

Mitigation Rulemaking: Facilitated Discussion

Session I: General Considerations and Requirements

Preamble:

- Jan Goldman-Carter, NWF: **preamble**, The preamble language allowing financial assurances to lapse should be removed, suggest that there should not be circumstances where that is permissible. (no problem with language of financial assurances in the rule)
 - Palmer Hough, EPA: clarification, There were some instances where the district engineer was not aware that financial assurance has lapsed. The proposed rule asks in the preamble for comments on whether there should be a provision for notification to district engineer within some time period prior to financial assurance is to lapse (this provision would mimic FL requirements)
 - George Howard, Restoration Systems: Response, Dedicated financial assurity should be required of government mitigation as well as private sector and non-profits mitigation.
- John Ryan, Land and Water Resources, Inc.: **preamble** section on unfunded Mandates Reform Act: this needs to be funded to give the regulators money to meet the timeframe and do the necessary work

1: Purpose and General Considerations

- Jan Goldman-Carter, NWF: **1c**, Should be direct reference to 404 (b) 1 requirements for practical alternatives in the rule. Should also be separate distinction between alternatives analysis and sequencing (i.e. should be a distinction between consideration of practicable alternatives and the requirement for appropriate and practicable minimizing of impacts).
- Wally Taylor, Sierra Club: **1c**, There should be further guidance and criteria/standards for district engineers to use to determine if avoidance and minimization have been performed.
- Jeanne Hanson, NMFS Alaska Region: **1d**, The rule is not very clear on meaning of accounting for regional variations under general considerations and how it will apply and be implemented (e.g. does it allow for Alaska's 1% rule?)

2: Definitions

- Connie Bersok, FL DEP: **2+** Supports the inclusion of uplands in definition of buffer in the rule;

- Connie Bersok, FL DEP: **2Δ** definitions for compensatory mitigation should be expanded to explicitly include work in uplands as potential mitigation activities.
- Ken Murin, PA DEP: **2Δ** The definition of compensatory mitigation and compensatory mitigation project should not include enhancement as part of definition because definition of enhancement says it may lead to decline in aquatic resource function and does not result in a gain in aquatic resource area;
- Jeanne Hanson, NMFS Alaska Region: **2Δ**, Need clarification on definition of off-site, are location restrictions based on watershed?
- John Ryan, Land and Water Resources: **2Δ**, Definition of on-site should be improved by removing or defining “near”.
- Rob Shreeve, MD State Highway Administration: **2Δ**, The definitions of off/on-site should be further clarified. Suggests that on-site should in the sub-watershed in which impact occurs and off-site is outside of sub-watershed. Sub-watershed is area that drains into impacted stream/wetland (e.g. could be major river basin or small creek drainage).
- Joy Zedler, UW: **2Δ**, The rule should exclude last three words in definition of reference aquatic resources (i.e. and anthropogenic disturbances) because as is the definition doesn't exclude anything as a reference aquatic resource.
- George Kelly, Environmental Bank and Exchange: **2Δ** The rule needs further clarification on how to reconcile service areas with the boundaries of a watershed plan (e.g. if watershed is much broader than service area of area of mitigation, how will the definitions be matched),
- Robin Mann, Sierra Club: **2Δ**, NRC report didn't articulate a role for broad stakeholder involvement in watershed planning. Thus, there is an inconsistency between preamble language about watershed approach, which references NRC approach to watershed planning, and definition of watershed in section 2 of the rule, which includes multiple stakeholder interests.
- Dan Spethmann, Temple-Inland: **2-**, 'Economics' needs to be defined. The potential for migrating wetlands from high value areas to low value areas and transferred benefits across the landscape needs to be taken into consideration in economic evaluation. Susan-Marie Stedman (NOAA NMFS) suggested that ILF programs may compensate for this.
- Don Ewoldt, National Mitigation Banking Association: **2** remove all use of word should from the rule, define 'should' as will not be used in this document.
- Mike Rolband, Wetlands Studies and Solutions: **2-**, Need a definition of ILF, **2-**, Need to define 'pooled mitigation'/'wetland condos', and perhaps this type of

mitigation should be prohibited, right now it is being promoted by some regulators to avoid the banking process so they don't have to go through rigorous requirements,

- Mike Rolband, Wetlands Studies and Solutions Inc.: **2-** need definitions for urban, suburban, rural and then how do you deal with the transition between these areas over time;

3: General compensatory mitigation requirements

- George Howard, Restoration Systems: **3aΔ**, Should say 'The purpose of this part is to establish *'equivalent standards and criteria'* not just 'standards and criteria'.
- Ellen Gilinsky, VA DEQ: **3bΔ**, Should be clarification on the limits of district engineer authority to determine if out of kind mitigation is appropriate.
- George Kelly, Environmental Bank and Exchange: **3bΔ**, Instead of automatically going back to on-site preference for mitigation sites where reliance on watershed plan is not practicable, he suggests we should instead look at most ecologically preferable alternative in that service area,
- Robin Mann, Sierra Club: **3b1Δ**, Should include 'where ecologically preferable' under conditions for allowing compensatory mitigation requirements to be satisfied by a particular bank.
- Doug Norris, MN DNR: **3cΔ**, What role will Corps, EPA play in developing and approving watershed plans? If someone comes up with another plan is it accepted as is or is there some kind of process? How is that addressed or not addressed in the rule?
- Ellen Gilinsky, VA DEQ: **3cΔ**, The role of states in approving watershed plans and states' efforts should be specifically recognized in the rule, and the approval of a watershed plan should be state 401 effort
 - Dennis Durbin, FHA: district engineer does not have authority to approve watershed plans
 - Bob Brumbaugh, Corps: will use information found in watershed plan,
 - Palmer Hough, EPA: Rule does not require district engineer to approve plans to site compensatory mitigation projects, instead it gives district engineer discretion to decide if plan was comprehensive enough to characterize environmental resources in that watershed and meet Corps purposes
 - Bob Brumbaugh, Corps: the district engineer may say that a specific plan doesn't have all of the information necessary for the purposes of siting mitigation projects (to make Corps decision).
 - Doug Norris, MN DNR: **3cΔ**, (Support Gilinsky) The rule should be more explicit about considering state level evaluations that prioritize locations for mitigation The rule should included state level analysis of wetlands

resources that would incorporate watershed type analysis, to consider the variation in wetland resources in the state.

- Ellen Gilinsky, VA DEQ: VA and ASWM is doing a lot of wetland mapping to preidentify areas for mitigation (support Norris comment)
- Mike Rolband, Wetlands Studies and Solutions Inc.: **3cΔ**, There is not enough clarity on the scale of watershed that will determine how mitigation decisions are made, this leads to confusion between regulators at different levels (state, county, local etc.)
 - Dennis Durbin, FHA, (Response Rolband) comment about scale of watershed. In the rule's preamble there is language that addresses that and provides flexibility.
- Susan-Marie Stedman, NOAA NMFS: **3c3Δ**, The rule should specify minimum level of information required or minimum standards required for watershed approach.
- Lisa Creasman: Conservation Trust for North Carolina: **3eΔ**, The rule needs clarification on in-kind mitigation. Does it mean wetland for wetland or wetland type for wetland type?
- George Howard, Restoration Systems: **3fΔ**, Should change that permittee responsible mitigation currently receives full credit from date of permit approval, yet banks have credits released over at least five year period; Supports phased credit release based on performance standards, including permittee responsible projects, all mitigation projects should trend towards banking standard of phased credit release. Thinks this is a 'blatant inequity', equivalence for the criteria of use is explicitly stated in congressional language (in defense authorization).
 - Steve Martin, Corps: (Response, Howard), the Defense Authorization did state equivalent standards on use and operation of mitigation should be to the maximum extent *practicable*.
 - George Howard, Restoration Systems: 'equality is equality whether it is practicable or not'
- Ken Murin, PA DEP: **3gΔ** The use of mitigation banks for compliance and enforcement actions needs to be explicitly stated in the rule.
- Ellen Gilinsky, VA DEQ: **3hΔ**, Rule may conflict with a state's 'no net loss' policy, by both allowing only preservation in a mitigation plan and allowing function over acreage measures for mitigation. (VA has state law that have to have no net loss of acreage and function)
 - George Kelly, Environmental Bank and Exchange: (Support Gilinsky) Need to address the possibility of lost acres and functions where preservation is identified as high priority using watershed approach in terms of 'no net loss' goal,

- Karyn Vandervoot, FHA PA: **3iΔ**, Should change “may give credit” to “shall give credit” under buffers. (*as is*: District engineers may require that compensatory mitigation project sites include, and may provide compensatory mitigation credit for, the establishment and maintenance of riparian areas and/or upland buffers around the restored, established, enhanced or preserved aquatic resources where necessary to ensure the long-term viability of those resources.)
- George Kelly, Environmental Bank and Exchange: **3jΔ**, The rule needs further clarification on what is ‘supplemental to’ in terms of generating credits by activities undertaken in conjunction (but supplemental to) other federal, state, local or tribal programs? (e.g. if doing monitoring for mitigation and did additional unrequired monitoring is that ‘supplemental to’?)
- Don Seaborn, Angler Environmental: **3k1-** should include that a bank sponsors could assume responsibility for mitigation that is typically thought of permittee responsible mitigation so that that banker could assume responsibility for something that is designed for a specific impact (project specific); do the rules allow for mitigation designed for a specific project by a third party (are there provision in the rule for project specific banks to be established).