

### Federal Policy: Advance Crediting

#### 2008 Compensatory Mitigation Regulations

##### §332.2 Definitions

*Advance credits* means any credits of an approved in-lieu fee program that are available for sale prior to being fulfilled in accordance with an approved mitigation project plan. Advance credit sales require an approved in-lieu fee program instrument that meets all applicable requirements including a specific allocation of advance credits, by service area where applicable. The instrument must also contain a schedule for fulfillment of advance credit sales.

*Fulfillment of advance credit sales of an in-lieu fee program* means 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 advance credits. Only after any advance credit sales within a service area have been fulfilled through the application of released credits from an in-lieu fee project (in accordance with the credit release schedule for an approved mitigation project plan), may additional released credits from that project be sold or transferred to permittees. When advance credits are fulfilled, an equal number of new advance credits is restored to the program sponsor for sale or transfer to permit applicants.

*Release of credits* means a determination by the district engineer, in consultation with the IRT, that credits associated with an approved mitigation plan are available for sale or transfer, or in the case of an in-lieu fee program, for fulfillment of advance credit sales. A proportion of projected credits for a specific mitigation bank or in-lieu fee project may be released upon approval of the mitigation plan, with additional credits released as milestones specified in the credit release schedule are achieved.

##### §332.8 Mitigation banks and in-lieu fee programs

(n) *Advance credits for in-lieu fee programs.*

(1) The in-lieu fee program instrument may make a limited number of advance credits available to permittees when the instrument is approved. The number of advance credits will be determined by the district engineer, in

consultation with the IRT, and will be specified for each service area in the instrument. The number of advance credits will be based on the following considerations:

- (i) The compensation planning framework;
- (ii) The sponsor's past performance for implementing aquatic resource restoration, establishment, enhancement, and/or preservation activities in the proposed service area or other areas; and
- (iii) The projected financing necessary to begin planning and implementation of in-lieu fee projects.

(2) To determine the appropriate number of advance credits for a particular service area, the district engineer may require the sponsor to provide confidential supporting information that will not be made available to the general public. Examples of confidential supporting information may include prospective in-lieu fee project sites.

(3) As released credits are produced by in-lieu fee projects, they must be used to fulfill any advance credits that have already been provided within the project service area before any remaining released credits can be sold or transferred to permittees. Once previously provided advance credits have been fulfilled, an equal number of advance credits is re-allocated to the sponsor for sale or transfer to fulfill new mitigation requirements, consistent with the terms of the instrument. The number of advance credits available to the sponsor at any given time to sell or transfer to permittees in a given service area is equal to the number of advance credits specified in the instrument, minus any that have already been provided but not yet fulfilled.

(4) Land acquisition and initial physical and biological improvements must be completed by the third full growing season after the first advance credit in that service area is secured by a permittee, unless the district engineer determines that more or less time is needed to plan and implement an in-lieu fee project. If the district engineer determines that there is a compensatory mitigation deficit in a specific service area by the third growing season after the first advance credit in that service area is sold, and determines that it would not be in the public interest to allow the sponsor additional time to plan and implement an in-lieu fee project, the district engineer must direct the sponsor to disburse funds from the in-lieu fee program account to provide alternative compensatory mitigation to fulfill those compensation obligations.

(5) The sponsor is responsible for complying with the terms of the in-lieu fee program instrument. If the district engineer determines, as a result of review of annual reports on the operation of the in-lieu fee program (see paragraphs (p)(2) and (q)(1) of this section), that it is not performing in compliance with its instrument, the district engineer will take appropriate action, which may include suspension of credit sales, to ensure compliance with the in-lieu fee program instrument (see paragraph (o)(10) of this section). Permittees that secured credits from the in-lieu fee program are not responsible for in-lieu fee program compliance.

### Examples: Advance Crediting

North Carolina Ecosystem Enhancement Program In-Lieu Fee Instrument (Sponsored by the North Carolina Department of Environment and Natural Resources).

[http://www.nceep.net/pages/pdfs/interim\\_final\\_instrument\\_8\\_2\\_10.pdf](http://www.nceep.net/pages/pdfs/interim_final_instrument_8_2_10.pdf)

Mississippi Delta In-lieu Fee Program (Sponsored by Ducks Unlimited).

[http://www.aswm.org/pdf/lib/msd-ilfp\\_final\\_instrument\\_083010.pdf](http://www.aswm.org/pdf/lib/msd-ilfp_final_instrument_083010.pdf)

Vermont In-lieu Fee Program (Sponsored by Ducks Unlimited).

<http://www.nae.usace.army.mil/reg/Mitigation/In-Lieu/VT.pdf>

Virginia Aquatic Resources Trust Fund (Sponsored by The Nature Conservancy).

[http://www.nao.usace.army.mil/Regulatory\\_Branch/VAARTF.asp](http://www.nao.usace.army.mil/Regulatory_Branch/VAARTF.asp)