



**US Army Corps
of Engineers**
Fort Worth District

Compensatory Mitigation by In-Lieu Fee in the Fort Worth District

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The Fort Worth District, U.S. Army Corps of Engineers (USACE) and The Nature Conservancy (Conservancy) signed an agreement on November 19, 1998, that establishes a pilot in-lieu fee trust fund program in the Fort Worth District. Other federal and state agencies, including the U.S. Environmental Protection Agency (EPA), U.S. Fish and Wildlife Service (FWS), Natural Resources Conservation Service (NRCS), Texas Parks and Wildlife Department (TPWD), Texas Natural Resource Conservation Commission (TNRCC), Railroad Commission of Texas (RCT), and Texas General Land Office (GLO) were also involved in the development of this program. This paper is intended to provide a brief introduction to in-lieu fees as a form of compensatory mitigation and a synopsis of the USACE-Conservancy in-lieu fee trust fund program.

Mitigation and the Section 404 Regulatory Program

The Clean Water Act (33 USC 1344 et seq.) was enacted to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” Under Section 404 of the act, the USACE regulates the discharge of dredged and fill material into waters of the United States, including wetlands, through its Regulatory Program (33 CFR Parts 320-330). This program is the primary federal tool for protecting wetlands and other aquatic resources of the United States. While the USACE has primary responsibility for implementing this program, other agencies, including the EPA, FWS, NRCS, TPWD, TNRCC, and National Marine Fisheries Service play important regulatory and advisory roles. The NRCS also administers a regulatory program for wetlands under the Food Security Act.

A fundamental precept of the Regulatory Program is the Department of the Army’s mitigation policy (33 CFR Part 320.4 (r)), which applies to all Regulatory Program authorizations, including general permits. Mitigation includes avoiding, minimizing, rectifying, reducing, or compensating for resource losses, as well as avoiding the loss of aquatic resources to the extent practicable. The Department of the Army’s mitigation policy requires that mitigation be considered throughout the permit application review process. The district engineer has the authority to require all appropriate and practicable mitigation necessary to minimize adverse project impacts, ensure that the project will not be contrary to the public interest, and satisfy such legal requirements as the 404(b)(1) guidelines (“Guidelines for Specification of Disposal Sites for Dredged or Fill Material,” 40 CFR Part 230).

In the case of general permits (e.g., nationwide, regional, and programmatic), the district engineer may, on a case-by-case basis, add any special condition necessary to ensure that the proposed activity would have only minimal individual and cumulative adverse effects on the environment, not be contrary to the public interest, and comply with all terms and conditions of the general permit. Thus, special conditions may be used to require a permittee to conduct appropriate and practicable compensatory mitigation. In addition, a general condition of the nationwide permits requires each permittee to minimize or avoid discharges of dredged or fill material into waters of the United States to the extent practicable at the project site unless the district engineer approves a mitigation plan that is more beneficial to the environment than on-site minimization or avoidance. Similarly, each

regional general permit issued in the Fort Worth District contains a general condition requiring that activities occurring in waters of the United States be avoided or minimized through the use of practicable alternatives.

Introduction to In-Lieu Fees

The USACE and other regulatory agencies recognize that payment of an in-lieu fee is, in certain cases, an effective means of providing compensatory mitigation. For example, nationwide permit general condition 13(g), which provides mitigation guidance to permit applicants, states that mitigation banking and in-lieu fees should be considered for compensatory mitigation to the extent appropriate. An in-lieu fee program allows a permittee to pay a fee to an established trust fund in lieu of implementing specific on-site or off-site compensatory mitigation. The amount of the in-lieu fee paid will normally represent the fair market cost of replacing those aquatic ecosystem resources that would be lost or impaired as a result of the authorized activity. The trust fund, in turn, finances mitigation projects that are designed to restore, enhance, create, or preserve aquatic ecosystem functions. The Fort Worth District in-lieu fee program is intended to provide compensatory mitigation primarily for smaller adverse impacts to the aquatic ecosystem, such as those authorized by general permits. Mitigation for projects having more substantial adverse impacts, such as those requiring authorization by individual permit, is normally conducted on-site or through such off-site mitigation options as mitigation banks and single- and joint-project mitigation.

While differing from mitigation banks in that in-lieu fee-funded mitigation projects are normally not accomplished in advance of the authorized adverse impacts, the two mitigation systems share many similarities. For example, mitigation sequencing (avoidance, minimization, and compensation), the practicability of providing appropriate on-site, in-kind compensation, and the availability of other off-site and/or out-of-kind mitigation opportunities must all normally be considered before determining that purchasing credits from a mitigation bank or paying an in-lieu fee is appropriate compensatory mitigation. In addition, both mitigation banks and in-lieu fee-funded mitigation projects must provide adequate assurances of success and timely implementation as conditions of their approval. An in-lieu fee program is simply another means of conducting off-site compensatory mitigation and does not normally supplant other forms of on-site or off-site mitigation.

The USACE-Conservancy In-Lieu Fee Trust Fund Program

Establishing In-Lieu Fee Trust Funds and Mitigation Projects

The USACE-Conservancy agreement establishes an in-lieu fee trust fund program that will finance aquatic ecosystem-enhancing activities conducted to compensate for adverse impacts to wetlands and other waters of the United States resulting from Section 404-authorized activities in the Fort Worth District. The basic goals of the trust fund program are to (1) increase the quality of restoration, enhancement, creation, and preservation of aquatic resources over that typically achieved by other forms of mitigation conducted to compensate for activities that have relatively minor adverse impact on the aquatic ecosystem and (2) provide Department of the Army permit applicants greater flexibility in compensating for adverse impacts to the aquatic ecosystem, especially when those impacts would be relatively minor.

The Conservancy, in coordination with the USACE, will establish independent regional trust funds throughout the Fort Worth District. The size and location of each region will be determined after considering United States Geological Survey hydrologic units, general vegetation and soil types, level of Section 404 permit activity, availability of mitigation banks and other third-party mitigation opportunities, overall demand for an in-lieu fee trust fund, and other factors. Regional trust funds can not be immediately established across the entire district because of the amount of planning and research required to establish each regional fund. The order of establishment will depend upon the level of Section 404 permitting activity, relative threat to the environment posed by authorized activities, and availability of mitigation banks and other third-party mitigation projects. Potential regions that include larger metropolitan areas (e.g., Dallas/Fort Worth, Austin, San Antonio, and Tyler/Longview/Marshall), aquatic ecosystems of special value (e.g., Caddo Lake, playa lakes), or high levels of aquatic ecosystem disturbance (e.g., east Texas oil and gas fields) will generally have higher priority.

In establishing a regional trust fund, the Conservancy will identify the types of aquatic resources being impacted in that region, the relative extent of those impacts, and the opportunities available to provide high value compensatory mitigation. The Conservancy will also determine a regional per-acre cost for restoring, enhancing, creating, and preserving each of the four basic aquatic ecosystem resource types in the Fort Worth District: forested wetland, emergent wetland, riparian stream, and open water. The per-acre cost will include all reasonable costs associated with mitigation project planning, design and construction; selection and acquisition of land or easements; and long-term monitoring, operation, and maintenance.

Over time, the Conservancy will submit to the USACE proposals for mitigation projects that the Conservancy believes would provide appropriate compensation for those Section 404-authorized activities that involved payment of an in-lieu fee. The Conservancy may submit proposals for projects it has developed or any other suitable privately or publicly owned mitigation project that the Conservancy may sponsor. In developing a proposal, the Conservancy will give primary consideration to providing compensation commensurate with the type and extent of adverse aquatic resources impacts for which in-lieu fees have been or are likely to be paid. The USACE will evaluate these proposals based on site suitability, likelihood of mitigation project success, potential of the project to maximize the environmental benefit of the in-lieu fee funds expended, relative value of the aquatic resource type(s) involved, and, in the case of preservation, the relative threat to the proposed site.

Use and Operation of an Established Trust Fund

A Department of the Army permit applicant may at any time request USACE approval to pay a fee to an established regional trust fund in lieu of providing other compensatory mitigation. However, the permit applicant must first comply with all applicable laws, regulations, and policies concerning the avoidance, minimization, and compensation of adverse project impacts to the aquatic ecosystem. The use of an in-lieu fee trust fund under this program will normally be limited to minor-impact activities authorized by general permits and letters of permission. Payment of an in-lieu fee will normally be approved only for impacts that occur within the region encompassed by an established trust fund.

If the USACE determines that payment of an in-lieu fee to an established trust fund would provide appropriate compensatory mitigation, in whole or in part, for the adverse impacts of a proposed

activity, the permit applicant will pay a fee that is the product of the per-acre cost of conducting mitigation (as determined by the Conservancy) and the number of acres of mitigation (mitigation ratio) that the USACE determines is necessary to adequately compensate for the likely adverse impacts of the proposed activity on aquatic ecosystem functions. A permit applicant who disagrees with the USACE's determination may elect to provide other appropriate and practicable, USACE-approved compensatory mitigation that complies with applicable laws, regulations, and policies.

Upon receiving USACE approval to pay an in-lieu fee to a trust fund, the applicant will pay the fee directly to the Conservancy, which will serve as the recipient of in-lieu fees contributed to each trust fund. The Conservancy is required to maintain written records of all fees paid and periodically report on the status of the regional trust funds to the USACE. Any interest accrued by the trust fund will remain with the fund. No trust fund assets may be expended by the Conservancy without prior written USACE approval except that the Conservancy may reimburse itself for reasonable expenses it incurs in developing and administering the regional in-lieu fee trust funds according to the schedule in the signed agreement.

The Conservancy, USACE, EPA, FWS, TNRCC, TPWD, RCT and GLO will periodically review the status of the trust fund accounts, per-acre fee schedules, mitigation ratios, and other components of the in-lieu fee trust fund program. The USACE and Conservancy will make adjustments as necessary to efficiently and effectively attain the stated goals of the in-lieu fee program.

Conclusion

The USACE is committed to protecting the aquatic environment through the Section 404 Regulatory Program. In implementing this in-lieu fee program, the Fort Worth District is striving to provide additional opportunities to conduct meaningful compensatory mitigation and enhance the flexibility and efficiency of the permit program. The Fort Worth District-Conservancy in-lieu fee program, in concert with other forms of on-site and off-site mitigation, including mitigation banking, provides permit applicants an even wider range of options to effectively compensate for unavoidable adverse impacts to the aquatic ecosystem.

For further information about in-lieu fees or the USACE-Conservancy in-lieu fee trust fund program in the Fort Worth District, contact Mr. David Martin in the Regulatory Branch, Fort Worth District, at (817) 978-4625 or Mr. Ray Johnson, The Nature Conservancy of Texas, at (409) 941-9114. For information about the Section 404 Regulatory Program, contact any regulatory project manager in the Regulatory Branch, Fort Worth District, at (817) 978-2681. On the Internet, you can visit the Fort Worth District's Regulatory Branch homepage at <http://www.swf.usace.army.mil> or the national USACE Regulatory Program homepage at <http://www.usace.army.mil/inet/functions/cw/cecwo/reg/>.