

March 12, 2018

Via email on March 12, 2018: [brent.j.jasper@usace.mil](mailto:brent.j.jasper@usace.mil) and [jennifer.a.moyer@usace.army.mil](mailto:jennifer.a.moyer@usace.army.mil)

Brent Jasper, Regulatory Project Manager/Mitigation Banking Coordinator  
Regulatory Branch  
CESWF-DE-R  
U.S. Army Corps of Engineers  
Post Office Box 17300  
Fort Worth, TX 76102-0300

Ms. Jennifer Moyer  
Chief, Regulatory Program  
Headquarters, U.S. Army Corps of Engineers  
441 G Street, N.W.  
Washington, D.C. 20314-1000

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

Dear Mr. Jasper and Ms. Moyer:

Pursuant to the public notice issued by the United States (“U.S.”) Army, Corps of Engineers (“Corps”) Fort Worth District on January 9, 2018 (“Public Notice”) and as amended on February 1, 2018 with a 30-day extension of the public comment period, the American Petroleum Institute (“API”), the Texas Oil & Gas Association (“TXOGA”), the Independent Petroleum Association of America (“IPAA”) and the American Exploration & Production Council (“AXPC”) hereinafter

“the Associations,” respectfully submit these comments on the proposed Additional Guidelines Covering Specific Elements for the Establishment of New Mitigation Banks in the Fort Worth District (“draft Guidelines”). We appreciate your consideration of our request to extend the public comment period. We have taken that opportunity to more carefully review the draft Guidelines. ***The Associations support the goals of predictability and transparency in mitigation banking. However, the significantly expanded draft Guidelines impose numerous additional unnecessary and unreasonably stringent requirements that will have the following effects: 1) substantially reduce lands available for mitigation banking (thereby hindering conservation goals as well as delaying energy and water infrastructure project development); 2) generate further inefficiencies in an already protracted permitting process; and 3) conflict with existing federal Executive Orders and regulatory reform efforts to promote consistency among the Corps districts. In light of these significant consequences and contemporaneous relevant reform efforts at the federal level, the Associations request that the Fort Worth District refrain from finalizing these draft Guidelines and instead focus on reviewing, modifying, and updating its existing guidance in coordination with the Corps Headquarters and stakeholders.***

API is the only national trade association representing all facets of the oil and natural gas industry, which supports 10.3 million U.S. jobs and nearly 8 percent of the U.S. economy. API’s more than 625 members include large integrated companies, as well as exploration and production, refining, marketing, pipeline, and marine businesses, and service and supply firms. They provide most of the nation’s energy and are backed by a growing grassroots movement of more than 40 million Americans. API and its members are dedicated to meeting environmental requirements, while economically developing and supplying energy resources for consumers. Many of the development projects that help industry domestically produce and deliver oil, natural gas, and natural gas resources depend on permits issued by the Corps. Furthermore, API and its members have been constructive participants in the U.S. Environmental Protection Agency (“EPA”) and the Corps’ development of key Clean Water Act (“CWA”) regulations including Nationwide Permits (“NWPs”) which affect the oil and natural gas industry as well as the Corps’ regulatory reform efforts.

TXOGA has more than 5,000 members and is the largest and oldest petroleum organization in Texas. Members of TXOGA produce in excess of 90 percent of Texas’ crude oil and natural gas, operate 100 percent of the state’s refining capacity, and are responsible for the vast majority of the state’s pipelines. The Texas oil and natural gas industry not only produces products used daily; it anchors the state’s economy. In 2016, the industry paid \$9.4 billion in state and local taxes and state royalties that directly funded schools, roads, and emergency services.

IPAA represents the thousands of independent oil and natural gas explorers and producers, as well as the service and supply industries that support their efforts, that will most directly be impacted by the federal regulatory policies. Independent producers develop about 95 percent of American

oil and natural gas wells, produce about 54 percent of American oil, and produce more than 85 percent of American natural gas. The IPAA is dedicated to ensuring a strong, viable American oil and natural gas industry, recognizing that an adequate and secure supply of energy is essential to the national economy. The IPAA members comment on a variety of complex issues involving a potentially significant expansion of federal jurisdiction over aspects of oil and natural gas operations. The IPAA has been active in the Corps' activities governing key aspects of the CWA as well as several aspects of mitigation reform, particularly those through the Department of Interior.

AXPC is a national trade association representing 33 of America's largest and most active independent natural gas and crude oil exploration and production companies. The AXPC's members are "independent" in that their operations are limited to the exploration for and production of natural gas and crude oil. Moreover, its members operate autonomously, unlike their fully integrated counterparts, which operate in different segments of the energy industry, such as refining and marketing. The AXPC's members are leaders in developing and applying the innovative and advanced technologies necessary to explore for and produce natural gas and crude oil that allows our nation to add reasonably priced domestic energy reserves in environmentally responsible ways.

## **I. EXECUTIVE SUMMARY AND RECOMMENDATIONS**

Following clear direction from the Administration and the Corps Headquarters for more efficient and streamlined processes for environmental reviews and permitting actions, the Associations request that the Fort Worth District refrain from finalizing these draft Guidelines and instead focus on reviewing, modifying, and updating its existing guidance in coordination with Headquarters and stakeholders. Any review must be aligned with the principles of alleviating regulatory burden and improving efficiency and effectiveness as underscored by the Administration's objectives.

Overall, these draft Guidelines provide for standards relating to the development of new mitigation banks (and potentially other compensatory mitigation projects) for the purpose of creating net gain in wetlands acres and function to be used as credits to offset unavoidable impacts to aquatic resources under the CWA. It is important to note that mitigation banks serve an important environmental and economic function of offering credits to CWA Section 404 permit applicants to offset unavoidable impacts but this step is considered only after all appropriate and practicable steps to first avoid and then minimize adverse impacts have been undertaken.<sup>1</sup> As an additional benefit and through the use of legal instruments such as conservation easements, the mitigation banks also serve to increase the amount of acreage that is reserved for the long-term stewardship of aquatic resources, as well as ecological, and land conservation values.

---

<sup>1</sup> 40 CFR Part 230; 33 CFR 332.1(c).

Within this CWA framework, the Corps is tasked with approving compensatory mitigation projects, and the 2008 Mitigation Rule on Compensatory Mitigation for Losses of Aquatic Resources implements standards for compensatory mitigation and includes a number of safeguards for sustained protection of compensatory mitigation sites.<sup>2</sup> Different Corps Districts also impose their own additional requirements. The Fort Worth District has already implemented two previous sets of guidelines setting standards and criteria for mitigation banks.

This is not the time for a third set of requirements and the Associations respectfully submit the following key comments for your consideration.

- The draft Guidelines are unnecessarily stringent and a significant expansion from the 2008 Mitigation Rule and prior banking guidelines and practices.
- The draft Guidelines are contrary to the direction and directives to alleviate regulatory burdens as set out in the Executive Order 13777 (“Enforcing the Regulatory Reform Agenda,” Feb. 24, 2017) and Executive Order 13766 (“Expediting Environmental Reviews and Approvals for High Priority Infrastructure Projects,” Jan. 24, 2017).<sup>3</sup>
- Many provisions in the Draft Guidelines propose severe restrictions on developing properties that include mineral interests or that are adjacent to properties with a potential for mineral extraction. In Texas, this would hinder the creation of new mitigation banks resulting in fewer and smaller mitigation banks that are geographically distant from impacts and less likely to be “in-kind.”
- Burdensome requirements in the draft Guidelines could result in increased delays and costs associated with establishing new mitigation banking projects as well as obtaining overall Corps permits.
- The draft Guidelines will have a chilling effect on the availability of new compensatory mitigation options that in turn, would hamper applicants’ ability to acquire timely Corps permits for essential energy and water infrastructure projects.
- The draft Guidelines are not limited in their applicability to mitigation banks; their scope would potentially extend to permittee-responsible mitigation and other regulatory program areas; and thus the draft Guidelines could have a wider negative impact on the availability of overall compensatory mitigation credits.

---

<sup>2</sup> 73 Fed. Reg. 19,594, Apr. 10, 2008 (“2008 Mitigation Rule”).

<sup>3</sup> Executive Order on Enforcing the Regulatory Reform Agenda, Feb. 24, 2017 (“EO 13777”) and Expediting Environmental Reviews and Approvals for High Priority Infrastructure Projects, Jan. 24, 2017 (“EO 13766”).

- Compensatory mitigation projects also benefit and improve the environment; and yet, the Fort Worth District appears to be discouraging the development of such projects.

The Associations are also deeply troubled that the draft Guidelines impose a default position of restricting surface mineral extraction and exploration activities without consideration of oil and natural gas operations as potentially compatible uses in keeping with established Texas oil and gas law as well as the 2008 Mitigation Rule and Corps practices. In essence, the draft Guidelines overgeneralize the potential for adverse impacts from these types of oil and natural gas activities without contemplating reasonable compatible uses.

The Associations offer measured recommendations for the Fort Worth District to consider that balance the rights of the surface owner and the mineral owner(s) in the use of the surface, while providing for more streamlined and efficient processes that encourage prudent and environmentally beneficial development of compensatory mitigation projects.

## II. BACKGROUND

Compensatory mitigation involves actions taken “to offset environmental losses resulting from unavoidable impacts to waters of the United States authorized by [Corps] permits.”<sup>4</sup> This type of compensatory mitigation is only required for unavoidable impacts authorized under CWA Section 404 and is not considered until after all appropriate and practicable steps have been taken to first avoid and then minimize adverse impacts to the aquatic resources pursuant to 40 CFR Part 230 (and CWA Section 404(b)(1) Guidelines).<sup>5</sup> The 2008 Mitigation Rule sets out regulations for compensatory mitigation for general permits and individual permits authorized by the Corps, including standards and criteria for mitigation banks.<sup>6</sup> Here, the Fort Worth District has proposed draft Guidelines for establishing new mitigation banks. The draft Guidelines would apply to all mitigation banking within the regulatory boundaries of the Fort Worth District but potentially have wider applicability to permittee-responsible mitigation projects.<sup>7</sup>

These draft Guidelines are the third set of guidelines for mitigation banking projects in the Fort Worth District. The previous two sets of Guidelines – CESWF-10-MITB and CESWF-12-MITB

---

<sup>4</sup> 33 CFR Section 332.3(a)(1).

<sup>5</sup> See *Id.* at Section 332.1(c); 2008 Mitigation Rule at 19,594.

<sup>6</sup> *Id.* at 2008 Mitigation Rule.

<sup>7</sup> Jasper, Brent, “Mitigation Banking Program in the Fort Worth District,” Development Impact Minimization Workshop, NCTCOG, Sept. 6, 2017. Available at: [http://www.nctcog.org/trans/environmentalstewardship/USACE\\_Mitigation\\_Banking-Permitting.pdf](http://www.nctcog.org/trans/environmentalstewardship/USACE_Mitigation_Banking-Permitting.pdf) (“Jasper Presentation”).

(“2011 Guidelines” and “2016 Guidelines”)<sup>8</sup> – were issued in 2011 and 2016, respectively. Each succeeding issue of the guidelines is cumulative and appears to be an expansion of previous guidelines. The 2011, 2016, and draft Guidelines can be summarized as follows:

The guidelines include the following previous versions, with each being cumulative and appearing to be an expansion of previous guidelines.

- **2011 Guidelines.** This is a short guideline with provisions for preservation, monitoring, long-term hydrology, credit release schedule, and service area. The basis for this was that if guidelines were followed, there would be fewer issues, less delay with mitigation banks, and increased predictability.
- **2016 Guidelines.** These guidelines were more detailed and specific, and included provisions for: 1) recently disturbed sites, 2) financial assurances, 3) stream credits, 4) stream design plans, 5) consultant qualification and experience, 6) modification of existing mitigation banking instruments (“MBIs”), 7) reference sites, 8) use of index of biotic integrity, 9) performance-based credit releases, 10) regulatory in-lieu fee and bank information tracking system (“RIBITS”) credit ledger reporting, 11) irrigation and monitoring, 12) abstract/title search, 13) additional tables for MBI, 14) document submittal, 15) funding of long-term endowment, 16) adjustment of long-term endowment funds, 17) conservation easement holder qualifications and experience, and 18) stream mitigation buffers. The basis for this was to establish considerations that could be incorporated into banking proposals as well as bank expansion, to increase predictability and transparency for mitigation banking activities, and to expedite the mitigation banking process.
- **Current Draft Guidelines.** These considerably expanded draft Guidelines include: 1) Phase 1 environmental assessment to be done at the prospectus phase, 2) additional invasive species requirements, 3) forest restoration performance standards, 4) baseline data including jurisdictional determinations (“JDs”) to be collected two years prior to the submission of the draft MBI, 5) additional buffer widths required for streams subject to lateral migration, 6) short-term financial assurances required to be fully retained until a bank has achieved full performance standards, 7) stream reference reach to be submitted for approval by the Interagency Review Team (“IRT”),<sup>9</sup> 8) flash grazing permitted under

---

<sup>8</sup> Fort Worth District Mitigation Banking Guidelines, CESWF-10-MITB, June 16, 2011 (“2011 Guidelines”); and CESWF-12-MITB, July 5, 2016 (“2016 Guidelines”).

<sup>9</sup> As required under 33 CFR Section 332.8(b), this is a team established by the District Engineer to review documentation for the establishment and management of mitigation banks and in-lieu fee programs. The team includes representatives from the Corps, other federal agencies such as the EPA, U.S. Fish and Wildlife Service, National Oceanic and Atmospheric Administration Fisheries, Natural Resources Conservation Service, and other federal, tribal, state and local agencies.

certain parameters, 9) stream stability demonstrations, 10) on-site supervision requirements, 11) title abstract to include a 100-year title search, 12) subsurface mineral exploration provisions, 13) templates for banking instruments (prospectus, MBI, conservation easement, and sample tables for short and long-term financial assurances, 14) JD identifying waters of the U.S. required for the third and final credit releases, 15) initial credit release for stream and wetland creation not approved for non-waters of the U.S. areas at time baseline surveys are completed but approved upon identification of the extent, limits, and type of waters of the U.S. as verified by the Corps, 16) mitigation activities specified in the MBI to be initiated within one year of initial credit release, and 17) force majeure provisions. According to the Public Notice and mirroring the 2016 Guidelines, the basis for these revisions is to increase predictability and transparency for mitigation banking activities as well as to expedite the mitigation banking process.

The scope and detail of the changes in the draft Guidelines are far more significant than the mere numerical count and Corps rationale indicate, and we provide our specific concerns below.

### III. GENERAL COMMENTS

The Associations support the overall Corps' efforts to streamline its regulatory requirements in ways that protect the environment and promote transparency while increasing the clarity, certainty, and timely decision-making needed for effective investment decisions. Yet, as outlined below, the Fort Worth District's draft Guidelines are burdensome and would impose numerous additional hurdles on an already protracted permitting process.

**A. The newly proposed draft Guidelines are unnecessarily stringent and a significant expansion from the 2008 Mitigation Rule and prior banking guidelines; and more importantly, are entirely contrary to the direction and directives to alleviate regulatory burdens as set out in the EO 13777 and EO 13766.**

The draft Guidelines are a considerable expansion from the 2008 Mitigation Rule (which is also under review) as well as the 2016 Guidelines published less than two years ago. The Specific Comments Section below lists several examples and recommends necessary revisions.

The draft Guidelines also fail to consider the clear direction set out in the Executive Order 13777.<sup>10</sup> This Executive Order highlights the need to lower regulatory burdens and directs federal agencies to identify and repeal, replace, or modify regulations that eliminate jobs, or inhibit creation; are outdated, unnecessary, or ineffective; impose costs that exceed benefits; or that create a serious

---

<sup>10</sup> EO 13777.

consistency or otherwise interfere with regulatory reform initiatives and policies.<sup>11</sup> As discussed in this comment letter, the draft Guidelines are entirely misaligned with these executive mandates. The draft Guidelines contemplate onerous requirements that will amplify regulatory burdens, and as evident by our comments, easily meet the minimum requirements under EO 13777 for onerous regulatory requirements.

EO 13766 continues this emphasis on reducing regulatory burdens on infrastructure projects and requires federal infrastructure decisions to be made with “maximum efficiency and effectiveness.”<sup>12</sup> EO 13766 outlines the policy of the executive branch “to streamline and expedite, in a manner consistent with law, environmental reviews and approvals for all infrastructure projects.”<sup>13</sup> The recently issued “Legislative Outline for Rebuilding Infrastructure in America” by the Administration also emphasizes the need to reduce inefficiencies in the environmental review and permitting process, and specifically provides recommendations to remove duplication in the review process for mitigation banking by eliminating the IRT, as well as calling for incentives for enhanced environmentally beneficial mitigation projects.<sup>14</sup>

While the Public Notice claims that the draft Guidelines will serve to increase predictability and expedite the mitigation banking process, our careful review of the increased processes and procedures woven into the draft Guidelines indicates otherwise. For example, requiring unnecessary IRT reviews and approvals of mineral management plans (“MMPs”) and surface use agreements (“SUAs”) will result in excessive delays, and is contrary to the clear mandate as set out by the Administration.<sup>15</sup>

**B. Given the fundamental regulatory reform efforts that are underway at the Corps, the Associations believe that it is inappropriate for the Fort Worth District to issue additional mitigation banking guidelines without considering the policies outlined in the Executive Orders on regulatory reform as well as the Corps Headquarters’ emphasis on improving efficiencies and effectiveness in the regulatory process.**

Under the policies of the Administration, we understand that the Corps currently is examining its internal policies, regulations, and processes to increase efficiencies and timeliness of decisions.<sup>16</sup>

---

<sup>11</sup> Id. at Section 3(d).

<sup>12</sup> EO 13766 at Section 1.

<sup>13</sup> Id.

<sup>14</sup> The White House, Legislative Outline for Rebuilding Infrastructure in America, Feb. 2018 (“Legislative Outline”).

<sup>15</sup> The Legislative Outline notes the following: “Approved timelines often are extended beyond those specified in the Mitigation Rule, due to protracted consultation among the [IRT]. The final approval of a mitigation bank is often delayed because of the time it takes to resolve disagreements among the entities participating in the second review. Removing the second review would enhance the efficiency of the mitigation bank approval time frames.” Legislative Outline at p. 39.

<sup>16</sup> 82 Fed. Reg. 43,314, Sept. 15, 2017 (“Subgroup to the Department of Defense (“DoD”)’s Regulatory Reform Task Force Request for Comments”); House Subcommittee on Water Resources and Environment, Public Hearing on



Major Jackson, Corps Deputy Commanding General of Civil and Emergency Operations, testified at a recent congressional hearing that the Corps’ “goal is intended to simplify the process for gaining infrastructure permits” and that it is aimed at “streamlining the regulatory processes.”<sup>17</sup> Mr. Dalton, Corps Director of Civil Works, further emphasized that one of the reforms to enhance project delivery is focused on how the Corps puts guidance together.<sup>18</sup> That is, Mr. Dalton added “guidance needs to be jointly developed so that one part of the organization is absolutely aware what is happening in another part of the organization.”<sup>19</sup> The Dalton Memorandum also highlights one of the core reforms being to “[i]ntegrate and [s]ynchronize [a]gency [p]olicy and [g]uidance.”<sup>20</sup>

The 2008 Mitigation Rule is also under review by the Corps Subgroup to the DoD Regulatory Reform Task Force.<sup>21</sup> The API and the Association of Oil Pipe Lines (“AOPL”) as well as many others submitted comments in response to the Corps Subgroup to the DoD Regulatory Reform Task Force’s request for comments.<sup>22</sup> The API and AOPL specifically noted their concerns with the implementation of mitigation requirements and the need for the Corps to improve its agency rules and processes to provide more certainty and consistency to the Section 404 permitting program.<sup>23</sup> The Administration’s Legislative Outline also includes recommendations for revisions to the 2008 Mitigation Rule. Thus, there is a possibility that the underlying rule may undergo

---

America’s Water Resources Infrastructure: Approaches to Enhanced Project Delivery, Jan. 18, 2017 (Testimony of Corps management and others) (“House Subcomm. Testimony”); and Dalton, James, Memorandum on Further Advancing Project Delivery Efficiency and Effectiveness of USACE Civil Works, June 21, 2017 (“Dalton Memorandum”).

<sup>17</sup> House Subcomm. Testimony.

<sup>18</sup> Id.

<sup>19</sup> Id. Note that within the Corps, there are a number of mitigation banking guidelines that apply to specific Corps Districts or divisions and each can vary widely in terms of specificity and assessment tools/legal instruments to be utilized. For example, the Corps Headquarters’ Fact Sheet on “Site Protection of Compensatory Mitigation Assets,” includes examples of use restrictions such as “prohibitions on mining, dumping, or clearing” but there is no reference to mineral extraction activities. Available at: <http://www.usace.army.mil/Media/Fact-Sheets/Fact-Sheet-Article-View/Article/1088696/site-protection-of-compensatory-mitigation-projects/>. Yet at the Corps Districts level, there is widespread variability in the consideration of mineral rights in the context of long-term site protection. For example, the South Pacific Division groups water and mineral rights together and generally states that these rights must be disclosed if they could adversely affect the long-term management and site protection and in many cases, they “*may*” need to be terminated or subordinated. [Emphasis added.] Corps South Pacific Division, Final 2015 Regional Compensatory Mitigation and Monitoring Guidelines for South Pacific Division, 2015, Section 4.6 at p. 29, Section 4.8.7.3 at p. 33, and Section 7.9 at p. 48 (“Regional Compensatory Mitigation and Monitoring Guidelines for South Pacific Division”). The Charleston District allows for a qualified mineral interest (see footnote 38) while the draft Guidelines are extremely prescriptive requiring the bank sponsor to permanently retire any and all subsurface mineral rights owned by the landowner without any case-by-case review as contemplated by the South Pacific Division (see discussion below). While it is appropriate for Corps Districts to account for regional variability, we agree with Mr. Dalton that there needs to be an overall review and oversight of the mitigation banking guidelines by the Corps Headquarters to ensure consistency with the overarching theme of improving efficiencies in the permitting process as well as to allow for compatible uses related to oil and gas activities to co-exist in a manner that does not jeopardize the objectives of the compensatory mitigation project.

<sup>20</sup> Dalton Memorandum.

<sup>21</sup> Subgroup to the DoD Regulatory Reform Task Force’ Request for Comments.

<sup>22</sup> Available at: <http://www.aopl.org/wp-content/uploads/2017/10/Corps-Reg-Reform-Comments-API-AOPL.pdf>

<sup>23</sup> Id.

significant changes that would need to be taken into account in implementing mitigation banking guidelines and policies at the Corps District level. Clearly, this is not the time to propose a third set of cumulative guidelines.

In light of these reform efforts, the Associations request that the Fort Worth District refrain from finalizing these draft Guidelines and instead focus on reviewing, modifying, and updating its existing guidance in coordination with Headquarters and stakeholders. Any review must be aligned with the principles of alleviating regulatory burden and improving efficiency and effectiveness as outlined in the Executive Orders and as laid out in the Dalton Memorandum.

**C. The draft Guidelines are exceedingly prescriptive, substantially exceed the 2008 Mitigation Rule requirements, and are mired in minutiae that will discourage applicants from developing mitigation banks.**

The Associations recognize that the 2008 Mitigation Rule provides for some discretion to the Corps Districts in applying mitigation requirements to allow for regional variability and site-specific conditions. However, the Fort Worth District appears to expand its draft Guidelines well beyond the scope of the 2008 Mitigation Rule. The Specific Comments Section below includes several examples and recommends striking or modifying the provisions to more closely align with the existing regulatory language.

Many provisions also include very specific and unreasonable requirements that would deter applicants interested in developing mitigation banks. One example (discussed in more detail below) is the requirement for “an experienced oil and gas attorney” to draft a SUA commonly used in oil and gas practice transactions and requiring the SUA to be reviewed and approved by the IRT, a team that presumably does not include oil and gas practitioners. There are also onerous restrictions in the draft Guidelines for subsurface mineral exploration and extraction activities with further obligations included for bank sponsors to assess adjacent lands for mineral extraction potential. These types of requirements are likely to hinder mitigation bank development resulting in fewer and smaller mitigation banks that are geographically distant from impacts, and less likely to be “in-kind.”

**D. Overall, the draft Guidelines will have a chilling effect on the availability of new compensatory mitigation options that in turn would hamper applicants’ ability to acquire timely Corps permits for essential energy and water infrastructure projects.**

With such extensive requirements in the draft Guidelines and templates, the Associations believe that those seeking to develop mitigation banks may be deterred. And consequently, there may be

fewer mitigation banking options for permittees to select as part of the Section 404 permitting requirement to offset unavoidable impacts.<sup>24</sup>

This is of particular significance here because the 2008 Mitigation Rule provides standards and criteria for mitigation projects and includes a hierarchy of preference with the order being: mitigation banks; in-lieu fee programs; and then permittee-responsible mitigation. Thus, permittees are steered toward the mitigation bank option which is seen as the default option with the burden being placed on the applicants to justify use of other options. **The lack of viable options to meet the compensatory mitigation requirements for a Section 404 permit will delay the Corps' approval process and result in hampering our members' and other key stakeholders' ability to construct and expand key energy and water infrastructure projects, including water storage reservoirs and flood control projects.**

**E. Many burdensome requirements in the draft Guidelines will likely result in increased delays and costs associated with banking projects as well as overall Corps permits.**

The draft Guidelines impose numerous additional reviews by external groups as well as new submittal requirements which will delay the approval process for banking projects. As discussed above, this is a departure from the goals set out by the Administration for a consolidated and streamlined federal permitting review process, as evidenced in the recommendations specified in the Administration's Legislative Outline. In addition, the ability to offset unavoidable environmental impacts with compensatory mitigation is an essential component of Section 404 permits and with a likely slowdown in the mitigation banking area, there will also be correlative impacts on the Corps permitting process with increased delays and project costs to be anticipated for the oil and natural gas industry. Examples of onerous costly requirements include: 1) the IRT to review and approve stream reference reaches as well as any SUAs; 2) all baseline data including JDs to not have been collected more than two years prior to submission of the draft MBI; and 3) a 100-year title search (while a 60-year search sufficed for the 2016 Guidelines) required for proposed mitigation bank sites and likely required for adjacent properties depending on the potential for mineral extraction.

**F. The draft Guidelines are not limited in their applicability to mitigation banks; their scope would likely extend to permittee-responsible mitigation and other regulatory program areas; and thus the draft Guidelines could have a wider negative impact on the availability of overall compensatory mitigation credits.**

---

<sup>24</sup> See 33 CFR Section 332.3(a)(1).

Given Mr. Jasper’s statement that “[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)**,” we also have concerns about the potential broader application of these draft Guidelines to other compensatory mitigation options especially given the issues we have raised in this comment letter.<sup>25</sup>

In addition, compensatory mitigation projects can also be designed to satisfy the mitigation requirements of the Endangered Species Act or Habitat Conservation Plans.<sup>26</sup> Compensatory mitigation projects for Corps permits may also be used to satisfy the environmental requirements of other federal, state, tribal, and local regulatory programs.<sup>27</sup>

Thus, while at first blush, it may appear that these draft Guidelines are limited to banking projects within the Fort Worth District in Texas, they may potentially be applied in other contexts such as Endangered Species Act reviews. This again stresses the need for the Fort Worth District to take the time to more thoroughly review these guidelines in coordination with the Corps headquarters and stakeholders.

**G. Compensatory mitigation projects also benefit and improve the environment; and yet, in a departure from the Administration’s goals, the Fort Worth District appears to be discouraging the development of such projects.**

The Associations also note that the development of compensatory mitigation projects, whether it be banking or permittee-responsible mitigation, is intended to improve the environment and should be encouraged with a streamlined environmental review process. This is reflected in the White House’s recently released Legislative Outline that emphasizes the need to establish procedures that “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] [t]his would streamline the environmental and permitting review process for those projects that demonstrate an improvement to the environment.”<sup>28</sup>

Instead of deterring potential developers of mitigation banks with burdensome and unnecessary requirements, the Fort Worth District should coordinate with Headquarters and stakeholders in developing guidance that provides incentives for developing mitigation banks.

---

<sup>25</sup> Jasper Presentation.

<sup>26</sup> 33 CFR Section 332.3(j)(3).

<sup>27</sup> Id. at Section 332.3(j)(1).

<sup>28</sup> Legislative Outline at p. 40.

#### IV. SPECIFIC COMMENTS

The Associations offer the following comments and recommendations that are of specific interest to the oil and natural gas industry. Our comments begin with Section 12 as relating to Subsurface Mineral Exploration which we have the most concerns with, following by a discussion of the remaining provisions.

**1. SUBSURFACE MINERAL EXPLORATION. This is a new provision that adds several onerous requirements relating to subsurface mineral exploration and extraction activities.**

Overall, these requirements impose unnecessarily strenuous hurdles and obligations on bank sponsors and do not allow for compatible uses. We recognize that the preamble to the 2008 Mitigation Rule states that “[d]istrict engineers will determine which uses are compatible and incompatible on a case-by-case basis.”<sup>29</sup> Yet, it is troubling that the draft Guidelines impose a default position of restricting surface mineral extraction and exploration activities without consideration of oil and natural gas operations as potentially compatible uses. The draft Guidelines overgeneralize the potential for adverse impacts from these types of oil and natural gas activities without contemplating reasonable compatible uses.

33 CFR Section 332.7(a)(2) states that the “[t]he real estate instrument, management plan, or other long-term protection mechanism of the compensatory mitigation site must, to the extent appropriate and practicable, prohibit incompatible uses (e.g., clear cutting or mineral extraction) that might otherwise jeopardize the objectives of the compensatory mitigation project.” [Emphasis added.]<sup>30</sup> “Mineral extraction” is listed as an example in a parenthetical but there is no explicit prohibition on oil and natural gas activities and the preamble explains that incompatible uses may be prohibited “to the extent appropriate and practicable” and only if they “otherwise jeopardize the objectives of the compensatory mitigation project.”<sup>31</sup> “[M]ineral extraction” is also grouped with “clear cutting” which suggests that the Corps’ intent was incompatible uses that inherently call for significant alteration of the natural surface terrain. However, those types of activities are very different from current practices utilized in oil and natural gas exploration and production.

More importantly, the draft Guidelines do not take into account established Texas oil and gas law that recognizes and provides a clear process for reconciling surface and mineral estate uses and allowing both uses to co-exist in certain circumstances.

---

<sup>29</sup> 2008 Mitigation Rule at p. 19,646.

<sup>30</sup> 33 CFR Section 332.7(a)(2).

<sup>31</sup> 2008 Mitigation Rule at p. 19,646. See also footnote 19 relating to Corps Fact Sheet on Site Protection of Compensatory Mitigation Assets.

Texas law is settled that the mineral interest is a separate interest in land that can be severed from the surface estate and that, where the mineral interest is severed, the mineral estate is dominant.<sup>32</sup> Here, it is also common for the mineral interest estate to be severed from the surface estate. But there is also the concept that “while the mineral estate is the dominant estate, the rights implied in favor of the mineral estate are to be exercised with *due regard* for the rights of the surface owner.”<sup>33</sup> Based on this “due regard” notion, Texas follows the well-established common law Accommodation Doctrine which recognizes that the mineral estate is dominant but a mineral estate owner must reasonably accommodate the surface owner’s existing uses.<sup>34</sup> The underlying principle of Accommodation Doctrine is to balance the rights of the surface owner and the mineral owner in the use of the surface.<sup>35</sup>

Clearly, the concept of compatible oil and natural gas uses co-existing with surface area use has a rich history and precedent in Texas which the Corps should not countermand. As such, oil and natural gas activities should not be summarily disavowed as incompatible or allowed only under very restrictive or impracticable terms. The Associations believe that conventional oil and gas operations or activities using the latest innovative technology of horizontal drilling can compatibly co-exist with various surface uses including compensatory mitigation projects. Oil and gas development is also a highly regulated activity that requires compliance with numerous federal, state, and local regulations, and permits issued pursuant to these regulations. These regulations, along with oil and gas operators’ commitment to environmental stewardship, already ensure that the land and water are protected; that wastes, emissions, and surface disturbances are minimized; and that land is returned to a natural state as soon as possible after development activity. In addition to these regulations, oil and gas companies have developed and utilize API Bulletin 75L,

---

<sup>32</sup> See Tarrant County Water & Improvement Dist. No. 1 v. Haupt, Inc., 854 S.W.2d 909, 911 (Tex. 1993) rev’g 833 S.W.2d 697 (Tex. App. 1992), remanded to 870 S.W.2d 350 (Tex. App. 1994) citing Cowan v. Hardeman, 26 Tex. 217, 222 (1862) and Harris v. Currie, 142 Tex. 93, 176 S.W.2d 302, 305 (1943). Also, note also the discussion in Tarrant County Water & Improvement Dist. No. 1 relating to regulatory taking or inverse condemnation (To protect its fresh water supply, a governmental entity’s action to restrict a mineral owner’s use of a surface through surface drilling where it is the only manner of use whereby minerals can be reasonably produced is a situation where inverse condemnation or regulatory takings is found to have occurred. Id. at 913. Similarly, provisions in the draft Guidelines where the Corps is requiring the bank sponsor to fully and permanently retire all subsurface mineral rights in perpetuity potentially raise issues of inverse condemnation. There are also additional ownership considerations to take into account. Surface owner may own all, none, or a percentage of minerals under the mitigation bank tract, or portions of the tract. Requiring retirement of minerals where the surface owner is not in complete control of 100% of the minerals may adversely affect the ability of other mineral owners to market or develop their property. Further, many horizontal wells must meet minimum distance requirements from lease lines and minimum unit sizes for Railroad Commission of Texas permit authorizations. See for example, 16 Tex. Admin. Code. Section 3.37(a)(1) (Statewide Spacing Rule). Retiring minerals within a mitigation bank may impact the ability of adjacent mineral owners’ or lessee’s ability to economically extract minerals.

<sup>33</sup> Id.

<sup>34</sup> Getty Oil Co. v. Jones, 470 S.W.2d 618, 621-622 (Tex. 1971) (stating reasonable limitations exist when the lessee makes use of the surface). This is such a well established legal principle that Texas courts have also extended its applicability to groundwater estates (that is, groundwater owners have a duty to accommodate the surface owner.). Coyote Lake Ranch, LLC v. the City of Lubbock, 498 S.W.3d 53 (Tex. 2016).

<sup>35</sup> Tarrant County Water & Improvement Dist. No. 1 at 911 (citing Getty et. al.).

which includes numerous best practices for the safe and environmental responsible development of oil and gas resources.<sup>36</sup>

In addition, we understand the need for long-term protection of mitigation banks to sustain their ecological values and to meet requirements under the 2008 Mitigation Rule, but the Corps already provides mechanisms such as Conservation Easements and MBIs to provide for sustained safeguards for mitigation banks. And Corps practices have long recognized that both uses can co-exist within this framework. In fact, there is precedent in the Fort Worth District where both uses have been found to be acceptable and allowed to co-exist. The Associations provide the South Forks Trinity River Banks Mitigation Banking (SFTBMB) Instrument, dated July 2006 and last modified October, 2009, as an example from the Fort Worth District.<sup>37</sup> For example, the SFTBMB states, “[t]he exploration for, and production and transportation of, subsurface mineral resources beneath this SFTRMB is acceptable provided the ground disturbing activities and surface alterations are minimized to the maximum extent practicable; activities are conducted in a manner that minimizes adverse environmental impacts; impacted areas are restored to pre-existing conditions as soon as practicable; reasonable and appropriate compensatory mitigation is achieved; and the entity conducting the activities complies with all applicable regulatory requirements, including Section 404 of the CWA.”<sup>38</sup>

***We recommend deleting the first sentence of Section 12 and replacing it with the following: The District Engineer shall allow the exploration for, and production and transportation of, subsurface mineral resources relating to oil and natural gas operation, as a use compatible with mitigation banking, provided that reasonable steps are taken to avoid and minimize impacts to the applicable mitigation project, and to mitigate, as practicable, where impacts are unavoidable.<sup>39</sup> Only in those instances where these reasonable measures are not able to be met, the District Engineer may consider restricting subsurface oil and natural gas exploration and extraction activities to the extent allowed under the law.***

---

<sup>36</sup> API, Guidance Document for the Development of a Safety and Environmental Management System for Onshore Oil and Natural Gas Production Operations and Associated Activities, API Bulletin 75L, 2007.

<sup>37</sup> South Forks Trinity River Mitigation Group, Mitigation Banking Instrument South Forks Trinity River Mitigation Bank, Ellis County, Texas, July 2006, modified Oct. 2009.

<sup>38</sup> *Id.* at p. 44. Another example is from the Corps’ Charleston District, 2010 Model Conservation Easement which allows for both uses: “Grantor specifically reserves a qualified mineral interest (as defined in § 170(h)(6) of the Internal Revenue Code) in subsurface oil, gas or other minerals and the right to access such minerals. However, there shall be no extraction or removal of, or exploration for, minerals by any surface mining method, nor by any method which results in subsidence or which otherwise interferes with the continuing natural condition of the Protected Property.” Corps Charleston District, Conservation Easement Model of September 2010, Section (D)(4) at p. 4.

<sup>39</sup> While case-specific and narrowly applying to a five-states range of a particular species, “Range-Wide Oil and Gas Candidate Conservation Agreement with Assurances for the Lesser Prairie-Chicken [“LEPC”]” is an analogous example of a comprehensive species-specific conservation plan that utilizes the “avoid, minimize, and mitigation” protocol for oil and gas development-related activities. U.S. Fish and Wildlife Service and the Western Association of Fish and Wildlife Agencies/Foundation for Western Fish and Wildlife, Range-Wide Oil and Gas Candidate Conservation Agreement with Assurances for the Lesser Prairie-Chicken (*Tympanuchus pallidicinctus*) in Colorado, Kansas, New Mexico, Oklahoma, and Texas, Feb. 28, 2014.

In addition to our overriding concerns and recommendations above, we request a number of specific revisions. While 33 CFR Section 332.8(t) considers long-term mechanisms for site protection, there is nothing in this section or the 2008 Mitigation Rule requiring bank sponsors to retire mineral rights in perpetuity.<sup>40</sup> In fact, one commenter stated specifically that a mitigation bank needs to be preserved in perpetuity; however, no such explicit change was made in the 2008 Mitigation Rule.<sup>41</sup> Moreover, as discussed above, such permanent draconian restrictions are not necessary given that subsurface mineral exploration and extraction activities can be conducted in a manner that is compatible with a mitigation banking project.<sup>42</sup>

***The sentence relating to the bank sponsor being required to fully and permanently retiring all subsurface rights in perpetuity must be deleted.***

This section also states that for any subsurface mineral rights held by other parties, the bank sponsor should make “reasonable efforts” to purchase or retrieve all subsurface mineral rights. It is very difficult to attain mineral rights in Texas for several reasons including but not limited to: 1) there are several mineral estates including ones owned by the State of Texas or the U.S. Government that cannot be purchased or retrieved; and 2) the mineral estate could be held by undivided interests in all and any mineral interests meaning that the co-owners of the undivided interests have unrestricted claims to all the mineral assets and the bank sponsors would need to negotiate with all of the undivided interests who may not all agree; and 3) because of their intrinsic value, the mineral estate may be priced higher than the surface estate.

Thus, such a requirement is likely to deter future bank sponsors from developing future projects. And even if bank sponsors were able to acquire mineral estates, the expense of purchasing those mineral estates would likely result in increases in costs of mitigation credits for Corps permittees.

***We recommend deleting this sentence relating to “reasonable efforts.”***

We believe that requiring bank sponsors to provide a mineral assessment report is beyond the requirements set out in the 2008 Mitigation Rule; but given current practice relating to mineral assessment reports, we have no issue with this requirement.

This section requires the MMP to be provided to the IRT for review as part of the draft MBI review. And there is a requirement for a SUA to be provided to the IRT for review and approval. As discussed above, IRT review and approval is not explicitly required under the 2008 Mitigation

---

<sup>40</sup> 33 CFR Section 332.8(t).

<sup>41</sup> 2008 Mitigation Rule at p. 19,646.

<sup>42</sup> See also footnote 32 relating to issues of regulatory taking.



Rule for MMPs or SUAs, and the Corps should refrain from elevating these to the IRT. This process introduces delay and inefficiencies into the process.

***For the reasons stated in our comments above, we recommend deleting the provisions requiring MMPs and SUAs to be reviewed by the IRT.***

The Corps also provides specific directions to hire “an experienced oil and gas attorney” in certain circumstances to draft a SUA for the potential of any subsurface holder(s) to conduct exploration or extraction activities in those areas. This language relating to an “experienced oil and gas attorney” is ambiguous, overly broad and inappropriate. The SUA is a very technical contractual oil and gas document and to include a requirement for the Corps or IRT to review and approve the SUA is unreasonable given that the Corps or members of IRT presumably are not oil and gas law experts. More importantly, because under Texas law the mineral estate is dominant and has a right to reasonable use of the surface, a surface owner cannot compel a mineral owner or lessee to enter into a SUA.

***We recommend deleting all requirements relating to the SUA.***

Horizontal drilling can also extend as far as two miles and it is unclear as to what potential areas and activities would be covered under these requirements.

***We request additional clarification.***

## **2. KEY PROVISIONS OF INTEREST TO THE OIL AND NATURAL GAS INDUSTRY.**

These provisions are discussed in the same order in which they are presented in the draft Guidelines.

- a) Phase 1 Environmental. A Phase 1 environmental assessment is required in accordance with ASTM Practice E-1527-13 at the prospectus phase for all mitigation bank sites.

The draft Guidelines require a Phase 1 environmental assessment in accordance with ASTM standards at the prospectus phase. This exceeds the requirements set out in the 2008 Mitigation Rule. This is a rigid standard that is associated with the “All Appropriate Inquiry” aspect to the Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”). Such a full-phased environmental site assessment is not necessary or appropriate in all circumstances.

***We recommend this section to be deleted in its entirety as it exceeds the requirements of the 2008 Mitigation Rule; however, a Phase 1 environmental assessment could be required at the discretion of the District Engineer, as needed, on a case-by-case basis.***

b) Invasive Species Requirements. Invasive species composition would be limited to 0% for over-story and mid-story and 1% in the herbaceous layers with exceptions for “specific problematic species” where justification may be considered.

Without considering site-specific data and species needs, we believe that having arbitrary values that apply overly restrictive requirements across the board is inappropriate.

***We recommend deleting this provision and replacing it with performance standards based on site-specific ecological data and species needs.***

c) Forest Restoration Performance Standards. Specific performance standards at the release of monitoring that are in addition to TXRAM scores are required, including the provision for a site to support a minimum of 250 stems per acre of trees that have been planted and rooted in the group for a minimum of five years. A footnote allows for some case-by-case basis evaluation.

The Texas Forest Service (“TFS”) in its “Technical Guidelines for East Texas Tree (Hardwood) Establishment and Quality Assurance,” recommends planting densities between 110 and 300 seedlings per acre when planting hardwood trees for wildlife purposes.<sup>43</sup> It is our assessment that allowing for 80% survival, the TFS Technical Guidelines and Standards would allow for between 90 and 240 surviving hardwood trees. Thus, these standards appear to be appropriate in the ecological context, but with such a broad suggested range, we suggest 200 stems per acre of trees as a reasonable parameter.

***We recommend that the 250 stems per acre of trees requirements be changed to 200 stems per acre of trees.***

---

<sup>43</sup> Available at:

[http://texasforests.tamu.edu/uploadedFiles/TFSMain/Manage\\_Forest\\_and\\_Land/Landowner\\_Assistance/Stewardship\(1\)/Technical\\_Guidelines\\_and\\_Quality\\_Assurance\\_Standards\\_for\\_Hardwood\\_Planting\\_-\\_August\\_2016.pdf](http://texasforests.tamu.edu/uploadedFiles/TFSMain/Manage_Forest_and_Land/Landowner_Assistance/Stewardship(1)/Technical_Guidelines_and_Quality_Assurance_Standards_for_Hardwood_Planting_-_August_2016.pdf) (“TFS Technical Guidelines and Standards”). While the guidelines are for East Texas trees, the planting densities can provide conservative guideposts for state-wide performance standards.

d) Baseline Data. All baseline data, including JDs must not be collected more than two years prior to the submission of the draft MBI.

The 2008 Mitigation Rule requirement pertaining to baseline data does not include a two-year restriction. Also, for delineations for baseline documentation, 33 CFR Section 332.4(c)(5) simply requires a description of a delineation of waters of the U.S. on the proposed compensatory mitigation project site, and the rule is silent about the timing or and the type of JD necessary.<sup>44</sup> Notwithstanding the rule requirements, an approved JD (“AJD”) is also effective for five years, and given the backlog and delays with issuance of JDs, two years is unreasonable and unnecessarily restrictive.<sup>45</sup>

*We recommend this entire section is deleted.*

e) Stream Migration Buffer. Streams subject to lateral migration may require additional buffer widths in order to ensure long-term viability of both the stream channel and its associated TXRAM buffer.

The 2016 guidelines already include provisions relating to stream migration buffers and the Associations would like clarification on the need for this additional non-mandatory requirement.

f) Reduction of Short-term Financial Assurances. Short-term financial assurances should be retained until such time that the bank has achieved full performance standards as specified in the MBI.

The 2016 Guidelines appear to adequately cover financial assurance requirements “in accordance with the 2008 Mitigation Rule.” The 2016 Guidelines require an additional 10% to cover for contingencies. The need for further provisions that require full short-term financial assurances to be retained until the bank has achieved full performance standards as specified in the MBI is unnecessary and imposes additional projects costs.

*We recommend that no additional provisions should be added to the financial assurance requirements.*

---

<sup>44</sup> 33 CFR Section 332.4(c)(5).

<sup>45</sup> Id. at Part 331, Appendix C.

g) Stream Reference Reach. Prior to scoring TXRAM and other relevant protocols, proposed reference reaches should be submitted to and approved by the IRT.

33 CFR Section 332.8(b) does not prescribe IRT review of stream reference reaches explicitly. It states that the IRT will review the prospectus, MBI, and other appropriate documents, and provide comments to the District Engineer.<sup>46</sup> As such, the District Engineer has some discretion. Also, the IRT reviews the MBI and will have an opportunity to comment at that time.<sup>47</sup>

***To avoid undue delay, we recommend that proposed stream reference reaches be approved by the Corps District and not elevated to the IRT for approval.***

h) Flash Grazing. Limited flash grazing as an adaptive management tool to control for invasive species is allowed under specific conditions.

33 CFR Section 332.7(a)(2) recognizes compatible uses such as fishing and grazing rights and we are supportive of this provision generally.<sup>48</sup> Grazing may increase species richness, decrease invasive species, and provide for more favorable hydroperiod.<sup>49</sup> However, this proposed section appears to be unduly restrictive in that it requires a separate request for each flash grazing event and limits it to short duration grazing. This provision imposes a heavy burden on the applicant for this use and should be revised.

***We recommend that the Fort Worth District apply the 2008 Mitigation Rule and authorize uses that will not jeopardize the objectives of the compensatory mitigation project without putting undue restrictions that make it burdensome for applicants to implement.***

i) On-site Supervision. This requires submission of on-site supervision schedule by the bank sponsor.

The 2008 Mitigation Rule requires “qualifications of the sponsors” to be included and the Fort Worth District expanded on this in the 2016 Guidelines with a section on consultant qualifications and experiences. In light of these existing requirements, the detailed on-site supervision schedule requirements proposed in the draft Guidelines are unnecessary and beyond what was contemplated under the 2008 Mitigation Rule.

---

<sup>46</sup> Id. at Section 332.8(b).

<sup>47</sup> Id. See also footnote 15.

<sup>48</sup> Id. at Section 332.7(a)(2).

<sup>49</sup> See Marty, Jaymee T., Effects of Cattle Grazing on Diversity in Ephemeral Wetlands, Conservation Biology, Vol. 19, Issue 5, Sept. 2005.

***We request that the Corps remove this unnecessary requirement.***

j) Title Abstract. As a component of the prospectus, this requires, amongst other things, the bank sponsor to provide a copy of a title abstract including a 100-year title search performed by a title company.

The 2008 Mitigation Rule includes site selection, baseline information, and prospectus requirements but there are no specific requirements relating to extensive title searches for subject properties or adjacent properties.<sup>50</sup> The 2016 Guidelines require a 60-year title search and the provision states that the information is necessary to comply with the 2008 Mitigation Rule. It is unclear as to why the Corps would now add a requirement extending the title search to 100 years and how it would be reconciled with the 2016 Guidelines. The Corps also states that it may require title abstracts, including a 100-year title search, for adjacent properties where there is a “potential for mineral extraction.” This open-ended provision in Section 11 of the draft Guidelines further states that this information may be required “on a case-by-case basis to identify and evaluate the likelihood and extent to which existing and proposed land use activities located on adjacent lands, could adversely affect the ecological condition of the proposed bank site.”

It is unclear how the Corps would determine the types of activities that would be considered to have adverse effects on the ecological condition of the proposed bank site. Given the Fort Worth District’s blanket statement in Section 12 of the draft Guidelines that “subsurface mineral exploration and extraction activities have the potential to adversely impact restored, enhanced and created aquatic resources,” the Associations are concerned that these additional “case-by-case” requirements will be required for any and all oil and gas exploration and extraction activities adjacent to potential mitigation bank locations. There are no such requirements in 33 CFR Section 332.8(d)(2) pertaining to title search information required for prospectus submittal. More importantly, mitigation bank applicants have no control over adjacent lands and requiring applicants to conduct title searches on adjacent properties is completely unreasonable and calls for speculative assessments.

***We recommend that the Corps adhere to the 2008 Mitigation Rule and remove additional onerous and unnecessary requirements for a completed prospectus. In addition, based on comments above, all oil and gas mineral extraction and exploration should not be automatically considered as adverse but should be evaluated within the context of the Texas oil and gas law***

---

<sup>50</sup> 33 CFR Sections 332.4(c)(3)-(5) and 332.8(d)(2). Under 33 CFR Section 332.3(d)(1)(iv), the District Engineer may consider “[C]ompatibility with adjacent land uses and watershed management plans” and those could be assessed using other reasonably available resources. For example, baseline information for mitigation guidelines for the South Pacific Division includes “interviews with adjacent landowners.” Regional Compensatory Mitigation and Monitoring Guidelines for South Pacific Division, Section 4.8.8.3 at p. 34.

*and the 2008 Draft Rule which allows for compatible uses that do not otherwise jeopardize the objectives of the compensatory mitigation project (see our recommended language above).*

k) Templates. This provision encourages the use of templates for prospectus, MBI, conservation easement, and sample tables as issued by the Fort Worth District.

While the draft Guidelines are available for public comment, these mitigation templates which are incorporated by reference into the draft Guidelines already appear to have been released “for use in the Fort Worth District” as provided on the Corps referenced website.<sup>51</sup> These are key documents covering substantive issues including the Conservation Easement template with a complete mineral extraction section. Stakeholders should be given the opportunity to review and comment on these important templates prior to release for public use.

*We request an additional comment period of at least 90 days that allows for the review and comment on these templates. We also request that these templates be reviewed and revised in conjunction with issues raised in this comment letter especially in reference to the surface mineral exploration section.*

l) Monitoring Phase JD. This provision requires a JD identifying waters of the U.S. for the third and final credit releases for all schedules including wetlands and streams.

The 2008 Mitigation Rule is silent on a need for a JD during the monitoring phase. 33 CFR Section 332.4(c)(10) requires parameters to determine whether the compensatory mitigation project is on track to meet performance standards and whether adaptive management is needed.<sup>52</sup> 33 CFR Section 332.8(o)(8) states that credit releases are tied to performance-based milestones such as construction, planting, and establishment of specified plant and animal communities.<sup>53</sup> Overall, a delineation requirement is specified only for baseline data and is not required under the 2008 Mitigation Rule.

*We recommend removing this unnecessary and burdensome requirement.*

---

<sup>51</sup> Available at: <http://www.swf.usace.army.mil/Missions/Regulatory/Permitting/Mitigation-Templates/>

<sup>52</sup> 33 CFR Section 332.4(c)(10).

<sup>53</sup> Id. at Section 332.8(o)(8).

m) Initial Credit Release for Stream and Wetland Creation. This states that initial credit releases for those waters that are not waters of the U.S. will not be approved at the time baseline surveys are performed. The initial credit release will be approved upon identification of the extent, limits, and types of waters of the U.S. as verified by the Corps, in addition to other performance standards in the MBI.

As discussed above, the 2008 Mitigation Rule ties release of credits to performance-based milestones. Also, a waters of the U.S. delineation requirement inserts an additional layer of unwarranted complexity given the uncertainty with the pending revision to the waters of the U.S. definition and related rulemaking. The language in the draft Guidelines is also unclear in terms of whether a full AJD would be required or some other form of delineation would be required by the Corps.

*We recommend removing this unnecessary and burdensome requirement.*

n) Force Majeure. This specifies conditions that will not constitute default if a bank sponsor fails to perform its obligations due to certain defined force majeure conditions.

This condition would be helpful to bank sponsors given delays that can occur that are outside of a bank sponsor's reasonable control. This type of a contractual provision is appropriate for the MBI.

*We are in agreement with this concept and would recommend letting parties negotiate the final language for inclusion into the legal instruments.*

## V. CONCLUSION


While limited to the Fort Worth District, these draft Guidelines have the potential to set a precedent to significantly impede viable compensatory mitigation options available to permittees in other Corps Districts and regulatory areas. To this end, we provide specific comments for your consideration.

*In light of the Corps' overall efforts to alleviate unnecessary regulatory burdens and to streamline permitting processes, we respectfully request that the Fort Worth District refrain from finalizing the draft Guidelines at this time, and instead reconsider these draft Guidelines in light of the directives set out by the Administration and the Corps Headquarters.*

We would also welcome the opportunity to engage in an exchange of information that would facilitate a balanced approach to maintain stakeholder access to a broad range of Texas mitigation banking resources.

We look forward to working with you on this important issue.

Sincerely,



Amy Emmert  
Senior Policy Advisor  
American Petroleum Institute  
1220 L Street, N.W.  
Washington, DC 20005  
Tel: (202) 682-8372  
Email: [emmerta@api.org](mailto:emmerta@api.org)



Mari Ruckel  
V.P. of Government & Regulatory Affairs  
Texas Oil and Gas Association  
304 West 13th Street  
Austin, Texas 78701  
Tel: (512) 478-6631  
Email: [mruckel@txoga.org](mailto:mruckel@txoga.org)



Dan Naatz  
Senior Vice President of Government Relations and Political Affairs



Independent Petroleum Association of America  
1201 15<sup>th</sup> Street NW Suite 300  
Washington, DC 20005  
Tel: (202) 857-4722  
Email: [dnaatz@ipaa.org](mailto:dnaatz@ipaa.org)



V. Bruce Thompson  
President  
American Exploration & Production Council  
1001 Pennsylvania Avenue, NW Suite 7-127  
Washington, DC 20004  
Tel: (202) 742-4541  
Email: [bthompson@axpc.us](mailto:bthompson@axpc.us)