

Proposed Revisions to Maryland Statute and Regulations Governing Wetland Mitigation and the MDE In-Lieu Fee Program

The Maryland Department of the Environment (MDE) intends to revise regulations in COMAR Title 26 Subtitle 23, Nontidal Wetlands in 2017. Revisions will be proposed to:

- 1) Achieve consistency with federal requirements listed in the Code of Federal Regulations 33 CFR Parts 325 and 332 for the Department of the Army and 40 CFR Part 230 for the U.S. Environmental Protection Agency for Compensatory Mitigation for Losses of Aquatic Resources (Federal Mitigation Rule);
- 2) Achieve consistency with statutory amendments to §§5-901 and 5-910, Environment Article, Annotated Code of Maryland; adopted in 2016 for Nontidal Wetlands – Nontidal Wetland Mitigation Banking to remove disincentives to mitigation banking;
- 3) Align MDE's regulatory authority to implement in-lieu fee and mitigation banking programs for compensatory mitigation to be consistent with federal requirements;
- 4) Enable MDE to continue to require and oversee compensatory mitigation on behalf of the U.S. Army Corps of Engineers (USACE) through a State Programmatic General Permit (SPGP); and
- 5) Increase the likelihood that compensatory mitigation requirements will be successfully completed in a timely manner.

What is mitigation?

In the context of this document, mitigation is defined as the creation, restoration, or enhancement of wetlands that were or will be lost due to regulated or agricultural activities.

Mitigation may be completed through 1) purchase of credit from a mitigation bank having available credit; 2) payment into an in-lieu fee program having available credit; or 3) permittee-responsible mitigation.

What is a mitigation bank?

The Federal Mitigation Rule defines a mitigation bank as a site, or suite of sites, where resources (e.g., wetlands, streams, riparian areas) are restored, established, enhanced, and/or preserved for the purpose of providing compensatory mitigation for impacts authorized by permits. In general, a mitigation bank sells compensatory mitigation credits to permittees whose obligation to provide compensatory mitigation is then transferred to the mitigation bank sponsor. The operation and use of a mitigation bank are governed by a mitigation banking instrument, which is a legal document reviewed and approved by the Interagency Review Team (comprised of state and federal resource and regulatory agencies).

What is an in-lieu fee program?

An in-lieu fee program is defined in the Federal Mitigation Rule as being a program involving the restoration, establishment, enhancement, and/or preservation of aquatic resources through funds paid to a governmental or non-profit natural resources management entity to satisfy compensatory mitigation requirements for permits. An in-lieu fee program sells compensatory mitigation credits to permittees whose obligation to provide compensatory mitigation is then transferred to the in-lieu

program sponsor. All the funds collected into the in-lieu fee program must be used to implement the mitigation requirements, with only a minimal administrative cost allowed. MDE currently operates in-lieu fee programs for losses to tidal and nontidal wetlands. Since MDE's ILF Programs do not meet the Federal Mitigation Rule requirements, the ILF Programs can no longer be used to satisfy federal mitigation requirements. MDE is seeking approval of the Nontidal Wetlands ILF Program to meet federal compensatory mitigation requirements.

What is permittee-responsible mitigation?

As defined by the Federal Mitigation Rule, permittee-responsible mitigation means an aquatic resource restoration, establishment, enhancement, and/or preservation activity undertaken by the permittee (or person subject to a mitigation requirement, an authorized agent, or contractor) to provide compensatory mitigation for which the permittee retains full responsibility.

What are the problems with the mitigation process?

1. Current Maryland Regulations are not aligned with the Federal Mitigation Rule. Since the USACE uses the Federal Mitigation Rule to make mitigation decisions, the applicant has to follow two different sets of rules depending on which agency is regulating the resource, leading to confusion. MDE needs consistent rules to continue to require mitigation on the USACE's behalf under the SPGP.
2. Maryland Regulations discourage mitigation banking. Regulations require higher mitigation replacement ratios when using mitigation banks. Since this banking disincentive ratio was recently removed from Maryland Statute, it should also be removed from Regulations to be consistent. Additionally, while banking is the first preference in the Federal Mitigation Rule, it is not the first preference in Maryland Regulations. Maryland Regulations related to the mitigation banking review process also lack some elements required under the Federal Mitigation Rule (e.g., Bank Prospectus and Instrument requirements).
3. Current Maryland Regulations discourage approval of MDE's In-Lieu Fee (ILF) Program by the USACE. The ILF Program must meet federal requirements to be considered for approval (e.g., ILF rate increases), some of which are not currently supported by State Regulations.
4. A disproportionately large amount of MDE staff time, in relation to ecological gain, is spent on following up with permittees to get permittee-responsible mitigation projects completed or to remediate failing projects. The timelines set in State Regulations allow applicants to get their permits prior to providing many elements required for the mitigation (e.g., a detailed design plan, known as Phase II mitigation plan, bond, etc.). Some of these same timelines set in State Regulations contradict those in the Federal Mitigation Rule.
5. It is becoming more difficult for applicants to satisfy mitigation requirements, since projects are now mostly permittee-responsible mitigation (where the permittee does the mitigation project, rather than paying into a mitigation bank or an ILF program). Historically, many mitigation requirements were satisfied through use of sites which consolidated mitigation from multiple permits (consolidated mitigation), but which are not recognized under the Federal Mitigation Rule. The Federal Mitigation Rule also has stricter requirements for mitigation (e.g., long-term management, financial assurance, etc.).
6. Mitigation projects should more effectively ensure a "no-net-loss" of acreage and function. Factors that currently limit the success of some mitigation projects include:
 - a. Timelines which require little commitment up-front (e.g., Phase II, bond) to ensure timely completion of a successful project.

- b. Inadequate current performance standards (e.g., current wetland vegetation and hydrology performance standards may be met without the site actually being a wetland; sites may meet performance standards, but may not be fully functioning ecologically).
- c. Outdated regulations, which were written in 1989, that do not reflect current policy and scientific understanding. MDE has developed documents to reflect data from the scientific community and regulatory/resources agencies including the Interagency Review Team to improve mitigation (Phase I and Phase II wetland mitigation plan checklists, mitigation guidance document, performance standards and monitoring protocols, mitigation banking checklists, etc.), most of which have been in place for several years and are on MDE's website.

General Regulation changes proposed

1. Revise Maryland's mitigation Regulations to be more consistent with Federal Mitigation Rule.
2. Format and length standards for Maryland Regulations under COMAR require that Maryland's mitigation Regulations be significantly restructured. This would result in additional, but shorter, sections for various mitigation topics. MDE may accomplish these changes by:
 - a. Adding and deleting text, within each section, without showing remaining unchanged language; or
 - b. Repealing and re-proposing and revising language in its entirety to be easier to review.
 There are positives and negatives of repealing and re-proposing these Regulations. A positive is that Regulations will be easier to understand and they can be better organized to make the process more straight-forward. A negative is that there may be a false perception that MDE is making many more changes than is actually the case.
3. Clarify the process for applicants.
4. Other revisions to Maryland Regulations that are needed to increase likelihood of successful projects.

Specific Changes for discussion

The following changes are being considered to make Maryland Regulations more consistent with the Federal Mitigation Rule.

1. Change mitigation order of preference.
 - a. Define environmentally preferable projects, since these may be chosen over mitigation banks and an ILF program. *Permittee-responsible mitigation onsite may be considered as "environmentally preferable" to offset impacts from agriculture.*
 - b. Establish mitigation banks as generally the first preference.
 - c. Establish ILF programs as generally the second preference.
 - d. Establish permittee-responsible mitigation as generally the last preference.
2. Require equivalent standards for mitigation banks, ILF programs, and permittee-responsible mitigation.
3. Condition all authorizations to require mitigation be completed (e.g., construction and planting) prior to or concurrent with impacts. *The timing for completion of mitigation for agricultural activities not exempted from mitigation would remain the same, within three years, based on Maryland Statute.*
4. Revise Phase II (detailed) mitigation plan approval process.

- a. Condition all authorizations to prohibit commencing regulated activities until Phase II Mitigation Plan is approved.
 - b. Delay issuance of certain permits (generally one acre of loss or more through Individual Permit) until the Phase II mitigation plan is reviewed and approved by MDE.
5. Revise criteria and rates for use of ILF.
 - a. Expand criteria so ILF rates account for all requirements in Federal Mitigation Rule.
 - b. Although actual ILF rates are not envisioned to be in Maryland Regulations, Regulations will describe how these ILF rates will be developed (e.g., Public Notice, etc.). ILF rates will need to be increased significantly to allow MDE to provide compensatory mitigation that meets the Federal Mitigation Rule requirements and to receive federal approval of the ILF Program. Effective rates could increase 2-8 times above current rates for nontidal wetlands. The process that MDE is using to estimate ILF rates will be discussed during the stakeholder meetings and during the public meetings scheduled for fall 2016.
 - c. Once the ILF rates are increased and the revised ILF Program is approved, it is important that ILF rates do not become stagnant in the future. MDE recommends that ILF rates be evaluated and adjusted as appropriate every 2-3 years. Regulations will describe how these ILF rates will be updated (e.g., Public Notice, etc.). There are a couple options for future ILF rate evaluations: 1) adjust the rate according to the most recent Annual Consumer Price Index as published by the Bureau of Labor Statistics of the U.S. Department of Labor; 2) evaluate actual costs for projects completed under the revised MDE ILF Program, including estimates for future long-term management/maintenance, catastrophic events, etc.; or 3) set the ILF rate 1% above the average bank rate in the area.
6. Clarify requirements for mitigation bank Prospectus and Instrument.
7. Eliminate higher replacement requirements when using a mitigation bank (also to be consistent with new nontidal wetland mitigation banking Statute).
8. Extend maximum duration of monitoring period.
9. Add criteria for review of replacement of lost acreage and function.
10. Revise bond/financial assurance requirements.
 - a. Increased bond amount to cover cost of mitigation.
 - b. Bond in place prior to commencement of regulated activities.
 - c. Extend duration of bond until end of monitoring period.
 - d. Subject government agencies to commitment to complete mitigation.

Additional items for discussion and recommendation:

1. Historically, MDE had a maximum impact size limit for projects to be eligible for mitigation through the ILF Program. MDE requests comment on whether impact size should be retained as a limit, as a factor for determining whether payment into the ILF is more or less environmentally preferable than other forms of mitigation, or whether impact size should be considered at all.
2. Refinement of performance standards to match MDE policy and Interagency Review Team requirements. *This may include adding more detail to Regulations or referencing another document.*
3. Refinement of information requirements for mitigation plans.
4. Revision to the definition of “temporary” impacts to include a time limit for restoration.

MDE will also evaluate if Statute changes are necessary to support any proposed Regulation changes.