

Compensatory Mitigation: What, Why, When and How



What Compels Mitigation

- Clean Water Act
- Endangered Species Act
- NEPA Process



Clean Water Act Section 404 Mitigation

- The Clean Water Act of 1972 protect our nation's waters or Waters of the U.S.
- Compensation for unavoidable impacts
- Mitigation: restoring, enhancing, creating or preserving other "waters"
- To obtain a project permit



What are “Waters” of the U.S.

- Waters” can include:
- Dry desert washes
- Streambeds of almost any size
- Wetlands that may be associated with those washes
- Isolated wetlands



ILF Program prior to USACE MOU Process

- Avoid the impact
- Minimize impacts
- Repair, rehabilitate, or restore the impacted habitat on-site mitigation
- Replace, enhance, or provide substitute habitat off-site mitigation
- Pay monies to existing In-Lieu Fee Program
- Few restrictions on use of funds



Sequencing (Prioritization), From 2006 MOU to 2008 Federal Rule Change

- Avoid the impact
- Minimize impacts
- Repair, rehabilitate, or restore the impacted habitat on-site mitigation
- Replace, enhance, or provide substitute habitat off-site mitigation
- Buy Credits from In-Lieu Fee Program
- Buy Credits from Mitigation Bank
- Restrictions on use of funds



Sequencing (Prioritization), as a Result of the 2008 Federal Rule Change

- Avoid the impact
- Minimize impacts
- Buy Credits from Mitigation Bank
- Buy Credits from In-Lieu Fee Program
- Project proponent implemented mitigation (on or off-site, in-kind or out-of-kind)



Endangered Species Act Mitigation

- Avoid the species and habitat impacts
- Minimize impacts
- Offset impacts; replace, enhance, or provide substitute habitat off-site mitigation or purchase Conservation Bank Credits



USFWS THREATENED & ENDANGERED SPECIES STATEWIDE

- 8 species of cactus
- 8 other species of plants
- 2 species of reptiles
- 6 bird species
- 7 species of mammals
- 2 species of crustaceans



NEPA Compelled Mitigation

- Federal project or project with federal nexus
- Preparation of a Categorical Exclusion
- Preparation of an Environmental Assessment
- Preparation of an Environmental Impact Statement
- May have mitigation requirements as a result of unavoidable impacts



Mitigation Strategies

- Mitigation Banks (none in Arizona)(404 Impacts)
- In-Lieu Fee Programs (5 approved in Arizona)(404 Impacts)
- Conservation Banks (2 in Arizona)(ESA Impacts)
- Habitat Conservation Plans (9 in Arizona)(ESA Impacts)



Mitigation Banks

- Currently no Mitigation Banks in State of Arizona

In-Lieu Fee Programs

- Arizona Game and Fish Department is only statewide ILF Program
- Can sell credits in any part of the state where an unavoidable impact occurs
- There are four other currently approved ILF Programs

Prescott Creeks Preservation Association

Pima County/Tucson Audubon Society

La Paz County Endangered Species Fund

Superstition Area Land Trust

USACE ILF Program Approval Process

- Prepare Program Prospectus
- Prospectus Released for Public Comment and Review and Approval by Interagency Review Team (IRT)
- Prospectus Approved
- ILF Enabling Instrument Prepared and Submitted for Approval by USACE
- ILF Instrument Approved

ILF Project Implementation Process

- Desire or need to restore or enhance aquatic habitats (riparian, xeroriparian) on Department Wildlife Areas
- Prepare Development Plan, Interim Management Plan and Long Term Management Plan (Mitigation plan)
- Submit proposed plans for ILF site to Department Lands Council, Executive Staff and Commission for approval
- Submit to USACE for approval

ILF Project Implementation Process (continued)

- USACE and Interagency Review Team Approves Plans Including Credit Release Schedule (after public comment period)
- New Projects Become Amendments to the ILF Instrument
- Any Change to the ILF Instrument is an Amendment
- Unavoidable Impact to Waters of the US Occurs

ILF Project Implementation Process (continued)

- Project Proponent Has a Need to Mitigate
- Project Proponent Shops for Available ILF Program Credits for Sale in Service Area of Impact
- Project Proponent Purchases Number of Credits Needed to Offset Impact (Acre for Acre or More)

ILF Project Implementation Process (continued)

- ILF Project Site Can Sell All Credits Based Upon a Pre-Approved Credit Release Schedule Until They are Sold Out
- Project Site is Protected in Perpetuity
- Dept Uses Conservation Land Use Agreement, Not Conservation Easement
- ILF Program Operator Responsible for Implementing Mitigation Plan Using Funds Received

ILF/Mitigation Banking Program Benefits (to fund recipients)



- Restore or enhance habitats on Department and other properties with outside funds
- Funds provide for administration (15%) of each credit sold and O & M in perpetuity for project sites
- Provide for biologically meaningful mitigation

ILF/Mitigation Banking Program Benefits (to project proponents)



- Provides certainty
- Provides clarity
- Provides predictability
- Provides timely permit processing
- Provides readily available mitigation opportunities

Current ILF Project Sites

- Powers Butte (Fully Funded)
- Springwater Canyon Wetland Restoration (Fully Funded)
- Cieneguita Wetland Restoration (Fully Funded)
- Martinez Canyon (Fully Funded)
- Chevelon Creek Wildlife Area (Still Selling Credits)

Future Proposed ILF Project Sites

- Arlington Wildlife Area (Phase II)
- Wilcox Playa Wildlife Area
- Wenima Wildlife Area
- Springerville Marsh Wildlife Area

Future Proposed ILF Project Sites (continued)

- Whitewater Draw Wildlife Area
- Sipe White Mountain Wildlife Area
- Cluff Ranch Wildlife Area
- Quigley Marsh Wildlife Area
- Colorado River Nature Center

Conservation Banks (ESA Impacts)

- A parcel of land containing natural resource values (ESA species/habitat values)
- Is conserved and managed in perpetuity by the bank sponsor/landowner to benefit ESA species and/or habitats
- Used to offset impacts occurring elsewhere to the same species/habitats.
- Bank sponsors/Landowners allowed to sell credits to fund long term management and restoration activities

Conservation Banks (Process)

- Enter into a Conservation Banking Agreement with the USFWS
- Grant a Conservation Easement to an eligible third party to protect site in perpetuity
- Develop a Long-term Management Plan
- Provide funding for monitoring and perpetual management (sale of credits once bank is established)

Habitat Conservation Plans (ESA Impacts)

- HCP's are planning documents required as part of an incidental take permit
- Describe the anticipated effects of the proposed taking and how those impacts will be minimized or mitigated
- Can apply to both listed and non-listed species, including those that are candidates or have been proposed for listing
- An ITP will only be issued if the HCP meets the requirements of Section 10 of the ESA
- The permit allows a landowner to legally proceed with an activity that would otherwise result in the illegal take of a listed species.

Habitat Conservation Plans (Process)

- Takes place on non-federal lands
- Include an assessment of potential impacts to the listed species
- Measures to be taken to minimize, mitigate and monitor impacts
- An alternative analysis to proposed action
- Apply to USFWS for incidental take permit

Incidental Take Permit (Process)

- ITP Application form
- A completed HCP
- Application fee
- Draft NEPA analysis resulting in a categorical exclusion, an EA or EIS
- USFWS Regional Director approves ITP

Comparison Matrix

	Authority And Purpose	Lands	Time Period	Users	Credit Sales	Mechanism For Protection
ILF Program	Clean Water Act, Replace lost functions and services	State, local government, NGO non profit land management entities	In perpetuity	Project proponents	Yes	Real Estate Instrument, Conservation Land Use Agreement
Conservation Bank	Endangered Species Act, Offset impacts to species or habitats	Private, Tribal State and Local Gov't	In perpetuity	Project proponents	Yes	Real Estate Instrument
Habitat Conservation Plan	Endangered Species Act, Allow incidental future take of listed species	Non-federal	Time Frame of the HCP	Landowners	No	HCP and NEPA documents

Framework for Statewide Program

- Utilize existing AGFD In-Lieu Fee Program as basis for structure
- Modification of Existing ILF Instrument to include other lands such as State Trust Lands
- Conservation banks could be a searchable GIS layer on tool such as HabiMap.
- Project proponents would be able to factor in values of their impacts and cost of mitigation up front

Framework for Statewide Program (continued)

- Project proponents could maximize avoidance and minimization using GIS tool
- Information included could be:
 - Locations of Conservation Banks
 - Amount, Credit Prices and Type of Credits Available
 - Locations of Sensitive Resources

Framework for Statewide Program (continued)

- Private Individual Properties (possibly)
 - Agreement process may be too onerous
 - Would need up front seed money if lands, portions of lands or Conservation Easements were to be purchased
- Private Properties (large developers, i.e mines, master planned communities)
 - Purchase property to be included in ILF program, provide endowment, use to offset/compensate for present and possible future impacts

Framework for Statewide Program (continued)

- Engage USFWS to include ESA Conservation Banks within program to allow credit “stacking”.
- Engage land management agencies, BLM etc to include mitigation requirements in NEPA process

Attributes of Included Lands

- Contain jurisdictional waters of the US that can be preserved
- Contain degraded aquatic resources (waters of the US) that can be restored or enhanced or would facilitate creation of new aquatic resources
- Have associated water rights
- Contain ESA species, critical habitat, suitable habitat or potential suitable habitat if restored

Attributes of Included Lands (continued)

- Contain state species of concern or of economic importance
- Contain unique habitats or linkage corridors

Any Questions?