



DEPARTMENT OF THE ARMY  
JACKSONVILLE DISTRICT CORPS OF ENGINEERS  
P. O. BOX 4970  
JACKSONVILLE, FLORIDA 32232-0019

REPLY TO  
ATTENTION OF

June 3, 2010

Regulatory Division  
North Permits Branch

Northwest Florida Water Management District  
Attn: Mr. Ron Bartel-Director, Resource Management Division  
152 Water Management Drive  
Havana, Florida 32333-4712

Dear Mr. Bartel:

The U.S. Army Corps of Engineers (Corps) is pleased to provide an extension for an additional three years or to July 9, 2013 for the currently approved Northwest Florida Umbrella, Water-Based, Regional Mitigation Plan (Plan), revised February 2008.

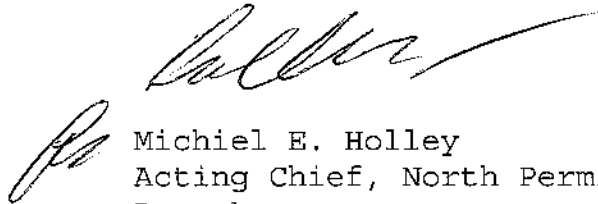
In accordance with the 33 Code of Federal Regulation (CFR), Part 332, Compensatory Mitigation for Losses of Aquatic Resources, specifically Section 332.8 (v)(2), the district engineer can determine circumstances warrant an extension of an additional three years beyond the initial two years for in-lieu fee (ILF) programs approved prior to July 9, 2008.

The Corps and Mitigation Review Team (MRT); consisting of representatives from U.S. Fish and Wildlife Service (FWS), National Marine Fisheries Service (NMFS), U.S. Environmental Protection Agency (EPA), Florida Fish and Wildlife Commission, Florida Department of Transportation, and members of your staff have consulted and agreed to bring the plan in compliance with the CFR part requirements referenced above.

In order to accomplish bringing the plan into compliance with the CFR, the district engineer has determined that circumstances warrant an extension for an additional three years or to July 9, 2013 to ensure that adverse impacts associated with permitted activity continue to be off-set with appropriate mitigation. The Corps invites you to review the revised federal regulations governing compensatory mitigation plans and ILFs. Attached is a checklist to assist you with the new rule requirements.

If you have any questions concerning this action, you may contact Mr. Randy Turner in writing at the letterhead address, by electronic mail at randy.l.turner@usace.army.mil, or by telephone at 904-232-1670.

Sincerely,

A handwritten signature in black ink, appearing to read "M. Holley", is written over a printed name and title.

Michiel E. Holley  
Acting Chief, North Permits  
Branch

Enclosures

Copy Furnished:

EPA, Atlanta  
USFWS, Panama City  
NMFS, St. Petersburg  
FDOT, Chipley  
FFWC, Tallahassee  
CESAJ-RD-P

## In Lieu Fee (ILF) Draft Instrument Checklist ((33CFR332.8(d)(6)):

1. A description of the proposed **geographic service area** of the mitigation bank or in-lieu fee program. The service area is the watershed, ecoregion, physiographic province, and/or other geographic area within which the mitigation bank or in-lieu fee program is authorized to provide compensatory mitigation required by DA permits. The service area must be appropriately sized to ensure that the aquatic resources provided will effectively compensate for adverse environmental impacts across the entire service area. For example, in urban areas, a U.S. Geological Survey 8-digit hydrologic unit code (HUC) watershed or a smaller watershed may be an appropriate service area. In rural areas, several contiguous 8-digit HUCs or a 6-digit HUC watershed may be an appropriate service area. Delineation of the service area must also consider any locally-developed standards and criteria that may be applicable. The economic viability of the mitigation bank or ILF program may also be considered in determining the size of the service area. The basis for the proposed service area must be documented in the instrument. An in-lieu fee program or umbrella mitigation banking instrument may have multiple service areas governed by its instrument (e.g., each watershed within a state or Corps district may be a separate service area under the instrument); however, all must be accounted for by service area;

**Included**  **Not Included** **Comments:**

2. **Accounting procedures.** The requirements for a ledger account are stipulated in 33CFR332.8(q)(1) of the final rule. Ledger reports are required for both mitigation banks and in-lieu fee programs. The draft instrument must describe the accounting procedures that will be used for the mitigation bank or in-lieu fee program.

**Included**  **Not Included** **Comments:**

3. A **provision** placing legal responsibility for providing the compensatory mitigation with the sponsor once a permittee secures credits from the sponsor.

**Included**  **Not Included** **Comments:**

4. **Default and closure** provisions. Specific closure procedures for mitigation banks are at the discretion of the district engineer (preamble Page 63).

**Included**  **Not Included** **Comments:**

5. **Reporting protocols** (refer to preamble and Corps' Special Conditions).

**Included**  **Not Included** **Comments:**

6. A complete **Mitigation and Monitoring Plan** § 332.4(c)(2) through (14):

(a) *Objectives.* A description of the resource type(s) and amount(s) that will be provided, the method of compensation (i.e., restoration, establishment, enhancement, and/or preservation), and the manner in which the resource functions of the compensatory mitigation project will address the needs of the watershed, ecoregion, physiographic province, or other geographic area of interest.

(b) *Site selection.* A description of the factors considered during the site selection process. This should include consideration of watershed needs, onsite alternatives where applicable, and the practicability of accomplishing ecologically self-sustaining aquatic resource restoration, establishment, enhancement, and/or preservation at the compensatory mitigation project site. (See § 332.3(d).) In general, the required compensatory mitigation should be located within the same watershed as the impact site, and should be located where it is most likely to successfully replace lost functions and services, taking into account such watershed scale features as aquatic habitat diversity, habitat connectivity, relationships to hydrologic

sources (including the availability of **water rights**), trends in land use, ecological benefits, and compatibility with adjacent land uses (33CFR332.3(b)1).

(c) *Site protection instrument.* A description of the legal arrangements and instrument, including site ownership, that will be used to ensure the long-term protection of the compensatory mitigation project site (see § 332.7(a)). The real estate instrument, management plan, or other mechanism providing long-term protection of the compensatory mitigation site must, to the extent appropriate and practicable, **prohibit incompatible uses** (e.g., clear cutting or **mineral extraction**) that might otherwise jeopardize the objectives of the compensatory mitigation project (33CFR332.7(a)). The real estate instrument, management plan, or other long-term protection mechanism must contain a provision requiring 60-day advance notification to the district engineer before any action is taken to void or modify the instrument, management plan, or long-term protection mechanism, including transfer of title to, or establishment of any other legal claims over, the compensatory mitigation site (33CFR332.7(a)3). For mitigation bank sites, real estate instruments, management plans, or other long-term mechanisms used for site protection must be finalized before any credits can be released (33CFR332.8(t)1). To provide sufficient site protection, a conservation easement or restrictive covenant should, where practicable, establish in an appropriate third party (e.g., governmental or non-profit resource management agency) the right to enforce site protections and provide the third party the resources necessary to monitor and enforce these site protections (33CFR332.7(a)1).

(d) *Baseline information.* A description of the ecological characteristics of the proposed compensatory mitigation project site and, in the case of an application for a DA permit, the impact site. This may include descriptions of historic and existing plant communities, historic and existing hydrology, soil conditions, a map showing the locations of the impact and mitigation site(s) or the geographic coordinates for those site(s), and other site characteristics appropriate to the type of resource proposed as compensation. The baseline information should also include a delineation of waters of the United States on the proposed compensatory mitigation project site. A prospective permittee planning to secure credits from an approved mitigation bank or in-lieu fee program only needs to provide baseline information about the impact site, not the mitigation bank or in-lieu fee project site.

(e) *Determination of credits.* A description of the number of credits to be provided, including a brief explanation of the rationale for this determination. (See § 332.3(f).)

(i) For permittee-responsible mitigation, this should include an explanation of how the Compensatory mitigation project will provide the required compensation for unavoidable impacts to aquatic resources resulting from the permitted activity.

(ii) For permittees intending to secure credits from an approved mitigation bank or in-lieu fee program, it should include the number and resource type of credits to be secured and how these were determined.

(f) *Mitigation work plan.* Detailed written specifications and work descriptions for the compensatory mitigation project, including, but not limited to, the geographic boundaries of the project; construction methods, timing, and sequence; source(s) of water, including connections to existing waters and uplands; methods for establishing the desired plant community; plans to control invasive plant species; the proposed grading plan, including elevations and slopes of the substrate; soil management; and erosion control measures. For stream compensatory mitigation projects, the mitigation work plan may also include other relevant information, such as planform geometry, channel form (e.g., typical channel cross-sections), watershed size, design discharge, and riparian area plantings.

(g) *Maintenance plan.* A description and schedule of maintenance requirements to ensure the continued viability of the resource once initial construction is completed.

(h) *Performance standards.* Ecologically-based standards that will be used to determine whether the compensatory mitigation project is achieving its objectives. (See § 332.5.) Performance standards must be based on attributes that are objective and verifiable. Ecological performance standards must be based on the best available science that can be measured or assessed in a practicable manner. Performance standards may be based on variables or measures of functional capacity described in functional assessment methodologies, measurements of hydrology or other aquatic resource characteristics, and/or comparisons to reference aquatic resources of similar type and landscape position. The use of reference aquatic

resources to establish performance standards will help ensure that those performance standards are reasonably achievable.

(i) *Monitoring requirements.* A description of parameters to be monitored in order to determine if the compensatory mitigation project is on track to meet performance standards and if adaptive management is needed. A schedule for monitoring and reporting on monitoring results to the district engineer must be included. (See § 332.6.) The mitigation plan must provide for a monitoring period that is sufficient to demonstrate that the compensatory mitigation project has met performance standards, but not less than **five years**. A longer monitoring period must be required for aquatic resources with slow development rates (e.g., forested wetlands, bogs) (33CFR332.6(b)).

(j) *Long-term management plan.* A description of how the compensatory mitigation project will be managed after performance standards have been achieved to ensure the long-term sustainability of the resource, including long-term financing mechanisms and the party responsible for long-term management. (See § 332.7(d).)

(k) *Adaptive management plan.* A management strategy to address unforeseen changes in site conditions or other components of the compensatory mitigation project, including the party or parties responsible for implementing adaptive management measures. The adaptive management plan will guide decisions for revising compensatory mitigation plans and implementing measures to address both foreseeable and unforeseen circumstances that adversely affect compensatory mitigation success. (See § 332.7(c).)

(l) *Financial assurances.* A description of financial assurances that will be provided and how they are sufficient to ensure a high level of confidence that the compensatory mitigation project will be successfully completed, in accordance with its performance standards (see § 332.3(n)). The DA permit must include a special condition requiring the financial assurances to be in place prior to commencing the permitted activity. Financial assurances shall be phased out once the compensatory mitigation project has been determined by the district engineer to be successful in accordance with its performance standards. The district engineer will receive notification at least 120 days in advance of any termination or revocation (33CFR332.3(n)5). From Pre-ambie (Page 48) of New Rule: District engineers have the authority to condition the approval of a permit to require the posting and execution of financial assurances by a third-party mitigation sponsor or a permittee, as long as the Corps is not positioned to accept directly, retain, or draw upon those funds in the event of a default. Financial assurances should be executed with the signatures of an additional governmental or nongovernmental environmental management entity or entities as a bond "surety" or "sureties," who agree to ensure performance if the Corps should determine that the sponsor or permittee, as the bond "principal," has defaulted on any of his or her responsibilities. The third-party instrument or permit conditions should also specify that the Corps stands as a third-party "obligee" to the principal and surety(ies) of the bond, possessing the full and final authority to determine the penal sum amount, and to determine whether the principal and the surety(ies) have specifically performed some or all of the obligations, covenants, terms, conditions, and agreements of the financial assurance. Finally, the financial assurance should specify that if both the principal and the surety(ies) default in their responsibilities, the Corps retains the full and final discretionary authority to identify new parties as additional surety(ies) to the bond.

**Included**  **Not Included** **Comments:**

**7. Credit release schedule**, which is tied to achievement of specific milestones. All credit releases must be approved by the district engineer, in consultation with the IRT, based on a determination that required milestones have been achieved. The district engineer, in consultation with the IRT, may modify the credit release schedule, including reducing the number of available credits or suspending credit sales or transfers altogether, where necessary to ensure that all credit sales or transfers remain tied to compensatory mitigation projects with a high likelihood of meeting performance standards. The mitigation banking instrument may allow for an initial debiting of a percentage of the total credits projected at mitigation bank maturity, provided the following conditions are satisfied: the mitigation banking instrument and mitigation plan have been approved, the mitigation bank site has been secured, appropriate financial assurances have been

established, and any other requirements determined to be necessary by the district engineer have been fulfilled (33CFR332.8(m)). In order for credits to be released, the sponsor must submit documentation to the district engineer demonstrating that the appropriate milestones for credit release have been achieved and requesting the release. The district engineer will provide copies of this documentation to the IRT members for review. IRT members must provide any comments to the district engineer within 15 days of receiving this documentation. However, if the district engineer determines that a site visit is necessary, IRT members must provide any comments to the district engineer within 15 days of the site visit (33CFR332.8(o)9). If the district engineer determines that the mitigation bank or in-lieu fee program is not meeting performance standards or complying with the terms of the instrument, appropriate action will be taken. Such actions may include, but are not limited to, suspending credit sales, adaptive management, decreasing available credits, utilizing financial assurances, and terminating the instrument.

**Included**  **Not Included** **Comments:**

**8. Any other information** deemed necessary by the district engineer.

**Included**  **Not Included** **Comments:**

**9. A compensation planning framework** (see paragraph (c) of this section), which contains the following elements:

- (a) The geographic service area(s), including a watershed-based rationale for the delineation of each service area;
- (b) A description of the threats to aquatic resources in the service area(s), including how the in-lieu fee program will help offset impacts resulting from those threats;
- (c) An analysis of historic aquatic resource loss in the service area(s);
- (d) An analysis of current aquatic resource conditions in the service area(s), supported by an appropriate level of field documentation;
- (e) A statement of aquatic resource goals and objectives for each service area, including a description of the general amounts, types and locations of aquatic resources the program will seek to provide;
- (f) A prioritization strategy for selecting and implementing compensatory mitigation activities;
- (g) An explanation of how any preservation objectives identified in paragraph (c)(2)(v) of this section and addressed in the prioritization strategy in paragraph (c)(2)(vi) satisfy the criteria for use of preservation in § 332.3(h);
- (h) A description of any public and private stakeholder involvement in plan development and implementation, including, where appropriate, coordination with federal, state, tribal and local aquatic resource management and regulatory authorities; (ix) A description of the long-term protection and management strategies for activities conducted by the in-lieu fee program sponsor;
- (i) A strategy for periodic evaluation and reporting on the progress of the program in achieving the goals and objectives in paragraph (c)(2)(v) of this

**Included**  **Not Included** **Comments:**

**10. Specification of the initial allocation of advance credits** (see paragraph (n) of this section) and a draft fee schedule for these credits, by service area, including an explanation of the basis for the allocation and draft fee schedule;

**Included**  **Not Included** **Comments:**

**11. A methodology for determining future project-specific credits and fees;** and

**Included**  **Not Included** **Comments:**

12. A description of the **in-lieu fee program account** required by paragraph (i) of this section.

**Included**  **Not Included** **Comments:**

## Items required for a MB or ILF Prospectus (33CFR332.8(d)(2)):

\*The prospectus must provide a summary of the information regarding the proposed mitigation bank or in-lieu fee program, at a sufficient level of detail to support informed public and IRT comment. The review process begins when the sponsor submits a complete prospectus to the district engineer. For modifications of approved instruments, submittal of a new prospectus is not required; instead, the sponsor must submit a written request for an instrument modification accompanied by appropriate documentation. The district engineer must notify the sponsor within 30 days whether or not a submitted prospectus is complete. A complete prospectus includes the following information:

1. The **objectives** of the proposed mitigation bank or in-lieu fee program.

**Included**  **Not Included** **Comments:**

2. How the mitigation bank or in-lieu fee program will be **established and operated**.

**Included**  **Not Included** **Comments:**

3. The **proposed service area**.

**Included**  **Not Included** **Comments:**

4. The **general need for and technical feasibility** of the proposed mitigation bank or in-lieu fee program.

**Included**  **Not Included** **Comments:**

5. The **proposed ownership arrangements** and long-term management strategy for the mitigation bank or in-lieu fee project sites.

**Included**  **Not Included** **Comments:**

6. The **qualifications of the sponsor** to successfully complete the type(s) of mitigation project(s) proposed, including information describing any past such activities by the sponsor.

**Included**  **Not Included** **Comments:**

7. For a MB, the prospectus must include:

(a) a **statement of the ecological suitability of the site** to achieve the objectives of the proposed mitigation bank, including the physical, chemical, and biological characteristics of the bank site and how that site will support the planned types of aquatic resources and functions; and

(b) **assurance of sufficient water rights** to support the long-term sustainability of the mitigation bank.

**Included**  **Not Included** **Comments:**

8. For a proposed in-lieu fee program, the prospectus must also include:

(a) The **compensation planning framework** (see paragraph (c) of this section); and

(b) A description of the **ILF program account**.

**Included**  **Not Included** **Comments:**