Potential Revisions to Nontidal Wetland Mitigation Regulations and ILF Rates

Frequently Asked Questions

August 26, 2025

Why are nontidal wetlands important?

Maryland has lost an estimated 40-60% of its wetlands since colonial times. Maryland's Nontidal Wetlands Act was adopted in 1989 in recognition of the importance of nontidal wetlands and gaps in their protection. The Act recognizes numerous benefits provided by nontidal wetlands:

- Reduction of pollutant loadings, including excess nutrients, sediment, and toxics
- Attenuation of floodwaters and stormwaters
- Shoreline stabilization and erosion control
- Waterfowl breeding and habitat for many species of fish, game and nongame birds, and mammals, including rare and endangered species
- Food chain support
- Timber production

The Act notes that "Further degradation and losses of nontidal wetlands will contribute to the decline of the Chesapeake Bay and other waters of the State."

How does the Supreme Court's Sackett decision affect regulation of wetlands in Maryland?

The Sackett decision does not directly affect the State of Maryland's own authority to regulate nontidal wetlands, including isolated wetlands. The federal authority and jurisdiction over nontidal wetlands has been reduced as a result of the decision, so fewer areas are regulated by the U.S. Army Corps of Engineers (USACE). However, for the USACE to determine which wetlands are regulated, they require an Approved Jurisdictional Determination (AJD). In Maryland, the USACE rarely issues AJDs, so Maryland has not seen a large reduction in federally-regulated wetlands yet.

What is mitigation and why is it required?

"Mitigation" refers to replacement of wetlands that are lost due to authorized activities or new agricultural activities. Wetlands may be completely lost (e.g., filled or drained), so that the area is no longer a wetland, or partially lost through the conversion of the wetland so that an authorized activity results in a change to the wetland plant community (e.g., loss of forest). Mitigation may include:

- Restoration/re-establishment where wetlands previously existed.
- Creation/establishment where wetlands did not exist previously.
- Enhancement/rehabilitation where wetland acreage is not increased but wetland functions are improved.
- Preservation of existing high-quality wetlands.

Mitigation is required because the Maryland Nontidal Wetlands Act mandates that there be a no-net-loss of nontidal wetland acreage and function. Nontidal wetland losses above a certain

threshold, or any size loss of certain designated important wetlands, must be mitigated. This is usually the responsibility of the entity receiving the authorization or conducting the agricultural activity. MDE assumes responsibility for mitigation of other smaller wetland losses (i.e., those impacts not requiring mitigation by the authorized person).

What are the three types of mitigation?

- Mitigation Bank. A mitigation bank is a site where aquatic resources are restored, created, enhanced, and/or preserved for the purpose of providing mitigation for authorized impacts. In general, a mitigation bank sells mitigation credits to permittees whose obligation to provide 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 (IRT).
- In-Lieu Fee (ILF) Program. An ILF program funds the restoration, creation, enhancement, and/or preservation of aquatic resources through funds paid to a governmental or non-profit natural resources management entity to satisfy mitigation requirements for permits. An ILF program sells mitigation credits to permittees whose obligation to provide compensatory mitigation is then transferred to the ILF program sponsor. All funds collected into the ILF program must be used to implement the mitigation requirements, with only a minimal administrative cost allowed. This program is reviewed and approved by the IRT.
- Permittee-Responsible Mitigation (PRM). Permittee-responsible mitigation means an aquatic resource restoration, creation, enhancement, and/or preservation activity undertaken by the permittee to provide mitigation for which the permittee retains full responsibility/liability.

What is the Interagency Review Team?

The Interagency Review Team (IRT) is composed of representatives from federal, State, and local agencies that review mitigation banks and ILF programs. The USACE and MDE are the co-chairs, with Maryland Department of Natural Resources, U.S. Fish and Wildlife Service, U.S. Environmental Protection Agency, and National Marine Fisheries Service also being active members. Various other federal, State, or local regulatory or resource agencies may join the IRT for specific projects of interest. The IRT meets monthly.

What are the benefits of encouraging mitigation banking and an MDE In-Lieu Fee Program in Maryland?

- Mitigation banking and the MDE ILF Program are additional mitigation options for applicants. Most applicants want to write a check and be done with their mitigation liability, which is the case when they purchase credits from a mitigation bank or the MDE ILF Program. This also significantly reduces the time it takes applicants to find mitigation during the permit review process.

- Mitigation banks and ILF sites generally result in higher functioning wetlands than postage-stamp sized permittee-responsible mitigation sites. Mitigation banks and ILF sites are larger, have more in-depth site selection, and have more oversight by the IRT than PRM sites.
- Investment directly related to mitigation bank development and ILF sites may help the economy.

Why is the ILF no longer recognized by the USACE and what does MDE need to do to bring it into compliance?

The U.S. Army Corps of Engineers has determined that the MDE ILF Program does not meet the requirements of the 2008 Federal Mitigation Rule, since it has not been updated since 1991 and ILF rates are not high enough to allow for mitigation construction that meets the Federal Mitigation Rule requirements. For this reason, the USACE will not allow the use of the ILF Program to satisfy federal compensatory mitigation requirements until the ILF Program is revised and approved by the IRT. Since most mitigation required by MDE is also required by the USACE, this means the ILF Program is currently not a mitigation option for most permittees. Having an ILF Program approved by the USACE means the ILF Program would once again be a viable mitigation option for most applicants. In order to bring the MDE ILF Program into compliance with the Federal Mitigation Rule, MDE must revise the ILF program and state regulations related to nontidal wetland mitigation to be consistent with the Federal Mitigation Rule. One of the main required changes is to ensure the ILF rates will result in sufficient funds to replace lost wetland acreage and functions.

Is the ILF Program viable currently?

No. Historically, MDE accepted ILF payments for large mitigation requirements (e.g., projects requiring up to 1 acre or more of mitigation). ILF was a viable mitigation option for applicants and helped speed up the permit process. Since the ILF rates were developed in 1991, and have not been updated, the funds received by applicants to satisfy their mitigation requirements are no longer sufficient to restore these wetlands. Therefore, over time MDE started phasing out the ILF Program, accepting payment for less projects, and instead requiring the applicant to look for other mitigation options (e.g., PRM). Starting a decade ago or more, since the ILF rates had become so out-of-date, MDE policy changed to discourage use of the ILF except in uncommon cases. Current policy states that ILF can only be considered for minor impacts (e.g., forested wetland impact less than 5,000 sf), where there was no mitigation bank or other environmentally preferable mitigation, and where the USACE is not requiring mitigation. Since actual costs to do mitigation continue to rise significantly in the past few years, in order to continue to meet no-net-loss of wetland acreage and function, if we continue to accept ILF payments at the 1991 rates, even for just these smaller impacts, we will need to significantly subsidize the wetland mitigation with State dollars. As that is not a desirable option, the Wetlands and Waterways Protection Program may consider denying the use of the ILF program at the 1991 rates, including for very small impacts.

Will these regulation changes also affect stream mitigation?
No. These regulations focus on nontidal wetland mitigation. Stream mitigation is under a separate regulation (COMAR 26.17.04).

How are existing regulations inconsistent with Maryland Nontidal Mitigation Banking Statute?

Maryland's Nontidal Wetland Mitigation Banking statute (Maryland Nontidal Wetlands Protection Act, Environment Article, Annotated Code of Maryland, Title 5, Subtitle 9) encourages mitigation banking, by having mitigation banks as the first order of preference for mitigation, with the exception of environmentally preferable onsite mitigation. Code of Maryland Regulations (COMAR) 26.23.04.03 discourages banking by including a higher mitigation ratio when using a mitigation bank. Instead it requires the applicant to conduct a mitigation site search, which may slow down the permit process and result in a lower functioning mitigation site. Existing regulations also limit the amount of mitigation credit that can be released before Year Two post-construction - again discouraging mitigation banks and limiting mitigation options.

How are existing regulations inconsistent with the 2008 USACE/USEPA Federal Mitigation Rule?

- The Federal Mitigation Rule requires consistent standards between all types of mitigation (banks, ILF, and permittee-responsible). Current Maryland regulations do not require consistent standards, discouraging development of mitigation banks.
- The Federal Mitigation Rule establishes mitigation banks as the first order of preference, while current Maryland regulations encourage permittee-responsible mitigation over mitigation banks, even requiring a mitigation site search and a higher amount of mitigation when using a mitigation bank.
- The Federal Mitigation Rule has higher standards for some mitigation-related elements (e.g., financial assurances, performance standards, site protection) which results in higher-quality more sustainable mitigation projects.
- The Federal Mitigation Rule allows for more bank credit sales earlier in the process than current Maryland regulations - making MDE stricter on mitigation banks than the federal requirements. By comparison PRM sites get all the credit up front despite often being less successful than banks.

Who was included in the 2016-2019 stakeholder outreach meetings?
MDE met separately with the several groups to discuss the proposed regulations:

- Maryland Building Industry Association
- Mitigation bankers in Maryland
- Environmental consulting firms
- Environmental groups
- Agriculture

- State and Federal regulatory and resource agencies
- Transportation
- Utility companies
- Department of Defense

Additionally, MDE issued a public notice and held three Listening Sessions throughout the state, with the intent of receiving comments from the public. While MDE did not provide draft regulation language during these outreach efforts, MDE discussed details of the proposed regulations and received a lot of valuable feedback. After considering this feedback, MDE made some changes to the proposed regulations. This resulted in the Maryland Building Industry Association sending three letters of support for the proposed regulation changes and ILF rates.

What was the feedback from these stakeholder meetings?

The feedback was largely positive. There were some concerns discussed (e.g., ensuring avoidance and minimization will still occur during the permit review, potential for bank price gouging, ensuring mitigation can still be required close to the impact, cost for small impacts like sheds, etc.). These concerns have been addressed in the proposed regulation language and are discussed below.

How will these changes affect the permit review process?

Proposed regulations will reduce permitting times, as the mitigation requirements of the State and USACE will be consistent and there will be more mitigation options. Purchasing credits from mitigation banks or the ILF will eliminate delays related to finding mitigation sites. **The applicant will still need to go through the alternatives analysis as part of the permit process, including for avoidance and minimization of impacts.** Mitigation is only required for permanent nontidal wetland impacts that are deemed unavoidable.

Will these regulations allow for the use of a wetland functional assessment to determine mitigation ratios?

While the proposed regulations maintain language requiring replacement ratios for mitigation projects, new language is proposed to allow MDE to use a wetland functional assessment to determine mitigation requirements in the future. The USACE will likely be using a function-based approach in the future (e.g., Maryland Wetland Assessment Methodology) and MDE would like to continue to be aligned with them. As wetlands are not all of the same quality, it makes sense that more mitigation is required for impacts to pristine wetlands than for impacts to degraded wetlands. This is what many surrounding states do now (e.g., WV, VA, PA). If MDE does not adopt a function-based approach, we will soon have very different mitigation requirements than the USACE, leading to more frustration by applicants. If MDE changes to a functional assessment method, the process would be put on public notice.

How do these proposed regulations affect forest clearing?

Forest clearing will be a consideration during the mitigation review, with projects proposing to clear large areas of forest being less preferable, resulting in the potential for reduced mitigation credit or rejection of the mitigation plan.

How will the Department address the concern that wetland mitigation will be conducted further from impacts?

Proposed regulations will require that the applicant evaluate onsite mitigation options. If this option is environmentally preferable, it is the preferred mitigation. *Note: This is consistent with the Maryland Wetland Mitigation Banking Statute.* Additionally, if there is an environmentally preferable mitigation option close to the impact site, the applicant should consider that mitigation option.

How do the proposed regulations affect overburdened and underrepresented communities?

Overburdened and underrepresented communities are not considered in existing regulations. This has resulted in mitigation being located predominantly outside these areas since it is often more difficult to do traditional in-kind mitigation within these areas. With proposed regulations, if a project is planned within an overburdened/underrepresented area, the applicant would need to discuss how mitigation could be satisfied in that area. Since it may be infeasible (land is already developed or forested) or undesirable (community fear of increased crime/mosquitoes) to create wetlands in that area, MDE would consider out-of-kind mitigation that meets the needs of the community and other water resource goals (e.g., stormwater retrofits, flood management, trees planted within parkland, or a combination of goals). Additionally, the applicant would need to consider the effects of the mitigation project on these areas. For example, it shouldn't be assumed that the community wants a mitigation site adjacent to them (e.g., concern about tree clearing related to a proposed mitigation site).

How do the proposed regulations address changing environmental conditions?

Changing environmental conditions are not considered in existing regulations. Applicants are not required to consider the potential effects on the mitigation project or how the mitigation can provide benefits related to changing environmental conditions (e.g., the creation of floodplain wetlands to retain floodwater during more intense storms). Proposed regulations would require these to be considered.

Will these changes result in higher mitigation costs for developers/homeowners?

Mitigation costs should not increase substantially, but may actually decrease as there are additional mitigation options. Promoting mitigation banking should lead to additional mitigation banks, which will result in competition and potentially lower prices for mitigation credit. Allowing payment into the ILF Program also provides an additional mitigation option. While some mitigation standards will be raised to meet the Federal Mitigation Rule requirements, most applicants already need to satisfy these standards for the USACE. Furthermore, applicants

proposing small impacts related to the addition of secondary structures (e.g., sheds) would only be required to pay at 25% of the final ILF rates.

How much are existing banks charging in Maryland?

While MDE does not track the cost of mitigation bank credits in Maryland, it is often higher than the proposed ILF rates. MDE can potentially do mitigation for cheaper than a mitigation bank, since we don't need to consider the "cost of investment". Meaning, MDE is not making a profit on the mitigation project. The banks need to get significant investment money in order to fund the large expensive mitigation sites. The bank investor needs to see a return on investment, a similar idea to investing in stocks. The bank sponsor (the entity proposing and operating the bank) spends a lot of money upfront to get the bank approved, including for costs associated with the site search, land/easement acquisition, surveying, wetland delineation, design, pre-construction monitoring, coordination with the IRT, permitting, construction, planting, etc. No bank credits are available for sale until the bank is approved by the IRT and items specified in the approved Mitigation Banking Instrument are completed (e.g., financial assurances secured, site protection mechanism recorded, etc.), and this is generally a small percentage of the total credits. Additional credits are available for sale upon demonstration of the site meeting successful milestones (e.g., construction and planting, monitoring reports, etc.), with a significant portion of credit unavailable until later in the monitoring period (e.g., Year 10 monitoring). That means the bank investor doesn't see a return on investment until several years after investing the money. Additionally, mitigation banks are a higher risk than many types of investment, so to get an interested investor, the predicted return needs to be worth the risk.

How do proposed regulations address potential price gouging by mitigation bankers?

Having additional mitigation options, including more mitigation banks, reduces the opportunity for price gouging as it increases competition. Additionally, proposed language requires MDE to develop a process that would go out on public notice to determine when costs of mitigation bank credits may be considered "price gouging", and the applicant could pay into the ILF or consider another type of mitigation as being preferable.

How were the proposed ILF rates established?

MDE solicited estimates from mitigation consultants, mitigation bankers, and state agencies. Estimates were broken down into cost for each task required by the Federal Mitigation Rule and the IRT. Tasks included: site search, Prospectus and Mitigation Banking Instrument preparation, land acquisition and legal fees, easement holder costs, design, permitting, construction, planting, as-builts, monitoring/maintenance, remediation, long-term management/maintenance, and catastrophic event fund. MDE used the median cost estimate for each task to develop our estimate. Additionally, MDE considered the budget listed in bids received in response to the Request for Proposals (RFP) through the nontidal wetland grant partnership with Chesapeake Bay Trust (CBT). MDE's proposed nontidal ILF rates are significantly lower than the cost per credit from most approved mitigation banks in Maryland.

Land costs used in the proposed ILF rates were based on Maryland Department of Planning land appraisals, that were run specifically for MDE for this purpose. *Note: MDE proposed a first round of ILF rates to the stakeholder outreach groups and made revisions based on their feedback.*

Wetland gains and losses have historically been tracked by watersheds for the State. The Nontidal Mitigation Banking Statute requires that mitigation banks have service areas based on watersheds. The Federal Mitigation Rule also requires that mitigation, including for ILF Programs, be tracked by watershed. Therefore ILF rates will be based on watersheds.

Since these rates were developed in 2016, MDE updated the rates in 2025 to reflect inflation according to the Consumer Price Index.

Will the higher ILF rates be phased in?

The ILF rates will be phased in over a three-year period to reach the final rates for projects having less than a half acre of mitigation required. During this interim period, if projects with a half acre or greater of mitigation required want to utilize the ILF Program, they would pay the final rates.

How will ILF rates be updated in the future?

To avoid the situation where the ILF become out-of-date, resulting in an ILF Program that is no longer sustainable, proposed regulations require that the ILF rates are updated in two ways:

- ILF rates will be updated annually to reflect inflation based on the Consumer Price Index.
- All costs associated with the ILF will be evaluated every three years and adjustments made to the ILF rates accordingly.

How does Maryland compare with other states, including for proposed ILF rates and presence of Bank/ILF sites?

This is actually a complicated question. Many states assess mitigation requirements based on functional credits, rather than square feet/acres (like MDE), or require case-by-case assessments for each project proposing to pay in, so comparing some of the states is like apples to oranges.

- In Pennsylvania, the Pennsylvania Department of Environmental Protection's ILF Program uses a functional assessment called PIESCES to determine wetland requirements. While this generally results in a range from $118,000-$158,400 per acre, they say that this rate is too low. They are able to do mitigation for this price only because they are doing combined wetland and stream mitigation projects (e.g., restoring streams with associated floodplain wetlands). They are taking in higher rates for the stream mitigation so that ends up helping with the actual costs of wetland mitigation. *Note: MDE is not proposing a stream ILF Program now, since we basically have no stream mitigation regulations in place and would need to start from scratch on*

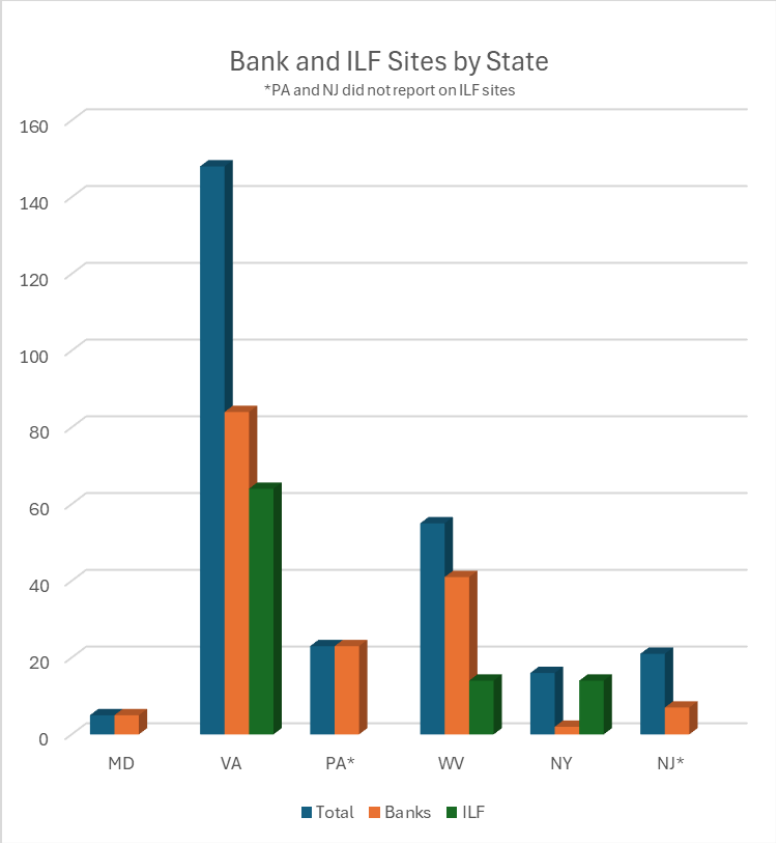
developing a stream ILF program. Pennsylvania's ILF Program is not recognized by the USACE so cannot be used to satisfy federally-required mitigation.

- In New Jersey, the New Jersey Department of Environmental Protection's ILF Program has a complicated system where the applicant is required to estimate the cost it would take to replace the resources and that is the ILF rate. This would result in a lot of additional work, time, and lack of predictability for both the applicant and the regulatory agency.
- In Virginia, The Nature Conservancy (TNC) ILF Program charges $60,000-$250,000 per acre. *Note: this ILF is run by TNC. We reached out to TNC previously to see if they wanted to do an ILF in Maryland, and they said "no" since it has a lot of development.*
- In West Virginia, the West Virginia Department of Environmental Protection's ILF Program currently charges $60,000 per credit, but they say these rates are old and are not enough to do wetland mitigation (even in a state with low land prices). Similar to PA, they are only able to do mitigation when they have a lot of stream mitigation money to offset the higher costs that would really be required for the wetland mitigation.
- In Maine, the Maine Department of Environmental Protection charges $187,744 - $250,034 per acre.
- In California, The National Fish and Wildlife Foundation's Sacramento District California In-Lieu Fee Program appears to charge around $501,250 per credit, with vernal pools being around $826,250 per credit (which is similar to acres in this case).
- In Oregon, the Oregon Department of State Lands has a complicated formula to assess ILF rates for each project. It considers land value of the impact site, restoration costs for that area, long-term management costs (assumed to be 30% of the restoration cost), administrative costs (10%), and a mitigation multiplier for the type of mitigation conducted. The maximum amount is set to not exceed the current highest known wetland mitigation bank credit.

The proposed 2025 MDE ILF rates are $176,973-$351,853, with the difference in price being mostly determined by the vast differences in land value and ease of restoring wetlands throughout Maryland. Please keep in mind that since wetland impacts in Maryland are relatively low compared to some other states, ILF mitigation sites will also be much smaller. We often restore mitigation sites that are about 10 acres. This does not have anywhere near the economy of scale as a program doing a mitigation site that is 100 acres or more, which is common in some other states.

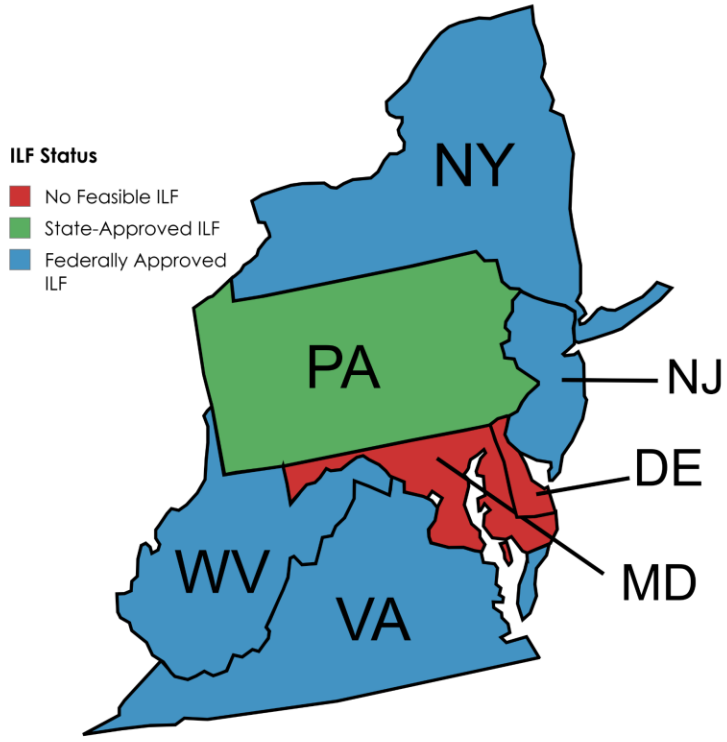
Maryland has fewer banks and ILF sites than neighboring states (Figure 1). Additionally, Maryland is one of the few states in the region without a federally approved ILF Program (Figure 2).

Figure 1. ILF Programs and Banks in Nearby State - July 2025*



*With the exception of New Jersey which has assumption, approved banks and ILF sites are based on the USACE RIBITS website. While the majority of banks/ILF sites include nontidal wetland credits, some are only stream or tidal wetlands. Delaware is not included since it doesn't have a comparable state wetlands program.

Figure 2. ILF Program Status of Other States in the Region - July 2025.



How will the proposed regulations improve wetland mitigation success?

Requiring applicants to find their own small PRM sites often results in wetland mitigation that is of lower function than banks or ILF sites, which are generally larger, more sustainable in the long-term, and involve the benefit of more agency review. EPA and the USACE, in developing the Federal Mitigation Rule, determined that banks and ILF projects have higher rates of success and are generally of a higher function than PRM sites, hence their preference for banks and ILF sites rather than PRM sites. By encouraging banking in Maryland and re-establishing a robust ILF Program, MDE can once again be a leader in the wetland mitigation arena. Additionally, for applicants who decide to pursue PRM sites, regulation changes would ensure a higher standard for the project (e.g., requiring financial assurances be held until MDE is sure the mitigation site is successful, improving site protection requirements, etc.). Since the requirements of the Federal Mitigation Rule can result in better mitigation projects, MDE wants to adopt many of these requirements to maintain a high-quality wetland program independent of any future uncertainty in federal guidance.