

DRAFT Response to the Summary of Public Comments Received on Puget Sound Partnership's (PSP) In-Lieu-Fee Mitigation Prospectus

Comments of an editorial nature, such as suggesting additions or changes to the text, have not been included in this summary. Comments of an editorial nature will be addressed directly through Track Changes on the first draft of the program instrument.

Substantive comments are listed below. I have summarized or paraphrased most comments in an attempt to lump similar comments together.

GENERAL COMMENTS

1. The in-lieu-fee (ILF) program will exacerbate development and impacts to critical areas.

We disagree. The proposed ILF program will not change existing regulatory requirements to avoid and minimize environmental impacts. Federal, state, and local permitting agencies will continue to implement mitigation sequencing. Only if the permitting agencies determine that impacts are unavoidable would compensation through the ILF program be considered.

In addition, PSP's ILF program must use "true-cost" accounting to determine the fee schedule. With "true cost" accounting, all costs associated with the mitigation project are accounted for in the credit price, such as, site acquisition, protection, design, construction, monitoring, contingencies, maintenance, and long term management. Many of these costs are not considered or required for permittee-responsible mitigation. PSP, therefore, believes that the cost of a credit will be far too expensive to encourage speculative development. In fact, using "true-cost" accounting, the cost of mitigation may result in more avoidance and minimization.

This will be addressed in the Instrument in the section on mitigation sequencing as well as in the section on the fee schedule.

2. In-lieu-fees should go to a county or city because it is the local jurisdiction and people living in the watershed who know what environmental restoration projects are most important.

We agree that local jurisdictions, tribes, local watershed groups, and local land trusts have critical knowledge about what projects are important within a watershed, as well as what opportunities exist. PSP intends to work with all these entities and groups to identify and select mitigation-receiving sites.

PSP's Pierce County pilot mitigation-receiving site will be implemented and owned by Pierce County. Future mitigation-receiving sites will be identified

and selected through the site selection process described in the approved instrument.

PSP will describe a proposed a site selection process in the section on mitigation-receiving site selection process of the instrument.

3. PSP ILF program should be administered locally and integrated into the communities that it would serve – locally operated ILF sites would be preferred.

The pilot sites will both be locally operated.

From identifying and selecting potential sites through land acquisition and ownership and legal protection through conservation easements, the Partnership intends to involve local governments, tribes, local land trusts, or some combination of these entities.

See also response to comment #2.

4. The ILF program, as proposed, has little relevance to PSP’s mission.

We disagree. The Puget Sound Partnership’s mission is to reverse Puget Sound’s decline and restore it to health by 2020. When impacts to critical resources, such as freshwater wetlands, are not adequately compensated it can result in impaired water quality and loss of wildlife habitat, both of which are affecting the health of Puget Sound.

The Puget Sound Action Agenda, which is the Partnership’s blueprint for restoring Puget Sound, focuses on an ecosystem approach. The In-lieu-fee program ties into the top four Priorities from the Action Agenda:

- **Priority A: Protect intact ecosystem processes, structures, and functions.**
Preservation of existing high quality resources, particularly important in urban areas, may be a minor component of the ILF program.
- **Priority B: Restore ecosystem processes, structures, and functions.**
A team of local, tribal, state and federal stakeholders will help select the mitigation-receiving sites for the ILF program. The selection process will focus on areas and functions prioritized for restoration in watershed plans. Mitigation-receiving site designs will focus on restoration of watershed processes.
- **Priority C: Reduce the sources of water pollution.**
Restoration and creation of wetlands in strategic locations can dramatically improve downstream water quality.
- **Priority D: Work effectively and efficiently together on priority actions.**
The Partnership’s ILF program is identified as near term action as one element to

help reform the environmental regulatory system to protect habitat at an ecosystem scale. The ILF program will be focused to provide mitigation that restores processes, areas, and functions that have been prioritized in a watershed. Approval and use of the program will require coordinated review and involvement from regulatory, permitting, and resource agencies at all levels of government, including local, tribal, state, and federal.

This will be reflected in the instrument in the Need for the Program section.

5. Address the problems with existing forms of mitigation (lack of long-term monitoring, maintenance, and enforcement) before proposing another untested option.

We agree that the problems with existing mitigation should be addressed. However, many of these problems, specifically those listed in the comment, are much easier to address with a consolidated site, such as an ILF mitigation-receiving site. It is currently difficult to find and fund an entity to perform long-term monitoring and maintenance on small, spatially distant, privately owned mitigation sites. Follow-up, compliance, and enforcement by regulatory agencies are also less efficient and more challenging in terms of time and funding. The ILF program is required, by federal rule, to include the costs associated with long-term monitoring and maintenance in the fee schedule for credits.

PSP has a vested interest in leveling the playing field for all types of compensatory mitigation so that the ILF program can be competitive. PSP intends to pursue other avenues to address on-going problems with existing concurrent, permittee responsible mitigation. Section D5 of the Action Agenda proposes several measures to improve compliance with existing regulations including supporting compliance inspection programs.

This will be addressed in the instrument by specifically citing studies of compensatory mitigation and the problems they identified. The instrument will discuss how the ILF program intends to address these problems, and how PSP intends to level the playing the field for other types of compensatory mitigation.

6. Concern that tribes will not have the opportunity or ability (particularly if the project lacks a federal nexus) to substantively comment on impact projects proposing to use the ILF program.

The proposed ILF program will not change existing regulatory requirements. However, PSP assumes that projects proposing to use the ILF program will require greater coordination by permitting entities at the federal, state, and local level.

As co-chairs of the IRT, the Corps and Ecology have agreed to work with the tribes to understand their concerns. PSP will schedule separate meetings with the tribes to address the issue of notification and how tribes can participate. PSP will work with regulatory agencies to establish a protocol for notifying affected tribes of impact projects that propose to use ILF programs.

7. How would one initiate the use of ILF? Need to identify/describe the process and how regulatory agencies at federal, state, local, tribal levels would coordinate.

Currently, regulatory agencies require that compensatory mitigation be provided for unavoidable impacts, but it is up to the permittee to propose specifically what the compensatory mitigation will be. In-Lieu-Fee mitigation would be one option available to permittees for providing compensatory mitigation. It would be up to the permittee to propose the use of ILF credits as compensation, and up to the regulatory agencies to decide whether the available ILF credits would provide adequate compensation for a specific impact project.

Once the instrument is drafted, PSP will start working with permitting staff and the public on education and outreach. PSP will focus on how to coordinate the decision-making among permitting staff at all levels of government (federal, state, local, tribal) regarding what constitutes adequate compensation for unavoidable impacts.

8. Review Critical Areas Ordinances and other local government regulations (e.g., Shoreline Master Program, County Comprehensive Plan, Community Plans, Development Design Standards and Guidelines, Zoning Regulations) within the Pierce County Pilot Area to ensure that off-site mitigation (including buffer impacts) are allowed.

We agree. Though this does not affect the drafting of the ILF instrument, PSP will determine if any of the jurisdictions in the pilot areas have regulations that conflict with the use of ILF mitigation. PSP will work with those jurisdictions to update their regulations to allow using alternative forms of compensatory mitigation.

9. Do not allow impacts that occur in one tribe's U & A to be compensated in another tribe's Uand A.

PSP will schedule separate meetings with interested tribes to understand their concerns and seek resolution to this issue.

Tribes have the option of participating on the IRT. Tribes participating on the IRT will be able to review and provide input on service area boundaries.

For the instrument, PSP could add site selection criteria to locate mitigation sites within the same U and A as the impacts.

NEED FOR PROGRAM (Section 2)

10. Add data comparing number of permits issued versus the number of projects (permits) with wetland impacts for the same time period, or compare number of permits issued with acreage of wetland loss for the same time period.

We agree. For the instrument, PSP will be providing more data on wetland acreage lost and amount of development within each of the proposed service areas. In addition we will be providing more information on alteration of aquatic resources and processes within each service area.

OBJECTIVES (Section 3)

11. Concern that “no net loss” requirement is not addressed and will not be met. “Restoring functions” may not result in “no net loss.” Add language that program will facilitate overall goal of no net loss.

PSP believes that this is an area where concurrent, permittee-responsible compensatory mitigation is falling short, both in terms of what is being required and the reality of what is accomplished on the ground. We will discuss this and provide citations in section on Need for Program.

PSP further believes that the Credit/Debit Tool being proposed for use in the ILF program will provide a more accurate accounting of function losses and function gains than the system of mitigation ratios currently in use. We will provide case study examples in the Method For Determining Debits and Credits section.

PSP will revise the instrument by changing the language in this objective: “Develop a self-sustaining program to complete mitigation projects and facilitate the goal of “no net loss” on a watershed scale.”

12. Concern about Objective D – the regulatory process will remain the same with or without ILF, but regulatory requirements for compensatory mitigation can be more easily satisfied because there is an effective solution to meet the need for mitigation.

PSP will revise the Instrument to clarify Objective D as follows: “More efficiently meet regulatory requirements by offering an effective method for fulfilling compensatory mitigation requirements.”

13. Clarify rationale behind Objective J (“Provide a functionally viable option to mitigate for small unavoidable impacts that currently may be falling through the cracks”)

Ecology's wetland mitigation compliance program has found that many mitigation sites intended to compensate for wetland impacts of less than 0.5 acre are not in compliance with permit requirements. Some are not even wetlands. Furthermore, it is cost prohibitive (in terms of staff time and AAG time) to enforce compliance on these small sites.

PSP will provide data, and citations in the section on Need For Program in the instrument to describe this issue, and how the ILF program can help to address it.

14. Need more specifics on how PSP intends to achieve all the objectives of the program. Concern that PSP is attempting to do too much.

The Instrument will include much more detail that will clarify how the objectives of the program will be achieved. Specifically,

- Objective A – The pilot sites and their mitigation plans should provide assurance that this program will provide high quality mitigation.
- Objective B – Based on recommendations from the the interagency review team (IRT), the instrument will describe a specific process that PSP will follow to identify and select future mitigation receiving sites. Furthermore, the instrument will include more specific information on wetland losses and alteration of aquatic processes in each of the proposed service areas. This will help inform more specific locations and functions that should be targeted within a watershed for restoration.
- Objective D – This will take a bit of time to accomplish while the program gets up and running and is able to demonstrate its success. PSP will facilitate this process through education and outreach to permitting entities at all levels of government, including the Governor's Office of Regulatory Assistance, as well as consultants. In addition, PSP will develop focus sheets that will be available to permit applicants and their consultants at local government permit counters.
- Objective E – This will be addressed in the section on Mitigation-Receiving Site Selection Process and in the Compensation Planning Framework.
- Objectives F & H – The Program Account section will describe the fee schedule, how costs will be calculated, and the process for disbursing collected fees. The sections on the Ledger, Credit Fulfillment and Release and Reporting will also provide more detail to provide confidence that PSP's ILF program will accomplish these objectives. (See also response to comment #11.)

PROGRAM SCOPE (Section 4.2)

15. Scope of instrument should either be clarified to only include freshwater wetlands, or it should include broader range of resources and include necessary detail (crediting metrics, performance milestones, ratios, etc.).

The Introduction to the program instrument will state, “The ILF program will work toward restoration of multiple resource types, including aquatic (e.g., wetlands, rivers, riparian areas, estuaries, and near shore habitats) and non-aquatic (e.g., prairie and oak savanna). However, PSP will clarify in the instrument that the Pierce County Pilot ILF Program is only meant to address impacts to freshwater wetlands and their buffers. The instrument will explain that as new tools for assessing impacts and mitigation associated with other resources are tested and become available, PSP intends to modify or amend the ILF program instrument to incorporate these tools and provide compensation for the resources they assess. Any proposal by PSP to modify its ILF program instrument would go out for public notice and would require subsequent review and approval by the IRT.

16. Support for program to expand to all aquatic resources, assuming appropriate mitigation receiving sites are found.

See response to comment #15.

When tools become available to assess the functions of other resource types, PSP will amend the ILF instrument. In addition to the section on Credit Debit Procedure, the section on Mitigation-Receiving Site Selection Process will be amended to address how mitigation-receiving sites of other resource types would be selected.

17. Will the PSP ILF program expand into King County?

King County is in the process of getting its own ILF program approved, the King County Mitigation Reserves Program (KC-MRP). PSP has no intention to compete with KC-MRP. On the contrary, PSP will do whatever it can to support King County and ensure that its ILF program is a success. Likewise, King County has been very supportive of PSP’s proposed ILF program. In fact, PSP has been using the KC-MRP as a model for its ILF program.

The instrument will clarify that PSP’s goal is to ensure that an ecologically viable and self-sustaining ILF program is available in all the watersheds draining into Puget Sound.

18. Will PSP ILF program be available for use in addressing natural resource damage (NRD) liability claims?

The PSP ILF program may be used to meet NRD liability claims, on a case-by-case basis, at the discretion of agencies with jurisdiction.

19. Develop a successful track record at individual sites before implementing an entire regional program.

We agree. The purpose of this pilot program is for PSP to develop and successfully implement an ILF program in Pierce County. With the help of Pierce County, a willing partner, we are confident of our ability to construct an ecologically successful pilot mitigation-receiving site. However, the pilot program will provide a learning experience in applying the credit debit tool, calculating the true cost of successful mitigation, educating all parties (e.g, permit staff, permittees and their consultants), facilitating communication between various regulatory and tribal agencies, and advancing updates to local government regulations and codes to ensure that alternative forms of compensatory mitigation are allowed when they provide environmentally preferable outcomes.

Once the pilot program is approved and successfully operating in Pierce County, PSP will propose adding the second pilot area, Thurston County. Partnering with a different local government and a different geographic location will provide further experience and enhance the ability of PSP's ILF program to adapt to local conditions and watershed needs.

All of this experience should provide PSP will the successful track record necessary to add further watersheds or counties as the need and interest arises.

20. Write instrument to have a narrow geographic scope. Demonstrate success before broadening the program. Specifically, do not include Puyallup/White watershed (WRIA 10) in the ILF Instrument for the Pierce County Pilot Area.

PSP believes that the proposed Pierce County Pilot Area (WRIAs 12, 11, and 10) is a narrow geographic scope.

PSP will provide additional information in the compensation planning framework for WRIA 10 that describes:

- Historical wetland losses
- Development pressure and the need for ILF mitigation
- Wetland restoration priorities and goals

This data will be used to inform any request for advance credits in WRIA 10.

21. PSP ILF program should stay out of service areas currently served by existing mitigation banks. PSP should insert "do not compete" clause relating to existing mitigation banks into ILF program instrument.

As mentioned in the prospectus, and as will be reiterated in the instrument, the pilot areas for the pilot ILF program were specifically selected because

there currently are no mitigation banks in those watersheds. Any proposal by PSP to expand its ILF program beyond the watersheds identified in the instrument and approved by the IRT would go out for public notice and would require subsequent review and approval by the IRT.

ILF Programs may offer a mitigation option for functions not provided by mitigation banks and therefore could augment, rather than compete with, existing mitigation banks in future service areas.

22. The ILF program should include considerations for federally established preference for use of mitigation bank credits.

The proposed ILF program will not change existing regulatory requirements. It is up to the regulatory agencies to follow the federally established preference for type of compensatory mitigation and determine what will provide adequate compensation for an unavoidable impact. Therefore, PSP does not propose to address the federally established preference for mitigation bank credits in the instrument for its pilot ILF program.

REGULATORY AUTHORITIES (section 4.3)

23. Concern that there is no state rule to implement and govern ILF programs; therefore it will be difficult to approve, implement, monitor, and account for program's success.

PSP's Pierce County Pilot ILF Program seeks approval under and will abide by the requirements of the federal rule, 33 CFR Part 332, Compensatory Mitigation for Losses of Aquatic Resources, administered by the Corps of Engineers. However, PSP's Pierce County Pilot ILF Program will also seek approval from the Washington State Department of Ecology under its authority to administer the state Water Pollution Control Act (90.48 RCW) and state Water Quality Standards (WAC 173.201A). The Corps of Engineers and the Department of Ecology serve as co-chairs of the IRT.

Ecology has broad authority relating to compensatory wetland mitigation under the state water pollution control act and the anti-degradation rule. Ecology is anticipated to become signatory to the final program instrument. The instrument will include provisions for enforcement of the terms of the instrument.

MITIGATION SEQUENCING (Section 4.4)

24. Add further mention/emphasis that the ILF program will not bypass local regulatory requirements for mitigation sequencing.

PSP will add language to the instrument to reiterate that the ILF program will not change current regulatory requirements for mitigation sequencing. PSP will add language, wherever appropriate, stressing the importance of mitigation sequencing and stating that the ILF program may only be considered for unavoidable impacts.

SPONSOR QUALIFICATIONS (Section 4.5)

25. Concerns about PSP's ability to manage fees appropriately. Concern that PSP will use the fees collected to fund implementation of the Action Agenda, rather than apply the funds to compensate for the impacts to critical resources.

The approved ILF program will contain safeguards and oversight by regulatory agencies to ensure that PSP manages fees appropriately. First, PSP will need to ensure that an ILF account is created solely for use of the ILF program. Second, PSP will need to develop a ledger to track, account for, and report on all fees collected and funds disbursed from the ILF account. Third, PSP will calculate its fees to fully account for all expenses associated with selecting, acquiring, protecting, designing, constructing, monitoring, maintaining, and managing the mitigation-receiving sites. This should ensure that PSP's ILF pilot program is a self-sustaining program, meaning that the fees collected will be used to fully implement mitigation-receiving sites and administer the program.

PSP will describe accounting requirements in the program account section of the instrument.

It is important to note that PSP is proposing this ILF program because it is part of the Action Agenda. Development and implementation of an ILF program is identified in the Action Agenda as a near term action (D4.6). Providing ecologically successful mitigation that addresses priority aquatic resource needs within a watershed will improve the health of Puget Sound as well as compensate for the impacts to critical resources.

26. Concern about the qualifications of PSP as proposed sponsor. PSP as an organization is inexperienced with the construction and implementation of successful mitigation sites. PSP should consider a role as a coordinating/enabling agency for individual ILF program applicants rather than lead sponsor. Greater chance of success if local stakeholders or area-based non-profits were in the role of lead sponsor.

We agree that PSP currently lacks experience with construction and implementation of mitigation projects. However, PSP is partnering with Pierce County Surface Water Management to construct and implement the pilot site in the Pierce County pilot area. Pierce County Surface Water Management has vast experience constructing, implementing, monitoring, and maintaining successful mitigation and restoration projects. PSP will be

learning from the Pierce County pilot site and gaining the necessary experience.

Though PSP does not have direct experience with construction and implementation of mitigation projects, the agency does have experience partnering with local governments and tribes to implement restoration projects throughout the Puget Sound.

PSP will partner with a non-profit for assistance with the implementation of the ILF program. The partner entity will be selected through a competitive process and will be responsible for assisting with fiscal management and mitigation project implementation.

27. Concern about PSP as sponsor. Add language, “or successor agency” since preceding agency incarnations have all been temporary.

The state legislature would be responsible for assigning the roles and responsibilities of PSP to a different entity if it chose to substantially alter the structure of the agency.

MITIGATION RECEIVING SITE SELECTION PROCESS (Section 4.7) *see also comments on section 10.2*

28. Require mitigation to take place on-site or close to where impacts occur to protect diversity and spatial continuity.

We acknowledge that some wetland (or other resource) functions may need to be compensated for in the immediate area where the unavoidable impact occurs. If the permitting agencies determine that on-site compensation is needed for an unavoidable impact, or for specific functions that will be lost as a result of an unavoidable impact then ILF mitigation would not be an option. However, studies have shown (NRC 2001, Johnson et al. 2002, more) that a strict adherence to on-site mitigation has contributed to the high incidence of failure of mitigation projects, particularly in urban areas. Mitigation should be located where ecological functions can be restored and functions can sustainably be provided over the long term. Hence the federal rule requires that the Corps use a watershed approach to select mitigation sites. Ecology, EPA, and the Corps jointly developed “Selecting Wetland Mitigation Sites Using a Watershed Approach” (Ecology 2009) as a guide to help applicants and consultants to identify suitable and sustainable mitigation sites that are more likely to successfully provide functions.

Some of the most common problems associated with on-site mitigation include:

- Relying on roof run-off or treated stormwater as the primary source of water.

- Alteration of hydrologic flows in urbanizing areas.
- Relying on enhancement of existing, degraded wetlands to compensate for loss of wetland acreage.
- Small buffers that become smaller over time
- Lack of long-term maintenance, management, and protection

This will be addressed in the instrument in the section on need for program, and will consist of more discussion of the failings of a strict adherence to on-site mitigation, including citations.

29. Concerns about trading impacts in one natural resource type for gains in another. Impact types in a watershed may be different than the resource types prioritized for conservation and restoration. Too much uncertainty about overall effect on the ecosystem of allowing this.

We agree. For the pilot ILF program PSP will focus on one natural resource type, freshwater wetlands. PSP will submit a mitigation-receiving site plan for each proposed ILF site. This plan will describe the functions that the proposed site will provide. The plan will also discuss how the proposed site will address watershed needs and anticipated impacts.

Once the pilot ILF program is approved and operating, PSP intends to add additional natural resource types as tools become available to quantitatively assess the losses and gains in the functions of those resources. If PSP chooses to expand its ILF program to compensate for additional resource types, PSP will submit a modified ILF program instrument for public notice. Furthermore, PSP will use the site selection procedure identified in the approved instrument to identify a mitigation-receiving site specific to the proposed natural resource type. If the site provides multiple resource types (e.g., nearshore, grading into estuarine wetland, grading into freshwater wetland), the mitigation plan will specifically identify how many credits would be available for each resource type. Credits in one resource type would not be available to compensate for losses to another resource type, unless the permitting agencies specifically determine that a credit of another resource type provides the most environmentally preferable mitigation. Regardless, credit sales could not exceed the combined total of credits for each resource type.

This will be addressed in the instrument in the section on Program Scope. Information on additional resource types will not be discussed in the pilot ILF instrument. The compensation planning framework will be revised to focus restoration needs on freshwater wetlands.

30. Concern that PSP is focused on salmon, shellfish, and marine habitats rather than freshwater issues that affect WRIA 12. The mitigation receiving sites will, therefore, not adequately address the specific needs of WRIA 12.

We disagree. PSP has been given the responsibility to recover the entire Puget Sound ecosystem including freshwater and upland areas... not just the marine component. The pilot mitigation-receiving site in Pierce County involves rehabilitating the headwaters of the North Fork of Clover Creek. This freshwater wetland project will restore hydrologic processes by reconnecting North Fork Clover Creek with its floodplain in a couple of key locations. Slowing velocities, decreasing downstream erosion, and increasing retention time in floodplain wetlands will reduce the risk of downstream flooding and improve water, as well as improve wildlife habitat and augment urban green space. The pilot mitigation-receiving site will provide a system-wide approach to restoring and protecting the watershed functions of Clover Creek. PSP believes this approach will serve as model not only in WRIA 12 but in other watersheds as well.

This will be addressed in the instrument in the compensation planning, which will be revised to focus on freshwater wetland restoration needs in each service area.

31. Develop multiple, smaller sites thereby providing a broad suite of environmental functions. These could be implemented in a reasonable time frame with a higher probability of success.

Comment noted. The Pierce County Pilot ILF Program will focus on freshwater wetlands and providing freshwater wetland functions, rather than a broad suite of environmental functions. Sites will be identified and selected according to the process described in the approved instrument. Size of mitigation-receiving site will generally not be a criterion for selection, rather, potential for gain in functions, potential to address watershed needs, and availability of funds would be the key criteria.

See also response to comment #29.

32. Analyze mitigation need in pilot areas to tailor mitigation-receiving sites to the anticipated types of impacts.

We agree. PSP will research and describe the anticipated types of impacts for each proposed service area (WRIA). In addition, the ILF program will use a watershed approach, which according to the federal rule [332.3(c)(2)(iv)] involves describing “historic and existing aquatic resources, including identification of degraded aquatic resources, and identification of immediate and long-term aquatic resource needs within watersheds that can be met through” the ILF pilot program. PSP will address this in the instrument in the compensation planning framework section with a focus on freshwater wetland resources.

33. Support for development of ILF sites within urban areas – provides great benefits toward maintaining wetland functions near to urban development impacts.

We agree. PSP’s proposed pilot mitigation-receiving site in Pierce County is located in an urban area on the boundary between the City of Tacoma and unincorporated Pierce County. The site involves rehabilitating the headwaters of North Fork Clover Creek.

See also response to comment #30.

This will be addressed in the instrument in the compensation planning framework section and in the section on mitigation-receiving site selection process/criteria.

34. Concern that small wetlands and small wetland mitigation sites (less than one acre) are not being valued. Smaller habitats can be essential to maintaining migratory corridors for salmonids and may provide important functions to species that are not replicated in a larger bank. Need to provide details on how program will be managed to avoid this net loss of certain habitat functions.

We agree. Ecology’s BAS volume 1 states, “the loss of small wetlands is one of the most common cumulative impacts on wetlands and wildlife (Weller 1988, Tiner et al. 2002). PSP’s proposed ILF program does not preclude the selection and implementation of small wetland mitigation sites or a mosaic of small wetlands within a larger contiguous site.

PSP will address this in the section on site selection in the ILF program instrument. The compensation planning framework will also contain more detail on historic wetland loss, current wetland conditions, and wetland restoration goals for each of the proposed service areas.

See also response to comment #31.

35. Clarify the definition of a mitigation-receiving site sponsor.

The sponsor or ILF program sponsor is the entity, in this case the Puget Sound Partnership, responsible for establishing and operating the ILF program. The sponsor is responsible for the implementation and ultimate success of all mitigation-receiving sites approved as part of its ILF program. Therefore, a mitigation-receiving site sponsor is the same as the sponsor. However, PSP will not be the owner or the holder of conservation easements on any mitigation-receiving sites. PSP envisions that governmental entities (such as tribes, counties, or cities) will own the mitigation-receiving sites. For example, Pierce County will own the Pierce County pilot site. PSP envisions that tribes, lands trusts, or conservation districts will hold the conservation easements.

This will be addressed in the instrument by adding a Definitions section to the instrument.

36. Will mitigation-receiving sites be proposed higher in the WRIA 10 watershed? Upper watershed provides different habitat functions than the lower watershed.

PSP will research and describe the anticipated locations and types of impacts for WRIA 10. PSP will also research whether it is feasible to include the lower and upper portions of a watershed within one service area. This will be discussed in the compensation planning framework of the instrument.

See also response to comment #32.

PROGRAM ACCOUNT (Section 5)

37. Clarify that calculation of credit costs must fully account for the successful implementation of the entire mitigation project (“true cost accounting”) including purchase of the property, design, permitting, construction, monitoring, adaptive management, and long-term maintenance and management of the site after all regulatory requirements have been met. PSP should disclose how it intends to adhere to true cost accounting in the establishment of its fee schedule.

We agree. PSP intends to adhere to full cost accounting (i.e., “true cost accounting”) in order to establish a self-sustaining program. PSP will provide a fee schedule in the program account section of the instrument. The fee schedule will clearly identify how costs for property acquisition and site protection, site-design, permitting, construction, monitoring, adaptive management, and long-term maintenance and management are incorporated into the cost of a credit.

38. The cost of the credit should incorporate a rate for inflation that assumes there will be up to a 3-year delay between collection of fee and project implementation.

We agree. PSP will provide a fee schedule in the program account section of the instrument. The program account section will explain the calculations and any multipliers or averaging that may affect the cost of credits.

39. How will PSP develop a fee schedule? Will it be based on costs for each mitigation-receiving site (in which case sites within the same watershed may compete against each other), or will PSP determine a common cost per credit within a service area or region?

PSP has not determined this yet. PSP intends to calculate credit costs under a variety of assumptions and scenarios. PSP will present the results of these scenarios to the IRT for review and input.

40. How will “extent and severity of impact” be correlated with cost of credit? Will there be penalty fees?

“Extent and severity of impact” refers to the size (acreage) of the impact and the level of functions that will be lost. Permittees interested in using ILF mitigation to compensate for unavoidable impacts will have the Credit/Debit Tool (referenced and described in the instrument) completed (*Need to determine who will complete*) to determine the number of debits (acre-points of function) that will result from the impact. Based on the number of debits, the number of credits from an ILF mitigation-receiving site needed to compensate for the debit will be calculated. The cost will be based on the number of credits the permittee will be required to purchase in order to compensate for the debits resulting from the impact.

The cost per credit will be based on the full cost accounting of the successful implementation, completion, and long-term management of a mitigation-receiving site. See also responses to comment #37, 38, & 39.

If the impact resulted from a violation, a multiplier could be applied, thereby increasing the number of credits needed to compensate for the debit. However, a decision to create a penalty multiplier (“penalty fee”) would need to be made by permitting agencies and not the ILF program sponsor.

The overview section in Program Establishment and Operation will be revised in the instrument. PSP will replace the phrase “extent and severity of impact” with “size of the impact and the level of functions that will be lost.” The section on Determination of Debits and Credits will explain in more detail how the credit debit tool will be used. The section on Credit Pricing will describe how the credits needed translate into costs.

41. Concern that PSP is proposing to use some of the fees collected in one service area to establish a program in another service area. This is contrary to federal requirements that fees be used in the service area where impacts occurred. Concern that this will result in an under-capitalized fee program that will be spread too thin to be effective.

The requirement to use fees collected in one service area to implement a project within that same service area only applies to advance credits. PSP will be pre-capitalizing the pilot ILF program in Pierce County with credits from a pilot site that will already be constructed and meeting initial performance standards by the time any credits are sold.

PSP is cognizant of the concern about spreading ILF funds too thin to be effective. In the Pierce County pilot ILF program PSP therefore intends to implement mitigation-receiving sites before the sale of any credits (and

therefore impacts). As sufficient funds are collected from credit sales, PSP will begin the process (as described in the approved instrument) to identify the next ILF mitigation-receiving site, which may be in another service area (though also part of the approved compensation planning framework).

If the IRT approves of any advance credits in the pilot service areas, then the fees collected from the sale of the advance credits will be used to implement a mitigation-receiving site within the same service area.

PSP will discuss this in the sections on program account and pre-capitalized credits within the instrument.

42. Establish/identify a transparent cost associated with applying the Credit/Debit Tool to avoid perception that there is a hidden cost, which PSP is subsidizing. The cost of development and use of the credit accounting system (Credit/Debit Tool) should be somehow acknowledged and included in the cost of a credit from the ILF Program.

PSP acknowledges that this may be concern. PSP will be developing a strategy for how the Credit/Debit Tool will be applied.

However, the Credit/Debit Tool was not developed for PSP's ILF program specifically. It is a tool developed by a state agency for general public use. It is likely that this method will be used in the future for all mitigation types. Therefore, the cost of developing the tool and providing training should not be borne by PSP or ILF program users.

Currently, PSP has does not intend to address this in the instrument.

43. Could a portion of ILF fees be used to support participation of IRT members? This would assure appropriate representation and commitment by resource agencies.

PSP recognizes the importance of natural resource agency representation and the time necessary to commit to active review and participation on the IRT. However, the intent of PSP's ILF program is to maximize the funds that are spent on the successful implementation and long-term management of mitigation-receiving sites that are contributing to the restoration of watershed processes.

PSP does not believe that it is an appropriate use of ILF fees to reimburse natural resource agency staff for their time to participate on the IRT. However, PSP is committed to leveling the playing field for all forms of compensation. In this regard, PSP will work to ensure that funding exists for regulatory agencies to perform the necessary review, compliance, and enforcement of all forms of compensation whether it is permittee-responsible, in-lieu-fee, or banks.

44. Concern that there is not a long-term funding source to support the staff and other resources necessary to sustain this program.

We disagree. Funding for the administration of the ILF program will be provided through the fees collected into the program. Administrative fees are one facet to the “true cost” accounting for credit prices. The successful implementation of the ILF program will result in self-sustaining funding over the long term. The pre-capitalization funds allocated by the state will allow pilot ILF mitigation-receiving sites to be implemented before any impacts occur. Having a project done in advance removes the pressure of needing to sell enough credits to generate enough money to implement a project within three growing seasons of the first advance credit sales.

LEDGER (Section 6)

45. If mitigation-receiving sites include multiple kinds of mitigation credits (for wetlands, streams, riparian buffer, nearshore habitat, etc.), once a credit of any kind is sold, the areal extent of that credit should be “taken off the books” to avoid selling multiple kinds of credits for a single acre.

We agree. However, for the Pierce County Pilot ILF Program, PSP will focus on one natural resource type, freshwater wetlands. The ledger will identify the total units of credit **proposed** for the site, the units of credit **released**, any units of credit **used** to compensate for debits, and units of credit that remain **available** to compensate for future debits. Once credits are **used** they are no longer available.

Once the pilot ILF program is approved and operating, PSP may add additional natural resource types as tools become available to quantitatively assess the losses and gains in the functions of those resources. If PSP chooses to expand its ILF program to compensate for additional resource types, PSP will submit a modified ILF program instrument for public notice. Furthermore, PSP will use the site selection procedure identified in the approved instrument to identify a mitigation-receiving site specific to the proposed natural resource type. If the site provides multiple resource types (e.g., nearshore, grading into estuarine wetland, grading into freshwater wetland), the mitigation plan will specifically identify how many credits would be proposed for each resource type. Credits in one resource type would not be available to compensate for losses to another resource type, unless the permitting agencies specifically determine that a credit of another resource type provides the most environmentally preferable mitigation. Once a credit of any kind of natural resource is sold, it will be deducted from the ledger to ensure that “double-dipping” does not occur.

See also response to comment #29.

This will be addressed in the ledger section of the instrument. In addition, a draft copy of the ledger will be submitted with the draft instrument.

METHOD FOR DETERMINING CREDITS AND DEBITS (Section 7.1)

46. Concern about the proposed Credit/Debit Tool's ability to accurately assess and value impacts and mitigation.

PSP acknowledges that this is a valid concern. The proposed Credit/Debit Tool is new and untested. However, Ecology's senior wetland ecologist (Tom Hruby) who has taken the lead on developing the tool has written, in collaboration with other wetland scientists, numerous wetland methods and documents, including the Washington State Wetland Function Assessment Method and the Washington State Wetland Rating Systems. The credit/debit tool has been released for peer review and has been sent to the IRT for their review.

Example scenarios that have been run through the credit/debit tool have indicated that the acreage of mitigation (credits) required to compensate for an impact (debits) generally exceeds what is currently being required with traditional mitigation ratios. This provides further justification for working to level the playing field for all form of compensation.

Further explanation of the method (and perhaps some example scenarios) will be included in the determination of credits and debits section of the instrument. In addition, the most recent draft (or final, if available) of the credit debit tool will be provided as an appendix to the draft instrument.

47. Prospectus indicates that PSP's ILF program intends to provide mitigation for impacts to streams and other critical resources beyond freshwater wetlands. What tool(s) will be used to assess stream/riparian "credits"?

At this time PSP suggests no method for assessing debits and credits for stream/riparian functions. Therefore, PSP is proposing that the pilot ILF program will focus on freshwater wetlands.

Once the pilot ILF program is approved and operating PSP may add additional natural resource types as tools become available to quantitatively assess the losses and gains in the functions of those resources.

PSP will clarify in the program scope section of the instrument that the pilot ILF program will focus on freshwater wetlands.

48. How will wetland impacts (debits) translate to stream mitigation (credits)?

At this time PSP suggests no method for translating functions lost in one resource type with gains in another resource type.

PSP's Pierce County Pilot ILF Program will focus on freshwater wetlands. Freshwater wetland credits generated by PSP's ILF program would not be available to compensate for losses (debits) to another resource type, such as streams. However, permitting agencies may, on a case-specific basis, determine that freshwater wetland credits from the ILF program provide the most environmentally preferable mitigation for impacts to another resource type.

This will not be addressed in the pilot ILF program instrument, because PSP is not advocating the use of its ILF program for out of resource compensation.

49. PSP ILF Instrument should discuss other widely used functional assessment tools, such as Habitat Equivalency Analysis, and note the degree to which they are or are not compatible with the Credit/Debit Tool and PSP fee schedule.

We disagree. 33 CFR 332.8(d)(6)(iv)(c) requires that an ILF program instrument include information on "A methodology for determining future project-specific credits and fees." PSP does not consider the ILF program instrument to be an appropriate venue for a discussion of all the mitigation assessment tools that exist.

In the instrument for the pilot program, PSP will discuss methods that will create a common currency for use on projects proposing impacts or wetland losses (debits) as well as on mitigation projects resulting in gains to wetland functions, acreage, or both. PSP proposes the credit/debit tool as the primary method for creating this common currency. However, the instrument will also discuss how traditional mitigation ratios may be used because some local jurisdictions may continue to require this.

50. How will ILF credits be valued in circumstances where compensatory mitigation "in-kind" is virtually impossible due to lack of adequate properties not designated Agricultural Lands of Long Term Commercial Significance/Agricultural Resource Lands?

Costs for credits will be determined in the fee schedule. The fees will be based on the estimated cost to acquire, protect, design, construct, monitor, maintain, and manage the mitigation-receiving sites. PSP's ILF program, as required by the federal rule [332.3(c)] will use a watershed approach rather than rely on a strict adherence to "in-kind" compensation. The identification and selection of a future mitigation-receiving site will follow the site selection process described in the approved instrument. Site selection will be based on watershed information that, according to the federal rule involves

describing “historic and existing aquatic resources, including identification of degraded aquatic resources, and identification of immediate and long-term aquatic resource needs within watersheds that can be met through” [332.3(c)(2)(iv)] the ILF pilot program.

See also response to comment #36.

PSP will address this in the pilot program instrument by describing the process for prioritizing and selecting sites. The compensation planning framework of the instrument will also describe the anticipated locations and types of impacts in the proposed service areas.

CREDIT FULFILLMENT/RELEASES (Section 7.3)

51. If the ILF program has three growing seasons to use fees collected to implement a mitigation-receiving site, how does this fit into the county’s review process? How will the temporal loss of functions be addressed?

First, it is up to permitting staff at the local, state, federal, and tribal levels to determine if ILF credits will provide adequate compensation for the proposed unavoidable impacts. See also response to comment #7.

When applying the Credit/Debit Tool, the temporal loss of functions is included in the calculations as a multiplier that increases the number of Debits (associated with the impact) that need to be replaced. If mitigation is done in advance then functions already exist before impacts occur. In the WRIA 12 service area, PSP anticipates that the pilot mitigation-receiving site will be constructed before any ILF credits are sold to compensate for unavoidable impacts. In this case the temporal loss factor (multiplier) would be reduced or removed from the calculation of Debits.

PSP will describe the Credit/Debit Tool in the section on Determining Credits in the instrument. This section will also include example credit/debit calculations using advance credits and pre-constructed pilot site credits. PSP will clarify in the instrument that using collected fees to implement a mitigation-receiving site within three growing seasons only applies to advance credits.

52. Clarify timing of mitigation-receiving site implementation in relation to when credits are sold (fees collected). Revise “three growing seasons” language.

Because PSP’s Pierce County Pilot ILF Program has the benefit of pre-capitalization funds, there are two scenarios:

- i. PSP expects that the pilot mitigation-receiving site, in WRIA 12, will be constructed before any ILF credits are approved for use (i.e., fees collected) as compensation for unavoidable impacts in that service

area. PSP anticipates that the IRT will approve the release of some credits from this site shortly after the instrument is approved. There is no time constraint on using fees collected from the sale of “released credits”

- ii. For Advance Credits...*“Land acquisition and initial physical and biological improvements must be completed by the third full growing season (essentially 3 years) after the first advance credit in that service area is secured by a permittee”* 33CFR 332.8(n)(4).

PSP will explain the difference between “advance credits” and “released credits” in the program account and credit fulfillment sections of the instrument. The compensation planning framework will detail the request for advance credits in each service area, as well as the necessary documentation to support this request. PSP will also clarify in the instrument that using collected fees to implement a mitigation-receiving site within three growing seasons only applies to advance credits.

ADVANCE CREDITS (Section 7.4)

53. Do not allow advance credits because there is no assurance against the potential net loss of resources.

We acknowledge that the sale of advance credits will result in a temporal loss of functions. However, that will be addressed when applying the Credit/Debit Tool. The temporal loss of functions is included in the calculations as a multiplier that increases the number of Debits (associated with the impact) that need to be replaced. See also response to comment #51.

We further acknowledge that the use of advance credits presents a risk of failure. However, IRT review and approval of the proposed instrument provides some safeguards to address the potential risk of failure,

- The compensation planning framework will include a justification to support the request for advance credits in each service area
- Documentation of past performance implementing and managing mitigation projects.
- Projected financing (fee schedule) identifying the proposed cost of a credit and documenting that this cost incorporates all aspects of project development, implementation, and long-term protection and management including contingencies for poor site performance or unforeseen circumstances.
- Site selection process to ensure that potential projects are prioritized in each service area to facilitate a rapid response to identify, select, and begin work on a mitigation-receiving site.
- *“Land acquisition and initial physical and biological improvements must be completed by the third full growing season (essentially 3 years) after the first advance credit in that service area is secured by a permittee,...*

If the district engineer determines that...it would not be in the public interest to allow the sponsor additional time to plan and implement an in-lieu fee project, the district engineer must direct the sponsor to disburse funds from the in-lieu fee program account to provide alternative compensatory mitigation to fulfill those compensation obligations.” 33CFR 332.8(n)(4).

It is important to note that traditional, permittee-responsible, concurrent mitigation has a potential to result in a net loss of resources. And it lacks the above listed safeguards provided in an approved ILF program instrument. See response to comment #5.

PSP will identify its request of advance credits for each service area, as well as the necessary documentation to support the request, in the compensation planning framework section of the instrument. The other safeguards listed above will be addressed in the sections on credit pricing and mitigation-receiving site selection process.

54. Concern that PSP does not understand the demand for mitigation credits, nor how much can be accomplished with collected mitigation fees.

PSP has and will continue to review and research permit data and wetland mitigation trends in Pierce County. However, in the midst of the current, unprecedented, economic downturn PSP believes there is a general lack of demand for mitigation credits. It is impossible to predict when the market will recover. Yet in the midst of this general uncertainty and pause in development, PSP sees the opportunity for improvement and for testing new mitigation options aimed at successfully restoring watershed processes. PSP’s proposed ILF program in Pierce County is a pilot. The purpose of this pilot is for PSP to gain experience developing, successfully implementing, and accounting for all aspects of the pilot mitigation-receiving site.

PSP will address this in the need for program section and the compensation planning framework of the instrument.

PRE-CAPITALIZATION (Section 7.5)

55. What eligible state-allocated funds are available for pre-capitalization?

The Washington State Legislature allocated approximately \$4 million dollars to develop pilot mitigation projects prior to the collection of mitigation fees, and therefore, in advance of permitted impacts. The pre-capitalization money has been allocated to implement a pilot mitigation-receiving site in Pierce County and a pilot mitigation-receiving site in Thurston County. This will help ensure no net loss of ecological function as the ILF program is being established.

PSP will explain the pre-capitalization in more detail in the program account section of the instrument.

56. Concern that state taxpayers are subsidizing a mitigation program. Recommend annual financial and environmental audits of credits in each service area. PSP ILF program should account for all expenditures and costs to ensure that taxpayers do not continue to subsidize development of mitigation projects.

We agree that taxpayers should not subsidize mitigation responsibilities. The state legislature allocated the pre-capitalization funds because they did not want to risk further impairing the health of local watersheds or Puget Sound with the temporal loss of wetland functions while the ILF program got up and running. Once the ILF program is up and running, the costs to implement ecologically successful mitigation sites that address watershed needs will be fully borne by the permittee. PSP will use “true cost accounting” to ensure that mitigation is not subsidized by the public. Costs will also include program administration. See response to comment #1.

We also agree with the need for annual financial and environmental audits of credits in each service area. PSP’s pilot ILF program will follow the requirements of the federal rule regarding accounting and reporting procedures [33CFR 332.8(i)(3)]. In addition, PSP proposes to track expenditures and fees collected by service area. PSP also intends to track and report on acreage and functions associated with impacts as well as acreage and functions provided by the mitigation-receiving sites.

PSP will provide details on accounting and reporting in the program account section and the credit fulfillment section of the instrument. PSP will include a copy of the proposed ledger as an appendix to the instrument.

See the response to comment #37.

57. Support for pre-capitalizing ILF mitigation-receiving sites (designing, permitting, and ideally constructing) before selling any credits. This can dramatically reduce temporal loss of wetland functions, thereby alleviating one of the concerns about ILF programs.

We agree. Comment noted.

THE NISQUALLY RIVER WATERSHED – WRIA 11 (Section 8.3)

58. Provide more rationale as to why the Nisqually watershed is included as a pilot watershed.

PSP proposes to include the Nisqually watershed (WRIA 11) for three primary reasons:

- The Leadership Council of the Partnership approved Pierce and Thurston Counties as the pilot areas for PSP’s ILF program. The Nisqually watershed bridges these two counties. It will thereby, provide some continuity between the pilot areas.
- The Nisqually Tribe is very supportive of the in-lieu-fee concept and PSP’s ILF program.
- In the future, PSP hopes to provide ILF mitigation-receiving sites that address the loss of prairie ecosystems, which have historically been an important part of the Nisqually watershed ecosystem.

PSP will include more discussion of how the ILF program can address watershed needs in the compensation planning framework for the Nisqually watershed (WRIA 11).

STAKEHOLDER INVOLVEMENT STRATEGY (Section 9)

59. Keep tribes informed of any proposed mitigation receiving site activities. (Regarding development of inventory of candidate sites: “The Tribe expects to be kept informed of project status and notified of any relevant project related actions,” including “opportunity to provide comment as new information becomes available.”)

We agree. PSP will develop a site selection contacts email list for each service area that will include affected Puget Sound tribes. Site selection contacts will be notified when PSP begins the site selection process. In most cases the site selection process will begin with a meeting of tribes, local governments, and appropriate natural resource staff members from state and federal agencies. This group will meet to identify and prioritize key functions and areas (watershed/basin) where the next mitigation-receiving site should be located.

Tribes participating on the IRT will also have the opportunity to review and approve of the proposed mitigation-receiving site, and review and approve of the mitigation plan.

PSP will fully describe the site selection process in the section on mitigation-receiving site selection process of instrument.

SITE SELECTION CRITERIA (Section 10.2)

60. Concern that language, “to ensure that mitigation activities will be able to remove site constraints,” may inadvertently preclude good mitigation sites from consideration.

PSP has no desire to preclude good mitigation sites from consideration. The phrase quoted in the comment will be re-worded. PSP will fully describe the site selection process in the section on mitigation-receiving site selection process of instrument.

61. Clarify hierarchy of considerations in the site selection process to ensure that good mitigation sites are not inadvertently precluded from consideration.

PSP has no desire to preclude good mitigation sites from consideration. PSP will revise the site selection process. PSP will revise the compensation planning framework to emphasize that the ILF program will use a watershed approach. According to the federal rule [332.3(c)(2)(iv)] this involves describing “historic and existing aquatic resources, including identification of degraded aquatic resources, and identification of immediate and long-term aquatic resource needs within watersheds that can be met through” the ILF pilot program.

PSP will describe a site selection process in detail in the section on Mitigation-receiving site selection process of the instrument.

See also response to comment #59.

62. Concern that Agricultural zoning designations in lower watershed areas (particularly WRIA 10?) will prevent use of these lands for mitigation receiving sites. Describe how PSP will overcome these hurdles and be able to restore functions in the lower watershed, and how development impacts in these areas will be compensated.

We acknowledge that this is a concern. However, sites located in an agricultural area are not necessarily excluded from use in the program. PSP will work with agricultural stakeholders as part of the site selection process to identify areas where restoration actions are compatible with ongoing agriculture.

In the compensation planning framework of the instrument, PSP will describe historic and current wetland conditions and the anticipated locations and types of impacts. This data will help inform the identification and prioritization of potential mitigation-receiving sites.

See response to comment #32.

IRT APPROVAL (Section 10.3)

63. IRT should approve specific sites via an approved instrument (including CE, contingency fund, long-term management fund) prior to awarding any credits.

Because PSP's Pierce County Pilot ILF Program has the benefit of pre-capitalization funds, PSP expects that the pilot mitigation-receiving site, in WRIA 12, will be protected and constructed before any ILF credits are approved for use (i.e., fees collected) as compensation for unavoidable impacts in that service area. Once the instrument for the Pierce County pilot ILF program is approved, PSP will submit a mitigation plan for the Pierce County pilot mitigation-receiving site (including a credit release schedule) to the IRT for their review and approval.

We acknowledge the concern that mitigation receiving sites should be identified before impacts occur. However, the federal rule [33CFR 332.8(n)] allows the awarding of credits prior to the identification and construction of a wetland mitigation-receiving site. IRT review and approval of the proposed instrument provides some safeguards to address concerns.

- The compensation planning framework will include a justification to support the request for advance credits in each service area
- Documentation of past performance implementing and managing mitigation projects.
- Projected financing (fee schedule) identifying the proposed cost of a credit and documenting that this cost incorporates all aspects of project development, implementation, and long-term protection and management including contingencies for poor site performance or unforeseen circumstances.
- Site selection process to ensure that potential projects are prioritized in each service area to facilitate a rapid response to identify, select, and begin work on a mitigation-receiving site.
- *"Land acquisition and initial physical and biological improvements must be completed by the third full growing season (essentially 3 years) after the first advance credit in that service area is secured by a permittee,... If the district engineer determines that...it would not be in the public interest to allow the sponsor additional time to plan and implement an in-lieu fee project, the district engineer must direct the sponsor to disburse funds from the in-lieu fee program account to provide alternative compensatory mitigation to fulfill those compensation obligations."* 33CFR 332.8(n)(4).

Proposed future mitigation-receiving sites would be added to the program as a modification of the instrument, and will need to be approved by the IRT prior to the award of any credits.

PSP will identify its request of advance credits for each service area, as well as the necessary documentation to support the request, in the compensation planning framework section of the instrument. The other safeguards listed above will be addressed in the sections on credit pricing and mitigation-receiving site selection process.

64. Concern that ILF program will not be held to the same standard that mitigation banks must attain. Recommend that standards and level of review be commensurate with risk of program founded on a “build when paid” basis.

PSP’s Pierce County Pilot ILF Program seeks approval under and will abide by the requirements of the federal rule, 33 CFR Part 332, Compensatory Mitigation for Losses of Aquatic Resources, administered by the Corps of Engineers. The IRT co-chairs and other agency representatives on the IRT are often the same people, and therefore, PSP has every confidence that the Corps, Ecology, and the other IRT members will review the instrument for the Pierce County Pilot ILF program and hold it to the same standard as mitigation banks. Furthermore, PSP will strive to level the playing field so that all mitigation options (ILF, banks, and permittee-responsible) are held to the same standard, thereby resulting in more ecologically successful mitigation.

PSP will add citations from the federal rule throughout the instrument to ensure adherence to its requirements.

Regarding the level of risk associated with PSP’s pilot ILF program, PSP anticipates that the pilot mitigation-receiving site will be constructed before any ILF credits are approved for use as compensation for unavoidable impacts. Since the mitigation-receiving site will be implemented in advance of permitted impacts, the risk, as well as the temporal loss of functions, will be reduced, certainly less than the risks associated with traditional, permittee-responsible, concurrent mitigation.

Furthermore, IRT review and approval of the proposed instrument provides some safeguards to address risks associated with a “build when paid” program.

- The compensation planning framework will include a justification to support the request for advance credits in each service area
- Documentation of past performance implementing and managing mitigation projects.
- Projected financing (fee schedule) identifying the proposed cost of a credit and documenting that this cost incorporates all aspects of project development, implementation, and long-term protection and management including contingencies for poor site performance or unforeseen circumstances.
- Site selection process to ensure that potential projects are prioritized in each service area to facilitate a rapid response to identify, select, and begin work on a mitigation-receiving site.
- *“Land acquisition and initial physical and biological improvements must be completed by the third full growing season (essentially 3 years) after the first advance credit in that service area is secured by a permittee,... If the district engineer determines that...it would not be in the public*

interest to allow the sponsor additional time to plan and implement an in-lieu fee project, the district engineer must direct the sponsor to disburse funds from the in-lieu fee program account to provide alternative compensatory mitigation to fulfill those compensation obligations.” 33CFR 332.8(n)(4).

SITE ACQUISITION AND PROTECTION (Section 11)

65. All mitigation receiving sites, whether publicly or privately owned, should be protected by a conservation easement.

We agree. PSP will clarify this in the section on Site acquisition and protection of the instrument.

PRESERVATION STRATEGY (Section 12)

66. Preservation, if allowed, should be subject to a strict “de minimis” allowable maximum component of preservation. Concern that public entities will try to get value from public land holdings that are already wetlands or are otherwise developmentally constrained.

PSP does not intend to propose mitigation-receiving sites that provide preservation as the sole form of compensation. However, PSP believes that preservation as a component of a mitigation-receiving site affords numerous benefits to the site as a whole, such as providing a seed source, habitat continuity, and a possible dispersal corridor.

The section on preservation strategy of the instrument will provide more detail on the circumstances under which credits for preservation may be generated. In the credit release schedule, PSP will propose an initial release of a portion of the anticipated credits after a conservation easement is recording on the mitigation-receiving site thereby ensuring long-term site protection. In the ILF program instrument PSP will cite and abide by the requirements of the federal rule for “credits provided by preservation” [33 CFR 332.8(o)(6)].

MITIGATION PROJECT IMPLEMENTATION (Section 13)

67. Will there be a “force majeure” clause to address contingencies for unforeseeable circumstances?

Yes. PSP will include a “force majeure” clause in the ILF program instrument.

68. Proposed sites should be secured with adequate financial assurances that fully reflect the degree of risk of failure or non-performance.

We agree that financial assurances are necessary to address the risk of failure and non-performance. For the Pierce County Pilot ILF Program, financial assurance will take the form of a contingency fund. A portion of the credit price will be applied to a contingency account separate from the general program account. PSP will ensure that the contingency account names the Corps and Ecology as the beneficiaries. Thus, the public interest is protected because the Corps and Ecology will, if necessary, have the ability to direct the contingency funds to fix problems on the sites if PSP fails to do so. This will be described in the program account section of the instrument.

69. Regarding financial assurances, do performance bonds apply? Is PSP self-insured because it is a state agency? Recommends a contingency fund (containing 15-20% of the total construction cost) to be set up project by project.

We agree with the recommendation to establish a contingency fund. A portion of the fees for each credit sold will go into this fund.

Please refer to the response for comment #68.

EVALUATION AND REPORTING (Section 14)

70. How will PSP's ILF Pilot Program engage local jurisdictions and monitor impacts and improvements at local and watershed scale?

At the site scale, mitigation-receiving sites will be monitored for attainment of performance standards. Some functions, such as water quality may be directly measured at the inlet and compared with water quality at the outlet. However, monitoring the affect of impacts is more problematic, both at the site scale and the watershed scale.

Though it does not directly address the issue of monitoring, PSP proposes to use the Credit/Debit Tool to keep track of and quantify debits from unavoidable impacts in three broad function buckets (water quality, water quantity, and wildlife habitat). Credits provided by the mitigation-receiving sites will also be assigned to the same three function buckets and quantified. PSP proposes use this data to inform future mitigation-receiving site selection and design decisions.

PSP will work with tribal and local government staff, the Partnership's Monitoring Program Manager and Ecosystem Recovery Coordinators, as well with the IRT to identify and develop a process for monitoring the affect of its ILF program.

71. Establish a coordinated monitoring database for all mitigation sites, in cooperation with other state agencies. Ensure that information from these sites is tied back to informing Puget Sound Restoration Goals.

We agree. PSP will work internally with the Puget Sound Partnership's Monitoring Program Manager, as well as with the King County Mitigation Reserves Program to develop a compatible monitoring database.

LIST OF COMMENTERS AND THEIR AFFILIATIONS

1. Scott M. Hansen, Puget Creek Restoration Society
2. Don Russell, WRIA 12 resident and property owner
3. Hugh Mortensen, Watershed Company
4. Diane Freethy, Skagit Citizens Alliance for Rural Preservation
5. Al Schmauder
6. Cyrilla Cook, Washington Department of Natural Resources, Aquatic Lands Division (DNR)
7. Diane Carlson, City of Bellevue
8. Margen Carlson, Washington Department of Fish and Wildlife (WDFW)
9. Eric Gleason, TRC Solutions; Victor Woodward, Habitat Bank LLC; Jerome Ryan, Skagit Environmental Bank; David Remlinger, Skykomish Habitat, LLC
10. Allison O'Sullivan, Suquamish Tribe
11. Jennifer Thomas, Parametrix
12. Stephanie Jones Stebbins, Port of Seattle
13. Pierce County (Ann Boeholt, Janine Redmond, Dave Risvold)
14. Jeff Parsons, Herrera Environmental Consultants
15. Ian Elliot
16. Crystal Elliot, Herrera Environmental Consultants
17. Sue Mauermann, Port of Tacoma
18. Jerome Ryan
19. Glen R. St. Amant, Muckleshoot Indian Tribe
20. Michael Murphy, King County
21. Nancy Brennan-Dubbs, U.S. Fish and Wildlife Service (USFWS)