

**MEETING NOTES**  
U.S. Army Corps of Engineers  
South Pacific Division

Meeting Date: December 16, 2011

**DIVISION STAFF**

Wade Eakle -- Division Ecologist & Regulatory Program Manager  
John Keever — Regional Programs Director  
Andy Constantaras — Regional Business Director

**SAN FRAN District Staff**

Lieutenant Colonel Torrey A. DiCiro -- District Commander  
Jane Hicks -- Regulatory Chief

**NMBA Reps**

- Michael McCollum, McCollum Associates
- Ben Guillon, New Forests
- Adam Davis, Ecosystem Investment Partners
- Patrick Britton, Ducks Unlimited
- Ed Flynn, Wetland Resources
  - Travis Hemmen, Westervelt Ecological Services

Topics:

**Background:**

Banking has evolved, California is one of the hot spots in the US, and the 2008 Rule helped to clarify procedures, set high standards (which the NMBA supports), and address shortcomings of previous guidance. Approximately 800 active banks nationwide, and NMBA goal is to represent issues to Agencies in a partnership to use incentives provided by environmental laws to enable private sector resources to achieve public priorities.

Need to judge industry, not in terms of whether or not there are profit seeking entities doing projects, but on the quality of the projects themselves. Presence of DU at this meeting underlines this.

**Consistency of Rule application:**

Rule is 3 years old now, so expectation is that there has been sufficient time for agency staff to understand and implement consistently. While RIBITS exists, it is very hard to determine how and whether forms of mitigation *apart from banking* (permittee responsible and in lieu) are being held to the standards in the Rule.

NMBA was of course very active in development of the rule, and equivalency of standards for all forms of mitigation was one of the important points stressed by the Association that was in fact

incorporated.

USACE response: Balance needed between consistency and flexibility. Internal discussions recognize the need for predictability, and inconsistency is frustrating for anyone, so we recognize this issue. District Commander DiCiro states clearly that we need to emphasize standard approach across Districts. *We need input from NMBA about where there is inconsistency and where there are problems.*

NMBA is doing national survey and coming up with recommendations of best practice. Consistent application really helps in explaining NMBA member business to investors, NGO's and stakeholders.

One specific issue is that as individuals on IRT's change, then the process has had to restart on bank applications, and varying interpretation has been problematic.

USACE response: We want to learn from industry about what's happening, not just NGO's and academics.

Another specific issue is interagency cooperation on IRT's and need for USACE leadership.

USACE response: It's a problem for us as well when people from different Agencies don't stick with timelines. The Corps sometimes "has to be the lead Agency, and 'drop the dime' to keep people on timelines". District Commander DiCiro states clearly that NMBA suggested best practice of USACE leadership on process is important. Discipline in process and holding other Federal resource agencies accountable will be important moving forward. "It's easier for us as the lead agency to lead the collaboration to bring others together to collaborate effectively.

**Prospectus and timely feedback:**

This has been an issue because other Agencies feel like they are not beholden to the timelines in the Rule. Perhaps sitting down with IRT members independent of any particular bank application to discuss importance of timelines and other process issues would be helpful.

There have been times when Corps has not provided comments and feedback on service area and credit methodology in the Prospectus. Getting feedback *early* is critical – it would be better to kill the project early if it really isn't going to work, rather than let it go forward and incur ongoing expense. This is particularly important to the landowner in California, so that they can evaluate whether or not there is a realistic revenue stream possible through conservation and restoration.

USACE response: Can you give us specific examples of feedback that isn't sufficient? This would help us in our attempt to improve the process. "We talked to Meg this morning about this very issue." Regulatory Chief Hicks states difficulty in making an early decision to give negative feedback on a prospectus before the process has been allowed to roll out. Need to balance requirements for extensive detail in the prospectus which is expensive, with sufficient detail to make these decisions. Still looking for 'perfect balance' in level of required detail in initial prospectus.

## Need to share best practices across Districts

For example, stream credits in Savannah District has been very effective. South Carolina species bank with USFWS really improved crediting method as well. How do we share best practices more effectively?

USACE response: Regulatory Chief Hicks asks Can we get a newsletter, or regular update somehow about best practices? This needs to happen nationally, but we can also talk among the 4 western Districts as well. How about *an agenda item of the monthly IRT meeting, not to pitch a project, but to give an update on best practices?* District Commander DiCiro adds: not just to give update, but to “give us homework as well”, and ask for specific feedback on how the IRT is responding to these best practice presentation.

Opportunity for USACE to benefit from positive publicity related to the ‘green business’ and job creation related to banking... Also time and cost effective compliance is provided, which is a very important story for the public and developers to understand.

There is an ongoing problem with supporting ‘for profit’ banking – still – among certain individuals in the Corps and in other natural resource Agencies. Therefore, a reticence to use credits for compliance.

### Service areas:

If an impact is slightly outside the service area, current position of Sacramento District is that ‘there is no way’ credits can be used for mitigation. In Savannah District, LA District, and others, there is opportunity to use credits from outside approved service area, at least on a case by case basis.

USACE response: We need to ensure consistency here, and we can look at things like ‘penalty ratio’ or other mechanisms to enable use of credits if they are available.

Another related issue is use of HCP’s. Corps is being requested to write wetland permits for HCP’s: Contra Costa, Santa Clara, Solano, etc. *These HCP’s provide direct competition to banks in the sense that service area may not overlap with HCP area* and HCP sponsor (local government) wants to receive monies and provide mitigation. However, the standard the HCP is being held to is *not the same standard that a bank is being held to*. This is directly counter to the equivalency of standards provisions in the Rule.

USACE response: County is setting up their own land conservancy, and trying to create a monopoly by requiring all wetland impacts to send money to that conservancy – literally not allowing banks. Regulatory Chief Hicks suggests that NMBA go to original stakeholder meetings when HCP’s are being set up.

Riverside County example – banks have been specifically identified by USFWS as a legitimate form of compliance with HCP. ‘Banks were grandfathered into HCP system’. *Corps could withhold 404 permit to an HCP if they disallow banks from being a legitimate method of compliance.* The whole issue of how HCP’s interact with banking is *not resolved* and remains a fundamental challenge to further private investment in conservation in California. *HCP’s could*

use 'early implementation' credits from banks to meet their objectives so they 'don't get behind on take' under ESA. However, some areas, like Yolo County will not allow mitigation out of County, even if the approved service area for a bank would otherwise be able to service that demand.

### **Regional Water Quality Control Board mitigation standards**

Need to coordinate standards with other agencies generally, and this is an example where mitigation banks could be a legitimate form of compliance, but needs USACE leadership to accomplish this. People at state Water Board is supportive of banking, but Regions vary widely, and they are the ones with real jurisdiction.

USACE response: RWQCB's need to be signatories to the IRT because they want input, but also need to take responsibility. NMFS should also state mitigation requirements in Biological Opinions: it would help USACE to support use of banks.

Regional Business Director Constantaras raises issue Central Valley Flood Protection conservation strategy. Need for habitat connectivity in mitigation for levee construction. Wants to evaluate how banks could really help with this issue.

Basic NMBA response is 'yes', banks can be helpful with this, but further follow-up on this issue is invited.