

Establishing In-Lieu Fee Mitigation Programs: Identifying Opportunities and Overcoming Challenges

Following the 2008 introduction of federal rules governing the operation of wetland compensatory mitigation programs, existing and new in-lieu fee (ILF) mitigation programs were compelled to comply with a series of new requirements. The Environmental Law Institute (ELI) asked ILF program sponsors across the country to identify the most pressing challenges associated with developing and implementing ILF programs under the new regulations. This article reviews the findings and identifies steps that may be helpful in the process of establishing and implementing ILF programs in the future.

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In-lieu fee (ILF) programs restore, establish, enhance, and/or preserve aquatic resources through funds paid by permittees to satisfy compensatory mitigation requirements.¹ In selling compensatory mitigation credits to permittees, the obligation to provide compensation is transferred to the ILF program sponsor. Federal regulations, finalized in 2008, establish standards for the operation of ILF programs.² The regulations require ILF programs to use a “watershed approach” in selecting project locations, develop measurable ecological performance standards, and conduct regular monitoring for all types of compensation. They also specify the components of a complete compensatory mitigation plan, including assurances of long-term protection of compensation sites, financial assurances, and identification of the parties responsible for specific project tasks.

To identify the issues that pose the greatest challenges to developing ILF instruments under the new regulations, ELI evaluated ILF practitioners, program sponsors, and regulators at the state and federal levels. We asked respondents to identify the topics of greatest concern from among a detailed list of ILF program elements, processes, and other considerations. Participants included 88 ILF practitioners, program sponsors, and regulators affiliated with a diverse range of state and federal programs. Based on the results of the evaluation, we identified the top 10 challenges common to many program sponsors in the development and implementation of ILF programs. Responses from state and federal regulators differed somewhat from those of other participants. State regulators stressed the importance of securing long-term financing and developing long-term management plans, while federal regulators emphasized methodology for determining advance credits and project-specific credits and fees.

To help ILF programs address these top 10 challenges, ELI developed a series of webinars designed to share insights and best practices among practitioners and regulators from different states.³ ILF program sponsors, federal and state regulators, and others shared their experiences to aid other sponsors and regulators across the country on the following topics.

ESTABLISHING IN-LIEU FEE MITIGATION PROGRAMS: TOP 10 CHALLENGES

1. Determining Advance Credits

The Compensatory Mitigation Regulations require that ILF program instruments specify a limited number of advance credits that can be sold by the program before specific sites are secured and mitigation plans approved.⁴ Programs must complete land acquisition and initial physical and biological improvements by the third full growing season after the first advance credit in that service area is secured by a permittee.⁵ The number of advance credits that may be available to be sold by a program is based on the “compensation planning framework,”⁶ the size of the service area, the resources available to the program, the sponsor’s past project performance, and the financing needed for mitigation projects, among other considerations. Some programs may request large numbers of advance credits (e.g., in cases where the program provides a type of compensation that no other entity is capable or willing to undertake), others may not request any advance credits at all (e.g., Coastal Mississippi Land Trust). In some

1 Compensatory Mitigation Regulations, 33 C.F.R. §332.2 (2008).

2 33 C.F.R. §§325, 332, 40 C.F.R. §230(J) (2008).

3 Webinar: 2013 In-Lieu Fee Mitigation Training Webinar Series, available at <http://www.eli.org/events/2013-in-lieu-fee-mitigation-training-webinar-series>.

4 33 C.F.R. §332.8(n) (2008).

5 33 C.F.R. §332.8(n)(3) (2008).

6 The compensation planning framework is a required component of the ILF program instrument that is used to guide the selection of specific compensation projects and must support a watershed approach to compensatory mitigation. 33 C.F.R. §332.8(c)(2) (2008).

cases, the limit on advance credit sales is determined as a percentage of all permitted impacts over a given time period, the percentage of all required mitigation over a given time period, or as the amount of credits needed to offset three to five years of impacts. More credits might also be available to experienced or reliable project sponsors.⁷

2. Range of Ways ILF Programs Can Be Structured to Guide Site Selection

Site selection is critical to the ecological success and sustainability of compensatory mitigation projects.⁸ The 2008 regulations require agencies to use a “watershed approach” to select compensatory mitigation sites. The goal of the watershed approach is to maintain and improve the quality and quantity of aquatic resources within watersheds through strategic selection of compensatory mitigation sites.⁹ The approved compensation planning framework must include the prioritization strategy that ILF programs will use for selecting and implementing compensatory mitigation activities within the context of the watershed approach.¹⁰

ILF programs have developed a range of strategies for site selection. Prioritization strategies may include pre-identifying sites for compensation projects (e.g., the Riverside-Corona Resource Conservation District ILF program in California), identifying priority areas from which the program will draw compensation sites (e.g., the Virginia Aquatic Resources Trust Fund), or developing a decisionmaking framework for site selection (e.g., Oregon Department of State Lands ILF Program).¹¹ For example, the Virginia Aquatic Resources Trust Fund uses a watershed approach to identify ecologically important areas in which to conduct compensation projects based on mitigation need within the watershed; available funds within the watershed and for the specific resource; landscape setting, size, and scope of the project; feasibility of restoration; and project costs.¹² In another example, the King County Mitigation Reserves Program in Washington developed a roster of sites chosen from among the county’s land holdings based on funding compatibility, potential for ecological “lift,” accessibility, and geographic coverage within service areas.¹³

There are two main administrative strategies that programs have developed for site selection—a program-based, decisionmaking

strategy relying on criteria for site evaluation and a request for proposals process.¹⁴ The Maine Natural Resource Conservation Program has used a competitive, two-step request for proposal models that includes a letter of intent followed by an invitation for full proposals for qualifying projects. Projects are rated using a number of criteria, including potential to meet program goals, landscape context, project readiness, project sponsor capacity, and cost-effectiveness.¹⁵

3. Short-Term Financial Assurances

During the active phase of the project, before performance standards are met, the federal regulations stipulate that the U.S. Army Corps of Engineers (the Corps) must require “sufficient financial assurances to ensure a high level of confidence that the compensatory mitigation project will be successfully completed, in accordance with applicable performance standards.”¹⁶ The role of financial assurances in a compensatory mitigation project is not to eliminate risk, but to manage it. The amount of financial assurances must be determined in consultation with the responsible party, and must reflect the size and complexity of the project, the degree of completion of the project, the likelihood of success, and the past performance of the mitigation provider as well as other appropriate factors.¹⁷

4. Long-Term Financing

Long-term financing is required to ensure that long-term management obligations for the site can be met in perpetuity.¹⁸ It is critical to carefully determine the amount of long-term management funding that will be necessary and that the funding mechanism (e.g., endowment, trust, other appropriate financial instrument) is secure and is likely to endure.¹⁹ Indeed, the long-term management and funding strategy should include provisions for contingency funding and an adaptive management clause outlining the steps to be taken if the project runs out of funding at some point in the future.²⁰ Calculating the initial amount of the fund is done by first creating a comprehensive long-term management plan (see below) that relies on sound assumptions using best management practices, available science, permit requirements, and realistic market costs for labor. The plan is then broken down into specific annual tasks and each task is assigned an itemized cost to determine the annual cash

7 Steve Martin, *Advance Credits*, ELI In-Lieu Fee Mitigation Training Webinar Series, Apr. 22, 2013, available at <http://www.eli.org/events/advance-credits>.

8 National Research Council, “Compensating for Wetland Losses Under the Clean Water Act,” Washington, DC, (National Academy Press 2001).

9 33 C.F.R. §332.3(c)(1) (2008).

10 33 C.F.R. §332.8(c)(2) (2008).

11 Jessica Wilkinson, *Range of Ways ILF Programs Can Be Structured to Guide Site Selection*, ELI In-Lieu Fee Mitigation Training Webinar Series, May 8, 2013, available at <http://www.eli.org/events/range-ways-ilf-programs-can-be-structured-guide-site-selection>.

12 Karen Johnson, *Range of Ways ILF Programs Can Be Structured to Guide Site Selection*, ELI In-Lieu Fee Mitigation Training Webinar Series, May 8, 2013, available at <http://www.eli.org/events/range-ways-ilf-programs-can-be-structured-guide-site-selection>.

13 Michael Murphy, *Range of Ways ILF Programs Can Be Structured to Guide Site Selection*, ELI In-Lieu Fee Mitigation Training Webinar Series, May 8, 2013, available at <http://www.eli.org/events/range-ways-ilf-programs-can-be-structured-guide-site-selection>.

14 *Id.* at 11.

15 Alex Mas, *Range of Ways ILF Programs Can Be Structured to Guide Site Selection*, ELI In-Lieu Fee Mitigation Training Webinar Series, May 8, 2013, available at <http://www.eli.org/events/range-ways-ilf-programs-can-be-structured-guide-site-selection>.

16 33 C.F.R. §332.3(n) (2008).

17 Steve Martin, *Short-Term Financial Assurances*, ELI In-Lieu Fee Mitigation Training Webinar Series, May 21, 2013, available at <http://www.eli.org/events/short-term-financial-assurances> (see examples from the Mobile and Norfolk districts at <http://www.eli.org/events/short-term-financial-assurances>).

18 33 C.F.R. §332.7(d).

19 Tim Dicitio, *Long-Term Financing*, ELI In-Lieu Fee Mitigation Training Webinar Series, June 3, 2013, available at <http://www.eli.org/events/long-term-financing>.

20 *Id.* See also Hall Holland, *Long-Term Financing*, ELI In-Lieu Fee Mitigation Training Webinar Series, June 3, 2013, available at <http://www.eli.org/events/long-term-financing>.

need. The year-over-year costs are then translated, based on careful consideration of an appropriate investment strategy and likely capitalization rate (i.e., projected rate of investment return minus the likely inflation rate), into the up-front funding need (the initial amount = annual cash need/capitalization rate). The investment strategy should ensure that the necessary annual spending would be sustainable over a long period of time without relying on any additional outside funding. Endowments may often be the most appropriate funding mechanism to use.²¹ The permitting agencies may also require various fail-safe mechanisms or operational safeguards, including the provision of several years' worth of initial annual funding in order to allow the long-term fund to mature.²²

5. Compensation Planning Framework

The compensation planning framework, a required component of the approved ILF instrument, is used to guide the selection of specific compensation projects under a watershed approach. The compensation planning framework must include 10 elements: geographic service area(s); description of threats; analysis of historic resource loss; analysis of current resource conditions; goals and objectives; prioritization strategy; preservation justification; description of stakeholder involvement; long-term management; and strategy for periodic evaluation and reporting.²³

When developing the compensation planning framework, ILF programs should incorporate and build on existing local planning documents and data sources, in addition to conducting any new planning or analyses. For example, the Mississippi Delta ILF program incorporated the Lower Mississippi Valley Joint Venture conservation planning into its framework.²⁴ ILF programs should also consider involving other local stakeholders in the development of the compensation planning framework. For example, the Virginia Aquatic Resources Trust Fund involved dozens of stakeholders including federal and state agencies, local government, universities, industry, and NGOs in the development of their framework.²⁵ ILF programs sometimes include preservation as part of the compensation strategy outlined in their framework. Maine's ILF program outlines specific program objectives including the preservation of priority habitats identified in the state's Wildlife Action Plan, which can improve connections between existing protected lands.²⁶

²¹ *Id.*

²² Sherry Teresa, *Long-Term Financing*, ELI In-Lieu Fee Mitigation Training Webinar Series, June 3, 2013, available at <http://www.eli.org/events/long-term-financing>.

²³ Steve Martin, *Compensation Planning Framework*, ELI In-Lieu Fee Mitigation Training Webinar Series, June 19, 2013, available at <http://www.eli.org/events/compensation-planning-framework>.

²⁴ Eric Held, *Compensation Planning Framework*, ELI In-Lieu Fee Mitigation Training Webinar Series, June 19, 2013, available at <http://www.eli.org/events/compensation-planning-framework>.

²⁵ Karen Johnson, *Compensation Planning Framework*, ELI In-Lieu Fee Mitigation Training Webinar Series, June 19, 2013, available at <http://www.eli.org/events/compensation-planning-framework>.

²⁶ Ruth Ladd, *Compensation Planning Framework*, ELI In-Lieu Fee Mitigation Training Webinar Series, June 19, 2013, available at <http://www.eli.org/events/compensation-planning-framework>.

6. Establishing Administrative Costs, ILF Program Accounts, and Fee Methodologies

The ILF program instrument must establish a methodology for determining future project-specific fees and must include a description of the ILF program account.²⁷ The program account must be established at an FDIC-accredited financial institution prior to accepting any fees from permittees and "may only be used for the selection, design, acquisition, implementation, and management of in-lieu fee compensatory mitigation projects . . . except for a small percentage that can be used for administrative costs."²⁸ All accrued interest and earnings must remain in the account for the purposes of providing compensatory mitigation for the program.²⁹ The Ducks Unlimited Mississippi Delta ILF program follows a standard procedure in which all ILF funds received are deposited in a separate interest-bearing account. A certain percentage of administrative fees are disbursed from the account for program management.³⁰ Disbursements for individual ILF projects are made based on a schedule of milestones, and multiple internal authorizations are required in order to make withdrawals.

Federal regulations also stipulate that approved ILF programs must ensure full cost accounting. In other words, 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; expenses such as land acquisition, project planning and design, construction, plant materials, labor, legal fees, monitoring, and remediation or adaptive management activities; estimates for program administration, contingency costs, long-term management and protection costs; and financial assurances.³¹ For example, Kentucky's two ILF programs' full cost-accounting methods include design, construction, maintenance, post-construction monitoring, project contingency or adaptive management funding, and the costs of easement or property purchase.³² Different formulae are used to calculate initial cost/credit for streams and for wetlands, and these calculations may vary by service area. Cost or credit changes are posted on the program's website and documented in its annual report. In another example, the New Hampshire Department of Environ-

²⁷ 33 C.F.R. §332.8(d)(6)(iv) (2008).

²⁸ 33 C.F.R. §332.8(i)(1) (2008).

²⁹ 33 C.F.R. §332.8(i) (2008).

³⁰ Eric Held, *Establishing ILF Program Accounts, Administrative Costs, and Fee Methodologies*, ELI In-Lieu Fee Mitigation Training Webinar Series, June 26, 2013, available at <http://www.eli.org/events/establishing-ilf-program-accounts-administrative-costs-fee-methodologies>.

³¹ 33 C.F.R. §332.8(o)(5)(ii) (2008). See also Palmer Hough, *Establishing ILF Program Accounts, Administrative Costs, and Fee Methodologies*, ELI In-Lieu Fee Mitigation Training Webinar Series, June 26, 2013, available at <http://www.eli.org/events/establishing-ilf-program-accounts-administrative-costs-fee-methodologies>.

³² Patti Grace-Jarrett, *Establishing ILF Program Accounts, Administrative Costs, and Fee Methodologies*, ELI In-Lieu Fee Mitigation Training Webinar Series, June 26, 2013, available at <http://www.eli.org/events/establishing-ilf-program-accounts-administrative-costs-fee-methodologies>.

mental Services Aquatic Resource Mitigation Fund Program has developed a multi-step formula to calculate mitigation payments.³³

7. Feasibility Analysis and Service Areas

Developing an ILF program is time- and resource-intensive, and it can involve significant risk for program sponsors if no market ultimately exists for ILF program credits in the designated service areas. When analyzing the feasibility of ILF program operations, factors to be considered include the development costs for the program, the annual cost of project implementation, the amount of project work that will be done by the program sponsor, and whether the revenue from administrative fees and applicable ILF project funding will be enough to cover the program costs, including long-term management.³⁴ In order to determine whether the scale of a proposed service area is large enough to support a dedicated program, the assessment process must analyze current supply and demand for credits and likely future demand for ILF credits, estimate reasonable pricing of credits and the overhead rate, calculate the likely income, and compare it against an internally decided threshold amount needed for financial feasibility.³⁵ For example, in the Sacramento Corps District, the National Fish and Wildlife Foundation conducted a feasibility analysis that included the scope of legal and financial liabilities, a market analysis, size of service areas, cost analysis, and credit pricing.³⁶ The market analysis may include review of sales rate, mitigation alternatives, cost thresholds, and the presence of competition.

ILF program instruments must describe the geographic service area of the program, which is the watershed, ecoregion, physiographic province, and/or other geographic area within which the ILF program is authorized to provide compensatory mitigation.³⁷ While the federal regulations provide some definitions and guidance on determining service areas for ILF programs, the rule leaves some discretion to the Corps and Interagency Review Team in a number of areas.³⁸ For example, while the terms “watershed” and “geographic area” are defined, they have no set scale.

33 Lori Sommer, *Establishing ILF Program Accounts, Administrative Costs, and Fee Methodologies*, ELI In-Lieu Fee Mitigation Training Webinar Series, June 26, 2013, available at <http://www.eli.org/events/establishing-ilf-program-accounts-administrative-costs-fee-methodologies> (Link to the multi-step formula is available at this link).

34 Hal Holland, *Economic Feasibility Analysis and Service Areas*, ELI In-Lieu Fee Mitigation Training Webinar Series, July 23, 2013, available at <http://www.eli.org/events/economic-feasibility-analysis-and-service-areas>.

35 Bill Stanley, *Economic Feasibility Analysis and Service Areas*, ELI In-Lieu Fee Mitigation Training Webinar Series, July 23, 2013, available at <http://www.eli.org/events/economic-feasibility-analysis-and-service-areas>.

36 *Id.* at 34.

37 33 C.F.R. §332.8(d)(6)(ii) (2008).

38 Palmer Hough, *Economic Feasibility Analysis and Service Areas*, ELI In-Lieu Fee Mitigation Training Webinar Series, July 23, 2013, available at <http://www.eli.org/events/economic-feasibility-analysis-and-service-areas>.

8. Long-Term Management Plan

Federal regulations require that all mitigation projects have a long-term management plan that specifies the parties responsible for long-term management and maintenance, the long-term management and maintenance requirements for the site, the party responsible for long-term ownership, the annual management costs for the project, and the funding mechanism that will be used to meet those costs, among other requirements.³⁹ Funding mechanisms may be non-wasting endowments, trusts, or contractual arrangements with future responsible parties, and should address inflation and other contingencies (see above).⁴⁰

In a good long-term management plan, all goals and objectives are clearly stated, appropriate, and measurable; all management tasks are well-defined, long-term funding requirements are identified, the funding of obligations is accounted for, and the capitalization rate (i.e., projected rate of investment return minus the likely inflation rate) considered is realistic.⁴¹ The long-term management plan must be consistent with all related legal documents (e.g., conservation easement, management and funding agreement, etc.), and should focus on the specific history, features, conservation values, and threats of the site. The plan should also discuss contingencies for high-risk actions or unstable conditions and allow for periodic review/revision to address changing circumstances.

ILF programs must also identify a long-term steward as part of the ILF instrument. Land trusts may be the most appropriate organizations to fill this role, as they understand and are committed to stewardship and are experts in the field.⁴² Land trusts can play a variety of roles in long-term stewardship, and may act as fee title holder, easement holder, long-term stewardship fund holder, or long-term manager.

9. Standard Operating Procedures and Mitigation Plan Development

Following approval of the ILF program instrument, several ILF programs have worked with state and federal agencies to develop standard operating procedures (SOP) to guide day-to-day implementation of the program, including project approval and development of mitigation plans. For example, the Virginia Aquatic Resources Trust Fund developed SOPs to provide consistency with the established bank approval process. This included developing templates to address common situations that ensure consistency in the review and approval process, while allowing

39 33 C.F.R. §332.7(d) (2008).

40 Palmer Hough, *Long-Term Management Plan*, ELI In-Lieu Fee Mitigation Training Webinar Series, July 31, 2013, available at <http://www.eli.org/events/long-term-management-plan>.

41 Deborah L. Rogers, *Long-Term Management Plan*, ELI In-Lieu Fee Mitigation Training Webinar Series, July 31, 2013, available at <http://www.eli.org/events/long-term-management-plan>.

42 Sylvia Bates, *Long-Term Management Plan*, ELI In-Lieu Fee Mitigation Training Webinar Series, July 31, 2013, available at <http://www.eli.org/events/long-term-management-plan>.

for project-specific modifications.⁴³ In Kentucky, the Corps uses Letters of Permission to provide an abbreviated, noncontroversial processing procedure, in which the Corps coordinates with EPA and the U.S. Fish and Wildlife Service on mitigation.⁴⁴

There are 12 required components for a mitigation plan,⁴⁵ including the objectives of the compensatory mitigation project, site-selection information, the site-protection instrument to be used, baseline information regarding the impact and compensation sites, the number of credits to be provided, a mitigation work plan, a maintenance plan, ecological performance standards, monitoring requirements, a long-term management plan, an adaptive management plan, and financial assurances.⁴⁶ The depth of information and analysis included should depend on the scope and scale of the proposed impacts. The North Carolina Ecosystem Enhancement Program developed a framework for arriving at a mitigation work plan, goals, performance standards, and monitoring time frame.⁴⁷ Watershed and project stressors, attendant functional losses and reductions, and project site characteristics are used to determine the maximum remaining uplift potential for a given site. This is then considered together with risk and cost in order to generate a work plan that contains a specific approach and level of intervention, and an assessment and monitoring time frame. These are in turn used to generate tailored goals, objectives, and performance standards for the project.

10. Determining Project-Specific Credits

Approved mitigation plans must include a description of the number of credits to be provided at a mitigation site, including a brief explanation of the rationale for this determination. The federal compensatory mitigation regulations define the term “credit” as “a unit of measure (e.g., a functional or a real measure or other suitable metric) representing the accrual or attainment of aquatic functions at a compensatory mitigation site.”⁴⁸ The number of credits must reflect the difference between pre- and post-compensatory mitigation project site conditions, as determined by a functional or condition assessment or other suitable metric. Several Corps districts have developed methodologies for determining the number of credits generated by a mitigation project. For example, the Savannah district developed an SOP in 2004 for stream credit

generation that includes calculation of in-channel credits and riparian buffer credits in separate worksheet modules.⁴⁹

Under the 2008 regulations, credits may be generated through preservation of aquatic resources, and in some cases preservation of non-aquatic resources within a given watershed. To generate preservation credits, all of the following criteria must be met: resources must provide important physical, chemical, or biological functions for a watershed and contribute significantly to ecological sustainability of the watershed; preservation must be determined appropriate and practicable by the district engineer; the resources must be under threat; and the resource must be permanently protected.⁵⁰ To the extent appropriate and practicable, preservation should be done in conjunction with aquatic resource restoration, establishment, and/or enhancement. Non-aquatic resources can only be used as compensatory mitigation for impacts to aquatic resources when those resources are essential to maintaining the ecological viability of adjoining aquatic resources, and are the most appropriate compensation for the authorized impacts.

The Willamette Partnership’s Ecosystem Credit Accounting System facilitates the buying and selling of credits and tracks the benefits of restoration.⁵¹ The Partnership has developed protocols, standards, and quantification methods to translate mitigation actions into quantified, verified, and tradable credits. Protocols outline the steps of the credit issuance process: validation, calculation, registration, verification, and tracking. Standards set thresholds that must be met at various stages of the process, and quantification methods calculate the credit value of a given action. Under the multi-credit accounting system, there are distinct credit types for terrestrial habitat, aquatic habitat, and water quality improvements.

Finally, there are several important issues to consider when determining stream credits.⁵² First, rigid buffer widths can limit other forms of functional uplift. Second, sinuosity can be both good and bad: it is a useful method for achieving physicochemical functional uplift, but an upper limit should be set by stream type to avoid credit chasing. Third, it is acceptable to “restore” only one side of a stream only under certain conditions, i.e., if the channel is large and relatively stable, and connected to a floodplain or surrounding landscape. Finally, credits should be based on improvements to functional capacity (i.e. change from baseline to post-restoration conditions), not simply on changes to dimension, pattern, and profile of a stream. ■

43 Bettina Sullivan, *Standard Operating Procedures and Mitigation Plan Development*, ELI In-Lieu Fee Mitigation Training Webinar Series, Sept. 4, 2013, available at <http://www.eli.org/events/standard-operating-procedures-and-mitigation-plan-development>.

44 Patti Grace-Jarrett, *Standard Operating Procedures and Mitigation Plan Development*, ELI In-Lieu Fee Mitigation Training Webinar Series, Sept. 4, 2013, available at <http://www.eli.org/events/standard-operating-procedures-and-mitigation-plan-development>.

45 33 C.F.R. §332.4 (2008).

46 Mike Moxey, *Standard Operating Procedures and Mitigation Plan Development*, ELI In-Lieu Fee Mitigation Training Webinar Series, Sept. 4, 2013, available at <http://www.eli.org/events/standard-operating-procedures-and-mitigation-plan-development>.

47 Greg Melia, *Standard Operating Procedures and Mitigation Plan Development*, ELI In-Lieu Fee Mitigation Training Webinar Series, Sept. 4, 2013, available at <http://www.eli.org/events/standard-operating-procedures-and-mitigation-plan-development>.

48 33 C.F.R. §332.2 (2008).

49 Justin Hammonds, *Credit Determination*, ELI In-Lieu Fee Mitigation Training Webinar Series, Mar. 28, 2014, available at <http://www.eli.org/events/lieu-fee-mitigation-training-webinar-series-credit-determination>.

50 Ruth Ladd, *Credit Determination*, ELI In-Lieu Fee Mitigation Training Webinar Series, Mar. 28, 2014, available at <http://www.eli.org/events/lieu-fee-mitigation-training-webinar-series-credit-determination>.

51 Nicole Maness, *Credit Determination*, ELI In-Lieu Fee Mitigation Training Webinar Series, Mar. 28, 2014, available at <http://www.eli.org/events/lieu-fee-mitigation-training-webinar-series-credit-determination>.

52 Will Harman, *Credit Determination*, ELI In-Lieu Fee Mitigation Training Webinar Series, Mar. 28, 2014, available at <http://www.eli.org/events/lieu-fee-mitigation-training-webinar-series-credit-determination>.

Recommendations for New ILF Programs: A Checklist for New Programs

ILF programs provide for rigorous scientific and technical advance planning to identify “high-priority resource needs on a watershed scale”¹ for compensatory mitigation projects. Federal regulations outline key criteria to ensure that ILF mitigation projects are ecologically successful over the long-term. Prior to establishing a program, each ILF sponsor must thoroughly evaluate each of these criteria and requirements to determine whether or not they have the capacity to develop and operate a program. Based on ELI’s assessment and the information presented in the webinars, a checklist of the key initial steps that potential program sponsors should consider when establishing a new ILF program was developed.

1. Conduct a feasibility analysis

Undertake an assessment of the feasibility of a new program, including examining the demand for ILF credits and any competition that might exist. Some information on demand or competition may be obtained on the Corps’ RIBITs site (e.g., by creating a map of all banks in a service area),² or, for members, through the National Mitigation Banking Association’s Mitigation Analyst Tool. See the discussion above on feasibility analysis for more information.³

2. Conduct a thorough review of program documents

Potential sponsors should thoroughly review federal and state regulations, district program guidance, model documents (e.g., easements, long-term stewardship agreements), etc. that may be specific to your state or region. This can help sponsors identify the components of the instrument that are likely to be the most challenging for their organization/agency to develop (e.g., compensation planning framework, setting up program accounts, determining credits, or providing for long-term financing). ELI’s ILF model instrument provides a digestible format for which to review these requirements.⁴ Your local Corps district and state agency websites and ELI’s webinar series web page are also great places for model documents and more information.

¹ 33 C.F.R. §332.3(b)(3) (2008).

² U.S. Army Corps of Engineers, Regulatory In-lieu Fee and Bank Information Tracking System, available at <http://geo.usace.army.mil/ribits/index.html>.

³ Hal Holland & Tim Dicintio, *Economic Feasibility Analysis and Service Areas*, ELI In-Lieu Fee Mitigation Training Webinar Series, July 23, 2013, available at <http://www.eli.org/events/economic-feasibility-analysis-and-service-areas>.

⁴ Jessica Wilkinson, *In-Lieu Fee Mitigation: Model Instrument Language and Resources*, Environmental Law Institute (2009), available at <http://www.eli.org/research-report/lieu-fee-mitigation-model-instrument-language-and-resources>.

3. Contact your local Corps district and state regulators

Early contact with state and federal regulators could identify any potential issues upfront so that program sponsors may attempt to address those issues prior to the start of the formal review process. It can also point out any potential conflicts and yield a better understanding of the local and regional expectations of the agencies.

4. Identify existing watershed or other applicable plans and reach out to other stakeholders

Where available, existing local watershed (or other) plans and data can inform the development of successful compensation planning frameworks (see the Mississippi Delta In-Lieu Fee Program example above). ELI and The Nature Conservancy have also developed a list of nationally consistent, readily available sources of data that can satisfy the information needs outlined in the “watershed approach” and aid in the development of the compensation planning framework.⁵

5. Review internal capacity (legal, financial, planning, etc.)

Based on initial discussions and research, the program should consider where capacity may be needed to meet the requirements. As you ponder these questions, you may find it useful to reach out to the experts, including people with appropriate regulatory, legal, financial, ecological, and management (program and financial management, as well as preserve/land management) expertise.

6. If it makes sense, move forward with the development of ILF program documents and the formal review process

As of June, 2014, there were 41 approved ILF programs across the country. This growing community of providers may provide invaluable resources to new programs. ■

⁵ See Environmental Law Institute and The Nature Conservancy “Watershed Approach Handbook: Improving Outcomes and Increasing Benefits Associated with Wetland and Stream Restoration and Protection Projects,” 2014, Environmental Law Institute, Washington, DC.