Ecological Restoration Business Association

Growth Through Resilient Environmental Solutions

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Mr. Mike Connor
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Washington, DC 20310-0108

Ms. Rhadika Fox
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September 13, 2023

Dear Mr. Connor and Ms. Fox:

The Ecological Restoration Business Association ("ERBA") engages regularly with your offices on Clean Water Act permitting as well as mitigation policies and practices. We appreciate that our collaborations have resulted in various policies and trainings directly supporting ecological restoration with real economic and ecological effects.

ERBA believes good environmental policy produces good environmental results. For example, the 2008 Compensatory Mitigation Rule ("2008 Rule") has encouraged the investment of billions of dollars by our member companies into hundreds of thousands of restored acres.[1] The resulting mitigation credits support economic development—both public and private—by providing a readily available source of compliance and reducing permit review times by one-half.[2] When the Corps and EPA regulatory instruments are appropriately designed and implemented, they incentivize investments that net ecological and economic returns.

In this collaborative spirit, we are writing to you today to articulate ERBA's concerns with, and an opportunity to improve, the current state of ecological restoration permitting, specifically within the §404 mitigation program. Despite decades of market maturity, permitting mitigation projects is getting slower, more costly, and arguably less effective. Paradoxically, it takes longer to permit a restoration or mitigation project than it does to permit a development project.[3] However, with a few key policy actions outlined in

[1] Doyle, Martin. "This Little-Known Industry Restores Our Environment and Bolsters Our Economy." *Inside Sources*, September 10, 2020, available here. Doyle's research found that of seven ERBA member firms sampled, they had collectively invested more than $1B from 2015-2020 in restoration of 166,600 acres of wetlands, 46,200 miles of streams and 93,000 acres of endangered species habitat.

[2] "The Mitigation Rule Retrospective: A Review of the 2008 Regulations Governing Compensatory Mitigation for Losses of Aquatic Resources." Institute for Water Resources, 2015-R-03, available here.

[3] Steve Martin and Becca Madsen, 2023. "The Time It Takes for Restoration: An Analysis of Mitigation Bank Instrument Timelines." Environmental Policy Innovation Center and Ecological Restoration Business Association, Washington D.C. (hereafter "MBI Timelines Report").

this letter, we believe mitigation permitting can be markedly improved. Specifically, we urge your leadership on the adoption of Regulatory Guidance Letter(s) (RGL) covering four topics:

1. 2008 Rule Timelines and IRT Roles & Responsibilities;
2. District Development of Permitting Pathways for Alternative Restoration Approaches;
3. Ecological Performance-Based Credit Release Schedules; and
4. The Watershed Approach and In-kind mitigation.

Below we offer more details on the current shared challenges, and the case for guidance on each of the four outlined topics.

THE CHALLENGES

A recent study by ERBA and the Environmental Policy Innovation Center (EPIC) determined that, on average, it takes the Corps 1.5 times longer to approve a mitigation bank than required by the 2008 Rule.[4] These delays limit credit supplies, affecting private and public development projects by raising compliance costs and extending permit review times. Such credit supply limitations are partly responsible for the Corps Civil Works Program's own existing mitigation backlog.[5] According to the Corps' own data, 42% of the Civil Works' required mitigation had not been initiated as of 2015. Both examples suggest the Corps is struggling to comply with some of its own regulatory requirements.

Complicating ecological restoration permitting matters further is the Corps' decentralized organizational structure. Coupled with the nation's diverse ecology that requires regional treatment, the Corps' structure has produced a patchwork of regional mitigation requirements. In most regions, the number of these mitigation policies and standards has increased steadily over time. While the Corps' organizational structure and the regional treatment of mitigation markets is understandable, the resulting patchwork and layering of policies has increased capital requirements for restoration projects while further extending review and approval timelines. It is simply getting more and more complicated to permit ecological restoration, especially mitigation banks.

In addition to increasing time and capital demands, these regional policies and procedures are hindering innovation with respect to restoration methods and practices. ERBA and the Walton Family Foundation recently co-sponsored a series of roundtable meetings with 25 stream restoration and mitigation experts. The stakeholder group explored how best to support stream restoration innovation within the §404 program.[6] Two of the group's key findings are salient here: 1) the predominant approach to stream restoration in the §404 program (i.e. Natural Channel Design) is being over-applied and not producing positive ecological outcomes in all cases—a source of rising academic and advocacy criticism; and 2) the §404 permitting program's current training and processes present barriers to alternative restoration mechanisms. In other words, the §404 permitting program is stifling innovation in stream restoration by systemically promoting a single method that, according to many critics, is producing equivocal ecological results.

[4] MBI Timelines Report.

[5] USACE procurement challenges are a major factor here as well. However, the scale of credit availability is often cited by USACE personnel in selecting USACE-administer mitigation projects.

[6] Please see the letter to your offices from ERBA, Meridian Institute, and Walton Family Foundation dated July 10, 2023. Attached to that letter is a report from the roundtable series titled, "Supporting Innovation in 404 Stream Mitigation for Improved Ecological Outcomes: Problem Statement and Recommended Solutions." (hereafter, the "Roundtable Findings & Solutions Report").

THE SOLUTIONS

The §404 permitting program, while largely a success story for environmental markets, is still clearly challenged. Despite the best of intentions by the Corps, the EPA and other IRT agencies, permitting restoration projects is increasingly protracted, increasingly expensive and the ecological outcomes—which are dictated by permit requirements—are increasingly criticized by scientists and environmental organizations. The current approach to mitigation permitting needs a disciplined refresh to be faster and more effective, which ERBA believes can be accomplished with a few joint guidance actions targeting mitigation project permitting.

Faster Permitting and Credit Releases – First RGL Priority

ERBA's first suggestion is a RGL designed to clarify mitigation review timelines as well as the roles and responsibilities of IRT members, especially chairs and co-chairs.[7] Regulatory timelines slip for various reasons. In some cases, IRT members request extensions to review and comment on submitted materials. In other cases, delays arise from indecision amongst the IRT as the multi-agency group seeks unanimous approval on a specific project detail. Both sources of delay can be minimized or completely avoided by an effective chair that 'watches the clock' while moving discussions towards productive conclusion.

Timeline extensions and consideration of comments submitted after deadlines should only occur in the rarest of circumstances. During regulatory review windows when unanimous consensus is elusive on a project-specific issue, IRT chairs should carefully listen and consider various perspectives and reach a final decision independently. While ERBA prefers consensus-based decision making, the Rule provides clear authority for the district engineer to make mitigation decisions without unanimous consensus. In ERBA's experience, this authority is underutilized in most cases and is the most immediately effective way for the Corps to meet mandated timelines.

This first RGL should also re-emphasize credit release request review timelines and include an automatic credit release scenario. As written, the Rule provides 15 days for the IRT to submit comments to the district engineer and another 30 days for the district engineer to notify the sponsor and IRT of their decision.[8] This timeline is rarely met, and in some cases credit release requests languish for years without response.[9] An automatic credit release would alleviate the role these delays play in constraining credit supplies. ERBA suggests that if IRT comments are not provided and the Corps sees no reason for concern, credit releases are automatically granted on the 30th day. Short of an automatic release, the Corps should at a minimum offer the requesting sponsor an appeals process to elevate the credit release request if no objectionable response has been received by the 30th day and the credits remain unreleased.

Process-Based Performance Metrics and the Watershed Approach – Second & Third RGL Priorities[10]

The second RGL we suggest should direct districts to develop policies and procedures for permitting alternative restoration approaches, particularly for streams to promote floodplain reconnection and stream-wetland complexes. With only a few exceptions, existing stream-specific policies and procedures incorporate metrics and standards derived from, and relevant only to, the mitigation market's most

[7] Please see ERBA's communication to Principal Deputy Assistant Secretary of the Army (Civil Works), Mr. Jamie Pinkham, dated April 6, 2022. This letter details several specific suggestions.

[8] See §332.8(o)(9).

[9] In some cases, members report delays in credit release requests up to two years and counting. These long delays on credit release requests have been particularly problematic in the Galveston District.

[10] Please see the Roundtable Findings & Solutions Report.

common stream restoration method—Natural Channel Design. While ERBA believes this approach is appropriate in many settings, it should not be the default in all settings. Given the bias towards Natural Channel Design, existing policies are a barrier to alternative approaches, requiring new metrics and standards be negotiated with IRTs on a case-by-case basis.

To incentivize ecological performance at mitigation banks, ecological processes should be monitored and quantified whenever possible. However, and again especially in the case of streams, most existing metrics and standards are tied to physical form, not ecological process. Therefore, ERBA's third RGL suggestion would direct districts to adopt credit release schedules that incentivize the early and durable achievement of ecological processes that are directly measured. ERBA views this suggested RGL and RGL 19-01 as complimentary. RGL 19-01 was issued after years of experience implementing Natural Channel Design projects, which routinely meet performance standards if managed appropriately. Therefore, an early release of credits in scenarios where the sponsor has a track record of success and has provided sufficient financial assurances makes sense for projects where stream form and stability are emphasized (i.e., Natural Channel Design). The RGL we suggest now would be used for non-Natural Channel Design projects targeting dynamic ecological processes, which when implemented successfully would elicit rapid and dramatic process changes.

Lastly for the purposes of supporting more effective restoration, ERBA recommends a RGL that clarifies the watershed approach in terms of its use and flexibility. The RGL should also clarify the bounds of in-kind mitigation and how it might be considered to support alternative approaches to stream mitigation, which may be specifically targeted within watershed plans. In some districts, the Rule's in-kind requirement[11] is interpreted to require that authorized stream impacts be offset with similar stream types—e.g., a second order single-thread intermittent stream. Such rigid interpretations potentially prioritize existing forms and functions over more ecologically preferrable and sustainable processes and systems.

This interpretation is also at odds with language in the Rule's preamble on the appropriateness of credits generated from restoration of non-jurisdictional features for offsetting jurisdictional impacts.[12] *Sackett*'s recent impact on the definition of WOTUS, which will likely change again, presents just the latest challenge for investment in mitigation as an environmental market. These constant swings in jurisdiction have long-term market impacts on incentives for investment and sustainable inventories of credits. The watershed approach concept authorized in the Rule offers sponsors and District staff regulatory relief to understand when out-of-kind credits may still provide ecological value to offset impacts to jurisdictional waters, despite changes in the scope of jurisdictional waters. While the watershed approach is limited to when "appropriate and practicable," now more than ever is the time to stem the impact of jurisdictional changes and incentive investment under the mitigation program in the best environmental outcomes. In short, watershed approaches with specific consideration of in-kind and out-of-kind scenarios can be instrumental in supporting innovative and scalable restoration approaches *and* provide some stability to an environmental market historically defined by swings in WOTUS.

[11] §332.3 (a)(1) states, "…Compensatory mitigation requirements must be commensurate with the amount and type of impact that is associated with a particular DA permit."

[12] See ERBA's White Paper titled "Need for Guidance on Application of Non-Jurisdictional Credits," submitted to the Corps on September 13, 2023 and available here: Advocacy & Resources (ecologicalrestoration.org)

CONCLUSION

We believe our industry is at a crossroads with respect to political pressure potentially affecting several environmental regulatory programs—including §404. When credit supplies are constrained, it is more difficult to permit, and build, development projects. Development interests understandably become frustrated, and their lobbying efforts are increasingly focused on rolling various regulations back. Meaningful permitting reforms that reduce the time and capital requirement for mitigation bank approvals will help relieve some of these pressures by increasing credit availability and lowering credit costs.

Thank you for consideration of our suggestions. We hope they are helpful and actionable, and we stand ready to collaborate with both of your offices. Please do not hesitate to contact us at sjohnson@ecologicalrestoration.org with any questions.

Sincerely, ERBA Board Leadership & Staff

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