



The Association of State Wetland Managers, Inc.

“Dedicated to the Protection and Restoration of the Nation’s Wetlands”

Executive Director

Marla J. Stelk
32 Tandberg Trail, Suite 2A
Windham ME 04062
(207) 892-3399

Chairman

Collis Adams
NH Dept. of Environmental Services
29 Hazen Drive
Concord, NH 03302
(603) 271-4054

Vice Chairman

Tom Harcarik
OH Environmental Protection Agency
50 West Town Street
Columbus, OH 43215
(614) 644-3639

Treasurer

Mark Biddle
DE Dept. of Natural Resources
and Environmental Control
820 Silver Lake Blvd., Suite 220
Dover, DE 19904
(302) 739-9939

Secretary

Amy Lounds
MI Dept. of Environmental Quality
525 W. Allegan Street
Lansing, MI 48933
(517) 284-5530

Past Chairman

Kenneth Murin
PA Dept. of Environmental Protection
RCSOB 400 Market Street
P.O. Box 8460
Harrisburg, PA 17105
(717) 772-5975

Members at Large

Jill Aspinwall
NJ Dept. of Environmental Protection

Denise Clearwater
MD Dept. of the Environment

Lauren Driscoll
WA State Dept. of Ecology

Timothy Rach
FL Dept. of Environmental Protection

Andrew Robertson
Saint Mary's University of Minnesota

August 8, 2019

Mr. Andrew Wheeler
Administrator, U.S. Environmental Protection Agency
1200 Pennsylvania Ave, NW
Washington, DC 20460

Mr. R.D. James
Assistant Secretary, U.S. Army Corps of Engineers
441 G Street NW Washington, DC 20314

Re: Proposed Mitigation Rule Amendment Rulemaking

Dear Administrator Wheeler and Assistant Secretary James:

The Association of State Wetland Managers (ASWM) is a nonprofit professional organization that supports the use of sound science, law, and policy in development and implementation of state and tribal wetland programs. We are pleased to take this opportunity to convey our positions to the Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps). Our organization and our member states and tribes have long standing positive and effective working relationships with both agencies in the implementation of dredge and fill regulations to protect our nation’s water resources. We appreciate the opportunity to provide the EPA and the Corps with our comments on the proposed Mitigation Rule amendment rulemaking. Please see our responses to the specific questions posed by the EPA and Corps.

Should the IRT process be eliminated or modified?

The response from our member states and tribes has been overwhelmingly in support of maintaining the IRT process. ASWM has consistently received feedback that the IRT process allows for greater coordination and consistency between the state authorization and the federal mitigation banking instrument. A few states have indicated that the IRT process does not always work well, however they still support their continued use as they believe the IRTs are valuable in having all regulatory viewpoints expressed in one group. Having IRTs is very beneficial, as they provide additional, often specialized expertise that can result in a balanced, holistic approach to mitigation.

ASWM believes that removing the IRT process will result in the unintended consequence of diminishing efficiencies for the applicant leading to additional time and expense, as the benefits of early communication and coordination between state and federal regulatory agencies will be gone. Limiting state review to the prospectus comment period is insufficient. Since the prospectus is a conceptual proposal, states will not have sufficient

information on the proposed bank to determine if state water quality standards will be met. That determination of compliance needs to be based on full design information that is only available later in the process. Relegating states and tribes to review federal permit decisions with the existing 30-day public comment period goes against the intent of cooperative federalism and ignores the important role and responsibility of states and tribes in protecting their own aquatic resources.

Our members have found that having other resource agencies on IRTs does not slow the process. Delays have occurred due to failure of the Corps to meet scheduled deadlines largely from limits on staff time. The slow process is the major problem with implementation of the Mitigation Rule. We believe that the Corps should meet scheduled deadlines, and there should be some accountability for failing to do so. The development of a Mitigation Banking Instrument template appropriate for each District's conditions would reduce the amount of time required for review and speed up the bank approval process.

Are administrative changes needed to improve mitigation bank and in-lieu fee program review process?

There are opportunities to save time in the review process by modifying the process to exploit what each agency does best. For example, a state agency may have a much more in-depth technical review process and be leading efforts to change the design approaches utilized by the industry. Thus, the state may be better suited to evaluate the design and construction aspects, whereas the Corps may have more detailed requirements and experience addressing the financial assurances and protective covenants needed to meet the federal mitigation rule. Providing standard templates would be a significant benefit all around. However, this needs to be a state/federal collaboration and not just a Corps effort, otherwise the current bifurcated process will remain since the templates may not necessarily address state requirements. The current rule does a poor job of addressing state requirements and coordination with state regulatory agencies.

We also recommend allowing, but not requiring, concurrent reviews by the Corps and IRT of all relevant documents, rather than waiting until the Corps deems the prospectus or instrument to be complete. Discretion should be given in establishing more efficient procedures, as best fits the States' and IRT organizational structure. For example, if concurrent submittals are a desired approach, they should be allowed. On the other hand, if other deadlines and distribution procedures best meet needs of other states, there should be discretion for that as well. Depending on the complexity of the proposal, reduced times for review should also be accommodated for new projects proposed under previously approved Umbrella Mitigation Banking Instruments and ILF Programs. Other recommendations for improvements to the IRT process include: assigning dedicated staff; a workflow/checklist for the review process of mitigation proposals; annual reports; monitoring reports; ledger reports; and other appropriate documents.

Should the Agencies make changes to address the Miscellaneous Receipts Statute?

ASWM supports the Agencies efforts to address the Miscellaneous Receipts Statute so that the Corps will not be in actual or constructive receipt of financial assurance funds. However, measures must be in place to ensure that financial assurances are sufficiently funded, enforceable, consistent between mitigation types, and can be promptly retrieved to conduct mitigation activities. States which operate under a general programmatic permit, assume the program, or have independent authority, should be allowed to receive financial assurances directly.

Should changes be made to the requirements associated with ILF program accounts?

ASWM does not have blanket support for third party audits. If a State runs an ILF program, it will have State auditors as well as federal accounting for fund expenditures and receipts. Annual reporting should be sufficient, with only major expenditures requiring prior approval from the Agencies. We do

support including in the ILF instrument a comprehensive description of how funds are managed, internal oversight and auditing. A third-party audit may only be required if there is justifiable cause from the accounting results.

The Mitigation Rule regulations states in §332.8(i)(1) that a “small percentage” of ILF funds may be used for administration. States with small ILF programs do not have the economy of scales comparable to larger programs, and thus may need a larger percentage of fees to cover administration and oversight of all aspects of ensuring successful mitigation. We believe that a rate of 10% for administrative costs is uniformly acceptable, but that higher rates from 10-25% can be approved when adequate justification is provided, and that these costs include not only overhead, but active oversight and management of ILF projects. We believe that the 25% rate is appropriate for smaller programs to support their staff in oversight, review, and management of ILF programs and the resulting mitigation projects.

Is clarity needed to facilitate multipurpose compensation projects?

ASWM supports the Agencies efforts to provide clarity on aspects of multipurpose compensation projects including credit generation and accounting to ensure authorized impacts are appropriately offset. The rule should clarify that there cannot be any double counting where an acre on a mitigation bank site is used for wetland impacts for one project and then that same acre is used again for impacts to another resource on a different project. We would not support an approach that allowed credit stacking on the same piece of property. We do support the use of mitigation banks to address multiple resource impacts from a project, provided that distinct areas and accounting/crediting have been clearly established.

The cost of mitigation can be a practicable option for applicants to avoid and minimize impacts to regulated resources so as to have less of a mitigation requirement. Funding from another entity which would be used by a permittee for mitigation could thus prolong agency efforts to achieve avoidance and minimization.

Are changes needed to accommodate State/Tribal assumption of the Section 404 program?

ASWM supports efforts by the current Administration to expand opportunities for assumption of the Section 404 program and appreciates efforts by the Agencies to clarify aspects of the 2008 Rule that may be challenging for states and tribes seeking to assume §404. ASWM would like to see the rule continue to include criteria for approval of mitigation projects while allowing procedural flexibility for states that assume. Providing additional clarification regarding bank/ILF review and use in the context of state/tribal assumed programs could be beneficial to this process. States and tribes that assume the §404 program should be allowed to receive and manage financial assurances, as well as an ILF program. States which have assumed §404 should have some discretion in organizing State level IRTs and their EPA approved ILFs should be recognized as equivalent for mitigation purposes by the Corps.

Are there approaches to quantify stream mitigation credits that better reflect the total amount of stream ecosystem restored, enhanced, or preserved in rivers and larger streams, and stream-wetland complexes, while maximizing available credits and opportunities for larger compensatory mitigation projects within a given watershed?

Although ASWM appreciates any efforts by the Agencies to further incentivize large dam removal projects, ASWM believes that the flexibility currently provided in the 2008 Mitigation Rule for stream mitigation crediting has been extremely successful and should not be limited to just one preferred credit metric. Most states and Corps districts currently use a combination of multiple measures to determine an appropriate number of credits and many states have moved to linear metrics.

Improvements and additional incentives could be made to support large scale dam removal projects, but limiting the flexibility currently utilized by the majority with a one-size fits all approach is not the

solution. ASWM supports further scientific, legal and policy research into this issue to find an alternative that provides flexibility and further incentivizes large dam removal projects. ASWM does not believe a uniform national rule for stream crediting would be desirable, as it would fail to take into account the diversity of stream types. ASWM supports the development of regional guidance to accommodate the differences in streams. We support including specific consideration of the following factors, as mentioned in the Agencies' slide show: linear feet, square feet, or other metrics that considers stream length, width, order and/or flow regime. Additional language is needed for review of proposals to artificially create new stream channels, or to relocate and extend existing channels.

ASWM also supports further consideration of whether merging credits for streams and wetlands at a single site can be done in a manner that reflects replacement of the suite of functions which occur in a riparian wetland system. In practice, streams and wetlands are sometimes treated as distinct features in assessments and crediting, rather than the integrated resources that they often are. Assessment of an entire riparian corridor, with a single form of crediting and integrated, holistic design that incorporates streams, wetlands, and associated upland buffer when relevant, would be more likely to replace lost acreage and functions.

ASWM appreciates the opportunity to comment on proposed Mitigation Rule amendment rulemaking. While these comments have been prepared with input from the ASWM Board of Directors, they do not necessarily represent the individual views of all states and tribes; we therefore encourage your full consideration of the comments of individual states and tribes and other state associations. Please do not hesitate to contact me should you wish to discuss these comments.

Sincerely,



Marla J. Stelk
Executive Director

Cc: ASWM Board of Directors
Krystal Bell, HQUSACE Regulatory Program
Stacey Jensen ASA(CW), Assistant for Tribal and Regulatory Affairs
Charles Kovatch, EPA HQ Office of Water
Andrew Hanson, EPA HQ Office of Intergovernmental Relations