DO THE MITIGATION REGULATIONS SATISFY THE LAW? WAIT AND SEE.

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I. INTRODUCTION

While we are now lauding and analyzing the new mitigation regulations,[1] we should not forget that they were compelled by Congress. There is a statute behind these important regulations, which directed establishment of a "level playing field" for mitigation providers.[2] In evaluating the new mitigation regulations, we cannot lose sight of the statute and its background.

It is no secret that the mitigation banking industry sought federal legislation to recognize mitigation banking and to obtain a "level playing field" for mitigation.[3] Having represented the National Mitigation Banking Association since 1998, I have watched the mitigation business, including mitigation banking, grow and change since the early 1990s. The mitigation banking industry has long noted that it has been held to higher environmental, economic, and administrative standards than any other mitigation provider.[4] It has long advocated that other providers, including permittees and in-lieu fee programs, should meet the same demanding standards. Mitigation bankers wanted the standards for other mitigation providers raised to attain equivalency. The

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1. 33 C.F.R. pt. 332 (Corps of Engineers); 40 C.F.R. pt. 230 (Environmental Protection Agency). This Article cites to the Corps' version of the mitigation regulations, which is the same as the Environmental Protection Agency (EPA) version in most respects. Where there is a difference under discussion, each version will be cited separately.

2. 33 U.S.C. § 1344 (2008).

3. Natl. Mitigation Banking Assn., *2006 NMBA Spring Newsletter, Draft Mitigation Regulations Released by Army and EPA*, http://www.mitigationbanking.org/pdfs/2006nmbaspringnewsletter.pdf (Spring 2006).

4. Royal C. Gardner, *Reconsidering In-Lieu Fees: A Modest Proposal*, Ecosystem Marketplace, http://ecosystemmarketplace.com/pages/article.opinion.php?component_id=5073&component_version_id=7494&language_id=12 (July 9, 2007) (accessed Apr. 17, 2009) (referencing mitigation bankers' "long wait" to see an equalization of standards).

new mitigation regulations go a long way toward imposing the kinds of standards demanded of mitigation banks on all mitigation providers.

I join the chorus of observers who have praised the new mitigation regulations, which have the potential to provide great benefits to the environment, to the regulatory program and to mitigation providers. By assuring more successful mitigation and greater consistency and predictability to all participants in mitigation, the regulations offer the promise of solving many of the problems that have plagued the mitigation process in the past. The regulations promise a new day for compensatory mitigation. Whether the regulations will deliver on that promise turns on careful implementation by all involved agencies and sectors. One way to monitor and evaluate the attainment of that potential is to measure the mitigation regulations against the statute that required them.

This Article does not look at all of the features of the new mitigation regulations. Rather, it reviews the legislative background of the mitigation regulations and looks at how well the regulations meet the statute. Congress, or at least the congressmen who introduced legislation addressing wetland mitigation, perceived a particular problem that needed a solution.[5] Congress intended the law directing promulgation of the regulations to address that problem.[6] It is worth looking at the regulations from the perspective of consistency with congressional intent. In this regard, this Article also looks at potential pitfalls where implementation of the regulations has the potential to undercut the statutory goals and principles. Finally, this Article addresses ways that drawing on experiences from the private sector improved the consistency and predictability of mitigation.

To evaluate these points, this Article concludes the following:

(1) the law requiring promulgation of the mitigation regulations developed out of a background that provides insight into the problem that Congress was trying to solve;

5. *See* H.R. 1474, 107th Cong. § 2(3) (Apr. 4, 2001) (explaining the nation's policy to mitigate the unavoidable loss of wetlands).

6. 33 U.S.C. § 1344.

(2) the regulations carry out much, but not all, of the congressional intent; but, by leaving vast discretion to vary terms in individual situations, there is a serious risk that the goals will not be met; and

(3) continued adherence to certain key principles, and establishment of internal systems to do so, will enhance the success of the mitigation regulations.

II. LEGISLATIVE CONTEXT

Congress required the mitigation rule in 2003 in a provision that accompanied an express authorization for Defense Department entities to participate in mitigation banks:

> (b) MITIGATION AND MITIGATION BANKING REGULATIONS—
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> (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.[7]

This provision was Section 314 of the National Defense Authorization Act (NDAA) for Fiscal Year 2004, which was added during

7. *Id.*

the Committee on Conference.[8] Neither the Army Corps of Engineers (Corps) nor the Environmental Protection Agency (EPA) sought enactment of this provision. Indeed, the agencies and many in the community interested in mitigation were surprised when this provision became law. At the time, the Corps, EPA, and other agencies had been working to implement a Mitigation Action Plan (MAP) to develop a series of interagency guidance documents to provide greater consistency for wetland mitigation.[9] MAP had involved mitigation stakeholders and had made progress in completing many of its intended steps.[10] After Congress enacted Section 314 of the NDAA, agencies turned to meet the statutory directive and essentially stopped implementing MAP.[11]

Despite the lack of the usual "legislative history" that might be assembled as a bill works its way through committees and reports, Section 314 has a legislative background. There were prior bills containing this provision and prior bills addressing mitigation banking, which provide insight into the problem that Section 314 sought to address.[12] It is worth considering this background when analyzing how well the regulations address the circumstances that prompted Congress to enact the provision.

This Article does not address the important legal issue of what weight should be given to legislative history when interpreting a statute. This is not a legal brief. Rather, the legislative background of Section 314 helps provide a perspective on what was happening in the world of mitigation and why Congress enacted the provision. This information also helps to assess whether the mitigation regulations are suited to meet the statutory goals.

The provision requiring mitigation regulations originated as part of wetland mitigation banking bills introduced by Congress-

8. *Id.*

9. *National Wetlands Mitigation Action Plan*, http://www.mitigationactionplan.gov/ (last updated June 13, 2006) (explaining that the Action Plan commenced in 2002 with a 2005 goal for completion of seventeen action items to improve wetland mitigation) [hereinafter *National Wetlands Mitigation*].

10. *National Wetlands Mitigation Action Plan, Stakeholder Coordination*, http://www.mitigationactionplan.gov/stake.html (last updated June 13, 2006).

11. *National Wetlands Mitigation*, *supra* n. 9 (stating that "further development of the remaining guidance documents called for in the MAP awaits finalization of the proposed rule"). The mitigation regulations missed the statutory deadline by three years.

12. *E.g.* H.R. 1290, 105th Cong. (Apr. 10, 1997); H.R. 3692, 104th Cong. (June 20, 1996).

man Walter Jones (R-N.C.). The American Wetland Restoration Act, introduced June 19, 2003, and later known as the "Jones Bill," was the latest in a series of similar bills introduced by Congressman Jones to codify mitigation banking in federal law.[13] The "Jones Bill" would have amended the Clean Water Act to include a section establishing statutory standards for mitigation banking.[14] What was subsequently enacted in the Defense Appropriations Bill appeared in Section 3 of H.R. 2531, which would have amended Section 404 with a new subpart to cover mitigation banking.[15] The following requirement to promulgate rules appeared in Subpart (u)(6)(C):

> (6) MITIGATION—
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> (A) *In General*—A mitigation bank approved under this subsection may, in accordance with this section, provide compensatory mitigation for activities requiring authorization under this section or provide required injunctive relief in an enforcement action by the Secretary or the Administrator.
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> (B) *In-Kind and Out-of-Kind*—Consistent with the Federal Guidance, in-kind compensation of wetlands impacts should generally be required. Out-of-kind compensation may be acceptable if it is determined to be practicable and environmentally desirable on a case-by-case basis.
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> (C) *Equivalent Standards and Criteria*—Not later than [one] year after the date of enactment of this subsection, the Secretary and the Administrator, in consultation with the heads of appropriate Federal agencies, shall issue regulations establishing standards and criteria applicable to the use of on-site mitigation, [in-lieu] fees,

13. H.R. 2531, 108th Cong. (June 19, 2003). The same language appeared in similar bills introduced by Congressman Jones in 1999, H.R. 1290, 106th Cong. (Mar. 25, 1999), and 2001, H.R. 1474, 107th Cong. (Apr. 4, 2001). Before these bills, Congressman Jones and other legislators had introduced somewhat different legislation to codify wetland mitigation banking, which did not contain a direction to promulgate "level playing field" regulations.

14. *Id*. at § 3.

15. *Id.*

> and other off-site mitigation as compensatory mitigation that are similar to the standards and criteria applicable to a mitigation bank under this subsection. Such standards and criteria shall include, consistent with this subsection, a definition of [in-lieu] fees and specific measures addressing selection of wetland mitigation projects, timing for initiation and completion of wetland mitigation projects, and other terms to ensure that such fees are used only under appropriate circumstances with adequate controls.[16]

In context, the requirement to publish rules was designed to create a "level playing field" among the types of mitigation, one of many provisions the bill included to enhance wetland mitigation. After establishing Subsection 404(u) with mitigation banking standards and criteria, Subpart (u)(C)(6) of the "Jones Bill" required, by regulation, that other forms of mitigation meet "standards and criteria . . . that are similar to the standards and criteria applicable to a mitigation bank" as set forth in the bill.[17] The bill, in turn, provided a legislative structure for the approval and use of mitigation banks.

Congressman Jones introduced legislation to establish a statutory structure for mitigation banking in 1996 and 1997,[18] as well as in later years. These earlier mitigation banking bills would have established federal standards and criteria for mitigation banks but did not include the "level playing field" provision that appeared in later bills introduced in 1999, 2001, and 2003.[19] What happened between 1997 and 1999 that might account for this change? Why would Congressman Jones have felt a "level playing field" requirement was a necessary component for his bill? Because the playing field became quite unlevel. In the view of the mitigation banking community, no sooner did the 1995 federal guidance for mitigation banking take root than there was a proliferation of efforts to avoid the requirements for mitigation banks

16. *Id.*

17. H.R. 2531, 108th Cong. at § 3.

18. H.R. 1290, 105th Cong.; H.R. 3692, 104th Cong.

19. H.R. 2531, 108th Cong. at § 3; H.R. 1474, 107th Cong. at § 3; H.R. 1290, 106th Cong. at § 3.

by establishment of non-bank systems such as in-lieu fee programs and other less heavily regulated consolidated off-site mitigation programs.[20]

The final interagency guidance for establishment of mitigation banks, "Mitigation Banking Guidance," was issued in 1995.[21] Although the Army Corps had approved mitigation banks before 1995, the Mitigation Banking Guidance began to be applied quite rigorously by the Corps and its coordinating agencies.[22] At the same time, there was no national guidance or standards for off-site consolidated mitigation that was not approved as a bank. The Mitigation Banking Guidance mentioned in-lieu fees[23] but provided no standards for such programs.[24] Despite the lack of national standards, the Corps was authorizing acquisition of mitigation by payment to in-lieu fee programs. Permit applicants could buy their way out of the requirement for mitigation with payments to in-lieu fee programs, which varied widely. The "gap" in national standards for off-site consolidated mitigation options was narrowed somewhat by release of the "Federal Guidance on the Use of In-Lieu Fee Arrangements for Compensatory Mitigation Under Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act," known as the "In-Lieu Fee Guidance," which was issued on November 7, 2000.[25]

However, the Mitigation Banking Guidance and the In-Lieu Fee Guidance established different systems for approval and use of mitigation credits.[26] Basically, the standards for mitigation

20. *See* Envtl. L. Inst., *The Federal Context for In-Lieu Fee Mitigation*, http://www.eli.org/Program_Areas/wmb/StateFedb.cfm (last updated July 2002) (stating that "vague language allowed in-lieu-fee programs to continue to evolve in the absence of any detailed requirements").

21. Federal Guidance for the Establishment, Use, and Operation of Mitigation Banks, 60 Fed. Reg. 58605 (Nov. 28, 1995).

22. *See* U.S. EPA, *Mitigation Banking Factsheet*, http://www.epa.gov/owow/wetlands/facts/fact16.html (last updated Jan. 12, 2009) (discussing the proliferation of mitigation banks after state agencies, local governments, and the private sector received the procedural framework).

23. 60 Fed. Reg. at 58605.

24. Envtl. L. Inst., *Banks and Fees—The Status of Off-Site Wetland Mitigation in the United States* 1, 8 (Envtl. L. Inst. Sept. 2002) (stating that "[u]ntil 2001, there were no standards governing approval or use of in-lieu-fee programs").

25. U.S. Army Corps of Engineers, *Federal Guidance on the Use of In-Lieu Fee Arrangements for Compensatory Mitigation under Section 404 of Clean Water Act and Section 10 of the Rivers and Harbors Act*, 65 Fed. Reg. 66914 (Nov. 7, 2000).

26. *Compare* 60 Fed. Reg. at 58605 (stating that mitigation banks should use an ap-

banks were more stringent than the standards for in-lieu fee programs. Mitigation bankers, and others, felt strongly that the more stringent controls provided greater assurance of mitigation success from mitigation banks than from in-lieu fee programs.[27] Among the features providing more security was the fact that before sale of credits, the banker: (1) must have an approved instrument; (2) must have an approved mitigation plan; (3) must secure the land; and (4) must place a conservation easement on the land.[28] Additionally, credits are not released for sale until the developer meets performance milestones, and the banker posts financial assurances. These controls minimize the potential for a failure where money and liability for mitigation changes hands but the mitigation is not produced. The banker can sell only what the regulators release, or in other words, approve. Even sales authorized before construction of the mitigation site are secured; in these situations, the banker must own the land, subject it to a conservation easement, and post financial assurances.[29] The worst case scenario, therefore, is that authorized advanced credits are sold while land remains in open-space conservation. In that case, the government, or other beneficiary of the financial assurance, may recover some monetary payment,[30] which should be available to carry forward the mitigation project.

Separately, the mitigation community was evaluating environmental performance of off-site consolidated mitigation, with an active debate on the issue of whether in-lieu fees and mitigation banks provide equivalent ecologically successful mitigation.

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propriate functional assessment methodology, or acreage if appropriate, to determine the amount of credits available. Regardless of the method, the number of available credits should be reflective of the difference between the site conditions with and without bank scenarios.) *with* 65 Fed. Reg. at 66916 (stating that in-lieu fee programs should give credit only when "existing wetlands and/or other aquatic resources are preserved in conjunction with restoration, creation[,] or enhancement activities, and when it is demonstrated that the preservation will augment the functions of the restored, created[,] or enhanced aquatic resource").

27. Gardner, *supra* n. 4 (asserting that "[m]itigation bankers generally view in-lieu fees with suspicion: they are not held to the same standards as mitigation banks").

28. Compensatory Mitigation for Losses of Aquatic Resources, 73 Fed. Reg. 19594, 19615 (Apr. 10, 2008).

29. *Id.*

30. *See id.* at 19640 (noting that "[t]he Corps lacks statutory authority to accept directly, retain, and draw upon financial assurances, such as performance bonds, to ensure compliance with permit conditions").

There was more data available on mitigation banks than other arrangements, and it showed a good record of meeting performance standards and ecological success.[31] Independent of this debate, it was clear that these two systems of consolidated off-site mitigation were not equivalent; they had different structures for approval, different requirements for security of performance, and many other differences.[32] Mitigation banks were required to invest in land, put on a conservation easement, and have site-specific restoration plans approved before they could offer any credits for sale and recoup any of their costs.[33] In contrast, in-lieu fee programs developed a general plan for mitigation, collected fees, and undertook the actual restoration or mitigation project after collecting sufficient fees.[34] There was criticism that in-lieu fee programs were authorized to use preservation as mitigation, while mitigation banks were rarely authorized for preservation credits. Government-operated in-lieu fee programs generally had fixed fees, which might be unrelated to the actual costs of obtaining land and conducting mitigation.[35] In some locations, the government-operated in-lieu fee program regularly charged less than a mitigation bank. Some government in-lieu fee programs had substantial bank accounts and very little actual mitigation acreage.[36]

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31. *See* Envtl. L. Inst., *Study Finds Dramatic Increase in Use of Mitigation Banks and In-Lieu-Fees*, http://www.eli.org/pressdetail.cfm?ID=9 (Oct. 16, 2002) (stating that "[w]etland mitigation banking, in-lieu-fee mitigation, and mitigation banking approved under umbrella agreements . . . all hold great promise for improving the effectiveness of compensatory mitigation").

32. The differences between in-lieu fees and mitigation banks are presented more fully in two studies by the Environmental Law Institute. *See generally* Jessica Wilkinson, Roxanne Thomas & Jared Thompson, Envtl. L. Inst., *The Status and Character of In-Lieu Fee Mitigation in the United States* (Envtl. L. Inst. June 2006) (discussing a comprehensive study of in-lieu fee programs); Jessica Wilkinson & Jared Thompson, Envtl. L. Inst., *2005 Status Report on Compensatory Mitigation in the United States* (Envtl. L. Inst. Apr. 2006) (discussing a comprehensive study of mitigation programs). Both reports and other studies of mitigation banking and in-lieu fees are available at http://www.epa.gov/owow/wetlands.

33. *See* 71 Fed. Reg. at 15530 (discussing and contrasting the different procedures mitigation banks and in-lieu fee programs must go through before selling credits).

34. *Id.*

35. 73 Fed. Reg. at 19599.

36. *See id.* (discussing a proposal of limiting the number of credits that in-lieu fee programs can sell before they have secured sites). These differences, and others, were explained in the Proposed Mitigation Regulations, which proposed a complete phase-out of in-lieu fees. 71 Fed. Reg. at 15530–15531. This Article does not further address the issue of whether in-lieu fee programs should have been eliminated. It is sufficient to note that

It should be no surprise, therefore, that the "Jones Bill" changed between 1997 and 1999, and began to include the requirement for "level playing field" regulations. The problem of different requirements and different performance between mitigation banks and in-lieu fees was only partially solved by the 2000 In-Lieu Fee Guidance. The "Jones Bill" was revised to address the emerging issue of varied standards and criteria among different systems of off-site consolidated mitigation.[37]

The "Jones Bill," as it was introduced over the years, proposed a comprehensive statute for mitigation banking, providing for more than the promulgation of "level playing field" regulations.[38] The bill would have codified mitigation banking in federal law, establishing administrative and substantive standards for mitigation banks.[39] Notably, among other things, the 2003 version of the "Jones Bill" would have added a policy and goal to the Clean Water Act to encourage mitigation banking, as follows:

> (9) [I]t is the national policy to foster wetlands mitigation banking as a means to mitigate the unavoidable loss of wetlands and to do so by providing a regulatory framework for the establishment, operation, and use of mitigation banks, making appropriate use of existing, successful programs for mitigation banking, and taking into account regional variations in wetlands conditions, functions, and values.[40]

A new Subsection 404(u) would have addressed "Use of Mitigation Banks," providing a legislative structure for the approval and use of wetland mitigation banks.[41] The terms largely followed the structure and approach of the 1995 Mitigation Banking Guidance.[42] That is, the legislation would have required a mitigation

various reports, including the Preamble to the Proposed Mitigation Regulations, identified the significant differences between in-lieu fees and mitigation banks.

37. H.R. 2531, 108th Cong. at § 2(3) (proposing to amend 33 U.S.C. § 1251(a) by adding Subsection (8)).

38. *Id*. at § 3 (proposing to amend 33 U.S.C. § 1344 by adding Subsection (u)(6)(C)).

39. *Id*. (proposing to amend 33 U.S.C. § 1344 by adding Subsection (u)(3)).

40. *Id*. at § 2(3) (proposing to amend § 101(a) of the Federal Water Pollution Control Act (33 U.S.C. § 1251(a) by adding Subsection (9)). Similar provisions expressing a national policy of support for mitigation banking appeared in earlier versions of the "Jones Bill."

41. *Id*. at § 3.

42. *See generally* 60 Fed. Reg. at 58605–58614 (showing that the legislation provided for mitigation bank approval is similar to the regulations).

banking instrument similar to that required under the Mitigation Banking Guidance, with similar standards for bank approval and use of bank credits.[43] In short, the "Jones Bill" was designed to codify standards for mitigation banks and to provide a national policy statement that mitigation banks are in the national interest.

There is little doubt that Congressman Jones was a strong supporter of mitigation banking. Some might argue that his legislative efforts accomplished nothing, given the few co-sponsors for his bills and the obvious fact that the bills never passed. To the contrary, it is highly significant that of the many ways that the "Jones Bill" would have helped mitigation banking, the one provision that became law was the "level playing field" requirement.[44] This indicates that by 2003, the major issue in the mitigation system that needed repair was the inequity among providers of mitigation. By 2003, with the passage of Section 314 of NDAA, Congress supported the notion of moving beyond disparate federal guidance for mitigation and demanded federal "level playing field" regulations for all mitigation.[45]

This is not to say that other concerns of the mitigation banking industry were unimportant, but only that many of those concerns could be addressed with Section 314 of NDAA. The differences in standards applied to permittee-provided mitigation, mitigation banks, and in-lieu fee providers adversely impacted by the emerging mitigation banking industry in several ways. Obviously there were competitive impacts to mitigation banks if an in-lieu system could charge lower fees and still offer the permit holder a full transfer of liability for the mitigation. This was a major issue where fees were set by statute or ordinance. Another disparity arose where in-lieu fee programs might have had lower costs by using either public land or preservation, each to a greater extent than was authorized for mitigation banks. In some instances, in-lieu fee programs and mitigation banks existed in the same general location and competed fairly; often this arose where land conservancies or other non-profit organizations were held to the same standards as mitigation banks. Since in-lieu fee pro-

43. 60 Fed. Reg. at 58609–58610, 58612; H.R. 2531, 108th Cong. at § 3(u)(3)–(4).
44. *Compare* H.R. 2531, 108th Cong. at § 3(u)(6)(C) *with* 117 Stat. at 1431.
45. H.R. 2531, 108th Cong. at § 3(u)(6)(C); 117 Stat. at 1431.

grams were often run by states, there was a perceived benefit to a permit holder to pay the fee to the state, especially when the state's fee program was administered within the same department as its natural resources permit program.

In-lieu fee programs collected money first and found mitigation projects afterwards, in accordance with general plans approved under the In-Lieu Fee Guidance.[46] Mitigation bankers viewed this as "trust me" mitigation—good plans on paper with no real way to ensure the plans were ever implemented. The other "trust me" mitigation was permittee-provided mitigation.[47] In that instance, the permit applicant's wetlands impact could be approved with only a general plan for mitigation, and specific mitigation plans could be submitted a year or more after permit issuance. One of the major problems with permittee mitigation was that it was often not attained at all. Scarce enforcement resources meant that incomplete permittee mitigation carried a low risk of facing enforcement consequences.

In purely monetary terms, mitigation bankers were competing with other mitigation providers who could write a good plan but could never have to implement it. Even if the plan was ultimately implemented, these other providers did not have to acquire land, place a conservation easement on land, post financial assurances, or make other investments that would provide them with a financial incentive to complete their mitigation project (either to sell the credits or release the financial security). The in-lieu fee provider got the money first and then had the duty to deliver the goods. The permittee-mitigation provider got to complete its impacts to wetlands first and then meet its obligations to produce mitigation. Only the mitigation banker had to invest in actual mitigation before reaping any reward.

The mitigation bankers advocated for raising the standards for other providers rather than for lowering the standards for mitigation bankers. Mitigation bankers were willing to compete on merit with other sources of mitigation or mitigation credits. They felt strongly that they could produce an environmentally sound product that should play a role in mitigation. The rub for

46. 65 Fed. Reg. at 66916.

47. *See* 33 C.F.R. § 332.2 (Westlaw current through Sept. 25, 2008) (discussing the regulations on compensatory mitigation for losses of aquatic resources).

mitigation bankers was seeing other mitigation providers held to less demanding environmental and administrative requirements.

In short, the problems of disparate systems for mitigation had become the focus of concern for mitigation bankers. Congressman Jones and other members of Congress were aware of the "state of play" in the mitigation business when they opted to legislate for a "level playing field."[48]

The legislative background to Section 314 of NDAA demonstrates an awareness of several issues pertinent to the mitigation regulations. The congressmen behind the bill supported mitigation banking; they wanted to advance mitigation banking by establishing predictable standards and criteria, and to close the gap between mitigation banking and other systems for mitigation.[49] Because the full "Jones Bill" never passed, the "level playing field" provision from 2003 has no explicit legislative history, such as reports or floor statements. As such, there is no legislative history in the traditional sense used by courts to interpret statutory intent. There is a context, however, that is important to note when evaluating the new mitigation regulations.

III. DO THE REGULATIONS MEET THE STATUTORY DIRECTIVES?

To consider whether the new regulations comport with the statute, it is worth parsing out the statute to its component parts and considering the regulations alongside the subparts of the law. Under the statute, the regulations were to:

(1) "establish[ ] performance standards" and

(2) establish "criteria for the use"

(3) "of on-site, off-site, and in-lieu fee mitigation and mitigation banking"

(4) which shall (to the maximum extent practicable)

  (a) "maximize available credits";

48. Pub. L. No. 108–136 (Nov. 2003).

49. Congressman Walter B. Jones, *Jones' Effort Leads to Simplified Federal Regulations, Enhanced Wetlands*, http://jones.house.gov/release.cfm?id=666 (Mar. 31, 2008).

(b) maximize "opportunities for mitigation";

(c) "provide flexibility for regional variations in wetland conditions, functions and values"; and

(d) "apply equivalent standards and criteria to each type of compensatory mitigation."[50]

Parsing out the Section highlights the problems with mitigation that led to the statute's enactment—different standards and criteria were being used for different mitigation providers, and there was a need to maximize credits and opportunities for mitigation banking, all within the context of equivalency for all types of mitigation.

As a starting point, the chart below lists the Subparts of the Statute and provides a brief summary of how the regulations stack up against the requirements of the law.

REGULATIONS AND STATUTE COMPARED

Statute (117 Stat. at 1431)	**Covered in Regulations**	**Regulation Citation(s)** (33 C.F.R.__)	**Meets Statutory Goal**
"establish performance standards"	Yes. Identifies mandatory categories or types of performance standards.	§§ 332.3(c) watershed approach; (h) preservation; (i) buffers; (m) timing; (n) financial assurances; § 332.4(c) mitigation plans that meet twelve criteria; § 332.5 ecological performance standards.	Yes, but there is flexibility to vary standards when applied.

50. 117 Stat. at 1431.

Statute (117 Stat. at 1431)	**Covered in Regulations**	**Regulation Citation(s)** (33 C.F.R.__)	**Meets Statutory Goal**
establish "criteria for the use"	Some. Authorizes use of mitigation types, sets priorities and a hierarchy among types of mitigation.	§§ 332.3(b) type or location of mitigation; (e) in-kind preference; (f) amount of compensatory mitigation; (g) statement of use; (k) permit conditions; (l) party responsible; § 332.8 to establish mitigation bank or in-lieu fee.	Yes, but there is flexibility to deny use despite priority structure.
"of on-site"	Yes. Includes permittee mitigation on-site.	§ 332.3(b)(5) permittee-responsible mitigation through on-site and in-kind mitigation.	Yes, but there are equivalency concerns.
of "off-site and in-lieu fee mitigation"	Yes. Includes in-lieu fee and defines off-site.	§§ 332.3(b)(3), (g) in-lieu fee program credits; use of mitigation banks and in-lieu fee programs; § 332.8 mitigation banks and in-lieu fee programs.	Yes, but there are equivalency concerns.
of "mitigation banking"	Yes. Includes mitigation banks and defines them.	§§ 332.3(b)(2), (g) mitigation bank credits; use of mitigation banks and in-lieu fee programs; § 332.8 mitigation banks and in-lieu fee programs.	Yes, but there are equivalency concerns.

Statute (117 Stat. at 1431)	**Covered in Regulations**	**Regulation Citation(s)** (33 C.F.R.__)	**Meets Statutory Goal**
which shall "maximize available credits"	No.	§ 332.1 is mentioned in the description of the law but not in the law's purpose; § 332.8(m) credit withdrawal from mitigation bank; § 332.8(n), advanced credits from in-lieu fee; § 332.8(o) determining credits.	No.
maximize "opportunities for mitigation"	No.	§ 332.1 is mentioned in the description of law but not in the law's purpose; § 332.3(f) amount of mitigation.	No.
"provide flexibility for regional variations in wetland conditions, functions and values"	Yes.	§ 332.1(e) statement to account for regional variations; § 332.3 general requirements; § 332.3(b) examples of wetland variations; § 332.3(d) site selection.	Yes, but it authorizes regional variations that have nothing to do with wetland conditions, functions, or values.
"apply equivalent standards" to each type of compensatory mitigation	Yes or no.	See "standards" provisions above; § 332.8 approval of mitigation banks and in-lieu fees.	Yes, but there is flexibility to vary the twelve criteria.

Statute (117 Stat. at 1431)	**Covered in Regulations**	**Regulation Citation(s)** (33 C.F.R.__)	**Meets Statutory Goal**
apply equivalent "criteria" to each type of compensatory mitigation	No.	§§ 332.3(c) watershed approach; (h) preservation; (i) buffers; (m) timing; (n) financial assurances; § 332.4(c) mitigation plans that meet twelve criteria; § 332.5 ecological performance standards.	No. Criteria for use (advanced credit releases, timing) differs.

This chart highlights certain points that warrant more discussion. The regulations go a long way toward requiring all mitigation providers to meet equivalent, if not identical, standards. When developing the regulations, the agencies considered not only the authorizing statute but also their experience and various reports and studies of compensatory mitigation that had been conducted in the recent past, most notably the 2001 National Research Council publication, *Compensating for Wetland Losses under the Clean Water Act* (2001 NRC publication).[51] The resulting regulations attempt to incorporate many scientific recommendations as well as follow the statutory direction.

By focusing on consistency with the legislation, this Article intentionally omits discussion of many of the other points raised by the mitigation regulations. For example, one of the major achievements of the mitigation regulations is its codification of sequencing.[52] The general mantra of mitigation—avoid, minimize, and then compensate—derived largely from policy guidance docu-

51. *See generally* Comm. on Mitigating Wetland Losses, Bd. on Envtl. Stud. and Toxicology, Water Sci. and Tech. Bd., Div. on Earth and Lift Stud. & Natl. Research Council, *Compensating for Wetland Losses under the Clean Water Act* (Natl. Acad. Press 2001) (discussing the extent to which science and technology can adequately replace wetland function, how effective the federal compensatory mitigation system is, and examining the compensatory mitigation systems and efforts to date).

52. 33 C.F.R. at § 332.1(c).

ments and from the principles of the Section 404(b)(1) Guidelines.[53] This three-step sequence for "mitigation" has now been codified in the new regulations.[54] The new regulations require permit applicants to demonstrate how they have complied with the avoidance and minimization steps, but the regulations do not provide standards for these first two steps; rather, the new mitigation regulations address step three—compensation.[55]

Similarly, the new regulations draw heavily from the recommendations of the 2001 NRC publication,[56] notably codifying the "watershed approach" for compensatory mitigation.[57] Because of the unsettled nature of this concept, integration of the "watershed approach" may present great challenges in a regulatory program. These issues, and many others, must be addressed in other articles. For this piece, it is important to look carefully at whether the regulations did what Congress intended and how the regulations may be best implemented to secure congressional goals.

One visible issue of compliance with the Statute arises from how the regulations treat "performance standards" and "criteria for the use" of mitigation. "Performance standards" is a defined term in the regulations,[58] but there is no definition for "criteria for the use." In fact, "performance standards" and "criteria for the use" are melded into many parts of the regulations. Various subparts of the regulations contain terms that would qualify as both performance standards and criteria for use, including the General Requirements,[59] the Planning and Documentation,[60] and, rather

53. *Memorandum of Agreement between The Department of the Army and The Environmental Protection Agency: The Determination of Mitigation under the Clean Water Act Section 404(b)(1) Guidelines*, www.epa.gov/owow/wetlands/regs/mitigate.html (last updated Jan. 12, 2009).

54. 33 C.F.R. at § 332.1(c).

55. *See generally* 33 C.F.R. § 332.3 (discussing general compensatory mitigation requirements, considerations, and methods).

56. Comm. on Mitigating Wetland Losses, *supra* n. 51, at 140–142, 144–146.

57. 33 C.F.R. at § 332.3(c) (setting out the watershed approach in compensatory mitigation in general, considerations for employing a watershed approach, information needed, and the appropriate scale).

58. *Id*. at § 332.2 ("Performance standards are observable or measurable physical (including hydrological), chemical and/or biological attributes that are used to determine if a compensatory mitigation project meets its objectives.").

59. *See generally id*. at § 332.3 (outlining the methods and standards a district engineer should consider when deciding what compensatory mitigation requirements should be included in a permit).

60. *Id*. at § 332.4(c)(3), (5), (7), (9).

briefly, in Ecological Performance Standards.[61] The provisions addressing Monitoring[62] and Management[63] also set out "performance standards" and "criteria for the use."

Are "performance standards" and "criteria for use" different? Yes. "Performance standards," as defined, set out the ecological standards that the mitigation project and sponsor must meet. This is a narrow definition identifying the "physical, chemical[,] and/or biological attributes" that will be used to measure mitigation performance.[64] The phrase should cover a broader range of environmental standards, such as site selection, grading, plant or seed selection, and hydrology; as well as administrative standards such as financial assurances, monitoring, and reporting. In fact, these features are requirements of the regulations[65] but apparently are not performance standards. Perhaps they are "criteria for use," although this is not clear.

Conceptually, "criteria for use," in contrast, should address the regime and system to decide when, how, and where to use mitigation. This could include credit determination, priorities among kinds of mitigation, and policies for use of mitigation. Perhaps the mitigation regulations consider all of the standards that fall outside of the defined term "performance standards" to be "criteria for the use." Despite a narrow definition of "performance standards," the regulations largely identify all of the kinds of administrative and environmental matters that should be considered to monitor performance and establish criteria for use. Perhaps they are just not separately labeled. More significantly, as addressed below, the regulations leave vast discretion for a Corps District to set the terms for performance and the criteria for use in each particular mitigation decision.[66] This puts at risk the itemization of standards and criteria in the regulations.

One of the landmark features of the performance standards and criteria for the use in the mitigation regulations is the list of

61. *Id*. at § 332.5.

62. *Id*. at § 332.6(a)(1), (b), (c)(1).

63. *Id*. at § 332.7(b), (c)(2), (4).

64. *Id*. at § 332.2.

65. *Id*. at § 332.3(b)(1), (d), (k), (n); § 332.6; § 332.7(c)–(d).

66. *See* Sec. IV, *infra* (discussing the autonomy of district engineers and the Corps in general when making mitigation decisions).

twelve requirements that all mitigation providers must meet.[67] With tongue firmly in cheek, we now have a "Twelve-Step Program" for mitigation. These twelve steps are the categories establishing what is required in every mitigation plan.[68] While mitigation banks and in-lieu fees have had to comply with this twelve-part list in the past, the mitigation regulations make a clear statement that permittee mitigation must now meet the same performance standards as consolidated off-site mitigation.[69] This includes, for permittee mitigation, identification of specific mitigation sites and plans at the time of individual permit application review.

Permittee-provided mitigation was the majority form of mitigation when the mitigation regulations were released, representing more than 60% of the nation's mitigation.[70] If permittees who do their own mitigation are held to meet the "Twelve-Step Program," the playing field will become much more level. In the past, permittees were granted authority to impact wetlands with presentation of only a general mitigation concept. The permit application available for public notice and comment often identified mitigation in very general terms and sometimes with a promise that the complete mitigation plan would be submitted to the Corps after permit issuance. Under the mitigation regulations, when a permit application goes to public notice, it must have a specific mitigation plan, and the permit, when issued, must include a final mitigation plan that contains all of the twelve required ele-

67. 33 C.F.R. at § 332.4(c)(2)–(13).

68. In brief, each mitigation plan must address the following twelve items: (1) project objectives; (2) site selection factors; (3) site protection instrument; (4) baseline information (at impact site and compensation site); (5) credit determination methodology; (6) work plan; (7) maintenance plan; (8) performance standards; (9) monitoring requirements; (10) long-term management plan; (11) adaptive management plan; and (12) financial assurances. *Id*.

69. *Id*. at § 332.4(c)(1) (setting out that individual permittees must submit plans which include the twelve items listed).

70. "In [Fiscal Year] 2003, an estimated 60 percent of the compensatory mitigation was provided through permittee-responsible compensatory mitigation, 33 percent was provided by mitigation banks, and 7 percent was provided by in-lieu fee programs." Dept. of the Army, U.S. Army Corps of Engineers Directorate of Civil Works Operations and Regulatory Community of Practice, *Final Environmental Assessment, Finding of No Significant Impact, and Regulatory Analysis for the Compensatory Mitigation Regulation*, i, vi (available at http://www.usace.army.mil/cecw/Documents/cecwo/reg/news/comp_mitig_analysis.pdf) (accessed Apr. 17, 2009) [hereinafter *Final Assessment*].

ments.[71] If these provisions are applied properly, site-specific mitigation plans will be rolled into the permit application review in a very specific, meaningful way.[72] The application of the mitigation regulations to individual permits could be the most significant change of all.

Procedurally, the mitigation regulations establish equivalent systems for approval of mitigation banks and in-lieu fee programs.[73] Each must go through the same interagency review process, with public notice and opportunity to comment on the mitigation prospectus.[74] The regulations establish, for the first time, deadlines for instrument review and an internal appeal process for disputes concerning approval of a mitigation bank or in-lieu fee program.[75] These are significant changes.

However, in recognition that in-lieu fees are not the same as mitigation banks, the regulations impose an additional planning requirement on in-lieu fees. While all mitigation providers must meet the general terms for mitigation planning, including the watershed approach[76] and the Twelve Steps,[77] in-lieu fee programs must prepare a "compensation planning framework."[78] The compensation planning framework should be an additional study and report, which identifies with specificity how the in-lieu fee program will support a watershed approach.[79] The compensation planning framework requires all of the information that might be desirable in a mini-watershed plan.[80] Notably, the detailed requirements are followed by a general provision stating that the

71. 33 C.F.R. at § 332.4(b)(1).

72. *Id.* On the other hand, the mitigation regulations are a bit unrealistic for many that obtain an individual permit. Wetlands permits generally are obtained early in project planning, and it is not unusual for a project to change between the time of permitting and actual construction. From the permittee's standpoint, these changes may result from issues with financing, changes in the marketplace for the real estate development, local conditions, or other factors. The wetland permit may "pre-date" final construction and thus final impacts by many years. Indeed, a project may obtain a wetland permit but never be built. In those circumstances, locking in mitigation at the time of permit review and issuance can be unrealistic and unfair.

73. *Id*. at § 332.8(d)(6)(ii).

74. *Id*. at § 332.8(d)(4).

75. *Id*. at § 332.8(c)(7)–(f).

76. *Id*. at § 332.3(c)(1).

77. *Id*. at § 332.4(c)(2)–(c)(14).

78. *Id*. at § 332.8(c)(1)–(c)(2).

79. *Id*.

80. *Id*.

district engineer has the discretion to decide "[t]he level of detail necessary for the compensation planning framework."[81]

Another major achievement of the regulations is establishment of a framework in which mitigation should no longer proceed on "trust me" plans. Before a permit applicant is relieved of mitigation liability, the specific mitigation site should be known, secured, under a plan for mitigation, and subject to conservation easements and financial assurances.[82] There remains some risk for in-lieu fee programs, which can collect fees as advance credits and accept the liability transfer (with those payments) based only on their written mitigation plans. That is, they can collect money before securing a particular site and commencing construction of mitigation. Moreover, even though they are supposed to meet the twelve requirements, the regulations grant a great deal of discretion to the district engineer to allow permittee mitigation and in-lieu fee programs to defer actual mitigation choices and mitigation construction.[83] These provisions leave too much potential for approval of good mitigation plans that never result in good mitigation. Even though the "advanced credits for in-lieu fees" have some limits,[84] there are not enough controls to ensure that this money collected in advance will be spent on mitigation. Mitigation banks and other mitigation providers need to carefully monitor these potential differences to avoid abuses.

Along the same lines, the mitigation regulations express a starting point—all mitigation should be secured with financial assurances and other administrative controls. However, the district engineer has discretion to decide the kind of assurance and to decide that there need not be a financial assurance.[85] This is an area where the regulations should allow virtually no exceptions. Making the mitigation provider secure its work with bonding or a letter of credit is simply appropriate and should not be unusual. Even permittee-provided mitigation should have bonding or other financial security. The other parts of the construction project that cause the wetlands impacts will have some kind of bonding, and

81. *Id*. at § 332.8(c)(3).
82. *Id*. at § 332.4(c)(1)–(c)(2).
83. *Id*. at § 332.4(c)(1).
84. *Id*. at § 332.8(n).
85. *Id*. at § 332.3(m), (n).

the incentive of getting financial assurances released should help perform the mitigation properly.

The mitigation regulations establish a hierarchy among providers of mitigation, which may also be viewed as a "criteria for the use" of mitigation.[86] Under this hierarchy, mitigation banks are given the first or highest preference, followed by approved in-lieu fee programs, and then permittee mitigation.[87] The regulations explain why this is appropriate, since mitigation banks continue to be subject to standards that require approval of plans, known sites and security of the site before any credit releases.[88] Having continued to allow mitigation providers that collect money before building mitigation (in-lieu fees) or that impact wetlands before building mitigation (permittees), the mitigation regulations give a preference to mitigation banks, the only provider that secures land and provides site-specific mitigation plans before collecting money.

This preference for mitigation banks is consistent with congressionally declared preferences, including the preference for surface transportation laws[89] and laws governing federal water projects.[90] However, the hierarchy in the mitigation regulations allows too much room for the district engineer to authorize deviations. While the tenor of the regulations would discourage such a result, it appears that an applicant might propose mitigation from an approved mitigation bank, with available in-kind credits in the service area. Nonetheless, the district engineer might reject that mitigation and decide that the mitigation should be provided in another manner, such as by a speculative in-lieu fee program or through a permittee promise. The agencies should administer the

86. *Id*. at § 332.3(b)(1)–(4).

87. *Id*. at § 332.4(b)(1).

88. *Id*. at § 332.4(b)(2).

89. Transportation Equity Act for the 21st Century, Pub. L. No. 105-178, 112 Stat. 107, 139 (Sec. 1108) (1998) (amending 23 U.S.C. § 133(b)(11)) ("[P]reference shall be given, to the maximum extent practicable, to the use of the mitigation bank" if certain criteria are met.).

90. Water Resources Development Act, Pub. L. No. 110-114, 121 Stat. 1041, 1092–1093 (Sec. 2036(c)) (2007) (enacting 33 U.S.C. § 2317(b)) ("In carrying out a water resources project that involves wetlands mitigation and that has impacts that occur within the service area of a mitigation bank, the Secretary, where appropriate, shall first consider the use of the mitigation bank if the bank" meets certain criteria.).

regulations to avoid this kind of result, which would not be good for the environment or for mitigation.

In that regard, the mitigation regulations do little to "maximize available credits and opportunities for mitigation" as the statute requires.[91] This phrase reflects a concept for application of Clean Water Act regulation that could have been encompassed in environmental, administrative, and economic aspects. The Corps' regulations identify the available use of compensatory mitigation as follows:

> *Use of Mitigation Banks and In-Lieu Fee Programs*— Mitigation banks and in-lieu fee programs may be used to compensate for impacts to aquatic resources authorized by general permits and individual permits, including after-the-fact permits, in accordance with the preference hierarchy in paragraph (b) of this section.[92]

EPA's regulations contain the same language but add the following sentence at the end of the above text: "Mitigation banks and in-lieu fee programs may also be used to satisfy requirements arising out of an enforcement action, such as supplemental environmental projects."[93] These statements about the use of mitigation clarify the instances when credits from mitigation providers may be used, but they do not add opportunities for mitigation, with the possible exception of EPA's regulation that specifies that mitigation banks and in-lieu fee programs can be used to resolve enforcement actions.

However, the EPA regulation gives the example of using these mitigation providers for "supplemental environmental projects" (SEPs).[94] The rule uses the term "such as," leaving ambiguity as to whether mitigation credits can be used for the restoration or mitigation component of enforcement actions. That is, when resolving an enforcement action, the government generally seeks restoration of impacts. If restoration is not possible, the government may accept mitigation. SEPs, in contrast, are recognized in enforcement policies as a way that a violator may reduce

91. 117 Stat. at 1431.
92. 33 C.F.R. at § 332.3(g).
93. 40 C.F.R. § 230.93(g) (Westlaw current through Oct. 9, 2008).
94. *Id.*

its fines or penalties. The restoration/mitigation component of a settlement is viewed independently from the fine/penalty component of the settlement. Under EPA's settlement policies, SEP must be undertaken as a project that the violator is not otherwise legally required to perform.[95] Conceptually, the violator is obligated to perform the restoration/mitigation, so the SEP could not substitute for that duty. Of course, the phrase "such as" leaves open the possibility that EPA would accept credits instead of restoration/mitigation, but there are serious questions left open. Certainly there was an opportunity to "maximize available credits and opportunities for mitigation" by making mitigation credits available more broadly in enforcement actions, but it appears that the Corps and EPA did not adopt that approach.

What other ways might "maximize available credits or opportunities for mitigation?" The regulations say that mitigation should replace lost aquatic functions, leaving it to the district engineer to decide the amount of mitigation needed.[96] The rule allows the use of functional measures but states that where such measures are not used, the mitigation should be at least one-to-one on acres or linear feet.[97] The regulations address general circumstances for requiring more than a one-to-one ratio. For example, a greater ratio may be necessary to account for risks of mitigation success or to require more mitigation when preservation is used.[98] At the same time, the rules provide that mitigation completed in advance of impacts is preferable and suggest raising the compensation due to account for temporal loss:

> *Timing*—Implementation of the compensatory mitigation project shall be, to the maximum extent practicable, in advance of or concurrent with the activity causing the authorized impacts. The district engineer shall require, to the extent appropriate and practicable, additional compensatory mitigation to offset temporal losses of aquatic functions that will result from the permitted activity.[99]

95. U.S. EPA, *Interim Clean Water Act Settlement Penalty Policy* 1, 22, (Mar. 1, 1995) (available at http://www.epa.gov/Compliance/resources/policies/civil/cwa/cwapol.pdf).

96. 33 C.F.R. at § 332.3(f)(1).

97. *Id*.

98. *Id*. at § 332.3(f)(2).

99. *Id*. at § 332.3(m).

However, the rules could have "maximized credits" or encouraged mitigation by, for example, providing or even suggesting that advanced mitigation (in the ground) might qualify for more credits or that functional measures might result in mitigation that has a much higher functional measure than the impacted sites. Why should a credit from a mitigation project that has been "proven" through, for example, three or four years on the ground, be worth the same as a credit derived from "advanced sales," when a site has not been secured and not yet altered? It is not clear that the regulations treat either credit differently. There probably is sufficient flexibility in the regulations, through provisions such as reallocation of credits,[100] to offer this opportunity, but the prospect of such maximizing of credits hardly jumps out from the regulations.

One feature that might be considered as maximizing the opportunity for credits applies only to in-lieu fee programs. The regulations allow in-lieu fee programs a set of "rolling" advanced credit sales.[101] That is, in-lieu fee programs can be allotted a set of "advanced credits" that can be sold before the fee program has control over a specific mitigation site or has started any mitigation. The need to obtain a site and commence construction is governed by a separate provision, which states that: "Land acquisition and initial physical and biological improvements must be completed by the third full growing season after the first advance credit in that service area . . . ."[102] Thus, in-lieu fee programs allow for three growing seasons to pass between collecting fees (i.e., selling credits) and starting to produce actual mitigation. Mitigation banks, in contrast, must have secured the actual mitigation site and placed it under a conservation easement (plus have mitigation plans and instruments approved) before selling any credits, and the mitigation banks must meet performance standards before releasing credits.

The regulations have a rather general standard for use of mitigation bank and in-lieu fee credits, which might be applied to grant greater value for "mature" credits, but this intention is not express:

100. *Id*. at § 332.8(g).
101. *Id*. at § 332.8(n)(3).
102. *Id*. at § 332.8(n)(4).

> *Use of Credits*—Except as provided below, all activities authorized by DA permits are eligible, at the discretion of the district engineer, to use mitigation banks or in-lieu fee programs to fulfill compensatory mitigation requirements for DA permits. The district engineer will determine the number and type(s) of credits required to compensate for the authorized impacts. Permit applicants may propose to use a particular mitigation bank or in-lieu fee program to provide the required compensatory mitigation. In such cases, the sponsor must provide the permit applicant with a statement of credit availability. The district engineer must review the permit applicant's compensatory mitigation proposal, and notify the applicant of his determination regarding the acceptability of using that mitigation bank or in-lieu fee program.[103]

While there is some question as to whether the regulations maximize credits or opportunities for mitigation, they should incentivize mitigation banking. Rigorous application of the "Twelve-Step Program" to permittee mitigation may well cause more permit applicants to seek available mitigation banking credits, stimulating advance investment, and off-site compensatory mitigation projects. The regulations indicate that if the permittee offers "unproven" credits, such as credits from an in-lieu fee program, the district engineer may require a higher ratio.[104] If these requirements are applied rigorously, permittees should be faced with a choice of delivering more credits if they do the project themselves or purchase credits from an in-lieu fee than if they purchase credits from a mitigation bank. Why would the permittee want to build 200 credits or buy 200 credits from an in-lieu fee if the same mitigation requirement can be met with 100 credits from a mitigation bank? In the end, this should drive mitigation markets to pre-existing, established mitigation projects, which will help the environment and help the mitigation banking industry. None of these features, however, maximize credits or mitigation; rather, they might be viewed as minimizing credits.

Similarly, the regulations allow the mitigation banking or in-lieu fee instrument to be amended, which could include a recalcu-

103. *Id*. at § 332.8(r).
104. *Id*. at § 332.8(o)(6).

lation of mitigation credits.[105] The mitigation bank could be allotted more credits based on actual performance of the bank. In fact, a streamlined review process is provided for changes such as "changes reflecting adaptive management of the mitigation bank or in-lieu fee program, credit releases, changes in credit releases and credit release schedules, and changes that the district engineer determines are not significant."[106] This provides some flexibility for "maximizing credits" by adjusting credit releases based on the mitigation production at a particular site.

IV. DO THE REGULATIONS PROVIDE PREDICTABILITY AND CONSISTENCY?

It is a truism that regulations provide predictability and consistency only if applied in a predictable and consistent manner. There has simply been insufficient time to make any judgments on implementation of the mitigation regulations. The Corps has traditionally operated with considerable autonomy in individual district offices and the mitigation regulations certainly preserve that autonomy. As noted throughout this Article, the mitigation regulations reflect a tension between establishment of mandatory criteria that must appear in all mitigation plans and retention of flexibility in the district engineer to decide how these criteria will be applied in particular cases. This tension has the potential to destroy the equivalency that the mitigation regulations seek to achieve.

For example, all mitigation must have financial assurances in terms of "checking off" the "financial assurances" step as one of the twelve mandatory steps of mitigation planning.[107] However, the district engineer can decide not only what form and how much financial assurance is necessary, but whether financial assurance is actually needed at all.[108] This is true for each of the mandatory twelve steps; the box must be checked, but there is great discretion to decide what goes into the box. The statute commanding the mitigation regulations required the Army to "provide flexibility for regional variations in wetland conditions, functions[,] and

105. *Id*. at § 332.8(g).
106. *Id*. at § 332.8(g)(2).
107. *Id*. at § 332.3(n).
108. *Id*. at § 332.3(n)(1), (2).

values,"[109] but the mitigation regulations authorize flexibility for every required condition, not just those conditions that relate to the physical environment of a region. This creates the risk that a mitigation project might look good on paper, satisfying each of the twelve steps, but lack substance because the district engineer has waived or conditioned the content of certain steps.

Such results—over extensive variation of what is actually required to meet the twelve mandatory steps—would be a travesty. It would undercut the goals of predictability, equivalency, and enhanced mitigation performance. This is why so many comments on the mitigation regulations expressed concern with the discretion retained by the Corps. It is the part of the mitigation rules that carries the greatest potential for success or failure of the entire program.

Viewed in another way, it is worth asking whether application of the regulations to particular circumstances would be enforceable. On one obvious level, the answer is yes. Regulations are enforceable, in that they are formal federal rules capable of being read and applied. A violation of a federal rule is subject to enforcement by the Corps or EPA. As to third-party enforcement, there may be some question as to whether the citizen suit provision of the Clean Water Act[110] would support a citizen suit against an individual alleged to violate these rules, given the definitions under that provision,[111] but that is a question beyond this Article. We may assume that under the Administrative Procedure Act, if not the Clean Water Act, a third party with standing could initiate a lawsuit challenging a permit decision for allowing mitigation not consistent with the federal regulations. Whether that plaintiff could get relief is a different matter.

The more precise question is whether, given the broad flexibility vested in the district engineer, any third party could successfully challenge a permit issuance or denial based on a claim that the mitigation was not consistent with the regulations. The regulations grant so much flexibility to deviate from the standards on a case-by-case basis that it is hard to imagine a devia-

109. 117 Stat. at 1431.

110. 33 U.S.C. § 1365 (2000).

111. *See id.* at § 1365(f) (lacking a provision stating that a citizen may sue under the applicable code).

tion that would constitute "non-compliance" with the regulations. A couple of examples illustrate the difficulty of enforcing the mitigation regulations.

A district engineer's decision using this flexibility could, for example, approve an in-lieu fee project based on its plans for future mitigation (even though sites were not identified) and authorize a considerable "advanced credit release," and the fee program would have up to three years to find sites and commence construction. The district engineer could extend the obligation to have sites and construction started from the three years in the regulations to some unspecified amount of "additional time" (the regulations set no outside limit). The result would be wetland impacts under a permit, money and liability for those impacts transferred to a fee provider, and no mitigation on the ground for more than three years after impacts. The mitigation regulations provide that mitigation should be timed to occur in advance or concurrent with the impacts.[112] However, the permit would have been issued and the wetlands impacted long before the nonperformance of the mitigation project. Also, the mitigation regulations authorize a district engineer to extend the time for compliance by the fee program, so even a long extension would not be facially illegal. Given these facts, could a plaintiff prevail arguing that the district engineer's decision violated the timing requirements of 33 C.F.R. Section 332.3(m)?

The discretion to vary the basic terms of the mitigation regulations could also result in unfair differences among mitigation providers. For example, all mitigation plans must have performance standards—step eight of the twelve mandatory steps.[113] But it is not clear that a district engineer would act beyond his or her discretion if he or she set modest performance standards for a permittee (such as yearly measure of wetland vegetative cover), while setting more rigorous standards for another provider (such as water quality measurements in addition to vegetative cover standards). The performance standards should not vary depending on who is providing the mitigation. Clearly this is not what

112. 33 C.F.R. at § 332.3(m) (implementation should be in advance or concurrent with authorized impacts).

113. *Id*. at § 332.4(c)(9).

the regulations intend, but it may be hard to raise disparities like these in third-party lawsuits challenging mitigation decisions.

Put differently, a good description on paper and an apparently reasonable justification by a district engineer may allow the Corps to authorize mitigation at odds with the goals of the mitigation regulations. The district engineer can decide, on a case-by-case basis, that financial assurances need not be required, that performance standards should be adjusted, that failure to meet mitigation plans should be excused, and that other deviations—quite extensive deviations—from the regulations are warranted. These kinds of decisions are very difficult for third parties to challenge successfully. Third parties may be able to challenge a permit and the mitigation approved in a permit. However, at the time of permit issuance, the promise on paper may sound very good. Given the discretion vested in district engineers, it is unlikely that a court would "second guess" decisions to deviate from the regulations.

This was the result in a lawsuit challenging authorization of mitigation by payment of an in-lieu fee, in which the National Mitigation Banking Association and others challenged the Corps' permit issued for modernization and expansion of the O'Hare Airport. In *National Mitigation Banking Association v. U.S. Army Corps of Engineers*,[114] the reviewing court upheld the permit terms on the basis that the Corps had considerable discretion to establish mitigation terms.[115] The Corps approved an in-lieu fee prospectus that identified no specific sites but set up a process for finding mitigation projects in the future.[116] The permittee paid the fee program over $26 million and was relieved of its mitigation liability.[117] The permit and associated instruments required the fee program to have certain amounts of acres under construction after one, two, and three years, to accord with the anticipated schedule of impacts under the permit.[118] The court deferred to the Corps' decision to accept the in-lieu fee providers' promises.[119]

114. 2007 WL 495245 (N.D. Ill. Feb. 14, 2007).
115. *Id*. at *28.
116. *Id*. at *9.
117. *Id*.
118. *Id*. at *2.
119. *Id*. at *29.

While the litigation addressed only the propriety of issuing the permit, events since the lawsuit illustrate the limitations of third-party enforcement rights. The fee provider missed every deadline in the permit and approved prospectus. Mitigation sites were not selected or constructed on the schedule provided in the instruments. The Corps required no financial assurances, and the mitigation provider has held the funds in a separate account, not an escrow account, since 2005. The Corps has taken no steps to enforce the terms of the prospectus against the fee program. This case arose before the mitigation regulations, but the basic issue of accepting a promise of "trust me" mitigation at the time of permit issuance has the potential to arise under the mitigation regulations.

Under the mitigation regulations, steps taken by the districts after permit issuance or approval of the mitigation provider's instruments will also be very hard to challenge successfully. Decisions by a district engineer to grant a mitigation provider exemptions or other deviations from the regulations might not be subject to third-party challenge. In the years after permit issuance, the Corps will still be administering the mitigation promises, but the wetland impacts will likely be completed. A third party might have standing to challenge issuance of a permit, based on the adverse impact to the environment of the permitted fill, but there could be serious questions of who has standing to challenge the Corps' actions that defer or reduce mitigation long after the permit has issued. It is clear that third parties cannot successfully compel the government to exercise its enforcement authority to prosecute the mitigation provider. There would also be jurisdictional issues of standing and perhaps ripeness if a third party complained that the Corps violated the law in changing the requirements for a mitigation provider after permit issuance. Additionally, it is far from clear what legal basis third parties would have to challenge a mitigation provider directly.

It is unlikely that court oversight will play a major role in requiring the federal agencies to administer the mitigation regulations appropriately. Rather, this will be a process of internal governmental review and continued input from external stakeholders. This process would be greatly aided by more transparent recordkeeping by the Corps and EPA of information on mitigation. Until there are good systems in place to track permits and

mitigation, implementation of the new mitigation regulations will depend on vigilant participation by all stakeholders.

V. CAN CONSISTENCY AND GOOD RESULTS BE BETTER SECURED?

Given the fact that third-party-initiated judicial oversight may not be likely or effective, security in implementing the regulations must be sought elsewhere. In this early period of implementation, attention to certain items could help set the process on the right course.

Predictability, consistency, and enforceability would be greatly enhanced if the administration of the regulations relies heavily on simple, self-executing administrative structures. The regulating agencies (composed of ecologists, biologists, and environmental scientists) need to think beyond the environmental sciences and think like people in the business of mitigation. They need to be sure that mitigation providers have short-, mid-, and long-term incentives to complete good mitigation projects.

Comparisons to the construction business are useful. In construction, projects must meet performance standards for many different categories, such as electrical, plumbing, and other construction standards. For the mitigation project, there will be ecological standards involving vegetation, hydrology, soils, and grading, as well as administrative requirements for reporting. Certainly, the regulators (of both construction trades and mitigation industries) have authority to penalize the responsible party after the fact for failure to meet those performance standards. After-the-fact enforcement, however, is resource intensive at best. It is selective by definition, in that not everyone gets caught or penalized. The track record of after-the-fact enforcement of mitigation is not strong.[120]

Counties and cities that administer construction codes retain after-the-fact enforcement authority but utilize, as a standard practice, many forms of self-executing "before-the-fact" and "during-the-fact" enforcement mechanisms. Thus, it is routine that

120. *See* U.S. Govt. Accountability Off., *Wetlands Protection: Corps of Engineers Does Not Have an Effective Oversight Approach to Ensure That Compensatory Mitigation Is Occurring, GAO-05-898* (Sept. 8, 2005) (recommending oversight of the mitigation process in order to ensure compliance).

specific construction plans must be submitted and approved in advance; the mitigation regulations echo this feature by requiring approval of mitigation plans in advance.[121] However, the mitigation regulations allow for delayed plan submissions in certain circumstances, such as nationwide permits and in-lieu fee programs.[122] Allowing the applicant to defer submitting a plan (in the mitigation context, until after obtaining money or obtaining its permit) leaves an unnecessary gap that has to be filled through agency oversight and action after the fact.

Construction codes and construction contracts routinely require posting of bonds and periodic regulatory review before release of bonds. The builder cannot proceed and cannot obtain release of bonds until there are inspections and certificates by electrical inspectors, plumbing inspectors, a certificate of occupancy, and similar periodic checks. The mitigation regulations embrace the concept of periodic review and release of credits for mitigation banks and for in-lieu fee programs.[123] Permittee mitigation, however, has no similar structure for periodic review other than reports of completion.[124] While the mitigation regulations require financial assurances,[125] it is far from clear that all mitigation providers will have to post assurances for all steps, as the district engineer has discretion to adjust this requirement.

The key element to obtaining meaningful "during-the-fact" compliance is money. Reliance on the profit motive, even for not-for-profit entities, makes good sense. All mitigation should have financial assurances posted that should not be released without proof of attainment of milestones.[126] The burden should be on the mitigation provider to present proof of completion to the agency before the financial assurance is released. Continuing with the construction analogy, because the investor/developer in a con-

121. 33 C.F.R. at § 332.4(c)(1)(i).
122. *Id*. at § 332.8(f)(1)(iii), (iv).
123. *Id*. at § 332.8(o)(8).
124. *Id*. at § 332.6(c).
125. *Id*. at § 332.3(k)(2)(iv).
126. The regulations clearly contemplate that there may be circumstances where the district engineer does not require financial assurances. *E.g. id.* at § 332.3(n)(1) ("In cases where an alternate mechanism is available to ensure a high level of confidence that the compensatory mitigation will be provided and maintained . . . the district engineer may determine that financial assurances are not necessary for that compensatory mitigation project.").

struction project desires to release its financial assurance, it will work to complete the required step in accordance with code; the system is designed so that failure to get the county approval has a real, monetary consequence. This kind of system requires the agency to inspect and verify. However, this kind of system puts the burden with the investor/developer to initiate the inspection when the project is ready. The default if the investor/developer is out of compliance is no money and no sale.

Mitigation should follow a similar pattern. If all mitigation projects were secured, the responsible party would have a financial incentive to get that security lifted, which could only be done with agency approval. Agency approval, presumably, would come only upon attainment of performance standards after inspection.

This is not to suggest that after-the-fact enforcement (through inspections for violations, notices of violations, or litigation) has no value. Rather, it is unrealistic to think that the threat of after-the-fact enforcement, alone, will strongly encourage compliance with mitigation standards. The government lacks the resources for widespread enforcement. In many instances, such as governmental or non-governmental in-lieu fee programs, there may also be policy reasons for declining to enforce. Given the range of potential violators of the law, it is understandable that enforcement would focus on unpermitted fills, or permit violations, rather than mitigation. It is also unlikely that the government would bring an enforcement action against in-lieu fee providers, that are governmental entities or not-for-profit organizations, based on general enforcement priorities and other considerations. The point is not whether the government will utilize after-the-fact enforcement but that including "before-the-fact" and "during-the-fact" controls will allow the government to focus its limited resources wisely.

Many of the issues for implementation involve training and attention to the principles underlying the mitigation regulations. Because of the importance of choices made in implementing the mitigation regulations, the National Mitigation Banking Association (NMBA) provided the Corps and EPA with a check list of seven elements for effective implementation of the regulations.[127]

127. Natl. Mitigation Banking Assn., *National Mitigation Banking Association Outlines Seven Implementation Recommendations*, http://www.mitigationbanking.org/pdfs/2008

The principles reflected on this list are designed to ensure that the mitigation regulations are effective and meet the statutory intent. The list was presented in spring 2008, shortly after publication of the final mitigation regulations.

NMBA KEY ELEMENTS FOR IMPLEMENTATION OF COMPENSATORY MITIGATION RULE

> **Element 1—Consistency**: NMBA recommends that the Corps of Engineers and the Environmental Protection Agency develop systems to ensure that the core principles of the Rule are implemented consistently by District Offices, Field Offices[,] and Regulators across the entire country. It also recommends that each District and Field Office designate one person to serve as its primary contact for mitigation banking issues.
>
> **Element 2—Training**: NMBA recommends that the Corps of Engineers and Environmental Protection Agency work with NMBA and other experts in the mitigation banking industry to develop a consistent mitigation bank training curriculum that can be implemented at the local level, and that each District and Field Office receive at least one full day of training by the end of September 2008. The Corps of Engineers and Environmental Protection Agency should also develop an on-going training process that promotes continued training for all representatives involved in the mitigation banking process.
>
> **Element 3—Preference**: NMBA recommends that the Environmental Protection Agency and the District Offices of the Corps of Engineers establish procedures consistent with the standard of the Rule, which states that mitigation banking is the preferred method for wetlands mitigation and that their practices reflect this preference.
>
> **Element 4—Schedules**: NMBA recommends that because the Rule sets deadlines for mitigation banks, the Corps of Engineers and the Environmental Protection Agency need to change employee performance standards and training regarding bank approval and credit release to ensure that the schedules are met. The agencies also need to ensure that

-compensatorymitigationrelease.pdf (May 8, 2008).

> adequate funding is provided to ensure implementation of the Rule.
>
> **Element 5—Equivalency**: NMBA recommends that District and Field Offices of the Corps of Engineers recognize the importance that the same standards and criteria are equally applied to each mitigation option consistent with PL 108–136. All mitigation options need to meet the [twelve] mitigation plan criteria of Section 332.4(c)(1)–(12). For example, the performance standards of Section 332.5 and the monitoring standards of 332.6 should be equitably enforced for all options.
>
> **Element 6—Watershed**: NMBA recommends that the Corps of Engineers and the Environmental Protection Agency, in concert with NMBA and other mitigation experts, further clarify the watershed approach to ensure that it is implemented in a manner that is consistent with the other core principles of the Rule. The Corps of Engineers and Environmental Protection Agency should also clearly outline the relationship between a watershed and a service area, and ensure that the relationship is being consistently applied by all District and Field Offices.
>
> **Element 7—Distinction**: NMBA recommends that the Corps of Engineers acknowledge the clear distinction between in-lieu fees and mitigation banks, consistent with the preference for accomplished mitigation. The Rule provides the Corps of Engineers with the discretion to discourage delayed mitigation by limiting advanced credit sales and providing higher ratios for in-lieu fees due to temporal loss. NMBA recommends that these tools be regularly used.[128]

While this list does not go into the detail of the chart parsing out the Statute and comparing it to the mitigation regulations, NMBA has highlighted the principles that can be drawn from the legislation. These are the elements that will need careful attention as experience unfolds under the regulations.

Perhaps the most important issues are consistency and equivalency. NMBA is concerned with the level of discretion left to individual Corps districts. While there should be flexibility to

128. *Id.*

address regional environmental conditions, the substantive and administrative requirements should not be waived and should not vary across the country. For example, under the regulations the agencies may establish rigorous performance standards regarding vegetation, hydrology or other bio-chemical standards. If measurements of hydrology, or bio-chemistry are required, the districts must apply them consistently and equivalently. They should not use unbridled discretion to decide that the standards might be too stringent or too expensive for certain mitigation providers, such as permittees or in-lieu fee providers.

VI. CONCLUSION

The mitigation regulations mark a significant turning point in the regulatory program and its approach to mitigation. Mitigation was addressed in a series of memorandum and guidance documents since the early 1990s.[129] Now, the standards and criteria for compensatory mitigation are in formal federal regulations. Faithful implementation of these regulations can "level the playing field" and improve mitigation. There are also many potential pitfalls looming. Much needs to happen over the next months and years to ensure that the mitigation regulations are implemented to meet their promise and goals.

129. See list of memorandum and guidance documents, most of which are now obsolete, available at www.epa.gov/owow/wetlands.