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P.O. Box 547881 Orlando, Florida 32854 • 407.496.1830 • www.mitigationbanking.com

January 19, 2010

Brigadier General Michael J. Walsh  
Commander, Mississippi Valley Division  
U.S. Army Corps of Engineers  
ATTN: CEMVD-PA  
P.O. Box 80  
Vicksburg, MS 39181-0080

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Re: Jan 30, 2009, MEMORANDUM THRU Director, Task Force  
Hope, SUBJECT: Mitigation Path Forward for Hurricane and Storm  
Damage Risk Reduction System (HSDRRS)

Dear Brigadier General Walsh:

The National Mitigation Banking Association ("NMBA") was only recently made aware of the above referenced Memorandum, which addresses mitigation for the Hurricane and Storm Damage Risk Reduction System ("HSDRRS") project within the jurisdiction of the New Orleans District of the U.S. Army Corps of Engineers. The Memorandum raises a number of concerns about the District's interpretation of mitigation regulations and policy. We believe that the Memorandum is not consistent with mitigation policy and should be revised by the Corps.

### **Introduction**

The NMBA is a membership organization representing businesses committed to the restoration and preservation of our nation's wetlands and natural habitat through the use of mitigation and conservation banks. The Association's members have established and operated mitigation banks throughout the United States since the early 1990s. Mitigation banking is a market-based industry which involves creation of sites of advanced, consolidated mitigation for the express purpose of compensating for the adverse impacts on wetlands or streams authorized by a permit under Section 404 of the Clean Water Act ("CWA"), 33 U.S.C. § 1344, or other similar laws. Mitigation bankers are in the business of restoring, enhancing and sometimes creating wetlands, in advance, to sell as compensatory mitigation when mitigation cannot be achieved at the development site.



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NMBA has worked with the U.S. Army Corps of Engineers ("Corps"), the U.S. Environmental Protection Agency ("EPA"), the U.S. Fish and Wildlife Service ("FWS"), the Congress and other federal and state agencies to assure that compensatory wetland mitigation meets high performance standards. Our members are proud of their projects, and have always advocated that all compensatory mitigation should meet equivalent, high standards to assure that unavoidable wetlands impacts are indeed addressed through implementation of successful mitigation plans. Mitigation banking has been heavily regulated, first under federal guidance and now under federal regulations. Because of the history of regulation and success, Congress has established a preference for mitigation banking to offset unavoidable impacts from surface transportation projects, as well as water resource projects. The same history of strong oversight and successful products stands behind the decision of the Corps and EPA in 2008 to establish a regulatory preference for mitigation banking credits.

Because of our interest in equitable application of mitigation standards to all federal programs, NMBA maintains that the New Orleans District Memorandum is not correct. We hope that, upon consideration of the points raised in this letter, the Corps will modify the memorandum and also assure that future decisions on use of mitigation banks address the concerns we express here.

### **Legal Context**

Various activities may impact wetlands, and may require a permit under Section 404 of the Clean Water Act, 33 U.S.C. 1344. The Corps regulatory program administers the Section 404 permit program, including evaluation and establishment of compensatory mitigation as a part of permit terms. Until recently, compensatory mitigation was administered primarily under a series of guidance documents and memoranda of agreement.

Since June, 2008, compensatory mitigation for impacts to wetlands is governed by regulations promulgated jointly by the Corps and EPA, see 73 Fed. Reg. 19594-19705 (April 10, 2008), amending 33 C.F.R. Parts 325, 332 and 40 C.F.R. Part 230. These regulations establish a series of performance requirements applicable to mitigation regardless of whether the mitigation is provided by a permit holder, an in-lieu fee provider or a mitigation bank. It is clear from the regulations, the Preamble, and the statute that required promulgation of these regulations that the objective is to improve performance of



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compensatory mitigation by establishing strong, consistent standards for all mitigation to meet.

In addition, the regulations establish a priority system for selection of mitigation, which requires consideration of credits from a mitigation bank as the first means of mitigating impacts to wetlands. See, 33 C.F.R. 332.3.<sup>1</sup> The selection of mitigation for permitted impacts, reflecting consideration of the requirements of the regulations, normally occurs in the context of a record of decision or similar decision document on an application for a Section 404 permit. That is, the mitigation regulations must be read in conjunction with, and as adding requirements to, the regulations governing issuance or denial of permits.

The Water Resources Development Act of 2007 ("WRDA 2007") includes several provisions concerning mitigation for wetland impacts. Section 2036(c) mandates two important requirements. First, the law requires that mitigation for water resource projects "complies with the mitigation standards and policies established pursuant to the regulatory programs administered by the Secretary".<sup>2</sup> This requirement is free standing, and not inconsistent with any

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<sup>1</sup> Section 332.3(b) establishes a hierarchy for mitigation type and location, assigning the first preference to mitigation banks in the following manner:

(2) *Mitigation bank credits.* When permitted impacts are located within the service area of an approved mitigation bank, and the bank has the appropriate number and resource type of credits available, the permittee's compensatory mitigation requirements may be met by securing those credits from the sponsor. Since an approved instrument (including an approved mitigation plan and appropriate real estate and financial assurances) for a mitigation bank is required to be in place before its credits can begin to be used to compensate for authorized impacts, use of a mitigation bank can help reduce risk and uncertainty, as well as temporal loss of resource functions and services.

<sup>2</sup> The mandate to comply with regulatory standards appears in Section 2036(a):

(a) MITIGATION FOR FISH AND WILDLIFE LOSSES.—Section 906(d) of the Water Resources Development Act of 1986 (33 U.S.C. 2283(d)) is amended—

(1) in the first sentence of paragraph (1) by striking "to the Congress" and inserting "to Congress in any report, and shall not select a project alternative in any report,";

(2) in the second sentence of paragraph (1) by inserting ", and other habitat types are mitigated to not less than in-kind conditions" after "mitigated in-kind"; and

(3) by adding at the end the following:



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other WRDA mitigation requirement. Second, the law establishes a preference for mitigation bank credits for impacts that occur within the service area of a mitigation bank:

(c) WETLANDS MITIGATION.—

(1) IN GENERAL.—In carrying out a water resources project that involves wetlands mitigation and that has impacts that occur within the service area of a mitigation bank, the Secretary, where appropriate, shall first consider the use of the mitigation bank if the bank contains sufficient available credits to offset the impact and the bank is approved in accordance with the Federal Guidance for the Establishment, Use and Operation of Mitigation Banks (60 Fed. Reg. 58605) or other applicable Federal law (including regulations).

As addressed more fully below, we believe that the dual requirements of WRDA 2007 combined with the 2008 Mitigation Regulations mean that the NO Memorandum is in error.

### **Analysis of the NO Memorandum**

The NO Memorandum addresses only WRDA 2007 Section 2036(c), the preference for mitigation bank credits provided by Congress. As noted above, WRDA 2007 Section 2036(a) requires consideration of the mitigation standards that apply in the Corps' regulatory program. That, of necessity, means compliance with the 2008 Mitigation Regulations which provide a preference for use of mitigation banking credits and establish other standards for mitigation performance.

There is no indication in the NO Memorandum that the regulatory standards were considered at all. The Mitigation Regulations apply at all stages of mitigation selection, and establish a hierarchy, under which the preferred forms of mitigation are first mitigation banks, then available credits from in lieu

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“(3) MITIGATION REQUIREMENTS.—

“(A) IN GENERAL.—To mitigate losses to flood damage reduction capabilities and fish and wildlife resulting from a water resources project, the Secretary shall ensure that the mitigation plan for each water resources project complies with the mitigation standards and policies established pursuant to the regulatory programs administered by the Secretary.



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fee programs, then a permittees' planned mitigation. See 33 C.F.R. 332(b)(1)-(6). Before rejecting use of credits from mitigation banks, the NO District was obligated to address the considerations set forth in the Mitigation Regulations.<sup>3</sup>

As a threshold matter, before addressing individual points, we question whether the District's approach -- deciding that mitigation banks would not be used at all for the HSDRRS -- is consistent with the law. The HSDRRS is a system, or a general plan of action, not a project. The HSDRRS it is composed of a number of actions and projects, that are being implemented over time through separate decision processes. The Memorandum notes that the precise mitigation needs were not yet known, and only estimated. The selection of mitigation needs -- including consideration of mitigation banks -- is specific to the projects and their impacts.

Put otherwise, we believe that the District remains required, by the Mitigation Regulations as well as WRDA, to consider the use of available mitigation bank credits for individual projects that are part of the HSDRRS as those projects proceed. At the time that project-specific mitigation needs are known, the law requires that "first look" at available mitigation bank credits to meet some or all of the mitigation needs.

In addition, the specific reasons expressed in the NO Memorandum raise a number of concerns. The Finding (supported by a four page explanatory memorandum) is reproduced here:

c. Finding. It is not appropriate to use mitigation banks for executing the HSDRRS mitigation mission for the following reasons: (1) enormous size and scope of the HSDRRS mitigation mission, (2) an insufficient amount of available mitigation credits in the project watershed, (3) the inability to reliably project a price for the mitigation credits needed, (4) contracting issues, (5) the possible uncontrolled escalation of over-all project costs, (6) negative impacts to the CEMVN's Clean Water Act Section 404 regulatory program, (7) resource agency concerns, and (8) non-Federal sponsor concerns of purchasing mitigation credits in areas away from project impacts, all as discussed further, below.

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<sup>3</sup> The Mitigation Regulations also establish performance standards and criteria for all mitigation. The NO District did not address whether and how the mitigation it proposes to use will meet those performance standards and criteria. These "level playing field" regulations are designed to assure that all mitigation meets similar high standards.



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NMBA believes that the reasons in the Finding are not based on information or analysis that satisfies the applicable legal standards. We have grouped certain of the reasons in the Finding together in addressing our concerns with the NO Memorandum.

*Size of the HSDRRS and Availability of Credits (reasons 1, 2).* It appears that the NO Memorandum assumed that the WRDA phrase "sufficient available credits to offset the impact" meant that all compensatory mitigation must come from mitigation banks for the preference to apply. This is wrong. The WRDA preference only requires that a mitigation bank have available credits to "offset the impact," rather than having credits to offset "all of the impacts." This is consistent with mitigation practice, in which it is routine that mitigation needs may be met with a number of different mitigation projects (e.g., some bank credits, some on-site mitigation, etc.) Any other interpretation would impose a size limitation on mitigation banks that does not exist in this law.

Significantly, to the extent that the WRDA text might be misread, the mitigation banking preference in the Mitigation Regulations has no similar language concerning "sufficient available credits" and it is equally binding on the Corps for water resources projects. The appropriate way to reconcile the possibly ambiguous WRDA text with the Mitigation Regulations is to take the common sense approach that a mitigation bank does not have to provide all of the mitigation required for a project to keep its preference. Rather, mitigation banks in the service area with credits available have to be identified and there must be a specific determination concerning using credits from such a mitigation bank for some or all of the mitigation needs. The NO Memorandum is in error to the extent that it assumes the mitigation banking preference is an "all or nothing" assessment, where banks must be able to provide compensatory mitigation for all impacts.

Moreover, the size of HSDRRS is not the proper "yardstick" for measuring mitigation needs; the impacts, and thus the mitigation needs (quantities), will be determined on a project by project basis, and it is at that level that the mitigation preference applies.

*Possible Price of Mitigation Credits, Potential Cost Overruns (reasons 3, 5).* Obtaining successful mitigation comes at a price, regardless of who conducts the mitigation. The NO Memorandum identifies its expected mitigation needs by



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type (expressed in Average Annual Habitat Units). The Memorandum does not indicate whether there has been any price discussion with the mitigation banks that have some available credits. The various reasons relating to price do not make sense without a rational price comparison showing how the District will obtain its mitigation without use of mitigation bank credits.

While stating that existing mitigation banks cannot meet all of the projected needs, the Memorandum does not explain how the District expects to meet the projected needs. We have to assume that the District plans to "do it itself," using some combination of traditional land purchase or easement combined with a restoration/mitigation plan to obtain the desired compensatory projects. The District will need to meet all of the performance standards of the Mitigation Regulations, the same as any provider of mitigation. As a result, it is hard to accept that if the District meets the same requirements as a mitigation banker, the cost of the mitigation credits can either not be predicted, or will vary significantly depending upon who performs the mitigation.

The NO Memorandum expresses concern about the uncertain price of mitigation bank credits in the future, but the law does not allow the District to reject mitigation banking *in advance* on this basis. On a project by project basis, the District needs to show that a price differential between mitigation bank credits and an alternative (e.g., its own mitigation plan) warrant rejecting use of the mitigation bank. It is not sufficient for the District to state that it has a limited mitigation budget unless it can also show that it will be able to meet its legal requirements within that budget and that mitigation credits will be cost prohibitive for the same product.

While the NO Memorandum expresses concern about market forces influencing the price of mitigation credits, the District ignores the fact that it will be seeking mitigation in the marketplace, and will be subject to the same market fluctuations and forces as the mitigation banker. The District has to estimate its mitigation costs taking into consideration compliance with the Mitigation Regulations and all of the same factors governing mitigation that apply to the mitigation banker. The Mitigation Regulations apply, and impose equivalent performance standards on all entities that perform mitigation, including the Corps. However, the tenor of the NO Memorandum is that it will be able to keep mitigation costs within a pre-set budget that could be jeopardized if the District had to purchase mitigation credits. If the District is "uncomfortable" projecting a



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price for purchase mitigation credits, it should be equally uncomfortable projecting its own cost to implement the same mitigation.

The Memorandum states that the projected cost for mitigation for all projects in the HSDRRS is approximately \$600 million. The estimated mitigation needs are organized by habitat type, but total 1035 Average Annual Habitat Units (AAHU). The budget thus provides an average of approximately \$600,000 per AAHU. This is a substantial "per credit" projection. If it is properly based on market costs to obtain successful mitigation, there should be no major difference in price between mitigation bank credits and other providers of the same mitigation.

The law does not require the District to purchase mitigation bank credits at any price. However, general concerns about possible future mitigation credit prices does not support the District rejecting even consideration of mitigation banking credits for the projects that are part of the HSDRRS.

Contracting Issues. This reason raises significant concerns. Two years after WRDA 2007 and more than a year after the Mitigation Regulations, the Corps should have the ability to contract for the purchase of mitigation credits. The law requires the Corps to utilize mitigation bank credits and it is hard to believe that the agency lacks contracting mechanisms to do this. The Memorandum solely states only that "CEMVN Contracting Division has expressed concerns regarding sole source contracts and negotiation of fair market value of a credit." Lack of experience does not constitute an excuse for ignoring legal requirements.

NMBA expects that, like other federal agencies,<sup>4</sup> the District can issue a Request for Proposals for provision of mitigation banking credits to avoid any possible "sole source" concerns, and there is ample experience in determining the fair value of goods and services procured by the government. Our members have

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<sup>4</sup> The Surface Transportation Law has included a preference for mitigation banks since 1998, and the Federal Highway Administration has regulations implementing that preference. See 23 C.F.R. Part 777 (Mitigation of Impacts to Wetlands and Natural Habitat). Federally funded transportation projects, including not only roads but airports and rail, have regularly purchased mitigation bank credits.



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sold credits to Department of Defense components in many parts of the country,<sup>5</sup> so it is quite hard to believe that the District would have difficulty contracting for the purchase of credits.

The Memorandum suggests that the public NEPA process could influence the market and price of available credits as a reason for rejecting use of mitigation bank credits. This is nonsense. Federal actions subject to NEPA that involve provision of mitigation routinely identify the potential kind of mitigation in the public process, whether the project intends to use mitigation banks or other mitigation. The Mitigation Regulations require this in the regulatory program, and as a result of WRDA 2036, the same requirement applies to the District. Identification of planned mitigation, including use of one or more mitigation banks, need not interfere with negotiations for mitigation credits.

*Clean Water Act Section 404 regulatory program, Other agency and non-federal sponsor concerns.* The thrust of these reasons is a view that mitigation banks should be reserved in some manner to provide mitigation for impacts under Section 404 permits and for the private impacts that are associated with regional development. In essence, the District is imposing a size and project character limitation on use of mitigation bank credits. The District is saying that a mitigation banker can only sell to certain kinds of customers. The law does not authorize the Corps to make these kinds of decisions for the private sector. To the contrary, the preferences in WRDA and the Mitigation Regulations would be completely vitiated if a Corps District could decide on its own that it preferred leaving mitigation banks available for non-WRDA impacts.

For similar reasons, NMBA is also concerned that the NO Memorandum recites a position by representatives of the U.S. Fish and Wildlife Service that "it would prefer that mitigation for large-scale civil works projects not be achieved via the purchase of mitigation credits." The Fish and Wildlife Service cannot informally overrule mandates of statutes and regulations with expressions of non-official positions. It is inappropriate for the District to rely on this kind of expression, which it specifically states is not official policy of the Fish and Wildlife Service.

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<sup>5</sup> Even without a formal, detailed survey, our members report sale of wetland mitigation, stream and endangered species credits to DoD (including the Corps of Engineers) entities in Alabama and California. We expect that your agency knows of many more examples.



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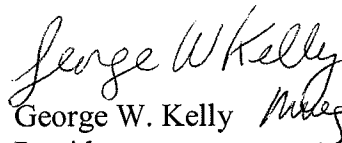
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### **Conclusion**

NMBA appreciates that the HSDRRS is a significant planning effort involving many actions and related projects designed to reduce risk to the greater New Orleans and southern Louisiana region. However, we believe that the District has misapplied mitigation law in deciding that mitigation banks will not be used for compensatory mitigation for any of the projects that are part of the HSDRRS. We believe that the Corps decision process to exclude use of mitigation banks is fatally flawed.

Thank you for your consideration of this matter. We look forward to hearing from you and working together to provide appropriate mitigation for Corps' civil works projects.

Sincerely,

  
George W. Kelly  
President

Cc: Colonel Alvin B. "Al" Lee  
Karen Durham-Aguilera, SES, P.E.  
Margaret Gaffney-Smith