National Wetlands Newsletter, Vol. 31, No. 2. Copyright © 2009 Environmental Law Institute.® Washington, D.C., USA.
Reprinted by permission of the *National Wetlands Newsletter*. To subscribe call 800-433-5120, e-mail orders@eli.org, or visit www.eli.org

Can the Mitigation Regulations Deliver Better Mitigation? Use Private Sector Models

By Margaret "Peggy" Strand

While the new mitigation regulations provide much cause for optimism, ensuring predictability, consistency, and enforceability will require strong administrative procedures to deliver progress.

It is no secret that the mitigation banking industry sought federal legislation to recognize mitigation banking and to obtain a "level playing field" for mitigation.[1] Having represented the National Mitigation Banking Association since 1998, I have watched the mitigation business, including mitigation banking, grow and change since the early 1990s. The mitigation banking industry has long noted it has been held to higher environmental, economic, and administrative standards than any other mitigation provider.[2] It has long advocated that other providers, including permittees and in-lieu fee programs, should meet the same demanding standards. Consistent with the statute that compelled them[3], the new mitigation regulations go a long way toward imposing the kinds of standards demanded of mitigation banks on all mitigation providers.

I join the chorus of observers who have praised the new mitigation regulations,[4] which have the potential to provide great benefits to the environment, to the regulatory program, and to mitigation providers. The regulations offer the promise of a "new day" for mitigation, solving many of the problems that have plagued the mitigation process in the past, by assuring more successful mitigation and greater consistency and predictability to all participants in mitigation. Whether the regulations will deliver on that promise turns on careful implementation from all involved agencies and sectors. This article addresses some ways that consistency and predictability of mitigation can be improved by drawing on experiences from the private sector.

Do the Regulations Provide Predictability and Consistency?

It is a truism that the regulations will provide predictability and consistency only if applied in a predictable and consistent manner. There has simply been insufficient time to make any judgments on implementation of the mitigation regulations. The U.S. Army Corps of Engineers has traditionally operated with considerable autonomy in individual District offices, and the mitigation regulations certainly preserve that autonomy. The new mitigation regulations reflect a tension between establishment of mandatory criteria that must appear in all mitigation plans, and retention of flexibility in the District Engineer to decide how these criteria will be applied in particular cases. This tension has the potential to destroy the equivalency the mitigation regulations seek to achieve.

For example, the regulations establish 12 mandatory criteria for all mitigation providers. Among these, all mitigation must have financial assurances; the "financial assurances" step must be "checked off" as one of the 12 mandatory steps.[5] However, the District Engineer can decide not only what form and how much, but whether financial assurances are actually needed.[6] This is true for each of the mandatory 12 steps; the box must be checked, but there is great discretion to decide what goes into the box. The statute commanding the mitigation regulations required the Corps to "provide flexibility for regional variations in wetland conditions, functions and values,"[7] but the mitigation regulations authorize flexibility for every required condition, not just those conditions that relate to the regional physical environment. This creates the risk that a mitigation project might look good on paper, having checked off each of the 12 steps, but lack substance because the content of certain steps has been waived, limited or conditioned by the District Engineer.

Such results—over-extensive variation of what is actually required to meet the 12 mandatory steps—would be a travesty. It would undercut the goals of predictability, equivalency, and enhanced mitigation performance. This is why so many comments on the mitigation regulations express concern with the discretion retained by the Corps. It is the part of the mitigation rules that carries the greatest potential for success or failure of the entire program.

Viewed in another way, it is worth asking whether application of the regulations to particular circumstances would be enforceable. On one obvious level, the answer is yes. Regulations are enforceable, in that they are formal federal rules capable of being read and applied. A violation of a federal rule is subject to enforcement by the Corps or the U.S. Environmental Protection Agency (EPA). As to third party enforcement, there may be some ques-

---

Ms. Strand is a partner at Venable, LLP, whose practice focuses on wetlands, species protection and natural resources law. This article is excerpted from an article titled, "Do the Mitigation Regulations Satisfy the Law? Wait and See," that will appear in volume 38, issue 2, of the Stetson Law Review.

tion as to whether the citizen suit provision of the Clean Water Act (CWA),[8] would support a suit against an individual alleged to violate these rules, given the definitions under that provision,[9] but that is a question beyond this article. We may assume that under the Administrative Procedure Act, if not the CWA, a third party with standing could initiate a lawsuit challenging a permit decision for allowing mitigation not consistent with the federal regulations. Whether that plaintiff could get relief is a different matter.

The more precise question is whether, given the broad flexibility vested in the District Engineer, any third party could successfully challenge a permit issuance or denial based on a claim that the mitigation was not consistent with the regulations. The regulations grant so much flexibility to deviate from the standards on a case-by-case basis that it is hard to imagine a deviation that would constitute "non-compliance" with the regulations. A couple of examples illustrate the difficulty of enforcing the mitigation regulations.

A District Engineer decision using this flexibility could, for instance, approve an in-lieu fee project based on its plans for future mitigation (even though sites were not identified), authorize a considerable "advanced credit release," and the fee program would have up to three years to find sites and commence construction. The District Engineer could extend the obligation to have sites and construction started from the three years in the regulations to some unspecified amount of "additional time" (the regulations set no outside limit). The result would be wetland impacts under a permit, money and liability for those impacts transferred to a fee provider, and no mitigation in the ground for more than three years after impacts. The mitigation regulations provide that mitigation should be timed to occur in advance or concurrent with the impacts.[10] However, the permit would have been issued and the wetlands impacted long before the non-performance of the mitigation project. And the mitigation regulations authorize a District Engineer to extend the time for compliance by the fee program, so even a long extension would not be facially illegal. Given these facts, could a plaintiff prevail arguing that the District Engineer's decision violated the timing requirements of 33 C.F.R. §332.3(m)?

The discretion to vary the basic terms of the mitigation regulations could also result in unfair differences among mitigation providers. For example, all mitigation plans must have performance standards—step eight of the 12 mandatory steps.[11] But it is not clear that a District Engineer would act beyond his discretion in setting modest performance standards for a permittee, such as yearly measure of wetland vegetative cover, while setting more rigorous standards for another provider, such as water quality measurements in addition to vegetative cover standards. The performance standards should not vary depending on who is providing the mitigation. Clearly this is not what the regulations intend, but it may be hard to raise disparities like these in third party lawsuits challenging mitigation decisions.

Put otherwise, a good description on paper and a reasonable sounding justification by a District Engineer may allow the Corps to authorize mitigation at odds with the goals of the mitigation regulations. The District Engineer can decide, on a case-by-case basis, that financial assurances need not be required, that performance standards should be adjusted, that failure to meet mitigation plans should be excused, and that other deviations—quite extensive deviations—from the regulations are warranted. These kinds of decisions are very difficult for third parties to challenge successfully. Third parties may be able to challenge a permit, and the mitigation approved in a permit. However, at the time of permit issuance, the promise on paper may sound very good. Given the discretion allowed to District Engineers, it is unlikely that a court would "second guess" decisions to deviate from the regulations.

This was the result in a lawsuit challenging authorization of mitigation by payment to an in-lieu fee, where the National Mitigation Banking Association and others challenged the Corps' permit issued for modernization and expansion of the O'Hare Airport. In *National Mitigation Banking Association v. U.S. Army Corps of Engineers,*[12] the reviewing court upheld the permit terms on the basis that the Corps had considerable discretion to establish mitigation terms.[13] The Corps approved an in-lieu fee prospectus that identified no specific sites, but set up a process for finding mitigation projects in the future.[14] The permittee paid the fee program over $26,000,000 and was relieved of its mitigation liability.[15] The permit and associated instruments required the fee program to have certain amounts of acres under construction after one, two, and three years, to accord with the anticipated schedule of impacts under the permit.[16] The court deferred to the Corps' decision to accept the promises of the in-lieu fee providers.[17]

While the litigation addressed only the propriety of issuing the permit, events since the lawsuit illustrate the limitations of third party enforcement rights. The fee provider missed every deadline in the permit and approved prospectus. Mitigation sites were not selected or constructed on the schedule provided in the instruments. The Corps required no financial assurances and the mitigation provider has held the funds in a "separate account," not a third party escrow account, since 2005. The Corps has taken no steps to enforce the terms of the prospectus or other instruments against the fee program. This case arose before the mitigation regulations, but the basic issue of accepting a promise of "trust me"

A good description on paper and a reasonable sounding justification by a District Engineer may allow the Corps to authorize mitigation at odds with the goals of the mitigation regulations.

mitigation at the time of permit issuance has the potential to arise under the new regulations.

Under the mitigation regulations, steps taken by the Districts after permit issuance or approval of the mitigation provider's instruments will also be very hard to successfully challenge. Decisions by a District Engineer to grant a mitigation provider exemptions or other deviations from the regulations may not be subject to third party challenge. A third party might have standing to challenge issuance of a permit, based on the adverse impact to the environment of the permitted fill, but there could be serious questions of who has standing to challenge the Corps' actions that defer or reduce mitigation, long after the permit has issued. It is clear that third parties cannot successfully compel the government to exercise its enforcement authority to prosecute the mitigation provider. There would also be jurisdictional issues such as standing and perhaps ripeness if a third party sought to complain that the Corps violated the law in changing the requirements for a mitigation provider after permit issuance. And it is far from clear what legal basis third parties would have to directly challenge a mitigation provider.

It is unlikely that court oversight will play a major role in holding the federal agencies to administer the mitigation regulations appropriately. Rather, this will be a process of internal governmental review and continued input from external stakeholders. This process would be greatly aided by more transparent record keeping by the Corps and EPA of information on mitigation. Until there are good systems in place tracking permits and mitigation, implementation of the new mitigation regulations will depend on vigilant participation by all stakeholders.

Can Consistency and Good Results be Better Secured?

Given the fact that third party initiated judicial oversight may not be likely or effective, implementation of the regulations needs to look elsewhere for security. In this early period of implementation, attention to certain items could help set the process on the right course.

Predictability, consistency, and enforceability would be greatly enhanced if the administration of the regulations relies heavily on simple, self-executing administrative structures. The regulating agencies, composed of ecologists, biologists, and environmental scientists, need to think beyond the environmental sciences and think like people in the business of mitigation. They need to be sure that mitigation providers have short-, mid-, and long-term incentives to complete good mitigation projects.

Comparisons to the construction business are useful. In construction, projects must meet performance standards for many different categories, such as electrical, plumbing, and other construction standards. For the mitigation project, there will be ecological standards involving vegetation, hydrology, soils, and grading, as well as administrative requirements for reporting. Certainly, the regulators (of both construction trades and mitigation industries) have authority to penalize the responsible party for failure to meet those performance standards after the fact. After-the-fact enforcement, however, is resource intensive at best. It is selective by definition in that not everyone gets caught or penalized. The track record of after-the-fact enforcement of mitigation is not strong.[18]

Counties and cities who administer construction codes retain after-the-fact enforcement authority, but utilize, as a standard practice, many forms of self- executing "before the fact" and "during the fact" enforcement mechanisms. Thus, it is routine that specific construction plans must be submitted and approved in advance; the mitigation regulations echo this feature by requiring approval of mitigation plans in advance.[19] However, the mitigation regulations allow for delayed plan submissions in certain circumstances, such as nationwide permits and in-lieu fee programs.[20] Allowing the applicant to defer submitting a plan (in the mitigation context, until after obtaining money or obtaining its permit) leaves an unnecessary gap that has to be filled through agency oversight and action after the fact.

All mitigation should have financial assurances posted that should not be released without proof of attainment of milestones.

Construction codes and contracts routinely require posting of bonds and periodic regulatory review before release of bonds. The builder cannot proceed, and cannot obtain release of bonds, until there are inspections and certificates by electrical inspectors, plumbing inspectors, certificate of occupancy, and similar periodic checks. The mitigation regulations embrace the concept of periodic review and release of credits for mitigation banks and for in-lieu fee programs.[21] Permittee mitigation, however, has no similar structure for periodic review other than reports of completion.[22] While the mitigation regulations require financial assurances,[23] it is far from clear that all mitigation providers will have to post assurances for all steps, as the District Engineer has discretion to adjust this requirement.

The key element to obtaining meaningful "during the fact" compliance is money. Reliance on the profit motive, even for not-for-profit entities, makes good sense. All mitigation should have financial assurances posted that should not be released without proof of attainment of milestones.[24] The burden should be on the mitigation provider to present proof of completion to the agency before the financial assurance is released. Continuing with the construction analogy, because the investor/developer in a construction project desires to release its financial assurance, it will work to complete the required step in accordance with code; the system is built so that failure to get the county approval has a real, monetary consequence. This kind of system requires the agency to inspect and verify. However, this kind of system puts the burden with the investor/developer to initiate the inspection when the project is ready. The default if the investor/developer is out of compliance is no money and no sale.

Continued on page 21

Mitigation Regulations, *from page 10*

Mitigation should follow a similar pattern. If all mitigation projects were secured, the responsible party would have a financial incentive to get that security lifted, which could only be done with agency approval. Agency approval, presumably, would come only upon attainment of performance standards, after inspection.

This is not to suggest that after-the-fact enforcement, through inspections for violations, notices of violations, or litigation, has no value. Rather, it is unrealistic to think that the threat of after-the-fact enforcement, alone, will incentivize compliance with mitigation standards. The government lacks the resources for widespread enforcement. In many instances, such as governmental or non-governmental in-lieu fee programs, there may also be policy reasons for declining to enforce. Given the range of potential violators of the law, it is understandable that enforcement would focus on unpermitted fills or permit violations rather than mitigation. It is also unlikely that the government would bring an enforcement action against in-lieu fee providers, who are governmental entity or not-for-profit organization, based on general enforcement priorities and other considerations. The point is not whether the government might take after-the-fact enforcement, but that building in "before the fact" and "during the fact" controls will allow the government to focus its limited resources wisely.

Conclusion

The mitigation regulations mark a significant turning point in the regulatory program and its approach to mitigation. Mitigation was addressed in a series of memorandum and guidance documents since the early 1990s.[25] Now, the standards and criteria for compensatory mitigation are in formal federal regulations. Faithful implementation of these regulations can "level the playing field" and improve mitigation. There are also many potential pitfalls looming. Consistent implementation, using "before the fact" and "during the fact" compliance mechanisms fairly, will go a long way to helping meet the lofty goals of the new regulations. ■

Endnotes

1. National Mitigation Banking Association, *2006 NMBA Spring Newsletter, Draft Mitigation Regulations Released by Army and EPA*, http://www.mitigationbanking.org/pdfs/2006nmbaspringnewsletter.pdf (Spring 2006).
2. Royal C. Gardner, *Reconsidering In-Lieu Fees: A Modest Proposal, Ecosystem Marketplace*, http://ecosystemmarketplace.com/pages/article.opinion.php?component_id=5073&component_version_id=7494&language_id=12 (July 9, 2007) (last accessed Oct. 8, 2008) (referencing mitigation bankers' "long wait" to see an equalization of standards).
3. Pub.L. 108-136, 117 Stat. 1431 (Nov. 24, 2003), 33 U.S.C. 1344, note.
4. Compensatory Mitigation for Losses of Aquatic Resources , 73 Fed Reg. 19594 (Apr. 10, 2008).
5. 33 C.F.R. §332.3(n).
6. *Id.* §332.3(n)(1), (2).
7. H.R. 2531, 108th Cong. §3(u)(6)(C); 117 Stat. at 1431.
8. 33 U.S.C. §1365 (2000).
9. *See id.* §1365(f) (lacking a provision stating that a citizen may sue under the applicable code).
10. 33 C.F.R. § 332.3(m) provides: "*Timing*. Implementation of the compensatory mitigation project shall be, to the maximum extent practicable, in advance of or concurrent with the activity causing the authorized impacts. The district engineer shall require, to the extent appropriate and practicable, additional compensatory mitigation to offset temporal losses of aquatic functions that will result from the permitted activity."
11. *Id.* §332.4(c)(9).
12. 2007 WL 495245 (N.D. Ill. Feb. 14, 2007).
13. *Id.* at *28.
14. *Id.* at *9.
15. *Id.*
16. *Id.* at *2.
17. *Id.* at *29.
18. *See* Government Accountability Office, *Wetlands Protection: Corps of Engineers Does Not Have an Effective Oversight Approach to Ensure That Compensatory Mitigation Is Occuring, GAO-05-898 (September 8, 2005) (recommending oversight of the mitigation process in order to ensure compliance).*
19. 33 C.F.R. §332.4(c)(1),(i).
20. *Id.* §332.4(f)(1),(iii),(iv).
21. *Id.* §332.8(o)(8).
22. *Id.* §332.6(c).
23. *Id.* §332.3(k)(2)(iv).
24. The regulations clearly contemplate that there may be circumstances where the District Engineer does not require financial assurances. *E.g. id.* § 332.3(n)(1) ("In cases where an alternate mechanism is available to ensure a high level of confidence that the compensatory mitigation will be provided and maintained . . . the district engineer may determine that financial assurances are not necessary for that compensatory mitigation project.").
25. See list of memorandum and guidance documents, most of which are now obsolete, at www.epa.gov/owow/wetlands.

Perpetual Stewardship, *from page 17*

gation bank by eradicating and maintaining invasive weeds from areas upstream of the mitigation bank, thus eliminating a threat to the long-term viability of the wetland within the bank. The cost of credits on a for-profit mitigation bank can seriously impact the financial feasibility of a small project, such as a private homebuilder of a single-family residential unit; therefore a low-cost option for small impacts should be available. In-lieu fee programs are a valuable alternative for such projects.

Aldo Leopold wisely said that "[w]e shall never achieve harmony with the land, any more than we shall achieve absolute justice or liberty for people. In these higher aspirations, the important thing is not to achieve but to strive." The new regulations are the result of much compromise and testing. And even though these new rules are not perfect, they are a significant step in the right direction. Those involved in mitigation banking are urged to adopt and implement the recommendations provided here so that the next iteration of these rules brings us closer to truly compensating, protecting and enhancing our natural resources in perpetuity. ■

Endnotes

1. Conducting a thorough due diligence is the first step for a banker and bank steward to ensure the maximum opportunity for success. Due diligence is the assembly of all relevant information that allows assessment of the feasibility of perpetual stewardship of a mitigation project and helps to ensure its long-term financial stability. The elements of due diligence include: (1) reviewing and researching title and all related title issues such as mineral rights, encroachments, easements, access, taxes, other authorized uses of the property, (2) permit conditions, (3) adjoining land uses, (4) legal issues, (5) hazards, (6) reporting requirements, (7) habitat monitoring and management activities, (8) site conditions e.g. biotic resources, cultural resources, invasive species present, (9) divisions of responsibilities, and (10) past and future public uses, to name a few. The time and resources in conducting a thorough due diligence can be exhaustive.
2. Compensatory Mitigation for Losses of Aquatic Resources , 73 Fed Reg. 19594 (Apr. 10, 2008).
3. §§332.4 & 332.8.
4. §332.5.