



November 9, 2022

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Mr. Brian Frazer, Acting Director  
Office of Wetlands, Oceans and Watersheds  
U. S. Environmental Protection Agency  
Washington, DC 20460

**By Electronic Mail**

Re: Draft ILF Instrument Review Workbook

Dear Mr. Frazer:

Thank you for your letter of October 4 responding to our concerns regarding some of the language in the draft ILF Instrument Review Workbook currently under development. We believe the changes you outline in your letter will go a long way toward addressing our concerns.

In the Report accompanying the 2020 Energy and Water Appropriations Act, Congress expressed its concern that the Corps of Engineers was not consistently implementing the mitigation hierarchy established by the 2008 Mitigation Rule. The Report states:

“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.”

We believe it is important that all guidance documents to be used to administer the 2008 Mitigation Rule clearly state the importance of the mitigation

Headquarters

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1250 Connecticut Ave NW, Suite  
200

Washington, DC 20036

tel: 202-930-2365

[www.environmentalbanking.org](http://www.environmentalbanking.org)

[info@environmentalbanking.org](mailto:info@environmentalbanking.org)

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hierarchy and emphasize that deviations from the hierarchy must be based on rigorous scientific and technical analysis fully documented in the record of decision.

Our concern is that if we fail to do so, we risk the continuing erosion of the mitigation hierarchy, and with it all of the evils outlined in our prior letter to USEPA on this matter.

Our recommendation is that the ILF Instrument Review Workbook changes incorporate the language from the 2008 Mitigation Rule, as underscored by the Congressional Report language from 2020, that deviations from the mitigation hierarchy are appropriate only when they result in the best mitigation available as determined through a rigorous scientific and technical analysis fully documented in the record of decision.

We very much appreciate your attention to this matter.

Very truly yours,

A handwritten signature in black ink that reads "John Paul Woodley, Jr." in a cursive script.

John Paul Woodley, Jr.  
Chair, National Environmental Banking  
Association

cc: Representative Marcy Kaptur, Chairwoman, House Energy and Water  
Development Appropriations Subcommittee

Representative Mike Simpson, Ranking Member, House Energy and  
Water Development Appropriations Subcommittee