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To: U.S. Environmental Protection Agency and U.S. Army Corps of Engineers
From: Ecological Restoration Business Association
Submitted to: MitigationRule@epa.gov and Krystel.L.Bell@usace.army.mil
Date: August 9, 2019

Re: Potential Amendments to the Regulations Governing Compensatory Mitigation

The Ecological Restoration Business Association (ERBA) is pleased to provide comments to the U.S. Environmental Protection Agency (USEPA) and the U.S. Army Corps of Engineers (the Corps) (collectively, the "Agencies") regarding potential amendments to the 2008 Compensatory Mitigation Rule (the "Rule"). The establishment of the Rule in 2008 was a landmark event for the mitigation industry and environmental markets at large. The Rule provides regulatory certainty that attracts investment in cost effective and efficient restoration solutions for permittees. This certainty creates a foundation for market stability and fosters growth in readily available mitigation options for permittees across a wider geographic range.[1]

While appreciating this great progress, ERBA also acknowledges the reality that delays still exist in the review and approval of mitigation projects and credit releases. These delays persist for multiple reasons and some could be partially addressed through targeted edits to the IRT process established under the Rule. A challenge for all stakeholders is understanding when delays are perpetuated by a structural element of the Rule's review process, which the proposed Rule-making could address, versus when delays are rooted in poor implementation or factors outside the scope of the Rule's jurisdiction. In this letter, ERBA attempts to focus on the former while giving due recognition to the latter. In questions one through three, we outline opportunities to tighten the structure of the Interagency Review Team (IRT) to retain the purpose of the IRT but improve processing timelines. In questions four through nine, we offer

[1] A recent study found that since passage of the Rule a decade ago, there has been an 120% increase in the number of mitigation bank credits. *See* Hough and Harrington, "Ten Years of the Compensatory Mitigation Rule: Reflections on Progress and Opportunities" 49 ELR 10018, January 2019.

our practitioner and provider perspective on considerations beyond the question of the IRT. Finally, in our appendices, we include recommendations on best practices and other policy measures that deserve strong consideration for implementation in conjunction with any Rule-making efforts.

Ultimately, ERBA members want to work with the Agencies to deliver high quality environmental restoration solutions as efficiently as possible. We encourage the Agencies' to make a holistic assessment of where these efficiencies can be gained without sacrificing the expertise of fellow resource agencies. We welcome further discussion with your offices and look forward to working with the Agencies throughout the Rule-making process.

1. Should the Interagency Review Team (IRT) process be eliminated or modified?

ERBA recommends substantial modification but not elimination of the IRT process.[2] A recurring concern in ERBA's discussions is the perplexing fact that impacts to our nation's aquatic resources are currently permitted much faster than approvals for mitigation projects to restore those aquatic resources.[3] ERBA members recognize that robust restoration of a resource is inherently time intensive, however considering that mitigation projects generate an ecological uplift and public benefit, ERBA members are frustrated by the extent of the disparity in impact and mitigation processing. To address this disparity, ERBA recommends the Agencies tailor the IRT's oversight and model certain stages of the mitigation review process on the individual permit process.

ERBA breaks down recommendations on IRT modification by each review stage:

[2] ERBA facilitated robust internal discussion on this topic and some members, based on their experience with IRT reviews, are receptive to IRT elimination. The recommendation presented in these comments represents the consensus reached by the ERBA board on the question of IRT elimination versus modification, and is not indicative of every ERBA member's IRT experience or company recommendation.

[3] Corps performance data reveals that 84% of general permits are issued in 60 days or less and 61% of individual permits are issued in 120 days or less, versus mitigation project applications at an average of 420 days to review and approve, almost double the 225 day timeline contemplated by the Rule. Another worthwhile observation here is that the Corps established performance metrics for Districts' issuance of general and individual permits, and the Corps might see a change in performance if a similar metric is established for mitigation project review timelines. This concept is discussed further in Question 4(i). *See* Tammy Turley "Regulatory: Process Improvement Initiatives," ERBA Policy Conference, March 2019; Steve Martin "Characterization and Analysis of Third Party Mitigation 2008-2018" NMEBC, May 2019.

I. *Prospectus Review*

Clarify the process and DE authority for a completeness determination. By design the prospectus is general in nature, however completeness review of the prospectus sometimes leads to unnecessary delays. The Rule currently specifies that a District Engineer (DE) must notify the Sponsor whether the prospectus is complete within 30 days, but does not contain requirements for moving forward with review after a finding that a prospectus is incomplete. ERBA recommends that the Rule outline a requirement for: i) the DE to provide the sponsor a specific list of deficiencies if the prospectus is incomplete, ii) once a sponsor provides the requested information in the amended prospectus, the DE should inform the sponsor within 15-days if the amended prospectus is complete, iii) which if so, should then trigger the 30-day timeframe for publishing the public notice. ERBA recommends that the Rule also specify that the DE should appropriately manage any subsequent completeness determinations, particularly those that raise new deficiency areas that were not covered in the initial completeness determination.

Require IRT engagement at the prospectus stage. ERBA supports the Rule's use of a 30-day public notice and comment period at the prospectus stage. We recommend strengthening the Rule's language to require IRT members to provide comment on the prospectus during this public comment period. If an IRT agency does not comment within the public comment period, and has not pursued a request for a reasonable (7-15 days) extension of the comment period, then the DE should assume the IRT member's concurrence with the prospectus. A goal here is to ensure that IRT members are tracking development of the mitigation instrument from the beginning and are in an informed position for future review stages. Under current practice, an IRT agency unengaged during the prospectus stage may raise issues during the draft stage that could have been initially addressed during the prospectus stage, which leads to avoidable delays. Generally, ERBA recommends Rule edits that empower the DE to better lead constructive IRT engagement during the prospectus stage.

Tailor IRT composition and scope of review. The Rule states that the DE has final authority over the composition of the IRT and will seek to include those agencies with a

substantive interest in the bank or ILF project. ERBA recommends that the Rule offer further direction to the DE on what qualifies as a "substantive interest" to guide the DE's decisions on when to limit the IRT involvement of certain agencies.

Additionally, the Rule should state that the DE will not include public agencies with a conflict of interest on an IRT, unless that agency is a co-chair with jurisdiction over a credit issuance, or at a minimum, the public agency implements a robust conflict of interest policy to ensure impartiality in IRT review. For example, an agency overseeing an ILF program or mitigation on public lands that would compete with the sponsor's proposed mitigation project has a vested interest as a mitigation provider and thus should be conflicted out from sitting on the IRT reviewing the sponsor's project.

Further, ERBA recommends that IRT members may not comment on administrative or procedural elements of adopted mitigation templates and/or SOPs presented in a sponsor's prospectus or draft instrument, unless the comment is justified based on a unique element of the proposed project (i.e. the template language conflicts with state law). Under current practice, some ERBA members experience serious delays when IRT members use the mitigation review process as an opportunity to debate District adopted policies or methods.

Require sponsor, DE, Co-Chair, and IRT members use of project management tools. State that at each review stage, the sponsor and reviewing authorities will conduct their review using the best available project management tools, such as those outlined on Appendix I. These best practices are proven to improve communication between the DE/IRT and sponsors, establish clear expectations on the IRT process' goals and timeline, and result in generally more efficient use of IRT time and resources. While we strongly endorse the specific best practices on Appendix I, we recommend maintaining a broad definition of "project management tools," or other similar term/reference, to retain flexibility and allow the concept to adapt to include the latest technology development or other project management system endorsed by the Agencies and stakeholders.

Clarify the scope of prospectus review. Provide further details on the specific components of a prospectus and draft instrument. Currently at the prospectus stage some

Districts and/or IRT members request extensive details from sponsors on components that are designed to be a part of a draft instrument. Submission of such items as grading plans, planting plans, management plans etc. at the prospectus stage prior to a determination of whether the project has potential for providing compensatory mitigation invites unnecessary commenting on items that should be the purview of the Corps and IRT at the detailed draft instrument review stage. To further help clarify the general nature of a prospectus we also recommend that §332.8(d)(2)(vii)(A) be amended to read: "A general assessment of the ecological suitability of the site to achieve the objectives of the proposed mitigation bank, including the physical, chemical, and biological characteristics of the bank site and how that site will support the planned types of aquatic resources and functions; and…"

II. *Draft Review of the Mitigation Instrument*

Clarify the process and DE authority for a completeness determination. The Rule's framework for completeness review of a draft instrument also contains a timeline gap that may cause delays. Similar to our recommendation for the prospectus determination, ERBA recommends that the Rule outline a requirement for: i) the DE to provide the sponsor a specific list of deficiencies if the draft instrument is incomplete, ii) once a sponsor provides the requested information in the amended draft, the DE should inform the sponsor within 15-days if the amended draft instrument is complete, iii) which if so, should then trigger distribution of draft instrument copies to the IRT for review. ERBA recommends that the Rule also specify that the DE should appropriately manage any subsequent completeness determinations, particularly those that raise new deficiency areas that were not covered in the initial completeness determination.

Better manage IRT review and objections during the initial 30-day draft comment period. ERBA supports the Rule's current language on a 30-day comment period for IRT members commencing 5 days after the DE's distribution of the complete draft instrument. However, current practice allows IRT members to raise new objections outside the 30-day comment period on the second, third, or fourth iterations of a draft instrument. To address, ERBA recommends that unless an IRT member is a co-chair with jurisdiction over a credit

issuance or has otherwise requested a reasonable time extension (e.g. 7-15 days), the DE should limit IRT members' comments and objections to the draft instrument 30-day review period. Any comment raised by an IRT member should include a citation to the applicable section of the Rule at 33 CFR 332 or state law/regulation/program that provides the justification for the commenter's concern. Upon the close of the IRT 30-day period, the DE shall share all comments with the sponsor and work with the sponsor and IRT over a 30-day period to address and make a decision on issues raised by the IRT. The DE should appropriately manage any subsequent IRT comments, particularly those that were not raised by the IRT member during their initial 30-day review period. One approach to accomplish this is only permitting IRT comment on subsequent versions of the draft instrument if the DE and sponsor request IRT review of the later draft for comment on an issue previously raised by the IRT or on a new issue that would benefit from IRT review. Our goal with this recommendation is to ensure efficient and organized engagement by the IRT agencies and limit the introduction of stray or new comments in the final stages of draft review.

Provide additional guidance on how to manage IRT timeline extension requests. State that the DE shall i) assume IRT concurrence if no comment is received during the 30-day draft IRT review period, ii) grant a one-time extension if an IRT member indicates they cannot meet the 30-day timeline but could provide comment within a reasonable timeframe (e.g. 7 to 15 days), and iii) assume concurrence if the extension is not met. Stipulate that additional timeline extensions may be granted at each review stage if agreed upon by the DE and sponsor.

Immediately communicate serious issues to the Sponsor. Specify that if the DE receives an IRT comment flagging a serious problem that could be a fatal flaw or result in significant project delays, then the DE should alert the sponsor in an expedient manner so that the sponsor can immediately take action to resolve the issue.

Initiate Office of Counsel review sooner. Specify that upon the DE's completeness determination of a draft instrument, language on the project's financial assurances, form of instrument, conservation easement, and other elements of a MBI subject to legal review, shall be sent to the Office of Counsel for review concurrent with IRT review. Under current practice, Office of Counsel typically is not engaged until the instrument is ready for signature, which can

result in substantial delays when the DE and sponsor are otherwise prepared for signature. The problem could also be ameliorated by development of standard language on financial assurance mechanisms that is blessed by Office of Counsel and implemented in each District. Any SOPs developed by Districts (see Question 4(ii) and (iii) recommendation) should also include reference to and direction on this earlier review by Office of Counsel.

III. *Final Approval of the Mitigation Instrument*

Restrict review authority of the final instrument to the DE and Co-Chairs. State that the final instrument shall be reviewed during a 30-day period by the DE/Chair and Co-Chairs, if applicable. The DE should appropriately manage any subsequent IRT comments/objections, particularly those that were not raised by the IRT member during their 30-day draft review period. At the end of the 30-day period, the DE will alert the Co-Chairs, IRT, and sponsor of their intent to approve the instrument. If the DE and Co-Chairs are in disagreement about the final form of the instrument, then the sponsor may elect to extend the timeline and pursue dispute resolution to work towards a form of the instrument that both the DE and Co-Chairs are prepared to sign.[4]

Outline a sponsor-initiated dispute resolution process. Add a provision (or expand upon the existing dispute resolution processes for permittees codified at 33 CFR 331) covering a dispute resolution process that offers recourse for sponsors seeking an appeal of a DE's decision related to mitigation project review, such as a DE's objection prior to the final instrument stage or DE's decision to deny a credit release request. The Portland Corps District developed guidance on a two-page analysis template to facilitate dispute resolution between the IRT and sponsor, which may be informative and a starting point for building out the Rule's dispute resolution process. The resolution process should outline an option for the sponsor to frame the details of the dispute and then elevate the dispute through Corps leadership, starting with the Chief of the Regulatory Branch and then, if the dispute is not resolved, moving to the District Engineer, then Division Headquarters, and finally the Corps HQ Chief. At each stage

[4] ERBA recognizes that some of these recommendations have the potential to impact the IRT dispute resolution process outlined in the Rule at 33 CFR 332.8(e). We are still considering whether recommendations are needed for changes to the IRT initiated dispute resolution process, such as on the timing of that process, and look forward to continuing a discussion on the topic with the Agencies.

Corps leadership should have 30 days to evaluate the sponsor's dispute details, attempt to resolve the dispute, and issue a detailed written response to the sponsor. It may be appropriate and helpful to also include reference to a dispute resolution process in the Mitigation Plan described at 33 CFR 332.4(c).

ERBA understands that the Agencies are also considering elimination of the IRT and for the reasons discussed in Question 2, 3 and 4, we caution against elimination. Additionally, some in ERBA fear that if the IRT comment is restricted to the prospectus stage, sponsors may spend more time and money building out proposals at the prospectus stage prior to receiving an initial evaluation on the potential of the mitigation project. This could create greater delays and deter sponsors. If the Agencies do pursue elimination, ERBA requests that the Agencies develop the replacement review process with full transparency and opportunities for engagement and practitioner input from industry stakeholders.

2. How would the removal of the IRT process affect your organization and the mitigation bank or ILF evaluation process?

Many ERBA members feel elimination of the IRT will result in further evaluation delays and deter sponsors from pursuing mitigation projects that produce multiple ecological benefits under multiple federal and state environmental programs. The trend towards multipurpose mitigation banks and ILF programs may increase the need for multi-agency engagement through a defined process. When well-functioning, the IRT acts as a valuable forum to facilitate concurrent rather than sequential review by relevant resource agencies. Prior to the establishment of the IRT, some mitigation sponsors experienced a maze of regulatory requirements and varying review timelines rather than a single IRT evaluation process. If the IRT agencies were removed, it is not clear how agency reviews would remain concurrent and coordinated and result in a final mitigation instrument signed off by multiple agencies for multiple offset purposes.

Anecdotally, some members have found that the IRT does enhance the environmental quality of mitigation projects and advances projects towards their multi purpose potential. For example, members operating in California have found the IRT review for proposed Section 404

and ESA conservation banks, and sometimes water quality banks as well, results in higher quality mitigation projects where floodplains are reconnected to the river in a way that also benefits the aquatic food chain and critical species, such as salmon and steelhead.[5] Further, members have found that state involvement on the IRT may lead to adoption of 404 mitigation credits for state program purposes. For example, Georgia's stream buffer mitigation program evolved to allow use of 404 stream credits for permitted variances. This evolution of credit application resulted from Georgia Department of Natural Resources' involvement on the IRT, which built state agency trust in the viability and performance of stream restoration projects under the 404 program. However, other members feel that under current practice the IRT is not enhancing the environmental quality of projects and is instead causing delays in bank approvals and credit releases.

Logistically, the involvement of other agencies through the IRT brings additional resources into the review process to supplement the often-limited resources at the Corps District level. Our members also find that the IRT provides a certain level of quality control to ensure there is consistency and predictability in the DE and IRT's evaluation of various mitigation proposals over time. Additionally, the IRT agencies also play a role in evaluating impact permits and ERBA fears that those agencies may be less comfortable with authorizing bank or ILF credits for impacts if the mitigation approval process for banks and ILFs is no longer transparent and inviting their input.

3. How would the removal of the IRT process affect your ability to use mitigation bank and ILF program credits to satisfy compensatory mitigation requirements of permits you receive from the Corps?

Some ERBA members believe that elimination of the IRT process will mean longer delays for permittees seeking to acquire bank or ILF credits. Growth in multipurpose mitigation projects could result in more efficient credits available for permittees from a single site and

[5] Another more specific example from an ERBA member: The sponsor originally planned to have the higher elevations of the site be in herbaceous vegetation to provide Swainson's hawk foraging habitat. The CA DFW suggested that the location was uniquely suited for higher elevation floodplain habitat. The sponsor made that change and it has been very successful both ecologically and financially.

single sponsor, rather than having to pursue multiple offset actions. If the IRT is eliminated, sponsors may be less likely to pursue multipurpose banks and thus there would be fewer multipurpose credits available for permittees.

4. How can the Agencies further streamline the review and approval process for mitigation banks and ILF programs, with or without the IRT?

ERBA's internal discussions on project review challenges revealed that there are multiple sources of delay outside of IRT review. While we have data showing that the Rule's timelines are exceeded by ~200 days on average, we do not have data on the specific causes of delay. Anecdotally, ERBA identifies these potential causes as: Office of Counsel review, Co-chair review, outside consultation requirements, Corps understaffed and/or underfunded, competing priorities for Corps' time, deficient information from sponsors, unorganized project management between the IRT and sponsor, and poor project manager and IRT training. If the Agencies do not also address these other delay sources in conjunction with IRT reform, ERBA fears stakeholders will realize few gains for faster mitigation project processing. Some delay sources and recommendations to consider include:

i. **Make mitigation review a priority.** The Corps should establish performance metrics for District staff and leadership to meet mitigation review and credit release milestones, which will incentivize Districts to prioritize mitigation related tasks. These metrics would be similar to the evaluation metrics for Districts processing nationwide and individual general permit applications. If Districts are consistently unable to meet the milestones within the Rule timelines, they should be required to complete additional training, implement corrective actions, and potentially be considered for additional mitigation lead staff and other resources to improve performance. The Corps should also add compliance with Rule timelines as a priority under their Success Performance Criteria.

ii. **Equip Agency staff with transparently developed instructive resources.** Direct Corps Districts to publish standard operating procedures (SOPs) that cover the administrative aspects of mitigation approval to standardize the processes and

streamline negotiations. These aspects include, but are not limited to: site selection, credit release schedules, financial assurances, site protection, long-term management plan, monitoring, review and approval process tools.[6] On financial assurances, District SOPs should allow for all forms of financial assurances to be considered equally, unless there is a state/regional regulation to the contrary prohibiting consideration of a certain assurance. Districts could also build out their SOPs to cover credit/debit metrics and performance standards, which might have more regional variance. Since the SOPs will primarily cover administrative and procedural aspects, there should be little variation among the 38 districts and their application of SOPs across applicants. Further, the Corps should direct that these SOPs may be amended only once every five (5) years via public notice and comment, to improve certainty in the marketplace. ERBA recognizes that there may need to be some flexibility in this requirement for Districts with minimal or no mitigation needs.

iii. **Standardize certain elements of the mitigation instrument to streamline Chair and Office of Counsel approval.** The Corps should direct every District, with input from Office of Counsel and industry experts, to develop templates for MBIs, financial assurances, bonds, conservation easements, deed restrictions and restrictive covenants, long-term management plans, and any other required components of a MBI as appropriate. The Corps should direct that these templates may be amended only once every five (5) years via public notice and comment, to improve consistency and certainty. To build flexibility into the templates, we also recommend that Districts develop "riders" that may be added to a national or District level template such as an MBI to address necessary regional or site variances.

iv. **Increase funding and training opportunities.** Corps HQ should prioritize funding for training and technical support materials to improve site monitoring and credit release efficiencies. To implement this technology during field assessments on credit/debit methodologies, the Corps should also offer a training course for

[6] Such as utilization of a shared calendar, shared tracking tool, establishing expectations on agency and sponsor-coordinated communication; *See* Appendix I.

Districts and IRTs on how to develop appropriate, workable, science-based crediting/debiting methodologies. In particular, for site monitoring efficiencies, the Corps should encourage the use of modern GIS/sensing/satellite/drone capabilities for bank, ILF and PRM monitoring to reduce cost and increase timeliness of monitoring on wetland and stream performance. ERBA understand that Corps HQ is pursuing a regional training effort and is supportive of this effort.

v. **Improve public tracking of the mitigation review process.** Corps HQ should require Districts to create a publicly visible pending record in RIBITS once a complete prospectus is received. Certain Districts (Norfolk, Jacksonville, Nashville, Huntington) already make the pending banks publicly visible as soon as they are created in RIBITS, and this policy should be uniformly adopted across all Districts. Further, RIBITS should add an option for interested parties to sign up for an alert once a prospectus is released for public comment. Such an alert system will bring greater transparency to the review process and ensure stakeholders are aware of deadlines and able to comment in a timely manner.

5. Are changes needed to better address compliance with the Miscellaneous Receipts Act (MRA) (31 U.S.C. 3302(b)) (e.g. the implementation of financial assurances)?

ERBA understands there is concern the Rule's current language stating financial assurances shall be payable at the direction of the Corps is in conflict with the MRA.[7] This concern may hinder the Corps' ability to effectively and efficiently apply financial assurances towards corrective actions as intended under the Rule. The Rule's language on directing financial assurances should be revised to remove reference to the Corps directing application of funds and instead state that the Corps will work with a third party to identify appropriate replacement compensatory mitigation, or otherwise empower the DE to take action on implementation of a compliance plan with replacement compensatory mitigation.

6. Are changes needed to the requirements for ILF program accounts? For example, changes to clarify how fees collected from the sale of credits are deposited into the program account;

[7] *See* 33 CFR 332.3(a)(6) and 33 CFR 332.8(i)(2).

changes to add language that allows for funds to be used for program audits; or changes to allow program account funds to be used to provide alternative compensatory mitigation?

ERBA believes that the Rule provides sufficient clarity that funds from the sale of credits must be deposited into the program account and that ILF program funds may be applied towards periodic audits and towards alternative compensatory mitigation options.

Regular program audits can improve transparency in ILF program operations and keep program administrators and the Agencies apprised of program performance and support informed decisions about program changes. The Rule at 33 CFR 332.8(i)(3) already requires ILF sponsors to submit annual reports to the DE and IRT, which reports should cover most information necessary to conduct an annual or otherwise periodic audit. However, sometimes the annual report may not be reviewed in an audit and compliance context. The Agencies may want to consider revising 332.8(i)(4) to state that the DE or other authorized party will conduct a periodic program audit based on the annual reports and other records of the ILF program to reach a compliance finding and identify any needed program actions. It may be appropriate to include a carve-out to this program audit requirement for non-profit and state agencies that already undertake routine audits. These audits should clearly state the ILF program's liabilities, i.e. mitigation yet to be provided, and those liabilities should be regularly updated based on the realized costs of delivering mitigation projects in the ground.

ILF programs' ability to apply funds towards alternative compensatory mitigation measures is an important tool for program administrators that offers flexibility and allows ILFs to partner with a private mitigation provider or purchase credits from a bank to satisfy credit liabilities. The Rule already clearly states that ILF program funds may be used to provide alternative compensatory mitigation, including purchasing bank credits, if the DE determines that the amount of ILF funds collected in a specific service area are not adequate to establish a viable compensatory mitigation project or there is otherwise a deficit of credits under the ILF program for a specific service area. Again, the existing Rule language sufficiently allows for ILF programs to apply program funds towards alternative compensatory mitigation measures.

7. Are changes needed to provide clarification on credit accounting for multipurpose mitigation banks and ILF programs to ensure authorized impacts are appropriately offset?

As multipurpose mitigation projects develop across the country, the Agencies, permittees and providers would benefit from transparency and some level of consistency in crediting methodologies for each resource type within a multipurpose bank. Clarifications on credit accounting will allow for more precise tracking of ecological uplift and corresponding credits at multipurpose mitigation sites. Better accounting will also enable better reporting to the public on RIBITS and other similar databases.

ERBA recommends adding a requirement to the Rule that if Districts pursue development of multi-purpose crediting methodologies, Districts must use a public notice and comment process that engages stakeholders and Districts shall periodically update those methodologies based on the best available science and technology through a transparent public notice and comment process. We note that Rule changes are not necessary to bring about these better crediting methodologies and this public process for development of methodologies could also be outlined in a guidance directive.

Additionally, ERBA recommends that the Agencies require sponsors of multi-purpose projects to develop and maintain i) a chart outlining the multiple program authorities applicable to the mitigation site and the number of credits and debits under each authority and ii) a map showing where credits under each program exist and may or may not overlap. These two simple tools are important to the successful implementation and monitoring of multi purpose mitigation sites and transparently communicate that there is not "double-dipping" of credits occurring at the site. ERBA can provide examples of these tools to the Agencies upon request.

8. Would the removal of "linear feet" from the list of the principal units of measure for credits, which are currently used mostly for streams, to instead use acres, area-based, or other ecological-based metrics facilitate restoration of rivers and larger streams? Are there changes to rule text that would support consistent tracking of credits generated from multipurpose compensatory mitigation projects (e.g. water quality credits, species credits, etc.) and put the restoration of rivers and larger streams on a more equal footing with the

restoration of headwater streams in terms of cost per unit credit and other factors, to produce more opportunities to generate stream compensatory mitigation credits that benefit watersheds?

ERBA recommends retaining reference to "linear feet" in the Rule text and the flexibility for the DE to determine the best credit unit based on the resource type. Rather than indicating a preference for one metric over another in the Rule text, ERBA recommends guidance or an amendment directing Districts to transparently develop their crediting mechanisms for stream and river restoration projects with input from the mitigation provider community.

From ERBA practitioners' experience with stream and river restoration, we underscore the importance of employing a metric that captures and quantifies the multi-benefits of a restored stream system and, resultantly, incentivizes high-quality, holistic, and robust stream restoration projects. For example, in small stream settings, a linear crediting basis makes sense due to the narrow zone of aquatic influence of that system. In contrast, the restoration of large rivers may have a more expansive ecological function lift and watershed benefit that a linear based method may fail to capture. Restoration on large rivers including re-connecting rivers to their historic floodplains and adjacent wetlands can also provide system-wide ecological, as well as, public safety benefits.

To incentivize restoration of more streams and river systems, the Agencies may want to consider adapting sections of RGL 18-01 on dam removal into the Rule text to clearly state that dam and culvert removal projects are viable options for generation of compensatory mitigation offsets under the 404 program. Also, while we understand and support the Agencies' goal of encouraging larger stream restoration, our experience as business practitioners indicates that these projects are often not pursued by sponsors due to the great amount of time and cost involved in such projects, and not because of reference to or a perception that linear feet is the sole metric available for river restoration projects.

The focus for all metrics should remain on the function of the metric and whether the metric accurately and transparently represents an ecological uplift commensurate to the impact the uplift is offsetting. Any such crediting methodology should also be commensurate

with the level of restoration employed such that minimal effort and minimal ecological lift results in minimal credit award. Conversely maximum holistic restoration efforts results in maximum credit award. This will encourage and incentivize holistic restoration projects and provide crediting parity between various projects.

9. What suggestions do you have regarding revisions to the mitigation regulations needed to facilitate state/tribal assumption of the 404 program?

Where the Rule text references an authorizing federal agency or DE's authority, ERBA recommends adding language such as "or other lead permitting agency" to clarify that state or tribal permitting agencies could also administer the mitigation program. From an implementation perspective, we caution that state or tribal agencies lacking the knowledgeable expertise and funding of Corps District offices may be ill-equipped to efficiently approve and review mitigation projects, which could deter private sector investment in that region's mitigation market. ERBA recommends open dialogue, guidance, and training efforts between the Agencies, states considering assumption, and mitigation providers to ensure continued success and robust project delivery under the 404 program.

Appendix I: IRT Best Project Management Practices

ERBA offers the following project best management practices as examples of changes that could be currently implemented, outside of the Rule-making, by the IRT to better communicate with project sponsors and transparently set project goals and deadlines. A critical component of these BMPs is use of an "After-Action Review" between the project sponsor and IRT agencies after signature of a MBI to recap on project challenges and identify opportunities for joint improvement on future projects. Such BMPs and after-action reviews have resulted in numerous process improvements and efficiencies, including:

- Increased project understanding by Agencies from face-to-face briefings/meetings
- Decreased comments from agencies on formatting, inaccurate details
- Decreased re-submittals due to appropriate revisions/responses to comments
- Increased ability to track versions of documents, making submittals complete
- Significantly reduced delay in signatures from target date
- Stronger working relationships with Agency representatives

Recommended BMPs:

IRT review and processing changes for projects:

- Utilize a shared calendar with the Sponsor that outlines benchmarks setting clear expectations of when comments are due and when Bank Signature is expected
- Consolidate all Agency comments for each exhibit under the appropriate headings
- Re-submit only revised documents after receiving comments
- Keep track of document submittals and comments in a table
- Date all revised documents in footer to correspond to dates in table of submittals

Sponsor internal changes instituted for projects:

- Meet with each Agency representative before each submittal to brief them, identify any concerns or issues (with all Agency representatives invited to all meetings)
- Work to get early agreement on significant issues (crediting, service areas, easement language)
- Meet with each Agency representative after receiving written comments to ensure the comments are understood and that our planned response is acceptable
- Hire a professional editor to increase accuracy of submittals and reduce typos
- Utilize weekly sponsor team meetings and meeting notes/agendas to track completed and pending tasks
- With each submittal include a revised table of document submittals and the schedule highlighting next steps for the agencies

Appendix II: Other Policy Measures to Consider

Many of the best practices improvements discussed in this letter could be realized through Regulatory Guidance Letter (RGL) from HQ to the Districts. A RGL on the mitigation review process could cover a number of priorities including:

1) Direct Districts to provide an annual summary to Corps HQ by the end of each calendar year summarizing the degree to which Rule timelines were met and actions being taken to improve adherence and efficiencies. Corps HQ should make these reports or a report summary available to the public.

2) Establish project management protocols for IRT members to work together in planning and responding to mitigation applications, including use of a shared calendar that will ensure accountability and efficient buy-in from all IRT members.

3) Create a timeline for Office of Counsel review and approval that engages Counsel earlier in the review process.

4) State that only one timeline extension may be granted by the DE to an IRT member per review stage, unless the DE and sponsor are in agreement to further extend the deadline.

5) Direct that when timelines are exceeded the DE, in coordination with any necessary co-chairs, must act efficiently to grant agency approval and move the IRT decision forward. To implement this directive, ERBA recommends establishing a process where i) concurrence is assumed if an IRT member does not respond to a request for feedback within the Rule timelines, ii) grant a one-time extension if an IRT member indicates they cannot meet the Rule timeline but could provide comment within a reasonable timeframe (e.g. 7-15 days), and iii) assume concurrence if the extension is not met.

6) Develop guidance for DEs on when a state or federal agency has a "substantive interest" in a mitigation project to warrant IRT participation. This guidance will empower DEs to play a more assertive role in selecting agencies for the IRT.

7) Specify that the Corps, as the lead agency within the IRT, be only required to pass along comments from other IRT members if the comments are within the scope of the Rule and any District-wide SOPs. This limit would not apply in the instance of comments from co-chairs that are relevant to the project's proposal for credits from programs outside the scope of 404 wetland and stream compensatory mitigation, such as ESA credits.