Federal Highway Administration
Every Day Counts
Innovation Initiative

In-Lieu Fee and Mitigation Banking FAQs

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What is compensatory mitigation?
Departments of Transportation (DOTs) and transportation agencies do their best to avoid and minimize any impacts to the environment, but some impacts are unavoidable. Compensatory mitigation is used to offset these unavoidable impacts to the environment. It involves the restoration, establishment, enhancement, and/or preservation of the environment, including threatened or endangered species and/or their habitats.

When is compensatory mitigation required?
Section 404 of the Federal Clean Water Act requires compensatory mitigation for projects that cause unavoidable impacts to streams, wetlands, and other waters of the United States. FHWA also authorizes mitigation under Executive Order 11990, which requires

Federal agencies to minimize impacts to wetlands. Mitigation for Federally protected species may also be required through the Endangered Species Act (ESA). Some state laws and regulations also require compensatory mitigation.

What is involved in a mitigation plan?

A mitigation plan consists of Objectives, a site protection instrument, baseline information, a Work Plan, Maintenance plan, performance standards, monitoring requirements, financial assurances, site selection factors, credit determination, a long-term management plan, and an adaptive management plan. The mitigation plan must specify parameters to be monitored, length of the monitoring period, the party responsible for monitoring, and the content of the monitoring reports. A site protection mechanism must ensure the mitigation area retains its function as a natural conservation area in perpetuity.

What is a mitigation bank?

A mitigation bank is a large scale mitigation site, which is approved through the Federal Clean Water Act, and other state programs. Each mitigation bank has a formal agreement between the bank sponsor and the Federal regulatory agencies. The agreement details the number of credits the bank can generate, the types of habitat the mitigation bank intends to create, restore, or enhance, the agreement also explains the long term management mechanism which will be utilized to ensure the site is protected in perpetuity. In mitigation banking, infrastructure developers buy credits from a bank sponsor before any impacts occur. These credits satisfy the regulatory Agency requirements for compensatory mitigation

Once credits have been purchased from a mitigation bank, who bears the risk?

The mitigation bank sponsor bears the risk once a credit is sold. The State DOTs are relieved of any further mitigation responsibility when they purchase credits from a mitigation bank. .. This lowers project costs as well as risks. The mitigation bank sponsor is responsible for maintaining the bank site as described in the agreement between the bank sponsor and the regulatory Agencies.

At what point in the process should banks be established?

The process to establish a mitigation bank could take a few years. Banks should be established well in advance of projects going through the Regulatory permitting process. Banks are typically established in advance of project construction. This reduces the risks posed to the environment by project-specific mitigation, since this might fail or not be performed correctly.

What is an In-Lieu Fee (ILF) program, and how is it different from mitigation banking?

An ILF program conducts wetland, stream, or threatened or endangered species habitat restoration, creation, enhancement, or preservation activities. Unlike banks, ILFs may perform various environmental enhancement activities throughout a watershed rather than at one particular site. ILF programs establish a similar agreement to a mitigation bank agreement, but the sites are not always completely constructed prior to the environmental impacts taking place. Once enough money is received by the ILF program, the ILF program implements the project in that watershed.

Who administers ILF programs?

Federal regulations require that ILF programs be administered by government entities or nonprofit.. Users of the ILF program pay a pre-determined amount per mitigation credit to an ILF sponsor, who performs the actual mitigation.

Once fees have been paid to an ILF, who bears the risk?

Just as with mitigation banks, state DOTs are relieved of any further mitigation responsibility when they pay fees to an ILF program. All risk transfers to the ILFs sponsors. The ILFs sponsors ensure mitigation credits will be available when needed. This lowers project costs as well as risks.

Are State DOTs and Divisions expected to use mitigation banking and ILFs?

Yes. Use of banks and ILF programs should become standard operating procedure for mitigation requirements under the Clean Water Act and Endangered Species Act. This FHWA Every Day Counts (EDC) initiative is intended to increase the use of banks and ILF programs for compensatory mitigation nationally.

Are mitigation banks and ILF used widely?

Some states have never used mitigation banks or ILF programs, while others use banks or ILF programs for the majority of their mitigation needs. Currently 33 states use mitigation banks. Conservation banks are harder to track, but at least 11 States have them. 20 states use ILF programs.

How does the mitigation banking/ILF approach to mitigation speed project delivery?
Banking and ILF programs are a proven method of shortening project delivery time. State DOTs can often fulfill their mitigation obligations by simply purchasing credits in a bank or paying into an ILF program. This can remove a significant hurdle to project delivery such as developing a mitigation plan or constructing the mitigation site.

Are regulatory agencies supportive of the mitigation banking/ILF approach?
Regulatory agencies now generally prefer banks and ILF programs because they often protect and restore larger blocks of habitat that provide greater ecosystem benefits than small, project-by-project mitigation. Since regulators do not typically award credits to a bank or ILF program until certain performance criteria are reached, environmental risk and uncertainty are minimized.

What benefits do mitigation banking and ILF offer to states?
Increasing and mainstreaming the use of these programs results in better use of public funds. Additionally, it offers greater benefits for the environment. . Often the impacts for infrastructure projects are small, and require a relatively small size mitigation site to compensate for the impacts. Purchasing credits from a mitigation bank or an ILF program simplify the process. The cost of creating and maintaining a small mitigation site usually exceeds the cost of purchasing credits from a mitigation bank or an ILF program.

Can State DOTs use Federal funds to establish banks/ILF programs before construction begins?
Yes. The Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA) specifically identified certain activities as eligible for Federal-aid participation (Section 1006, 1007). These activities may occur concurrently with or before the construction of highways or other transportation projects funded under Title 23. The permitted activities include:

- Banking of wetlands and streams mitigation concurrent or in advance of project construction
- Contributions to statewide and regional efforts to conserve, restore, enhance and create wetlands
- Development of statewide and regional wetlands conservation and mitigation plans

Should project-level environmental reviews be completed before mitigation banking or an ILF is started?
Not necessarily. As long as the efforts are consistent with all applicable requirements of Federal law regulations, and State transportation planning requirements are met, mitigation banking and ILF programs can go forward.

What types of funds can State DOTS use to establish mitigation banking and ILF programs?
Under 23 CFR Part 710.513 and 23 CFR Part 777, State DOTs are eligible for participation using either National Highway System or Surface Transportation Program Federal aid funds.

Who should be involved in setting up financial agreements for banks/ILFs?
Division offices should coordinate with resource and regulatory agencies, State DOTs, non-governmental organizations (NGOs), and non-profits to determine the suitability of banking/ILF for mitigating project impacts. This should occur before participation with Federal aid funds is approved. This will ensure that Federal-aid funds are being used appropriately.

What else should Division Offices do in setting up these agreements?
Division offices should assist State Departments of Transportation (DOTs) through participation in interagency meetings and, when possible, serving on the Interagency Review Team (IRT) reviewing State DOT bank proposals. In addition, FHWA DOs should continue to look for opportunities to enhance/expedite the project delivery process. They should encourage the use of banking and ILF programs to mitigate for unavoidable impacts to wetlands, streams, and wildlife habitat.

When can Federal Aid funds be used to establish a bank?
Under appropriate circumstances, Federal Aid funds can be used to pay for the establishment of a bank when payment is due to the vendor rather than to a state DOT. In this way, the state DOT does not have to outlay its own funds and wait for reimbursement.

Credits in a DOT-sponsored bank may be utilized for mitigation of highway projects that are eligible for Federal Aid funding even if Federal Aid funds are not actually used.

Who is responsible for managing mitigation banks?

It varies. Third parties operate privately owned (non-State DOT-owned) banks and ILF programs in which State DOTs do not assume the responsibilities of performance and management. These programs, especially mitigation and conservation banks, tend to involve larger geographic areas. They also generally provide greater ecological benefits.

If mitigation banking is used, who is responsible for mitigation performance?

Federal regulations encourage State DOTs to purchase credits from a bank or ILF sponsor to satisfy mitigation requirements. Once a State DOT purchases credits, and the transaction is approved, the State DOTs is relieved of any further responsibility for mitigation. Mitigation banks and ILF program sponsors as outlined in the banking instrument are responsible for achieving all mitigation performance requirements.

What is required for a State DOT to set up a bank or ILF?

If a State DOT wishes to establish a bank or ILF program, it must work with the USACE District to assemble an IRT (Interagency Review Team). This team will be essential in developing the mitigation banking agreement which outlines the details of the mitigation bank including the habitat types targeted, ecological performance standards, number of credits available, credit release schedule, service area, mitigation plan, and long term management mechanism. None of these is required for entities that simply purchase credits from a bank or ILF program.

What are the general requirements to start a bank or ILF program?

Each bank or ILF program requires a formal agreement among the bank/ILF program owners, and regulators. This agreement establishes liability, performance standards, credit determination, management and monitoring requirements, and the terms of bank credit approval. Banks need a work plan and a credit release schedule. An ILF must demonstrate accountability and sustainability. Credit release for banks and ILF programs is tied to meeting ecological performance standards.

What standards do banks and ILFs need to meet?

Banks and ILFs are monitored to determine if projects meet ecological performance standards, as outlined in the bank/,ILF agreement. The amount of financial assurances must be adequate and approved by USACE or FWS. Higher risk projects/mitigation instruments require a greater amount of funding assurance.

What are the challenges to mitigation banking and ILF?

New banks require more than a year for approval and construction. Some USACE districts lack banks or ILF programs. DOT banks are eligible for Federal-aid funding, but only Federally funded projects can be mitigated in Federally- funded mitigation banks.

What additional resources on mitigation banking and ILF processes are available?

FHWA is currently reviewing potential changes to policy that would further encourage the use of banking and ILF programs, so some information may change. Here are links for the most current information:

Conservation banking: http://www.fws.gov/endangered/landowners/conservation-banking.html

Wetlands banking and ILF: http://www.epa.gov/wetlandsmitigation