

1) **Service Areas**

Issue: One of the fundamental issues in the operation of banks and in-lieu-fees is the determination and utilization of a mitigation bank's Service Area. By definition, the Corp is to take a "watershed approach" to mitigation (33CFR 332.3(c)), but leaves the issue of the definition of the watershed (i.e. size, boundaries, etc) within which the watershed approach is applied to the local district (33CFR 332.3(c) 4).

Discussion: Though we recognize the 2008 Mitigation Rule (the "Rule") provides for local determination of watershed definition and watershed approach, the lack of watershed plans approved by the District Engineer (the "DE") creates uncertainty in the approval process of both mitigation bank instruments and the use of mitigation bank credits for compensatory mitigation. Though the uncertainty should dissipate over time as watershed approaches are implicitly defined through the permitting process, our over-riding concern is the potential for inconsistency and arbitrary decision-making regarding Service Area determination and appropriateness as applied to compensatory mitigation needs for specific projects within previously approved Service Areas. In fact in one District (Sacramento) it seems that some regulators are cutting urban areas out of a watershed in determining appropriate mitigation, which is counter to the regulations' understanding. Some jurisdictions rely on tributary strategy or watershed improvement plans that are founded on exhaustive scientific formulas and long term data to establish the area determined to be a watershed within that State. The question is whether the ACE utilizes or takes into consideration those studies or strategies in determining service areas for banks or utilizes another standard. Without clear up front direction often bank sites are selected and presented that may not qualify for a certain service area.

Tied to the Watershed Approach is the Rule's discussion on Service Area for banks and in lieu fees found at 33 CFR 332.8. Specifically, 33 CFR 332.8(c) discusses the compensation framework which an in-lieu-fee provider must take, and 33 CFR 332.8(d) 6(ii) A discusses the selection of the Service Area. This part of the Rule recognizes that physiographic boundaries other than the watershed in which the mitigation bank is located may be appropriate for determining the Service Area of a bank. The preamble to the Rule found in Vol. 73, No. 70 April 28, 2008 on page 19654 specifically states that the district engineer should take economic factors into review when determining a Service Area. We are finding that DEs are not taking economic factors into play, nor are they recognizing other physiographic boundaries. We also find that some DEs, in issuing a permit, are deliberately reducing the area where mitigation for a permit must be located to a size less than an approved bank Service Area apparently to preclude the use of the bank.

Best Practice: Several districts recognize a "primary" and "secondary" Service Area which takes into account both the immediate watershed, on whatever scale, and a larger ecologically similar area within which mitigation would be acceptable if more preferable options (e.g. another approved bank in the primary Service Area) do not exist. Some districts then require a mitigation penalty for permittees utilizing mitigation credits from a secondary service area. This approach takes into account the economic factors when deciding the scale at which a "watershed approach" is taken and is appropriate in light of the discussions found in the preamble to the rule. We believe that the approach which limits the view of a "watershed approach" to a too- small watershed unit (such as in one case a 12 digit HUC) is not in the spirit

of the preamble to the rule, and does not serve the Corps requirement to “maximize the available credits” which the law requires.

Request of HQ: To reiterate and require districts to develop written policies on the scale of watershed size (HUC size) used to make the “watershed approach” required in 33 CFR 332.3 taking into consideration all the requirements of 33 CFR 332.3(c) 3, the preamble to the rule, and the distribution of historic and potential future impacts to a region. We also ask HQ to require a written policy by each district on service area size which complies with the rule and the intent of the preamble and the requirement of the law to “maximize the availability of credit.”

2) **Prospectus Issues**

Issue: Last year we reported that several Districts were requiring additional information on Prospectus’s that exceeded the intent of the rule, which was for the Prospectus to act as a proof of concept level review. One specific example was that several districts were requiring a completed JD before issuance of the Public Notice when something less (such as the 87’ Manuals description of a “desk review” for delineation) might be more cost effective and provide the information needed for the Corps to make decisions. A second example is requiring full scale sampling to support an eco risk assessment in areas where there are contaminated waterways that might impact restoration efforts. This year, we are finding other issues with the permitting process in that 33 CFR 332.8(d) 2 requires the Sponsor to discuss both the service area proposed, and the bank operation, but then neither the Corps nor the IRT provide concurrence, or at least comments, on those aspects of the Prospectus until after the draft MBI is submitted (and in two cases not until right before the MBI was to be signed). These issues have a common ground in that the 33 CFR 332.8 lays out a process for decision making which is designed to allow all parties to make decisions and expend resources at appropriate times in the process. When districts do not follow the process laid out in 33 CFR 332 appropriately, the result is inefficiencies in District staff time and additional costs to the Sponsor.

Best Practice: Utilization of the decision points laid out in the rule and recognition of the level of detail required at each step in the process. Specifically, requiring only sufficient information in the Prospectus for the commenting agencies of the IRT to make clear determination on the items which will determine whether it makes sense, both economically and ecologically, for the Bank Sponsor and the IRT to continue investing their time and effort in the MBI development process. The following items should be specifically addressed in comments by the USACE, with either a statement of conditional acceptability or comments on what would need to be changed so that these specific areas can be addressed appropriately in the Draft MBI;

1. Service Area
2. Credit calculation methodology
3. Appropriateness of bank site in context of watershed approach.
4. Identification of any specific items that the Bank Sponsor intends to study, analyze, report, design and implement unique to that jurisdiction and the physiographic characteristics of the site.

HQ Request: Work with the Districts to implement the Best Practice defined above.

3) **Financial Assurances**

Issue: 33 CFR 332 allows for insurance to be a form of financial assurance and now we have the December 1, 2011 Memorandum clarifying use of insurance products from Corp Legal. Hopefully this Memorandum is being distributed to the District field office staff providing them with authority to review and act more quickly on the use of proposed insurance products as financial assurance for all mitigation projects.

Best Practice: The use of insurance policies as an acceptable component of the financial assurance program for a Bank.

HQ Request: Thank you for helping facilitate this initiative. We will continue to report response from the District offices.

Timeline Issues

Issue: 33 CFR 332.8 contains timelines for review of mitigation banking instruments. Many members report that Corps Districts are not moving forward with review if sister agencies have not commented within the rule timelines. Since the Corps is the ultimate authority in the MBI process, Corps Districts need to make it clear that they are moving forward in compliance with the regulations if the sister agencies have not provided timely input. (Philadelphia District, Chicago District, Detroit District, New York District).

Best Practice: USACE IRT Chair holding sister agencies to timelines(e.g. New Orleans District, Charleston District, Jacksonville District, and Portland District).

HQ Request: 33 CFR 332 clearly puts the Corps of Engineers in charge of the mitigation process. As such the Corps needs to set the standard for other agencies, and move the process along. We ask HQ to request information of the District on delays caused by other agencies not responding in accordance with the regulations, and to formally notify the sister agencies that this delay will result in the lost opportunity to comment.

4) **In-kind vs. Out-of-kind credits:**

Issue: Although the rule properly requires in-kind mitigation, the question becomes what is the definition of “in-kind.” We are finding that some districts are splitting the definition of “in-kind” to varying levels of granularity. We are concerned that migrating down to the lowest eco-type possible, and then not allowing for use of mitigation bank credits in the service area unless they are specifically the same type, prevents the development of landscape-scale mitigation projects which are a central objective of the Rule.

Best Practice: Utilizing a functional assessment approach which adjusts the number of mitigation credits required to satisfy the permit if the mitigation bank credits are for an eco-system (i.e. pocosin wetland vs. seepage wetland) which is different than the impacted eco-system but within in the same broad category of eco-type (e.g. freshwater wetlands).

Request of HQ: HQ continue to stress the practicality of the mitigation process so that the likelihood of success in restoring aquatic resources can be achieved, and develop a clear definition of “in-kind” at the District level so as to achieve clarity, consistency and timeliness in the permitting process.

5) District Legal Review

Issue: Regulatory staffs continually report to the Sponsors that District Legal review is the cause of many of the delays in Districts meeting the requirements of timelines. Often legal review is not occurring until after the final MBI submission phase of the process laid out in 33 CFR 332.8

Best Practice: Some Districts have legal staff sit in one or more meetings, or have assigned a legal staff member to become the “banking” counsel, so that he or she is familiar with the issues. Some districts have developed a common template for conservation easements and financial assurances that can speed legal review.

Request of HQ: We request HQ to engage with HQ legal to provide training to District Counsel on the requirements of 33 CFR 332 and to encourage the development of processes for District Counsel to engage in the Bank permitting process at the Prospectus level, or at least the Draft MBI.

6) Equivalence of Mitigation

Issue: 33 CFR 332.4 requires ALL forms of mitigation to provide for various elements including financial assurances, and long-term management. Some districts have policies on these issues which are bank specific and do not have written policy for other forms of mitigation for these issues. One banker has also stated that there seems to be differences between the service areas allowed for an in-lieu-fee and a banker.

Best Practice: All District policy on mitigation, specifically any policy which affects the items in 33 CFR 332.4 (and banks and in-lieu fees) should be written in language which addresses all forms of mitigation.

Request of HQ: HQ should remind all Districts that the requirements of 33 CFR 332.4 apply to all forms of mitigation, and that all policy relevant to any specific form of mitigation needs to be written, and be compliant with the regulations.

7) Long Term Stewardship

Issue: The mitigation rule requires that “the party responsible for ownership and all long-term management” must be identified in the bank instrument (332.7 (d)(1) and that the land management plan should include a description of the management needs, annual cost estimates for these needs and “identify the funding mechanism that will be used to meet those needs” (CFR 332.7 (d)(2). However, there has been no guidance document on how to calculate these costs nor which financial instruments are appropriate for these accounts. In fact, most districts today do not require a detailed accounting of these costs, or a third party holder of the funds or that the accounts have non-wasting, inflationary adjustments to protect principle.

Best Practice: Many districts (e.g., Mobile, Sacramento, New Orleans, Charleston) allow for third-party non-profit and governmental organizations with both conservation and financial expertise to hold and manage long-term stewardship accounts to support the future land management of the property. The Corps should encourage this approach to ensure financial oversight of these funds and adequate returns to ensure sufficient resources to manage the sites.

These long-term stewardship accounts should be managed to ensure for accountability, accessibility and long-term growth, with appropriate financial safeguards to ensure prudent investment practices. In addition, funding documents should state that the monies shall be held for the purposes of managing the property, with appropriate regulatory oversight, and not for benefits of particular individuals or organizations.

Request of HQ: HQ should develop a document highlighting appropriate mechanisms and entities for holding and managing these long-term stewardship accounts to ensure the funding mechanisms to meet the future land management needs.

8) **Grandfathering of Bank Issues:**

Issue: 33 CFR 332 allows for banks that were in existence in the rules to be grandfathered into current use with no changes to the MBI. Several Bankers report varying issues with District staff refusing to use grandfathered bank credits because the terms of the MBI would not be acceptable under today's rules. Specifically, some banks have larger service areas than what would be allowed under today's rules, and some banks have different performance standards and long term protection instruments than what would be used today.

Best Practice: As allowed for by the 2008 Rule, mitigation Bank credits which have been entitled (both released and pending) should be maintained as valid mitigation options for 404 permit applications regardless of whether there has been a change in District policy.

Request of HQ: HQ should remind Districts that the MBI is a contract between the Banker and the District, and the District needs to honor the use of credits authorized.

9) **Standard Operating Procedures:**

Issue: Standard Operating Procedures (SOPs) are in various stages of development across the Districts. There are significant variances across Districts in terms of:

- Stage of development
- Level of clarity and specificity
- Level of adherence to the 2008 Rule
- Policies and methodologies within the same eco-regions

Best Practice #1: The publishing of an SOP which provides clarity and specificity for both the determination of an Applicant's mitigation requirements as well as the methodology and guidelines for determining mitigation credits. By eliminating uncertainty through the establishment of clear and specific SOPs, the USACE creates a timely and efficient permitting process for all parties, and frees up the District staff to work on higher level functions.

Best Practice #2: Neighboring Districts with similar eco-regions developing common methodologies for mitigation based on the best science and experience within the eco-region. This saves District staff time as they do not have to "re-create the wheel" if their colleagues in a neighboring District have already worked thru an issue.

Best Practice #3: Districts which publish Public Notices about SOPs and hold meaningful stakeholder meetings before developing SOP's can avoid mistakes and develop workable mitigation strategies which are rule compliant

Request of HQ: Review District-level SOPs to determine where assistance is needed to ensure compliance of the District SOPs with the 2008 Rule, and identify opportunities where District-specific best practices can be applied across eco-regions. Encourage Districts to publish Public Notices and hold meetings with stakeholders, including local bankers when developing and revising SOP's.