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SUBJECT: Permit Number: AI 170959/21-NT-3040/202160426, DRG / WSSI
Maryland Statewide Umbrella Mitigation Bank Instrument, Application Number
2021-60426

Sent by email to john.j.dinne@usace.army.mil and kelly.neff@maryland.gov

January 7, 2022

Dear Mr. Dinne and Ms. Neff:

Thank you for the opportunity to comment on the prospectus for a Statewide Umbrella Mitigation Bank Instrument. The very notion of a statewide mitigation bank instrument is offensive and violates the spirit and potentially the letter of the federal regulations governing compensatory mitigation banks.¹ Mitigation banks are designed to offset likely environmental impacts from particular expected development projects.

Whether a bank meets the necessary criteria to compensate losses of aquatic resources depends on an analysis of the types and relative locations of wetlands at issue. The creation of an “umbrella” bank, envisioned in this application, runs counter to the detailed, individualized analysis appropriate to the application process for any mitigation bank. We submit the following three concerns with this proposal:

1. Pre-defining a financing structure creates incentives to expedite and streamline at cross purposes with the specific review required to meet the mitigation aims of the Clean Water Act.

¹ 33 C.F.R. § 332.8 (c).

2. **Inclusion of this umbrella mitigation bank proposal with the Lake Elkhorn mitigation bank fails to provide the public with adequate notice.**
3. **Authorizing 35% of credits to be released upon approval of a Mitigation Banking Instrument is a particular concern given the broad-based nature of the prospectus.**

Below find more in-depth discussion of these three main concerns.

1. **Pre-defining a financing structure creates incentives to expedite and streamline at cross purposes with the specific review required to meet the mitigation aims of the Clean Water Act.**

Federal regulation requires specific projects used to provide compensation to be consistent with the approved framework. It requires modification to be approved only after consultation with the Interagency Review Team.² An umbrella framework that allows adding additional geographic service areas as proposed runs counter to a distinct review. Federal regulation sets out eleven factors that must be contained in a mitigation planning framework. These include factors that connect the mitigation site to other elements of the watershed (see i. watershed-based rationales) and factors unique to a certain geography, such as field documentation of the current aquatic resources onsite.

The applicant's submission does not contain any of these elements, except for the Lake Elkhorn site, since additional sites are not yet determined. While the applicant might put forth that further details will be provided when additional sites are added, the structure of this proposal threatens to lighten the level of review described in federal regulation, changing the model from a specific, site-based analysis to a broad-based allowance. The eleven elements necessary for a compensation planning framework according to 33 Part 332.8 Section (c)(2) are as follows:

- (i) The geographic service area(s), including a watershed-based rationale for the delineation of each service area;
- (ii) A description of the threats to aquatic resources in the service area(s), including how the in-lieu fee program will help offset impacts resulting from those threats;
- (iii) An analysis of historic aquatic resource loss in the service area(s);
- (iv) An analysis of current aquatic resource conditions in the service area(s), supported by an appropriate level of field documentation;

² 33 C.F.R. § 332.8 (c) (1), stating "All specific projects used to provide compensation for DA permits must be consistent with the approved compensation planning framework. Modifications to the framework must be approved as a significant modification to the instrument by the district engineer, after consultation with the IRT."

- (v) A statement of aquatic resource goals and objectives for each service area, including a description of the general amounts, types and locations of aquatic resources the program will seek to provide;
- (vi) A prioritization strategy for selecting and implementing compensatory mitigation activities;
- (vii) An explanation of how any preservation objectives identified in paragraph (c)(2)(v) of this section and addressed in the prioritization strategy in paragraph (c)(2)
- (vi) satisfy the criteria for use of preservation in §332.3(h);
- (viii) A description of any public and private stakeholder involvement in plan development and implementation, including, where appropriate, coordination with federal, state, tribal and local aquatic resource management and regulatory authorities;
- (ix) A description of the long-term protection and management strategies for activities conducted by the in-lieu fee program sponsor;
- (x) A strategy for periodic evaluation and reporting on the progress of the program in achieving the goals and objectives in paragraph (c)(2)(v) of this section, including a process for revising the planning framework as necessary; and
- (xi) Any other information deemed necessary for effective compensation planning by the district engineer.³

Finally, the regulations state that the level of detail necessary for the compensation planning framework is at the discretion of the district engineer and will take into account the characteristics of the service area(s) and the scope of the program.⁴ This prospectus has no such analysis. Instead, it proposes to “pre-coordinate” a scheme of compensation for all types of wetlands and water quality impacts for the purpose of streamlining environmental permitting decisions affecting wetlands and waterways statewide. CBF views this approach as the antithesis of the aims of the Clean Water Act for specified permit review.⁵

Individual permit applications should be able to show that the applicant, to the extent practicable, has taken steps to avoid wetland impacts; minimized potential impacts on wetlands; and provided compensation for any remaining unavoidable impacts.⁶ The purpose of the regulations on compensatory mitigation is to establish standards and criteria for the use of all types of compensatory mitigation, including mitigation banks, to offset unavoidable impacts to waters of the United States authorized through the issuance of Department of the Army permits pursuant to section 404 of the Clean Water Act and/or sections 9 or 10 of the Rivers and Harbors Act of 1899.⁷

³ 33 C.F.R. § 332.8 (c)(2).

⁴ 33 C.F.R. § 332.8 (c).

⁵ 33 U.S.C. 1344 Section 404 (b).

⁶ [Overview of CWA Section 404: Regulatory Authority Factsheet.](#)

⁷ 33 C.F.R. § 332.1 (a)(1).

2. Inclusion of this umbrella mitigation bank proposal with the Lake Elkhorn mitigation bank fails to provide the public with adequate notice.

The umbrella mitigation bank proposal states, “The Geographical Service Area for this UMBI will be statewide, in Maryland.” As a matter of public notice, except for the addendum describing the first site location at Elkhorn Lake, the prospectus is devoid of any site-specific information that a commenter could evaluate in order to know if the proposal meets any qualification of a mitigation bank for any wetlands or water quality impacts anywhere. The prospectus reliance on one broad and general instrument could speed and streamline agency review of new sites without robust public notice and opportunity for comment on required reviews for avoidance, minimization and compensatory mitigation sequence.

The inclusion of this proposal along with the Lake Elkhorn mitigation bank application also deprives the umbrella instrument of adequate review. The proposal was not as obviously relevant to all Maryland, and for those regionally affected by the Lake Elkhorn site, was necessarily a second priority to commenting on the Elkhorn proposal, which given the size of the proposal was a hefty undertaking.

3. Authorizing 35% of credits to be released upon approval of a Mitigation Banking Instrument is a particular concern given the broad-based nature of the prospectus.

CBF agrees that temporal losses of habitat function do occur under the auspices of concurrent mitigation and therefore supports the concept of mitigation banking *per se*, but only when a superior environmental outcome can be guaranteed. The accelerated release schedule included in this prospectus for 35% of credits simply following approval of a Mitigation Banking Instrument by the Interagency Review Team suggests that the applicant could be renumeralated for merely producing a document without providing any onsite improvements to wetlands or water quality.

Resource agencies must reject this framework, especially with such a lack of specificity on the size, location, and potential credits that could be generated by a hypothetical bank. Based on a market and service area analysis, information on risk of success, land costs and other considerations, it may be appropriate to propose a schedule for release of credits, but in even those cases, CBF opposes release of more than 15% at the time of instrument approval by the Interagency Review Team.

In conclusion, the Chesapeake Bay Foundation does not see the value to the state's water quality or wetland resources by approving a broad-based shell mitigation bank prospectus for one entity and requests that the U.S. Army Corps of Engineers and Maryland Department of Environment deny this permit request.

Sincerely,

A handwritten signature in black ink, appearing to read "R. Clark", written in a cursive style.

Robin J. Clark
Maryland Staff Attorney
Chesapeake Bay Foundation