

**DEPARTMENT OF DEFENSE**

Department of the Army

Corps of Engineers

**ENVIRONMENTAL PROTECTION AGENCY****DEPARTMENT OF AGRICULTURE**

Natural Resources Conservation Service

**DEPARTMENT OF THE INTERIOR**

Fish and Wildlife Service

**DEPARTMENT OF COMMERCE**

National Oceanic and Atmospheric Administration

**Federal Guidance for the Establishment, Use and Operation of Mitigation Banks**

**AGENCIES:** Corps of Engineers, Department of the Army, DOD; Environmental Protection Agency; Natural Resources Conservation Service, Agriculture; Fish and Wildlife Service, Interior; and National Marine Fisheries Service, National Oceanic and Atmospheric Administration, Commerce.

**ACTION:** Notice.

**SUMMARY:** The Army Corps of Engineers (Corps), Environmental Protection Agency (EPA), Natural Resources Conservation Service (NRCS), Fish and Wildlife Service (FWS) and National Marine Fisheries Service (NMFS) are proposing guidance regarding the establishment, use and operation of mitigation banks for the purpose of providing compensatory mitigation for adverse impacts to wetlands and other aquatic resources. The purpose of this guidance is to clarify the manner in which mitigation banks may be used to satisfy mitigation requirements associated with the Clean Water Act (CWA) Section 404 permit program and the wetland conservation provisions of the Food Security Act (FSA) (i.e., "Swampbuster" provisions). Recognizing the potential benefits mitigation banking offers for streamlining the permit evaluation process and providing more effective mitigation for authorized impacts to wetlands, the agencies encourage the establishment and appropriate use of mitigation banks in the Section 404 and "Swampbuster" programs.

**DATES:** Written comments must be submitted on or before April 20, 1995.

**ADDRESSES:** All comments concerning this proposed document should be

submitted in writing to: Mitigation Banking Docket, Wetlands Division, Mail Code (4502F), U.S. Environmental Protection Agency, 401 M Street, SW., Washington, DC 20460.

**FOR FURTHER INFORMATION CONTACT:** Mr. Jack Chowning (Corps) at (202) 272-1725; Ms. Julie Metz (Corps) at (703) 355-3065; Mr. Thomas Kelsch (EPA) at (202) 260-8795; Ms. Sandra Byrd (NRCS) at (202) 690-3501; Mr. Michael Long (FWS) at (703) 358-2183; Ms. Susan-Marie Stedman (NMFS) at (301) 713-2325.

**SUPPLEMENTARY INFORMATION:** Mitigating the harmful effects of necessary development actions on the Nation's wetlands and other aquatic resources is a central premise of Federal wetlands programs. The CWA Section 404 permit program relies on a sequential approach to mitigating these harmful effects by first avoiding unnecessary impacts, then minimizing environmental harm, and, finally, compensating for remaining unavoidable damage to wetlands and other aquatic resources through, for example, the restoration or creation of wetlands. Under the "Swampbuster" provisions of the FSA, farmers are required to provide mitigation to offset certain conversions of wetlands for agricultural purposes in order to maintain their program eligibility.

Mitigation banking has been defined as wetland restoration, creation, enhancement, and in exceptional circumstances, preservation undertaken expressly for the purpose of mitigating unavoidable adverse wetland losses in advance of development actions, when compensatory mitigation cannot be achieved at the development site or is not as environmentally beneficial. It typically involves the consolidation of fragmented wetland mitigation projects into one large contiguous site. Units of restored, created, enhanced or preserved wetlands are expressed as "credits" which may subsequently be withdrawn to offset "debits" incurred at a project development site.

Ideally, mitigation banks are constructed and functioning in advance of development impacts, and are seen as a way of reducing uncertainty in the CWA Section 404 permit program or the FSA "Swampbuster" program by having established compensatory mitigation credit available to an applicant. By consolidating compensation requirements, banks can more effectively replace lost wetland functions within a watershed, as well as provide economies of scale relating to the planning, implementation, monitoring and management of mitigation projects.

On August 23, 1993, the Clinton Administration released a comprehensive package of improvements to Federal wetlands programs which included support for the use of mitigation banks within environmentally sound limits as a means for compensating for authorized wetland impacts. At that same time, EPA and the Department of the Army issued interim guidance clarifying the role of mitigation banks in the Section 404 permit program and providing general guidelines for their establishment and use. In that document it was acknowledged that additional guidance would be developed, as necessary, following completion of the first phase of the Corps Institute for Water Resources national study on mitigation banking.

This notice responds to a need identified in the Corps national study for more detailed guidance on the policy of the Federal government regarding the establishment, use and operation of mitigation banks. The proposed guidance is based, in part, on the experiences to date with mitigation banking, as well as other environmental, economic and institutional issues identified through the Corps national study. The agencies are specifically soliciting public comment on the proposed guidance and will consider all comments submitted by the public in developing final guidance. A copy of the proposed guidance is published with this notice.

**John H. Zirschky,**

*Acting Assistant Secretary (Civil Works),  
Department of the Army.*

**Robert Perciasepe,**

*Assistant Administrator for Water,  
Environmental Protection Agency.*

**James R. Lyons,**

*Assistant Secretary, Natural Resources and  
Environment, Department of Agriculture.*

**George T. Frampton, Jr.,**

*Assistant Secretary for Fish and Wildlife and  
Parks, Department of the Interior.*

**Douglas K. Hall,**

*Assistant Secretary for Oceans and  
Atmosphere, Department of Commerce.*

### **Federal Guidance for the Establishment, Use and Operation of Mitigation Banks**

#### **I. Introduction**

##### *A. Purpose and Scope of Guidance*

This document provides policy guidance for the establishment, use and operation of mitigation banks for the purpose of providing compensatory mitigation for authorized adverse impacts to wetlands and other aquatic resources. This guidance is provided