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CONSISTENT IMPLEMENTATION OF COMPENSATORY MITIGATION RULE COULD LEAD TO REDUCTION IN WETLANDS LOSSES

**National Mitigation Banking Association Outlines
Seven Implementation Recommendations**

JACKSONVILLE, Fla. (May 8, 2008) – A new compensatory mitigation rule announced by the U.S. Army Corps of Engineers and the U.S. Environmental Protection Agency (EPA) could provide a strong boost to long-term protection of wetlands if implemented accurately and consistently nationwide, according to the National Mitigation Banking Association (NMBA).

Speaking before the National Mitigation Banking Conference, incoming NMBA President Sheri Lewin today outlined “Seven Key Elements for Implementation” that could determine the success and direct impact of the new rule.

“Tens of thousands of wetland acres each year are lost without being properly mitigated by in-lieu fee programs and developers,” Lewin said. “The new rule establishes higher standards that go a long way toward improving the quality, sustainability and accountability of all forms of compensatory mitigation.”

The rule, which marks the first significant Congressionally-mandated change to wetlands law in nearly 30 years, was developed to allow the Corps and EPA to promote greater consistency, predictability and ecological success of mitigation projects under the Clean Water Act. It includes provisions to develop equivalent standards and greater accountability for the three compensatory mitigation mechanisms: mitigation banks, in-lieu fees and permittee-responsible compensatory mitigation. The rule establishes mitigation banks, which work in advance of impacts and ensure care of wetlands in perpetuity, as the preferred mitigation option.

“Developing the rule is just the first step,” Lewin added. “What we recommend is that the EPA and Corps of Engineers now develop policies and procedures that will ensure that the rule is implemented properly and consistently across the country. Our key elements outline the areas where we believe the EPA and Corps of Engineers need to strike quickly to ensure that the new rule leads to a reduction in wetland losses.”

In making its recommendations, NMBA focused on seven areas: Consistency, Training, Preference, Schedules, Equivalency, Watershed and Distinction.

“It is the mission of the National Mitigation Banking Association to promote high performance standards and financial assurances of all forms of mitigation to ensure that unavoidable wetland impacts are appropriately replaced and sustainable in perpetuity,” Lewin said. “We are pleased that the regulations acknowledge the scientifically documented success of mitigation banks and are focused on raising the bar for all forms of mitigation through the proper implementation of this rule.”

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Compensatory Mitigation for the Losses of Aquatic Resources Rule

Compensatory Mitigation Rule:

On March 31, 2008, the United States Army Corps of Engineers and the United States Environmental Protection Agency (EPA) released a new Compensatory Mitigation Rule that clarifies steps for compensatory mitigation for unavoidable impacts to the nation's wetlands and streams. The rule will become effective on June 9, 2008.

Key Points from the Rule

- Establishes a hierarchy for mitigation options with mitigation bank credits being the most preferred option. In-lieu fee program credits are second with permittee-responsible mitigation as the third option.
- Maintains the goal of “no net loss” of wetlands set by President George H.W. Bush in 1989 and reiterated by President George W. Bush during his first term.
- Provides one set of regulations for all forms of compensatory mitigation, instead of separate guidance documents used in the past.
- Does not change when compensatory mitigation is required, but does change where and how it is required.
- Creates new definition of “watershed” and “watershed approach.”

Goals of the New Rule as Described by the Corps of Engineers and EPA

- Implement environmentally effective standards for compensatory mitigation that are based on the best available science, and incorporate key National Research Council recommendations for improving the success of compensatory mitigation;
- Create a “level playing field” among the three compensatory mitigation mechanisms through equivalent standards and greater accountability, so that providers of timely, high-quality mitigation are preferred, because there is greater assurance that the compensatory mitigation will be successful;
- Increase the efficiency and predictability of the process of proposing compensatory mitigation and approving new mitigation banks and in-lieu fee programs; and,
- Enhance public participation in compensatory mitigation decision-making.

Three Mechanisms for Providing Compensatory Mitigation:

Mitigation Banks: Mitigation Banking was developed in the 1990s as a private option for compensatory mitigation. Units of restored, created, enhanced or preserved wetlands are expressed as “credits” which may subsequently be withdrawn to offset “debits” incurred at a project development site.

In-Lieu Fee Mitigation: Like mitigation banks, in-lieu fee programs involve off-site compensation, and are generally administered by state and local governments or nonprofit organizations. While mitigation banks are required to achieve certain milestones before selling credits, in-lieu fee programs generally have initiated compensatory mitigation projects only after collecting fees. This often creates a substantial time lag between permitted impacts and implementation of compensatory mitigation projects.

Permittee-Responsible Compensatory Mitigation: This is the most traditional form of compensation and continues to represent the majority of compensation acreage provided each year. The permittee retains responsibility for ensuring that required compensation activities are completed and successful. Permittee-responsible mitigation can be located at or adjacent to the impact site or at another location generally within the same watershed as the impact site.

National Mitigation Banking Association
Key Elements for Implementation of Compensatory Mitigation Rule

Element 1 – Consistency: NMBA recommends that the Corps of Engineers and the Environmental Protection Agency develop systems to ensure that the core principles of the Rule are implemented consistently by District Offices, Field Offices and Regulators across the entire country. It also recommends that each District and Field Office designate one person to serve as its primary contact for mitigation banking issues.

Element 2 – Training: NMBA recommends that the Corps of Engineers and Environmental Protection Agency work with NMBA and other experts in the mitigation banking industry to develop a consistent mitigation bank training curriculum that can be implemented at the local level, and that each District and Field Office receive at least one full day of training by the end of September 2008. The Corps of Engineers and Environmental Protection Agency should also develop an on-going training process that promotes continued training for all representatives involved in the mitigation banking process.

Element 3 – Preference: NMBA recommends that the Environmental Protection Agency and the District Offices of the Corps of Engineers establish procedures consistent with the standard of the Rule, which states that mitigation banking is the preferred method for wetlands mitigation and that their practices reflect this preference.

Element 4 – Schedules: NMBA recommends that because the Rule sets deadlines for mitigation banks, the Corps of Engineers and the Environmental Protection Agency need to change employee performance standards and training regarding bank approval and credit release to ensure that the schedules are met. The agencies also need to ensure that adequate funding is provided to ensure implementation of the Rule.

Element 5 – Equivalency: NMBA recommends that District and Field Offices of the Corps of Engineers recognize the importance that the same standards and criteria are equally applied to each mitigation option consistent with PL 108-136. All mitigation options need to meet the 12 mitigation plan criteria of Section 332.4(c)(1)-(12). For example, the performance standards of Section 332.5 and the monitoring standards of 332.6 should be equitably enforced for all options.

Element 6 – Watershed: NMBA recommends that the Corps of Engineers and the Environmental Protection Agency, in concert with NMBA and other mitigation experts, further clarify the watershed approach to ensure that it is implemented in a manner that is consistent with the other core principles of the Rule. The Corps of Engineers and Environmental Protection Agency should also clearly outline the relationship between a watershed and a service area, and ensure that the relationship is being consistently applied by all District and Field Offices.

Element 7 – Distinction: NMBA recommends that the Corps of Engineers acknowledge the clear distinction between in-lieu fees and mitigation banks, consistent with the preference for accomplished mitigation. The Rule provides the Corps of Engineers with the discretion to discourage delayed mitigation by limiting advanced credit sales and providing higher ratios for in-lieu fees due to temporal loss. NMBA recommends that these tools be regularly used.

LOCAL NMBA CONTACTS:

For media interested in contacting a local or regional representative of the National Mitigation Banking Association for comments, below is the direct contact information for members of the NMBA Board of Directors who are available to discuss the Compensatory Mitigation Rule and the “Seven Key Elements for Implementation” presented by NMBA.

President: Sheri Lewin – Environmental Resource Marketing, Clermont, Florida (407) 797-8827

Immediate Past President: Don Ewoldt – Lake Erie Land Company, Chesterton, Indiana (219) 898-4048

Craig Denisoff – Westervelt Ecological Services, Sacramento, California (916) 802-3054

George Howard – Restoration Systems, Raleigh, North Carolina (919) 306-4258

George Kelly – Environmental Bank and Exchange (EBX), Owing Mills, Maryland (410) 375-6340

Ren Martyn – Finger Rock Preserve LLC – Steamboat Springs, Colorado (970) 846-3118

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