

# Mitigation Banks and In-Lieu Fee Programs



April 2011  
Lexington, KY



# 3<sup>rd</sup> Party Mitigation

- 1 or more sites where resources are restored, established, enhanced, and/or preserved to offset permitted impacts
- Sponsor assumes responsibility for the mitigation
- Operation & use are governed by an instrument
- Permittees acquire mitigation credits

# Benefits of third party mitigation

- Reduced risk & uncertainty
- More efficient compliance
- Often greater planning and scientific effort
- Greater ecological value than many PRM
- May streamline permitting, by reducing need to evaluate permittee-responsible mitigation



# Drawbacks of 3<sup>rd</sup> Party Mitigation

- Failure may result in substantial loss of aquatic resource function
- Migration of functions and services
- Extensive agency effort in instrument development & oversight



# Differences Between Banks & ILFs

## ■ Mitigation banks:

- Public or private sponsor
- Site secured & project initiated in advance of debits
- Corps has no authority over bank expenditures

## ■ In-lieu fee programs:

- Government or non profit conservation organization
- Fees often received before implementing project
- Corps approves project funding

# Benefits of Each

## ■ Banks

- Advance site identification
- Credit release linked to performance
- Compensation in advance of impacts

## ■ ILFs

- Mitigation when no banks
- Compensation for a range of resources
- IRT can direct site selection in a watershed approach
- Sponsor interest in conservation



# Drawbacks of Each

## Mitigation Banks

- Site selection in advance of agency review
- Less likely to be developed in small or weak markets


## In-lieu fee programs

- Risk of mitigation not being provided
- Temporal lag between permitted impacts and project implementation

# Overview of 3<sup>rd</sup> Party Instrument Development

- Draft prospectus
- Prospectus & Public Notice
- Draft instrument
- Final instrument

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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** Complete Prospectus Received by DE			
Phase II	Public notice must be provided within 30 days of receipt of a complete prospectus	30	
	30-Day Public Comment Period	30	
	DE must provide the sponsor with an initial evaluation letter within 30 days of the end of the public comment period.	30	
Day 90			
<b>Sponsor Considers Comments, Prepares and Submits Draft Instrument</b> ~DE must notify sponsor of completeness w/in 30 days of submission~			
Day 1 Complete Draft Instrument Received by IRT Members			
Phase III	30-day IRT comment period begins 5 days after DE distributes draft instrument to IRT members	30	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.
	DE discusses comments with IRT and seeks to resolve issues ~ # of days variable~	60	
Day 90			
<b>Sponsor Prepares Final Instrument</b> ~Sponsor provides copies to DE and all IRT members~			
Day 1 Final Instrument Received by DE & IRT			
Phase IV	DE must notify IRT members of intent to approve/not approve instrument within 30 days of receipt.	30	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.

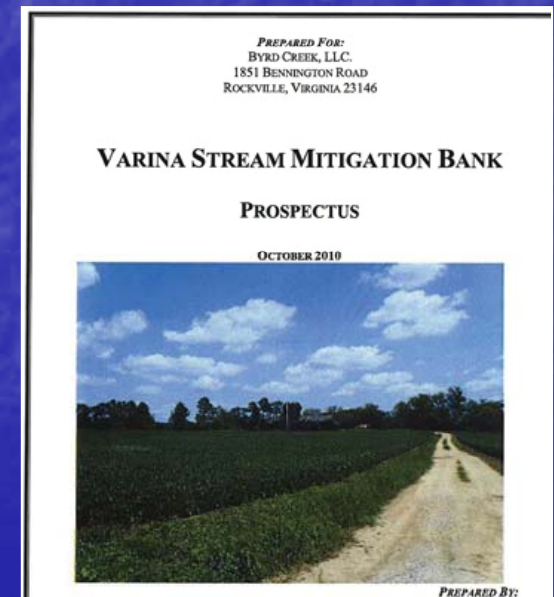
# Phase 1: Draft Prospectus

- Preliminary review of draft prospectus
- Optional but “...*strongly recommended*...”
- IRT has opportunity to review
- DE provides comments to sponsor within 30 days

# Phase 2: Prospectus

## Contents (§332.8(d)(2))

1. Objectives
2. How it will be established & operated
3. Proposed service area
4. Need & technical feasibility
5. Ownership arrangements
6. Qualifications





# Prospectus must also include

- **For Banks:**

- Ecological suitability
- Assurance of sufficient water rights

- **For ILFs:**

- Compensation planning framework
- Description of ILF program account

# Public Notice issued for complete prospectus

Include at a minimum information on:

- Name & address of sponsor
- Corps PM contact
- Location of project
- Brief description of project
- Summary of prospectus
- State that prospectus available on request
- Other information at *33CFR 325.3*

Copies of all comments provided to IRT within 15 days of PN expiration

## Initial evaluation of the prospectus provided to Sponsor

- Written determination of potential suitability of proposal
- If suitable, Corps advises sponsor to begin preparing draft instrument
- If not suitable, Corps informs sponsor of reasons for that determination



# Phase 3 - Draft Instrument

## Contents §332.8(d)(6)

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

		Event	# of Days**	
Phase I		<b>Optional Preliminary Review of Draft Prospectus</b>	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~			
Phase II	Day 1**	<b>Complete Prospectus Received by DE</b>		
	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~				
Phase III	Day 1	<b>Complete Draft Instrument Received by IRT Members</b>		
	Day 30	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~				
Phase IV	Day 1	<b>Final Instrument Received by DE &amp; IRT</b>		
	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.
	Day 45	Remainder of time for initiation of dispute resolution process by IRT members	15	
<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

# All 3rd party mitigation instruments include:

- Service area(s)
- Accounting procedures
- Sponsor assumption of mitigation responsibility
- Default and closure provisions
- Reporting protocols
- Other information deemed necessary

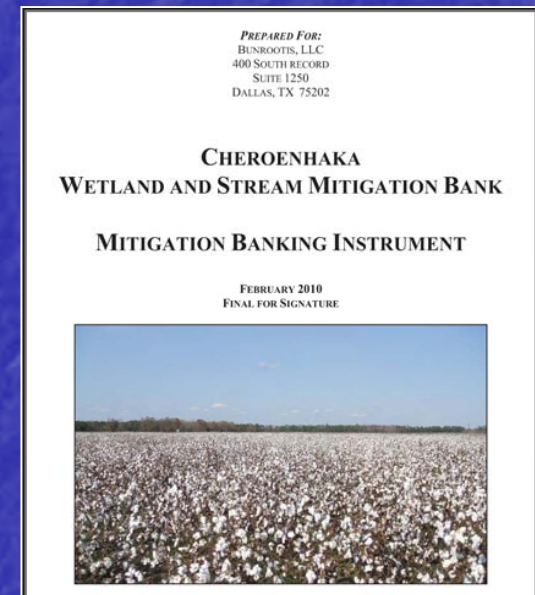
# Additional information required for:

## Mitigation banks:

- Mitigation plans
- Credit release schedule

## In-lieu fee programs:

- Compensation planning framework
- Description of ILF program account
- Advance credits, by service area
- Fee schedule, by service area
- Method for determining fees and credits





# 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 determines instrument approval

# Credit Release Schedule

- **Single site banks:** instrument
- **Umbrella banks & ILF:** mitigation plan
- Tied to performance-based milestones
- Reserve *significant* share of credits for release only after attainment of performance standards
- Credit release approval by Corps in consultation with IRT

# Factors to consider in determining credit release schedule include:

- Method of compensatory mitigation
- Likelihood of success
- Nature and amount of work required
- Aquatic resource type(s) and function(s) to be provided
- Initial capital costs to construct project



# Initial Credit Release from Mitigation Banks

% 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

# Credit Release Schedule Example 1

## ■ Ohio Wetlands:

- 30% Initial Release
- Up to 15% - Year 3
- Up to 15% - Year 5
- Up to 15% - Year 7
- 25% Final Release – Year 10



# Credit Release Schedule Example 2

## ■ Norfolk Stream Restoration:

- 15% Initial Release
- 10% Construction complete
- 10-25% Year 1 - Bankfull or not
- 10-25% Year 2 - Bankfull or not
- 10-25% Year 3 - Bankfull or not
- No additional releases until Bankfull event

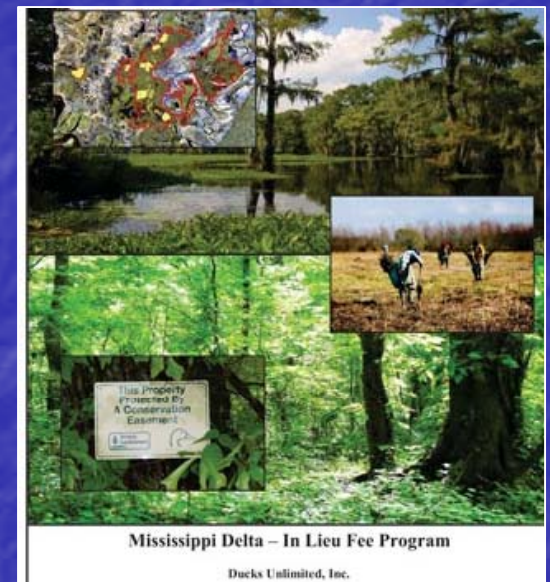




# Additional information required for:

## In-lieu fee programs:

- Compensation planning framework
- Description of ILF program account
- Advance credits, by service area
- Fee schedule, by service area
- Method for determining fees and credits



# Compensation Planning Framework includes:

- Service area (watershed-based)
- Analysis of historic aquatic resource loss & current condition
- Threats to aquatic resources & how they are addressed
- Aquatic resource goals & objectives
- Prioritize mitigation projects
- Use of preservation
- Description of stakeholder involvement
- Long-term protection and management
- Evaluation and reporting

# ILF Program Account

- Funds for mitigation projects ONLY
- Interest income
- Administrative costs
- Corps responsible for approving funding
- Annual reports
  - Revenues & expenditures
  - Permit list
  - Credit balances
- Program audit



# Cost of Mitigation Credits - 332.8(o)(5)

- Credit costs determined by the sponsor
- Cost per credit for ILF credits based on:
  - Expected costs
  - Full cost accounting, including appropriate contingencies



# NC EEP Fee Schedule

<b>Fee Category</b>	<b>Unit</b>	<b>Fee per Unit - Higher Fee HU</b>	<b>Fee per Unit - Lower Fee HU</b>
Riparian Buffer	Sq.ft	\$0.96	\$0.96
Stream	Lin.ft	\$338	\$256
Non-riparian wetland	Acre	\$44,883	\$23,081
Riparian wetland	Acre	\$62,210	\$35,172
Coastal wetland	Acre	\$153,035	\$153,035

# ILF Program Advance Credits

- Cap on advance credits specified in instrument
- Advance credits available once instrument approved
- As projects produce *released* credits, *advance* credits are fulfilled & available again



# ILF project implementation

- Land acquisition and improvements must be initiated by **3rd growing season** after first advance credit is acquired



# Number of ILF Program Advance Credits is based on

- Compensation planning framework
- Service area size
- Available resources
- Sponsor's past project performance
- Financing needed for mitigation projects
- Other considerations

# Possible approaches to determining the number of advance credits:

- No advance credits
- Large # advance credits
- # of credits to provide 3 years mitigation
- More credits for experienced sponsor
- Existing ILFs: % of approved but not implemented projects



# NC EEP Advance Credit Allocation

River Basin	Cataloging Unit	Advance Stream Credits	Advance Wetland Credits
Cape Fear	<b>TOTAL:</b>	<b>170,000</b>	<b>635</b>
	03030002	62,841	112
	03030003	29,571	8
	03030004	53,717	125
	03030005	13,458	368
	03030006	9,723	4
	03030007	691	18

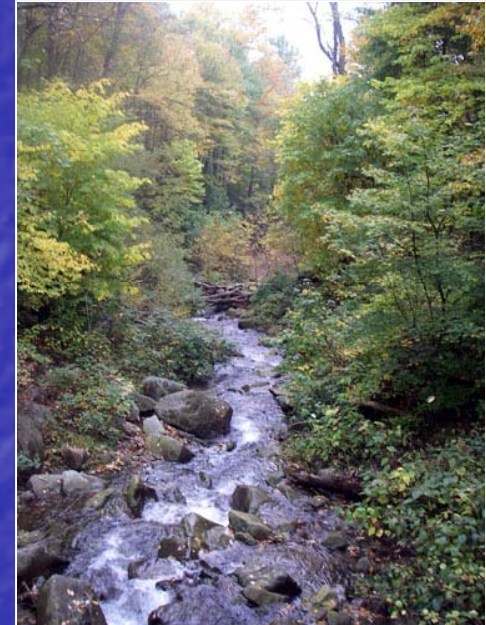
# Modification of 3rd Party Instruments:

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



# Site Closure

- Performance standards met
- Available credits debited
- Monitoring completed
- Long-term steward identified
- Long-term management funds
- Future management requirements understood by steward, sponsor & IRT





# *Questions?*

