



# **Improving In-Lieu Fee Program Implementation: *Project Approval and the Three-Year Growing Season***



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## Improving In-Lieu Fee Program Implementation

Since 1990, the overall goal of the Clean Water Act Section 404 program has been the “no net loss” of aquatic ecosystems. Ensuring that the area and functions of aquatic ecosystems are maintained depends on effective compensatory mitigation. In-lieu fee (ILF) programs are an important mechanism to provide compensatory mitigation and thus contribute to the “no net loss” goal.

The following is part of a series of comprehensive guides on some of the most challenging components of ILF program implementation identified through extensive research and interviews with operating ILF programs and other mitigation stakeholders. These guides help address perennial problems for ILF programs by identifying specific challenges, providing detailed recommendations on ways to meet these challenges, and including examples or case studies of programs to illustrate successful approaches.

The guides cover the following topics:

- 1) Full cost accounting
- 2) Project approval and the three-year growing season
- 3) Long-term management
- 4) Programmatic audits

## Project Approval and the Three-Year Growing Season

The 2008 Compensatory Mitigation Rule (2008 Rule)<sup>1</sup> establishes a robust review and approval process for compensatory mitigation projects to ensure that projects successfully offset functions lost to permitted impacts. However, the approval process for third-party mitigation—mitigation banks and ILF programs and projects—can often be lengthy and sometimes take longer than regulatory guidelines prescribe. The purpose of this guide, which serves as a companion piece to the Environmental Law Institute’s 2020 report “Improving Compensatory Mitigation Project Review,”<sup>2</sup> is to identify key challenges in the program and project review and approval process and make recommendations to minimize delays and help ILF programs meet regulatory requirements for project initiation.

This guide provides an overview of regulatory requirements and common challenges associated with compensatory mitigation project review and approval for ILF programs. It then describes

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<sup>1</sup> 33 C.F.R. § 332

<sup>2</sup> Environmental Law Institute (2020). *Improving Compensatory Mitigation Project Review*. <https://www.eli.org/research-report/improving-compensatory-mitigation-project-review>

actions to consider for ILF programs to address these challenges, both internally and in working with the Interagency Review Team (IRT).

## Program Components and Regulatory Requirements

### The Three-Year Growing Season Requirement

According to the 2008 Rule, “[I]and 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.”<sup>3</sup> Many ILF programs have found meeting this requirement to be a significant challenge. According to interviews conducted for our 2019 report on ILF program implementation,<sup>4</sup> nine of the 41 ILF programs we interviewed reported that they have missed the growing season deadline in at least one service area or for a given resource type. At least ten other programs were likely to go out of compliance with the growing season requirement in the near future. Most of these programs that have missed, or will soon miss, a deadline reported that they are working with or have worked with the Corps and IRT on an extension that will allow them to come into compliance.<sup>5</sup>

ILF programs cited various challenges in meeting this deadline, such as difficulty in securing project sites (especially in finding willing landowners), time delays with clearing title for permanent protection, delays associated with completing assessment protocols for determining credits, and the overall length of the project review and approval process. Another often-cited challenge was an inability to sell enough credits in a service area; programs may sell a small number of credits in a service area but are then unable to raise enough funds to conduct a project.

The duration of the three-year growing season timeline itself can be a factor in whether a program is able to meet the growing season requirement. The length of time a program has to begin work in a service area can vary significantly depending on when the first credit sale occurs relative to the start of the current growing season. The timing of the credit sale (i.e., right before the first full growing season starts versus during the growing season) may leave a program with as few as 29 or as many as 40 months to achieve “initial physical and biological improvements” by the end of the third growing season.

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<sup>3</sup> 33 C.F.R. § 332.8(n)(4).

<sup>4</sup> Environmental Law Institute and Institute for Biodiversity Law and Policy at Stetson University College of Law (2019). In-Lieu Fee Mitigation: Review of Program Instruments and Implementation Across the Country. <https://www.eli.org/research-report/lieu-fee-mitigation-review-program-instruments-and-implementation-across-country>

<sup>5</sup> *Id.*

## Project Review and Approval

Lengthy project review and approval by the Corps was one of the most commonly cited reasons for going out of compliance with the three-year growing season requirement.<sup>6</sup> The 2008 Rule includes timelines for project review and approval (Box A) to “promote timely decisions on instruments for these third-party mitigation activities.”<sup>7</sup> Under the Rule, the maximum amount of time anticipated for federal review and approval is 225 days, not including the time the sponsor spends drafting/reviewing documents. The 2008 Rule breaks the review timeline into four phases (Box A).

### Box A: Project Review and Approval Timeline Under the 2008 Rule<sup>8</sup>

**Phase I** (Optional Preliminary Review of Draft Prospectus) is not counted in the 225 days. The phase provides the opportunity for a sponsor (mitigation provider) to provide a draft prospectus to the district engineer and to receive comments from the IRT within 30 days.

**Phase II** is when the mitigation provider submits the prospectus. The district engineer publishes a public notice within 30 days of receipt of a complete prospectus; this is followed by a 30-day public comment period. The district engineer provides the IRT members and sponsor with the comments within 15 days of the close of the comment period and is to provide the sponsor with an initial evaluation letter within 30 days of the close of the comment period. This phase includes the first significant opportunity for review by the IRT member agencies.

**Phase III** is the draft Mitigation Project Plan, treated as an Amendment to the ILF Program Instrument. It is supposed to last 90 days from the sponsor’s submission of a complete draft to the district engineer. The district engineer notifies the sponsor within 30 days of completion of the draft. The district engineer distributes the complete draft instrument to the IRT within five days, allowing 30 days for IRT comment and feedback. The remainder of the period is used to evaluate comments and resolve issues raised among the IRT and with the sponsor.

**Phase IV** is submission and approval of the final instrument/mitigation project plan. The sponsor provides the final plan to the district engineer and IRT. The district engineer must notify IRT members of intent to approve the instrument within 30 days of receipt. The IRT has 45 days from submission to object to approval of the instrument and initiate dispute resolution.<sup>9</sup>

<sup>6</sup> *Id.*

<sup>7</sup> Compensatory Mitigation Rule, 73 Fed. Reg. 19598 (Apr. 10, 2008) Preamble to the Final Rule.

<sup>8</sup> Environmental Law Institute (2020). *Improving Compensatory Mitigation Project Review*. <https://www.eli.org/research-report/improving-compensatory-mitigation-project-review>

<sup>9</sup> 33 C.F.R. § 332.8(g)(1).

The 2008 Rule explains that the total time can vary for a variety of reasons, including additional time to complete consultation required by law (including endangered species consultation and historic resource coordination), to conduct government-to-government consultation with Tribes, and to address the failure of the provider to deliver required or necessary information for a decision.<sup>10</sup>

The IRT provides a framework for collaboration among the Corps, federal agencies with overlapping regulatory authorities, and state and local partners to review, approve, and oversee mitigation banks and ILF programs. The IRT ensures an active role for the states—especially those with robust programs and thus a substantive interest in the establishment of banks and ILF programs—and that different areas of expertise are available to evaluate the ability of potential projects to offset functions lost to permitted impacts. For our 2020 report, banks, ILF programs, and IRT members told us that the IRT is critical to project review, particularly for setting expectations for acceptable prospectuses, banking and ILF instruments, and mitigation projects, and for coordination where a state operates its own compensatory mitigation wetland or stream permitting program under state law and/or has its own wetland banking rule.

Programs report wide variation in project approval timelines. While the shortest timeframe reported was nine months, several sponsors reported project approvals taking three years or more.<sup>11</sup> According to an analysis of Corps' data conducted by the Corps' Institute for Water Resources, between 2014 and 2018, the mean Corps processing time for a mitigation banking instrument was approximately 459 days, and the mean Corps processing time for ILF programs and projects was 295 days.<sup>12</sup> These review periods represent the time from the date of receipt of a complete prospectus to the date the district engineer decided whether to approve the mitigation banking or ILF program instrument, excluding the time it took the provider to draft program instruments and associated documents or to respond to comments from the IRT.

As indicated in the Corps' data, the review and approval process for ILF programs and projects can often be lengthy, sometimes greatly exceeding the regulatory requirements. A number of factors might influence the length of the project approval process for ILF programs.

## Factors that Influence Project Review and Approval for ILF Programs

The length of the project review and approval process can depend on a variety of factors, such as the quality of the project and project documentation, IRT negotiation process and availability

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<sup>10</sup> 33 C.F.R. § 332.8(f).

<sup>11</sup> Environmental Law Institute and Institute for Biodiversity Law and Policy at Stetson University College of Law (2019). *In-Lieu Fee Mitigation: Review of Program Instruments and Implementation Across the Country*. <https://www.eli.org/research-report/lieu-fee-mitigation-review-program-instruments-and-implementation-across-country>

<sup>12</sup> Martin, S. (2019). Characterization and Analysis of 3<sup>rd</sup> Party Mitigation 2008-2018 Using ORM & RIBITS Data. Presentation at Mitigation and Ecosystem Banking Conference, May 8, 2019.

and experience of IRT staff, availability and use of standard templates, and availability and use of project management strategies by the IRT. Below, we describe challenges internal to ILF program operations, as well as those related to agency review and IRT coordination. While some challenges, such as a lack of IRT staff and IRT staff turnover, will need to be addressed primarily by the agencies, ILF programs may be able to collaborate with the IRT to address some process-related factors that are external to program operation. Some substantive issues also may create challenges for project review and approval (see Box B).

### Challenges Internal to ILF Program Operations

- **Site selection and project development.** The quality and complexity of the proposed ILF project site and the proposed restoration and land management at the site is a significant factor in the duration of review. Review and approval tend to be shorter for simple sites. Relatively simple hydrology, more data available, fewer constraints on construction access and timing, not overly engineered designs, clear project functional uplift, identified land manager, and site protection in place are characteristics that can lead to more timely project approvals. Complex sites often lead to more complicated site design and longer review times. More discussion and negotiation with the IRT may be expected for more complex and multi-purpose project sites. These sites may involve more complicated site design or require the provider to conduct additional studies and can thus lead to longer IRT review and approval times.

Finding compensation project sites that can be moved through the approval process in a timely fashion can be challenging for a number of reasons. Programs may face challenges identifying sites that are of a scale or type to meet a program's actual liabilities in the service area. In some cases, a lack of available data on physical conditions of a proposed site, such as hydrologic, topographic, and bathymetric factors, may complicate the process of site evaluation and selection. Discovering unresolved Clean Water Act violations on site can also cause delays. Further complicating the site selection process is the common challenge of finding willing landowners to participate in a project and stay engaged for the year or sometimes years it may take for a project to be approved. A lack of willing landowners can limit the number of quality sites available for an ILF project. Additionally, sites with complicated title issues can cause excessive amounts of time to clear. This can be very difficult to navigate in some areas of the country with a lot of mineral and gas resources.

Further, many ILFs may find that there are certain service areas that are much more challenging to find "typical" and "straightforward" sites (e.g., some service areas may have relatively few historic impacts needing restoration).

These factors are especially challenging for the many programs that have not identified project sites in the program instrument or before selling advance credits in a service area and are now on the clock to meet the three-year growing season requirement. Pre-identifying sites, however, may be challenging for a number of reasons. For example, in

at least one case, a program is prohibited by the state from soliciting for proposed sites until it has sufficient funds in hand to conduct a project, impeding the program's ability to meet the timeline. Further, the general trend toward more multi-purpose sites that are more complex may necessitate longer average project review and approval times.

- **Quality of project submissions.** The quality of the project submission can affect the timeline. Incomplete, inaccurate or unnecessary data, inconsistencies (such as summary tables that do not correspond to the data), and poor editing of the document can increase review times.
- **Experience and expertise.** Provider experience with mitigation project development under the 2008 Rule has also affected the mitigation project review process and length of review. A lack of in-house (or available) knowledge and expertise on project development (e.g., site selection and mitigation techniques), project management strategies, and other factors can affect the mitigation project review process.

#### Challenges Related to Agency Review and IRT Coordination

- **Lack of templates and standard operating procedures (SOPs).** A lack of templates (e.g., model documents for site protection, financial assurances, credit determination methodology, long-term management) and standard operating procedures leaves a gap in guidance for providers, especially those who are new to mitigation, and may lead to inconsistencies among projects proposed in a district or state. Without standardized processes and language, providers may find themselves always reacting to, and improvising responses to, comments from the IRT, delaying the process further.<sup>13</sup> As stated in the Corps' and EPA's Mitigation Rule Retrospective, "clearly stated roles and responsibilities for members of interagency review teams; development of standard operating procedures governing mitigation banking and in-lieu fee program instruments; issuance of mitigation banking and in-lieu fee program guidelines, and related other tools such [as] model instruments for site protection and financial assurances, performance standards, and other mitigation and monitoring guidelines," as well as "standardized tools and practices, including regularly scheduled meetings of interagency review teams," could improve efficient review of bank and ILF proposals.<sup>14</sup>
- **Legal review.** In our 2020 review of mitigation project approvals, respondents indicated that Corps legal review can add months to the project review timeline. In districts where Corps attorneys conducted review only at the end of the process, after staff has completed all phases of its review, this can lengthen review times.

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<sup>13</sup> Environmental Law Institute (2020). *Improving Compensatory Mitigation Project Review*. <https://www.eli.org/research-report/improving-compensatory-mitigation-project-review>

<sup>14</sup> USACE, Institute for Water Resources (2015). *The Mitigation Rule Retrospective: A Review of the 2008 Regulations Governing Compensatory Mitigation for Losses of Aquatic Resources*.

- **Early coordination regarding other regulatory requirements.** Although the Clean Water Act Section 404/401 state permitting process itself does not generally result in significant delays, Endangered Species Act (ESA) and historic preservation consultation processes have led to lengthier review processes.
- **Lack of project management systems.** A lack of project management systems—schedules and calendar systems to track comments and responses—can result in processes becoming largely reactive rather than schedule-driven. Without an agreed upon schedule with set deadlines, there is less accountability for the provider or the IRT to complete its tasks in a timely manner.

For our 2020 report, districts and providers explained that there is often no system in place to track progress toward project approval and often no specific method to track timing and response to comments. This lack of systems can mean that the IRT will need to spend time reviewing each draft to ensure that all changes are made in response to comments and that these changes have been consistent throughout the documents, such as in figures and tables. Further, absent a tracking strategy, programs and IRT members have found themselves unable to track settled substantive items in the instrument (e.g., service areas, credits, etc.) to prevent these items from being reconsidered later in the process. These issues can be exacerbated by staff turnover at the districts and lack of continuity among IRT agencies. Programs have reported having to revisit previously addressed issues in projects close to approval due to staff turnover.

Without key project management strategies, collecting IRT comments and setting up meetings and site visits may also take a significant amount of time.

- **Delays in setting up site visits.** A number of programs reported that delays in setting up site visits extended the project approval timeline. In some cases, this delay can lead to service areas going out of compliance. For example, if a project document is submitted at a time of year when getting into the field is impossible and a site visit is necessary, approvals may be delayed.

### Box B: Substantive Issues that Delay Project Approval

ILF programs cite several substantive issues that delay project approval.

**Credit determination.** Credit determination can pose challenges, particularly if a district lacks a standard and consistent credit determination methodology. Changes in the number of proposed credits versus the number of credits ultimately approved may result in delays if methodologies shift throughout the approval process.

**Functional assessment.** Functional assessment methodologies are increasingly being used to determine debits and credits or develop performance standards in districts across the country, and more assessment methodologies are under development. In some cases, the development of new methodologies and application of existing methods may cause delays.

**Site protection.** Programs face a number of challenges with site protection, including securing suitable site protection instruments (e.g., management plans and commitments) on public lands, identifying and securing landowner commitments throughout the lengthy review process, clearing title with mineral or oil exceptions, or completing timely IRT review of site protection instruments.

**Long-term management.** Determining long-term management requirements, such as how much funding is needed to achieve the required long-term stewardship tasks, may present challenges that delay project approval. Other issues include identifying an entity to hold long-term management funds and a party responsible for long-term stewardship. Standardized documents may help streamline development and review of long-term management documentation. See our Guide on Long-Term Management in this series for more information.

Environmental Law Institute (2020). *Improving Compensatory Mitigation Project Review*.

## Recommendations

The following section describes some potential actions ILF programs should consider alone or in collaboration with the IRT to help them address the challenges described above.

### Considerations for Factors Internal to ILF Program Operations

#### 1. Site Selection and Project Development

Simpler sites and less complex project design can shorten review times. However, these types of sites and projects are not always available or desirable. To address the review and approval delays associated with site selection and project development, some ILF programs select sites in advance or work with other partners, such as state agencies, to help with project site identification and selection. For example, the Louisiana Department of Natural Resources ILF Program selects projects from a list of projects identified by the Coastal Protection and Restoration Authority (CPRA), the state entity in charge of ensuring comprehensive coastal

protection. Approximately ten programs have identified projects or target sites in their instrument or have released credits from operations prior to the publication of the 2008 Rule or from projects completed prior to signing their program instrument.

Other programs make use of annual review solicitations (or request for proposal or RFP processes). In these instances, the process of site selection needs to meet defined standards, and there are orderly timelines and review processes that operate ahead of the formal review process. Programs that include formal and comprehensive review processes to evaluate and select projects submitted under a RFP may submit more developed mitigation plans for initial review by the Corps/IRT. Although, in some cases, the RFP process may cause delays if the ILF does not get any responses to the RFP.

In addition, early feedback on site selection or project design from the IRT may identify projects that may not have a good chance of approval or ways to improve projects so that they move through the review and approval process more quickly.

*Actions to consider:*

- Consider identifying specific project sites for future development when developing the instrument (e.g., [The King County Mitigation Reserves Program](#) pre-identified project sites for future development in its program instrument).
- Consider not selling advance credits in a service area until a project site or sites have been identified (e.g., Arizona Game and Fish Department ILF Mitigation Program).
- Consider identifying ways to prioritize other non-restoration projects, such as enhancement and preservation for service areas with few project opportunities or low credit sales.
- Consider making use of annual review solicitations (or RFPs) to identify sites and implement projects that can streamline the review process by outsourcing project identification and standardizing review and approval.
- As soon as possible, perform title examinations and coordinate with the State Historic Preservation Officer and the U.S. Fish and Wildlife Service, in order to identify any significant complexities with the site.
- Submit a draft prospectus/pre-consultation (Phase I), which can allow providers to receive feedback on key items to address any major concerns early.
- Set up pre-prospectus meetings with the IRT to identify problem sites and determine which projects may be unworkable.
- Consider working with the IRT to use the draft and final prospectus as an opportunity for IRT members to provide focused and detailed comments. Providing more information in the prospectus may allow for some of the key elements (e.g., the credit determination methodology) to be settled at this stage rather than later.
- Consider seeking other methods of reaching compliance, such as buying bank credits, in order to avoid going out of compliance.

## **2. Quality of Project Submissions**

High quality project instrument submissions that are complete, internally consistent with accurate data, and in the expected format (if there is one) may result in faster review times. Sponsors can provide timely responses to comments that sufficiently address the IRT comments in a way that is easy to track. Review times may be longer if the reviewer has to search the document to ensure that all comments were addressed and that changes were consistently made across the documents (e.g., text, as well as engineering drawings, technical values, tables, design drawings, etc.).

*Actions to consider:*

- Understand what the IRT is looking for in an approvable project, take advantage of opportunities to meet and to review policies and templates, and identify problem landscapes, aquatic resource types, and restoration techniques early.
- Submit the best quality draft proposal possible—thoroughly completing all necessary sections, including consistent and necessary data, taking time to edit the document, and following any specified formats.
- Ensure that all data submissions accurately represent conditions in the field and that all requested data forms are complete and consistent.
- Respond to IRT comments in a timely manner, ensuring that all comments and changes are reflected and incorporated into the text, as well as engineering drawings, technical values, tables, design drawings, etc. Make use of project management tools to track comments (see Institute Project Management Strategies section below).
- Consider examining end of phase letters received for other sites and ensure comments/directions included are integrated in the current submittal being developed.

## **3. Expertise and Track Record**

In-house (or available) expertise and experience can improve the project review and approval process. In general, programs with more experience may choose more viable sites (i.e., sites that are more likely to be approved by the IRT), may be more likely to be able to navigate the variation in guidelines and methodologies among districts, and may require less back-and-forth with the IRT because the programs understand the process and know what is required of them.

These characteristics may lead to fewer revisions and shorter timelines. Developing internal programmatic standard operating procedures on instrument development and project approval procedures can help a program ensure that experience is not lost with staff turnover. Further, it is good practice to create a consistent system to archive programmatic and project level correspondence with the IRT and to formalize in writing any agreements or undertakings to ensure consistency.

*Actions to consider:*

- Develop a list of the kinds of expertise needed for project development and implementation and potential resources for this expertise. Programs might turn to in-house staff/resources or hire outside contractors. A relatively small number of programs accomplish all program operations in house. These programs often have staff that have design, surveying, field work, monitoring, administration, marketing, and legal expertise, among other skills. In some cases, these programs may draw from their larger parent organizations (either private organizations or public agencies) for some of these functions. Other programs generally contract out parts of the operation—often site selection, engineering, design, and construction. These programs may have staff that are responsible for administration, project selection, and reporting, but much of the engineering and construction are contracted out.
- Develop structured training and standard operating procedures on project approval between entry-level and more experienced staff members to transfer institutional knowledge and efficiently meeting expectations.
- Seek opportunities to engage with the ILF program community or more experienced ILF sponsors. ILF programs have established an In-Lieu Fee Communications Group. This group allows programs across the country to discuss current challenges, post new developments, and share strategies.

### Considerations for Challenges Related to Agency Review and IRT Coordination

Several challenges associated with the project review and approval process noted in our 2020 report are specifically related to Corps and IRT operations. Recognizing the intended collaborative nature of the IRT review process, we describe some opportunities for ILF programs to work with the IRT to reduce sources of delay.

#### 1. Develop Templates and Standard Operating Procedures (SOPs)

Corps district templates provide guidance for ILF programs, especially those that are new to mitigation but also those encountering new challenges related to long-term management, financial assurance, monitoring, and other recurrent issues. Templates help set expectations for what needs to be included in the instrument and the type of information and analyses the IRT will require, resulting in more timely project approvals. The most needed templates include those for site protection, financial assurances, and long-term management. Advance legal review and approval of these documents may also shorten the time for project review.

#### *Actions to consider:*

- Work with the IRT/Corps to identify standardized templates for different program components that may be useful.
- Providers in regions without standardized templates may consider looking to neighboring districts for templates and procedures for best practices and example language.

## **2. Legal Review**

Because Corps legal review can add months to the project review timeline, programs should encourage early involvement of legal counsel in document review. For our 2020 report, districts identified an opportunity to accelerate final instrument/amendment approval by providing a “conditionally complete” final mitigation banking instrument to the Corps general counsel for legal review concurrently with submittal to the IRT of the final instrument.<sup>15</sup> This advance review can help identify any issues promptly, particularly where the sponsor is using documents with language and provisions that differ from templates, potentially shortening the period of time to actual signature and approval. Where the IRT has developed templates, advance legal review and approval of templates may be especially helpful in expediting approval.

### *Actions to consider:*

- Encourage early legal review of documents by Corps attorneys by asking that legal staff be involved in earlier on in the process—for example, attending one coordination meeting prior to the conclusion of the review process.
- Encourage advance legal review and approval of templates.

## **3. Early Coordination Regarding Other Regulatory Requirements**

Some providers indicated that they sometimes experience delays due to Endangered Species Act (ESA) and historic preservation consultation. To address these delays, providers, including ILF program administrators, may find it helpful to start permitting conversations early or concurrently with the instrument approval process. Engaging the appropriate agencies to address ESA and cultural resources concerns early on may also minimize delays in the project review timeline.

### *Actions to consider:*

- Begin conversations with appropriate agencies for ESA and historic preservation consultation as early as the initial site visit, if doing so would help reduce delays.
- Set monthly meetings with Section 401 agencies to review project status (in addition to IRT meetings) to ensure commenting agencies are on track.

## **4. Institute Project Management Strategies**

Project management strategies can include document-sharing platforms to facilitate project tracking in real-time among IRT members and the provider; a tracking tool that shows which sections have been reviewed, adjusted, and agreed upon by the IRT so that the same sections are not repeatedly reviewed; detailed schedules and project review timelines that are visible to the public; and scheduled frequent check-in calls between the IRT and provider, as appropriate.

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<sup>15</sup> Environmental Law Institute (2020). *Improving Compensatory Mitigation Project Review*. <https://www.eli.org/research-report/improving-compensatory-mitigation-project-review>

Programs should consider setting up a pre-determined schedule and system with the IRT to set deadlines to ensure timely progress at the very first project meeting. Deadlines and timelines can be facilitated by use of document-sharing platforms that allow concurrent review and tracking of responses. For example, the North Carolina Division of Mitigation Services (NCDMS) ILF Program posts the draft mitigation plan on SharePoint in real time, comments are due in 30 days, and the content of comments is immediately available and visible to IRT members and the provider. Another mitigation provider worked with the Corps to develop a set of project management strategies to facilitate a more efficient project approval process. The provider and the Corps developed a comment matrix that lists all IRT comments and provider responses for each document section (e.g., maps, development plan, and appendices). This helps track all responses to comments so that the IRT does not need to spend time reviewing the entire document each review cycle to ensure that necessary changes have been made. To avoid misunderstanding and frustrations later in the process, the provider and the IRT also convened a kick-off meeting to focus on the schedule and project management expectations. This approach requires sufficient staff capacity within the IRT and the mitigation sponsor.

*Actions to consider:*

- Work with the IRT to establish a project management schedule at the outset of each project submission to set regular meeting times, site visits, and deadlines for responding to IRT comments. Programs may consider setting up weekly calls between the provider and IRT chair/co-chair to maintain accountability and address questions.
- Work with the IRT to create a shared calendar accessible to both the sponsor and the IRT for these meetings and deadlines. Programs and the IRT can consider making project review timelines visible to the public, as well.
- Maintain a document-sharing platform accessible to both the sponsor and the IRT.
- Work with the IRT to develop a system to track reviews, comments, and responses for documents, and keep track of when substantive items have been settled.

## **5. Standardized Scheduling of Site Visits**

Site visits with the IRT can help work out the potential issues ahead of time, forestall unnecessary rounds of comment because of understanding of site issues and opportunities, and save time in document preparation and approval. In some cases, weather restrictions or field conditions can prevent timely scheduling of site visits, in which case programs and the IRT may want to conduct field reviews during an earlier phase. Early site visits also present a key opportunity for clarification and problem-solving between providers and the IRT.

Emerging technologies, including the use of drones, cameras, LIDAR, and electronic submittal and sharing of data, may provide new opportunities for engaging with the IRT to evaluate and monitor compensation sites. These new technologies may provide serious advantages, such as reduced travel time and costs for site visits, increased ability for the IRT to view more of a site than in a traditional site visit, and availability of more detailed site information for review.

However, the use of these technologies will require more intentional integration into policy frameworks and operational requirements before they can be widely adopted.

*Actions to consider:*

- Work with the IRT to schedule and reserve field dates for site visits in advance (at the beginning of the review process). For example, in January of each year, the NCDMS IRT schedules a week per month of “field days,” so members and providers know what weeks are available for site visits.
- Use site visits as opportunities for productive discussion between the sponsor and the IRT to identify and work out possible approaches.
- Evaluate the possible use of remote technologies for site visits.

## Addressing the Three-Year Growing Season Requirement

Some ILF programs have systems to help ensure compliance with the three-year growing season requirement and also how to work with the IRT if service areas go out of compliance. According to our 2019 report, most programs have not missed the three-year deadline required in the 2008 Rule in any of their service areas, and many do not anticipate having any trouble meeting the requirement.<sup>16</sup> About half of these programs pre-identify project sites or potential sites in their program instruments or conduct projects in advance and thus are not selling advance credits. Several other programs in this group select projects on land owned or managed by program sponsors, use RFP processes for project selection, or select projects identified in state plans. The remaining programs identify and select projects using a prioritization process detailed in their compensation planning framework and are generally not conducting projects in advance of selling credits.

The National Fish and Wildlife Foundation Sacramento District California ILF Program outlined a process in its instrument for working with the IRT on how to proceed if the program is nearing the three-year growing season deadline. Exhibit E of the program instrument details the general process of ILF project site selection (see Box C) that includes how to proceed if the deadline will be exceeded, “which may include, but not be limited to the following: continuing to wait a specified period of time as determined by the IRT, merge funds with another Service Area or purchase bank credits.”<sup>17</sup>

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<sup>16</sup> Environmental Law Institute and Institute for Biodiversity Law and Policy at Stetson University College of Law (2019). *In-Lieu Fee Mitigation: Review of Program Instruments and Implementation Across the Country*. <https://www.eli.org/research-report/lieu-fee-mitigation-review-program-instruments-and-implementation-across-country>

<sup>17</sup> National Fish and Wildlife Foundation Sacramento District California ILF Program (2019). *Sacramento District California In-Lieu Fee Enabling Instrument*, Exhibit E.

## Conclusion

This guide outlines several recommendations that programs may find useful for improving and streamlining project approval timelines and processes. These include ensuring quality of project submission, identifying sources of in-house or outside expertise, beginning permitting conversations early, and identifying efficiencies in the site selection process. We also provide recommendations for how ILF programs can work with the IRT to improve review processes, including developing templates and standard operating procedures, expediting legal review, establishing a schedule and project management strategies, and reserving dates in advance for site visits. Programs and IRTs may find it helpful to use a project management schedule and document-tracking system and take advantage of pre-prospectus meetings to identify issues early on. In juggling many different timelines and processes for project approval, both programs and agencies may find that the organizational, strategic, and low-investment strategies outlined above may help reduce delays and ensure effective compensatory mitigation projects.

**Box C: National Fish and Wildlife Foundation Sacramento District California ILF Program Instrument Exhibit E – ILF Project Development Process.**

General Process for ILF Project Site Selection

1. On an on-going basis, Program Sponsor will calculate the amount of collected funds for each Service Area.
2. A minimum of fifty thousand dollars (\$50,000) (threshold) within a Service Area will trigger the Program Sponsor to consider in consultation with the IRT whether minimum threshold funding is available in the Service Area to warrant ILF Project development consideration. If sufficient funding for ILF Project development does not exist, proceed to step 9.
3. If sufficient funding is present, Program Sponsor will conduct an evaluation of critical needs within the Service Area and an evaluation of the existence of potential ILF Project opportunities and/or ILF Project partners through a request for proposals process and/or other outreach.
4. In addition to 3) above, Program Sponsor will determine if there is a mitigation bank in the Service Area with applicable available credits.
5. Program Sponsor will evaluate and compare potential ILF Project proposals, including the purchase of any applicable available mitigation bank credits, using the Project Evaluation Criteria worksheet (Exhibit E). The worksheet references the requirements of the 2008 Mitigation Rule, and specifically uses the first three requirements that are applicable at the ILF Project prospectus stage as a screen to determine whether an ILF Project proposal should be considered and evaluated. The worksheet is intended as a tool to aid the Program Sponsor

and IRT in evaluating and comparing proposed ILF Projects for funding consideration, but is not the only consideration.

6. Program Sponsor will present to the IRT for the IRT's consideration the highest priority ILF Project(s) that Program Sponsor determines to be feasible and practicable, and that can be implemented with available funds. The presentation will be in the form of an Initial Project Prospectus (as described in further detail below), including an estimated budget for each such proposed ILF Project(s), which Program Sponsor will submit to the IRT along with the Project Evaluation Criteria worksheet described above.

a) As soon as possible, and no later than fifteen (15) days from receipt of the Initial Project Prospectus(es), each IRT Member will notify the USACE and Program Sponsor in writing whether it will participate or abstain from participating on the IRT with respect to consideration of each proposed ILF Project.

b) As soon as possible, and no later than fifteen (15) days from receipt of the complete Initial Project Prospectus(es), the USACE will issue a public notice of the Initial Project Prospectus(es) providing a thirty (30) day public comment period. If required or otherwise desired, other IRT Members participating on the IRT with respect to consideration of the Initial Project Prospectus(es) may also issue a public notice of the Initial Project Prospectus(es) providing a public comment period. To the extent possible, the USACE and such other IRT Members shall coordinate such public notices and public comment periods to run concurrently.

c) If the proposed ILF Project would provide benefits to special status, threatened, or endangered species, the appropriate state or federal fish and wildlife agencies that are not otherwise on the IRT (i.e., USFWS and CDFW) may be requested by the IRT and Program Sponsor to participate in the IRT discussions regarding the proposed ILF Project.

7. Approval of Initial Project Prospectus(es). Within thirty (30) days of the close of the applicable public comment period(s), the IRT shall consider the Initial Project Prospectus(es), supporting information, and any public comments received regarding the proposed project(s), and provide to Program Sponsor its written approval or denial of the Initial Project Prospectus(es). Alternatively, the IRT may provide Program Sponsor with comments regarding the Initial Project Prospectus(es) that Program Sponsor may address in revisions to the Initial Project Prospectus(es) and resubmit to the IRT for its written approval or denial.

a) If an Initial Project Prospectus is approved, then as of the date of such approval the Program Sponsor may access and expend funds in the applicable Service Area-specific Sub-Account to pay for the ILF Project Development Plan, in accordance with the estimated budget for the Project Development Plan as set forth in the approved Initial Project Prospectus. If in the course of the Project Development Plan process, the Program Sponsor discovers that the expenditures will exceed the budget, the Program

Sponsor will notify the IRT in writing and propose a budget augmentation for the IRT's consideration and written approval. The expenditure of such funds is intended to allow the Program Sponsor to develop and finalize, based on the foundation of the Initial Project Prospectus, a formal Project Development Plan for the applicable ILF Project.

- b) Once finalized, the Project Development Plan will be submitted to the IRT as a formal request for a modification to the Instrument in accordance with the ILF Project approval process set forth below.

8. If sufficient funding is not available for ILF Project development, the Program Sponsor will wait to determine if sufficient funding has been reached for ILF Project development. If funding is sufficient after waiting an additional period of time (not to exceed twenty-four (24) months total after first funds collected in the Service Area), proceed with steps 3 through 8. If funding is not sufficient by the end of the 24-month period, proceed to step 9.

9. Consult with the IRT as to how to proceed, which may include, but not be limited to the following: continue to wait a specified period of time as determined by the IRT; merge funds with another Service Area; or, purchase mitigation bank credits.



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