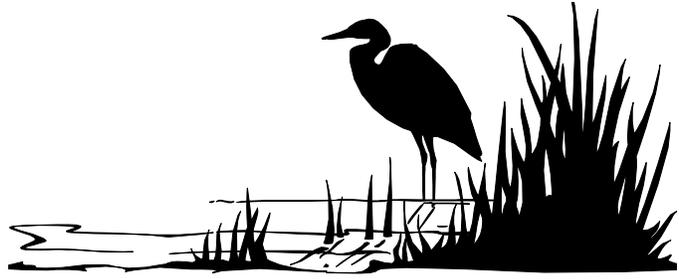


## South Carolina Mitigation Bank Review Team In-Lieu Fee Based Mitigation Guidelines



### A. Introduction.

The interagency Federal Guidance for the Establishment, Use and Operation of Mitigation Banks only briefly discusses the concept of something they term “In-lieu-fee Mitigation Arrangements.” They specifically state that such arrangements do not meet the definition of mitigation banking because they do not typically provide compensatory mitigation in advance of project impacts. They provide guidance that such arrangements may be appropriate when they provide adequate assurances of success and timely implementation. They recommend that a formal agreement between the cosponsor and the agencies, similar to a banking instrument, be used to define conditions under which its use is considered appropriate.

An interagency supported document entitled “Joint State/Federal Administrative Procedures for the Establishment and Operation of Wetland Mitigation Banks in South Carolina (Mitigation Banking Procedures Document) was developed and serves as the basis for developing and implementing wetland mitigation banks through the Mitigation Bank Review Team (MBRT) in the State of South Carolina. Many tenets and procedures contained in this document apply to in-lieu fee arrangements including use of the MBRT for development and implementation of such arrangements, sequencing requirements related to the 404 permit process and on-site mitigation alternatives, and mitigation service areas of the State.

Options for guidance relating to in-lieu fee banking arrangements would include

- Drafting separate guidance that includes reiteration or incorporation by reference of applicable portions of the Mitigation Banking Procedures Document or,
- Incorporating special guidance for in-lieu fee arrangements into the next rewrite of the procedures document.

In that the MBRT is approaching in-lieu fee arrangement banking on a pilot scale and guidance surrounding its implementation is likely to change as we learn from experience, the former choice (separate guidance) seems preferable.

Because in-lieu fee arrangements do not provide up-front mitigation and our experience with such arrangements is limited, the MBRT recommends approaching such arrangements with caution. The suggested guidelines below represent such an approach. The MBRT also recommends that initial endeavors be limited to a maximum of three pilot efforts to gauge success with and better refine the concept. Since in-lieu fee based mitigation is a new concept and we, as wetland regulatory and resource agencies, are still uncertain of the ramifications, approaching it on a pilot scale seems the most prudent approach. Pilot projects will also allow the MBRT to evaluate in-lieu fee mitigation and then refine the details and guidelines that will be necessary for a full scale in-lieu fee based program if deemed appropriate.

## **South Carolina Mitigation Bank Review Team In-Lieu Fee Based Mitigation Guidelines**

### **B. Guidance.**

#### **1. Sponsor Qualifications.**

Sponsors shall be limited to qualified private non-profit conservation entities and the State Department of Natural Resources. Qualified private conservation entities must meet the following criteria:

- a. Be exempt from federal income under section 501 (c)(3) of the Internal Revenue Code;
- b. Include in its mission, charter or statement of purpose the protection of natural resources and/or waters of the United States;
- c. Have a governing body such as a board of directors or trustees;
- d. Have an annual operating budget which will allow it to carry out responsibilities associated with sponsorship of an in-lieu fee program;
- e. Have the institutional capacity to accomplish required sponsorship duties (i.e., purchase of lands, restoration work, monitoring, easement administration);
- f. Have prior experience in compensatory mitigation arrangements; and
- g. By action of the organization's governing body, agrees to adhere to the "Statement of Land Trust Standards and Practices" as published by the Land Trust Alliance. The MBRT will verify sponsor qualification under these criteria.

Discussion: Since in-lieu-fee arrangements do not provide up-front compensatory mitigation, such arrangements will be confined to entities with an acceptable level of "trust collateral" and experience in the compensatory mitigation arena. Limiting entities to those meeting the above qualifications ensures that these criteria are met. It is possible that expansion to consider other types of sponsors may reach a greater comfort level after pilot projects and the criteria under which they operate have been refined.

#### **2. Management Plan.**

The in-lieu-fee arrangement must contain a management plan with clear objectives and an implementation schedule based on fund availability.

Discussion: To assure that compensation activities occur within a reasonable time frame and to facilitate ecosystem scale planning, fee based mitigation project objectives must be clearly identified or targeted up-front. Fee based mitigation programs differ from mitigation banks in that they generally do not provide compensation in advance of impacts and as a result there is a temporal loss of wetland functions. Identification of specific projects up-front provides for a timelier implementation of compensation activities, thus minimizing temporal losses. Fee based mitigation programs are most likely to be successful and effective in compensating for the overall loss of wetland functions when developed in context with a comprehensive, ecosystem scale planning effort. Specific geographic boundaries will be targeted up-front and will be consistent with the protection of entire ecosystems as opposed to individual tracts of land.

All fee based mitigation projects will be supported by a formal, written instrument, developed in cooperation with an interagency team and including all involved parties as signatories. The instrument will clearly outline the management goals and objectives of the project and include specifics on the establishment, operation, and long-term management and maintenance. Project goals and objectives will focus on the protection of entire ecosystems and/or compliment existing planned protection efforts. A

## **South Carolina Mitigation Bank Review Team In-Lieu Fee Based Mitigation Guidelines**

written instrument is central to the successful establishment of a fee-based program because it formalizes consensus among the signatory parties and it provides the framework for implementation of the program.

### **3. Protection Mechanisms.**

Properties involved in in-lieu fee arrangements shall be protected in perpetuity. Suitable protection may be by conservation organization purchase in fee-title or, under appropriate circumstances, purchase of conservation easements.

Discussion: Perpetual protection is necessary to achieve the long-term ecosystem goals which serve as the main basis for compensatory mitigation credits through an in-lieu fee arrangement. This perpetual protection provides a basis for assuring the eventual climax state maturation of wetland and potentially associated upland systems. These climax systems are viewed as a limited resource particularly in forested systems. Purchase of perpetual conservation easements, in certain circumstances may allow for a greater areal extent of protected lands for the same dollar figure. Cases may also arise where desired protection can only be obtained through easement purchase. Circumstances under which such easements may qualify for credit will be specified in the in-lieu fee arrangement enabling instrument. The instrument will also contain language which precludes sale or transfer of lands or easements except to other qualified conservation organizations.

### **4. Expenditures.**

Primary expenditure of funds under this program shall be for the purposes of restoration, enhancement and acquisition (fee title or easement) of restorable, threatened and/or lands whose acquisition accomplishes an ecosystem goal or purpose. For restorable lands, acquisition shall take sequential precedence over restoration activities. Expenditures for management activities directly tied to project goals shall also be allowed but will generally not exceed more than 15%. No funds will be allocated for capital expenditures such as trucks, boats, etc. All expenditures shall be well documented and reported to the MBRT periodically.

Discussion: Establishing guidelines for program spending and careful tracking of legitimate expenditures are key elements in developing a viable in-lieu fee agreement. Appropriately structured in-lieu fee programs can serve as a means of fostering ecosystem or landscape scale protection of large, threatened or ecologically desirable tracts of land. Perpetual protection of ecologically targeted and/or restorable wetlands as a first step precludes foreclosure of future potential restoration/enhancement activities. Management costs will be kept to a minimum in order to expend the overwhelming majority of funds for compensatory activities. However, the management entity will be recompensed for reasonable management costs germane to the overall project goals.

a. Mitigation costs which constitute legitimate expenditures include:

- (1) Land or easement costs, as established by independent appraisal.
- (2) Transaction costs.
  - Negotiation costs
  - Appraisal
  - Title work
  - Environmental hazard assessment
  - Survey where needed

## **South Carolina Mitigation Bank Review Team In-Lieu Fee Based Mitigation Guidelines**

(3) Restoration and enhancement costs

- Restoration/enhancement planning
- Restoration/enhancement implementation

b. Management Costs which would fall under the 15% cap include:

Stewardship costs

- Signage, control of exotics, general liabilities of ownership
- Monitoring and enforcement (esp. of easements)
- Reporting requirements (to the MBRT)

### **5. Funding.**

Projects will not substitute for funding that would currently exist or is reasonably obtainable under other authorities (e.g. through State or Federal budgets, etc.).

Discussion: Precautions will be taken to insure that mitigation funds do not become merely a substitute for funds that can be obtained through the normal State or Federal appropriations process. Also, we will be careful to avoid duplication or interference with existing programs for restoration/protection like the Wetland Reserve and National Wildlife Refuge (NWR) programs. Lands within the acquisition boundary of NWR's can be assumed to be reasonably obtainable through normal appropriations process, given some time. For similar reasons, management activities on existing State and Federal lands are generally inappropriate targets for in-lieu fee programs if funding is obtainable under other authorities.

### **6. Sequencing.**

The use of in-lieu fee mitigation credits must follow standard sequencing requirements of avoidance, minimization and on-site and within watershed compensation opportunities.

Discussion: The establishment of in-lieu fee mitigation programs where credits are readily available for purchase could result in project development plans of lower quality stemming from a reduced incentive for avoiding and minimizing wetland impacts. This problem can be minimized by strict adherence to the 404(b)(1) guidelines and avoidance and minimization sequencing prior to allowing the use of in-lieu fee mitigation credits. The loss of site specific wetland functions and values can also be minimized by requiring an analysis of onsite and within watershed compensatory mitigation opportunities prior to authorizing use of in-lieu fee credits.

### **7. Preservation Guidelines.**

Preservation proposals must pass the MBRT preservation guidance criteria established for primarily preservation mitigation banks.

Discussion: Preservation proposals derive the essence of their credits from the perpetual protection and preservation of designated wetland areas and associated upland buffers. Because it is difficult to achieve the overall mitigation objective of functional replacement through strictly preservation actions, federal and state guidance recommend that preservation be used as the sole basis for generating credits in mitigation banks only in exceptional circumstances. In an effort to provide additional guidance for the appropriateness of a particular preservation bank, the Mitigation Banking Review Team (MBRT) developed a set of working guidelines. In general, it is the opinion of the MBRT that preservation

## **South Carolina Mitigation Bank Review Team In-Lieu Fee Based Mitigation Guidelines**

mitigation banks shall complement or represent a component of landscape or ecosystem scale plans for important natural resources, elements of which are currently represented by State Priority Management Areas. These areas are further defined in the working guidance adopted by the MBRT. These guidelines establish a set of criteria to be satisfied in order for a proposed preservation bank to be considered suitable. The same issues apply to fee based mitigation programs and therefore, it is important that future fee based proposals involving mostly preservation pass MBRT preservation guidance criteria.

The MBRT Working Guidelines, as amended, will provide a filter for individual proposals. The MBRT is updating the Working Guidelines to

- More strongly emphasize degree of threat in its evaluations and
- More strongly emphasize the relative rarity of habitat types in its evaluations.

### **8. State Priority Management Areas (PMAs).**

Mitigation projects will be limited to State PMAs as refined by the MBRT.

Discussion: To ensure that mitigation plans are effective in compensating for lost wetland functions and to provide for an ecosystem scale planning approach to mitigation, in-lieu fee based mitigation projects will be limited to State Priority Management Areas. These areas are defined as those areas of the State identified by state and federal natural resource agencies as specific target areas for the preservation, restoration, and/or enhancement of natural resource values. While a specific list has not been compiled, these areas may be associated with wildlife refuges, heritage trust sites, national estuarine reserves, wildlife habitat focus areas, outstanding resource waters and similar habitat management programs. High-risk wetlands associated with rapidly growing urban areas may also be included. The MBRT will be refining these areas from their general description at some time in the future.

In addition, pursuant to a 309 grant, OCRM is evaluating priority preservation properties and assembling a list of potential acquisitions identified by focus area chairs and conservation groups. The list will provide the MBRT with an efficient means for evaluating suitable State Priority Management Areas within the Coastal Zone.

### **9. Monitoring and Success Criteria.**

All fee based mitigation projects will be subject to periodic reviews by the MBRT. Pilot agreements must contain set review periods (6 months or 1 year) where adjustments to the agreement can be made. Agreements will also have provisions that subject the project to termination if improvements are not deemed adequate. Provisions for fund disbursement shall also be included in case a project is terminated.

Discussion: Projects that are not achieving mitigation goals in a timely manner could be increasing the already inherent temporal affects of in-lieu-fee mitigation. Mismanagement of funds resulting in delays in executing the management plan will, on a case by case basis, result in termination of the project. Because the fee based mitigation concept is new, pilot agreements will require periodic adjustments and fine-tuning. Periodic reviews will be necessary to keep pilot projects on tract and to monitor their effectiveness. It is important for written agreements to contain provisions for termination and fund disbursement in worst-case scenarios.

### **10. Temporal Factors.**

A factor needs to be built in to account for mitigation not done in advance of the impact as for standard mitigation banks (i.e., a “temporal premium”).

## **South Carolina Mitigation Bank Review Team In-Lieu Fee Based Mitigation Guidelines**

Discussion: As stated earlier in the document, one of the biggest differences between mitigation banking and in-lieu fee programs is that compensation is not accomplished in advance of impacts. Indeed, there may be a significant lag time before compensatory replacement of functions occurs. This loss of function over time represents a resource loss which needs to be factored into compensatory accounting.

### **11. Service Area.**

Geographic Service areas for in-lieu fee programs will be established following the Service Area map contained in the July, 1996 "Establishment and Operation of Wetland Mitigation Banks in South Carolina".

Discussion: Compensatory mitigation should be performed as close to the impact area as possible to truly compensate for functional loss. At a minimum, the watershed and topographic grid units established as service areas under the mitigation banking guidance represent reasonable geographic service area limits to facilitate such functional replacement

### **12. Variances.**

Under extraordinary circumstances, the MBRT will have the ability to approve individual projects that fall outside of these guidelines.

Discussion: In developing guidance in this relatively new arena, we recognize that there may be projects which by agency consensus represent extremely desirable compensatory mitigation but fall outside the main concepts on which this guidance was based. In the rare event that such projects are presented for consideration, this element will allow their consideration.

**South Carolina Mitigation Bank Review Team  
Instrument Outline for In-lieu-Fee (ILF) Mitigation Programs**

**I. Introduction**

1. Program Description
  - A. General program concept.
  - B. Site location and geographic boundaries.
  - C. Program sponsor including list of qualifications.
  - D. Program goals and objectives.

**II. Program Establishment**

1. Management Plan
  - A. Ecosystem goals.
  - B. Existing and proposed landscape conditions.
  - C. Description of methods and tasks to accomplish program goals and objectives.
2. Performance criteria.
3. Implementation timetable.
4. Long-term protection mechanism.
5. Crediting and debiting procedure.
  - A. Fee determination.
  - B. Credit schedule.
  - C. Temporal factor.
  - D. Identification of kind and location factors.

**III. Program Operation**

1. Provisions for sale and transfer of credits.
  - A. Sequencing requirements.
  - B. Service area.
  - C. Determination of credit availability.
2. Provisions for fund management and allocation.
  - A. Identification of legitimate expenditures (Management costs).
  - B. Priorities for funding.
  - C. Holder of funds.
3. Accounting system for fees collected and expenditures.

**IV. Long-term Management and Maintenance**

1. Long-term management responsibilities.
  - A. Wildlife/habitat management.
  - B. Forest/timber management.
  - C. Control of exotics.
2. Provisions for monitoring and enforcement.
  - A. Schedule of periodic reviews and program adjustments.
  - B. Reporting requirements.
3. Contingency actions in event of partial or total program failure.
4. Provisions for program termination and fund disbursement in the event of program failure.