



DEPARTMENT OF THE ARMY
U.S. ARMY CORPS OF ENGINEERS, CHARLESTON DISTRICT
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CHARLESTON SC 29403-5107

March 30, 2021

Regulatory Division

South Carolina Mitigation Association
Attn: Messrs. Conger, Johnson, Nelson, Smith, Cousins,
Hughes, and Smith & Mss. Knight-Meng, Redmond, and Allden
P.O. Box 1763
Columbia, SC 29202

Dear Messrs. Conger, Johnson, Nelson, Smith, Cousins,
Hughes, and Smith & Mss. Knight-Meng, Redmond, and Allden:

Thank you for your December 22, 2020 letter, on behalf of the South Carolina Mitigation Association (SCMA), regarding the SCMA's concerns with the Charleston District (the District) and Interagency Review Team's (IRT) regulatory compliance with the Compensatory Mitigation for Losses of Aquatic Resources: Final Rule (the Rule), as well as the District's current Guidelines for Preparing a Compensatory Mitigation Plan (Guidelines).

As an initial matter, the District appreciates the SCMA's mission and relationship with District staff and the IRT members, in recognition that the District routinely reviews and monitors the mitigation banks of SCMA members. We acknowledge that in the past five years, relatively few mitigation banks were approved as a result of workload and staff changes in comparison to the three mitigation banks the District has approved in the last four months.

Although we continue to see an increase in proposed mitigation banks, we will strive to continue to increase District efficiencies and turnaround times when reviewing proposed mitigation banks at the more recent pace. In reviewing your letter, my staff noted areas in our review process where we can increase transparency. For example, we have already changed the Regulatory In-lieu Fee and Bank Information Tracking System (RIBITS) to provide information and additional access to bank Sponsors and their Consultants. We look forward to updating the regulated community (e.g., SCMA, mitigation bank sponsors, and consultants) on these changes. For example, RIBITS now allows bank sponsors and their consultants to participate in the mitigation bank review process virtually, to include reviewing and responding to comments from the IRT in RIBITS.

Your letter suggested several areas for improvements.

1. SCMA: Requiring IRT members to simultaneously submit feedback to the District and the Sponsor.

Corps response: While the District has always uploaded IRT comments into RIBITS, revisions now allow consultants to review comments and upload documents directly to RIBITS. This change increases transparency and improves the efficiency of the comment and response process.

2. SCMA: Requiring IRT members to provide more specific questions or requests for information so that the Sponsor can directly address the comment.

Corps response: We often request clarification on comments from IRT members prior to forwarding to a prospective bank sponsor, specifically on issues that are either outside our purview or with which we disagree. We will continue working with the IRT to provide clear comments to bank sponsors and their consultants. However, based on your request in Item No. 1 above, the Corps will often be receiving these comments at the same time as the bank sponsors.

3. SCMA: Encouraging IRT members to visit the proposed mitigation site and to interact with the Sponsor during the review process.

Corps response: We cannot require site visits by the IRT members, but agree that site visits provide better overall understanding of a site's mitigation potential and often lead to more meaningful comments. With the ongoing concerns regarding COVID, site visits with large groups have been discouraged. In the past, multiple site visits have been held to allow more IRT members to visit a proposed bank site. We will continue to work with the banks sponsors and their consultants in scheduling site visits.

4. SCMA: Requiring more frequent IRT meetings.

Corps response: We believe changes to RIBITS will help resolve part of this concern. We further believe that additional meetings would reduce the time that the District and the IRT can devote to reviewing mitigation bank's proposals. The IRT Meetings are used to update members on issues and review progress of due outs. The frequency of monthly meetings is consistent with other Districts and is commensurate with the number of banks in review.

5. SCMA: Encouraging Sponsors to attend the IRT meetings and encouraging limited Sponsor participation in IRT meeting discussions.

Corps response: With two weeks' notice, we can add a bank sponsor to the IRT meeting agenda if the agenda is not already full. Unfortunately, due to limits on available time for IRT meetings, we do have to restrict the number of bank sponsors who can discuss their proposed banks during monthly IRT meetings.

6. SCMA: Delegating monitoring reports and site inspections to other experienced and qualified USACE regulatory staff.

Corps response: While we will continue to get assistance from other project managers to review monitoring reports and conduct site inspections, current staff workload and COVID restrictions do not afford much increase in this area.

7. SCMA: Limiting agency feedback to current guidance (District’s 2010 “Guidelines for Preparing a Compensatory Mitigation Plan”).

Corps response: While we can’t force IRT agencies to limit their feedback to the guidance, we generally utilize our discretion on what comments are pertinent to the Guidelines. We currently have two proposed banks that are partially utilizing the South Carolina Stream Quantification Tool (SC SQT), and the bank sponsors for these two proposed banks are doing so voluntarily. Otherwise, we utilize the current Guidelines.

8. SCMA: Consistency with the Rule – Mitigation Hierarchy.

Corps response: We will continue to review mitigation bank proposals consistent with the Rule. For further clarification, please see 33 CFR 332.3(a), which states as follows:

“When evaluating compensatory mitigation options, the district engineer will consider what would be environmentally preferable. In making this determination, the district engineer must assess the likelihood for ecological success and sustainability, the location of the compensation site relative to the impact site and their significance within the watershed, and the costs of the compensatory mitigation project. In many cases, the environmentally preferable compensatory mitigation may be provided through mitigation banks or in-lieu fee programs because they usually involve consolidating compensatory mitigation projects where ecologically appropriate, consolidating resources, providing financial planning and scientific expertise (which often is not practical for permittee-responsible compensatory mitigation projects), reducing temporal losses of functions, and reducing uncertainty over project success. Compensatory mitigation requirements must be commensurate with the amount and type of impact that is associated with a particular DA permit. Permit applicants are responsible for proposing an appropriate compensatory mitigation option to offset unavoidable impacts.” (emphasis added).

9. SCMA: Publication of Timely and Accurate Data – RIBITS.

Corps response: We have granted permissions in RIBITS to consultants to upload documents directly to RIBITS. Consultants also have permissions to debit their mitigation bank ledgers. These permissions have been made to further ensure timely publication of data to RIBITS. We will continue annual audits of the ledgers.

10. SCMA: Functionally Equivalent Preservation.

Corps response: We will continue to consider proposed compensatory mitigation plans for compliance with the Rule and the current Guidelines. For further clarification, please see 33 CFR 332.3(h)(1) and (2), which states as follows regarding the five criteria for preservation:

“(1) Preservation may be used to provide compensatory mitigation for activities authorized by DA permits when all the following criteria are met:

- (i) The resources to be preserved provide important physical, chemical, or biological functions for the watershed;
 - (ii) The resources to be preserved contribute significantly to the ecological sustainability of the watershed. In determining the contribution of those resources to the ecological sustainability of the watershed, the district engineer must use appropriate quantitative assessment tools, where available;
 - (iii) Preservation is determined by the district engineer to be appropriate and practicable;
 - (iv) The resources are under threat of destruction or adverse modifications; and
 - (v) The preserved site will be permanently protected through an appropriate real estate or other legal instrument (e.g., easement, title transfer to state resource agency or land trust).
- (2) Where preservation is used to provide compensatory mitigation, to the extent appropriate and practicable the preservation shall be done in conjunction with aquatic resource restoration, establishment, and/or enhancement activities. This requirement may be waived by the district engineer where preservation has been identified as a high priority using a watershed approach described in paragraph (c) of this section, but compensation ratios shall be higher.”

Under the District’s current Guidelines, there is up to a 25% credit reduction if remaining aquatic resources are protected. Please note that this reduction does not generate credits. Compensatory Mitigation would still be required, as appropriate, to offset the loss of waters of the United States because of a permitted project.

11. SCMA: Preservation in-lieu of avoidance.

Corps response: Pursuant to 33 CFR 332.1(c), we will issue permits pursuant to Clean Water Act Section 404 only upon a determination that each proposed discharge complies with applicable provisions of 40 CFR Part 230, including those which require the permit applicant to take all appropriate and practicable steps to avoid and minimize adverse impacts to waters of the United States. For unavoidable impacts, the Rule allows the District Engineer to require compensatory mitigation. Some proposed projects have proposed to place site protection instruments on remaining on-site aquatic resources, upland buffers, and riparian zones to receive a reduction to the proposed project’s compensatory mitigation requirements under the District’s current Guidelines. This reduction in the proposed project’s compensatory mitigation requirement is intended to promote maximum avoidance and minimization of potential indirect and cumulative impacts to the remaining aquatic resources. For those proposed projects that have proposed preservation of certain on-site aquatic resources as a form of compensatory mitigation, we will consider such proposals for consistency with the Rule and the District’s current Guidelines.

Thank you for your letter and suggestions to help further improve the District's Regulatory program. I would like to schedule a meeting with members of SCMA to discuss the changes the District has made to RIBITS and changes we proposed to the national RIBITS team to promote even more transparency. If we may be of further assistance, please contact me at 843-329-8004, or Mr. David Wilson of my staff, at 843-329-8026.

Sincerely,

A handwritten signature in black ink, appearing to read 'Joe Owens', with a long horizontal flourish extending to the right.

Joseph E. Owens
Major, U.S. Army
Acting Commander and District Engineer