

Appendix B: Mitigation Banks

What is a Mitigation Bank?

A mitigation bank is a wetland, stream, or other aquatic resource area that has been restored, established, enhanced, or preserved for the purpose of providing compensation for unavoidable impacts to aquatic resources permitted under Section 404 of the federal Clean Water Act.

- In Texas, the US Army Corps of Engineers (USACE) is the primary regulatory authority for mitigation banks; USEPA also has some oversight authority.
- Mitigation banks have four distinct components:
 1. the bank site where the acreage is restored, enhanced, or preserved.
 2. the bank instrument: the formal agreement between the bank owner and USACE establishing liability, performance standards, management, monitoring requirements, and the terms of bank credit approval.
 3. An Interagency Review Team that provides regulatory oversight.
 4. the geographic area in which permitted impacts can be compensated for at a given bank.
- The value of a bank is defined in compensatory mitigation credits. The bank instrument identifies the number of credits available for sale and requires the use of ecological assessment techniques to certify that those credits provide the required ecological functions.
- Mitigation banks are a form of third-party compensatory mitigation, in which the responsibility for implementation and success is assumed by a third-party other than the permittee (the person who received the 404 permit allowing an adverse impact in the first place).
- Since mitigation banking is the most reliable form of compensation, the use of banks is a preferred form of mitigation.
- Successful wetland mitigation requires agreement among USACE and the project proponents on size, type, timeline, required and desired functions, management, funding and oversight.
- Management of any mitigation wetland by a responsible party is important to ensure its success.
- Mitigation banks are subject to significant federal oversight that provides assurances that management and wetland success will be a top priority.

Created vs. Restored Wetland Banks

- Preference should be given to restored wetlands over created wetlands because they are more likely to re-establish required and desired functions.
- Wetlands created out of upland need more complex design, construction, and management to establish and maintain required and desired functions.
- Pre-construction credits may be necessary to establish a bank. Federal policy may allow up to 30% of the wetland mitigation bank credits to be sold before restoration
- Not all of the remaining 70% of the credit should be sold until the wetland has developed the required functions. This may take from 10 to 25 years.
- Substantial pre-construction credit should be limited to restoration rather than creation projects because of their higher likelihood of reaching functional equivalence.
- Before the credits from a banked wetland may be sold, an evaluation of wetland functionality is required.
- Created wetlands have a higher likelihood of failure to meet functional standards than restored wetlands. This is largely due to the greater scientific and technical challenges that wetland creation possesses.

- Restored wetlands have an advantage when there are remnant features of the former wetland such as hydric soils, hydrology, seed banks, and roots.
- Establishing a functional hydrologic regime for a created wetland may be simpler than creating other functions. For instance, wetland grasses may take from 1 to 5+ seasons to become established and habitat for swamp dwelling animals that require a closed tree canopy could take decades to develop.