February 1, 2021

Mr. Tom Cavanaugh
Administrative Appeal Review Officer
U.S. Army Corps of Engineers
South Pacific Division, CESPD-PDO, 4765H
Phillip Burton Federal Building, PO Box 36023
450 Golden Gate Avenue
San Francisco, CA 94102

RE: ***Revised Mitigation Bank Enabling Instrument Template***

Mr. Cavanaugh:

The California Ecological Restoration Business Association (CalERBA) appreciates the opportunity to provide comments on the revised mitigation Bank Enabling Instrument Template (Proposed BEI) and Credit Sale Agreement (Agreement) to the U.S. Army Corps of Engineers South Pacific Division (the Corps) and peer agencies, including the U.S. Fish and Wildlife Service (USFWS), California Department of Fish and Wildlife (CDFW), California Natural Resources Agency (CNRA), the National Marine Fisheries Service (NMFS), the U.S. Environmental Protection Agency (EPA), the State Water Resources Control Board (State Water Board), and the Natural Resources Conservation Service (NRCS) (collectively, the "Agencies"). We value the Agencies use of a public notice and comment period to make these template updates and greatly appreciate your accommodation of our comment extension request in response to our January 4th communication.

CalERBA represents California's growing ecological restoration industry of companies in the business of land stewardship and delivering wetland, stream and species mitigation projects. Member businesses support job creation and bolster the state's natural infrastructure through accountable mitigation, resiliency, and biodiversity outcomes. Specific to the Proposed BEI template, members have decades of experience working with the Agencies under mitigation instruments, including prior versions of the BEI template and instruments that predate the use of template documents. Based on this industry experience, we respectfully submit the following comments and recommendations for consideration.

I. General Support for Advance Mitigation Agreements.

CalERBA members applaud the work of the Agencies to facilitate permittees and mitigation providers' agreements for advance mitigation sales transactions. Advance mitigation planning is proven to accelerate project construction and reduce the temporal loss of ecological services for the benefit of permittees and the public. Mitigation providers benefit from advance mitigation contracts for a number of reasons: providers can work with permittees to anticipate impacts and create or reserve mitigation with a close nexus to the impact; providers enjoy greater business predictability and a faster return on their upfront capital investment, potentially lowering the cost of mitigation compliance; and providers are incentivized to expand and accelerate their investments in more restoration outcomes due to the certainty afforded by advance mitigation contracts. Incentivizing additional mitigation banks throughout the state is critical to balancing conservation with infrastructure development and will offer regulators more reliable options to respond to permittees' needs. Advance mitigation furthers California's "Cutting Green Tape" (CGT) and Executive Order N-82-20 (EO 30x30) goals, while also improving existing mitigation dynamics between permittees and providers. For these reasons, CalERBA overall supports the Agencies' updates to the BEI to better facilitate advance mitigation agreements.

II. Support for change to Interim Management Plan.

CalERBA supports incorporation of the Interim Management Plan information into the Development Plan exhibit and the deletion of a separate Interim Management Plan in the list of required exhibits. This change eliminates redundancy and condenses the presentation of information to facilitate a more streamlined Agency review.

III. Recommendation: Revise Timing for Release of Performance Security to Better Match Risk and Improve Incentives for Additional Mitigation Projects.

CalERBA recommends that the Agencies revise the Proposed BEI to release the Performance Security upon achievement of all performance standards and full endowment funding. As currently drafted, the Proposed BEI conditions return of a banker's Performance Security on formal bank closure, which is conditioned on the formal transfer of sold advance mitigation credits to the permittee. Waiting for the transfer of sold advance credits will problematically delay bank closure and, correspondingly, release of the Performance Security until several years after all performance standards are met, credits released, and the endowment is fully funded.

Following CalERBA's recommendation on the Performance Security would revert to the successful approach of the 2008 BEI template and is more appropriate considering the risk reduction purpose of the Performance Security. Bankers' short term financial assurances are intended to mitigate risk for a corresponding stage of bank development, until the role of risk management is eventually shifted to the fully funded endowment. The Performance Security is intended to provide the Agencies with funding for corrective action to ensure that ecological performance standards are met. Once those standards are met then the corresponding risk, ecological performance, is no longer present so the Performance Security should be released. There may still be some risk concerns around Interim Management, which should be assured by the corresponding Interim Management Security, and not by doubling down and holding onto the Performance Security. Delaying release of the Performance Security to the time of bank closure, despite availability of other funds for corrective action, is overly burdensome on the banker, duplicative, and unnecessary to satisfy risk reduction for the specific project stage.[1]

[1] *See* Regulatory Guidance Letter (RGL) 19-01 for Corps HQ discussion on the multiple risk reduction mechanisms overseeing banks at various stages of site development, including short-term financial assurances, credit release schedules, adaptive management and monitoring reports. This discussion supports the notion that risk reduction mechanisms should be required commensurate to the specific project stage's risk profile and accounting for other mechanisms. Duplicative mechanisms to reduce risk are not necessary when there is a high degree of confidence that the ecological performance standards will be achieved. Mitigation banks rarely fail; 2020 data from IWR found that only 39 banks out of 1,900 were suspended for some form of non-compliance (email correspondence from Steve Martin, IWR, 6/5/20). As of 1/22/21, RIBITS reflects that only one mitigation bank has been terminated in the state of California, which occurred almost eight years ago in 2013. Since then California continues to attract investment from sophisticated long-standing mitigation providers in the business of delivering successful mitigation and with a low risk profile for bank non-compliance and termination.

Also of concern, at 20% of the mitigation site's construction costs, the Performance Security represents a significant expense for bankers. Tying up this amount of capital until the formal transfer of mitigation credits and bank closure hinders bankers' ability to invest in other much-needed restoration outcomes. Further, analyzing that the Performance Security will not be returned until bank closure and several years later than the same security was released under the 2008 BEI generally discourages bankers from investing in new mitigation projects because of a trend towards onerous financial requirements.

While the Agreement proposes an optional "Sunset Date" as a provision to address some of these concerns, the typical permittee pursuing an advance mitigation purchase is unlikely to agree to this sunset provision. CalERBA strongly recommends that the Agencies consider reverting to the practice under the 2008 BEI and release the Performance Security upon achievement of all performance standards and full endowment funding. CalERBA also welcomes the opportunity to work with the Agencies to address risk reduction and bank performance concerns that may have motivated the change to the 2017 BEI template.

As a secondary recommendation, at a minimum CalERBA requests that the Agencies revise the BEI to allow formal bank closure and return of the Performance Security prior to the transfer of all sold advance bank credits. The sold advance bank credits should be allowed to still proceed with transfer after formal closure of the bank. If there is a need for remediation at the bank site after formal closure, endowment funds can be applied for corrective action.

Lastly, CalERBA is concerned about how the change in the Proposed BEI will impact existing bank sites where the Performance Security has been returned to the Bank Sponsor but the bank has not yet transferred all sold advance credits or proceeded to bank closure. CalERBA recommends that the Agencies clarify in a guidance document accompanying the final version of the Proposed BEI that these existing banks will not be subject to the new Proposed BEI term on Performance Security and the prior BEI/instrument terms will be honored. Again, CalERBA would appreciate the opportunity for further discussion on these concerns and this recommendation with the Agencies.

IV. Recommendation: Strengthen language on IRT/Signatory Agencies' Responsibilities.

CalERBA recommends that the Agencies revise Section XI(B) of the proposed BEI to use stronger language than "will make a good faith effort to review." CalERBA recommends revising the first sentence of this Section to state: "The [IRT or Signatory Agencies] <u>shall</u> review the annual reports and Remedial Action plans within 60 calendar days from the date of receipt of complete submittal, <u>and shall provide a formal communication update to the Bank Sponsor if review is projected to extend beyond 60 calendar days</u>."

Prior experience indicates that the Agencies are currently varied in their response times to such requests and that other priorities often take precedence over mitigation requests, despite good faith efforts on behalf of all parties. In some instances, major delays in review of monitoring reports, credit releases and other requests seriously hinder mitigation providers' investment-backed plans for mitigation projects and the ability to sell in-demand credits to permittees. Delays in monitoring report review also undermine ecological performance and reduction in the temporal loss of ecological services, since Agencies are later alerting mitigation providers to an adaptive management request or potential compliance concern. CalERBA recommends this stronger language in Section XI(B) and throughout the

BEI to clearly direct Agencies to prioritize their mitigation oversight and response obligations. This revised language would encourage faster review times and support California's goals under the CGT Initiative and EO 30x30 to accelerate restoration and protections for biodiversity.

V. Recommendation: Expand Section VI(A) "Financial Assurances" to accommodate use of more financial assurances than solely Letters of Credit.

CalERBA recommends that the Agencies revise the Proposed BEI to contemplate use of performance bonds, escrow accounts, and casualty insurance as permissible financial assurances for commercial mitigation banks, in addition to letters of credit.

As stated in the 2008 Compensatory Mitigation Rule and in multiple subsequent Corps' guidance documents, "financial assurances may be in the form of performance bonds, escrow accounts, casualty insurance, letters of credit… or other appropriate instruments."[2] CalERBA members have worked successfully with other Corps Districts that permit use of multiple types of financial assurances, including bonds, escrow accounts, and casualty insurance. Additionally, members have seen the successful use of bonds in many other state led environmental initiatives. Permitting Bank Sponsors to flexibly utilize a wider range of financial assurance options will attract more business models and investment to mitigation bank projects. CalERBA recognizes that some Agencies' staff may be most comfortable with letters of credit and unfamiliar with the mechanics of other types of financial assurances. CalERBA members are available to review these Agency concerns and offer training support as needed.

VI. Recommendation: Streamline amendments to existing BEIs when amendments are requested to align with the Proposed BEI and Agreement language.

CalERBA recommends that the Agencies commit to an expedited approval policy for mitigation providers' requests to amend prior approved BEIs to incorporate the Proposed BEI's modified provisions and references to the Agreement as needed. Existing mitigation banks should also have the opportunity to pursue advance credit sales to permittees and have those credit sales acknowledged by the Agencies and tracked in RIBITs, and should not be at a disadvantage due to use of a prior BEI template. Even under an expedited process, we recognize that staff have limited capacity to process a multitude of amendment requests at one time. We suggest giving priority to BEI amendment requests from banks with contracts in place for agency advance mitigation sales.

For amendment requests that solely relate to changes to align with the Proposed BEI and Agreement, Bank Sponsors should not be charged a CDFW review fee since such changes are to conform to the Agencies' proposed language, and not a change induced by the Bank Sponsor. Alternatively, if a CDFW review fee is assessed, the amendment should be classified as a "simple" rather than "complex" amendment request.

VII. Recommendation: Prioritize funds for the mitigation program and train staff to adhere to the BEI Template for more streamlined reviews that meet regulatory timelines.

While templates are an important tool to streamline review of proposed mitigation banks, the Agencies' commitment to efficient implementation of the template during the review process is just as critical. In 2012, the state legislature, CDFW and the mitigation community agreed on a fee schedule for mitigation

[2] *See* 33 CFR 332.3(n)(2); RGL 5-01; RGL 19-01, p. 8.

bank reviews in exchange for faster bank review timelines and dedicated funding towards implementation and compliance oversight. However, at eight years later, mitigation review delays persist beyond the agreed upon 30, 60 or 90-day review timelines and implementation of mitigation requirements varies notably across state regions. CalERBA urges funding towards dedicated staff members for bank review and oversight in each region. The presence of dedicated and skilled staff to work with mitigation practitioners will attract investment in banks and other restoration projects.

Fees collected from bank applicants should be prioritized towards training and designated project manager and counsel experts, who can work closely with California IRTs and devote their time to processing mitigation requests. Agency work plans and performance metrics should be updated to reflect staff members' dedication to the mitigation program and evaluations based on achieving certain program targets (i.e. 80% of BEIs reviewed in 180 days or less). In addition to prioritizing funding for dedicated mitigation staff, CalERBA recommends that the Agencies conduct new BEI template staff training, including counsel, that emphasizes use of the template i) for consistent implementation of mitigation requirements and ii) to tailor the scope of agency review and limit unnecessary delays in BEI approval. In particular, Agencies' staff and counsel should not edit approved BEI template language unless such edits are warranted based on the unique aspects of the proposed bank or other unusual circumstances not anticipated by the template.

VIII. Request: Issue any templates referenced in the Proposed BEI exhibits for public notice and comment.

The Proposed BEI references several new template agreements in the Exhibits, including the provided Credit Sales Agreement and several others that were not provided for comment. CalERBA requests that all new templates or template revisions contemplated by the Proposed BEI are issued on public notice and comment to allow for stakeholder and industry input.

IX. Request: Follow-Up Meeting to Discuss Recommendations and Implementation.

Thank you for your consideration of our industry and this comment letter. CalERBA strongly supports the use of templates by the Agencies and appreciates the Agencies' changes to better facilitate advance mitigation investments. CalERBA requests a meeting with the Corps via a video or phone conference in the coming weeks to further discuss these recommendations and implementation concerns. We understand that CDFW is planning a working group as a component of implementation. We urge CDFW and the Agencies to elevate the working group as a priority for all staff involved, especially considering the role mitigation projects play in meeting the state's progressive 30x30 and CGT goals. Please contact us at your earliest convenience to coordinate on a meeting, and if you have any questions.

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