



Maryland
Department of
the Environment

Proposed Revisions to Maryland Regulations for Nontidal Wetland Mitigation and the MDE In-Lieu Fee Program





Agenda

- **Welcome & Walk-through Agenda**
- **Introductions of Attendees**
- **Goals and Objectives for the Meeting** – Outreach, NT wetland mitigation, feedback
- **Presentation** - Potential regulation changes and ILF rates
- **Discussion** - Topics to stimulate discussion include: ILF as second preference for mitigation, establishing ILF rates, etc.
- **Follow-up/Next Steps** - Request for additional comments/ILF estimates, summary report to stakeholders, timelines for regulation changes
- **Questions?**



Problems with Mitigation Process

- Regulations are not aligned with the Federal Mitigation Rule.
- Maryland Regulations discourage mitigation banking (e.g., higher ratios, location preference, lack elements required in Mitigation Rule).
- Regulations are not in line with proposed ILF Program, discourages approval by IRT.
- Large amount of MDE staff time spent on following up with permittee-responsible mitigation projects (e.g., timelines).
- Difficult for applicants to satisfy mitigation requirements
 - Projects are now mostly permittee-responsible mitigation
 - Mitigation Rule sets stricter requirements for all mitigation
- Should ensure “no-net-loss” of acreage and function (e.g., timelines require little commitment up-front, performance standards, outdated regulations).



Goals of Revisions

COMAR Title 26 Subtitle 23, Nontidal Wetlands in 2017

- 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).
- 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.
- Align MDE's regulatory authority to implement in-lieu fee and mitigation banking programs for compensatory mitigation to be consistent with federal requirements.
- 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).
- Increase the likelihood that compensatory mitigation requirements will be successfully completed in a timely manner.



Nontidal Wetland Mitigation Banking

- House Bill 797: revisions to §§5-901 and 5-910
- Mitigation banking disincentive ratios removed
- Mitigation site location
 - Historically – on-site considered first
 - Now
 - “where it may be environmentally preferable”
 - on-site “when is considered environmentally preferable”
- Service Area
 - Historically – preference to same county and watershed
 - Now - determined by Department, in coordination with IRT, consistent with Federal guidelines
 - Same 8-digit HUC as bank
 - May be expanded to other 8-digit HUCs if environmentally justified
- Public Notice required for all banks
- Definitions (related to banks)
 - Hydrologic Unit, HUC, Instrument, IRT, SA



Regulation Changes Proposed - General

- Revise mitigation Regulations to be more consistent with Federal Mitigation Rule.
- Format and length standards.
- Clarify the process for applicants.
- Other revisions needed to increase likelihood of successful projects.



Regulation Changes - Proposed

Change mitigation order of preference.

- Mitigation banks generally first.
- ILF programs generally second.
- Permittee-responsible mitigation generally last.
- Define environmentally preferable projects, since may be preferred option.
 - *For impacts from agriculture, onsite permittee-responsible mitigation may be considered “environmentally preferable”.*



Regulation Changes – Proposed (cont.)

- Eliminate higher replacement ratios when using a mitigation bank.
- Equivalent standards for mitigation banks, ILF programs, and permittee-responsible mitigation.
- Revise criteria and rates for use of ILF.
 - Expand criteria so ILF rates account for all requirements in Mitigation Rule.
 - Regulations will describe how ILF rates will be developed (e.g., Public Notice, etc.).
 - Regulations will describe how ILF rates will be updated. Options:
 - Adjust every 2-3 years?
 - Adjust according to Annual Consumer Price Index.
 - Evaluate actual costs for projects completed under revised MDE ILF Program (including all costs).
 - 1% above average bank rate.
 - Should MDE maintain a maximum impact size limit for projects paying into the ILF Program?
- Clarify requirements for mitigation bank Prospectus and Instrument.



Regulation Changes – Proposed (cont.)

- Condition all authorizations to require mitigation be completed 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.*
- Revise Phase II (detailed) mitigation plan approval process.
 - Condition all authorizations to prohibit commencing regulated activities until Phase II mitigation plan is approved.
 - 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.
- Extend maximum duration of monitoring period.
- Add criteria for review of replacement of lost acreage and function.



Regulation Changes – Proposed (cont.)

- Revise bond/financial assurance requirements.
 - Increased bond amount to cover cost of mitigation.
 - Bond required earlier in process (prior to permit issuance or prior to commencement of regulated activities).
 - Extend duration of bond until end of monitoring period.
 - Subject government agencies to commitment to complete mitigation.
- Refine performance standards to match MDE and IRT policy.
 - *This may include adding more detail to Regulations or referencing another document.*
- Refine information requirements for mitigation plans.
- Revise definition of “temporary” impacts to include a time limit for restoration.



Estimated ILF Rates

- ILF rates have not been revised since 1991.
- Historically based on county, included estimated costs for land, design, construction, and monitoring. Did not include salary and many other items now required by Mitigation Rule.
- Rates range from \$11,100/ac (Somerset) to \$58,000/ac (Howard).
- Inadequate to cover current costs to complete mitigation under Mitigation Rule.
- The 2008 Federal Mitigation Rule requires that ILF rates include “the expected costs associated with the restoration, establishment, enhancement, and/or preservation of aquatic resources in that service area. The costs must be based on full cost accounting and include, as appropriate, expenses such as land acquisition, project planning and design, construction, plant materials, labor, legal fees, monitoring, and remediation or adaptive management activities, as well as administration of the in-lieu fee program. The cost per unit credit must also take into account contingency costs appropriate to the stage of project planning, including uncertainties in construction and real estate expenses. The cost per unit of credit must also take into account the resources necessary for the long-term management and protection of the in-lieu fee project. In addition, the cost per unit credit must include financial assurances that are necessary to ensure successful completion of in-lieu fee projects.”



Estimated ILF Rates (cont.)

- **ILF rates need to be increased significantly to allow MDE to provide mitigation that meets the Mitigation Rule requirements and to receive federal approval of the ILF Program.**
- All money must be used for mitigation and all expenditures must be approved by the IRT.
- Existing ILF rates do not include cost for many items required by the Mitigation Rule: salary, development of Prospectus/Mitigation Instrument, permitting, wetland delineations, as-built plans, easement holder costs, financial assurances, rigorous monitoring, short-term maintenance, remediation, long-term management/maintenance, or catastrophic event funds.

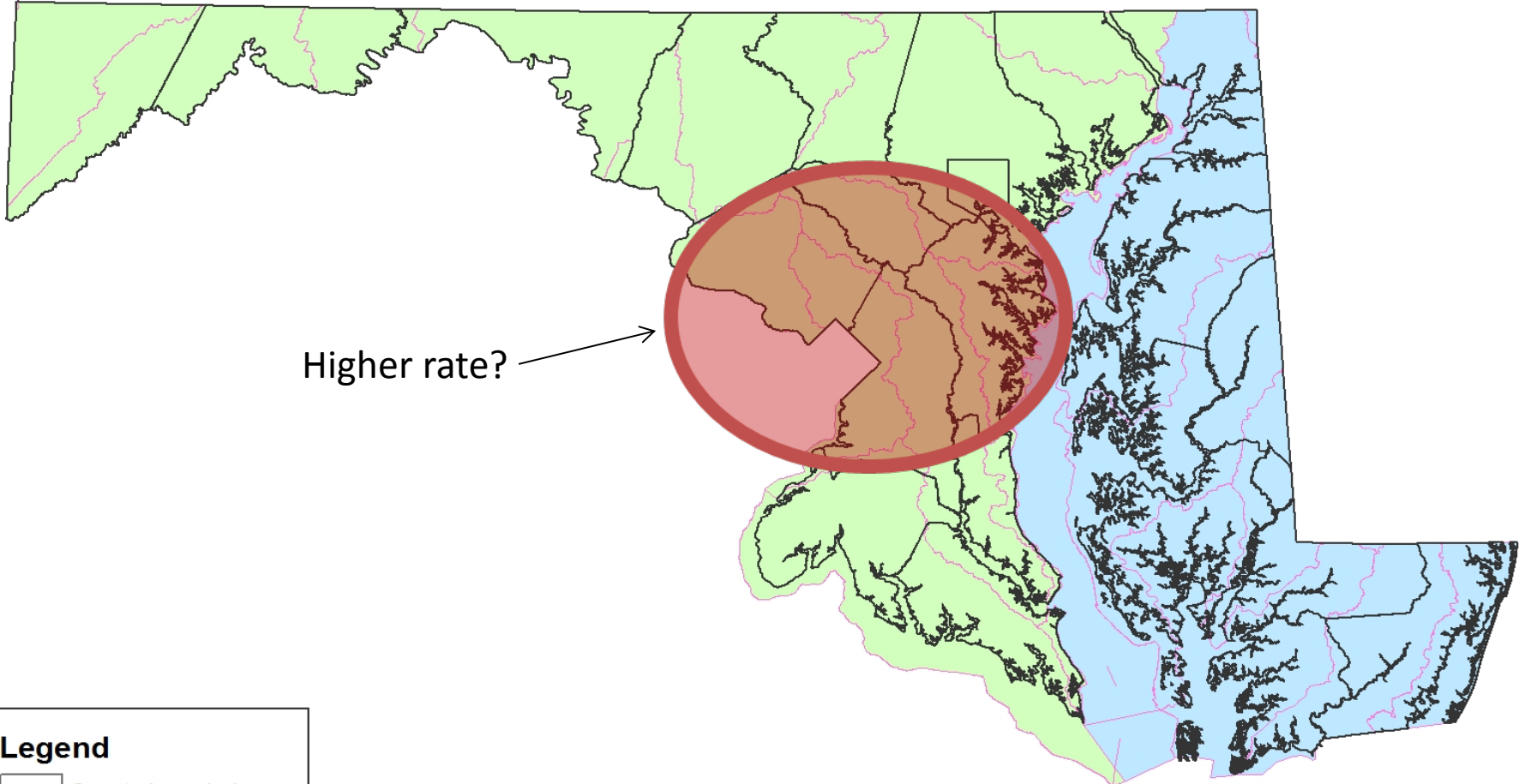


Estimated ILF Rates (cont.)

Process of Developing cost estimates:


- Estimates from mitigation consultants, mitigation bankers, and state agencies.
 - Received seven estimates, each broken down into cost for each task required by Mitigation Rule and IRT.
 - Used median cost estimate for each task.
- Bids received in response to recent RFPs through nontidal wetland grant partnership with CBT.
 - RFP released 3 times since 2014, and resulted in bids for 6 projects with potential to meet requirements.
 - Bids only included costs to design, construct, and maintain site (for the initial two-year period), with assumption that MDE would do additional tasks required by Mitigation Rule and the IRT (e.g., developing the Prospectus/Mitigation Instrument, getting IRT approval, monitoring, maintenance and remediation (after the initial two-year period), long-term management, catastrophic event fund, etc.). MDE added estimates for these costs.
 - Within range.
- Cost per credit from approved mitigation banks in MD and VA. Proposed ILF rates are within the range.

Estimated MDE Nontidal Wetland In-Lieu Fee Rates





Legend

 County boundaries

 HUC boundaries

Estimated rates:

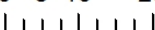
 \$2.10/sf, \$91,476/ac

 \$2.85/sf, \$124,146/ac



Larry Hogan, *Governor*
Boyd Rutherford, *Lt. Governor*
Ben Grumbles, *Secretary*



0 5 10 20 Miles




Discussion

- ILF as second preference for mitigation
 - Generally ahead of permittee-responsible mitigation (unless environmentally preferable)
 - Size limit
- Establishing ILF rates
 - Initial rates
 - Periodic updates to rates
- Other



Next Steps

- Outreach (key stakeholders, public meetings)
- Request for: additional comments, ILF cost estimates
- Summary of stakeholder comments
- Statute changes?
- Revise Draft ILF Instrument
- Draft Regulations (Public Notice)
- Finalize Regulations - Spring/Summer 2017?
- Tidal Wetland Mitigation, Waterway Mitigation



www.mde.state.md.us/wetlands

Kelly Neff

410-537-4018

Kelly.neff@maryland.gov