



Board of Directors

---

Stephen Collins  
President

Randy Wilgis  
Vice President

Ben Guillon  
Treasurer

Mike McCollum  
Secretary

David Urban  
Immediate Past President

---

Russ Krauss  
Director At Large

Doug Lashley  
Director At Large

Sheri Lewin  
Director At Large

Ren Martyn  
Director At Large

Matthew Peevy  
Director At Large

Charles Thompson  
Director At Large

Wayne White  
Director At Large

Headquarters

---

1155 15<sup>th</sup> Street, NW  
Suite 500  
Washington, DC 20005  
tel: 202-457-8409  
fax: 202-530-0659  
[www.mitigationbanking.org](http://www.mitigationbanking.org)  
[info@mitigationbanking.org](mailto:info@mitigationbanking.org)

January 17, 2012

U.S. Army Corps of Engineers  
ATTN: CECW-CO-R (Ms. Amy S. Klein)  
441 G Street NW.  
Washington, DC 20314-1000.

Re: Docket No. COE-2011-0028, USACE's Plan for Retrospective Review Under E.O. 13563

Dear Ms. Klein:

These comments are provided by the National Mitigation Banking Association (NMBA) in response to the U.S. Army Corps of Engineer's (Corps) notice seeking comments on the USACE's Plan for Retrospective Review Under E.O. 13563, 76 Fed. Reg. 70297-70299 (Nov. 16, 2011).

### Introduction

The NMBA is an association of wetland and stream mitigation bankers and species conservation bankers with membership nation-wide, supporting policies that advance use of market-based environmental restoration and mitigation. We greatly appreciate the longstanding relationship that we have had with the Corps working on policies for wetland and stream mitigation banking and for species conservation banking. Since its founding in 1998, the NMBA has provided leadership for the advancement of mitigation and conservation banking as an effective approach to protection and enhancement of national resources. More information about the NMBA is available at [www.mitigationbanking.com](http://www.mitigationbanking.com)

There is no question that mitigation and conservation banking meet the goals of E.O. 13563, to make regulatory programs efficient and less burdensome on the regulated public. Mitigation and conservation banking are natural resource credit programs that bring the power of the private market to environmental regulation, which results in administrative efficiencies for the Corps and lower costs of compliance for the permit applicants. As the Corps is aware, these administrative and cost efficiencies come with no loss of environmental protection. To the contrary, wetland and stream mitigation banks and species conservation banks have an outstanding record of producing strong environmental results utilizing private and not government capital.



Banking also improves the resource base on a watershed or ecoregional/habitat scale, recognized as most important by ecologists.

Currently, the Corps' 2008 Mitigation Regulations, 33 C.F.R. Part 332, strongly support wetland mitigation banking for use in compensatory mitigation under the regulatory program. These 2008 Mitigation Regulations should serve as a model for all federal agencies with responsibilities to enforce, conserve or restore natural resources as they establish high standards for compensation and recognize that mitigation banks are superior to other mitigation providers in achieving ecologically protective results. NMBA looks forward to continuing to work with the Corps on implementation of the 2008 Mitigation Regulations to improve effectiveness, as we have since 2008.

As the Corps establishes its plans for compliance with E.O. 13563, NMBA urges it to recognize the seminal role of natural resource credit programs in all parts of the regulatory program. This includes wetland and stream mitigation banking, species conservation banking and other natural resource credit programs such as water quality trading. The federal government should look for opportunities to promote natural resource credit programs and bring market-based approaches into environmental regulation. Any regulations that the Corps reviews under its E.O. 13563 plans should include specific provisions that support and encourage natural resource credit programs whether at the State or Federal level. This may be as simple as an acknowledgement that nothing in the particular regulatory program prevents the use of banking to addition of more detailed provisions for use of banking. As the Corps selects particular regulatory programs for review, NMBA will work with the agency on specific suggestions.

### **Specific Comments**

The Federal Register Notice seeks comments in two categories. First, the Corps asked for comment on achieving the goals of E.O. 13563 in general, posing specific questions, so that it can develop its plan for implementing the E.O. Second, the Corps identified its Nation Wide Permit Regulations as an initial set of regulations that it would evaluate for compliance with the E.O., seeking comments on those particular regulations.

The Corps stated that the notice was "the USACE's first step to develop a plan that ensures that the agency's regulations are effective and not burdensome." 76 Fed. Reg. 70298. To that end, the Corps asked the public to provide input by responding to the following questions:

1. How should the Corps modify its Regulations to ensure that they are serving their stated purpose efficiently and effectively? Please provide specific recommendations on edits that could be made and suggestions on appropriate outreach and timing.
2. How can we reduce burdens and maintain flexibility for participants in the regulatory process in a way that will promote the protection of waters of the United States via the improvement of the Regulations?
3. How can the process set forth in the Regulations better achieve simplified and efficient outcomes?



4. How can the Regulations be changed to better harmonize with, be consistent with, and coordinate effectively with, other federal regulations and environmental review procedures?
5. How can we ensure that information developed to support findings under the Regulations are guided by objective scientific evidence?
6. Are there better ways to encourage public participation and an open exchange of views as part of the regulatory review? Please cite specific areas where improvements could be made and indicate what tools or mechanisms might be made available to achieve this goal.
7. The NWP program allows for comment and periodic review during the reauthorization process every five years. How else can the periodic review of the NWP program be utilized to comply with this E.O.?
8. How else might we modify, clarify, or improve the Regulations to reduce burdens, promote predictability, and increase efficiency?

The Corps should specify in its Plan that it will look for opportunities to include market-based credit trading programs to the maximum extent feasible. Such a policy will assure that the Regulations are “serving their stated purpose efficiently and effectively” (Question 1), “reduce burdens and maintain flexibility for participants in the regulatory process in a way that will promote the protection of waters of the United States” (Question 2), and “better achieve simplified and efficient outcomes” under the Regulations (Question 3.)

Question 3 asks about changing processes in the rules to achieve simplified and efficient outcomes. The current mitigation rule (33 C.F.R. Part 332) has created an overlapping series of requirements some of which are redundant. For example, the mitigation rule creates a scenario where the agency staff can place financial assurances AND a restrictive release of credits for mitigation bankers, not recognizing that the restriction in credit release is a performance guarantee. Also, the mitigation rules require sufficient protections and assurances for ecological success, such that the permitting of a mitigation bank could be completed in a timelier manner without any reduction in level of protections and assurances. There are other examples of changing processes that the NMBA is willing to work with the Corps to identify and change in the regulations.

Question 4 asks about better integrating the Corps rule with other federal agency regulations and procedures. In some parts of the United States there is a significant overlap of wetlands and wetland dependent species listed by the United State Fish and Wildlife Service and National Marine Fisheries Service. There are several provisions in the Endangered Species Act, Sections 7 and 10, which do not integrate well with the Corps review of Section 404 fill permits under the Clean Water Act. The Corps should work with these agencies to find way to blend these authorities that would benefit the agencies, the permit applicants and the bankers. The Corps also should work with these other agencies and the U.S. Environmental Protection Agency to support use of natural resource credits generated by Corps approved mitigation banks to help address needs arising from natural resource damage assessments (NRDA). We would be glad to work with the Corps towards that end.



Question 7 also asks about improvements to the NWP program, in particular the five year periodic review of NWPs. NMBA suggests that the Corps should utilize the periodic review and reissuance of the NWPs to specify that mitigation and conservation banking are preferred approaches to compensatory mitigation under the NWPs. While this principle is expressed in 33 C.F.R. Part 332, the Corps could take additional steps to advance mitigation banking by addressing this in its permitting regulations.

Question 8 asks for general comments. NMBA has provided its general comments those in its introduction, above. We value our ongoing relationship with the Corps on issues of compensatory mitigation and look forward to continuing that relationship. The 2008 Mitigation Regulations will, at the appropriate time, warrant review and we will work with the Corps on such improvements as may be warranted in the future. The Plan should include a schedule for which regulations will be reviewed over the upcoming years.

Moreover, mitigation banking should be an integral part of the Federal Government's watershed and tributary restoration initiatives. Many of these federal programs, including those being undertaken by the Corps itself, have ambitious goals about the number of acres to be preserved, enhanced and restored. Mitigation banks can be utilized to help meet these goals by matching the watershed goals with efforts by the banking community to restore those same lands. The Corps should support eligibility of bank credits to meet these federal programs. The Corps should support establishment of performance criteria similar to those required of mitigation bankers for the federal preservation, enhancement and restoration programs.

As a general matter, we urge the Corps to recognize the value of natural resource credit programs as an integral part on all of its regulatory programs, not simply compensatory mitigation for Section 404 permits. Thank you for the opportunity to provide these comments.

Sincerely,

Stephen M. Collins, President  
National Mitigation Banking Association

cc: Meg Gaffney Smith