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Re: Revising "Grandfathered" In-Lieu Fee Program Instruments

Dear Meg and Brian:

The National Mitigation Banking Association ("Association") greatly appreciates the work of the U.S. Army Corps of Engineers ("USACE") and the Environmental Protection Agency ("EPA") on compensatory mitigation. The regulations for Compensatory Mitigation for Losses of Aquatic Resources, promulgated April 10, 2008, were designed to improve the success of compensatory mitigation and level the playing field among providers of mitigation. The Association has valued the opportunity to work with agency personnel as these important rules are implemented.

Introduction and Summary

We have passed the one year mark since the effective date (June 8, 2008) of the Mitigation Regulations. As you know, pre-existing in-lieu fee programs were allowed a two-year "grandfather" period, after which they were required to comply with the regulations, absent granting of an extension (for up to three years) by the District Engineer. The Association is writing at this juncture to urge the agencies to adhere strictly to the letter and spirit of the Mitigation Regulations in bringing pre-existing in-lieu fee programs up to the new standards.

It is critical that pre-existing in-lieu fee programs be brought into compliance with the new Mitigation Regulations as promptly as possible. The new provisions for in-lieu fee programs must be administered strictly and consistently. This letter provides some suggestions, which we offer in a spirit of cooperation to continue ongoing progress towards the goal of improving compensatory mitigation. Because the letter is lengthy, the recommendations are summarized here:



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1. Limit Extensions of Time
 - a. The regulations allowed sufficient time for compliance
 - b. Delayed compliance delays the benefits of the regulations
2. Require Robust, Complete Compensation Planning Framework
 - a. Assure transparency and wide use by making all information public
 - b. Assure solid science to meet goals of regulation
3. Equivalency Goals Remain Paramount
 - a. Deferred compliance with regulations undercuts equivalency
 - b. Transparency of decision making assures improved mitigation

Suggestions and Recommendations

1. Limit Extensions of Time. The Mitigation Regulations allowed in-lieu fees a two-year period "after which time they must meet the requirements of this part, unless the district engineer determines that circumstances warrant an extension of up to three additional years. The district engineer must consult with the IRT before approving such extensions." 33 C.F.R. 332.8(v); 40 C.F.R. 230.98(v). A two year period is time enough for programs to come into compliance. The Preamble to the final Mitigation Regulations, 73 Fed. Reg. 19664 (April 10, 2008), demonstrates that the agencies considered various longer grandfather periods and determined that two years was a fair amount of time to attain compliance:

The purpose of the grandfathering period is to allow time for the in-lieu fee program to conform its instrument to the requirements of today's rule. The district engineer may, in consultation with the IRT, extend the grandfathering period by up to an additional three years where there is good cause, and the in-lieu fee program is providing appropriate compensatory mitigation in a timely manner. An example of good cause would be an extension to allow an existing in-lieu fee program that supports a programmatic general permit or a regional general permit to continue to operate until that general permit expires.

The example given of a "good cause," while not the exclusive reason, clearly indicates that the "good cause" means something significant and related to sound administration of the regulatory program. "Good cause" does not mean simply that the in-lieu fee program ran out of time to apply. Nor should the claim of limited mitigation alternatives in a location be "good cause" to delay in-lieu fee compliance



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with the Mitigation Regulations. If the in-lieu fee program is an "exclusive" mitigation provider in a location, all the more reason why it should meet the requirements of the Mitigation Regulations.

To be fair and transparent, we recommend that requests for and decisions on extensions of the grandfather period be in writing and published on agency websites, so the public can easily follow this important matter. Openness will encourage the highest level of compliance by all participants.

Any extension of the grandfather period delays compliance with the important new requirements of the Mitigation Regulations. The Preamble to the final Mitigation Regulations, 73 Fed. Reg. 19665 (April 10, 2008), addressed the pros and cons of in-lieu fee mitigation, and emphasized that compliance with the new regulations was intended to avoid problems that lead to the initial proposal by the agencies to eliminate in-lieu fees:

Several commenters said that the under-performance of many current inlieu fee programs is the result of the structure of existing policies rather than the compensatory mitigation mechanism, and that these problems could be alleviated by making specific and targeted improvements and establishing and enforcing consistent program standards. Some commenters stated that by eliminating in-lieu fee programs, the proposed rule is inappropriately promoting for-profit mitigation banking. Instead of eliminating in-lieu fee programs, these commenters said that equivalent standards should be established that are based on ensuring successful and sustainable aquatic resource functions, not economic viability.

* * *

However, in-lieu fee programs can provide other benefits that we believe justify allowing them to operate under slightly different requirements. In particular, they can perform more thorough watershed planning than is often done by banks, and may be able to better target their activities to watershed needs and priorities. There is no basis for the assertion that land used for in-lieu fee projects is of poor quality. There are successful in-lieu fee programs operating in different areas of the country, and we have

