Outreach Meetings – Summary

Prior to revising the State's nontidal wetland mitigation regulations and increasing the MDE nontidal wetland mitigation in-lieu fee (ILF) rate, MDE conducted outreach to solicit stakeholder feedback. As part of the outreach effort, MDE met with several stakeholder groups and held public meetings across the state (in Hagerstown, Baltimore, and Cambridge). Feedback from this outreach is summarized below, and is sorted by topic. The group providing the feedback is noted at the end of each comment. Please note that these comments may not reflect opinions of all those at that stakeholder meeting, but these were the comments that were expressed.

MDE met with the following stakeholder groups:

Environmental/DNR = ENV
Public Meeting = PM
Agriculture = AG
Developers = DEV
Mitigation Bankers/Consultants= MIT
Maryland Association of Counties = MACO
Utilities/Department of Defense = UTIL/DOD
Transportation = TRANS

Feedback

General

- Most groups agreed that clarification and consistency with the USACE are goals everyone would support in regards to regulation changes.
- Tighten the language in the regulations to ensure that lost functions are adequately replaced by mitigation. Mitigation regulations should reiterate that avoidance and minimization need to be exhausted prior to defaulting to compensatory mitigation. Projects are often permitted without avoidance and minimization being exhausted. Mitigation requirements may help lead to further avoidance/minimization. Avoidance/minimization should be well documented. (ENV)

Mitigation Order of Preference

- Most groups want to encourage banking and want ILF to be an option. Banks and ILF can provide predictibility.
- Order of Preference
    - SHA supports the proposed order of preference. (TRANS)
    - Why is permittee-responsible mitigation the last option in the proposed order of preference? (PM)
    - It might help if permittee-responsible mitigation was set as the second option as long as they were held to the same standards as banks. (MIT)

    - Farmers will want to do permittee responsible mitigation on their own property because banks and the ILF program will be too expensive. (AG)
- Local/urban watersheds
    - There is a concern that wetland functions will be moved out of small local watersheds to banks and ILF sites. There should be enough flexibility to allow regulatory agencies to require mitigation in the local watershed and their priorities when there are opportunities (e.g., including for preservation). (ENV)
    - Focus on <u>functional</u> replacement for these developed areas. Small, "low functioning" wetlands in urban areas may be more important than large "high functioning" wetlands in more rural areas simply because they are the only resource left in the urban area. (ENV)
    - Consider "values", in addition to functions - (e.g., projects than allow for public access). (ENV)
- Differences in price between different options
    - Multiple parties expressed concern about potential price gouging by banks. Need "checks and balances" in areas where there is only one bank. (PM, AG, MIT, DEV)
    - The state should match the order of preference found in the federal mitigation rule and not worry about price gouging. The concern about price gouging hasn't been justified nationally. (MIT)
    - There should be some way to allow the use of ILF or permittee responsible mitigation over banks when it is demonstrated that a banker is price gouging. Could there be a cap that only lets bankers set credit prices a certain percentage over the established ILF rates? E.g. If bank is charging a certain % above ILF – part of justification for not using the bank. (DEV)
    - If we say "if bank costs are higher than x% above the ILF rates, the permittee has more justification for doing permittee-responsible site" may be good. However, ILF rates need to include all bank costs for this to be fair. (MIT)
    - Could the required order of preference factor in cost feasibility initially, while the banking industry is getting established? For example, phasing in this bank preference? (DEV)
    - Why have banks as first option if ILF is cheaper? (UTIL/DOD)
    - Bank credit costs may be higher (e.g., twice as much as the ILF rates) – we should be very clear that they still can't use the ILF. (MIT)
    - It is important for Banks and ILF to be held to the same standard, including Service Areas. If not applicants will petition to pay into the ILF due to lower rates. (MIT)
- "Environmentally preferable"
    - The option for "Environmentally Preferable" mitigation projects is good way to allow the flexibility to do a variety of good projects. (ENV)
    - Who will establish and decide on the "environmentally preferable" criteria? The criteria will be very important. Would have to be clear, but still allow MDE discretion to authorize good permittee-responsible mitigation projects. (PM, MIT, DEV)
    - Having predictability for mitigation review is paramount. Using banks to satisfy mitigation requirements should always be an option for applicants when available,

even if there is an "environmentally preferable" permittee-responsible mitigation project proposed by a resource or regulatory agency. (TRANS)

- If ILF is second option, should eliminate the requirement of a site search. (TRANS)

Mitigation Banks

- High land costs in Maryland are a factor that will likely inhibit the establishment of mitigation banks in the state. (ENV)
- If local mitigation options are limited, applicants should be allowed to mitigate 1:1 at a bank (including in the secondary service area) and do an out-of-kind mitigation project locally. (PM)
- SHA is very supportive of entrepreneurial mitigation banking in Maryland. SHA is currently having difficulty meeting project timelines while satisfying the requirements of the 2008 federal mitigation rule. Purchasing credits from banks would most likely save SHA money. MDE should be doing everything possible to incentivize banking (e.g. lowering mitigation replacement ratios since mitigation is often completed in advance at banks, increasing the size of service areas, and allowing a more aggressive credit release schedule). (TRANS)
- There was concern expressed over whether impacts to unique resources (e.g. Use III or IV) would be able to utilize credits at banks that didn't replace the resources. (TRANS)
- Bank Service Areas should be larger – these could be reduced in size as more banks develop. It would be helpful to be able to utilize any bank in the state when there isn't one servicing a given impact area. (UTIL/DOD)
- Very small mitigation requirements (e.g., 200 sf) – do bankers want these, or can they go into ILF Program instead? (IRT)

ILF Program

- Having an ILF program would be very helpful. It is difficult for DOD to make payments directly to bankers. (UTIL/DOD)
- Shouldn't set ILF as second unless can get more staff to manage. (MIT)
- Thresholds for impacts paying into the ILF Program
    - Raise or eliminate ILF thresholds. (TRANS, DEV)
    - If bank not available, may consider impact thresholds that would favor ILF for smaller impacts and PRM for larger impacts (e.g., NJ). (MIT)
    - An impact threshold for the ILF would be helpful to local groups who don't want a lot of mitigation to occur out of the local watershed. Lifting the threshold would be a mistake and may result in permitted projects and ILF projects going through a higher level of scrutiny by the conservation groups. (ENV)
    - We would recommend the use of a clear decision process for how to best replace the functions and values of the impacted wetlands. Both size and cumulative loss/ impact should be considered in the mitigation hierarchy to ensure that local functions are sustained and improved. The wetland type and primary functions of the impacted wetlands should determine the location for mitigation that will best serve to replace these functions. (ENV)
    - If take in more money, will need to subdivide ILF Service Areas faster. (IRT)

    - Several groups raised the issue - is there enough MDE staff to maintain a much larger ILF Program? May need to add "administrative fee" to ILF rate to support additional staff.
- ILF Program Operations
    - Partners
        - It may be possible to use transportation funding as seed money for ILF program. They may be able to partner with MDE – they predict impacts and fund, we can do ILF ahead of time. However, then project would be required to meet all federal requirements for the money (e.g., NEPA, etc.), so would be more expensive. (TRANS)
        - PEPCO would be willing to partner with MDE in some capacity to help achieve a successful ILF program. PEPCO has partnered with non-profits in the past to help achieve goals. (UTIL/DOD)
        - The Farm Bureau would be willing to promote the ILF Request for Proposal. (AG)
    - An ILF program taking money in for impacts prior to constructing the mitigation is undesirable because the mitigation could get delayed or never be completed. A higher ratio should be required for ILF programs, because they may be built later. (ENV)
- ILF site locations
    - Want ILFs to cover areas that don't have banks. (MIT)
    - ILF sites should be sited in watersheds without banks or in environmentally preferable areas/watersheds that may be purchased at much higher land cost so that valuable sites are not dropped just for "cost" reasons. (IRT)
    - ILF projects should be based on state conservation goals (existing targeting by conservation groups). (ENV)
    - ILF money should be available for preservation of high value wetland habitats. Also the preservation of upland coastal areas that will be wetland (i.e. coastal resiliency) should be considered – since many of these areas will become nontidal wetlands next. It is better to concentrate on conserving existing high-value wetland resources that are under threat than trying to construct man-made wetlands that may fail to replicate the natural functions. However, preservation should focus on high-value areas. (ENV)
    - The ILF program should go to non-profit organizations and land conservancies, and award money based on merit. (MIT, PM)
- MDE should have a high level of discussion with DNR about DNR managing ILF sites. (TRANS)

ILF Rates

- ILF rates should be high enough to encourage proper avoidance and minimization. (ENV)
- Proposed ILF rates:
    - Overall

        - The proposed ILF rates are too low. The ILF rates should be higher than what is proposed to better reflect the cost of actually putting mitigation in the ground. (TRANS, IRT, MIT, PM)
        - They often pay twice as much for mitigation. (TRANS)
        - Several ILF programs are currently failing since their rates were set too low (e.g. Tennessee and Kentucky). (MIT, PM)
        - The proposed ILF rate for the Eastern Shore looks good. The proposed ILF rate for the Western Shore, excluding Central MD, seems low. The proposed ILF rates need to be higher in Central MD due to higher land costs and lack of opportunity. $150,000 may be an appropriate ILF rate for Central MD. Routine evaluation/updates to the ILF rates will be very important, especially if the rates are initially set too low. (ENV)
        - It would be a good idea to set ILF rates higher than the expected rate because it is easier to lower the rate than to increase it. (MIT, TRANS)
        - Individual mitigation sites vary greatly, so it is very tough to determine a single ILF rate to cover all projects. (TRANS)
        - Developers are generally ok with the proposed ILF rate increase because they recognize the land value. (MIT)
        - ILF rates should be justified. (DEV)
    - Estimates
        - Consider more estimates in urban areas. (IRT, TRANS)
        - When looking at estimates from CBT projects, be sure to add land costs to estimates. (TRANS)
        - MDE should send developers and bankers the current estimates so that they can help fill in the gaps. Some of the cost estimates seem subjective (e.g., management/maintenance/remediation). (DEV)
    - In comparison to banks
        - Rates should be high enough that ILF doesn't compete with banks. (TRANS)
        - Should be much higher (e.g., 15-25%) than bank rates, as to not compete with banks. (IRT)
        - ILF rates can directly affect bank pricing. Bankers often will set their price at the ILF rates or just below. (DEV)
- Proposed ILF rate zones
    - It is not a good idea to have a universal ILF rate across the state because local land values vary greatly. ILF rates need to reflect the actual land costs across localities. The ILF rates should be set by geographic areas no larger than counties. Be sure the rates are high enough that can actually mitigate in the areas impacted, including more developed areas (e.g., South River). (ENV)
    - May want to add another higher ILF rate in urban areas. (IRT)
    - Defining the entire Western Shore as one single ILF rate zone, based on the land value disparity therein and highest demands occurring in highest land value zones, is an opportunity for negative feedback later. (MIT)
    - A watershed based approach to determining the ILF rate would be fundamentally flawed. Consider an approach to defining the ILF Rates based on land values. Basing rate on "$ to improvement" (MDP calculates) is worth investigating.

Then the rates would be more justifiable. Land value is the hardest element to get. (MIT)
    - Land values on the upper Eastern Shore are very different than land values on the lower Eastern Shore. (PM)
    - Setting ILF rates by 10-digit HUC (or smaller) may give a better representative value for local costs. County boundaries seem like too large of an area. But, if the ILF rates were based on a mean value across a county it should balance out. (PM)
    - May consider splitting ILF rate by major physiographic region, since much harder (more expensive to do work in some regions) – e.g., having the same rate for GA CO and HA CO may not be justified. (MIT, ENV)
    - Would rather ILF rates broken into larger areas (so predictable), rather than on a parcel level. (MIT)
- What should be included in cost?
    - Include all costs required by the bankers (e.g., all bond costs). Banks have added costs associated with credit release, financial assurances, etc. If ILF is too much lower than banks, applicant may successfully petition to pay into ILF instead of banks, since many parties that generate high impacts also have high amount of political power. It will also set bank prices too low, which is unsustainable (MIT)
    - Rates need to be adequate to cover mitigation and staff to implement, otherwise setting everyone up for failure. (MIT)
    - ILF rates should be based on the market. (PM)
    - ILF fund should also serve as a counter-balance if Mitigation Bank rates become overly "profit-centric" in the future. (MIT)
    - It is okay if ILF rates are a little higher than actual costs, as may help cover LOA losses. (MIT)
- ILF rates on case-by-case basis
    - The ILF rate burden could be shifted to applicants by setting a minimum rate and having applicants justify it on a case by case basis. (MIT)
    - May set rates high, then require applicant to justify lower ILF rate. (MIT)
    - Asking the permittee to discuss/propose ILF rate based on case-by-case (for their project, as done in NJ) is too unpredictable. (MIT)
- TNC has a mitigation cost estimator (especially for Long-Term Management). (IRT)
- ILF rate adjustments
    - In order to meet no net loss, the ILF rates should not be phased in, but the entire cost of the project should be paid from the start. (MIT)
    - Can there be an initial adjustment period (e.g. 5 years), where ILF rates are evaluated/adjusted based on actual costs, after which adjustments would be made based on the consumer price index?
    - A 4-5 year cycle for updating the ILF rates would be preferable to a 2 year or 10 year cycle. A 2 year cycle would make project planning too difficult. (MIT)
    - May want to say “will never raise or lower ILF more than x amount (e.g., 10%) during any update”, so more predictable. (IRT)
    - ILF rate adjustments should be tied to consumer price index. (UTIL/DOD)
    - When evaluating how to update ILF rates, may consider 2 different methods, so not stuck. (IRT)

Financial Assurances

- Banks are required to have financial assurances as well as having a credit release schedule to help ensure success. Permittee responsible mitigation only has financial assurances. Financial assurances are really important for mitigation success as documented in the federal mitigation rule. (MIT)
- Bond amount
    - Bond costs should be able to be reduced based on the likelihood of success for a given project (e.g. mitigation on hydric soils). Agricultural mitigation projects have historically been much more successful than non-agricultural mitigation, so farmers should not be penalized with stricter requirements and higher mitigation costs due to others' failures. (AG)
    - Farmers can often get mitigation done relatively cheaply due to available land, access to construction equipment, etc. The bond should be based on their actual costs, not on a third party. (AG)
    - Bonds - May want to include a 10% contingency (like counties do). (IRT)
- Bond timing
    - Not in favor of requiring bonds before permit issuance. (MIT)
    - It would be better not to have a mitigation bond required prior to permit issuance because there many other approvals that are contingent on the MDE permit that will take time to get. It would be a hassle (and expensive) to hold a bond while seeking these other approvals. (DEV)
    - Requiring bonds before permit issuance would help to ensure mitigation projects are completed. (PM)
    - Bonding mitigation projects through the whole ten year monitoring period will be very expensive, as bonds typically only cover a two year period of time (this argument was countered by mitigation bankers). (MIT)
- Public utilities should be treated similarly to government agencies in regards to financial assurances because, like government agencies, public utilities aren't going away. (UTIL/DOD)

Phase II mitigation plan

- Desire for flexibility with the timing of permit issuance in relation to mitigation approval. (TRANS)
- If they need Phase II mitigation plan approved earlier, may need to include a time limit for MDE review. (TRANS)
- Requirements should be relaxed on a case-by-case basis. (TRANS)

Monitoring

- It is almost impossible for DOD to fund monitoring period because project funding gets closed out prior to end of monitoring. (UTIL/DOD)
- Monitoring length
    - It should be written so that the longer monitoring period is optional, not required. (AG)

- Include option for reduced monitoring length requirements (if meeting Performance Standards). Success often can be determined within five years. Monitoring requirements affects project cost. (DEV, TRANS)

Next Steps

- Once draft language for the regulation changes are finalized they should be documented in a very easy to understand, non-technical document that is forwarded to the Farm Bureau so that we can educate farmers on the proposed changes. (AG)
- Many groups agreed that waterway mitigation should be worked on next. Waterways are important because many banks will propose both wetland and waterway credit. There are much more waterway impacts than tidal wetland impacts.

Other

- When credits are sold at banks, the online ledgers that are available to the public (RIBITS) are updated with project information (i.e. permit numbers). This process should be made very clear to the public and environmental groups. (ENV)
- There is a lot of competition between various programs for restoration sites to satisfy a number of different requirements. It would be nice to get more coordination between state agencies for picking the best restoration sites for the different programs. It would be ideal if a workgroup could be set up to go through areas on a watershed level. (ENV)
- AG lands are lost to development and then again to the mitigation required by development. We should try to prevent prime farm land from going into programs like the ILF and we should ensure that farmers are properly compensated when they do participate in these programs. (AG)
- IRT should work on other issues to help bankers (e.g., credit release, SOPs, performance standards, etc.). (MIT, TRANS, DEV)
- MDE should work with the IRT to help reduce the cost of mitigation. (MACO)
- Time limit for temporary impacts – Corps is working on determining this as part of the GP-5 (IRT)