



August 9, 2019

VIA E-MAIL

U.S. Army Corps of Engineers
441 G Street NW
Washington, DC 20314
MitigationRuleAmendment@usace.army.mil

U.S. Environmental Protection Agency
1200 Pennsylvania Avenue NW
Washington, DC 20460
MitigationRuleStates@epa.gov

Re: Pre-Proposal Comments on Potential Amendments to the 2008 Mitigation Rule

Dear Sir or Madam:

The GPA Midstream Association ("GPA Midstream") appreciates this opportunity to submit to the U.S. Army Corps of Engineers ("Corps") and the U.S. Environmental Protection Agency (together, with the Corps, "Agencies") pre-proposal comments on potential revisions to the Agencies' 2008 Mitigation Rule, 73 Fed. Reg. 19594 (Apr. 10, 2008).

GPA Midstream has served the U.S. energy industry since 1921. GPA Midstream is composed of nearly 80 corporate members of all sizes that are engaged in the gathering and processing of natural gas into merchantable pipeline gas, commonly referred to in the industry as "midstream activities." Such processing includes the removal of impurities from the raw gas stream produced at the wellhead, as well as the extraction for sale of natural gas liquid products ("NGLs") such as ethane, propane, butane, and natural gasoline. GPA Midstream members account for more than 90 percent of the NGLs produced in the United States from natural gas processing. Our members also operate hundreds of thousands of miles of domestic gas gathering lines and are involved with storing, transporting, and marketing natural gas and NGLs. GPA Midstream is the primary advocate for a sustainable midstream industry focused on enhancing the viability of natural gas, natural gas liquids, and crude oil.

GPA Midstream and its members support amending the 2008 Mitigation Rule to (1) streamline the process for approving mitigation bank and in-lieu fee ("ILF") program instruments, and (2) provide greater clarity and certainty for the regulated community. GPA Midstream members must routinely obtain Clean Water Act Section 404 permits for a wide variety of construction and maintenance activities. Member companies rely frequently on mitigation banks and ILF programs to mitigate unavoidable impacts to jurisdictional wetlands and waters resulting from certain oil and gas projects. The timing and intensity of industry activities necessarily are market-driven, and industry members operate on razor thin margins. To survive in a competitive environment, member companies must be nimble and have the ability to respond quickly to both market conditions and customer demand. Ready access to a sufficient

supply of mitigation is necessary to support the industry's viability. GPA Midstream believes that the revisions to the 2008 Mitigation Rule suggested below would help to accomplish this aim, benefiting both its members and the broader economy.

A. Streamlining the IRT Review Process

GPA Midstream supports streamlining—but not eliminating—the interagency review team (“IRT”) process to improve what has become an unnecessarily cumbersome and time-consuming process for approving mitigation bank and ILF instruments. The 2008 Mitigation Rule currently provides the IRT three separate opportunities to participate in approval of a mitigation bank or ILF proposal: (1) commenting on the prospectus; (2) reviewing the draft instrument; and (3) approving the final instrument.¹

Any three-step, multi-agency review process will be inherently unwieldy and time-consuming, but the 2008 Mitigation Rule creates additional inefficiencies by effectively requiring consensus among IRT members, which have divergent interests and authorities, in order to approve a final instrument. Currently, *any* IRT member—from a local government up to a federal resource agency—can object to an instrument's approval and initiate dispute resolution.² As a result, the instrument approval process frequently stretches beyond the 2008 Mitigation Rule's prescribed 225-day review period.³

The Agencies should eliminate these inefficiencies by consolidating IRT review into a single 60-day period, during which member agencies would provide focused comments on the draft instrument. Each IRT member would be invited to provide comments on those portions of a draft instrument that the Corps has identified as being relevant to that member's programs and enabling authority (as opposed to the instrument as a whole). The Corps would then be required to review, consider, and respond to the IRT members' comments. Final instrument approval, however, would be a decision left to the Corps' sole discretion. Returning such exclusive discretion to the Corps would be consistent with Congress' direction in Section 314 of the National Defense Authorization Act for Fiscal Year 2004, the statute from which the 2008 Mitigation Rule originated.⁴

This approach will make the instrument approval process more efficient and honor Congress' intent while preserving a defined role for the IRT in assessing mitigation bank and ILF proposals. By soliciting focused comments from the IRT over a 60-day period, the instrument approval process would be shortened by as many as 75 days while still ensuring that the Corps receives and considers important feedback from the interested federal, state, and local agencies. The potential for delays would also be reduced because final instrument approval

¹ See 33 C.F.R. § 332.8(d)(4), (7), (8).

² *Id.* § 332.8(e)(1).

³ *Legislative Outline for Rebuilding Infrastructure in America* at 39 (Feb. 2018).

⁴ See 10 U.S.C. § 2694b(b), Pub. L. No. 108-136, § 314(b) (108th Cong. Nov. 24, 2003) (“[T]he 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.”).

would no longer depend on achieving consensus among multiple agencies with potentially divergent viewpoints.

B. Compliance with the Miscellaneous Receipts Statute

GPA Midstream supports amending the 2008 Mitigation Rule to clarify that financial assurance mechanisms should not cause the Corps to receive—either actually or constructively—any funds. The financial assurance mechanisms that GPA Midstream’s members typically use, described below, do not result in actual or constructive payments to the Corps. GPA Midstream recognizes, nonetheless, that the Corps has concerns that financial assurance mechanisms could run afoul of the Miscellaneous Receipts Statute, 31 U.S.C. § 3302(b).

GPA Midstream recommends that the Agencies address these concerns by prescribing the specific types of instruments—like letters of credit, performance bonds, insurance policies, and similar instruments—that applicants may use to provide financial assurances in line with the Miscellaneous Receipts Statute and how to use them correctly. Under this approach, the Corps would revise 33 C.F.R. § 332.3(n) to identify those mechanisms that require payment to a neutral third party (rather than the Corps) and those that require direct funding of activities by the project sponsor. For mechanisms involving payment to a third party, the regulations should include specific, narrowly-defined criteria for nongovernmental organizations (“NGOs”) to qualify to be named beneficiaries of these instruments and establish a process under which the Corps would solicit applications from NGOs to become qualified beneficiaries. The Corps would require the instrument to contain sufficient conditions to ensure that the designated NGO uses the proceeds to ensure completion of the mitigation project.

These measures would prevent the Corps from being in constructive or actual receipt of financial assurance funds. By making NGOs the beneficiaries of assurance instruments, the Corps would not be in actual receipt of any proceeds. The Corps would also not retain discretion over how financial assurance funds are spent; the instrument, which will have been subject to Corps’ review and approval to confirm compliance with the regulatory requirements, would dictate how the NGO must spend this money. As a result, the Corps would not be in constructive receipt of any funds.

C. Clarifications for Multipurpose Mitigation Projects

The Agencies should amend the 2008 Mitigation Rule to remove obstacles to the use of projects that generate mitigation credits under multiple regulatory programs. These multipurpose projects are important conservation tools that provide cost-effective vehicles for offsetting multiple types of environmental impacts and addressing mitigation obligations under several statutes. The 2008 Mitigation Rule recognized that applicants may use a single mitigation project to generate credits for multiple purposes,⁵ but there remain obstacles to the use of multipurpose projects.

The Agencies can remove these obstacles by amending the 2008 Mitigation Rule in two distinct ways. *First*, the regulations should specify that an applicant may obtain Section 404 mitigation credits for a project already proposed for another regulatory program as long as

⁵ 33 C.F.R. 332.3(j).

another agency has not already given its final approval for the project at the time the applicant proposes the project to the Corps. The Corps has, from time to time, erroneously declined to allow applicants to claim mitigation credit for projects that have been proposed for another purpose to another agency but not yet approved by that agency. The justification for these denials is that one cannot claim mitigation credit from lands that are already protected. However, such lands are not subject to any preexisting protections prior to final approval. Any amended rule should recognize that applicants may identify additional regulatory programs—and receive credits under those programs—up until a mitigation project receives final agency approval.

Second, the 2008 Mitigation Rule should be revised to ensure that each type of mitigation credit generated by a multipurpose project is evaluated and scored independently from one another. Different types of mitigation are measured using different approaches, such that the methods and metrics used to determine the number of mitigation credits will vary from program to program. These differences mean that the performance of one type of mitigation (*e.g.*, wetlands mitigation) does not necessarily dictate how another type (*e.g.*, species mitigation) will perform. They likewise mean that multipurpose projects readily can provide independent mitigation benefits for each purpose irrespective of the other purposes. The mitigation rules should thus clarify that (1) mitigation credits should not be discounted on the basis that a project serves multiple purposes, and (2) the performance of one type of mitigation on a multipurpose site should not itself affect the viability of the credits for the other types of mitigation.

D. Quantifying Stream Mitigation

GPA Midstream urges the Agencies to require the use of functional credit units to quantify stream mitigation wherever doing so is practicable. Variations in stream quality and other characteristics make it such that the use of linear feet (or even linear feet in conjunction with stream width or flow regime) will not capture the range of functions that a stream segment serves. Functional assessment methods, when they are available, provide a better means to capture stream functions that are restored, enhanced, or preserved by mitigation activities. Capturing these functions will, in turn, help the Corps better assess how stream mitigation activities help offset impacts to wetland functions and more accurately determine credits provided by a stream mitigation project.

E. Standardizing the Watershed Approach

The Agencies could make the Section 404 permitting process more efficient by standardizing how Corps Districts implement the requirement to use a “watershed approach to compensatory mitigation.”⁶ The 2008 Mitigation Rule gives individual Districts substantial discretion, such that there is no single “watershed approach.” For instance, some Districts use an 8-digit hydrologic unit code (HUC) approach to define the relevant primary and secondary watersheds, some use a 12-digit HUC code, and others make no distinction between primary and secondary watersheds. The Districts also vary in the requirements they impose for an applicant to be allowed to purchase mitigation credits outside the primary watershed. Some districts even

⁶ *Id.* § 332.3(c).

require IRT approval to purchase mitigation credits outside the primary watershed, an additional process that can be cumbersome and time-consuming.

Navigating the idiosyncrasies of each District's watershed approach comes at a cost to both applicants and the Corps. These costs would be reduced—if not eliminated—by amending the 2008 Mitigation Rule to create a uniform watershed approach that varies minimally from District to District.

GPA Midstream appreciates the opportunity to submit comments to EPA and the Corps. We offer our continued assistance and remain available to provide additional data or answer questions. If you have any questions, please contact me at (202)279-1664 or by email at Mhite@GPAMidstream.org.

Sincerely,

A handwritten signature in black ink that reads "Matthew Hite". The signature is written in a cursive, flowing style.

Matthew Hite
Vice President of Government Affairs
GPA Midstream Association