



**US Army Corps
of Engineers®**
New England District

PUBLIC NOTICE

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CORPS CONSIDERS IN LIEU FEE PROGRAM WITH MASSACHUSETTS

The New England District, Corps of Engineers, is proposing to enter into a Memorandum of Understanding with the Massachusetts Department of Fish and Game, Division of Marine Fisheries (DMF) to establish a program of fees in lieu of on-site mitigation for minor impact to Essential Fish Habitat (EFH).

The In-Lieu Fee (ILF) program will be implemented by a Memorandum of Understanding (MOU) between the Corps and DMF. The MOU is consistent with the "Federal Guidance on the Use of In-Lieu Fee Arrangements for Compensatory Mitigation Under Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act" (65 FR 66914, November 7, 2000). Oversight of the ILF program will be the responsibility of the Corps and DMF.

A draft of the MOU is attached.

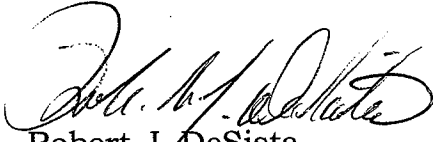
In-Lieu Fee (ILF) mitigation will occur in circumstances where a permittee is required to compensate for the functions and values of Essential Fish Habitat lost as a result of the Corps authorization to conduct work in waters of the United States after all efforts are made to avoid and minimize impacts. Recipients of permits or authorizations for projects in the Commonwealth of Massachusetts may be eligible to use the ILF program to satisfy mitigation requirements of the Corps' Massachusetts Programmatic General Permit (MA PGP). ILF is an option available to the applicant where project specific mitigation is not available or is not expected to be successful. Use of the ILF program for specific projects is contingent on Corps approval.

The ILF program will collect fees which will be deposited in DMF's expendable Trust and which will be used for the restoration, creation, enhancement, and preservation of EFH resources within the waters of Massachusetts. The program will provide compensation for lost EFH functions and values that result from activities authorized under the MA PGP. Appropriate mitigation projects will be recommended to the Corps for approval by a Steering Committee chaired by DMF.

The fee in-lieu of project-specific mitigation will be determined by the Corps in consultation with the Steering Committee and appropriate Federal and State agencies. The permit will state the amount of the fee to be paid before the permit is valid.

On March 28, 2006, the Department of the Army and the U.S. Environmental Protection Agency (EPA) published in the Federal Register a draft rule pertaining to Compensatory Mitigation for Losses of Aquatic Resources. When the final rule is published, this MOU will be reevaluated to ensure consistency.

The Corps of Engineers is soliciting comments and will consider all received from the public; Federal, state, and local agencies and officials; Indian Tribes; and other interested parties in order to consider and evaluate the impacts of this proposed activity.



Robert J. DeSista
Chief, Regulatory Division

If you would prefer not to continue receiving Public Notices, please contact Ms. Tina Chaisson at (978) 318-8058 or e-mail her at bettina.m.chaisson@usace.army.mil. You may also check here () and return this portion of the Public Notice to: Bettina Chaisson, Regulatory Division, U.S. Army Corps of Engineers, 696 Virginia Road, Concord, MA 01742-2751.

NAME: _____
ADDRESS: _____

**Memorandum of Understanding
Between
MA Department of Fish and Game
Division of Marine Fisheries
and
US Army Corps of Engineers, New England District**

I. Purpose: The purpose of this Memorandum Of Understanding (MOU) is to establish the procedures and guidelines for in-lieu fee compensatory mitigation for permits issued by the U.S. Army Corps of Engineers ("Corps"), in the Commonwealth of Massachusetts under Section 10 of the Rivers and Harbors Act of 1899 ("Section 10") (33 U.S.C. § 403) and Section 404 of the Clean Water Act ("CWA") (33 U.S.C. § 1344). This MOU is intended to provide a framework for compensatory mitigation for authorized impacts to aquatic resources, in particular impacts to Essential Fish Habitat ("EFH") as determined under the Magnusson-Stevens Fisheries and Conservation Act (16 U.S.C. § 1801 *et seq.*) and aquatic fish and shellfish habitat in Massachusetts, by allowing permittees to provide fee payments in lieu of on-site mitigation to the *Commonwealth of Massachusetts's Marine Mammals and Fisheries Research and Conservation Trust, dated April 10, 2001* (the "DMF Trust" or "Trust") as required compensatory mitigation in circumstances considered appropriate by the Corps, in consultation with Federal and State review agencies. The Trust is an expendable trust account established by the Commonwealth pursuant to M.G.L. c. 6A, s.6 and 801 CMR 50.00 and is administered by Massachusetts Division of Marine Fisheries ("DMF"). Payment of in-lieu fees will be available as a means of compensatory mitigation for certain permitted projects that the Corps and Federal and State review agencies determine appropriate. In-lieu fees paid into the Trust will be used by DMF to implement projects that will create, enhance, or restore aquatic habitat. This MOU is an agreement between the Corps, the Massachusetts Department of Fish and Game ("DFG"), an agency of the Commonwealth of Massachusetts, established pursuant to M.G.L. c. 21A, s.8, and DMF, a division within DFG established pursuant to M.G.L. c. 21A, s.8 and M.G.L. c. 130. This MOU is not intended, nor can it be relied upon, to create any rights or a cause of action for third parties against the United States.

II. A. Authority: The Secretary of the Army has delegated authority to the Corps to administer the permitting programs under Section 404 of the CWA and Section 10 of the Rivers and Harbors Act. Corps regulations allow the conditioning of permits, 33 C.F.R. § 325.4, to address mitigation of impacts to aquatic resources. The Corps, the U.S. Environmental Protection Agency, the National Oceanic and Atmospheric Administration, and U.S. Fish and Wildlife Service issued guidance in October, 2000 on the use of in-lieu fee arrangements as compensatory mitigation, *Federal Guidance on the Use of In Lieu Fee Arrangements for Compensatory Mitigation under Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act (the "In-Lieu Guidance")*. The In-Lieu Guidance states that the Corps "may find circumstances where such arrangements are appropriate so long as they meet the requirements that would otherwise apply to an off-site, prospective mitigation effort and provides adequate assurances of success and timely implementation."

B. DFG has authority, pursuant to M.G.L.c. 21A, s.8, to manage and protect the Commonwealth's wildlife and their habitats, including in the area of marine fisheries through DMF. DMF, in turn, has the authority and responsibility under M.G.L. c. 130 § 17 for the development and stewardship of marine fisheries resources, habitat, and harvest. DMF's fisheries management activities are performed through a long-standing strategic partnership with the National Marine Fisheries Service and extensive involvement with the New England and Mid-Atlantic Regional Fishery Management Councils, the Atlantic States Marine Fisheries Commission, and the Massachusetts Marine Fisheries Advisory Commission. DMF has previously established the above referenced Trust, which is authorized to accept contributions from private parties as well as federal, state, and local governmental entities. Among the purposes for which monies deposited into the Trust may be used is for "conservation programs and initiatives" and for "programs for protecting, benefiting and improving marine mammals and fisheries management in Massachusetts." DMF is an experienced administrator of compensatory mitigation projects, including, most recently, implementing a number of compensatory mitigation projects using mitigation funds deposited into the Trust associated with the Hubline project. For these reasons, the Corps has determined that DMF is a qualified organization within the meaning of the In-Lieu Guidance.

III. A. In-lieu Fee Program: In-lieu fee mitigation is a program where funds are paid by a permittee to a natural resource management entity for implementation of aquatic resource development projects undertaken as mitigation for the permittee's authorized impacts to aquatic resources, instead of completing on-site mitigation. The Corps, in consultation with State and Federal agencies, may find circumstances where in-lieu fee arrangements are appropriate so long as they meet the requirements of an off-site, prospective mitigation effort and provide adequate assurances of success and timely implementation.

B. Through this MOU, the Corps will partner with DMF to create an in-lieu fee program to provide alternative compensatory mitigation for authorized impacts to EFH and aquatic fish and shellfish habitat. Payment of in-lieu fees may be available as a means of compensatory mitigation for certain permitted projects that meet the criteria for the Massachusetts Programmatic General Permit (MA PGP, NAE-2004-2594), and in some instances where a permitted project does not meet all criteria of the MA PGP but the impacts on aquatic resources are within the applicable size (square footage) limits of the MA PGP. In-lieu fees may also be used in the resolution of unauthorized activities as agreed upon by the Corps and Federal and State review agencies, where impacts on aquatic resources are within the applicable size (square footage) limits of the MA PGP.

C. As provided in the In-Lieu fee Guidance and this MOU, the use of in-lieu fees for compensatory mitigation shall occur only after the relevant permitted activity has complied with State and Federal regulations and policies regarding avoidance and minimization of impacts resulting from the permitted activity. The in-lieu fee option for aquatic resource mitigation is only allowed after permittee-responsible mitigation options are considered and are deemed infeasible or less environmentally beneficial in the effort to address the loss of the aquatic functions and values.

IV. A. Program Operation: Projects for which in-lieu fees are considered will be reviewed and permitted in accordance with applicable State and Federal regulations and procedures. Corps permits for which in-lieu fees are used as compensatory mitigation will include a condition requiring payment of appropriate fees to the Trust. The condition will state that no work may be done under the permit until the Corps has received written verification from DMF that the required in-lieu fee has been deposited in the Trust account.

B. Initially, the Corps will determine fees per square foot of impact based on the experience of DMF and the Corps in constructing compensatory EFH habitat creation and restoration projects. Fees may be adjusted annually based on experience and changes in costs of project implementation.

C. DMF will aggregate the in-lieu fee payments deposited into the Trust pursuant to this MOU to maximize the size and/or quality of mitigation sites and projects available for restoration, preservation or creation. DMF will spend such funds on mitigation projects that provide the greatest potential to replace or protect aquatic resources, functions, and values, including EFH and aquatic fish and shellfish habitat, that are adversely impacted, specifically or cumulatively, by projects permitted by the Corps for which in-lieu fees serve as mitigation.

D. DMF will establish a Steering Committee for the Trust which evaluates impacts to fisheries, prioritizes and evaluates proposed mitigation projects, oversees DMF's implementation of the projects, and conducts program monitoring. Members of the in-lieu fee Steering Committee will, at a minimum, include representatives of the Corps, DMF, NMFS, with DMF serving as Chair.

E. The Steering Committee will:

- identify the species and habitat types generally impacted by activities permitted by the Corps for which in-lieu fees have been paid;
- identify specific projects that will mitigate impacts from activities permitted by the Corps for which in-lieu fees are paid;
- based on DMF's experience in constructing similar projects, advise the Corps as to the cost that would have been incurred if the same type and area of habitat were constructed on site;
- establish a ratio of impacted to constructed habitat sufficient to improve the likelihood of successful habitat creation consistent with State and Federal compensatory mitigation guidance;
- subject to the Corps' approval, develop a schedule of in-lieu fee payments for authorized impacts eligible for participation in this program; and
- as part of DMF's annual report, advise the Corps as to appropriate adjustments to in-lieu fees based on the implementation costs of mitigation projects constructed,

F. When sufficient in-lieu fee payments have been made to the Trust, but no later than two years after the first deposit is made, the Steering Committee will notify the Corps that it is proposing that DMF implement a mitigation project in accordance with the provisions of this MOU using in-lieu fee funds that have been collected. The Steering Committee may propose

the use of in-lieu fees in conjunction with other funds held in the Trust to accomplish a mitigation project. Steering Committee recommended project proposals will be presented to the Corps for approval, and until the Corps provides written approval of the proposed project, no in-lieu fees contained in the Trust can be disbursed for use for a mitigation project. Prior to Corps approval, the Corps will review all projects involving restoration, creation, and/or enhancement using the current Corps mitigation guidance.

G. Mitigation projects must take into consideration the impacts to aquatic resources to be mitigated, site suitability, baseline condition of the sites, the maximum return on expended funds, benefits to aquatic resources, the location and status of other mitigation projects, and an acceptable plan and budget. As closely as possible, the proposed project will be constructed in an area with habitat values similar to the habitat impacts that generated the in-lieu fees, the primary division being aquatic resource areas north and south of Cape Cod.

H. DMF accepts legal responsibility for the implementation of the projects selected by the Steering Committee and approved by the Corps, including the satisfaction of mitigation terms associated with such projects. In-lieu fee project costs that are eligible for funding under this MOU include costs associated with accomplishment of mitigation projects including, but not limited to labor, site acquisition as appropriate, appraisals, surveys, project design, project permitting, project management, monitoring, stewardship, legal, closing, equipment, and materials necessary to accomplish mitigation and monitoring. Primary considerations in all mitigation project proposals and approval decisions shall be the benefit to the aquatic resources of Massachusetts and the most cost effective approach to accomplishment of mitigation projects. For the purposes of this MOU, "cost effective" shall mean a project implementation approach that obtains the largest environmental benefit associated with the lowest administrative costs. For purposes of this MOU, "administrative costs" shall mean costs associated with development, implementation, monitoring, and oversight of mitigation projects undertaken in accordance with this MOU, as further specified in Section VI ("Administrative Overhead"). All in-lieu fee funds shall be expended solely for the accomplishment of compensatory mitigation projects and related administrative costs as described herein, and no funds may be expended except as provided for in this MOU.

I. Mitigation projects proposed by the Steering Committee to the Corps will include a project-specific narrative for Trust-funded proposals with a description of the proposed project and site-specific plan including the location, baseline conditions, kind of compensation to be provided, a schedule for conducting the project, monitoring and maintenance provisions, provisions for protection of the site and project in the form of a MGL c. 91 Waterways license for the project, and performance standards for determining ecological success of mitigation sites. In addition, funds will be withheld by DMF for remedial measures (e.g., contingency fund) until DMF and the Corps deem the mitigation construction site successful. DMF may require a performance bond of its contractors to ensure the construction is completed as proposed. DMF may implement a portion or all of a funded project on its own, and/or oversee the implementation of a funded project using contractors. In the latter case, the contract will be procured by DMF in accordance with the

Commonwealth's contracting requirements, and include a description of the timing of payments for work described in the contract.

J. A summary of deposits, by State fiscal year, made into the Trust, projects funded and impacts mitigated tracked by DMF, will be reported to the Corps and State and Federal regulatory agencies no later than September 30 of the following State fiscal year, and will be available on the DMF and Corps mitigation web page for public review.

- V. **Use of the Trust as Compensatory Mitigation by Corps:** This MOU acknowledges that Corps permittees can propose to use the Trust as an alternative to permittee-responsible compensatory mitigation when the Corps determines, taking into account input from the Federal resource agencies, that it is more ecologically beneficial. When a payment to the Trust is the accepted form of compensatory mitigation, it will be included in a special condition of the Section 10/404 permit. The permittee will be required to provide the Trust payment before permitted work can commence.
- VI. **Financial Controls:** All funds received by DMF pursuant to this MOU shall be deposited in and administered in accordance with the Trust. The DMF shall account for in-lieu fee funds held, in accordance with generally accepted accounting principles, and the account shall be subject to audit. Interest earned by the Trust shall remain with the Trust. In-lieu fees paid into the Trust may be used in combination with other Trust monies if, and only if, doing so will further the goals of this MOU.
- VII. **Administrative Overhead:** DMF shall receive compensation from in-lieu fees deposited in the Trust for costs associated with development, implementation, monitoring, and oversight of mitigation projects undertaken in accordance with this MOU, including for salaries and overhead costs for DFG or DMF staff, whether regular payroll or overtime expenses, and for any salary-related charges assessed DFG or DMF by the Commonwealth's Office of the State Comptroller. The compensation is deemed to represent and reimburse reasonable overhead and related administrative costs of administering the fund to accomplish the mitigation projects.
- VIII. **Time Constraints:** If more than two years pass from the date of receipt of funds and the funds have not been allocated, or no proposals for the funds meet the eligibility criteria, DMF, with concurrence of the Corps, may extend the disbursement date for up to another two years. Funds that remain in the Trust after the projects have been selected for funding shall be carried over for the next project selection cycle.
- IX. **Good Faith:** The parties hereto agree that both shall exercise their rights and obligations in good faith as contained in this MOU.
- X. **Reports:** A primary goal of the in-lieu fee program is to play an important role in meeting No Net Loss of aquatic functions and values. To that end, the Corps will review data provided by DMF to ensure aquatic resource impacts are matched with sufficient compensatory mitigation in the form of restoration and creation to meet national standards. DMF will report to the Corps on a calendar year basis with the location and amount of EFH

impacts, and information on the functions lost through permitted impacts. More specifically, DMF's annual report to the Corps will include the following information:

1. The permitted aquatic resource impacts that provided payment into the Trust to complete their mitigation requirements, including:
 - permit number (State and Corps permit numbers);
 - date permit/authorization issued;
 - acreage by aquatic resource type(s), functions and values lost by the project;
 - location/town; and
 - date of payment amount deposited into the Trust.

2. The description of projects receiving Trust funds with the following details:
 - a description of each project funded and information on the progress or completion of those projects;
 - acreage and type(s) of aquatic resources restored, created, or otherwise protected;
 - the success of the project based on performance standards developed by DMF for the specific project;
 - mitigation type(s);
 - location;
 - costs;
 - fee and/or easement holder;
 - date acquired; and
 - date construction completed (if applicable);
 - status of monitoring;
 - status of financial assurances
 - status and costs of other EFH mitigation projects implemented with Trust funds..

The reports will be made available to the public through the issuance by the Corps of a Public Notice and posting on the Corps website (www.nae.usace.army.mil).

- XI. **Amendment and Termination:** The parties hereto agree that each shall exercise their rights and obligations in good faith as contained in this MOU. Any party may terminate this MOU by giving ninety (90) days written notice to the other party. Amendments require written approval by DFG, DMF and the Corps. Prior to termination, DMF shall provide an accounting of in-lieu fee funds held and disbursed in the Trust, and shall complete payment on contracts for projects approved by the Corps with in-lieu fee funds held in the Trust, in the proper proportion as to the total cost of the project and the amount of in-lieu fee funds that had been authorized for expenditure by the Corps. Upon termination of this MOU, after payment of all outstanding obligations as provided herein, the remaining funds shall be paid as determined by the Corps, in consultation with DMF.

- XII. **Expiration of MOU:** This MOU expires on 31 January 2015. Prior to the expiration, the Corps will determine, in consultation with DMF, the efficacy of the in-lieu fee program established by this MOU and whether to extend the term of this MOU.

This MOU is acknowledged this _____ day of _____, 2008.

U.S. ARMY CORPS OF ENGINEERS, NEW ENGLAND DISTRICT

COL Curtis L. Thalken
District Engineer

DATE

COMMONWEALTH OF MASSACHUSETTS

Mary Griffin
Commissioner, MA Department of Fish and Game

DATE

Paul Diodati
Director, MA Division of Marine Fisheries

DATE

DRAFT