

poor), then the functions that support, or are supported by, that structure are also deemed to be good (or poor) for that wetland class, relative to reference sites. Condition-based assessment tools, such as an IBI, offer an alternative to functional measures in assessing whether a wetland of equivalent condition and function to the one lost has been replaced through the mitigation process.

As an example, the Ohio Environmental Protection Agency (OEPA) has been using measures of condition to ensure ecological parity and functional replacement in both their regulatory program, and as a tool for the ambient assessment of wetlands in the state. This is a model of how to operationalize this approach including determination of mitigation ratios (see reports by the OEPA; see <http://www.epa.state.oh.us/dsw/wetlands/WetlandEcologySection.aspx>). Ultimately, if the mitigation wetland that results is of the same HGM class and vegetation type, which by definition perform the same functions as the impacted site, and if there is a no net loss of acres, and if its condition is equivalent to or higher than the impacted wetland, there is a high likelihood that functional replacement has occurred, and that the overall status of the wetland resources has been protected.

The choice of which approach to use depends, of course, on the goals of the assessment program. If the goal is to track replacement of a specific rate of ecosystem function, a functional assessment might be used. If the program goal is to evaluate the overall performance of wetland mitigation projects or programs in a state or region, condition-based approaches may be employed. For example, condition assessment can be combined with probabilistic sampling of a population of natural wetlands (both reference standard and reference wetlands) and compared with a sample of mitigation wetlands. This will help with the establishment of mitigation performance standards that best reflect reference condition in a region and that can inform decisions about the ecological suitability of proposed mitigation sites. ■

-Siobhan Fennessy,  
Professor of Biology, Kenyon College

## INTERAGENCY REVIEW TEAMS

# Post-Mitigation Rule IRTs in New England: Overseeing Transitions From Pre-Rule to Rule-Compliant In-Lieu Fee Programs

The New England District of the U.S. Army Corps of Engineers (the Corps) covers six states, which offers both opportunities for learning and challenges for overseeing six different approaches to aquatic resources. The advantage is that we can learn from the experiences with mitigation in one state when dealing with the other states, but the disadvantage is that all six states have different laws related to aquatic resources and mitigation. Also, we have just one region of the U.S. Environmental Protection Agency (EPA), the U.S. Fish and Wildlife Service (FWS), and the National Marine Fisheries Service (NMFS) with whom to coordinate, so there is much overlap between the federal members of the Interagency Review Teams (IRTs).

The region differs from much of the rest of the country in that we have no approved mitigation banks, and only one department of transportation (DOT) umbrella bank in process. However, we have fairly new (early 2008), but active, in-lieu fee (ILF) programs in three states, one just approved in January 2011, and discussions on ILF program establishment in two others.

Maine, Massachusetts, and New Hampshire established ILF programs that pre-date the 2008 Mitigation Rule. As a result, all are in the process of developing Mitigation Rule-compliant programs with varying challenges to address. The Association of State Wetland Managers has set up a monthly conference call for states across the country developing compliant programs; this has proven to be a good forum in which to share frustrations, confusion, and potential solutions. For these three New England states, there are several important components of becoming compliant: establish formal IRTs; develop com-

prehensive planning frameworks (CPFs); determine advance credits; and incorporate the best of the existing programs while following the Mitigation Rule.

*Revise the ILF instrument to establish formal IRTs (33 C.F.R. §§332.2 and 332.8(b)(2,4,5):* The Mitigation Rule requires the District Engineer to approve all ILF and mitigation banking decisions, meaning that compliant instruments must afford the Corps veto power over proposed ILF mitigation sites. In New Hampshire, the Corps and EPA have been the only federal agencies actively involved in the ILF program, and the Corps already must approve all projects selected for funding, as must the state's Wetland Council. While the formal IRT to review the proposed new instrument will include the FWS and the NMFS, these agencies have limited staff resources and would generally have to limit involvement to reading e-mails. The state will also need to decide if it would like participation of state resources agencies on the IRT, since some are already on the site selection committee, which selects projects to recommend for funding.

In Maine, the existing program does not specifically reference an IRT naming the federal and state agencies involved and their roles, but there is an IRT for the pending DOT umbrella bank comprised of the Corps, EPA, the FWS, the NMFS, the Maine Department of Environmental Protection (MEDEP), the Maine Department of Inland Fisheries and Wildlife, and the Maine Land Use Regulatory Commission. The Corps plans to use this IRT with the ILF program, except for the MEDEP, which is the sponsor of the ILF program.

The Massachusetts program, sponsored by the Massachusetts Department of Marine Fisheries (MADMF), is specifically for

work in tidal waters. The only federal agencies currently on their steering committee are the Corps and the NMFS. The Corps is accorded no special status. The IRT to review a draft instrument would include the Corps, EPA, the FWS, the Massachusetts Coastal Zone Management Program, the Massachusetts Department of Environmental Protection, and the NMFS, with the Corps as chair or co-chair and holding veto power over proposed projects.

**“The underlying lesson learned so far from working with all three states is that communication is critical: between the Corps and the IRT; between the state and the Corps/IRT; between the states themselves for information sharing; and with other interested parties, such as other state agencies.”**

*Develop CPFs that are used to select, secure, and implement ecologically meaningful compensation in an ILF program (33 C.F.R. 332.8(c)):* Both Maine and New Hampshire have the challenge of running programs where they grant funds to other governmental or nonprofit entities for projects, so they have limited control over what is submitted. With the support of the IRT, EPA especially, both states developed project scoring to give more credit to projects that: are in Beginning With Habitat areas (Maine only); in the Fish & Game Wildlife Action Plan (New Hampshire only); are adjacent to other protected lands; provide habitat connectivity; include exemplary natural communities; compensate for functions lost to impacts in the service area; or include restoration and/or enhancement. Both states have done outreach to potential grant applicants to educate them about the program and what makes for a good project. It should be noted that it is very difficult to find quality restoration sites with adequate buffers in New England. As a result, many proposals come in for preservation-only. The CPFs will emphasize the importance of gaining functions, not just protecting them, but the IRTs recognize the challenges.

*Determine advance credits that are available for sale prior to compensation work being initiated (33 C.F.R. §332.2):* All states struggle with this concept and how to include it in an ILF program. The Corps has recommended that the credits be based on the previous 3-5 years of permitted impacts, with a minimum number of credits for every service area. The IRTs have no interest in having any of the New England ILF programs running out of advance

credits, and then having to turn permit applicants down, since permittee-responsible mitigation is the only alternative.

*Incorporate the best of the existing programs while following the Mitigation Rule:* Both the Maine and New Hampshire programs are currently working very well, with good procedures for soliciting, reviewing, and recommending projects for funding, and providing good oversight on the release of funds as milestones are met. The IRTs want to keep these processes, yet ensure that the items above, plus some program-specific issues, are appropriately addressed to ensure compliance.

One of the processes that will be kept, but will require some changes, is Maine's review process for mitigation projects. The state contracts with The Nature Conservancy (TNC) to run their ILF program. TNC puts out an annual request for summaries of project proposals. The summaries are then reviewed with the MEDEP and the Corps to determine if any are ineligible for the program, e.g., are only for educational programs or are proposed as a non-federal match for some federal programs, etc. Those that pass this initial screening are invited to submit full proposals. A review committee comprised of the Corps,

six state agencies (including the DOT), two nonprofits, and TNC (ex-officio) meets twice to discuss the proposals. This enables grant applicants to answer questions and provide clarifications. The committee ranks the proposals using an agreed-upon set of categories and scoring protocol and recommends the amount to be paid by the Maine Natural Resources Conservation Program: full amount; a partial payment; or no payment. These recommendations are then provided to an approval committee comprised of three state agencies and three federal agencies (the Corps, EPA, and the FWS) and chaired by the Commissioner of the MEDEP who only votes to break ties. Currently, the Corps does *not* have veto power and there is no official IRT for the program yet, but there also has been no disagreement by the Corps with the vote to date, and only one disagreement by EPA and the FWS. This multi-step process has been very effective, but will need some changes on the approval process.

By contrast, the Massachusetts program has some major issues, such as the limitations for use to general permits, which must be addressed. However, there is recognition that MADMF is the best entity to provide quality compensation for coastal resources, and the agency is interested in maintaining sponsorship, and will be working to develop a compliant instrument.

The underlying lesson learned so far from working with all three states is that communication is critical: between the Corps and the IRT; between the state and the Corps/IRT; between the states themselves for information-sharing; and with other interested parties, such as other state agencies. Within the IRT, communication is essential to end up with the best programs possible and to avoid the delays that would result should a member object to an instrument and resort to the dispute resolution process (33 C.F.R. §332.8(e)). ■

*-Ruth M. Ladd, Chief, Policy Analysis & Technical Support Branch, New England District, U.S. Army Corps of Engineers*

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