

**Draft IRT Meeting Notes – HCCC ILF Mitigation Program  
TAGRO, Tacoma, WA**

**May, 2 2012**

**Attendees:** Brad Murphy (Ecology), Gail Terzi (Corps), Kathleen Barnhart (Kitsap County), Thom Johnson (PNPTC-Jamestown), Cyrilla Cook (WDNR), Linda Storm (EPA), LaJane Schopfer (Mason County), Donna Frostholm (Jefferson County), Roma Call (PGST), Steve Todd (Suquamish Tribe), Richard Brocksmith (HCCC), Randy Lumper (Skokomish Tribe), David Hirsh (NMFS), Doris Small (WDFW)

**Note Taker:** Scott Olmsted (ESA)

**Agenda Review:**

The sponsor has met individually with the IRT tribes and new tribal language was placed in Appendix A, page 4. Drafted language was based on past conversations; e.g., the program will not displace any government to government responsibilities.

The March 30<sup>th</sup> version of the instrument is the most recent version. Changes associated with more recent conversations since March 30<sup>th</sup> have been captured in track changes (see below) and will be forwarded to the IRT in coming weeks.

The Corps mentioned that in the past, a mitigation bank wanted a tribe to be conservation easement (CE) holder for the bank, but there were some legal issues regarding tribes holding a CE and the ability of the state (Washington) to enforce the CE. If mitigation bank lands are located off the reservation and the tribe holds the CE, there may be legal issues; however, if the tribe owned the land (tribal trust land), then there would likely not be legal issues, but there may be a conflict of interest.

At the Lummi Bank, they are having the NW Indian Fisheries Commission (NWIFC) hold the CE. This is OK with all parties involved. This arrangement (NWIFC holding the CE) could work out for the HCCC ILF program if a potential mitigation site were to be located on reservation land.

**Past Meeting Minutes:**

Based on a past action item from the April meeting, the Corps provided an explanation about the various ways IRT members can sign/be a party to/not sign the instrument when it becomes certified. A paper detailing the various options was passed out at the meeting. **ACTION: Corps to send out to the IRT an electronic version of the paper that was passed out at the meeting.** Being a party to the instrument requires that certain agency resources be available to facilitate enforcement of ILF program requirements.

March Meeting Minutes-selected clarification of notes is provided below.

The Corps clarified the difference between excess credits (those credits returned by a completed mitigation project that are above and beyond what was required at that site) vs. advance credits and how they can be used (see March meeting minutes). Excess credits associated with an ILF program would be ecologically equivalent to those provided by a mitigation bank, and could be sold.

Credit prices do not vary based on the time lag between when impacts occur and when mitigation is commenced (cheaper prices closer to project installation because the time lag is shorter). It is agreed that the time lag to installation of a mitigation project is no more than 3 full growing seasons, and that credit prices need to be equitable with regards to time lag.

Nationwide, since the implementation of the Federal Rule, administrative costs have risen from about 2 percent to 10 percent.

The HCCC instrument does not speak to excess credits. HCCC's current policy decision is to not sell excess credits because the goal of the program is to get beyond no net loss (provide a functional lift). King Co is trying to have a balance between excess and advance credits; to have them zero out, because they cannot require a developer to do more mitigation than what is required based on the impacts. This nexus of proportionality can be addressed by: indicating that the applicant has paid money to buy credits, at which point they transferred mitigation responsibility, the sponsor then uses pooled money to conduct a project that the applicant could not have performed. The determination of the number of credits (nexus of proportionality) is based on the impacting project and the tools (methods to determine the number of credits required) available in the instrument.

Down the road, the IRT can see how the program is performing by reviewing ledgers and Appendix U requirements (program performance measures).

Because ILF programs pool credit sale monies and implement larger, more ecologically beneficial projects, there is good potential for added value to the ecosystem (net gain in function).

Preservation may be the preferred/priority method for "difficult to replace" resources. Federal rule does not disallow impacts to difficult to replace resources. This was clarified in the instrument.

Finalized March notes.

April Meeting Minutes-selected clarification of notes is provided below.

**ACTION: April notes will be briefly reviewed again at the next meeting.**

**Review and Discuss changes to the March 30 2012 Instrument:**

After March 30<sup>th</sup>, multiple changes were made to the site selection section based on several discussions with the co-chairs, tribes, and/or IRT. These changes to the instrument text were reviewed at this meeting.

Decoupling mitigation means=certain functions are mitigated for at different places because these functions cannot effectively be taken offsite for ecological reason (e.g., stormwater functions), while others functions can be effectively mitigated offsite (e.g., habitat functions).

Ideally, HCCC would undertake offsite mitigation and onsite mitigation. However, there could be times when an applicant wants to be responsible for the onsite mitigation (this may occur so that the applicant can potentially save money by conducting the mitigation themselves).

The nested approach for site selection will be used for out of kind mitigation, in addition to in-kind mitigation.

Site selection approach- administrative funds are used to create conceptual plans. A spending agreement will be submitted after site selection rationale is agreed upon by the co-chairs and IRT, and after the preliminary conceptual plans have been submitted. If this process does not work as the program operates into the future, the IRT can work with the sponsor to change this in the instrument. Parties to the instrument sign the spending agreements (Ecology, Corps, EPA), rather than the whole IRT.

#### **Difficult to replace habitats:**

A handout that provided language on the difficult to replace habitats was handed out at a previous meeting and via email by the sponsor.

Language regarding difficult to replace habitats was added to three sections of the instrument: a new objective in Appendix A.4; in Appendix A.3 language was added from the federal rule and a list of difficult to replace resources was provided (resources agreed upon by IRT); and a brief section in Appendix H mentions difficult to replace habitats, in the Preservation as a Mitigation Strategy section.

The current list of habitats is good for now. During the IRT meeting "...but not limited to..." and "This list of difficult-to-replace habitats may be updated..." were added to this section of the instrument (Appendix A.3).

The IRT is having difficulty determining if native shellfish should be included in the difficult to replace habitats and critical functions list. Would this be covered under subtidal habitats, which is already in the list? . The IRT agrees to not use shellfish (in difficult to replace habitats), just their habitats.

#### **Interim nearshore approach:**

Version 4.9.2012 of the interim nearshore approach was emailed out to the IRT and this will be included in the "newest" version of the instrument.

Since the March 30<sup>th</sup> version of the instrument was released, the instrument has not changed much other than minor text changes, but the factor ratings included in the interim nearshore tool have been decreased. Tom Hruby at Ecology has revised the calculator a bit and this was presented at the meeting.

Ecology's calculations yield lower total credit costs. Ecology is only proposing to reduce factors/conversion ratios, not costs.

Ecology's proposal is based on the freshwater wetland tool; HCCC is working with a much broader array of habitats that often present more risks.

Temporal lag is not captured on the front side (credit side) of Ecology's interim tool proposal. It is captured on the mitigation side for freshwater wetland mitigation (in the freshwater wetland tool).

**ACTION: take Table 4 out of the instrument.**

There is concern on the part of Ecology, that the ratios/conversion factors that are currently proposed in the interim nearshore tool are too conservative (or at least more than they are getting now).

Ecology's proposal eliminates some flexibility of the IRT to determine the risk associated with a specific project.

The IRT will attempt to determine what they like about Ecology's proposal and include it in HCCC's interim tool.

To reduce subjectivity (associated with large ranges of factors) of the tool, one can have fewer individuals using the tool=>HCCC will be involved in applying the interim tool in every case; however, applicants will be proposing the number of credits they will purchase as part of their ILF use plan.

Use of the interim tool will be a self-adjusting process that the IRT will be able to review (ledgers) to see if functions are adequately being replaced (or if it is too easy to replace functions) and then make adjustments to the ratios/conversion factors.

A more complex interim tool may lead to more subjectivity; however, the currently proposed tool allows for more transparency.

Certain IRT members have concern that ramping down conversion factors, such as that proposed by Ecology, will not achieve no net loss over time and would rather keep the factors high. BMPs (minimization measures) that are required as part of the project should be able to be captured to help reduce the costs associated with mitigation.

Squamish Tribe has some concerns: 1. would like to see temporal lag be more transparent. 2. Determine if there may be redundancies in risk, degree of impact, or conversion factor. (Risk is not double counted because there are at least two separate/distinct risk factors-one is associated with replacing the habitat/functions and the other is associated with lag time before a mitigation project is implemented.

Temporal loss is accounted for on both sides of the HCCC interim tool; one on the front side, how long it takes to re-establish functions by habitat type; one on the back side, how long it takes for the mitigation strategy to re-establish functions.

The IRT agrees that there is no double counting on the temporal lag factor.

The ILF program gets 3 full growing seasons (after the first credits are sold) to implement mitigation projects.

WDFW was curious if an applicant would be required to buy more credits, say for a structure that is tall or oriented in a specific direction resulting in further impacts. Sponsor-this would be considered in the intensity of impact and area of impact factors. How are BMPs applied to credit determinations? The Corps and NMFS require BMPs as part of project construction. This should be kept in mind as far as degree of impact factor, reducing it in the end.

**ACTION: in the instrument, discuss how minimization (BMPs) measures may influence the number of credits required for a particular project.**

**ACTION: add language that clarifies that mitigation will be required only for the impacts of the project receiving the permit (nexus of proportionality).**

The IRT is OK with using the HCCC proposed interim tool in the instrument.

Additional points raised by Tom Hruby (Ecology) to the sponsor; these will be addressed in the instrument:

1. Shrub-scrub wetlands that are tidally influenced are covered by both the Ecology freshwater wetland tool and the HCCC interim nearshore tool. Salinity concentrations of 1.5 ppt mark the split between tidally influenced and freshwater wetlands using the Ecology tool. There is little of this habitat type in Hood Canal. **ACTION: The sponsor will clarify: IRT preference would be to note this habitat is covered by both tools, that there is some discretion as to which tool to use, but preference would be to use HCCC interim nearshore approach where applicable.**

2. Will saltwater habitat ever be created as a mitigation strategy; should this be included in the interim tool? Yes. Keep it in the interim tool, as there are some limited examples of this happening.

3. When calculating debits, these are really acres (unlike Ecology freshwater wetland tool). Should the sponsor term these habitat class debits or habitat acre debits? **ACTION: The sponsor will clarify this with language stating they are acres.**

4. For out of kind mitigation, ratios will be determined on a case-by-case basis and reviewed by the IRT. The IRT will need to agree on the resource tradeoffs. This will be tracked in the ledger. **ACTION: The sponsor will add new language in the Instrument to document that out of kind mitigation will be determined on a case-by-case basis.**

Regarding financial assurances, the Corps is considering accepting a political promise from HCCC as has been done in other programs across the country. King Co DNR is required (by ordinance) to request the King County Council to provide financial assurances-they will ask for more money from the county legislature if needed. For a non-profit (HCCC), the co-chairs will need a political promise. HCCC does

have some discretionary funds, will be proposing to use these if necessary, but also will propose to inform the member governments and ask for their input on how to cover financial assurances if needed.

If an IRT member does not sign the instrument, this does not water-down their input.

The Suquamish Tribe submitted proposed edits for Appendix A and Appendix U:

Appendix A, track at the most relevant scales given our mechanistic approach (e.g. drift cell, AMU, and sub-basin levels).

Appendix U-added objective-Ensure the HCCC ILF program is meeting the program goals and objectives.

Will the HCCC ILF Program be evaluated on an annual basis? The IRT will frequently review ledgers when spending agreements are submitted. There will be an annual IRT meeting to review ledgers and program evaluation (every other year, for now). The program performance evaluation will occur every two years, given little will happen in two years and the program performance evaluation takes a lot of time to prepare.

IRT has until May 30<sup>th</sup> to provide final comment on the final draft instrument. Comments will be reviewed and incorporated into the instrument, the sponsor will submit the final instrument, it will be reviewed by Corps and Ecology who could then write an “intent to sign” letter. The co-chairs have 30 days after receiving the final instrument to determine if they are going to sign it; the IRT then has 15 days to implement formal dispute resolution.

The sponsor hopes to have the final instrument ready by June 4<sup>th</sup>, on June 5<sup>th</sup> (IRT meeting) the sponsor will discuss how comments were incorporated, after this any new comments will be addressed, final instrument will hopefully be submitted ~June 7<sup>th</sup>. Potentially, by June 14<sup>th</sup>, the co-chairs will issue intent to sign. The instrument may be signed in late June or early July (optimistic schedule). This will likely be before the EHW2 permit is issued.

Five letters of support are known to be coming to the co-chairs (three have already been submitted)

**ACTION: Corps to cc: the letters of support to the IRT as they are received.**

Corps signs the instrument last and will sign original copies for all members of the IRT.

Regulatory agencies can require the purchase of additional credits if additional indirect impacts are determined after the fact as noted by monitoring requirements (for example, if there are additional eelgrass impacts associated with the Navy’s EHW2).

Next meeting: June 5<sup>th</sup>-Kitsap County Public Works Building

Meeting after that-July 9<sup>th</sup> or 10<sup>th</sup>? **ACTION: the sponsor will send out a Doodle poll for additional potential dates for the July IRT meeting. For now, IRT pencil in July 9<sup>th</sup>.**