

# 3rd Party Mitigation Documentation:

*From Conceptual Plan to Final Instrument*



Regulatory Branch  
U.S. Army Corps of Engineers

Office of Wetlands, Oceans and Watersheds  
U.S. Environmental Protection Agency

June 2011



# Third-Party Compensation

§332.8/230.98 – Mitigation Banks/ILF

- Banks/ILFs must have instrument signed by DE
- Designed to be self-sustaining



# Differences Between Mitigation Banks and In-Lieu Fee Programs

- Mitigation banks:
  - Public or private sponsor
  - Compensation site secured and mitigation initiated in advance of debits
  - Single or multiple project sites
  - Corps has no authority over bank expenditures
- In-lieu fee programs:
  - Government or non profit conservation organization
  - Fees often received before securing/implementing mitigation project
  - Multiple project sites
  - Corps approves project funding




# Overview

- Draft Prospectus
- Prospectus
- Draft Instrument
- Final Instrument

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**INSTRUMENT**  
**GUM LOG MITIGATION BANK**  
Jefferson, Georgia



US Army Corps of Engineers  
Savannah District  
Wetland Mitigation Bank Review Team

September 2005



**Compensatory Mitigation Rule  
Timeline for Bank or ILF Instrument Approval\***

		Event	# of Days**		
Phase I		Optional Preliminary Review of Draft Prospectus	30		DE provides copies of draft prospectus to IRT and will provide comments back to the sponsor within 30 days.
	<b>Sponsor Prepares and Submits Prospectus</b> ~DE must notify sponsor of completeness w/in 30 days of submission~				
Day 1**		<b>Complete Prospectus Received by DE</b>			
Phase II	Day 30	Public notice must be provided within 30 days of receipt of a complete prospectus	30		
	Day 60	30-Day Public Comment Period	30		
	Day 90	DE must provide the sponsor with an initial evaluation letter within 30 days of the end of the public comment period.	30	15	DE distributes comments to IRT members and sponsor within 15 days of the close of the public comment period.
<b>Sponsor Considers Comments, Prepares and Submits Draft Instrument</b> ~DE must notify sponsor of completeness w/in 30 days of submission~					
Day 1		<b>Complete Draft Instrument Received by IRT Members</b>			
Phase III		30-day IRT comment period begins 5 days after DE distributes draft instrument to IRT members	30		
	Day 90	DE discusses comments with IRT and seeks to resolve issues ~ # of days variable~	60	90	Within 90 days of the receipt of a complete draft instrument by IRT members, the DE must notify the sponsor of the status of the IRT review.
<b>Sponsor Prepares Final Instrument</b> ~Sponsor provides copies to DE and all IRT members~					
Day 1		<b>Final Instrument Received by DE &amp; IRT</b>			
Phase IV	Day 30	DE must notify IRT members of intent to approve/not approve instrument within 30 days of receipt.	30	45	IRT members have 45 days from submission of final instrument to object to approval of the instrument and initiate the dispute resolution process.
		Remainder of time for initiation of dispute resolution process by IRT members	15		
Day 45	<b>INSTRUMENT APPROVED/NOT APPROVED, or DISPUTE RESOLUTION PROCESS INITIATED</b>				

EPA/Corps draft 4/02/08

**Total Required Federal Review (Phases II-IV): ≤225 Days**

\*Timeline also applies to amendments

\*\*The timeline in this column uses the maximum number of days allowed for each phase.

# Phase 1: Draft Prospectus

- Preliminary review of draft prospectus
- Optional
  - “...**strongly recommended**...intended to identify potential issues early so that the sponsor may attempt to address those issues prior to the start of the formal review process.”
- IRT has opportunity to review
- DE will provide comments to sponsor within 30 days



# Example: Draft Prospectus Checklist

- All Fed/State IRT agencies in CA
- 11 elements required
- 404/ESA
- Submit to IRT at least 14 days prior to IRT meeting

## Optional Checklist

### Draft Prospectus for Mitigation Banks

*[Revised September 2010 by the Multi-Agency Product Delivery Team]*

Please refer to the Cover Sheet, revised *September 2010*, for procedures related to the submission of a mitigation bank proposal. Please provide the following information and a copy of this checklist with the submittal of a Draft Prospectus:

- Proposed Bank Name - Use a short name based on a geographic feature if possible and include "Mitigation Bank" in the name;
- Bank contacts – include the name, address, phone, fax, and email for: Bank Sponsor, Property Owner, Consultants, etc.;
- General location map and address of the proposed Bank Property;
- Accurate current map of the proposed Bank Property on a 7.5-minute USGS map showing boundaries of the mitigation bank;
- Color aerial photographs that reflect current conditions of the proposed Bank Property and surrounding properties. Briefly discuss compatibility of proposed mitigation bank with adjacent property land uses including known present and proposed zoning designations;
- Map of the proposed mitigation bank service area(s), description of the general need for the mitigation bank and basis for such determination; and
- Site conditions description. This should include a BRIEF description of: site conditions; habitats and species known or potentially present; photos of the Bank Property; description and acreage of existing wetlands and other waters of the U.S. present on the proposed Bank Property; hydrology; methods for establishing, restoring, rehabilitating, and/or preserving wetlands and other waters of the U.S., and habitat for federal, and state listed species; and site history, including past and present land uses, surrounding land uses and zoning along with the anticipated future development in the area;
- Explain how the proposed bank would contribute to connectivity and ecosystem function. Also discuss potential conflicts and compatibility with any conservation

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Phase IV	Final Instrument Received by DE & IRT		
Day 1			
Day 30	DE must notify IRT members of intent to approve/not approve instrument within 30 days of receipt.	30	
Day 45	Remainder of time for initiation of dispute resolution process by IRT members	15	45 IRT members have 45 days from submission of final instrument to object to approval of the instrument and initiate the dispute resolution process.
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# Phase 2: Prospectus

- Contents (§332.8(d)(2)) Bank and ILF:
  1. Objectives
  2. How the Bank or ILF program will be established and operated
  3. Proposed service area
  4. Need and technical feasibility
  5. Ownership arrangements
  6. Qualifications



# Prospectus Contents (cont'd)

- Banks must also include:
  7. Ecological suitability
  8. Assurance of sufficient water rights
- ILFs must also include:
  7. Compensation planning framework
  8. Description of ILF program account



# Public Review and Comment

- Public Notice Required
  - Prospectus
  - Most modifications of approved instruments
- Copies of comments provided to IRT & sponsor



# Prospectus Checklist Example

- All Fed/State IRT agencies in CA
- 8 elements required by rule
- 12 additional elements
- 404/ESA
- Submit to IRT at least 14 days prior to IRT meeting

**Checklist**  
**Prospectus for Mitigation Banks**  
*[Revised September 2010 by the Multi-Agency Product Delivery Team]*

Please refer to the Cover Sheet, revised *September 2010*, for information and instructions related to the submission requirements for a mitigation bank proposal.<sup>1</sup> Please provide the following information and a copy of this checklist with the submittal of a Prospectus:

- Proposed Bank Name - Use a short name based on a geographic feature if possible and include "Mitigation Bank" in the name;<sup>2</sup>
- Bank contacts – Include the name, address, phone, fax, and email for: Bank Sponsor, Property Owner, Consultants, etc;
- General location map and address of the proposed Bank Property;
- Accurate current map of the proposed Bank Property on a 7.5-minute USGS map showing proposed boundaries of the mitigation bank;
- Color aerial photographs that reflect current conditions proposed Bank Property and surrounding properties. Briefly discuss compatibility of proposed mitigation bank with adjacent property land uses including known present and proposed zoning designations;
- Description of how the mitigation bank will be established and operated, including the proposed ownership arrangements and long-term management strategy, and any phases planned [include description of phases, boundaries, target habitat/species, and the number of credits associated with each phase];
- Qualifications of the Bank Sponsor to successfully complete the type(s) of mitigation project(s) proposed, including information describing any similar activities by the Bank Sponsor;
- [USACE District to include the appropriate language: Approved or preliminary<sup>3</sup>] jurisdictional determination (JD) of on-site wetlands and other

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<sup>1</sup> Additional information may be requested to deem the prospectus complete.

<sup>2</sup> A name change may be requested if the proposed bank name is already being used.

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# Initial evaluation of the Prospectus provided to Sponsor

- Based on comments from public and IRT
- Written determination of potential suitability of proposed Mitigation Bank or In-Lieu Fee program to provide compensatory mitigation for DA permits
- If suitable, District Engineer informs sponsor to begin preparing draft Instrument
- If not suitable, District Engineer informs sponsor of reasons for making that determination
  - Sponsor may revise prospectus to address those deficiencies and resubmit



# Phase 3 – Draft Instrument

- Contents (§332.8(d)(6)) Banks and ILF:
  1. Service area
  2. Accounting procedures
  3. Provision stating legal liability
  4. Default and closure provisions
  5. Reporting protocols



# Draft Instrument Content (cont'd)

- Banks must also include:
  - Mitigation plans (12 items)
  - Credit release schedule
- ILFs must also include:
  - Compensation planning framework
  - Advance credits
  - Fee schedule
  - Method for determining fees and credits
  - Description of in-lieu fee program account



# Draft Instrument Content Comparison

## Bank & ILF

- Service Area
- Accounting procedures
- Assumption of mitigation responsibility/liability
- Default and closure provisions
- Reporting protocols
- Other information deemed necessary by District Engineer

## Bank only

- Mitigation plans addressing the 12 required elements (§332.4(c)(2) through (14))
- Credit release schedule

## ILF only

- Compensation planning framework
- Advance credits
- Fee schedule
- Method for determining fees and credits
- Description of in-lieu fee program account

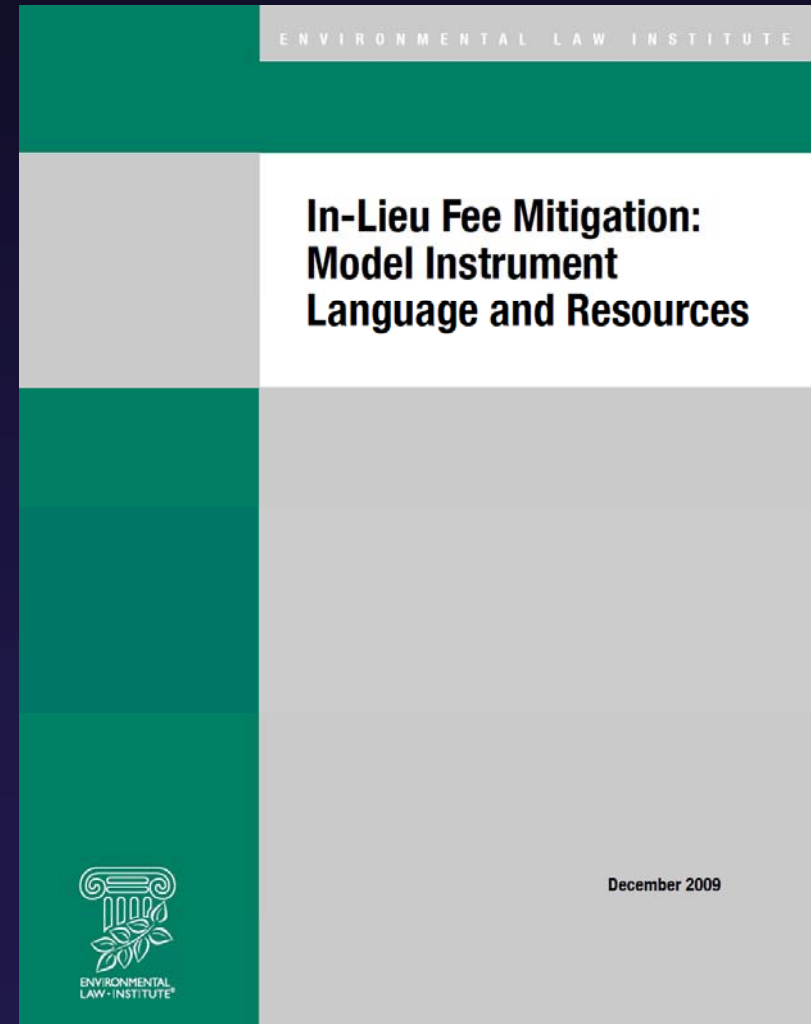




# Template ILF Instrument

## Example: ELI Model

- December 2009
- Overview of approval process
- Analysis of each element from rule
  - 9 (or 10) required
  - 2 potential additional
- Provides examples



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# Phase 4: Final Instrument

- Contents
  - Core elements
    - 18 for final bank instruments (includes 12 elements for mitigation plans)
    - 10 for final ILF instruments
  - Supporting documentation addressing IRT comments
  - DE decides whether instrument should be approved



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# Modification of Third Party Instruments

- Modification including:
  - Umbrella bank sites
  - In-lieu fee project sites
  - Site expansion
  - New credit types
- Streamlined process
  - Changes based on adaptive management
  - Changes in credit release schedules
  - Changes district engineer determines are not significant



# Exercise: Van Vleck MB

1. Objectives
2. Site protection instrument
3. Baseline information
4. Work plan
5. Maintenance plan
6. Performance standards
7. Monitoring requirements
8. Financial assurances
9. Site selection factors
10. Credit determination
11. Long-term management plan
12. Adaptive management plan
13. Credit release schedule
14. Service Area
15. Accounting procedures
16. Assumption of mitigation responsibility/liability
17. Default and closure provisions
18. Reporting protocols

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# Questions?

