

Debbie Beadle

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**From:** David Gee <dgee@gsblaw.com>  
**Sent:** Wednesday, March 6, 2013 1:11 PM  
**To:** ECA  
**Cc:** Megan Gee; David Gee  
**Subject:** Dear City Council Members: Because the Fee-in-Lieu topic was in front of the Council last night, I would like to  
**Attachments:** SEA\_DOCS-#1093614-v1-Public Comment to Sammamish City Council re Fee in Lieu.pptx; SEA\_DOCS-#1093607-v1-fee in lieu code revisions.docx; SEA\_DOCS-#1093607-v2-fee in lieu code revisions.docx; Fwd 3.5.13 Public Comment to Sammamish City Council re Fee in Lieu.msg; RE Fwd 3.5.13 Public Comment to Sammamish City Council re Fee in Lieu.msg

EXHIBIT NO. CC11

make sure that the City Council has the benefit of the materials we sent yesterday. Attached is (1) our Powerpoint presentation; and (2) redlined and clean versions of our proposed revisions to the relevant code sections.

Unfortunately, although our powerpoint presentation regarding fee-in-lieu alternatives was sent before 3 PM yesterday (a recent note from the City indicates that is the deadline), the powerpoint and draft revisions were not available for your reference during my public comment last night. (A copy of our initial transmittal of these materials is attached FYI).

Here it is again for your review.

To recap our presentation and proposed revisions to the code, we request the City Council to consider the following key points regarding fee-in-lieu mitigation:

- As I stated last night, the 2012 DOE guidance regarding fee-in-lieu programs clarifies that although the City of Sammamish might elect to sponsor a fee-in-lieu program, **the approval of a fee-in-lieu programs must be through the Army Corp of Engineers and DOE.** The changes we have proposed to the pending draft are intended to clarify that point, and to assure that the ECA fee-in-lieu alternative remains an option for the City of Sammamish and its citizens, even if Sammamish does not opt to sponsor a program itself, or does not receive Federal and state approval for such a program.
- In response to some of the comments and questions by Council Members last nite, it is very important to clarify that the additional option of fee-in-lieu mitigation, as recommended by the Planning Commission and presented in the City's draft of Code revisions, **is available only if (a) it is "not feasible to mitigate on the development proposal site"; and (b) the" off-site mitigation will achieve equivalent or greater hydrological, water quality and wetland or aquatic area habitat functions."**
- The other important point is that in those circumstances identified by the draft code **BAS does support fee-in-lieu mitigation**, recommended by DOE and AMEC, as a preferred alternative to on-site mitigation when (a) it is "not feasible to mitigate on the development proposal site"; and (b) the" off-site mitigation will achieve equivalent or greater hydrological, water quality and wetland or aquatic area habitat functions."
- As a result, the other clarification we are recommending is that for the benefit of the environment, **to the extent that those two pre-conditions exist, the use of fee-in-lieu mitigation should not only be optional, but required.**
- Finally, for the same reason, **use of fee-in-lieu mitigation should be driven by what is the best approach for the environment as determined in the context of a given critical area site, not by the size of the site**—single family or otherwise; accordingly, fee-in-lieu mitigation should be available (if not required) anytime it is determined that (a) it is "not feasible to mitigate on the development proposal site"; and (b) the" off-site mitigation will achieve equivalent or greater hydrological, water quality and wetland or aquatic area habitat functions."

that (a) it is “not feasible to mitigate on the development proposal site”; and (b) the” off-site mitigation will achieve equivalent or greater hydrological, water quality and wetland or aquatic area habitat functions.”

We appreciate your consideration of these comments and recommendations.

Sincerely,

David Gee  
22201 NE 28<sup>th</sup> Place  
Sammamish, WA 98074

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**DAVID W. GEE**

Owner | Tel: 206.464.3939 ext 1351 | Mobile: 425.760.9312 | Fax: 206.464.0125 | [dgee@gsblaw.com](mailto:dgee@gsblaw.com)

GARVEY SCHUBERT BARER | 18th Floor | 1191 Second Avenue | Seattle, WA 98101 | ► [GSBLaw.com](http://GSBLaw.com)

# City of Sammamish Environmental Critical Area Review 2012-2013

Public Comment: Clarification of Fee-in-Lieu Alternatives

Sammamish City Council Meeting  
March 5, 2012

David and Megan Gee  
22201 NE 28<sup>th</sup> Place  
Sammamish, WA 98074

# Best Available Science

## *Wetlands*

*Prepared for the City of Sammamish  
by AMEC Environment & Infrastructure, Inc.*

### *Best Available Science*

#### *Wetlands*

As a result of failure of many previous mitigation projects, Ecology and some Washington jurisdictions are encouraging the use of mitigation banks and in-lieu fee programs because these can offer greater assurance for mitigation success to both the applicant and the jurisdiction.

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As a result, where existing isolated wetlands occur, a review should be conducted to identify the functions that the wetland provides to determine how the isolated wetland should be managed for ecological function of the watershed as a whole. The NRCS suggested that, for isolated wetlands, mitigation should be encouraged off-site to improve the overall function of the watershed (NRCS, 2006), where fill is allowed and/or merited following mitigation sequencing as described previously.

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# Fee-in-Lieu Programs to be Approved by Federal + State Government



DEPARTMENT OF  
**ECOLOGY**  
State of Washington

## Guidance on In-Lieu Fee Mitigation

## Pertinent Regulations

### Federal

The U.S. Army Corps of Engineers (Corps) and the U.S. Environmental Protection published the *Federal Rule on Compensatory Mitigation: Compensatory Mitigation Aquatic Resources; Final Rule* (33 CFR Parts 325 and 332 and 40 CFR Part 230), dated April 10, 2008<sup>2</sup>. The federal rule defines requirements of compensatory mitigation for unavoidable impacts to waters of the U.S. and other aquatic resources resulting from authorized activities. The federal rule outlines the review and approval process and requirements for ILF programs. The Corps serves as chair of the process and invites Ecology to participate as co-chair<sup>3</sup> of the Interagency Review Team (IRT).

### State

While Ecology does not have a direct rule regarding ILF programs, we do have authority to require compensatory mitigation for unavoidable impacts to waters of the state. Ecology's authority rests with the state Water Pollution Control Act (Chapter 90.48 RCW) and associated water quality regulations (Chapter 173-201A WAC). Based on the anti-degradation policy (Chapter 173-201A-300 WAC), adequate mitigation is required to effectively offset unavoidable impacts to surface waters of the state of Washington. Per Section 401 of the federal Clean Water Act, Ecology must certify that projects comply with state water quality standards before the Corps' Section 404 permit can be authorized. For projects proposing to use ILF mitigation, Ecology follows the federal ILF review and approval process. It is under this process that Ecology serves as co-chair of the IRT.

# Proposed Revisions to Draft Code re Off-site Mitigation

Off-site mitigation should be required if applicant/qualified professional demonstrates:  
-on-site is not feasible  
-off-site is best for environment

## 21A.50.140 Mitigation, maintenance, monitoring and contingency. \* \* \* \*

(3) Mitigation shall be in-kind and on-site where feasible and sufficient to maintain critical area and buffer functions, and where applicable to prevent risk from a hazard posed by a critical area, except that mitigation shall be off-site when the following apply:

(4) ~~The city may approve off-site mitigation if an applicant demonstrates that:~~

- (a) A qualified professional determines or an applicant otherwise demonstrates that it is not feasible to mitigate on the development proposal site; and
- (b) A qualified professional determines or an applicant otherwise demonstrates that the off-site mitigation will achieve equivalent or greater hydrological, water quality and wetland or aquatic area habitat functions.

(5) When off-site mitigation is authorized, the city shall give priority to locations in the following order of preference:

- (a) Within the same drainage subbasin;
- (b) Within the city limits;
- (c) Within the boundaries of a state and/or federally approved fee-in-lieu mitigation program.

(6) Mitigation shall not be implemented until after the City of Sammamish approves the applicable critical areas study, mitigation plan and any required permits. Following City approval, mitigation shall be implemented in accordance with the provisions of the approved critical areas study and mitigation plan. (Ord. 02005-193 § 1; Ord. 099-29 § 1)

Edit to clarify that Federal/State Approve Fee-in-Lieu Programs





THANK YOU

**21A.50.140 Mitigation, maintenance, monitoring and contingency.**

\* \* \* \*

(3) Mitigation shall be in-kind and on-site where feasible and sufficient to maintain critical area and buffer functions, and where applicable to prevent risk from a hazard posed by a critical area, **except that mitigation shall be off-site when the following apply:**

(a) A qualified professional determines or an applicant otherwise demonstrates that it is not feasible to mitigate on the development proposal site; and

(b) A qualified professional determines or an applicant otherwise demonstrates that the off-site mitigation will achieve equivalent or greater hydrological, water quality and wetland or aquatic area habitat functions.

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(a) Within the same drainage subbasin;

(b) Within the city limits;

(c) Within the boundaries of a state and/or federally approved fee-in-lieu mitigation program.

(6) Mitigation shall not be implemented until after the City of Sammamish approves the applicable critical areas study, mitigation plan and any required permits. Following City approval, mitigation shall be implemented in accordance with the provisions of the approved critical areas study and mitigation plan. (Ord. O2005-193 § 1; Ord. O99-29 § 1)

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(4) The city may approve off-site mitigation if an applicant demonstrates that:

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**21A.50.310 Wetlands – Mitigation requirements.**

When mitigation for wetland and/or wetland buffer impacts is required, mitigation shall meet the requirements listed in SMC 21A.50.145 in addition to the following supplementary requirements:

\* \* \* \* \*

(4) Mitigation Type and Location. Mitigation actions shall be in-kind and conducted within the same sub-basin and on the same site as the alteration, **except that mitigation shall be off-site when the following apply:**

(a) A qualified professional determines or an applicant otherwise demonstrates there are **no reasonable on-site opportunities for mitigation**, or on-site opportunities do not have a high likelihood of success due to development pressures, adjacent land uses, or on-site buffers or connectivity are inadequate;

(b) A qualified professional determines or an applicant otherwise demonstrates **off-site mitigation has a greater likelihood of providing equal or improved wetland functions than the impacted wetland**; and

(c) Off-site locations have been identified and evaluated in the following order of preference:

(i) State and/or federally approved fee-in-lieu or mitigation bank program sites within the City limits in accordance with SMC 21A.50.315;

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- (ii) ~~State and/or federally approved fee-in-lieu or mitigation bank program sites within the WRIA 8 in accordance with SMC 21A.50.315;~~
- (iii) ~~Other state and/or federally approved fee-in-lieu or mitigation bank program sites.~~

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**21A.50.315 Wetlands – Alternative Mitigation**

\*\*\*\*\*

(2) Fee-in-lieu Mitigation.

(a) Fee-in-lieu mitigation shall be approved for use as compensation for approved impacts to wetlands, when:

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- (i) Criteria in SMC 21A.50.310(4) are met;
- (ii) ~~A state and/or federally approved fee-in-lieu mitigation is available;~~
- (iii) ~~A qualified professional determines or an applicant otherwise demonstrates that wetland fee-in-lieu mitigation provides appropriate compensation for the authorized impacts;~~
- (iv) The proposed use of fee-in-lieu mitigation is consistent with the terms and conditions of the fee-in-lieu mitigation program ~~that is selected;~~ and

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(v) The compensatory mitigation agreement occurs in advance of authorized impacts.

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(b) Available ~~fee-in-lieu mitigation programs shall be identified and evaluated in the following order of preference;~~

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- (i) ~~A state and/or federally approved fee-in-lieu program that utilizes receiving mitigation sites within the City of Sammamish.~~
- (ii) ~~The King County Mitigation Reserves Program, or other state and/or federally approved program that gives priority to sites within the same sub-basin and/or a pre-defined service area that includes the City of Sammamish.~~
- (iii) ~~Other state and/or federally approved fee-in-lieu mitigation program.~~

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**21A.50.350 Streams – Mitigation requirements.**

When mitigation for stream or stream buffer impacts is required, mitigation shall meet the requirements listed in SMC 21A.50.145 in addition to the following supplementary requirements:

\*\*\*\*\*

(2) Mitigation Type and Location. Mitigation actions shall be in-kind and conducted within the same sub-basin and on the same site as the alteration, **except that mitigation shall be off-site when the following apply:**

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- (a) ~~A qualified professional determines or an applicant otherwise demonstrates there are no reasonable on-site opportunities for mitigation or on-site opportunities do not have a high likelihood of success due to development pressures, adjacent land uses, or on-site buffers or connectivity are inadequate;~~

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(b) A qualified professional determines or an applicant otherwise demonstrates off-site mitigation has a greater likelihood of providing equal or improved functions than the impacted stream; and

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(c) Off-site locations have been identified and evaluated in the following order of preference:

(i) State and/or federally-approved fee-in-lieu or mitigation bank program sites located within the city limits in accordance with the provisions of this section;

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(ii) State and/or federally-approved fee-in-lieu or mitigation bank program sites located within the WRIA 8 in accordance with the provisions of this section;

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(iii) Other state and/or federally-approved fee-in-lieu or mitigation bank program sites.

(3) Fee-In-Lieu Stream Mitigation Program. Fee-in-lieu mitigation may be authorized for streams, subject to the avoidance sequence requirements and mitigation measures of this title, and the availability of a state and/or federally approved fee-in-lieu program, to be used in the following order of preference:

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(a) A state and/or federally-approved program that utilizes receiving mitigation sites within the City of Sammamish.

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(b) The King County Mitigation Reserves Program, or other state and/or federally-approved program that gives priority to sites within the same sub-basin and/or a pre-defined service area that includes the City of Sammamish;

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(c) Other state and/or federally-approved fee-in-lieu program sites.

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**21A.50.140 Mitigation, maintenance, monitoring and contingency.**

\* \* \* \*

(3) Mitigation shall be in-kind and on-site where feasible and sufficient to maintain critical area and buffer functions, and where applicable to prevent risk from a hazard posed by a critical area, **except that mitigation shall be off-site when the following apply:**

(a) A qualified professional determines or an applicant otherwise demonstrates that it is not feasible to mitigate on the development proposal site; and

(b) A qualified professional determines or an applicant otherwise demonstrates that the off-site mitigation will achieve equivalent or greater hydrological, water quality and wetland or aquatic area habitat functions.

(5) When off-site mitigation is authorized, the City shall give priority to locations in the following order of preference:

(a) Within the same drainage subbasin;

(b) Within the city limits;

(c) Within the boundaries of a state and/or federally-approved fee-in-lieu mitigation program.

(6) Mitigation shall not be implemented until after the City of Sammamish approves the applicable critical areas study, mitigation plan and any required permits. Following City approval, mitigation shall be implemented in accordance with the provisions of the approved critical areas study and mitigation plan. (Ord. O2005-193 § 1; Ord. O99-29 § 1)

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**21A.50.310 Wetlands – Mitigation requirements.**

When mitigation for wetland and/or wetland buffer impacts is required, mitigation shall meet the requirements listed in SMC 21A.50.145 in addition to the following supplementary requirements:

\* \* \* \* \*

(4) Mitigation Type and Location. Mitigation actions shall be in-kind and conducted within the same sub-basin and on the same site as the alteration, **except that mitigation shall be off-site when the following apply:**

(a) A qualified professional determines or an applicant otherwise demonstrates there are **no reasonable on-site opportunities for mitigation**, or on-site opportunities do not have a high likelihood of success due to development pressures, adjacent land uses, or on-site buffers or connectivity are inadequate;

(b) A qualified professional determines or an applicant otherwise demonstrates **off-site mitigation has a greater likelihood of providing equal or improved wetland functions than the impacted wetland;** and

(c) Off-site locations have been identified and evaluated in the following order of preference:

(i) State and/or federally-approved fee-in-lieu or mitigation bank program sites within the City limits in accordance with SMC 21A.50.315;

- (ii) State and/or federally-approved fee-in-lieu or mitigation bank program sites within the WRIA 8 in accordance with SMC 21A.50.315;
- (iii) Other state and/or federally-approved fee-in-lieu or mitigation bank program sites.

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**21A.50.315 Wetlands – Alternative Mitigation**

\* \* \* \* \*

(2) Fee-in-lieu Mitigation.

(a) Fee-in-lieu mitigation shall be approved for use as compensation for approved impacts to wetlands, when:

- (i) Criteria in SMC 21A.50.310(4) are met;
- (ii) A state and/or federally-approved fee-in-lieu mitigation is available;
- (iii) A qualified professional determines or an applicant otherwise demonstrates that wetland fee-in-lieu mitigation provides appropriate compensation for the authorized impacts;
- (iv) The proposed use of fee-in-lieu mitigation is consistent with the terms and conditions of the fee-in-lieu mitigation program that is selected; and
- (v) The compensatory mitigation agreement occurs in advance of authorized impacts.

(b) Available fee-in-lieu mitigation programs shall be identified and evaluated in the following order of preference:

- (i) A state and/or federally- approved fee-in-lieu program that utilizes receiving mitigation sites within the City of Sammamish.
- (ii) The King County Mitigation Reserves Program, or other state and/or federally-approved program that gives priority to sites within the same sub-basin and/or a pre-defined service area that includes the City of Sammamish;
- (iii) Other state and/or federally-approved fee-in-lieu mitigation program.

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**21A.50.350 Streams – Mitigation requirements.**

When mitigation for stream or stream buffer impacts is required, mitigation shall meet the requirements listed in SMC 21A.50.145 in addition to the following supplementary requirements:

\* \* \* \* \*

(2) Mitigation Type and Location. Mitigation actions shall be in-kind and conducted within the same sub-basin and on the same site as the alteration, **except that mitigation shall be off-site when the following apply:**

- (a) A qualified professional determines or an applicant otherwise demonstrates there are no reasonable on-site opportunities for mitigation or on-site opportunities do not have a high likelihood of success due to development pressures, adjacent land uses, or on-site buffers or connectivity are inadequate;

(b) A qualified professional determines or an applicant otherwise demonstrates off-site mitigation has a greater likelihood of providing equal or improved functions than the impacted stream; and

(c) Off-site locations have been identified and evaluated in the following order of preference:

(i) State and/or federally-approved fee-in-lieu or mitigation bank program sites located within the city limits in accordance with the provisions of this section;

(ii) State and/or federally-approved fee-in-lieu or mitigation bank program sites located within the WRIA 8 in accordance with the provisions of this section;

(iii) Other state and/or federally-approved fee-in-lieu or mitigation bank program sites.

(3) Fee-In-Lieu Stream Mitigation Program. Fee-in-lieu mitigation may be authorized for streams, subject to the avoidance sequence requirements and mitigation measures of this title, and the availability of a state and/or federally approved fee-in-lieu program, to be used in the following order of preference:

(a) A state and/or federally-approved program that utilizes receiving mitigation sites within the City of Sammamish.

(b) The King County Mitigation Reserves Program, or other state and/or federally-approved program that gives priority to sites within the same sub-basin and/or a pre-defined service area that includes the City of Sammamish;

(c) Other state and/or federally-approved fee-in-lieu program sites.

SEA\_DOCS:1093607.2

## Debbie Beadle

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**From:** David Gee  
**Sent:** Wednesday, March 6, 2013 9:48 AM  
**To:** 'Melonie Anderson'; 'Kamuron Gurol'; 'Debbie Beadle'  
**Cc:** 'meggee@comcast.net'; David Gee  
**Subject:** RE: Fwd: 3.5.13 Public Comment to Sammamish City Council re Fee in Lieu

Thank you. Because the Fee-in-Lieu topic was in front of the Council last night, I would like to make sure that the Council has the benefit of the materials. Would it be possible for them to be circulated to Council at this time?

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DAVID W. GEE

Owner | Tel: 206.464.3939 ext 1351 | Mobile: 425.760.9312 | Fax: 206.464.0125 | [dgee@gsblaw.com](mailto:dgee@gsblaw.com)

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**From:** Melonie Anderson [mailto:[manderson@ci.sammamish.wa.us](mailto:manderson@ci.sammamish.wa.us)]  
**Sent:** Wednesday, March 06, 2013 9:22 AM  
**To:** David Gee; Kamuron Gurol; Debbie Beadle  
**Cc:** [meggee@comcast.net](mailto:meggee@comcast.net)  
**Subject:** RE: Fwd: 3.5.13 Public Comment to Sammamish City Council re Fee in Lieu

I will make sure this is entered into the record. I was so busy yesterday afternoon, that I didn't check my email to see that you had sent this information.

Thanks.

Melonie

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**From:** David Gee [mailto:[dgee@gsblaw.com](mailto:dgee@gsblaw.com)]  
**Sent:** Tuesday, March 05, 2013 7:26 PM  
**To:** Kamuron Gurol; Debbie Beadle; Melonie Anderson  
**Cc:** David Gee; [meggee@comcast.net](mailto:meggee@comcast.net)  
**Subject:** Fw: Fwd: 3.5.13 Public Comment to Sammamish City Council re Fee in Lieu

Sorry about any confusion - I'm not sure whether this submission made it to the City Council--it corresponds to my public comment on Tuesday night. Would you please confirm that they have received it. Thanks.

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DAVID W. GEE

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**From:** [meggee@comcast.net](mailto:meggee@comcast.net) [<mailto:meggee@comcast.net>]  
**Sent:** Tuesday, March 05, 2013 02:36 PM  
**To:** dbeadle <[dbeadle@ci.sammamish.wa.us](mailto:dbeadle@ci.sammamish.wa.us)>  
**Cc:** David Gee; Megan gee <[meggee@comcast.net](mailto:meggee@comcast.net)>  
**Subject:** Fwd: 3.5.13 Public Comment to Sammamish City Council re Fee in Lieu

**Debbie, here is another public comment power point presentation for tonights meeting. This will be presented by Megan Gee. Thanks.**

Please be aware that email communication with Council Members or City staff is a public record and is subject to disclosure upon request.