

Mitigation Bank Factsheet

What is a Mitigation Bank?

Mitigation banks are one option available to compensate for unavoidable impacts to aquatic resources. The Federal Mitigation Rule adopted April 10, 2008, by the U.S. Army Corps of Engineers (USACE) and the U.S. Environmental Protection Agency (EPA) (33 CFR Part 332 and 40 CFR Part 230) defines a mitigation bank as a site, or suite of sites, where resources (e.g., wetlands, streams, riparian areas) are restored, established, enhanced, and/or preserved for the purpose of providing compensatory mitigation for impacts authorized by permits. In general, a mitigation bank sells compensatory mitigation credits to permittees whose obligation to provide compensatory mitigation is then transferred to the mitigation bank sponsor. The operation and use of a mitigation bank are governed by a mitigation banking instrument (MBI), which is a legal document between the bank sponsor and regulators establishing the service area, liability, performance standards, management and monitoring requirements, and the terms of bank credit approval. This document is reviewed and approved by the Interagency Review Team (IRT), with USACE and the Maryland Department of the Environment (MDE) as co-chairs and other members generally including EPA, U.S. Fish and Wildlife Service, National Marine Fisheries Service, and Maryland Department of Natural Resources.

What is the review and approval process for a Mitigation Bank?

The 2008 Federal Mitigation Rule requires that for a mitigation bank to be approved, it must follow a formal mitigation bank review process. This process includes the submittal and IRT review/approval of a draft prospectus (optional), prospectus, draft MBI, and final MBI. The prospectus is basically a concept phase while the MBI includes most of the legal language and the detailed plans. During the prospectus stage all proposed mitigation bank projects are placed on 30-day public notice by MDE and USACE, providing the public with the opportunity to submit comments and request a hearing. After public notice has been completed and the IRT has recommended that the project move forward, the information in the prospectus and IRT comments are used to support the development of the draft MBI. The IRT reviews and provides comments on the draft MBI. The bank sponsor then revises the draft MBI to address all IRT comments and submits the final MBI. If the IRT approves the final MBI, all responsible parties (e.g., bank sponsor, USACE, and MDE) sign the MBI. After signature, the final MBI will be considered approved. The final MBI must be approved by the USACE and MDE prior to the site being eligible for use to mitigate for federal and State authorized impacts.

Additionally any proposed impacts to aquatic resources associated with the construction of the bank must follow MDE and USACE's permit process through the submittal of a Joint Federal/State Application for the Alteration of Any Floodplain, Waterway, Tidal or Nontidal Wetland in Maryland (JPA) to MDE and USACE. This includes providing documentation that all necessary steps have been taken to first avoid and then minimize adverse impacts to the aquatic resources. No impacts to regulated resources associated with the mitigation bank can commence prior to this authorization.

After the final MBI is approved and any required permits/authorizations are issued, work efforts may initiate on the site, with the understanding that all other obligations will be implemented in accordance with the signed document.

What is an Umbrella Mitigation Banking Instrument?

In some cases, a mitigation bank sponsor may choose to pursue an umbrella mitigation banking instrument (UMBI). An UMBI allows a bank sponsor to develop multiple mitigation bank sites under a single instrument. The process begins when a bank sponsor prepares and submits a prospectus and UMBI, which includes at least one mitigation site plan to the IRT for approval. Once approved the UMBI serves as the basis for authorization of additional mitigation bank sites. The bank sponsor must submit a request for modification along with a mitigation site plan to the IRT for each new mitigation bank site that is proposed to be developed under the UMBI. The review process for each new site is similar to the process for a new MBI. The mitigation site plan is placed on 30-day public notice by MDE and USACE, providing the public with the opportunity to submit comments and request a hearing. After public notice has been completed and the IRT provides comments to the bank sponsor, the bank sponsor prepares and submits a draft amendment to the UMBI, including a new or revised mitigation site plan, to the IRT. The information in the draft amendment is used to support the development of a final amendment which is submitted to the IRT for signature. After signature, the final amendment will be considered approved. The final amendment must be approved by MDE and the USACE prior to the new mitigation bank site being eligible for use to mitigate for State and federal authorized impacts. Each new mitigation bank site may also require MDE and USACE approval of the impacts to regulated resources through the JPA process.

What are the benefits of Mitigation Banks?

There are many benefits to mitigation banking that result in less risk and uncertainty for compensatory mitigation projects. These include, but aren't limited to the following:

- Mitigation banks are typically constructed prior to the regulated impact activities that utilize site credits, thereby reducing temporal loss of aquatic function.
- Mitigation banks use an IRT process that brings more expertise and collaboration into the planning, approval, and oversight of compensatory mitigation projects.
- Mitigation banks typically result in a multitude of small projects with unavoidable impacts to aquatic resources all mitigating at the same site. This consolidation of mitigation allows for a larger mitigation site that has the potential for more ecological value.
- The 2008 Federal Mitigation Rule (33 CFR Part 332 and 40 CFR Part 230) includes requirements for all compensatory mitigation projects that are more robust than they were historically (e.g. performance standards, monitoring requirements, financial assurances, site protection instrument, long-term management plan, and adaptive management plan). Many of these more robust requirements may not be feasible for small projects with unavoidable impacts that propose to do permittee-responsible compensatory mitigation. However, mitigation banks allow an option for these more robust standards to be met for smaller projects resulting in compensatory mitigation that is better protected and more successful.
- The consolidation of mitigation enables the efficient use of limited agency resources in the review and compliance monitoring of compensatory mitigation projects.
- Mitigation banks are considered a “performance-based” form of aquatic resources replacement because, unlike permittee-responsible mitigation, the release of aquatic resource credits generated by banks are tied to demonstrated achievement of project goals.

- Mitigation banks allow for additional efficiencies that can result in quicker permit reviews and more cost-effective compensatory mitigation projects. *Please note: the impact project still needs to go through the full JPA process including avoidance and minimization.*
- Mitigation bank sponsors typically assume the responsibility for compensatory mitigation implementation and success from a permittee. This transfer of liability is often appealing for permittees, who would otherwise be responsible for the design, construction, monitoring, ecological success, and long-term protection of the site.
- Mitigation banking creates an economic incentive for restoring, creating, enhancing and/or preserving large areas of aquatic resources.

How does a person conducting a regulated activity requiring mitigation use a Mitigation Bank?

First, verify that your regulated activity is located within the service area of an approved mitigation bank with available credits. This can be done by utilizing the USACE RIBITS (Regulatory In-lieu Fee and Bank Information Tracking System) website. If so, you may propose in your JPA to offset unavoidable impacts by purchasing credits from the bank. Proposals to use bank credit will be reviewed on a case-by-case basis by MDE and USACE permit managers and may be subject to public comment during the JPA process.

Is more information available?

MDE Mitigation Bank Website

(<https://mde.maryland.gov/programs/water/WetlandsandWaterways/AboutWetlands/Pages/mitigationbanks.aspx>)

USACE Baltimore District Regulatory Mitigation Website

(<https://www.nab.usace.army.mil/Missions/Regulatory/Mitigation.aspx>)

USACE RIBITS Website

(<https://ribits.ops.usace.army.mil/>)

EPA Mitigation Banks under CWA Section 404 Website

(<https://www.epa.gov/cwa-404/mitigation-banks-under-cwa-section-404>)

EPA/USACE Compensatory Mitigation for Losses of Aquatic Resources; Final Rule

(https://www.nab.usace.army.mil/Portals/63/docs/Regulatory/Mitigation/wetlands_mitigation_final_rule_4_10_08.pdf)

National Research Council, 2001. "Compensating for Wetland Losses Under the Clean Water Act," National Academy Press, Washington, D.C.

(<https://www.nap.edu/read/10134/chapter/1>)