



December 22, 2020

U.S. Army Corps of Engineers
ATTN: Lieutenant Colonel Rachel Honderd
Commander, Charleston District
69A Hagood Avenue
Charleston, SC 29403

RE: Charleston District Interagency Regulatory Team, Mitigation Banking and Regulatory Compliance

LTC Honderd,

The South Carolina Mitigation Association ("SCMA" or "Association") represents the compensatory mitigation community within the Charleston District (District). We consist of individuals and businesses that work diligently to develop and provide mitigation resources, that offset unavoidable impacts to wetlands and streams in the District. Our members consider our relationship with representatives of the District and members of the Interagency Review Team ("IRT") as key partnerships to facilitate the development of mitigation within our great state.

The mitigation banking industry, particularly our members, have embraced the concepts of efficiency and predictability embodied by 33 CFR Parts 325 and 332, Compensatory Mitigation for Losses of Aquatic Resources also known as the final Rule published April 10, 2008 ("Rule"). The SCMA is concerned that the principles of the Rule (a comprehensive set of standards and clearly articulated requirements) are not being rigorously enforced by the Charleston District. This leads to inefficiency and uncertainty in the market and regulated community. SCMA is providing the following comments to foster an active and efficient mitigation market. SCMA's remarks relate to five main areas.

- 1. Regulatory review timelines;**
- 2. Consistency with federal rules;**
- 3. The publication of timely and accurate data;**
- 4. Functionally equivalent preservation; and**
- 5. Preservation in-lieu of avoidance.**

Specific comments related to these areas are provided below.

Regulatory Review Timelines

SCMA recommends the following to improve regulatory review timelines.

- Enforce a formal schedule (as listed in Table 1 below) for the review and authorization of bank documents (e.g., Prospectus, Draft Mitigation Banking Instrument and Final Mitigation Banking Instrument).
- Empower the IRT Chair (lead by the USACE) to administer accountability for IRT members in reviewing and providing comments on bank documents per the District's schedule. The Association recognizes that additional time may be required on a case-by-case basis, but we request that extensions meet the criteria as identified in the Rule and that the IRT Chair notify the Sponsor by providing documentation and a revised schedule.

The Regulatory In-lieu Fee and Bank Information Tracking System (RIBITS) indicates that 26 commercial (mitigation) banks have been authorized by the District since 1994, a period of 26 years. An additional 26 banks are pending (or under evaluation) with the IRT. Within the past decade, 45 proposals were submitted and only 31% have been approved. Within the past five years, eight mitigation banks have been approved and these banks took an average of 3.5-years to secure authorization, from the date the District recognized the Prospectus as complete. The Association recognizes that the Sponsor is responsible for promptly responding to requests by the District for more information and/or comments provided by the IRT. However, we are concerned about the adverse impact that extended regulatory review timelines have on the mitigation industry and the availability of mitigation within the District.

An examination of the Rule's history indicates that the public (via public comment during rulemaking) expressed concern regarding the potential predictability and consistency in application of the Rule. As a result, the Rule emphasizes "a comprehensive set of standards, and binding, more clearly articulated requirements." The mitigation industry expressed concern that the Rule would damage the economic viability of wetland mitigation banking. In response, the final Rule emphatically states, "it will not adversely affect the economic viability of mitigation banks," and by "further clarifying the requirements and timelines for mitigation bank approval, the final Rule will, in fact, enhance the economic viability of mitigation banks." Further the Preamble to the Rule states, "the timelines in the Rule for processing proposed mitigation banks will promote timely decisions on instruments for third-party mitigation activities. The Rule streamlines the process for establishing mitigation banks, while recognizing the need for thorough and effective IRT review before credit sales can begin. To accomplish these goals, the Rule establishes reasonable deadlines for each step in the review and approval process" and is intended to "increase regulatory efficiency by providing clear, consistent requirements, improving the third-party mitigation review process through the use of mitigation banks." The framers of the Rule assured the mitigation banking community that the Rule does the following.

- "Clarifies the roles and responsibilities of the Corps and other agencies, including the IRT, in the review and approval of compensatory mitigation, and provides realistic deadlines for each step in the process."
- "Provides greater efficiency and predictability to the process of authorizing new mitigation banks by establishing clear standards and criteria for instruments and mitigation plans and setting reasonable timelines for review and decision-making. These improvements in regulatory efficiency and predictability should serve to stimulate an increase in the number of mitigation banks, and therefore an overall increase in the number of third-party compensatory mitigation credits to offset permitted impacts."

A summary of the intended timelines as imposed by the Rule and interpreted by the Association are listed in Table 1.

Table 1: Anticipated Timeline for Review and Approval of a Banking Instrument.

Milestone	Calendar Days
Sponsor submits Prospectus	--
The District Engineer (DE) will notify the Sponsor within 30-days if the Prospectus is complete	30
Complete Prospectus Milestone	--
The DE will advertise (via public notice) a complete Prospectus within 30-days of receipt	30
Public Notice comments are due within 30-days of the notice	30
The DE will distribute public comments to the IRT and Sponsor within 15-days	15
The DE will provide an initial evaluation letter within 15-days	15
Draft Mitigation Banking Instrument (MBI) Milestone	--
The Sponsor will submit a Draft MBI	--
The DE will notify the Sponsor within 30-days if the draft MBI is complete	30
The DE provides the IRT with 35-days for receipt and review of the draft MBI	35
The DE will compile and provide agency comments on the draft MBI to the Sponsor within 90-days of receipt of the MBI.	55
Revised Draft MBI Milestone	--
The Sponsor will revise and re-submit the Draft MBI based on agency feedback	--
The DE provides the IRT with 35 days for receipt and review of the draft MBI	35
The DE will compile and provide agency comments on the draft MBI to the Sponsor within 90 days of receipt of the MBI.	55
Final MBI Milestone	--
The Sponsor will submit the Final MBI	--
The DE provides the IRT with 30 days for review of the Final MBI	30
The DE will compile and provide agency comments on the Final MBI to the Sponsor within 40 days of receipt of the MBI.	10
Dispute resolution period	15
Expected days to secure Final MBI approval	385

1. This summary excludes the time (days) a Sponsor allocates towards developing and revising the bank documents (i.e., Prospectus and Instruments). The Sponsor bears the burden of promptly responding to agency comments and request for information.
2. If only one draft of the MBI is required, the total amount of time to secure final approval will be 290-days.
3. The District may also want to consider the schedule published by the EPA in 2008
<https://www.mvk.usace.army.mil/Portals/58/docs/regulatory/Tentative%20Timeline%20for%20Mitigation%20Banking.pdf>

To improve the regulatory review process, we ask that the USACE consider:

- **Requiring IRT members to simultaneously submit feedback to the IRT Chair (the USACE mitigation lead) and the Sponsor.** IRT members review and provide comments during an initial public notice (Prospectus) and on the Draft and Final instruments. Your designee traditionally receives IRT feedback, compiles these comments, and provides this feedback to the Sponsor. We intend to reduce the burden on your designee, improve communication among parties, accelerate timelines, and foster collaboration among the Sponsor and individual IRT members. The Sponsor can begin addressing feedback upon receiving comments from individual IRT members, thereby fostering private/public collaboration and timely revisions to the instrument. This suggestion would allow a more efficient method of commenting by avoiding extended periods waiting on comments.

- **Requiring IRT members to provide specific questions or requests for information so that the Sponsor can directly address the comment.** Direct questions and requests discourage ambiguity and will facilitate adherence to the proposed timeline.
- **Encouraging IRT members to visit the mitigation site and interact with the Sponsor during the review process.** Currently, interactions between the Sponsor and IRT members are constrained and in-person interaction is limited to the initial Prospectus-level site visit. Often the full IRT is unable to attend this initial site visit. Agency members that are unable to attend the site visit or interact with the Sponsor directly are at a disadvantage because they may not understand the context of the mitigation site or the specific goals of the bank. As such, the Association recommends additional site visit opportunities during the MBI phase, particularly if these multiple visits would promote efficiency in the review of the banking instrument.
- **Requiring more frequent IRT meetings (e.g., every three-weeks).** Due to the number of proposed mitigation banks currently under review and knowing that more banks developed by are members are pending, the Association encourages the IRT to schedule more frequent meetings to discuss mitigation proposals and documents under review.
- **Encouraging Sponsors to attend the IRT meetings.** Attendance at the meeting by the Sponsor will allow the sponsor and the IRT to quickly address concerns or questions. Our members believe that attendance at the IRT meeting will enhance efficiency and communication and will encourage all parties to be fully prepared, prior to the meeting.
- **Encouraging Sponsors to participate in a limited discussion at the IRT meetings.** A limited (e.g., 10-minute) discussion will allow the Sponsor to elaborate and provide details related to a specific project or proposed activities. This limited discussion will allow IRT members to present specific questions and concerns and provide the Sponsor with an opportunity to respond. Our members believe that this discussion at the IRT meeting will enhance efficiency and communication and will encourage all parties to be fully prepared, prior to the meeting.
- **Delegating monitoring reports and site inspections to other experienced and qualified USACE regulatory staff.** This would reduce the workload burden on members of the IRT. Implementation of this recommendation, even for a short term (such as, quarterly) on an annual basis, would allow IRT members to focus their attention on pending proposals, allowing the District to achieve the predictability and consistency mandated by the Rule.
- **Limiting agency feedback to current guidance (District's 2010 "Guidelines for Preparing a Compensatory Mitigation Plan").** The IRT is developing the South Carolina Stream Quantification Tool (SC SQT) but to date the tool is not published or formally adopted. The Association welcomes progressive measures that assist the industry and regulators in quantitatively documenting improvement of project performance and functional lift. Additionally, we appreciate the IRT affording the mitigation industry an opportunity to currently utilize portions of the SC SQT in our mitigation planning efforts in situations where current guidance may lack sufficient metrics to document uplift of mitigation plans. However, our members request that current published guidance be the governing document for regulatory review and that members of the IRT limit feedback to the current guidance, unless a provider is voluntarily utilizing portions of the SC SQT to document functional lift.

Consistency with the Rule - Mitigation Hierarchy

SCMA recognizes that the Rule provides the USACE with the flexibility to deviate from the mitigation hierarchy. However, the Association re-iterates our support for the District to develop (mitigation)

guidelines that align with the Rule and prioritize mitigation credits in accordance with the Final Rule. Adherence to the hierarchy will continue to promote the development of mitigation banks within the state.

Publication of Timely and Accurate Data - RIBITS

The Regulatory In-lieu Fee and Bank Information Tracking System (RIBITS) is a publicly available and robust tool that serves as a working (mitigation) database in the Charleston District supported by multiple stakeholders, including sponsors and regulators. The timely publication of accurate information (e.g., prospectus documents, banking instruments, credit ledgers, and other supporting documents) is necessary to foster watershed-based mitigation projects within the state. Further, the timely publication of this information will allow SCMA to promote consistency among Sponsors by referring our members to publicly available information associated with each stage of the mitigation development process. SCMA is requesting specific feedback from the USACE regarding measures to promote the timely publication of accurate information via the RIBITS database. The Association is committed to implementing the recommendations (i.e., formatting, additional tabulated deliverables, etc.) provided by the USACE to promote more frequent RIBITS updates.

Functionally Equivalent Preservation

The Association is concerned that the preservation of on-site wetlands by an Applicant - seeking a Department of the Army ("DOA") permit for adverse impacts - may fall short of the USACE's expectations for preservation proposed by a mitigation Sponsor. In the anticipated revisions to the Charleston District's SOP, the Association supports the Charleston District's efforts to establish wetland preservation standards. These standards should account for the quality (or lack thereof) of the on-site aquatic resources and support the District's efforts to ensure that preservation is functionally equivalent (i.e., held to the same standard) between Sponsors and Applicants proposing to preserve the remaining on-site wetlands. This definition of equivalent standards for preservation supports the Rule and the strategic selection of mitigation sites on a watershed basis. Notwithstanding, the Association would like to re-iterate support for the Charleston District's 2010 guidance that at least 50% of the mitigation credits generated by a mitigation plan result from restoration or enhancement activities.

Preservation in-lieu of avoidance

Applications for a DOA permit must iterate and consider design alternatives to avoid and minimize adverse impacts to aquatic resources. Mitigation should only be considered following adequate documentation and justification of avoidance and minimization measures. The remaining adverse impacts should then be adequately offset (to meet the programmatic goal of no overall net loss of aquatic resource function and service) via the strategic selection of equivalent mitigation on a watershed basis.

The Association has identified several public notices e.g., Cainhoy (SAC 2016-756), Long Savannah (SAC 2015-00012) and Misty Meadow Residential Development (SAC-2016-01087)) in which an Applicant proposes on-site mitigation, which includes preservation of the remaining on-site aquatic features. The Association suggest that a natural resource identified for avoidance and minimization measures, should not (also) serve as adequate mitigation. Per the 2010 guidelines,

"With the possible exception of outstanding aquatic resources that are important on a watershed scale, the preservation of buffer zones, riparian areas, and the remaining aquatic resources on the project site does not meet the preservation criteria identified in the Mitigation Rule (33 CFR 332.3(h)). Therefore, the preservation of these areas does not generate compensatory mitigation credits to offset adverse impacts to aquatic resources."

The Association supports a reduction in the required mitigation for equivalent preservation of on-site resources but suggests that the USACE consider indirect impacts (i.e., fragmentation and runoff) that impair and prevent on-site preservation activities from being functionally equivalent to the actions identified by a Sponsor. The Association recognizes Permittee Responsible Mitigation (PRM), specifically off-site PRM, as a viable mitigation practice when conducted in adherence to the mitigation hierarchy.

Conclusion

In summary, the Association wants to ensure that all mitigation plans (banks, on-site and off-site PRMs, and In-Lieu Fee programs) are held to the same equivalent standards as required by the Federal Rule. The Association and District should promote adherence to the SOP to ensure consistency and that each generated mitigation credit provides sufficient ecological uplift to offset permitted impacts to aquatic resources. In addition, our members respectfully submit that communications, transparency, and time-accountability associated with the mitigation process currently do not meet the expectations of the Rule. We encourage the USACE to implement procedures that facilitate adherence to the timelines established in the Rule.

SCMA appreciates your consideration of these issues. Our desire is to partner with the USACE and the IRT to improve the industry and quality of mitigation provided to offset unavoidable impacts. We consider this a part of a dialogue and we welcome the opportunity to meet with you in person or virtually to discuss these ideas and develop solutions. Please reach out to our Association via our email at info@scmitigation.org with any questions or to schedule a time to speak or meet.

Signed by the Executive Committee Members on behalf of the South Carolina Mitigation Association:

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Daniel Johnson – Wildlands Engineering

Ross Nelson – American Mitigation Company

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