Mitigation Banking Program in the Fort Worth District

Development Impact Minimization Workshop

NCTCOG Office Arlington, TX
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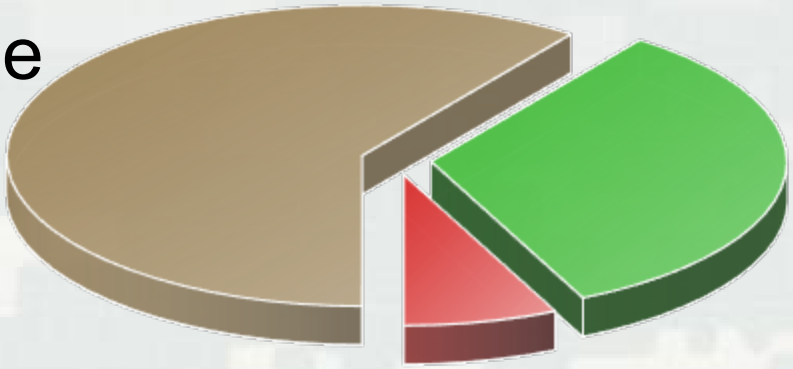
US Army Corps of Engineers
BUILDING STRONG®

Fort Worth District Mitigation Banking

Objectives

- Define Mitigation Banking & Considerations
- Post 2008 Mitigation Rule Guidance and Initiatives in the Fort Worth District

Types of Compensatory Mitigation



Mitigation Bank Defined

- **"… a site, or suite of sites,**
- **resources (e.g., wetlands, streams, riparian areas) restored, established, enhanced, and/or preserved**
- **for the purpose of providing compensatory mitigation for impacts authorized by DA permits.**
- **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."**

Benefits of Third Party Mitigation

- Reduced risk & uncertainty
- More efficient compliance
- Greater planning and scientific effort
- May streamline permitting, by reducing effort evaluating mitigation proposal

Benefits of Mitigation Banks

- Advance site identification
- Credit release linked to performance
- Compensation in advance of impacts

Types of Mitigation Banks

- Single Client
- Commercial
  - ►Private (entrepreneurial)
  - ►Public
  - ►Private non-profit

Mitigation Failures

Problems included:

- Failure to implement
- Lack of oversight
- Prevalence of on-site wetland creation
- Low rate of ecologic success

History

March 24, 2011 – Public Notice CESWF-11-TXRAM – Release of draft form for utilization and testing.

June 16, 2011 – Public Notice CESWF-10-MITB – Guidelines Covering Specific Elements for the Establishment of New Mitigation Bank in the Fort Worth District (First Round)

October 2, 2013 – Public Notice CESWF-13-MITB-1 – Fort Worth District Stream Mitigation Method

History (cont.)

October 13, 2015 – Public Notice CESWF-11-TXRAM - TXRAM Version 2.0

July 5, 2016 – Public Notice CESWF-12-MITB – Additional Guidelines Covering Specific Elements for the Establishment of New Mitigation Bank in the Fort Worth District (Second Round)

September, 2017 – Proposed additional Mitigation Banking Guidelines (Round 3) ????????

Texas Rapid Assessment Method (TXRAM)

March 24, 2011 – Public Notice CESWF-11-TXRAM

- Provide a rapid, repeatable, field-based conditional assessment
- Evaluating ecological condition of wetlands and streams
- Streamline and improve the process of impact assessment and mitigation calculation

TXRAM

Successes

- Better accountability of aquatic resource impacts and compensatory mitigation
- Used for performance based credit releases associated with mitigation banks

TXRAM

Challenges

- Resources to finalize – Time & $$
- Currently under contract to revise TXRAM
- Wetland Module –
  - Connectivity – Actually renders a lower score for sites surrounded by contiguous wetlands
- Stream Module –
  - Riparian Buffer – Too Narrow

2011 Banking Guidelines

June 16, 2011 – Public Notice CESWF-10-MITB

(First Round)

- Preservation
- Monitoring Requirements
- Long-Term Hydrology
- Credit Release Schedule
- Service Area

Service Area Guidelines

- Same SA for wetland and stream banks
- Combination of 8-digit HUC and Level III Ecoregions of Texas
- Primary, secondary, and tertiary service areas
- If guidelines are followed should be fewer issues
- If guidelines are not followed…could lead to delay
- Increased predictability

Service Area Guidelines

Successes

- Compensatory mitigation in closer proximity to impacts
  - Watershed / Ecoregion
- Reduced evaluation times
- Increased predictability

Service Area Guidelines

Challenges

- Less coverage = Less Competition
- Smaller banks ??

Stream Mitigation Method (50/50)

- USACE has typically shown a preference for in-kind replacement of lost aquatic functions
- On-site ecological limitations for permittee-responsible mitigation (PRM) and lack of true in-kind mitigation bank credits
- In the Fort Worth District, this particularly held true for in-kind replacement of lost stream functions

??Dilemma??

- Allowing for the exclusive continued use of upland buffer and wetland enhancement activities, to offset stream loss, would result in further net loss of overall stream functions within the District's area of responsibility in the state of Texas.

- In an effort to address this issue, the District developed the "50-50" Stream Mitigation Method to help ensure that an appropriate level of compensatory mitigation for stream functions is achieved.

Reason For Action

- Need to provide a greater degree of in-channel replacement of functions for impacted streams whereby compensatory mitigation is typically in-kind and performed to replace lost aquatic functions
- Compensatory mitigation for most projects (except coal mines/reservoirs) occurs primarily through purchase of mitigation bank credits
- Historically stream loss has been largely mitigated through upland plantings located in areas outside of waters of the U.S. (legacy mitigation banks)
  - In a 2-year period approximately 100,000 LF of stream loss in the DFW area mitigated through banks without any in-channel work and minimal riparian work (upland tree plantings)

Transparent Evaluation Process

- Evaluated several alternatives including methods developed by other USACE Districts
- Developed draft proposal coordinated with Fort Worth District Office of Counsel and Southwestern Division
- Published a 30-day Public Notice on 15 APR 2013
- Public meeting held on 25 APR 2013 attended by Federal and state resource agencies, IRT members, bank sponsors, consultants, and stakeholders
- Public notice comment period extended

Definitions

- **In-Channel Credits/In-Channel Lift**: Mitigation Bank Credits or PRM TXRAM lift generated from work performed in a given stream assessment reach (SAR) which results in a minimum of 50% ecological lift associated with the three TXRAM in-channel core elements. These elements are identified as Channel Condition, In-stream Condition, and Hydrologic Condition.

- **Stream Credits**: Mitigation Bank Credits generated from activities associated with ecological lift achieved through activities that are not associated with in-channel, nor with riparian work.

Definitions (cont.)

- **Riparian Buffer Credits:** Mitigation Bank Credits or PRM TXRAM lift generated from riparian work performed in a given SAR, which results in ecological lift associated with the TXRAM core element identified as Riparian Buffer Condition.

- **In-Kind Mitigation**: Perennial and intermittent stream impacts are to be mitigated with in-kind replacement relative to stream type. Ephemeral stream impacts may be mitigated with either ephemeral or intermittent stream mitigation.

Stream Mitigation Method

- Follows similar logic to the hierarchy prescribed in the Mitigation Rule. Maintains in-kind preference relative to hydrologic classification (ephemeral, intermittent, perennial)

- Incorporates a stepwise sequencing process to appropriately maximize use of mitigation banks with in-channel credits for 50% of required mitigation, based on credit availability

Stream Mitigation Method Hierarchy
Mitigation Banks

- 1st. A minimum of 50% mitigation from banks with in-channel credits. Remaining mitigation through any combination of riparian buffer credits, or legacy bank, also referred to as “stream credits” (i.e. with little to no in-channel work)

- 2nd. If in-channel bank credits are not available then a minimum of 50% of required mitigation from banks with riparian buffer credits and remaining mitigation from legacy bank credits

- 3rd. If riparian bank credits are not available, then all mitigation from legacy bank credits

- This Stream Assessment Method serves to better align with the 2008 Mitigation Rule relative to in-kind stream mitigation
- Consistent with all other Regulations
- Will increase in-kind credit demand, thus creating a market to support a greater number of mitigation banks with in-channel credits
- The preference for in-channel credits will affect legacy banks – slower credit sales. Credits would still remain as viable options.
- Approved mitigation banks with credits currently classified as stream credits (a legacy bank term) which have performed in-channel or riparian work, would be able to request a mitigation credit re-classification and ledger update to accommodate this new methodology

TXRAM 2.0

- Original intent was to use TXRAM 1.0 for one year and re-evaluate.
- District encouraged practitioners to utilize the model and to proved written comment.
- Approximately 131 unique comments were received.
- TXRAM 1.0 achieved its objectives but comments highlighted areas where it could be improved.

TXRAM 2.0

- Summary of Changes
- ??????????????????

2016 Banking Guidelines

July 5, 2016 – Public Notice CESWF-12-MITB (Second Round)

- Recently Disturbed Sites
- Financial Assurances
- Stream Credits (ownership/control of both sides of the stream)
- Stream Design Plans (60% for DMBI / 95% for FMBI)

2016 Banking Guidelines (cont.)

- Consultant Qualifications & Experience
- Modification of Existing MBIs
- Reference Sites
- Use of Index of Biotic Integrity
- Performance Based Credit Releases
- RIBITS Credit Ledger Reporting

2016 Banking Guidelines (cont.)

- Irrigation and Monitoring
- Abstract/Title Search
- Funding of Long-Term Endowment
- CE Holder Qualifications and Experience
- Stream Mitigation Buffers

2017 Proposed Banking Guidelines

- Phase I Environmental Assessment
- Invasive Species Requirements
- Establish Performance Standards for Forest Restoration
- Baseline Data Requirement
- Stream Migration Buffer
- Reduction of Short Term Financial Assurances
- Stream Reference Reach Requirements
- Flash Grazing

2017 Proposed Banking Guidelines (cont.)

- Stream Stability for Riparian Planting
- Title Abstract
- Subsurface Mineral Exploration
- Templates
- Monitoring Phase JD's
- Initial Credit Release for Stream and Wetland Creation
- Initiation of Mitigation Activities
- Force Majure

33 CFR Part 332

- 2008 Mitigation Rule – “Compensatory Mitigation for Losses of Aquatic Resources”

- 33 CFR 332.3 (b) The district engineer shall consider the type and location of proposed compensatory mitigation in the following order: Mitigation bank credits, In-lieu fee program credits, Permittee-responsible mitigation under a watershed approach, Permittee-responsible mitigation through on-site and in-kind mitigation, Permittee-responsible mitigation through off-site and/or out-of-kind mitigation.

Permittee-Responsible Mitigation (Watershed Approach)

- 33 CFR Part 332.3 (b) (4): Permitted impacts are **not in the service area of an approved mitigation bank**; permittee-responsible compensatory mitigation should be determined using the principles of a watershed approach as outlined in paragraph (c) of this section.
- Paragraph (c) provides framework for choosing mitigation site using watershed approach. A watershed approach may include on-site compensatory mitigation, off-site compensatory mitigation (including mitigation banks or in-lieu fee programs), or a combination of on-site and off-site compensatory mitigation.
- This applies primarily to those cases where a USACE recognized watershed plan exists. This option is rarely used in the Fort Worth District.

Permittee-responsible mitigation through on-site and in-kind mitigation.

- Where a watershed approach is not practicable, on-site and in-kind compensatory mitigation is considered.

- The district engineer must also consider the practicability of on-site compensatory mitigation and its compatibility with the proposed project.

Permittee-responsible mitigation through off-site and/or out-of-kind mitigation.

- For use when:

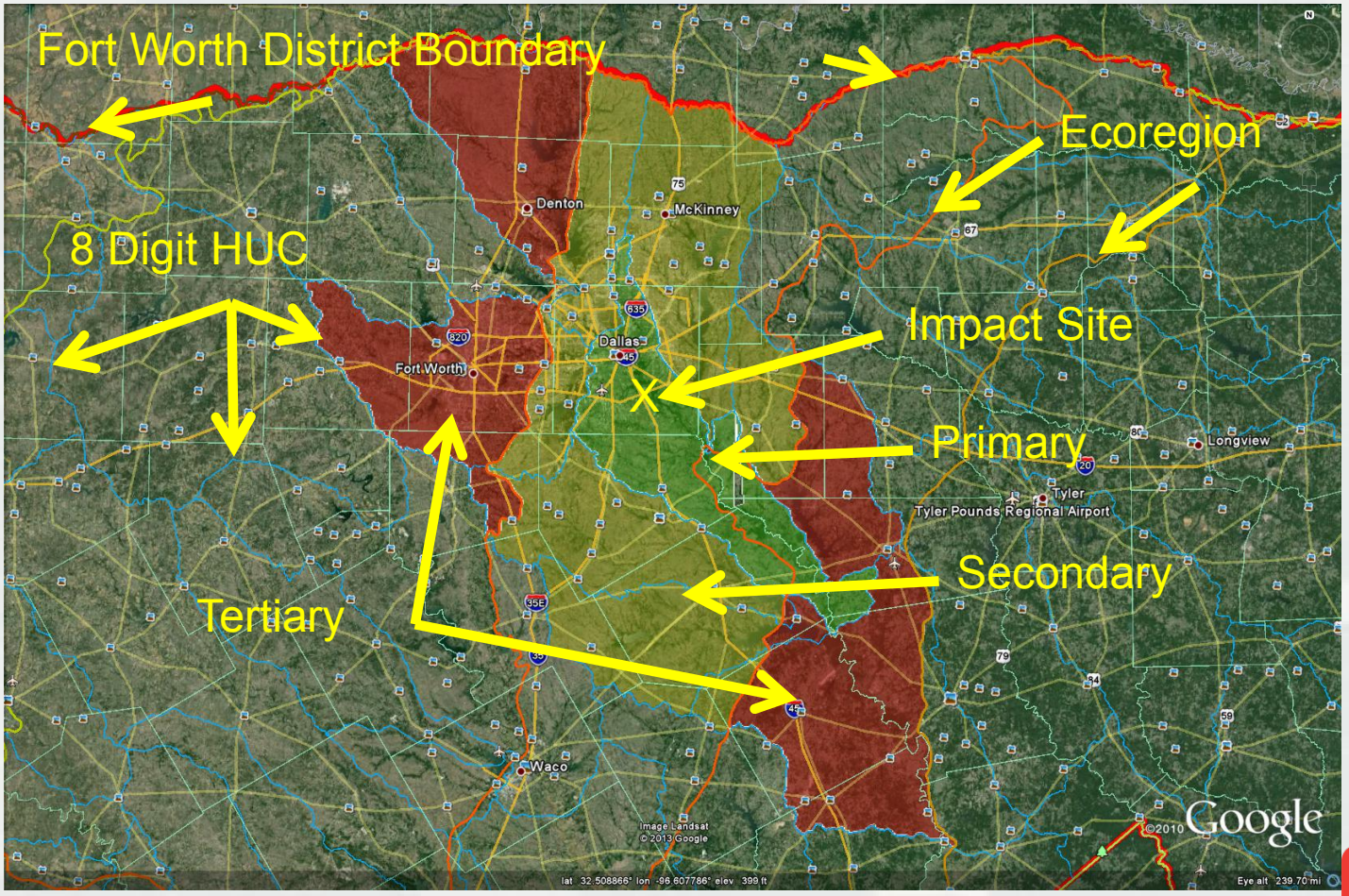
  1. On-site, in-kind mitigation not practicable

  2. Unlikely to compensate for the permitted impacts, or will be incompatible with the proposed project

  3. Off-site and/or out-of-kind mitigation has greater likelihood of offsetting permitted impacts.

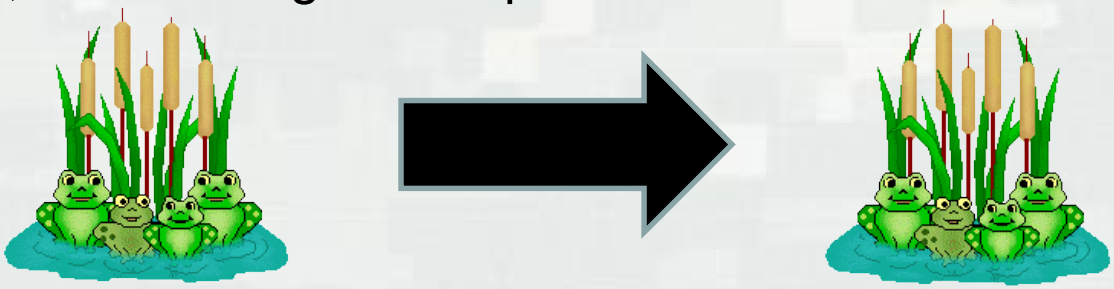
EXAMPLE: Mitigation tract adjacent to state park in primary, secondary or tertiary area with mitigation activities undertaken by experienced mitigation provider.

General Location of Mitigation Site(s)(cont)

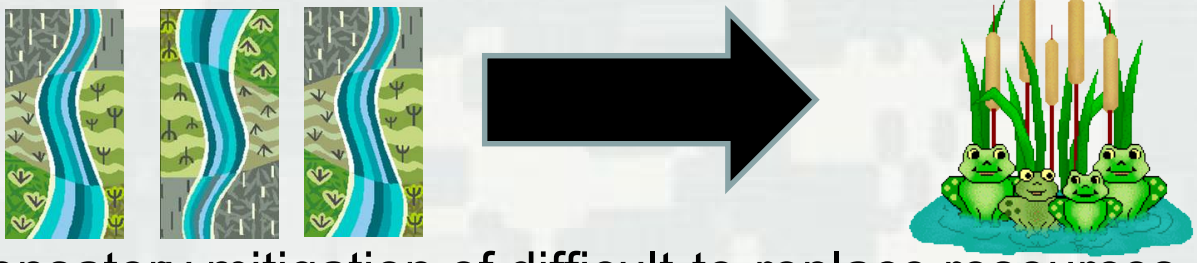


Mitigation Type

- In general, in-kind mitigation is preferable to out-of-kind mitigation



- If DE determines, using a watershed approach, that out-of-kind mitigation will serve the aquatic resource needs of the watershed, out-of-kind mitigation may be authorized (although this is rare).



- Compensatory mitigation of difficult-to-replace resources should be through in-kind mitigation.

Mitigation Plan Submittal

U.S. Army Corps of Engineers (USACE)

Fort Worth District

Mitigation Plan Template

This template includes the components required in a mitigation plan as outlined in the Final Rule on Compensatory Mitigation for Losses of Aquatic Resources (Federal Register Vol. 73, No. 70; April 10, 2008) and in the Code of Federal Regulations (CFR) Title 33, Part 332.4. A mitigation plan is required as part of compensatory mitigation projects, including permittee-responsible mitigation, mitigation banks, or in-lieu fee programs.

http://www.swf.usace.army.mil/Missions/Regulatory/Permitting/MitigationTemplates.aspx

Additional District Policy

- It is an initiative of the Fort Worth District to hold permittee-responsible mitigation projects to the **same standards as mitigation banks (to the extent possible).**
- All permittee-responsible mitigation proposals must receive **supervisor review/approval during the permitting process.**

Questions?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