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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



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looked at how those programs are structured when writing this final rule. To provide greater accountability in the use of funds collected in advance of project approval and construction, we have added a provision requiring in-lieu fee programs to segregate funds collected from permittees in a program account, with provisions in the instrument that will allow the district engineer to redirect those funds to other mitigation activities if the program does not provide the required mitigation in a timely manner.

In short, the new requirements imposed on in-lieu fees established in the Mitigation Regulations will have their intended effect – improving compensatory mitigation – only if the fee programs come into compliance with those provisions. Extensions of time that defer full compliance should be avoided.

2. Require Robust, Complete Compensation Planning Framework. The Compensation Planning Framework is a new and important requirement for in-lieu fee programs, 33 C.F.R. 332.8(c); 40 C.F.R. 230.98(c), above and beyond the equivalent (and mostly identical) requirements that were established for both in-lieu fees and mitigation banks. In the Preamble, 73 Fed. Reg. 19651 (April 10, 2008), the agencies stated that the Compensation Planning Framework was an essential part of the reason for retaining the in-lieu fee option:

We also asked for comment on how to ensure that in-lieu fee programs achieve the same level of success and certainty in providing compensation for permitted impacts as mitigation banks. One response we received to this request was that many in-lieu fee programs conduct more extensive and intensive watershed based resource planning prior to securing sites and developing mitigation plans for specific projects. These commenters argued that in-lieu fee programs were better positioned to identify and provide resources that best meet the needs of the watershed, even when these resources are not the "easiest" to provide, or appropriate sites are more expensive or difficult to secure. The agencies have determined that this may be a legitimate advantage of in-lieu fee programs, and this consideration was part of the basis for our determination to allow continued authorization of in-lieu programs in this final rule. To ensure that this benefit is realized, we have formalized this comprehensive planning process in the requirement



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for in-lieu fee programs to include a compensation planning framework in their instrument.

The Compensation Planning Framework was described as "itself a type of watershed plan." 73 Fed. Reg. 19654 (April 10, 2008). It is a critical part of planning, reviewing and ultimately approving in-lieu fees under the Mitigation Regulations. The Mitigation Regulations adopt a watershed approach to compensatory mitigation, but make clear that the Compensation Planning Framework is "over and above" the watershed approach. 73 Fed. Reg. 19651 (April 10 2008):

Compensation planning framework for in-lieu fee programs. We have added this section to the final rule to provide a level of watershed planning for in-lieu fee programs that goes beyond the watershed planning typically conducted by mitigation banks. The compensation planning framework is also intended to help reduce some of the risk and uncertainty surrounding in-lieu fee programs, since those programs will be able to sell a limited number of credits before selecting and implementing compensatory mitigation projects. The compensation planning framework will be used to select, secure, and implement aquatic resource restoration, establishment, enhancement, and/or preservation activities.

While the regulations set forth what should be included in the Compensation Planning Framework¹ we urge the agencies to obtain the maximum benefit from this

¹ 33 C.F.R. 332.8(c) (same, 40 C.F.R. 230.98(c)) provides:

- (2) The compensation planning framework must contain the following elements:
- (i) The geographic service area(s), including a watershed-based rationale for the delineation of each service area;
 - (ii) A description of the threats to aquatic resources in the service area(s), including how the in-lieu fee program will help offset impacts resulting from those threats;
 - (iii) An analysis of historic aquatic resource loss in the service area(s);
 - (iv) An analysis of current aquatic resource conditions in the service area(s), supported by an appropriate level of field documentation;
 - (v) A statement of aquatic resource goals and objectives for each service area, including a description of the general amounts, types and locations of aquatic resources the program will seek to provide;



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innovative tool. It provides an important, distinguishing compliance measure for in-lieu fees, and should provide useful information to the regulators and the public. We offer the following suggestions for implementation of the Comprehensive Planning Framework:

- Require the Compensation Planning Framework to reflect the "best of the best" in data and approach to watershed planning. The Framework must be "extensive and intensive," as promised in the Preamble.
- Assure that the Compensation Planning Frameworks are separately available and searchable to the public. To this end, they should be free standing, independent documents included with a prospectus or instrument, not simply paragraphs within the prospectus or instrument.
 - These Frameworks will have valuable information, useful for understanding the watershed and its needs, as well as the value of the in-lieu program.
 - Since the Frameworks and their information would be available to the public under FOIA, making it readily available from the start (in a structurally simple manner, i.e., separate document) will help inform the public.

(vi) A prioritization strategy for selecting and implementing compensatory mitigation activities;

(vii) An explanation of how any preservation objectives identified in paragraph (c)(2)(v) of this section and addressed in the prioritization strategy in paragraph (c)(2)(vi) satisfy the criteria for use of preservation in § 332.3(h);

(viii) A description of any public and private stakeholder involvement in plan development and implementation, including, where appropriate, coordination with federal, state, tribal and local aquatic resource management and regulatory authorities;

(ix) A description of the long-term protection and management strategies for activities conducted by the in-lieu fee program sponsor;

(x) A strategy for periodic evaluation and reporting on the progress of the program in achieving the goals and objectives in paragraph (c)(2)(v) of this section, including a process for revising the planning framework as necessary; and

(xi) Any other information deemed necessary for effective compensation planning by the district engineer.



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- Requiring a free-standing document emphasizes that the Framework must be "extensive and intensive," akin to a watershed plan.
- For example, the Regulations require the Frameworks to provide data on aquatic resource threats, historic aquatic resource loss, and current aquatic resource conditions (33 C.F.R. 332.8(c)(2)(ii), (iii), (iv)) which will be of great public interest. This data should be:
 - Supported by high quality, reliable research.
 - Supported by high quality field documentation.
 - Easily available to the public, for reasons described above.
- Aquatic resource goals (33 C.F.R. 332.8(c)(2)(v)) in the Frameworks should be specific and quantified to the maximum extent possible. The in-lieu fee, which can be sponsored only by a government or non-profit organization, should provide very specific goals and objectives. Again, this information will be very valuable to the public and should be made easily available.
- General statements or statements of general intent should not be acceptable to meet the requirements of 33 C.F.R. 332.8(c)(2).

3. Equivalency Goals Remain Paramount. While the agencies recognized that mitigation banks, in-lieu fees and permittee mitigation had distinguishing features, the Mitigation Regulations nonetheless sought equivalency of performance and performance standards among all mitigation providers. The Regulations established many uniform requirements for all mitigation, whether provided by mitigation bankers, in-lieu fee providers or permit holders. These requirements include:

- Public opportunity for comment
- Adherence to the same twelve categories of performance standards
- Interagency Review Team (IRT) review (for banks and in-lieu fees)

All of these requirements were intended to improve the quality of compensatory mitigation. Those in-lieu fee programs that delay full compliance with the Regulations will remain "non-equivalent" and lack the features that the agencies determined were needed to improve compensatory mitigation. By requiring full compliance, on time, the Mitigation Regulations can meet their promise.



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In conclusion, the Association repeats its appreciation for the efforts of the USACE and EPA to improve compensatory mitigation. The Mitigation Regulations raised the bar for everyone who offers compensatory mitigation projects in the regulatory program, to meet the shared goal of better compensatory mitigation. The Association urges you to assure that all mitigation meets the regulatory standards as the June 2010 deadline approaches, and bring grandfathered in-lieu fee programs promptly into full compliance.

Sincerely,

George Kelly, President
National Mitigation Banking Association

cc: Colonel Reinhardt Koenig, Alaska District
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