



US Army Corps  
of Engineers  
Portland District

# Public Notice

## Proposed Statewide In-Lieu Fee Program

30-Day Notice

**Issue Date:** May 13, 2008  
**Closing Date:** June 13, 2008

Interested parties are hereby notified that the U.S. Army Corps of Engineers, Portland District (Corps) is seeking comments on a proposal to establish a statewide in-lieu fee program. A prospectus describing the proposed program has been received from the program sponsor, the Oregon Department of State Lands (DSL) and is attached to this notice (Enclosure 1).

The term “in-lieu fee program” refers to a program involving restoration, establishment, enhancement, and/or preservation of aquatic resources through funds paid to a governmental or non-profit natural resources management entity to satisfy compensatory mitigation requirements.

Similar to a mitigation bank, an in-lieu fee program sells compensatory mitigation credits to permittees whose obligation to provide compensatory mitigation is then transferred to the in-lieu fee program sponsor. The operation and use of an in-lieu fee program are governed by an in-lieu fee program instrument.

The statewide in-lieu fee program is being proposed as a means to meet the requirements for compensatory mitigation associated with projects, which may be permitted by the Corps. If the program is approved, it would provide an alternative to permittee-responsible mitigation. The program would be designed and administered in a manner consistent with the Final Rule for Compensatory Mitigation for Losses of Aquatic Resources, which was published in the Federal Register on April 10, 2008. While the program could also be used to meet compensatory mitigation requirements associated with the State of Oregon’s Removal-Fill Law, this Public Notice is focused solely on the Federal review and approval process. Regardless of whether the proposed program is approved, the Corps is willing to consider other proposals from qualified entities to develop in-lieu fee mitigation projects.

The Corps has convened an Interagency Review Team (IRT) comprised of Federal and State agencies. This team will work with DSL to create a statewide instrument and legal agreement that specifies watershed-based aquatic resource objectives, procedures for defining service areas and accounting for credits, legal obligations, default and closure provisions, reporting protocols, and financial accounting requirements. If the statewide instrument is approved, individual mitigation plans will be prepared as in-lieu fee project sites are identified. These plans would be incorporated as amendments to the statewide instrument. Additional Tribal and local representatives may be invited to join the IRT during review of individual mitigation projects.

The prospectus, which outlines the purpose and structure of the proposed program, is attached to this notice. Comments should be submitted to the Corps, and should be received no later than the expiration date of this public notice. Comments regarding the following topics would be especially useful: priority service areas, priority aquatic resource types, and methods of accounting for credits generated by in-lieu fee projects that are undertaken in conjunction with, but supplemental to, other aquatic resource conservation activities. Comments received in response to this Notice will be provided to DSL and the IRT.

Please provide comments to the following:

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# Oregon Department of State Lands

## Prospectus for a Statewide Fee-in-Lieu Program

May 2008

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## 1. Introduction

Permits are required by the U.S. Army Corps of Engineers (Corps) through the Clean Water Act (CWA) Section 404 and Rivers and Harbors Act Section 10 regulatory programs for discharge of dredge or fill materials within “waters of the U.S.” and by the Department of State Lands (DSL) through Oregon’s Fill and Removal Law. These regulatory agencies, in coordination with Federal and State resource agencies, require that aquatic resource functions and services lost due to impacts be replaced through compensatory mitigation.

In 1994 DSL created a Fee-in-lieu<sup>1</sup> program as a mitigation option in Oregon for wetland impacts, but since 2001 the Corps has not recognized this program as a mitigation option for Federal wetlands permitting. DSL is currently working toward Corps recognition of a revised fee-in-lieu (FIL) program. The following prospectus outlines the circumstances and manner in which a statewide FIL Program may serve to satisfy compensatory mitigation requirements of the Corps Regulatory program.

### Need for the FIL program

Most permittee-responsible and offsite compensatory wetland mitigation projects implemented are small, less than one acre in size, and their environmental benefits are limited in scope. Studies have shown that many mitigation sites in Oregon and around the country have a high rate of failure or under-performance (Fishman Environmental Services 1987; Kunz et al. 1988; Gwin and Kentula 1990; Kusler and Kentula 1990; Erwin 1991; Kentula et al. 1992; Lewis 1992; Storm and Stellini 1994; Shaich and Franklin 1995; Wilkinson and Thomas 2005). Some common problems identified by these studies are project designs without a landscape or watershed context; ill-defined project goals and success criteria; lack of baseline data; indeterminable viability of sites because of a combination of poor location, design inadequacies or failure to implement the specified design, and inappropriate long-term management; and inadequate monitoring efforts and regulatory oversight.

Federal regulations recognize that mitigation banks and in-lieu fee programs may be the environmentally preferable options because they usually involve consolidating compensatory mitigation projects and resources to target more ecologically significant functions, provide financial planning and scientific expertise, reduce temporal losses of function, and reduce uncertainty over project success (33 CFR Part 332).

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<sup>1</sup> Oregon’s removal-fill program refers to “fee-in-lieu” as “payment-in-lieu” or historically, “payment to provide” mitigation. These terms are synonymous.

## **2. Bank Development Plan**

### **2.1 Goals and Objectives**

The goals and objectives for the FIL Program are as follows:

- a) Provide an alternative to permittee-responsible compensatory mitigation that will effectively replace functions and services lost through permitted impacts.
- b) Minimize the temporal loss of wetland functions and services by gaining approval of mitigation sites in advance of mitigation needs.
- c) Create a program that has a level of accountability commensurate with mitigation banks.
- d) Provide projects to meet current and expected demand for credits, in areas without sufficient mitigation banks.
- e) Achieve ecological success on a watershed basis by providing wetland types and functions that are appropriate to the service area, and by integrating FIL projects with other conservation activities.

### **2.2 Qualifications of Sponsor**

The Department of State Lands serves as the administrative arm of the Oregon State Land Board (Governor, Secretary of State, State Treasurer), which has ultimate responsibility for the matters of DSL. The Department of State Lands provides natural resource conservation through policy direction and regulatory compliance through the administration of the removal-fill program. The agency ensures continued availability of state waterways for commerce, recreation, navigation and fisheries; protects, restores and enhances wetlands; supports the efforts of The Oregon Plan for Salmon and Watersheds and the Healthy Streams Partnership; and controls the regulation and enforcement of removal and fill operations within all waters of the state, including wetlands. "Waters of this State" are defined in OAR 141-085-0010(220) as:

All natural waterways, tidal and non-tidal bays, intermittent streams, constantly flowing streams, lakes, wetlands, that portion of the Pacific Ocean that is in the boundaries of the state, all other navigable and non-navigable bodies of water in this state and those portions of the ocean shore.

The Wetland and Waterways Conservation Division of DSL consists of the wetlands planning section and the operations section. The wetlands planning

staff works on carrying out provisions related to the 1989 Wetlands Conservation Statute (ORS 196.668 to 198.692) to address the growing concern over the decline in Oregon's wetlands resource base, including:

- The creation of local conservation plans,
- Development and approval of local wetland inventories as part of a statewide wetland inventory and land use planning objectives, and
- Implementation of a wetland land use notification process that requires all counties and cities to notify DSL when certain development activities are proposed in areas mapped as wetlands.

Wetland staff helps local governments with wetland inventories and planning, and helps property owners determine if wetland permits are needed. They also provide wetland delineation expertise (guidance and report review) to local governments, consultants, agencies and landowners.

Operations staff conduct permitting, monitoring, and compliance work related to the Removal Fill Program. Staff includes two wetland mitigation specialists, one of whom administers DSL's oversight of private wetland mitigation banks, and the other who manages the FIL Program and the Oregon Mitigation Bank Revolving Fund Account.

### **2.3 Establishment and Operation**

The Department of State Lands intends to establish itself as a qualified fee-in-lieu mitigation sponsor for Corps and DSL authorizations in Oregon. As a state regulatory agency, DSL will work with other state natural resource agencies to assure their requirements are being met. An Interagency Review Team (IRT) will advise the Corps on the establishment and management of the FIL Program. The team will be composed of representatives invited by Corps from other federal, tribal, state, and local resource agencies that would have a substantive interest in the establishment and management of the FIL Program being sponsored by DSL. The Corps District Engineer may designate different representatives of the agencies listed above, and may invite additional members, to serve on the IRT for individual mitigation projects. While Corps and DSL currently co-chair the IRT for private mitigation banks, the Corps alone will chair the IRT for the DSL FIL Program to avoid any potential or perceived conflicts of interest.

The structure of the FIL Program will be outlined in a statewide instrument that describes the program elements such as service area<sup>2</sup> determination, project selection criteria through a compensation planning framework, credit/debit

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<sup>2</sup> A service area is the geographic area within which impacts may be mitigated by credit purchase from a specific FIL mitigation project.

accounting, and reporting requirements. The instrument will serve as the “umbrella” under which mitigation projects around the state will be established. Each mitigation project will have a separate “mitigation plan,” reviewed and signed by DSL, the IRT, and Corps, and added through amendment to the FIL Instrument. Mitigation plans will include the following information:

- a) Objectives
- b) Compensation planning framework
- c) Site selection rationale
- d) Site protection instrument
- e) Baseline information
- f) Determination of credits
- g) Mitigation work plan
- h) Maintenance plan
- i) Monitoring requirements
- j) Long-term management plan
- k) Adaptive management plan
- l) Long-term funding mechanism
- m) Other information as needed

Project selection criteria are discussed in Section 2.5 of this document. Generally, the program and use of Oregon Wetlands Mitigation Bank Revolving Fund Account monies will be administered as a wetland grant program (see Section 3.3). Potential grantees will apply for funds to conduct a wetland project, DSL will review the project for consistency with the review criteria, and the project will be added as an instrument amendment following IRT review and Corps approval. The Department of State Lands will remain responsible for the implementation, performance, and long-term management of compensatory mitigation projects completed through these third-party contracts. DSL does not anticipate that the Corps will be involved in the management of the grants. DSL will act as grant manager and report to the Corps on the work conducted programmatically (see Section 4).

## **2.4 Prioritization Strategy**

Over time, DSL hopes to have mitigation projects around Oregon that will provide appropriate compensatory mitigation for impacts to the waters of the U.S. and state waters, including wetlands, within that mitigation project’s service area.

Priority service areas around the state are those that have an existing obligation for DSL (funds available), have anticipated demand for compensatory mitigation based on historical wetland impacts, and that are not adequately serviced by a private mitigation bank. Demand for mitigation credits will be determined using

DSL and Corps permit authorization trends, and Oregon population and growth information. Current priority areas are:

**Basin 1-North Coast**

Lower Columbia  
Necanium  
Wilson-Trask-Nestucca

**Basin 2B-Mid-Willamette**

Molalla-Pudding  
South Santiam

**Basin 2C-Lower Willamette**

Clackamas  
Lower Willamette  
Tualatin

**Basin 5-Deschutes**

**Basin 15- Rogue**

Middle Rogue

**Basin 16-Umpqua**

South Umpqua

**Basin 17- South Coast**

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DSL will develop mitigation projects over time as opportunities become available. Selection of mitigation projects will focus on leveraging large-scale restoration projects that address watershed priorities in the service area, as outlined in a compensation planning framework.

DSL will look toward existing statewide or regional documents for historic and current watershed information, including U.S. Forest Service Watershed Analyses, Oregon Watershed Enhancement Board Basin Restoration Priorities, The Oregon Conservation Strategy, watershed assessments completed by local watershed councils, and other guidance as available.

As a guideline, DSL proposes that service areas for mitigation projects will typically follow fourth-field HUC (hydrologic unit code) sub-basin boundaries west of the Cascade Mountains where compensatory mitigation needs are historically higher and more concentrated, and third-field HUC drainage basin boundaries east of the Cascades where needs are historically fewer and more diffuse. Justification for the final service area selected for a mitigation project will be presented in each mitigation plan and include consideration of watershed factors; 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 available mitigation project; availability of private mitigation banks in the area; and population and growth information for the area.

DSL will seek mitigation projects that best address aquatic resource needs in the service area, and will work with federal, state, local and tribal agencies, as well as conservation groups to achieve this. DSL will partner with appropriate third-party organizations through the FIL grant program to plan, implement, monitor, maintain, and provide long-term stewardship and ownership of the projects.

## 2.5 Project Selection Criteria

Each FIL Program mitigation project will be evaluated for its potential to provide appropriate compensatory mitigation for impacts to the waters of the U.S. based on the following criteria:

- a) **Likelihood of success:** Funded projects must demonstrate a high likelihood of success through a sound wetland restoration, creation and/or enhancement concept. The water source for the site should be reliable. 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 wetland acreage and/or function, with limited maintenance. Restoration projects will receive priority due to the higher "lift" in functions that can be achieved, and the higher success rate of these types of projects.
- b) **Multiple objectives:** Projects will be evaluated for their ability to address multiple functions and services such as improvement of fish and wildlife habitat, support for rare species, flood attenuation, water quality improvement, and recreation or education values. Projects should target native plant community diversity and natural processes. Greater functional gains will be given more preference.
- c) **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.
- d) **Capacity of the applicant and the project team:** The applicant must demonstrate that they have sufficient capacity and expertise to manage the project. The project team must have the necessary expertise and capacity to carry out pre-implementation planning, restoration construction, follow-up monitoring and remediation of project problems.
- e) **Fund leveraging and project costs:** Collaborative funding from multiple sources is encouraged, but not necessary. The project budget should identify all sources of funding and in-kind services, and itemized list of components to be funded including planning, implementation, monitoring and accounting. Projects with a high wetland functional gain per dollar will be given preference. In no way will other funding sources act to subsidize required mitigation.

- f) **Long-term management:** Suitable projects must have a plan for long-term management and stewardship. Long-term stewardship could be provided by a non-profit conservation organization, local government or other interested constituency.

## **2.6 Public and Private Stakeholder Involvement**

As sponsor and as a state agency, DSL will ensure that the requirements and needs of other state agencies are being met through establishment and execution of the FIL Program. IRT members will serve to review documentation and conduct mitigation site evaluations for the FIL Program, and provide comments to the Corps District Engineer. The IRT and Corps will review comments from the 30-day public notice for the prospectus and instrument amendments.

DSL will continue to partner with conservation organizations, other State and Federal agencies and local governments through the FIL Grant Program to implement mitigation site restoration, creation, and/or enhancement projects.

## **3. Crediting and Debiting Procedure**

### **3.1 Generation of Credits**

In the initial phase of program development, mitigation projects will be established using existing deposits in the Wetland Mitigation Bank Revolving Fund dated prior to Corps approval of the DSL FIL Program instrument. The number of credits available from a mitigation project will reflect the difference between pre- and post- project site conditions as determined by a wetland delineation and functional assessment. Generation of credits using these funds will be based on state guidelines, including any minimum ratio requirements. Current requirements are outlined in OAR 141-085-0136:

- a) Restoration<sup>3</sup>: One (1) acre of restored wetland will generate one (1) credit.
- b) Creation<sup>4</sup>: One and one-half (1.5) acres of created wetland will generate one (1) credit.
- c) Enhancement<sup>5</sup>: Three (3) acres of enhanced wetland will generate (1) credit.

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<sup>3</sup> Restoration means to reestablish wetland hydrology to a former wetland sufficient to support wetland characteristics (Oregon Administrative Rule 141-085-0010 (180)).

<sup>4</sup> Creation means to convert an area that has never been a wetland to a jurisdictional wetland (Oregon Administrative Rule 141-085-0010 (42)).

<sup>5</sup> Enhancement refers to a human activity that increases the function of an existing degraded wetland (Oregon Administrative Rule 141-085-0010 (60)).

Only projects that generate credits in excess of the current mitigation obligation (associated with DSL's payment-to-provide program) for the basin will be considered eligible for FIL mitigation. Mitigation projects that receive collaborative funding from multiple sources are encouraged under the FIL Program, as allowed for in federal regulations (33 CFR Part 332). DSL 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 a low amount of maintenance, and may include the cost of riparian and upland restoration activities if they contribute to the functionality of the site. If a mitigation site requires additional means to ensure protection from adverse future land uses, costs associated with acquisition of land (appraised land value), easements, or equivalent mechanisms will be included in the complete cost of the project.

### **3.2 Credit Releases**

In order for the FIL Program to be available as an option for meeting Corps mitigation requirements for permit authorizations within a given service area, a mitigation project will have to be identified and described in a mitigation plan that has been approved by the IRT. The number of credits available at any given time will be determined by the credit release schedule outlined in the mitigation plan, and may include advance credits (as described in Federal regulation at 33 CFR Part 332).

Credits generated through FIL mitigation projects may be sold to any private or public sector individual, organization, agency, or entity that is seeking mitigation credits as authorized by a Section 404 permit within a FIL Program service area. Use of, as well as the number and type, of credits for activities authorized by Corps permits will be at the discretion of the Corps District Engineer. Upon sale of credits, DSL becomes responsible for the mitigation requirements of the permit. Per state statute, the cost of a credit will be determined annually by DSL as the average cost of credits available from all active mitigation banks in the state. If private mitigation bank credits are available in the service area, purchase of these credits must be given preference under both Federal regulations (33 CFR Part 332) and Oregon administrative rules 141-085-0131 (3a). Credits purchased from FIL may be used to holistically satisfy the environmental requirements of multiple agencies if it is for the same project activity and the agencies have approved purchase of credits to fulfill mitigation requirements. The amount of compensatory mitigation required may vary between agencies based on regulatory authority and mitigation ratio requirements.

### **3.3 The FIL Program Account**

In 1994, the Oregon Legislature established the Wetland Mitigation Bank Revolving Fund (WMBRF). This legislation enabled the Department to collect

fees in lieu of mitigation and governs the management and expenditure of the funds. The following excerpts from statute outline collection and use of funds from the WMBRF.

**ORS.196.643 Payments to comply with permit condition, authorization or resolution of violation.** *A person who provides off-site compensatory wetland mitigation in order to comply with a condition imposed on a permit in accordance with ORS 196.825 (5), an authorization issued in accordance with ORS 196.800 to 196.905 or a resolution of a violation of ORS 196.800 to 196.905 may make a payment for credits to an approved mitigation bank with available credits, or to the Oregon Wetlands Mitigation Bank Revolving Fund Account, if credits from a mitigation bank are not available. If the person is making a payment to the Oregon Wetlands Mitigation Bank Revolving Fund Account, the payment shall be equal to the average cost of credits available from all active mitigation banks in the state. [2003 c.738 §22]*

**196.650 Use of account.** *The Department of State Lands may use the moneys in the Oregon Wetlands Mitigation Bank Revolving Fund Account for the following purposes:*

- (1) For the voluntary acquisition of land suitable for use in mitigation banks.*
- (2) To pay for specific projects to create, restore or enhance wetland areas for purposes of carrying out the provisions of ORS 196.600 to 196.905. Moneys deposited in the account for wetland impacts may be used only for wetland creation, restoration and enhancement.*
- (3) For purchase of credits from approved mitigation banks.*
- (4) For payment of administrative, research or scientific monitoring expenses of the department in carrying out the provisions of ORS 196.600 to 196.655.*
- (5) For the disbursement of funds received under the Federal Coastal Zone Management Act of 1972, as amended (16 U.S.C. 1451 et seq.), for such purposes as specifically stipulated in a grant award.*
- (6) For the disbursement of funds received under the Federal Emergency Wetlands Resources Act of 1986, P.L. 99-645, for the voluntary acquisition of wetlands and interests therein as identified in the wetlands provisions of the Statewide Comprehensive Outdoor Recreation Plan. [Formerly 541.585; 1993 c.18 §37; 2003 c.738 §12]*

DSL will maintain a subaccount for the Corps approved FIL Program containing information for each FIL mitigation project. This program account will be separate from funds received prior to approval of the FIL Program instrument and separate from funds resulting from mitigation requirements not under Corps jurisdiction. All interest and earnings from the subaccount will remain in that account for use by the FIL Program for the purpose of providing compensatory mitigation for Section 404 permits, and may not be used for other DSL programs.

The program account will be used only for the selection, design, acquisition, implementation, monitoring and management of in-lieu fee compensatory mitigation projects except for a small percentage (to be determined in the instrument) that can be used for administrative costs. Administrative costs may include FIL Program staff, currently consisting of one dedicated position in DSL funded through interest from the WMBRF. Long-term maintenance and management is an allowable expense, and requests must be accompanied by a description of management needs, annual cost estimates for these needs, and should address inflationary adjustments and other contingencies, as appropriate. Long-term financing mechanisms may include non-wasting endowments, trusts, contractual arrangements with future responsible parties, and other appropriate financial instruments.

Corps approval of FIL mitigation plans will include the project budget. DSL will ask the IRT and Corps to approve annual disbursements for each mitigation project. Grant contracts will be managed by DSL through advance payments and reimbursements for pre-authorized eligible expenses.

#### **4. Monitoring and Maintenance**

Individual mitigation site plans will include performance standards, monitoring and maintenance requirements as outlined in section 2.3 of this document. Grant agreements between DSL and entities receiving FIL Grant Program funding will outline measurable objectives, activity schedule, budget and accounting procedures, performance standards, reporting protocols and monitoring requirements. Monitoring is required for five years or until the success criteria is achieved whichever is longer (OAR 141-085-0166(4)) and will require pre- and post functional assessments and wetland delineations. Agreements also require that project sites be protected from adverse future land uses with a permanent conservation easement or equivalent mechanism.

Grantees are accountable to DSL for the conditions under the grant agreement and can be subject to state enforcement actions and procedures. However, by accepting FIL payments initially, DSL assumes ultimate responsibility to defend the sufficiency of the compensatory mitigation plan to compensate or replace the functional attributes lost or diminished and will monitor, manage and otherwise assure the success of the compensatory mitigation project performed by DSL or the designated third party(ies) (OAR 141-085-0161).

#### **5. Reporting**

The FIL Program will submit an annual report to the Corps District Engineer and IRT containing the following:

- a) For each mitigation project:

- 1) A ledger report that includes the Corps, DSL or other agency permit number, the amount of authorized impacts, the amount of required compensatory mitigation, the amount paid to the FIL Program, and the date the funds were received from the permittee;
  - 2) An accounting of FIL Program expenditures;
  - 3) The balance of advance credits and released credits at the end of the report period for each resource type, and any changes in credit availability (including additional credits released).
  - 4) A comparison of the functions lost through authorized wetland impacts in the service area with the functions accrued, or expected to accrue, at the mitigation project.
  - 5) The annual monitoring report for each mitigation project.
  - 6) A description of any remedial action items implemented during the prior year at any of the mitigation projects.
  - 7) An explanation of why any mitigation projects are not meeting their performance standards and any adaptive management strategies undertaken in the last year, or planned for the upcoming year.
- b) Statewide: All income, disbursements, and interest earned by the program account and the balance of funds.

### **Ownership arrangements and Long-term Management of Project Sites**

Each project approved for use in the Corps approved FIL Program will meet the appropriate ownership and stewardship requirements to insure its long-term protection. The final conservation easement or equivalent protection mechanism shall be submitted to the Corps and the IRT for review and approval prior to the final release of mitigation project credits. At the end of the monitoring period, upon satisfaction of the performance standards, and approved transfer of the bank to a long-term steward, DSL will request that the Corps issue a written "bank closure certification."

## 6. Literature Cited

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