

## In-Lieu Fee Mitigation

Healthy wetlands and streams are essential to maintain and restore Washington waters, including Puget Sound, and keep our economy vibrant. Wetlands filter drinking water, hold flood waters, recharge groundwater, and provide recreation and fish and wildlife habitat.

Parties seeking permits for activities that affect wetlands or other aquatic resources must first avoid and then minimize those adverse effects. After avoidance and minimization have been achieved, the remaining unavoidable impacts must be compensated through mitigation.

Mitigation means countering the negative environmental impacts that developing the land can have on wetlands, rivers, streams, lakes, and other aquatic resources. Compensatory mitigation is the stage of the mitigation sequence where impacts to wetland functions are offset through the creation, restoration, enhancement, or preservation of other wetlands.

In-Lieu Fee (ILF) mitigation is one approach to compensate for wetland impacts that result from development.

### **Q: What is in-lieu fee mitigation?**

**A:** ILF mitigation involves the restoration, creation, enhancement, or preservation of aquatic resources through funds paid to a governmental or non-profit natural resources management entity to satisfy compensatory mitigation for federal, state, and local permits.

An ILF project can be used only after a permitting/regulatory agency determines that unavoidable wetland impacts are adequately offset by the ILF project. If the agencies determine that the ILF project compensates for the wetland loss, the permit recipient purchases credits (i.e., pays a fee) from the sponsor.

The funds from the credit purchase are used by the sponsor to implement the mitigation project instead of (i.e., in-lieu of) the permittee completing their own mitigation project.

### **DEFINITIONS**

**Credits:** A unit of trade representing the increase in the ecological value of the site measured by acreage, functions, or other assessment method.

**In-Lieu Fee Instrument:** The documentation of agency and sponsor agreement on the objectives and administration of the project. The In-Lieu Fee instrument describes in detail the physical and legal characteristics of the project including the service area, project establishment, operation, and maintenance.

**IRT:** An interagency group of federal, state, tribal, and local regulatory and resource agency representatives who are invited to participate in negotiations with the sponsor on the terms and conditions of the ILF project.

**Performance standards:** Measurable criteria for determining if project goals and objectives are being met. Performance standards document a desired state, threshold values, or amount of change necessary to show that the project is working successfully.

**Service area:** A specific geographic area in which ILF projects can reasonably be expected to provide appropriate compensation for unavoidable impacts to wetlands and aquatic resources.

#### **Contact information**

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#### **Special accommodations**

To ask about the availability of this document in a version for the visually impaired, call the Shorelands and Environmental Assistance Program at 360-407-6600. Persons with hearing loss, call 711 for Washington Relay Service. Persons with a speech disability, call 877-833-6341.

# Frequently Asked Questions

## **Q: How is in-lieu fee different from other types of mitigation?**

**A: In-Lieu Fee mitigation:** In-lieu fee projects sell credits to permit recipients whose obligation to provide compensatory mitigation is then transferred to the sponsor of an approved in-lieu fee program. The sponsor of the ILF program then becomes responsible for the success of the ILF project. The ILF projects are usually constructed after impacts have occurred and fees have been collected.

Other approaches to provide compensation for wetland impacts that result from development are listed below:

- **Advance mitigation:** Wetland sites are built in advance to compensate for project impacts already identified. Advance mitigation can combine compensation for multiple wetland losses. For these projects, the permit recipient remains responsible for the success of the mitigation project.
- **Concurrent or “permittee-responsible” mitigation:** Generally, the wetlands are built after the permit is issued and the adverse impact occurs. Mitigation can occur on or off site. In these situations the permit recipient retains responsibility for the success of the mitigation.
- **Wetland mitigation banking:** Wetland areas are established before unavoidable permitted losses occur. These are typically used to offset unknown wetland losses associated with several permits, rather than a single project. Bank credits can be sold to permit recipients to meet permit requirements. Like an in-lieu fee program, the responsibility for the success of the mitigation transfers to the bank sponsor when credits are purchased.

## **Q: What are the benefits of an in-lieu fee program?**

**A:** ILF programs provide many benefits, such as:

- Project sites can be selected based on local watershed needs and local watershed plans.
- Flexibility to combine mitigation needs from small project impacts into larger, more sustainable wetland complexes.
- Ease of use - the permit recipient pays a fee into a fund that transfers their mitigation responsibilities to the ILF sponsor.
- Provides the state a better opportunity at mitigation success by having an ILF sponsor, experienced in completing wetland projects, implement the wetland mitigation plan.
- Provides permanent protection – the agencies require mechanisms for long-term protection, management, and maintenance of the project sites.

# Frequently Asked Questions

## **Q: Will in-lieu fee projects result in more wetlands lost?**

**A:** Applicants proposing projects that will adversely impact wetlands must go through mitigation sequencing to avoid and minimize wetland losses, regardless of whether they propose to use credits as compensation. Credits can be used only when the permitting agency determines that the unavoidable wetland impacts are adequately offset by the ILF project.

## **Q: What role does Ecology take with in-lieu fees? Does Ecology regulate in-lieu fee projects?**

**A:** Unlike wetland mitigation banking, Ecology doesn't have a state rule specific to ILF programs. Ecology regulates ILFs under the following mechanisms:

- Water Pollution Control Act, RCW 90.48,
- Water Quality Standards for Surface Waters of the State of Washington, WAC 173-201A, and
- Clean Water Act Section 401 water quality review of an associated US Army Corps of Engineers (Corps) Section 404 review.

## **Q: What is the process for reviewing in-lieu fee programs?**

**A:** ILF programs have a specific review and approval process by the Corps under the federal mitigation rule (33 CFR Parts 325 and 332, 40 CFR Part 230). ILF projects go through the following certification steps:

- **The review process starts when the sponsor submits a prospectus to Ecology and the Corps.** Once the Corps determines that the prospectus is complete, notice is issued seeking public input regarding the proposed project.
- **The Interagency Review Team (IRT) is convened.** The IRT reviews and provides technical input on the sponsor's project design, service area, performances measures, and the number of advance credits available. Public comments are considered during the technical review stage.
- **Sponsor submits a draft ILF Instrument for IRT review and comments.** The sponsor incorporates these comments and submits a Final Instrument to the IRT.
- **Sponsor arranges for signing after all necessary comments are incorporated and approved by the IRT.** The approval process is complete once Ecology, the Corps, and the sponsor sign the ILF instrument. Depending upon the location of the ILF project and what activities are proposed for the project, local jurisdictions and tribal governments may also want to sign the instrument.

# Frequently Asked Questions

**Q: Who uses in-lieu fee sites?**

**A:** Project proponents (e.g., individuals, businesses, developers, or other organizations) with permitted impacts to wetlands and other aquatic resources may be allowed to pay into a restoration fund instead of completing their own, separate, mitigation project.

**Q: How are in-lieu fee project sites selected?**

**A:** Sites are proposed by the program sponsor for review by the IRT. Ecology recommends that the sponsor selects sites using a watershed approach which includes site selection guidance (Ecology publication #09-06-032 and #10-06-007), watershed plans, and local information.

**Q: What happens if an ILF mitigation project isn't successful?**

**A:** Each mitigation site will have Financial Assurances (FAs) established to ensure satisfactory compliance with their ILF instrument. FAs will be established for numerous items including construction, site performance, and long-term monitoring and maintenance. Each mitigation site will have a monitoring program to determine how the site is functioning. If the monitoring or visits to the site show that it is not successful, Ecology and/or the Corps can require the sponsor to correct the discrepancies using contingency funds as needed. If the sponsor is unable to correct the site themselves, Ecology and/or the Corps can access the established FAs to pay a third party to correct the discrepancies and ensure that the site provides successful mitigation for all credits sold.

**Q: Who is eligible to be an ILF Sponsor?**

**A:** By federal rule, only non-profit natural resource entities and governmental natural resource entities are eligible to be program sponsors.

**Q: How can I get more information on ILF mitigation?**

**A:** More information regarding in-lieu fee mitigation can be found at the following website: <http://www.ecy.wa.gov/mitigation/ilf.html>.