

## Mitigation Rulemaking: Facilitated Discussion

### Session II: Administrative Requirements and Performance Standards

#### 4: Planning and Documentation

- Steve Martin, Corps Norfolk District: **4c1Δ**, In the 2<sup>nd</sup> sentence, the word final (mitigation plan) should be changed to conceptual (mitigation plan). Otherwise the final language penalizes those that regularly submit permits (e.g. state DOTs or large developers).
  - Jeanne Hanson, NMFS Alaska Region: **4c1Δ** (response Martin) final may be too strict, but conceptual is too vague for required mitigation plan (e.g. initial or working), but should be a high-bar and should be tied back to permit,
  - Rich Mogensen, EarthMark's Mid-Atlantic Mitigation, LLC: (Response to Martin) In terms of mitigation plan (**4c1Δ**) provided to the Corps for permit approval, perhaps there should be something between conceptual (mitigation plan), which can be interpreted in many ways, and final (mitigation plan).
    - George Kelly, Environmental Bank and Exchange: (support Mogensen), Ask Martin if is there a rationale for going to a conceptual mitigation plan instead of keeping it at a final mitigation plan.
      - Steve Martin, Corps: response: Holding up permit for final (100% design) for large mitigation projects (e.g. DOT plans) may unduly burden permittees with many mitigation projects.
  - Mike Rolband, Wetlands Studies and Solutions, Inc.: **4c1Δ** (response Martin) should define 'final plan' in the rule's definition and if permits are issued with something less define that term (e.g. sketch plan, conceptual plan, construction documents),
  - George Kelly, Environmental Bank and Exchange: **8jΔ** (Response Martin) if permittee responsible requires only a 'conceptual' mitigation plan for permit approval then, for equivalency, banks should only be required to submit a conceptual mitigation plan for credit release, but this doesn't make sense for the bank and thus more than 'conceptual' plan should be required of permittee responsible mitigation
- Peggy Strand, Venable LLP: **4c(1-14)+** Supports equivalent standards/provisions for mitigation plans for *every* mitigation provider (including: determination of credits, specific work plan, specific site, specific financial assurances to obtain mitigation site and for long-term management). Currently these standards are only required of mitigation banks and not other providers.
  - Peggy Strand, Venable LLP, Follow-up **4c1-14Δ** should include phase in period so mitigation providers and permit applicants can prepare to meet

strict mitigation plan requirements rather than have exceptions for modification from these stricter requirements.

- Jeanne Hanson, NMFS Alaska Region: **4c6Δ** should be language that recognizes that economic theory be part of determining credits,
- Jason Albritton, TNC: **4c12Δ** preamble language about removing liability for “acts of God”, this should be part of adaptive management plan and shouldn’t waive liability for acts of God;
  - Palmer Hough: EPA, language is “natural catastrophe provisions” on page 15527 of the rule (end of first column); let us know if you think this should be in the text of the rule
- Mike Rolband, Wetlands Studies and Solutions Inc.: **4c13Δ** Financial assurances should be tailored to cost of actually performing the work in case the provider fails to perform so that someone could step in and fix the problem.
- George Kelly, Environmental Bank and Exchange: **4c13Δ** needs further clarification on whether financial assurances should be phased out as performance standards are met or as credits are released, or whether 100% of the financial assurances are needed until all standards are met.

#### 5: Ecological performance standards

- Ken Murin, PA DEP: **5+**, Support ecological performance standards section, especially if they are based on project goals and location of the project
- Ellen Gilinsky, VA DEQ: **5+** Support the performance standards section, VA already doing most of this under joint guidance with district Corps, this should limit some do-it-yourself mitigation (Support Murin),
- Jeanne Hanson, NMFS Alaska Region: **5Δ** clarification on ‘*reasonable* amount of effort’ for measuring performance standards,
- Robin Mann, Sierra Club: **5Δ** should incorporate notion of reaching sustainability in performance standards.

#### 6: Monitoring

- Ken Murin, PA DEP: **6+**, Support monitoring section,
- Bill Gilmore, NC DENR: **6bΔ**, The rule needs clarification of criteria for when a monitoring period: *must* be five years, may be *waived* or may be *extended*.

- Ellen Gilinsky, VA DEQ: **6bΔ** Concern that five year monitoring period might be insufficient for specific wetlands (specifically forested), banks in VA require 10 years.
- John Ryan, Land and Water Resources Inc.: **6bΔ**, The rule should add flexibility to 5 year monitoring period, which should be tied to performance standards,
- Mike Rolband, Wetlands Studies and Solutions Inc.: **6bΔ**, The monitoring period should be consistent, at least in each corps district, based on specific wetland or mitigation type regardless of provider,
- Jeanne Hanson, NMFS Alaska Region: **6bΔ** should include recognition for short growing seasons for determining longer monitoring periods.
- Mike Rolband, Wetlands Studies and Solutions, Inc.: **6Δ** information from monitoring reports should be fed back to providers or consultants; and monitoring reports should be done in a consistent manner at least in a district based on wetland type or stream type so that can gain information on state of the art in terms of design,
- Jan Goldman-Carter, NWF/CWN Wetlands Group: **6-** should have repercussions for failure to submit monitoring reports,

## 7: Management

- Julie Sibbing, NWF: **7a,bΔ**, Concerned about the amount of shoulds in site protection (as is “...should be provided long-term protection”, “...should restrict or prohibit incompatible uses”) and sustainability sections (as is “...should be designed to the maximum extent practicable to be self-sustaining”). Need to use shall or must instead.
  - George Kelly, Environmental Bank and Exchange: (Follow-up to Sibbing) **7aΔ** Should be stronger language for all forms of mitigation concerning site protection in perpetuity
- Michael Thabault, US FWS: **7bΔ** should explicitly state that all terms and conditions of original permit (or bank agreement) flow to long term manager (receiver of site),
  - Mike Rolband: Wetlands Studies and Solutions, Inc., **7bΔ** (response Thabault) Only the permit conditions that apply to mitigation should flow to long term manager.
    - Don Ewoldt, National Mitigation Banking Association, **7bΔ** (Supports Rolband, response Thabault)
- Ken Murin, PA DEP: **7bΔ**, once performance standards are achieved mitigation sites should revert to being regulated jurisdictional wetlands (i.e. waters of the US)
  - Julie Sibbing response; rule clarifies this in section **1b**

- Bill Gilmore, NC DENR, EEP: **7bΔ**, **8aΔ** should be a provision to address issues when long-term active management or stewardship might not be practicable (e.g. sea level rise; or if endangered species is no longer present)
  - Palmer Hough, EPA: response: the rule tries to address this in the preamble, “natural catastrophe provisions”
  - Steve Martin, Corps Norfolk district: response, some of Gillmore’s comments may be addressed by adaptive management plan.
- John Ryan, Land and Water Resources Inc.: **7dΔ** Capitalization of long-term management agreement should be determined by permittee and long-term manager (should not be determined by MBRT/IRT);
- John Ryan, Land and Water Resources Inc.: **7dΔ**, Need more clarification and standard, consistent language on what long-term management is and on the responsibilities of long-term managers.
- Jan Goldman-Carter, NWF/CWN Wetlands Group: **7dΔ** should specify that government agencies who will serve as long-term managers for mitigation sites should also have financial assurances, and they should be privately financed for this management (if impacts are private).
- Michael Thabault, US FWS: **7dΔ** should explicitly ensure that long-term financing be specified in future dollars.