sponsor proposes remedial actions, or an agency on the MBRT considers remedial actions to be necessary, the MBRT will review and reach consensus on the specific remedial measures to be implemented at a bank.

Consistent with its authorities under Section 10/404, the Corps is responsible for authorizing use of a particular mitigation bank on a project-specific basis and determining the number and availability of credits required to compensate for proposed impacts in accordance with the terms of the banking instrument. Decisions rendered by the Corps must fully consider review agency comments submitted as part of the permit evaluation process. Similarly, the NRCS, in consultation with the FWS, will make the final decision pertaining to the withdrawal of credits from banks as appropriate mitigation pursuant to FSA.

#### 3. Role of the Bank Sponsor

The bank sponsor is responsible for the preparation of the banking instrument in consultation with the MBRT. The bank sponsor is also responsible for the overall operation and management of the bank in accordance with the terms of the banking instrument, including the preparation and distribution of monitoring reports and accounting statements/ledger.

## 4. Dispute Resolution Procedure

The MBRT will work to reach consensus on its actions in accordance with this guidance. It is anticipated that all issues will be resolved by the MBRT in this manner.

a. Development of the banking *instrument.* During the development of the banking instrument, if the agency representatives on the MBRT cannot reach consensus on the content of the banking instrument within a reasonable timeframe, or if an agency representative considers that a particular decision raises concern regarding the application of existing policy or procedures, an agency may request the issue be reviewed by a higher level within each agency. If resolution is still not achieved, any agency(ies) may initiate interagency review through written notification to, as appropriate, the Corps District Engineer, EPA Regional Wetlands Division Director, FWS Field Supervisor, NMFS Habitat Coordinator, NRCS State Conservationist and corresponding management levels within other agencies represented on the MBRT. Said notification will describe the issue in sufficient detail and provide recommendations for resolution. Within 20 days, the District

Engineer or State Conservationist (as appropriate), or an appropriate designee, will lead necessary discussions to achieve interagency concurrence on the issue of concern, and forward documentation of the resolution to the MBRT Chair for distribution to the other MBRT member agencies. The bank sponsor may also request the District Engineer or State Conservationist review actions taken to develop the banking instrument if the sponsor believes that inadequate progress has been made on the instrument by the MBRT.

b. Application of the banking instrument. As previously stated, the Corps and NRCS are responsible for making final decisions on a projectspecific basis regarding the use of a mitigation bank for purposes of Section 10/404 and FSA, respectively. In the event an agency on the MBRT is concerned that a proposed use may not comply with the terms of the banking instrument, that agency may raise the issue to the attention of the Corps or NRCS through the permit evaluation process. In order to facilitate timely and effective consideration of agency comments, the Corps or NRCS, as appropriate, will advise the MBRT agencies of a proposed use of a bank and initiate discussion as necessary. The Corps will fully consider comments provided by the review agencies regarding mitigation as part of the permit evaluation process. The NRCS will consult with FWS in making its decisions pertaining to mitigation.

If, in the view of an agency on the MBRT, an issued permit or series of permits reflects a pattern of concern regarding the application of the terms of the banking instrument, that agency may initiate review of the concern by the full MBRT through written notification to the MBRT Chair. The MBRT Chair will convene a meeting of the MBRT, or initiate another appropriate forum for communication, typically within 10 days upon receipt of notification, to resolve concerns. If resolution is not reached, an agency may request that the issue be reviewed by higher levels within each agency consistent with the procedures described in the preceding paragraph. Invoking this dispute resolution procedure to address concerns regarding the application of a banking instrument will not delay any permit decision pending before the authorizing agency (i.e., Corps or NRCS).

This guidance does not affect in any way the Corps statutory authorities and responsibilities under Section 404 of the Clean Water Act or Section 10 of the Rivers and Harbors Act. The ability of

an agency to elevate a particular permit or policy issue in accordance with the Section 404(q) Memoranda of Agreement between the Department of the Army and the Federal advisory agencies will not be limited in any way by this guidance. Similarly, EPA's authority to deny or restrict authorization of a CWA permit in accordance with Section 404(c) will not be limited in any way by this guidance.

### D. Criteria for Use of a Mitigation Bank

## 1. Project Applicability

All activities regulated under Section 10/404 may be eligible to use a mitigation bank as compensation for unavoidable impacts to wetlands and/or other aquatic resources in so far as the use complies with the terms of the banking instrument. Mitigation banks established for FSA purposes may be debited only in accordance with the mitigation and replacement provisions of 7 CFR part 12.

Mitigation banks may also be used to compensate for adverse impacts to wetlands and/or other aquatic resources authorized under other resource protection programs such as state regulatory programs. In no case may the same credits be used to compensate for more than one activity; however, the same credits may be used to compensate for an activity which requires authorization under more than one program.

# 2. Relationship to Mitigation Requirements

For purposes of Section 10/404, all appropriate and practicable steps must be undertaken by the applicant to first avoid and then minimize adverse impacts to aquatic resources, prior to authorization to use a particular mitigation bank. Remaining unavoidable impacts must be compensated to the extent appropriate and practicable. For both the Section 10/404 and "Swampbuster" programs, requirements for compensatory mitigation may be satisfied through the use of mitigation banks when either on-site compensation is not practicable or use of the mitigation bank is environmentally preferable to on-site compensation.

It is important to emphasize that applicants should not expect that establishment of, or participation in, a mitigation bank will ultimately lead to a determination of compliance with applicable mitigation requirements (i.e., Section 404(b)(1) Guidelines or FSA Manual), or as excepting projects from any applicable requirements.