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Re: ERBA Recommendations for Implementation of the Administration's Infrastructure Initiative

The Ecological Restoration Business Association (ERBA) applauds the U.S. Army Corps of Engineers (USACE) leadership on the President's Infrastructure Plan. We thank you for welcoming our perspective at your May 2nd and 3rd Stakeholder meetings on project delivery and permit streamlining. During that meeting, we were particularly encouraged by Assistant Secretary R.D. James' challenge to participants to come forward with specific ideas that the USACE can execute administratively in the coming months. With this invitation in mind, we gathered a list of recommendations from our member companies and organizations for the USACE's consideration.

Each of these recommendations could be implemented through policy guidance and direction from USACE HQ to Districts to clarify operational and best practices. These recommendations would not require a legislative change or change to the 2008 Compensatory Mitigation Rule (the Rule). ERBA suggests the USACE implement most of these recommendations through a Regulatory Guidance Letter or Letters (RGL), signed by Major General Jackson, Deputy Commanding General for Civil and Emergency Operations, to the Corps' 38 district commanding officers. We recommend utilizing a RGL as the implementation mechanism because it is a middle-ground administrative action that could be executed within 12 to 18 months and carries the authority of a Corps leadership directive. This mechanism is preferential to a formal rule-making that would entail a multi-year interagency effort and could become a highly politicized endeavor that loses sight of our shared interest in increasing permitting efficiencies.

For further details and specifics on each recommendation, we have also formatted the attached chart to outline the problem, solution, and policies impacted by our recommendation.

1. Direct each USACE District to adopt Standard Operating Procedures (SOPs) and publish such SOPs via public notice and comment, by 12/31/2019. Please see the chart for specifics on elements we believe should be included in every District's SOPs.
2. Direct each USACE Division to adopt standard templates for mitigation projects, such as Mitigation Banking Instruments (MBI), prospectuses, financial assurances, conservation easements and restrictive covenants, and long term management plans.
 - a. Direct MBI templates to clearly state that the MBI is a contract between the Sponsor/Property Owner and USACE and outline the MBI provisions that may only be amended via written agreement between the USACE and all parties to the MBI.

3. Make ORM data publicly available and require Districts to update RIBITS databases within a reasonable timeframe of receiving information from mitigation site sponsors.
4. Enforce the Interagency Review Team's (IRT) adherence to the set timelines for mitigation banking instrument (MBI) and In-Lieu Fee (ILF) site plan review and approval in the Rule and provide direction on moving forward when IRT leadership has exceeded the Rule's timeline. Relatedly, limit the scope of IRT discussion to those issues pertinent to the 2008 Rule and district SOPs and permit only one timeline extension per review.
 - a. Use a GPRA performance metric and project management training to incentivize adherence to the Rule's timelines.
5. Provide technical support and training to the USACE Districts and IRTs that support consistent and efficient project review. This support should include providing resources for the development of digital technology that advances in-house data permit and project tracking and support for the use of modern GIS/sensing technology to address the need for more timely performance monitoring across all mitigation project types.
6. Establish a task force at HQ to institute the minimum number of actual workable, science-based crediting/debiting and service area methodologies possible. Consistent with the task force's determinations, advance adoption at the District level of those wetland and stream methodologies.
7. Issue guidance to allow a permittee responsible mitigation (PRM) performed in advance of mitigation bank instrument (MBI) approval on adjacent property to be subsumed into the mitigation bank. The MBI would document that the PRM project was approved in advance and the PRM portion of the project would need to have in place all required mitigation plan elements. Liability for the PRM portion of the project would transfer to the bank sponsor upon approval of the MBI.
8. Issue guidance to apply realistic time lag and risk factors to compensatory mitigation projects.
9. Issue guidance to Corps Districts affirming the appropriateness of dam and other barrier removal as a compensatory mitigation method.

We hope this feedback is productive and helpful in your efforts to respond to the Administration's call to improve permitting efficiencies. As always, ERBA strives to serve as a resource and practitioner partner to the USACE. Please do not hesitate to reach out to ERBA with any questions or comments on the ideas we present here. Additionally, we would welcome the opportunity to again sit down with USACE leadership and further review these recommendations and ways ERBA could assist with understanding and implementation.

The Ecological Restoration Business Association

ERBA Recommendations to USACE for Administrative Changes

Item	Problem to Address	Solution	Practitioner's Notes	Policies Improved and Potential Outcomes
1	<p>Lack of transparency and consistency in approval of mitigation projects between and within the 38 USACE Districts. The overwhelming autonomy granted to local district engineers under the Rule resulted in 38 different, and often ad-hoc, applications of the Rule. Removal of the bureaucratic variability will create more certainty for Sponsors and eliminate any potential disadvantages being placed on one party versus another.</p>	<p>USACE HQ should direct, as a component of a Regulatory Guidance Letter, every USACE District to publish SOPs that cover the administrative aspects of mitigation approval to standardize processes and streamline negotiations. Ultimately, since SOPs will cover administrative and procedural aspects, there should be little variation among the 38 districts and their application of SOPs across applicants. Further, USACE 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.</p> <p>The Corps should also use the expert panel approach in development of these SOPs (particularly on development of metrics and performance standards) much like the process used to develop the regional supplements to the Wetland Delineation Manual. This is true particularly in development of performance standards as paragraph 332.5 of the 2008 Rule requires that</p>	<p>All SOP guidelines should be established in accordance with the existing Rule at 33 CFR Part 332. Key Categories to include in the SOP (others may be appropriate as well):</p> <ul style="list-style-type: none"> - site selection - credit release schedule - financial assurances - site protection - long-term management plan - monitoring - review and approval process <p>tools, i.e. shared calendar, shared tracking tool, expectations on agency accessibility and coordinated communication</p> <p>Categories to consider for a more detailed SOP development:</p> <ul style="list-style-type: none"> - credit/debit metrics - performance standards <p>*In development, the Corps should incorporate and rely on Experts in the field with practical experience, much like the process used to develop the supplements to the Wetland Delineation Manual. This will ensure the SOPs are well-</p>	<p>While it is the current policy of some USACE Districts to adhere to an SOP, this action by USACE HQ would bring greater transparency to the regulated public and mitigation providers, greater consistency in application of mitigation across all districts, and more efficient project review and approval.</p>

		performance standards “must be based on the best available science that can be measured or assessed in a practicable manner.”	thought out and rooted in sound science and practical on-the-ground experience.	
2	Lack of transparency in mitigation instruments and equivalency between districts in requirements for elements of those instruments. Lack of certainty in what USACE Districts require for successful mitigation.	USACE HQ should direct, as a component of a Regulatory Guidance Letter, every USACE Division to develop templates for MBIs, financial assurances, bonds, conservation easements, deed restrictions and restrictive covenants, and long term management plans. USACE should direct that these templates may be amended only once every five (5) years via public notice and comment, to improve consistency and certainty.	The Corps should develop these templates through a public notice and comment period that allows for practitioners and industry experts to provide draft language and expertise. Templates should be established in accordance with the existing 2008 Compensatory Mitigation Rule at 33 CFR Part 332. We understand that some of our member companies are hesitant to commit to development of mitigation projects in USACE districts that often amend their mitigation templates and thus make it difficult to predict what the market will look like and District will require in a few months or a few years for a successful mitigation project.	While many Corps Districts have adopted templates, more widespread adoption of templates would give mitigation providers greater predictability and would support more efficient project review and approval.
2a	Some Districts require language disclaiming the MBI as a contract between a Sponsor/Property Owner and USACE or other federal agency. By not treating the MBI as a contract instrument, USACE Districts are able to change the terms of the MBI	Direct MBI templates to clearly state that the MBI is a contract between the Sponsor/Property Owner and USACE and outline the MBI provisions that may only be amended via written agreement between the USACE and all parties to the MBI.	We recognize there needs to be some flexibility in an MBI to adapt to site and policy changes and therefore recommend including language in a national MBI template that outlines what provisions and terms must be agreed to by all parties via a written amendment, such as	

	without full agreement of the parties via an amendment process. This leads to a lack of consistency and certainty for the Sponsor.		administrative and financial terms, and which provisions are not subject to a written amendment, such as credit releases.	
3	Without informative, accessible, and transparent data on credit supply and demand, mitigation providers can not maximize and increase their investment in needed mitigation projects and efficiently respond to the demands of developers.	<p>USACE HQ, in keeping with past commitments made by the agency, should make ORM data publicly available, including data on the amount and type of aquatic resource impacts, the amount and type of compensatory mitigation required, and the locations of approved impacts and compensatory mitigation projects, including permittee-responsible mitigation.</p> <p>In a RGL, USACE should direct Districts to update RIBITS databases after receiving information from mitigation sponsors on a specified timeframe deemed appropriate and reasonable after discussion with the USACE and stakeholders.</p>	For just one example, a member company's mitigation bank outside of Houston TX does not have any sales transactions listed on its RIBITS ledger despite the sponsor having submitted five separate transactions to the District, the first of which dates back to early 2016.	Providing data on permitting – impacts and compensatory mitigation – in a transparent manner provides mitigation providers with the information they need to assess market demand and make investments in mitigation solutions. This will increase the supply of compensatory mitigation credits and reduce permitting times.
4	Investment in mitigation banks is dis-incentivized in certain districts due to a lack of certainty surrounding MBI approval and IRT processing. Similarly, some ILF programs are not operating efficiently due to the extensive process and long turnaround times associated with mitigation	<p>Through a RGL:</p> <ol style="list-style-type: none"> 1. Require publication of adherence to the 2008 Final Rule timelines and dispute resolution process 2. Create greater accountability at the Corps Division level for holding district engineers responsible for meeting the prescribed deadlines 	<p>See following case study.</p> <p>A policy directive similar to California Department of Fish and Wildlife's policy of publishing permit processing times may be worth USACE's consideration.</p> <p>Our member companies can provide examples illustrating the</p>	Better enforcement of existing provisions in 33 CFR Part 332: 33CFR 332.8(a)(3) states: --- "In order to ensure timely processing of instruments and other documentation, comments from IRT members must be

	<p>site plan approval. With a predictable and timely approval process, third party mitigation project credits will get to market with greater efficiency and certainty. Unfortunately, granting last minute agency review extensions at various review stages (prospectus, draft instrument, final instrument), then accepting agency comments even after the extended deadlines, presents an obstacle to efficient review.</p>	<ol style="list-style-type: none"> 3. Create a timeline for Office of Counsel review and approval 4. State that only one timeline extension is allowed per review 5. Direct that when timelines are exceeded and the option for extension has already been used, IRT members other than the Corps shall be deemed to have waived their right to provide further comment and the district engineer <u>must</u> solely act to grant agency approval and move the IRT decision forward. 6. Describe that the USACE, as the lead agency within the IRT, is only required to pass along comments from other IRT members if the comments are within the scope of the 2008 Rule and any district-wide SOPs. 	<p>issue addressed in Item 6, including:</p> <ul style="list-style-type: none"> • A federal field office that does not like a certain channel design and thus is reticent to approve stream projects that use this approach, even though such an objection is outside the purview of the IRT under the Rule • A state resource agency that sits on an IRT and requires there to be an untenable 0% invasive species cover for the life of the project 	<p>received by the district engineer within the time limits specified in this section. Comments received after these deadlines will only be considered at the discretion of the district engineer to the extent that doing so does not jeopardize the deadlines for district engineer action.”</p> <p>332.8(a)(4) states: “The district engineer will give full consideration to any timely comments and advice of the IRT. The district engineer alone retains final authority for approval of the instrument in cases where the mitigation bank or in-lieu fee program is used to satisfy compensatory mitigation requirements of DA permits.”</p>
4a	<p>Lack of incentives and programs to empower IRT leadership to move projects and reviews forward and adhere to deadlines.</p>	<p>Adopt a GPRA performance metric for Corps Districts related to review and approval of third-party compensatory mitigation projects. The Corps would work with the Office of Management and Budget (OBM)</p>	<p>PM tools would provide a clear timeline at the inception of the process (known as a Gantt chart), with the ability to determine which actions can proceed simultaneously and which can only proceed</p>	<p>Having a performance metric for meeting timelines outlined in the 2008 Rule would provide greater incentive for Corps Districts to process</p>

		<p>to establish a Government Performance and Results Modernization Act (GPRA) performance metric for Corps District staff related to meeting review and approval timelines for mitigation banks, in-lieu fee programs, and in-lieu fee projects that align with the timelines included in the 2008 Compensatory Mitigation Rule (i.e., draft prospectus, prospectus, draft instrument and final instrument). Achievement and recognition of this review timeline performance should be weighted sufficiently, in comparison to permit processing metrics, to reflect the programmatic efficiencies that banks and in-lieu-fee programs can facilitate.</p> <p>Further, all IRT members, including USACE leadership on the IRT, should be required to participate in project management (PM) principles and tools training. To implement and lead this PM effort, there should be resources to support a designated Mitigation Project Manager or expert, who would assist with training and oversight of less experienced/knowledgeable staff assigned to MBI review.</p>	<p>sequentially. The actions which can only proceed sequentially are identified as being on the “critical path.” Delays in critical path activities can be identified early and their impacts minimized. The regulatory project manager, the IRT, and the applicant would have a common view of the progress of the MBI, and activities and resource requirements would also be identified at the beginning of the process.</p>	<p>project proposals in a timely manner, manage IRT members more efficiently, and make decisions that move projects along the approval pipeline.</p>
5	Anecdotally, we understand that there is a need for	In the next budget request, prioritize funding for technical support	One of our member companies specializes in environmental data	Current district level policies on data collection

	<p>increased data reporting and better access to USACE data on mitigation site approvals and monitoring. This need is especially true for site monitoring at all forms of mitigation, including banks, PRM and ILFs, to ensure all projects are meeting their performance requirements and the Corps is timely informed when oversight is needed. We also understand that there are current inefficiencies in data collection and aggregation, which lead to inconsistent and inaccurate data and time wasted.</p>	<p>materials, including digital technology and data input forms for monitoring. To implement this technology during field assessments on credit/debit methodologies, the USACE should also offer a training course for Districts and IRTs on how to develop appropriate, workable, science-based crediting/debiting methodologies. In particular, for site monitoring efficiencies, the Corps should implement 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.</p>	<p>collection and reporting. Based on their expertise, they recommend using preformatted data-input forms and report exports for Wetlands Delineation, which were designed with assistance from expert Charlie Newling. Their form design approach offers a solution to the issues of inconsistent and inaccurate data, as well as time wasted when using pen and paper.</p>	<p>would be modified or expanded upon to incorporate the use of digital technology.</p>
6	<p>Not all Corps districts have developed crediting methodologies for wetlands and streams nor are existing methodologies consistently available on Districts' websites. The lack of clarity and transparency on credit/debit and service area methodologies, inhibits investment in compensatory mitigation solutions. Additionally, there needs to be some level of consistency between Districts on the</p>	<p>First, we recommend that Corps HQ form a task force at HQ to establish the possible realm of actual workable, science-based crediting/debiting and service area methodologies.</p> <p>We then recommend that the Corps issue a RGL or Memorandum to the Field that: 1) Directs each Corps District to adopt a crediting/debiting methodology for wetlands and streams, consistent with the 2008 Mitigation Rule, by a specified date; 2) Provides guidance on how to</p>	<p>See South Pacific Division guidance on determination of compensatory mitigation ratios for an example: http://www.spa.usace.army.mil/Portal/16/docs/civilworks/regulatory/Mitigation/SOP%20for%20Determination%20of%20Mitigation%20Ratios.pdf</p>	<p>Greater investment in compensatory mitigation solutions, which will support faster permitting approval.</p>

	methodologies used rather than 38 different ways to measure environmental performance.	develop crediting/debiting methodologies for wetlands and streams; 3) Directs each District to make such crediting methodologies available to the public, and 4) Directs each District to also make their methodologies on how service areas are assigned to a new bank available to the public.		
7	The amount of time it takes to process third party mitigation instruments and credit releases encourages applicants to propose smaller PRM projects to meet project deadlines.	Issue guidance to allow a permittee responsible mitigation (PRM) performed in advance of mitigation bank instrument (MBI) approval on adjacent property to be subsumed into the mitigation bank, with liability transfer to the mitigation bank sponsor, by modification of the MBI.	When a development schedule does not allow time for bank permit processing, allowing PRM sites to be formally subsumed by a surrounding mitigation bank provides assurances of long term durability, landscape scale, and liability exchange to a professional banker. This will reduce USACE staff time spent on long term compliance.	This proposal is a variation of the authorization of umbrella mitigation banks in § 332.8(h). An umbrella mitigation banking instrument may provide for future authorization of additional bank sites, by modification of the MBI. Perhaps by adopting the MBI as an umbrella bank, the PRM site could be subsumed (essentially upgraded) into the remainder of the bank site.
8	Banks are often improperly assessed the same time lag whether credits are released in year 1 or year 5. Time lag should be adjusted to capture only the time between the credit release and final mitigation success. Actual risk	Apply realistic time lag and risk factors to mitigation bank projects. Time lag should reflect the actual time elapsed between actual credit release date and final success, not the start of the project and final release. Risk should reflect the strong adherence of banks to the 12	Bank projects in the Jacksonville District are routinely assessed with the same time lag for each credit release regardless if it is in year 1 or year 5. Risk factors for bank sites are arbitrarily set even though banks automatically address all risk factors in the Uniform Mitigation	Under the 33 CFR 332.2 definition for temporal loss there is no justification for discounting credit yield during the period before they are used to offset an impact. Similarly, risk

	<p>for banks is inherently lower than PRM given the durability requirements including thoroughly vetted legal and financial assurances. Risk should be virtually non-existent on banks that only release credits as success is proven.</p> <p>PRM sites should be assessed with conservative time lag factors that reflect the reality of potential remedial actions, project delays, and surrounding urbanization since there is no leverage once the mitigation is released at permit issuance. PRM projects should be held to the same standards as banks (clear title, financial assurances, long term management plan and funding) so that risk is not shifted to the public. After this requirement, risk factors should be realistically applied for remaining risks due to design constraints, project size, or location.</p>	<p>elements of mitigation in the mitigation rule. Similarly, apply realistic time lag and risk factors to PRM. Time lag should reflect the fact that PRM mitigation is in effect 100% released at permit issuance, and risk should be commensurate with the verifiable level of adherence to the 12 elements of mitigation found in the 2008 mitigation rule.</p>	<p>Assessment Methodology (UMAM) through adherence to the 2008 federal mitigation rule.</p>	<p>factors are addressed by the release schedule procedure in § 332.8(o)(8) and financial assurances in § 332.2(n). In § 332.3 there is a discussion of the relative risk of permittee-responsible mitigation when compared to advance mitigation provided by with mitigation banks or in-lieu fee programs. The risk is deemed highest for permittee-responsible mitigation, which suggests that to meet the stated purpose of the rule (§ 332.1) to, in part, “apply equivalent standards and criteria to each type of compensatory mitigation.” It follows that a form of mitigation with higher risk should be given higher risk factors to effect equivalent standards.</p>
9	<p>Dam and other barrier removal projects may be more predictable than other restoration techniques at</p>	<p>Provide guidance to USACE Districts, in a RGL, that 1) Affirms the appropriateness of barrier removal (i.e. dam removal/culver</p>	<p>See the report, “Environmental Markets and Stream Barrier Removal” for recommendations on the issues that should be</p>	<p>Providing clarity on the appropriateness of dam and barrier removal as a compensatory mitigation</p>

	<p>delivering sustainable environmental outcomes because they restore self-sustaining processes and require minimal maintenance over time. However, since there is not currently national support and guidance for these projects under the 404 program, their potential to provide more readily available stream restoration credits is not fully incentivized and realized under the 404 program.</p>	<p>replacement) as an appropriate compensatory mitigation method; 2) Directs Districts to develop district-specific, workable, and science-based crediting methodologies for crediting such projects; and 3) Emphasizes the 2008 Compensatory Mitigation Rule's position that the Corps has flexibility in determining appropriate long-term protection mechanisms for such projects.</p>	<p>incorporated into national and district-specific guidance on dam and barrier removal guidance.</p>	<p>method will support the approval of durable and sustainable stream mitigation projects, increase the supply of stream credits, and reduce permitting times.</p>
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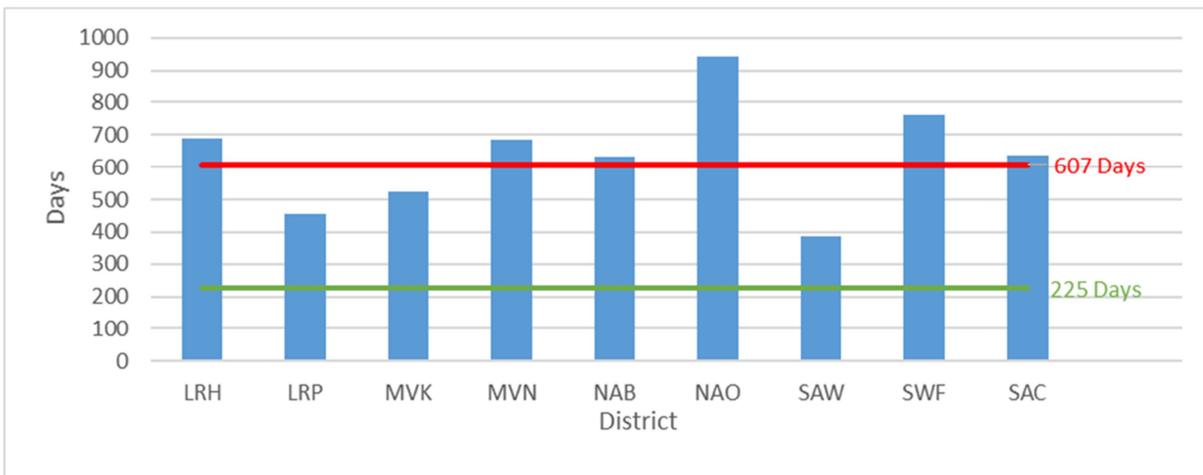
Case Study: The Need for Adherence to the 2008 Rule IRT Timelines

One of ERBA’s member companies has tracked the approval timelines for their 37 mitigation banks by District from 2010 to 2017 to illustrate the variation in approval times. The cumulative timeline for the agency review process is 225 days, as outlined and required by 33 CFR Part 332.8 (d). Average approval time for the mentioned projects was 607 days.

Average approval time was 607 days, 225 days of which total maximum agency review times required by 33 CFR Part 332.8 (d). The member company did note that these review times include time spent by the applicant responding to USACE and IRT agency comments, however, the variation in approval average times suggests potential for increased review efficiency.

District	No. of Approved MBI	Average (Days)
Huntington (LRH)	4	690
Pittsburgh (LRP)	2	456
Vicksburg (MVK)	6	526
New Orleans (MVN)	11	685
Baltimore (NAB)	1	631
Norfolk (NAO)	3	942
Wilmington (SAW)	8	388
Fort Worth (SWF)	1	762
Charleston (SAC)	1	635
Total	37	607

Average time from prospectus submittal to bank approval:



*The Green line represents the Rule’s specified time for approval and the Red line represents the actual average time for approval.