expressly to assist Federal personnel, bank sponsors, and others in meeting the purpose and goals of Section 404 of the Clean Water Act (CWA), Section 10 of the Rivers and Harbors Act, the wetland conservation provisions of the Food Security Act (FSA) (i.e., "Swampbuster"), and other applicable Federal statutes and regulations. The policies and procedures discussed herein are consistent with current requirements of the Section 10/404 regulatory program and "Swampbuster" provisions and are intended only to clarify the applicability of existing requirements to mitigation banking.

The policies and procedures are applicable to the establishment, use and operation of public mitigation banks, as well as privately-sponsored mitigation banks, including third party banks (e.g., entrepreneurial banks).

B. Background

For purposes of this guidance, mitigation banking means the restoration, creation, enhancement and, in exceptional circumstances, preservation of wetlands and/or other aquatic resources expressly for the purpose of providing compensatory mitigation in advance of authorized impacts to similar resources.

The objective of a mitigation bank is to provide for the replacement of the chemical, physical and biological functions of wetlands and other aquatic resources which are lost as a result of authorized impacts. Using appropriate methods, the newly established functions are quantified as mitigation "credits" which are available for use by the bank sponsor or by other parties to compensate for adverse impacts (i.e., "debits"). Consistent with mitigation policies established under the Council on Environmental Quality Implementing Regulations (CEQ regulations) (40 CFR part 1508.20), and the Section 404(b)(1) Guidelines (Guidelines) (40 CFR part 230), the use of credits may only be authorized for purposes of complying with Section 10/ 404 when adverse impacts are unavoidable In addition, for both the Section 10/404 and "Swampbuster" programs, credits may only be authorized when on-site compensation is either not practicable or use of a mitigation bank is environmentally preferable to on-site compensation. Prospective bank sponsors should not construe or anticipate participation in the establishment of a mitigation bank as ultimate authorization for specific projects or as excepting such projects from any applicable requirements.

Mitigation banks can have several advantages over individual mitigation

projects, some of which are listed below:

1. It may be more advantageous for maintaining the integrity of the aquatic ecosystem to consolidate compensatory mitigation into a single large parcel or contiguous parcels when ecologically

appropriate;2. Establishment of a mitigation bank can bring together financial resources, planning and scientific expertise not practicable to many project-specific compensatory mitigation proposals. This consolidation of resources can increase the potential for the establishment and long-term management of successful mitigation that maximizes opportunities for contributing to biodiversity and/or watershed function:

3. Use of mitigation banks may reduce permit processing times for projects that qualify and provide more cost-effective compensatory mitigation opportunities;

Compensatory mitigation is typically implemented and functioning in advance of project impacts, thereby reducing temporal losses of aquatic functions and uncertainty over whether the mitigation will be successful in offsetting project impacts;

The existence of mitigation banks can contribute towards attainment of the goal for no overall net loss of the Nation's wetlands by providing applicants with opportunities to compensate for authorized impacts when mitigation might not otherwise be required.

II. Policy Considerations

The following policy considerations provide general guidance for the establishment, use and operation of mitigation banks. This policy applies to all mitigation bank proposals submitted for approval on or after the effective date of this guidance and to those in early stages of planning or development. It is not intended that this policy be retroactive for mitigation banks that have already received agency approval. While it is recognized that individual mitigation banking proposals may vary, the fundamental precepts of this guidance should apply to all future mitigation banks.

For the purposes of Section 10/404, and consistent with the CEQ regulations, the Guidelines, and the Memorandum of Agreement Between the Environmental Protection Agency (EPA) and the Department of the Army Concerning the Determination of Mitigation under the Clean Water Act Section 404(b)(1) Guidelines, mitigation means sequentially avoiding impacts, minimizing impacts, and compensating for remaining unavoidable impacts.

Compensatory mitigation, under Section 10/404, is the restoration, creation, enhancement, or in exceptional circumstances, preservation of wetlands and/or other aquatic resources expressly for the purpose of compensating for unavoidable adverse impacts. A site where wetlands and/or other aquatic resources are restored, created, enhanced, or in exceptional circumstances, preserved expressly for the purpose of providing compensatory mitigation in advance of authorized impacts to similar resources is a mitigation bank.

A. Authorities

This guidance is established in accordance with the following statutes, regulations, and policies. It is intended to clarify provisions within these existing authorities and does not establish any new requirements.

1. Clean Water Act Section 404 (33

USC 1344).

2. Rivers and Harbors Act of 1899 Section 10 (33 USC 403 et seq.).

- 3. Environmental Protection Agency, Section 404(b)(1) Guidelines (40 CFR part 230). Guidelines for Specification of Disposal Sites for Dredged or Fill Material.
- 4. Department of the Army, Section 404 Permit Regulations (33 CFR parts 320–330). Policies for evaluating permit applications to discharge dredged or fill material.
- 5. Memorandum of Agreement between the Environmental Protection Agency and the Department of the Army Concerning the Determination of Mitigation under the Clean Water Act Section 404 (b)(1) Guidelines (February 6, 1990).

6. Title XII Food Security Act of 1985 as amended by the Food, Agriculture, Conservation and Trade Act of 1990 (16

USC 3801 et seq.).

7. National Environmental Policy Act (42 USC 4321 et seq.), including the Council on Environmental Quality's implementing regulations (40 CFR parts 1500-1508).

8. Fish and Wildlife Coordination Act (16 USC 661 et seq.).

9. Fish and Wildlife Service Mitigation Policy (46 FR 7644-7663, 1981).

10. Magnuson Fishery Conservation and Management Act (16 USC 1801 et

11. National Marine Fisheries Service Habitat Conservation Policy (48 FR 53142-53147, 1983).

B. Planning Considerations

1. Prospectus

Prospective bank sponsors are encouraged to submit a prospectus to