



June 10, 2010

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Brian M. Frazer
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Room 6105R: MC-4502R
Washington, D.C. 20460

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

Dear Meg and Brian:

By letter of October 22, 2009, the National Mitigation Banking Association wrote to you "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." We were concerned that delayed or deferred compliance with the 2008 Mitigation Regulations would undercut achievement of the environmental goals of those regulations. A copy of the October 22, 2009 letter is enclosed.

We are now on the eve of the close of the two year "grandfather" period allowed to pre-Regulation in-lieu fee programs. Based on information presented at the Mitigation and Ecosystems Banking Conference (May 3-6, 2010, Austin, Texas), we understand that there are approximately 47 pre-Regulation in-lieu fee programs and that your agencies expect that most of those programs will seek to continue to operate. We understand that a few of these programs have requested permission to continue to operate and that letters authorizing such operations have been sent from some Districts to some of the in-lieu fee programs.

This is an issue of great importance to implementation of the 2008 Mitigation Regulations. While in-lieu fee programs may assist the regulatory program by providing a way that permit applicants can offer "mitigation" for impacts, if those in-lieu fee programs do not meet the stringent requirements of the 2008 Mitigation Regulations, the ecological benefits of the regulatory program are not attained. Moreover, maintaining a "second tier" option for mitigation impedes investment in "first tier" mitigation, compliant with the new Regulations.



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Our letter of October 22, 2009 included recommendations, as summarized here:

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

These recommendations were based on and supported by an in depth discussion of the 2008 Regulations and their background. There was no written response to the October 2009 letter.

During discussions with each of you, the Association has also raised some concerns with use of ad hoc mitigation arrangements, which do not qualify as mitigation banks or in-lieu fee programs, for compensatory mitigation. The 2008 Rule is clear that these are the only two forms of mitigation with transfer of liability from the applicant to the provider. Any applicant proposing the use of these ad hoc programs should be made aware that it is considered Permittee Responsible mitigation and the permit applicant will retain full responsibility for implementing the 12 elements of a mitigation plan in the Regulations. Such ad hoc third party arrangements should not have been grandfathered and should not be continued under the Mitigation Regulations.

The end of the two year grandfather period provides an appropriate point to evaluate systematic improvements to in-lieu fees. The Association has long been concerned with the time delay between collection of in-lieu fee funds and accomplishment of mitigation on the ground, notwithstanding the deadlines set out in the Mitigation Regulations. Allowing and even encouraging fee programs that cannot meet those deadlines to purchase available mitigation bank credits would stimulate the process of achieving mitigation on the ground.

Now that your agencies are addressing continuation of pre-Regulation in-lieu fee programs, we would appreciate knowing what steps are underway to address the recommendations that we offered seven months ago. We would like to avoid use of cumbersome and burdensome tools such as submitting Freedom of Information Act



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requests to each Corps District, seeking their correspondence for pre-Regulation in-lieu fee programs. We would prefer to address these important matters in terms of overall application and implementation of the 2008 Mitigation Regulations.

I appreciate in advance any response that you may provide promptly.

Sincerely,

David T. Urban, ms

David T. Urban, President
National Mitigation Banking Association

Enclosure



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October 22, 2009

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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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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

