

**TESTIMONY OF
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**JOINT HEARING BEFORE THE
COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS
AND THE
COMMITTEE ON ENERGY AND NATURAL RESOURCES
UNITED STATES SENATE**

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Good morning Chairman Sullivan and Chairman Murkowski. I am Mary Anne Thiesing, Wetlands Coordinator in the Office of Ecosystems, Tribal and Public Affairs in Region 10 of the U.S. Environmental Protection Agency. I am pleased to be here today to discuss the Clean Water Act section 404 mitigation program, compensatory mitigation banking, and the EPA's coordination with the U.S. Army Corps of Engineers.

The Clean Water Act was promulgated in 1972 to "restore and maintain the chemical, physical, and biological integrity of the nation's waters." The Act established the section 404 permit program, which involves the authorization of discharges of dredged or fill material to waters of the United States, discharges that can degrade or even destroy these waters.

The U.S. Army Corps of Engineers is given responsibility under the Act to issue section 404 permits. In Alaska, these discharges are often associated with activities such as road construction and energy development.

To offset impacts from permitted activities, the section 404 program is built on the concept that when impacts to waters, including their loss, are unavoidable, they shall be compensated by

establishing, restoring, or preserving waters at the impact site or at another location, generally within the same watershed as the impacts. Consideration of mitigation occurs throughout the permit application process and includes avoidance and mitigation measures. However, there may still be unavoidable impacts to waters. Compensatory mitigation is only considered after a proposed project has first looked at how to avoid and minimize adverse impacts.

Section 404 permits, particularly individual permits that are associated with activities with more than minimal adverse effects to the aquatic environment, may include special conditions for conducting compensatory mitigation to offset degradation and loss of waters of the United States when avoidance or minimization of the impacts is not practicable.

There are three basic mechanisms that permittees may use to offset the aquatic impacts that will result from their proposed projects. A permit applicant can propose to purchase credits from a mitigation bank, purchase credits from an in-lieu fee program, or conduct a compensatory mitigation project on its own.

1. A mitigation bank is a site with restored, established, enhanced, and/or preserved aquatic resources that the Corps, in consultation with an Interagency Review Team composed of federal and state natural resource and regulatory agency representatives, has approved for use to compensate for losses from future permitted activities. The bank approval process establishes the number of available compensation credits, which permittees may purchase upon Corps approval of the bank. The bank sponsor is responsible for the success of these mitigation bank sites.

2. With in-lieu fee mitigation, a permittee provides funds to an in-lieu fee program sponsored by a government or nonprofit entity that conducts compensatory mitigation projects consistent with an agreement approved by the Corps, in consultation with an Interagency Review Team. Typically, specific compensatory mitigation projects are started only after pooling funds from multiple permittees. The in-lieu fee program sponsor is responsible for the success of these in-lieu fee mitigation sites.
3. With permittee-responsible mitigation, the permittee undertakes and bears full responsibility for the implementation and success of the required compensation. Compensation may occur either at the site where the regulated activity caused the loss of aquatic resources or at a different location, preferably within the same watershed.

The EPA works closely with the Corps as part of the Interagency Review Teams that oversee the review, approval, and management of mitigation banks and in-lieu fee programs. For proposed permittee-responsible mitigation, the EPA typically provides comments to the Corps during the permit review process.

As called for in the National Defense Authorization Act for Fiscal Year 2004, the Corps and the EPA published regulations in 2008 that revise and clarify compensatory mitigation requirements. The 2008 Mitigation Rule ensures a level playing field among providers of compensation by holding all forms of compensatory mitigation to equivalent standards regardless of whether the compensation is provided by a mitigation bank, an in-lieu fee program, or by the permit applicant. The 2008 Mitigation Rule also increased consistency and predictability in compensatory mitigation requirements by clarifying the contents of mitigation plans and the

timelines for review. The 2008 Rule did not change when compensation is required but rather focuses on how and where compensatory mitigation is planned, implemented, and managed to improve its ecological success and sustainability.

Section 404 permitting requirements for compensatory mitigation are based on what is practicable and capable of compensating for the aquatic resource functions that will be lost as a result of the permitted activity. In determining what type of compensatory mitigation will be environmentally preferable, the Corps must assess the likelihood for ecological success and sustainability, the location of the compensation site relative to the impact site and their significance within the watershed, and the costs of the compensatory mitigation project. Furthermore, compensatory mitigation requirements must be commensurate with the amount and type of impact associated with a particular section 404 permit. Determinations of the appropriate amount and type of compensatory mitigation are made using methodologies that are tailored to address regional variations in wetland and stream resources and their associated functions and services.

Although careful attention is given to compensatory mitigation requirements when they are necessary, the majority of section 404 authorizations do not require any compensatory mitigation. According to a recent analysis of permitting data from 2010 through 2014, the Corps issued approximately 56,400 written authorizations nationally per year under its permit authorities, approximately 10 percent of which required compensatory mitigation. This percentage reflects a number of factors, including the Corps's ability to successfully engage with other federal and state resource agencies and permit applicants during the permit review process

to identify ways to avoid and minimize adverse impacts to the nation's waters. The majority of those authorizations were done under the general permit program which have no more than minimal adverse effects to aquatic resources. Compensatory mitigation is required when necessary to offset unavoidable yet significant impacts to wetlands and streams only after a project includes all means necessary to avoid or minimize impacts.

Compensatory mitigation is a basic component of the section 404 permit program and is consistent with the Act's goals of restoring and maintaining the chemical, physical, and biological integrity of the nation's waters. The agencies work to ensure this provision is applied consistently, predictably, and effectively so that permit applicants can proceed with projects that achieve their needs while protecting public health and water quality.

Thank you for the opportunity to be here today. I will be happy to answer any questions.