



Ecological Restoration Business Association
 8270 Greensboro Drive
 Tysons, Virginia 22102
 P: 703-584-8375 · www.ecologicalrestoration.org



February 3, 2021

Pennsylvania Environmental Quality Board
 Rachel Carson State Office Building, 16th Floor
 400 Market Street
 Harrisburg, PA 17101-2301
 Via email to RegComments@pa.gov

Re: Proposed Rule-Making 25 PA. Code Ch. 105

The Ecological Restoration Business Association (ERBA) appreciates the opportunity to comment to the Environmental Quality Board (the Board) on the proposal to amend Chapter 105 to update provisions relating to compensatory mitigation (the Amendment). ERBA represents third party providers of Clean Water Act §404 mitigation and other ecological restoration solutions across the country, including Pennsylvania. Our members deliver mitigation through the three mitigation forms of banks, In-Lieu Fee (ILF) programs, and permittee responsible mitigation (PRM).

All three of these delivery mechanisms play a critical and necessary role in the §404 mitigation program by providing regulators and permittees with options to responsibly move forward with permitted impacts. Regardless of delivery mechanism, ERBA is committed to high, consistent standards and stringent application of the 2008 Mitigation Rule at 33 CFR 332 (the Rule) to all forms of compensatory mitigation. Predictable adherence to the Rule incentivizes private investment in mitigation options and accountable environmental outcomes. From our national perspective, ERBA offers the following specific recommendations for your consideration:

I. Add a Definition for “Service Areas.” The Amendment adds “Service Areas” as a defined term to support language under 105.20a (b) and (c) regarding the siting of compensatory mitigation and would revise siting criteria on a watershed basis. We recommend that the Service Areas definition include language to ensure that the service areas for mitigation banks and ILF programs are established using the same criteria and based on the same geographic area.

This recommendation for equivalency in Service Areas is consistent with the Rule (see Section 314(b)) and the guidance set forth in Regulatory Guidance Letter 19-01 (RGL 19-01, February 22, 2019), which was issued to guide district engineers in establishing equivalent service areas for mitigation banks and ILF programs. Notably, this guidance states that:

Congress mandated that 33 CFR Part 332 ‘apply equivalent standards and criteria to each type of compensatory mitigation’ (Section 314(b) of Pub. L. 108-136). Therefore, each Corps district should ensure that within their district, service areas for mitigation banks and in-lieu fee programs are established using the same criteria. Thus, service areas for mitigation banks and in-lieu fee programs operating in the same Corps district and providing mitigation credits for similar aquatic resource categories should be based on the same geographic criteria (e.g., watershed, ecoregions, physiographic provinces),

as long as the mitigation bank sponsor uses similar criteria for selecting compensatory mitigation sites as the in-lieu fee program sponsor....Because mitigation banks and in-lieu fee programs differ primarily in the timing of implementation of compensatory mitigation projects, there is no ecological basis for approving different service areas for mitigation banks and in-lieu fee programs that provide credits for similar aquatic resource types and use similar site selection criteria.

Again, because the U.S. Army Corps of Engineers holds authority to establish service areas under §404 of the Clean Water Act, the definition of “Service Areas” must ensure that service areas for mitigation banks and ILF programs are determined equitably and in accordance with the Rule and RGL 19-01. Further, we request that the definition for “Service Areas” add that credits from mitigation bank secondary service areas, particularly when the bank has met ecological performance standards, should be prioritized over advance credits from ILF programs or PRM projects, in accordance with the Rule’s hierarchy at 33 CFR 332.3.

II. Consistency with the Rule and Mitigation Preference Hierarchy. The public notice states that the Amendment would generally be consistent with the Rule. To ensure consistency with the Rule, we recommend that the Amendment not just “allow mitigation banking, in-lieu fee, and permittee responsible mitigation options,” but also explicitly define and mirror the preference hierarchy established in the Rule. Bank credits are often the preferable mitigation option due to the advance planning, site identification, construction, and attainment of ecological standards in advance of permitted impacts, which all reduce performance risk and the temporal loss of ecological services. These advance mitigation features of banks underpin the Rule’s established hierarchy for selecting the type and location of compensatory mitigation with an explicit preference at §332.3(b)(2) for mitigation bank credits over advance credits for ILF programs when appropriate bank credits are available for use. To ensure consistency with this significant provision of the Rule, the Amendment should also incorporate the mitigation preference hierarchy.

III. Add a Definition for “Temporal Loss.” The Amendment would incorporate by reference Pennsylvania’s Rapid Assessment and Aquatic Resource Functional Assessment Protocols (the Functional Protocol) for compensatory mitigation to promote consistency with the Rule. The reference is made under the presumption that “the addition of these guidance documents and methodologies would provide a standardized and predictable process for the regulated community in evaluating the appropriate level of compensatory mitigation needed to offset unavoidable impacts to aquatic resources for a given project.” While in many ways the Functional Protocol is consistent with the Rule, the Functional Protocol does not address the important issue of temporal loss. Under §332.2 “Definitions,” the Rule defines temporal loss as “the time lag between the loss of aquatic resource functions caused by the permitted impacts and the replacement of aquatic resource functions at the compensatory mitigation site. Higher compensation ratios may be required to compensate for temporal loss.”

ERBA recommends adding the term “temporal loss” to the Amendment as a new definition to achieve consistency with the Rule. Additionally, we request that the Functional Protocol incorporate a temporal loss coefficient for ILF credits or PRM projects, or that the crediting otherwise account for temporal loss to promote consistency with the Rule. These recommendations on a “temporal loss” definition would align the Amendment with guidance in peer states that accounts for temporal loss in function crediting. For example, the West Virginia Stream & Wetland Valuation Metric (2017) implemented in the Army Corps of Engineers’ Huntington and Pittsburgh Districts includes multiple references to “temporal loss,” including a discussion on how to account for temporal loss in crediting ratios.

Thank you for your consideration of this comment letter. As always, ERBA strives to serve as a resource and practitioner partner to the agencies that our members work with, including the Board. Please do not hesitate to reach out to ERBA on the comments we present here or if ERBA members can assist with further information or perspectives.

Sara Johnson, Executive Director
The Ecological Restoration Business Association
sjohnson@ecologicalrestoration.org