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TO: Prospective Mitigation Bankers, Mitigation Providers, and Consultants

FROM: J. Robert Hume, Regulatory Office Chief, Norfolk District Army Corps
of Engineers
David L. Davis, Office of Wetlands & Water Protection Director, Department of
Environmental Quality

RE: Suggestions for Proposing Compensatory Mitigation Sites

In accordance with all applicable state and federal laws and regulations, both the U.S. Army Corps of Engineers (the Corps) and the Virginia Department of Environmental Quality (DEQ) often support the use of offsite compensation for impacts to surface waters and wetlands. Acceptable forms of offsite compensation may include mitigation banks, in-lieu fee projects, and project-specific mitigation. Over the past few years, Virginia has experienced a large increase in both the number of approved mitigation banks and in the number of proposed banks. Some areas of Virginia have multiple mitigation banks within a watershed. Given the number of operational and proposed mitigation banks, as well as the number of mitigation proposals we receive for review, it is important to coordinate with the regulatory agencies early in the process to determine if you have a viable mitigation proposal, prior to committing significant time and resources to a particular site. We offer the following "Mitigation Do's and Don'ts" to assist you with the process. Please note that this document covers banks, in-lieu fee program project sites, and project-specific mitigation sites. All Do's and Don'ts are applicable to all types of mitigation, unless otherwise specified.

DO

1. Familiarize yourself with the Joint Corps-EPA mitigation Regulations <http://www.usace.army.mil/CECW/Documents/cecwo/reg/materials/33cfr332.pdf> and state law governing mitigation banking, VA Code Ann. Sections 62.1-44.15:5 (<http://leg1.state.va.us/cgi-bin/legp504.exe?000+cod+62.1-44.15C>). The principles outlined in these references are important to understand before undertaking a bank project. Also consider supporting information issued by Norfolk District on compensatory mitigation including:

Norfolk District Frequently Asked Questions about the Mitigation Regulations:
[http://www.nao.usace.army.mil/technical%20services/Regulatory%20branch/PN/Compensatory Mitigation Regulations/Compensatory Mitigation Regulations.pdf](http://www.nao.usace.army.mil/technical%20services/Regulatory%20branch/PN/Compensatory%20Mitigation%20Regulations/Compensatory%20Mitigation%20Regulations.pdf)

and the Virginia Offsite Mitigation Location Guidelines:
[http://www.nao.usace.army.mil/technical%20services/Regulatory%20branch/PN/VA Offsite Mit Guidelines/VA Offsite Mit Guidelines.pdf](http://www.nao.usace.army.mil/technical%20services/Regulatory%20branch/PN/VA%20Offsite%20Mit%20Guidelines/VA%20Offsite%20Mit%20Guidelines.pdf)

For mitigation projects that would provide wetland credit, familiarize yourself with the Norfolk District Corps and Virginia Department of Environmental Quality Recommendations for Wetland Compensatory Mitigation (<http://www.deq.virginia.gov/wetlands/pdf/mitigationrecommendabbrevjuly2004.pdf>)

For mitigation projects that would provide stream mitigation credit, familiarize yourself with the Unified Stream Methodology (USM) (<http://www.deq.virginia.gov/wetlands/mitigate.html#usm>).

2. Provide the agencies with basic preliminary site information, such as:
 - locating the project boundaries of the site on a USGS topographic map and/or GIS shapefile, a National Wetland Inventory map, a recent aerial photograph, and a soil survey map;
 - providing narrative descriptions of the site, its soils, size, topography, vegetation, watershed, and other general features;
 - providing narrative descriptions of the proposed goals and preliminary design ideas, including the location and composition of reference wetlands and stream reaches (this does not entail detailed engineering studies).
 - providing a narrative description of the current and anticipated use of the watershed including adjoining lands (this may be identified in a locality's comprehensive plan or other planning documents),
 - providing the location of other protected lands within the watershed
 - providing an estimate of what impacts (if any) to wetlands or other waters of the U.S. are anticipated to be necessary to create/restore/enhance wetlands or other waters associated with the proposed mitigation project
 - a description of stormwater conveyance on and through the site, including the feasibility of pre-treatment for water quality or rerouting of flows

3. For proposed mitigation bank sites, plan to present the site at an Interagency Review Team (IRT) meeting. Provide the agencies with site information and attend an IRT meeting early in the process and prior to spending significant funds for land purchase, detailed engineering, or other specialized studies. The IRT members will decide at that meeting whether a site visit is warranted and when it will occur. Often, the agencies will be able to provide direction for a project before you spend a lot of time and money on a site that may not work.

4. For project-specific mitigation sites, schedule a pre-application site visit with the agencies (at a minimum, the Corps and DEQ) early in the process and prior to spending significant funds for land purchase, detailed engineering, or other specialized studies. Often, the agencies will be able to provide direction for a project before you spend a lot of time and money on a site that may not work.

5. Realize that landscape position and future land use is essential in locating a potentially viable compensation site. Adjacency to rivers, streams, forested areas, drained agricultural areas, potential developments, or other wetlands should be considered before using just any available parcel. Just because it may be feasible

- to create wetlands on a particular property does not mean that the site is suitable for use as compensation (it may result in an artificial or “unnatural” wetland in the landscape with limited opportunities to provide recognized wetland functions). Evaluate the location of wetland and/or stream mitigation sites on land that is already disturbed or may have been wetland and has converted to upland such as prior converted (PC) wetlands.
6. Realize that habitat diversity is often a key to the overall success of the proposed mitigation project. Diversity of rare, imperiled, declining, or important habitats is strongly encouraged, and may include some upland buffers, some open water, or different wetland or stream types.
 7. Realize that compensation project development and permitting impacts to aquatic resources are two different processes; very little overlap exists.
 8. Understand that for a proposed mitigation bank, an Interagency Review Team (IRT) must be formed and the Mitigation Banking Instrument (MBI) must be signed, financial assurances must be in place, the mitigation plan, including Long-term management provisions and any deed restrictions or conservation easements must be recorded prior to the release or sale of any credits.
 9. Consider options for long-term ownership/stewardship of the mitigation bank site for that period after all bank credits have been sold. Conservation easements, held by a third party land steward, are the preferred means of long-term stewardship of mitigation sites, especially mitigation bank and in-lieu fee project sites. Consider local land trusts, state-wide organizations such as Virginia Outdoors Foundation, state agencies such as Department of Forestry, and national conservation organizations such as The Nature Conservancy.
 10. Consider the elimination of or compensation for any activities on the property that may negatively impact the compensation site.
 11. Consider measures needed to secure the mitigation site from nearby activities that may have an adverse effect on the mitigation site. For example, consider larger buffers on stream or wetland systems where development potential exist up gradient/up slope of the compensation site.
 12. Keep in mind that Section 106 of the National Historic Preservation Act (NHPA) applies to all mitigation projects including mitigation banks. Section 106 of NHPA requires federal agencies with jurisdiction over federally licensed undertakings to take into account the effects of these undertakings on properties included in or eligible for the National Register of Historic Places. The entire mitigation bank will be within the Corps' scope of analysis. Archaeological/Architectural and/or landscape surveys may be required. Consultation with the Virginia Department of Historic Resources, the Advisory

Council on Historic Preservation and other consulting parties may be necessary to fulfill the requirements of Section 106.

13. Coordinate with the Virginia Department of Game and Inland Fisheries, the Virginia Natural Heritage Program, and the Virginia Field Office of the U.S. Fish and Wildlife Service to determine the likelihood of rare, threatened, or endangered species occurring on the proposed mitigation site prior to conducting any site activities.
14. Consult with the Corps and DEQ BEFORE initiating work that may be associated with planned compensation such as grading, clearing, timbering (including clearcutting), bushhogging, or mowing. Otherwise, the Corps and/or DEQ may not accept the mitigation proposal.

DON'T

1. Expect that because you or your client have acquired a particular property, that it will necessarily be approved by federal and state regulatory agencies for use as a compensation site.
2. Expect that all bank proposals will be approved by the IRT. Regulatory agencies have limited resources, and time and effort shall be delegated to those bank proposals that have a greater likelihood of successfully achieving wetland and/or stable stream conditions.
3. Propose wetland and/or stream mitigation sites that would entail extensive clearing or conversion of upland forested areas. It may not be ecologically defensible or sustainable to change these areas into aquatic areas.
4. Expect that a bank in a particular location guarantees economic success. Many other factors are involved in the wetland permitting process and the local planning process.
5. Propose a permit-specific compensation site where more than three permits will be compensated, or where the site is ultimately intended to be a bank. A site that will ultimately be brought before the IRT for approval as a bank, should be proposed as a bank initially. A site that is used for 3 or fewer permits and then proposed as a bank, regardless of the original intent, should not have bank areas that are integrally linked to the permit-specific compensation areas.
6. Propose preservation-only sites for wetland or stream compensation. While preservation of these areas as part of a mitigation project is valuable, the majority of the site (as a rule of thumb greater than 80% of the site's wetland credits and 50% of stream credits) must consist of wetland restoration/creation/enhancement and/or stream restoration/enhancement in order to meet the "no net loss" goal.

7. Propose compensation in areas with recently clear-cut riparian buffers. Stream mitigation credits shall not be generated from a timbered area until it is fully stable & under normal circumstances, not sooner than 5 years after the site was last timbered. This time will allow the Corps and DEQ to better assess the stability of the channels and associated riparian area and the need for any restoration/enhancement measures.
8. Propose compensation in areas that have been recently converted from a forested or scrub-shrub community to agriculture. Stream mitigation credits shall not be generated from a recently converted area until it is fully stable & under normal circumstances, not sooner than 5 years after the site was converted. This time will allow the Corps and DEQ to better assess the stability of the channels and associated riparian area and the need for any restoration/enhancement measures.
9. Expect to generate mitigation credits by clearcutting forested areas and replanting those areas in different tree species.
10. Propose compensation sites based solely on creation of wetlands from upland areas. Based on experience, creation of wetlands from upland areas, especially when not adjacent to other wetlands, is often difficult to achieve and time consuming. When approving a mitigation project, we are looking for a high degree of certainty in achieving wetland conditions as quickly as possible; therefore, we will generally not approve mitigation projects that involve creation only.
11. Propose stream creation.
12. Assume that a Mitigation Banking Instrument (MBI) is entirely a boilerplate document. MBIs are tailored to each bank's site-specific circumstances; much of the language has been standardized, where possible. Examples of bank-specific issues that need to be addressed include bank service area, credit composition, percent of advance credit, credit release schedule, and performance standards.
13. Expect that a bank will necessarily provide compensation for the whole spectrum of potential wetlands/waters impacts in a given service area. The decision to use a bank as a compensation alternative rests solely with the regulatory agencies (after considering input from the advisory agencies). The presence of a bank with available credits does not override the goal of in-kind compensation.
14. Assume that because you, your consultant, or your client owns a bank, that the regulatory agencies will approve use of that bank for a particular permit.
15. Overlook the possible need for detailed soils, geotechnical or hydrology studies to assure the regulatory agencies that the mitigation project design will work.
16. Assume that each and every proposed mitigation bank will receive 15% initial release of credits. The percentage of credits released initially depends on the likelihood and

timing of achieving success. Advance credit percentages may be reduced or even eliminated, if site-specific circumstances suggest a more speculative design.

17. Propose compensatory mitigation projects located within individual lots in a subdivision. These projects may not be sustainable or viable on a long-term basis.

We hope that you find these suggestions useful as you review potential compensatory mitigation sites. Please do not hesitate to call the Corps or DEQ for a site review. You can contact the Corps (Steve Martin, 757-201-7787 or at steven.m.martin@usace.army.mil) or Jeanne Richardson 434-384-0182 or at jeanne.c.richardson@usace.army.mil) or the DEQ (Bettina Rayfield at 804-698-4204 or betttina.rayfield@deq.virginia.gov) if you have further questions.