

New In-Lieu Fee Compensatory Mitigation Option

Property owners seeking to obtain wetland permits now have three options to mitigate unavoidable adverse impacts to wetlands. The Wisconsin Department of Natural Resources (WDNR) recently announced the creation of the Wisconsin Wetland Conservation Trust (WWCT), an in-lieu fee program that allows permittees to purchase credits from the WDNR in exchange for the WDNR satisfying third-party compensatory mitigation requirements for state and federal wetland permits.

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Background

In Wisconsin, there are two types of wetland permits: general and individual. General permits apply to preapproved activities that meet specific criteria. Individual permits apply to activities where no exemption or general permit is available and require some form of wetland mitigation. The WWCT program applies to Wisconsin individual permits and federal wetland permits under section 404 of the Clean Water Act and section 10 of the Rivers and Harbors Act.

To obtain an individual permit, applicants must show that: (1) there are no practical alternatives; (2) the proposed project minimizes impacts to wetlands; and (3) mitigation offsets any unavoidable impacts. Previously, permittees had only two options for the third requirement. To mitigate unavoidable impacts, permittees could either (1) purchase credits from an approved bank ("mitigation banking") or (2) complete a mitigation project within the same watershed service area or within a half mile of the permitted unavoidable wetland adverse impact ("permittee-responsible mitigation"). Now, permittees may also purchase credits from the WDNR and have the WDNR conduct the mitigation to satisfy their compensatory mitigation requirements.

What Is an In-Lieu Fee Program?

The in-lieu fee program allows permittees to pay the WDNR to assume their legal obligations to provide compensatory mitigation, which includes restoring, establishing, enhancing, and/or preserving aquatic resources. The WDNR is authorized to conduct WWCT-based mitigation in the entire geographic area of the state of Wisconsin. The state has been broken down into 12 "Service Areas" based on watersheds, each of which has been assigned a certain number of credits.

Benefits of the New In-Lieu Fee Program

Mitigation banking and permittee-responsible mitigation alone have proved to be inadequate in several ways. Wisconsin has a very limited number of mitigation bank credits available in only a fraction of the Service Areas. This dearth of credits has created mitigation gaps throughout the state. Consequently, permittees have sought out-of-service-area mitigation banking, which means that mitigation is occurring far away from the impacted wetland. Alternatively, permittees have chosen permittee-responsible mitigation, which is often economically inefficient and burdensome for permittees because they are not environmental experts and lack experience creating wetland mitigation projects.

The WWCT buttresses the existing compensatory mitigation options by providing a more consistent supply of mitigation credits in the same Service Area as the adverse impact, thus creating an additional avenue to mitigate unavoidable adverse impacts that may be better suited to the watershed needs.

Cost of Credits

The WDNR determines the credit fee and maintains a fee schedule for each Service Area. The cost per unit includes fees associated with program administration, selection, design, planning, engineering, acquisition, implementation, contingency, monitoring, long-term management of mitigation projects, and providing financial assurances. Presently, the cost per unit ranges from \$58,000 to \$61,000 depending on the Service Area.

Process for Purchasing Credits Under the In-Lieu Fee Program

A permittee can satisfy its wetland mitigation permit requirements by purchasing Advanced Credits or Released Credits. Advanced Credits are available for sale prior to having an approved project, though the total number of available credits depends on the Service Area. Released Credits are available by achieving performance standards for an approved project.

The process for purchasing credits under the in-lieu fee program begins when a permittee submits a Draft Mitigation Summary Sheet with other required materials to the WDNR. After submitting the Draft Mitigation Summary Sheet, the permittee and WDNR have a pre-application meeting. Following the pre-



application meeting, the permittee must revise its Draft Mitigation Summary Sheet and submit a final version with its wetland individual permit application, indicating the Service Area of the project and each proposed wetland impact by cover type and delineated acreage using the wetland types on the Mitigation Summary Sheet. After receiving a preliminary determination of the amount of approvable wetland impact from the WDNR, the WDNR Mitigation Coordinator will notify the permittee of its mitigation credit purchase requirement. This notification will include the approved mitigation ratio, credit quantity, credit cover type, and Service Area to which the credits will be applied. Finally, the Mitigation Coordinator will notify the Wetland In-Lieu Fee Coordinator that the WDNR has authorized the credit purchase and the permittee will then be required to contact the WWCT to initiate the credit purchase.

Reminder: The WDNR Prioritizes Avoid, Minimize, Mitigate

Despite the new mitigation option, it is important to remember that mitigation does not entitle applicants to a wetland permit. The WDNR must still determine that the proposed project represents the least environmentally damaging practicable alternative and that the applicant has taken all practicable measures to minimize adverse impacts.

If you have questions about the WDNR in-lieu fee program, please contact your Reinhart attorney or any member of the Reinhart Entitlements or [Environmental Law](#) groups.

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