

**LOCAL PROCEDURES ON THE FUNCTIONS OF THE MITIGATION REVIEW TEAM AND
USE OF IN LIEU FEE MITIGATION IN KENTUCKY**

I. INTRODUCTION

A. Permits are required through the Rivers and Harbors Act for work in or affecting navigable "waters of the United States (U.S.)" and through the Clean Water Act (CWA) for the discharge of dredged and/or fill materials within "waters of the U.S." The U.S. Army Corps of Engineers (COE) and the Kentucky Natural Resources and Environmental Protection Cabinet's Division of Water (KDOW) administer the above permitting process. These regulatory agencies, in coordination with the Federal and State resource agencies, require that impacts to streams and wetlands be first avoided, and then minimized. If avoidance and minimization cannot be accomplished, then compensatory mitigation will be required when unavoidable impacts will result in the loss of aquatic resource functions and values.

B. Compensatory mitigation projects are designed to replace aquatic resource functions and values that are adversely impacted by issuance of Department of the Army (DA) permits pursuant to Section 404 of the CWA and Section 10 of the Rivers and Harbors Act. These mitigation objectives are stated in regulation; the 1990 Memorandum of Agreement on mitigation between Environmental Protection Agency (EPA) and the DA; the November 28, 1995, Federal Guidance on the Establishment, Use and Operation of Mitigation Banks ("Banking Guidance"); the November 7, 2000, Federal Guidance on the Use of In-Lieu-Fee Arrangements for Compensatory Mitigation Under Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act ("In-Lieu-Fee Guidance"); and the December 24, 2002, Regulatory Guidance Letter 02-02 on compensatory mitigation projects.

C. Compensatory mitigation generally requires the permittee to mitigate on-site or to locate an impaired stream or wetland off-site, then restore it to a suitable functional condition. Locating good mitigation sites can be problematic for permittees in certain situations. Another option that can be considered is the payment of in-lieu-fees to an entity that will expend the monies to implement stream and related wetland restoration projects. The COE may execute written agreements with these entities for the purposes of in lieu fee mitigation. The following procedures have been developed in consideration of the above "In-Lieu-Fee Guidance."

II. MITIGATION REVIEW TEAM (MRT):

A. The COE will establish and chair a MRT, in cooperation with other Federal and State resource agencies, that will function to define the conditions under which the in-lieu-fees may be used; to approve proposed projects for design and construction with in-lieu-fee monies; and perform a yearly review of ongoing and completed projects.

The MRT will include a single representative from each COE district in which a specific in-lieu-fee project is located, KDOW, U.S. Fish and Wildlife Service (FWS), EPA, and the Kentucky Department of Fish and Wildlife Resources (KDFWR). The State of Kentucky includes more than one COE District; therefore, the district within which the project is located will approve the restoration project. The in-lieu-fee funding recipient (recipient) will maintain a schedule of the in-lieu-fee funds that are received and expended within each COE district geographic boundary.

B. The MRT will approve potential enhancement/restoration projects by a simple majority vote. These votes will occur at scheduled quarterly meetings of the MRT. Additional meetings may be held on an "as needed" basis and will be agreed upon by a majority of the MRT. At these meetings, the recipient will present the preliminary plans/scopes of work for candidate projects for preliminary approval by the MRT and/or final design plans for projects that have received preliminary approval from the MRT. Upon approval by the MRT of the preliminary plan, the recipient is authorized to complete the next stage of the project design. Upon approval by the MRT of the final design, the recipient is authorized to begin implementation of the in-lieu-fee project. In order to be considered by the MRT, a preliminary plan must be submitted at least 60 days in advance of each quarterly meeting. In order for the MRT to approve construction, design plans must be submitted 60 days in advance of the scheduled quarterly meeting. If the proposed in-lieu-fee restoration project requires a discharge of dredged and/or fill material into "waters of the U.S.," then an application for a DA permit and State Individual Water Quality certification will accompany the final design plans.

C. When a MRT representative's attendance at a quarterly meeting is problematic, the MRT member may vote via E-mail, FAX, or letter; however, the COE must receive the MRT representative's vote within 3 days after meeting. The COE, KDOW, KDFWR (Environmental Section), FWS, and EPA each will appoint an individual within their agency to participate as the MRT representative, and pay any travel, labor, and related expenses of their representative. No MRT representative can charge the in-lieu-fee fund for any expenses that are incurred with the representative's participation on the MRT.

III. PROJECT TYPE:

A. Funded projects will directly compensate for impacts to the aquatic environment that are similar to impacts resulting from the administration of the COE Regulatory Program. When COE permits are issued that are conditioned to include the payment of money in lieu of other mitigation, that money must be used to offset the loss to the aquatic environment that the COE is responsible to protect under federal law. These impacts typically result in the physical loss of aquatic habitat and related aquatic functions of streams, wetlands, or other special aquatic sites as defined in 40 CFR 230(q-1). In some

cases, there may not be a one-to-one relationship between impact sites and mitigation projects; however, on an overall basis, the projects should balance the loss of aquatic functions to meet the Federal goal of no net loss. For example, impacts resulting from permitted coal mining activities in the Eastern Kentucky Coalfield Region will be mitigated by in-kind restoration of functions and values, first considering opportunities in the same watershed, then within the river basin, and finally within the eco-region.

B. Types of projects generally acceptable for funding are as follows:

1. Full-scale restoration of a stream or stream reach to its natural pattern, profile and dimension along with creating aquatic habitat and establishing riparian vegetation and floodplain function.
2. Removing culverts (day lighting) or concrete lining from stream channels, then restoring the characteristic pattern, profile, dimension, and riparian zone to the affected stream segment.
3. Stream enhancement, which includes establishing riparian vegetation, the stabilization of eroding stream banks through bioengineering techniques or other habitat-friendly means and the creation of aquatic habitat in-stream. Bank stabilization measures such as gabions, excessive riprap, retaining walls or grouting will not be considered suitable for in-lieu-fee funding in most situations.
4. In exceptional circumstances mitigation credit may be given for the preservation of aquatic resources in conjunction with restoration projects. This is generally accomplished through Conservation Easements, Deed Restrictions or acquisition of ecologically sensitive stream corridors.

C. Types of projects generally unacceptable for funding are as follows:

1. Projects or planning documents that have a primary purpose of improving or creating water supply, flood control, sewer improvements, or other water-related improvements that do not involve aquatic habitat restoration work.
2. Any project that seeks or receives matching Federal funds or grants. The purpose of in-lieu-fee is to provide compensatory mitigation of impacts resulting from the COE Regulatory Program. It is not appropriate to expend Federal funds or grants to mitigate these impacts because the Federal government would essentially be funding mitigation projects for impacts resulting from private actions.

3. Projects such as nature trails, boat ramps, creating fishing access, and similar access, humanitarian or educational projects will not qualify.

IV. CRITERIA FOR PROJECT SELECTION:

A. Recipients will work with KDFWR Private and Public Lands Biologists, Federal, State, and local agencies, landowners, and other entities to locate potential sites for mitigation projects. Typically, this would include sites containing degraded aquatic habitat, straightened or channelized streams, unstable stream channels, stream segments lacking riparian vegetation and similar impairments. However, not all degraded or impaired streams will qualify as potential mitigation projects that can be funded with in-lieu-fee monies. A variety of factors will be evaluated by the MRT to determine if a site is a suitable candidate for an in-lieu-fee mitigation project. These factors include:

1. The degree of impairment and functional replacement. Extremely degraded streams (void of aquatic life or nearly so) that have been straightened, channelized, lined with concrete or culverted will usually offer good opportunities for improvements to natural functions and values, and will generally be considered as good candidates for in-lieu-fee mitigation projects. Likewise, streams with severe bank erosion, stream segments lacking riparian vegetation, and similar problems will be considered good candidates. Previously impacted stream reaches that have recovered, with respect to habitat, water quality and channel stability, will generally not be considered suitable project sites.
2. Landowner Cooperation. In order for a potential project site to be acceptable, the perspective landowner must be receptive to having stream enhancement or restoration work performed on his/her land and must be willing to allow permanent protection (e.g., through a Deed Restriction, Conservation Easement or similar written agreement) of the subject stream corridor.
3. Technical Feasibility and Likelihood of Success. The in-lieu-fee mitigation project should focus on natural ecological processes and should be planned and designed to be self-sustaining over time to the extent possible. The work must result in some tangible increase in ecological function and benefit to the stream. Stream reaches where insurmountable problems exist, and where enhancement/restoration would not provide a legitimate improvement, will not be viewed as a suitable sites for using in-lieu-fee funding. For example, if water quality was so poor that the stream is void of life, or nearly so, planting trees or stabilizing its banks or adding aquatic habitat structures would do nothing to expedite recovery. Proposed mitigation techniques need to be well understood and reliable. When uncertainties surrounding the technical

feasibility of a proposed mitigation technique exist, the MRT may impose special requirements on the recipient and ask for appropriate reporting from the recipient. It may be possible for these special requirements to be phased-out or reduced once the attainment of prescribed performance standards is demonstrated. It shall be the role of the recipient to submit a plan detailing specific performance standards to the MRT to ensure that the technical success of the project can be evaluated by the MRT.

4. Proximity. As a general rule, COE-permitted impacts and proposed in-lieu-fee mitigation project sites will be within the same eco-region, river basin, and 8-digit Hydrologic Unit Code (HUC) as the projects generating the in-lieu-fee monies. (The US Geological Survey established a national framework for cataloging watersheds of different geographical scales. Each watershed level in the hierarchy is designated using the hydrologic unit cataloging system. At the national level, this system involves an 8-digit code that uniquely identifies four levels of classification: region, sub-region, accounting code, and cataloging unit.) In order to ensure in-kind functional replacement, the in-lieu-fee mitigation will generally be performed on streams that are within the same watershed or geographic area and within one stream order of the impacted stream in which permitted in-lieu-fee funding was generated.

5. Impaired Streams. Streams occurring on the EPA 303(d) list and targeted watersheds as identified by Federal and State agencies will receive a higher priority for use of in-lieu-fee monies if the habitat restoration work would ameliorate the impairment and at the same time adequately mitigate for the functions and values lost at impacted sites.

6. Project Size. To the degree that mitigation opportunities present themselves and the amount of in-lieu-fee money becomes available, larger stream restoration/enhancement projects (1,000 feet or more) will receive higher priority than smaller projects.

7. Watershed Management. The MRT and recipients will attempt to select in-lieu-fee projects within watersheds where other water quality/stream restoration monies (e.g., 319 grants, NRCS programs) have been allocated, when and where such opportunities exist. Whenever possible, in-lieu-fee monies will be concentrated within watersheds where a high degree of impairment exists and landowner cooperation is widespread. In-lieu-fee mitigation projects will be planned and developed to address the specific resource needs of a particular watershed.

V. IN-LIEU-FEE MITIGATION PROJECT PLAN REQUIREMENTS:

A. The level of information and detail submitted to the MRT will vary depending upon the complexity of the proposed mitigation project and the stage of review and/or approval. To determine whether a proposed mitigation project is viable and worth pursuing, a preliminary mitigation project plan (preliminary plan) will be submitted. Upon review and approval of a preliminary plan, a more detailed final mitigation project plan (final plan) would subsequently be submitted to the MRT for review and approval.

B. Preliminary In-Lieu-Fee Mitigation Project Plan. A preliminary plan should contain sufficient information and detail to allow the MRT to make a decision as to whether or not the project seems viable and appropriate while at the same time being fiscally conservative in terms of resource expenditures (i.e., time and money). Preliminary plans should include, at a minimum the following:

1. Location of the proposed restoration site (Narrative description, maps, latitude/longitude (lat/long) or Universal Transverse Mercator (UTM) coordinates)
2. Baseline conditions and characterization of the site, including a general assessment of stream type, stability (i.e., pattern, profile, dimension, sediment/substrate, etc.), stage of channel evolution, functional assessment (e.g., EPA's Rapid Bio-assessment Protocol, Eastern Kentucky Stream Assessment Protocol, etc.), and photographs that are clear & legible. The level of detail for baseline conditions contained in a preliminary plan is expected to be less rigorous than that of a final plan; however, the same fundamental items pertaining to stream condition must be addressed. Visual assessments and best professional judgment may, with supporting written justifications, provide sufficient information for a general narrative of existing stream conditions in a preliminary plan.
3. Conceptual plan outlining the type of improvements to functions (physical, chemical, and biological processes) and values that are proposed and how they will be accomplished.
4. Preliminary project costs based on the anticipated scope of work needed to accomplish proposed levels of functional replacement.
5. General conditions and needs of the watershed and potential opportunities for additional projects.

C. Design Plan. A design plan submitted to the interagency MRT should include, at a minimum, the following:

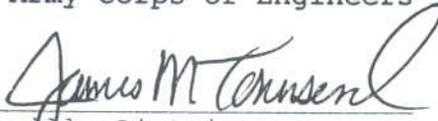
1. Location of the proposed restoration site (Narrative description, maps, lat/long or UTM coordinates)
2. Baseline conditions and characterization of the site including an assessment of stream type, stability (i.e., pattern, profile, dimension, sediment/substrate, etc.), stage of channel evolution, functional assessment (e.g., EPA's Rapid Bio-assessment Protocol, Eastern Kentucky Stream Assessment Protocol, etc.), and photographs (clear & legible).
3. Plan outlining the type of improvements to functions (physical, chemical, and biological processes) and values that are proposed and how they may be accomplished.
4. Schedule for conducting the work.
5. Performance standards for determining ecological success that are measurable, meaningful, based on sound ecological principles and directly linked to the functional replacement being proposed for the restoration project.
6. Reporting protocols and monitoring that are tailored to the specifics of the proposed restoration project and that are pertinent to the chosen performance standards.
7. Financial, technical, and legal provisions for restoration work and remedial actions and responsibilities.
8. Financial, technical, and legal provisions for long-term management and maintenance.
9. Provisions that clearly state that the legal responsibility for ensuring successful restoration rests with the in-lieu-fee recipient.
10. "Letter of Intent" signed by landowner needs to be submitted prior to the MRT approving monies to be spent on project design.
11. Conservation easement or deed restriction must be executed prior to the MRT approving monies to be spent on construction.

VI. AGREEMENT MODIFICATION, TERMINATION, AND WITHDRAWAL:

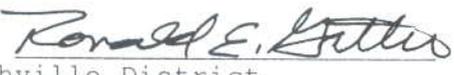
A. Any signatory entity may propose modifications to these local procedures. The proposed modification shall be made in writing and submitted to all MRT members. Modification shall require approval of each signatory agency within 90 days of the modification submitted. The chair of the MRT will have the responsibility for making the final decision regarding the terms and conditions of these local procedures where agreement cannot be reached within these 90 days.

B. Any MRT member may withdraw from this agreement with 30 days advance written notice to all signatory members. The Chair of the MRT will have the right to suspend the function of the MRT should it's actions become inconsistent with the mitigation policies of the COE's Regulatory Program.

U.S. Army Corps of Engineers

By:  Date: 6/4/03
Louisville District
Regulatory Branch Chief

By:  Date: 7-3-03
Huntington District
Regulatory Branch Chief

By:  Date: 6/16/03
Nashville District
Regulatory Branch Chief

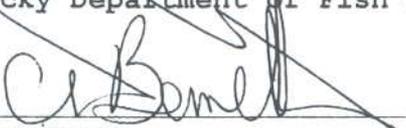
U.S. Environmental Protection Agency Region IV

By:  Date: 7/30/03
Chief, Wetlands Section

U.S. Fish and Wildlife Service:

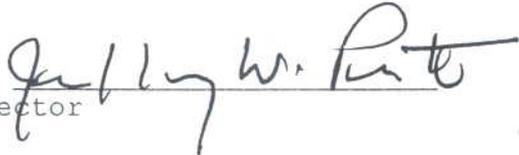
By:  Date: 6/4/03
Field Supervisor
Kentucky Field Office

Kentucky Department of Fish and Wildlife Resources

By: 
Commissioner

Date: 6-10-03

Kentucky Natural Resources & Environmental Protection Cabinet,
Division of Water

By: 
Director

Date: 6/12/03