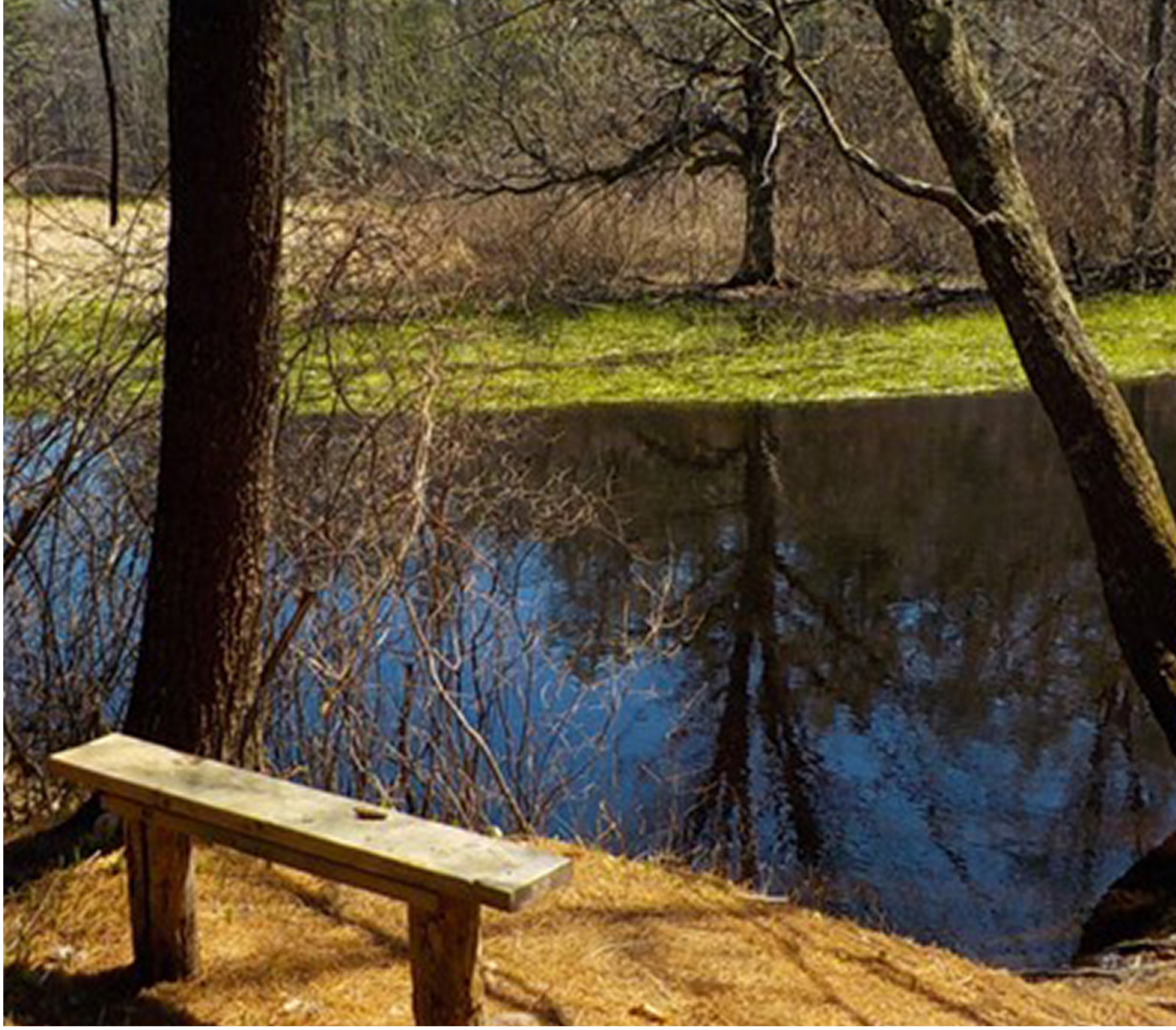

Improving In-Lieu Fee Program Implementation: *Long-Term Management of Mitigation Sites*

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About the Environmental Law Institute

The Environmental Law Institute makes law work for people, places, and the planet. Since 1969, ELI has played a pivotal role in shaping the fields of environmental law, policy, and management, domestically and abroad. Today, in our sixth decade, we are an internationally recognized, non-partisan publishing, research, and education center working to strengthen environmental protection by improving law and governance worldwide.

Cover photo courtesy of Massachusetts Department of Fish & Game In-Lieu Fee Program.

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Improving In-Lieu Fee Program Implementation

Since 1990, the overall goal of the Clean Water Act section 404 program has been the "no net loss" of aquatic ecosystems. Ensuring that the area and functions of aquatic ecosystems are maintained depends on effective compensatory mitigation. In-lieu fee (ILF) programs are an important mechanism to provide compensatory mitigation and thus contribute to the "no net loss" goal.

The following guide is part of a series of comprehensive guides on some of the most challenging components of ILF program implementation identified through extensive research and interviews with operating ILF programs and other mitigation stakeholders. These guides help address perennial problems for ILF programs by identifying specific challenges, providing detailed recommendations on ways to meet these challenges, and including examples or case studies to illustrate effective approaches to implementation.

The guides cover the following topics:

1) Full cost accounting
2) Project approval and the three-year growing season
3) Long-term management
4) Programmatic audits

This particular guide will assist ILF program sponsors and other stakeholders in preparing for the long-term management of mitigation sites. After noting the regulatory requirements, this guide discusses typical challenges for ILF programs related to long-term management and makes recommendations on how to avoid or address some of the common challenges. It also offers sample language for certain provisions regarding long-term management and concludes with additional resources for further information.

Long-Term Management of Mitigation Sites

Individual ILF projects may encompass a broad range of activities, such as establishing, restoring, or preserving a wetland or stream, removing dams or barriers, constructing water control structures, or removing invasive species. Once completed, an ILF project is expected to be self-sustaining. Yet the U.S. Army Corps of Engineers (Corps) and the U.S. Environmental Protection Agency (EPA) recognize that many mitigation sites will not be self-sustaining. For example, a mitigation site may require continued monitoring for and removal of invasive species, regular prescribed burning, or maintenance of water control structures. Property rights also may need to be enforced to protect the site against unauthorized use or trespass. Consequently, Corps and EPA regulations require long-term management of mitigation sites, including individual ILF projects.

Effective long-term management requires careful advance planning and implementation. Key challenges include:

- selecting the appropriate real estate protection mechanism and maintaining its validity;
- identifying long-term management and maintenance tasks and estimating costs for those tasks;
- determining which entity or entities will perform these tasks;
- establishing a financial mechanism and investment strategy to provide funding for long-term management.

No ILF program operates exactly as another. One common feature, however, is that staff will change and memories will fade. Accordingly, it is critical to clearly document the roles and responsibilities of all entities involved in long-term management of mitigation sites. Many long-term management plans are designed to last in perpetuity, which, as long-term stewards have observed, is a very long time.

Definitions of Key Terms

The following definitions are adapted from the Environmental Law Institute (ELI) and Land Trust Alliance's *Handbook for Land Trusts*:[1]

- **Long-term stewardship** refers to the full range of activities that take place on a compensatory mitigation site after that site has met its performance standards. Long-term stewardship activities include: long-term management and maintenance of the site, easement stewardship and defense, and long-term endowment management. Long-term stewardship does not include active-phase site monitoring (which occurs before performance standards are met).
- **Long-term management and maintenance** refers to the routine assessment and active management of the site after performance standards have been met. Long-term management and maintenance responsibilities will vary depending on the needs of the site but may include more intensive activities like controlled burning, invasive species control, and management of active site features, such as pumps, as well as more minimal activities, such as maintaining fences and signs.
- **Easement stewardship and defense** means the management, monitoring, and enforcement of the easement in perpetuity, and other activities generally considered part of easement stewardship, such as maintaining landowner relations. Easement stewardship and defense primarily involve regular monitoring of the project site for uses in violation of the easement. In the event of a violation, easement stewardship and defense include pursuing legal action.
- **Long-term stewardship fund management** is the management and distribution of financial resources set aside to fund long-term stewardship activities. Mitigation providers are required to deliver funds to support the long-term stewardship of

[1] Environmental Law Institute & Land Trust Alliance, *Wetland and Stream Mitigation: A Handbook for Land Trusts* (2012). https://www.eli.org/research-report/wetland-and-stream-mitigation-handbook-land-trusts.

compensatory mitigation sites. The long-term funding mechanism can be managed by a variety of entities, such as the ILF program sponsor, the entity that holds the site in fee, the entity that holds an easement on the property, the party responsible for long-term management and maintenance, or a third-party fiduciary. The long-term funding mechanism may also be divided into separate streams of funding (e.g., one stream for long-term management and maintenance and another for easement monitoring and defense), and these streams may be maintained by separate entities.

Box A: Why Long-Term Planning Matters: The Case of The Environmental Trust
The Environmental Trust (TET) was a not-for-profit, California-based land trust that had 15 years of experience, managed more than 4,600 acres of conservation lands, and held more than $4 million in endowment funds. Despite good intentions, TET made multiple mistakes in its land acquisition and management programs. TET sometimes failed to record conservation easements, and it accepted conservation lands and long-term management responsibilities without properly identifying and costing management tasks. TET also failed to require an adequate endowment that would generate sufficient income to fund the long-term management activities for its sites, and it lacked a sound investment strategy, assuming unreasonable rates of return. Additionally, TET used funds earmarked for the endowment as part of its operating budget. Ultimately, in 2005 TET filed for bankruptcy, forcing other conservation entities, land trusts, and local governments to take over the responsibility—and expenses—for long-term management. Otherwise, according to the bankruptcy plan, the conservation protections would have to be abandoned and extinguished. The TET case thus serves as a cautionary reminder of the necessity and importance of careful planning for long-term management. Since TET's bankruptcy, the Land Trust Alliance developed an accreditation program that recognizes land trusts that satisfy national quality standards, including financial requirements. Accredited land trusts are reviewed every five years, thus promoting confidence in a site's long-term sustainability. Sources: Royal C. Gardner, *Legal Considerations*, *in Conservation and Biodiversity Banking: A Guide to Setting Up and Running Biodiversity Credit Trading Systems* (Ricardo Bayon, Nathaniel Carroll & Jessica Fox eds., 2008); Cameron Johnson, Note, *Perpetuating Perpetuity*, 31 Utah Environmental Law Review 437 (2011); Peter Szabo, *An Impact Evaluation of the Land Trust Accreditation Program's First Ten Years* (July 2018), https://www.landtrustaccreditation.org/storage/downloads/impactevaluation/Impact_Evaluation_Full_Report.pdf.

Regulatory Requirements

The starting point for the rules governing ILF programs and long-term management and maintenance of ILF sites is the Corps and EPA regulations adopted in 2008 (the 2008 Rule).[2] Note that the 2008 Rule allows flexibility and afford regulators discretion to exercise their best

[2] 33 C.F.R. pt. 332.

professional judgment when reviewing mitigation proposals. Because of the variability in ecological (and other) conditions across the country, some Corps districts have issued their own guidance, standard operating procedures, and/or templates or models. Anyone developing and operating an ILF must consult these documents as well.

Furthermore, state laws and regulations play a significant role in the establishment of ILF programs and the implementation of long-term management plans. For example, real estate protection instruments, such as conservation easements, are governed by state law, and the precise rules differ from jurisdiction to jurisdiction. Some states also may limit which entities are authorized to hold or manage long-term stewardship funds. ILF sponsors should be familiar with the relevant requirements of state law, as this will influence how a federally authorized ILF program will operate.

Despite the differences among the states and among Corps districts, the general process for establishing an ILF program and developing long-term management and maintenance plans follows a similar path. Figure 1 below sets out the process as contemplated by the 2008 Rule, focusing on the provisions most relevant to long-term management. The **prospectus** (a pre-application document) leads to the **draft ILF instrument**. Once the Corps approves the draft, the **final ILF instrument** addresses the ILF program's operation. After the Corps approves the final ILF instrument and the ILF program is operational, the ILF sponsor must submit a **mitigation plan** that includes a **long-term management plan** for each individual mitigation project (for some programs, the process may be similar to the instrument approval or instrument modification process). Once the mitigation project is in the long-term management phase, the Corps may require an **annual report** on the status of the long-term funding account, which could include a discussion about management activities.

Figure 1. Key Requirements of the 2008 Rule Regarding Long-Term Management in ILF Program Documents

Prospectus

Must include:

- ILF **program objectives** (sites are ultimately managed for the long-term toward these objectives)
- Proposed **ownership arrangements**
- Long-term protection **management strategies** for ILF project sites

Draft/Final Instrument

Must include:

- Description of the **strategies for long-term management and protection** in the compensation planning framework
- **Provisions addressing long-term financing** (if needed)
- A **fee schedule** for initial advance credits and a **methodology** for determining future project-specific credits and fees that takes into account long-term management and protection

May include:

- Identification of party responsible and legal mechanisms for long-term management
- Provisions that allow the long-term management responsibilities to transfer from the sponsor to a land stewardship entity
- Provisions regarding financial arrangements and transfer of long-term management funds to the steward

Mitigation Plan

Must include:

- Description of the **site protection instrument** or other long-term protection arrangements
- A **long-term management plan** that describes long-term financing mechanisms (for information on what is typically included in a long-term management plan, see ELI and the Land Trust Alliance's *Handbook for Land Trusts*)
- **Party responsible** and **legal mechanisms** for long-term management (if not addressed in instrument)
- Provisions regarding **financial arrangements** and transfer of long-term management funds to the steward (if not addressed in instrument)

Other Relevant Requirements

- An ILF sponsor may be required to submit an **annual report** regarding the funding account for long-term management and could include information on long-term management tasks or activities.
- The site protection instrument, management plan, or other long-term protection mechanism must contain a provision requiring a **60-day advance notification** to the Corps before any action is taken to void or modify the instrument, plan, or mechanism.

Challenges in Practice, Considerations, and Recommendations

Based on our literature review and interviews with various mitigation stakeholders, we identified some of the common or likely challenges that ILF programs may face related to planning for and implementing long-term management. We also note some points for consideration and offer recommendations to help ILF programs avoid or address challenges associated with long-term management and maintenance. To the extent possible, these tasks should be dealt with early in the process.

Challenge: selecting the appropriate site protection mechanism and maintaining its validity

Considerations and Recommendations:

- The 2008 Rule explains that "[l]ong-term protection may be provided through real estate instruments such as conservation easements held by entities such as federal, tribal, state, or local resource agencies, non-profit conservation organizations, or private land managers; the transfer of title to such entities; or by restrictive covenants. For government property, long-term protection may be provided through federal facility management plans or integrated natural resources management plans."[3]
- The laws regarding site protection instruments vary by state (e.g., there may be differences as to whether the site protection instrument needs to be re-recorded and, if so, how often that must occur).
- Generally, conservation easements may be better than deed restrictions.[4]
- Consider multiple or layered conservation easements or other instruments to be held by different entities to ensure enforcement.
- As noted in the 2008 Rule, the site protection instrument should provide for third-party enforcement rights.
- Clearly identify compatible/incompatible uses.
- Conduct a title review early during the review process (before site approval) to identify any conflicting rights, such as oil, gas, and mineral rights.
- Resolve any issues identified through the title review, preferably through discharge or subordination.
- Make sure the site protection instrument is properly recorded.
- Determine whether it will be necessary to re-record the site protection instrument to maintain its validity and set up a procedure to ensure this happens, if required.

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[3] 33 C.F.R. § 332.7(a)(1)

[4] For more information on the advantages and disadvantages of different site protection instruments, see Cynthia Wood & Steven Martin, *Compensatory Mitigation Site Protection Instrument Handbook for the Corps Regulatory Program* (Institute for Water Resources 2016), https://www.spk.usace.army.mil/Portals/12/documents/regulatory/references/Site_Protection_Instrument_Handbook_August_2016.pdf?ver=2016-09-13-145114-107.

Challenge: identifying long-term management and maintenance tasks and estimating costs for those tasks

Considerations and Recommendations:

- As an initial matter, consider selecting relatively low-maintenance sites that will require minimal work or lower costs in long-term management.
- Remember that funding for long-term management is different than the financial assurances that may be required during the construction phase of mitigation projects.
- Long-term management and maintenance tasks will vary from program to program, site to site, district to district, and state to state. Some sites will require only easement stewardship and defense (e.g., North Carolina Division of Mitigation Services), while others will require more active management, such as invasives removal.
- Some potential challenges that might arise during the long-term management phase include encroachment, dumping, invasive species, boundary concerns (e.g., road expansions), trespass, or changes to adjacent or nearby lands that may impact the site in unexpected ways.
- It may be more challenging to identify tasks and estimate costs for a site that has not yet been selected. For example, if a site has not been selected at the time credit fees are set through full cost accounting, land or other costs may increase significantly after the cost is set and before the site is procured. See the guide on Full Cost Accounting in this series for more information.[5]
- If possible, wait to sell credits until the program has a defined project, which allows the program to properly cost credits (e.g., Arizona Game and Fish Department ILF Program).
- Try to identify <u>all</u> possible tasks and costs, no matter how small or infrequent.
- When identifying tasks and estimating costs, consider prior experience with similar projects.
- Think carefully about how tasks may change in light of climate change (e.g., saltwater intrusion, zombie forests, increases in invasive species). This is another reason to include contingency in long-term management cost estimates.
- Take into account soft costs, such as neighbor relations.
- Take into account annual costs and other costs, such as replacing an entire fence or re-recording the deed or easement if necessary.
- Specificity is needed but should be balanced with the ability to engage in adaptive management.
- Use [The Nature Conservancy's (TNC) Long-Term Stewardship Calculator](), the [Center for Natural Lands Management's Property Analysis Record (PAR)](), or similar calculators to estimate task costs.

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[5] Environmental Law Institute and Institute for Biodiversity Law and Policy at Stetson University College of Law (2021). Improving In-Lieu Fee Mitigation – Full Cost Accounting https://www.eli.org/wetlands-program/ILFresources

- Use the Land Trust Alliance's Legal Defense Reserves Calculator or similar calculators for easement defense estimates.
- If a land trust, consider easement defense insurance (e.g., Terrafirma).
- If the sponsor plans to outsource projects (e.g., a request for proposals (RFP)), require applicants to include detailed information about long-term management and maintenance in their proposals and ensure the cost estimates for long-term management are reasonable.
- Ensure credit costs include an appropriate amount for long-term management and maintenance. See the guide on Full Cost Accounting in this series for more information.[6]
- Consider setting priorities for tasks (even general categories) in case unforeseen events (e.g., insufficient funding, natural disaster, etc.) arise during the long-term management phase so that the steward knows how to prioritize if funds are limited.
- Although some programs use volunteers, when estimating costs, the sponsor should not assume volunteers will handle long-term management tasks for free.
- Do not underestimate costs in an attempt to keep credit costs lower.
- Document the rationale behind the estimates, decisions, and assumptions made.
- Update the long-term management budget and fee schedule as needed. See the guide on Full Cost Accounting in this series for more information.[7]

Challenge: identifying which entity or entities will perform long-term management and maintenance tasks

Considerations and Recommendations:

- Identify who/which entity will be responsible for and perform which roles (e.g., program sponsor, property owner, steward, easement holder, endowment holder/manager) early in the process, if feasible. For example, King County Mitigation Reserves Program in Washington makes its Department of Natural Resources and Parks responsible for long-term stewardship activities, while the Department of Development and Environmental Services enforces the terms of the restrictive covenants. A third county agency manages the investment funds.
- The conservation easement holder should be a long-term natural resource or governmental entity with experience holding easements for conservation purposes.
- Identify the entity that will manage the long-term stewardship fund; consider whether the entity that will manage the long-term stewardship fund should be a separate entity from the long-term steward.
- If using a third party to manage the long-term stewardship fund, look for an entity with experience managing funds for conservation purposes.

[6] *Id.*
[7] *Id.*

- Bring the entity or entities into the process to enhance planning. For example, if a land trust will be the easement holder or manager, it can advise on tasks and costs, or an endowment holder can advise on the cap rate and investment policy.
- Determine whether there are any state law limitations on certain entities (e.g., California law limits who can hold easements or endowments).
- If a land trust will be involved in long-term management or as an easement holder, use a land trust accredited by the Land Trust Accreditation Commission, an independent program of the Land Trust Alliance.
- Consider a co-holder or secondary easement holder to provide layered/backup protections.
- Make sure each role is clearly defined and well documented.
- Prepare a formal stewardship agreement that defines all parties' roles and responsibilities for long-term management, including easement defense.

Challenge: establishing a financial mechanism and investment strategy to provide funding for long-term management and maintenance

Considerations and Recommendations:

- Choose an appropriate long-term stewardship fund. The 2008 Rule notes "non-wasting endowments, trusts, contractual arrangements with future responsible parties, and other appropriate financial instruments" as options.[8]
- Develop clear investment policy statements.
- Set a realistic cap rate, which is the net amount of gain (by percentage) that the fund must produce annually on average to cover long-term management and maintenance expenses. The initial amount required for the fund would be the annual cash needed divided by the cap rate. Thus, if $25,000 is required annually for long-term management and the cap rate is 3%, the initial funding amount would be $833,333.
- Take into account inflation and administrative fees (e.g., administrative fees charged by the entity managing the long-term stewardship fund), which will increase the target rate of return.
- Select an appropriate investment strategy for the target rate of return (e.g., King County Mitigation Reserves Program based its target rate of return on the county's investment history over a 13-year period; see box below).
- Consider budgeting an additional amount for contingency specifically in the context of long-term management.
- Tools such as the TNC Calculator can assist greatly in determining these figures.
- Consider a delayed spend/interim management period that is separately funded; this allows the endowment to grow before spending (e.g., the Santa Ana Watershed ILF Program in California contemplates an interim management plan and interim management period).

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[8] 33 C.F.R. § 332.7(d)(3)

- Set up the account so that funds are dedicated to long-term management and maintenance and cannot be used for other purposes.
- Consider how to deal with shortfalls (e.g., due to a poor estimate on funding or lack of credit sales—including because of changes in Clean Water Act jurisdiction). In the case of a shortfall, the steward may have to use another source of funding, use funds from the principal, or prioritize some tasks over others.
- Determine whether easement stewardship and defense funds will be co-mingled with long-term management funds or whether these will be segregated as a separate fund.

Box B: Investment Strategy: Pooling Funds and Relying on Investment History to Set a Cap Rate
The King County Investment Pool invests cash reserves for all County agencies and approximately 100 special districts and other public entities such as fire, school, sewer and water districts and other public authorities. It is one of the largest investment pools in the State, with an average asset balance of about $4 billion. On average, County agencies comprise 40 percent of the pool and outside districts 60 percent. The Executive Finance Committee (EFC) establishes County investment policies and oversees the investment portfolio to ensure that specific investments comply with both those investment policies and State law. The Pool is only allowed to invest in certain types of highly-rated securities, including certificates of deposit, U.S. treasury obligations, federal agency obligations, municipal obligations, repurchase agreements and commercial paper. The pool has averaged approximately a five percent rate of return over the past 13 years. Excerpted from King County Mitigation Reserves Program, *In Lieu Fee Program Instrument* (2011), Appendix F.

Box C: Designed to Fail: Lessons Learned from Mitigation Banks on Unrealistic Assumed Rate of Return and Conservative Investment Requirements

All compensatory mitigation is expected to be held to equivalent standards. Like ILF mitigation sites, mitigation banks are to be managed by long-term stewards through the use of financial mechanisms, such as endowments. The state of Florida's approach to financial mechanisms for mitigation banks, which has largely been followed by the Corps' Jacksonville District, offers an instructive lesson on what not to do.

Regulations adopted by the Florida Department of Environmental Protection and water management districts (which provide authorization for mitigation banks under state law) assume that long-term endowment accounts will yield an annual six percent rate of return. Many mitigation bank instruments rely on this assumption when calculating the required principal for the endowment account. Yet the funds may be placed only in conservative investments, such as one-year U.S. Treasury bills, FDIC-insured certificates of deposits, or money-market accounts.

A conservative investment policy can result in a sustainable cash flow for long-term management—so long as there is sufficient principal. A problem arises, however, when the assumed rate of return is disconnected from the actual rate of return. For example, one-year U.S. Treasury bills have not provided a six percent rate of return since 2000. At the end of 2020, returns on such investments are less than one percent. Thus, if the cost estimates for long-term management and maintenance activities at these sites are accurate, the rules in Florida will lead to situations in which the annual interest generated will not cover annual expenses.

Sources: Florida Administrative Code, Rule 62-342.700(12)(b); *Mitigation Bank Trust Fund Agreement to Demonstrate Perpetual Management Financial Assurance*, Form No. 62-342.700(5), Perpetual Management, https://floridadep.gov/water/submerged-lands-environmental-resources-coordination/content/mitigation-bank-permitting-forms; Macrotrends, *1 Year Treasury Rate - 54 Year Historical Chart*, https://www.macrotrends.net/2492/1-year-treasury-rate-yield-chart.

Box D: Sample Language Regarding Long-Term Management Funds

Established in 1995, TNC's Virginia Aquatic Resources Trust Fund (VARTF) ILF program had 134 mitigation projects as of 2018. The National Fish and Wildlife Foundation's (NFWF) Sacramento District California ILF Program was established more recently, but NFWF has decades of experience with managing conservation funds. Below are excerpts from both program instruments of provisions related to long-term management funds. Note that each program contemplates an investment policy statement that describes how the investment strategy is correlated to the cap rate or spend rate for the annual long-term management and maintenance costs.

Excerpts from VARTF's 2019 Amended and Restated Program Instrument (p. 23–24):

<u>Funding Long-Term Management Activities</u>

The Conservancy shall establish an endowment fund or transfer sufficient funds to an existing endowment fund to finance Long-Term Management activities. The instrument or agreement establishing the endowment or transferring funds to an existing endowment shall restrict use of the funds to the activities described in the LTMP. The instrument or agreement is subject to IRT approval. For the purposes of this Instrument, this fund is called the Long-Term Management Fund. The Long-Term Management Fund is intended to be an enduring source of funding for the activities described in the approved LTMP. If the Long-Term Management Fund is to be established utilizing a funding mechanism other than an endowment, the Conservancy must submit the alternative mechanism to the IRT for approval and demonstration that the alternative mechanism would be sufficiently funded and managed to meet the needs of Long-Term Management in accordance with the justification requirements as outlined in more detail below.

For each Site or Site Phase, the Conservancy shall submit a justification for the fully funded amount of the Long-Term Management Fund, and this justification shall be attached to the LTMP. The justification shall demonstrate that earnings income generated by the Long-Term Management Fund, after accounting for inflation and any anticipated annual account maintenance fees, is reasonably expected to cover the estimated annual cost of Long-Term Management. The justification shall include an investment policy statement for the Long-Term Management Fund specifying the types of investments planned to generate earnings and the expected average annual rate of return. The justification shall include a table with line-items for all Long-Term Management tasks. Each line-item shall include task descriptions, the unit used for pricing purposes (e.g., each item, hours, linear feet, etc.), number of units required to complete a discrete occurrence of the task, cost per unit, cost per discrete task occurrence, discrete task recurrence interval, and total annual cost for each task. The table shall also account for administration expenses (10% of total annual costs) and contingency expenses (20% of total annual costs).

Based on the justification table, the Conservancy shall calculate the projected total annual cost of carrying out the LTMP. The Conservancy shall identify a reasonable capitalization rate that accounts for inflation and any account maintenance fees. The fully funded amount of the Long-Term Management Fund shall be determined by dividing the projected total annual cost by the identified capitalization rate. Both the capitalization rate and the fully funded amount are subject to Chair approval, after IRT review of the Conservancy's justification.

The Conservancy must deposit Program funds into the Long-Term Management Fund within thirty (30) calendar days of Site Budget approval, as part of each SDP approval.

Excerpts from NFWF's 2014 Sacramento District California In-Lieu Fee Enabling Instrument (p. 28–29):

Long-Term Management and Maintenance Fund

The Program Sponsor shall establish an LTMM Fund for each ILF Project for the long-term or perpetual management and maintenance of the ILF Project site, if one is required. The Program Sponsor or another entity approved by the IRT may be the holder/administrator of an LTMM Fund for an ILF Project. LTMM Funds shall be held in a Long-term Management and Maintenance Account, that, pursuant to 33 C.F.R. § 332.8(u)(3), shall be separate and independent from the Program Account, and established at an institution that is a member of the Federal Deposit Insurance Corporation or the Securities Investor Protection Corporation or any successor organization to such organizations.

In circumstances where the Program Sponsor is the holder/administrator of an LTMM Fund for an ILF Project, the Program Sponsor shall invest the funds in accordance with its then-prevailing Investment Policy Statement for the Program Accounts held by the Program Sponsor. If different from the Program Sponsor, the entity receiving funds to perform long-term land management activities shall have no right or responsibility with respect to the investment or financial management of the LTMM Fund under this Instrument or otherwise.

The Program Sponsor's Investment Policy Statement for LTMM Funds shall be generated and implemented with the objective of achieving an investment return sufficient to fund the annual stewardship activities, as adjusted annually by inflation, as well as an annual fee of 1% ("LTMM Fund Annual Fee") of the LTMM Fund's balance for the annual administration, operation, reporting, and accounting of the LTMM Fund. The Program Sponsor as holder/administrator of the LTMM Fund shall assess and collect the LTMM Fund Annual Fee either quarterly or annually, at the Program Sponsor's election, during each year in which the LTMM Fund is in existence. The Annual Fee shall be deducted from the balance of the LTMM Fund.

a. The Program Sponsor shall disburse funds from the LTMM Fund to the land manager for its performance of the Land Management Activities on the ILF Project site, upon the terms and conditions set forth in a contract or agreement between the Program Sponsor and the land manager.

b. The Program Sponsor shall have a duty of loyalty to the land manager with respect to the LTMM Fund, and shall not use or borrow against funds in the LTMM Fund for its own benefit, except for assessment and collection of the fees due to the Program Sponsor or its financial institutions, or as otherwise approved, permitted, or directed by the applicable IRT Members.

c. The Program Sponsor shall not be liable to the applicable IRT Members, the land manager, or any other entities or persons for losses arising from investment of funds in the LTMM Fund that is consistent with applicable law and this Instrument.

d. The Program Sponsor shall submit to the applicable IRT Members a financial activity report for each LTMM Fund it holds/administers by March 15 of each calendar year the LTMM Fund is in existence. In each activity report, the Program Sponsor shall report on the balance of the LTMM Fund at the beginning of the calendar year: deposits; disbursements; fees; earnings, gains, losses and other investment activity accruing to the LTMM Fund during the previous calendar year; administrative and program management expenses; and the balance of the LTMM Fund at the end of the calendar year.

Conclusion

The ultimate success of an ILF program may depend on how well it plans for long-term management and maintenance of its mitigation sites. A mitigation site requires more than just a dedicated steward for long-term management and maintenance; it also requires an appropriate site protection instrument and long-term stewardship fund to protect and conserve the site from a host of threats.

To be most effective, long-term management planning must be incorporated at the ILF program's inception. Accurately identifying long-term management and maintenance activities and estimating their costs should be a key component of full-cost accounting and setting credit prices. Similarly, it is critical that the ILF program's investment assumptions and strategies are realistic to ensure that funding will be available for the long term.

The information in this guide should help programs identify and avoid or address some of the common challenges associated with planning for and implementing long-term management and maintenance activities.[9]

[9] We would like to thank the program sponsors, mitigation professionals, and other stakeholders who spoke with us and the Stetson Law students who assisted with research for this guide.

Resources

General Background

- Environmental Law Institute & Institute for Biodiversity Law and Policy at Stetson University College of Law, *In-Lieu Fee Mitigation: Review of Program Instruments and Implementation Across the Country* (2019), https://www.eli.org/research-report/lieu-fee-mitigation-review-program-instruments-and-implementation-across-country.
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