



US Army Corps
of Engineers
Portland District

OREGON INTERAGENCY RECOMMENDATIONS

January 04, 2008

U.S. Fish and Wildlife Service, National Marine Fisheries Service, U.S. Environmental Protection Agency, U.S. Army Corps of Engineers, Oregon Department of State Lands, Oregon Watershed Enhancement Board, Oregon Department of Fish and Wildlife

PUBLIC FUNDS TO RESTORE, ENHANCE, AND PROTECT WETLAND AND AT-RISK, THREATENED AND ENDANGERED SPECIES HABITATS: APPROPRIATE USES OF THESE FUNDS IN SPECIES AND WETLAND MITIGATION PROJECTS

Issue and Background

A wide range of public (state and Federal) funding has been dedicated to different grant programs in Oregon for the purposes of restoring, enhancing, protecting, creating, or otherwise conserving terrestrial and aquatic habitats, and habitats and populations of at-risk, threatened, or endangered species.

At the same time that these funds have become available, there has been expanding use of various types of mitigation projects, particularly wetland and species conservation banking, to compensate for the impacts that various development and management activities have on regulated natural resources. This has resulted in questions about the appropriate use of these public funds to satisfy mitigation requirements.

In November 2006, the relevant state and federal regulatory and funding agencies (collectively, the Agencies) in Oregon convened to discuss this issue and developed a number of conclusions and recommendations for establishing a common approach regarding appropriate use of public conservation funds in mitigation projects, including wetland mitigation banks and species conservation banks. This document formalizes these conclusions and recommendations.

These conclusions and recommendations do not expand or alter any of the existing laws, regulations, or other authorities under which the Agencies operate. However, it is expected that the Agencies will use their respective legal review, or other authorities and means to implement the conclusions and recommendations in a unified, consistent fashion to the greatest extent possible and permissible.

Conclusions and Recommendations

1. The Agencies believe that funds from programs identified as Public Resource Protection and Restoration Programs (RPRPs) should not be used to finance mitigation projects undertaken to satisfy regulatory requirements. To do so would be inconsistent with the mandated and/or intended purposes and limitations of these programs.
 - For the purposes of this guidance, RPRPs are programs that provide funds for voluntary natural resource protection and/or restoration. RPRP funds are defined as funds that have a primary

purpose of achieving a net ecological benefit through creating, restoring, enhancing, or preserving habitats (in other words, providing an improvement or increase in the quality or quantity of the target habitats or species compared to current conditions).¹

2. The Agencies also believe “Fee-in-Lieu” funds (FIL)² should be treated similarly to RPRP funds with respect to their use in financing mitigation projects, except as noted in number 4. below.
 - FIL are payments made to agencies in lieu of physical compensatory mitigation for regulated activities. The funds are then used to finance other voluntary conservation actions that result in resource benefits that equal or exceed the original mitigation obligation. This satisfies legal mitigation obligations by indirectly mitigating for the impacts of the regulated activities on a programmatic basis.
3. In order to remain consistent with the legal and intended purposes of the RPRPs and FIL program, the Agencies should not support the use of RPRP or FIL funds to finance mitigation projects undertaken to satisfy regulatory requirements, including the establishment of mitigation or conservation banks and the generation and sale of credits from such banks.
 - Establishment of a mitigation project or the sale of credits from banks means that, while habitat at the site has been maintained or restored, it is done so to compensate for habitat losses elsewhere. If the mitigation project or banking credits were to be established through the use of RPRP funds, the intended “net benefit” of those funds will be reduced or eliminated.
 - Use of FIL funds to establish a mitigation project or generate banking credits means that funds provided in-lieu of direct compensatory mitigation for impacts from already permitted development projects are actually being used to mitigate for impacts from additional development projects, thereby resulting in a reduced capacity of the FIL program to mitigate for those original impacts and in a net loss of habitat.
4. Use of FIL funds to finance conservation actions that programmatically compensate for the impacts of already-permitted development projects and that will not be used as mitigation for additional development projects is consistent with the intended purposes of FIL programs.
5. The Agencies believe that the limitations described in this document regarding the use of RPRP and FIL funds to finance legally required mitigation projects, mitigation or conservation banks, or the generation and sale of credits in mitigation and conservation banks is consistent with previously published Federal guidance.
 - This previous guidance is contained in the U.S. Environmental Protection Agency’s “*Federal Guidance for the Establishment, Use, and Operation of Mitigation Banks*” published in the

¹ Some examples of RPRP funds include the Natural Resources Conservation Service (NRCS) Conservation Reserve Enhancement, Wetland Reserve, and Environmental Quality Incentives Programs, U.S. Fish and Wildlife Service (USFWS) Partners for Wildlife Program, Oregon Watershed Enhancement Board grants and the Oregon Department of Fish and Wildlife Access and Habitat Program and Fish Restoration and Enhancement Program funds,. Other state and Federal landowner incentive and stewardship programs also issue grants and assistance that can be defined as RPRP funds.

² FIL funds are used to satisfy agency programmatic mitigation obligations. Some examples of FIL funds include the Oregon Department of State Lands (DSL) Payment in Lieu Wetland Grant Program, and the Northwest Power and Conservation Planning Council and Bonneville Power Administration Fish and Wildlife Program grants.

- Federal Register on November 28, 1995 (FR 60-58605), the U.S. Fish and Wildlife Service’s May 2, 2003 National Memorandum: *“Guidance for the Establishment, Use, and Operation of Conservation Banks,”* and the U.S. Army Corps of Engineers September 7, 2005 Public Notice *“The Use of Existing Federal Programs to Restore Enhance, or Create Wetlands and How Such Areas Will Be Considered in the Review of Department of the Army Permit Applications and Mitigation Banks.”*
 - Implementation of the conclusions and recommendations described in this document would ensure that both Federal and nonfederal RPRP funds and FIL funds available in the state of Oregon are subject to the same standards and considerations consistent with applicable laws and regulations.
6. As in the previous Federal guidance, while these conclusions and recommendations do not support the use of RPRP or FIL funds to establish compensatory mitigation projects, mitigation or conservation banks, or to generate credits in mitigation and conservation banks, they do not preclude such actions on sites where these funds have been or will be used for various restoration, enhancement, or protection actions, contingent on certain conditions.
- The extent to which a site can be used for compensatory mitigation or the type and amount of credits allocated to a bank is limited to the conservation benefit accrued on the site only through non-RPRP and non-FIL sources.³ The amount and type of mitigation “value” allocated to a site or bank should be commensurate with habitat enhancements or protections above and beyond those realized through any use of RPRP or FIL program funds at the site. Commensurability should be measured based on the relative habitat and conservation values derived through the RPRP (or FIL) and non-RPRP (or non-FIL) sources. Return or repayment of the RPRP or FIL funds as allowed under some of these programs should not alter this calculation.
 - Such multi-source funded projects should include accounting that is detailed and transparent enough to accurately measure the relative habitat and conservation values derived through each funding source.
7. These conclusions and recommendations also do not preclude purposeful leveraging of various sources of funds to attain maximum ecological gain. For instance, combining FIL and RPRP funds to finance a project that has both compensatory mitigation and voluntary components is consistent with the legal and intended purposes of the funds under certain conditions.
- As described in number 6. above, the extent to which such a project can be used to satisfy mitigation obligations is limited to the conservation benefit accrued through the FIL funds. The amount and type of mitigation “value” claimed for a project should be commensurate with the level of contribution from the FIL funds and accounting should be adequate to make this determination.
8. These conclusions and recommendations should not restrict the flexibility of the agencies to use FIL or RPRP funds to enhance the ecological values of existing banks or mitigation sites. (Example – agencies might choose to use such funds to add property protection easements to older mitigation projects which were not required to provide perpetuity protection at the time of establishment.) However, additional mitigation “credit” should not be granted for these enhancements.

³ As an example, if RPRP funds were used to acquire or protect a site, bank credits could be generated for restoration or enhancement of the site’s habitat values through non-RPRP funds, but not for the acquisition or protection of the site. Conversely, if RPRP funds had been used to create or restore a site’s habitat values, but non-RPRP funding sources allowed for protection or preservation of the site, bank credits could be generated for the non-RPRP funds.

9. There may be specific situations in which the Agencies would support exceptions to and deviations from these conclusions and recommendations. In particular, allowing “net conservation benefit” banks to generate credits based on the use of RPRP or FIL program funds may be appropriate.
 - Net conservation benefit banks are primarily defined as those in which funds generated through sale of credits are wholly reallocated towards protection and enhancement of additional habitat sites.
 - Net conservation benefit banks are also secondarily defined as those that, based on specific factors related to the habitat, location, or species in question, will, by virtue of their establishment and management, significantly contribute to attainment of critical conservation objectives. An example may include situations in which the Agencies determine that a particular site, habitat, or species is at such high risk of loss in the state that use of RPRP or FIL program funds to establish a bank and generate credits may be necessary to achieve long-term sustainability of the resource in question. Another example may include situations in which establishment and management of a bank will improve the status of a species significantly enough to either reduce the need to list the species as threatened or endangered under the Endangered Species Act or to delist or downlist a currently listed species.
 - However, such situations are expected to be rare, especially with respect to the secondary definition of “net conservation benefit” bank. Except for situations in which the Agencies have been able to identify in advance where and when banks will achieve net conservation benefit goals, the Agencies should presume that net conservation benefits will not be obtained and the burden of proving otherwise should rest with the bank sponsor or applicant.
10. The Agencies should require that sponsors of banks and other mitigation areas identify whether RPRP or FIL funding and assistance has or will be used on the proposed bank or mitigation site, and the habitat and conservation values that are projected to be realized through that use. The Agencies should also require that recipients of RPRP and FIL funds disclose to the funding entities whether funded projects will include mitigation components.
11. These recommendations are not intended apply retroactively to already-approved bank credits or mitigation projects that may have been wholly or partially financed through RPRP or FIL program funds, provided they are operating in compliance with applicable regulations, conditions, and agreements.
12. Operations related to Mitigation Bank Review Teams (MBRT), Conservation Bank Review Teams (CBRT), and applicable permitting and RPRP/FIL grant review processes should be modified as quickly as possible to accommodate greater consideration of and consistency with these conclusions and recommendations.

Additional Recommendations

Additional specific actions to assist in addressing the issues described above include:

1. Developing outreach and information methods to ensure that RPRP and FIL fund recipients understand the limitations related to use of these funds and services in conservation and mitigation banking;

2. Developing disclosure documents and language that would allow sponsors of banks and other mitigation projects to consistently, easily, and accurately identify whether RPRP or FIL program funding and assistance has or will be used on the proposed mitigation site or bank, and the habitat and conservation values that are projected to be realized through that use; and
3. Modifying MBRT and CBRT processes to ensure a consistent and equitable method for determining the relative habitat and conservation values derived through the RPRP (or FIL) and non-RPRP (or non-FIL) sources and how such proportioning will be used to determine allocation of banking credits.