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**TESTIMONY OF
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U.S. ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE
SUBCOMMITTEE ON WATER RESOURCES AND ENVIRONMENT
OF THE
COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE
U. S. HOUSE OF REPRESENTATIVES**

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INTRODUCTION

Good morning, Mr. Chairman and members of the Subcommittee. I am G. Tracy Mehan, Assistant Administrator for Water at the U.S. Environmental Protection Agency (EPA). I welcome the opportunity to join my colleague Dominic Izzo of the Department of Army to discuss the use of mitigation banking in fulfilling our shared responsibilities under the Clean Water Act (CWA) wetlands program.

Before discussing the Administration's position on H.R. 1474, "the American Wetland Restoration Act," I will briefly discuss the importance of wetlands, the concept of wetlands compensatory mitigation, and the federal guidance on mitigation banking. As you are aware, there is considerable interest by the public, government agencies, and private entrepreneurs in ensuring that wetlands functions and values lost to activities permitted under the CWA are effectively replaced. Working with these partners, EPA is committed to ensuring that such mitigation results in functioning wetlands systems, and we have made compensatory mitigation success a program priority.

WETLANDS COMPENSATORY MITIGATION

Wetlands are among our Nation's most critical and productive natural resources, protecting private property from flooding and providing shoreline erosion control. They help protect water quality, support commercially valuable fisheries, and provide primary habitat for wildlife, fish, and waterfowl. As a result, wetlands destruction and degradation can lead to serious consequences, including increased flooding, declining water quality, and species decline.

Under the CWA Section 404 program, dischargers must, to the extent practicable, avoid, then minimize, and finally compensate for impacts to wetlands and other waters of the United States. Offsetting adverse impacts from unavoidable development activities is the final step in this decision sequence established to meet our Clean Water Act goals. Compensatory mitigation is typically done through the restoration, enhancement, creation, or, in exceptional circumstances, preservation of wetlands. Our level of success in replacing lost wetlands functions and values is vital, because every year some 24,000 acres of wetlands and other waters are lost as a result of approximately 120,000 activities permitted by the Section 404 program.

There are various compensatory mitigation options that can be used by Section 404 permittees. The most common type of mitigation is permittee-provided mitigation, where the permittee assumes all responsibilities for ensuring the ecological and long-term success of the mitigation. Other common mitigation options include mitigation banking and in-lieu-fee mitigation. Mitigation banking is a market-oriented way to support wetlands permitting and improve the environmental effectiveness of federal wetlands protection

programs. Mitigation banks provide an opportunity for the regulated community to offset their wetland impacts by purchasing “credits” of wetlands restored or created by a third party. In-lieu-fee mitigation occurs in circumstances where a permittee provides funds to a third party to complete mitigation other than purchasing credits from a mitigation bank approved under the federal guidance.

STATUS OF MITIGATION BANKING/ FEDERAL GUIDANCE

In November 1995, the Environmental Protection Agency, Army Corps of Engineers, Natural Resources Conservation Service, Fish and Wildlife Service, and National Marine Fisheries Service jointly issued federal guidance regarding the establishment, use, and operation of wetland mitigation banks. This guidance was the product of detailed interagency discussions and public input, and has been highly rated by some groups. A fundamental precept of mitigation banking is that the restoration or creation of aquatic resources takes place in advance of authorized impacts to wetlands and other waters, thereby reducing the temporal losses of aquatic resources. In practice, restored, enhanced or created wetlands are expressed as “credits,” which may subsequently be withdrawn to offset wetlands impacts, or “debits,” incurred at a development site.

There are approximately 300 approved mitigation banks in operation in the United States, and approximately 100 additional banks in development. Today, active or pending banks exist in 41 States and this number is growing. Mitigation bank sponsors include State or local governmental agencies, non-profit organizations, or private

entrepreneurs. In addition to the federal mitigation banking guidance, 30 States now have statutes, regulations, or guidelines authorizing or encouraging the establishment of wetland mitigation banks. Note that in 1998, the “Transportation Equity Act for the 21st Century” established a preference for the use of mitigation banks for highway projects.

Many landowners applying for Clean Water Act permits do not wish to become wetlands experts or to undertake the long-term management effort needed to ensure the ecological success of wetland mitigation projects. Rather, they are simply seeking authorization to move forward with their development projects. When carried out consistent with the federal guidance, mitigation banks provide these landowners greater flexibility for complying with mitigation requirements and often have several advantages over individual mitigation projects, including the following:

- < Mitigation banks can enhance the environmental effectiveness of wetlands protection programs. In some circumstances, it is more environmentally beneficial to consolidate several smaller compensatory mitigation projects into a single large parcel or group of continuous parcels that restores important wetlands functions.
- < Mitigation banks approved under the federal guidance can reduce the time required to evaluate a permit application and provide more cost-effective compensatory mitigation opportunities for landowners. Through the purchase of credits from an approved mitigation bank, applicants can transfer the responsibility for providing mitigation to a wetlands expert with the resources and incentive to ensure that the mitigation is ecologically effective.
- < Mitigation banks consolidate planning and scientific resources that can increase the potential for the establishment and long-term management of ecologically effective mitigation. The establishment of mitigation banks requires a level of planning and scientific expertise not available with many individual mitigation proposals.
- < Mitigation banks can increase the efficiency of limited agency resources used to review compliance of mitigation projects at a single site, and thus improve the

ability to ensure the ecological effectiveness of the restored, enhanced, or created wetlands purposes.

- < Mitigation banks, chartered under the federal guidance, have explicit performance standards that provide greater assurance that the parcel replacing the developed wetlands can be successfully restored and allow for more effective assessment of the full functions and values of the replacement acreage.

H.R. 1474, THE “AMERICAN WETLAND RESTORATION ACT”

EPA has long endorsed the use of mitigation banks as a way to increase the predictability of the permitting process and increase the success of wetlands restoration efforts to offset impacts permitted under the Section 404 program. The bill being considered by this Subcommittee -- H.R. 1474, the “American Wetland Restoration Act” -- would codify key mitigation banking policies and procedures. It would establish in law an important market-based approach to current CWA wetlands protection programs, to help increase the quality and quantity of the Nation’s wetlands by encouraging flexible entrepreneurial actions. H.R. 1474 recognizes a National policy to conserve, create, and restore wetlands and to achieve the National no overall net loss goal. It also mandates the development of standards equivalent to those applicable to mitigation banking for “in-lieu-fee” mitigation and other forms of mitigation.

The Administration supports the mitigation banking concept and the provisions of this legislation which largely mirror and reference the federal mitigation banking guidance. The federal guidance has been in place for approximately six years during which time we have had the opportunity to gain experience with States, the mitigation bankers, and others on a variety of issues associated with the implementation of the guidance. EPA would

welcome the opportunity to work with Congressman Jones and others to use past experience with mitigation banking to clarify details that may make the bill even more effective.

MITIGATION STAKEHOLDER FORUM

The EPA, in partnership with the Maryland Department of the Environment, is conducting a stakeholder forum in early October to discuss the effectiveness of current federal mitigation policies and other issues associated with the implementation of ecologically effective wetlands mitigation. This Mitigation Stakeholder Forum will provide an opportunity for frank discussions among mitigation providers, federal and State regulators, members of the environmental community, mitigation bankers, in-lieu-fee providers, Congressional staff, non-governmental organizations, academics and others with an interest in the future of this issue. The participants will have the opportunity to discuss the conclusions and recommendations of the National Academy of Sciences' comprehensive analysis on the effectiveness of wetlands compensatory mitigation under Section 404, the General Accounting Office conclusions, and recommendations from their analysis of in-lieu-fee mitigation, as well as other independent reviews of wetlands compensatory mitigation that my colleague Mr. Izzo speaks to in his testimony. The ultimate goal of the Mitigation Stakeholder Forum is to inform the development of an action plan to implement the good recommendations that have resulted from these efforts. The Mitigation Stakeholder Forum and the proceedings could inform the framers of H.R. 1474 if the bill is further refined.

CONCLUSION

Thank you for the opportunity to provide testimony on wetlands mitigation banking and other forms of compensatory mitigation. Wetlands protection and environmentally effective compensatory mitigation are critical to the goals of the Clean Water Act. It is important that any practice used to restore these important resources be conducted in a manner that provides the greatest likelihood of successfully replacing lost functions and values. I look forward to working with Congress on this and other wetlands-related legislation that would address potential threats to the Nation's water quality, flood control, erosion prevention, and aquatic wildlife habitat.

I would be happy to address any questions that you may have at this time.

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