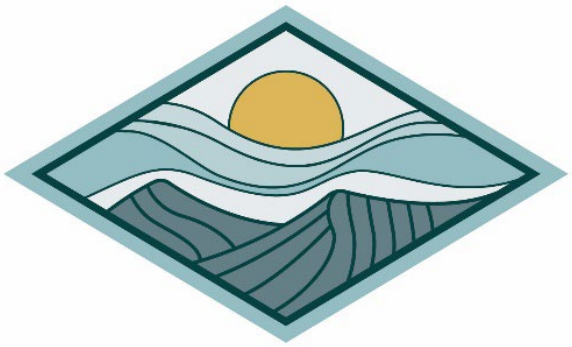

MONTANA STATEWIDE IN-LIEU FEE MITIGATION PROGRAM INSTRUMENT

SPONSORED BY
MONTANA FRESHWATER PARTNERS

FINAL VERSION 2.0

MAY 2020

With Approved Updates Through December 31, 2023

Prepared By: Montana Freshwater Partners
Statewide In-Lieu Fee Mitigation Program
P.O. Box 338 Livingston, MT 59047

Prepared For: U.S. Army Corps of Engineers
Helena Regulatory Office
10 West 15th Street, Ste.2200
Helena, MT 590626

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This In-Lieu Fee Program Instrument (hereinafter, Instrument), regarding the establishment, use, operation, and maintenance of the federally-approved Montana Statewide In-Lieu Fee Program (hereinafter, ILF Program), is an agreement made and entered into by the U.S. Army Corps of Engineers, Omaha District (Corps) and the not-for-profit corporation, Montana Freshwater Partners (MFP), the program Sponsor. The following agencies and organizations that constitute the Interagency Review Team (IRT) have indicated their acceptance: the U.S. Army Corps of Engineers, Omaha District; the U.S. Environmental Protection Agency; the Montana Department of Environmental Quality; the Montana Department of Fish, Wildlife and Parks; and, the U.S. Fish and Wildlife Service.

SIGNATURE PAGE

This Agreement, entered into by Montana Freshwater Partners (MFP) and the U.S. Army Corps of Engineers, Omaha District (USACE), is for the purpose of establishing In-Lieu Fee (ILF) mitigation throughout the State of Montana (ILF Program). The ILF Program will be used to mitigate for unavoidable wetland and stream impacts approved through USACE, who is responsible for administering Section 404 of the Clean Water Act. The creation, operation and use of individual mitigation sites will be in accordance with this Instrument agreement.

The Interagency Review Team (IRT) that provides technical support to USACE includes the following agencies: US Environmental Protection Agency; US Fish and Wildlife Service; Montana Department of Environmental Quality; and Montana Department of Fish, Wildlife and Parks.

The objective of the ILF Program Instrument agreement is to establish guidelines, responsibilities, and standards for the establishment, use, operation, and management of the ILF Program (and associated mitigation sites), in accordance with the 2008 Final Mitigation Rule (33 CFR 332/40 CFR 230).

This Instrument agreement applies to Montana's 16 primary geographical Services Areas, which are based on the United States Geological Survey Hydrologic Unit Code (USGS HUC 6 and HUC 8) watershed boundaries. The primary geographical Service Area for each mitigation project will be defined by which of the 16 Services Areas the site is located within. At the discretion of USACE, credits may be approved outside of a given mitigation site's primary geographic Service Area.

_____ Date Signed: _____
Wendy Weaver, Executive Director
Montana Freshwater Partners

_____ Date Signed: _____
Keith Fink, Chief, Operations Division,
U.S. Army Corps of Engineers, Omaha District

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1 Preamble

1.1 Purpose

The purpose of this Instrument is to establish guidelines, responsibilities, and standards for the establishment, use, operation, and management of the Montana Statewide In- Lieu Fee Mitigation Program (ILF Program). Montana Freshwater Partners (MFP) is the program Sponsor. The purpose of this Program Instrument is to establish guidelines, responsibilities, and standards for the establishment, use, operation, maintenance, and reporting of the ILF Program. The Program will be used for Compensatory Mitigation for 1) unavoidable impacts to Waters of the U.S. that result from activities authorized under Section 404 of the Clean Water Act; 2) section 10 of the Rivers and Harbors Act; 3) impacts to aquatic resources authorized by other federal or state agencies with regulatory authority, or 4) completed enforcement actions under the Clean Water Act. This Instrument addresses compensatory mitigation for impacts to jurisdictional waters, including wetlands, streams, and lakes. The ILF Program Instrument will not act as a framework for establishing mitigation banks. Rather, the Instrument outlines the circumstances and manner in which this statewide ILF program will provide a complementary compensatory mitigation option to permit applicants under USACE regulatory program.

This Instrument document is an updated version of the original Montana ILF Program Instrument (dated January 15, 2013). Since the time the original Instrument was approved in 2013, MFP and USACE with extensive collaboration with the Interagency Review Team (IRT), have gained a greater understanding of the accounting, reporting, review process and the day-to-day operations that are required to operate as the statewide In-Lieu Fee Program in Montana. In the process of working together, MFP and USACE recognized a number of items that required greater clarity and revision to bring the overall document into better alignment with USACE/EPA Final Rule for Compensatory Mitigation for Losses of Aquatic Resources (33 CFR 332/40 CFR 230). The revisions captured in Version 2.0 of the Instrument also include several previously approved Instrument Modifications that were made to the Instrument in 2017 and 2018. Version 2.0 of the Instrument will be referred to simply as the "Instrument" for the remainder of this document.

This document, executed and fully ratified as of the date indicated on this document's Signature Page is the legal document by which MFP and USACE will use to implement the Montana ILF Program until the document is formally revised or amended, if necessary, in the future.

1.2 Goals And Objectives

The primary goal of the ILF Program is to provide effective compensatory mitigation for the authorized, unavoidable adverse impacts to the waters of the United States and waters of the State. The program is intended to uphold the goal of no net loss of jurisdictional water bodies and waterways through the preservation, enhancement, establishment, and restoration of ecological functions within a watershed context through the establishment and management of compensatory mitigation projects. It is the intent of the parties that this program be operated in a collaborative manner, including collaboration among the IRT members and other agencies and organizations with similar or consistent aquatic resource missions within the State of Montana.

The objectives of the ILF Program are as follows:

1. Provide an in-lieu fee alternative to mitigation banks and permittee-responsible compensatory mitigation through compensatory mitigation projects implemented using a watershed approach.
2. Use scale efficiencies by combining the required mitigation for impacts from individual smaller projects within a watershed into collective mitigation and restoration at larger sites with greater ecological value.
3. Provide compensatory mitigation in a timely and effective manner by streamlining the compensatory mitigation process that minimizes temporal loss of ecological functions and services.
4. Use a watershed approach as defined in 33 CFR 332 to identify the most appropriate off-site mitigation options available, thereby obtaining greater ecological benefits than would otherwise be achieved by on-site mitigation options or distant off-site mitigation banks that are impracticable, out-of-kind, or of lower ecological value.
5. Operate in a financially self-sustaining manner: collect sufficient mitigation fees to complete compensatory mitigation projects and all associated protection, management, monitoring and maintenance.
6. Provide public benefit by applying mitigation resources toward improvement of ecologically impaired aquatic resources that have important ecological value to the watershed.

1.3 Approval

Version 2.0 of this Instrument is considered fully executed upon the latter date of signature by the Executive Director of MFP and the USACE Chief of Operations Division, Omaha District. This document supersedes the previous Montana State-Wide ILF Program Instrument dated January 15, 2013. This document in its entirety will apply to all credit sales and subsequent projects occurring on or after the execution date of this document. Where possible, MFP will work with the USACE, in consultation with the IRT, to bring previous projects and credit sale agreements in alignment with the terms and conditions of this Instrument.

2 Regulatory Authorities

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

2.1 Federal 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 and Environmental Protection Agency, Final Rule (33 CFR Part 332/40 CFR Part 230)
- EO 11990 Protection of Wetlands
- EO 11988 Floodplain Management
- National Environmental Policy Act (42 USC § 4321 et seq.)
- Endangered Species Act (16 USC § 1531 et seq.)

- Fish and Wildlife Coordination Act (16 USC § 661 et seq.)
- National Historic Preservation Act (54 USC § 300101 et seq.), and Section 106 (36 CFR Part 800)

2.2 State Authorities

- Natural Streambed and Land Preservation Act of 1975 (310) Mont. Code Ann.§§ 75-7- 101 et seq.
- Short Term Turbidity Exemption Mont. Code. Ann.§ 75-5-318
- Montana Water Quality Act. Title 75 Chapter 5
- Stream Protection Act. Montana Code Ann. Title 87 Chapter 5 Part 5

3 Provision of Legal Responsibility

MFP agrees to accept full legal responsibility for satisfying the mitigation requirements for USACE permits for which mitigation fees from a permittee have been accepted under the terms of this Instrument. This responsibility includes compliance with 33 CFR Part 332, 40 CFR Part 230 and any other applicable federal, state and local jurisdiction laws that are in effect as of the date of this document. In satisfaction of the compensatory mitigation requirements, the Sponsor will provide compensatory mitigation of the type and in the amount necessary to meet applicable regulation requirements. Any transfer of mitigation responsibility from the permittee to the Sponsor is contingent upon the prior approval by the Sponsor and USACE.

1. Mitigation responsibility includes, but is not limited to: the identification and selection of compensatory mitigation project sites, property rights acquisition, mitigation project plan design and development, construction, monitoring, protection, and long-term management of the required mitigation.
2. The transfer of mitigation responsibility from the permittee to the Sponsor for each impact site will be effective upon (a) the permittee purchasing from the Sponsor the appropriate number and resource type of credits, and (b) USACE's receipt of the Statement of Sale, which expressly specifies that the Sponsor, and its successors and assigns, assume responsibility for accomplishment and maintenance of the transferee's compensatory mitigation requirements associated with the impacting project, as required by the permit conditions, upon completion of the credit sale.

4 Statewide ILF Program Structure

4.1 Statewide Instrument

Under this Instrument, MFP establishes itself as a Montana statewide Sponsor of federally approved in-lieu fee mitigation. This Instrument is intentionally broad and sets the framework under which MFP-sponsored ILF projects will be identified, funded, operated, maintained and managed. Version 2.0 of the Instrument supersedes all previous Statewide ILF Program Instruments, and subsequent modifications thereof. The Instrument provides the authorization for the ILF Program to provide credits to be used as compensatory mitigation for activities permitted by USACE. As compensatory mitigation projects are identified, MFP will submit compensatory mitigation project plans to the District Engineer for review and approval. Review and approval of compensatory mitigation project plans will follow the process outlined for Modifications to the Instrument (*Section 10*) and according to the procedures

outlined in 33 CFR 332.8(g). At the District Engineer's discretion, review and approval of additional compensatory mitigation project plans may follow the streamlined modification process outlined in 33 CFR 332.8(g)(2).

4.2 Interagency Review Team

USACE District Engineer has established an Interagency Review Team for the ILF Program. The District Engineer or designee is the official chair for the IRT and will be responsible for establishing the IRT and managing the IRT process. The District Engineer will make the final decision regarding the amount and type of compensatory mitigation to be required of permittees, and determine whether and how use of credits from the ILF Program is appropriate to compensate for unavoidable impacts.

The primary role of the IRT is to assist USACE in its administration of the Instrument, evaluate mitigation project plans, recommend remedial or adaptive management measures, review approval of credit release, review monitoring reports, and advise USACE regarding modifications to this Instrument. The IRT's role and responsibilities are more fully set forth in Section 332.8(b) of the Federal Mitigation Rule (33 CFR Part 332). IRT participation does not, however, override or nullify the independent permitting authority of a Federal, State or local permitting entity to enforce their permit requirements at compensatory mitigation project sites.

The ILF Program IRT will include members representing:

- U.S. Army Corps of Engineers, Omaha District (Chair)
- U.S. Environmental Protection Agency, Region 8
- Montana Department of Environmental Quality
- Montana Department of Fish, Wildlife and Parks
- U.S. Fish and Wildlife Service

The IRT will review and provide comments on the Instrument and subsequent modifications. IRT members will also review and provide written comments on mitigation project plans, annual monitoring reports and field inspections, and credit release requests. The IRT may also be requested to provide expertise on other related matters, such as assessing the achievement of performance standards, reviewing long-term management plans, and recommending corrective actions or adaptive management. Written comments will be submitted within the time limits established by 33 CFR 332.8. Comments received after such deadlines will only be considered at the discretion of the District Engineer to the extent that doing so does not jeopardize the deadlines for actions required of the District Engineer.

The IRT for individual ILF projects may be augmented, at the discretion of the District Engineer in consultation with MFP, with additional representatives from Tribal, Federal, State, or local governments. Additional members of the IRT for individual ILF projects will be specified in each mitigation project plan. In general, these IRT members' roles will be limited to providing project-specific review and comments to the District Engineer.

The District Engineer (or designee) serves as the Chair of the IRT and alone retains final authority for approval of the Instrument and subsequent modifications. The District Engineer will give full consideration to any timely comments and advice of the IRT.

Any of the IRT members may terminate their participation upon written notification to the Corps. Any such termination will not invalidate this Instrument. Participation of the IRT agency seeking termination will end thirty (30) days after written notification.

1. The IRT will work to reach consensus in its actions. This consensus-building process will include providing MFP the opportunity to provide additional information to IRT members during the IRT's decision making processes. The IRT will seek to reach such a consensus within a reasonable period of time and with minimal delays; and

2. The members of the IRT will review such documents and compensatory mitigation projects as each considers necessary to provide meaningful input to the IRT Chair, and express any recommendations, concerns, or potential improvements concerning the implementation of the ILF Program to the Sponsor.

4.3 Geographic Service Areas

To accomplish the goal of a watershed approach to mitigation, Service Areas are established as those watersheds delineated by the Montana Department of Transportation and USACE as 16 Watershed Districts (Figure 1). These Watershed Districts have been adopted by USACE and are used as the basis for other compensatory mitigation project plans including mitigation banks under Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act. MFP will use these Watershed Districts to define the ILF Service Areas, and for the purpose of this document, the two terms are synonymous. Compensatory mitigation will be provided for permitted impacts within the same geographic Service Area in which the impact occurs unless the District Engineer, in consultation with the IRT, has agreed to an exception as defined under the Final Rule (33 CFR 332.8(d)(6)(ii)).

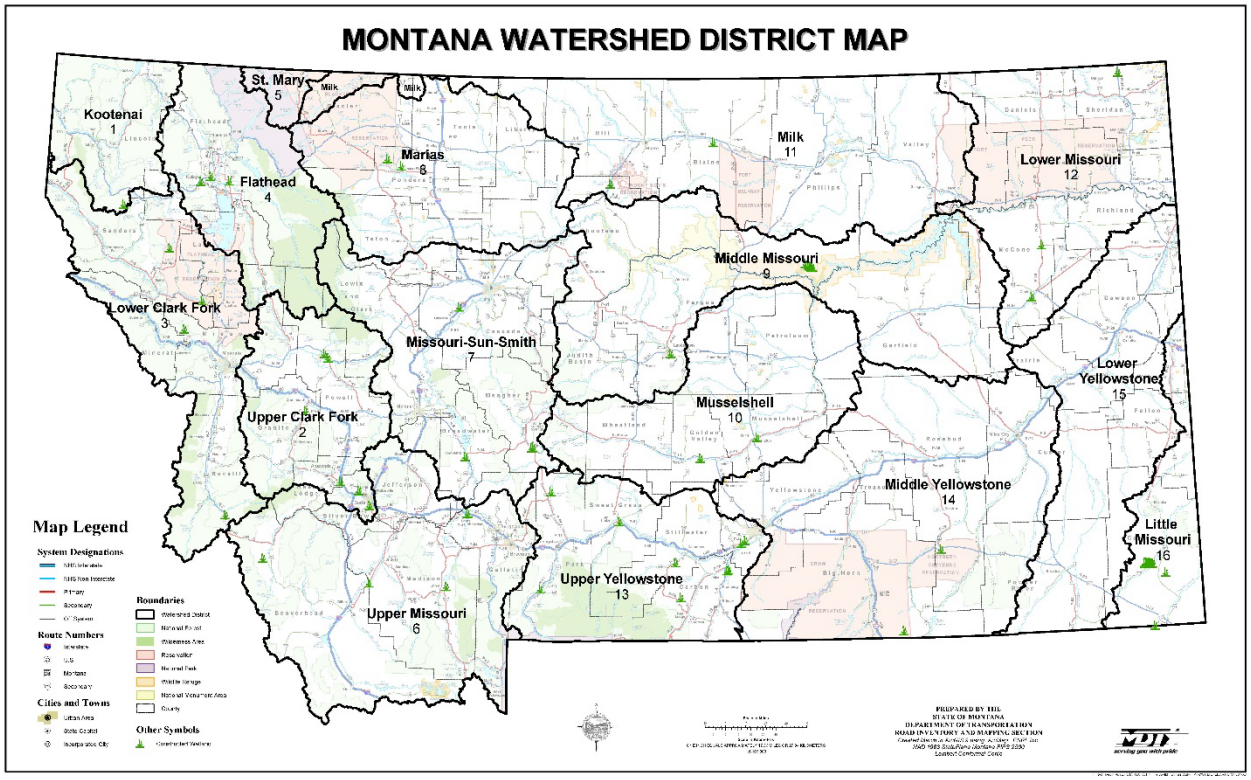

Figure 1. Montana ILF Program Service Areas (Watershed Districts)

Service Areas will serve as the basis for a watershed approach to site selection as well as for Accounting and Reporting procedures. USACE and IRT will review and approve mitigation project plans for compensatory mitigation projects implemented to mitigate impacts of permitted actions within the same geographic Service Area. MFP intends to conduct mitigation for permitted actions by performing site selection within sub-watersheds within the Service Area to the extent possible and reasonable and with USACE and IRT review. However, the Montana Statewide ILF Program may be used to compensate for an impact that occurs outside of the Service Area if specifically approved by USACE in consultation with the IRT (33 CFR 332.8(d)(6)(ii)).

Individual projects will be proposed for Service Areas in project-specific mitigation project plans. In the event that USACE determines that a Service Area for a given compensatory mitigation project should differ from the established Service Area, USACE in consultation with the IRT will make final Service Area determinations for approved mitigation project plans. Considerations will include the extent of ecologically similar areas, geographic constraints, the expected amount and type of mitigation required in an area (demand) compared with the aquatic resources and amount of credits that are expected from an ILF project, the availability and appropriateness of commercial mitigation banks in the area, population and growth information, and ongoing watershed management programs.

4.4 ILF Program Closure

MFP or USACE, acting independently or in concert, may terminate this Instrument within 60 days of written notification to the other party and to the IRT members. In the event that the Statewide ILF Program operated by MFP is terminated, MFP is responsible for providing to the IRT reports detailing credit and fee ledger balances, as well as status reports for all compensatory mitigation projects. MFP remains responsible for fulfilling any outstanding or pre-existing project obligations including the successful completion of ongoing compensatory mitigation projects, relevant maintenance and monitoring, reporting, and long-term management requirements.

MFP will remain responsible for fulfilling these obligations or ensuring the transfer of these obligations to a separate party approved by USACE.

Funds remaining in the Service Area accounts after the above obligations are satisfied must continue to be used for the restoration, enhancement, and/or preservation of aquatic resources and associated upland buffers. Any expenditure of these remaining funds requires USACE and IRT review and approval. If MFP has outstanding mitigation obligations at the time of closure which it is unable to fulfill, USACE, in consultation with the IRT, will direct MFP to: 1) use these funds to provide further restoration, enhancement or preservation activities, 2) secure credits from another source of third party mitigation, or 3) disburse funds to another entity such as a governmental or non-profit natural resource management entity willing to undertake further compensation activities. USACE itself cannot accept directly, retain, or draw upon those funds in the event of a default.

4.5 Assignments of Obligations

MFP may be permitted to assign its obligations, responsibilities, and entitlements associated with site protection, monitoring, and long-term management under this Instrument to a separate party provided that such assignment is consistent with the federal rule (33 CFR 332) and approved by USACE. USACE following consultation with other members of the IRT must approve the identity of the assignee in order for any assignment to effectively relieve MFP of those obligations. Approval of the identity of the assignee will not be unreasonably withheld. MFP must amend this Instrument or associated compensatory mitigation project plans accordingly to reflect separate party assignments.

In this case, applicable financial resources must be approved by USACE. The physical ownership of real property containing a compensatory mitigation project site, and the obligations, responsibilities, and entitlements under this Instrument are separate and distinct; thus, ownership of the MFP interest may be transferred independently. Once assignment has been properly accomplished, MFP will be relieved of all its obligations and responsibilities under this Instrument associated with the compensatory mitigation project site(s) for which separate party assignments are made.

5 ILF Program Account & Accounting Procedures

Upon approval of the ILF Program and prior to accepting any fees from permittees, MFP will create and maintain distinct and separate accounting – hereinafter referred to as the ILF Program Accounts – of revenue and expense financial transactions and asset management associated with the Montana Statewide ILF Program. Only credit fees and any interest earned from those fees will be assigned to the ILF Program Accounts. Those funds will be used only for the selection, design, acquisition, implementation, monitoring, management and protection of MFP ILF projects and allowable costs associated with administration of the ILF Program. Mitigation funds accepted from permittees will be tracked in separate accounts from funds accepted by MFP from other entities and for other purposes.

5.1 Program Accounts

5.1.1 Advance Credits

Upon the sale of advance credits, the accounts noted below will be established under the MFP ILF Program Account. The standard allocation of percentages for each sub-account provided below will be used to maintain sufficient and appropriate balances among accounts. MFP may revise the standard percent allocations with an Instrument modification. MFP will allocate and deposit funds to appropriate accounts within 60 days of the receipt of mitigation funds from a permittee.

The MFP ILF Mitigation Program Accounts consist of a Statewide Program Administration Account that can be used for administrative costs associated with administration of the ILF Program, and three separate sub-accounts for each of the 16 Service Areas as follows: a Mitigation Account, a Contingency Account and a Long-Term Management Account, as illustrated in Table 1.

Table 1. MFP ILF Program Accounts Structure

ILF Program Accounts			
Administration	**Mitigation**	**Contingency**	**Long-Term Management**
State-Wide	*Sub-Accounts*		
	Service Area 1	Service Area 1	Service Area 1
	Service Area 2	Service Area 2	Service Area 2
	Service Area 3	Service Area 3	Service Area 3
	Service Area 4	Service Area 4	Service Area 4
	Service Area 5	Service Area 5	Service Area 5
	Service Area 6	Service Area 6	Service Area 6
	Service Area 7	Service Area 7	Service Area 7
	Service Area 8	Service Area 8	Service Area 8
	Service Area 9	Service Area 9	Service Area 9
	Service Area 10	Service Area 10	Service Area 10
	Service Area 11	Service Area 11	Service Area 11
	Service Area 12	Service Area 12	Service Area 12
	Service Area 13	Service Area 13	Service Area 13
	Service Area 14	Service Area 14	Service Area 14
	Service Area 15	Service Area 15	Service Area 15
	Service Area 16	Service Area 16	Service Area 16

Collectively, the accounts in Table 1 constitute the MFP ILF Program for advance credit sales and accounting, and include funds that will be available to support all of the ILF compensatory mitigation projects within the State. It should be noted that the Statewide Program Administration Account is a universal account that is funded by a portion of all credit sales across the 16 Service Areas. This account is the only account that does not have strict guidelines regulating the Service Area(s) in which advance credit proceeds may be expended. Mitigation, Contingency, and Long-Term Management funds from advance credit sales must be applied in the Service Area where the impact occurred unless otherwise approved by the USACE.

1. Statewide Program Administration Account. MFP will maintain a Statewide Program Administration Account to administer the overall Statewide Instrument. The Statewide Program Administration Account is funded by 20% of the advance credit sales across the 16 Service Areas. The standard percentage of credit fees allocated to the Statewide Program Administrative Account may be adjusted by MFP with an Instrument modification to sustain the account and associated account purposes, and informed by ILF Program project history and annual ILF Program reporting. In addition, up to 20% of the accrued interest earnings from the collective ILF Program Accounts may be directed back to the Statewide Program Administration Account so long as the mitigation obligations from those accounts are sufficiently funded. The Statewide Program Administration Account funds will be used to pay for program administration duties not directly attributable to specific, approved mitigation projects, including but not limited to:

    a. Staff time and employment expenses, including relevant training
    b. Office expenses, rent, computer equipment, and office equipment and supplies related to program administration
    c. Phone, internet, and other communications expenses
    d. Credit inquiries, potential sale evaluations, and credit sale documentation
    e. Site selection leading to project identification
    f. Fee and credit accounting for Program account and compensatory mitigation project accounts, including accounting services
    g. Legal services
    h. Data management
    i. Reporting regarding the statewide program
    j. Correspondence and meetings with IRT and other regulatoryagencies, including negotiation of modifications to this Instrument
    k. Program development
    l. Other program administration duties as necessary
    m. Bank and other fees associated with operation of the program
    n. Project and proposal development costs may also be charged to the Statewide Administration Program Account until the project is approved by the Evaluation letter (see below).

2. Mitigation Sub-Account. A Mitigation sub-account will be established for each Service Area, to hold mitigation project establishment funds (fees) from advance credit sales and from which mitigation project expenses will be disbursed to approved mitigation projects. The Mitigation sub-account is funded by 50% of each advance credit sale within a given Service Area. The standard percentage of credit fees allocated to the 16 Mitigation sub-accounts may be adjusted by MFP with an Instrument modification to sustain the account and associated account purposes, and informed by ILF Program project history. Funds from the mitigation account will be available during the project's Operational Phase for the development, implementation and establishment of each compensatory mitigation project (see Section 6.3. for description of Operational Phase).

3. Statewide Mitigation Sub-Account. Interest generated from the 16 Mitigation sub-account may be used to fund a separate statewide mitigation sub-account that can be used to pay for equipment, materials, software, training or other activities that support Operational-Phase project activities across the state. Only the interest generated by the 16 Mitigation sub-accounts may be used to fund this statewide mitigation sub-account. *(Added per December 2021 Minor Instrument Modification).*

4. Contingency Sub-Account. A Contingency sub-account will be established for each Service Area, to cover contingencies related to project implementation or implementation of adaptive management actions for compensatory mitigation projects. This is to include expenses incurred during the Operational Phase of each approved compensatory mitigation project. Funds from the Contingency sub-account may be used as a form of Financial Assurances for projects in the same Service Area; and can also be used to support unexpected expenditures during the Long-Term Management Phase for projects in the same Service Area. The Contingency sub-account is funded by 17% of each advance credit sale within a given Service Area. The standard percentage of credit fees allocated to the Contingency Account may be adjusted by MFP with an Instrument modification to sustain the account and associated account purposes, and informed by ILF Program project history.

5. Statewide Contingency Sub-Account. Interest generated from the Administrative, Mitigation and Contingency sub-accounts listed above may be used to fund a separate statewide contingency sub-account that can be used to pay for contingency-related expenses or other activities that support ILF Program and Operational-Phase project activities across the state. Released credit proceeds (described in *Section 5.1.2*) will also be deposited into this account. *(Added per December 2021 Minor nstrument Modification and modified with March 2022 Instrument Modification Request).*

6. Long-Term Management Sub-Account. A Long-Term Management sub-account will be established for each Service Area. The Long-Term Management sub-accounts will be held in reserve to fund long-term management activities, including adaptive management and remediation at compensatory mitigation project sites and enforcement of protections. The Long-Term Management sub-account is funded by 13% of each advance credit sale within a given Service Area. The standard percentage of advance credit fees allocated to the Long-Term Management sub-account may be adjusted by MFP with an Instrument modification. Long-term financing mechanisms may include endowments, trusts, contractual arrangements with future responsible parties, and other appropriate financial instruments. Funds in the Long-Term Management Account will be available solely for use during the Long-Term Management phase and are not available for use on a project until the project enters the Long-Term Management phase, with two exceptions: the transfer of LTM funds during the Operational Phase is allowed (with USACE approval) if a

long-term steward requires an upfront transfer of the LTM funds as a condition for their commitment to being the LTM steward and/or as a requirement for closing and recording a site protection vehicle (i.e. conservation easement).

The sub-accounts described above will be funded from the sale of advance mitigation credits and will be available upon approval of the compensatory mitigation project plan and budget (as described in *Section 6.2*), with sufficient funds to cover all anticipated project-specific expenses. The funds in these accounts will be used for compensatory mitigation, project administration, project plan development, land acquisition or protection, planning and design, project implementation, project management, monitoring and maintenance activities, and other activities and expenses directly attributable to a specific compensatory mitigation project.

Except as otherwise allowable under the Final Mitigation Rule, non-expended funds from the Statewide Program Administration, Mitigation, and Contingency Accounts will be held in interest-bearing financial instruments that may include, but are not limited to, checking accounts, savings accounts, money markets, bonds, and certificates of deposit at a financial institution(s) that is a member of the Federal Deposit Insurance Corporation (FDIC). Non-expended funds from Long-Term Management Accounts may be invested in non-FDIC insured securities, such as equities or fixed income investments. All investments of ILF funds must comply with MFP's Investment Policy Statement adopted by the Board of Directors. All of the principal, plus interest and earnings from the Mitigation, Contingency and Long-Term Management Accounts will also stay in the specific Service Area, with two exceptions: 1) Up to 20% interest earnings from the collective ILF Program Mitigation, Contingency, and Long-Term Management sub-accounts may be directed back to the Statewide Program Administrative Account so long as the mitigation obligations from those accounts are sufficiently funded; and 2) interest and earnings generated by the Long-Term Management investment vehicle may be distributed amongst Service Areas for the purpose of implementing long-term management tasks in perpetuity.

Except as otherwise approved by USACE, MFP will review and balance funds among accounts annually (including Mitigation and Contingency funds remaining after a project has entered the Long-Term Management phase), to ensure that Program Accounts in total do not exceed those amounts deemed necessary to implement current mitigation obligations, sustain long- term management and protection responsibilities for implemented compensatory mitigation projects, and provide financial resources. MFP agrees to disburse funds considered to be in excess of those necessary for these purposes to additional or alternative mitigation or conservation measures, or to support other ILF programmatic needs.

USACE in consultation with MFP has the authority to direct MFP to develop and implement alternative compensatory mitigation projects in cases where MFP does not provide compensatory mitigation as agreed to by the parties or in cases of default. MFP will fund these alternative projects from the Mitigation sub-accounts. USACE will direct development and implementation of alternative mitigation projects through the issuance of a signed Corrective Action Directive Letter to MFP that specifies what responsive action MFP must take and the timeframe in which the action must be completed.

5.1.2 Released Credits

When a project meets performance standards, USACE releases a portion of the credits specified in the mitigation project plan. The released credits replenish the advance credit withdrawals and satisfy a portion of the credit obligation for that Service Area. Occasionally, MFP may develop a mitigation site that generates wetland or stream

credits in excess of the Service Area's advance credit obligation. Released credits that are in excess of a given Service Areas advance credit obligation, referred to here as simply *released credits*, are also referred to as 'surplus' released credits in *Section 7.1 Generation of Credits*. In USACE's mitigation credit tracking databased (RIBITS), these credits would be tracked as 'available credits' in the program ledger. A site will only have released *wetland* credits available for sale if the Service Area's advance *wetland* credit obligation has been fulfilled and there are additional released *wetland* credits available for sale. Likewise, released *stream* credits will only be available for sale if the Service Area's advance *stream* credit obligation has been fulfilled and there are additional released *stream* credits available for sale.

From a program accounting perspective, released credits in excess of the Service Area's advance credit obligation are quite different from the accounting requirements for advance credits. The accounting restrictions outlined in *Section 5.1.1.* for advance credits are necessary to ensure that funds are available to develop post-impact mitigation offsets. However, since released credits, as defined in this section, can only exist after a mitigation site has been established, has met performance standards and has satisfied advance credit obligations, these released credits provide *pre-impact mitigation offsets* for future credit sales. Therefore, the accounting restrictions outlined in *Section 5.1.1.* for advance credits do not strictly apply to released credit proceeds. While the proceeds from released credit sales must be used to support the Montana ILF program, the Final Rule does not require them to be strictly allocated to the Administrative, Mitigation, Contingency and Long-Term Management sub-accounts as described in *Section 5.1.1.*, and they do not necessarily have to be restricted to the Service Area in which the released credit sale originated. MFP may use the released credit proceeds at its discretion to support the ILF program provided that (1) the mitigation site from which the sale originated is sufficiently funded, and (2) the other mitigation sites (if any) within the same Service Area are also sufficiently funded. If these conditions are met, the proceeds from released credit sales may be used to fund a range of standard actions that directly support the Montana ILF Program, without prior approval from USACE. Examples of standard ILF program expenditures include, but are not limited to actions and expenditures for: ILF program audits, ILF project due diligence and evaluation, ILF project implementation, ILF program administrative duties, ILF program coordination with USACE/IRT, and unanticipated ILF project expenses. Any use of these funds to pay for actions or expenses that would be considered non-standard or atypical for the ILF program will require prior USACE approval.

For accounting tracking purposes, released credit proceeds will be deposited into the Statewide Contingency Sub-Account described in *Section 5.1.1.*, which will allow MFP to accurately track deposits and withdrawals related to released credit sales separately from advance credit deposits and withdrawals. Deposits and withdrawals to the Statewide Contingency Sub-Account will be reported in the ILF Annual Reports.

5.2 Credit & Fee Ledger

MFP will maintain two ledgers: one to track ILF program credit sales and project expenditures (Program Account Report Ledger), and a second to track debits and credits (Service Area Credit Transaction Ledger). Both ledgers will be organized by Service Area, and the two will be related to each other. The ledgers will be used to track the source of funding for compensatory mitigation projects as well as where and how fees collected from credit sales are spent.

The Program Account Report Ledger will track all income (mitigation fees collected from advance and released credit sales and any interest earned) and expenditures from the program. The ledger will comprise separate sub-ledgers for each of the sixteen Service Areas. Each Service Area fee ledger will show the following:

- Credit fee amount

- Origin of deposits (Impact project Permit Number(s))
- Expenditures for each sub-account (Administration, Mitigation, Contingency, Long-Term Management)

In addition, expenditures from each mitigation project will include all aspects of implementing projects (employee payroll and expenses, contracted services, direct expenses, property acquisition and protection, design and permitting, construction, monitoring, and long-term maintenance and management).

The Service Area Credit Transaction Ledger will track the number of advance and released credits sold and released within each Service Area, as well as the number of advance and released credits that are available for purchase. This ledger will be used to verify USACE's online wetland and stream mitigation credit tracking system (RIBITS). Refer to *Section 7.6* for more details on the Credit Transaction Ledger.

The above Ledgers will be provided to the USACE in annual accounting reports by March 31 of the following year for approval by USACE. Reports will include detailed summaries of Program Account deposits and disbursements for each Service Area made over the previous fiscal year (January 1 – December 31). USACE may review Program Account records with 14 days' written notice. When so requested, MFP will provide access to all books, accounts, reports, files, and other records relating to the Program Account.

5.3 Financial Obligations

Notwithstanding any other provision of this Instrument, MFP's financial obligation for the ILF Program will be limited to funds in the ILF Program Account. MFP intends to satisfy its obligations under this Instrument by obtaining sufficient funding from mitigation credit fees collected to carry out all programmatic, design, development, implementation, monitoring, remediation, and site management responsibilities. Funding for this work is provided through thorough credit price estimation procedures and mitigation fees that are determined through full cost accounting. Mitigation project approval by USACE in consultation with the IRT is contingent upon demonstration by MFP that credit pricing is adequate to cover MFP's obligations under this Instrument.

MFP will maintain sufficient financial resources to ensure a high level of confidence that approved compensatory mitigation projects will be successfully completed, in accordance with applicable performance standards. MFP will take the following actions to ensure funds are available to meet mitigation requirements for credits sold:

1. Funds outlined in approved compensatory mitigation project plans will be earmarked for project-specific budgets, and used to pay project-specific expenses as work or other project-specific actions are accomplished.

2. Sixteen (16) Contingency sub-accounts will be maintained within the ILF Program, and will be funded through the initial allocation of 17% of the fees collected from the advance credit sales. Contingency Account funds may be used to cover unanticipated expenses associated with planning or implementation or maintenance of the mitigation project during the Administrative, Operational Phase and Long-Term Management Phase. In addition to the Contingency funds, other forms of short-term financial assurances such as a performance bond(s) may be provided (if deemed necessary by USACE) to pay for major project actions that cannot be fully addressed by the Contingency fund alone. The additional short-term financial assurance will essentially serve as an emergency fund or insurance policy to address partial or total mitigation site failure during the Operational Phase.

3. Sixteen (16) Long-Term Management sub-accounts will be maintained within the ILF Program and held in reserve to fund long-term management, including monitoring and adaptive management and remediation at compensatory mitigation project sites and enforcement of MFP's site protections, after a project enters the Long- Term Management phase. The Long-Term Management Account will be funded through the initial allocation of 13% of the fees collected from advance credit sales.

4. MFP will review the Financial Assurance coverage that is in place for each project on an annual basis to ensure that the coverage provided by the Financial Assurance mechanism (i.e. performance bond) is sufficient to conduct replacement mitigation, including costs for land acquisition or protection, planning and design, legal fees, mobilization, construction, and monitoring if necessary. The Financial Assurance coverage can be reduced as project performance standards are met, as identified in the Final Mitigation Plan for each site.

5. Funds in the Statewide ILF Program Contingency Account (funded by released credit sale proceeds) will be available to cover costs associated with standard ILF program actions and expenses, as well as to support ILF project requirements and costs as needed across the 16 Service Areas.

6 Compensatory Mitigation Project Establishment, Operation & Long-Term Management

MFP is established as the Sponsor of a qualified Statewide ILF Mitigation Program for USACE authorizations in Montana. The IRT will advise USACE on the management of the MFP Montana Statewide ILF Mitigation Program. As Sponsor of the Program, MFP will sell mitigation credits to impact site permittees. The funds received from permittees may be consolidated and used to implement various compensatory mitigation projects and support the ILF program.

Project selection, approval, implementation, monitoring and long-term management will follow the specific frameworks, processes, phases, and management structure described below.

6.1 Compensation Planning Framework

All compensatory mitigation projects provided by MFP under the terms of this Instrument will be developed consistent with the Compensation Planning Frameworks (CPFs) that have been developed for each of the 16 Service Areas (see example in Exhibit A or, alternatively, located in the RIBITS cyber repository for the MFP ILF Instrument. The CPFs will be used to guide aquatic resource restoration, enhancement, establishment, and preservation activities.

The CPFs provide the watershed approach that MFP will use for establishing priorities and identifying opportunities for resource restoration within the 16 designated ILF Service Areas across the state. This approach considers watershed needs, and how locations and types of compensatory mitigation projects address those needs. A landscape perspective is used to identify the types and locations of ILF compensatory mitigation projects that will benefit the watershed and offset losses of aquatic resource functions and services caused by activities authorized by USACE permits. Each CPF considers landscape scale, historic and potential aquatic resource conditions, past and

projected aquatic resource impacts in the watershed, and terrestrial connections between aquatic resources and key habitats.

Each Service Area under this Statewide ILF Mitigation Program Instrument has an approved CPF that intentionally presents a framework for prioritization and planning based on general selection criteria in order to maximize flexibility of planning within each Service Area, and among Service Areas as appropriate, to acknowledge the varied and dispersed nature of historic and anticipated mitigation requirements among Service Areas. A framework for ongoing prioritization and planning allows MFP, in collaboration with USACE and IRT, to address mitigation needs in the context of ever-evolving watershed conditions and restoration needs, as well as to integrate with other ongoing non-mitigation project planning and restoration activities.

Compensatory mitigation project planning under this ILF Instrument will be conducted according to the following general procedure, and further detailed in the CPFs:

1. Upon sale of advance credits in a Service Area, MFP will complete Service Area mitigation planning consistent with the CPF specific to the affected Service Area.
2. Consider type, amount, and location of impacts to ecological functions relative to needs of sub-basin (6-digit or 8-digit level HUC) or Service Area identified in the CPF.
3. Select compensatory mitigation project(s) that best meet needs of sub-basin and Service Area using a watershed approach, as defined in 33 CFR 332.2, and given existing and anticipated permitted impacts.

Approved CPFs will be reviewed and updated every five (5) years to ensure mitigation site selection is based on relevant and contemporary information for each Service Area. This first iteration of the CPFs were reviewed and approved on December 27, 2016. MFP will conduct the first five-year CPF review by the end of the 2021 calendar year. MFP will then have 12 calendar months to update the CPFs and coordinate with USACE to review and finalize the updated CPFs. All of the CPFs will be due for the second 5-year CPF review process by the end of the 2026 calendar year. Alternatively, if the demand for new ILF project sites do not warrant the need for all 16 CPFs to be updated every five years, MFP will update individual CPFs when new ILF project sites are needed in Service Areas with CPFs that have not been updated within the previous 5 years. The review process will follow the streamlined review process outlined in §332.8(g)(2).

6.2 Mitigation Site Planning & Approval Process

Each compensatory mitigation project will have a separate mitigation project plan reviewed by USACE and IRT and signed by MFP and USACE. Mitigation project plans will be developed and implemented in accordance with 33 CFR 332 and will be considered as a modification to the Instrument. Review and approval of subsequent compensatory mitigation project plans will follow the process outlined for Modifications to the Instrument *(Section 10)* and according to the procedures outlined in 33 CFR 332.8(g). At the District Engineer's discretion, review and approval of additional compensatory mitigation project plans may follow the streamlined instrument modification process outlined in 33 CFR 332.8(g)(2). Mitigation project plans will include the following twelve elements as listed under 33 CFR 332.4 (c)(iii):

1. Project objectives
2. Site selection factors

3. Site protection instrument
4. Baseline information
5. Determination of credits
6. Work plan
7. Maintenance plan
8. Performance standards
9. Monitoring requirements
10. Long-term management plan
11. Adaptive management plan
12. Financial assurances

The mitigation project plan will also include a detailed credit release schedule (see *Section 7.3*) and financial assurance release schedule. The scheduled release of credits will correspond to the timeframe established for plan approval, project implementation and monitoring of the compensatory mitigation project sites to ensure ecological performance standards are being met.

For clarification, the Maintenance Plan element within each mitigation project plan will summarize the anticipated Maintenance period activities, should the project enter into a temporary Maintenance period, as described in *Section 6.3.1.* The Maintenance plan element within a mitigation project plan is intended to be short (~1 page) and will necessarily consist of a high-level summary of anticipated activities. This level of detail is appropriate given that the site has yet to be constructed at this stage of the project implementation process. A more detailed Maintenance plan may be necessary if it appears likely that the site will enter a temporary Maintenance period prior to entering the LTM phase.

Regarding the LTM plan element, since the LTM tasks, responsibilities and associated costs can only be anticipated at the mitigation project plan stage, it is acceptable for MFP to include a short (~1 page), high-level long-term management plan in each mitigation project plan which will address the requirements listed in §332.7(d). A more detailed LTM Plan will be prepared at an appropriate time after the site has been constructed, and must be completed and approved by the USACE before the site can enter the LTM Phase. Useful calculators and LTM Plan templates might include the TNC Stewardship calculator and California LTM Plan template which MFP can use to develop a plan that addressed §332.7(d), the LTM expectations described in *Section 6.3.2.*, and factors in the long-term steward requirements.

The mitigation project plan review and approval process will follow the 9-step process illustrated in Figure 2. This process was originally developed by MFP in coordination with USACE and IRT in March 2017 and has since been updated to match the streamlined review process described in §332.8(g)(1):

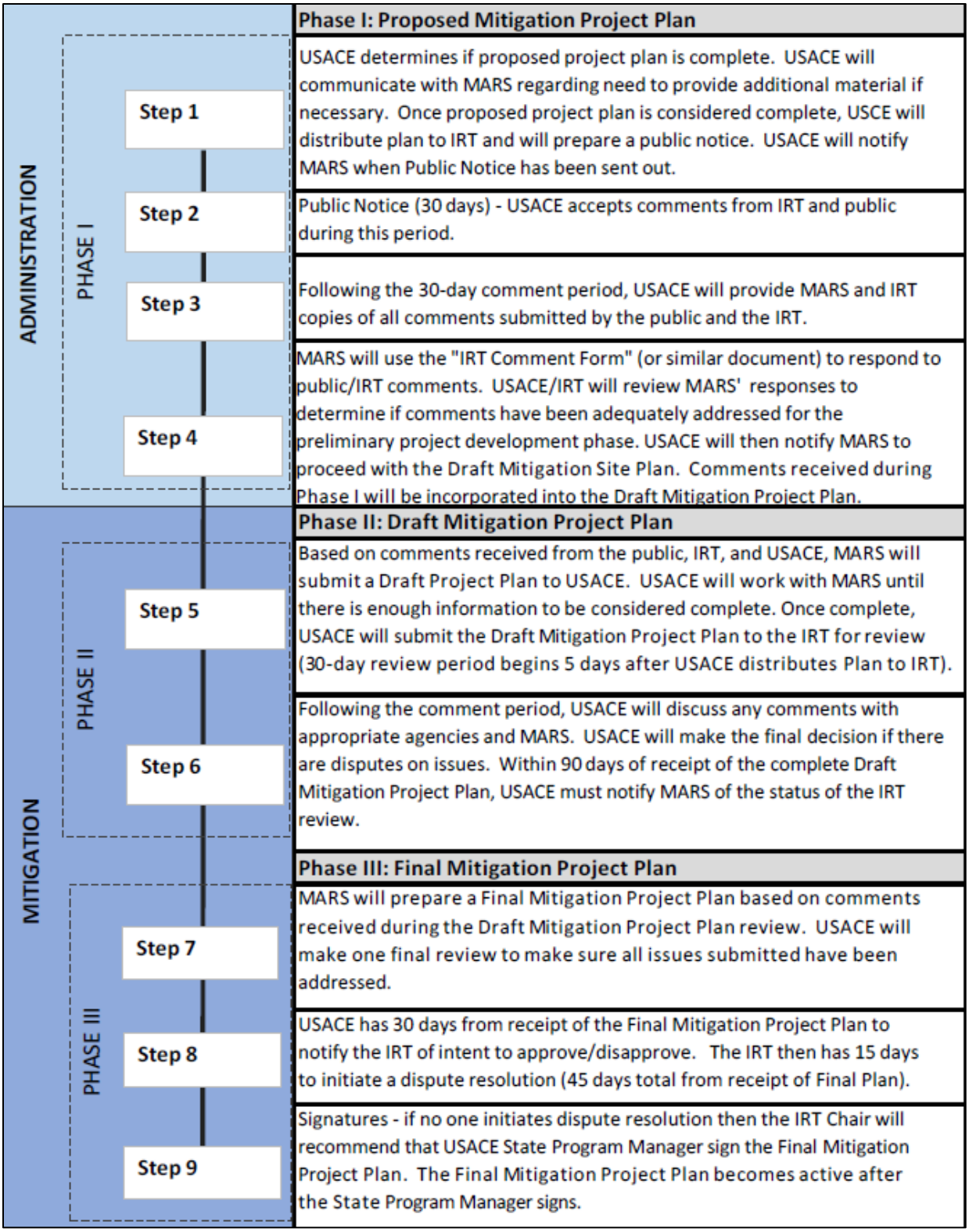

Figure 2. 9-Step Mitigation Project Plan review and approval process.

6.3 Mitigation Project Phases

Compensatory mitigation projects have two primary phases, the **Operational Phase** and the **Long-Term Management Phase,** with specific sequences, timelines, and requirements associated with each (Figure 3).

6.3.1 Operational Phase

The **Operational Phase** begins at the date of the first advance credit sale within the Service Area and ends once the site has achieved its performance standards, has met its advance credit obligations, has an approved Long-Term Management (LTM) Plan and steward in place, and has secured (and funded) a LTM funding mechanism. Nested within the Operational Phase is the three-year growing season period, the Establishment period, and Maintenance period described below:

3-Year Growing Season Time Period: MFP will have three full growing seasons after the date of the advance credit sale in a given Service Area to identify a suitable project site, develop an approved site plan, secure the site property and property protections, and implement the initial physical and biological improvements. The three-year growing season time period may be adjusted if the District Engineer determines that more or less time is needed to plan and implement the project. The growing season start- and end-date will depend on the location of the project site and will be determined using the wetland delineation growing season guidance provided in USACE Regional Supplement documents. If MFP is unable to meet the 3-year growing season timeline for project implementation, the District Engineer must either make a determination that more time is needed to plan and implement an in-lieu fee project or direct MFP to disperse funds from the Program Account to provide alternative compensatory mitigation, including mitigation sites in other Service Areas, to fulfill those compensation obligations.

Establishment Period: The Establishment begins when the site is constructed and typically lasts about five years, but may be shorter or longer depending on how quickly (or slowly) the performance standards and other project requirements are achieved. The site will be monitored on an annual basis during the Establishment period, beginning in the first growing season following construction completion. The monitoring activities will follow the protocols outlined in the approved mitigation project plan to document performance standard success, which in turn will trigger credit releases per the credit release schedule defined in the approved mitigation project plan. Maintenance activities and adaptive management activities will be performed as needed to ensure project success during this period. Monitoring activities are discussed further in *Section 6.61* below.

Maintenance Period: The Maintenance period is the time occurring after the site meets performance standards and advance credit obligations, but before it enters into the LTM phase. In some cases, a site may transition smoothly from the Establishment Phase into the LTM Phase without the need for a Maintenance period, but in other cases a Maintenance period may be necessary if, for example, it takes longer than anticipated to finalize the LTM Plan, or if the legal agreements between the long-term steward and MFP or landowner take longer than expected. MFP anticipates avoiding these delays by proactively working on the final LTM Plan and any site closure/transfer arrangements well ahead of time; however, if circumstances require that the site enters into a temporary Maintenance period, MFP will maintain the quality and condition of the site as it was measured at the end of the performance monitoring period until the site enters into the LTM phase. Performance monitoring will not be necessary, but MFP will undertake adaptive management, such as annual monitoring based on site-specific maintenance needs, to ensure

credit production is stable between the end of the Establishment period and the beginning of the LTM phase.

The Operational Phase ends when USACE, in consultation with the IRT and MFP, determines that:

1. All applicable performance standards for the project site prescribed in the approved mitigation project plan have been achieved;
2. All advance credits have been released and the advanced credit obligation has been met;
3. MFP, in consultation with USACE and IRT, has an approved Long-Term Management Plan in place;
4. MFP has either: (1) assumed responsibilities for accomplishing the Long-Term Management Plan, in which case MFP will fulfill the role of long-term steward, or (2) has assigned those responsibilities to another long-term steward;
5. A LTM funding mechanism is in place and appropriate moneys from the LTM Account have been transferred or made available to the Long-term steward, if applicable; and
6. MFP has complied with the terms of this Instrument.

Refer to *Section 6.6.6* for other actions tied to the Operational Phase closure process.

With regards to funding and Financial Assurances, the **Operational Phase** is associated with **Administrative, Mitigation, Contingency, and Financial Assurances** (described more fully in *Section 5.1*). In addition to the Administrative and Mitigation funds, Contingency funds will be available during the Operational Phase to address unanticipated project costs associated with corrective actions or adaptive management activities that are needed to ensure project success. Contingency funds may also be set aside to serve as short-term Financial Assurances (which is synonymous with the term "Financial Assurances"), or other forms such as a performance bond(s) may be used, if deemed necessary by USACE. Financial assurance mechanisms will essentially serve as an emergency fund or insurance policy to address partial or total mitigation site failure during the Operational Phase. The coverage period of the Financial Assurance mechanism(s) begins when the Final Mitigation Project Plan has been approved and ends once the site has met the Establishment period/Operational Phase requirements listed above, which aligns with the end of the Operational Phase. Financial Assurances can be phased out as the performance standards are met (as defined in the approved Final Mitigation Project Plan), but they are not entirely released until the end of the Operational Phase.

6.3.2 Long-Term Management Phase

The **Long-Term Management (LTM) Phase** begins AFTER the site has met its Operational/Establishment period obligations described above, and continues indefinitely, unless otherwise directed by the District Engineer. Compensatory mitigation sites should be *self-sustaining*, but typically at least some form of management will be required periodically to ensure that the project is sustainable for the duration of the LTM phase. While not specifically defined in the Final Mitigation Rule or USACE guidance, the terms self-sustaining and sustainable refer to the ability of the site to continue to provide long-term ecological benefits to offset the permitted impacts as it matures over time, with minimal maintenance or active management. Long-term management and maintenance should allow for a given mitigation site to mature and to adapt to natural dynamic processes such as seasonal and long-term climatic variability. These changes may include shifts in species composition and/or ecological functions

as the site matures. Long-term adaptation to natural process does not preclude the site from being able to continue to deliver ecological benefits over time.

The LTM phase expectations are:

- Ensure that the site is able to mature and adapt as a self-sustaining functioning aquatic resource.
- Ensure the site is in compliance with the intent and provisions outlined in the site protection instrument (i.e. deed restriction or conservation easement).
- Ensure the site is protected from (and not being impacted by) not-natural actions that would materially jeopardize the site (i.e. dredging, filling, draining, excessive grazing, tilling).
- Manage noxious weeds to a reasonable and practicable extent to avoid excessive infestations.
- Maintain, repair and/or replace any permanent critical engineered site structures or features that are integrally linked to supporting created or artificial wetlands or stream conditions onsite (i.e. pumps, head gates/weirs, earthened berms, etc.). Critical structures or features are those that are intended to be permanent and, if they fail, the site (or a significant portion of the site) could no longer be self-sustaining. This does not include 'soft' engineered design features which are intended to help the site become established during the Establishment Phase, but ultimately will decay, morph, or adapt overtime such that the natural processes of the site take over and are no longer dependent on the soft structure.
- The long-term steward will be responsible for regularly inspecting the site to confirm that the terms of the site protection instrument and expectations listed above are being met and will undertake actions to swiftly correct any identified deficiencies.
- Prohibited activities, required management activities, and responsible parties will be identified in the site protection vehicle and/or contractual arrangements as appropriate.

MFP, USACE and IRT will use the expectations summarized above to guide the development and approval of LTM plans and supporting site protection instruments and contracts.

Funding for the **Long-Term Management Phase** draws upon **Long-Term Financial Resources** in the form of interest/dividends derived from an endowment, trusts, contractual arrangements with future responsible parties, and other appropriate financial instruments to pay for the site's long-term management and maintenance needs. Any remaining **Contingency funds** associated with the mitigation site or Service Area may also be used to support LTM activities. Funds in the Long-Term Management Account will be available solely for use during the Long-Term Management phase and are not available for use on a project until the project enters the Long-Term Management phase, with two exceptions: the transfer of LTM funds during the Operational Phase is allowed (with USACE approval) if a long-term steward requires an upfront transfer of the LTM funds as a condition for their commitment to being the LTM steward and/or as a requirement for closing and recording a site protection vehicle (i.e. conservation easement).

The funding mechanism and anticipated annual LTM budget will be defined in the approved LTM Plan that will be finalized before the site enters the LTM phase.

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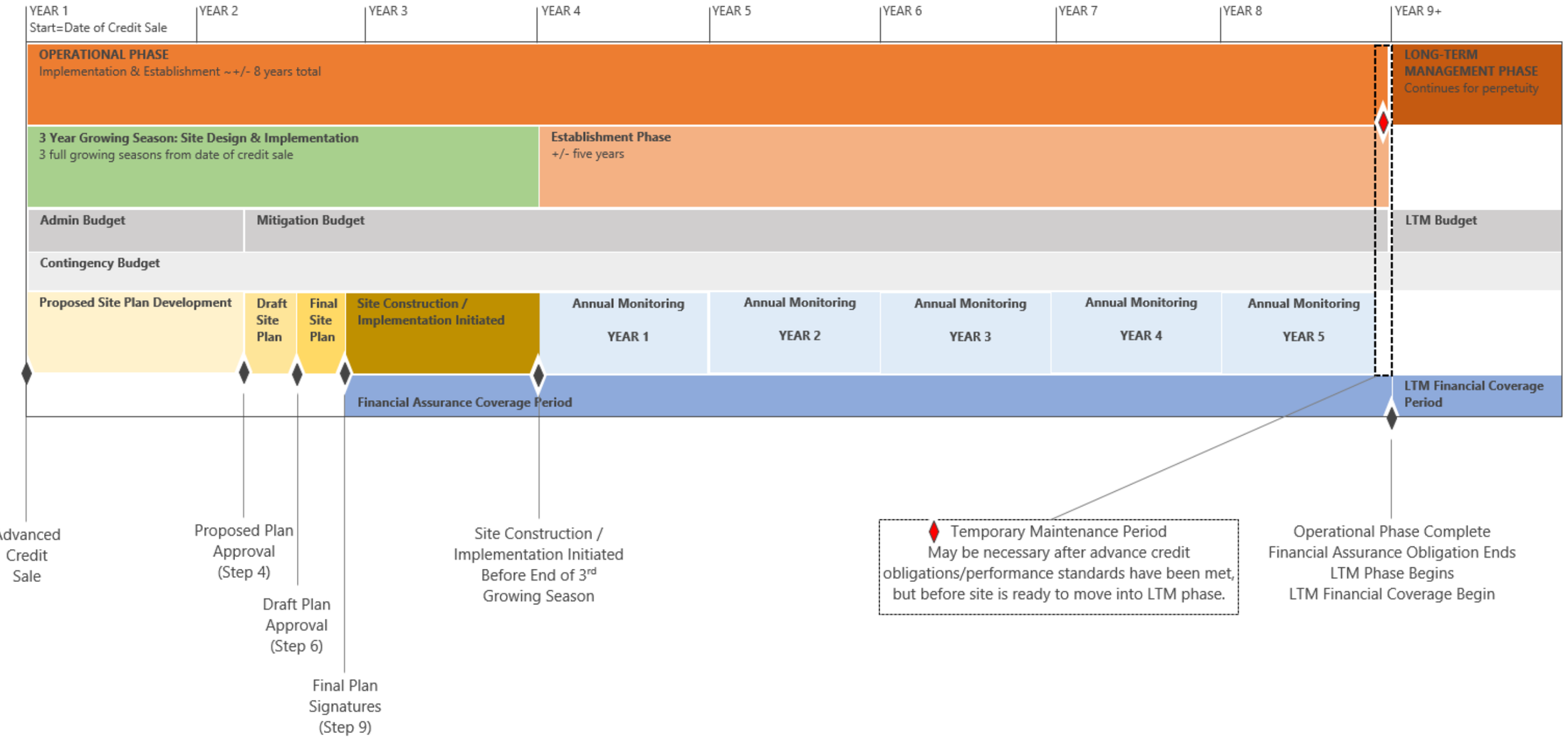

Figure 3. ILF Program Phases & General Timeline

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6.4 Mitigation Credit Pricing

Upon permit approval mitigation credit fees will be collected from permittees and deposited into the MFP ILF Program Accounts. Mitigation fees from advance credit sales will fund the Statewide Program Administration Account, Mitigation sub-accounts, Contingency sub-accounts, and Long-Term Management sub-accounts. Credit prices will reflect full-cost accounting to implement all aspects of planning, establishment and long-term management of compensatory mitigation projects undertaken by the Statewide ILF Mitigation Program. Mitigation fees from advance credit sales will be apportioned to program accounts according to the ratios in Table 2.

Table 2. Mitigation Fee Summary

Cost Category	Percent of Fee	Elements of Credit Fee
Mitigation Account	50%	All costs associated with the development, implementation, and establishment of mitigation projects during the Operational Phase.
Contingency Account	17%	Unanticipated costs associated with planning, implementation, establishment, or maintenance of the mitigation project during the Operational Phase. May be used as Financial Assurances during Operational Phase. Can be used to support activities in the Long-Term Management Phase.
Long-Term Management Account	13%	To be used as financial resources for long-term management and maintenance once the site has entered the Long-Term Management Phase.
Statewide Program Administration Account	20%	Administration and management of the statewide ILF Program, including organizational operations (staff time, office expenses, phone, internet, program development, other program administration), legal, accounting, project planning, and consulting fees.
Total Credit Price	**100%**	

MFP will establish a price per unit of wetland mitigation credit and stream mitigation credit that will be sufficient to fund all accounts described in the Funding Provisions section of this document, including: Statewide Program Administration Account, Mitigation sub-account, Contingency sub-account, and Long-Term Management sub-account.

33 CFR 332.8(o)(5)(ii) (2008) states:

> *For in-lieu fee programs, the cost per unit of credit must include the expected costs associated with the restoration, establishment, enhancement and/or preservation of aquatic resources in that Service Area. These costs must be based on full cost accounting, and include, as appropriate, expenses such as land acquisition or protection, project planning and design, construction, plant materials, labor, legal fees, monitoring, and remediation or adaptive management activities, as well as administration of the in-lieu fee program.*

The methodology used to determine advance stream and wetland credit prices is described below. Credit prices (dollar/credit) are summarized per Service Area in the Annual Report.

MFP determines advance wetland and stream credit prices using a base wetland credit price and a base stream credit price that is adjusted on weighted factors to scale the base price. The base wetland credit price and base stream credit price are calculated using accrued expenditure data from existing MFP ILF mitigation projects, as well as information from a variety of consulting companies, practicing engineers, practicing biologists, contractors and agencies familiar with stream and wetland restoration costs. The base credit price accounts for the types of expected costs associated with the site selection, design, construction, monitoring and long-term management for mitigation sites. These costs include, but are not limited to, all of the relevant costs associated with site selection, land acquisition, planning and engineering, legal fees for permanent site protection, contractor fees, mobilization, equipment rentals, construction costs, revegetation costs, weed management costs, contingency costs, short-term Financial Assurances (i.e. performance bonds), monitoring, maintenance, and periodic site visits and maintenance during the long-term management phase.

The base credit cost may be adjusted to account for factors that may drive costs up, or in some cases minimize project costs. Weighted factors are adjusted up or down to more accurately account for higher or lower project costs in a given Service Area based on some or all of the following:

Geographic Factor: Accounts for the location of the Service Area in which the impact and compensatory mitigation will occur relative to the location of MFP's office locations in Montana. Service Areas that are relatively close to MFP's office locations will have lower expenses related to travel, lodging, and long-distance coordination, compared to Service Areas that are more distant and would require larger time commitments to conduct work.

Project Partner Factor: Considers whether or not MFP has existing relationships with partners, Conservation Districts, contractors, tribal members, watershed groups, or other contacts that could assist in identifying suitable project sites within the targeted Service Area. Service Areas where MFP has a well-established network of contacts are likely to require less time and effort to identify a suitable location for a compensatory mitigation project. Service Areas in which MFP has few to no existing partners will likely require a greater reconnaissance and outreach effort.

Land Value Factor: Accounts for the costs incurred for land acquisition and site protection for each compensatory mitigation site. Land values from publicly available data records are used to develop average land values on a county level, which is then averaged across each Service Area. Service Area land values were grouped to compare price differences between Service Areas. Service Areas with comparatively low land values will presumably have lower land acquisition and site protection costs; Service Areas with mid-range land values will have proportionally higher land-related costs; and Service Areas with the highest land values, generally located near Montana's population centers, will have the highest land-related fees and costs.

Economy of Scale Factor: Credit prices may also take into consideration economies of scale as a function of the number of credits sold to a given permittee, anticipated credit demand, and number of credits generated by a given mitigation project. Alternatively, an Administrative Fee may be applied to the total credit purchase price for purchases that are below a minimum purchase threshold.

Project Efficiency Factor: Considers whether or not MFP already has a project lined up for development at the time of the advance credit sale. The efficiency factor may be used to reduce the weighted price factor if MFP already has a project ready for development in the targeted Service Area (which will reduce site investigation and design costs). The weighted credit price may be reduced in cases where MFP has a 'shovel-ready' project that can move quickly into construction.

Other Factors: Other factors that may add to credit prices include geographical constraints (such as mountainous terrain or constricted valleys) that limit suitable project sites; and landowner owner type (private, public, tribal) which may involve additional requirements or project constraints. Credit prices may be higher for small or fractional credit sales, where an additional transaction fee may be added to credit costs. Credit prices may also take into consideration opportunities for cost savings resulting from projects conducted at sites with minimal or no land acquisition or protection costs, such as on properties where protections already exist. In-kind permittee contributions to mitigation projects may include land or land protections or services that offset part of credit transaction costs. In-kind contributions may reduce credit transaction costs but will not reduce the price of credits.

The total credit purchase price quoted to the permittee is the scaled base price multiplied by the number of debits required by the permit.

MFP will review credit pricing annually to maintain pace with inflation, and to ensure fees are sufficient to cover all mitigation costs for each Service Area, as well as ensure the sustainability and accountability of the Montana Statewide ILF Program. MFP may make credit pricing adjustments at the Service Area, multi-Service Area, or statewide level at MFP's discretion. USACE and IRT will be notified when annual credit price adjustments are made and will be provide summary of those changes. It is MFP's intention to make credit price adjustments on an annual basis and use this set fee schedule for the calendar year. However, MFP retains the right to modify credit prices when necessary for unusual or unique credit sales where the annual fee schedule would be insufficient to cover anticipated costs. MFP also retains the right to increase the annual fee schedule mid-year if it is apparent that the fee structure will not sufficiently cover mitigation costs. MFP will notify USACE and IRT if a mid-year price increase is necessary.

Note that the credit price methodology described above pertains to advance credit sales only, and does not equate directly to other units of mitigation credit such as Functional Units (which will be evaluated on a case-by-case basis). In addition, once the mitigation site is established and has met its initial advance credit obligation, any additional released credits that have been generated onsite may be sold on the open market at market prices. This is discussed further in *Section 5.1.2* and *Section 7.1.*

6.5 Permits

MFP will obtain all appropriate environmental documentation, permits and other authorizations needed to establish and maintain compensatory mitigation project sites. Compliance with this Instrument does not fulfill the requirement or substitute for such authorization.

6.6 Management And Establishment of Mitigation Projects

MFP will develop a Monitoring and Maintenance Plan and a Long-Term Management Plan, within each compensatory mitigation project plan, that specifies the monitoring that will be conducted to evaluate performance standards and

outlines adaptive management strategies and site maintenance and protection during and beyond the period of performance standards.

6.6.1 Monitoring

Monitoring will meet requirements outlined in the Final Mitigation Rule and project-specific final mitigation project plan. MFP is responsible for monitoring the in-lieu fee project sites, in accordance with the approved monitoring requirements for each project, to determine the level of success and identify problems requiring remedial action or adaptive management measures. Monitoring must be conducted in accordance with the requirements in 33 CFR 332.6, and at time intervals appropriate for the particular project type.

Performance monitoring will be conducted during the Establishment time period (Figure 3) and continue until such time that the District Engineer, in consultation with the IRT, has determined that the performance standards for the project have been attained." (33 CFR 332.8(q)(2)).

Performance monitoring will require qualitative and quantitative assessments of physical and biological characteristics of the project as appropriate, using appropriate analytical methods. The purpose of monitoring is to determine the level of compliance with established ecological performance standards specified in the approved mitigation project plan, which are intended to measure whether the requisite ecological lift is being created. The purpose of monitoring is also to identify problems requiring remedial action or adaptive management measures. Where projects are conducted as partnerships or with additional non-mitigation funding, MFP will monitor the components of the project specifically developed to meet mitigation requirements and as specified in the mitigation project plan.

Monitored parameters will depend in large part on the type, scale and scope of a proposed project, but will generally include hydrologic conditions, vegetative cover, fish or wildlife usage, soil stability, beneficial land use or land management change, and presence/extent of noxious weeds and nuisance species in accordance with the ecological performance standards for a given site.

Monitoring requirements and specifications will vary among compensatory mitigation project sites and will be outlined in detail in the mitigation project plan for each compensatory mitigation project. USACE, in consultation with the IRT, will have the opportunity to review and approve monitoring requirements during review of the mitigation project plans.

MFP will formulate a monitoring plan for each project that details the monitoring requirements for the compensatory mitigation project, including:

1. the parameters to be monitored,
2. the length of the monitoring period,
3. the party responsible for conducting the monitoring,
4. the frequency for submitting monitoring reports to the District Engineer, and
5. the party responsible for submitting those monitoring reports to the District Engineer. (33 CFR 332.6).

In general, MFP will provide annual monitoring reports for each project to USACE and IRT in conjunction with annual credit reporting by March 31 of each year following the growing season until all applicable performance standards

have been achieved and associated credits released. Each report will be submitted in electronic format, and will contain the following:

1. Plans, maps, and/or photographs adequate to illustrate site conditions;
2. A narrative summarizing the condition of individual ILF projects;
3. Monitoring results with comparison to performance standards, and;
4. Recommendations for adaptive management at the site.

The monitoring duration may be extended beyond 5 years at USACE's discretion in individual mitigation project plans or if applicable performance standards have not been met within the specified monitoring time period. The District Engineer may also reduce or waive monitoring requirements upon determination that performance standards and credit obligations have been met.

6.6.2 Maintenance Provisions

ILF projects will be designed, to the maximum extent practicable, to be self-sustaining and to minimize maintenance needs once performance standards have been achieved. During the Establishment period, maintenance may include weed control, replanting, fence maintenance and other such activities necessary to promote self-sustaining performance during initial years following implementation. Active maintenance practices will continue through the Operational Phase, with maintenance actions triggered through adaptive management and as indicated by monitoring results. Projects requiring phased installation may specify maintenance and monitoring measures that promote the phased approach.

As noted in Section 6.3.1, a temporary Maintenance Period may be necessary until the site formally transitions into the LTM Phase. A specific Maintenance Period plan will be developed as part of the mitigation project plan, as described in *Section 6.2*.

Periodic site maintenance may also be required once a site has entered the Long-Term Management Phase, and is discussed in Section 6.6.7 below.

6.6.3 Adaptive Management and Contingencies Planning

Each mitigation project plan will include an adaptive management plan component. Adaptive management is defined in the federal rule as a "management strategy to address unforeseen changes in site conditions or other components of the compensatory mitigation project, including the party or parties responsible for implementing adaptive management measures. The adaptive management plan will guide decisions for revising compensatory mitigation project plans and implementing measures to address both foreseeable and unforeseen circumstances that adversely affect compensatory mitigation success." (33 CFR 332.4(c)(12)). Adaptive management plan components of the mitigation project plans will necessarily lack specific measures to address underperformance or other factors hampering project success, since the type of underperformance or confounding factors will not be known at the time the mitigation project plan is developed. Specific corrective measures will be developed if and when underperformance details become clear. Any and all adaptive management measures will be appended to the mitigation project plan. The IRT will review and comment on any additions or amendments to mitigation project plans. Contingency funds, incorporated into the credit fees and held in reserve in a separate account (see *Section 5.1*), can be used to defray the cost of developing and implementing adaptive management actions.

Section 33 CFR §332.7(c)(2008) provides further guidance on adaptive management of compensatory mitigation projects:

> *If monitoring or other information indicates that the compensatory mitigation project is not progressing towards meeting its performance standards as anticipated, the responsible party must notify the District Engineer as soon as possible. The District Engineer will evaluate and pursue measures to address deficiencies in the compensatory mitigation project. The District Engineer will consider whether providing ecological benefits comparable to the original objectives of the compensatory mitigation project.*
>
> *The District Engineer, in consultation with the responsible party (and other federal, tribal, state, and local agencies, as appropriate), will determine the appropriate measures. The measures may include site modifications, design changes, revisions to maintenance requirements, and revised monitoring requirements. The measures must be designed to ensure that the modified compensatory mitigation project provides aquatic resource functions comparable to those described in the mitigation project plan objectives.*
>
> *Performance standards may be revised in accordance with adaptive management to account for measures taken to address deficiencies in the compensatory mitigation project. Performance standards may also be revised to reflect changes in management strategies and objectives if the new standards provide for ecological benefits that are comparable or superior to the approved compensatory mitigation project. No other revisions to performance standards will be allowed except in the case of natural disasters.*

Once approved by USACE and IRT, the revised project elements identified in the adaptive management plan will be implemented, and will be appended to the approved mitigation project plan. Ecological performance standards, monitoring requirements and schedule, and credit release schedule will be amended accordingly to incorporate the terms of the project as revised in the adaptive management plan.

If monitoring indicates the need for significant modification of a compensatory mitigation project as part of adaptive management, the responsible party must get approval from USACE. A streamlined review process is available (see 33 CFR 332.8(g)(2)).

In cases where adaptive management costs exceed funds available in the Contingency sub-account, other forms of Financial Assurance (i.e. performance bonds) may need to be drawn upon to address the failure or issue. If the failure is substantial and would be difficult or impossible to correct on-site (e.g., landscape conditions change such that hydrology is insufficient to support a wetland), MFP will, in consultation with USACE and IRT, evaluate whether the project should be abandoned altogether in favor of pursuing alternate measures, such as a new project. A failure of a project (in whole or in part) is considered "default", in which case default provisions in this Instrument would apply.

6.6.4 Noncompliance and Default

If the USACE, in consultation with the IRT, determines that MFP is in noncompliance with any provision of this Instrument or that a Site is delinquent or is otherwise not meeting the advance credit obligation, the USACE may take appropriate corrective measures, including but not limited to, suspending Credit sales, initiating adaptive management, decreasing available credits, requiring alternative compensation, and/or terminating the Program Instrument. Noncompliance includes performance failure and delinquency that results in a failure to fulfill advance

credit obligations. Before a compensatory mitigation project is found to be in default, the USACE, in consultation with the IRT and Sponsor, will seek to address the causes of noncompliance. Corrective measures available to the USACE should be commensurate with the scale at which noncompliance occurs. Such measures will ensure that mitigation fees collected from project applicants ultimately result in sufficient compensatory mitigation to offset the original impacts.

Phases of compensatory mitigation project noncompliance include: (1) performance failure, (2) project delinquency and (3) project default.

1. Performance Failure. Performance failure may occur if, for any reason, a compensatory mitigation project fails to comply with terms of an approved mitigation project plan, including failure to meet performance standards after a project is completed. If monitoring reveals a performance failure, MFP, USACE and the IRT will first attempt to address the failure through adaptive management. If adaptive management efforts are successful, no further responses to project performance failure will be necessary. In cases where the failure of a specific performance standard is inconsequential to the site's performance and its ability to meet credit obligations, USACE may waive the adaptive management requirement. If this occurs, the performance monitoring criteria and credit release schedule in the mitigation project plan will be updated accordingly, through an Instrument Modification.

2. Project Delinquency. Project delinquency occurs when adaptive management measures are not undertaken by MFP or if MFP fails to adequately implement adaptive management measures in response to performance failure. When site delinquency occurs, the USACE may notify MFP in writing identifying areas of delinquency and requesting MFP to propose, within 60 days from the date of receipt of that notice, corrective measures or a process for determining corrective measures. The IRT will advise the USACE on whether or not to authorize MFP to implement the proposed corrective measures. USACE may provide a timeline for and authorize implementation of proposed corrective measures or request revisions. If corrective measures are implemented successfully, no further responses to site delinquency will be necessary.

3. Project Default. USACE may determine a project default if corrective measures following a delinquency notice are unsuccessful or if MFP fails to comply with terms of the corrective actions specified in project delinquency notification. USACE will notify MFP of project default by letter. Where USACE determines that MFP is in default, USACE may take appropriate action, including but not limited to: suspending sale of advance credits, requiring adaptive management measures, decreasing available advance credits, directing Financial Assurances or Contingency funds to provide alternative mitigation, taking enforcement actions, or terminating the Instrument. Should MFP fail to correct the reasons for default according to and within the time period specified in the default notification, USACE following consultation with the IRT may terminate the Instrument and any subsequent ILF Program operations.

6.6.5 Force Majeure

Any delay or failure of MFP to comply with the terms of this Instrument will not constitute a default if and to the extent that such delay or failure is primarily caused by any Force Majeure or other conditions beyond MFP's reasonable control that significantly, adversely affect its ability to perform its obligations hereunder. USACE retains sole discretion over the final determination of whether an act or event constitutes Force Majeure, whether

significant adverse impacts to a compensatory mitigation project have occurred, to what extent changes to a compensatory mitigation project will be permitted, and corrective measures that may be employed. Force Majeure events include natural or human-caused catastrophic events or deliberate and unlawful acts by third parties.

1. Examples of a natural catastrophic event include, but are not limited to: flood, drought, lightning, earthquake, wildfire, landslide, disease or regional pest infestation, effects of climate change on habitat or hydrology.
2. Examples of a human-caused catastrophic event include, but are not limited to substantial damage resulting from: war, insurrection, pandemic, riot or other civil disorders, spill of a hazardous or toxic substance, or fire.
3. Examples of a deliberate and unlawful act include, but are not limited to substantial damage resulting from the following: the dumping of a hazardous or toxic substance, the illegal diversion of water from a project area, or significant acts of vandalism or arson.

Other conditions beyond MFP's control will include: interference by third parties; condemnation or taking by any governmental body; change in applicable law, regulation, rule, ordinance, or permit condition, or the interpretation or enforcement thereof; any order, judgment, action or determination of any federal, state or local court, administrative agency or governmental body; and/or suspension or interruption of any permit, license, consent, authorization or approval. MFP will provide written notice to the District Engineer and IRT if the performance of any of the ILF projects are affected by any such event as soon as it is reasonably practical.

MFP will not be deemed to be in noncompliance or default due to unavoidable delays when delays to implementation or action are due to USACE/IRT decision-making process including review and approval of mitigation actions, or to events categorized by USACE in its sole discretion under the Force Majeure provision above.

6.6.6 Transition of Operational Phase to Long-Term Management Phase

Upon satisfaction of requirements and performance standards for any compensatory mitigation project under this Instrument, USACE will certify, following consultation with MFP and the IRT, that the Operational Phase of a compensatory mitigation project has concluded once the following requirements have been met:

1. All applicable performance standards for the project site prescribed in the approved mitigation project plan has been achieved;
2. All advance credits have been released and the advanced credit obligation has been met;
3. MFP, in consultation with USACE and IRT, has an approved Long-Term Management Plan in place;
4. MFP has either: (1) assumed responsibilities for accomplishing the Long-Term Management Plan, in which case MFP will fulfill the role of long-term steward, or (2) has assigned those responsibilities to another long-term steward;
5. A Long-Term Management funding mechanism is in place and appropriate moneys from the Long-Term Management Account have been transferred or made available to the long-term steward, if applicable; and
6. MFP has complied with the terms of this Instrument.

As a final step in the Operational Phase closure process, USACE may perform a final compliance inspection to confirm that all performance standards associated with implementation have been achieved. Certification will occur upon MFP's receipt of a letter of "Project Closure Certification" (or similar documentation) issued by USACE to MFP confirming that all advance credits associated with that project have been released, and confirming that MFP has fulfilled all compensatory mitigation project requirements for released credits.

MFP may request that part of or an entire ILF project be transitioned to the LTM Phase early if it is determined that certain performance standards are unattainable or it is otherwise in MFP's interest to do so. USACE will decide whether to grant such requests. In the event that credits were released prior to the early closure, MFP will remain responsible for fulfilling all obligations consistent with this Instrument and conditioned upon the number of advance credits sold.

6.6.7 Ownership and Long-Term Management

Entering the Long-Term Management Phase of a compensatory mitigation project is contingent upon MFP securing long-term protection of each ILF project in accordance with an approved Long-Term Management Plan. All real property on which compensatory mitigation projects are implemented will be either (1) subject to deed restrictions or a conservation easement granted to or purchased by MFP or other land trust or public entity by a landowner that restricts management to uses consistent with this Program. All restrictive covenants or conservation easements will be permanent in duration, must be approved by the IRT and provided to USACE, and must be recorded with the deed in the county office of the appropriate county seat prior to the release of any credits; (2) owned in fee simple by MFP and subject to a restrictive covenant established by MFP and approved by USACE/IRT limiting management to uses consistent with this Program or similarly restricted by a conservation easement granted by MFP to a separate party; or (3) in the case of publicly owned or tribal lands, subject to a long-term management plan or agreement between USACE, MFP, and the administering agency or tribe and developed in cooperation with the administering agency or tribe. Properties with existing conservation easements or equivalent protections as well as lands held by state, federal, tribal, or other entities in the public trust present opportunities to optimize mitigation and conservation on a watershed scale.

Conservation easements will be held by entities such as federal, tribal, other state or local resource agencies, or non-profit conservation organizations, including MFP. The protection mechanism will assign long-term stewardship roles and responsibility for the project and will prohibit incompatible uses that might otherwise jeopardize the requirements of the ILF compensatory mitigation project. Copies of such recorded instruments will be sent to USACE and become part of the official project record. Each protection instrument will contain a provision requiring notification to MFP and the District Engineer if any action is taken to void or modify it.

On publicly- or tribal-owned property, long-term protection may be provided through facility management plans or integrated natural resource plans or conservation land use agreements. On privately held property, including property or easements held by conservation organizations or MFP, real estate instruments will be recorded. MFP will ensure that such protection mechanisms are in place prior to credit release, as stipulated in each mitigation project plan. Copies of such recorded instruments on privately-owned property or agreements for publicly- or tribal-owned property will be sent to USACE and become part of the official project record.

Funding for the Long-Term Management Phase will draw upon Long-Term Financial Resources in the form of an endowment (or other interest-bearing account) to pay for the site's long-term management and maintenance needs.

The funding mechanism and anticipated annual Long-Term Management budget will be defined in the approved Long-Term Management Plan that will be finalized before the site enters the Long-Term Management phase. Funds in the Long-Term Management Account will be available solely for use during the Long-Term Management phase and are not available for use on a project until the project enters the Long-Term Management phase, with two exceptions: the transfer of LTM funds during the Operational Phase is allowed (with USACE approval) if a long-term steward requires an upfront transfer of the LTM funds as a condition for their commitment to being the LTM steward and/or as a requirement for closing and recording a site protection vehicle (i.e. conservation easement). Any remaining Contingency funds associated with the mitigation site or Service Area may also be used to support Long-Term Management activities.

MFP will remain responsible for complying with the provisions of this Instrument throughout the operational life of the Statewide ILF Program, regardless of the ownership status of the underlying real property where compensatory mitigation projects are located, unless those responsibilities have been assigned with IRT and USACE approval. Although MFP is not required to do so, it may transfer ownership of all or a portion of a compensatory mitigation project site's real property interest to another party, provided USACE, following consultation with the other members of the IRT, expressly approves the transfer in writing. MFP will provide no less than 60 days' written notice to the IRT of any transfer of fee title or any portion of MFP's real property interest to another party.

MFP may transfer its long-term management responsibility to a separate party assignee, which will then serve as long-term steward in place of MFP. The assignee may be a public agency, a land steward entity, or a non-governmental organization with such designated capacities. The identity of the assignee and the terms of the long-term management and maintenance agreement between MFP and the assignee must be approved by USACE in consultation with the IRT, in advance of assignment. USACE will retain the option of becoming a signatory to any contract or other arrangement assigning rights and delegating the responsibilities to the steward.

Upon execution of a long-term management assignment agreement and the transfer of the funds designated for the compensatory mitigation project in the Long-Term Management Account, and upon satisfaction of the remaining requirements for closure of the Operational Phase of the compensatory mitigation project, MFP will be relieved of all further long-term management responsibilities under this Instrument which are associated with the site for which responsibilities have been transferred.

Regardless of the legal mechanism protecting the compensatory mitigation project site, MFP will be responsible for long-term management of the site unless or until responsibility is assigned to another party. The long-term management strategy will be consistent with the expectations outlined in *Section 6.3.2* include the following components:

1. Specific needs for long-term success of the project including a general discussion of watershed benefits and site history will be considered. Generally, the long-term management strategy for a project will emphasize long-term and self-sustaining processes that produce and maintain aquatic resource benefits.

2. Each compensatory mitigation project will meet USACE's long-term protection requirements. Agreements will require that project sites be protected from adverse future land uses with a permanent conservation easement, deed restriction, or other appropriate legal mechanism. For each project, MFP will submit a proposal for a specific long-term protection mechanism to USACE and the IRT for review and approval.

3. Compensatory mitigation projects may be conducted by MFP on lands protected by easements held by a separate land trust entity. MFP may either continue to assume responsibility for long-term management or delegate monitoring and/or management responsibilities to that land owner or easement holder entity. However, it may be most advantageous or necessary to transfer responsibility for long-term management to a separate party; e.g. where property owners request that a single entity hold the easement and provide long-term management. Where long-term management becomes the responsibility of a separate party, a long-term management plan may be presented to USACE for approval that describes how the separate party will implement the strategy. In either case, the responsible party will maintain long-term management funds sufficient to ensure long-term protection of the site.

4. MFP, or approved designee, will be responsible for maintaining ILF projects, consistent with the approved long-term management plan, to ensure the project's long-term viability as functional aquatic resource. Site maintenance during the Long-Term Management Phase will be performed by the property owner or the long-term steward, depending on the specific provisions for long-term stewardship. MFP will retain such responsibility unless and until the long-term projection responsibility is formally transferred to a long-term steward approved by USACE.

5. The ILF Program includes a Contingency Account and Long-Term Management Account. These accounts will be held by MFP except where responsibility for long-term management has been transferred to a separate party.

6.7 Responsibilities of USACE and IRT

In approving this Statewide ILF Program Instrument, USACE and IRT agree to oversee and encourage MFP in administering the program in good faith and under the terms of the Final Mitigation Rule. Specifically,

1. USACE agrees to provide appropriate oversight in carrying out their responsibilities under the provisions of this Instrument.

2. USACE agrees to review and provide comments on project plans, monitoring reports, contingency and remediation proposals, and similar submittals from the Sponsor in a timely manner. USACE will coordinate its review with the members of the IRT.

3. USACE agrees to review requests to modify the terms of this Instrument, to determine achievement of performance standards in order to evaluate the award of credits, and to approve compensatory mitigation project plans. USACE will coordinate review with the members of the IRT so that a decision is rendered or comments detailing deficiencies are provided in a timely manner. USACE agrees to not unreasonably withhold or delay action on such requests.

4. USACE agrees to act in good faith when rendering decisions about acceptability of Financial Assurances, requiring corrective or remedial actions, requiring long-term management and maintenance actions, and releasing credits. USACE will exercise good judgment in directing the development, approval, and implementation of plans that may necessitate accessing Financial Assurances, and only to the extent they reasonably and in good faith conclude that such remedial or corrective actions are an effective and efficient expenditure of resources. USACE will act in good faith in determining the scope and nature of corrective actions to be undertaken, will act in good faith in conducting monitoring, developing reports, and assessing compliance with performance standards; and will not unreasonably limit options available as

corrective action activities or otherwise apply their discretion so as to unduly prejudice the Sponsor regarding the timing or number of credits released. Approval by USACE of the identity of any assignee responsible for executing the Long-Term Management Plan, and approval of the terms of any long-term management assignment agreement, will not be unreasonably withheld.

5. USACE will inspect the compensatory mitigation project sites as necessary to evaluate, in consultation with other members of the IRT, the achievement of performance standards, to assess the results of any corrective measures taken, to monitor implementation of Long-Term Management Plans, and, in general, to verify the Sponsor's compliance with the provisions of this Instrument.

6. Upon satisfaction of the requirements for any compensatory mitigation project phase under this Instrument, USACE will determine the number of credits released and certified according to performance standards for the approved compensatory mitigation project and will certify that the Operational Phase of a compensatory mitigation project has concluded and that the site has entered the Long-Term Management Phase. Certification of the completion of the Operational Phase will occur upon the Sponsor's receipt of a letter of "Project Closure Certification" (or similar documentation) issued by USACE to the Sponsor confirming that all advance credit obligations have been met.

7 Credit Transactions

The standard unit of measure used in in-lieu fee mitigation programs and mitigation banking to quantify an impact is a 'debit'; restoration, enhancement and preservation at a compensatory mitigation project is typically measured in 'credits' and occasionally as functional units. Generally, the determination of debits at a permit site and credits at a compensatory mitigation project in Montana are governed by existing USACE procedures specific to compensatory mitigation in the State of Montana. USACE has established specific and separate procedures for the determination of debits and credits for wetlands and for streams. Determination of debits and credits for the purpose of providing compensatory mitigation under this Instrument will be conducted using the following specific procedures, unless alternative procedures have been identified and approved for use by USACE and IRT: *Wetland Compensatory Mitigation* Ratios (USACE, 2005); *Montana Wetland Assessment Method* (Berglund and McEldowney, 2008); *Montana Stream Mitigation Procedure* (USACE, 2013).

Unless otherwise specified in a specific compensatory mitigation project plan and until updated procedures are published by USACE, mitigation credits and/or functional units will be determined and counted using the procedures listed above. While mitigation ratios are generally accounted for in establishing credits achieved, USACE may, at their discretion and according to the relevant terms of the federal rule, require credit to debit mitigation ratios greater than one to one where necessary to account for the method of compensatory mitigation (e.g., restoration or preservation), the timing of mitigation relative to permitted actions, or other differences between impacts at the permit site and benefits or lift at the compensatory mitigation project.

7.1 Generation Of Credits

The anticipated number of credits resulting from an approved compensatory mitigation project will be specified in each compensatory mitigation project plan and will be determined using Wetland Mitigation and Stream Mitigation Procedures established by USACE and referenced above or by other appropriate means as mutually agreed on by USACE and MFP for specific compensatory mitigation projects. Generation of credits from approved mitigation

projects will be based on federal regulations in accordance with 33 CFR Part 332, Compensatory Mitigation for Losses of Aquatic Resources. The District Engineer, in consultation with the IRT, will determine the number of credits generated by each compensatory mitigation project based upon the approved design and the resulting performance standards achieved, in accordance with the terms and conditions contained herein.

This Instrument recognizes two types of credits.

Advance credits: Advance credits are those issued to the ILF program and "available for sale prior to being fulfilled in accordance with an approved compensatory mitigation project plan" (33 CFR Part 332.2, Definitions). Advance credits will be "released as milestones specified in the credit release schedule are achieved" and are available "for fulfillment of advance credit sales" (33 CFR Part 332.2, Definitions). Advance credit prices are based on the ILF fee schedule described in *Section 6.4* of this Instrument. For the purpose of this Instrument, the term "*advance credit obligation"* refers to the credits that MFP is obligated to generate to offset permitted impacts associated with advance credit sales in each Service Area.

Released Credits: Once the mitigation site been established and has met its advanced credit obligation, any additional released credits that have been generated in excess of the advance credit obligation may be sold at market prices. Temporal loss ratio penalties will not apply to this type of credit. In addition, these credits are considered on par with mitigation bank credits from a mitigation hierarchy standpoint. Refer to *Section 5.1.2* for a description of how the proceeds from released credit sales will be managed.

Advance credits identified in this Instrument or credits generated by an established mitigation project may be sold to any private or public sector individual, organization, agency, or entity seeking mitigation credits as authorized by the ILF Instrument within any Service Area. The number and type of credits and their application for activities authorized by USACE permits will be at the discretion of USACE. Upon sale of advance credits, MFP becomes responsible for meeting the mitigation requirements identified in the approved mitigation project plan. When advance credits are fulfilled through credits generated from mitigation projects in the Service Area, "an equal number of new advance credits is restored to the program sponsor for sale or transfer to permit applicants" (33 CFR Part 332.2, Definitions). Credits are released as the project matures and meets performance standards, according to the credit release schedule in the final mitigation project plan. Once a credit has been released, it cannot be rescinded.

Mitigation credits will not be available from restoration projects conducted outside of the Statewide ILF Program. However, MFP anticipates that mitigation fees may be directed to supplement other programs and projects with consistent restoration, enhancement, or preservation objectives. The federal rule states: "However, compensatory mitigation credits may be generated by activities undertaken in conjunction with, but supplemental to, such programs in order to maximize the overall ecological benefits of the restoration or conservation project." 33 CFR §332.3(j)(2)(2008).

Where mitigation is conducted through collaborative projects, MFP may only claim mitigation credit proportional to the funding amount it provided to the 'complete project', including cash and in-kind contributions. A 'complete project' is defined as one that is ecologically self-sustaining with minimal maintenance, and may include the cost of restoring, enhancing, and/or preserving riparian and upland buffer areas if they contribute to the functionality of the site. If a compensatory mitigation project site requires additional means to ensure protection from adverse future

land uses, MFP may include costs associated with acquisition of land, easements, or equivalent mechanisms as contributing to the cost of the project.

ILF projects that are eligible for collaborative funding from multiple sources are encouraged under the ILF Program. Credits will be based solely on aquatic resource functions provided as a result of the mitigation project plan, supplemental to and over and above those provided by collaborative funding from other programs. USACE, in consultation with the IRT, will determine the amount of mitigation credit available to MFP for collaboratively funded projects, based primarily on the proportion of ILF Program Account disbursements relative to the complete project cost. Credit apportionment may be modified by USACE and IRT if, after a collaboratively funded project is completed, an audit indicates that MFP's actual financial contribution was substantially more or less than anticipated.

7.2 Advance Credits

Advance credits will be issued to MFP and available for sale as mitigation credits in accordance with this Instrument and all applicable requirements for permits issued under Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act. The Federal Mitigation Rule defines advance credits as "any credits that are available for sale prior to being fulfilled in accordance with an approved compensatory mitigation project plan." (33 CFR Part 332.2). MFP requests and USACE agrees to grant advance credits for sale to permittees causing unavoidable impacts.

This Instrument authorizes MFP to sell advance credits to permittees undertaking permitted actions to meet their compensatory mitigation requirements, provided these advance credits have been issued for the Service Area in which the permittee impact site is located. This Instrument establishes the number of advance wetland mitigation credits and stream mitigation credits available for sale (Table 3). In anticipation of variable credit demand among Service Areas, MFP uses a two-tiered advance credit schedule among Service Areas:

> *Moderate credit demand* is anticipated in primarily rural, agricultural watersheds with potential for significant infrastructure maintenance and development impacts (utility crossings, highway development) and where jurisdictional water resources may be inherently limited. The number of advance credits proposed for moderate credit demand is 25,000 stream credits and 20 wetland credits per Service Area with moderate credit demand.
>
> *High credit demand* is anticipated in developing or urbanizing regions or where significant transportation infrastructure maintenance or development may occur and where jurisdictional water resources may be inherently more common. The number of advance credits proposed in high potential credit demand Service Areas is 50,000 stream credits and 40 wetland credits per Service Area.

The classification of certain Service Areas as having higher potential credit demand was determined by considering three primary factors related to impacts resulting from permitted actions: 1) Development – impacts resulting from development associated with population growth rates by county within Service Areas or with anticipated energy development and associated pipe and transmission lines; 2) Transportation - dominant transportation corridors including primarily state and federal highways and railroads, particularly those following major river courses; and 3) natural and/or environment impacts such as flooding, contamination, spills or releases, and erosion. Those Service Areas that have experienced relatively rapid growth or which contain significant transportation infrastructure corridors are considered to present higher permit demand and associated mitigation requirements. For these, we used a factor of 2x relative to the base level (moderate demand) number of advance credits. Table 3 indicates the primary impetus for designation of each high credit demand service area.

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Table 3. Advance credits issued with the Instrument for each Service Area.

Watershed District No.	Service Area	Credit Demand Factors Present	Wetland Credits	Stream Credits
1	Kootenai		20	25,000
2	Upper Clark Fork	Development, Transportation	40	50,000
3	Lower Clark Fork	Transportation	40	50,000
4	Flathead	Development, Transportation	40	50,000
5	St. Mary		20	25,000
6	Upper Missouri	Development, Transportation	40	50,000
7	Missouri-Sun-Smith	Development, Transportation	20	25,000
8	Marias	Development	20	25,000
9	Middle Missouri		20	25,000
10	Musselshell	Flood	40	50,000
11	Milk	Development, Transportation	40	25,000
12	Lower Missouri	Development, Transportation	20	25,000
13	Upper Yellowstone	Development, Transportation	40	50,000
14	Middle Yellowstone	Development, Transportation	40	50,000
15	Lower Yellowstone	Transportation	40	50,000
16	Little Missouri	Development (Energy)	40	25,000

To derive the number of advance credits for Service Areas presented in Table 3, MFP considered the average extent of impact (1,275 feet for streams and 6.8 acres for wetlands) from USACE Individual Permits, and the extent of impact from the largest single non-restoration project (17,500 feet for streams and 46.9 acres for wetlands) resulting from USACE Individual and Nationwide Permits over a 10-year period (Ellis, 2005), and FOIA data request 2012). MFP estimated credits necessary to mitigate those impacts assuming an extent of impact to resulting debit ratio of 1:3 for streams and a ratio of 1:1.5 for wetlands. Using these ratios, an average permitted impact will require approximately 3,825 stream credits or 10 wetland acre credits of mitigation; the maximum permitted impact would

require roughly 52,000 stream credits or 70 wetland credits for mitigation (Table 4). The proposed advance credit numbers are intermediate between the average and maximum permitted extent of impact for a single permit in a moderate credit demand Service Area. Records of requirements for compensatory mitigation of streams are not as robust as for wetlands and so present greater uncertainty in anticipating future credit demand. Additionally, MFP anticipates that effective stream restoration will require capitalization at the level represented by a theoretical example, provided below, as a minimum.

Table 4. Capital Cost Basis and Average and Max Permit Basis for estimating credit demand in moderate credit demand and high credit demand Service Areas.

Estimated and Proposed Credit Demand					
	Capital Cost Basis*	Average and Max Permit Basis		Advance Credits Proposed	
		Average	Maximum	Moderate Demand	High Demand
Stream Credits	25,000	3,825	52,000	25,000	50,000
Wetland Credits	20	10	70	20	40

*Capital Cost Basis refers to the number of credits generated from a mitigation project of sufficient size to create efficiency of scale in project development. "Average" and "Max Permit Basis" refer to estimated credit requirements from a single permitted project in a Service Area.

In addition to considering the number of advance credits that may be necessary to meet credit demand for a single permit, MFP must also consider economies of scale and a minimum number of credit sales necessary to fund a typical mitigation project. MFP may determine it is necessary to apply an additional transaction fee to small wetland or stream credit sales to cover the costs of site selection and the 9-step approval process. The number of advance stream and wetland credits for each Service Area presented for moderate credit demand Service Areas (Table 3) is considered adequate to capitalize stream and wetland mitigation/restoration projects in the appropriate watershed context. The number of advance credits requested for moderate credit demand is based primarily on the following examples of theoretical mitigation projects that are of sufficient scale to achieve efficiencies through economies of scale:

Stream mitigation project example (see Table 5). 5,000 feet of stream restoration and bank revegetation with fenced and restored riparian buffers on both sides of the stream. The ratio of lineal feet of stream restoration to resultant stream credits is approximately 1:3 (15,000 credits), and for riparian mitigation is approximately 1:2 (~10,000 credits), for a total of ~25,000 credits, as determined by the Montana Stream Mitigation Procedure calculator worksheet (USACE, 2010).

Wetland mitigation project example. 30 acres of wetland restoration. The ratio of acres of restored mitigation wetland to resultant wetland credits is 1.5:1, for a total of ~20 credits, as determined from the Montana Wetland Compensatory Mitigation Ratios (USACE, 2005).

As advance credits are sold, the number of remaining advance credits available to MFP to sell diminishes until these sold advance credits are fulfilled and replenished by credits generated from projects in the Service Area meeting performance measures. As projects implemented by MFP meet performance standards defined in the mitigation

project plan, USACE will release credits from the project sites according to the credit release schedule (*Section 7.3*). USACE may then issue new advance credits to replenish the number allocated to MFP for sale to applicants according to this Instrument. The total number of advance credits available for sale or transfer will not exceed the number granted in this Instrument for each Service Area. However, MFP may request additional advance credits in excess of the number granted in this Instrument. USACE may approve additional advance credits as described in the Instrument modification procedures outlined in 33 CFR 332.8(g).

Table 5. Credit calculation for example typical stream mitigation project.

Stream Mitigation Table					
Factors	**Mitigation Reach 1**	**Mitigation Reach 2**	**Mitigation Reach 3**	**Mitigation Reach 4**	**Mitigation Reach 5**
Net Improvement	2.5	0	0	0	0
Stream Status	0.05	0	0	0	0
Type of Protection	0.15	0	0	0	0
Mitigation Timing	0	0	0	0	0
Comparative Stream Order	0.2	0	0	0	0
Location	0.1	0	0	0	0
Sum of Factors (SF_m)	3	0	0	0	0
Linear Feet (LF_m)	5000	0	0	0	0
SF_m x LF_m	15,000.0	0.0	0.0	0.0	0.0
Total Stream Credits = Σ (SF_m x LF_m) =					**15,000.0**
Riparian Mitigation Credit Table					
Factors		**Mitigation Reach 1**	**Mitigation Reach 2**	**Mitigation Reach 3**	**Mitigation Reach 4**
Net Improvement	Stream Side A	0.5	0	0	0
Net Improvement	Stream Side B	0.5	0	0	0
Type of Protection		0.15	0	0	0
Mitigation Timing		0	0	0	0
Comparative Stream Order		0.2	0	0	0
Location		0.1	0	0	0
Sum of Factors (SF_m)		1.45	0	0	0
Linear Feet (LF_m)		5000	0	0	0
Reach Multiplier (RM)		1.25	0	0	0
SF_m x LF_m X RM		9,062.5	0.0	0.0	0.0
Total Riparian Credits = Σ (SF_m x LF_m X RM) =					**9,062.5**

*ASSUMPTIONS: (1) 5,000ft of stream restoration & bank revegetation with fenced riparian buffers on both sides of stream; (2) substantial net improvement; (3) tertiary waters (pg 18 of protocol); (4) 3x buffer width; (5) 33-60% to be restored; (6) left and right side equal; (7) conservation easement protection; (8) Schedule 5 timing; (9) same order; and (10) off-site.

7.3 Credit Release

Advance credits will be released from the project site as the advance credit obligations in a given Service Area are fulfilled in accordance with an approved mitigation project plan and credit release schedule. Credit release schedules and associated project milestones may vary by project and will vary among restoration, enhancement, and preservation projects. Credit release schedules will generally provide for release of a percentage of total credits

anticipated from a mitigation project for achieving project milestones defined in the mitigation plan, including: approval of a mitigation plan, securing property, establishment of permanent protection of property, completion of physical and biological improvements, and achieving performance standards.

Approved mitigation plans emphasizing restoration will generally cap at 30% of the release of credits for project milestones achieved prior to meeting performance standards, including mitigation plan approval, securing and protecting property, and completing physical and biological improvements. The remaining 70% of credits will be released as performance standards are met. An example of a typical credit release schedule might include:

- 20% of credits released upon approval of a mitigation project plan and establishment of permanent protections placed on real property at the compensatory mitigation project site.
- 10% of credits released upon completion of physical and biological improvements at the mitigation site.
- 70% of credits released incrementally as performance standards are achieved.

MFP anticipates that there may be mitigation projects where mitigation project plans emphasize preservation as approved mitigation. In such cases, a typical release schedule might include:

- 75% of credits may be released at the signing of the site protection documents and completion of physical and biological improvements.
- Remaining 25% of credits may be released once associated performance standards (e.g. fencing or other physical improvements required in the mitigation plan to enforce preservation) have been achieved.

The actual number of credits available for consideration to be released at any given point in the development of an ILF project will be determined through site monitoring and reporting. Because there is some degree of uncertainty about how many credits will ultimately be realized as performance standards are met, there is the potential for a given mitigation project to generate a greater number of credits than proposed in the mitigation project plan. Credit generation progress will be documented in the ILF Program's Annual Report, which will contain monitoring results from the previous calendar year as well a credit release request commensurate with conditions observed onsite and performance standard criteria. In instances where a mitigation site generates credits above and beyond the number needed to meet the advance credit obligation, MFP may offer those additional released credits for sale at market prices. Temporal loss ratios will not apply to available credits that are purchased to offset future impacts. These credits will be considered on par with mitigation bank credits from a mitigation hierarchy standpoint.

If mitigation activities cannot be implemented in accordance with an approved compensatory mitigation project plan, the USACE must consult with MFP and the IRT to consider modifications to the site mitigation project plan, including adaptive management, revisions to the credit release schedule, and alternatives for providing compensatory mitigation to satisfy any credits that have already been sold. Once implemented, if the ILF project does not then achieve its performance-based milestones, USACE may modify the credit release schedule, including reducing the number of credits, according to procedures described in the federal rule (See 33 CFR 332.8(o)(8)(iii)).

7.4 Sale of Credits

All activities regulated under Section 10 of the Rivers and Harbors Act, Section 404 of the Clean Water Act and other activities as USACE may authorize consistent with this Instrument may be eligible to use the ILF Program as compensatory mitigation for unavoidable impacts. Credits purchased may only be used in conjunction with a USACE

permit authorization, resolution of an unauthorized activity, or in conjunction with other actions as USACE may authorize. The District Engineer will make decisions about the appropriate compensatory mitigation on a permit case-by-case basis, during evaluation of a USACE permit application. Authority for approving use of the ILF Program for compensatory mitigation lies with the District Engineer.

The responsibility to provide compensatory mitigation remains with the applicant/permittee unless and until credits are purchased from the ILF Program. Upon USACE approval of purchase of credits from the ILF Program, the permittee may contact MFP to secure the necessary amount and resource type of credits, as outlined in USACE permit conditions. Each Section 404 authorization that includes a special condition allowing purchase of credits from the ILF Program will include a requirement that MFP certify the transfer of responsibility via a Statement of Sale of Credit letter to the permittee and USACE. Certifications will outline USACE permit number and state the number and resource type of credits that have been sold to the permittee. A copy of each certificate will be retained in the administrative and accounting records for the ILF Program Instrument. Debits will be reflected in annual accounting reports as outlined in *Section 8.0*.

Generally, credit sales will occur prior to or during the Operational Phase of a given mitigation site; however, in a situation where all of the Operational Phase requirements have been met, but the site still has credits available for sale, those credits can be sold after the site has entered the Long-Term Management Phase. Operational Phase requirements include meeting performance standards and advanced credit obligations, as well as getting an approved Long-Term Management Plan and Long-Term Management funding mechanism in place before the site transitions into the Long-Term Management Phase.

7.5 Credit Accounting

MFP seeks to achieve a net gain in ecological functions through mitigation actions within each Service Area through its Statewide ILF mitigation program. At a minimum the program must achieve no net loss of aquatic ecological function in a watershed context. Through its ILF program, MFP seeks to balance objectives of no net loss for each wetland and stream type through a watershed approach that may emphasize restoration or preservation of certain aquatic types or functions that differ from types or functions impacted by permitted actions. In order to track the balance of gains and impacts, MFP will establish credit accounting that records impacts from permitted actions and lift from compensatory mitigation projects according to wetland and stream type. MFP will use USACE's established mitigation procedures for wetlands (USACE, 2005; Berglund and McEldowney, 2008) and streams (USACE, 2013) as the basis for maintaining a credit ledger of debits from permitted actions and credits generated from mitigation actions, unless other appropriate means for measuring credits are mutually agreed on by USACE and MFP for specific compensatory mitigation projects.

MFP will be responsible for taking the following steps to ensure functional losses are mitigated through implementation of projects that achieve equivalent or greater functional gains within each Service Area:

1. When a mitigation credit is sold to offset an unavoidable impact in a given Service Area, MFP will record the debits of each wetland or stream impacted as a result of the permitted action, as determined by USACE.

2. MFP will apply the Compensation Planning Framework and consider specific debits to be mitigated in the Service Area and strive to design and implement projects that fully compensate for functional losses using a watershed approach.

3. MFP will quantify and record the functional credit types "gained" through implementation of a compensatory mitigation project.

7.6 Credit Ledger

For each Service Area MFP will maintain a Credit Ledger to account for all credit transactions including issuance of advance credits to MFP, the sale of advance credits to permit applicants, the release of advance credits, and the release and subsequent sale of any additional credits that were generated onsite.

MFP will compile an annual Credit Ledger report for the District Engineer that will include the beginning and ending balance of advance and released credits, permitted impacts by resource type for which the ILF program will offset compensatory mitigation requirements, all additions and subtractions of credits and any other changes in credit availability. The annual Credit Ledger will be included in the Annual Statewide ILF Program Report discussed in *Section 8.1.*

8 Program Reporting

MFP has established a calendar-based fiscal year and reporting year (January 1 - December 31). MFP will submit an annual program report by March 31 of the following calendar year to the District Engineer and IRT that consists of: (1) a Statewide ILF Program Report that summarizes Program accounts and credit transaction activities and (2) a compilation of Mitigation Project Reports that detail activities for all active compensatory mitigation projects, including any adaptive management actions that have taken place over the reporting calendar year.

8.1 Statewide ILF Program Report

MFP will submit an annual report that summarizes Statewide ILF program accounts and activities and includes the following components:

1. *Service Area Credit Transaction Report:* This report will provide a summary of all the wetland and stream credit transactions that occurred during the reporting year, and prior years. Credit transactions will be summarized in a Wetland and Stream Credit Ledger. The Ledger will include: 1) the total number of advance stream and wetland credits issued for each Service Area; 2) an itemized list of credit sales in each Service Area including sale date, permit number and number of credits; 3) an itemized list of credit releases in each Service Area including date, number of credits released, and reason for credit release; 4) the advance credit balance, indicating MFP's remaining credit obligation; and 5) the balance of any additional credits that were generated above and beyond the advance credit obligation that are available for purchase. The Service Area Credit Transaction Report will also include copies of all Statement of Sale Credit letters issued during the reporting year, as well as a summary of the credit fee schedule that was used to calculate credit prices that year.

2. *Program Accounts Report Ledger*: This report will provide a statement of all income received from credit sales; the distribution of those fees among the respective Mitigation, Contingency and Long-Term Management Sub-Accounts; and expenses related to mitigation activities. The Program Accounts Report Ledger will include beginning and ending account balances, line-item expenditures summaries, credit sales and interest for the ILF Program Accounts.

3. *Mitigation Monitoring Report:* A Monitoring Report will be prepared for each active compensatory mitigation project, based on the monitoring report recommendations in USACE Regulatory Guidance Letter No. 08-03 (October 10, 2008). Each Monitoring Report will include the following: a project overview (location, responsible party, project dates, etc.); project summary; performance summary; adaptive management summary; monitoring requirements; monitoring activities and results; photo log; maps and plans; and a final summary of project performance, planned adaptive management activities, and new credit release requests.

9 Other Provisions

9.1 Dispute Resolution

Resolution of disputes concerning the signatories' compliance with this Instrument will be in accordance with those stated in 33 CFR 332.8. Disputes related to satisfaction of performance standards may be referred to independent review from government agencies or academia that are not part of the IRT. The IRT will evaluate any such input and determine whether the performance standards have been met.

9.2 Validity of the Instrument

This Instrument will become valid on the latter date of the signature of the Chair of the MFP Board of Directors and USACE Chief of Operations Division. This Instrument may only be amended or modified with the written approval of the Chair of the MFP Board of Directors and the District Engineer, with the exception of minor modifications such as project site plan approvals or modifications resulting from adaptive management.

Revisions made to the original MFP ILF Instrument (January 2013) that are captured in this document will apply to any new credit sales and subsequent projects that occur once this Instrument document becomes valid. Where possible, MFP will work with USACE to bring previous projects and credit sale agreements in alignment with the terms and conditions of this Instrument.

9.3 Instrument Review

This Instrument will undergo a formal review by MFP and USACE every 5 years following the procedures outlined in *Section 10* to ensure the document continues to comply with the Final Mitigation Rule requirements, and reflects improved operational efficiencies for the ILF program. This schedule is intended to create efficiencies by way of a holistic review process, and to minimize the administrative burden for both MFP and USACE by avoiding multiple stand-alone requests for minor revisions to the ILF Instrument. MFP will initiate the first five-year Instrument review five years after the latter signature date of this document. MFP, in coordination with USACE, will have 12 calendar months to make any necessary updates and finalize the revised Instrument. In the interim, MFP, in coordination with USACE, may update this Instrument as needed via the Instrument Modification process (see *Section 10*).

9.4 Changes to Final Rule

This Instrument and the MFP ILF Program will comply with the Compensatory Mitigation for Losses of Aquatic Resources Final Rule (33 CFR Part 332/40 CFR Part 230) and the requirements therein, as it is written as of the date of this agreement. Any changes to the Final Mitigation Rule will trigger a review of this Instrument to assess whether or not the Rule changes will affect the terms and conditions of the Instrument and ILF Program procedures described herein.

9.5 Notice

Any notice required or permitted hereunder will be deemed to have been given either (i) when delivered by hand, (ii) on the date postmarked by United States Postal Service registered or certified mail, or (iii) sent by express or next-day nationwide delivery system, addressed as follows (or addressed in such other manner as the party being notified will have requested by written notice to the other party):

Montana Program Manager
U.S. Army Corps of Engineers
Omaha District – Regulatory
10 West 15th Street, Suite 2200
Helena, Montana 59626

9.6 Invalid Provisions

In the event any one or more of the provisions contained in this Instrument are held to be invalid, illegal or unenforceable in any respect, such invalidity, illegality or unenforceability will not affect any other provisions hereof, and this Instrument will be construed as if such invalid, illegal or unenforceable provision had not been contained herein.

9.7 Headings and Captions

Any paragraph heading or captions contained in this Instrument will be for convenience of reference only and will not affect the construction or interpretation of any provisions of this Instrument.

9.8 Binding

This Instrument will be immediately, automatically, and irrevocably binding upon MFP and its successors, assigns and legal representatives upon signing by MFP and USACE even though it may not, at that time or in the future, be executed by the other potential parties to this Instrument, such as the various IRT agencies.

9.9 Liability of Regulatory Agencies

USACE and MFP administer their regulatory programs to best protect and serve the public's interest in its wetlands and waterways, and not to guarantee the availability of credits to any entity, or ensure the financial success of mitigation banks, specific individuals, or entities. The public should not construe this Instrument as a guarantee in any way that USACE or MFP will ensure sale of credits from the ILF Program, or that the regulatory agencies will forgo other mitigation options that may also serve the public interest.

9.10 Right to Refuse Service

USACE approval of purchase of credits from the ILF Program does not signify MFP's acceptance or confirmation of MFP's offer to sell. MFP reserves the right to refuse to sell credits from the ILFProgram for any reason.

9.11 Notification of Modification

If any action is taken to void or modify an ILF Project real estate instrument, management plan, or other long-term protection mechanism, MFP must notify USACE in writing 60 days in advance.

9.12 ILF Program Audit

MFP may be required by USACE to conduct a formal ILF Program audit. Prior to establishing an audit date and potential reoccurrence schedule, USACE in coordination with MFP, will clearly identify and define the purpose of the audit, the information that will be audited, the level of detail required of the analysis, who will perform the audit, how much the audit process will cost, and who will bear the costs of the audit process. These conditions will be captured in a future Instrument modification. The timing of the future audit will consider 1) MFP's capacity to conduct the audit process evaluation with USACE without negatively impacting MFP's ability to meet ILF project timelines and other ILF deliverables; 2) MFP's ability to pay for audit costs without negatively impacting MFP's ability to meet its other ILF fiscal responsibilities; and 3) MFP's capacity to organize and prepare for the audit evaluation. The date for the future audit will also be captured as an Instrument modification.

10 Modifications

This Instrument may not be modified except by written agreement between MFP and USACE, following consultation with the IRT and following the modification procedures outlined in 33 CFR 332.8(g).

The District Engineer and MFP may use a streamlined modification review process for minor changes to this Instrument document and changes reflecting specific mitigation project plans, including the addition or removal of compensatory mitigation projects and plans, adaptive management of the compensatory mitigation project, credit releases, changes in credit release schedules, and changes that the District Engineer determines are not significant. The streamlined review process will follow procedures outlined in 33 CFR 332.8(g)(2).

REFERENCES

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EXHIBIT A:
COMPENSATION PLANNING FRAMEWORK

The *Statewide ILF Compensation Planning Framework (CPF) Model* presents the intentions and general model for CPFs that were developed for each Service Area.

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Statewide ILF Compensation Planning Framework (CPF) Model

The Compensation Planning Framework (CPF) is used to select, secure, and implement aquatic resource restoration, enhancement, and preservation activities. Montana is divided into 16 Watershed Districts, which are used to delineate Service Areas in this Instrument. The Compensation Planning Framework presented does not provide specific priorities and actions for Montana's 16 Service Areas. In establishing this Instrument, the program Sponsor intentionally presents a framework for prioritizing and planning based on general criteria in order to maximize the flexibility of the planning within each Service Area and to accommodate the varied and dispersed nature of historic and anticipated mitigation requirements among Service Areas. A framework for ongoing prioritization and planning will allow MFP, in collaboration with the Corps and IRT, to address mitigation needs in the context of ever-evolving watershed conditions and restoration needs, as well as to integrate ILF projects with other non-mitigation project planning and restoration activities.

The mission of MFP is to restore and protect Montana's aquatic resources. Planning compensatory mitigation projects using a watershed approach will draw guidance from existing watershed plans, species restoration plans, expert opinions, and other sources necessary to identify and prioritize high-quality compensatory mitigation projects on an ongoing basis.

The following components of the Compensation Planning Framework are designed to meet requirements of 33 CFR 332.8(c).

1 Service Area (332.8 (c)(2)(i)

To accomplish the goal of a watershed approach to mitigation, Service Areas are established as those watersheds described by the Montana Department of Transportation and Corps as 16 Watershed Districts (Figure 1). These Watershed Districts have been adopted for use by the Corps as the basis for compensatory mitigation plans and mitigation banks under Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act. MFP will provide compensatory mitigation for permitted impacts within the same geographic Service Area in which the impact occurs unless the District Engineer, in consultation with the IRT, has agreed to an exception as allowed under the Final Rule (332.89 (d)(6)(ii)(A).

These Service Areas will serve as the basis for a watershed approach to site selection as well as for Accounting and Reporting purposes. The Corps and IRT will review and approve mitigation project plans for compensatory mitigation projects implemented to mitigate impacts of permitted actions within the same geographic Service Area. MFP intends to conduct mitigation for permitted actions by performing site selection within sub-watersheds within the Service Area to the extent possible and reasonable and with Corps and IRT review. However, the Montana Statewide ILF Program may be used to compensate for an impact that occurs outside of the Service Area if specifically approved by the Corps in consultation with the IRT.

Individual projects will be proposed for Service Areas in project-specific mitigation project plans. In the event that the Corps determines that a Service Area for a given compensatory mitigation project should differ from the established Service Area, the Corps in consultation with the IRT will make final Service Area determinations for approved mitigation project plans. Considerations will include the extent of ecologically similar areas, the expected amount and type of mitigation required in an area (demand) compared with the aquatic resources and amount of credits that are expected from an ILF project, the availability of credits already banked in the Service Area by the ILF

or mitigation banks, population and growth information, the economic viability of the site, and ongoing watershed management programs.

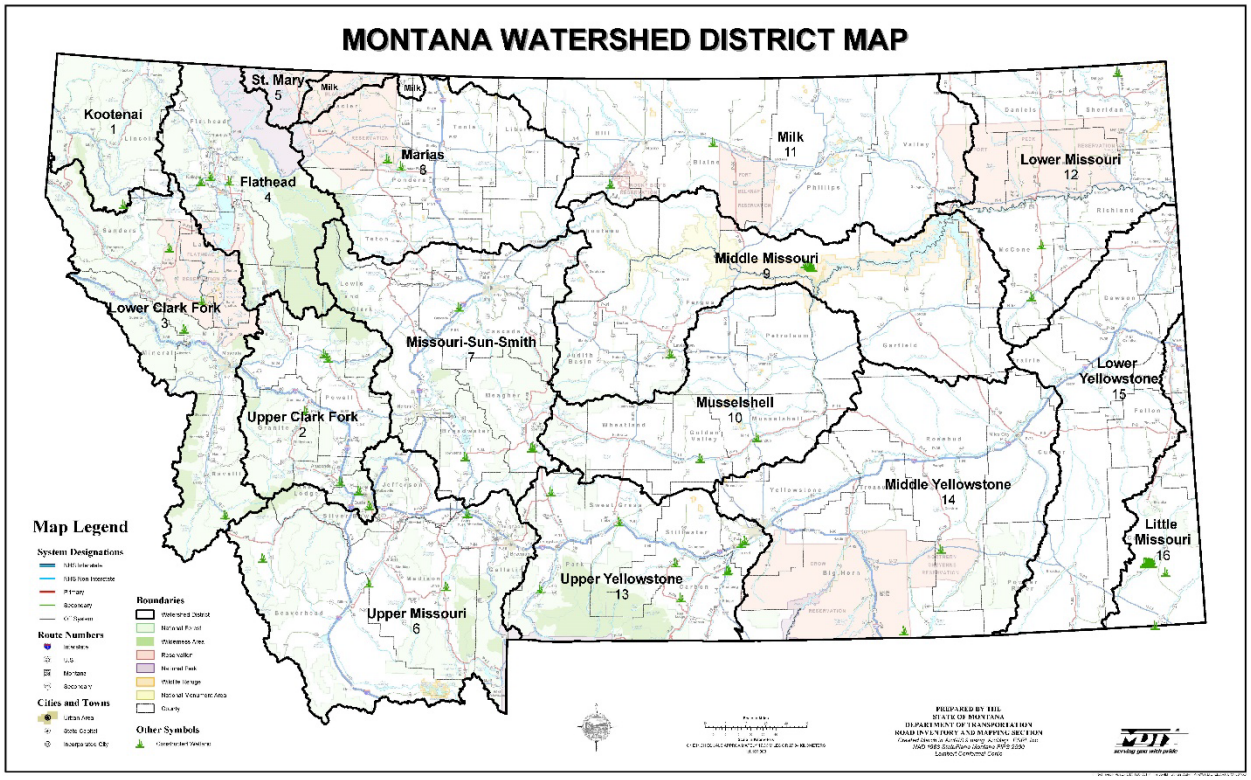

Figure 1. Montana ILF Program Service Areas (Watershed Districts)

2 Threats (332.8 (c)(2)(ii)

Montana is a large state with widely varying terrain, climate, and levels of urban and natural resource development. Threats to aquatic resources, similarly, are diverse and vary substantially among the sixteen Service Areas. On a statewide basis, dominant threats to aquatic resources as identified by DEQ in its 2010 integrated report to the EPA (MDEQ 2010) include:

- the physical, chemical or thermal alteration of the water bodies or related riparian communities from agriculture (both crop and grazing), development, transportation infrastructure, recreational activities, and energy or other resource development;
- sedimentation from altered land use and associated transportation networks;
- flow alteration, largely related to agricultural diversions and suburban/urban development;
- water quality impairment, largely related to agricultural and resource-extraction practices and land use, and increasingly associated with urban development;
- dams associated with impoundments;
- mining and related tailings;

- forestry and associated transportation networks;
- animal feed operations.

DEQ identified agricultural practices as the dominant source of impairments to aquatic resource quality in Montana. Hydromodification, resource extraction, forestry, and urban-related impacts present other common sources of impairments. Most agricultural impairments in Montana are not regulated by the Corps. And, while DEQ's report is a valuable tool for identifying aquatic resource impact areas, its findings are typically from a water quality impairment perspective. There are other significant threats to aquatic resources such as conversion of large, conservation-size properties through subdivision development that limits opportunities to utilize these areas for restoration, enhancement, and preservation as part of a watershed approach. Table 1 provides a summary of the Nonpoint Source pollutants identified in DEQ's 2016 Water Quality Integrated Report (MDEQ 2016).

Table 1. Montana DEQ 2016 Nonpoint Source Activities & Related Pollution Summary

Nonpoint Source	Activity	Pollutant	Non-Pollutant
Agriculture	Pesticide Application Irrigation Livestock Watering Riparian Habitat Disturbance (trampling) Removal of Native Riparian Vegetation	Sediment Nutrients Salinity Temperature Bacteria Pesticides	Habitat Loss Flow Alteration Channelization
Forestry	Logging Road Construction	Sediment Nutrients Temperature	Habitat Loss
Transportation	Road Construction Road Maintenance Accidental Spills Atmospheric Deposition	Sediment Oil & Grease Metals	Habitat Loss Channel Degradation
Urban & Suburban	Stormwater Runoff Construction Residential Waste Disposal	Oil & Grease Pesticides Fertilizers Bacteria Metals Sediment Contaminants Nutrients Temperature	Habitat Loss Flow Alteration Channel Degradation Nuisance Algae Blooms Toxic Algae Blooms Channel Erosion
Contaminated Sediments	Abandoned Mines	Metals Sediment	Habitat Loss Erosion
Hydrologic Modification	Channel Straightening Channel Widening Channel Relocating Water Diversion Dam Construction	Temperature Sediment Transport Dissolved Oxygen	Bank Stability Instream Flows
Recreation	Boating Fishing Hiking/Mountain Biking Off-Highway Vehicles	Oil & Grease Sediment Invasive Species Bacteria	Habitat Loss
Atmospheric Deposition	Farming Industry Other Human Activity	Nitrogen Mercury Chemicals (PCBs)	

Source: Montana DEQ 2016 Water Quality Integrated Report, pg 37. http://deq.mt.gov/Water/Resources/report

3 Historic Aquatic Resource Loss (332.8 (c)(2)(iii)

In general, Montana can be characterized as a semi-arid landscape with wetlands and riparian areas covering less than 4 percent of the state's land area. Aquatic resources play a major role in the state's economic and environmental well-being. Sixty percent of fish, amphibian, bird, reptile, and mammal species of greatest conservation need rely on the state's wetlands and riparian areas (Montana Watercourse, 2011). Furthermore, agriculture, tourism, and industry are largely reliant on water availability and water quality for their existence.

Wetlands provide critical biological and economic benefits such as plant and wildlife habitat, flood attenuation, and groundwater recharge. However, increasing pressures from human activities such as urbanization, agricultural development, and land conversion have debilitated some of the ecosystem services they provide (EPA 2011). Wetland conversion in Montana is typically associated with road construction, agriculture and residential development. From 1780 to 1980 it is estimated that Montana experienced 27% wetland loss (Dahl, 1990). Current estimates indicate 1/3 of the state's wetlands are gone or their quality has been so compromised as to prohibit proper functioning (personal communication with Lynda Saul, PWS Wetland Program Coordinator, MDEQ June 15, 2011). The quality of wetlands has been reduced by fragmentation of habitat, increased development, and to a lesser extent, agriculture.

4 Current Aquatic Resource Conditions in Service Areas (332.8 (c)(2)(iv)

Current or existing aquatic resource conditions vary substantially across Montana and cannot be concisely characterized. Aquatic resource conditions within each Service Area will be evaluated as a critical element of early planning under mitigation project plan development to meet mitigation requirements within each Service Area. Existing conditions within each Service Area are a fundamental consideration in development of a plan and will be integrated into mitigation project planning for specific mitigation requirements and mitigation project plans. MFP will draw from available resource expertise, watershed assessments, Total Maximum Daily Load (TMDL) plans, species of concern management plans, watershed prioritization plans, and other resources to evaluate current conditions.

5 Aquatic Resource Goals By Service Area (332.8 (c)(2)(v)

Resource goals will be developed for Service Areas as mitigation demands are generated within the Service Area. Goals will reflect any existing conservation plans developed at watershed or state scales and will reflect best opportunities to implement mitigation at an effective scale. Goals will be developed based largely on existing assessments of historic aquatic resources losses, and will recognize the practical limitations, and opportunities, for using mitigation as an aquatic resource conservation strategy at the watershed scale. In the absence of meaningful or useful existing assessments that provide context for setting goals, resource goals for compensatory mitigation projects will be established following the prioritization strategy outlined in the next section.

Goals and objectives for the ILF program within a Service Area will be further refined as the scale of credit demand is determined and will be influenced by the scale of ILF funding in the Service Area.

6 Prioritization Strategy (332.8 (c)(2)(vi)

Montana's diverse landscapes and watersheds do not lend themselves to a single, statewide prioritization strategy. Rather, existing conditions, reports and specific resource goals from existing watershed plans within a Service Area will help to inform MFP regarding projects that can address ecologically limiting factors within a watershed. As mitigation needs arise, MFP will consider identified project opportunities in relation to the watershed's resource

goals and identify appropriate mitigation strategies including restoration of habitat and habitat-forming processes, habitat enhancement, habitat preservation, creation or establishment of stream or wetland resources, and connecting fragmented or isolated habitats. Each potential ILF project will be evaluated for its ability to provide appropriate compensatory mitigation for impacts to the waters of the U.S. based on the following criteria:

- **Likelihood of success:** Funded projects must demonstrate a high likelihood of success through a sound restoration, creation or establishment and/or enhancement concept and project planning. Projects are more likely to provide expected results where water sources are reliable and secure, where plans emphasize restoration or protections of processes that promote self-sustaining and dynamic aquatic systems, and where protection or restoration of functions that provide a higher "lift" in functions is emphasized. Projects are more likely to be successful if they are planned and designed to be resilient in the face of anticipated land-use change and climate change. Threats from invasive species or vandalism should be low or manageable. The project will be evaluated for its ability to result in successful and sustainable net gain of stream/wetland function, with limited maintenance. Restoration projects will receive priority over creation or enhancement projects due to the greater benefit to function that can be achieved, and the higher success rate of these types of projects.

- **Multiple aquatic objectives:** The project will be evaluated for its ability to address multiple functions and services and between both wetlands and streams. The project should emphasize native biodiversity and natural processes.

- **Species specific management or restoration plans:** Local, regional, or statewide efforts to restore or enhance critical habitats for federally threatened and endangered species or state species of concern will be considered where compensatory mitigation projects may complement species recovery or conservation efforts.

- **Supports regional conservation initiatives and is compatible with the surrounding landscape:** Projects should be located where they pose minimal conflicts with adjacent land uses and where they meet regional conservation priorities, address limiting factors identified in watershed assessments, provide habitat corridors, and/or add to the effectiveness of nearby protected natural areas.

- **Long-term management:** Suitable projects must have a high likelihood of successful and appropriate long-term management given planned stewardship, ownership and easement conditions.

- **Leverage available funds.** Collaborative funding from non-ILF sources will be considered where it is compatible and conducive to meeting mitigation requirements and expanding the value and beneficial outcomes of compensatory mitigation projects. In particular, partnerships offer potential for MFP as an ILF Sponsor to conduct mitigation in watersheds where mitigation fees alone may be insufficient to independently fund ecologically beneficial compensatory mitigation projects in a watershed context. Preference may be given to projects that provide a higher functional gain as a consequence of collaborative funding. Similarly, projects that contribute to or enable larger scale restoration and protection efforts may be preferential to numerous isolated smaller scale projects. MFP will not use partnerships or non-mitigation funds for 'double dipping' to establish extra mitigation credits from partnership-funded projects. However, projects funded in part by partners have the potential to complement mitigation fees to leverage greater ecological benefit than can be realized from mitigation fees alone.

7 Preservation Strategy (332.8 (c)(2)(vii)

Preservation of compensatory mitigation project sites is generally required in conjunction with aquatic resource restoration or enhancement in order to sustain and protect the mitigation project investments and long-term functioning of the compensatory mitigation site. The mitigation project plan for each compensatory mitigation project will define how preservation will be used to meet mitigation objectives and how it meets criteria outlined in Section § 332.2 (h) (2) of the Final Rule. This section of the rule also provides for the application of preservation as a primary mitigation strategy when applied in a watershed context. Preservation of existing aquatic resources that are important for maintaining or improving ecological functions of a watershed may be part of the overall watershed approach of the ILF program.

Preservation will be considered for sites that are under imminent threat to a valuable aquatic resource. These may include, but not be limited to: 1) sites that support aquatic threatened and endangered species or species of concern; 2) sites where a significant percentage of existing wetlands and riparian areas within a watershed can be preserved in relatively pristine condition; and, 3) where resources are considered unique, rare, or difficult to replace. Preservation strategies will target smaller and unique sites where a preservation strategy is less likely to be compromised by adjacent or nearby land management.

8 Public and Private Involvement (332.8 (c)(2)(viii)

MFP's Statewide ILF program is uniquely positioned to incorporate public and private involvement through partnerships and joint project funding. As the ILF Sponsor, MFP will consider opportunities to enhance compensatory mitigation project outcomes and increase the extent of mitigation benefits through collaboration with state, federal, tribal and other public aquatic resource protection programs or on public or tribal lands, except where those programs or lands impose costs, restrictions or other constraints that could limit the effectiveness of the ILF program. IRT members will serve in part to review documentation, conduct compensatory mitigation project evaluations, and to provide comments to the Corps relevant to their agencies' responsibilities and other considerations. MFP will also consider opportunities to partner with private or commercial entities and other conservation and restoration entities, including watershed groups, to promote collaboration in conservation of aquatic resources in Montana.

MFP anticipates engaging partners to collaborate and provide the following functions:

- Locate and identify suitable lands
- Hold easements (i.e., Land Trusts)
- Assist with development and implementation of monitoring programs
- Assist with expansion of contiguous habitat
- Provide long term management and protection
- Provide local knowledge and contacts

Following is a listing of probable mitigation program and project partners.

- Potential federal and state public partners include:
  - Western Area Power Administration (WAPA)
  - US Fish and Wildlife Service (USFWS)

- US Bureau of Land Management
- US Bureau of Reclamation
- USDA Forest Service
- US Environmental Protection Agency (EPA)
- US Army Corps of Engineers (Corps)
- USDA Natural Resources Conservation Service (NRCS)
- USDA Farm Service Agency
- Montana Dept. of Environmental Quality (DEQ)
- Montana Dept. of Fish Wildlife and Parks (FWP)
- Montana Dept. of Natural Resources and Conservation (DNRC)
- Montana Department of Transportation (MDT)
- Bonneville Power Administration (BPA)
- U.S. Federal Highway Administration

- Potential NGO partners include:
  - American Prairie Foundation
  - American Bird Conservancy
  - Avian Science Center – University of Montana
  - Ducks Unlimited, Inc.
  - Montana Fish, Wildlife and Parks Foundation
  - Montana Land Reliance
  - Pheasants Forever, Inc.
  - Rocky Mountain Elk Foundation
  - The Conservation Fund
  - The Trust for Public Land
  - The Nature Conservancy
  - Trout Unlimited
  - Yellowstone River Conservation Districts Council
  - Individual County Conservation Districts
  - Montana Association of Conservation Districts
  - Greater Yellowstone Coalition
  - Yellowstone Valley Audubon Society
  - Montana Watershed Coordination Council

9 Long-Term Protection and Management Strategies by Sponsor (332.8 (c)(2)(ix)

MFP will be responsible for developing and implementing a long-term protection and management plan for each ILF mitigation project. On publicly owned property, long-term protection and management may be provided through facility management plans or integrated natural resource plans. On privately owned property, including property held by MFP or other conservation organizations, real estate instruments will be recorded with the appropriate County Clerk and Recorder's Office(s) to guarantee protection and provide notice. MFP will ensure that protection mechanisms are in place prior to release of credits. Draft conservation easements or equivalent protection

mechanisms will be submitted to the IRT and Corps as part of each project mitigation plan for review and Corps approval.

MFP ILF Program projects will be designed, to the maximum extent practicable, to minimize long-term management once performance standards have been achieved. MFP will be responsible for maintaining ILF Program projects consistent with the approved long-term management plan to ensure long-term viability as functional aquatic resource sites. MFP will retain responsibility unless and until the long-term management responsibility is formally transferred to a long-term manager with Corps approval. The long-term management plan developed for each ILF project will include a description of anticipated management needs with estimated annual costs and an identified funding mechanism (such as non-wasting endowments, trusts, contractual arrangements with future responsible parties, or other appropriate financial instruments).

10 Periodic Evaluation and Reporting (332.8 (c)(2)(x)

See previous *Section 5* of this CPF Model for a description of evaluation and monitoring of compensatory mitigation projects. See previous *Section 7* for a description of reporting for the Statewide ILF Program and for specific compensatory mitigation projects.

MFP will monitor completed ILF mitigation projects using a mitigation monitoring protocol developed by MFP that is consistent with Corps of Engineers guidance at the time each ILF project is initiated. This protocol will provide consistent methods and measurements among sites allowing for additional evaluation of the ILF Program as a whole, thus helping to ensure that performance standards are met. The frequency and duration of monitoring and specific monitoring requirements will be defined in each individual mitigation plan. In general, monitoring reports will include: 1) plans, maps, and photographs to illustrate site conditions; 2) a narrative summarizing condition of the site as well as monitoring results as compared to performance standards; and 3) recommendations for contingency or adaptive management as needed. The Corps may extend the monitoring duration designated in the mitigation plan if performance standards have not been met. The Corps may also reduce or waive monitoring requirements upon determination that performance standards have been achieved.

Monitoring and contingency reports will address adaptive management strategies that provide management guidelines and recommendations for future site restoration and monitoring. The responsibility of each participating party will be clearly defined and address procedures to improve or alleviate foreseen or unforeseen threats to restored aquatic sites and functions. The monitoring and contingency plan will track progress towards measurable goals and their associated objectives.

References Cited In CPF Model

Dahl, T.E. 1990. *Wetland Losses in the United States 1780's – 1990's*. U.S. Department of the Interior, Fish and Wildlife Service, Washington . D.C. 13pp.

Environmental Protection Agency (EPA). 2011. *A Reference Wetland Network for Assessment and Monitoring Montana's Herbaceous Wetlands*; http://mtnhp.org/reports/MTRefNetwork.pdf (accessed June 13, 2011).

Montana Department of Environmental Quality (MDEQ), 2010. Montana Water Quality Assessment Report. http://cwaic.mt.gov/wq_reps.aspx?yr=2012qryId=92866

MDEQ, 2016. MDEQ 2016 Water Quality Integrated Report. http://deq.mt.gov/Water/Resources/report

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EXHIBIT B: DEFINITIONS

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Statewide ILF Instrument Version 2.0 Definitions

This Instrument adopts all definitions as defined in the Final Rule. However, in cases where MFP has a differing term or definition, or where an additional term has been applied, clarification has been provided in the definitions listed.

ADVANCE CREDITS - Advance credits are those issued to the ILF program and "available for sale prior to being fulfilled in accordance with an approved compensatory mitigation project plan" (33 CFR Part 332.2).

FINANCIAL ASSURANCE – Financial assurance mechanisms (synonymous with the term "Financial Assurances"), such as a performance bond(s) are intended to serve as an emergency fund or insurance policy to address partial or total mitigation site failure during the Operational Phase. Financial Assurance coverage is intended to pay for major project actions that other forms of Contingency funding cannot cover. The coverage period the Financial Assurance mechanism(s) begins when the Final Mitigation Project Plan has been approved and ends once the site has met the Establishment period/Operational Phase requirements, which aligns with the end of the Operational Phase. Financial Assurances can be phased out as the performance standards are met (as defined in the approved Final Mitigation Project Plan), but they are not entirely released until the end of the Operational Phase.

GROWING SEASON –The growing season start- and end-date for each mitigation project will depend on the location of the project site and will be determined using the wetland delineation growing season guidance provided in the Corps Regional Supplement documents (USACE, March 2010 and USACE, May 2010)

LONG-TERM FINANCIAL RESOURCES – Long-term financial resources provide funding throughout the Long-Term Management phase, and may come in the form of an endowment (or other interest-bearing account) to pay for the site's long-term management and maintenance needs. Funds should be managed to avoid expending the principal investment to the greatest extent practicable.

MITIGATION PROJECT PLAN – Synonymous with the term 'Mitigation Site Plan'. The document that formally establishes a compensatory mitigation project and stipulates the terms and conditions of its construction, operation, credit release, and long-term management. Each mitigation plan will be bound by the terms and conditions of this Instrument by reference.

PROTECTION — Protection refers to legal instruments and mechanisms established at a mitigation project site to provide permanent protection from land use or management practices that may limit natural aquatic functions at the site as established through the mitigation project. Examples of protections include conservation easements, deed restrictions, and other legal encumbrances as approved in a mitigation project plan.

RELEASED CREDITS - Once the mitigation site been established and has met its advance credit obligation, any additional (or 'surplus') released credits that have been generated onsite may be sold at market prices. Temporal loss ratio penalties will not apply to this type of credit. These credits are considered on par with mitigation bank credits from a mitigation hierarchy standpoint.

SELF-SUSTAINING - The terms self-sustaining and sustainable refer to the ability of the site to continue to provide long-term ecological benefits to offset the permitted impacts as it matures over time, with minimal maintenance or active management. Long-term management and maintenance should allow for a given mitigation site to mature and to adapt to natural dynamic processes such as seasonal and long-term climatic variability. These changes may include shifts in species composition and/or ecological functions as the site matures. Long-term adaptation to natural process does not preclude the site from being able to continue to deliver ecological benefits over time.

SERVICE AREA –The geographic extent of the Montana ILF Program Service Areas is synonymous with the 16 watershed districts defined by the Montana Department of Transportation (unless modified with approval from USACE). Compensatory mitigation will be provided for permitted impacts within the same geographic Service Area in which the impact occurred unless the District Engineer, in consultation with the IRT, has agree to an exception as defined under the Final Rule (33 CFR 332.8(d)(6)(ii)).

SHORT-TERM FINANCIAL ASSURANCE – Synonymous with *Financial Assurance*

SUSTAINABLE - See *Self-Sustaining*

EXHIBIT C:
INSTRUMENT MODIFICATION SUMMARY

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INSTRUMENT MODIFICATION SUMMARY

The following is a list of Instrument Modifications that have been approved as of the last signature date of this Version 2.0 Instrument. All documentation related to the Modifications below are saved in the program records held by MFP. The Instrument Modifications Summary will be updated as needed to reflect new Modifications.

Instrument Modification #1 – November 13, 2013

1) Final Upper Yellowstone (Watershed District/Service Area #13) Compensation Planning Framework approved. 11.13.2013

Instrument Modification #2 – November 18, 2013

1) Final Milk (Watershed District/Service Area #4) Compensation Planning Framework approved. 11.18.2013

Instrument Modification #3 – November 19, 2013

1) Final Flathead (Watershed District/Service Area #4) Compensation Planning Framework approved. 11.19.2013

Instrument Modification #4 – June 27, 2014

1) Final Middle Yellowstone (Watershed District/Service Area #14) Compensation Planning Framework approved. 6.27.2014

Instrument Modification #5 – July 8, 2014

1) Final Upper Missouri (Watershed District/Service Area #6) Compensation Planning Framework approved. 7.8.2014

Instrument Modification #6 – January 20, 2015

1) Final Missouri-Sun-Smith (Watershed District/Service Area #7) Compensation Planning Framework approved. 1.20.2015

Instrument Modification #7 – December 16, 2016

1) Final Lower Missouri (Watershed District/Service Area #12) Compensation Planning Framework approved. February 2016

2) Final Marias (Watershed District/Service Area #8) Compensation Planning Framework approved. February 2016

3) Final Upper Clark Fork (Watershed District/Service Area #2) Compensation Planning Framework approved. February 2016

Instrument Modification #8 – December 27, 2016

1) Final Kootenai (Watershed District/Service Area #1) Compensation Planning Framework approved.

2) Final Lower Clark Fork (Watershed District/Service Area #3) Compensation Planning Framework approved.

3) Final St. Mary (Watershed District/Service Area #5) Compensation Planning Framework approved.

4) Final Middle Missouri (Watershed District/Service Area #9) Compensation Planning Framework approved.

5) Final Musselshell (Watershed District/Service Area #10) Compensation Planning Framework approved.

6) Final Little Missouri (Watershed District/Service Area #16) Compensation Planning Framework approved.

Instrument Modification #9 – March 31, 2017

1) Changed % allocation of historic and future credit sales to: 20% Statewide Administration, 50% Mitigation, 17% Contingency, and 13% Long-Term Management;

2) Project and proposal development may be charged to the Statewide Administration Account until the project is approved by the Evaluation letter, rather than from the Mitigation Account.;

3) Non-expended funds may now also be held in savings accounts. Non-expended funds from Long-Term Management Accounts may now be invested in non-FDIC insured endowment accounts or trusts, complying with MFP's Investment Policy Statement. No more than 20% interest earnings from the collective ILF Program Mitigation, Contingency, and Long-Term Management Accounts may be directed back to the Statewide Program ILF Account;

4) Funds from the Contingency and Long-Term Management Accounts may be used as Financial Assurances for future projects in the same Service Area (rather than statewide). *NOTE: This modification was intended to apply to projects that were approved by the Corps and IRT prior to the execution of the Version 2.0 Instrument. However, this modification will not apply to projects approved after the execution of this Version 2.0 Instrument. Projects approved after Version 2.0 execution may not use Long-Term Management Account funds as a form of Financial Assurance.

5) Added 9 step process for site approval including timelines and accounts.

Instrument Modification #10 – April 11, 2017

1) Emond Ranch Prairie Pothole Restoration Final Mitigation Site Plan (Milk Service Area, #11) Approved

Instrument Modification #11 – May 2, 2017

1) Rau RO-08 Channel Migration Easement00 Final Mitigation Site Plan (Middle Yellowstone Service Area, #14) Approved

Instrument Modification #12 – April 13, 2018

1) Sevenmile Creek Restoration & Wetland Re-Establishment Final Mitigation Site Plan (Missouri-Sun-Smith Service Area, #7) Approved

Instrument Modification #13 – June 4, 2018

1) Fox Creek Tributary Final Mitigation Site Plan (Lower Yellowstone Service Area, #15) Approved

Instrument Modification #14 – August 21, 2018

1) Added 20 additional wetland credits to Lower Missouri River Watershed District #12 for a total of 40 advance wetland credits.

Instrument Modification #15 - November 22, 2019

1) USACE approved an 18 month extension for the 3 year growing season.

2) USACE rescinded the 20 additional advance wetland credits previously approved under Instrument Modification #14.

Instrument Modification #16 - May 4, 2020

1) USACE approved a modification to the Fox Creek Tributary Mitigation Project credit release schedule.

Instrument Modification #17 – June 16, 2020

1) Miller Creek Stream Final Mitigation Site Plan (Lower Clark Fork Service Area, #3) Approved. June 16, 2020

Instrument Modification #18 – July 21, 2021

1) Marias Wetland Final Mitigation Site Plan (Marias Service Area, #8) Approved

Instrument Modification #19 – September 27, 2021

1) USACE approved an extension to the Lower Missouri Service Area growing season timeline to October 15, 2023.

Instrument Modification #20 – December 15, 2021

1) USACE approved a modification to the 2020 Final Instrument, Section 5.1.1 to allow for the establishment of a 'Statewide Mitigation Sub-Account' and a 'Statewide Contingency Sub-Account'.

2) December 15, 2021. USACE approved the transfer of funds from the Middle Yellowstone Service Area Long-Term Management Sub-Account to the Middle Yellowstone Service Area Mitigation Sub-Account.