2012 Annual Report of the Massachusetts In-Lieu Fee Program

September 2012

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 2011 through July 2012. In addition, 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. Twenty (20)

projects impacting 16,351.25 ft^2 of aquatic habitats have contributed $193,432.50 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. However, the process of funding the first series of restoration projects using ILF was initiated on September 21 with the release of an RFR (Request for Responses) on the Commonwealth of MA Comm - PASS website. The deadline for submitting a response (proposal) is October 31st. Following the deadline, proposals will be reviewed and ranked by a panel comprised of restoration professionals and IRT representatives. The IRT will then review the proposals and rankings in mid-November to establish priority projects for funding. IRT selected projects will be submitted to the Corps for final approval before the end of November. The anticipated date to begin the disbursement of ILF funds is December 2012.

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. On September 20, 2012, the IRT agreed to a recommendation submitted by DMF to set the administrative fee at 12% of all accrued fees. This administrative fee level was based on the percent difference of an assessment of the average square footage cost per acre of $8.80, determined during the development of the ILF program in 2008, and the actual square footage charge of $10 per square foot applied in the assessment of ILF payments for coastal habitat impacts.

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, two important programmatic developments occurred; 1) a $20,000 grant from the Mass Bays Program was acquired by DMF to help identify suitable restoration sites and potential restoration options for the ILFP. This was identified by the Corps as a critical need for DMF and the IRT to address during the development of the ILF program. 2) a program Prospectus, drafted by DFG, outlining a new and

expanded statewide ILF program was submitted to the Corps for public comment. These ongoing developments are described in more detail below.

Identifying Mitigation Project Priorities

While generalized mitigation priorities have been established for each habitat category covered under the current program (Table 3), identifying specific restoration options by location remains a challenge. 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. To address this, DMF applied for and received $20,000 in funding through the Mass Bays Research and Planning Grant Program for a project entitled *Identifying and Prioritizing Restoration Opportunities for Coastal Aquatic Habitats in the Mass Bays Region.* The goals of the project are to 1) identify and prioritize coastal habitat restoration options in order to facilitate appropriate decision-making when selecting restoration projects and 2) develop a sustainable methodology for assessing priority restoration sites on a larger, regional scale. To accomplish this, DMF is hosting two regional meetings in October. Participants will include habitat restoration professionals from coastal communities, nonprofit organizations, and other relevant local, state and federal government agencies. We will present an analysis of current restoration project inventories and related coastal alteration impacts by habitat types to identify restoration priority gaps, and solicit input from stakeholders on a restoration project ranking methodology developed for this project. Using input from the meeting participants, we will further develop suitable project selection criteria that will be applied to the first round of ILF restoration project funding currently underway.

Program expansion

In May 2011, DFG began drafting a conceptual summary for a new ILF program. Under this proposal, entitled "*Prospectus for a State-wide In-Lieu Fee Program administered by the Massachusetts Department of Fish and Game*", the existing ILF program administered by DMF will become a component of a comprehensive statewide program administered by DFG. The new proposal includes restoration options for both inland and coastal aquatic resources as well as a land preservation component. 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. Following an extensive in-house comment period, the Prospectus was recently finalized and submitted to the Corps for review. The Corps is expected to publish a public notice of a 30 day public comment period on October 2nd, 2012.

DFG's goal is to have an approved program instrument for a state-wide ILFP in place prior to June 9, 2013, the date when the DMF ILFP is required to update its existing ILFP to the full scope of requirements of the 2008 mitigation rule. The development of the new DFG ILFP will preclude the need for DMF to develop a separate program instrument for the current ILFP. Information compiled for the Comprehensive Planning Framework and ILF Program Instrument covering coastal / marine aquatic resources will be incorporated as an element of the new DFG state-wide program, with other state agencies providing material to address inland aquatic resources and land preservation/acquisition.

Summary

Fees totaling $193,432.50 were collected on 20 permits impacting 16,351.25 ft^2 of aquatic habitats between December 2008 and July 2012. The average impact area was 961 ft^2 and the average ILF payment was $11,378.38 (Table 4). The habitat category with the greatest impacted area is Open Water with 13775.75 ft^2. The service area with the largest impacted area is the South with 10869 ft^2 of impacted habitats. There were ten impacts to aquatic habitats in the North service area, five impacts in the Central service area, and seven impacts in the South service area (Figure 1). Two projects impacted multiple habitat types. Nine of the 29 projects where ILF was recommended and 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 ILFP development includes the identification of suitable compensatory mitigation sites in each coastal service area and an extensive program expansion effort by DFG that will result in an ILFP that addresses aquatic impacts state-wide for multiple permit levels.

No mitigation projects have been funded under this program to date, however an RFR process to select restoration projects to submit for Corp approval is underway. It is anticipated that funds will be disbursed toward a restoration project (s) by December 2012. The base fee for assessing ILF will remain at $10 per square foot. A twelve percent (12%) charge on all accrued fees will be utilized to cover program administration costs.

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 (sq ft)	Project Year					Total
						2008	2009	2010	2011	2012	
Central	Mud flat	Duxbury	2008-3219	1/29/2010	20		$400.00				$400.00
			2008-3220	4/20/2010	12		$240.00				$240.00
			2008-3485	9/22/2011	20		$400.00				$400.00
			2008-3490	5/11/2009	16		$160.00				$160.00
	Salt marsh	Duxbury	2008-3220	4/20/2010	125		$2,500.00				$2,500.00
Central Total							**$3,700.00**				**$3,700.00**
North	Mud flat	Rockport	2009-709	4/6/2010	200		$4,000.00				$4,000.00
		Salem	2007-2786	11/9/2009	2		$150.00				$150.00
		Saugus	1984-00335	1/24/2012	55					$1,100.00	$1,100.00
		Somerville	2009-2702	11/14/2011	1250			$25,000.00			$25,000.00
	Open water	Beverly	2010-1995	1/6/2011	80			$800.00			$800.00
		Chelsea	2011-00807	3/20/2012	1100					$11,000.00	$11,000.00
		Danvers, Crane River	2009-2418	1/31/2011	544				$5,400.00		$5,400.00
		Newburyport	2009-1427	10/26/2009	35.25		$352.50				$352.50
		Salem	2008-3223	5/12/2010	1273		$12,730.00				$12,730.00
		Weymouth, Fore River	2008-2574	1/6/2009	750	$7,500.00					$7,500.00
North Total						**$7,500.00**	**$17,232.50**	**$25,800.00**	**$5,400.00**	**$12,100.00**	**$68,032.50**
South	Mud flat	Dartmouth	2012-00764	7/23/2012	150					$3,000.00	$3,000.00
		Harwich	2007-2548	5/20/2009	300		$6,000.00				$6,000.00
	Open water	Dartmouth	2012-00764	7/24/2012	967.5					$9,675.00	$9,675.00
		Fairhaven	2009-2273	1/31/2011	459		$4,590.00				$4,590.00
		New Bedford	2005-2900	5/26/2011	7951				$79,510.00		$79,510.00
		Yarmouth	2009-399	3/9/2012	616		$6,160.00				$6,160.00
	SAV	Marion	2010-02451	3/18/2011	425.5				$12,765.00		$12,765.00
South Total							**$16,750.00**		**$92,275.00**	**$12,675.00**	**$121,700.00**
Grand Total						**$7,500.00**	**$37,682.50**	**$25,800.00**	**$97,675.00**	**$24,775.00**	**$193,432.50**

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

Service Area	Habitat	Year Received				Total (ft^2)
		2009	2010	2011	2012	
Central	Mud flat	16.00	32.00		20.00	68.00
	Salt marsh		125.00			125.00
Central Total		16.00	157.00		20.00	193.00
North	Mud flat	2.00	200.00	1,250.00	55.00	1,507.00
	Open water	785.25	1,273.00	624.00	1,100.00	3,782.25
North Total		787.25	1,473.00	1,874.00	1,155.00	5,289.25
South	Mud flat	300.00			150.00	450.00
	Open water			8,410.00	1,583.50	9,993.50
	SAV			425.50		425.50
South Total		300.00		8,835.50	1,733.50	10,869.00
Grand Total		1,103.25	1,630.00	10,709.50	2,908.50	16,351.25

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 removal	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.

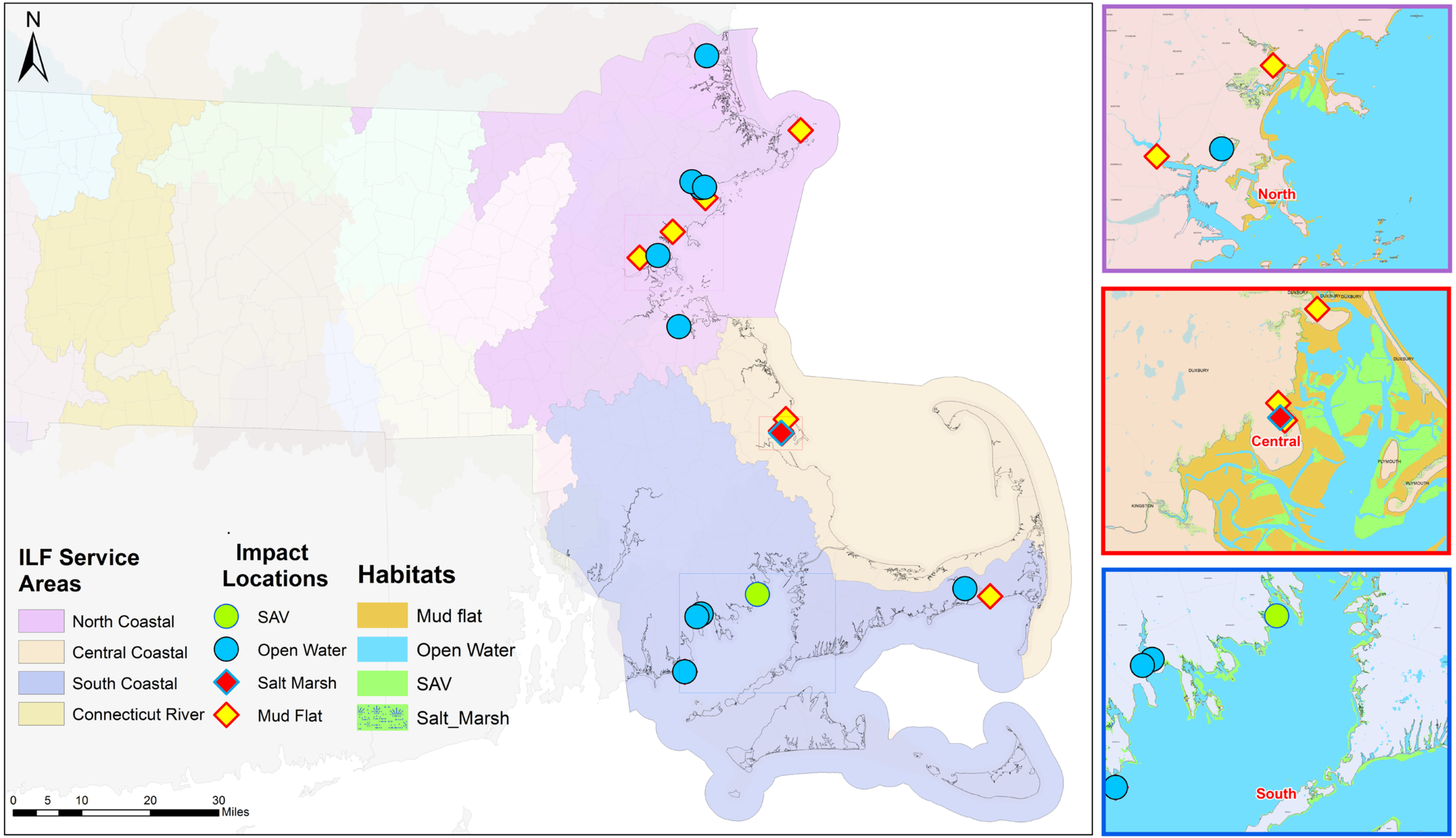

Table 4. ILF Assessed and Used by Permittee

Year of payment receipt	Region	Habitat type	Number of habitat impacts	Area of habitat impact (ft^2)	Sum of fee amount
2009	North	Mud flat	1	2	$150.00
2009	North	Open water	2	785.25	$7,852.50
2010	North	Mud flat	1	200	$4,000.00
2010	North	Open water	1	1273	$12,730.00
2011	North	Mud flat	1	1250	$25,000.00
2011	North	Open water	2	624	$6,200.00
2012	North	Mud Flat	1	55	$1,100.00
2012	North	Open water	1	1100	$11,000.00
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
2012	Central	Mud flat	1	20	$400.00
2009	South	Mud flat	1	300	$6,000.00
2011	South	Open water	2	8410	$84,100.00
2011	South	SAV	1	425.5	$12,765.00
2012	South	Mud flat	1	150	$3,000.00
2012	South	Open water	2	1583.5	$15,835.00
Total			22*	16351.25	$193,432.50
Average				961.84	$11,378.38
By Region		North	10	5289.25	$68,032.50
		Central	5	193.00	$3,700.00
		South	7	10869.00	$121,700.00
By Year		2009	5	1103.25	$14,162.50
		2010	5	1630.00	$19,870.00
		2011	6	10709.50	$128,065.00
		2012	6	2908.50	$31,335.00
By Habitat Type		Mudflat	10	2025.00	$40,450.00
		Open water	10	13775.75	$137,717.50
		Salt marsh	1	125.00	$2,500.00
		SAV	1	425.50	$12,765.00

**Two projects impacted 2 habitat types, so there are 22 habitat impacts but only 20 projects total.*

Table 5. ILF Assessed and Not Used by Permittee

Year Permitted	Region	ACOE Permit #	Habitat Type	Number of habitat impacts	Area of Impact (ft^2)	Sum of fee amounts
2009	Central	2009-2325	Mud Flat	1	1,976	$39,520.00
	South	2006-2842	Mud Flat	1	145	$2,900.00
	South	2009-1429	Mud Flat	1	2,560	$51,200.00
	South	2005-01682	Mud Flat	1	16,165	$194,450.00
	South	2009-205	Open Water	1	130	$1,300.00
2011	Central	2011-00670	Mud Flat	1	26	$520.00
	Central	2011-00670	Salt Marsh	1	88	$1,760.00
	South	2007-3044	Open Water	1	2,052	$20,520.00
2012	Central	2004-00364	Mud Flat	1	61	$1,220.00
	North	2011-00106	Mud Flat	1	825	$16,500.00
	North	2011-00106	Open Water	1	526	$5,260.00
Total				11	24,554	$335,150.00
Average					2232.2	$30,468.19
By Region			North	2	1,351	$21,760.00
			Central	4	2,151	$43,020.00
			South	5	21,052	$270,370.00
By Year			2009	5	20,976	$289,370.00
			2011	3	2,166	$22,800.00
			2012	3	1,412	$22,980.00
By Habitat Type			Mud Flat	7	21,758	$306,310.00
			Open Water	3	2,708	$27,080.00
			Salt Marsh	1	88	$1,760.00

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.
February 7, 2012	DMF is awarded a $20,000 Research and Planning grant from the Mass Bays Program. The project, *Identifying and Prioritizing Restoration Opportunities for Coastal Aquatic Habitats in the Mass Bays Region* will help identify and prioritize restoration options, and develop a sound, technical, repeatable ranking methodology for prioritizing potential restoration and enhancement projects to be used when selecting coastal restoration projects receiving ILF funds.

April 9, 2012	IRT meeting. To date, 19 projects totaling $180,757.50 in fees collected, impacting 15,233.75 ft^2 of habitat.
July 27, 2012	Twenty projects, impacting 22 habitat types, totaling $193,432.50 in fees collected, impacting 16,351.25 ft^2 of habitat.
September 20, 2012	Meeting of IRT to discuss project funding options. A 12% administration charge from the accrued fees was also proposed by DMF and agreed upon by the IRT.
September 21, 2012	RFR soliciting project to be considered for funding under the ILFP posted on Commonwealth's Comm-PASS website and distributed statewide to restoration professionals.
September 26, 2012	DFG submits "Final Prospectus for State-wide ILFP" to the Corps.
October 2, 2012	Expected date of Corps public notice posting for the Final Prospectus submitted by DFG.
October 31, 2012	RFR deadline to submit proposals.
November 2012	Anticipated date of selecting project(s) for funding through the ILF program.
December 2012	Expected first disbursement of ILF funds.