



PAT MCCRORY
Governor

DONALD R. VAN DER VAART
Secretary

MEMORANDUM

TO: ENVIRONMENTAL REVIEW COMMISSION
The Honorable Jimmy Dixon, Co-Chairman
The Honorable Chuck McGrady, Co-Chairman
The Honorable Trudy Wade, Co-Chairman

HOUSE OF REPRESENTATIVES SUBCOMMITTEE ON AGRICULTURE AND NATURAL AND
ECONOMIC RESOURCES

The Honorable Jimmy Dixon, Co-Chairman
The Honorable Pat McElraft, Co-Chairman
The Honorable Roger West, Co-Chairman

SENATE APPROPRIATIONS SUBCOMMITTEE ON NATURAL AND ECONOMIC RESOURCES

The Honorable Andrew Brock, Co-Chairman
The Honorable Bill Cook, Co-Chairman
The Honorable Trudy Wade, Co-Chairman

FISCAL RESEARCH DIVISION

FROM: Mollie Young, Director of Legislative Affairs

SUBJECT: Progress Report in Petitioning the US Army Corp of Engineers for Wetlands Mitigation
Flexibility

Pursuant to Session Law 2015-241, section 14.24(a), “the Department shall report on its progress in petitioning the Corps Offices as required by subsection (a) of this section to the Environmental Review Commission, the chairs of the Senate Appropriations Committee on Natural and Economic Resources and the House Appropriations Committee on Agriculture and Natural and Economic Resources, and the Fiscal Research Division no later than March 1, 2016.” The attached document satisfies this reporting requirement.

If you have any questions or need additional information, please contact me by phone at 919-707-8618 or via email at Mollie.Young@ncdenr.gov.

cc: Tom Reeder, Assistant Secretary for Environment, DEQ
Michael Ellison, Director of Mitigation Services, DEQ





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Progress Report in Petitioning the US Army Corp of Engineers for Wetlands Mitigation Flexibility

Department of Environmental Quality, Division of Mitigation Services

In accordance with North Carolina Session Law 2015-241, Section 14.24(a), the North Carolina Department of Environmental Quality petitioned the United States Army Corps of Engineers (USACE) to allow for public and private mitigation providers within the state to perform wetland mitigation outside of the eight-digit Hydrologic Unit Code (HUC) where development will occur in order to allow for greater flexibility of mitigation. This request was made with two observations:

(1) that there have been inconsistent case-by-case allowances for multi-HUC mitigation credit usage by the Wilmington District, particularly with unique North Carolina Department of Transportation off-site mitigation sites in the past (a situation that does not allow any predictability for mitigation providers in the District), and

(2) that mitigation banks in other USACE Districts in the Southeastern United States are routinely afforded substantially larger service areas. As required by the Session Law, the petition was sent to the Wilmington District, the South Atlantic Division, and the Headquarters of the United States Army Corps of Engineers.

On February 19th, the Department of Environmental Quality received a response from Colonel Kevin Landers, Sr., the District Commander for the Wilmington District of the South Atlantic Division of the United States Army Corps of Engineers. In his response, Colonel Landers pointed out that mitigation credits are generally available statewide through the DEQ Division of Mitigation Services, and that when located within the same HUC as proposed impacts, mitigation credits provided by the state are preferred over credits outside the HUC of impact that could be provided by private enterprise. Colonel Landers concluded that “the Geographic Service Areas currently in place are generally consistent with the current practices of other Districts, and are compliant with Federal rules and regulations.” Therefore, despite the Department’s request, the Wilmington District appears to have no plans to allow for greater flexibility and opportunity to perform wetlands mitigation outside of the eight-digit Hydrologic Unit Code (HUC) where development will occur, for both public and private development. Please find attached Colonel Lander’s full response.





DEPARTMENT OF THE ARMY
WILMINGTON DISTRICT, CORPS OF ENGINEERS
69 DARLINGTON AVENUE
WILMINGTON, NORTH CAROLINA 28403-1343

February 4, 2016

Regulatory Division

Subject: North Carolina petition for Multi-HUC Service Areas for Mitigation

Donald R. van der Vaart, Secretary
North Carolina Department of
Environmental Quality
1601 Mail Service Center,
Raleigh, North Carolina 27699-1601

RECEIVED
Office of the Secretary

FEB 19 2016

Department of Environment
and Natural Resources

Dear Secretary van der Vaart:

Please reference your letters dated January 4, 2016, from the North Carolina Department of Environmental Quality (NCDEQ) concerning expansion of mitigation service areas to the Wilmington District (District), to Brigadier General C. David Turner, and Lieutenant General Thomas P. Bostick. Your letters requested the District consider revisions to the Geographic Service Areas (GSAs) currently used for compensatory mitigation requirements associated with Department of the Army (DA) permits. We understand that this request was also a requirement of North Carolina Session Law 2015-241, Section 14.24(a), which mandates that NCDEQ petition the District in this regard.

We have given much consideration to this petition and understand the economic impact that GSAs have on the business of mitigation banking within the state. Furthermore, in our review of the District's GSAs, we have considered the recommendations of the Presidential Memorandum referenced in your letters, as well as the requirements of 33 CFR Part 332, Federal Mitigation Rule (Rule). After thorough consideration of this matter, we have concluded that the GSAs currently in place are generally consistent with the current practices of other Districts, and are compliant with Federal rules and regulations.

Consistency with other USACE Districts

As you know, the Wilmington District (District) has historically used the 8-digit Hydrologic Unit Code (HUC) as the basis for establishing GSAs. However, a case-by-case consideration of a different GSA can be made based on site specific factors such as credit demand, ecoregion, and the types of aquatic resources being impacted and restored. The Wilmington District has received several requests in recent years to reconsider the GSAs. Therefore, we have routinely communicated with other Districts, particularly within the South Atlantic Division (SAD), to

ensure consistency with our approach. Not long ago, we conducted a survey of all USACE Districts, which confirmed our belief that our approach is not unusual or inconsistent.

After receiving your letters, we reinitiated contact with the other Districts in SAD in an effort to more fully understand their current practices with respect to GSAs. The results of that effort indicate that simply stating the number of HUCs included within a bank's GSA does not fully convey how those HUCs were established or how they are utilized, and thus may not provide a good comparison to the Wilmington District's current practices.

The concept of mitigation banking has significantly evolved since guidance on this subject was initially published in 1995, and then again with publication of the Rule in 2008. Moreover, the concept of what constitutes an appropriate GSA has also changed, both regionally and nationally, over the years. Consequently, many banks that were established in the 1990s and early 2000s, including several that are referenced in your letters, have GSAs that are larger than what is generally considered acceptable by today's standards. This can be attributed to several factors, including a lack of consistent guidance about what constituted an appropriate GSA, coupled with a burgeoning demand for mitigation credits in areas where banks did not exist. While those banks may have included multiple HUCs, there were often limitations on the use of those HUCs. For example, limitations included, but were not necessarily limited to, increased ratios for going out-of-HUC (the increased requirement would be the responsibility of the permit applicant); preferences for in-HUC mitigation for banks with overlapping GSAs; limitations on the use of adjacent HUCs based on ecoregion; and/or the inclusion of only a very small portion of an adjacent 8 digit HUC.

Although older banks in other Districts may provide for "secondary service areas", use of that secondary service area is usually subject to the approval of the regulatory staff and, typically, use of the secondary service area has been authorized when no mitigation credits are available in the primary service area. Your letters stated that the information used in your analysis of other District's GSAs was obtained from the Regulatory In-lieu Fee and Bank Information Tracking System (RIBITS). RIBITS was not designed to convey specific operational details about GSAs (e.g., hierarchy for use of primary, secondary, and tertiary GSAs, penalties for using secondary or tertiary GSAs, etc.). As such, the limited detail provided in RIBITS does not provide a sufficient basis upon which to conclude that Wilmington's District's GSAs are inconsistent with other Districts, in effect. Based on our most recent communications with our sister Districts in SAD, it appears to be the general consensus that the Districts are moving towards GSAs based on the 8-digit HUC.

We strongly believe that the use of the 8 digit HUC provides several important benefits to both the mitigation providers as well as the public of North Carolina. First, by maintaining the primary GSA as the 8 digit HUC, simplicity and predictability are provided for our stakeholders. We believe this comports with maintaining the "predictability sufficient to provide incentives" as stated in the Presidential Memorandum referenced in your letter. Second, use of the 8 digit HUC strikes a reasonable balance between providing a large enough area for mitigation providers to

locate mitigation sites while ensuring that impacts to aquatic resources important to the public of North Carolina are adequately compensated. We note that for approximately 14 years, the Division of Mitigation Services (formerly EEP) has consistently been able to provide mitigation in the 8 digit HUC in which the impact occurred, with limited exceptions in a few river basins such as the Little Tennessee and Catawba. Finally, all mitigation banking instruments executed in the Wilmington District contain a provision allowing the credits to be used outside of the 8 digit HUC in which the bank is located, provided that use has been approved by Regulatory Division Staff on a case-by-case basis.

Finally, it has been our experience that the entrepreneurial mitigation providers have traditionally aligned their efforts with NC Department of Transportation projects and around urban population centers where our permit workload is concentrated, and hence, mitigation requirements are highest. Given these circumstances, we would be unable to justify the establishment of larger service areas in some parts of the state and, in fact, according to the rule, probably could contract those areas to more fully ensure that losses of aquatic resources and watershed impairment are more adequately addressed by compensatory mitigation projects.

Mitigation Banking as the Preferred Mitigation

We disagree that mitigation banks are always the preferred means of compensating for unavoidable impacts to Waters of the United States. As described in Section 332.3(b)(2) of the Rule, the preference for mitigation type is based upon a number of considerations, including risk and uncertainty, temporal loss, the ecologic viability of larger sites, rigorous scientific, technical analysis and project planning and significant investment in financial resources. In many states, mitigation banks satisfy these requirements better than small in-lieu fee (ILF) programs. However, despite the stated preference for mitigation banks, these same considerations often justify the utilization of the North Carolina Division of Mitigation Services (NCDMS) mitigation. Mitigation sites developed through NCDMS are generally comparable in size to bank sites, undergo a similar level of technical review and are developed using a detailed watershed planning process that exceeds the requirements of the banks. In fact, this model (including use of the 8 digit HUC) has allowed the District, through its partnership with NCDMS and the NC Department of Transportation to ensure that critical transportation infrastructure projects are not delayed by mitigation requirements.

The regulated public and the agencies are fortunate that North Carolina has a comprehensive In-Lieu-Fee program that serves the entire state. In the event we were to universally allow larger GSAs for Banks, we envision a potentially significant issue for permittees and their acquisition of mitigation credits. In accordance with previous state legislation private entities are required to purchase bank credits if the permittee's project is located within a banks service area. However, when determining the most appropriate mitigation, the District employs a Watershed Approach, as required by the Rule. This approach would typically result in a preference for mitigation provided within the 8-digit HUC, which is available state-wide through the NCDMS. As a result, it is unlikely that the Corps would approve the use of the bank credits to provide

mitigation for out-of-HUC impacts even if they had secondary GSAs because mitigation credits would be available within the 8 digit HUC in which the impact occurred. This could possibly have the unintended consequence of a private entity being required to purchase mitigation credits from a private bank *and* DMS in order to satisfy both the State's and the Corps requirements.

Our partnership with NCDMS has provided benefits to the District, and even more so to the regulated public of North Carolina. There is no doubt that the quantity and quality of mitigation are vastly improved as a result of this program. NCDMS has provided an essential service to the regulated public of North Carolina by allowing them to purchase credits and proceed with their development plans with no further delays. Through its Full Delivery Program, NCDMS has also provided a tremendous amount of economic benefit to mitigation providers, design firms, and construction firms. We believe that this is one of the main reasons that North Carolina continues to be a national leader in aquatic resource restoration, a belief that is supported by the recognition that has been given NCDMS, and by the fact that we are routinely contacted by other Districts seeking to emulate our processes.

GSAs within the District

As previously described, the ability of a private mitigation bank to provide credits outside its primary service area is generally provided in the instrument that establishes its use. Furthermore, the NCDMS also has the ability to provide mitigation outside of the 8-digit HUC, and has done so many times, provided that each instance is approved by the District. In certain situations the District has also considered exceptions to the 8-digit GSA and has approved larger GSAs in cases where it is clear that the 8-digit HUC is too small to allow for the development of mitigation sites. Examples of this include the expanded service area within the Catawba and Little Tennessee River Basins and also the GSA for the Great Dismal Swamp Restoration Bank, which was recently approved to serve parts of three adjacent 8-digit HUCs.

Thank you for your interest in the District's mitigation program and please let me know if you have further questions regarding GSAs applied to federal mitigation requirements within North Carolina. Given the complexity of this issue, we would welcome the opportunity to meet with you to discuss this issue in more detail and to more fully describe the District's mitigation requirements.

Sincerely,



Kevin P. Landers Sr.
Colonel, U.S. Army
District Commander

Copies Furnished:

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