

# **In-Lieu Fee Program Instrument Outline For Proposed In-Lieu Fee Programs in the States of Kansas and Missouri**

The U.S. Army Corps of Engineers (Corps) and U.S. Environmental Protection Agency joint regulation (33 CFR Part 332) for Compensatory Mitigation for Losses of Aquatic Resources, herein referred to as the Mitigation Rule, improves planning, implementation, and management of permittee-responsible and third party compensatory mitigation projects. The purpose of this document is to explain how the various Corps Districts, whose regulatory boundaries fall within the State of Missouri and the surrounding states, in consultation with the state's Interagency Review Team (IRT), comprised of representatives from federal and state resource agencies, interpret the required content for documentation of an in-lieu fee (ILF) compensatory mitigation program.

An ILF compensatory mitigation program is one that involves the restoration, establishment, enhancement, and/or the preservation of aquatic resources through funds paid to a non-profit natural resource management entity or to a governmental (federal, tribal, state, or local) body by a Department of the Army (DA) permit recipient in order to satisfy compensatory mitigation requirements outlined in the DA permit. Similar to a compensatory mitigation bank, an approved ILF program sponsor sells compensatory mitigation credits to DA permit recipients whose obligation to provide compensatory mitigation is then transferred to the ILF program sponsor. It is the ILF program sponsor's responsibility to identify and to propose projects that result in the overall improvement to aquatic resources within the approved service area of the ILF program. Funds, generated by the sale of advance credits, are used to identify, plan, and implement various types of ILF compensatory mitigation projects.

The operation and the use of an ILF program are governed by an ILF program instrument. The approval of the ILF program sponsor, the approval of the ILF program instrument, and the approval of individual mitigation project sites is the responsibility of the Corps in consultation with the IRT. A timeline for the approval process is included as Appendix A of this document.

The following outline identifies the information that must be submitted to the appropriate Corps District and to the IRT for evaluation and the approval of an ILF program sponsor. The level of detail necessary for the compensation planning framework is at the discretion of the district engineer, and will take into account the characteristics of the service area(s) and the scope of the proposed ILF program.

## **I. A Complete ILF Program Prospectus Includes:**

- A. The objectives of the proposed ILF program.
- B. How the ILF program will be established and operated.
- C. The proposed service area(s), including a shape file, with metadata, illustrating the service area boundary.
  1. The service area for the ILF program should be defined as an appropriately sized watershed or part of a watershed where aquatic resource functions and services are to be mitigated.

- a. Service areas must be justified by the watershed approach and the overall suitability of any proposed project site to provide flood attenuation, water quality benefits, habitat for wildlife, and resource type replacement for wetlands and streams that are most likely to be impacted or are in need of restoration or establishment in the proposed service area.
  - b. The Corps Districts, operating in Missouri, and the state IRT have agreed that the Ecological Drainage Unit (EDU) is the largest service area unit that will be considered in Missouri. The Kansas City District and the Kansas IRT have agreed that the Hydrologic Unit Code (HUC) is the basis for the service area unit boundary. Individual Corps Districts will work with the state IRT to determine the appropriate service area boundary for a particular state. The ILF program sponsor can be approved to operate in more than one service area. However, the compensation planning framework must be completed for each proposed service area of operation.
- D. The general need for and the technical feasibility of the proposed ILF program.
- E. The proposed ownership arrangements and the long-term management strategy for the ILF project sites.
- F. The qualifications (not-for-profit charter or federal, tribal, state, or local government) of the entity to be an ILF program sponsor and the qualifications of that entity to successfully complete the type(s) of mitigation project(s) proposed, including information describing any past such activities completed by the sponsor.

**G. Compensation Planning Framework**

1. The compensation planning framework must support the watershed approach to compensatory mitigation and all ILF projects must be consistent with the approved compensation planning framework.
2. The watershed approach identifies and defines any unique watershed boundaries within the service area and incorporates the items below to address how the ILF program will benefit wetland and/or other aquatic and riparian habitats, water quality, hydrologic conditions, and wildlife needs within the identified service area.
  - Identify and briefly discuss historic losses and current trends of losses of wetlands, losses of aquatic habitats, losses of riparian areas, and losses of wildlife habitats within the watershed based on current and historic land use as appropriate.
  - Identify and briefly discuss water quality issues present within the watershed.
  - Describe the immediate and the long-term needs of the watershed to improve both the aquatic and upland wildlife habitats and the water quality and describe the suitability (technical feasibility) of the site to meet the needs of the watershed.
  - Describe the historic and the current state of the project site and the adjacent lands. In addition, describe the ecological suitability (physical, chemical and biological characteristics) of the site to achieve the objectives of the mitigation project and to improve the conditions within the identified watershed.

- Identify and discuss the short-term and the long-term off-site threats (including water rights) within the watershed that may affect the wetlands, streams, riparian zones, and the water quality services constructed at the project site. Discuss how these threats are addressed in order to assure longevity of services at the mitigation site.
3. The compensation planning framework must include the following items.
    - a. The geographic service area, including a watershed-based rationale for the delineation of each service area. In addition, provide a shape file, with metadata, illustrating the service area boundary.
    - b. A description of the threats to the existing aquatic resources in the service area, including how the ILF program will help offset impacts resulting from those threats.
    - c. A description of the historic loss of aquatic resources in the service area proposed for operation by the ILF sponsor.
    - d. A description of current aquatic resource conditions such as; 303(d) listed waters; active stream incision and/or bank erosion; general riparian zone condition, etc. in the service area(s). Descriptions must be supported by an appropriate level of field documentation.
    - e. Describe the aquatic resource goals and objectives within each proposed service area, including a general description of the amounts, types, and locations of aquatic resources the program will seek to provide.
    - f. A prioritization strategy for selecting and implementing compensatory mitigation activities.
    - g. An explanation of how preservation of existing resources meets the needs of compensatory mitigation based on the following criteria:
      - The resources to be preserved provide important physical, chemical, and biological functions for the particular watershed.
      - The resources to be preserved contribute significantly to the ecological sustainability of the watershed.
      - The resources are under threat of destruction or adverse modification.
      - Because the preservation site provides compensatory mitigation to offset losses of aquatic resources and because preservation must be proposed in conjunction with aquatic resource restoration, establishment and/or enhancement activities, unless waived by the district engineer, the preservation site must be protected by a real estate covenant or other legal instrument.
      - Generally, for the approval of preservation credit, the area proposed for preservation credit must be larger than the area of aquatic impact authorized in the DA permit (greater than 1:1 compensation ratio).
    - h. Describe any public and private stakeholder involvement in plan development and implementation, including, where appropriate, coordination with federal, state, tribal and local aquatic resource management and regulatory authorities.
    - i. Describe the long-term protection and management strategies for activities conducted by the ILF program sponsor.
    - j. Describe the strategy for periodic evaluation and reporting on the progress of the program in achieving the goals and the objectives described in item (e) above including a process for revising the compensation planning framework as necessary.

4. Any modifications to the compensation planning framework must be approved by the district engineer in consultation with the IRT.

H. Describe the ILF program account that meets the following criteria:

1. The account must be established at a financial institution that is a member of the Federal Deposit Insurance Corporation.
2. All interest and earnings accruing to the program account must remain in that account for use by the ILF program for the purposes of providing compensatory mitigation.
3. The program account may only be used for administrative costs, and the selection, design, acquisition, implementation, and the management of the ILF compensatory mitigation project site(s). Up to ten percent of the program account may be used for the administrative costs associated with administering the program.
4. The terms of the program account must specify that the district engineer has the authority to direct those funds to alternative compensatory mitigation projects in cases where the sponsor does not provide compensatory mitigation in a timely manner (typically by the end of the third full growing season after the first advance credit in the service area is secured).
5. If the program sponsor accepts any funds from entities other than Department of the Army permit recipients those funds received must be held in an account separate from the ILF program account.

Note – As part of the ILF program instrument the compensation planning framework will be reviewed by the IRT and will be a major factor in the district engineer’s decision on whether to approve the instrument. A compensation planning framework must be submitted for each service area proposed for operation by the ILF program sponsor.

## **II. Draft ILF Instrument Requirements**

A. Describe the proposed geographic service area of the ILF program.

1. The basis for the proposed service area, as outlined in Section I above, must be documented in the instrument.
2. Provide a map outlining the proposed service area along with a shape file, including metadata, illustrating the service area boundary.
3. The instrument may govern multiple service areas within the state or the Corps District. However, all impacts and compensation must be accounted for by service area and the Compensation Planning Framework must be completed and approved for each proposed service area of operation.

B. A discussion of the factors reviewed to establish the level of advance credits requested by the program sponsor and the accounting procedures for the advance credits, the released credits, and the credits sold.

C. A provision stating that legal responsibility for providing the compensatory mitigation lies with the ILF program sponsor once a permittee secures credits from the sponsor.

D. Default and closure provisions.

- E. Reporting protocols for credit sales and monitoring report schedule.
- F. Any other information deemed necessary by the district engineer.
- G. The compensation planning framework, as described in Section I(G) must be completed for each proposed service area.
- H. Specification of the initial allocation of advance credits and a draft fee schedule for these credits, by service area, including an explanation of the basis of the requested advance credit allocation and draft fee schedule.
  - 1. The credit fee schedule (cost per unit of credit) must include the expected costs associated with the restoration, establishment, enhancement, and/or preservation of aquatic resources in the service area. These costs are based on full cost accounting and include: land acquisition, project planning and design, construction, plant materials, labor, legal fees, monitoring, remediation, and program administration.
  - 2. The advanced credit allocation must be justified based on the typical size of the projects envisioned and the anticipated rate of credits earned in the service area.
- I. A methodology for determining future project-specific credits and fees.
- J. A description of the ILF program account, established at a financial institution that is a member of the Federal Deposit Insurance Corporation. The terms of the account must contain language that provides the authority to the district engineer to direct funds held in the account to alternative compensatory mitigation projects in cases where the sponsor has not completed compensatory mitigation in a service area by the third full growing season after the first advanced credit was purchased.
- K. IRT review.
  - 1. When the appropriate Corps District determines that the draft ILF program instrument is complete the ILF program sponsor must provide a sufficient number of copies of the draft instrument to the district engineer in order that a copy can be provided to each member of the IRT.
  - 2. The IRT may provide comments to the district engineer for incorporation into the final ILF program instrument. The Chair (USACE Project Manager) of the IRT will seek to resolve all issues, using a consensus based approach, prior to preparation of the final instrument.

### **III. Final ILF Instrument Requirements**

- A. The ILF sponsor must submit a final instrument to the appropriate Corps District for approval. The final instrument must contain documentation that explains how the final instrument addresses the comments provided by the IRT.
- B. The ILF program sponsor must provide a copy of the final instrument directly to each of the participating members of the IRT.

- C. The district engineer will contact the IRT agencies, by letter, to inform them that he/she is prepared to sign the final instrument.
- D. If the IRT members agree with the approval of the final instrument the appropriate agency official will sign and return the signature page to the corps for final approval.

#### **IV. Individual ILF Project Approval**

- A. When an ILF mitigation project site is identified the ILF sponsor must submit a mitigation plan to the appropriate Corps District that includes the following items.
  - 1. Objectives
    - a. Specific objectives must identify: order, classification such as Rosgen, and channel-floodplain connectivity. The final goal to be provided by the resource for: amount (e.g., acres, linear feet); function (e.g., channel stability, shading of riverine system, vegetative structure, reconnect stream to floodplain); and/or services (e.g., filtering nutrients from agricultural runoff, provide quality habitat for a specific species of concern),
    - b. The resources to be provided (e.g., forested or emergent wetlands with species composition matching reference aquatic resources of similar type and landscape position in the service area, stream type, provide flood water capacity, improve aquatic species passage),
    - c. The method of compensation (i.e., restoration, enhancement, establishment, preservation), and
    - d. The feasibility of establishing the desired resource. Briefly describe how the resources provided will address the needs of the watershed and the proposed service area.
  - 2. Site Selection
    - a. Compensatory mitigation projects shall be appropriately sited and designed to ensure that natural hydrology and landscape position will support long-term sustainability and function as a self-sustaining system. Discuss how the mitigation site is ecologically suitable for providing the desired aquatic resource functions by describing:
    - b. The hydrological conditions, soil properties, native seed source, and other physical and chemical characteristics.
    - c. The watershed-scale features such as aquatic habitat diversity, habitat connectivity, the existence of threatened or endangered species related to prior habitat loss, and other landscape scale functions.
    - d. The size and the location of the mitigation site relative to hydrologic sources (including the availability of water rights) and other ecological features.
    - e. The compatibility with adjacent land uses and any existing watershed management plans.
    - f. The reasonably foreseeable effects the compensatory mitigation project will have on ecologically important aquatic or terrestrial resources, cultural resources, or habitat for federally or state listed threatened and endangered species.



- Wetland credit types shall be identified to the Cowardin class (e.g., PFOs, PSS, PEM). In the absence of a condition or functional assessment method, wetland credits will be determined based on a combination of land area and the method of compensation (restoration, enhancement, establishment, and/or preservation), with a maximum credit value given not to exceed 1 credit for each 1 acre gain in wetland area. Upon implementation of a functional or condition assessment method in the State of Missouri the approved methodology will be used to assess wetland credits.
- Stream credits will be determined by applying an approved stream assessment method (Missouri Method, Kansas Method, etc.) or, in the absence of an approved method, the Corps, in consultation with the IRT, will determine the number of stream mitigation credits created at the ILF project site. The credits assigned will be determined by stream type (ephemeral/intermittent/perennial), location, stream condition, in-stream and riparian zone improvements, and the total linear feet of stream contained in the project site. Riparian areas are critical components of stream ecosystems that provide important ecological functions, and directly influence the functions of streams, especially in terms of habitat quality and water quality. Therefore, it is important for mitigation projects containing streams and other open waters to include riparian areas as part of the overall compensatory mitigation project.
- Upland buffers adjacent to wetlands that provide habitat connectivity and other ecological functions, and improve water quality may also generate compensatory mitigation credits because of their contribution to the ecological functions of the overall compensatory mitigation project. The Corps in consultation with the IRT will determine on a case-by-case basis when buffers are essential to maintaining the ecological viability of adjoining aquatic resources, and thus eligible to produce compensatory mitigation credits. Credits will be determined on a percentage of land area, habitat connectivity, and ecological functions to be included as buffer until a condition or functional assessment methodology is approved.

## 6. Mitigation Work Plan

- a. Describe in detail the specifications and work descriptions of the compensatory mitigation project, including, but not limited to the geographic boundaries of the project; construction methods; timing; and sequence.
- b. Describe the sources of water, including connections to existing waters and uplands, and anticipated seasonal water depths in the wetland (water budget).
- c. Describe the methods for establishing the desired plant community and plans to control undesirable plant species, including species composition and type of plantings (i.e. seeding, propagules, seedlings, saplings, etc.) and height of saplings. If trees are being planted, include a plan for how to control for wildlife damage.
- d. Include any grading plan identifying the location and the elevation of the constructed features proposed.
- e. For stream projects include existing channel cross-sections, proposed alterations to the stream channel and/or stream banks, a description of in-stream structures including materials used for improvements, dimensions and elevations, and riparian plantings.

## 7. Operation and Maintenance Plan

- a. Provide a description of and a schedule of maintenance required to maintain the viability of the mitigation site once the initial construction is completed [e.g. mowing frequency and timing, herbicide (application method, timing, type, and frequency), irrigation plan, passive water control structures, supplemental irrigation source, in-stream structures]

## 8. Performance Standards

- a. Describe the ecological, administrative, and adaptive management standards that will be used to determine whether the compensatory mitigation project is achieving its objectives. The standards must be based on attributes that are objective and verifiable. They must be based on the best available science that can be measured or assessed in a practicable manner. The standards should take into account the expected stages of the aquatic resource development process in order to allow early detection of potential problems and appropriate adaptive management. The use of reference aquatic resources (least disturbed and exhibit the highest levels of functions in the service area) is encouraged to establish performance standards. This approach can help ensure that the performance standards are reasonably achievable, by reflecting the range of variability exhibited by the regional class of aquatic resources as a result of natural processes and anthropogenic disturbances.
- b. The performance standards should relate to the objectives of the mitigation site, so that the project can be quantitatively and/or qualitatively evaluated to determine if it is developing into the desired resource type, providing the expected functions and/or services, and attaining any other applicable metrics. Examples include:
  1. Structural Measures:
    - Description-size, classification (HGM, Cowardin, Rosgen) of aquatic resource(s).
    - Hydrology-duration, periodicity, Soils-hydric indicators, redoximorphic features,
    - Vegetation-dominants, species composition, density, coverage,
    - Stream-status of structures and structural integrity, sinuosity, cross-section, bank full width, particle size (e.g. no significant change in D50 size particle silt, sand, gravel, cobble ), longitudinal profile.
  2. Indicators of attainment or condition: snag density, foliage height, diversity, basal area, degree of shading, channel profile,
  3. Composite measures-FQI, HSI, IBI, FCI/FCU, etc.

## 9. Monitoring Requirements

- a. Monitoring of the project site must be conducted by the ILF sponsor or their authorized agent in order to determine if the compensatory mitigation project is on track to meet performance standards and used as a measure to determine if adaptive management is needed.
- b. The project site must be monitored for a period not less than five years after final construction and planting. Extending the monitoring period beyond the five year minimum may be required depending on:

1. Resource type (e.g., forested wetlands, riparian corridors, bottomland hardwood forests, wet prairie).
2. Adaptive management measures occurring after initial site work (e.g., planting of additional trees, adjustments/re-building of in-stream structures to address stream stability).
- c. The instrument must include: the parameters to be monitored, monitoring methods and procedures, a schedule for monitoring; the party responsible for conducting the monitoring and, if separate, the party responsible for submitting the monitoring report; and permission for the IRT members to participate in the monitoring process if requested.
- d. Upon a determination by the Corps and IRT that performance standards have not been met or the compensatory mitigation project is not on track to meet them, the monitoring period may be extended. The IRT may also revise monitoring requirements when remediation and/or adaptive management is required.

#### 10. Long-term Management Plan

- a. Describe how the project site will be managed after performance standards have been achieved to ensure the long-term sustainability of the resources, including a description of long-term management needs, annual cost estimates for these needs, identify the funding mechanism that will be used to meet those needs and the party responsible for carrying out the long-term management activities.
- b. The sponsor is encouraged to transfer the long-term management responsibilities for the project site to a land stewardship entity, such as a public agency, non-governmental organization, or private land manager, as long as the entity is approved by the IRT. If the entity is identified in the instrument they shall be signatory to the instrument.
- c. In cases where the long-term management entity is a public authority or government agency, that entity shall provide a plan or give an indication how long-term financing will be established, and include a written stewardship commitment specifying commitment to long-term management and maintenance and a plan for financing.
- d. Non-governmental organizations shall demonstrate that long-term financing mechanisms will be implemented. In cases where long-term financing for long-term management of compensatory mitigation projects is necessary, district commanders should consider the need to make inflationary adjustments and certain financial assumptions such as total return assumptions and capitalization rates (e.g. endowments, or Consumer Price Index adjustments in the case of annual payments).
- e. The Corps and IRT prefer that the land stewardship entity be identified in the instrument however the Mitigation Rule provides the prospective sponsor flexibility to identify the entity at a later time as long as the future transfer of long-term management responsibility is approved by the Corps and IRT.

#### 11. Adaptive Management Plan

- a. Describe strategy to address unforeseen changes in site conditions or other components that adversely affect the project's success, including the party or parties responsible for implementing the adaptive management measures.

- b. Circumstances that may qualify for adaptive management include an inability to construct the mitigation project in accordance with the approved mitigation work plans, the monitoring report or other information reveals the mitigation site is not progressing towards meeting its performance standards, possible remedial measures that result in site modifications, design changes, revisions to maintenance requirements, revised monitoring requirements.

## 12. Financial Assurances

- a. Describe the financial assurances that will be provided and how they are sufficient to ensure a high level of confidence that the compensatory mitigation project will be successfully completed in accordance with the proposed performance standards.
- b. The amount of financial assurances, approved by the district engineer, will be determined by the size and the complexity of the project site, the degree of completion of the project at the time of project approval, the likelihood of success, the past performance of the program sponsor, and any other factors the Corps deems appropriate.
- c. The rationale for determining the amount of the required financial assurances must be documented in the instrument and may include (costs for land acquisition, planning and engineering, legal fees, mobilization, construction, monitoring, and maintenance.)
- d. The financial assurances may be in the form of performance bonds, escrow accounts, casualty insurance, letters of credit, or other appropriate instruments approved by the district engineer. The financial assurances must be in the form that ensures the district engineer will receive notification at least 120 days in advance of any termination or revocation.
- e. For performance bonds or letters of credit a standby trust account must be established. All amounts paid by the financial assurance provider must be paid directly to the standby account for distribution by the account trustee in accordance with the Corps' instructions.
- f. Financial assurances may be phased out when the mitigation project site has been determined by the Corps to be successful in accordance with its performance standards. Otherwise, the assurance shall remain in place until the Corps in consultation with the IRT determines performance standards have been achieved.
- g. The instrument must clearly specify the conditions under which the financial assurances are to be released to the sponsor, and/or other financial assurance provider.

## B. Credit Release Schedule for the ILF Project Site

1. All credit releases must be approved by the Corps, in consultation with the IRT, based on a determination that required milestones have been achieved.
2. Release of credits must be tied to performance based milestones (i.e. construction, planting, establishment of specified plant communities, bank full events, etc.).
3. Up to 20 percent of the total credits projected may be debited from the project site upon instrument approval, appropriate financial assurances have been established, and any other requirements determined to be necessary by the IRT have been fulfilled.
4. The credit release schedule should reserve no less than 20 percent of the total credits for release only after full achievement of ecological performance standards.

5. In order for credits to be released, the sponsor must request the release and submit documentation (i.e. monitoring report) to the Corps demonstrating that the appropriate milestones have been achieved. The Corps will provide copies of this documentation to the IRT members for review. The IRT members will provide any comments to the Corps within 15 days of receiving this documentation. If the Corps determines that a site visit is required to verify that milestones have been achieved the IRT members must provide any comments to the Corps within 15 days of the site visit. The Corps must schedule the site visit so that it occurs as soon as it is practicable, but the site visit may be delayed by seasonal considerations that affect the ability of the Corps and the IRT to assess whether the applicable credit release milestones have been achieved. After full consideration of any comments received, the Corps will determine whether the milestones have been achieved and the credits can be released. The Corps shall make a decision within 30 days of the end of that comment period, and notify the sponsor and the IRT.
6. The Corps, in consultation with the IRT, may modify the credit release schedule, reduce the number of release credits or suspend advance credit sales or transfers altogether, when deficiencies in the performance standards have been observed or specific requirements of the instrument have not been met.

# Appendix A

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

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

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Total Required Federal Review (Phases II-IV): ≤225 Days

\*Timeline also applies to amendments

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

## **Appendix B**

### **In-Lieu Fee Program Advance Credit Operating Procedures**

The purpose of Appendix B is to explain the operating procedures to be used by

In-Lieu Fee (ILF) Program sponsors, operating within the State of Missouri and in the State of Kansas, to determine and use advance credits as defined in the U. S. Army Corps of Engineers and the U. S. Environmental Protection Agency joint regulation for Compensatory Mitigation for Losses of Aquatic Resources (Mitigation Rule) found at 33 CFR, Part 332.

The term advance credit means any credits of an approved ILF program that are available for sale, within an approved service area, prior to being fulfilled<sup>1</sup> in accordance with an approved mitigation project plan. Advance credits are awarded to ILF Program sponsors to provide support for mitigation projects prior to the ILF sponsor accruing sufficient credits to support site planning and other mitigation activities within a service area. The goal in establishing advance credits is to reduce delays in mitigation that would have otherwise occurred between when funding was received from parties that impacted the resource and when the ILF sponsor had sufficient funding to provide mitigation for those impacts. Advanced credits also reduce uncertainties by providing support for the ILF sponsor to implement the planned mitigation projects with less knowledge of the exact timing of funding.

The allocation of advance credits requested by the ILF sponsor must be justified based on the typical size of projects envisioned and the anticipated rate of credits earned in the service area. The number of advance credits determined in a given service area will be established by the District Engineer in consultation with the IRT at the time the In-Lieu Fee Instrument is approved. Once established for the service area, the number of advance credits will not change unless there is a significant change in project size, a demonstrated change in the rate of credits earned or a failure to meet performance standards which requires a review of the ILF program in that service area.

Under this implementation, as an ILF sponsor earns release credit through the implementation of projects, a matching number of advance credit will be released, up to the maximum allowed for that service area. This will support continued planning and progress on additional projects within the service area. Thus, as each ILF project moves toward completion and earns release credit, the original allocation of advance credit becomes available once again to support the next project(s).

It is important for ILF programs to consider that a minimum of 20% of the credits will not be released for an individual ILF mitigation project until success in all performance standards have been demonstrated through monitoring. Because this will take years for most projects, the number of advance credits may decline with time. The ILF program should consider this factor in determining the number of advance credits requested and determining the credit fee schedule. The credit fee schedule (cost per unit of credit) should be established by reviewing the expected costs associated with the restoration, establishment, enhancement, and/or preservation of aquatic resources in the service area. These costs are based on full cost accounting and include: land acquisition, project planning and design, construction, plant materials, labor, legal fees, monitoring, remediation, program administration, etcetera.

For more information on ILF program implementation in Missouri, please contact the Regulatory Branch of the appropriate U.S. Army Corps of Engineers District. For more information on ILF programs in Kansas, please contact the Kansas City District.

<sup>1</sup> *Fulfillment of advance credit sales of an ILF program means application of credit released in accordance with a credit released schedule in an approved mitigation project plan to satisfy the mitigation requirements represented by the advance credit. Only after any advance credit sales within a service area have been fulfilled through the application of released credit from an ILF project (in accordance with the credit release schedule for an approved mitigation project plan), may additional released credit from that project be sold or transferred to permittees. When advance credit is fulfilled, an equal number of advance credit is restored to the program sponsor for sale or transfer to permittees.*

## **Appendix C**

### **Examples of Real Estate Covenants Approved by each Corps of Engineers District**

(See Following Pages)