



VIA E-MAIL

October 31, 2012

Ms. Ruth M. Ladd
U.S. Army Corps of Engineers
New England District
696 Virginia Road
Concord, MA 01742-2751

Re: Comments on “Prospectus for a State-wide In-Lieu Fee Program Administered by the Massachusetts Department of Fish and Game, September 26, 2012,” File No. NAE-2007-2926

Dear Ms. Ladd:

On behalf of the Association to Preserve Cape Cod (APCC), I am providing the following comments regarding the proposed state in-lieu fee mitigation program for wetland and aquatic habitat. APCC is an environmental non-profit organization whose mission is to protect, preserve and restore the natural resources of Cape Cod. We are a Cape-wide organization with more than 5,500 members from every town on Cape Cod.

Comments:

The proposed In-Lieu Fee Program (ILFP) offers the following potential benefits:

- 1) Compared to the 2008 Memorandum of Understanding, it offers a more holistic, regional and watershed-based approach to selecting projects where ILFP funds will be used based on impacts, needs, threats and other factors specified in pages 6-12 (Section IV-1 to IV-5).
- 2) A prioritization strategy is proposed (p. 14-16) which takes into account the restoration project’s likelihood of success and ability to meet multiple mitigation objectives, prioritizes mitigation projects in the same service area as the permitted impacts, supports broader regional conservation and management initiatives, and considers the cost of implementing and maintaining the project (Section IV-6).
- 3) The ILFP would be administered and implemented by state agencies (DFG, including DMF, DER and DFW) with proven experience and technical expertise in managing and administering successful restoration and protection projects (Section II).
- 4) The ILFP would continue to pool mitigation funds to spend on projects which offer the most benefits and cost-effectiveness (Section I, V).

- 5) Land preservation would be the predominant component of the ILFP strategy (Section IV-9).

Notwithstanding the above benefits, APCC has concerns regarding the proposed program. APCC recognizes that the state program represents the implementation of the federal in-lieu fee mitigation program described in 33 CFR Part 332, “Compensatory Mitigation for Losses of Wetland Habitat, FR Vol. 73, No. 70, April 10, 2008), aka “the 2008 rule.” The purpose of the federal program is to offset unavoidable impacts to the waters of the United States. Our concerns relating to the proposed program include the following:

- 6) ILFP mitigation fees represent lost wetland and aquatic habitat that was permitted to occur. This is poor environmental and economic policy, for reasons given below.
- 7) Mitigation and restoration of impacted wetland habitat frequently do not result in the same quality of habitat that existed prior to impact (Moreno-Mateos et al., 2012).
- 8) The state’s proposed ILFP is based on the federal policy of “no net loss of wetlands.” While we might argue whether “no net loss” is a successful policy in terms of ensuring no net loss of wetland type, area and wetland services such as ecological functions, flood control, storm damage prevention, water supply protection, etc., a more proactive approach is overdue. Wetlands and aquatic habitat provide such critically important ecological and environmental services that national and state policies should promote “net gain of wetlands.” The proposed ILFP must go beyond “no net loss of wetlands” and promote “net gain of wetlands” and state how this will be achieved.
- 9) The Army Corps of Engineers (ACOE) has not developed appropriate ecosystem-based standards to determine how “unavoidable impacts” are measured or determined. In theory, any development impact is unavoidable.
- 10) The ACOE has not articulated that its fee determination process accounts for the full economic and ecological cost of allowing “unavoidable impacts” to occur. APCC believes that the fee determination process has not utilized an ecosystem-based comprehensive valuation of ecological services. For example, the true cost impact of salt marsh degradation should account for the value of carbon sequestration, nutrient and pollutant retention, fisheries and shellfish habitat, migratory bird impacts, flood control, protection against sea level rise, and many other ecological and environmental services provided by salt marshes.
- 11) ILFP fees that have been collected likely represent a tiny fraction of the overall actual costs of implementing mitigation and restoration projects, particularly when rising costs over time are taken into account. ILFP fees should be assessed based on real costs (i.e., the actual total cost) of implementing restoration and protection programs.

- 12) The proposed transfer of responsibility for ensuring successful mitigation from the permittee to the agency responsible for mitigation, in this case DFG, is contrary to our notion of individual responsibility and violates the ethical precept that an offender should be responsible for all damages. The program is essentially a “get out of jail free card” for simply a fee. As noted it also masks the full cost of restoration and mitigation of lost wetland habitat and transfers the cost from the developer or other proponent to the public.
- 13) The proposed ILFP would expand upon the existing program by extending the program to include fees from impacts created by ACOE Individual Permit projects. However, while the Prospectus summarizes Category II ACOE permit impacts since 2008 and fee income, no information is provided concerning impacts from Individual Permits issued since 2008. This information would be useful to gauge the impact and/or utility of the proposed ILFP.
- 14) Expanding the program to allow ILFP fees for impacts under ACOE Individual Permits may encourage more impacts to be permitted. The program encourages developers and proponents to pay mitigation fees as opposed to first avoiding impacts or secondly minimizing impacts. “Unavoidable impacts” should be narrowly defined, otherwise ILFP encourages a developer to pursue a calculable fee.
- 15) Several agencies within DFG also have regulatory responsibilities to provide input to permit applications. There is a distinct potential for conflicts of interest. This is particularly problematic in a fiscally austere climate where there are few or no funds to support needed restoration projects.
- 16) The proposed ILFP should have a goal of leveraging ILFP funds with other sources of funds to implement projects that would provide greater benefits than if the ILFP funds were used on their own for stand-alone mitigation projects. However, there must be an accounting methodology for projects that accurately reflects the contribution of ILFP funds vs. other leveraged funds to ensure that the mitigation value of the ILFP funds is not overstated. If an acre of salt marsh is restored using five percent ILFP funds, it is dubious even to claim 1/20 of an acre restored because of economies of scale. Claiming an acre restored by ILFP is outright erroneous. Overstating the value of the ILFP funds for achieving a restoration would make it impossible to verify the actual effectiveness of the ILFP.
- 17) The prioritization strategy should consider conservation and management initiatives from other legitimate regional or local conservation or resource management entities whether or not they work with DFG (Section IV-6). These include but are not limited to, regional planning agencies, county government, consortiums of conservation or resource organizations or other entities with regional expertise and interests.
- 18) The prioritization strategy states that Criteria 3 is “Whether the project will result in mitigation in the same service area.” Our concern is that if an impact is allowed in one sub-area and mitigation or restoration is allowed in another sub-area, the

impacted watershed may suffer a net loss. For example, the Coastal service area includes the entire Massachusetts coast and is divided into three sub-areas: North, Central and South. What if an impact is allowed in the Central sub-area but mitigated or restored in another sub-area? Criteria 3 should be revised to “Whether the project will result in mitigation in the same service sub-area.”

- 19) Our recent experience is that at least one major restoration agency (NOAA’s Restoration Center) is reluctant to combine funding obtained from mitigation fees with funding for proactive restoration projects in order to implement restoration projects. How many other agencies and organizations have similar policies that might limit the usefulness of ILFP funds?

In closing, APCC believes that the proposed ILFP represents a good-faith attempt on the part of DFG to deal with poor federal policies. Many improvements should be made to the federal program to make the state program better.

Sincerely,



Edward J. DeWitt