

# **An Agreement Between The Nature Conservancy and the U.S. Army Corps of Engineers, Fort Worth District, to Establish an In-Lieu Fee Program in the Fort Worth District**

This agreement between the Fort Worth District, U.S. Army Corps of Engineers (USACE) and The Nature Conservancy (Conservancy) implements general procedures for establishing an in-lieu fee trust fund program in the Fort Worth District, as described below. The U.S. Environmental Protection Agency (EPA), U.S. Fish and Wildlife Service (FWS), Texas Parks and Wildlife Department (TPWD), Texas Natural Resource Conservation Commission (TNRCC), Railroad Commission of Texas (RCT), and Texas General Land Office (GLO) have also been involved in the development of these general procedures. The USACE and the Conservancy hereby agree to the procedures set forth below.

## **1. Purpose and Goals:**

The purpose of this agreement is to facilitate the establishment of regional trust funds to finance activities that will compensate for adverse impacts to wetlands and other waters of the United States in the Fort Worth District resulting from activities authorized under Section 404 of the Clean Water Act (CWA) and Section 10 of the Rivers and Harbors Act of 1899. The goals of the trust fund program are to:

- a. provide Department of the Army permit applicants greater flexibility in compensating for adverse impacts to the aquatic ecosystem, especially when those impacts would be relatively minor;
- b. substantially increase the extent and quality of restoration, enhancement, and protection of aquatic resources over that typically achieved by other forms of compensatory mitigation for activities that have relatively minor adverse impact to the aquatic ecosystem; and
- c. reduce the extent of cumulative adverse impacts to the aquatic ecosystem.

## **2. General Procedures for Developing the Trust Funds:**

The Conservancy, in coordination with the USACE, shall establish regional trust funds by dividing the Fort Worth District into geographic regions. The Conservancy shall use USGS hydrologic units, general vegetation and soil types, amount of ongoing Section 404 and Section 10 permitting activity, availability of mitigation banks and other third-party mitigation projects, need for a trust fund, and other appropriate factors to establish the regions. These regions shall be large enough to generate funds sufficient to conduct meaningful mitigation activities yet small enough to provide compensatory mitigation as close to adversely impacted areas as practicable.

The Conservancy shall then prioritize the geographic regions for developing regional trust funds and implementing mitigation projects. Priority shall be based on such regional factors as Section 404 permitting activity, relative threat to the environment posed by authorized activities, and availability of mitigation banks and other third-party mitigation projects in the region. Generally, regions that include the Dallas/Fort Worth, Austin, Tyler/Longview/Marshall, and San Antonio areas, as well as regions that contain aquatic ecosystems of special value or a large amount of ground disturbing activity, will have the highest priority.

The USACE and Conservancy encourage the resource agencies involved in the development of these procedures to continue their participation during the implementation of this trust fund program. Their involvement in such aspects of the program as determining and prioritizing geographic regions and evaluating mitigation project proposals, including initial site visits and assessing the feasibility and ecological benefit of specific proposed projects, will enhance the effectiveness of the program.

In developing a trust fund program for a particular region, the Conservancy shall identify the type of aquatic systems typically being impacted, the extent of those impacts, and suitable mitigation areas and activities. The Conservancy shall conduct sufficient research to establish average per-acre costs for restoring, enhancing, and preserving each basic aquatic ecosystem resource type (forested wetland, non-forested wetland, stream, and pond) in that region. The per-acre cost will include reasonable costs associated with mitigation project planning, design and construction; selection and acquisition of land or easements; and long-term monitoring, operation, and maintenance. The USACE will develop, and revise as appropriate, mitigation ratios for each region based on the potential type and extent of adverse impact to the aquatic ecosystem authorized by USACE permits and the type and extent of aquatic resource gain associated with in-lieu fee-funded mitigation projects.

The Conservancy shall endeavor to identify specific mitigation projects for restoring, enhancing, and/or preserving aquatic ecosystems as soon as practicable after a geographic region has been established. The Conservancy shall then develop and submit to the USACE a proposal for implementing the mitigation project. In developing a proposal, the Conservancy shall give primary consideration to providing compensation commensurate with the type(s) and extent of adverse aquatic resources impacts for which in-lieu fees have been or will be paid. The USACE will evaluate proposals based on site suitability, likelihood of mitigation project success, maximizing the environmental benefit of in-lieu fee funds expended, relative value of the aquatic resource type(s) involved, and, in the case of preservation, the relative threat to the proposed site. Mitigation projects sponsored by a government agency, individual, or other organization, including mitigation projects on public land, may be considered but must be coordinated through the Conservancy. Mitigation projects may require Department of the Army authorization under Section 404 of the Clean Water Act and/or Section 10 of the Rivers and Harbors Act of 1899. Mitigation projects may also require separate authorization from landowners or other regulatory agencies, such as the GLO.

Mitigation project proposals submitted by the Conservancy to the USACE shall include the following, as appropriate:

- a. a detailed description of the mitigation project area consisting of vicinity and site maps, spatial (Universal Transverse Mercator) coordinates of the project area, aerial photographs (if available), land use history, and a determination of waters of the United States, including a wetland delineation conducted in accordance with the Corps of Engineers 1987 Wetlands Delineation Manual or subsequent USACE-approved method;
- b. a detailed description of the project, including the type and location of all proposed ground disturbing activities and structures, a construction schedule, and a planting plan that includes a list of the species to be used, planting density, planting methods and schedule, and planting plan success criteria;

c. a description of the local hydrology, assessment of likely mitigation project-related changes to local hydrology, and demonstration that local hydrology would be sufficient to support the proposed mitigation project;

d. a description of how any adverse impacts to the aquatic ecosystem, such as to local hydrology, upstream or downstream aquatic resources, and wildlife habitat, would be minimized;

e. a discussion of any potential effect the project may have on any species listed as threatened or endangered under the Endangered Species Act or Texas Parks and Wildlife Code (Chapters 67 and 68, as amended) that may be found in the vicinity of the project;

f. a description of other pertinent issues and possible impacts such as those related to cultural resources, ecologically sensitive areas, local/regional hydrology, land uses of adjacent properties, and regional or river basin planning;

g. a plan for monitoring the development and success of the proposed mitigation project, regularly reporting on the status and success of the mitigation project to the USACE, and addressing contingencies, long-term maintenance, and protective real estate arrangements; and

h. a detailed description of the projected costs of design, construction, monitoring, land or easement acquisition, long-term operation and maintenance, and contingencies.

Upon receiving a complete mitigation project proposal, the USACE shall solicit comments from the EPA, FWS, TPWD, TNRCC, RCT, and GLO. The USACE may also issue a public notice to solicit public comment on a proposal if the USACE determines that issuance of a public notice is necessary to serve the public interest or otherwise appropriate. Before making a final decision regarding the mitigation project's feasibility and ability to meet the stated goals and objectives of the program, the USACE shall consider the need for the specific activities in the location proposed, the correlation between the proposed activities and the adverse impacts to the aquatic environment represented by the in-lieu fees that would fund the proposed mitigation project, the environmental costs and benefits of the mitigation project, and all comments received. No trust fund assets may be expended on a mitigation project without prior written USACE approval. The expenditure of trust fund assets is also subject to the Conservancy's corporate policies and procedures.

### 3. Use and Operation of Trust Funds:

A Department of the Army permit applicant may at any time request to pay a fee to a regional trust fund in lieu of other forms of compensatory mitigation. However, to receive any credit from the USACE for paying an in-lieu fee, the applicant must receive prior approval from the USACE and comply with all applicable laws, regulations, and policies concerning the avoidance, minimization, and compensation of adverse project impacts to the aquatic ecosystem. The use of an in-lieu fee trust fund under this program will normally be limited to activities authorized by general permits and letters of permission.

For projects not requiring agency coordination during the permit application evaluation process, the USACE may determine without resource agency coordination whether payment of an in-lieu fee to a trust fund is appropriate compensation for likely adverse project impacts to the aquatic ecosystem.

For projects requiring coordination with such agencies as the EPA, FWS, TPWD, TNRCC, RCT, and GLO during the permit application evaluation process, the USACE shall fully consider each agency's comments regarding the use of the in-lieu fee trust fund before making its determination.

If the USACE determines that payment of an in-lieu fee to a trust fund constitutes appropriate compensatory mitigation, in whole or in part, for the adverse impacts of a proposed activity, the permittee shall pay a fee to the trust fund according to the established regional per acre fee schedule and the number of acres that the USACE determines is appropriate to compensate for the likely adverse project impacts to aquatic ecosystem functions, both temporary and permanent. The USACE shall in all cases have the final authority in determining the appropriate number of acres. The applicant may elect to conduct other appropriate and practicable mitigation if it complies with all USACE laws, regulations, and policies and receives USACE approval.

Upon receiving USACE approval to pay an in-lieu fee to a trust fund, the permittee shall pay the fee directly to the Conservancy. The Conservancy shall act as the passive recipient of all in-lieu fees contributed to the trust; it shall play no role in any Department of the Army permit decision, determining the nature and extent of any required compensatory mitigation, or determining the appropriateness of any specific in-lieu fee payment. The Conservancy shall notify the USACE in writing upon receiving an in-lieu fee. The Conservancy shall, in coordination with the USACE, keep a written record of each in-lieu fee paid that includes the Department of the Army permit number; permittee's name and address; location and water bodies affected by the permitted project; river basin in which the project is located; type, quality, and extent of each type of aquatic resource for which in-lieu compensation is being made; and amount of the in-lieu fee. The Conservancy hereby agrees to receive, hold, and expend the fees contributed to the trust fund in the manner and within the limitations described below.

#### 4. Geographic Applicability:

Regional trust funds may be developed anywhere within the Fort Worth District subject to the requirements of this agreement. A Department of the Army permit applicant whose proposed project lies within the service area of an established regional trust fund is potentially eligible to use that fund, subject to applicable USACE laws, regulations, policies, and in-lieu fee requirements.

#### 5. Financial Controls and Reporting:

The Conservancy shall hold and invest in-lieu fees collected pursuant to this agreement in a manner consistent with the Conservancy's policies and procedures for the investment of its own funds. The Conservancy will establish separate accounts in its financial records for each trust fund and will credit each account with its share of the net investment income earned. These funds will be invested so as to maximize the safety of the principal amount held by the Conservancy. The Conservancy shall account for the funds so held in accordance with generally accepted accounting principles and provide the USACE with an itemized annual statement that includes a list of the account(s) in operation, the investment instrument(s) in which the funds are invested, and, for each account, the beginning and ending annual balances, total amount of in-lieu fees collected, investment income earned, and authorized expenditures. The annual statement shall be made available to the public. Entities other than the Conservancy who receive O&M funds pursuant to paragraph 6.b. below shall be required to agree to the same reporting requirements and controls contained in this paragraph.

Reporting requirements and compliance procedures for specific compensatory mitigation projects constructed with in-lieu fee trust fund monies shall be developed as appropriate on a project-by-project basis. Generally, compensatory mitigation project agreements should include a provision to submit annual or biennial mitigation project-specific progress reports.

## 6. Trust Fund Expenditures

No trust fund assets may be expended by the Conservancy without prior written USACE approval except that the Conservancy may be reimbursed for reasonable expenses it incurs in administering and developing the regional in-lieu fee trust funds, as described by the schedule in the last paragraph of this section. Each regional trust fund may be charged for reasonable and appropriate expenses associated with the acquisition of land and easements, design and implementation of mitigation projects, and long-term operation and maintenance of projects. These expenses shall be included in the overall cost of each mitigation project and reflected in the regional trust fund's per-acre cost. Project-specific expenses shall be included in each project proposal submitted to the USACE by the Conservancy and debited from a regional trust fund as follows:

- a. The costs of implementing a mitigation project, such as the purchase price of the land, payment for a conservation easement, construction activities, and establishment of vegetation, may be debited directly from the trust fund;
- b. The reasonable costs of long-term operation and maintenance (O&M) of a mitigation project may be debited from the trust fund and paid to the entity responsible for the long-term management of the mitigation project. The receiving entity shall place the O&M funds in a mitigation project-specific interest-bearing account. An O&M fund shall be the minimum size necessary to provide reasonable long-term care for the mitigation project and no larger than 20% of the project's total cost. The Conservancy shall minimize the use and size of O&M funds to the extent practicable by designing low- or no-maintenance mitigation projects.
- c. The administrative costs to the Conservancy or other project sponsor of acquiring land for a mitigation project may be debited from the trust fund and paid to the acquiring entity. The Conservancy or other project sponsor may be reimbursed for these administrative costs at a rate of up to 3% of the first \$500,000 of the purchase price plus 2% of the second \$500,000 plus 1% of the purchase price greater than \$1,000,000; and
- d. The Conservancy or other project sponsor may be paid for the reasonable staff costs of developing and implementing a mitigation project at an hourly rate agreed to by the Conservancy and USACE.

The Conservancy may also be compensated for reasonable expenses not associated with specific mitigation projects that it incurs developing and administering regional in-lieu fee trust funds. For this purpose, the Conservancy may collect at least \$1,000 from each regional trust fund per calendar year but not more than 1% of the average daily balance of each trust fund during the calendar year if the average balance is greater than \$100,000. If a regional trust fund contains insufficient funds to compensate the Conservancy for these general administration expenses, the Conservancy may, upon

receiving USACE approval, borrow the necessary funds from another regional trust fund, which would be repaid as soon as practicable.

7. Periodic Review of Program:

The Conservancy, USACE, EPA, FWS, TNRCC, TPWD, RCT and GLO shall periodically review the status of the trust fund accounts, delineation of regions, per-acre fee schedules, and other components of the in-lieu fee trust fund program. Changes in fees, boundaries, and other program components shall be made to each regional trust fund as appropriate to further the intended purposes of the program and to increase program efficiency and effectiveness. Collected in-lieu fees that have not been expended in three years may, at the discretion of the USACE, be expended on other mitigation projects that would serve the same basic purpose as the trust. An extension of time may be granted by the USACE on a case-by-case basis.

8. Good Faith Agreement:

The USACE and Conservancy hereto agree to exercise their rights and responsibilities as contained in this agreement in good faith in as much as their mutual desire under this agreement is to protect and enhance the aquatic environment.

9. Amendment and Termination:

This agreement may be amended or terminated by either party by giving ninety days written notice of their intention to the other party. Any amendment requires the mutual agreement of the parties. Prior to any termination of this agreement, the Conservancy shall provide the USACE an accounting of funds in the trust and documentation that the Conservancy has met its financial obligations. Upon termination of this agreement, the USACE shall determine how the remaining trust funds will be expended. The trust funds will remain with the Conservancy until expended.

10. Signatories:

(FOR THE) Wayne A. Lea  
District Engineer, Fort Worth District  
U.S. Army Corps of Engineers

19 November 1998  
Date

[Signature]  
The Nature Conservancy

Nov 5, 1998  
Date