which is important to the region in which the aquatic resources are located, and (2) are under demonstrable threat of loss or substantial degradation due to human activities that might not otherwise be expected to be restricted (e.g., by Section 10/404 or the FSA "Swampbuster" provisions). The existence of a demonstrable threat must be based on clear evidence of destructive land use changes which are consistent with local and regional land use trends and are not the consequence of actions under the control of the bank sponsor. The number of mitigation credits available from a bank that is based solely on preservation should be based on the functions that would otherwise be lost or degraded if the aquatic resources were not preserved, and the timing of such loss or degradation. As such, compensation for aquatic resource impacts will generally require a greater number of acres from a preservation bank than from a bank which is based on restoration, creation or enhancement.

6. Inclusion of Upland Areas

Credit may be given for the inclusion of upland areas occurring within a bank only to the degree that such features increase the overall ecological functioning of the bank. If such features are included as part of a bank, it is important that they receive the same protected status as the rest of the bank and be subject to the same operational procedures and requirements. An appropriate functional assessment methodology should be used to determine the manner and extent to which such features augment the functions of restored, created or enhanced wetlands and/or other aquatic resources. The presence of upland areas may increase the per-unit value of the aquatic habitat in the bank, but upland areas are not directly counted as mitigation credits.

7. Mitigation Banking and Watershed Planning

Mitigation banks should be planned and developed to address resource needs within a particular watershed. Moreover, decisions regarding the location and uses of a mitigation bank, as well as the type of wetlands and/or other aquatic resources to be restored, created, enhanced or preserved may often be made within the context of ecological objectives set for the watershed. Watershed planning efforts often identify categories of activities having minimal adverse effects on the aquatic ecosystem which could be authorized under a general permit. In order to reduce potential cumulative

effects of such activities, it may be appropriate to offset these types of impacts through the use of a mitigation bank established in conjunction with a watershed plan.

C. Establishment of Mitigation Banks

1. Mitigation Banking Instruments

All mitigation banks need to have a banking instrument as documentation of agency concurrence on the objectives and administration of the bank. The banking instrument should describe in detail the physical and legal characteristics of the bank, and how the bank will be established and operated. The banking instrument will be signed by the bank sponsor and the concurring regulatory and resource agencies represented on the Mitigation Bank Review Team (section II.C.2.). The following information should be addressed, as appropriate:

- a. Bank goals and objectives;
- b. Ownership of bank lands;c. Bank size and classes of wetlandsand/or other aquatic resources proposed
- for inclusion in the bank; d. Description of baseline conditions;
 - e. Geographic service area;
- f. Wetland classes or other aquatic resource impacts suitable for compensation:
- g. Methods for determining credits and debits;
 - h. Accounting procedures;
- i. Performance standards for determining credit availability and bank success;
- j. Reporting protocols and monitoring plan;
- k. Contingency and remedial actions and responsibilities;
 - l. Financial assurances;
 - m. Compensation ratios;
- n. Provisions for long-term management and maintenance.

In cases where initial establishment of the mitigation bank involves a discharge into waters of the United States requiring Section 10/404 authorization, the banking instrument will be made part of the Department of the Army (DA) permit. The permit application to establish a bank will be evaluated by the Corps on its own merits pursuant to Section 10/404 policies and procedures. As such, preparation of a banking instrument should not alter the normal permit evaluation process timeframes. A bank sponsor may proceed with activities for the construction of a bank subsequent to receiving the DA authorization. It should be noted, however, that a bank sponsor who proceeds in the absence of a banking instrument does so as his/her own risk.

In cases where the mitigation bank is established pursuant to the FSA, the

banking instrument will be included in the plan developed or approved by NRCS and the Fish and Wildlife Service (FWS).

2. Agency Roles and Coordination

Collectively, the signatory agencies to the banking instrument will comprise the Mitigation Bank Review Team (MBRT). Representatives from the Corps, EPA, FWS, National Marine Fisheries Service (NMFS), and NRCS, as appropriate given the projected use for the bank, should typically comprise the MBRT. In addition, it is appropriate for representatives from state, tribal and local regulatory and resource agencies to participate where an agency has authorities and/or mandates directly affecting or affected by the establishment, use or operation of a bank. No agency is required to sign a banking instrument; however, in signing a banking instrument, an agency agrees to comply with the terms of that instrument.

The Chair of the MBRT will be the Corps, except in cases where the bank is proposed solely for the purpose of complying with the FSA, in which case NRCS will be the MBRT Chair. Either agency may delegate that responsibility to another Federal, state, tribal or local agency, as appropriate.

The primary role of the MBRT is to facilitate the establishment of mitigation banks through the development of mitigation banking instruments. Because of the different authorities and responsibilities of each agency represented on the MBRT, there is a benefit in achieving agreement up front. For this reason, the MBRT will strive to obtain consensus² on its actions. The MBRT will review and reach consensus on the banking instrument and final plans for the restoration, creation, enhancement, and/or preservation of wetlands and other aquatic resources. Once the banking instrument has been signed, the MBRT will not typically be involved in the operation of a bank on a project-specific basis. Periodically, the MBRT will review monitoring and accounting reports. In the event a bank

²The term consensus as defined herein, is a process by which a group synthesizes its concerns and ideas to form a common collaborative agreement acceptable to all members. Under consensus, agreements or decisions are made without voting. An agreement is reached through a process of gathering information and viewpoints, discussion, analysis, persuasion, a combination or synthesis of the proposals and/or development of totally new solutions that are acceptable to the group. The goal of consensus is to reach an agreement or decision with which everyone can agree, but not necessarily unanimity. A consensus agreement is a recognition by a group that it has reached the best achievable solution for the parties involved.