

FINAL DRAFT HCCC ILF IRT MEETING NOTES
Port Orchard, WA
June 5, 2012

PLEASE NOTE THAT THESE NOTES ARE CONSIDERED DRAFT UNTIL REVIEWED AND APPROVED BY THE INTERAGENCY REVIEW TEAM. AS A DRAFT, THESE NOTES MAY HAVE INACCURACIES OR OMISSIONS, AND THEY SHOULD NOT BE CITED OR REFERENCED UNTIL FINALIZED.

Attendees: Brad Murphy (Ecology), Gail Terzi (Corps), Kathleen Barnhart (Kitsap County), Thom Johnson (PNPTC-Jamestown), Cyrilla Cook (WDNR), Linda Storm (EPA), Donna Frosthalm (Jefferson County), Roma Call (PGST), Steve Todd (Suquamish Tribe), Richard Brocksmith (HCCC), Randy Lumper (Skokomish Tribe), Nancy Brennan-Dubbs (USFWS), Doris Small (WDFW), Stacy Vynne (PSP) (after lunch)

Note Taker: Scott Olmsted (ESA)

Meeting notes review:

April meeting notes--no new comments were received since the last meeting; they are now considered final.

May meeting notes-Suquamish Tribe submitted comments.

ACTION: HCCC will send out the signatories handout that was passed around at the last IRT meeting.

Nexus of proportionality-excess credit can be used to fulfill advance credits. Once advance credits have been fulfilled, excess credits can then be used to fulfill a deficiency of credits in other service areas in the ILF program; this would be a rare occurrence/case. The sponsor would need to go to co-chairs who would consult with the IRT.

ILF programs differ from other forms of mitigation in that: applicant pays money into the program, monies are pooled, mitigation site are undetermined at this point, and maybe most importantly, there is a scaling factor that pooled monies can accomplish mitigation projects that are able to generate more significant functional lift than a "typical" mitigation project.

Excess credits may also be used for some service areas where there are functional deficiencies resulting from mitigation project that do not generate the lift that was intended.

To note, developers are buying credits and are released of their mitigation responsibility, and are not responsible for the outcome of the mitigation project; therefore, if a mitigation project generates more credit than anticipated, a developer does not get money back—they did not take on that risk and were assessed debits based on the impacts of their particular project.

EHW2-impacts will occur below 30 feet. There have been conversations between regulatory agencies regarding how to interpret the Navy's impact analysis, but there is no common agreement at this time.

King County ILF-for their financial assurance, an ordinance was approved that said the ILF program would ask the city council for additional funds if the program is deficient.

If a special condition is written into the permit and if, during monitoring of a project, additional damage is identified (direct or indirect) as a result of the construction of a project, additional mitigation may be required. This would be a case-by-case requirement. Regulators would need to be clear on whether the impacts are due to construction versus operation of the structure. *This requirement would be a condition of the permit.*

Review and discussion of instrument comments-4-5 sets of comments were received and have been compiled and sent out for review by the IRT. Track changes were merged into 2 docs, the basic agreement and technical appendices. HCCC responded to Suquamish Tribe comments, on the basic agreement, separately and handed these out during the meeting.

Suquamish Tribe comments mainly concerned: 1. Service area, 2. Interim tool, 3. Financial assurances.

Service areas-Suquamish Tribe would like smaller services areas for marine and freshwater environments; at the subbasin scale. This would potentially include 22 service areas. The Corps believes these service areas would be too small to support the ILF project. With the mechanistic approach, the currently planned program will still get at same approach as the smaller service areas. Smaller service areas would require the CPF (compensation planning frameworks) to be revised, recalculations of advance credits for each service area, new ledgers for each service area, and program accounts for each service area. And it may be more difficult to find mitigation sites within a smaller service area—the nested approach (currently proposed) is a better way of identifying a mitigation location than by going to separate service area (with smaller service areas). Plus, smaller service areas would require more administrative costs. The HCCC ILF program goes beyond what federal rule requires. Corps recommends staying with the current approach.

EPA-Would like more clarification and consistency codifying the nested approach. Would like a more rigorous explanation of how the nested approach applies to freshwater service areas—define the mechanistic approach. HCCC-the freshwater service area text does this, but HCCC can add more, but does it need to be laid out more? HCCC-has added reference to “nested approach” and “mechanistic approach.” **ACTION-add a definition for the nested approach; a generic definition that references H.2** Suquamish Tribe-the federal rule is vague in regards to the watershed approach; the nested approach helps to clarify this; it is a compromise between the federal rule (vague) and the 22 service areas (detailed). There is concern that the 5 marine AMUs may not be enough (e.g., when bulkheads are installed and in-kind mitigation is not available; mitigation is moved off-site and may be out-of-kind, potentially resulting in significant functional loss over time (not meeting no-net-loss). This may be true, but without the ILF program, mitigation reverts to permittee-responsible mitigation which has been less than successful.

ACTION-clean up language so that the nested approach/mechanistic language is clear for the freshwater service area; look through the whole document for this clean up.

Marine service areas and why they are divided the way they are? Federal rule provides guidance for determining service area boundaries based on: size, economic viability, and for ecological reasons. Is Hood Canal one big unit or are the AMUs significantly different (fish use the entire canal)? HCCC has revised language to address this topic.

ACTION-add AMU figure.

Mitigation banks are required to perform watershed analysis. For ILF programs, CPF are the equivalent; the CPF provides a prioritization framework-very important.

The ILF program may help illuminate when a project should not be permitted: when using the mechanistic approach and no mitigation site can be identified. This decision is up to the regulatory agencies, not the IRT, but the program may help highlight this type of impacting project. The HCCC will provide mitigation reports to regulatory agencies to help provide this mitigation feedback.

When critical functions need to be maintained onsite (as determined and described in the ILF use plan) and there is no option for mitigation onsite, a permit should be denied; however, the IRT cannot make this decision, it is up to the regulators. The HCCC has the option to deny accepting an impacting project into the program

During use of the interim marine/nearshore tool, the IRT will inform the HCCC within a 45 day window on the outcome of the tool and whether it appears to be adequate for mitigation of the impacts. The ILF program provides more mitigation visibility to the regulatory agencies (i.e., if the ILF program does not accept a project, regulatory agencies should examine why/what risk/what impacts are associated with the impacting project).

How does having smaller service areas (at the subbasin scale) differ from having multiple AMUs or freshwater service areas (as currently proposed). 1. Program may potentially be unviable-not enough pooled money/not enough mitigation opportunities. 2. The instrument would need to be rewritten as described above. The currently proposed approach gets to the same end point as having smaller service areas because of the mechanistic approach of selecting receiving sites.

Interim tool-Suquamish Tribe comments- the interim tool is not reflective of all costs/impacts. Do not change the mitigation factors to make credits more marketable. The interim tool needs to reflect full, long term costs. HCCC: 1. The interim too is simple on purpose. 2. It goes beyond what is currently required. 3. Full cost accounting is there (34% goes long term accounts). The Suquamish Tribe does not want mitigation factors to be reduced until the IRT determines how well the program is operating. The program is not designed to underestimate costs/mitigation ratios; it is an iterative process; and is based on real world costs. Upfront credit costs might not allow for mom/pop projects to use the program, but with time, credit costs may be adjusted.

There was concern voiced by the IRT that the program cannot have marketability override ecological functions. The response-mitigation factor ratios were adjusted to be more in line with what is required currently.

Financial assurances-HCCC worked with Corps legal counsel. HCCC will use discretionary funds to meet potential project/program overruns; this language has been added to the instrument. King Co approved a financial assurances ordinance, but HCCC cannot require the three counties to support the program should it run into financial strain. The Suquamish Tribe would like a resolution or similar agreement, rather than a financial promise. HCCC-The HCCC board has approved legal language in basic agreement. The financial assurance language in the instrument states a "request" for financial support from local governments rather than requiring a legal obligation from them. Corps-this is more financial commitment than other programs provide. There was a special board meeting on June 1st at HCCC to approve language in the instrument for submittal to Corps and Ecology---if the program falls short financially---the HCCC will make up the difference. The HCCC board has adopted this language=>a resolution.

Counties-permitting staff receives separate reimbursement for review of permit applications and they are the face of the regulatory program and discussing mitigation options. The IWMP grant that HCCC received will be used to work with local governments to allow use of the ILF program. The ILF program will assist counties in meeting SMP requirements of no net loss.

A clean version of basic agreement was handed out for review. Recap-there was a March 30 version, it was updated, there were IRT meetings, comments were addressed, there was a May 15 version, new comments received May 30, these were incorporated, all comments are now compiled in the 6.3.2012 version.

ACTION-EPA-tribal waters can be more than waters on the reservation-waters of tribal lands is the legal language. Tribes to follow up on EPA's language (Line 28 page 1), if tribes would like broader language or more authority. ACTION-include definition for tribal waters.

IRT decided that mitigation is for habitats; waters of the US, State, and waters on tribal reservations.

Action: Need some language about AMU closure, potentially. Service area or AMU closure (are they the same?). If a service area or AMU is closed then it back to permittee-responsible mitigation.

HCCC-trying to get buy-in on AMU and/or Service area closure. **ACTION: Corps to check with counsel.**

Co-chairs decide that they do not need to consult with the IRT when they are considering closure of the program (under section X. of the basic agreement). This is covered in detail in Appendix S. **ACTION: add reference to Appendix S in the basic agreement.**

ACTION: Add definition of AMU.

Does the program need to meet the goal and aspirations of IWMP and HCCC members? No, not IRT agencies aspirations or those of HCCC members/stakeholders.

ACTION: add definitions for no net loss and net resource gain.

ACTION: Add wetland mitigation rule to scientific guidance section of the instrument.

The instrument text needs to be consistent about when the Corps/Ecology are “in consultation with IRT”.

ACTION: change “Skokomish” to “Skokomish Tribe”.

Action=Corps-Line 36 on page 18 of 24 (Section V. of the basic agreement) corps to check with counsel.

Usual and accustomed areas were taken out of the basic agreement by Tribal legal.

Could a service area closure come out of adaptive management recommendations (e.g., revise credit/debit system)? Potentially, but then it’s back to status quo mitigation (permittee-responsible).

ACTION: Corps-needs any deviation from the basics agreement template to be highlighted for them so legal can review it.

Corps has concerns that if there is much difference between HCCC BA and the template, then Corps legal may have difficulty accepting the changes/additions.

TECHNICAL APPENDICES:

ACTION: as part of HCCC’s statement of sale provided to the Corps and Ecology, HCCC will provide an accompanying map showing the impact location (before roster sites are determined). HCCC plans to have a geodatabase that provides information on impact and mitigation locations.

The IRT is uncertain what the post-interim nearshore mitigation tool will look like. Appendix D of the instrument will need to be reworked if a more robust tool is adopted.

After the 5.16 version of the technical appendices, comments were incorporated into the 5.30.12 version, no new comments have been incorporated since then into the 6.4.12 version.

Phasing-initially, there will be focus on large federal/state projects, while working with the counties to figure out how the ILF program will work with their ordinances. Counties will decide how they want to use the ILF program at their discretion. Do tribes and governments want to use the program immediately, or with time? The language in the instrument currently states the program will attempt start with larger-scale projects, but states that everyone can, but does not need to, use the ILF program. This language does not limit where a mitigation receiving site could be located (e.g., a mitigation site could be located in Mason Co., even if Mason Co does not participate in the program). At any time,

Mason Co could deny a permit application, including the mitigation portion of the project. The language in the instrument does not translate to a “phased” roll-out of the program.

ACTION: Richard to fix the run-on sentence in A.2.

ACTION: add governor’s exec order 89-10, protection of wetlands (December 1989) into Appendix A.

If a resource cannot be mitigated an applicant may need to consider alternative sites or designs according to the 404b1 guidelines; these regulations should be consulted/addressed before a permitted project seeks to use the ILF program. **ACTION: EPA and Corps to discuss and come back to HCCC with decision on how 404b1 guidelines fit into the ILF program.**

Shellfish beds-native vs. native cultivated vs. naturally propagating. HCCC-sometimes you have to cultivate natives to get them back. The instrument is talking about the habitat of the shellfish. Have to replace habitat functions of an impact. Native shellfish beds are difficult to replace. IRT is OK with “native shellfish” in the instrument text.

ACTION: Define native shellfish beds.

Initial biological improvement=e.g., grading and planting.

The definition of the watershed approach is kept vague in the instrument so as to not constrain the program. This concept is covered in multiple sections of the instrument.

ACTION: move language from beginning of Appendix C up to Appendix A.

ACTION: obvious places where you can cite the federal rule, do so; in areas, where it provides clarity, as a citation.

Typical BMP measures count as minimization measures (these are construction-related measures rather than LID, which do not count).

ACTION: Nexus of proportionality; define it.

Regarding scrub-shrub wetlands, both mitigation tools apply to it (marine/nearshore and freshwater); IRT decided to use the interim marine/nearshore tool for the assessment of tidal scrub-shrub wetlands.

Degree of Impact factor may need to change the interim tool range of values (multipliers) at a later point.

The interim marine/nearshore tool spreadsheet of values is for guidance; to assist with the case-by-case assessment of impacts. The spreadsheet provides a starting point for informal negotiations with the IRT, and with regulatory agencies. **ACTION: Sharpen the language that regulatory agencies can recommend/require higher (or lower) values than those listed in the interim marine/nearshore tool spreadsheet.**

SRF Board-if SRF Board funds are used to plan/design a mitigation project, the proportion of functional lift associated with the mitigation project will be divided up, between SRF Board and HCCC mitigation, and tracked separately in the ledger.

ACTION: Site selection factor=add climate change.

Long term stewardship template-this will be developed with the first ILF project and included as an appendix. If you want to transfer mitigation responsibilities, it needs to be approved by the co-chairs, in consultation with the IRT.

Timeline for the instrument-final version will be delivered to the Corps by Friday at 5pm. Electronic versions will be sent to all IRT. Wait until intent to sign before hardcopies are sent out to the IRT. Corps has 30 days before they need to decide on the intent to sign. IRT has 45 days from receiving the final instrument to begin dispute resolution.

The co-chairs will determine if all IRT concerns have been addressed. Dispute resolution may potentially be handled by the colonel (government to government talks).

The co-chairs want to be sure there are no problems with the basic agreement since it requires parties to re-sign the instrument in order to make changes; it is easier to make changes to the appendices via an exchange of letters.

Intent to sign-the chair person for a tribe or an agency head at local agreement are the individuals who typically sign the instrument.

ACTION: Corps to determine if the letter of support is the same thing as intent to sign. Can the applicable IRT members state that the letter of support still stands?

Draft ILF Use Plan-IRT has the opportunity to review the ILF use plan for the Navy project-IRT can consult/discuss.

ACTION: In the run-through of the Navy's project mitigation/debit/credit calculations-include impact to geoduck.

EHW2-construction impacts were not assessed in the impacts calculations, nor were impacts associated with docking submarines.

ACTION-for Corps/Ecology-for the Navy's project, there is an acre points error of 4.4 vs. 4.8 acre points; for the wetland fill that is bisecting, are the indirect impacts assessed?; are indirect impacts associated with docking submarines assessed?; are direct construction impacts assessed?; are geoduck impacts assessed?

ACTION-HCCC send draft ILF Use plan (write DRAFT on the document) and associated excel spreadsheets (mitigation calculations).

ACTION-HCCC, in the interim marine/nearshore spreadsheet, adjust riparian to 3.0.

ACTION-HCCC, schedule a webinar regarding EHW2 impact calculations in the next couple weeks.

Corps is writing two RODs for the Navy since they are unsure at this time which track (ILF or permittee responsible) will be utilized.

ACTION: HCCC, determine or re-examine if higher degree of risk values have been considered for the Navy's impacts (Riparian/geoduck).

Navy can switch from permittee-responsible mitigation to ILF mitigation.

Navy did not conduct an in-depth search for mitigation sites, since they did not want to own the mitigation properties.

ACTION: ask Katherine Blackwell/Joe Brock (Corps) and Rebecca (Ecology) if they would like to be a part of the webinar hosted by HCCC.

Corps-Navy has given a presentation on the HEA assessed impacts and mitigation. Shine tidelands utility easements still pose a problem regarding buy-off from the regulatory agencies. The easements would not count towards mitigation.

Regarding the calculations in the interim marine/nearshore tool for the Navy's project, regulators agreed on the impact numbers, but not the other table numbers (degree of risk or other conversion factors).

If Corps' "foot is in the door" as far as permitting a project, they can consider requiring mitigation for riparian impacts.

The Corps will issue an individual permit for the Navy's project; the Navy would like to begin wharf construction on July 16th.

The next IRT meeting is on July 9th.