

**Permittee-Responsible Nontidal Wetland Mitigation  
Approval Process in Maryland**

December 16, 2019

*The Maryland Department of the Environment (MDE) has developed this guidance document to assist permittees in successfully getting through the mitigation process. This guidance may not reflect the policies of the U.S. Army Corps of Engineers.*

*This is intended to be a living document. Revisions may occur frequently, as mitigation policies (including decisions made as part of the Interagency Review Team) evolve.*

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## 1. Introduction and Purpose

This document contains guidance on aquatic resource mitigation within the permitting process, in accordance with Code of Maryland Regulations (COMAR), Maryland Department of the Environment (MDE) policy, and the Federal Mitigation Rule adopted April 10, 2008 by the U.S. Army Corps of Engineers (USACE) and the U.S. Environmental Protection Agency (EPA) (33 CFR Part 332 and 40 CFR Part 230). MDE has developed this guidance document to encourage consistency, equivalency, and predictability in the development and review of compensatory mitigation sites, specifically permittee-responsible mitigation (PRM). **This document should not be interpreted as a guarantee that a mitigation site meeting these guidelines will be approved by MDE or the USACE, as MDE and the USACE must consider projects on a case-by-case basis. Additionally, this guidance may not reflect the policies of the USACE or other local, state, or federal agencies.**

This document is applicable to the development of mitigation sites designed to provide compensatory mitigation in accordance with the COMAR and the Federal Mitigation Rule for unavoidable impacts to Waters of the U.S. and Waters of the State, including wetlands, and their functions, as a result of activities authorized under Section 404 of the Clean Water Act, and Maryland Nontidal Wetlands Protection Act. This document applies only to permittee-responsible mitigation for nontidal wetland impacts.

All projects where mitigation is required by the USACE must meet the Federal Mitigation Rule standards. Projects where mitigation is not required by the USACE (e.g., some types of wetland conversion impacts) are not be required to meet the Federal Mitigation Rule standards, but must meet COMAR and MDE policies.

## 2. What is mitigation?

When the MDE Wetlands and Waterways Program issues an authorization for an activity that will result in unavoidable losses of nontidal wetlands and waterways, the acreage and functions must be replaced through aquatic resource restoration, establishment, enhancement, and/or preservation. Some nontidal wetland impacts are exempt from the mitigation requirement, as stated in COMAR 26.23.04.01 and 26.23.04.02. Determination if mitigation will be required is part of the Joint Permit Application process. In order to avoid delays in permitting, mitigation should be proposed as part of the pre-application process. Proposed mitigation should be included as part of the Joint Federal/State Application for the Alteration of Any Floodplain, Waterway, Tidal or Nontidal Wetland in Maryland (JPA), or for agricultural projects, as the mitigation component of the soil conservation and water quality plan.

### **3. Mitigation Types**

The 2008 Federal Mitigation Rule defines three distinct types of mitigation: 1) mitigation banks, 2) in-lieu fee, and 3) permittee-responsible. All three types of mitigation include 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 or other authorizations. In general, the sponsors of a mitigation bank or in-lieu fee (ILF) program sell compensatory mitigation credits to permittees whose obligation to provide compensatory mitigation is then transferred to the mitigation bank or ILF sponsor. The mitigation bank or ILF sponsor provides a large amount of mitigation, which is associated with a certain amount of credits. These credits are withdrawn from the site as they are sold. While a mitigation bank sponsor may be a government, nonprofit, private entity, etc., an ILF sponsor must be a government or non-profit natural resources management entity. The operation and use of a mitigation bank and ILF program are governed by a mitigation banking instrument or ILF instrument, legal documents reviewed and approved by the Interagency Review Team. A permittee-responsible mitigation (PRM) is mitigation 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.

#### **3.1 Mitigation Order of Preference**

The mitigation order of preference is generally: 1) mitigation banks, 2) approved in-lieu fee programs<sup>1</sup>, 3) permittee responsible mitigation. However, consistent with the 2008 Federal Mitigation Rule, 33 CFR 332.3(a)(1), mitigation order of preference will be determined through consideration of the most environmentally preferable mitigation option, which may justify diverging from this standard mitigation order of preference. Maryland Statute<sup>2</sup> requires that the potential for on-site mitigation should be considered when it is environmentally preferable. Considerations the environmentally preferable option should include: likelihood for ecological success and sustainability, location of compensation site relative to the impact site and their significance within the watershed, and the cost of the mitigation project.

#### **3.2 Requirements for use of ILF Program**

There are currently no ILF programs in Maryland approved by the USACE. While MDE continues to operate the Nontidal Wetland Compensation Fund (Nontidal Fund), developed in 1991, this fund does not meet the requirements of the Federal Mitigation Rule, and therefore is

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<sup>1</sup> The MDE ILF Program is currently not approved.

<sup>2</sup> Maryland House Bill 797

not recognized by the USACE. The ILF rates included in MDE's nontidal wetland Compensation Fund Fee Structure have not been adjusted since May 15, 1991. Before the MDE Nontidal Wetland ILF program can be approved by the USACE, ILF rates will need to be adjusted to reflect actual current mitigation costs and an ILF instrument will need to be approved by the USACE and IRT. For this reason, payment into the Nontidal Fund to satisfy mitigation must meet all of the following requirements: 1) there are no mitigation banks willing to sell credits, with available credits having a service area encompassing the area of impacts, 2) the USACE either does not regulate the resource (e.g., federally isolated wetlands), waives the mitigation requirement, or the project is a Category A with less than 5,000 square feet permanent nontidal wetland impact, 3) mitigation required is less than 10,000 square feet nontidal wetland, and 4) MDE allows payment into the Nontidal Fund. In cases where a small proposed impact is slightly outside of a mitigation bank's service area, MDE may require that the applicant purchase credit from the mitigation bank rather than pay into the Nontidal Fund.

### **3.3 Permittee-Responsible Advanced Mitigation**

Permittee-responsible advance mitigation is compensatory mitigation constructed in advance of a specific known project with known impacts. The "advance mitigation plan" must be proposed<sup>3</sup> to the USACE and MDE in advance for known projects with future expected impacts where the impacts, functions and services that will be lost have been identified and documented and will be appropriately compensated for at the advance mitigation site. The known projects and impacts must be earmarked in advance of the mitigation plan approval and mitigation construction in order to be considered. If there is concern that the proposed impact projects may fall through, substitute projects may also be proposed, but must be identified in advance of the mitigation. The advance mitigation can only be used by the same party that developed the mitigation site (single user). The permittee retains full responsibility for success of the mitigation. By comparison, a bank may compensate for multiple users with unknown impacts and there is a transfer of responsibility/liability.

Applicants may conduct advance mitigation at their own risk. Even if the advance mitigation site is authorized by a permit, establishing the advance mitigation in advance of future impacts does not create any guarantee or presumption that a future impact will be authorized or that the advance mitigation will be approved for use by those identified future projects.

Permittee-responsible advance mitigation must comply with the Federal Mitigation Rule<sup>4</sup>, COMAR, and MDE policy and requires careful tracking in a ledger managed by the permittee

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<sup>3</sup> Advanced mitigation sites constructed for mitigation that is not required by the USACE may not need to be approved by the USACE, unless an authorization is required for impacts due to construction of the mitigation project, and does not need to meet all requirements of the Federal Mitigation Rule. These project must still meet all requirements of COMAR.

<sup>4</sup> Mitigation not required by USACE does not need to meet requirements of the Federal Mitigation Rule.

and reviewed by MDE/USACE. In addition, a plan is required showing the specific areas that have been or will be debited. When a JPA is submitted, the applicant must identify the use of the advance mitigation site and specific areas within the site for the specific impacting projects and include the ledger and plan documenting the used areas and proposed areas to be used. For additional guidance on advance mitigation sites, please see [Appendix A](#)<sup>5</sup>.

#### 4. Mitigation Debit Requirements

The amount of compensation required will be determined on a project-specific basis by the agency regulating the impacts (e.g., MDE and/or USACE). For wetlands, this amount will be based on: 1) credit replacement ratio, and 2) mitigation type ratio. Credit replacement ratios are based on the type of impact (e.g., emergent nontidal wetlands) while the mitigation type ratio is based on the type of mitigation proposed (e.g., restoration, enhancement).

Credit replacement ratios are used to determine the amount of mitigation required for an impact. Before any regulated aquatic resources have been impacted by a project, the amount of each type of resource to be lost (e.g., forested nontidal wetland) must be determined. These impact amounts should also include loss through permanent conversion impacts and indirect impacts from the proposed activity, which may also require mitigation. Examples may include: changes in stormwater runoff resulting in reduced hydrology to existing wetlands, lowering of the water table adjacent to existing wetlands, and flooding of wetlands resulting in a change in vegetative type. Credit replacement ratios are expressed as a relationship between two numbers. The first number specifies the amount to be mitigated and the second number specifies the amount of resource impacted. Wetland credits are generally described in square feet while stream credits are generally described in linear feet. These credit replacement ratios are different than the mitigation type ratio. MDE credit replacement ratios are generally as follows:

Resource	Impact Type	Replacement Ratio for Permanent Impacts
Nontidal Wetlands*	Farmed wetland	1:1
	Emergent	1:1
	Scrub-shrub	2:1
	Forested	2:1
	Emergent to landscape management area**	1:1
	Scrub-shrub to landscape management area**	2:1
	Forested to landscape management area**	2:1

<sup>5</sup> Appendix A is located on the MDE Wetlands and Waterways Program website at: <https://mde.maryland.gov/programs/Water/WetlandsandWaterways/AboutWetlands/Documents/Advanced-Mit-Guidance.pdf>

	Scrub-shrub to emergent conversion	1:1
	Forested to emergent conversion	1:1
	Forested to scrub-shrub conversion	1:1
	Wetlands of special state concern	Increased by 1

\* USACE may require mitigation for impacts to other aquatic resources (e.g., nontidal open water).

\*\* Landscape management area may include areas that are routinely mowed (e.g., once a year or more often) or are mulched.

The amount of mitigation credits required for any permit is within the sole discretion of the agency issuing such permit (MDE and/or USACE) for which impacts are authorized and for which mitigation is required and will take into account such factors as the area and location of resources to be impacted. While out-of-kind mitigation is generally not acceptable, in rare case when it is allowed, higher mitigation may be required. Mitigation ratios will generally also be higher when: impacts are within a bank’s secondary service area, outside a bank’s service area, or to account for temporal losses when a mitigation site is constructed after the impact.

## 5. Mitigation Approval Process

### 5.1 Mitigation for Development Activities<sup>6</sup>

If mitigation will be required for an impact, a phase I mitigation plan must be developed and included as part of the JPA submitted to MDE. The following steps should be taken:

- Determine the acreage of each type of aquatic resource (e.g., forested nontidal wetland, perennial stream) to be impacted. Nontidal wetland delineations should be consistent with the 1987 “Corps of Engineers Wetlands Delineation Manual” and regional supplements to this manual<sup>7</sup>.
- Determine mitigation type being proposed: 1) purchase of available credits from an approved mitigation bank having a service area overlapping with the area of impacts, 2) payment into the ILF program, please refer to Section 3.2, 3) completing a permittee-responsible mitigation project. The applicant is encouraged to consult the USACE Regulatory In-Lieu Fee and Bank Information Tracking System website<sup>8</sup> to find up-to-date information on banks and ILF programs with available credit.

<sup>6</sup> This section focuses on impacts proposed by development. There may be variations in the process for projects proposing impacts from agriculture or mining.

<sup>7</sup> [http://www.usace.army.mil/Missions/Civil-Works/Regulatory-Program-and-Permits/reg\\_supp/](http://www.usace.army.mil/Missions/Civil-Works/Regulatory-Program-and-Permits/reg_supp/)

<sup>8</sup> <https://ribits.usace.army.mil/>

- If proposing a permittee-responsible mitigation project, locate appropriate mitigation site(s)<sup>9</sup>. Unless on-site mitigation is a viable option, a site search should be conducted following a watershed approach, as described in [Appendix B](#)<sup>10</sup>. Some web-based GIS prioritization tools (e.g., Watershed Resources Registry), may also be utilized to find potential mitigation sites.
- Develop and submit a phase I mitigation plan ([Appendix C](#)<sup>11</sup>) as part of the JPA. Do not proceed with a phase II mitigation plan until the phase I has been approved by the regulatory agencies. If requesting to purchase credit from a mitigation bank or pay into the ILF program, this should be proposed as the phase I mitigation plan. If proposing a permittee-responsible mitigation project for mitigation required by the USACE, the mitigation must meet all Components of a Compensatory Mitigation Plan 33 CFR 332.4(c)(2)-(14), in addition to those in COMAR and MDE policy. The applicant should include information specified in [Appendix B](#) for all permittee-responsible mitigation projects. The phase I mitigation plan should also include all elements in the “Phase I Mitigation Plan - Required Information”. Since the phase I mitigation plan is intended to be conceptual, the applicant does not need to provide as much detail for these elements as for the phase II mitigation plan. *For permittee-responsible mitigation, demonstrate that you have the right to use the site for mitigation.*
- The regulatory agencies will review the phase I mitigation plan and provide feedback<sup>12</sup>. The phase I mitigation plan must be approved prior to issuance of authorization. If payment into a mitigation bank is approved by the regulatory agencies, the bank sponsor must submit documentation to the regulatory agencies that these credits were debited and that the bank sponsor is accepting responsibility for the mitigation obligation, prior to issuance of authorization. If payment into the ILF program is approved by MDE, payment must be received by MDE prior to issuance of authorization.
- For all projects where the applicant<sup>13</sup> proposes to do permittee-responsible mitigation, the applicant must obtain mitigation surety bonds or other approved financial assurances

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<sup>9</sup> It is advisable for the applicant to secure the services of a competent environmental consultant in order to help formulate the mitigation plan. A list of environmental consulting firms is available on MDE’s website.

<sup>10</sup> Appendix B is located on the MDE Wetlands and Waterways Program website at: <https://mde.maryland.gov/programs/Water/WetlandsandWaterways/AboutWetlands/Documents/Components-Mit-Plan-Guidance.pdf>

<sup>11</sup> Appendix C is located on the MDE Wetlands and Waterways Program website at: [https://mde.maryland.gov/programs/Water/WetlandsandWaterways/AboutWetlands/Documents/PHASE-I\\_requirements.pdf](https://mde.maryland.gov/programs/Water/WetlandsandWaterways/AboutWetlands/Documents/PHASE-I_requirements.pdf)

<sup>12</sup> MDE cannot officially approve the phase I mitigation plan until after completion of the public notice period (for projects where public notice is required). MDE will render a decision on the acceptability of the phase I as part of the final permit decision.

<sup>13</sup> When the permittee is a government entity, to meet the Federal Mitigation Rule, they may satisfy their financial assurance through alternate means, including a letter of commitment from high-level decision makers within the organization (e.g., the Secretary of a State agency or the County Commissioners) stating the sponsor’s commitment to satisfy the mitigation requirements for mitigation obligations. For mitigation not required by the USACE, government entities are not required to provide financial assurances, as specified in COMAR 26.23.04.04(B). Please refer to Appendix B for more details.



prior to commencing impacts<sup>14</sup>. For mitigation required by the USACE, these should include: 1) Construction Fund, 2) Maintenance and Monitoring Fund, 3) Catastrophic Event Fund, and 4) Long-Term Management Fund. The Construction financial assurance will be released after the regulatory agencies determine that the mitigation project has been successfully completed and is developing into an acceptable aquatic system. The Maintenance and Monitoring Fund (MMF) will be held through the active monitoring period, until all required monitoring and maintenance is complete and the mitigation site meets all required performance standards. During this period, some of the MMF may be released based on specific milestones (e.g., complete monitoring reports received showing that the site is meeting performance standards). The Catastrophic Events and Long-Term Management can be combined, but will be held after the mitigation site is closed, to ensure long-term success.

- For permittee-responsible mitigation that is required by the USACE<sup>15</sup>, the applicant must provide long-term management. Once the active monitoring period is completed and the site is meeting final year performance standards, the mitigation site is converted to the Long-Term Management Period. At this point, the designated long-term steward takes over responsibility of monitoring and maintaining the mitigation site. If there is no designated long-term steward, the permittee remains as the long-term steward.
- The applicant should submit the phase II mitigation plan, including all information in “Final Nontidal Wetland Mitigation Plan Checklist (Phase II)” (within [Appendix B](#)), to the regulatory agencies as part of the permit application, to the maximum extent practicable<sup>16</sup>. The Federal Mitigation Rule requires that projects requiring an individual permit have an approved phase II mitigation plan prior to issuance of authorization. For all other projects, the phase II mitigation plan must be approved prior to commencing authorized impacts. If MDE and USACE are both requiring the mitigation, the applicant should send all the information to both agencies at the same time, to allow coordination of their review and comments.

If the project is not exempt from mitigation requirements, and the permittee is proposing to conduct permittee-responsible mitigation, the following mitigation steps are required as permit conditions:

- After the phase I mitigation plan has been approved, develop a phase II mitigation plan, being sure to include all elements in the Final Nontidal Wetland Mitigation Plan Checklist (Phase II).

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<sup>14</sup> When mitigation is not required by USACE, financial assurances do not need to meet the Federal Mitigation Rule, but must meet the requirements in COMAR 26.23.04.04(B), including a financial assurance conditioned upon the successful completion of the construction of the mitigation project according to the approved mitigation plan.

<sup>15</sup> For mitigation not required by USACE, the applicant does not need to provide long-term management, other than a permanent site protection mechanism.

<sup>16</sup> For mitigation not required by USACE, according to COMAR 26.23.04.05(C), the Phase II Mitigation Plan shall be submitted within 3 months of the Department’s final permit decision.

- For nontidal wetlands, submit the phase II mitigation plan within three months of receiving a favorable permit decision<sup>17</sup>, unless otherwise determined by the regulatory agencies. The phase II mitigation plan must be approved by the regulatory agencies prior to commencing authorized impacts. If necessary, revise the mitigation plan based on comments by the regulatory agencies.
- After the phase II mitigation plan is approved by the regulatory agencies, construct the mitigation site(s). The mitigation project should be successfully constructed in advance or concurrently with the authorized impacts. Notify MDE upon the start of grading and the completion of planting of the mitigation project. Submit an "as-built" site design plan to the regulatory agencies within 120 days of the completion (including grading, planting, and/or vegetative stabilization) of the mitigation project. As-built plans should include all elements described in Section of [Appendix B](#).
- Demonstrate that the mitigation site has been protected in perpetuity through a site protection mechanism acceptable to the regulatory agencies.
- Monitor the mitigation project for the period of time specified in the authorization to ensure the site is meeting performance standards. Utilize the performance standards and monitoring protocol approved by the Interagency Review Team ([Appendix B](#)), unless the conditions within the permit or authorization state otherwise. Submit monitoring reports to the regulatory agencies. Conduct maintenance and remediation activities, as appropriate, to meet performance standards.
- The original permittee or authorized person, as stated in the authorization, must notify the regulatory agencies if the authorization is transferred to another party. If the mitigation obligation has not yet been completed to the regulatory agency's satisfaction (through purchase of credit from an approved mitigation bank, payment into the ILF program, or termination of PRM monitoring by the agencies), and the permittee or authorized person listed on the authorization transfers responsibility for the mitigation obligation to another party, the permittee or authorized person listed on the authorization must notify the regulatory agencies.

## **5.2 Mitigation for Agricultural Activities**

Agricultural activities that are conducted in nontidal wetlands may require a Soil Conservation and Water Quality Plan and approval from MDE. The farmer should contact MDE to get assistance through the process.

## **6. Regulatory In-Lieu Fee and Bank Information Tracking System (RIBITS)**

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<sup>17</sup> Requirement based on COMAR 26.23.04.05(C). MDE will render a decision within 45 days of receipt of a complete phase II mitigation plan.

The USACE RIBITS website provides an up-to-date source of information on mitigation banks and ILF programs for bank sponsors and applicants. Information on mitigation banks in Maryland, including all major documents pertaining to the bank (e.g., prospectus and instrument), description of the bank, status of bank approval, service areas, available credits, and monitoring reports can be found on the USACE RIBITS website (<https://ribits.usace.army.mil/>).

## **7. Additional Resources**

The MDE Wetlands and Waterways Program Mitigation website (<http://mde.maryland.gov/programs/Water/WetlandsandWaterways/AboutWetlands/Pages/mitigation.aspx>) and the USACE Baltimore District Mitigation website (<http://www.nab.usace.army.mil/Missions/Regulatory/Mitigation.aspx>) also contain information on mitigation in Maryland.