



**U.S. Army Corps
of Engineers**

Baltimore District
PN-23-24

Public Notice

**In Reply to Application Number
NAB-2022-61353-M37(Mill Swamp Mitigation
Bank)**

Comment Period: May 10, 2023 to June 9, 2023

THE PURPOSE OF THIS PUBLIC NOTICE IS TO SOLICIT COMMENTS FROM INTERESTED PARTIES CONCERNING THE PROSPECTUS FOR DEVELOPMENT OF A PRIVATE COMMERCIAL COMPENSATORY MITIGATION BANK.

The Baltimore District, United States Army Corps of Engineers (Corps) has received a complete prospectus pursuant to the 2008 Mitigation Rule (33 CFR 332) proposing to establish a compensatory mitigation bank (“Bank”) and generate mitigation credits to offset unavoidable impacts to waters of the United States (WOUS) authorized under Section 404 of the Clean Water Act (33 USC 1344). The proposed Bank may also provide alternative types of mitigation for Corps civil works projects as well as mitigation in connection with resolving Clean Water Act enforcement cases. In addition, the proposed Bank may be used to generate compensatory mitigation credits to offset unavoidable impacts to wetland and/or waters regulated by the state of Maryland.

BANK SPONSOR:

NextEra Energy Marketing, LLC
700 Universe Boulevard EPM
JB, Juno Beach, FL 33408

WATERWAY AND LOCATION OF THE PROPOSED BANK:

The Mill Swamp Mitigation Bank (Bank) is located on Mill Swamp (a tributary to Pomonkey Creek) in Charles County, Maryland and encompasses approximately 50 acres. The project site is in the Middle Potomac-Anacostia-Occoquan Service Area identified as Hydrologic Unit Code (HUC 020700010) in the Southeastern Plains Level III ecoregion. The project midpoint location is 38° 39’ 34” N, 77° 04’ 42” W and occurs near Pomonkey, Charles County, Maryland. See Appendix A of the prospectus for a vicinity map and service area map.

OVERALL PROJECT PURPOSE:

The primary purpose of the Bank is to provide commercial compensatory stream and wetland mitigation credits for unavoidable impacts to streams and nontidal wetlands authorized under Section 404 of the Clean Water Act.

The linked amendment request (entitled as a “Mill Swamp Prospectus with Appendix A”) provides a summary of the development of the Bank and initiates the Corps’ review associated with establishment of this Bank. The proposed bank, including associated approved site-specific mitigation plans, is the legal document for the establishment, operation, and use of the maintenance of the Bank in a way that complies with the regulations governing compensatory mitigation for activities authorized by DA permits granted by the Corps.

Pursuant to 33 CFR 332.8(d)(4), the Corps has posted a full copy of the subject prospectus online so that it is available for review by the public. The prospectus may be downloaded from the Regulatory In-Lieu Fee and Bank Information Tracking System at web address:

https://ribits.ops.usace.army.mil/ords/f?p=107:10:16104566432926::::P10_BANK_ID:6408

PROJECT DESCRIPTION:

The proposed establishment of this 50-acre Bank site involves the re-establishment, rehabilitation, and enhancement of aquatic resources. The bank sponsor proposes that ecological lift associated with establishment of this mitigation bank, including stream habitat construction, riparian corridor connection, wetland re-establishment, forest planting, and invasive species control, and wetland and stream preservation would generate wetland and/or stream credits that are to provide off-site compensatory mitigation for activities authorized under a DA permit. Specifically, the following is a list of project objectives as described by the bank sponsor:

- Restore streams in the Mill Creek watershed and rehabilitate stream buffers to produce 3,285 functional feel of stream mitigation credits.
- Re-establish approximately 9.4 acres of forested mosaic wetlands;
- Enhance approximately 25 acres of existing forested mosaic wetlands;
- The Bank is proposed to be protected in perpetuity via recordation of a real estate instrument such as a conservation easement or restrictive covenant.
- Upon Bank closure, the Bank is proposed to be managed long term by a third-party long-term steward, and if not identified, the bank sponsor will retain the legal responsibility for long-term management of the Bank site.

PROPOSED SERVICE AREA:

The service area of a Bank is a geographic area, such as a watershed or ecoregion, within which the mitigation bank is authorized to provide compensatory mitigation required by DA permits. The proposed primary Service Area is the Middle Potomac-Anacostia-Occoquan Service Area (HUC 02070010). The secondary service area is the Lower Potomac Watershed (HUC 02070011). The secondary service area was chosen because of the proximity of the proposed bank's location within the sub-basin in relation to other watersheds.

The use of the secondary service area would be considered by the Corps only when credits are not available from another approved mitigation bank within the primary service area and the applicant demonstrates that the mitigation credits will replace the lost aquatic functions and services at the impact site. Impacts to coastal and tidal aquatic resources would be excluded from mitigating at this nontidal bank.

MITIGATION BANK APPROVAL AND PERMITTING PROCESSES:

This Bank may be one of a number of practicable options available to applicants to compensate for unavoidable impacts associated with permits issued under the authority of Section 404 of the Clean Water Act. Released mitigation bank credits are generally the preferred option for compensatory mitigation because Banks consolidate resources, involve more financial planning and scientific expertise, and must meet certain performance standards, thereby reducing risks associated with mitigation projects. Approval to use an approved Bank site to offset impacts for a specific project is the decision of the Corps pursuant to Section 404 of the Clean Water Act. The Corps provides no guarantee that any particular individual or general permit will be granted authorization to use an approved Bank site to compensate for unavoidable impacts associated with a proposed permit. Authorization by the Maryland Department of the Environment may also be required to use this Bank to offset specific impacts regulated by the State of Maryland.

Issuance of a public notice regarding proposed Bank sites is required pursuant to 33 C.F.R. § 332.8(d)(4) and 40 C.F.R. § 230.98(d)(4). The proposed establishment of the bank will be evaluated pursuant to the 2008 Mitigation Rule (33 CFR Part 332).

The Sponsor must obtain the appropriate federal, state, and local permits required to implement the Bank construction activities. The bank sponsor has not yet submitted an application for a Corps permit. The Corps will complete consultation, if appropriate, under the Endangered Species Act, the National Historic Preservation Act and other applicable federal laws, prior to any DA permit authorization for construction of the Bank site.

Based upon a preliminary review of the prospectus, the proposed work to develop the Bank site may result in temporary and/or permanent impacts to WOUS or work within navigable WOUS. No DA permit application has been submitted to date for the proposed construction activities associated with development of the Bank. A preliminary review indicates that the proposed work may qualify for Corps authorization under the Nationwide Permit #27 (Aquatic Habitat Restoration, Enhancement, and Establishment Activities) or State Programmatic General Permit. Both the Programmatic General Permit and Nationwide Permit #27 have undergone a full public interest review as required by Corps regulations (33 CFR 320.4(a)), and National Environmental Policy Act documentation has been prepared that addresses environmental considerations.

EFFECTS ON AQUATIC RESOURCES:

The proposed work would result in approximately 9.40 acres of wetland restoration, 24.98 acres of wetland enhancement, 7,490 linear feet of stream restoration, and additional riparian buffer preservation/enhancement. The project will temporarily impact approximately 120,713 square feet emergent nontidal wetland, 55,266 square feet scrub-shrub nontidal wetland, 101,281 square feet forested nontidal wetland, 1,697 linear feet of intermittent stream, and 4,313 linear feet of perennial stream.

LEAD FEDERAL AGENCY:

The Corps, as the lead federal agency, is responsible for all coordination pursuant to applicable federal authorities.

The Interagency Review Team (IRT) responsible for review, approval, and oversight of the proposed mitigation bank includes representatives from the Corps, the United States Environmental Protection Agency, the United States Fish and Wildlife Service,

the National Marine Fisheries Service, the Maryland Department of Natural Resources, the Maryland Department of the Environment, the Maryland Historic Trust. The Baltimore District of the Corps chairs the IRT and the Maryland Department of the Environment co-chairs the IRT.

ENDANGERED SPECIES:

A preliminary review of this prospectus indicates that the proposal is not likely to adversely affect federally listed threatened or endangered species or their critical habitat, pursuant to Section 7 of the Endangered Species Act, as amended. As the evaluation of this application continues, additional information may become available which could modify this preliminary determination.

ESSENTIAL FISH HABITAT:

The Magnuson-Stevens Fishery Conservation and Management Act (MSFCMA), as amended by the Sustainable Fisheries Act of 1996 (Public Law 04-267), requires all federal agencies to consult with the National Marine Fisheries Service (NMFS) on all actions, or proposed actions, permitted, funded, or undertaken by the agency that may adversely affect Essential Fish Habitat (EFH), including species of concern, life cycle habitat, or Habitat Areas of Particular Concern. The project site lies in or adjacent to EFH as described under MSFCMA for managed species under the MSFCMA. The Baltimore District has made a preliminary determination that the project is not within on EFH and will have no effect on EFH.

HISTORIC RESOURCES:

Pursuant to Section 106 of the National Historic Preservation Act of 1966 and applicable guidance, the Corps has reviewed the latest published version of the National Register of Historic Places and initially determined that no properties listed or eligible for inclusion, in the National Register of Historic Places, are located at the site of the proposed Bank. The Corps has made the preliminary determination that the proposed project has no potential to cause effects on historic properties. The Corps final eligibility and effect determination will be based on coordination with the State Historic Preservation Office as appropriate and required, and with full consideration given to the proposed undertaking's potential direct and indirect effects on historic properties within the Corps' identified permit area.

TRIBAL RESOURCES:

Section 106 of the National Historic Preservation Act also requires federal agencies to consult with federally recognized American Indian tribes that attach religious and cultural significance to historic properties that may be affected by the agency's undertaking. Corps Tribal Consultation Policy mandates an open, timely, meaningful, collaborative, and effective deliberative communication process that emphasizes trust, respect, and shared responsibility. The policy further emphasizes that, to the extent practicable and permitted by law, consultation works toward mutual consensus and begins at the earliest planning stages before decisions are made and actions taken. The Corps final eligibility and effect determination will be based on coordination with interested tribes, in accordance with the Corps current tribal standard operating procedures as appropriate and required, and with full consideration given to the proposed undertaking's potential direct and indirect effects on tribal resources.

MODIFICATION OF CIVIL WORKS PROJECTS: 33 USC 408 (SECTION 408):

All Section 408 proposals will be coordinated internally at the Corps. The Section 408 decision will be issued along with the Section 404 and/or Section 10 decision. Please see the following link for more information regarding Section 408:

<https://www.nab.usace.army.mil/Missions/Regulatory/Section-408-Requests/>

The applicant must obtain any state or local government permits which may be required.

NOTE:

This public notice is being issued based on information furnished by the bank sponsor. This information has not been verified or evaluated to ensure compliance with laws and regulation governing the regulatory program.

REQUEST FOR PUBLIC HEARING:

Any person may request a public hearing. The request must be submitted in writing to the district engineer within the designated comment period of the notice and must state the specific reasons for requesting the public hearing.

SUBMISSION OF COMMENTS:

The Corps is soliciting comments from the public; federal, state, and local agencies and officials; Indian Tribes; and other interested parties to help inform the Corps and the IRT as to the overall merits of the proposed Bank, the scope of the proposed mitigation bank, the delineation of the proposed service area, the ecological suitability of the Bank site to achieve restoration of WOUS, and to identify project aspects that should be addressed during the development of a draft mitigation banking instrument. Any comments received will be considered by the Corps to determine whether the proposal has the potential to provide mitigation opportunities for project proponents (permittees) authorized to impact WOUS under Section 404 of the Clean Water Act and/or Section 10 of the Rivers and Harbors Act or as a means of resolving Section 404 and/or Section 10 enforcement actions. Comments provided will become part of the public record for this action and are subject to release to the public through the Freedom of Information Act.

Written comments concerning the proposed Bank must be received within the comment period specified above through postal mail at the address below or electronic submission to the project manager's email address below. All comments should reference the Application Number NAB-2022-61353-M37.

Mr. Nick Ozburn
U.S. Army Corps of Engineers, Baltimore District
Regulatory Branch
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Baltimore, MD 21201
nicholas.r.ozburn@usace.army.mil

Please share this information concerning the proposed work with any persons known by you to be interested, who did not receive a copy of this notice.

General information regarding the Corps' permitting and mitigation processes can be found on our website at <https://www.nab.usace.army.mil/Missions/Regulatory.aspx>. This public notice has been prepared in accordance with Corps implementing regulations at 33 CFR 325.3. If you have any questions concerning this specific project, or would like to request a paper copy of this public notice, please contact Nick Ozburn, at (410) 395-4662 or by email at nicholas.r.ozburn@usace.army.mil. This public notice is issued by the Chief, Regulatory Branch.