

DRAFT

RE: EPA –HQ-OW-2006-0020 and RIN 0710-AA55
Comments to Compensatory Mitigation for Losses of Aquatic Resources

Dear Sir/Madam:

The New Jersey Freshwater Wetlands Mitigation Council (Council) is writing in response to the above referenced proposed rule published in the March 28, 2006 Federal Register. The Council is a seven (7) member body established to govern the State of New Jersey's Wetland Mitigation Fund, review wetland mitigation bank proposals and disburse grants to restore, enhance, and preserve wetlands (N.J.S.A. 13:9B-14). The Council consists of two members from the environmental community, two members of the academic community, two members from the building community and the Commissioner of the New Jersey Department of Environmental Protection (Department). The following are the Council's comments regarding the proposed rules:

33 CFR 332.9 and 40 CFR 230.99 In-Lieu Fee Programs

The Council does not agree with applying in New Jersey the requirement to phase out in-lieu fee programs in five years or with the requirement to have all in-lieu fee programs meet the timing requirement and credit release schedule for mitigation banks standards. The Council recommends that the Department of Defense/ Environmental Protection Agency (DOD/EPA) keep the rule flexible enough to provideallow- for the continued existence of at least some in-lieu-fee programs.

The Council manages monetary contributions received from applicants who have received permits through the Department's Freshwater Wetlands Program. The Department deals with most of the mitigation cases and the Mitigation Council receives relatively few. As per N.J.A.C 7:7A-15, bBefore the Department will allow a-permittees to make a-monetary contributions to satisfy a requirement to compensate for an impact to an aquatic resource they first must demonstrate that it is not feasible to perform the mitigation themselves, and they cannot purchase credits from a bank. The Council recommends DOD/EPA consider a similar hierarchy.

The Council may only contract with governmental agencies or non-profit conservation organizations to carry out wetland mitigation projects. This in lieu fee program encourages public/non profit participation in the restoration and preservation of wetlands. In addition, since government agencies and a non-profit conservation organizations are not required or allowed to make a profit to accomplish their goals they may be able to perform mitigation in areas of the State where the land is too expensive for the economics to work for a for profit company or mitigation banker.

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Once a permittee ~~makes a monetary contribution~~~~donates cash~~ to the Council the ~~funds~~~~money is are~~ placed in the Wetland Mitigation Fund. Through a grant process, the Council distributes the collected ~~funds~~~~dollars~~ to qualifying non-profit or government entities to conduct wetland mitigation projects. This has been an evolving process and at this time there is significant oversight and conditions placed on the Council's grant projects. ~~There is significant oversight and conditions placed on these grant projects.~~ The performance standards for current Council wetland mitigation grants are the same as those applied to the creation of wetland mitigation banks and stand alone wetland mitigation projects. The Council recommends that DOD/EPA require all in-lieu programs to have performance standards equivalent to a stand alone mitigation project and bank. This would address the concern that all mitigation should meet the same standards. If DOD/EPA is concerned about the time lag between when the dollars are collected and when the mitigation is placed in the landscape we recommend that a higher ratio be placed on this type of mitigation to address the temporal loss.

In lieu fee programs help fulfill a public need especially for small wetland impacts that are often associated with the development/improvements to a single family home. The Department requires mitigation for impacts that may be as small as 100 square feet. Generally for this size of ~~an~~ impact it is not feasible for a single family homeowner to provide an ecologically significant mitigation project. However, through an in lieu program multiple impacts in a watershed can be aggregated and an ecologically beneficial mitigation project built. If there is no bank and all in lieu fee programs are eliminated, the Army Corps will be required to oversee the review, construction and monitoring of multiple small mitigation projects. Government time is better spent focusing on the oversight of ecologically beneficial projects such as mitigation banks, larger stand alone mitigation projects and aggregated mitigation projects funded through an in-lieu fee program.

Permittees conducting a clean-up of hazardous waste or the closure of a landfill often have problems locating suitable on-site and off-site wetland mitigation sites. If there is no wetland mitigation bank it is environmentally beneficial to allow these permittees to make a monetary contribution. This helps to expedite the clean-up or landfill closure. If there was no in lieu fee program this could delay these types of projects.

If States are required to make in-lieu fee programs consistent with a bank, ~~we would need to set up~~ "banks" would need to exist in each watershed. In New Jersey we have divided our State into 20 watershed management areas. Our watershed management areas are as large as a Hydrologic Unit Code (HUC) 8 to

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as small as several HUC 14's put together. Therefore, to ensure there is a bank in each watershed management area that would require establishing~~For NJ that would mean setting~~ up 20 wetland mitigation banks. Not all ~~of the~~ watersheds have the level of development necessary to support the construction of a wetland mitigation bank. In addition, since some of the watersheds are heavily urbanized and often have contamination issues, finding a suitable site would prove difficult. These issues may make it difficult to have a bank within these areas and could lead to public controversy about the legal requirements to direct mitigation credits to banks in relatively distant watersheds. However, the grant program allows the Council to fund wetland mitigation projects within these areas. If EPA moves forward with this proposal, since in lieu programs are administered through cash poor government or non profit entities, the Council recommends that EPA set up one-time funding to assist in the development of banks in each of New Jersey's watersheds.

~~The Council has accepted \$3,336,768.25 dollars in contributions for 29.6496 acres of permitted impacts to wetlands in fifteen of New Jersey's twenty watersheds. The Council has spent \$3,041,628.16 dollars in seven watersheds to preserve 284.10 acres of land and restore and enhance 150.60 acres of wetlands. The Council is providing this information to demonstrate that an in-lieu fee program can provide successful wetland mitigation projects when it includes sufficient standards, conditions and oversight. Therefore, we urge EPA to retain the option for in-lieu fee programs.~~

Attached to this letter is a copy of the Council's mitigation fund grant process, a blank grant agreement, a resolution that identifies performance standards for all grant projects as well as a list of the type of projects the Council has funded. If you have any questions pertaining to the above feel free to contact Jill Aspinwall at the above address or by phone at (609) 777-0454.

Sincerely

Edmund Bennett Jr., Chairperson
New Jersey Freshwater Wetland Mitigation Council