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100 YEARS

MITIGATION: CHALLENGES & OPPORTUNITIES

Provide Consistency and Certainty; Offer Alternative (Flexible/Advanced) Options; Address Lack of Banking Capacity; Coordinate Criteria on Work Windows and Mitigation Measures

Take-Aways:

Mitigation uncertainty is delaying project delivery and driving up construction costs. If a project proponent cannot adequately estimate mitigation cost and secure mitigation, it will negatively impact construction phasing, schedules and cause excessive cost and delay. For example, design build projects often shift 404 permit responsibilities to the contractor without providing cost or schedule relief for permitting delays or unanticipated mitigation costs that may arise. This forces contractors to add-in cost contingencies – resulting in higher costs to the owner and/or responsible contractors dropping out of the procurement due to untenable risk.

Challenges:

- Complex procurement strategies, construction scheduling, the strict regulation of hydrologic and habitat modifications, and competition for mitigation sites can encumber the already challenging task of mitigating for "like" value and function. Project proponents need to examine mitigation strategies as early as possible. Yet, there is a shortage of mitigation banking credits in some parts of the country, and many U.S. Army Corps of Engineers (USACE or Corps) districts are unwilling to accept in-lieu fee arrangements or they are simply unavailable. Clean Water Act (CWA) permit approvals can lead to major delays and cost overruns (often due to jurisdictional determinations (JD), consults, conditioning) and projects can come to a halt when field staff seek to re-evaluate impacts for even minor project changes.

Recommendations:

AGC's recommendations are consistent with: (1) Executive Order (EO) 13766, "Expediting Environmental Reviews and Approvals for High Priority Infrastructure Projects," which calls upon federal agencies to "streamline and expedite…environmental reviews and approvals for all infrastructure projects;" (2) EO 13777, "Enforcing the Regulatory Reform Agenda," which established a federal policy "to alleviate unnecessary regulatory burdens" on the American people; and (3) the Trump Administration's Legislative Outline for Rebuilding Infrastructure in America. The Plan includes several proposals that would remove regulatory barriers to developing compensatory mitigation to offset project impacts.[i]

ADDRESS INCONSISTENCY AMONG DISTRICTS

- Mitigation formula vary by Corps district. Corps Headquarters (HQ) should establish nationwide ratios or mitigation evaluation criteria at the federal level for addressing permanent impacts to provide the regulated community with more certainty upfront. This would require significant cooperation from USACE and the U.S. Fish and Wildlife Service (USFWS).

- To this end, USACE HQ should assert centralized control and oversight over wetlands and stream valuation metrics. Instead of each region developing its own method, HQ's should develop a standardized method that calculates reasonable mitigation ratios.[ii]

LIMIT JOINT ADMINISTRATION OF 404 PROGRAM

- Eliminate the U.S. Environmental Protection Agency's (USEPA) role in making jurisdictional determinations and its veto power over USACE 404 permit decisions. This veto power adds additional uncertainty and possible politicization of the process thus increasing risk and driving up financing costs. Project proponents should not have to question whether USEPA will disagree with the Corps' decision-making or withdraw a 404 permit after is has been issued by the Corps and relied upon by industry.

OFFER ALTERNATIVE (FLEXIBLE & ADVANCE) OPTIONS

- Provide greater flexibility for project sponsors to receive advance[iii] mitigation credits in areas where current and projected needs exist; this signal to mitigation providers to get credits "on the ground." AGC also supports programmatic approaches (to support future projects) that define upfront standard mitigation requirements for similar activities in similar regions.[iv] A programmatic plan could be offered as a mitigation option along with banking, permittee-responsible mitigation, and in-lieu fee. But note, an across-the-board preference for compensatory mitigation to be implemented *in advance of project impacts* is too inflexible. It fails to recognize the realities of project funding and permitting and may negatively impact an applicant's ability to secure both.

- Provide project proponents greater flexibility to compensate for permitted impacts that extend beyond the service area of a particular mitigation bank. Modify the 2008 Mitigation Rule at 33 C.F.R. § 332.3(b)(4), "[w]here permitted impacts are not in the service area of an approved mitigation bank or in-lieu fee (ILF) program that has the appropriate number and resource type of credits available, permittee-responsible mitigation is the only option."

ADDRESS LACK OF BANKING CAPACITY

- Eliminate the "Interagency Review Team" for mitigation banks and authorize the Corps to review and approve banks after a simple 30-day review and comment period offered to USEPA, the USFWS, and National Marine Fisheries Service. This will save considerable time, costs, and reduce staff effort which can be re-directed to expediting permit reviews or other work.[v]

- Remove obstacles and delays to the establishment and use of new mitigation banks and ILF programs – such as USACE District guidelines that go well beyond the 2008 Mitigation Rule and include provisions that make investment in mitigation less attractive (e.g., permanent retirement of subsurface mineral rights, overly stringent financial assurance requirements, and severely low limits on invasive species). A 2015 Corps' study concluded that a mitigation banking system can reduce permit processing times by up to 50 percent.

- Address the lack of mitigation banking capacity[vi] in many regions of the country, by developing a national ILF mitigation option whereby sponsors of large projects may contribute funding, at mitigation market rates, to a national account when bank credits are unavailable. (Per AGC's conversations with USACE regulatory program staff, this would require a change to current law that would allow the Corps to receive funds for this purpose.) The funding from the national account would be apportioned among the districts based on where impacts were taken and applied toward wetlands/habitat preservation and promoting banking opportunities.

COORDINATE WORK WINDOWS AND MITIGATION PLANNING

- Exempt temporary impacts from the requirement to provide compensatory mitigation, if the resource is restored, within a reasonable (predetermined) timeframe, to preconstruction conditions and functions.

- Coordinate on conditions/criteria for managing construction windows (i.e., timing restrictions) and mitigation measures for resources (e.g., the Corps' wetlands vs. USFWS species concerns). Conflicts can arise between seasonal work windows (limited time when construction is allowed due to species/habitat protection – like fish migration and spawning or bird nesting and foraging – or due to weather conditions that prohibit construction) and agency criteria on mitigation measures. If unforeseen, undisclosed listed species or critical habitat are encountered on a 404-permitted construction project, the agencies should allow resolution via prompt proactive mitigation efforts, rather than stopping work and initiating a re-evaluation.

- Limit work restrictions on construction activities (e.g., tree clearing, in-stream activities and general earth disturbance) to instances where threatened and endangered (T&E) species have been identified through the completion of an environmental impact review and survey. Work restrictions for non-T&E species delay projects and increase costs for *deminimis* benefit.
- Agencies' mitigation planning commitments that impose seasonal or environmental work restrictions, and other related construction BMP requirements, should be detailed in record of decision (ROD) as part of the NEPA process to: streamline and provide transparency for permitting; facilitate agency coordination; and ensure that project limitations are realized by the owner and properly addressed by the contractor during bidding and scheduling.

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[i] The White House's infrastructure plan includes a proposal to streamline the approval and oversight of mitigation banks under the 2008 Mitigation Rule. A related proposal would expedite the permitting of projects that enhance the environment through mitigation. Another proposed reform would eliminate USEPA's role in making jurisdictional determinations under Section 404 and its power to veto 404 permits granted by USACE.

[ii] Several USACE Districts have developed a "functions and values" type of assessment to calculate mitigation ratios for stream and wetland impacts (*e.g.*, Fort Worth and Galveston Districts in Texas, the Charleston District in South Carolina and the Huntington District, West Virginia and the four USACE Offices in Ohio – Huntington, Buffalo, Pittsburg and Louisville). These methods are inconsistent among Districts and generally produce higher credit ratios (particularly for stream mitigation) than the traditional 1.5 feet of mitigation for one foot of stream/linear impact. In result, the mitigation ratios for streams may exceed the ratio set for wetlands, a more valued resource. Demand for stream credits has increased, creating supply shortages in some areas and forcing applicants to delay work on projects waiting for bank credit releases or undertaking permittee-responsible mitigation.

[iii] The State of North Carolina (NC) operates a state-wide in-lieu fee (ILF) program that may serve as a model for AGC's recommended national program (discussed elsewhere in this document). The system back-stops the banks and is only available for use by a project when bank credits are unavailable. NC has a statewide banking instrument with USACE that provides off-site compensatory wetland and stream mitigation in advance of permitted impacts under the condition that the state submit to the USACE a final mitigation plan within a year and then execute the plan. The state administers the program with NC Department of Environmental Quality (DEQ) staff and contracts out for mitigation design and construction. The state charges the customer on a per credit basis. The program brings stability and predictability to the credit market.

[iv] *See* the multi-agency rangewide programmatic biological opinion (PBO) for the Indiana bat and northern long-eared bat - https://www.fws.gov/midwest/endangered/section7/fhwa/pdf/UserGuideRevisedFeb2018.pdf.

[v] In 2000, the Corps, USEPA, FWS, and NOAA issued interagency guidance on the use of ILFs to offset wetland fill impacts (*Fed. Reg*. 65, Nov. 7). That guidance reiterated the Corps' and USEPA's mitigation MOA preference for on-site, in-kind mitigation, but recognized that such mitigation may not always be available, practicable, or environmentally preferable. The guidance provides that ILF arrangements may be used if there is a formal agreement that is developed, reviewed, and approved through the interagency Mitigation Bank Review Team (MBRT) process.

[vi] AGC's recent examination of the RIBITS (Regulatory In-lieu fee and Bank Information Tracking System) database found limited ILF programs in the Western half of the country – see analysis below. The lack of wetland mitigation alternatives may get worse: AGC predicts that President Trump's recent Executive Order 13778 directing the USEPA and USACE to modify or rescind the 2015 WOTUS rule is likely to stall and further depress the establishment of any new mitigation banks because it is likely that the federal government will eventually relinquish control over work in remote streams and isolated waters/wetlands. AGC closely reviewed RIBITs in June 2017. At that time, there were 1,090 approved or pending ILF sites in RIBITs, of which 422 were approved, 352 were pending and the rest were terminated. The site generated a map of the United States, which clearly showed that the Western one-half of the country is woefully underserved. A cursory sampling of the individual ILF site data showed many sites with no credits available, although AGC understands that RIBITS can be out of date for these details. Also, many sites were small in area, suggesting they were for a single project or client. Even in the East, where ILF sites are more prevalent, the availability of ILF credits is restricted because, like banks, ILF sites are approved for service in one or two watersheds for which they are located.