

**COMPLETE JOINT STATEMENT OF
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**BEFORE THE TRANSPORTATION AND INFRASTRUCTURE
COMMITTEE, SUBCOMMITTEE ON WATER RESOURCES
AND ENVIRONMENT**

UNITED STATES HOUSE OF REPRESENTATIVES

**WETLANDS PROTECTION
AND MITIGATION BANKING**

**WASHINGTON, D.C.
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MR. CHAIRMAN AND MEMBERS OF THE SUBCOMMITTEE:

INTRODUCTION

Thank you for the opportunity to provide the Administration's views on wetlands protection and mitigation banking. I am Michael Davis, Deputy Assistant Secretary of the Army for Civil Works. As the Deputy Assistant Secretary responsible for Civil Works Policy, I am directly involved in the regulatory initiatives of the Army Corps of Engineers, which has primary responsibility for the administration of Sections 9 and 10 of the Rivers and Harbors Act and which coordinates with the Environmental Protection Agency (EPA) in the implementation of Section 404 of the Clean Water Act (CWA). With me today is Mr. Robert Wayland, the Director of the EPA's Office of Wetlands, Oceans, and Watersheds, the office responsible for administering EPA's role in the Section 404 program. We appreciate the interest shown by this Congress in the Administration's efforts to protect the Nation's wetlands and, in particular, our approach to mitigation banking. We appreciate the opportunity to discuss the Administration's experience with mitigation banking and to offer our views on proposed legislation that addresses this issue.

It is useful to first understand the context in which mitigation banking is operating and to provide some background information about the operation of the Clean Water Act Section 404 program. We will highlight the regulatory and programmatic underpinnings for mitigation banking and provide some information about the current status of implementation of the Federal guidance on mitigation banking. This overview of the Section 404 regulatory program, combined with our

experience to date in implementing mitigation banking across the country, will highlight a few key considerations that we must continue to address if the unique win-win of mitigation banking is to be realized.

SECTION 404 STATISTICS -- HOW THE PROGRAM WORKS

As noted in Figures 1 and 2, in Fiscal Year (FY) 1997, over 68,000 landowners asked the Corps for a Section 404 permit to discharge dredged or fill material into the waters of the United States, including wetlands. Of those, 87 percent received authorization under a general permit in an average time of 15 days. Less than 10 percent were subject to the more detailed individual permit evaluation, where the average time was 104 days. Less than one-half of one percent of the 68,000 applications were denied. It may be that in a few cases the Corps took too long to evaluate an application and perhaps subjected landowners to an unnecessarily lengthy evaluation process. However, these cases are very rare compared to the ones that go forward in a timely manner with minimal regulatory burdens. Finally, it should be noted that thousands of additional landowners proceed under the authority of general permits that do not require notifying the Corps.

While we believe that generally the program is fair and working well from a landowner's perspective, some continue to criticize the Corps for issuing too many permits. However, through the regulatory evaluation and conditioning process, including the general permit process, the Corps has been very successful in reducing impacts to the Nation's waters, including wetlands, as well as reducing adverse effects on other landowners. Most applicants are willing to "avoid, minimize, and/or compensate" for the adverse effects on waters of the U.S. including wetlands or other landowners that their projects could cause. Through effective application of the environmental criteria and the public interest review, the Corps believes that it has been successful in striking the correct balance between protection of the overall public interest and reasonable development of private property.

Administration Wetlands Initiatives -- A Fair, Flexible, and Effective Approach

These statistics reflect the significant changes made to the Federal wetlands program as part of the Administration's Wetlands Plan. Shortly after coming into office, the Clinton Administration convened an interagency group to address legitimate concerns with Federal wetlands policy. After hearing from States, developers, farmers, environmental interests, Members of Congress, and scientists, the group completed a 40-point plan identifying actions to enhance wetlands protection while making wetlands regulation more fair and flexible. The Administration's Wetlands Plan was issued in August 1993 and emphasizes the following objectives:

- *streamlining the wetlands permitting program to eliminate unnecessary regulatory burdens;*
- *increasing cooperation with private landowners to protect and restore wetlands;*
- *basing wetland protection on good science and sound judgement; and*
- *increasing participation by States, Tribes, local governments, and the public in wetlands protection.*

The Administration's Wetlands Plan includes over 40 specific initiatives, and in the four years since it was developed, many of the common-sense, workable initiatives from the plan have been implemented. For example, in 1993 the Corps and EPA issued guidance (Regulatory Guidance Letters (RGL) 93-2) clarifying the need for flexibility in processing permit requests, emphasizing that small projects with minor impacts do not need the same detailed review as large projects. In June of 1995, the Corps issued Nationwide Permit 29 for single family homes impacting less than 2 acre of non-tidal wetlands. This permit eliminates an unnecessary burden on families building a home or adding to an existing home which would impact wetlands on their property. Currently, the Corps is finalizing an administrative appeals process for permit denials. This program will allow landowners to appeal a Corps permit denial, or permit conditions the applicant views as equivalent to a denial, without the inconvenience and expense of going to Federal court. Lack of funding for the appeals process has delayed its implementation, but the Corps is moving ahead based on the increase in its regulatory budget to \$106 million in FY 1998. The Corps will begin implementing this program during FY 1998. These are some of the program initiatives that demonstrate our commitment to implementation of the Administration's Wetlands Plan and meaningful improvements to the wetlands program. In addition, in November of 1995, the Corps and EPA, along with three other agencies, issued joint Federal guidance concerning the establishment, use and operation of wetland mitigation banks. The guidance provides a solid policy framework that encourages mitigation banking, while establishing reasonable environmental standards.

WETLANDS MITIGATION

Mitigating for unavoidable adverse impacts resulting from necessary development actions in the aquatic environment, including wetlands, is a central aspect of the Section 404 Program. By offsetting such losses to the aquatic environment through the restoration, enhancement, creation or, under certain defined circumstances, the preservation of the aquatic environment, including wetlands, we are helping the Nation achieve the goal of "no overall net loss" of our remaining wetland resources. The Section 404 Program relies on the use of compensatory

mitigation to offset, to the extent appropriate and practicable, unavoidable damage to the aquatic environment, including wetlands.

The techniques for restoring wetlands, particularly freshwater wetlands, have been developing over the last decade. They continue to be refined as more is learned about these complex systems. A number of private and governmental entities have successfully restored degraded or lost wetlands to a productive status. For example, the U.S. Fish and Wildlife Service (FWS), in cooperation with private landowners across the Nation, has implemented 9,500 restoration projects affecting 200,000 acres. Since 1992, the U.S. Department of Agriculture has accepted offers under the Wetlands Reserve Program to restore wetlands on approximately 300,000 acres. Although there have been many successes, there continues to be concern about the effectiveness of individual case-by-case mitigation efforts to successfully replace wetland functions destroyed by authorized activities. Many mitigation projects have, in fact, failed due to one or more of the following reasons: poor siting and project design; inadequate monitoring programs; lack of adequate maintenance or remedial activities; and in some cases, failure of permittees to comply with the conditions of their permits. Moreover, landowners have expressed concern about the difficulties and long-term costs associated with providing mitigation required to gain approval for most wetlands projects.

MITIGATION BANKING

As discussed above, one of the Clinton Administration Wetlands Plan's key provisions is the endorsement of wetlands mitigation banking, when implemented in the context of the mitigation "sequencing" provisions of the regulatory program. Mitigation banking is an innovative, market-based alternative for landowners to effectively and efficiently compensate for wetland impacts, as required under Federal wetlands programs, without many of the problems and concerns mentioned above. Specifically, mitigation banking is an important mechanism for achieving a streamlined wetlands permitting program, a program based in good science and sound judgment, increased cooperation with private landowners to protect and restore wetlands, and increased participation by States, Tribes, local governments and the public in wetlands protection.

The concept of mitigation banking has been used in a limited manner for more than 15 years, but the practice is still relatively new and continues to evolve. Recently-established policies at the Federal and State levels have helped to define mitigation banking and provide a catalyst for the establishment of mitigation banks across the country. As stated in the Federal guidance, mitigation banking means:

“...the restoration, creation, enhancement and, in exceptional circumstances, preservation of wetlands and/or other aquatic resources expressly for the purpose

of providing compensatory mitigation in advance of authorized impacts to similar resources.”

Mitigation banks provide an option for the regulated community when compensatory mitigation at development sites is not practicable or when use of a mitigation bank is environmentally preferable to on-site compensation. In practice, restored or created wetlands are expressed as “credits,” which may subsequently be withdrawn to offset wetlands impacts, or “debits,” incurred at a development site.

Most landowners applying for permits do not wish to become wetlands experts or to undertake the long-term management effort 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 greater flexibility for complying with mitigation requirements and may have several advantages over individual mitigation projects, including the following:

- 1) Use of mitigation banks may reduce the time required to evaluate a permit application and provide more cost-effective compensatory mitigation opportunities for landowners. Through the purchase of credits from an approved mitigation bank, these applicants can transfer the responsibility for providing mitigation to a wetlands expert with the resources and incentive to ensure that the mitigation is ultimately successful.
- 2) Mitigation banks can also enhance the environmental effectiveness of wetlands protection programs. It is often more environmentally beneficial to consolidate compensatory mitigation into a single large parcel or group of contiguous parcels that maximizes the opportunity to successfully restore important wetlands functions. Establishment of a mitigation bank involves a level of financial commitment, as well as a level of planning and scientific expertise, not practicable for many project-specific compensatory mitigation proposals. This consolidation of resources can increase the potential for the establishment and long-term management of successful mitigation. Moreover, compensatory mitigation is typically implemented and functioning in advance of project impacts, thereby reducing temporal losses of aquatic functions and uncertainty over whether the mitigation will be successful in offsetting project impacts.
- 3) Consolidation of compensatory mitigation within a mitigation bank increases the efficiency of limited agency resources used in the review and compliance monitoring of mitigation projects. Thus, the agencies’ ability to ensure the success of efforts to restore, create or enhance wetlands for mitigation purposes is improved.

4) Finally, mitigation banking provides more assurances that the parcel replacing the developed wetlands can be successfully restored and allows a better assessment of the full functions and values of the replacement acreage.

NATIONAL MITIGATION BANKING STUDY

The Water Resource Development Act of 1990 (Public Law 101-640) provided the impetus for the Corps, through its Institute for Water Resources (IWR), to conduct a national wetlands mitigation banking study. The purposes of this study are 1) to comprehensively review and evaluate wetlands mitigation banking, 2) to determine its potential for achieving established national wetland goals, 3) to determine its applicability to Corps programs, 4) to develop general guidance on the establishment and operation of wetland mitigation banks, and 5) to formulate a demonstration program for potential implementation by the Corps.

The study began in December 1991 and has been conducted as a two-phase effort. The first phase was devoted to 1) critical review and evaluation of banks by means of case studies, coordination with others and literature research, 2) analysis of technical and policy issues, 3) assessment of crediting and debiting methods, and 4) determination of the feasibility of a wetlands mitigation banking demonstration program together with identification of potential demonstration sites.

The results of the first phase of the study were published in six reports. The Corps study identified the need for a clear national policy on mitigation banking and increased Corps involvement in the establishment of banks. These recommendations were in response to the problems encountered by banks and the need to support a more widespread acceptance and implementation of the concept. The first phase also concluded that there were many ways in which banking can be structured, especially commercial mitigation banking. New types of partnerships continue to be developed.

The first study phase found that, as of 1992, there were more than forty mitigation banks in existence, and many more in planning. The first-phase report indicated that these banks were a sufficient basis to evaluate mitigation banking and could serve effectively as a demonstration program. Although many mitigation banks typically had limited or insufficient oversight requirements and no Corps involvement in their planning, the majority were found to be either functioning as planned or there was good indication that they would be functional at some later time. While these banks represented a variety of institutional arrangements, most were sponsored by the client, that is, the user of the bank.

Very few banks offered compensatory mitigation on the open market to a general range of

users. The national study has referred to these types of banks as “commercial banks.” While there was increasing interest in commercial banking, a feeling of uncertainty by potential investors, due to the absence of a national or regional policy, greatly impeded implementation. Nevertheless, the first privately-sponsored commercial bank (an entrepreneurial bank) was authorized by the Corps in December 1992.

The second phase of the national wetlands mitigation banking study has focused on efforts that will assist the mitigation banking community in applying the banking concept. These tasks are 1) continued evaluation of market-oriented banking, 2) assistance in the preparation of policy and guidance pertaining to wetlands mitigation banking, 3) preparation of detailed procedural and technical guidance on the establishment and operation of banks for the benefit of potential public and private sponsors and Corps field personnel, and 4) preparation of a final report bringing together all of the study findings.

The IWR has already published three second-phase reports and conducted numerous training workshops and seminars in support of field implementation of the Federal guidance. The IWR is currently participating in the development of a Corps of Engineers training course specifically designed for the Federal agency personnel that are involved in evaluating and approving mitigation banking efforts.

INTERAGENCY MITIGATION BANKING POLICY

Under the 1993 Administration’s Wetlands Plan, the EPA and the Corps, in coordination with the FWS, the National Marine Fisheries Service, and the Natural Resource Conservation Service, issued interim guidance to their field staff that clarified the manner in which wetlands mitigation banking was to be used within the Section 404 regulatory program. This guidance provided interim direction pending the results of additional studies and encouraged, within environmentally sound limits, the use of mitigation banks for compensatory mitigation under Section 404.

Building on the information being accumulated through the national mitigation banking study, the White House Wetlands Working Group established an interagency team to prepare more comprehensive mitigation banking guidance. On March 6, 1995, a draft version of the interagency policy was published in the Federal Register for public comment. There were 130 comment letters received and considered by the agencies during preparation of the final policy. The final policy guidance was published in the November 28, 1995, Federal Register and became effective on December 28, 1995.

Recognizing the potential benefits mitigation banking offers for streamlining the permit evaluation process and producing more effective mitigation for authorized impacts to wetlands, the agencies prepared the policy guidance to encourage the establishment and appropriate use of mitigation banks in Federal wetlands programs. It is important to note, the interagency policy guidance does not change the substantive requirements of the Section 404 permit program. Rather, it provides general guidance regarding the steps needed to establish and operate mitigation banks consistent with existing regulations and policies and with appropriate environmental safeguards. The following highlights several of the key provisions of the interagency policy.

The guidance defines mitigation banking to include the restoration, creation, enhancement and, in exceptional circumstances, preservation of wetlands and/or other aquatic resources. As indicated in the guidance, the agencies have a strong preference that restoration projects be used for mitigation, because of the increased likelihood of success, but recognize there are circumstances where creation, enhancement and preservation may be appropriate and provide superior environmental benefits.

Under the guidance, approval of a mitigation bank involves the development of a formal agreement that describes in detail the terms and conditions under which the bank will be established and operated. As members of a mitigation banking review team, the Federal agency representatives will provide technical assistance to the bank sponsor during preparation of the banking agreement. We will also provide information and advice concerning the feasibility and need for the mitigation bank. The Corps will typically lead the effort and will be responsible for making the final decisions regarding the terms of the agreement. The public will have an opportunity to comment on each banking proposal. Our goal is to ensure that a decision on each mitigation bank occurs in a timely manner.

All activities regulated under Section 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. Use of a particular bank is left to the discretion of a permittee and is subject to approval by the Corps through the permit evaluation process. The service area of a mitigation bank is the designated area, e.g. the watershed or county, wherein a bank can reasonably be expected to provide appropriate compensation for impacts to wetlands functions and/or other aquatic resources.

Credits and debits are the terms used to designate the units of trade, that is the currency, in mitigation banking. Credits represent the accrual or attainment of aquatic functions at a bank; debits represent the loss of aquatic functions at an impact or project site. Credits are debited from a bank when they are used to offset aquatic resource impacts, for the purpose of satisfying Section 404 permit or FSA requirements. Credits may be sold to third parties. The cost of

mitigation credits to a third party is determined by the bank sponsor, not the Federal government.

As discussed previously, the number of credits available for withdrawal, that is debiting, should generally be commensurate with the level of aquatic functions attained at a bank at the time of debiting. However, the agencies recognize that the success of a mitigation bank with regard to its capacity to establish a healthy and fully functional aquatic system relates directly to both the ecological and financial stability of the bank. Since financial considerations are particularly critical in early stages of bank development, it is generally appropriate, in cases where there are adequate financial assurances and where the likelihood of success of the bank is high, to allow debiting of a percentage of the total credits projected for the bank at maturity. Such determination should take into consideration the initial capital costs needed to establish the bank and the likelihood of its success. However, it is the intent of the policy to ensure that those actions necessary for the long-term viability of a mitigation bank be accomplished prior to any debiting of the bank. In this regard, the following requirements should be satisfied prior to debiting: 1) banking instrument and final mitigation plans have been approved; 2) bank site has been secured; and 3) appropriate financial assurances have been established. In addition, initial physical and biological improvements should be completed within the first full growing season following initial debiting of a bank.

The bank sponsor is responsible for securing adequate funds for the operation and maintenance of the bank during its operational life, as well as for management of the bank beyond its operational life, as necessary. The bank sponsor is responsible for monitoring the mitigation bank, in accordance with monitoring provisions identified in the banking instrument, to determine the level of success and identify problems that may require remedial action.

Efforts to improve implementation of the mitigation banking policy continue. The IWR is assisting in the preparation of supporting technical guidance, including a model banking instrument. The Corps of Engineers Waterways Experiment Station, IWR and Corps Headquarters are developing a training course that covers, in addition to the policy aspects of mitigation banking, the technical considerations concerning siting and construction of banks. The agencies continue to provide encouragement and information to bank sponsors, as well as to State, Tribal and local development, regulatory and resource agencies involved in mitigation banking.

STATUS AND OUTLOOK

Since the Administration first endorsed mitigation banking as a part of our 1993 Wetlands Plan, we have taken steps to encourage the development of banks across the country. When carefully implemented, the results have been positive. The number of banks either in existence or

in the application process has more than doubled. In 1993, 44 banks were in operation and another 68 were in the planning stage. Today, there are more than 100 fully-operational banks, including several State program banks with multiple sites, and approximately 110 banks are being developed (see Figure 3).

The environment has benefited from these developments. Mitigation banking has allowed for the consolidation of mitigation efforts to provide an opportunity to successfully restore important wetland functions, including the protection of water quality, improved flood control, and enhanced wildlife habitat. Generally, these projects have brought together the financial resources, scientific expertise, and legal commitment needed to ensure these restoration projects meet their environmental objectives and are properly managed and protected in perpetuity.

The rapid growth in mitigation banking has also had a dramatic economic result, as most of this activity has occurred within private commercial banking ventures. In 1992, there were just a handful of commercial mitigation bankers in the business. Earlier this year, the Corps identified nearly 40 commercial banks in operation and another 50-75 banks proposed for agency approval. In Florida alone, the State has estimated that credits associated with all permitted and proposed mitigation banks within the State represented a three quarter of a billion dollar industry.

While the Administration is pleased that mitigation banking has experienced such growth throughout the Nation (see Figure 4), we are also encouraged by the positive regulatory result that has accompanied this success. Specifically, mitigation banking has been operating successfully, and in full compliance with the environmental safeguards established in the Section 404 Program. Under the Section 404 "sequencing" requirement, wetland impacts must first be avoided and minimized to the extent practicable before compensatory mitigation is assessed for all unavoidable impacts. This regulatory requirement is being implemented in a manner that effectively allows for case-by-case considerations that avoid and minimize wetlands impacts, while still providing a viable economic market for banks located throughout the country. The Administration is committed to ensuring that mitigation banking continues to yield both these positive environmental and economic results.

As a result of this demonstrated progress, we remain optimistic about the future of wetlands mitigation banking. There is clearly common ground on this very important issue. As called for in the Administration's Wetlands Plan, we support the Congressional endorsement of the agencies' approach to mitigation banking. Legislation such as H.R. 1290 would provide clear Congressional intent to promote mitigation banking as a concept and practice. Moreover, H.R. 1290 tracks closely with many of the important improvements of the Federal banking guidance, such as the definition of "mitigation bank" and the agencies' approach to establishing appropriate service areas.

However, it is important to recognize that the concept of mitigation banking is still evolving. As such, we are concerned that detailed legislation, such as the provisions of H.R. 1290, is so specific that it would not provide the necessary flexibility to respond to varying circumstances and improvements in mitigation banking.

Moreover, we also believe that it is critical that any legislation that Congress may consider regarding this issue, including H.R. 1290, recognize the need for the Section 404 Regulatory Program to continue to provide effective environmental review of proposed projects. Specifically, the mitigation sequencing requirements need to be codified by Congress to ensure that mitigation banks are used only to compensate for unavoidable wetland impacts. This approach to mitigation banking has proven successful, both for the environment and for the mitigation banking community; and we will continue to encourage it to ensure that mitigation banking promotes, rather than undermines, the protection of wetlands under Federal wetlands programs.

Finally, while we continue to encourage Congressional endorsement for mitigation banking, we believe that mitigation banking and other Section 404 issues need to be addressed in the context of broader Clean Water Act reauthorization. In this regard, we welcome the opportunity to work with Congressman Jones and other members of this Committee to develop mitigation banking provisions that meets our mutual objective to encourage wetlands mitigation banking in a flexible and environmentally sensitive manner.

CONCLUSION

The interagency mitigation banking guidance affirms the Administration's strong support for mitigation banking and the realization of the important role mitigation banking can play in Federal wetlands programs. The guidance provides support and encouragement for mitigation banking in both the private and public sector and endorses a watershed approach for integrating mitigation banking goals and objectives with local needs. While the guidance is specific on key policy issues at the national level, flexibility is maintained to allow field offices latitude in interpreting the guidance to address regional needs and interests. We support Congressional endorsement of the basic concepts and principles that make mitigation banking a valuable tool. With this kind of leadership, both the public and private sector can continue to explore the innovative arrangements necessary to expand the opportunities for successful compensatory mitigation. Mitigation banking is an important option that should be available to those needing authorization under the Section 404 and Swampbuster programs.

Mr. Chairman, that concludes our statement. We would be pleased to address any questions that you or the committee may have on the important subject of wetlands protection

and mitigation banking.