

# In-Lieu Fee Prospectus Review Workbook

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EPR staff – EPR designed stream mitigation site under construction in North Carolina.

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# Introduction

In 2007, the U.S. Army Corps of Engineers (Corps) and the U.S. Environmental Protection Agency (EPA) began training federal, state, and tribal members of Interagency Review Teams (IRTs) on the review and approval process for mitigation banks and in-lieu fee (ILF) programs through national and regional courses.<sup>1</sup> In 2008, the Corps and EPA issued joint regulations known as the Mitigation Rule which standardized the review and approval process for mitigation banks and ILF programs. This review workbook and checklist reflect the lessons learned through more than a decade of teaching and learning from participants across the country. This workbook is one of a series of five review workbooks, with one for each of the following: Mitigation Bank Prospectus, Mitigation Bank Instrument, ILF Prospectus, ILF Instrument, and ILF Project Site Plan. Each workbook is accompanied by a checklist that takes the mitigation review elements from each workbook and puts them in a fillable document to help track the IRT members' review progress and comments. Where the review elements are the same for mitigation banks and ILF programs, the corresponding workbooks are the same.

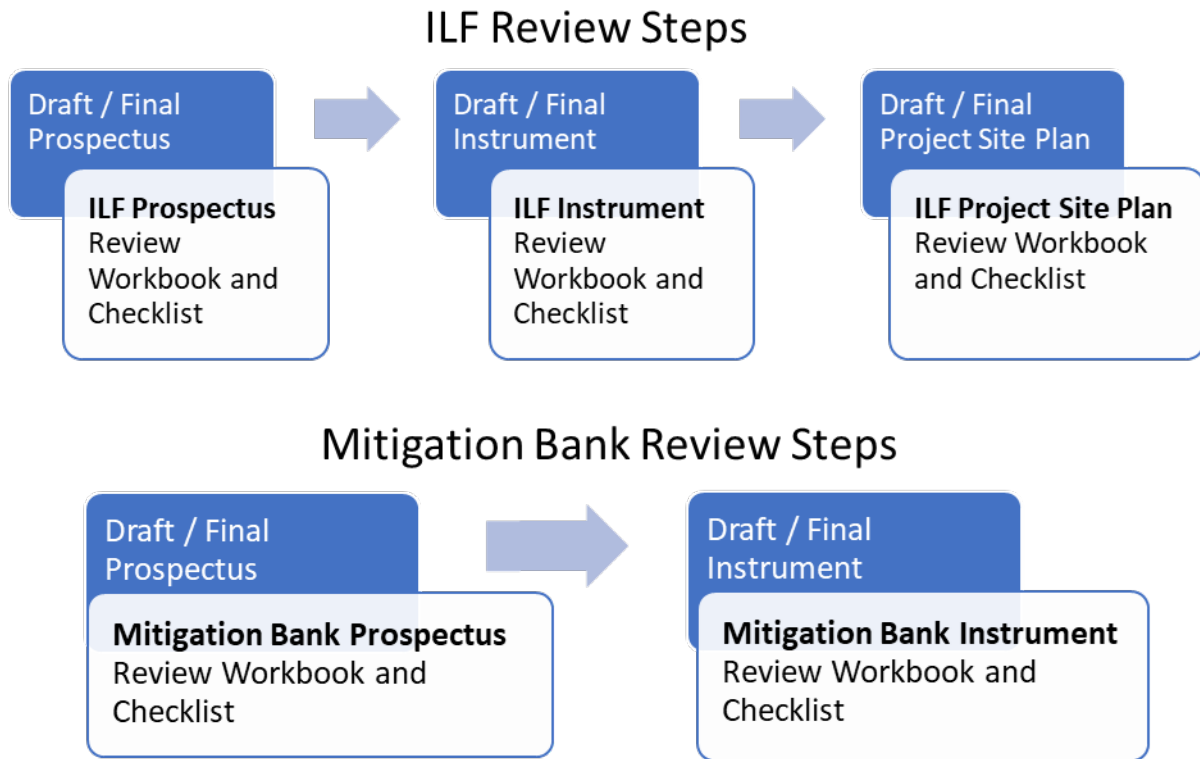
The workbooks provide many references and example practices discussed during the trainings and are organized according to the mitigation elements identified in the Mitigation Rule. Each mitigation element includes the relevant regulatory text, examples of how it is addressed from different District templates or instruments, and a series of questions to help IRT members adequately review all the relevant information needed to understand the proposal. The workbooks and checklists are technical resources to provide an organized structure for reviewing mitigation bank and ILF program proposals and ensuring that all aspects of the Mitigation Rule are considered. The checklist includes each review element question in a table for easily identifying what information has been reviewed and where any comments or questions remain after review. Bank and ILF proposals can often be hundreds of pages long and organized as a single or multiple documents. The checklists have been designed to help track where information is and determine if more information or clarification is needed.

The complete set of five workbooks covers each of the major review steps for a mitigation bank and an ILF program development, as shown below (Figure 1). Bank review starts with the workbook and checklist for the mitigation bank prospectus. The bank prospectus workbook covers the eight review elements from the Mitigation Rule associated with a mitigation bank prospectus. Next is the mitigation bank instrument review workbook, which starts by asking if there are any unresolved questions from the bank prospectus review and then focuses on the 18 elements required for mitigation bank instruments. The ILF proposal review is a bit more complicated, with three workbooks and associated checklists. The ILF program prospectus covers the eight review elements from the Mitigation Rule associated with an ILF prospectus (six in common with the Mitigation Bank Prospectus Workbook). The ILF program instrument workbook differs from the bank instrument review workbook because it only covers 11 review elements needed for establishing the program, five in common with bank instruments, and six that only pertain to the ILF program instruments (Figure 1). Lastly, there is the ILF project site plan review workbook that covers 19 review elements, including all 18 elements required for a mitigation bank instrument and one additional element specific to establishing ILF sites.

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<sup>1</sup> See: <https://www.conservationfund.org/our-work/conservation-leadership-network/our-services/training-resources-3rd-party-mitigation-interagency-review-team>

Figure 1. Mitigation Bank and ILF Workbooks and Checklists



This workbook and checklist are intended for use by members of the IRT to facilitate the review of an ILF program prospectus. The purpose of this prospectus review workbook is to assist the IRT reviewer in evaluating whether a proposed ILF program would be potentially suitable to provide compensatory mitigation for lost aquatic resource functions and services. It is not intended to provide local guidelines and policies or replace any locally developed templates, tools, or guidelines used to prepare and review an ILF program prospectus.

### Workbook Organization

The workbook and associated checklist cover eight separate review elements described below that are typically associated with an ILF program prospectus. The checklist includes each review element and its components with space to indicate if each component is addressed (yes/no), is complete (yes/no), the page #s where it is addressed, and space for any comments about the component.

#### **Prospectus Workbook Elements**

- Objectives of the proposed ILF program
- How the ILF program will be established and operated
- Proposed service area(s)
- General need for and technical feasibility of the proposed ILF program
- Proposed ownership arrangements and long-term management strategy for the ILF project sites
- Qualifications of the Sponsor
- Compensation Planning Framework (CPF)
- Description of the ILF program account  
(33 CFR 332.8(d)(2)/40 CFR 230.98(d)(2))

The Mitigation Rule does not provide detailed descriptions for all review elements. As a result, many districts and associated states have clarified the requirements in local prospectus templates, outlines, checklists, and guidelines. (Many of these documents may be found on the Regulatory In-Lieu Fee and Banking Information Tracking System [RIBITS] website <https://ribits.ops.usace.army.mil/>). In addition, the eight elements listed are not all given equal weight in reviewing the prospectus. Some elements like the Compensation Planning Framework (CPF) may be critical in determining if a proposed ILF program is potentially suitable to provide compensatory mitigation. For example, the CPF is a critical tool for the strategic identification of potential ILF projects to address ecological needs within a given program service area. General need for, proposed service area, or qualifications in some cases may constitute fatal flaws. In determining which elements are critical to the initial evaluation of a prospectus, consideration should first be given to any district/state guidelines and practices.

Note, for the addition of a new ILF project site, land, or a new credit type to an approved ILF program, the Sponsor must submit to the Corps a written request for instrument modification accompanied by all appropriate documentation (33 CFR 332.8(g)(1)/40 CFR 230.98(g)(1)). The same elements required in a prospectus for a new bank are required when a new site is proposed to be added to an existing ILF program via modification to an existing ILF program instrument (see the Bank Prospectus Review Workbook and ILF Project Site Plan Review Workbook in this series).

# Background

For every permit issued by the Corps under the Clean Water Act (CWA) section 404, adverse impacts to wetlands, streams, estuaries, and other aquatic resources must be avoided and minimized to the extent practicable. For those unavoidable impacts, compensatory mitigation is often required to replace the loss of wetland, stream, and other aquatic resource functions in the watershed.<sup>2</sup> The phrase “watershed” used throughout this workbook includes consideration of landscape and seascape perspectives. Compensatory mitigation refers to the restoration, establishment (creation), enhancement, or preservation of wetlands, streams, estuaries, or other aquatic resources required in order to offset these unavoidable adverse impacts.

In 2008, the Corps and the EPA issued joint regulations known as the Mitigation Rule.<sup>3</sup> These regulations established standards for all compensatory mitigation projects to offset permitted losses under CWA section 404. The Mitigation Rule recognizes three mechanisms for satisfying compensatory mitigation requirements: mitigation banks, ILF programs, and permittee-responsible mitigation (PRM). Equivalent standards are required for all compensatory mitigation projects regardless of the mechanism used to develop that project. This document focuses on reviewing and developing an ILF prospectus.

## Organization of the Mitigation Rule (Corps: 33 CFR 332/ EPA 40 CFR 230)

- The Mitigation Rule is divided into eight sections:
  1. Purpose and general considerations
  2. Definitions
  3. General compensatory mitigation requirements
  4. Planning and documentation
  5. Ecological performance standards
  6. Monitoring
  7. Management
  8. Mitigation banks and in-lieu fee (ILF) programs
- The first seven sections apply to all forms of compensatory mitigation
- The last section establishes standards that apply only to mitigation banks and ILF programs

- **Mitigation Bank:** A mitigation bank is a project where aquatic resource conservation (restoration, establishment, enhancement, or preservation) has been initiated in advance of permitted losses of aquatic resource functions or services. Banks typically provide consolidated compensation for multiple permit actions. With the approval of regulatory agencies, permittees can acquire credits from a mitigation bank to meet their permit requirements for compensatory mitigation. The bank Sponsor (not the permittee) is responsible for the success of the bank project. Banks provide off-site compensation, meaning it is at a location not typically on or immediately adjacent to the permitted impacts. Bank operation is governed by an instrument that the Sponsor drafts, often based on district

<sup>2</sup> For some resource types, it may be preferable to site compensatory mitigation projects using geographic units other than watersheds. For example, for vernal pools, landscape units known as vernal pool regions may be preferable and for coral reefs, tidal wetlands, and other marine and estuarine resources, seascape units such as reef complex or littoral drift cell may be preferable. According to the RIBITS, projects using seascape or landscape units to site compensatory mitigation projects make up less than 5% of ILF projects.

<sup>3</sup> The appropriate citation from the Code of Federal Regulations associated with the Corps is 33 CFR Part 332 and EPA is 40 CFR Part 230, both are included throughout the workbooks.



or state provided templates, and is subject to review and approval by the Corps and its state and federal counterparts who compose the IRT.

- **ILF Programs:** ILF programs are established by a public agency or non-profit organization (the ILF Sponsor) and sell credits to permittees. The Sponsor commits to use those funds to perform mitigation activities. Typically, the Sponsor collects funds from multiple permittees in order to pool the financial resources necessary to build and maintain the mitigation site. The ILF Sponsor is responsible for the success of the mitigation. Like banking, ILF mitigation is also typically off-site; however, unlike banking, the mitigation typically occurs after the permitted impacts. Many districts/states require additional compensation to offset this temporal lag (see 33 CFR 332.3(f)(2)/40 CFR 230.93(f)(2)). Like banks, ILF program operation is governed by an instrument drafted by the Sponsor, often based on district or state provided templates, and is subject to review and approval by the Corps and the IRT.

**Templates:** Many districts have developed prospectus templates to increase review efficacy. These templates are becoming more commonplace and encouraged by many district and state policies and practices. The IRT staff should be aware of language revision constraints and refrain from commenting on prior, approved language within the templates or providing comments that conflict with the approved template.

- **Permittee-Responsible Mitigation:** PRM is undertaken by a permittee to compensate for aquatic resource impacts resulting from a specific project. The permittee performs the mitigation after the permit is issued but prior to or concurrent with the initiation of permitted impacts. The permittee is responsible (liable) for the implementation, success and long-term protection and management of the mitigation project. The permit governs the PRM. There is no IRT involvement or instrument associated with PRM, and PRM may occur at the site of the permitted impacts or an off-site location, preferably within the same watershed.

**Mitigation Preference Hierarchy:** The mitigation rule established a preference hierarchy for mitigation credits ((33 CFR 332.3(b)(2) and (3)/40 CFR 230.93(b)(2) and (3)). Under this hierarchy if the appropriate type (wetland, stream, etc.) of released credits are available from a mitigation bank or released credits from an ILF project in a service area that includes the permitted impact, those credits are generally preferred over advance credits from ILF programs or PRM projects that have not been initiated.

Using released credits from banks and ILF projects is generally a preferred form of compensatory mitigation under the Mitigation Rule because they implement projects in advance of permitted losses, thus reducing temporal losses of functions and uncertainty over project success. Additionally, ILF programs may consolidate compensatory mitigation projects where ecologically appropriate, in turn combining resources (including financial as well as agency resources), and scientific and technical expertise. (Note, this may be more of a challenge or even impractical for small PRM projects.) An ILF program prospectus may also include descriptions of how the mitigation project will provide offsets under other regulatory authorities such as state counterparts to CWA section 404, CWA section 402, or the Endangered Species Act.

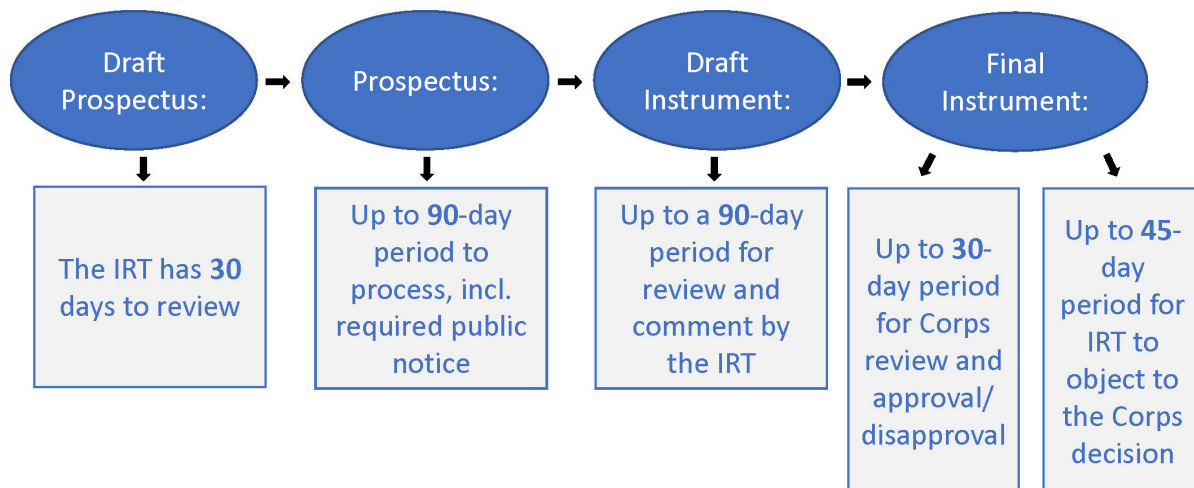
ILF programs differ from mitigation banks in a number of ways:

- ILF programs can only be sponsored by government (usually state or local government) or non-profit conservation organizations.

- ILF programs are required to use a watershed approach for strategic site selection (forms part of the Compensation Planning Framework).
- ILF programs include two types of credit activities: advance credits that are associated with a program service area (NOT a project site); and released credits, generated by project sites that were funded with proceeds from advance credit sales and meet performance standards.
- ILF programs typically operate by selling advance credits as mitigation. These advance credits are associated with service areas, and the proceeds are then used to develop and implement mitigation projects on sites within the applicable service area. Credits generated from an ILF project site or mitigation bank (released credits) are generally preferred over these advance credits.
- The fee schedule for these advance credits is publicly available.
- When a program sells advance credits and has accrued sufficient proceeds from those credit sales, the ILF program can then identify project sites and develop and implement mitigation projects.
- Credits generated from an ILF project (released credits) are first used to fulfill a mitigation obligation generated by the sale of an advance credit. If there are any released credits left over after fulfillment, they can be sold and may be determined to be equivalent to a bank credit.
- ILF programs are required to identify financial accounting procedures to ensure that all collected funds are transparently and appropriately managed and dispensed.
- These programs often provide compensatory mitigation when there are few or no mitigation banks with available credits or where PRM is not practicable.
- Some ILF programs provide compensation for resources that are more difficult or less in demand, like the ecologically valuable fens, shellfish, seagrasses, mudflats, and subtidal sediment remediation projects, which generally have limited opportunities for return on investment.

Development of an ILF program follows a four-step approval process (see Figure 2). The Sponsor is responsible for preparing and submitting all documentation associated with the ILF instrument to the IRT for review.<sup>4</sup> The timelines depicted in Figure 2 are contingent upon the submittal of complete documents by the Sponsor at each step in the process.

Figure 2. ILF program development



<sup>4</sup> Development and review of the ILF program instruments as well as ILF projects (project sites implemented by an ILF program) follow the same four-step process as development of bank instruments. An ILF project proposal is required to provide the same information as a bank project.

**Draft Prospectus** submittal is considered an optional step in the Mitigation Rule, although many districts/states require submittal. The purpose is to identify any potential issues (both cautionary elements and potential fatal flaws) with the proposed ILF program proposal early in the process so the Sponsor can address them prior to the start of the formal process. A robust and timely review of the draft prospectus by the IRT members may save agencies and prospective Sponsor's resources before a considerable investment is incurred in a proposal unlikely to be approved.

**Prospectus** submittal is required for all ILF program proposals. The prospectus provides a summary of the ILF program proposal at a sufficient level of detail to support informed review and comment by the IRT and the public (33 CFR 332.8(d)(2)/40 CFR 230.98(d)(2)). The Corps will provide the Sponsor with an initial evaluation letter (IEL) stating the potential suitability of the proposal to provide compensatory mitigation. If the proposal is suitable, the Corps may direct the Sponsor to prepare a draft instrument. If the proposal is deemed unsuitable, the Sponsor may revise the prospectus to address the deficiencies and resubmit. An approved prospectus does NOT guarantee approval of a proposed ILF program.

#### **Prospectus Review and Public Notice (33 CFR 332.8(d)(4)/40 CFR 230.98(d)(4))**

A prospectus review begins when the Sponsor submits a complete prospectus to the Corps (and IRT). Within 30 days of receipt of a complete prospectus or a requested instrument modification, the district will issue a public notice for the proposal. The public notice is typically for a 30-day comment period and, at a minimum, must include a summary of the prospectus and indicate that the full prospectus is available to the public for review. Many districts will either include the prospectus with the public notice or provide a web link to the prospectus. For modifications of approved instruments, the public notice must summarize and make available to the public whatever documentation is appropriate.

The Corps must notify the Sponsor if the comment period is extended beyond 30 days and explain why a longer comment period is necessary.

Copies of all comments received in response to the public notice must be distributed to the IRT and the Sponsor within 15 days of the close of the public comment period.

#### **Initial Evaluation of the Prospectus (33 CFR 332.8(d)(5)/40 CFR 230.98(d)(5))**

After the end of the comment period, the district engineer (Corps) will review the public notice comments received and typically, in consultation with the IRT, provide an initial evaluation letter (IEL) as to the potential of the proposed ILF program to provide compensatory mitigation for activities authorized by Department of the Army (Corps) permits. This IEL must be provided to the Sponsor within 30 days of the end of the public notice comment period.

If the Corps determines that the proposed ILF program has the potential for providing appropriate compensatory mitigation for activities authorized by Corps permits, the IEL will inform the Sponsor that it may proceed with the preparation of the draft ILF instrument.

If the Corps determines that the proposed ILF program does not have the potential for providing appropriate compensatory mitigation for Corps permits, the initial evaluation letter must discuss the reasons for that determination. The Sponsor may revise the prospectus to address these concerns and submit the revised prospectus to the Corps. If the Sponsor submits a revised prospectus, a revised public notice will be issued. On several occasions, districts have determined that a proposed ILF program is not potentially suitable for compensatory mitigation regardless of revision. In those cases, districts and/or Sponsors have withdrawn

those proposals from further consideration.

This initial evaluation procedure does not apply to proposed modifications of approved instruments (33 CFR 332.8(d)(5)(iv)/40 CFR 230.98 (d)(5)(iv)).

### **Delays in Prospectus Review**

Delays in the timelines specified in the Mitigation Rule can affect ILF program planning and feasibility. The Sponsor's ability to develop program elements is more difficult when regulatory timelines are not followed.

Review can be delayed for a number of reasons including:

- Completion of Endangered Species consultation
- Completion of Cultural/Historic resources coordination (Section 106 NHRPA)
- Government to Government coordination (tribal coordination)
- Sponsor's failure to provide necessary information
- The necessary information cannot be secured within the specified timeframe
- IRT members failing to provide timely reviews

**Draft Instrument** is submitted to the IRT by the Sponsor for review and comment. The draft instrument must be based on the prospectus and describe in detail the physical and legal characteristics of the mitigation bank or ILF program and how it will be established and operated. It must incorporate all draft instrument elements as mandated in the Mitigation Rule (33 CFR 332.8(d)(6)/40 CFR 230.98(d)(6)). The draft instrument should also incorporate or address any recommendations provided in the initial evaluation of the prospectus. The IRT Chair or co-chairs are responsible for providing all comments to the Sponsor to be addressed in the final instrument within 90 days of receipt of the complete draft ILF instrument.

**Final Instrument** is then submitted to the IRT by the Sponsor, along with documentation indicating how the Sponsor addressed previous comments on the draft instrument. The Corps must notify other members of the IRT within a 30-day period of its intent to approve/disapprove the Final Instrument. If a federal member of the IRT disagrees, they have up to 45 days to object to the Corps decision and initiate a formal dispute resolution process. There is no automatic approval of an ILF program (or bank) instrument.

# Terminology

**Advance Credits:** Credits of an approved ILF program that are available for sale prior to being fulfilled (implementation of a mitigation project) in accordance with an approved mitigation project plan. Advance credit sales require an approved ILF program instrument that meets all applicable requirements (33 CFR 332.2/40 CFR 230.92).

**Assessment methodology:** The mechanism or tool used to evaluate the loss of functions or services at the permitted impact site as well as the gain in functions or services provided at the compensation site. Assessment methods vary by aquatic resource type (e.g., wetlands, streams) and between districts/states.

**Compensation Planning Framework (CPF):** The watershed-based planning framework or tool used to select, secure, and implement aquatic resource restoration, establishment, enhancement, and/or preservation activities. All ILF projects used to provide compensation for Department of the Army (Corps) permits must be consistent with the approved CPF (33 CFR 332.8(c)(1)).

**Compensatory mitigation methods:** There are four compensatory mitigation methods, restoration, establishment, enhancement, and preservation:

- Restoration encompasses two types of actions, re-establishment of aquatic resources in a place where those resources formerly occurred (e.g., prior converted cropland) and rehabilitation of degraded aquatic resources. Much of the stream mitigation implemented involves the rehabilitation of degraded streams;
- Establishment (creation) is the development of an aquatic resource where one did not previously occur;
- Enhancement is the manipulation of one or more characteristics of an aquatic resource to improve or intensify one or more aquatic resource functions; and
- Preservation means removing any threat of destruction or adverse modification to an aquatic resource through appropriate physical and legal mechanisms.

**Credit:** A unit of measure (functional, areal, or other suitable metrics) representing the accrual or attainment of aquatic functions or services at a mitigation site. The measure is based on restored, established, enhanced, or preserved aquatic resources. Credits are the currency that an ILF program utilizes for trading.

**District:** Refers to an Army Corps of Engineers (Corps) district office.

**Fees:** The costs of compensatory mitigation credits provided by an ILF program are determined by the ILF program Sponsor (33 CFR 332.8(o)(5)(i)/40 CFR 230.98(o)(5)(i)). The district engineer may evaluate fee schedules for ILF programs to determine whether those fees satisfy the criteria in 33 CFR 332.8(n)(5)(ii)/40 CFR 230.98(n)(5)(ii) and are sufficient for providing the required compensatory mitigation (Preamble to 2008 Mitigation Rule, p 19609).

Credit prices may vary based on mitigation resource type (e.g., wetland or stream). The cost per unit of credit must include the expected costs associated with the restoration, establishment, enhancement, and/

or preservation of aquatic resources in that service area. These costs must be based on full cost accounting, and include, as appropriate, expenses such as land acquisition, project planning and design, construction, plant materials, labor, legal fees, monitoring, and remediation or adaptive management activities, long term management funding, as well as administration of the ILF program. (33 CFR 332.8(o)(5)(ii)/40 CFR 230.98(o)(5)(ii)).

**Fulfillment of Sales of Advance Credits from an ILF Program:** Application of credits released in accordance with a credit release schedule in an approved mitigation project plan to satisfy the mitigation requirements represented by the sale or debit of advance credits. Only after any advance credit sales within a service area have been fulfilled (through the application of released credits from an ILF project) may additional released credits from that project be sold or transferred to permittees (33 CFR 332.2/40 CFR 230.92).

**Functions:** Functions are the physical, chemical, and/or biological processes that occur in ecosystems (e.g., denitrification or carbon sequestration).

**Hydrologic Unit Codes (HUCs):** A nationwide hierarchical mechanism used to delineate watersheds based on surface hydrologic features. This system first developed by the USGS divides the country into 21 regions (2-digit), 222 subregions (4-digit), 370 basins (6-digit), 2,270 subbasins (8-digit), ~20,000 watersheds (10-digit), and ~100,000 sub-watersheds (12-digit). HUCs are often used in the definition of mitigation bank and ILF program service areas.

**ILF Program:** Mitigation that occurs when a permittee purchases credits from an ILF Sponsor (a public agency or non-profit organization). The Sponsor commits to utilizing those funds to perform mitigation activities. Typically, the Sponsor collects funds from multiple permittees in order to pool the financial resources necessary to build and maintain the mitigation site. The ILF Sponsor is responsible for the success of the mitigation. Like banking, ILF mitigation is also typically off-site; however, unlike mitigation banks, ILF mitigation typically occurs after the permitted impacts. Like banks, ILF program operation is governed by an instrument drafted by the Sponsor, often based on district or state-provided templates, and is subject to review and approval by the Corps and the IRT

**ILF Project:** A compensatory mitigation project developed by an ILF program to offset permitted losses of aquatic resource functions and services. ILF projects are required to follow the same standards, development, and approval process as a mitigation bank sites. The 12 required elements for mitigation plans (33 CFR 332.4(C)(2)-(14)/40 CFR 230.94(C)(2)-(14)) apply to the bank, ILF, and PRM projects.

**In-kind:** A resource of a similar structural and functional type to the impacted resource.

**Instrument:** Refers to the ILF instrument and all associated exhibits/attachments. In some cases, the instrument is all-inclusive. In other cases the instrument is the framework, and the exhibits/attachments provide the detail on each element (monitoring, site selection, etc.).

**IRT (Interagency Review Team):** An interagency group of federal, tribal, state, and/or local regulatory and resource agency representatives that reviews documentation for and advises the co-chairs (Corps district and any other agency chairing the IRT) on the establishment and management of a mitigation bank or an ILF fee program (33 CFR 332.2/40 CFR 230.92). The reference to the IRT or IRT reviewer in

this workbook is a reference to the IRT co-chairs (Corps and any other counterpart state, tribal, or federal agency with independent regulatory authority) as well as other IRT members (other federal, tribal, state, or local agency included on the IRT).

**Multiple authority ILF programs:** Also called “Joint ILF programs.” These are ILF programs that provide compensatory mitigation for resource impacts under more than one regulatory authority. Examples include programs that provide compensation for resources regulated under CWA section 404 and the Endangered Species Act. Each regulatory agency has authority over credits providing compensation for impacts authorized under its jurisdiction.

**Out-of-kind:** A resource of a different structural and functional type than the impacted resource.

**Released Credits:** Those credits generated by an ILF project meeting performance milestones. The district engineer, in consultation with the IRT, may determine that those credits are available for sale or transfer once any debited advance credits have been fulfilled. A proportion of projected credits for a specific mitigation bank or ILF project may be released upon approval of the mitigation plan, with additional credits released as milestones specified in the credit release schedule are achieved (33 CFR 332.2/40 CFR 230.92).

**Resource type:** The type of aquatic resource considered. Examples include wetlands, streams, marine habitats, or subsets like vernal pools, pine savannas, tidal marsh, intermittent stream, lagoons, etc.

**RIBITS:** The national web-based application used by a number of federal agencies to track mitigation bank and ILF activities. It is an important tool that is used by Sponsors and regulators for the management of ledger and reporting activities. To access it, go to: <https://ribits.ops.usace.army.mil/ords/f?p=107:2>

**Service area:** The geographic area within which impacts can be mitigated at a specific ILF program, as specified in the instrument (33 CFR 332.2/40 CFR 230.92.2).

**Services:** The benefits that human populations receive from the functions provided by ecosystems (e.g., flood flow attenuation or water quality improvement).

**Sponsor:** ILF program Sponsor; any government or non-profit conservation organization responsible for establishing and operating an ILF program. The ILF Sponsor is responsible for the success of the ILF program and all associated project sites.

**Temporal Loss:** The time lag between the loss of aquatic resource functions or services caused by the permitted impacts and the replacement of aquatic resource functions or services at the compensatory mitigation site.

**Watershed approach:** An analytical and strategic approach for selecting compensatory mitigation projects that consider the needs of a watershed and how the location and types of compensatory mitigation projects within the watershed address those needs. This same approach can be applied to other landscape/seascape units.

# Commonly Used Acronyms

Bank Enabling Instrument (BEI)  
Banking Instrument (BI)  
Compensatory Planning Framework (CPF)  
Environmental Protection Agency (EPA)  
Geographic Information Systems (GIS)  
Hydrologic Unit Codes (HUCs)  
Initial Evaluation Letter (IEL)  
In-lieu fee (ILF)  
Interagency Review Team (IRT)  
Letters of Intent (LOI)  
Long-term management (LTM)  
Mitigation Banking Instrument (MBI)  
Permittee Responsible Mitigation (PRM)  
Regulatory In-lieu Fee and Bank Information Tracking System (RIBITS)  
United States Army Corps of Engineers (Corps or USACE)



# 1. Objectives

Objectives are an essential element of an ILF prospectus. Before objectives can be identified, however, the ILF program's overarching goals need to be specified. A goal is a broad statement of what is intended to be accomplished by implementing the proposed ILF program, or in other words, the ILF program's purpose. The goal(s) should provide an overview of the intended result and list the major functions and services to be achieved by the proposed ILF program (Ossinger 1999). For example, the overall goal of a proposed ILF program in a given program service area might be to restore emergent and forested wetlands to a condition similar to historic wetlands in the watershed, which would provide:

- overwintering habitat for salmonids and breeding habitat for native amphibians,
- flood storage and improvements in water quality for the adjacent stream system, and
- credits to help meet the demand for compensatory mitigation within the program's proposed service area.

Objectives identify the specific components necessary to accomplish the ILF program's goal(s). These objectives are typically a list of specific, measurable outcomes used to demonstrate whether the program's goals have been achieved. One goal may have several objectives. The goal described in the paragraph above identifies six objectives; the first four are phrased as functions or ecological services (flood flow attenuation, overwintering habitat for salmonids, etc.), and the remaining two relate to program operations/demand and conservation values. Ossinger (1999) provides a good reference to understanding and identifying goals, objectives, and subsequently the development of enforceable performance standards used to evaluate the attainment of a program's objectives. An ILF program's goals and objectives are typically discussed in greater detail in the CPF for the ILF program prospectus (see Element 7: Compensation Planning Framework in this workbook).

## 1a. Does the prospectus include a description of the aquatic resource type(s) and approximate amount(s) the ILF program would provide?

The type and approximate amount of resource(s) expected to be provided by the proposed program should be identified so reviewers can evaluate whether they are feasible, necessary, and appropriate in each program service area. A prospectus may propose providing resource types (wetlands or streams) that are not in demand or likely to be necessary in a service area, like freshwater tidal wetlands that are impacted relatively infrequently. Those proposals are often discouraged and should be reviewed carefully. In specific cases, more intensive management is expected for some aquatic resources. For example, fire-dependent systems (i.e., pine savannah habitat on the Gulf Coast and some tidal or brackish marsh habitat along the East Coast) require ongoing management to maintain their condition and function. The reviewer should also determine if the proposed resource types and amounts specified in a prospectus are consistent with local district/state's credit determination mechanism.

### Objectives

Objectives of the proposed ILF program (33 CFR 332.8(d)(2)(i)/40 CFR 230.98(d)(2)(i)).

1b. Does the prospectus identify the functions and services expected to be provided by the ILF program?

The functions and services provided by the proposed program should be clearly identified to ensure they are relevant to the proposed program service area(s) and associated watershed setting. Descriptions should be focused on the functions and services targeted for improvement or preservation by the program. For example, one of the functions performed by many seasonal wetlands is denitrification. Denitrification and the resulting water quality improvement would be an appropriate goal for an ILF program service area located in a watershed with chronic eutrophic conditions. Different resource types provide different functions and services. For example, seasonal palustrine wetland restoration does not provide the same functions or services as tidal wetland restoration.

1c. Has the ILF program considered sites located within a watershed or landscape position where they are likely to provide the proposed functions and services?

Consider whether the functions and services identified in the objectives are realistic for the proposed ILF program to provide. Is the ILF program likely to select project sites that would provide an opportunity to replace lost functions or services? Does it provide an opportunity to enhance existing but compromised functions or services? For example, a wetland restoration project located adjacent to a conservation area may be more likely to contribute to biodiversity (function) than a project with no connection to other habitats; restoration of a headwaters seasonal wetland may be more likely to support denitrification (function) than a project located on the mainstem of a river; and floodplain restoration in higher order floodplains may be more likely to contribute to floodwater abatement (service) than a project located on a first-order stream.

## 2. How the ILF Program will be Established and Operated

The details of how an ILF program is established and operated are discussed in the ILF Instrument Review Workbook. The purpose of including this section in a prospectus document is for the Sponsor to provide a concise vision or conceptual plan of their proposed ILF program establishment and operation.

The Mitigation Rule does not explicitly discuss how ILF programs are to be established and operated in a single location in the regulation. Instead, a number of relevant elements are found throughout the section of the regulations associated with third-party compensatory mitigation (33 CFR 332.8/40 CFR 230.98).

### **How the ILF Program will be Established and Operated**

How the ILF program will be established and operated (33 CFR 332.8(d)(2)(ii)/40 CFR 230.98(d)(2)(ii)).

There are several key aspects of program establishment and operation that are not explicitly discussed in the Mitigation Rule:

- 1) How the ILF program proposes to identify projects;
- 2) How the program plans to develop and implement mitigation projects; and
- 3) How the program plans to pursue project approval by the Chair.

### 2a. Does the prospectus specify how the program will identify mitigation projects?

The Mitigation Rule does not specify how the ILF program is required to identify ILF projects, so long as site selection is consistent with the program's CPF (see Element 7 in this workbook). ILF program prospectus have identified a number of approaches for identifying projects, including:

**Opportunistic identification:** ILF programs identify potential project sites that are consistent with the CPF but do not explicitly prioritize the identification or implementation of projects. Many newly approved ILF programs initially identify projects using this approach but then will graduate to a more strategic approach.

**Strategic focus on credit demand and timing:** At this time, this is probably the most common approach ILF programs use to identify projects. Programs consider credit demand in a service area and the three growing season requirement for implementing projects to fulfill debited advance credits (33 CFR 332.8(n)(4)/230.98(n)(4)). This concept is discussed in greater detail in Review Element 3 of the ILF Instrument Review Workbook. Projects are selected that satisfy not only the CPF but also satisfy demand and implementation timeframe constraints.

**Scoring and weighting project proposals to select the most appropriate projects:** This is especially applicable to programs that use Requests For Proposals (RFPs) from qualified mitigation providers to identify and implement projects. Generally, RFP approaches may be the most effective at providing timely compensatory mitigation projects. This approach is used by a number of ILF programs including those in Maine (ME DEP 2011), New Hampshire (NH DES 2012), North Carolina (NCEEP 2010), and Oregon (OR DSL 2012).

**Project sites identified in the program instrument:** A number of ILF program instruments identify specific projects at the instrument level (either in the CPF or as exhibits to the instrument). This approach may be especially useful when the ILF program has already secured an interest in mitigation project sites or state and local government-sponsored programs. This approach has been adopted by a few programs including, King County Mitigation Reserves (WA; King County 2011), Riverside-Corona Resource Conservation District (CA; RCRCO 2012), and the Living River Restoration Trust (VA; Living River Restoration Trust 2018).

## 2b. Does the prospectus specify how the ILF program will develop and implement mitigation projects?

The Mitigation Rule does not specify an acceptable mechanism that an ILF program must use to develop mitigation projects. Consequently, a number of different mechanisms are used by different ILF programs for project development:

**Design and build:** This mechanism is the most common in use. The Sponsor either designs and constructs the mitigation project or contracts out design and construction.

**Design-Bid-Build:** Under this approach, the Sponsor either designs the projects and contracts out the construction or, more frequently, competitively solicits bids for the design and then for construction, either to separate entities, or combined to one entity.

**Request for Proposals (RFP):** The Sponsor issues a request for project proposals. The Sponsor identifies all necessary criteria, including need, geographic or program service areas, types of compensation, timing, selection criteria (including ecological criteria), and following receipt of proposals, then evaluates the proposals. An award/contract/agreement is made with parties associated with the selected project(s). The contract or agreement specifies the timing of project implementation, performance measures, and payment to the provider of the selected project.

**Purchase of Bank Credits:** This is often used as a last resort by ILFs, for instance, when it has been more than three years since the first debit of an advance credit, and the ILF program has not implemented a mitigation project to fulfill that mitigation obligation. ILF programs have purchased bank credits in one or more service areas to fulfill obligations. Regardless of the frequency of bank credit purchases by ILF programs, project sites selected for credit purchase must comply with the ILF program's CPF.

## 2c. Does the prospectus indicate the process the program will use to obtain project approval?

ILF programs are required to submit mitigation plans to the Chair or co-chairs and follow the instrument modification process (33 CFR 332.8(g)(1)/ 40 CFR 230.98(g)(1)) for project approval. Project approval is discussed in the regulations (33 CFR 332.8(k)/ 40 CFR 230.98(j)); however, the language does not specify the mechanisms or processes for obtaining approval. The specifics have been left to ILF programs, in consultation with their Chair or co-chairs, to determine. Mechanisms used include:

**Opportunistic:** An ILF program will request project review and approval by the Chair or co-chairs as the need for projects or credits arise, and/or projects are found or proposed. This approach gives the ILF program considerable flexibility in deciding when and where to pursue project approval and, as such, is the most common approach applied by programs. Examples of opportunistic use include the Missouri

Conservation Heritage Foundation's ILF program, the New York Wetland Trust, and the Virginia Aquatic Resource Trust Fund.

**Regular schedule and process:** Maine and New Hampshire's ILF programs utilize a RFP process for projects and follow an annual regular schedule and process for processing, reviewing, and approving projects. Refer to the ILF program's annual proposal and award timelines for more details (Maine DEP 2020, New Hampshire DES 2012).

**Permitting process:** This mechanism applies to two states, Kentucky and Indiana, where the Corps districts have developed a streamlined permitting process known as a Letter of Permission (LOP) for ILF programs to add project sites. This process combines the timeframes for the four-step site approval process spelled out in the Mitigation Rule and the permitting process that usually follows site approval. It ensures timely processing of project proposals but relies heavily on checklists and templates developed by the Chair or co-chairs for each step (concept plan checklist, early coordination, public notice, IRT coordination, etc.) in the permit process.

### 3. Proposed Service Area

A service area is a watershed and/or landscape unit (HUC 6, HUC, 8, littoral cell, ecoregion, physiographic province, or administrative area) within which the resource impact occurs, and compensation would be provided (33 CFR 332.8(d)(6)(ii)(A)/40 CFR 230.98((d)(6)(ii)(A)).

An ILF program generally has more than one service area. ILF programs may also have different service areas for different credit types, such as wetlands, streams, tidal flats, different types of wetlands, and/or other resource types, including listed species.

#### Service Area

The geographic service area is a defined area within which the ILF program is authorized to provide compensatory mitigation, as specified in the instrument (33 CFR 332.2/40 CFR 230.92).

The service area must be appropriately sized to ensure that the aquatic resource compensation provided by the ILF program will effectively offset permitted impacts and/or replace lost functions/services across the entire program service area (33 CFR 332.8(d)(6)(ii)(A)/40 CFR 230.98((d)(6)(ii)(A)).

The prospectus should include the following for all program service areas:

1. A map or other electronic representation (shapefile, kmz file, etc.) to identify the extent of each program service area.
2. The environmental factors (i.e., watershed, resource type, landform, seascape unit, at-risk species) used in determining the service areas should be specified. These factors are discussed further in Element 7 CPF in this workbook.
3. Any district, state, or local-specific requirements (laws, regulations, policy, management plans, etc.) used to determine the extent of service areas.
4. Any economic considerations (e.g., expansion of a service area to increase credit availability) that have been factored into the configuration of a service area.
5. The rationale for the location and extent of the service area (including economic considerations) is clearly documented in the CPF for the ILF program (33 CFR 332.8(c)(2)(i)/ 40 CFR 230.98(c) (2)(i)).

Where watershed boundaries do not exist (i.e., marine areas) an appropriate spatial scale should be used to replace functions/services within the same ecological system (reef complex, wave climate, embayment, drift cell, etc.) (33 CFR 332.3(c)(2)(v)/40 CFR 230.93(c)(2)(v)).

#### 3a. Does the prospectus clearly define service area(s) for the program?

It is important that the prospectus provide both a description of the service area(s) and associated map(s). Service area boundaries on the ground may not be as precisely defined as depicted on maps. Some service areas are based on ecoregions or HUCs, such as HUC 8 or HUC 6. HUCs are periodically revised, often changing extents in relatively flat areas like coastal plains. So, it is important that the prospectus provide both a description of the service area(s) and associated map(s). Where possible, the boundaries of the service area should be clearly defined (i.e., use readily recognizable features for limits like an adjacent

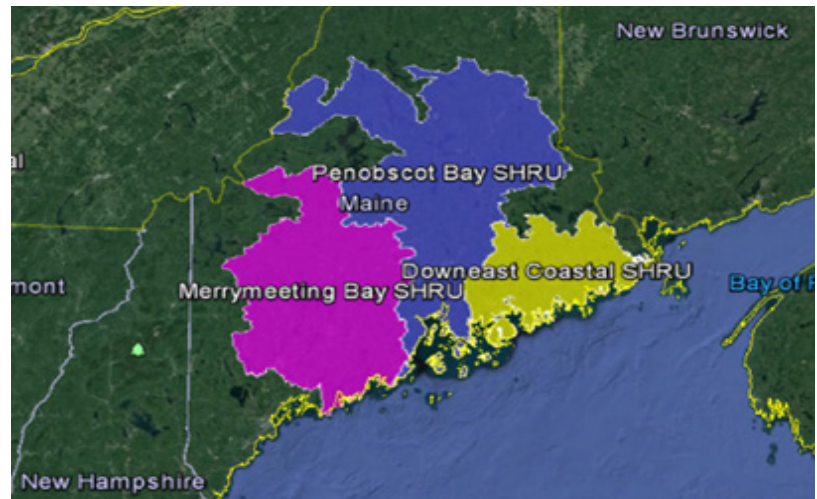
roadway, state line or county boundary, or geographic feature like a stream, drainage divide, or moor chain) to minimize future disputes between the Sponsor, the IRT members and with regulators (non IRT members) over whether proposed permits are within a specific service area(s).

3b. Does the prospectus or CPF identify the basis of the service area (i.e., watershed, coastal bay system, ecoregion, species distribution) and provide justification/rationale supporting its location and extent?

The size of the service area may be related to the extent of the functions and services provided by the ILF program.

For example, the distribution of some aquatic types (i.e., vernal pools, coniferous bogs) is not based on watershed but the landscape, elevation, climate, stratigraphy, geomorphology, or species distribution/use of an area by a distinct population, like the Atlantic salmon in Maine (Figure 3). The service areas for the Maine Atlantic Salmon Restoration and Conservation ILF program (ME DMR 2018), which provides compensatory mitigation to offset loss of stream area or function, is based on recovery units (population segments) and includes consideration of the specie's historic and current/potential range and/or any designated critical habitat.

Figure 3. Maine Atlantic salmon habitat recovery units (service areas). Source: Atlantic salmon restoration and conservation program (ME DMR 2018).



3c. Does the program service area(s) seem appropriately sized to ensure that the proposed aquatic resources will effectively compensate for permitted impacts and replace lost functions/services?

The prospectus must provide the justification or rationale for defining the limits and/or ecological appropriateness of each proposed service area and an accompanying map showing the initial ILF site(s) location(s) and position(s) within the proposed service area. This justification or rationale is often part of the draft CPF.

3d. Does the service area comply with local, district, and/or state requirements (scale, size, or resource type)?

Refer to the local district/state for guidelines (or guidance documents), templates, and/or state/tribal laws and regulations for more on the criteria for ILF program service areas.

## 4. Need and Technical Feasibility

While the general need and technical feasibility are identified as required elements in a prospectus under the Mitigation Rule, what should be included in this element is not clearly defined in the regulations. A number of districts (e.g., Portland, New Orleans, Fort Worth, Jacksonville, and Norfolk) and states (i.e., California) have clarified what is meant by these terms.

After consideration of the manner in which general need and technical feasibility are addressed in the Mitigation Rule and numerous district/state prospectus tools, it may be more useful for the IRT reviewer to evaluate General Need and Technical Feasibility as separate concepts:

### **Need and Technical Feasibility**

The general need for and feasibility of the proposed ILF program (33 CFR 332.8(d)(2)(iv)/40 CFR 230.98(d)(2)(iv)).

- General need refers to the need for the type(s) of compensatory mitigation credits that would be generated by the proposed ILF program. That need is based on a consideration of whether there is both a market demand and an ecological resource demand for the type(s) of credits that may be generated by the proposed program. The lack of an identified need for the proposed ILF program's credits would be considered a fatal flaw when reviewing a prospectus but more of an additional risk to the Sponsor. Resource scarcity may also be a factor in determining need.

**FYI on Resource Scarcity:** Resources that used to be common but are now rare in occurrence. Examples of these include vernal pools in the northeast, Atlantic white cedar (*Chamaecyparis thyoides*) on the east coast, freshwater tidal wetlands in the Pacific Northwest, or eelgrass (*Zostera marina*) in southern California. Suppose a formerly common resource type, like coastal prairie in the Gulf states, has transitioned into degraded forested wetlands through invasion of Chinese tallow tree (*Triadica sebifera*). In that case, it may be more appropriate to consider restoration of coastal prairie habitat rather than utilizing the more commonly available bottomland hardwood credits to offset impacts to these resources.

- Technical feasibility refers to whether implementation of the ILF program is possible given current science and technology and is compatible with service area characteristics (watershed/landscape characteristics including land use, development, general topography, potential hydrologic regimes, etc.). Technical feasibility also includes consideration of potential constraints to project implementation.

### **General Need:**

4a. Does the prospectus provide information on past, current, or anticipated demand for the proposed compensation in each proposed service area?

It is important that the Sponsor consider the potential demand for the mitigation credits that the proposed ILF program might provide. The reviewer should consider whether the prospectus provides a general discussion of market demand, including current and projected credit demand and availability, and/or related documentation that demonstrates the general need for the ILF program. This discussion should not



be a detailed market analysis, which may contain proprietary information. Additionally, some prospectus will consider other mitigation programs (other ILFs, banks, etc.) within or adjacent to their targeted service areas and the credit types available from these other programs as part of their analysis of need/demand. The National Fish and Wildlife Foundation's (NFWF) 2012 prospectus for an ILF program in central California considers existing and proposed banks as well as activities by a prior ILF program sponsored by NFWF.

The prospectus should include any state or local government requirements, guidelines, and/or templates in determining the demand for proposed compensation in a given service area. An example of this is found in the Wisconsin Wetland Conservation Trust prospectus (WI DNR 2013). Suggested references may include past permit data (Corps regulatory program data), data on current and past mitigation bank and ILF activity in the area (RIBITS), local wetland inventories for cities within the proposed service area, protected wetlands within the area, identification of the types of aquatic resources likely to be impacted by future development, etc. The 2020 prospectus for a proposed ILF program in Iowa sponsored by the Land Learning Foundation (LLF) utilized an analysis of historic and current resource loss and credit demand conducted by the Iowa Department of Natural Resources.

If the IRT reviewer and/or Chair or co-chairs determine that there does not appear to be sufficient need for the ILF program or the type of credits it would provide, they should communicate this to the Sponsor so that it can evaluate the financial feasibility of the program.

#### 4b. Does each proposed program service area examine ecological resource needs within its limits?

The prospectus should identify any watershed, estuary, or other conservation plans with which it is compatible. The prospectus should briefly identify and address any ecological impairments or chronic environmental problems (water quality, flooding, etc.) that the ILF program could help address. The prospectus should also identify any national, regional, or local benefits the program might provide and any current or potential threats to the resource types (development, pollution, alteration, etc.) that the program would help abate or offset within the proposed service area. Note, this coverage should be introductory and overarching, with more detail expected in subsequent elements, including Element 7: Compensation Planning Framework.

#### ***Technical Feasibility:***

#### 4c. Does the prospectus address the technical feasibility of the proposed ILF program?

The prospectus should identify proposed methods that would be used to implement future ILF projects. For example, does the ILF program include restoration, enhancement, establishment, preservation, or perhaps a combination of those mechanisms? Does the prospectus indicate how the program would implement projects (Design-build, RFP, etc. – see Element 2 of this workbook for more details)?

In evaluating technical feasibility, some prospectus have highlighted Sponsor's past experience in developing assessment methodologies, prioritization of projects, and project implementation (WI DNR 2013) (this discussion overlaps with components of Element 6: Qualifications of this workbook).

**Technical Feasibility Prospectus Example:**

The NFWF 2012 prospectus divided technical feasibility into three elements: technical feasibility, financial feasibility, and Sponsor's capability.

- Technical feasibility refers to the evaluation of proposed projects in terms of technical criteria such as landscape setting, biotic condition and structure of proposed projects, physical structure, and connectivity to other conserved resources.
- Financial feasibility examines whether the program is structured to provide adequate funding for operations. The factors evaluated include:
  - 1) Whether full-cost accounting is applied to operations
  - 2) Adequate numbers and types of credits likely to generate adequate funds
  - 3) Credit pricing
- Sponsor's capability, which overlaps with Element 6: Qualifications in this workbook, includes the organizational structure of the Board of Directors, staff's technical and financial capability, as well as technical consultants' expertise and capabilities.

#### 4d. Does the prospectus identify any constraints that would limit the mitigation potential of the ILF program?

The prospectus should provide a general list of possible constraints with brief discussions on how they may limit the ILF program's potential. If an existing (approved) or proposed mitigation bank or ILF program overlaps with one or more of the proposed program service areas, the prospectus should evaluate if and how this existing mitigation may limit/affect the demand for mitigation credits that would be provided by the proposed ILF program. Other constraints on a program's mitigation potential may include stakeholder interests, including those of local and tribal governments (such as fishing rights), existing state or local water, transportation, or land use plans, the presence of state and/or federally listed species (restoration activities may provide habitat enhancement opportunities as well), and location and extent of historic properties in a service area.

## 5. Ownership Arrangements

Districts and States consider the following for any proposed ILF project sites:

- Ownership – Site ownership will influence the long-term protection mechanism or site protection instrument used for the ILF project
- Other property interests - These other interests may include other easements (drainage, utility, open space, conservation, etc.), financial interests (i.e., contracts, liens, and mortgages), and severed rights (mineral, oil and gas, timber)
- Proposed long-term protection mechanism – The site protection mechanism used to legally protect any proposed ILF project sites (conservation easement, declaration of restrictions, transfer of title, conservation land use agreement, etc.)
- Proposed long-term management strategy – How the Sponsor intends for any ILF project sites to be managed once they move into long-term management

### Ownership Arrangements

The proposed ownership arrangements and long-term management strategy for the proposed ILF project sites (33 CFR 332.8(d)(2)(v)/40 CFR 230.98(d)(2)(v)).

**FYI:** For more detailed information on long-term protection mechanisms, refer to the ILF Project Review Workbook, Element 6: Site Protection Instrument.

### 5a. Does the prospectus identify how the program will manage ILF project site ownership arrangements?

The ILF program may undertake a range of potential ownership arrangements for mitigation projects, including:

- Fee simple ownership – The ILF program Sponsor owns the project property in full.
- Mitigation easement – An increasingly common mechanism where the ILF Sponsor does not own the land where the ILF project is situated but secures (through purchase or donation) from the landowner the right to develop and operate an ILF project site on the property.
- Conservation easement – Several ILF Sponsors may use a conservation easement to protect project lands. The easement holder (grantee) must have the qualifications and capacity to be responsible for enforcement of any restricted or prohibited actions on the ILF project site. The prospectus for LLF (2020) is an example of this approach.
- Joint ownership – The ILF program and another entity like a non-profit, state, local, or tribal government jointly own an ILF project. This is also a common mechanism.
- Government ownership (federal, state, local, or tribal ownership) – This is becoming an increasingly common mechanism. However, ownership by federal or state agencies can complicate the long-term protection of the ILF project site. The prospectus should identify any portion of the ILF project site that would occur on public lands and the public entity that owns the land. The prospectus (NFF and

USFS 2015) for the Western Slope ILF Program (Colorado) is an example of applying this approach to compensatory mitigation.

- Contractual arrangements – For ILF projects implemented through an RFP process, the program Sponsor does not own any interest in the property but instead has contracted with a third party to implement and manage an ILF project, including long-term protection,

The prospectus should address these potential ownership arrangements.

A number of ILF programs do not set out to own land or hold conservation easements. One such example is the NFWF ILF program prospectus (NFWF 2012), which intends to work with experienced partners like other non-profit organizations, private sector, and government organizations to enable those partners to own or hold easements over project lands and to manage those lands on a long-term basis.

**5b. Does the prospectus identify what the form of long-term site protection mechanism is likely to be proposed (conservation easement, declaration of restrictions, etc.) for ILF projects?**

Each type of long-term protection or site protection mechanism (conservation easement, declaration of restrictions, title transfer, conservation land use agreement, etc.) proposed for future project sites has different considerations (Wood and Martin 2016). The mechanism used depends upon land ownership (discussed in 5a above). Most districts/states prefer conservation easements where the landowner (grantor) gives responsibility to another party, the easement holder (or grantee), to enforce the easement, including any land use restrictions or prohibitions. Conservation easements are more durable than deed restrictions (Wood and Martin 2016). However, easements may not be feasible in cases where there are no conservation-based or compatible organizations to hold the easement. In some cases, easements cannot be legally recorded over some state lands, such as subtidal or intertidal areas. Similarly, easements cannot be recorded over federal-owned lands. These considerations are discussed further in Wood and Martin (2016).

**Note: Questions 5c-5e are applicable only to the review of those ILF prospectus that identify specific project sites.**

**5c. Does the prospectus identify any existing easements or other property restrictions?**

This is only applicable if the ILF program prospectus or CPF identifies specific project sites, like Riverside-Corona RCD (CA), the King County Mitigation Reserves ILF (WA), and the Everglades National Park (ENP) ILF programs (U.S. DOI 2015). Most prospectuses do not identify specific project sites.

If the prospectus (or CPF) identifies specific project sites, then the district/state may also require information on easements and other interests to better determine whether the proposed site is potentially suitable as a mitigation project. This information may take the form of a preliminary title report, title commitment, or title insurance. Typically, maps depicting the property's boundaries and the location and extent of any easements on the ILF project site property are also required.

Any easements or other property restrictions recorded on the deed prior to recording the site protection instrument would be considered primary interests. These easements, such as drainage, utility, or rights of way, would be unaffected by the site protection instrument and could be exercised unless they are subordinated to the site protection instrument. This is the real estate concept of "first in time, first in right".

5d. Does the prospectus or associated exhibits identify any other interests in the property (financial, mineral/timber, water rights)? If so, does the prospectus (or associated exhibits/attachments) explain how those other interests may affect the ILF project site?

These interests may not be identified in a preliminary title report or title commitment; however, most are identified as exceptions (exclusions) in a title insurance policy. It is vital that the prospectus (or more often exhibits to the prospectus) identify all interests on the ILF project site property, including a copy of the associated legal documents.

Exercising these interests, for example timbering or mining minerals on site, could adversely affect the ILF project site. Many districts require Sponsors to submit information identifying these interests associated with the ILF project site, including how they might affect the project and how the Sponsor plans to address these interests (e.g., by purchasing subsurface or timber rights, excluding those lands from the project site, etc.). Wood and Martin (2016) discuss these other interests further.

5e. If the site is located on public lands does the prospectus identify any additional long-term protection measures? Do they seem sufficient?

As noted in 5a and 5b, it may not be possible to record a conservation easement or other restriction on federal or state-owned lands, so consideration may need to be given to other measures that are either already in place or may be overlaid on existing mechanisms. The Mitigation Rule identifies Federal Facility Management plans (such as Forest Management plans, Integrated Natural Resource Management Plans, etc.) as one such mechanism (33 CFR 332.7(a)(1)/40 CFR 230.97(a)(1). However, management plans are typically reviewed and revised periodically and so by themselves may not provide the necessary long-term protection of an ILF project site. In a number of cases, a second mechanism, like a conservation land use agreement, may be developed and executed between the regulatory agency and the federal landowner to provide an additional, more durable mechanism (Wood and Martin 2016).

5f. Does the prospectus identify the proposed long-term management arrangements, including the party(ies) responsible for long-term management?

The prospectus should describe the long-term management strategy proposed for any project sites, including:

- Whether the Sponsor or landowner (if different) would be the long-term manager of the ILF project site once it has closed
- Whether the responsibility for long-term management can be transferred
- The intended mechanism for financing long-term management (i.e., endowment, trusts, appropriations)
- The expected long-term management activities needed to maintain ecological functions and services provided by the project site

An ILF program may utilize different long-term management approaches for different projects. The degree of specificity provided depends upon whether the prospectus (including CPF) identifies specific project sites.

## 6. Qualifications

The ILF program Sponsor is required to be a governmental or non-profit natural resources management entity (33 CFR 332.2/40 CFR 230.92.2). Like mitigation bank Sponsors, an ILF program Sponsor is also required to demonstrate that it is qualified to successfully complete the types of mitigation projects proposed in the prospectus, including descriptions of similar prior activities (see 33 CFR 332.8(d)(2)(vi)/40 CFR 230.98(d)(2)(vi)).

- The first criterion is intended to “limit sponsorship of ILF fee programs to governmental or non-profit land management entities that operate explicitly in the public interest, rather than to serve the needs of investors” (emphasis added, see the Preamble to the Mitigation Rule, Federal Register / Vol. 73, No. 70 Thursday, April 10, 2008, pg. 19614)
- The second criterion charges the Corps and the IRT to carefully evaluate the capabilities and demonstrated performance of a natural resource management entity prior to approving it as an ILF program Sponsor in order to minimize the risk associated with allowing an unqualified entity to sell advance credits (Preamble to the Mitigation Rule, Federal Register / Vol. 73, No. 70 Thursday, April 10, 2008, pg. 19600)

Under both federal and state law, government and non-profit conservation organizations are held to high standards for accounting and reporting. The requirements for rigorous and transparent reporting and accounting, including annual reporting of financial and credit activity, periodic review of fee schedules by the Chair or co-chairs, and periodic audits of ILF program operations, are consistent with these standards.

Designation of an organization as a 501(c)(3), a non-profit organization does not in itself provide adequate evidence of the organization’s qualifications – its accountability, governance, or effectiveness. A poorly run non-profit organization raises the risk of legal and operational failures that could result in its inability to carry out the mitigation obligations assumed through the sale of advance credits.

### 6a. Does the prospectus document the Sponsor’s experience as a government or non-profit natural resource management agency?

The prospectus should explicitly document the Sponsor’s experience in successfully completing restoration or compensatory mitigation projects. The prospectus may point to the experience of the Sponsor’s consultant or agent, but the Sponsor may subsequently replace those parties. New non-profit organizations may not have sufficient experience as natural resource management agencies, which may be considered in some districts/states as a disqualifying factor. In some cases, that shortcoming may be ameliorated by limiting the number of service areas available to the program, limiting the number of advance credits available to the program, or by ensuring that members of the board overseeing the non-profit have the necessary experience in natural resource management.

6b. Does the prospectus document the technical capabilities of the Sponsor to implement an ILF program?

**Considerations for the evaluation of non-profits as ILF program Sponsors:**

There are several accreditation processes that are used to evaluate charities that may assist in the evaluation of non-profits as ILF Sponsors. Consider the standards developed by the Land Trust Accreditation Commission (2017) or the Better Business Bureau Wise Giving Alliance (<https://www.give.org/donor-landing-page/bbb-standards-for-charity-accountability>)

The Nature Conservancy (D. Schenck Pers. Comm. 2021) has summarized some of these factors as follows:

- **Mission:** Non-profits are founded for the public good and operate to accomplish a stated purpose through specific program activities. A nonprofit should have a well-defined mission, and its programs should effectively and efficiently work toward achieving that mission. The mission statement should be clearly stated, serve the public interest, address strategic partnerships with other organizations, provide a clear set of ethical principles, and ensure periodic evaluation of program operations.
- **Legal Compliance:** Non-profits must comply with all applicable federal, state, and local laws. This includes complying with laws and regulations related to IRS filing requirements, governance, human resources, licensing, financial accountability, taxation, valuation of in-kind gifts, unrelated business income, document retention and destruction, related entities, data security, accessibility, fundraising, lobbying, and advocacy. The nonprofit should be in good standing with the state in which it is incorporated.
- **Public Disclosure:** Non-profits should have a designated representative who is responsible for ensuring that the organization is complying with federal and state laws that require disclosure of information to the public.
- **Conflict of Interest:** Non-profits should have a written conflict of interest policy and statement. This policy should identify the types of conduct or transactions that raise conflict of interest concerns.
- **Risk Management and Insurance:** The non-profit should manage risk and periodically assess the need for insurance coverage in light of the organization's activities and its financial capacity.
- **Financial Accounting:** Non-profits should have sound financial and operational systems in place and ensure that accurate records are kept. The organization's financial and non-financial resources must be used in furtherance of tax-exempt purposes.

It is important that the prospectus provides information on the technical capabilities of the Sponsor to implement the proposed work, not just the capabilities of its contractors, agents, or consultants, which can and often are replaced by the Sponsor.

Technical capabilities may include a Sponsor's experience in the assessment of aquatic resource condition, land acquisition, development and implementation of site protection mechanisms (conservation easements, declarations of restrictions, etc.), and long-term management of conservation lands (see WI DNR 2013).

If the prospectus indicates that the program proposes to design and implement stream or tidal mitigation projects, then it is critical that the program have staff with relevant skills associated with the design, implementation, and oversight of those types of mitigation projects. If not, then it may be appropriate to preclude the program from providing those types of compensation.

A number of ILF programs do not design or build their own mitigation projects but instead contract mitigation projects, for example through RFPs. In those cases, it is important that the Sponsor document its experience and capabilities in developing and implementing open, competitive, and transparent contracting processes. The NFWF 2012 prospectus emphasizes its experience both in operating a prior ILF program in California and its experience in receiving, managing, and disbursing funds for a wide range of environmental restoration projects, including mitigation projects.

6c. For ILFs that would be sponsored by a non-profit organization, does the prospectus document the composition of the non-profit's Board of Directors?

Some for-profit enterprises have minted non-profits to sponsor ILF programs with the intent to steer projects to the for-profit organization. This runs counter to the Preamble to the Mitigation Rule (Federal Register / Vol. 73, No. 70 Thursday, April 10, 2008, pg. 19614) that limits sponsorship of ILF programs to governmental or non-profit land management entities that operate explicitly in the public interest, rather than to serve the needs of investors. A Board of Directors drawn from a number of companies, government agencies, or non-profit organizations increases the likelihood of the program operating in the public interest and increases the likelihood of transparent program development, operation, and reporting. For example, the Board of Directors for NFWF (2012) includes representatives from the U.S. Fish and Wildlife Service and National Oceanic and Atmospheric Administration. The Board of the Hood Canal Coordinating Council (HCCC) ILF program (2011) includes members of several tribes and localities as well as non-voting members from several state and federal agencies.



## 7. Compensation Planning Framework

The CPF is an ILF program tool used to identify project sites that meet aquatic resource needs in a watershed. The Mitigation Rule clearly lays out (1) what the framework is used for and (2) what should be included in the framework (33 CFR 332.8(c)(2)/40 CFR 230.98(c)(2)). Collectively, the framework elements (or criteria) constitute a watershed/landscape-based approach to site selection, focusing on projects that best address ecologic/environmental needs of the service area where the project is located.

### Compensation planning framework

The CPF must support a watershed approach to compensatory mitigation (33 CFR 332.8(c)(1)/40 CFR 230.98(c)(1)).

#### 7a. Does the prospectus include a CPF?

The prospectus for an ILF program must include a CPF (33 CFR 332.8(d)(2)(viii)(A)/40 CFR 230.98(d)(2)(viii)(A)). The CPF will be used to select, secure, and implement aquatic resource restoration establishment, enhancement, and/or preservation activities (33 CFR 332.8(c)(1)/40 CFR 230.98(c)(1)).

ILF programs utilize information from a variety of sources and tools, including local and regional assessments, plans, models, GIS and other datasets, lists of impaired waters, and more, to obtain the data needed for building their watershed analysis/assessment.

#### Sources ILF programs use in the development of the CPF may include:

- **Wetland conservation plans** assess, identify, and prioritize restoration and protection priority areas, e.g., wetland inventories, advanced identification of disposal areas, Special Area Management Plans (SAMPs), etc.
- **Water quality reports** such as a list of 303(d) waterways
- **State wildlife action plans (SWAP)** identify species of greatest conservation need (SGCN) and assesses the condition of their population(s) and habitat(s).
- **Endangered Species Act (ESA) Habitat Conservation Plans** are a required part of applications for permits issued under the Endangered Species Act (ESA) to parties undertaking projects that might result in the “take” (causing impacts to) of a threatened or endangered species.
- **Fish habitat partnerships** conduct analyses that identify priority restoration and preservation catchment basins for high ecological value fish and mussels.
- **Landscape development index (LDI)** shows relative level of human induced impact.
- **Total Maximum Daily Load (TMDL) implementation plans** establish restoration targets designed to result in attainment of water quality goals.
- **Flood management plans** illustrate location/quantity of flooding impact and may be found in state and local flood management and hazard mitigation plans.
- **Comprehensive Conservation and Management Plans** are developed by partners for each estuary in the National Estuary Program administered by EPA.

The prospectus should layout the resources/information compiled and provide a strategy to be used in future site selection

It is at the ILF program's discretion to decide the approach they will use for identifying ILF projects, as long as site selection complies with the CPF criteria laid out in the ILF program and with the regulatory requirements. ILF programs have implemented various approaches to site selection that range in complexity and specificity. Four approaches that span this range include:

**Opportunistic identification:** selecting sites that fulfill the regulatory requirements of the CPF but are otherwise considered “barebones,” generalized, and lacking in detail.

**Strategic focus on credit demand and timing:** projects are selected that meet the requirements of the CPF as well as credit demand and timing of project implementation.

**Scoring and weighting project proposals to select the most appropriate projects:** scoring/weighting used by multiple ILF programs (Maine NRCP 2020, Oregon DSL 2012) to help select the most appropriate projects.

**Project sites identified in the program instrument:** sites are pre-identified at the instrument level, a common approach for ILF programs that already have secured property/land.

#### 7b. Are the elements of the CPF framework clearly identified?

An instrument must include the following ten framework elements (33 CFR 332.8(c)(2)/40 CFR 230.98(c)(2)):

- Geographic service area(s)
- Threats to aquatic resources in the service area(s)
- How threats are discussed (sometimes combined with the above)
- Analysis of historic aquatic resource loss and current conditions
- Aquatic resource goals and objectives for each service area
- Prioritization strategy for selecting/implementing projects
- Explanation of the use of preservation
- Description of stakeholder involvement and coordination with regulatory and resource agencies
- Long-term protection and management strategies
- Strategy for evaluation and reporting

The IRT reviewer should consider the extent to which these elements are present in the draft CPF.

#### 7c. Does the CPF explain the development of program geographic service area(s)?

The service area(s) is the geographic area(s) in which an ILF program may provide compensatory mitigation for permitted impacts to aquatic resources (33 CFR 332.8(d)(6)(ii)(A)). These geographic areas vary in their extent and scope and are specific to each ILF program. Service areas can be defined using a variety of geographic boundaries, including watershed, ecoregional, physiographic, and/or administrative boundaries. The CPF typically lays out the criteria and context for which its service area(s) was defined.

For example, the proposed Iowa ILF program (LLF 2020) bases service areas on Ecological Drainage Units defined by the Rock Island District and the state of Iowa. NFWF (2012) proposed to define its service areas based on ecologic and resource need rather than geography. Its vernal pool service areas are based primarily on vernal pool regions defined by the U.S. Fish and Wildlife Service (2005). The size of the service area(s) must be adequate to offset permitted impacts and maintain economic viability (refer to Element 6: Geographic Service Area in the ILF Instrument workbook for more on service area size adequacy).

#### 7d. Does the CPF describe and discuss threats to aquatic resources in service area(s)?

While there is considerable variability in how threats are defined by ILF programs, the CPF should reference sources, such as development trends (population trends, transportation and infrastructure planning, etc.) and geospatial data in determining what activities/processes may have caused, is currently causing, and has the potential to cause destruction, degradation, and/or impairment to an ecosystem, natural resource or community (ELI 2009, Maine DEP 2011).

**Examples of types of aquatic resource threats identified by an ILF program include**  
(Maine DEP 2011):

- Habitat loss and fragmentation (due to population increase and development)
- Altered hydrologic regimes (water withdrawal, dams)
- Alteration of the buffer zones around surface waters (lakes, ponds, rivers, streams, and wetlands)
- Loss of landscape connectivity due to road impacts
  - fish and other wildlife passage blockages
  - loss of access to free movement and key habitat for wildlife
  - increased incidence of roadkill
- Other impacts (from roadways, impoundments, agriculture, development, etc.)
  - increased frequency/extent of disturbances, like pollution and fire
  - changes in hydrology
  - increased salinity in adjacent waterbodies
  - increased opportunity for invasion by exotic and invasive species
  - increased recreation impacts (new roadways=new access)
  - forest conversion
  - changes in climatological patterns

Threats identified should be specific to the service area(s) and may be rated or ranked. For example, in the Maine ILF program instrument, threats are qualitatively ranked based on their scope, severity, contribution, and irreversibility, based on available data and expert opinion (Maine DEP 2011).

#### 7e. Does the CPF provide an analysis of historic aquatic resource loss and current conditions?

For the prospectus, the CPF should include a brief analysis of historic aquatic loss, which helps the ILF program to prioritize locations and aquatic resource types and justify the restoration need. A program may

describe the ecological history of the state since colonial settlement (where that information is available) and provide a timeline of development and corresponding watershed/landscape and aquatic degradation that leads to the present. The history may present statistics/estimates comparing natural resource presence pre-settlement to current conditions and/or discuss the historical loss by service area, resource type, or anthropogenic activity (i.e., mining, dredging, agricultural conversion). Supporting sources for evaluating resource loss and current conditions may include historical documentation, peer-reviewed journal articles, state or district aquatic resource impact permit files, regional and state assessments/reports, metrics/rankings for the highest quality resource areas remaining, and GIS data layer(s) that approximates historic loss and/or fragmentation. GIS layer(s) of historic resource areas may also serve as a tool for identifying possible restoration locations (Coastal Resources Group 2012, LLF 2020, Cumberland River Compact [CRC] 2016).

#### 7f. Does the CPF clearly state aquatic resource goals and objectives for each service area?

The CPF's aquatic resource goals and objectives should include a high-level discussion on the type(s) of aquatic resources the ILF program is focused on restoring for each service area. It should also include some indication of the general locations (statewide to project site) and amounts of aquatic resources the program will seek to provide (33 CFR 332.8(c)(2)(v)/40 CFR 230.98(c)(2)(v)).

The Sponsor may also include the overall goals of the ILF program (e.g., provide an alternative to permittee responsible mitigation, expand ILF mitigation to apply to larger scale projects/impacts, provide compensation for scarce or at-risk resources, contribute to environmental sustainability within the watershed, Massachusetts DFG 2014), or connect the program's goals to the agency or organization's overall mission (e.g., "provide effective and responsible levels of protection and restoration of New Hampshire's aquatic resources through an efficient regulatory program..." NH DES 2012).

#### 7g. Does the CPF clearly lay out a prioritization strategy for selecting/implementing projects? And does it explain the approach that will be used?

The CPF is used to strategically select and prioritize ILF compensatory mitigation sites. The CPF should include a description of the ILF program's prioritization strategy, including laying out the criteria used to select and implement projects. The site selection strategy in the CPF should show how the ILF program will incorporate consideration of the watershed or landscape context in strategic site selection. The CPF should show how the site selection strategy ties to the identified threats, historic and current conditions, and aquatic resource goals for each program service area. There is a range of approaches ILF programs use, from identification of specific potential project sites (King County 2011, Riverside-Corona RCD 2012) to specification of the framework or specific criteria used for site identification and selection (CRC 2016, etc.). The NFWF (2012) CPF focuses on prioritizing projects that improve aquatic habitat structure and function. Factors considered include whether a project would buffer or connect existing aquatic resources, such as vernal pool complexes, the hydrologic condition of aquatic resources (intact, altered, degraded, etc.), and the physical and/or biotic structure, including species composition and integrity of proposed projects and adjoining areas.

## 7h. Does the CPF provide an explanation of use of preservation?

The use of preservation by ILF programs must comply with preservation criteria discussed in the Mitigation Rule (33 CFR 332.3(h)/40 CFR 230.93(h)), which states that preservation may be used to provide compensatory mitigation when it satisfies the following conditions:

- Provides important functions for the watershed;
- Contributes substantially to the ecological sustainability of the watershed;
- Is determined to be appropriate and practicable by the Corps;
- Is under threat of destruction or adverse modification<sup>5</sup>;
- Will be permanently protected; and
- To the extent appropriate and practicable, will be done in conjunction with restoration, establishment, and/or enhancement of aquatic resources.

The prospectus may list these five conditions in the narrative on the use of preservation.

## 7i. Does the CPF provide a description of stakeholder involvement and coordination with regulatory and resource agencies?

The CPF should contain a narrative describing at a broad level the types of stakeholders (i.e., public, private, conservation groups, non-profits, academia) and the state and resource agencies the Sponsor is coordinating with for the ILF program. Some programs will also include federal agencies and tribal representatives. Programs will vary in level and focus/scope of stakeholder involvement. For example, programs may request stakeholder involvement in:

- Developing the CPF and the resources used/tools developed by the program,
- Developing the program's conservation action planning efforts (identifying conservation targets, developing measurable conservation objectives, etc.),
- Obtaining resource information and finding mitigation opportunities within a service area as part of project site selection, and/or
- Developing, reviewing, and implementing mitigation projects (NH DES 2012, ME DEP 2011, TNC 2014, and NFWF 2014).

## 7j. Does the CPF describe long-term protection and management strategies?

The CPF should describe the long-term protection and management strategies or activities undertaken by the ILF program Sponsor (33 CFR 332.8(c)(2)(ix)/40 CFR 230.98(c)(2)(ix)). Regardless of the method of project implementation (e.g., design-build, RFP, bank credit purchase), the ILF program retains responsibility for ensuring that each project has suitable long-term protection (i.e., legal mechanism such as a conservation easement) and long-term management provisions. The specifics are detailed in each ILF project plan (refer to the ILF Project Workbook for more information); however, the prospectus often provides a general overview of their long-term protection and management strategy and process (LLF 2020, NFWF 2012, NFF and USFS 2015).

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<sup>5</sup> District or state-specific guidelines may clarify what is meant locally by the threat of destruction or adverse modification.

7k. Does the CPF clearly lay out a strategy for evaluation and reporting?

Per the Mitigation Rule, the CPF must include a strategy for periodic evaluation and reporting on the progress of the ILF program in achieving its stated goals and objectives (see question 1f.). This evaluation should include a process for revising the CPF if necessary (33 CFR 332.8(c)(2)(x)/40 CFR 230.98(c)(2)(x)). The CPF should indicate what types of reports (monitoring, assessments, programmatic, progress) and the associated timeframe(s) (annual, biannual, etc.) for submittal to the IRT will be followed. These reports should give the IRT reviewer a good indication of the program's status in progressing towards its stated goals and objectives and identify any changes that may affect or alter the program/CPF's strategy or goals.

In Summary

To prepare for reviewing the contents of an ILF program's CPF, the IRT reviewer should refer to past instruments and current district/state policy to determine the level of detail necessary for the CPF narrative. The content and detail of an instrument CPF are ultimately decided by the Chair or co-chairs and takes into account the characteristics of the service area(s) and the scope of the program. The IRT review is a major consideration in the Chair's or co-chairs' initial evaluation of the prospectus (33 CFR 332.8(c)(3)/40 CFR 230.98(c)(3)).

## 8. Description of ILF Program Account

The Mitigation Rule defines the foundations of an ILF program account, clearly outlining conditions on when an account must be established, how it must be established, and how funds are distributed. These explicit provisions in the regulations are in part the result of evaluations of ILF programs prior to the issuance of the Mitigation Rule, including the Government Accountability Office (GAO 2001) and the Environmental Law Institute (ELI 2006), that identified serious concerns regarding the lack of transparency and adequacy of accounting of ILF mitigation funds and corresponding ineffective oversight of these ILF programs by the Corps and EPA. The Mitigation Rule established a regulatory standard for ILF programs to ensure that program account funds were used only for the ILF mitigation program and were appropriately tracked and distributed within the program account.

### 8a. Does the ILF prospectus discuss establishment of a program account?

The Mitigation Rule (33 CFR 332.8(i)(1)/40 CFR 230.98(i)(1)) indicates that the ILF Program account:

- May only be used for the deposit of mitigation fees from permittees.
- May be established after the ILF instrument is approved by the Chair or co-chairs in consultation with the rest of the IRT but must be established before the ILF program may accept any funds.
- Must be established at a financial institution that is a member of the Federal Deposit Insurance Corporation (FDIC). This better ensures that funds are deposited in a reputable and accountable financial institution.

### 8b. Does the prospectus describe an accounting mechanism for keeping permittee fees and funds from sources other than permittees separate?

Any funds from sources other than permittees (donations, grants, appropriations, adjoining non-mitigation projects, etc.) must be kept in separate accounts (33 CFR 332.8(i)(1)/40 CFR 230.98(i)(1)). This ensures there is no commingling of mitigation fees with non-mitigation fees. These two fee types must be kept separate to accurately account for advance credit debits and repayments. Examples of this proposed separation of mitigation fees from non-mitigation fees can be seen in a number of prospectus (NFWF 2012, HCCC 2011, WI DNR 2013). Additionally, any interest income and earnings from mitigation fees must remain in the ILF program account.

### 8c. Does the prospectus describe what the program account may be used for?

The program account may only be used for the selection, design, acquisition, implementation, and management of ILF compensatory mitigation projects. This means that educational activities must be funded with non-mitigation fees (Preamble to the Mitigation Rule, Federal Register / Vol. 73, No. 70 Thursday, April 10, 2008, pg. 19657).

A small percentage of the mitigation fees can be used to administer the ILF Program. That percentage is determined by the Sponsor to cover the expense of administering the program in accordance with the

requirements of the Mitigation Rule and is subject to approval by the Chair or co-chairs in consultation with the IRT and Sponsor (Preamble to the Mitigation Rule, Federal Register / Vol. 73, No. 70 Thursday, April 10, 2008, pg. 19609).

**Note:** The regulations do not clearly identify what constitutes “a small percentage of mitigation fees” for administrative costs. The percentage is determined in discussions between the Chair or co-chairs, IRT, and Sponsor, and can range from a low of five to as high as 25 percent, with a national average of 15 percent (from 2019 ILF presentation materials for National IRT Mitigation Bank and ILF Program Training Course ILF Presentation).

**More on establishing ILF Program Accounts...**

The ILF program prospectus should address some key aspects of the proposed ILF program account including how it will manage:

- Administrative fees
- Mitigation fees/funds (which should be further tracked by resource and/or service area, and can only be used for compensatory mitigation projects, not education or research)
- Interests and/or earnings must remain in the program account and used for compensatory mitigation
- Non 404/Section 10/401 fees (e.g., Proceeds from credits sale to offset impacts to isolated waters)

**8d. Does the ILF prospectus discuss reporting on ILF program account activity?**

Once an ILF program account is established and conducting transactions, the Mitigation Rule has provided regulatory guidance for reporting deposits and disbursements.

The Sponsor must provide annual reports to the Chair or co-chairs and IRT that include the following (33 CFR 332.8(i)(3)/40 CFR 230.98(i)(3)):

- All income received, disbursements, and earnings by the program account
- List of permits for which mitigation fees were accepted (refer to regulations for permit information to be included)
- Description of ILF program account expenditures
- Balance of advance and released credits at the end of the reporting period for each service area
- Any other information required by the Chair or co-chairs

The prospectus should clearly indicate the type and frequency of reporting, including the status of the program account. Examples include NFWF 2012, HCCC 2011, WI DNR 2013, and LLF 2020.



# Conclusion

As discussed in the introduction to this workbook, the primary focus when reviewing an ILF prospectus is to determine whether the proposed program is potentially suitable to provide appropriate compensatory mitigation. A good start for determining if a proposal is potentially suitable is for the IRT member to follow the guidance provided in each element of this ILF Prospectus Review Workbook and review and respond to the associated checklist questions. Once a prospectus is determined suitable by the IRT, the Sponsor may begin the next step in the ILF program development process, drafting an ILF program instrument. An approved prospectus does not guarantee that a subsequent ILF instrument will be approved.

It is the responsibility of the IRT Chair or co-chairs, in consultation, with IRT members to determine whether a prospectus is potentially suitable. The Chair or co-chairs in turn depend on individual IRT members to provide their expertise (knowledge and experience). So, it is incumbent on the IRT members to give a thoughtful and timely review of the prospectus.

In cases where the information provided in the prospectus is insufficient for the IRT Chair or co-chairs to make their determination, for example, if the Sponsor has not adequately documented its qualifications, the Sponsor will need to provide additional effort and/or information to address or resolve any identified issues. For cases where additional information is needed, it is the responsibility of the IRT Chair or co-chairs and members to discuss the situation clearly and comprehensively with the Sponsor. In these discussions, it is essential to distinguish between necessary information and information that is useful but not critical to a potential suitability determination.

In cases where the IRT Chair or co-chairs determines that some aspect of the proposal is fatally flawed, for example, if the Sponsor does not appear to meet the qualification requirements for an ILF program, the IRT Chair should advise the Sponsor of the fatal flaw(s) before the Sponsor undertakes the additional expense of developing an ILF program instrument.

# References

This includes literature referenced in the workbook as well as a sampling of prospectus outlines, templates, and instructions issued by the districts and states across the United States that were reviewed and, at times, referenced in this prospectus review workbook. This list was current as of January 2022; however, program instruments, templates, and tools will be revised over time.

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Maine Natural Resource Conservation Program (NRCP). 2020. Request for Letters of Intent Package. 23 pp. [http://mnrpc.org/sites/default/files/MNRCP\\_2020\\_RFLOI\\_final.pdf](http://mnrpc.org/sites/default/files/MNRCP_2020_RFLOI_final.pdf)

Maine Department of Marine Resources (ME DMR). 2018. Atlantic Salmon Restoration and Conservation Program ILF Instrument. 79 pp. [https://ribits.ops.usace.army.mil/ords/f?p=107:378:::NO::P378\\_PROGRAM\\_ID:2842](https://ribits.ops.usace.army.mil/ords/f?p=107:378:::NO::P378_PROGRAM_ID:2842)

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# APPENDIX A: REVIEW CHECKLIST

# ILF Prospectus Review Checklist Questions

The ILF Prospectus Review Checklist reflects the content of each element in the ILF Prospectus Review Workbook. For each element, the checklist asks whether the question was addressed (yes/no), whether the narrative is complete (yes/no), and the page number(s) of the narrative. A comment section for reviewer input is also included.

Review Element Question	Yes/No	Incomplete (Y/N)	Page #	Comments
<b>1. Objectives</b>				
1a. Does the prospectus include a description of the aquatic resource type(s) and approximate amount(s) the ILF program would provide?				
1b. Does the prospectus identify the functions and services expected to be provided by the ILF program?				
1c. Has the ILF program considered sites located within a watershed or landscape position where they are likely to provide the proposed functions and services?				
<b>2. How the ILF Program will be Established and Operated</b>				
2a. Does the prospectus specify how the program will identify mitigation projects?				
2b. Does the prospectus specify how the ILF program will develop and implement mitigation projects?				
2c. Does the prospectus indicate the process the program will use to obtain project approval?				
<b>3. Service Area</b>				
3a. Does the prospectus clearly define service area(s) for the program?				
3b. Does the prospectus or CPF identify the basis of the service area (i.e., watershed, coastal bay system, ecoregion, species distribution) and provide justification/rationale supporting its location and extent?				

<b>Review Element Question</b>	<b>Yes/ No</b>	<b>Incomplete (Y/N)</b>	<b>Page #</b>	<b>Comments</b>
3c. Does the program service area(s) seem appropriately sized to ensure that the proposed aquatic resources will effectively compensate for permitted impacts and replace lost functions/services?				
3d. Does the service area comply with local, district, and/or state requirements (scale, size, or resource type)?				
<b>4. Need and Technical Feasibility</b>				
4a. Does the prospectus provide information on past, current, or anticipated demand for the proposed compensation in each proposed service area?				
4b. Does each proposed program service area examine ecological resource needs within its limits?				
4c. Does the prospectus address the technical feasibility of the proposed ILF program?				
4d. Does the prospectus identify any constraints that would limit the mitigation potential of the ILF program?				
<b>5. Ownership Arrangements</b>				
5a. Does the prospectus identify how the program will manage ILF project site ownership arrangements?				
5b. Does the prospectus identify what form of long-term site protection mechanism is likely to be proposed (conservation easement, declaration of restrictions, etc.) for ILF projects?				
5c. Does the prospectus identify any existing easements or other property restrictions?				

<b>Review Element Question</b>	<b>Yes/ No</b>	<b>Incomplete (Y/N)</b>	<b>Page #</b>	<b>Comments</b>
5d. Does the prospectus or associated exhibits identify any other interests in the property (financial, mineral/timber, water rights)? If so, does the prospectus (or associated exhibits/attachments) explain how those other interests may affect the ILF project site?				
5e. If the site is located on public lands does the prospectus identify any additional long-term protection measures? Do they seem sufficient?				
5f. Does the prospectus identify the proposed long-term management arrangements, including the party(ies) responsible for long-term management?				
<b>6. Qualifications</b>				
6a. Does the prospectus document the Sponsor's experience as a government or non-profit natural resource management agency?				
6b. Does the prospectus document the technical capabilities of the Sponsor to implement an ILF program?				
6c. For ILFs that would be sponsored by a non-profit organization, does the prospectus document the composition of the non-profit's Board of Directors?				
<b>7. Compensation Planning Framework (CPF)</b>				
7a. Does the prospectus include a CPF?				
7b. Are the elements of the CPF framework clearly identified?				
7c. Does the CPF explain the development of program geographic service area(s)?				
7d. Does the CPF describe and discuss threats to aquatic resources in service area(s)?				
7e. Does the CPF provide an analysis of historic aquatic resource loss and current conditions?				



<b>Review Element Question</b>	<b>Yes/ No</b>	<b>Incomplete (Y/N)</b>	<b>Page #</b>	<b>Comments</b>
7f. Does the CPF clearly state aquatic resource goals and objectives for each service area?				
7g. Does the CPF clearly lay out a prioritization strategy for selecting/ implementing projects? And does it explain the approach that will be used?				
7h. Does the CPF provide an explanation of use of preservation?				
7i. Does the CPF provide a description of stakeholder involvement and coordination with regulatory and resource agencies?				
7j. Does the CPF describe long-term protection and management strategies?				
7k. Does the CPF clearly lay out a strategy for evaluation and reporting?				
<b>8. Description of ILF Program Account</b>				
8a. Does the ILF prospectus discuss establishment of a program account?				
8b. Does the prospectus describe an accounting mechanism for keeping permittee fees and funds from sources other than permittees separate?				
8c. Does the prospectus describe what the program account may be used for?				
8d. Does the ILF prospectus discuss reporting on ILF program account activity?				