

DNR Responses to Senator Bert Stedman's Questions

February 27, 2018

Attachment 1

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			
	Day 30	Public notice must be provided within 30 days of receipt of a complete prospectus	30	DE distributes comments to IRT members and sponsor within 15 days of the close of the public comment period.	
		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
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			
	Day 90	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		90
Sponsor Prepares Final Instrument					
~Sponsor provides copies to DE and all IRT members~					
Phase IV	Day 1	Final Instrument Received by DE & IRT			
	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	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.

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February 27, 2018

Attachment 2



DEPARTMENT OF THE ARMY
ALASKA DISTRICT, U.S. ARMY CORPS OF ENGINEERS
REGULATORY DIVISION
P.O. BOX 6898
JBER, AK 99506-0898

Regulatory Division
POA-2016-106

MAR 23 2017

Jeff Bruno
Acting Executive Director
Office of Project Management and Permitting
550 W 7th Avenue, Suite 1430
Anchorage, Alaska 99501

Dear Mr. Bruno,

Thank for the opportunity for us to provide feedback on the potential for the State of Alaska to develop an In-Lieu Fee Compensatory Mitigation Program. We have reviewed your draft prospectus received in our office on February 17, 2017 and assigned Department of the Army (DA) file number POA-2016-0106 to this action. Please reference this number in all future correspondence with our office concerning this action.

The Corps response to a draft prospectus allows the district engineer to provide early feedback regarding the potential for the proposed in-lieu fee program to provide compensatory mitigation to offset environmental losses resulting from unavoidable impacts to waters of the United States authorized by DA permits. As discussed in our March 9, 2017 meeting, several issues warrant specific attention as they indicate potential unsuitability of the proposal to provide compensatory mitigation for DA permits.

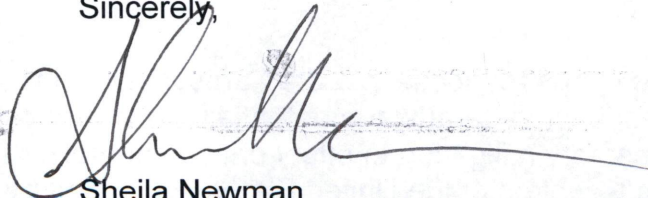
The draft prospectus indicates your intent is to develop a flexible, general use mitigation program. The Corps of Engineers authority allows only for the approval of an in lieu fee program that offsets environmental losses resulting from unavoidable impacts to waters of the United States authorized by DA permits. Another issue is whether there is a need for the State's proposed program. The Alaska District required compensatory mitigation on less than 30% of individual permits and 3% of general permits in 2016. The demand for in lieu fee credits totaled 132 and was limited in geographic scope. The draft prospectus does not provide any data to support the need for an in-lieu fee program.

The draft prospectus does not provide the watershed approach required for each compensation planning framework given the scale of the proposed service areas. Instead, the information directs that a watershed approach will be used for site selection. The lack of required analysis for each compensation planning framework indicates that the service areas are inappropriately sized. The service areas must be scaled to a size that will allow for rule compliant information to be provided. In addition, to defer the watershed approach to individual site selection defeats the overall intent of in-lieu fee program.

At our meeting, we identified geographic areas where impacts from DA permits have occurred historically and are occurring presently. We also identified a thought process to build service areas based on this information. We strongly suggest that this information be considered if you choose to revise the draft prospectus and/or submit a formal prospectus.

We have enclosed our detailed comments on the draft prospectus for your consideration. We look forward to a continued dialogue with DNR. If you have any questions, please feel free to contact me at sheila.m.newman@usace.army.mil or at (907) 753-5556.

Sincerely,

A handwritten signature in dark ink, appearing to read 'Sheila Newman', with a long horizontal flourish extending to the right.

Sheila Newman
Special Actions Branch Chief
Regulatory Division

Enclosure

Enclosure: Section Review and Comments

State of Alaska to develop an In-Lieu Fee Compensatory Mitigation Program

Department of the Army (DA) file number POA-2016-0106

While not an Initial Evaluation pursuant to 33 CFR 332.8(d)(5), the detailed comments that follow are intended to assist the Department of Natural Resources (DNR) in the preparation of a prospectus that provides a summary of the information regarding the proposed program, at a sufficient level of detail to support informed public and IRT comment.

Introduction and Program Overview

1. The term "general use" is used in this section. Please define this term.
2. Please remove all non-relevant information from the prospectus. For example, the statement: "This program would be the first statewide ILFP to be administered by DNR in Alaska," is not relevant pursuant to 33 CFR 332. Moreover, while the "United States Environmental Protection Agency (USEPA)," also has promulgated requirements jointly with the U.S. Army Corps of Engineers (USACE), USEPA does not approve instruments.
3. Please note that a prospectus is not "approved," USACE must make a determination that the proposed in-lieu fee program has potential for providing appropriate compensatory mitigation for activities authorized by DA permits and informs the sponsor that he/she may proceed with preparation of the draft instrument. Please revise this section accordingly.

Objectives of the In-Lieu Fee Program

1. Please provide a sufficiently detailed description of the resource type(s) and amount(s) that will be provided.
2. Please provide 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.
3. Please revise and/or clarify the apparent typo "(Figure 1Error! Reference source not found.)."
4. Please clarify the meaning and intent of: "new suite of meaningful mitigation options."
5. 33 CFR 332 states in pertinent part that "Credits for compensatory mitigation projects on public land must be based solely on aquatic resource functions provided by the compensatory mitigation project, over and above those provided by public programs already planned or in place." Please provide information to a sufficient level of detail that addresses this criteria.
6. There are numerous "other goals" listed in this section that are separate from, and in some cases contrary to, Section 404 of the Clean Water Act. For example, while your

agency may have a goal to “Collect and make publicly available data that enhances all stakeholders’ abilities to make decisions relating to aquatic resources, climate change, changing environments, etc.,” ILF funds cannot be expended on this type of activity and thus must remain separate. Please revise and/or clarify all “other goals” as they relate to providing compensatory mitigation under Section 404 of the Clean Water Act.

In-Lieu Fee Program Establishment and Operation

This section did not provide a sufficient level of detail for how the ILF program is to be established and operated. Statements that pertinent rule sections will be followed at a future date with no details, or non-relevant information, about how this is anticipated to be done does not provide a sufficient level of detail needed for informed public and IRT comment.

1. Please provide sufficiently detailed written specifications and work descriptions for anticipated compensatory mitigation projects, including, but not limited to, the geographic boundaries of the project; construction methods, timing, and sequence.
2. Please provide a sufficiently detailed description of anticipated source(s) of water, including connections to existing waters and uplands; methods for establishing the desired plant community.
3. Please provide a sufficiently detailed description of anticipated plans to control invasive plant species; the proposed grading plan, including elevations and slopes of the substrate; soil management; and erosion control measures.
4. For stream compensatory mitigation projects, please provide a sufficiently detailed description of anticipated mitigation work plans. This 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.

Proposed Service Areas

1. Please provide a sufficiently detailed description of how your proposed service areas are appropriately sized to ensure that the aquatic resources provided will effectively compensate for adverse environmental impacts across the entirety of each service area. While the proposed service areas may generally follow mapping that has been developed by numerous agencies, they were not developed for the purpose of determining whether the aquatic resources provided will effectively compensate for adverse environmental impacts across the entirety of each area pursuant to Section 404 of the Clean Water Act.
2. Please note, the economic viability of an in-lieu fee program may also be considered in determining the size of the service area. It appears this was taken into account in the delineation of the boundaries of the service areas; therefore, please provide sufficiently detailed information to support economic viability. However, please note that regardless of this consideration, each service area must still be appropriately sized to ensure that the

aquatic resources provided will effectively compensate for adverse environmental impacts across the entirety of each service area.

General Need and Technical Feasibility

1. Please provide a sufficiently detailed description of the factors considered in determining the need of the potential ILF program. While it is stated that this will increase options and that less than 1% of the State of Alaska is privately owned, details provided do not document the need of the potential ILF program.
2. This sections states in pertinent part: "...new opportunities for compensatory mitigation that may include restoration, enhancement, preservation, cleanup of contaminated sites, and the collection and publication of data." Establishment is not listed here, but is in other places in the document. Please clarify and/or revise your document as to whether establishment is a form of compensatory mitigation DNR wishes to pursue. Moreover, "cleanup of contaminated sites" may not be compensatory mitigation. Please provide sufficient details as to how this is anticipated to be compensatory mitigation. Lastly, "collection and publication of data" appears not to be a form of compensatory mitigation. Please clarify and/or revise your document accordingly.
3. Please provide further information pertaining to the statement: "This ILFP is set up to offset impacts as required by the Clean Water Act and offers conventional mitigation credits. Depending on the impact, it could potentially offer non-conventional credits that address Alaska's unique needs and characteristics. DNR's ILFP will open up several additional resources (mainly on SOA DNR managed lands) that offer the flexibility needed to ensure a sustainable and meaningful mitigation program in Alaska."

Ownership and Long-Term Management of the ILFP Project Sites

Statements that pertinent rule sections will be followed at a future date with no details, or non-relevant information, about how the program is anticipated to be conducted does not provide a sufficient level of detail needed for informed public and IRT comment. Please provide sufficient level of detail needed for informed public and IRT comment.

1. This section states in pertinent part that: "Projects developed through this ILFP will be protected through a wide range of land protection mechanisms that satisfy ILFP requirements and result in long-term protection of aquatic resources (e.g., resource management plans, site specific management plans, planning classifications, conservation easements, deed restrictions, etc.). Long-term protection tools will be selected and utilized as appropriate for each mitigation project developed under this ILFP." Descriptions of these anticipated legal arrangements and instruments that will be used to ensure the long-term protection of the compensatory mitigation project site is not at an

appropriate level of detail needed for informed public and IRT comment. Please provide additional details regarding these mechanisms, in particular the “planning classifications” mechanism.

2. Please provide a sufficiently detailed description of how the anticipated compensatory mitigation projects will be managed after performance standards have been achieved to ensure the long-term sustainability of the resource, including anticipated long-term financing mechanisms.

Accounting Procedures

33 CFR 332.8(i)(1) states in pertinent part that “The program account may only be used for the selection, design, acquisition, implementation, and management of in-lieu fee compensatory mitigation projects, except for a small percentage (as determined by the district engineer in consultation with the IRT and specified in the instrument) that can be used for administrative costs.” Please provide the anticipated administrative costs percentage.

Compensation Planning Framework (CPF)

The CPF was added to the final rule **to provide a level of watershed planning for in-lieu fee programs that goes beyond the watershed planning typically conducted by mitigation banks**. The compensation planning framework is also intended to help reduce some of the **risk and uncertainty** surrounding in-lieu fee programs, since those programs will be able to sell a limited number of credits before selecting and implementing compensatory mitigation projects.

The CPF is a major factor of consideration during instrument review and therefore must be a major consideration during the review of the prospectus. The level of detail necessary for the CPF is at the discretion of the DE, and will take into account the characteristics of the service areas and the scope of the program. If an in-lieu fee prospectus is permitted to proceed to an instrument, the CPF will be reviewed by the IRT, and will be a major factor in the DE’s decision on whether to approve the instrument.

Introduction

The Introduction states: “Alaska’s broad range of terrestrial and marine aquatic resources and dispersed population support the establishment of a flexible and transparent mitigation instrument that targets important aquatic resources within the landscape/watershed context. This CPF uses an ecoregion approach (33 CFR §332.8(d)) to develop 11 SAs and a watershed approach for compensatory mitigation site selection and prioritization (33 CFR §332.3(c)), as described in Sections 2.0-3.0.”

The CPF must support a watershed approach to compensatory mitigation. The delineation of geographic service areas must be established on a watershed-based rationale. It appears that the service areas proposed in the CPF do not follow a watershed-based rationale, but instead site selection and prioritization were established using a watershed approach.

Please revise the delineation of the proposed geographic service areas to follow a watershed-based rationale. Also, please include this rationale as part of any revised CPF.

In order to help reduce some of the risk and uncertainty surrounding your ILF program, please revise your CPF accordingly to provide the appropriate level of watershed planning. While it is understood that to remain "flexible" is a goal of this CPF, it is required that watershed planning be conducted at an appropriate level to reduce some of the risk and uncertainty surrounding the ILF program.

Service Areas

In addition to the items above, a 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. Provided documentation does not support the large size of the proposed service areas.

This section states in pertinent part: "While the SAs are large, they are appropriately sized to ensure that the aquatic resources preserved, enhanced, or restored will effectively compensate for environmental impacts within the same ecosystem while maintaining economic viability as a mitigation instrument."

Please note that providing compensatory mitigation in the form of "the same ecosystem" is not the goal of the watershed approach. The ultimate goal of a watershed approach is to maintain and improve the quality and quantity of aquatic resources within watersheds through strategic selection of compensatory mitigation sites.

A watershed approach means an analytical process for making compensatory mitigation decisions that support the sustainability or improvement of aquatic resources in a watershed. It involves consideration of watershed needs, and how locations and types of compensatory mitigation projects address those needs. A landscape perspective is used to identify the types and locations of compensatory mitigation projects that will benefit the watershed and offset losses of aquatic resource functions and services caused by activities authorized by DA permits. The size of watershed addressed using a watershed approach should not be larger than is appropriate to ensure that the aquatic resources provided through compensation activities will effectively compensate for adverse environmental impacts resulting from activities authorized by DA permits.

This section also states: "Utilizing large and geographically distinct SAs affords the State of Alaska ILFP the ability to identify a large assortment of potential mitigation options that are more likely to offset impacts to specific habitat types without artificial constraints." Please explain and define "artificial constraints."

Prioritization Strategy for Selecting and Implementing Compensatory Mitigation Activities

Comments on this section could not be offered as the proposed service areas were not established using a watershed approach.

Preservation Objectives

The first two paragraphs of this section do not appear to be relevant to the establishment and operation of an ILF program. Furthermore, this section uses information derived from previous sections of this CPF in order to satisfy the criteria for use of preservation pursuant to 33 CFR 332.3(h). An explanation of how any preservation objectives meet the preservation criteria was not submitted. Please submit an explanation of how any preservation objectives meet the preservation criteria. Please see 33 CFR 332.8(c)(2)(vii).

This section states in pertinent part: "The 2008 Mitigation Rule states that preservation "is particularly valuable for protecting unique, rare, or difficult-to-replace aquatic resources, such as bogs, fens, and streams, and may be the most appropriate form of compensatory mitigation for those resources" (Preamble 33 CFR §325 and 332). These and other important aquatic resources are present in many of the SAs. Consistent with the 2008 Mitigation Rule and associated regulatory guidance, the Alaska ILFP seeks to provide preservation credits for aquatic resources that provide important chemical, physical, and biological functions within each SA." Please provide a sufficiently detailed description to support this statement.

This section states in pertinent part: "The watershed approach described in Section 3.2 will be used to identify important aquatic resources and describe the threat of development that would be removed through preservation. This process will ensure a transparent and effective means of achieving the Alaska ILFP's objectives. The State of Alaska is in a unique position to ensure that lands preserved under the ILFP would be protected and managed over the long-term." Please apply the watershed approach as noted above.

Stakeholder Involvement

Please provide information related to any stakeholder involvement pertaining to the creation of this ILF prospectus.

Long-Term Protection and Management Strategies

For government property, long-term protection may be provided through federal facility management plans or integrated natural resources management plans. It is not that the third-party mitigation provider is a governmental entity that allows for long-term protection through federal facility management plans or integrated natural resources management plans, but the fact

the land is owned by the government that allows this provision. Therefore, the statement: "As a public mitigation provider, DNR is afforded flexibility to identify the mechanism that will provide long-term protection to the proposed mitigation sites (33 CFR §332.7(a))" appears to be not consistent with rule.

This section states in pertinent part: "DNR has a long history of managing lands and mitigation sites developed through this ILFP will be protected through a natural resource management plan or comparable resource agency planning document." For government property, long-term protection may be provided through federal facility management plans or integrated natural resources management plans. It is not clear from the documentation what is anticipated as a "comparable resource agency planning document." Please provide a sufficiently detailed description of a "comparable resource agency planning document."

Please provide a sufficiently detailed description regarding the following statement: "For mitigation site management, DNR will typically serve as the long-term steward and responsible party for overseeing compensatory mitigation activities or, on occasion, may designate the responsibility to a third party." If property is transferred to a third party, will the property remain in State ownership?

33 CFR 332.7(d) and 33 CFR 332.8(u) outlines required information as it pertains to long-term management. Please provide sufficiently detailed information as it to these requirements.

Terrestrial Service Areas

This section states in pertinent part: "DNR anticipates using formal documented commitments to implement the long-term protection and management of compensatory mitigation lands required under the 2008 Mitigation Rule." Formal documented commitments are alternative mechanisms used to address financial assurances. They are not used for site protection, nor are they long-term management plans. Please provide a sufficiently detailed clarification of this statement. Please ensure all aspects of 33 CFR 332.7 are addressed.

Streams

The first paragraph states: "The preamble to the 2008 Mitigation Rule (33 CFR §332.7(a)) recognizes the challenges with respect to long-term site protection of dynamic riverine systems. DNR plans to manage and protect streams that are part of ILFP mitigation sites to the greatest extent practicable." The preamble to the rule states: "For stream compensatory mitigation projects, appropriate means of site protection will be determined by district engineers, after considering the characteristics of the compensation activities and the real estate interests of the project proponent. For example, in-stream rehabilitation measures may not warrant long-term protection. Specific requirements for site protection are at the discretion of the district engineer." Long-term protection is determined on a case-by-case basis by the DE. The preamble does not recognize challenges as it relates to compensatory mitigation projects in streams, but states that after consideration of the characteristics of the compensation activities and the real estate

interests of the project proponent, in-stream rehabilitation measures may not warrant long-term protection. Also, please note that the preamble addresses restoration activities and does not address preservation of stream systems. Please revise this section accordingly.

Marine Service Areas

This section states: "Similarly, DNR would not be required to develop real estate instruments to provide long-term protection of compensatory mitigation lands within tidal and subtidal lands owned by the State of Alaska within the marine SAs. These lands are also dynamic and subject to natural coastal forces and outside influences that cannot be managed or influenced by DNR (33 CFR §332.7(a)). To the greatest extent practicable, the Alaska ILFP will manage compensatory mitigation sites within the marine SAs to achieve the stated goals and objectives."

The preamble to the rule states in pertinent part: "There are other examples of situations where it may not be feasible to require site protection through real estate or legal instruments for compensatory mitigation projects. One potential situation is the construction of oyster habitat or the restoration of sea grass beds in state-owned tidal waters, where the project proponent does not have a real estate interest, but may obtain authorization to conduct those environmentally beneficial activities. Another example may be the restoration of tidal marshes or other coastal resources, since the long-term sustainability of those projects in the dynamic coastal environment cannot be assured because of the natural littoral processes that occur in those areas."

Long-term protection is determined on a case-by-case basis by the DE. The preamble does not state that long-term protection is not required for tidal and subtidal lands. It does however provide examples where site protection may not be feasible or could not be assured. Sponsors are still required to address site protection. Please note the preamble addresses restoration activities on these areas and does not address preservation activities. Please revise this section accordingly.