NATIONAL STONE, SAND & GRAVEL ASSOCIATION

Natural building blocks for quality of life

June 13, 2006
U.S. EPA Docket Center
Attn.: Docket Number EPA-HQ-OW-2006-0020
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Re: Compensatory Mitigation for Losses of Aquatic Resources

COMMENTS ON BEHALF OF THE NATIONAL STONE, SAND & GRAVEL ASSOCIATION

The National Stone, Sand & Gravel Association (NSSGA) appreciates the opportunity to provide its comments to the Corps of Engineers and the Environmental Protection Agency regarding their jointly proposed rule on "Compensatory Mitigation for Losses of Aquatic Resources" as published in the Federal Register (Vol. 71, No. 59) on March 28, 2006.

NSSGA is the world's largest mining association by product volume. Our member companies account for more than 90 percent of the crushed stone and in excess of 70 percent of the sand and gravel produced annually in the United States. These products, often referred to together as "aggregates", are used extensively for construction and repair of the nation's infrastructure as well as for commercial and residential building purposes. Our members' materials are also used extensively in environmental applications such as for water filtration, erosion control and landscaping as well as other forms of pollution control. During 2005, a total of about 3.2 billion tons of crushed stone, sand and gravel, valued at $17.4 billion, were produced by approximately 117,000 working men and women in the aggregates industry.

These critical aggregates materials can only be extracted from areas where nature has put them. In the case of sand and gravel, these areas are often related to aquatic resources. This interrelation provides for, on the one hand, inevitable impacts, and on the other hand, extraordinary opportunities for wetland and other aquatic resource restoration and creation. In fact, former sand and gravel extraction areas are used for wetland mitigation banks for compensatory mitigation as well as for groundwater recharge basins and a multitude of other land uses. The fertile wildlife habitat value of former sand and gravel extraction sites is a well-documented fact.

1605 KING STREET ■ ALEXANDRIA, VA 22314
703 525 8788 ■ 800 342 1415 ■ FAX 703 525 7782
WWW.NSSGA.ORG

As a result of the aquatic resource relationship cited above, our membership is especially interested in these proposed rules, both as prospective activity based permittees and as potential mitigation bankers.

General Comments

NSSGA appreciates the Agencies efforts to "maximize available credits and opportunities for mitigation, provide flexibility for regional variations in wetland functions and values, and apply equivalent standards and criteria to each type of compensatory mitigation." We believe that on the whole, the proposed rule will establish proper performance standards for the use of permittee-responsible compensatory mitigation and mitigation banks and improve the quality and success of compensatory mitigation projects while at the same time providing an improved and more efficient review and approval process.

While we have a few important concerns which we will address in specific comments below, NSSGA respects the logic behind a watershed approach that offers more flexibility than a rigid "on-site, in kind" mentality that discriminated against a more broad and ecologically sophisticated approach. We likewise understand the rationale for applying this proposed rule on compensatory mitigation to all types of aquatic resources and emphasizing the "sequencing" mandate and commend the Agencies for making clear that the District Engineer has the authority, after considering the comments of members of the Interagency Review Team, to make decisions on approvals for mitigation banks.

Watershed Approach

As noted above, NSSGA supports the use of a "watershed approach." This approach places proper emphasis on the actual ecological function of wetlands and other waters within the watershed and function and value they provide, rather than simply focusing on immediate and sometimes isolated areas that have been adversely impacted. NSSGA appreciates this ecologically based "big picture" approach, which allows for comprehensive planning, considering the requirements of other regulatory and non-regulatory programs that affect the same watershed and the compatibility of other proposed or existing facilities or projects. The proposed rule recognizes that the flexibility in considering without prejudice "off-site" and "out-of-kind" mitigation is an enhancement for the watershed and for functional and valuable compensatory mitigation.

However, we must express some concerns regarding the many situations where the ideal --- existence of a formal watershed plan --- developed by federal, state/and or local authorities is absent. We understand that guidelines exist for developing watershed plans and that "project sponsors should make a reasonable effort commensurate with the scope and scale of the project and impacts, to obtain" information such as: current trends in habitat loss and conversion; cumulative impacts of past and current development activities; sensitive species' needs, if any; site conditions hindering or favoring the success of mitigation projects; chronic environmental problems, including flooding or poor water quality; and local watershed goals and priorities. It would clearly be too burdensome to place on the permittee's shoulders the responsibility for development of a

watershed plan that rivals one developed by the resources and time invested by the combined efforts of federal, state and local governments.

Therefore, it would be unwise to specify minimal information requirements for use in the watershed approach. Even with less than exhaustive watershed information, such an approach is ecologically superior to a non-watershed focus. We believe that it is important for the District Engineer, who is clearly the decision-maker regarding the approval of mitigation banking instruments and the service area of a mitigation bank, to have the same role in ultimately determining the adequacy of the information provided in a watershed plan and the degree to which a watershed approach is practicable. The responsibility of project sponsors to develop watershed plans where they do not exist must have some limits and the proposed rule's discussion of "reasonable effort commensurate with the scope and scale of the project and impacts" is appropriate if adhered to by the District Engineer.

Timing

The proposed rule states generally, that compensatory mitigation should be done in advance of or concurrent with adverse impacts. Additionally, it states that if it is "not practicable to complete the initial physical and biological improvements required by the approved mitigation plan by the first full growing season following the impacts resulting from the permitted activity" the Corps may increase the required mitigation ratios to account for temporal loss.

NSSGA interprets this as "physical mitigation" --- moving dirt, replacing plants, etc. --- as opposed to the administrative side of mitigation --- hiring consultants, planning, etc. We suggest an extension of the timing before mitigation ratios are increased, from the "first full growing season" until the "second full growing season." In recognition that the proposed rule covers all compensatory mitigation, not solely mitigation banks, it may be extremely difficult in some unpredictable climates and in areas with very short growing seasons to "physically" mitigate in advance of or concurrent with project impacts. Based on timing and financial constraints inherent in complicated land planning activities more flexibility is needed and appropriate. This proposed rule makes some progress toward the goal of focusing on functional values rather than acreage alone, and while we understand and respect the issue of temporal loss, NSSGA feels that a little more flexibility here given regional variability is appropriate. Recently, the U. S. Department of the Interior released a report that demonstrates for the first time a "net gain" in wetlands acreage in the United States. As we proceed beyond the "no net loss" goal it is appropriate to focus more precisely on functions and values within a watershed context rather than focus immediately on acreage.

Functional Analysis

A workable methodology for measuring functions and values is critical to this entire effort. Ecological performance standards that are based on variables or measures of

functional capacity described in functional assessment methodologies should be adaptable to the region or watershed where the compensatory mitigation is taking place. Some methodologies are overly complex and less useful without adaptations in specific regions of country. It is important that flexibility in assessment methodology be followed and that methods that are user friendly, easy to replicate and appropriate for a given region or watershed be allowed.

Financial Assurances

The proposed rule requires that all mitigation providers secure sufficient financial assurances to assure completion of the compensatory mitigation consistent with an approved mitigation plan. It is noted that financial assurances may take several forms such as letters of credit, performance bonds, or other sureties. It is also noted that the District Engineer will determine on a case-by-case basis appropriate financial assurances and that in cases "where alternative mechanisms are used to provide reasonable assurances that compensatory mitigation projects will be completed financial assurances may not be necessary or appropriate." Most states require a "bond" for reclamation activities for stone, sand and gravel surface mines. NSSGA requests that the final rule specifically consider existing bonds required by state and sometimes local governments as potentially adequate for financial assurance if such assurance is deemed necessary.

Co-Permitting

The concept of "co-permitting", where the mitigation bank sponsor would sign the permit and assume responsibility for providing compensatory mitigation credits once the permittee has secured those credits from the mitigation bank, seems unnecessary and problematic at best. This is especially the case given the special condition permit language in the proposed rule to transfer responsibility for providing compensatory mitigation in cases where credits are secured from a mitigation bank. Since permits are at times amended and provide for a multitude of legal responsibilities, co-permitting could muddy the waters, increase confusion and conflict and cause more harm than benefit. While the concept might be attractive to some, it could ultimately put small, but necessary, mitigation bank sponsors at a competitive disadvantage.

In-Lieu Fee Programs

Under the proposed rule, in-lieu fee programs are to be completely phased out within five years if they are not modified to meet the requirements of mitigation banks within that time frame. We feel that "in-lieu-fee" programs are useful and necessary especially in certain areas where full-scale mitigation banks are not available or economically feasible. It would be better to consider tightening regulation of "in-lieu fee" programs rather than eliminating them entirely. As is noted in the proposal, more financial assurance can be required for such programs and they can be restricted to specific geographic regions, specific aquatic resource types or small project impacts. Retaining limited "in-lieu fee" programs with a preference for mitigation banks makes more sense.

The total elimination of "in-lieu fee" programs could lead to a reduction of mitigation opportunities. For companies like those in our industry which are closely tied to the communities in which they operate, "in-lieu fee" programs with the right mix of local and governmental agencies and NGO's, are important opportunities to pay back the public, establish a rapport with stakeholders and maintain a community-based focus while at the same time contributing to critical land stewardship in areas where that assistance is most needed.

Maintaining a restricted form of "in-lieu" fee program as an alternative option for those who cannot locate or afford a mitigation bank option would seem to be the prudent choice.

Flexibility In Using Mitigation Projects to Meet Other On-Site Regulatory Requirements

It is appropriate that the proposed rule recognize that compensatory mitigation, including mitigation banks, may be designed to comprehensively address requirements under multiple programs and authorities for the same activity, for example providing separate credits for both wetland creation under the CWA and habitat conservation under the ESA.

Other Issues

There are many other important issues which we do not have time to address in detail. We agree with the appropriateness of a five-year monitoring period in most circumstances and are pleased to see the treatment and understanding of the "umbrella" mitigation banking concept. We believe that the proposed rule indeed makes the process of establishing a mitigation bank more predictable by establishing more disciplined time frames and articulating a dispute resolution process while at the same time acknowledging the primary decision making authority of the District Engineer. The recognition of preservation and buffer areas, including riparian areas as critically important and eligible for credits is also a positive feature of the proposal.

Summary

NSSGA views this proposed rule on compensatory mitigation in general as an advance toward a more rational and effective compensatory mitigation regulatory regime which in most instances will maximize available credits and opportunities for mitigation and enhance the ability of quality mitigation banks to be established and to be successful on the basis of an environmentally justified watershed approach. Among the most positive aspects of the proposed rule which NSSGA supports are:

- **Greater emphasis on watershed ecology;**
- **More flexibility to consider off-site and out-of-kind mitigation where appropriate;**
- **Appropriate credits for preservation and buffer areas;**
- **Increased emphasis on function and values rather than just acreage; and**