2011 Annual Report of the Massachusetts In-Lieu Fee Program

September 2011

Introduction

In 2008, the U.S. Army Corps of Engineers (Corps), the Massachusetts Department of Fish and Game (DFG) and the Massachusetts Division of Marine Fisheries (DMF) entered into a Memorandum of Understanding (MOU) authorizing DMF as the program administrator for the Massachusetts In-lieu Fee (ILF) Program. This compensatory mitigation program addresses authorized impacts to aquatic resources, in particular Essential Fish Habitat (EFH) and aquatic habitats of managed diadromous fish and marine finfish and shellfish species in Massachusetts' waters, resulting from projects permitted under the Massachusetts General Permit (GP). DMF operates this program under the direction of an Interagency Review Team (IRT) consisting of representatives from the Corps, Massachusetts Office of Coastal Zone Management (CZM), Massachusetts Department of Environmental Protection (DEP), U.S. Environmental Protection Agency (EPA), National Marine Fisheries Service (NMFS) and DFG. The IRT developed this program to provide an alternative to permittee-responsible compensatory mitigation under the GP in order to achieve the goal of "no net loss" to aquatic habitat area, functions and values. Program participants provide fee payments in lieu of on-site mitigation to the *Commonwealth of Massachusetts' Marine Mammals and Fisheries Research and Conservation Trust* (Trust). This 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 DMF.

As outlined in Federal Mitigation Rule guidance and in Section IV (J) of the MOU, DMF is required to report to the Corps the location and amount of aquatic habitat impacts as well as information on the functions lost through permitted impacts on a calendar year basis. This annual report must contain information on aquatic resource impacts from permitted projects that deposit payments into the Trust to complete their mitigation requirements, including a summary of deposits by year, projects funded, and impacts mitigated using ILF funds. This report includes program information from July 2010 through June 2011. In addition, given that this is the first report submitted to the Corp in this format, all program information tracked since program initiation (2008) is included.

Record of In-lieu Fees Deposited to the Trust

Table 1 provides a summary of all In-lieu fees deposited into the Trust since program inception. Service area, impacted habitat type, Town/Watershed, Corps permit ID number, date of receipt of payment, area of impact (ft^2), and deposit amount by year are included. The Trust does not

accrue interest, thus the total sum of the ILF amounts collected is as reported. Fourteen (14) projects impacting 12,192.75 ft^2 of aquatic habitats have contributed $137,097.50 to the program to date. Table 2 provides a breakdown of authorized impacts (ft^2) by service area, habitat type, and year of payment.

Record of Projects Receiving Trust Funds

Section 10 (2) of the MOU requires DMF to provide information on projects receiving Trust funds as part of the annual report. The annual report must include project descriptions and specific information on the start date, completion date, mitigation type, location, performance standards, status of monitoring, costs, and financial assurances for all projects. To date, no Trust funds have been used to fund any compensatory mitigation projects.

In-lieu Fee Adjustments

Section IV (E) instructs DMF to advise the Corps as part of the annual report as to appropriate adjustments to in lieu fees based on the implementation costs of mitigating projects constructed. No adjustments are being recommended at this time.

Important Programmatic Developments

DMF continues to work toward establishing an effective ILF program in Massachusetts under the guidance of the IRT and the Corps. During the last year, three important programmatic developments occurred. 1) A deadline and monetary benchmark was established for disbursing the first round of ILF funds for mitigation projects. 2) Restoration areas and potential restoration projects were identified as a priority need in the development of the program prior to funding mitigation projects. 3) A conceptual summary was drafted by DFG outlining a new statewide ILF program. These ongoing developments are described in more detail below.

Mitigation Project Funding

In November 2010, a meeting with the Corps and the IRT was convened to address specific requirements in the MOU related to the use of collected funds for mitigation. Section IV (F) of the MOU specifies "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 IRT will notify the Corps that it is proposing that DMF implement a mitigation project…using in-lieu fee funds that have been collected". In addition, Section VIII states "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 disbursal date for up to

another two years". The two-year deadline for this requirement was December 2010. At that time, funds collected for the program totaled $34,032.50 (see Table 4).

The IRT identified two primary concerns. First, "sufficient in-lieu fee payments" constituted a higher level of funding than the amount of in-lieu fees generated by the program to that point. Second, fees cannot contribute toward mitigating environmental impacts if they accrue in perpetuity in the Trust account. These concerns warranted defining specific parameters for "sufficient in-lieu payments" and a suitable timeframe for collecting fees prior to disbursement. Based on the IRT recommendation, DMF submitted a request to the Corps for an extension of the disbursal date for ILF funds for an additional 2 years **or** until the program collects $200,000 in fees, whichever occurs first. The Corps granted this request in a letter to DMF on November 18, 2010. This letter specified the need for DMF and the IRT to identify suitable compensatory mitigation sites according to the provisions of the MOU.

Identifying Mitigation Project Priorities

Identifying suitable restoration sites in each service area for ILF fund support is a programmatic priority. Mitigation priorities have been identified for each habitat category covered under the current program (Table 3). Suitable projects that provide the greatest potential to replace or protect aquatic resources, functions, and values require a thorough understanding of both regional (service areas) threats and restoration priorities. DMF is pursuing funding opportunities to solicit input from coastal communities, non profit organizations, and other relevant state agencies for developing a list of priority restoration sites in each service area. These options will be vetted through IRT and will be included as a component of the ILF Program Instrument that is currently under development.

Program expansion

In May 2011, DFG began drafting a conceptual summary for a new ILF program to be administered by DFG. Under this proposal, the existing ILF program administered by DMF will become a component of a comprehensive statewide program. The proposal includes restoration components for both inland and coastal aquatic resources as well as a land preservation component. Additionally, ILF eligible permit categories will be expanded to include the Corps Individual Permits (IP). The proposed program expansion is expected to substantially increase the amount of ILF funds generated to address habitat impacts to aquatic resources resulting from Corps projects permitted in Massachusetts. Information compiled for the Comprehensive Planning Framework and ILF Program Instrument covering coastal / marine aquatic resources will be incorporated as an element of the statewide program, with other

state agencies providing material to address inland aquatic resources and land preservation/acquisition.

Summary

The ILF option was assessed on 22 permits between December 2008 and June 2011. Fees totaling $137,097.50 have been received by the program from fourteen (14) projects impacting 12,192.75 ft^2 of aquatic habitats. The average impact area was 813 ft^2 and the average ILF payment was $9,100 (Table 4). The habitat type with the greatest impacted area is open water with 11092.25 ft^2. The service area with the largest impacted area is the South with 9135.50 ft^2 of impacted habitats. There were seven impacts to aquatic habitats in the North service area, and four impacts in both the Central and South service areas (Figure 1). One project impacted two different habitat types. Eight of the 22 projects where ILF was assessed elected not to utilize the ILF option (Table 5). There were no impacts recorded in the Connecticut River service area.

DMF continues to work toward establishing an effective ILF program for Massachusetts under the guidance of the IRT and the Corps. Ongoing ILF Program development includes steps taken to bring the ILF Program into compliance with the Federal Mitigation Rule and the identification of suitable compensatory mitigation sites in each service area. New program developments include an effort to expand the ILF program to include permitted impacts to aquatic resources throughout all watersheds in the state. A goal of this new program is to establish a comprehensive mitigation strategy for both inland and coastal aquatic resources. This new program will include restoration components for both inland and coastal/marine aquatic resources, as well as a land preservation framework. Service areas will be established for inland regions and program eligibility will be expanded to include Corps Individual Permit (IP) impacts.

No mitigation projects have been funded under this program to date. No ILF rate adjustments are being recommended. Future annual reports will include descriptions of funded projects, monitoring and progress reports, updates for restored resources resulting from funded projects, and other pertinent program achievements. For addition information, please contact Mark Rousseau at 978-282-0308 x162 or mark.rousseau@state.ma.us.

Table 1. ILF Deposit Summary

Service Area	Habitat	Town/Watershed	Permit Number	Payment Rcvd Date	Area of Impact (ft^2)	Project Payment Year			Total
						2009	2010	2011	
Central	Mud flat	Duxbury	2008-3490	5/11/2009	16.00	$160.00			$160.00
			2008-3219	1/29/2010	20.00		$400.00		$400.00
			2008-3220	4/20/2010	12.00		$240.00		$240.00
	Salt marsh	Duxbury	2008-3220	4/20/2010	125.00		$2,500.00		$2,500.00
Central Total						**$160.00**	**$3,140.00**		**$3,300.00**
North	Mud flat	Salem	2007-2786	11/9/2009	2.00	$150.00			$150.00
		Rockport	2009-709	4/6/2010	200.00		$4,000.00		$4,000.00
	Open water	Weymouth, Fore River	2008-2574	1/6/2009	750.00	$7,500.00			$7,500.00
		Newburyport	2009-1427	10/26/2009	35.25	$352.50			$352.50
		Salem	2008-3223	5/12/2010	1273.00		$12,730.00		$12,730.00
		Beverly	2010-1995	1/6/2011	80.00			$800.00	$800.00
		Danvers, Crane River	2009-2418	1/31/2011	544.00			$5,400.00	$5,400.00
North Total						**$8,002.50**	**$16,730.00**	**$6,200.00**	**$30,932.50**
South	Mud flat	Harwich	2007-2548	5/20/2009	300.00	$6,000.00			$6,000.00
	Open water	Fairhaven	2009-2273	1/31/2011	459.00			$4,590.00	$4,590.00
		New Bedford	2005-2900	5/26/2011	7951.00			$79,510.00	$79,510.00
	SAV	Marion	2010-02451	3/18/2011	425.50			$12,765.00	$12,765.00
South Total						**$6,000.00**		**$96,865.00**	**$102,865.00**
Grand Total						**$14,162.50**	**$19,870.00**	**$103,065.00**	**$137,097.50**

Table 2. Authorized impacts (ft^2) by habitat type

Service Area	Habitat	Year Received			Total (ft^2)
		2009	2010	2011	
Central	Mud flat	16	32		48
	Salt marsh		125		125
Central Total		**16**	**157**		**173**
North	Mud flat	2	200		202
	Open water	785.25	1273	624	2682.25
North Total		**787.25**	**1473**	**624**	**2884.25**
South	Mud flat	300			300
	Open water			8410	8410
	SAV			425.5	425.5
South Total		**300**		**8835.5**	**9135.5**
Grand Total		**1103.25**	**1630**	**9459.5**	**12192.75**

Table 3. Mitigation Priorities for habitat impacts

Open Water	Water quality improvement	Salt marsh	Salt marsh restoration
	Sediment remediation		Removal of tidal restrictions
	Marine debris removal		Sediment remediation
	Fish habitat enhancement		Conservation easements
	Coastal fill	Streams	Fish passage (dam removal, ladders)
	Shellfish restoration		Water level management
SAV	Eelgrass planting		Water quality improvements
	Modification of mooring hardware	Mudflat	Marine debris removal
			Shellfish restoration

Figure 1. Impact Project Locations 2009 – 2011.

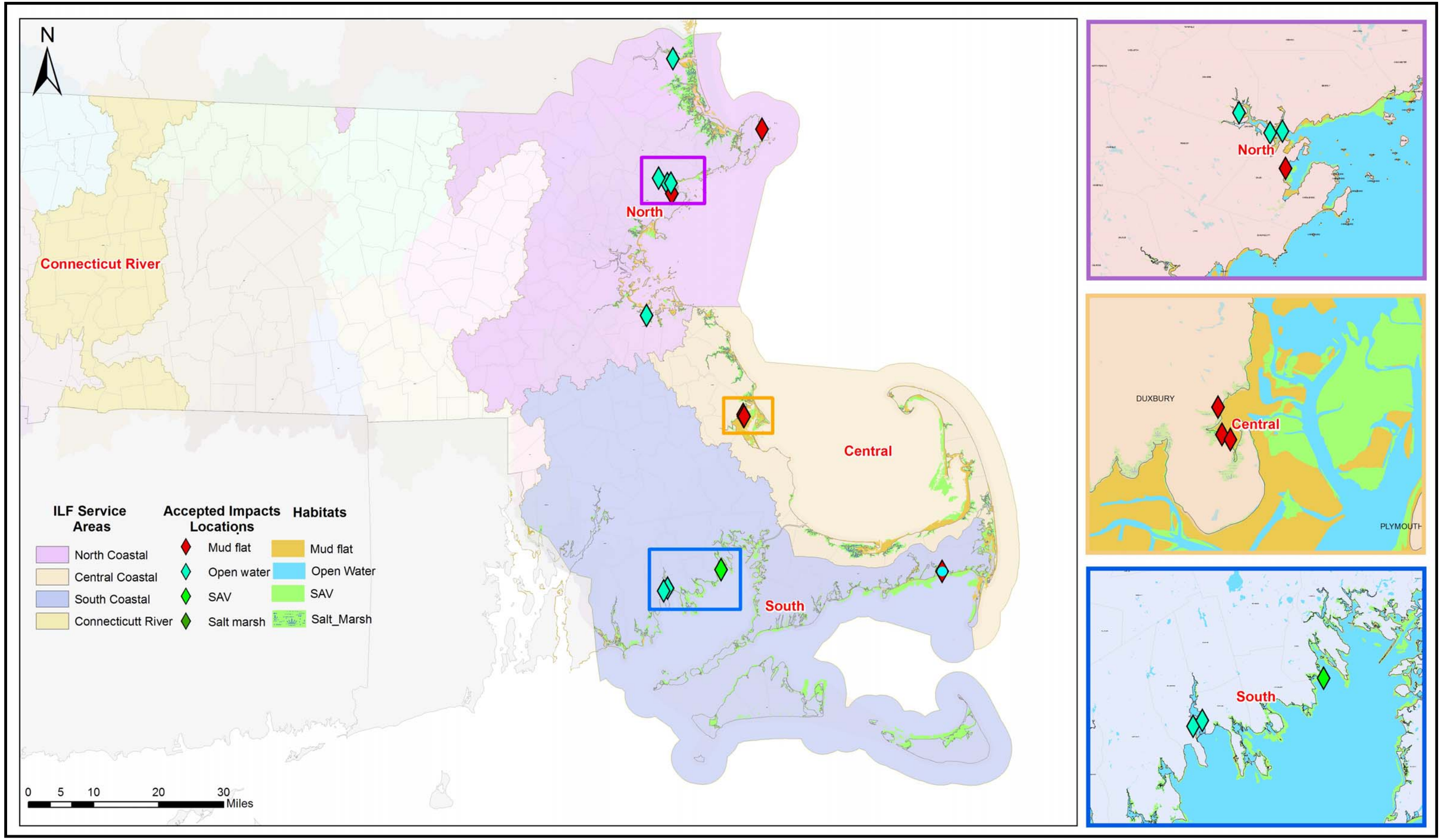

Table 4. ILF Assessed and Used by Permittee

Year of payment receipt	Region	Habitat type	Number of habitat impacts	Area of habitat Impact (ft^2)	Sum of fee amount
2009	Central	Mud flat	1	16.00	$160.00
2010	Central	Mud flat	2	32.00	$640.00
2010	Central	Salt marsh	1	125.00	$2,500.00
2009	North	Mud flat	1	2.00	$150.00
2009	North	Open water	2	785.25	$7,852.50
2010	North	Mud flat	1	200.00	$4,000.00
2010	North	Open water	1	1273.00	$12,730.00
2011	North	Open water	2	624.00	$6,200.00
2009	South	Mud flat	1	300.00	$6,000.00
2011	South	Open water	2	8410.00	$84,100.00
2011	South	SAV	1	425.50	$12,765.00
Total			**15***	**12192.75**	**$137,097.50**
Average				**812.85**	**$9,139.83**
By Region		North	7	2884.25	$30,932.50
		Central	4	173.00	$3,300.00
		South	4	9135.50	$102,865.00
By Year		2009	5	1103.25	$14,162.50
		2010	5	1630.00	$19,870.00
		2011	5	9459.50	$103,065.00
By Habitat Type		Mud flat	6	550.00	$10,950.00
		Salt marsh	1	125.00	$2,500.00
		Open water	7	11092.25	$110,882.50
		SAV	1	425.50	$12,765.00

**One project impacted 2 habitat types, so there are 15 habitat impacts but only 14 projects total.*

Table 5. ILF Assessed and Not Used by Permittee

Year permitted	Region	Habitat type	Number of habitat impacts	Area of habitat impact (ft^2)	Sum of fee amount
2009	Central	Mud flat	2	1,996.00	$39,920.00
2009	South	Mud flat	3	18,870.00	$248,550.00
2009	South	Open water	2	746.00	$7,460.00
2010	North	Open water	1	1,250.00	$25,000.00
Total			**8**	**22,862**	**$320,930.00**
Average				**2,858**	**$40,116.00**
By Region		North	1	1,250.00	$25,000.00
		Central	2	1,996.00	$39,920.00
		South	5	19,616.00	$256,010.00
By Year		2009	7	21,612.00	$295,930.00
		2010	1	1,250.00	$25,000.00
By Habitat Type		Mudflat	5	20,866.00	$288,470.00
		Open water	3	1,996.00	$32,460.00

Appendix A. Chronology of ILF Program Achievements.

March 10, 2007	Meeting of Corps, NMFS, and DMF to discuss formation of MA ILF program.
August 2007	Draft MOA submitted to Corps and DMF administration.
June 4, 2008	ILF Memorandum of Understanding (MOU) is signed between Corps and DFG.
June 9, 2008	The Corps of Engineers and U.S. Environmental Protection Agency issue regulations pertaining to Compensatory Mitigation for Losses of Aquatic Resources (33 CFR Parts 325 and 332); Final Rule. This "Federal Mitigation Rule" requires that ILF programs which predate July 9, 2008 come into compliance with the Mitigation Rule within two years of that date [33 CFR332.8(v)(2)].
September 24, 2008	First IRT meeting.
December 2008	Massachusetts ILF Mitigation Program Fact Sheet issued by Corps and posted on Corps and DMF website.
January 6, 2009	First ILF deposit ($7500) is made into the *MarineFisheries* Trust Account. MOU requires expenditure of funds no later than 2 years (January 2011) after the first deposit.
June 9, 2010	A three-year extension request for the MOU expiration date is submitted to Corps to bring MA ILF program into compliance with the Federal Mitigation Rule.
June 21 2010	The Corps grants *MarineFisheries* the extension request. The ILF Program has until June 9, 2013 to come into compliance with the Mitigation Rule.
November 1, 2010	An ILF Steering committee meeting convenes to discuss ILF funds and mitigation options going forward.
November 7, 2010	The ILF program has collected $34,032.50 to date. In accordance with Section IV (F) of the MOU, the IRT recommends that *MarineFisheries* file a request to extend the deadline for funds disbursement for an additional 2 years **or** until the fund reaches $200K, whichever occurs first.
November 18, 2010	The Corps of Engineers grants *MarineFisheries* the extension request. *MarineFisheries* and the ILF Steering Committee will use the intervening time to identify suitable compensatory mitigation sites according to the provisions of the MOU.
March 15, 2011	In-Lieu Fee information is added to the *MarineFisheries* website. http://www.mass.gov/dfwele/dmf/programsandprojects/fee_mitigation.htm
May 31, 2011	The Massachusetts Department of Fish and Game (DFG) express interest to the Corps in developing a comprehensive, statewide ILF program. Representatives from DFG agencies meet with Corp representative in Boston to discuss pursuing an expanded statewide ILF program.
September 1, 2011	14 projects totaling $137,097.50 in fees collected, impacting 12,192.75 ft^2 of EFH.