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To: U.S. Army Corps of Engineers
From: Ecological Restoration Business Association
Re: USACE; Subgroup to the DoD Regulatory Reform Task Force, Review of Existing Rules
Filed to Docket No.: COE-2017-0004
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The Ecological Restoration Business Association (ERBA) is pleased to provide comments to the U.S. Army Corps of Engineers (USACE), docket COE-2017-0004 regarding how USACE can improve implementation of regulatory reform and suggestions on potential regulations for repeal, replacement, or modification.

First established in 1998 as the National Mitigation Banking Association, ERBA promotes federal legislation and smart regulatory policies that encourage advance compensatory mitigation and private investment in ecological restoration projects that offset unavoidable adverse impacts of development, as required under the Clean Water Act (CWA). Our member companies have projects that support infrastructure in 18 states across the country and work with developers daily to provide private sector compensatory mitigation solutions. The broader ecological restoration sector creates 225,000 jobs (and growing) and has a total economic impact of \$24.5 billion.¹ Because our members are experts in the process of ecological restoration and generate mitigation services in advance of impacts, they help expedite the permitting process for developers while taking on the mitigation-based liabilities of development projects. Our member companies can cut permit timelines in half, compared to projects where permit applicants are pursuing their own mitigation.²

Like all regulated entities, the ecological restoration industry faces the challenge of regulatory burdens. ERBA members support their clients' development and infrastructure

¹ BenDor, T et al. 2015. Estimating the size and impact of the ecological restoration economy. <https://doi.org/10.1371/journal.pone.0128339>.

² U.S. Army Corps of Engineers. 2015. The Mitigation Rule Retrospective: A Review of the 2008 Regulations Governing Compensatory Mitigation for Losses of Aquatic Resources www.iwr.usace.army.mil/Portals/70/docs/iwrreports/2015-R-03.pdf.

projects and are motivated to provide clients with the most cost effective methods of compensatory mitigation. Our efforts, however, are often slowed by regulatory inconsistencies and delays. Wetlands and stream related compensatory mitigation activities are subject to USACE policies and guidance, including the “Mitigation Rule” codified at 33 CFR 332 “Compensatory Mitigation for Losses of Aquatic Resources.” ERBA has identified opportunities for improvement, particularly in the implementation of the Mitigation Rule, in the areas of accountability, transparency, consistency and equivalency.

The following suggested changes would aid our member companies by providing clear, reliable processes for delivering their mitigation solutions to developers as quickly and business friendly as possible, and also aid USACE district offices in their efficient implementation of the Mitigation Rule. We would respectfully request that USACE consider ERBA’s recommendations as the USACE works to improve its body of regulations and policies.

I. **Develop Standard Operating Procedures for the administrative, procedural and credit methodologies of mitigation processes.** Development of Standard Operating Procedures (SOPs) in every USACE district would increase transparency in the process and provide certainty in the marketplace, which ultimately lowers the risks and costs for solution providers and developers. ERBA recommends development of SOPs and standardized techniques for both wetlands and stream mitigation programs through a transparent public notice and comment process with an accountable timeline for implementation of the new processes. Once developed, any changes to SOPs or standardized credit methodologies should only be made through a transparent public notice and comment process, which allows for the industry to constructively comment on any revisions to these important aspects of project performance and value. ERBA member companies have the knowledge and resources to work with the USACE district offices on promulgation of SOPs, templates, and standardized debit and credit methodologies.

A. **Address the administrative and procedural aspects of mitigation.** Developers and mitigation providers benefit from nationwide consistency in the required administrative and procedural aspects of mitigation banking, such as financial

assurances and site protection instruments. Correspondingly, these aspects of the SOPs should be standardized and simplified at the USACE division level or higher to provide more direction, best practices at the district levels, and ensure uniformity in requirements and application, for example, through the release of a national Mitigation Banking Instrument template (see below). Such standardization would improve the acceptability of submittals, thereby shortening the review time, including Office of Counsel reviews, which are adding a significant amount of time to the approval process.

1. **Consistently apply the Watershed Approach.** ERBA recommends that the USACE Headquarters, either through SOPs or other guidance, clarify that a site within a defined service area of an impact meets the “Watershed Approach” under the Mitigation Rule. Developers and restoration businesses suffer when some USACE district offices choose to interpret “Watershed Approach” more narrowly than the Mitigation Rule definition permits, such as requiring mitigation within an eight digit HUC rather than service area. USACE Headquarters could proactively correct this discrepancy between district (or evaluator) interpretations by issuing direct guidance that clarifies service area satisfies the Watershed Approach. A “check and balance” system should be established so that inconsistencies are identified and corrected early in the permit review process so that time and resource efficiencies are maximized.

B. **Develop standardized credit methodologies.** At a lower level, each USACE district should develop a standard credit methodology on both i) how to calculate the required mitigation offsets and ii) how to calculate credits from a mitigation project site, regardless of the form of compensatory mitigation. Districts should use the same methodologies for determining debits and credits when administering the Mitigation Rule and when determining compensatory mitigation needs for their civil works projects. For our members and their clients, these calculations form the foundation of understanding how to obtain a permit for impacts. Requiring promulgation of credit methodologies through this process would provide transparency and equivalency and in

turn help both developers and mitigation providers make better business decisions and investments.

1. **Incentivize restoration projects with high ecological output.** Credit methodologies can incentivize the strategic design and placement of banks in areas of higher ecological value, such as near existing important habitat or a critical water feature. For example, if a bank is located in a higher-value area, the methodology should recognize its value through a credit adjustment factor or multiplier.

C. **Uphold equivalency of standards.** To fulfill the original intent of the National Defense Authorization Act's "equivalency of standards" objective, SOPs and standardized credit methodologies should apply equivalently to the approval and operation of all forms of compensatory mitigation (i.e. Permittee Responsible Mitigation (PRM), In-Lieu Fees (ILF), and mitigation banks).

D. **Incentivize adherence to SOPs.** Once Districts have promulgated SOPs, and for those districts already operating under SOPs, incentivize District Engineers' adherence to the policies published in their respective Districts' SOPs and permitting timeframes by including such adherence as a component of regular evaluations of Corps personnel, both at the District and Division level, and the District's budget.

II. **Develop a national Mitigation Banking Instrument template.** To expedite review of applications for mitigation projects, the USACE should promulgate a baseline Mitigation Banking Instrument (MBI) template for national use. Such a national template would include language on key MBI provisions such as service areas, performance standards, credit release schedules, financial assurances, site protections, long-term management plans, monitoring, and reporting, among others. The template would incorporate reference to or acknowledgment of adopted SOPs governing provisions that are to be standard nationwide and not vary from district to district. A few recommendations for certain MBI provisions are included below, and ERBA member companies are available to provide additional specific examples of effective language and requirements for each major MBI provision.

A. **Standardize performance standards.** ERBA strongly supports science-based performance standards that are reflective of successful restoration benchmarks. Performance-based standards grounded in current restoration science achieve better ecological outcomes than using an understanding of the “historical site,” which often results in overly complex and bureaucratic standards (for example, see the USACE Chicago District guidelines currently out for Public Notice). Current restoration science-based benchmarks successfully retain the ecological integrity of a mitigation project. With this understanding, USACE should develop nationally consistent performance standards for all forms of compensatory mitigation via a national MBI template.

B. **Define the acceptable level of design plans for an MBI.** A specific issue that often leads to unnecessary delays during prospectus and MBI review is review of the project sponsor’s design plan. To streamline this regulatory hold up, the USACE should agree on an acceptable level of design plans needed for prospectus and MBI purposes. This definition would be set at a level such that the design plans will provide visibility to USACE on what the district should measure when evaluating a bank’s success, while remaining flexible and adaptive to future changes. Further, such a definition would give project sponsors a clear understanding of what scope and level of detail is expected at certain stages in the process. Generally, USACE districts should find design plans acceptable if the design demonstrates that the project will achieve functional ecological success. If, after review of the design plans at the prospectus stage, there is a reasonable question on the viability of the proposed project site’s basic functionality, i.e. the site’s soils or hydrology, then the project applicant may be asked to provide more design plan details. As noted in ERBA’s final suggestion below, Item VII, ERBA aims to serve as an educational resource. ERBA member companies could work with USACE districts to organize regional webinars covering restoration science and the critical aspects of prospectus/MBI design plans that are indicative of hydrological success and ecological output.

1. **Design plan recommendation.** At the prospectus stage, ERBA recommends a sufficient level of detail so that opportunities and constraints are accurately fleshed out, typically about 30% design. ERBA notes that this approximate 30% may not be necessary at the draft prospectus stage. At the MBI review stage, ERBA recommends that 60% design is needed, with a recognition that some design aspects are more pertinent than others and may require more substantial detail.

C. **Provide guidance to districts on use of the national MBI template.** The USACE HQ could issue the MBI template via a Regulatory Guidance Letter (RGL) to district offices that describes how districts are to implement the consistent requirements of each template provision. This RGL should also guide districts on which aspects of the MBI are the most important for analysis and critique, i.e. which aspects are impactful on a project's ultimate outcome, and include general guidance on the need for some deference to the bank applicant on particular details of a design plan. The USACE HQ could follow-up to the RGL with regional training sessions on implementation of the national MBI template.

D. **Agency coordination and efficiency.** ERBA understands that the U.S. Fish and Wildlife Service (FWS) is also developing national templates for conservation banks. ERBA recommends that USACE coordinate with FWS on development of templates for joint wetlands and species banks.

III. **Modernize the IRT structure.** When the Mitigation Rule was first codified ten years ago the process of permitting mitigation banks was still being established and input from multiple agency stakeholders was helpful for the success of evaluating an MBI and bank project. More recently, the structure of the Interagency Review Team (IRT) and process of incorporating multiple stakeholders' comments has often inadvertently resulted in a time delay in the permitting of successful bank sites and production of mitigation for developers. Other priorities and budget constraints also affect IRT timelines. In many cases across the country, IRT agency members are not providing comments within the time requested, which delays the IRT action

under review. To take control of the MBI review process and ensure IRTs meet their timelines, ERBA recommends that the USACE enhance their direction of the IRT and reduce the number of stakeholders on the IRT. This could be accomplished either through the USACE leading final IRT decision making, while considering, to the extent the USACE deems necessary, the comments of other IRT members, or through a departure from the traditional IRT structure and process. Under these scenarios, the USACE would assume ultimate responsibility for issuance of MBIs. ERBA recognizes that this shift in IRT structure might not be viable for joint CWA and Endangered Species Act banks, and for those joint bank IRTs ERBA recommends the wildlife agencies adopt more stringent review timelines and other best practices, further described below in Item IV.

A. **Eliminate conflicts of Interest.** There is a conflict of interest when agencies that operate ILF programs or perform PRM also sit on an IRT for a bank project that would directly compete for money with those ILFs or PRM projects. ERBA recommends IRT's adopt the following policy: IRT members whose agencies receive revenue in an applicant's proposed service area shall be automatically conflicted out from comment and/or oversight of banks in that service area.

IV. **Improve efficiency of bank prospectus and MBI review practices.** There are opportunities for bank sponsors and IRTs (or the USACE district, pending the above suggestion) to streamline the prospectus and MBI review process. Currently at the prospectus stage some IRTs seek an unnecessarily detailed prospectus and the IRT will require several iterations of a draft prospectus before approval. Rather than pursuing a highly detailed document, the USACE should lead the IRT to develop a list of general criteria necessary for the purposes of evaluating the prospectus as a conceptual document that provides a roadmap for a bank project. Alternatively, the review comments provided by each IRT member should be stated such that the member approves of the document upon addressing the comments provided. With either of these perspectives, the USACE should then work to approve or disapprove the proposed concepts of a project or finalize the document and not get bogged down in a cycle of multiple edits on specific details. As a general best practice measure, all parties should track together

that there is a complete review of each document section at each review stage. In our experience, an IRT member may respond on one section of a draft but fail to comment on other sections until later versions are circulated. While these delayed comments are valuable, they must happen earlier in the process to improve efficiencies. The USACE district and bank sponsors could coordinate to mark each section of each document version as either approved or disapproved. This practice would then track that a prospectus or MBI version has been fully and conclusively reviewed at each appropriate stage.

A. **Develop a national prospectus template.** Our members find that currently there is variability between USACE districts on the level of detail and information required to be provided at the prospectus stage. USACE should develop a national prospectus template, grounded in the Mitigation Rule's originally intended prospectus requirements (see 33 CFR 332.8(d)(2)), which would outline general criteria, major concepts and provide a baseline model of an acceptable prospectus. This template should be developed through a national public notice and comment process. If any changes are made to the template, those changes and updates should also go through a transparent public notice and comment process.

B. **Strengthen adherence to review timelines.** As stated above, a prospectus or MBI may require several iterations of a draft document before the IRT grants final approval. The review process would be more productive if there were clearer boundaries on the process, similar to those used for permit review, including agencies commenting within their roles and responsibilities pursuant to the CWA. First, ERBA recommends that the USACE restrict IRT revision requests to those that substantively relate to the proposed project, i.e. the physical, chemical and biological conditions of the site. Second, ERBA suggests that USACE implement a cap on the number of revision requests an IRT may make of an applicant's document. This cap is requested because agency representatives, in many cases across the country, are providing comments in a piecemeal manner, rather than thoroughly reviewing the document and providing comprehensive comments. Once the cap has been reached and if further revisions are

still requested, the burden would shift to the IRT to explain to the project applicant why the project as a whole is not acceptable to the IRT. Based on member companies' experiences, ERBA recommends the cap is set at three cycles of revision requests. Finally, adherence to these review processes and set timelines should be incorporated in the performance metrics of USACE district offices' annual evaluations.

V. Allow for the purchase of mitigation under a Permittee-Responsible Mitigation plan.

ERBA member companies' clients are frustrated when there is a mitigation bank site established in the service area of their impact, but credits have not yet been released from the bank and thus the developer's only option may be PRM. Developers seeking to buy bank credits often want to avoid PRM plans due to the time and ongoing liability involved with PRM projects. To solve this discrepancy, the USACE could issue guidance, similar to the suggested language found under Attachment A, which would allow permittees to include the future purchase of mitigation banking credits as an aspect of their PRM plan, provided that the appropriate financial assurances are posted to guarantee performance. ERBA holds that this suggestion could be implemented through guidance, without a change to the language of the Mitigation Rule, as long as the guidance addresses how a PRM plan to purchase credits shall be considered within the Rule hierarchy, such as in Item (d) under Attachment A.

VI. Provide clear guidance on implementation of the mitigation banking "preference."

The Mitigation Rule states a clear preference for use of mitigation banks when considering compensatory mitigation options: "the district engineer should give preference to the use of mitigation bank credits when these considerations are applicable." 33 CFR 332.3. However, ERBA member companies have found that in practice the preference is not adhered to even when there are the appropriate mitigation credits available in the service area of the resource impact. USACE could address this inconsistency between the law and implementation by issuing clear guidance on how the preference should be considered by the District Engineer and disseminated to evaluators, planners, project managers, and banking project managers across the district, both from Regulatory and Civil Works Planning program perspectives. This could be done through a RGL or a policy that outlines set criteria on when other forms of compensatory

mitigation may be directed for use by the District Engineer, despite the availability of appropriate mitigation bank credits within the service area. In the past, some districts used a decision template in which district engineers had to detail the reasons why they chose to not direct use of mitigation bank credits for an impact when credits were available. ERBA would support revisiting use of and adherence to such decision templates to guide USACE offices' implementation of the Mitigation Rule preference. Further, maximizing the participation of regulatory staff (evaluators and mitigation banking personnel) with planning staff in these educational training courses would assist districts in routine coordination among their staff to improve efficiencies in the mitigation banking and watershed planning programs.

VII. **Increase USACE district offices' training.** Regulatory delays sometimes occur due to a lack of training within USACE district offices on the technical aspects of mitigation and restoration science and/or due to poor project management. Some districts have addressed this issue via an office mitigation banking coordinator, which could be beneficial for other districts as well. ERBA recognizes that the resources of USACE Regulatory are limited and would welcome the opportunity to serve as an outside educational and expert resource when useful and appropriate.

A. **Utilize ERBA educational resources.** USACE HQ should encourage district offices to attend ERBA organized regional webinars on restoration science and aspects of the MBI approval process, as well as "field days" and discussions held at ERBA member company mitigation project sites.

B. **Improve project management.** USACE districts should periodically, allowing for stakeholder input, review and revise project management protocols for reviewing and evaluating permit applications, ILF project plans, bank prospectus, and MBIs to increase the efficiency and predictability in their reviews. Districts should track and annually report to the Institute for Water Resources the number of days taken to evaluate each permit application, ILF project plan, prospectus, and MBI. ERBA member companies recognize they can also play a role in efficient project management and would be open

to employing such tools as shared schedules and tracking sheets and generally aligning with district offices on shared objectives and timing.

With improved direction from USACE in implementing the Rule and other policies, private sector ecological restoration can better assist developers and also increase their contribution to the nation's job growth and economy. Thank you for your consideration of these comments.

Attachment A

Suggested Guidance for incorporating the use of future bank credits under Permittee Responsible Mitigation (PRM) Plans.

- a. The following guidance applies to all future Mitigation Banking Instruments (MBI), as well as to those MBIs already approved and those under review, at the request of the bank sponsor.
- b. In order to fulfill the goal of Section 314(b) of the 2004 National Defense Authorization Act (Pub. L. 108–136) “to the maximum extent practicable, maximize available credits and opportunities for mitigation,” the Permit Applicant’s commitment to acquire credits from future releases of approved banks shall be considered an acceptable component of a Permittee Responsible Mitigation Plan.
- c. The Permittee Responsible Mitigation Plan shall include financial assurances in the form of funds placed into escrow at the time of permit issuance sufficient to acquire the required credits.
- d. A Permittee Responsible Mitigation Plan which incorporates the acquisition of credits from future releases of an approved bank shall be considered as equivalent to PRM-Landscape Scale under the preference as defined in the 2008 Mitigation Rule
- e. The future credit releases which may be utilized under this approach should be those with a high degree of certainty of being released. At a minimum, only those banks meeting the following criteria may be considered by the District engineer:
 - i. Those banks that have demonstrated attainment of initial performance measures
 - ii. Those banks with unreleased credits likely to be released within the same timeframe as PRM mitigation would be required to be constructed.
- f. At the time of request for released credits, such credit releases shall also be expedited. The District Engineer will have the discretion to determine which credit releases from a particular bank satisfy this requirement.