

Oregon Department of State Lands Statewide In-Lieu Fee Instrument

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Oregon Department of State Lands
Statewide Federally Approved In-Lieu Fee Program Instrument

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This In-Lieu Fee Program Instrument (hereinafter, Instrument), regarding the establishment, use, operation, and maintenance of the Oregon Department of State Lands Statewide In-Lieu Fee Program (hereinafter, ILF Program), is an agreement made and entered into by the U.S. Army Corps of Engineers, Portland District (Corps), and the Oregon Department of State Lands (DSL). By signature of this agreement, the following agencies have indicated their acceptance: the Environmental Protection Agency, the U.S. Fish and Wildlife Service, the Oregon Department of Environmental Quality, the Oregon Department of Fish and Wildlife, and the Oregon Department of Transportation.

I. Preamble

A. PURPOSE

The purpose of this Instrument is to establish guidelines, responsibilities, and standards for the establishment, use, operation, and maintenance of the ILF Program. The ILF Program will be used for compensatory mitigation for unavoidable impacts to waters of the United States that result from activities authorized under Section 404 of the Clean Water Act, Section 10 of the Rivers and Harbors Act, and for impacts from other activities as the Corps District Engineer may authorize, provided that such activities have met all applicable requirements and are authorized by the appropriate authority. The ILF Program will also be used to implement Oregon's Removal-Fill Law [Oregon Revised Statutes (ORS) 196.800-196.990], though this Instrument addresses only the Federal aspect of the ILF Program.

B. GOALS AND OBJECTIVES

The primary goal of the ILF Program is to provide effective compensatory mitigation for the functions and services of waters of the U.S. lost through authorized impacts.

The objectives of the ILF Program are as follows:

- a) Provide an alternative to permittee-responsible compensatory mitigation by constructing mitigation projects adequate to meet current and expected demand for credits in prioritized service areas.
- b) Minimize the temporal loss of waters of the United States by developing mitigation projects in advance of mitigation needs as funds allow.

- c) Maintain a level of accountability commensurate with mitigation banks, such that mitigation obligations assumed by DSL are met in a timely and effective manner.
- d) Achieve ecologically significant restoration projects that sustain aquatic resource functions and services consistent with a watershed approach.

C. APPROVAL

This Instrument is considered fully executed upon the latter date of signature by the Director of DSL and the District Engineer.

D. ESTABLISHMENT AND USE OF CREDITS

In accordance with the provisions of this Instrument, credits will be available for use as mitigation in accordance with all applicable requirements for permits issued under Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act. The District Engineer, based on recommendations of an Interagency Review Team (IRT), will determine the number of credits available for each compensatory mitigation service area and project (hereinafter, mitigation project) based upon the approved number of advance credits assigned to particular service areas, and based on the design and the resulting habitats achieved, in accordance with the terms and conditions contained herein.

Though this Instrument focuses solely on Federal requirements, DSL intends that credits will be available for use as mitigation for impacts that are jointly or solely regulated by the Corps and Oregon's Removal-Fill Law.

E. DISCLAIMER

This Instrument does not in any manner affect statutory authorities and responsibilities of the signatory parties.

F. EXHIBITS

Exhibit A—Prioritization and Compensation Planning Framework
Exhibit B—Instrument Modification Procedure
Exhibit C—Financial Accounting Structure
Exhibit D—Mitigation Plans
Exhibit E—Advance Credits
Exhibit F—Statement of Sale of Credit

II. Definitions*

***This Instrument uses Federal definitions. However, in cases where DSL has a differing term or definition, clarification has been added in brackets.**

1. **ADVANCE CREDITS**—Credits that are available for sale prior to being fulfilled in accordance with an approved mitigation project plan.
2. **BUFFER** – An upland, wetland, and/or riparian area that protects and/or enhances aquatic resource functions associated with wetlands, rivers, streams, lakes, marine, and estuarine systems from disturbances associated with adjacent land uses.
3. **COMPENSATORY MITIGATION** –The restoration, establishment, enhancement, and/or in certain circumstances preservation of aquatic resources for the purposes of offsetting unavoidable adverse impacts which remain after all appropriate and practicable avoidance and minimization have been achieved.
4. **COMPENSATORY MITIGATION PROJECT**—Compensatory mitigation implemented by the permittee as a requirement of a DA permit (i.e. permittee-responsible mitigation), or by a mitigation bank or an in-lieu-fee program.
5. **COMPLETE PROJECT COST**- The cost of developing an ecologically viable mitigation project, including the costs of project planning and design; construction; plant materials; labor; riparian areas, buffers, and upland restoration activities if they are required for the functionality of the site and approved by the District Engineer; any additional means needed to ensure protection of the site from adverse future land uses, including acquisition of land, easements, or equivalent mechanisms; legal fees; monitoring; maintenance; remediation or adaptive management activities; funding for long-term management and stewardship; and administrative costs.
6. **[CONVERTED WETLAND**—A DSL term that means a) Wetlands that on or before June 30, 1989, were brought into commercial agricultural production by diking, draining, dredging, leveling, filling or any similar hydrologic manipulation and by removal or manipulation of natural vegetation, and that are managed for commercial agricultural purposes. Converted wetlands does not include any stream, slough, ditched creek, spring, lake or any other waters of this state that are located within or adjacent to a converted wetland area.]
7. **[CREATION** – A DSL term defined as converting an area that has never been a wetland to a jurisdictional wetland.]

8. CREDIT – A unit of measure (e.g., a functional or areal measure or other suitable metric) representing the accrual or attainment of aquatic functions at a compensatory mitigation site. The measure of aquatic functions is based on the resources restored, established, enhanced, or preserved.
9. [CROPPED WETLAND—A DSL term referring to a converted wetland that is regularly plowed, seeded and harvested in order to produce a crop for market. Pasture, including lands determined by the Natural Resources and Conservation Service to be “farmed wetland pasture,” is not cropped wetland.]
10. DA—Department of the Army.
11. DEBIT – A unit of measure (e.g., a functional or areal measure or other suitable metric) representing the loss of aquatic functions at an impact or project site. The measure of aquatic functions is based on the resource impacted by the authorized activity.
12. [DEGRADED WETLAND – A DSL term that refers to a wetland in poor condition with diminished functions and services resulting from hydrologic manipulation (such as diking, draining and filling) and other disturbance factors that demonstrably interfere with the normal functioning of wetland processes.]
13. ENHANCEMENT – The manipulation of the physical, chemical, or biological characteristics of an aquatic resource to heighten, intensify, or improve a specific aquatic resource function(s). Enhancement results in the gain of selected aquatic resource function(s), but may also lead to a decline in other aquatic resource function(s). Enhancement does not result in a gain in aquatic resource area. [DSL limits this definition to improve the condition and increase the functions and values of an existing degraded wetland or other water or this state.]
14. ESTABLISHMENT—The manipulation of the physical, chemical, or biological characteristics present to develop an aquatic resource that did not previously exist at an upland site. Establishment results in a gain in aquatic resource area and functions. [The DSL equivalent term is “Creation.”]
15. FUNCTIONS—The physical, chemical, and biological processes that occur in ecosystems.
16. [GRANTEE – The entity that receives a grant from DSL for the purposes of establishing and maintaining a Compensatory mitigation project.]
17. IMPACT—Adverse effect.

18. **IN-LIEU FEE PROGRAM** – 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 for DA permits. 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 program sponsor.
19. **IN-LIEU FEE PROGRAM INSTRUMENT** – The legal document for the establishment, operation, and use of an in-lieu fee program.
20. **INTERAGENCY REVIEW TEAM (IRT)** – An interagency group of federal, state, tribal, and/or local regulatory and resource agency representatives that reviews documentation for, and advises the District Engineer on, the establishment and management of a mitigation bank or an in-lieu fee program.
21. **MITIGATION BANK**—A site, or suite of sites, where resources (e.g., wetlands, streams, riparian areas) are restored, established, enhanced, and/or preserved for the purpose of providing compensatory mitigation for impacts authorized by DA permits. In general, a mitigation bank sells compensatory mitigation credits to permittees whose obligation to provide compensatory mitigation is then transferred to the mitigation bank sponsor. The operation and use of a mitigation bank are governed by a mitigation banking instrument.
22. **MITIGATION PLAN** – The document that formally establishes a compensatory mitigation project and stipulates the terms and conditions of its construction, operation, and long-term management. Each mitigation plan will be bound by the terms and conditions of the In-Lieu Fee Program Instrument by reference.
23. **MITIGATION PROJECT**—The entire compensatory mitigation project, including all activities described in the mitigation plan and undertaken on the mitigation site to generate credits.
24. **MITIGATION SITE**—A site or sites where aquatic resources are restored, created, enhanced or preserved for the purpose of providing compensatory mitigation for authorized impacts to similar resources.
25. **PERFORMANCE STANDARDS**—Observable or measurable physical (including hydrological), chemical and/or biological attributes that are used to determine if a compensatory mitigation project meets its objectives.

26. **PRESERVATION** – The removal of a threat to, or preventing the decline of, aquatic resources by action in or near those aquatic resources. This term includes activities commonly associated with the protection and maintenance of aquatic resources through the implementation of appropriate legal and physical mechanisms. Preservation does not result in a gain of aquatic resource area or functions.
27. **RE-ESTABLISHMENT**—The manipulation of the physical, chemical, or biological characteristics of a site with the goal of returning natural/historic functions to a former aquatic resource. Re-establishment results in rebuilding a former aquatic resource and results in a gain in aquatic resource area, functions and services. [The DSL equivalent term is “Restoration”.]
28. **REHABILITATION**— The manipulation of the physical, chemical, or biological characteristics of a site with the goal of returning natural/historic functions to a degraded aquatic resource. Rehabilitation results in a gain in aquatic resource function, but does not result in a gain in aquatic resource area. [The DSL equivalent term is “Enhancement.”]
29. **RELEASED CREDITS**—Credits associated with mitigation projects that have met their performance standards, as determined by the District Engineer, in consultation with the IRT, that are available for sale or transfer, or for fulfillment of advance credit sales.
30. **RESTORATION**— The manipulation of the physical, chemical, or biological characteristics of a site with the goal of returning natural/historic functions to a former or degraded aquatic resource. For the purpose of tracking net gains in aquatic resource area, restoration is divided into two categories: re-establishment and rehabilitation. [The DSL equivalent terms are “Restoration” and “Enhancement”. Restoration for DSL means to re-establish wetland hydrology to a former wetland sufficient to support wetland characteristics.]
31. **SERVICE AREA** – The geographic area within which impacts can be mitigated at a specific mitigation bank or an in-lieu fee program.
32. **SERVICES**—The benefits that human populations receive from functions that occur in ecosystems.
33. **SPONSOR**—Any public or private entity responsible for establishing, and in most circumstances, operating a mitigation bank or in-lieu fee program.
34. **STANDARD PERMIT**—A standard, individual permit issued under the authority of section 404 of the Clean Water Act and/or sections 9 or 10 of the Rivers and Harbors Act of 1899.

35. STEWARD – An entity such as a land trust or local government with the mission and capacity to provide ongoing management of a mitigation site as a natural area to sustain wetland functions and services in perpetuity.
36. TEMPORAL LOSS—The time lag between the loss of aquatic resource functions caused by the permitted impacts and the replacement of aquatic resource functions at the compensatory mitigation site. Higher compensation ratios may be required to compensate for temporal loss. When the compensatory mitigation project is initiated prior to, or concurrent with, the permitted impacts, the District Engineer may determine that compensation for temporal loss is not necessary, unless the resource has a long development time.
37. [WATERS OF THE STATE—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 this state, all other navigable and non-navigable bodies of water in this state and those portions of the ocean shore, as defined in ORS 390.605, where removal or fill activities are regulated under a state-assumed permit program as provided in 33 U.S.C. 1344(g) of the Federal Water Pollution Control Act, as amended.]
38. WATERS OF THE UNITED STATES—Waterbodies, including wetlands, over which there is Federal jurisdiction under the Clean Water Act and/or the Rivers and Harbors Act.
39. WATERSHED APPROACH—An analytical process for making compensatory mitigation decisions that support the sustainability or improvement of aquatic resources in a watershed. It involves consideration of watershed needs, and how locations and types of compensatory mitigation projects address those needs. A landscape perspective is used to identify the types and location of compensatory mitigation projects that will benefit the watershed and offset losses of aquatic resource conditions, past and projected aquatic resource impacts in the watershed, and terrestrial connections between aquatic resources when determining compensatory mitigation requirements for DA and DSL permits.
40. WATERSHED PLAN—A plan developed by federal, tribal, state, and/or local government agencies or appropriate non-governmental organizations, in consultation with relevant stakeholders, for the specific goal of aquatic resource restoration, enhancement, and preservation. A watershed plan addresses aquatic resource conditions in the watershed, multiple stakeholder interests, and land uses. Watershed plans may also identify priority sites for aquatic resource restoration and protection. Examples of watershed plans include special area management plans, advance identification programs, and wetland management plans.

41. [WETLAND GRANT—A grant awarded by DSL to a grantee to implement a Compensatory mitigation project.]

* Derived from 33 CFR 332 (Federal Register v73 19594-19705); Cowardin, L.M. et al. 1979; Oregon Revised Statutes ORS 196.600 et seq.

III. Regulatory Authorities

The establishment, use, operation, and maintenance of the ILF Program will be carried out in accordance with the following authorities:

A. *FEDERAL AUTHORITIES*

- Clean Water Act (33 USC 1251 et seq.)
- Rivers and Harbors Act of 1899 Section 9 and 10 (33 USC 403)
- Regulatory Programs of the Corps of Engineers, Final Rule (33 CFR Parts 320-332)
- Endangered Species Act (16 USC 1531 et seq.)
- Fish and Wildlife Coordination Act (16 USC 661 et seq.)
- National Historic Preservation Act, Section 106

B. *AUTHORITY OF THE ARMY CORPS OF ENGINEERS*

The District Engineer or designee is the official chair for the IRT and will be responsible for establishing the IRT and managing the IRT process. The District Engineer will make the final decision regarding the amount and type of compensatory mitigation to be required of federal permittees, and determine whether and how use of credits from the ILF Program is appropriate to compensate for unavoidable impacts.

C. *STATE AUTHORITIES*

- ORS Chapter 196.600 – 196.990

D. *AUTHORITY OF THE OREGON DEPARTMENT OF STATE LANDS*

DSL serves as the administrative arm of the Oregon State Land Board (Governor, Secretary of State, State Treasurer). 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.

IV. Program Structure

A. ILF PROGRAM AND RESOURCES

Under this Instrument, DSL establishes itself as a statewide sponsor of federally approved in-lieu fee mitigation. This Instrument is intentionally broad and sets the framework under which DSL-sponsored mitigation projects will be identified, funded, operated, maintained and managed. The Instrument provides the authorization for the ILF Program to provide credits to be used as compensatory mitigation for DA permits and activities. Funds received from sales will be used by DSL to accomplish mitigation projects as described herein. As projects are identified, DSL will submit site-specific mitigation plans to the District Engineer for review and approval as modifications to the Instrument through the process outlined in Exhibit B, and included in this Instrument as subparts of Exhibit D.

B. INTERAGENCY REVIEW TEAM

The District Engineer will establish an IRT for the ILF Program.

The ILF Program IRT will consist of:

- U.S. Army Corps of Engineers, Portland District (Chair)
- U.S. Environmental Protection Agency, Region 10
- U.S. Fish and Wildlife Service, Oregon Fish and Wildlife Office
- Oregon Department of Environmental Quality
- Oregon Department of Fish and Wildlife
- Oregon Department of Transportation

The IRT will review and provide comments on the Instrument and subsequent modifications. IRT members will also review and provide written comments on mitigation plans, annual monitoring reports and field inspections, credit release requests, and remediation plans. The IRT agencies may also be requested to provide expertise on other related matters, such as assessing the achievement of performance standards, reviewing long-term management plans, and recommending corrective actions or adaptive management. Written comments will be submitted within the time limits established by 33 CFR 332.8. Comments received after such deadlines will only be considered at the discretion of the

District Engineer to the extent that doing so does not jeopardize the deadlines for actions required of the District Engineer.

The IRT for individual mitigation projects may be augmented, at the discretion of the District Engineer, with representatives from additional Tribal, Federal, State, or local agencies. Additional members of the IRT will be specified in each mitigation plan added to this Instrument under Exhibit D. In general, these IRT members' roles will be limited to providing project-specific review and comments to the District Engineer.

The District Engineer serves as the Chair of the IRT, and alone retains final authority for approval of the Instrument and subsequent modifications. The District Engineer will give full consideration to any timely comments and advice of the IRT.

Any of the IRT members may terminate their participation upon written notification to the Corps. Any such termination will not invalidate this Instrument. Participation of the IRT agency seeking termination will end thirty (30) days after written notification.

C. *ILF PROGRAM ACCOUNT*

The Oregon Removal-Fill Mitigation Fund (ORFMF) is an Oregon statutory account that collects fees in lieu of mitigation (deposits) and expends the funds on wetland restoration (wetland grants). The ORFMF may not be used for purposes other than those outlined by statute (Exhibit C) and is maintained as a separate account from DSL's general operating budget.

Upon Corps approval of the ILF program, DSL will create a separate ILF Program Account within the ORFMF. Non-ILF program funds in the ORFMF may also be used to fund mitigation projects in accordance with this Instrument and the Removal-Fill Law. All interest and earnings from the Program Account will remain in that account for the purpose of providing compensatory mitigation for impacts to Waters of the U.S. The Program Account will collect deposits from the sale of credits, and will be used only for the selection, design, acquisition, implementation, monitoring, management and protection of mitigation projects, and administrative costs for DSL. Administrative costs, not to exceed 15% of the Program Account, are allowed for DSL to manage the ILF Program.

The IRT will have oversight of the ILF Program Account. Complete budgets for mitigation projects will be approved as part of mitigation plans, however DSL may spend a limited portion of ILF funds for the purposes of advance planning and project design in advance of seeking formal approval of a project from the District

Engineer and IRT. This amount will be specified as part of a preliminary review of a prospectus for a proposed project. Annual accounting reports will be presented to the IRT by December 1 and will include detailed summaries of Program Account deposits and disbursements for each mitigation project made over the previous State fiscal year (July 1 – June 30). Any deviation in excess of ten percent from the total approved budget will require Corps approval before additional funds are disbursed. The Corps may review Program Account records with 14 days written notice. When so requested, DSL shall provide all books, accounts, reports, files, and other records relating to the Program Account.

D. *ILF PROGRAM CLOSURE*

Upon 30 days written notice to the Corps, DSL may request closure of the ILF Program. In the event that the ILF Program is closed, DSL is responsible for fulfilling any remaining obligations for credits sold. Funds remaining in the ILF Program Account after these obligations are satisfied should continue to be used for wetland restoration, establishment, enhancement, and/or preservation of aquatic resources. Therefore, these funds will remain in the ORFMF for uses dictated in Oregon statute, as described in Exhibit C. Any changes to use of the ORFMF must be approved by the Oregon Legislature.

E. *MITIGATION PROJECTS*

Mitigation projects will be funded through the ORFMF, and administered as wetland grants. Potential grantees will apply for funds to conduct a project; DSL will review the proposed project for consistency with the Instrument and submit a mitigation plan, including a project budget, to the Corps along with a written request for an Instrument modification (Exhibit B). DSL will manage the grant through advancements and reimbursements for pre-authorized eligible expenses and report annually to the Corps and IRT.

V. Mitigation Project Establishment and Operation

A. *ESTABLISHMENT*

Advance Credits

Advance credits, as used in this Instrument, are credits that are not associated with a mitigation project and that are available for sale prior to initiation of a mitigation project. The number of advance credits by service area is shown in Exhibit E. These specifications were based on the availability of mitigation bank credits, the recent history of impacts in each service area, and the projected financing necessary to begin planning and implementation of a project.

Land acquisition and initial physical and biological improvements must be completed by the third full growing season after the first advance credit in that service area is sold to a permittee.

Any debited advance credits must be fulfilled by released credits as they are produced by in-lieu fee projects in a given service area before released credits are available for sale. Once the mitigation obligations associated with debited advance credits have been satisfied by released credits, that corresponding amount of advance credits is again available for use.

Project Site Selection and Review Procedures

DSL staff will seek mitigation projects based on the prioritization and compensation-planning framework outlined in Exhibit A, and the amount of funding available. Sites that meet the criteria for selection (Exhibit A) will be recommended for approval to the IRT and Corps through the Instrument modification process outlined in Exhibit B. DSL will, in most instances, ask for preliminary review of a project prospectus in order to identify and address potential issues early.

Instrument Modifications

As ILF projects are identified, DSL will submit a written request to the Corps to modify the Instrument. This process is outlined in Exhibit B.

Permits

Grantees will obtain all appropriate permits and authorizations needed to construct and maintain mitigation projects. This Instrument, mitigation plans, or wetland grant contracts between DSL and grantees do not substitute for such authorization. DA authorizations issued to grantees for construction of mitigation projects will not include special conditions specific to the achievement of performance standards outlined in mitigation plans.

Financial Assurances

Notwithstanding any other provision of this Instrument, DSL's financial obligation for the ILF Program will be limited to funds in the ILF Program Account. DSL will take the following actions to ensure funds are available to meet mitigation requirements for credits sold:

- 1) Funds collected from the sale of advance credits will be held in the ORFMF and designated by service area until fund expenditure is approved by the Corps.
- 2) Funds outlined in approved mitigation project budgets will be earmarked for the project, held in the ORFMF, and paid to grantees as 120-day advances and reimbursements as work is accomplished. An exception is the long-term funding mechanism, which may be paid to the grantee or to an approved third-party steward as a lump sum.
- 3) A contingency fund will be established within the Program Account. At any point in time, the balance of this fund will be equal to 30% of the credit cost for the associated mitigation project multiplied by the number of released credits sold from mitigation projects in their monitoring phase. The contingency required for a mitigation project may be capped, or accumulated funds released to the general Program Account, if DSL demonstrates reduced risk and receives Corps approval.

B. OPERATION

Service Areas

Service areas shall be sized appropriately to ensure that the aquatic resources provided by the mitigation project will effectively compensate for expected adverse impacts. In general, DSL proposes that service areas be the fourth field hydrologic unit code (HUC) watersheds west of the Cascade Mountains where compensatory mitigation needs are historically higher and more concentrated, and as sub-basins (as identified by the Oregon Water Resources Department) east of the Cascades where needs are historically fewer and more diffuse.

Service areas are established by this Instrument for areas where advance credits are being requested (Exhibit E). Service areas for individual mitigation projects will be identified in mitigation plans. Considerations include the extent of ecologically similar areas, 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 a mitigation project, the availability of private mitigation banks in the area, population and growth information, ongoing watershed management programs, and the watershed's compensation planning framework. Final mitigation project service area determinations will be made by the Corps in consultation with the IRT.

Mitigation Plans

Mitigation plans for each mitigation project will outline measurable objectives, performance standards, and monitoring requirements (Exhibit B). Pre- and post-

project implementation wetland delineations and functional assessments will be completed using Corps-approved techniques. Mitigation plans must include a map that defines the complete project area.

C. **MONITORING**

DSL will monitor the complete project area regardless of the percent of funding DSL provides, unless otherwise specified in the mitigation plan. The frequency and duration of monitoring, and specific monitoring methods will also be defined in each mitigation plan specific to the performance standards to be evaluated. In general, DSL will provide annual monitoring reports for each project to the Corps and IRT by December 1 of each year. Each report will be submitted in paper and electronic format, and shall follow the format as outlined in US Army Corps of Engineers Regulatory Guidance Letter No. 08-03 (October 10 2008).

The monitoring duration may be extended at the Corps' discretion if performance standards have not been met, or if the mitigation project involves aquatic resources with slow development rates, such as forested or vernal pool wetlands. The District Engineer may also reduce or waive monitoring requirements upon determination that performance standards have been met, however, projects must be monitored for a minimum of 5 years.

DSL shall provide for access to the project site by members of the IRT or their agents or designees at reasonable times as necessary to conduct inspections and compliance monitoring with respect to the requirements of this Instrument. Inspecting parties shall not unreasonably disrupt or disturb activities on the property, and will provide written notice within reasonable time prior to the inspection.

D. **MANAGEMENT**

Maintenance Provisions

Mitigation projects will be designed, to the maximum extent practicable, to be self-sustaining once performance standards have been achieved. DSL shall be responsible for maintaining mitigation projects, consistent with the appropriate mitigation plan, to ensure their long-term viability as functional aquatic resources. DSL shall retain such responsibility unless and until the long-term project responsibility is formally transferred to an approved long-term steward. The long-term management plan to be developed for each mitigation project will include a description of anticipated management needs with annual cost estimates and an identified funding mechanism (such as non-wasting endowments, trusts, contractual arrangements with future responsible parties, or other appropriate financial instruments).

Contingency Plans/Remedial Actions

Advance Credits

The recent history of the in-lieu fee programs managed by DSL indicate that credits can be achieved using the methods outlined in this Instrument and at the price allowed by Oregon statute (Exhibit C). Strategies that will continue to be utilized include careful selection of cost-effective but ecologically significant projects, collaborative funding for projects and associated credit apportionment (Section VI-B), and use of existing funds within the ORFMF in basins where mitigation obligations have been met.

If within any service area the cumulative mitigation dollars available two years after the first advance credit sale are insufficient or a project has not been found, DSL will notify the Corps and may request to satisfy the mitigation requirements by other means, including but not limited to (in order of preference):

1. Combination of debits from two or more service areas. DSL will describe how the combination maintains a watershed approach. Combined service areas will generally be no larger than the Environmental Protection Agency's Level III Ecoregions (http://www.epa.gov/wed/pages/ecoregions/or_eco.htm) unless otherwise approved by the District Engineer;
2. Out-of-kind replacement for some or all of the credits, where doing so would achieve priority actions outlined in a watershed plan;
3. Funding a limited portion of the complete project costs for a project, even if accrual or attainment of aquatic functions has already been achieved, and/or Public Resource Protection and Restoration Programs were utilized. This may include placing a conservation easement on a project under threat from adverse future land use, or establishing an endowment for long-term monitoring and maintenance.

If the District Engineer, in consultation with the IRT, determines that there is a compensatory mitigation deficit in a specific service area by the third growing season after the first advance credit in that service area is sold, and determines that it would not be in the public interest to allow DSL additional time to plan and implement an in-lieu fee project, or achieve the mitigation by other means, the district will direct the sponsor to disburse funds from the in-lieu fee program account to provide alternative compensatory mitigation to fulfill those compensation obligations. In that case, the mitigation liability to the ILF program will be reduced accordingly and transferred to the receiving party, along with an amount of funds not to exceed the original amount paid for the impacts.

Mitigation Projects

If monitoring or other information indicates that a mitigation site is not progressing toward meeting its performance standards in a timely manner, DSL

shall notify the District Engineer as soon as possible. Likewise, if the District Engineer and IRT determine that terms of the Instrument or mitigation plans have not been met, the District Engineer may report, in writing, any findings and recommend corrective measures if needed.

In such instances, the District Engineer, in consultation with DSL and IRT, will determine the appropriate measures DSL should take to meet the objectives of the mitigation plan. Measures may include, but are not limited to, site modifications, design changes, revisions to maintenance requirements, and/or revised monitoring requirements. DSL shall use the contingency fund as necessary to implement adaptive management plans as outlined in mitigation plans, or developed in coordination with the IRT. Performance standards may be revised, upon mutual agreement, to reflect the measures taken, or to reflect changes in management strategies and objectives. If the new standards do not provide ecological benefits that are comparable to the approved mitigation project, the Corps may reduce the number of credits available from the project or request DSL provide a commensurate amount of additional mitigation.

Default

Should the District Engineer determine that DSL is in material default of any provision of this Instrument or an approved mitigation plan, the District Engineer may take appropriate action. Such actions may include, but are not limited to, suspending credit sales, adaptive management, decreasing available credits, directing funds to alternate locations, taking enforcement actions, or terminating the Instrument.

Mitigation Project Closure

At the end of the monitoring period and approval of the long-term stewardship contract, or upon sale of the last credit, whichever is later, the Corps shall issue a written "project closure certification" to DSL.

DSL may request that part of or an entire mitigation project be closed early, and that the associated credits anticipated be forfeited, if it is determined that the performance standards are unattainable or it is otherwise in DSL's interest. The Corps shall decide whether to grant such requests. In the case that credits were debited or transferred prior to the early closure, DSL shall be responsible for fulfilling all related obligations consistent with this Instrument.

Long-Term Ownership and Protection

DSL shall be responsible for ensuring long-term protection of each mitigation site. On publicly owned property, long-term protection may be provided through facility management plans or integrated natural resource plans. On privately held

property, including property held by conservation organizations, real estate instruments shall be recorded. DSL will ensure that such protection mechanisms are in place prior to site closure or final credit release, as stipulated in each mitigation plan. The draft conservation easement or equivalent protection mechanism shall be submitted to the IRT for review.

Where permanent legal property protection instruments are appropriate, conservation easements will be held by entities such as Federal, Tribal, other State or local resource agencies, or non-profit conservation organizations. The protection mechanism shall assign long-term stewardship roles and responsibility for the project and will, to the extent practicable, prohibit incompatible uses that might otherwise jeopardize the objectives of the mitigation project. Copies of such recorded instruments shall be sent to the Corps and become part of the official project record. Each protection instrument shall contain a provision requiring notification to DSL and the District Engineer if any action is taken to void or modify it.

VI. Credit Accounting

A. GENERATION OF CREDITS

DSL may use any funds within the ORFMF to establish mitigation projects. When using funds from the State's payment in-lieu (formerly payment to provide) program, defined as non-federal deposits made solely as compensatory mitigation required by the state, the equivalent number of credits will be deducted from the mitigation project ledger, or these funds will be reimbursed to the payment in-lieu account, and the transaction reflected in the ILF Program Account.

DSL may only generate credits from a mitigation project when there is a net benefit to aquatic resources at the site as determined by the difference between pre- and post- site conditions, and the benefit is in excess of any existing State mitigation obligation in the project's Oregon Water Resources Department sub-basin.

Credit generation may be based on the standard mitigation ratios established in DSL rules at the time a new mitigation project is proposed, or based on a functional assessment and evaluation methodology, to be determined in consultation with the IRT during review of each project. The method used will be specified in each mitigation plan. The standard minimum mitigation ratios for wetlands are currently:

- a) Restoration: One (1) acre of restored wetland for one (1) acre credit.
- b) Creation: One and one-half (1.5) acres of created wetland for one (1) acre of credit.
- c) Enhancement: Three (3) acres of enhanced wetland for one (1) acre of credit.
- d) Enhancement of cropped wetland: Two (2) acres of enhanced cropped wetland for one (1) acre of effected wetland.

Preservation of existing waters of the U.S. that are under threat of development may be proposed to generate credits. To qualify, preservation sites will either support a significant population of rare plant or animal species; be a rare wetland type (S1 or S2 according to the Oregon Natural Heritage Program); be a native mature forested wetland; or be in good condition and highly functioning, plus serve a documented watershed need, or preserve a wetland type disproportionately lost in the watershed. Credits may also be proposed for preservation or improvements of riparian areas, buffers and uplands if the resources in these areas are essential to maintain the ecological viability of a water of the U.S. Credits generated for preservation and buffers will be determined on a case-by-case basis through negotiation between DSL and the Corps in consultation with the IRT.

Mitigation projects that are eligible for collaborative funding from multiple sources are encouraged under the ILF Program. Credits will be based solely on aquatic resource functions provided as a result of the mitigation plan, over and above those provided by funding programs identified as Public Resource Protection and Restoration Programs, in accordance with Oregon Interagency Recommendations (2008). The Corps, in consultation with the IRT, will determine the amount of mitigation credit available to DSL for collaboratively funded projects, based on the proportion of ILF Program Account disbursements relative to the complete project cost. Credit apportionment may be modified by the Corps and IRT if, after a collaboratively-funded project is completed, an audit indicates that DSL's actual financial contribution was substantially more or less than anticipated.

B. CREDIT RELEASE

For service areas with advance credits approved, any debited advance credits must be fulfilled by released credits as they are produced by in-lieu fee projects before released credits are available for sale. Once the mitigation obligations associated with debited advance credits have been satisfied by released credits, that corresponding amount of advance credits is again available for use.

In service areas not approved for advance credits, credits may not be sold prior to approval of a site mitigation plan. Each mitigation plan will include a credit release schedule referenced to performance standards.

In general, credits from mitigation projects will be released according to the following schedule:

- Up to 15% of credits may be available upon approval of a mitigation plan and actions have been taken to establish or improve hydrological function of the mitigation site.
- At least 55% of credits will be released incrementally upon approval of the as-built report and achievement of performance standards, as approved in mitigation plans.
- 30% will be released upon Corps and IRT approval of a stewardship contract between DSL and a third-party entity, which includes a long-term management plan with a protection and funding mechanism.

The actual number of credits available at any given point in the development of a mitigation project will be determined through annual site monitoring and reports.

Additional credits may be available as a result of increased wetland functions and services that accrue over time. Additional credits are contingent on achievement of the performance standards over time and are at the discretion of the Corps.

C. COST OF CREDITS

The cost of each credit will be determined by DSL in accordance with Oregon statute, ORS 196.643 (Exhibit C). Prices charged will be reflected in annual program reports.

D. SALE OF CREDITS

All activities regulated under Section 10 of the Rivers and Harbors Act, Section 404 of the Clean Water Act, Oregon's Removal-ILF Law [Oregon Revised Statutes (ORS) 196.800-196.990] and other activities as the Corps or DSL may authorize consistent with this Instrument may be eligible to use the ILF Program as compensatory mitigation for unavoidable impacts. Credits purchased may only be used in conjunction with a Corps and/or DSL permit authorization, resolution of an unauthorized activity, or in conjunction with other actions as the Corps or DSL may authorize. The Corps and DSL retain authority to approve the purchase of credits from the ILF program, and determine the number of credits required for compensatory mitigation, on a case-by-case basis. This Instrument does not guarantee that the Corps or DSL will accept the use of ILF program credits for a specific project.

The Corps and DSL, to the extent practicable, will work to ensure that mitigation requirements for an impact regulated by both agencies are consistent. Credits may be sold to fulfill State requirements even when no Corps authorization is required. Deposits for such credits shall be placed in the ILF Program Account.

The responsibility to provide compensatory mitigation remains with the permittee unless and until credits are purchased from the ILF Program. Upon Corps approval of purchase of credits from the ILF Program, the permittee may contact DSL to secure the necessary amount of credits, as outlined in DA permit conditions. Each Section 404 authorization that includes a special condition requiring purchase of credits from the ILF program will include a requirement that DSL certify the transfer of responsibility via written communication to the permittee and the Corps. Certifications will outline the Corps permit number and state the number and resource type of credits that have been sold to the permittee (Exhibit F). A copy of each certificate will be retained in the administrative and accounting records for the ILF Program Instrument. Debits will be reflected in annual accounting reports as outlined in Section VIII.

DSL is responsible for fulfilling mitigation requirements for authorized activities that utilize the ILF Program. This responsibility will remain with DSL for individual authorizations until the project from which credits were purchased is closed.

VII. Program Reporting

DSL shall submit an annual report by December 1 to the District Engineer and IRT containing the following:

ILF Program Report

The report shall describe all income, disbursements, and interest earned with respect to the ILF Program Account for the state's previous fiscal year (July 1 to June 30).

Mitigation Project Reports

The report shall contain the following information for each service area and mitigation project that has not been approved for closure:

- a. A 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 ILF Program, and the date the funds were received from the permittee;

- b. An accounting of expenditures for the mitigation project;
- c. 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).
- d. A project monitoring report (if the monitoring period has not ended) following the format as outlined in US Army Corps of Engineers Regulatory Guidance Letter No. 08-03 (October 10 2008)..

VIII. Other Provisions

- A. Force Majeure: DSL or a grantee will not be responsible for mitigation site failure that is attributed to natural catastrophes such as flood, drought, disease, or regional pest infestation, that the IRT Chair, determines is beyond the reasonable control of DSL or a grantee to prevent or mitigate.
- B. Dispute Resolution: Resolution of disputes concerning the signatories' compliance with this Instrument shall be in accordance with those stated in 33 CFR 332.8. Disputes related to satisfaction of performance standards may be referred to independent review from government agencies or academia that are not part of the IRT. The IRT will evaluate any such input and determine whether the performance standards have been met.
- C. Validity of the Instrument: This Instrument will become valid on the latter date of the signature of Director of DSL and the Corps District Engineer. This Instrument may only be amended or modified with the written approval of the Director of DSL and the District Engineer.
- D. Notice: Any notice required or permitted hereunder shall be deemed to have been given either (i) when delivered by hand, or (ii) three (3) days following the date deposited in the United States mail, postage prepaid, by registered or certified mail, return receipt requested, or (iii) sent by Federal Express or similar next day nationwide delivery system, addressed as follows (or addressed in such other manner as the party being notified shall have requested by written notice to the other party):

U.S. Army Corps of Engineers
CENWP-OD-G Policy Specialist
P.O. Box 2946
Portland Oregon 97208-2946

Oregon Department of State Lands
WWC Wetland Mitigation Specialist
775 Summer Street NE, Suite 100
Salem, Oregon 97301-1279

- E. Invalid Provisions: In the event any one or more of the provisions contained in this Instrument are held to be invalid, illegal or unenforceable in any respect, such invalidity, illegality or unenforceability will not affect any other provisions hereof, and this Instrument shall be construed as if such invalid, illegal or unenforceable provision had not been contained herein.
- F. Headings and Captions: Any paragraph heading or captions contained in this Instrument shall be for convenience of reference only and shall not affect the construction or interpretation of any provisions of this Instrument.
- G. Binding: This Instrument shall be immediately, automatically, and irrevocably binding upon DSL and its successors, assigns and legal representatives upon signing by DSL and the Corps even though it may not, at that time or in the future, be executed by the other potential parties to this Instrument, such as the various IRT agencies.
- H. Liability of Regulatory Agencies: The Corps and DSL administer their regulatory programs to best protect and serve the public's interest in its wetlands and waterways, and not to guarantee the availability of credits to any entity, or ensure the financial success of mitigation banks, specific individuals, or entities. The public should not construe this Instrument as a guarantee in any way that Corps or DSL will ensure sale of credits from the ILF Program, or that the regulatory agencies will forgo other mitigation options that may also serve the public interest.
- I. Right to Refuse Service: Corps approval of purchase of credits from the ILF program does not signify DSL's acceptance or confirmation of DSL's offer to sell. DSL reserves the right to refuse to sell credits from the ILF program for any reason.
- J. Notification of Modification: If any action is taken to void or modify a mitigation site real estate instrument, management plan, or other long-term protection mechanism, DSL must notify the Corps in writing.

IX. Modifications

This Instrument may not be modified except by written agreement between DSL and the Corps. Instrument modifications, including the addition or expansion of mitigation projects and expansion of the ILF program to include compensatory mitigation for non-wetland waters, will follow the process outlined in Exhibit B. The District Engineer may use a streamlined modification review process for changes reflecting adaptive management of the ILF program, credit releases,

changes in credit releases and credit release schedules, and changes that the District Engineer determines are not significant (Exhibit B).

X. References

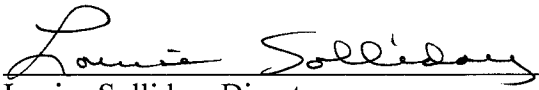
33 CFR 332. Compensatory Mitigation for Losses of Aquatic Resources (FR V. 73 No. 70, April 10, 2008). Department of Defense, Department of the Army, Corps of Engineers. 33 CFR Parts 325 and 332.

Cowardin, L.M. et al. 1979. Classification of Wetlands and Deepwater Habitats of the United States. U. S. Fish and Wildlife Service, Office of Biological Services. Washington, D.C. FWS/OBS-79/31. 131 pp.

Oregon Interagency Recommendations (January 4, 2008). 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. 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.

Oregon Revised Statutes ORS 196.600 et seq., Oregon Administrative Rules 141-085.

IN WITNESS WHEREOF, the parties hereto have executed this modified In-Lieu Fee Instrument on the date herein below last written by the IRT Chair

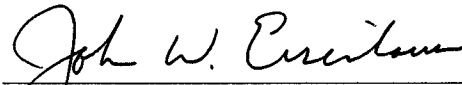


Louise Solliday, Director
Oregon Department of State Lands

February 11, 2012
Date

INTERAGENCY REVIEW TEAM

By the IRT Chair:



John W. Eisenhower, P.E.
Colonel, Corps of Engineers
District Commander

3 APRIL 2012
Date

By the IRT members of the ILF Program:

Paul Henson
State Supervisor
Oregon Fish and Wildlife Office
U.S. Fish and Wildlife Service

Date

By the IRT members of the ILF Program:

Environmental Protection Agency
Richard Parkin
Director
Office of Ecosystem, Tribal and Public Affairs

Date

By the IRT members of the ILF Program:

Oregon Department of Environmental Quality

Date

By the IRT members of the ILF Program:

Oregon Department of Fish and Wildlife
Roy Elicker
Director

Date

By the IRT members of the ILF Program:

Date

Oregon Department of Transportation