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April 21, 2020

Chairman Mary Neumayr
U.S. Council for Environmental Quality
730 Jackson Place, N.W.
Washington, DC 20506

RE: ***Recommendations to Expedite High Priority Infrastructure, Maintain Environmental Protections & Spur Job Growth and Economic Recovery***

ERBA supports the efforts of the Administration and Council on Environmental Quality (CEQ) to identify policies that would enhance stimulus investments in high priority infrastructure. These investments will produce long-term value for the American public if directed to increasing communities' natural resiliency, building sustainable infrastructure, and supporting family-wage jobs.

America's ecological restoration industry, at 225,000 jobs and growing, stands ready to meet and deliver on these goals. Our member companies consult with public agencies and private industry daily on construction and improvements for our country's roads, bridges, and dams, making us acutely aware of their unique regulatory challenges, and ready to respond with permitting solutions. Our industry generates diverse job opportunities, often in rural areas, on purposeful work with large scale positive community impacts. With targeted policy incentives, our industry can deliver infrastructure and ecological services that provide extensive public benefits, while stimulating economic growth and jobs creation.

Based on ERBA members' extensive experience, we offer the following recommendations for CEQ's consideration to expedite high priority infrastructure, maintain environmental safeguards, and spur job growth:

Emphasize Mitigation in the NEPA Review Process.

ERBA recommends CEQ strongly promote consideration of third party provided mitigation from existing wetland/stream mitigation banks and ILFs in the NEPA review process for projects utilizing stimulus funding. This approach will expedite a mitigated Finding Of No Significant Impact (FONSI) for infrastructure projects that intend to use mitigation bank or ILF credits to reduce/eliminate temporal losses and provide advance or concurrent mitigation for impacts.

This recommendation aligns with CEQ's recently proposed revisions to NEPA, that of emphasizing the role of mitigation to reach a mitigated FONSI and mitigated Environmental Assessments (EA). As the new NEPA guidelines are yet to be finalized, we encourage CEQ to use existing guidance to inform and encourage agencies' understanding and application of these mitigation concepts, including providing implementation guidance and training to enhance agency mitigation efforts.

Promote use of a “functional equivalence” exemption for certain ecological restoration projects.

ERBA recommends CEQ encourage agencies to apply the doctrine of “functional equivalence” to appropriate aquatic resource, species, and coastal restoration projects. Projects with overall net environmental benefits, like a mitigation, restoration or resiliency investment, may warrant a distinction in law from projects with overall net significant adverse environmental impacts, and justify a nimbler, fast tracked environmental review process. Reduction in duplicative review processes for projects with net environmental benefits will expedite delivery of those environmental benefits to offset adverse impacts, speeding up permitting and construction of critical infrastructure. ERBA recommends treating these environmental outcome focused projects as exempt from the procedural requirements of NEPA if the regulations authorizing the project already require public engagement and considerations “functionally equivalent” to NEPA requirements, especially relative to their role in enhancing economic recovery.

CEQ’s recently proposed revisions to NEPA regulations offers guidance on the criteria threshold for application of the “functional equivalence” doctrine. Notably, the functionally equivalent analysis must include public participation, substantive and procedural standards to ensure full consideration of environmental issues, and have a purpose to examine environmental issues. ERBA supports these criteria, and additionally, ERBA recommends consideration of the nature of the project subject to review - if the project allows for public input and would deliver net environmental benefits, it may be more appropriate to exempt certain NEPA procedural requirements, especially for high priority infrastructure projects important to economic recovery.

While CEQ’s proposed NEPA revisions are not yet final, it is important to note that some agencies, i.e. EPA, use the “functional equivalence” doctrine, and ERBA asks that CEQ encourage the doctrine’s use where appropriate for specific agencies as they consider high priority infrastructure projects.

Encourage and Support the Corps Expanded application of Nationwide Permit 27 (NWP).

ERBA is asking the Corps to clearly authorize actions associated with ecological restoration and resiliency focused projects under NWP 27. The Corps’ NWP 27 authorizes activities related to aquatic habitat restoration, enhancement, and establishment. Considering the NWP’s defined scope of activities and intent to authorize activities that result in a net increase of aquatic resource functions and services, ERBA believes that the NWP should also apply to the activities of ecological restoration providers, however the NWP is not consistently applied in this manner. ERBA recommends the Corps train District Engineers and issue guidance to Districts that clarifies NWP 27 is intended to authorize actions by a third party ecological restoration provider in connection with a mitigation, restoration or resiliency focused project that generates net ecological uplift. Such guidance should also address any outstanding inconsistencies in application of NWP 27’s impact thresholds triggering mitigation requirements. Improvement in this application of NWP 27 will expedite the permitting and review process for many projects, especially those with net environmental benefits, and better support infrastructure development. CEQ’s support for the Corps adopting this approach would be welcome, given the need for timely and efficient permitting to expedite infrastructure development.

For example, if i) a third party ecological restoration provider is implementing a project identified as a high priority under Louisiana’s Coastal Master Plan (which may receive funding under an economic stimulus package) and ii) the application documents how the project, as designed and implemented, will result in a net increase of aquatic resource functions and services and will not result in individual or

cumulative significant adverse impacts to the environment, then the project should be permitted to the maximum extent applicable under the NWP 27.

Consider expanding the use of Categorical Exclusions (CatEx) for large scale restoration projects.

Projects with net environmental benefits and an environmental purpose may, in specific circumstances, warrant treatment as a CatEx for purposes of NEPA review. For example, federal resource agencies might consider a CatEx for projects that are exclusively focused on ecological restoration and below a certain acreage threshold. The criteria for the Department of Interior's CatEx's offers some guidance on potential considerations in the mitigation, restoration, and resiliency context as well. ERBA stops short of a specific recommendation on a CatEx at this time, but we do recommend and would welcome further discussion on this important topic with CEQ and other stakeholders. Thoughtful development of a CatEx for environmentally beneficial projects could fast track much needed resiliency projects around the country.

Thank you for your consideration of our industry and these recommendations. ERBA would welcome the opportunity to further discuss these policies and implementation with your office via a video or phone conference meeting. Please contact us at your earliest convenience to coordinate on a meeting for further discussion.

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