

## NEED FOR GUIDANCE ON APPLICATION OF NON-JURISDICTIONAL CREDITS



The Ecological Restoration Business Association (ERBA) recommends that the Army Corps of Engineers (the Corps) and the Environmental Protection Agency (the EPA) issue joint guidance emphasizing that mitigation credits generated from non-jurisdictional aquatic features may be applied as permissible offsets for impacts to jurisdictional WOTUS. Based on the watershed approach and other regulatory authorities within the 2008 Compensatory Mitigation Rule (the 2008 Rule), such guidance supports existing and future investment in compensatory mitigation projects. In the absence of this guidance, several mitigation banks and in-lieu fee programs will be left with significant ‘stranded’ inventories of now non-jurisdictional credits and disincentivized from future mitigation projects that would restore the valuable ecological functions of non-jurisdictional features. Aside from supporting the continued investment in advanced mitigation, the recommended guidance will also provide permittees with the widest potential availability of mitigation credit inventories—allowing more of their development projects to proceed as efficiently as possible.

### **THE 2008 RULE LANGUAGE ON THE TOPIC:**

“The Corps does not generally require that any particular wetland or resource be used to provide compensatory mitigation. Rather, the project sponsor proposes a mitigation option and the Corps determines whether the proposed option is adequate to compensate for resource functions and services lost at the impact site. *We believe that non-jurisdictional waters can be used to provide compensatory mitigation for activities authorized by DA permits, if the rehabilitation, enhancement, and/or preservation of those waters is determined to be appropriate compensation for authorized impacts.*”<sup>1</sup>

“The district engineer *must* use a watershed approach to establish compensatory mitigation requirements in DA permits to the extent appropriate and practicable... A watershed approach to compensatory mitigation considers the importance of landscape position and resource type of compensatory mitigation projects for the sustainability of aquatic resource functions within the watershed. Such an approach considers how the types and locations of compensatory mitigation projects will provide the desired aquatic resource functions, and will continue to function over time in a changing landscape... *It includes the protection and maintenance of terrestrial resources, such as non-wetland riparian areas and uplands, when those resources contribute to or improve the overall ecological functioning of aquatic resources in the watershed.*”<sup>2</sup>

### **GUIDANCE REQUESTED:**

This topic is best definitively addressed via joint guidance in the form of a Regulatory Guidance Letter (RGL) from the Corps and the EPA HQs to the Districts and Divisions i) addressing any outstanding concerns that field staff have regarding when mitigation credits for non-jurisdictional resources may be applied to jurisdictional offsets and ii) underscoring the intent and language behind the relevant provisions of the 2008 Rule.<sup>3</sup> Recognizing that RGL development is a timely (but worthwhile) process, ERBA recommends that, prior to issuance of a RGL, Corps HQ circulate a memo or other authoritative communication to the Divisions and Districts emphasizing the 2008 Rule language and directing Districts to fully embrace the intent of that language when making decisions on mitigation for impacts in the post-Sackett regulatory environment.

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<sup>1</sup> United States, Department of the Army, Corps of Engineers "Compensatory Mitigation for Losses of Aquatic Resources." Vol. 73 Fed. Reg. Page 19618 (April 10, 2008) [emphasis added].

<sup>2</sup> 33 CFR 332.3(c)(1) & (2)(a) [emphasis added].

<sup>3</sup> Note that this topic could fit within a RGL more broadly focused on the Watershed Approach, such as the one recommended in the recently released report titled, “Supporting Innovation in 404 Stream Mitigation for Improved Ecological Outcomes: Problem Statement and Recommended Solutions,” shared with the Corps and EPA leadership on July 10, 2023 by ERBA, Meridian Institute, and Walton Family Foundation.

In the absence of these guidance actions, Districts will continue to vary in their interpretation of the 2008 Rule's direction on the topic, potentially to the detriment of bank sponsors, permittees, and watershed resources. Bankers will be disincentivized from future investment in compensatory mitigation-driven restoration due to losses associated with now-stranded inventories and the threat of future-stranded inventories resulting from an ever-changing definition of WOTUS. Stranded inventories not only represent immediate losses to existing investment, they also mean fewer credits are available for permittees—likely delaying permitting timelines for public and private development. Lastly, the absence of guidance will perpetuate the risk of future losses for mitigation sponsors when WOTUS inevitably changes again. Meaning, watersheds will suffer from deterred investment in restoration under the compensatory mitigation program – a primary driver of private capital towards conservation in the country.

**SPOTLIGHT ON THE ISSUE IN DISTRICTS:**

ERBA members work in over half of the Corps' 38 Districts and have vast experience and knowledge of Districts' trends on this topic over the years. Depending on the chief and lead mitigation project manager for a District, over the years many Districts have narrowly interpreted the 2008 Rule or completely ignored the Preamble language (cited above) and instead required that approved mitigation bank credits may only be generated from aquatic resources considered jurisdictional.<sup>4</sup> As highlighted in the language above, this strict interpretation is at odds with the plain text of the 2008 Rule. From just a few members recently, ERBA understands that the Savannah District has a policy of not allowing mitigation credits for non-jurisdictional restoration work to offset jurisdictional impacts, and that Galveston District staff have alluded that mitigation bankers will have stranded credit inventories of non-jurisdictional features following implementation of the post-*Sackett* WOTUS rule. Finally, the Fort Worth District is requiring a 3:1 trading ratio when credits generated from non-jurisdictional streams are used to offset jurisdictional impacts. In all cases, these policies represent severe to complete losses of past restoration investments.

Before these misunderstood interpretations spread further, ERBA urges Corps and EPA leadership to take action via definitive guidance statements and direction, preferably joint guidance, to their field staff as soon as possible. If ERBA can assist with any follow up questions or additional information, please do not hesitate to reach out to Executive Director Sara Johnson at [sjohnson@ecologicalrestoration.org](mailto:sjohnson@ecologicalrestoration.org).

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<sup>4</sup> ERBA members noted that while some Districts have moved away from their historic narrow interpretations, these interpretations are usually based on the viewpoint of one individual, and if staff change again, which is happening in several Districts, the problematic viewpoint could return.