



Ecological Restoration Business Association
8270 Greensboro Drive, Suite 700
Tysons, Virginia 22102
P: 703-584-8375 · www.ecologicalrestoration.org

April 21, 2020

Mr. Ryan A. Fisher
Assistant Secretary of the Army (Civil Works)
U.S. Army Corps of Engineers
108 Army Pentagon
Washington, DC 20310-0108

Ms. Jennifer Moyer
Chief, Regulatory Program
U.S. Army Corps of Engineers
441 G Street, NW
Washington, D.C. 20314-1000

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

The Ecological Restoration Business Association (ERBA) truly appreciates your ongoing efforts to keep your workforce safe while simultaneously retaining as much operational capacity as possible. We have been impressed and encouraged by the flexibility and open-minded, cooperative attitude of Corps Districts' staff working with ERBA members to keep site visits and project development moving forward.

As we look towards the recovery phase and begin crafting policy mechanisms to put Americans back to work, ERBA strongly supports stimulus investments in high priority infrastructure. These investments will produce long-term value for the American public if directed towards 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 coordinate with public utilities and agencies 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 environmental and regulatory solutions to critical infrastructure projects, while stimulating economic growth and additional job creation with our investment in restoration projects.

Based on ERBA members' extensive experience, we offer the following recommendations for the Corps that will expedite high priority infrastructure, maintain environmental safeguards, and spur job growth:

Promote Advance Mitigation that enables "Shovel Ready" Infrastructure.

Direct Corps Districts' to use advanced mitigation credits for Clean Water Act 404 regulated impacts consistent with the preference for advanced mitigation in the 2008 Compensatory Mitigation Rule (the

Rule). Use of mitigation credits cuts permitting time by 50% and reduces delays because the Corps has already reviewed and approved the mitigation. This means that mitigation credits can expedite major infrastructure priorities, while maintaining high environmental standards.

When mitigation bank or ILF credits are not available, the Corps should maximize the flexibility provided under the Rule that allows permittees to meet their mitigation needs with mitigation projects that are well-sited, have a high likelihood of success and sustainability, and/or high-quality aquatic resources.

Provide Guidance to Districts on Flexibility in Selecting Environmentally Preferable Projects.

Infrastructure projects funded under a stimulus package may face a permitting challenge if the project has Section 404 impacts and there are no available released mitigation credits in the project's service area. In this limited scenario, ERBA recommends that Corps HQ should encourage Districts, at the discretion of the District Engineer, to use the flexibility provided in the Rule to approve "environmentally preferable" projects, which determination should be based on "likelihood for ecological success and sustainability, the location of the compensation site relative to the impact site and their significance within the watershed, and the costs of the compensatory mitigation project" (see Rule Section 332.3(a)(1)).

For example, in some cases, it may be environmentally preferable to approve compensatory mitigation projects in watersheds adjacent to that of the impact site and the Rule provides for the flexibility needed to take this approach under 332.3(b)(1). When compensation is allowed in service areas adjacent to impacts, a proximity factor/multiplier should be used to account for the available credits' increased distance from the impact site. This flexible approach is permissible under the Rule (see 332.3(f)(1)) and will support accelerated permitting for stimulus funded projects and high-quality conservation outcomes.

This flexible approach is warranted for projects intended to support economic recovery and will ensure advance mitigation is used to support "shovel ready" status for stimulus-funded infrastructure. Specific to service area flexibility for mitigation of high priority infrastructure projects, the Corps should also consider the following:

- When determining the proximity factor/multiplier under mitigation calculators, Districts should consider the many preferential factors inherent to mitigation banks (i.e. the watershed approach, significant risk and temporal loss reduction, etc).
- Permittees with impacts within a bank's service area should be incentivized to purchase credits, such as through use of a mitigation ratio of 1:1, especially if the bank credits are certified and construction/restoration activities implemented at the bank site. Generally, this 1:1 ratio is appropriate unless the bank's instrument contemplates a secondary service area with a different ratio for that service area based on a watershed planning approach.

Direct Corps HQ Regulatory to prioritize and expedite approval of mitigation projects proposed to support infrastructure utilizing stimulus funding. Districts should prioritize the review timelines of mitigation project proposals if the project sponsor can demonstrate that the mitigation would service a high priority infrastructure project utilizing stimulus funding. We recommend the Corps consider the following strategies as a way to expedite mitigation for high priority infrastructure projects:

- The Rule outlines 225 Regulatory Review days for the District to review and approve a mitigation proposal, however in practice this 225 day benchmark is rarely met. Districts should redirect

staff priorities to, at a minimum, meet the 225 day timeline, limit the number of time extensions granted to IRT members, and utilize best practices for streamlined communication between the District, IRT members and sponsor. If Congress enacts infrastructure stimulus legislation it may be appropriate to limit the review to a year or two years and to require an after action review between the District and sponsor to confirm the mitigation project's viability.

Prioritize mitigation specific Regulatory Guidance Letters (RGL). ERBA recommends the Corps build on its existing work and issue additional guidance to Districts to expedite approval of mitigation projects and bring mitigation options to market sooner. Specifically, the Corps should, 1) prioritize and complete development of a forthcoming RGL on the administrative and procedural elements of mitigation, and 2) expand efforts to provide implementation guidance and training for Corps Districts for RGL 19-01, including objective criteria for accelerated credit release schedules.

Expand the application of Nationwide Permit (NWP) 27. Confirm application of NWP 53 for stream mitigation projects.

Clearly authorize actions associated with ecological restoration and resiliency focused projects under NWP 27, to the maximum extent applicable. 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, it would seem that the NWP should also apply to the activities of ecological restoration providers. However, the NWP is not consistently applied in this manner.

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.

Confirm that NWP 53 may be applied to eligible low-head dam removal projects that generate stream mitigation credits. The Corps' NWP 53 authorizes removal of low-head dams that fit the NWP's eligibility criteria. However, NWP 53 is not consistently applied in cases where the low-head dam removal project is proposed as a method for generation of stream mitigation credits. NWP 53 does not expressly prohibit mitigation projects from being authorized under the permit. Eligible low-head dam removal projects, including those proposed for stream mitigation credits, should be permitted to the maximum extent practical under NWP 53. These dam removal and stream restoration projects will spur economic activity in rural regions, improve water quality, and deliver resiliency benefits to communities.

Support Continued Field Operations During Covid-19 Restrictions.

Endorse Districts' use of virtual technology to the maximum extent feasible to continue meetings and site visits with project sponsors. While meeting restrictions are in place, the Corps should work with project sponsors to conduct site visits, monitoring, and as-built surveys remotely, such as via drone technology, to the maximum extent feasible. The Corps' flexibility in working with project sponsors under these unique circumstances will ensure that projects can move forward during the critical growing season and, importantly, will continue to bring a supply of mitigation credits to market to offset infrastructure impacts.

Work with project sponsors on deadlines that may be unavoidably impacted by Covid-19 restrictions.

While ERBA members are taking every effort to continue operations, there may inevitably be delays in project construction due to Covid-19 restrictions. We appreciate the Corps' understanding and willingness to work with sponsors to constructively meet compliance deadlines or otherwise adjust schedules to avoid non-compliance actions when the sponsor has made every reasonable effort to meet said construction or other MBI established deadlines.

Provide regulatory certainty to support market investments. During these uncertain times, the Corps can support existing and future industry investments in mitigation offsets by providing certainty, consistency and transparency in mitigation regulations and processes.

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.

Sara Johnson
Ecological Restoration Business Association
sjohnson@ecologicalrestoration.org