



# Ecological Restoration Business Association

*Growth Through Resilient Environmental Solutions*

[www.ecologicalrestoration.org](http://www.ecologicalrestoration.org)

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Sara Johnson

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Resource Environmental Solutions

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Ducks Unlimited

TJ Mascia  
Davey Mitigation

Preston Smith  
Wildwood Environmental Credits

Jaime Zsiros  
Mitigation Resources of North America

Ms. Emily Joseph  
Director, Office of Restoration and Damage Assessment  
U.S. Department of the Interior  
Mailstop/Room 2627  
1849 C Street, N.W.  
Washington, DC 20240

**Re: Comments on NRDAR Type A Proposed Rule**

Dear Ms. Joseph:

The Ecological Restoration Business Association (ERBA) is pleased to provide comments to the Office of Restoration and Damage Assessment (ORDA) on docket DOI-2022-0016 (the Notice), regarding ORDA's proposed revisions to the simplified Type A procedures in the regulations for conducting natural resource damage assessment and restoration (NRDAR) for releases of hazardous substances. ERBA commends ORDA for publishing the Notice and for undertaking a process to determine how ORDA can increase the efficiency and cost-effectiveness of the NRDAR process. As detailed below, ERBA has some suggestions for ORDA on how to improve the proposed revisions outlined in the Notice in a subsequent Final Rule.

**I. Introduction**

ERBA is an association of member companies who are committed to restoring and conserving America's wetlands, streams, habitats, and other resources. First established in 1998 as the National Mitigation Banking Association, ERBA's mission is to support private investment in durable environmental results that enable responsible economic growth. ERBA promotes federal legislation and regulatory policies that encourage advance compensatory mitigation and private investment in ecological restoration projects that offset unavoidable adverse impacts of development or hazardous substances to comply with the Clean Water Act (CWA) and other resource statutes. Our member companies have projects that support infrastructure in nearly every state across the country and work daily with developers to provide private sector compensatory mitigation solutions. The broader ecological restoration sector creates 225,000 jobs (and growing) and has a total economic impact of

\$24.5 billion.<sup>1</sup> Our members are experts in the process of ecological restoration and generate services to respond to a variety of impacts. In addition, our members are adept at navigating the various permitting processes necessary to accomplish ecological restoration, which expedites the regulatory process and reduces the temporal loss of ecological services.<sup>2</sup>

ERBA believes that there is a huge potential benefit to using ecological project development (including banking) in the NRDAR context. Ecological project sponsors have experience delivering measurable ecological benefits that cut across several complex frameworks and contracting approaches. These range from critical habitat for protected species, water pollutant nutrient reductions, stream and wetland restoration for dredge and fill permits, to all of the above at multipurpose bank sites. ERBA members have successfully developed projects at NRD sites, for example at the Portland Harbor Superfund Site. The ability of restoration project development to turn NRDAR recoveries into on-the-ground restoration efficiently, quickly, and at-scale, can lead to greater outcomes for the public, potentially responsible parties (PRPs), and the NRDAR trustee agencies (Trustees). These greater outcomes include realization of ecological restoration before the settlement process is complete and facilitation of the settlement process (because it allows PRPs to settle through the payment of money or the purchase of credits).

## **II. ORDA's Proposed Rule**

ERBA strongly supports the revival of the Type A pathway and the overall streamlining of the NRDAR process that this renewal will hopefully entail. ERBA expects that the proposed new Type A rule will result in more efficient NRDAR settlements and quicker implementation of restoration. ERBA applauds ORDA's efforts to find ways to expedite the assessment process, as it should allow the Trustees to turn recovered assessment dollars into on-the-ground restoration projects more quickly, which is beneficial for all involved parties and impacted resources. In this section, ERBA provides positive comments on many aspects of the Notice, while also identifying a few ways in which ORDA could further improve the proposed language in the Notice.

The Notice lays out a number of key ways in which ORDA plans to modernize the NRDAR process. ERBA agrees with ORDA's decision to expand the types and sizes of cases that will be eligible to use the new Type A process. In particular, removing the previous geographical limitations on where the Type A rule can be used and, instead, allowing for its use nationwide, is a positive step towards improving the NRDAR process. So too is ORDA's proposed increase of the eligible damages cap in the new Type A rule. Increasing the monetary cap on a particular claim's eligibility to use the Type A process from the current \$100,000 limit is paramount if ORDA wants the Type A process to be a viable option for

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<sup>1</sup> BenDor, T et al. 2015. Estimating the size and impact of the ecological restoration economy. <https://doi.org/10.1371/journal.pone.0128339>.

<sup>2</sup> Notably, our member companies can cut permit timelines in half, compared to projects where permit applicants are pursuing their own mitigation. U.S. Army Corps of Engineers. 2015. The Mitigation Rule Retrospective: A Review of the 2008 Regulations Governing Compensatory Mitigation for Losses of Aquatic Resources [www.iwr.usace.army.mil/Portals/70/docs/iwrreports/2015-R-03.pdf](http://www.iwr.usace.army.mil/Portals/70/docs/iwrreports/2015-R-03.pdf).

cases going forward. ERBA supports ORDA raising that limit to up to \$3 million in general, or up to \$5 million in the cases of discrete spills with a small number of PRPs.

In addition, ERBA supports decoupling the Type A process from the archaic formulas found in the current regulations and allowing for the use of more modern, more flexible models like habitat equivalency analysis (HEA) and resource equivalency analysis (REA). ERBA also thinks it is wise for ORDA to allow flexibility for the use of other models that may be developed in the future and encourages ORDA to retain that flexibility in the Final Rule.

### III. Improvements

The changes ORDA proposes in the Notice are well-intentioned and reflect the practical knowledge gained over the past two decades by Trustees, PRPs, and associated partners in the NRDAR process (like third-party restoration providers). ERBA commends ORDA for the effort put into these proposed revisions. Yet there are ways that ORDA could further improve the proposed new Type A rule.

For example, ORDA should include in the new Type A rule specific and definite parameters for how long it should take to complete the Type A process. This will help ensure that claims are resolved expeditiously and that the focus of the NRDAR process remains, appropriately, on getting restoration on the ground to replace the public's lost natural resources. As detailed in ORDA's own "Operating Principle for Restoration Activities" (Operating Principle) memorandum,<sup>3</sup> the goal of the NRDAR Program is "the *timely* restoration of injured resources..." Id. at 2 (emphasis added). The objective of the NRDAR process is actual restoration; the assessment procedures themselves are simply tools to get to that final objective. Importantly, the Operating Principle explains that the goal of the NRDAR process is not just restoration, but timely restoration. Delaying restoration helps no one. Without explicit timeframes for completion of the new Type A process, there is no guarantee that the promise of a "streamlined and simplified" assessment process will be achieved. For third-party restoration credit providers in particular, the unnecessarily elongated and unpredictable current NRDAR process timeframe makes it incredibly difficult to match up investment timelines with NRDAR restoration projects. Too often, ERBA member companies have been ready and able to provide tangible restoration projects for NRDAR case teams, only for Trustee/PRP timelines to become too drawn out and inconsistent to make investment viable. Not to mention the continued injury to the public that comes from delayed restoration. For all these reasons, ORDA should include clear limits on the length of time that the new Type A process should take.

ORDA should also ensure that the monetary cap on Type A eligibility keeps pace with inflation. Without something tethering the cap to rising prices, the new Type A process is at risk of the same obsolescence that plagues the current Type A rule. One potential way to avoid this issue would be to tie the \$3 million (sometimes \$5 million) cap to some federal government price index. That way, over time, the same relative size claims would be eligible to use the Type A process. ERBA does not have strong feelings about how ORDA chooses to address this issue but does think it is an important revision needed in the Final Rule.

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<sup>3</sup> Available at <https://www.doi.gov/sites/doi.gov/files/operating-principle-for-restoration-final-exec-committee-letterhead-2021-final.pdf>.

Finally, ERBA suggests that ORDA clarify what it means in proposed § 11.36(b) with regard to the categories of injury and compensable value for when both a Type A and Type B process can be used for a NRDAR assessment. The list of injuries and compensable value is somewhat confusing and it is not clear exactly what types of categories are excluded from this list. ERBA is in favor of a new Type A rule that is clear and easy to understand, for that will help streamline assessments and get to restoration faster. Along these lines, ORDA should look at § 11.36(b) and consider better explaining its meaning (perhaps by identifying which categories of injuries would be ineligible).

#### **IV. Additional Considerations**

In addition to the above comments on particular elements of the Notice, ERBA encourages ORDA more broadly to incorporate language in the Final Rule that identifies restoration credits as a useful tool for NRDAR case teams and PRPs to consider as part of a “streamlined and simplified” NRDAR process. There are many different kinds of third-party restoration providers that could assist Trustees and PRPs alike with getting to restoration faster, including NRDAR-specific restoration banks, in-lieu fee (ILF) structures, multi-purpose banks, and full-delivery request for proposal (RFP) structures. Our industry can provide a menu of different options for various restoration needs that arise under the NRDAR umbrella.

##### **A. Greater Ecological Value and Protection**

One of the biggest advantages to using restoration from a bank (multi-purpose mitigation or NRDAR-focused) is that these banks protect lands in perpetuity. Restoration secured from a bank gives Trustees assurance that the NRDAR funds being spent will provide long-term benefits to the public and ecological resources. In addition, banks typically involve larger, more ecologically valuable parcels, and more rigorous scientific and technical analysis, planning, and implementation than non-bank projects. 33 CFR § 332.3(b)(2). They can also facilitate implementation of ecological restoration before completion of the settlement process and allow PRPs to settle through the payment of money or the purchase of credits. Given these considerations, all parties involved could get more value from a bank project as compared to a non-bank project. ORDA should add language to the Final Rule that explicitly recognizes that, where appropriate and available, acquisition of credits from banking projects is allowed, suggested, and even preferred under the regulations.

##### **B. Timing and Availability**

Time is an important element of the overall NRDAR process. The longer it takes to restore the public’s natural resources, the more interim loss is incurred. Using third-party restoration providers to accomplish NRDAR restoration has the potential to significantly shorten restoration timelines. A fully established multi-purpose bank has already secured all of the necessary permits and authorizations needed to proceed to restoration activities. A bank that has met all its performance standards also removes an additional layer of uncertainty for Trustees and PRPs alike when it comes to success criteria. For NRDAR cases where the injury occurred many years ago, utilizing an established bank allows for prompt resolution of the claim without implicating any potentially thorny questions about baseline. For more recent injuries, if Trustees can come to clear agreement about what metric of restoration (e.g., DSAY or some other unit of NRDAR measurement), then third-party providers who regularly generate

these types of projects could more easily provide options than a PRP-driven or perhaps even a Trustee-driven one-off project.

**C. Leveraging “Leftover” Funds**

Another way in which third-party restoration could be used to help resolve NRDAR cases concerns those “leftover” or “residual” funds from past cases that are now dormant. We understand that there are a not insignificant number of cases where the main restoration projects have long since been implemented and the Trustees moved on, but where there are residual funds left in the NRDAR Fund for that particular claim. One way that ORDA could accomplish more restoration would be to use restoration banks, ILFs, or an RFP structure to combine “leftover” recoveries from multiple past cases and leverage those funds into supporting tangible projects that produce landscape-scale ecosystem benefits.

**V. Conclusion**

ERBA appreciates ORDA’s consideration of these comments and encourages ORDA to address these issues in a Final Rule that revitalizes the Type A process. ERBA wants to help ORDA better understand some of the issues that arise for third-party restoration providers attempting to operate in the NRDAR space and would welcome a further dialogue with ORDA on these issues.

Sincerely,

Kyle Graham, NRDAR Committee Chair  
Amanda Carr, NRDAR Committee Co-Chair  
Brian Ferrasci-O’Malley, NRDAR Committee Advisor  
Sara Johnson, Executive Director

Ecological Restoration Business Association