



When it Comes to Wetland Mitigation, Choose Wisely

NOVEMBER 19, 2015

[Brent Carson](#)

Work in wetlands triggers the need to perform wetland mitigation under separate federal, state and local requirements. Mitigation may take several forms including wetland creation, restoration, enhancement, and, under some circumstances, preservation.

[Federal mitigation regulations](#) establish the following rank-order preference for wetland mitigation:

1. Buying Credits from an approved Wetland Mitigation Bank
2. Buying Credits from an approved In-Lieu Fee Program
3. Permittee Responsible Mitigation Using a Watershed Approach
4. Permittee Responsible Mitigation that is On-Site and In-Kind
5. Permittee Responsible Mitigation that is Off-Site and/or Out of Kind

To be successful in developing projects that impact wetlands, it is important to understand your mitigation choices and to avoid conflicts that can occur when complying with varying mitigation requirements.

Avoidance and Minimization Come First

Before wetland mitigation can even be considered, applicants must prove that they have avoided wetlands and minimized impacts, a process known as *mitigation sequencing*. The federal avoidance requirements are codified in the [404\(b\)\(1\) Guidelines](#). Under [Army Corps guidance](#), a “sliding scale” of scrutiny is applied to such avoidance analyses. Most large wetland fill projects must rebut a presumption that there are less damaging alternatives available. Minimization may focus on reducing the project footprint, eliminating impervious surfaces, and using retaining walls to reduce side slopes.

Mitigation Options and the Federal Mitigation Hierarchy

Wetland mitigation banks are typically large mitigation projects, often privately funded, that create, restore, enhance and/or preserve wetlands. They are built after scrutiny and approval by an Interagency Review Team (IRT) lead by the Army Corps, EPA, and Washington Department of Ecology. Because of their size, demonstrated ecological benefits, and financial assurances, and because credits are only released for sale when explicit milestones have been achieved, mitigation banks receive top billing for mitigation under the federal rules. There are currently [14 approved mitigation banks](#) in operation in Washington State. The proposed [Keller Farm Mitigation Bank](#) is currently under review as the first bank for use in King County.

In-Lieu Fee (ILF) programs, which can only be sponsored by non-profits or governments, establish a mechanism to select, secure, and construct a number of mitigation projects over time, using funds collected from the sale of ILF credits. Because ILF programs build mitigation projects that have many of the same features as mitigation banks, ILF programs are ranked second in preference. They fall below mitigation banks because there are greater risks regarding the future success of yet-to-be-selected and implemented mitigation projects. [ILF programs are now in operation](#) in King and Pierce Counties, and in those portions of Jefferson and Kitsap Counties that drain into the Hood Canal. ILF programs are proposed for Thurston County and Lower Lake Chelan area.

Both mitigation banks and ILF programs have a service area in which to sell credits. However, wetland fill projects outside of, but close to, a service area may be authorized to obtain mitigation through the nearby bank or ILF. Applicants proposing to buy credits from a bank or ILF must submit a proposed “use plan” which can be denied if the Army Corps or Ecology determine that the mitigation provided by the bank or ILF is not the environmentally preferred compensatory mitigation for the location and type of wetland impacts to occur.

Permittee Responsible Mitigation (PRM) involves the wetland fill applicant and its consultant designing and constructing a wetland mitigation project on land owned or controlled by the applicant. The applicant is responsible for monitoring (typically for 10 years) and guaranteeing the success of the mitigation project.

In 2001, the National Research Council released a comprehensive evaluation of wetland mitigation which focused on the many failures of PRM projects. While significant improvements have been made in mitigation design standards and mandated monitoring and contingency planning, there remain risks of failure and there are temporal losses that occur because wetland impacts often occur in advance of achieving the full ecological and environmental benefits of a PRM project. These factors led the Army Corps and EPA to rank PRM lowest in the mitigation hierarchy.

There are three options identified in the federal rules for PRM. **PRM projects using a watershed approach** are most favored. Such projects consider the needs of the watershed for advancing and sustaining aquatic resource functions, such as the need for specific habitat enhancements, water quality improvements or flood control. **On-site, in-kind PRM projects** replace the specific wetland functions and values that are impacted by the wetland fill at the same location as the fill site. **Off-site, out-of-kind PRM projects** focus on creating, restoring or enhancing wetlands with different functions and values than the impacted wetland, and may be located far from the impact site.

Under federal rules, watershed based PRM projects are considered best among PRM options because they provide what the watershed needs most in terms of the function and value of wetlands. Also, many on-site, in-kind mitigation projects historically created small low-value isolated wetlands located in the midst of development. Too often, local land use changes altered local hydrology and jeopardized the success of these projects. The federal rules are willing to “give up” some local functions provided by a wetland to be filled in favor of a mitigation project that provides increased functions that are in great need within the watershed.

The mitigation hierarchy in the federal mitigation rule is not absolute. The rule uses words like “should give preference,” not “shall.” The guiding principles under these rules focus on mitigation that is most likely to be successful and sustainable to meeting performance standards, taking into consideration the location of the compensation site relative to the impact site, the needs of the watershed, and the cost of the compensatory mitigation. Nonetheless, in areas where mitigation banks or ILF credits are for sale, it is often very difficult to obtain approval for a PRM project without a very strong consultant report citing to the rule’s guiding principles and demonstrating the value of the mitigation project and its likely success.

There are clear benefits to an applicant buying credits from an available bank or ILF program, because all responsibility for mitigation is shifted to the banker or ILF sponsor. However, this often comes with a financial tradeoff, since the cost of buying credits from a bank or ILF program may be significantly higher than designing and building a PRM project. However, the “all-in” cost for a PRM project must always be considered, including the time for obtaining approvals, the cost of land, monitoring and contingency responsibilities.

A significant problem for some applicants is that many local governments, who are mandated to regulate wetlands under critical area ordinances, have been slow to embrace mitigation through banks and ILF programs and many retain an “on-site in-kind” mitigation mandate. This can lead to conflicts between mitigation required by the Army Corps and the local government. To resolve such conflicts, an

applicant may need to convince the Army Corps to accept a strong on-site, in-kind PRM project. Alternatively, the applicant may seek an exception from the local government's on-site, in-kind mitigation requirement by applying for a Planned Unit Development or variance. Local government's historical resistance to banks and ILF programs appears to be, in part, due to concerns that mitigation benefits will fall outside of the jurisdictional boundary but the impacts will be felt inside the city. Federal agencies and Ecology are working to shift such thinking and encourage local governments to embrace a watershed approach that benefits the region.

For more information

Partner [Brent Carson](#) has over 25 years' experience providing strategic advice and critical support to clients with complex land development projects in and around wetlands, including in-water construction permits and mitigation banks. If you have any questions, or would like more information about the evolving landscape of wetland mitigation, please contact Brent at brc@vnf.com

Follow us on Twitter [@VanNessFeldman](#)

© 2015 Van Ness Feldman, LLP. All Rights Reserved. This document has been prepared by Van Ness Feldman for informational purposes only and is not a legal opinion, does not provide legal advice for any purpose, and neither creates nor constitutes evidence of an attorney-client relationship.