June 29, 2006

RE: Docket No. EPA-HW-OW-2006-0020

To Whom It May Concern:

Thank you for the opportunity to submit comments on the proposed rule, *Compensatory Mitigation for Losses of Aquatic Resources,* published at 71 Fed. Reg. 15520 (March 28, 2006). Public Employees for Environmental Responsibility (PEER) is a Washington D.C.-based non-profit, non-partisan public interest organization concerned with honest and open government. Specifically, PEER serves and protects public employees working on environmental issues. PEER represents thousands of local, state and federal government employees nationwide, including many working in the field of wetland protection.

Background

On March 28, 2006, the Environmental Protection Agency (EPA) and the Army Corps of Engineers (Corps) jointly proposed a rule revising the standards governing compensatory mitigation for aquatic resources, including wetlands and streams. The proposed rule would amend the Corps regulations at 33 C.F.R. Part 325 and add a new Part 332, and would also amend the EPA 404 (b)(1) guidelines at 40 C.F.R. 230. In general, PEER believes that wetland creation (one type of wetland mitigation) is fraught with scientific uncertainties and has a horrendous track record. Therefore, PEER is uncomfortable with the concept of mitigation banks as it pertains to wetland creation. Moreover, given the flaws and uncertainties contained in the proposed rule, this discomfort is magnified even more.

PEER is also concerned about the message that this proposed rule sends. It is abundantly clear that mitigation bank special interests are behind this proposal. Basically, the proposed rule is pushing applicants to use available banks, and if there are no banks, to establish one. In fact, the proposed rule goes so far as to make it *mandatory* for the district engineer to use a bank in some instances (see, e.g., page 155236 of the proposed rule which states, "...the district engineer ***shall*** require that this alternative compensatory mitigation be required...." (emphasis added)). The Corps and EPA should not be championing the use of unproven mitigation banks as a substitute for traditional mitigation.

We would also like to take this opportunity to point out that this proposed rule has the potential to be rendered meaningless should the recent Supreme Court decision in *Rapanos et ux., et al. v. United States* result in a significant decrease in federal jurisdiction over wetlands and intermittent streams. PEER believes that the decision

authored by Justice Scalia is non-sensical; that is, any discharge of pollutants into wetlands and/or intermittent streams feeding navigable waters of the United States will ultimately adversely impact navigable waters. It is inconceivable that Congress intended to protect waters of the United States while allowing the headwaters and wetlands that purify and protect such waters to be degraded. Until this issue is clarified legislatively, PEER urges both the Corps and EPA to issue guidance on the matter consistent with EPA's *amicus* brief on the *Rapanos* case.

Specific Comments

No Net Loss

On page 15535 of the proposed rule, "preservation" is defined as "the removal of a threat to, or preventing the decline of, aquatic resources by an action in or near those aquatic resources." The rule goes on to clarify that "[p]reservation does not result in a gain of aquatic resource areas or functions." Given that preservation does not result in a gain of aquatic resource areas or functions, preservation cannot, by itself, be used as mitigation for a loss of aquatic resource areas or functions. To do so would result in a net loss of wetlands, which is contrary to existing national policy. However, on page 15537, the proposed rule states "[p]reservation may be used to provide compensatory mitigation..." In addition, the proposed rule allows for credits to be given for buffers and uplands (see page 15543). While PEER certainly agrees that uplands and buffers are critical components of the aquatic ecosystems, they cannot compensate for the loss of aquatic areas. PEER suggests that the rule be amended such that preservation of wetlands, buffers and uplands must be included as part of a mitigation package, but cannot be used to gain credits for the destruction of wetlands and other aquatic areas.

Moreover, the proposed regulations are unclear as to the *amount* of mitigation that would be required. Instead, it leaves the determination of credits (see page 15539) up to the applicant and the managers of the bank. Decades of failed mitigation sites and scientific research have taught us that 1:1 mitigation is simply not sufficient. PEER believes that if the proposed rule is silent on the issue of mitigation amounts, the natural fallback position will be 1:1. Therefore, PEER believes the proposed rule should be amended to specify the amount of mitigation required, which must take into consideration the percentage of mitigation projects that fail.

The rule does not require that mitigation bank sites be protected in perpetuity. Rather, Section 332.7 of the proposed rule states that "[t]he aquatic habitats, riparian areas, buffers, and uplands that comprise the overall compensatory mitigation project ***should*** be provided long term protection...." (emphasis added). It is non-sensical to allow an applicant to destroy wetlands, buy credits to a mitigation bank to compensate for these wetlands, and then not protect the wetlands that have been created in the bank. If the mitigation banks themselves are not protected, there will undoubtedly be an ultimate net loss of wetlands. For example, if a mitigation bank is allowed to be destroyed before the mitigated wetlands are given a chance to succeed, the perceived value of the wetlands would be lower than if they had been natural wetlands. Therefore, one could envision a scenario where high quality wetlands were filled, these wetlands were mitigated through the purchase of credits in a bank, and a few years later these mitigated wetlands are filled

and mitigated - with less value wetlands - elsewhere. The scenario is rather like a child's game of "Operator," where the whispered sentence gets more and more mangled as it is passed around the room. In this case, the wetlands become of lower and lower value as they are mitigated, because of the natural lag time associated with wetland creation and restoration. PEER therefore recommends that the proposed rule be revised to require that all mitigation banks be preserved in perpetuity.

Stream mitigation

The proposed rule allows for the mitigation of streams. There is a plethora of scientific evidence on the importance of headwaters streams, yet there is a dearth of evidence supporting the contention that these streams can be re-created, or even restored. Until it can be demonstrated to the satisfaction of peer reviewing scientists that the functions of these streams can be mitigated, it is not appropriate to allow their destruction in exchange for the promise of their re-creation in a mitigation bank.

PEER recommends that the Corps and EPA remove all language relating to stream mitigation, and conduct research on the feasibility of stream mitigation.

Sequencing

Sequencing - avoiding wetland impacts, minimizing unavoidable impacts, and mitigating for any impacts that remain- is the fundamental principle of Section 404 of the Clean Water Act. Currently, the regulations require an applicant to clearly demonstrate that less damaging alternatives are not practicable, and a permit *cannot* be issued if such practicable alternatives exist. An applicant must then minimize any unavoidable impacts, and mitigate for the remaining impacts. However, the proposed rule only requires the Corps to make a "determination that the permit applicant has taken all appropriate and practicable steps to avoid and minimize adverse impacts to waters of the United States" (page 15534). In order to avoid confusion in the regulated community, and to ensure the continued stringent application of sequencing, the Corps and EPA should reiterate the current sequencing language exactly.

District Engineer Discretion

The proposed rule leaves virtually everything to the discretion of the District Engineers of the Corps. For example, page 15537 of the proposed rule states, "the district engineer ***should*** require that compensatory mitigation be of a similar type to the impacted resource" (emphasis added). Note that there are dozens of examples of this type of unconstrained discretion peppered throughout the proposed rule. Given that District Engineers vary in their stringency from district to district, this would result in the unequal application of this rule across the country, which would in turn result in an uneven playing field for the regulated community. By utilizing discretionary words such as "should" and "may" instead of mandatory language such as "must" or "shall," the Corps and EPA are guaranteeing confusion among the regulated community and the regulators themselves. Moreover, this discretionary languages turns this proposed rule into a guidance document without the force of law, and results in something that is completely unenforceable. PEER therefore recommends that all the duties imposed on District Engineers be mandatory duties rather than discretionary.

Timing of Credits

Page 15538 of the proposed rule states that "[i]mplementation of the compensatory mitigation project shall be, to the maximum extent practicable, in advance of or concurrent with the activity causing the authorized impacts." PEER strenuously disagrees with the leeway given in this part. Given the scientific uncertainty associated with wetland creation, PEER believes it must be *mandatory* that credits be given only for mitigation that is in place and fully functioning. Although the proposed rule states that the District Engineer "may" require additional compensatory mitigation to offset temporal losses, this vague, discretionary requirement is not enough to ensure no net loss of wetlands. Therefore, PEER recommends that the rule be amended to require the mitigation to be in place and fully functioning before credits can be drawn.

Specific Regional Concerns

PEER has concerns about the elimination of in lieu fee programs, and their replacement with mitigation banks, for the New England region in particular. In New England, the majority of authorized impacts occur in the State Programmatic General Permit (SPGP) category. Some of these projects result in on-site mitigation for local impacts (such as flood storage), but it is rare that other mitigation is required. New England currently does not have any operational mitigation banks (the one bank currently proposed in Massachusetts has serious flaws, and it is unlcear when, or if, this bank will be up and functioning). Due to this unique circumstance, the federal agencies and their state counterparts are developing in lieu fee programs in four of the six New England states for the *SPGPs only*. In this instance, these in lieu fee programs will result in additional protection that would otherwise not be gained. PEER therefore believes that the proposed rule ought to allow for in lieu fee programs when mitigation banks are not appropriate or available.

Conclusion

PEER has serious concerns about the proposed rule as written. While we are certainly open to more oversight and accountability over mitigation, the rule as written does not provide this oversight or accountability. We urge EPA and the Corps to amend the proposed rule to protect our vital wetlands and waters, and to provide clarity and a level playing field for the regulated community.

Thank you for the opportunity to comment.

Sincerely,

Jeffrey Ruch
Executive Director