



DEPARTMENT OF THE ARMY
BALTIMORE DISTRICT, CORPS OF ENGINEERS
ATTN: REGULATORY BRANCH
2 HOPKINS PLAZA
BALTIMORE, MARYLAND 21201-2930

April 11, 2022

Operations Division

Mr. T.J. Mascia
Davey Resources Group, Inc.
1500 N Mantua Street
Kent, Ohio 44240

Dear Mr. Mascia:

This letter is in reference to the Maryland Statewide Umbrella Mitigation Banking Instrument (UMBI) and Lake Elkhorn Mitigation Bank (LEMB) prospectus, dated June 17, 2021. The LEMB proposes to generate mitigation credits to offset unavoidable impacts to waters of the United States (U.S.) authorized under Section 10 of the Rivers and Harbors Act (33 USC 403) and Section 404 of the Clean Water Act (33 USC 1344) within the proposed mitigation bank service area. In addition, the Bank is proposed to generate mitigation credits to offset unavoidable impacts to waters of the State of Maryland authorized under Titles 5 and 16 Environment Article Annotated Code of Maryland and also provide Total Maximum Daily Load (TMDL) and/or National Pollutant Discharge Elimination Systems Municipal Separate Storm Sewer System (MS4) nutrient and sediment credits. The LEMB site is located on an unnamed tributary to the Little Patuxent River within open space in Columbia, Maryland with the center of the site located approximately at Latitude: 39.223139, and Longitude -76.814917. Your Department of the Army (DA) file number for the submitted prospectus is **CENAB-OPR-NAB-2021-60426-M15 (DRG MD UMBI – Lake Elkhorn Mitigation Bank)**.

A Joint Maryland Department of the Environment (MDE) and Corps 30-day public notice was issued on August 2, 2021, for the proposed development of the LEMB site. In response to comments received, the Corps and MDE extended the public comment period and held a Joint MDE/Corps Public Hearing on December 7, 2021. In response to comments received, the public comment period for the Joint Public Hearing was extended through February 23, 2022. Comments and testimony in response to the public notice were received from the Maryland Department of Natural Resources (DNR), U.S. Environmental Protection Agency (EPA), U.S. Fish and Wildlife Service (FWS), elected officials, nonprofit organizations, and the general public.

National Marine Fisheries Service indicated they had no comments on the prospectus. Maryland Historical Trust confirmed a no effect determination for the proposed LEMB site. Interagency Review Team (IRT) Co-chair, Ms. Kelly Neff, Maryland Department of the Environment (MDE), provided MDE's agency comments directly to you on March 10, 2022.

Due to the volume of comments received, the comments have been uploaded to the cyber repository in the Regulatory In-Lieu Fee and Banking Information Tracking System (RIBITS) for your review and response (https://ribits.ops.usace.army.mil/ords/f?p=107:278:4709227469283:::P278_BANK_ID:5978).

The proposed Lake Elkhorn Mitigation Bank site is located within open space managed by the Columbia Association (CA) for the benefit of the residents of Columbia. The Corps continues to have major concerns about the potential impacts and associated limited restoration potential in the upper portion of the project (i.e., High Tor Hill to Jackson Pond). As discussed during the preapplication site visit, tree clearing adjacent to private property requires comprehensive justification in terms of purpose and need and potential functional uplift in consideration of the temporal lag to re-establish the existing forested riparian buffer. This is especially true in an area where the riparian area also serves an aesthetic/recreational function for the public. The Corps recognizes that the proposed impacts to the riparian area are intended to be temporary with the objective of producing long-term gains in aquatic resource functions and services as the habitat undergoes ecosystem development over time; however, while it is possible to enhance a particular function or suite of functions, this may come at the expense of other functions. The removal of mature trees and other dense vegetation in the riparian area of this popular community area may provide increased floodplain connectivity and bank stability, but may also temporarily reduce existing mature forested habitat, aesthetic, and recreational functions and services identified as important factors as expressed in public comments. These concerns are shared by the resource agencies, some elected officials, nonprofit organizations, and local citizens.

The Corps continues to question the need for upper portion of the project in light of the potential consequences and temporal lag in restoring riparian buffer function along with the limited functional uplift/mitigation credit. Therefore, the Corps strongly recommends that the sponsor not proceed with preparation of the draft instrument without removal of proposed work activities in Reach 1 (i.e., upstream of Jackson Pond). The Corps also recommends a "light touch" approach to all areas characterized by moderate to low stream bank erosion potential with adjacent mature riparian forested area that are unable to adapt to increased saturation associated with floodplain reconnection (e.g., the beech tree stands between Tamar Drive and MD 175). Should the sponsor elect to continue to more detailed design, the Corps also strongly recommends that the design be coordinated with local residents and members of the IRT prior to any formal submittal to the IRT.

In addition, the proposed LEMB credit release schedule exceeds Maryland mitigation regulations and IRT credit release guidance to reasonably assure mitigation credit is released at a measured rate throughout the project's monitoring period along with sufficient financial assurances to offset any potential default. We understand that revision to the project area and credit release schedule may impact the practicality of the bank and the Corps is available to discuss these issues. We also understand that agency, public, and private stakeholder involvement, coordination and/or approvals may be required for the proposed project to proceed; therefore, we strongly recommend you begin discussions immediately with the other stakeholders about potential modifications to the scope of the proposed project prior to meeting with the IRT to discuss any revisions. Detailed and specific Corps comments on the prospectus are included in Enclosure 1.

In conclusion, based on our initial evaluation and review of your prospectus, including the comments received in response to the public notice, public hearing, and IRT field visits, the Corps has determined that with certain major revisions to the proposed work and the credit release schedule, the proposed LEMB has the potential to provide compensatory mitigation for activities authorized by DA permits. As stated above, the Corps would strongly recommend the sponsor meet with the IRT to discuss the concerns expressed with the proposed project prior to proceeding with preparation of the draft instrument.

After meeting with the IRT, should the sponsor appropriately address the outstanding deficiencies outlined in this initial evaluation letter and receive approval from the Corps and MDE to proceed, then a draft mitigation banking instrument may be submitted to the IRT and the Corps. The comments provided herein, and separately by the MDE, must be addressed in the preparation of the draft mitigation banking instrument (MBI). A separate errata sheet for the comments must be provided electronically in both Word and pdf format to the Corps and MDE as part of the draft MBI submittal. To facilitate faster review, comments specific to the UMBI and Lake Elkhorn Mitigation Site should be appropriately grouped in the response. Finally, reference the enclosed document entitled "Requirements for Mitigation Bank and In-Lieu Fee Program Instruments" (Enclosure 2) to assist you in preparation of the draft instrument.

A permit application for proposed discharges of dredged and/or fill material into waters of the United States and adjacent jurisdictional wetlands, necessary for construction of the LEMB, pursuant to Section 404 of the Clean Water Act must be submitted concurrent with submittal of the draft mitigation banking instrument. Also, please remember, you must obtain all appropriate state, local and federal authorizations.

If you have any questions concerning this matter, please contact Jack Dinne of this office at (410) 935-3787 or email john.j.dinne@usace.army.mil.

Sincerely,

DAVIA.JOSEPH
.P.1229279170

Digitally signed by
DAVIA.JOSEPH.P.1229279170
Date: 2022.04.11 08:23:54
-04'00'

Joseph P. DaVia
Chief, Maryland North Section

Enclosures

Cc (via email):

Mr. Scott Petrey, WSSI, spetrey@wetlands.com
Ms. Beth Bachur, CENAB-OP-R, beth.bachur@usace.army.mil
Ms. Bethany Blakeman, CENAB-OP-OC, Bethany.A.Blakeamn@usace.army.mil
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Mr. Ray Li, United States Fish and Wildlife Service, ray_li@fws.gov
Mr. Jonathan Watson, National Marine Fisheries Service, jonathan.watson@noaa.gov
Mr. Bill Morgante, Maryland Board of Public Works, bill.morgante@maryland.gov

To identify how we can better serve you, we need your help. Please take the time to fill out our new customer service survey at:
<http://www.nab.usace.army.mil/Missions/Regulatory.aspx>

Enclosure 1 Corps Comments:

1. Ownership/Title Report. There is a title search summary included as Exhibit 10, and the prospectus indicates the full title report and title insurance commitment are available upon request. Please submit a full title report including all exhibits, and the title insurance commitment. Please summarize and explain each easement, each recorded or unrecorded lien or encumbrance on, or interest in the proposed bank property, including each exception listed on the title insurance policy. A plat should be provided depicting all relevant property lines, easements, bank site boundaries on the bank site. Describe the manner in which each encumbrance may affect the bank operations or ecological value and how each encumbrance may or may not affect the long-term sustainability of the bank site. Note any liens and easements that may affect a bank's viability that will need to be resolved before the bank can be approved. The Corps must review and approve title work for the entire proposed project.

2. Section 7 of the Endangered Species Act. The FWS tool, Information for Planning and Consultation (IPAC) report lists potential critical habitat for the Northern Long-Eared Bat (*Myotis septentrionalis*)(NLEB). Please coordinate with FWS to determine whether the project will affect critical habitat (or the bat itself) and include that coordination with the permit application. In addition, please note that the FWS recently published a proposed rule to change NLEB status from threatened to endangered. If NLEB status changes to endangered then incidental take associated with tree clearing activities would be prohibited under ESA. FWS has stated the Final Rule is expected by November 2022.

3. Multiple Credit Program Types. Multiple credit types are proposed to be established including Total Maximum Daily Load (TMDL), National Pollutant Discharge Elimination System (NPDES), Municipal Separate Storm Sewer System (MS4), and Section 404 Clean Water Act compensatory mitigation credits. For proposals to establish and administer multiple program credit types (e.g., TMDL, Water Quality and/or Section 404/Section 10), all the respective credit programs need to actively participate in coordination and administration of any joint bank, including partnering on the IRT and MBI development. Any such proposal will need to be coordinated with the appropriate program(s) to determine how credits are to be established, released, and operated at a joint bank. A draft MBI should address basic procedures for notifying appropriate MDE program representatives and the IRT of joint credit type projects including credit releases. In addition, it is preferable to locate any proposed water quality program credit types at separate geographic locations on the site. There can be no overlap/double counting of credits allocated to separate Clean Water Act programs. Nevertheless, the IRT would require the entire stream and wetland restoration project meet the more rigorous Section 404 compensatory mitigation standards, including performance standards, site protection, financial assurances, monitoring, and long-term management and associated funding.

Alternatively, the UMBI and any MBIs can state that the bank is currently being proposed for 404 mitigation credits only. However, in the future, the sponsor may propose to generate nutrient reduction credits for TMDL or NPDES purposes from

remaining unsold 404 credits. The use of this 404 mitigation bank credits for TMDL or NPDES purposes requires a modification to the UMBI and Mitigation Site Plan (MSP) in accordance with the procedures at 332.8(g). In the event of conversion from 404 to TMDL credits in the future, the entire stream and wetland restoration project must meet more rigorous Section 404 compensatory mitigation standards, including performance standards, site protection, financial assurances, monitoring, and long-term management and associated funding.

4. Credit assessment/determination. Per the Mitigation Rule, please reference aquatic resource “function, values and services” throughout the documents. Credits will be assessed based on the functional uplift and improvement over values and services provided by the aquatic resources, including associated buffers. Stream credits should be determined using the Maryland Stream Mitigation Framework (MSFS) Calculator with the Aquatic Passage component. Contact Mr. Nick Ozburn of our office (at nicholas.r.ozburn@usace.army.mil) for additional guidance and assistance with the MSFS and aquatic passage component.

Similarly, a wetland functional workgroup is developing the Maryland Rapid Assessment Method (MDRAM) to evaluate wetland functional impacts and gains. Pending approval and implementation of MDRAM, tidal and nontidal wetland ratio determinations should follow the ratio determination method approved by the IRT at the time the individual mitigation project approval. Since the MDRAM is expected to be implemented during the operational period of the proposed UMBI, please include a reference stating that once adapted, the new wetland functions tool could be used to evaluate future wetland impacts and wetland credits. In addition, it could also be retroactively applied to any previously approved wetland mitigation bank credit (provided it does not decrease the previously approved wetland credit value in consideration of the associated impact credit calculation). A note indicating this should be added to the LEMB addendum. As with stream credit determinations, wetland credit determination should be based on functional uplift. For example, rehabilitation projects will get different credit determinations than enhancement projects, since more functions are being uplifted. Also, please note that, due in part to the inherent risk and associated temporal lag in achieving full performance, wetland creation projects may get less credit than wetland restoration. This will likely be determined on a case-by-case basis. Because of the potential credit determination differences in approaches, please distinguish between wetland (stream and buffer) “enhancement” and “rehabilitation” in submittals.

Please note there are specific IRT policies for credit increases associated with the type of site protection and the use of an accredited long-term steward (i.e., an accredited land trust). Any credit increases for sites with existing site protection will be determined on a case-by-case basis based on the documented increase in site protection.

Permanent wetland impacts should be removed from the wetland crediting. Also, CA trails including a realistic width for maintenance/disturbance should also be excluded from the credit calculations.

Also, please note that if any federal funds are involved in a proposed bank, the Corps must ensure compliance with 33 C.F.R. 332.3(j)(2): "Except for projects undertaken by federal agencies, or where federal funding is specifically authorized to provide compensatory mitigation, federally-funded aquatic resource restoration or conservation projects undertaken for purposes other than compensatory mitigation, such as the Wetlands Reserve Program, Conservation Reserve Program, and Partners for Wildlife Program activities, cannot be used for the purpose of generating compensatory mitigation credits for activities authorized by Department of Army permits. However, compensatory mitigation credits may be generated by activities undertaken in conjunction with, but supplemental to, such programs in order to maximize the overall ecological benefits of the restoration or conservation project."

5. Permitting. Please note that the Corps and MDE consider stream restoration impacts differently (generally these are permanent impacts for the Corps and temporary impact for MDE). This should be reflected in separate impact tables in the Joint Permit Applications. Please contact the Corps and/or MDE to discuss in more detail.

6. Site Selection and Protection. The compensatory mitigation project site must be ecologically suitable for providing the desired aquatic resource functions, including considerations for watershed-scale features and compatibility with adjacent land uses, watershed management plans. In general, projects proposing to restore stream function and riparian wetland areas will result in ecological benefits; however a proposed restoration project used to provide compensatory mitigation for Department of the Army permits should be strategically sited where the ecologically self-sustainable aquatic resource restoration goals and post-project condition are feasible in perpetuity, have no known encumbrances/rights that will negatively affect the compensation goals, are not likely affected by existing or future activities occurring within the site and on adjacent properties, and are adjoining existing preservation and conservation areas. The compensatory mitigation site goals may be negatively affected by incompatible goals and management needs associated with the administration of the LEMB for public access/open space areas. Please clarify the suitability of the site to provide the desired aquatic functional uplift in consideration of watershed-scale features and compatibility with adjacent land uses and watershed management plans.

Conservation easements are the preferred type of site protection instrument. If it is not practicable to identify a third-party conservation easement holder, the sponsor shall provide documentation of efforts, and an alternative site protection such as a declaration of restrictive covenants may be used when a conservation easement is not practicable. The LEMB addendum indicates "The project is located on land owned and maintained by the Columbia Association." Please clarify what the already-executed site protections provide and what uses are allowed and will be allowed under the LEMB easement agreement. Please include a copy of the CA protections already in place. Also, please clarify what type of long-term planning documents the CA use and how they will be modified to document the LEMB easement agreement. Please clarify if the existing easement will be subordinate to the LEMB easement.

7. Credit Release Schedule. All credit release schedules must reserve a significant share of the projected total credits for release only after full achievement of ecological

performance standards. In Maryland, the significant share to be held for all credit release schedules is a minimum of 20 percent. If a sponsor is not proposing to use the standard credit release schedule for Maryland (Table 1) then the sponsor should address all the factors considered, including those identified in the attached “Credit Release Schedule General Considerations” dated December 2, 2020, or most current version for a determination by the IRT. Please note the current proposed LEMB credit release schedule exceeds the IRT standard and MDE regulations and will require revision and potentially additional justification. Please see the MD IRT’s prescribed credit release schedule(s) in Table 1 below.

Table 1. Credit release for nontidal wetland, stream and fish barrier removal¹ projects.

Milestone	Interagency Review Team (IRT) Standard Release Example		IRT Accelerated Release Example ("Managed-Risk" Projects)	
	Credit Received	Cumulative	Credit Received	Cumulative
Initial Credit Release ²	15%	15%	20%	20%
Construction Credit Release	Up to 15%	30%	Up to 20%	40%
1 st Monitoring Report (Yr 2)	Up to 20%	50%	Up to 20%	60%
2 nd Monitoring Report (Yr 3) ³	Up to 10%	60%	Monitoring report submittal required with no associated credit release	
3 rd Monitoring Report (Yr 5) ⁴	Up to 10%	70%	Up to 20%	80%
4 th Monitoring Report (Yr 7)	Up to 10%	80%	Monitoring report submittal required with no associated credit release	
5 th Monitoring Report (Yr 10)	20%	100%	20%	100%

The Corps understands that certain low risk projects may be approved under RGL 19-01; however, based on the information provided to date it is unlikely that the LEMB would qualify for such an aggressive credit release schedule.

8. Service Area. The service area must be appropriately sized to ensure that the aquatic resources provided will effectively compensate for adverse environmental impacts across the entire service area (33 CFR 332.8(d)(6)(ii)(A)). The MD IRT uses the

¹ Fish barrier removal projects may have an alternate credit release schedule determined on a case-by-case basis.

² 100% release of preservation credit

³ For mitigation projects proposing use of the Managed-Risk Proposals credit release schedule, monitoring reports will still be required in Year 3.

⁴ Starting at the end of Year 5 (the 3rd monitoring report), if the mitigation bank site meets the final year monitoring performance standards for two consecutive monitoring events and has met all performance-based milestones every monitoring year, the bank sponsor may request reduction or waiver of remaining monitoring requirements. In addition, remediation must not have occurred during the last two years before requesting a reduction or waiver of required monitoring requirements to ensure that the compensatory mitigation project is truly meeting its performance standards and progressing towards ecological sustainability.

project location Federal 8-digit HUC (HUC 8) watershed as the primary service area and a secondary service area is generally the adjacent 8-digit HUC(s) abutting the 8-digit HUC in which the mitigation bank is located, within the same 6-digit river basin, and within the same ecoregion as the mitigation bank site. Considerations for service areas include the distance from which ecological functions can reasonably be expected to compensate for impacts, the contribution to existing watershed-based restoration efforts, the degree of restoration of processes within the watershed beyond the bank site location, the position of the bank within the watershed, the quality/diversity/regional significance of the restored habitats, the size and characteristics of the HUC 8 in which the bank is located, types of impacts that may be compensated through the use of credits, watershed needs, economic viability of the bank, etc. Please be sure to address all the criteria in discussing site selection and the need for establishing a bank within the service area. Please note that the Patuxent Mitigation Bank has recently been approved in the proposed LEMB service area.

Use of the bank site for unavoidable impacts located in an approved secondary service area may only be considered during project-specific permit evaluation when there are no available credits in the primary service area of any other bank and the applicant can demonstrate with documentation that the secondary service area will replace the lost aquatic functions at the impact site with in-kind mitigation. Any secondary service area compensatory mitigation purchase must be approved by the Corps and/or MDE, through project-specific permit decisions, prior to purchase. On a case-by-case basis, evaluation of factors listed above will also be used for consideration of the appropriateness of a bank site to compensate for impacts beyond the geographic service area as part of the permit decision by the regulatory agency requiring the mitigation (Corps and/or MDE). This decision is also based on the specifics associated with a permit decision and does not require a separate consultation with the IRT.

9. Performance Standards. Please contact the Corps or MDE for the current Wetland and Stream Performance Standards. Please note that the performance standards will require re-evaluation of the stream metrics, using the stream calculator during each monitoring year. If the score is decreased by more than five percent from the approved score than an adjustment of credits may be implemented.

10. Maintenance/Monitoring/Reporting of Bank Sites. Maintenance and Monitoring Protocols used will be those consistent with the most recent IRT approved standards and protocols at the time of UMBI/bank approval. The sponsor has the responsibility for assuring the success of the compensatory mitigation projects prior to bank closure and transfer to the LTS.

An adaptive management plan shall be developed for each proposed mitigation site under the UMBI to guide decisions for revising compensatory mitigation plans and implementing measures to address both foreseeable and unforeseen circumstances that may adversely affect compensatory mitigation success. The adaptive management plan shall be developed during project planning and mitigation plan approval.

In general, the MD IRT requires a total of 10 years of monitoring for forested nontidal wetlands and compensatory stream restoration projects with possible reduction of monitoring requirements with approval of the IRT if final performance standards are met for two consecutive years (after 5 successful years of monitoring). In no cases shall a mitigation site be monitored for less than 5 years. The annual ledger reports should be submitted at the end of each calendar year or no later than January 31st of the following calendar year during bank operation rather than on the anniversary of the UMBI execution date. Site visits to verify monitoring reports (and any associated credit release request) should not be scheduled in the nongrowing season portion of the year. Monitoring Reports should be submitted electronically to the IRT co-chairs and uploaded to the appropriate cyber repository in RIBITS. In addition, the bank sponsor is responsible for updating the RIBITS ledger within five business days of each credit sale and uploading copies of the completed credit bill of sale statement. Please clarify how multiple credit type banks will track mitigation credits and all credit types withdrawn for other programs. All credits withdrawn should be included in the ledger, with a column listing the program (e.g., mitigation, TMDL, etc.).

11. Interim Monitoring. Please remember to address a potential Interim Monitoring Period, the period when a site has completed the active monitoring period and met all final performance standards but not all the credits have been sold in the draft MBI.

12. Financial Assurances. Financial assurance funding amount cost-estimates for all aspects of the proposed mitigation bank including construction, performance (monitoring and maintenance), and catastrophic funds must be provided with the draft MBI. Please see the Corps' mitigation website for a cost estimate template. When a cost is not itemized or included that is shown on the spreadsheet, please add a comment describing why it is not needed to be included for this site.

13. Long Term Management Plan. The Long-Term Management Plan (LTMP) should address how any trails within the mitigation bank easement will be maintained, including the funds required for this activity. Please clarify that the Long-Term Steward (LTS) will take over upon bank closure, not simply after ten years and meeting performance standards (i.e., interim monitoring is a possibility). The long-term steward should be a land stewardship entity with qualifications, reliability, no potential conflicts of interests, and appropriate adequate funding for the long-term management activities for a future compensatory mitigation bank site. Please address what is the proposed long term funding approach for LEMB. The Long-Term Management Plan should also address the long-term performance of the stream restoration. A LTMP financing mechanism and strategy must be addressed and cost-estimate provided using The Nature Conservancy Land Stewardship calculator (<https://www.conservationgateway.org/ConservationPlanning/ToolsData/Pages/stewardshipcalculator.aspx>).

The prospectus indicates potential Long-Term Steward for the LEMB is the Columbia Association, please clarify their roles, qualifications, and provide documentation of their acceptance of these roles. Will maintenance of the LEMB be conducted by CA staff or

other contractual staff under the direction of CA? For example, does CA have certified herbicide application staff for control of invasive species and staff familiar with wetland plant species?

In addition to clarifying CA qualifications to serve as the Long-Term Steward, please clarify the CA willingness and ability to accept LTM responsibility and confirm they can accept funds for LTM under any applicable fiscal laws. Also, please clarify how/if these funds will be in a separate account specifically dedicated to oversight of the LEMB. Also, please clarify the proposed funding of long-term site protection and management.

14. Tree Removal. As stated above, loss of riparian tree cover within the CA open space along the stream is problematic due to the aesthetics and associated wildlife connections. The value of the trees to residents is intensified and perceived value maybe disproportionate to its value strictly as a riparian buffer. Numerous examples of residents utilizing the riparian area for recreation and citing its value for local wildlife were provided during the comment period. For example, the Maryland Ornithological Society reported 215 different bird species at Lake Elkhorn. The concern that extensive tree clearing will reduce habitats for wildlife and the associated aesthetic value of the CA trail system buffer is understandable. Please evaluate alternatives that would result in less impact to regulated resources and upland forest including less invasive forms of stream restoration, stream stabilization, and stormwater retrofits. Please develop a tree save plan for IRT review and approval. The plan should address the process of identifying and protecting trees and vegetation within the project area LOD. For example, will saved trees be visually identified in the field? How will temporary fencing be employed. How will savaged trees be used in the LEMB project? How will tree root zones be protected from soil compaction during construction? Will tree protection (sheeves) be employed to protect saved trees near access and construction areas? Please consider coordinating the efforts to reduce and avoid tree impacts with CA and local citizens. The Corps would also recommend a site visit with the IRT to review efforts outlined in the tree save plan to avoid and minimize tree removal as a component of a proposed design review walk through.

In addition, please note that the southern portion of the project is designated as Forest Interior Dwelling Species (FIDS) habitat. This area has less visibility to the CA trail system; however, it is still important to avoid and minimize tree clearing and canopy openings. Additionally, any clearing within a FIDS area should follow DNR and FWS requirements (e.g., time of year restrictions, retention of snags and woody debris). Additional coordination with these agencies will be required for any proposed clearing in FIDS habitat.

15. Stormwater Management and the LE Watershed Management Plan. A large number of commenters referenced the CA's watershed plan for Lake Elkhorn and requested implementation of upland BMPs rather than stream restoration. The Corps acknowledges that a portion of these comments/requests were based on a

misrepresentation of the proposed stream restoration work as ditching/channelization of the existing stream with complete clear cutting of the riparian zone. The Corps and the IRT would also oppose such a proposal and never consider approval of any such bank proposal. The Corps also acknowledges the watershed plan does recommend stream restoration along with a set of uplands BMPs. Please address in detail CA's implementation of the recommendations of the watershed plan (including planned and completed projects) and the rationale behind proceeding with stream restoration. Please address how the proposed stream restoration design fits in with watershed plan and more recent reports (e.g., 2016 Columbia Association Lake Sediment Management Plans, 2015 Columbia Association Water Quality Report, Columbia Association Open Space Assessment Report). Please summarize the benefits and constraints associated with remaining recommended projects in the watershed plan including the potential impacts and ability to address hydrologic inputs to the tributary. Please address the observed and/or documented stream response to the implemented stormwater management efforts. Have the efforts resulted in sufficient reduction the watershed hydrologic response to address the excess erosion experienced by the stream? Have high frequency storm events been reconnected to the floodplain? Have the implemented projects addressed the water quality issues within the watershed? Please clarify how any remaining proposed BMPs would address the hydrologic response and if these would be sufficient to address the associated water quality concerns, reconnect the floodplain, address the excess bank erosion currently occurring. Also, please clarify the past and planned dredging (e.g., volumes, sediment characteristic, cost) for the various ponds and lakes within the LEMB project area.

16. Stakeholders-Citizen Outreach. Please provide a description/plan that addresses any public and private stakeholder involvement in design/plan development and implementation, including where appropriate, coordination with federal, state, and local aquatic resource management, regulatory, and property ownership authorities.

Additional General Comments:

17. Some sections of the UMBI clearly delineate the description between the UMBI and addendum(s). In some sections of the UMBI, the there is no distinction or the distinction is confusing or perhaps not completely accurate. Whenever possible, please keep make it clear which element of a description is referencing.

18. The aquatic resources on the site, including wetlands should be delineated and this delineation verified by the Corps. The mitigation plan and the methods of mitigation proposed (e.g., creation, rehabilitation, enhancement, and preservation) should match the verified aquatic resource and wetland boundaries.

19. Please provide the stream reach length (linear feet), wetland area (square feet), Cowardin classification, and GPS coordinates (centroid) for the aquatic resources in a table as part of the draft MBI submittal.

20. Please include a full geomorphic assessment of the stream including near bank stress and erosion potential for entire stream in the stream assessment report. Please note locations of various hydrologic inputs including existing and potential stormwater management.

21. Please provide a water budget in the draft mitigation plan.

22. Please provide further details for the phasing proposed work along with a proposed construction schedule. Please address how the proposed phasing of the construction for each phase can occur without adversely effecting other sections of the overall mitigation area.

23. As stated above, financial assurance funding amount cost-estimates for the construction, performance (monitoring and maintenance), and catastrophic funds should be provided with the draft MSP Addendum 1 to the UMBI. Please see the mitigation website for a cost estimate template. When a cost is not itemized or included that is shown on the spreadsheet, please add a comment describing why it is not needed to be included for this site.

Additional Addendum 1: Lake Elkhorn Comments:

24. The Draft MBI should include additional detail on proposed aquatic functional uplift. Each proposed goal should be supported by baseline data. The evaluation should discuss each reach separately. Each goal must also be tied to a performance standard with measurable criteria to ensure the proposed functional uplift is achieved.

25. The Corps agrees that due to the high amount of impervious surface within the drainage area, the LEMB may only provide limited biological restoration potential. Please clarify the discrepancy that the Prospectus estimates the impervious surface as 26 percent while the U.S. Geological Survey StreamStats webtool estimates it at 42.8 percent. Please provide reference reach data that supports the proposed functional uplift.

26. As proposed the project will result in the loss of this mature forest and the associated functions. Please provide more support for how this riparian buffer will be improved in light of this anticipated loss of riparian function and revise the proposed Level 3 scores as appropriate.

27. Please provide baseline water quality data.

Additional Specific Comments:

28. Page 1. Paragraph 2. The description should also include references to the Corps and Maryland stream and wetland programs (e.g., CWA and RHA).

29. Page 1. Paragraph 2. Sentence 2. “may be used as compensatory mitigation to replace lost functions, values, and services...”

30. Page 2. Paragraph 1. Sentence 1. This is a very long complex sentence. Consider breaking up the sentence for clarity and please add “within an approved bank’s service area” to the last portion of the description. Also, please add waters of the State after waters of the U.S. to the permitted impacts portion of the description.

31. Page 2. Last Paragraph. For clarity, please consider breaking this section into an UMBI specific description followed by an addendum/MB specific description. Also, please consider eliminating “detailed” from the UMBI description since that qualifier is probably best suited for the addendum description.

32. Page 3. Section iv. Similar to the land protections description, please list out the various type of financial assurances that maybe employed.

33. Page 4. If this is the first use, please insert “(GSA)” after Geographic Service Area. Also, is the comma in the first sentence correct?

34. Page 4. Paragraph 1. Sentence 2. The Bank Sponsor”, in consultation with the IRT Co-chairs, “will establish...

35. Page 4. Paragraph 1. Last sentence. Should the Section be renamed since this is explaining individual MB site GSAs not the UMBI GSA?

36. Page 6. M. Would it be more appropriate to state that a share of the credit release is based on full achievement of ecological performance standards?

37. Page 6. N. It seems like the UMBI would provide the basics of bank closure and the details would be specific to each approved addendum. The outline terminology of the following section seems more appropriate.

38. Page 6. 4. Paragraph 2. Please clarify that the use of credits from MBs approved under the UMBI would offset impacts.

39. Page 7. First Section. Acknowledgement that wetland functional assessment for impacts and mitigation crediting is under development for Maryland should be included in this section.

Page 7. B. Sentence 1. To avoid confusion, please avoid the use of “withdrawal” in this context (i.e., credit release schedule). This is an IRT approval and release of credits based on providing specific information and/or achieving ecologically based performance standards. Second sentence. Approval of the use of credits to offset an unavoidable impact is a component of the permit evaluation process. The decision is made by Corps and MDE permit evaluators, sometimes in consultation with the IRT.

40. Page 8. Table 1. Footnote 1. RGL 19-01 prescribes three credit releases not seven. The first column would be considered a hybrid release schedule based on RGL 19-01. Footnote 2. ...may propose "for IRT approval" an alternative.... Footnote 3. ...two consecutive years of "fully" meeting...

41. Page 8. End of Credit release Schedule. The description should also cover the release of preservation credits as a separate topic.

42. Page 8. C Annual Report. Generally annual monitoring reports are due by the end of the year to allow inclusion of recent growing season information; however, if this is intended to be a summary document of all addendums approved under the UMBI the anniversary date maybe acceptable. The section may want to address the different reporting requirements. Submittals will be both an electronic upload to the agencies and/or RIBITS and a hardcopy.

43. Page 9. 5. Paragraph 2. A description of interim monitoring should be included for any addendum that has all credits release but has not sold all the credits and is therefore not ready for bank closure and LTM.

44. Page 9. 5a. Paragraph 2. Please confirm the 2018 monitoring protocols is the most current.

45. Page 10. Paragraph 2 and 3. A hard return is missing between the paragraphs.

46. Page 11. 6. Please add Maryland Historical Trust (MHT) to the IRT list.

Addendum 1

Addendum 1. Cover page. Please standardize the project name. In some places it is WSSI Maryland Statewide and in other places it is DRG/WSSI Maryland Statewide.

47. Overview. Bank Purpose. Please add references to MDE's authorities too.

48. Page 4. Section iv. A survey of macroinvertebrates would also be useful in establishing water quality and biological function of the stream.

49. Page 5. F. The proposed credit release schedule is too aggressive. Without significant financial assurance withheld for the duration of the monitoring period the most the IRT would approve is 50 percent by approval of post construction requirements. Also, the IRT requires a minimum of 20 percent for the final release. Please contact the Corps and MDE to discuss a revised credit release schedule.

50. Page 6. 5 b. This description does not address the feasibility of the project based on the needs identified in watershed plans. In terms of Site Selection Factors please address what are the long-term trends in land use are for this watershed. How is the proposed design compatible with these adjacent land uses and provide for the long-term sustainability of the site? Describe how the proposed mitigation plan will provide landscape corridors and be sited contiguous with existing corridors and connections to

other aquatic and protected areas. Describe how the proposed mitigation plan incorporates wetland and riparian buffers to protect water quality from adjacent and upstream land uses.

51. Page 10. 8 c. along with a complete Title Report requested above, please provide the Title Insurance information.

52. Page 14. Summary of Impacts. Stream restoration impacts are considered permanent by the Corps. Activities like dewatering and temporary access restored to preconstruction conditions are considered temporary impact.

53. Maryland Stream Mitigation Framework spreadsheet. For a project of this scale, the MSMF requires the use of a detail stream functional assessment not the EPA RBP.

Preliminary Concept Design Map. Is the proposed wetland creation displayed on the map? Creation is also not mentioned in the narrative following the maps. Please clarify. Please include the results of the 2D modeling in the draft MBI submittal (as color coded mapping). Also, please include the stream functional assessment (pre and proposed) forms as part of the draft MBI submittal. As stated above, a detail function assessment approach should be used not the RBP.

Enclosure 2 Requirements for Mitigation Bank and In-Lieu Fee Program Instruments

Mitigation bank and in-lieu fee program instruments must include the following information:

- Description of the proposed service area(s). Service areas may be based on the watershed, ecoregion, or physiographic province, and/or other geographic area in which the bank or in-lieu fee program is authorized to provide compensatory mitigation
- Accounting procedures
- Provision stating that legal responsibility for providing mitigation lies with the sponsor once a permittee secures credits from the sponsor
- Default and closure provisions
- Reporting protocols
- Any other information deemed necessary by the district engineer

For a mitigation bank, a complete instrument must also include the following information (33 CFR 332.4(c)(2)-(14)/ 40 CFR 230.94(c)(2)-(14)):

- Objectives
- Site selection factors considered
- Site protection instrument (conservation easement, declaration of restrictions, title transfer, etc.)
- Baseline information – description of ecological characteristics of the proposed mitigation bank site
- Description of number of credits to be provided
- Mitigation work plan – detailed written specification and work descriptions for the mitigation bank site
- Maintenance plan – description and schedule of maintenance requirements
- Performance Standards – ecologically-based standards used to determine whether the project is achieving its objectives
- Monitoring requirements
- Long-term management plan – description of mitigation site management after meeting all performance standards to ensure long-term sustainability of the site
- Adaptive management plan – a management strategy to address unforeseen changes in site conditions or other aspects of the project. It guides decisions for addressing circumstances that adversely affect a mitigation project
- Financial assurances – a description of any financial assurances that will be provided to ensure that the mitigation project will be completed in accordance with its performance standards.
- A credit release schedule tied to achievement of specific milestones.

For an in-lieu fee program, a complete instrument must include the following information:

- Compensation planning framework (33 CFR 332.8(c)/40 CFR 230.98(c));
- Specification of the amount of advance credits (33 CFR 332.8(n)/40 CFR 230.98(n)) and the fee schedule for these credits;
- Methodology for determining future project-specific credits and fees;
- Description of the in-lieu fee program account (33 CFR 332.8(i)/40 CFR 230.98(i)).

Enclosure 3 Credit Release Schedule General Considerations" dated December 2, 2020

Mitigation Rule 33 CFR 332.8(o)(8)(i) Credit Release Schedule General Considerations
and
Regulatory Guidance Letter 19-01 (RGL-19-01)
Baltimore District, U.S Army Corps of Engineers
December 2, 2020

The Corps' Regulatory Guidance Letter (RGL) 19-01 provides guidance on credit release schedules for mitigation banks. RGL 19-01 discusses an optional credit release schedule for mitigation banks to allow more credit to be released after the Corps has reviewed the as-built plans and other monitoring information and determined that the mitigation bank has been successfully constructed. To qualify for this optional RGL 19-01 credit release schedule, the mitigation sponsor must agree to keep full replacement financial assurances in place until the mitigation bank has achieved the ecological performance standards necessary for the final credit release.

A requirement for adoption of a RGL 19-01 credit release schedule is for posting of full replacement financial assurances and those financial assurances cannot be released until all ecological performance standards are met for the site for final credit release. When the sponsor establishes full replacement financial assurances and keeps those financial assurances in place until the mitigation bank or in-lieu fee (ILF) project site achieves its ecological performance standards, the RGL 19-01 credit release schedule allows for 3 releases: 1) initial credit release, 2) one post-construction interim release, and 3) final credit release. A credit release schedule with a greater number of interim credit releases will be required when the Corps does not have a high degree of confidence that the project will succeed, or the sponsor wants financial assurances released back as performance-based milestones are achieved.

As part of the review for all financial assurances, the sponsor will provide a cost estimate of the proposed financial assurances to the Corps for review and approval. Full replacement financial assurances will cover the cost of providing replacement compensatory mitigation, including costs for land acquisition, planning and engineering, legal fees, mobilization, construction, monitoring, and mid-course adaptive management and corrective actions. The sponsor will provide an itemized cost breakdown using the current version of the district-approved cost-estimate spreadsheet (available on the Baltimore District RIBITS website and <https://www.nab.usace.army.mil/Missions/Regulatory/Mitigation/>) for Corps review, in coordination with the IRT. The completed cost-estimate spreadsheet should be labeled as draft/confidential/proprietary. There may be different project costs not identified on the spreadsheet that may need to be added. However, for any itemized costs not completed on the cost-estimate spreadsheet, the rationale for not including those costs shall be provided in the comments column of the spreadsheet.

The Corps has discretion, after consulting with the Interagency Review Team, to determine the credit release schedule for a particular bank or ILF project. The Corps will consider aspects of the mitigation bank or ILF project site, including but not limited to the following factors when determining the credit release schedule. Mitigation banking instrument submittals proposing credit release schedules aligned with RGL 19-01 must address/discuss the following factors on a project-specific basis for the IRT's

evaluation and consideration in determining the appropriate credit release schedule. The sponsor may provide relevant peer reviewed studies and professional experiences to demonstrate successes in how resources were restored, including timelines and any other information helpful for IRT evaluation. The Corps determines, after consulting with the IRT, the appropriate credit release schedule for the proposed mitigation bank after considering the specific characteristics of the mitigation bank and past performance of the sponsor.

1. Method of providing compensatory mitigation credits:
 - Projects where the causes of degradation are easily reversed and are intended to address most, if not all, causes of degradation
 - Site previously supported targeted aquatic resources (rehabilitation, re-establishment, or enhancement)
 - Establishment/some re-establishment projects may not be appropriate
2. Likelihood of success and risks
 - Higher risk projects may not be appropriate
 - Site selection, existing and projected future adjacent and watershed land uses
 - Difficult-to-replace aquatic resources (e.g., bogs, fens, vernal pools, streams, etc.)
3. Nature and amount of work needed to generate credits
 - Amount of work needed for ecological improvements
 - Complexity of the work
 - Reliance on structures requiring maintenance
4. The aquatic resource type(s) and function(s) to be provided by the mitigation bank or ILF project
 - Time between initiation of mitigation project and maturation of anticipated ecological functions at the site
 - Difficulty in restoring functions
5. Other specific characteristics of the mitigation bank or ILF project
 - Site selection/watershed approach (landscape connectivity, adjacent land uses, connectivity to adjacent existing aquatic resources)
 - Buffers
 - Stormwater management plans at site/watershed,
 - Need for active management, structures requiring maintenance (e.g., outfalls, drop structures, weirs, bank stabilization)
 - Invasive species
 - Difficult-to-replace resources
6. Past performance and experience of the sponsor and team
 - Number of approved banks/past success of approved mitigation banks
 - Record of successful credit releases

- Record of posting financial assurances
 - Experience with the proposed project type and level of risk typically involved in that project type
 - Experience within NAB ecoregions and/or watershed or similar ecoregion/watersheds
 - Experience with delivery under other mechanisms like permittee-responsible mitigation or other programs
 - Compliance record for permits, mitigation, mitigation banking and ILF instruments
7. Mitigation demands in watershed – watersheds with development demands and limited mitigation options for permittees
8. Any other factors deemed appropriate by the IRT.