

Request for Feedback on Methodology for Developing Maryland Nontidal Wetland In-Lieu Fee Rates

January 2017

I. Overview

The Maryland Department of the Environment (MDE) has been working on revisions to its nontidal wetlands compensatory mitigation regulations and in-lieu fee program over the past several years in order to improve consistency with the 2008 federal Compensatory Mitigation Rule. Improving consistency between MDE requirements and the federal requirements is a priority to reduce duplication in the permitting process and allow for a single in-lieu fee payment by permittees to meet both federal and State requirements for required mitigation, both leading to improved customer service.

Recently, in the Summer and Fall of 2016, MDE completed a series of outreach meetings to obtain stakeholder and public input on various policy issues associated with revising its nontidal compensatory mitigation and in lieu fee program. These meetings provided an excellent opportunity for MDE to discuss issues and obtain input and feedback on various options for revisions.

A key topic of discussion at the outreach meetings was the approach or methodology for setting new in-lieu fee rates. Based on comments received at the outreach meetings, MDE has developed a revised approach for setting in-lieu fee rates. This revised approach includes using real property values from tax assessment records and defining the geographic scope of applicable rates at a smaller geographic scale than Eastern vs. Western Maryland.

MDE is seeking feedback on the revised approach. Feedback should be directed to Kelly Neff at Kelly.Neff@maryland.gov.

II. Background

2008 Federal Mitigation Rule Requirements for ILF Rates

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 the service area where the mitigation is occurring. The costs must include 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 must also take into account contingency costs appropriate to the stage of project planning, including uncertainties in construction and real estate expenses and the resources necessary for the long-term management and protection of the in-lieu fee project. Finally, the cost must include financial assurances that are necessary to ensure successful completion of the projects.

Issues with existing MDE ILF rates

Maryland's existing ILF rates do not include the costs for many items required by the 2008 Federal Mitigation Rule: salary (time spent to find sites, review and manage projects, etc.), development of Prospectus/Mitigation Instrument, permitting (e.g., county grading permits, MDE/USACE permits, Notice of Intent permit, etc.), pre- and post-construction wetland delineations, as-built plans, easement holder costs, financial assurances, sufficient monitoring (monitoring was rarely done for past ILF projects), short-term maintenance/maintenance, remediation, long-term management/maintenance, or catastrophic event funds.

III. ILF Approach Vetted with Stakeholders and the Public in Summer/Fall 2016

MDE estimated new ILF rates that included cost estimates for all of the items required in the 2008 Federal Mitigation Rule and vetted these rates with stakeholders in the Summer/Fall 2016 as part of an outreach effort. They were developed by soliciting mitigation estimates from mitigation consultants, mitigation bankers, and state agencies. By Summer 2016, for nontidal wetlands MDE had received seven estimates, each broken down into cost for each task required by the 2008 Federal Mitigation Rule. Tasks included: 1) land cost, 2) design, engineering, approval (e.g., Prospectus/Mitigation Plan), surveying, permitting; 3) construction, planting, as-builts; 4) monitoring, maintenance, and remediation; 5) long-term management fund; and 6) catastrophic event fund. Additionally, MDE considered bids received in response to recent Request for Proposals (RFP) through the nontidal wetland grant partnership with Chesapeake Bay Trust (CBT). MDE used all of this and a 15% administration fee, to develop 2 potential ILF rates, one for the eastern part of the State (\$90K per acre) and one for the western part of the State (\$125K per acre).

IV. Summary of Stakeholder Feedback

MDE held three public meetings across the State and met with relevant stakeholder groups (e.g., mitigation consultants/mitigation bankers, developers, counties, agriculture, transportation, Department of Defense, utility companies, environmental groups, Interagency Review Team) in the Summer/Fall of 2016 to get feedback on the potential ILF rates (\$90K/acre for the eastern part of the State and \$125K for the western part of the State).

The majority of the stakeholders thought these ILF rates were too low, especially on the Western Shore. Many stakeholders were basing this feedback on personal experience (building or contracting others to build mitigation), with at least some of the higher cost being due to higher land values and mitigation construction costs on the western shore. There was concern that if the ILF rates were too low, mitigation would not be possible in the areas where the impacts actually occurred (e.g., urban areas), but instead mitigation would be completed in the "cheapest" areas of

Maryland. Stakeholders suggested we further divide the ILF rates (e.g., by HUCs) to better reflect the differences in mitigation cost throughout the State. They also suggested we use a better estimate for land value, since this varies greatly across the State. They wanted to be sure that whatever ILF rates were used, they were justified. Many stakeholders also suggested that if MDE wants to support a healthy mitigation banking community in Maryland, ILF rates must include all costs required by the mitigation bankers.

V. Revised Approach

The Geographic Scope

MDE proposes to divide the ILF rates by 8-digit HUCs (Appendix A). This will allow the rates to better reflect actual costs of doing mitigation in that area, while still being easy for an applicant to calculate and predict.

The Proposed Formula

(Land Value per acre in 8 Digit HUC where project is permitted) + (cost of mitigation tasks) + (easement holder costs) + (financial assurance costs) + (15% of total for administration for projects less than 1 acre or 30% of total for administration for projects greater than 1 acre) = in-lieu fee rate per acre for each federal 8 digit HUC.

a. How would MDE derive the land value per acre in 8 digit HUCs?

Using the residential land values from the Maryland Department of Planning tax assessment records, MDE would compile the median values for 12-digit State watersheds to get an average land value for each 8-digit Federal HUC (see Appendix B). (Although the Maryland Department of Planning also has land values for agricultural land and commercial land, MDE believes that of the three, residential land values are the most appropriate values to be used for the purpose of developing in-lieu fee rates.) Since there was a clear break in land values and physical location between the upper portion of the Middle Potomac Catoctin HUC, mostly within Frederick County, and the lower portion of the Middle Potomac Catoctin HUC, mostly within Montgomery County, MDE split this HUC into two distinct areas. MDE's future Service Areas will likely also reflect this split. Some HUCs were too small for accurate data analysis; so they were combined with adjacent larger HUCs. The Cheat HUC 05020004 was combined with the Youghiogheny HUC 05020006. The Brandywine-Christina HUC 02040205 was combined with the Chester-Sassafras HUC 02060002. While no permanent nontidal wetland impacts have occurred during the entire length of the Wetlands and Waterways Program (since 1991) within the Lower Chesapeake Bay or Upper Chesapeake Bay HUCs, if an impact does occur within one of these HUCs, ILF rates will be based on the cost of the HUC closest to the impacts.

b. How would MDE derive cost estimates for the mitigation tasks?

MDE will use input from knowledgeable stakeholders (e.g., bankers, consultants, and state agencies) implementing mitigation projects to obtain estimates of the costs associated with the following tasks: 1) site search; 2) design, engineering, approval, (e.g., Prospectus/Mitigation Plan), surveying, permitting; 3) construction, planting, and as-builts; 4) monitoring, maintenance, and remediation; 5) long-term management fund; 6) catastrophic event fund. When looking at the estimates, we will determine the average estimate for each task. This will allow us to still include costs for projects where we did not have prices for all tasks (e.g., some estimates just included construction/planting costs). MDE will also determine the average construction/planting cost for Eastern Shore projects, and use this for the construction/planting estimate for HUCs located on the Eastern Shore.

c. How would MDE derive cost estimates for easement holders?

This will be based on discussions with potential easement holders (e.g., Maryland Environmental Trust).

d. How would MDE derive cost estimates for financial assurance?

Mitigation bankers are required by the federal 2008 rule to provide a bond or other similar type of financial assurance. Additionally, MDE requires grantees receiving ILF funds through the Chesapeake Bay Trust Nontidal Wetland Grant program (using MDE ILF funds) to provide a bond for the entire cost of the project. Based on discussions with bankers, we would assume a 2.5% cost to hold the bond for each year, with the assumption that the bond would be held for one year.

e. Basis for Administrative Fee

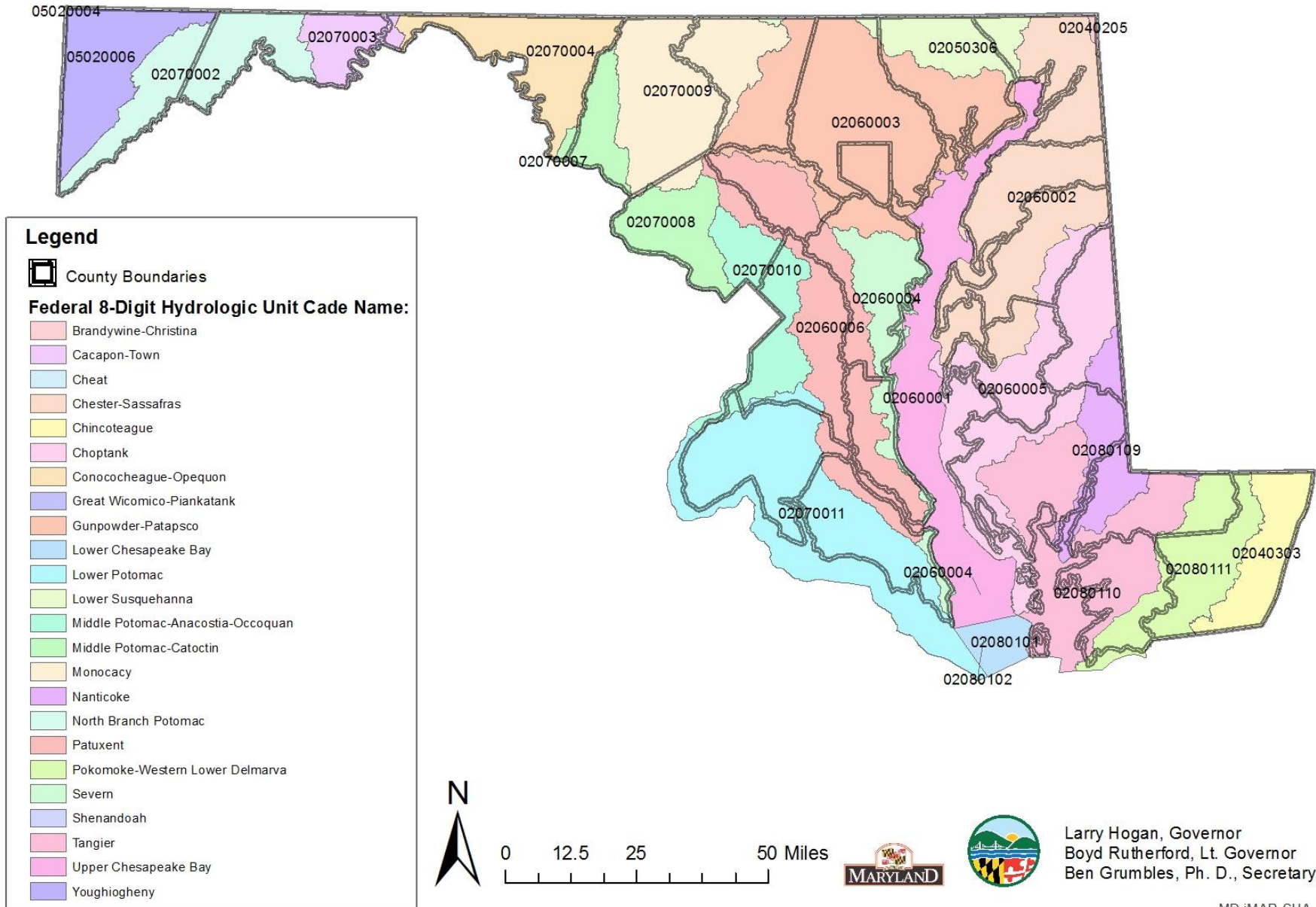
MDE proposes a 15% administrative fee for the ILF Program. This will include the cost for Chesapeake Bay Trust oversight, and MDE Mitigation Section training and equipment. *An additional administrative cost (e.g., 15%) is recommended for projects with impacts greater than one acre, to account for the additional staff time required to oversee these larger mitigation requirements.*

VI. Proposal for Future Updates to ILF Rates

It is important that ILF rates do not become stagnant in the future, but instead remain sufficient to provide mitigation that meets the Federal Mitigation Rule requirements. MDE recommends that ILF rates be evaluated and adjusted as appropriate every five years. For this reason, actual ILF rates are not envisioned to be in Maryland Regulations. However, Regulations will describe how and when these ILF rates will be developed and updated, allowing for public input during future revisions (e.g., Public Notice, etc.).

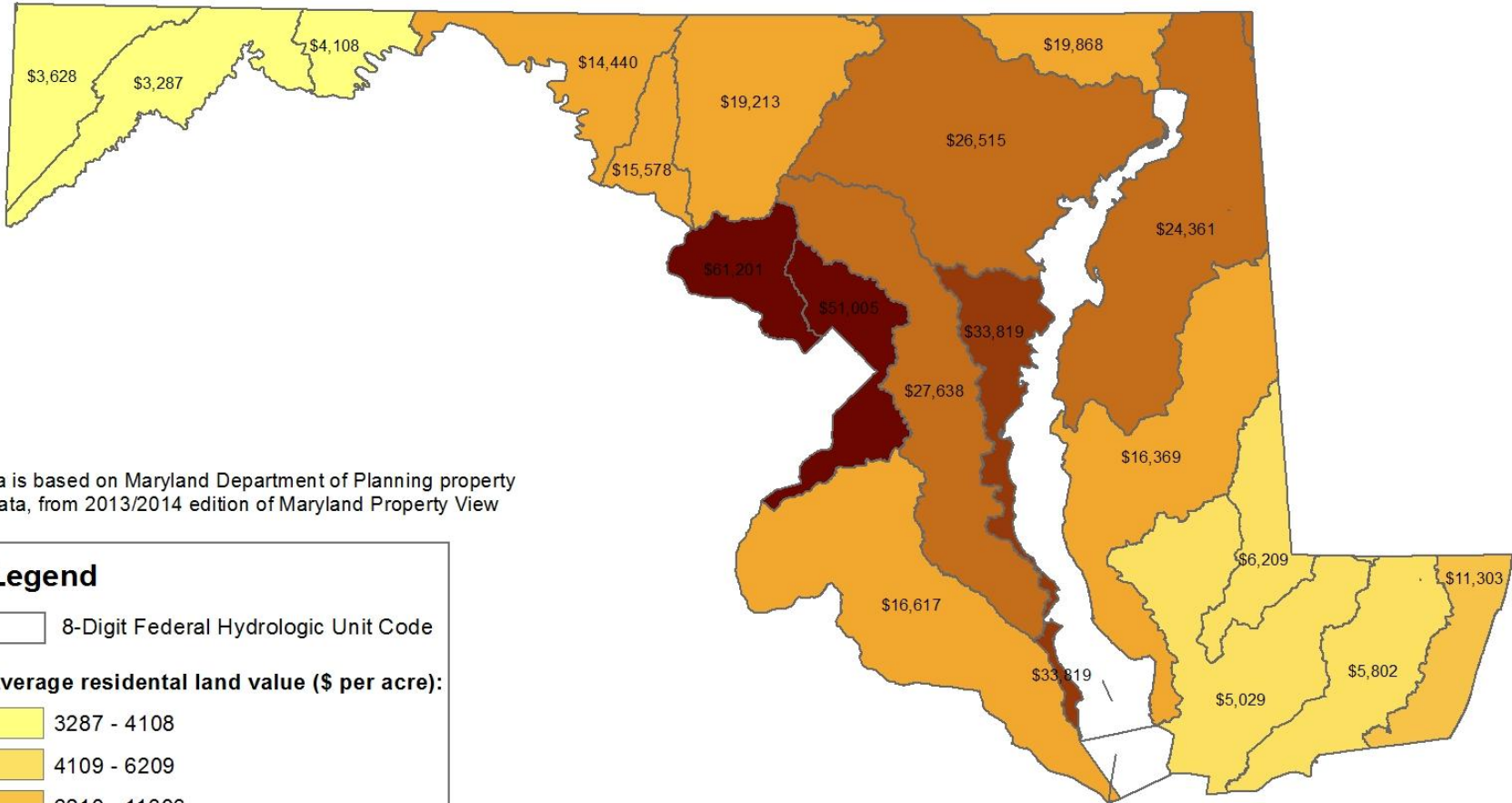
Appendix A

8-Digit Hydrologic Unit Codes within Maryland



Appendix B

Average Residential Land Value by Federal 8-Digit Hydrologic Unit Code



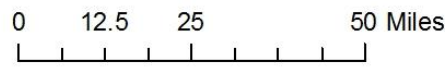
Data is based on Maryland Department of Planning property data, from 2013/2014 edition of Maryland Property View

Legend

8-Digit Federal Hydrologic Unit Code

Average residential land value (\$ per acre):

- 3287 - 4108
- 4109 - 6209
- 6210 - 11303
- 11304 - 19868
- 19869 - 27638
- 27639 - 33819
- 33820 - 61201



Larry Hogan, Governor
 Boyd Rutherford, Lt. Governor
 Ben Grumbles, Ph. D., Secretary