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GAO REPORT: WETLANDS IN-LIEU-FEE MITIGATION RULES NEED GREATER OVERSIGHT AND ACCOUNTABILITY

AGENCIES SHOULD IMPROVE MONITORING OF “IN LIEU FEES” AND “AD HOC ARRANGEMENTS”

WASHINGTON, D.C.—Representative Sherwood Boehlert (R-NY), along with other colleagues on the House Transportation and Infrastructure Committee, today released a General Accounting Office (GAO) report that documents the need for the Army Corps of Engineers (Corps) and Environmental Protection Agency (EPA) to increase oversight of “in lieu fees” and “ad hoc arrangements,” two relatively new practices under Clean Water Act regulatory programs to compensate for wetlands losses.

“GAO’s detailed report (Wetlands Protection: Assessments Needed to Determine Effectiveness of In-Lieu-Fee Mitigation) confirms that, while mitigation banking can be an effective tool to meeting the nation’s goal of no net loss of wetlands, the jury is still out on in lieu fees and ad hoc arrangements,” Rep. Boehlert said. “This is a classic example where regulatory flexibility must be accompanied by accountability. Agencies and beneficiaries of in lieu fees and ad hoc arrangements must be held accountable; the Corps and EPA should establish criteria and standards for ecological success, monitor restoration, enhancement, creation, and preservation efforts to ensure such success, and hold the proper parties legally responsible when expectations are not met.”

Under the Clean Water Act’s section 404 wetlands program, permittees (such as developers and transportation agencies) must compensate for unavoidable, adverse impacts to wetlands. Permittees may perform their own mitigation or they may pay third parties for mitigation, usually at locations away from the development site. A common method of third party mitigation is the use of mitigation banks, where public or private entities enter into agreements with the Corps to restore, enhance, create, or preserve wetlands and then sell credits to developers. Over the last decade, the number of mitigation banks has grown to more than 200, with several hundred more in the planning stage. In 1995, Federal agencies issued guidance on mitigation banking that endorsed the practice and included various requirements to help provide for success of the banks.

The two other forms of third party mitigation, and the focus of GAO’s investigation, are in lieu fees and ad hoc arrangements. Under in lieu fee systems,

developers pay fees to public entities or private nonprofit natural resources management organizations that, usually under agreements with the Corps, use accumulated fees to establish wetlands. Federal agencies issued guidance on in lieu fees in October 2000. Under ad hoc arrangements, developers pay individuals or entities, which are neither mitigation banks nor considered by the Corps to be in-lieu-fee organizations, to perform mitigation.

Rep. Boehlert, joined by the bipartisan leadership of the Transportation and Infrastructure Committee, requested the GAO investigation in December 1999, responding to concerns that in lieu fees and other third party arrangements were lacking accountability and undermining more successful efforts (such as through mitigation banks) to restore and conserve wetlands.

GAO's report, which covers in lieu fee arrangements established through September 2000, contains various findings, including:

- The Corps has established 63 in-lieu-fee arrangements in 17 Corps districts, allowing developers to meet mitigation requirements for over 1,440 acres and pay over \$64.2 million to organizations.
- Twenty-four Corps districts allowed developers to use ad hoc arrangements to mitigate adverse impacts to wetlands.
- In lieu fees have the potential to be effective (at least in some cases) and the October 2000 guidance should help to address some concerns about accountability and unfair competition with mitigation banks.
- In many cases, Corps officials are not able to document whether in lieu fees and ad hoc arrangements are effective and adequately enforced.

GAO's report includes two recommendations:

- To ensure that in-lieu-fee organizations adequately compensate for adverse impacts to wetlands, EPA, in conjunction with the Secretaries of Army, Commerce, and the Interior, should establish criteria to determine the ecological success of mitigation efforts and develop and implement procedures for assessing success.
- To better ensure the ecological success of mitigation efforts under ad hoc arrangements, the Secretary of the Army should instruct the Corps to establish procedures to clearly identify whether developers or recipients of funds are responsible for the ecological success of mitigation efforts and, using the same success criteria applicable to in-lieu-fee arrangements, to develop and implement procedures for assessing success.

Boehlert emphasized that “GAO’s report confirms the need for passage of H.R. 1474, Rep. Walter Jones’ (R-NC) bill on wetlands mitigation and restoration.” The bill amends the Clean Water Act to include wetlands “no net loss” and “net gain” goals, incorporate the safeguards contained in the 1995 mitigation banking guidance, and require the Corps and EPA to establish standards and criteria for the operation, use, and ecological success of third party mitigation (such as in lieu fees).

Boehlert said he was well aware of concerns among some environmental organizations about wetlands mitigation but believed that, with administrative and legislative safeguards, third party mitigation, including in lieu fees, could be a useful tool in allowing development and infrastructure projects to move forward, while making progress toward the wetlands “no net loss” and “net gain” goals.

“I hope the Administration and Congress will carefully review GAO’s report and then take the next steps of implementing the recommendations and passing H.R. 1474.”

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