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Mr. William T. Walker
Acting Chief, Regulatory
Headquarters, U.S. Army Corps of Engineers
441 G Street, NW
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By electronic mail

RE: In-Lieu Fee Program Instrument Review Workbook: November 2022 EPA-840-B-22002 - NEBA Concerns Regarding Inferred "Equivalency" Between Mitigation Bank Credits and In-lieu Fee Credits

Dear Tom:

During the past year, the National Environmental Banking Association (NEBA) became aware of some problematic language in the draft In-Lieu Fee Program Instrument Review Workbook that indicated that released in-lieu fee (ILF) credits were considered equivalent to mitigation bank credits under the mitigation hierarchy. NEBA raised these concerns with the EPA Office of Water, and the Workbook language was amended to more accurately state the relationship between actual mitigation bank credits and released in-lieu fee credits under the mitigation hierarchy. However, NEBA continues to be concerned that the Workbook language does not adequately reflect the precedence of mitigation banking credits over released in-lieu fee credits under the 2008 Mitigation Rule.

The discretion to establish equivalency between released ILF credits and mitigation credits clearly does not exist in the 2008 Compensatory Mitigation Rule and mitigation hierarchy without first meeting the strict criteria mandated in the Rule. While NEBA appreciates the improvements to the language made in response to our concerns, we remain concerned that our requests to include both the 2008 Rule's mitigation hierarchy and criteria for overriding it in the workbook were not addressed by EPA. The recently released workbook language, without appropriate context provided, may be understood as making released ILF credits equivalent to mitigation bank credits, contrary to the language and intent of the Rule.

The Code of Federal Regulations 40 CFR and 33 CFR Section 230.93 establishes a clear hierarchy with a distinct preference for Mitigation Bank Credits, the reasons for which are spelled out in Section 230.93(b)(2) and include "*reduced risk of uncertainty*", "*avoidance of temporal loss*", and "*significant investment of financial resources that is often not practical for many in-lieu fee programs",* etc. Section 230.93(b)(3) states that in-lieu fee credits are preferable "*Where permitted impacts are not located in the service area of an approved mitigation bank* (emphasis added)*, or the approved mitigation bank does not have the appropriate number and resource type of credits available to offset those impacts…*" As stated in the section, overriding this hierarchy must be based on "*rigorous scientific and technical analysis*" providing justification for substituting ILF credits for mitigation bank credits.

Recent failures to conform to the mitigation hierarchy by local Corps of Engineers districts was noted by Congress in the report accompanying the 2020 Energy and Water Appropriations Act. Congress makes the following statement in the report:

"Compensatory Mitigation Rule.- There is concern that the Corps may not be consistent in its implementation of the 2008 Compensatory Mitigation Rule, based on the Corps' publicly available data. There are concerns that particular districts have failed to adhere to the mitigation hierarchy in the Rule as it pertains to the preference for mitigation bank credits. The Corps is reminded that although the Rule provides some discretion, the Rule is clear that this discretion is limited and deviations from the mitigation hierarchy must be based on scientific and technical analysis. The Corps is directed to properly and consistently implement the Rule, including adherence to its mitigation hierarchy and documentation of decisions by the District Engineer regarding which mitigation mechanism is appropriate to offset impacts under the Rule and which sections of the Rule justify the particular decision. The Corps shall brief the Committees on Appropriations of both Houses of Congress not later than one year after the enactment of this Act on steps taken to ensure proper and consistent application of the Rule across districts, consistent with this direction."

In-Lieu Fee programs have significant shortcomings compared to mitigation banks. It is due to these shortcomings that the 2008 Rule established the Mitigation Hierarchy with a preference for bank credits. An intensive 2019 study by Duke University[1] systematically points out the numerous liabilities in ILF programs. These Include:

- "*By their design, ILF programs are given a lower bar for compensatory mitigation than their counter parts."*[2]

[1] Doyle Martin W., *"The Financial and Environmental Risks of In Lieu Fee Programs for Compensatory Mitigation'* Duke, Nicholas Institute 2019
[2] Op. cit. p. 16, para 2, l. 1

- "*One of the key structural flaws of the ILF model in concept and practice is the potential for fees to be set too low and thus create financial and ecological deficits"*[3]
- "*It is unclear who is responsible for ILF program failures"*[4]
- *"There is a real potential for ILF programs to accumulate significant and grossly underfunded financial liabilities"*[5]
- *"The ILF program sponsors and their umbrella organizations will not, in the end, bear the full costs of the program failure or even partial costs of a partial failure"*[6] The report labels this a moral hazard with one of two outcomes: either the regulatory agencies significantly lower the mitigation requirements for projects that have already purchased credits, or the agencies absorb the cost and pass it on to the public.
  Anyone considering equivalency between ILF and mitigation bank credits is encouraged to read the Duke University study in full.
  Our specific concerns with the In-Lieu Fee Program Workbook includes the workbook sections listed below:

The text on Page 5 states:

"Under this hierarchy if the appropriate type (wetland, stream, etc.) of released credits are available from a mitigation bank or released credits from an ILF project in a service area that includes the permitted impact, those credits are generally preferred over advance credits from ILF programs or PRM projects that have not been initiated."

While this statement is true as it pertains to PRM, it represents the workbook's entire discussion of the Mitigation Preference Hierarchy and appears to give equal preference to bank credits and released ILF credits over PRM projects. <u>This section on the "Mitigation Preference Hierarchy" should actually state what the hierarchy is</u>. The Workbook's avoidance of including the mandated mitigation hierarchy and its inclusion of potentially misleading language equating ILF credits to bank credits (as referenced in several sections listed below) has the very real potential to guide Interagency Review Team (IRT) members into decisions that violate the Mitigation Rule.

The seventh bulleted item on Page 6 states:

Credits generated from an ILF project (released credits) are first used to fulfill a mitigation obligation generated by the sale of an advance credit. <u>If there are any released credits left over after fulfillment, they can be sold and may be determined to be equivalent to a bank credit</u> (emphasis added).

[3] Op. cit. p. 12, para 3, l. 1
[4] Op. cit. p. 18, para 2, l. 1
[5] Op. cit. p. 18, para 4, l. 1
[6] Op. cit. p. 19, para 4, l. 5

This sentence speaks for itself; it is a clear statement equating ILF credits to mitigation bank credits in direct violation of the mitigation hierarchy, and of the very specific demand from Congress to stop equating ILF credits with mitigation bank credits without first providing the rigorous scientific and technical studies justifying such a substitution as mandated in the Mitigation Rule.

The ninth bulleted item on Page 6 states:

"These (ILF) *programs often provide compensatory mitigation when there are few or no mitigation banks with available credits or where PRM is not practicable."*

This sentence condones the use of ILF credits even within the service areas of mitigation banks which have the available credits as long as there are only a <u>few</u> such banks. This is undeniably a direct violation of the mitigation hierarchy and the mitigation rule in general. It has no place in a workbook providing guidance to IRT staff. Among the questions such a statement generates, it would have to be asked how it is okay to override the mitigation hierarchy as long as there are only a few qualifying banks in the service area? How many banks qualify as a few? Conversely, the statement implies that it is not okay to overrule the hierarchy if there are many banks in the service area. Nor does the practicability of a PRM option bear upon the applicability of the mitigation hierarchy in any case.

The second paragraph on Page 27 states:

"*Released credits may be determined to be equivalent to mitigation bank credits*"

Section 3c, third sentence on Page 30 states:

"*These surplus credits may be determined to be equivalent to mitigation bank credits in the mitigation preference hierarchy*"

<u>It goes without saying that the authority to rewrite federal regulations does not exist at the agency staff level</u>. Regardless, the ILF Workbook provides guidance to IRT staff members that directly contradicts the mandated requirements of the 2008 Rule and the specific direction from Congress to "*properly and consistently implement the Rule, including adherence to its mitigation hierarchy and documentation of decisions by the District Engineer*".

NEBA has failed to dissuade EPA from including this potentially misleading language in the Workbook. We are concerned that this language may reflect a concerted and intentional effort to elevate the status of released ILF credits within the mitigation hierarchy to the detriment of mitigation banks.

The fundamental problem with this approach is that it potentially places ILF programs in direct competition with private-sector mitigation bankers. Because of their inherent advantages as public or non-profit organizations, ILF programs inevitably have a competitive edge over the private-sector mitigation banking industry. One of the primary policy considerations underlying the 2008 Mitigation Rule was the intent to enlist private capital in aid of environmental mitigation. Another policy consideration was the need to ensure that projects permitted under the Clean Water Act that involve unavoidable destruction of aquatic resources are required to pay the full cost of restoration of the public benefits represented by those resources.

A policy determination that released ILF credits are equivalent to mitigation bank credits goes against both of these established policies. Where ILF programs are permitted to go into direct competition with mitigation banks, private investment is inevitably discouraged. The effort and expense required to establish a mitigation bank is already immense, and the return on the investment is fraught with risk and long in coming. It is wholly inappropriate to increase this risk by routinely placing mitigation bankers in direct competition with entities that pay no taxes and are not responsible to investors for deriving a return on their investment.

This practice will have a devastating impact on the mitigation banking industry and on the mitigation program as a whole. We therefore request that the specific language of the 2008 Mitigation Rule – and specifically of the mitigation hierarchy – be made clear to all IRT members, and that the hierarchy required in the Mitigation Rule be followed in all mitigation credit approvals. <u>We request that the ILF Program Review Workbook not be distributed to IRT staff until the issue of this language has been resolved</u>.

NEBA will continue to work with Senior Administrative staff of the EPA, USACE and with Congress to rectify this issue.

Very Truly Yours,

John Paul Woodley, Jr.

John Paul Woodley, Jr.
Chair, NEBA Board of Directors

Cc: USEPA Office of Water
Senate Committee on Environment and Public Works
House Committee on Infrastructure and Environment
Congressman Mike Simpson
Congressman Mike Thompson