

# NIMBA

NATIONAL MITIGATION BANKING ASSOCIATION

P.O. Box 547881 Orlando, Florida 32854 • 888.272.NMBA • www.mitigationbanking.com

October 24, 2007

Stephen L. Johnson  
Administrator  
U.S. Environmental Protection Agency  
1200 Pennsylvania Avenue, N.W.  
Suite 3000  
Washington, D.C. 20460

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950 Pennsylvania Avenue, N.W.  
Washington, D.C. 20530-0001

Peter Geren  
Secretary of the Army  
101 Army Pentagon  
Washington, D.C. 20310-0101

Re: Notice of Intent to Commence Action

Dear Sirs:

Pursuant to 33 U.S.C. § 1365(a)(2) and (b), the National Mitigation Banking Association on behalf of itself and its members hereby provides notice of intent to sue the U.S. Army Corps of Engineers and the U.S. Environmental Protection Agency, and appropriate officers thereof in their official capacity, for failure to perform duties that are non-discretionary. The National Mitigation Banking Association is a representative organization with a business address as follows: Post Office Box 547881, Orlando, Florida 32854-7881.

The non-discretionary duty that has been violated is the requirement that final regulations governing mitigation be promulgated by November 24, 2005. In 2003, the U.S. Congress directed that final regulations establishing, among other things, standards for mitigation be promulgated no later than two years from the effective date of the law, which was November 24, 2003. The statute is codified at 33 U.S.C. 1344, note, as follows:

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Pub. L. 108-136, div. A, title III, Sec. 314(b), Nov. 24, 2003, 117 Stat. 1431, provided that:

(1) To ensure opportunities for Federal agency participation in mitigation banking, the Secretary of the Army, acting through the Chief of Engineers, shall issue regulations establishing performance standards and criteria for the use, consistent with section 404 of the Federal Water Pollution Control Act (33 U.S.C. 1344), of on-site, off-site, and in-lieu fee mitigation and mitigation banking as compensation for lost wetlands functions in permits issued by the Secretary of the Army under such section. To the maximum extent practicable, the regulatory standards and criteria shall maximize available credits and opportunities for mitigation, provide flexibility for regional variations in wetland conditions, functions and values, and apply equivalent standards and criteria to each type of compensatory mitigation.


(2) Final regulations shall be issued not later than two years after the date of the enactment of this Act [Nov. 24, 2003].

To carry out this statutory mandate, in March, 2006, the U.S. Environmental Protection Agency and the U.S. Army Corps of Engineers jointly published proposed regulations, 71 Fed. Reg. 15,520-15,556. Final regulations have not been promulgated. Failure to promulgate final regulations as required by the statute constitutes a violation of a duty which is not discretionary. The violation is continuing until corrected.

If the violation is not corrected by promulgation of final regulations within 60 days of the date of this letter, the National Mitigation Banking Association or any of its members may commence a civil action to obtain appropriate relief, including attorneys fees.

You may contact me or our counsel Margaret N. Strand (202-344-4699) at Venable, LLP if you have any questions with respect to this matter. .

Sincerely,



Don Ewoldt, President  
National Mitigation Banking Association

cc: G. Dunlop  
B. Frazer  
M. Sudol