

# In-Lieu Fee (ILF) Programs

Jeff Phillips, U.S. Fish and Wildlife Service



THE  
CONSERVATION FUND

Webinar 8, February 2021

*Photo: ILF site near Tillamook, Oregon*

# In-Lieu Fee Programs

Program involving the restoration, establishment, enhancement, and/or preservation of



aquatic resources |

habitat



through funds paid to a governmental or non-profit natural resources management entity to satisfy compensatory mitigation requirements for



DA permits |

impacts to specified species or habitat.



# How do banks and ILF programs differ?

## Bank

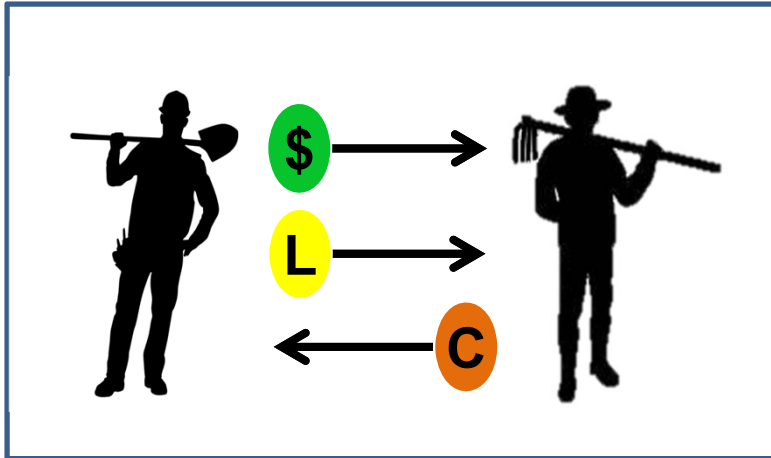
- Sponsor is a public or private entity
- Site secured and mitigation typically initiated in advance of impacts
- Single or multiple mitigation sites
- No agency oversight over bank expenditures

## ILF

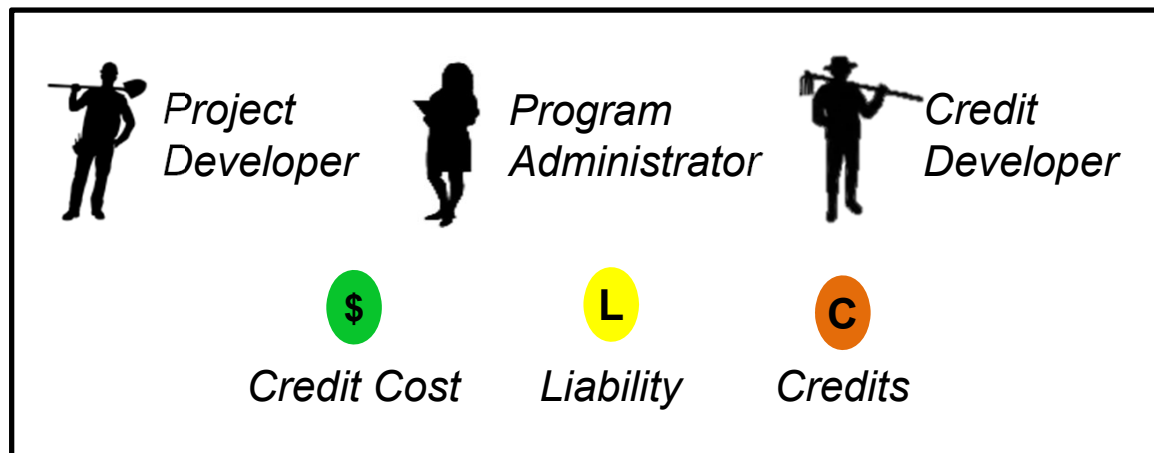
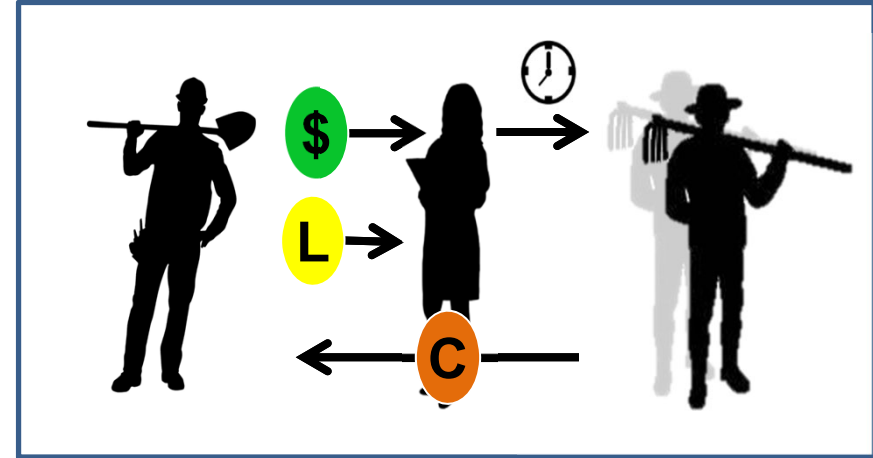
- Sponsor is gov't or non-profit conservation organization
- Fees typically received before implementing mitigation project(s)
- Typically multiple project sites over the life of the program
- Agency oversight of ILF accounting

**HELD TO EQUIVALENT STANDARDS**

## Conservation Bank



## In Lieu Fee Program



# ILF Sponsor

\*These are from the Corps 2008 rule - USFWS does not have written guidance but considers these components best practices.

- ✓ Eligibility “a governmental or non-profit natural resources management entity” [33 CFR 332.2]
  - ✓ “...operate explicitly in the public interest, rather than to serve the needs of investors...” [FR 73, 19614]
- ✓ Qualifications of the sponsor to successfully complete the type(s) of mitigation project(s) proposed, including past experience [33 CFR 332.8(d)(2)(vi)]
- ✓ Sponsors must also be able to manage the ILF program (e.g. program accounts, program reporting, etc.)

**1) How many ILF programs are approved nationwide?**

**2) How many ESA/species ILF programs are approved nationwide?**

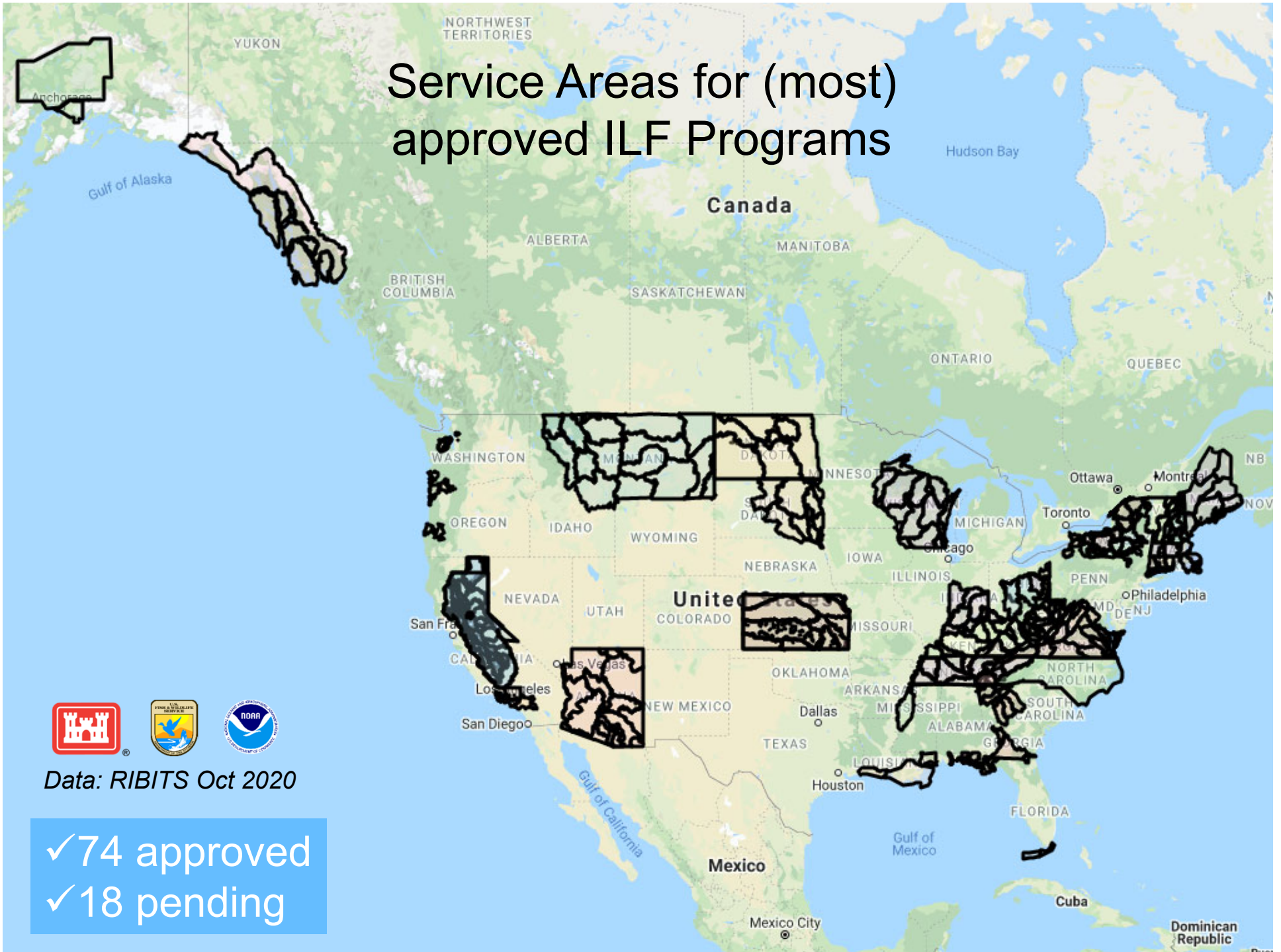


Vernal Pool, Oregon Fish and Wildlife Office



Vernal Pool Fairy Shrimp, U.S. Fish and Wildlife Service

# Service Areas for (most) approved ILF Programs



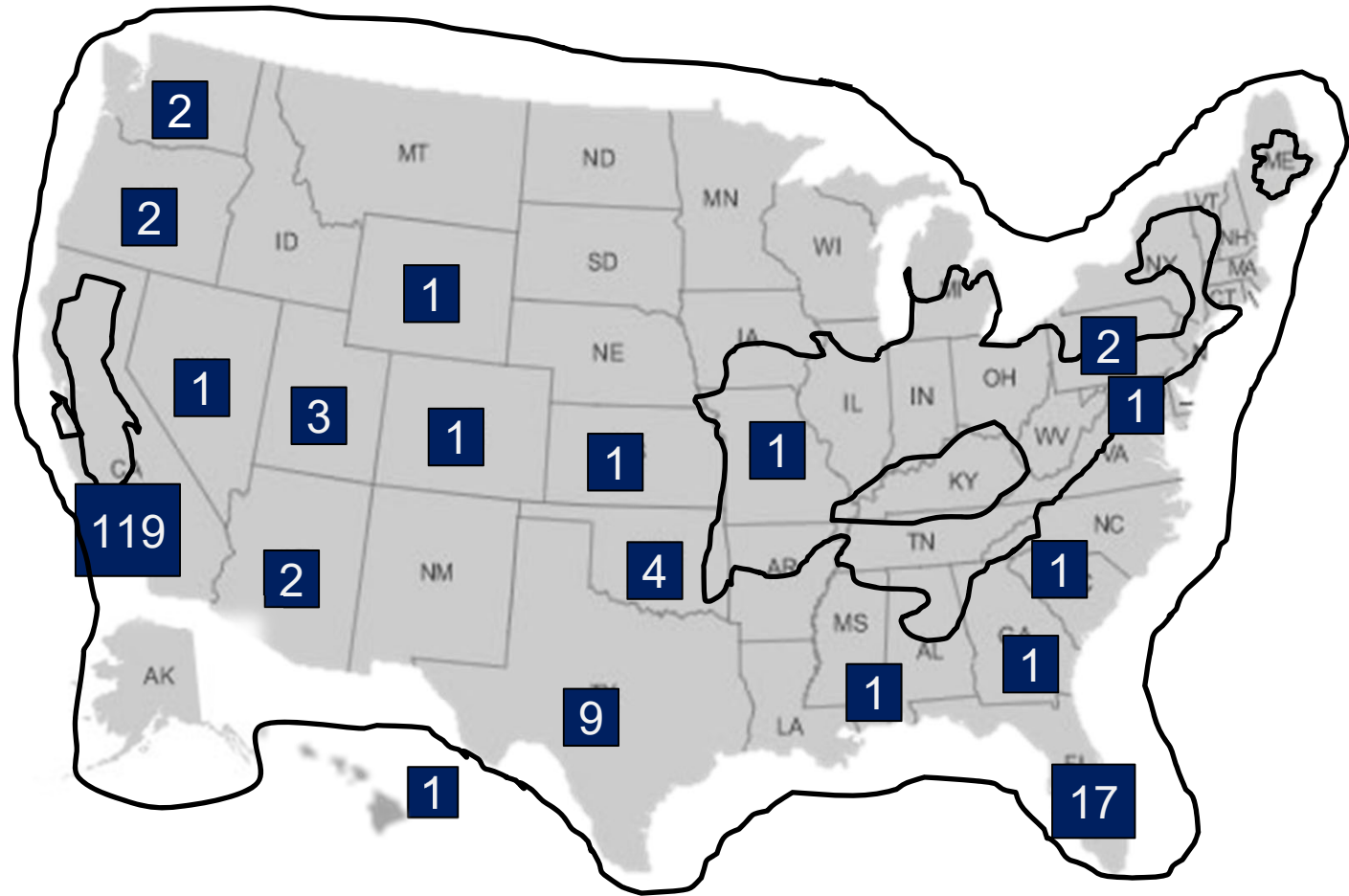
Data: RIBITS Oct 2020

✓ 74 approved  
✓ 18 pending



# 6 Species ILF Programs

(170 Conservation Banks)



Data source: RIBITS, October 2020  
 Services ILFs not all in RIBITS





## CWA 404 ILF Projects that Conserve Listed Species

(but do not provide ESA credits; FWS or NMFS are not “co-chairs”)

- Hood Canal (HCC Council)
- Cape Fear River (NC DMS)
- Roanoke & Tennessee Basins (VA ARTF)
- Coosa & Chattahoochee Rivers (GA Wetland Trust Fund)
- La Paz County Endangered Species (County, FWS)



# In-lieu Fee Programs for Species



- Similar to 404 ILF programs in most ways, including:
  - Sponsor = gov't or non-profit environmental entity
    - (exception = Eagle ILF)
  - Governed by an Instrument with Service(s)
- One unique difference - may be established to fund specific conservation action(s) rather than establishment of a conservation site. For example:
  - captive rearing and release program
  - vaccination program
  - reduce exposure to contaminants



# Benefits of ILF Programs

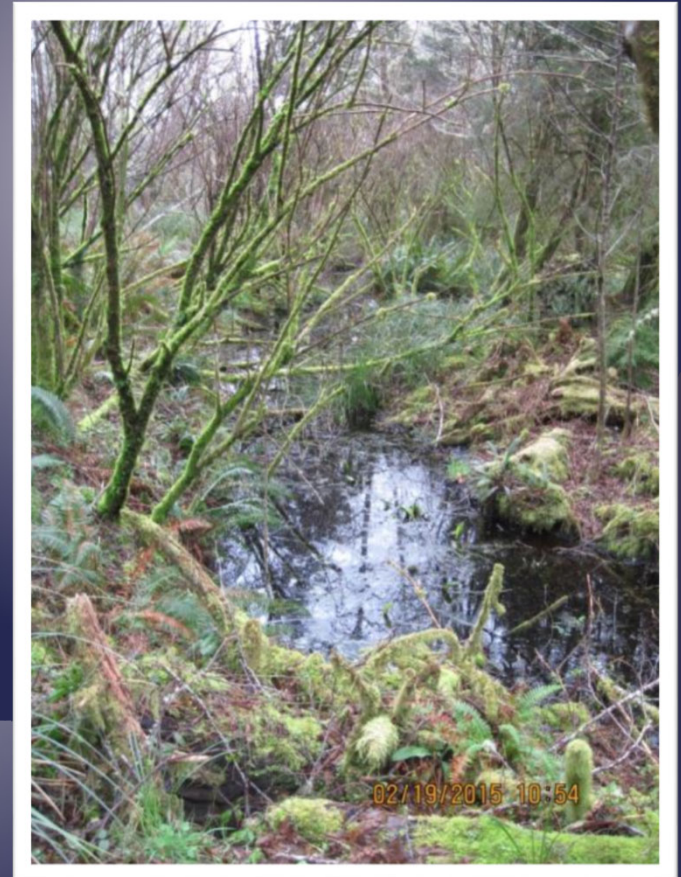
- Third-party mitigation where there are no banks
- Alternative to Permittee-Responsible Mitigation
- Compensation for a variety of resources
- Sponsor, Regulators and MRT/IRT can direct site selection
- Sponsor has interest in resource restoration and conservation



Tidewater goby, USFWS

# Drawbacks of ILF Programs

- Risk of mitigation not being provided
- Temporal lag between impacts and project implementation
- Potential for migration of functions and services
- Project failure may result in substantial loss of resource acreage or function



*Photo: OR Dept. State Lands*

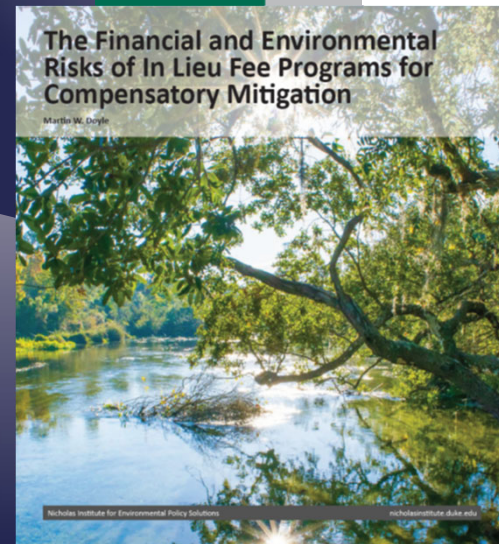
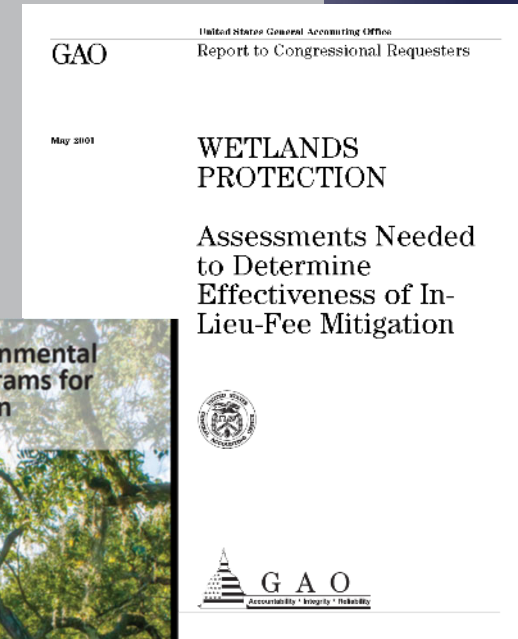
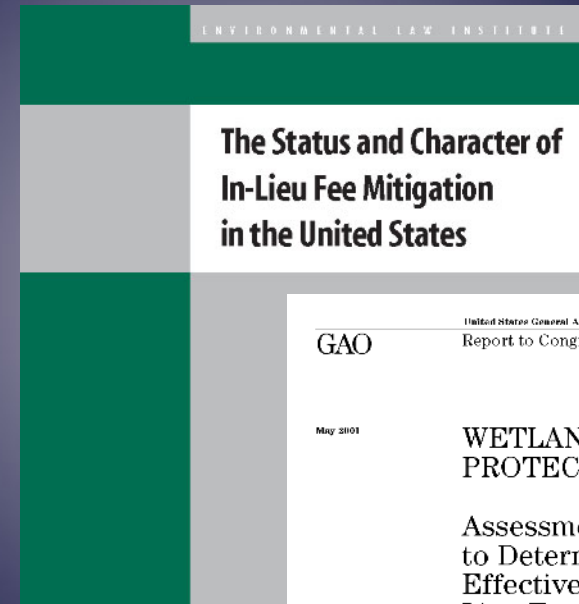
# Past concerns with ILF operations

*(Prior to 2008)*

Some:

- Lacked transparency and accountability in fund management
- Did not collect sufficient funds
- Did not implement projects in a timely manner; temporal losses
- Co-mingled ILF funds with non-ILF funds; Subsidizing compensation?

USACE/EPA 2006 Proposed Mitigation Rule included phase-out of ILFs...





# Instrument Content Comparison

(332.8(d)(6))



## Bank

Service Area

Accounting  
Procedures

Legal Liability  
Statement

Default & Closure  
Provisions

Reporting Protocols

Other Information

\* Mitigation Plans  
(12 Component)

\* Credit Release  
Schedule

## ILF

Service Area

Accounting Procedures

Legal Liability  
Statement

Default & Closure  
Provisions

Reporting Protocols

Other Information

Compensation  
Planning Framework

Advanced Credits &  
Fee Schedule

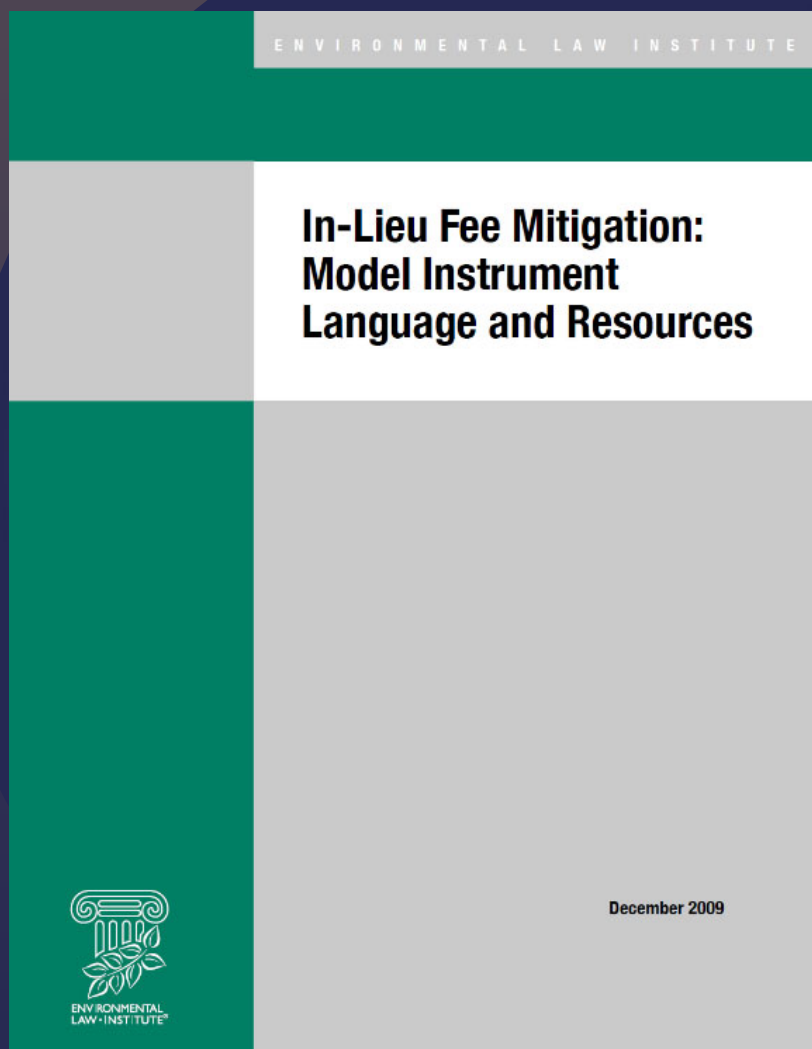
Method for Determining  
Future Credits & Fees

Program Account

\* Included in the ILF site authorization



# Model ILF Instrument Example



- December 2009
- Overview of approval process
- Analysis of each element from rule
- Background and definitions
- Examples and sample language

# Template ILF Instrument: LA Corps District



## 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

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

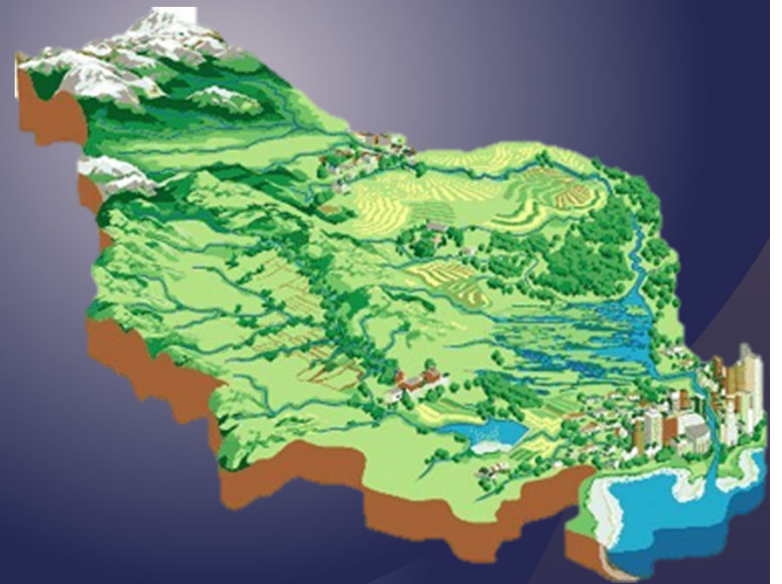


# Compensation Planning Framework (CPF)



332.8(c)

- **Objective:** Mechanism for strategic site selection that meet resource needs in the watershed, ecoregion or physiographic province (service area)
- Guides selecting compensation projects
  - Like a watershed plan
  - Supports watershed approach

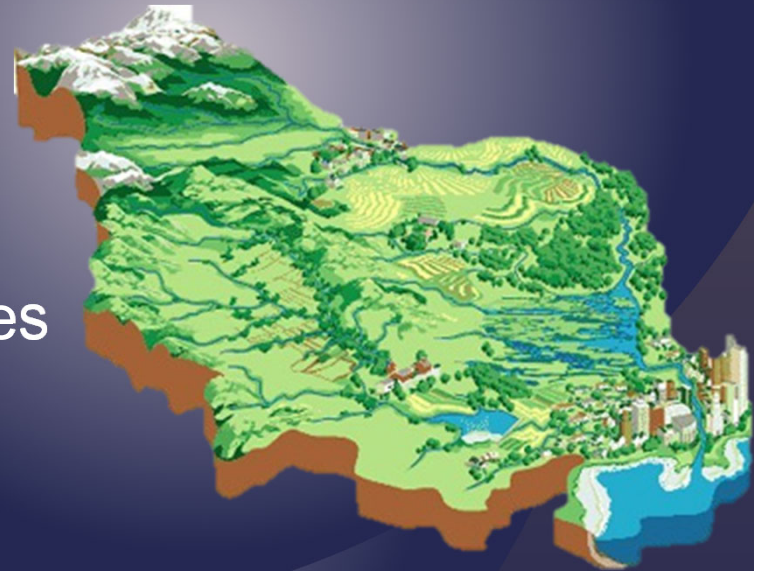


\* For species, draw from recovery plans or conservation strategies



# CPF, cont.

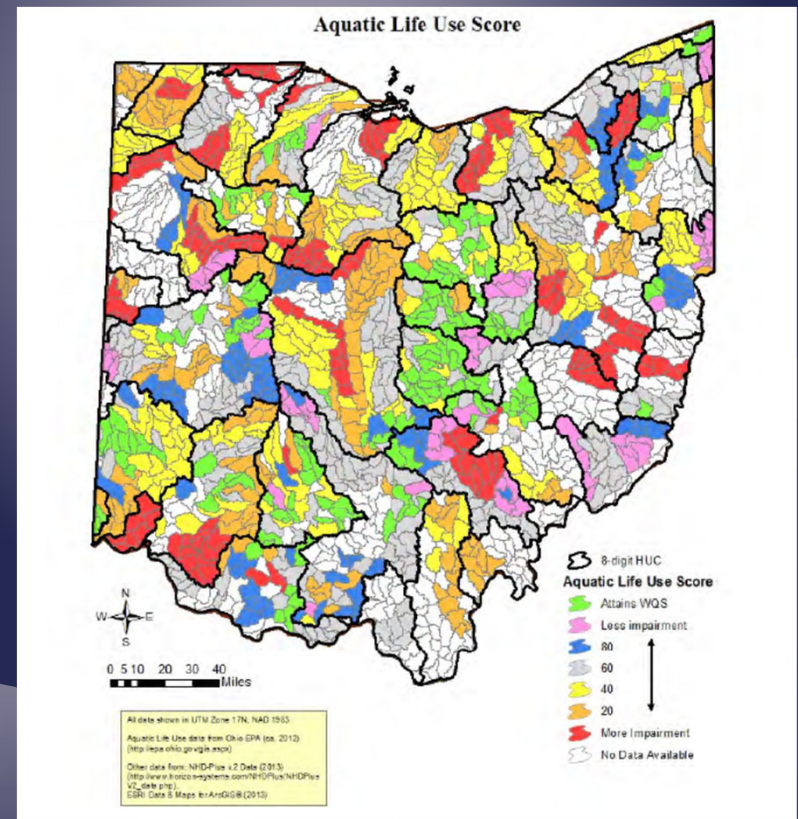
1. Service area (watershed-based rationale)
2. Analysis of historic aquatic resource loss and current condition
3. Threats to aquatic resources
4. How threats are addressed
5. Aquatic resource goals and objectives
6. Prioritize mitigation projects
7. Use of preservation
8. Description of stakeholder involvement
9. Long-term protection and management
10. Evaluation and reporting



# CPF, cont.

## Utilizing Existing Planning Resources

- Wetland Conservation Plans
- Water quality reports
- State Wildlife Action Plans
- Habitat Conservation Plans
- Fish Habitat Partnership Analyses
- Landscape Development Index (LDI)
- TMDL implementation plans
- Flood management plans



OH EPA Integrated Report on Water Quality

# COMPONENTS OF ILF PROGRAMS: CPF SITE SELECTION – SCORING & WEIGHING (OR)

- State Priorities: Historic impacts and future growth areas
- Sites Identified through evaluating:
  - Regional conservation plans and priorities
  - Likelihood of success
  - Multiple objectives (wetlands, species, WQ)
  - Applicant expertise
  - Fund leveraging
  - Long term management

**Table 1. Priority watersheds in the state by HUC3 and HUC4.**

<b>Basin 1 – North Coast</b>	<b>Basin 5--Deschutes</b>
Lower Columbia	
Necanicum	
Wilson-Trask-Nestucca	<b>Basin 15—Rogue</b>
<b>Basin 2B—Mid-Willamette</b>	Middle Rogue
Molalla-Pudding	
<b>Basin 2C—Lower Willamette</b>	<b>Basin 16—Umpqua</b>
Clackamas	South Umpqua
Lower Willamette	
Tualatin	<b>Basin 17—South Coast</b>
	Coos

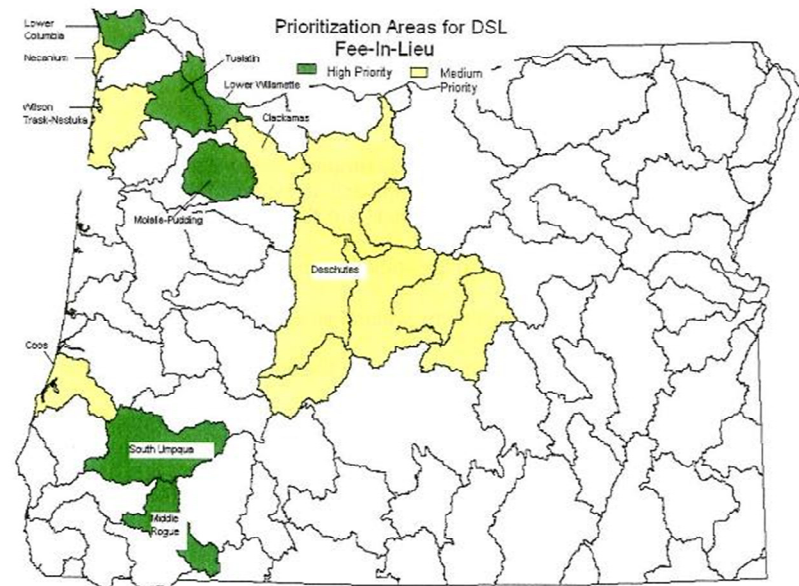
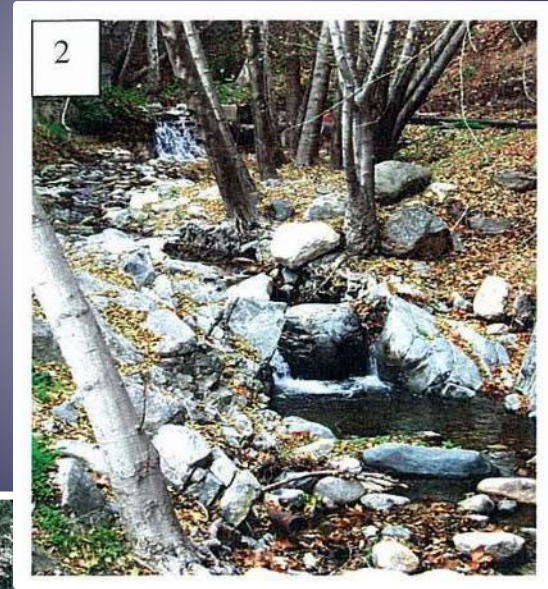


Figure 1. Priority watersheds for the establishment of FIL projects.

## COMPONENTS OF ILF PROGRAMS:

### CPF site selection – Pre-Identified Sites (CA Riverside-Corona RCD)

- Identified 25 Sites
- High Level assessment of:
  - Condition
  - Threats
  - Aquatic Resources
  - Preservation Objectives
  - Mitigation Opportunities
- Prioritization Strategy
  - Existing CE lands
  - Purchase new CE's
  - Restoration, etc.



Unlike banks, ILFs typically provide compensation *before* project sites are secured.

These credits are called “Advance Credits”



# Advance Credits

33 CFR 332.8(d)(6)(iv)(B)

- Available for sale before a mitigation site is secured.
- Limited number (capped) specified for each service area in the instrument.
- As projects produce **released** credits, **advance** credits are fulfilled and available again.
- Released credits are equivalent to bank credits



# RIBITS

## Regulatory In-lieu Fee and Bank Information Tracking System

Home Help Print Settings >> [ILF Programs](#) >> [ILF Program](#) >> Ledger

<< Collapse

TRACKING

MITIGATION  WQT

MENU

- Mitigation Concepts
- Banks & Sites
- ILF Programs
- Umbrella Banks
- NRDA Projects
- Reporting
- Bank & ILF Establishment
- Assessment Tools
- Credit Classifications
- Related Resources
- Find Credits
- Help

FILTER

- USACE District
- State
- FWS Field Office
- NOAA Fisheries Region

### Virginia Aquatic Resources Trust Fund

[Comprehensive Site Ledger] [Jump to Cyber Repository]

#### ILF Program Ledger Summary -

Last Program Transaction: Oct 21, 2020

Name	Advance Credits Available	Unfulfilled Credits	Site Credit Summary			
			Available Credits	Withdrawn Credits	Released Credits	Potential Credits
<b>Atlantic Ocean</b>						
<b>Wetland</b>	<b>6.38383</b>	<b>5.61617</b>	<b>0</b>	<b>0</b>	<b>2</b>	<b>2</b>
Non-Tidal	5	5	-	-	-	-
Tidal	1.38383	.61617	-	-	-	-
Wetland	0	0	-	-	-	-
<b>Stream</b>	<b>5000</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>0</b>
<b>Chesapeake Bay</b>						
<b>Wetland</b>	<b>7.9216</b>	<b>17.0784</b>	<b>12.8121</b>	<b>76.2295</b>	<b>106.12</b>	<b>222.54</b>
Non-Tidal	3.937	16.063	-	-	-	-
Tidal	3.9846	1.0154	-	-	-	-
Wetland	0	0	-	-	-	-
<b>Stream</b>	<b>3878</b>	<b>1122</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>0</b>
<b>Chowan</b>						
<b>Wetland</b>	<b>1.94</b>	<b>5.06</b>	<b>125.045</b>	<b>84.635</b>	<b>214.74</b>	<b>367.38</b>
Non-Tidal	.005	4.995	-	-	-	-
Tidal	1.935	.065	-	-	-	-
Wetland	0	0	-	-	-	-
<b>Stream</b>	<b>4728</b>	<b>272</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>4823</b>

Lower James



# Number of Advance Credits based on:

- Compensation planning framework
- Service area size, projected mitigation demand
- Resources available to program
- Sponsor's past project performance
- Financing needed for mitigation projects
- Other considerations



ILFs have released credits in a program service area *when*:

Credits from projects meeting performance standards

>

Debits of advance credits

These released credits are equivalent to bank credits  
Examples: NC DMS, VA ARTF, ME NRCP

# Some Approaches to Advanced Credits:

- Everglades NP
- ME NRCP
- GA LT
- Riverside-Corona RCD
- La Paz County ILF (AZ)



Razorback Sucker. Photo by J. Brooks, Arizona Department of Game and Fish



# ILF Fee Schedule

- Credit costs determined by sponsor, approved by the IRT/ MRT
- Cost per credit based on:
  - Expected costs
  - “Full cost accounting”, includes the full cost to generate a credit (including program administration costs and contingencies)
- Fees may also consider:
  - Resource type
  - Location of compensation project
  - Size of impacts
- Challenges:
  - Fee estimates of future costs



# Approaches to Fee Schedule

Fixed fees	DU NY, OH TNC, VARTF, TN SMP, MO CHF, NFWF, NC DMS
Calculators	OR DSL, NH ARM
Formulas	ME NRCP, King Co, MT MARS

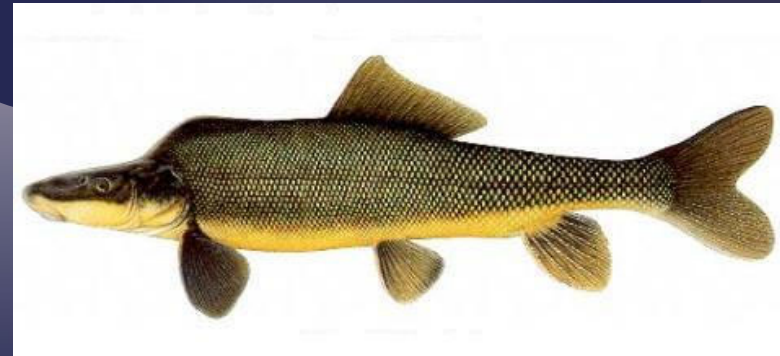
- Updated fees: regular schedule or project-by-project
- Admin Fees:
  - Range from 5 to 27%
  - Average 15%
  - Sliding scale approach

# Example: Fixed Fee

## La Paz County, AZ ILF Fee Schedule

- Boat ramp: \$500
- Removal of bankline: \$5,000
- Removal of bankline, spawning season: \$5,000
- Removal of bankline in critical habitat: \$10,000
- Unauthorized beach creation: \$5,000
- Subsequent violation: \$5,000

*Amounts are cumulative*



Razorback sucker

# Example: Calculator

## NFWF Sacramento ILF Fee Schedule

Table 2. Vernal Pool Credits

A	B	C	D	E	F
No. of Credits Purchased	Unit Price Per Credit	Base Price (\$) (# Credits x B)	Contingency Amount (\$)	Administrative Fee Amount (\$)	Total Price (\$) (C + D + E)
0.01 – 0.25	\$265,000		$(0.30 \times C)$	\$10,000	
0.26 – 0.50	\$265,000		$(0.30 \times C)$	$(0.15 \times C)$	
0.51 – 1.00	\$265,000		$(0.30 \times C)$	$(0.15 \times C)$	
1.01 – 3.00	\$265,000		$(0.20 \times C)$	$(0.15 \times C)$	
3.01 – 5.00	\$220,000*		$(0.15 \times C)$	$(0.16 \times C)$	
5.01 +	\$175,000*		$(0.10 \times C)$	$(0.20 \times C)$	

\*Bulk-price discount to be applied if applicable for a particular Advance Credit Transfer

# Example: Formula King County Fee Schedule

<b>S I T E</b>	<b># Credits</b>	<b>Land</b>	<b>Select/ Design</b>	<b>Const</b>	<b>M &amp; M</b>	<b>Contin- gency</b>	<b>L T M</b>	<b>Admin</b>	<b>CPI</b>	<b>Cost / Credit</b>
<b>X</b>	N	\$\$	\$	\$	\$	\$	\$	\$	\$	\$/N
<b>Y</b>	N-2	\$\$\$	\$	\$\$\$	\$	\$\$	\$	\$\$	\$	\$\$/(N-2)
<b>Z</b>	N+P	\$	\$\$	\$	\$	\$	\$\$	\$	\$	\$/ (N+P)

$$\Sigma \frac{(\text{Costs of each element})}{\# \text{ Credits from project}} = \text{Cost/credit}$$

Weighted average cost for all projects = Credit price



# Ex. Maine Fee Schedule

Resource dependent formula

Base Rate =

[Regional construction & monitoring costs]  
+ [County unimproved land cost]

x Multipliers

2:1 for  $\geq 20K$  sf

2:1 for areas of special significance

4:1 for vernal pools and shorebird habitat

+ Additional fees for impacts to uplands that affect aquatic organisms (e.g. vernal pool species)

## Compensatory Mitigation Fee Formula

<b>Estimated Land Value</b>	Estimated per acre cost <sup>1/</sup>
<b>Estimated Real Estate Transaction Costs</b>	\$12,000 <sup>2/</sup>
<b>Estimated Restoration &amp; Adaptive Management Costs</b>	Estimated per acre cost <sup>3/</sup>
<b>Title &amp; Closing Costs</b>	2% of estimated land value
<b>Estimated Real Estate Assurance Costs</b>	5% of estimated land value
<b>Project Cost Subtotal</b>	Sum of above categories
<b>ILF Program Administrative Fee</b>	8% of project cost subtotal
<b>Contingency Costs</b>	2% of project cost subtotal
<b>TOTAL FEE PER ACRE</b>	Project Cost Subtotal + Admin Fee + Contingency Costs

## Estimated Cost Per Acre Land Values by Service Area

<b>ILF Service Area</b>	<b>Estimated Per Acre Compensatory Mitigation Fee</b>
Alabama	\$5,377
Arkansas	\$5,789
Connecticut	\$15,370
Georgia	\$6,200
Illinois	\$10,903
Indiana	\$10,609
Iowa	\$11,432
Kentucky	\$6,141
Maryland	\$10,503
Michigan	\$7,846
Mississippi	\$5,107
Missouri	\$6,200
New Jersey	\$17,251
New York	\$5,706
North Carolina	\$7,435
Ohio	\$8,904
Oklahoma	\$4,319
Pennsylvania	\$8,669
Tennessee	\$6,553
Vermont	\$6,106
Virginia	\$7,258
West Virginia	\$5,224

# Approaches to ILF project development:

- Design and build
- Design-Bid-Build
- Request for Proposals
- Purchase Bank Credits



# Approaches to Mitigation Project Approval

- Opportunistic
- Permitting process
- Regular Public Schedule



# Example: Regular Public Schedule

## MAINE NRCP Annual Project Approval Timeline

	June	July	Aug	Sept	Oct	Nov	Dec
LOI	█						
Proposal			█				
PN					█		
Review Committee				█			
Approval Committee		█				█	
Awards							█

# CPF Ex: Scoring/Weighting

## ME Natural Resource Conservation Program

### Project Review Criteria (& weights)

- Potential to meet program goals (30%)
- Landscape context (20%)
- Project readiness/feasibility (20%)
- Sponsor capacity (15%)
- Cost effectiveness (10%)
- Other benefits (5%)



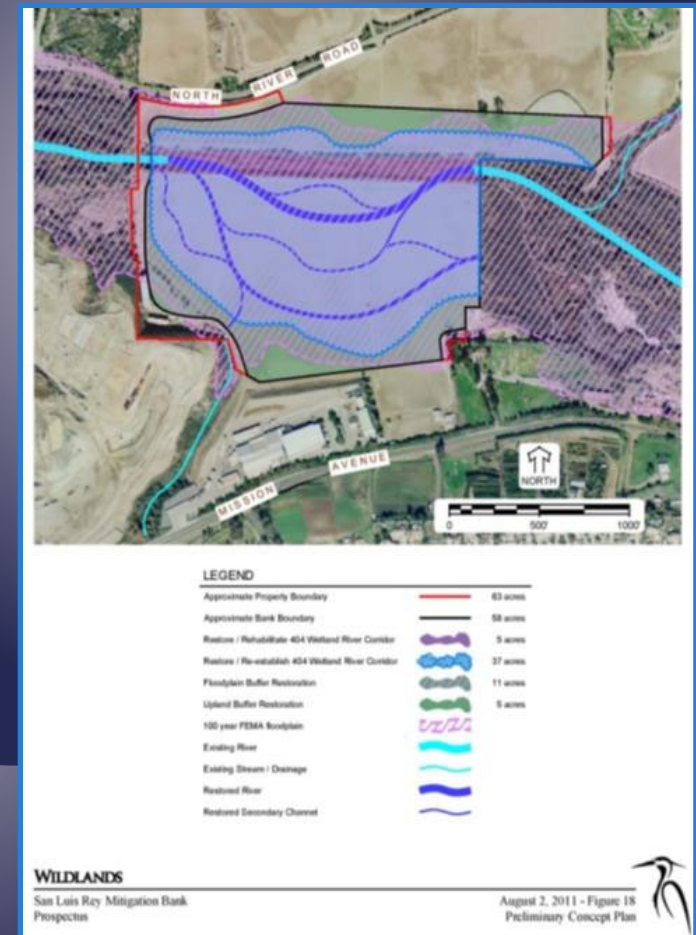


# ILF Program Account (332.8(i))

- Sponsor must establish a program account:
  - After Instrument is approved
  - Before accepting any fees
  - At FDIC member institution
- Earnings remain in the account for mitigation
- Non ILF funds must be kept in separate accounts
- Funds for long-term management can be transferred after sign-off
- Periodic Program Audits

# ILF Instrument Modification: Mitigation Plan 332.4(c)

1. Objectives
2. Site Selection
3. Site Protection Instrument
4. Baseline Information
5. Determination of Credits
6. Mitigation Work Plan
7. Maintenance Plan
8. Performance Standards
9. Monitoring Requirements
10. Long-Term Management Plan
11. Adaptive Management Plan
12. Financial Assurances



No permit issued for bank/ILF project until relevant aspects of plan determined. 332.8(j) & (k)



# Accounting & Reporting Requirements

## Mitigation Bank

- Annual Credit Ledger\* for Transactions
  - Sales
  - Debits
  - Balance

## ILF

- Annual Program Account Report
- Annual Credit Ledger Report
- Individual Credit Ledger for Mitigation Sites

- Project Monitoring reports
- Financial assurance report
- Long-term management funding report

\* Must be a credit ledger in RIBITS which is updated frequently



# Santa Cruz RCD ILF

June 2019

Santa Cruz, Monterey Counties

- Advanced credits 1-6% of total credits possible
- Project credit release schedule
- Pre-proposal project application template
- Can cover non-FWS mitigation
- Working group helps identify projects



Photos: USFWS



Tidewater Goby



Santa Cruz long-toed salamander



California red-legged frog



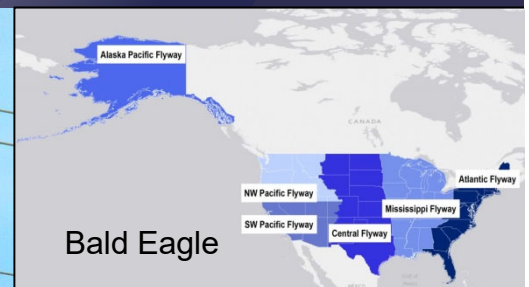
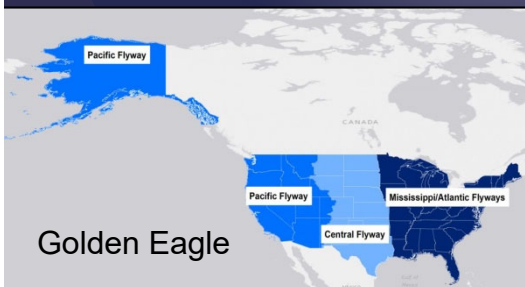
SantaCruzRCD...pdf



# Eagle ILF Program



- Sponsor is an LLC
- BGEPA, ESA, 2016 Eagle Rule: 50 CFR § 22.26(c)(1)(iv)
- Power pole retrofits
- Based on REA (bird-years)
- 1 credit = 1 pole (10 yr min)
- FWS LE qualifies utilities (need APP; additionality)





# Atlantic Salmon Restoration & Conservation Program ILF



## September 2018 Gulf of Maine Atlantic Salmon DPS



USACE and FWS Co-Chairs  
Sponsor is Maine Dept. Marine Resources  
Kick started by 2017 FHWA and USACE pBiOp  
Provides ESA 7(a)(1) conservation/recovery actions

Mitigate in-stream impacts to salmon for CWA 404 & RHA  
Section 10 permitted projects

Projects evaluated by Review Committee (FWS, NMFS, State, quasi-govt or NGO)

Debits/Credit: 1 unit = 100m<sup>2</sup> rearing and spawning habitat;  
GIS-based model

Higher credit ratios for restoration (1:1) than enhancement and preservation (up to 40:1)





*Photo: ILF site near Tillamook, Oregon*