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Re: CWA §404 Mitigation Reform and Implementation of the Administration's Infrastructure Initiative

The Ecological Restoration Business Association (ERBA) applauds the leadership of the U.S. Environmental Protection Agency (EPA) on the President's Infrastructure Plan. We thank you for your time and engagement during recent meetings in DC regarding mitigation reform efforts. We are encouraged by your willingness to understand the practitioner's perspective and a common sense approach to regulatory reform that will benefit permittees, mitigation providers, agencies, and our nation's environment. Considering the current momentum in Washington, ERBA underwent an initiative to gather from our member companies and organizations the following list of recommendations for consideration by the EPA and U.S. Army Corps of Engineers (USACE).

Each of these recommendations could be implemented through policy guidance and direction from EPA and USACE HQ to Regions and 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 EPA and USACE implement most of these recommendations through a Regulatory Guidance Letter or Letters (RGL), signed by commanding officials and issued to the USACE' Districts and EPA Regions. 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 an EPA or USACE 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. We underscore the importance of our first set of recommendations on IRTs, which we believe would address current frustrations, while avoiding the need for an arduous rule-making process.

1. 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, unless otherwise agreed upon

by the bank sponsor and IRT members. Implement a project delivery management process for IRTs and require corresponding mandatory training for all IRT members.

- a. Use a GPRA performance metric and project management training to incentivize adherence to the Rule's timelines.
2. Direct each USACE District to adopt Standard Operating Procedures (SOPs) and publish such SOPs via public notice and comment, by 12/31/2019. Effective SOPs will lower the workload for IRT members by providing very clear direction on project elements. Please see the chart for specifics on the factors that we believe should be included in every District's SOPs.
3. 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.
4. Make ORM data publicly available and require Districts to either update RIBITS databases within a reasonable timeframe of receiving information from mitigation site sponsors, or permit site sponsors access to timely update their site's information on the database.
5. Provide technical support and training to the USACE Districts, EPA Regions, 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. Advance adoption at the District level of workable, science-based crediting/debiting and service area methodologies for wetlands and streams. Work with the USACE HQ and Districts to ensure that these methodologies are as consistent as possible nationwide and that they leverage best practices already developed in many Districts.
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.

We hope this feedback is 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 EPA. Please do not hesitate to reach out to ERBA on any of the ideas we present here. Additionally, we would welcome the opportunity to again sit down with EPA 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>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 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>	<p>Through a RGL:</p> <ol style="list-style-type: none"> <li>1. Require publication of adherence to the 2008 Final Rule timelines and dispute resolution process</li> <li>2. Establish a project mgmt. approach for IRTs to work together in planning and responding to mitigation applications.</li> <li>3. Create a timeline for Office of Counsel review and approval</li> <li>4. State that only one timeline extension is allowed per review, unless all parties on the IRT and sponsor are in agreement to further extend the deadline.</li> <li>5. Direct that when timelines are exceeded the district engineer, in coordination with any necessary co-chairs, must act efficiently to grant agency approval and move the IRT decision forward. To implement this directive, require all IRT members, the sponsor, and any co-chairs to develop a</li> </ol>	<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>Employ an "After-Action Review" with IRT Agencies after signature of MBI to recap, which have resulted in numerous process improvements and efficiencies, including:</p> <p><u>IRT review and processing changes for future projects:</u></p> <ul style="list-style-type: none"> <li>- Utilize a shared calendar with the Sponsor that outlines benchmarks setting clear expectations of when comments are due and when Bank Signature is expected.</li> <li>- Consolidate all Agency comments for each exhibit under the appropriate headings</li> <li>- Re-submit <u>only revised documents</u> after receiving comments</li> <li>- Keep track of document submittals and comments in a table</li> <li>- Date all revised documents in footer to correspond to dates in table of submittals</li> </ul> <p><u>Sponsor internal changes instituted for future projects:</u></p>	<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 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</p>

		<p>shared calendar tool that will ensure accountability and efficient buy-in from all members.</p> <p>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. This limit shall 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 wetlands banking, such as ESA or EFH credits.</p>	<ul style="list-style-type: none"> <li>- Meet with each Agency representative before each submittal to brief them, identify any concerns or issues (with all Agency representatives invited to all meetings)</li> <li>- Work to get early agreement on significant issues (crediting, service areas, easement language)</li> <li>- Meet with each Agency representative after receiving written comments to ensure the comments are understood and that our planned response is acceptable</li> <li>- Hire a professional editor to increase accuracy of submittals and reduce typos</li> <li>- Utilize weekly sponsor team meetings and meeting notes/agendas to track completed and pending tasks</li> <li>- With each submittal include a revised table of document submittals and the schedule highlighting next steps for the agencies</li> </ul> <p><u>Efficiency Results:</u></p> <ul style="list-style-type: none"> <li>- Increased project understanding by Agencies from face-to-face briefings/meetings</li> <li>- Decreased comments from agencies on formatting, inaccurate details</li> <li>- Decreased re-submittals due to appropriate revisions/responses to comments</li> <li>- Increased ability to track versions of documents, making submittals complete</li> <li>- Significantly reduced delay in signatures from target date</li> </ul>	<p>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>
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			- Stronger working relationships with Agency representatives	
1a	Lack of incentives and programs to empower IRT leadership to move projects and reviews forward and adhere to deadlines.	<p>Adopt a GPRA performance metric for Corps Districts and other resource agency staff sitting on IRTs related to review and approval of third-party compensatory mitigation projects. Use of such a metric would create discipline across the board for all IRT members to meet the designated timeframes for the approval process.</p> <p>The agencies would work with the Office of Management and Budget (OBM) 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. Rather than only tracking how many projects are permitted by each IRT, ERBA recommends tracking review performance at each major project milestone, i.e. the draft prospectus, prospectus, draft instrument and final instrument stages. Achievement and recognition of this review timeline performance should</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 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>ERBA recognizes that a bank sponsor’s timely response to IRT inquiries and requests also impacts project timelines. For purposes of evaluating agency performance, the time when IRT members are waiting on a response from project sponsors should not count factor into the agency’s review time.</p>	<p>Having a performance metric for meeting project milestones in the review process according to the timelines outlined in the 2008 Rule would provide greater incentive for Corps Districts to process project proposals in a timely manner, manage IRT members more efficiently, and make decisions that move projects along the approval pipeline. By breaking down the performance evaluation to individual project milestones, the GPRA metric will encourage the overall shift ERBA recommends towards a “project management” approach for IRT members.</p>

		<p>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>		
2	<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</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"> <li>- site selection</li> <li>- credit release schedule</li> <li>- financial assurances</li> <li>- site protection</li> <li>- long-term management plan</li> <li>- monitoring</li> <li>- review and approval process tools, i.e. shared calendar, shared tracking tool, expectations on agency accessibility and coordinated communication</li> </ul>	<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>

		<p>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 performance standards “must be based on the best available science that can be measured or assessed in a practicable manner.”</p>	<p>Categories to consider for a more detailed SOP development:</p> <ul style="list-style-type: none"> <li>- credit/debit metrics</li> <li>- performance standards</li> </ul> <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-thought out and rooted in sound science and practical on-the-ground experience.</p>	
3	<p>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.</p>	<p>USACE HQ should direct, as a component of a Regulatory Guidance Letter, every USACE Division to develop templates for MBLs, 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. To build flexibility into the templates, we also recommend</p>	<p>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.</p> <p>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</p>	<p>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.</p>

		that district develop “riders” that may be added to a national or district level template such as an MBI to address necessary regional or site variances.	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.	
4	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.
5	Anecdotally, we understand that there is a need for 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,	In the next budget request, prioritize funding for technical support 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	One of our member companies specializes in environmental data 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	Current district level policies on data collection would be modified or expanded upon to incorporate the use of digital technology.



	<p>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>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>offers a solution to the issues of inconsistent and inaccurate data, as well as time wasted when using pen and paper.</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 methodologies used rather than 38 different ways to measure environmental performance.</p>	<p>First, we recommend that USACE HQ direct Districts to adopt workable, science-based crediting/ debiting and service area methodologies, and coordinate with USACE HQ to ensure that methodologies are as consistent as possible nationwide and leverage existing best practices.</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 develop crediting/debiting methodologies for wetlands and streams; 3) Directs each District to make such crediting methodologies available to the public, and 4)</p>	<p>See South Pacific Division guidance on determination of compensatory mitigation ratios for an example: <a href="http://www.spa.usace.army.mil/Portals/16/docs/civilworks/regulatory/Mitigation/SOP%20for%20Determination%20of%20Mitigation%20Ratios.pdf">http://www.spa.usace.army.mil/Portals/16/docs/civilworks/regulatory/Mitigation/SOP%20for%20Determination%20of%20Mitigation%20Ratios.pdf</a></p>	<p>Greater investment in compensatory mitigation solutions, which will support faster permitting approval.</p>

		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 for banks is inherently lower than PRM given the durability requirements including thoroughly vetted legal and	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 elements of mitigation in the mitigation rule. Similarly, apply realistic time lag and risk factors to PRM. Time lag should reflect the	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 Assessment Methodology (UMAM) through adherence to the 2008 federal mitigation rule.	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 factors are addressed by the release schedule procedure in § 332.8(o)(8) and financial

<p>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>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>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>
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**Case Study: Opportunity for Improved Adherence to the 2008 Rule IRT Timelines**

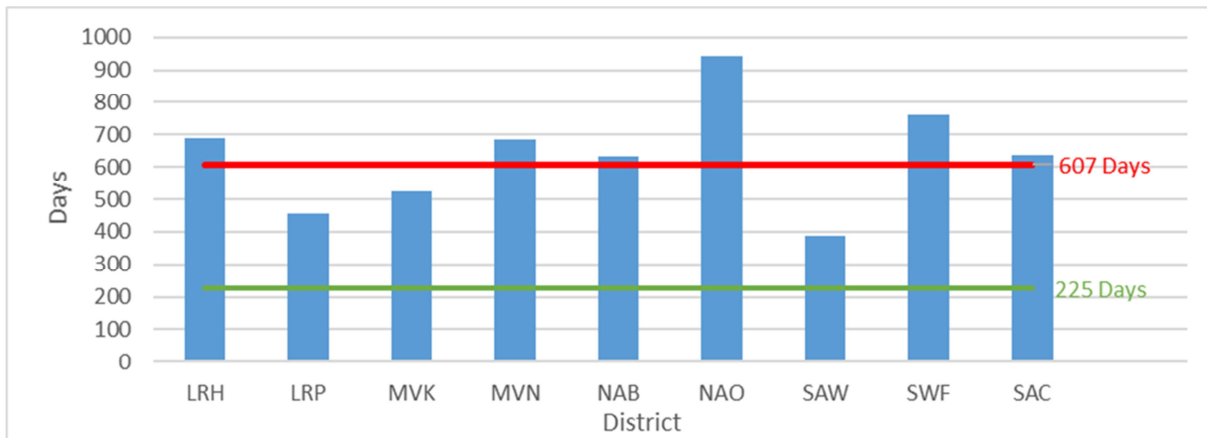
Timely cooperation between the resource agencies that sit on the IRT and project sponsors results in robust and accountable restoration projects that are good for the environment and permittees. Looking at a sample of IRT review timelines across the country demonstrates that there are opportunities for performance improvement. ERBA advocates that these improvements are best achieved when viewed as shared project efficiencies and undertaken with a team mentality by both the IRT members and the mitigation project sponsor.

One of ERBA’s member companies has tracked IRT approval timelines for their 37 mitigation banks by District from 2010 to 2017 to illustrate the current 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).

The average approval time for the 37 banks at hand was 607 days. While this average does include both agency review time as well as the time spent by the applicant responding to IRT comments, an average of 607 days is almost triple the maximum 225 day timeline for agency review established by 33 CFR Part 332.8 (d). The large variation in average approval times among USACE Districts (from 388 to 942 days) suggests that there is potential for increased efficiencies in the review process across Districts and IRTs. ERBA members hope to work with agencies on these efficiencies by playing a role in adopting some of the project management tools referenced above in our first recommendation.

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
<b>Total</b>	<b>37</b>	<b>607</b>

**Average time from prospectus submittal to bank approval:**



\*The Green line represents the Rule’s specified time for agency review and the Red line represents the average time for agency review plus sponsor responses for approval of a sample of banks.