

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 2019



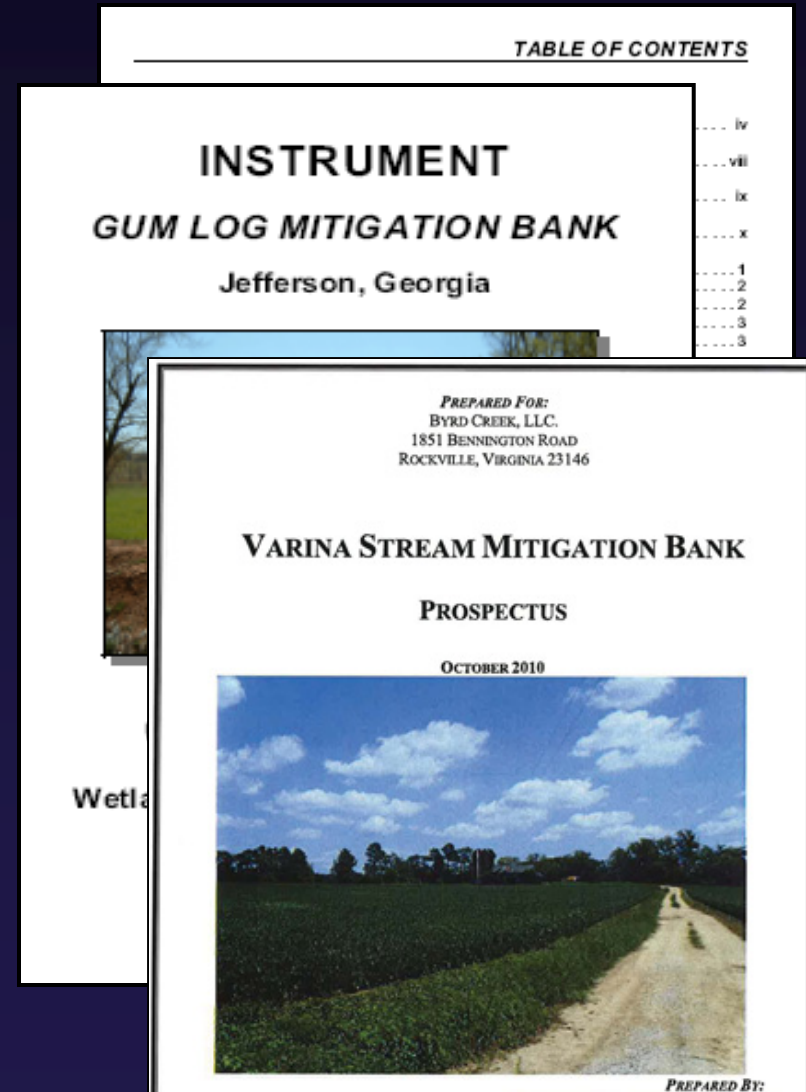
Differences Between Mitigation Banks and In-Lieu Fee Programs

- 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 proposals which entail expenditures



Overview

- Draft Prospectus
- Prospectus
- Draft Instrument
- Final Instrument



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.
		Sponsor Prepares and Submits Prospectus ~DE must notify sponsor of completeness w/in 30 days of submission~			
Phase II	Day 1**	Complete Prospectus Received by DE			
		Public notice must be provided within 30 days of receipt of a complete prospectus	30		
	Day 30	30-Day Public Comment Period	30		
	Day 60	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.
	Day 90				
Sponsor Considers Comments, Prepares and Submits Draft Instrument ~DE must notify sponsor of completeness w/in 30 days of submission~					
Phase III	Day 1	Complete Draft Instrument Received by IRT Members			
		30-day IRT comment period begins 5 days after DE distributes draft instrument to IRT members	30		
		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.
	Day 90				
Sponsor Prepares Final Instrument ~Sponsor provides copies to DE and all IRT members~					
Phase IV	Day 1	Final Instrument Received by DE & IRT			
		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.
	Day 30	Remainder of time for initiation of dispute resolution process by IRT members	15		
	Day 45	INSTRUMENT APPROVED/NOT APPROVED, or DISPUTE RESOLUTION PROCESS INITIATED			

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: Ohio Draft Prospectus Checklist

- 3 Corps Districts, EPA, FWS, NRCS, OEPA, ODNR
- Part of comprehensive guidelines
- 9 elements required



**U S Army Corps
of Engineers**
Huntington District

Public Notice

In reply refer to Public Notice No. Wetland Mitigation Banking in Ohio Issuance Date: July 28, 2011

Stream: Ohio Wetlands Closing Date: Not Applicable

Please address all inquiries to:
U.S. Army Corps of Engineers, Huntington District
ATTN: CELIA GOREN Public Notice No. (reference above)
502 8th Street
Huntington, WV 25701-2070

Phone: (304) 399-5210

**GUIDELINES FOR WETLAND MITIGATION BANKING IN OHIO
BASED UPON THE 2008 FINAL RULE ON
COMPENSATORY MITIGATION FOR LOSSES OF AQUATIC RESOURCES
WITHIN THE U.S. ARMY CORPS OF ENGINEERS,
BUFFALO, HUNTINGTON AND PITTSBURGH DISTRICTS**

APPENDIX 3 DRAFT MITIGATION BANK PROSPECTUS CHECKLIST

Please provide the following information and checklist with the submittal of a Draft Prospectus (see 33 CFR 332.8(d)(3) for additional information):

- ☐ A. Proposed Bank Name - Use a short name based on a geographic feature if possible; include "Mitigation Bank" in the name
- ☐ B. Bank contacts - include the name, address, phone, fax, email, and role in project for at least one contact: the contact may be the Bank Sponsor, Land Owner, Consultant, etc
- ☐ C. General location map and address of the proposed bank property
- ☐ D. Accurate current map of the proposed bank property on a 7.5 minute USGS map showing boundaries of the site
- ☐ E. Aerial photo of the bank site and surrounding properties
- ☐ F. Soils map of the bank site and surrounding properties
- ☐ G. Map of the proposed bank service area
- ☐ H. Current site conditions description including
 - o potential wildlife habitats and species known or potentially present
 - o photos of the site
 - o description of potential wetlands and waters present on site
 - o hydrology description
 - o approximate acreage of existing wetlands and waters to be restored
 - o site history including past land uses
 - o surrounding land uses and zoning
 - o anticipated future development in the area
 - minimum water (channel & balance measure)

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EPA/Corps draft 4/02/08

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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



Need and Technical Feasibility

Example: New Orleans District Prospectus Checklist

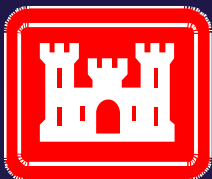
- a) Identify any watershed plans mitigation project accommodates.
- b) Identify any regional or local benefits derived from the bank.
- c) Identify any potential threats to the bank site or resource type the bank intends to provide &/or protect.
- d) Discuss the proposed construction work required to develop the bank and its feasibility.



Sponsor Qualifications

Example: Norfolk District Complete Prospectus Checklist

1. Provide list of prior experience
2. Provide documentation that the person signing the MBI has the authority to sign if the Sponsor is a company
 - a) If company (typically LLC), request and review copy of its operating agreement
 - b) Ensure person signing for company has ability to do so (may need multiple signatures)



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



Ecological Suitability:

Example: Norfolk District Prospectus Checklist

1. Summarize current site conditions including land use, vegetation, hydrology, and soils
2. Include information on rare or T/E species, historic properties, impaired waters (303(d) streams), etc.
3. Identify known encumbrances (mortgages, liens, rights-of-way, easements, etc.) on the property.
4. Identify previous land uses of the site & adjacent properties.
5. Identify current zoning & existing &/or proposed development adjacent to the bank site.
6. Identify current zoning of the bank site.
7. Summarize the historical hydrology of the site.
8. Indicate whether Corps has made “waters of the U.S.” JD
9. Identify which of the Virginia Off-site Mitigation Location Guidelines are met by the proposal.

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

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~Sponsor provides copies to DE and all IRT members~				

DE distributes comments to IRT members and sponsor within 15 days of the close of the public comment period.

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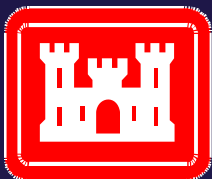
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Public Review and Comment

- Public Notice Required
 - Prospectus
 - Modifications of approved instruments (new sites, new land, new credit types)
- Copies of comments provided to IRT & sponsor



Initial Evaluation of the Prospectus Provided to Sponsor

- Written determination of **potential suitability** to provide compensatory mitigation
- **If suitable**, sponsor may begin preparing draft Instrument
- **If not suitable**, sponsor informed of reasons for that determination
- Sponsor may revise prospectus to address those deficiencies and resubmit



AN APPROVED PROSPECTUS
DOES NOT GUARANTEE AN
APPROVED BANK OR ILF
PROGRAM!



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



Accounting & Reporting Requirements

- Mitigation bank
 - Ledger for credit transactions
- ILF program
 - Annual report ledger
 - ILF program account report
 - Individual ledgers for each ILF project site
- Both
 - Monitoring reports
 - Financial assurance report
 - Long-term management funding report

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



Initial Credit Release

% of total bank credits once:

1. Instrument and plan are approved
2. Bank site has been secured
3. Financial assurances established
4. Any other requirements set by Corps are met



Example: Credit Release Schedule

- Mobile Wet Pine Flats
 - 20% Initial Release
 - 15% Hydrologic restoration
 - 15% 2nd incremental release
 - 15% 3rd Incremental release
 - 15% 4th Incremental Release
 - 20% Final Release (approx Year 10)



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 Bank Instrument

Example: California

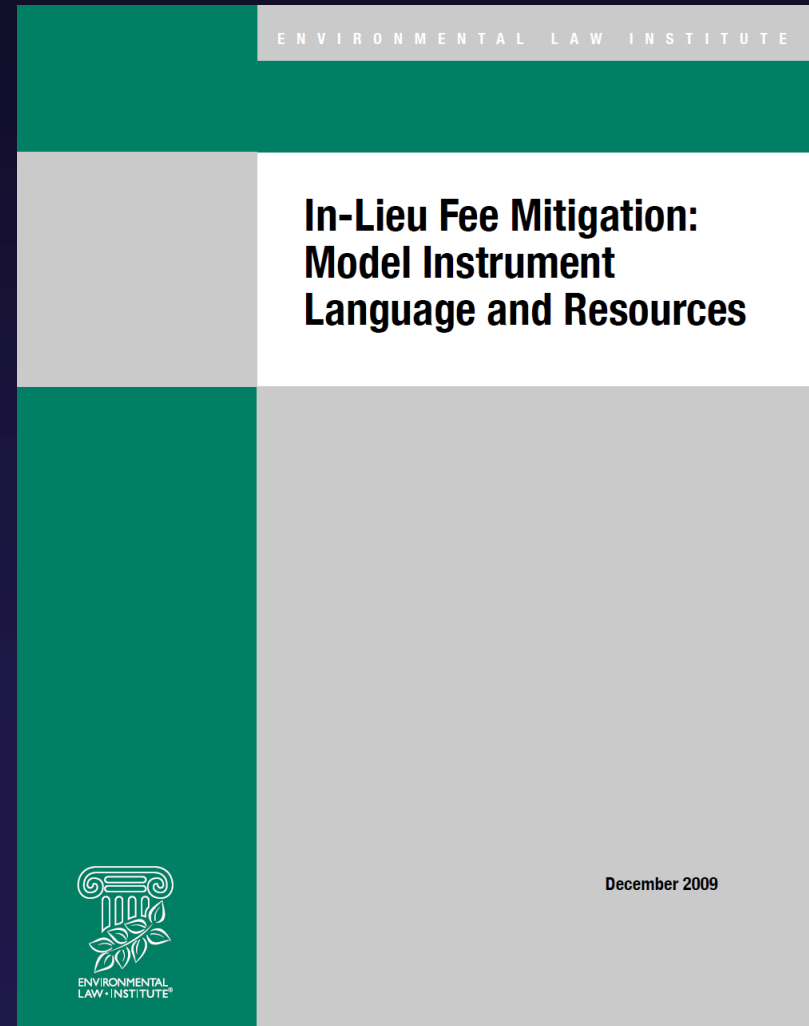
D-2 Endowment Fund Analysis, Assumptions and Funding Schedule	
	<p align="center">Checklist</p> <p align="center">Draft Bank Enabling Instrument Requirements for Mitigation Banks <i>[Revised September 2010 by the Multi-Agency Product Delivery Team]</i></p>
<input type="checkbox"/> "Exhibit	<p>Please refer to the Cover Sheet, revised <i>September 2010</i>, for information and instructions related to the submission requirements for a mitigation bank proposal. The following are the submission requirements for a Draft Bank Enabling Instrument (BEI). Please provide the following information and a copy of this checklist with the submittal of a Draft BEI. Any proposed modifications to the BEI template shall be identified using tracked changes or other electronic comparison and explained in a memorandum. The Draft BEI should be submitted in a 3-ring binder containing all the information and documents listed below. The binder should contain labeled tabs (i.e., Exhibit A, Bank Location Maps). The submittal should also include an electronic, editable format of the BEI, the Conservation Easement, and other applicable template-derived documents. The Draft BEI should include the most recent banking templates and the other necessary exhibits listed below and described in Appendix 1 of the BEI Template.</p>
<input type="checkbox"/> "Exhibit	<p><input type="checkbox"/> BEI</p> <p><input type="checkbox"/> "Exhibit A" - Bank Location Maps</p> <p><input type="checkbox"/> A-1 General Vicinity Map</p> <p><input type="checkbox"/> A-2 Map of <i>[if applicable, include: Property and]</i> Bank Property</p> <p><input type="checkbox"/> A-3 Map of any Existing Conserved Land in Bank Property Vicinity <i>[if applicable]</i></p> <p><input type="checkbox"/> "Exhibit B" - Service Area Map(s) and Description(s)</p> <p><input type="checkbox"/> B-1 Map(s) of the Bank's Service Area(s)</p> <p><input type="checkbox"/> B-2 Narrative Description(s) of the Bank's Service Area(s)</p> <p><input type="checkbox"/> "Exhibit C" - Development Plan</p> <p><input type="checkbox"/> C-1 Development Plan</p> <p><input type="checkbox"/> C-2 Construction Security Analysis and Schedule</p> <p><input type="checkbox"/> C-3 Performance Security Analysis and Schedule</p> <p><input type="checkbox"/> "Exhibit D" - Bank Management and Operation Documents</p> <p><input type="checkbox"/> D-1 Interim Management Security Analysis and Schedule</p>

- All Fed/State IRT agencies in CA
- 2 page BEI checklist (revised 2010)
- 43 page BEI template (May 2008)
- 13 sections/11 appendices
- 404/ESA
- Submit to IRT 21 days prior to IRT meeting

Model 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



Template ILF Instrument

Example: LA Corps District

1. Purpose and Authorities
2. Definitions
3. Stipulations
4. Program Structure
5. Project Establishment and Operation
6. Credit Accounting
7. Program Reporting
8. Other Provisions
9. Execution

Exhibits:

- A. Prioritization and CPF
- B. Program Service Area Map
- C. Instrument Modification Process
- D. Development Plans
- E. Interim Management Plans
- F. Long-term Managements Plans
- G. Statement of Sale of Credit Form
- H. Real Estate Instrument
- I. Property Assessment Form
- J. Credit Ledger Report Form

IN-LIEU FEE ENABLING INSTRUMENT

Name of Program

IN-LIEU FEE PROGRAM

This In-Lieu Fee Enabling Instrument ("Instrument"), dated this ____ day of ____, 2013 ("Execution Date"), is made by and between Name of Organization ("Program Sponsor"), the Los Angeles District of the U.S. Army Corps of Engineers ("USACE"), Region IX of the U.S. Environmental Protection Agency ("USEPA"), and the California Regional Water Quality Control Board, Region 8 ("RWQCB"). The USACE, USEPA, and RWQCB comprise and are referred to jointly as the Interagency Review Team ("IRT"). The Program Sponsor and the IRT members who have agreed to sign this Instrument are hereinafter referred to jointly as the "Parties." This Instrument sets forth the agreement of the Parties regarding the establishment, use, operation and maintenance of the Name of Program In-Lieu Fee Program (the "Program").

RECITALS

- A. The Program Sponsor is responsible for establishing and operating the Program.
- B. USACE and USEPA have jurisdiction over Waters of the U.S. pursuant to the Clean Water Act, 33 U.S.C. § 1251 *et seq.* Waters of the U.S. include jurisdictional wetlands.
- C. RWQCB is charged with preserving, protecting, enhancing, and restoring water quality pursuant to section 401 of the Clean Water Act.
- D. The IRT is the interagency group which oversees the establishment, use, operation, and maintenance of the Program.
- E. The primary goal of the Program is to provide effective Compensatory Mitigation for the Functions and Services of Waters of the U.S. lost through authorized Impacts.
- F. The objectives of the Program are (1) to provide an alternative to permittee-responsible Compensatory Mitigation by implementing In-Lieu Fee ("ILF") Projects adequate to meet current and expected demand for Credits in the Service Area; (2) create a Program that has a level of accountability commensurate with mitigation banks as specified in 33 C.F.R. Part 332; (3) provide ILF Projects that meet current and expected demand for Credits; and (4) achieve ecological success on a watershed-basis by siting ILF Projects using the best available decision support tools, and by integrating ILF Projects with ongoing conservation activities being undertaken within the region.

AGREEMENT

1

Name of Program In-Lieu Fee Program

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Sponsor Prepares and Submits Prospectus

~DE must notify sponsor of completeness w/in 30 days of submission~

	Day 1**	Complete Prospectus Received by DE	
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

Sponsor Considers Comments, Prepares and Submits Draft Instrument

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		DE discusses comments with IRT and seeks to resolve issues ~ # of days variable~	60	90
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Sponsor Prepares Final Instrument

~Sponsor provides copies to DE and all IRT members~

Phase IV	Day 30	Remainder of time for initiation of dispute resolution process by IRT members	15	45	Submission of final instrument to object to approval of the instrument and initiate the dispute resolution process.
	Day 45	INSTRUMENT APPROVED/NOT APPROVED, or DISPUTE RESOLUTION PROCESS INITIATED			

EPA/Corps draft 4/02/08

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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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DE distributes comments to IRT members and sponsor within 15 days of the close of

Sponsor Prepares Final Instrument

~Sponsor provides copies to DE and all IRT members~

Phase IV	Day 1	Final Instrument Received by DE & IRT			
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Develop Mitigation Bank Process

1. Begin Date* 04-Apr-2016

2. Bank Name*

Prospectus

3. Date Draft Prospectus Received

4. Date Comments on Draft Prospectus Provided to Sponsor

5. Date Complete Prospectus Received*

6. Date of Evaluation Letter*

Instrument

7. Date Draft Instrument Received*

8. Date Complete Draft Instrument Received*

9. Date DE Distributed Copies of Draft Instrument to IRT*

10. Date Instrument Comments Provided to Sponsor*

11. Date Final Instrument Received for Approval*

12. Date DE Notifies IRT of Proposed Decision*

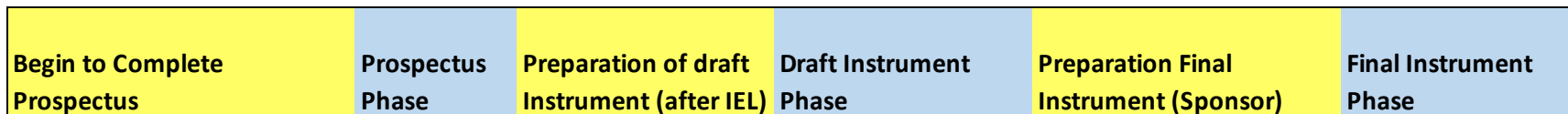
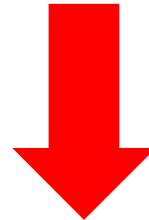
13. Dispute Resolution Initiated?*

14. Closure Method*

15. Date of DE's Final Decision (End Date)*



Converted Mandatory Entry Dates in ORM for DEVMB/DEVINLIEU into intervals



Sponsor



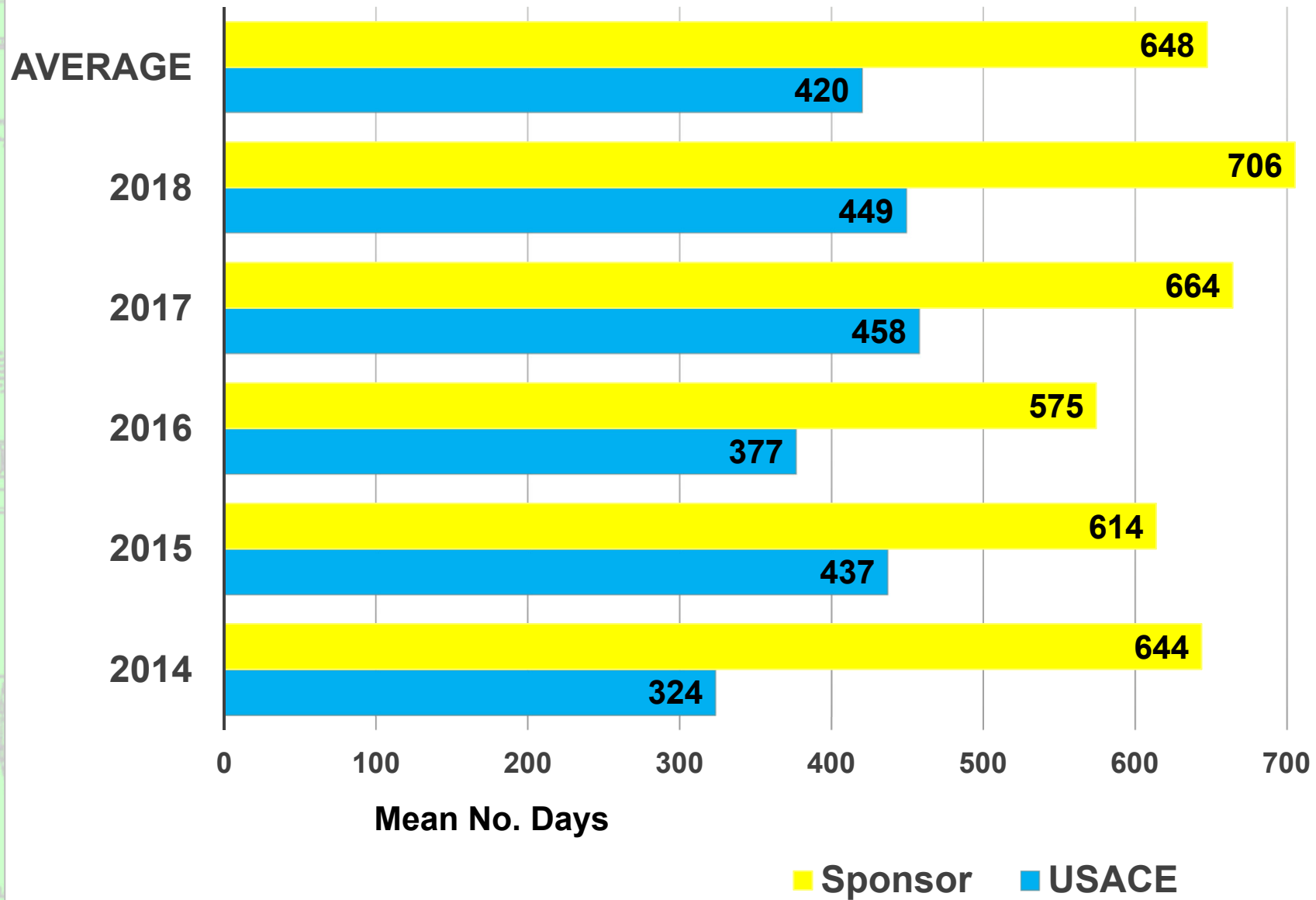
USACE



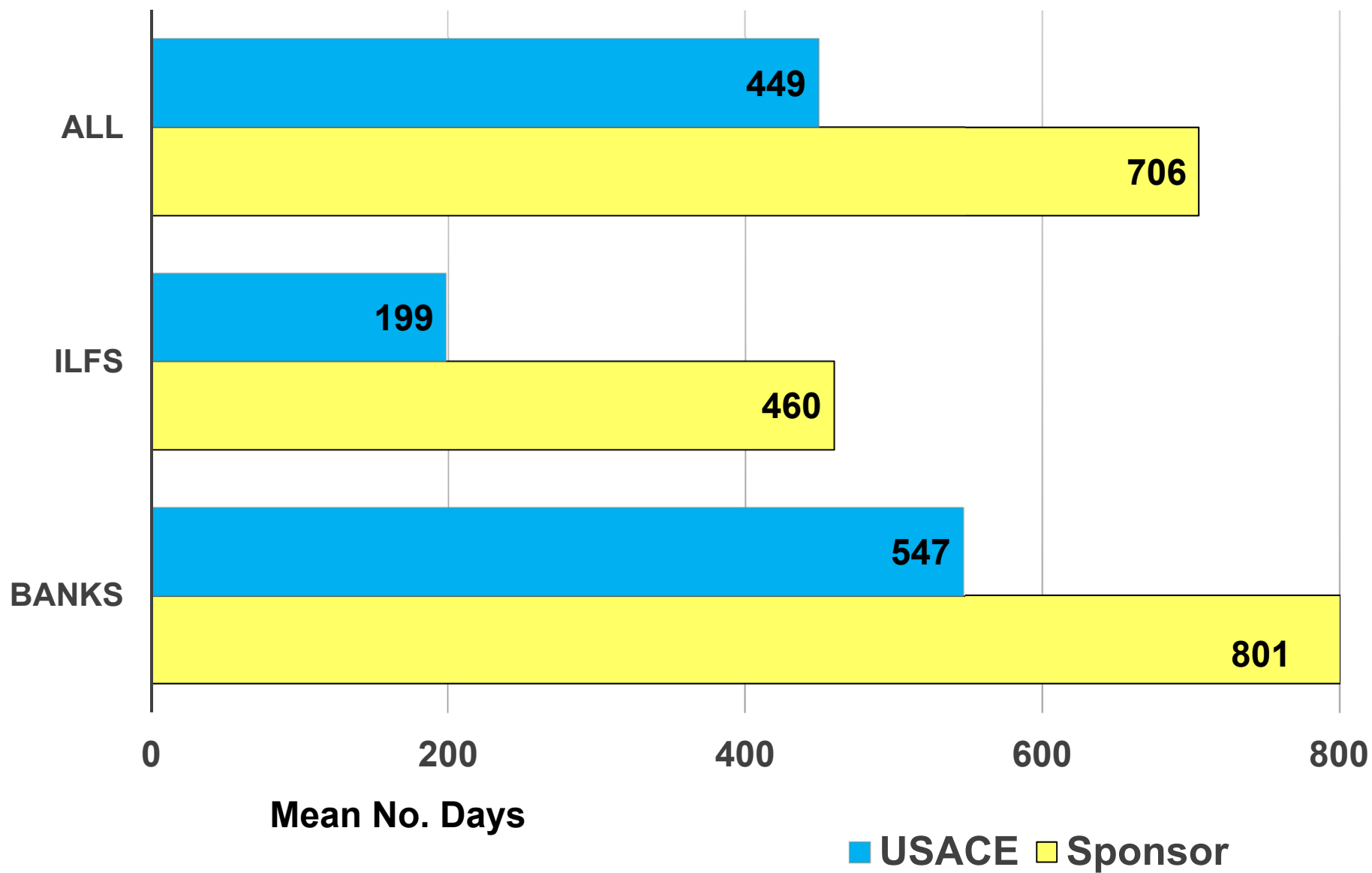
US Army Corps
of Engineers ®



USACE and Sponsor Processing Times



Mean Processing Intervals in FY 2018



Timelines may be affected by:

1. Endangered Species Act consultation
2. Historic Preservation Act coordination
3. Government-to-government consultation (tribes)
4. Sponsor does not submit necessary information in a timely manner
5. Information needed for Corps decision cannot be provided within the timeframes
6. Other agency approvals for multiagency banks



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



Other Modifications

- Change in ownership
- Change in sponsor
- Transfer of mitigation lands or instrument
- New long-term steward
- Others?



Improving the IRT Review Process

Case Study: California

- After a challenging and lengthy bank approval, sponsor and IRT conducted “*After-Action Review*”
- Sponsor and IRT independently brainstormed what could improve process in future
- Met and discussed ideas
- Agreed to a set of changes for next bank

Improving the IRT Review Process

Case Study: California

- IRT requests:
 - Utilize a shared calendar – clear expectations for comment deadlines, final decision, etc
 - Consolidate all agency comments by section of bank template
 - Re-submit only revised documents after receiving comments
 - Track document submittals and comments in a table
 - Date all revised documents in footer to correspond to dates in table of submittals

Consolidate IRT Comments by Template Section

DOCUMENT SECTION	IRT COMMENT	RESPONSES TO IRT COMMENTS ARE NUMBERED, ADDITIONAL REVISIONS ARE IDENTIFIED AS "REVISION"
		REVISION: Section Q USACE Provision was added to page 32 "...the BEI is not a contract..."
EXHIBIT A – BANK LOCATION MAPS		
A-1 VICINITY MAP		
A-2 PROPERTY MAP		
A-3 NEARBY CONSERVED LANDS		REVISION: Exhibit A-3 was revised to show neighboring property in USFWS conservation easement, which was omitted from previously submitted exhibit.
EXHIBIT B - SERVICE AREA MAPS & DESCRIPTIONS		
B-1.1 GGS SERVICE AREA MAP		1 At the request of CDFW, an additional GGS Service Area Map was developed showing the DWR impact areas within the GGS Service Area (Exhibit B-1.1.1)
B-1.2 SEASONAL WETLANDS SERVICE AREA MAP	<ol style="list-style-type: none"> 1. CDFW- Map shows wetland service area extending well into the Diablos, outside of the California Central Valley Ecoregion, but the description on page 2 of B-2 says "The proposed Wetlands Service Area includes the extent of the USDA Major Land Resource Area (California Central Valley Ecoregion) that lies within the two 6-digit HUCs..." 2. USACE- Remove the portion of the service area in San Benito County. This location is within the San 	<ol style="list-style-type: none"> 1. The Seasonal Wetland Service Area Maps (Exhibit B-1.2, B-1.3, B-1.4, B-2.2, and Service Area Hydrologic Analysis Figure 2) have been revised to reflect the limit of the Major Land Resource Area that lies within the 6-Digit HUCS... 2. The revised Seasonal Wetlands Service Area Map exhibits omit any area within San Benito County,

Improving the IRT Review Process

Case Study: California

- Sponsor agreed to implement additional changes:
 - Meet each IRT rep before submittal (all reps invited to all meetings)**
 - Work to get early agreement on significant issues (e.g., crediting, service area)
 - Meet each IRT rep after receiving written comments to ensure comment understood and planned response acceptable**
 - Use professional editor to increase accuracy of submittals
 - Include revised submittal table and schedule with each submittal

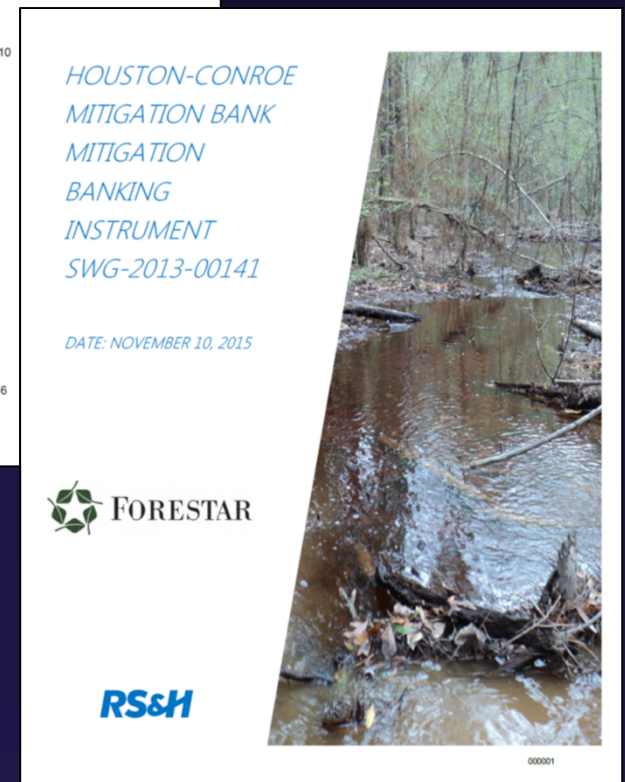
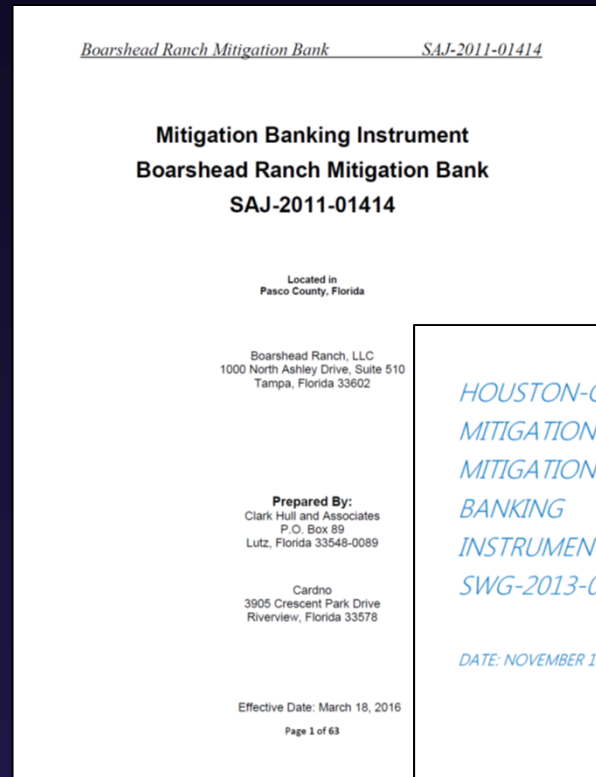
Improving the IRT Review Process

Case Study: California

- Results on next bank (with new IRT reps):
 - Increased project understanding by IRT from face-to-face briefings and meetings
 - Decreased comments from IRT on formatting, inaccurate details
 - Decreased re-submittals due to appropriate revisions and responses to comments
 - Increased ability to track version of documents, making submittals complete
 - Significantly reduced delay in securing approval signatures (total time to approval ~1.5 years)
 - Stronger working relationships with IRT representatives

Example Instruments

- Boarshead Ranch Mitigation Bank
 - Good example, on CD
- Houston–Conroe Mitigation Bank
 - Mock review of draft MBI exercise



Questions?

