can occur on a case-by-case basis depending on the Scope of Analysis of the project.*

Several questions were sent in regarding the lack of good stream mitigation guidance. *The Omaha District does agree that stream mitigation is very important and complicated. Because of the complex nature of streams our stream mitigation process has been slow. We do however plan on getting better guidance on streams in the near future; we did not want to hold up all guidance in the mean time.*

Several Department of Roads had concerns over limiting mitigation to within a watershed since often their projects are linear in nature.

Since the impacted wetland/aquatic resource was established in a particular watershed and originally attributed to its overall health it should naturally be mitigated within that same watershed so as not to further impact it. That said, the Corps does also allow more than one watershed to be considered within the service area when it can be shown that shifting the mitigation site to another watershed could/would have more ecological benefits.

PART B COMMENTS

There were several comments regarding buffers, Right-of-Ways (ROW), and their conditions.

This Omaha District guidance typically applies to standard situations. The Corps is aware of extenuating situations and project managers in conjunction with appropriate District personnel can make exceptions as long as they can be adequately documented as to the reason. The Corps understands that often times the DORs have to purchase ROW well in advance and these situations are taken into consideration. The buffer width came from our headquarters (Condition 19, Mitigation). At a minimum the vegetated buffer should include the minimum success criteria listed in section III though the project manager may have additional requirements.

Table 1 is indented to be a guide allowing the project manager/State Supervisor who is familiar with the area to make that exact determination. Under minimum evaluation criteria a section on upland buffer has been added to cover additional concerns.

There were questions regarding Mitigation plans, Force Majeure and site protection.

When the completed mitigation plan is not available during the Public Notice period the Omaha District has decided to allow 7-10 days from the date the Corps mails the mitigation plan for agency review.

The Corps' goal is to have the mitigation last as long as the impacts and one way to work towards that goal is to have protective measures such as easements.

Force Majeure refers to an exception that would excuse someone from their obligation to replace lost aquatic resource functions. Because this applies on a case-by-case basis the terminology "Unexpected and disruptive forces that are beyond what would be considered as normal or natural disturbance" will remain.

Several comments were received regarding the success criteria and the Floristic Quality Index (FQI).

The bullet regarding the buffer area must remain undisturbed had been correct to reflect that sound management practices are accepted.

Currently no assessment of any kind is being required and often times there are disputes as to the condition of a site. Applying FQI is an attempt to remove a small portion of subjectivity since all parties doing FQI should be reaching relatively the same score. This would also aid in the mitigation since it would be a score (less subjective) in which to match or exceed. Because vegetation is usually an indicator of conditions at a site the FQI was chosen but only in small, simple or non-controversial sites similar to how the routine method is applied with the '87 manual.

Appendix J contains a description of the Taft (1997) article explaining the Floristic Quality Index. FQI is a vegetation assessment not necessarily meant for a wildlife score. FQI can be used on all species found or based on dominant species.

Once the project manager assigns the 'routine' method and after a delineation has been performed then this method can be calculated. No additional information needs to be obtained and no additional training or extra field time is expected when using FQI. The Coefficient of conservatism (C-value) is based on categories created on how plant species rank within a region's natural setting. Typically a Heritage Program (experts from the same region) determines the C-values and so values are determined in advance (They are independent of the Corps). While the FQI doesn't address all issues to a wetland it can serve as an adequate indicator of a site's condition. Since choosing the appropriate method depends on use and objectives of a project a Project Manager can request additional information that they see fit for the project. The Routine and comprehensive methods are labeled as minimum requirements.

Please note that there are some states within the Omaha District that do not currently have C-values established and therefore cannot use that option at this time.

A grant program has developed regional application tools for assessing the condition of wetlands. The Region would welcome cooperative efforts with the Corps and other agencies to develop this approach to other wetland types in a regulatory context. The Corps would be interested in this development as well.

Several questions pertained to areas within the section of Monitoring and Reporting.

Because wetlands are dynamic ecosystems, it is the Omaha District's belief that it is important to be able to review at a minimum of 5 years of site data before it can be adequately concluded that a site would be able to mimic natural wetlands and adapt to the natural wet/dry cycles that occur. Because climatic conditions can change year after year it is prudent to have several years worth of data to get a better idea of the site's characteristics. Research has also suggested that it takes a minimum of three years of active management to control invasive plant species such as Phalaris so that native plants have a better chance to survive. If we didn't have enough monitoring cycles the wetland site might end up being a monotypic stand and ultimately not replacing lost functions. A minimum of 5 years was chosen because the Corps does realize that it would be a burden to obligate someone indefinitely trying to account for all possible natural situations.

The purpose of monitoring is to see if the site is progressing in such a way that would improve the sites ability to adapt to the natural cycle. If more monitoring is needed it implies the site is not quite functioning as projected and therefore should not necessarily be considered a success or get full credits.

Regarding the specific report itself, a Project manager may tailor the monitoring report to fit special cases or needs.

PART C COMMENTS

A few comments were received regarding banks creating one large wetland.

One noted advantage to mitigation banks is that they take small isolated wetlands and aggregate them into a larger complex. This does not mean one large wetland but a complex - several small wetlands positioned on the landscape that creates a bank as a whole.

There were a few comments regarding the Roles of Sponsor and MBRT.

The Omaha District is aware that when a sponsor is another government agency that they cannot always secure the required easements and in those cases a letter stating the fact with a promise to obligate the necessary funds to complete the project will suffice.

The MBRT is the neutral overseeing entity that has no monetary investments in the bank. Their decisions and requirements are to be based on ecological benefits the bank is designed to create with the idea that these benefits will offset others impacts (in the form of buying credits). Because the MBRT determines how many credits and when credits can be released and the sponsor has a financial interest in the bank (how many credits can be released and sold) it is inappropriate for the sponsor (or its agent) to be on the MBRT.

Technically, the only agency that is required to sign a mitigation bank is the Corps but having the major agencies as part of the MBRT not only assist the different programs by streamlining the process but it brings together different disciplines in order to better assist the sponsor.

Several comments were in reference to the Prospectus.

The Formal "Notice of Intent" is notice in writing that a sponsor wishes to create a bank that has been thought out to the point that a plan that details the goals, objectives and success criteria as well as acres can be provided but the sponsor wishes to get the MBRT involved to assist in any shortcomings. This is often utilized when a sponsor wishes to have some feedback from the MBRT as to the likelihood of success before too much time and money have been invested in the draft prospectus.

Mitigation banks are an investment not only monetary ways for the sponsor but in time and effort for the MBRT and allowing them to be involved at the earliest time possible gives everyone an opportunity for dialog and input which can save money and time. CRP projects can be considered for mitigation banks as long as the Letter of Intent is submitted prior to any management or easement changes.

There were several comments regarding the Instrument, the phased approach and Service areas.

The instrument represents the legal and binding agreement that must be signed by all parties (MBRT and the sponsor) that have an interest in the bank. In cases where an instrument has been approved prior to new guidance the approved and signed instrument remains intact. In the case of an umbrella agreement however it will be up to the discretion of the local MBRT to determine if any modifications are required (only for future sites).

One of the appeals for setting up an agreement (Instrument) is that everyone understands and accepts what is required of each member. In addition mitigation banks are set up years in advance of most of the debiting and in order for the sponsor to determine their costs they often times need to know the MBRT expectations. It seems it would not be in the best interest of the program to remove the legal importance of an instrument by any party.

A functional assessment is typically used to determine the amount of lift at the site, which will be used to create the credit ledger. In the case where acres are still being used a less cumbersome method may be used at the discretion of the MBRT.

It is the intention of the Omaha District to allow the phase approach because credit release is only based on the phase that is currently active and not based on all phases proposed. The benefit of allowing the phased approach is to minimize the paperwork where there is redundancy.

In the recent past many of our states have used the Major Land Resource Area maps (MLRAs) to determine service area that usually comprises many watersheds. Since our new direction is that of a watershed approach the Omaha District will continue to utilize 8-digit HUCs but rely on the MBRT to fine tune the service area to fit the individual aspects of each bank.

Several comments were received regarding the success criteria and the Floristic Quality Index (FQI).

Please see response under Part B and below

Whether restoring or establishing a wetland certain success criteria need to be met (which are established within the banking instrument). While it is much easier to obtain those success criteria at a restoration site the Omaha District did not feel a penalty should be added to those wishing to use the other option. Also, in mitigation banks situations some form of bond/credit is obtained in order to assure the bank is successful.

Several comments questioned the section of Monitoring and Reporting.

Please see response under Part B and below.

The purpose of monitoring is to see if the site is progressing in such a way that would improve the sites ability to adapt to the natural cycle. If more monitoring is needed it implies the site is not quite functioning as projected and therefore should not necessarily be considered a success or get full credits.

A few comments pertained to Protection/Long-term protection

The Omaha District feels that issues such as endowment fund to supply the perpetual care and maintenance of a bank should remain between the sponsor and the long-term manager.

There were several comments relating to Credits and Credit release/ Credit and Accounting, Compensation Ratio Table

The Omaha District policy differs from the Chicago District policy in that we do not distinguish between private, public or single-user banks and that we do not limit the maximum percentage that can be protection (preservation) or enhancement. Protection credits, which by nature are already certified, do not fall within that 30%. The 30% release policy only applies to the areas that do not yet meet banking instrument success criteria and the 1987 Corps manual. Therefore it is possible for an individual bank to actually have more than 30% of its credits available to sell before the entire site has been certified.

Because the Omaha District encompasses 6 states it is often difficult to set down one set of criteria that can adequately be applied across the board. In this situation it was decided to set a minimum threshold (two conditions added to help establish those minimums) and allow the state MBRTs to justify higher ratios for their prospective regions and ecosystems.

Often times an ideal buffer is not available as a requirement and the option of increasing the buffer by lowering the buffer ratio was designed to encourage a larger buffer than required in hopes to improve overall aquatic habitats. This is not required only proposed as one more option in appropriate cases.

With the exceptions of enhancement, protection and buffers the ratios (in Ratio A category) are at a minimum of 1:1, allowing for states to set ratios higher if they choose. The rationale for enhancement is that these are wetlands that are functioning and are 'altered' (but to what extent it not known unless a functional assessment is done) which can create a 'lag' in the natural cycle and other functions can be lowered because of the alteration so a higher ratio was applied. Since protection doesn't actually work towards the goal of 'No Net Loss' it gets a much higher ratio. Even though the Districts are encouraged to only focus on the policy of 'No net loss' the Omaha District feels that existing wetlands definitely have attributes worth saving. Similar to the idea behind protection buffers do not directly apply to the "No net loss" policy (higher ratio than actual wetlands) but because buffers can aid in the functions of a wetland they get a lower ratio than protection. Ratio B category ratios are higher because they are generally applied to pre-credits (temporal loss) and out-of-kind (not attempting to replace lost functions).

APPENDICES COMMENTS

There were a few comments relating to the Compensatory Mitigation Plan Checklist (Appendix B)

As a general guide, The Corps headquarters provided Attachment A that includes the mentioned checklist. The Omaha District will continue to utilize portions of this checklist that we see best contributes to the program for our ecoregions.

A comment regarding the Outline for Monitoring Reports.

This is a general outline and doesn't take into consideration all situations. In the case of 'mitigation sites' and the impacts are already known it will be up to the Project manager to determine how much information is needed to fulfill the necessary requirements. Because mitigation banks are typically larger and will potentially mitigate for multiple impacted sites (in the future) they need to have a much more extensive report to assure all current and future impacts are be properly mitigated.