

**DEPARTMENT OF THE ARMY  
OFFICE OF THE ASSISTANT SECRETARY OF THE ARMY (CIVIL WORKS)**

**COMPLETE STATEMENT  
OF**

**MR. DOMINIC IZZO  
PRINCIPAL DEPUTY ASSISTANT SECRETARY OF THE ARMY (CIVIL WORKS)**

**FOR THE HEARING BEFORE THE**

**SUBCOMMITTEE ON WATER RESOURCES AND ENVIRONMENT  
COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE**

**UNITED STATES HOUSE OF REPRESENTATIVES**

**ON**

**H.R. 1474, AMERICAN WETLAND RESTORATION ACT**

**ROOM 2167, RAYBURN HOUSE OFFICE BUILDING**

**1:00 pm, 20 September 2001**

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MR. CHAIRMAN AND MEMBERS OF THE SUBCOMMITTEE:

**INTRODUCTION**

Thank you for the opportunity to provide the Army Corps of Engineers views on the proposed "American Wetland Restoration Act", H.R. 1474, which relates to wetlands mitigation banking. We appreciate the continued interest shown by this Committee regarding the Army Corps of Engineers and other Federal agency efforts to

protect our Nation's wetlands and your support for the wetland mitigation banking program. At the outset let me confirm that the Army is completely committed to the national policy of "No Net Loss of Wetlands". Since the late 1980's, when that policy began to take effect, Corps permittees have been required to compensate for the wetland impacts and losses resulting from their permitted activities.

### **H.R. 1474**

We believe that H.R. 1474 could provide a strong platform for continuing the practice of using wetland resources protected in mitigation banks as compensation for authorized wetland impacts. Some opponents of the mitigation banking approach have argued that since there is no mention of mitigation banking in the Clean Water Act, it is inappropriate to use such a method for providing compensation when wetlands will be impacted. We, however, continue to believe that the Army, in coordination with Federal and state resource agencies, has the responsibility for providing the public with valid options for accomplishing their compensatory mitigation obligations. Mitigation banking is one such option. It is a valuable service that benefits the regulator, the permit applicant, the banker, and most importantly the environment.

Currently, the principles of the mitigation banking program are described in the form of interagency guidance. The "Federal Guidance for the Establishment, Use and Operation of Mitigation Banks," was published in the Federal Register on November 28, 1995, and is the basic source of direction for mitigation banking. We note that H.R. 1474 would recognize the approach established in the guidance and specifically require the use of banking charters and the requirement for financial assurances that make banking possible. However, we are concerned about the level of detail in H.R. 1474 that in our opinion specifies a number of requirements and practices that go beyond what the Federal guidance embodies. If enacted as currently drafted, the proposed legislation will reduce the flexibility that has allowed mitigation banking to become

established as a viable mitigation option.

We believe much of what H.R. 1474 would require could be accomplished through administrative rulemaking, which would eliminate the need for some of the detail currently proposed for legislation. In fact H.R. 1474 requires the Secretary of the Army and the Administrator of the Environmental Protection Agency to issue administrative regulations concerning some of the policies incorporated in the Federal Guidance on mitigation banking. Army and EPA could codify those policies and practices in the Federal guidance document that have proven successful. It would also allow an opportunity periodically to develop procedural changes that would support goals such as the decision-making time frames included in H.R. 1474.

The interagency Federal mitigation banking guidance has been in place for over 5 years. There are still challenges that exist with the process for approving and establishing mitigation banks. For instance, mitigation banks continue to take longer to approve than the 90 days recommended in the Federal Guidance document, frequently because of resource challenges and difficulties reaching a consensus. It is important that timeframes for review are not unnecessarily lengthy, as it is important to make environmentally sound mitigation options available as quickly as possible. However, time limits like those established in H.R. 1474 may be difficult to meet. The Corps, EPA, and other Federal agencies need to consider alternative methods for accomplishing interagency reviews and approvals of mitigation bank proposals. We believe that the interagency review process proposed in H.R. 1474 would provide the agencies adequate input into the process.

Detailed legislative definitions and instructions could conflict with other necessary mid-course adjustments concerning management of the Federal mitigation banking program. Some of the explicit statutory language in H.R. 1474 could hinder bank sponsors from providing sound wetlands mitigation at a reasonable cost. For

example, bank sponsors sometimes sell credits to people who buy them for purposes other than meeting the requirements contained in a Corps permit. In the way that H.R. 1474 is currently written, this option could be viewed as no longer available, thus, eliminating a source of revenue used to support the development of private mitigation banks. Other unforeseen consequences may also result from the detailed language in the proposed legislation.

Detailed statutory requirements could make it difficult for Federal agencies to manage the program adaptively, to respond to regional needs, and make programmatic adjustments that benefit the public and the environment. We need to retain the ability to allow new ideas and practices to be tested and changed to meet local conditions, and to allow the public an opportunity to comment and advise the Corps and EPA about how the program operates. Such feedback is essential to the management of environmentally oriented regulatory programs, like that of the Clean Water Act Section 404 program.

In addition, my staff are working with Corps staff and EPA and other agency staffs to review the findings of two reports related to mitigation. The first report, completed in May 2001 by the General Accounting Office, on the effectiveness of in-lieu-fee mitigation, emphasizes the importance of accountability, and the development of procedures to assess ecological success. The second report, completed in June of 2001 by the National Academy of Sciences (NAS), reviewed the effectiveness of wetlands mitigation. The Army believes that these two reports raise several valid concerns regarding mitigation that should be addressed to improve program performance. Therefore, we will continue to evaluate fully the results to these reports, and consider their recommendations when developing any relevant policy guidance or rulemaking on mitigation, to include mitigation banking.

## **MITIGATION BANKING STATUS**

The Administration appreciates the support of the Congress in the development of practices like mitigation banking for managing the Nation's wetland resources. Wetland losses have been an item of intense concern to the Nation's resource monitors and managers for the last 30 years, and this Administration supports the goal of “no overall net loss of wetlands” as I stated at the outset. We believe that the Section 404 Program continues to make significant contributions towards achieving this goal.

Mitigation banking is an important tool that should continue to be available to address the mitigation requirements associated with permit applications. Most landowners applying for permits do not wish to become wetland experts or to undertake the long-term management efforts needed to ensure the success of wetlands mitigation projects. Rather, they are simply seeking authorization to move forward with their development projects. Mitigation banks provide these landowners an additional option for complying with the mitigation requirements in their permits.

Banking also can provide the regulatory agency better control over the quality of the mitigation being required, and allows wetlands mitigation projects to be consolidated. Larger mitigation sites are often more ecologically successful than smaller mitigation projects scattered piecemeal across the landscape. Mitigation banking provides the opportunity to position mitigation sites in a manner that best benefits the watershed. Smaller sites, while sometimes locally important, are often subject to neglect, degradation or loss through activities in the surrounding area. In these circumstances, mitigation banks that incorporate many smaller sites under a watershed oriented management plan can better ensure their success.

Principally for these reasons, the Corps, EPA, and State agencies have encouraged the development of mitigation banks across the country. The number of

banks either in operation or in the application process has more than doubled since an inventory taken in 1992. At that time, 44 banks were in operation and another 68 were in the planning stage. By early 2000, more than 230 banks had been implemented with Federal approval (see Figure 1, below). In addition, there are at least another 140 banks in operation within State program approvals that may also be used by Federal permittees.

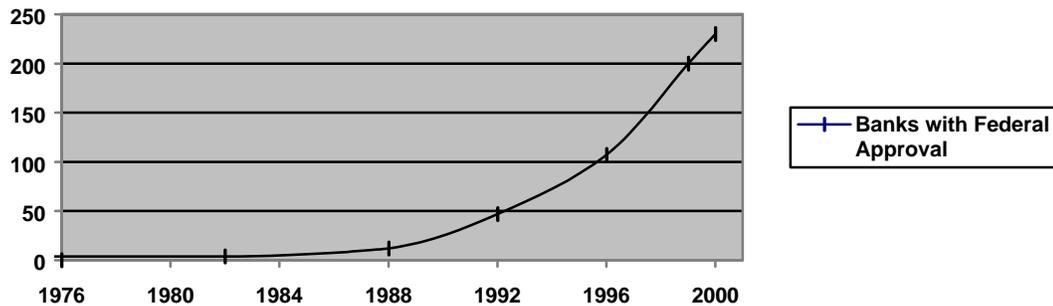


Figure 1.

Generally, mitigation banking projects bring together the financial resources, scientific expertise, and legal commitment needed to ensure that mitigation projects meet their environmental objectives and are properly managed and protected. The rapid growth in mitigation banking also had a dramatic economic result as much of this activity has occurred within private commercial banking ventures. In early 1992, there were no “for profit” mitigation banks, but by early 2000, there were about 100 for profit banks established. In Florida alone, the State estimated several years ago that credits associated with mitigation banking represented at least a three-quarter of a billion-dollar industry.

## CONCLUSION

My staff and staff from the Corps would be pleased to work with you and your

staff on this important initiative. We support H.R. 1474 as it would encourage the establishment and use of wetland mitigation banks. We would prefer that the legislation provide a framework for the establishment of mitigation banks, and endorse the basic concepts, principles and practices that make mitigation banking a valuable tool, to ensure that the legislation provides the necessary flexibility to administer the program. With this kind of leadership, both the public and private sector can continue to explore the innovative arrangements necessary to expand the opportunities for providing successful compensatory mitigation.

Mr. Chairman that concludes my statement and I would be pleased to address any questions that you or the committee may have.