

# REGULATORY GUIDANCE LETTER (RGL) 19-01

*Mitigation Bank Credit Release Schedules and Equivalency in Mitigation Bank and In-Lieu Fee Program Service Areas*

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*“The views, opinions and findings contained in this report are those of the authors(s) and should not be construed as an official Department of the Army position, policy or decision, unless so designated by other official documentation.”*



**US Army Corps of Engineers**



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# Summary of RGL 19-01

## Three-Phase Credit Release Schedule:

- Initial Credit Release, Single Post-Construction Credit Release, & Final Performance-Based Credit Release
- “As long as sufficient financial assurances are in place to provide a high degree of confidence that the ecological performance standards will be achieved.”
- “If the district engineer does not have a high degree of confidence... then he or she should require... incremental credit releases that occur as the bank site achieves performance-based milestones.”
- “An in-lieu fee program sponsor could qualify for a similar credit release schedule... as long as he or she is willing to post similar financial assurances for that ILF project.”



## Summary of RGL 19-01

### Service Areas:

- “Each Corps district should ensure that... service areas for mitigation banks and in-lieu fee programs are established using the same criteria.”
- “Mitigation banks and ILF programs should have similar service areas.”



## APPLICABILITY OF RGL 19-01

- Applies to mitigation banks and in-lieu fee programs that have not yet been approved by district engineers.
- For approved mitigation banks and in-lieu fee programs, sponsors may request instrument modifications.
  - Streamlined modification process (§332.8(g)(2)) for changes in credit release schedules.
  - Full instrument modification for changes in service areas (§332.8(d)).



# TRADITIONAL CREDIT RELEASE SCHEDULE (§332.8)

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## Initial Credit Release

- Approval of MBI or Mitigation Plan
- Site Protection Secured
- Financial Assurances Funded
- Any Other District Engineer Requirements

## Interim Credit Release(s)

- Achievement of Performance-Based Milestones
- No minimum number of interim credit releases specified.

## Final Credit Release

- Achievement of Ecological Performance Standards
- Reservation of “Significant Share” of Credits (15-20%)



# PREMISE OF CREDIT RELEASE SCHEDULE IN RGL 19-01 <sup>6</sup>

The number of interim credit releases can be reduced if financial assurances are in place to provide incentive to achieve ecological performance standards.

Financial assurances act as a risk management tool.



# CREDIT RELEASE SCHEDULE PER RGL 19-01

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## Initial Credit Release

- Approval of MBI or Mitigation Plan
- Site Protection Secured
- Financial Assurances Funded that take the place of additional post-construction interim credit releases to incentivize achievement of ecological performance standards for final credit release.
- Any Other District Engineer Requirements

## Post-Construction Interim Credit Release

- Construction Complete
- Submittal of As-Builts and First Monitoring Report
- Consultation with Interagency Review Team (IRT)

## Final Credit Release

- Reservation of “Significant Share” of Credits (~25%)
- Achievement of Ecological Performance Standards
- Financial Assurances Released to Sponsor



## FINANCIAL ASSURANCES

*Financial Assurances* are financial resources that can be used to complete the mitigation bank or ILF project if the sponsor is unwilling or unable to take the actions necessary to achieve the objectives of the project.

Acceptable forms of financial assurances include performance bonds, escrow accounts, casualty insurance, or letters of credit. The Nashville District has template documents for letters of credit and escrow accounts on our website.

The financial assurances must cover costs of the project throughout all seven years of monitoring for replacement mitigation, including costs for land acquisition, planning and engineering, legal fees, mobilization, construction, and monitoring. [see §332.3(n)(2)]





## FINANCIAL ASSURANCES

Financial assurances must provide sufficient confidence that the mitigation bank or ILF project will be successfully constructed and achieve its ecological performance standards.

The District Engineer has discretion to approve an alternative mechanism to ensure a high level of confidence that the mitigation bank, ILF project, or permittee-responsible mitigation project will be successfully completed and achieve its objectives.



## DISTRICT ENGINEER'S DISCRETION

- The District Engineer (DE) retains discretion, after consulting with the Interagency Review Team (IRT), to determine credit release schedule for a particular mitigation bank or ILF project.
- An ILF program sponsor could qualify for a similar credit release schedule for an in-lieu fee project, as long as he or she is willing to post similar financial assurances.
- If DE does not have high degree of confidence that the sponsor will keep financial assurances in place until ecological performance standards are achieved, then he or she can require additional interim credit releases.



# DISTRICT ENGINEER CONSIDERATIONS

## Risk Assessment:

- Past experience with Sponsor
- Method of Compensatory Mitigation (e.g., restoration, creation)
- Likelihood of Mitigation Success
- Complexity of Proposal

## Financial Assurances:

- Will sponsor renew financial assurances when necessary until ecological performance standards are achieved?
- Does sponsor want financial assurances returned in increments before ecological performance standards are achieved?



## SERVICE AREAS FOR MITIGATION BANKS AND IN-LIEU FEE PROGRAMS

*Service Area* means the geographic area within which impacts can be mitigated at a specific mitigation bank or an in-lieu fee program, as designated in its instrument. [§332.2]

“The service area must be appropriately sized to ensure that the aquatic resources provided will effectively compensate for adverse environmental impacts across the entire service area.” [§332.8(d)(6)(ii)(A)]



# SERVICE AREAS FOR MITIGATION BANKS AND IN-LIEU FEE PROGRAMS

- Service areas for mitigation banks and ILF programs operating in the same Corps district and providing mitigation credits for similar aquatic resource categories should be based on the same geographic criteria (e.g., watershed, ecoregions, physiographic provinces).
- Because mitigation banks and ILF programs differ primarily in the timing of implementation of compensatory mitigation projects, there is no ecological basis for approving different service areas for mitigation banks and in-lieu fee programs that provide credits for similar aquatic resource types and use similar site selection criteria



## Service Area Proposals in Nashville District

The Corps will evaluate service area proposals on a case-by-case basis, and retains the discretion to adopt approaches that differ from this guidance as appropriate and consistent with regulatory requirements.

Since this guidance does not apply to mitigation banks and ILF programs that have already been approved, we cannot reduce service areas of ILF programs already authorized.

ILF programs are required to follow a step-wise approach to identify and site projects within the 8-digit HUC of impact sites, similar to bank primary service areas. The Nashville District will follow this guidance in developing service areas for new ILF programs.

The Nashville District will reevaluate service areas of approved ILF programs when an ILF sponsor proposes to modify their program instrument.



## NASHVILLE DISTRICT SERVICE AREA GENERAL FRAMEWORK

The general service area framework consists of the establishment of a primary service area within the 8-Digit HUC where the mitigation bank is located, and secondary service area(s) in adjacent 8-Digit HUCs within the same or similar ecoregion as the primary service area.

The secondary service area must be adjacent to the primary service area, within the same Major River Drainage, and must be located within a Level III Ecoregion with similar aquatic resource types as the mitigation site.



## KEY POINTS

- 33 CFR Part 332 provides flexibility for determining credit release schedules for mitigation banks and ILF projects.
- District engineer reserves discretion to determine whether a particular mitigation bank sponsor is eligible for a three-phase credit release schedule, or if the sponsor should follow the traditional credit release schedule.
- Consistent with Part 332, there should be equivalence in service areas for mitigation banks and ILF programs that provide compensatory mitigation for similar resource types within a district.
- This RGL does not change requirements for:
  - Conducting monitoring and submitting monitoring reports
  - Evaluating ecological performance standards
  - Remediation or adaptive management if necessary

