

March 12, 2018

Mr. Brent Jasper
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Ms. Jennifer Moyer
Chief, Regulatory Program
Headquarters, U.S. Army Corps of Engineers
441 G Street, N.W.
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Submitted via e-mail to brent.i.jasper@usace.army.mil and jennifer.a.moyer@usace.army.mil

Re: Comments of National Trade Associations on CESWF-18-MITB, Proposed Additional Banking Guidelines Covering Specific Elements for the Establishment of New Mitigation Banks in the Fort Worth District of the U.S. Army Corps of Engineers

Dear Mr. Jasper and Ms. Moyer:

The undersigned organizations appreciate this opportunity to comment on the proposed "Guidelines Covering Specific Elements for the Establishment of New Mitigation Banks in the Fort Worth District" (proposed guidelines). Public Notice CESWF-18-MITB. We represent a wide cross section of the nation's agriculture, construction, electric utility, mining, and business interests.

The majority of the undersigned associations represent companies with operations in the U.S. Army Corps of Engineers (Corps) Fort Worth District that will be directly impacted by the proposed guidelines. However, our interest in the proposal goes beyond the significant impact it will have on projects within the Fort Worth District. Specifically, the associations highlighted the need to address implementation of the Corps' 2008 Mitigation Rule as part of the Corps' review of regulations that may be appropriate for repeal, replacement, or modification pursuant to Executive Order 13777, "Enforcing the Regulatory Reform Agenda." 82 Fed. Reg. 33, 470 (July 20, 2017). The proposed guidelines contain a number of the policies that the associations highlighted as being candidates for revision under E.O. 13777, as they are unnecessary, impose costs that exceed benefits, and inhibit job creation. Additionally, the proposed guidelines conflict with Executive Order 13766, "Expediting Environmental Reviews and Approvals for High Priority Infrastructure Projects" (Jan. 30, 2017), which calls upon federal agencies to "streamline and expedite...environmental reviews and approvals for all infrastructure projects." 82 Fed. Reg. 8,657.

The associations therefore request that the Fort Worth District, as well as Corps Headquarters, review the proposed guidelines considering the regulatory burden reduction and permit streamlining policies outlined in E.O. 13777 and E.O. 13766. The associations also request that, pursuant to the policies noted in the White House's recently released Legislative Outline for Rebuilding Infrastructure in America, the guidelines be reviewed to ensure that they "expedite environmental or permitting reviews for projects that enhance the environment through mitigation, design, or other means" so as to "provide incentives for project sponsors to propose more environmentally beneficial projects...[and] streamline the environmental and permitting review process for those projects that demonstrate an improvement to the environment."¹ This is especially important in light of the fact that the proposed guidelines apply directly to mitigation banks, but will presumably also be applied to permittee-responsible mitigation projects,² which are often conducted by mining operations and others, and are designed to produce on-site environmental benefits.

Of particular concern to the associations are the proposed requirements regarding subsurface mineral rights, which are overly burdensome, unnecessary, and significantly impact the availability of necessary banking credits. Specifically, the proposed guidelines require that "for any subsurface mineral rights owned by the landowner, the bank sponsor should fully and permanently retire all subsurface minerals (oil, gas, and other hydrocarbon) rights in perpetuity. For subsurface mineral rights held by other parties, the bank sponsor should make reasonable efforts to purchase or retrieve all subsurface mineral rights."³ However, as several of the associations noted in their regulatory reform comments, such permanent restrictions – which are being applied with increasing frequency among certain Corps districts and are incredibly difficult to meet given the value of such minerals – are not required by the 2008 Mitigation Rule, nor are they necessary. Importantly, subsurface minerals can often be accessed in a manner compatible with, and which does not jeopardize, the objectives of the banking project. The Corps' own 2010 Model Conservation Easement for Compensatory Mitigation Purposes includes language allowing grantors to specifically reserve a qualified mineral interest in subsurface oil, gas, and other minerals, as well as the right to access such minerals. The associations therefore request that the Fort Worth District eliminate this unduly burdensome requirement, and that Corps Headquarters address the issue nationally under E.O. 13777.

The requirements concerning financial assurances are also unduly burdensome, and provide an example of the overly stringent approaches to financial assurance requirements several of the associations noted should be addressed nationally as part of the Corps' E.O. 13777 review. Without providing any evidence of the alleged "increased risk of failure associated with stream restoration and enhancement activities," the Fort Worth District is proposing to require that no partial reductions in financial assurances be permitted for partial project completion. Such a requirement is unnecessary, and fails to take into account the increased project costs

¹ Legislative Outline for Rebuilding Infrastructure in America, available at <https://www.whitehouse.gov/wp-content/uploads/2018/02/INFRASTRUCTURE-211.pdf>, at pg. 40.

² See Jasper Presentation ("[i]t is an initiative of the Fort Worth District to hold permittee-responsible mitigation projects to the same standards as mitigation banks (to the extent possible)").

³ Proposed Guidelines at pg. 4.

that will result from its imposition, as projects currently are able to reduce overall costs based on a reduction in financial assurances required once certain milestones are achieved. The proposed guidelines also fail to acknowledge that the 2008 Mitigation Rule does not require financial assurance, and that financial assurance is often unnecessary and unduly burdensome, such as, for example, where other state programs already require it.

Many of the other proposed guidelines will likewise significantly increase delays and costs associated with Clean Water Act Section 404 permitting, and as such should be reviewed by the Fort Worth District and Corps Headquarters under E.O. 13777 and E.O. 13766. For example, the proposed invasive species limits of 0% in the overstory and mid-story, and 1% in the herbaceous layer, are unnecessary and overly burdensome. Mitigation banks can stretch over hundreds or thousands of acres, and abut lands over which a bank operator has no control. To require that not a single plant on the invasive species list be allowed in the entire mitigation bank is simply infeasible. Additionally, the proposed guidelines would not allow baseline data over two years to be used, including jurisdictional determinations (JDs). Such a requirement is not mandated by 33 CFR Section 332.4(c)(5), which simply requires a description of a delineation of "waters of the U.S." on the proposed compensatory mitigation project site, nor does it take into account the fact that an approved JD is effective for five years. Furthermore, while the associations strongly support the proposed provision allowing for cattle grazing on mitigation banks, which is fully consistent with the 2008 Mitigation Rule, because Corps districts do not consistently allow for grazing the associations ask that Corps Headquarters review the issue nationally under the executive orders.

In light of these issues, as well as those raised by other commenters, the associations request that the Fort Worth District review the proposed guidelines and modify them as necessary to be consistent with the policies articulated in E.O. 13777, E.O. 13766, and the Infrastructure Legislative Outline. The associations also reiterate our request that Corps Headquarters review and address such policies nationally as appropriate as part of its E.O. 13777 regulatory reform activities.

Sincerely,

American Farm Bureau Federation
Associated General Contractors of America
Associated General Contractors of Texas
National Mining Association
National Rural Electric Cooperative Association
National Stone Sand and Gravel Association
The Fertilizer Institute
U.S. Chamber of Commerce