

Mitigation Rulemaking: Facilitated Discussion

Session III: Third Party Mitigation

MBRT vs. IRT

- Ellen Gilinsky, VA DEQ: Should keep MBRT and not change to IRT.
- Mike Rolband, Wetlands Studies and Solutions Inc.: LEAVE AT MBRT

8: Mitigation Banks

- George Howard, Restoration Systems: **8,9** all mitigation methods should have equivalent standards, and those types (e.g. ILF) that can not meet standards shouldn't be allowed a break; in thin mitigation markets, where banks may currently be not profitable, credit release schedules should be accelerated to be equivalent to permittee responsible mitigation so that banks can compete; the goal should be to professionalize mitigation and not just put mitigation into banks, banks must have flexibility to meet standards, or they will only continue to be successful in only the places they have worked thus far (e.g. FL etc.)
- Ellen Gilinsky, VA DEQ: **8Δ** Generally... the role of states (and state programs) in this section is subservient to role of federal agencies (this is not prominent enough in the rule); the states should have a more equal role with federal agencies in reviewing and approving banks (i.e. states should be co-chair, not just at discretion of district engineer, especially in states that have more than 401 program), Specifically... **8b2Δ** should specifically state that the state should be co-chair if there are state programs; **8b4Δ** district engineer alone should not have final authority for approval of banking instrument, instead there should be a role for the state;
 - Ken Murin: PA DEP, **8b7**, (support Gilinsky 8) about role of states in MBRT/IRT process;
 - Dan Spethman, Temple-Inland, (response Gilinsky 8Δ) In terms of the role of the state, don't states have 401 certification process which allows a state to deny certification to a 404 project.
 - Gilinsky response: Yes, but 17 states have own separate wetlands laws that go beyond 401 certification. But, all states have 401 authority.
- Ellen Gilinsky, VA DEQ: **8d+** support dispute resolution process suggested in the rule, but should not only be in hands of the Corps, there should be a role for the states.
 - Karyn Vandervoot: PA FHA, **8d+** (support Gilinsky) Support dispute resolution procedures, but would like timelines to be applied to other Corps decision-making processes (e.g. time frames);

- Karyn Vandervoot, PA FHA: **8a2Δ** Have not been able to use Corps land for mitigation (against Corps mission), “Public lands” sites for mitigation banks needs further definition;
- George Kelly, Environmental Bank and Exchange: **8a2Δ** should be protection in perpetuity for credits sold on public lands;
- Jeanne Hanson, NMFS Alaska Region: **8b1Δ (as well as throughout rule)** ‘his’ language should be removed from the rule.
- Jan Goldman-Carter, NWF/CWN Wetlands Group: **8c4Δ** should remove suggestion that the timeframe for public comments on approval of mitigation bank can be shorter than 30 days; should require the district engineer to make prospectus available to the public.
- John Ryan, Land and Water Resources, Inc.: **8c5Δ** Need clarification on a general rule for service area size; should be specific HUC; or use regulatory needs (how much area needs to be covered to address impacts), not economics to determine the size;
- Michael Thabault, US FWS: **8c5.iiΔ** should connect determination of services area to ecological unit, functions and values (e.g. watershed or multiple watersheds etc.), not economics or regulatory needs, this would also apply to definitions of service area;
 - Mike Rolband: Wetlands Studies and Solutions Inc., (Response Thabault 8c5.ii) could limit the service area of a bank to the same 8 digit or adjacent HUC code within the river watershed, and also have to be in same physiographic province (like in VA by law and policy);
- Robin Mann, Sierra Club: **8c5.iiΔ** should remove “economically viable” language from service area determination;
- Jason Albritton, TNC: **8c5Δ** ecological rather than economic considerations should drive determination of service areas;
 - Dan Spethman: Temple-Inland, (Response Thabault, Albritton) there is upcoming body of economic based research to provide way to value goods and services; economics language should not be removed from mitigation ratios and mitigation values because need to recognize that economics is not finance
- George Kelly, Environmental Bank and Exchange: **8c5Δ** preamble states some banks (e.g. single user banks) may have larger service areas than other, service areas should not be defined by type of bank sponsor so that standards are equivalent;
- Mike Rolband, Wetlands Studies and Solutions Inc.: **8c5.2-** should add considerations for “suburban” areas in this section,

- Mike Rolband, Wetlands Studies and Solutions Inc.: **8c7A** once banking agreement is signed, federal agencies that don't sign the agreement they should not be able to block use of banks when permits are issued; if agencies that normally participate in MBRT don't have time or resources to fully participate and sign the instrument then they should not be allowed to participate or object;
- Karyn Vandervoot, PA FHA: **8d6A** Need clarification on whether Corps can require upland preservation and not give credit for it;
- Connie Bersok, FL DEP: **8k+** Support language about using other methods for determining credits (supports using functional assessment units to determine credits);
- Wally Taylor, Sierra Club: **8k2A** comment about the wetland types that a bank offers and whether or not the offered types in the bank are appropriate for compensating for impacts to specific types of wetlands; concerned that functional assessment where practicable may not be practicable because the mitigation in the bank has been done in advance and may not offer the full range of possible impacted functions
 - Palmer Hough, EPA: response: **3e** has discussion on type of wetland, specifically says there is a preference for in-kind, but there are concerns about the clarity of in-kind (response Creasman)
 - Dan Spethman, Temple-Inland: (response Taylor 8k2A); purpose of mitigation banking is creating replacement in advance of impact, which is a value of mitigation banking.
 - John Ryan, Land and Water Resources, Inc.: (response Taylor 8) the advantage of mitigation banks is that mitigation is done in advance of impacts, concern that impacted functions are mitigated is often addressed by regulators by setting specific ratios;
 - Don Seaborn, Angler Environmental: (response Taylor 8), For projects with larger impacts it may be preferable to do project specific mitigation rather than buy bank credits to ensure specific impacts are adequately compensated and mitigation can be designed with those impacts in mind.
- Dan Spethman, Temple-Inland: **8k2A** This section needs further clarification on whether if functional assessment is used to quantify credits, are you obligated to use the same assessment to evaluate impacts. If so this may be a disincentive for using functional assessment at all.
- Jason Albritton, TNC: **8k5A** should be specifically stated that credits provided by preservation should be predicated on watershed plan to identify where preservation should be used;
- Connie Bersok, FL DEP: **8k5-6A** should clarify use of functional assessment units for determining preservation credits and riparian, buffer and upland credits, currently specifies they shall be acres or linear feet;

- Connie Bersok, FL DEP: **8k6Δ** “essential” should be defined in terms of defining credits for riparian, upland and buffer areas, so these areas are not used as mitigation of last resort;
 - Doug Norris, MN DNR: **8k6Δ**, (Support Bersok) concerned about only allowing credits for non-aquatic resources that are “essential” to maintaining the ecological viability of adjoining aquatic resources would create a disincentive for protecting buffers (which can be really important); could adequately replace aquatic resources and upland buffers through permit conditions and replacement ratios.

- Jeanne Hanson, NOAA Alaska region: **8k6Δ** buffers are used in sequencing prior to compensatory mitigation for minimization of impacts to aquatic resource, this should be acknowledged in the rule; is concerned that buffers will be used to meet compensatory mitigation requirements when before they were used to avoid impacts

- John Ryan, Land and Water Resources, Inc.: **8k8Δ** Need clarification on what happens if there is not a response by the end of the time frame for review of milestones necessary for release of credits. Is that an indication of acceptance?
 - Rich Mogensen: EarthMark’s Mid-Atlantic Mitigation, LLC, (support Ryan) would also like to see timeline requirement for Corps credit release notification to banker;

- Karyn Vandervoot, PA FHA: **8lΔ** Suggests that it is restrictive to require the sponsor to notify the district engineer “each time” a credit is approved, instead could be a specific time period, e.g. monthly or quarterly

- George Kelly, Environmental Bank and Exchange: **8lΔ** there should be a statement requiring the chair of IRT (Corps) to report deficiencies in monitoring report to bank sponsors within a reasonable period of time;

- Michael Thabault, US FWS: **8mΔ** should be more stringent language as to which bank is appropriate for the impact specified in the banking agreement, right now the language implies that district engineer could permit mitigation in any bank;

- John Ryan, Land and Water Resources, Inc.: **8mΔ** in the use of credits there is a discrepancy between the Corps and EPA language, EPA allows enforcement actions to go to banks and this should be included in the Corps regulations;

- Dan Spethman, Temple-Inland: **8pΔ** As banking instruments are updated, is the original instrument grandfathered in? (e.g. Is the service area grandfathered in if area is added to the bank, is the original bank held to a new standard when area is added or is a portion of it grandfathered in?) Are there portions of the original instrument that are grandfathered in as changes are made to the instrument.

- Robin Mann, Sierra Club: **8-** this section on bank authorization should contain language that authorization of banks should be in light of whether it is consistent with existing watershed plans.
- Rich Mogensen, EarthMark's Mid-Atlantic Mitigation, LLC: **8-** Would like to see appeals process if a bank is denied at the end of the one year period, and specify a way to rectify concerns.

9: In-lieu fee programs

- Suzanne Klimek, NC EEP: **9A** ILF programs have benefits and there should be a provision for them in the rule, NC will submit specific comments on conditions for ILF programs;
- Ken Murin, PA DEP: **9A** For small impacts, ILF should be an option. Should be more flexibility to allow for some ILF programs because dealing with these types of small acreage and minimal number impacts would be difficult with only mitigation banks.
- Ken Murin, PA DEP: **9A**, against the total suspension of ILF program, especially for states that have more specific requirements than (or work outside, or below threshold) the 404 program, (or in states with few large mitigation projects and more small projects where it might not be economically feasible to have a bank)
- Michael Thabault, US FWS: **9A** seems shortsighted to eliminate ILF especially for very small impacts, this regulation should put timeframes on when ILF money is spent to improve ILF programs.
 - Mike Rolband, Wetlands Studies and Solutions Inc.: **9** (support Thabault) ILF programs should focus on using money, need regulations to require ILF programs to spend funds in specified timeframe (focus should not focus on collecting money and collecting interest (referenced VA ILF program), but should focus on spending money)
 - Jessica Wilkinson, ELI: Many ILF programs have a timeframe in their agreements
 - Jason Albritton, TNC: (Response Rolband); TNC agrees that spending ILF money and not just holding on to it is a priority; VA ILF program is doing the mitigation, even if its not spending much money, they can do this because they receive *bargain sales* because of non-profit status, so they are meeting requirements of compensatory mitigation even if they are not spending all of the money (e.g. received money for approximately 180 acres of impact, and have restored 405 acres and preserved uplands or wetlands for 2500 acres), TNC has an extensive planning process that sites their mitigation sites (not doing mitigation on poor quality lands which are cheaper)

- Connie Bersok, FL DEP: **9A** some sort of ILF program needs to be maintained, but could be renamed; without ILF there will be many unmet mitigation needs
- Jason Albritton, TNC: **9A** TNC recognizes ILF as separate tool and should have a role, but should have strong standards such as money usage timelines, watershed planning, monitoring, and interagency review
- George Kelly, Environmental Bank and Exchange: **9+** NC EEP, it is not a classic ILF because has a commitment to provide mitigation 5 years in advance of permit by 2014 and has performance standards tied to credit release, but it is a good example of how to get better results and good performance with a hybrid ILF program (more equivalency); need to address these types of programs in the regulations;
- Jeanne Christie, ASWM: concerned about concept of “value” and the application of value in rule; supposed to be addressing both function and values in the rule, but values are left out particularly in calculation of credits and performance standards, etc.; the rule’s current approach underestimates certain values as mitigation primarily addresses lost functions; **9A** (Response Rolband, Jason) gets to these issues with ILF programs because may be addressing the loss of function in ILF mitigation, but not the loss of value (i.e. moving wetlands out of urban areas).
- Suzanne Klimek, NC EEP: **9-** is missing programmatic approaches to compensatory mitigation and how mitigation is reviewed by regulatory agencies (i.e. not site by site), NC will provide comments; it is important for a national rule to have those provisions/tools, should be flexibility (ILF and programmatic tools).
- John Ryan, Land and Water Resources, Inc.: **9** phase-out period of five years for ILF programs is too long; ILF programs should identify sites, have specific site plans and start IRT process within 1 year, and finish process in 2 years;
- George Howard, Restoration Systems: **9** in phase out stage of ILF, should be required to have competitive private sector advertisements (RFPs) to provide the unmet needs.
- John Ryan, Land and Water Resources, Inc.: **9-** the preference for using banks for compensatory mitigation where banks and ILF programs have the same service area should be stated in the rule;