
DECEMBER 2001 NMBA NEWSLETTER

President's Message

Looking Back: Reviewing our accomplishments in 2001 reflects big results for a small Association. We count the Interagency In-Lieu Fee Guidance, the GAO Report on In-Lieu Fees, the NAS Study on Mitigation and subcommittee hearings on the Jones Bill, H.R. 1474 among the major achievements. The NMBA filed comments on the Corps of Engineers proposed revisions and reissuance of the nationwide permits, and also filed comments on the draft environmental impact statement for the nationwide permits. We had a successful Association meeting during the May Terrene Conference in Florida. We testified in support of the Jones Bill in September. In October, our members participated in a two-day forum on mitigation sponsored by EPA and other agencies. We have been actively working to obtain post-SWANCC guidance for wetlands permitting, through meetings and communications with the Corps, EPA and others. From the jurisdictional issues after SWANCC to the standards for wetland mitigation, the Association has been active in all areas of federal mitigation policy.

Looking forward: In 2002, we are looking forward to the February 27 - March 1 Terrene Conference in Washington, D.C. See www.terrence.org for more information. We will once again schedule our Association meeting in conjunction with Terrene. Your Board is developing a meeting agenda and invites members to suggest topics. We see 2002 as a time to regroup our attentions to broader habitat mitigation, including wetlands and other ecosystems. We will continue to work on issues of regulatory jurisdiction. And we continue to support H.R. 1474, the Jones Bill.

Nationwide Permit Revisions and Reissuance

The comment period on the proposal to reissue/revise the nationwide permits ended October 9, 2001. The Corps will have to take action prior to February 11, 2002 to either extend the existing permits, which would otherwise lapse, or reissue and revise the permits. The Corps' proposal made no distinction between mitigation banks, in lieu fees or other ad hoc forms of mitigation, so the NMBA filed comments demonstrating the advantages of banking over other forms of consolidated mitigation. The NMBA also expressed concerns about the Corps' approach to allowing vegetated buffers or other "non-wetland" compensation for wetland impacts. We recommended that the Corps provide additional scientific support before it allows waiver of the "wetland for wetland" mitigation policy.

EPA Criticizes Corps EIS

The Corps released a draft environmental impact statement (EIS) on the nationwide permit program on July 31, 2000. NMBA submitted comments on this document, suggesting that the Corps had not adequately supported its views on mitigation. EPA, which rates other agency's EISs, rated the Corps EIS with a Category 3--Inadequate rating. EPA cited problems with: the limited data used for examining cumulative impacts; the lack of consideration of other wetlands losses; the lack of consideration of a reasonable range of alternatives (including Programmatic General Permits), alternatives for reducing the scope of authorized activities or the impact thresholds of the NWPs were not examined; and there was an over-reliance on the success of mitigation to offset impacts. EPA has recommended formal revision of the draft EIS and that that revision should be made available for public comment. Further EPA raised concerns regarding whether the Corps should modify

and reissue the Nationwide Permits prior to finalizing the EIS. If EPA is unable to resolve the issues articulated in its comments to the Corps it has the ability to forward its concerns to the Council on Environmental Quality pursuant to the National Environmental Policy Act (NEPA).

Jones Bill Hearing

On September 20, 2001, the Water Resources Subcommittee of the House Transportation and Infrastructure Committee held hearings on H.R. 1474, Walter Jones' bill to codify the wetland mitigation banking program. The NMBA submitted formal testimony for the record. In addition, two members testified in person before the committee, George Howard and Mike Rolband. The Subcommittee members expressed many favorable comments about mitigation banking. Both Mike and George were personally commended for their testimony. The bill was to be scheduled for a vote, but the events of September 11, the economic stimulus package and major budget debates have resulted in no action yet on mitigation banking.

Corps RGL on Mitigation

The Corps issued a Regulatory Guidance Letter (RGL) on Mitigation dated October 31, 2001, responding in part to the NAS Study of Mitigation. Issued in response to the GAO and NAS study, the RGL minimizes the traditional preference for on site mitigation, allowing greater discretion for off site mitigation. It also sets more stringent criteria for non-banking consolidated mitigation to help insure success, providing a closer level of standards among off site consolidated mitigation forms. On the other hand, the RGL encourages ecological trading through the use of vegetated buffers, and improvements to open waters or uplands as compensatory

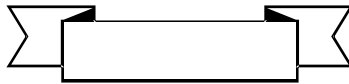
mitigation for wetland impacts. The RGL was issued with no interagency coordination or public input. As a result, many groups, including the NMBA, are submitting comments to the Corps after the fact. NMBA applauds the standards established for other, non-banking forms of mitigation but remains concerned about open-ended discretion in trading wetlands for non-wetland mitigation. Check it out at www.usace.army.mil.

A Sample of Recent Court Decisions Interpreting CWA Jurisdiction in light of SWANCC

Because many members are interested in the SWANCC jurisdictional issues, we prepared a white paper which is excerpted here. If you would like more information or details, contact Peggy Strand at mstrand@venable.com. On September 26, 2001, a U.S. District Court in Indiana concluded in *U.S. v. Rueth Development Company* that the wetlands at issue were protected by the Clean Water Act (CWA) because of a direct relationship with a nearby tributary, noting a "drop of rainwater landing in the Site is certain to intermingle with water from the Little Calumet River." Several other court decisions have interpreted CWA jurisdiction over tributaries and adjacent wetlands, two categories of "waters of the United States" not explicitly addressed by the U.S. Supreme Court's opinion in *Solid Waste Agency of Northern Cook County (SWANCC)*. It is worth remembering that the term "adjacent" includes contiguous and neighboring, and thus is not limited to waters that have a surface water connection to the nearby waterway. The majority of these decisions appear to be interpreting jurisdiction over such waters broadly, and the *SWANCC* decision narrowly. For example, 9th Circuit Court of Appeals held in *Headwaters v. Talent Irrigation District* that irrigation canals are jurisdictional because they are

tributaries to the natural streams with which they exchange water. Similarly, the Federal District Court in Idaho held in *Idaho Rural Council v. Bosma* that the CWA was intended to protect a spring which ran down a ravine into a pond, and then across a pasture into a canal which discharged into a jurisdictional creek. However, at least two cases take a narrower interpretation of “waters of the United States” in light of *SWANCC*. The 5th Circuit Court of Appeals

held in *Rice v. Harken* that a discharge onto dry land, some of which eventually reaches groundwater or navigable waters by gradual natural seepage, does not trigger CWA jurisdiction. And, a bankruptcy court in Louisiana stated in *Re James Needham* that a body of water is subject to CWA regulation only if actually and easily navigable, or if adjacent to an open body of navigable water. The *Needham* decision is currently under appeal.



Hope to see you in Washington, D.C.
Feb 27 - March 1, 2002!

John Ryan, President (847-692-7170, jryan@lawrinc.com)
Craig Denisoff, Vice President (916-331-8810, cdenisoff@wildlands inc.com)
Ray Pavelka, Treasurer (941-481-2011, raymond.pavelka@marinerproperties.com)
Rich Mogensen, Secretary (704-655-9707, rich.k.mogensen@williams.com)
Lew Lautin, Past-President (954-462-1707, llautin@wet landsbank.com)
Peggy Strand, Washington, D.C. Representative (202-513-4699, mstrand@venable.com)