



DEPARTMENT OF THE ARMY
U.S. ARMY CORPS OF ENGINEERS, LOUISVILLE DISTRICT
600 DR. MARTIN LUTHER KING JR PL
LOUISVILLE, KY 40202

August 3, 2021

ID No. LRL-2010-325

Chairman Brandon Smith
Interim Joint Committee on Natural Resources and Energy
House of Representatives of the Commonwealth of Kentucky
702 Capital Ave., Annex Room 252
Frankfort, KY 40601

Dear Chairman Smith,

Thank you for inviting me to the Interim Joint Committee on Natural Resources and Energy meeting on August 5, 2021. Unfortunately, my schedule cannot accommodate participation in the meeting. However, this letter documents the Corps' position concerning the operation and current status of the Kentucky Department of Fish and Wildlife Resources (KDFWR) In-Lieu Fee Program (Corps ID LRL-2010-325).

Since 2000 the KDFWR has operated an in-lieu fee (ILF) program within the Commonwealth of Kentucky in accordance with an ILF instrument ("Instrument"). The ILF Instrument allows the KDFWR to receive funds from Department of Army (DA) permittees to satisfy compensatory mitigation requirements to offset unavoidable impacts to waters of the United States as required by DA permits. The KDFWR ILF Program operates under the terms of this Instrument and is one of several compensatory mitigation options available to DA permittees. The KDFWR ILF Program facilitates the issuance of DA permits and economic development by shortening permit processing timeframes and reducing the regulatory burden for permittees by transferring compensatory mitigation obligations from permittees to the KDFWR ILF Program. As such, the Corps supports the operation of the KDFWR ILF Program.

In accordance with federal regulations (33 C.F.R. § 332), the Corps maintains oversight of the KDFWR ILF Program. I have enclosed a summary of the pertinent sections of 33 C.F.R. § 332 which outlines the Corps' role and authority related to ILF programs. As codified in 33 C.F.R. § 332.8, it is the Corps' responsibility to determine if the KDFWR is in compliance with the ILF Instrument. As required by these regulations, the Corps must consult with the Kentucky Interagency Review Team (IRT) in this decision-making process. The Kentucky IRT consists of the U.S. Environmental Protection Agency, the U.S. Fish and Wildlife Service, and the Kentucky Division of Water. To determine the status of the KDFWR ILF Program, the Corps regularly undertakes compliance reviews.

Since 2000, the KDFWR ILF Program has met its compensatory mitigation obligations, successfully completing 46 stream and wetland mitigation projects providing approximately 130 miles of stream restoration. The ILF program currently has 49 pending mitigation projects in various stages of planning and implementation. These projects would provide approximately 225 miles of streams and approximately 535 acres of wetland mitigation. To accomplish this pending work, KDFWR has obligated over 85% of the current ILF Program funds. The KDFWR ILF Program has been in compliance with its Instrument since its inception and KDFWR staff continue to proactively cooperate with the Corps in all aspects of ILF program management through the most recent review period (2017).

The Corps initiated the most recent Program Compliance Review in January 2021. This review is anticipated to be completed by early fall 2021 and includes a forward-looking plan (“KDFWR Strategic Plan for Mitigation Project Implementation”) to facilitate the timely implementation of mitigation projects. We also anticipate a final decision regarding modification of the KDFWR ILF Instrument around the same time.

As part of the program compliance review, the Corps is undertaking an evaluation of project implementation timeframes in each service area in accordance with the regulations at 33 C.F.R. § 332.8 (n)(4). Land acquisition and initial physical and biological improvements must be completed by the third full growing season after the first advance credit in that service area is secured by a permittee, *unless the Corps determines that more or less time is needed to plan and implement an in-lieu fee project*. If the Corps determines that there is a compensatory mitigation deficit in a specific service area by the third growing season after the first advance credit in that service area is sold, *and determines that it would not be in the public interest to allow the sponsor additional time to plan and implement an in-lieu fee project*, the district engineer must direct the sponsor to disburse funds from the ILF program account to provide alternative compensatory mitigation to fulfill those compensation obligations. Several factors are being considered by the Corps in each service area to determine whether to (1) grant more time to plan and implement an in-lieu fee project or (2) direct the sponsor to disburse funds from the ILF program account to provide alternative compensatory mitigation. Among these factors are the past track record of the ILF program in successful project delivery, the number/type and age of outstanding credit obligations greater than three full growing seasons for each service area, and the status of pending projects in the review/planning stage in each service area.

During the past few years, the Corps has observed the steady progress made by KDFWR in moving numerous mitigation projects forward. Additionally, KDFWR continues to improve delivery of the ILF Program. KDFWR staffing changes, implemented in 2020, have significantly reduced the timeframe for property and easement acquisition. Other recent improvements include increases in the amount and diversity of programmatic financial assurances, and the number of mitigation sites approved by the Corps and the IRT in critical service areas. Additionally, KDFWR expects to initiate physical and biological improvements on several mitigation project sites in the coming months.

On March 1, 2021, I sent a letter to Speaker Osborne (see attached) providing additional information regarding the KDFWR ILF Program and the Corps' regulatory authority. The letter also identified a key member of my staff, Mr. Michael Ricketts, Chief, Regulatory Division to facilitate further discussions. I encourage you or a member of your staff to contact Mr. Ricketts by email (michael.s.ricketts@usace.army.mil) or by phone (502-315-6188) if you have any further questions. We are copying via email the Speaker of the House, Governor Andrew G. Beshear, chiefs of staff, the Kentucky IRT, and the KDFWR on this letter for their situational awareness.

Respectfully,

Eric D. Crispino
Colonel, Corps of Engineers
District Commander

Enclosures

Copies Furnished:

Governor Andrew Beshear, Governor of the Commonwealth of Kentucky
Via chief of staff

Ms. La Tasha Buckner, Governor's Chief of Staff
LaTasha.Buckner@ky.gov

Speaker David W. Osborne, Speaker of the House of Representatives of the Commonwealth of Kentucky
David.Osborne@lrc.ky.gov

Mr. David Floyd, Chief of Staff to Speaker Osborne, Speaker of the House of Representatives of the Commonwealth of Kentucky
David.Floyd@LRC.KY.GOV

Mr. Michael Hatten Chief, Regulatory Division, Huntington District
Michael.E.Hatten@usace.army.mil

Mr. Todd Tillinger, Chief, Regulatory Division Nashville District
Todd.N.Tillinger@usace.army.mil

Mr. Gregory Williams, Chief, Regulatory Division Memphis District
Gregg.W.Williams@usace.army.mil

Ms. Jennifer Garland, Deputy Field Supervision, Kentucky Field Office, U.S. Fish and Wildlife Service
Jennifer_Garland@fws.gov

Mr. Shawn Hokanson, Manager, Water Resources Branch, Kentucky Division of Water
Shawn.hokanson@ky.gov

Dr. Ashley Monroe, U.S. Environmental Protection Agency, Region 4
Monroe.Ashley@epa.gov

Mr. Rich Storm, Commissioner Kentucky Department of Fish and Wildlife Resources
Rich.storm@ky.gov