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December 14, 2005

Jim Townsend
ATTN: CELRL-OP-F
P.O. Box 59
Louisville, KY 40401-0059

VIA ELECTRONIC MAIL

Dear Jim Townsend:

From all of my colleagues at the Environmental Law Institute (ELI), I would like to thank you and your staff for completing the compensatory mitigation survey we sent to your district this summer. As you know, the survey was designed to generate data on the status of compensatory mitigation that is required to replace wetlands and aquatic resources unavoidably lost or adversely affected by impacts permitted through the Clean Water Act §404 program.

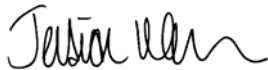
Before publishing the results of our survey, we would like to request that you verify that the data we have collected are accurate. Attached you will find a checklist designed for your quick review and verification. Because some of the responses we received revealed some conflicting information, we have included a few additional questions to ensure that we have accurately captured and characterized the compensatory mitigation activity in your district. We request that *before answering these questions*, you review the assumptions and definitions we have provided.

We would greatly appreciate a response by **January 6, 2006**. Responses can be mailed, emailed, or faxed to the address listed below.

Page Two
December 14, 2005

Thank you in advance for your help. We sincerely hope that this study will be a valuable resource to you and your colleagues. If you plan to submit comments to us, but cannot make the **January 6, 2006** deadline, please let Jared Thompson know (contact information provided below). Also, feel free to call or email if you have any questions. I can be reached at 202-558-3100 or eliwilkinson@comcast.net.

Sincerely,



Jessica Wilkinson, Director
Wetlands Program

Submit to:

Jared Thompson, Research Associate
Environmental Law Institute
2000 L Street, NW Suite 620
Washington, DC 20036
PH: 202/939-3247
FAX: 202/939-3868
E-Mail: jthompson@eli.org

Encl.

Cc: Mark Sudol, Chief, Regulatory Division, U.S. Army Corps of Engineers

**Environmental Law Institute
Compensatory Mitigation Study
December 2005**

For the purposes of this study, the following definitions were used and assumptions made.

Compensatory mitigation is required “to replace aquatic resource functions unavoidably lost or adversely affected by authorized activities”¹ under §404 of the Clean Water Act. It is commonly understood that there are “three general, discrete mechanisms for providing compensatory mitigation: permittee-responsible mitigation, mitigation banks, and in-lieu fees.”² These three forms of mitigation are defined below:

(1) **Permittee-responsible mitigation** – By far the largest category of mitigation, permittee-responsible mitigation is distinguished by the fact that the liability for meeting mitigation requirements remains with the permittee. Permittee-responsible mitigation can occur on-site, off-site, or through a single-user mitigation bank. As noted by the National Research Committee, “the typical permittee will perform the mitigation itself or hire an agent to perform it, and the permittee remains responsible for the mitigation.”³

(2) **Mitigation banks** – Mitigation banking is “wetland [or stream] restoration, creation, enhancement, and in exceptional circumstances, preservation undertaken expressly for the purpose of compensating for unavoidable [wetland, stream, and other aquatic resource] losses [largely] in advance of development actions.”⁴ Since 1995, all mitigation banks have been required to have a Mitigation Banking Instrument in place as “documentation of agency concurrence on the objectives and administration of the bank.”⁵

Mitigation banking can also be accomplished through the purchase of credits from a mitigation bank established through an **umbrella banking instrument**. An umbrella instrument is a banking instrument sponsored by a single entity (public or private) for “the establishment and operation of multiple bank sites.”⁶ Umbrella banking instruments establish the parameters of the banking program and lay out the requirements for what should be included in supplemental site-specific information (e.g., individual site plans). As with individual wetland mitigation banks, umbrella banking programs have a formal agreement in place.

¹ U.S. Army Corps of Engineers. December 24, 2002. “Subject: Guidance on Compensatory Mitigation Projects for Aquatic Resource Impacts Under the Corps Regulatory Program Pursuant to Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act of 1899.” Regulatory Guidance Letter No. 02-2. 1(a).

² National Research Council. 2001. “Compensating for Wetland Losses Under the Clean Water Act.” National Academy Press: Washington, DC. p. 82. [Hereinafter NRC.]

³ NRC. p. 83.

⁴ Department of Defense, Environmental Protection Agency, Department of Agriculture, Department of the Interior, and Department of Commerce. Tuesday, November 28, 1995. “Federal Guidance for the Establishment, Use and Operation of Mitigation Banks.” Federal Register, Vol. 60, No. 228. 58605-58614. [Hereinafter Banking Guidance.]

⁵ Banking Guidance. C(2).

⁶ Banking Guidance. C(2).

(3) **In-lieu-fee mitigation** – “In-lieu-fee mitigation occurs in circumstances where a permittee provides funds to an in-lieu-fee sponsor instead of either completing project-specific mitigation or purchasing credits from a mitigation bank approved under the Banking Guidance.”⁷ The 2000 ILF Guidance states that a formal in-lieu-fee agreement should be “established by the sponsor with the Corps, in consultation with the other agencies.”⁸

ELI differentiates between in-lieu-fee **programs** and project-specific or one-time only **in-lieu-fee projects**. **Our survey requested that you identify the approved and pending in-lieu-fee programs in your district.** An in-lieu-fee mitigation **program** is characterized by having in place a formal agreement between a regulatory agency and a third party sponsor⁹ that allows multiple permittees to make multiple payments, or one permittee to make multiple payments, to the program sponsor in lieu of meeting their mitigation obligations through project-specific mitigation or purchasing credits from an approved mitigation bank. The establishment of in-lieu-fee **programs** is recognized in the 2000 ILF Guidance, which states: “It may be appropriate to establish an “umbrella” arrangement for the establishment and operation of multiple sites. In such circumstances, the need for supplemental information (e.g., site specific plans) should be addressed in specific in-lieu-fee agreements.”¹⁰ The in-lieu-fee **program** agreement lays out the legal, financial, and long-term management obligations of each party. The program sponsor generally develops a separate compensatory mitigation plan or “site specific plan,”¹¹ for each mitigation action undertaken with funds from the in-lieu-fee program. The site-specific plan is generally provided to the Corps for review and approval.

The 2000 ILF Guidance suggests that in-lieu-fee agreements should be established in every circumstance where a permittee provides funds to a third party instead of either completing project-specific mitigation or purchasing credits from a mitigation bank. ELI does, however, recognize that many Corps districts approve project-specific or one-time only in-lieu-fee **projects** without an in-lieu-fee agreement in place. These are instances when the Corps allows a permittee to make a single payment to a third party to satisfy their compensatory mitigation obligations.

We do ask that you are mindful of this distinction when responding to the questions below.

⁷ U.S. Department of the Army, U.S. Environmental Protection Agency, U.S. Department of Interior, and U.S. Department of Commerce. *Federal Guidance on the Use of In-Lieu-Fee Arrangements for Compensatory Mitigation under Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act*. 2000. [Hereinafter ILF Guidance.]

⁸ ILF Guidance. IV(B).

⁹ In some instances in-lieu-fee programs have been established through state or local legislation/regulations and are administered by a state or local environmental regulatory agency. These programs often are not approved by the Corps, as they only accept in-lieu fees for impacts that fall below the §404 threshold or in states that have assumed the §404 program.

¹⁰ ILF Guidance. IV(B).

¹¹ ILF Guidance. IV(B).

District Mitigation Data Review and Verification

Data provided on 9/16/2005 by:

Lee Anne Devine
 USACE, Louisville District
 502-315-6692
 Lee.Anne.Devine@lrl02.usace.army.mil

I. Review of Compensatory Mitigation Information

A. Compensatory Mitigation Methods

Please place an "X" in the "Accurate" column if the information provided below is accurate. If your district has any approved or pending mitigation banks, umbrella agreements, or in-lieu-fee programs that are *not* identified below, please provide this supplemental information on the following page (Section II).

1. Mitigation Banks

Accurate	Bank Name	Sponsor	Status
	G & L Mitigation Bank	G & L	Approved-active
	Geist Reservoir Mitigation Bank	Shorewood Corp.	Approved-Inactive-Soldout
	Morse Reservoir Wetland Mitigation Bank	Shorewood Corp.	Approved-Inactive-Soldout
	Nelson County Wetland Mitigation Bank Number One	PTRL Environmental Services	Approved-active
	Pond Creek Water Storage/Wetland Mitigation Bank	PTRL Environmental Services	Approved-active
	Schroeder Mitigation Bank	Gary W. Schroeder	Approved-active
	Wetland Bank of Kentucky (Hawkings Bank)	Highview Engineering Inc.	Approved-Inactive-Suspended
	Wolfe Mitigation Bank		Approved-Inactive-Other-In Monitoring Phase

2. Umbrella Banking Programs

Accurate	Bank Name	Sponsor	Status
	CreekBankers, Inc.	CreekBankers, Inc.	Approved-active
	Kentucky Transportation Cabinet		Proposal Abandoned
	TECO Coal Corp.	TECO Coal Corp.	Pending

3. In-Lieu-Fee Programs

Accurate	Program Name	Sponsor	Status
	In-Lieu-Fee Program for Stream and Wetland Mitigation	Kentucky Dept. of Fish & Wildlife Resources	Approved-Active
	Louisville and Jefferson County Metropolitan Sewer District Program	Louisville and Jefferson County Metropolitan Sewer District	Approved-Active
	Northern Kentucky University In-Lieu-Fee Program	Northern Kentucky University	Approved-Active

B. District Mitigation Guidance

Please indicate whether or not we have accurately identified all of your **district-specific** mitigation guidance, mitigation standard operating procedures, mitigation check-lists, mitigation do's and don'ts, banking guidance, and in-lieu-fee guidance. If your district has any approved or pending guidance documents that are *not* identified below, please provide this supplemental information on the attached sheet.

Accurate	District Guidance Citation
	Louisville District, U.S. Army Corps of Engineers. "Mitigation Guidelines." September 22, 2004. http://www.lrl.usace.army.mil/diwms/article.asp?id=273
	Louisville and Detroit Districts, U.S. Army Corps of Engineers, Natural Resources Conservation Service, U.S. Environmental Protection Agency, U.S. Fish and Wildlife Service, Indiana Department of Environmental Management and the Indiana Department of Natural Resources (Indiana Mitigation Banking Review Team). "Interagency Coordination Agreement on Wetland Mitigation Banking Within the State of Indiana." April 24, 2002. http://www.lre.usace.army.mil/functions/rf/html/inbank.pdf
	Buffalo, Huntington, Louisville, and Pittsburgh Districts, U.S. Army Corps of Engineers. "U.S. Army Corps of Engineers Mitigation Guidelines Checklist for the State of Ohio." September 23, 2004. http://www.lrh.usace.army.mil/_kd/Items/actions.cfm?action=Show&item_id=4467&destination=ShowItem

II. Supplementary Information

A. Additional Compensatory Mitigation Method Information

Please provide supplementary information on any approved or pending mitigation banks, umbrella agreements, or in-lieu-fee programs in your district that are *not* identified above. For status, please indicate whether the bank or program is approved, pending, or other. If other, please define.

1. Additional Mitigation Banks

Bank Name	Sponsor	Status

2. Additional Umbrella Banking Programs

Bank Name	Sponsor	Status

3. Additional In-Lieu-Fee Programs

Program Name	Sponsor	Status

B. Additional District Mitigation Guidance

Please provide supplementary information on any pending or approved **district-specific** mitigation guidance, mitigation standard operating procedures, mitigation check-lists, mitigation do's and don'ts, banking guidance, or in-lieu-fee guidance not identified above. Please provide a full citation and, where possible, the URL where the document can be accessed.

III. Additional Questions

A. Does your district allow permittees to make payments to third parties *outside the approved in-lieu-fee programs identified above* instead of completing project-specific mitigation or purchasing credits from a mitigation bank?

- Yes
- No

1. If yes, how does your district define this form of mitigation (i.e., project-specific in-lieu fee, activity-specific in-lieu-fee)?

2. If yes, how many such transactions would you estimate your district has approved since 2000?

- 1-5
- 6-10
- 10-15
- 15-20
- More than 20. Please estimate:_____

3. If yes, how many third parties, or mitigation providers, have been the recipients of these funds since 2000?

- 1-5
- 6-10
- 10-15
- 15-20
- More than 20. Please estimate:_____

4. If yes, please specify how the Corps verifies which party/parties is/are responsible for meeting the compensatory mitigation requirements, performance standards, and other requirements, such as financial assurances, real estate assurances monitoring and long-term maintenance provisions (i.e., is this information consistently included as a special condition of the permit)?

B. Does your district allow permittees to satisfy their mitigation obligations through means other than permittee-responsible mitigation, purchasing credits from the mitigation banks identified above, or paying into an in-lieu fee program identified above?

Yes

No

1. If yes, please define and describe these alternative forms of mitigation below: