

# Improving Compensatory Mitigation Project Review

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## Abstract

The success of compensatory mitigation projects relies on a robust review and approval process that ensures that the protections in federal regulations are implemented in practice on the ground and that compensation projects effectively offset permitted impacts. The 2008 rule was designed to improve the review and approval process for all three forms of compensation— mitigation banking, In-Lieu Fee programs, and permittee-responsible mitigation. This report is focused on the review and approval process for third-party mechanisms – mitigation banks and In-Lieu Fee programs. We did not examine permittee-responsible compensation. The 2008 federal compensatory mitigation regulations include several provisions designed to “promote timely decisions on instruments for these third-party mitigation activities.” Yet, the review and approval process for mitigation banks and in-lieu fee (ILF) projects can be lengthy, often exceeding the regulatory timelines. Maintaining an efficient process is necessary to ensure that quality compensation options are available to offset impacts in a timely fashion. Effective processes also ensure that states with parallel permitting processes—and thus a substantive interest in the establishment of banks and ILF programs—play a collaborative role in review and approval. The Environmental Law Institute, working with a panel of experts, conducted a wide-ranging analysis of the review and approval processes applied to banks and ILF programs and projects across the country. We identified challenges in the review process—from both the agencies’ and providers’ points of view—and examples of successful coordination. We identify opportunities for improving the efficiency of review processes.

## Introduction

The success of compensatory mitigation projects relies on a robust review and approval process that ensures that the protections put in place in federal regulations are implemented on the ground and that the compensation project successfully offsets functions lost to permitted impacts. A robust and efficient review and approval process relies on a number of important components, including formalized procedures, collaboration among the relevant agencies to ensure that a range of expertise and experience is involved, adherence to regulatory timelines, and a commitment to comprehensive staff training. Maintaining an efficient process ensures quality compensation options are available to offset impacts in a timely fashion. Currently, however, the review and approval process can often be lengthy, sometimes greatly exceeding the regulatory timelines.

The 2008 Compensatory Mitigation Rule was designed to improve the review and approval process for all three forms of compensation— mitigation banking, In-Lieu Fee programs, and permittee-responsible mitigation. This report is focused solely on the review and approval process for third-party mechanisms—mitigation banks and in-lieu fee (ILF) programs. We did not examine permittee-responsible compensation. The Rule includes several provisions designed to “promote timely decisions on instruments for these third-party mitigation activities” (Compensatory Mitigation Rule, 73 Fed. Reg. 19598 (Apr. 10, 2008) Preamble to the Final Rule). First, the Rule establishes timelines for project review and approval for banks and ILF programs. Under the Rule, the total time allowed for the federal review and approval process (not including the time the bank or ILF provider spends drafting/reviewing documents) is  $\leq 225$  days. The regulations stipulate that the total time can vary for a variety of reasons, including

additional time to complete consultation required by law (including endangered species consultation and historic resource coordination), to conduct government-to-government consultation with Tribes, and to address the failure of the provider to provide required information for a decision or the necessary information for a decision (see 33 CFR 332.8(f)).

Second, the Rule also establishes an Interagency Review Team (IRT) process. The IRT is defined as “an interagency group of federal, tribal, state, and/or local regulatory and resource agency representatives that reviews documentation for, and advises the district engineer on, the establishment and management of a mitigation bank or an in-lieu fee program” (33 CFR 332.2). The IRT is established and chaired by the district engineer. The Rule identified the U.S. Army Corps of Engineers (Corps) as the chair of the IRT and the final decision-maker for mitigation banks and in-lieu fee programs/projects used to satisfy DA permits (33 CFR §332.8(b)(4)). Representatives from the U.S. Environmental Protection Agency (EPA), U.S. Fish and Wildlife Service (USFWS), NOAA Fisheries, the Natural Resources Conservation Service (NRCS), and other federal agencies, as appropriate, may also participate in the IRT, and often do. The IRT also often includes representatives from tribal, state, and local agencies (33 CFR 332.8(b)(2)). The IRT provides a framework for close collaboration among the Corps, other federal agencies with overlapping regulatory authorities, and state and local partners in the review, approval, and oversight of banks and ILF programs. In this way, the IRT ensures that states—especially those with robust programs and thus a substantive interest in the establishment of banks and ILF programs—can play an important and collaborative role in review and approval. It also helps to ensure that different areas of expertise are available for the evaluation of the potential of the project to successfully offset functions lost to permitted impacts. Thus, the IRT is designed to facilitate a more efficient review process. In fact, the Rule states, “Because of our experience with the 1995 mitigation banking guidance, we believe that the IRT review process is more effective than a simple public notice process for determining the potential success and usefulness of a proposed mitigation bank” (Compensatory Mitigation Rule, 73 Fed. Reg. 19598 (Apr. 10, 2008) Preamble to the Final Rule).

In addition to establishing the timelines for interagency review during each of the three required phases of mitigation bank and ILF proposal development (i.e., prospectus, draft instrument, and final instrument), as well as other key oversight decisions such as instrument amendments and credit release requests, the Rule also established that IRT “[c]omments 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” (33 CFR §332.8(b)(3)).

Although the Rule put these measures into place in an effort to improve timely review, in practice, project review and approval often takes longer than the Rule requires. Mitigation providers indicate that the review and approval process can take up to several years for a given project. This lengthy process can impose significant costs and delays in the implementation and availability of quality mitigation options. Further, inefficiencies have at times resulted in delays in ILF project implementation that threaten compliance with the 3-growing season implementation timeline for ILF project initiation as required in the Rule.<sup>1</sup>

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<sup>1</sup> Federal regulations require that in each service area, site acquisition and initial physical and biological improvements must be completed by the third full growing season after the first sale of advance credits. 33 CFR 332.8(n)(4).

Many reasons have been suggested for the lengthy review and approval process. These include duplication in review among the agencies represented on the IRT, issues discussed without timely resolution among IRT members, and delays in scheduling and conducting site visits, among others. In interviews with ILF programs conducted by ELI in 2017 – 2018,<sup>2</sup> programs indicated that staff turnover at the Districts, overworked District staff, lack of continuity and institutional knowledge among IRT agencies, sometimes conflicting input of the IRT, and shifting targets are all common challenges. Delays by mitigation providers in responding to agency comments also occur and while mitigation providers should always take the time they need in order to effectively address agency comments, this time also contributes to the sometimes lengthy review process for banks and ILF programs and projects.

Even given these challenges, the collaborative review process is broadly regarded as beneficial. However, it is clear that the process could be improved. Indeed, where states, the Corps, and providers have come together they have developed procedures for making the process more efficient. As stated in the Corps' and EPA's Mitigation Rule Retrospective, “clearly stated roles and responsibilities for members of interagency review teams; development of standard operating procedures governing mitigation banking and in-lieu fee program instruments; issuance of mitigation banking and in-lieu fee program guidelines, and related other tools such [as] model instruments for site protection and financial assurances, performance standards, and other mitigation and monitoring guidelines” as well as “standardized tools and practices, including regularly scheduled meetings of interagency review teams” could improve efficient review of bank and ILF proposals (USACE, Institute for Water Resources, 2015).

This study of how the review of third-party compensatory mitigation works in practice is intended to examine substantive and procedural causes for delay, to examine IRT practices that can improve efficiency and avoid delay, and to identify best practices that may inform future implementation.

## Methodology

In order to glean insights into the compensatory mitigation project review process, we designed an approach to identify a broad range of experience with banking and ILF project approval across the nation. We first assembled an advisory committee composed of 11 experienced individuals from state and federal agencies, mitigation bank sponsors, ILF providers, and one staff member from The Conservation Fund. The committee provided recommendations that informed our full list of interview contacts and provided feedback on our draft interview template. Committee members also responded to the final interview questions themselves, thereby contributing to the larger data set.

Working with the committee, we identified 30 experienced participants in the third-party compensatory mitigation process—for a total of 41 respondents including the 11 advisory committee members. The list included eight Corps employees, one Conservation Fund, two EPA,

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<sup>2</sup> ELI, In-Lieu Fee Mitigation: Review of Program Instruments and Implementation Across the Country (July 2019), <https://www.eli.org/research-report/lieu-fee-mitigation-review-program-instruments-and-implementation-across-country>.

two USFWS, 13 state agency staff, seven mitigation bankers, and eight ILF providers (one provider who works on banks and ILF programs is counted in both groups). After establishing the contact list, we then developed a standard interview template, working with the full advisory committee to fine-tune categories and specific questions. The questions were grouped thematically into the following five categories: (1) Timing; (2) Challenges; (3) Best Practices; (4) Interagency Review Teams; and (5) Outcomes.

Once we completed the interview template, we spent the fall months of 2019 carrying out interviews. Each of the 30 phone interviews was roughly an hour in length, during which time we asked interviewees the questions from the template and explored any other pertinent topics that arose. The advisory committee members responded in writing via email. We also asked respondents to provide us with or direct us to any guidance documents, templates, or other tools that they have used or have found relevant to the project review process timelines.

Once all interviews were completed, we combined our individual, category-sorted interview results and supporting documents into one document organized by topic area to more effectively analyze the responses. The issues, impediments, opportunities, and practices we identified in these grouped responses, informed when appropriate by the additional documents provided, are the basis for the analysis. We report the responses by category of respondent – provider (banker or ILF provider), state agency, Corps District staff, and other IRT members (federal agencies, including EPA and USFWS). Not every respondent commented on every topic, so we do not report ratios.

### Structure of the Report

The report discusses the challenges in the review process from both the agencies' and mitigation providers' points of view, identifies examples of coordination and management practices that affect the review timeline, and provides recommendations for how IRTs and the Corps can work together to build a more efficient process.

The sections are organized by topic area. Topics include:

- The Project Approval Timeline
- Substantive Issues Affecting Review Timeline
- Management Challenges
- Interagency Review Teams
- Opportunities for Improving Practice
- Outcomes

## The Project Approval Timeline

Under the Rule, the total time allowed for the federal review and approval process of bank and ILF program instruments is  $\leq 225$  days (not including the time the provider spends drafting/reviewing documents) (See Figure 1). The Rule breaks the process into four phases.

Phase I (Optional Preliminary Review of Draft Prospectus) is not counted in the 225 days. It offers the opportunity for a provider (mitigation provider) to provide a draft prospectus for a bank, ILF, or mitigation project approval within an existing ILF to the district engineer and to receive comments from the IRT within 30 days.

Phase II commences the formal process. The district engineer publishes a public notice within 30 days of receipt of a complete prospectus; this is followed by a 30-day public comment period. The district engineer provides the IRT members and provider with the comments within 15 days of the close of the comment period and is to provide the provider with an initial evaluation letter within 30 days of the close of the comment period. This phase includes the first significant opportunity for review by the IRT member agencies.

Phase III is the draft instrument (draft Mitigation Banking Instrument (MBI)) phase. It is supposed to last 90 days from the provider's submission of a complete draft to the district engineer. The district engineer notifies the provider within 30 days of completeness of the draft. The district engineer distributes the complete draft instrument to the IRT within 5 days, allowing 30 days for IRT comment and feedback. The remainder of the period is used to evaluate comments and resolve issues raised among the IRT and with the provider.

Phase IV is submission of the final instrument. The provider provides the instrument to the district engineer and IRT. The district engineer must notify IRT members of intent to approve the instrument within 30 days of receipt. The IRT has 45 days from submission to object to approval of the instrument and initiate dispute resolution.

The review and approval of individual in-lieu fee projects are treated as modifications of the ILF program instrument. As such, the Rule requires that the review follow the mitigation bank and ILF program review process and timeline.

### Data on Length of Project Review

In our interviews, seven respondents (1 provider, 4 state agencies, 1 District, and 1 IRT member) told us that they do not track data on length of project review as a matter of course. Five other respondents (3 providers and 2 state agencies) told us that they may be able to, due to existing processes in place, be able to retroactively determine length of project review. Three respondents (1 state, 1 District, and 1 IRT member) told us that they are were just starting to track timelines at the time they were interviewed. Two respondents (1 state agency and 1 IRT member) told us they have very limited data. Two Districts mentioned that some of the relevant information may



be obtainable through the Corps' ORM2 database.<sup>3</sup> However, the database may not be consistently entered and so information may vary by District.

According to an analysis of Corps data conducted by the Corps' Institute for Water Resources, between 2014 and 2018, the mean Corps processing time for a mitigation banking instrument was approximately 459 days and the mean Corps processing time for an ILF program instrument was 295 days.<sup>4</sup> These review periods represent the time from the date of receipt of a complete prospectus to the date the district engineer decided whether to approve or not approve the mitigation banking or in-lieu fee program instrument. The time it took the provider to draft mitigation bank or in-lieu fee program instruments and associated documents or to respond to comments from the IRT are not included in the data.

Three states were able to share some limited data on length of project review and one provider told us that they do have data that they did not want to share at this time. All three states have parallel permitting programs. The Oregon Department of State Lands told us that it does track total days (including time spent with the provider) from initial submission (prospectus) until approval. In the state, average total days to approval after the publication of the Rule has been 805 days. Before the Rule, approval took 438 days on average. The state explained that the more complex submissions they received after the Rule combined with fewer Corps staff resources devoted to the work of the IRT and a new stream assessment methodology that has recently come online has extended project review timelines. The Washington Department of Ecology told us that total bank proposal review used to take between 2–3 years. Now, review is taking closer to 3–5 years due to heavy workload and reduced District staff, especially for legal review.

The state of Minnesota was able to share the most detailed information with us. They shared total Corps review time for ten mitigation banks initiated since 2016. The ten projects included four banks with final approval and six banks that have approved prospectus. On average, the total *Corps* review time for Phase II (prospectus) for all ten banks was 125 days. Total *Corps* review time (including Phase II, Phase II and Phase IV review) was reported for three of the four wetland bank projects with final approval. The average *Corps* review time for these three banks was 381 days. The state recorded Phase III (draft instrument approval) and Phase IV (final instrument approval) Corps review time for all four banks with final approval; Phase III averaged 155 days and Phase IV average 91 days for the four projects.

A few providers were also able to share data with us. The Maine In-Lieu Fee Compensation program told us that timelines are very predictable and on an annual schedule. The Maine ILF program operates an annual Request for Proposals (RFP) process to identify and review projects.

One national mitigation banker reported data for twenty-one projects. For these projects, the number of total number of days from date of public notice to instrument approval ranges from 119 to 393 days (there were also two outliers of over 1,200 days). The average number of days from first draft instrument to approval was 280 days. These numbers include the amount of time

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<sup>3</sup> The Army Corps of Engineers (Corps) ORM2 database is geospatial database and tracking tool used to collect and manage the agency's regulatory program data.

<sup>4</sup> Martin, S. 2019. Characterization and Analysis of 3<sup>rd</sup> Party Mitigation 2008-2018 Using ORM & RIBITS Data. Presentation at Mitigation and Ecosystem Banking Conference, May 8, 2019.

the provider spent on document drafting and response to comments as well as the time for IRT review. Another national mitigation banker shared data for fifteen post-2008 wetland banks and “joint banks” having wetland and species credits. The average time from first prospectus submittal to date of final signature approval was 26 months, including both Corps review time and time for provider review/response to comments and instrument drafting. The fastest project review was 17 months, and the slowest was 39 months.

### Compensatory Mitigation Rule Timeline for Bank or ILF Instrument Approval\*

		Event	# of Days**	
Phase I		<b>Optional Preliminary Review of Draft Prospectus</b>	30	DE provides copies of draft prospectus to IRT and will provide comments back to the sponsor within 30 days.
	<b>Sponsor Prepares and Submits Prospectus</b> ~DE must notify sponsor of completeness w/in 30 days of submission~			
		<b>Complete Prospectus Received by DE</b>		
Phase II	Day 1**			
	Day 30	Public notice must be provided within 30 days of receipt of a complete prospectus	30	
	Day 60	30-Day Public Comment Period	30	
Day 90	DE must provide the sponsor with an initial evaluation letter within 30 days of the end of the public comment period.	30	15	DE distributes comments to IRT members and sponsor within 15 days of the close of the public comment period.
<b>Sponsor Considers Comments, Prepares and Submits Draft Instrument</b> ~DE must notify sponsor of completeness w/in 30 days of submission~				
		<b>Complete Draft Instrument Received by IRT Members</b>		
Phase III	Day 1			
	Day 90	30-day IRT comment period begins 5 days after DE distributes draft instrument to IRT members  DE discusses comments with IRT and seeks to resolve issues ~ # of days variable~	30  60	90  Within 90 days of the receipt of a complete draft instrument by IRT members, the DE must notify the sponsor of the status of the IRT review.
<b>Sponsor Prepares Final Instrument</b> ~Sponsor provides copies to DE and all IRT members~				
		<b>Final Instrument Received by DE &amp; IRT</b>		
Phase IV	Day 30	DE must notify IRT members of intent to approve/not approve instrument within 30 days of receipt.	30	IRT members have 45 days from submission of final instrument to object to approval of the instrument and initiate the dispute resolution process.
		Remainder of time for initiation of dispute resolution process by IRT members	15	
Day 45	<b>INSTRUMENT APPROVED/NOT APPROVED, or DISPUTE RESOLUTION PROCESS INITIATED</b>			

EPA/Corps draft 4/02/08

**Total Required Federal Review (Phases II-IV): 1025 Days**

\*Timeline also applies to amendments

\*\*The timeline in this column uses the maximum number of days allowed for each phase.

Figure 1: U.S. Environmental Protection Agency/U.S. Army Corps of Engineers, The Timeline for Bank and ILF Program Approval (2008)

## Most Common Sticking Points

Points of delay in the project review timeline can vary from IRT to IRT, provider to provider, and project to project. Respondents told us that projects may encounter slower periods at any point in the timeline. However, we most commonly heard that the longest stage, and the stage that most often exceeds timelines, is Phase III (the longest scheduled phase under the official timeline). This Phase is the review of the draft banking instrument and its ILF equivalent (amendment to approve a specific mitigation project under an existing ILF instrument).

### *Draft Instrument (Phase III)*

Respondents from all sectors (7 providers, 2 state agencies, 5 Districts, and 1 IRT member) reported that the draft instrument phase can be lengthy. The draft instrument is complex and is the first phase that includes all of the elements that must be thoroughly reviewed by the IRT. One provider told us, “the devil is in the detail; more work needs to be done by the provider, and more time is needed by the IRT to review this body of work.” The same provider told us that the length of the review for the draft instrument is the result of a number of factors and “depends on the complexity of the project, the negotiation process, and the quality of information submitted by the Sponsor.”

Six providers and two Districts told us that the draft instrument can go through multiple rounds of increasingly detailed review causing this phase to far exceed the 90-day regulatory timeline in some cases. One provider told us that some IRTs will review the entire document each time the document is reviewed within this draft instrument phase and sometimes comment on something new each time, even if the information has not changed from previous versions of the document. We heard from three providers that comments are not closed on individual items and that new substantive comments can arise late in the review process on items that providers had assumed were settled. This can reduce the ability to get to closure on the document. Further, one provider reported that each subsequent draft of the instrument after the first draft is “no longer on the regulatory clock,” so that the 90-day timeline indicated in the Rule for this phase can be greatly exceeded.

At the same time, we heard that the quality and complexity of the proposed bank or ILF project and the quality or complexity of the restoration and land management at the site is a significant factor in the duration of this phase of review. Ten respondents (2 providers, 5 Districts, and 3 state agencies) told us that review and approval is shorter for simple sites. Respondents identified a number of site/project characteristics that lead to timely project approvals, including simple hydrology, more data available, not overly engineered designs, fewer site constraints, clear uplift, identified land manager, private landowner, and site protected with easement. One state agency told us that complex projects—or projects for which the provider is asking for special considerations outside of the normal procedure—can take longer than more straightforward projects. For example, a number of banks on the west coast provide both compensatory mitigation and endangered species credits. These banks have co-regulators, not all of which are required to adhere to the regulatory timelines in the mitigation Rule. Complex sites or complicated projects may also require the provider to conduct additional field studies, which

could lengthen the total time to approval. However, one provider commented that the industry is moving towards more multi-purpose sites that are more complex and may take longer to review.

Respondents from all sectors told us that the quality of the instrument document itself also influences the length of review. Where the draft instrument is incomplete or not organized the review times can be longer. Likewise, the timing of the submission may affect review times. If site visits or field reviews are necessary and have not been done at an earlier phase, approval can be delayed if the document is submitted at a time of year when getting into the field is impossible.

Communication among IRT members is also a factor in the length of the approval time. (See discussion of IRT practices, below). One provider told us that disagreement among IRT members can extend review times in this phase. Three providers and five state agencies told us that Districts aim to reach consensus among IRT members, and this can sometime cause delays. One District told us they will move forward with a decision if they are not able to reach consensus, in some cases. One state respondent told us that sometimes an IRT member will change positions over the course of review. A provider told us that the Corps chair waiting for IRT member responses or coordinating with IRT members for confirmation of their approval of submissions can take a significant amount of time. Another provider suggested that the Corps does not push IRT members to respond because they work with them on other projects and do not want to offend anyone. And, another provider suggested that Corps coordination and compilation of IRT comments (even if minimal) and their communication with a provider can take a significant amount of time.

Communication between the IRT and the provider can also be challenging. One state told us that Corps District staff are not willing to have substantive discussions of the draft instrument outside of a formal document commenting process (informal conversations during site visits, for example, are not allowed or encouraged). So, things that might be able to be worked out in in-person discussions need to be addressed through formal comments, which may extend the length of the process. Similarly, one provider and one IRT member told us that their respective District is not flexible at all in their application of the Rule.

### *Prospectus (Phase 2)*

Three providers and one state agency mentioned the prospectus as a sticking point in the timeline. One provider told us that the level of detail required in the prospectus varies from District to District. In some places the prospectus is “basically a draft MBI” and requires a significant amount of review. In other instances, prospectus submissions lack detail and this can lead to more lengthy review later. Seven respondents (3 providers, 3 state agencies, and 1 District) told us that it would be useful to require more information in the prospectus so that a framework for some of the key elements (e.g., the credit determination methodology that will be used) can be settled at this stage rather than waiting for later. One provider told us it would be helpful if the IRT would formalize their opinions on project potential for approval later.

### *Final Instrument (Phase IV)*

We heard from respondents from all sectors (3 providers, 3 state agencies, and 1 District) that Corps legal review can add months to the project review timeline. We heard that Corps attorneys review the document after staff has completed its review and that this order of operations can greatly lengthen review times. One state agency told us that the legal review of the instrument can take between 30–90 days, or longer. As one provider noted, the counsel review has no timeline.

One provider and one District told us that the legal review is especially challenging as it relates to the conservation land agreement.

One state agency indicated that reviews of the final instrument by state regulators or district engineers can lengthen the process at the end because obtaining final signatures can take a long time.

### Improvements to Existing Review Steps

We asked participants if there are any procedures or steps, either currently required by regulations or applied by Corps Districts or IRTs that are *not useful* to effective review and approval of compensation sites. We heard that overall the steps outlined in the Rule are all useful and important. No respondents recommended removal of the review steps in the timeline. However, a few respondents suggested some specific practices *within* the existing steps that could be improved.

One provider suggested that the project instrument itself could be simplified and that some decisions related to design could be made later, during project construction. For example, planting plans could be finalized or updated during construction, based on what plant stock is available at the time.

A number of respondents suggested some improvements to facilitate the IRT process. (See IRT discussion below). One state suggested that the IRT should get the prospectus and the instrument for each project at the same time as the District does. One provider suggested that checklists of reviewable items should be available for the IRT. This respondent also suggested that the IRT could, for example, allow more risk if the state is taking on long-term management. And, one provider said that if IRT members chose not to comment after multiple opportunities, then the Corps should not hold up the approval process to wait for written confirmation.

One District suggested that public comment might not be necessary for small clerical changes to the instrument. Another District mentioned that most of the public comments come from competing providers. Similarly, one state suggested that the Corps should sometimes take a conservative view of changes that would require the instrument to go back out for public comment, noting that these rarely lead to new comments.

Some respondents suggested some changes to the regulatory timeline. Two Districts suggest that the pre-prospectus step should be mandatory to identify problem sites and unworkable projects.

Another District suggested merging Phase III and IV (draft and final instrument stages) for ILF project approvals where the conservation planning framework is sufficiently detailed, the site is well-understood, and the Phase III review document requires few or very minor changes. One provider also identified the final approval step as a source of delay, noting that at times IRT members reopen an issue that had been previously resolved. Another provider suggested that the draft MBI should (as is currently the case) be available to IRT for comment, but that Corps should then be able to negotiate and approve terms of a final MBI in order to avoid repeated rounds of Phase III review; this would still be subject to the Phase IV dispute resolution process for final plans that may be out of bounds.

### Withdrawal of Projects

We asked respondents when along the timeline projects are most often withdrawn. According to one state agency, projects on poor or unsuitable sites or with questionable project design may not even make it past the draft prospectus phase (Phase I). Other projects may be withdrawn later, when a mitigation provider no longer believes a project is viable (or profitable) enough to continue.

A number of respondents from all sectors (2 providers, 2 state agencies, 2 Districts, and 1 IRT member) told us that if projects are going to be withdrawn it will most often happen in the draft prospectus stage (Phase I). This early feedback is one reason that several respondents suggested that the pre-application phase is important and, as stated in one case above, should be considered mandatory.

Another group of respondents (1 provider, 5 state agencies, 4 Districts, 2 IRT members) suggested that projects are mostly withdrawn at the prospectus stage. One state told us that the prospectus should have the minimum information to determine whether or not to move forward. And, one District told us that the public notice of the prospectus can reveal siting problems that can ultimately lead to a project being withdrawn. One District suggested that a more thorough review at this stage can identify projects that will likely be problematic later.

Two providers and one state also told us that projects can be withdrawn later in the timeline—at the draft instrument stage or even later. These respondents suggested that late withdrawals are often related to disputes over crediting and profitability.

One District told us that if providers walk away from a proposed project it is usually because they found out that profitability was not sufficient. For example, one provider told us that the IRT can reduce the number of credits that the provider proposed in subsequent reviews of the draft instrument. In some cases, the provider will decide that the project is then no longer viable.

The draft site mitigation plan can also reveal some significant issues with the site or the project that indicate it is not worth moving forward. These issues can include invasive species, site complexity (e.g., levees or contamination), project feasibility, mineral rights, location in the watershed, predicted credits as they relate to profit margin, or insufficient capital to start the project. One District indicated that a project stalled out at the draft instrument stage due to a local land use issue.

## Substantive Issues Affecting Review Timeline

The research approach also sought to identify specific substantive program components that tend to require the longest review or most discussion (Box 1 lists the Twelve Components of a Mitigation Plan (33 CFR 332.4(c)). Respondents identified various issues that include many program components. However, the most commonly cited components included (1) site selection, (2) credit determination, and (3) site protection and long-term stewardship. A focus on best practices and techniques for addressing and resolving these areas may benefit the review timeline going forward. These substantive areas were raised by respondents across all sectors, including Corps Districts, IRT members, and mitigation providers.

### **Box 1: Twelve Components of a Mitigation Plan (33 CFR 332.4(c))**

1. Objectives
2. Site selection (further described in §332.3(d))
3. Site protection instrument (further described in §332.7(a))
4. Baseline information
5. Determination of credits (further described in §332.3(f))
6. Mitigation work plan
7. Maintenance plan
8. Performance standards (further described in §332.5)
9. Monitoring requirements (further described in §332.6)
10. Long-term management plan (further described in §§332.7 and 332.8(u))
11. Adaptive management plan (further described in §332.7(c))
12. Financial assurances (further described in §332.3(n))

### Site Selection

Site selection (also described as site suitability) was among the most commonly cited substantive sticking point in project review and approval. Respondents told us that discussions of site selection and site suitability happen at the prospectus stage or pre-prospectus stage. Some of the factors affecting the review and approval of a proposed project site are that 1) more complex sites can require more discussion and negotiation, particularly where IRT members are “risk-averse”; 2) site selection justification can sometimes require lengthy studies and collection of information; and 3) good sites may not be available for ILF projects in a given service area even though advance credits have been sold.

As mentioned above, respondents told us that simpler sites are more likely to lead to shorter review times and more complex sites often lead to more complicated site design and longer review times. Some of the site complexities cited by respondents that can extend review times include encumbrances, mineral rights, cultural resources, and contamination. One state reported that the Corps and IRT might not recognize enhancement credits for restoration of a site that included cleanup of contaminated soils, and that agencies require a clean site as a baseline. A



District told us that uncommon situations (e.g., nearby waste management plant) can also cause delays in evaluation.

Several respondents (1 provider, 1 state agency, 1 District) told us that sometimes a lot of time is spent collecting information and conducting studies to justify site selection after initiation of the review process and that this can lengthen the time to project approval. In some cases, the IRT needs more information in order to evaluate the suitability of a given site. They may request additional information in the course of Phase II or even Phase III for justification of the site and the proposed credits to be generated by the mitigation project. This may require the provider to conduct studies to respond to objections or to address comments. These types of studies, although conducted “off the regulatory clock” may still greatly extend individual project approval timelines and the average project approval timeline for a given District or provider.

For ILF programs, who are on the clock to start a project within three growing seasons of the sale of the first advance credit in a service area, finding good sites to satisfy the program’s compensation obligations can be especially challenging. One provider told us that sometimes there are few suitable sites in a service area. The lengthy mitigation project approval process itself can further limit the number of available sites. One ILF program told us that some rural landowners who own suitable sites do not want to wait for months or years for the mitigation project to be approved and that this impedes the program’s ability to purchase the property or execute the conservation easement. This respondent further observed that the IRT may not recognize the extent to which options available for fulfilling the obligations are limited, as they do not see all of the rejected alternatives in the service area.

#### Credit Determination

Credit determination is another commonly cited substantive sticking point. We heard from eleven respondents (5 providers, 5 state agencies, and 1 District) that credit determination is challenging, especially where the District does not have a standard and consistent methodology in place. We heard that credit determination methodologies are not applied consistently across projects or that the number of proposed credits versus the number of credits ultimately approved can change dramatically during the approval process (e.g., from prospectus to draft instrument).

Respondents reported that lack of a predictable credit determination methodology can make project development challenging. One provider said that it does not always know when developing a project which credit determination methodology the IRT is going to use and how many credits the provider can expect. One provider told us that its IRT and District will no longer commit to a credit determination methodology in the prospectus phase, so the number of credits that will be generated from the project will not be determined until after the provider has invested significant time in developing the draft instrument. Another provider told us that there is no standard application of credit ratios and that debates can arise over how the credit ratios should be set based on mitigation method (e.g., rehabilitation versus enhancement).

Respondents also told us that the number of credits that the project can generate may change significantly as the project moves through the approval process from the prospectus to the draft instrument. Two providers told us that credit ratios can drop or change during subsequent drafts

of the draft instrument. One provider reported that if allowable credits drop substantially (as much as 2–3-fold) during subsequent drafts of the instrument, this can mean that a promising proposed project is no longer viable. The provider told us that this has occurred for 30–40% of their submissions.

### Site Protection

Site protection was cited as a substantive sticking point by some providers (3) and Districts (2). Among the challenges were securing suitable site protection instruments (management plans and commitments) on public lands; identifying and securing willing private landowners and keeping them engaged throughout the lengthy review timelines given changes in site protection language; and completing timely IRT review of site protection instruments.

### Long-Term Management

Long-term management (LTM) is another commonly cited substantive sticking point that can contribute to the length of review. Long-term management commences after the performance standards for a site are met, all credits have been released, and the agencies have signed off on a site. This signals the end of the establishment and operational phases and the beginning of the LTM phase.

Various issues related to LTM were raised by all of the respondent groups represented. In general, the challenges included determining the content of long-term management responsibilities and drafting the long-term management plan, determining the amount of long-term management funding, and finding and securing appropriate long-term managers.

One provider reported that drafting the LTM plan (specifically determining what will be required of the provider for long-term management) can extend approval times. LTM activities will vary project to project depending on the site conditions and project design. And IRTs seem to vary in what they will require of the provider over the long-term. For example, one provider told us that the IRT wants the provider to ensure that performance standards/uplift identified in the mitigation plan be maintained over the long-term. This standard may require a significant amount of funds to be set aside to maintain this standard over the long-term as well as a sophisticated long-term manager (if not the provider) to take on the site. What will be required of the long-term manager is a question of growing importance as more sites move into the long-term management phase under the Rule. The Rule is mostly vague on this point, only saying that LTM must “ensure the long-term sustainability of the resource.” 33 C.F.R. § 332.4(c)(11) However, one provider suggested that, where in place, templates or standard documents can reduce or eliminate delays related to review and approval of LTM plans.

Several respondents suggested that LTM funding is another issue that can hold up project approval. One provider reported that there is a lot of inconsistency in how long-term funding requirements are applied across Districts and that IRTs are asking for additional resources with each new proposal. In another case, one provider told us that identifying an entity that will hold the long-term management funds can also be a sticking point. One District also advised that if

the plan identifies cooperative funding of LTM (not just from the provider) that this complexity can hold up approval.

Other respondents (1 provider, 2 state agencies, and 1 District) suggested that a lack of appropriate long-term managers to take on long-term stewardship was causing delays. The Rule requires that the party responsible for long-term management be named in the long-term management plan. One provider told us that there just are not a lot of local conservation organizations or land trusts to approach for LTM. Another provider told us that local stewardship organizations may not have the experience or capacity needed to take on compensation sites. We also heard that securing long term management partnerships on rural sites can be especially challenging. And, we heard from regulators in the west that determining long-term management agreements on public land is especially challenging.

#### Other Sticking Points

##### *Service Areas*

Respondents across all sectors (2 providers, 2 Districts, and 1 IRT member) suggested that the determination of service areas in approval of an instrument is a time-consuming requirement to resolve. Under the Rule, bankers and ILF programs propose service areas in their instruments, but those proposals are often reviewed in light of current practices and existing banks in the District. Some Districts have fixed or set services areas (e.g., Savannah, Charleston, and Louisville Districts), and others (Huntington, Pittsburgh, Buffalo, Wilmington, and Mobile Districts) have standards, such as use of watershed (e.g., HUC8s) or ecoregion boundaries. Some Districts have procedures in place to expand service areas systematically, given certain conditions (e.g., South Pacific Division and Jacksonville District), or have established rules/guidelines for primary, secondary, and tertiary service areas (e.g., Fort Worth and Galveston Districts). One provider suggested that the way service areas are determined is inconsistent or unpredictable and that this can lead to extended review times. Another provider suggested that some providers may fight, unsuccessfully, for larger service areas, which can lead to longer than average review times. While this issue was raised in various interviews, its resolution seems to be case-by-case and substantive rather than something that has a ready or obvious procedural reform.

##### *Functional Assessment*

The 2008 Rule emphasizes the agencies' desire to increasingly tie decision-making to functional improvement. Functional assessment methodologies are increasingly being used to determine debits and credits or develop performance standards in Districts across the country, and more assessment methodologies are under development. As one provider told us, the questions around functional assessments include what assessments are appropriate, how to score them, and how to set performance standards if not using formal assessments methods. Indeed, one District suggested that the assessment method used in their state is not a good tool for mitigation and requiring the application of the methodology can cause delays in approval. The development and application of new methodologies is also challenging. One District pointed out that the lengthy process for developing an assessment methodology can cause delays in project approvals, as

IRTs seek to wait for the methodology to be ready for implementation before moving forward with project or instrument approval.

### *Performance Standards*

Several respondents (2 providers, 1 state agency, 1 District, and 1 IRT member) suggested that we interviewed suggested that determining performance standards can be challenging, especially where projects are addressing requirements from multiple agencies or where projects offer multiple credit types.

One state respondent mentioned that draft mitigation project site plans do not often contain the type of SMART (Specific, Measurable, Attainable, Relevant or Time constrained) performance criteria that the IRT is looking for and that reviewing and responding to performance standards submitted in draft proposals can result in extended timelines.

### *Mitigation work plan*

A relatively small number of respondents (3 state agencies, 1 District, and 1 IRT) said that the development of the restoration or design plan is a substantive sticking point. As discussed above, we heard that more complex or “risky” sites and projects may lead to longer review times and that higher quality submissions take far less time. One District also told us that providers sometimes push the limits of the proposal and will want to negotiate every last detail, and that this can lead to more lengthy approval times.

## Management Challenges

Respondents identified several common management challenges to regulators’ ability to meet the timeline that are not specific to individual requirements of the Federal Rule.

### Lack of Staff and Staff Turnover

We heard from a number of respondents that a lack of sufficient Corps staff to deal with project approvals can be a challenge sectors (2 providers, 2 state agencies, 1 District, and 1 IRT member), along with high turnover in District offices and on IRTs (2 providers and 1 District).

A number of respondents (2 state agencies and 2 Districts) believed that the overall volume of work to be done delays review and action on third party mitigation projects. One District told us, for example, that it has had up to 80 banks to review at one time with no significant organizational changes or additional staff to address the more detailed requirements of the Rule. Other Districts are also dealing with a large volume of projects in the approval pipeline.

At the same time, many Corps District mitigation program leads are not solely dedicated to mitigation review. Most are also responsible for an array of other activities (e.g., permit review, training, etc.). As with the Corps lead, IRT members usually do not have a sole mitigation focus and have other priorities and responsibilities. We also heard that institutional priorities may influence timelines. For example, one state agency suggested that there is no strategic incentive

for the Corps to meet the regulatory timelines because mitigation project review is not a priority action (i.e., permitting actions take priority over mitigation project review or other activities related to mitigation—especially third-party mitigation). Corps leadership is currently working to address this issue.

Finally, we heard that a lack of expertise at a Corps District can delay project review. One provider said that some staff lacked expertise on the Rule or different components of the instrument as well as in applying project management strategies. At the same time, however, experienced IRTs or state lead staff can supply some of this expertise and fill in existing gaps. We heard training was important and much needed—especially in managing processes like IRT reviews. However, respondents told us that not all IRT members have access.

#### Lack of Project Management Strategies

Another often cited challenge is a lack of good project management strategies that can positively affect the project approval process.

One provider told us that, in many cases, Corps staff does not have a good way to track schedules and no deadlines are set (for either the provider or the agencies). A couple of respondents (1 provider and 1 state) told us that if there are no deadlines set for the agencies or the provider then there is no incentive to reach those deadlines. This means that the process becomes largely reactive rather than schedule-driven. We heard that setting IRT meeting times, determining dates for site visits, and collecting IRT comments can all take a significant amount of time.

Respondents from all sectors and in most Districts told us that there is nothing in place to track progress towards project approval and there is no way to track timing and response to comments. One District told us that the lack of a strategy to track comments and responses means the IRT has to spend a lot of time reviewing each draft to ensure that all changes are made in response to comments and that these changes are made throughout the document, including in figures, etc. As discussed above, the lack of management strategies means that there is no way to track settled substantive items in the instrument (e.g., service areas, credits, etc.) so that these items cannot then be brought up again later in the process.

#### Standard Operating Procedures (SOPs) and Templates

We heard from two providers and one IRT member that a lack of templates and standard operating procedures leads to inconsistencies among projects and delays among providers. A lack of templates also means no good guidance available for providers, especially those who are new to mitigation. This can lead to a process in which providers are always reacting to, and improvising responses to, comments from the IRT. This can extend the length of project approval.

While standards and templates can be highly useful, on the other hand, one provider told us that when IRTs do issue new guidelines they sometimes apply them to projects that are already in the approval pipeline. This can cause major delays to projects that are already under review and

where various commitments and assumptions have been made. Occasionally templates can prove to be restricting and can impede innovation or flexibility.

### Quality of the Project Documentation

Another often cited set of challenges is related to the quality of the project submission itself. Starting with the completeness of the original draft, the quality of the document affects the timeline. One District respondent told us that sometimes providers submit data that do not accurately represent conditions in the field, or they fail to complete data forms, or they submit unnecessary data that adds to the bulk of the document. In addition, inconsistencies in the submittal (e.g., summary tables that do not correspond to the actual data) or poor editing of the document can increase review times. Several respondents (3 providers and 2 state agencies) told us that the more complete and sophisticated the first draft the faster the process goes.

The ability of the provider to quickly return responses to comments that sufficiently address the IRT comments is also important. One District told us that it takes time for the Corps and IRT to ensure that all necessary changes/responses to comments are made by the provider (especially if tracking is not done). All comments and commitments need to be reflected and fully incorporated into engineering drawings, technical values, tables, design drawings, etc. When the IRT does not know when the provider will provide revisions or when different parts of the instrument are at different review points, the schedule becomes more difficult to track and document. One District told us that sometimes providers push the limits of projects in hopes of extracting additional credits, thus more review time is needed, and timelines are extended.

One provider told us that an often-overlooked factor in the duration of review is the quality of the proposed bank/ILF site and the quality of the proposed restoration and land management. Troubled and complex sites can take more time. Well-characterized sites with easily-calculated credits can be approved more quickly. “Better projects take far less time.” In some cases, the project site is just complicated. If it takes the provider a long time to finalize environmental studies, obtain easements, etc., this can delay the process.

### Permitting Issues

23 respondents indicated that the 404/401 state permitting process does not result in significant delays in the timeline for compensatory mitigation project review. But, 11 respondents told us that they do experience some permitting delays. Respondents mentioned a few reasons for the largely negligible influence of permitting on the length of project review and approval. Respondents from North Carolina, Ohio, Illinois and Colorado spoke highly of running the 404/401 permitting process concurrent with mitigation project review, with the documents often combined. In this system, providers may apply for permits later on at a stage where the project is unlikely to evolve, often after approval of the draft instrument. Monthly meetings with 401 agencies to go over project status (in addition to IRT meetings) are used to ensure commenting agencies are on track.

Another apparently effective strategy, according to nine respondents, is to simply start permitting conversations early, often concurrent with the instrument approval process. However, one state

agency noted that there is such a thing as “too early” in some cases. Though providers in the state are strongly urged to submit a Pre-Construction Notification for NW27 at the draft instrument phase, time is not saved because the Corps does not act on the permits until the final instrument phase, where delays may occur. Other providers echoed this sentiment, noting that permitting may affect the timelines where the timing does not align with the approval of the instrument. Therefore, the benefits of beginning permitting early vary according to state statutory timelines.

A couple of respondents indicated some permitting-related time lags in the mitigation project review process that were often more isolated than broadly procedural. For example, one state agency mentioned recent issues with slow 401 permit review but attributed this to the state agencies’ being understaffed. One District in California mentioned the California Environmental Quality Act (CEQA) environmental impact review process as a potential cause of delay if it results in required changes to the design that must be then approved by the IRT.

The letter of permission (LOP) process used in Louisville, Nashville, Memphis, and Huntington Districts structures expectations and provides a document to plan around. The LOP:

authorizes all activities performed in association with the enhancement, rehabilitation, establishment, re-establishment, maintenance, and repair of compensatory mitigation projects associated with a Corps approved Mitigation Bank (Bank) or In-Lieu Fee (ILF) Instrument, including dredging, temporary and permanent work, structures, discharges of dredged or fill material into “waters of the U.S.,” the removal of structures, and the removal of fill.<sup>5</sup>

The LOP thus serves as the individual permit for the project. The LOP lays out step-by-step implementation and application procedures and includes a timeline.

#### Consultation Issues

11 respondents identified delays due to Endangered Species Act (ESA) and historic preservation consultation, while 19 respondents did not believe this added to the time for review. Two and one state agency respondent indicated that these processes often add more work for already overburdened, understaffed Corps Districts, slowing the review of projects considerably. One provider noted that they are often willing to start the consultation process earlier than the IRT is able to. They may provide information for the Corps to initiate ESA/106 coordination at the draft instrument phase in an attempt to save time but be met with inaction by the Corps. One provider remarked that although coordination with the appropriate agencies may begin early on, the Corps must provide official consultation documentation. The main obstacle, according to this provider and others, is that consultation must come from the federal agency, not the provider. From this provider’s perspective, none of the expedited approaches they take to advance consultation seem to be very effective in reducing the potential effects of the consultation process on review timeframes. They are largely dependent on the workload and capacity of the Corps.

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<sup>5</sup> U.S. Army Corps of Engineers Public Notice LRL-2010-323-pgj, <https://www.lrl.usace.army.mil/Portals/64/docs/regulatory/publicnotices/LRL-2010-323%20pnpics.pdf>.

Others did not identify serious consultation issues, offering a number of reasons why this may be the case. The Los Angeles District described a system that runs smoothly because the USFWS and the state Department of Fish and Wildlife are on the IRT and are able to comment throughout the process. In this District and in others, historic preservation is also built into the IRT approval process. Contrary to the above providers who did not see tangible benefits from starting consultation conversations early, other providers said that engaging the appropriate agencies to address ESA and cultural resources concerns as soon as the initial site visit does in fact reduce the impact of consultation on the project review timeline.

One provider mentioned the advantages of programmatic consultations, an approach taken for impacts to vernal pool species in California. The programmatic consultation established lower mitigation ratios for permittees that choose to purchase bank credits from USFWS-approved banks rather than through a permittee-responsible compensation project. This approach, referred to as the programmatic consultation with a banking option, is still recommended by the USFWS.

Providers and state agency representatives alike said that dealing with consultation issues upfront eliminates delays entirely, provided that the IRT does not ask for new studies or try to reopen consultation discussions after issues have apparently been resolved. In Alaska, historic preservation did not lead to delays simply because it was addressed without IRT input, as a non-IRT issue.

#### Provider Characteristics that Affect the Process

When asked what characteristics of providers affect the mitigation project review process, respondents (regardless of sector) identified one factor as especially important: provider experience with mitigation project development under the Rule. According to respondents, providers with more experience choose more viable sites, are less likely to make assumptions about the uniformity of guidelines and methodologies among states and require less back-and-forth with the IRT because they understand the process and know what is required of them. These characteristics lead to fewer revisions and shorter timelines.

In-house expertise on the part of the provider can also affect the mitigation project review process, particularly when it results in better designed projects and higher quality submissions or where proposed topics are highly technical (such as stream mitigation). In contrast, a lack of in-house knowledge and expertise can contribute to delays. Another component of experience, according to one provider operating in several states, is training. Actively including providers in trainings that might otherwise be IRT-focused, or designing trainings specifically for providers, may help bridge the knowledge gap between entry-level and more experienced providers.

Respondents also mentioned a number of other provider characteristics that affect the process. Flexibility—the willingness to respond to IRT feedback and negotiate adjustments—was highlighted by one provider and one District. Respondents, including both providers and IRT members, stressed a few other provider characteristics that help minimize delays in project review: timeliness and responsiveness, adherence to guidance documents and templates (without adding unnecessary data or including that which is factually inaccurate), and the ability to



directly address IRT comments and edits in the banking documents. These characteristics, or the lack thereof, play an important role in determining the delays experienced throughout the mitigation project review process.

## Data Gaps

When asked if there are any data gaps that, if addressed, would make the mitigation project review and approval process more efficient, respondents provided a range of responses. Though many respondents identified one or more data gaps, others did or could not. Respondents most often cited a lack of available information on the physical conditions of a site as possibly leading to delays, emphasizing hydrologic, topographic and bathymetric, and chemical factors.

One District and five state agencies identified gaps in hydrologic data for rivers, streams, and wetlands as an issue, particularly due to implications for the consistency of evaluating and applying hydrology and vegetation performance standards and site monitoring. These respondents highlighted a need to establish more standardized reference sites for the sake of creating a catalog of well-informed performance standards; such a catalog would effectively spell out which hydrologic characteristics of a site should be replicated in a new project, to the extent possible. Hydrologic standards supported by sound data on the hydrology of reference wetlands, ample functional assessments of wetlands and streams, and adequate river gauging (for projects completed on floodplains), may lead to more clarity and therefore more efficient project approval.

Some respondents (2 state agencies and 1 District) also mentioned an absence of LIDAR data, which could be used to create 3D maps of wetlands and streams. IRT members identified LIDAR data as promoting more efficient mitigation project review when it is available. Unfortunately, the data is spotty on a national scale and is often inconsistent within a state or District, benefitting some projects but not others. One state agency also pointed out a lack of soil data as a factor that has hampered review of past projects. One state specifically mentioned contamination sampling data, which, if made available, could be useful as establishing a basis for “no increased risk” a state standard that has affected some mitigation approvals. Taken together, these responses indicate how thorough data on a site’s physical characteristics, or the absence of said data, can be an important factor in supporting or impeding efficient project review.

Some providers identified a general need for performance standards to be as data-driven and objective as possible, based in sound science and not aspirational goals or personal opinion. One provider underscored a broad need for the IRT to seek consultation from specialists when determining performance standards in areas outside of their expertise. This respondent emphasized the importance of consulting with professional foresters to determine performance standards for tree density, noting that a given IRT member—in the absence of input from a specialist—might suggest a figure for a forested area that is not appropriate for end results.

In addition to placing importance on the physical and biological characterizations of project sites, a number of respondents identified data gaps that deal with the availability of economic analyses, among other factors. One District, one state agency, and one provider discussed a desire for greater market analysis for prospective providers, which would help bankers determine if a

project would produce enough credits to be viable. This would help eliminate delays by helping less experienced bankers weed out some projects early on before spending time developing an instrument (thus helping to keep some non-viable projects out of the pipeline). One provider said that online access to property value assessments and courthouse records could be useful for ILF programs in some states. Another pointed out that there are sometimes gaps in the information that is available to IRT members to address procedural questions, such as the task of addressing site protection when mineral rights are reserved.

Finally, one state agency spoke not of specific data gaps but of the need to aggregate and geolocate data while including geomorphological, hydrological, and vegetative data and make it accessible for both the IRT and providers.

### Interagency Review Teams

We asked a number of questions to try to better understand how the IRT works in practice. We asked about the value or lack of value of the IRT and the challenges, if any, associated with the IRT process. Many respondents highlighted the importance and value of the IRT but suggested practices and procedures that could improve the review process.

#### The Value of the IRT

Most respondents across all sectors, unsolicited, told us that the IRT is critical to efficient project review. Of the 25 respondents that explicitly commented on the value of the IRT, 24 told us that the IRT is important. Respondents report that the IRT is particularly valuable in setting expectations for acceptable prospectuses, banking and ILF instruments, and mitigation projects. The St. Paul District of the Corps specifically noted the importance of the IRT in providing providers with a single coordinated answer, recognizing all of the sites, resources, and regulatory issues that might otherwise require multiple independent reviews.

Some IRTs are quite large, with up to 13 members (e.g., TN), while others have only limited membership or participation. Some Corps Districts have one IRT, while other Districts have many. Participation by state, federal, and local agencies varies considerably across Corps Districts and states. In addition to the Corps, EPA almost always participates, as well as the primary state agency or agencies responsible for natural resources and/or environmental protection. Other participants often include NOAA Fisheries, state fish and wildlife agencies, state water resources agencies, and some local and coastal agencies. Some IRTs are very active and engaged. Others leave most of the technical review and decision-making to the Corps and the lead state environmental agency, participating only with respect to sites or specific resources of particular interest. For example, in many instances, the participation of the USFWS or state wildlife agencies depends chiefly upon the location of the mitigation project and the availability of staff.

Respondents from across all sectors advised that the IRT is critically important where a state operates its own compensatory mitigation wetland or stream permitting program under state law and/or has their own wetland banking rule. In some of these cases, the state co-chairs the IRT. Two states specifically pointed to the importance of the IRT in assuring that both federal and state permitting requirements are met. A state agency and mitigation providers in California

specifically emphasized the value of the IRT in that state given the many concurrently operating regulatory programs and agencies that define and oversee various forms of crediting for third-party providers. They report that it is best to have all the agencies at the table when evaluating mitigation banks and ILF projects that need to satisfy numerous regulatory objectives and technical standards. Another state pointed out the unique relationship between the District and the state agency. The Seattle District Corps and Washington Department of Ecology have developed a program that combines and streamlines state and federal requirements. This program significantly reduces/eliminates the potential duplicative process for providers. In addition, the respondent indicated that the state and the Corps strive to speak in one unified voice in order to provide clear direction to the provider.

State agencies and Corps staff from four different Corps Districts also reported that the substantial diversity and depth of technical expertise is often helpful in effective evaluation of mitigation projects/site selection. Among the specialized knowledge areas most frequently named were hydrology and habitat-related expertise on the IRTs.

#### Impediments to Function of the IRT

A number of states and Corps District respondents report that IRT agency member understaffing or lack of state funding can cause delays or impede the IRT process. Some also note that at times some Corps Districts have not had sufficient staff devoted to the workload of banks and ILFs, or that these duties have been secondary to other District staff duties including permitting and evaluation of permittee-responsible mitigation (PRM). In these instances, a robust state agency role on the IRT can at times keep the IRT process functioning.

Respondents in three states observed that when staff turnover and transitions are not well planned or where there are gaps in training new IRT staff, this can cause delay. Some of these transitional issues can be overcome with training, according to one Corps District. Conversely, however, one mitigation provider reported that newly appointed IRT members that attended national trainings came back even more demanding with respect to certain issues, such as financial assurances.

One provider and one District noted that when an IRT member agency has a “stovepiped” perspective of its responsibilities, looking only at its own resource issues without regard of the larger Team, this can limit the effectiveness of the IRT. This can result in focusing on only one aspect of the bank or mitigation project plan without taking into account the tradeoffs or array of choices that may be available for mitigation in a particular watershed or geographic service area. One ILF mitigation provider suggested that some IRT members are “risk averse” and hence are inclined to seek more assurances and ask for more project conditions with respect to their resource area of jurisdiction. Perhaps, this provider suggested, the IRT should recognize that it is ultimately the mitigation provider that is on the hook for performance, not the IRT.

One mitigation provider reported that the greatest sources of delay were the delays in resolving unresolved differences among IRT members. In some Districts, decisions are deferred until the IRT members reach total consensus. A number of respondents emphasized their desire for the Corps to make a final decision at the end of the review processes even if consensus has not been reached among IRT members, something the District has the authority to do.

## IRT Best Practices

With a decade of experience implementing the Rule, IRTs have developed a number of practices and procedures for managing their workflow, coordinating review among member agencies, and developing and updating programmatic approaches when needed. A number of “best practices” were identified by respondents (See Table 1).

*Scheduling and Organization of IRT Meetings.* Regularly scheduled meetings facilitate coordination. Best practices include scheduled monthly or bimonthly meetings in states/Districts with substantial banking or ILF activities according to at least 11 respondents, reflecting practices across a variety of states and Districts, and at least quarterly IRT meetings in others. For example, in the Nashville District, the IRT meets monthly. Meeting dates are scheduled a year ahead, and agendas are distributed two weeks ahead. In Ohio, the IRT meets quarterly; the Louisiana IRT also meets quarterly unless there are specifically challenging projects. Louisiana’s IRT uses conference calls for IRT meetings between the quarterly meetings.

*Remote Meeting Techniques.* Email and remote web-based conferences and meetings save time and money for IRT agencies. Many IRTs use these approaches exclusively, particularly in large states or Corps Districts, and others use these alternately with face-to-face meetings. These facilitate continuity of review when in-person meetings are not needed. A number of state agencies and IRT members reported that they reserve specific conference call or meeting dates ahead of time for the year and the agenda and supporting materials are distributed two weeks ahead.

*Policy Meetings.* Respondents reported that it is helpful for each IRT to have *several meetings each year* that are not specifically devoted to project/instrument review, so that these can be used to identify programmatic opportunities for efficiency, to work out scientific/compensatory mitigation issues, or to adopt policy and procedural improvements. For example, in Wisconsin, the IRT meets quarterly to discuss policy and big picture issues (especially related to coordination of state and federal regulatory approvals). The full group of IRT members meets to consider specific bank/ILF proposals as needed. In Florida, the IRT meets onsite for banks, but there are also quarterly statewide meetings for the Florida Department of Environmental Protection, Florida Water Management Districts, and the Corps to address an entire array of permitting and cross-cutting issues (including but not limited to compensatory mitigation). In Montana, the IRT meets monthly by phone conference, but the second hour of each meeting is devoted to policy issues and discussions and excludes the providers. One mitigation provider operating in multiple Districts also endorsed the idea of periodic IRT programmatic meetings devoted to process, management, and technical issues. This respondent recommended that providers be included in these meetings.

*Site Visits.* It is helpful to have scheduled and reserved field dates for site visits. This approach can offer designated field dates each year in order to facilitate IRT members holding these dates and allowing advance scheduling to providers. In January of each year, the North Carolina IRT schedules a week per month of “field days”, and members and providers then know what weeks are available for site visits. Site visits with the IRT can help work out the potential issues ahead

of time, forestall unnecessary rounds of comment because of understanding of site issues and opportunities, and save time in document preparation and approval.

*Project Management Tracking.* Specific deadlines and timelines for review are helpful; these can be facilitated by use of document-sharing platforms that allow concurrent review and tracking of responses or declination of responses. Project approval stages and timelines can be visible to the public. And review documents and timelines can be shared and made visible among the IRT members and the mitigation provider to improve response times and avoid delay. In North Carolina, the Draft Mitigation Plan is posted on SharePoint in real time, comments are due in 30 days, and the content of comments are immediately available and visible to IRT members and the provider.

One provider advised that the IRT should make its priority clear for review and approval of mitigation project plans submitted by ILFs given the three-growing season requirement; and that it should be clear about the schedule and needs for feedback, in order to ensure that IRT agencies prioritize the plan and respond promptly. The same respondent suggested that weekly calls between the provider and IRT chair/co-chair can help maintain accountability and address questions without delays.

Table 1 - IRT Best Practices

<i>Scheduling and organization of meetings</i>	<ul style="list-style-type: none"> <li>● regularly scheduled meetings, with frequency varying according to IRT project load</li> <li>● meetings scheduled well in advance and distributing agendas a few weeks prior</li> <li>● meetings held via conference call in between less-frequent in-person meetings</li> </ul>
<i>Remote meeting techniques</i>	<ul style="list-style-type: none"> <li>● email communications and web-based meetings (save time and money)</li> <li>● use of remote meetings when in-person communication is not necessary</li> <li>● alternate in-person meetings with remote meetings as needed</li> </ul>
<i>Policy meetings</i>	<ul style="list-style-type: none"> <li>● some programmatic (not devoted to project review) meetings are necessary; there may be entire meetings devoted to policy or dedicated portions of regular IRT meetings</li> <li>● inclusion of providers in programmatic meetings, as appropriate</li> </ul>
<i>Site visits</i>	<ul style="list-style-type: none"> <li>● schedule and reserve site visit “field dates” well in advance</li> <li>● IRT participation preempts potential issues, saving time during commenting and document review</li> </ul>
<i>Project management tracking</i>	<ul style="list-style-type: none"> <li>● establish specific, clear deadlines for review and comment</li> <li>● establish a mutually agreed-upon schedule</li> <li>● use document-sharing platforms to facilitate project tracking in real-time among IRT member and the provider</li> <li>● a tracking tool that shows which sections have been reviewed, adjusted, and</li> </ul>

	<p>agreed upon by the IRT so that the same sections are not repeatedly reviewed</p> <ul style="list-style-type: none"> <li>● make project review timelines visible to the public</li> <li>● schedule frequent check-in calls between the IRT and provider, as appropriate</li> </ul>
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### Other Opportunities for Improving Practice

Apart from IRT management, respondents identified additional practices that can facilitate effective review and timely approval processes (Table 2). Some of these include greater specificity in state requirements, use of templates, project management techniques, preliminary review practices, better timing and use of site visits, and full delivery mitigation solicitations where available. We elaborate on these below.

#### State Regulations

Review and approval processes are more predictable where state regulations include detailed information on credit determination, financial assurance, and other recurring factors, such as in New Jersey and Florida. In other words, while the Compensatory Mitigation Rule leaves a great deal of leeway for exercise of professional judgment in determining compliance with all of the required elements, some states and state programs have adopted explicit requirements in connection with state regulatory and permitting processes that can facilitate predictability. At the same time, greater detail in state regulations may limit flexibility.

#### Use of Standard Templates for all Documents

This is the most frequently cited best practice across all respondents. Michigan’s mitigation banking “example agreement” provides the key to achieving workable approvals according to the state.<sup>6</sup> Oregon provides template documents on the Department of State Lands website.<sup>7</sup> The Nashville District of the Corps and Tennessee DEC have templates for site protection and financial assurances, among others, which they report make it easier to navigate both Corps and state approval processes, while satisfying the needs of each regulator.<sup>8</sup> The Omaha District of the Corps provides a “sponsor packet,”<sup>9</sup> as well as prospectus outline, draft instrument outline and final instrument notes. The Savannah District created a mitigation banking instrument template that is in use by most banks; the newest version should be released in 2020.<sup>10</sup> This District also

<sup>6</sup> [https://www.michigan.gov/documents/deq/wrd-wetlands-bank-agreement-example\\_559935\\_7.pdf](https://www.michigan.gov/documents/deq/wrd-wetlands-bank-agreement-example_559935_7.pdf)

<sup>7</sup> Oregon Department of State Lands, Forms: Waterways & Wetlands. At <https://www.oregon.gov/dsl/WW/Pages/WWforms.aspx>

<sup>8</sup> U.S. Army Corps of Engineers Nashville District Website, Mitigation. At <https://www.lrn.usace.army.mil/Missions/Regulatory/Mitigation/>

<sup>9</sup> U.S. Army Corps of Engineers Omaha District Website, Mitigation Information. At <https://www.nwo.usace.army.mil/Missions/Regulatory-Program/Mitigation/>

<sup>10</sup> U.S. Army Corps of Engineers Savannah District Website, Mitigation At <https://www.sas.usace.army.mil/Missions/Regulatory/Mitigation/>

published performance standards in its 2018 SOP.<sup>11</sup> New Jersey, which does much of its compensatory mitigation under state law under its EPA-approved assumed 404 program, has created a detailed model mitigation banking instrument, which includes numerous document templates used by most applicants for state mitigation. The St. Paul District has guidance on performance standards and crediting.<sup>12</sup>

The Sacramento District of the Corps has many templates, including the banking instrument, conservation easements, long-term management plan, etc. California developed a banking enabling instrument template for the entire state which provides substantial advantages. (<https://www.wildlife.ca.gov/Conservation/Planning/Banking/Templates>). The template was developed and is managed by a statewide project delivery team (PDT). In addition to the instrument template, the PDT has developed a conservation easement template and checklists for each step of the review process. The PDT was established by a Memorandum of Understanding (MOU) among the Corps, State Water Board, USFWS, NMFS, CA Dept of Fish and Wildlife, USEPA, NRCS, and the CA Natural Resources Agency that outlines processes for developing and making changes to the templates. The attorneys from each agency reviewed and approved the templates prior to release. This addressed the problem noted earlier about agency attorney review taking a lot of time at the end of the process.

If a provider wants to deviate from the CA template it adds time, but the existence of the multi-agency template also provides an incentive to use it and thus streamlines the process. The last statewide update to the template was in 2017 and was done with a large public outreach process. The Mitigation Banking Enabling Instrument Review Worksheet used in California provides a standard way to determine completeness and to identify any substantive issues. It assists mitigation providers in determining whether they have met the requirements that will be needed.

Washington state has spent considerable time creating templates, checklists, guidance and internal SOPs to help streamline the review process for both the regulators and the provider. The State Banking Rule (173-700 WAC) provides credit ratio ranges to help narrow down what types of credit ratios could be awarded to specific mitigation activities, which helps providers gauge their potential credit generation opportunities. In addition, in partnership with EPA Region 10 and the Seattle District, the state published interagency mitigation guidance documents in 2006 that provide, among other topics, definitions and explanations on mitigation actions (preservation, establishment, re-establishment, rehabilitation, and enhancement) which helps providers accurately define the type of mitigation action proposed for their project.

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<sup>11</sup> "Draft Monitoring Guidelines & Performance Standards for Freshwater Wetlands and Non-Tidal Streams U.S. Army Corps of Engineers (Corps), Savannah District (Version 1.0, November 8, 2018)" At

[https://ribits.usace.army.mil/ords/f?p=107:150:16711787608660::NO::P150\\_DOCUMENT\\_ID:73128](https://ribits.usace.army.mil/ords/f?p=107:150:16711787608660::NO::P150_DOCUMENT_ID:73128)

<sup>12</sup> U.S. Army Corps of Engineers St. Paul District, Target Hydrology and Performance Standards for Compensatory Mitigation Sites, *Available at*

<https://www.mvp.usace.army.mil/Portals/57/docs/regulatory/MN-Special/St.%20Paul%20District%20Corps%20of%20Engineers%20Regulatory%20Branch%20Guidance--Target%20Hydrology%20and%20Performance%20Standards%20for%20Compensatory%20Mitigation%20Sites.pdf?ver=2019-03-28-073256-783>

One national mitigation provider emphasized the importance of “templates, templates, and more templates.” But the same provider also wanted to emphasize that there should be a set of procedures relating to the use of templates and how and when they are updated. Another mitigation provider notes that the lack of templates in the Districts where it works have led to unnecessary complexity and not enough standardization in review.

#### Process management

One mitigation provider suggests the value of establishing an agreed project management schedule at the outset, with a shared calendar accessible to the provider and the IRT. This can help ensure that reviews, responses, and promises about documents remain on track. The shared schedule can be adjusted as needed, but its creation and maintenance can help all parties stick to the process. This can be done even if the District or IRT do not adopt other best practices, such as document sharing or concurrent review. Each IRT meeting can review and revisit the project schedule as needed to identify if adjustments may be needed, but also to affirm commitments and expectations.

This mitigation provider also worked with the District to set up a system to track submittals and comments. The comment matrix lists all IRT comments and provider responses for each document section (e.g., maps, development plan, and appendices). All IRT comments are numbered and additional revisions are identified as “revision.” The matrix helps to track all responses to comments so that the IRT does not need to spend time reviewing the entire document each review cycle to ensure that necessary changes have been made. This process can also help to ensure that settled issues are not reopened later in the review process. The mitigation provider also committed to meet with each IRT agency before submitting documents and work to reach agreement on significant issues early in the process. As they commented, “having a kick-off meeting that focuses on the schedule and the rules of the road helps to set expectations upfront and avoid misunderstandings and frustrations later in the process.” These changes have led to improvements in process and reduced delays in approvals for this IRT. One provider stressed the need for project management training for any Corps staff working on IRTs.

#### Preliminary reviews

Draft prospectus (Phase I) reviews can save time for both the provider and the IRT. Some Corps and state respondents report that they use the draft prospectus/pre-consultation process to identify and eliminate unsuitable sites or mitigation project proposals early. However, some Districts and IRT respondents report that they seldom use this technique.

Savannah District always uses a draft prospectus and requires substantial detail in order to ensure that providers avoid difficulties and can address issues upfront. One District recommends that the Corps always require a draft prospectus in the case of banks to enable the Corps to eliminate unsuitable sites very early in the process.

Oregon also uses the pre-prospectus for important early review and feedback; it publishes an updated “preparation for pre-prospectus meeting” guide for providers, most recently updated in



September 2019.<sup>13</sup> In contrast, the Kentucky IRT does not engage in pre-prospectus meetings, nor does the Los Angeles District (unless requested by a provider).

One provider commented that pre-prospectus meetings are useful. And another provider suggests that early consultation with the Corps and IRT about site selection (by email with attached mapping data and information) can save time and help identify potential issues with site and permitting issues. One District notes that providers' failure to use the draft prospectus step represents a lost opportunity to work out problems early.

The Florida DEP reports that most of identified issues are addressed in the pre-proposal stage in order to enable the state to meet its very stringent approval time limits. In practice this may mean that processes are still lengthy but occur before the official "clock" starts. A state agency in another state reports that review of a pre-proposal document, such as a draft prospectus, can be useful, but is not as useful if the provider is inadequately prepared and doesn't supply key information such as real estate or siting commitments.

Respondents emphasize the need for IRTs and their members to make good use of the draft prospectus (Phase I) and prospectus (Phase II). According to one provider, some IRTs do not really focus their detailed technical comments until the draft MBI (Phase III).

#### Site Visits

In the IRT context we discussed the use and scheduling of site visits. This section examines best practices for timing of site visits. Site visits occur at various times in various Corps Districts and IRTs. These may occur at the pre-prospectus phase, or during the review of the prospectus, or at other moments. The Savannah District schedules the visit prior to the public notice, in order to assure that comments are informed and that the IRT will properly understand the public comments. So does the New England District in NH, CT, and MA. In the Portland District, the site visit is scheduled for immediately *after* the close of the public notice and comment period in order to enable the IRT and provider to address the comments. In some instances, the site visit is planned only after the draft MBI has been submitted.

Site visits are most useful when the IRT and the provider have the opportunity to identify and work out possible approaches. The value of the visit is enhanced by communication. One provider, however, reported that its IRT does not allow for dialogue between the provider and IRT members during the site visit, so that the provider generally only hears about problem areas later when it receives formal compiled comments. This foregoes a key opportunity for clarification and problem solving. Most respondents told us that the site visit is a good opportunity for productive discussions with the IRT.

As mentioned above, the Maine In-Lieu Fee Compensation program operates an annual RFP process to identify and review projects. The Maine Natural Areas program helps the ILF project review committee do its work more effectively. The agency visits most sites that are being

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<sup>13</sup> Oregon Department of State Lands, How to Prepare for and Schedule a Pre-Application Meeting. Available at <https://www.oregon.gov/dsl/WW/Documents/PreAppPrep.pdf>

proposed in response to the annual RFP *prior* to a review committee decision on whether to offer them a contract. All of this precedes the Corps review process and improves the evaluation of the sites and projects by the review committee that selects projects for funding.

Table 2 - Other Opportunities for Improving Practice

<i>State regulations</i>	<ul style="list-style-type: none"> <li>● seek to include detailed information on credit determination, financial assurance, and other recurring factors</li> <li>● explicit requirements can facilitate predictability</li> </ul>
<i>Use of standard templates for all documents</i>	<ul style="list-style-type: none"> <li>● develop and provide templates for components of the instrument, including for site protection, financial assurances, and long-term management, among others</li> <li>● create multi-agency templates, where appropriate, to make it easier to navigate Corps and state approval timelines</li> </ul>
<i>Process Management</i>	<ul style="list-style-type: none"> <li>● establish an agreed upon project management schedule at the outset, with a calendar accessible to the provider and IRT</li> <li>● establish a comment matrix that lists IRT comments and provider responses for each document section to reduce redundant, full-document review and ensures settled issues remain settled</li> <li>● establish project management training for any Corps staff working on IRTs</li> </ul>
<i>Preliminary reviews</i>	<ul style="list-style-type: none"> <li>● conduct pre-prospectus review for all projects to identify and eliminate unsuitable sites or mitigation project proposals early</li> <li>● use draft and final prospectus as opportunity for IRT members to provide focused and detailed comments</li> </ul>
<i>Site visits</i>	<ul style="list-style-type: none"> <li>● schedule or reserve dates for site visits to facilitate participation by IRT</li> <li>● encourage opportunities to identify and work out possible approaches through productive discussions during site visits</li> </ul>
<i>Use of full delivery mitigation and annual review solicitations</i>	<ul style="list-style-type: none"> <li>● use of full delivery mitigation or annual review solicitations can standardize review and approval in some cases</li> </ul>
<i>Administrative options to shorten the time for review</i>	<ul style="list-style-type: none"> <li>● conduct concurrent review of documents by IRT and Corps</li> <li>● create systems to track comments, responses, and decisions among IRT agencies and provider</li> <li>● encourage early involvement of legal counsel in the review of documents</li> <li>● encourage advance legal review and approval of templates</li> <li>● delegate signature authority to appropriate Corps staff, where appropriate</li> <li>● develop BMPs for sponsors to aid prompt IRT review: such practices might include tracking the editing of documents to assure data, charts, and summaries are consistent and data sheets are complete and accurate; use of</li> </ul>

	recommended templates; guidance on use of document status tracking software and indexed/linked documents; and opportunities to coordinate with the IRT early and often.
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Use of Full Delivery Mitigation and Annual Review Solicitations.

Full delivery mitigation (contractors find, acquire, design, construct and monitor the project through completion and may even be responsible for successful completion of milestones) and annual review solicitations (or request for proposal processes) may standardize review and approval in certain parts of the country with high demand for mitigation and many options for mitigation. They include early agreement on sites and/or activity types that streamline the review process. In these instances, the process of site selection needs to meet defined standards and there are orderly timelines and review processes that operate ahead of the formal review process under the compensatory mitigation Rule such that there is little left to review and approve.

In North Carolina, there are few delays for ILF site review, and most NC banks are umbrella banks. The North Carolina Division of Mitigation Services In-Lieu Fee program is able to move through review and approval quickly in part because almost all projects are implemented through full delivery contracts (contractors find, acquire, design, construct and monitor the project through completion). The contractor attends the site visit and participates in responding to comments.

In New England, much of the compensatory ILF mitigation is accomplished pursuant to annual RFPs and much of the mitigation is preservation. This makes it easier to evaluate through the state processes, which essentially stand in for the IRT, and the Corps approval is at or near the end of the process. For example, in Maine the Natural Areas Program uses EPA grant funding to help it evaluate possible projects and to prepare reports that can then be used in the state ILF project review process that leads to project selection and then review by the Corps. Such RFP and scheduled solicitation approaches may be less available in states/Districts with limited options for mitigation sites and activities, and where the projects may have particularly complex factors (use of federal or state lands, contamination of sites, or limited availability of lands in appropriate watershed/service areas that can provide in-kind mitigation).

Administrative Options to Shorten the Time for Review

It is possible to gain efficiencies within the timeline while conducting the activities specified by the Rule. Finding efficiencies can be helpful in ensuring that the review periods can be met and that overruns do not occur.

Concurrent review of documents can provide efficiencies. For example, in Montana the IRT used to wait until after they reviewed comments from the 30-day Public Notice period before they began their review the conceptual plan (i.e., prospectus). They have now tried a fast track approach for one project where the IRT began their review during the 30-day Public Notice period, rather than waiting for completion of the public notice and comment, so more time was saved in Phase II.

In terms of document management, one state agency recommended that the Corps and IRT receive all documents for review at the same time. This may save days or weeks by eliminating any delay occasioned by the Corps waiting to transmit documents to the IRT. The North Carolina DMS uses a SharePoint site to give notice and track document reviews in an efficient way, without losing any time.

Some respondents suggested that the project approval phased review process should be visible to the public—like the Federal Infrastructure Permitting dashboard. The Sacramento District reports that a provider-provided form to track comments and responses has been helpful. The Savannah District suggested that it would be helpful for providers to clearly indicate where it has made each of the changes to the Instrument in response to IRT comments. A state agency IRT member suggests that a tracking and decision log would improve accountability for decisions, prevent re-opening of decisions that have already been made, and ensure continuity if there is staff turnover.

Advancing legal review can also expedite completion of the review process. Our respondents noted that one or more Districts have identified an opportunity to accelerate final instrument/amendment approval by providing a “conditionally complete” final Mitigation Banking Instrument to the Corps general counsel for legal review concurrently with submittal to the IRT in Phase IV. This can shorten the period of time to actual signature and approval. The Sacramento District notes the importance of involving counsel even earlier. This can help identify any issues promptly—particularly where the provider is using documents with wording and provisions that differ from templates. One mitigation provider advised that Corps counsel review can cause major delays at the end of the process, and that it would be far better if counsel were involved earlier in the document review process (including in the approval of boilerplate template documents). Another provider also recommended that counsel attend at least one coordination meeting prior to the conclusion of the review process, to reduce delay.

Delegated signature authority can at times save time in the process. The New England District shortened the last approval stage by the district engineer delegating final signature authority to the chief of the regulatory division.

Strict state timelines can provide impetus for prompt decision making. But this also requires adequate staff support. Even in states with timelines, processes can be prolonged.

Finally, developing best management practices for providers may aid more efficient IRT review. Such practices might include tracking the editing of documents to assure data, charts, and summaries are consistent and data sheets are complete and accurate; use of recommended templates; guidance on use of document status tracking software and indexed/linked documents; and opportunities to coordinate with the IRT early and often.

## Outcomes

The 2008 mitigation Rule was intended to “improve the quality and success of compensatory mitigation projects” by creating higher standards for the “planning, implementation and management of compensatory mitigation projects” (Compensatory Mitigation Rule, 73 Fed. Reg.

19598 (Apr. 10, 2008) Preamble to the Final Rule). The Rule's regulatory timelines are designed to promote timely decisions and improve the approval process so that good projects can yield credits where and when they are needed.

We asked respondents if current approaches, as implemented by local IRTs, are producing good outcomes in terms of quality of compensatory mitigation and timely production of mitigation credits. Respondents from all sectors told us that they are seeing good outcomes and that projects are doing well ecologically. Providers and IRT members told us that project quality is high, that sites are exceeding standards, and that the process is generating quality compensatory mitigation that is providing habitat and restoring function. As one state told us, these results are likely due, at least in part, to only approving good projects.

In addition, several respondents told us that process and outcomes are continuously improving, and progress is being made. Several respondents suggested that guidelines and methodologies that have been applied since the Rule can be credited with raising outcomes. One state told us that improvements are due in part to raising performance standards. We also heard that program consistency and dedicated regulatory staff are leading to better projects. One provider explicitly called out the important role of the IRT, saying that the expertise that the IRT brings to the table is improving the quality of projects.

Respondents also told us that although they believe the process is leading to much better and less risky projects, improvements can be made. One provider suggested that good projects are getting through, but that other good projects are not making it through because the process can be inflexible, and providers are walking away. As one District told us, managing risk and uncertainty is huge and it requires more information, more studies, and more financial assurances. This takes time, which ultimately affects regulatory timelines and the three-year growing season requirement for ILFs.

A couple of providers suggested that inconsistency in the application of requirements across the country may be affecting timelines. For example, one provider told us that some Districts have achieved a high level of effectiveness, while others are very slow and can take twice that amount of time.

To date, there has been no consistent approach, methodology or effort at the national scale to assess the ecological performance of compensatory mitigation projects. A few respondents suggested long-term follow-up remains challenging but will be important to actually understand if current approaches are leading to good ecological outcomes. In the meantime, there is a need to collect the data needed to analyze progress towards improving the effectiveness and timeliness of project approvals, an effort that will require state and federal support and investment.<sup>14</sup>

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<sup>14</sup> Two recent studies provide a useful framework for thinking about an approach to doing the kind of large-scale evaluation that will be needed to better understand the long-term performance of compensatory mitigation projects. In 2018, the Southern California Coastal Water Research Project, in collaboration with the Environmental Law Institute, completed "An Integrated Framework for Evaluating Wetland and Stream Compensatory Mitigation." The document was intended to help states and other interested parties develop a long-term, scientifically rigorous approach to evaluating the overall performance of their wetland and stream compensatory mitigation programs.; In 2009, ELI convened a panel of expert wetland scientists to develop a study design to assess the regulatory and

## Conclusion

The 2008 Compensatory Mitigation Rule put in place a number of provisions intended to maintain a timely review and approval process for third-party compensatory mitigation. In this study, we have identified a number of challenges in the implementation of review and approval—from both the agencies’ and providers’ points of view—as well as best practices that may inform future implementation. There are substantive and procedural ways to improve efficiency while still ensuring a rigorous and thorough review. Overall, we draw several conclusions:

1. The elements of the 2008 Rule are useful and have improved the review and approval process. They are generally thought by respondents to have led to better outcomes in terms of the quality of compensation projects (although no comprehensive study of the performance of compensation project has yet been conducted). However, there are still a number of recurring substantive issues, such as site selection, credit determination, site protection, and long-term management, that are causing delays in the review and approval process, in some cases.
2. Review and approval of banks, ILFs, and projects still often exceeds the regulatory timeframe, but delays are, in large part, due to known causes. Some of these causes, such as poor communication, lack of templates, lack of project management strategies, and data gaps, can be addressed with process/management improvements. Others, such as over-burdened regulatory staff, high levels of turnover in District and IRT staff, and a lack of training, may be more challenging. The improvements necessary to address these challenges would take a commitment from the Corps and other federal and state agencies to fund additional staff and provide resources.
3. The IRT is important to the effective evaluation of these compensatory mitigation actions, which operate on a watershed/ecological scale. The IRT members provide necessary expertise during the project review, especially for complex or multipurpose projects. They also make sure that parallel state and federal permitting processes are addressed from the beginning of project review, rather than at the end. However, the IRT review process is not without challenges. We detail a number of improvements that could be implemented with little or moderate investment, including proactive scheduling and organization of IRT meetings, better use of remote meeting techniques, regularly scheduled policy meetings, scheduling of opportunities for site visits, and implementation of proven project management techniques (See Table 1).
4. Efficiencies in the review process can be gained via project management tools applied to the review process. Core methods include detailed schedules with tracking tools; BMPs to aid providers on project submissions; effective use of preliminary reviews; and more training on regulatory process and substantive issues as well as on project management techniques

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ecological outcomes of the three compensatory mitigation mechanisms — mitigation banking, in-lieu fee mitigation, and permittee-responsible mitigation — in a manner that will enable comparisons of the three mechanisms nationwide. The final study design, “[Towards a National Evaluation of Compensatory Mitigation Sites: A Proposed Study Methodology](#)” establishes a protocol for the on-going national assessment of mitigation sites.

(Table 2). Proactive scheduling and use of document-sharing platforms and project tracking tools can help to address some of the delays associated in some states and districts with lengthy or repetitious reviews. These kinds of project management strategies have been implemented and have improved results (for example, in the Sacramento District).

5. Some typical delays are due to substantive evaluation issues. These are often best addressed with thoughtfully-designed SOPs and templates. Where in place, templates appear to make it easier for providers and IRTs to achieve a common understanding, resulting in timely project approvals. The most needed templates include those for site protection, financial assurances, and long-term management. Advance legal review and approval of these documents may also shorten the time for project review.

Third-party compensatory mitigation can present complex issues requiring thorough understanding of aquatic resource functions and a well-grounded, interdisciplinary use of science. At the same time, the many state and federal actors as well as mitigation providers have to meet a great many legal, technical, and management requirements. The experience of IRTs and providers to date show that these challenges can be met within the framework of the current Rule; but some more complex or multi-purposed projects may take longer to review. In all cases, establishing realistic and agreed upon schedules at the beginning of the process will set clear expectations for all parties.



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