



REPLY TO
ATTENTION OF

DEPARTMENT OF THE ARMY
NEW ORLEANS DISTRICT, CORPS OF ENGINEERS
P.O. BOX 60267
NEW ORLEANS, LOUISIANA 70160-0267

CEMVN-PM-RS

30 Jan 2009

MEMORANDUM THRU Director, Task Force Hope

FOR Commander, Mississippi Valley Division

SUBJECT: Mitigation Path Forward for Hurricane and Storm Damage Risk Reduction System (HSDRRS)

1. Background for referenced subject.

a. Legislation. Section 2036(c), Wetlands Mitigation, of the Water Resources Development Act of 2007 (WRDA 2007), directs the US Army Corps of Engineers (Corps) to consider the application of mitigation banks for civil works projects. The legislation states:

“In carrying out a water resources project that involves wetlands mitigation and that has impacts that occur within the service area of a mitigation bank, the Secretary, where appropriate, shall first consider the use of the mitigation bank if the bank contains sufficient available credits to offset the impact and the bank is approved in accordance with the federal guideline for the establishment, use and operation of mitigation banks or other applicable federal law (including regulations).”

b. Interpretation. On 6 November 2008, CECW-P issued Implementation Guidance for the WRDA 2007-Section 2036(c) Wetlands Mitigation. The guidance provides an interpretation of the legislative language as follows:

“The purchase of credits from mitigation banks established by others shall be considered first, where appropriate, when providing compensatory mitigation for environmental impacts to wetlands resulting from construction of a Corps Civil Works project.”

No further guidance or interpretation of the statute has been provided to date.

2. Application to New Orleans HSDRRS.

a. Scale. To provide the 100-year level of protection as authorized by Congress through P.L. 109-234 (4th Supplemental); P.L. 110-28 (5th Supplemental); and P.L. 110-252 (6th Supplemental) for the New Orleans HSDRRS, mitigation will be required for over 4,000 acres of unavoidable wetland impacts. The 2007 Programmatic Cost Estimate for mitigation was approximately \$600 million.

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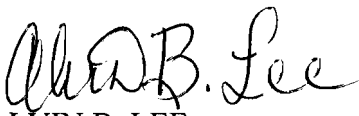
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b. CEMVN Evaluation. The CEMVN established a multidisciplinary team to investigate implementation of Section 2036(c) of WRDA 2007 for the HSDRRS for the New Orleans area.

c. Finding. It is not appropriate to use mitigation banks for executing the HSDRRS mitigation mission for the following reasons: (1) enormous size and scope of the HSDRRS mitigation mission, (2) an insufficient amount of available mitigation credits in the project watershed, (3) the inability to reliably project a price for the mitigation credits needed, (4) contracting issues, (5) the possible uncontrolled escalation of over-all project costs, (6) negative impacts to the CEMVN's Clean Water Act Section 404 regulatory program, (7) resource agency concerns, and (8) non-Federal sponsor concerns of purchasing mitigation credits in areas away from project impacts, all as discussed further, below.

3. The CEMVN has considered the purchase of credits from private mitigation banks to provide compensatory mitigation for environmental impacts to wetlands resulting from construction of the New Orleans HSDRRS projects. The CEMVN concurs with the recommendation of the mitigation team that it is not appropriate to use mitigation banks for execution of the HSDRRS mitigation obligation. Please see enclosed document which discusses factors influencing this decision.

Encl


ALVIN B. LEE
Colonel, EN
Commanding

Discussion of Factors Influencing the Decision

The size and scope of the New Orleans HSDRRS mitigation mission renders the use of mitigation banks inappropriate.

The CEMVN HSDRRS Environmental Team projects over 4,000 acres of unavoidable wetland impacts that will require mitigation and expects that the amount of mitigation necessary will continue to grow as elements of the HSDRRS are finalized. The CEMVN HSDRRS Environmental Team is currently tracking a need to mitigate for 465 Average Annual Habitat Unit (AAHUs) of Bottomland Hardwood wet, 507 AAHUs of Bottomland Hardwood non-wet, and 63 AAHUs of marsh.

There is currently one mitigation bank in the New Orleans area watersheds with 63 average annual habitat units of marsh available. There are an additional six mitigation banks in the parishes to the north and west of New Orleans that contain 3,916 AAHUs of Bottomland Hardwood wet. The majority of these AAHUs (3,619) are part of a mitigation bank in St. Charles Parish that is on the protected side of a non-Federal levee. Only protected side HSDRRS Bottomland Hardwood AAHUs (507 AAHUs non-wet) would be considered for the St. Charles site. A consensus with the resource agencies would be required, since the HSDRRS protected side impacts are Bottomland Hardwoods non-wet and the St. Charles site AAHUs are Bottomland Hardwoods wet. Of the remaining five Bottomland Hardwood mitigation banks in the area, one is in the East Baton Rouge (Amite River) area. In discussions with the resource agencies, it was determined that this site was too far away from the impact area to be considered as a mitigation service area for HSDRRS Bottomland Hardwoods wet impacts. Majority of the Bottomland Hardwood impacts wet are associated with the West bank and Vicinity project. With these two major mitigation banks eliminated from consideration for Bottomland Hardwood wet impacts, there is a total of 87 AAHUs available for mitigation of Bottomland Hardwoods in the remaining four banks.

Habitat Type	Projected AAHUs		
	Need ¹	Available in-kind ²	Available in-place ³
Bottomland Hardwood - wet	465	3,916	87
Bottomland Hardwood - non wet	507		
Marsh	63	63	

¹ This number will increase as final designs are completed.

² AAHUs available in approved mitigation banks in SE Louisiana.

³ AAHUs available in approved mitigation banks in local watershed.

With the amount of mitigation credits currently available, the CEMVN cannot come close to completing the HSDRRS mitigation mission using existing mitigation banks. Additional mitigation banks would need to come online to enable the CEMVN to acquire a sufficient amount of credits to meet the HSDRRS mitigation requirements. Section 2036(c) clearly states

that the Secretary "... shall first consider the use of the mitigation bank *if* the bank contains sufficient *available* credits (emphasis added)."

Compensatory mitigation should be completed concurrently with project construction (environmental impact), or as soon as possible thereafter. Waiting for possible mitigation banks to possibly come online sometime in the distant future in potentially adequate numbers is too far removed from this requirement and contradictory to Section 2036(c)'s requirement to consider the use of a mitigation banks "*if* the bank contains sufficient *available* credits".

The price of mitigation credits is market-driven, therefore the size of the HSDRRS mitigation mission will impact market rates for mitigation credits in the project watershed. The CEMVN will not be able to accurately forecast the cost of purchasing mitigation credits for the HSDRRS mission.

The value of a mitigation credit from a mitigation bank depends solely on current demand—mitigation credit prices are market-driven. An owner of a mitigation bank can set prices for mitigation credits based on credit availability and demand for those credits. As such, the CEMVN does not have the capability to reliably predict the cost of credits in advance of purchase, and mitigation bank owners can raise and lower credit prices at will. This makes project planning, budgeting, and contracting almost impossible to achieve.

CEMVN Contracting Division has expressed concerns regarding sole source contracts and negotiation of fair market value of a credit.

Securing sufficient amounts of mitigation credits raises many of the same issues the CEMVN faces regarding securing sufficient borrow material for the HSDRRS. The purchase of mitigation credits could potentially result in more complex and difficult problems than borrow acquisition for the CEMVN Contracting Division given that each mitigation project inside the HSDRRS would be selected after an independent evaluation of alternatives. Further, because a variety of resource types will be impacted through construction of the HSDRRS, securing mitigation credits from different types of mitigation banks will be necessary.

A NEPA analysis of HSDRRS mitigation projects would be conducted by the CEMVN prior to formal contract negotiation with owners of mitigation banks on issues of price or availability. This public disclosure of the CEMVN's intention to use mitigation banks for its HSDRRS mitigation projects prior to formal contract negotiations, coupled with the CEMVN's stated need for massive amounts of mitigation bank credits, could influence the market and the price of available credits.

The CEMVN's 2007 Project Cost Estimate (PCE) for mitigation for the HSDRRS was approximately \$600 million. If the CEMVN executes its HSDRRS mitigation mission via the purchase of mitigation bank credits, it is possible that the cost could exceed the PCE for the HSDRRS mitigation mission.

The CEMVN's large-scale purchase of mitigation bank credits may impede private development in the New Orleans HSDRRS project area. Private developers and homeowners rely upon the

availability of wetland mitigation banks to meet the mitigation requirements of their CWA 404(b)(1) permits. Due to the amount of credits needed by the CEMVN to complete the HSDRRS mitigation mission and the relatively small amount of available mitigation credits in the project watershed area, CWA 404 permit applicants would likely face delays in securing sufficient mitigation credits and those credits would likely be more expensive. If the CEMVN purchases entire blocks of credits from local mitigation banks, the entire supply of credits for certain types of resources could be depleted, thus making certain private development projects cost prohibitive, or simply impossible to complete.

The HSDRRS projects were designed on an expedited schedule to aid in the economic recovery of New Orleans following Hurricane Katrina. Should the CEMVN purchase all available mitigation credits in the region, private developers and home owners could experience, at a minimum, time delays and cost increases. These constraints on regional development would be contrary to the intent of HSDRRS projects to facilitate the economic recovery of the region.

Further, for the CEMVN to perform a legally sufficient NEPA analysis of its proposed mitigation projects, it must discuss unavoidable socio-economic impacts that arise from purchasing its credits from mitigation banks. These socio-economic impacts could include the impacts to the CWA 404 permitting program and regional development, as discussed previously, raising public concern and creating negative public comment.

Resource Agency concerns.

The U.S. Fish and Wildlife Service (USFWS) has expressed concerns to the CEMVN regarding the purchase of mitigation bank credits for large-scale civil works projects. The USFWS has stated that it would be amenable to the CEMVN's purchase of mitigation credits for small civil works projects; however, it would prefer that mitigation for large-scale civil works projects not be achieved via the purchase of mitigation credits. The USFWS would prefer that the CEMVN construct its own mitigation projects for large-scale civil works projects. This is not a formal position of USFWS at this time.

Mitigation projects performed in state or Federal wildlife areas would have the additional benefit of public access and recreational use. Private mitigation banks retain their private ownership, and the public is not allowed access. With the present projected need for 4,000 acres in compensatory mitigation, a potential exists to provide the public with additional benefits, beyond that of wetland compensation, including hiking, biking, wildlife viewing, etc., by mitigating in state or Federal wildlife areas rather than merely purchasing credits from a private mitigation bank.

Non-Federal Sponsor Concerns.

The CEMVN anticipates a mixed reaction from its non-Federal sponsor (NFS) for the New Orleans HSDRRS project if the CEMVN were to propose purchase of mitigation bank credits as the method for mitigating the impacts from the HSDRRS project.

In the case of traditional mitigation, the NFS would acquire the appropriate real estate interest in the mitigation site, consistent with its obligation to provide lands, easements and rights of way for the project. In addition, the mitigation construction costs would be cost-shared by the

CEMVN and the NFS. The NFS would be required to operate and maintain (O&M) the mitigation area for the life of the project.

One of the positive aspects of using mitigation banks from the NFS perspective is that the purchase is a one-time construction cost that may or may not be cost-shared, depending upon the specific project authorization. The purchase of mitigation bank credits eliminates the NFS's obligation to O&M the mitigation project.

However, for reasons stated earlier in this memo, the CEMVN will be unable to reliably project the cost of purchasing mitigation bank credits. It is possible that given the market conditions in the project area combined with the large demand generated by the HSDRRS mitigation mission that the purchase of mitigation credits, even though it is a one-time cost, could result in a much higher cost to the NFS than traditional mitigation.

Further, the CEMVN anticipates its NFS to prefer mitigation in close proximity to the project impacts (i.e. if the impact to wetlands is in St. Bernard Parish, the NFS would prefer the mitigation for the project to occur in St. Bernard Parish). However, it is likely that some mitigation credit purchases would be from mitigation banks that are in the same watershed, but are not in the same parish as the projects. The NFS, and public, may feel that certain parishes are bearing the impacts for project construction while other parishes outside the project area, but within the same watershed, are reaping the economic and ecological benefits from the purchase of mitigation credits inside their jurisdictions.