

Instrument between the  
Southeast Alaska Land Trust and the  
U.S. Army Corps of Engineers, Alaska District  
for the  
Southeast Alaska Land Trust In-lieu Fee Program

2011

## Table of Contents

I. Introduction .....	1
A. Purpose.....	1
B. Statutory and Regulatory Authorities.....	1
C. Goals and Objectives.....	1
D. Approval and Effective Date.....	2
E. Disclaimer.....	3
II. Geographic Service Area and Compensation Planning Framework .....	3
A. Geographic Service Area .....	3
B. Compensation Planning Framework .....	4
III. Legal Responsibility to Provide Compensatory Mitigation.....	4
A. ILF Sponsor Responsibilities .....	4
B. Corps Responsibilities.....	5
IV. Establishment of Credits.....	6
A. Advance Credits.....	6
B. Schedule for Fulfillment of Advance Credit Sales.....	7
C. Methodology for Project-specific Credits .....	7
D. In Lieu Fee Calculation and Fee Schedule.....	8
V. Accounting Procedures .....	10
VI. In-Lieu Fee Program Account .....	10
VII. Reporting.....	11
VIII. Responsibilities & Financial Arrangements for Long-Term Management .....	12
IX. Amendment, Default, and Closure .....	14
X. References.....	15
XI. Points of Contact.....	15
XII. Signatures .....	16
XIII. Exhibits .....	16
A. Southeast Alaska Service Area Map with 8-digit HUCs.....	16
B. Compensation Planning Framework (SEAL Trust, 2009) Table of Contents .....	16
C. Sample In-lieu Fee Calculation.....	16
D. Sample Letter Documenting an In-lieu Fee Payment .....	16
XIV. Addendum- Concurrence by IRT Members .....	16

## **I. Introduction**

This In-Lieu Fee Program Instrument (hereinafter “Instrument”) regarding the establishment, use, operation, and maintenance of the federally approved Southeast Alaska Land Trust In-lieu Fee Program (hereinafter “ILF Program”) is an agreement made and entered into by the U.S. Army Corps of Engineers, Alaska District, Regulatory Division (hereinafter “Corps”) and the Southeast Alaska Land Trust In-lieu Fee Program Sponsor (hereinafter “ILF Sponsor”).

### **A. Purpose**

The purpose of the Instrument is to establish responsibilities and procedures for the establishment, use, operation, and maintenance of the ILF Program. The ILF Program will be used for compensatory mitigation for unavoidable impacts to waters of the United States, including wetlands, that result from activities authorized under Section 404 of the Clean Water Act, Section 10 of the Rivers and Harbors Act, and for impacts from other activities as the Corps District Engineer may authorize, provided that such activities have met all applicable requirements and are authorized by the appropriate authority.

The Instrument addresses compensatory mitigation for unavoidable direct and indirect impacts to wetlands and their buffers and to other aquatic resources and their buffers including streams and their riparian areas, lakes, ponds, and tidally-affected waters. The Instrument provides a mechanism whereby a permittee can pay an in-lieu fee to the ILF Sponsor to compensate for wetland or other aquatic resource losses in the Southeast Alaska Service Area, which is identified in Section II.A. The Instrument also describes how the ILF Sponsor uses the in-lieu fees to undertake mitigation projects that provide long-term protection of other aquatic resources to compensate for the unavoidable losses.

### **B. Statutory and Regulatory Authorities**

The establishment, use, operation, and maintenance of the ILF Program will be carried out in accordance with the following authorities:

Clean Water Act (33 USC 1251 et seq.)

Rivers and Harbors Act of 1899 Section 9 and 10 (33 USC 403)

Regulatory Programs of the Corps of Engineers, Final Rule (33 CFR Parts 320-332)

The Alaska District Regulatory Division is the lead Corps District responsible for approval of the Instrument.

### **C. Goals and Objectives**

The primary goal of the ILF Program is to provide effective compensatory mitigation for the functions and services of the waters of the U.S. lost through permitted impacts.

The objectives of the ILF Program are as follows:<sup>1</sup>

1. Identify and acquire properties to meet compensatory mitigation obligations under Corps permitting in an efficient and timely manner, in consultation with the Interagency Review Team (hereinafter “IRT”). Where appropriate, the in-lieu fees from smaller permitted projects will be consolidated to provide mitigation through larger properties with greater ecological value.
2. Work with willing landowners to acquire valuable aquatic resources where the threat of development would lead to a loss of those habitats, impair the overall ecological health of a watershed, or conflict with community land use goals.
3. Preserve valuable aquatic resources that provide important functions and services and that support the ecological health and sustainability of a watershed, through the acquisition of property (fee simple title) or property rights (conservation easements). As opportunities arise, the ILF Sponsor may also work in partnerships on the restoration, enhancement or establishment of valuable wetlands as compensatory mitigation projects.<sup>2</sup>
4. Work in an efficient and transparent manner with the IRT and utilize a mitigation project site selection process that is ecologically-based, relies on the best available information, and provides compensatory mitigation that meets the anticipated demand for credits in the Southeast Alaska service area.
5. Provide an efficient and periodic accounting of in-lieu fees, credits, and mitigation projects.
6. Provide permanent protection of valuable aquatic habitats through the ILF Sponsor’s legal, real estate instruments and stewardship of properties.

#### **D. Approval and Effective Date**

The Instrument is considered approved and effective upon the latter date of signature by the Southeast Alaska Land Trust President of the Board of Directors and the U.S. Army Corps of Engineer Alaska District Engineer (or designee). At such time when the Instrument becomes effective, the Instrument replaces and supersedes the *Agreement between the Southeast Alaska Land Trust and the Regulatory Branch, U.S. Army Corps of Engineers, Alaska District to Establish a Fee-based Compensatory Mitigation Program under Section 404 of the Clean Water Act* (September 23, 1998; hereinafter “1998 Agreement”).

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<sup>1</sup> The listed objectives are abbreviated from a full description found on pages 3-4 of the *Compensation Planning Framework for the Southeast Alaska Land Trust In-Lieu Fee Program*. Section X. References.

<sup>2</sup> The 2008 Mitigation Rule uses the term “compensatory mitigation project” to describe ILF Sponsor activities that include restoration, enhancement, establishment, and preservation of aquatic resources (33 CFR 332.3). On every permit, the Corps first seeks restoration projects in order to achieve no net loss of wetlands.

The Instrument incorporates in-lieu fees previously received by the ILF Sponsor under the 1998 Agreement. However, these older in-lieu fees did not consistently identify a compensatory mitigation requirement nor were they based on a calculation of the cost of transacting a mitigation project. Therefore, no specific “debit” can be carried forward under the Instrument. Section IV.D describes how the older in-lieu fees will be used under the Instrument.

### **E. Disclaimer**

The Instrument does not in any manner affect statutory authorities and responsibilities of the signatory parties.

## **II. Geographic Service Area and Compensation Planning Framework**

### **A. Geographic Service Area**

The service area for the ILF Program is Southeast Alaska, a coastal ecosystem of about 22 million acres located between 55° N and 60° N, extending about 500 miles from the Canadian border (south of Ketchikan) northwest to Yakutat Bay, and roughly 120 miles in width (Exhibit A). Identifying the ILF Program service area as Southeast Alaska is in keeping with its ecological integrity as a north temperate coastal rainforest, the region’s longstanding geopolitical and cultural subdivision within the state of Alaska, the regulatory district for federal and state agencies, and the organizational reach of the Southeast Alaska Land Trust.

Existing delineations define the Southeast Alaska service area’s watersheds and organize available aquatic resource data and management information, as follows:

- The U.S. Geological Service identifies four 6-digit and eleven 8-digit Hydrologic Unit Codes (HUC): 19010101 – 19010401.
- The U.S. Forest Service identifies 22 Biogeographic Provinces comprised of groups of watersheds, with further delineation of 926 “Value Comparison Units” (VCU) within the provinces. Each VCU generally encompasses a drainage basin (watershed) with one or more large stream system and includes estuaries and adjacent marine habitats associated with the terrestrial drainage system (*Tongass National Forest Land and Resource Management Plan*, 1997; 2008).
- The Nature Conservancy and Audubon Alaska further combine the Forest Service’s 22 biogeographic provinces into five sub-regional groupings based on climate, physiography, and plant distribution and provide watershed-scale information in a GIS format (*The Coastal Forests & Mountains Ecoregion in Southeastern Alaska and the Tongass National Forest*, 2007).

The ILF Sponsor, to the extent workable, will rely on these watershed delineations in mitigation project identification and will maintain records using both the 8-digit USGS HUC and the biogeographic province nomenclature. Individual mitigation projects will be proposed by the ILF

Sponsor in the service area in project-specific mitigation plans. Exhibit A provides a map of the Southeast Alaska Service Area and displays the eleven 8-digit HUCs.

## **B. Compensation Planning Framework**

The *Compensation Planning Framework for the Southeast Alaska Land Trust In-Lieu Fee Program* (hereinafter “Framework”) describes the Southeast Alaska service area, the present condition of aquatic resources, and the historic losses and potential threats to those resources (due to urbanization, local and regional transportation infrastructure, hydropower development and transmission, resource development, etc.). The Framework explains how the ILF Sponsor will use permittee-provided fees to protect aquatic resources on vulnerable land parcels to offset impacts to aquatic functions and services throughout the service area. Further, the Framework identifies the ILF Program goals and objectives, a strategy for prioritizing the selection and implementation of mitigation projects, and long-term protection and management strategies for properties held by ILF Sponsor. Finally, the Framework explains how the ILF Sponsor satisfies regulatory criteria for use of in-lieu fees for preservation activities. The Framework is included by reference in the ILF Instrument and its Table of Contents is provided in Exhibit B. The full document is available upon request at the office of the Southeast Alaska Land Trust or at its website: [www.southeastalaskalandtrust.org](http://www.southeastalaskalandtrust.org).

## **III. Legal Responsibility to Provide Compensatory Mitigation**

### **A. ILF Sponsor Responsibilities**

The ILF Sponsor assumes all legal responsibilities for satisfying the compensatory mitigation requirements for a Corps permit 1) upon receipt and acceptance by the ILF Sponsor of the appropriate payment from the permittee, and 2) once the ILF Sponsor has submitted documentation to the Corps indicating that an ILF payment has been received, the Corps permit number, and the number and resource type of credits secured by the permittee. See Section VII. and Exhibit D for more details on credit transaction documentation.

Upon request, the ILF Sponsor calculates an in-lieu fee estimate necessary to satisfy a permittee’s compensatory mitigation requirement established by a Corps permit. The ILF Sponsor will verify the mitigation requirement with the Corps prior to completing the in-lieu fee. The in-lieu fee will cover the known or anticipated costs required to meet the mitigation obligation, including real estate cost, land transaction expenses, long-term stewardship/management funding (for activities including monitoring, enforcement, legal defense and adaptive management), ILF Sponsor administrative fee, and, where applicable, site restoration costs. See Section IV.D. for more details on project-specific in-lieu fee calculations. If disagreements over an in-lieu fee calculation cannot be resolved, the ILF Sponsor will direct the permittee back to the Corps for resolution of the permittee’s compensatory mitigation obligation.

The ILF Sponsor reserves the right to decline to provide an ILF estimate when approached by a permittee. While the ILF Sponsor anticipates this would be an infrequent occurrence, there may be instances where, for example, Southeast Alaska Land Trust (hereinafter “SEAL Trust”) holds an interest in a property that could be affected by the permitted project. The ILF Sponsor may also decline to provide an ILF estimate when a permittee proposes that SEAL Trust acquire a property interest (e.g., a donated conservation easement) as a mitigation project that does not meet SEAL Trust’s project selection criteria or the land trust’s mission. If the ILF Sponsor exercises this right, it will promptly inform the Corps of its decision to decline to provide an ILF estimate, and will direct the permittee back to the Corps for alternatives that may resolve the permittee’s compensatory mitigation obligation.

The ILF Sponsor will submit to the Corps a request for approval of each proposed ILF mitigation project site in accordance with 33 CFR 332.8(j) and include a site-specific mitigation plan and credit release request.

## **B. Corps Responsibilities**

The District Engineer or his/her designee is the chair of the IRT operating in the Southeast Alaska service area under the Instrument. The Corps is responsible for establishing the IRT and managing the IRT process. The District Engineer or his/her designee will make the final decision regarding the amount and type of compensatory mitigation to be required of a permittee, and will approve the use of credits from the ILF Program to compensate for unavoidable impacts.

During the permitting process, the Corps verifies the amount and type of aquatic resources to be impacted by a proposed project and determines the amount and type of aquatic resources of compensatory mitigation to be required in a permit. When the ILF Sponsor contacts the Corps to confirm this information provided by the permittee, the Corps will verify this information, along with the Corps permit application number and project name.

When a large-scale or publicly-funded project (e.g., highway, airport and marine transportation; power production and transmission lines; or resource development project) is undergoing permitting and ILF mitigation is likely to be required, the Corps may extend an invitation to the ILF Sponsor to participate in the mitigation proceedings.

The Corps will process an ILF mitigation project site proposed by the ILF Sponsor as a modification to the Instrument under the streamlined review process in 33 CFR 332.8(g)(2). As part of this process, the Corps, in consultation with the IRT, will make a determination of the number of credits that a proposed ILF mitigation project site makes available for fulfillment of mitigation debit obligations.

## IV. Establishment of Credits

### A. Advance Credits

*Routine Projects.* As of the effective date of the Instrument, the ILF Sponsor has a pool of 150 advance credits available for ILF compensatory mitigation located in the Southeast Alaska service area.<sup>3</sup> The ILF Sponsor will use this pool of 150 advance credits for *routine projects* where the typical ILF mitigation requirement may be in the size range of < 1 acre to 10-plus acres, or functional-equivalent units. As an in-lieu fee payment is accepted, the ILF Sponsor commits a specific number of these advance credits (i.e., these advance credits are “sold” to the permittee) to meet the mitigation debt of that permit, which is recorded in the ILF ledger as “debits”. On an ongoing basis, as an ILF mitigation project site (with identified aquatic resources) is proposed by the ILF Sponsor and approved by the Corps, in consultation with the IRT, the Corps then releases a specific number of credits available from that site. These “released credits” are first used to fulfill outstanding debits accrued within a sub-region of the service area, and the Instrument provides flexibility to hold released credits within that sub-region for anticipated development project/s (with ILF mitigation requirements) instead of crediting other debits elsewhere in the entire Service Area.<sup>4</sup>

*Large Projects.* In addition, the ILF Sponsor will occasionally seek a modification of the ILF Instrument, under the streamlined review process in accordance with 33 CFR 332.8(g)(2), to obtain an additional number of advance credits for mitigation of a less-frequent, *large project* (e.g., airports, highways, power transmission lines, large-scale resource developments, etc.) that would impact aquatic resources generally in excess of 10 acres and would require a substantial ILF compensatory mitigation. Segregating large-project advance credits accommodates the potential that the NEPA review and permitting of a large project include specific mitigation plan requirements or ILF mitigation project sites. The Corps, in consultation with the IRT, will conduct a review of the Instrument modification request concurrent with a permit evaluation of the overall mitigation planning for a large project. Further, when a large project’s mitigation plan, developed during the permitting process, specifies particular ILF mitigation projects with identified wetlands acreage or functional credits and the ILF Sponsor’s modification request addresses the mitigation plan requirements at 33 CFR 332.4(c)(2)-(c)(14) for each of these mitigation projects, Corps approval of those ILF mitigation projects (and the credits to be released) will be made at the time of this modification request for advance credits for that large project. In other words, if enough assessment and mitigation information is available to gain Corps credit release approval concurrent with their permit decision, the ILF Sponsor does not need to seek additional approvals when these specific ILF mitigation projects are executed.

In summary, under this two-tiered approach, SEAL Trust will be able to accommodate the smaller-scale, *routine project* ILF mitigation requests without a single *large project* tying up all the available advance credits for the service area. Further, the occasional “pulse” of advance

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<sup>3</sup> SEAL Trust explained how it estimated the advance credit number, in accordance with 33 CFR 332.8(n)(1), in: SEAL Trust, *Proposed Advance Credits for the SEAL Trust In-Lieu Fee Program*, (January 5, 2011). Memorandum to the Interagency Review Team Members. 6 pp.

<sup>4</sup> 33 CFR 332.8(n)(2)



credits for a large project would be recorded in a separate, large-project specific ledger and would be retired as the debits are satisfied through ILF project site activity (Section V).

## **B. Schedule for Fulfillment of Advance Credit Sales**

The ILF Sponsor anticipates that it may be necessary to accumulate in-lieu fee payments from several smaller routine projects until sufficient financial resources are available to propose and execute an economically feasible ILF mitigation project that satisfies the accumulated debits from those routine projects in a manner that accrues substantial aquatic resource protection within the service area. The ILF Sponsor commits to a schedule of advance credit fulfillment by the third full growing season after the first advance credit in the service area is secured by a permittee, or will request a determination by the Corps that more time is needed 1) to execute a fee-simple property or conservation easement acquisition for preservation, or 2) to purchase land or a land interest (conservation rights) and partner with another party to complete initial physical and biological improvements in a restoration, enhancement or establishment mitigation project. If it determines that it is not in the public interest to allow additional time, the Corps may direct the ILF Sponsor to provide alternative mitigation to fulfill the obligation.<sup>5</sup>

The Corps acknowledges that temporal losses may occur until such time when a restoration/enhancement/establishment project yields functional lift or until sufficient funds from project impacts are accumulated to execute a feasible mitigation project. The Corps addresses those temporal losses during permit evaluation, with consideration for the adequacy, cost-effectiveness, and practicability of compensatory mitigation.

Upon request, the ILF Sponsor will share with the Corps confidential information on prospective ILF project sites and/or probable acquisition costs to demonstrate the need to accumulate ILF payments over a multi-year period.

## **C. Methodology for Project-specific Credits**

Each Corps permit will identify the amount and type of aquatic resources impacted by a specific development project. The Corps also identifies the project-specific ILF compensatory mitigation requirements (the amount and type of aquatic resource) in each permit.

An ILF compensatory mitigation requirement is expressed as a functional or areal unit of measure that becomes the currency a permittee purchases (as advance credits) from the ILF Sponsor (who assumes the mitigation requirement as debits). The ILF Sponsor, in turn, purchases properties or property interests for preservation or does so working in partnership with others conducting restoration, enhancement or establishment projects. These properties or property interests would include important aquatic resources that satisfy outstanding debits, which are then recycled as released credits available for purchase by future permittees.

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<sup>5</sup> 33 CFR 332.8(n)(4)

As the ILF Sponsor evaluates potential mitigation project sites, the aquatic resources will be assessed according to the available methods likely to identify Southeast Alaska-specific aquatic resources.<sup>6</sup> To the extent practicable (as region-specific methods allow), properties may be evaluated for various aquatic resource functions including such attributes as: hydrology, water quality, fish support, support for other aquatic species, support for terrestrial plants and animal habitat, and carbon sequestration.<sup>7</sup> The amount, types, and functions of aquatic resources found at a mitigation site would be assessed, and the ILF Sponsor anticipates that sites will typically contain a combination of aquatic resources.

While the ILF Sponsor will primarily seek to address the preservation of moderate or high-value aquatic resources that provide important functions in a watershed to fulfill its ILF mitigation obligation (debits)<sup>8</sup>, the ILF Instrument will also provide some credit for any lower-value aquatic resources or non-wetland riparian and upland areas also found at a proposed mitigation site that contribute to the overall functioning of the aquatic resources in a watershed.<sup>9</sup> To the extent workable and timely, the ILF Sponsor will apply a site selection process that gives priority to ILF project sites in watersheds within the same 8-digit HUC sub-region as the permitted impacts occur. On-site, in-kind, off-site, and out-of-kind aquatic resources will be considered for mitigation under the ILF Program.

The ILF Sponsor will include the details of the proposed credits determination in a mitigation plan when seeking Corps and IRT approval for each potential mitigation site.<sup>10</sup>

#### **D. In Lieu Fee Calculation and Fee Schedule**

Upon request, the ILF Sponsor will calculate an in-lieu fee for a permittee's mitigation requirement using region-specific, periodically-updated costs and national standards for preservation land practices. An in-lieu fee estimate includes four cost components:

- 1) *real estate (per-acre) cost* to purchase fee simple title or a conservation easement for a property, based on Southeast Alaska real estate markets and land sales;

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<sup>6</sup> 33 CFR 332.8(o) requires a functional assessment only where practicable and allows other suitable metrics for credits and debits.

<sup>7</sup> CH2MHill, *Evaluation of Wetland Assessment Methods and Credit-Debit Systems for In-Lieu Fee Mitigation of Coastal Aquatic Resources in Southeast Alaska*, October 2010. 74 pp.

<sup>8</sup> 33 CFR 332.3(h).

<sup>9</sup> 33 CFR 332.3(c).

<sup>10</sup> The Instrument acknowledges that, over time, a credit-debit framework (with a universal unit and conversion factors) may be developed and used by the ILF Sponsor, Corps, and IRT in Southeast Alaska. The framework could provide for an accounting between: 1) the credits attributable to a composite of aquatic resources found at a potential mitigation project site, and 2) the outstanding debits (from permitted impacts) to be satisfied. It is anticipated that the Instrument may be modified in the future to incorporate these methods.

- 2) *transaction costs* to execute a purchase that cover the costs of staff work on the project site, a site visit, survey, market appraisal, environmental review, baseline report (documenting the site's condition, conservation/aquatic resource values, and intended uses), legal cost, and real estate closing fees;
- 3) *a stewardship endowment fund fee* that is invested conservatively to generate sufficient income to cover annual monitoring and management costs and to also address any violations and/or infrequent legal defense cost in perpetuity; and
- 4) *an administrative fee* to cover SEAL Trust's costs of long-term recordkeeping, ILF program management, accounting of the ILF Funds, and annual reporting obligations to the Corps.

When calculating an in-lieu fee for a smaller permitted project, the ILF Sponsor anticipates that the real estate, land transaction, and stewardship costs that would be incurred when SEAL Trust purchases a larger property could be prorated. Exhibit C provides an ILF calculation example that identifies the actual cost components, range of current probable costs, and underlying assumptions. The cost components will be revised as real estate markets and professional services change, and national interest rates and inflation rates records are updated annually.

The Corps and ILF Sponsor recognize that an ILF calculation provided to a permittee is a good-faith estimate of the costs that the ILF Sponsor will incur to execute one or more mitigation projects that fulfill that permittee's mitigation requirement assumed by the ILF Sponsor as a mitigation "debt". It is understood that once a permittee makes an in-lieu fee payment and the ILF Sponsor notifies the Corps of that ILF credits transaction, the permittee has met their mitigation requirement and the ILF Sponsor has full control and responsibility for the in-lieu fee. In the event that a portion of a specific in-lieu fee remains after the specific mitigation debt is fully satisfied by the ILF Sponsor, the remaining funds will remain in the ILF Program Account for use on other ILF mitigation projects. Over time, it is anticipated that the in-lieu fee payments, collectively, will be sufficient to fulfill the compensatory mitigation debt, collectively, that the ILF Sponsor has assumed.

The ILF Sponsor handles real estate costs, market appraisals, and actual in-lieu fee estimates provided to permittees and ILF payments from permittees as confidential information. Under standard land trust practices, SEAL Trust's purchase and sales agreements with landowners hold the transaction and appraisals confidential as well. Section VII. Reporting identifies the annual reporting of program details required, and upon request the ILF Sponsor will make the above-mentioned confidential data available for inspection and audit by the Corps.<sup>11</sup>

The Corps and the ILF Sponsor will treat pre-2009 in-lieu fee payments received by the ILF Sponsor (i.e., payments prior to the Juneau Large Airport Project ("JALP") in-lieu fee payments) as monies to be used by the ILF Sponsor to assist in the execution of mitigation projects and the ILF Program under the Instrument. The ILF Sponsor and the Corps acknowledge that the pre-JALP in-lieu fee payments did not consistently correlate the amount of a fee paid to the actual

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<sup>11</sup> 33 CFR 332.8(i)

amount of impacted acres, mitigation ratios, or probable real estate, land transaction, and stewardship costs to execute an ILF mitigation project that fulfills the mitigation debt. The ILF Sponsor will commit these earlier fees to compensatory mitigation throughout the service area as opportunities arise, and the Corps agrees that the pre-JALP ILF mitigation obligations are fulfilled once these older in-lieu fees are spent.

## V. Accounting Procedures

The ILF Sponsor will establish and maintain a system for tracking the production of credits, credit transactions, and financial transactions between the ILF Sponsor and permittees, as follows:

- **Credits Ledgers** will account for the credit transactions. The ledgers will track credits sold to permittees (that become ILF Sponsor “debits”) as well as the credits that are fulfilled (and released) when ILF mitigation projects are completed. As described in Section IV.A, the ILF Sponsor will maintain a *routine projects ledger* that tracks credit transactions for projects with smaller-scale wetlands impacts throughout the service area. The running balance of advance credits available for the entire ILF Program will be calculated as routine project credits transactions occur. Individual *large project ledgers* will also be maintained, as needed, for the less frequent, larger-scale project with separate accounting of credit transactions as the credits are sold and subsequently fulfilled when mitigation projects are executed. The production of credits from each ILF mitigation project (i.e., released credits) will also be tracked.<sup>12</sup>
- The **ILF Financials** (i.e., the ILF payments accepted and the ILF funds expended from the ILF Program Account) will be tracked according to standard accounting practices. and reported annually. See Sections VI and VII.

## VI. In-Lieu Fee Program Account

Under the ILF Instrument, the ILF Sponsor will continue to maintain an ILF Program Account with a financial institution that is a member of the Federal Deposit Insurance Corporation (FDIC). The ILF Program Account is professionally managed, funds are held in FDIC-insured sub-accounts and certificates of deposit, and interest earned is regularly deposited into the account. The ILF payments received will be deposited in the ILF Program Account, with six (6) % directed to the ILF Sponsor’s unrestricted funds account and used for reasonable overhead and the administrative costs to operate and manage the ILF Program.

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<sup>12</sup> 33 CFR 332.8(p)(2).

The ILF Program Account is used for the selection, design, acquisition, implementation, monitoring, long-term stewardship or management, and permanent protection of ILF mitigation projects. The ILF Sponsor will track staff time and other routine expenses to specific ILF Program activities as they evaluate, select, acquire and establish long-term stewardship or management of preservation properties. The ILF Sponsor will maintain a dedicated *ILF Stewardship Fund* where the stewardship and management endowment fees for all ILF mitigation properties protected by SEAL Trust are deposited, conservatively invested, and used to cover expenses for stewardship and management (including monitoring, enforcement, litigation, and property maintenance) in perpetuity.

The Corps has the authority to audit the ILF Program Account at any time.

As a companion to the ledgers described in Section V, the ILF Sponsor will provide an annual report on the ILF Program Account to the Corps and IRT. See Section VII.

## VII. Reporting

The ILF Sponsor must report to the Corps the following information:

1. A **Monitoring Report** for any restoration ILF project that has been undertaken, in accordance with the schedule defined in a project-specific mitigation plan.
2. A **Credit Transaction Notification** where the ILF Sponsor reports to the Corps that it has accepted an ILF payment, the permit number, and the number and resource type of compensatory mitigation credits that were secured by the permittee. Exhibit D provides a sample letter from the ILF Sponsor to the Corps.
3. An **Annual Program Report** that includes the following information:
  - A. ILF Program Account (financial) Report of:
    1. all income received, the sum of all disbursements, and interest earned by the account;
    2. a year-end balance in the ILF Program Account;
    3. a description of the ILF Program expenditures from the account; and
    4. a list of permits for which ILF payments were accepted, including:
      - Corps permit number
      - Service area
      - Amount of authorized impacts by resource type/s and number/s

- Amount of required compensatory mitigation by resource type/s and number/s
- Total ILF payment amount
- Date ILF payment was received from the permittee.

B. Credit Ledger Report of:

1. the balance of advance credits and released credits at the end of the report period, including individual large-project subaccounts, as appropriate;
2. the permitted impacts for each resource type;
3. all additions and subtractions of credits during the report period. This includes a record of each ILF mitigation project and its production of released credits; and
4. other changes in credit availability (e.g., credit sales suspended; large project advance credits).

C. Other Information as required by the Corps.

4. The ***Financial Assurances and Long-Term Management Funding Report*** that documents the following:
  1. beginning and ending balances of the *ILF Stewardship Fund*;
  2. deposits into and any withdrawals from the *ILF Stewardship Fund*; and
  3. information on the amount, status, and expiration of required financial assurances, in cases where an ILF restoration project has been undertaken and is not yet completed.

The reports will be submitted via electronic format to the Corps no later than 90 days following the end of each calendar year.

## **VIII. Responsibilities & Financial Arrangements for Long-Term Management**

The ILF Sponsor will provide long-term protection of mitigation sites by holding conservation easements or through fee simple land ownership. In both instances, a stewardship fee is calculated and ILF funds are transferred to a dedicated ILF Stewardship (endowment) Fund that

is invested to generate sufficient financial resources to conduct long-term stewardship of the mitigation site.

A conservation easement clearly identifies the natural resource values being protected on a property, the prohibited uses, the allowable uses only to the extent they do not impair the underlying conservation purposes, and the provisions for ILF Sponsor approval of allowable uses and for enforcement by the ILF Sponsor. The ILF Sponsor and landowner have agreed that the long-term management of the land will be in accordance with the terms of the conservation easement. The ILF Sponsor has the responsibility to enforce the easement and take legal action, if necessary. A conservation easement under the ILF Program provides long-term protection through: 1) the extinguishment of development rights on a mitigation site, and 2) the long-term management actions of the ILF Sponsor (monitoring, enforcement, legal defense, and funding) which are described in a property's mitigation plan prepared for the Corps and IRT. Also, a conservation easement is recorded and legally stays in effect with the land in perpetuity as the property passes through successive landowners.

Under fee simple land acquisition, the ILF Sponsor has all the rights and responsibilities of ownership to a mitigation project site. The ILF Sponsor describes the long-term management in the mitigation plan prepared for a fee-simple mitigation project site. The management includes a description of regular monitoring with follow-up actions as needed (e.g., maintenance, enforcement, or cooperation with neighboring landowners), the responsible party, and the funding mechanism to support management efforts in perpetuity.

The ILF Sponsor may transfer fee-simple title and all the long-term, legal responsibilities for an ILF mitigation project site to a land stewardship entity, such as a public agency, another non-governmental organization, or a private land manager. However, the ILF Sponsor must provide 60-day advance notice to the Corps of a proposed transfer, and the transfer must be approved, in advance, by the Corps. The transfer of fee-simple property ownership is legally formalized through a Warranty Deed that is recorded at the nearest State of Alaska Recording District. If the transfer is to a public agency, that agency assumes responsibility for providing alternative compensatory mitigation acceptable to the Corps if the original mitigation site experiences any loss in functions due to the agency's authorization of incompatible uses.<sup>13</sup> If all the long-term responsibilities for a specific property are transferred, the ILF Sponsor shall also transfer the long-term stewardship or management endowment fee received for the project or otherwise arrange for a disbursement from the ILF Stewardship Fund to the receiving land entity. On the other hand, if the deed for a property is transferred to another entity but the ILF Sponsor retains legal conservation interests in the property, the ILF Sponsor will retain the funds to fulfill its long-term stewardship responsibilities.

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<sup>13</sup> 33 CFR 332.7(a)(4).

## **IX. Amendment, Default, and Closure<sup>14</sup>**

Both parties can seek to amend the terms of the Instrument. To the extent appropriate, amendments to the Instrument will be processed under the streamlined review process in accordance with 33 CFR 332.8(g).

If the Corps determines that the ILF Sponsor has failed to provide compensatory mitigation in a timely manner (i.e., ILF Sponsor has failed to meet milestones of project-specific mitigation plans, establish and maintain a credit ledger and individual ledgers for ILF projects, and submit annual reports required in Section VII in a timely manner), the Corps will take appropriate action to achieve compliance with the terms of the Instrument or all approved mitigation project plans. The Corps may consider the ILF Sponsor in default of a specific ILF project mitigation plan or of the overall ILF Program operation. The Corps will take any action, including but not limited to suspending credit sales, adaptive management, decreasing available credits, directing the ILF Sponsor to use ILF program funds to provide alternative compensatory mitigation, utilizing financial assurances, using ILF Program Account funds to secure credits from another source of third-party mitigation, and suspending or terminating the Instrument.<sup>15</sup>

Any delay or failure of SEAL Trust to comply with the terms of this Instrument shall not constitute a default hereunder if and to the extent that such delay or failure is primarily caused by any act, event or conditions beyond SEAL Trust's reasonable control and significantly adversely affects its ability to perform its obligations hereunder, including: 1) acts of God, earthquake, fire, landslide, flooding, or interference by third parties; 2) condemnation or other taking by any governmental body; 3) change in applicable law, regulation, rule, ordinance or permit condition, or the interpretation or enforcement thereof; 4) any order, judgment, action or determination of any federal, state or local court, administrative agency or government body; or 5) the suspension or interruption of any permit, license, consent, authorization or approval. If the performance of the ILF Sponsor is affected by such event, SEAL Trust shall give written notice thereof to the Corps and IRT as soon as is reasonably practicable.

Upon 60 days written notice, the Corps or ILF Sponsor may request closure of the ILF Program. In the event that the ILF Program operated by SEAL Trust is terminated, SEAL Trust is responsible for fulfilling any remaining ILF project obligations, outstanding credits obligations, relevant reporting, and long-term management requirements. The ILF Sponsor shall remain responsible for fulfilling these responsibilities until such time as any long-term financing obligations have been met and the long-term ownership of all mitigation lands has been transferred to a land stewardship entity approved by the Corps. Funds remaining in the Sponsor's ILF mitigation accounts after ILF program obligations are satisfied shall be transferred to a land stewardship entity approved by the Corps and used for restoration, enhancement, and

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<sup>14</sup> The proposed text in this section comes largely from sample language in the Environmental Law Institute, *In-lieu Fee Mitigation: Model Instrument Language and Resources*, 2009. Pages 25-27.

<sup>15</sup> 33 CFR 332.8(o)(10).



preservation of aquatic resources. The Corps itself cannot accept directly, retain, or draw upon those funds in the event of default or closure.

## **X. References**

CH2MHill, *Evaluation of Wetland Assessment Methods and Credit-Debit Systems for In-Lieu Fee Mitigation of Coastal Aquatic Resources in Southeast Alaska*, October 2010, Prepared for Southeast Alaska Land Trust. 74 pp.

Environmental Law Institute, *In-Lieu Fee Mitigation: Model Instrument Language and Resources*, December 2009. 99 pp.

Southeast Alaska Land Trust, *Compensation Planning Framework for the Southeast Alaska Land Trust In-Lieu Fee Program*, December 2009. 56 pp. Available at: [www.southeastalaskalandtrust.org](http://www.southeastalaskalandtrust.org)

Southeast Alaska Land Trust, *In-Lieu Fee Program Account*, December 2010. 5 pp. Available at: [www.southeastalaskalandtrust.org](http://www.southeastalaskalandtrust.org)

Southeast Alaska Land Trust, *Proposed Advance Credits for the SEAL Trust In-Lieu Fee Program*, January 5, 2011. Memorandum to the Interagency Review Team Members. 6 pp.

## **XI. Points of Contact**

The points of contact for all communications between the parties shall be:


Mr. Randy Vigil  
U.S. Army Corps of Engineers, Juneau Regulatory Field Office  
8800 Glacier Highway, Suite 106  
Juneau, Alaska 99801-8079  
(907) 790-4490

Ms. Diane Mayer  
Executive Director  
Southeast Alaska Land Trust  
119 Seward Street, Suite #2  
Juneau, Alaska 99801  
(907) 586-3100

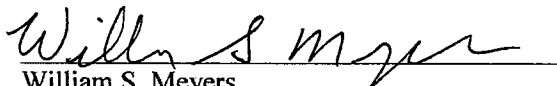
## XII. Signatures

This Instrument shall become effective at the date that it is signed by both parties, whichever comes later.

Signatures:

  
\_\_\_\_\_  
Jon Tillinghast, President  
Board of Directors  
Southeast Alaska Land Trust  
In-Lieu Fee Program Sponsor

9/29/11  
Date

  
\_\_\_\_\_  
William S. Meyers  
Chief South Branch, Regulatory Division  
Alaska District, U.S. Army Corps of Engineers

17 Oct 11  
Date

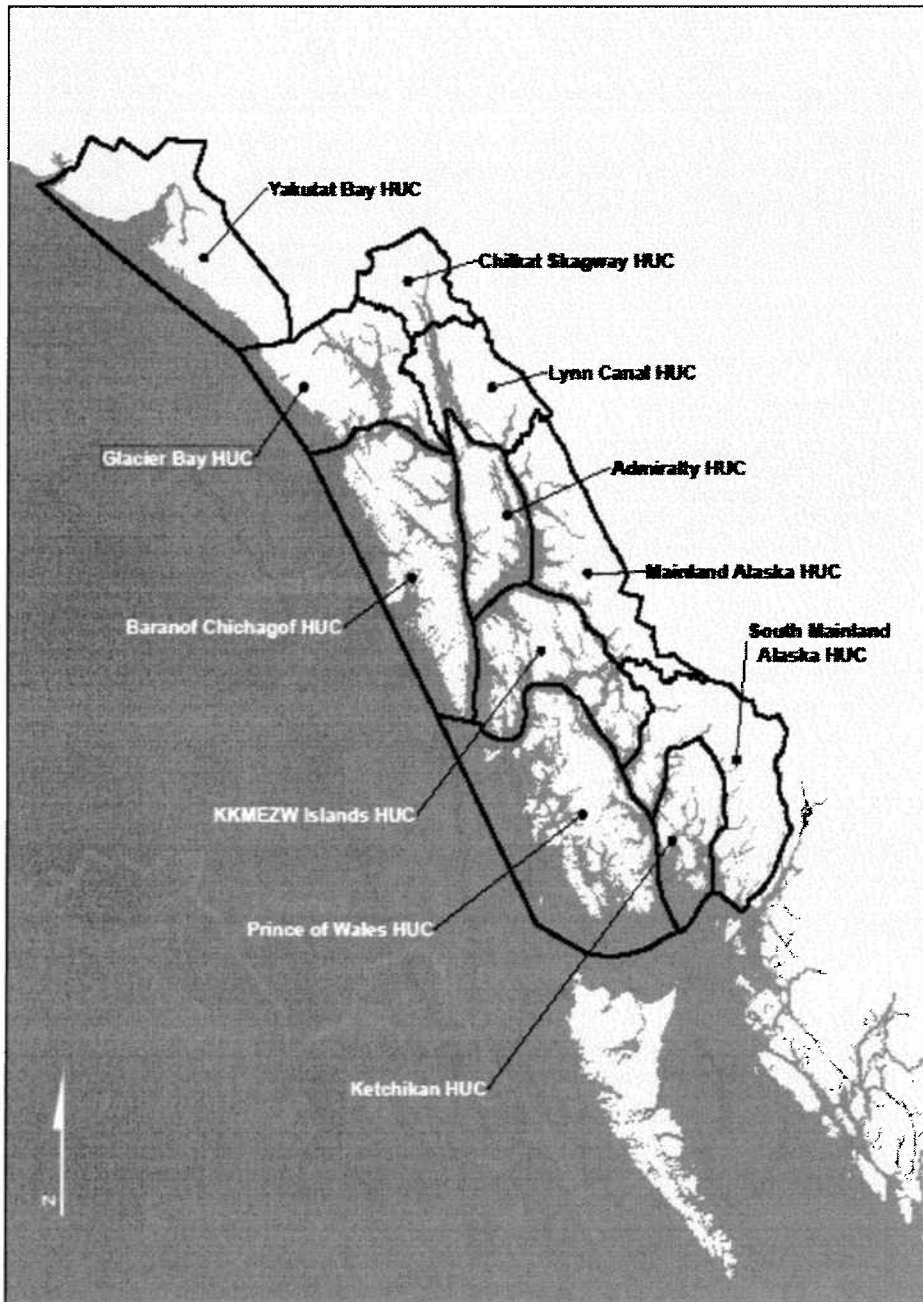
## XIII. Exhibits

- A. Southeast Alaska Service Area Map with 8-digit HUCs
- B. Compensation Planning Framework (SEAL Trust, 2009) Table of Contents
- C. Sample In-lieu Fee Calculation
- D. Sample Letter Documenting an In-lieu Fee Payment

## XIV. Addendum- Concurrence by IRT Members

## Southeast Alaska ILF Service Area

With 8-Digit HUCs



**Exhibit B.**  
**Compensation Planning Framework (SEAL Trust, 2009)**

**Table of Contents**

I. Executive Summary	3
II. Introduction	5
III. Service Area	6
IV. Aquatic Resources of Southeast Alaska	10
<i>Southeast Alaska Land Cover</i> .....	10
<i>Freshwater Wetland Types, Functions and Services</i> .....	11
<i>Coastal Marine Habitats</i> .....	12
V. Historic Aquatic Resource Loss	13
<i>Urbanization</i> .....	15
<i>Timber Harvest, Associated Roads, and Log Transfer, Storage and Processing Facilities</i>	16
<i>Transportation</i> .....	17
<i>Other Coastal Development</i> .....	17
VI. Potential Future Threats to Aquatic Resources	19
<i>Larger-Scale Projects</i> .....	20
Urbanization.....	20
Transportation .....	21
Energy/Utility Projects.....	24
Timber Harvest & Forest Restoration.....	26
<i>Smaller-Scale or Remote Projects</i> .....	26
VII. Aquatic Resource Goals and Objectives	27
VIII. Strategy for Selecting and Implementing Mitigation Projects	32
<i>Aquatic Resource Type and Scarcity</i> .....	32
<i>Project Site Location and Timing</i> .....	33
<i>Project addresses Regulatory Requirements</i> .....	34
<i>SEAL Trust Mission and National Land Trust Standards and Practices</i> .....	35
<i>Process for Project Selection and Implementation</i> .....	36
IX. Preservation Objectives	37
X. Stakeholder Involvement and Coordination	38
XI. Long-term Protection and Management Strategies	39
XII. Periodic Evaluation and Reporting	40
Appendix A: Definitions of Waters of the United States (33 CFR 328)	44
Appendix B: ShoreZone Mapping of Coastal Marine Habitat in Southeast Alaska -----	46
Appendix C: Southeast Alaska Region and Communities -----	48
Appendix D: Existing Hydropower Facilities, Potential Hydro Sites, and Transmission Lines in Southeast Alaska -----	49
Appendix E. Conservation Priority Watersheds in the Biogeographic Provinces of Southeast Alaska	51
Appendix F. Public Outreach -----	56

**Exhibit C**  
**Sample In-lieu Fee Calculation**

**Project Requiring ILF Mitigation:**  
**Applicant/Permittee:**

**U.S. Army Corps of Engineer Permit #: POA**

Example	Acres	Land Cost \$/Acre	Land Cost Subtotal	SEAL Trust Site Visit	Appraisal	Staff Time	Legal	Survey	Phase 1 Environmental	Base-line	Real Estate Closing (cost varies)	Trans-action Costs Subtotal	Stewardship or Management Endowment	ILF Project Cost Subtotal	SEAL Trust Admin. Fee	In-Lieu Fee Cost TOTAL	Est. Cost per Acre
Base Costs for an Average 30-acre ILF Project Site in Southeast Alaska	30	approx. \$6,000 to 30,000	approx. \$180,000 to 900,000	\$0 (JNU) to \$1,200+ (remote)	approx. \$5,000 to \$7,200 (+ transportation)	\$5,000	\$3,000	approx \$5,000 (+ trans-port.)	\$3,500 (+ trans-port.)	\$3,000	For this ex. \$1,150 to \$3,760	approx \$25,000 to 30,000	approx. \$30,000 to 80,000	Sum of Land, Trans-action & Steward-ship Costs	6% of ILF Project Cost Subtotal	ILF Proj. Cost Subtotal + Admin. Fee	
<b>Prorated ILF Example Only:</b> ILF for 2 acres of wetland impact at 2:1 mitigation ratio	4	\$18,000	\$72,000	\$500	\$867	\$667	\$400	\$667	\$533	\$400	\$338	\$4,371	\$7,333	\$83,704	\$5,022	\$88,726	\$22,182

**Notes:**

1. Land values vary dramatically based on location, access, utilities etc. The estimated per-acre range of \$6,000 to \$30,000 includes remote parcels and urban land across SE Alaska, and is based on consultation with realtors, regional listings, native allotments, public agency land sales, and SEAL Trust land transaction experience.

2. The base transaction cost and base stewardship cost are calculated for an average 30-acre project site. These costs are then pro-rated by acreage in the subsequent ILF estimate of 2 acres of impacted wetlands at a 2:1 mitigation ratio.
3. The Stewardship & Management Endowment Fee is based on national standards and calculated for a project in SE Alaska. The endowment sets aside funds and assumes a 3.45% real return (1988-2010 average inflation & US Treasury rates) to generate approximately \$1,200-\$3,000 for annual monitoring, and management of violations, reserved rights, and litigation of a conservation land in perpetuity. The fee varies due to property location & costs to visit annually, and SEAL Trust updates the U.S. inflation and Treasury rates annually.
4. SEAL Trust administrative fee covers recordkeeping, Corps reporting, accounting of ILF Funds, and ILF program management and administration.

**Prepared by Southeast Alaska Land Trust. 119 Seward St., Suite 2, Juneau, Alaska 99801. (907)586-3100.  
setrust@ptialaska.net.**

**Date:**

**Exhibit D**

**Sample Letter Documenting an In-lieu Fee Payment and Credit Transaction**

Date: \_\_\_\_\_

Field Supervisor  
U.S. Army Corps of Engineers  
8800 Glacier Highway, Suite 106  
Juneau, AK. 99801

Subject: In-lieu Fee and Credits Notification

The Southeast Alaska Land Trust has received an ILF compensatory mitigation payment for the unavoidable impacts to aquatic resources as follows:

Permit Number: POA # \_\_\_\_\_

Project Name: \_\_\_\_\_

Permittee: \_\_\_\_\_

Date Payment Received: \_\_\_\_\_

Credits Secured by the Permittee:

Resource type: \_\_\_\_\_

Number (Units): \_\_\_\_\_

Resource type: \_\_\_\_\_

Number (Units): \_\_\_\_\_

Please contact me if you have any questions regarding this transaction.

Sincerely,

Diane Mayer  
Executive Director

cc: Permittee

## ADDENDUM XIV

Concurrence of Interagency Review Team Members